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

Re: Updated Definition of "Waters of the United States," EPA-HQ-OW-2025-0322, 90 *Federal Register* 52498, November 20, 2025

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") proposed updated definition of "Waters of the United States" (WOTUS).[1] Clean Water Act (CWA) permits are necessary for AGC members to perform construction activities on all types of public and private projects. The definition of WOTUS directly affects these permitting programs. **AGC generally supports the agencies' proposed approach, but recommends targeted improvements to key areas—specifically, where the agencies should go further to provide clarity and to prevent non-jurisdictional features from being caught up during case-by-case implementation.**

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 represents a large swathe of the nation's economy and mainly comprises small businesses.[2]

[1] Current Proposal, 90 Fed. Reg. 52,498. Available online at: https://www.govinfo.gov/content/pkg/FR-2025-11-20/pdf/2025-20402.pdf.

[2] In the second quarter of 2025, construction gross output totaled $2.55 trillion at a seasonally adjusted annual rate. In November 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 $337.83, which was 19% more than the average for the overall private sector. Construction is a major buyer of U.S.-made materials and machinery. In 2024, U.S. manufacturers' shipments of construction materials and supplies totaled $816 billion, or 11% of total U.S. manufacturing shipments. Shipments of construction machinery, mostly to the domestic construction industry, totaled $47 billion, or 10% 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. CONTRACTORS NEED A WORKABLE AND ENDURING DEFINITION

The definition of WOTUS—which dictates the scope of federal control, CWA permitting responsibility, and 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 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. As Justice Alito describes in *Sackett,* the CWA, when lacking clarity, is incredibly challenging for contractors to navigate: "Many landowners faced with this unappetizing menu of options would simply choose to build nothing."[3]

Contractors need a simple definition of WOTUS that supports timely jurisdictional determinations and allows regulated parties to proceed with a high level of confidence that they are operating in compliance on projects. With the current proposal, AGC appreciates the agencies' efforts to produce a rule with sufficient clarity for the public to comply and offers the agencies the following recommendations to strengthen the resultant final rule. Due process dictates that when penning penal statutes, such as the CWA, Congress must be clear enough for laymen to "understand what conduct is prohibited."[4] It necessarily follows that the agencies should not introduce uncertainty during the regulatory process by looking for elephants in mouseholes.[5]

AGC is a member of the Waters Advocacy Coalition (WAC) and Federal Stormwater Association (FSWA) and incorporates by reference the comments submitted on behalf of coalition members to this docket.

II. The Clean Water Act Provides Guardrails for the Agencies

The best reading of the Clean Water Act sets guardrails for the definition of WOTUS. These guardrails are apparent in the text of the statute itself, in Supreme Court rulings, in the Act's legislative history, and when using the traditional tools of statutory construction.

The first guardrail is that "the CWA's use of the plural term 'waters' encompasses 'only those relatively permanent, standing, or continuously flowing bodies of water described in ordinary parlance as 'stream, oceans, rivers, and lakes.'"[6] In *Sackett*, the Court turns to Black's Law and the Random House Dictionary to support this common-sense understanding. To further support that

[3] *Sackett v EPA,* Plurality Opinion at p.14. Accessible online at: https://www.supremecourt.gov/opinions/22pdf/21-454_4g15.pdf.
[4] "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. EPA,* Plurality Opinion at p24, quoting *McDonnell v. United States*, 579 U. S. 550, 576 (2016).
[5] *Sackett v EPA,* Plurality Opinion at p.20.
[6] *Sackett v EPA,* Plurality Opinion at p.14.

reading of the term waters, we offer the Oxford English definition of "waters" when used specifically for denoting particular types of bodies of water, as in the CWA: "A body or mass of standing or flowing water, irrespective of size or type; a sea, lake, river, etc."[7] This definition would be "hard to reconcile with classifying 'lands,' wet or otherwise, as 'waters.'"[8]

The narrow reading of "waters" is also supported by the term's use in the CWA's predecessor, The River and Harbors Act, which uses "water of the United States" and "navigable water" interchangeably, and the traditional tools of statutory construction. The Rule of Lenity, for example, says that ambiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant's favor. The CWA is partly a criminal statute that imposes massive daily fines and the threat of imprisonment for non-compliance. In recognition of that, a reviewing court should construe the CWA as narrowly as possible.[9]

The Constitutional Doubt canon, which was recognized by the Supreme Court in the 1909 case *United States ex rel. Attorney General. v. Delaware & Hudson Company,* also speaks to the wisdom of a narrow reading. In that case, Justice White explained that "[w]here a statute is susceptible of [multiple] constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."[10] Reading "waters" to include lands that remain dry for most of the year raises serious constitutional questions about the limits of the commerce clause. This is made clear in *Sackett*, where the court was forced to cite *Gibbons v. Ogden*, a foundational case for constitutional law students, to set out the limits of the commerce clause. The Constitutional Doubt doctrine makes it clear that the best reading of the CWA captures only waters that are able to be used or substantially affect interstate commerce.

The second guardrail in the CWA is the Act's intentional and repeated use of the term "navigable." Although the CWA does extend beyond traditionally navigable waters, the significant nexus test and accompanying case by case determinations made under the 2023 rule would read the term out of the statute completely. In one case cited in *Sackett,* the agencies found jurisdiction some 120 miles from the nearest navigable waterway. The surplusage canon says that every word and provision is to be given effect. None should be ignored, particularly terms as prominent as "navigable" in the CWA.

The third guardrail, and the one addressed most keenly by the proposed rule, is that the statute is best read to capture only waters with relatively permanent flow. In *Rapanos v. United States,* Justice Scalia called this "its only plausible interpretation." The absurdity doctrine says that a provision may

[7] Oxford English Dictionary, definition of "water, n." II.11.a. Available online at: https://www.oed.com/dictionary/water_n?tab=meaning_and_use&tl=true#15028261.
[8] *Sackett v. EPA,* Plurality Opinion at p.15, quoting *Rapanos.*
[9] This argument is not impacted by the CWA's other role as a civil statute. In a 1992 case, Justice Souter explained that those who "suggest lenity is inappropriate because we construe the statute today 'in a civil setting' rather than 'a criminal prosecution.' The rule of lenity, however, is a rule of statutory construction whose purpose is to help give authoritative meaning to statutory language. It is not a rule of administration calling for courts to refrain in criminal cases from applying statutory language that would have been held to apply if challenged in civil litigation." *United States v. Thompson/Ctr. Arms Co.,* 504 U.S. 505, 518 n.10 (1992)(Souter, J., plurality opinion).
[10] *United States ex rel. Att'y Gen. v. Del. & Hudson Co.*, 213 U.S. 366 (1909).

be judicially corrected if failing to do so would result in a disposition no reasonable person could approve of. This is exactly what happened in *Rapanos* and *Sackett*, where the Court corrected the CWA's lack of clarity by including the concept of relatively permanent flow. To forego the plain language meaning of "relatively permanent" by imposing jurisdiction on lands that are dry for the majority of the year strains credulity and runs afoul of the absurdity doctrine. Remember that under the significant nexus test eschewing the concept of relative permanence, jurisdiction can be found more than 100 miles away from a navigable waterway—we call that absurd.

The agencies, and any reviewing court, should keep these guardrails top of mind when considering the proposed rule. Our position is that the proposed rule is directionally sound and largely consistent with *Sackett* and the text of the CWA. However, AGC presents some changes for consideration and urges the agencies to go further to provide certainty to the regulated public. Incorporating AGC's recommended changes into the final rule would be aligned with the best reading of the statute and avoid overreach in the field.

III. AGC RECOMMENDATIONS ON EXCLUSIONS

Given the regulatory changes over the past decade, it may be easier to start with what is *not* a WOTUS. AGC supports the continued codification of common exclusions, with the nuanced recommendations presented here and included in the WAC and FSWA 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, ditches, and other wet features that dot the landscape.

Administrations under both parties have acknowledged the importance of a core set of exclusions—including the 2015, 2020, and 2023 rules—even if the exclusions vary slightly between revisions. However, in the current proposal, AGC is concerned that the agencies have declined to include some clear exclusions that in the past have proven helpful.[11] The agencies' assertion that the exclusions are unnecessary within the proposed framework is shortsighted given that implementation of prior rules has trended towards an expansive view of federal jurisdiction.

AGC strongly urges the agencies to take a "belt and suspenders" approach by providing ample exclusions that leave no doubt that the corresponding wet or semi-wet features are non-jurisdictional. Clear exclusions give much needed direction to agency field staff and certainty to the regulated public.

[11] "The agencies are not proposing to codify the additional exclusions that were added in the NWPR [Navigable Watrs Protection Rule]. The agencies acknowledge that clear exclusions from the definition of "waters of the United States" have been helpful for agency staff, States, and landowners in determining whether or not a feature requires additional investigation regarding its jurisdictional status. However, it is the position of the agencies that most of those exclusions covered features that would not be jurisdictional under the proposed rule, either because they would meet the terms of one of the existing or revised exclusions, or because they would not meet the definition of "waters of United States" as proposed." See also, the referenced footnote 98: "Stormwater control features and wastewater recycling structures that were excluded under NWPR and created in non-jurisdictional waters rather than in dry land, may not be excluded under the proposed rule. Many of these aquatic features, however, will continue to be non-jurisdictional because they do not satisfy the proposed rule's definition of "waters of the United States."" Current Proposal, 90 *Fed. Reg.* at 52,534.

That said, AGC appreciates and supports the agencies' retention of several core exclusions, especially for ditches and water-filled depressions, which are essential exclusions for the construction industry.[12] Furthermore, we support the new exclusion for groundwater in the proposal with a minor change to add "diffuse or shallow subsurface flow," bringing clarity to an area of confusion.

In this section, AGC strongly urges the agencies to reinstate the prior exclusions for stormwater controls (another key exclusion on which contractors rely) and ephemeral features. We also offer feedback to improve the ditch exclusion.

Finally, AGC supports the statement: "The agencies are not proposing to revise the current regulatory language, which states that paragraph (b) exclusions apply to paragraph (a)(2) through (5) waters even in circumstances where the feature would otherwise be jurisdictional."[13]

A. Reinstate the Exclusion for Stormwater Control Features

The Obama administration's 2015 rule and the 2020 Navigable Waters Protection Rule (NWPR) included exclusions for "stormwater control features." However, the agencies are not proposing to include this exclusion in the current proposal, despite their acknowledgement that many of these features would not be considered jurisdictional under the rule as proposed.[14]

AGC recommends that the agencies incorporate this exclusion in the final rule:

> Stormwater control features constructed or excavated in upland *or in non-jurisdictional waters* to convey, treat, infiltrate, or store stormwater runoff.[15] [Emphasis added.]

The exclusion language above (as written in the NWPR) also is consistent with the 2015 rule as it codifies the intention that the agencies expressed in the preamble to the 2015 rule:

> The agencies' longstanding practice is to view stormwater control measures *that are not built in "waters of the United States" as non-jurisdictional.*[16] [Emphasis added.]

As explained in prior letters to the agencies (see the Appendix), AGC members often construct, modify, and maintain stormwater control features on construction projects to comply with CWA section 402 requirements under the National Pollutant Discharge Elimination System or "stormwater" program. By necessity, contractors and others are interacting with stormwater control features on a regular basis. Reinstating the exclusion for these features will ensure that compliance

[12] As AGC has explained in detail within multiple letters to the agencies (see the Appendix for links to previous AGC letters, including AGC's response to the agencies' request for preliminary feedback in early 2025).
[13] Current Proposal, 90 *Fed. Reg.* at 52,534.
[14] Current Proposal, 90 *Fed. Reg.* at 52,534.
[15] Navigable Waters Protection Rule (2020), 85 *Fed. Reg.* at 22,338.
[16] Clean Water Rule (2015), 80 *Fed. Reg.* at 37,100.

under one section of the CWA (*i.e.*, 402) does not create a future liability under another section of the Act (*i.e.,* 404).

Alternatively, the agencies could modify the wastewater treatment exclusion to also address stormwater treatment systems. However, the wastewater treatment exclusion is not a perfect fit for the stormwater controls used in construction and development. Therefore, AGC's preferred approach is to reinstate the exclusion for stormwater control features.

B. Reinstate the Exclusion for Ephemeral Features

In the current proposal, the agencies have chosen not to include an exclusion covering ephemeral features. They assert that the exclusion is unnecessary as these features would not be jurisdictional following the ruling in *Sackett*.[17]

AGC agrees that ephemeral features are not relatively permanent flowing waters and should not be considered jurisdictional. However, AGC strongly recommends that the agencies reinstate the exclusion for ephemeral features to provide clarity. The exclusion is even more important now that the agencies are proposing the "wet season" concept as an important component of their new "relatively permanent" definition. The agencies make it clear in the preamble that the wet season does not necessarily correspond to when there is the most precipitation[18] (*i.e.,* when ephemeral features are likely to contain flow). However, an exclusion for ephemeral features will forestall any confusion with implementation in the field and with the regulated public. In this way, the exclusion would be an important backstop for the wet season approach to keep field staff from mistakenly bringing ephemeral features into consideration for jurisdiction, especially in the arid West.

In line with the agencies' own admission that ephemeral features are not WOTUS and in conformity with the *Rapanos* and *Sackett* decisions, AGC recommends the agencies reinstate the exclusion for ephemeral features to provide requisite certainty to the regulated public:

> Ephemeral features that flow only in direct response to precipitation, including ephemeral streams, swales, gullies, rills, and pools.[19]

Ephemeral features remain a grey area in the field. AGC praised the NWPR proposal for providing welcome clarification and certainty related to ephemeral features.[20] Reinstating the exclusion for ephemeral features in combination with the wet season concept within the relatively permanent

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"… [P]roposing to codify the NWPR's exclusion of ephemeral features is not necessary because ephemeral features would not satisfy the relatively permanent standard in *Sackett* as proposed in this rule so would already be non-jurisdictional. Thus, the agencies think it is not necessary to explicitly exclude them." Current Proposal, 90 *Fed. Reg.* at 52,534.

[18] Current Proposal, 90 *Fed. Reg.* at 52,518.

[19] Navigable Waters Protection Rule (2020), 85 *Fed. Reg.* at 22,251.

[20] 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

definition will give that same level of confidence on projects moving forward under the proposed rule when finalized.

C. Strengthen the Ditch Exclusion

In addition to proposing a new definition of a "ditch" (discussed in Section IV), the agencies propose to retain the standalone exclusion for ditches. "Under the proposed rule, ditches (including roadside ditches) that are constructed or excavated entirely in dry land are not 'waters of the United States.'" … "[T]he agencies limit the exclusion to those non-navigable ditches (including roadside ditches) that are constructed or excavated entirely in dry land, even if those ditches have relatively permanent flow and connect to a jurisdictional water."[21]

AGC strongly supports retaining a standalone exclusion for ditches. The *Sackett* ruling clarified that non-relatively permanent, ephemeral features are not jurisdictional, and ditches 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—unless they were constructed or excavated in a WOTUS.

AGC further urges the agencies to remove the proposed exclusion's reference to "dry land" and urges the agencies to stop using the terms "dry land" or "upland," which the agencies often use interchangeably and are generally considered to refer to "non-jurisdictional features." The terms introduce immense confusion. If the agencies' intent is to exclude ditches constructed or excavated in non-jurisdictional areas, the final rule should say so plainly and use terminology that regulated parties can apply with confidence.

AGC also sees value in the alternative approach laid out in the proposal to "exclude all ditches that carry less than a relatively permanent flow of water regardless of where and how the ditch was constructed or excavated or what purpose it serves."[22] To maximize clarity and reduce case-by-case determinations, AGC recommends that the agencies take an either/or approach to the exclusion in the final version:

> Ditches (including roadside ditches) that are constructed or excavated entirely outside "waters of the United States" or a ditch that carries less than a relatively permanent flow of water regardless of where and how the ditch was constructed or excavated or what purpose it serves are not jurisdictional.

AGC also recommends the agencies include "roadside ditches with a constructed backslope" to the exclusion, as AGC understands it to be a reliable way of identifying roadside ditches that were not constructed in a water of the United States. Given the prevalence of roadway and roadside ditch construction and maintenance activities, adding these ditches expressly to the exclusion will reduce the amount of time required to assess them before routine work can begin.

[21] Current Proposal, 90 *Fed. Reg.* at 52,539.
[22] Current Proposal, 90 *Fed. Reg.* at 52,540.

AGC's recommendations would materially reduce the need for case-by-case assessment of ditches, while still protecting jurisdictional waters that may have been channelized. Furthermore, these changes are consistent with the best reading of the statute and relevant Supreme Court precedent.

AGC also supports the agencies' proposal to put the burden of proof (historical assessment) back on the agencies, as this information may not be readily available to project proponents or landowners/operators. This is especially true for roadway ditches that may have been constructed 50-100 years ago with little documentation. AGC further recommends the agencies provide further direction to ensure that establishing proof does not become a time-consuming, back-and-forth process between the agencies and project proponents.

Why the Ditch Exclusion Is Important for the Construction Industry

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 an 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."[23] 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."[24]

Prior AGC comments[25] 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

[23] 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.
[24] 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.
[25] 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.

shall a State adopt waste transport … as a designated use for any water of the United States."[26] 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.[27] If a waterbody is not meeting its WQC then the state must develop a pollutant-specific total maximum daily load (TMDL) for the waterbody.[28] 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.

IV. AGC RECOMMENDATIONS ON OTHER PROPOSED ACTIONS

A. Categorical Waters

The proposed categorical waters fairly represent those waters that are commonly understood —in ordinary parlance—as waters: traditional navigable waters and territorial seas, relatively permanent waters connected to those waters, and adjacent wetlands that are indistinguishable from WOTUS[29] as upheld in *Sackett*. With two suggested changes discussed below, AGC supports the proposed categorical waters.

- **(a)(1) – Traditional Navigable Waters** – AGC supports the agencies' proposal to retain (a)(1) waters and suggests adding "in transport" to reflect the authority under which Congress enacted the CWA.
- **(a)(2) – Interstate Waters** – The agencies propose removing the interstate waters category (a)(2). AGC supports eliminating this category. Broadly including interstate waters serves to bring in small, isolated, wet or semi-wet areas that are not WOTUS in their own right and merely cross a state boundary at some point. Removing this category reflects Congressional intent, which focused on navigable waters. Furthermore, this category introduces uncertainty for individuals who may have a wet or semi-wet otherwise non-jurisdictional feature on their property with no way of knowing if it crosses a state boundary at some point.

[26] 40 C.F.R. Part 131.10(1).
[27] 40 C.F.R. § 131.11(a).
[28] 33 U.S.C. § 1313(d).
[29] "Wetlands are "waters of the United States" if they bear the "significant nexus" of physical connection, which makes them as a practical matter *indistinguishable* from waters of the United States." *See Rapanos v. United States*, 547 U.S. 715, 2006, at 755. Accessible online through the Library of Congress: https://tile.loc.gov/storage-services/service/ll/usrep/usrep547/usrep547715/usrep547715.pdf.

- **(a)(3) – Tributaries** – The proposal maintains jurisdiction over tributaries of TNWs with a new definition: "[bodies] of water with relatively permanent flow, and a bed and bank, that connects to a downstream [TNW] or the territorial seas either directly through one or more waters or features that convey relatively permanent flow." AGC will provide recommendations on the definition in Section IV.B. Relevant to the overall discussion of categorical waters here, AGC recommends that the agencies combine the (a)(3) and (a)(5) categories. The resultant category would include rivers, streams, lakes and ponds that are relatively permanent, standing, or continuously flowing bodies of water and are connected to category (a)(1) waters. Furthermore, AGC supports the agencies' determination that non-relatively permanent segments would sever jurisdiction upstream.
- **(a)(4) – Adjacent Wetlands** – The agencies do not propose to change jurisdiction over adjacent wetlands nor change the definition of "adjacent" or "wetland." However, the agencies provide a new definition of "continuous surface connection" to reflect *Sackett* (see Section IV.B.).
- **(a)(5) – Lakes and Ponds** – See recommendation above for tributaries.

In summary, AGC recommends the agencies adopt these categorical waters (changes noted in bold):

- **(a)(1)** – Waters which are currently used, or were used in the past, or may be susceptible to use **to transport** interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide;
- **(a)(2)** – **Rivers, lakes, streams, and ponds** that are relatively permanent, standing, or continuously flowing bodies of water and that connect to waters identified in paragraph (a)(1), either directly or through one or more waters or features that convey relatively permanent flow; and
- **(a)(3)** – Wetlands adjacent to the waters identified in paragraph (a)(1) or (a)(2) of this section and with a continuous surface connection to those waters.

B. Key Definitions within the Proposal

a. Tributary

The agencies propose to define tributary as "a body of water with relatively permanent flow, and a bed and bank, that connects to a downstream [TNW] or the territorial seas either directly through one or more waters or features that convey relatively permanent flow."[30]

In line with the recommendation in Section IV.A to combine category (a)(3) and (a)(5) waters, AGC asserts that the tributary definition is no longer necessary. AGC recommends the agencies provide clarifying information in the preamble, especially related to when jurisdiction would be severed. However, the key element is "relatively permanent flow" to a category (a)(1) water, not an attribute

[30] Current Proposal, 90 *Fed. Reg.* at 52,521.

such as "bed and bank." AGC is highly concerned that the codification of "bed and bank" in the regulatory text through the tributary definition is a backdoor approach to assert jurisdiction over any feature with a "bed and bank." Indeed, the agencies previously have used the presence of a "bed and bank" to assert jurisdiction over ephemeral features. The inclusion of "bed and bank" is further unnecessary as grassy swales or sheet flow following a storm would not contain relatively permanent flow or would be otherwise excluded as erosional or ephemeral features (see AGC recommendation to add an exclusion for ephemeral features).

b. Relatively Permanent (and the Wet Season)

The agencies propose to define relatively permanent as "standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season."[31] The agencies go on to explain that for a water feature to be considered relatively permanent, surface water would need to be present "throughout the entirety of the wet season," which results from predictable seasonal precipitation patterns year after year.[32] The wet season in a particular area occurs when average monthly precipitation exceeds average monthly evapotranspiration[33]—not when it experiences the most precipitation. The agencies reiterate that "[c]onsistent with the *Sackett* decision, ephemeral waters (*i.e.,* those with surface water flowing or standing only in direct response to precipitation (*e.g.,* rain or snow fall)) are not jurisdictional because they are not relatively permanent."[34]

The Court has acknowledged that "relatively permanent" brings into jurisdiction some waters that are not permanent. However, the Justices have left defining relatively permanent to the agencies within certain boundaries—one can think of them as bookends. The first is that *seasonal rivers* such as "a *290-day*, continuously flowing stream" or features that "might dry up in extraordinary circumstances, such as drought" *would not necessarily be excluded* from jurisdiction (emphasis added).[35] Therefore, it is not readily apparent that a seasonal water flowing 290 days (or 9.7 months) is jurisdictional or not. This "bookend" has some flexibility. Another boundary or bookend is that ephemeral and intermittent features—"ordinarily dry channels through which water occasionally or intermittently flows"—are excluded from jurisdiction.[36] Meaning that this "bookend" is fixed. In Section III, AGC strongly recommends reinstating the exclusion for ephemeral features primarily to ensure this important boundary on jurisdiction is maintained during implementation of the "wet season" concept—especially within the arid West.

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[31] Current Proposal, 90 *Fed. Reg.* at 52,517.
[32] Current Proposal, 90 *Fed. Reg.* at 52,518.
[33] Current Proposal, 90 *Fed. Reg.* at 52,518.
[34] Current Proposal, 90 *Fed. Reg.* at 52,517-52,518.
[35] *See Rapanos v. United States*, 547 U.S. 715, 2006, (plurality) at footnote 5 (accessible online through the Library of Congress: https://tile.loc.gov/storage-services/service/ll/usrep/usrep547/usrep547715/usrep547715.pdf).
[36] *Id* at 733. "All of these terms *connote* continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. Even the least substantial of the definition's terms, namely, 'streams,' connotes a continuous flow of water in a permanent channel—especially when used in company with other terms such as 'rivers,' 'lakes,' and 'oceans.' None of these terms encompasses transitory puddles or ephemeral flows of water."

AGC generally supports the agencies' proposed definition for relatively permanent with slight modification (see below) to address potential lag time that may arise before flow begins during the wet season.

> "Relatively permanent" means "standing or continuously flowing year-round or **at least as long as the duration** of the wet season **and overlapping with the wet season**." (Changes noted in bold.)

The modifications are necessary to ensure that the feature to be assessed for jurisdiction contains flow for "at least as long as the duration of the wet season and overlapping with the wet season" without having to match a specific start date on the calendar for that location. It relieves project proponents from having to ascertain whether they are dealing with "lag time" if flow is delayed by a few days. At the point the seasonal flow begins, the assessment begins and can be conducted during a set duration of time for that location. It also prevents "lag time" from further reducing the time during which the water in question must flow to maintain its "relatively permanent" status. As a reminder, "ordinarily dry channels through which water occasionally or intermittently flows"—are excluded from jurisdiction.

AGC agrees that the "wet season" provides a straight-forward means to assess waters for seasonal flow. Moreover, it can be applied within the differing climates throughout the United States providing regional flexibility. In combination with the exclusion for ephemeral features, the "wet season" can provide regulatory clarity on projects by identifying the period of time during which potential WOTUS need to be assessed. With the modification AGC recommends above and even as proposed, shorter durations or breaks in flow would necessarily exclude that feature from federal jurisdiction—*as would mere ephemeral flow*. In discussion with wetlands consultants, the wet season is a familiar concept, albeit not universal in its public understanding. However, the agencies explain its application within the context of the proposal and identify implementation tools that currently exist.

AGC recommends the agencies provide compliance assistance during implementation. The agencies should develop a fact sheet or other "plain language" educational material about the wet season. AGC supports the use of Web-based Water-Budget Interactive Modeling Program ("WebWIMP") outputs reported in the Antecedent Precipitation Tool as the primary tool for identifying the relevant wet season months. However, AGC encourages the agencies to remain engaged with the regulated community with regard to these tools and on methods (e.g., observation) to assess flow during the wet season. The agencies should ensure the primary tools remain aligned with the regulations and discourage the use of tools, e.g., the National Wetlands Inventory, that are not designed for regulatory purposes.

c. Continuous Surface Connection

The proposal provides a new definition for "continuous surface connection," applicable to adjacent wetlands, and by proposing to exclude those portions of a wetland that lack a continuous surface connection to a jurisdictional water from jurisdiction. Per the proposal: "[T]he agencies would

define 'continuous surface connection' for the first time to mean 'having surface water at least during the wet season and abutting (i.e., touching) a jurisdictional water.' Thus, the agencies' proposed definition of 'continuous surface connection' provides a two-prong test that requires both (1) abutment of a jurisdictional water; and (2) having surface water at least during the wet season."[37] The agencies previously laid out the framework for this definition in the March 2025 Continuous Surface Connection Guidance.

AGC supports the proposed definition, but we believe that a continuous surface **water** connection requirement is what is contemplated by *Sackett*. It is consistent with Supreme Court precedent that wetlands abutting a jurisdictional water are covered and that the wetland should be "as a practical matter indistinguishable" from the jurisdictional water that it abuts. The Sackett decision affirms that a barrier between a wetland and a jurisdictional water will remove that wetland from being considered jurisdictional—as it does not abut and is not indistinguishable.

As such, AGC recommends the addition of "water" to continuous surface connection. Wetlands abutting a jurisdictional water are covered, but the wetland should be "as a practical matter indistinguishable" from the jurisdictional water that it abuts. The "indistinguishability" requirement makes it clear that the surface connection to a jurisdictional water is based on **water**.

d. Ditch

The agencies propose "ditch" to mean "a constructed or excavated channel used to convey water."[38]

AGC generally supports the proposed definition with minor change. AGC appreciates that the agencies recognize that water will be present in ditches, yet the mere presence of water does not make a ditch jurisdictional. To improve the definition, AGC encourages the agencies to capture the range of uses more completely. Ditches serve functions other than conveying water, such as receiving and holding runoff to aid in groundwater infiltration or evapotranspiration—or more importantly to maintain safe conditions on roadways and reduce flooding. It is not necessary for the agencies to enumerate every possible function of a ditch within the definition. However, the agencies should recognize at a high level the main uses within the definition.

V. Small Business Concerns

One of the intended outcomes of *Sackett* was that small businesses and landowners wouldn't have to "retain an expensive expert consultant who is capable of putting together a presentation that stands a chance of persuading the [Army] Corps [of Engineers]." Contractors and landowners should have a reasonable ability to identify waters on their own property. While we acknowledge that the proposed rule simplifies the process from the 2023 regime, we believe the agencies could go further to simplify the rule and to provide small businesses with compliance assistance. The proposed rule claims that small businesses won't incur costs because the proposal would reduce the number of jurisdictional waters. However, the Regulatory Impact Analysis (RIA) also recognizes that "small entities would be expected to see a slight short-term regulatory burden to become familiar with any

[37] Current Proposal, 90 *Fed. Reg.* at 52,527.
[38] Current Proposal, 90 *Fed. Reg.* at 52,545.

rule issued by the agencies." The RIA also says that "it is the agencies' general practice to provide training materials to aid in rule familiarization." We respectfully recommend that the agencies stick to that practice and offer compliance assistance for small businesses, particularly with regards to wet season implementation.

VI. CONCLUSION

In closing, the agencies have taken care to align the rule with *Sackett*. AGC maintains that the agencies could go further to protect non-jurisdictional waters (such as stormwater control features, ephemeral features, and ditches) from being regulated during implementation, modify slightly the categorical waters and definitions for clarity, and take steps to ensure that treatment of adjacent wetlands reflect the need for a continuous surface "water" connection—and still have a legally durable rule within the bounds of the statute.

AGC appreciates this opportunity to provide feedback on behalf of its construction industry member companies.

Respectfully,

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APPENDIX: AGC'S ENGAGEMENT ON THE DEFINITION OF WOTUS

AGC of America 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;[39]
- Proposed rule in 2014;[40]
- Proposed recodification of pre-existing rules in 2017;[41]
- Request for preliminary feedback in 2017;[42]
- Proposed rule in 2019;[43]
- Request for preliminary feedback in 2021;[44]
- Proposed rule in 2021.[45]

[39] 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.

[40] 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.

[41]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.

[42]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.

[43] 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.

[44] 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.

[45] 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.

- Response to the decision in *Sackett v. EPA* in 2023.[46]
- Note the agencies did not solicit feedback on the conforming rule in 2023.
- Response to request for feedback in early 2025.[47]

[46] Letter of the Waters Advocacy Coalition to Michael Regan and Michael Connor (July 24, 2023).
[47] AGC of America, Response to The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations, EPA-HQ-OW-2025-0093, available at: https://www.regulations.gov/comment/EPA-HQ-OW-2025-0093-0168 and Waters Advocacy Coalition comments to the same docket, available at: https://www.regulations.gov/comment/EPA-HQ-OW-2025-0093-0483.