



State of Utah

SPENCER J. COX
Governor

DEIDRE M. HENDERSON
Lieutenant Governor

Office of the Governor
Public Lands Policy Coordinating Office

REDGE B. JOHNSON
Executive Director

February 7, 2022

Submitted via Federal eRulemaking Portal: <https://www.regulations.gov/>

Damaris Christensen
Oceans, Wetlands, and Communities Division
Office of Water
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

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

Subject: Revised Definition of “Waters of the United States”—Proposed Rule
Docket ID No. EPA-HQ-OW-2021-0602

Dear Ms. Christensen and Ms. Jensen:

The State of Utah (State) respectfully submits the following comments and recommendations regarding the Revised Definitions of “Waters of the United States” (WOTUS), in response to the Department of the Army, Corps of Engineers' (USACE) and the Environmental Protection Agency's (EPA) proposed rule defining the scope of waters protected under the Clean Water Act (CWA). The State appreciates USACE's and EPA's efforts to revise the definition of WOTUS. The USACE, the EPA, and the State share the goal of protecting public health and the environment and confronting climate change through cooperative federalism.

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The State provided previous comments concerning WOTUS on November 14, 2014, *Proposed Rule Defining “Waters of the United States”*, on June 19, 2017, *EPA Request for Local Government on Waters of the United States*, on September 27, 2017, *Definitions of “Waters of the United States” Recodification of Pre-Existing Rules*, on August 9, 2018, the *Recodification of Preexisting Rule, Supplemental Notice of Proposed Rulemaking*, on April 15, 2019, *Revised Definition of “Waters of the United States”*, and on September 3, 2021, *Recommendations regarding the Revision of the Definition of “Waters of the United States”*. The State reaffirms and incorporates those comments by reference. In collaboration with the Utah Department of Agriculture and Food (UDAF) and the Utah Division of Water Quality, the State offers the following comments and recommendations for your consideration.

The EPA and USACE must provide a clear, easily understood distinction between waterbodies that are subject to CWA jurisdiction and those that are not. The EPA and USACE should clarify CWA jurisdiction for governmental entities and regulated industries by providing accurate and current online, interactive tools for the purpose of mapping jurisdictional waters. This clarity is especially important for Utah’s regulated industries that must obtain CWA 404 Permits as part of their operations. Such industries often do not have resources available to decipher and navigate complex regulatory regimes to determine whether their operations comply, nor can they pass the costs of such an undertaking on to consumers.

To improve clarity and predictability, the State encourages the agencies to take steps to pare back the scope WOTUS, so it more closely matches the common meaning of “navigable” in the context of navigable waters. Moving WOTUS more towards the public understanding of “navigable” has the greatest potential to increase clarity and predictability in the regulatory context. It may also negate the need for any guidance documents regarding the scope of traditional navigable waters.

Delayed Rulemaking for “Phase 2”

The State encourages the EPA and USACE to delay any further rulemaking for “Phase 2” of the proposed rule until after the U.S. Supreme Court has made a decision in *Sackett, Michael, et ux. v. EPA, et al.*, a case from the 9th Circuit Court recently granted Certiorari. The outcome of the *Sackett* case could profoundly impact the way the CWA is implemented and clarify previous Supreme Court decisions regarding WOTUS, including the 2006 *Rapanos* decision. States, Tribes, and local governments will be able to provide more valuable input during the development of the Phase 2 rule if they do so after the U.S. Supreme Court issues a decision. Further development of the Phase 2 rule by the EPA and

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the USACE prior to a decision in *Sackett* will increase uncertainty for regulated entities and cause an unnecessary commitment of resources by parties seeking involvement in rule development. An appropriate delay of Phase 2 rule development until after a Supreme Court decision will better allow the EPA and USACE to craft a legally sound and durable rule that respects the jurisdiction of State, Tribes, and local government and provides long-term certainty to regulated entities.

Regionalization of “Water of the United States” Rulemaking

The EPA and USACE should strongly consider taking a regional approach to the development of a Phase 2 rule, which could include separate rules for different regions of the United States. The wide variety of climates and ecoregions across the United States make the implementation of a one-size-fits-all nation-wide rule inherently difficult and has contributed to many of the challenges that the CWA has faced over the years. Phase 2 rulemaking, unique to different regions, could be based on the EPA’s [Level II](#) or [Level III](#) Ecoregions, or perhaps the different region’s used in the EPA’s [Streamflow Duration Assessment Method \(SDAM\)](#). Region-specific rules, while they could be very beneficial to the Western States, must nevertheless not exceed the jurisdiction granted by Congress in the CWA.

The State understands that creating unique rules for different regions of the country will be challenging and time consuming for the EPA and the USACE, but ultimately, the State believes that a flexible, regionalized approach that accounts for widely different conditions in different parts of the country will ensure a more durable rule and allow for better protections for water resources while lessening undue administrative burdens on regulatory agencies and regulated entities. An early investment of EPA and USACE resources to create region-specific rules, though surely complicated and time consuming, could pay tremendous benefits in the future.

The very concept of waters that are “relatively permanent” differs greatly in different parts of the United States, and indeed within different states. Even within Utah, the standard for a “relatively permanent” stream in Utah’s arid Great Basin region looks very different than a relatively permanent stream in the high-elevation Uintah Mountains. Average flow duration in streams varies widely due to differences in snowpack, precipitation, evaporation, and geology. The creation of region-specific rules, using the best available scientific data, will allow the EPA and USACE to minimize much of the subjectivity that has plagued previous iterations of WOTUS and establish objective

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measures that offer much greater certainty to States, Tribes, local governments, and other parties impacted by the proposed rulemaking.

The State encourages the EPA and USACE to explore regionalization concepts with States, Tribes, local governments, and other entities, such as the Western States Water Council. Reliance on State expertise will help the EPA and USACE find an approach to regionalization that provides the needed flexibility and specificity without creating an unduly complicated process. As a decision in the *Sackett* case is still pending, the EPA and USACE could use this time to better explore and evaluate a regionalized approach, perhaps starting pilot projects in different areas of the country. Utah would gladly participate in early discussions on how to operationalize this idea.

“Significant Nexus” Test

The EPA and USACE should ensure that the Phase 2 Rule’s application of the “significant nexus test” articulated in Justice Kennedy’s concurrence in *Rapanos* requires a connection between waters that is more than speculative or insubstantial to establish jurisdiction. The Rule should ensure that the meaning of “significant” does not extend to CWA jurisdiction to waters with a *de minimis* connection to jurisdictional waters. Rules that seek to expand CWA jurisdiction to additional waters with speculative, insubstantial, or *de minimis* connections can greatly increase regulatory burdens on businesses, farms, and individuals while undermining the principles of cooperative federalism that are foundational to the CWA. Close consultation with states and other parties after a decision in *Sackett* will help the EPA and USACE better avoid these pitfalls.

Utah Department of Agriculture and Food

The State supports and emphasizes the report and recommendations made by the Farm, Ranch, and Rural Communities Committee (FRRCC) to the EPA dated December 2021.¹ The Utah Department of Agriculture and Food (UDAF) is represented on the FRRCC with a committee member and therefore UDAF’s concerns and comments are reflected fully in the FRRCC report.

The FRRCC report states that the EPA must, “Define WOTUS using clear terms that are easy to interpret and apply. The most important aspect of any definition of WOTUS is it

¹ Farm, Ranch, and Rural Communities Committee. 2021. Recommendations to the Environmental Protection Agency. Available online at: <https://www.epa.gov/system/files/documents/2022-01/december-2021-frrcc-recommendations-and-attachments.pdf>

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must be easily interpreted by farmers, ranchers, and leaders of rural communities and interpreted with clear lines of jurisdiction. It is necessary that a new WOTUS rule avoid vague terminology that both landowners and regulators cannot apply without engaging in burdensome analyses. Accurate and current online, interactive tools should be considered for the purpose of mapping jurisdictional waters to provide as an informal guide to farmers, ranchers, and leaders of rural communities. Agency rules must have clear, easily understood standards that improve the ability of agency personnel to make accurate determinations in the field and provide for adequate due process.

Additionally, the jurisdictional features must be defined in ways to allow “farmers, ranchers, and rural communities the flexibility needed to implement innovative environmentally beneficial projects that do not adversely impact the function or water quality of WOTUS.”²

The definition of WOTUS must include exclusions that are essential to farmers, ranchers, and rural communities. Regional differences must be taken into consideration and recognized, as well as “Waters that do not fit into any of the jurisdictional categories within the new WOTUS rule should not be jurisdictional.”³ Exclusions that are essential include:⁴

- Prior converted cropland (PCC)
- Groundwater
- Farm ditches, road ditches, canals, ponds, playas, stock ponds, prairie potholes and other isolated features
- Storm water detention, tail water recovery, or other environmentally beneficial practices should not be considered WOTUS
- Wastewater, reclaimed water, or recycle water systems should not be considered WOTUS

² Ibid.

³ Ibid.

⁴ Ibid.

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Conclusion

The State appreciates the opportunity to comment on the Proposed Rule. Utah looks forward to partnering with the EPA and USACE to create a workable definition of WOTUS. Please direct any written correspondence to the Public Lands Policy Coordinating Office at the address below or call to discuss any questions or concerns.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Johnson', with a long horizontal flourish extending to the right.

Redge B. Johnson
Executive Director