



Via Electronic Submission: www.regulations.gov

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Mr. Lee Forsgren
Acting Assistant Secretary of the Army for
Civil Works
108 Army Pentagon
Washington, DC 20310-0108

Mr. Edward E. Belk, Jr.
Director of Civil Works
U.S. Army Corps of Engineers
441 G Street, NW
Washington, DC 20314-1000

Re: Definition of “Waters of the United States” – Request for Input on Sackett Implementation (Docket ID No. EPA-HQ-OW-2025-0093)

Dear Acting Assistant Secretary Forsgren and Director Belk:

On behalf of the National Waterways Conference (NWC), we appreciate the opportunity to submit comments in response to the agencies’ March 24, 2025, Federal Register notice (at 90 Fed. Reg. 13428) inviting public input on the interpretation and implementation of key jurisdictional terms under the Clean Water Act (CWA), as clarified by the U.S. Supreme Court in *Sackett v. EPA* (598 U.S. 651 (2023)). NWC has submitted comments on previous WOTUS rulemakings and supports a definition that provides regulatory clarity, predictability, and is firmly grounded in the statutory language and relevant case law.

NWC is a national organization whose members include ports, flood control agencies, levee boards, regional water supply districts, navigation interests, and public and private sector stakeholders who depend on water resources infrastructure for public safety, environmental management, and economic activity. Our mission is to promote common-sense water policies that recognize the public benefits of the Nation’s water resources and the partnerships required to manage them effectively.

We offer the following comments in response to the specific areas outlined in the notice:

I. “RELATIVELY PERMANENT” WATERS.

Clarifying the term “relatively permanent” is essential to aligning the implementation of the Clean Water Act with the U.S. Supreme Court’s decision in *Sackett v. EPA* and earlier rulings in *Rapanos v. United States*. NWC has consistently supported a narrower, more predictable scope of jurisdiction that distinguishes relatively permanent waters from features that are temporary or precipitation-dependent.

Under the *Rapanos* plurality, jurisdiction extends only to “relatively permanent, standing or continuously flowing bodies of water,” such as streams, rivers, lakes, and similar features. This language provides a clear and workable standard and avoids sweeping in water features that lack regular, sustained flow. However, the current regulatory framework does not clearly differentiate between ephemeral features and certain related categories—such as swales, gullies, and small washes—that have traditionally been excluded from jurisdiction.

This ambiguity creates confusion in the field and raises concerns about inconsistent application across Corps districts. To ensure the final rule reflects judicial precedent and provides a functional framework for regulated parties and agency staff, further clarification is needed.

Recommendations:

- Develop and adopt field-verifiable criteria to distinguish relatively permanent waters from ephemeral features, which flow only in direct response to precipitation and are typically dry most of the year. These criteria could include the average duration and frequency of flow over a water year, evaluated under ordinary climatic conditions.
- Clearly differentiate ephemeral features from other non-jurisdictional waters. These features may appear similar to swales or erosional features already excluded in regulation, but the rule does not currently explain how ephemeral streams differ from these other categories.
- Incorporate tools such as stream gage data, seasonal hydrographs, and hydrologic modeling to support consistent determinations across regions and field offices.
- Develop and use logical and consistent terminology in the final rule to avoid overlap between categories of excluded or jurisdictional features. This will help prevent confusion in implementation, ensure greater clarity in compliance, and uphold the narrower jurisdictional scope articulated by the Court in *Sackett* and *Rapanos*.

II. CONTINUOUS SURFACE CONNECTION BETWEEN WETLANDS AND JURISDICTIONAL WATERS.

NWC has consistently supported a limited and clearly defined approach to adjacent wetlands, emphasizing that wetlands must have a continuous surface connection to a relatively permanent water to be considered jurisdictional. We continue to urge the Agencies to avoid definitions of adjacency that rely on vague or overly expansive terms like “neighboring” or “riparian,” or on subsurface hydrologic connections.

Recommendations:

- The Agencies might consider clarifying that human-made barriers such as levees, berms, or roads should be considered a break in surface connection unless water visibly and continuously flows across or through them under ordinary conditions.

- Temporary interruptions caused by low flow or dry periods may not eliminate jurisdiction where an observable surface connection persists during normal conditions, but seasonal or event-driven flows may not satisfy the “continuous” standard.
- The Agencies could consider practical guidance and manuals for field staff, including visual indicators of surface connection and field checklists to determine whether “it is difficult to determine where the water ends and the wetland begins,” consistent with *Sackett*.

III. DITCHES.

Ditches serve a wide range of critical public functions, from transporting stormwater to enabling road safety and preventing flooding. NWC has consistently supported exempting ditches that do not function as relatively permanent waters, particularly those constructed in uplands for stormwater conveyance, flood control, or agricultural drainage. These features are typically designed and maintained for engineered purposes and often do not exhibit the characteristics of jurisdictional waters under the CWA.

Importantly, many ditches are required under federal or state design standards, particularly those adjacent to highways and roads. Roadside ditches, for example, are constructed to safely channel stormwater away from transportation corridors to prevent pooling, erosion, or traffic hazards. If these ditches were considered jurisdictional under WOTUS, routine maintenance like clearing sediment or repairing slopes could require a Section 404 permit. This would not only delay essential safety work but could expose local, state, or federal agencies to legal liability if that delay contributes to flooding or roadway damage. In some regions, these permitting hurdles have already limited or delayed required maintenance.

Additionally, stormwater conveyances such as Municipal Separate Storm Sewer Systems (MS4s) present a unique regulatory conflict. These systems are already subject to oversight under CWA Section 402 through the National Pollutant Discharge Elimination System (NPDES). MS4 infrastructure may include open ditches, channels, and pipes designed to collect, treat, and direct stormwater runoff. However, if these conveyances are also deemed jurisdictional “tributaries” under WOTUS, they would be regulated both as point sources and as waters of the U.S. – a conflicting application of the law. Such dual classification could improperly trigger state water quality standards and total maximum daily loads (TMDLs) for systems never intended to meet ambient water quality criteria. Further, if stormwater entering an MS4 is treated as entering a WOTUS, local governments could become responsible for the quality of incoming flow – not just their discharges – creating unmanageable legal and compliance burdens.

There is also confusion around man-made flood control ditches, particularly those in urban or suburban areas that resemble natural channels due to vegetation or visible flow after storms. While they may appear to be natural waterbodies, these ditches are often engineered to temporarily convey runoff and lack consistent flow or ecological functions. Without clarity in the

rule, these features risk being swept into federal jurisdiction despite serving primarily non-aquatic purposes.

For these reasons, NWC urges the Agencies to draw clearer distinctions between jurisdictional waters and non-jurisdictional conveyances that serve engineered, public safety, and stormwater management functions.

Recommendations:

- Presume non-jurisdictional status for ditches constructed wholly in uplands, including those used for stormwater, flood control, or irrigation, unless they exhibit clear indicators of relatively permanent flow.
- Clarify that roadside ditches constructed to meet federal or state safety and drainage standards are not jurisdictional. Requiring Section 404 permits for routine maintenance of these ditches creates unnecessary delays, cost burdens, and liability risks for public agencies responsible for public safety.
- Acknowledge that stormwater conveyances regulated under NPDES, such as MS4s, are not a WOTUS. A system cannot be both a point source discharging into a WOTUS and a WOTUS itself. Including MS4s as a WOTUS could create legal contradictions and open local governments to citizen suits, while also inappropriately subjecting stormwater infrastructure to water quality standards and TMDLs.
- Distinguish man-made flood control ditches from natural tributaries by considering their origin, function, and hydrology. Ditches constructed to manage stormwater in developed areas may appear stream-like but lack consistent flow or ecological connectivity. These should not be deemed jurisdictional absent clear, field-verifiable criteria.
- Avoid relying solely on biological indicators, such as the presence of fish, as evidence of jurisdiction. These features should be considered alongside hydrologic permanence, origin, and purpose.
- Develop a standardized field methodology, such as a national decision tree or checklist, to guide Corps districts and regulated entities in making consistent determinations regarding ditch jurisdiction.

IV. ADDITIONAL SUGGESTIONS FOR IMPLEMENTATION.

As the Agencies work to implement a durable and judicially consistent definition of “waters of the United States” following *Sackett*, transparency, predictability, and consistency

across regions remain key concerns for stakeholders. One of the most frequent challenges faced by landowners, local governments, and regulated entities is the lack of accessible, up-to-date information on which waters are considered jurisdictional. Currently, the jurisdictional determination process remains largely case-specific and localized, which can create delays and inconsistencies, increase compliance costs, and generate confusion about federal authority – particularly when determinations vary across Corps districts.

A practical, forward-looking solution would be the creation of a centralized, geospatial database to track and visualize jurisdictional determinations over time. Field-verified data collected by agency staff could be used to update and refine this resource, which in turn could serve as a shared tool for federal, state, and local stakeholders. Such a system could also provide a clearer public record of decision-making, support more efficient permitting, and help identify where agency implementation may need clarification or adjustment.

Recommendations:

- The Agencies might consider working with states to develop and maintain a comprehensive, state-by-state database of jurisdictional determinations, with corresponding maps of jurisdictional and non-jurisdictional waters. This could increase transparency, reduce the need for case-by-case determinations, and support stakeholder compliance.
- As jurisdictional determinations are made in the field, those data points could be used to update the maps and database regularly.
- The Agencies may wish to establish a policy requiring that the database be formally reviewed and updated every 10 to 20 years, incorporating new data, science, and legal interpretations.
- The Agencies should also consider including supporting maps and documentation – not just the jurisdictional determination forms – in the publicly accessible portion of the database. This would allow third parties, including local governments and private landowners, to develop complementary mapping and planning tools, which would then also complement the Agencies' database.
- Ensure the database is user-friendly and publicly available so that agencies, regulated parties, and the general public can consult it as a baseline reference. Increased accessibility would foster regulatory certainty and better-informed decision-making across the board. The Agencies could consider implementing a stepwise jurisdictional determination process, beginning with an evaluation of whether a feature clearly qualifies for exclusion. If so, the feature would be removed from further consideration before assessing whether it meets any of the defined jurisdictional categories of waters. This approach could help streamline determinations by screening out clearly non-jurisdictional features early, limiting the need for more complex and time-consuming analysis unless truly warranted.

V. CONCLUSION.

NWC appreciates the Agencies' efforts to gather input on how to implement the *Sackett* decision in a way that is faithful to the Clean Water Act and promotes clarity, consistency, and lawful application in the field. We welcome the opportunity to participate in ongoing discussions and stand ready to assist in crafting an approach that works for both regulators and regulated entities.

If you have any questions or would like to discuss these comments further, please do not hesitate to contact us. I may be reached at (202) 203-4795 or by email at julie@waterways.org.

Sincerely,



Julie A. Ufner
President and CEO
National Waterways Conference