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Submitted electronically via: <https://www.regulations.gov>

RE: U.S. Environmental Protection Agency and U.S. Army Corps of Engineers Revised WOTUS definition— Docket ID No. EPA-HQ-OW2025-0093

Dear Director Jensen and Acting Director Boyd:

The Association of California Water Agencies (ACWA) respectfully submits comments regarding the U.S. Environmental Protection Agency's (EPA) and U.S. Army Corps of Engineers (USACE) (collectively "the Agencies") request regarding clarification on a revised definition of "waters of the United States" (WOTUS).¹ ACWA encourages the Agencies to develop a durable definition of WOTUS to meet the nation's water supply and quality needs.

ACWA is the largest statewide coalition of public water agencies in the country. ACWA's more than 470 member agencies are responsible for delivering about 90 percent of the water to communities, farms, and businesses in California. ACWA represents water management entities in every sector of water supply including municipal and agricultural water, water recycling, water reuse, wastewater management, and stormwater management. For more than a century, ACWA and its members have been working to provide high quality, reliable water supplies in an environmentally sustainable and fiscally responsible manner.

¹ *WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations*, 90 Fed. Reg. 13428 (March 24, 2025) (codified at 33 C.F.R. pt. 328 and 40 C.F.R. pt. 120).
https://www.epa.gov/system/files/documents/2025-03/wotus_notice_march2025.pdf.

ACWA recognizes the important water quality improvements brought about by passage and implementation of the Clean Water Act (CWA). Source water protection is vital to our members and ACWA has a history of encouraging EPA to use its authorities to prevent pollutants from entering California's water supply. For this reason, ACWA has been very active in legislative and regulatory initiatives related to the jurisdictional scope of the CWA.

To achieve water quality and reliability goals, ACWA members need predictability and certainty in determining if a waterbody is subject to CWA jurisdiction. Regulatory certainty is essential for water agencies to understand how to plan for and meet water supply and water quality objectives.

I. Introduction

For years, WOTUS has been at the forefront of the federal regulatory landscape for water providers. Over the last decade water providers have had to work to develop infrastructure solutions for our nation under five different CWA regulatory regimes from regulations like the pre-2015 regulations and guidance, the 2015 Clean Water Rule, the 2020 Navigable Waters Protection Rule, the 2023 Rule, and the Amended 2023 Rule. The lack of certainty surrounding what bodies of water should be governed by the CWA and a lack of a clear WOTUS definition have significantly impacted public water agencies like ACWA members.

Regulatory certainty and clarity will help protect our nation's water resources and facilitate the development and maintenance of critical water infrastructure necessary to support public health, the economy, and the environment. The U.S. Supreme Court's decision in *Sackett v. EPA* (*Sackett*) provided much needed judicial guidance and ACWA appreciates the opportunity to provide comments that we hope will help guide the Agencies as they revise the definition of WOTUS.

To achieve water quality and reliability goals of our nation's complex, unique water systems, ACWA members need predictability and certainty in determining what waterbodies are subject to CWA jurisdiction. As such, ACWA has historically played an active role in influencing federal initiatives related to the jurisdictional scope of the CWA and what should constitute WOTUS.

ACWA urges the Agencies to develop a WOTUS definition in accordance with the recommendations discussed below. ACWA also recommends the Agencies engage with and include feedback from ACWA member agencies as well as regional, western water, and other water industry players to ensure a durable WOTUS definition is developed.

Recommendations

II. Importance of Exemptions for Ditches, Stormwater, Groundwater Recharge, Water Reuse, Wastewater, and Water Recycling, Artificial Conveyance, Terminal Storage, and Constructed Wetlands

Over the last decade various the CWA rulemakings have provided exemptions for a number of manmade water infrastructure features. Some of these exemptions, such as those for irrigation ditches are longstanding, while others, like the exemption for water recycling features, have been provided as water supply technologies have advanced. These exclusions provide important

certainty for water providers and the communities that rely on them. They also provide the appropriate balance protecting sources of water with the need for a functional permitting process that allows for efficient water infrastructure construction, operation and maintenance. These exemptions align with *Sackett* as none of the afore mentioned features are “streams, oceans, rivers, and lakes”.

The Agencies should specifically provide exemptions for ditches, stormwater control features, groundwater recharge, water reuse, water recycling, and wastewater treatment features.

a. Maintain exemption for ditches

The Agencies should continue the longstanding practice of exempting irrigation ditches and drains from WOTUS jurisdiction. Irrigation ditches provide water to agricultural operations throughout California and help grow more than 400 different commodities. California’s agricultural production benefits the entire nation providing a third of the country’s vegetables and over three-quarters of the country’s fruits and nuts.

Per the Agencies request for supporting documentation, information on relevant ditch exemptions can be found in *Regulatory Guidance Letter (RGL) No. 07-02: Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act* (July 4, 2007) and *Joint Memorandum to the Field Between the U.S. Environmental Protection Agency Concerning Exempt Construction or Maintenance of Irrigation Ditches and Exempt Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act* (July 24, 2020).

b. Maintain exemption for stormwater control features, groundwater recharge, water reuse, water recycling and wastewater features

Stormwater control features, groundwater recharge, water reuse and wastewater recycling features were excluded from WOTUS, with certain geographic limitations (being constructed in “dry land” or “uplands”), under the 2015 Clean Water Rule and the Navigable Waters Protection Rule (NWPR). ACWA asks that the geographic limitations for these exclusions be removed. Narrowing the exclusions to the geographic characteristics of “dry land” or “upland” unnecessarily limits the exclusions and creates confusion and ambiguity about what components, if any, fall within the exclusions. Geographic limitations are also inconsistent with *Sackett*.

ACWA requests that an express water reuse systems exclusion, without geographic limitations, be included to provide regulatory certainty and encourage the development of these types of environmentally beneficial projects that increase California’s water supply resiliency.

The Agencies should also provide clear exemptions for municipal separate storm sewer systems (MS4) features including detention ponds, bioretention facilities, and permeable paving.

c. Clarify that artificial conveyance and terminal storage are exempt

The Agencies should also add an express exclusion for artificial water conveyance infrastructure from the definition of WOTUS. Under previous rulemakings, there was uncertainty as to the potential designation of certain western water delivery systems as WOTUS. Adding an express WOTUS exclusion for artificial water conveyance infrastructure would provide much-needed regulatory clarity for water providers.

The Agencies should also provide exemptions for terminal reservoirs. Terminal reservoirs are artificial (human made) water storage infrastructure that could be mistaken for a “lake or pond” in “ordinary parlance”. However, terminal reservoirs are neither and should be exempt from WOTUS because these human made water storage facilities do not discharge downstream and therefore do not have a “continuous surface connection” as required by *Sackett*. Providing an express WOTUS exclusion for terminal reservoirs would prevent confusion and ensure regulatory certainty.

The economic, agricultural, public health, and climate resilient infrastructure that has been engineered in the United States would not be possible without the ability to divert, transport, store, treat, and deliver water for human consumption as well as ecosystem restoration. Potentially designating water delivery systems as WOTUS would trigger numerous additional legal requirements for maintenance and operation that do not result in improved water quality or otherwise further the goals of the CWA.

d. Clarify that constructed wetlands are exempt

Nature-based treatment systems, such as constructed wetlands, are designed to treat urban runoff and remove pollutants before they enter WOTUS. These constructed treatment wetlands work by removing many pollutant constituencies and often are designed as a series of facilities throughout a watershed. Overregulation of these types of facilities would discourage the use of these water quality treatment methods, which currently provide a benefit to receiving waters. Therefore, ACWA requests that the Agencies interpret constructed wetlands as excluded within any water reuse systems exclusion or stormwater control feature exclusion.

III. Response to Agencies Requested Questions

In addition to the exemptions noted above ACWA provides responses to a number of the questions the Agencies requested additional information on.

- The scope of “*relatively permanent*” waters and to what features this phrase applies.
 - o We believe that the Supreme Court was clear in *Sackett* that terms such as relatively permanent should be interpreted through the lens of “ordinary parlance as ‘streams, oceans, rivers, and lakes’”.

- o In light of the *Sackett* decision, the Agencies should consider elements of the definition of “relatively permanent” that was in use in the pre-2015 regulatory regime i.e. natural tributaries that typically flow year-round. In addition, ephemeral streams, especially those in the Western United States, should not be considered relatively permanent features. The *Rapanos* plurality decision exempted ephemeral streams, and the 2020 Navigable Waters Protection Rule (NWPR) largely exempted ephemeral streams.
- The Agencies seek feedback on whether certain characteristics, such as flow regime, flow duration, or seasonality should inform a definition of “relatively permanent” as well as to which features this phrase should apply to in light of *Sackett*.
 - o As noted above the Supreme Court was clear in *Sackett* that terms such as relatively permanent should be interpreted through the lens of “ordinary parlance as ‘streams, oceans, rivers, and lakes’”.
 - o If the Agencies consider flow regime, flow duration, or seasonality, they should be informed by the plurality decision in *Rapanos*, and therefore *Sackett*, that to be jurisdictional the feature needs to have water in it for most of the year. ACWA acknowledges that there may be instances, especially in times of extreme drought, that a jurisdictional water body may not have water in it for a majority of the year. In these instances, the Agencies should consider if the water body would have water in it for most of the year during years of normal hydrologic conditions.
 - o We encourage the Agencies to exercise caution when considering establishing a WOTUS threshold through the use of flow or geographic features. A fair amount of the controversy and challenges created by prior WOTUS rules over the last decade were linked to efforts to establish criteria based on flow and or geographic features that might make sense in the Eastern United States but were not appropriate in the West. If the Agencies look to establish another WOTUS litmus test based on features such as flow, we encourage them to conduct additional outreach to water providers in California and the Western United States.
- The Agencies are particularly interested in feedback regarding how to identify “relatively permanent” tributaries in the field to assist with transparent, efficient, and predictable implementation.
 - o One of the challenges that has grown out of CWA implementation over the decades is an increasingly unclear understanding of what may or may not constitute a WOTUS. Efforts to determine a WOTUS often required the work of specialized consultants and lengthy and costly consultation with the Agencies. In *Sackett* the Court recognizes this challenge and it notes the importance of statutes being defined in a manner that ordinary people can understand what conduct is prohibited. This, combined with the Court’s stipulation that “ordinary parlance” should be used when identifying WOTUS features indicates the expectation that an ordinary person

should be able to look at a feature and determine if it is a stream, ocean, river or lake.

- o If instances arise in the field where it is not clear whether a body of water constitutes “streams, ocean, river, or lakes” we encourage the Agencies to consult with local water providers. Local water providers such as ACWA’s members can provide both technical advice as well as important information on historic flow regimes and relevant ecosystem considerations related to what may constitute “relatively permanent” tributaries.
- The scope of “*continuous surface connection*”, definition of “*adjacent*”, definition of “*abut*” and to which features this phrase applies. (i.e. wetlands considerations)
 - o The Agencies seek feedback on several factors (“continuous surface connection”, “adjacent”, “abut”), relating to what constitutes a “wetland”. As the Agencies note, the multiple approaches to determining what constitutes a wetland and the various connecting factors has caused a great deal of confusion over the last decade. In *Sackett* the Court provides additional clarity. The Court offers two considerations 1.) The adjacent body of water is itself a WOTUS (streams, ocean, river, or lakes) and 2.) The wetland has a continuous surface connection with that water in a manner that makes it difficult for an ordinary person “to determine where the ‘water’ ends, and the ‘wetland’ begins”. If an area does not meet these two criteria it should not be considered a wetland. This treatment of wetlands is similar to the regulatory regime pre-2015.
 - o As previously noted in our comments constructed wetlands are nature-based treatment systems that are designed to treat urban runoff and remove pollutants before they enter a WOTUS. They do not meet the criteria to be considered a WOTUS wetland under the two criteria established by *Sackett*. Therefore, ACWA requests that Agencies interpret constructed wetlands as excluded within any future water reuse systems exclusion or stormwater control feature exclusion.
- The Agencies solicit feedback on whether flow regime (e.g., relatively permanent status or perennial or intermittent flow regimes), physical features, excavation in aquatic resources versus uplands, type or use of the ditch (e.g., irrigation and drainage), biological indicators like presence of fish, or other characteristics could provide clear and implementable distinctions between jurisdictional and non-jurisdictional ditches.
 - o As previously noted in our comments, the Agencies should continue the longstanding practice of exempting irrigation ditches, drainage ditches, and canals from WOTUS jurisdiction. See *Regulatory Guidance Letter (RGL) No. 07-02: Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act* (July 4, 2007) and *Joint Memorandum to the Field Between the U.S. Environmental Protection Agency Concerning Exempt Construction or Maintenance of Irrigation*

Ditches and Exempt Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act (July 24, 2020).

- o With respect to manmade conveyance facilities the Agencies should not consider biological indicators. Water is an element that is necessary for life and as such the presence of biological material such as weeds and, in some instances, aquatic species, can be found in irrigation ditches and other conveyance facilities. Water managers generally try to limit the presence of biological material in ditches and other artificial conveyance features as it can interfere with operations, but its presence has not historically been used as criteria to determine WOTUS jurisdiction. We are concerned that adding a consideration of biological material could further confuse jurisdictional determinations. It is not uncommon for unlined (earthen) irrigation ditches to have plant material present in them during irrigation season. Irrigation ditches and drains have long been exempt from WOTUS and adding consideration of biological indicators would cause unnecessary confusion and uncertainty.

IV. Conclusion

ACWA thanks the Agencies for their work to develop a durable WOTUS definition that can safeguard California's waters while not unduly hindering water supply and quality. Please let us know if there are further opportunities for ACWA to collaborate on WOTUS efforts that balance the broad interest of the Clean Water Act or if we can provide additional information and resources. If you have any questions or would like to follow up on this matter, please contact ACWA Director of Federal Relations, Ian Lyle, at ianl@acwa.com or (202) 434-4765.

Respectfully,

A handwritten signature in black ink, appearing to read "Ian Lyle", is positioned above the printed name and title.

Ian Lyle
Director of Federal Relations
Association of California Water Agencies