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

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

The American Farm Bureau Federation (AFBF) appreciates the opportunity to provide comments on a revised definition of "waters of the United States (WOTUS)." AFBF is the Voice of Agriculture®. We are farm and ranch families working together to build a sustainable future of safe and abundant food, fiber and renewable fuel for our nation and the world. The livelihood of farmers and ranchers depends on healthy soil and groundwater. We support the objectives of federal environmental statutes such as the Clean Water Act (CWA), however the ambiguity of where the line between federal and state jurisdiction lies has created confusion for landowners. Unfortunately, we have lived in a world of regulatory uncertainty for decades due to ever-changing rulemakings that redefine the scope of the CWA. We have seen WOTUS definitions change with each Administration, guidance documents offered and then rescinded, and confusing litigation that have provided more questions than answers. Landowners, small businesses, and American families are the ones who suffer the most. This Administration has an opportunity to produce a durable rule that injects clarity and certainty into the definition of WOTUS.

It should be obvious by now that the definition of WOTUS is very important to farmers and ranchers across the country, which is why AFBF has participated in rulemaking, legislative proceedings, and litigation related to this issue for decades. Whether they are growing plants or raising animals, farmers and ranchers need water. For that reason, farming and ranching tend to occur on lands where water is available, either from rainfall or from ground or surface water sources. Often there are features on these lands that are wet only after it rains and maybe miles from the nearest navigable water without a discernable connection. These features would be unrecognizable to farmers and ranchers as regulated waters; to them, these features are a normal part of an agricultural landscape.

As a founding member of the Waters Advocacy Coalition (WAC), AFBF also incorporates by reference the comments submitted by WAC. The purpose of these separate comments is to provide particular emphasis on those aspects of WOTUS that most directly affect farmers and ranchers.

The Definition of WOTUS Profoundly Affects Everyday Farming and Ranching Activities

Farming and ranching are necessarily water-dependent enterprises. Fields on farms and ranches often have low spots that may have standing water at least some of the time. Some of these areas are ponds that are used for stock watering, irrigation water, or settling and filtering farm runoff. Irrigation ditches also carry flowing water to fields throughout the growing season as farmers

and ranchers open and close irrigation gates to move water to active fields and pastures. These irrigation ditches are typically constructed through upland areas to connect sources of water to fields and pastures. The water sources range from wells to surface water management systems capturing tail water to irrigation canals or even navigable waters. At times irrigation systems also function as drainage systems, channeling flows back into these sources. In short, America's farm and ranch lands are an intricate maze of surface water management systems including impoundments, ditches, ponds, wetlands, "ephemeral" drainages, and other water features.

Considering drains, ditches, stock ponds, impoundments, irrigation ditches, and low spots in farm fields and pastures as jurisdictional "waters" opens the door to regulation of ordinary farming activities that move dirt or apply products to the land on those lands. Everyday activities such as plowing, planting, or fence building in or near ephemeral drainages, impoundments, ditches, or low spots could result in enforcement action triggering the CWA's harsh civil and criminal penalties unless a permit was obtained first. Bear in mind that permitting under CWA requires the investment of significant amounts of time and money. Most farmers and ranchers have neither of those in abundance. Further, farmers have to protect their crops, requiring them to apply weed, insect, and disease control products. Many farming operations require regular fertilizer application to produce crops on an economically viable basis. Such a simple act could also be swept into the CWA's broad scope under the initial rule on WOTUS advanced during the Biden Administration (the "Biden Rule"), including application of organic fertilizer (i.e., manure).[1] On much of our most productive farmlands (i.e., areas with plenty of rain), it is practicably impossible to avoid impacts to isolated wetlands, ephemeral features and small ditches in and around farm fields when applying crop protection products and fertilizer. But it would be cost-prohibitive to obtain permits for farming on so many spots, particularly since they are often completely dry and difficult to differentiate from the rest of the field. The concern is multiplied by the threat of criminal penalties from even an accidental deposition.

The Biden Rule is Legally Flawed

Just as the Supreme Court was considering the definition of WOTUS in *Sackett v. EPA*, the Biden Administration published its new definition of WOTUS under the Biden Rule[2] that heavily relied on the complex, subjective, and idiosyncratic "significant nexus" test.[3] Four months later, the Court unanimously decided that the "significant nexus" test was unlawful and incompatible with the CWA and directed the Agencies to adopt the "relatively permanent" test and redefine "adjacency" as it pertains to their jurisdiction over wetlands.[4]

In response, the Agencies issued a "Conforming Rule" that was not subject to notice and comment.[5] The Conforming Rule took the language from the Biden Rule and simply deleted any reference to the "significant nexus" test and narrowed the definition of "adjacent." AFBF was highly critical of the Agencies' Conforming Rule because it failed to provide any explanation as

[1] *See, e.g.*, 40 C.F.R. § 122.2 (defining "pollutant").
[2] 88 Fed. Reg. 3004 (Jan. 18, 2023).
[3] *See id.* (applying "significant nexus" test of *Rapanos v. United States*, 547 U.S. 715, 759-87 (2006) (Kennedy, J., concurring)).
[4] *See Sackett v. EPA*, 598 U.S. 651, 680-84 (2023).
[5] 88 Fed. Reg. 61964 (Sept. 8, 2023).

to how the Agencies would interpret the "relatively permanent" standard. The Agencies[6] refused to provide any additional context or a clear definition of "relatively permanent" and "continuous surface connection." We believe that the Agencies may have intentionally left these terms undefined to expand their regulatory reach. Simply put, the Agencies exploited these ambiguities to give themselves the latitude to regulate land features as they please going forward. During this time, the Agencies weren't even trying to hide the fact that they were violating *Sackett* through their field memos (essentially, Instructions to Corps and EPA staff on how to implement the rule). Through these field memos, the Agencies declared expansive interpretations of the "relatively permanent" and "continuous surface connection" requirements that cannot be squared with the *Sackett* decision. For instance:

- Even "if a wetland is divided by a road," the wetlands on either side of the road are jurisdictional so long as "a culvert [] maintain[s] a hydrologic connection" between the two and *either* wetland has a continuous surface connection to a relatively permanent water. The Agencies further claim they can "consider if a subsurface hydrologic is maintained" between the two wetlands as part of assessing whether they can assert jurisdiction over both. (Field Memo LRB-2021-01386)

- A "pipe directly connecting [a wetland and a relatively permanent tributary] under a road serves as a physical connection that meets the continuous surface connection requirement for the wetland." (Field Memo NAP-2023-01223)

- A wetland "exhibits a continuous surface connection" to a relatively permanent impoundment of a jurisdictional water via "an ephemeral drainage swale" that "conveys water from the surrounding uplands and [the wetland] at a low frequency and low volume" such as after a "rain event." (Field Memo NAP-2023-01223)

- "Depending on the factual context, including length of the connection and physical indicators of flow, more than one feature such as a non-relatively permanent ditch, other non-relatively permanent channel, or culvert can serve as part of a continuous surface connection where together they provide an unimpaired, continuous physical connection to a jurisdictional water." (Field Memo POH-2023-00187)

These field memos illustrate how the Biden Administration attempted to twist *Sackett* (and the underlying *Rapanos* plurality opinion) to conform to its overbroad and unlawful interpretation of the CWA.

Lower courts have begun to take note of the Agencies' disregard of the limiting principles articulated by the *Rapanos* plurality and *Sackett*:

- In December 2023, the Fifth Circuit rejected the federal government's attempt to assert jurisdiction over wetlands in Louisiana as "incompatible with finding adjacency under *Sackett*."[7] The government tried to argue that the property in question contained jurisdictional wetlands. But as that court pointed out, the "nearest relatively permanent

[6] The agencies included the Department of the Army, Corps of Engineers, Department of Defense; and the Environmental Protection Agency.
[7] *Lewis v. United States*, 88 F.4th 1073, 1079 (2023).

body of water is removed miles away from the Lewis property by roadside ditches, a culvert, and a non-relatively permanent tributary. In sum, it is not difficult to determine where the 'water' ends and any 'wetlands' on Lewis's property begin—there is simply no connection whatsoever."[8]

- Soon after, the U.S. District Court for the Southern District of Florida found that "relatively permanent, standing, or continuously flowing bod[ies] of water" do not include "'intermittent' or 'ephemeral' ditches or channels with seasonal flow" and thus, such ditches and channels near the defendants' property are not jurisdictional.[9] The court further held that, even if those ditches and channels are jurisdictional, any wetlands on the defendants' property are not "indistinguishable" from those ditches and channels because there is no continuous "surface water connection" between the wetlands and the ditches or channels. The court emphasized that the statement in *Sackett* that "temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells" and *Sackett*'s requirement that jurisdictional wetlands must be "indistinguishable" from another WOTUS "would have no practical meaning" if physical abutment alone could establish a "continuous surface connection."[10]

Although the Conforming Rule does not completely align with *Sackett* or *Rapanos*, we do not believe that a full repeal of the Biden Rule is appropriate. Additions to the regulatory text need to be made to give more context to the meaning of terms like "relatively permanent," "continuous surface connection," and "indistinguishable." Significant changes need to be made to the Conforming Rule's preamble, but surgical changes can be made to the regulatory text to bring it in line with these Supreme Court decisions. AFBF strongly advises the Agencies to take this approach.

Relatively Permanent Standard

As discussed above, *Sackett* directed the Agencies to use the "relatively permanent" test to determine the scope of the federal government's jurisdictional reach. To understand this regulatory test, one must look back to the *Rapanos* plurality for context. In the plurality's decision, Justice Scalia states that 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.'" Throughout the text of *Rapanos*, Justice Scalia repeatedly states that ephemeral and intermittent streams should not be regulated as a federal WOTUS. For example, he states, "The phrase [waters of the United States] does not include channels through which water flows intermittently or ephemerally."[11] Additionally, the plurality agreed that "the restriction of 'the waters of the United States' to

[8] *Id.* at 1078.
[9] *United States v. Sharfi*, No. 21-CV-14205, 2024 WL 4483354, at *12-*14 (S.D. Fla. Sept. 21, 2024) (Maynard, Mag. J.).
[10] *United States v. Sharfi*, No. 21-CV-14205, 2024 WL 5244351, at *1 (S.D. Fla. Dec. 30, 2024) (adopting recommendations and report of magistrate judge).
[11] *Rapanos v. United States*, 547 U.S. 715, 739 (2006) (Scalia, J.) (plurality opinion) (internal quotation marks omitted).

exclude channels containing merely intermittent or ephemeral flow also accords with the commonsense understanding of the term."[12]

However, in the aftermath of the *Rapanos* decision, the Agencies drafted interpretive guidance (the "2008 Guidance") where they interpreted "relatively permanent" to mean flowing year-round or having continuous flow at least seasonally. The Agencies interpreted "seasonally" to mean generally three months, or possibly even less time depending on where in the United States the water feature is located. The Agencies purported to rely on a footnote in *Rapanos* to support this interpretation, but on its face, that footnote discussed the possibility that a "seasonal" river flowing for 290 days (closer to 10 months) would not necessarily be *excluded* under the relatively permanent test.[13] In other words, whether jurisdiction can be exercised over rivers, streams, and tributaries that flow continuously for 290 days is a case-by-case basis inquiry. The Agencies inverted what Justice Scalia intended and instead concluded that any feature that flows continuously for at least 90 days (merely because there are 90-days in one season) is automatically jurisdictional. Nowhere in Scalia's decision does he ever refer to a 90-day flowing stream. It goes without saying that not necessarily *excluding* 290 days of continuous flow cannot possibly equate to automatically *including* 90 days of continuous flow. If you take all of the context clues provided by Scalia—including but not limited to (1) the selection of the words "relatively permanent," (2) the insistence that intermittent streams are not WOTUS, and (3) the example of the 290-day flowing stream not necessarily being jurisdictional—it is fantastical to reach the conclusion that a 90-day flowing stream would be jurisdictional. Still, the Agencies made this incredible leap. It is important to give meaning to both "relatively" and "permanent," but we believe this interpretation fails to incorporate the latter term.

In addition, the Agencies made another grand assertion when they state that ***all*** intermittent streams are categorically regulated. Again, in *Rapanos*, Justice Scalia is clearly wavering on a 290-day flowing stream, stating that it could be included within or excluded from WOTUS jurisdiction. This conclusion clearly does not support categorically regulating all intermittent streams. The fact that an intermittent stream only flows for a few months or during specific periods (such as 90 days) shows that it lacks the permanence associated with jurisdictional waters under the *Rapanos* and *Sackett* framework.

The Biden Rule makes the relatively permanent standard even less restrictive than the 2008 Guidance. The new rule completely abandons the seasonal (90-day) concept and does not use any bright line tests (days, weeks, or months) or any concepts of flow regime (ephemeral, intermittent, perennial). The rule vaguely says relatively permanent tributaries have flowing or standing water year-round or continuously during certain times of the year and they do not include tributaries with flowing or standing water for only a short duration in direct response to precipitation. As an example, the Agencies suggest that consecutive storm events, or even a single strong storm event, is enough to create relatively permanent flow. This change to the relatively permanent test greatly expanded the Agencies' jurisdiction beyond what is allowed by *Rapanos* and *Sackett*.

Post-*Sackett* (and *Rapanos*), there is no question that all ephemeral and some intermittent features should not be regulated as a WOTUS. It is worth noting that, ultimately, the question is

[12] *Id*. at 733-34.
[13] *See Rapanos*, 547 U.S. at 732 n.5.

not whether intermittent tributaries or ephemeral streams are "important" or may as a scientific matter have some connection with downstream navigable waters;[14] rather, the question is whether they should be considered as falling within the bounds of federal jurisdiction. As with so many other categories in the Biden Rule, the Agencies collapsed that distinction. While we understand that all water is connected within the hydrologic cycle, the CWA does not extend legal protections to all waters. Congress specifically drew the line based on navigability, and that line must be respected.

Wetlands Must be "Indistinguishable" from WOTUS to be Deemed "Adjacent"

Section 404 of the CWA gives the federal government the ability to regulate wetlands that are adjacent to regulated navigable waters. However, over the last few decades there has been considerable debate over what the term "adjacent" means. Thankfully, *Sackett* provided clarity by stating that to be jurisdictional, wetlands must directly abut a WOTUS in such a way that the WOTUS and the wetland are *indistinguishable* from one another. Wetlands must be adjacent to a WOTUS in such a way that "the wetland has a continuous surface connection with that water, making it difficult to determine where the water ends and the wetland begins."[15] As the *Rapanos* plurality explained, and as *Sackett* endorsed, there must be "no clear demarcation between 'waters' and wetlands."[16] This portion of the ruling greatly narrowed the Agencies' interpretation of adjacency.

The Biden Rule's definition of adjacency violates *Sackett* by interpreting "continuous surface connection" to mean a physical connection that does not need to be a continuous surface hydrologic connection and not requiring "wetlands" to directly abut a relatively permanent water. Even under the 2008 Guidance, the "continuous surface connection" test required wetlands to directly abut a relatively permanent tributary. By contrast, the Biden Rule abandons this directly abutting requirement and instead provides that wetlands have a continuous surface connection even if they are separated from a relatively permanent impoundment of a tributary by a natural berm, bank, dune, or similar natural landform so long as that break does not sever a continuous surface connection and provides evidence of a continuous surface connection. This approach is needlessly complex and clearly out-of-step with *Rapanos* (and *Sackett*). Under the Biden Rule, wetlands also meet the continuous surface connection requirement if they are located some distance away from a relatively permanent tributary but connected by some linear feature such as a ditch, swale, or pipe.

In order to uphold the ruling in *Sackett*, the Agencies must 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

[14] Proposed Rule, 86 Fed. Reg. 69,372, at 69,390 (Dec. 7, 2021) ("Revised Definition of 'Waters of the United States'").
[15] 598 U.S. at 678.
[16] *Id.* (quoting *Rapanos*, 547 U.S. at 742).

interruptions can occur during times of low tides or dry spells. Lower courts agree that indistinguishability is required.[17]

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 that a 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.

Impoundments, Interstate Waters, and Intrastate Waters Are Not Necessarily WOTUS

The Agencies must eliminate the standalone categorical inclusion of impoundments, interstate waters and intrastate waters. Under the Biden Rule, all impoundments of any (a)(1), (a)(3), and (a)(4) waters are WOTUS. The Agencies should eliminate this as a standalone category, as it conflicts with *Sackett*. Specifically, there is no basis to read *Sackett* and *Rapanos* as putting impoundments on the same footing as traditional interstate navigable waters, yet that is what the 2023 Rule did. Both *Sackett* and *Rapanos* require a connection to a traditional interstate navigable water as the lynchpin for asserting jurisdiction over a non-navigable, relatively permanent, standing, or continuously flowing body of water.

Likewise, a water feature is not a WOTUS solely because it crosses state lines. Yet the Biden Rule designates interstate waters as jurisdictional waters even if they are non-navigable and are not used in commerce. For a non-wetland water body to be jurisdictional, it must either be a traditional interstate navigable water or it must be relatively permanent, standing, or continuously flowing and connected to a traditional interstate navigable water. Interpreting this any other way is effectively reading the word "navigable" out of the CWA. In fact, the Southern District of Georgia has highlighted this concern, finding "the inclusion of all interstate waters in the definition of 'waters of the United States,' regardless of navigability, extends the Agencies' jurisdiction beyond the scope of the CWA because it reads the term navigability out of the CWA."[18] Additionally, it is worth noting that Congress specifically removed the term "interstate waters" from the CWA in 1972, and nothing in *Sackett* even hints at the possibility that interstate waters are categorically WOTUS even when they are not navigable in fact. On the contrary, *Sackett* reiterated the Court's longstanding view that traditional navigable waters are "interstate waters that [are] either navigable in fact and used in commerce or readily susceptible to being used this way."

The standalone intrastate waters category (referred to as (a)(5) waters under the Biden Rule) is unnecessary and doesn't fully comport with the *Sackett* decision. Similar to the impoundment and interstate waters categories, this "other waters" category unlawfully encompasses waters that are not "connected to traditional interstate navigable waters," which is contrary to *Sackett* and the *Rapanos* plurality opinions. The same logic applies to all three of these categories—impoundments, interstate waters and intrastate waters can only be jurisdictional if they are relatively permanent, standing, or continuously flowing bodies of water *connected to* a traditional interstate navigable water or because these features themselves are traditional

[17] *See, e.g.*, *Lewis*, 88 F.4th at 1078-79; *Sharfi*, 2024 WL 5244351, at *1.
[18] *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1358 (S.D. Ga. 2019).

navigable waters. If these features pass that threshold, then they should be regulated under the "relatively permanent" category of jurisdiction. There is no need or legal basis to retain a standalone categorical inclusion of impoundments, interstate waters and intrastate waters after *Sackett*.

Ditches are not WOTUS

Ditches and constructed water features commonly found on farms that are used to collect, convey, or retain water should be excluded from the definition of WOTUS.[19] Without adequate drainage, farmlands could remain saturated after rain events and unable to provide adequate aeration for crop root development. Drainage ditches and other water management structures can help increase crop yields and ensure better field conditions for timely planting and harvesting. In areas without sufficient rainfall, irrigation ditches and canals are needed to connect fields to water supplies and to collect and convey water that leaves fields after irrigation. Put simply, ditches are vitally important to support American agriculture and ultimately to feed the growing population.

We strongly recommend that the definition of WOTUS retain standalone exclusions for ditches (including, but not limited to drainage ditches and irrigation ditches), and artificial ponds (including, but not limited to, stock watering ponds, irrigation ponds, and sediment basins).[20] But if these exclusions are to be meaningful, they must not be limited to features constructed on dry land or upland. Because these features are constructed to store water, it would not typically be useful for them to be constructed along the tops of ridges, for example. Rather, often the only rational place to construct a ditch or a farm or stock pond is in a naturally low area to capture stormwater that enters the ditch or pond through sheet flow and ephemeral drainages. Depending on the topography of a given patch of land, ditch or pond construction may be infeasible without some excavation in a natural ephemeral drainage or a low area with wetland characteristics.

Following *Sackett*, ditches should generally be excluded from jurisdiction because they are not bodies of water described in ordinary parlance as streams, oceans, rivers, and lakes. Moreover, 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."[21] Regulation of ditches as WOTUS threatens to read the term "navigable" out of the statute, and it impermissibly intrudes upon state and tribal authority.[22] Equally important, it is

[19] AFBF acknowledges that construction of such features in a WOTUS should not eliminate CWA jurisdiction.
[20] Farmers also rely on conservation infrastructure to support their operations, including grassed waterways, terraces, sediment basins, biofilters, and treatment wetlands. These features serve important functions such as slowing stormwater runoff, increasing holding time before water enters a stream, sediment trapping, increasing soil infiltration, and pollutant filtering. The Agencies should also clarify that such features are excluded unless they were constructed in a WOTUS.
[21] *Rapanos*, 547 U.S. at 736 n.7.
[22] *See id.* at 736-38.

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.[23]

The Agencies should retain the approach to ditches and artificial ponds from the Navigable Waters Protection Rule ("NWPR"),[24] which is protective of downstream navigable waters and avoids impinging upon state and local governments' traditional authority. The NWPR appropriately recognized the practical realities surrounding ditches on farm and ranch lands by excluding ditches so long as they are not constructed in WOTUS and by excluding other water features found on agricultural lands (e.g., farm, irrigation, and stock watering ponds) so long as they were "constructed or excavated in upland or in non-jurisdictional waters."[25] We strongly support both of these exclusions as codified in the NWPR. We also strongly support the NWPR's clarification that the Agencies bear the burden of proof "to demonstrate that a ditch relocated a tributary or was constructed in a tributary or an adjacent wetland."[26] To the extent there is uncertainty about the historical status of the ditch, the NWPR appropriately placed the burden of proof on the government to prove its jurisdictional status. This clarification provided much needed certainty to farmers and ranchers as to how the Agencies would implement the ditch exclusion. Relatedly, the Agencies should make it equally clear that the Agencies bear the burden of proving that a farm pond or sediment basin—or any other feature that would qualify for the artificial lakes and ponds exclusion—was constructed or excavated in a WOTUS, as opposed to upland or a non-jurisdictional water.

Prior Converted Cropland are not WOTUS

Since 1993, the definition of WOTUS has explicitly excluded prior converted cropland ("PCC"). In 2023, however, the Agencies upended nearly 30 years of largely consistent implementation of the PCC exclusion by codifying the "change in use" principle for the first time. We strongly oppose this change and recommend that the Agencies revert to the longstanding, original policy that lands remain PCC unless they are abandoned *and* they revert to wetlands.

When the Agencies originally promulgated the PCC exclusion in 1993, they explained that PCC are "areas that, prior to December 23, 1985, were drained or otherwise manipulated for the purpose, or having the effect, of making production of a commodity crop possible [and that are] inundated for no more than 14 consecutive days during the growing season…."[27] This exclusion reflects the recognition that PCC generally have been subject to such extensive modification and degradation as a result of human activity that the resulting "cropped conditions" constitute the normal circumstances for such lands.[28] The 1993 Rule specifically clarified that PCC do not lose their status merely because the owner changes use.[29] Thus, even if the PCC are used for a non-agricultural use, they remain excluded from the definition of "waters of the United States." That interpretation was upheld in *United States v. Hallmark Construction Co*.[30] The change in use issue was litigated again in *New Hope Power Co. v. U.S. Army Corps of Engineers*, with that

[23] *See id.* at 752-53.
[24] 85 Fed. Reg 22,250 (Apr. 21, 2020).
[25] *Id.* at 22,338.
[26] *Id.* at 22,299.
[27] 58 Fed. Reg. 45,008, 45,031 (Aug. 25, 1993) (the "1993 Rule").
[28] *See id.* at 45,032.
[29] *See id.* at 45,033-34.
[30] 30 F. Supp. 2d 1033, 1035, 1040 (N.D. Ill. 1998).

court finding a change in land use does *not* cause a property to lose PCC status.[31] Relatedly, another important clarification in the 1993 Rule is that even if PCC are "abandoned," meaning not used for agricultural production at least once in five years, they do not automatically become subject to CWA regulation.[32] Rather, the PCC merely become eligible for CWA regulation. The critical inquiry is whether wetland conditions (as determined using the Corps' 1987 Wetlands Delineation Manual) have returned to the area. If not, the land remains PCC and excluded from the definition of "waters of the United States."

Although the 1993 Rule strived to ensure consistency between determinations made by the U.S. Department of Agriculture ("USDA") under the Food Security Act of 1985 and those made by the Agencies under the CWA, the final authority regarding Clean Water Act jurisdiction has always remained with EPA. Thus, even though Congress made changes in the 1996 farm bill to how USDA makes PCC eligibility determinations for purposes of the conservation compliance programs it administers, that bill did not affect how EPA and the Corps make PCC determinations for CWA purposes.[33]

Accordingly, the Agencies' decision to import the USDA's "change in use" principle into the CWA context was ill-advised. The 1996 farm bill adopted that concept relevant to USDA *wetlands* certifications (not PCC certifications), but as noted above, those changes did not affect the Agencies' determination of what constitutes "waters of the United States" for CWA purposes. This issue was litigated in *New Hope*, with the court setting aside the government's "issue paper" asserting that USDA "change in use" principles applied to jurisdictional determinations under the CWA. That court squarely rejected the assertion that a change in land use, without abandonment and return of wetland conditions, makes prior converted cropland part of "the waters of the United States."[34]

For these reasons, we recommend that the Agencies revise the definition of PCC by re-codifying the definition in the 2020 NWPR. That definition codified the Agencies' decades-long interpretation that an area loses its PCC status for CWA purposes only where it is abandoned *and* has reverted to wetlands. The Agencies further made it clear that abandonment means an area is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. Finally, the Agencies appropriately recognized, in the NWPR, that a site can be PCC regardless of whether there is a PCC determination from either USDA or the Corps, as there is no specific requirement for issuance of a formal PCC determination, and USDA does not provide determinations unless a farmer is seeking benefits under the conservation compliance programs. The 2023 definition of PCC, by contrast, was too restrictive in limiting the PCC exclusion to areas that are designated as such by the USDA. Just because wetland characteristics return does

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[31] 746 F. Supp. 2d 1272, 1282 (S.D. Fla. 2010).
[32] 1993 Rule at 45,033-34.
[33] *See* H.R. Conf. Rep. No. 104-494, at 380 (1996), *reprinted in* 1996 U.S.C.C.A.N. 683, 745 (clarifying "the amendments to abandonment provisions under Swampbuster should not supersede the wetland protection authorities and responsibilities" of the Agencies under the CWA). Similarly, when USDA amended its regulations following the 1996 farm bill, it specified that they "do[] not affect the obligations of any person under other Federal statutes, or the legal authorities of any other Federal agency including, for example, EPA's authority to determine the geographic scope of Clean Water Act jurisdiction." *See* 61 Fed. Reg. 47,019, 47,022 (Sept. 6, 1996).
[34] *New Hope*, 746 F. Supp. 2d at 1279, 1282-84; *cf.* Pls' Mot. for Prelim. Inj. or Summ. J. (ECF No. 18), at 14, 27-28, *New Hope*, No. 10-CV-22777 (S.D. Fla. filed July 2, 2010) (discussing USDA-related provisions in the "issue paper").

not mean that federal jurisdiction returns. It still must meet the "continuous surface connection" standard.

Groundwater is Not WOTUS

Groundwater is not regulated under the law because it does not meet the statutory or judicial definitions of "navigable waters." The primary goal of the CWA is restoring and maintaining the integrity of the nation's surface waters. Its language and legislative history make clear that the CWA is focused on surface water pollution and the discharge of pollutants into waters connected to traditional navigable waters—not the regulation of groundwater, which typically flows in subsurface aquifers and lacks a direct surface connection.

This interpretation has been reinforced by multiple federal courts. For instance, in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, the Supreme Court acknowledged that certain discharges to groundwater can be the "functional equivalent" of a direct discharge to navigable waters, but the Court explicitly stopped short of bringing groundwater itself under the CWA's jurisdiction.[35] Additionally, groundwater regulation has traditionally been left to the states, which manage groundwater quantity and quality through separate legal frameworks. Expanding CWA jurisdiction to include groundwater would not only conflict with the CWA's text and structure but also risk disrupting established state authority and undermining the federal-state balance that the CWA was designed to preserve.

Tools for Jurisdiction

Over the years, the Agencies have been afforded many regulatory and scientific tools to help guide jurisdiction determinations, ranging from the Wetland Delineation Manual (and Regional Supplements, LiDAR and GIS mapping tools to name a few). We believe that none of these tools should be used in isolation to establish jurisdiction but unfortunately, the Biden Administration frequently relied on single indicators.

Ordinary High Water Mark (OHWM)

A perfect example is the Agencies' use of the Ordinary High Water Mark (OHWM) as a primary indicator for asserting jurisdiction under the CWA. Although the OHWM has historically been used to delineate the extent of waterbodies subject to federal regulation, its application is increasingly misaligned with the holding in *Sackett*. As already discussed, the Court determined that "relatively permanent bodies of water with a continuous surface connection to traditionally navigable waters" fall within the scope of the CWA. The OHWM, by contrast, is a physical indicator that does not necessarily reflect a legally sufficient hydrologic or ecological connection under this narrower test.

The identification of the OHWM is inherently subjective and inconsistent. Field indicators such as changes in vegetation, soil characteristics, or sediment deposits can vary dramatically by region, climate, and land use, and may be difficult to interpret reliably, especially in ephemeral or intermittent streams. This creates the potential for inconsistent regulatory outcomes, with similar

[35] 590 U.S. 165, 170, 176-77, 183-86 (2020).

features treated differently depending on who conducts the assessment or in which geographic region it occurs.

Additionally, reliance on the OHWM can lead to regulatory overreach, particularly in arid or semi-arid regions where streams may only carry water briefly after precipitation events but still leave behind physical markers. In these cases, the presence of an OHWM may be mistaken for evidence of a jurisdictional waterbody, even when the stream lacks permanence or a meaningful surface connection to navigable waters. While the OHWM can provide useful information about the historical presence of water, it is not a legally determinative standard under current CWA jurisprudence and should not be used in isolation to assert federal jurisdiction.

Stream Duration Assessment Method (SDAM)

Another tool that we have serious concern with is the Stream Duration Assessment Method (SDAM). This is a standardized field-based tool developed by the Agencies to determine the duration of flow in a stream channel—specifically, whether a stream is perennial, intermittent or ephemeral. However, there are several critical problems when used to establish CWA jurisdiction. First and foremost, SDAMs are not designed to determine legal jurisdiction; rather, they were developed to categorize streams as ephemeral, intermittent, or perennial based on observable field indicators. These classifications do not directly align with the legal thresholds established by *Sackett,* which limits federal jurisdiction to relatively permanent waters with continuous surface connections to traditionally navigable waters. As a result, SDAMs may inaccurately capture streams that lack a legally sufficient link to jurisdictional waters.

Furthermore, SDAMs rely on a set of field indicators that can be highly variable, seasonal, and region-specific, introducing a level of subjectivity and inconsistency that undermines their reliability in regulatory contexts. Misidentification of stream features, particularly in regions with ephemeral or flashy hydrology, may lead to erroneous assertions of federal authority. Additionally, while SDAMs have been regionally calibrated in some areas, many regions still lack finalized or peer-reviewed versions, raising concerns about the method's applicability across diverse landscapes.

Finally, there is growing concern that regulatory Agencies may over-rely on SDAM findings as determinative, rather than treating them as part of a broader jurisdictional analysis. This practice risks regulatory overreach or misclassification, especially when SDAM results are not paired with hydrologic connectivity assessments or legal tests such as the "relatively permanent" standard. For these reasons, while SDAMs may serve as a helpful technical reference, it is inadequate and potentially misleading when used as a stand-alone tool to establish CWA jurisdiction.

Conclusion

For all the reasons outlined above and those set forth in WAC's comments, AFBF recommends that the Agencies make the necessary changes outlined above to bring the WOTUS definitions in line with *Sackett*. Farmers and ranchers support the creation of a durable rule that injects clarity into the regulatory process and does not leave landowners guessing what parts of their property are subject to regulation. We look forward to reviewing a proposed rule that upholds Supreme Court precedents, respects congressional intent and recognizes cooperative federalism. Thank you for the opportunity to provide these comments.

Sincerely,

Samuel A. Kieffer

Vice President, Public Policy