

# WATERS OF THE U.S. WETLANDS JURISDICTION

## Oppose Expansion of Federal Clean Water Act Jurisdiction

### Action Needed:

**Tell Congress that the Administration needs to resume permitting activities across the board and go back to the drafting table to fully incorporate a recent U.S. Supreme Court ruling. Public stakeholders must be included in this process.**

### Background:

The Clean Water Act grants the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) jurisdiction over “navigable waters,” defined in the act as “Waters of the United States” (WOTUS) without further clarification. Both the federal agencies and the courts have long struggled to define WOTUS: establishing which waters are regulated by the federal government and which fall under the jurisdiction of state and local governments for protection. Federal jurisdiction affects all CWA programs (not just dredge and fill/wetlands permits) and determines when a construction site must obtain a federal permit.

The last four administrations have issued significant guidance and/or new, widely divergent definitions of WOTUS, leading to significant regulatory uncertainty that has stretched over decades. The most recent effort, the Biden administration’s 2023 rule, greatly expanded federal reach over waters and relied heavily on the significant nexus test for determining federal jurisdiction over waters. The 2023 rule is on hold in 27 states in part due to AGC-supported litigation that challenged several key provisions of the rule including significant nexus. Then a U.S. Supreme Court decision in a separate case (May 25, 2023, *Sackett v. EPA*) struck down the significant nexus test. The agencies released an amended version of the 2023 rule, but did not address the legal failings of the rule and did not solicit public feedback on their revisions.

### AGC Message:

- **Congress should direct agencies to resume jurisdictional determinations that reflect the U.S. Supreme Court decision in the *Sackett* case.** Over the summer, EPA and the Corps placed an unnecessary and disruptive moratorium on approved jurisdictional determinations (i.e., permitting decisions) while they rush through edits to the 2023 rule considering the *Sackett* decision. And while the agencies have stated they will resume permitting now that the revised rule is out; it is unclear whether permitting will move forward in the 27 states where the 2023 rule is still on hold.
- **The 2023 rule is legally unsupported beyond its reliance on significant nexus.** The 2023 rule is on hold in 27 states, was rejected by both chambers of Congress, and its core provisions were thrown out by the Supreme Court. The hastily drafted, minor edits to the rule do not address its significant legal flaws, nor fully implement the *Sackett* decision. Not only did the Court reject significant nexus, but the Justices clarified that isolated water features, non-adjointing wetlands, and ordinarily dry features are not WOTUS. Furthermore, the agencies finalized their revisions without accepting public comment—a practice typically reserved for only minor, non-controversial edits. The regulated community must be given a seat at the table in the drafting of a truly durable definition of WOTUS.