

Congress of the United States
Washington, DC 20515

March 8, 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 you today regarding the United States Supreme Court’s most recent announcement to grant certiorari to *Michael Sackett, et ux., Petitioners v. Environmental Protection Agency, et al. (Sackett)*.¹ For almost two decades, rural communities, businesses, and industries who rely on clean water have been trapped in political and legal limbo, surrounded by a shroud of legal opinions and faulty federal regulations. On June 9, 2021, the United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps) (collectively, the “Agencies”) announced their intent to revise the definition of “waters of the United States,” (WOTUS).² Any decision by the Supreme Court on *Sackett* will have profound impacts on the Agencies’ rulemaking process. Therefore, we urge the EPA and the Corps to halt its current rulemaking.

The United States Court of Appeals for the Ninth Circuit has improperly held that federal jurisdiction for WOTUS should follow the “significant nexus” test laid out in Justice Kennedy’s concurring opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), rather than a more narrow approach based on the areas the Kennedy opinion and the plurality opinion authored by Justice Scalia have in common.³ The Obama Administration’s 2015 WOTUS rule also followed this flawed “significant nexus” approach, resulting in an unprecedented expansion of the definition of

¹Sackett v. EPA, Case No. 21-454.

²Press Release, EPA, *Army Announce Intent to Revise Definition of WOTUS* (June 9, 2021), available at <https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus>.

³ Sackett v. EPA, No. 19-35469, 8 F.4th 1075, (9th Cir. 2021), available at https://cdn.ca9.uscourts.gov/datastore/opinions/2021/08/16/19-35469.pdf?utm_medium=email&_hsmi=2&_hsenc=p2ANqtz-8X1_eQE4an2yYyXY-F5JnWEob7pRRCNyWE_WNPGvKmaVzQkTU4XG3g86yXMmLSbFrQziJUOdjVuALPH_zKcqfxO7MQ3Q&utm_content=2&utm_source=hs_email.

WOTUS.⁴ This rule asserted federal jurisdiction over typically dry channels and a variety of intrastate non-navigable isolated waters.⁵ It is expected that a decision in *Sackett* would set forth a clearer and more appropriate test to define WOTUS and deliver certainty to the farmers, ranchers, private landowners, and industries who face the burden of this federal overreach.

Any future rulemaking must be based on fully informed legal guidance. The Agencies' goal of developing a lasting rule can only be achieved if appropriate legal standards are met, and it is premature to develop a new rule until the Court's *Sackett* opinion is issued. The Agencies themselves have stated that their rulemaking will take into account "updates to be consistent with relevant Supreme Court decisions."⁶ We hope the Agencies' regulatory activities remain consistent with these statements. If the Agencies move ahead with their current rulemaking, and the Court instructs the use of a more limiting test like Justice Scalia's plurality opinion, the Agencies would be forced to implement a new rulemaking process once again post-*Sackett*. Unfortunately, not only would this be a misuse of agency resources and taxpayer dollars, it would only serve to leave the regulated community with prolonged uncertainty regarding regulations and enforcement.

Confusion, unpredictability, and litigation have surrounded the scope of federal authority of our nation's navigable waterways for decades. Currently, the Administration's plan to revise the definition of WOTUS will be the sixth change in ten years; despite the Administration's statements that the new regulation would only be a return to the regulatory definition used before the 2015 WOTUS rule updated in conformance with judicial decisions.⁷ In reality, the rule takes a new and expansive approach to the definition of WOTUS, creating additional costs and burdens for regulated stakeholders.

Further, the Agencies certified that the new regulation would not have a significant effect on small businesses.⁸ However, the United States Small Business Administration's Office of Advocacy, meant to serve as an independent voice for small business, disagreed with this assessment,⁹ specifically finding that the "Agencies have improperly certified the proposed rule under the *Regulatory Flexibility Act* (RFA) because it would likely have direct significant impacts on a substantial number of small entities."¹⁰ The Office of Advocacy asked that the

⁴ Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37053, (Aug. 28, 2015), available at <https://www.federalregister.gov/documents/2015/06/29/2015-13435/clean-water-rule-definition-of-waters-of-the-united-states>.

⁵ *Id.*

⁶ Press Release, *EPA and Army Announce Next Steps for Crafting Enduring Definition of Waters of the United States* (July 30, 2021), available at <https://www.epa.gov/newsreleases/epa-and-army-announce-next-steps-crafting-enduring-definition-waters-united-states>.

⁷ *Id.*

⁸ 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>.

⁹ Letter from Major L. Clark, III, Dep. Chief Counsel, Off. of Advoc., SBA, to Hon. Michael S. Regan, Admin., EPA, and the Hon. Michael L. Connor, Assistant Sec'y of the Army for Civil Works, Dep't of the Army (Feb. 7, 2022), available at <https://cdn.advocacy.sba.gov/wp-content/uploads/2022/02/08152154/Comment-Letter-Proposed-WOTUS-Definition-2022.pdf>.

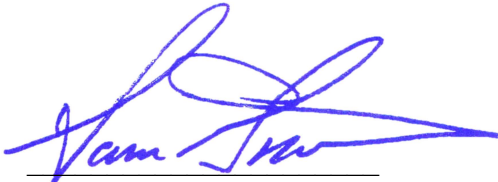
¹⁰ *Id.*

Agencies hold the rule in abeyance while it conducts a Small Business Advocacy Review (SBAR) panel, in accordance with the RFA.¹¹

Rural communities across the country are dedicated to clean water, and they do not deserve to be punished by constant regulatory uncertainty. Any further rulemaking prior to the Supreme Court's decision will jeopardize Americans' best interests and fail to ensure our communities will not be subject to further uncertainty and government overreach. A premature rulemaking will also hinder efforts in communities across the country to build out and improve our Nation's infrastructure, as the regulatory definition of WOTUS has a direct impact on agencies' ability to authorize and complete infrastructure projects in a timely and efficient manner. This is especially troubling timing as Congress recently approved billions of dollars in funding for critical infrastructure.¹²

We urge the EPA and the Corps to halt all current rulemaking actions surrounding the WOTUS definition as the United States Supreme Court takes up this landmark case. The Agencies should instead use this time to continue meaningful engagement with stakeholders, including convening an SBAR panel. This would allow the Agencies to fully understand and account for the impacts to small businesses, farmers, rural communities, and countless other stakeholders that will result from any regulatory change to the definition of WOTUS. We look forward to working with you on this important issue. If you have questions, please contact Ryan Hambleton, Republican Staff Director of the Subcommittee on Water Resources and Environment, at (202) 225-9446.

Sincerely,



Sam Graves
Ranking Member
Committee on Transportation and
Infrastructure



Dan Newhouse
Chairman
Congressional Western Caucus



David Rouzer
Ranking Member
Subcommittee on Water Resources and
Environment

¹¹ *Id.*


¹² *Infrastructure Investment and Jobs Act*, P.L. 117-58.



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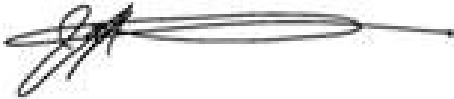
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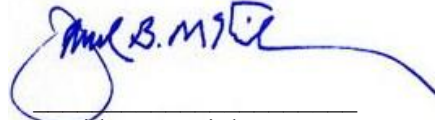
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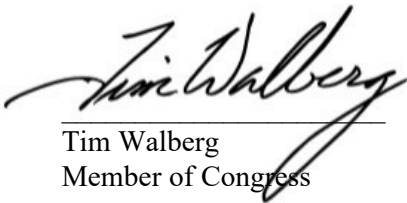
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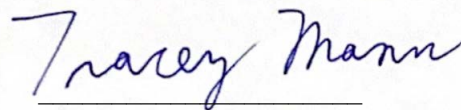
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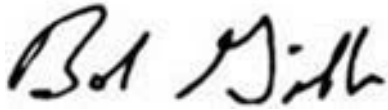
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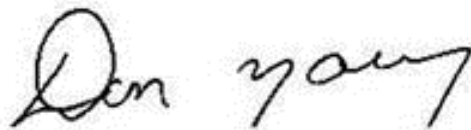
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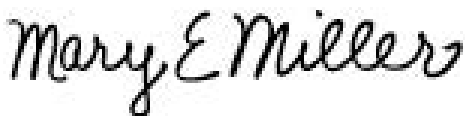
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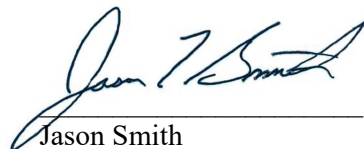
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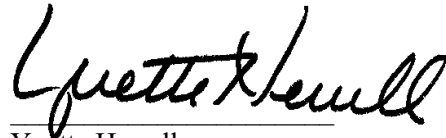
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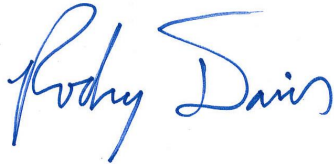
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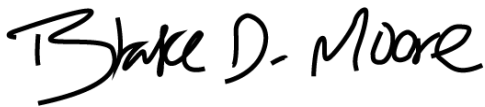
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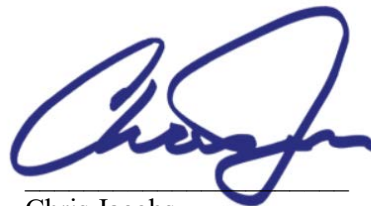
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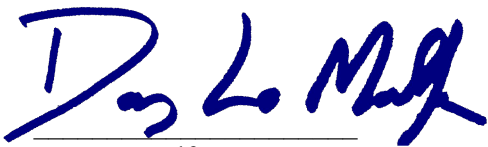
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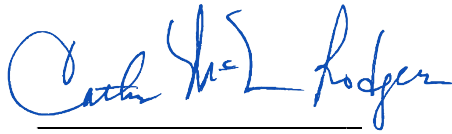
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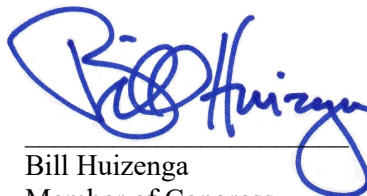
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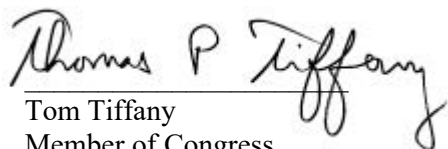
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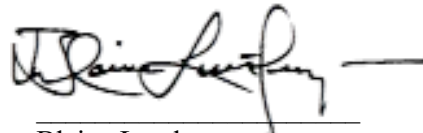
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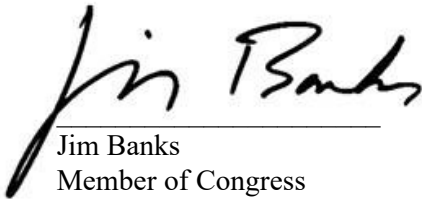
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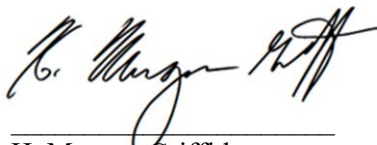
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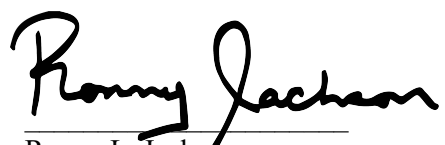
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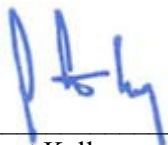
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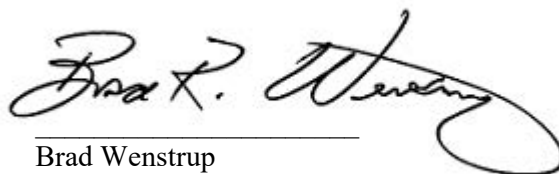
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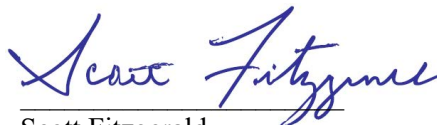
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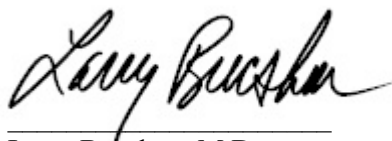
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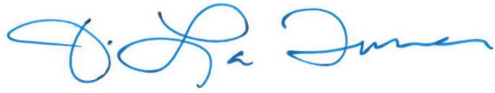
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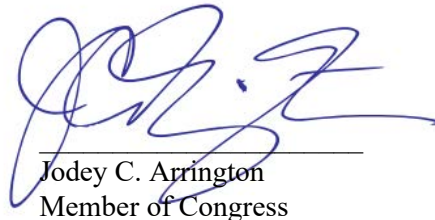
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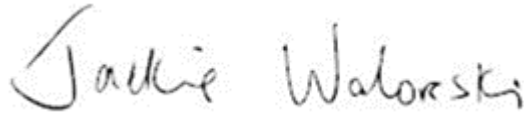
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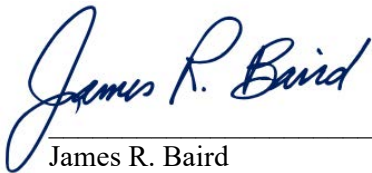
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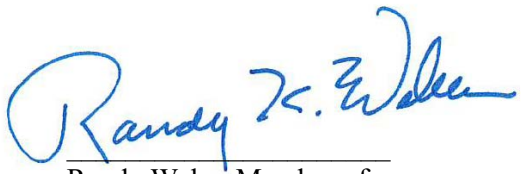
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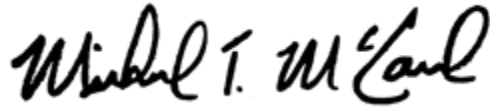
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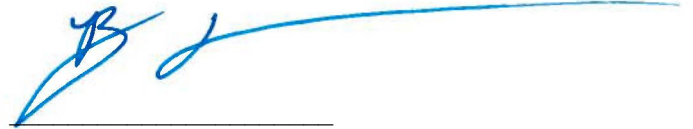
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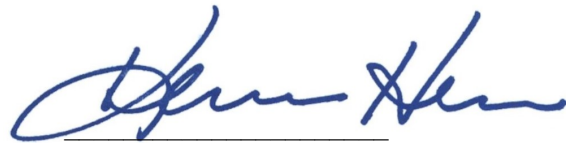
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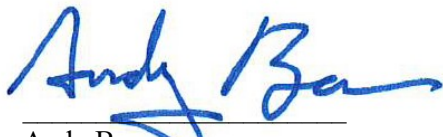
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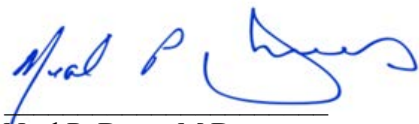
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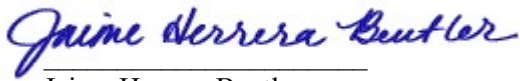
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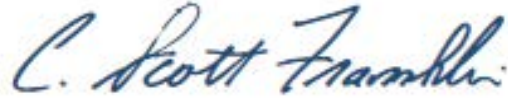
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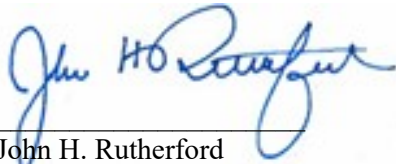
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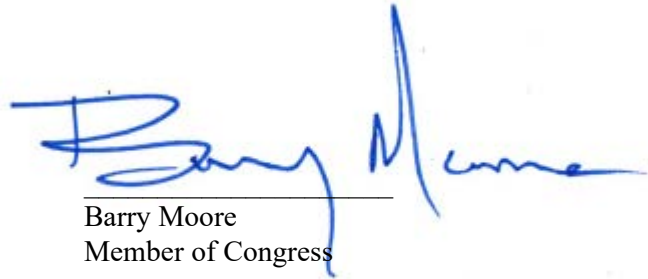
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