



Christopher Phalen
Vice President, Domestic Policy

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The Honorable Jessica Kramer
Assistant Administrator
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Adam Telle
Assistant Secretary of the Army
Civil Works
U.S. Department of Defense
101 Army Pentagon
Washington, DC 20310

Re: Comments of the National Association of Manufacturers; Updated Definition of “Waters of the United States”; 90 Fed. Reg. 52,498 (November 20, 2025); Docket No. EPA-HQ-OW-2025-0322; FRL 11132.1-01-OW

Dear Assistant Administrator Kramer and Assistant Secretary Telle,

The National Association of Manufacturers (NAM) respectfully submits these comments on the proposed rulemaking issued by the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (USACE) (together, the Agencies), Updated Definition of “Waters of the United States”; 90 Fed. Reg. 52,498 (November 20, 2025) (“the proposed rule” or “the proposal”). The NAM appreciates the opportunity to submit comments on the proposed rule and supports the EPA’s commitment to evaluating and modernizing regulations like the definition of Waters of the United States (WOTUS) that impact the nation’s manufacturing industry.

The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that supports and empowers the 13 million people who make things in America. As the largest manufacturing association in the U.S., the NAM’s membership includes businesses of all sizes, across all industrial sectors, and in all 50 states. Manufacturers collectively contribute \$2.9 trillion to the U.S. economy—and right-sized, commonsense regulations are critical to sustaining the manufacturing strength that underpins our nation’s prosperity.

Manufacturers appreciate EPA’s commitment to delivering on the president’s directive to reconsider regulatory developments that present “substantial restraint[s] on our economic growth and ability to build and innovate,”¹ by proposing to clarify “key aspects”² of WOTUS and therefore recognize the limits of federal jurisdiction under the Clean Water Act (CWA) over waterways, wetlands, and other aquatic features and infrastructure across the United States, consistent with the U.S. Supreme Court’s decision in *Sackett v. EPA* (*Sackett*).

¹ *Unleashing Prosperity Through Deregulation*, Exec. Order No. 14192, 90 Fed. Reg. 9065 (6 February 2025); *Presidential Memorandum: Memorandum for the Heads of Executive Departments and Agencies, Directing the Repeal of Unlawful Regulations* (9 April 2025); *Repeal of Greenhouse Gas Emissions Standards for Fossil Fuel-Fired Electric Generating Units*, 90 Fed. Reg. 25752 (17 June 2025). RIN 2060-AW55; *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Regulations Related to Project Emissions Accounting; Withdrawal of Proposed Rule*, 90 Fed. Reg. 34206 (21 July 2025). RIN 2060-AV62.

² Proposed rule, at 52499.

For nearly two decades, the NAM has called for a durable definition of WOTUS that brings certainty and predictability so that manufacturers can plan and invest in major projects over long time horizons. Manufacturers are committed to being responsible stewards of land and water resources, and this proposed rule strikes the right balance between the dual mandate of the CWA to “to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,”³ and that it is “the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution” and “to plan the development and use . . . of land and water resources.”⁴ Striking this balance by relinquishing certain waters from federal jurisdiction does not mean that these waters are unregulated. Indeed, it is the express intent of Congress, as stated in the CWA, to ensure states have the “primary responsibilities of rights” to such regulation. The Supreme Court in *Sackett* unanimously drove this point home by finding that “[i]t is hard to see how the States' role in regulating water resources would remain ‘primary’ if the EPA had jurisdiction over anything defined by the presence of water.”⁵

The NAM supports the Agencies’ proposal, as it appropriately scopes the definition of WOTUS to conform with Supreme Court precedent, congressional intent, and basic tenets of cooperative federalism.

I. Manufacturers’ Interest in the Proposed Rule

Manufacturers in the U.S. have an immediate and significant interest in the proposed rule. Manufacturing is a key component of the nation’s economy and directly impacts critical areas such as transportation, construction, energy, and technology.

For decades, manufacturers have dealt with uncertainty around the definition of WOTUS, the threshold term used in the CWA that establishes the Act’s geographic reach. Jurisdictional determinations for waters under the CWA impact manufacturers’ ability to pursue projects and create jobs. For instance, CWA sections 303, 401, 402, and 404 all reference the Act’s definition of navigable waters as “the waters of the United States, including the territorial seas.”

Whether it is constructing or expanding facilities, constructing infrastructure projects, or building new energy generation, NAM members have therefore been subject to increased red tape and uncertainty as the WOTUS definition has shifted over the years. This is especially true in the instances where the definition has been changed^{6,7} to reflect a broader interpretation of federal jurisdiction than Congress intended. With respect to the proposed rule, frequent changes to the definition of WOTUS and litigation that has arisen from these changes pose perhaps the biggest issue to manufacturers in the U.S.

The decades-long debate and litigation surrounding the definition of WOTUS have created significant uncertainty for businesses. This uncertainty has posed a number of challenges for

³ 33 U.S.C. Sec. 1251(a)

⁴ 33 U.S.C. Sec. 1251(b)

⁵ *Sackett et ux v. Environmental Protection Agency et al.* No. 21–454 Slip op. (25 May 2023) available at https://www.supremecourt.gov/opinions/22pdf/21-454_4g15.pdf

⁶ *Clean Water Rule: Definition of “Waters of the United States”* 80 Fed. Reg. 37054, (29 June 2015). RIN 2040-AF30, available at <https://www.federalregister.gov/documents/2015/06/29/2015-13435/clean-water-rule-definition-of-waters-of-the-united-states>

⁷ Revised Definition of “Waters of the United States”; Conforming, 88 Fed. Reg. 61964 (8 September 2023). RIN 2040-AG32, available at <https://www.federalregister.gov/documents/2023/09/08/2023-18929/revised-definition-of-waters-of-the-united-states-conforming>

manufacturers in the project and permit space. Many manufacturing facilities and projects that use manufactured goods have some connection to water features, meaning frequent and erroneous interpretive changes have made it difficult for manufacturers to effectively plan, invest, and create jobs. Whether it is constructing a manufacturing facility, building a pipeline or transmission line, expanding a highway, producing critical minerals, or myriad other manufacturing activities, WOTUS uncertainty has real world consequences. Without a durable definition, manufacturers run the risk of investing and constructing facilities under one regime, only to see regulatory and litigation risks abruptly change under a new definition.

For example, in the arid west many streams and arroyos are ephemeral and would not be classified as WOTUS under *Sackett* and the proposed definition—but they have been deemed jurisdictional under previous rulemakings. Conversely, in wetter areas in the eastern U.S., the jurisdiction over wetlands has swung wildly over the years. In either case, uncertainty leads to stalled manufacturing investment and risks that a definitional change or inconsistent application of a regulation could lead to long-term legal risk for a manufacturer acting in the best possible faith to comply with the regulation.

Given the importance of this issue for manufacturers' ability to invest and grow in the United States, the NAM has led litigation challenging past rules that overstepped congressional intent of the scope of federal jurisdiction of WOTUS.^{8,9} As such, along with the reasons listed above, there is an additional interest for the NAM and our members in seeing an appropriately scoped and durable definition enumerated in the Code of Federal Regulations.

II. Current Definition and Supreme Court Precedent

As noted above, the history of the definition of WOTUS is a long and contentious one, with the definition and its jurisdictional scope swinging back and forth multiple times since 2006 due to Supreme Court cases and the interpretations of different administrations.

Most recently, the Biden Administration in January 2023 promulgated a final rule titled "Revised Definition of 'Waters of the United States,'"¹⁰ which updated and expanded the definition of WOTUS and the attendant federal jurisdiction. Later that year, in response to the Supreme Court's decision in *Sackett*, the Agencies issued a final conforming rule¹¹ (now referred to by the Agencies as the "Amended 2023 Rule") to ostensibly bring the prior final rule into compliance with the *Sackett* ruling. The Supreme Court in *Sackett* held that "waters" as defined by the CWA (33 U.S.C 1362(7)) "refers only to 'geographic[al] features that are described in ordinary parlance as 'streams, oceans, rivers, and lakes' " and to adjacent wetlands that are "indistinguishable" from those bodies of water due to a continuous surface connection[.]" and that "[t]o assert jurisdiction over an adjacent wetland under the CWA, a party must establish 'first, that the adjacent [body of water constitutes] . . . 'water[s] of the United States'

⁸ National Association of Manufacturers v. U.S. Department of Defense et al., No. 16-299 (Oct. 11, 2017) (Oral Argument Transcript) *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-299_3eah.pdf

⁹ National Association of Manufacturers v. U.S. Department of Defense et al., No. 16-299 Slip op. (Oct. 11, 2017) *available at* https://www.epa.gov/sites/default/files/2018-01/documents/16-299_national_assn._of_mfrs._v._department_of_defense_01222018.pdf

¹⁰ Revised Definition of "Waters of the United States" 88 Fed. Reg. 3004, (18 January 2023). RIN 2040-AG19; *available at* <https://www.federalregister.gov/documents/2023/01/18/2022-28595/revised-definition-of-waters-of-the-united-states>

¹¹ *Revised Definition of "Waters of the United States"; Conforming* 88 Fed. Reg. 61964 (8 September 2023). RIN 2040-AG32; *available at* <https://www.federalregister.gov/documents/2023/09/08/2023-18929/revised-definition-of-waters-of-the-united-states-conforming>

(i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”¹²

However, the Agencies’ compliance with *Sackett* was incomplete, most notably as it bypassed the public comment process. The NAM believes the Amended 2023 Rule was also deficient in that while it removed the invalidated “significant nexus” terminology, the remaining definitions of “relatively permanent” and “continuous surface connection” were left vague and open to a wide range of interpretations, contrary to *Sackett*’s precedent.

The Trump Administration took action on March 12, 2025 by issuing “Continuous Surface Connection” Guidance, which provided implementation guidance for determining a continuous surface connection such that “unless a wetland has a continuous surface connection – directly abutting a requisite jurisdictional water – it cannot be determined to be jurisdictional as an adjacent wetland.”¹³

The NAM commends the Agencies’ work in this Guidance to provide manufacturers a clearer understanding of the limits of federal jurisdiction and is appreciative of the opportunity to offer the following analysis and recommendations on specific provisions of the current proposed rule.

III. Modernizing and Clarifying Key Definitions and Concepts

The NAM supports the Agencies’ efforts to clarify key concepts in the rule and provide bright line definitions. To further refine the proposal and adhere closely to *Sackett*, below we recommend some revisions to the proposed language.

A. Relatively Permanent Waters

The NAM supports the direction the Agencies have taken with the proposed updated definition of “relatively permanent waters.”¹⁴ The NAM agrees that waters that flow or stand only in direct response to discrete precipitation events (i.e., “ephemeral waters”) are not jurisdictional under the CWA.

The NAM is concerned, however, that the proposed rule involves complex definitions that are, in many cases, circular. For example, the proposed rule would extend jurisdiction to “tributaries [...] that are relatively permanent, standing or continuously flowing bodies of water.” “Tributary” is then defined as a “body of water with relatively permanent flow, and a bed and banks [...]” “Relatively permanent”, in turn, is defined as “standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season.” Three separate and overlapping provisions are not needed to capture the principle stated in *Sackett* that the statutory term “waters” encompasses only “relatively permanent, standing or continuously flowing bodies of water ‘forming geographic[al] features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’” 143 S. Ct. at 1336. The

¹² *Sackett et ux v. Environmental Protection Agency et al.* No. 21–454 Slip op. (25 May 2023) available at https://www.supremecourt.gov/opinions/22pdf/21-454_4g15.pdf

¹³ *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* (12 March 2025). Available at <https://www.epa.gov/system/files/documents/2025-03/2025cscguidance.pdf>

¹⁴ Proposed Rule, at 52517.

NAM cautions against employing concepts that are not found in the text of the Act or *Sackett*, such as “the wet season.” Instead, the NAM recommends adherence to *Sackett*’s direction that relatively permanent waters are jurisdictional only to the extent they form geographical features described in ordinary parlance as streams, oceans, rivers, and lakes. Accordingly, to streamline these definitions the rule should specifically redefine 33 CFR 328.3(a)(3) and 40 CFR 120.2(a)(3) waters as: “Relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes connected to waters identified in (a)(1);”.

This approach would provide manufacturers with certainty and durability, improve permitting efficiency through plain language implementing the key directives of *Sackett*, and ensure regulatory clarity that is currently lacking.

i. Wet Season

In the wake of the *Sackett* decision, the NAM called for a “bright line test” in defining and determining what constitutes “relatively permanent waters.” The NAM supports and appreciates the Agencies’ proposal to enshrine that jurisdictional waters must be relatively permanent, standing, or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes.

Manufacturers encourage the Agencies to remove the concept of “wet season” in a final rule. Specifically, manufacturing operations in the arid west face a different set of hydrological realities than those on the East Coast or in the Midwest. The “wet season” in the arid west typically consists of snowpack accumulation in mountain ranges that melts months after the various precipitation events that lead to snowpack accumulation; while in Florida, rainfall occurs year-round, with heavier precipitation in summer months. Within the wide range of hydrological circumstances across the country, there is typically no bright geographic line separating one area’s “wet season” from another’s, and it may shift from year to year. Consequently, the term “wet season” may represent a moving target and may not impose any meaningful limitations within a single state, much less nationwide.

However, if the Agencies decide to retain the “wet season” concept and definition, the NAM recommends the following actions to provide the certainty and clarity manufacturers need. In such a situation, the NAM would recommend that the Agencies consult with the Bureau of Reclamation, the National Oceanic and Atmospheric Agency (NOAA), and the Natural Resource Conservation Service (NRCS) for additional tools and resources for monitoring and measuring snowpack in the west so as to more effectively map that geography’s distinct “wet season” to the subsequent flow of regional waters. Such interagency consultation would help provide manufacturers with more effective and consistent jurisdictional determinations and implementation of the proposed definition across the nation’s diverse hydrology and geography.

For instance, the effectiveness of the suggested Antecedent Precipitation Tool (APT) WebWIMP tool¹⁵ is based on a water-budget model of soil moisture, precipitation, and

¹⁵ Regarding the proposed use of the APT WebWIMP for wet season definitions, should the Agencies retain that term in a final rule, the Agencies should integrate the APT WebWIMP into a more user-friendly website interface to allow

evapotranspiration and therefore would not be effective in determining wet season in regions where hydrology is dominated instead by snowpack. The NOAA National Snow Analyses, NOAA National Water Model, and NRCS SNOwpackTELelemetryNetwork are programs that could be enhanced to help define the wet season. If “wet season” is kept in a final rule, the Agencies should work with these agencies and their programs to issue guidance on which regions should use wet season based on winter precipitation (snow accumulation with spring melt) instead of rainfall and soil-water balance. Regional guidance publications by the Corps’ Engineer Research and Development Center (ERDC) may be an effective way to establish these methods.

The NAM believes the Agencies have shown well-reasoned and good faith efforts to implement the clear intent and plain meaning of the *Sackett* decision within the realities of a large nation with complex and highly varied hydrological and geographical conditions. Manufacturers urge the proposed refinements to further ensure adherence to *Sackett*.

ii. Tributary

The NAM supports the Agencies’ efforts to confirm that WOTUS jurisdiction extends to “a body of water with relatively permanent flow ... that connects to a downstream traditional navigable water,”¹⁶ provided the body of water is the type of geographical feature described in ordinary parlance as a stream, ocean, river or lake (not, e.g., “storm drains, roadside ditches [and] ripples of sand in the desert”)¹⁷.

The proposed definition of tributary, however, is not necessary to implement the clear language of *Sackett*. “Tributary” is not a term used by Congress in the Act or the Supreme Court in *Sackett* to describe waters of the United States, nor is it a type of geographical feature used in “ordinary parlance” to describe such waters (in contrast to rivers, streams, lakes and oceans). Instead, “tributary” is a vast concept long relied on by the agencies to describe virtually any upstream surface feature that contributes water downstream. While the NAM appreciates the Agencies’ effort to identify limiting principles, the proposed definition may create more confusion, including with its reliance on some ambiguous terms such as “debris pile” and “channelized non-jurisdictional surface water feature.”

Providing further examples or more clearly defining these ambiguous terms would enhance regulatory clarity and permit efficiency. Many manufacturing facilities utilize drainage features that could resemble the examples provided, but without additional clarity it would be difficult to determine when such features break the connection necessary to establish jurisdiction with a tributary. More illustrative examples and clearer

more direct and automated determination of wet/dry season. APT is limited as it calculates based on recorded weather station measurements for certain calendar dates with a 2-day lag time, and it would be helpful to be able to determine predicted annual wet seasons for locations in advance so that field visits can be planned during the normal wet season to collect direct observations of flow or standing water. This might be accomplished by embedding annually estimated WebWIMP wet/dry season dates to the output of the APT, or by enhancing the functionality of the National Water Prediction Service Precipitation tools. Alternatively, U.S. Drought Monitor or National Integrated Drought Information System are tools that could be enhanced to report wet/dry season dates.

¹⁶ 90 Fed. Reg. at 52,521.

¹⁷ *Rapanos V. United States* 547 U. S. ____ (2006) (J. Scalia, plurality opinion) *available at* https://www.epa.gov/sites/default/files/2016-04/documents/rapanos_decision_2006.pdf

definitions would help manufacturers accurately assess jurisdiction, reduce inconsistent interpretation, and support cooperative federalism in the CWA as it was envisioned by Congress and further affirmed by the Supreme Court.

B. Continuous Surface Connection

With respect to “continuous surface connection,” manufacturers similarly support an updated definition that hews to clear physical realities and what the law, as interpreted by *Sackett*, intended. Specifically, manufacturers support the Agencies implementing the new bright-line test espoused in *Sackett*.¹⁸

The NAM agrees that, consistent with *Sackett*, there must be a two-prong approach that recognizes both the continuous surface connection requirement and the requirement for indistinguishability between the wetland and the jurisdictional water. As such, the NAM recommends that the Agencies revise the “continuous surface connection” definitions to both (1) require an abutment of a jurisdictional water, and (2) replace the proposed language regarding the “wet season”¹⁹ with language requiring the wetland be “indistinguishable from the jurisdictional water.” This recommendation is supported by and consistent with a recent U.S. District Court for the Southern District of Florida decision implementing *Sackett*, *United States of America v. Benjamin K. Sharfi* (*Sharfi*),²⁰ which held that the indistinguishable requirement is a critical element of the *Sackett* decision’s test for adjacent wetlands. The NAM believes this refinement will support the Agencies’ goal to promulgate a “clearly understandable and transparent approach”²¹ that will streamline jurisdictional determinations and permitting decisions, providing greater certainty and durability to manufacturers.

While the NAM appreciates the Agencies’ suggested alternative approaches, the NAM ultimately supports instead the definition as proposed inclusive of the suggested changes above and agrees that the implementation challenges posed by requiring the “perennial presence of surface water” are prohibitive. Similarly, the NAM does not support the alternative approach that would define “continuous surface connection” as “simply abutting, i.e. touching.”²² This alternative approach would apply an overbroad definition that does not account for the key finding in *Sackett* that “the CWA extends to only those wetlands that are ‘as a practical matter indistinguishable from waters of the United States.’”²³ The plain meaning of “indistinguishable” requires a higher threshold than simple geographic abutment.

Finally, similar to above comments regarding the proposed new definition of “relatively permanent,” the NAM reiterates the recommendation to remove the term “wet season” from the rule, but should it be retained again suggests that the Agencies engage in greater interagency coordination so as to not harm manufacturers.

¹⁸ *The Navigable Waters Protection Rule: Definition of “Waters of the United States”* 85 Fed. Reg. 22250 (21 April 2020): This definition included “adjacent wetlands and jurisdictional lakes, ponds, and impoundments include[ing] those that abutted traditional navigable waters, the territorial seas, tributaries, or lakes, ponds, or jurisdictional impoundments; those with certain surface water connections; and those physically separated from a jurisdictional water only by a natural berm, bank, dune, or similar natural feature.”

¹⁹ As described in the proposed rule, at 52527

²⁰ No. 2:21 cv 14205 CIV MARRA/MAYNARD, (S.D. Fla. Feb. 1, 2022)

²¹ Proposed rule, at 52528.

²² Proposed rule, at 52530.

²³ Proposed rule, at 52527; *Sackett v. Environmental Protection Agency*, 598 U.S. ____ (2023)

IV. Exclusions Impacting Manufacturers

Manufacturers appreciate the Agencies' efforts to enhance clarity and transparency by proposing definitions of exclusions included in 40 CFR 120.2(b) and 33 CFR 328.3(b). The NAM agrees that including definitions in the regulatory text will ensure greater predictability for regulated entities, States, and the Agencies.

A. Waste Treatment Systems

The NAM supports the Agencies' clarification of the "waste treatment systems" exclusion and believe that discharges into waste treatment systems should remain outside of federal jurisdiction. Providing a definition of "waste treatment systems" within the regulatory text delivers greater clarity and consistency for the regulated community and states implementing their own programs.

To reflect modern water management practices and further advance cooperative federalism, the NAM recommends the exclusion and definition be broadened to explicitly include discharges into all engineered systems for water collection, conveyance, treatment, or reuse — including wastewater, stormwater, reuse, and reclamation facilities. Explicitly recognizing these systems within the exclusion would ensure regulated and engineered treatment features are not subject to federal jurisdiction and would promote consistent implementation across the regions.

i. Stormwater

The previous 2020 Navigable Waters Protection Rule included exclusions for stormwater control features constructed in uplands to convey, treat, infiltrate, or store stormwater runoff. However, the proposed rule does not include this exception and indicates that stormwater discharges are still deemed ineligible for the waste treatment system exclusion based on the 2024 Memorandum NWS–2023–923. Therefore, regulation of stormwater facilities will continue to be evaluated on a case-by-case basis. However, constructed stormwater features such as channels and basins/ponds can appear to be natural features over time and meet the criteria of Ordinary High Water Marks and wetland conditions. Given this fact, the NAM recommends including a specific exception for stormwater to clarify that stormwater facilities constructed in uplands are not WOTUS.

Alternatively, if the Agencies choose not to include such a specific exception, the NAM requests that the Agencies reevaluate the policy of not allowing stormwater to be included in the wastewater exception as discussed in the 2024 Memorandum NWS–2023–923.

B. Ditches

The NAM supports the Agencies' efforts to clarify the exclusion for "ditches" and agrees that exclusion of certain ditches aligns with the CWA statutory language and the *Rapanos* plurality opinion²⁴, as confirmed in *Sackett*. In particular, manufacturers

²⁴ *Rapanos v. United States* 547 U. S. ____ (2006) (J. Scalia, plurality opinion) *available at* https://www.epa.gov/sites/default/files/2016-04/documents/rapanos_decision_2006.pdf

strongly support maintaining the longstanding exclusion for ditches constructed or excavated entirely in dry land, even where such ditches have relatively permanent flow.²⁵ Additionally, more can be done to build on and improve the success of this longstanding exclusion.

A clear and workable ditch exclusion is essential for manufacturing facilities, which rely on engineered drainage features for water, stormwater management, and permitted discharges. However, when the proposed definitions of excluded “ditches” and “tributary” are read together, the proposal introduces ambiguities that make it difficult to determine when, and to what extent, a ditch is jurisdictional. The proposed language below addresses this concern.

To clarify the ditches exclusion and ensure consistency with *Sackett*, the proposed rule should adopt the tests used in *Sharfi*, in which the U.S. District Court for the Southern District of Florida held that the man-made ditches and channels at issue were not “waters of the United States” under *Sackett* because: (1) they were “not geographical features ordinarily described as streams, oceans, rivers, or lakes;” and (2) they lacked relative permanence as defined by the U.S. Supreme Court in *Sackett* and *Rapanos*. The District Court found that the ditches, which “are, at most, ‘intermittent’ or ‘ephemeral’ ditches or channels with seasonal flow” do not meet the *Sackett* standard of “relatively permanent, standing or continuously flowing bodies of water” to qualify as waters of the United States. The proposed rule should mirror this analysis, which is clear and faithfully implements *Sackett*.

The proposed rule expressly excludes ditches only where they are “constructed or excavated entirely in dry land.” That exclusion, while supported historically by the NAM, can be improved because as currently formulated it leaves many ditches open to jurisdiction because they were created by draining wetlands or in non-upland areas. The NAM therefore recommends the Agencies incorporate exclusion language under which the jurisdictional analysis would focus on the current conditions. Under such a test, manmade ditches of any kind would not be jurisdictional unless they are: (1) features ordinarily described as streams, oceans, rivers, or lakes; and (2) relatively permanent, standing, or continuously flowing bodies of water, consistent with *Sackett* and *Sharfi*.

In addition, the proposed definition of “ditch” to mean “a constructed or excavated channel used to convey water,” does not provide sufficient clarity. In practice, land used for agricultural purposes and manufacturing sites can have expansive ditch systems used to drain or direct rainfall/stormwater. The *Rapanos* plurality noted that applying the term “waters of the United States” to “storm sewers and culverts, ... drain tiles [and] manmade drainage ditches” has “stretched the term ... beyond parody.”²⁶ Yet the current regulatory exclusion does not apply if a ditch intersects a WOTUS at any point, even a single point. The proposed rule is susceptible to the same interpretation as written, rendering the exclusion of limited value. Specifically, the definition does not protect against the unreasonable outcome in which a single point of contact effectively converts the entire ditch system into WOTUS, notwithstanding the intent to exclude.

²⁵ 90 Fed. Reg. at 52,539.

²⁶ *Rapanos*, 547 U.S. at 734.

V. Ensuring Consistency Across CWA Programs

As a general matter, the NAM notes that the Agencies eliminating upland, manmade culverts and ditches from jurisdiction for the CWA Section 402 program (the National Pollutant Discharge Elimination System program, or NPDES) may create some disconnects with the CWA Section 404 program (regulating the discharge of dredged or fill material into WOTUS).

The NAM supports removing those features both from the Section 402 program and the Section 404 program, and notes that this has been occurring on a case-by-case basis over the years. Resolving this issue would provide durability and certainty currently lacking for manufacturers seeking permits for new or expanded facilities.

However, removing those same features from the NPDES program's jurisdiction creates potential uncertainty insofar as it may inadvertently, and incorrectly, allow states to step in and fill that gap to make determinations that are inconsistent under CWA Sections 402 and 404. The NAM suggests that the Agencies engage in additional interagency consultation to ensure this is not an unintended consequence of the rulemaking and provide clearer examples and definitions of these terms.

The NAM appreciates the Agencies' consideration of these comments and the Administration's ongoing engagement with manufacturers throughout process of proposing this updated WOTUS definition. Manufacturers strongly support a return to certainty and predictability that reflects the appropriate balance between federal and state authorities, as Congress intended and the Supreme Court has reaffirmed.

Sincerely,

A handwritten signature in black ink, appearing to read "Christopher Phalen", written in a cursive style.

Christopher Phalen
Vice President, Domestic Policy