



Public Comments Submitted to the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (together, the agencies) re

Updated Definition of “Waters of the United States”

Docket ID No. EPA-HQ-OW-2025-0322

Submitted by the Committee for a Constructive Tomorrow (CFACT)

October 9, 2026

The Committee for a Constructive Tomorrow (CFACT), a non-profit public-policy organization headquartered in Washington, D.C., is pleased to respond to the request for public comments on the agencies’ Supplemental Notice of Proposed Rulemaking (supplemental) to update the federal government’s definition of “Waters of the United States” (WOTUS), pursuant to the issuance of a Final Rule.

Bringing clarity to what constitutes WOTUS, subject to regulation by EPA and the Corps under the Clean Water Act (CWA) was necessitated by the U.S. Supreme Court’s 2023 decision in *Sackett v. EPA*, which limited the scope of the waters covered by the CWA.

There is much in the supplemental that holds the promise of delivering that clarity. For example, the supplemental includes definitions that are consistent with the *Sackett* decision, thereby ensuring that the agencies will issue a Final Rule that will likely survive judicial review. Disputes over what constitutes WOTUS have triggered a torrent of litigation ever since the CWA was enacted in 1972. This has placed an undue burden on the nation’s farmers and ranchers who have had to cope with the statute’s chronic unpredictability.

The “wet season” concept contained in the November 20, 2025 proposed rule would likely have faced challenges in the courts. In its *Sackett* ruling, the Supreme Court explained that waters covered under the CWA must be “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.’” However, in attempting to define “relatively permanent,” the proposed rule said it meant “standing or continuously flowing bodies of surface water that are

standing or continuously flow year-round or at least during the wet season” (emphasis added).¹ But the rule never defined “wet season,” an omission certain to open the flood gates to the kind of litigation that has plagued the WOTUS provisions of the CWA for decades. The agencies are to be commended for moving away from the “wet-season” concept in the supplemental.

Likewise, the supplemental’s emphasis that “continuous surface connection” should mean continuous surface *water* connection is key in aligning with the Supreme Court’s *Sackett* language pertaining to “where water ends and wetland begins.”

Two recent WOTUS-related regulatory actions, both initiated by the Army Corps of Engineers *after* the Supreme Court’s *Sackett* decision, underscore the importance of additional clarity in developing a WOTUS final rule.

In early 2025, the Corps declared an Idaho couple’s 4.7-acre rural property a federally-regulated wetland, claiming a small, sometimes soggy depression on their otherwise flat, dry land is “part of” a “navigable” waterway and thus subject to regulation under the CWA. Yet the couple’s property has no “continuous surface water connection” to a navigable waterway. According to the Corps’ argument, parts of the couple’s property are somehow connected to an alleged wetland (nothing more than a swale) across a 35-foot-wide county gravel road, even though the road is elevated above both pieces of land and contains no culverts through which water could pass. The swale touches an unnamed stream, which is connected to a named stream, which is then connected to a navigable water, Lake Pend Oreille. The lake is two miles from the couple’s land, with no continuous surface water connection between the two.²

After the Corps’ actions in Idaho were disclosed, officials at the agency in late 2025 reversed course and dropped efforts to impose CWA jurisdiction on the property. However, on April 8, 2026, the Corps withdrew (and thus effectively denied) a CWA permit request by a Utah developer to create 265 single-family homesites on a 142-acre parcel of land north of Salt Lake City. The parcel, known as the Old Farm Subdivision, is located nine miles from the nearest navigable water, the Great Salt Lake, and has no “continuous surface connection” to that lake. Separating the Old Farm parcel from the Great Salt Lake is an upland area, the Union Pacific Railroad, Interstate 15, and the Willard Bay reservoir (not a navigable waterway). Denying the

¹ Updated Definition of “Waters of the United States,” Environmental Protection Agency, November 20, 2025 <https://www.regulations.gov/document/EPA-HQ-OW-2025-0322-0001>

² Bonner Russell Cohen, “Even under Trump, Feds Charge Idaho Couple with Wetlands Violation,” *Idaho Statesman*, August 19, 2025 <https://www.idahostatesman.com/opinion/readers-opinion/article311747770.html>

CWA permit to the residential developer in Utah is in no way compatible with the *Sackett* decision.³

Indeed, the Corps' recent regulatory actions in Idaho and Utah – both in defiance with the *Sackett* decision -- serve as compelling arguments for updating the definition of WOTUS as is being proposed by the agencies.

Thank you very much.

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³ Bonner Russell Cohen, "Feds Defy Supreme Court Ban on Labeling Every Puddle a Protected Wetland," *The Federalist*, October 5, 2026 [https://thefederalist.com/2026/10/05/feds-defy-supreme-court-ban-on-labeling-every-
puddle-a-protected-wetland/](https://thefederalist.com/2026/10/05/feds-defy-supreme-court-ban-on-labeling-every-puddle-a-protected-wetland/)