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U.S. Environmental Protection Agency  
EPA Docket Center, Water Docket  
Mail Code 28221T  
1200 Pennsylvania Avenue, N.W  
Washington, D.C. 20460

**Submitted via regulations.gov**

**Re: WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations, 90 Fed. Reg. 13,428 (Mar. 24, 2025), Docket No. EPA-HQ-OW-2025-0093**

To Whom it May Concern:

GPA Midstream Association (“GPA Midstream”) and the Interstate Natural Gas Association of America (“INGAA”) appreciate the opportunity to provide recommendations to the U.S. Environmental Protection Agency (“EPA”) and the U.S. Army Corps of Engineers (“Corps”) (collectively, “the Agencies”) on implementing the definition of “Waters of the United States,” or “WOTUS,” in light of the Supreme Court’s decision in *Sackett v. EPA*, 143 S. Ct. 1322 (2023).

GPA Midstream has served the U.S. energy industry since 1921 and represents more than 50 domestic corporate members that directly employ 57,000 employees engaged in the gathering, transporting, processing, treating, storage, and marketing of natural gas, natural gas liquids, crude oil and refined products, commonly referred to as “midstream activities.” The work of our members indirectly creates or impacts an additional 400,000 jobs across the U.S. economy. In 2023, GPA Midstream members had an economic impact of \$206.2 billion through operating more than 506,000 miles of gas gathering pipelines, gathering more than 91 billion cubic feet per day of natural gas, and operating over 365 natural gas processing facilities that delivered pipeline quality gas into markets across a majority of the U.S. interstate and intrastate pipeline systems.

INGAA represents the interstate natural gas pipeline industry operating in North America. INGAA’s members transport over 95 percent of the nation’s natural gas through a network of 200,000 miles of pipelines. INGAA represents a significant portion of the interstate natural gas transmission pipeline companies operating in the United States, as well as comparable companies in Canada and Mexico.

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Natural gas plays a prominent role in our nation's energy mix, and interstate natural gas pipelines are an integral part of the energy infrastructure. Natural gas currently constitutes about 38% of the total U.S. primary energy production and about 43% of U.S. electricity generation.<sup>1</sup> Natural gas is projected to supply 60% of the nation's energy demand.<sup>2</sup> Data centers' growing demand for electricity will require additional natural gas to support generation estimated between 3 billion cubic feet per day (bcf/d) and 6 bcf/d by 2030.<sup>3</sup> If this growth in consumption is to occur, large amounts of infrastructure, including pipeline capacity and storage capacity must be built in the United States.

## Summary

GPA Midstream's members are engaged in the gathering and processing of natural gas into merchantable pipeline gas to support upstream oil and gas production. Midstream companies must keep pace with oil and gas producers by quickly building gathering lines, processing plants, and compressor stations to process and transport pipeline-quality gas downstream. INGAA's members operate infrastructure to support the transportation of natural gas between states through the construction and maintenance of pipelines and other related infrastructure, including compressor stations. Despite the need for speed and flexibility, obtaining Clean Water Act permits – or even just negotiating whether a permit is required – can frustrate the midstream industry's ability to keep pace. Delays through slow permitting timeframes, changes to engineering and design or the location of midstream assets, and regulatory uncertainty can add unnecessary costs to project development and even lead to cancelled infrastructure projects.

As such, we cannot overstate the importance of the Agencies' definition of "Waters of the United States" as it defines the extent of regulation under several Clean Water Act programs. These include (i) state water quality standards under Section 303(a); (ii) total maximum daily loads for impaired waters under Section 303(d); (iii) National Pollutant Discharge Elimination System permits, including individual, general, and storm water permits, under Section 402; (iv) oil spill reporting requirements under Section 311; and (v) dredge and fill permits under Section 404. Thus, where the definition of "waters of the United States" lacks clarity, each of these programs lacks clarity. Similarly, where ambiguities allow for inconsistent or expansive claims of federal jurisdiction, each of these programs are subject to inconsistencies or improper expansions in scope. Therefore, GPA Midstream and INGAA greatly appreciate the Agencies' desire to provide "clear and transparent direction regarding the definition of" Waters of the United States that "prioritize[s] practical implementation approaches." 90 Fed. Reg. at 13,429-30. The general goal of "more effective and efficient jurisdictional determinations" and "permitting actions," *id.*, will be welcome

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<sup>1</sup><https://www.eia.gov/energyexplained/us-energy-facts/data-and-statistics.php>.

<sup>2</sup><https://www.goldmansachs.com/pdfs/insights/pages/generational-growth-ai-data-centers-and-the-coming-us-power-surge/report.pdf>.

<sup>3</sup><https://www.spglobal.com/ratings/en/research/articles/241022-data-centers-more-gas-will-be-needed-to-feed-u-s-growth-13290987>.

in a regulatory field that has too often produced uncertainty due to subjective, unpredictable, and inconsistent views of federal jurisdiction.

GPA Midstream and INGAA recommend the following guiding principles in defining “Waters of the United States”:

- The Agencies should follow the *Rapanos* plurality opinion in defining “relatively permanent” waters due to its common sense and clear approach.
- The Agencies should re-instate the approach to a “continuous surface connection” found in the Navigable Waters Protection Rule.
- The Agencies should also follow the Navigable Waters Protection Rule with respect to defining jurisdictional ditches.

## **Recommendations**

### **1. The Agencies should bring clarity and certainty to the definition of “relatively permanent” waters, founded on the plurality opinion in *Rapanos*.**

GPA Midstream and INGAA understand the importance of accurately defining what are “relatively permanent” waters, as the Supreme Court has made clear that phrase is one of the defining limitations of “Waters of the United States.” *See Rapanos v. United States*, 547 U.S. 715, 734 (2006) (“the Act’s use of the traditional phrase ‘navigable waters’ (the defined term) further confirms that it confers jurisdiction only over relatively *permanent* bodies of water” and not waters with “ephemeral flow”); *Sackett*, 143 S. Ct. 1322, 1336 (2023) (“we conclude that the *Rapanos* plurality was correct: the CWA’s use of ‘waters’ encompasses ‘only those 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.’” (quoting *Rapanos*, 547 U.S. at 739) (alteration in original)).

As noted in the *Rapanos* plurality opinion, relative permanence is a key characteristic of the traditionally navigable waters that Congress intended to regulate. GPA Midstream and INGAA believe that the *Rapanos* plurality adopted a workable and common sense definition of “relatively permanent”: “continuously present, fixed bodies of water” with “a continuous flow of water in a permanent channel.” 547 U.S. at 733. These may include “streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought” and “seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months.” *Id.* at 732, n.5. Therefore, “relatively permanent” should generally have consistent, year-round flow.

What the definition should not involve is either the inclusion of ephemeral “waters” that merely convey runoff during or immediately after precipitation or the need for technical experts to assess the surrounding landscape and biota in order to render an opinion, such as in *United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011). There, neither the court nor the defendant were capable of

determining whether a channel was a “relatively permanent” jurisdictional tributary without expert reports discussing degrees of soil saturation, surface ponding during certain months, the “morphological conditions of the vegetation ... the presence and density of plant species adapted to saturated soil conditions,” and the presence of downstream culverts. *Id.* at 185 (internal quotations omitted). We believe that the characteristics of waters are rarely difficult to discern.

**2. The Agencies should reinstate the approach taken in the Navigable Waters Protection Rule to define a “continuous surface connection” and the features to which this phrase would apply.**

The necessity of the term “continuous surface connection,” and its application to wetlands, originates in *United States v. Riverside Bayview*, 474 U.S. 121 (1985). Although *Riverside Bayview* did not use the term itself, it examined when federal jurisdiction applies to wetlands, which would typically be excluded from the Clean Water Act.

In determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs – in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of “waters” is far from obvious.

*Id.* at 132; *see also id.* at 133 (rejecting the notion that Congress’ intended definition of “waters” could have included “wetlands”). Thus, the Court allowed Clean Water Act regulation of “adjacent wetlands” that “are inseparably bound up with ‘waters’ of the United States” due to “the inherent difficulties of defining precise bounds to regulable waters.” *Id.* at 134.

GPA Midstream and INGAA submit that the rule of *Riverside Bayview* is that wetlands are only subject to Clean Water Act jurisdiction where there are no clear means of separating a water from a wetland. Therefore, we support the approach used in the Navigable Waters Protection Rule where a continuous surface connection is required between a jurisdictional water and a wetland. Any physical separation between them, whether it be by a berm, flood gate, pump station, or any other feature, makes the wetland non-jurisdictional.<sup>4</sup> Where a person of ordinary prudence can see a

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<sup>4</sup> The Agencies have taken the correct approach to explaining a “continuous surface connection” in the recent joint EPA and Corps Guidance Document, 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 (March 12, 2025) (“March 2025 Guidance”): a wetland is only jurisdictional when it is adjacent to a jurisdictional water and there is a “continuous surface connection to a requisite covered water making it difficult to determine where the water ends and wetland begins.”

physical separation between a jurisdictional water and a wetland, *Riverside Bayview* would no longer permit Clean Water Act jurisdiction over the wetland.

GPA Midstream and INGAA understand that, in practical application, a jurisdictional water and wetland may lose an otherwise continuous surface connection during dry spells or droughts. We do not believe that an occasional drought should deprive a wetland of federal jurisdiction any more than unusual flood conditions can establish federal jurisdiction over otherwise dry land. GPA Midstream and INGAA believe that, as with “relatively permanent” waters, the Agencies and land owners or right-of-way owners should look to what are the common or ordinary conditions of potentially jurisdictional wetlands.

### **3. The Agencies should likewise reinstate the approach taken in the Navigable Waters Protection Rule to define “jurisdictional ditches.”**

GPA Midstream and INGAA support re-instating the Navigable Water Protection Rule’s definition of a “ditch” as a constructed or excavated channel used to convey water.

GPA Midstream and INGAA strongly support the Agencies’ goals of providing clarity as to when ditches are regulated under the Clean Water Act. Therefore, the Agencies should reject an approach that uses an unstructured multi-factor approach where the Agencies and the regulated community must consider variables such as flow regime, various physical features, whether the ditch lies in uplands or lowlands, different usages, biological indicators, and others. Many such issues will require landowners or right-of-way owners to employ consultants to understand whether the Clean Water Act applies to their property and many factors are both subjective and likely to be conflicting in any particular case. Further, past practices have shown that treating typically dry ditches as “tributaries” leads to absurd results that Congress never intended. *See Rapanos*, 547 U.S. at 725-29 (discussing several cases leading to such absurd results).

If ditches should be regulated as tributaries at all, then they should meet the ordinary dictionary definition of a “tributary:” “A river or stream flowing into a larger river or stream.” Webster’s II New Riverside University Dictionary (1984) at 1232. GPA Midstream and INGAA do not believe that any special rules should be applied to ditches. Instead, they should be treated similarly to natural tributaries, requiring a “relatively permanent” flow to a traditionally navigable water. This will provide regulatory clarity and eliminate the absurd results discussed in *Rapanos*, where the occasional trickle of water makes a roadside ditch a “water of the United States” because it can theoretically be connected to a navigable water dozens of miles away. *See Rapanos*, 547 U.S. at 726-27 (criticizing *Treacy v. Newdunn Assoc.*, 344 F.3d 407 (4th Cir. 2003), *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), and *Community Ass’n for Restoration of the Env’t v. Henry Bosma Dairy*, 305 F.3d 943 (9th Cir. 2002)).

Clear, common sense rules for when ditches are subject to federal jurisdiction avoids needless costs and delays for regulated parties and greatly reduces tying up regulators in lengthy and contentious jurisdictional determinations. Further, it significantly limits the prospect of subjecting

landowners or right-of-way owners to civil or criminal penalties for routine land management activities.

**4. The Corps should address the jurisdictional determination process in revised Special Emergency Procedures issued pursuant to Executive Order 14,156**

GPA Midstream and INGAA greatly appreciate that Corps districts have adopted Special Emergency Procedures for processing permits in accordance with Executive Order 14,156. We believe that the Special Emergency Procedures can help reduce a frustratingly slow and cumbersome process that can unnecessarily delay, or even cancel, vital energy infrastructure projects. Unfortunately, the Special Emergency Procedures omit any mention of Preliminary Jurisdictional Determinations or Approved Jurisdictional Determinations. The jurisdictional determination process can significantly delay the construction of vital energy infrastructure, even when the Corps district ultimately determines that it has no jurisdiction. We believe that adopting procedures for speeding the jurisdictional determination process fits well within the spirit of Executive Order 14,156 and other orders emphasizing the need for reducing regulatory barriers to the orderly development of energy infrastructure.

**Conclusion**

GPA Midstream and INGAA strongly support a simple and easy to understand definition of “waters of the United States.” We believe this not only accords with Congressional intent and Supreme Court precedent but avoids unnecessary delays, costs, and disputes in expanding and operating critical energy infrastructure. GPA Midstream and INGAA look forward to working with the Agencies in moving towards this goal.



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