



July 24, 2023

The Honorable Michael S. Regan
Administrator
Office of Administrator
Mail Code 1101A
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

The Honorable Michael L. Connor
Assistant Secretary of the Army for Civil
Works
U.S. Army Corps of Engineers
108 Army Pentagon
Washington, DC 20310

Dear Administrator Regan and Assistant Secretary Connor:

The Waters Advocacy Coalition (WAC) provides the following recommendations as the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) develop a rule to amend the January 18, 2023 final rule defining “waters of the United States” (WOTUS), consistent with the U.S. Supreme Court’s May 25, 2023 decision in *Sackett v. Environmental Protection Agency*.

WAC’s members are committed to both building modern, resilient infrastructure and protecting and restoring America’s wetlands and waters. WAC represents a diverse cross-section of the nation’s agriculture, construction, transportation, real estate, mining, manufacturing, forestry, energy, recreational, specialty pesticides, wildlife conservation, and public health and safety sectors—all of which are vital to a thriving national economy and provide much needed jobs.¹ WAC and its members have extensive expertise relevant to rulemaking proceedings related to the definition of WOTUS. We have submitted comments on all of the Agencies’ prior rulemakings and guidance documents on this issue. In those comments, WAC has consistently urged the Agencies to avoid adopting expansive theories of CWA jurisdiction that: (i) fail to preserve the States’ traditional and primary authority over land and water use; (ii) ignore relevant Supreme Court precedent on the definition of WOTUS; (iii) effectively read the term “navigable” out of the statute; and (iv) redraw the line between federal and state authority based on ecological considerations.

EPA and the Corps have stated that they intend to issue a *final* rule by September 1, 2023 that amends the Biden WOTUS Rule to ensure consistency with the decision in *Sackett*.² Based on this truncated rulemaking timeline, it appears that the Agencies will forego public comment and simply strike language from the rule related to the significant nexus test as well as the definition of “adjacent,” while reinforcing the Agencies’ interpretation of the “relatively

¹ A complete list of WAC members is attached to these recommendations as Appendix A.

² See U.S. EPA, “Amendments to the 2023 Rule,” *available at* <https://www.epa.gov/wotus/amendments-2023-rule> (last visited July 10, 2023).

permanent” test set forth in the preamble. That is not a defensible response to *Sackett* or an appropriate approach to this rulemaking. As explained more fully below, the Biden WOTUS Rule’s interpretation of “relatively permanent” cannot be squared with the *Rapanos* plurality’s test, which the *Sackett* majority firmly endorsed. Other aspects of the Biden WOTUS Rule are no longer viable under *Sackett*. For instance, the Agencies must either strike the standalone interstate waters and wetlands from the rule or clarify that interstate waters must be navigable to be jurisdictional as an “(a)(1)” water. Finally, WAC offers additional recommendations on how to revise the definition of WOTUS in the wake of *Sackett*.

I. The Definition of WOTUS Must Adhere to the Core Holdings in *Sackett*.

After over a decade of litigation, *Sackett* produced a clear majority opinion from the Supreme Court on “what the [Clean Water] Act means by ‘the waters of the United States.’”³ The Court concluded that “the *Rapanos* plurality was correct: 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.’”⁴ The Court acknowledged that the phrase WOTUS does extend to some wetlands, but only those wetlands that are “adjacent” to another WOTUS such that they are “indistinguishably part of a body of water that itself constitutes” WOTUS.⁵ “Wetlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby.”⁶ For a wetland to be jurisdictional under the CWA, it must be adjacent to a “relatively permanent body of water connected to traditional interstate navigable waters” and it must have a “continuous surface connection with that water, making it difficult to determine where ‘water’ ends and the ‘wetland’ begins.”⁷

Sackett leaves no doubt that the *Rapanos* plurality’s test for jurisdiction, as further clarified by the *Sackett* majority, governs moving forward. The opinion sets forth numerous findings and conclusions that the Agencies must follow in revising the definition of WOTUS:

- The CWA’s reach extends only to “the waters of the United States.” To be jurisdictional, a water feature must qualify as a WOTUS in its own right, *i.e.*, it must be indistinguishably part of a body of water that itself constitutes “waters” under the CWA.⁸ “Waters” under the CWA include only those “relatively permanent, standing or continuously flowing bodies of water . . . described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’”⁹

³ 143 S. Ct. at 1329.

⁴ *Id.* at 1336 (quoting *Rapanos v. United States*, 574 U.S. 715, 739 (2006) (plurality)).

⁵ *Id.* at 1339.

⁶ *Id.* at 1340.

⁷ *Id.* at 1341 (quoting *Rapanos*, 547 U.S. at 742 (plurality)).

⁸ *Id.* at 1339.

⁹ *Id.* at 1336.

- The Agencies cannot read the term “navigable” out of the statute; that term “shows that Congress was focused on ‘its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.’”¹⁰
- “Waters” does not encompass anything defined by the ordinary presence of water. Such an interpretation would be “tough to square with *SWANCC*, which held that the Act does not cover isolated ponds[.]” It would also run contrary to the Congressional policy outlined 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.”¹¹
- Correcting the Agencies’ overbroad misunderstanding of WOTUS was needed because of the potentially crushing penalties that property owners face even for inadvertent violations.
- The Agencies have no statutory basis to impose the significant nexus test, which is a “particularly implausible” interpretation of the Act. The Agencies’ “conception of ‘the waters of the United States’ is truly staggering when this vast territory [of wetlands] is supplemented by all of the additional area, some of which is generally dry, over which the Agency asserts jurisdiction under the [Biden WOTUS] Rule.” Though the significant nexus test fails under the plain text of the Act, there also is no clear statement in the CWA that would allow this impingement on traditional state authority, “[p]articularly given the CWA’s express policy to ‘preserve’ the States’ ‘primary’ authority over land and water use.”
- 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.

Sackett reinforces numerous key principles that WAC has long highlighted. For instance, to be durable and defensible, any definition of WOTUS must not significantly impinge of the States’ traditional and primary authority over land and water use. A definition that pushes the outer limits of the Agencies’ CWA authority and fails to give adequate weight to the Section 101(b) policy would be legally vulnerable and would undermine the Agencies’ stated goal of establishing a durable rule. Relatedly, the Agencies must avoid adopting an overly narrow reading of *SWANCC*. That case stands for far more than just a rejection of the “migratory bird

¹⁰ *Id.* at 1337 (quoting *SWANCC*, 531 U.S. 159, 172 (2001)).

¹¹ *Id.* at 1338.

theory.” Indeed, *Sackett* confirms that *SWANCC* stands more broadly for the holding that the Corps lacks jurisdiction over “ponds that are *not* adjacent to open water.”¹² Just as important, the Agencies’ interpretation of WOTUS must give effect to the term “navigable.”¹³ Finally, the need for a clear and easily implementable definition of WOTUS is beyond debate. *Sackett* emphasizes the important due process considerations in play, and it is incumbent on the Agencies to refrain from adopting another “hopelessly indeterminate” interpretation of the phrase WOTUS.¹⁴

II. Specific Recommendations for a Revised Definition of WOTUS.

As noted above, the Agencies appear on the fast track to revising the Biden WOTUS Rule in less than two months. The timing of such an expedited “final” rule suggests that the Agencies may intend to double down on the interpretation of “relatively permanent” set forth in that rule and call it a day. Such revisions would not, however, ensure consistency with *Sackett*. Rather, to faithfully implement *Sackett*, the Agencies must promulgate a revised definition of WOTUS that incorporates the following changes.

A. The Agencies Must Eliminate the Standalone Interstate Waters and Interstate Wetlands Category.

As WAC has previously explained,¹⁵ the definition of WOTUS cannot encompass water features solely by virtue of the fact that they cross State lines. *Sackett* makes it clear that the assertion of jurisdiction over all interstate waters and interstate wetlands, regardless of navigability, impermissibly reads the term “navigable” out of the statute. *Sackett* underscores the importance of navigability to the definition of WOTUS. Congress’s use of the term “navigable” means that WOTUS “principally refers to bodies of navigable water like rivers, lakes, and oceans.”¹⁶ In explaining when wetlands are jurisdictional under the CWA, the Court held that “[w]etlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby.”¹⁷ And if the Agencies want to assert jurisdiction over adjacent wetlands, they must first establish that the wetland is adjacent to a “water of the United States,” which is a “relatively permanent body of water connected to traditional interstate navigable waters.”¹⁸ The Court further explained 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.”¹⁹ The Biden WOTUS Rule, by contrast, designates interstate waters and wetlands as “(a)(1)” waters even if they are non-navigable, not used in commerce. It also improperly deems: (i) relatively permanent waters to be jurisdictional solely by virtue of being

¹² *See id.* at 168 & 166 (quoting from 191 F.3d 845, 850-52 (7th Cir. 1999)).

¹³ *Id.* at 1337.

¹⁴ *Id.* at 1342.

¹⁵ *E.g.*, 2019 WAC Comments at 13-14; 2014 WAC Comments at A-2 to A-3.

¹⁶ 143 S. Ct. at 1337.

¹⁷ *Id.* at 1340.

¹⁸ *Id.* at 1341.

¹⁹ *Id.* at 1330.

connected to a non-navigable interstate water or wetland; and (ii) impoundments of any interstate waters or wetlands to be jurisdictional. None of these categorical assertions of jurisdiction is viable following the *Sackett* decision; thus, the Agencies must remove these categories from the definition.

B. The Agencies Must Adopt an Interpretation of “Relatively Permanent, Standing or Continuously Flowing Bodies of Water” that is Consistent with the *Rapanos* Plurality and *Sackett* Opinions.

The preamble to the Biden WOTUS Rule adopts an overly broad interpretation of “relatively permanent, standing or continuously flowing bodies of water” that is incompatible with *Sackett* and the *Rapanos* plurality opinion it endorses. *Sackett* stated that “the CWA’s use of ‘waters’ encompasses only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’”²⁰ The Biden WOTUS Rule’s interpretation of this language would extend WOTUS far beyond “streams, oceans, rivers, and lakes” to encompass any “other” intrastate water feature in the (a)(5) category. Moreover, it is far too amorphous and thus fails to provide property owners with sufficient notice of their obligations under the CWA.

Under the Biden WOTUS Rule, the Agencies interpreted “relatively permanent, standing or continuously flowing bodies of water” to encompass not only features that may flow seasonally, but also features where flow comes and goes due to “various water management regimes and practices.”²¹ Under the rule, the Agencies may consider information about the regular manipulation schedule and may potentially consider other remote resources of on-site information to assess flow frequency.²² Moreover, the Agencies deliberately declined to include any flow duration benchmarks or minimum flow duration. Instead, they simply included a vague and confusing explanation that “[r]elatively permanent waters do not include surface waters with flowing or standing water for only a short duration in direct response to precipitation.”²³ Accordingly, “tributaries in the arid West” that are “dominated by coarse, alluvial sediments and exhibit high transmission losses, resulting in streams that often dry rapidly following a storm event” are not relatively permanent,²⁴ whereas “relatively permanent flow may occur as a result of multiple back-to-back storm events throughout a watershed” or even single “larger storm events.”²⁵ In addition, the Biden WOTUS Rule’s “relatively permanent” standard does not grapple with the requirement articulated in *Sackett* that jurisdictional waters are “bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes.”

²⁰ 143 S. Ct. at 1336.

²¹ 88 Fed. Reg. at 3085.

²² *Id.*

²³ *Id.* at 3084.

²⁴ *Id.* at 3086.

²⁵ *Id.* at 3086-87.

The Biden WOTUS Rule’s interpretation of “relatively permanent, standing or continuously flowing bodies of water” cannot be squared with *Sackett* or the *Rapanos* plurality. *Sackett* reinforced that Congress’s deliberate use of the plural term “waters” in the phrase “waters of the United States” means that the Act’s reach extends only to bodies of water like streams, oceans, rivers, and lakes.²⁶ *Sackett* also held that Congress’s use of the term “waters” elsewhere in the CWA “confirm[s] the term refers to bodies of *open* water” and that Congress’s “use of ‘waters’ elsewhere in the U.S. Code likewise correlates to rivers, lakes, and oceans.”²⁷ Moreover, in *Rapanos*, the plurality explained that its test may, but does not necessarily, encompass “streams, rivers, or lakes that might dry up *in extraordinary circumstances*, such as drought,” as well as “*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*.”²⁸ Nothing in the aforementioned language from either *Sackett* or *Rapanos* supports the Biden WOTUS Rule’s interpretation that water features that are manipulated to receive only intermittent flow, or that flow only in response to occasional large storm events, or for far less than a “season,” can be WOTUS.

It bears emphasis that the *Rapanos* plurality developed the “relatively permanent” standard in the context of a case in which it criticized the Corps for “stretch[ing] the term ‘waters of the United States’ beyond parody” and in which it repeatedly stated that it did *not* consider *intermittent* flow to meet its standard.²⁹ For instance, the plurality stated:

- Terms included in the dictionary definition of “waters” all “connote continuously present, fixed bodies of water, *as opposed to ordinarily dry channels through which water occasionally or intermittently flows*.”³⁰
- “It suffices for present purposes that channels containing permanent flow are plainly within the definition, and that the dissent’s ‘intermittent’ and ‘ephemeral’ streams...—that is, streams whose flow is ‘[c]oming and going at intervals . . . [b]roken, fitful,’ . . . , or ‘existing only, or no longer than, a day; diurnal . . . shortlived,’ . . .—are not.”³¹
- “The restriction of ‘the waters of the United States’ to exclude channels containing merely intermittent or ephemeral flow also accords with the commonsense understanding of the term.”³²

²⁶ 143 S. Ct. at 1336-37.

²⁷ *Id.* at 1337.

²⁸ *Rapanos*, 547 U.S. at 732 n.5 (emphases added).

²⁹ *Id.* at 734.

³⁰ *Id.* at 732-33 (emphasis added).

³¹ *Id.* at 732 n.5 (citation omitted).

³² *Id.* at 733-34.

- “Most significant of all, the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from ‘navigable waters,’ by including them in the definition of ‘point source’. . . . The separate classification of ‘ditches, channels, and conduits—which are terms ordinarily used to describe the watercourses through which *intermittent* waters typically flow—shows that these are, by and large, *not* ‘waters of the United States.’”³³
- “The phrase [“waters of the United States”] does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.”³⁴

Again, the plurality did acknowledge that unusual conditions, such as a seasonal drought that would interrupt year-round flow, would not necessarily mean that a water is excluded from the meaning of “relatively permanent.” But that limited acknowledgement is a far cry from proclaiming that all streams with intermittent flow—or even all streams with ninety days of continuous flow—meet the relatively permanent test. The plurality only suggested that a river that flowed continuously for 290 days *might* be considered a WOTUS.³⁵ It is unreasonable to interpret that language to mean that anything with more than ephemeral flow is relatively permanent.

Now that *Sackett* has clarified that the *Rapanos* plurality was correct in holding that CWA jurisdiction extends only to relatively permanent rivers, streams, oceans, and lakes, the Agencies must revise the definition of WOTUS accordingly. In so doing, they must provide clear standards for determining how much flow constitutes relatively permanent, rather than force property owners to have to once again feel their way on a case-by-case basis.

C. The Definition of WOTUS Should Exclude Most Ditches.

Defining which ditches are jurisdictional, and which are appropriately excluded from the definition of WOTUS, remains a top priority for WAC members. Ditches are ubiquitous across the country, and WAC members rely on a wide variety of ditches each day as part of the construction, operation, and maintenance of homes, electric transmission and distribution lines, transportation-related infrastructure such as roads and railways, agricultural irrigation infrastructure, flood control infrastructure, rural drains and roads, mines, and other important activities. Ditches play a critical role in all of these activities, ensuring that stormwater is properly channeled away from facilities and land where it would otherwise collect and interfere with the intended use of the land and facilities. Ditches are also critical to ensuring proper drainage and flood prevention on agricultural fields, roads, and urban spaces.

Following *Sackett*, ditches would generally be excluded from jurisdiction because they are not bodies of water described in ordinary parlance as streams, oceans, rivers, and lakes. And because a water feature can only be jurisdictional if they are WOTUS in their own right (*i.e.*,

³³ *Id.* at 735-36 (emphasis in original; cleaned up).

³⁴ *Id.* at 739.

³⁵ *Id.* at 732 n.5.

they are indistinguishably part of a body of water that is itself WOTUS), ditches that do not satisfy these requirements should be excluded from the definition of WOTUS. 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.”³⁶

Regulation of ditches as WOTUS would not only read the term “navigable” out of the statute, it would impermissibly intrude upon state and tribal authority.³⁷ Equally important, 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.³⁸

D. The Agencies Must Revise the Definition of “Adjacent” to Clarify That Wetlands are Jurisdictional Only When They Are Indistinguishably Part of Another WOTUS.

The term “adjacent” in the definition of WOTUS has caused problems for decades.³⁹ Among other things, prior interpretations of “adjacent” failed to heed the holding in *SWANCC* that “the text of the statute will not allow” the Agencies’ jurisdiction to “extend[] to ponds that are *not* adjacent to open water.”⁴⁰ *Sackett*, however, clarifies that the adjacency concept cannot extend to wetlands unless a wetland directly abuts a WOTUS in such a way that the WOTUS and the wetland are indistinguishable from one another. Following *Sackett*, neighboring wetlands cannot be jurisdictional, nor can wetlands that are separated by man-made dikes or barriers, natural river berms, beach dunes and the like, unless such barriers were unlawfully constructed specifically to remove CWA jurisdiction.⁴¹ *Sackett* makes it clear that wetlands that are separated by such barriers do not satisfy the continuous surface connection requirement. Similarly, although *Sackett* stated that a wetland can still satisfy the continuous surface connection even if there are “temporary interruptions” in the connection such as “low tides or dry spells,”⁴² that language makes it clear that there must ordinarily be a continuous surface *hydrologic* connection between a wetland and the abutting WOTUS, and not merely some physical connection. Finally, *Sackett* makes it clear that features such as pipes and ditches cannot satisfy the continuous surface connection requirement, as such features, just like man-made dikes or barriers and natural barriers, make it easy to determine where the WOTUS ends and the wetland begins. In all events, such barriers and features constitute “clear demarcation[s] between ‘waters’ and wetlands” such that the wetland is no longer indistinguishably part of another WOTUS (and hence, is not a WOTUS in its own right). The Agencies must revise the definition of “adjacent”

³⁶ *Rapanos*, 547 U.S. at 736 n.7.

³⁷ *See id.* at 46-47.

³⁸ *See id.* at 47-48.

³⁹ *E.g.*, 2011 WAC Comments at 84; 2003 FEPP Comments at 39.

⁴⁰ *SWANCC*, 531 U.S. at 167-68.

⁴¹ *See* 143 S. Ct. at 1340-41 & n.16.

⁴² *Id.* at 1340-41.

and their interpretation of the continuous surface connection requirement to conform to these holdings in *Sackett*.

E. The Agencies Should Retain Other Codified Exclusions.

The Agencies previously explained that the exclusions in the Biden WOTUS Rule “provide important clarity on which features are and are not jurisdictional” and that the codified exclusions “reflect the agencies’ longstanding practice and technical judgment that certain waters and features are not subject to the Clean Water Act.”⁴³ WAC appreciates the Agencies’ attempts, both in the Biden WOTUS Rule and in prior rules, to codify in the regulatory text a list of waters that are categorically *not* jurisdictional. WAC continues to support the codification of exclusions, so long as they provide clarity, are not overly restrictive in their applicability, and do not serve as the basis for establishing jurisdiction. As the Agencies revise the recently codified definition of WOTUS to conform to *Sackett*, they should retain the current exclusions, with the caveat that the Agencies should revise the ditch exclusion in accordance with WAC’s recommendations above (*see supra* at Part II.C).

III. The Agencies Should Clarify that NWPR AJDs Are Valid for All Purposes.

Up until promulgation of the Biden WOTUS Rule, the Agencies consistently maintained that changes to the WOTUS definition do *not* apply retroactively and that AJDs and permits issued under a prior rule will *not* be reopened following changes to the definition.⁴⁴ Yet in the Biden WOTUS Rule, the Agencies took the position that because two district courts vacated the 2020 NWPR, NWPR AJDs “may not reliably state the presence, absence, or limits of ‘waters of the United States’ on a parcel and will not be relied upon by the Corps in making new permit decisions following the Arizona district court’s August 30, 2021 order vacating the 2020 NWPR.”⁴⁵ Although the Agencies further stated that “stand-alone” NWPR AJDs generally will remain valid until their expiration date, they nevertheless cast doubt on the validity of those AJDs by warning recipients of such AJDs about “the unreliability of those jurisdictional findings” and cautioning those property owners to discuss their options with the Corps prior to any discharges into waters identified in the AJDs as non-jurisdictional.⁴⁶

The Agencies should retract these statements in the Biden WOTUS Rule; affirm unconditionally that NWPR AJDs remain valid for their full five-year terms; and rely on NWPR AJDs to make new permit decisions if that is how the applicant wishes to proceed. First, since the District of Arizona vacated the NWPR in 2021 without first holding it unlawful on the merits, the Ninth Circuit has made it clear that courts “granting a voluntary remand” “lack the authority” to also vacate the regulation without first holding it unlawful on the merits.⁴⁷ The

⁴³ 88 Fed. Reg. at 3,103-04.

⁴⁴ *See, e.g.*, 80 Fed. Reg. at 37,073-74 (2015 WOTUS Rule); 84 Fed. Reg. 56,626, 56,664 (Oct. 22, 2019) (2019 Repeal Rule); 85 Fed. Reg. at 22,331-32 (NWPR).

⁴⁵ 88 Fed. Reg. at 3,136.

⁴⁶ *See id.*

⁴⁷ *In re Clean Water Act Rulemaking*, 60 4th 583, 588 (9th Cir. 2023)

judicial vacatur no longer provides a basis for the Agencies to continue to cast doubt on AJDs that were properly issued during the time when the duly promulgated NWPR was in effect.

Second, a unanimous Supreme Court in *Sackett* made it clear that the Agencies erred in trying to reinstate the significant nexus test by repealing the NWPR. The NWPR wisely abandoned the significant nexus test in favor of a definition of WOTUS that was more in line with the *Rapanos* plurality's relatively permanent test, and the decision in *Sackett* underscores the wisdom of that decision. In light of *Sackett*, the Agencies should make it clear that all AJDs—both stand-alone AJDs and AJDs associated with pending permit requests—that were issued when the NWPR was in effect are valid for the AJDs' full five-year terms *and* that the Corps can appropriately rely on such AJDs when making permit decisions.

IV. Conclusion

WAC agrees that the Agencies must revise the definition of WOTUS to conform to *Sackett* and that they must do so expeditiously. For the reasons set forth above, the Agencies cannot simply stand by their prior interpretations of the relatively permanent and continuous surface connection standards. To ensure that the definition of WOTUS is durable and defensible, the Agencies must ensure consistency with the *Rapanos* plurality and *Sackett* opinions, rather than adopt unduly narrow interpretations of those opinions.

Sincerely,

Courtney Briggs, WAC Chair (CourtneyB@fb.org)

David Chung, Counsel for WAC (DChung@crowell.com)



APPENDIX A

American Exploration & Mining Association	ICSC
American Exploration & Production Council	Leading Builders of America
American Farm Bureau Federation	Liquid Energy Pipeline Association
American Forest & Paper Association	National Association of Home Builders
American Fuel & Petrochemical Manufacturers	National Association of Manufacturers
American Gas Association	National Association of Realtors
American Iron & Steel Institute	National Association of State Departments of Agriculture
American Petroleum Institute	National Club Association
American Public Power Association	National Corn Growers Association
American Road & Transportation Builders Association	National Cotton Council of America
American Society of Golf Course Architects	National Council of Farmer Cooperatives
American Soybean Association	National Mining Association
Associated Builders and Contractors	National Multifamily Housing Council
Associated General Contractors of America	National Pork Producers Council
Association of American Railroads	National Rural Electric Cooperative Association
Club Management Association of America	National Stone Sand & Gravel Association
Essential Minerals Association	Responsible Industry for Sound Environment
Florida and Texas Sugar Cane Growers	Southeastern Lumber Manufacturers Association
Golf Course Builders Association of America	Texas Wildlife Association
Golf Course Superintendents Association of America	The Fertilizer Institute
Independent Petroleum Association of America	Treated Wood Council
	United Egg Producers
	USA Rice Federation
	US Chamber of Commerce