WATERS OF THE UNITED STATES IMPLEMENTATION POST-SACKETT DECISION: EXPERIENCES AND PERSPECTIVES

(118–69)

HEARING

BEFORE THE

SUBCOMMITTEE ON
WATER RESOURCES AND ENVIRONMENT

OF THE

COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE
HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTEENTH CONGRESS

SECOND SESSION

SEPTEMBER 11, 2024

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Washington, DC 20515

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SEPTEMBER 6, 2024

SUMMARY OF SUBJECT MATTER

TO: Members, Subcommittee on Water Resources and Environment
FROM: Staff, Subcommittee on Water Resources and Environment
RE: Subcommittee Hearing on "*Waters of the United States Implementation Post-Sackett Decision: Experiences and Perspectives*"

I. PURPOSE

The Subcommittee on Water Resources and Environment of the Committee on Transportation and Infrastructure will meet on Wednesday September 11, 2024, at 10:00 a.m. ET in Room 2167 of the Rayburn House Office Building to receive testimony at a hearing entitled, "*Waters of the United States Implementation Post-Sackett Decision: Experiences and Perspectives*." The hearing will examine implementation of the Administration's conforming rule on the definition of the definition of "waters of the United States" (WOTUS) under the Clean Water Act (CWA), following the 2023 Supreme Court decision in *Sackett v. EPA* (*Sackett*), 598 U.S. 651. The hearing will provide Members with the opportunity to receive testimony from witnesses who have experienced the regulatory impact of the conforming rule and its implementation. Members will receive testimony from witnesses representing the State of Alaska, the State of Colorado, the American Farm Bureau Association, and the National Association of Home Builders (NAHB).

II. "WATERS OF THE UNITED STATES" AND THE CLEAN WATER ACT

Congress enacted the 1972 amendments to the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (CWA), with the goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[1] The CWA protects "navigable waters," which is defined in the CWA as the "waters of the United States, including the territorial seas."[2]

However, the CWA does not further define the term "waters of the United States" (WOTUS). As such, the United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps) have attempted to define which waters are subject to Federal regulation under the CWA. Since the CWA grants authority to EPA and the Corps to implement the Act, EPA and the Corps have promulgated several sets of rules interpreting the agencies' jurisdiction over WOTUS and the corresponding scope of CWA authority.

The definition of WOTUS governs the application of CWA programs—including tribal and state water quality certification programs, pollutant discharge permits, and oil spill prevention and planning programs. For example, Section 303, which requires states to develop water quality standards for their waters such as Total Max-

[1] CWA, Pub. L. No. 92–500, 86 Stat. 816.
[2] *Id.* at §502(7).

imum Daily Load (TMDL), Section 311, which prohibits the discharge and mandates reporting of oil and other hazardous substances into WOTUS, and Section 401, which outlines state approval for Federal permits that would affect a WOTUS, are all dependent on the definition of WOTUS.[3]

In addition, the CWA prohibits the discharge of any pollutant by any person into a WOTUS, unless in compliance with one of the enumerated permitting provisions in the Act. The two main permitting authorities in the CWA are Section 402 (the National Pollutant Discharge Elimination System, or "NPDES") for discharges of pollutants from point sources, and Section 404, for discharges of dredged or fill material.[4] Both Sections 402 and 404 govern discharges into "navigable waters," and thus are directly dependent on the definition of WOTUS.

EPA runs its own NPDES permitting program, and the CWA authorizes EPA to approve individual states and tribes to manage their own NPDES permitting programs, in keeping with the CWA's intent of Federal-state partnership.[5] Nearly all states have assumed administration of their own NPDES permitting programs, with only three exceptions: Massachusetts, New Hampshire, and New Mexico.[6]

EPA and the Corps play complementary roles in implementing the Section 404 program, with the Corps in charge of issuing permits for discharge of dredged or fill material, using a set of environmental guidelines promulgated by EPA, in conjunction with the Corps, to evaluate permit applications.[7] The Corps likewise administers the day-to-day program, including jurisdictional determinations (JD), which certify the presence or absence of waters subject to the CWA.[8]

Similar to the NPDES permitting process, EPA may also allow states and tribes to assume authority to grant or deny dredge and fill permits under Section 404, under the condition that states or tribes develop a wetlands permit program consistent with the CWA.[9] Currently, two states are approved to manage their Section 404 program: Michigan and New Jersey.[10] The status of the approval of a state-managed program for the State of Florida is under litigation.[11]

The CWA also authorizes the Federal Government to levy penalties upon those deemed to have violated its provisions. Specifically, Section 309 of the CWA outlines the authority given to bring civil and/or criminal punishment against those who have violated the CWA.[12] Civil and criminal penalties vary based on the type of infringement.[13] For example, penalties for point source discharges into a WOTUS without, or in violation of, a permit can be one year and/or $2,500–$25,000 per day for negligent violations, and three years and/or $5,000–$50,000 per day.[14]

III. PREVIOUS WOTUS RULES

The last three Presidential Administrations, through EPA and the Corps, have each published in the Federal Register regulatory changes to the definition of WOTUS.

In 2015, the Obama Administration published a rule, known as the Clean Water Rule, which redefined WOTUS in the agencies' regulations for the first time since the 1980s.[15] The regulatory changes to the definition of WOTUS incorporated in the 2015 Clean Water Rule allowed the Corps and EPA to utilize both the "relatively

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[3] *Id.* at §§ 303, 311, 401.

[4] *Id.* at §§402(b) and 404.

[5] LAURA GATZ, CONG. RSCH. SERV. (RL30030), CLEAN WATER ACT: A SUMMARY OF THE LAW, (Updated Oct. 18, 2016), *available at* https://www.crs.gov/Reports/RL30030 [hereinafter CRS REPORT RL30030].

[6] *Id.*

[7] CWA, *supra* note 1, §404(b); *see also* CRS REPORT RL30030, *supra* note 5.

[8] EPA, *Permit Program under CWA Section 404, available at* https://www.epa.gov/cwa-404/permit-program-under-cwa-section-404.

[9] EPA, *State or Tribal Assumption of the CWA Section 404 Permit Program, available at* https://www.epa.gov/cwa-404/state-or-tribal-assumption-cwa-section-404-permit-program.

[10] LAURA GATZ & KATE R. BOWERS, CONG. RESEARCH SERVICE (R46927), REDEFINING WATERS OF THE UNITED STATES (WOTUS): RECENT DEVELOPMENTS, (updated July 8, 2022) [hereinafter CRS REPORT R46927], *available at* https://www.crs.gov/reports/pdf/R46927/R46927.pdf.

[11] See EPA, *State and Tribal Assumption of Section 404 of the Clean Water Act, available at* https://www.epa.gov/cwa404g/us-interactive-map-state-and-tribal-assumption-under-cwa-section-404; *see also* State of Florida, *State 404 Program, available at* https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/state-404-program.

[12] CWA, *supra* note 1, §309, 33 U.S.C. §1319.

[13] *See id.*; EPA, *Criminal Provisions of Water Pollution, available at* https://www.epa.gov/enforcement/criminal-provisions-water-pollution.

[14] *Id.*

[15] Clean Water Rule: Definition of "Waters of the United States" Final Rule, 80 Fed. Reg. 37054 (June 29, 2015).

permanent" or "significant nexus" concepts, espoused in the 4–1–4 Supreme Court decision in *Rapanos v. United States* (*Rapanos*).[16]

Under the Trump Administration, EPA and the Corps rescinded the 2015 Clean Water Rule, recodifying guidance from 2008 that was in effect prior to the 2015 Rule.[17] Then, in 2020, EPA and the Corps published in the Federal Register another definition of WOTUS in the Navigable Waters Protection Rule.[18] The Navigable Waters Protection Rule was structured to focus the WOTUS definition primarily on relatively permanent bodies of water that provide surface flow to navigable waters or the territorial seas in a typical year, and moved away from the "significant nexus" test.[19]

Shortly after taking office in January 2021, President Biden signed an Executive Order revoking President Trump's Executive Order, directing EPA and the Corps to revise and rescind the Clean Water Rule.[20]

On December 30, 2022, EPA and the Corps released the Revised Definition of the 'Waters of the United States' Rule, which went into effect on March 20, 2023.[21] The 2022 WOTUS definition was based largely upon the pre-2015 regulations, while again authorizing CWA jurisdiction under either the "relatively permanent waters" or "significant nexus" test concepts.[22]

IV. *SACKETT v. EPA*

Since passage of the CWA, there has been a substantial amount of litigation in the Federal courts on scope of CWA jurisdiction, including numerous Supreme Court cases.

In 2006, the Supreme Court issued a 4–1–4 opinion in *Rapanos* that did not produce a clear, legal standard on determining jurisdiction under the CWA.[23] The *Rapanos* decision produced three distinct opinions on the appropriate scope of Federal authorities under the CWA. Justice Scalia's plurality opinion provided a "relatively permanent/flowing waters" test with "continuous surface connection."[24] Writing alone, Justice Kennedy proposed a "significant nexus" test for WOTUS, concluding that a case-by-case basis for determining navigable waters was appropriate.[25] Justice Stevens' dissenting opinion advocated for maintenance of existing EPA and the Corps authority over waters and wetlands.[26]

In October 2022, the Court heard oral arguments in the latest case surrounding the definition of WOTUS under the CWA in *Sackett*. The petitioners in the *Sackett* case own a parcel of land in Idaho which sits across the street from an area of wetlands that drains into an unnamed tributary of a creek, which in turn flows into Priest Lake.[27] The Sacketts' efforts to build on their parcel of land, around thirty feet from the area of wetlands, had been the subject of a decades-long dispute with EPA and the Corps regarding CWA jurisdiction and regulatory process.[28] The Ninth Circuit Court, using the "significant nexus" test, had upheld EPA's decision that the Sackett property was subject to Federal jurisdiction under the CWA.[29]

In May 2023, the Court decided unanimously that the CWA did not apply to the Sackett property but differed on the reasoning 5–4.[30] The majority in *Sackett* rejected the "significant nexus" test penned by Justice Kennedy in *Rapanos*, instead ruling in favor of the "relatively permanent" test espoused in the *Rapanos* plurality

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[16] *See id.*; Rapanos v. United States, 547 U.S. 715 (2006). These concepts are discussed further below.

[17] *See* Exec. Order No. 13778, (Feb. 28, 2017), *available at* https://www.govinfo.gov/content/pkg/DCPD-201700147/pdf/DCPD-201700147.pdf; Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56626 (Oct. 22, 2019).

[18] The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22250 (Apr. 21, 2020).

[19] *See* CRS REPORT R46927, *supra* note 10.

[20] Exec. Order No. 13990, (Jan. 20, 2021), *available at* https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01765.pdf.

[21] Revised definition of "Waters of the United States" Final Rule, 88 Fed Reg. 3004 (Jan. 18, 2023).

[22] *Id.*

[23] *Rapanos v. United States*, 547 U.S. 715 (2006).

[24] *Id.* at 739 and 742.

[25] *Id.* at 782 (Kennedy, J., concurring).

[26] *See id.* at 788 (Stevens, J., dissenting).

[27] KATE R. BOWERS, CONG. RESEARCH SERVICE LEGAL SIDEBAR (LSB10707), SUPREME COURT REVISITS SCOPE OF "WATERS OF THE UNITED STATES" (WOTUS) UNDER THE CLEAN WATER ACT, (Mar. 11, 2022), *available at* https://www.crs.gov/reports/pdf/LSB10707/LSB10707.pdf.

[28] *Id.*

[29] *Sackett v. EPA*, 8 F. 4th 1075, 1091–1093 (9th Cir. 2021).

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

opinion.[31] While concurring in judgment, four justices disagreed with the majority's holding that wetlands are jurisdictional under the CWA only if there is a continuous surface connection to other covered jurisdictional waters.[32]

V. CONFORMING RULE AND IMPLEMENTATION

While the Biden Administration's original rule, nor any other specific prior regulation was specifically brought before the Court, the majority opinion in *Sackett* rejected key jurisdictional interpretations such as "significant nexus" reflected in the Biden Administration's original rule.[33] Immediately following the *Sackett* decision, the Corps paused processing of approved jurisdictional determinations.[34]

On August 29, 2023, EPA and the Corps issued a final rule titled "Revised Definition of 'Waters of the United States'; Conforming," amending the initial Biden Administration rule post-*Sackett*.[35] Due to prior ongoing litigation over the initial January 2023 Biden Administration rule, the conforming rule went into place on September 8, 2023, in 23 states, the District of Columbia, and United States territories.[36] In the other 27 states, EPA and the Corps are regulating WOTUS consistent with the pre-2015 regulatory regime.[37]

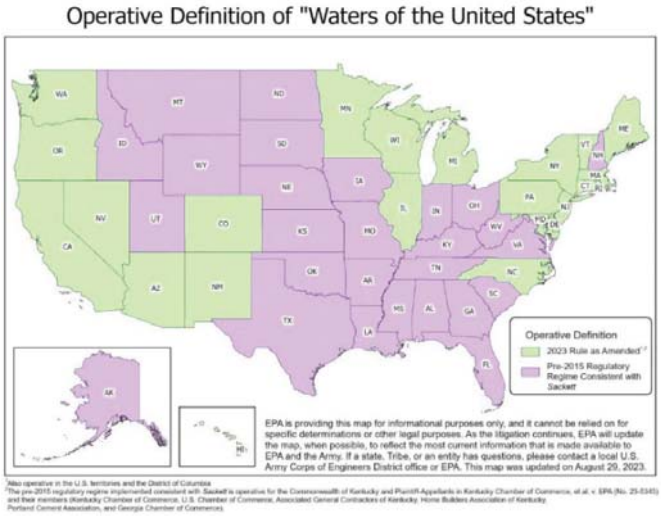

Figure 1 shows the operative definition of WOTUS currently in effect in each state, with green representing states where the amended 2023 rule is in effect and purple representing where the pre-2015 regime is in effect.[38]

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[31] KATE R. BOWERS, CONG. RESEARCH SERVICE LEGAL SIDEBAR (LSB10981), SUPREME COURT NARROWS FEDERAL JURISDICTION UNDER CLEAN WATER ACT, (June 21, 2023), *available at* https://www.crs.gov/Reports/LSB10981.

[32] *Id.*

[33] *See id*.

[34] *See* E.A. Crunden, et. al., *Wetlands approvals paused after Supreme Court decision*, E&E NEWS, (June 2, 2023), *available at* https://subscriber.politicopro.com/article/eenews/2023/06/01/wetlands-approvals-paused-after-supreme-court-decision-00099717; *see also, Review of Fiscal Year 2024 Budget Request: Agency Perspectives (Part I) Hearing Before the Subcomm. on Water Resources and Environ. of the H. Comm. on Transp. and Infrastructure*, 118th Cong., (June 22, 2023) (Statement of Hon. Michael L. Connor, in response to questioning by David Rouzer, Chairman, Subcomm. on Water Resources and Environ. of the H. Comm. on Transp. and Infrastructure).

[35] Revised Definition of "Waters of the United States"; Conforming, 88 Fed. Reg. 61964 (Sept. 8, 2023).

[36] *Id.; see also* EPA, *Definition of "Waters of the United States": Rule Status and Litigation Update, available at* https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update.

[37] *Id.*

[38] *Id.*

On September 27, 2023, EPA and the Corps issued a joint coordination memorandum outlining how EPA and the Corps would coordinate on jurisdictional determinations, which was to be in effect for nine months.[39] On June 25, 2024, the memorandum was extended an additional nine months.[40] EPA and the Corps each maintain online resources with additional implementation materials.[41]

Some states and stakeholders have raised concerns with the pace of implementation of the conforming WOTUS rule, and whether EPA and the Corps are in compliance with the ruling in *Sackett*.[42] Other stakeholders have expressed dissatisfaction with the *Sackett* ruling and called for states and the Biden Administration to evaluate other authorities to address the effects of *Sackett*.[43]

VI. WITNESSES

- Emma Pokon, Commissioner, Alaska Department of Environmental Conservation
- Nicole Rowan, Director, Water Quality Control Division, Colorado Department of Public Health and Environment
- Courtney Briggs, Chairman, Waters Advocacy Coalition, on behalf of the American Farm Bureau Federation
- Vincent E. Messerly, P.E., President and CEO, Stream and Wetlands Foundation, on behalf of the National Association of Home Builders

[39] 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

[40] 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.

[41] *See* Corps, Regulatory Program and Permits Juris Info, *available at* https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/juris_info/; *see also* EPA, Current Implementation of Waters of the United States, *available at* https://www.epa.gov/wotus/current-implementation-waters-united-states.

[42] *See e.g.* Sam Hess, *States, Industry Launch Broad Legal Attack On EPA's Amended WOTUS Rule*, INSIDEEPA, (Feb. 6, 2024), *available at* https://insideepa.com/daily-news/states-industry-launch-broad-legal-attack-epa-s-amended-wotus-rule.

[43] *See e.g.* Sam Hess, *Groups Urge Officials To Expand Wetlands Protections In Wake of Sackett*, INSIDEEPA, (June 4, 2024), *available at* https://insideepa.com/daily-news/groups-urge-officials-expand-wetlands-protections-wake-sackett.

WATERS OF THE UNITED STATES IMPLEMENTATION POST-*SACKETT* DECISION: EXPERIENCES AND PERSPECTIVES

WEDNESDAY, SEPTEMBER 11, 2024

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
Washington, DC.

The subcommittee met, pursuant to call, at 10 a.m., in room 2167 Rayburn House Office Building, Hon. David Rouzer (Chairman of the subcommittee) presiding.

Mr. ROUZER. The Subcommittee on Water Resources and Environment will come to order.

Before we go further, I think it would be appropriate to take a quick moment of silence in memory of all those who passed and sacrificed on 9/11. If you will join me in a moment of silence.

[Moment of silence observed.]

Mr. ROUZER. I ask unanimous consent that the chairman be authorized to declare a recess at any time during today's hearing.

Without objection, so ordered.

I also ask unanimous consent that Members not on the subcommittee be permitted to sit with the subcommittee at today's hearing and ask questions.

Without objection, so ordered.

As a reminder, if Members wish to insert a document into the record, please also email it to DocumentsTI@mail.house.gov. Again, that is DocumentsTI@mail.house.gov.

I now recognize myself for the purposes of an opening statement for 5 minutes.

OPENING STATEMENT OF HON. DAVID ROUZER OF NORTH CAROLINA, CHAIRMAN, SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

Mr. ROUZER. For more than half a century, the Clean Water Act has worked to improve the quality of our Nation's waterways. In our continued pursuit to protect and improve the quality of our Nation's waters, it is imperative that the regulatory framework under the Clean Water Act works as Congress intended it to work, allowing the demands of the 21st century to be met.

To do so, we must have environmental protection and economic development—this critical balance that protects the environment without unnecessarily hampering our economy and private prop-

erty rights. To achieve this, we must also balance the role of the Federal Government with that of the States and municipalities. The Clean Water Act was never envisioned for the Federal Government to have control over every ditch and mud puddle. It left room for States to protect their waters as they best see fit.

So, consider this as well: Our competitors in China, as well as elsewhere in the world, they don't care about regulations or environmental permitting. When they want to build it, they just do it, with little, if any, regard to the environment.

Now, while we do not want to adopt their mentality—nor would we—we should not put meaningless delays on critical infrastructure projects like manufacturing, housing, or very critical energy projects.

As I have stated many times before, regulations should be simple and easy to follow. The benefit of that is, they should carry out the intent of the law in a clear and transparent manner, making them easy to enforce. There should be no subjectivity or wiggle room for any bureaucrat to substitute their own biases or interpretations.

But, unfortunately, that has certainly not been the case with the Clean Water Act.

Now, there is no greater example of bureaucratic overreach than the nightmare of complying with and understanding the definition of a water of the United States, or WOTUS, as we call it. This definition determines the scope of jurisdictional waters under the Clean Water Act, affecting water-quality certification programs, pollutant discharge permits, and oilspill prevention.

Now, a good example of all this is in North Carolina. Pharmaceutical company Novo Nordisk, the worldwide leader in treating and preventing a wide range of diseases, including diabetes, announced a $4 billion investment for a site expansion, bringing more than 1,000 jobs to the State. In October, they requested a jurisdictional determination, or JD, as we call it, which never came. They were told to apply for a permit and to modify it once a JD was issued. They have since applied for a permit without determination. However, the permit review process can take more than 1 year.

Novo Nordisk cannot conduct onsite avoidance and minimization analysis before they know what parcel of property must be avoided. Nor can they conduct an offsite alternatives analysis without a clear concept of how their site works against other sites that may or may not have similar issues. And this is just one example of many instances across the country where economic investment and job creation—and, in this case, public health as well—are all stalled due to this vague process.

The Supreme Court's ruling in *Sackett* v. *EPA* last year provided a decisive win for America's farmers, small businesses, and property owners. Yet, despite the Court's clarity, there remains a distinct incongruence between the ruling and the latest definition of a WOTUS from this administration, which has led to a new round of legal challenges and additional confusion.

When Assistant Secretary of the Army for Civil Works Michael Connor testified before the subcommittee last December, he reported a backlog of more than 4,000 jurisdictional determinations that need to be made. While the administration claims some

progress has been made in approving these, the inconsistent and piecemeal approach it is taking in implementing its WOTUS rule is causing serious delays on a variety of different projects around the Nation.

Sackett struck down the "significant nexus" test and held that a WOTUS must have a continuous surface connection to traditional navigable waters. That ruling was over 1 year ago, and we just passed the 1-year mark since the administration issued its revised rule.

Farmers, homebuilders, businesses, manufacturers, and many other hard-working Americans rely on the Corps and EPA for predictable, workable, and stable WOTUS regulations. The administration has not yet delivered.

So, in summation, the administration's implementation is not in accordance with the *Sackett* ruling generally, nor is it consistent project to project where JDs have been issued. So, I remain concerned about the lack of transparency and lack of consistency with which this revised definition has been implemented.

We are all still waiting for clear and consistent guidance on which everyone can rely. The decision to approach WOTUS on a site-specific basis, without clear training and universal application, has served only to muddy the waters—no pun intended—of a very clear and straightforward Supreme Court ruling.

So, I look forward to hearing from our witnesses today about their experiences and challenges with WOTUS implementation since the *Sackett* decision and what recommendations they have for us in Congress so we can work to provide surety to Americans who rely on clear implementation of this important rule.

[Mr. Rouzer's prepared statement follows:]

Prepared Statement of Hon. David Rouzer, a Representative in Congress from the State of North Carolina, and Chairman, Subcommittee on Water Resources and Environment

For more than half a century, the Clean Water Act has worked to improve the quality of our nation's waterways. In our continued pursuit to protect and improve the quality of our nation's waters, it is imperative that the regulatory framework under the Clean Water Act works as Congress intended it to work, allowing the demands of the 21st century to be met.

To do so we must have environmental protection and economic development—this critical balance that protects the environment without unnecessarily hampering our economy and private property rights. To achieve this, we must also balance the role of the federal government with that of the states and municipalities. The Clean Water Act was never envisioned for the federal government to have control over every ditch and mud puddle, and left room for states to protect their waters as they best see fit.

Our competitors in China, as well as elsewhere in the world, do not care about regulations or environmental permitting. When they want to build, they just do it, with little if any regard to the environment. While we do not want to adopt their mentality—nor would we—we should not put meaningless delays on critical infrastructure projects like manufacturing, housing, or energy projects.

As I have stated many times before, regulations should be simple and easy to follow. They should carry out the intent of the law in a clear and transparent manner, making them easy to enforce. There should be no subjectivity or wiggle room for any bureaucrat to substitute their own biases or interpretations. Unfortunately, that's not the case with the Clean Water Act.

There is no greater example of bureaucratic overreach than the nightmare of complying with and understanding the definition of a "water of the United States" or "WOTUS." This definition determines the scope of jurisdictional waters under the

Clean Water Act, affecting water quality certification programs, pollutant discharge permits, and oil spill prevention.

In North Carolina, pharmaceutical company Novo Nordisk, a leader in treating and preventing a wide range of diseases including diabetes, announced a four-billion-dollar investment for a site expansion, bringing over one thousand jobs to the state. In October, they requested a jurisdictional determination, or JD, which never came. They were told to apply for a permit and to modify it once a JD was issued. They have since applied for a permit without determination. However, the permit review process can take over a year.

Novo Nordisk cannot conduct on-site avoidance and minimization analysis before they know what parcel of property must be avoided. Nor can they conduct an off-site alternatives analysis without a clear concept of how their site works against other sites that may or may not have similar issues. This is just one example of many instances across the country where economic investment and job creation—and in this case, public health as well—are stalled due to this vague process.

The Supreme Court's ruling in *Sackett* vs. *EPA* last year provided a decisive win for America's farmers, small businesses, and property owners. Yet, despite the Court's clarity, there remains a distinct incongruence between the ruling and the latest definition of a WOTUS from this administration, which has led to a new round of legal challenges and additional confusion.

When Assistant Secretary of the Army for Civil Works Michael Connor testified before the Subcommittee last December, he reported a backlog of more than 4,000 jurisdictional determinations that need to be made. While the Administration claims some progress has been made in approving these, the inconsistent and piecemeal approach it is taking in implementing its WOTUS rule is causing serious delays on a variety of different projects across the nation.

Sackett struck down the "significant nexus" test and held that a WOTUS must have a continuous surface connection to traditional navigable waters. That ruling was over a year ago, and we just passed the one year mark since the Administration issued its revised rule. Farmers, home builders, businesses, manufacturers, and many other hard-working Americans rely on the Corps and EPA for predictable, workable, and stable WOTUS regulations. The Administration has not yet delivered.

In summation, the Administration's implementation is not in accordance with the *Sackett* ruling generally; nor is it consistent project to project where JDs have been issued. I remain concerned about the lack of transparency and lack of consistency with which this revised definition has been implemented. We are all still waiting for clear and consistent guidance on which everyone can rely. The decision to approach WOTUS on a site-specific basis without clear training and universal application has served only to muddy the waters of a very clear and straightforward Supreme Court ruling.

I look forward to hearing from our witnesses today about their experiences and challenges with WOTUS implementation since the *Sackett* decision and what recommendations they have for us in Congress so we can work to provide surety to Americans who rely on clear implementation of WOTUS.

Mr. ROUZER. I now recognize Ranking Member Napolitano for 5 minutes for an opening statement.

OPENING STATEMENT OF HON. GRACE F. NAPOLITANO OF CALIFORNIA, RANKING MEMBER, SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

Mrs. NAPOLITANO. Thank you, Mr. Chairman, for yielding that time to me.

For the past 25½ years, I have made protection and preservation of water a primary focus of my time in Congress. In the arid West, where annual droughts have become an unfortunate consequence of a warming climate, I have worked to make our communities more resilient to climate change, such as ensuring my communities are prepared for their current and future water needs. I have worked with local officials to promote the conservation, recycling, and reuse of every drop of water available.

Knowing of these ongoing challenges that may soon face every community in the United States, I grow frustrated with the heated

and often misguided rhetoric on the scope of waters protected by the Clean Water Act. In my view, we get lost on questions of who is best suited to protect our water resources, rather than thinking about the importance of rivers, streams, lakes, and wetlands for current and future needs.

Mr. Chairman, clean water was not always a partisan issue, and no issue has more support among American families than the protection of the Nation's waters. Yet, in recent years, this issue of comprehensive Clean Water Act protections has become so politicized that it has become increasingly difficult to find any commonalities.

For this, I cite the example, this issue is prominently highlighted in the extreme "Project 2025" manifesto. It has been the focus of two failed Congressional Review Act efforts to overturn vital clean water protections. And, recently, decades-old water protections have fallen to a Supreme Court that, time and again, substitutes its own conservative philosophies for the established legal precedent or clear statements of congressional intent.

In the aftermath, we are left with a Nation less prepared to protect its precious water resources and less capable of ensuring the long-term health and resiliency of our communities, our neighbors, and our future generations.

History has shown that the current State-by-State approach of protecting rivers, streams, and wetlands is likely to fail, as it did before the enactment of the Clean Water Act.

Without minimum levels of protection, States will be negatively impacted by pollution from upstream sources if neighboring States choose not to put the same priority on protecting water resources.

Without minimum levels of protection, farmers, businesses, and communities may no longer rely on sufficient, safe, and sustainable supplies of water to meet our quality-of-life needs, our economic and agricultural needs, and our day-to-day survival, especially in arid regions of the West.

Without minimum levels of protection, American families may be forced to pay more for safe and reliable resources of water for their homes—if such resources even remain available.

Without minimum standards of protection, businesses will face different requirements and standards in every State or community, likely increasing the complexity and cost of doing business, which will, again, result in higher prices for American families.

Mr. Chairman, in my remaining time in Congress, I remain committed to protecting clean water for more people, not less. I believe the Supreme Court purposely chose to substitute its own philosophy over decades-old, legally grounded efforts to protect water quality.

That is why I joined with Ranking Member Larsen, Congressman Beyer, and Congresswoman Stansbury in introducing the Clean Water Act of 2023. I believe this bill will restore the minimum levels of protections struck down by the conservative Court and can put back into place the predictable Federal-State partnership which protected our rivers, streams, and wetlands for over five decades, all while providing predictability and certainty to American businesses.

To me, the answer is clear: We should recognize the familiarity and workability of the historic Clean Water Act and get on with the preservation of the health of our economy as well as that of our communities, of our environment, and our water-dependent futures.

Mr. Chairman, I yield back the balance of my time.

[Mrs. Napolitano's prepared statement follows:]

Prepared Statement of Hon. Grace F. Napolitano, a Representative in Congress from the State of California, and Ranking Member, Subcommittee on Water Resources and Environment

Thank you, Mr. Chairman, for yielding me this time.

For the past 26 years, I have made the protection and preservation of water a primary focus of my time in Congress.

In the arid west, where annual droughts have become an unfortunate consequence of a warming planet, I have worked to make our communities more resilient to climate change, such as ensuring my communities are prepared for their current and future water needs.

I have worked with local officials to promote the conservation, recycling, and reuse of every drop of water available.

Knowing of these ongoing water challenges that may soon face every community, I grow frustrated with the heated and often-misguided rhetoric on the scope of waters protected by the Clean Water Act.

In my view, we get lost on questions of who is best suited to protect our water resources, rather than talking about the importance of rivers, streams, lakes and wetlands for current and future needs.

Mr. Chairman, clean water was not always a partisan issue, and no issue has more support among American families than the protection of our nation's waters.

Yet, in recent years, the issue of comprehensive Clean Water Act protections has become so politicized that it has become increasingly difficult to find any commonalities.

For example, this issue is prominently highlighted in the extreme Project 2025 manifesto.

It has been the focus of two failed Congressional Review Act efforts to overturn vital clean water protections.

And, recently, decades-old water protections have fallen to a Supreme Court that, time-and-again, substitutes its own conservative philosophies for established legal precedent or clear statements of Congressional intent.

In the aftermath, we are left with a nation less prepared to protect its precious water resources and less capable of ensuring the long-term health and resiliency of our communities, our neighbors and future generations.

Mr. Chairman, history has shown that the current, state-by-state approach to protecting rivers, streams and wetlands is likely to fail as it did before enactment of the Clean Water Act.

Without minimum levels of protection, states will be negatively impacted by pollution from upstream sources if neighboring states choose not to put the same priority on protecting water resources.

Without minimum levels of protection, farmers, businesses and communities may no longer rely on sufficient, safe and sustainable supplies of water to meet our quality-of-life needs, our economic and agricultural needs and our day-to-day survival, especially in the arid regions of the country.

Without minimum levels of protection, American families may be forced to pay more for safe and reliable sources of drinking water for their homes, if such sources even remain available.

Without minimum standards of protection, businesses will face differing requirements and standards in every state or community, likely increasing the complexity and cost of doing business—which will, again, result in higher prices for American families.

Mr. Chairman, in my remaining time Congress, I remain committed to protecting clean water for more people, not less.

I believe the Supreme Court purposefully chose to substitute its own philosophy over decades-old, legally grounded efforts to protect water quality.

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To me, the answer is clear. We should recognize the familiarity and workability of the historic Clean Water Act and get on with the preservation of the health of our economy as well as our communities, our environment and our water-dependent futures.

I yield back the balance of my time.

Mr. ROUZER. The gentlelady yields back.

I now recognize Ranking Member Larsen for up to 5 minutes.

OPENING STATEMENT OF HON. RICK LARSEN OF WASHINGTON, RANKING MEMBER, COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

Mr. LARSEN OF WASHINGTON. Thank you, Mr. Chair and Ranking Member Napolitano, for this hearing and update on the waters of the U.S. and the Clean Water Act.

My home State of Washington is defined by its clean water, from Puget Sound to the hundreds of lakes and thousands of miles of rivers and streams. Washingtonians know that protecting these rivers, streams, and wetlands takes work and that the health of our water bodies are intertwined.

Our waters and water-related economy depend on the historic protections of the Clean Water Act and its pollution-prevention programs. It is more effective and less costly to prevent pollution than to clean up pollution. This is true in Washington State; it is true across the country.

When Congress passed the Clean Water Act over 50 years ago, Members recognized the effectiveness and importance of comprehensive pollution-prevention measures—stopping pollution before it happens rather than simply cleaning it up. The Clean Water Act was enacted on an overwhelming and bipartisan basis.

Before this law, rivers and lakes served as little more than open sewers. Lake Erie was pronounced "dead," and Ohio's Cuyahoga River literally caught on fire.

Thanks to the Clean Water Act, the Cascade River in my district was recently designated as an Outstanding Resource Water by the State of Washington, which now protects the river from any future activities or development that would degrade its water quality.

In passing the Clean Water Act, Congress specifically noted that a State-by-State, do-it-alone approach was, quote, "inadequate in every vital aspect," end quote, and left waters severely polluted and expensive to restore.

For decades, then, Republicans and Democrats shared these bipartisan principles to defend clean water, maintain a strong Federal-State partnership to protect waters, stop pollution from entering the system in the first place, and support a robust Federal floor of protections while allowing States to do more, but not less.

After the *Sackett* decision, the robust Federal protections for our Nation's waters have been eliminated for more than 50 percent of wetlands and up to 70 percent of streams.

History has shown that a lack of strong Federal water-quality protections makes it difficult and expensive for States to protect their waters if neighboring States adopt a lesser standard. States are now faced with a decision on how to handle pollution of the countless nonnavigable streams, lakes, and wetlands once protected by the Clean Water Act.

Some States will meet this challenge by establishing new State-level water-quality standards for unprotected wetlands and streams, as the State of Colorado has done. Other States will choose to do nothing, or worse, pull back on State-level protections, like the State of North Carolina, leaving critical waters completely unprotected.

Without uniform national protections, downstream States will be negatively impacted by pollution from upstream sources if neighboring States choose not to pass new protections.

Last Congress, though, we did pass the Bipartisan Infrastructure Law, affirming our commitment to improving water-quality infrastructure. The BIL included significant investments in water infrastructure, providing $13.8 billion in Federal dollars for upgrading wastewater systems, preventing pollution discharges, and supporting restoration programs in places like the Puget Sound.

These investments are critical, providing a lifeline to communities across the country struggling to maintain water quality. Such a large Federal investment was a downpayment to address the backlog of water infrastructure needs across the country.

The *Sackett* decision reduces the effectiveness of these investments and reduces the Federal role in the successful partnership that has been the Clean Water Act. If we are to maintain the same historic protections, States will have to step up and spend more resources protecting water quality.

Unfortunately, States will be doing so from scratch, without the decades of experience from the EPA and the Army Corps of Engineers. In this post-*Sackett* world, we must find ways to leverage Federal experience in assisting States that are stepping up to maintain water-quality protections.

But Congress can do its job as well and legislate a solution. Passing the Clean Water Act of 2023, a bill I introduced in partnership with Ranking Member Napolitano, would restore the historic, bipartisan protections that the *Sackett* decision removed.

So, I want to thank the witnesses for joining us today, and I look forward to your testimony.

With that, I yield back.

[Mr. Larsen of Washington's prepared statement follows:]

Prepared Statement of Hon. Rick Larsen, a Representative in Congress from the State of Washington, and Ranking Member, Committee on Transportation and Infrastructure

My home state of Washington is defined by its clean water, from Puget Sound to the hundreds of lakes and thousands of miles of rivers and streams.

Washingtonians know that protecting these rivers, streams and wetlands takes work, and that the health of our water bodies are intertwined.

Our waters and our water-related economy depend on the historic protections of the Clean Water Act and its pollution-prevention programs.

It is more effective and less costly to prevent pollution than to clean up pollution. This is true in Washington state, and it is true across the nation.

When Congress passed the Clean Water Act over 50 years ago, Members recognized the effectiveness and importance of comprehensive pollution prevention measures—stopping pollution before it happens rather than simply cleaning it up.

The Clean Water Act was enacted on an overwhelming and bipartisan basis. Before this law, rivers and lakes served as little more than open sewers—Lake Erie was pronounced "dead," and Ohio's Cuyahoga River literally caught on fire.

Thanks to the Clean Water Act, the Cascade River in my district was recently designated as an Outstanding Resource Water by the State of Washington, which now protects the river from any future activities or development that would degrade water quality.

In passing the CWA, Congress specifically noted that a state-by-state, do-it-alone approach was "inadequate in every vital aspect" and left waters severely polluted and expensive to restore.

For decades, Republicans and Democrats shared these bipartisan principles to defend clean water: maintain a strong federal-state partnership to protect our waters; stop pollution from entering the system in the first place; and support a robust federal floor of protections while allowing states to do more, but not less.

After the Sackett decision, the robust federal protections for our nation's waters have been eliminated for more than 50 percent of wetlands and up to 70 percent of streams.

History has shown that a lack of strong federal water quality protections makes it difficult and expensive for states to protect their waters if neighboring states adopt a lesser standard.

States are now faced with a decision on how to handle pollution of the countless, non-navigable streams, lakes and wetlands once protected by the Clean Water Act.

Some states will meet this challenge by establishing new state-level water quality standards for unprotected wetlands and streams, as the State of Colorado has done.

Other states will choose to do nothing, or worse, pull back on state-level protections, like the State of North Carolina, leaving critical waters completely unprotected.

Without uniform national protections, downstream states will be negatively impacted by pollution from upstream sources if neighboring states choose not to pass new protections.

Last Congress, we passed the Bipartisan Infrastructure Law, affirming our commitment to improving infrastructure. The BIL included significant investments in water infrastructure—providing $13.8 billion in federal dollars for upgrading wastewater systems, preventing pollution discharges and supporting restoration programs in places like the Puget Sound.

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Such a large federal investment was a downpayment to address the backlog of water infrastructure needs across the country.

The Sackett decision reduces the effectiveness of these investments and reduces the federal role in the successful partnership that has been the Clean Water Act. If we are to maintain the same historic protections, states will have to step up and spend more resources on protecting water quality.

Unfortunately, states will be doing so from scratch, without the decades of experience of EPA and the Army Corps of Engineers.

In this post-Sackett world, we must find ways to leverage federal experience in assisting states that are stepping up to maintain water quality protections.

Congress can do its job, as well, and legislate a solution. Passing the Clean Water Act of 2023, a bill I introduced in partnership with Ranking Member Napolitano, would restore the historic, bipartisan protections that the Sackett decision removed.

Thank you to the witnesses for joining us today, and I look forward to your testimony.

Mr. ROUZER. The gentleman yields back.

I ask unanimous consent to enter into the record a series of letters regarding WOTUS implementation from the Associated Builders and Contractors, dated September 11, 2024; Idaho Mining Association, dated September 9, 2024; Associated General Contractors of America, dated September 9, 2024; National Parks Conservation Association, September 10, 2024; National Stone, Sand, and Gravel Association, dated September 11, 2024; National Mining Associa-

tion, dated September 11, 2024; State of Alaska Department of Transportation and Public Facilities, dated September 6, 2024; and, finally, from 24 State attorneys general, led by West Virginia, dated September 6, 2024.

Without objection, so ordered.

[Hon. Rouzer's submissions for the record are on pages 59–72.]

Mr. ROUZER. I would now like to welcome our witnesses and thank them for being here today.

First, we have Emma Pokon—or is it "Pokon"?

Ms. POKON. Either is just fine.

Mr. ROUZER. Well, which do you prefer, ma'am?

Ms. POKON. I think I say it "Pokon."

Mr. ROUZER. "Pokon"—commissioner of the Alaska Department of Environmental Conservation; Nicole Rowan, director of the Water Quality Control Division at the Colorado Department of Public Health and Environment; Ms. Courtney Briggs, chairman of the Waters Advocacy Coalition, on behalf of the American Farm Bureau Federation; and Vince Messerly, president of the Stream and Wetlands Foundation, on behalf of the National Association of Home Builders.

So, briefly, I would like to take a moment to explain our lighting system to our witnesses. Fairly self-explanatory. Green means go. Yellow means you have about 45 seconds to 1 minute left. And red means, of course, conclude your remarks as quickly as you can.

So, with that—oh, I also ask unanimous consent that the witnesses' full statements be included in the record.

Without objection, so ordered.

I ask unanimous consent that the record of today's hearing remain open until such time as our witnesses have provided answers to any questions that may be submitted to them in writing.

Without objection, so ordered.

I also ask unanimous consent that the record remain open for 15 days for any additional comments and information submitted by Members or witnesses to be included in the record of today's hearing.

Without objection, so ordered.

As your written testimony has been made part of the record, the subcommittee asks you to limit your oral remarks to 5 minutes.

And, with that, Commissioner Pokon, you are recognized for 5 minutes.

TESTIMONY OF EMMA POKON, COMMISSIONER, ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION; NICOLE ROWAN, DIRECTOR, WATER QUALITY CONTROL DIVISION, COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT; COURTNEY BRIGGS, CHAIRMAN, WATERS ADVOCACY COALITION, ON BEHALF OF THE AMERICAN FARM BUREAU FEDERATION; AND VINCENT E. MESSERLY, PRESIDENT, STREAM AND WETLANDS FOUNDATION, ON BEHALF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS

TESTIMONY OF EMMA POKON, COMMISSIONER, ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Ms. POKON. Thank you, Chairman Rouzer, Ranking Member Napolitano, Ranking Member Larsen, and members of the subcommittee. I appreciate the opportunity to testify today.

My name is Emma Pokon. I serve as the commissioner of the Alaska Department of Environmental Conservation.

To start today, I want to emphasize the importance of this topic to the State of Alaska. Our State has 900,000 miles of navigable rivers and streams, 22,000 square miles of lakes, 27,000 miles of coastline, and more wetlands than every other State in the Union combined. At about 130 million acres, it is estimated around 63 percent of the wetlands in the Nation. And all of that is before you get to glaciers and groundwater.

If you want to build a home, a road, a mine, or really anything in the State, you will likely impact a water of some sort. And where there is an impact to a water body, Alaska DEC is going to be working to ensure that impact doesn't compromise the water-quality standards we have set to protect human health and the environment.

Under the Federal Clean Water Act, Alaska DEC implements the section 402 discharge permitting program, evaluates section 404 dredge and fill permits for section 401 certification, and assesses water quality throughout the State to ensure water bodies that fail to meet State water-quality standards have plans developed to address that impairment.

Importantly, I also have broad authority under State statute to establish and protect water-purity standards. If you want to discharge to water in the State of Alaska, you need authorization from my team regardless of whether it is going into a traditional navigable water body, a tributary, an adjacent wetland, an isolated surface water, or groundwater.

In fact, in all 50 States, State agencies work diligently to do their part to protect waters in their jurisdictions. Many of these States, Alaska among them, apply the same water-quality standards to all waters within their boundaries.

You can see, then, a lack of Federal regulation does not necessarily mean no regulation, no Government oversight at all. If EPA doesn't control an activity affecting water, State law and policymakers can make the judgment call about what level of protection is appropriate for their residents.

And, frankly, we are better suited to make those judgment calls. We have better visibility on the totality of circumstances for our residents. We are also more accessible to our residents, so there are

better opportunities for the feedback loops that make democracy work.

But the Federal agencies do seem reluctant to trust States. Nationally, more than 1 year after *Sackett* was decided and the agencies published a revised rule, EPA and the Corps have still failed to address the "indistinguishable" concept and the vagueness concerns articulated by the Court.

Instead, we have seen worrying "Chicken Little" rhetoric from the administration. They have characterized the decision as a terrible threat to water. The White House itself has gone as far as declaring that the Court decided the case incorrectly, essentially challenging fundamental constitutional checks and balances.

Rather than developing a standard that can be understood and implemented by the regulated community and State partners, the agencies appear intent on leveraging uncertainty and threats of heavy civil and criminal liability to effectively maintain sweeping control across the country.

If major elements of the Supreme Court guidance go unaddressed, we can anticipate continuing conflict and pendulum swings in implementation. That is not good for anyone.

Without stability, States don't have certainty around what resources to consider committing to new or existing programs that regulate State-only waters. And the public we serve will continue to either go through unnecessary and expensive permitting exercises, getting approvals from the incorrect authority, or, as the Court feared, choosing to forgo productive activities on their own lands entirely.

In closing, I would first remind everyone that States exist, we are here, and we are ready to do our jobs to protect State waters at the level deemed appropriate by our elected legislatures and chief executives.

And, second, I would posit that the field of water-quality regulation would be best served by accepting the totality of the guidance provided by the United States Supreme Court and working with States to achieve our common objectives of a predictable, respectful, and rule-of-law-driven regulatory framework.

Thank you.

[Ms. Pokon's prepared statement follows:]

Prepared Statement of Emma Pokon, Commissioner, Alaska Department of Environmental Conservation

Dear Chairman Graves, Chairman Rouzer, Ranking Member Larsen, and Ranking Member Napolitano:

Thank you for the invitation to provide testimony on the implementation of the Clean Water Act, specifically the scope of statute as defined by the term "Waters of the United States" (WOTUS), following the United States Supreme Court decision in *Sackett*.

This topic is important to the State of Alaska. We have roughly 900,000 miles of navigable rivers and streams; 22,000 square miles of lakes; 27,000 miles of coastline; and, at about 130 million acres, more wetlands than every other state in the union combined. And all of that is before considering glaciers and groundwater. Anyone looking to build a home, a road, or a mine in the state will likely impact a water of some sort.

Alaska's Department of Environmental Conservation (DEC) regulates pollution across media—from soil contamination to air emissions to water discharges. Under the federal Clean Water Act, DEC implements the Section 402 discharge permitting

program, evaluates Section 404 dredge and fill permits for Section 401 certification, and assesses water quality throughout the state to ensure water bodies that fail to meet state water quality standards have plans developed to address that impairment.

Importantly, DEC also possesses broad authority under state statute to establish and protect water purity standards. Anyone looking to discharge wastewater in the state of Alaska needs authorization from DEC—regardless of whether the discharge goes to a traditional navigable water body, a tributary, an adjacent wetland, an isolated surface water, or groundwater. In fact, in all 50 states, state agencies work diligently to do their part to protect waters in their jurisdictions. Many of these states, Alaska among them, generally apply the same water quality standards to all waters within their boundaries regardless of whether they are under federal jurisdiction.

Thus, a reduced scope of federal authority does not necessarily mean activity will be free of regulatory oversight. State policymakers can make judgment calls about what level of protection is appropriate for their residents. And states are often better situated to make those judgment calls. State officials have more complete visibility on circumstances for residents, are more accessible, and may have more nuanced appreciation for unique ecosystem issues and concerns.

To illustrate, many factors make Alaska's circumstances unique compared to other states and regions of the country. There's the sheer geographic size and volume of water bodies and wetlands. And, as a younger state, Alaska remains largely undeveloped in terms of infrastructure and resource extraction. Our state is also in the enviable position of having had landscape level planning to establish state and federal conservation units that will remain undeveloped even as other resource rich areas—often on federal, State, or Alaska Native Corporation owned lands—could progress to production. In this context, Alaskan lawmakers and elected officials might make different judgment calls than the federal government or more industrialized and developed states.

But federal agencies are reluctant to trust states; instead, they continue to grope for complete authority over all waters. Nationally, more than a year after *Sackett* was decided and the agencies published a revised rule, EPA and the Corps have still failed to address the "indistinguishable" concept and the vagueness concerns articulated by the Supreme Court. Rather than developing a standard that can be understood and implemented by the regulated community and state partners, the agencies appear intent on leveraging uncertainty and the risk of civil and criminal liability to effectively maintain sweeping authority in their own hands.

As long as major elements of the Supreme Court guidance go unaddressed, conflict and pendulum swings in implementation will likely continue. Without stability, states will struggle to appropriately adjust existing programs. Nor will states have the time to seek additional authorities from their legislatures. And the public we serve will continue either going through unnecessary and expensive permitting exercises, getting approvals from the incorrect authority, or, as the Court feared, choosing to forego productive activities on their land.

Federal policymakers must remember that states exist. We're here, and we're ready to do our jobs to protect state waters. Moreover, working with states to achieve a stable regulatory framework would best serve the field of water quality regulation.

Mr. ROUZER. Ms. Rowan, you are recognized for 5 minutes.

TESTIMONY OF NICOLE ROWAN, DIRECTOR, WATER QUALITY CONTROL DIVISION, COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Ms. ROWAN. Thank you, Chairman Rouzer, Ranking Member Napolitano, Ranking Member Larsen, and distinguished subcommittee members for the opportunity to testify before you today.

My name is Nicole Rowan, and I serve as the director of the Colorado Department of Public Health and Environment's Water Quality Control Division. Since 1975, our division has implemented the point source discharge permitting program under section 402 of the Clean Water Act.

I am here to discuss the implications of the *Sackett* v. *EPA* decision for the State of Colorado.

The *Sackett* decision significantly impacted the arid and semi-arid States in the West. In Colorado, for example, approximately half of our streams are not relatively permanent, and around half of our wetlands do not meet the Supreme Court's "continuous surface connection" test.

However, these wetlands and seasonal streams are vital to our environment and economy. They play a crucial role in flood and wildfire mitigation, water filtration, and habitat for wildlife. Natural systems act as a first defense against pollution, filtering out contaminants before reaching larger water bodies. They also support key sectors of our economy: agriculture, recreation, and tourism.

As a headwater State, our actions to protect water quality have far-reaching implications for our downstream neighbors.

The *Sackett* decision had immediate implication for Colorado businesses. Some homebuilders and contractors that no longer needed permits from the Corps put their permits on hold because the State, lacking a dredge and fill permitting program, could not authorize these activities. However, placing fill material in Colorado waters was not allowed under State statute without a permit.

Colorado sought to remedy this challenge by issuing an enforcement discretion policy shortly after the *Sackett* decision. This informed the regulated community that the State would not penalize those without a permit who notified us of their projects and implemented best management practices from the Corps' nationwide permits.

Some larger projects, however, did not qualify for discretion under the policy. Colorado had to act quickly to allow these projects to proceed.

Shortly after the Supreme Court heard oral argument for *Sackett*, Colorado Governor Jared Polis convened a task force to examine options for a State dredge and fill program. The task force had representatives from agriculture, water supply, construction, mining, oil and gas development, local government, and the conservation community. All agreed that Colorado needed a program to fill a gap left by *Sackett*.

The task force proposed four different approaches, ranging from continuing to use enforcement discretion to full assumption of the 404 program. These four approaches were presented to a broader audience of stakeholders, who were asked to provide written comments to inform State legislation.

During the Colorado General Assembly's 2024 regular session, legislation was introduced authorizing our division to issue permits for dredge and fill activity for all ephemeral and intermittent streams and all wetlands in the State, which went further than just regulating the gap of waters created by *Sackett*. However, this approach provides certainty to the regulated community by eliminating a "significant nexus" determination.

Through a series of over 45 stakeholder meetings with nearly 500 participants, we drafted clear exemptions and exclusions to this permitting regime that ultimately resulted in bipartisan support for the legislation from groups like Earthjustice and the Sierra Club, as well as the Colorado Chamber of Commerce, Colorado Mining Association, and the State's largest water advocacy organi-

zation representing over 400 water user interests, including water supply, agriculture, and local government.

Governor Polis signed House bill 1379 into law on May 30, making Colorado the first State to enact legislation in response to *Sackett*. The bipartisan legislation ensures that Federal 404 standards will continue while also addressing Colorado's unique needs. This approach provides much needed regulatory certainty and also demonstrates that bipartisan solutions are achievable at the State level.

Thank you for your attention and for allowing us to share Colorado's success story.

[Ms. Rowan's prepared statement follows:]

Prepared Statement of Nicole Rowan, Director, Water Quality Control Division, Colorado Department of Public Health and Environment

Thank you, Chairman Rouzer, Ranking Member Napolitano, Chairman Graves, Ranking Member Larsen, and distinguished subcommittee members, for the opportunity to testify before you today. My name is Nicole Rowan, and I serve as the Director of the Colorado Department of Public Health and Environment's Water Quality Control Division. We are the primary water quality protection program in the state. Since 1975, we have implemented a delegated Section 402 program under the federal Clean Water Act (or "federal Act") and a Section 401 water quality certification program. Our 250-person division regulates 11,000 businesses across Colorado to ensure that they can operate effectively while protecting the state's water resources.

I am submitting this written testimony on behalf of the State of Colorado to accompany my oral testimony concerning Colorado's proactive response to the U.S. Supreme Court's decision in *Sackett v. EPA* (May 2023). Colorado led the nation to establish a state dredge and fill program in response to the *Sackett* decision through legislation. Our program reinstates water quality protections that had been in place for 50 years at the federal level prior to *Sackett*, and also addresses a number of Colorado-specific priorities. While we take pride in this success story, we also want to take this opportunity to emphasize the resulting significant financial burden on states like Colorado that wish to continue wetland and water quality protection at the pre-*Sackett* level, as well as the entities regulated by those states.

As you know, the U.S. Supreme Court's decision in *Sackett v. EPA* significantly narrowed the scope of waterways and wetlands historically protected under the Clean Water Act. The Court's decision altered the decades-long status quo that acknowledged the interconnectivity of all water sources, regardless of navigability or permanence. The *Sackett* decision saddled states with the burden of filling the gaps in longstanding, uniform federal protection—to the extent states choose to do so at all. The decision will undeniably result in a patchwork of regulatory schemes across the nation to address water quality protection, which is counter to the intent and purpose of the federal Clean Water Act since wetlands serve to protect both seasonal and permanent waterways that eventually flow across state borders. The decision also greatly undermines the principle of cooperative federalism that is the cornerstone of the Clean Water Act—through which the federal government is responsible for setting uniform, protective nationwide standards that states may choose to implement in different ways with federal assistance and oversight.

I. Implications of the *Sackett* Decision for Colorado

From a proportional standpoint, the *Sackett* decision has some of the greatest implications for the arid and semi-arid states in the West, such as Colorado. This is because approximately 50% of Colorado's streams are seasonal and thus do not satisfy the "relatively permanent" test under *Sackett* to be considered "waters of the United States." Further, because of Colorado's dry climate and topography, over 50% of the state's wetlands do not have a "continuous surface connection" to relatively permanent waters, although the vast majority of these wetlands are vital to protecting downstream waters. Colorado is also home to many fens, which are a special kind of wetland in our mountainous regions that take thousands of years to form. Fens are especially effective in filtering pollution from downstream waters and also act as carbon sinks.

The impacts of the *Sackett* decision in Colorado are particularly stark because water in our state is increasingly scarce, and yet vital to our prosperity. As the state's water needs expand, the health of our waterways becomes even more important to support our economy and growing population. Indeed, Colorado's wetlands and seasonal streams provide countless opportunities for outdoor recreation, including rafting and kayaking, hunting and fishing, and observing wildlife. Colorado also takes great pride in its agricultural economy, which relies on clean and predictable water supplies. Wetlands, in particular, provide broad public benefits, including erosion control, flood control, groundwater recharge, minimization of wildfire impacts, and water quality enhancement through filtration of pollutants. Further, as a headwaters state where most of our water originates high in the Rocky Mountains through snowfall, the 17 downstream states that depend on water originating in Colorado through interstate compacts are also affected by the quality of our water.

II. COLORADO'S BIPARTISAN RESPONSE TO THE *SACKETT* DECISION

For all of these reasons, the *Sackett* decision and subsequent change to the regulatory definition of "waters of the United States" made it imperative for Colorado to take immediate action to fill the gap left in oversight of dredge and fill activities. Since 1975, Colorado has administered an EPA-approved point source discharge permitting program under Section 402 of the federal Act. The state, however, did not establish a permitting program to regulate discharges of dredged or fill material. Instead, along with 47 other states, Colorado has historically relied on the U.S. Army Corps of Engineers' ("USACE") Section 404 permitting program to protect its waterways from the impacts of dredge and fill activities. Through Colorado's Section 401 authority, Colorado has worked cooperatively with the USACE for nearly 50 years to ensure that activities being conducted under individual 404 permits do not adversely impact water quality. Without the 404 permit trigger, however, Colorado lacked a program designed to protect its wetlands and waterways from the impacts of dredge and fill activities.

Indeed, the *Sackett* decision put certain projects in Colorado on hold and left those project proponents with no way to legally move forward with construction or maintenance activities. Like the federal Act, Colorado's Water Quality Control Act prohibits the discharge of pollutants (including dredged and fill material) into state waters without first obtaining a permit with effluent limitations designed to meet water quality standards established by the Colorado Water Quality Control Commission. Colorado cannot issue 402-type permits for discharges of dredged or fill material because such discharges, by their nature, exceed water quality standards. For this reason, after the *Sackett* decision, project proponents in Colorado risked being in violation of state law (i.e., discharging pollutants into state waters without a permit) for conducting any dredge and fill activities in waters that were no longer under federal jurisdiction.

Three years before the announcement of the *Sackett* decision, Colorado undertook significant efforts to examine "gap-filling" options for water quality protection. In response to the Navigable Waters Protection Rule published in April 2020, the Colorado Department of Public Health and Environment led a stakeholder process to discuss legislative solutions for filling a similar gap in federal dredge and fill protection of our state's waterways and wetlands. That stakeholder effort began with monthly meetings and eventually evolved into weekly meetings during Colorado's 2021 legislative session. Although state dredge and fill legislation was not ultimately passed during that session, because of these outreach efforts, much of the foundation had already been laid by the time the *Sackett* decision was announced.

Colorado's proactive approach continued in anticipation of the *Sackett* decision. Shortly after the Supreme Court heard oral argument for the *Sackett* case in October 2022, Governor Polis convened a task force to examine options for a state-administered dredge and fill program. The task force included representatives from several important sectors within the state: agriculture, water supply, construction, industry and commerce (including mining and oil and gas development), local governments, and the conservation community. Representatives from the Governor's Office, the State Attorney General's Office, and various executive agencies, including Colorado's Department of Public Health and Environment, Department of Agriculture, Department of Natural Resources, and Department of Transportation, also participated. The task force met seven times from February 2023 to July 2023.

All members of Governor Polis's task force agreed that Colorado needed a program to fill the gap in dredge and fill protection left by the *Sackett* decision. The task force proposed four possible approaches (including the pros and cons of each) for Colorado to address dredge and fill activities in the post-*Sackett* landscape: (1) an enforcement discretion approach—a temporary option that would allow dredge

and fill activities to continue until a more permanent solution could be agreed upon, involving installation of best management practices in exchange for no enforcement for discharging without a permit; (2) a "gap waters" approach, which would focus on protecting waters and wetlands previously protected under the "significant nexus" test from the Court's *Rapanos* decision and corresponding EPA guidance issued in 2008; (3) a Colorado "state waters" program, which would protect all "state waters," as that term is defined in state statute, including wetlands, that do not fall under federal jurisdiction; and (4) full assumption to administer the federal Section 404 program. The task force agreed that it would be important to continue the longstanding exemptions and exclusions found in the definition of "waters of the United States" and the 404 permitting program framework, while taking the opportunity to provide additional clarity and adding exemptions and exclusions to address Colorado-specific needs. In July 2023, these four approaches, along with the exemptions and exclusions, were presented in a series of sector-specific meetings open to a broader audience of interested stakeholders. The Task Force did not endorse or recommend any particular one of these approaches. Stakeholders were asked to provide written comments on the options to the Governor's Office by October 2023, which would be considered in crafting legislation to be introduced in Colorado's 2024 legislative session.

The Governor's Office and the Departments considered a myriad of written comments to assist the bill sponsors, Speaker of the House Julie McCluskie, Chair of the House Agriculture, Water and Natural Resources Committee Representative Karen McCormick, Chair of the Senate Agriculture and Natural Resources Committee Dylan Roberts, and Joint Budget Committee Member Barbara Kirkmeyer, in crafting legislation to authorize a state dredge and fill program. In January 2024, soon after Colorado's legislative session began, the House sponsors and the Department hosted a hybrid informational meeting to announce the proposed framework of the program and continuing opportunities for robust stakeholder involvement as details were being considered. Nearly 400 people attended that meeting, demonstrating a high level of interest in the program. Shortly thereafter, a draft bill was shared with stakeholders, kicking off three and half months of negotiating and fine-tuning bill language with representatives from the various sectors. This back-and-forth continued both before and after the bill was officially introduced as House Bill 24–1379. During this period, the bill sponsors held numerous in-person meetings and remained in constant contact with all stakeholders to consider various proposals. This process resulted in dozens of amendments to the introduced bill, demonstrating the high level of cooperation that went into the final product.

Incorporating input and specific language from the various stakeholders ultimately made the legislation stronger and more focused on Colorado's unique interests. The collaboration and expertise of several state agencies were also key factors in the bill's success, along with the partnership of Colorado's diligent and well-organized conservation coalition. Colorado Governor Jared Polis signed the bill into law on May 30, 2024, making Colorado the first state in the country to enact legislation in direct response to the *Sackett* decision. Colorado could not have achieved this accomplishment without bipartisan buy-in and collaboration from all stakeholders. All stakeholders were willing to work together to achieve the common goal of protecting Colorado's valuable water resources, with each sector having unique concerns and perspectives to contribute.

III. Colorado's Dredge and Fill Program Framework and Continued Stakeholder Involvement

The resulting legislation established Colorado's Dredge and Fill Protection Program within the Colorado Water Quality Control Act, which protects all "state waters" from the impacts of dredge and fill activities. Consistent with the wishes of the regulated community, the Colorado program is based on the longstanding federal Section 404 permitting principles of avoidance and minimization of adverse impacts, and mitigation requirements to compensate for unavoidable impacts. The legislation also requires project proponents seeking to construct reservoirs under state-issued individual dredge and fill permits to develop a fish and wildlife mitigation proposal in consultation with the Division of Parks and Wildlife. The Colorado Parks and Wildlife Commission then evaluates the proposal and transmits its mitigation recommendation to the Colorado Water Conservation Board, which may affirm, modify, or amend the Commission's mitigation recommendation.[1] This requirement has been in place since 1987 for reservoirs being constructed under federal

[1] Colorado Revised Statutes, § 37–60–122.2 (2024).

Section 404 permits, and Colorado felt it was important to maintain these same protections for projects that no longer fall under USACE jurisdiction.

The legislation directs the division to administer USACE's existing nationwide and regional permits to protect "state waters" that are no longer covered under the federal Section 404 permitting program. Colorado defines "state waters" as "any and all surface and subsurface waters which are contained in or flow through the state, including wetlands . . . ."[2] This includes all ephemeral and intermittent streams and other water features (unless otherwise excluded), even if they are isolated from other state waters. Colorado's point source discharge program and dredge and fill program are purposefully designed to protect any and all state waters that do not otherwise fall under federal jurisdiction. The broad scope of our water quality protection programs provides regulatory certainty in light of the ever-changing federal definition waters of the United States.

While the scope of protection under the legislation is broad, it also eliminates the need for a significant nexus determination and provides numerous exemptions for certain activities and exclusions for specified types of waterbodies, including those that have been long-recognized under the federal definition of waters of the United States and the section 404 framework, but with added clarity. For example, the federal permitting exemption for "normal farming activities" in section 404 of the Clean Water Act has created confusion for years. The federal exemption includes "upland soil and water conservation practices" (e.g. erosion control) in its list of normal farming practices, but the term has never been defined in statute or regulation. At the request of agriculture stakeholders, Colorado included a detailed definition of the term, which also recognizes that farmers and ranchers implement these types of practices daily, thereby reducing nonpoint source pollution and improving water quality.

Colorado's legislation also expands and clarifies the federal statutory exemption for "construction and maintenance of farm ponds, stock ponds, or irrigation ditches or the maintenance of drainage ditches" to better align with Colorado's extensive use of ditches and acequias for irrigation and drainage. The state provision, crafted in partnership with our agriculture stakeholders, exempts:

> Construction or maintenance of farm ponds, stock ponds, farm lagoons, springs, recharge facilities located in uplands, and irrigation ditches or acequias, or maintenance of a drainage ditch, roadside ditch, or a ditch or canal conveying wastewater or water. Construction of new work or to extend, expand, or relocate an irrigation ditch or acequia for municipal or industrial purposes is not an exempt activity . . . .

The provision goes on to include detailed definitions of the terms "construction," "maintenance," "irrigation ditches," and "acequias," which, again, were agreed upon by representatives from Colorado's farming and ranching sectors.

We also crafted additional exemptions and exclusions to address the specific concerns of the various sectors, including common-sense provisions to allow for certain infrastructure and water supply projects to be constructed and maintained in a more efficient manner. For example, a permitting exemption was included for dredging and other maintenance activities in off-channel reservoirs, which does not exist at the federal level.

The legislation directs Colorado's Water Quality Control Commission to adopt rules governing certain aspects of the program such as: (1) procedures and guidelines for the division's issuance of individual permits for larger projects and incorporation of the federal 404(b)(1) guidelines as the framework of those permits; (2) procedures for consultation with relevant state and local agencies in developing individual permit terms; (3) compensatory mitigation requirements for projects that meet certain impact thresholds; (4) rules for the issuance of general permits to promote efficiency for activities in response to wildfire or other natural disasters, voluntary ecological restoration activities, and activities impacting isolated state waters; and (5) fee amounts to assist with covering the cost of administering the program. The Department recently initiated a new stakeholder effort that will continue until the rulemaking hearing, scheduled for December 2025. Meetings will be held with stakeholders on a monthly basis to discuss all aspects of the regulation and to receive comments, even before the formal rulemaking process begins in August 2025.

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[2] Colorado Revised Statutes, § 25–8–103(19) (2024). The division has historically included wetlands in its administration of the state's point source discharge program, but Colorado took the opportunity in House Bill 24–1379 to specifically include "wetlands" in the statutory definition of state waters.

IV. THE RESULTING FINANCIAL BURDEN ON COLORADO AND OTHER STATES

While Colorado considers the passage of House Bill 24–1379 to be a major bipartisan success for the protection of our valuable water resources, administering a program to fill the gap in protection left by the *Sackett* decision will result in a significant fiscal impact for the state—just to *maintain* the longstanding status quo of prior federal protection. The Department anticipates spending approximately $500k–$600k per year and hiring four full-time employees. In order to sustain the program, a portion of the program costs will be passed to the regulated community through cash fees, which they are not used to paying at the federal level.

Later this year, Colorado anticipates receiving a grant through EPA's Wetland Program Development Grant ("WPDG") program, which will allow the Department to hire contractors to assist with program development. While these resources are valuable, funding for the WPDG program has remained flat for more than a decade, maintained at approximately $14.5 million per year. When adjusted for inflation, FY23 funding levels are at a 22% reduction from ten years ago. Additionally, these grants are for program development and not ongoing administration of programs. By upending the 50-year status quo, the *Sackett* decision left states to establish and administer fully protective dredge and fill programs. More than ever, states will need to rely upon federal assistance to protect their wetlands and downstream water resources.

V. CONCLUSION

In conclusion, while Colorado has taken significant steps to address the regulatory gaps left by the *Sackett* decision, our experience underscores the critical need for sustained federal support and collaboration. The proactive measures we have implemented, including the creation of a state dredge and fill program, reflect our commitment to maintaining the high standards of water quality that Coloradans—and those downstream—rely upon. However, the financial and administrative burdens placed on states by this decision are substantial and ongoing. As we continue to navigate the complex and evolving landscape of water regulation, it is imperative that the federal government remains an engaged partner, providing both financial assistance and consistent regulatory frameworks to ensure that states can effectively protect their water resources. Only through such cooperative efforts can we uphold the foundational principles of the Clean Water Act and safeguard the health of our nation's waters for future generations.

Mr. ROUZER. Thank you very much.

Ms. Briggs.

TESTIMONY OF COURTNEY BRIGGS, CHAIRMAN, WATERS ADVOCACY COALITION, ON BEHALF OF THE AMERICAN FARM BUREAU FEDERATION

Ms. BRIGGS. Chairman Rouzer, Ranking Member Napolitano, and members of the subcommittee, thank you for the opportunity to testify today.

My name is Courtney Briggs, and I serve as chairman of the Waters Advocacy Coalition, also known as WAC, and as senior director of government affairs at the American Farm Bureau Federation.

WAC is a multi-industry coalition representing a cross-section of the Nation's construction, transportation, real estate, mining, manufacturing, forestry, agriculture, energy, wildlife conservation, recreation, and public health and safety sectors—all vital to a thriving national economy and providing much needed jobs in local communities.

It is an honor to be here on behalf of our trade associations and the thousands of members and millions of jobs we collectively support.

Our members are committed to protecting our natural resources while maintaining their businesses. They live in the communities

where they work and understand their responsibility in keeping our waterways healthy.

However, the 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.

Over the last few years, we have seen the Biden administration offer a new WOTUS definition, the Supreme Court hand down a highly consequential decision in *Sackett*, and then the agencies respond with a conforming rule and numerous agency memos.

Despite a clear ruling in *Sackett*, there have been no clear directions from the agencies about which water features are regulated by the Federal Government and which are left to the States. Instead, the agencies are making up the rules as they go.

They have failed to clarify the meaning of "relatively permanent" and "continuous surface connection," which are crucial terms for defining the scope of Federal jurisdiction. It seems the agencies want to leave these terms undefined, allowing them to exploit the gray areas that persist in a post-*Sackett* world. By leaving these terms undefined, the agencies gain unchecked power to regulate land and natural resources, creating murky waters for regulated entities.

In this ambiguous regulatory regime, American businesses and landowners are left guessing where the line of jurisdiction lies, despite the severe penalties for Clean Water Act compliance—either $64,000 per day for every day of noncompliance or jail time.

It is, thus, all too easy for our members to unknowingly break the law. To put it simply, WAC members are tired of playing the agencies' never-ending guessing games.

The agencies have also neglected to provide clear implementation guidance to stakeholders. Instead, WAC members began hearing feedback that secret implementation guidance was being distributed by Corps headquarters to the districts with strict instructions not to share publicly.

The agencies' refusal to release this secret guidance forced many WAC members to submit FOIA requests. The agencies responded with substantially redacted texts, stating that the guidance was deliberative. How can something that is being used on the ground to make determinations that directly impact regulated parties be deliberative?

The agencies' implementation improv is putting our members' projects and the communities that rely on them at risk. This is a flagrant abuse of power and a blatant disregard for Government transparency.

Rather than offering clear guidance, the agencies are relying on memos haphazardly placed on their website with little public notice. Each memo gives a small snippet as to how they are implementing this rule, leaving stakeholders to play connect-the-dots, with their livelihoods on the line.

Many of the concepts outlined in these memos run counter to the decision in *Sackett*. The agencies offer no mechanism for appealing the memos, no opportunity for public comment. These memos are effectively rulemakings hiding in plain sight.

It is unacceptable that 1½ years since *Sackett* the agencies continue to flout the Court's ruling and hold project proponents and States hostage in regulatory limbo.

Our Nation's job creators, small businesses, farmers, landowners, and even States remain in the dark about how the rule is being implemented. This is especially concerning given the serious penalties for even negligent Clean Water Act violations, such as simply moving dirt in the wrong place.

The agencies seem more interested in charting their own course than adhering to the Supreme Court's decision.

Thank you so much for the opportunity to testify today, and I look forward to your questions.

[Ms. Briggs' prepared statement follows:]

Prepared Statement of Courtney Briggs, Chairman, Waters Advocacy Coalition, on behalf of the American Farm Bureau Federation

Chairman Rouzer and Ranking Member Napolitano, thank you for the opportunity to testify today. My name is Courtney Briggs, and I serve as Chairman of the Waters Advocacy Coalition (WAC) and as Senior Director of Government Affairs at the American Farm Bureau Federation (AFBF).

WAC is a multi-industry coalition representing a cross-section of the nation's construction, transportation, real estate, mining, manufacturing, forestry, agriculture, energy, wildlife conservation, recreation, and public health and safety sectors—all of which are vital to a thriving national economy and provide much-needed jobs in local communities. It is an honor to be here representing the 45 trade associations, and the hundreds of thousands of members collectively across the country, that make up WAC. I am also here representing the thousands of hard-working farm and ranch families that produce the abundant food, fiber, and renewable fuel that our nation and the world depend on.

Our members are committed to protecting our natural resources while also maintaining profitable businesses. They live in the communities where they work and understand their responsibility in keeping our waterways healthy. I have a unique understanding of this mindset, as it is imbedded into the business philosophy of almost every farmer and rancher across this country. They know they cannot grow crops or raise animals without clean water and healthy soil, and they must leave the land in better condition than they received it. I think we can all agree that this is our collective goal, but the Biden Administration's interpretation of WOTUS lacks clarity and certainty for landowners and pushes the scope of the federal government's jurisdictional reach to the outer bounds of what is legal under the Clean Water Act (CWA). The U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers' (the agencies) failure to faithfully implement the *Sackett* decision has real-life consequences for important infrastructure and development projects, and is impacting real people in the communities that you all represent.

FLIP FLOPPING OF WOTUS IS UNFAIR TO LANDOWNERS

WAC and its members support the objectives of federal environmental statutes such as the CWA. What we cannot support is the continuing ambiguity of the line separating federal and state jurisdiction, which is an issue that has created confusion for landowners, regulators, and the general public for decades. We have lived in a world of regulatory uncertainty due to near-constant rulemakings that swing the pendulum back and forth, redefining the scope of the CWA. We have seen "waters of the United States" (WOTUS) definitions change with each new Administration and guidance documents offered and then rescinded, generating more questions than answers. Landowners, small businesses, and American families are the ones who suffer the most with these constant changes.

Like clockwork, in early 2023, the agencies swung the regulatory pendulum and finalized a new definition of WOTUS that greatly expanded the federal government's role in regulating land use. WAC was highly critical of the agencies' decision to move forward with this rulemaking because the Supreme Court was set to imminently hand down a highly consequential decision in *Sackett v. EPA*. Shortly after the 2023 rule went into effect, the Court handed down a decision that reinforced

property owners' rights and ensured adherence to the congressional intent of the CWA. The Court also respected the CWA's cooperative federalism framework, as well as the states' primary authority and responsibility to regulate non-federal waters within their borders.

All nine Supreme Court justices agreed that the Biden Administration's use of the controversial "significant nexus test" was illegitimate, and a majority of the Court agreed that EPA's interpretation of "adjacency" was overly broad. In an opinion authored by Justice Alito, the Court reprimanded the agencies for illegally expanding their regulatory reach. WAC celebrated this legal victory because our members thought it would inject more clarity and certainty into the regulatory process. Unfortunately, we were wrong.

On Sept. 8, 2023, the Corps and the EPA published a final rule revising the regulatory definition of WOTUS under the CWA to try to conform the definition to the *Sackett* decision. This "conforming rule" failed to provide any more context to specific terms that are serving as the linchpin for determining the scope of the federal government's authority. It became obvious that the agencies were going to exploit the gray areas that still exist in a post-*Sackett* world to try to expand their regulatory reach. Leaving these terms undefined and interpreting them expansively and in a freewheeling manner since *Sackett* has given the agencies the latitude to regulate land use however they please.

WHY WORDS MATTER: RELATIVELY PERMANENT AND CONTINUOUS SURFACE CONNECTION

With the death of "significant nexus" in *Sackett*, the Court agreed that the agencies must solely follow the "relatively permanent" test; a regulatory test originally authored by Justice Scalia in *Rapanos v. United States*. As its name suggests, the test states that a relatively permanent water that is connected to a traditional interstate navigable water can be regulated as a "navigable water" (i.e., as a WOTUS). Likewise, an adjacent wetland can be jurisdictional if it has a "continuous surface connection" to a traditional interstate navigable water or a relatively permanent water connected thereto.

In the aftermath of the *Rapanos* decision, the agencies drafted interpretive guidance (2008 Guidance) where they interpreted "relatively permanent" to mean flowing year-round or having continuous flow at least seasonally. In practice, the agencies unlawfully swept in even ephemeral water features that carried flow only after precipitation events (and far too many intermittent features as well). The agencies interpreted "seasonally" to mean generally three months, or possibly even less time depending on what part of the country the water feature is located in. The agencies purported to rely on a footnote in *Rapanos* to support this interpretation, but on its face, that footnote discussed the possibility that a river flowing for 290 days (closer to 10 months) would not necessarily be *excluded* under the relatively permanent test. In other words, whether jurisdiction can be exercised over rivers, streams, and tributaries that flow continuously for 290 days is a case-by-case basis inquiry. The agencies inverted what Justice Scalia intended and instead concluded that any feature that flows for continuously for at least 90 days is automatically jurisdictional. See *Rapanos*, 547 U.S. at 732 n.5. It goes without saying that not necessarily *excluding* 290 days of continuous flow cannot possibly equate to automatically *including* 90 days of continuous flow.

The new rule makes the relatively permanent standard even more expansive than the 2008 guidance. The new rule abandons the seasonal concept and does not use any bright line tests (days, weeks, or months) or any concepts of flow regime (ephemeral, intermittent, perennial). The rule vaguely says relatively permanent tributaries have flowing or standing water year-round or continuously during certain times of the year and they do not include tributaries with flowing or standing water for only a short duration in direct response to precipitation. As an example, the agencies suggest that consecutive storm events, or even a single strong storm event, is enough to create relatively permanent flow. This subtle change will greatly expand what areas the agencies can assert jurisdiction over under the relatively permanent test.

Because the agencies have tied the relatively permanent standard to the ditch exclusion, the broader the relatively permanent standard gets, the fewer ditches will be excluded from jurisdiction. Under both the 2008 guidance and the 2023 rule, ditches are excluded only if they do not carry relatively permanent flow. Again, because the relatively permanent test has expanded, fewer ditches will meet the requirement in the exclusion.

Likewise, the 2023 rule also expands which wetlands (and "other waters") are jurisdictional by virtue of having a continuous surface connection to a relatively per-

manent water. The agencies interpret "continuous surface connection" to mean a physical connection that does not need to be a continuous surface hydrologic connection, and wetlands need not directly abut a relatively permanent water. Under the 2008 guidance, however, wetlands would only meet the "continuous surface connection" test if they directly abut a relatively permanent tributary (e.g., are *not* separated by uplands, a berm, dike, or similar feature). The new rule, by contrast, abandons this directly abutting requirement and instead provides that wetlands have a continuous surface connection even if they are separated from a relatively permanent impoundment of a tributary by a natural berm, bank, dune, or similar natural landform so long as that break does not sever a continuous surface connection and provides evidence of a continuous surface connection. Wetlands also meet the continuous surface connection requirement if they are located some distance away from a relatively permanent tributary but connected by some linear feature such as a ditch, swale, or pipe. The picture becomes clear that the agencies are moving in the wrong direction.

It is worth noting that, ultimately, the question is not whether tributaries or ephemeral streams are "important" or may as a scientific matter have some connection with downstream navigable waters, see, e.g., 86 Fed. Reg. at 69,390; rather, the question is whether they should be considered as falling within the bounds of federal jurisdiction. As with so many other categories in the 2023 rule, the agencies collapse that distinction.

ALITO'S DECISION IN *SACKETT*

While the decision in *Sackett* did not pinpoint a specific flow metric to be used to determine the meaning of relatively permanent, it did give us more context as to what a regulated feature should look like. *Sackett* "conclude[d] 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.'" The *Rapanos* plurality, in turn, repeatedly distinguished between "continuously present, fixed bodies of water" and "ordinarily dry channels through which water occasionally or intermittently flows." Indeed, the *Rapanos* plurality explained that, as a matter of "commonsense," the phrase "waters of the United States" excludes "channels containing merely intermittent or ephemeral flow."

Equally important, in *Sackett*, Justice Alito wrote that, to be jurisdictional, a "wetland [must] ha[ve] a continuous surface connection with [a relatively permanent] water . . . making it difficult to determine where the 'water' ends and the 'wetland' begins." Additionally, the Court held "that the Clean Water Act extends to only those wetlands that are as a practical matter indistinguishable from waters of the United States." In further elaborating what it means to have a "continuous surface connection," Justice Alito noted that "temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells." Read in context, Justice Alito clearly had in mind that, to be jurisdictional, wetlands must typically have a continuous surface *hydrologic* connection to a relatively permanent water, not just some ordinarily dry physical connection like a ditch, pipe, or swale that might span hundreds (or even thousands) of feet.

WOTUS IMPLEMENTATION CONCERNS

Immediately after the *Sackett* decision was handed down, the Corps notified the public that they would be pausing the issuance of approved jurisdictional determinations (AJDs) indefinitely. During the summer of 2023, landowners' only option to move forward on a project was to accept a preliminary jurisdictional determination (PJD). PJDs force landowners to concede that their land is a WOTUS and accept the permitting and mitigation requirements—often unnecessarily. Many projects with specific production windows had their backs against a wall and saw this as the only option, especially in weather-dependent industries such as construction. The directives in *Sackett* gave the agencies the ability to move forward with most AJDs over that summer but the Corps chose to take the summer off.

In September 2023, the agencies released two joint elevation coordination memos to the field that established a process by which the agencies will coordinate on CWA jurisdictional matters to "ensure accurate and consistent implementation" of the 2023 rule or the pre-2015 regulatory regime, depending on which regulatory frame-

work is applicable.[1] The memos also outline procedures and specific timelines under which the agencies can review and provide comment on certain draft AJDs. Again, these elevation memos only discuss the process for how the agencies will handle the approved jurisdictional determinations that are elevated to Corps and EPA headquarters to be decided by bureaucrats in Washington, D.C., and it fails to provide any actual information for landowners to understand how the Corps intends to implement the rule on the ground.

It has been exactly one year since the issuance of the elevation coordination memos and unfortunately, many of WAC's members are still experiencing significant challenges. Our members have experienced blatant disregard for the timelines specified by the agencies. Some of our members have draft AJDs that were elevated for local or headquarters coordination twelve months ago and still have not been resolved. Our members have compared this process to a "black box," with many receiving no communication from the agencies on the status or any questions or comments the agencies have regarding their draft AJDs. We also understand that some Corps Districts have completely stopped issuing AJDs—putting important projects and the communities that rely on them at risk. Within WAC, we have many examples of these challenges that we are willing to share with the Committee without attribution.

Shortly after the release of the elevation coordination memo, WAC members from various industry sectors and regions of the country also began to hear about internal guidance, directives, and training documents regarding implementation that the Corps developed but has not made available to the public. One of these documents includes internal headquarters-level guidance dated around September 2023 that includes information germane to, among other issues, assessing whether an arid west drainage is relatively permanent. We also understand the agencies have been providing regular training and information to District Office staff regarding implementation of the final rule post-*Sackett*. Through our contacts within the environmental consulting community, we heard firsthand of this "secret" implementation guidance. We were astonished by the blatant lack of transparency from the federal government.

AGENCY IMPLEMENTATION MEMOS DEFY *SACKETT*

The calls from various landowners, industry sectors and states to provide more information on implementation reached a fever pitch earlier this year and the agencies quietly released two "Headquarters Field Memos Implementing the 2023 Rule, as Amended" on the WOTUS Implementation section of EPA's website. The agencies subsequently released three additional "Headquarters Field Memos Implementing the Pre-2015 Regulatory Regime Consistent with Sackett" on a separate part of EPA's website. Unfortunately, the agencies not only failed to prominently feature these updates or provide any notification to the public about their existence, but they also neglected to offer any guidance on how these memos should be interpreted or applied. As of Sept. 5, 2024, the agencies have released 10 total policy memoranda, four related to draft AJDs completed under the 2023 rule and six related to draft AJDs completed under the pre-2015 regulatory regime. Unfortunately, these field memoranda functionally expand the scope of federal jurisdiction in violation of *Sackett*.

Much of what little direction the agencies have provided the regulated community and public in the form of these memos directly conflicts with *Sackett* and operates as quasi-rulemakings in disguise, in violation of the Administrative Procedure Act (APA). These memoranda are precisely the kind of regulatory overreach the APA was designed to prevent. According to the APA, a "rule" is an agency statement of general or particular applicability intended to implement, interpret, or prescribe policy, or to describe organizational practice. Yet, the agencies have been issuing "Memos to the Field" and telling stakeholders that EPA regional and Corps District Offices should use them for jurisdictional determinations whenever they see a similar fact pattern. It's like pouring muddy water into clear streams and pretending

[1] U.S. Env't. Prot. Agency and U.S. Army Corps of Eng'rs, 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) on the Pre-2015 Regulatory Regime (Sep. 27, 2023), https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-pre-2015-regulatory-regime__508c.pdf; U.S. Env't. Prot. Agency and U.S. Army Corps of Eng'rs, 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) on the January 2023 Rule, As Amended (Sep. 27, 2023), https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-amended-2023-rule__508c.pdf.

no one will notice—these memos are clearly being used to set broad policy under the guise of specific guidance on WOTUS regulations.

Furthermore, the agencies have asserted that these memoranda are to be incorporated into the WOTUS interpretation lexicon. While on paper, they attempt to sidestep rulemaking responsibilities by claiming these memos are not legally binding, this is merely an effort to disguise what they truly are: rulemakings hiding in plain sight. The agencies offer no mechanism for appealing these memos, nor any opportunity for public comment before they are issued. As a result, the public is left navigating murky waters with politically charged, legally flawed documents that decision-makers rely on, leaving them in a state of legal limbo with no recourse.

For example, the agencies instructed the North Dakota field office to reconsider, post-*Sackett*, whether a wetland separated by a 15-foot "dirt track road and a seasonally plowed field"—and lacking a "culvert to maintain a connection" to a navigable feature—is still jurisdictional. The agencies asserted that physically separate wetlands may be treated as one jurisdictional wetland based on various factors, even without a hydrologic connection, revealing a clear intent to evade *Sackett's* holdings.

As another example, a recently released memorandum directs the Buffalo District to evaluate whether a small wetland (only 0.030 acres) connected solely by a non-relatively permanent stream and another wetland over approximately 195 feet, still qualifies as jurisdictional under the CWA, despite the lack of a continuous surface connection to a navigable water. The agencies suggest that these disconnected features can collectively form a single jurisdictional wetland, demonstrating a clear intent to sidestep the *Sackett* ruling's requirement for a direct and continuous surface connection. Additionally, this memo vaguely discusses their understanding of "indistinguishable" when they state that the term is "not alone determinative of whether adjacent wetlands are 'waters of the United States.'" They also add that "Sackett does not require the agencies to prove that wetlands and covered waters are *visually* identical."

The agencies' failure to provide clear direction to the public is creating significant uncertainty on the ground and delaying important projects. It is worth noting again that landowners need clarity from the agencies on how they are interpreting and implementing the rule because the CWA carries severe civil and criminal penalties for even negligent violations. Landowners can be fined up to $64,000/per day or receive jail time for any CWA violations. These penalties can devastate small businesses, so landowners must understand how this rule is implemented. Leaving them in the dark will only open them up to unknowingly violating the law. Due to the agencies' veil of secrecy, landowners are denied their constitutional rights of due process and fair notice.

WAC Letter and Freedom of Information Act Request

Given the lack of transparency surrounding the elevation coordination memo, the agencies' implementation memos, and the secret field guidance, WAC sent a letter to agency leaders sharing our member's implementation challenges and asking for answers on how the agencies are implementing the rule. It has been six months since we sent the letter, and we have yet to receive a response from either agency. This lack of response only exacerbates the frustration felt by our members, further codifying the belief that the agencies do not actually want our members to have a working understanding of implementation. This motivated WAC and many individual WAC members to pursue our last available option toward gaining this vital information: a Freedom of Information Act (FOIA) request.

Several months after the initial FOIA request, the government provided a 1,128-page response. Unfortunately, a large majority of the documents and text were redacted and labeled as "deliberative" under a misapplication of FOIA Exemption 5 (deliberative process privilege). However, the agencies' FOIA response confirmed two important things: 1) the secret implementation guidance does exist and has been disseminated to Corps districts and 2) Corps districts were explicitly instructed by headquarters not to share this information with the public.[2] Shockingly, the SharePoint that outlines the secret implementation guidance was redacted from the response. It defies logic that the implementation guidance that is currently being used on the ground is considered "deliberative."

[2] U.S. Department of the Army, Office of Counsel, Waters Advocacy Coalition FOIA Request No. FP–24–012628.

FAILED PUBLIC OUTREACH

In the wake of *Sackett*, the agencies have repeatedly promised to engage stakeholders on implementation recommendations. In a July 13, 2023, hearing before the House Transportation and Infrastructure Committee's Subcommittee on Water Resources and Environment, then-EPA Assistant Administrator Radhika Fox told Congress the Agency would "host implementation discussions with a range of stakeholders . . . if there are ongoing questions after that rulemaking is complete."[3] When asked about next steps on WOTUS implementation during a Dec. 5, 2023, hearing before the same subcommittee, Assistant Secretary of the Army for Civil Works Michael Connor similarly promised Congress that the Corps would "continue to engage with the public and then look as we get into next year doing guidance documents."[4]

However, 1.5 years after the *Sackett* decision and exactly one year after the publication of the final "conforming" rule, the agencies have only recently attempted to engage with the public or answer any implementation-related questions from the regulated community. For example, many of our associations participated in the agencies' listening sessions on Feb. 27 and 28, 2024, and raised implementation questions during those meetings that went unanswered. Many of our associations also asked these questions in stakeholder meetings with EPA's Office of Water on March 22, 2024. Unfortunately, the agencies did not respond to our questions during the listening session or at any point thereafter. Our members need this information to ensure that they are complying with the law. Engaging with the regulated community aligns with EPA's[5] and the Corps'[6] own policies promoting meaningful public engagement and involvement. It also reflects the White House's direction to the heads of all federal agencies to broaden public engagement in the regulatory process. We encourage a more robust and ongoing discussion to ensure clear and consistent WOTUS implementation.

HOW IS THIS DIFFERENT FROM SIGNIFICANT NEXUS?

As we have already established, the Supreme Court unanimously drove a stake into the heart of the significant nexus test. However, through the agency implementation memos we have pieced together a few aspects of what we anticipate is published in the secret Corps guidance. First, the agencies are merely requiring a physical connection, as opposed to a hydrologic connection in order to establish jurisdiction, which is inconsistent with both the *Rapanos* and *Sackett* decisions. Second, they have confirmed that they will use non-relatively permanent features, such as a dry ditch or a low spot in a farm field, to satisfy a continuous surface connection. Third, in their most recent implementation memo the agencies completely disregard Justice Alito's direction that adjacent wetlands need to be "indistinguishable" from a WOTUS. Gutting the meaning behind this consequential term greatly expands the regulatory reach afforded to the agencies. Finally, it is clear that the agencies want to continue a case-by-case regulatory regime that is akin to how the significant nexus test operated. Considering all of this in combination, it begs the very important question: As a practical matter, how is this fundamentally different from the significant nexus test that the Court struck down? After *Sackett*, many of us in the WAC community expressed concern that the agencies were going to creatively compile polices that achieved the same goals as the significant nexus test. Unbelievably, it seems that is exactly what is transpiring.

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[3] *Hearing on Agency Perspectives of FY24 Budget Requests: Hearing Before the H. Comm. on Transp. and Infrastructure*, 118 Cong. (July 13, 2023).

[4] *Hearing on Water Resources Development Acts: Status of Past Provisions and Future Needs: Hearing Before the H. Comm. on Transp. and Infrastructure*, 118 Cong. (Dec. 5, 2023).

[5] *See* U.S. Env't. Prot. Agency, Meaningful Engagement Policy (Sept. 2024), *available at* https://www.epa.gov/environmentaljustice/epas-meaningful-engagement-policy .

[6] *See* U.S. Army Corps of Eng'rs , Fact Sheet: Collaboration & Public Participation Center of Expertise, *available at* https://www.iwr.usace.army.mil/Portals/70/docs/CPCX/PIS_Fact_Sheet.pdf. ("Public participation and collaboration are becoming an integral part of the U.S. Army Corps of Engineers' missions. Effective involvement and collaboration achieves more sustainable project solutions and helps projects stay on schedule. Experience has proven that open, ongoing and two-way communication between the Corps and the communities we serve reduces project risks and improves internal and external customer satisfaction." *See also* 2021–2025 Strategic Plan: USACE Collaboration and Public Participation Center of Expertise, *available at* https://www.iwr.usace.army.mil/Portals/70/docs/CPCX/

[6] *See* Memorandum from Richard L. Revesz, Adm'r., Office of Management and Budget; Memorandum for the Heads of Executive Departments and Agencies on "Broadening Public Participation and Community Engagement in the Regulatory Process" at 1 (July 19, 2023), *available at* https://www.whitehouse.gov/wp-content/uploads/2023/07/Broadening-Public-Participation-and-Community-Engagement-in-the-Regulatory-Process.pdf

COOPERATIVE FEDERALISM

Cooperative federalism is one of the clear objectives of the CWA. Section 101(b) of the CWA states that it is Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use of land and water resources, and to consult with the Administrator with respect to the exercise of the Administrator's authority under the CWA. Congress was emphatic that the states have a role to play in protecting our nation's water. This means that there is a clear point where federal jurisdiction ends and state jurisdiction begins. In the past, we have seen regulatory definitions of WOTUS, such as the Obama Administration's rule, that would have usurped state's authority—thereby violating one of the clear intentions of the law. It is important that this balance is preserved.

However, the uncertainty as to where the jurisdictional line lies makes it very difficult for states to understand what is under their authority. We have heard from leadership of the Environmental Council of the States and directly from many individual states that they share the exact same concerns that WAC has articulated over the last year. We have heard members of the environmental community reference "gap waters" that exist in a post-*Sackett* world, but how are they able to identify those? The agencies have not provided a clear interpretation of relatively permanent or continuous surface connection, have not offered the secret implementation guidance and are flouting the decision from *Sackett*. Again, how can states stand up a regulatory program with all these critical pieces missing?

CONCLUSION

Given the need for clear regulations to protect water resources, it is unacceptable that 1.5 years since the *Sackett* decision and more than a year after the agencies finalized their revised 2023 WOTUS rule, the agencies continue to mislead Congress and the public, slow-walk compliance with the *Sackett* decision, and hold project proponents and states hostage in regulatory limbo by failing to make decisions. As a result of the uncertainty, our nation's job creators, small businesses, farmers, landowners, and even states remain in the dark about how the rule is being implemented. This is especially concerning given the serious criminal and civil penalties for even negligent CWA violations, such as simply digging in the wrong place.[7] This represents a total failure of leadership and lack of government transparency.

Mr. ROUZER. Mr. Messerly.

TESTIMONY OF VINCENT E. MESSERLY, PRESIDENT, STREAM AND WETLANDS FOUNDATION, ON BEHALF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS

Mr. MESSERLY. Good morning, Chairman Rouzer, Ranking Member Napolitano, and members of the subcommittee. I appreciate the opportunity to appear before you today on behalf of the National Association of Home Builders.

My name is Vince Messerly. I am president of the Stream and Wetlands Foundation, based in Lancaster, Ohio, and we are a mitigation bank sponsor and in-lieu fee program sponsor.

During the past year, the implementation of the revised WOTUS rule post-*Sackett* has been a tremendous letdown for homebuilders and wetland consultants. Particularly, this has been frustrating on two fronts: The agencies are not faithfully adhering to the Supreme Court's holdings, and the regulated public has been stiff-armed in the implementation guidance.

We must be clear, *Sackett* was not a controversial decision. All nine Justices agreed that the agencies exceeded their Federal authority. The "significant nexus" test clearly overstepped the Clean Water Act.

[7] 33 U.S.C. §1319(c)–(d).

For decades, NAHB has advocated for a clear and predictable WOTUS. Housing production is linked to successful permitting. As a mitigation banker, I work in partnership with homebuilders to navigate the Clean Water Act. Our purpose is twofold: safeguarding the environment, while allowing the creation of housing.

Housing attainability is at an all-time record low. According to NAHB's "Priced Out" study, nearly 80 percent of households are unable to afford the median price of a new home. The picture becomes more stark when you consider that for every $1,000 increase in a new home's price, an additional 106,000 households are priced out of the market.

Uncertainty and delays in permitting, especially as it relates to WOTUS, needlessly increase housing costs and turns the American Dream into just that—only a dream.

Here is how the EPA and the Army Corps missed the mark on the revised WOTUS rule.

Instead of relying on the "significant nexus" test, the agencies are now relying on undefined regulatory terms "relatively permanent waters" and "continuous surface connections." They left these terms undefined in the preamble before and after the *Sackett* decision. These undefined terms are being used to connect isolated wetlands to WOTUS via unregulated streams or features such as ditches, swales, pipes, et cetera.

This has morphed into a game of Twenty Questions for homebuilders and other project applicants asking: How far away is just too far to document connectivity? The uncertainty and confusion are having significant impacts on the homebuilding and infrastructure projects. Based on the agencies' 10 coordination memos, we can gather 195 feet is a relatively short distance and could be used to determine jurisdiction, while in another example 2 miles away is just too far.

The Court was clear: To assert jurisdiction, a wetland must be adjacent to WOTUS. And to be adjacent, wetlands must be indistinguishable from the waters of the United States, meaning there must be no clear demarcation. Yet the agencies are tracing connectivity between features that are clearly distinguishable.

Last December, Congressman Duarte shared before the subcommittee during a hearing with Michael Connor of the Army Corps of Engineers his personal experience with swales being wrongly used to establish connectivity.

As for transparency, during the same hearing, Mr. Connor said that the agencies' implementation guidance will be a public process. Unfortunately, that has not manifested. The agencies issued a final post-*Sackett* rule invoking the APA "good cause" exemption, which precluded public comments because it was deemed unnecessary.

Given that our members are unclear on the WOTUS regs, NAHB has sent a FOIA request to the Army Corps requesting implementation guidance. Over 6 months later, NAHB finally received a formal response with reams of redacted information, and some of the only unredacted information we received were multiple copies of the same slide deck used for public seminars.

Regrettably, these webinars were one-sided. We were invited to participate, but our lingering questions surrounding WOTUS implementation were completely sidestepped.

Moreover, during a March 22nd stakeholder meeting with NAHB and others, EPA was asked whether their coordination memos were nationally binding. This is a critical issue because, under the APA, nationally binding documents must be open for public comment. As we tried to proceed for an answer, the EPA simply ended the conversation.

To boost housing production and improve affordability, the residential construction industry needs a clear and predictable section 404 permitting process. This predictability can be achieved if Congress codifies the definitions of "relatively permanent waters" and "continuous surface connections" or, alternatively, tells the regulated community what features do not fall under these definitions.

Thank you again for the opportunity. We look forward to working with you, and I am glad to answer questions.

[Mr. Messerly's prepared statement follows:]

Prepared Statement of Vincent E. Messerly, President, Stream and Wetlands Foundation, on behalf of the National Association of Home Builders

INTRODUCTION

Chairman Rouzer, Ranking Member Napolitano, and members of the Subcommittee, I appreciate the opportunity to appear before you today on behalf of the National Association of Home Builders ("NAHB"). My name is Vince Messerly, and I am the president of the Streams and Wetlands Foundation, a non-profit wetlands mitigation bank based in Ohio. I also serve as Vice Chairman of NAHB's Environmental Issues Committee.

NAHB's membership includes more than 140,000 member firms, involved in the home building, remodeling, multifamily construction, land development, property management, subcontracting and light commercial construction industries. NAHB members construct approximately 80% of all new housing in the United States each year.

As a mitigation banker, I have the opportunity to collaborate hand-in-glove with home builders and developers to accomplish two bedrock goals: creating housing opportunities and safeguarding the environment. Our team develops and monitors wetland bank projects to ensure high quality aquatic resources are restored and receive long-term protection. Builders undergoing the Clean Water Act (CWA) 404 permitting process purchase wetland bank credits to offset their construction activity on wetlands. This dynamic has supported over 1,500 permit applicants, facilitating an estimated $3 billion in economic development and infrastructure projects, while also protecting, enhancing, or restoring more than 4,000 acres of wetlands, riparian corridors, and upland buffers.

Because of this experience, I have a unique understanding of the CWA regulatory process and how the inefficiencies impact home building in the real world. The *Sackett* Supreme Court decision crystallized the intent of the CWA and corrected the goalposts. On September 8th, 2023, the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers (hereafter "the Agencies") released their revised definition of the Clean Water Act term "waters of the United States" ("WOTUS") to comply with *Sackett*. As the one-year mark has passed, NAHB regrets to share with the Subcommittee that the revised rule's implementation has been a letdown. The Agencies failed on two fronts—WOTUS is not being implemented according to the Supreme Court's holdings, and the understanding of the regulatory process continues to be as clear as mud.

The residential construction industry, and others in the regulated community, continue to experience prolonged and opaque permitting processes, which makes it more difficult for home builders to provide homes or apartments at a price point attainable for most households. Consequently, builders and developers operating under an unpredictable regulatory environment will make home building inefficient and costly, ultimately exacerbating our nation's housing crisis.

HOUSING ATTAINABILITY:

Before examining *Sackett* and the Agencies' WOTUS implementation, it is crucial to contextualize the immense housing challenges Americans are experiencing. Predictability and certainty in the CWA 404 permitting regime are crucial because housing production is linked to successful permitting. Our nation is facing a fever-pitched housing attainability crisis. The root cause of this crisis is straightforward—there is a dearth of supply in the single-family and multifamily markets, both for-rent and for-sale. NAHB's economists estimate that there is over a 1.5-million-unit housing shortage in the U.S.[1] Unfortunately, this has forced a majority of Americans to remain on the sidelines, unable to access the American Dream of homeownership and the ability to build economic success.

According to NAHB's "Priced Out Estimates" study for 2024, *77% of households are unable to afford the median price of a new home which sits at $495,750*.[2] Lowering costs is pivotal because prospective homebuyers are highly elastic to price changes. The study further demonstrates that for every $1,000 increase in the median price of a new home, an additional 106,031 households would be priced out of the market. Indeed, constrained inventory is fueling the housing affordability crisis.

Permitting delays and regulatory uncertainty needlessly increases housing costs by reducing housing supply. As someone who has navigated the CWA 404 wetland permitting process, regulators do not need to deny a permit to halt a housing project, simply delaying the process, or worse failing to provide clear regulatory guidance is more than enough to cause a developer or builder to abandon a project—no matter how desperately needed housing might be in a community.

The challenges surrounding WOTUS permitting become stark when you consider the time and cost to obtain a CWA section 404 permit. A 2002 study found that it takes an average of 788 days and, adjusted for inflation, $471,836 to obtain an individual permit and 313 days and $50,233 for a "streamlined" nationwide permit. Over $1.7 billion is spent annually by the private and public sectors obtaining wetlands permits.[3] Importantly, these ranges do not consider the cost of mitigation, which can be exorbitant. When considering these implications—from housing attainability to CWA section 404 permitting—it is clear why we need to have proper implementation of the WOTUS rule, which is why *Sackett* sought to address long-running concerns over federal overreach.

THE *SACKETT* DECISION

In May 2023, the United States Supreme Court decided the case *Sackett* v. *Env't Prot. Agency*.[4] The Sacketts own a 0.63-acre vacant lot in a residential subdivision near Priest Lake, Idaho. To the north, the lot is bounded by a county road, and on the other side of the road there is a drainage ditch. To the south, the lot is bounded by another road and a row of houses sit south of that road; those houses have frontage on Priest Lake.

The government asserted jurisdiction over a wetland area on the Sacketts' lot pursuant to the Clean Water Act. The question in the *Sackett* case was whether that wetland area was a "water of the United States" and therefore jurisdictional. All nine justices agreed that the government had improperly asserted jurisdiction over the wetland, and five justices established a test for determining when the government may assert Clean Water Act jurisdiction over wetlands.

The Court began its opinion by explaining that the Clean Water Act can have "crushing" consequences on property owners, even those that inadvertently contravene its requirements.[5] (The EPA threatened Michael and Chantell Sackett with fines of $40,000 per day because they unknowingly backfilled their property). The Court then provided a history of its previous CWA cases. In *United States v. Riverside Bayview Homes, Inc.*[6], the Court allowed the Corps of Engineers to assert jurisdiction over wetlands that actually abutted a navigable water.[7] Then in *Solid Waste*

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[1] Single-Family Starts will Rise in 2024 but Supply-Side Challenges Persist, https://www.nahb.org/news-and-economics/press-releases/2024/02/single-family-starts-will-rise-in-2024.

[2] Na Zhao, Nearly 77% of U.S. Households Cannot Afford a Median-Priced New Home, https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2024/special-study-households-cannot-afford-a-median-priced-new-home-april-2024.pdf?rev=cb6f4f7d507341cb9ece97b90b6709c3.

[3] Sunding, D., & Zilberman, D. (2002). The economics of environmental regulation by licensing: An assessment of recent changes to the wetland permitting process. https://digitalrepository.unm.edu/nrj/vol42/iss1/5/

[4] *Sackett v. Env't Prot. Agency*, 598 U.S. 651 (2023).

[5] *Sackett*, 598 U.S. at 660.

[6] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

[7] *Sackett*, 598 U.S. at 665.

Agency of Northern Cook Cty. v. Army Corps of Engineers[8] (*SWANCC*), the Court held that isolated ponds not adjacent to open waters did not fall under the jurisdiction of the CWA. Furthermore, the *Sackett* Court explained that after the SWANCC decision "[t]he agencies never defined exactly what they regarded as the 'full extent of their authority.' They instead encouraged local field agents to make decisions on a case-by-case basis. What emerged was a system of 'vague' rules that depended on 'locally developed practices.'"[9]

Finally, the *Sackett* Court addressed *Rapanos v. United States*.[10] In *Rapanos*, no opinion garnered five votes. In describing the *Rapanos* plurality opinion, the *Sackett* Court wrote that the CWA:

> May fairly be read to include only those wetlands that are "as a practical matter indistinguishable from waters of the United States," such that it is "difficult to determine where the 'water' ends and the 'wetland' begins." 547 U.S., at 742, 755, 126 S.Ct. 2208 (emphasis deleted). That occurs when wetlands have 'a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands.'"[11]

Additionally, in *Rapanos*, a concurring opinion determined that "jurisdiction under the CWA requires a 'significant nexus' between wetlands and navigable waters and that such a nexus exists where 'the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity' of those waters."[12]

As the *Sackett* Court explained, even after three Supreme Court opinions addressing the jurisdiction of the CWA many property owners were in a "precarious position because it is often difficult to determine whether a particular piece of property contains waters of the United States."[13]

After analyzing the wording of the CWA and these three previous cases, the Court ruled that the Sacketts' wetlands were not jurisdictional. The Court rejected the "significant nexus" test and clarified that for the government to assert jurisdiction over a wetland that wetland must be adjacent to a "water of the United States." And to be adjacent, wetlands must be "indistinguishably part of a body of water that itself constitutes "waters" under the CWA."[14] Moreover, "[w]etlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby."[15] Thus, the Court held that:

> The CWA extends to only those wetlands that are "as a practical matter indistinguishable from waters of the United States." *Rapanos*, 547 U. S., at 755 (plurality opinion) (emphasis deleted). This requires the party asserting jurisdiction over adjacent wetlands to establish "first, that the adjacent [body of water constitutes] . . . 'water[s] of the United States,' (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." Id., at 742."[16]

SACKETT AFTERMATH

Following the *Sackett* decision, the Agencies immediately instituted a nationwide freeze in processing any requested jurisdictional determination (JD), or issuance of CWA 404 wetlands permits based upon already issued AJDs until the Agencies could amend (i.e., fix) their Revised Definition of Waters of the United States[17] rule to comply with the *Sackett* ruling. The resulting three-month suspension of the CWA 404 permitting program halted home building and infrastructure projects around the country. Assistant Secretary of the Army Civil Works Mr. Michael Con-

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[8] *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159 (2001).
[9] *Sackett*, 598 U.S. at 665–66.
[10] *Rapanos v. United States*, 547 U.S. 715 (2006).
[11] *Sackett*, 598 U.S. at 678 (quoting *Rapanos*).
[12] *Id.* at 667 (quoting J. Kennedy's concurring opinion in *Rapanos*).
[13] *Id.* at 669 (internal quotations omitted).
[14] *Sackett*, 598 U.S. at 676.
[15] *Id.* at 20
[16] *Sackett*, 598 U.S. at 678–79.
[17] Revised Definition of "Waters of the United States," 88 Fed. Reg. 3004 (Jan. 18, 2023).

nor announced over 4,000 projects seeking approved jurisdictional determinations (AJDs) were backlogged before this Subcommittee on December 5th, 2023.[18]

NAHB members reported that the Agencies' staff encouraged project proponents, who were seeking AJDs, to instead agree to accept preliminary jurisdictional determinations (PJDs) to avoid delays in Corps field staff processing AJDs, which compounded ongoing confusion over the *Sackett* ruling. It is crucial to highlight—when a property owner accepts a PJD, they are agreeing to not have the Agencies make a CWA jurisdictional determination, and instead presume all aquatic features (i.e., wetlands, streams, drainage ditch, pond, etc.) are jurisdictional and therefore require a permit. As a result, landowners were coaxed into surrendering to the PJD route, which is more likely to trigger additional permitting requirements, including being forced to pay for compensatory mitigation.

Nearly three months after *Sackett*, the Agencies released regulatory text amendments amendment to the WOTUS rule on August 13, 2023 [19], and purported to have complied with the *Sackett* opinion. Surprisingly, the actual changes to the regulatory text of the WOTUS definition were quite limited. To highlight the major change—the Agencies removed references to the "significant nexus" test under three of the rule's five jurisdictional categories—tributaries, adjacent wetlands, and Intrastate lakes and ponds.[20] For each of those three jurisdictional categories where the "significant nexus" test was removed, what now remains is an equally confusing and vague standard. This new test requires federal regulation if the water feature in question is "relatively permanent," or has "continuous surface connection" between itself and a downstream jurisdictional feature—both of which were left undefined.

On September 8, 2023, the Agencies issued their Revised Definition of "Waters of the United States"; Conforming (hereafter "the Conforming Rule").[21] Frustratingly, the Agencies again refused to define "continuous surface connection" or "relatively permanent" despite the *Sackett* Court's repeated admonishment for expansive interpretations of regulatory authority to regulate non-navigable isolated wetlands as "adjacent wetlands." In a deeply disturbing choice, the public and regulated industries were intentionally prohibited from commenting on the rule or the flaws with the existing preamble. The Conforming Rule was finalized using the APA "good cause" exemption [22] because the Agencies determined public comment was unnecessary. As a matter of government transparency and public participation, this is highly problematic.

Because the Agencies used the "good cause" exemption, they continued to rely on the preamble from their January 2023 rulemaking. For example, they asserted within the preamble the concept of "relatively permanent" when determining whether a feature meets the "tributary" jurisdictional category, which stretches beyond the Supreme Court's understanding of the concept (i.e., free flowing rivers, streams, creeks, etc.). This means the Agencies can claim evidence of a "relatively permanent tributary" by simply being "able to trace evidence of a flow path downstream".[23]

This evidence includes ephemeral flows [24], which is flowing water from a "concentrated period of back-to-back precipitation events." [25] Furthermore, the Agencies claim "a tributary may flow through another stream that flows infrequently, and only in direct response to precipitation, and the presence of that stream is sufficient to demonstrate that the tributary flow to a paragraph (a)(1) water." [26] Perhaps one of most egregious assertions within the preamble concerns the concept of "continuous surface connection" in the context of jurisdictional tributaries is that "[t]ributaries are not required to have a surface flowpath all the way down to the paragraph (a)(1) water and the flowpath may include subsurface flow." [27]

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[18] Water Resources Development Acts: Status of Past Provisions and Future Needs: House Water Resources and Environment Subcommittee of the Transportation and Infrastructure Committee, 118th Cong. (2023). https://transportation.house.gov/calendar/eventsingle.aspx?EventID=406974

[19] Amendments to 40 CFR 120.2 and 33 CFR 328.3, https://www.epa.gov/system/files/documents/2023-08/Regulatory%20Text%20Changes%20to%20the%20Definition%20of%20Waters%20of%20the%20United%20States%20at%2033%20CFR%20328.3%20and%2040%20CFR%20120.2.pdf.

[20] *Id.* at 3

[21] 88 Fed. Reg. 61964 (Sept. 8 2023).

[22] Congressional Research Service: The Good Cause Exception to Notice and Comment Rulemaking: Judicial Review of Agency Action (2019). https://crsreports.congress.gov/product/pdf/R/R44356.

[23] 88 Fed. Reg. 3079 (January 18, 2023).

[24] *Id.* at 3084.

[25] *Id.* at 3086, 3087.

[26] *Id.* at 3084.

[27] *Id.* at 3084.

The *Sackett* decision made clear the Agencies only have authority under the CWA to take jurisdiction over "relatively permanent" waterbodies and wetlands that are indistinguishable from those waters. The Conforming Rule intentionally failed to provide any regulatory definition of what constitutes a "relatively permanent" waterbody and ignores the concept of "indistinguishability." Unlike the WOTUS regulatory definition finalized under Navigable Waters Protection Rule[28], the Conforming Rule neglects to exclude from federal jurisdiction all "ephemeral features," which only possess water following a rainfall event, but instead claims within the preamble that ephemeral features could have "relevantly permanent" flow.

The Conforming Rule rendered more confusion and uncertainty in the residential construction industry. The Agencies refused to provide a clear regulatory definition of either "relatively permanent" waterbodies, or "continuous surface connection", and avoided collaboration with the public on implementation guidance. In response, NAHB submitted a Freedom of Information Act ("FOIA") on October 11th, 2023, request seeking information concerning how the Agencies were interpreting and enforcing the final Conforming Rule in the field. Specifically, the NAHB FOIA request sought:

- Copies of administrative guidance documents,
- Training materials provided to Corps district offices,
- Implementation guidance from the Agencies headquarters staff to Corps district offices, and
- Questions from all Corps district offices to Agencies headquarters staff concerning implementation of the Conforming Rule.

Despite FOIA's statutory deadline that requires a response within 30 days, over six months passed before NAHB received a formal response. The Agencies' FOIA response included 1,500 pages—over half of which was redacted citing a FOIA exemption for internal deliberative documents. Among the unredacted documents were multiple copies of the same public webinars and factsheets. This unsatisfactory response forced NAHB to submit a FOIA administrative appeal to the Agencies concerning the heavily redacted documents and liberal use of the "Exemption 5".[29] Specifically, NAHB is challenging the Agencies' assertion that documents related to the implementation or enforcement of a final rule can still be considered deliberative and internal.

Finally, in June 2024, the Agencies updated[30] the coordination memorandum which was first released in September, 2023.[31] Together those memos string together a process by which the Corps and EPA would coordinate jurisdictional determinations. They do not provide any clarity to the regulated community concerning when a feature is or is not a "water of the United States." Instead, the memos established an internal elevation process between Corps districts, EPA Regional Offices, and the Agencies headquarters staff to review before finalizing any approved jurisdictional determinations (AJDs) for either adjacent wetlands or intrastate lakes and ponds. Not surprisingly, several of the pending AJDs subject to internal elevation and review by Agencies headquarters staff concern interpreting and applying the undefined concepts of "relevantly permanent" and "continuous surface connection" when making jurisdictional determinations for non-navigable adjacent wetlands, ephemeral tributaries, and isolated ponds.

EXAMPLES OF THE AGENCIES' OVERREACH AFTER *SACKETT*

It is unfortunate that the Agencies have returned to the playbook that they used after the SWANCC decision. They are encouraging "local field agents to make decisions on a case-by-case basis." And, to no surprise, what has emerged is "a system of 'vague' rules."[32] The Agencies are asserting federal jurisdiction over isolated wetlands by relying upon man-made non-jurisdictional features like roadside drainage ditches, pipes, culverts, and swales. The Agencies claim these theoretical connec-

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[28] 85 Fed. Reg. 22250 (April 21, 2020).

[29] Department of Justice: FOIA Guide, 2004 Edition: Exemption 5. https://www.justice.gov/archives/oip/foia-guide-2004-edition-exemption-5.

[30] Michael L. Connor, Assistant Secretary of the Army; Bruno Pigott, Acting Assistant Administrator U.S. Environmental Protection Agency, 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 (June 25, 2024).

[31] Michael L. Connor, Assistant Secretary of the Army; Radhika Fox, Assistant Administrator U.S. Environmental Protection Agency, 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).

[32] *Sackett*, 598 U.S. at 665–66.

tions are enough to claim jurisdiction over isolated wetlands, even when it is clear where the jurisdictional water ends, and the wetland begins.[33]

For example, in Corpus Christi, Texas, the Agencies have asserted jurisdiction over a wetland that is connected to a jurisdictional water only by a non-jurisdictional 115-foot-long ephemeral drainage ditch.[34] Moreover, the ditch runs through two culverts before reaching the jurisdictional waterbody. The Agencies provide that wetlands can be considered adjacent "when a channel, ditch, swale, pipe, or culvert (regardless of whether such feature would itself be jurisdictional) serves as a physical connection that maintains a continuous surface connection between an adjacent wetland and a relatively permanent water."[35] In this matter, the Agencies asserted jurisdiction because "[t]he 115-foot length of the physical connection via the ditch and the culverts is relatively short."[36]

Yet, in *Sackett* the Court held that the CWA extends to "only" those wetlands that are "as a practical matter *indistinguishable* from waters of the United States."[37] Furthermore, it stated that a wetland cannot be considered part of water of the United States "even if they are located nearby."[38] In the above example, the wetland in question is clearly distinguishable from the water of the United States—there is no evidence that it is difficult to determine where the waterbody ends and the wetland begins. Additionally, the Agencies asserted jurisdiction because the distance between the wetland and waterbody is "relatively short"—in other words "nearby." A clear contravention of *Sackett*.

Similarly, in Camden-Wyoming, Delaware, the Agencies asserted jurisdiction over two wetlands—Wetland #6 and Wetland #8.[39] Wetland #6 is 70 feet away from a jurisdictional waterbody and connected to it by a non-jurisdictional 70-foot pipe. Wetland #8 is 350 feet away from a jurisdictional waterbody and connected to it by a non-jurisdictional 350-foot swale.[40]

Again, the Agencies misread *Sackett*. They implausibly assert that "Under *Sackett*, the word 'indistinguishable' is not a separate element of adjacency, nor is it alone determinative of whether adjacent wetlands are "waters of the United States"; rather, the term (among others the Supreme Court uses) informs the application of the "continuous surface connection" requirement."[41] However, the Court stated, "In sum, we hold that the CWA extends to only those wetlands that are 'as a practical matter indistinguishable from waters of the United States.'"[42] This is not an offhand comment or a minor point, but the "holding" of the *Sackett* decision. And it provides that the CWA extends "only" to those wetlands that are "indistinguishable" from jurisdictional waters. With respect to Wetland #6 there is a wetland, then a pipe and then a jurisdictional water. Clearly, the Agencies could distinguish between the wetland and the jurisdictional water because there is a 70-foot pipe between them. Similarly, with respect to Wetland #8 the Agencies could distinguish where the wetland ended, and the jurisdictional water began—because there is a 350-foot swale between them. Finally, with respect to both wetlands the Agencies claim the distances to the jurisdictional waters are "relatively short." But as the *Sackett* Court stated, even wetlands that are "nearby" cannot be considered part of the jurisdictional water.[43]

Lastly in Snow, Ohio, the Agencies have asserted jurisdiction over a wetland that is connected to a jurisdictional waterbody through a 95-foot non-jurisdictional stream and then 100 feet of a second wetland that abuts the jurisdictional waterbody.[44] As with the other examples above, the Agencies pay no mind to *Sackett*'s holding that to assert jurisdiction over a wetland, the Agencies must prove that it is indistinguishably part of the jurisdictional water body. In this example, the Agencies could distinguish the wetland in question, a non-jurisdictional stream,

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[33] *Sackett*, 598 U.S. at 678–79.
[34] Russel Kaiser, U.S. Environmental Protection Agency; Milton Boyd, U.S. Department of the Army, MEMORANDUM ON SWG–2023–00284 (June 25, 2024).
[35] *Id.* at 2.
[36] *Id.* at 4.
[37] *Sackett*, 598 U.S. at 678. (emphasis added).
[38] *Id.* at 676.
[39] Russel Kaiser, U.S. Environmental Protection Agency; Milton Boyd, U.S. Department of the Army, MEMORANDUM ON NAP–2023–01223 (June 25, 2024).
[40] *Id.* at page 3.
[41] *Id.* at 2.
[42] *Sackett*, 598 U.S. at 678.
[43] *Sackett*, 598 U.S. at 676.
[44] Stacey Jensen, U.S. Environmental Protection Agency; Milton Boyd, U.S. Department of the Army, MEMORANDUM ON LRB–2023–00451 (Sept. 3, 2024).

a second wetland, and the jurisdictional waterbody.[45] In violation of *Sackett*, the Agencies declare that 195 feet is a "relatively short" distance.[46]

While these are only four examples, it is evident that the Agencies are not faithfully implementing the Court's directives. If home builders and the residential construction industry cannot understand the regulatory framework under which to operate, how can we expect to achieve housing production to address our national affordability crisis? Safeguarding the environment and building homes do not have to be mutually exclusive.

CONCLUSION

Thank you, Chairman Rouzer and Ranking Member Napolitano, for convening this important hearing and allowing NAHB to share our views on how the Agencies' WOTUS implementation post-*Sackett* is impacting our industry's ability to increase the production of quality, affordable housing. NAHB stands ready to work with you and members of the Subcommittee to achieve thoughtful, effective policies to address these concerns and expand the availability of attainable, affordable housing for all Americans.

NAHB commends Chairman Rouzer and this Subcommittee for spearheading H.R. 7023, the Creating Confidence in Clean Water Permitting Act. This was a welcome step in improving the process. As we continue to move forward, NAHB urges Congress to consider the following improvements to the CWA Section 404 permitting:

- If the Agencies continue to refuse to provide regulatory definitions for either "relatively permanent" water (RPW) or "continuous surface connection" (CSC), Congress must step in and either define these terms, or conversely identify features that cannot, by statute, be considered either a RPW or CSC such as:
  - ° Ephemeral features that only flow in direct response to a rainfall event cannot be an RPW.
  - ° Man-made features (i.e., pipes, ditches, culverts, etc.) used to connect otherwise isolated wetlands to jurisdictional features.
  - ° Groundwater, including shallow subsurface flow.
- Obtaining AJDs is an essential step during CWA 404 permitting process. Congress must ensure that the Agencies prioritize responding to AJD requests. As stated in this written testimony, the regulated community is being maneuvered toward the PJD route. This is concerning because property owners are surrendering their land to federal regulation in an effort to receive quicker permitting. PJDs are also non-binding which means that they are not appealable nor subject to judicial review. Homebuilders must accept their permit as is or refuse the permit and abandon their project—costing upwards of hundreds of thousands of dollars in sunk development costs.
- The past three presidential administrations have turned project proponents into regulatory ping pong victims. With each administration crafting their own WOTUS rule, home builders who may have held AJDs from a prior administration, have had their validity denied not because of changes in the environmental conditions found on their property, but rather due to court rulings or changes in administration's priorities. NAHB recommends that regulatory changes to the definition of WOTUS should not invalidate an AJD during its lifespan. Further, we recommend that AJDs be durable for 10 years, as envisioned in the Creating Confidence in Clean Water Permitting Act.

I appreciate the opportunity to discuss these critical issues.

Mr. ROUZER. Thank you very much.

And I thank all of you for your great testimony.

Ms. Pokon, I appreciated hearing your testimony about the important role that States play in regulating and implementing water-quality standards. And as mentioned in my own opening statement, this is the key part of the Clean Water Act that many people choose to ignore.

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[45] *Id.* at 4.

[46] Stacey Jensen, U.S. Environmental Protection Agency; Milton Boyd, U.S. Department of the Army, MEMORANDUM ON LRB–2023–00451 (September 3, 2024).

What has the State of Alaska's experience been post-*Sackett*, and what are you hearing from the Army Corps of Engineers in Alaska?

Ms. POKON. Thank you, Chairman.

We certainly have been watching the 401 certifications come through to kind of get a sense for if there has been a change in the Army Corps of Engineers' implementation of the 404 program. And, not seeing any clear indicators, we have met with our district office. The message that was delivered to us was essentially that, in Alaska, nothing has changed. Nothing.

They did tell us—we pressed for some specifics, like, are there some general principles that are being applied? Is there something you can share with us about what the standard is? And it sounded like—well, they repeated that they are determining it on a case-by-case basis.

They did share that, for the North Slope of Alaska, which is an area about the size of Utah, that they consider much of that area to be jurisdictional because of permafrost wetlands. Now, those wetlands aren't forming because of relationship with a jurisdictional water, those wetlands are forming because the upper layer of permafrost is melting.

And so, you have this massive area that, just by virtue of being a wetland that is adjacent to a wetland that is adjacent to a wetland is adjacent to a wetland that is then abutting a navigable water body.

There doesn't seem to be any limit to this contagion, that as long as on the surface there is an ecosystem that can be characterized as a wetland—there are saturated soils—the Corps of Engineers will claim jurisdiction over that.

They also made some comments that called into question whether or not they are even looking for surface water or whether or not they are looking for any flow of water to indicate connectivity of the water between the wetland and a jurisdictional water.

Mr. ROUZER. Thank you very much. I wish we had more time.

Ms. Briggs, you talked about the challenges that your membership is facing. Of course, agriculture is taking it on the chin on any number of fronts that you look at.

Can you talk a little more specific to that and how this is such a challenge for our American farmers who are feeding and trying to clothe not only us but the rest of the world?

Ms. BRIGGS. Yes. Thank you, Mr. Chairman, for the question.

And I will remind everyone that food security is national security. So, our farmers and ranchers have the most important job in the world.

WOTUS continues to be an issue—the problems that I already outlined, the lack of clarity with the rulemaking, and now no implementation guidance. They are not giving our members the roadmap on how they are expected to follow the law. That is really all my members want to know: What is in, and what is out?

But a lot of people like to say, "Well, farmers have all of these exemptions. Isn't that nice? And they don't have to comply with the Clean Water Act." That is absolutely not true, because the exemptions that have been provided are not clear. An exemption is only as good as how clear it is.

So, I don't understand how the agencies are hiding the ball on implementation. I don't understand why they will not come back and clarify these terms post-*Sackett*. And our farmers are really hurting out there because of it.

Mr. ROUZER. Yes.

Mr. Messerly, you touched on regulations and the cost to building a home, which obviously translates to cost to homebuyer.

How much extra cost are people paying for when they purchase a home just simply due to regulation, beyond just WOTUS but WOTUS included?

Mr. MESSERLY. Well, thank you, Chairman Rouzer. Good question. Cost—and as a mitigation sponsor, we can speak towards that.

So, just as a for-example, in Ohio, the typical applicant mitigates at a ratio of two times of what they impacted. A simple nationwide permit, which is impacts of less than one-half acre, would require 1 acre of mitigation. An acre of mitigation in Ohio would be about $70,000, on average, sometimes a little more, sometimes a little less. So, when you apply that to the cost of a small business project or a residential construction project, that cost can be overwhelming.

That cost for the mitigation does not include those costs that are affiliated with retaining an attorney, an engineer, a surveyor, a wetlands biologist, not to mention the time of processing the permit. A substantial amount of time passes. These are things that the permit applicants have to bear the cost of upfront, and that can really be stifling. And by that I mean, that is not something they have a loan for. This is something they are paying out of pocket until they secure that permit and the project can be implemented.

There are a lot of permit applicants that never get submitted. They die before they ever get there just because of the overwhelming cost.

Mr. ROUZER. Yes. Those that scream about affordable housing—and we all want the most affordable housing possible—are the same ones who put all the regulations in place that keep it from being affordable.

Anyhow, just an editorial comment.

I yield to my good friend, Mrs. Napolitano.

Mrs. NAPOLITANO. Thank you, Mr. Chair.

Ms. Rowan, you testified the impacts of the *Sackett* decision are particularly stark in many Western States, such as Colorado, where water is both increasingly scarce and vital to long-term economic, environmental, and social health of our communities.

I believe that every-State-go-it-alone approach is inconsistent with congressional intent on the Clean Water Act and will likely result in increased costs and decreased water quality available for our communities.

What are your perspectives? Do you agree?

Ms. ROWAN. Thank you, Ranking Member Napolitano. Yes, we agree.

Colorado's a headwater State, and our water flows to 17 downstream States, and protecting water quality is very important.

I think an example of that, a recent example, is our work with the State of Kansas. We have been working to address salinity

issues across the Arkansas River—"Our Kansas River," as they call it in Kansas—on both sides of the State line, particularly focused on protecting agriculture.

Mrs. NAPOLITANO. And my State is currently dependent on other upstream States for much of its municipal agriculture and industrial water supply.

I applaud your State's efforts but recognize that not all States prioritize or invest in protecting interstate sources of water. What is the likely consequence if bordering States face different priorities on protecting what are, in essence, shared multistate water resources?

Ms. ROWAN. Thank you, Ranking Member Napolitano.

I think one thing that we have appreciated about Federal standards and other parts of the Clean Water Act that we implement is that there is a consistent and uniform Federal standard and it provides some level of protection.

I think what we hear from businesses is having a uniform standard is good for business, and it provides the certainty that the regulated community needs.

Mrs. NAPOLITANO. Thank you.

What is the economic impact to American families, businesses, and farmers if existing sources of potable water fail to be protected, or worse, are eliminated due to neglect, destruction, or pollution?

Ms. ROWAN. Thank you.

I think one of the things that we have been really focused on in Colorado is making sure that those impacts don't occur. And that is why we were so quick to stand up enforcement policy and work to pass this legislation in Colorado.

Mrs. NAPOLITANO. Thank you.

I believe the question of who should ultimately be responsible for protecting rivers, streams, and wetlands has become hyper-politicized, and some parties now are unwilling to engage in meaningful conversations involving this decades-old issue. You have done a wonderful job on that.

Yet you discuss the success of your State in negotiating with often-competing sectors within your State, including the agriculture, water supply, construction industry, and the conservation community.

Any advice for us in Congress to promote a meaningful dialogue on this issue?

Ms. ROWAN. Thank you, Ranking Member Napolitano.

I think we worked incredibly hard on getting common ground across a variety of different interest groups, and one of the key stakeholders of our process was Colorado's agricultural community.

One of the things that we did in the legislation was to adopt the 2020 Navigable Waters Protection Rule related to prior converted cropland, which was a big desire by our agricultural community.

We also worked very hard to define exclusions and exemptions for irrigation ditches, which are the lifeblood of agriculture in Colorado.

Mrs. NAPOLITANO. Thank you.

Mr. Chair, I would like to introduce into the record——

Mr. ROUZER [interrupting]. Without objection.

Mrs. NAPOLITANO [continuing]. Letters from American Rivers, Audubon Society, Clean Water for All, National Wildlife Federation, Southern Environmental Law Center, and Protect Colorado Water Coalition.

Mr. ROUZER. Without objection, so ordered.

[Hon. Napolitano's submissions for the record are on pages 76–90.]

Mrs. NAPOLITANO. Thank you.

I yield back.

Mr. ROUZER. The gentlelady yields back.

I now recognize Mr. Bost.

Mr. BOST. Thank you, Mr. Chairman.

So, now here we are, a year into the Biden administration's new WOTUS ruling, and nothing has changed. There has been no regulatory clarity, no real guidance, no communication with the public. While the administration may be OK with this, there are serious implications for landowners and industry stakeholders.

Ms. Briggs, you noted in your written testimony that landowners can be fined up to $64,000 per day or receive jail time for any clean water violation. I will repeat that again: $64,000 or jail time. That is not small change for a simple mistake or a misunderstanding. That is devastating to any landowner or small business.

Now, Ms. Briggs, from a farming perspective, can you speak to the challenges that the farmers have faced under this administration's poorly amended WOTUS rule and how easy it may be for a landowner to make a simple mistake and be in violation and look at $64,000 a day and jail time?

Ms. BRIGGS. Yes. I mean, after the Biden administration's rulemaking came out, then after *Sackett*, then after the conforming rule, we heard—it was at a fever pitch, the amount of confusion and concern and uncertainty that we were hearing from our members.

And it is incredibly easy for our members right now, under this regulatory regime, to unknowingly break the law and be subject to all of those penalties that can, frankly, put a member out of business. I mean, we represent so many small businesses who don't have the ability to absorb those kind of costs. And it is $64,000 per day for every noncompliance on the farm field. So, that can add up quickly, and it can be absolutely devastating.

But with this level on uncertainty, it is unfair to our landowners. And, again, I just don't understand why the agencies won't come out, clearly tell landowners what the rules of the road are.

It is like—I like to take my kids to the pool every now and then, and it is like that pool sign where it says all the rules. And it is, you know, no jumping, no splashing, no glass. And then at the bottom, it says, if you violate these rules, then you will lose your membership to the pool.

Well, imagine that is the sign for our landowners, but all of the rules have been blacked out, and at the bottom it says, you could be subject to $64,000 a day or jail time. It just doesn't square.

Mr. BOST. Well, welcome to our world, because it is every administrative body under this administration.

At any rate, Mr. Messerly, based on your testimony and what I am hearing from my constituents, I think we can both agree that

the permitting process here is a mess. It is costly. It is slow. It is killing infrastructure projects. Thousands of small projects die before the builders even had the chance to apply for their permit. And a simple nationwide permit to impact just one-half acre of wetland can easily cost upwards of hundreds of thousands of dollars.

You have shared that, at your nonprofit, you have worked with over 1,500 permit applicants developing infrastructure projects. Can you share with us real-world examples where WOTUS permitting has significantly delayed or even caused a permitting applicant to just walk away?

Mr. MESSERLY. Good question. And I would be glad to share. I don't have clearance from particular permit applicants to share any names or anything, but it happens quite often. Usually, it is small-business owners that call, and they just never even bother to apply after they talk with me and find out what the cost is.

But there are times where it is even large companies that want to develop projects. One project stands out in my mind, northeast Ohio. The applicant wanted to impact wetlands to build a large commercial operation. Their siting criteria needed it to be near an interstate highway, needed it to be within a certain distance of the public. They wanted to site it in an urban area for traffic, for business.

And that particular project, it was determined that this, I will say, moderate-quality wetland that was surrounded by a railroad, industrial park, and an urban arterial highway was too good. It was determined to be regionally important and therefore could not be impacted.

The applicant withdrew the permit, built the project about 100 miles away—different city, different community. The community lost out on the job creation.

Mr. BOST. I think what we are seeing here today—and I know my time is up, Mr. Chairman.

But what we are seeing here today is what we have known for a long time about our WOTUS rule. It is ridiculous, not being able to know where the Government lies and what in the world they can do to you and when they can do it. And that is a shame, because it stifles growth and scares many of our landowners.

Thank you.

With that, I will yield back.

Mr. ROUZER. Mr. Larsen.

Mr. LARSEN OF WASHINGTON. Thank you, Mr. Chair.

First off, I appreciate the concerns Members have about a lot of things that Congress does and the Supreme Court does and the administration does, but we don't need to be overstating impacts.

In fact, in nearly 3 years, the Bipartisan Infrastructure Law has provided $480 billion to 60,000 projects that benefit every congressional district in the country. The AGC was here a few weeks back to testify that nearly every county in the country has a project being built because of the Bipartisan Infrastructure Law. The numbers I just cited are corroborated by ARTBA, the road builders.

So, to make broad statements that projects are getting killed every day because of WOTUS does not actually line up with the facts. I know fact-checking around here gets a little—people a little dicey, but those are facts. I am sure folks will have some things

they want to say about what I said here, and that is OK, but let's not overstate the challenges or overstate the problem itself.

Because there is another set of the problem that the *Sackett* decision brings, and that is undermining just the basic principle of cooperative federalism that Ms. Rowan discussed in her testimony. Before the Clean Water Act adoption in 1972, an individual State's efforts to protect the health of its waters could be undermined by the actions of its neighboring States.

And so, Ms. Rowan, what challenges did Colorado face in protecting its water resources from interstate pollution?

Ms. ROWAN. Thank you, Ranking Member Larsen.

We are a headwater State, and so, water from Colorado flows to downstream States, 17 of them. And protecting our water quality within Colorado but also in the water that is delivered downstream is of critical importance, and it is something we take very seriously.

Mr. LARSEN OF WASHINGTON. Have any of these States written a thank-you letter to Colorado for protecting the cleanliness of their waters yet?

Ms. ROWAN. Thank you, Ranking Member Larsen. No, we haven't received any letters to that——

Mr. LARSEN OF WASHINGTON [interrupting]. Would you substitute a thank-you letter for them taking action in their own State to increase their water-quality programs?

Ms. ROWAN. Thank you, Ranking Member Larsen. You know——

Mr. LARSEN OF WASHINGTON [interrupting]. You don't need to thank me for anything.

Ms. ROWAN [continuing]. We closely collaborate with a number of our States through implementing the 402 program, and have for years, and have regular dialogue. We do have an active partnership right now with the State of Kansas really focused on——

Mr. LARSEN OF WASHINGTON [interrupting]. Yes, you mentioned that.

Ms. ROWAN. Yes.

Mr. LARSEN OF WASHINGTON. Well, I wouldn't want to replace a thank-you letter with these States actually taking actions as opposed to doing nothing because *Sackett* passed and using *Sackett* as the excuse to not protect their waters.

And it just seems to me, returning to a pre-*Sackett* system of uniform Federal protections would be better than a patchwork approach, which is what we have.

But if we are stuck with it for now, how can the Federal Government better assist States to protect their wetlands and downstream water resources, Ms. Rowan?

Ms. ROWAN. Thank you, Ranking Member Larsen.

I think we do appreciate some Federal standards. It does provide some level of protection for States to shoot for. And that uniformity is appreciated. And, again, we think that this provides regulatory certainty to our industries and development and economy in Colorado.

Mr. LARSEN OF WASHINGTON. Yes.

My first hearing on—and I mention this all the time to the committee—my first hearing on the waters of the U.S. was back in, I think, 1824. No, it wasn't that long ago. It was in the mid-2000s, I think. And anyone who thinks that this hearing is going to re-

solve this issue today or even that the *Sackett* decision is the last word on this, I just don't think history backs that up, frankly, right now, either congressional history, administration history, or Supreme Court history.

Had the Supreme Court then decided to give us one decision instead of two decisions, with *Rapanos* and with *SWANCC*, then we probably wouldn't be here. But they did. And I just think we will be at it again. And I look forward to the next 19 hearings we have on WOTUS to resolve this.

Thank you very much.

I yield back.

Mr. ROUZER. Fun, fun, fun. Mr. LaMalfa.

Mr. LAMALFA. Thank you, Mr. Chairman. I appreciate the opportunity to have this hearing, whether it takes us 1 or 19 more because, indeed, the Clean Water Act and many other environmental measures have been weaponized to stop people from doing most things.

Look at the *Sackett* decision itself. They wanted to build a stock pond on their own land and were thwarted for many years and much pain. And if you want to look at a Clean Water Act problem, I would invite the panelists and everybody else to take a look at the Klamath River post-dam removal and how nasty and mucky and silty that river is with little regard towards what would really happen. They were just so hot to get those dams out.

Anyway—so, I guess this would be tilted towards Ms. Briggs and Mr. Messerly as well. In my home State of California, where it is near impossible to build housing in areas where it makes sense, open areas like that, except for in flood plains and where agricultural land is, because there doesn't seem to be any critters there that they care about.

So, Mr. Messerly, for example, in Butte County, we have something called meadowfoam, and they seem to think there are several different species of meadowfoam. So, if it grows in what's called a vernal pool, it holds water for a few minutes after a rain, that is a wetland, and that is an endangered species. Meanwhile, they are growing meadowfoam up in Oregon as a seed oil plant, and so, you have this. But prime areas where housing could be built outside of flood plains and outside of agricultural land is unusable.

So, speak about what you might know about California's situation on trying to build housing, especially since houses in California are starting to average $500,000, $600,000 in most cases to build anything, if you can build it, such as around Chico, California, which they got shut down once again.

Mr. MESSERLY. Not sure I quite followed all your question.

Mr. LAMALFA. Well, I threw a lot out there. Just talk about availability of building homes and what it is doing to the price structure, especially in California for normal people.

Mr. MESSERLY. Yes, and, in an agricultural area, and Courtney could address this as well, but the question would be: Are these waters of the United States, is it prior converted cropland or not? And from a species standpoint, I am not familiar with the species in California, but this one that you are talking about sounds like it could be very difficult to identify. But it is also rare, and that makes it even harder to identify.

Mr. LAMALFA. Well, it is not rare in Oregon if you are harvesting the stuff, but it is called meadowfoam, and it is fairly prolific. But it seems to be protected, and it prevents homes from being built or other stuff on suitable land.

Mr. MESSERLY. And so, that ties in a whole another topic, the Endangered Species Act. And that intertwines because of the nexus of the 401 and 404 permitting programs, you get pulled in by the ESA as well.

Mr. LAMALFA. Well, they use the Clean Water Act in order to have the waters of the United States apply to every vernal pool, which some of these grow in.

Mr. MESSERLY. Yes.

Mr. LAMALFA. Ms. Briggs, you have heard the situation here where land that had been idle but had been farmed extensively in the past but for some years was idle, and then you go back to start farming it again and you are in trouble from the EPA, along with the Army Corps for somehow violating the Clean Water Act—which I would tell you, when this was passed back in the 1970s by Congress, if Congress would have passed a bill that is being interpreted the way it is now to stop any type of development or farming, those Members of Congress would have gotten thrown out on their ear for passing such a bill. It has been reinterpreted time and time again.

So, Ms. Briggs, talk about how unfair that is that you have had farmable land and that they keep changing the interpretation of the WOTUS rule. From 2008, it was changed by Obama up until 2015, then it only applied to half the country, and then President Trump was able to change it in 2020, which was promptly rescinded by Biden in 2021, which led us to the second case in 2023.

How much sense does this make trying to farm under all these conditions? You talk about the pool rules.

Ms. BRIGGS. Oh, it is incredibly difficult with the pendulum swinging back and forth and the ping-ponging of rules based on changes of administration. There is no clarity, there is no certainty for our members.

So, they just don't understand where that bright line of jurisdiction is. It doesn't exist under these rulemakings. And you talk about land that has been idled in California, again, the ag exemptions are only as good as how well they are written.

And we have problems with prior converted cropland, we have problems with the exemptions that are listed in 404(f) because when you talk about normal farming practices and that being exempt under 404, right behind it is a recapture provision that essentially says you are exempt unless we tell you you are not.

So, no farmer has certainty in using any of those exemptions, and, unfortunately, we have seen farmers burned by both compliance under Swampbuster and the Clean Water Act.

Mr. LAMALFA. So, the list of rules always has——

Ms. BRIGGS [interrupting]. An asterisk.

Mr. LAMALFA. At the end of the rules: "and any other thing we feel like enforcing you on," which is the one they gig you on.

Ms. BRIGGS. There is always an asterisk associated with ag exemptions. We can take this away from you at any time if we feel like it. I am paraphrasing there.

Mr. LAMALFA. You are right. Well, they are sure good at gigging us, but I see them not very on time producing reports and things we ask for here, or they are heavily redacted like was talked about.

So, Mr. Chairman, we have a lot more to do on this. Thank you. I yield back.

Mr. ROUZER. Ms. Norton.

Ms. NORTON. Thank you, Mr. Chairman. First, let me say I strongly opposed the Supreme Court's decision in *Sackett* v. *Environmental Protection Agency*. I urge this committee to take up legislation to overturn the *Sackett* decision and restore Clean Water Act protections for the Nation's rivers, streams, and wetlands.

Ms. Rowan, what is your view of the pace of the implementation of the conforming waters of the United States rule?

Ms. ROWAN. Thank you, Congresswoman. Our law in Colorado is really filling the gap left by the *Sackett* decision that was then taken into account in the conforming rule. So, that is really what we are focused on is filling that gap.

We have worked really closely with the Corps of Engineers, both after the *Sackett* decision and as the rule has been implemented to understand what they are taking jurisdiction over, and then what would be, in our purview, to work on permitting in the future, and that has been a very collaborative relationship. And they have provided a lot of good information for us as we have been navigating the process.

Ms. NORTON. Ms. Rowan, do you support legislation that would overturn the *Sackett* decision and restore protections under the Clean Water Act, and if so, why?

Ms. ROWAN. Thank you, Congresswoman. I think returning to a pre-*Sackett* regime would provide a uniform level of protection across the United States. We have found that businesses and regulated entities really like certainty and especially when they are working across different State lines and the different businesses. It does provide them the certainty from a regulatory perspective.

Ms. NORTON. Thank you. And, again, I urge this committee to overturn the *Sackett* decision.

And I yield back.

Mr. ROUZER. Mr. Burlison, you are recognized for 5 minutes.

Mr. BURLISON. Thank you, Mr. Chairman. Ms. Briggs, last year, the Supreme Court, obviously, struck down the decision, but it seems that the EPA is completely ignoring it, from your testimony and everyone's testimony here. And there are some examples of this. The EPA prevented Dan Ward, a farmer in Iowa, from building a pond on his land. Robert White from North Carolina filed a suit against the EPA because they are ignoring the rule of law from the Supreme Court and still regulating his land.

So, even though the *Sackett* decision should be preventing the EPA from imposing these, they are still acting as if the decision doesn't exist.

So, the question is, what can we do? What can we do to ensure that the EPA is following the decision of the courts?

Ms. BRIGGS. Well, you can pass a law codifying the *Sackett* decision. I think that that would be helpful if it was in the statute.

But I just want to take a minute because you mentioned specific instances of people being harmed. I don't think that I am exag-

gerating the impact that this is having on WAC members. I hear about people who have to walk away from projects, walk away from revenue for their small business, walk away from creating jobs in rural communities because of this regulation.

And frankly, this is one of those regulatory rulemakings that makes the next generation of farmers not want to get in farming. So, there is a real ripple effect here that I think folks are failing to acknowledge.

Mr. BURLISON. One of the issues that we faced in Missouri was that you have, you know, your State department that is enforcing a lot of the regulations, because the EPA doesn't have the manpower or the resources to do so.

So, with a little bit of money, they influence and require the State resources to enforce them. In our State, it is the Missouri Department of Natural Resources. I assume that is the way it is in every State to some extent.

And the question that I have is that what we experienced is that the EPA may not have a rule—they may not pass anything formally, they may not go through the rulemaking process. Sometimes they will just issue a guidance document that then that guidance document the State enforces as though it is a rule. And yet, no one elected to anything made a change. I wonder if you could comment on that.

Ms. BRIGGS. Yes. So—thank you, Congressman. So, the field memos that I mentioned in my testimony, again, they give you little bits and pieces about how they intend to implement this rulemaking. And I think if you take it all collectively, it is really a rulemaking hiding in plain sight. Like, it has the effect of a rulemaking.

Mr. BURLISON. Right.

Ms. BRIGGS. And the fact that that has not gone through notice and comment, it hasn't gone through stakeholder engagement is really a problem. So, the fact that they are taking these guidance documents and applying them as rulemaking is very concerning.

But they will not hand over the implementation guidance that is being disseminated to the Corps districts. We know they exist.

Mr. BURLISON. You have to get FOIA requests for that or——

Ms. BRIGGS [interrupting]. This is the response we got [indicating document]: 1,123 pages, most of it is redacted. I will point you—and I am happy to send this to you, to one page, where they talk about: here is the implementation guidance that Corps districts should be using. Here is the SharePoint. And they black out the SharePoint.

There is evidence in here where they say: do not share this with the public. Read the FOIA response. I am happy to share it with the committee.

Mr. BURLISON. So, there is no transparency at all.

Ms. Pokon, I can see that you might have some thoughts on this, how the State is basically—the States are being leveraged to be the "heavy," to be the enforcer for the EPA when there is no real actual laws or elected officials involved.

Ms. POKON. I'll say, as a State agency that works with the EPA both in implementing the Federal program, but also in implementing our own, I haven't seen the guidance that has been pro-

vided to the Corps of Engineers. So, I don't know if, when a permittee comes to our agency, if I need to issue them a State permit under State authority or if they should be getting a Federal permit under the section 402 program.

And I think that, while we implement the same water quality standards statewide, that that can matter for a lot of different reasons. I might take a different enforcement approach with an entity if I have more flexibility and support them getting into compliance, rather than having to act in a way where we fear the EPA is going to come crashing in over our shoulders and enforce over us.

I also have more flexibility in adjusting specifics of the program in a timely way to support facilities that need to operate. When we have to send things to our regional office for approval, it can be quite a lengthy process to get something finalized.

Mr. BURLISON. Thank you.

I yield back.

Mr. ROUZER. Ms. Scholten, you are recognized.

Ms. SCHOLTEN. Thank you, sir.

Thank you to all of our witnesses for being here today. This is an incredibly challenging time. I serve the great State of Michigan, including miles of beautiful west Michigan coastline. One of the largest freshwater estuaries in the entire country, the largest river system in the State of Michigan, all within my district. To say this is an essential conversation is truly an understatement.

Ms. Briggs, while I agree with you that particularly in our ag community, we are experiencing incredible uncertainty, the *Sackett* decision has undermined our ability in significant and meaningful ways to protect this precious nonrenewable natural resource.

Despite State-level efforts to bolster water regulations, there is no guarantee that our neighbors will pursue the same protections under the *Sackett* decision, as water can cross State lines. We see that in the Great Lakes region as clear as when you pull up a map.

This ruling may ultimately hinder Michigan's efforts—we are one of three States which has been designated the authority to govern our own wetlands to enforce those laws.

Ms. Rowan, Colorado has similarly sought to maintain strong water standards at the State level. Can you speak to the burden States that have led in safeguarding their waters must carry without strong and consistent Federal protections post-*Sackett*?

Ms. ROWAN. Thank you, Congresswoman. So, I think an immediate need for our State, again, was making sure that the uncertainty that was left behind didn't hinder economic development and progress. And so, we had to really get creative quick and develop an enforcement policy.

And we are fortunate enough to have our legislature move forward, based on a lot of stakeholder support and common ground for a solution in Colorado that can hopefully withstand some of the back-and-forth that we have seen at the Federal level.

And I do think that one burden that we are facing is that we had to put State dollars together to fund this program and be able to issue timely permits in the ways that our regulated community deserves and desires. And so, that is when big impact is a financial burden.

Ms. SCHOLTEN. Thank you. As I mentioned, Michigan is home to the largest freshwater estuary system in this region, arguably in the world, considering the Great Lakes being the largest reservoir of freshwater. Also home to 275,000 acres of Great Lakes coastal wetlands, which are incredibly biologically diverse and imperative to the health of the larger Great Lakes Basin.

However, these coastal wetlands connect to groundwater sources and may be at risk as the groundwater connects below the surface, not meeting the post-*Sackett* definition of waters of the United States.

Again, to Ms. Rowan, can you elaborate on how essential these wetlands are in ensuring water quality standards and healthy habits, as well as how *Sackett* may harm critical groundwater sources linked to these wetlands below the water surface?

Ms. ROWAN. Thank you, Congresswoman. Coming from an arid West State, our water is very important and valued, and wetlands provide a very critical way to—and a natural solution for filtering pollutants and protecting downstream water supplies and also have an impact on protecting our groundwater sources which are used for a variety of ways in Colorado: for agriculture, drinking water.

And so, it is just vital that we did find a way to protect this resource in Colorado.

Ms. SCHOLTEN. Thank you. I invite anyone else to offer comments in the remaining few seconds that we have.

Ms. POKON. Could I add——

Ms. SCHOLTEN. Yes.

Ms. POKON. Thank you, Congresswoman. I empathize with the concern over State resources and having adequate funding and applaud Colorado for making that investment.

I would add, though, that I don't know that—so, under our 402 program, for example, which is where the Federal Government has jurisdiction—and we are implementing a Federal program—funding is grievously short currently. And so, for our program, for example, we get about—I don't know—$1 million, $1½ million through EPA and Federal funding for that program, and then we invest $5 million of State funds.

So, I think a lot of States are already providing an investment in protecting their waters. And so, I don't know that the post-*Sackett* world is necessarily that dramatic of a change, but I do think that if EPA and the executive wanted to better support States in protecting our waters, that funding the Federal programs that we are implementing would be a good step in that direction.

Ms. SCHOLTEN. Thank you. I appreciate that.

Again, without clean water, we are not going to be able to enjoy the incredible apples, blueberries, asparagus, and the vital ag industry that we have. Again, believe me, I hear you on the uncertainty. Our farmers are existing in the margins right now.

This is a serious issue that demands a serious response from legislators on both sides. Thank you again for your testimony today.

I yield back.

Mr. ROUZER. The gentlelady yields back.

Ms. Maloy, you are recognized.

Ms. MALOY. Thank you, Mr. Chairman. I have been sitting here listening to this, and I have done a lot of work in permitting and

project planning in my career, and it seems like a lot of the conversations about this start from the assumption that if the Federal Government isn't managing something, if they don't have jurisdiction over something, if we don't define it as WOTUS in this particular instance, that it is going to get destroyed.

And I appreciate all of your testimony because I hear all of you saying that we are actually doing a pretty good job of managing in the States and even in industries and that we don't have to start with the assumption that the Federal Government isn't doing it. It won't be done correctly. And I like that because Government is a blunt instrument.

And one of the other things I am hearing is that people who are required to comply with this, which is everybody, don't know when they are in compliance. And because the full power of the Federal Government is behind this, that is a really scary situation for someone to be in.

So, I am going to filibuster here for a second, and then I do have questions.

So, I heard from my constituents that the Corps of Engineers released a 143-page manual to its people in order to help them determine when someone is in compliance. If you are at the Corps of Engineers and you have to have a 143-page manual to determine compliance, it really seems like that is going to be a problem for a family that wants to build a stock watering pond on their land. They are just not going to be able to make that determination. But they could be facing potential jail time and the kind of fines that nobody can actually afford.

And then I represent Utah, and in Utah, we have a lot of ephemeral streams. We get snowmelt like you do in Colorado and Alaska, and it runs downhill. And if we have a good snow year, there might be water in places we don't normally have water, and if we have not a great snow year, there is not much water. And it makes it really tough for people to figure out how to apply these definitions to places in Utah.

And I have a responsibility to represent my constituents who can't figure out with a 143-page manual and a bunch of letters from agencies, whether they can move forward on something.

So, my first question—and it is for all of you. We are going to start with Ms. Pokon and go down the list.

In your experience, do these long processes of getting permits create better outcomes?

Ms. POKON. I think I can confidently say that the process could be better streamlined, particularly where there is a Federal intersect. As I mentioned earlier, if we want to adjust our approach based on site-specific circumstances or other conditions that are unique to a facility or to a location, that can be a quite lengthy process working with the Federal Government, so lengthy that often it just doesn't work for the facility that needs to be able to operate.

So, then they are faced with either not operating and maybe giving up the business plan, or operating in noncompliance, which also isn't a good option that they want to follow through with.

So, yes, I think the process could be improved. I also think that States tend to be a little bit more nimble, and we have the aware-

ness of a fuller totality of circumstances that are affecting our facilities and our residents.

Ms. MALOY. Thanks. So, I am going to put you down as a no, it is not actually creating better outcomes. It is just a lengthy process.

Ms. Rowan?

Ms. ROWAN. Thank you, Congresswoman. I do believe that there are good outcomes from the permitting process. I think when it comes to our wetlands and seasonal streams, what we are talking about here is kind of losing chunks of them in their entirety, and it is hard to get them back.

So, I do think that the permitting process helps protect in that regard. I think also in Colorado our history has been that a vast majority of the permitting proceeds under the nationwide and regional general permits, which——

Ms. MALOY [interrupting]. I am going to rush you a little because I am almost out of time. I had a couple more questions I wanted to ask.

Ms. Briggs, does the length of the permitting process help the outcome?

Ms. BRIGGS. No.

Ms. MALOY. Thank you. Mr. Messerly?

Mr. MESSERLY. No, ma'am.

Ms. MALOY. Thank you. So, it seems like the Court made a move to limit the jurisdiction of these agencies, said they are overreaching in *Sackett*. And then in light of the *Chevron* decision, it seems like the Court is signaling that they don't want agencies to keep overreaching their authority.

We are sitting here talking about how agencies are trying to go around that and redefine it, and that they are defining their authority as if we have jurisdiction, then people are safe. I just don't think that is true.

My last question, if you guys can answer it really fast, is how much do you think it is costing people you represent in time and money to get these permits?

And we are going to start with you, Mr. Messerly, because we are going to run out of time. Really quickly.

Mr. MESSERLY. A lot. A basic permit I mentioned earlier, $70,000 for mitigation; consulting fees, attorney fees, et cetera, on top of that easily puts it over $100,000 just for a general permit.

On average, we typically see applicants needing upwards of 2 acres of mitigation. So, it just escalates from there. Multiply it. So, it is very expensive.

Ms. MALOY. Thank you. I want to hear your answer, Ms. Briggs. I am out of time. I don't know how 5 minutes goes by so fast.

Ms. BRIGGS. I would just say the cost of delay.

Ms. MALOY. Yes. I am going to follow up with all of you in writing for answers on this and the other question I didn't get to because I think this is really important that we get answers. Thank you.

Mr. ROUZER. The gentlelady yields back. Ms. Hoyle.

Ms. HOYLE OF OREGON. Thank you very much. My questions are for Ms. Rowan. Thank you for being here today.

My questions are because, Oregon, like Colorado, we have State protection laws that now differ from the Federal laws, and we are all trying to work out how we interpret these things. So, as you have worked with the EPA and the Army Corps while developing your program, what have you found most helpful in the technical assistance that is provided, and where do you feel like you could have better technical assistance?

Ms. ROWAN. Thank you, Congresswoman. Thank you for that question.

One of the things we did in crafting the legislation was really hearing from our stakeholders about what is working, about the current Federal process, and trying to get an understanding of what not to take away, because they actually like certain portions. And so—and the Corps was very, very helpful, as were our stakeholders, in helping us understand how exemptions and exclusions were—how they operate in Colorado.

And one of the things that we did with the legislation is really have a more expansive set of exclusions and exemptions for the variety of activities and water body types in Colorado. So, they were very helpful in helping us understand how that has worked historically.

I think another area where we are going to continue to work really hard, and I think we have a unique opportunity as a State, is how we do mitigation moving forward. So, I think that is going to be critical as we stand up our new program.

Ms. HOYLE OF OREGON. Thank you. Also, do you feel that you have had the clarity provided that is necessary to determine State versus Federal waters?

Ms. ROWAN. Thank you, Congresswoman. We are really focused on, again, filling the gap that *Sackett* left behind. And so, the Corps has been working very closely with them to let us know when a water in Colorado is not a WOTUS so that we can work with those entities to make sure that they have what they need to keep moving forward with their project under our enforcement discretion policy and now as part of our permitting program.

Ms. HOYLE OF OREGON. And then, could you just go into more—I know you have touched on this.

What has been the feedback and public perception for affected parties and stakeholders of how WOTUS has changed in your State?

Ms. ROWAN. Thank you, Congresswoman. After the *Sackett* decision, the Nature Conservancy did a public survey in Colorado from voters from all political affiliations statewide. And what that survey found was that 67 percent of those surveys really wanted to see some State level of oversight to fill the gap.

Ms. HOYLE OF OREGON. Excellent. Thank you, and I yield back.

Mr. ROUZER. Mr. Collins.

Mr. COLLINS. Thank you, Mr. Chairman. I am going to jump right in. I mean, I have been jumping around like a jumping bean, I think, here this morning.

Mr. Messerly, Home Builders Association. I just want to start out, if you could give me some real-world consequences of an ambiguous definition to WOTUS, and what does it exactly mean for my constituents?

Mr. MESSERLY. So, Mr. Collins, make sure I understand your question correctly. You are asking, what is the definition of waters of the United States?

Mr. COLLINS. Well, I mean, it is ambiguous at best. So, I mean, what are the homebuilders out there seeing, and how is it affecting my constituents?

Mr. MESSERLY. Yes. The biggest effect, to be honest with you, when you look at the definition of water of the United States, the vast majority of the definition is very clear. Navigable waters, Territorial seas, oceans.

In the 1890s, they defined——

Mr. COLLINS [interrupting]. What's that got to do with homebuilding?

Mr. MESSERLY. When you get it down to—by the time you get to the headwaters, where they are building houses, where they are farming, where they are ranching, where they are mining: those are where the rub is.

And those waters need to have a continuous surface connection with a relatively permanent water.

Mr. COLLINS. So, when you get—when your builders are getting permits and they don't know if the water is federally—if the Feds have jurisdiction or the States, right?—that is where we are going with this. So, what do they do? They just—they bide their time and wait until they get a Federal Government who we all know works at the pace of a snail going backwards? Or they just give up, throw their hands up and say, hey, let's just go ahead and pay everything we need to and get this out of the way?

Mr. MESSERLY. Sometimes they give up and sometimes they concede. Other times they walk away. My——

Mr. COLLINS [interrupting]. Does that actually cost the homebuilder—the person buying the home at the end of the day?

Mr. MESSERLY. At the end of the day, that cost gets passed on to that person living in that home.

Mr. COLLINS. You got any estimates or anything on what you think it is costing? Does it add 20 percent?

Mr. MESSERLY. It could easily add that. If you are building for a single residence, it could easily add more than that.

But you are talking, again, anybody from an affordability standpoint, from a financing standpoint, every $1,000 of increase in a house takes away 106,000 eligible borrowers that could be borrowing money to qualify to buy that house.

Mr. COLLINS. And I would think right now with the way mortgage rates are and the way that building construction material costs are, that is pretty substantial.

Mr. MESSERLY. It is—it can be very overwhelming.

Mr. COLLINS. Over a rule that has affected building houses?

Mr. MESSERLY. Correct.

Mr. COLLINS. Which we really don't know what the rule is.

Mr. MESSERLY. There is some ambiguity, that is for sure.

Mr. COLLINS. Some ambiguity?

Mr. MESSERLY. Yes. And I would add——

Mr. COLLINS [interrupting]. That is putting it lightly.

Mr. MESSERLY [continuing]. I would add, I have never met somebody——

Mr. COLLINS [interrupting]. I think you are being nice.

Mr. MESSERLY [continuing]. That is anti-environmental. They want to protect the environment. They want to do the right things.

I think why the WOTUS definition is so contentious is, is the permitting program is broken, and the cost to comply with the permitting program is excessive. So, it is almost a death sentence when you get that notice that you have a waters of the United States that you have to deal with.

Mr. COLLINS. I tell you what, I want to move to Ms. Briggs just for what time is left.

I understand that many Waters Advocacy Coalition members and organizations filed Freedom of Information Act requests to obtain more information on how the agencies are implementing WOTUS.

What kind of response did you receive from them?

Ms. BRIGGS. First, I just want to say that this WOTUS rule is standing in the way of affordable housing, renewable energy projects, projects that are benefiting communities like the construction of schools, and environmentally beneficial projects like the development of wetlands. I have heard from many States that are wanting to build wetlands in order to improve water quality, but they can't get through the 404 permitting process.

But to answer your question, we did get a response. Most of it was redacted, and they, once again, failed to provide the implementation guidance. We know it exists through the documents. We know they don't want the public to know it, but they have not handed over——

Mr. COLLINS [interrupting]. What was the reason for redacting?

Ms. BRIGGS. They said it was deliberative, so, I don't understand——

Mr. COLLINS [interrupting]. They are still deliberating?

Ms. BRIGGS. I don't understand why it is labeled deliberate.

Mr. COLLINS. But this [indicating document] is the guidance?

Ms. BRIGGS. Yes.

Mr. COLLINS. But it is not finished, because we are deliberating?

Ms. BRIGGS. That is what they——

Mr. COLLINS [interrupting]. It is not classified, right? It is just deliberative?

Ms. BRIGGS. They say it is deliberative. Therefore, they are still deliberating over it, but it is being used in the countryside.

Mr. COLLINS. Mr. Chairman, this is nothing but typical overreach from the Federal Government who doesn't really care what input anybody puts into anything or what anybody says. They are going to do what they feel like they want to do and try to hide whatever they can.

I would like to enter into record, if I could—this is the 1,200-page—mostly—581 pages, as a matter of fact, of redacted pages of the response from the U.S. Army Corps of Engineers on WOTUS.

Mr. ROUZER. Without objection, so ordered.

Response to Waters Advocacy Coalition's Freedom of Information Act Request, Submitted for the Record by Hon. Mike Collins

The 1,128-page document is retained in committee files and is available online at https://docs.house.gov/meetings/PW/PW02/20240911/117592/HHRG-118-PW02-20240911-SD003.pdf

Mr. COLLINS. And I am out of time.

Mr. Chairman, I yield back. Sorry for going over.

Mr. ROUZER. Mr. Duarte, you are recognized.

Mr. DUARTE. Thank you, Mr. Chairman. Thanks to the panel for being here today.

Ms. Briggs, you work for American Farm Bureau. Farmers got to farm land, and sometimes we take farming land out of farm systems, maybe take wheat fields and graze them for a few years or a few decades, depending on markets and business models and the entity's desire to farm one crop or another, under one cropping system or another.

So, right now, we are in a situation, and we are speaking today about permit processing of the Army Corps of Engineers and EPA that is almost nonexistent, or at least very, very slow.

The Army Corps of Engineers has also, as I understand through some consultants I work through, put notice that they are not even doing delineation verification mapping work right now. If you are a farmer and you simply have a professional biologist map the wetlands that might be jurisdictional on your land using their best understanding of what wetlands may or may not be jurisdictional, from whatever information they can get from the Army Corps these days, which may be vague—they are not even processing those right now because they are so backed up with permits. In my opinion, greatly regulating wetlands that they have no authority to regulate.

Are you getting that feedback from any of your farmers?

Ms. BRIGGS. I am certainly hearing it from WAC members that approve jurisdictional determinations in many Corps districts are just not happening. And that is really rich because when you talk to the Corps about AJDs, they say: It's a free service, every [inaudible] can get one, nothing to worry about. Go down to your local Corps office, we will hook you up with an AJD.

But there are Corps districts out there that are not issuing AJDs. They are prioritizing AJDs that are linked to a permit.

So, what this is effectively doing is pushing landowners into PJDs. PJDs are basically when landowners concede that everything is—they throw their hands up and concede that everything is jurisdictional. They go through the mitigation. They go through the permitting process. It is the only way to move the process forward.

Mr. DUARTE. So, if you don't concede jurisdiction to the Corps, they will not process your delineation maps?

Ms. BRIGGS. In some Corps districts, that is correct.

Mr. DUARTE. Yes. Excellent.

Mr. Messerly, Home Builders. You want to build homes. You have got some dry rolling grasslands, as is familiar in California. It doesn't look like a wetland to anybody who is—USGS, U.S. Geological Survey, doesn't map anything on the property as a wetland. But, nonetheless, a homebuilder may need to submit a non—a de-

lineation that suggests that whatever features are on that property are not jurisdictional wetlands.

If they don't declare them jurisdictional wetlands, they are not going to get processed. Is that an experience you are having?

Mr. MESSERLY. Yes. A lot of times the Corps districts are deferring on performing approved jurisdictional determinations, or AJDs, and encouraging applicants to fill out the PJD, the preliminary jurisdictional determination.

And the problem with that is, if these are isolated wetlands, they are not regulated by the waters of the United States. By default, accepting the terms of the PJD is, one, is it is nonbinding, it assumes everything is a water of the United States, and you cannot appeal it.

Mr. DUARTE. Let me skip ahead here. So, farmers go to the NRCS, or the farm service agency to have their Federal Government engagement with what their farming plans are and what farm programs or restrictions may be placed on them. Homebuilders may go to a local zoning or a local permitting agency at the county level or State level to suffice things.

Has there been any better communications with these regulatory agencies than there has been with your advocacy groups? Does the NRCS, FSA, local ag commissioner, local farm advisor, local permitting office, local State offices have better information than you have seen as to what the Army Corps of Engineers is requiring under these new WOTUS regs? Either one. I think there is a short answer.

Ms. BRIGGS. Well, they are not coordinating with each other.

And the most perfect example of this is the understanding of prior converted cropland because NRCS and Army Corps are now supposed to have the same understanding. The Corps has moved to a change-of-use policy to be in line with what NRCS is doing, but they have different interpretations of what that means. So, that is impossible for a landowner to navigate.

Mr. DUARTE. Mr. Messerly?

Mr. MESSERLY. Something similar. We often see farm fields apply for an AJD. They will be told: You need to talk with NRCS. NRCS will come out and verify it——

Mr. DUARTE [interrupting]. Just to finish up here, because I am running out.

And every violation of the Clean Water Act is subject to potential criminal penalties. There is no effort being made by the Army Corps of Engineers, EPA, and sometimes DOJ gets involved here—I know that personally—there is no definition of what is jurisdictional, and criminal penalties loom over anybody who violates whatever the Army Corps' interpretation of this law is.

Is that a workable situation for your constituents?

Mr. MESSERLY. No, it is not.

And to finish it up, both agencies will point to the other agency and say, we will give you a letter that says this is what you have, but it is up to the other agency to make a final determination and determine your eligibility for farm benefits or determine your eligibility for section 404 of the Clean Water Act. It really puts them in a catch-22.

Mr. DUARTE. And we already have a U.S. geological survey of every mapped water of the United States to begin with. We have thoroughly mapped our waters of the United States, but that cannot be used conclusively to determine WOTUS jurisdiction?

Mr. MESSERLY. That is correct.

Mr. DUARTE. Thank you. I yield back, Chairman.

Mr. ROUZER. Mr. Ezell.

Mr. EZELL. Thank you, Mr. Chairman. Thank you, sir. Thank you all for being here today.

I will tell you, over 1 year ago, we were here discussing the same concerns, over 1 year ago. And I want to thank you for coming back again, some of you that were here last year.

But I want to kind of get—I have several things I want to try to discuss and try to get to all of it today.

Ms. Pokon, how have the regulatory agencies engaged with your State while implementing the *Sackett* decisions?

Ms. POKON. Thank you. It is tough to say because I am not sure they are implementing it. As I said, our district office, the Corps of Engineers, has articulated that they don't think anything has changed in our State.

But I would posit that "indistinguishable" should mean something, and I also think that the Court's concerns around the vagueness should matter as well. I think it is unfortunate that we would have to coordinate with our Corps office and that Colorado has had to in such granular detail when the Court made pretty clear, I think, that they would like it to be a commonsense, understandable definition that your average homeowner can go out and understand whether or not they need to get a permit from the Federal Government or not.

Mr. EZELL. Common sense doesn't normally go along with the Federal Government.

My next question is for Mr. Messerly. This committee has heard from homebuilders and how a "significant nexus" test would cause great confusion for construction projects. Thankfully, the *Sackett* decision struck down the "significant nexus" tests and provided more clarity on Federal jurisdiction over waters. However, the administration's conforming rule only cut out the "significant nexus".

What are the areas of the *Sackett* decision that are not being implemented, and what effects are they having on home building?

Mr. MESSERLY. It boils down to a relatively permanent water and a continuous surface connection where there is no demarcation of where one ends and the other one begins. And they are not simply following that.

It really causes a great deal of confusion for States that have regulatory programs, States that want to develop regulatory programs because they don't know where Federal regulation ends and theirs begins. So, it creates problems on both sides of the aisle.

I look to Ohio. We have a tiered permitting approach for wetlands that the State regulates that are not waters of the United States. It works very well. Our State program was implemented after the *SWANCC* decision in 2001. I would encourage you all to look at that.

The tiered permitting system has distinct timelines that must be followed if permits are issued by default. We protect every wetland in Ohio, and it works very well.

Mr. EZELL. Very good. Following up, my district is a unique situation where projects may fall under three different Army Corps jurisdictions and subject to three different sets of standards. To eliminate confusion, it is incredibly important that all the Army Corps establishes clear standards across all jurisdictions.

Mr. Messerly, given your experience, can you speak how different districts are implementing the *Sackett* decision, and how is it impacting industries across States with multiple Corps jurisdictions?

Mr. MESSERLY. All districts are not created equal, unfortunately.

Mr. EZELL. Yes.

Mr. MESSERLY. There are great differences. Some are implementing *Sackett* almost exactly the way the Supreme Court ruled—I am sorry. They are implementing WOTUS.

But when we look at some other districts, they are really floundering. They are not able to process AJDs, they are not able to process permits, and it is debilitating in those districts.

Mr. EZELL. Thank you.

Ms. Briggs, it was brought to my attention some Army Corps districts in Vicksburg have stopped issuing approved jurisdictional determinations altogether.

What impact do you think this is having on the people in Mississippi?

Ms. BRIGGS. Yes. I am glad you brought this up because Vicksburg is one of the Corps districts that has said they are not approving AJDs, and resources are actually being moved from Vicksburg to other Corps districts. So, that is just going to exacerbate the problem.

And our builders, our farmers, our energy developers are not going to be able to take on these projects without Clean Water Act permits.

And if I just may, you asked him a question about "significant nexus"——

Mr. EZELL [interposing]. Right.

Ms. BRIGGS [continuing]. And I would very much argue that the snippets that we have received through the field memos that the agencies have released, if taken collectively, fundamentally aren't that different from "significant nexus". And this is what we feared as WAC.

We feared that they would get rid of "significant nexus" from the rulemaking, and that it would come up with a policy that has the same force and scope of "significant nexus", but just call it something different. And that is what we think is materializing.

Mr. EZELL. Thank you.

Mr. Chairman, if I could have one moment?

Mr. ROUZER. Go ahead.

Mr. EZELL. Continuing with Ms. Briggs, I know you are here representing the Waters Advocacy Coalition. But by trade, you represent the agricultural industry.

Can you speak how this rule has impacted rural agricultural land and rural landowners like the ones in my district?

Mr. ROUZER. Keep it to about 20 seconds.

Ms. BRIGGS. It is confusion. It is uncertainty. The exemptions are really not providing the certainty that our members need in order to be able to use them.

Mr. EZELL. Thank you.

Mr. Chairman, I yield back.

Mr. ROUZER. Mr. Van Orden.

Mr. VAN ORDEN. Thank you, Mr. Chairman. I am just going to say out loud what everybody here is thinking, because it is readily apparent.

No one in Washington, DC, knows what the hell they are talking about when it comes to this subject. Zero. Last year, we had a dude with a 40-pound brain who is a law professor lecture us about how to run farms. I asked him the last time he was on a farm. He said his mom—we just pulled up the transcript. His mom used to get horse manure, and they used that in his garden. Those were his bona fides.

There is simply enough stupid to go around in this entire problem set. And when I agree with Mr. Larsen, what's going on here, right? That is dogs and cats sleeping together at this point.

So, here is the problem. Congress keeps putting their fingers into things where they don't belong. They don't. You know who knows what's going on here? You do, ma'am. And my farmers do. I represent the Third Congressional District of the State of Wisconsin. We have the largest contiguous section of the Mississippi River in any congressional district in the country. You go from lock 3 to 11, right—or from Red Wing down to Dubuque.

We don't have a north-south highway in the Third Congressional District. We have the Mississippi River. And we are at the forefront of not only organic farming, but also conservation. So, our guys built these retention ponds so you have runoff and all of these nutrients going to these ponds, and then they settle at the bottom, they pull them out, they reuse them, it lowers input cost. They put the water that is in there to irrigate the fields again. All of that will go away.

And you know where those nitrates are going to go? Right into the Mississippi River in the watershed, and they are going to go down to Mike's district. That is going to happen if this happens, because you have got a bunch of really super-duper important people around here, and if you don't believe me, ask them. They will tell you. And they are going to tell your farmers how to run their business. That is a nonstarter.

So, here is part of the problem. Congress is lazy. Congress is lazy. My predecessors abdicated the responsibilities to the executive branch so they could keep getting elected and come up here and have these very super important meetings. That is what happened.

Well, guess what happened? *Chevron* happened. So, Congress is going to have to do their job, which is write very prescriptive legislation and tell the executive branch what they are going to do, because we are the Article I authority. We are. We are members of the co-equal branch of Government. And they have been obfuscating these things. They have been running a Green New Deal agenda disguising it as confusion about legislation. I can't under-

stand this; let's write a rule. Nope. You don't get to write law. We do.

So, I am going to be here at least until January 4 or—I don't know. I will be at least here until January 4. We will probably have another meeting January 5. Maybe someone else from Wisconsin. I don't know.

But as long as I am here, I am going to do this. I am going to advocate incredibly strongly for my farmers and yours to make sure that they can feed the world.

And I don't really have a question. I am just—I am sick and tired of talking about this same thing. I am sick and tired of our farmers talking to me every day; they don't know what to do. They don't know if they are breaking the law. They don't know if they are going to be able to feed their families. They don't know if their house is going to be taken away from them because they are getting charged $64,000 a day for doing something that they thought was right. That is not OK. It's not. This is broken.

So, when I get input from my farmers and I sit down, I listen to this guy, and Val, my buddy from Oregon, who is a Democrat, and we are like, OK, let's craft legislation to make sure this works well. When we do that, we each represent 850,000 people, that is what the executive branch is supposed to do, not run their own agenda. It is very frustrating. It is.

And with that, I yield back.

Mr. ROUZER. The gentleman yields back. My understanding is there is no other Member that has a desire to ask any questions. That being the case, our hearing today concludes.

I want to thank our witnesses for your great testimony. It has been a very, very good hearing, a lot of great questions, and I think very beneficial, not only for each of the Members here on the committee, but for those who choose to take a look at the record later. This has been an exceptional hearing in my opinion.

With that, let's see if we have any final things I need to get in the record.

[Discussion off the record.]

Mr. ROUZER. The bosses here say we are clear to go. Subcommittee adjourned.

[Whereupon, at 11:53 a.m., the subcommittee was adjourned.]

SUBMISSIONS FOR THE RECORD

Letter of September 11, 2024, to Hon. David Rouzer, Chairman, and Hon. Grace F. Napolitano, Ranking Member, Subcommittee on Water Resources and Environment, from Kristen Swearingen, Vice President, Legislative and Political Affairs, Associated Builders and Contractors, Submitted for the Record by Hon. David Rouzer

SEPTEMBER 11, 2024.

The Honorable DAVID ROUZER,
Chairman,
Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment, U.S. House of Representatives, Washington, DC 20515.

The Honorable GRACE NAPOLITANO,
Ranking Member,
Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment, U.S. House of Representatives, Washington, DC 20515.

DEAR CHAIRMAN ROUZER, RANKING MEMBER NAPOLITANO AND MEMBERS OF THE U.S. HOUSE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE'S SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT:

On behalf of Associated Builders and Contractors, a national construction industry trade association with 67 chapters representing more than 23,000 members, I write to thank you for holding a hearing on "Waters of the United States Implementation Post-Sackett Decision: Experiences and Perspectives." This hearing is vital to examining the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers' WOTUS implementation strategy and conformity with Sackett.

On May 25, 2023, the U.S. Supreme Court issued its decision in Sackett v. EPA, narrowing the scope of WOTUS that may be regulated under the Clean Water Act. Specifically, the Court rejected the 'significant nexus' test relied on by the Biden-Harris administration's January 2023 WOTUS final rule. To conform with the Court's decision, the EPA and Army Corps issued an August 2023 final rule and fact sheet, eliminating the "significant nexus" test. However, in doing so the agencies advanced the rule without meaningful opportunities for input from the construction industry and other stakeholders and failed to fully implement the court's opinion, including the definition of "relatively permanent" waters.

In addition, the EPA and Army Corps have not provided the regulated community with sufficient guidance regarding their interpretation of the August 2023 rule. Instead, the EPA and Army Corps have issued Field Memos without expanding on their interpretation or application, creating uncertainty for the regulated community. ABC is concerned the EPA and Army Corps' approach to WOTUS risks continuing the decades-long uncertainty surrounding the scope of federal authority under the CWA, resulting in litigation, regulatory uncertainty and confusion in the business community.

The Sackett decision placed clear boundaries on the scope of the federal government's authority relating to WOTUS while maintaining reasonable environmental protections for America's waterways. Now, the EPA and Army Corps must adhere to the Court's ruling. It is time for the EPA and Army Corps to provide the regulated community, including the construction industry, with the clarity necessary to complete much-needed projects in our communities that allow workers and local economies to thrive.

ABC urges the EPA and the Army Corps to fully comply with the Sackett decision and provide the regulated community with a clear, concise definition of WOTUS necessary to inform them of how to comply with the law while also serving as good stewards of the environment, as they did prior to the Biden-Harris administration's shortsighted reversal of President Donald Trump's WOTUS policies.

ABC appreciates the opportunity to comment on the committee's review of post-Sackett WOTUS implementation.

Sincerely,

KRISTEN SWEARINGEN,
Vice President, Legislative and Political Affairs,
Associated Builders and Contractors.

Letter of September 9, 2024, to the Committee on Transportation and Infrastructure and the Subcommittee on Water Resources and Environment, from Benjamin Davenport, Executive Vice President, Idaho Mining Association, Submitted for the Record by Hon. David Rouzer

SEPTEMBER 9, 2024.

House Transportation and Infrastructure Committee,
Subcommittee on Water Resources and Environment,
2165 Rayburn House Office Building, Washington, DC 20515.

Re: Subcommittee Hearing on "Waters of the United States Implementation Post-Sackett Decision: Experiences and Perspectives," Wednesday, September 11, 2024, in 2167 of the Rayburn House Office Building

DEAR CHAIRMAN ROUZER AND RANKING MEMBER LARSEN,

I am writing to express the views of the Idaho Mining Association (IMA) on the implementation by the Federal government of the United States Supreme Court decision in *Sackett v. EPA*, a case decided well over a year ago on May 25, 2023.

ABOUT IMA

IMA is a non-profit, non-partisan, state-wide trade association located in Boise, Idaho. IMA is the recognized voice in support of exploration and mining in the State of Idaho. Our purpose is to advocate for a sustainable mining industry that benefits our state and local communities, while advancing the mineral resource and mining related interests of our members.

We represent and inform our membership on legislative, regulatory, safety, technical, and environmental issues that surround the mining industry. We are committed to the protection of human health, the natural environment, and a prosperous mining industry in Idaho and across the United States.

THE SACKETT CASE AND THE CRITICAL NEED FOR IMPLEMENTATION GUIDANCE TO THE BUSINESS COMMUNITY

In their second trip to the Supreme Court in over a decade, Michael and Chantell Sackett, an Idaho family seeking to build a home on their property in Priest Lake, successfully reversed a decision by the United States Court of Appeals for the Ninth Circuit that the CWA covers adjacent wetlands with a "significant nexus" to traditional navigable waters. Last May, the Court held that the jurisdictional reach of the Clean Water Act (CWA) extends only to wetlands that are "as a practical matter indistinguishable" from waters of the United States. Accordingly, *Sackett* requires more regulatory precision by the Army Corps of Engineers and Environmental Protection Agency to determine where traditional "navigable" waters end and wetlands begin.

In *Sackett*, the Supreme Court noted with great particularity the importance of notice by government "with sufficient definiteness that ordinary people can understand what conduct is prohibited" under the CWA. This is due to the potential severe criminal sanctions for even negligent violations and the need to avoid arbitrary enforcement. For IMA member companies that depend on regulatory certainty for their business models while advancing environmental stewardship, any delay by the Corps and EPA in meaningfully implementing the *Sackett* decision is problematic on multiple fronts.

For example, for publicly traded companies accountable to their shareholders and other constituencies, even an *inadvertent* CWA violation would be a public relations disaster, not to mention undermining the significant investment already made by these companies in environmental protection. Rather than leaving the regulated community to feel their way post-*Sackett* on a case-by-case basis, the Corps and EPA should wholly embrace clear illumination—as soon as possible—by which the Clean Water Act extends to wetlands with a continuous surface connection to waters of the United States so that they become "indistinguishable" from those waters.

The Supreme Court noted in *Sackett* that the "CWA is a potent weapon." The Idaho Mining Association welcomed the outcome in *Sackett* and welcomes its compliance. IMA members look forward, with the expert guidance of the appropriate Federal agencies, to distinguishing what the Supreme Court termed the "indistinguishable" under the Clean Water Act so that both the environment and company business models remain protected. IMA respects CWA obligations that flow to its members, and each day that passes absent clarity by the Federal government on *Sackett* compliance is one more day that business and the environment are at risk.

Sincerely,

BENJAMIN DAVENPORT,
Executive Vice President, Idaho Mining Association.

Letter of September 9, 2024, to Hon. David Rouzer, Chairman, and Hon. Grace F. Napolitano, Ranking Member, Subcommittee on Water Resources and Environment, from Alex Etchen, Vice President, Government Relations, Associated General Contractors of America, Submitted for the Record by Hon. David Rouzer

SEPTEMBER 9, 2024.

The Honorable DAVID ROUZER,
Chairman,
Subcommittee on Water Resources and Environment, United States House of Representatives, Washington, DC 20515.

The Honorable GRACE NAPOLITANO,
Ranking Member,
Subcommittee on Water Resources and Environment, United States House of Representatives, Washington, DC 20515.

RE: AGC statement for the record for hearing entitled "Waters of the United States Implementation Post-Sackett Decision: Experiences and Perspectives"

DEAR CHAIRMAN ROUZER AND RANKING MEMBER NAPOLITANO:

On behalf of the Associated General Contractors (AGC) of America—the leading association in the construction industry representing more than 27,000 firms, including America's leading general contractors and specialty-contracting firms—I thank you for holding the hearing entitled, "Waters of the United States Implementation Post-Sackett Decision: Experiences and Perspectives." AGC respectfully shares challenges that the construction industry has experienced with the implementation of the Waters of the United States (WOTUS) since the *Sackett* v. *Environmental Protection Agency* ruling.

Federal agencies and courts have long struggled to define WOTUS. Differing regulations and definitions of the rule over the last four presidential administrations have created significant regulatory uncertainty for construction projects and it is impacting contractors' ability to plan and execute their work efficiently. In 2023, the Biden administration issued their definition of WOTUS, expanding federal reach over waters and wetlands, relying on a "significant nexus test" to assert federal jurisdiction over almost any wet area. The Supreme Court's *Sackett* decision struck down the significant nexus test, finding that it is flawed for determining when projects require a federal permit.

In response, the Biden administration hastily drafted edits to the rule that unfortunately do not address its significant legal flaws, nor fully implement the *Sackett* decision. Agencies also finalized their revisions without accepting public comment—a practice that is typically reserved for only minor, non-controversial edits. Further, the administration is also elevating some projects for interagency review and then releasing field memos that describe how they may decide in specific scenarios where the 2023 rule remains unclear. This practice is akin to regulation through guidance, leaving stakeholders wading through unclear regulations and then analyzing scenario-based memos for clues on whether their project may move forward.

Congress must ensure that any changes in policy surrounding WOTUS are consistent with the Supreme Court's ruling so that construction projects nationwide do not face legal uncertainty. AGC thanks the subcommittee for holding this important hearing and looks forward to working with subcommittee members on this issue.

Sincerely,

ALEX ETCHEN,
Vice President, Government Relations, Associated General Contractors of America.

Letter of September 10, 2024, and Memo from Fall 2023 to Hon. David Rouzer, Chairman, and Hon. Grace F. Napolitano, Ranking Member, Subcommittee on Water Resources and Environment, from Chad W. Lord, Senior Director, Government Affairs, National Parks Conservation Association, Submitted for the Record by Hon. David Rouzer

SEPTEMBER 10, 2024.

The Honorable DAVID ROUZER,
Chairman,
Subcommittee on Water Resources and Environment, Committee on Transportation and Infrastructure, Washington, DC 20515.

The Honorable GRACE NAPOLITANO,
Ranking Member,
Subcommittee on Water Resources and Environment, Committee on Transportation and Infrastructure, Washington, DC 20515.

DEAR CHAIRMAN ROUZER AND RANKING MEMBER NAPOLITANO:

Please find enclosed a copy of a memorandum written by the National Parks Conservation Association (NPCA) last fall describing the potential consequences of the United States Supreme Court's decision in *Sackett v. EPA* to our national parks. I ask that it be included in the hearing record.

NPCA's analysis demonstrates that the Supreme Court's decision strips protections for non-adjacent wetlands and many tributaries that play an important role in protecting national park waters. As the memo notes, water plays an important role in national parks. Although park waters within park boundaries are protected by park statutes and the National Park Service's Organic Act, many park waters originate outside park boundaries or are substantially affected by waters outside park boundaries. The recent narrowing of the definition of WOTUS leaves more of these upstream waterways and wetlands unprotected by federal law, which could have devastating impacts on many of our park waterways.

All our waters are connected. Protecting and restoring wetlands and streams is critical to protecting the waters in our national parks. Healthy wetlands improve water quality by filtering polluted runoff from farm fields and city streets that otherwise would flow into rivers, streams, and water bodies across the country. Wetlands and tributaries provide vital habitat to wildlife, waterfowl, and fish, reduce flooding, and provide clean water for fishing, swimming, and paddling in national parks.

Please do not hesitate to contact me with questions.

Sincerely,

CHAD W. LORD,
Senior Director, Government Affairs, National Parks Conservation Association.

ATTACHMENT

MEMORANDUM FOR:	INTERESTED PARTIES
FROM:	Chad Lord, Senior Director, Government Affairs Rachel Kenigsberg, Senior Associate General Counsel
DATE:	Fall 2023
REASON:	Potential Impacts of *Sackett v. EPA* on waters in and near units of the National Park System

INTRODUCTION

On May 25, 2023, the U.S. Supreme Court released its decision in *Sackett v. EPA*, which reduced the scope of waters regulated by the Clean Water Act (CWA). Justice Alito's opinion held:

> "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.')[1]

[1] Sackett, ET UX. v. Environmental Protection Agency ET AL. No. 21–454. Pg. 14.

> "[w]e hold that the CWA extends to only those wetlands that are 'as a practical matter indistinguishable from waters of the United States.' *Rapanos*, 547 U.S., at 755 (plurality opinion) (emphasis deleted). This requires the party asserting jurisdiction over adjacent wetlands to establish 'first, that the adjacent [body of water constitutes] . . . 'water[s] of the United States,' (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.' *Id.*, at 742.)"[2]

On August 29, 2023, the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) announced it would finalize a rule amending the 2023 definition of "waters of the U.S." (WOTUS) to conform federal regulations with the Supreme Court's *Sackett* decision. The decision made clear that certain aspects of the 2023 rule were invalid, so the agencies' amendments conformed the regulatory text to the Court's holding (cited above). The agencies published their final rule on September 8, 2023.[3]

The practical impact of the Court's decision and subsequent revision of federal regulations is still being evaluated. However, insight into the local effects of the Court's decision might follow the impacts identified in an analysis of a similar WOTUS definition proposed by the EPA and Army Corps in 2020. This analysis suggests that many waters upstream from national parks will no longer be protected by federal law.

Water plays an essential role in national parks: they provide crucial habitat for fish and wildlife, offer recreational opportunities, provide drinking water for visitors and—in many cases—are central to the parks' unique character and value. Such water-dependent parks are found across the country. Although these waters are protected by statute and National Park Service (NPS) policies within park boundaries, many park waters originate outside park boundaries or are otherwise substantially affected by waters outside of parks, including tributaries and wetlands. The protection of water quality and wildlife habitat in national parks depends on the protection of these upstream wetlands and ephemeral streams. Since NPS relies on the federal protections provided under the Clean Water Act, the recent narrowing of the definition of WOTUS leaves more upstream waterways and wetlands unprotected by federal law.

NPCA's analysis[4] of the Navigable Waters Protection Rule[5] (the "2020 Rule"), which proposed a similar definition to the one adopted by the Supreme Court, showed that it would have stripped protections from many waters by revising the definition of "waters of the United States." Specifically, the 2020 rule—like the *Sackett* decision—narrowed the scope of the Clean Water Act by removing federal protection for wetlands that do not have a continuous surface flow into covered waters (now defined as 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."). The 2023 Rule also narrowed what tributaries are federally protected to only ones that are relatively permanent, standing or continuously flowing.

The loss of federal protection for non-adjacent wetlands and many tributaries could be devastating to parks because these waterbodies play crucial roles in maintaining the biological, chemical and physical integrity of downstream park waters.[6] Because of the similarity between the 2020 Rule and the recent Supreme Court decision, NPCA believes its analysis of the 2020 Rule is useful to describing the future impact of *Sackett v. EPA* on national park waters.

NATIONAL PARK WATERS

The National Park System has over 150,000 miles of rivers and streams flowing through it and over 4 million acres of lakes, oceans and other water bodies are

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[2] Sackett, ET UX. v. Environmental Protection Agency ET AL. No. 21–454. Pg. 22.
[3] 88 FR 3004. Sept. 8, 2023.
[4] NPCA appreciates the work by the Emmett Environmental Law and Policy Clinic at Harvard Law School, which conducted this analysis on behalf of NPCA.
[5] 85 Fed. Reg. 22,250 (Apr. 21, 2020)
[6] *See* EPA & Dep't of the Army, *Technical Support Document for the Clean Water Rule: Definition of Waters of the United States* 101 (May 27, 2015), https://www.epa.gov/sites/production/files/2015-05/documents/technical__support__document__for__the__clean__water__rule__1.pdf.

found within park boundaries.[7] These waters are integral aspects of many parks. Visitors rely on clean water for drinking, fishing and swimming and clean water ensures the integrity of wildlife habitat and ecosystems inside national parks.[8] Moreover, many iconic parks rely on the presence of water for stunning visuals that attract millions of visitors. Nonetheless, as discussed below, many parks have impaired waters or waters that were threatened by the 2020 Rule and likely threatened by the *Sackett* decision.

Saint Croix National Scenic Riverway, Wisconsin & Minnesota

Saint Croix National Scenic Riverway could be at risk from this decision. The St. Croix River, which flows through the park, has recently experienced greater pollution because of expanded agriculture and urban development.[9] The 2020 Rule and now likely the *Sackett* decision increased the possibility of further pollution to St. Croix National Scenic Riverway. It is estimated that 26 percent of the wetlands located in the park's watershed would have been unprotected under the 2020 Rule and 64–77 percent of the watershed's streams are ephemeral and at risk for loss of protection.[10] The loss of federal protection for these waters could have had negative downstream consequences for the integrity of St. Croix National Scenic Riverway's waters.

Indiana Dunes National Park, Indiana

The decrease in waters protected also impact waters at Indiana Dunes National Park. Approximately 69 percent of the park's waterbodies are already impaired.[11] The park is home to the Great Marsh—the biggest internal wetland on the Lake Michigan shoreline. NPCA helped secure funding for a restoration project aimed at rehabilitating the Great Marsh because recent agriculture and construction have disturbed its hydrology.[12] However, NPCA's efforts will likely be hindered by the *Sackett* decision because part of Indiana Dunes National Park is located in the Chicago River watershed and experts estimated that 86 percent of that watershed's wetlands may have lost protection and that 39–56 percent of the watershed's streams are ephemeral.[13] Another part of the park is also located in the Little Calumet-Galien watershed and 70 percent of that watershed's wetlands would have been unprotected under the 2020 rule and likely are federally unprotected after *Sackett*.[14] It is likely that the pollution and hydrological disturbances already found in the park's waterbodies and in the Great Marsh will now get worse.

Chaco Culture National Historical Park, New Mexico

Ephemeral streams play an important role in many national parks, particularly in parks in the arid West where there is a high percentage of ephemeral waters. The United States Geological Survey (USGS) and NPS have identified several "parks with significant intermittent or ephemeral drainages" within the Four Corners region, including Chaco Wash in Chaco Culture National Historical Park.[15] As noted by the report, a "vast network of perennial, intermittent and ephemeral springs, pools, washes and streams sustain the larger water bodies and their associated riparian corridor," and these areas "collectively support the diverse flora and fauna throughout the region."[16] Specifically, the ephemeral features support the region's "unique and significant water-dependent features such as hanging gardens

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[7] *Water Quantity*, NAT'L PARK SERV., https://www.nps.gov/subjects/protectingwater/water-quantity.htm.

[8] *See Water Use in National Parks*, NAT'L PARK SERV., https://www.nps.gov/subjects/protectingwater/water-use.htm#:~:text=Ecosystem%20Use&text=Many%20ecosystems%20in%20national%20parks,of%20maintaining%20healthy%20river%20systems.

[9] Abigail A. Tomasek et al., *Wastewater Indicator Compounds in Wastewater Effluent, Surface Water, and Bed Sediment in the St. Croix National Scenic Riverway and Implications for Water Resources and Aquatic Biota, Minnesota and Wisconsin, 2007–08*, U.S. GEOLOGICAL SURVEY 3 (2012), https://pubs.usgs.gov/sir/2011/5208/pdf/sir2011-5208.pdf.

[10] Woods Decl. ¶ 58; Fesenmyer Decl. ¶ 13.

[11] *See Indiana Dunes National Park Statistics*, NAT'L PARK SERV. (last updated Feb. 7, 2019), https://www.nps.gov/subjects/protectingwater/his-parkreport.htm?unitType=Park&parkNames=INDU.

[12] *Id.*

[13] Woods Decl. ¶ 55; Fesenmeyer Decl. ¶ 8.

[14] Woods Decl. ¶ 56.

[15] Juliane M. Bowen, Review of Available Water-Quality Data for the Southern Colorado Plateau Network and Characterization of Water Quality in Five Selected Park Units in Arizona, Colorado, New Mexico, and Utah, 1925 to 2004, Scientific Investigations Report 2008–5130, U.S. GEOLOGICAL SURVEY 5 (2008).

[16] *Id.*

and cottonwood stands."[17] Potentially eliminating protection for certain ephemeral streams may have dire consequences for Chaco, given the integral roles they play.

NPS's Hydrographic and Impairment Statistics website indicates that the park has negligible amounts of currently impaired waters.[18] However, the park's waters are at risk because the Army Corps has determined that ephemeral streams located near Chaco Culture National Historical Park will be impacted by oil and gas projects.[19] The Bureau of Land Management has also noted that there may be negative impacts to surface water quality in the surrounding area and the map accompanying their analysis reveals that potential projects may be developed in Chaco's watershed.[20] Downstream park waters are at risk because developers may no longer need a permit under section 402 or 404 of the CWA when their projects impact certain ephemeral streams. NPCA has sought to protect Chaco Culture National Historical Park in New Mexico from the negative impacts of oil and gas developments,[21] but the *Sackett* decision could hamper those efforts.

Everglades National Park, Florida

Nearly 100 percent of waters in the Everglades are already impaired,[22] in part because "land-use activities that impair water quality have intensified in the upstream watersheds."[23] The Everglades is highly susceptible to the effects of upstream water practices and is increasingly threatened by nearby land development and agricultural practices.[24] Water pollution has caused overpopulation of some coastal and inland plant species in the park, disturbing its ecosystem.[25] Park waters are further threatened because the 2020 Rule would not have protected 81 percent of the wetlands in the Big Cypress Swamp watershed, which provides a significant portion of water flow into the park.[26] Degraded water quality may threaten the substantial economic activity the park attracts. In 2019, the Everglades accumulated $110 million in visitor spending and helped support 1,510 jobs.[27]

The 2020 Rule would have also hampered wetlands restoration efforts in Everglades National Park. The park has undertaken a project seeking to restore 6,300 acres of wetlands within the park.[28] Compensatory mitigation funds from permitted development projects that fill wetlands in the adjacent counties finance this unprecedented wetland restoration program. Because the 2020 Rule and probably the *Sackett* decision eliminated the need to obtain federal permits for filling many types of wetlands, such as those separated by a jurisdictional water by a manmade feature that does not have a direct hydrological surface connection with said water, compensatory mitigation could be reduced.

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[17] *Id.*

[18] *See Chaco Culture National Historical Park Statistics*, NAT'L PARK SERV. (last updated Feb. 27, 2018), https://www.nps.gov/subjects/protectingwater/his-parkreport.htm?unitType=Park&parkNames=CHCU

[19] *See* Pls.' Mem. Law Supp. Mot. Summ. J, *Conservation Law Foundation et al., v. Environmental Protection Agency*, No. 1:20-cv-10820-DPW (D. Mass. Oct. 15, 2020) at 39; Decl. Michelle Wu Exs. 21–24, *Conservation Law Foundation et al., v. Environmental Protection Agency*, No. 1:20-cv-10820-DPW (D. Mass. Oct. 15, 2020) [hereinafter "Wu Decl."].

[20] *See* Wu Decl. Ex. 25 (map of potential oil and gas developments around Chaco Culture National Historical Park, with potential projects inherently located in the park's watershed).

[21] *See Advocacy in Action: Fragile Treasures Threatened in Chaco Culture National Historical Park*, NATIONAL PARKS CONSERVATION ASSOCIATION, https://www.npca.org/advocacy/25-fragile-treasures-threatened-in-chaco-culture-national-historical-park.

[22] *See Everglades National Park Statistics*, NAT'L PARK SERV. (last updated July 27, 2020), https://www.nps.gov/subjects/protectingwater/his-parkreport.htm?unitType=Park&parkNames=EVER.

[23] *Water Quality in Big Cypress National Preserve and Everglades National Park—Trends and Spatial Characteristics of Selected Constituents*, U.S. GEOLOGICAL SURVEY 3 (2004), https://pubs.usgs.gov/wri/wri034249/wri03__4249__miller.pdf.

[24] *Id.* at 3–4.

[25] Donatto Surratt et al., *Recent Cattail Expansion and Possible Relationships to Water Management: Changes in Upper Taylor Slough (Everglades National Park, Florida, USA)*, ENVIRONMENTAL MANAGEMENT, 49(3), 720–733 (2012), https://doi.org/10.1007/s00267-011-9798-x.

[26] Woods Decl. ¶ 53.

[27] *South Florida National Parks and Preserve Create Over $352 Million in Economic Benefit*, NAT'L PARK SERV. (June 16, 2020), https://www.nps.gov/ever/learn/news/south-florida-national-parks-and-preserve-create-over-352-million-in-economic-benefit.htm.

[28] *Hole-in-the-Donut Restoration Project*, NAT'L PARK SERV. (last updated Oct. 13, 2020), https://www.nps.gov/ever/learn/nature/hidprogram.htm.

Big Cypress National Preserve, Florida

One hundred percent of Big Cypress National Preserve's waters are already impaired,[29] in part because "land-use activities that impair water quality have intensified in the upstream watersheds."[30] Big Cypress is highly susceptible to the effects of upstream water practices and is increasingly threatened by nearby land development and agricultural practices.[31] Preserve waters are further threatened because the 2020 Rule, and likely the *Sackett* decision, would not have protected 81 percent of the wetlands in the Big Cypress Swamp watershed, which is where the preserve is located.[32] Degraded water quality may threaten the substantial economic activity the preserve attracts. In 2019, Big Cypress National Preserve accumulated $81.5 million in visitor spending and helped support 1,080 jobs.[33]

During 2017 and 2018, oil and gas exploration surveys in Big Cypress National Preserve injured many of the preserve's wetlands. In March of 2020, NPCA supported the Army Corp's position that the CWA would regulate future projects; however, the Corps rescinded that position in April 2020.[34] Apart from oil and gas, the threat of off-road vehicle (ORV) trail development as proposed by the National Park Service in 2022 would potentially require the agency to seek 404 permits and compensatory mitigation. However, wetlands protections have now been significantly decreased.

Florissant Fossil Beds National Monument, Colorado

NPS's Hydrographic and Impairment Statistics website reveals that Florissant has no currently impaired waters.[35] However, the park is at risk of degradation because up to 35 percent of its miles of streams may have lost protection.[36] These streams are at significant risk of becoming polluted, and because they flow directly to the park, threaten the water quality of Florissant Fossil Beds National Monument.

Yellowstone National Park, Montana, Idaho and Wyoming

NPS's Hydrographic and Impairment Statistics website reveals that Yellowstone's waterways are currently negligibly impaired.[37] However, the park could be at risk of becoming degraded. The Tongue River basin in Montana lays upstream of Yellowstone River, and in 2015, about 35 percent of its waters that were impacted by section 404 projects were non-relatively permanent ephemeral streams and non-floodplain wetlands.[38] Such waters may no longer be jurisdictional under the CWA. The loss of protection for these basin waters can result in the degradation of Yellowstone River, due to downstream pollutants, and thereby harm Yellowstone National Park.

Great Smoky Mountains National Park, North Carolina and Tennessee

Great Smoky Mountains National Park has waterways that are nearly 54 percent impaired and shoreline miles that are about 93 percent impaired.[39] Headwater streams in the park are threatened by high acidity and NPS notes that "acidic streams are suspected to be the main cause of decline of the native brook trout pop-

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[29] *See Big Cypress National Preserve Statistics*, NAT'L PARK SERVICE (last updated Aug. 16, 2020), https://www.nps.gov/subjects/protectingwater/his-parkreport.htm?unitType=Park&parkNames=BICY.

[30] *Water Quality in Big Cypress National Preserve and Everglades National Park—Trends and Spatial Characteristics of Selected Constituents*, U.S. GEOLOGICAL SURVEY 3 (2004), https://pubs.usgs.gov/wri/wri034249/wri03__4249__miller.pdf.

[31] *Id.* at 3–4.

[32] Woods Decl. ¶ 53.

[33] *South Florida National Parks and Preserve Create Over $352 Million in Economic Benefit*, NAT'L PARK SERV. (June 16, 2020), https://www.nps.gov/ever/learn/news/south-florida-national-parks-and-preserve-create-over-352-million-in-economic-benefit.htm.

[34] *Army Corps Finds Significant Damage in Big Cypress National Preserve After NPS Green Lights Oil and Gas Exploration*, NATIONAL PARKS CONSERVATION ASSOCIATION (Mar. 11, 2020), https://www.npca.org/articles/2486-army-corps-finds-significant-damage-in-big-cypress-national-preserve-after.

[35] *See Florissant Fossil Beds National Monument Statistics*, NAT'L PARK SERV. (last updated Feb. 14, 2014), https://www.nps.gov/subjects/protectingwater/his-parkreport.htm?unitType=Park&parkNames=FLFO.

[36] Decl. Andrew Robertson (on file with author) (forthcoming).

[37] *See Yellowstone National Park Statistics*, NAT'L PARK SERV. (last updated Dec. 27, 2017) https://www.nps.gov/subjects/protectingwater/his-parkreport.htm?unitType=Park&parkNames=YELL.

[38] Br. Amici Curiae Trout Unlimited et al., *South Carolina Coastal Conservation League v. Wheeler*, No. 2:20-cv-01687-DCN (D.S.C. July 17, 2020) at 27.

[39] *See Great Smoky Mountains National Park Statistics*, NAT'L PARK SERV. (last updated Mar. 29, 2018), https://www.nps.gov/subjects/protectingwater/his-parkreport.htm?unitType=Park&parkNames=GRSM.

ulation in the park."[40] There are karst-depression wetlands outside of the park that will likely now be considered non-adjacent and will therefore be at risk of being dredged or filled, or having pollutants be discharged into them.[41] Karst-depression wetlands are habitats "for plants and animals that are otherwise rare or absent in southern uplands" and are ecologically significant.[42] Moreover, wetlands in general can act as buffers for acidity.[43] The loss of CWA protection for these wetlands may prevent them from being helpful acidity buffers to the Great Smoky Mountains National Park, further endangering the native book trout and the area's recreational fishing industry.

Kings Canyon National Park, California

NPS's Hydrographic and Impairment Statistics website indicates that the park is not impaired.[44] However, park waters could be in danger of becoming impaired because the park is located in the San Joaquin River watershed, which contains a substantial amount of non-relatively permanent ephemeral streams.[45]

Gila Cliff Dwellings National Monument, New Mexico

Approximately 21 percent of park waterways are impaired.[46] However, park waters could be in danger of becoming impaired because the park is located in the Upper Gila watershed, which contains a substantial amount of ephemeral streams.[47]

Obed Wild and Scenic River, Tennessee

About 28 percent of the park's waterways are impaired,[48] and the park contains some "severely polluted waters."[49] Its water quality is threatened by out-of-park operations, such as wastewater discharges associated with upstream suburban and urban growth, and pollutants associated with timbering, mining, oil, and gas operations.[50] Obed Wild and Scenic River most likely has ephemeral streams located within its watershed,[51] which could have lost CWA protection. The park hosts "one of only two existing populations of the federally endangered Alabama lampshell mussel" as well as the spotfin chub, a federally threatened fish species.[52] Further impairment of the park's already degraded waters could jeopardize the survival of these vulnerable species.

Blue Ridge Parkway, Virginia and North Carolina

About 67 percent of the park's waterways are already impaired, as well as about 74 percent of its waterbodies and 68 percent of its shoreline miles.[53] The impair-

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[40] *Great Smoky Mountains: Water Quality*, NAT'L PARK SERV., https://www.nps.gov/grsm/learn/nature/water-quality.htm.

[41] *See* Shaun A. Goho, Harvard Law School's Emmett Environmental Law and Policy Clinic, on Behalf of National Parks Conservation Association, Comment Letter on Proposed 2020 Rule to Revise Definitions of "Waters of the United States" 46 (Apr. 12, 2019), http://clinics.law.harvard.edu/environment/files/2019/04/EELPC-NPCA-WOTUS-comments.pdf.

[42] William J. Wolfe, *Hydrology and Tree-Distribution Patterns of Karst Wetlands at Arnold Engineering Development Center, Tennessee*, U.S. GEOLOGICAL SURVEY 2 (1996), https://pubs.usgs.gov/wri/wri96-4277/pdf/wrir__96-4277__a.pdf.

[43] *See, e.g.*, W.M. Mayes, et al., *Wetland Treatments at extremes of pH: A review*, 407 SCI. TOTAL ENV'T 3944 (2007).

[44] *See Kings Canyon National Park Statistics*, NAT'L PARK SERV. (last updated Mar. 31. 2017), https://www.nps.gov/subjects/protectingwater/his-parkreport.htm?unitType=Park&parkNames=KICA.

[45] Woods Decl. ¶ 38; Woods Decl. Ex. 9.

[46] *See Gila Cliff Dwellings National Monument Statistics*, NAT'L PARK SERV. (last updated Feb. 27, 2018), https://www.nps.gov/subjects/protectingwater/his-parkreport.htm?unitType=Park&parkNames=GICL.

[47] Woods Decl. ¶ 41; Woods Decl. Ex. 12.

[48] *See Obed Wild and Scenic River Statistics*, NAT'L PARK SERV. (last updated Apr. 28, 2017), https://www.nps.gov/subjects/protectingwater/his-parkreport.htm?unitType=Park&parkNames=OBRI.

[49] James Hughes et al., *Long-Term Discrete Water Quality Monitoring at Big South Fork National River and Recreation Area, Blue Ridge Parkway, and Obed Wild and Scenic River*, NAT'L PARK SERV. 15 (Dec. 2018), [hereinafter "Long-Term Monitoring Report"].

[50] *Id.*

[51] *See* Rodney R. Knight et al., *Hydrologic Data for the Obed River Watershed, Tennessee*, NAT'L PARK SERV. & U.S. GEOLOGICAL SURVEY 4 (2014), https://pubs.usgs.gov/of/2014/1102/pdf/ofr2014-1102.pdf.

[52] James Hughes et al., *Long-Term Discrete Water Quality Monitoring at Big South Fork National River and Recreation Area, Blue Ridge Parkway, and Obed Wild and Scenic River*, NAT'L PARK SERV. 17 (Dec. 2018).

[53] *See Blue Ridge Parkway Statistics*, NAT'L PARK SERV. (last updated Sept. 9, 2021), https://www.nps.gov/subjects/protectingwater/his-parkreport.htm?unitType=Park&parkNames=BLRI.

ment of many waters within Blue Ridge Parkway is caused by conditions that originate outside of the parks' boundaries, such as urban and residential development that occurs adjacent to the park.[54]

Congaree National Park, South Carolina

Over 24 percent of Congaree's waterways are impaired.[55] Congaree has poor surface water quality and is threatened in part by the effects of municipal and industrial wastewater discharges, urbanization, stormwater runoff and upstream poultry concentrated animal feeding operations.[56]

Letter of September 11, 2024, to Hon. David Rouzer, Chairman, and Hon. Grace F. Napolitano, Ranking Member, Subcommittee on Water Resources and Environment, from Michele Stanley, Executive Vice President and Chief Advocacy Officer, National Stone, Sand & Gravel Association, Submitted for the Record by Hon. David Rouzer

SEPTEMBER 11, 2024.

The Honorable DAVID ROUZER,
Chairman,
Subcommittee on Water Resources and Environment, Committee on Transportation and Infrastructure, U.S. House of Representatives, Washington, DC 20515.

The Honorable GRACE NAPOLITANO,
Ranking Member,
Subcommittee on Water Resources and Environment, Committee on Transportation and Infrastructure, U.S. House of Representatives, Washington, DC 20515.

DEAR CHAIRMAN ROUZER AND RANKING MEMBER NAPOLITANO,

On behalf of the 500 members of the National Stone, Sand & Gravel Association (NSSGA), I write to express our gratitude for the much-needed oversight hearing titled *Waters of the United States (WOTUS) Implementation Post-Sackett Decision: Experiences and Perspectives* on September 11, 2024. Your attention to this matter is crucial and greatly appreciated.

NSSGA represents the aggregates and industrial sand industry, and the companies that manufacture equipment and provide services. Our industry, with 9,000 facilities and well over 100,000 employees in high-paying jobs, plays a vital role in sustaining our lifestyle and constructing the nation's infrastructure and communities. The 2.5 billion tons of aggregates we produce annually are fundamental components required for building communities, roads, airports, transit, rail, ports, clean water and energy networks. Aggregates are a local product because rocks are heavy, and excess transportation adds to the cost of the material. If operations are not allowed to expand or open near where they are needed, the materials end up costing more.

The stone, sand and gravel industry urgently needs clarity and certainty regarding Clean Water Act (CWA) permitting. NSSGA's members frequently pull CWA permits when developing new quarries or determining if, when, or how to expand their existing quarry, and the lack of clear guidelines is a significant challenge. In May 2023, the Supreme Court issued a clear ruling to limit federal jurisdiction under the CWA in *Sackett v. EPA*.

Sackett ruled on the jurisdiction of adjacent wetlands, providing a two-part test to make that determination, and ruled that the significant nexus test was inconsistent with the CWA and the original 2023 WOTUS rule. The agencies are now relying on two new tests from *Sackett* to determine jurisdiction. They are relying on a new and untested 'relatively permanent water' (RPW) test for tributaries and doing everything they can to claim jurisdiction of adjacent wetlands through the 'continuous surface connection' (CSC) test. These new and unknown tests harm landowners and industry and put practitioners in a precarious position because the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (USACE) determine jurisdiction case-by-case. The Justices made it clear that an ad-

[54] Long-Term Monitoring Report, *supra* note 80 at 18–19 ("These streams are 303d-listed for causes originating outside park boundaries.").

[55] *See Congaree National Park Statistics*, NAT'L PARK SERV. (last updated April 6, 2021), https://www.nps.gov/subjects/protectingwater/his-parkreport.htm?unitType=Park&park Names=CONG.

[56] JoAnn M. Burkholder et al., *Natural Resource Condition Assessment: Congaree National Park*, NAT'L PARK SERV. (2018) xxii, 176.

jacent wetland is only jurisdictional when *indistinguishable* from an otherwise jurisdictional WOTUS feature.

While the EPA and USACE have provided some webinars and recently began providing field Memorandum for Records (MFR) on certain jurisdictional determinations that are, again, on a case-by-case basis, there has been no publicly available guidance or efforts to define the ambiguous terms of RPW or CSC by the agencies. This puts many landowners, industry, and practitioners in a risky position because it is often difficult to determine whether a particular feature is WOTUS, and as such, could lead to incidental impacts coupled with civil penalties and possibly criminal prosecution. The agencies are defining CSC as *any* physical connection, even if that connection itself is not jurisdictional. The agencies state that back-to-back rainfall could satisfy the RPW test to make a drainage ditch, an otherwise dry feature, jurisdictional. This violates the clear language of an "indistinguishable" connection in the unanimous *Sackett* opinion and was not promulgated via rulemaking, which violates the Administrative Procedure Act. The only option for our members is to request an approved jurisdictional determination (AJD) and wait for the agencies to tell them what is considered federal jurisdiction. These delays cost the industry real money and increase overall infrastructure project costs.

The environmental consultants NSSGA members use to provide insight into filing permits have shared that they do not know what to expect until the agencies finally review their requests and issue an AJD. These consultants have shared examples of where they have found a feature to be ephemeral and, therefore, non-jurisdictional, but the EPA and USACE will interpret the data differently to claim that feature as an RPW. NSSGA encourages the agencies and Congress to sit down with industry to best determine how federal staff is making these decisions and to walk through how it is compliant with the Supreme Court's decisions.

NSSGA applauds this committee for holding a hearing to explore how the federal agencies are disregarding a unanimous Supreme Court opinion. Essentially, the agencies have created a new significant nexus test in all but name and brought many development and infrastructure projects to a halt. With the expiration of the Infrastructure Investment and Jobs Act (IIJA) funding on the horizon, federal agencies should utilize their existing authorities to help the industry ramp up production to utilize best the investments made by Congress, and that should include expediting AJDs and permits under the CWA.

Sincerely,

MICHELE STANLEY,
Executive Vice President & Chief Advocacy Officer,
National Stone, Sand & Gravel Association.

Letter of September 11, 2024, to Hon. David Rouzer, Chairman, and Hon. Grace F. Napolitano, Ranking Member, Subcommittee on Water Resources and Environment, from Rich Nolan, President and Chief Executive Officer, National Mining Association, Submitted for the Record by Hon. David Rouzer

SEPTEMBER 11, 2024.

The Honorable DAVID ROUZER,
Chairman,
Subcommittee on Water Resources and Environment, Committee on Transportation and Infrastructure, U.S. House of Representatives, Washington, DC 20515.

The Honorable GRACE NAPOLITANO,
Ranking Member,
Subcommittee on Water Resources and Environment, Committee on Transportation and Infrastructure, U.S. House of Representatives, Washington, DC 20515.

DEAR CHAIRMAN ROUZER AND RANKING MEMBER NAPOLITANO:

On behalf of the National Mining Association (NMA) and our nearly 280 members, thank you for holding today's hearing on the implementation of the U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency's (EPA) Waters of the United States (WOTUS) rule following the U.S. Supreme Court's decision in *Sackett v. EPA*. We applaud your leadership in examining this critical issue and appreciate the opportunity to share our members' experiences.

STATEMENT OF INTEREST

The NMA is the national trade organization that serves as the voice of the entire U.S. mining industry and the hundreds of thousands of American workers it employs. We work to ensure America has secure and reliable supply chains, abundant and affordable energy, and the American-sourced materials necessary for U.S. manufacturing, infrastructure, national security, and economic security, all delivered under world-leading environmental, safety and labor standards. Our members support clear and reasonable regulatory requirements that both protect the environment and support responsible development.

U.S. MINERS NEED REGULATORY CLARITY AND CERTAINTY

Our members regularly obtain federal Clean Water Act (CWA) permits and rely on efficient, predictable, and durable regulatory frameworks. Especially in this era of intense global competition and volatility, U.S. miners, including small businesses, need regulatory clarity and certainty to make confident decisions that will create jobs, strengthen local economies and communities, and create high-quality, American-made goods and services. This includes metallurgical coal for steelmaking and critical infrastructure, thermal coal for heating and energy both at home and for our allies abroad, and hardrock minerals from copper to gold that support renewable energy technologies, healthcare, and more.

A year and a half after the Court's decision and a full year after the revised WOTUS rule went into effect, the agencies have not faithfully implemented *Sackett* or provided clear direction to the regulated community. The agencies' implementation improv is putting our members' projects and the communities that rely on them at risk. Our members are committed to protecting natural resources and promoting responsible development in the communities in which they live and work. But many of them are facing significant project delays and increased costs because the agencies cannot make the basic decision of whether a project needs a federal CWA permit.

For example, several of our member companies are having difficulty obtaining an approved jurisdictional determination (AJD) from the Corps. In some cases, our members have been waiting a year or more for their AJD to be issued. Some draft AJDs have been elevated to Corps and EPA headquarters without any explanation or timeline for completion. In the meantime, our members are unable to move forward with their projects. In situations where our members do not have the luxury of time for the Corps to determine whether they need a CWA permit, some companies have been forced to take the route of a preliminary jurisdictional determination (PJD). PJDs concedes that all features on the site are federally jurisdictional, even if the agencies would have determined they are not.

Ultimately, some companies are facing an impossible decision—either to languish in regulatory limbo for months or even years waiting for the federal government to decide whether their project needs a CWA permit or to be forced to pull the plug on the project altogether.

We urge the Subcommittee to ensure the agencies are faithfully applying the *Sackett* decision, processing jurisdictional determinations efficiently, and being transparent with our members about how the post-*Sackett* regulatory regime is being implemented.

Respectfully,

RICH NOLAN,
President and CEO, National Mining Association.

Letter of September 6, 2024, to the Committee on Transportation and Infrastructure and the Subcommittee on Water Resources and Environment, from Ryan Anderson, Commissioner, Alaska Department of Transportation and Public Facilities, Submitted for the Record by Hon. David Rouzer

SEPTEMBER 6, 2024.

Committee on Transportation and Infrastructure,
Subcommittee on Water Resources and Environment,
U.S. House of Representatives,
2165 Rayburn House Office Building, Washington, DC 20515.

WOTUS Implementation Post-*Sackett* Decision

DEAR CHAIRMAN GRAVES, CHAIRMAN ROUZER, AND RANKING MEMBERS:

I understand that the House Committee on Transportation and Infrastructure's Subcommittee on Water Resources and Environment is taking testimony on experiences and perspectives of the regulated public on the permitting of projects after the Supreme Court's decision in *Sackett v. EPA*. As the Commissioner of Alaska's Department of Transportation and Public Facilities (DOT&PF), in the state with 63% of the nation's wetlands, I can assure you that the Corp of Engineer's (ACE) wetland permitting system has only become slower and more burdensome post-*Sackett*. Specific examples of the additional burdens to the regulated public and slow delivery of permits and decisions include:

1.) ACE has not established processes or updated regulations for wetland delineations consistent with *Sackett*. From outward appearances, ACE is treating *Sackett* as a minor modification of the regulatory landscape rather than a landmark decision.

2.) Staff turnover at the Alaska Regulatory Division of the ACE has resulted in a limited understanding by staff of the unique environmental conditions found in Alaska and we are often dealing with out-of-state ACE project managers.

3.) The Regulatory Guidance Letter No. 05–07; Approved NEPA Categorical Exclusions for Nationwide Permit (NWP) 23 (2005) has not been updated to incorporate changes to the FHWA categorical exclusion list. This has limited the ability of DOT&PF to use NWP 23, and directly results ACE staff requiring DOT&PF to seek costly and time-consuming individual permits, rather than the NWP that should be available for DOT&PF's activities.

4.) The Alaska Regulatory Division of the ACE has limited staff with expertise in Section 106 of the Historic Preservation Act and, until recently, the ACE has worked cooperatively with Professionally Qualified Individuals at DOT&PF fulfill ACE's obligation under Section 106. The ACE's recent transition to an entirely independent Section 106 process result in substantial confusion among Tribes and other consulting parties.

5.) The ACE's introduction of a new electronic permitting system for NWPs has slowed the process to receive routine permits. DOT&PF was not informed of the change and is trying to adapt to the new system with no guidance from the ACE.

Overall, DOT&PF's experience with wetland permitting post-*Sackett* has been disappointing. The ACE's lack of clarity and guidance has had a negative impact on wetland permitting in Alaska.

I appreciate your giving me the opportunity to report DOT&PF's experiences and perspectives on ACE's post-*Sackett* permitting.

Sincerely yours,

RYAN ANDERSON,
Commissioner, Alaska Department of Transportation and Public Facilities.

cc: Ryan Hambleton
Corey Kuipers

Letter of September 6, 2024, to Hon. Sam Graves, Chairman, and Hon. Rick Larsen, Ranking Member, Committee on Transportation and Infrastructure, and Hon. David Rouzer, Chairman, and Hon. Grace F. Napolitano, Ranking Member, Subcommittee on Water Resources and Environment, from 24 State Attorneys General, Submitted for the Record by Hon. David Rouzer

SEPTEMBER 6, 2024.

The Honorable SAM GRAVES,
Chairman,
Committee on Transportation and Infrastructure, U.S. House of Representatives, 1135 Longworth House Office Building, Washington, DC 20515.

The Honorable RICK LARSEN,
Ranking Member,
Committee on Transportation and Infrastructure, U.S. House of Representatives, 2163 Rayburn House Office Building, Washington, DC 20515.

The Honorable DAVID ROUZER,
Chairman,
Subcommittee on Water Resources and Environment, U.S. House of Representatives, 2333 Rayburn House Office Building, Washington, DC 20515.

The Honorable GRACE NAPOLITANO,
Ranking Member,
Subcommittee on Water Resources and Environment, U.S. House of Representatives, 1610 Longworth House Office Building, Washington, DC 20515.

DEAR CHAIRMAN GRAVES, CHAIRMAN ROUZER, RANKING MEMBER LARSEN, AND RANKING MEMBER NAPOLITANO:

We were happy to learn that the subcommittee on Water Resources and Environment intends to hold a hearing next week titled, "Waters of the United States Implementation Post-*Sackett* Decision: Experiences and Perspectives." We write to provide our experiences and perspectives as States. Unfortunately, our recent experiences haven't been good.

A. *SACKETT V. EPA* AND A RETURN TO STATUTORY TEXT

The Supreme Court's decision in *Sackett v. EPA*, 598 U.S. 651 (2023), sought to refocus both the Environmental Protection Agency and the Army Corps of Engineers on the *text* of the Clean Water Act. For years, the Agencies had pushed broad understandings of what constituted "waters of the United States"—the key statutory phrase that defines the CWA's jurisdictional reach. *See* 33 U.S.C. § 1362(7). Indeed, "by the EPA's own admission, almost all waters and wetlands [we]re potentially susceptible to regulation under [the most recent pre-*Sackett*] test." *Sackett*, 598 U.S. at 669 (cleaned up). At the same time, the Agencies' rules often provided very little guidance to the parties who had to actually wrestle down whether a particular piece of land was subject to the Act, including the States. This breadth and ambiguity was a dangerous mix: "because the CWA can sweep broadly enough to criminalize mundane activities like moving dirt, [the Agencies'] unchecked definition of 'the waters of the United States' mean[t] that a staggering array of landowners [we]re at risk of criminal prosecution or onerous civil penalties." *Id.* at 669–70.

Sackett should have been a step towards fixing things. Drawing on earlier precedents and a straightforward reading of the Act (among other things), *Sackett* held that "the CWA's use of 'waters' encompasses only those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes." 598 U.S. at 671 (cleaned up). They must be "connected to traditional interstate navigable waters." *Id.* at 678. Wetlands are also covered when they are "indistinguishably part of a body of water that itself constitutes 'waters' under the CWA." *Id.* at 676. That indistinguishability requires "a continuous surface connection to bodies that are 'waters of the United States' in their own right, so there is no clear demarcation between 'waters' and wetlands." *Id.* at 678. Applying these principles, the Supreme Court found that the Sacketts' property did not include covered "waters" where it contained wetlands across a road from a tributary that fed a creek that in turn fed an intrastate lake. *Id.* at 662–63, 684.

Although EPA asked the Court to "defer to its understanding of the CWA's jurisdictional reach," the Court explained that EPA's understanding was "inconsistent with the text and structure of the CWA." *Sackett*, 598 U.S. at 679. Among other things, the Agencies' approach—which applied an ill-defined "significant nexus" test and a broad understanding of "adjacent" wetlands—showed too little respect to the

States' traditional control over land and water regulation. *Id.* at 680. Beyond that, the administrative interpretation gave "rise to serious vagueness concerns in light of the CWA's criminal penalties." *Id.* This approach was flatly wrong—it not only "degraded States' authority" but also "diverted the Federal Government . . . into something resembling a local zoning board." *Id.* at 709 (Thomas, J., concurring) (cleaned up).

B. The Agencies' Post-*Sackett* "Conforming" Rule

Given how soundly the Court rejected the Agencies' approach, one might've expected the Agencies to significantly reevaluate their methods. They didn't. The administration first condemned the decision outright. *See* White House, *Statement from President Joe Biden on Supreme Court Decision in* Sackett v. EPA (May 25, 2023), https://bit.ly/3Xx95V7 ("The Supreme Court's disappointing decision in *Sackett v. EPA* will take our country backwards."). And just a few short months after the decision, the Agencies issued a terse "conforming" rule—without notice and comment—that made only a handful of changes to the prior rule that the Supreme Court had so directly condemned. *See* Revised Definition of "Waters of the United States"; Conforming, 88 Fed. Reg. 61964 (Sept. 8, 2023). The Agencies tweaked the definition of adjacency (for wetlands purposes), removed the significant-nexus test, and dropped interstate wetlands. *Id.* at 61965–66.

The Agencies otherwise left everything just as it had been pre-*Sackett*. 88 Fed. Reg. at 61966 (explaining that "[t]he agencies will continue to interpret the remainder of the definition of 'waters of the United States'" as they did in the "2023 Rule," as they believed that was "consistent with the *Sackett* decision"); *see also id.* at 61967 (describing "the agencies' intent . . . to preserve [any] remaining portions [of the 2023 Rule] to the fullest possible extent," even if other parts are struck down or stayed). Vague administrative guidance remains in place, and an expansive understanding of "waters" still leaves the Agencies free to assert jurisdiction over bits of water large and small. *See* Joint Coordination Memo. to the Field Between the U.S. Dep't of the Army, U.S. Army Corps of Eng'rs & the U.S. Env't Prot. Agency (Sept. 27, 2023), https://bit.ly/3SDQ4yi ("[T]he implementation guidance and tools in the [Final Rule] preamble that address the regulatory text that was not amended by the conforming rule . . . generally remain relevant to implementing the [2023 Rule], as amended."). And even as *Sackett* reemphasized the importance of focusing on "navigable" waters, 598 U.S. at 672, the Agencies showed exactly zero concern for navigability. The Agencies also ominously warned that they would take additional actions to define the statute's reach, suggesting there's still more to come. 88 Fed. Reg. at 61966.

The Agencies' 2023 rule, as purportedly "conformed" by their later one, remains inconsistent with *Sackett* in several important ways. For example:

- Although the "relatively permanent" standard is a central part of *Sackett*, the Agencies have provided effectively no guidance on how that standard is now to be applied. They instead left in place guidance from 2023 that had criticized the standard and dubbed it inadequate. *See, e.g.*, Revised Definition of "Waters of the United States," 88 Fed. Reg. 3004, 3005 n.2 (Jan. 18, 2023) (declaring that the "relatively permanent standard identifies only a subset of the 'waters of the United States'"); *id.* at 3007 ("Sole reliance on the relatively permanent standard's extremely limited approach has no grounding in the Clean Water Act's text, structure, or history."); *id.* at 3039 ("[T]he relatively permanent standard used alone runs counter to . . . science."); *id.* at 3039–41 (attacking the relatively permanent standard at length).
- To the extent the Agencies *did* provide guidance, the 2023 Rule proposed to rely—in some ill-defined way—on complicated mapping, modelling, and "[g]eomorphic indicator[]" assessment to determine whether waters are relatively permanent. 88 Fed. Reg. at 3087. This approach undermines the certainty and specificity that *Sackett* promoted through the use of easily understood items like "geographical features." *Sackett*, 598 U.S. at 671 (cleaned up). The rule also does not discuss volume or duration of water flow, which should be a central part of evaluating the permanence of water.
- The 2023 Rule does not clearly or lawfully define the "continuous surface connection" standard that, working with relative permanence, drives the jurisdictional analysis. Instead, it relies on connections through nonjurisdictional features, *connections that lack water*, and connections that are not "continuous" based on any ordinary understanding of that word. *See, e.g.*, 88 Fed. Reg. at 3095 (refusing to require a hydrologic connection or connection through jurisdictional waters and instead permitting connection through any discrete feature,

like a pipe); *id.* at 3096 ("A continuous surface connection is not the same as a continuous surface *water* connection."); *contra Sackett*, 598 U.S. at 678 (contemplating a water surface connection except for "temporary interruptions . . . because of phenomena like low tides or dry spells").

- The 2023 Rule refashions numerous intuitive concepts into the sort of administrative terms of art that would confuse regulated parties: "adjacent," "certain times of year," "interstate waters," "continuous surface connection," "impoundments," "relatively permanent," "seasonally," and "tributaries" are but a few examples of ordinarily straightforward terms that the 2023 Rule deploys in tortuous new ways. And it is replete with categories of regulated waters that leave so much wiggle room for the regulators that regulated parties will have little chance of convincing the Agencies that their lands and waters *must* be excluded. This vagueness creates a continuing threat of criminal charges for innocent landowners and others.
- The 2023 Rule covers *all* interstate waters, even if they are not connected to traditionally navigable waters. *Contra Sackett*, 598 U.S. at 678. *Sackett* never hinted that waters are automatically federally regulated merely because they cross state borders.
- The 2023 Rule says the relatively permanent test "is meant to encompass" isolated waters like "ponds" and "impoundments that are part of the tributary system." 88 Fed. Reg. at 3085. Such coverage is well beyond the "streams, oceans, rivers, and lakes" that were the focus of *Sackett*'s test. 598 U.S. at 671. Disconnected, small volumes of water should be the most obvious waters falling *outside* the reach of "waters of the United States," but the Agencies still seem to believe they are within their grasp.
- In litigation with the States, the Agencies have insisted that *Sackett* did not actually require that wetlands be "indistinguishable" from traditional waters. Given that indistinguishability is a central part of *Sackett*, this insistence is bizarre. *See Glynn Env't Coal., Inc. v. Sea Island Acquisition, LLC*, No. CV 219–050, 2024 WL 1088585, at *4 (S.D. Ga. Mar. 1, 2024) ("The CWA only extends to wetlands that are indistinguishable from 'waters of the United States' as a practical matter."). By taking this approach, the Agencies have created a rule that is "substantially broader than the indistinguishability test adopted in the decision." Tony Francois, *"Same As It Ever Was"—An Application of a 1980s Classic to EPA and Army Regulations "Conforming" to* Sackett v. EPA, CF004 ALI–CLE 627 (Feb. 1, 2024).

Altogether, the Agencies' "conforming" rule has not conformed to *Sackett* in many serious and substantial ways.

C. The Agencies' On-The-Ground Implementation Post-*Sackett*

The Agencies' continued unwillingness to meaningfully apply *Sackett*'s requirements has led to problems on the ground.

In one post-*Sackett* case, for instance, the Agencies instructed an Omaha field office to reconsider whether a wetland that is separated from a supposedly jurisdictional wetland by a 15-foot "dirt track road and a seasonally plowed field" (and that lacks even a "culvert to maintain a connection" to a navigable feature by way of the "jurisdictional" wetland) is nevertheless jurisdictional. EPA & USACE, Memorandum to Reevaluate Jurisdiction for NWO–2003–60436, at 2 (Feb. 16, 2024), https://bit.ly/4gfLLT1. These facts neatly track *Sackett*; it should be an easy case. Yet the Agencies suggested the separate wetlands may be treated as one jurisdictional wetland based on a slew of factors that need not include any hydrologic connection—and that may arise from only "historic" conditions. *Id.*

In another recent memorandum applying the "amended" 2023 rule, the Agencies still insist that "'indistinguishable' is not a separate element of adjacency," and "the CWA does not require a continuous surface water connection between wetlands and covered waters." EPA & USACE, Memorandum on NAP–2023–01223, at 2 (June 25, 2024), https://bit.ly/3Ze7XH7. The Agencies believed the CWA could reach a wetland connected to a tributary solely by a 70-foot-long pipe under a road. *Id.* at 3. They stressed that they did not need to observe any actual water flow to find the necessary "continuous surface connection." *Id.* at 4. Here again, the Agencies seemed unwilling to focus on actual water and adjacency in the way instructed by *Sackett*.

In still another instance, the Agencies returned a jurisdictional determination to the Buffalo field office that had found that a group of wetlands spanning a 165-acre area should not all be treated as a single wetland—and should not be deemed "waters" because they did not bear a continuous surface connection. EPA & USACE,

Memorandum on LRB–2021–01386 (Feb. 16, 2024), https://bit.ly/47hONCf. The Agencies believed that "a shallow subsurface connection or indicators of a shallow subsurface connection" could be enough to link the wetlands together; these linked wetlands would then be evaluated together to decide if they had an continuous surface connection, such as abutment. *Id.* at 3. In other words, the Agencies pressed the field office to daisy-chain wetlands together through tenuous, underground, non-hydrological connections so that even distant wetlands could be tied to traditionally jurisdictional waters.

And in a last example, the Agencies asserted jurisdiction over a wetland connected to a "tidally-influenced ditch" by way of a 115-foot-long "non-relatively permanent drainage ditch and … two culverts that convey surface flow." EPA & USACE, Memorandum on SWG–2023–00284, at 3 & n.3 (June 25, 2024), https://bit.ly/4edpaoh. This last example is especially troubling because it draws together distant water features by way of concededly non-jurisdictional water features like ditches and culverts with temporary flows (at best).

Judging from public reports and anecdotal evidence we've received, these official determinations are signals of a broader trend. We understand, for example, that the Agencies are asserting jurisdiction over dry ditches crossing farms. *See* Dave Dickey, *Is EPA Ignoring the Supreme Court Decision in Sackett?*, INVESTIGATE MIDWEST (July 16, 2024), https://bit.ly/3z7XRgl. EPA also brought an enforcement action against a landowner for building bulkheads on his farm; EPA "assert[ed] jurisdiction over many acres of [his] properties that, except for an occasional big storm, are dry land—much of it planted in crops." App'x to Mot. for Prelim. Injun. at 54, *White v. EPA*, No. 24–1635 (4th Cir. Aug. 27, 2024), ECF No. 18–2. And we have been told that the Agencies have indicated in post-*Sackett* training sessions that they will continue to apply as aggressive an approach as they can.

This federal-first mentality is a significant threat to the States. West Virginia is lined with ephemeral steams. Other States, like Alaska and Florida, are covered with expansive wetlands. Still other States, like North Dakota and Iowa, have unique water features like prairie potholes that could also draw the Agencies' attention. We could go on, but the point is the same: if the Agencies are going to continue to insist that just about every water feature (or sometimes, non-water feature) affords them jurisdiction, then States will be quickly pushed aside. Yet the States better understand local needs critical to water regulation. Federal control over all water regulation is not the best outcome for anyone.

The States take seriously their responsibility to act as stewards of these vital resources. Protection against water pollution is important. But Congress has spoken to how it wants to tackle that problem; the Supreme Court has placed signposts, too. The Agencies cannot defiantly insist on going their own way.

* * * *

Because the Agencies continue to construe "waters of the United States" inconsistently with *Sackett*, 27 States have filed suit, with most having already secured preliminary injunctions. *See West Virginia v. EPA*, No. 3:23-cv-00032 (D.N.D. filed Feb. 16, 2023); *Kentucky v. EPA*, No. 3:23-cv-00007 (E.D. Ky. filed Feb. 22, 2023); *Texas v. EPA*, No. 3:23-cv-00017 (S.D. Tex. filed Jan. 18, 2023). We anticipate those challenges will ultimately succeed. But if the States and others are to receive some relief from endless rounds of maneuvering from the Agencies (and the endless rounds of litigation that come with them), Congress will almost certainly need to act. Responsible agencies would have stayed the present rule, re-opened notice and comment, and revised their approach entirely. The Agencies instead dug in. It's now left to Congress to dig them out. *See, e.g.*, Brandon Pang, *Doesn't Look Like Anything to Me: Protecting Wetlands by Narrowing the Definition of "Waters of the United States"*, 7 LSU J. ENERGY L. & RES. 223, 224 (2019) (describing how the "many controversial and unsuccessful attempts to resolve this issue" show that it is "for Congress to revisit and amend the CWA, redefining WOTUS once and for all").

We look forward to working with the subcommittee to move closer to the clarity and certainty that *Sackett* sought. Thank you again for the chance to offer our experiences and perspectives on this important issue.

Sincerely,

PATRICK MORRISEY,
West Virginia Attorney General.
STEVE MARSHALL,
Alabama Attorney General.
TIM GRIFFIN,
Arkansas Attorney General.
TREG TAYLOR,
Alaska Attorney General.
ASHLEY MOODY,
Florida Attorney General.
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TODD ROKITA,
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ALAN WILSON,
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KEN PAXTON,
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BRIDGET HILL,
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GENTNER F. DRUMMOND,
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MARTY JACKLEY,
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SEAN D. REYES,
Utah Attorney General.

Statement of American Rivers, Submitted for the Record by Hon. Grace F. Napolitano

Since 1973, American Rivers has protected wild rivers, restored damaged rivers, and conserved clean water for people and nature. With headquarters in Washington, D.C. and nearly 400,000 supporters, members, and volunteers across the country, we are the most trusted and influential river conservation organization in the United States, delivering solutions for a better future.

We are writing to you to express our gratitude for holding a hearing on "Waters of the United States Implementation Post-Sackett Decision: Experiences and Perspectives" and share our insights and continued commitment to the protection of America's rivers and streams, the source of much of American's drinking water.

THE IMPORTANCE OF SMALL STREAMS AND WETLANDS

All of America's rivers are fed by small streams and wetlands—representing tens of thousands of miles of waterways. Not only does polluting and destroying these small waterbodies lead to local pollution and flooding, but also the cumulative effects of losing smaller streams and rivers lead to massive impacts on our larger rivers and drinking-water systems. Approximately 117 million people—over one-third of the total U.S. population—get some or all their drinking water from public drinking-water systems that rely in part on these streams.[1] These small streams:

- Protect water quality, ensuring both humans and wildlife have access to clean water.
- Provide natural flood control. The network of small streams and wetlands hold and store billions of gallons of flood waters every year that might otherwise wash away homes and property.
- Sustain downstream ecosystems. Small streams and wetlands feed into bigger streams, then rivers, and then bays and estuaries. The food web and chemical processes that happen within the water are essential for healthy ecosystems, and it all starts with small streams and wetlands.

Because small streams and wetlands are the source of the nation's fresh waters, changes that degrade these headwater systems affect streams, lakes, and rivers downstream. Land-use changes in the vicinity of small streams and wetlands can impair the natural functions of such headwater systems. Changes in surrounding vegetation, development that paves and hardens soil surfaces, and the total elimination of some small streams reduces the amount of rainwater, runoff, and snowmelt the stream network can absorb before flooding.

The increased volume of water in small streams scours stream channels, changing them in a way that promotes further flooding. Such altered channels have bigger and more frequent floods. The altered channels are also less effective at recharging groundwater, trapping sediment, and recycling nutrients. As a result, downstream lakes and rivers have poorer water quality, less reliable water flows, and less diverse aquatic life. Algal blooms and fish kills can become more common, causing

[1] 33 USC §1344

problems for commercial and sport fisheries. Recreational uses may be compromised. In addition, excess sediment can be costly, requiring additional dredging to clear navigational channels and harbors and increasing water filtration costs for municipalities and industry.[2]

The natural processes that occur in small streams and wetlands provide Americans with a host of benefits, including flood control, adequate high-quality water, and habitat for a variety of plants and animals. Like small streams, wetlands are also key components of the nation's network of rivers and streams. Many wetlands, such as marshes that border lakes or streams, have obvious connections to surface waters. Other wetlands, however, seem cut off from stream networks—but that appearance is deceiving. Recent research further documents that even wetlands that are referred to as "isolated" are not isolated at all but have both hydrologic and biologic linkages to regional aquatic systems, and thus are referred to as "geographically isolated" and remain significantly related. Wetlands are almost always linked to stream networks and other wetlands through groundwater.

BENEFITS PROVIDED BY SMALL STREAMS AND WETLANDS

Small streams and wetlands provide natural flood control. When small streams and wetlands are in their natural state, they absorb significant amounts of rainwater, runoff, and snowmelt before flooding. However, when a landscape is altered, such as by a landslide or large forest fire or a housing development, the runoff can exceed the absorption capacity of small streams. Moreover, the power of additional water coursing through a channel can change the channel itself. Humans often alter both landscape and stream channels in ways that result in larger and more frequent floods downstream. Natural streambeds are rough and bumpy in ways that slow the passage of water. In watersheds that are not carefully protected against impacts of land development, stream channels often become enlarged and incised from increased runoff. Changed channels send water downstream more quickly, resulting in more flooding.

Small streams and wetlands maintain water supplies. Headwater systems play a crucial role in ensuring a continual flow of water to downstream freshwater ecosystems, and USGS models show that headwater streams in the northeastern U.S. contribute 55 percent of mean annual water volume to fourth- and higher-order streams and rivers. Water in streams and rivers comes from several sources: water held in the soil, runoff from precipitation, and groundwater. Water moves between the soil, streams and groundwater. Wetlands, even those without any obvious surface connection to streams, are also involved in such exchanges by storing and slowly releasing water into streams and groundwater, where it later resurfaces at springs. Because of these interactions, groundwater can contribute a significant portion of surface flow in streams and rivers; conversely, surface waters can also recharge groundwater. If connections between soil, water, surface waters, and groundwater are disrupted, streams, rivers, and wells can run dry. Two-thirds of Americans obtain their drinking water from a water system that uses surface water. The remaining one-third of the population relies on groundwater sources. The quality and amount of water in both of these sources respond to changes in headwater streams.

Small streams and wetlands protect water quality. Materials that wash into streams include everything from soil, leaves, and dead insects to runoff from agricultural fields and animal pastures. One of the key ecosystem services that stream networks provide is the filtering and processing of such materials. Healthy aquatic ecosystems can transform natural materials like animal dung and chemicals such as fertilizers into less harmful substances. Small streams and their associated wetlands play a key role in both storing and modifying potential pollutants, ranging from chemical fertilizers to rotting salmon carcasses, in ways that maintain downstream water quality.

Headwater streams maintain biological diversity. Headwater streams are probably the most varied of all running-water habitats; they range from icy-cold brooks tumbling down steep, boulder-filled channels to outflows from desert springs that trickle along a wash for a short distance before disappearing into the sand. As such, headwater systems offer an enormous array of habitats for plant, animal and microbial life. Regionally important riparian plants, such as alder and tamarisk, exercise a strong influence on headwater streams. Headwater streams in regions with beavers are vastly different from those in regions without beavers. Environmental conditions change throughout a stream network. In wet regions, streams grow larger

[2] American Rivers, Where Rivers are Born, the Scientific Imperative for Protecting Small Streams and Wetlands. https://www.americanrivers.org/resource/small-streams-wetlands/

and have wider channels, deeper pools for shelter, and more permanent flow as they move downstream. In arid regions and even humid regions during dry periods, headwater streams may become smaller downstream as water evaporates or soaks into a streambed. With this variety of influences, headwater streams present a rich mosaic of habitats, each with their own characteristic community of plants, animals, and microorganisms.

THE IMPACTS OF SACKETT V. EPA

The Supreme Court's Sackett decision has had the effect of severely confusing the landscape of stream and wetland protections, putting clean water at risk, increasing flood risk, destroying pristine habitat and putting significant burdens on states. These changes have real local impact, as American Rivers has found across the country.[3]

California

In the absence of federal protections from the Clean Water Act, each state has the authority to regulate their waters beyond the minimum standard. Most states opt to meet said minimum, but some go above it. In 2019, the California State Water Board predicted that federal protections could be shifting and acted to expand their definition of "waters of the state".

The result was a return to the historically favored definition of "waters of the state" referencing, all waters within the state. This includes the primary victims of the Sackett decision: isolated wetlands and small streams. California wetlands are a pertinent case, as their wetland acreage has grown from 2.9 million acres—10% of its historical extent—to 3.9 million acres[4]. When many places in the US are continuously losing wetlands, California is leading in wetland restoration. One such example is the Dutch Slough, a long-term effort to recover 30,000 acres of wetland habitat[5]. These projects function as more than simple conservation, as the Dutch Slough is predicted to offset carbon emissions equal to the annual use of 1000 cars. The restoration efforts are occurring at both a large and small scale as well, with the Southern California Restoration Project listing 306 different projects, the large majority being smaller, community led and organized endeavors[6].

Colorado

Two-thirds of Colorado's waters have temporary flows, and Colorado has historically relied on federal protections for these waters. This is why on March 20th, 2023, Colorado House Democrats introduced a bill to restore protections to at least pre-Sackett levels, as California had done before[7]. Tom Caldwell, a local brewery owner commented "As the owner of a brewery in a resort town I depend on cold, clean water to craft award-winning beers. Clean water allows me to run my business, create jobs and contribute sales tax revenue for my community [. . .] we need to protect our waterways and wetlands."

New Mexico

Imagine you are a rural farmer in an arid climate. In such places, usually your irrigation only flows seasonally, or perhaps after rainfall, and the river that you draw from is dry otherwise. For as long as you know, the river has been recognized as a legitimate water feature. Now imagine a new surveyor visiting during a period where there is no water in the river. From this they conclude that your river, for regulatory purposes, is not actually a body of water. This is sadly what could happen in New Mexico.

New Mexico is likely the most dire place in the nation in the wake of Sackett. The "continuous surface connection" rule most obviously affects isolated wetlands. However, another condition for protection under Sackett is for the water to be "relatively permanent". In New Mexico, up to 95% of stream and river mileage does not

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[3] American Rivers. America's Most Endangered Rivers Report. See: https://www.americanrivers.org/wp-content/uploads/2024/04/AmericasMostEndangeredRivers%C2%AEof2024Report.pdf

[4] California Wetlands Portal. https://mywaterquality.ca.gov/eco_health/wetlands/extent/index.html#:~:text=According%20to%20the%20State%20of,wetlands%20that%20uses%20new%20data

[5] Berkeley, Rausser College of Natural Resources, Wetland restoration helps California combat climate change. https://ourenvironment.berkeley.edu/news/2023/04/wetland-restoration-helping-california-combat-climate-change

[6] Southern California Wetlands Recovery Project 2024. https://scwrp.org/projects/page/6/

[7] HB24–1379 Regulate Dredge & Fill Activities in State Waters. https://www.cohousedems.com/news/joint-release%3A-legislation-to-protect-streams%2C-rivers-and-wetlands-in-colorado-introduced

run year round[8]. Overall, 67% of surface water supplying the public drinking water system in New Mexico comes from intermittent, ephemeral, or headwater streams, equaling 1996 miles overall (though that proportion can rise higher than 87% depending on location)[9]. Sackett has at once jeopardized all of this.

Large rivers, like the Rio Grande, while still protected, are made up of thousands of small streams and are influenced by many isolated wetlands. If the smaller streams flowing into larger rivers are polluted, the result is a polluted river.

This has real consequences. For the residents of Santa Fe, it means your river of the same name can be polluted through the 10 mile stretch that goes through the center of the city[10]. For the Tewa people, it means your land's life blood could turn to poison as White Rock Canyon is contaminated. For farmers using acequias (community-based irrigation ditches), it means your ability to grow the food traditional to your community is now in question. For trout fishers and white water rafters, it means the waters you rely on may no longer be able to sustain your business. And for almost all New Mexicans, the quality of your drinking water is at the mercy of how well treatment plants filter the intermittent stream and river water that is no longer regulated.

North Carolina

While Sackett ostensibly aims to settle confusion on what is regulated and what is not, it has actually done the opposite. In North Carolina, state regulations on waters are set to the minimum of what is federally required as of the Farm Act of 2023[11]. There are over 4 million acres of wetlands in North Carolina, totaling nearly 14% of its overall area[12]. In light of Sackett, even the most optimistic predictions are frightening, with anywhere between 34 and 72% of wetlands losing protections[13]. This variation is due mostly to how "indistinguishability" is interpreted. When flooded, some wetland types, such as riverine swamp forests, appear indistinguishable from permanent streams and rivers that connect with it. If the broadest definition is applied, it could mean that almost no wetlands are regulated.

Examples of this are found throughout North Carolina. Beaver Marsh is a 32-acre reserve just north of downtown Durham, along the Ellerbe Creek which runs through the city. The wetland in figure X is just across from the one in figure Y, but they have a critical difference in whether or not they are regulated under Sackett. One has regularly flowing streams into Ellerbe Creek, a regulated water, while the other has its (relatively permanent) stream blocked by a berm. This means the first is regulated and the second is not. Is there any real difference between the two in how they affect Ellerbe Creek? No, and frankly Sackett does not account for this in the slightest. Near Hill Street Park in Raleigh there is a headwater wetland that connects to a permanent stream, but the wetland itself only has surface water during parts of the year, making it "distinguishable" at most times, and therefore unregulated as well.

These loose protections give free reign to developers to pollute as they please in these waters; pollution that will feed into what are legally protected waters such as Ellerbe Creek, and into drinking water sources as is often the case with headwater streams and wetlands[14]. However indistinguishability and relative perma-

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[8] New Mexico Waters Protected and At Risk in the Wake of the Sackett Decision. https://smumn.maps.arcgis.com/apps/dashboards/1c2208e510114287a7b55ea1e7fc3f54

[9] National Hydrography Dataset Plus at medium resolution; Federal Safe Drinking Water Information System 4 Quarter 2006 Data. https://www.epa.gov/sites/default/files/2015-06/documents/2009__10__15__wetlands__science__surface__drinking__water__surface__drinking__water__nm.pdf

[10] Story Map on Protect New Mexico Waters. See: https://nmwaters.org/#section__d74cb5116

[11] GENERAL ASSEMBLY OF NORTH CAROLINA SESSION 2023 SENATE BILL 582 RATIFIED BILL. https://www.ncleg.gov/Sessions/2023/Bills/Senate/PDF/S582v7.pdf

[12] Carolina Wetlands Association. State of Wetlands. https://www.carolinawetlands.org/state-of-the-wetlands#:~:text=Wetland%20Types%20and%20Abundance,million%20acres%20in%20South%20Carolina.

[13] Atwater, Will. March 26, 2024. Environmental advocates use events to spread awareness about the potential loss of wetlands and the need to protect surface water. https://www.northcarolinahealthnews.org/2024/03/26/environmental-advocates-use-events-to-spread-awareness-about-the-potential-loss-of-wetlands-and-the-need-to-protect-surface-water/

[14] Development of a Wetland Monitoring Program for Headwater Wetlands in North Carolina. May 2008. https://www.ncwetlands.org/wp-content/uploads/NC__Headwater__Wetlands__Monitoring__Grant-1-Final-Report-with-Revisions-10-2008-b.pdf

nence are defined going forward, it will be sorely inadequate to continue the state's 20 yearlong trend of no-net-loss in wetlands as things are under Sackett [15].

Georgia

The Okefenokee Swamp, located mostly in southern Georgia, is a national treasure. Okefenokee is an almost entirely untouched blackwater swamp spanning 438,000 acres, containing over 620 species of plants and hundreds of species of birds, reptiles, and mammals [16]. It is uniquely undisturbed by human activity, so much so that it is under consideration to become a UNESCO World Heritage Site for its pristine state [17]. Sackett is the latest, and perhaps greatest, challenge in preserving this national treasure.

Twin Pines Minerals applied to mine for titanium oxide in 582 acres of Trail Ridge in March 2020 [18]. Trail Ridge borders the east of Okefenokee, with the closest site being just a few hundred feet away. The mining will take place on and near wetlands that are dangerously close to Okefenokee, with predictions stating the project will withdraw more than 1.4 million gallons of water a day [19]. The company's self-funded study concluded this would not negatively impact Okefenokee; researchers at the University of Georgia along with other institutions across the nation strongly insist otherwise [20].

The mine has a back and forth history. Their application to federal regulators went through under the Trump-era Navigable Waters Protection Rule in 2022, which concluded similarly to Sackett that wetlands without surface connection should not receive protections [21]. Though the Biden administration reversed those rules, the advent of Sackett guarantees that Trail Ridge is not federally protected and is subject only to state level regulation. Currently, the Georgia state government has approved a "demonstration mine", with Twin Pines mining hoping to prove they can operate with minimal environmental impact [22]. Multiple organizations such as Georgia River Network, the Southern Environmental Law Center, and more have already pointed out the flaws in leaving the long-term health of Okefenokee up to a rigged "experiment" [23].

There is federal will to save Okefenokee, but the methods are uncertain and treading new ground. The Fish and Wildlife Services have, in an unprecedented move, claimed federal rights to Okefenokee's water, hoping to stop development on those grounds [24]. This shows that there is strong federal will to protect Okefenokee, but it is much harder to achieve with the loss of protections following Sackett. There is still opportunity to act, and the outpouring of public support is a positive sign. The recent public comment period in the Georgia state legislature attracted 78,632 written comments and 115 oral comments, with almost none of them being in favor of the mine [25]. This is a chance to send a national message that, despite opposing forces, the country is still in the business of protecting our waters.

WHY SACKETT IS A BURDEN

Today, now more than ever, Congress must reaffirm its commitment to the objective of the original, bipartisan Clean Water Act by reinstating protections for waters and wetlands that the Sackett decision removed.

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[15] Kurki-Fox, Jack; Branan, Andrew; Burchell, Mike; N.C. Cooperative Extension, The Status and Trends of Wetland Loss and Legal Protection in North Carolina. https://content.ces.ncsu.edu/the-status-and-trends-of-wetland-loss-and-legal-protection-in-north-carolina

[16] United States Fish and Wildlife Service. Okefenokee National Wildlife Refuge Amphibians, Fish, Mammals and Reptiles List. https://www.fws.gov/sites/default/files/documents/okfmam.pdf

[17] UNESCO World Heritage Center 1992–2024. https://whc.unesco.org/en/tentativelists/5252/

[18] Twin Pines Minerals, LLC. https://twinpinesmineralscharlton.com/

[19] Associated Press. March 4, 2024. Mining Company Can't Tap Water Needed for Okefenokee Wildlife Refuge, US Says https://www.usnews.com/news/us/articles/2024-03-04/mining-company-cant-tap-water-needed-for-okefenokee-wildlife-refuge-us-says

[20] Comments on TPM LLC Draft Mining Land Use Plan (and supporting documents) submitted to Georgia EPD. See: https://protectokefenokee.org/wp-content/uploads/2023/03/MLUP-comments-CRJ-submitted-to-EPD.pdf

[21] Bynum, Russ. Associated Press. August 22, 2022. https://apnews.com/article/lawsuits-georgia-wildlife-army-90389deefb681953d68fd69cb2054e2d

[22] Twin Pines Minerals Proposed Saunders Demonstration Mine SAS–2018–00554 Application via PowerPoint Presentation. See: https://www.sas.usace.army.mil/Portals/61/docs/TPM%20Permit%20Application%20-%20TTL.pdf?ver=2020-05-12-215022-183

[23] [Editor's note: American Rivers did not list a citation for footnote 23.]

[24] Letter from U.S. FWS to Georgia EDP. See: https://aboutblaw.com/bc54

[25] Nolin, Jill. Georgia Recorder. March 6, 2024. Okefenokee mine opponents, backed by feds, call for Georgia EPD to thwart Twin Pines dig. https://georgiarecorder.com/2024/03/06/okefenokee-mine-opponents-backed-by-feds-call-for-georgia-epd-to-thwart-twin-pines-dig/

Even in an ideal world where every state has comprehensive individual protections, Sackett would still be a burden. Aside from the improbability of every state being willing to responsibly protect their waters, agency resources limit what can actually be done. State level organizations simply do not have the size or funding that the EPA does. Perhaps this is not an issue for a wealthy state like California, but what of places like New Mexico, West Virginia, or Louisiana? The power of those state governments does not equal what is possible on a federal level. In the long term, a federal return to standard is necessary; this is not a case where leaving it to the states is the most efficient or fair solution.

RECOMMENDATIONS

The Clean Water Act was passed with a goal to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." While the Clean Water Act, and the EPA's efforts to enforce it have made gains in improving our nation's waters since the passage of the act, there is still much work to do. We recommend the following:

1. Support a comprehensive definition of the "Waters of the United States" that includes small streams and wetlands as Congress intended when the law was amended and passed in 1972.
2. Increase federal funding to conservation programs that prioritize acquiring lands through voluntary measures such as easements to protect aquatic areas or programs that compensate landowners not to develop on wetlands.
3. Enhance enforcement of state, tribal, and local water protections currently on the books and increase funding for enforcement agencies.
4. Support a scientifically robust review process under Section 401 to ensure states and tribes have the specific authority to condition or deny water quality certifications for infrastructure projects.
5. Direct EPA to update its technology-based limits for industry water pollution control systems as frequently and consistently as possible to protect public health.
6. Strengthen the Clean Water Act by closing its loophole for agricultural runoff and other "nonpoint" sources of pollution, which are by far the largest sources of impairments in waterways across the U.S.
7. Consider more consistent, universal guidelines for waterway impairment designations for all 50 states, and for gauging unhealthy levels of key pollutants like nitrogen.
8. Make it easier to effectively enforce key provisions and requirements of the Clean Water Act, including the cleanup plans—called "Total Maximum Daily Loads".
9. Boost funding for the EPA and state environmental agency staff required to measure water quality, and to develop and implement the cleanup plans needed to bring impaired waterways back to life.
10. Require EPA to produce and publish an updated National Water Quality Assessment report, which they are required to send to Congress biennially under section 305(b) of the Clean Water Act. Congress should also require the EPA to update their data requirements to include improved information on stormwater pollution.

We would like to thank the Subcommittee on Water Resources and the Environment for the opportunity to share these observations and our report with you. We would be happy to answer any additional questions the committee may have on this subject and we are happy to be a resource in the future. Our organization is fully committed to working with you on these timely federal water issues and appreciate your strong leadership. Thank you for your consideration.

Sincerely,

GARY BELAN,
Senior Director, Clean Water Supply.
JAIME D. SIGARAN,
Associate Director, Policy and Government Relations.

Letter of September 10, 2024, to Hon. Sam Graves, Chairman, and Hon. Rick Larsen, Ranking Member, Committee on Transportation and Infrastructure, and Hon. David Rouzer, Chairman, and Hon. Grace F. Napolitano, Ranking Member, Subcommittee on Water Resources and Environment, from Felice Stadler, Vice President, Government Affairs, National Audubon Society, Submitted for the Record by Hon. Grace F. Napolitano

SEPTEMBER 10, 2024.

The Honorable SAM GRAVES,
Chair,
Committee on Transportation and Infrastructure.

The Honorable RICK LARSEN,
Ranking Member,
Committee on Transportation and Infrastructure.

The Honorable DAVID ROUZER,
Chair,
Subcommittee on Water Resources and Environment.

The Honorable GRACE NAPOLITANO,
Ranking Member,
Subcommittee on Water Resources and Environment.

Re: Subcommittee Hearing Titled, "Waters of the United States Implementation Post-*Sackett* Decision: Experiences and Perspectives"

DEAR CHAIR GRAVES, RANKING MEMBER LARSEN, SUBCOMMITTEE CHAIR ROUZER, AND SUBCOMMITTEE RANKING MEMBER NAPOLITANO,

I am writing in response to the announced hearing to examine how the U.S. Environmental Protection Agency (EPA), the U.S. Army Corps of Engineers (USACE), states, and other stakeholders are implementing the Supreme Court's decision in *Sackett* v. *EPA*. On behalf of the National Audubon Society and our 1.4 million members and supporters, I write to reiterate concerns that the *Sackett* decision undermines the Clean Water Act and threatens water quality throughout the nation, impacting birds, people, and communities.

Audubon's mission is to protect birds and the places they need—and birds need clean water. Waterways throughout the United States serve as essential habitat for birds and other wildlife, including smaller waterbodies like seasonal streams and isolated wetlands. These water bodies provide crucial sources of drinking water, food, and nutrition for birds. Birds also use lakes, streams, and wetlands for breeding and nesting, as well as for rest stops during long migratory journeys. Something that may look like a disconnected pond to us could be providing critical migratory habitat for birds traveling throughout the country.

Sadly, we know we have lost 3 billion birds in the past 50 years—in part due to dwindling wetlands and significant development of natural spaces—and we know that two-thirds of North American bird species are at risk of extinction from climate change. Birds are telling us that action is needed now to stop these declines. The health of birds is directly tied to the health of communities across the nation and declines in bird health also impact the economy directly, as 96 million Americans engage in birding-related activities every year, contributing $100 billion to local economies annually.

Unsurprisingly, the same threats facing birds are also impacting people and communities throughout the nation. Wetlands and seasonal streams provide more than just critical bird habitat—they also provide us with nature's filters to clean our drinking water and protect us from storms, floods, and other climatic stressors. Too many low-income communities, Tribal communities, and communities of color do not have consistent access to safe, affordable drinking water. Strong protections under the Clean Water Act are needed to support clean water and flood resilience for communities.

The *Sackett* decision curtailed the ability of the EPA and the USACE to regulate waters of the United States, particularly wetlands and smaller waterways which may be seasonal or ephemeral. The ruling limited the ability of the federal agencies to permit activities on many of these smaller waterways and opened opportunities for unregulated development to occur in many of these critical ecosystems. The ruling relegated regulatory authority of smaller waterways back to the states—in essence creating a 50-state patchwork of water regulations across the nation.

As birds migrate throughout the hemisphere, so too does water migrate throughout watersheds and across political boundaries. This makes regulation of clean water a federal responsibility—as the bipartisan creators of the Clean Water Act originally intended. Reducing federal regulatory jurisdiction decreases the ability for

federal oversight and management of our nation's waterways. Before *Sackett*, federal permits were subject to NEPA review and many states do not have a state-level equivalent for environmental review and public comment.

The 50-state patchwork of regulations creates uncertainty. Establishing an appropriate state regulatory program requires resources, time, dedication, expertise, and staff. Wetland permitting requires scientific and technical expertise which many state agencies lack. Without sufficient budgeting, expertise, and authority, any state-created program is destined to fail in protecting smaller waterbodies from unregulated dredge and fill.

Audubon urges your Committee to move past partisan reactions to the *Sackett* decision and focus on solutions that birds and people need. Congress must take action to fill the regulatory gap created by *Sackett* and ensure the true intent of the Clean Water Act—providing as many tools in the toolbox as necessary to protect all of our nation's waterways for birds and people.

Sincerely,

FELICE STADLER,
Vice President, Government Affairs, National Audubon Society.

Letter of September 10, 2024, to Hon. Sam Graves, Chairman, and Hon. Rick Larsen, Ranking Member, Committee on Transportation and Infrastructure, and Hon. David Rouzer, Chairman, and Hon. Grace F. Napolitano, Ranking Member, Subcommittee on Water Resources and Environment, from the Clean Water for All Coalition, Submitted for the Record by Hon. Grace F. Napolitano

SEPTEMBER 10, 2024.

The Honorable SAM GRAVES,
Chairman,
Committee on Transportation and Infrastructure, United States House of Representatives, 1135 Longworth House Office Building, Washington, DC 20515.

The Honorable RICK LARSEN,
Ranking Member,
Committee on Transportation and Infrastructure, United States House of Representatives, 2163 Rayburn House Office Building, Washington, DC 20515.

The Honorable DAVID ROUZER,
Chairman,
Subcommittee on Water Resources and Environment, United States House of Representatives, 2333 Rayburn House Office Building, Washington, DC 20515.

The Honorable GRACE NAPOLITANO,
Ranking Member,
Subcommittee on Water Resources and Environment, United States House of Representatives, 1610 Longworth House Office Building, Washington, DC 20515.

Re: Subcommittee Hearing Titled, "Waters of the United States Implementation Post-Sackett Decision: Experiences and Perspectives"

CHAIRMAN GRAVES, RANKING MEMBER LARSEN, SUBCOMMITTEE CHAIRMAN ROUZER, AND SUBCOMMITTEE RANKING MEMBER NAPOLITANO,

The undersigned members and partners of the Clean Water for All Coalition are writing in response to the announced hearing to examine how the U.S. EPA ("EPA"), the U.S. Army Corps of Engineers ("USACE"), states, and other stakeholders are implementing the Supreme Court's decision in *Sackett* v. *EPA*. We write to share our concerns that the Supreme Court's decision makes it impossible for the country to achieve Congress's objective in passing the Clean Water Act: to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

Clean Water for All is a national coalition that brings together diverse organizations to advance equitable policies that promote and increase clean water protections, access, and affordability across the nation. Our members are from all across the country and include hunters and fishers, local waterkeepers, environmental justice advocates, and sustainable businesses.

The membership recognizes that clean and abundant water resources are important for public health, agriculture, transportation, flood control, climate resilience, energy production, recreation, fishing and shellfishing, municipal and commercial uses, indigenous cultural practices, and much more—because our waters are all intimately connected. For example, polluting or destroying a community's local wet-

lands or streams threatens its groundwater reserves and can worsen flood risks during intense storms. What happens to a community's streams and wetlands will also impact the quality of the water that their downstream neighbors have, which they often rely on for drinking water and other important uses.

Before the Clean Water Act, a patchwork of state requirements failed to prevent water bodies—from large, iconic rivers and lakes to neighborhood creeks and ponds—from harmful levels of pollution. A state-by-state approach without a federal backstop of safeguards enabled a "race to the bottom," where states with weaker protections became safe havens for polluters. It led to some of the worst environmental crises in our nation's history:

- The Delaware River was so polluted it darkened the paint on passing ships.
- 26 million fish died in a single Florida lake in January 1969, triggered by food processing plants dumping waste into a creek upstream.
- An oil spill in 1969 near Santa Barbara spewed an estimated 3 million gallons of crude oil into the Pacific Ocean—killing thousands of birds, fish and sea mammals.
- Lake Erie was considered "functionally dead," with pollution from factories, sewage and farms triggering algal outbreaks that smeared beaches and killed fish.
- The federal government dumped nearly 50,000 drums of low-level radioactive waste in the Pacific Ocean west of San Francisco between 1946 and 1970.
- General Electric discharged more than one million pounds of Polychlorinated Biphenyls (PCBs) in the Hudson River over a 30-year period. A 200-mile stretch of the river remains contaminated to this day.

In response, Congress passed the Clean Water Act—an ambitious law that aimed to make water bodies swimmable and fishable by 1983 and to eliminate pollutant discharges by 1985. The law's various protections—including its broad applicability to waters of all types—drove towards these goals and were instrumental in waterways across the nation becoming far cleaner. Waters that were once effectively open sewers came back to life and became treasured destinations for recreation and commerce.

But the Clean Water Act did not fully achieve its objective, as two recent reports make clear. In March, the U.S. Fish & Wildlife Service released a report to Congress about wetland trends in the continental United States during the period from 2009–2019. That report revealed that the rate of wetlands loss in the country accelerated in recent years, and that the nation has lost approximately 670,000 acres of vegetated wetlands, mostly by conversion to much less ecologically valuable ponds. And just two weeks ago, EPA's Office of Water released the National Lakes Assessment 2022 Report, evaluating the health of our nation's lakes between 2017 and 2022. Half of the country's lakes are in poor condition due to nutrient pollution, and both the number of lakes with good shallow water habitat and the number of lakes with good ratings for lakeshore disturbance decreased by nine percent. The detection of microcystins—toxins created by algae outbreaks—increased by almost 30 percentage points, to 50%. These results reveal that the work of the Clean Water Act was far from done.

And then the Supreme Court made things far worse. In May 2023, the Court decided *Sackett* v. *EPA*, the worst judicial rollback of environmental protections ever. That ruling said that the federal Clean Water Act does not protect most types of wetlands, even though they are critically important by themselves and for the health of all kinds of other waterbodies. The Court also limited the law's ability to protect many other waters. The decision removed federal protections for millions of acres of wetlands and thousands of stream miles throughout the country. The decision has serious consequences across the country and has endangered the drinking water sources of tens of million people. The harm of the Court's decision is difficult to overstate, and it will only get worse with time, as new activities destroy and pollute waters without the kinds of pollution controls and required mitigation the Clean Water Act would have required.

Yet polluters are not satisfied. They are attempting to remove even more protections across the country. For one, through litigation challenging the regulatory changes following *Sackett*, several parties are pushing for rulings that would further weaken the Clean Water Act and would make water bodies' protections depend on novel and vague concepts—an approach completely at odds with their alleged interest in clarity and regulatory stability. In addition, corporate polluters and developers have worked to weaken state-level clean water protections and oppose states' efforts to strengthen their safeguards to fill in the gap *Sackett* created, which is in substantial tension with rhetoric supporting states' ability to formulate their own policies on clean water.

After *Sackett*, countless water bodies will be vulnerable to pollution and destruction without Clean Water Act safeguards; these harms could be magnified if industry efforts succeed. Protections for wetlands and other waters left at risk vary significantly from state to state. And, as the enclosed report, "*Sackett* v. *EPA*: The State of Our Waters One Year Later" by Clean Water for All, reveals, enacting protections to fill the gaps the decision created is difficult—especially when some states have sought to weaken their programs to limit protections only to those waters that the Court allowed the federal law to cover.

Without intervention, the deregulation from *Sackett* will exacerbate these negative trends, endangering the wetlands and waterways we depend on for drinking water, flood resilience, thriving economies, and recreation and enjoyment. Everyone should have to play by the same set of rules, and whether your water is protected shouldn't depend on what zip code you happen to live in. Ultimately, leaders in Congress will need to repair the harm that the Supreme Court caused. In the meantime, however, because each day that passes with diminished protections will mean more wetlands and streams polluted and destroyed, we encourage Congress to support state efforts to strengthen their own laws.

Sincerely,

ALABAMA RIVERS ALLIANCE.
AMERICAN RIVERS.
AMIGOS BRAVOS.
BAYOU CITY WATERKEEPER.
BRIGHT NEIGHBORHOOD CDC.
CENTER FOR WATER SECURITY AND COOPERATION.
CLEAN WATER ACTION.
COMMITTEE ON THE MIDDLE FORK VERMILION RIVER.
EARTHJUSTICE.
ENVIRONMENTAL LAW & POLICY CENTER.
ENVIRONMENTAL PROTECTION NETWORK.
FOR LOVE OF WATER (FLOW).
FRESHWATER FUTURE.
FRIENDS OF THE ROUGE.
GREENLATINOS.
HURON RIVER WATERSHED COUNCIL.
IDAHO RIVERS UNITED.
ILLINOIS DIVISION, IZAAK WALTON LEAGUE OF AMERICA.
INDIANA SPORTSMENS ROUNDTABLE.
IOWA ENVIRONMENTAL COUNCIL.
IZAAK WALTON LEAGUE OF AMERICA.
JUST TRANSITION NORTHWEST INDIANA.
KENTUCKY WATERWAYS ALLIANCE.
LAKE ERIE ADVOCATES.
LAKE SUPERIOR WATERSHED CONSERVANCY.
LATINO FARMERS & RANCHERS INTERNATIONAL, INC.
LEAGUE OF CONSERVATION VOTERS.
MASSACHUSETTS RIVERS ALLIANE.
MILWAUKEE RIVERKEEPER.
NATIONAL WILDLIFE FEDERATION.
NATURAL HERITAGE INSTITUTE.
NATURAL RESOURCES DEFENSE COUNCIL.
OHIO ENVIRONMENTAL COUNCIL.
OHIO DIVISION OF THE IZAAK WALTON LEAGUE OF AMERICA.
PARK WATERSHED.
PENNFUTURE.
POTOMAC RIVERKEEPER NETWORK.
RIVER ALLIANCE OF WISCONSIN.
RIVER NETWORK.
SIERRA CLUB.
SOCIALLY RESPONSIBLE AGRICULTURE PROJECT.
SOH2O SAVE OUR WATER.
SOUTHERN ENVIRONMENTAL LAW CENTER.
TIP OF THE MITT WATERSHED COUNCIL.
UNIVERSAL ACCESS TO CLEAN WATER FOR TRIBAL COMMUNITIES.
VERDE.
WATERKEEPER ALLIANCE.
WATERKEEPERS CHESAPEAKE.
WINYAH RIVERS ALLIANCE.
YOUNG, GIFTED & GREEN.

Letter of September 11, 2024, to Hon. David Rouzer, Chairman, and Hon. Grace F. Napolitano, Ranking Member, Subcommittee on Water Resources and Environment, from Jim Murphy, Senior Director, Legal Advocacy, National Wildlife Federation, Submitted for the Record by Hon. Grace F. Napolitano

SEPTEMBER 11, 2024.

The Honorable DAVID ROUZER,
Chair,
House Transportation and Infrastructure Committee, Subcommittee on Water Resources and Environment, 2165 Rayburn House Office Building, Washington, DC 20515.

The Honorable GRACE F. NAPOLITANO,
Ranking Member,
House Transportation and Infrastructure Committee, Subcommittee on Water Resources and Environment, 2164 Rayburn House Office Building, Washington, DC 20515.

DEAR CHAIR ROUZER AND RANKING MEMBER NAPOLITANO,

On behalf of the National Wildlife Federation, we are writing to share our perspective ahead of the Subcommittee on Water Resources and Environment hearing entitled "Waters of the United States Implementation Post-Sackett Decision: Experiences and Perspectives." This issue is of utmost importance to the National Wildlife Federation and our nearly seven million members and supporters. We remain seriously concerned with the devastating impacts of the Supreme Court's decision in *Sackett* v. *EPA* on our nation's waters and wildlife habitat.

The *Sackett* decision has instigated the largest setback for clean water in over half a century. It is a major threat to public health and wildlife as well as access to cultural resources, traditions, and outdoor recreation. Small streams and wetlands that are no longer federally protected in light of *Sackett* provide clean water for farmers, supply drinking water to tens if not hundreds of millions of people, keep the economy afloat, protect communities from floods, provide fish and wildlife habitat, and serve as natural features to promote drought resilience. Without a strong federal baseline that adequately protects these waters nationwide, the burden falls to states and localities to protect wetlands and streams. History has shown us that this state-by-state approach is not enough to ensure the protection of our waters for future generations.

The National Wildlife Federation is the nation's largest conservation education and advocacy organization with a long history of protecting the nation's rich array of water resources. We have championed clean and healthy rivers and streams since our founding in 1936. Conserving our nation's wetlands, streams, and rivers for fish, wildlife, and communities is at the core of our mission. We worked to pass the Clean Water Act in 1972 and have worked hard to fulfill its promise of clean water for all Americans ever since.

FIFTY YEARS AGO: A BIPARTISAN CLEAN WATER ACT TO ADDRESS OUR WATERS IN CRISIS

The patchwork of different state laws in place before the Clean Water Act was signed into law failed to ensure safe water quality for people and wildlife. The Delaware River was so polluted it darkened the paint on passing ships. The Cuyahoga River caught fire more than a dozen times and was so fouled from industrial and sewage waste that it "oozes rather than flows." Lake Erie was considered "functionally dead" with pollution from factories, sewage and farms triggering algal outbreaks that smeared beaches and killed fish. In Washington, DC, the Potomac River was little more than an open sewer, leading TIME magazine to write the "Potomac River reaches the nation's capital as a pleasant stream, and leaves it stinking from the 240 million gallons of wastes that are flushed into it daily."[1]

In response, Congress passed the bipartisan Clean Water Act. Through a cooperative federal-state partnership, the Clean Water Act aims to prevent, reduce, and eliminate pollution and destruction of our waters in order to "restore and maintain the chemical, physical and biological integrity of the Nation's waters," with a goal to make all waters in the United States "swimmable and fishable" by 1983. While this goal has yet to be achieved, the law has improved the health of many waters

[1] National Wildlife Federation. Five Decades of Clean Water. https://www.nwf.org/-/media/Documents/PDFs/NWF-Reports/2022/Five-Decades-of-Clean-Water1

nationwide and prevented deterioration or destruction in many more.[2] As a result, the number of waters that meet clean water goals has doubled since the passage of the Clean Water Act.

STRONG MEASURES TO PROTECT CLEAN WATER ARE STILL NEEDED

Despite the progress made, there remains a long way to go to achieve clean water for all. The United States has lost over half of our wetlands since European colonization, and the latest Wetlands Status and Trends report from the U.S. Fish and Wildlife Service shows that this trend is continuing.[3] Between 2009–2019, the rate of wetland loss has increased by 50%.[4] During the last decade, an area of vegetated wetlands greater than the size of Rhode Island disappeared from the landscape.

The latest Wetlands Status and Trends report makes clear that we need to improve our approach to wetlands conservation in the United States. However, the Supreme Court's decision in *Sackett* v. *EPA* threatens the 50 years of progress made to clean up our rivers and restore our wetlands. According to the Environmental Protection Agency, the *Sackett* decision has had the effect of removing federal Clean Water Act protections from up to 63% of wetlands and up to 4.9 million of miles of streams.[5] Now, the burden falls to states and localities to protect these waters.

The Clean Water Act's regulatory framework is founded on strong federal-state partnerships (cooperative federalism). As such, a strong Clean Water Act is the foundation for strong state efforts. Although some states and Tribal governments have programs that separately protect some wetlands and streams, many others do not or lack the resources to adequately do so. As was true before the Clean Water Act's passage, the resulting patchwork of state protections are not an adequate substitute for a uniform federal baseline.

Additionally, several states and Tribes have laws in place prohibiting the regulation of waters beyond those covered by the Clean Water Act. Many states that do wish to be protective of wetlands and streams do not currently have the resources or expertise to do so, and there is little to no federal funding available to resource state wetland programs. States that do have the resources and expertise to safeguard wetlands can only do so much to protect watersheds shared with other states that may have no or lesser protections in place.

HEALTHY WATERS PROTECT COMMUNITIES, WILDLIFE, AND ECONOMIES

The *Sackett* decision comes at a time when communities need the natural benefits of wetlands and streams more than ever. The wetlands under threat store and slowly release water downstream, naturally protecting communities from flood and storm surge, recharging groundwater, improving water quality, storing carbon, shoring up water supplies in times of drought, serving as fish and wildlife habitat, and providing access to cultural resources.

Protecting and restoring wetlands helps mitigate the damage from increasingly severe storms and floods, which continue to disproportionately impact socially vulnerable communities. Wetlands play an enormous and low-cost role in absorbing floodwaters. For instance, one single acre of wetland can store 1 to 1.5 million gallons of floodwaters and a 2020 analysis of all 88 tropical storms and hurricanes impacting the U.S. between 1995 and 2016 found that counties with greater wetland coverage experienced significantly less property damage than counties with little or no wetlands.[6] [7]

Removing federal protections from vast swaths of waters across the country will also have a disproportionate impact on Tribal communities, Indigenous peoples, communities of color, and low-income communities. Communities that depend on fishing for sustenance and for cultural practices are particularly at risk from impaired water quality.

Tribes rely on the Clean Water Act to trigger consultation requirements. The broad exclusion of important waters from federal jurisdiction also undercuts states

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[2] National Wildlife Federation. Five Decades of Clean Water. https://www.nwf.org/Educational-Resources/Reports/2022/Five-Decades-of-Clean-Water

[3] National Wetland Inventory. https://www.fws.gov/program/national-wetlands-inventory/web-mapping-services

[4] United States Fish and Wildlife Service 2019 Wetlands Status and Trends Report. https://www.fws.gov/project/2019-wetlands-status-and-trends-report

[5] Environmental Protection Agency. https://www.youtube.com/watch?v=lcCVelsAy2c&ab__channel=U.S.EPA

[6] Environmental Protection Agency, Functions and Values of Wetlands, EPA 843–F–01–002c (2001) (factsheet)

[7] Sun, F., and R.T. Carson. 2020. Coastal wetlands reduce property damage during tropical cyclones. Proceedings of the National Academy of Sciences 117: 5719–5725

and Tribes' ability to protect against cross-border pollution, including the destruction of upstream wetlands and ephemeral streams that protect tribal waters. Without federal resources to regulate waters within their borders, states and Tribes may be impacted by pollution from upstream sources.

Additionally, for many states and Tribes, the health of the economy and dependent communities is directly linked to the health of the state's natural resources. Nationwide, the craft brewing industry, notably dependent on clean water supplies, contributed $72.2 billion to the U.S. economy in 2022 and more than 460,000 jobs.[8] Smaller, non-perennial streams threatened by the *Sackett* decision sustain prized sport fisheries like trout and salmon. As such, much of the nation's $867 billion outdoor recreation economy rely on these small streams and wetlands as well.[9] In some rural, mountain communities, river recreation and related activities generate the largest share of the local economy.

From the Everglades to Puget Sound—and all the bogs, brooks, and marshes in between—America's wetlands, rivers, estuaries, and streams are critical for fish and wildlife as well. Although wetlands cover only 6% of the Earth's land surface, 40% of all plant and animal species live or breed in wetlands.[10] More than a third of all federally endangered or threatened species live only in wetlands and half use wetlands at some point in their lives.[11] Roughly half of North American waterfowl hatch in the Prairie Pothole Region and more than a third of North American bird species rely on wetlands for food, shelter, breeding, nesting, and rearing their young. Similarly, small and headwater streams are the capillaries that feed our larger watersheds, supporting native fisheries, supplying drinking water, and absorbing floodwaters. Coastal estuaries and mangrove forests serve as the first line of defense against storm surges and provide important habitat and shelter for fish and wildlife, from oysters to dolphins.

PEOPLE WANT CLEAN WATER

Poll after poll shows that the public overwhelmingly wants the clean, fishable, and swimmable waters promised by the Clean Water Act. A recent survey found that the vast majority of Americans strongly support Clean Water Act protections, with 75% of Americans in favor of protecting more waters and wetlands nationwide.[12]

At a time when aging water infrastructure and changing precipitation patterns as a result of climate change threatens to worsen water quality challenges, Congress should heed the public and address the harm done by the *Sackett* decision and ensure federal safeguards for all important waters. In the meantime, Congress must support state and Tribal efforts to enact or strengthen protections for the waters we all rely on.

Sincerely,

JIM MURPHY,
Senior Director, Legal Advocacy, National Wildlife Federation.

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[8] Brewers Association. https://www.brewersassociation.org/statistics-and-data/economic-impact-data/

[9] Outdoor Industry Association. https://outdoorindustry.org/advocacy

[10] "Why Healthy Wetlands Are Vital to Protecting Endangered Species: U.S. Fish & Wildlife Service." *FWS.Gov*, 26 Apr. 2023, www.fws.gov/story/2023-04/why-healthy-wetlands-are-vital-protecting-endangered-species.

[11] "Why Are Wetlands Important?" *EPA*, Environmental Protection Agency, www.epa.gov/wetlands/why-are-wetlands-important. Accessed 10 Sept. 2024.

[12] Morning Consult survey on behalf of the Walton Family Foundation. https://www.waltonfamilyfoundation.org/learning/access-and-availability-to-clean-water-is-a-concern-nationwide

Letter of October 17, 2023, to Hon. Thomas R. Carper, Chairman, and Hon. Shelley Moore Capito, Ranking Member, Senate Committee on Environment and Public Works, from farmers and agricultural professionals, Submitted for the Record by Hon. Grace F. Napolitano

OCTOBER 17, 2023.

Chairman TOM CARPER,
Ranking Member SHELLEY MOORE CAPITO,
Senate Committee on Environment and Public Works,
410 Dirksen Senate Office Building, Washington, DC 20510.

Via email

RE: Farmers support legislation to restore strong federal clean water protections under the Clean Water Act

DEAR CHAIRMAN CARPER & RANKING MEMBER CAPITO:

We are farmers and other agricultural professionals who support strong protections under the Clean Water Act. We need strong federal protections to safeguard the streams, wetlands, and other waterways that help sustain our livelihoods and communities. In the wake of the U.S. Supreme Court's decision in *Sackett* v. *EPA*, which drastically reduced the number of waters protected by the Clean Water Act, we support congressional action now to restore the full scope of the Act as the bipartisan Congress that enacted the statute intended.

To feed America, we farmers need clean water. Our crops and livestock are only as healthy as the water we use on our farms. Headwater, seasonal, and rain-dependent streams supply water to larger streams and rivers from which we draw water for irrigation and for our livestock to drink. If our water is contaminated, our businesses suffer because we cannot sell contaminated crops or rely on tainted livestock. And just like families and communities across America, we need clean, safe water for drinking, cooking, bathing, and numerous other things at our homes.

Farmers also need healthy, intact wetlands. With more frequent storms and a warming climate, wetlands help reduce pollution and protect our homes and farming operations from flooding. If upstream industries are allowed to degrade these critical water bodies, they put farmers and our families and livelihoods at risk.

Federal clean water protections benefit farmers and ranchers; they do not impose unreasonable or unworkable burdens on our industry. We know that most day-to-day agricultural practices do not require Clean Water Act permits because they are exempt.

That means we can farm our land, build or maintain stock ponds or irrigation ditches, maintain drainage ditches, and build farm roads without having to apply for a permit or worry about Clean Water Act enforcement. In fact, EPA and the Army Corps of Engineers have estimated that agricultural discharges account for less than one percent of the wetland area and about two percent of the stream length for which they have issued Clean Water Act permits. And in the rare instances when we do need permits, fast-track permits with modest requirements (nationwide permits or general permits) are available.

We disagree with the rhetoric advanced by the Farm Bureau, some states, and industry, that strong clean water protections harm farmers. The streams, wetlands, and other waters flowing through our farms are no less worthy of protection because of the farming and ranching that occurs there. Rather, we need the waters on our land to be protected to support our farming and ranching. We therefore support congressional action to restore strong federal clean water protections under the Clean Water Act.

Sincerely,

ROBERT WHITESCARVER (LEAD),
Whiskey Creek Angus,
Churchville, Virginia.

JOHN AGER,
Hickory Nut Gap Farm,
Fairview, North Carolina.

GREG BOWEN,
American Chestnut Land Trust,
Double Oak Farm,
Prince Frederick, Maryland.

PATRICK CROWE,
Owner, Crowesgrow,
Matthews, North Carolina.

PETER ELMORE,
Star Bright Farm, LLC,
White Hall, Maryland.

VERA FABIAN,
Farmer/Owner, Ten Mother's Farm,
LLC, Cedar Grove, North Carolina.

QUEEN QUET MARQUETTA L. GOODWINE,
Chieftess of the Gullah/Geechee
Nation, Gullah/Geechee Sea Island
Coalition,
St. Helena Island, South Carolina.

BEN GRIMES,
Dawnbreaker Farms,
Hurdle Mills, North Carolina.
LIZ LAMB,
Community Farming Program Manager, The 6th Branch,
Baltimore, Maryland.
BERNARD NAGELVOORT,
Associate Director, Lord Fairfax Soil and Water Conservation District,
Berryville, Virginia.
HIRAM RAMIREZ,
Urban Gourmet Farms,
Charlotte, North Carolina.
MARIA RUSSO,
Co-Founder, Sistermoon Farm,
Shenandoah Junction, West Virginia.
LINDSEY SHAPIRO,
Pasa Sustainable Agriculture,
Harrisburg, Pennsylvania.
SEAN SIMPSON,
Farmer/Owner, Terra Flora Market Garden, Norwood, North Carolina.
JAMIE SWOFFORD, FARMER,
Old North Farm,
Shelby, North Carolina.
JENNIFER STAFFORD,
Farmer/Owner, J & J Family Farm, LLC, Clover, South Carolina.
LEO TAMMI,
Shamoka Run Farm,
Mount Sidney, Virginia.
KEVIN TATE,
Richard Foltz Farm, Stanley, Virginia.
BRENT WILLS,
Farmer, Wills Soil & Stream, Farm Advisor, Bramble Hollow Farm,
Montvale, Virginia.

Letter of September 10, 2024, to Hon. Sam Graves, Chairman, and Hon. Rick Larsen, Ranking Member, Committee on Transportation and Infrastructure, and Hon. David Rouzer, Chairman, and Hon. Grace F. Napolitano, Ranking Member, Subcommittee on Water Resources and Environment, from Protect Colorado Waters Coalition, Submitted for the Record by Hon. Grace F. Napolitano

SEPTEMBER 10, 2024.

The Honorable SAM GRAVES,
Chairman,
Committee on Transportation and Infrastructure, United States House of Representatives, 1135 Longworth House Office Building, 2163 Washington, DC 20515.

The Honorable RICK LARSEN,
Ranking Member,
Committee on Transportation and Infrastructure, United States House of Representatives, Rayburn House Office Building, Washington, DC 20515.

The Honorable DAVID ROUZER,
Chairman,
Subcommittee on Water Resources and Env., United States House of Representatives, 2333 Rayburn House Office Building, Washington, DC 20515.

The Honorable GRACE NAPOLITANO,
Ranking Member,
Subcommittee on Water Resources and Env., United States House of Representatives, 1610 Longworth House Office Building, Washington, DC 20515.

RE: Hearing on "Waters of the United States Implementation Post-Sackett Decision: Experiences and Perspectives"

DEAR CHAIRMAN GRAVES, RANKING MEMBER LARSEN, SUBCOMMITTEE CHAIRMAN ROUZER, AND SUBCOMMITTEE RANKING MEMBER NAPOLITANO,

The Protect Colorado Waters Coalition consists of 20 environmental and conservation organizations, representing more than 275,000 Coloradans, who came together to support the passage of legislation in Colorado in response to the U.S. Supreme Court's *Sackett* v. *EPA* decision. The coalition's goal is to restore the level of protections that existed prior to *Sackett*, ensuring creation of a Colorado permitting program that allows for responsible dredge and fill activities to occur without irreparable harm to the state's wetlands and streams.

In Colorado (and 47 other states), the U.S. Army Corps of Engineers issues permits under Section 404 of the Clean Water Act to protect waters of the United States (or "WOTUS") from the impacts of discharges of dredged or fill material. The Supreme Court's *Sackett* decision is the single largest reduction of what the Clean Water Act covers as WOTUS since its inception, removing protections for countless wetlands, streams, and rivers.

Healthy ecosystems are essential for providing clean drinking water and the overall health of our communities. In addition, the economic benefits provided by waters and wetlands (while difficult to quantify) are undoubtedly in the millions, if not billions, of dollars annually. In the absence of federal action from Congress to address the large gap created by *Sackett*, states are now faced with the challenge of working on a time consuming and controversial multi-year effort to create their own permitting programs to protect waters no longer considered WOTUS to ensure water supplies and wildlife habitat are not irreparably harmed.

Before the passage of the Clean Water Act, cities and industries commonly dumped raw sewage into our nation's rivers. In addition to impacts to streams and rivers, nearly half a million acres of wetlands were lost annually. Since statehood in 1876, Colorado has lost approximately 50% of its original wetlands due to activities such as drainage, fill, or excavation[1]. Wetlands play a vital role in the life of wildlife, support our water supplies, and create resilience to extreme weather events such as floods, wildfires, and heat waves that have greatly increased over the past few decades. According to the Colorado Natural Heritage Program, as much as 75% of Colorado's fish and wildlife depend on riparian habitats[2], and according to the Colorado Wildlife Council hunting and fishing contributes over $3.25B a year to the state's economy, providing more than 25,000 full-time jobs across the state.[3] Wetlands also play an important role in agriculture, reducing the risks and impacts of floods, droughts, and wildfires, which can destroy valuable soil and property. With an annual statewide economic contribution of $47B and nearly half of Colorado's acreage being dedicated to farming, ranching, and other agricultural activities, protection of wetlands is critical toward having a vibrant agricultural economy and healthy wildlife population.[4]

The state estimated that the *Sackett* decision resulted in a loss of protection for the majority of Colorado's streams, about 80% of which are ephemeral or intermittent.[5] This loss of protection is not unique to Colorado; others in the arid American Southwest are impacted even more severely and face the same loss of protection to their water supply from increased pollution. This is coupled with experiencing the worst long-term drought conditions in 1,200 years across the region[6], especially impacting agriculture which uses about 80% of the Colorado River's water to irrigate 15% of the nation's farmland.[7] Additionally, Colorado is the headwater state with 8 major river basins providing water supplies to 18 states and Mexico.

In its amicus brief in the *Sackett* case, the State of Colorado points out the perils of excluding ephemeral streams and intermittent waters from the Clean Water Act. The brief is available here [https://protect-us.mimecast.com/s/cQXXC2kgo5I8QxE9C1bbFD?domain=urldefense.com]. At page 16, the State provided this clear warning:

> Ephemeral and intermittent waters play a large collective role in maintaining and defining the physical, chemical, and biological integrity of perennial waters. Impairment or loss of these systems through unregulated fill or pollution would have considerable and long-lived negative consequences for fisheries, ecosystem services, and economies dependent on them.

While Colorado acted swiftly in the wake of *Sackett*, becoming the first state after the decision to pass legislation enabling a state dredge and fill permitting program in May 2024, it has been a long, controversial process that began nearly three years ago in response to the 2020 Navigable Waters Protection Rule. Passing this legislation took tremendous leadership from Governor Polis' Administration and the sponsors of HB24–1379, specifically Speaker of the House Julie McCluskie, Senator Dylan Roberts, and Representative Karen McCormick. There were over 200 lobbyists registered on the bill (the large majority of whom represented the regulated sectors of industry, water users/suppliers, and agriculture) and the sponsors met with

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[1] https://cnhp.colostate.edu/cwic/work/restoration/#:~:text=Since%20Colorado%20became%20a%20state,once%20provided%20across%20our%20state.

[2] https://cnhp.colostate.edu/cwic/work/restoration/#:~:text=Since%20Colorado%20became%20a%20state,quality%2C%20and%20water%20storage%20functions.

[3] https://cowildlifecouncil.org/benefits/#:~:text=Hunters%20and%20anglers%20are%20an,manufacturers%20to%20the%20tourism%20industry.

[4] https://ag.colorado.gov/sites/ag/files/documents/Colorado%20Agriculture%20Brochure.pdf

[5] https://19january2021snapshot.epa.gov/sites/static/files/2014-09/documents/colorado.pdf

[6] https://www.nature.com/articles/s41558-022-01290-z

[7] https://feedingourselvesthirsty.ceres.org/regional-analysis/colorado-river#:~:text=Agriculture%20uses%20approximately%2080%25%20of,90%25%20of%20the%20winter%20vegetables.&text=A%20recent%20study%20found%20that,irrigation%20for%20cattle%2Dfeed%20crops.&text=Agriculture%20is%20the%20largest%20water,in%20the%20Colorado%20River%20Basin.

hundreds of stakeholders over the course of dozens of meetings resulting in 40 amendments to the bill.

Throughout this process, Colorado has faced many challenges in filling the gap left by the *Sackett* decision. The state lacks the staff and funding available at the federal level for agencies to provide robust review of the project's impact to fish, wildlife, and historic cultural resources. The state does not yet have a functioning mitigation program for unavoidable impacts associated with dredge and fill activities. While the state is working to address these issues, it will never have access to the level of funding that has historically been available at the federal level to address these, and other needs.

Water is the lifeblood of America. However threats to wetlands and our nation's water supply have increased significantly due to the *Sackett* decision. Colorado is meeting this moment by creating its own dredge and fill permitting program, but it's been a long controversial process, and in the end the state does not have the financial support to fill all gaps created by *Sackett*. While there are significant challenges, we encourage other states to follow Colorado's lead because of the critically important role of wetlands, ephemeral, and intermittent streams in providing clean, safe, reliable water supplies.

Sincerely,

JOSH KUHN,
(Co-Chair of the Protect Colorado Waters Coalition),
Senior Water Campaign Manager, Conservation Colorado.

KRISTINE OBLOCK,
(Co-Chair of the Protect Colorado Waters Coalition),
Protect Our Waters Campaign Manager,
Clean Water for All Coalition.

APPENDIX

QUESTIONS FROM HON. DAVID ROUZER TO EMMA POKON, COMMISSIONER, ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Question 1. Every state has special considerations that they consider when crafting water quality regulations. How might a high level of National regulation of waters complicate your ability to meet the specific needs of your state?

ANSWER. Congress recognized and anticipated that a one-size-fits-all approach would not work well across the nation's diverse regions. One mechanism for ensuring flexibility in the statutory framework is the provision for states to implement the regulatory programs—including section 402 wastewater discharge and section 404 dredge and fill. Unfortunately, the value of states implementing these programs has eroded greatly because of the granular level of federal agency oversight, review, and second-guessing.

In a questionable allocation of our collective public resources, EPA reviews the same State decisions multiple times. For example, after DEC experts have developed and drafted a permit (based on EPA guidance), EPA will review and comment on (and maybe object to) a permit when it is released for public comment.[1] EPA again then reviews all permits issued by the State during a comprehensive periodic review.

In a similar demonstration of distrust and duplication of effort, EPA headquarters and regional staff meet quarterly with DEC's compliance and enforcement program for updates on our responses to specific, discrete noncompliance events. While enforcement discretion is theoretically a place where implementing states should have flexibility on how to best bring a facility into compliance and how to allocate resources, EPA leaves DEC staff with the impression that they must strictly adhere to a detailed matrix of EPA-approved responses. Periodic state review framework engagements from EPA reinforces this by scoring DEC staff against how closely they have adhered to that predetermined matrix. Through their scoring criteria and review, EPA demonstrates more interest in whether DEC adhered to what EPA preapproved than whether matters were effectively resolved. Staff time dedicated to unproductive follow-ups with facilities that have already come into compliance as well as the time in EPA meetings erode State resources that could otherwise be spent on higher priority, substantive regulatory activities.

Some State decisions cannot be implemented until EPA reviews and approves our experts' analyses, causing significant delays. Regulations adopted by Alaska DEC and sent to EPA for approval can wait for a decade or more[2]—a timeline that is not workable for facilities subject to our permitting requirements. For example, mixing zone regulations submitted to EPA in 2006 were not approved until 2019.

Some State decisions are effectively overturned or reversed by EPA overseers—either expressly or simply by failing to respond. For example, Alaska DEC submitted mercury water quality standards to EPA in 2003, in 2004 EPA deferred ap-

[1] In one recent experience, EPA formally objected to a permit proposed by DEC on the basis that it did not comply with EPA's nationally promulgated, granular effluent limit guidelines (ELGs). DEC staff argued that the ELG was irrational as it required expensive disposal of rainwater that met state water quality standards. After formal objection and months of staff expert and attorney time, EPA finally conceded that DEC's permit could be issued as drafted because DEC pointed out that EPA had been referencing the wrong EPA-issued ELG all along.

In another recent experience, EPA formally objected to a minor modification of a permit because it did not comply with detailed national ELGs. Rather than providing clarity to regulated parties up front about what rules apply to their operation, EPA encouraged DEC to instead exercise enforcement discretion to rationalize EPA's standard in practice.

[2] In fairness, some regulations are reviewed and approved promptly. For example, changes to Alaska's antidegradation regulations delivered in March 2018 were approved by the end of July the same year, in about four and half months; site specific criteria regulations delivered in January 2017 were approved by the end of the next month.

proval—apparently indefinitely. Another lengthy saga unfolded with respect to residue water quality standards: DEC submitted regulations to EPA in June 2008, EPA disapproved the regulations in January 2010; DEC then submitted a revised proposal in May 2011, but EPA never responded to the revised package; DEC submitted revised regulations rescinding the standard in 2021 and EPA approved the rescission in 2023, closing out the 15-year ordeal—for now. However, DEC must now implement the effective residue standard which has generated at least one administrative appeal and confusion for regulated entities, in part because the clarifying amendments were ignored by EPA.

In other circumstances, EPA requires exhaustive monitoring and documentation to even consider changing a previously designated use or standard for a water body. In one example a legacy contaminated site (that existed well-before state primacy or even statehood) resulted in compromised water quality and effectively precluded some waterbody uses that had been designated by default. To change the designated use, which quite obviously had not been met for over a century, two years of data needed to be collected before developing or submitting a regulation package. Similarly, community wastewater facilities that require site-specific criteria for waterbodies because of natural conditions have undergone a years-long effort and expense to collect data to satisfy EPA.

These elements of EPA oversight of a Clean Water Act primacy program (which far exceed oversight of other federal programs that DEC implements) frequently serve to limit, delay, and stymie State regulatory actions.

Question 2. What are some of the challenges the state of Alaska has encountered when trying to understand how the Agencies intend to implement WOTUS post-*Sackett*?

ANSWER. EPA and the Corps have not yet published clear guidance to help potential permittees or state agencies, including those like Alaska DEC that are implementing Clean Water Act programs, understand their approach. Well over a year later, it is unclear whether there has even been guidance issued to line staff at the agencies. Instead, district offices are apparently sending requests for formal approved jurisdictional determinations to headquarters to decide on a case-by-case basis. It seems the agencies themselves still do not fully understand how they intend to implement WOTUS post-*Sackett*.

EPA did initially publish a "conforming rule" in August 2023 that excised the term "significant nexus." That limited adjustment to the final WOTUS rule reflects an extraordinarily narrow take away from the Court's holding. The conforming rule did not address the Court's indistinguishable criteria or constitutional vagueness concerns.

Instead, the agencies have since claimed jurisdiction in a manner directly contrary to the Court's requirement that a wetland be "indistinguishable" from an "adjacent" jurisdictional water. The Corps' Alaska District Office asserted that most of the North Slope of Alaska is subject to federal Clean Water Act jurisdiction. This is an area the size of Utah where an upper layer of permafrost groundwater melts seasonally, creating wetlands trapped above lower layers of permafrost that remain frozen year-round. Perhaps permafrost wetlands directly adjacent to a jurisdictional waterbody might be within the scope of WOTUS. That claim becomes laughable when based on a theory of jurisdictional contagion[3] spreading across acres and miles of tundra. A wetland that does not form because of any relationship with a jurisdictional water and that is a substantial distance away is neither "adjacent" nor "indistinguishable." By failing to acknowledge those criteria however, the federal government maintains that it controls any activity on those lands.

Beyond ignoring those specific jurisdictional criteria, there have been clear indications that the agencies are pushing hard to return to the "everything is WOTUS" posture. For example, the Corps appears to be interpreting "continuous surface connection," a clear reference to "surface water," to include a wetland ecosystem, irrespective of whether there is visible surface water present. In fact, in meeting with the Alaska District Office, Corps staff referenced "digging holes" on properties to determine the depth of ground water in evaluating the presence or extent of a wetland. This approach is confounding given the Supreme Court's clear statement that a vague standard is problematic. How does an approach that requires digging holes and applying ecological subject matter expertise resolve concerns about a standard being vague?

[3] The Corps jurisdictional determinations also demonstrate that its theory of jurisdictional contagion crosses not just unlimited distance, but also distinct, separately classified, wetland types.

The Corps has publicly committed to issuing jurisdictional determinations free of charge as a public service. But, in practice, that "service" appears to be limited. For example, the Alaska District Office noted that they are choosing to prioritize JD requests that are accompanied by a permit application (i.e., where the party has already conceded federal jurisdiction). But the Corps may not be able to get to a stand-alone JD, such as one requested in the context of a property transfer.

Tracking the Corps standards for jurisdictional determinations has been challenging because the agencies have not published clear guidance, the JDs they have published contradict the Court's guidelines, and the bandwidth and timelines for providing case-by-case JDs is apparently limited.

Question 3. Due to the uncertainty of the current regulatory structure at the Corps, some jurisdictional determinations are being made by staff from Corps districts that do not usually cover the geographic areas and hydrologic conditions of the applicants post-*Sackett*.

Do you think it would be fair for someone from a Corps district on the east coast, for instance, to be making WOTUS decisions in Alaska?

ANSWER. Officials from a different region may face challenges in making sound jurisdictional determinations. Corps staff in distant offices may lack familiarity with the applicable regional delineation manuals, forecasting tools, and other materials.[4] Staff outside of Alaska may also be hampered by the lack of detail in the mapping and imaging data. Moreover, there is significant risk that distant staff will lack awareness of local information and context. Nor are those staff able to conduct site visits as easily or quickly. Generally, a lack of familiarity or experience with regionally unique ecosystems and water regimes increases the risk of bad and unpredictable decisions.

Distance also generates pragmatic hurdles to the communication with and access for the public served by the agency staff. Public officials should be accountable to the public they serve. And the public should have opportunities to evaluate and understand government decision-making. While distance does not render access and communication impossible, it does generate hurdles and is a clear disadvantage to remote offices processing applications.

Question 4. What is the difference between preliminary jurisdictional determinations (PJDs) that the Corps has been pushing project proponents towards, and approved jurisdictional determinations (AJDs)? How do PJDs cause issues for permit applicants as opposed to AJDs?

ANSWER. The Army Corps defines AJDs and PJDs in its regulations and further in a 2016 Regulatory Guidance Letter (RGL).[5] Several important distinctions between these processes are evident on the face of those published regulatory documents. The Corps markets PJDs as more expeditious,[6] but also concedes that PJDs both (1) are not appealable[7] and (2) effectively attach federal jurisdiction to aquatic resources that "may not be jurisdictional."[8] By contrast, an AJD process is lengthier and requires allowing agency staff access to your property. But the AJD will provide a more precise wetlands delineation, potentially limiting excess compensatory mitigation burdens, and is appealable.

Taken together, the Corps has established a framework that incentivizes projects to pursue a PJD. For an individual permittee, the "expeditious" feature of the PJD is attractive, as delays can cause significant expense. The Corps' AJD process is less appealing as it is more time-intensive and costly. Moreover, for the additional time and cost, an applicant is unlikely to achieve a different result through the AJD process given the federal agencies' demonstrated reluctance to find that they do not have jurisdiction. While an AJD decision is appealable, the cost of litigation is another high hurdle. Effectively, the Corps is leveraging project costs and timelines to steer projects toward a process that gives the Corps control (without accountability) well beyond what Congress granted.

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[4] Notably, the Corps has published regionally specific wetland delineation manuals, streamflow forecast tools, and other tools. These tools reflect the Corps' position that jurisdictional determinations are technically complex and that regionally specific circumstances affect jurisdictional determinations.

[5] 33 CFR 331.2; U.S. Army Corps of Engineers, Regulatory Guidance Letter 16–01 Re. Jurisdictional Determinations (October 2016) available at https://www.spn.usace.army.mil/Portals/68/docs/regulatory/resources/RGL/RGL16-01.pdf.

[6] RGL at 3.

[7] 33 CFR 331.2 ("Preliminary JDs are advisory in nature and may not be appealed.")

[8] A PJD can be used even where "initial indications are that the aquatic resources on a parcel may not be jurisdictional." Once you have the PJD, however, the Corps "will treat all aquatic resources that would be affected in any way by the permitted activity on the parcel as jurisdictional." RGL at 3.

If the Corps and EPA took up the challenge to publish a clear and intuitive WOTUS definition, projects could move forward comfortably knowing whether a permit was required without waiting for the Corps to extensively study water regimes. This would save time and resources for both the agencies and projects while being responsive to the Court's vagueness concerns.

QUESTIONS FROM HON. DAVID ROUZER TO COURTNEY BRIGGS, CHAIRMAN, WATERS ADVOCACY COALITION, ON BEHALF OF THE AMERICAN FARM BUREAU FEDERATION

Question 1. What is the difference between preliminary jurisdictional determinations (PJDs) that the Corps has been pushing project proponents towards, and approved jurisdictional determinations (AJDs)? How do PJDs cause issues for permit applicants as opposed to AJDs?

ANSWER. A preliminary jurisdictional determination (PJD) is a non-binding, advisory opinion from the U.S. Army Corps of Engineers that there *may* be waters of the United States (WOTUS) on a given property along with approximate locations of those waters and wetlands. By accepting a PJD, landowners conceded, for the purposes of moving forward with the permitting process, to treat the identified areas as WOTUS without a formal, definitive evaluation from the Army Corps. This means they cannot dispute the jurisdictional status of those areas during the permitting process. PJDs can cause significant issues for permit applicants because they push landowners to accept federal jurisdiction over areas that may not actually qualify as WOTUS, simply to avoid permitting delays.

In contrast, an approved jurisdictional determination (AJD) is an official, legally binding determination from the Corps that specifies the presence or absence of WOTUS on the property. An AJD involves a thorough, on-site evaluation by the Corps to precisely delineate which features are subject to federal jurisdiction. AJDs provide certainty for landowners because they establish definitively which areas are regulated, and which are not, and they are valid for five years.

Many landowners were falling into regulatory limbo waiting for the Army Corps to provide AJDs, which forced many WAC members to unnecessarily accept a PJD in order to get their projects moving in a timely manner. Many industries run on strict timelines and cannot afford to have their projects held hostage waiting for an AJD. This means that landowners are forced to needlessly pay mitigation costs for land that may not actually be a WOTUS.

Landowners are at a disadvantage if they later discover that the PJD included areas that should not have been regulated, in contrast AJDs provide a clear record that can be appealed administratively or challenged in court.

Question 2. At a Subcommittee hearing in December 2023, Assistant Secretary of the Army Michael Connor described the issuance of jurisdictional determinations (JDs) and the lack of National guidance that regulated communities could count on, as a "chicken or the egg-type situation."[1] How has the Corps' internal lack of direction and clarity affected regulated communities on the ground?

ANSWER. At this 2023 hearing, Assistant Secretary of the Army Michael Conner explained that they intended to start issuing jurisdictional determinations, and only later provide implementation guidance—which led to the "chicken or egg" discussion. The Corps has had over a year to figure this out and it is astonishing that the public still does not have a comprehensive implementation guidance document. The penalties for CWA compliance are $64,000/per day or jail time—regulated entities need to know how this is being implemented because these penalties can force small businesses to close their doors. By leaving regulated entities in the dark, the federal agencies are hoping that every permit seeker will be forced to ask the Corps for permission to perform approved activities or worse use their own land. The regulated public is being denied the constitutional rights of due process and fair notice. It is also worth noting that Mr. Conner testified before the Senate Environment and Public Works Committee where he was specifically asked about WOTUS implementation guidance. In his response, he denied its existence. Subsequently our coalition requested this information through a Freedom of Information Act request. Unsurprisingly, while the response that we received redacted the SharePoint link

[1] *Water Resources Development Acts: Status of Past Provisions and Future Needs Hearing Before the Subcomm. on Water Resources and Environ. of the H. Comm. on Transp. and Infrastructure*, 118th Cong., (December 5, 2023) (Statement of Hon. Michael L. Connor, in response to questioning by David Rouzer, Chairman, Subcomm. on Water Resources and Environ. of the H. Comm. on Transp. and Infrastructure).

to the implementation guidance, it did confirm the existence of an implementation guidance document that has been sent from Army Corps headquarters to Corps districts. This only exacerbates our members' distrust of the federal government and highlights the failure in transparency.

Question 3. Wetland restoration is a key tool in balancing environmental protection and development. Can you provide any examples where wetland restoration is being halted due to Section 404 permitting delays?

ANSWER. Yes, wetland restoration is very important and provides valuable environmental benefits. However, one of the greatest regulatory barriers is WOTUS compliance because these projects often require work in connected streams. For instance, Iowa's Department of Agriculture has expressed serious frustration over the challenges that the WOTUS permitting regime has caused in the conservation space. Iowa Agriculture Secretary Mike Naig has been rather vocal about the fact that this regulatory red tape is standing in the way of the creation of new wetlands and preventing the projects from being completed due to mitigation requirements. It is unfortunate that the positive environmental and ecological impacts of these projects cannot be realized because of the agencies' lack of clarity in WOTUS regulations.

Question 4. EPA Administrator Michael Regan has publicly committed to being transparent, stating he wanted EPA to "be a flagship example of transparent, efficient, and effective government."[2] You mentioned that states and members of your coalition filed a FOIA request with EPA and the Corps for training and guidelines documents implementing *Sackett*.

Do you think the EPA is living up to their promise? If not, what can Congress do to ensure the EPA is being transparent about WOTUS?

ANSWER. The agencies' failure to provide a clear understanding of the important terms that define the scope of WOTUS and blatant attempts to conceal implementation guidance that the Corps is relying upon from regulated parties completely contradicts that statement made by Administrator Regan. As stated in my testimony, the agencies have failed to be transparent. The best example of this is the redacted Freedom of Information Act response that we received. The agencies are actively trying to keep information hidden from the public, making it all too easy for the regulated public to unknowingly break the law. It defies logic as to why the agencies want to keep this information behind closed doors. Congress needs to use their oversight power to demand that the agencies publicly release this information and hold these agencies accountable.

Question 5. How are ephemeral features being treated by the Agencies post-*Sackett*? Has there been consistent direction on these features? How do you think the implementation of WOTUS in ephemeral features meshes with the "relatively permanent" direction?

ANSWER. In the *Sackett* decision, Justice Alito did not mince words when it came to the federal government's jurisdiction over ephemeral features when he said: "*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."' The Court also said that as a matter of "commonsense," the phrase "waters of the United States" excludes "channels containing merely intermittent or ephemeral flow."* Thus, in reading and interpreting the Supreme Court's own decision, it is without question that ephemeral features should not, and cannot as a matter of law, be regulated as a WOTUS. They are simply not "relatively permanent" water features. However, the agencies' clear refusal to adhere to the law, and abide by the high court's decision has now opened the door for the regulation of ephemeral features. Anecdotally, we are hearing that the agencies are finding a way to establish jurisdiction "by any means necessary." They are also using these non-relatively permanent features to stretch their interpretation of "continuous surface connection."

Question 6. At the hearing, you spoke about agricultural exemptions from WOTUS regulations, and their lack of effectiveness. Can you explain what similar exemptions actually look like in practice? Are they being applied as they should be?

ANSWER. Due to the nature of our industry, agriculture has been provided with some exemptions—both regulatory and statutory. In section 404 (F) of the CWA, the statute outlines a number of exemptions associated with normal farming practices. Unfortunately, the exception is drastically narrowed by the "recapture" provision

[2] EPA, Administrator Michael Regan Message to EPA Employees—Reaffirming Freedom of Information Act, (May 19, 2021), *available at* https://www.epa.gov/aboutepa/administrator-michael-regan-message-epa-employees-reaffirming-freedom-information-act-may.

found in section 404(f)(2). Given the subjective nature of the recapture provision, farmers cannot confidently rely on the exemption for protection from CWA enforcement actions. Likewise, the regulatory exemption for prior converted cropland is very confusing and the correct interpretation of this language has been hotly debated for many years. The agricultural exemptions are only useful to farmers if they are clear and actually provide legal protections.

Question 7. EPA and the Corps have issued a series of coordination memos to the regulated communities on what "connectivity" *could* be for determining a WOTUS. The challenge, however, is that there are no clear limits on connectivity. You have previously noted that non-relatively permanent waters have been used to assert jurisdiction over wetlands post-*Sackett*. Have the Agencies provided any insight on how far is too far for a non-relatively permanent water to determine connectivity to a wetland?

ANSWER. No, the agencies have not provided any clear insights as to what distances they will use to establish jurisdiction. They intend on keeping the regulated community guessing as to what will fall under their jurisdiction. This is why we want to see their implementation guidance, so we can more clearly understand where the limits lie. By keeping their rule ambiguously written and in the absence of public-facing implementation guidance, the agencies can establish jurisdiction however they please. The public is left to take on all the risk and connect the dots with their livelihoods on the line. This simply is not fair and is a blatant failure to provide government transparency.

QUESTIONS FROM HON. DAVID ROUZER TO VINCENT E. MESSERLY, PRESIDENT, STREAM AND WETLANDS FOUNDATION, ON BEHALF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS

Question 1. How do timelines for water permits differ at the state and Federal level, and how does this affect those who rely on such permits?

ANSWER. The Army Corps' data indicates that general permits (Nationwide Permits or NWPs) for impacts to wetlands less than 0.5 acres are typically issued within 45 days. Individual 404 permits are issued within 120 days. While the Corps has a non-binding policy that states NWPs are to be issued in 45 days and individual 404 permits are expected to be issued within 120 days, the actual experience of permittees is quite different. For example, an analysis of CWA 404 permitting data cited by EPA and the Corps within their required economic analyses for the revised WOTUS rule found the average timeframe for a CWA 404 permit applicant to prepare, submit, and receive a NWP was 313 days; while the timeframe for the more complex individual permitting process was 788 days (2 years and 2 months). In addition, the Corps has the discretion to pause the permitting process when permit applications are sent back to the applicant for additional information or for modifications to the amount of proposed impacts or for changes in the mitigation proposal. The time that passes when the clock is paused, is not accounted for in the Corps data for processing timeframes, which can often be substantial. There can be substantial misuse of the Corps utilizing the "pause" option when processing permits that lead to substantial delays in the permitting process. Some staff (not all) have been known to send applicants on wild goose chases for additional information and stall the permitting process unnecessarily.

In Ohio we have had a state permitting program for impacts to non-federal waters ("isolated wetlands") that has been in place since early 2002 in response to the SCOTUS ruling on *SWANCC vs. Army Corps of Engineers*. The Ohio permitting program has a tiered approach to permitting with compulsory timelines that the state permitting authority (Ohio EPA) must abide by. Ohio has three categories of wetland, with categories being assigned based on the wetland's relative functions and services, sensitivity to disturbance, rarity, and potential to be adequately compensated for by wetland mitigation.

Wetlands assigned to category 1 are low quality wetlands; wetlands assigned to category 2 are moderate quality, and wetlands assigned to category 3 are high quality. Rapid and/or detailed functional assessment tools that are approved by the agency are used to determine wetland category. The EPA advocated for the development and use of rapid assessment tools 25+ years ago. Those tools are to be used to make permitting decisions and to evaluate compensatory mitigation projects.

Ohio has three (3) levels of permits to authorize impacts to non-WOTUS wetlands. OEPA has 15 days to notify that applicant if their permit application is complete or not. If the permit application is determined to be incomplete, the OEPA must timely notify the applicant of the deficiency. If they fail to notify the applicant with-

in the 15-day review period, by default the application is deemed to be complete. Below is a brief description of the three levels of permits used in Ohio for non-WOTUS impacts.

- Level 1 permits are for impacts to 0.5 acres or less of category 1 and 2 wetlands. OEPA must approve or deny a level 1 permit within 30-days of determining an application is complete. Failure of the agency to timely approve or deny the permit results in an approved permit by default.
- Level 2 permits are for impacts greater than 0.5 acres of category 1 wetland (with no upper limit) or to greater than 0.5 acres of category 2 wetland up to 3.0 acres. OEPA must approve or deny a level 2 permit within 90-days of determining an application is complete. Failure of the agency to timely approve or deny the permit results in an approved permit by default.
- Level 3 permits are for impacts of greater than 3.0 acres of category 2 wetlands and to category 3 wetlands. OEPA must approve or deny a level 3 permit within 180-days of determining an application is complete. Failure of the agency to timely approve or deny the permit results in an approved permit by default.

Question 2. Wetland restoration is a key tool in balancing environmental protection and development. Can you provide any examples where wetland restoration is being halted due to Section 404 permitting delays?

ANSWER. The Environmental Policy Innovation Center (EPIC) issued a report in 2023 that clearly documents the Corps inability to timely complete the review and approval of restoration projects for mitigation banks. Additionally, the Corps recently acknowledged that they have not promptly completed the review and approval of mitigation banks (e.g. wetland restoration) as they rolled out a memo to the public. As announced at the Ecological Restoration Business Association's ("ERBA") 8th Annual Policy Conference held on 16 September 2024, Assistant Secretary of the Army Michael Connor signed a memorandum titled, *Improving U.S. Army Corps of Engineers Timeline Compliance with the 2008 Compensatory Mitigation Rule* ("Memorandum"), clarifying certain aspects of the 2008 Mitigation Rule to improve the U.S. Army Corps of Engineers' ("Corps") timelines for review of proposed mitigation banks and in-lieu fee ("ILF") programs. The Memorandum is issued in response to ERBA recommendations and a recent analysis of Corps data indicating that the 2008 Mitigation Rule's review timeline of no longer than 225 days is on average, not being met. ERBA sent a letter to the Corps in April 2022 requesting a regulatory guidance letter on the 2008 Mitigation Rule that includes several of the final memo's recommendations. ERBA's April 2022 letter can be accessed here.† The Memorandum provides the following clarifications:

1. As chair of the Interagency Review Team ("IRT"), the district engineer should strive to achieve consensus with IRT members within the mitigation rule timeline; if consensus is not readily possible, the district engineer will move the review process forward so as to meet the 2008 Mitigation Rule timeline.
2. The district engineer should, to all extents practicable, minimize the number of review iterations of complete draft instruments.
3. If a draft instrument is not complete, it should be returned with the missing components identified.
4. If specific provision(s) of a complete draft instrument have been identified as substantive area(s) of concern by IRT members, the district engineer should work with the IRT members and sponsor to address those specific concerns within the constraints of the mitigation rule timeline. Extending the mitigation rule timeline should be limited to the scenarios cited in 33 CFR § 332.8(f).
5. The district engineer should comply with the 2008 Mitigation Rule timeline for credit release decisions of 45 days.
6. Site visits may not be necessary for every credit release but should be used when documentation provided by the sponsor does not sufficiently inform a decision by the district engineer; when the district engineer determines that a site visit is necessary, the district engineer should immediately notify the sponsor.
7. Notification and scheduling of a site visit related to a credit release request should occur within the mitigation rule timeline for credit release requests of 45 days. The district engineer and sponsor's availability should determine when the site visit occurs, which may be outside the 45-day period.

† https://img1.wsimg.com/blobby/go/41e32553-5f04-46fc-9fa2-2486b37b0f46/downloads/ERBA%20RGL%20Recommendations%20to%20Corps%20HQ%20(April%2020.pdf?ver=1726589984959

8. IRT members should be invited to participate in the scheduled site visit, but the availability of individual IRT member(s) should not drive the scheduling of, nor delay the site visit.
9. Headquarters should develop nationwide templates for the general elements that should be included in any mitigation bank or ILF program instruments for use where there are no local developed templates. In addition, Headquarters should seek input from federal, Tribal, and state partners as well as the public and private sectors (including mitigation bank sponsors and in-lieu fee program sponsors) and/or NGO partners to develop national templates for specific types of financial assurances.
10. The district engineer should develop, in collaboration with the IRT, templates for site protection instruments, credit release schedules, and service area determinations.
11. The district engineer should, in collaboration with the IRT, develop and regularly update rapid assessment methods ("RAMs") for quantifying impact and offset actions, while using standard operating procedures ("SOPs") until such RAMs are available. As part of this effort, the district engineer should issue a public notice on draft rapid assessment procedures and SOPs to allow the regulated public and other interested members of the public (including third-party mitigation sponsors) to provide comments on these tools.
12. Headquarters should take steps to better document the causes of delays in the mitigation rule timeline and credit release timeline, including adapting existing databases and record-keeping (e.g., ORM data fields). Additionally, the Corps should seek input from federal (e.g., EPA or other federal IRT members), Tribal, and state partners as well as the private sector and/or NGO partners to better identify the sources of delay and potential solutions.

Question 3. Could you share some real-world examples where WOTUS permitting significantly delayed, or even caused a permit applicant to walk away from, a project?

ANSWER. As stated in Q1: permitting for a NWP can extend upward of 313 days, and an IP can run for over two years.

Below are three examples, where I'm able to share client names:

- The proposed Ikea in the greater Cleveland area that was withdrawn.
- Sherwin Williams research and development facility was substantially delayed (greater Cleveland area).
- Cleveland Clinic facility in Avon, OH was substantially delayed.

Question 4. Permitting delays and fees associated with the Section 404 permitting process can rack up quickly, often leading to costs being passed on to the price of new developments, affecting affordability. In your experience working with home builders to develop projects of 10 to 25 homes, what do permitting delays and costs look like, not only for the developers, but also for home buyers?

ANSWER. Regrettably, there are thousands of small projects that die before prospective project proponents have even applied for a permit. Most of these projects are contemplated by small businesses and individuals that discover how time consuming and costly it is to pull a 404 permit. For example, when the agencies proposed the latest WOTUS regulatory definition, their economic analyses included a study that examined the average (i.e., median) permitting timeframes it took landowners to prepare, submit, and receive from the Corps permit authorizations for both NWPs and individual permits (IPs). Based upon that study the median timeframe to obtain a streamlined NWP was 313 days when a more complex IP took 788 to obtain. Therefore, even a simple NWP authorizing less than ½ acre impact of wetland can easily *cost more than $200,000*—engineers, surveyors, wetland scientists, attorneys, mitigation costs, and land costs all contribute to this amount.

Delays in the permitting process are an added layer of strain for applicants. Time delays are costly—interest expense and additional consultant and legal fees add up quickly. Often, we see applicants simply agree to accept PJDs and permit terms and conditions that they would otherwise not agree to, just to end the permitting process and to stop the hemorrhaging of capital to get the project permitted. The cost to develop the lots are subsequently passed on to the homebuyers. This can easily amount to an additional cost of more than $10,000 per lot that is passed along to the home buyer. As I've stated in my written testimony, homebuyers are acutely sensitive to price changes. NAHB's "Priced Out" study demonstrates that for every $1,000 increase in a new, median priced home—106,031 households are priced out of the market.

Question 5. EPA and the Corps have issued a series of coordination memos to the regulated communities on what "connectivity" *could* be for determining a WOTUS. The challenge, however, is that there are no clear limits on connectivity. In some of your testimony, you have mentioned that non-relatively permanent waters have been used to assert jurisdiction over wetlands post-*Sackett*. Have the Agencies provided any insight on how far is too far for a non-relatively permanent water to determine connectivity to a wetland?

ANSWER. The coordination memos that the EPA and Army Corps issued do not provide the necessary, clear guidelines the regulated public needs to confidently navigate the serious consequences of the CWA. The memos have demonstrated to project proponents that 195 feet is "relatively short" to establish "connectivity"; however, we've seen an example where they tried to trace two miles of connectivity and that was deemed too far. The public is operating under this system of vague rules to try and determine if their property is under federal jurisdiction.

In *Sackett*, the Supreme Court held that the CWA extends to "only" those wetlands that are "as a practical matter *indistinguishable* from waters of the United States."[1] Furthermore, the Court stated that a wetland cannot be considered part of water of the United States "even if they are located nearby."

If the Agencies abided by the Court's directive surrounding distinguishability, the public could more confidently navigate the 404-permitting process.

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[1] [Editor's note: A citation for footnote 1 was not provided.]