Filed electronically at www.regulations.gov

April 23, 2025

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

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

We, the Associated General Contractors of America (AGC), appreciate the opportunity to provide feedback on the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers' (Corps) (jointly, the agencies) request for recommendations on aligning the definition of "Waters of the United States" (WOTUS) with recent U.S. Supreme Court decisions. The definition of WOTUS directly affects permitting programs that cover activities that AGC members perform while constructing projects of all types. AGC supports the agencies' initiative to review and address some of the shortcomings within the current definition.

AGC is the nation's leading construction trade association. It dates to 1918, and it today represents more than 28,000 member firms representing construction contractor firms, suppliers and service providers across the nation, and has members involved in all aspects of nonresidential construction. Through a nationwide network of chapters in all 50 states, D.C., and Puerto Rico, AGC contractors are engaged in the construction of the nation's public and private buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities and multi-family housing units, and they prepare sites and install the utilities necessary for housing developments.

The industry makes a large contribution to the nation's economy and mainly comprises small businesses. In the fourth quarter of 2024, construction gross output totaled $2.55 trillion at a seasonally adjusted annual rate. In March 2025, the industry employed 8.3 million employees. Construction jobs pay well: hourly earnings for production and nonsupervisory employees in construction, mainly hourly craft workers, averaged $36.79, which was nearly 19% more than the average for the overall private sector. Construction is a major buyer of U.S.-made materials and machinery. In 2021, U.S. manufacturers' shipments of construction materials and supplies totaled $679 billion, or 11% of total U.S. manufacturing shipments. Shipments of construction machinery, mostly to the domestic construction industry, totaled $51 billion, or 11% of total U.S. machinery shipments. Construction firms are overwhelmingly small businesses. In 2022, the latest year available, there were 760,000 construction firms with employees, of which 607,000 or 80% had fewer than 20 employees. More than 99.8% of construction firms had fewer than 500 employees.

I. INTRODUCTION

The Clean Water Act (CWA) grants EPA and the Corps jurisdiction over "navigable waters," defined as "Waters of the United States" (WOTUS) without further clarification. Both federal agencies and courts have long struggled to define WOTUS, resulting in confusion over which waters are regulated by the federal government and leaving other waters to the purview of state and local governments for protection. The CWA, as amended in 1972, focuses on eliminating discharges of pollution to navigable waters and recognizes the importance of protecting the primary responsibilities and rights of the states in pollution prevention and in the use of land and water resources.[1] Subsequently, the agencies have expanded that jurisdiction, and case law has at times either supported or halted that expansion—sometimes with conflicting opinions. For example, in *Riverside Bayview*[2] the U.S. Supreme Court affirmed that adjacent wetlands are included in the definition of jurisdictional water; however, in *SWANCC,*[3] the Court cautioned that the term "navigable" cannot be read out of the [CWA]; and in *Rapanos,*[4] that water must be "relatively permanent surface water" or there must be a "significant nexus" for a non-navigable water to be regulated—not a mere hydrologic connection.

Most recently, in *Sackett*,[5] the Court narrowed the scope of federal waters and struck down the "significant nexus" test, but did not define "relatively permanent." The Justices clarified that isolated water features, non-adjoining wetlands, and ordinarily dry features are not WOTUS. A few months later, in September 2023, the agencies published a "conforming" version of the rule (hereinafter conforming rule).[6] The conforming rule failed to fully implement *Sackett* and did not address the broader legal flaws of the Biden administration's original rule finalized earlier that year. The agencies also did not solicit public feedback on their revisions. As a result, the conforming rule continues to impose an overly broad interpretation of federally regulated waters under the CWA and, in its implementation, relies heavily on case-by-case determinations, creating widespread confusion. As a result of litigation from AGC and others, the conforming rule is currently on hold in 27 states.

Why It Is Important for the Construction Industry

The precise definition of WOTUS—which dictates the scope of the federal control and CWA permitting responsibility as well as enforcement jurisdiction—is of fundamental importance to the construction industry. AGC members perform many construction activities on land and water that often require a jurisdictional determination from the Corps before proceeding. Construction work that involves the discharge of dredged material or the placement of fill material in a WOTUS cannot legally commence without authorization from the federal government, which takes the form of a CWA Section 404 permit (and may require additional permissions and reporting duties under other CWA programs). Therefore, changes to CWA regulations, case law, and resultant guidance

[1] CWA, Oct 18, 1972, Title 1, Section 101(b).
[2] 474 U.S. 121 (1985).
[3] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001).
[4] *Rapanos v. United States*, 547 U.S. 715 (2006).
[5] *Sackett v. EPA (2023)*. Available online at: https://www.supremecourt.gov/opinions/22pdf/21-454_4g15.pdf.
[6] *Revised Definition of "Waters of the United States,"* 88 Fed. Reg. 3004 (Jan. 18, 2023); *Revised Definition of "Waters of the United States; Conforming*, 88 Fed. Reg. 61964 (Sept. 8, 2023).

throughout the years have invariably affected our members' ability to secure financing and approval to construct new projects or maintain existing infrastructure and facilities across the nation.

AGC's General Recommendations about WOTUS Moving Forward

Contractors need a simple definition for WOTUS that allows for rapid jurisdictional determinations. So far, the agencies have issued confusing definitions that require project teams to wait for an extended period of time while regulators, consultants, and lawyers make their best guesses. AGC encourages the agencies to take advantage of this opportunity to finalize a rule that is workable, durable, and legally sufficient.

First off, the agencies can make simple, yet necessary edits to the 2023 rule's regulatory text to more fully follow *Sackett*. AGC summarizes key legal shortcomings of the 2023 rule in Section III.A. Addressing these shortcomings will allow contractors to proceed with a reasonable degree of certainty regarding the jurisdictional status of the water bodies on their job sites.

The preamble to the rule, on the other hand, requires a complete rewrite to ensure that any resultant rule is applied with consistency and in a manner that aligns with a clear reading of the statute and relevant Supreme Court rulings. As the Justices in *Sackett* affirm, the regulated community has a right to know how to comply with the law. Instead, the conforming rule overly relies on case-by-case analysis. The conforming rule does not work in the real world for practical purposes and does not provide sufficient clear direction on how to comply. This is particularly problematic given that CWA violations may result in not only civil penalties, but also criminal liability—placing small businesses and individual site operators at significant legal and financial risk for unknowingly violating vague or inconsistently applied standards.

The agencies should also strengthen longstanding exclusions on which the regulated community depends to rein in federal overreach on all wet areas.

Finally, the agencies should take steps to simplify and streamline the permitting process.

II. AGC'S ENGAGEMENT ON THE DEFINITION OF WOTUS

AGC has long been engaged in the agencies' efforts to define what WOTUS means under the CWA, including submitting written comments on EPA's and the Corps' proposals and related efforts to redefine federal jurisdiction over construction work in waters and wet areas, including letters in response to:

- An advanced notice of proposed rulemaking in 2003;
- Draft agency guidance following a series of court cases in the early 2000s;
- Draft guidance in 2011;[7]

[7] Waters Advocacy Coalition, Comments on the Draft Guidance on Identifying Waters Protected by the Clean Water Act, (July 29, 2011), Docket ID No. EPA-HQ-OW-2011-0409 online at: https://www.rezulations.gov/comment/EPA-HQ-OW-2011-0409-3514.

- Proposed rule in 2014;[8]
- Proposed recodification of pre-existing rules in 2017;[9]
- Request for preliminary feedback in 2017;[10]
- Proposed rule in 2019;[11]
- Request for preliminary feedback in 2021;[12]
- Proposed rule in 2021.[13]
- Response to the decision in *Sackett v. EPA* in 2023.[14]

The conforming rule[15] is at least the fifth major change in federal policy in less than a decade to redefine the scope of WOTUS, creating ongoing regulatory instability for the construction industry and others. The Biden administration's conforming rule fails to provide sufficient guidance to the regulated community, including AGC's members, as to the scope of federal jurisdiction over WOTUS. For example, the agencies fail in the conforming rule to define the meaning of "relatively permanent, standing or continuously flowing" waters, which creates uncertainty for AGC's members over the jurisdictional status of any feature with less than a permanent flow of water, including intermittent and ephemeral waters and features that flow only in response to precipitation. The use of "relatively permanent," along with other vague and broad terms such as

[8] Waters Advocacy Coalition, Comments on the Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, (November 13, 2014, corrected November 14, 2014), Docket ID No. EPA-HQ-OW-2011-0880 online at: https://www.regulations.govicomment/EPA-HQ-OW-2011-0880-17921; Federal Stormwater Association, Comments on the Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, (November 14, 2014), Docket ID No. EPA-HQ-OW-2011-0880 online at: https://www.regulations.govicomment/EPA-HQ-OW-2011-0880-15161; and the Coalition of Real Estate Associations, Comments on the Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, (August 8, 2014), Docket ID No. EPA-HQ-OW-2011-0880 online at: https://www.regulations.govicomment/EPA-HQ-OW-2011-0880-5175. And construction-specific comments: AGC of America, Comments on the Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, (November 13, 2014), Docket ID No. EPA-HQ-OW-2011-0880 online at: https://www.regulations.gov/comment/EPA-HO-OW-2011-0880-14602.

[9] AGC of America, Comments on the Proposed Definition of "Waters of the United States" — Recodification of Pre-existing Rules, (September 27, 2017), Docket ID No. EPA-HQ-OW-2017-0203 online at: https://www.regulations.govicomment/EPA-HQ-OW-2017-0203-10460; and Waters Advocacy Coalition comments (September 27, 2017) on the same online at: https://www.regulations.govicomment/EPA-HQ-OW-2017-0203-11027.

[10] AGC of America, Response to request for recommendations to revise the definition of "Waters of the United States" under the Clean Water Act, (Nov. 28, 2017) Docket ID No. EPA—HQ—OW-2017-0480 online at: https://www.regulations.govicomment/EPA-HQ-0W-2017-0480-0632.

[11] AGC of America, Response to Proposed Revisions to the Definition of Waters of the United States. (April 15, 2019); Docket ID No. EPA-HQ-OW-2018-0149 online at: https://www.regulations.govicomment/EPA-HQ-OW-2018-0149-6859; the Waters Advocacy Coalition comments (April 15, 2019) on the same online at: https://www.regulations.govicomment/EPA-H0-0W-2018-0149-6849; and Federal StormWater Association comments (April 15, 2019) online at: https://www.regulations.govicomment/EPA-HQ-OW-2018-0149-6877.

[12] AGC of America provided verbal remarks at the public hearing (August 31, 2021) on Pre-Proposal Recommendations on the Definition of "Waters of the United States," Docket ID No. EPA-HQ-OW-2021-0328; and Waters Advocacy Coalition comments (September 3, 2021) on the same online at: https://www.regulations.govicomment/EPA-HQ-OW-2021-0328-0316.

[13] AGC of America, Response to Proposed Revisions to the Definition of Waters of the United States, 86 Federal Register, 69,372 (Dec. 7, 2021); Docket ID No. EPA-HQ-OW-2021-0602 online at: https://www.regulations.gov.

[14] Letter of the Waters Advocacy Coalition to Michael Regan and Michael Connor (July 24, 2023).

[15] *See supra* footnote 6.

"tributary," "adjacent," and what it means for a wetland to have a "continuous surface connection"—and overly expansive definitions of "impoundments" and "interstate waters"—has allowed the agencies to regulate features that are usually dry or that are remote from any navigable water, and wetlands that are readily distinguished from waters to which they may have some physical connection.

Furthermore, the agencies established a new joint agency review process for some jurisdictional determinations.[16] The agencies then released field memos that provided case-by-case analysis of their decision-making. These documents demonstrate improper regulatory overreach in the agencies' post-*Sackett* approach to finding jurisdiction over wetlands and other non-navigable waters. The Trump administration rightly rescinded several of the memos that conflicted with *Sackett*. AGC urges the agencies to rescind all remaining field memos. Any necessary clarifications should be included directly in the **regulatory text itself**, not deferred to the preamble or informal guidance documents. While preambles can offer useful context, they do not provide the legal certainty that regulated entities require to ensure compliance and avoid enforcement risk.

Because of these deficiencies, the rule has faced AGC-supported challenges in the courts.[17] When considering next steps, the agencies should address the main criticisms levied against the 2023 Rule within the litigation, which we summarize in the following section on our top recommendations.

1. The Rule's categorical inclusion of all interstate waters regardless of navigability violates the CWA.
2. The Rule's relatively permanent test cannot be squared with *Sackett*.
3. The Rule's definition of jurisdictional wetlands contradicts *Sackett*.
4. The Rule's coverage of impoundments is impermissibly broad.
5. The tributary rule is vague and ignores *Sackett*'s requirements.
6. The exclusion for ditches provides inadequate guidance.
7. The Rule is rooted in a misunderstanding of the CWA's protection of traditional state authority over land and water use

Finally, AGC is a member of the Waters Advocacy Coalition (WAC or Coalition) and incorporates by reference the comments submitted on behalf of WAC members to this docket. Although we may touch on similar issues here, please refer to the Coalition comments for a thorough analysis and discussion on these recommendations—

- Adhere to the Supreme Court's authoritative interpretations of the CWA.
- Ensure faithful implementation of *Sackett* through a targeted rulemaking effort, not merely guidance.

[16] Joint Coordination Memorandum to the Field Between the U.S. Department of the Army, U.S Army Corps of Engineers, and the U.S. Environmental Protection Agency ("2022 Coordination Memo") online at https://www.epa.gov/system/files/documents/2022-12/Waters%20of%20the%20United%20StatesCoordination%20Memorandum.pdf.

[17] *Texas v. EPA*, No. 3:23-cv-00017; *West Virginia, et al. v. EPA*, No. 3:23-cv-32. (These cases are currently on hold while the agencies solicit input on further clarifying the definition of WOTUS).

- Adopt an interpretation of "relatively permanent, standing or continuously flowing bodies of water" that is consistent with the *Rapanos* plurality and *Sackett* opinions.
- Revise the definition of "adjacent" to clarify that wetlands are jurisdictional only when they are indistinguishably part of another WOTUS.
- The definition of WOTUS should exclude most ditches.
- Eliminate the standalone interstate waters category.
- Eliminate the standalone impoundments category.
- Eliminate the standalone intrastate lakes and ponds category.
- Retain and revise the codified exclusions.
- Grandfathering of approved jurisdictional determinations (AJDs).

III. KEY AGC RECOMMENDATIONS

A. Address Deficiencies Raised in Litigation Over the Conforming Rule

The conforming rule is currently on hold in 27 states due to ongoing AGC-supported litigation. The conforming rule violates the Administrative Procedure Act, the plain text of the CWA and Supreme Court precedent, and the Constitution, provides little certainty to the regulated community, and raises concerns under the major questions doctrine. We summarize below the main arguments in the cases relevant to jurisdictional features for consideration and to move the agencies towards a more legally defensible rule in the future.

1. The conforming rule's categorical inclusion of all interstate waters regardless of navigability violates the CWA.

The conforming rule assumes Congressional intent to include interstate waters under federal jurisdiction that were not asserted in the statute, even if the water is not navigable and is isolated from traditional navigable waters (TNW). Doing so reads the term "navigable" out of the CWA and ignores the U.S. Supreme Court's affirmation that WOTUS are navigable and used/could be used in commerce or a relatively permanent body of water connected to TNWs.

2. The conforming rule's relatively permanent test cannot be squared with Sackett.

In *Sackett*, the Justices confirm that the relatively permanent test (i.e., relatively permanent, standing or continuously flowing streams, oceans, rivers, and lakes) is the correct route for determining federal waters. However, the conforming rule includes tributaries and wetlands (and their impoundments) as well as intrastate waters---in conflict with *Sackett*. Furthermore, the agencies fail to define "relatively permanent" and describe it in such a way that could include nearly any feature excluding those that flow for a short duration due to precipitation. Again, the agencies fail to define what would constitute a short duration, even the number of precipitation events is left up to chance. The relatively permanent test within the conforming rule fails to provide regulatory certainty, leaving stakeholders to guess about compliance on a case-by-case basis.

3. The conforming rule's definition of jurisdictional wetlands contradicts Sackett.

The conforming rule ignores the reasoning in *Rapanos*, which *Sackett* affirms, that only wetlands that are indistinguishable from WOTUS are covered by the CWA: in that it should be hard to distinguish between the wetland and the WOTUS. The conforming rule relies on identifying a continual surface connection but fails to offer clear guidance on what constitutes that connection, possibly bringing in a chain of connections through non-jurisdictional features. The agencies' interpretation is overly broad and again leaves project proponents or landowner/operator guessing about how to comply with the rule.

4. The conforming rule's coverage of impoundments is impermissibly broad.

The conforming rule falsely considers impoundments of interstate waters, covered tributaries and wetlands to be covered under the CWA in addition to impoundments of TNWs. However, an impounded water feature must, in its own right, be considered a WOTUS for its impoundment to likewise fall under jurisdiction. Furthermore, the agencies consider these impoundments jurisdictional based on the waterbody's status at the time it was impounded, not its current hydrology. This reasoning can lead to isolated, unconnected features being considered WOTUS. Again, the project proponents or landowner/operator is left guessing whether isolated ponds on the property are federal waters.

5. The tributary rule is vague and ignores Sackett's requirements.

The conforming rule's jurisdictional claim over tributaries linked to non-navigable interstate waters or impoundments is faulty. It further ignores the requirement in *Sackett* that a WOTUS be a relatively permanent body of water that is commonly understood as a waterbody, such as a river or stream—not a manmade ditch. Furthermore, the conforming rule requires additional case-by-case analysis to determine whether a feature is a jurisdictional tributary.

6. The exclusion for ditches provides inadequate guidance.

The conforming rule exclusion for ditches applies a vague standard that requires project proponents or landowners/operators to know whether the ditch was excavated in dry land. (This letter goes into more detail on ditches in section IV.)

7. The conforming rule is rooted in a misunderstanding of the CWA's protection of traditional state authority over land and water use.

Sackett confirms there are limits to federal control over waters and that States play the primary role in land and water use within their boundaries.

A regulation is only valid if it falls within the authority granted by Congress through statute. Recent Supreme Court decisions—like *Loper Bright Enterprises v. Raimondo*,[18] *West Virginia v. EPA*,[19] and

[18] Congress in 1946 enacted the APA "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *Morton Salt*, 338 U.S. at 644, 70 S.Ct. 357. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 391, 144 S. Ct. 2244, 2261, 219 L. Ed. 2d 832 (2024).

[19] "A clear statement [in the statute] is necessary to conclude that Congress intended to delegate authority 'of this breadth to regulate a fundamental sector of the economy.'" *W. Virginia v. Env't Prot. Agency*, 597 U.S. 697, 716, 142 S. Ct. 2587, 2605, 213 L. Ed. 2d 896 (2022) (cleaned up).

Sackett v. EPA[20]—underscore that agencies must remain within the bounds of congressional intent, reinforcing that the WOTUS rule may not exceed the limits set by Congress.

IV. SAFEGUARD EXCLUSIONS

In general, AGC supports the codification of common exclusions, with the nuance presented here and included in the WAC comments in this docket. Without clear limitations on federal jurisdiction, there will continue to be many opportunities for Corps field staff and EPA inspectors to assert federal control over ponds and basins built to serve as stormwater control devices, water-filled depressions, and ditches and other wet features that dot the landscape. In the 2020 Navigable Waters Protection Rule (NWPR), the first Trump administration recognized the importance of these exclusions.

AGC also acknowledges that some key terms (e.g., relatively permanent) may be hard to define; in these instances, it may be more effective for the agencies to **expressly exclude** certain water features to provide needed clarity. Furthermore, AGC supports the exclusion of ephemeral waters and of groundwater, consistent with U.S. Supreme Court rulings.

AGC urges the agencies to decouple their discussion of exclusions from the concepts of a feature being constructed in "dry land" or "upland." The distinction is unnecessary, as *Sackett* definitively ended the "significant nexus" test through which non-jurisdictional features could be brought under the CWA at a landscape scale or via tenuous connections to downstream jurisdictional waters. If the feature was/is not constructed or excavated within jurisdictional waters, then it should be excluded.

1. Stormwater Controls

The conforming rule imposed considerable uncertainty over stormwater control basins and ponds of various sizes and functions that ultimately drain to an otherwise regulated WOTUS. The agencies should consider that the 2015 and 2020 rules both provided exclusions for stormwater controls and once again **expressly exclude** these features from the WOTUS definition.

As AGC has previously shared with the agencies,[21] EPA's CWA Section 402 permit for active construction sites (which serves as a model for the nation) requires contractors to "design, install, and maintain erosion and sediment controls that minimize the discharge of pollutants from earth-disturbing activities." Contractors also are required to "control stormwater volume and velocity" to minimize pollutant runoff and streambank/channel erosion. On a large majority of regulated construction sites, these requirements have led contractors to build temporary basins to hold rainwater that has "run off" the surrounding jobsite and slowly release it to receiving waters via an outlet control structure and/or under-drainage systems. At present time, ponds and basins are the most reliable and proven way of containing sediment-laden water on a construction site. They are

[20] 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. Sackett v. Env't Prot. Agency, 598 U.S. 651, 680, 143 S. Ct. 1322, 1342, 215 L. Ed. 2d 579 (2023).
[21] AGC of America, Response to Proposed Revisions to the Definition of Waters of the United States, 86 Federal Register, 69,372 (Dec. 7, 2021); Docket ID No. EPA-HQ-OW-2021-0602 online at: https://www.regulations.gov.

recognized as a "best management practice" (BMP) to protect surface water. (Prior to 2012, the federal Construction General Permit mandated sediment basins on all construction sites where the total disturbed drainage area at any given time was 10 acres or more.)

After the soil disturbance (earth-moving) phase of the project, it is quite common for the property owner or contractor to clean out and modify the basin to function as a permanent stormwater management pond for the completed site, either as a detention pond or a retention pond. Additionally, the permanent pond must be maintained on a life-cycle basis to ensure that it is functioning properly.

2. Water-Filled Depressions

The agencies should **maintain an exclusion** for water-filled depressions. These depressions include, for example, utility corridors where compaction from construction equipment creates a localized hardpan that holds water and aquatic vegetation. In some parts of the country, these are called right-of-way (ROW) wetlands, and they are prevalent along utility corridors. Over the years, AGC has urged the agencies to clarify that these depressions are not jurisdictional through this exclusion.

Additionally, excavation for aggregates and other resources results in open depressions or pits that can collect runoff. Operations at these pits can fluctuate. A period of inactivity does not necessarily mean that the pit is "abandoned." **This exclusion should not be time-bound.**

3. Ditches

The *Sackett* ruling has changed the ditch conversation moving forward. Not only are ephemeral features not jurisdictional, but ditches themselves are not considered bodies of water "described in ordinary parlance as streams, oceans, rivers, and lakes." Meaning that **most ditches, including roadway ditches, should be excluded from the WOTUS definition—except when they (1) convey perennial flow to downstream traditional interstate navigable waters and (2) were constructed in a WOTUS or relocate or alter a WOTUS.** AGC also urges the agencies to put the burden of proof (historical assessment) on the agencies, as this information may not be readily available to project proponents or landowners/operators.

Why the Ditch Exclusion Is Important

Section 404 permitting requirements can be a significant burden on transportation project development, especially for minor maintenance and construction activities that only impact man-made wetlands or ditches located adjacent to roads. AGC has repeatedly expressed concern over ditches being treated as WOTUS when, in fact, they are often point sources built and maintained as part of a roadway drainage system or municipal separate storm sewer systems (MS4).

The issue of ditches is critically important because they are pervasive and endemic to every type of landscape and human activity across the nation. Like other stormwater features, ditches are often constructed to comply with regulations and other legal requirements. AGC has warned treating ditches as jurisdictional could hinder the construction industry's ability to maintain safe operations,

by restricting or delaying efforts to prevent flooding and damage to roadways. Furthermore, insofar as roadside ditches are a component of a MS4, the MS4 itself is regulated under the CWA's National Pollutant Discharge Elimination System (NPDES) program. According to EPA guidance, "MS4 systems often include ditches and other manmade structures …. designed to convey and treat stormwater, MS4s will contribute flow (directly or indirectly) to traditionally jurisdictional waters."[22] AGC continues to maintain that "to the extent that ditches (and other system components) are mapped and identified as part of an MS4, and subject to an NPDES permit governing the MS4 of which they are a part, then such ditches (and components) should not be WOTUS under the exclusion for waste treatment systems."[23]

Prior AGC comments[24] have discussed the illogical results that ensue when ditches and MS4s are considered WOTUS. One of the best illustrations of this is related to water quality standards. If roadside ditches are WOTUS, then CWA Section 303 would require states to establish water quality standards and "designate uses" for them. Yet the main purpose of an MS4 is to transport stormwater—and activity that would plainly violate EPA's regulations, which state that "in no case shall a State adopt waste transport … as a designated use for any water of the United States."[25] Likewise, if an MS4 were WOTUS, then states would need to develop EPA-approved WQSs and "designate uses" for storm sewer systems, as well as water quality criteria (WQC) that protect the designated use.[26] If a waterbody is not meeting its WQC then the state must develop a pollutant-specific total maximum daily load (TMDL) for the waterbody.[27] Interpreting the CWA in a manner that construes MS4s to be WOTUS would force states to develop WQC and TMDLs for storm systems designed to transport stormwater. Moreover, if an MS4 were somehow deemed a WOTUS, then the MS4's NPDES permit becomes an approval to discharge pollutants from one jurisdictional water into another jurisdictional water.

States, state departments of transportation, road commissions, and MS4s would all struggle under the administrative strain of setting water quality standards alone—not to mention the need for Section 404 permitting and mitigation, spill plans, or other requirements that would apply.

Clarify Exemption for Work in Roadside Ditches

The agencies must take care not to impose any obstacles (or delays) to the critically important and routine maintenance activities in jurisdictional ditches, which would not only affect flood control and public safety but would also impact the ability of an MS4 to meet its CWA NPDES permit requirements. Currently, the agencies are using the Trump administration's July 2020 Ditch

[22] Federal Stormwater Association, Comments on the Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, November 14, 2014), Docket ID No. EPA-HQ-OW-2011-0880.
[23] Coalition of Real Estate Associations, Comments on the Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, (August 8, 2014), Docket ID No. EPA-HQ-OW-2011-0880.
[24] AGC of America, Comments on the Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, (November 13, 2014), Docket ID No. EPA-HQ-OW-2011-0880 online at: https://www.regulations.gov/comment/EPA-HQ-OW-2011-0880-14602.
[25] 40 C.F.R. Part 131.10(1).
[26] 40 C.F.R. § 131.11(a).
[27] 33 U.S.C. § 1313(d).

Exemption Memo.[28] AGC requests the agencies review this memo for conformity with *Sackett*. For example, the memo references ditches draining wetlands.

V. OTHER CONSIDERATIONS

A. Embrace Streamlining Opportunities

This administration has repeatedly recognized the importance of permitting reform. Executive Orders 14154 (Unleashing American Energy) and 14156 (Declaring a National Energy Emergency), as well as President Trump's April 15, 2025, memo on permitting technology, emphasize the need for action on this front. We wholeheartedly agree that the permitting process should be easier and faster than it is. AGC has fought for years to make this a reality, and we are heartened by this administration's efforts. In recent testimony to the U.S. Senate Environment and Public Works Committee,[29] as well as our 2017 white paper, AGC explains our recommendations on streamlining all environmental review and approvals. We include recommendations specific to CWA section 404 below.

B. Provide a Clear, Predictable and Enduring Definition of WOTUS

In that testimony, AGC highlighted the need for a CWA section 404 process that enhances project certainty, minimizes litigation risks, and prevents unnecessary delays. The agencies can effectuate these goals by fully implementing Sackett and by:

- **Addressing vagueness concerns in the definition.** Agencies should recognize the importance of issuing a rule that provides the requisite certainty for compliance with the law without fear of shifting agency interpretations. In addition to significant project delays and costs, contractors could face fines and jail time if they "guess wrong" about the need for a federal permit to cover a ditch or even an unassuming, dry patch of land on their project. The Justices recognized the imperative for regulatory certainty in the *Sackett* case and raised "serious vagueness concerns" that implicate due process requirements for penal statutes like the CWA.[30]
- **Limiting the case-by-case analysis and guesswork that exposes contractors to regulatory ambiguity.** The Biden administration regulated WOTUS through guidance by elevating some project permits for extensive review and releasing field memos describing their reasoning. However, the applicability of those memos to other projects was unclear,

[28] Available online at: https://www.epa.gov/sites/default/files/2020-07/documents/final_ditch_exemption_memo_july_2020_with_epa.pdf.
[29] Available online at: https://www.epw.senate.gov/public/_cache/files/8/b/8bc73a96-74a9-4bf1-b7cf-c7e72ced67d7/26C31358154CFAEF82328B6C757490B951DDE413FE9A7503F5DA17D5465B9834.02-19-2025-pilconis-testimony.pdf.
[30] See *U.S. Supreme Court, Sackett v. EPA (2023)*. "[T]he EPA's interpretation gives rise to serious vagueness concerns in light of the CWA's criminal penalties, thus implicating the due process requirement that penal statutes be defined 'with sufficient definiteness that ordinary people can understand what conduct is prohibited.'" Available online at: https://www.supremecourt.gov/opinions/22pdf/21-454_4g15.pdf.

because all the rationale was case-specific. Under the Biden administration, stakeholders had to wade through unclear regulations and then analyze scenario-based memos for clues on whether their project can move forward. AGC encourages the Trump administration to withdraw these field memos. Federal agencies should avoid regulating through guidance.

C. Facilitate the Issuance of Approved Jurisdictional Determinations (AJDs)

AGC members are reporting that the Corps is not providing AJDs in a timely manner, which results in projects instead pursuing the more expensive option of a Preliminary Jurisdictional Determination (PJD) to advance the project. By moving ahead with a PJD, the project team assumes that the federal government has jurisdiction and acts accordingly. This is an expensive option due to mitigation requirements that would be applied at a cost. Fully implementing the *Sackett* decision will go a long way in reducing delays in obtaining AJDs and reduce the need for PJDs. However, the agencies should look for ways to empower and incentivize staff to move forward with AJDs. The agencies should also explore and encourage innovative approaches, such as allowing approved consultants to make determinations, thereby reducing some of the administrative burden on agency staff. The Corps could vet the consultants and audit their determinations to ensure compliance. Other federal environmental regulatory programs rely on consultants and experts, which reduces a bottleneck at the agencies.

D. Constrain Excessive Mitigation Requirements

AGC has long raised concerns that mitigation requirements are becoming excessive, unpredictable, and cost-prohibitive, detracting from economic investment. Federal agencies are incorporating mitigation into nearly every type of permit, often in novel or expansive ways. For example, under current rules, mitigation for species is now considered a "reasonable and prudent measure," stormwater permits may include mitigation for environmental justice, and CWA Section 404 permits—including Nationwide Permits—routinely require compensatory mitigation. State agencies are following suit by adding high mitigation ratios for state waters or climate-related impacts.

An AGC member shared that mitigation for an acreage with dry washes that had not seen water in decades cost about $400,000 on one project in the arid West. Compounding the issue, mitigation banks are often insufficient to meet demand, and permittee-responsible mitigation is often much more costly. A recent U.S. Department of Transportation (DOT) report[31] echoed AGC's concerns, noting that a lack of available mitigation credits is delaying projects seeking CWA Section 404 permits.

AGC urges the administration to examine the cumulative effect of these requirements and encourage agencies to look for ways to reduce mitigation costs and rein in excessive mitigation requirements—such as the establishment of a maximum expenditure for federal reimbursement of mitigation costs on federally-funded projects. There is precedent for such constraints: DOT already limits reimbursement for certain types of environmental restoration or pollution abatement.

[31] Available online at https://www.transportation.gov/sites/dot.gov/files/2024-07/2024%20Report%20to%20Congress%20on%20Process%20Improvements%20for%20NEPA%20Projects.pdf.

Agencies should adopt innovative solutions to improve credit availability, lower costs, and ensure that mitigation does not become a barrier to infrastructure development.

Reasonable mitigation measures for projects, limiting reimbursements, as well as fully implementing the *Sackett* decision will all help control costs and alleviate shortages in the banking markets. Agencies should adopt innovative mitigation solutions to make credits more accessible to projects.

E. Rescind the 2025 Ordinary High Water Mark Manual and Reinstate RGL 05-05

AGC urges the agencies to reinstate Regulatory Guidance Letter (RGL) 05-05 as the guidance on ordinary high water mark (OHWM) identification and rescind the *2025 National Ordinary High Water Mark Field Delineation Manual for Rivers and Streams: Final Version*.[32] The presence of an OHWM should not be a deciding factor for jurisdiction over a waterbody. Unfortunately, the manual (which is akin to a textbook) and its accompanying data sheet have facilitated this practice. Furthermore, the manual has not been updated to reflect the *Sackett* decision. It contains landscape scale considerations as well as additional physical indicators that would stand up a now-defunct significant nexus analysis. If the agencies were to retain the manual for reference, we urge the agencies to update it to align with *Sackett* and maintain a caution over using it for jurisdictional determinations. As stated in our comment letter[33] on the draft manual: "At a minimum, the legal parameters should be noted and assurances provided that jurisdictional waters will not increase (laterally or linearly) based on erroneous applications of OHWM to non-jurisdictional ephemeral and other waters or those subject to exclusions."

F. Confirm Grandfathering of Permits

The Biden administration reopened JDs and CWA permits issued under the 2020 Navigable Waters Protection Rule, which created immediate regulatory uncertainty. At that time, some projects with an AJDs in hand had to reevaluate their permits. Grandfathering provisions allow for continuity. With the current regulatory patchwork, projects can have AJDs from under the 2020 NWPR, the Biden administration's initial 2023 rule, as well as the conforming rule, or the pre-2015 regulatory framework—and quite possibly some are getting started under the new guidance issued by this administration in March 2025. The agencies have included grandfathering provisions in prior rulemakings and should confirm that AJDs are valid for their five-year terms—unless the applicant requests a reevaluation.

VI. CONCLUSION

In closing, AGC urges the agencies to replace the conforming rule with a rule (and new preamble) that fully conforms with the statute and relevant Supreme Court decisions. In doing so, we encourage the agencies to retain longstanding exclusions (updated to reflect *Sackett*) and look for

[32] Available online at https://erdc-library.erdc.dren.mil/bitstreams/4b8fbcd6-cb52-4c81-80d6-ec3c6946b1c6/download.
[33] American Petroleum Institute, AGC of America, and the Fertilizer Institute letter to M. Wilson, USACE, at usace.ohwm@usace.army.mil, dated December 1, 2023.

opportunities to streamline the process while prioritizing AJDs over PJDs. We also ask the administration to reverse the trend towards over-mitigation and, likewise, resolve concerns with insufficient credits. In the end, the regulated community needs a clear, predictable and enduring WOTUS definition. AGC looks forward to working with the administration throughout the rulemaking process.

AGC appreciates this opportunity to provide feedback on behalf of its construction industry member companies. If you have any questions, please contact Melinda Tomaino directly at melinda.tomaino@agc.org or (703) 837-5415.

Respectfully,

Melinda Tomaino

Melinda Tomaino
Senior Director, Environment and Sustainability

Spencer Phillips
Counsel, Regulatory and Litigation Advocacy