

Congress of the United States

Washington, DC 20515

September 20, 2022

The Honorable Michael S. Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20004

The Honorable Michael L. Connor
Assistant Secretary of the Army for Civil Works
U.S. Department of the Army
108 Army Pentagon
Washington, DC 20310

Dear Administrator Regan and Assistant Secretary Connor:

We write to bring your attention to *West Virginia v. Environmental Protection Agency (EPA)*, a recent Supreme Court decision that clarified the limitations of certain agency action.¹ Although Article I, Section 1 of the United States Constitution vests “all legislative powers” in Congress,² the Biden Administration has largely relied on executive action to advance its radical agenda. For example, in his first year, President Biden issued more executive orders and approved more major rules than any recent president.³ We are concerned that such reliance on the administrative state undermines our system of government. Our Founders provided Congress with legislative authority to ensure lawmaking is done by elected officials, not unaccountable bureaucrats.⁴ Given this Administration’s track record, we are compelled to underscore the implications of *West Virginia v. EPA* and to remind you of the limitations on your authority.

In *West Virginia v. EPA*, the Court invoked the “major questions doctrine” to reject an attempt by the EPA to exceed its statutory authority.⁵ As the Court explained, “[p]recedent teaches that there are ‘extraordinary cases’ in which the ‘history and breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.’”⁶ Under this doctrine, an agency must point to “clear congressional authorization for the authority it claims.”⁷ However, in this instance, the EPA could not point to such authorization. Rather, the EPA “discover[ed] an unheralded power representing a transformative expansion of its regulatory authority in the vague language of a long-extant, but rarely used, statute designed as a gap filler.”⁸

¹ *West Virginia v. EPA*, 597 U.S. __ (2022).

² U.S. CONST. art. I, § 1.

³ See Federal Register, *Executive Orders* (accessed Aug. 2022), available at <https://www.federalregister.gov/presidential-documents/executive-orders>; see also Deep Dive, *How Biden Has Made Policy With Short-Term, Costly Rules: Charts*, BLOOMBERG LAW (May 2022), available at <https://news.bloomberglaw.com/environment-and-energy/how-biden-has-made-policy-with-short-term-costly-rules-charts>.

⁴ See U.S. CONST. art I; see also THE FEDERALIST NO. 51 (James Madison).

⁵ *West Virginia*, 597 U.S. at 20.

⁶ *Id.* at 17 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 129, 159-160).

⁷ *West Virginia*, 597 at 4.

⁸ *Id.* at 5.

Notably, such discovery “allowed [EPA] to adopt a regulatory program that Congress had conspicuously declined to enact itself.”⁹ As a result, the Supreme Court rejected the EPA’s attempt to so plainly exceed its statutory authority.

Unfortunately, EPA’s attempt to invent new authorities is not unusual for the Biden Administration. Recently, the Court struck down the Centers for Disease Control and Prevention’s attempt to impose an eviction moratorium¹⁰ and the Occupational Safety and Health Administration’s attempt to impose a vaccine or testing mandate.¹¹ Thankfully, in *West Virginia v. EPA*, the Court made clear that such reliance on the administrative state will no longer be tolerated. To be clear, “the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people’s representatives.”¹² In the United States, it is “the peculiar province of the legislature to prescribe general rules for the government of society.”¹³

One of the most serious instances where a presidential administration has sought to usurp the authority granted to it by Congress is in the attempts to revise the definition of “waters of the United States,” (WOTUS) under the *Clean Water Act*.¹⁴ For decades, rural communities, farmers, businesses, and industries who rely on clean water have dealt with legal and regulatory uncertainty, compounded with confusing and overreaching Federal regulations over what is considered a WOTUS and subject to Federal regulations and permitting.¹⁵ *West Virginia v. EPA* suggests that there is “reason to hesitate” with regard to this claim of authority given the two criteria outlined by Chief Justice Roberts: the history and breadth of the authority asserted and the economic and political significance of that assertion.¹⁶

Following enactment of the *Clean Water Act*, the United States Army Corps of Engineers (USACE or Corps) and EPA (collectively, the “Agencies”) promulgated WOTUS regulations in 1986 and 1988, which had been in effect.¹⁷ However, as time progressed, the Corps and EPA began interpreting WOTUS in an increasingly broad way. This culminated in two Supreme Court cases, one in 2001 and the other in 2006, where the Court interpreted the *Clean Water Act*’s scope more narrowly.¹⁸ However, in the latter of the two cases, *Rapanos v. United States*, the Supreme Court issued a fractured 4-1-4 plurality decision which led to a significant amount of confusion.¹⁹ In this case, Associate Justice Antonin Scalia issued a plurality opinion detailing a narrow, straightforward approach to determine if a body of water is considered a WOTUS. However, Associate Justice

⁹ *Id.* at 5.

¹⁰ *Alabama Assn. of Relators v. Department of Health and Human Servs.*, 594 U.S. ___ (2021).

¹¹ *National Federation of Independent Business v. Occupational Safety and Health Administration*, 595 U.S. ___ (2022).

¹² *West Virginia*, 597 at 56 (Gorsuch, J., concurring).

¹³ *Fletcher v. Peck*, 6 Cranch 87, 136 (1810).

¹⁴ *Federal Water Pollution Control Act (Clean Water Act)*, 33 U.S.C 1251 et seq.

¹⁵ STEPHEN P. MULLIGAN, CONG. RSCH. SERV., R44585, EVOLUTION OF THE MEANING OF “WATERS OF THE UNITED STATES” IN THE CLEAN WATER ACT 2 (2022), available at <https://crsreports.congress.gov/product/pdf/R/R44585>.

¹⁶ *West Virginia*, 597 at 17.

¹⁷ USACE, “Final Rule for Regulatory Programs of the Corps of Engineers,” 51 Fed. Reg. 41,206, (Nov. 13, 1986), available at https://archives.federalregister.gov/issue_slice/1986/11/13/41202-41260.pdf#page=5; EPA, “Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations,” 53 Fed. Reg. 20,764 (June 6, 1988), available at https://archives.federalregister.gov/issue_slice/1988/6/6/20736-20789.pdf#page=29.

¹⁸ See *Solid Waste Agency of Northern Cook County (SWANCC) v. Corps*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006).

¹⁹ *Rapanos*, 547 at 715.

Anthony Kennedy issued the concurring opinion that created what is known as the “significant nexus” test for defining WOTUS, which erroneously expands what waters may be considered WOTUS using vague and malleable terminology.²⁰

The Obama Administration then followed this flawed interpretation from Justice Kennedy in its 2015 WOTUS rule, which resulted in an unprecedented expansion of regulatory control by Federal agencies over what is considered WOTUS.²¹ This 2015 rule was entangled in litigation to the point that the United States Court of Appeals for the Sixth Circuit felt compelled to issue a stay on the rule’s enforcement while the Courts evaluated these cases.²² Eventually, the rule was replaced by the Navigable Water Protection Rule in 2020 that brought long awaited clarity on the extent of waters covered under the *Clean Water Act*.²³ The Biden Administration is now seeking to repeal and replace this rule in a two-part rulemaking, in what appears to be a return to the expansive, confusing, and dubious approach taken by the Obama Administration in 2015.²⁴ Simply put, the fight over the definition of WOTUS is characterized by opportunistic attempts by both the Obama and Biden Administrations to administratively expand the authority of both the EPA and the Corps.

This assertion of authority by the Corps and EPA is one of great economic and political significance. Earlier this year, the United States Small Business Administration’s (SBA’s) Office of Advocacy found that “the Agencies improperly certified the proposed rule under the Regulatory Flexibility Act (RFA) because it would likely have direct significant impacts on a substantial number of small entities.”²⁵ WOTUS and its subsequent rulemakings have had long standing political and economic significance.²⁶

As such, the United States Supreme Court decided to grant certiorari to *Michael Sackett, et ux., Petitioners v. EPA, et al. (Sackett)*.²⁷ In March, over 200 Members of the House of Representatives wrote to the Agencies urging a halt on all current rulemaking actions surrounding the WOTUS definition as the Supreme Court takes up this landmark case.²⁸ We reiterate that request, and now further stress that the Agencies must consider the decision of *West Virginia v. EPA* prior to issuing a rulemaking that would clearly surpass the Agencies’ congressional authority to define WOTUS.

²⁰ *Id.* at 780.

²¹ *Clean Water Rule: Definition of “Waters of the United States,”* 80 Fed. Reg. 37,054 (June 29, 2015).

²² *See Ohio v. Corps* (In re EPA & DOD Final Rule), 803 F.3d 804 (6th Cir. 2006) (granting petitioners motion for stay), available at <https://www.opn.ca6.uscourts.gov/opinions.pdf/15a0246p-06.pdf>.

²³ *The Navigable Waters Protection Rule: Definition of “Waters of the United States,”* 85 Fed. Reg. 22,250 (Apr. 21, 2020).

²⁴ Press Release, EPA, *Army Announce Intent to Revise Definition of WOTUS*, June 9, 2021, available at <https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus>; see, e.g., 33 CFR § 328.3; 33 U.S.C. § 1251 et seq.

²⁵ Letter from Major L. Clark, III, Dep. Chief Counsel, Off. of Advoc., SBA, to Hon. Michael S. Regan, Admin., EPA, and the Hon. Michael L. Connor, Assistant Sec’y of the Army for Civil Works, Dep’t of the Army (Feb. 7, 2022), available at <https://cdn.advocacy.sba.gov/wp-content/uploads/2022/02/08152154/Comment-Letter-Proposed-WOTUS-Definition-2022.pdf>.

²⁶ See e.g.: Letter from the U.S. Chamber of Commerce, to the Hon. Gina McCarthy, Admin., EPA, and the Hon. Jo- Ellen Darcy, Assistant Sec’y of the Army for Civil Works, Dep’t of the Army, (Nov. 12, 2014).

²⁷ *Sackett v. EPA*, Case No. 21-454.

²⁸ Letter from Ranking Member Sam Graves, the Hon. Dan Newhouse, et al., to Hon. Michael S. Regan, Admin., EPA, and the Hon. Michael L. Connor, Assistant Sec’y of the Army for Civil Works, Dep’t of the Army (Mar. 8, 2022).

As Ranking Members of several House Committees, including those overseeing your Agencies, we intend to exercise our robust investigative and legislative authority to not only forcefully reassert our Article I responsibilities, but to ensure the Biden Administration does not continue to exceed Congressional authorizations.

Accordingly, to assist in this effort, please answer the following no later than October 4, 2022, as it relates to your Agencies, please provide the following:

- a. A list of all pending rulemakings concerning the definition of WOTUS and the specific Congressional authority for each rulemaking.
- b. A list of all expected rulemakings concerning WOTUS and the specific Congressional authority for each rulemaking.

Thank you for your attention to this matter. If you have questions, please contact Ryan Hambleton, Republican Staff Director, Subcommittee on Water Resources and Environment, at (202) 225-9446.

Sincerely,



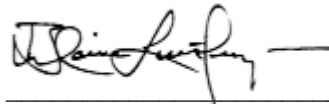
Sam Graves
Ranking Member
Committee on Transportation
and Infrastructure



David Rouzer
Ranking Member
Subcommittee on Water Resources
and Environment



Mike Bost
Ranking Member
Committee on Veterans' Affairs



Blaine Luetkemeyer
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Committee on Small Business



Garret Graves
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Select Committee on the Climate Crisis



Frank D. Lucas
Ranking Member
Committee on Science, Space, and
Technology



Tom Cole
Ranking Member
Committee on Rules



Bruce Westerman
Ranking Member
Committee on Natural Resources



James Comer
Ranking Member
Committee on Oversight and Reform



Glenn "GT" Thompson
Ranking Member
Committee on Agriculture



John Katko
Ranking Member
Committee on Homeland Security



Jason Smith
Ranking Member
Committee on the Budget



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Rodney Davis
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Committee on House Administration



Cathy McMorris Rodgers
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