



February 7, 2022

Administrator Michael Regan
U.S. Environmental Protection Agency (EPA)
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Jaime A. Pinkham, Acting Assistant Secretary of the Army (Civil Works)
Department of the Army
108 Army Pentagon
Washington, DC 20310-0104

RE: Revised Definition of Waters of the United States, Docket EPA-HQ-OW-2021-0602

Dear Administrator Regan and Mr. Pinkham:

Today, I write on behalf of Americans for Prosperity (AFP) activists across all 50 states to provide comments opposing the U.S. Environmental Protection Agency (“EPA”) and the U.S. Army Corps of Engineers’ (“ACOE”) proposed rule to revise the definition of Water of the United States (WOTUS) under the Clean Water Act (CWA). EPA and ACOE are returning in part to the 1986 regulations or the pre-2015 definition of WOTUS with significant changes. This is the fourth new regulation in seven years defining “navigable waters” also known as “waters of the United States”. There has been an immense lack of clarity on what defines a WOTUS and the process around permitting for the regulated community. This has caused a great deal of confusion creating a sea of red tape for farmers, ranchers, developers, and millions of hardworking Americans.

AFP has consistently advocated for a common-sense definition of WOTUS that more appropriately interprets the authority of the federal government under the CWA. These comments will focus on the Biden administration’s efforts to move forward with a rulemaking despite the Supreme Court granting certiorari in a case that will directly impact the definition of WOTUS, the request for an extended comment period from many stakeholders that have been ignored, and the difference between the proposed rule and the pre-2015 standard it claims to be reverting to.

On January 24, 2022, the Supreme Court of the United States granted certiorari in the Michael Sackett v. EPA matter limited to the following question; whether the Ninth Circuit set forth the proper test for determining whether wetlands are "waters of the United States" under the Clean Water Act.¹ Over the past 15 years Michael Sackett and his wife Chantell have been going

¹ <https://www.supremecourt.gov/docket/docketfiles/html/public/21-454.html>

through litigation that began due to EPA issuing a compliance order determining their property near Priest Lake, Idaho was an adjacent wetland under the Rapanos “significant nexus” standard and a federal permit would be required to build. The Sacketts had received their local permits and were in the beginning phases of building when they received the order. “EPA prohibited the Sackett’s from constructing their home, demanded costly restoration work, and required a three-year monitoring program, during which the property was to be left untouched. The agency also threatened the Sacketts with fines of up to \$75,000 per day if they didn’t obey the order.”²

The Supreme Court has already ruled once in the case confirming their right to contest EPA’s order. EPA has withdrawn the compliance order but maintains it has the power to regulate the Sacketts’ property under the CWA. The Michael Sackett v. EPA case will most likely not be heard until the court’s next term begins. “The Supreme Court will decide whether or not to retain the ‘significant nexus’ test from the Rapanos decision. This decision could have major ramifications for all aspects of administration of the Clean Water Act, including both permitting and enforcement. If the Court decision leads to a narrow reading of the CWA, it would directly impact this proposed rulemaking and EPA and ACOE’s future phase two rulemaking.

EPA and ACOE moving forward on revising the definition of WOTUS ahead of the Supreme Court decision will only cause more confusion and result in further revisions after the case is heard. There has been no indication from regulators that they will pause this process until oral arguments begin in the Sackett case. The decision by the Supreme Court to grant cert on this WOTUS matter is very telling, this is the second case the Court has taken up during the Biden administration which would impact EPA’s policymaking in the future.

Before the Supreme Court granted cert in the Sackett case many stakeholders were already seeking an extended comment period for this highly impactful regulation. Organizations ranging from the National Association of Clean Water Agencies³, The Fertilizer Institute⁴, Portland Cement Association⁵, Georgia Chamber of Commerce⁶, American Farm Bureau Federation⁷, and many others have all requested an extended comment period. We agree with these organizations, this is a very comprehensive regulatory matter that EPA and ACOE are promulgating and there must be a concise common-sense definition of WOTUS. They indicated the proposed rule would return to the pre-2015 definition of WOTUS, but that is simply not the case. This proposed rulemaking deserves meaningful stakeholder engagement but with the time constraints that has been limited. Due to the outpouring of stakeholder request for an extension and the Supreme Court’s decision to grant cert in the Sackett the promulgation of this rule should be significantly extended or halted until the Court’s decision.

In comments submitted by the Georgia Chamber, they suggest “the proposed rule appears to take a novel and expansive approach to the Definition of Waters of the United States (WOTUS) that is well outside the scope and reach of the pre-2015 guidance and rules.” The Fertilizer Institute, echoed these concerns, AFP agrees with these commenters that EPA and ACOE have once again left stakeholders without a clear and concise definition. The proposed rule states, “the agencies

² <https://pacificlegal.org/case/sackett-v-environmental-protection-agency/>

³ <https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0130>

⁴ <https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0114>

⁵ <https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0140>

⁶ <https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0139>

⁷ <https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0112>

are exercising their discretionary authority to interpret ‘waters of the United States’ to mean the waters defined by the longstanding 1986 regulations, with amendments to certain parts of those rules to reflect the agencies’ interpretation of the statutory limits on the scope of the ‘waters of the United States’ and informed by Supreme Court case law.”⁸

The proposed rule interpretation includes the “relatively permanent” and “significant nexus” tests that the Supreme Court introduced in the Rapanos decision. The proposed rule interprets WOTUS to include:

“Traditional navigable waters, interstate waters, and the territorial seas, and their adjacent wetlands; most impoundments of “waters of the United States”; tributaries to traditional navigable waters, interstate waters, the territorial seas, and impoundments that meet either the relatively permanent standard or the significant nexus standard; wetlands adjacent to impoundments and tributaries, that meet either the relatively permanent standard or the significant nexus standard; and “other waters” that meet either the relatively permanent standard or the significant nexus standard.”⁹

The Solano Irrigation District (SID) in San Diego, California has significant concerns that, “the proposed rules interpreting the Supreme Court’s decision regarding ‘significant nexus’ and ‘relatively permanent’ tests to define CWA jurisdiction for ‘other waters’ and tributaries, thereby vastly expanding regulatory jurisdiction over wetlands and other water bodies beyond the pre-2015 regulations and guidance.” EPA and ACOE have proposed this rule under the guise that this is a simple and straightforward revision back to the pre-2015 definition, but they have made major changes that have left stakeholders concerned. AFP has concerns with EPA and ACOE’s use of both the “relatively permanent” and “significant nexus” test being used in one rulemaking. These tests are different and further confuse the regulated community on how to define WOTUS and comply with the regulations.

AFP appreciates the opportunity to provide comment, and our activists look forward to consideration of this feedback.

Sincerely,

Abigale Tardif
Policy Analyst, Regulations

⁸ 86 FR 69373.

⁹ 86 FR 69373.