



July 13, 2023

The Honorable Michael L. Connor
Assistant Secretary of the Army for Civil Works
U.S. Army Corps of Engineers
108 Army Pentagon
Washington, DC 20310

Re: Moratorium on Approved Jurisdictional Determinations

Dear Assistant Secretary Connor:

The Waters Advocacy Coalition (WAC) hereby urges the U.S. Army Corps of Engineers (Corps) to lift the nationwide moratorium it has imposed on new “approved jurisdictional determinations” (AJDs). The Corps’ ongoing refusal to issue AJDs is creating significant uncertainty for job creators, food producers, housing developers and other important sectors of the national economy. In May, the Supreme Court unanimously ruled that the “significant nexus” test used by the Corps and the U.S. Environmental Protection Agency (EPA) to establish jurisdiction over certain wetlands and other water features was inconsistent with the Clean Water Act. Rather than implement the Supreme Court’s decision through the AJD process, the Corps has halted the processing of AJDs, putting numerous projects in limbo.

Last month, you testified before the House Committee on Transportation and Infrastructure and stated that the Corps does not expect to be “back in the AJD business” until EPA and the Corps finalize revisions to the regulatory definition of “waters of the United States” that conform the regulations to the Supreme Court’s decision in *Sackett v. EPA*. Although EPA and the Corps have only recently said they expect to issue a final rule by September 1, 2023, the Agencies have in the meantime left property owners to once again feel their way through jurisdictional questions on a case-by-case basis. Together, the lack of guidance from the Agencies and the Corps’ refusal to issue AJDs present significant barriers to growing a thriving economy and building strong infrastructure.

WAC represents a large cross-section of the nation’s economy, including the construction, real estate, mining, manufacturing, forest products, agriculture, energy, recreation, and public health and safety sectors, all of which are vital to a thriving national economy and provide much needed jobs. Many of WAC’s members construct residential developments, multi-family housing units, commercial buildings, shopping centers, factories, warehouses, waterworks, and other utility facilities. WAC members also construct, operate, and maintain critical infrastructure such as highways, bridges, railroads, tunnels, airports, electric generation, transmission, and distribution facilities, and pipeline facilities. WAC’s agricultural members provide virtually every agricultural commodity produced commercially in the United States, including significant portions of the U.S. milk, corn, cotton, sugar, rice, egg, pork, and beef supply. In addition, other WAC members sell and distribute fertilizer, pesticides, and biotechnology products used by American farmers. WAC members design, build, manage, and maintain golf facilities that



generate economic development and tax revenue for thousands of communities across the country. Other WAC members are focused specifically on wildlife and habitat conservation. Members represent producers of most of America's coal, metals, and industrial and agriculture minerals, which form the building blocks of many of the nation's supply chains. WAC also has member groups representing the energy industry that generate, transmit, transport, and distribute our nation's energy to residential, commercial, industrial, and institutional customers.

Sackett provided much needed clarity about the limits of federal regulatory authority under the Clean Water Act by bringing an end to assertions of jurisdiction based on the freewheeling "significant nexus" theory. Moreover, by endorsing the *Rapanos* plurality's "relatively permanent" test, *Sackett* leaves no doubt that isolated water features, non-adjointing wetlands, and ordinarily dry features are not WOTUS. As such, the Corps can readily issue AJDs in the vast majority of cases where *Sackett* provides a clear answer to the question of whether a feature is WOTUS and do not need to wait for the development of a final rule further revising the definition of WOTUS.

As the Agencies recently represented in the 2023 WOTUS Rule, "only roughly 12% of resources assessed in approved jurisdictional determinations under the *Rapanos* Guidance required a significant nexus analysis[.]" 88 Fed. Reg. 3,004, 3,126. (Jan. 18, 2023). Thus, the regulated community continues to need AJDs to help inform decisions about how to conduct their operations and use their land even after *Sackett*'s invalidation of the significant nexus test.

Although nothing in the Clean Water Act compelled the Corps to establish the AJD process decades ago, having codified the process into its regulations (33 C.F.R. Part 331), the Corps may not just arbitrarily refuse to implement its own regulations. The Corps' current refusal to process AJDs flies in the face of its prior assurance that the agency "recognizes the value of JDs to the public and reaffirms the Corps commitment to continue its practice of providing JDs when requested to do so." RGL No. 16-01, at 1 (Oct. 2016). Equally important, the Corps has acknowledged that several Supreme Court justices in *Hawkes* "highlighted that the availability of AJDs is important for fostering predictability for landowners." *Id.* Indeed, those justices emphasized that "[t]he Act, especially without the JD procedure were the Government permitted to foreclose it, continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1817 (2016) (Kennedy, J., concurring).

In light of these considerations, the Corps must not postpone complying with the *Sackett* decision by refusing to process AJD requests. The moratorium on AJDs significantly harms WAC members whose activities depend on prompt Corps attention to AJD and permitting requests. Freezing this important program until at least September 1 will create yet another bottleneck for stakeholders and the Corps who have been struggling to implement numerous rules over the past several years. In some cases, businesses received an AJD under the 2020 Rule, and were then told that these needed to be redone under the pre-2015 regulatory regime or the 2023 WOTUS rule. Implementing yet another rule will take time that our members don't have. This is a busy season, and this new unwarranted delay just adds to years of hardship.



WAC looks forward to the Agencies' efforts to finalize a revised definition of WOTUS that is faithful to *Sackett* and the *Rapanos* plurality's "relatively permanent" test and plans to weigh in on those revisions. In the meantime, however, the Corps cannot simply freeze its regulatory program. We hereby urge the Corps to immediately resume processing AJDs and thus provide WAC members and other landowners certainty over whether use of their lands is subject to regulation under the Clean Water Act.

Sincerely,

A handwritten signature in black ink that reads "CBriggs". The signature is written in a cursive, flowing style.

Courtney Briggs
Chair, Waters Advocacy Coalition

Cc: The Honorable Michael S. Regan, Administrator