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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
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The Honorable David Rouzer
Chairman
Subcommittee on Water Resources and Environment
U.S. House of Representatives
2333 Rayburn House Office Building
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The Honorable Grace Napolitano
Ranking Member
Subcommittee on Water Resources and Environment
U.S. House of Representatives
1610 Longworth House Office Building
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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,

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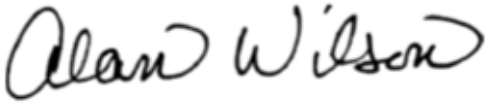

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