February 7, 2022

The Honorable Michael S. Regan
Administrator, Environmental Protection Agency
1200 Pennsylvania Ave, NW
Washington, DC 20460

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

Re: Docket ID No. EPA–HQ– OW–2021–0602; 86 Fed. Reg. 69372 (Dec. 1, 2021)

Administrator Regan and Assistant Secretary Connor:

On behalf of ConservAmerica, a nonprofit dedicated to promoting commonsense, market based and fiscally responsible solutions to today's environmental, conservation, and energy challenges, I write to request that the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) suspend the pending rulemaking to redefine the scope of waters considered jurisdictional under the Clean Water Act (CWA) until the U.S. Supreme Court completes its consideration of *Sackett v. EPA*, Case No. 21-454.

The *Sackett* case turns on the fundamental question as to the scope of the agencies' regulatory authorities under the CWA, commonly referred to as "waters of the United States" (WOTUS). Questions regarding the extent of this authority have been a source of controversy and uncertainty for decades. This has resulted in multiple rulemakings, continuous litigation, and three Supreme Court rulings. The fact that your agencies have reverted to a regulatory framework established in 1986, as you simultaneously rescind and weigh yet another WOTUS definition, underscores the need for the Court to set jurisdictional boundaries more clearly before this current process concludes. When confronted with the possibility that the agencies could move forward with a rule that may be rendered invalid in months, it is reasonable and prudent to pause further action until the Court rules.

As an environmental organization, efforts to reform, strengthen, and improve protections for our nation's waterways are among our highest priorities. But these protections must be achieved on a durable basis and in a manner that respects the rule of law, private property rights, and state and local government roles. Chief among the challenges associated with the application of the CWA over the course of its history is the lack of continuity in its application, and overreach.

Property owners, farmers, and businesses need to know that the rule will be applied consistently and fairly. By establishing a clear WOTUS definition that aligns with the Court's direction, the agencies can provide that much needed certainty. Unfortunately, the agencies do not yet know what that direction will be, and there are indications that the Court will adopt an alternative view of the agencies' authority.

As with the prior 2015 rule, the agencies are relying on a "significant nexus" standard to determine the scope of their authorities. While this standard is derived from Justice Kennedy's concurring opinion in *Rapanos v. U.S.*, a majority of the Supreme Court rejected the "any connection" theory of jurisdiction, finding that standard too broad.[1] The conservative plurality held that the plain language of the CWA "does not authorize this 'Land Is Waters' approach to federal jurisdiction" and that "[i]n applying the definition to ephemeral streams, wet meadows, storm sewers and culverts, directional sheet flow during storm events, drain tiles, manmade drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term 'waters of the United States' beyond parody."[2] Instead, the plurality held that the CWA "confers jurisdiction over only relatively *permanent* bodies of water."[3]

While not binding, the plurality decision is instructive - and the fact that the Court has taken up the *Sackett* case over the Biden Administration's objections is an additional strong indication as to its leaning. The Administration's approach would resort to a case-by case review process over a broad array of features to determine whether they are regulated. For a rule intended to provide clear jurisdictional boundaries, this standard is vague and impracticable. And because the burden is on the regulated community to demonstrate a feature is not jurisdictional, the agencies are arguably extending their authorities over areas that the plurality previously sought to exclude.

In light of the current circumstances and the upcoming Supreme Court review, it would be far better to wait and finalize a WOTUS definition that provides the regulatory certainty that is needed.

Thank you for your prompt consideration of our request.

Sincerely,

Todd Johnston
Vice President

[1] 547 U.S. 715 (2006).
[2] *Id. at 734.*
[3] *Id.* (emphasis in original).