

Congress of the United States
Washington, DC 20515

June 21, 2023

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

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

Dear Administrator Regan and Assistant Secretary Connor:

We write to request a detailed update on the planned next steps of the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps), collectively “Agencies,” in response to the Supreme Court’s (Court) recently issued decision in *Sackett v. EPA*, 598 U.S. ___ (May 25, 2023) (*Sackett II*). The Court’s ruling reinforces property owners’ rights, protects the separation of powers by limiting your Agencies’ authority to what Congress has delegated in statute, and ensures adherence to the congressional intent in writing the Clean Water Act (CWA). Additionally, the Court upholds the cooperative federalism framework of the CWA, as well as the states’ authority and responsibility to regulate non-Federal waters within their borders. All nine Supreme Court justices agreed that the Biden Administration’s definition of “waters of the United States” (WOTUS) based on “significant nexus” is illegitimate, and a majority of the Court articulated a clear, easily administrable definition of WOTUS.¹

In implementing the Court’s decision, the Agencies must adhere to the majority opinion and not slow-walk compliance with the decision. The Agencies wasted valuable time and resources by prioritizing the promulgation of a rule over the first two years of the Biden Administration; that is now clearly unlawful. Notably, this Administration ignored our repeated admonitions that the Agencies should wait until the Supreme Court acted to proceed,² and our warnings that the rule

¹ *Sackett v. EPA*, No. 21-454 (U.S. May 25, 2023), available at https://www.supremecourt.gov/opinions/22pdf/21454_4g15.pdf; 598 U.S. ___ (2023).

² E.g., “Graves, Capito Lead EPA Colleagues in Joint Resolution to End WOTUS Rule” (Feb. 6, 2023), <https://www.capito.senate.gov/news/in-the-news/graves-capito-lead-gop-colleagues-in-joint-resolution-to-endwotus-rule>; “Capito, Graves Lead Colleagues in Filing Amicus Brief on Clean Water Act Authority” (Apr. 19, 2022), https://www.capito.senate.gov/news/press-releases/capito-graves-lead-colleagues-in_filing-amicus-brief-onclean-water-act-authority.

being drafted would not be “durable.”³ Now the EPA and the Corps must work to bring application of WOTUS quickly and effectively in line with *Sackett II*.

While we are pleased to see *Sackett II* clearly define the scope of the Agencies’ regulatory authority, we are concerned that the Administration is now delaying implementation of the ruling. For instance, in response to the Supreme Court’s decision, some Corps districts have stated that they will temporarily halt the review and issuance of approved jurisdictional determinations.⁴ Such a freeze in processing jurisdictional determinations unnecessarily delays the permitting process for projects. The Agencies previously used taxpayer resources to revisit already settled jurisdictional determinations issued by the previous Administration. The Biden Administration must now follow the law by implementing the Supreme Court’s decision with the same fervor it showed in its prior efforts on WOTUS. Failure to do so is indicative that these recent delays are needless at best, or intentional efforts to halt economic development at worst.

Following the Court’s ruling in *Rapanos v. EPA*, the Agencies took a year to provide interim legal guidance and two years to issue the 2008 guidance document on implementing that case.⁵ However, implementing the ruling in *Rapanos* was legally complex because of the 4-1-4 nature of the decision. By contrast, the “continuous surface connection test” upheld by a majority of the Court in *Sackett II* is clear and can be implemented immediately.⁶

In order to comply with the Court’s ruling, the Agencies must provide immediate direction to their regional and district offices to apply *Sackett II* in the evaluation of jurisdictional determinations and permits, ensuring clarity and consistent nationwide application of CWA jurisdiction to landowners and the regulated community. Ongoing delays and confusion will hamper project development across the country, including those authorized by the Infrastructure Investment and Jobs Act.

³ E.g., “Capito, EPW Republicans Tell Biden Administration to Halt New WOTUS Definition Rulemaking, Await SCOTUS Decision” (Feb. 23, 2022), <https://www.epw.senate.gov/public/index.cfm/2022/2/capito-epw-republicanstell-biden-administration-to-halt-new-wotus-definition-rulemaking-await-scotus-decision>.

⁴ E.A. Cruden, et al., “Wetlands Approvals Paused After Supreme Court Decision,” *E&E News* (June 1, 2023), <https://subscriber.politicopro.com/article/eenews/2023/06/01/wetlands-approvals-paused-after-supreme-courtdecision-00099717>; Sam Hess, “Sackett Lawyer Urges Agencies to Advance CWA Actions Amid Pause,” *InsideEPA* (June 6, 2023), <https://insideepa.com/daily-news/sackett-lawyer-urges-agencies-advance-cwa-actionsamid-pause> (citing Corps’ Chicago District Regulatory Branch and Sacramento District Regulatory Branch). U.S. Army Corps of Eng’rs, Chicago Dist., “Approved Jurisdictional Determinations Are on Hold,” <https://www.lrc.usace.army.mil/Missions/Regulatory/Jurisdictional-Determinations/>

⁵ Env’tl. Prot. Agency and U.S. Army Corps of Eng’rs, Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States* (June 5, 2007), <https://www.epa.gov/sites/default/files/2016-04/documents/rapanosguidance6507.pdf>; Env’tl. Prot. Agency and U.S. Army Corps of Eng’rs, Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008), https://www.epa.gov/sites/default/files/201602/documents/cwa_jurisdiction_following_rapanos120208.pdf.

⁶ *Supra* note 1, at 4-5.

In light of these developments, we request a briefing and response to the following questions no later than June 28, 2023, so that we may fully understand the Administration's plan to implement a truly durable definition of a WOTUS in line with *Sackett II*:

1. What concrete steps are the Agencies taking following *Sackett II* to implement the majority's opinion?
2. Will you direct the Corps to immediately resume the issuance of jurisdictional determinations? If not, please provide a detailed explanation justifying the failure to resume issuance.

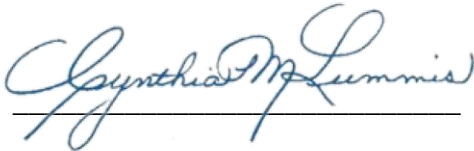
Sincerely,



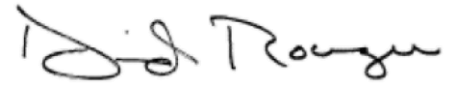
Shelley Moore Capito
United States Senator
Ranking Member
Committee on Environment and Public
Works (EPW)



Sam Graves
Member of Congress
Chairman
Committee on Transportation and
Infrastructure (T&I)



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David Rouzer
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T&I Subcommittee on Water Resources and
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