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Environmental Protection Agency
EPA Docket Center
Water Docket
Mail Code 28221T
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RE: Docket ID No. EPA-HQ-OW-2025-0093

Comments of Americans for Prosperity

Americans for Prosperity (“AFP”) submits these comments to the “WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations” published March 24, 2025 in the Federal Register by the Environmental Protection Agency (“EPA”) and the Department of the Army, Corps of Engineers (“Corps”).

Public Listening Sessions and The Recommendations Docket

The agencies’ Federal Register notice announced “listening sessions”¹ on specific key topics to hear stakeholders’ perspectives on defining “waters of the United States” (“WOTUS”) consistent with the Supreme Court’s interpretation of the scope of Clean Water Act (“CWA”) jurisdiction, and how to implement that interpretation as the agencies consider their next steps. The notice further indicated that the agencies are accepting written recommendations from the public via a “recommendations docket.”² Collectively, those opportunities are intended to provide engagement with “a full spectrum of stakeholders.”³

¹ “WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations”, Notice; announcement of listening sessions and solicitation of stakeholder feedback, Department of Defense, Department of the Army, Corps of Engineers; Environmental Protection Agency, March 24, 2025 Federal Register, 90 FR 13428.

² *Id.*

³ *Id.*

The agencies have indicated they

“are committed to providing additional clarity regarding which waters are ‘waters of the United States’ under the Federal Water Pollution Control Act, also known as the Clean Water Act. *The Trump Administration is going to take a close look at critical aspects of ‘waters of the United States’ and ensure that the definition follows the Supreme Court’s Sackett decision to provide realistic durability and consistency.*”⁴

AFP’s comments herein include a discussion of the Supreme Court’s decision in *Sackett*, and why, following promulgation of a “new” final WOTUS rule, a trained and knowledgeable work force is *critical* to achieving the agencies’ stated goals of “practical implementation approaches,durability and stability,”⁵ including “.... more effective and efficient jurisdictional determinations, permitting actions, and other actions consistent with relevant decisions of the Supreme Court.”⁶

The Importance of the *Sackett* Decision

The facts before the U.S. Supreme Court in *Michael Sackett, Et. Ux., Petitioners v. Environmental Protection Agency, et al.*, 598 U.S. 651 (2023)⁷ were such that the Court found that “[t]he wetlands on the Sacketts’ property are *distinguishable from any possibly covered waters*”⁸ while reversing and remanding the matter to the U.S. Court of appeals for the Ninth Circuit. The Sacketts had backfilled their property with dirt and rocks in preparation for building a home.⁹

“A few months later, the EPA sent the Sacketts a compliance order informing them that their backfilling violated the CWA because their property contained protected wetlands. The EPA demanded that the Sacketts immediately “ ‘undertake activities to restore the Site’ ” pursuant to a “ ‘Restoration Work Plan’ ” that it provided. *Sackett v. EPA*, 566 U.S. 120, 125 (2012). The order threatened the Sacketts with penalties of over \$40,000 per day if they did not comply.”¹⁰

Against that backdrop, years of litigation ensued.

⁴ *Id.*, p. 13429, Emphasis Added.

⁵ *Id.*, p. 13430.

⁶ *Id.*

⁷ *Michael Sackett, Et. Ux., Petitioners v. Environmental Protection Agency, et al.*, 598 U.S. 651 (2023). For purposes of citation references in this Comment document, page number references to *Sackett v. EPA* will utilize the pagination of the Opinion of the Court, No. 21-454, *Michael Sackett, Et. Ux., Petitioners v. Environmental Protection Agency, et al.*, decided May 25, 2023.

⁸ *Id.*, Opinion of the Court, pp. 27-28, emphasis added.

⁹ *Id.*, pp. 4-5.

¹⁰ *Id.*, p 5.

While most of us would like to think the dilemma faced by the Sacketts is one that is out of the ordinary; most of us who have followed the “adventures of the WOTUS rules” know that it is not. The universe of projects that have been delayed, halted, or scrapped altogether as a result of the hodgepodge of implementation and enforcement of the current and *previous* WOTUS rules likely will never be fully identified. As the Court noted:

“...because the CWA can sweep broadly enough to criminalize mundane activities like moving dirt, this unchecked definition of ‘the waters of the United States’ means that a staggering array of landowners are at risk of criminal prosecution or onerous civil penalties.”¹¹

Moving Dirt Should Not Be A Crime

Sackett lays bare the perplexing situation landowners face when confronted with the possibility of criminal prosecution or civil penalties for simply moving dirt.

“What are landowners to do if they want to build on their property? The EPA recommends asking the Corps for a jurisdictional determination, which is a written decision on whether a particular site contains covered waters. But the Corps maintains that it has no obligation to provide jurisdictional determinations,and it has already begun announcing exceptions to the legal effect of some previous determinations, Even if the Corps is willing to provide a jurisdictional determination, a property owner may find it necessary to retain an expensive expert consultant who is capable of putting together a presentation that stands a chance of persuading the Corps. And even then, a landowner’s chances of success are low, as the EPA admits that the Corps finds jurisdiction approximately 75% of the time.

If the landowner is among the vast majority who receive adverse jurisdictional determinations, what then? It would be foolish to go ahead and build since the jurisdictional determination might form evidence of culpability in a prosecution or civil action. The jurisdictional determination could be challenged in court, but only after the delay and expense required to exhaust the administrative appeals process. ... Another alternative would be simply to acquiesce and seek a permit from the Corps. But that process can take years and cost an exorbitant amount of money. Many landowners faced with this unappetizing menu of options would simply choose to build nothing.”¹²

¹¹ *Supra*, Footnote 7, pp. 12-13.

¹² *Id.* pp. 13-14, internal citations omitted.

As a result of *Sackett*, and the Trump administration’s commitment “to take a close look”¹³ at the WOTUS rule in light of that decision, the dilemma faced by the millions of landowners who need to move dirt is now before EPA and the Corps to come up with a solution.

So what’s next?

Transparent, Efficient, and Predictable Implementation of A “New” WOTUS Rule

The agencies have stated that their administrative actions “will be consistent with the Clean Water Act and relevant Supreme Court decisions.”¹⁴ This is precisely what AFP recommends and what the American people deserve.

A “New” WOTUS Rule Can Be a Major Component of Permit Reform

Nearly everyone agrees that permit reform is needed. But what that reform should look like and how that reform should take shape are not easily articulated. This is because a project may require a permit for an array of activities from an array of agencies. And in order to effectuate practical on-ground operational “fire up the bulldozers” permit reform, that “reform” *must address all aspects* of a project’s proposed activities. The fact remains that at present, there is no federal “one stop shop” to acquire all the necessary approvals for a project to even *begin*, much less for a project to be completed.

Nevertheless, EPA and the Corps currently have before them an opportunity to “get it right” at least with respect to one massive component of permit reform – the WOTUS rule. Arguably, the linchpin of permit reform is the WOTUS rule.

This is particularly true in the energy sector. Before a solar farm is installed, before a land based wind turbine is installed, before a small nuclear reactor is built, before a natural gas plant is built, before a battery storage facility is installed, before a pipeline is built, and before electric transmission lines are built, “moving dirt” has to occur.

And if EPA and the Corps are able to craft a rule that genuinely provides for “practical implementation approaches, ...durability and stability, as well as more effective and efficient jurisdictional determinations, permitting actions, and other actions consistent with relevant decisions of the Supreme Court”¹⁵ - then perhaps the backlog of energy projects can receive the “green light” to move forward and the backhoes and drills can get to work to unleash American energy abundance.

¹³ *Supra*, Footnote 1, p. 13429.

¹⁴ *Id.*

¹⁵ *Id.* p. 13430.

The Tasks Ahead

Notwithstanding the public listening sessions and the herculean efforts that staff at both EPA and the Corps have invested to date, all of this will be in vain unless new, updated, and thorough training is provided - and reinforced – for all those who have responsibility for site visits, jurisdictional determinations, and are otherwise charged with implementation of any “new” WOTUS rule. This is because we have a new landscape. And this new landscape can easily get bogged down in the “WOTUS sins of the past.”

That ought not happen.

But it *will* happen unless affirmative steps are taken - by each agency that has any responsibility with respect to WOTUS determinations - to ensure that it does not.

A culture develops in each workplace. The workplace culture at EPA and the workplace culture at the Corps are not immune to this. Sometimes, a workplace culture can get stuck in how things *have been done* to such an extent that those who are entrenched in and who have a vested interest in that culture simply refuse to move forward.

And that can happen with a “new” WOTUS rule.

The major task before EPA and the Corps is not the drafting and finalizing of a “new” WOTUS rule. That will be the easy part.

The major task before the agencies will be the dismantling of the “mini-WOTUS fiefdoms” in federal government field offices far, far away from the I-495 Capital Beltway Corridor. Mostly unknown to the public, but quite well known to those who have encountered them, these “mini-WOTUS fiefdoms” have operated, for the most part, well “under the radar” of agency leadership. While their findings can be challenged, it takes time, energy, and money to do so. The ordeal of fighting the federal government is an exhausting endeavor, with the government having a cadre of professionals at its disposal.

And if past behavior is any indicator of future behavior – and it is – then EPA, the Corps, and *all* agencies with any responsibility for WOTUS implementation and enforcement had better “buckle up” and require their staff to “straighten up” or any “new” WOTUS rule – whatever it may say on paper and no matter how many legal challenges it is able to withstand – has little to no change of “practical implementation.”¹⁶ For a narrative of what *can go wrong* when a federal government agency *gets it wrong* – and fails to *correct* its error – until directed to do so by a Federal Court - see the ordeal experienced by David and Rita Boucher as described in the August

¹⁶ *Id.*

8, 2019 Order of the United States Court of Appeals for the Seventh Circuit in *Rita Boucher v. United States Department of Agriculture, et al.*¹⁷

AFP recommends that EPA and the Corps take steps to insure that implementation of any “new” WOTUS rule is given the attention it merits, given past WOTUS implementation debacles.

Practical Recommendations for EPA and the Corps

To that end, AFP identifies a number of items for EPA’s and the Corps’ consideration as the agencies move forward with the drafting, proposal, finalization, and the all important implementation of a “new” WOTUS rule:

- Each staff person and each and every outside consultant and/or contractor and any and all other relevant persons with responsibility for the drafting, review, and finalization of any “new” WOTUS rule should be required to have a *working knowledge* of the applicable Clean Water Act sections, the *Sackett* decision, and all other “relevant” Supreme Court decisions as cited in Footnote 6 of the agencies’ March 24, 2025 Federal Register notice
- Each and every field person, inspector, and any and all other relevant persons who either currently have or in the future will have any role in any inspection, analysis, or determination concerning the applicability of any “new” WOTUS rule should be required to have a *working knowledge* of the applicable Clean Water Act sections, the *Sackett* decision, and all other “relevant” Supreme Court decisions as cited in Footnote 6 of the agencies’ March 24, 2025 Federal Register notice
- The agencies should require each and every federal, state, and local agency that enters into any agreement with the agencies with respect to any aspect of any “new” WOTUS rule, including any agreement to enforce, implement, or otherwise make any determinations with respect to any “new” WOTUS rule, to provide the same training to their respective staff, including consultants and contractors, as is required of EPA/Corps staff with respect to any “new” WOTUS rule
- The agencies should design a *new* training program that is *updated and thorough* and that will provide all relevant staff, including consultants and contractors, sufficient training so that “practical implementation approaches, ...durability and stability, as well as more effective and efficient jurisdictional determinations, permitting actions, and other actions consistent with relevant Supreme Court decisions”¹⁸ may occur
- Before any determination or other relevant action under any “new” WOTUS rule is issued to a landowner or other applicable party, a team of agency staff should review the

¹⁷ *Rita Boucher v. United States Department of Agriculture, et al.*, 149 F. Supp 3 1045 (7th Cir. 2019). United States Court of Appeals for the Seventh Circuit, No. 16-1654, Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division, No. 1:13-cv-01585, Argued September 21, 2018, Decided August 8, 2019.

¹⁸ *Id.*, p. 13430.

document to insure that the matters identified in the document are factually accurate and legally defensible. Even if a team review process is currently in place, that review process should be reevaluated for effectiveness, particularly in light of *Sackett*

- The agencies should design *new field guidance* so that any “new” WOTUS regulation requirements are clearly and plainly articulated to staff
- The agencies should hold *all* relevant staff, including consultants and contractors, accountable for their respective responsibilities under any “new” WOTUS rule

Conclusion

AFP appreciates the agencies’ efforts in holding these listening sessions and setting up a recommendations docket. AFP supports the agencies’ efforts to take a “close look”¹⁹ at the WOTUS rule to ensure that the definition “follows the Supreme Court’s *Sackett* decision to provide realistic durability and consistency.”²⁰

Respectfully Submitted,

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¹⁹ *Id.*, p. 13429.

²⁰ *Id.*