

VIA REGULATIONS.GOV

U.S. Environmental Protection Agency
Water Docket
Mail Code 28221T,
1200 Pennsylvania Avenue NW,
Washington, DC 20460

Re: **WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations, Docket #: EPA-HQ-OW-2025-0093**

Over the last two decades, America's hog farmers have been at the forefront of the ongoing public debate over revising and designing a consistent, and common sense, definition for what is a Water of the United States under the Clean Water Act (CWA). In light of the Supreme Court's clear direction in *Sackett v EPA*, 598 U.S. 651 (2023), the National Pork Producers Council (NPPC) applauds the effort of the United States Environmental Protection Agency (EPA) to undertake the development once and for all of a long standing durable definition that provides clarity and consistency, to the definition of Waters of the United States. We welcome, and appreciate, this opportunity to provide information and recommendations to EPA.

NPPC is an association of 43 state pork producer organizations and the voice in Washington, D.C., for the nation's 60,000 pig farmers. The U.S. pork industry represents a significant value-added activity in the agricultural economy and the overall U.S. economy, producing high-quality, safe, and affordable pork. The tens of thousands of family farmers who make up the U.S. pork industry are cornerstones of their rural communities, and altogether more than 500,000 American jobs are supported by U.S. pork production.

NPPC is proud of the reputation it and its members have earned for initiating innovative environmental improvement programs. NPPC and its producer members take an active role in advocacy at both the federal and state levels for clean water environmental initiatives. Accordingly, the U.S. pork industry continues to treat as its top goal meeting worldwide consumer demand while simultaneously protecting water, air and other environmental resources that are in our care or potentially affected by our farms.

The nation's pork producers are firm supporters of the CWA's goals and are committed to responsibly and wisely managing the manure nutrients produced by their animals to protect and restore water quality. Meeting the stringent zero-discharge requirements of the CWA's Concentrated Animal Feeding Operations (CAFO) rule is a daily top priority for pork producers. Their animal housing and manure storage facilities are designed to contain 100 percent of the manure nutrients produced by the animals and to facilitate its safe, effective and efficient use

as a crop fertilizer and soil conditioner in farm fields. All of these activities are covered by specific requirements in the CAFO rule, and pork producers have embraced the required measures. Furthermore, nearly every major pork-producing state has its own extensive regulatory and permitting requirements, equal to or in many cases beyond the federal CAFO rule.

Our producers' commitment to protecting water quality through the responsible and sound management of their animals' manure nutrients can be observed in farm fields wherever hogs are produced. Manure is a major source of nutrients to support and enhance crop production, adding to soil fertility and soil health. Pork producers know that manure management efforts are important to restoring and protecting the health and vitality of downstream, more-permanently flowing waters or traditional navigable waters (TNW). Pork producers' efforts to protect these waters start at the top of watersheds, commonly remote and a great distance from the TNWs, where their farms are found. They start on their own farms, in crop fields with drainage features, ditches, swales, depressions and associated small streams that flow intermittently.

Like others in agriculture, pork producers have been greatly concerned by the overreach exhibit by EPA in past efforts to define WOTUS, include efforts in a previous administration to exponentially expand federal jurisdiction over private property by seeking to capture at least 5 million miles of remote drainage features, ditches and remote, ephemeral waterways and millions of acres of wet spots or farmed wetlands in fields. While the Supreme Court's decision made clear this overreach would not stand, the time is right for the agency to take action, listen to stakeholders, and develop a durable definition of WOTUS that will last for decades. In that light, in addition the comments submitted by the Waters Advocacy Coalition to which NPPC has joined, we offer the following additional suggestions as EPA contemplates changes to the definition:

Need for targeted, expedited rulemaking to fully conform the WOTUS definition to Sackett

America's pig farmers, like others throughout the agricultural sector, strongly support the Agencies' stated intent to expeditiously obtain stakeholder input on the WOTUS definition and to undertake a rulemaking process to revise the 2023 definition with a focus on clarity, simplicity, and durable improvements. This rulemaking is necessary because the "conforming rule" issued in the prior Administration fails to conform to Supreme Court precedent. A new rulemaking is the only way to ensure a durable, clear fix.

In particular, the conforming rule failed to define key phrases ("relatively permanent" and "continuous surface connection"). Not surprisingly, under EPA and Army Corps guidance the

January 2023 preamble, exploit that ambiguity and interpret those phrases far too broadly. This leads to significant uncertainty for farmers and the regulated community overall.

Further, while a rulemaking is necessary, there is no need for a lengthy repeal/replace rulemaking. The foundation for a conforming definition is there, because the current rule text quotes directly from both *Sackett* and the earlier *Rapanos* decisions. Just a few discrete fixes are needed to ensure full conformity:

- Simplify the rule to just three categories:
 - (1) traditional interstate *navigable* waters and territorial seas;
 - (2) relatively permanent, standing, or continuously flowing rivers, streams, lakes, and ponds connected to category (1) waters; and
 - (3) wetlands with a continuous surface connection to category (1) or (2) waters
- Delete certain categories (e.g., interstate waters) as either contrary to *Sackett* and/or needlessly redundant
- Add clarifying language that defines relatively permanent and continuous surface connection
- Revise exclusions to add clarity on what water features are not WOTUS

The Agencies' March 12 guidance on "continuous surface connection" was a great start, but more changes are needed. These changes should be codified in the rule text so that they have the binding force of law.

Key Supreme Court Holdings

Following *Sackett*, it is clear that WOTUS includes only three categories of waters:

- (1) traditional interstate navigable waters;
- (2) relatively permanent bodies of water connected to traditional interstate navigable waters; and
- (3) wetlands with a continuous surface connection with either (1) or (2), making it difficult to determine where 'water' ends and the 'wetland' begins.

The CWA's use of 'waters' encompasses "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" While WOTUS includes some wetlands, it is limited to only those that are "adjacent" to another WOTUS such that they are "indistinguishably part of a body of water that itself constitutes" WOTUS. "Wetlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby."

Wetlands satisfy the “continuous surface connection” requirement only where “there is no clear demarcation between ‘waters’ and wetlands,” although “temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells.” Barriers separating a wetland from a WOTUS remove the wetland from federal jurisdiction unless illegally constructed.

Further, the term “waters” does not encompass anything defined by the ordinary presence of water. Such an interpretation is tough to square with *SWANCC*, which held that the Act does not cover isolated ponds. It also conflicts with the Congressional policy in CWA section 101(b) because “it is hard to see how the States’ role in regulating water resources would remain ‘primary’ if the [Agencies] had jurisdiction over anything defined by the presence of water.”

Assertions of jurisdiction based on “freewheeling inquir[ies]” that “provide[] little notice to landowners of their obligations under the CWA” will not pass muster. “Due process requires Congress to define penal statutes with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” “[T]he CWA does not define the EPA’s jurisdiction based on ecological importance,” and neither courts nor the Agencies can “redraw the Act’s allocation of authority” between federal and state governments.

Relatively Permanent

Only relatively permanent rivers, streams, lakes, and ponds connected to traditional interstate *navigable* waters should be WOTUS. The preamble to the 2023 Rule sets forth an overly broad interpretation of “relatively permanent, standing or continuously flowing bodies of water” that encompasses channels, ditches, and other often dry features that the Agencies characterize as “tributaries” (another undefined term), as well as “other” intrastate water features under the (a)(5) category.

The Agencies need to define “relatively permanent” more precisely. The 2023 Rule doesn’t include any definition, which has resulted in overreach. The closest the Agencies have come to providing clarity in the past was in the 2008 *Rapanos* guidance, which used an approximate 90-day (one season) benchmark. But even that benchmark is too broad. *Rapanos* said relatively permanent “do[es] not necessarily exclude streams, rivers, or lakes that might dry up *in extraordinary circumstances*, such as drought,” and that it does not necessarily exclude “*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months—such as [a] 290-day, *continuously flowing stream*.”

If an open water body that dries up during drought or a stream that flows continuously for 290 days *might* be, but are not necessarily, WOTUS under the relatively permanent standard, it is implausible that merely having 90 days of continuous flow automatically/always satisfies the relatively permanent standard.

The *Rapanos* plurality opinion is very clear that ephemeral waters are not WOTUS. The opinion is just as clear that many (or perhaps most) intermittent waters are not WOTUS. That is the *only* plausible reading of *Rapanos* plurality.

Adjacent wetlands/continuous surface connection

The Agencies should amend the rule text to incorporate the “indistinguishability” element of the continuous surface connection requirement and to clarify that: (i) discrete features such as non-jurisdictional channels, pipes, and ditches cannot serve as continuous surface connections; (ii) wetlands separated by natural and man-made barriers do not satisfy the continuous surface connection requirement; and (iii) a continuous surface connection requires both direct abutment *and* a continuous surface *water* connection, though temporary interruptions can occur during times of low tides or dry spells.

Under *Sackett*, wetlands are jurisdictional only if they directly abut a WOTUS in such a way that the WOTUS and the wetland are *indistinguishable* from one another. There must be no clear demarcation between waters and wetlands. The wetland must have a continuous surface connection with a RPW, making it difficult to determine where the water ends and the wetland begins.” Wetlands with only an intermittent, physically remote hydrologic connection to “waters of the United States” do not implicate the boundary-drawing problem of *Riverside Bayview*” and thus, cannot be jurisdictional.

Physical abutment is necessary, but not sufficient to meet the continuous surface connection requirement. Under *Sackett* and *Rapanos*, any barrier (other than one that is illegally constructed) severs jurisdiction. Thus, dunes, dikes, and other barriers sever jurisdiction regardless of whether they are an indicator of a hydrologic connection. The Agencies got this right in the 2008 Guidance, when they interpreted “continuous surface connection” to mean “not separated by uplands, a berm, dike, or similar feature.” *Sackett* also makes it clear the continuous surface connection must be a continuous surface water connection. Otherwise, the Court’s statement that dry spells and low tides do not sever jurisdiction makes no sense.

Indistinguishability is a key element in establishing a wetland is WOTUS. The Agencies should codify this requirement in the rule text. Lower courts agree that indistinguishability is required. The Fifth Circuit rejected the Government’s attempt to assert jurisdiction over a wetland in the *Lewis* case where the “nearest relatively permanent body of water [was] removed miles away from the Lewis property by roadside ditches, a culvert, and a non-relatively permanent

tributary,” because “it is not difficult to determine whether the ‘water’ ends and any ‘wetlands’ on Lewis’s property begin.” In another case, *Sharfi*, a district court faulted the Government for “ignor[ing] this indistinguishability requirement, which becomes meaningless if abutment alone establishes a ‘continuous surface connection.’”

Wetlands connected only by discrete, physical connections such as non-jurisdictional ditches, pipes, channels, etc. are not WOTUS. There *is* a clear demarcation between such wetlands and the adjacent WOTUS, and there is no boundary-drawing problem between the two. The Agencies have correctly rescinded all guidance that suggests discrete features establish a continuous surface connection.

Ditches

The rule text should exclude most ditches, and all constructed farm ditches, as most are not bodies of water described in ordinary parlance as streams, oceans, rivers, and lakes. Ditches should be excluded unless they convey perennial flow to downstream traditional interstate navigable waters and were constructed to relocate or alter a WOTUS. Further, the Agencies should bear the burden, as they did under the NWPR, of establishing that a ditch was constructed with the intent to relocate or alter a WOTUS.

As the *Rapanos* plurality explained, “[o]n its only natural reading, such a statute that treats ‘waters’ separately from ‘ditches, channels, tunnels, and conduits,’ thereby distinguishes between continuously flowing ‘waters’ and channels containing only an occasional or intermittent flow.” Regulation of ditches as WOTUS threatens to read the term “navigable” out of the statute, and it impermissibly intrudes upon state and tribal authority. It is unnecessary to define WOTUS to include ditches in order to protect water quality; the Agencies can rely on existing Section 402 permitting requirements to protect downstream waters.

The current ditch exclusion (in the 2023 Rule) is too narrow, as a ditch must be excavated wholly in/drain only dry land *and* contain less than relatively permanent flow. The very purpose of ditches is to collect and convey water from a saturated or ponded area, and modern drainage engineering criteria call for slowing drainage and runoff to reduce erosive force and potential collection in flood areas. Because of this, there is a high likelihood that few ditches could be excluded under the 2023 Rule. Ditches should be excluded if they were constructed in non-jurisdictional water features. They should not need to be excavated wholly in upland.

Elimination of Unlawful or Unnecessary Categories

The agency must eliminate both unlawful and unnecessary categories including the following:

- **Interstate waters:** Neither *Sackett* nor *Rapanos* says a water is a WOTUS merely because it crosses state lines, and Congress removed “interstate waters” from the Act in 1972. If an interstate water is neither navigable nor relatively permanent, there is no basis to define it as a WOTUS. *Sackett* makes it clear that the CWA’s coverage does not extend beyond the following categories of water bodies: (i) traditional interstate navigable waters; (ii) relatively permanent bodies of water connected to traditional interstate navigable waters; and (iii) wetlands with a continuous surface connection to bodies of water in the categories (i) and (ii), such that they are as a practical matter indistinguishable from such bodies of water.
- **Impoundments:** there is no basis in either *Sackett* or the *Rapanos* plurality to put impoundments on the same footing as traditional interstate navigable waters, yet that is what the 2023 Rule does. Impoundments can be jurisdictional only if they are traditional interstate navigable waters or if they are relatively permanent and connected to a traditional interstate navigable water. Such impoundments would be captured by either of those categories, so there is no need (or any legal basis) to have a standalone impoundments category.
- **Intrastate lakes/ponds** – to be WOTUS, intrastate lakes/ponds must be relatively permanent and connected to a traditional interstate *navigable* water. There is no basis to claim jurisdiction over intrastate lakes/ponds if they only connect to a non-navigable interstate water. The Agencies should combine lakes/ponds with rivers/streams in a single, “relatively permanent” category [see *suggestions for streamlining categories above*]

Exclusions

Additionally, the agencies should seek the codification of exclusions that are clear and not overly narrow. The Agencies should go back to the NWPR’s definition of prior converted cropland. Under that approach, PCC remain excluded unless the lands are abandoned *and* they revert to wetlands. They do not become WOTUS merely because of a change in use. Whether lands are PCC for CWA purposes should not depend on USDA wetland certifications under “Swampbuster.” EPA and the Corps can and should make PCC determinations for CWA purposes.

The Agencies should expand the artificial lakes and ponds exclusion by eliminating the requirement that such features be “used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.” Excluded ponds are often used for more than one purpose without turning them into a jurisdictional water. Both the 2015 Rule and the NWPR clarified that the list of excluded ponds has always been illustrative and not exhaustive.

Any exclusions that are conditioned on creation in dry land are too restrictive, and the Agencies should revise those exclusions to use the wording from the NWPR, which excluded various features so long as they were constructed or excavated in *either* upland or in non-jurisdictional waters.

Finally, the Agencies should clarify that wetlands that develop entirely within the confines of any non-jurisdictional water feature would be considered part of the excluded feature and would not be considered “waters of the United States.”

Conclusion

NPPC agrees that the Agencies should revise the 2023 definition of WOTUS to ensure full alignment with Sackett and that they can do so expeditiously. The 2023 Rule correctly incorporates some of the language from the Supreme Court’s Sackett and Rapanos plurality opinions into the regulatory text, but the rule otherwise fails to ensure consistency with Sackett, because the Agencies improperly retained certain jurisdictional categories and undercut the regulatory text by using preamble language and subsequent guidance memoranda to advance overly broad interpretations of the relatively permanent and continuous surface connection requirements that conflict with Sackett. The Agencies should take this opportunity to course correct and ensure full consistency with the Rapanos plurality and Sackett opinions.

The National Pork Producers Council is grateful for the opportunity to comment and provide suggestions to EPA as it embarks on this long overdue process. If you need further information, or clarification on any of the points raised above, please do not hesitate to contact me at 202-347-3600 or by email at formicam@nppc.org.

Sincerely,



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