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April 23, 2025

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

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RE: **WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations**
EPA-HW-OW-2025-0093, 40 CFR Part 120
FRL-12683-01-OW, 40 CFR Part 328

Dear Ms. Jensen and Mr. Boyd:

The State of Utah (“Utah” or the “State”) has reviewed the referenced notice (“Notice”) concerning the definition of “Waters of the United States” (“WOTUS”) and appreciates the opportunity to submit comments on this significant issue. The Notice specifically seeks input on implementing the WOTUS definition in light of the Supreme Court’s 2023 decision in *Sackett v. Environmental Protection Agency*.¹ Overall, Utah encourages the Environmental Protection Agency (“EPA”) and the United States Army Corps of Engineers (“USACE”) to implement a clear and narrow definition of WOTUS that allows states to assume more management authority over natural resources, including water, within their borders.

¹ WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations, 90 Fed. Reg. 13428 (No. 55) (Mar. 24, 2025) (to be codified at 33 CFR Part 328 and 40 CFR Part 120).

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WOTUS is a critical term in the Clean Water Act (“CWA”) that delineates the scope of federal regulatory authority over the nation’s waters.² The CWA aims to protect “navigable waters,” which the CWA defines as “the waters of the United States, including the territorial seas.”³ However, the CWA lacks a clear definition of “waters of the United States,” leading to decades of debate, fluctuating regulations, and numerous legal challenges.⁴ The Supreme Court’s decision in *Sackett v. Env’t Prot. Agency*, 598 U.S. 651 (2023) (“*Sackett*”), represents the latest attempt to clarify the outer boundaries of the CWA. Other states have submitted comments requesting that the WOTUS definition be clear and narrowly tailored, consistent with the *Sackett* decision, and Utah joins in that request.

The definition of WOTUS carries significant implications for State, particularly Utah’s vast landscape. According to the U.S. Department of Health and Human Services, twenty-four of the State’s twenty-nine counties are classified as “rural” or “frontier.”⁵ Vital land uses in these rural areas, such as agriculture, ranching, and mining, are inherently dependent on water resources and are directly impacted by which bodies of water are deemed WOTUS. Requiring onerous CWA Section 404 (dredge and fill) permitting (“CWA Permitting”) on waters that should not be considered WOTUS makes it difficult for the completion of projects beneficial to the State’s rural communities.

Furthermore, Utah is experiencing rapid population growth, ranking among the fastest growing states nationwide according to the U.S. Census Bureau.⁶ Accommodating this growth requires the construction of affordable housing, which inevitably necessitates water usage. Construction of affordable housing may be complicated by CWA permitting requirements on waters that were never intended to be subject to the CWA by its Congressional framers.

EPA and USACE are the primary federal agencies tasked with interpreting and implementing the definition of WOTUS. Historically, the definition has served to identify which water bodies, encompassing wetlands, streams, rivers, and lakes, fall under federal protection under the CWA. This federal jurisdiction subsequently triggers specific permit requirements for activities such as discharging pollutants or adding fill to wetlands.⁷

² 33 U.S.C. § 1251, *et seq.*

³ 33 U.S.C. § 1311(a), 1362(7).

⁴ “[T]he outer boundaries of the [CWA’s] geographical reach have been uncertain from the start.” *Sackett v. Env’t Prot. Agency*, 598 U.S. 651, 658 (2023).

⁵ <https://mchb.tvisdata.hrsa.gov/Narratives/Overview/958c7b3e-4a88-48a8-8b76-f73ca0bb7b4a>

⁶ <https://www.census.gov/newsroom/press-releases/2023/population-trends-return-to-pre-pandemic-norms.html>

⁷ 33 U.S.C. § 1342.

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Ultimately, the WOTUS definition dictates the scope of federal authority over water resources. A broader definition expands federal permitting requirements to a larger number of water bodies. Conversely, a narrower definition grants the State greater flexibility in establishing its mechanisms to protect Utah's waters consistent with the State's goals and management objectives. Determining whether federal or state/local entities hold primary control over water resources carries significant consequences for diverse sectors, including agriculture, construction, manufacturing, and land development. The level of governmental control directly influences the permitting processes and environmental regulations that stakeholders must follow.

"For more than half a century," EPA "wrestled with the problem" of defining WOTUS through regulations intended to encapsulate the relevant case law.⁸ This ongoing challenge highlights the complexity and contention surrounding the term. In 2015, the Obama Administration introduced the Clean Water Rule ("CWR"),⁹ aiming to clarify and expand the definition of WOTUS. However, the CWR sparked significant controversy and legal challenges, including a successful lawsuit brought by Utah and sixteen other states.¹⁰

Subsequently, in 2020, the Trump administration replaced the CWR with the Navigable Waters Protection Rule ("NWPR").¹¹ The NWPR significantly narrowed the WOTUS definition by emphasizing a direct connection to traditionally navigable waters. Despite this shift, the NWPR also faced its legal challenges.¹²

Most recently, in 2023, the Biden administration issued yet another new rule intended to build upon aspects of the CWR while also considering Supreme Court decisions, scientific understanding, and the agency's expertise. This rule employed a "significant nexus" test to determine jurisdiction over certain waters.¹³

Amid this regulatory back-and-forth, the U.S. Supreme Court issued its pivotal decision in *Sackett*. The *Sackett* ruling significantly reshaped the definition of WOTUS, particularly concerning the jurisdictional status of wetlands. The Court narrowed the scope of federal authority over wetlands, establishing a requirement for a continuous surface connection between a wetland and other jurisdictional waters for it to be classified as WOTUS.¹⁴

⁸ *Sackett*, 598 U.S. at 659.

⁹ 80 Fed. Reg. 37056 (2015).

¹⁰ <https://kmyu.tv/news/local/utah-ag-10-state-coalition-touts-victory-in-blocking-2015-wotus-rule>; *See Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1343–44 (S.D. Ga. 2019).

¹¹ 85 Fed. Reg. 22250 (2020).

¹² *See, e.g., State v. U.S. Env't Prot. Agency*, 989 F3d 874 (10th Cir. 2021).

¹³ 88 Fed. Reg. 3004 (2023).

¹⁴ *Sackett*, 598 U.S. at 678-79.

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In response to the *Sackett* decision, the EPA and USACE have attempted to revise the WOTUS definition to align with *Sackett*. On March 24, 2025, the agencies published a Federal Register notice soliciting public input to aid in this crucial definitional process.¹⁵

What is and what is not WOTUS can be examined using Supreme Court cases and the regulations found in 33 CFR § 328 (USACE regulations) and 40 CFR § 120 (EPA regulations). For this letter, the State will address these two agencies' regulations collectively as "Regulations," given their near-identical definitions.

The current Regulations classify WOTUS into three categories: territorial seas, tidal waters, and non-tidal waters.¹⁶ Within these categories, the following are generally considered WOTUS: waters used in interstate or foreign commerce; territorial seas; interstate waters; impoundments of these waters; tributaries of these waters that are relatively permanent, standing, or continuously flowing; wetlands adjacent to these waters (although the definition of "adjacent" has been subject to change and legal interpretation, especially after the *Sackett* ruling, which has led to a focus on a continuous surface connection in many current interpretations); and certain intrastate lakes, ponds, and wetlands with a specific nexus to interstate commerce are also included.¹⁷ In the 1980s, the federal government adopted a broad interpretation of WOTUS following the Supreme Court's decision in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). The *Riverside* Court upheld the federal government's authority to prevent a development company from filling its property deemed as WOTUS without a proper permit, asserting that CWA protections could extend to wetlands adjacent to navigable waters if they were "inseparably bound up" with those waters.¹⁸ Subsequently, the Supreme Court further broadened this interpretation by holding that even "isolated waters" that are not adjacent to wetlands could be considered WOTUS.¹⁹

However, the tide began to turn in 2006 when the Supreme Court decided *Rapanos v. United States*, 547 U.S. 715 (2006). *Rapanos decision* held that for wetland waters to be considered WOTUS, they must possess a "continuous surface connection" to "relatively permanent, standing, or continuously flowing" waters.²⁰ Most recently in *Sackett*, the Court further narrowed the definition of "adjacent" as it applies to wetlands. *Sackett* reinforced the requirement of a "continuous surface connection" to other jurisdictional waters and explicitly eliminated the "significant nexus" theory as "implausible."²¹

¹⁵ 90 Fed. Reg. 13428 (2025).

¹⁶ 33 C.F.R. § 328.2.

¹⁷ 33 C.F.R. § 328.3(a).

¹⁸ *Riverside*, 474 U.S. at 134.

¹⁹ *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*. 531 U.S. 159, 160 (2001).

²⁰ *Rapanos*, 547 U.S. at 741-42.

²¹ *Sackett*, 598 U.S. at 678-80.

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While the process of determining which waters *qualify* as WOTUS has been complex and subject to considerable uncertainty, exclusions from the WOTUS definition are more clearly delineated. Specifically, 33 CFR § 328.3(b) explicitly excludes the following categories: groundwater, waste treatment systems, prior converted cropland (as defined by the Secretary of Agriculture), ditches, artificially irrigated areas that would revert to dry land if irrigation ceased, artificial lakes and ponds, water filled depressions, and swales and erosional features.

With this overview in mind, the State proposes the following regulatory reforms to better align water resource management with Congress's original intent under the CWA. The CWA explicitly states, "it is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise and authority under this Chapter."²² This congressional declaration underscores the recognition of states' primary responsibility in regulating water resources, a principle that the State believes is not consistently reflected in the current federal-state dynamic.²³ The State encourages the EPA and USACE to adopt regulations that narrowly construe the bodies of water that qualify as WOTUS and reserve most waters for state regulation. Furthermore, the State recommends that the federal agencies continue to simplify the assumption process, allowing states the option to assume Section 404 regulatory primacy. Utah advocates for a system that more readily empowers states to administer the CWA (should they choose to do so), moving away from the current predominantly top-down federal approach.

WOTUS must be defined clearly and narrowly to give notice of which bodies of water are subject to the CWA. This definition should be carefully crafted to preserve state authority over the majority of water resources. As the Supreme Court recently held, "the CWA's use of 'waters' encompasses only those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes" that are "connected to traditional interstate navigable waters."²⁴

Furthermore, bodies of water qualifying as WOTUS must be "navigable" in the constitutional sense, specifically as it relates to the Commerce Clause.²⁵ To define WOTUS, "navigable" should be interpreted narrowly, "invoking only Congress's authority over waters that

²² 33 U.S.C. § 1251(b).

²³ "Regulation of land and water use lies at the core of traditional state authority . . . the CWA's express policy [is] to 'preserve' the States' 'primary' authority over land and water use." *Sackett*, 598 U.S. at 679-80.

²⁴ *Id.* at 667, 671.

²⁵ *Id.* at 672.

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are, were, or could be used as highways of interstate or foreign commerce.”²⁶ This limitation, allowing federal oversight only to navigable waters that act as highways of interstate or foreign commerce, is important because it “does not displace states’ traditional sovereignty over their waters.”²⁷

A clear and narrow definition of WOTUS would significantly enhance the ability of state agencies, such as Utah State Parks (“USP”), to better serve the public. By simplifying the determination of which waters are subject to the CWA and removing unnecessary federal permitting requirements, USP can avoid potentially costly and time-consuming identification processes. Incorrectly navigating an unclear definition could lead to CWA penalties or expensive litigation. Moreover, when water bodies are indeed unnecessarily subject to federal permitting, essential park activities and the construction of new projects become more complex and challenging to execute.

CWA permitting requirements create significant hurdles for USP in managing water resources, impacting crucial aspects such as water quality testing, accessibility improvements, recreation management (including motorized boating), and the planning and development of vital infrastructure near water (*e.g.*, campgrounds, day-use areas, and concession operations). These projects are urgently needed to accommodate increasing visitation and enhance the overall visitor experience within Utah’s State Parks.

Furthermore, in addition to advocating for a limited definition of WOTUS itself (as previously discussed), the State urges the federal agencies to limit the definition of WOTUS, itself (see page 8), and provide more areas and activities for “categorical exclusions” from the requirement of CWA permits under 33 CFR § 328(b). Specifically, the federal government should incorporate exclusions essential to Utah’s farmers, ranchers, and rural communities. The State looks forward to providing detailed input on categorical exclusions as the WOTUS implementation process moves forward.

Finally, the State urges the federal government to explicitly redefine “wetlands” and “adjacent” as outlined in 33 CFR § 328.3(c)(1)-(2). To fully incorporate the Supreme Court’s ruling in *Sackett*, these new definitions must provide precise meanings. They should include all essential elements and exclude all nonessential elements. This clear delineation is crucial for states to readily distinguish the limited subset of wetlands that constitute wetlands from the majority of wetlands, which rightly fall under state regulation and control.

²⁶ *Id.* at 685 (Thomas, J., concurring).

²⁷ *Id.* at 686 (Thomas, J., concurring).

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The current Regulation defines “wetlands” broadly as “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.”²⁸ “Adjacent” is defined as “having a continuous surface connection.”²⁹ The State contends that the existing broad definition of “wetlands” encompasses areas well beyond the scope authorized by the Supreme Court in its *Sackett* decision, necessitating a more precise and limiting revision.

The Supreme Court in *Sackett* clarified that the CWA’s jurisdiction over wetlands is limited to those that are “indistinguishably part of a body of water that itself constitutes ‘waters’ under the CWA.”³⁰ The Court elaborated, stating that the CWA may apply to “[o]nly those wetlands that are as a practical matter indistinguishable from waters of the United States, such that it is difficult to determine where the water ends and the wetland begins. That occurs when wetlands have a continuous surface connection to bodies that are [WOTUS] in their own right, so that there is no clear demarcation between waters and wetlands.”³¹ Wetlands should be defined only to include relatively permanent bodies of water that have a continuous surface connection with and are indistinguishable from WOTUS waters, such “that there is no clear demarcation between ‘waters’ and wetlands.”³² Adjacent should be defined as having a continuous *aquatic* surface with more standard WOTUS bodies of water, specifically excluding only neighboring wetlands.

The State asserts that the current definitions are not sufficiently exact and do not properly account for the *Sackett* and *Rapanos* decisions, which limited the extent to which the federal government can regulate “wetlands” under the CWA. To address these deficiencies and better align with the Supreme Court precedent and the CWA’s intended scope, the State suggests the following updated definitions:

PROPOSED Clean Water Rule: Definition of “Waters of the United States” 40 CFR 230.3 PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL.

§230.3 Definitions.

(o) The term *waters of the United States* means:

- a. For purposes of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (o)(2) of this section, the term “waters of the United States” includes only:

²⁸ 33 C.F.R. § 328.3(c)(1).

²⁹ 33 C.F.R. § 328.3(c)(2).

³⁰ *Sackett*, 598 U.S. at 676.

³¹ *Id.* at 678 (internal citations omitted).

³² *Ibid.*

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1. Those interstate waters that are navigable-in-fact and currently used or susceptible to use in interstate or foreign commerce. These waters include the territorial seas.
2. Relatively permanent, standing or continuously flowing streams, rivers, and lakes having an indistinguishable surface connection with navigable-in-fact waters described in a.1.
3. Those adjacent wetlands that are a relatively permanent body of water and have a continuous surface connection with and are indistinguishable from the waters described in a.1. and a.2.
4. The following are never "Waters of the U.S.":
 - A. Groundwater or channels through which waters flow intermittently or ephemerally.
 - B. Ditches, conveyances, and other structures, manmade or otherwise, used primarily for agricultural, or flood abatement or storm-water control purposes.
5. The following definitions apply to terms used under this section:
 - A. Indistinguishable means that the waters have merged, so there is no clear demarcation between the two.
 - B. Relatively permanent waters are those waters whose normal status quo state is year-round – or at a minimum 290 days per year – presence or existence, and for which non-existence (i.e. drying up) during its typical period of presence or existence is an extraordinary circumstances and have an indistinguishable surface connection with navigable-in-fact waters described in a.1.
 - C. Adjacent means having a continuous aquatic surface.

Thank you for the opportunity to comment. 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 'Redge B. Johnson', written over a horizontal line.

Redge B. Johnson
Director