

Congress of the United States
Washington, DC 20515

November 14, 2023

The Honorable Michael Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460

The Honorable Michael L. Connor
Assistant Secretary of the Army for Civil Works
U.S. Department of the Army
108 Army Pentagon
Washington, DC 20310-0108

Dear Administrator Regan and Assistant Secretary Connor:

We write to express our concerns with the actions taken by the Environmental Protection Agency and the U.S. Army Corps of Engineers (Corps) (collectively “the agencies”) in response to the Supreme Court’s decision in *Sackett v. EPA*, No. 21-454 (U.S. May 25, 2023) (hereinafter “*Sackett*”). While we acknowledge that the agencies have altered their regulatory definition of “waters of the United States” (WOTUS) to conform to the *Sackett* decision, we remain concerned with the confusion and lack of clarity that continues to exist for all landowners.

The unanimous decision in *Sackett* forced the agencies to eliminate the troubling “significant nexus” test and narrow their interpretation of adjacency. The Court held that this “freewheeling inquiry that provides little notice to landowners of their obligations under the Clean Water Act.” Farmers, ranchers and small businesses throughout the country have been highlighting these concerns for many years and were hopeful the Court’s decision would lead to changes that inject clarity and certainty into the regulatory process. Unfortunately, they have been thrust back into a world of uncertainty because the agencies have left the prevailing regulatory test—the “relatively permanent” test – ambiguously defined. The agencies have failed to place any guardrails on what it means to be a relatively permanent, standing or continuously flowing body of water. Likewise, they have also left “continuous surface connection,” which serves as the linchpin for regulating adjacent wetlands undefined. Leaving these terms amorphously defined gives the agencies the latitude to assert jurisdiction over private property with very few limits. The Supreme Court already admonished the agencies for their past interpretations of WOTUS and once again, they are pushing their jurisdictional reach outside the bounds of their legal authority. The agencies squandered the opportunity to provide a clear and durable WOTUS rule when they failed to provide more context to these important terms.

The agencies also chose to use the “good cause” exemption to bypass the conventional regulatory process, including stakeholder engagement. They created a false sense of urgency by halting the issuance of approved jurisdictional determination (AJDs) immediately after *Sackett* was handed down. The decision to hold approved jurisdictional determinations hostage led to stalled economic development throughout the summer months. Given the clarity of this decision, the agencies should have been able to provide an interim directive that would allow at least some AJDs to move forward.

Instead, the agencies advanced these changes without feedback from state and local partners, small businesses, or the various industry sectors that are impacted by this rule.

It is imperative that landowners clearly understand where the bright line of federal jurisdiction lies. Clean Water Act violations carry significant criminal and civil penalties meaning that farmers, ranchers, and small business owners could face jail time and thousands of dollars in fines a day for making changes to their property. In *Sackett*, Justice Alito describes the CWA as “a potent weapon.” It appears the agencies plan to implement their regulatory authority on a case-by-case basis—with few limits. The Justices acknowledge the fact that the Corps has no obligation to provide jurisdictional determinations for every landowner. This flies in the face of the spirit of *Sackett* which was to narrow the federal government’s reach over private property and provide clarity for landowners.

The agencies have added another layer of confusion by failing to issue formal implementation guidance to Corps field staff. Members of the regulated community have interacted with Corps officials across many regions who have expressed frustration by the lack of direction that has been handed down from Corps headquarters. We pose the following implementation questions that we believe must be answered for landowners to fully understand the scope of federal CWA jurisdiction and have clear expectations of when they will need a CWA permit:

- How will the agencies direct their field staff to interpret the term “relatively permanent” and what supporting data will be required to demonstrate that a feature meets this definition?
- How will the agencies direct their field staff to interpret the term “continuous surface connection” and what supporting data will be required to demonstrate that a feature meets this definition?
- Do the agencies intend on continuing to regulate ephemeral features as Federal waters?
- Will the agencies supply implementation guidance? If so, when? And will it be available to the public?
- Farmers, builders, and others have had months of delays, so what are the agencies doing to help move the AJD process forward?

Our constituents deserve certainty and safeguards from federal government regulations dictating how they use their land. The latest action taken by the Biden Administration is a poor attempt to bring their illegal WOTUS rule in-line with the *Sackett* decision and it continues to use ambiguous terms in a calculated manner in order to expand their regulatory authority. Our nation’s farmers, ranchers and rural communities deserve better.

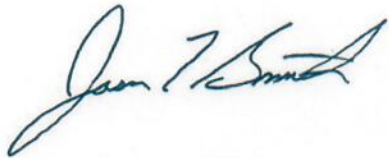
Sincerely,



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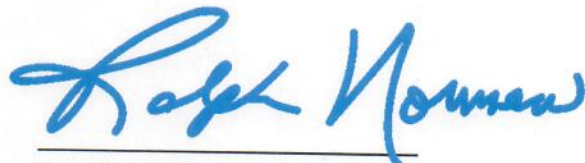
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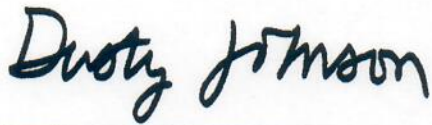
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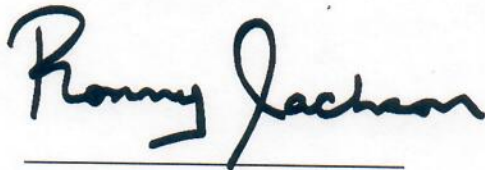
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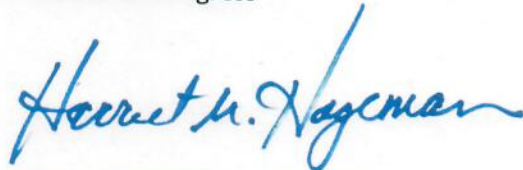
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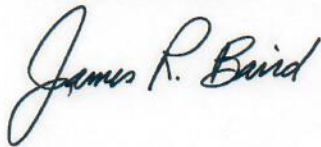
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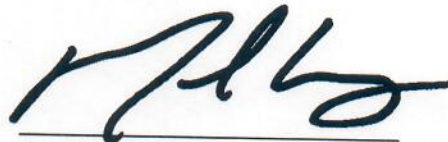
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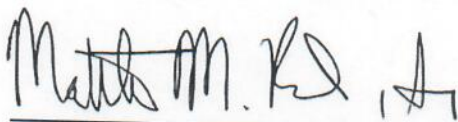
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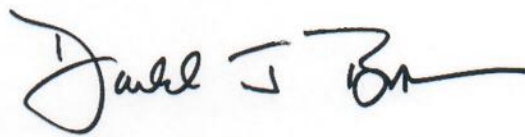
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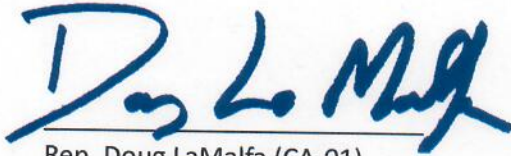
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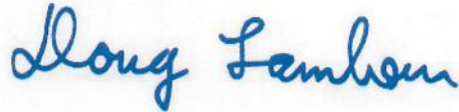
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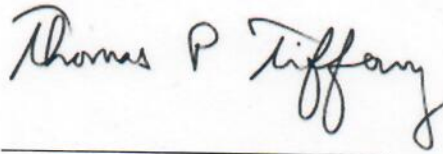
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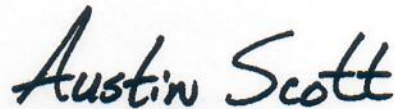
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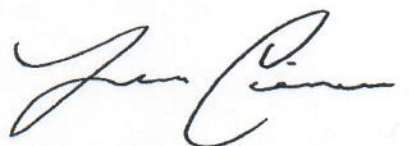
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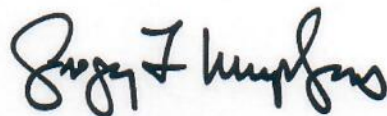
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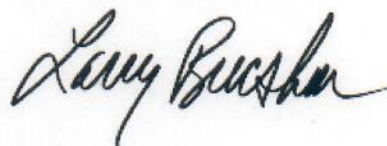
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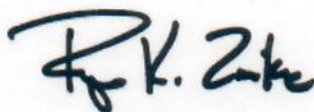
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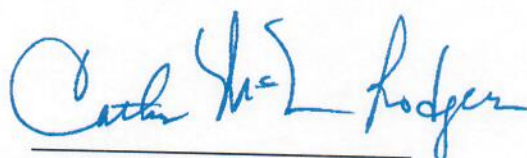
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