



March 29, 2024

TRANSMITTED VIA ELECTRONIC MAIL

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

Mr. Bruno Pigott
Acting Assistant Administrator
U.S. Environmental Protection Agency
Office of Water
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: "Waters of the United States" Implementation

Dear Assistant Secretary Connor and Acting Assistant Administrator Pigott:

The Waters Advocacy Coalition (WAC) writes to share specific concerns and questions related to the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency's (EPA) implementation of the revised rules concerning the definition of "Waters of the United States."

WAC represents a cross-section of the nation's construction, transportation, real estate, mining, manufacturing, forestry, agriculture, energy, wildlife conservation, and public health and safety sectors—all of which are vital to a thriving national economy and provide much-needed jobs in local communities.

On September 8, 2023, the Corps and the EPA (collectively, the Agencies) published a final rule revising the regulatory definition of "waters of the United States" (WOTUS) under the Clean Water Act (CWA)¹ to try to conform the definition to the U.S. Supreme Court's decision in *Sackett v. EPA*.² In the preamble to the final rule, the Agencies stated that while the final rule was "immediately effective," the Agencies may at a later time provide additional administrative guidance documents, memoranda, and training materials for either the public or Corps district staff on how they intend to implement the conforming regulatory definition of WOTUS.³

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-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

¹ Revised Definition of "Waters of the United States"; Conforming, 88 Fed. Reg. 61,964 (Sept. 8, 2023).

² 598 U.S. 651 (2023).

³ 88 Fed. Reg. at 61,966.

complete.”⁴ When asked about next steps on WOTUS implementation during a December 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.”⁵

However, nearly a year after the *Sackett* decision and more than six months after the publication of the final “conforming” rule, the Agencies have failed to meaningfully engage 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 February 27 and February 28, 2024, and raised implementation questions during that meeting. 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’s⁶ and the Corps’⁷ own policies promoting meaningful public engagement and involvement. It also reflects the White House’s direction to the heads of all federal agencies to broaden public engagement in the regulatory process.⁸ We encourage a more robust and ongoing discussion to ensure clear and consistent WOTUS implementation.

⁴ *Hearing on Agency Perspectives of FY24 Budget Requests: Hearing Before the H. Comm. on Transp. and Infrastructure*, 118 Cong. (July 13, 2023).

⁵ *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).

⁶ See U.S. Env’t. Prot. Agency, Public Involvement Policy (May 2023), available at <https://archive.epa.gov/publicinvolvement/web/pdf/policy2003.pdf> (last visited Dec. 27, 2023). See p. 13 (“Unless the applicable statute or regulation provides otherwise, the comment period for public review of unusually complex issues or lengthy documents generally should be no less than 60 days.”); See p. 4 (“The Agency should approach all decision making with a bias of significant and meaningful involvement. Experience throughout government has shown that a lack of adequate participation or of effective means for participation can result in decisions that do not appropriately consider the interests or needs of those that will be most affected by them. Furthermore, early involvement can ultimately reduce delay, by avoiding time-consuming review, public debate or litigation. Finally, decisions based on meaningful public involvement are likely to be better in substance and stand the test of time, avoiding the need to reopen controversial issues.”)

We recognize that EPA is currently updating its Public Involvement Policy, Docket ID No. EPA-HQ-OEJECR-2023-0326, 88 Fed. Reg. 78,747 (Nov. 16, 2023). Several of our associations filed comments in this docket. Still, the new draft guidance emphasizes and builds on EPA’s commitment to meaningful public involvement, which EPA appears to be ignoring. See p. 3 (“The Policy will help EPA staff build and strengthen capacity and capabilities necessary to ensure members of the public are reached and heard in actions which they are interested in or affected by.”)

⁷ 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/>)

⁸ 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-content/uploads/2023/07/Broadening-Public-Participation-and-Community-Engagement-in-the-Regulatory->

However, the Agencies' lack of clarity and transparency surrounding the implementation of the final rule on the ground has stalled critical projects and put the communities that depend on them at risk. In light of these concerns, WAC, and several of its members, submitted requests under the Freedom of Information Act (FOIA) to obtain these materials.⁹ We respectfully urge you to work with the regulated community in a meaningful and constructive dialogue and provide answers to the following questions.

I. Interagency Coordination and Elevation Process of Certain Draft Approved Jurisdictional Determinations (AJDs)

Several of our association members' draft approved jurisdictional determinations (AJDs) have been elevated to Corps and EPA headquarters under the process outlined in two joint coordination memos to the field between the Department of the Army, Corps, and EPA.¹⁰ The purpose of these memos is to establish 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. The memos also outline procedures and specific timelines under which the Agencies can review and provide comment on certain draft AJDs.

Regrettably, our members have experienced disregard for these specified timelines by the Agencies. Some of our members have draft AJDs that were elevated for local or headquarters coordination six months ago and still have not been resolved. Our members have also compared this process to a "black box," with many receiving no communication from the Agencies on the status or any questions or comments the Agencies have regarding their draft AJDs. This raises the following series of questions:

1. Why have the timelines for review been delayed?
2. Why have the reasons for these delays not been communicated with the project proponent?

[Process.pdf](#) ("It is crucial for Federal Agencies to craft regulatory proposals with input from affected members of the public. Public involvement in the development of regulations can lead to more effective and equitable regulations; greater trust in government and democratic accountability; and increased public understanding of the regulatory process."); ("Such engagement improves the information available to Federal Agencies when making evidence-based regulatory decisions. Broadening such public participation and community engagement in the regulatory process is also consistent with this Administration's priorities on public engagement.").

⁹ National Association of Home Builders (Oct. 11, 2023), Waters Advocacy Coalition (March 14, 2024) and National Mining Association (March 15, 2024)

¹⁰ 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.

3. Will the Agencies communicate questions or comments regarding the draft AJDs with project proponents? If not, why not?

II. Headquarters Field Memos

Late last month, the Agencies quietly released two “Headquarters Field Memos Implementing the 2023 Rule, as Amended” on the WOTUS Implementation section of EPA’s website.¹¹ 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.¹² 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. In light of this lack of transparency, we are left with the following questions:

1. How do the Agencies intend to use these field memos?
2. Will these memos be used to inform broadly applicable guidance?
3. Are the approaches set forth in these memos intended to apply to all future AJDs?
4. Are these memos binding on any parties?
5. How will the public be informed when these memos are released?
6. How many of these memos are in development, and when will they be made publicly available?
7. Are there plans to create a well-marked and prominently displayed repository on both agency’s websites to make it easier for the public to locate and review these memos?
8. How soon after finalization will the memos be released? We are aware of memos that were finalized almost a month before they were released to the public.

III. Public Availability of Headquarters-Level Internal Guidance and Training

We understand the Agencies have developed internal guidance, directives, or training documents regarding implementation of the rule that have not been 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*.

¹¹ U.S. Env’t. Prot. Agency and U.S. Army Corps of Eng’rs, Joint Memorandum on LRB-2021-01386 (Feb. 16, 2024), https://www.epa.gov/system/files/documents/2024-02/lrb-2021-01386-joint-decision-memo_final_508c.pdf; U.S. Env’t. Prot. Agency and U.S. Army Corps of Eng’rs, Joint Memorandum on MVS-2023-00288 (Feb. 16, 2024), https://www.epa.gov/system/files/documents/2024-02/mvs-2023-00288-joint-decision-memo_final_508c.pdf.

¹² U.S. Env’t. Prot. Agency and U.S. Army Corps of Eng’rs, Memorandum to Re-evaluate Jurisdiction for NOW-2003-60436 (Feb. 16, 2024), https://www.epa.gov/system/files/documents/2024-01/nwo-2003-60436-joint-decision-memo_final_12-18-23_508c.pdf; ¹² U.S. Env’t. Prot. Agency and U.S. Army Corps of Eng’rs, Memorandum on Evaluating Jurisdiction for LRL-2023-00466 (Feb. 16, 2024), https://www.epa.gov/system/files/documents/2024-02/lrl-2023-00466-joint-decision-memo_final_508c.pdf; U.S. Env’t. Prot. Agency and U.S. Army Corps of Eng’rs, Memorandum to Re-evaluate Jurisdiction for SAS-2001-13740 (Feb. 16, 2024), https://www.epa.gov/system/files/documents/2024-03/sas-2001-13740-joint-decision-memo_final_2-28-24_508c.pdf.

Transparency is paramount for federal agencies, especially in this instance when the CWA carries punitive civil and criminal penalties for even negligent violations. Regardless of whether these implementation documents are nominally informal training or internal guidance documents, if the Agencies are relying on them to administer the CWA, they should be made public. Withholding these documents raises due process concerns. We therefore request the following information:

1. Do the Agencies have any Headquarters-level guidance, training, or directives regarding interpretation or implementation of the final rule that agency staff are relying on to make jurisdictional decisions in the field?
2. Have the Agencies held any training for Agency staff or leadership on implementing the *Sackett* decision and/or final rule?
3. When will the Agencies make these documents, training materials, memoranda, or discussions available to the public?
4. How are the Agencies currently interpreting the term “relatively permanent” on the ground?
5. What training materials have the Department of the Army and EPA Headquarters given to its Districts and Regions to interpret and implement “relatively permanent?”
6. How are the Agencies currently interpreting the term “continuous surface connection” on the ground?
7. What training materials have the Department of the Army and EPA Headquarters given to its Districts and Regions to interpret and implement “continuous surface connection?”
8. What tools or resources are the Agencies using to make these determinations?
9. Will the Agencies seek input from the regulated community on interpreting these key concepts and terms?
10. Will the forthcoming implementation guidance comply with the Administrative Procedure Act and be made available for public review and comment before being finalized?

IV. Conclusion

Thank you in advance for your attention and response to these critical issues affecting a wide swath of the economy. We urge you to engage in substantive discussions with the regulated community and provide answers to these questions. Our members need this information so they can move forward with delivering on this administration’s ambitious infrastructure, transportation, housing, manufacturing, and economic priorities and comply with the law.

If you have any questions, or need additional information, please contact Courtney Briggs, WAC Chair, at courtneyb@fb.org or 202-577-7294.

Sincerely,

American Exploration & Mining Association
American Farm Bureau Federation
American Public Power Association

American Road & Transportation Builders Association
American Society of Golf Course Architects
Associated Builders and Contractors
Associated General Contractors of America
Essential Minerals Association
Golf Course Superintendents Association of America
Independent Petroleum Association of America
National Asphalt Pavement Association
National Association of Home Builders
National Association of Manufacturers
National Association of REALTORS®
National Association of State Departments of Agriculture
National Club Association
National Cotton Council
National Mining Association
National Pork Producers Council
National Rural Electric Cooperatives Association
National Stone, Sand and Gravel
RISE (Responsible Industry for a Sound Environment)
The Fertilizer Institute
Treated Wood Council
Southeastern Lumber Manufacturers Association
U.S. Chamber of Commerce