THE STATE of ALASKA
GOVERNOR MIKE DUNLEAVY

Department of Environmental Conservation

OFFICE OF THE COMMISSIONER
Juneau

PO Box 111800
Juneau, AK 99811
Main: (907) 465-5180
www.dec.alaska.gov

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Office of Management and Budget
Office of Information and Regulatory Affairs
Washington, DC 20004

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Re: EPA Amendments to the "Revised Definition of 'Waters of the United States'"

Dear Office of Information and Regulatory Affairs:

Thank you for agreeing to meet with the State of Alaska on this important issue. As OIRA is aware, in May of 2023, the United States Supreme Court issued *Sackett v. EPA*,[1] a case that drastically changed the landscape of water-pollution regulation under the Clean Water Act. OIRA is currently reviewing EPA's novel proposal to "amend"[2] its January 18, 2023 final waters of the United States ("WOTUS") rule to, as EPA maintains, comport with *Sackett*.[3] In so doing, it is our understanding that EPA would bypass the notice-and-comment process required by § 553 of the Administrative Procedure Act ("APA"). Unsurprisingly, this proposal is controversial.

The controversy surrounding this action speaks to its importance. Its importance makes it imperative that the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps") (collectively, "Agencies") get this rulemaking right. But EPA's approach is all wrong. As explained below, this approach will deprive stakeholders of the opportunity for meaningful comment. This will, in court, doom the new-final rule to reversal (in violation of 5 U.S.C. § 553) and a potential remand. This would further delay any WOTUS certainty. Alaska urges OIRA to return this rule to EPA with instruction to provide for proper notice and comment as required by the APA before proceeding.

1. Stakeholders are deprived of the opportunity to evaluate EPA's interpretation of Sackett.

The pre-*Sackett* world was a world in which the Agencies rarely (if ever) found a wetland they didn't consider WOTUS. *Sackett* turned this world upside-down, leaving regulation of most wetlands, now, to States. The Supreme Court did this by limiting Clean Water Act jurisdiction over wetlands to only those wetlands that are "as a practical matter indistinguishable" from waters that are WOTUS in their own right "such that it is difficult to determine where the 'water' ends and the 'wetland' begins."[4] The Supreme Court

[1] *Sackett v. E.P.A.*, 143 S. Ct. 1322 (May 25, 2023).
[2] While the content of the new-final rule remains a mystery to Alaska, who was not consulted during this process, we assume EPA is deleting all references to "significant nexus," citing inclusion of its novel "severability clause" in the January final rule, and proceeding with that rule sans "significant nexus" rhetoric.
[3] *See* https://www.epa.gov/wotus (stating EPA is amending WOTUS rule "consistent with" *Sackett*).
[4] *Sackett*, 143 S.Ct. at 1340 (internal quotations omitted).

established a two-part test for determining whether a wetland is a WOTUS[5] but did not further define "indistinguishable."

In so holding, *Sackett* pulls heavily from a previous Supreme Court case, *Rapanos v. United States*.[6] Far from parroting *Rapanos*, however, *Sackett* built upon it. *Sackett* reaffirmed the *Rapanos* plurality's limited scope of federal jurisdiction and staked out the appropriate division of power between States and the Agencies in administering the Clean Water Act. Emphasizing the importance of States' "primary authority to combat water pollution by regulating land and water use,"[7] *Sackett* wryly noted that "[i]t is hard to see how the States' role in regulating water resources would remain 'primary' if the EPA had jurisdiction over anything defined by the presence of water"[8] and tracked back to Congress's intent as reflected in § 101(b) to support its re-balancing of federal–State power over regulating water pollution.[9] This rebalancing of federal–State power has implications beyond wetlands that are unlikely to be reflected in EPA's new-final WOTUS rule.

But *Sackett* went further. *Sackett* indicates that the term "navigable" in "navigable waters" had more import than the Agencies have ever given it.[10] *Sackett* dispenses with the notion that CWA jurisdiction may be based on "ecological consequences."[11] *Sackett* admonishes against the overcomplexification of jurisdictional determinations.[12] And in *Sackett*, the Supreme Court *explicitly refused to defer to EPA's final WOTUS rule*.[13] Calling "the scope of EPA's conception of waters of the United States" "truly staggering," the Court squarely rejected each of EPA's arguments. These arguments, of course, are not limited to litigation: they are the very ideas that animated EPA's final WOTUS rule, which was issued before *Sackett* came out. The notion that EPA may simply snip out its fundamentally incorrect premises from the prior final WOTUS rule, like a surgeon removing a tumor, ignores that EPA's entire foundation for the final WOTUS rule is now cancerous.

An example is illustrative. Key to *Sackett*'s holding, and key to future wetlands jurisdictional determinations, is the term "indistinguishable."[14] But nowhere in EPA's 79-page December 7, 2021 rulemaking can that term be found. Nor is that term anywhere in EPA's 141-page January 18, 2023 final rule. This key term must be operationalized by the new-final WOTUS rule in some way: the public deserves to see, and express an opinion on, EPA's plan. And if EPA has chosen to leave this term undefined—allowing EPA staff to expand EPA's jurisdiction during implementation—that's a critiqueable problem.

Further, history teaches that EPA cannot be trusted to faithfully implement Supreme Court decisions. In the wake of *Rapanos*, for example, EPA did not consider itself bound to the language of the *Rapanos* plurality opinion, instead electing to adopt a test embraced by only one justice (the "significant

[5] *Id.* ("This requires the party asserting jurisdiction over adjacent wetlands to establish "first, that the adjacent [body of water constitutes] ... 'water[s] of the United States,' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." (alterations in original)).
[6] 547 U.S. 715 (2006) (pl. op.).
[7] *Sackett*, 143 S.Ct. at 1344.
[8] *Id.* at 1338.
[9] *Id.* at 1342.
[10] *Id.* at 1337.
[11] *Id.* at 1343–44.
[12] *Id.* at 1335, 1342.
[13] *Id.* at 1341.
[14] *Id.* at 1340 (holding that wetlands must be "as a practical matter, indistinguishable" from waters considered WOTUS in their own right for CWA jurisdiction to attach).

nexus" test). Nor did EPA faithfully adhere to the Supreme Court's holding in *SWANCC v. Army Corps*[15] that ecological considerations cannot support an assertion of jurisdiction—a point noted by the Supreme Court in *Sackett*.[16] And don't get us started on *West Virginia v. EPA*,[17] a decision from the 2022 term chastising EPA for exceeding its power under the Clean Air Act. Past practice, in short, gives us less than utmost confidence that EPA will, on its own, faithfully follow Supreme Court precedent.

The public deserves an opportunity to examine, and provide input on, EPA's interpretation of *Sackett* before EPA's new-final rule becomes final.

2. Commentors to the December 7, 2021 proposed rule had no reason to focus on the "relatively permanent" test.

The Agencies' December 7, 2021 proposed rule—the only Biden WOTUS rule that stakeholders had the opportunity to comment on—was 79 pages and included 232 supporting documents, which added thousands more pages for the public to review. In that rule, the "significant nexus" test—now invalid per *Sackett*—represented the farthest extent of federal jurisdiction. As such, it was naturally the focus of scrutiny. Now, the "relatively permanent" test from *Rapanos*, combined with the "indistinguishable" language from *Sackett*, work together to define the farthest reach of federal jurisdiction over wetlands.

The Agencies themselves admitted that the relatively permanent test creates only "a subset of waters that will virtually always have the requisite nexus" under the significant nexus standard.[18] Commentors had no way of knowing that the relatively permanent test would take center stage following *Sackett*. Accordingly, while commenting on the December 7, 2021 proposed rule, stakeholders were incentivized to focus on the unlawfulness of the significant nexus test. And unfortunately, those stakeholders (like Alaska) who *did* comment on the relatively permanent test had to muddle their way through EPA's internally inconsistent articulation of that rule, only to find that EPA's December 7, 2021 rule was not actually faithful to the test as articulated in the *Rapanos* plurality opinion.

EPA's new bait-and-switch-like tactic, in short, will leave stakeholders feeling like they have been misled, and deprived of an opportunity to comment on what is now the most important part of the rule. There is no "good cause" that can justify deviation from these crucial protections.

Aside from its unlawfulness under the APA, this lack of transparency and lack of interest in public input is simply bad policy. OIRA has the power, and the duty under E.O. 12866 § 6(b)(3), to prevent this by returning EPA's new-final rule back to EPA, so EPA may proceed according to the established, and lawful, process of seeking public comment. Alaska respectfully requests that OIRA do that.

Thank you for your time.

Sincerely,

Jason Brune
Commissioner, Alaska Department of Environmental Conservation

[15] *Solid Waste Agency of N. Cook Cnty. (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159, 168 (2001).
[16] *Sackett*, 143 S.Ct. at 1333.
[17] *W. Virginia v. EPA*, 142 S.Ct. 2587 (2022).
[18] 86 Fed. Reg. at 69395.