
April 23, 2025

Ms. Stacey Jensen
Oceans, Wetlands and Communities Division
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Mr. Milton Boyd
Office of the Assistant Secretary of the Army for Civil Works
Department of the Army
108 Army Pentagon
Washington, D.C. 20310-0104

Submitted via Federal eRulemaking Portal to Docket No: EPA-HQ-OW-2025-0093

Re: Comments on the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' notice soliciting written recommendations on the implementation of the definition of "Waters of the United States"

Dear Ms. Jensen and Mr. Boyd:

The National Rural Electric Cooperative Association (NRECA) respectfully submits these comments to the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (together, the Agencies) in response to the notice of March 24, 2025 requesting written recommendations on implementing the definition of "waters of the United States" (WOTUS) in light of the Supreme Court's 2023 decision in *Sackett v. Environmental Protection Agency (Sackett)*.¹

NRECA recommends that the Agencies revise expeditiously the definition of WOTUS from September 8, 2023 (the 2023 Rule)² to one that ensures proper and full alignment with the Supreme Court's 2023 decision in *Sackett v. Environmental Protection Agency (Sackett)*.³ The 2023 Rule correctly incorporates key language from *Sackett* and other key court decisions into the regulatory text but fails to ensure that the text is implemented properly. The agencies fell short because they improperly undercut the regulatory text by first leaving several key phrases undefined and then using preamble language and subsequent guidance memoranda to advance overly broad interpretations of those phrases. The Agencies should take this opportunity to revise the definition of WOTUS to one that is consistent with *Sackett* and provides the clarity that electric cooperatives have sought for decades.

NRECA is the national trade association representing nearly 900 not-for-profit electric cooperatives and other rural electric utilities, including 64 generation and transmission (G&T) cooperatives and 832 distribution cooperatives. America's electric cooperatives are owned by the people that they serve and

¹ 90 Fed. Reg. 13428 (Mar. 24, 2025)

² 88 Fed. Reg. 61694 (Sep. 8, 2023).

³ 598 U.S. 651 (2023).

comprise a unique sector of the electric industry. From growing exurban regions to remote farming communities, electric cooperatives provide power and serve as engine of economic development to 42 million Americans in 48 states and across 56 percent of the nation’s landscape.

The G&T cooperatives generate and transmit power to distribution cooperatives that provide it to end of the line cooperative consumer-members. Collectively, G&Ts generate and transmit power to nearly 80 percent of the distribution cooperatives in the nation which together own and maintain 2.7 million miles, or 42%, of the nation’s electric distribution lines. Both G&T and distribution cooperatives share an obligation to serve their consumer-members by providing safe, reliable, and affordable electric services.

Electric cooperatives keep the lights on in areas that are primarily residential and sparsely populated. Those characteristics make it comparatively more expensive for rural electric cooperatives to operate than the rest of the electric sector, which tends to serve more compact, industrialized, and densely populated areas. Because electric cooperatives serve areas with low population density, costs are borne across a base of fewer consumers and by families that spend more of their limited resources on electricity than do comparable customers of municipal-owned or investor-owned utilities. Using data from the U.S. Energy Information Administration (EIA) and other sources, NRECA estimates that rural electric cooperatives serve an average of eight consumers per mile of line and collect annual revenue of approximately \$19,000 per mile of line. In contrast, for the rest of the industry, the averages are 32 customers and approximately \$79,000 in annual revenue per mile of line.

The nature of electric cooperatives’ service territories, and their local, member-driven structure, empowers them to play a vital role in transforming communities, innovating to meet tomorrow’s energy demands, and being good stewards of the environment. As such, electric cooperatives have a vested interest in protecting the land, water, species, and air in the communities they serve. Electric cooperatives support common sense solutions to environmental impacts that balance the cost of compliance with the environmental benefits and believe that policies that needlessly increase costs have a dramatic impact on those who can least afford it.

After decades of uncertainty, the Supreme Court has provided clear direction in its *Sackett* decision. It is now up to the Agencies to provide rules of the road that strike an appropriate balance between protecting the environment and providing the clarity and predictability needed to allow electric cooperatives to provide power to their consumer-members at a cost they can afford.

A Clear Definition of WOTUS Grounded in Law and Supreme Court Decisions Provides Regulatory Certainty and Unleashes American Energy

President Trump has laid out a clear vision for his administration that emphasizes the need for domestic electricity generation and streamlined permitting. These executive actions include, but are not limited to:

- Executive Order 14154, *Unleashing American Energy*, which acknowledges the need to “facilitate the permitting and construction of interstate energy transportation and other critical infrastructure” and the need to “provide greater certainty in the Federal permitting process.”⁴
- Executive Order 14156, *Declaring a National Energy Emergency*, which states that “The integrity and expansion of our Nation's energy infrastructure—from coast to coast—is an immediate and pressing priority for the protection of the United States' national and economic security” and expresses the need to “expedite the completion of all authorized and appropriated infrastructure, energy, environmental, and natural resources projects.”⁵

⁴ 90 Fed. Reg. 8353 (Jan. 29, 2025).

⁵ 90 Fed. Reg. 8433 (Jan. 29, 2025).

- Presidential Memoranda on *Directing the Repeal of Unlawful Regulations*, which explicitly includes *Sackett* in its list of laws against which agencies must evaluate regulations for unlawfulness.⁶

In addition to these actions, EPA itself has announced its Powering the Great American Comeback initiative, which aims to achieve the Agency’s mission while “energizing the greatness of the American economy.”⁷ This initiative is based on five important pillars. Pillar 3 on Permitting Reform, Cooperative Federalism, and Cross-Agency Partnership is particularly relevant to the definition of WOTUS. The pillar states that “[a]ny business that wants to invest in America should be able to do so without having to face years-long, uncertain, and costly permitting processes that deter them from doing business in our country in the first place.” Further it says, “It will be important for the EPA to work with our partners at the state and federal levels to ensure projects are being approved and companies can invest billions of dollars into our nation. Streamlining these processes, while partnering with businesses to follow the necessary steps to safeguard our environment, will incentivize investment into our economy and create American jobs . . .”

With the growth of data centers and return of manufacturing as well as with aging existing infrastructure, electric cooperatives – like others in the electric utility sector – must construct and maintain thousands of miles of critical infrastructure which sometimes – and unavoidably – must cross wetlands and other waterbodies. Electric cooperatives are also building new power plants or retrofitting existing ones some of which may be near waterbodies. In addition, NRECA members must regularly perform maintenance and construction on a variety of features near or on waterbodies at generating facilities (e.g. stormwater conveyances, cooling ponds, spill diversion ditches, waste management areas, raw material storage areas, equipment pads, Spill Prevention Control and Countermeasure (SPCC) containment areas, etc.).

There can be significant uncertainty surrounding whether a potentially impacted waterbody is a WOTUS and this uncertainty can lead to increased delays and higher costs. By providing a clear definition of WOTUS grounded in the law, the Agencies would reduce significant uncertainty surrounding what waters are and are not jurisdictional under the Clean Water Act, reduce the cost – for both the public and the Federal government associated with making those determinations, and implement Congress’ intent to preserve and protect the states’ primary responsibility over abating water pollution and over the use and planning of land and water resources.

Ultimately, a clear definition of WOTUS grounded in the law and Supreme Court decisions would give electric cooperatives greater certainty when permitting existing energy and transmission projects as well as when they consider expanding their operations which will help meet the country’s growing energy needs, avoid unnecessary utility bill increases, and meet the Administration’s goal of unleashing American energy.

The Agencies Should Pursue an Expeditious and Targeted Rulemaking to Provide Industry the Regulatory Clarity it Needs to Develop Energy and Transmission Projects

NRECA supports and appreciates the Agencies’ stated intent to obtain stakeholder input on the WOTUS definition and to undertake an expeditious rulemaking process to revise the definition established in the 2023 Rule with one focused on “clarity, simplicity and improvements that will stand the test of time.”⁸

⁶ See Presidential Memoranda, “Directing the Repeal of Unlawful Regulations,” (April 9, 2025). Available at <https://www.whitehouse.gov/presidential-actions/2025/04/directing-the-repeal-of-unlawful-regulations/>.

⁷ See EPA Press Release, “EPA Administrator Lee Zeldin Announces EPA’s ‘Powering the Great American Comeback’ Initiative” (February 4, 2025). Available at: <https://www.epa.gov/newsreleases/epa-administrator-lee-zeldin-announces-epas-powering-great-american-comeback>.

⁸ See EPA Press Release, “Administrator Zeldin Announces EPA Will Revise Waters of the United States Rule” (March 12, 2025). Available at <https://www.epa.gov/newsreleases/administrator-zeldin-announces-epa-will-revise-waters-united-states-rule>.

As a general matter, the foundation of a clear, simple, and durable rule is already in place given that the regulatory text to the 2023 Rule already quotes directly from *Sackett* as well as from the plurality opinion in *Rapanos v. United States*.⁹ The Agencies do not need to undertake a lengthy multi-step process to first rescind and then replace the definition of WOTUS. Instead, the Agencies should move quickly to make the necessary, targeted changes to the 2023 Rule to ensure full alignment with the Supreme Court’s direction. These changes should include definitions of key phrases left undefined in *Sackett* (notably “continuous surface connection” and “relatively permanent”) as well as clear language in the preamble for how the terms are meant to be implemented. Leaving these terms undefined leaves them open to improperly expansive interpretation by agency staff in the field.

NRECA appreciates that the Agencies have already begun taking measures to correct previous misinterpretations of key phrases by issuing guidance on the “continuous surface connection” requirement.¹⁰ NRECA agrees with the rationales advanced by the Agencies in that guidance. This new guidance is a good start to ensuring true alignment between the definition of WOTUS and *Sackett*, but the Agencies must do more. They should incorporate the guidance into any forthcoming regulation and define the “relatively permanent” standard consistent with *Sackett*. They should also eliminate the standalone interstate waters, impoundments, and intrastate lakes and ponds categories; and revise the list of exclusions to clearly state that features such as ephemeral channels and any artificial features constructed in non-jurisdictional waters are *not* WOTUS.

Going one step further, while a clear WOTUS regulatory definition is essential, it is equally and perhaps more important that the implementing agencies have clear direction on how to implement the regulations consistently across the country. The inherently qualitative terms used to define WOTUS, including such qualitative terms found in the *Sackett* decision, necessitate consistent and predictable. Spanning multiple different WOTUS definitions over time, this regulatory space has long suffered from different interpretations of the same regulatory phrases both between regulatory offices and among regulatory staff at the same office. There should be one clear interpretation of the WOTUS regulations to ensure that the clarity provided in any regulatory definition of WOTUS is implemented appropriately.

The Agencies Should Retain the Long-Standing Exclusion of Waste Treatment Systems

The waste treatment system (WTS) exclusion is particularly important to electric cooperatives. NRECA strongly supports its inclusion in the regulatory text of a forthcoming rule. The exclusion has been included in all regulations implementing WOTUS for decades – issued by both Republican and Democratic administrations – and should again be included in any forthcoming regulation defining WOTUS.

Waste treatment systems vary by facility, and include wastewater collection features, wastewater treatment facilities, storm water sedimentation ponds, cooling ponds, and associated conveyances to and from those features. These features provide important environmental benefits by facilitating the proper handling and treatment of wastes produced during the process of generating, transmitting, and distributing electricity, and ensuring that pollutant discharges are properly controlled before they discharge through a point source regulated under the EPA’s National Pollutant Discharge Elimination System (NPDES) program to a WOTUS. A WTS exclusion appropriately excludes these types of features from the definition of WOTUS.

⁹ 547 U.S. 715 (2006).

¹⁰ See “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 Concerning the Proper Implementation of ‘Continuous Surface Connection’ Under the Definition of ‘Waters of the United States’ Under the Clean Water Act” (March 12, 2025). Available at <https://www.epa.gov/system/files/documents/2025-03/2025cscguidance.pdf>.

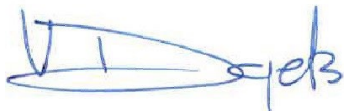
Simply excluding WTS is not enough, however. The Agencies should also include a clear definition of what a “waste treatment system” is. The Agencies did just that in the Navigable Waters Protection Rule of 2020 by defining the term “waste treatment system” to include “all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).”¹¹ Unfortunately, the term was dropped from the 2023 Rule thereby increasing confusion and uncertainty.

The 2020 definition provides a good start for a definition of “waste treatment system” however NRECA recommends that the Agencies replace the term “designed” with “used” to clarify that the exclusion applies to the role in managing wastewater that the structure actually performs. In addition, it is important that the Agencies clearly explain in the preamble to any forthcoming regulation that CWA and state permits can be used to *indicate* that a feature is used to perform a waste treatment function (e.g., demonstrating that a feature is part of an NPDES-permitted system indicates that it is part of a system used for treatment), but that such a permit is *not required* for demonstrating that the WTS exclusion applies. Finally, the Agencies should clearly explain in the preamble that the WTS continues to apply to features that are closed in place and retain waste. Such a clarification would be consistent with a definition of “waste treatment system” which includes WTS components that retain pollutants either actively or passively.

NRECA appreciates the opportunity to provide these comments to inform EPA the Corps on defining WOTUS. NRECA also submits and incorporates by reference the comments submitted by the Waters Advocacy Coalition (WAC), a group – to which NRECA belongs – representing a diverse cross-section of the nation’s agriculture, construction, transportation, real estate, mining, manufacturing, forestry, energy, recreational, wildlife conservation, and public health and safety sectors.

We welcome the opportunity to discuss our comments and to work with you on this important issue. If you have any questions, please contact me at Vlad.Dorjets@nreca.coop.

Respectfully,



Vlad Dorjets
Regulatory Affairs Director
National Rural Electric Cooperative Association

¹¹ 85 Fed. Reg. 22339 (April 21, 2020).