



Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515

Sam Graves
Chairman

Rick Larsen
Ranking Member

Jack Ruddy, Staff Director

Katherine W. Dedrick, Democratic Staff Director

October 31, 2024

The Honorable Michael S. Regan
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, DC 20460

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

Dear Administrator Regan and Assistant Secretary Connor:

As Members of the House Transportation and Infrastructure Committee, we write regarding the United States Army Corps of Engineers (Corps) and United States Environmental Protection Agency (EPA) implementation of the definition of “waters of the United States” (WOTUS) under the *Clean Water Act (CWA)* following the United States Supreme Court’s decision in *Sackett v. EPA (Sackett)*.¹ This Administration is not adhering to *Sackett*, attempting to maintain broad Federal overreach, slow-walking implementation, failing to provide adequate direction to regulated communities, and delaying projects which require certainty under a *CWA* permitting regime.

In *Sackett*, the Supreme Court provided needed clarity on the definition of a WOTUS, reinforcing property owners’ rights, protecting the separation of powers by limiting the authority that Congress explicitly delegated in statute, and adhering to the Congressional intent of the *CWA*.² *Sackett* rightly upheld the cooperative Federalism framework of the *CWA*, as well as the authority of states to regulate non-Federal waters within their borders as they see fit.

Importantly, all nine Supreme Court justices agreed that use of the “significant nexus” test to determine WOTUS was illegitimate and represented major Federal overreach.³ Despite warnings from this Committee and others that the Administration should not issue a new WOTUS rule before the *Sackett* decision, your Agencies published a WOTUS rule in January 2023 based substantially on the “significant nexus” concept.⁴

¹ *Sackett v. EPA*, 598 U.S. 651 (2023) [Hereinafter *Sackett*].

² *Id.*; *CWA*, Pub. L. No. 92-500, 86 Stat. 816.

³ *Sackett*, *supra* note 1.

⁴ See e.g. Letter from Reps. Sam Graves, Dan Newhouse, David Rouzer, et. al. to EPA Admn. Michael S. Regan and Asst. Sec’y of the Army for Civil Works Michael L. Connor (Mar. 8, 2022); see also e.g. Brief of Sen. Shelley Moore Capito, Rep. Sam Graves, and a Coalition of 199 Members of Congress as *Amici Curiae* supporting Petitioners, *Sackett v. EPA*, No. 21-454 (Oct. 3, 2022); Revised definition of “Waters of the United States” Final Rule, 88 Fed Reg. 3004 (Jan. 18, 2023).

In addition to striking down the “significant nexus” test, the majority in *Sackett* articulated a clear, administrable definition of WOTUS; however, this Administration continues to flout the *Sackett* decision.⁵ The majority opinion held that “the CWA extends to only those ‘wetlands with a continuous surface connection to bodies that are “waters of the United States” in their own right,’ so that they are “indistinguishable” from those waters.”⁶ Thus, *Sackett* clearly distinguished that a WOTUS must have a continuous surface connection to a traditionally navigable water to be subject to *CWA* regulations.⁷ Subsequently, your Agencies published a revised WOTUS rule in September 2023 to conform with *Sackett*.⁸ However, the substance and implementation of this revised rule has been problematic.⁹

In June 2023, Chairmen Graves and Rouzer, along with the Ranking Members of the Senate Environment and Public Works Committee and its Subcommittee on Fisheries, Water, and Wildlife sent a letter to your Agencies, imploring them to “adhere to the majority opinion and not slow-walk compliance with the decision.”¹⁰ Additionally, on September 11, 2024, the Subcommittee on Water Resources and Environment of the Committee on Transportation and Infrastructure held a hearing entitled, “Waters of the United States Implementation Post-*Sackett* Decision: Experiences and Perspectives.”¹¹

This hearing provided an opportunity for Members to hear from regulated communities dependent on a clear and dependable WOTUS regulatory regime on whether your Agencies were meeting Congress’ expectations. At the hearing, witnesses provided concerning testimony about implementation of WOTUS since the decision in *Sackett*.¹² For example, Courtney Briggs, representing the American Farm Bureau Federation, testified that “[t]he Biden Administration’s interpretation and implementation of WOTUS lacks clarity and certainty for landowners and businesses and stretches the Federal Government’s jurisdictional reach beyond the limits of what is legal.”¹³ Unfortunately, the hearing illustrated that the Administration’s slow and unclear implementation of the post-*Sackett* rule is failing to comply with the Supreme Court’s decision. As a result, the regulated community is facing negative real world impacts throughout the country.

⁵ *Sackett*, *supra* note 1.

⁶ *Id.* at 27.

⁷ *Id.*

⁸ Revised Definition of “Waters of the United States”; Conforming, 88 Fed. Reg. 61964 (Sept. 8, 2023).

⁹ See Press Release, H. Comm. on Transp. and Infrastructure, *Hearing Highlights Ongoing Struggles of States, Farmers, Home Builders & Others with Administration’s WOTUS Rule*, (Sept. 11, 2024), available at <https://transportation.house.gov/news/documentsingle.aspx?DocumentID=407746>.

¹⁰ Letter from the Hon. Sam Graves, Chairman, H. Comm. on Transp. and Infrastructure, the Hon. David Rouzer, Chairman, Subcomm. on Water Resources and Environment of the H. Comm. on Transp. and Infrastructure, the Hon. Shelley Moore Capito, Ranking Member, S. Comm. on Environment and Public Works, and the Hon. Cynthia M. Lummis, Ranking Member, Subcomm. on Fisheries, Water, and Wildlife of the S. Comm. on Environment and Public Works, to EPA Admn. Michael S. Regan and Asst. Sec. of the Army for Civil Works Michael L. Connor (June 21, 2023).

¹¹ *Waters of the United States Implementation Post-Sackett Decision: Experiences and Perspectives Hearing Before the Subcomm. on Water Resources and Environ. of the H. Comm. on Transp. and Infrastructure*, 118th Cong., (Sept. 11, 2024) [Hereinafter September 2024 Hearing].

¹² See *id.*

¹³ *Id.*, Testimony of Courtney Briggs, Chairman, Waters Advocacy Coalition, on behalf of American Farm Bureau Federation.

Adherence to *Sackett*

Stakeholders have raised concerns that the amended, September 2023, WOTUS rule does not adequately address *Sackett*. For example, while the amended rule does remove references to the “significant nexus” test, it leaves several other concepts from the *Sackett* decision undefined.¹⁴ At the September Subcommittee hearing, Vince Messerly, a professional engineer and wetlands delineator testified that “the Agencies refused to define ‘continuous surface connection’ or ‘relatively permanent’”¹⁵ in the revised rule.

The EPA and Corps have not provided a workable WOTUS rule compliant with *Sackett*, which will have devastating consequences on states and proponents for energy, agriculture, manufacturing, homebuilding, and infrastructure projects. Emma Pokon, Commissioner of the Alaska Department of Environmental Conservation warned in her testimony that rather than developing an implementable standard consistent with *Sackett*, “the agencies appear intent on leveraging uncertainty and the risk of civil and criminal liability to effectively maintain sweeping authority in their own hands.”¹⁶ It is disconcerting that the Administration is ignoring the clear decision of the Supreme Court in order to facilitate an overreach of Federal authority, expanding jurisdiction over waters in which the Federal Government shall have no involvement.

Permitting Uncertainty and Delays

Compounding our concerns, the revised WOTUS rule has only served to further uncertainty and delays in processing permit applications and approved jurisdictional determinations (AJDs). Given the breadth of industries that rely on a dependable and clear *CWA* permitting regime, your Agencies’ continued delays halts the progress of important projects.

On September 27, 2023, your Agencies released a joint coordination memorandum, outlining management of WOTUS and AJDs.¹⁷ In theory, this coordination memorandum, and its extensions issued on June 25, 2024, and August 30, 2024, direct more AJDs to be elevated from the Corps district level to the headquarters of both Agencies.¹⁸ In practice, this elevation process has stalled

¹⁴ Press Release, WATERS ADVOCACY COALITION, *Revised WOTUS rule ignores SCOTUS ruling*, (Aug. 29, 2023), available at <https://watersadvocacy.org/revised-wotus-rule-ignores-scotus-ruling>.

¹⁵ September 2024 Hearing, *supra* note 12, Testimony of Vincent E. Messerly P.E., President, Streams and Wetlands Foundation, on behalf of National Association of Home Builders.

¹⁶ September 2024 Hearing, *supra* note 12, Testimony of Emma Pokon, Commissioner, Alaska Department of Environmental Conservation.

¹⁷ EPA and Corps, Joint Coordination Memorandum to the Field between the U.S. Department of the Army, U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA), (Sept. 27, 2023), available at https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-amended-2023-rule_508c.pdf [Hereinafter Sept. 23 Memo].

¹⁸ *Id.*; EPA and Corps, Extension of Joint Coordination Memoranda to the Field between the U.S. Department of the Army, U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency (EPA), (June 25, 2024), available at https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-amended-2023-rule_508c.pdf; EPA and Corps, Coordination Process Update: Joint Coordination Memoranda to the Field between the U.S. Department of the Army, U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency (EPA), available at https://www.epa.gov/system/files/documents/2024-08/ajd-coordination-memos-update-report_8-28-2024_508.pdf [Hereinafter August 2024 Memo].

numerous important projects that rely on AJDs for assurance that they are in compliance with the *CWA*.

At the September 2024 hearing, we heard multiple examples of projects, including even the construction of wetlands, that have been halted or delayed due to bureaucratic inaction or unclear direction.¹⁹ In addition, it appears as if your Agencies plan to continue this inadequate framework. The elevation and coordination process outlined in the joint coordination memorandum has been extended through March 27, 2025, raising concerns that your Agencies will continue to circumvent these AJD decisions and delay projects well into next year.²⁰ This means that some draft AJDs could be stuck in review for nearly two years before the permitting process begins.

Transparency

In addition to the slow pace of post-*Sackett* implementation, this Administration's failure to be transparent and provide clear direction to the public, states, and even Corps districts, has created significant uncertainty on the ground.²¹ For months, the Administration has refused to produce memoranda, training materials, or other tools that would be helpful for the regulated community to understand how your Agencies are implementing WOTUS.²²

While your Agencies have begun publicly posting memoranda on AJDs on their websites, practically they do little to increase confidence in permitting outside of each specific site. In the August 2024 coordination memorandum, it states that "the memoranda do not impose legally binding requirements on EPA, the Corps, Tribes, States, or the regulated community, and may or may not apply to a particular situation based upon the circumstances."²³ In addition, at the September 2024 hearing, Mr. Messerly testified that "EPA was asked whether their coordination memos were nationally binding. This is a critical issue because, under the APA (Administrative Procedures Act), nationally binding documents must be open for public comment. As we tried to proceed for an answer, the EPA simply ended the conversation."²⁴ As such, the few documents available to the public do not provide certainty to regulated entities, and the Administration has been evasive in providing direction to the regulated community.

¹⁹ See e.g. September 2024 Hearing, *supra* note 10 (Statements of Courtney Briggs in response to questioning by Rep. Eric Burlison; Vincent E. Messerly, P.E. by Rep. Mike Bost; Emma Pokon by Rep. David Rouzer, Chairman, Subcomm. on Water Resources and Environ. of the H. Comm. on Transp. and Infrastructure).

²⁰ August 2024 Memo, *supra* note 16.

²¹ See e.g. Letter from Patrick Morrissey, Attorney General, State of West Virginia, and 23 other Attorneys General, to Hon. Sam Graves, Chairman, H. Comm. on Transp. and Infrastructure, the Hon. David Rouzer, Chairman, Subcomm. on Water Resources and Environment of the H. Comm. on Transp. and Infrastructure, the Hon. Rick Larsen, Ranking Member, H. Comm. on the Transp. and Infrastructure, and Hon. Grace Napolitano, Ranking Member, Subcomm. on Water Resources and Environment of the H. Comm. on Transp. and Infrastructure (Sept. 6, 2024), *available at* <https://ago.wv.gov/Documents/Letter%20Congress%20WOTUS.pdf>.

²² Fact Sheet from WATERS ADVOCACY COALITION, Landowners and the Regulated Community Deserve Accountability from EPA and the Army Corps on WOTUS (May 2024), (on file with Comm.).

²³ August 2024 memo, *supra* note 16.

²⁴ September 2024 Hearing, *supra* note 12, Testimony of Vincent E. Messerly P.E., President, Streams and Wetlands Foundation, on behalf of National Association of Home Builders.

Due to the lack of transparency for the public, several stakeholders placed requests under the *Freedom of Information Act* (FOIA) seeking further information on your Agencies decision making processes.²⁵ The response to their FOIA request included highly redacted materials that did not provide substantive information to the public regarding the processing of AJDs with a claim that many materials were “deliberative,” and therefore could not be made public.²⁶ At the September 2024 hearing, Courtney Briggs, representing the American Farm Bureau Federation, raised an important point: “How can something that is being used on the ground to make determinations that directly impact regulated parties be deliberative. . . . This is a flagrant abuse of power and a blatant disregard for government transparency.”²⁷ The Administration’s refusal to release to these materials is blatantly disrespecting to the public and its right to be informed about regulations that directly affect them. Based on the unclear piecemeal approach to AJDs, the Administration appears to be making the rules up as it goes, leaving those who rely on a competent permitting regime in the dark.

The Committee is deeply concerned that your Agencies have failed to comply with *Sackett* and provide regulated communities with the permitting certainty they rely on. Congress and the Supreme Court provided clear directions that your Agencies continue to ignore. Despite repeated attempts to seek clarification about this Administration’s implementation of WOTUS rules, your Agencies continue to thwart transparency, failing to adequately respond to questions posed by Members following the Subcommittee hearings.²⁸ As part of the Committee’s continuing oversight activities of your Agencies’ WOTUS implementation, please provide responses to the following questions and requested information, as soon as possible, but no later than 5:00 p.m. ET on November 14, 2024:

1. Your Agencies contend that the memoranda issued as part of the coordination process do not impose legally binding requirements. If not legally binding, then please describe the purpose of the memoranda?
2. Please provide copies of any written instructions, talking points, technical documents, guidance documents, memoranda of understanding, or memoranda of agreement referring or relating to the implementation of the definition of WOTUS since May 25, 2023.

²⁵ See e.g. Email from Courtney Briggs, Chairman, Waters Advocacy Coalition, *FOIA Request – Records Related to Implementation of the Revised Definition of “Waters of the United States,”* (Mar. 12, 2024), available at https://insideepa.com/sites/insideepa.com/files/documents/2024/mar/epa2024_0542a.pdf; see also *Industry FOIA Request Seeks ‘Internal’ EPA Guidance Amid WOTUS Concerns*, INSIDEEPA, (Mar. 25, 2024), available at <https://insideepa.com/daily-news/industry-foia-request-seeks-internal-epa-guidance-amid-wotus-concerns>.

²⁶ See e.g. Response to FOIA Request submitted by National Association of Home Builders, available at <https://www.nahb.org/~media/NAHB/advocacy/docs/industry-issues/waters-of-the-us/foia-wotus-response>.

²⁷ September 2024 Hearing, *supra* note 12, Testimony of Courtney Briggs, Chairman, Waters Advocacy Coalition, on behalf of American Farm Bureau Federation.

²⁸ For example, after Subcommittee Hearings, Members have the opportunity to ask further Questions for the Record. In response to Questions for the Record for a Hearing Before the Subcomm. on Water Resources and Environment of the H. Comm. on Transp. and Infrastructure, titled *Review of Fiscal Year 2024 Budget Request: Agency Perspectives (Part II)*, (July 13, 2023), EPA failed to provide adequate detail. Additionally, response to Questions for the Record on this subject have not been received following a Hearing Before the Subcomm. on Water Resources and Environment of the H. Comm. on Transp. and Infrastructure, titled *Water Resources Development Acts: Status of Past Provisions and Future Needs* (Dec. 5, 2023).

3. Do your Agencies plan to release any further public guidance for implementing the revised WOTUS rule to the public?
4. What steps are your Agencies taking to create a permitting regime faithful to the *Sackett* decision, outside of removing the “significant nexus” test?
5. How does the average time it takes to receive an AJD following *Sackett* compare to timelines pre-*Sackett*?
6. How many draft AJDs remain in the coordination and elevation process?
7. Why did your Agencies extend the elevation and coordination process through March 2025? Are there plans to extend the process further?
8. What effect has the lack of guidance had on the issuance of permits among Corps districts?
9. Are all Corps districts issuing AJDs? If not, please describe why AJDs are not being issued.

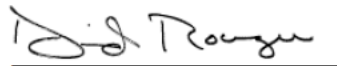
Pursuant to House Rule X, clause 1(r), the Committee has jurisdiction over these issues and shall conduct appropriate oversight of these actions. This request and any documents created as a result of this request will be deemed Congressional documents of the Committee. An attachment contains additional instructions for responding to this request. When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2165 of the Rayburn House Office Building and the Minority Staff in Room 2164 of the Rayburn House Office Building.

Thank you for your prompt attention to this important. If you have questions, please contact Ryan Hambleton, Majority Staff Director, Subcommittee on Water Resources and Environment, at [REDACTED]

Sincerely,



Sam Graves
Chairman
Committee on Transportation
and Infrastructure



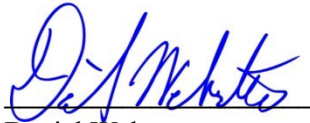
David Rouzer
Chairman
Subcommittee on Water Resources
and Environment



Eric A. "Rick" Crawford
Chairman
Subcommittee on Highways and Transit



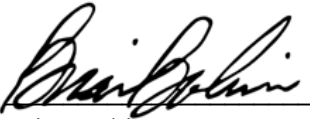
Garret Graves
Subcommittee on Aviation



Daniel Webster
Subcommittee on Coast Guard and
Maritime Transportation



Troy E. Nehls
Subcommittee on Railroads, Pipelines,
and Hazardous Materials



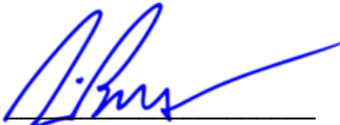
Brian Babin, D.D.S.
Member of Congress



Aaron Bean
Member of Congress



Mike Bost
Member of Congress



Tim Burchett
Member of Congress



Eric Burlison
Member of Congress



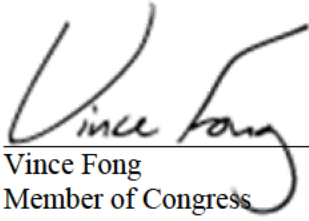
Mike Collins
Member of Congress



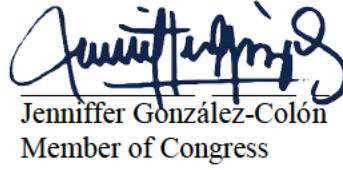
John S. Duarte
Member of Congress



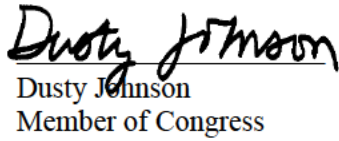
Mike Ezell
Member of Congress



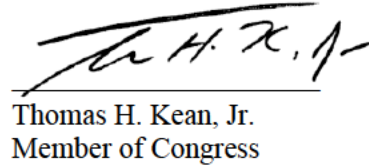
Vince Fong
Member of Congress



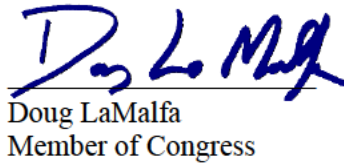
Jenniffer González-Colón
Member of Congress



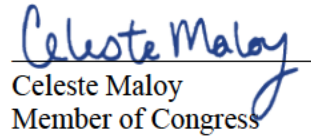
Dusty Johnson
Member of Congress



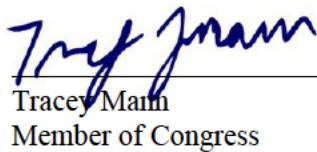
Thomas H. Kean, Jr.
Member of Congress



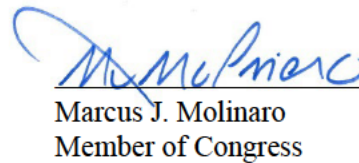
Doug LaMalfa
Member of Congress



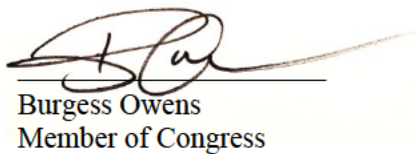
Celeste Maloy
Member of Congress



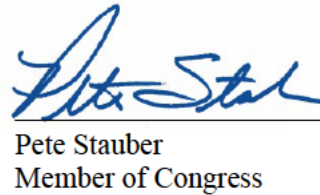
Tracey Mann
Member of Congress



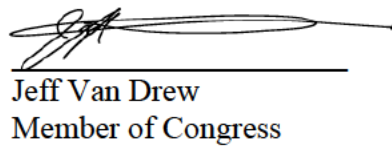
Marcus J. Molinaro
Member of Congress



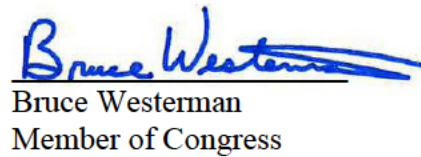
Burgess Owens
Member of Congress



Pete Stauber
Member of Congress



Jeff Van Drew
Member of Congress

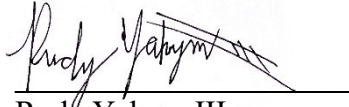


Bruce Westerman
Member of Congress

Administrator Regan & Assistant Secretary Connor

October 31, 2024

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A handwritten signature in black ink, appearing to read "Rudy Yakym III", is written over a horizontal line.

Rudy Yakym III

Member of Congress

cc: Mr. Jaime Pinkham, Principal Deputy Assistant Secretary of the Army for Civil Works
United States Department of the Army

The Honorable Rick Larsen, Ranking Member
Committee on Transportation and Infrastructure

The Honorable Grace F. Napolitano, Ranking Member
Subcommittee on Water Resources Environment

Enclosure

Attachment A – Requirements for Responding to the House Committee on Transportation and
Infrastructure Records Requests in the 118th Congress