

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

MARY FRANCES REPKO, DEMOCRATIC STAFF DIRECTOR
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February 23, 2022

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 20310-0108

Dear Administrator Regan and Assistant Secretary Connor:

We write to request that the Biden Administration immediately halt plans to finalize a novel definition of “waters of the United States” (WOTUS) under the *Clean Water Act*.¹ Last month, the Supreme Court agreed to hear *Sackett v. Environmental Protection Agency*, Case No. 21-454 (*Sackett*). It is expected that the Court will rule on the appropriate test for determining whether waterbodies and wetlands are jurisdictional waters under the *Clean Water Act* for the first time in more than 15 years. The Court’s eventual ruling will have direct bearing on the definition of WOTUS. Given this pending litigation, we believe that the Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (collectively, the “Agencies”) must stop any work to redefine WOTUS until you are able to assess and adhere to the Court’s ruling.

Despite this Administration’s statements of a desire to establish a “durable” definition of WOTUS in order to end “whiplash in how to best protect our waters across America,”² its approach to date has exacerbated—not mitigated—regulatory uncertainty. This summer, the Administration chose to uproot the Navigable Waters Protection Rule (NWPR)³ and announced plans for two different rulemakings.⁴ If the Administration maintains this approach, it will then need to implement at least *three* different definitions of WOTUS over the course of the next few years to accommodate new direction from the Court.

¹ Revised Definition of “Waters of the United States,” 86 Fed. Reg. 69372 (Dec. 7, 2021), *available at* <https://www.federalregister.gov/documents/2021/12/07/2021-25601/revised-definition-of-waters-of-the-united-states>.

² EPA, *News Release: EPA and Army Take Action to Provide Certainty for the Definition of WOTUS* (Nov. 18, 2021), <https://www.epa.gov/newsreleases/epa-and-army-take-action-provide-certainty-definition-wotus>.

³ EPA, *News Release: EPA, Army Announce Intent to Revise Definition of WOTUS* (June 9, 2021), <https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus>.

⁴ EPA, *News Release: EPA and Army Announce Next Steps for Crafting Enduring Definition of Waters of the United States* (July 30, 2021), <https://www.epa.gov/newsreleases/epa-and-army-announce-next-steps-crafting-enduring-definition-waters-united-states>.

The Court's decision to hear *Sackett* offers the opportunity for the Administration to correct its course. Rather than implementing its multi-step, confusing, and opaque process to change the WOTUS definition, the Administration should wait for the Court's ruling before developing novel regulatory definitions. In fact, the Agencies have publicly stated themselves that their revised regulatory definition of WOTUS would contain "updates to be consistent with relevant Supreme Court decisions."⁵ It would be premature for the Agencies to change the WOTUS definition to be consistent with Supreme Court precedent until the Court rules in *Sackett*.

For the duration of the *Sackett* litigation, the Administration should refocus its resources on supporting and advancing critical permitting and infrastructure development, such as expeditiously processing *Clean Water Act* permits. The *Infrastructure Investment and Jobs Act*, P.L. 117-58, authorizes and appropriates funding for the development of significant new assets and improvements to existing assets, including roads, bridges, locks, dams, levees, and port infrastructure.⁶ Instead of wasting critical time, staff resources, and taxpayer dollars on rulemaking efforts that could be upended by the Court even before the end of the year, the Agencies must focus their resources on reviewing and issuing the permits needed for important infrastructure projects to move forward.

The Administration should also use this time to continue to engage with farmers, landowners, states, businesses, and other affected stakeholders to understand how changes to the definition of WOTUS impact property and important economic activities. Several stakeholders and Members of Congress have written to the Agencies requesting additional time for the public to provide feedback on the current WOTUS rulemaking process, due to the already complicated nature of the proposed rule and broad impacts it will have. Meaningful engagement is not just listening to stakeholders, but applying the information stakeholders provide to inform the development and implementation of regulations consistent with the law.

For example, we were deeply troubled by EPA Assistant Administrator for Water Radhika Fox's January 13, 2022, response to a letter from Senator Joni Ernst, in which Ms. Fox stated:

[T]he agencies' experience was not that the NWPR provided clarity, predictability, or consistency in the application of the CWA. To the contrary, and as explained in considerable detail in the agencies' recently released proposed rule, the NWPR was difficult to implement and yielded inconsistent results (a copy of the proposed rule can be found at www.epa.gov/wotus). Also, foundational concepts underlying much of it were confusing. These factors alone can be a source of harm to farmers and others seeking certainty.⁷

Ms. Fox's statement about the alleged harm to farmers from the NWPR is directly contradicted by agriculture stakeholder feedback and key recommendations from a federal

⁵ *Id.*

⁶ *Infrastructure Investment and Jobs Act*, P.L. 117-58.


⁷ Letter from the Hon. Radhika Fox, Assistant Administrator, Office of Water, EPA, to the Hon. Joni K. Ernst, U.S. Senate (Jan. 13, 2022).


advisory committee developed the preceding month. The Farm, Ranch, and Rural Communities Advisory Committee stated:


American agriculture appreciated the clarity the 2020 Navigable Waters Protection Rule (2020 Rule) provided. Many features were retained within federal jurisdiction, but it was workable for farmers, ranchers, and rural communities. Unfortunately, not much implementation was allowed to be realized before the agencies attempt to again rewrite the definition of WOTUS.⁸


This demonstrates a stark disconnect between the Administration's characterization of stakeholder views on the definition of WOTUS and the documented stakeholder views themselves and underscores the need for more meaningful engagement. Any regulatory changes concerning WOTUS have far-reaching implications for stakeholders, as well as for the ability to authorize and complete critical infrastructure projects in a timely and efficient manner. We encourage the Administration to use this time to learn from affected stakeholders and focus efforts on supporting the improvement and buildout of infrastructure across the country.

Sincerely,


Shelley Moore Capito
United States Senator



James M. Inhofe
United States Senator


Kevin Cramer
United States Senator


Cynthia M. Lummis
United States Senator


Richard Shelby
United States Senator


John Boozman
United States Senator


Roger F. Wicker
United States Senator


Dan Sullivan
United States Senator

⁸ Farm, Ranch, and Rural Communities Advisory Committee, *Recommendations to U.S. EPA Administrator Michael Regan from the Farm, Ranch, and Rural Communities Advisory Committee* at 5 (Dec. 2021), available at <https://www.epa.gov/system/files/documents/2022-01/december-2021-frcc-recommendations-and-attachments.pdf>.



Joni Ernst
United States Senator



Lindsey O. Graham
United States Senator

Enclosure