

Updates on the Definition of “Waters of the United States”

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“Waters of the United States” and the Clean Water Act

- **“Waters of the United States” is a threshold term in the Clean Water Act that establishes the geographic scope of federal jurisdiction under the Act.**
- **Clean Water Act regulatory programs address “navigable waters,” defined in the statute as “the waters of the United States, including the territorial seas.”**
- **The Clean Water Act does not define “waters of the United States.”**
- **The EPA and the Department of the Army have defined “waters of the United States” by regulation since the 1970s.**

“Waters of the United States” and the Clean Water Act

- **§ 1251(a).** The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.
- **§ 1251(a)(1).** it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
- **§ 1344. Permits for dredged or fill material**
 - **(a) Discharge into navigable waters at specified disposal sites**
- **§ 1343. Ocean discharge criteria**
 - **(a) Issuance of permits.** No permit under section 1342 of this title for a discharge into the territorial sea, the waters of the contiguous zone, or the oceans shall be issued,

Why “Waters of the United States” Matters

“Navigable Waters”: Waters of the United States,
including Territorial Seas

303
Water
Quality
Standards
& TMDLs

States
Tribes
EPA

311
Oil Spill
Programs

EPA
USCG
DOT

401
State/Tribal
Certification

States
Tribes
EPA

402
Pollutant
Discharge
Permits

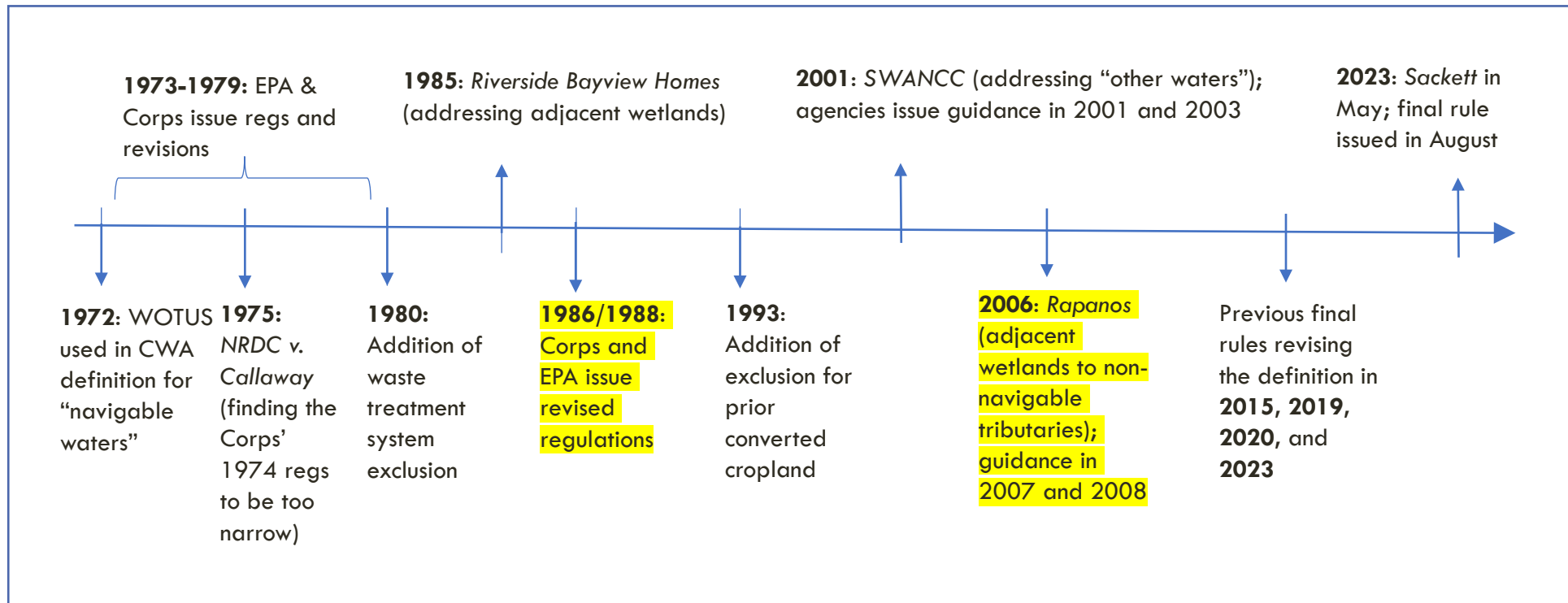
States
Tribes
EPA

404
Discharge of
dredged
and/or fill
material

USACE
EPA
States
Tribes

“Waters of the United States” Over Time

The definition of “waters of the United States” has been a subject of dispute and addressed in several Supreme Court cases.



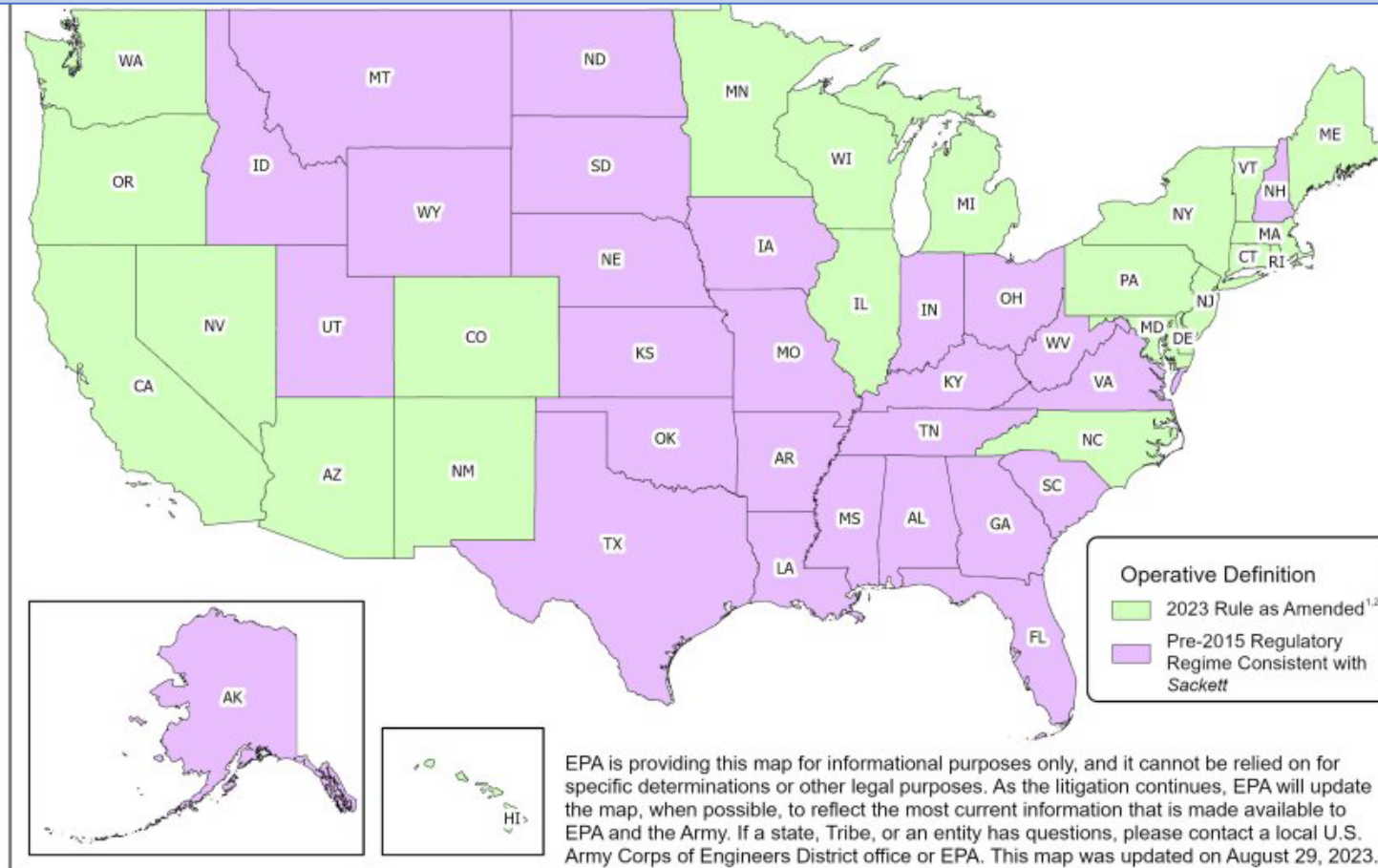
Recent Events

January 2023	2023 Rule published – “Revised Definition of ‘Waters of the United States’”
March 2023	2023 Rule effective
May 2023	<i>Sackett</i> Supreme Court decision
June 2023	EPA and Army announce plans to issue a final rule amending the 2023 rule
August 2023	Final rule amending the 2023 rule: signature and announcement
September 2023	Final rule amending the 2023 rule: publication and effective date

Ongoing Litigation

- **As a result of ongoing litigation on the January 2023 Rule, the agencies will implement the January 2023 Rule, as amended by the conforming rule, in 23 states, the District of Columbia, and the U.S. Territories.**
- **In the other 27 states and for certain parties, the agencies are interpreting "waters of the United States" consistent with the pre-2015 regulatory regime and the Supreme Court's decision in *Sackett* until further notice.**

Operative Definition of “Waters of the United States”



¹Also operative in the U.S. territories and the District of Columbia

²The pre-2015 regulatory regime implemented consistent with *Sackett* is operative for the Commonwealth of Kentucky and Plaintiff-Appellants in *Kentucky Chamber of Commerce, et al. v. EPA* (No. 23-5345) and their members (Kentucky Chamber of Commerce, U.S. Chamber of Commerce, Associated General Contractors of Kentucky, Home Builders Association of Kentucky, Portland Cement Association, and Coogan Chamber of Commerce).

The *Sackett* Decision

- While the 2023 Rule was not directly before the Court, the Court considered the jurisdictional standards set forth in the rule.
- The Court concluded that the significant nexus standard was inconsistent with the Court's interpretation of the Clean Water Act (CWA).

The *Sackett* Decision

- The Court concluded that the *Rapanos* plurality was correct: the CWA's use of "waters" encompasses only those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes.
- The Court also agreed with the *Rapanos* plurality that wetlands are "waters of the United States" when the wetlands have a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between "waters" and wetlands.

Conforming Rule: Final Rule Amending the January 2023 Rule

- The agencies have determined that there is “good cause” under section 553(b)(B) of the Administrative Procedure Act to issue a final rule without prior proposal and opportunity for comment because such notice and opportunity for comment is unnecessary.
- Certain provisions of the 2023 Rule are invalid under the Supreme Court’s interpretation of the Clean Water Act in the *Sackett* decision.
- Providing advance public notice and seeking comment is unnecessary because the sole purpose of this rule is to amend these specific provisions of the 2023 Rule to conform with *Sackett*, and such conforming amendments do not involve the exercise of the agencies’ discretion.

Preamble to the Conforming Rule

- I. Why are the agencies issuing this final rule?**
- II. Which provisions are amended?**
- III. Severability**
- IV. Statutory and Executive Orders reviews**

Preamble to the Conforming Rule

- **It is both reasonable and appropriate for the agencies to promulgate this rule in response to a significant decision of the Supreme Court and to provide administrative guidance to address other issues that may arise outside of this limited rule. The agencies have a wide range of approaches to address such issues, including:**
 - **approved jurisdictional determinations and Clean Water Act permits;**
 - **guidance;**
 - **notice and comment rulemaking; and**
 - **agency forms and training materials.**

Preamble to the Conforming Rule

- **The agencies will continue to interpret the definition of “waters of the United States” consistent with the *Sackett* decision.**
- **The agencies also intend to hold stakeholder meetings to ensure the public has an opportunity to provide the agencies with input on other issues to be addressed.**

Changes to January 2023 Rule Jurisdictional Waters

Categories of Jurisdictional Waters

(a)(1)

- (i) Traditional Navigable Waters
- (ii) Territorial Seas
- (iii) Interstate Waters – revised to remove interstate wetlands

(a)(2) Impoundments of Jurisdictional Waters

(a)(3) Tributaries – revised to remove significant nexus test

(a)(4) Adjacent Wetlands – revised to remove significant nexus test

(a)(5) Additional Waters – revised to remove significant nexus test and streams and wetlands

Changes to January 2023 Rule Jurisdictional Waters

(1) Waters which are:

- i. Currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- ii. The territorial seas; or
- iii. Interstate waters, ~~including interstate wetlands~~.

(a)(1)(iii) interstate waters revised to remove interstate wetlands

Changes to January 2023 Rule Jurisdictional Waters

- (3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section
- ~~(i) that are relatively permanent, standing or continuously flowing bodies of water; or~~
 - ~~(ii) that either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section.~~

(a)(3) tributaries revised to delete significant nexus standard

No Changes to January 2023 Rule Exclusions

(b)(1) Waste treatment systems

(b)(2) Prior converted cropland

(b)(3) Certain ditches

(b)(4) Artificially irrigated areas that would revert to dry land if irrigation ceased

(b)(5) Certain artificial lakes and ponds

(b)(6) Artificial reflecting or swimming pools or other small ornamental bodies of water

(b)(7) Certain waterfilled depressions

(b)(8) Swales and erosional features

Changes to January 2023 Rule Definitions

(c)(1) Wetlands

(c)(2) Adjacent – revised

(c)(3) High tide line

(c)(4) Ordinary high water mark

(c)(5) Tidal waters

(c)(6) Significantly affect – deleted

Changes to January 2023 Rule Definitions

(2) *Adjacent* means having a continuous surface connection. ~~bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are “adjacent wetlands.”~~

Revised definition of
“adjacent”

Corps Approved Jurisdictional Determinations (AJDs)

- After the *Sackett* decision was issued, the Corps paused issuance of all AJDs while the agencies determined next steps.
- After a short time, the Corps began issuing some types of AJDs:
 - Where no water resources are involved (dry land AJDs).
 - Where features meet the terms of the exclusions under the 2023 Rule or pre-2015 regulatory regime, where applicable.
- The Corps resumed issuing all types of AJDs on the effective date of the new rule.

Additional Information

- EPA and Department of the Army are holding two webinars for Tribes and states on November 15 and November 16, 2023. Both webinars will present the same information on the conforming rule and pre-2015 regulatory regime.
- Register for the November 15, 2023 (2:30pm-4pm Eastern) webinar:
https://www.zoomgov.com/webinar/register/WN_kLdkK6LQSU2xi5DcrA123g#/registration
- Register for the November 16, 2023 (12:30pm-2pm Eastern) webinar:
https://www.zoomgov.com/webinar/register/WN_6bTSgfhRcm0PnVQLeaKVw

Additional Information

- See <https://www.epa.gov/wotus> for additional information.
- Please contact wotus-outreach@epa.gov with any questions.

Questions?