

# Waters of the United States

## ISSUE SUMMARY:

On August 29, 2023, the U.S. Environmental Protection Agency (EPA) and Department of the Army (the agencies) issued a final rule to amend the final [“Revised Definition of ‘Waters of the United States’” rule](#), published in the *Federal Register* on January 18, 2023. This final rule conforms the definition of “waters of the United States” to the U.S. Supreme Court’s May 25, 2023, decision in the case of *Sackett v. Environmental Protection Agency*. The Conforming Rule, “Revised Definition of ‘Waters of the United States’; Conforming,” published in the *Federal Register* and became effective on September 8, 2023. As a result of ongoing litigation, the Amended January 2023 Regulations are enjoined in certain states, and the pre-2015 regulatory regime is being implemented consistent with *Sackett* in those states. The agencies are committed to ensuring that the definition of “waters of the United States” is consistently implemented in the field.

## UPCOMING MILESTONES:

- **Fall/Winter 2024 - Implementation:** The agencies are developing case-specific field memoranda, tools and resources to assist in assessing whether a water is jurisdictional or not under the applicable definition of “waters of the United States.” The EPA and Army have approved jurisdictional determination coordination processes in place to provide guidance to EPA regional and Corps district offices on questions that have been elevated to the agencies’ headquarters offices for input. The coordination procedures have been extended through March 2025 to allow the agencies to continue to work together to address issues as they arise in the field and to ensure accurate and consistent implementation. Any [case-specific field memoranda](#) are distributed to all of the EPA regions and Corps districts and are posted on the web to ensure transparency and accessibility to the public. The EPA and Army also continue to work with USDA on prior converted cropland issues and other related matters. The agencies are also finalizing five regionalized streamflow duration assessment methods (SDAMs) to classify streamflow duration and assist in determining whether tributaries are “relatively permanent.”
- **Fall/Winter 2024 - Litigation:** As a result of litigation, the 2023 Rule is enjoined in 26 States. As a result, the pre-2015 regulatory regime is being implemented consistent with *Sackett* in those states. Shortly after the parties in these cases had finished litigating the motions for preliminary injunction, the Supreme Court handed down its ruling in *Sackett*. After the agencies issued the Conforming Rule, the plaintiffs in the Southern District of Texas and North Dakota litigation filed amended complaints challenging the Amended 2023 Regulations late last year. Early in 2024, the plaintiffs in the Southern District of Texas and North Dakota litigation filed motions for summary judgment seeking to vacate the Amended 2023 Regulations. In June 2024, a motion for a limited preliminary injunction against the rule brought by an individual litigant was denied by the U.S. District Court for the Eastern District of North Carolina. Briefing on the motions for summary judgment will conclude in fall of 2024, and the district courts could issue rulings by the end of the year on the legality of the Amended 2023 Regulations. Briefing in the Fourth Circuit Court of Appeals in the North Carolina preliminary injunction litigation will be concluded by the end of the year. Kentucky has stated that it intends to file an amended complaint against the Amended 2023 Regulations in Fall 2024.

## BACKGROUND:

“Waters of the United States” is a threshold term in the Clean Water Act and establishes the geographic scope of federal jurisdiction under the Act. Clean Water Act regulatory programs, including water quality standards, impaired waters and total maximum daily loads (TMDLs), oil spill prevention, preparedness and response programs, state and Tribal water quality certification programs, and section 402 and 404 (dredge and fill) permitting programs address “navigable waters,” defined in the statute as “the waters of the United States, including the territorial seas.” Over

the past five decades there have been multiple definitions and regulatory interpretations, multiple Supreme Court decisions, and ongoing litigation surrounding the definition of “waters of the United States.”

The longstanding regulations for defining “waters of the United States” were established in 1986 and 1988 by the Corps and EPA, respectively. U.S. Supreme Court opinions came in 1985, 2001, and 2006. After the 2006 decision in *Rapanos*, the agencies implemented the pre-2015 regulatory regime, which is the pre-2015 regulations defining “waters of the United States” implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience. The agencies revised their regulations in 2015, 2019, and 2020. In 2021, two district courts vacated the 2020 Navigable Waters Protection Rule, and the agencies returned to implementing the pre-2015 regulatory regime nationwide. In January 2023, the agencies published a revised definition of “waters of the United States” in the *Federal Register*, and the rule became effective on March 20, 2023.

On May 25, 2023, the Supreme Court issued the *Sackett* decision. Although the January 2023 Rule itself was not directly before the Court, the Court did consider the jurisdictional standards that were set forth in the January 2023 Rule, including the relatively permanent standard and significant nexus standard. The Supreme Court concluded that the significant nexus standard was inconsistent with the Court’s interpretation of the Act. The Court also concluded that the *Rapanos* plurality was correct that the term “waters” as used in the Clean Water Act encompasses only relatively permanent, standing or continuously flowing bodies of water, including streams, oceans, rivers, and lakes. For wetlands, the Court also agreed with the plurality that, to be jurisdictional, wetlands must have a continuous surface connection to water bodies that are “waters of the United States” in their own right so that there is no clear demarcation between “waters” and wetlands. Based on the Court’s decision, EPA and Army determined that the regulatory text of the January 2023 Rule needed to be amended. The Conforming Rule published in the *Federal Register* in September 2023, and that rule became immediately effective. In that rule, the agencies amended key aspects of the January 2023 regulatory text to conform it to the *Sackett* decision.

Each of the agencies’ rulemakings since 2015 to revise the definition of “waters of the United States” has given rise to a host of legal challenges. This litigation has, at times, led to different definitions of “waters of the United States” being in effect in different parts of the country. Most recently, parties, including 27 states have filed suit against the January 2023 Rule. As a result of the litigation, the January 2023 Rule is not operative in certain states until further legal action. Where the January 2023 Rule is not enjoined, the agencies are implementing the January 2023 Rule, as amended by the Conforming Rule. The agencies are implementing the pre-2015 regulatory regime consistent with *Sackett* where the January 2023 Rule is enjoined.

The Amended 2023 Regulations identify five categories of “waters of the United States”: traditional navigable waters, the territorial seas, and interstate waters; impoundments of jurisdictional waters; relatively permanent tributaries of the above waters; wetlands adjacent to traditional navigable waters, the territorial seas, interstate waters, and relatively permanent jurisdictional impoundments and tributaries; and relatively permanent lakes and ponds not covered in the other categories that have a continuous surface connection to traditional navigable waters, the territorial seas, interstate waters, or relatively permanent tributaries. In light of *Sackett*, adjacent means “having a continuous surface connection.” The regulations also detail what are not “waters of the United States,” which include waste treatment systems, prior converted cropland, certain ditches, certain artificially irrigated areas, certain artificial lakes and ponds, certain artificial reflecting or swimming pools, certain waterfilled depressions; and swales and erosional features.

To make sure that EPA and Corps staff were prepared to implement the regulatory regimes currently in effect, the agencies hosted a series of trainings for their field staff. The agencies also hosted webinars for states and Tribal co-regulators and for other federal agencies. The state and Tribal webinars were recorded and posted on the web for the public to access.

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☒ Congress ☒ Industry ☒ States ☒ Tribes ☒ Media ☒ Other Federal Agency  
☒ NGO ☒ Local Governments ☒ Other (name of stakeholder) Army/Corps, DOJ, USDA, DOT, DOI

## MOVING FORWARD:

- EPA is committed to consistent and effective implementation of the definition of “waters of the United States” consistent with *Sackett* through close coordination with the Army and Corps, developing case-specific field memoranda [under the Amended January 2023 Regulations](#), case specific field [memoranda under the pre-2015 regulatory regime](#), implementation [tools](#), and resources. OW is committed to ensuring effective communication, collaboration, and coordination with stakeholders and throughout the agency with the Clean Water Act programs that rely on the definition of “waters of the United States.”
- Regarding the ongoing litigation, EPA is working closely with DOJ, Army, and the Corps to defend the Amended 2023 Regulations in a series of lawsuits filed by trade associations, states, and one individual, as well as on individual challenges to enforcement cases and jurisdictional determinations.
- EPA, the Corps, and Army are also seeking ways to expand and build up existing efforts to work with Tribes, states, and territories to enhance their programs, and to build and expand partnerships with NGOs and other organization working on stream and wetland protection efforts.

LEAD OFFICE/REGION: OFFICE OF WATER

OTHER KEY OFFICES/REGIONS: ALL EPA  
REGIONS, OGC, OECA, OLEM, ORD