# Statement of the American Farm Bureau Federation

**To the House Water Subcommittee**

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**Presented By:**
**Testimony of Ms. Courtney Briggs on behalf of the American Farm Bureau Federation**
**Chairman, Waters Advocacy Coalition**

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Chairman Rouzer and Ranking Member Napolitano, thank you for the opportunity to testify today. My name is Courtney Briggs, and I serve as Chairman of the Waters Advocacy Coalition (WAC) and as Senior Director of Government Affairs at the American Farm Bureau Federation (AFBF).

WAC is a multi-industry coalition representing a cross-section of the nation's construction, transportation, real estate, mining, manufacturing, forestry, agriculture, energy, wildlife conservation, recreation, and public health and safety sectors—all of which are vital to a thriving national economy and provide much-needed jobs in local communities. It is an honor to be here representing the 45 trade associations, and the hundreds of thousands of members collectively across the country, that make up WAC. I am also here representing the thousands of hard-working farm and ranch families that produce the abundant food, fiber, and renewable fuel that our nation and the world depend on.

Our members are committed to protecting our natural resources while also maintaining profitable businesses. They live in the communities where they work and understand their responsibility in keeping our waterways healthy. I have a unique understanding of this mindset, as it is imbedded into the business philosophy of almost every farmer and rancher across this country. They know they cannot grow crops or raise animals without clean water and healthy soil, and they must leave the land in better condition than they received it. I think we can all agree that this is our collective goal, but the Biden Administration's interpretation of WOTUS lacks clarity and certainty for landowners and pushes the scope of the federal government's jurisdictional reach to the outer bounds of what is legal under the Clean Water Act (CWA). The U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers' (the agencies) failure to faithfully implement the *Sackett* decision has real-life consequences for important infrastructure and development projects, and is impacting real people in the communities that you all represent.

**Flip Flopping of WOTUS is Unfair to Landowners**

WAC and its members support the objectives of federal environmental statutes such as the CWA. What we cannot support is the continuing ambiguity of the line separating federal and state jurisdiction, which is an issue that has created confusion for landowners, regulators, and the general public for decades. We have lived in a world of regulatory uncertainty due to near-constant rulemakings that swing the pendulum back and forth, redefining the scope of the CWA. We have seen "waters of the United States" (WOTUS) definitions change with each new Administration and guidance documents offered and then rescinded, generating more questions than answers. Landowners, small businesses, and American families are the ones who suffer the most with these constant changes.

Like clockwork, in early 2023, the agencies swung the regulatory pendulum and finalized a new definition of WOTUS that greatly expanded the federal government's role in regulating land use. WAC was highly critical of the agencies' decision to move forward with this rulemaking because the Supreme Court was set to imminently hand down a highly consequential decision in *Sackett v. EPA*. Shortly after the 2023 rule went into effect, the Court handed down a decision that reinforced property owners' rights and ensured adherence to the congressional intent of the CWA. The Court also respected the CWA's cooperative federalism framework, as well as the states' primary authority and responsibility to regulate non-federal waters within their borders.

All nine Supreme Court justices agreed that the Biden Administration's use of the controversial "significant nexus test" was illegitimate, and a majority of the Court agreed that EPA's interpretation of "adjacency" was overly broad. In an opinion authored by Justice Alito, the Court reprimanded the agencies for illegally expanding their regulatory reach. WAC celebrated this legal victory because our members thought it would inject more clarity and certainty into the regulatory process. Unfortunately, we were wrong.

On Sept. 8, 2023, the Corps and the EPA published a final rule revising the regulatory definition of WOTUS under the CWA to try to conform the definition to the *Sackett* decision. This "conforming rule" failed to provide any more context to specific terms that are serving as the linchpin for determining the scope of the federal government's authority. It became obvious that the agencies were going to exploit the gray areas that still exist in a post-*Sackett* world to try to expand their regulatory reach. Leaving these terms undefined and interpreting them expansively and in a freewheeling manner since *Sackett* has given the agencies the latitude to regulate land use however they please.

**Why Words Matter: Relatively Permanent and Continuous Surface Connection**

With the death of "significant nexus" in *Sackett*, the Court agreed that the agencies must solely follow the "relatively permanent" test; a regulatory test originally authored by Justice Scalia in *Rapanos v. United States*. As its name suggests, the test states that a relatively permanent water that is connected to a traditional interstate navigable water can be regulated as a "navigable water" (*i.e.*, as a WOTUS). Likewise, an adjacent wetland can be jurisdictional if it has a "continuous surface connection" to a traditional interstate navigable water or a relatively permanent water connected thereto.

In the aftermath of the *Rapanos* decision, the agencies drafted interpretive guidance (2008 Guidance) where they interpreted "relatively permanent" to mean flowing year-round or having continuous flow at least seasonally. In practice, the agencies unlawfully swept in even ephemeral water features that carried flow only after precipitation events (and far too many intermittent features as well). The agencies interpreted "seasonally" to mean generally three months, or possibly even less time depending on what part of the country the water feature is located in. The agencies purported to rely on a footnote in *Rapanos* to support this interpretation, but on its face, that footnote discussed the possibility that a river flowing for 290 days (closer to 10 months) would not necessarily be *excluded* under the relatively permanent test. In other words, whether jurisdiction can be exercised over rivers, streams, and tributaries that flow continuously for 290 days is a case-by-case basis inquiry. The agencies inverted what Justice Scalia intended and instead concluded that any feature that flows for continuously for at least 90 days is automatically jurisdictional. See *Rapanos*, 547 U.S. at 732 n.5. It goes without saying that not necessarily *excluding* 290 days of continuous flow cannot possibly equate to automatically *including* 90 days of continuous flow.

The new rule makes the relatively permanent standard even more expansive than the 2008 guidance. The new rule abandons the seasonal concept and does not use any bright line tests (days, weeks, or months) or any concepts of flow regime (ephemeral, intermittent, perennial). The rule vaguely says relatively permanent tributaries have flowing or standing water year-round or continuously during certain times of the year and they do not include tributaries

with flowing or standing water for only a short duration in direct response to precipitation. As an example, the agencies suggest that consecutive storm events, or even a single strong storm event, is enough to create relatively permanent flow. This subtle change will greatly expand what areas the agencies can assert jurisdiction over under the relatively permanent test.

Because the agencies have tied the relatively permanent standard to the ditch exclusion, the broader the relatively permanent standard gets, the fewer ditches will be excluded from jurisdiction. Under both the 2008 guidance and the 2023 rule, ditches are excluded only if they do not carry relatively permanent flow. Again, because the relatively permanent test has expanded, fewer ditches will meet the requirement in the exclusion.

Likewise, the 2023 rule also expands which wetlands (and "other waters") are jurisdictional by virtue of having a continuous surface connection to a relatively permanent water. The agencies interpret "continuous surface connection" to mean a physical connection that does not need to be a continuous surface hydrologic connection, and wetlands need not directly abut a relatively permanent water. Under the 2008 guidance, however, wetlands would only meet the "continuous surface connection" test if they directly abut a relatively permanent tributary (e.g., are *not* separated by uplands, a berm, dike, or similar feature). The new rule, by contrast, abandons this directly abutting requirement and instead provides that wetlands have a continuous surface connection even if they are separated from a relatively permanent impoundment of a tributary by a natural berm, bank, dune, or similar natural landform so long as that break does not sever a continuous surface connection and provides evidence of a continuous surface connection. Wetlands also meet the continuous surface connection requirement if they are located some distance away from a relatively permanent tributary but connected by some linear feature such as a ditch, swale, or pipe. The picture becomes clear that the agencies are moving in the wrong direction.

It is worth noting that, ultimately, the question is not whether tributaries or ephemeral streams are "important" or may as a scientific matter have some connection with downstream navigable waters, see, e.g., 86 Fed. Reg. at 69,390; rather, the question is whether they should be considered as falling within the bounds of federal jurisdiction. As with so many other categories in the 2023 rule, the agencies collapse that distinction.

**Alito's Decision in *Sackett***

While the decision in *Sackett* did not pinpoint a specific flow metric to be used to determine the meaning of relatively permanent, it did give us more context as to what a regulated feature should look like. *Sackett* "conclude[d] that the *Rapanos* plurality was correct: the CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water `forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" The *Rapanos* plurality, in turn, repeatedly distinguished between "continuously present, fixed bodies of water" and "ordinarily dry channels through which water occasionally or intermittently flows." Indeed, the *Rapanos* plurality explained that, as a matter of "commonsense," the phrase "waters of the United States" excludes "channels containing merely intermittent or ephemeral flow."

Equally important, in *Sackett*, Justice Alito wrote that, to be jurisdictional, a "wetland [must] ha[ve] a continuous surface connection with [a relatively permanent] water… making it difficult

to determine where the 'water' ends and the 'wetland' begins." Additionally, the Court held "that the Clean Water Act extends to only those wetlands that are as a practical matter indistinguishable from waters of the United States." In further elaborating what it means to have a "continuous surface connection," Justice Alito noted that "temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells." Read in context, Justice Alito clearly had in mind that, to be jurisdictional, wetlands must typically have a continuous surface *hydrologic* connection to a relatively permanent water, not just some ordinarily dry physical connection like a ditch, pipe, or swale that might span hundreds (or even thousands) of feet.

**WOTUS Implementation Concerns**

Immediately after the *Sackett* decision was handed down, the Corps notified the public that they would be pausing the issuance of approved jurisdictional determinations (AJDs) indefinitely. During the summer of 2023, landowners' only option to move forward on a project was to accept a preliminary jurisdictional determination (PJD). PJDs force landowners to concede that their land is a WOTUS and accept the permitting and mitigation requirements—often unnecessarily. Many projects with specific production windows had their backs against a wall and saw this as the only option, especially in weather-dependent industries such as construction. The directives in *Sackett* gave the agencies the ability to move forward with most AJDs over that summer but the Corps chose to take the summer off.

In September 2023, the agencies released two joint elevation coordination memos to the field that established a process by which the agencies will coordinate on CWA jurisdictional matters to "ensure accurate and consistent implementation" of the 2023 rule or the pre-2015 regulatory regime, depending on which regulatory framework is applicable. [1] The memos also outline procedures and specific timelines under which the agencies can review and provide comment on certain draft AJDs. Again, these elevation memos only discuss the process for how the agencies will handle the approved jurisdictional determinations that are elevated to Corps and EPA headquarters to be decided by bureaucrats in Washington, D.C., and it fails to provide any actual information for landowners to understand how the Corps intends to implement the rule on the ground.

It has been exactly one year since the issuance of the elevation coordination memos and unfortunately, many of WAC's members are still experiencing significant challenges. Our members have experienced blatant disregard for the timelines specified by the agencies. Some of our members have draft AJDs that were elevated for local or headquarters coordination twelve months ago and still have not been resolved. Our members have compared this process to a "black box," with many receiving no communication from the agencies on the status or any

[1] U.S. Env't. Prot. Agency and U.S. Army Corps of Eng'rs, Joint Coordination Memorandum to the Field between the U.S. Department of the Army, U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) on the Pre-2015 Regulatory Regime (Sep. 27, 2023), https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-pre-2015-regulatory-regime_508c.pdf; U.S. Env't. Prot. Agency and U.S. Army Corps of Eng'rs, Joint Coordination Memorandum to the Field between the U.S. Department of the Army, U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) on the January 2023 Rule, As Amended (Sep. 27, 2023), https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-amended-2023-rule_508c.pdf.

questions or comments the agencies have regarding their draft AJDs. We also understand that some Corps Districts have completely stopped issuing AJDs – putting important projects and the communities that rely on them at risk. Within WAC, we have many examples of these challenges that we are willing to share with the Committee without attribution.

Shortly after the release of the elevation coordination memo, WAC members from various industry sectors and regions of the country also began to hear about internal guidance, directives, and training documents regarding implementation that the Corps developed but has not made available to the public. One of these documents includes internal headquarters-level guidance dated around September 2023 that includes information germane to, among other issues, assessing whether an arid west drainage is relatively permanent. We also understand the agencies have been providing regular training and information to District Office staff regarding implementation of the final rule post-*Sackett*. Through our contacts within the environmental consulting community, we heard firsthand of this "secret" implementation guidance. We were astonished by the blatant lack of transparency from the federal government.

**Agency Implementation Memos Defy *Sackett***

The calls from various landowners, industry sectors and states to provide more information on implementation reached a fever pitch earlier this year and the agencies quietly released two "Headquarters Field Memos Implementing the 2023 Rule, as Amended" on the WOTUS Implementation section of EPA's website. The agencies subsequently released three additional "Headquarters Field Memos Implementing the Pre-2015 Regulatory Regime Consistent with Sackett" on a separate part of EPA's website. Unfortunately, the agencies not only failed to prominently feature these updates or provide any notification to the public about their existence, but they also neglected to offer any guidance on how these memos should be interpreted or applied. As of Sept. 5, 2024, the agencies have released 10 total policy memoranda, four related to draft AJDs completed under the 2023 rule and six related to draft AJDs completed under the pre-2015 regulatory regime. Unfortunately, these field memoranda functionally expand the scope of federal jurisdiction in violation of *Sackett*.

Much of what little direction the agencies have provided the regulated community and public in the form of these memos directly conflicts with *Sackett* and operates as quasi-rulemakings in disguise, in violation of the Administrative Procedure Act (APA). These memoranda are precisely the kind of regulatory overreach the APA was designed to prevent. According to the APA, a "rule" is an agency statement of general or particular applicability intended to implement, interpret, or prescribe policy, or to describe organizational practice. Yet, the agencies have been issuing "Memos to the Field" and telling stakeholders that EPA regional and Corps District Offices should use them for jurisdictional determinations whenever they see a similar fact pattern. It's like pouring muddy water into clear streams and pretending no one will notice — these memos are clearly being used to set broad policy under the guise of specific guidance on WOTUS regulations.

Furthermore, the agencies have asserted that these memoranda are to be incorporated into the WOTUS interpretation lexicon. While on paper, they attempt to sidestep rulemaking responsibilities by claiming these memos are not legally binding, this is merely an effort to disguise what they truly are: rulemakings hiding in plain sight. The agencies offer no mechanism

for appealing these memos, nor any opportunity for public comment before they are issued. As a result, the public is left navigating murky waters with politically charged, legally flawed documents that decision-makers rely on, leaving them in a state of legal limbo with no recourse. For example, the agencies instructed the North Dakota field office to reconsider, post-*Sackett*, whether a wetland separated by a 15-foot "dirt track road and a seasonally plowed field" — and lacking a "culvert to maintain a connection" to a navigable feature — is still jurisdictional. The agencies asserted that physically separate wetlands may be treated as one jurisdictional wetland based on various factors, even without a hydrologic connection, revealing a clear intent to evade *Sackett's* holdings.

As another example, a recently released memorandum directs the Buffalo District to evaluate whether a small wetland (only 0.030 acres) connected solely by a non-relatively permanent stream and another wetland over approximately 195 feet, still qualifies as jurisdictional under the CWA, despite the lack of a continuous surface connection to a navigable water. The agencies suggest that these disconnected features can collectively form a single jurisdictional wetland, demonstrating a clear intent to sidestep the *Sackett* ruling's requirement for a direct and continuous surface connection. Additionally, this memo vaguely discusses their understanding of "indistinguishable" when they state that the term is "not alone determinative of whether adjacent wetlands are 'waters of the United States.'" They also add that "Sackett does not require the agencies to prove that wetlands and covered waters are *visually* identical."

The agencies' failure to provide clear direction to the public is creating significant uncertainty on the ground and delaying important projects. It is worth noting again that landowners need clarity from the agencies on how they are interpreting and implementing the rule because the CWA carries severe civil and criminal penalties for even negligent violations. Landowners can be fined up to $64,000/per day or receive jail time for any CWA violations. These penalties can devastate small businesses, so landowners must understand how this rule is implemented. Leaving them in the dark will only open them up to unknowingly violating the law. Due to the agencies' veil of secrecy, landowners are denied their constitutional rights of due process and fair notice.

**WAC Letter and Freedom of Information Act Request**

Given the lack of transparency surrounding the elevation coordination memo, the agencies' implementation memos, and the secret field guidance, WAC sent a letter to agency leaders sharing our member's implementation challenges and asking for answers on how the agencies are implementing the rule. It has been six months since we sent the letter, and we have yet to receive a response from either agency. This lack of response only exacerbates the frustration felt by our members, further codifying the belief that the agencies do not actually want our members to have a working understanding of implementation. This motivated WAC and many individual WAC members to pursue our last available option toward gaining this vital information: a Freedom of Information Act (FOIA) request.

Several months after the initial FOIA request, the government provided a 1,128-page response. Unfortunately, a large majority of the documents and text were redacted and labeled as "deliberative" under a misapplication of FOIA Exemption 5 (deliberative process privilege). However, the agencies' FOIA response confirmed two important things: 1) the secret implementation guidance does exist and has been disseminated to Corps districts and 2) Corps

districts were explicitly instructed by headquarters not to share this information with the public.[2] Shockingly, the SharePoint that outlines the secret implementation guidance was redacted from the response. It defies logic that the implementation guidance that is currently being used on the ground is considered "deliberative."

**Failed Public Outreach**

In the wake of *Sackett*, the agencies have repeatedly promised to engage stakeholders on implementation recommendations. In a July 13, 2023, hearing before the House Transportation and Infrastructure Committee's Subcommittee on Water Resources and Environment, then-EPA Assistant Administrator Radhika Fox told Congress the Agency would "host implementation discussions with a range of stakeholders…if there are ongoing questions after that rulemaking is complete." [3] When asked about next steps on WOTUS implementation during a Dec. 5, 2023, hearing before the same subcommittee, Assistant Secretary of the Army for Civil Works Michael Connor similarly promised Congress that the Corps would "continue to engage with the public and then look as we get into next year doing guidance documents."[4]

However, 1.5 years after the *Sackett* decision and exactly one year after the publication of the final "conforming" rule, the agencies have only recently attempted to engage with the public or answer any implementation-related questions from the regulated community. For example, many of our associations participated in the agencies' listening sessions on Feb. 27 and 28, 2024, and raised implementation questions during those meetings that went unanswered. Many of our associations also asked these questions in stakeholder meetings with EPA's Office of Water on March 22, 2024. Unfortunately, the agencies did not respond to our questions during the listening session or at any point thereafter. Our members need this information to ensure that they are complying with the law. Engaging with the regulated community aligns with EPA's[5] and the Corps'[6] own policies promoting meaningful public engagement and involvement. It also

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[2] U.S. Department of the Army, Office of Counsel, Waters Advocacy Coalition FOIA Request No. FP-24-012628.

[3] *Hearing on Agency Perspectives of FY24 Budget Requests: Hearing Before the H. Comm. on Transp. and Infrastructure,* 118 Cong. (July 13, 2023).

[4] *Hearing on Water Resources Development Acts: Status of Past Provisions and Future Needs: Hearing Before the H. Comm. on Transp. and Infrastructure,* 118 Cong. (Dec. 5, 2023).

[5] *See* U.S. Env't. Prot. Agency, Meaningful Engagement Policy (Sept. 2024), *available at* https://www.epa.gov/environmentaljustice/epas-meaningful-engagement-policy .

[6] *See* U.S. Army Corps of Eng'rs , Fact Sheet: Collaboration & Public Participation Center of Expertise, *available at* https://www.iwr.usace.army.mil/Portals/70/docs/CPCX/PIS_Fact_Sheet.pdf. ("Public participation and collaboration are becoming an integral part of the U.S. Army Corps of Engineers' missions. Effective involvement and collaboration achieves more sustainable project solutions and helps projects stay on schedule. Experience has proven that open, ongoing and two-way communication between the Corps and the communities we serve reduces project risks and improves internal and external customer satisfaction." *See also* 2021-2025 Strategic Plan: USACE Collaboration and Public Participation Center of Expertise, *available at* https://www.iwr.usace.army.mil/Portals/70/docs/CPCX/

[6] *See* Memorandum from Richard L. Revesz, Adm'r., Office of Management and Budget; Memorandum for the Heads of Executive Departments and Agencies on "Broadening Public Participation and Community Engagement in the Regulatory Process" at 1 (July 19, 2023), *available at* https://www.whitehouse.gov/wp-

reflects the White House's direction to the heads of all federal agencies to broaden public engagement in the regulatory process. We encourage a more robust and ongoing discussion to ensure clear and consistent WOTUS implementation.

**How is this Different from Significant Nexus?**

As we have already established, the Supreme Court unanimously drove a stake into the heart of the significant nexus test. However, through the agency implementation memos we have pieced together a few aspects of what we anticipate is published in the secret Corps guidance. First, the agencies are merely requiring a physical connection, as opposed to a hydrologic connection in order to establish jurisdiction, which is inconsistent with both the *Rapanos* and *Sackett* decisions. Second, they have confirmed that they will use non-relatively permanent features, such as a dry ditch or a low spot in a farm field, to satisfy a continuous surface connection. Third, in their most recent implementation memo the agencies completely disregard Justice Alito's direction that adjacent wetlands need to be "indistinguishable" from a WOTUS. Gutting the meaning behind this consequential term greatly expands the regulatory reach afforded to the agencies. Finally, it is clear that the agencies want to continue a case-by-case regulatory regime that is akin to how the significant nexus test operated. Considering all of this in combination, it begs the very important question: As a practical matter, how is this fundamentally different from the significant nexus test that the Court struck down? After *Sackett*, many of us in the WAC community expressed concern that the agencies were going to creatively compile polices that achieved the same goals as the significant nexus test. Unbelievably, it seems that is exactly what is transpiring.

**Cooperative Federalism**

Cooperative federalism is one of the clear objectives of the CWA. Section 101(b) of the CWA states that it is Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use of land and water resources, and to consult with the Administrator with respect to the exercise of the Administrator's authority under the CWA. Congress was emphatic that the states have a role to play in protecting our nation's water. This means that there is a clear point where federal jurisdiction ends and state jurisdiction begins. In the past, we have seen regulatory definitions of WOTUS, such as the Obama Administration's rule, that would have usurped state's authority—thereby violating one of the clear intentions of the law. It is important that this balance is preserved.

However, the uncertainty as to where the jurisdictional line lies makes it very difficult for states to understand what is under their authority. We have heard from leadership of the Environmental Council of the States and directly from many individual states that they share the exact same concerns that WAC has articulated over the last year. We have heard members of the environmental community reference "gap waters" that exist in a post-*Sackett* world, but how are they able to identify those? The agencies have not provided a clear interpretation of relatively permanent or continuous surface connection, have not offered the secret implementation guidance and are flouting the decision from *Sackett*. Again, how can states stand up a regulatory program with all these critical pieces missing?

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content/uploads/2023/07/Broadening-Public-Participation-and-Community-Engagement-in-the-Regulatory-Process.pdf

**Conclusion**

Given the need for clear regulations to protect water resources, it is unacceptable that 1.5 years since the *Sackett* decision and more than a year after the agencies finalized their revised 2023 WOTUS rule, the agencies continue to mislead Congress and the public, slow-walk compliance with the *Sackett* decision, and hold project proponents and states hostage in regulatory limbo by failing to make decisions. As a result of the uncertainty, our nation's job creators, small businesses, farmers, landowners, and even states remain in the dark about how the rule is being implemented. This is especially concerning given the serious criminal and civil penalties for even negligent CWA violations, such as simply digging in the wrong place.[7] This represents a total failure of leadership and lack of government transparency.

[7] 33 U.S.C. §1319(c)-(d).