

**From:** [Walker, William T Jr CIV USARMY CENAO \(USA\)](#)  
**To:** [CDL-REG-All](#)  
**Cc:** [Smith, Thomas Patrick SES USARMY USACE \(USA\)](#); [Cooper, David R SES USARMY CEHQ \(USA\)](#); [Gaffneysmith, Margaret E CIV USARMY CEHQ \(USA\)](#); [Inkelas, Daniel CIV USARMY CEHQ \(USA\)](#); [Zilioli, Erica M CIV USARMY CEHQ \(USA\)](#)  
**Subject:** WOTUS Rule Implementation Update  
**Date:** Monday, April 24, 2023 6:42:27 PM  
**Attachments:** [WOTUS Rule Effective by State-20APR23.xlsx](#)

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All,

WOTUS Rule update effective April 24, 2023. This direction replaces the direction issued April 21, 2023 at 3:35 PM.

On December 30, 2022, the Environmental Protection Agency and the U.S. Department of the Army ("the agencies") announced the final "Revised Definition of 'Waters of the United States'" rule. On January 18, 2023, the rule was [published in the Federal Register](#), and the rule took effect on March 20, 2023.

However, in light of the March 19, 2023, District Court for the Southern District of Texas order preliminarily enjoining the 2023 Rule in Idaho and Texas, the April 12, 2023, District Court for North Dakota order preliminarily enjoining the 2023 Rule in 24 States, and the most recent April 20, 2023, U.S. Court of Appeals for the Sixth Circuit stay of enforcement of the 2023 Rule until May 10, 2023, the agencies are interpreting "waters of the United States" consistent with the pre-2015 regulatory regime in the following 27 States until further notice:

Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming.

The Stay issued by the 6<sup>th</sup> Circuit Court of Appeals until May 10, 2023 applies to the Commonwealth of Kentucky and all Plaintiff-Appellants in *Commonwealth of Kentucky v. EPA* (No. 23-5343) and *Kentucky Chamber of Commerce, et al. v. EPA* (No. 23-5345). Therefore, in the remaining 23 States (and in the District of Columbia and in all U.S. territories) we are still implementing the 2023 Rule for most parties. However, we are implementing the pre-2015 regime for entities that are "Plaintiff-Appellants in Case 23-5345 and their members". This includes: Kentucky Chamber Of Commerce, U.S. Chamber Of Commerce, Associated General Contractors Of Kentucky, Inc., Home Builders Association Of Kentucky, Portland Cement Association, and Georgia Chamber Of Commerce. The 23 States to which this applies are:

Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin.

The Corps may not apply the 2023 Rule to the Commonwealth of Kentucky, or to the Plaintiff-Appellant organizations or their members who identify themselves as such. Recognizing that members of these organizations may reside throughout the country, and their membership may not be self-evident, if you are operating in one of the 23 states listed immediately above (or in the

District of Columbia or in a U.S. territory), before processing or issuing any new approved jurisdictional determination , you may wish to ask the requestor if they are the Commonwealth of Kentucky, or a Plaintiff-Appellant organization, or a member of a Plaintiff-Appellant organization. If the requestor can document any of these three instances are true, then the Corps district should complete the approved jurisdictional determination under the pre-2015 regime.

The agencies developed the 2023 Rule with consideration of the relevant provisions of the Clean Water Act and the statute as a whole, relevant Supreme Court case law, and the agencies' technical expertise after more than 45 years of implementing the longstanding pre-2015 "waters of the United States" framework. This rule also considers the best available science and extensive public comment to establish a definition of "waters of the United States" that supports public health, environmental protection, agricultural activity, and economic growth. The agencies continue to believe the rule, which is "informed by the text of the relevant provisions of the Clean Water Act and the statute as a whole, as well as the scientific record, relevant Supreme Court case law, input from public comment, and the agencies' experience and technical expertise after more than 45 years of implementing the longstanding pre-2015 regulations defining 'waters of the United States,'" is the best interpretation of the Clean Water Act.

The agencies remain committed to establishing and implementing a durable definition of "waters of the United States" informed by diverse perspectives. Our goal is to protect public health, the environment, and downstream communities while supporting economic opportunity, agriculture, and industries that depend on clean water.

The attached spreadsheet indicates which WOTUS regulations we are currently implementing in each state and in U.S. territories. This spreadsheet is maintained on the HQ Jurisdiction SharePoint.

Additional information will be provided as it becomes available.

Resources for implementation of the pre-2015 regime and the 2023 Rule are available on the HQ Jurisdiction SharePoint: (b)(5)

Please contact Matt Wilson if you have questions.

Thank You

Tom

William "Tom" Walker  
Chief, Regulatory Program (Acting)  
Headquarters, U.S. Army Corps of Engineers  
441 G Street, NW  
Washington, DC 20314

(b)(6)

	<b>4/20/23-current</b>
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**Washington**  
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2023 Rule; Pre-2015 Regime for the Commonwealth of Kentucky and Plaintiff-Appellants in Case 23-5345 and their members  
Pre-2015 WOTUS Regime

**Wisconsin**  
**Wyoming**

2023 Rule; Pre-2015 Regime for the Commonwealth of Kentucky and Plaintiff-Appellants in Case 23-5345 and their members  
Pre-2015 WOTUS Regime

**U.S. Territories**

2023 Rule; Pre-2015 Regime for the Commonwealth of Kentucky and Plaintiff-Appellants in Case 23-5345 and their members

**From:** [Wilson, Matthew S CIV USARMY CEHQ \(USA\)](#)  
**To:** [CDL-REG-All](#)  
**Subject:** WOTUS Rule Implementation Update  
**Date:** Friday, May 12, 2023 2:09:18 PM  
**Attachments:** [WOTUS Rule Effective by State-20APR23.xlsx](#)  
[WOTUS operative definition 05122023.pdf](#)

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Regulators,

BLUF: On 10 May 2023 the 6<sup>th</sup> Circuit Court of Appeals issued an injunction pending appeal of the Kentucky WOTUS litigation. What this means for our current implementation of WOTUS is that nothing has changed relative to how we have been implementing WOTUS since 24 April 2023. The attached map and the attached spreadsheet indicate which WOTUS Rule is currently in effect in each US jurisdiction.

In the 23 states where the 2023 Rule remains in effect we are still implementing the 2023 Rule for most parties. However, we are implementing the pre-2015 regime for entities that are "Plaintiff-Appellants in Case 23-5345 and their members". This includes: Kentucky Chamber Of Commerce, U.S. Chamber Of Commerce, Associated General Contractors Of Kentucky, Inc., Home Builders Association Of Kentucky, Portland Cement Association, and Georgia Chamber Of Commerce. The 23 States to which this applies are: Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin.

EPA has added a statement to its website which describes the current Rule status.

<https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>

Headquarters is adding a similar statement to the Announcements on our Regulatory webpage, and that announcement should be up soon.

<https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/>

Once the HQ announcement is live, districts may want to add the announcement to their district webpages as well.

Resources for implementation of the pre-2015 regime and the 2023 Rule are available on the HQ Jurisdiction SharePoint: (b)(5)

Thank you for your patience and efforts as we work through this transitional period.

Please feel free to contact me by telephone or by email if you have any questions.

Matt Wilson  
Regulatory Program Manager  
Headquarters, U.S. Army Corps of Engineers  
441 G Street NW

Washington, DC 20314-1000

(b)(6)

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**Sent:** Monday, April 24, 2023 7:42 PM  
**To:** CDL-REG-All (b)(6)  
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Chief, Regulatory Program (Acting)  
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441 G Street, NW  
Washington, DC 20314

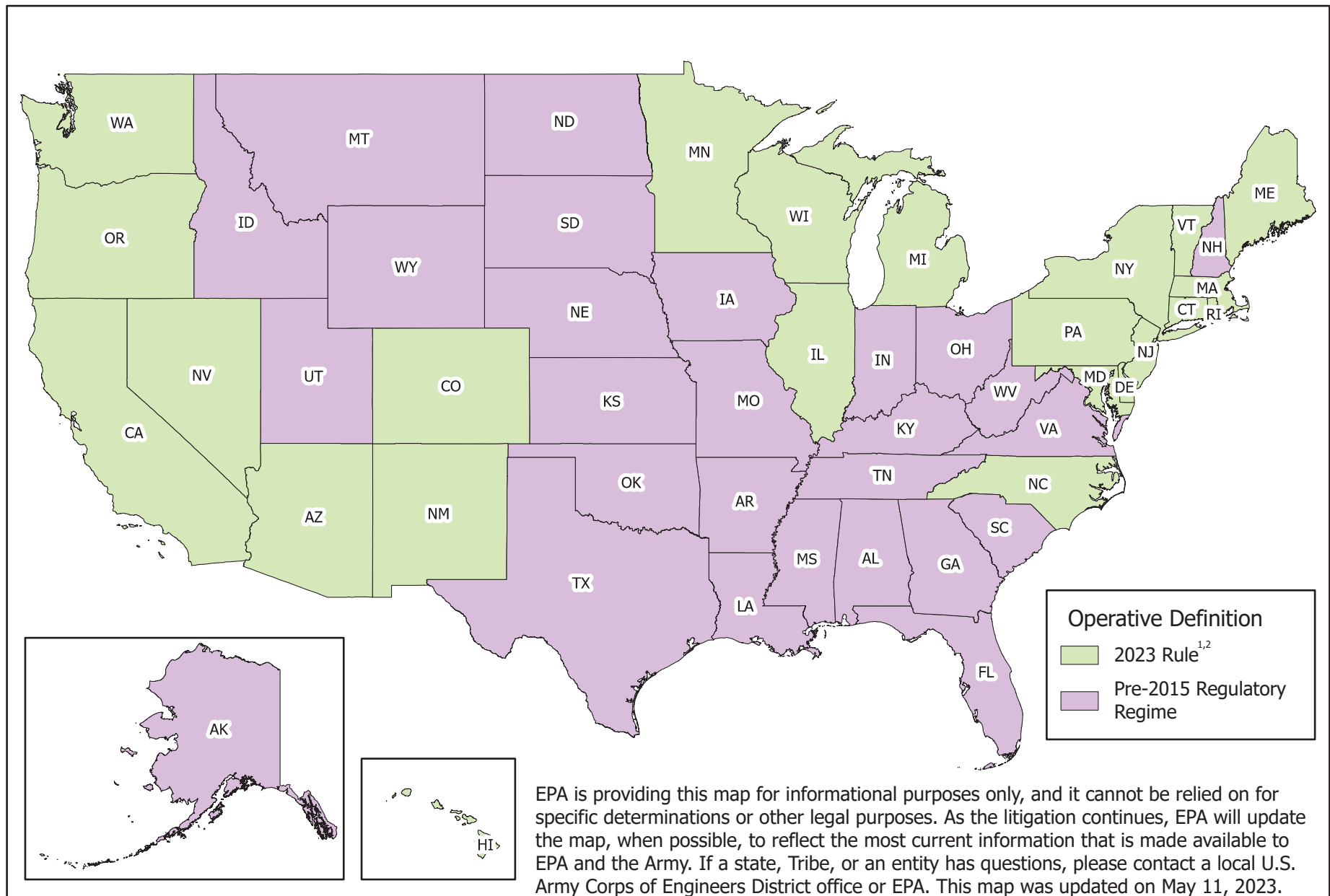
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# Operative Definition of "Waters of the United States"



<sup>1</sup> Also operative in the U.S. territories and the District of Columbia

<sup>2</sup>The pre-2015 regulatory regime 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 Georgia Chamber of Commerce).

## Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

## SUPREME COURT OF THE UNITED STATES

## Syllabus

SACKETT ET UX. *v.* ENVIRONMENTAL PROTECTION  
AGENCY ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT

No. 21–454. Argued October 3, 2022—Decided May 25, 2023

Petitioners Michael and Chantell Sackett purchased property near Priest Lake, Idaho, and began backfilling the lot with dirt to prepare for building a home. The Environmental Protection Agency informed the Sacketts that their property contained wetlands and that their backfilling violated the Clean Water Act, which prohibits discharging pollutants into “the waters of the United States.” 33 U. S. C. §1362(7). The EPA ordered the Sacketts to restore the site, threatening penalties of over \$40,000 per day. The EPA classified the wetlands on the Sacketts’ lot as “waters of the United States” because they were near a ditch that fed into a creek, which fed into Priest Lake, a navigable, intrastate lake. The Sacketts sued, alleging that their property was not “waters of the United States.” The District Court entered summary judgment for the EPA. The Ninth Circuit affirmed, holding that the CWA covers wetlands with an ecologically significant nexus to traditional navigable waters and that the Sacketts’ wetlands satisfy that standard.

*Held:* The CWA’s use of “waters” in §1362(7) refers only to “geographic[al] features that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes’” and to adjacent wetlands that are “indistinguishable” from those bodies of water due to a continuous surface connection. *Rapanos v. United States*, 547 U. S. 715, 755, 742, 739 (plurality opinion). To assert jurisdiction over an adjacent wetland under the CWA, a party must 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.” *Ibid.* Pp. 6–28.

## Syllabus

(a) The uncertain meaning of “the waters of the United States” has been a persistent problem, sparking decades of agency action and litigation. Resolving the CWA’s applicability to wetlands requires a review of the history surrounding the interpretation of that phrase. Pp. 6–14.

(1) During the period relevant to this case, the two federal agencies charged with enforcement of the CWA—the EPA and the Army Corps of Engineers—similarly defined “the waters of the United States” broadly to encompass “[a]ll . . . waters” that “could affect interstate or foreign commerce.” 40 CFR §230.3(s)(3). The agencies likewise gave an expansive interpretation of wetlands adjacent to those waters, defining “adjacent” to mean “bordering, contiguous, or neighboring.” §203.3(b). In *United States v. Riverside Bayview Homes, Inc.*, 474 U. S. 121, the Court confronted the Corps’ assertion of authority under the CWA over wetlands that “actually abut[ed] on a navigable waterway.” *Id.*, at 135. Although concerned that the wetlands fell outside “traditional notions of ‘waters,’” the Court deferred to the Corps, reasoning that “the transition from water to solid ground is not necessarily or even typically an abrupt one.” *Id.*, 132–133. Following *Riverside Bayview*, the agencies issued the “migratory bird rule,” extending CWA jurisdiction to any waters or wetlands that “are or would be used as [a] habitat” by migratory birds or endangered species. 53 Fed. Reg. 20765. The Court rejected the rule after the Corps sought to apply it to several isolated ponds located wholly within the State of Illinois, holding that the CWA does not “exten[d] to ponds that are not adjacent to open water.” *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U. S. 159, 168 (SWANCC) (emphasis deleted). The agencies responded by instructing their field agents to determine the scope of the CWA’s jurisdiction on a case-by-case basis. Within a few years, the agencies had “interpreted their jurisdiction over ‘the waters of the United States’ to cover 270-to-300 million acres” of wetlands and “virtually any parcel of land containing a channel or conduit . . . through which rainwater or drainage may occasionally or intermittently flow.” *Rapanos*, 547 U. S., at 722 (plurality opinion).

Against that backdrop, the Court in *Rapanos* vacated a lower court decision that had held that the CWA covered wetlands near ditches and drains that emptied into navigable waters several miles away. As to the rationale for vacating, however, no position in *Rapanos* commanded a majority of the Court. Four Justices concluded that the CWA’s coverage was limited to certain relatively permanent bodies of water connected to traditional interstate navigable waters and to wetlands that are “as a practical matter indistinguishable” from those waters. *Id.*, at 755 (emphasis deleted). Justice Kennedy, concurring only in the judgment, wrote that CWA jurisdiction over adjacent wetlands

## Syllabus

requires a “significant nexus” between the wetland and its adjacent navigable waters, which exists when “the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity” of those waters. *Id.*, at 779–780. Following *Rapanos*, field agents brought nearly all waters and wetlands under the risk of CWA jurisdiction by engaging in fact-intensive “significant-nexus” determinations that turned on a lengthy list of hydrological and ecological factors.

Under the agencies’ current rule, traditional navigable waters, interstate waters, and the territorial seas, as well as their tributaries and adjacent wetlands, are waters of the United States. See 88 Fed. Reg. 3143. So too are any “[i]ntrastate lakes and ponds, streams, or wetlands” that either have a continuous surface connection to categorically included waters or have a significant nexus to interstate or traditional navigable waters. *Id.*, at 3006, 3143. Finding a significant nexus continues to require consideration of a list of open-ended factors. *Ibid.* Finally, the current rule returns to the agencies’ longstanding definition of “adjacent.” *Ibid.* Pp. 6–12.

(2) Landowners who even negligently discharge pollutants into navigable waters without a permit potentially face severe criminal and civil penalties under the Act. As things currently stand, the agencies maintain that the significant-nexus test is sufficient to establish jurisdiction over “adjacent” wetlands. By the EPA’s own admission, nearly all waters and wetlands are potentially susceptible to regulation under this test, putting a staggering array of landowners at risk of criminal prosecution for such mundane activities as moving dirt. Pp. 12–14.

(b) Next, the Court considers the extent of the CWA’s geographical reach. Pp. 14–22.

(1) To make sense of Congress’s choice to define “navigable waters” as “the waters of the United States,” the Court concludes that the CWA’s use of “waters” encompasses “only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic[al] features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’” *Rapanos*, 547 U. S., at 739 (plurality opinion). This reading follows from the CWA’s deliberate use of the plural “waters,” which refers to those bodies of water listed above, and also helps to align the meaning of “the waters of the United States” with the defined term “navigable waters.” More broadly, this reading accords with how Congress has employed the term “waters” elsewhere in the CWA—see, e.g., 33 U. S. C. §§1267(i)(2)(D), 1268(a)(3)(I)—and in other laws—see, e.g., 16 U. S. C. §§745, 4701(a)(7). This Court has understood CWA’s use of “waters” in the same way. See, e.g., *Riverside Bayview*, 474 U. S., at 133; *SWANCC*, 531 U. S., at 168–169, 172.

The EPA’s insistence that “water” is “naturally read to encompass

## Syllabus

wetlands” because the “presence of water is ‘universally regarded as the most basic feature of wetlands’” proves too much. Brief for Respondents 19. It is also tough to square with *SWANCC*’s exclusion of isolated ponds or *Riverside Bayview*’s extensive focus on the adjacency of wetlands to covered waters. Finally, it is difficult to see how the States’ “responsibilities and rights” in regulating water resources would remain “primary” if the EPA had such broad jurisdiction. §1251(b). Pp. 14–18.

(2) Statutory context shows that some wetlands nevertheless qualify as “waters of the United States.” Specifically, §1344(g)(1), which authorizes States to conduct certain permitting programs, specifies that discharges may be permitted into any waters of the United States, except for traditional navigable waters, “including wetlands adjacent thereto,” suggesting that at least some wetlands must qualify as “waters of the United States.” But §1344(g)(1) cannot define what wetlands the CWA regulates because it is not the operative provision that defines the Act’s reach. Instead, the reference to adjacent wetlands in §1344(g)(1) must be harmonized with “the waters of the United States,” which is the operative term that defines the CWA’s reach. Because the “adjacent” wetlands in §1344(g)(1) are “includ[ed]” within “waters of the United States,” these wetlands must qualify as “waters of the United States” in their own right, *i.e.*, be indistinguishably part of a body of water that itself constitutes “waters” under the CWA. To hold otherwise would require implausibly concluding that Congress tucked an important expansion to the reach of the CWA into convoluted language in a relatively obscure provision concerning state permitting programs. Understanding the CWA to apply to wetlands that are distinguishable from otherwise covered “waters of the United States” would substantially broaden §1362(7) to define “navigable waters” as “waters of the United States *and adjacent wetlands*.” But §1344(g)(1)’s use of the term “including” makes clear that it does not purport to do any such thing. It merely reflects Congress’s assumption that certain “adjacent” wetlands are part of the “waters of the United States.”

To determine when a wetland is part of adjacent “waters of the United States,” the Court agrees with the *Rapanos* plurality that the use of “waters” in §1362(7) may be fairly read to include only wetlands that are “indistinguishable from waters of the United States.” This occurs only when 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.” 547 U. S., at 742.

In sum, the CWA extends to only wetlands that are “as a practical

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matter indistinguishable from waters of the United States.” This requires the party asserting jurisdiction 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.” *Rapanos*, 547 U. S., at 755, 742. Pp. 18–22.

(c) The EPA asks the Court to defer to its most recent rule providing that “adjacent wetlands are covered by the [CWA] if they ‘possess a significant nexus to’ traditional navigable waters” and that wetlands are “adjacent” when they are “neighboring” to covered waters. Brief for Respondents 32, 20. For multiple reasons, the EPA’s position lacks merit. Pp. 22–27.

(1) The EPA’s interpretation is inconsistent with the CWA’s text and structure and clashes with “background principles of construction” that apply to the interpretation of the relevant provisions. *Bond v. United States*, 572 U. S. 844, 857. First, “exceedingly clear language” is required if Congress wishes to alter the federal/state balance or the Government’s power over private property. *United States Forest Service v. Cowpasture River Preservation Assn.*, 590 U. S. \_\_\_, \_\_\_. The Court has thus required a clear statement from Congress when determining the scope of “the waters of the United States.” Second, the EPA’s interpretation gives rise to serious vagueness concerns in light of the CWA’s criminal penalties, thus implicating the due process requirement that penal statutes be defined “‘with sufficient definiteness that ordinary people can understand what conduct is prohibited.’” *McDonnell v. United States*, 579 U. S. 550, 576. Where penal statutes could sweep broadly enough to render criminal a host of what might otherwise be considered ordinary activities, the Court has been wary about going beyond what “Congress certainly intended the statute to cover.” *Skilling v. United States*, 561 U. S. 358, 404. Under these two principles, the judicial task when interpreting “the waters of the United States” is to ascertain whether clear congressional authorization exists for the EPA’s claimed power. Pp. 22–25.

(2) The EPA claims that Congress ratified the EPA’s regulatory definition of “adjacent” when it amended the CWA to include the reference to “adjacent” wetlands in §1344(g)(1). This argument fails for at least three reasons. First, the text of §§1362(7) and 1344(g) shows that “adjacent” cannot include wetlands that are merely nearby covered waters. Second, EPA’s argument cannot be reconciled with this Court’s repeated recognition that §1344(g)(1) “‘does not conclusively determine the construction to be placed on . . . the relevant definition of ‘navigable waters.’”” *SWANCC*, 531 U. S., at 171. Third, the EPA

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falls short of establishing the sort of “overwhelming evidence of acquiescence” necessary to support its argument in the face of Congress’s failure to amend §1362(7). Finally, the EPA’s various policy arguments about the ecological consequences of a narrower definition of “adjacent” are rejected. Pp. 25–27.

8 F. 4th 1075, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, GORSUCH, and BARRETT, JJ., joined. THOMAS, J., filed a concurring opinion, in which GORSUCH, J., joined. KAGAN, J., filed an opinion concurring in the judgment, in which SOTOMAYOR and JACKSON, JJ., joined. KAVANAUGH, J., filed an opinion concurring in the judgment, in which SOTOMAYOR, KAGAN, and JACKSON, JJ., joined.

Opinion of the Court

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## SUPREME COURT OF THE UNITED STATES

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No. 21–454

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MICHAEL SACKETT, ET UX., PETITIONERS *v.*  
ENVIRONMENTAL PROTECTION  
AGENCY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[May 25, 2023]

JUSTICE ALITO delivered the opinion of the Court.

This case concerns a nagging question about the outer reaches of the Clean Water Act (CWA), the principal federal law regulating water pollution in the United States.<sup>1</sup> By all accounts, the Act has been a great success. Before its enactment in 1972, many of the Nation’s rivers, lakes, and streams were severely polluted, and existing federal legislation had proved to be inadequate. Today, many formerly fetid bodies of water are safe for the use and enjoyment of the people of this country.

There is, however, an unfortunate footnote to this success story: the outer boundaries of the Act’s geographical reach have been uncertain from the start. The Act applies to “the waters of the United States,” but what does that phrase mean? Does the term encompass any backyard that is soggy enough for some minimum period of time? Does it reach “mudflats, sandflats, wetlands, sloughs, prairie pot-holes, wet meadows, [or] playa lakes?”<sup>2</sup> How about ditches, swimming pools, and puddles?

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<sup>1</sup> 86 Stat. 816, as amended, 33 U. S. C. §1251 *et seq.*

<sup>2</sup> 40 CFR §230.3(s)(3) (2008).



## Opinion of the Court

For more than a half century, the agencies responsible for enforcing the Act have wrestled with the problem and adopted varying interpretations. On three prior occasions, this Court has tried to clarify the meaning of “the waters of the United States.” But the problem persists. When we last addressed the question 17 years ago, we were unable to agree on an opinion of the Court.<sup>3</sup> Today, we return to the problem and attempt to identify with greater clarity what the Act means by “the waters of the United States.”

I  
A

For most of this Nation’s history, the regulation of water pollution was left almost entirely to the States and their subdivisions. The common law permitted aggrieved parties to bring nuisance suits against polluters. But as industrial production and population growth increased the quantity and toxicity of pollution, States gradually shifted to enforcement by regulatory agencies.<sup>4</sup> Conversely, federal regulation was largely limited to ensuring that “traditional navigable waters”—that is, interstate waters that were either navigable in fact and used in commerce or readily susceptible of being used in this way—remained free of impediments. See, e.g., Rivers and Harbors Act of 1899, 30 Stat. 1151; see also *United States v. Appalachian Elec. Power Co.*, 311 U. S. 377, 406–407 (1940); *The Daniel Ball*, 10 Wall. 557, 563 (1871).

Congress’s early efforts at directly regulating water pollution were tepid. Although the Federal Water Pollution Control Act of 1948 allowed federal officials to seek judicial abatement of pollution in interstate waters, it imposed high

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<sup>3</sup>See *Rapanos v. United States*, 547 U. S. 715 (2006). Neither party contends that any opinion in *Rapanos* controls. We agree. See *Nichols v. United States*, 511 U. S. 738, 745–746 (1994).

<sup>4</sup>See N. Hines, *Nor Any Drop To Drink: Public Regulation of Water Quality*, 52 Iowa L. Rev. 186, 196–207 (1966).

## Opinion of the Court

hurdles, such as requiring the consent of the State where the pollution originated. See 62 Stat. 1156–1157. Despite repeated amendments over the next two decades, few actions were brought under this framework.<sup>5</sup>

Congress eventually replaced this scheme in 1972 with the CWA. See 86 Stat. 816. The Act prohibits “the discharge of any pollutant” into “navigable waters.” 33 U. S. C. §§1311(a), 1362(12)(A). It broadly defines the term “pollutant” to include not only contaminants like “chemical wastes,” but also more mundane materials like “rock, sand,” and “cellar dirt.” §1362(6).

The CWA is a potent weapon. It imposes what have been described as “crushing” consequences “even for inadvertent violations.” *Army Corps of Engineers v. Hawkes Co.*, 578 U. S. 590, 602 (2016) (Kennedy, J., concurring). Property owners who negligently discharge “pollutants” into covered waters may face severe criminal penalties including imprisonment. §1319(c). These penalties increase for knowing violations. *Ibid.* On the civil side, the CWA imposes over \$60,000 in fines per day for each violation. See Note following 28 U. S. C. §2461; 33 U. S. C. §1319(d); 88 Fed. Reg. 989 (2023) (to be codified in 40 CFR §19.4). And due to the Act’s 5-year statute of limitations, 28 U. S. C. §2462, and expansive interpretations of the term “violation,” these civil penalties can be nearly as crushing as their criminal counterparts, see, e.g., *Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810, 813, 818 (CA9 2001) (upholding Agency decision to count each of 348 passes of a plow by a farmer through “jurisdictional” soil on his farm as a separate violation), *aff’d* by an equally divided Court, 537 U. S. 99 (2002) (*per curiam*).

The Environmental Protection Agency (EPA) and the

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<sup>5</sup> See Hearings on Activities of the Federal Water Pollution Control Administration before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 90th Cong., 1st Sess., 674 (1967) (reporting only one abatement suit between 1948 and 1967).

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Army Corps of Engineers (Corps) jointly enforce the CWA. The EPA is tasked with policing violations after the fact, either by issuing orders demanding compliance or by bringing civil actions. §1319(a). The Act also authorizes private plaintiffs to sue to enforce its requirements. §1365(a). On the front end, both agencies are empowered to issue permits exempting activity that would otherwise be unlawful under the Act. Relevant here, the Corps controls permits for the discharge of dredged or fill material into covered waters. See §1344(a). The costs of obtaining such a permit are “significant,” and both agencies have admitted that “the permitting process can be arduous, expensive, and long.” *Hawkes Co.*, 578 U. S., at 594–595, 601. Success is also far from guaranteed, as the Corps has asserted discretion to grant or deny permits based on a long, nonexclusive list of factors that ends with a catchall mandate to consider “in general, the needs and welfare of the people.” 33 CFR §320.4(a)(1) (2022).

Due to the CWA’s capacious definition of “pollutant,” its low *mens rea*, and its severe penalties, regulated parties have focused particular attention on the Act’s geographic scope. While its predecessor encompassed “interstate or navigable waters,” 33 U. S. C. §1160(a) (1970 ed.), the CWA prohibits the discharge of pollutants into only “navigable waters,” which it defines as “the waters of the United States, including the territorial seas,” 33 U. S. C. §§1311(a), 1362(7), (12)(A) (2018 ed.). The meaning of this definition is the persistent problem that we must address.

## B

Michael and Chantell Sackett have spent well over a decade navigating the CWA, and their voyage has been bumpy and costly. In 2004, they purchased a small lot near Priest Lake, in Bonner County, Idaho. In preparation for building a modest home, they began backfilling their property with

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dirt and rocks. A few months later, the EPA sent the Sacketts a compliance order informing them that their backfilling violated the CWA because their property contained protected wetlands. The EPA demanded that the Sacketts immediately “undertake activities to restore the Site” pursuant to a “Restoration Work Plan” that it provided. *Sackett v. EPA*, 566 U. S. 120, 125 (2012). The order threatened the Sacketts with penalties of over \$40,000 per day if they did not comply.

At the time, the EPA interpreted “the waters of the United States” to include “[a]ll . . . waters” that “could affect interstate or foreign commerce,” as well as “[w]etlands adjacent” to those waters. 40 CFR §§230.3(s)(3), (7) (2008). “[A]djacent” was defined to mean not just “bordering” or “contiguous,” but also “neighboring.” §230.3(b). Agency guidance instructed officials to assert jurisdiction over wetlands “adjacent” to non-navigable tributaries when those wetlands had “a significant nexus to a traditional navigable water.”<sup>6</sup> A “significant nexus” was said to exist when “wetlands, either alone or in combination with *similarly situated lands* in the region, *significantly affect* the chemical, physical, and biological integrity” of those waters. 2007 Guidance 8 (emphasis added). In looking for evidence of a “significant nexus,” field agents were told to consider a wide range of open-ended hydrological and ecological factors. See *id.*, at 7.

According to the EPA, the “wetlands” on the Sacketts’ lot are “adjacent to” (in the sense that they are in the same neighborhood as) what it described as an “unnamed tributary” on the other side of a 30-foot road. App. 33. That tributary feeds into a non-navigable creek, which, in turn, feeds into Priest Lake, an intrastate body of water that the

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<sup>6</sup>EPA & Corps, Clean Water Act Jurisdiction Following the U. S. Supreme Court’s Decision in *Rapanos v. United States* & *Carabell v. United States* 7–11 (2007) (2007 Guidance).

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EPA designated as traditionally navigable. To establish a significant nexus, the EPA lumped the Sacketts’ lot together with the Kalispell Bay Fen, a large nearby wetland complex that the Agency regarded as “similarly situated.” According to the EPA, these properties, taken together, “significantly affect” the ecology of Priest Lake. Therefore, the EPA concluded, the Sacketts had illegally dumped soil and gravel onto “the waters of the United States.”

The Sacketts filed suit under the Administrative Procedure Act, 5 U. S. C. §702 *et seq.*, alleging that the EPA lacked jurisdiction because any wetlands on their property were not “waters of the United States.” The District Court initially dismissed the suit, reasoning that the compliance order was not a final agency action, but this Court ultimately held that the Sacketts could bring their suit under the APA. See *Sackett*, 566 U. S., at 131. After seven years of additional proceedings on remand, the District Court entered summary judgment for the EPA. 2019 WL 13026870 (D Idaho, Mar. 31, 2019). The Ninth Circuit affirmed, holding that the CWA covers adjacent wetlands with a significant nexus to traditional navigable waters and that the Sacketts’ lot satisfied that standard. 8 F. 4th 1075, 1091–1093 (2021).

We granted certiorari to decide the proper test for determining whether wetlands are “waters of the United States.” 595 U. S. \_\_\_\_ (2022).

## II

## A

In defining the meaning of “the waters of the United States,” we revisit what has been “a contentious and difficult task.” *National Assn. of Mfrs. v. Department of Defense*, 583 U. S. \_\_\_, \_\_\_ (2018) (slip op., at 1). The phrase has sparked decades of agency action and litigation. In order to resolve the CWA’s applicability to wetlands, we begin by reviewing this history.

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The EPA and the Corps initially promulgated different interpretations of “the waters of the United States.” The EPA defined its jurisdiction broadly to include, for example, intrastate lakes used by interstate travelers. 38 Fed. Reg. 13529 (1973). Conversely, the Corps, consistent with its historical authority to regulate obstructions to navigation, asserted jurisdiction over only traditional navigable waters. 39 Fed. Reg. 12119 (1974). But the Corps’ narrow definition did not last. It soon promulgated new, much broader definitions designed to reach the outer limits of Congress’s commerce power. See 42 Fed. Reg. 37144, and n. 2 (1977); 40 Fed. Reg. 31324–31325 (1975).

Eventually the EPA and Corps settled on materially identical definitions. See 45 Fed. Reg. 33424 (1980); 47 Fed. Reg. 31810–31811 (1982). These broad definitions encompassed “[a]ll . . . waters” that “could affect interstate or foreign commerce.” 40 CFR §230.3(s)(3) (2008). So long as the potential for an interstate effect was present, the regulation extended the CWA to, for example, “intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds.” *Ibid.* The agencies likewise took an expansive view of the CWA’s coverage of wetlands “adjacent” to covered waters. §230.3(s)(7). As noted, they defined “adjacent” to mean “bordering, contiguous, or neighboring” and clarified that “adjacent” wetlands include those that are separated from covered waters “by man-made dikes or barriers, natural river berms, beach dunes and the like.” §230.3(b). They also specified that “wetlands” is a technical term encompassing “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal conditions do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.” §230.3(t). The Corps released what would become a 143-page manual to guide officers when they determine whether

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property meets this definition.<sup>7</sup>

This Court first construed the meaning of “the waters of the United States” in *United States v. Riverside Bayview Homes, Inc.*, 474 U. S. 121 (1985). There, we were confronted with the Corps’ assertion of authority under the CWA over wetlands that “actually abut[ted] on a navigable waterway.” *Id.*, at 135. Although we expressed concern that wetlands seemed to fall outside “traditional notions of ‘waters,’” we nonetheless deferred to the Corps, reasoning that “the transition from water to solid ground is not necessarily or even typically an abrupt one.” *Id.*, at 132–133.

The agencies responded to *Riverside Bayview* by expanding their interpretations even further. Most notably, they issued the “migratory bird rule,” which extended jurisdiction to any waters or wetlands that “are or would be used as [a] habitat” by migratory birds or endangered species. See 53 Fed. Reg. 20765 (1988); 51 Fed. Reg. 41217 (1986). As the Corps would later admit, “nearly all waters were jurisdictional under the migratory bird rule.”<sup>8</sup>

In *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U. S. 159 (2001) (SWANCC), this Court rejected the migratory bird rule, which the Corps had used to assert jurisdiction over several isolated ponds located wholly within the State of Illinois. Disagreeing with the Corps’ argument that ecological interests supported its jurisdiction, we instead held that the CWA does not “extend[d] to ponds that are not adjacent to open water.” *Id.*, at 168 (emphasis deleted).

Days after our decision, the agencies issued guidance that

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<sup>7</sup>See Corps, Wetlands Delineation Manual (Tech. Rep. Y-87-1, 1987) (Wetlands Delineation Manual); see also, *e.g.*, Corps, Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0) (ERDC/EL Tr-07-24, 2007).

<sup>8</sup>GAO, Waters and Wetlands: Corps of Engineers Needs To Evaluate Its District Office Practices in Determining Jurisdiction 26 (GAO-04-297, 2004) (GAO Report).



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sought to minimize SWANCC’s impact. They took the view that this Court’s holding was “strictly limited to waters that are ‘nonnavigable, isolated, and intrastate’” and that “field staff should continue to exercise CWA jurisdiction to the full extent of their authority” for “any waters that fall outside of that category.”<sup>9</sup> The agencies never defined exactly what they regarded as the “full extent of their authority.” They instead encouraged local field agents to make decisions on a case-by-case basis.

What emerged was a system of “vague” rules that depended on “locally developed practices.” GAO Report 26. Deferring to the agencies’ localized decisions, lower courts blessed an array of expansive interpretations of the CWA’s reach. See, e.g., *United States v. Deaton*, 332 F. 3d 698, 702 (CA4 2003) (holding that a property owner violated the CWA by piling soil near a ditch 32 miles from navigable waters). Within a few years, the agencies had “interpreted their jurisdiction over ‘the waters of the United States’ to cover 270-to-300 million acres” of wetlands and “virtually any parcel of land containing a channel or conduit . . . through which rainwater or drainage may occasionally or intermittently flow.” *Rapanos v. United States*, 547 U. S. 715, 722 (2006) (plurality opinion).

It was against this backdrop that we granted review in *Rapanos v. United States*. The lower court in the principal case before us had held that the CWA covered wetlands near ditches and drains that eventually emptied into navigable waters at least 11 miles away, a theory that had supported the petitioner’s conviction in a related prosecution. *Id.*, at 720, 729. Although we vacated that decision, no position commanded a majority of the Court. Four Justices concluded that the CWA’s coverage did not extend beyond two categories: first, certain relatively permanent bodies of

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<sup>9</sup>EPA & Corps, Memorandum, Supreme Court Ruling Concerning CWA Jurisdiction Over Isolated Waters 3 (2001) (alteration omitted).



## Opinion of the Court

water connected to traditional interstate navigable waters and, second, wetlands with such a close physical connection to those waters that they were “as a practical matter indistinguishable from waters of the United States.” *Id.*, at 742, 755 (emphasis deleted). Four Justices would have deferred to the Government’s determination that the wetlands at issue were covered under the CWA. *Id.*, at 788 (Stevens, J., dissenting). Finally, one Justice concluded that jurisdiction under the CWA requires a “significant nexus” between wetlands and navigable waters and that such a nexus exists where “the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity” of those waters. *Id.*, at 779–780 (Kennedy, J., concurring in judgment).

In the decade following *Rapanos*, the EPA and the Corps issued guidance documents that “recognized larger grey areas and called for more fact-intensive individualized determinations in those grey areas.”<sup>10</sup> As discussed, they instructed agency officials to assert jurisdiction over wetlands “adjacent” to non-navigable tributaries based on fact-specific determinations regarding the presence of a significant nexus. 2008 Guidance 8. The guidance further advised officials to make this determination by considering a lengthy list of hydrological and ecological factors. *Ibid.* Echoing what they had said about the migratory bird rule, the agencies later admitted that “almost all waters and wetlands across the country theoretically could be subject to a case-specific jurisdictional determination” under this guidance. 80 Fed. Reg. 37056 (2015); see, e.g., *Hawkes Co.*, 578 U. S., at 596 (explaining that the Corps found a significant nexus between wetlands and a river “some 120 miles

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<sup>10</sup>N. Parrillo, Federal Agency Guidance and the Power To Bind: An Empirical Study of Agencies and Industries, 36 Yale J. on Reg. 165, 231 (2019); see 2007 Guidance 7–11; EPA & Corps, Clean Water Act Jurisdiction Following the U. S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States* 8–12 (2008) (2008 Guidance).

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away”).

More recently, the agencies have engaged in a flurry of rulemaking defining “the waters of the United States.” In a 2015 rule, they offered a muscular approach that would subject “the vast majority of the nation’s water features” to a case-by-case jurisdictional analysis.<sup>11</sup> Although the rule listed a few examples of “waters” that were excluded from regulation like “[p]uddles” and “swimming pools,” it categorically covered other waters and wetlands, including any within 1,500 feet of interstate or traditional navigable waters. 80 Fed. Reg. 37116–37117. And it subjected a wider range of other waters, including any within 4,000 feet of indirect tributaries of interstate or traditional navigable waters, to a case-specific determination for significant nexus. *Ibid.*

The agencies repealed this sweeping rule in 2019. 84 Fed. Reg. 56626. Shortly afterwards, they replaced it with a narrower definition that limited jurisdiction to traditional navigable waters and their tributaries, lakes, and “adjacent” wetlands. 85 Fed. Reg. 22340 (2020). They also narrowed the definition of “[a]djacent,” limiting it to wetlands that “[a]but” covered waters, are flooded by those waters, or are separated from those waters by features like berms or barriers. *Ibid.* This rule too did not last. After granting the EPA’s voluntary motion to remand, a District Court vacated the rule. See *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949, 957 (D Ariz. 2021).

The agencies recently promulgated yet another rule attempting to define waters of the United States. 88 Fed. Reg. 3004 (2023) (to be codified in 40 CFR §120.2). Under that broader rule, traditional navigable waters, interstate waters, and the territorial seas, as well as their tributaries and adjacent wetlands, are waters of the United States. 88

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<sup>11</sup>EPA & Dept. of the Army, Economic Analysis of the EPA-Army Clean Water Rule 11 (2015).

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Fed. Reg. 3143. So are any “[i]ntrastate lakes and ponds, streams, or wetlands” that either have a continuous surface connection to categorically included waters or have a significant nexus to interstate or traditional navigable waters. *Id.*, at 3006, 3143. Like the post-*Rapanos* guidance, the rule states that a significant nexus requires consideration of a list of open-ended factors. 88 Fed. Reg. 3006, 3144. Finally, the rule returns to the broad pre-2020 definition of “adjacent.” *Ibid.*; see *supra*, at 7. Acknowledging that “[f]ield work is often necessary to confirm the presence of a wetland” under these definitions, the rule instructs local agents to continue using the Corps’ Wetlands Delineation Manual. 88 Fed. Reg. 3117.

## B

With the benefit of a half century of practice under the CWA, it is worth taking stock of where things stand. The agencies maintain that the significant-nexus test has been and remains sufficient to establish jurisdiction over “adjacent” wetlands. And by the EPA’s own admission, “almost all waters and wetlands” are potentially susceptible to regulation under that test. 80 Fed. Reg. 37056. This puts many property owners in a precarious position because it is “often difficult to determine whether a particular piece of property contains waters of the United States.” *Hawkes Co.*, 578 U. S., at 594; see 40 CFR §230.3(t) (2008). Even if a property appears dry, application of the guidance in a complicated manual ultimately decides whether it contains wetlands. See 88 Fed. Reg. 3117; Wetlands Delineation Manual 84–85 (describing “not . . . atypical” examples of wetlands that periodically lack wetlands indicators); see also *Hawkes Co. v. United States Army Corps of Engineers*, 782 F. 3d 994, 1003 (CA8 2015) (Kelly, J., concurring) (“This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property”). And because the CWA can sweep

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broadly enough to criminalize mundane activities like moving dirt, this unchecked definition of “the waters of the United States” means that a staggering array of landowners are at risk of criminal prosecution or onerous civil penalties.

What are landowners to do if they want to build on their property? The EPA recommends asking the Corps for a jurisdictional determination, which is a written decision on whether a particular site contains covered waters. Tr. of Oral Arg. 86; see Corps, Regulatory Guidance Letter No. 16–01, at 1 (2016) (RGL 16–01); 33 CFR §§320.1(a)(6), 331.2. But the Corps maintains that it has no obligation to provide jurisdictional determinations, RGL 16–01, at 2, and it has already begun announcing exceptions to the legal effect of some previous determinations, see 88 Fed. Reg. 3136. Even if the Corps is willing to provide a jurisdictional determination, a property owner may find it necessary to retain an expensive expert consultant who is capable of putting together a presentation that stands a chance of persuading the Corps.<sup>12</sup> And even then, a landowner’s chances of success are low, as the EPA admits that the Corps finds jurisdiction approximately 75% of the time. Tr. of Oral Arg. 110.

If the landowner is among the vast majority who receive adverse jurisdictional determinations, what then? It would be foolish to go ahead and build since the jurisdictional determination might form evidence of culpability in a prosecution or civil action. The jurisdictional determination could be challenged in court, but only after the delay and expense required to exhaust the administrative appeals

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<sup>12</sup>See 88 Fed. Reg. 3134; Corps, Questions and Answers for *Rapanos* and *Carabell* Decision 16 (2007); J. Finkle, Jurisdictional Determinations: An Important Battlefield in the Clean Water Act Fight, 43 Ecology L. Q. 301, 314–315 (2016); K. Gould, Drowning in Wetlands Jurisdictional Determination Process: Implementation of *Rapanos v. United States*, 30 U. Ark. Little Rock L. Rev. 413, 440 (2008).

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process. See 33 CFR §331.7(d). And once in court, the landowner would face an uphill battle under the deferential standards of review that the agencies enjoy. See 5 U. S. C. §706. Another alternative would be simply to acquiesce and seek a permit from the Corps. But that process can take years and cost an exorbitant amount of money. Many landowners faced with this unappetizing menu of options would simply choose to build nothing.

## III

With this history in mind, we now consider the extent of the CWA’s geographical reach.

## A

We start, as we always do, with the text of the CWA. *Bar-tenwerfer v. Buckley*, 598 U. S. 69, 74 (2023). As noted, the Act applies to “navigable waters,” which had a well-established meaning at the time of the CWA’s enactment. But the CWA complicates matters by proceeding to define “navigable waters” as “the waters of the United States,” §1362(7), which was decidedly not a well-known term of art. This frustrating drafting choice has led to decades of litigation, but we must try to make sense of the terms Congress chose to adopt. And for the reasons explained below, we conclude 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 geographic[al] features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’” 547 U. S., at 739 (quoting Webster’s New International Dictionary 2882 (2d ed. 1954) (Webster’s Second); original alterations omitted).

This reading follows from the CWA’s deliberate use of the plural term “waters.” See 547 U. S., at 732–733. That term typically refers to bodies of water like those listed above. See, e.g., Webster’s Second 2882; Black’s Law Dictionary

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1426 (5th ed. 1979) (“especially in the plural, [water] may designate a body of water, such as a river, a lake, or an ocean, or an aggregate of such bodies of water, as in the phrases ‘foreign waters,’ ‘waters of the United States,’ and the like” (emphasis added)); Random House Dictionary of the English Language 2146 (2d ed. 1987) (Random House Dictionary) (defining “waters” as “a. flowing water, or water moving in waves: The river’s mighty waters. b. the sea or seas bordering a particular country or continent or located in a particular part of the world” (emphasis deleted)). This meaning is hard to reconcile with classifying “‘lands,’ wet or otherwise, as ‘waters.’”” *Rapanos*, 547 U. S., at 740 (plurality opinion) (quoting *Riverside Bayview*, 474 U. S., at 132).

This reading also helps to align the meaning of “the waters of the United States” with the term it is defining: “navigable waters.” See *Bond v. United States*, 572 U. S. 844, 861 (2014) (“In settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition”). Although we have acknowledged that the CWA extends to more than traditional navigable waters, we have refused to read “navigable” out of the statute, holding that it at least shows that Congress was focused on “its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.” *SWANCC*, 531 U. S., at 172; see also *Appalachian Electric*, 311 U. S., at 406–407; *The Daniel Ball*, 10 Wall., at 563. At a minimum, then, the use of “navigable” signals that the definition principally refers to bodies of navigable water like rivers, lakes, and oceans. See *Rapanos*, 547 U. S., at 734 (plurality opinion).

More broadly, this reading accords with how Congress has employed the term “waters” elsewhere in the CWA and

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in other laws. The CWA repeatedly uses “waters” in contexts that confirm the term refers to bodies of open water. See 33 U. S. C. §1267(i)(2)(D) (“the waters of the Chesapeake Bay”); §1268(a)(3)(I) (“the open waters of each of the Great Lakes”); §1324(d)(4)(B)(ii) (“lakes and other surface waters”); §1330(g)(4)(C)(vii) (“estuarine waters”); §1343(c)(1) (“the waters of the territorial seas, the contiguous zone, and the oceans”); §§1346(a)(1), 1375a(a) (“coastal recreation waters”); §1370 (state “boundary waters”). The use of “waters” elsewhere in the U. S. Code likewise correlates to rivers, lakes, and oceans.<sup>13</sup>

Statutory history points in the same direction. The CWA’s predecessor statute covered “interstate or navigable waters” and defined “interstate waters” as “all *rivers, lakes, and other waters* that flow across or form a part of State boundaries.” 33 U. S. C. §§1160(a), 1173(e) (1970 ed.) (emphasis added); see also Rivers and Harbors Act of 1899, 30 Stat. 1151 (codified, as amended, at 33 U. S. C. §403) (prohibiting unauthorized obstructions “to the navigable capacity of any of the waters of the United States”).

This Court has understood the CWA’s use of “waters” in the same way. Even as *Riverside Bayview* grappled with whether adjacent wetlands could fall within the CWA’s coverage, it acknowledged that wetlands are not included in “traditional notions of ‘waters.’” 474 U. S., at 133. It explained that the term conventionally refers to “hydrographic features” like “rivers” and “streams.” *Id.*, at 131. *SWANCC* went even further, repeatedly describing the “waters” covered by the Act as “open water” and suggesting

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<sup>13</sup>See, e.g., 16 U. S. C. §745 (“the waters of the seacoast . . . the waters of the lakes”); §4701(a)(7) (“waters of the Chesapeake Bay”); 33 U. S. C. §4 (“the waters of the Mississippi River and its tributaries”); 43 U. S. C. §390h–8(a) (“the waters of Lake Cheraw, Colorado . . . the waters of the Arkansas River”); 46 U. S. C. §70051 (allowing the Coast Guard to take control of particular vessels during an emergency in order to “prevent damage or injury to any harbor or waters of the United States”).



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that “the waters of the United States” principally refers to traditional navigable waters. 531 U. S., at 168–169, 172. That our CWA decisions operated under this assumption is unsurprising. Ever since *Gibbons v. Ogden*, 9 Wheat. 1 (1824), this Court has used “waters of the United States” to refer to similar bodies of water, almost always in relation to ships. *Id.*, at 218 (discussing a vessel’s “conduct in the waters of the United States”).<sup>14</sup>

The EPA argues that “waters” is “naturally read to encompass wetlands” because the “presence of water is ‘universally regarded as the most basic feature of wetlands.’” Brief for Respondents 19. But that reading proves too much. Consider puddles, which are also defined by the ordinary presence of water even though few would describe them as “waters.” This argument is also tough to square with *SWANCC*, which held that the Act does not cover isolated ponds, see 531 U. S., at 171, or *Riverside Bayview*, which would have had no need to focus so extensively on the adjacency of wetlands to covered waters if the EPA’s reading were correct, see 474 U. S., at 131–135, and n. 8. Finally, it is also instructive that the CWA expressly “protect[s] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution” and “to plan the development and use . . . of land and water resources.”

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<sup>14</sup> See, e.g., *United States v. Alvarez-Machain*, 504 U. S. 655, 661, n. 7 (1992) (discussing a treaty “to allow British passenger ships to carry liquor while in the waters of the United States”); *Kent v. Dulles*, 357 U. S. 116, 123 (1958) (discussing a prohibition on boarding “vessels of the enemy on waters of the United States”); *New Jersey v. New York City*, 290 U. S. 237, 240 (1933) (enjoining employees of New York City from dumping garbage “into the ocean, or waters of the United States, off the coast of New Jersey”); *Cunard S. S. Co. v. Mellon*, 262 U. S. 100, 127 (1923) (holding that the National Prohibition Act did not apply to “merchant ships when outside the waters of the United States”); *Keck v. United States*, 172 U. S. 434, 444–445 (1899) (holding that concealing imported goods on vessels “at the time of entering the waters of the United States,” without more, did not constitute smuggling).



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§1251(b). It 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. See *County of Maui v. Hawaii Wildlife Fund*, 590 U. S. \_\_\_, \_\_\_ (2020) (slip op., at 7); *Rapanos*, 547 U. S., at 737 (plurality opinion).

## B

Although the ordinary meaning of “waters” in §1362(7) might seem to exclude all wetlands, we do not view that provision in isolation. The meaning of a word “may only become evident when placed in context,” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 132 (2000), and statutory context shows that some wetlands qualify as “waters of the United States.”

In 1977, Congress amended the CWA and added §1344(g)(1), which authorizes States to apply to the EPA for permission to administer programs to issue permits for the discharge of dredged or fill material into some bodies of water. In simplified terms, the provision specifies that state permitting programs may regulate discharges into (1) any waters of the United States, (2) except for traditional navigable waters, (3) “including wetlands adjacent thereto.”<sup>15</sup>

When this convoluted formulation is parsed, it tells us that at least some wetlands must qualify as “waters of the

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<sup>15</sup>This provision states in relevant part: “The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact.” 33 U. S. C. §1344(g)(1).

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United States.” The provision begins with a broad category, “the waters of the United States,” which we may call category A. The provision provides that States may permit discharges into these waters, but it then qualifies that States cannot permit discharges into a subcategory of A: traditional navigable waters (category B). Finally, it states that a third category (category C), consisting of wetlands “adjacent” to traditional navigable waters, is “includ[ed]” within B. Thus, States may permit discharges into A minus B, which includes C. If C (adjacent wetlands) were not part of A (“the waters of the United States”) and therefore subject to regulation under the CWA, there would be no point in excluding them from that category. See *Riverside Bayview*, 474 U. S., at 138, n. 11 (recognizing that §1344(g) “at least suggest[s] strongly that the term ‘waters’ as used in the Act does not necessarily exclude ‘wetlands’”); *Rapanos*, 547 U. S., at 768 (opinion of Kennedy, J.). Thus, §1344(g)(1) presumes that certain wetlands constitute “waters of the United States.”

But what wetlands does the CWA regulate? Section 1344(g)(1) cannot answer that question alone because it is not the operative provision that defines the Act’s reach. See *Riverside Bayview*, 474 U. S., at 138, n. 11. Instead, we must harmonize the reference to adjacent wetlands in §1344(g)(1) with “the waters of the United States,” §1362(7), which is the actual term we are tasked with interpreting. The formulation discussed above tells us how: because the adjacent wetlands in §1344(g)(1) are “includ[ed]” within “the waters of the United States,” these wetlands must qualify as “waters of the United States” in their own right. In other words, they must be indistinguishably part of a body of water that itself constitutes “waters” under the CWA. See *supra*, at 14.

This understanding is consistent with §1344(g)(1)’s use of “adjacent.” Dictionaries tell us that the term “adjacent” may mean either “contiguous” or “near.” Random House

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Dictionary 25; see Webster’s Third New International Dictionary 26 (1976); see also Oxford American Dictionary & Thesaurus 16 (2d ed. 2009) (listing “adjoining” and “neighboring” as synonyms of “adjacent”). But “construing statutory language is not merely an exercise in ascertaining ‘the outer limits of a word’s definitional possibilities,’” *FCC v. AT&T Inc.*, 562 U. S. 397, 407 (2011) (alterations omitted), and here, “only one . . . meanin[g] produces a substantive effect that is compatible with the rest of the law,” *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371 (1988). Wetlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby.

In addition, it would be odd indeed if Congress had tucked an important expansion to the reach of the CWA into convoluted language in a relatively obscure provision concerning state permitting programs. We have often remarked that Congress does not “hide elephants in mouseholes” by “alter[ing] the fundamental details of a regulatory scheme in vague terms or ancillary provisions.” *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001). We cannot agree with such an implausible interpretation here.

If §1344(g)(1) were read to mean that the CWA applies to wetlands that are not indistinguishably part of otherwise covered “waters of the United States,” see *supra*, at 14, it would effectively amend and substantially broaden §1362(7) to define “navigable waters” as “waters of the United States *and adjacent wetlands*.” But §1344(g)(1)’s use of the term “including” makes clear that it does not purport to do—and in fact, does not do—any such thing. See *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U. S. 644, 662–664, and n. 8 (2007) (recognizing that implied amendments require “‘clear and manifest’” evidence of congressional intent). It merely reflects Congress’s assumption that certain “adjacent” wetlands are *part of* “waters of the United States.”

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This is the thrust of observations in decisions going all the way back to *Riverside Bayview*. In that case, we deferred to the Corps’ decision to regulate wetlands actually abutting a navigable waterway, but we recognized “the inherent difficulties of defining precise bounds to regulable waters.” 474 U. S., at 134; see also *id.*, at 132 (noting that “the transition from water to solid ground is not necessarily or even typically an abrupt one” due to semi-aquatic features like shallows and swamps). In such a situation, we concluded, the Corps could reasonably determine that wetlands “adjoining bodies of water” were part of those waters. *Id.*, at 135, and n. 9; see also *SWANCC*, 531 U. S., at 167 (recognizing that *Riverside Bayview* “held that the Corps had . . . jurisdiction over wetlands that actually abutted on a navigable waterway”).

In *Rapanos*, the plurality spelled out clearly when adjacent wetlands are part of covered waters. It explained that “waters” may fairly be read to include only those wetlands that are “as a practical matter indistinguishable from waters of the United States,” such that it is “difficult to determine where the ‘water’ ends and the ‘wetland’ begins.” 547 U. S., at 742, 755 (emphasis deleted). That occurs when 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.” *Id.*, at 742; cf. 33 U. S. C. §2802(5) (defining “coastal waters” to include wetlands “having unimpaired connection with the open sea up to the head of tidal influence”). We agree with this formulation of when wetlands are part of “the waters of the United States.” We also acknowledge that temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells.<sup>16</sup>

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<sup>16</sup> Although a barrier separating a wetland from a water of the United States would ordinarily remove that wetland from federal jurisdiction, a

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In sum, we hold that the CWA extends to only those wetlands that are “as a practical matter indistinguishable from waters of the United States.” *Rapanos*, 547 U. S., at 755 (plurality opinion) (emphasis deleted). 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.” *Id.*, at 742.

## IV

The EPA resists this reading of §1362(7) and instead asks us to defer to its understanding of the CWA’s jurisdictional reach, as set out in its most recent rule defining “the waters of the United States.” See 88 Fed. Reg. 3004. This rule, as noted, provides that “adjacent wetlands are covered by the Act if they ‘possess a “significant nexus” to’ traditional navigable waters.” Brief for Respondents 32 (quoting *Rapanos*, 547 U. S., at 759 (opinion of Kennedy, J.)); see 88 Fed. Reg. 3143. And according to the EPA, wetlands are “adjacent” when they are “neighboring” to covered waters, even if they are separated from those waters by dry land. Brief for Respondents 20; 88 Fed. Reg. 3144.

## A

For reasons already explained, this interpretation is inconsistent with the text and structure of the CWA. Beyond that, it clashes with “background principles of construction”

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landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA. Whenever the EPA can exercise its statutory authority to order a barrier’s removal because it violates the Act, see 33 U. S. C. §§1319(a)–(b), that unlawful barrier poses no bar to its jurisdiction.

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that apply to the interpretation of the relevant statutory provisions. *Bond*, 572 U. S., at 857. Under those presumptions, the EPA must provide clear evidence that it is authorized to regulate in the manner it proposes.

## 1

First, this Court “require[s] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.” *United States Forest Service v. Cowpasture River Preservation Assn.*, 590 U. S. \_\_\_, \_\_\_–\_\_\_ (2020) (slip op., at 15–16); see also *Bond*, 572 U. S., at 858. Regulation of land and water use lies at the core of traditional state authority. See, e.g., *SWANCC*, 531 U. S., at 174 (citing *Hess v. Port Authority Trans-Hudson Corporation*, 513 U. S. 30, 44 (1994)); *Tarrant Regional Water Dist. v. Herrmann*, 569 U. S. 614, 631 (2013). An overly broad interpretation of the CWA’s reach would impinge on this authority. The area covered by wetlands alone is vast—greater than the combined surface area of California and Texas. And the scope of the EPA’s conception of “the waters of the United States” is truly staggering when this vast territory is supplemented by all the additional area, some of which is generally dry, over which the Agency asserts jurisdiction. Particularly given the CWA’s express policy to “preserve” the States’ “primary” authority over land and water use, §1251(b), this Court has required a clear statement from Congress when determining the scope of “the waters of the United States.” *SWANCC*, 531 U. S., at 174; accord, *Rapanos*, 547 U. S., at 738 (plurality opinion).

The EPA, however, offers only a passing attempt to square its interpretation with the text of §1362(7), and its “significant nexus” theory is particularly implausible. It suggests that the meaning of “the waters of the United

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States” is so “broad and unqualified” that, if viewed in isolation, it would extend to all water in the United States. Brief for Respondents 32. The EPA thus turns to the “significant nexus” test in order to reduce the clash between its understanding of “the waters of the United States” and the term defined by that phrase, *i.e.*, “navigable waters.” As discussed, however, the meaning of “waters” is more limited than the EPA believes. See *supra*, at 14. And, in any event, the CWA never mentions the “significant nexus” test, so the EPA has no statutory basis to impose it. See *Rapanos*, 547 U. S., at 755–756 (plurality opinion).

## 2

Second, the EPA’s interpretation gives rise to serious vagueness concerns in light of the CWA’s criminal penalties. Due process requires Congress to define penal statutes “‘with sufficient definiteness that ordinary people can understand what conduct is prohibited’” and “‘in a manner that does not encourage arbitrary and discriminatory enforcement.’” *McDonnell v. United States*, 579 U. S. 550, 576 (2016) (quoting *Skilling v. United States*, 561 U. S. 358, 402–403 (2010)). Yet the meaning of “waters of the United States” under the EPA’s interpretation remains “hopelessly indeterminate.” *Sackett*, 566 U. S., at 133 (ALITO, J., concurring); accord, *Hawkes Co.*, 578 U. S., at 602 (opinion of Kennedy, J.).

The EPA contends that the only thing preventing it from interpreting “waters of the United States” to “conceivably cover literally every body of water in the country” is the significant-nexus test. Tr. of Oral Arg. 70–71; accord, Brief for Respondents 32. But the boundary between a “significant” and an insignificant nexus is far from clear. And to add to the uncertainty, the test introduces another vague concept—“similarly situated” waters—and then assesses the aggregate effect of that group based on a variety of open-ended factors that evolve as scientific understandings



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change. This freewheeling inquiry provides little notice to landowners of their obligations under the CWA. Facing severe criminal sanctions for even negligent violations, property owners are “left to feel their way on a case-by-case basis.” *Sackett*, 566 U. S., at 124 (quoting *Rapanos*, 547 U. S., at 758 (ROBERTS, C. J., concurring)). Where a penal statute could sweep so broadly as to render criminal a host of what might otherwise be considered ordinary activities, we have been wary about going beyond what “Congress certainly intended the statute to cover.” *Skilling*, 561 U. S., at 404.

Under these two background principles, the judicial task when interpreting “the waters of the United States” is to ascertain whether clear congressional authorization exists for the EPA’s claimed power. The EPA’s interpretation falls far short of that standard.

## B

While mustering only a weak textual argument, the EPA justifies its position on two other grounds. It primarily claims that Congress implicitly ratified its interpretation of “adjacent” wetlands when it adopted §1344(g)(1). Thus, it argues that “waters of the United States” covers any wetlands that are “bordering, contiguous, or neighboring” to covered waters. 88 Fed. Reg. 3143. The principal opinion concurring in the judgment adopts the same position. See *post*, at 10–12 (KAVANAUGH, J., concurring in judgment). The EPA notes that the Corps had promulgated regulations adopting that interpretation before Congress amended the CWA in 1977 to include the reference to “adjacent” wetlands in §1344(g)(1). See 42 Fed. Reg. 37144. This term, the EPA contends, was “‘obviously transplanted from’” the Corps’ regulations and thus incorporates the same definition. Brief for Respondents 22 (quoting *Taggart v. Lorenzen*, 587 U. S. \_\_\_, \_\_\_ (2019) (slip op., at 5)).

This argument fails for at least three reasons. First, as we have explained, the text of §§1362(7) and 1344(g)(1)



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shows that “adjacent” cannot include wetlands that are not part of covered “waters.” See *supra*, at 22.

Second, this ratification theory cannot be reconciled with our cases. We have repeatedly recognized that §1344(g)(1) “‘does not conclusively determine the construction to be placed on . . . the relevant definition of ‘navigable waters.’” *SWANCC*, 531 U. S., at 171 (quoting *Riverside Bayview*, 474 U. S., at 138, n. 11); accord, *Rapanos*, 547 U. S., at 747–748, n. 12 (plurality opinion). Additionally, *SWANCC* rejected the closely analogous argument that Congress ratified the Corps’ definition of “waters of the United States” by including “‘other . . . waters” in §1344(g)(1). 531 U. S., at 168–171. And yet, the EPA’s argument would require us to hold that §1344(g)(1) actually did amend the definition of “navigable waters” precisely for the reasons we rejected in *SWANCC*.

Third, the EPA cannot provide the sort of “overwhelming evidence of acquiescence” necessary to support its argument in the face of Congress’s failure to amend §1362(7). *Id.*, at 169–170, n. 5. We will infer that a term was “‘transplanted from another legal source’ . . . only when a term’s meaning was ‘well-settled’ before the transplantation.” *Kemp v. United States*, 596 U. S. \_\_\_, \_\_\_–\_\_\_ (2022) (slip op., at 9–10). Far from being well settled, the Corps’ definition was promulgated mere months before the CWA became law, and when the Corps adopted that definition, it candidly acknowledged the “rapidly changing nature of [its] regulatory programs.” 42 Fed. Reg. 37122. Tellingly, even the EPA would not adopt that definition for several more years. See 45 Fed. Reg. 85345 (1980). This situation is a far cry from any in which we have found ratification. See, e.g., *George v. McDonough*, 596 U. S. \_\_\_, \_\_\_ (2022) (slip op., at 5) (finding ratification when “Congress used an unusual term that had a long regulatory history in [the] very regulatory context” at issue).

The EPA also advances various policy arguments about

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the ecological consequences of a narrower definition of adjacent. But the CWA does not define the EPA’s jurisdiction based on ecological importance, and we cannot redraw the Act’s allocation of authority. See *Rapanos*, 547 U. S., at 756 (plurality opinion). “The Clean Water Act anticipates a partnership between the States and the Federal Government.” *Arkansas v. Oklahoma*, 503 U. S. 91, 101 (1992). States can and will continue to exercise their primary authority to combat water pollution by regulating land and water use. See, e.g., Brief for Farm Bureau of Arkansas et al. as *Amici Curiae* 17–27.

## V

Nothing in the separate opinions filed by JUSTICE KAVANAUGH and JUSTICE KAGAN undermines our analysis. JUSTICE KAVANAUGH claims that we have “rewrit[ten]” the CWA, *post*, at 12 (opinion concurring in judgment), and JUSTICE KAGAN levels similar charges, *post*, at 3–4 (opinion concurring in judgment). These arguments are more than unfounded. We have analyzed the statutory language in detail, but the separate opinions pay no attention whatsoever to §1362(7), the key statutory provision that limits the CWA’s geographic reach to “the *waters* of the United States.” Thus, neither separate opinion even attempts to explain how the wetlands included in their interpretation fall within a fair reading of “waters.” Textualist arguments that ignore the operative text cannot be taken seriously.

## VI

In sum, we hold that the CWA extends to only those “wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right,” so that they are “indistinguishable” from those waters. *Rapanos*, 547 U. S., at 742, 755 (plurality opinion) (emphasis deleted); see *supra*, at 22. This holding compels reversal here. The wetlands on the Sacketts’ property are distinguishable

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from any possibly covered waters.

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We reverse the judgment of the United States Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

*It is so ordered.*

THOMAS, J., concurring

**SUPREME COURT OF THE UNITED STATES**

No. 21–454

MICHAEL SACKETT, ET UX., PETITIONERS *v.*  
ENVIRONMENTAL PROTECTION  
AGENCY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[May 25, 2023]

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins,  
concurring.

I join the Court’s opinion in full. The Clean Water Act (CWA) confines the Federal Government’s jurisdiction to “‘navigable waters,’” defined as “the waters of the United States.” 33 U. S. C. §§1311(a), 1362(7), (12). And the Court correctly holds that the term “waters” reaches “‘only those relatively permanent, standing or continuously flowing bodies of water “‘forming geographic[al] features”’ that are described in ordinary parlance as “streams, oceans, rivers, and lakes.”’” *Ante*, at 14 (quoting *Rapanos v. United States*, 547 U. S. 715, 739 (2006) (plurality opinion)). It also correctly holds that for a wetland to fall within this definition, it must share a “continuous surface connection to bodies that are “waters of the United States” in their own right” such that “there is no clear demarcation between “waters” and wetlands.” *Ante*, at 21 (quoting *Rapanos*, 547 U. S., at 742 (plurality opinion)).

However, like the *Rapanos* plurality before it, the Court focuses only on the term “waters”; it does not determine the extent to which the CWA’s other jurisdictional terms—“navigable” and “of the United States”—limit the reach of the statute. *Ante*, at 14–18; *Rapanos*, 547 U. S., at 731 (plurality opinion). I write separately to pick up where the

THOMAS, J., concurring

Court leaves off.

## I

The CWA’s jurisdictional terms have a long pedigree and are bound up with Congress’ traditional authority over the channels of interstate commerce. *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U. S. 159, 168, and n. 3, 172, 173–174 (2001) (SWANCC). That traditional authority was limited in two ways. First, the water had to be capable of being used as a highway for interstate or foreign commerce. Second, Congress could regulate such waters only for purposes of their navigability—by, for example, regulating obstructions hindering navigable capacity. By the time of the CWA’s enactment, the New Deal era arguably had relaxed the second limitation; Congress could regulate navigable waters for a wider range of purposes. But, critically, the statutory terms “navigable waters,” “navigable waters of the United States,” and “waters of the United States” were still understood as invoking only Congress’ authority over waters that are, were, or could be used as highways of interstate or foreign commerce. The CWA was enacted, and must be understood, against that key backdrop.

## A

As the Court correctly states, “land and water use lies at the core of traditional state authority.” *Ante*, at 23; see also *ante*, at 2. Prior to Independence, the Crown possessed sovereignty over navigable waters in the Colonies, sometimes held in trust by colonial authorities. See R. Adler, *The Ancient Mariner* of Constitutional Law: The Historical, Yet Declining Role of Navigability, 90 Wash. U. L. Rev. 1643, 1656–1659 (2013); R. Walston, *The Federal Commerce and Navigation Powers: Solid Waste Agency of Northern Cook County’s Undecided Constitutional Issue*, 42 Santa Clara L. Rev. 699, 721 (2002) (Walston). Upon Independence, this

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sovereignty was transferred to each of the 13 fully sovereign States. See *Martin v. Lessee of Waddell*, 16 Pet. 367, 410 (1842) (“[W]hen the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government”). Thus, today, States enjoy primary sovereignty over their waters, including navigable waters—stemming either from their status as independent sovereigns following Independence, *ibid.*, or their later admission to the Union on an equal footing with the original States, see *Lessee of Pollard v. Hagan*, 3 How. 212, 230 (1845) (“The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. . . . The new states have the same rights, sovereignty, and jurisdiction over this subject as the original states”); see also M. Starr, *Navigable Waters of the United States—State and National Control*, 35 Harv. L. Rev. 154, 169–170 (1921). The Federal Government therefore possesses no authority over navigable waters except that granted by the Constitution.

The Federal Government’s authority over certain navigable waters is granted and limited by the Commerce Clause, which grants Congress power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Art. I, §8, cl. 3. From the beginning, it was understood that “[t]he power to regulate commerce, includes the power to regulate navigation,” but only “as connected with the commerce with foreign nations, and among the states.” *United States v. Coombs*, 12 Pet. 72, 78 (1838) (Story, J., for the Court); accord, *Gibbons v. Ogden*, 9 Wheat. 1, 190 (1824) (“All America understands . . . the word ‘commerce,’ to comprehend navigation. It was so un-

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derstood, and must have been so understood, when the constitution was framed”); see also R. Barnett, The Original Meaning of the Commerce Clause, 68 U. Chi. L. Rev. 101, 125–126 (2001) (Barnett); R. Natelson, The Legal Meaning of “Commerce” in the Commerce Clause, 80 St. John’s L. Rev. 789, 807–810 (2006). In fact, “shipping . . . was at that time the indispensable means for the movement of goods.” Barnett 123. The Commerce Clause thus vests Congress with a limited authority over what we now call the “channels of interstate commerce.” *United States v. Lopez*, 514 U. S. 549, 558–559 (1995); see also *American Trucking Assns., Inc. v. Los Angeles*, 569 U. S. 641, 656–657 (2013) (THOMAS, J., concurring).

This federal authority, however, does not displace States’ traditional sovereignty over their waters. “The power to regulate commerce comprehends the control *for that purpose*, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie.” *Gilman v. Philadelphia*, 3 Wall. 713, 724–725 (1866) (emphasis added). And, traditionally, this limited authority was confined to regulation of the channels of interstate commerce themselves. *Corfield v. Coryell*, 6 F. Cas. 546, 550–551 (No. 3,230) (CC ED Pa. 1823) (Washington, J., for the Court). It encompassed only “the power to keep them open and free from any obstruction to their navigation” and “to remove such obstructions when they exist.” *Gilman*, 3 Wall., at 725. Thus, any activity that “interferes with, obstructs, or prevents such commerce and navigation, though done on land, may be punished by congress.” *Coombs*, 12 Pet., at 78. But, activities that merely “affect” water-based commerce, such as those regulated by “[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State,” are not within Congress’ channels-of-commerce authority. *Gibbons*, 9 Wheat., at 203; see also *Corfield*, 6 F. Cas., at 550.

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This understanding of the limits of Congress’ channels-of-commerce authority prevailed through the end of the 19th century. The Court’s cases consistently recognized that Congress has authority over navigable waters for only the limited “purpose of regulating and improving navigation.” *Gibson v. United States*, 166 U. S. 269, 271–272 (1897); see also *Port of Seattle v. Oregon & Washington R. Co.*, 255 U. S. 56, 63 (1921) (“The right of the United States in the navigable waters within the several States is limited to the control thereof for purposes of navigation”). And, this Court was careful to reaffirm that “technical title to the beds of the navigable rivers of the United States is either in the States in which the rivers are situated, or in the owners of the land bordering upon such rivers” as determined by “local law.” *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 60 (1913).

The River and Harbor Acts of 1890, 1894, and 1899 illustrate the limits of the channels-of-commerce authority. The 1890 Act authorizes the Secretary of War to “prohibi[t]” “the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction.” §10, 26 Stat. 454. The 1894 Act made it unlawful to deposit matter into “any harbor or river of the United States” that the Federal Government has appropriated money to improve and prohibited injuring improvements built by the United States in “any of its navigable waters.” §6, 28 Stat. 363.

Congress consolidated and expanded these authorities in the 1899 Act. Section 10 of the Act prohibits “[t]he creation of any obstruction . . . to the navigable capacity of any of the waters of the United States,” requires a permit to build “structures in any . . . water of the United States,” and makes it unlawful “to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity” of any water, “within the limits of any breakwater, or of the channel of any navigable water of the United States.” 30



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Stat. 1151 (codified, as amended, at 33 U. S. C. §403). In addition, §13 of the Act, sometimes referred to as the “Refuse Act,” prohibits throwing, discharging, or depositing “any refuse matter . . . into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water.” 30 Stat. 1152 (codified, as amended, at 33 U. S. C. §407). Section 13 also prohibits depositing material “on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water . . . whereby navigation shall or may be impeded or obstructed.” *Ibid.*

Three things stand out about these provisions. First, they use the terms “navigable water,” “water of the United States,” and “navigable water of the United States” interchangeably. 33 U. S. C. §§403 and 407; see also V. Albrecht & S. Nickelsburg, *Could SWANCC Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 Env. L. Rev. 11042, 11044 (2002) (Albrecht & Nickelsburg). As a result, courts have done the same in decisions interpreting the River and Harbor Acts. See, e.g., *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 608–609 (CA3 1974); *New England Dredging Co. v. United States*, 144 F. 932, 933–934 (CA1 1906); *Blake v. United States*, 181 F. Supp. 584, 587–588 (ED Va. 1960).

Second, Congress asserted its authority only to the extent that obstructions or refuse matter could impede navigation or navigable capacity. Thus, in *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690 (1899), this Court recognized that any “act sought to be enjoined” under the 1890 Act must be “one which fairly and directly tends to obstruct (that is, interfere with or diminish) the navigable capacity of a stream.” *Id.*, at 709; accord, *Lake Shore & Michigan Southern R. Co. v. Ohio*, 165 U. S. 365, 369 (1897) (holding

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that federal jurisdiction over “navigable waters” was limited to preventing “interfering with commerce”). Similarly, in *Wisconsin v. Illinois*, 278 U. S. 367 (1929), this Court interpreted the 1899 Act in light of the constitutional prohibition on Congress “arbitrarily destroy[ing] or impair[ing] the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end.” *Id.*, at 415.<sup>1</sup> The touchstone, thus, remained actual navigation.

Third, §13 of the Act requires some form of surface water connection between a tributary and traditionally navigable waters. See 33 U. S. C. §407 (prohibiting depositing refuse “into any tributary of any navigable water from which the same shall float or be washed into such navigable water”). To be sure, the Refuse Act also prohibits leaving refuse “on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water.” *Ibid.* But, this prohibition reflects nothing more than Congress’ traditional authority to regulate acts done on land that directly impair the navigability of traditionally navigable waters. See *Rio Grande Dam & Irrigation Co.*, 174 U. S., at 708 (explaining that the Act reaches “any obstruction to the navigable capacity, and anything, wherever done or however

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<sup>1</sup> Courts had long carefully enforced limits on Congress’ navigation authority in prosecutions brought under the Act of July 7, 1838, ch. 191, 5 Stat. 304 (Steamboat Acts of 1838), which prohibited the transportation of goods “upon the bays, lakes, rivers, or other navigable waters of the United States” by certain steamboats. See, e.g., *The Seneca*, 27 F. Cas. 1021 (No. 16,251) (DC Wis. 1861); see also *The James Morrison*, 26 F. Cas. 579, 582 (No. 15,465) (DC Mo. 1846) (holding that the 1838 Act did not reach a ship whose “employment ha[d] no other than a remote connection with ‘commerce or navigation among the several states;’ no more connection than has the farmer who cultivates hemp, tobacco or cotton for a market in other states—the miner who digs and smelts lead—the manufacturer who manufactures for the same market, or the traveler who intends purchasing any of these articles”).

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done, . . . which tends to destroy the navigable capacity of one of the navigable waters of the United States”); see also *Northern Pacific R. Co. v. United States*, 104 F. 691, 693 (CA8 1900); *Coombs*, 12 Pet., at 78. It does not mean that the land itself is a navigable water.<sup>2</sup>

The history of federal regulation of navigable waters demonstrates that Congress’ authority over navigation, as traditionally understood, was narrow but deep. It only applied to a discrete set of navigable waters and could only be used to keep those waters open for interstate commerce. See *Port of Seattle*, 255 U. S., at 63; *Rio Grande Dam & Irrigation Co.*, 174 U. S., at 709. Yet, where Congress had authority, it displaced the States’ traditional sovereignty over their navigable waters and allowed Congress to regulate activities even on land that could directly cause obstructions to navigable capacity. *Gilman*, 3 Wall., at 724–725; *Coombs*, 12 Pet., at 78.

In light of the depth of this new federal power, it was carefully limited—mere “effects” on interstate commerce were not sufficient to trigger Congress’ navigation authority. As one District Court presciently observed in interpreting the term “navigable waters of the United States” in the Steamboat Act of 1838:

“To make a particular branch of commerce or trade within a state, a part of the commerce among the several states, it would not be sufficient that it was remotely connected with that commerce among the several states; for almost everything and every occupation and employment in life are remotely connected with

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<sup>2</sup>The early 20th century also saw the Reclamation Act of 1902, ch. 1093, 32 Stat. 388; Federal Power Act, ch. 285, 41 Stat. 1063; Oil Pollution Act, 1924, ch. 316, 43 Stat. 604; and Flood Control Act of 1936, ch. 688, 49 Stat. 1570, all of which relied on navigability. See Walston 724–726. Although the Acts were also designed to achieve incidental benefits such as pollution control, Congress located its authority in preserving navigation. *Ibid.*

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that commerce or navigation. And if congress has the right to regulate every employment or pursuit thus remotely connected with that commerce, of which they have the control, then it has the right to regulate nearly the entire business and employment of the citizens of the several states. . . . Yet, if congress has the power to regulate all these employments, and a thousand others equally connected with that commerce, then it can regulate nearly all the concerns of life, and nearly all the employments of the citizens of the several states; and the state governments might as well be abolished. It is not sufficient, then, that navigation, or trade, or business of any kind, within a state, be remotely connected, or, perhaps, connected at all with ‘commerce with foreign nations, or among the several states, or with the Indian tribes,’ it should be a part of that commerce, to authorize congress to regulate it.” *The James Morrison*, 26 F. Cas. 579, 581 (No. 15,465) (DC Mo. 1846).

The Court’s observation that “federal regulation was largely limited to ensuring that ‘traditional navigable waters’ . . . remained free of impediments,” *ante*, at 2, thus does no more than reflect the original understanding of the federal authority over navigable waters.

## B

As noted above, the scope of Congress’ authority over waters was defined by the traditional concept of navigability, imported with significant modifications from the English common law.<sup>3</sup> Thus, Congress could regulate only “naviga-

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<sup>3</sup>The English rule tied navigability to the ebb and flow of the tides, but began to be eroded in America as early as the Northwest Ordinance of 1787 due to the superior commercial capacity of American inland rivers. See *The Daniel Ball*, 10 Wall. 557, 563 (1871); *Propeller Genesee Chief v. Fitzhugh*, 12 How. 443, 454–457 (1852); see also *Economy Light & Power*

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ble waters.” Consistent with that backdrop, the term “navigable waters”—used interchangeably with “waters of the United States” and “navigable waters of the United States”—referred to the waters subject to Congress’ traditional authority over navigable waters until the enactment of the CWA.

## 1

The term “navigable waters” has been in use since the founding to refer to the highways of commerce that were key to the Nation’s development. Great cities like Philadelphia and St. Louis emerged at first as commercial ports along these navigable waters. The Framers recognized that “Providence has in a particular manner blessed” our country with “[a] succession of navigable waters” that “bind [the Nation] together; while the most noble rivers in the world, running at convenient distances, present [Americans] with highways for the easy communication of friendly aids and the mutual transportation and exchange of their various commodities.” The Federalist No. 2, p. 38 (C. Rossiter ed. 1961) (J. Jay). These “vast rivers, stretching far inland” have been of “transcendent importance” to our Nation’s economic expansion by forming “great highways” for commerce. L. Houck, *Law of Navigable Rivers* xiii (1868).

This Court authoritatively set out the scope of the term “navigable waters of the United States” in the seminal case of *The Daniel Ball*, 10 Wall. 557 (1871). That case arose under the Steamboat Act of 1838, which prohibited the transportation of goods “upon the bays, lakes, rivers, or other navigable waters of the United States.” §2, 5 Stat.

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*Co. v. United States*, 256 U. S. 113, 120 (1921) (“[I]t is curious and interesting that the importance of these inland waterways, and the inappropriateness of the tidal test in defining our navigable waters, was thus recognized by the Congress of the Confederation [in the Northwest Ordinance] more than 80 years before this court decided *The Daniel Ball* . . . and more than 60 years before *The Propeller Genesee Chief*”).

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304. This Court held that the term “navigable” refers to waters that are “navigable in fact,” meaning that “they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.” *The Daniel Ball*, 10 Wall., at 563. The Court then explained that navigable waters are “of the United States,” “in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.” *Ibid.*; see also *The Montello*, 11 Wall. 411, 415 (1871) (“If . . . the river is not of itself a highway for commerce with other States or foreign countries, or does not form such highway by its connection with other waters, and is only navigable between different places within the State, then it is not a navigable water of the United States, but only a navigable water of the State”). It is this “junction” between waters to “for[m] a continued highway for commerce, both with other States and with foreign countries,” that brings the water “under the direct control of Congress in the exercise of its commercial power.” *The Daniel Ball*, 10 Wall., at 564. The definition of a “navigable water of the United States” was thus linked directly to the limits on Congress’ commerce authority: A navigable water of the United States was one that was ordinarily used for interstate or foreign commerce.

Wetlands were generally excluded from this definition. In *Leovy v. United States*, 177 U. S. 621 (1900), for example, the Court employed the *Daniel Ball* test to hold that the term “navigable waters of the United States,” as used in the 1890 River and Harbor Act, did not “prevent the exercise by the State of Louisiana of its power to reclaim swamp and overflowed lands by regulating and controlling the current

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of small streams not used habitually as arteries of interstate commerce.” 177 U. S., at 632. The Court observed that applying the Act to wetlands reclamation “would extend the paramount jurisdiction of the United States over all the flowing waters in the States.” *Id.*, at 633. “If such were the necessary construction of the” term “navigable water,” the Court explained, the River and Harbor Act’s “validity might well be questioned.” *Ibid.* But, the Court declined to interpret the Act to reach the wetlands, because it recognized that the phrase “navigable waters of the United States” encompassed only those waters reached by the traditional channels-of-commerce authority:

“When it is remembered that the source of the power of the general government to act at all in this matter arises out of its power to regulate commerce with foreign countries and among the States, it is obvious that what the Constitution and the acts of Congress have in view is the promotion and protection of commerce in its international and interstate aspect, and a practical construction must be put on these enactments as intended for such large and important purposes.” *Ibid.*

The Court thus held that the mere use of a wetland by fishermen was not sufficient to make the wetland a navigable water of the United States; it “was not shown that passengers were ever carried through it, or that freight destined to any other State than Louisiana, or, indeed, destined for any market in Louisiana, was ever, much less habitually, carried through it.” *Id.*, at 627.<sup>4</sup>

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<sup>4</sup>*Leovy v. United States* also reflected the law’s longstanding hostility to wetlands: “If there is any fact which may be supposed to be known by everybody, and, therefore, by courts, it is that swamps and stagnant waters are the cause of malarial and malignant fevers, and that the police power is never more legitimately exercised than in removing such nuisances.” 177 U. S., at 636. Traditionally, the only time wetlands were the subject of federal legislation was to aid the States in draining them.



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The *Daniel Ball* test, with minor variations, marked the limits of federal jurisdiction over waters up to the enactment of the CWA. For instance, in *Economy Light & Power Co. v. United States*, 256 U. S. 113 (1921), the Court applied *The Daniel Ball* but expanded it to hold that the River and Harbor Act of 1899 reaches waters that are not currently capable of supporting interstate commerce, though they once did. 256 U. S., at 123–124. And, in *United States v. Appalachian Elec. Power Co.*, 311 U. S. 377 (1940), the Court applied *The Daniel Ball* to reach waters that could be made navigable with reasonable and feasible improvement. 311 U. S., at 408–409. While these cases expanded the outer boundaries of the term, creating an expanded form of the *Daniel Ball* test, they reflect the Court’s longstanding view that the statutory term “navigable water” required application of the *Daniel Ball* test.

## 2

In the New Deal era, as is well known, this Court adopted a greatly expanded conception of Congress’ commerce authority by permitting Congress to regulate any private intrastate activity that substantially affects interstate commerce, either by itself or when aggregated with many similar activities. See *Wickard v. Filburn*, 317 U. S. 111, 127–129 (1942); see also *United States v. Darby*, 312 U. S. 100, 119 (1941). Yet, this expansion did not fundamentally change the Court’s understanding that the term “navigable waters” referred to waters used for interstate commerce. Thus, in *Appalachian Elec.*, the Court continued to apply the concept of navigability to determine the scope of Congress’ Commerce Clause authority to require licenses under

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See, e.g., Swamp Land Act of 1850, ch. 84, 9 Stat. 519; see also S. Johnson, *Wetlands Law: A Course Source* 25–26 (2d ed. 2018). Wetlands preservation only gained traction due, in large part, to advances in firearms technology that made waterfowl hunting feasible. G. Baldassarre & E. Bolen, *Waterfowl Ecology and Management* 10–14 (1994).



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the Federal Water Power Act for the construction of hydroelectric dams in “navigable waters.” 311 U. S., at 406–410. Only after applying the *Daniel Ball* definition to determine that the river in question was navigable did the Court hold that Congress had plenary authority over the erection of structures in the river, regardless of whether the structure actually impeded navigability. 311 U. S., at 423–426. While this represented an expansive application of the old concept that Congress can prevent obstructions to navigable capacity, see *supra*, at 4, 7–8, *Appalachian Elec.* made clear that the term “navigable waters” remained tethered to Congress’ traditional channels-of-commerce authority—not to the broader conceptions of the commerce authority adopted by the Court at that time.

The next year, in *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U. S. 508 (1941), the Court reaffirmed that the term “navigable waters,” this time as used in the Flood Control Act of 1936, was to be interpreted in light of the expanded *Daniel Ball* test. 313 U. S., at 522–525. Significantly, *Oklahoma* was decided mere months after *Darby*, one of the most significant cases expanding the scope of the commerce authority. 312 U. S., at 119. However, *Oklahoma* did not so much as mention *Darby* in construing the jurisdiction Congress conveyed in the term “navigable waters.” Instead, it cited *Darby* only in passing and to support the argument that, once a river is deemed navigable under the channels-of-commerce authority, Congress has authority to protect “the nation’s arteries of commerce” by regulating intrastate activities on nonnavigable parts and tributaries of the navigable river lest such activities “impai[r] navigation itself.” *Oklahoma*, 313 U. S., at 525. This was nothing more than an application of the principle that Congress can regulate activities that obstruct navigable capacity. Thus, even as the Court expanded the Commerce Clause in other contexts, it continued to understand that the term “navigable waters” refers solely to the aquatic

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channels of interstate commerce over which Congress traditionally exercised authority.

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This understanding of the term “navigable waters”—*i.e.*, as shorthand for waters subject to Congress’ authority under the *Daniel Ball* test—persisted up to the enactment of the CWA. See, *e.g.*, *Stoeco Homes, Inc.*, 498 F. 2d, at 608–609; *United States v. Joseph G. Moretti, Inc.*, 478 F. 2d 418, 428–429 (CA5 1973); see also D. Guinn, *An Analysis of Navigable Waters of the United States*, 18 *Baylor L. Rev.* 559, 579 (1966) (“[T]he test of *The Daniel Ball* and *Appalachian Power Co.* are religiously cited as being the basis for the holding on the issue of navigability”). As a court observed near the time of the CWA’s enactment, “[a]lthough the definition of ‘navigability’ laid down in *The Daniel Ball* has subsequently been modified and clarified, its definition of ‘navigable water of the United States,’ insofar as it requires a navigable interstate linkage by water, appears to remain unchanged.” *Hardy Salt Co. v. Southern Pacific Transp. Co.*, 501 F. 2d 1156, 1167 (CA10 1974) (citations omitted). This Court’s cases, too, continued to apply traditional navigability concepts in cases under the River and Harbor Acts right up to the CWA’s enactment. See *United States v. Standard Oil Co.*, 384 U. S. 224, 226 (1966) (holding that spilling oil in a navigable water was prohibited by the Refuse Act (§13 of the 1899 Act) because “its presence in our rivers and harbors is both a menace to navigation and a pollutant”); *United States v. Republic Steel Corp.*, 362 U. S. 482, 487–491 (1960) (“diminution of the navigable capacity of a waterway” required for violation of the Refuse Act). Thus, on the eve of the CWA’s enactment, the term “navigable waters” meant those waters that are, were, or could be used as highways of interstate or foreign commerce.

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## II

This history demonstrates that Congress was not writing on a blank slate in the CWA, which defines federal jurisdiction using the same terms used in the River and Harbor Acts: “navigable waters” and “the waters of the United States,” 33 U. S. C. §§1311(a), 1362(7), (12). As explained above, courts and Congress had long used the terms “navigable water,” “navigable water of the United States,” and “the waters of the United States” interchangeably to signify those waters to which the traditional channels-of-commerce authority extended. See *supra*, at 6. The terms “navigable waters” and “waters of the United States” shared a core requirement that the water be a “highway over which commerce is or may be carried,” with the term “of the United States” doing the independent work of requiring that such commerce “be carried on with other States or foreign countries.” *The Daniel Ball*, 10 Wall., at 563. The text of the CWA thus reflects the traditional balance between federal and state authority over navigable waters, as set out by *The Daniel Ball*. It would be strange indeed if Congress sought to effect a fundamental transformation of federal jurisdiction over water through phrases that had been in use to describe the traditional scope of that jurisdiction for well over a century and that carried a well-understood meaning.<sup>5</sup>

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<sup>5</sup>In fact, when Congress has wished to depart from this traditional meaning, it has done so expressly, as in parts of the Federal Power Act, §23, 41 Stat. 1075 (requiring approval for dam construction “across, along, over, or in any stream or part thereof, other than those defined herein this chapter as navigable waters”); the Federal Water Pollution Control Act, ch. 758, §2(a), 62 Stat. 1155 (as amended, 86 Stat. 816) (authorizing federal-state cooperation to abate water pollution in “interstate waters” and their tributaries); and the Water Quality Act of 1965, 79 Stat. 905–906 (authorizing grants to research abatement of pollution into “any waters”); see *Hardy Salt Co. v. Southern Pacific Transp. Co.*, 501 F. 2d 1156, 1168 (CA10 1974) (noting that Congress only departs from the expanded *Daniel Ball* test by using “clear and explicit language,” as it did in parts of the Federal Power Act).

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The Army Corps of Engineers originally understood the CWA in precisely this way. In its 1974 regulation establishing the first CWA §404 permitting program,<sup>6</sup> the Corps interpreted the term “the waters of the United States” to establish jurisdiction over the traditional navigable waters as determined by the expanded *Daniel Ball* test, noting also that the term is limited by Congress’ navigation authority. 39 Fed. Reg. 12115. The Corps anchored its jurisdiction in the expanded *Daniel Ball* test, defining “navigable waters” to include “those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.” 33 CFR §209.120(d)(1) (1974); see also §§209.260(d)(1)–(3) (requiring “[p]ast, present, or potential presence of interstate or foreign commerce,” “[p]hysical capabilities for use by commerce,” and “[d]efined geographic limits of the water body”). The regulations also made clear that traditional navigability factors were the baseline for CWA jurisdiction: “It is the water body’s capability of use by the public for purposes of transportation or commerce which is the determinative factor.” §209.260(e)(1).

Almost immediately, however, a few courts and the recently created Environmental Protection Agency (EPA) rejected this interpretation. Instead, they interpreted the CWA to assert the full extent of Congress’ New Deal era authority to regulate anything that substantially affects interstate commerce by itself or in the aggregate. See *United States v. Ashland Oil & Transp. Co.*, 504 F. 2d 1317, 1323–1329 (CA6 1974); *P. F. Z. Properties, Inc. v. Train*, 393 F. Supp. 1370, 1381 (DC 1975); *National Resource Defense Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (DC 1975);

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<sup>6</sup>Section 404 authorizes the Corps to “issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” 33 U. S. C. §§1344(a), (d).

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*United States v. Holland*, 373 F. Supp. 665, 669, 672–674 (MD Fla. 1974); 40 CFR §125.1(o) (1974) (initial EPA CWA definition). The courts that reached this conclusion relied almost exclusively on legislative history and statutory purpose. See, e.g., *Holland*, 373 F. Supp., at 672 (“The foregoing [legislative history] compels the Court to conclude that the former test of navigability was indeed defined away in the [CWA]”). But signals from legislative history cannot rebut clear statutory text, and the text of the CWA employs words that had long been universally understood to reach only those waters subject to Congress’ channels-of-commerce authority. See *supra*, at 15.

These courts and the EPA had only one textual hook for their interpretation: In defining the term “navigable waters” as “the waters of the United States,” the CWA seemed to drop the term “navigable” from the operative part of the definition. Seizing on this phrasing, the EPA’s general counsel asserted in 1973 that “the deletion of the word ‘navigable’ eliminates the requirement of navigability. The only remaining requirement, then, is that pollution of waters covered by the bill must be capable of affecting interstate commerce.” 1 EPA Gen. Counsel Op. 295 (1973). Similarly, the District Court that vacated the Corps’ original CWA definition held, without any analysis or citation, that the term “the waters of the United States” in the CWA is “not limited to the traditional tests of navigability.” *National Resource Defense Council*, 392 F. Supp., at 671.

That interpretation cannot be right. For one, the terms “navigable waters” and “the waters of the United States” had long been used synonymously by courts and Congress. The CWA simply used the terms in the same manner as the River and Harbor Acts. Moreover, no source prior to the CWA had ever asserted that the term “the waters of the United States,” when not modified by “navigable,” reached any water that may affect interstate commerce. Instead, *The Daniel Ball* made clear that “[t]he phrase ‘waters of the

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United States, in contradistinction from the navigable waters of the States,’ . . . distinguishes interstate from intrastate waters.” Albrecht & Nickelsburg 11049 (quoting *The Daniel Ball*, 10 Wall., at 563); accord, 1 A. Knauth, Benedict on Admiralty §44, p. 96 (6th ed. 1940) (“The inland lakes of various States are navigable but, having no navigable outlet linking them with our system of water-ways, have never been held to be public *waters of the United States*” (emphasis added)). The text of the CWA extends jurisdiction to “navigable waters,” and—precisely tracking *The Daniel Ball*—clarifies that it reaches “the waters of the United States,” rather than the navigable waters of the States.

Thus, the CWA’s use of the phrase “the waters of the United States” reinforces, rather than lessens, the need for a water to be at least part of “a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.” *The Daniel Ball*, 10 Wall., at 563. At most, the omission of the word “navigable” signifies that the CWA adopts the expanded *Daniel Ball* test—that includes waters that are, have been, or can be reasonably made navigable in fact—in its statutory provisions. The Federal Government’s interpretation, by contrast, renders the use of the term “navigable” a nullity and involves an unprecedented and extravagant reading of the well-understood term of art “the waters of the United States.” See Albrecht & Nickelsburg 11049 (“EPA’s conclusion is ahistorical as well as illogical”).<sup>7</sup> “[T]he waters of the

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<sup>7</sup>To be sure, the CWA is more aggressive in regulating navigable waters than the River and Harbor Acts. But, the increased stringency is not accomplished by expanding jurisdiction. The Acts use the same jurisdictional terms. Instead, the difference between them lies in the expanded scope of activities that the CWA regulates and its shift from an enforcement and injunctive regime to a previolation licensing regime. See Albrecht & Nickelsburg 11046. I express no view on the constitutionality of this regime as applied to navigable waters or on the Court’s holding in *United States v. Appalachian Elec. Power Co.*, 311 U. S. 377

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United States” does not mean *any* water *in* the United States.

There would be little need to explain any of this if the agencies had not effectively flouted our decision in *SWANCC*, which restored navigability as the touchstone of federal jurisdiction under the CWA, and rejected the key arguments supporting an expansive interpretation of the CWA’s text. We expressly held that Congress’ “use of the phrase ‘waters of the United States’” in the CWA is not “a basis for reading the term ‘navigable waters’ out of the statute”—directly contradicting the EPA’s 1973 interpretation, upon which every subsequent expansion of its authority has been based. 531 U. S., at 172. We also held that the Corps did not “mist[ake] Congress’ intent” when it promulgated its 1974 regulations, under which “the determinative factor” for navigability was a “‘water body’s capability of use by the public for purposes of transportation or commerce.’” *Id.*, at 168 (quoting 33 CFR §209.260(e)(1)). In doing so, we rejected reliance on the CWA’s “ambiguous” legislative history, which the EPA had used “to expand the definition of ‘navigable waters’” to the outer limit of the commerce authority as interpreted in the New Deal. 531 U. S., at 168, n. 3.<sup>8</sup> Instead, we made clear that Congress did not intend

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(1940), that Congress can regulate things in navigable waters for purposes other than removing obstructions to navigable capacity. I note, however, that before the New Deal era, courts consistently construed statutes to authorize only federal actions preserving navigable capacity in order to avoid exceeding Congress’ navigation authority. See *supra*, at 8–13.

<sup>8</sup>The historical context demonstrates that it was the Corps’ failure to regulate to the full extent of Congress’ navigation power, not its commerce power generally, that led to the enactment of the CWA. See Albrecht & Nickelsburg, 11047 (explaining that the CWA’s legislative history is better interpreted “as the Supreme Court in *SWANCC* read it, to mean simply that Congress intended to override previous, unduly narrow agency interpretations to assert its broadest constitutional authority over *the traditional navigable waters*”); see also S. Bodine, Examining the Term “Waters of the United States” in Its Historical Context, C.



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“to exert anything more than its commerce power over navigation.” *Ibid.*; see also *id.*, at 173 (rejecting the Government’s argument that the CWA invokes “Congress’ power to regulate intrastate activities that ‘substantially affect’ interstate commerce”).

SWANCC thus interpreted the text of the CWA as implementing Congress’ “traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made”—*i.e.*, the expanded *Daniel Ball* test. 531 U. S., at 172 (citing *Appalachian Elec.*, 311 U. S., at 407–408).<sup>9</sup> And, consistent with the traditional link between navigability and the limits of Congress’ regulatory

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Boyden Gray Center for the Study of the Administrative State Policy Brief No. 4 (2022).

<sup>9</sup>Section 404(g), added by the 1977 CWA Amendments, does not demonstrate that the CWA departs from traditional conceptions of navigability. That provision states that States may administer permit programs for discharges into “navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce . . . , including wetlands adjacent thereto).” 91 Stat. 1601 (codified, as amended, at 33 U. S. C. §1344(g)). This provision thus authorizes States to establish their own permit programs over a discrete class of traditionally navigable waters of the United States: those that once were navigable waters of the United States, but are no longer navigable in fact. See *Economy Light & Power Co.*, 256 U. S., at 123–124. Some have asserted that this nonjurisdictional provision—the function of which in the statute is to *expand* state authority—signals that Congress actually intended an unprecedented expansion of federal authority over the States. *Rapanos v. United States*, 547 U. S. 715, 805–806 (2006) (Stevens, J., dissenting); see also *post*, at 3–5 (KAVANAUGH, J., concurring in judgment); *post*, at 1–3 (KAGAN, J., concurring in judgment). But, as the Court explains, not only is §404(g) not the relevant definitional provision, its reference to “wetlands” is perfectly consistent with the commonsense recognition that some wetlands are indistinguishable from navigable waters with which they have continuous surface connections. *Ante*, at 18–22, 27. To infer Congress’ intent to upend over a century of settled understanding and effect an unprecedented transfer of authority over land and water to the Federal Government, based on nothing more



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authority, *SWANCC* noted that any broader interpretation would raise “significant constitutional and federalism questions” and “result in a significant impingement of the States’ traditional and primary authority over land and water use.” 531 U. S., at 174. Both in its holdings and in its mode of analysis, *SWANCC* cannot be reconciled with the agencies’ sharp departure from the centuries-old understanding of navigability and the traditional limits of Congress’ channels-of-commerce authority.

In sum, the plain text of the CWA and our opinion in *SWANCC* demonstrate that the CWA must be interpreted in light of Congress’ traditional authority over navigable waters. See *Albrecht & Nickelsburg* 11055 (noting that *SWANCC* “states more than once that Congress’ use of the term ‘navigable waters’ signifies that Congress intended to exercise its traditional authority over navigable waters, and not its broader power over all things that substantially affect commerce”). Yet, for decades, the EPA (of its own license) and the Corps (under the compulsion of an unreasoned and since discredited District Court order) have issued substantively identical regulatory definitions of “the waters of the United States” that completely ignore navigability and instead expand the CWA’s coverage to the outer limits of the Court’s New Deal-era Commerce Clause precedents.

### III

This case demonstrates the unbounded breadth of the jurisdiction that the EPA and the Corps have asserted under the CWA. The regulatory definition applied to the Sacketts’ property declares “intrastate” waters, wetlands, and various other wet things to be “waters of the United States” if their “use, degradation or destruction . . . *could affect inter-*

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than a negative inference from a parenthetical in a subsection that preserves state authority, is counterintuitive to say the least.

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state or foreign commerce.” 40 CFR §230.3(s)(3) (2008) (emphasis added). To leave no doubt that the agencies have entirely broken from traditional navigable waters, they give several examples of qualifying waters: those that “are or could be used by interstate or foreign travelers for recreational or other purposes,” those “[f]rom which fish or shellfish are or could be taken and sold in interstate or foreign commerce,” those that “are used or could be used for industrial purposes by industries in interstate commerce,” “[t]ributaries of” any such waters, and “[w]etlands adjacent to” any such waters. §§230.3(s)(3)(i)–(iii), (5), (7). This definition and others like it are premised on the fallacy repudiated in *SWANCC*: that the text of the CWA expands federal jurisdiction beyond Congress’ traditional “commerce power over navigation.” 531 U. S., at 168, n. 3.

Nonetheless, under these boundless standards, the agencies have “asserted jurisdiction over virtually any parcel of land containing a channel or conduit . . . through which rainwater or drainage may occasionally or intermittently flow,” including “storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years.” *Rapanos*, 547 U. S., at 722 (plurality opinion). The agencies’ definition “engulf[s] entire cities and immense arid wastelands” alike. *Ibid.* Indeed, because “the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface,” “any plot of land containing such a channel may potentially be regulated.” *Ibid.*

If this interpretation were correct, the only prudent move for any landowner in America would be to ask the Federal Government for permission before undertaking any kind of development. See Tr. of Oral Arg. 86, 116–117. This regime turns Congress’ traditionally limited navigation authority on its head. The baseline under the Constitution, the CWA, and the Court’s precedents is state control of waters. See

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SWANCC, 531 U. S., at 174 (reaffirming “the States’ traditional and primary power over land and water use”); *Leovy*, 177 U. S., at 633 (repudiating an interpretation of the 1899 Act that would render practically every “creek or stream in the entire country” a “navigable water of the United States” and “subject the officers and agents of a State . . . to fine and imprisonment” for draining a swamp “unless permission [was] first obtained from the Secretary of War”). By contrast, the agencies’ interpretation amounts to a federal police power, exercised in the most aggressive possible way.

Thankfully, applying well-established navigability rules makes this a straightforward case. The “wetlands” on the Sacketts’ property are not “waters of the United States” for several independently sufficient reasons. First, for the reasons set out by the Court, the Sacketts’ wetlands are not “waters” because they lack a continuous surface connection with a traditional navigable water. See *ante*, at 27. Second, the nonnavigable so-called “tributary” (really, a roadside ditch) across the street from the Sacketts’ property is not a water of the United States because it is not, has never been, and cannot reasonably be made a highway of interstate or foreign commerce. See *SWANCC*, 531 U. S., at 172. Third, the agencies have not attempted to establish that Priest Lake is a navigable water under the expanded *Daniel Ball* test. The lake is purely intrastate, and the agencies have not shown that it is a highway of interstate or foreign commerce. Instead, the agencies rely primarily upon interstate tourism and the lake’s attenuated connection to navigable waters. See U. S. Army Corps of Engineers, G. Rayner, Priest Lake Jurisdictional Determination (Feb. 27, 2007); see also Brief for National Association of Home Builders of the United States as *Amicus Curiae* 21–24. But, this is likely insufficient under the traditional navigability tests to which the CWA pegs jurisdiction. See *supra*, at 10–13; accord, Tr. of Oral Arg. 119 (EPA counsel conceding that Congress “hasn’t used its full Commerce Clause authority” in

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the CWA). Finally, even assuming that a navigable water is involved, the agencies have not established that the Sacketts' actions would obstruct or otherwise impede navigable capacity or the suitability of the water for interstate commerce. See *Rio Grande Dam & Irrigation Co.*, 174 U. S., at 709.

This is not to say that determining whether a water qualifies under the CWA is *always* easy. But, it is vital that we ask the right question in determining what constitutes “the waters of the United States”: whether the water is within Congress' traditional authority over the interstate channels of commerce. Here, no elaborate analysis is required to know that the Sacketts' *land* is not a *water*, much less a water of the United States.

## IV

What happened to the CWA is indicative of deeper problems with the Court's Commerce Clause jurisprudence. The eclipse of Congress' well-defined authority over the channels of interstate commerce tracks the Court's expansion of Congress' power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Art. I, §8, cl. 3. As I have explained at length, the Court's Commerce Clause jurisprudence has significantly departed from the original meaning of the Constitution. See *Gonzales v. Raich*, 545 U. S. 1, 58–59 (2005) (dissenting opinion); *Lopez*, 514 U. S., at 586–602 (concurring opinion). “The Clause's text, structure, and history all indicate that, at the time of the founding, the term “commerce” consisted of selling, buying, and bartering, as well as transporting for these purposes.” *Raich*, 545 U. S., at 58. This meaning “stood in contrast to productive activities like manufacturing and agriculture,” and founding era sources demonstrate that “the term ‘commerce’ [was] consistently used to mean trade or exchange—not all economically gainful activity that has some attenuated connection

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to trade or exchange.” *Ibid.* (citing *Lopez*, 514 U. S., at 586–587 (THOMAS, J., concurring); Barnett 112–125).<sup>10</sup> By departing from this limited meaning, the Court’s cases have licensed federal regulatory schemes that would have been “unthinkable” to the Constitution’s Framers and ratifiers. *Raich*, 545 U. S., at 59 (opinion of THOMAS, J.).

Perhaps nowhere is this deviation more evident than in federal environmental law, much of which is uniquely dependent upon an expansive interpretation of the Commerce Clause. See *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 281–283 (1981); see also Brief for Claremont Institute’s Center for Constitutional Jurisprudence as *Amicus Curiae* 17–25. And many environmental regulatory schemes seem to push even the limits of the Court’s New Deal era Commerce Clause precedents, see *Hodel*, 452 U. S., at 309–313 (Rehnquist, J., concurring in judgment), to say nothing of the Court’s more recent precedents reining in the commerce power. See, e.g., *SWANCC*, 531 U. S., at 173–174; cf. *Rancho Viejo, LLC v. Norton*, 334 F. 3d 1158, 1160 (CA DC 2003) (Roberts, J., dissenting from denial of rehearing en banc) (“The panel’s approach in this case leads to the result that regulating the taking [under the Endangered Species Act] of a hapless toad that, for reasons of its own, lives its entire life in California constitutes regulating ‘Commerce among the several States’” (ellipsis omitted)).

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<sup>10</sup> Further scholarship notes that the term “commerce” as originally understood “was bound tightly with the *Lex Mercatoria* and the sort of activities engaged in by merchants: buying and selling products made by others (and sometimes land), associated finance and financial instruments, navigation and other carriage, and intercourse across jurisdictional lines.” R. Natelson, The Legal Meaning of “Commerce” in the Commerce Clause, 80 St. John’s L. Rev. 789, 845 (2006). This “did not include agriculture, manufacturing, mining, *malum in se* crime, or land use. Nor did it include activities that merely ‘substantially affected’ commerce; on the contrary, the cases included wording explicitly distinguishing such activities from commerce.” *Ibid.*

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The Court’s opinion today curbs a serious expansion of federal authority that has simultaneously degraded States’ authority and diverted the Federal Government from its important role as guarantor of the Nation’s great commercial water highways into something resembling “a local zoning board.” *Rapanos*, 547 U. S., at 738 (plurality opinion). But, wetlands are just the beginning of the problems raised by the agencies’ assertion of jurisdiction in this case. Despite our clear guidance in *SWANCC* that the CWA extends only to the limits of Congress’ traditional jurisdiction over navigable waters, the EPA and the Corps have continued to treat the statute as if it were based on New Deal era conceptions of Congress’ commerce power. But, while not all environmental statutes are so textually limited, Congress chose to tether federal jurisdiction under the CWA to its traditional authority over navigable waters. The EPA and the Corps must respect that decision.

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**SUPREME COURT OF THE UNITED STATES**

No. 21–454

MICHAEL SACKETT, ET UX., PETITIONERS *v.*  
ENVIRONMENTAL PROTECTION  
AGENCY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[May 25, 2023]

JUSTICE KAGAN, with whom JUSTICE SOTOMAYOR and JUSTICE JACKSON join, concurring in the judgment.

Like JUSTICE KAVANAUGH, “I would stick to the text.” *Post*, at 14 (opinion concurring in judgment). As he explains in the principal concurrence, our normal method of construing statutes identifies which wetlands the Clean Water Act covers—and the answer provided exceeds what the Court says today. Because the Act covers “the waters of the United States,” and those waters “includ[e]” all wetlands “adjacent” to other covered waters, the Act extends to those “adjacent” wetlands. 33 U. S. C. §§1362(7), 1344(g)(1). And in ordinary language, one thing is adjacent to another not only when it is touching, but also when it is nearby. See *post*, at 4–5 (quoting multiple dictionaries). So, for example, one house is adjacent to another even when a stretch of grass and a picket fence separate the two. As applied here, that means—as the EPA and Army Corps have recognized for almost half a century—that a wetland comes within the Act if (i) it is “contiguous to or bordering a covered water, *or* (ii) if [it] is separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like.” *Post*, at 14 (emphasis in original). In excluding all the wetlands in category (ii), the majority’s “‘continuous surface connection’ test disregards the ordinary meaning of

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‘adjacent.’” *Post*, at 9. The majority thus alters—more precisely, narrows the scope of—the statute Congress drafted.

And make no mistake: Congress wrote the statute it meant to. The Clean Water Act was a landmark piece of environmental legislation, designed to address a problem of “crisis proportions.” R. Adler, J. Landman, & D. Cameron, *The Clean Water Act: 20 Years Later* 5 (1993). How bad was water pollution in 1972, when the Act passed? Just a few years earlier, Ohio’s Cuyahoga River had “burst into flames, fueled by oil and other industrial wastes.” *Ibid.* And that was merely one of many alarms. Rivers, lakes, and creeks across the country were unfit for swimming. Drinking water was full of hazardous chemicals. Fish were dying in record numbers (over 40 million in 1969); and those caught were often too contaminated to eat (with mercury and DDT far above safe levels). See *id.*, at 5–6. So Congress embarked on what this Court once understood as a “total restructuring and complete rewriting” of existing water pollution law. *Milwaukee v. Illinois*, 451 U. S. 304, 317 (1981) (internal quotation marks omitted). The new Act established “a self-consciously comprehensive” and “all-encompassing program of water pollution regulation.” *Id.*, at 318–319. Or said a bit differently, the Act created a program broad enough to achieve the codified objective of “restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation’s waters.” §1251(a). If you’ve lately swum in a lake, happily drunk a glass of water straight from the tap, or sat down to a good fish dinner, you can appreciate what the law has accomplished.

Vital to the Clean Water Act’s project is the protection of wetlands—both those contiguous to covered waters and others nearby. As this Court (again, formerly) recognized, wetlands “serve to filter and purify water draining into adjacent bodies of water, and to slow the flow of surface runoff into lakes, rivers, and streams.” *United States v. Riverside Bayview Homes, Inc.*, 474 U. S. 121, 134 (1985) (citation



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omitted). Wetlands thus “function as integral parts of the aquatic environment”—protecting neighboring water if themselves healthy, imperiling neighboring water if instead degraded. *Id.*, at 135. At the same time, wetlands play a crucial part in flood control (if anything, more needed now than when the statute was enacted). And wetlands perform those functions, as JUSTICE KAVANAUGH explains, not only when they are touching a covered water but also when they are separated from it by a natural or artificial barrier—say, a berm or dune or dike or levee. See *post*, at 12–13 (giving examples). Those barriers, as he says, “do not block all water flow,” and in fact are usually evidence of a significant connection between the wetland and the water. *Ibid.* Small wonder, then, that the Act—as written, rather than as read today—covers wetlands with that kind of connection. Congress chose just the word needed to meet the Act’s objective. A wetland is protected when it is “adjacent” to a covered water—not merely when it is “adjoining” or “contiguous” or “touching,” or (in the majority’s favorite made-up locution) has a “continuous surface connection.” See, e.g., *ante*, at 27.

Today’s majority, though, believes Congress went too far. In the majority’s view, the Act imposes unjustifiably “crushing consequences” for violations of its terms. *Ante*, at 3. And many of those violations, it thinks, are of no real concern, arising from “mundane” land-use conduct “like moving dirt.” *Ante*, at 13. Congress, the majority scolds, has unleashed the EPA to regulate “swimming pools[] and puddles,” wreaking untold havoc on “a staggering array of landowners.” *Ante*, at 1, 13. Surely something has to be done; and who else to do it but this Court? It must rescue property owners from Congress’s too-ambitious program of pollution control.

So the majority shelves the usual rules of interpretation—reading the text, determining what the words used there mean, and applying that ordinary understanding

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even if it conflicts with judges' policy preferences. The majority's first pass through the statute is, as JUSTICE KAVANAUGH says, "unorthodox." *Post*, at 9. "A minus B, which includes C"? *Ante*, at 19. The majority could use every letter of the alphabet, and graduate to quadratic equations, and still not solve its essential problem. As the majority concedes, the statute "tells us that at least some wetlands must qualify as 'waters of the United States.'" *Ante*, at 18–19. More, the statute tells us what those "some wetlands" are: the "adjacent" ones. And again, as JUSTICE KAVANAUGH shows, "adjacent" does not mean adjoining. See *post*, at 4–6; *supra*, at 1–2. So the majority proceeds to its back-up plan. It relies as well on a judicially manufactured clear-statement rule. When Congress (so says the majority) exercises power "over private property"—particularly, over "land and water use"—it must adopt "exceedingly clear language." *Ante*, at 23 (internal quotation marks omitted). There is, in other words, a thumb on the scale for property owners—no matter that the Act (*i.e.*, the one Congress enacted) is all about stopping property owners from polluting. See *supra*, at 2.

Even assuming that thumb's existence, the majority still would be wrong. As JUSTICE KAVANAUGH notes, clear-statement rules operate (when they operate) to resolve problems of ambiguity and vagueness. See *post*, at 11; see also *Bond v. United States*, 572 U. S. 844, 859 (2014); *United States v. Bass*, 404 U. S. 336, 347 (1971). And no such problems are evident here. One last time: "Adjacent" means neighboring, whether or not touching; so, for example, a wetland is adjacent to water on the other side of a sand dune. That congressional judgment is as clear as clear can be—which is to say, as clear as language gets. And so a clear-statement rule must leave it alone. The majority concludes otherwise because it is using its thumb not to resolve ambiguity or clarify vagueness, but instead to "correct" breadth. Those paying attention have seen this move

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before—actually, just last Term. In another case of environmental regulation (involving clean air), the Court invoked another clear-statement rule (the so-called major questions doctrine) to diminish another plainly expansive term (“system of emission reduction”). See *West Virginia v. EPA*, 597 U. S. \_\_\_, \_\_\_, \_\_\_ (2022) (slip op., at 2, 19). “[C]ontra the majority,” I said then, “a broad term is not the same thing as a ‘vague’ one.” *Id.*, at \_\_\_ (dissenting opinion) (slip op., at 8). And a court must treat the two differently. A court may, on occasion, apply a clear-statement rule to deal with statutory vagueness or ambiguity. But a court may not rewrite Congress’s plain instructions because they go further than preferred. That is what the majority does today in finding that the Clean Water Act excludes many wetlands (clearly) “adjacent” to covered waters.

And still more fundamentally, why ever have a thumb on the scale against the Clean Water Act’s protections? The majority first invokes federalism. See *ante*, at 23–24. But as JUSTICE KAVANAUGH observes, “the Federal Government has long regulated the waters of the United States, including adjacent wetlands.” *Post*, at 11. The majority next raises the specter of criminal penalties for “indeterminate” conduct. See *ante*, at 24–25. But there is no peculiar indeterminacy in saying—as regulators have said for nearly a half century—that a wetland is covered *both* when it touches a covered water *and* when it is separated by only a dike, berm, dune, or similar barrier. (That standard is in fact more definite than a host of criminal laws I could name.) Today’s pop-up clear-statement rule is explicable only as a reflexive response to Congress’s enactment of an ambitious scheme of environmental regulation. It is an effort to cabin the anti-pollution actions Congress thought appropriate. See *ante*, at 23 (complaining about Congress’s protection of “vast” and “staggering” “additional area”). And that, too, recalls last Term, when I remarked on special canons “magically appearing as get-out-of-text-free cards”

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to stop the EPA from taking the measures Congress told it to. See *West Virginia*, 597 U. S., at \_\_\_\_–\_\_\_\_ (dissenting opinion) (slip op., at 28–29). There, the majority’s non-textualism barred the EPA from addressing climate change by curbing power plant emissions in the most effective way. Here, that method prevents the EPA from keeping our country’s waters clean by regulating adjacent wetlands. The vice in both instances is the same: the Court’s appointment of itself as the national decision-maker on environmental policy.

So I’ll conclude, sadly, by repeating what I wrote last year, with the replacement of only a single word. “[T]he Court substitutes its own ideas about policymaking for Congress’s. The Court will not allow the Clean [Water] Act to work as Congress instructed. The Court, rather than Congress, will decide how much regulation is too much.” *Id.*, at \_\_\_\_ (slip op., at 32). Because that is not how I think our Government should work—more, because it is not how the Constitution thinks our Government should work—I respectfully concur in the judgment only.

KAVANAUGH, J., concurring in judgment

## SUPREME COURT OF THE UNITED STATES

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No. 21–454

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MICHAEL SACKETT, ET UX., PETITIONERS *v.*  
ENVIRONMENTAL PROTECTION  
AGENCY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[May 25, 2023]

JUSTICE KAVANAUGH, with whom JUSTICE SOTOMAYOR, JUSTICE KAGAN, and JUSTICE JACKSON join, concurring in the judgment.

The Clean Water Act generally prohibits dumping dredged or fill material without a permit into the “waters of the United States.” 33 U. S. C. §§1311(a), 1344(a), 1362. The “waters of the United States” include wetlands that are “adjacent” to waters covered by the Act—for example, wetlands that are adjacent to covered rivers or lakes. §§1344(g), 1362(7). The question in this case is whether the wetlands on the Sacketts’ residential property are adjacent to covered waters and therefore covered under the Act.

The Ninth Circuit held that the wetlands on the Sacketts’ property are covered by the Clean Water Act because, as relevant here, the wetlands have a “significant nexus” to covered waters nearby. 8 F. 4th 1075, 1093 (2021). The Court today reverses the Ninth Circuit’s judgment.

I agree with the Court’s reversal of the Ninth Circuit. In particular, I agree with the Court’s decision not to adopt the “significant nexus” test for determining whether a wetland is covered under the Act. And I agree with the Court’s bottom-line judgment that the wetlands on the Sacketts’

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property are not covered by the Act and are therefore not subject to permitting requirements.

I write separately because I respectfully disagree with the Court’s new test for assessing when wetlands are covered by the Clean Water Act. The Court concludes that wetlands are covered by the Act only when the wetlands have a “continuous surface connection” to waters of the United States—that is, when the wetlands are “adjoining” covered waters. *Ante*, at 20, 22 (internal quotation marks omitted). In my view, the Court’s “continuous surface connection” test departs from the statutory text, from 45 years of consistent agency practice, and from this Court’s precedents. The Court’s test narrows the Clean Water Act’s coverage of “adjacent” wetlands to mean only “adjoining” wetlands. But “adjacent” and “adjoining” have distinct meanings: Adjoining wetlands are contiguous to or bordering a covered water, whereas adjacent wetlands include both (i) those wetlands contiguous to or bordering a covered water, *and* (ii) wetlands separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like. By narrowing the Act’s coverage of wetlands to only adjoining wetlands, the Court’s new test will leave some long-regulated adjacent wetlands no longer covered by the Clean Water Act, with significant repercussions for water quality and flood control throughout the United States. Therefore, I respectfully concur only in the Court’s judgment.

I

The Clean Water Act generally prohibits dumping a “pollutant”—including dredged or fill material—into “navigable waters” without a permit. 33 U. S. C. §§1311(a), 1344(a), 1362. The Act defines “navigable waters” as “the waters of the United States, including the territorial seas.” §1362(7).

As the Court today ultimately agrees, see *ante*, at 19, and

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the Sacketts acknowledge, see Tr. of Oral Arg. 7–8, 33–34, 56–57, the statutory term “waters of the United States” covers wetlands “adjacent” to waters of the United States—for example, wetlands adjacent to a river or lake that is itself a water of the United States. 33 U. S. C. §1344(g).

As enacted in 1972, the Clean Water Act protected “the waters of the United States.” §§1311(a), 1362(7), 1362(12). In 1975, the Army Corps interpreted “waters of the United States” to include wetlands “adjacent to other navigable waters.” 40 Fed. Reg. 31324. In 1977, Congress expressly adopted that same understanding of the Act, amending the Act to make clear that only the Federal Government, and not the States, may issue Clean Water Act permits for dumping dredged or fill material into certain “waters of the United States,” “including wetlands adjacent” to those covered waters. Clean Water Act, 91 Stat. 1601; 33 U. S. C. §1344(g). In that 1977 Act, Congress thus expressly recognized “adjacent wetlands” as “waters of the United States.”

Interpreting the text of the Act as amended in 1977, this Court has long held that the Act covers “adjacent” wetlands. See *United States v. Riverside Bayview Homes, Inc.*, 474 U. S. 121, 134–135, 138 (1985) (“Congress expressly stated that the term ‘waters’ included adjacent wetlands.”); see also *Rapanos v. United States*, 547 U. S. 715, 742 (2006) (plurality opinion) (wetlands that “are ‘adjacent to’” waters of the United States are “covered by the Act”); *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U. S. 159, 167, 172 (2001) (recognizing “Congress’ unequivocal” “approval of, the Corps’ regulations interpreting the [Act] to cover wetlands adjacent to navigable waters”). The Court has also ruled that the Act’s coverage of adjacent wetlands does not extend to “isolated” wetlands. *Id.*, at 168–172.

So the question here becomes the meaning of “adjacent” wetlands under the Clean Water Act. As a matter of

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ordinary meaning and longstanding agency practice, a wetland is “adjacent” to a covered water (i) if the wetland is adjoining—that is, contiguous to or bordering—a covered water—or (ii) if the wetland is separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like.

The Court and I agree that wetlands in the first category—that is, wetlands adjoining a covered water—are covered as adjacent wetlands. *Ante*, at 19–22. But the Court and I disagree about the second category—that is, wetlands separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like. The Court concludes that wetlands in that second category are not covered as adjacent wetlands because those wetlands do not have a continuous surface connection to a covered water—in other words, those wetlands are not adjoining the covered water. I disagree because the statutory text (“adjacent”) does not require a continuous surface connection between those wetlands and covered waters.

The ordinary meaning of the term “adjacent” has not changed since Congress amended the Clean Water Act in 1977 to expressly cover “wetlands adjacent” to waters of the United States. 91 Stat. 1601; 33 U. S. C. §1344(g). Then as now, “adjacent” means lying near or close to, neighboring, or not widely separated. Indeed, the definitions of “adjacent” are notably explicit that two things need not touch each other in order to be adjacent. “Adjacent” includes “adjoining” but is not limited to “adjoining.” See, *e.g.*, Black’s Law Dictionary 62 (rev. 4th ed. 1968) (defining “adjacent” as “Lying near or close to; sometimes, contiguous; neighboring; . . . may not actually touch”); Black’s Law Dictionary 50 (11th ed. 2019) (defining “adjacent” as “Lying near or close to, but not necessarily touching”); see also, *e.g.*, Webster’s Third New International Dictionary 26 (1976) (defining “adjacent” as



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“to lie near, border on”; “not distant or far off”; “nearby but not touching”).

By contrast to the Clean Water Act’s express inclusion of “adjacent” wetlands, other provisions of the Act use the narrower term “adjoining.” Compare 33 U. S. C. §1344(g) with §§1321(b)–(c) (“adjoining shorelines” and “adjoining shorelines to the navigable waters”); §1346(c) (“land adjoining the coastal recreation waters”); see also §1254(n)(4) (“estuary” includes certain bodies of water “having unimpaired natural connection with open sea”); §2802(5) (“‘coastal waters’” includes wetlands “having unimpaired connection with the open sea up to the head of tidal influence”). The difference in those two terms is critical to this case. Two objects are “adjoining” if they “are so joined or united to each other that no third object intervenes.” 1968 Black’s 62 (comparing “adjacent” with “adjoining”); see *ibid.* (“Adjoining” means “touching or contiguous, as distinguished from lying near to or adjacent”); see also Black’s Law Dictionary 38–39 (5th ed. 1979) (same); Webster’s Third 26–27 (similar). As applied to wetlands, a marsh is adjacent to a river even if separated by a levee, just as your neighbor’s house is adjacent to your house even if separated by a fence or an alley.

In other contexts, this Court has recognized the important difference in the meaning of the terms “adjacent” and “adjoining” and has held that “adjacent” is broader than “adjoining or actually contiguous.” *United States v. St. Anthony R. Co.*, 192 U. S. 524, 533 (1904). As an example, the *St. Anthony* case concerned a federal statute granting railroads the right to cut timber from “public lands adjacent” to a railroad right of way. *Id.*, at 526, n. 1, 530. The Court held that timber could be taken from “adjacent” sections of land that were *not* “contiguous to or actually touching” the right of way. *Id.*, at 538. The Court explained that if “the word ‘adjoining’ had been used instead of ‘adjacent,’” a railroad could not have taken the relevant

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timber. *Ibid.*

In short, the term “adjacent” is broader than “adjoining” and does not require that two objects actually touch. We must presume that Congress used the term “adjacent” wetlands in 1977 to convey a different meaning than “adjoining” wetlands. See *Russello v. United States*, 464 U. S. 16, 23 (1983).

## II

Longstanding agency practice reinforces the ordinary meaning of adjacency and demonstrates, contrary to the Court’s conclusion today, that the term “adjacent” is broader than “adjoining.”

After the Act was passed in 1972, a key question quickly arose: Did “waters of the United States” include wetlands? By 1975, the Army Corps concluded that the term “waters of the United States” included “adjacent” wetlands. 40 Fed. Reg. 31324. In 1977, Congress itself made clear that “adjacent” wetlands were covered by the Act by amending the Act and enacting §1344(g). 91 Stat. 1601.

Since 1977, when Congress explicitly included “adjacent” wetlands within the Act’s coverage, the Army Corps has adopted a variety of interpretations of its authority over those wetlands—some more expansive and others less expansive. But throughout those 45 years and across all eight Presidential administrations, the Army Corps has *always* included in the definition of “adjacent wetlands” not only wetlands adjoining covered waters but also those wetlands that are separated from covered waters by a man-made dike or barrier, natural river berm, beach dune, or the like.

- In 1977 and 1980, under President Carter, the Army Corps and EPA defined “adjacent” wetlands as including wetlands “separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like.” 42 Fed. Reg.

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37144; see 45 Fed. Reg. 85345.

- In 1986, under President Reagan, the Army Corps adopted a new regulatory provision defining “waters of the United States” and reaffirmed that “adjacent” wetlands include wetlands “separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like.” 51 Fed. Reg. 41210, 41251.
- From 1986 until 2015, under Presidents Reagan, George H. W. Bush, Clinton, George W. Bush, and Obama, the regulations continued to cover wetlands “separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like.” See 33 CFR §328.3(c) (1991); 40 CFR §230.3(b) (1991); 33 CFR §328.3(c) (1998); 40 CFR §230.3(b) (1998); 33 CFR §328.3(c) (2005); 40 CFR §230.3(b) (2005); 33 CFR §328.3(c) (2010); 40 CFR §230.3(b) (2010).
- In 2015, under President Obama, the Army Corps and EPA promulgated a new rule, which again specified that “adjacent” wetlands include wetlands “separated by constructed dikes or barriers, natural river berms, beach dunes, and the like.” 80 Fed. Reg. 37105, 37116.
- In 2019 and 2020, under President Trump, the Army Corps and EPA repealed the 2015 rule and issued a new rule. But even following the repeal and new rule, adjacent wetlands included wetlands that are “physically separated” from certain covered waters “only by a natural berm, bank, dune, or similar natural feature” or “only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection . . . in a typical year, such as through a culvert, flood or tide gate, pump, or similar artificial feature.” 85 Fed. Reg. 22338, 22340 (2020).

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- In 2023, under President Biden, the Army Corps and EPA once again issued a new rule that defined “adjacent” wetlands to include wetlands “separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like.” 88 Fed. Reg. 3143–3144.

That longstanding and consistent agency interpretation reflects and reinforces the ordinary meaning of the statute. The eight administrations since 1977 have maintained dramatically different views of how to regulate the environment, including under the Clean Water Act. Some of those administrations promulgated very broad interpretations of adjacent wetlands. Others adopted far narrower interpretations. Yet *all* of those eight different administrations have recognized as a matter of law that the Clean Water Act’s coverage of adjacent wetlands means more than adjoining wetlands and also includes wetlands separated from covered waters by man-made dikes or barriers, natural river berms, beach dunes, or the like. That consistency in interpretation is strong confirmation of the ordinary meaning of adjacent wetlands.

### III

The Act covers “adjacent” wetlands. And adjacent wetlands is a broader category than adjoining wetlands. But instead of adhering to the ordinary meaning of “adjacent” wetlands, to the 45 years of consistent agency practice, and to this Court’s precedents, the Court today adopts a test under which a wetland is covered only if the wetland has a “continuous surface connection” to a covered water—in other words, if it adjoins a covered water. *Ante*, at 22 (internal quotation marks omitted). The Court says that the wetland and the covered water must be “indistinguishable” from one another—in other words, there must be no “clear demarcation” between wetlands and covered waters. *Ante*, at 21 (internal quotation marks

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omitted).

The Court’s “continuous surface connection” test disregards the ordinary meaning of “adjacent.” The Court’s mistake is straightforward: The Court essentially reads “adjacent” to mean “adjoining.” As a result, the Court excludes wetlands that the text of the Clean Water Act covers—and that the Act since 1977 has *always* been interpreted to cover.

In support of its narrower “continuous surface connection” interpretation of covered wetlands, the Court emphasizes that the 1972 Act’s overarching statutory term is “waters of the United States.” *Ante*, at 19. And the Court suggests that the term “waters of the United States” cannot be interpreted to cover “adjacent wetlands” but only “adjoining wetlands.” See *ante*, at 19–22. But in 1977, Congress itself expressly made clear that the “waters of the United States” include “adjacent” wetlands. 91 Stat. 1601. And Congress would not have used the word “adjacent” in 1977 if Congress actually meant “adjoining,” particularly because Congress used the word “adjoining” in several other places in the Clean Water Act. 33 U. S. C. §§1321(b)–(c), 1346(c); see also §§1254(n)(4), 2802(5).

To bolster its unorthodox statutory interpretation, the Court resorts to a formula: “A minus B, which includes C.” *Ante*, at 19. That just seems to be a fancier way of arguing (against all indications of ordinary meaning) that “adjacent” means “adjoining.” But again the Court is imposing a restriction nowhere to be found in the text. In the end, the Court has no good answer for why Congress used the term “adjacent” instead of “adjoining” when Congress enacted §1344(g) in 1977.<sup>1</sup>

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<sup>1</sup>Perhaps recognizing the difficulty of reading the Act to mean “adjoining” when it actually says “adjacent,” the Court at one point suggests that “adjoining” is equivalent to “adjacent.” *Ante*, at 19–20. As a matter of ordinary meaning, as explained at length above, that is incorrect. Adjoining wetlands are a subset of adjacent wetlands, not the

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Recall again how the 1977 Act came about. In 1975, the Army Corps concluded that the 1972 Act’s coverage of “waters of the United States” included “adjacent” wetlands. 40 Fed. Reg. 31324. Then in 1977, Congress adopted a new permitting program for a category of “waters of the United States.” Congress allocated to the Federal Government exclusive authority to issue Clean Water Act permits for dumping dredged or fill material into certain “waters of the United States,” “including wetlands adjacent thereto.” 91 Stat. 1601. Through that statutory text, Congress made clear its understanding that “waters of the United States” included “adjacent” wetlands—and indeed, Congress designed important federal-state permitting authorities around that precise understanding. Congress’s 1977 amendment did not “merely” express “an opinion” about the meaning of the Clean Water Act; rather, it reflected what Congress understood “its own prior acts to mean.” *Bell v. New Jersey*, 461 U. S. 773, 785, n. 12 (1983) (internal quotation marks omitted).

Moreover, Congress’s 1977 decision was no accident. As this Court has previously recognized, “the scope of the Corps’ asserted jurisdiction over wetlands”—including the Corps’ decision to cover adjacent wetlands—“was specifically brought to Congress’ attention” in 1977, “and Congress rejected measures designed to curb the Corps’ jurisdiction.” *United States v. Riverside Bayview Homes, Inc.*, 474 U. S. 121, 137 (1985). Subsequently, this Court has recognized that Congress’s 1977 amendment made clear that the Act “cover[s] wetlands adjacent to navigable waters.” *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U. S. 159, 167 (2001); see *Riverside Bayview*, 474 U. S., at 138 (“Congress expressly stated that the term ‘waters’ included adjacent wetlands”).

Not surprisingly, in the years since 1977, no one has

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whole set of adjacent wetlands.

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seriously disputed that the Act covers adjacent wetlands. And in light of the text of the Act, eight consecutive Presidential administrations have recognized that the Act covers adjacent wetlands and that adjacent wetlands include more than simply adjoining wetlands. The Court’s analysis today therefore seems stuck in a bit of a time warp—relitigating an issue that Congress settled in 1977 and that this Court has long treated as settled: The Act covers adjacent wetlands. By adopting a test that substitutes “adjoining” for “adjacent,” the Court today errs.

The Court also invokes federalism and vagueness concerns. The Court suggests that ambiguities or vagueness in federal statutes regulating private property should be construed in favor of the property owner, particularly given that States have traditionally regulated private property rights. See *ante*, at 23–25; see also *Solid Waste Agency of Northern Cook Cty.*, 531 U. S., at 173–174. To begin with, the Federal Government has long regulated the waters of the United States, including adjacent wetlands.

In any event, the decisive point here is that the term “adjacent” in this statute is unambiguously broader than the term “adjoining.” On that critical interpretive question, there is no ambiguity. We should not create ambiguity where none exists. And we may not rewrite “adjacent” to mean the same thing as “adjoining,” as the Court does today.

Finally, contrary to the Court’s suggestion otherwise, the analysis in this separate opinion centers on the “operative” text, “waters of the United States.” *Ante*, at 27. To recap: The 1972 Act covered “waters of the United States.” In 1977, when Congress allocated permitting authority, Congress expressly included “adjacent” wetlands within the “waters of the United States.” Since then, the Executive Branch and this Court have recognized that “waters of the United States” covers “adjacent” wetlands. Based on the

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text of the statute, as well as 45 years of consistent agency practice and this Court’s precedents, I respectfully disagree with the Court’s decision to interpret “waters of the United States” to include only adjoining wetlands and not adjacent wetlands.

#### IV

The difference between “adjacent” and “adjoining” in this context is not merely semantic or academic. The Court’s rewriting of “adjacent” to mean “adjoining” will matter a great deal in the real world. In particular, the Court’s new and overly narrow test may leave long-regulated and long-accepted-to-be-regulable wetlands suddenly beyond the scope of the agencies’ regulatory authority, with negative consequences for waters of the United States. For example, the Mississippi River features an extensive levee system to prevent flooding. Under the Court’s “continuous surface connection” test, the presence of those levees (the equivalent of a dike) would seemingly preclude Clean Water Act coverage of adjacent wetlands on the other side of the levees, even though the adjacent wetlands are often an important part of the flood-control project. See Brief for Respondents 30. Likewise, federal protection of the Chesapeake Bay might be less effective if fill can be dumped into wetlands that are adjacent to (but not adjoining) the bay and its covered tributaries. See *id.*, at 35. Those are just two of many examples of how the Court’s overly narrow view of the Clean Water Act will have concrete impact.

As those examples reveal, there is a good reason why Congress covered not only adjoining wetlands but also adjacent wetlands. Because of the movement of water between adjacent wetlands and other waters, pollutants in wetlands often end up in adjacent rivers, lakes, and other waters. Natural barriers such as berms and dunes do not block all water flow and are in fact evidence of a regular connection between a water and a wetland. 85 Fed. Reg.



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22307; 88 Fed. Reg. 3095, 3118. Similarly, artificial barriers such as dikes and levees typically do not block all water flow, 85 Fed. Reg. 22312; 88 Fed. Reg. 3076, and those artificial structures were often built to control the surface water connection between the wetland and the water. 85 Fed. Reg. 22315; 88 Fed. Reg. 3118. The scientific evidence overwhelmingly demonstrates that wetlands separated from covered waters by those kinds of berms or barriers, for example, still play an important role in protecting neighboring and downstream waters, including by filtering pollutants, storing water, and providing flood control. See 88 Fed. Reg. 3118; 33 CFR §320.4(b)(2) (2022); see also *United States v. Riverside Bayview Homes, Inc.*, 474 U. S. 121, 134 (1985). In short, those adjacent wetlands may affect downstream water quality and flood control in many of the same ways that adjoining wetlands can.

The Court's erroneous test not only will create real-world consequences for the waters of the United States, but also is sufficiently novel and vague (at least as a single standalone test) that it may create regulatory uncertainty for the Federal Government, the States, and regulated parties. As the Federal Government suggests, the continuous surface connection test raises "a host of thorny questions" and will lead to "potentially arbitrary results." Brief for Respondents 29. For example, how difficult does it have to be to discern the boundary between a water and a wetland for the wetland to be covered by the Clean Water Act? How does that test apply to the many kinds of wetlands that typically do not have a surface water connection to a covered water year-round—for example, wetlands and waters that are connected for much of the year but not in the summer when they dry up to some extent? How "temporary" do "interruptions in surface connection" have to be for wetlands to still be covered? *Ante*, at 21. How does the test operate in areas where

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storms, floods, and erosion frequently shift or breach natural river berms? Can a continuous surface connection be established by a ditch, swale, pipe, or culvert? See 88 Fed. Reg. 3095. The Court covers wetlands separated from a water by an artificial barrier constructed *illegally*, see *ante*, at 21–22, n. 16, but why not also include barriers authorized by the Army Corps at a time when it would not have known that the barrier would cut off federal authority? The list goes on.

Put simply, the Court’s atextual test—rewriting “adjacent” to mean “adjoining”—will produce real-world consequences for the waters of the United States and will generate regulatory uncertainty. I would stick to the text. There can be no debate, in my respectful view, that the key statutory term is “adjacent” and that adjacent wetlands is a broader category than adjoining wetlands. To be faithful to the statutory text, we cannot interpret “adjacent” wetlands to be the same thing as “adjoining” wetlands.

\* \* \*

In sum, I agree with the Court’s decision not to adopt the “significant nexus” test for adjacent wetlands. I respectfully disagree, however, with the Court’s new “continuous surface connection” test. In my view, the Court’s new test is overly narrow and inconsistent with the Act’s coverage of adjacent wetlands. The Act covers adjacent wetlands, and a wetland is “adjacent” to a covered water (i) if the wetland is contiguous to or bordering a covered water, *or* (ii) if the wetland is separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like. The wetlands on the Sacketts’ property do not fall into either of those categories and therefore are not covered under the Act as I would interpret it. Therefore, like the Court, I would reverse the judgment of the U. S. Court of Appeals for the Ninth Circuit and remand for further proceedings. But I respectfully

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concur only in the Court's judgment.

**From:** [Walker, William T Jr CIV USARMY CENAO \(USA\)](#)  
**To:** [CDL-REG-DISTRICT-CHIEFS](#)  
**Cc:** [CDL-REG-All](#)  
**Subject:** Initial direction in light of Sackett  
**Date:** Friday, May 26, 2023 11:40:24 AM  
**Attachments:** [2023 05 25 Sackett v. EPA \(05 25 2023\).pdf](#)

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Chiefs,

On 25 May 2023, the Supreme Court of the United States issued a decision in the case of *Sackett v. Environmental Protection Agency*. The Opinion is attached here. USACE Headquarters is working with EPA, Army, and DOJ to determine the full scope and effect of this decision. As this decision will have implications on the determination of waters covered under the Clean Water Act, all USACE staff are directed to pause until further notice the issuance of any Approved Jurisdictional Determination. Additional information will be provided as it becomes available. If you have any questions, please contact me.

Thank You

Tom

William "Tom" Walker  
Chief, Regulatory Program (Acting)  
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441 G Street, NW  
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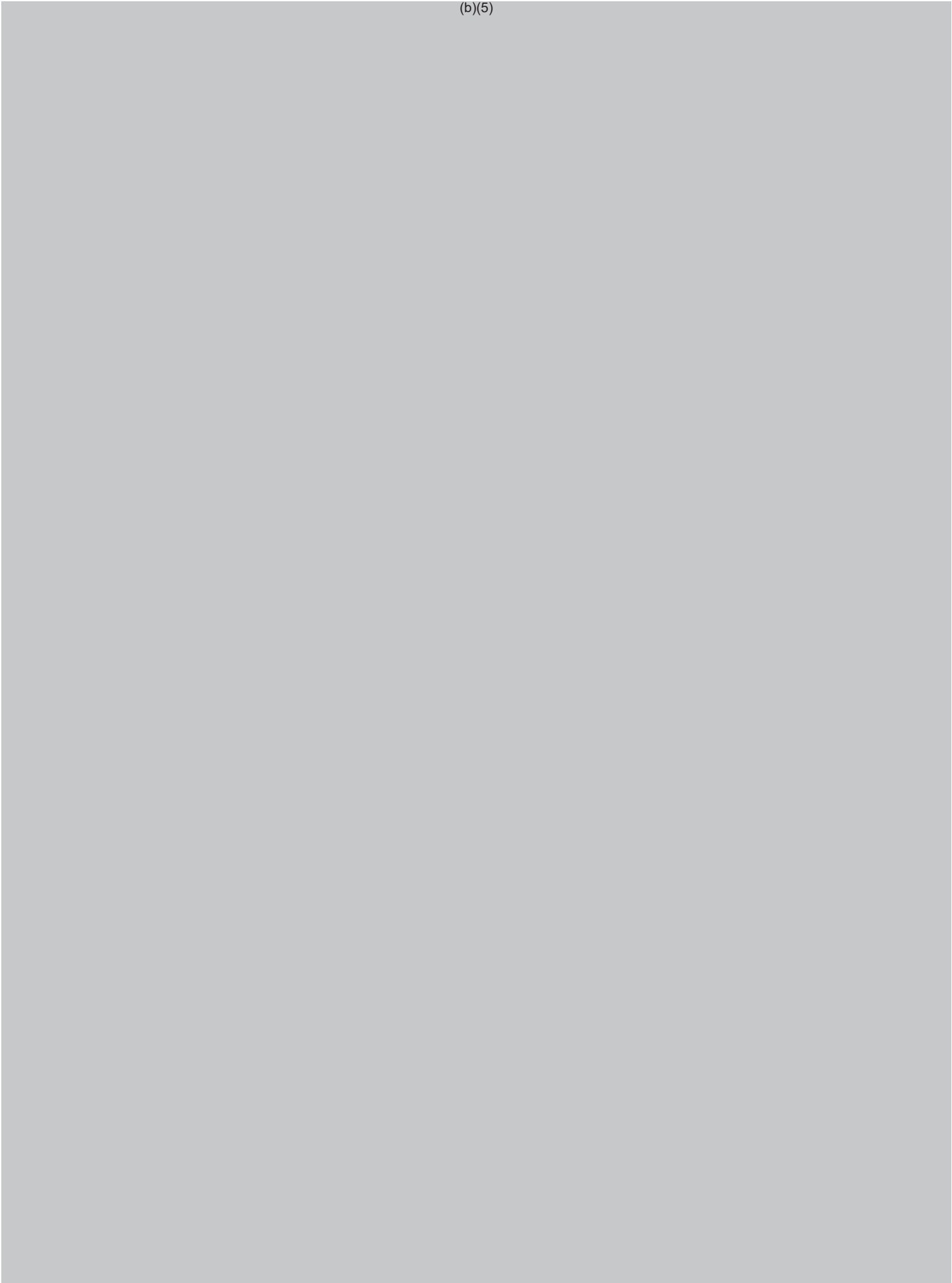
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**From:** [Walker, William T Jr CIV USARMY CENAO \(USA\)](#)  
**To:** [CDL-REG-All](#)  
**Cc:** [DLL-CECW-CO-R](#); [Wilson, John Maxwell \(Max\) CIV USARMY CEHQ \(USA\)](#); [Inkelas, Daniel CIV USARMY CEHQ \(USA\)](#); [Zilioli, Erica M CIV USARMY CEHQ \(USA\)](#); [Garman, Douglas M CIV USARMY CEHQ \(USA\)](#); [Gaffneysmith, Margaret E CIV USARMY CEHQ \(USA\)](#)  
**Subject:** WOTUS UPDATE: EPA And Army Announce Amendments to the 2023 Rule.  
**Date:** Tuesday, August 29, 2023 3:12:53 PM  
**Attachments:** [Pre-publication Version of the Final Rule - Amendments to the Revised Definition of Waters of the United States.pdf](#)  
[FINAL\\_WOTUSPublicFactSheet08292023.pdf](#)  
[Regulatory Text Changes to the Definition of Waters of the United States at 33 CFR 328.3 and 40 CFR 120.2.pdf](#)  
[WOTUS\\_opdef\\_082923.pdf](#)  
**Importance:** High

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All,

Today, 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*. Parts of the January 2023 Rule are invalid under the Supreme Court’s interpretation of the Clean Water Act in the [Sackett decision](#). Therefore, the agencies have amended key aspects of the regulatory text to conform it to the Court’s decision.

**IMPORTANT: Please note that the final rule will not become effective until it has been published in the *Federal Register*. Therefore, there is no immediate change to our current implementation and the nationwide “pause” on issuance of most approved JDs remains in effect. We will provide additional direction to our districts and divisions regarding the pause concurrent with or prior to the final rule’s publication in the *Federal Register*. We expect that the final rule will be published in the *Federal Register* and become effective within the next several weeks.**

While EPA’s and Army’s 2023 rule defining “waters of the United States” was not directly before the Supreme Court, the decision in *Sackett* made clear that certain aspects of the 2023 rule are invalid. The amendments issued today are limited and change only parts of the 2023 rule that are invalid under the *Sackett v. EPA* decision. For example, the rule removes the significant nexus test from consideration when identifying tributaries and other waters as federally protected. It also revises the adjacency test when identifying federally jurisdictional wetlands, clarifies that interstate wetlands do not fall within the interstate waters category, and clarifies the types of features that can be considered under the “additional waters” category. The amendments to the January 2023 Rule do not change the eight exclusions from the definition of “waters of the United States.” Additionally, the agencies’ amended definition of “waters of the United States” does not affect the longstanding activity-based permitting exemptions provided to the agricultural community by the Clean Water Act.

The conforming rule will become effective upon publication in the *Federal Register*. Please see EPA’s [Rule Status and Litigation Update page](#) for information about the status of the January 2023 Rule, as amended by this conforming rule, and litigation.

The agencies are hosting a public webinar to provide updates on the definition of “waters of the United States” on September 12, 2023, from 3pm-4pm Eastern Time. Because this webinar is for the public and since registration capacity is limited, we ask that USACE staff NOT register for the webinar. The webinar will be recorded and will be posted on EPA’s website after the event.

(b)(5)

For now, we recommend that district and division staff take some time to read and become familiar with the final rule. Attached are a prepublication version of the final rule, a public

fact sheet for the final rule, and a redline version of the regulatory text amendments that have been made to amend the 2023 Rule. These materials are in the public domain on EPA's website and therefore they can be shared externally. These materials will be posted to the HQ Jurisdiction SharePoint later this afternoon.

Lastly, please be aware that in the jurisdictions and for the parties where the January 2023 Rule is enjoined, the agencies are interpreting the phrase "waters of the United States" consistent with the pre-2015 regulatory regime and the Supreme Court's decision in *Sackett*. The attached map illustrates which definition of "waters of the United States" is generally operative in each state across the country as a result of litigation challenging the 2023 Rule. The map is also available at <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>. As the litigation continues, EPA will update the map, when possible, to reflect the most current information that is made available to the EPA and the Army.

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Additional details regarding the amendments to the 2023 Rule and implementation of "waters of the United States" will be provided as we prepare for the effective date of the final rule.

Please contact Matt Wilson if you have any questions.

Thank you for all that you do!

Tom

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Washington, DC 20314

(b)(6)

**PRE-PUBLICATION NOTICE.** The EPA Administrator, Michael S. Regan, signed the following final rule on August 28, 2023, and the Assistant Secretary of the Army (Civil Works), Michael L. Connor, signed the following final rule on August 25, 2023, and EPA is submitting it for publication in the *Federal Register* (FR). EPA is providing this document solely for the convenience of interested parties. This document is not disseminated for purposes of EPA's Information Quality Guidelines and does not represent an Agency determination or policy. While we have taken steps to ensure the accuracy of this Internet version of the rule, it is not the official version of the final rule for purposes of compliance or effectiveness. Please refer to the official version in a forthcoming FR publication, which will appear on the Government Printing Office's govinfo website (<https://www.govinfo.gov/app/collection/fr>) and on Regulations.gov (<https://www.regulations.gov>) in Docket No. EPA-HQ-OW-2023-0346. Notwithstanding the fact that EPA is posting a pre-publication version, the final rule will not be promulgated until published in the *Federal Register*.

6560-50-P

## **DEPARTMENT OF DEFENSE**

### **Department of the Army, Corps of Engineers**

#### **33 CFR Part 328**

### **ENVIRONMENTAL PROTECTION AGENCY**

#### **40 CFR Part 120**

**[EPA-HQ-OW-2023-0346; FRL-11132-01-OW]**

**RIN 2040-AG32**

#### **Amendments to the “Revised Definition of ‘Waters of the United States’”**

**AGENCY:** Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) and the Department of the Army (“the agencies”) are amending the Code of Federal Regulations (CFR) to conform the definition of “waters of the United States” to a 2023 Supreme Court decision. This conforming rule amends the provisions of the agencies’ definition of “waters of the United States” that are invalid under the Supreme Court’s interpretation of the Clean Water Act in the 2023 decision.

**DATES:** This final rule is effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** The agencies have established a docket for this action under Docket ID No. EPA-HQ-OW-2023-0346. All documents in the docket are listed on the <https://www.regulations.gov/> web site. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute.

Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <https://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Whitney Beck, Oceans, Wetlands and Communities Division, Office of Water (4504T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 564-2281; email address: *CWAwotus@epa.gov*, and Stacey Jensen, Office of the Assistant Secretary of the Army for Civil Works, Department of the Army, 108 Army Pentagon, Washington, DC 20310-0104; telephone number: (703) 459-6026; email address: *usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@army.mil*.

**SUPPLEMENTARY INFORMATION:**

**I. Why are the agencies issuing this final rule?**

This action amends Code of Federal Regulations (CFR) provisions promulgated in “Revised Definition of ‘Waters of the United States,’” 88 FR 3004 (January 18, 2023) (“2023 Rule”), to conform to the 2023 Supreme Court decision in *Sackett v. EPA*, 598 U.S. \_\_\_, 143 S. Ct. 1322 (2023) (“*Sackett*”). The Administrative Procedure Act (APA) provides that, when an agency for good cause finds that public notice and comment procedures are impracticable, unnecessary, or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. 5 U.S.C. 553(b)(B). The Environmental Protection Agency (EPA) and the Department of the Army (“the agencies”) have determined that there is good cause under APA section 553(b)(B) to issue this 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 *Sackett*. The effect of the *Sackett* decision was to render these provisions immediately inconsistent with the Supreme Court’s interpretation of the Clean Water Act. Consistent with the agencies’ previously stated intent regarding the severability of the 2023 Rule in the event that provisions of that rule were held invalid, *see* 88 FR 3135, the agencies are conforming the 2023 Rule’s definition of the term “waters of the United States” to the Supreme Court’s decision. Specifically, the agencies are revising 40 CFR 120.2(a)(1)(iii), (a)(3) through (5), and (c)(2) and (6), and 33 CFR 328.3(a)(1)(iii), (a)(3) through (5), and (c)(2) and (6) to amend aspects of the definition as needed to conform to the Supreme Court’s interpretation of the Clean Water Act in *Sackett*. 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, providing advance public notice and seeking comment is unnecessary. A notice and comment process would neither provide new information to the public nor inform any agency decision-making regarding the aspects of the regulations defining “waters of the United States” that are invalid as inconsistent with the Clean Water Act under *Sackett*.

For similar reasons, there is good cause under the APA to make this rule immediately effective, 5 U.S.C. 553(d)(3), because this rule does not impose any burdens on the regulated community; rather, it merely conforms the 2023 Rule to the Supreme Court’s decision in *Sackett* by amending the provisions of the 2023 Rule that are invalid under the Supreme Court’s interpretation of the Clean Water Act. Making the rule immediately effective will also provide more clarity and certainty to the regulated community and the public following the *Sackett* decision. Many States and industry groups challenging the 2023 Rule have advocated in litigation for quick action by the agencies in light of *Sackett*, citing the need for regulatory

certainty and less delay in processing approved jurisdictional determinations and certain Clean Water Act permits. A delayed effective date for amendments to regulations defining “waters of the United States” to conform to *Sackett* would prolong confusion and potentially result in project delays for prospective permittees that seek approved jurisdictional determinations to evaluate whether their projects will result in discharges to “waters of the United States.” Making the rule immediately effective also avoids delaying provision of clarity to aid States and authorized Tribes administering Clean Water Act permitting programs and to members of the general public who seek to understand which waters are subject to the Clean Water Act’s requirements. It is thus appropriate for the agencies to revise the affected provisions in 40 CFR 120.2 and 33 CFR 328.3 to conform to *Sackett* as quickly as possible and to make those revisions immediately effective.

In 1972, Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Public Law No. 92–500, 86 Stat. 816, as amended, 33 U.S.C. 1251 *et seq.* (“Clean Water Act” or “Act”). Central to the framework and protections provided by the Clean Water Act is the term “navigable waters,” defined in the Act as “the waters of the United States, including the territorial seas.” 33 U.S.C. 1362(7). On January 18, 2023, the final “Revised Definition of ‘Waters of the United States’” rule was published in the *Federal Register*, and the rule took effect on March 20, 2023.<sup>1</sup>

In 2006, the Supreme Court addressed the scope of “waters of the United States” in *Rapanos v. United States*, 547 U.S. 715 (2006) (“*Rapanos*”). As the Court in *Sackett* noted, no position in *Rapanos* commanded a majority of the Court. *Sackett*, 143 S. Ct. at 1344. In *Rapanos*,

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<sup>1</sup> As a result of litigation, the 2023 Rule is enjoined in 27 States as of the date this final rule was signed. See *Texas v. EPA*, Nos. 23-00017 & 23-00020 (S.D. Tex. March 19, 2023); *West Virginia v. EPA*, No. 23-00032 (D.N.D. April 12, 2023); *Commonwealth of Kentucky v. EPA*, Nos. 23-5343/5345 (6th Cir. May 10, 2023).

all nine members of the Court agreed that the term “waters of the United States” encompasses some waters that are not navigable in the traditional sense. *Rapanos*, 547 U.S. at 731 (Scalia, J., plurality opinion) (“We have twice stated that the meaning of ‘navigable waters’ in the Act is broader than the traditional understanding of that term, *SWANCC*, 531 U.S. at 167; *Riverside Bayview*, 474 U.S. at 133.”). A four-Justice plurality in *Rapanos* interpreted the term “waters of the United States” as covering “relatively permanent, standing or continuously flowing bodies of water,” *id.* at 739, that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a “continuous surface connection” to such waterbodies, *id.* (Scalia, J., plurality opinion). The *Rapanos* plurality noted that its reference to “relatively permanent” waters did “not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought,” or “*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months.” *Id.* at 732 n.5 (emphasis in original). Justice Kennedy’s concurring opinion took a different approach, concluding that “to constitute “navigable waters” under the Act, a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.” *Id.* at 759. He concluded that wetlands possess the requisite significant nexus if the wetlands “either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” *Id.* at 780. The four dissenting Justices in *Rapanos* would have deferred to the agencies and also concluded that waters would be jurisdictional under “either the plurality’s or Justice Kennedy’s test.” *Id.* at 810 & n.14 (Stevens, J., dissenting).

The 2023 Rule incorporated the two jurisdictional standards from *Rapanos* into the definition of the term “waters of the United States.” First, under that rule, the “relatively

permanent standard” refers to the test to identify: relatively permanent, standing or continuously flowing tributaries connected to traditional navigable waters, the territorial seas, or interstate waters; relatively permanent, standing or continuously flowing additional waters with a continuous surface connection to such relatively permanent waters or to traditional navigable waters, the territorial seas, or interstate waters; and, adjacent wetlands and certain impoundments with a continuous surface connection to such relatively permanent waters or to traditional navigable waters, the territorial seas, or interstate waters. Second, the “significant nexus standard” under the 2023 Rule refers to the test to identify waters that, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters. The regulatory text also defined “significantly affect” for purposes of the significant nexus standard. 88 FR 3006. Under the 2023 Rule, waters were jurisdictional if they met either standard.

The 2023 Rule also defined the term “adjacent” with no changes from the agencies’ longstanding regulatory definition. “Adjacent” was defined as “bordering, contiguous, or neighboring.” 88 FR 3116-17. Wetlands separated from other “waters of the United States” by man-made dikes or barriers, natural river berms, beach dunes and the like were defined as “adjacent” wetlands. *Id.*

On May 25, 2023, the Supreme Court decided *Sackett v. EPA*. While the 2023 Rule was not directly before the Court, the Court considered the jurisdictional standards set forth in that rule. The enterprise of the 2023 Rule—to define “waters of the United States”—was the same as the Supreme Court’s enterprise in *Sackett*: “to identify with greater clarity what the Act means by ‘the waters of the United States.’” 143 S. Ct. at 1329; *see also id.* at 1331 (“The meaning of



[33 U.S.C. 1362(7)] is the persistent problem that we must address.”). The Supreme Court recognized the agencies’ definition and utilization of “adjacent” and “significant nexus” “as set out in [the agencies’] most recent rule,” the 2023 Rule, 143 S. Ct. at 1335, 1341, but concluded that the significant nexus standard was “inconsistent with the text and structure of the [Clean Water Act].” *Id.* at 1341. Instead, the Court “conclude[d] that the *Rapanos* plurality was correct: the [Clean Water Act]’s use of ‘waters’ encompasses ‘only those relatively permanent, standing or continuously flowing bodies of water “forming geographic[al] features” that are described in ordinary parlance as “streams, oceans, rivers, and lakes.”’” *Id.* at 1336 (quoting *Rapanos*, 547 U.S. at 739). The Court also “agree[d] with [the plurality’s] formulation of when wetlands are part of ‘the waters of the United States,’” *id.* at 1340-41: “when 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.”’” *Id.* at 1344 (citing *Rapanos*, 547 U.S. at 742, 755). Thus, the Supreme Court concluded that “this interpretation”— *i.e.*, the interpretation of adjacent wetlands as “waters of the United States” set out in the 2023 Rule—“is inconsistent with the text and structure of the CWA” insofar as it incorporated the “significant nexus” test and defined “adjacent” other than as the *Rapanos* plurality defined the term. *Id.* at 1341.

The agencies are revising the 2023 Rule to remove the significant nexus standard and to amend its definition of “adjacent” as these provisions are invalid under the Supreme Court’s interpretation of the Clean Water Act in *Sackett*. See section II of this preamble for the specific amendments. Under the decision in *Sackett*, waters are not jurisdictional under the Clean Water Act based on the significant nexus standard. In addition, under the decision in *Sackett*, wetlands are not defined as “adjacent” or jurisdictional under the Clean Water Act solely because they are

“bordering, contiguous, or neighboring . . . [or] separated from other ‘waters of the United States’ by man-made dikes or barriers, natural river berms, beach dunes and the like.”

Therefore, under this conforming rule, waters cannot be found to be jurisdictional because they meet the significant nexus standard; nor can wetlands be found to be jurisdictional based on the definition of “adjacent” codified in the 2023 Rule. Furthermore, as a result of the decision in *Sackett* invalidating the significant nexus standard, the provision for assessment of streams and wetlands under the additional waters provision of paragraph (a)(5) is no longer valid as any jurisdictional streams and wetlands are covered by paragraphs (a)(1) through (4) of the 2023 Rule.<sup>2</sup>

Finally, the agencies are removing “interstate wetlands” from the 2023 Rule to conform with the decision in *Sackett*. The Supreme Court in *Sackett* examined the Clean Water Act and its statutory history and found the predecessor statute to the Clean Water Act covered and defined “interstate waters” as “all *rivers, lakes, and other waters* that flow across or form a part of State boundaries.” *Sackett* at 1337 (citing 33 U.S.C. 1160(a), 1173(e) (1970 ed.) (emphasis in original)). The Court concluded that the use of the term “waters” refers to such “open waters” and not wetlands. *Id.* As a result, under *Sackett*, the provision authorizing wetlands to be jurisdictional simply because they are interstate is invalid.

The agencies will continue to interpret the remainder of the definition of “waters of the United States” in the 2023 Rule consistent with the *Sackett* decision. And 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

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<sup>2</sup> Lakes and ponds, however, may still be jurisdictional under paragraph (a)(5) if they do not fall within paragraphs (a)(1) through (3) of the 2023 Rule (for example, if they are not tributaries connected to waters identified in paragraphs (a)(1) or (2)) and they are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (3).

outside this limited rule. *See County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020) (“EPA, too, can provide administrative guidance (within statutory boundaries) in numerous ways, including through, for example, grants of individual permits, promulgation of general permits, or the development of general rules.”). The agencies have a wide range of available approaches to address such issues, including: approved jurisdictional determinations and Clean Water Act permits (both of which are final agency actions subject to judicial review); guidance; notice and comment rulemaking; and, agency forms and training materials. The agencies intend to hold stakeholder meetings to ensure the public has an opportunity to provide the agencies with input on other issues they would like the agencies to address. The agencies are also committed to taking particular actions that have been requested by stakeholders to improve implementation of the definition of “waters of the United States.” For example, the agencies are working to improve coordination among Federal agencies through coordination memoranda and trainings. The agencies are also developing regionally-specific tools to facilitate implementation of the definition of “waters of the United States.” The agencies will continue to provide trainings to Tribes, States, and the public as appropriate to promote clarity and consistency. The agencies will continue to post materials and outreach opportunities to EPA’s website at <https://www.epa.gov/wotus>.

## **II. Which provisions are amended?**

This final rule amends the following provisions in the 2023 Rule: 40 CFR 120.2(a)(1)(iii), (a)(3) through (5), (c)(2) and (6), and 33 CFR 328.3(a)(1)(iii), (a)(3) through (5), (c)(2) and (6). A list of these revisions is provided below.

- *40 CFR 120.2(a)(1)(iii) and 33 CFR 328.3(a)(1)(iii)*: Removed the phrase “including interstate wetlands” from this provision. Made conforming edits to the

regulatory text so that it reads: “(iii) Interstate waters;”.

- *40 CFR 120.2(a)(3) and 33 CFR 328.3(a)(3)*: Removed the significant nexus standard from the tributaries provision. Made conforming edits to the regulatory text so that it reads: “(3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section that are relatively permanent, standing or continuously flowing bodies of water.”
- *40 CFR 120.2(a)(4) and 33 CFR 328.3(a)(4)*: Removed the significant nexus standard from the adjacent wetlands provision. Made conforming edits to the regulatory text so that it reads: “(4) Wetlands adjacent to the following waters: (i) Waters identified in paragraph (a)(1) of this section; or (ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3) of this section and with a continuous surface connection to those waters.”
- *40 CFR 120.2(a)(5) and 33 CFR 328.3(a)(5)*: Removed the significant nexus standard and streams and wetlands from the provision for intrastate lakes and ponds, streams, or wetlands not otherwise identified in the definition. Made conforming edits to the regulatory text so that it reads: “(5) Intrastate lakes and ponds not identified in paragraphs (a)(1) through (4) of this section that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3) of this section.”
- *40 CFR 120.2(c)(2) and 33 CFR 328.3(c)(2)*: Revised the definition of “adjacent” to read: “(2) Adjacent means having a continuous surface connection.” Note that the agencies recognize that revising the definition of adjacent creates redundancy

in 40 CFR 120.2(a)(4) and 33 CFR 328.3(a)(4), which already include the requirement for a “continuous surface connection,” but deleting existing regulatory text to reduce redundancy is outside the scope of the agencies’ determination in this rule that there is good cause under APA section 553(b)(B) to issue this final rule without prior proposal and opportunity for comment.

- 40 CFR 120.2(c)(6) and 33 CFR 328.3(c)(6): Removed the term “significantly affect” and its definition in its entirety.

### **III. Severability**

The purpose of this section is to clarify the agencies’ intent with respect to the severability of provisions of this rule and the 2023 Rule as amended by this final rule in the event of litigation. In the event of a stay or invalidation of any part of this rule, the agencies’ intent is to preserve the remaining portions of the rule to the fullest possible extent. Further, if any part of the 2023 Rule as amended by this rule is stayed or invalidated, the agencies’ intent is to preserve its remaining portions to the fullest possible extent. The agencies explained in the 2023 Rule that it was carefully crafted so that each provision or element of the rule is capable of operating independently. 88 FR 3135. None of the amendments made in this rule affects the 2023 Rule’s severability or undermines the ability of each part of this rule or the remaining parts of the 2023 Rule to operate independently.

The exclusive purpose of the 2023 Rule was to define “waters of the United States,” and this rule simply conforms that definition to *Sackett*. “Waters of the United States” is defined in paragraphs (a)(1) through (5), subject to the exclusions in paragraph (b), and using terms defined in paragraph (c). The categories (a)(1) through (5) are disjunctive, and while they may overlap, no one category (or subcategory) depends on another. The modifications to the 2023 Rule in this

rule do not alter those basic features of the regulatory text. Therefore, if any provision or element of this rule or of the 2023 Rule as amended by this rule is determined by judicial review or operation of law to be invalid, that partial invalidation will not render the remainder of this rule or the 2023 Rule, as amended, invalid. Further, if the application of any portion of this rule or the 2023 Rule, as amended by this rule, to a particular circumstance is determined to be invalid, the agencies intend that this rule and the 2023 Rule, as amended, remain applicable to all other circumstances.

For example, if paragraph (c)(2), which contains the revised definition of “adjacent,” were deemed invalid, it would affect implementation of paragraph (a)(4), which addresses “adjacent wetlands,” but it would not affect any other provision of this rule (or the 2023 Rule, as amended), all of which would continue to operate. As another example, if paragraph (a)(1)(iii), which provides that interstate waters (amended by this rule to no longer include interstate wetlands) are “waters of the United States,” were deemed invalid, every other provision of this rule (and the 2023 Rule as amended) could continue to operate. References to paragraph (a)(1) in paragraphs (a)(3) through (5), and (c)(2) would remain in effect, and paragraph (a)(1) would simply be read to consist of paragraphs (a)(1)(i) and (ii), without (iii) in whole or in part. As a third example, if one of the exclusions from “waters of the United States” in paragraph (b), or any part of one of the exclusions, were deemed invalid, the remainder of this rule, and thus, the 2023 Rule as amended, would remain in effect. The rationale for each exclusion in paragraph (b) is distinct and invalidating one exclusion would not have any practical impact on any other part of the definition of “waters of the United States.”

#### **IV. Statutory and Executive Orders Reviews**

Additional information about these statutes and Executive Orders can be found at

<https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

*A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14094:*

*Modernizing Regulatory Review*

This action is a significant regulatory action as defined in Executive Order 12866, as amended by Executive Order 14094. Accordingly, the agencies submitted this action to the Office of Management and Budget (OMB) for Executive Order 12866 review. Documentation of any changes made in response to the Executive Order 12866 review is available in the docket.

This conforming rule amends the provisions of the agencies’ definition of “waters of the United States” that are invalid under the Supreme Court’s interpretation of the Clean Water Act in *Sackett*. As such, it is the agencies’ view that the rule does not by itself impose cost savings or forgone benefits.

*B. Paperwork Reduction Act (PRA)*

This action does not impose an information collection burden under the PRA because it does not contain any information collection activities. However, this action may change terms and concepts used by EPA and Army to implement certain programs. The agencies thus may need to revise some of their collections of information to be consistent with this action and will do so consistent with the PRA and implementing regulations.

*C. Regulatory Flexibility Act (RFA)*

This action is not subject to the RFA. The RFA applies only to rules subject to notice and comment rulemaking requirements under the APA, 5 U.S.C. 553, or any other statute. This rule is not subject to notice and comment requirements because the agencies have invoked the APA “good cause” exemption under 5 U.S.C. 553(b).

*D. Unfunded Mandates Reform Act (UMRA)*

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The definition of “waters of the United States” applies broadly to Clean Water Act programs, and this rule amending the definition of “waters of the United States” simply conforms to a decision of the Supreme Court. The action imposes no enforceable duty on any Tribal, State, or local governments, or the private sector.

*E. Executive Order 13132: Federalism*

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

This conforming rule amends the provisions of the agencies’ definition of “waters of the United States” that are invalid under the Supreme Court’s interpretation of the Clean Water Act in *Sackett*. Because the limited amendments in this rule do not involve the exercise of the agencies’ discretion, federalism consultation would neither provide new information nor inform any agency decision-making regarding the aspects of the regulations defining “waters of the United States” that are invalid under the Supreme Court’s interpretation of the Clean Water Act in *Sackett*. The agencies recognize, however, that changes to the definition of “waters of the United States” may be of interest to State and local governments. The agencies intend to hold discussions with State and local governments on implementation of the definition of “waters of the United States.”

*F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*

This rule amends the provisions of the agencies’ definition of “waters of the United States” that are invalid under the Supreme Court’s interpretation of the Clean Water Act in



*Sackett*. Because the amendments in this rule do not involve the exercise of the agencies’ discretion, in this instance Tribal consultation and coordination could not inform the decision-making in this final rule. The agencies recognize, however, that changes to the definition of “waters of the United States” may be of interest to Tribal governments. The agencies intend to hold discussions with Tribes on implementation of the definition of “waters of the United States.”

*G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks*

EPA and the Army interpret Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the agencies have reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order.

This conforming rule amends the provisions of the agencies’ definition of “waters of the United States” that are invalid under the Supreme Court’s interpretation of the Clean Water Act in *Sackett*. Because these amendments are necessary to conform to the Supreme Court’s decision and do not involve the exercise of the agencies’ discretion, the rule does not concern an environmental health risk or safety risk and is not subject to Executive Order 13045. Similarly, this action does not concern human health, and therefore EPA’s Policy on Children’s Health also does not apply.

*H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use*

This action is not a “significant energy action” because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

*I. National Technology Transfer and Advancement Act*

This rule does not involve technical standards.

*J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All*

Executive Order 12898 (59 FR 7629, February 16, 1994) directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on communities with environmental justice concerns. Executive Order 14096 (88 FR 25251, April 21, 2023) supplements the foundational efforts of Executive Order 12898 to address environmental justice.

EPA and the Army believe that it is not necessary to assess whether this action would result in disproportionate and adverse effects on communities with environmental justice concerns, as this is a conforming rule and the targeted amendments made do not reflect an exercise of agency discretion. In prior analyses of potential distributional impacts of the 2023 Rule (see *Economic Analysis for Final "Revised Definition of 'Waters of the United States'" Rule*, Docket ID No. EPA-HQ-OW-2021-0602-2489), the agencies examined whether the change in benefits due to that rule may be differentially distributed among communities with environmental justice concerns in the affected areas when compared to two baselines—the primary baseline of the pre-2015 regulatory regime and the secondary baseline of the 2020 Navigable Waters Protection Rule. In that prior analysis, for most of the wetlands and affected waters impacted at a hydrologic unit code (HUC)<sup>3</sup> 12 watershed level, there was no evidence of

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<sup>3</sup> HUC boundaries are established by the U.S. Geological Survey and Natural Resources Conservation Service.

potential environmental justice impacts from the 2023 Rule warranting further analysis when compared to both baselines.

The agencies recognize that the burdens of environmental pollution and climate change often fall disproportionately on communities with environmental justice concerns. Climate change will exacerbate the existing risks faced by communities with environmental justice concerns. However, this conforming rule merely amends the provisions of the agencies' definition of "waters of the United States" that are invalid under the Supreme Court's interpretation of the Clean Water Act in *Sackett*. As noted above, these amendments on their own do not result in any cost savings or forgone benefits not directed by the operation of law. Because this rule does not involve the exercise of the agencies' discretion, the agencies did not engage with communities with environmental justice concerns in developing this action.

#### *K. Congressional Review Act (CRA)*

This action is subject to the CRA, and the agencies will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a "major rule" as defined by 5 U.S.C. 804(2). The CRA allows the issuing agency to make a rule effective sooner than otherwise would be provided by the CRA if the agency makes a good cause finding that notice and comment public rulemaking procedures are impracticable, unnecessary, or contrary to the public interest (5 U.S.C. 808(2)). The agencies have made a good cause finding for this rule as discussed in section I of this preamble, including the basis for that finding.

## **List of Subjects**

### *33 CFR Part 328*

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These boundaries are numbered using nested codes to represent the scale of the watershed size. For example, HUC 12 watersheds are smaller than HUC 4 watersheds.

Administrative practice and procedure, Environmental protection, Navigation (water),  
Water pollution control, Waterways.

*40 CFR Part 120*

Environmental protection, Water pollution control, Waterways.

**Michael L. Connor,**  
Assistant Secretary of the Army (Civil Works),  
Department of the Army.

**Michael S. Regan,**  
Administrator,  
Environmental Protection Agency.

## **Title 33—Navigation and Navigable Waters**

For the reasons set out in the preamble, 33 CFR part 328 is amended as follows:

### **PART 328—DEFINITION OF WATERS OF THE UNITED STATES**

1. The authority citation for part 328 continues to read as follows:

**Authority:** 33 U.S.C. 1251 *et seq.*

2. Section 328.3 is amended by:

- a. Revising paragraphs (a)(1)(iii), (a)(3), and (a)(4)(ii);
- b. Removing paragraph (a)(4)(iii);
- c. Revising paragraphs (a)(5) and (c)(2); and
- d. Removing paragraph (c)(6).

The revisions read as follows:

(a) \* \* \*

(1) \* \* \*

(iii) Interstate waters;

\* \* \* \* \*

(3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section that are relatively permanent, standing or continuously flowing bodies of water;

(4) \* \* \*

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3) of this section and with a continuous surface connection to those waters;

(5) Intrastate lakes and ponds not identified in paragraphs (a)(1) through (4) of this section that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3) of this section.

\* \* \* \* \*

(c) \* \* \*

(2) *Adjacent* means having a continuous surface connection.

\* \* \* \* \*

**Title 40—Protection of Environment**

For reasons set out in the preamble, 40 CFR part 120 is amended as follows:

**PART 120—DEFINITION OF WATERS OF THE UNITED STATES**

3 The authority citation for part 120 continues to read as follows:

**Authority:** 33 U.S.C. 1251 *et seq.*

4. Section 120.2 is amended by:

- a. Revising paragraphs (a)(1)(iii), (a)(3), and (a)(4)(ii);
- b. Removing paragraph (a)(4)(iii);
- c. Revising paragraphs (a)(5) and (c)(2); and
- d. Removing paragraph (c)(6).

The revisions read as follows:

(a) \* \* \*

(1) \* \* \*

(iii) Interstate waters;

\* \* \* \* \*

(3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section that are relatively permanent, standing or continuously flowing bodies of water;

(4) \* \* \*

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3) of this section and with a continuous surface connection to those waters;

(5) Intrastate lakes and ponds not identified in paragraphs (a)(1) through (4) of this section that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3) of this section.

\* \* \* \* \*

(c) \* \* \*

(2) *Adjacent* means having a continuous surface connection.

\* \* \* \* \*



## Fact Sheet for the Final Rule: Amendments to the Revised Definition of “Waters of the United States”

August 2023



### Overview

On August 29, 2023, the U.S. Environmental Protection Agency (EPA) and Department of the Army (the agencies) announced a final rule amending the 2023 definition of “waters of the United States.”<sup>1</sup> The amendments conform with the U.S. Supreme Court’s May 25, 2023, decision in the case of *Sackett v. Environmental Protection Agency*. While EPA’s and Army’s 2023 rule defining “waters of the United States” was not directly before the Supreme Court, the decision in *Sackett* made clear that certain aspects of the 2023 rule are invalid. Therefore, the agencies have amended key components of the regulatory text to conform it to the Supreme Court decision. The final rule provides clarity for protecting our nation’s waters consistent with the Supreme Court’s decision while advancing infrastructure projects, economic opportunities, and agricultural activities.

### Changes to the “Waters of the United States” Categories and Definitions<sup>2</sup>

The agencies’ amendments change the parts of the 2023 definition of “waters of the United States” that are invalid under the *Sackett* decision. For example, the rule removes the significant nexus test from consideration when identifying tributaries and other waters as federally protected. It also revises the adjacency test when identifying federally jurisdictional wetlands, clarifies that interstate wetlands do not fall within the interstate waters category, and clarifies the types of features that can be considered under the “additional waters” category.

#### Changes that the agencies have made to the January 2023 Rule categories:

Jurisdictional Category	Key Changes to the January 2023 Rule Regulation Text	Regulatory Text Paragraph
<b>Traditional Navigable Waters</b>	No changes	(a)(1)
<b>Territorial Seas</b>	No changes	(a)(1)
<b>Interstate Waters</b>	Removing interstate wetlands from the text of the interstate waters provision	(a)(1)
<b>Impoundments</b>	No changes	(a)(2)
<b>Tributaries</b>	Removing the significant nexus standard	(a)(3)
<b>Adjacent Wetlands</b>	Removing the significant nexus standard	(a)(4)
<b>Additional Waters</b>	Removing the significant nexus standard; removing wetlands and streams from the text of the provision	(a)(5)

<sup>1</sup> The “Revised Definition of ‘Waters of the United States’” rule published in the Federal Register on January 18, 2023.

<sup>2</sup> These tables are provided for informational purposes; the rule establishes the requirements defining “waters of the United States.”

***Changes that the agencies have made to the January 2023 Rule definitions:***

Definition	Key Changes to the January 2023 Rule Regulation Text	Regulatory Text Paragraph
<b>Wetlands</b>	No changes	(c)(1)
<b>Adjacent</b>	Revised definition to mean “having a continuous surface connection.”	(c)(2)
<b>High tide line</b>	No changes	(c)(3)
<b>Ordinary high water mark</b>	No changes	(c)(4)
<b>Tidal waters</b>	No changes	(c)(5)
<b>Significantly affect</b>	Deleted definition	(c)(6)

## **No Changes to the Exclusions from “Waters of the United States”**

The amendments to the January 2023 Rule do not change the eight exclusions from the definition of “waters of the United States” that provide clarity, consistency, and certainty. **The exclusions are:**

- **Prior converted cropland**, adopting USDA’s definition and generally excluding wetlands that were converted to cropland prior to December 23, 1985.
- **Waste treatment systems**, including treatment ponds or lagoons that are designed to meet the requirements of the Clean Water Act.
- **Ditches** (including roadside ditches), excavated wholly in and draining only dry land, and that do not carry a relatively permanent flow of water.
- **Artificially irrigated areas**, that would revert to dry land if the irrigation ceased.
- **Artificial lakes or ponds**, created by excavating or diking dry land that are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
- **Artificial reflecting pools or swimming pools**, and other small ornamental bodies of water created by excavating or diking dry land.
- **Waterfilled depressions**, created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction operation is abandoned and the resulting body of water meets the definition of “waters of the United States.”
- **Swales and erosional features** (*e.g.*, gullies, small washes), that are characterized by low volume, infrequent, or short duration flow.

Additionally, the agencies’ amended definition of “waters of the United States” does not affect the longstanding activity-based permitting exemptions provided to the agricultural community by the Clean Water Act.

## **For More Information**

Additional information is available on [EPA’s Waters of the United States website](#).



## **Amendments to 40 CFR 120.2 and 33 CFR 328.3**

The EPA Administrator, Michael S. Regan, signed the final rule Amendments to the “Revised Definition of ‘Waters of the United States’” on August 28, 2023, and the Assistant Secretary of the Army (Civil Works), Michael L. Connor, signed the final rule on August 25, 2023. EPA is providing this document describing the amendments to the Code of Federal Regulations (CFR) solely for the convenience of interested parties. It is not a final rule. This document is not disseminated for purposes of EPA's Information Quality Guidelines and does not represent an Agency determination or policy. While we have taken steps to ensure the accuracy of this document, the official version of the final rule will be published in the *Federal Register* and will be available on Regulations.gov (<https://www.regulations.gov>) in Docket No. EPA-HQ-OW-2023-0346.

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This content is from the eCFR and is authoritative but unofficial.

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## Title 33 — Navigation and Navigable Waters

### Chapter II — Corps of Engineers, Department of the Army, Department of Defense

#### Part 328 — Definition of Waters of the United States

Authority: 33 U.S.C. 1251 et seq.

Source: 51 FR 41250, Nov. 13, 1986, unless otherwise noted.

#### § 328.3 Definitions.

For the purpose of this regulation these terms are defined as follows:

(a) *Waters of the United States* means:

(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;~~

(2) Impoundments of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under paragraph (a)(5) of this section;

(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;~~

(4) Wetlands adjacent to the following waters:

(i) Waters identified in paragraph (a)(1) of this section; or

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3) ~~(i)~~ of this section and with a continuous surface connection to those waters; ~~or~~

~~(iii) Waters identified in paragraph (a)(2) or (3) of this section when the wetlands 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;~~

(5) Intrastate lakes and ponds, ~~streams, or wetlands~~ not identified in paragraphs (a)(1) through (4) of this section:

~~(i) That are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3)(i) of this section. ; 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.~~

(b) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(2) through (5) of this section:

(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act;

(2) Prior converted cropland designated by the Secretary of Agriculture. The exclusion would cease upon a change of use, which means that the area is no longer available for the production of agricultural commodities. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA;

(3) Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;

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

(5) Artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(6) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons;

(7) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States; and

(8) Swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow.

(c) In this section, the following definitions apply:

(1) *Wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(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.”

(3) *High tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other

physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(4) *Ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(5) *Tidal waters* means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

~~(6) *Significantly affect* means a material influence on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section. To determine whether waters, either alone or in combination with similarly situated waters in the region, have a material influence on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section, the functions identified in paragraph (c)(6)(i) of this section will be assessed and the factors identified in paragraph (c)(6)(ii) of this section will be considered:~~

~~(i) Functions to be assessed:~~

~~(A) Contribution of flow;~~

~~(B) Trapping, transformation, filtering, and transport of materials (including nutrients, sediment, and other pollutants);~~

~~(C) Retention and attenuation of floodwaters and runoff;~~

~~(D) Modulation of temperature in waters identified in paragraph (a)(1) of this section; or~~

~~(E) Provision of habitat and food resources for aquatic species located in waters identified in paragraph (a)(1) of this section;~~

~~(ii) Factors to be considered:~~

~~(A) The distance from a water identified in paragraph (a)(1) of this section;~~

~~(B) Hydrologic factors, such as the frequency, duration, magnitude, timing, and rate of hydrologic connections, including shallow subsurface flow;~~

~~(C) The size, density, or number of waters that have been determined to be similarly situated;~~

~~(D) Landscape position and geomorphology; and~~

~~(E) Climatological variables such as temperature, rainfall, and snowpack.~~

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This content is from the eCFR and is authoritative but unofficial.

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**Title 40 – Protection of Environment**  
**Chapter I – Environmental Protection Agency**  
**Subchapter D – Water Programs**  
**Part 120 – Definition of Waters of the United States**

Authority: 33 U.S.C. 1251 et seq

Source: 85 FR 22340, Apr. 21, 2020, unless otherwise noted.

**§ 120.2 Definitions.**

For the purpose of this regulation these terms are defined as follows:

(a) *Waters of the United States* means:

(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;~~

(2) Impoundments of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under paragraph (a)(5) of this section;

(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;~~

(4) Wetlands adjacent to the following waters:

(i) Waters identified in paragraph (a)(1) of this section; or

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3) ~~(i)~~ of this section and with a continuous surface connection to those waters; ~~or~~

~~(iii) Waters identified in paragraph (a)(2) or (3) of this section when the wetlands 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;~~

(5) Intrastate lakes and ponds, ~~streams, or wetlands~~ not identified in paragraphs (a)(1) through (4) of this section:

~~(i) That are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3)(i) of this section. ; 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.~~

(b) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(2) through (5) of this section:

(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act;

(2) Prior converted cropland designated by the Secretary of Agriculture. The exclusion would cease upon a change of use, which means that the area is no longer available for the production of agricultural commodities. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA;

(3) Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;

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

(5) Artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(6) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons;

(7) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States; and

(8) Swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow.

(c) In this section, the following definitions apply:

(1) *Wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(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.”

(3) *High tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other

Definitions.

physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(4) *Ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(5) *Tidal waters* means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

~~(6) Significantly affect means a material influence on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section. To determine whether waters, either alone or in combination with similarly situated waters in the region, have a material influence on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section, the functions identified in paragraph (c)(6)(i) of this section will be assessed and the factors identified in paragraph (c)(6)(ii) of this section will be considered:~~

~~(i) Functions to be assessed:~~

~~(A) Contribution of flow;~~

~~(B) Trapping, transformation, filtering, and transport of materials (including nutrients, sediment, and other pollutants);~~

~~(C) Retention and attenuation of floodwaters and runoff;~~

~~(D) Modulation of temperature in waters identified in paragraph (a)(1) of this section; or~~

~~(E) Provision of habitat and food resources for aquatic species located in waters identified in paragraph (a)(1) of this section;~~

~~(ii) Factors to be considered:~~

~~(A) The distance from a water identified in paragraph (a)(1) of this section;~~

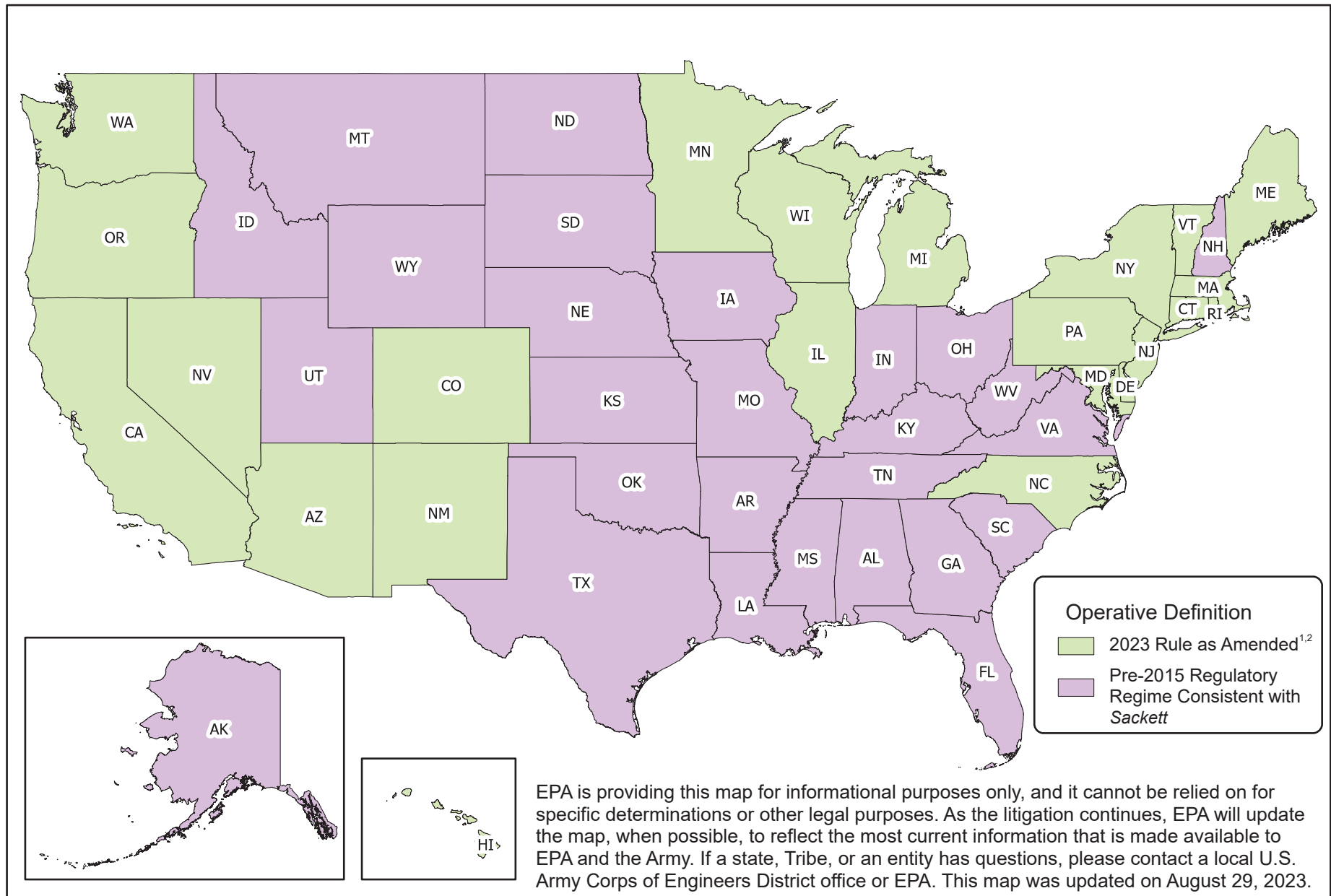
~~(B) Hydrologic factors, such as the frequency, duration, magnitude, timing, and rate of hydrologic connections, including shallow subsurface flow;~~

~~(C) The size, density, or number of waters that have been determined to be similarly situated;~~

~~(D) Landscape position and geomorphology; and~~

~~(E) Climatological variables such as temperature, rainfall, and snowpack.~~

# Operative Definition of "Waters of the United States"



<sup>1</sup>Also operative in the U.S. territories and the District of Columbia

<sup>2</sup>The 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 Georgia Chamber of Commerce).

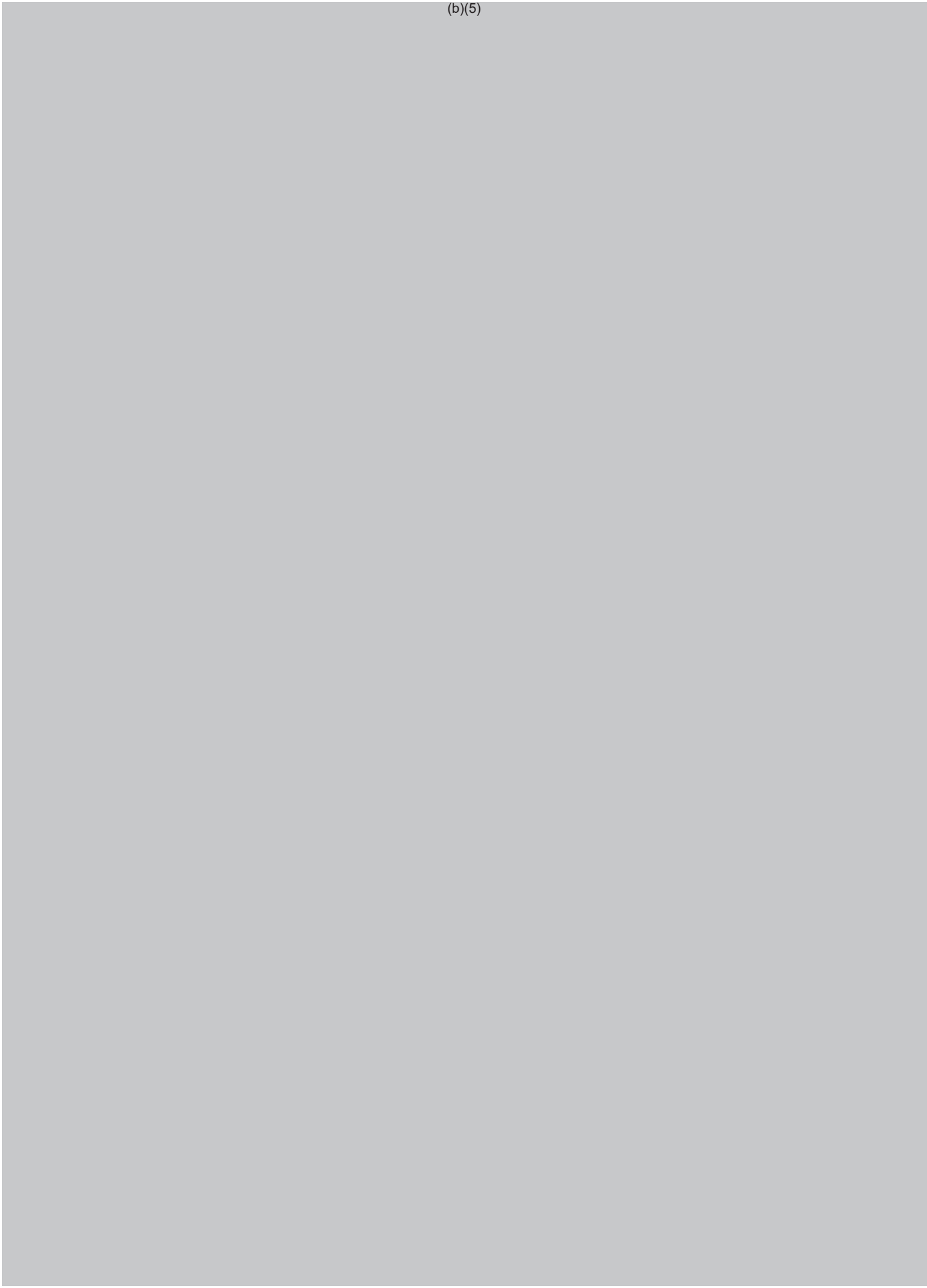
















(b)(5)





(b)(5)





# Fact Sheet for the Final Rule: Amendments to the Revised Definition of “Waters of the United States”

August 2023



## Overview

On August 29, 2023, the U.S. Environmental Protection Agency (EPA) and Department of the Army (the agencies) announced a final rule amending the 2023 definition of “waters of the United States.”<sup>1</sup> The amendments conform with the U.S. Supreme Court’s May 25, 2023, decision in the case of *Sackett v. Environmental Protection Agency*. While EPA’s and Army’s 2023 rule defining “waters of the United States” was not directly before the Supreme Court, the decision in *Sackett* made clear that certain aspects of the 2023 rule are invalid. Therefore, the agencies have amended key components of the regulatory text to conform it to the Supreme Court decision. The final rule provides clarity for protecting our nation’s waters consistent with the Supreme Court’s decision while advancing infrastructure projects, economic opportunities, and agricultural activities.

## Changes to the “Waters of the United States” Categories and Definitions<sup>2</sup>

The agencies’ amendments change the parts of the 2023 definition of “waters of the United States” that are invalid under the *Sackett* decision. For example, the rule removes the significant nexus test from consideration when identifying tributaries and other waters as federally protected. It also revises the adjacency test when identifying federally jurisdictional wetlands, clarifies that interstate wetlands do not fall within the interstate waters category, and clarifies the types of features that can be considered under the “additional waters” category.

### Changes that the agencies have made to the January 2023 Rule categories:

Jurisdictional Category	Key Changes to the January 2023 Rule Regulation Text	Regulatory Text Paragraph
<b>Traditional Navigable Waters</b>	No changes	(a)(1)
<b>Territorial Seas</b>	No changes	(a)(1)
<b>Interstate Waters</b>	Removing interstate wetlands from the text of the interstate waters provision	(a)(1)
<b>Impoundments</b>	No changes	(a)(2)
<b>Tributaries</b>	Removing the significant nexus standard	(a)(3)
<b>Adjacent Wetlands</b>	Removing the significant nexus standard	(a)(4)
<b>Additional Waters</b>	Removing the significant nexus standard; removing wetlands and streams from the text of the provision	(a)(5)

<sup>1</sup> The “Revised Definition of ‘Waters of the United States’” rule published in the Federal Register on January 18, 2023.

<sup>2</sup> These tables are provided for informational purposes; the rule establishes the requirements defining “waters of the United States.”

***Changes that the agencies have made to the January 2023 Rule definitions:***

Definition	Key Changes to the January 2023 Rule Regulation Text	Regulatory Text Paragraph
<b>Wetlands</b>	No changes	(c)(1)
<b>Adjacent</b>	Revised definition to mean “having a continuous surface connection.”	(c)(2)
<b>High tide line</b>	No changes	(c)(3)
<b>Ordinary high water mark</b>	No changes	(c)(4)
<b>Tidal waters</b>	No changes	(c)(5)
<b>Significantly affect</b>	Deleted definition	(c)(6)

## **No Changes to the Exclusions from “Waters of the United States”**

The amendments to the January 2023 Rule do not change the eight exclusions from the definition of “waters of the United States” that provide clarity, consistency, and certainty. **The exclusions are:**

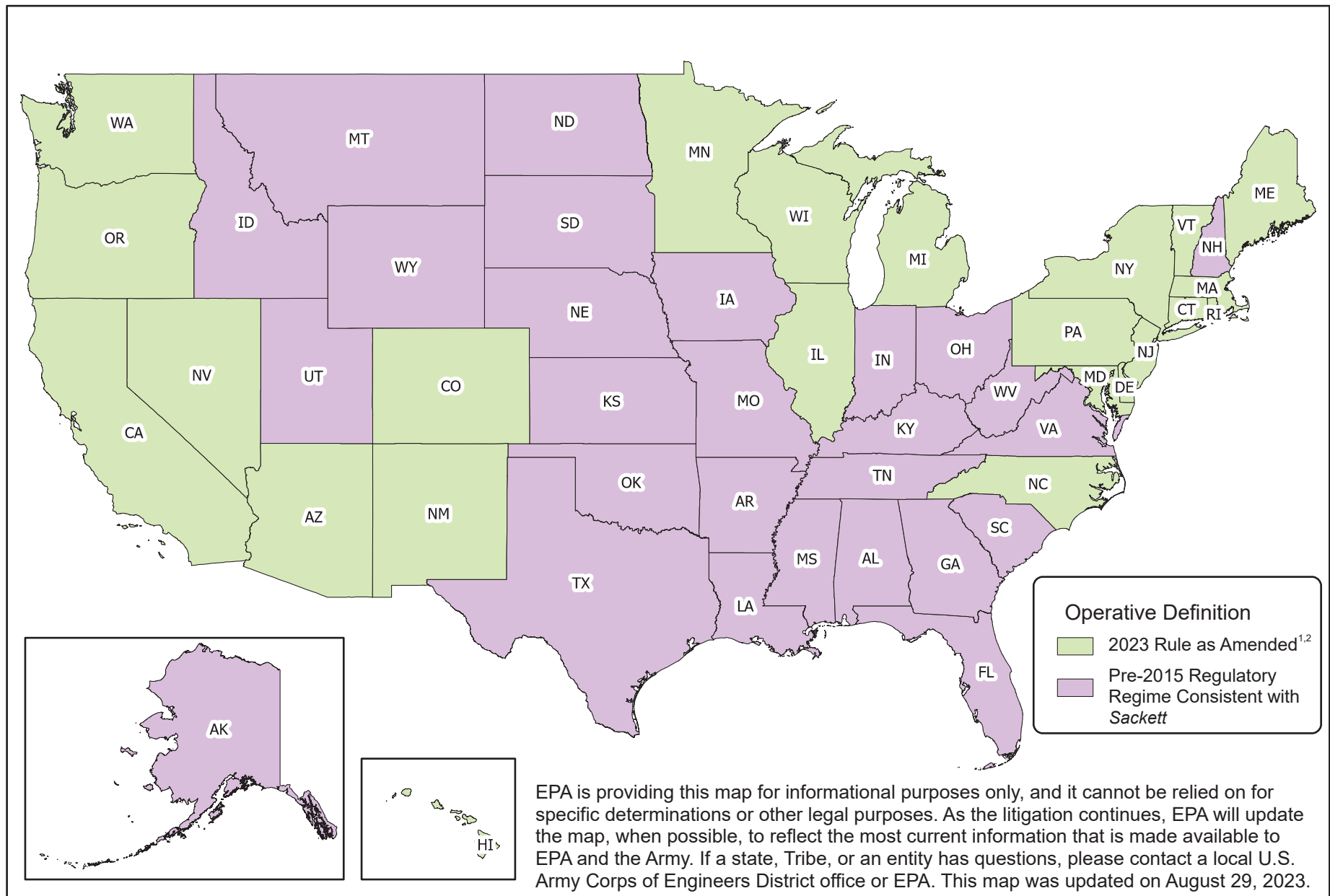
- **Prior converted cropland**, adopting USDA’s definition and generally excluding wetlands that were converted to cropland prior to December 23, 1985.
- **Waste treatment systems**, including treatment ponds or lagoons that are designed to meet the requirements of the Clean Water Act.
- **Ditches** (including roadside ditches), excavated wholly in and draining only dry land, and that do not carry a relatively permanent flow of water.
- **Artificially irrigated areas**, that would revert to dry land if the irrigation ceased.
- **Artificial lakes or ponds**, created by excavating or diking dry land that are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
- **Artificial reflecting pools or swimming pools**, and other small ornamental bodies of water created by excavating or diking dry land.
- **Waterfilled depressions**, created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction operation is abandoned and the resulting body of water meets the definition of “waters of the United States.”
- **Swales and erosional features** (*e.g.*, gullies, small washes), that are characterized by low volume, infrequent, or short duration flow.

Additionally, the agencies’ amended definition of “waters of the United States” does not affect the longstanding activity-based permitting exemptions provided to the agricultural community by the Clean Water Act.

## **For More Information**

Additional information is available on [EPA’s Waters of the United States website](#).

# Operative Definition of "Waters of the United States"



<sup>1</sup>Also operative in the U.S. territories and the District of Columbia

<sup>2</sup>The 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 Georgia Chamber of Commerce).

**From:** [Smith, Thomas Patrick SES USARMY USACE \(USA\)](#)  
**To:** [DLL-Division-&-Center-Commanders](#)  
**Cc:** [Spellmon, Scott A LTG USARMY CEHQ \(USA\)](#); [Graham, William H JR MG USARMY CEHQ \(USA\)](#); [Belk, Edward E Jr SES USARMY CEHQ \(USA\)](#); [Walker, William T Jr CIV USARMY CENAO \(USA\)](#); [Gaffneysmith, Margaret E CIV USARMY CEHQ \(USA\)](#); [Cooper, David R SES USARMY CEHQ \(USA\)](#); [Handura, James J COL USARMY CESP \(USA\)](#); [Perez, Pete G SES USARMY CEHQ \(USA\)](#); [Brown, Theodore A SES USARMY CEHQ \(USA\)](#); [Hill, Stephen L \(Steve\) SES USARMY CEHQ \(USA\)](#); [Bush, Eric L SES USARMY CEHQ \(USA\)](#); [DLL-MSD-Program-Directors](#)  
**Subject:** Amendment to the Revised Definition of "Waters of the US"  
**Date:** Wednesday, August 30, 2023 4:28:05 PM

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Commanders:

On Tuesday August 29, 2023, the U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army (the agencies) announced a final rule amending the 2023 definition of "waters of the United States" to conform with the recent Supreme Court decision in *Sackett v. EPA*. The agencies are committed to following the law and implementing the Clean Water Act to deliver the essential protections that safeguard the nation's waters from pollution and degradation. This action provides the clarity that is needed to advance these goals, while moving forward with infrastructure projects, economic opportunities, and agricultural activities.

More information about the final rule is available here - <https://www.epa.gov/newsreleases/conform-recent-supreme-court-decision-epa-and-army-amend-waters-united-states-rule> .

The agencies will host a public webinar on September 12, 2023 to provide updates on the definition of "waters of the United States." The agencies also plan to host listening sessions this fall with co-regulators and stakeholders, focusing on identifying issues that may arise outside this limited rule to conform the definition of "waters of the United States" with the *Sackett v. EPA* decision.

Learn more about this action on [EPA's "waters of the United States" website](#).

Tom Walker, Chief Regulatory at HQ USACE, will continue to share information and lead implementation discussions with the Regulatory Community of Practice.

Respectfully,

Tom

**Thomas P. Smith, PE, PMP, SES**  
**Chief, Operations and Regulatory**  
**NAD and LRD Regional Integration**  
**US Army Corps of Engineers**

(b)(6)





(b)(5)





(b)(5)



(b)(5)







**From:** [Walker, William T Jr CIV USARMY CENAO \(USA\)](#)  
**To:** [CDL-REG-All](#)  
**Cc:** [Inkelas, Daniel CIV USARMY CEHQ \(USA\)](#); [Wilson, John Maxwell \(Max\) CIV USARMY CEHQ \(USA\)](#); [Zilioli, Erica M CIV USARMY CEHQ \(USA\)](#); [Wood, Lance D CIV USARMY CEHQ \(USA\)](#); [Gaffneysmith, Margaret E CIV USARMY CEHQ \(USA\)](#); [Boyd, Milton W CIV USARMY CEHQ \(USA\)](#)  
**Subject:** WOTUS UPDATE: Amendments to January 2023 WOTUS Rule Became Effective Today; Pause on AJDs Lifted  
**Date:** Friday, September 8, 2023 3:29:03 PM  
**Attachments:** [Amendments 2023 WOTUS 88FR61964.pdf](#)  
[FINAL WOTUSPublicFactSheet08292023.pdf](#)  
[Regulatory Text Changes to the Definition of Waters of the United States at 33 CFR 328.3 and 40 CFR 120.2.pdf](#)  
[WOTUS\\_opdef\\_082923.pdf](#)  
[Voluntary Coordination Request \(Amended 2023 Rule\) Template-8SEP23.docx](#)  
[Voluntary Coordination Request \(Pre-2015+Sackett\) Template-8SEP23.docx](#)  
[Final pre-2015 Appendix A - list of resources \(06 Sept 23\).docx](#)  
[FINAL 2023-amended MFR-jurisdiction \(08 Sep 2023\).docx](#)  
[FINAL pre-2015 MFR-jurisdiction post-Sackett \(08 Sep 23\).docx](#)

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All,

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*. Parts of the January 2023 Rule are invalid under the Supreme Court’s interpretation of the Clean Water Act in the [Sackett decision](#). Therefore, the agencies have amended key aspects of the regulatory text to conform it to the Court’s decision.

The conforming rule, "Revised Definition of 'Waters of the United States'; Conforming," [published in the Federal Register](#) and became effective today 8 September 2023.

The *Federal Register* notice for the final conforming rule is attached. Also attached for your use are a public fact sheet for the final conforming rule and a redline version of the regulatory text amendments that have been made to amend the January 2023 Rule. These materials are in the public domain on EPA’s website and therefore they can be shared externally.

The agencies are hosting three public webinars to provide updates on the definition of “waters of the United States” on September 12, 2023 (3pm-4pm Eastern Time), September 13, 2023 (1pm-2pm Eastern Time), and September 20, 2023 (3pm-4pm Eastern Time). **Each webinar will present the same information.** The webinars have reached registration capacity, but the agencies will post a recording of the webinar to EPA's website. **Because these webinars are for the public, we ask that any USACE participants who may have registered please cancel your registration.** USACE staff can view the recorded webinars once they have been posted to EPA’s website.

Where the January 2023 Rule is not enjoined, the agencies are implementing the January 2023 Rule, as amended by the conforming rule. In the jurisdictions and for the parties where the January 2023 Rule is enjoined, the agencies are interpreting the phrase “waters of the United States” consistent with the pre-2015 regulatory regime and the Supreme Court’s decision in *Sackett*. The attached map illustrates which definition of “waters of the United States” is generally operative in each state across the country as a result of litigation challenging the 2023 Rule. The map is also available at

<https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>. As the litigation continues, EPA will update the map, when possible, to reflect the most current information that is made available to the EPA and the Army. Please visit EPA's [Rule Status page](#) for additional information about the status of the January 2023 Rule, as amended, and litigation.

(b)(5)

**Now that the conforming rule has become effective, the nationwide pause on issuance of certain approved jurisdictional determinations (AJDs) is now lifted in entirety. Effective immediately, USACE districts may resume issuance of all AJDs under the applicable regulatory regime.**

**There are a few important changes to our implementation under the conforming rule and also under the pre-2015 regime consistent with Sackett. These changes are as follows:**

**1. Approved JD MFR Framework:**

(b)(5)

**2. Web Posting of Approved JDs:**

**USACE** will continue our practice of posting each final AJD to our web page when the AJD is completed and maintaining a copy of the AJD on our webpage until the AJD expires. One important aspect that has changed with respect to web posting of AJDs is that, going forward and until further notice, districts should post the AJD location map(s) and the final JD map(s) that show the lateral limits of the aquatic resources and/or features that were evaluated in the AJD in addition to the MFR that provides the Corps' basis of jurisdiction. The

maps and basis of jurisdiction should be combined into a single PDF document to facilitate easy access by members of the public.

### 3. **ORM Updates:**

-  
ORM has been updated to reflect the conforming rule and also the pre-2015 regime consistent with *Sackett*.

- In states and jurisdictions where the conforming rule is in effect, the ORM interface will function to process AJDs completed under the conforming rule.
- In states where the “pre-2015 regime” consistent with *Sackett* is in effect, the ORM interface will function to process AJDs completed under the pre-2015 regime consistent with *Sackett*.

Any pending AJDs will need to be withdrawn using the closure method, “Withdrawn to become an Amended 2023 Rule JD or “Withdrawn to become a Pre-2015 Post-Sackett JD” as applicable.

For any AJD completed in a state/jurisdiction where the conforming rule is in effect, where the requestor is a plaintiff-appellants in *Commonwealth of Kentucky v. EPA* (No. 23-5343) and/or *Kentucky Chamber of Commerce, et al. v. EPA* (No. 23-5345) and requests that their AJD be completed under the pre-2015 regime consistent with *Sackett*, the district will need to request that HQ allow an exception in ORM to allow the action to be processed under the pre-2015 regime.

An updated ORM AJD quick guide will soon be posted to the ORM homepage.

### 4. **AJD Coordination Requirements:**

#### **Conforming Rule AJD Coordination Requirements:**

During December of 2022 the agencies issued a joint memo that outlines procedures for coordination of certain draft approved jurisdictional determinations completed under the January 2023 Rule. That December 2022 Coordination Memo has been rendered inoperative under the conforming rule, since that December 2022 memo only required coordination of draft approved jurisdictional determinations that involved a significant nexus evaluation. Because there will be no significant nexus evaluations under the conforming rule, the December 2022 coordination memo is moot.

As of the date of this email, the agencies have not established any coordination requirements for draft approved JDs completed under the conforming rule. However, the agencies have indicated that they may issue a new coordination memo applicable to conforming rule AJDs within the coming weeks.

Please note that AJDs are case-specific determinations based on the record and factual questions or policy concerns may be raised in the context of a particular AJD. Corps districts

may seek headquarters-level review or guidance on draft approved jurisdictional determinations at any time. When in doubt (for those scenarios where there are questions), districts may elevate the draft approved JD for higher level policy interpretation or guidance.

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#### **Pre-2015 Regime AJD Coordination Requirements:**

**The** 5 June 2007 and 28 January 2008 *SWANCC/Rapanos* Coordination Memoranda remain partially applicable to the Pre-2015 Regime implemented consistent with *Sackett*.

- The coordination requirements in the 2007 and 2008 memos for draft AJDs involving intra-state, non-navigable, isolated waters potentially covered solely under 33 C.F.R. §328.3(a)(3), where jurisdiction is asserted or not asserted based on interstate commerce factors, remain applicable. Until further notice, districts should continue their practice of coordinating such AJDs with the EPA Region, EPA HQ, and USACE HQ.
- Because there will be no significant nexus evaluations under the pre-2015 regime as implemented consistent with *Sackett*, the coordination requirements in the 2007 and 2008 memos for AJDs involving **a finding of a “significant nexus” with traditional navigable waters are now moot.**

As of the date of this email, the agencies have not established any new coordination requirements for draft approved JDs completed under the pre-2015 regime consistent with *Sackett*. However, the agencies have indicated that they may issue a new coordination memo applicable to pre-2015 regime AJDs within the coming weeks.

Please note that AJDs are case-specific determinations based on the record and factual questions or policy concerns may be raised in the context of a particular AJD. Corps districts may seek headquarters-level review or guidance on draft approved jurisdictional determinations at any time. When in doubt (for those scenarios where there are questions), districts may elevate the draft approved JD for higher level policy interpretation or guidance.

(b)(5)

#### **5. Status of recent Implementation Memos/Guidance:**

**Several WOTUS-related implementation memos were issued or re-posted by the agencies in conjunction with the promulgation of the January 2023 Rule. The status of those**



**memos and their applicability to the conforming rule and the pre-2015 regime consistent with Sackett is discussed below.**

- **#1: Joint EPA-Army guidance that was posted to the EPA website on 30 December 2022.** This “TNW Guidance” is an updated version of previous guidance (formerly known as “Appendix D” to the 2007 *Rapanos* JD Guidebook), which provides guidance for determining whether a water is a “traditional navigable water” for the purposes of the Clean Water Act and the agencies’ implementing regulations. There have been no substantive changes to this guidance since it was originally issued on May 30, 2007. The TNW guidance is available at the below link: <https://www.epa.gov/wotus/waters-qualify-traditional-navigable-waters-under-section-a1-agencies-regulations> . The TNW guidance remains effective and applicable under both the conforming rule and the pre-2015 regime consistent with *Sackett*.
- **#2: 24 July 2020 Joint EPA-Army Memo Concerning Exempt Construction or Maintenance of Irrigation Ditches and Exempt Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act (a.k.a., “the 2020 Ditch Memo”).** The 2020 Ditch Memo is related to implementation of statutory exemptions, and it is not specific to our implementation of the definition of “waters of the United States,” but it is an important memo to keep in mind as we implement the Regulatory program. This 2020 Memo provides a clear, consistent approach regarding the application of the exemptions from regulation under Section 404(f)(1)(C) of the CWA for the construction or maintenance of irrigation ditches and for the maintenance of drainage ditches (“ditch exemptions”). This 2020 Memo superseded Regulatory Guidance Letter 07-02. The 2020 Ditch Memo remains effective and applicable under both the conforming rule and the pre-2015 regime consistent with *Sackett*.
- **#3: 7 December 2022 Joint EPA-Army-USDA Memo (a.k.a., the “2022 Agriculture Memo”).** The 2022 Agriculture Memo provides procedures for use by the agencies’ personnel that will facilitate their efforts to ensure that federal wetland programs are administered in an efficient and effective manner. The 2022 Agriculture Memo defines common terms used by the agencies in implementing their respective programs and discusses the agencies’ implementation procedures. The 2022 Agriculture Memo also contains key information related to our implementation of the exclusion for prior converted cropland under the conforming rule. The 2022 Agriculture Memo remains effective and is fully applicable under the conforming rule. The 2022 Agriculture Memo is partially applicable under the pre-2015 regime consistent with *Sackett*. (b)(5)

[REDACTED]

- (b)(5) [Redacted]  
[Redacted]  
[Redacted]  
[Redacted]  
[Redacted]

[Redacted]  
[Redacted]  
[Redacted]

Please contact Matt Wilson if you have any immediate questions.

Thank you for all that you do!

Tom

Jacksonville, Florida. The Coast Guard is activating these safety zones in order to protect vessels and waterway users from the potential hazards created by reentry vehicle splashdowns and recovery operations. In accordance with the general regulations in 33 CFR part 165, subpart C, no U.S.-flagged vessel may enter the safety zones unless authorized by the COTP Savannah or a designated representative except as provided in § 165.T07-0806(d)(3). All foreign-flagged vessels are encouraged to remain outside the safety zones.

There are four other safety zones listed in § 165.T07-0806(a)(2) through (a)(5), which are located within the COTP St. Petersburg and Jacksonville AORs, that are being simultaneously activated through separate notifications of enforcement of the regulation document issued under Docket Numbers USCG-2023-0719, and USCG-2023-0757.<sup>1</sup>

Twenty-four hours prior to the Crew-6 recovery operations, the COTP Jacksonville, the COTP Savannah, the COTP St. Petersburg, or designated representative will inform the public that whether any of the five safety zones described in § 165.T07-0806, paragraph (a), will remain activated (subject to enforcement). If one of the safety zones described in § 165.T07-0806, paragraph (a), remains activated it will be enforced for four hours prior to the Crew-6 splashdown and remain activated until announced by Broadcast Notice to Mariners on VHF-FM channel 16, and/or Marine Safety Information Bulletin (as appropriate) that the safety zone is no longer subject to enforcement. After the Crew-6 reentry vehicle splashdown, the COTP or a designated representative will grant general permission to come no closer than 3 nautical miles of any reentry vehicle or space support vessel engaged in the recovery operations, within the activated safety zone described in § 165.T07-0806, paragraph (a). Once the reentry vehicle, and any personnel involved in reentry service, are removed from the water and secured onboard a space support vessel, the COTP or designated representative will issue a Broadcast Notice to Mariners on VHF-FM channel 16 announcing the activated safety zone is no longer subject to enforcement. The recovery operations are expected to last approximately one hour.

The Coast Guard may be assisted by other Federal, State, or local law

enforcement agencies in enforcing this regulation.

Dated: September 1, 2023.

**Nathaniel L. Robinson,**

*Commander, U.S. Coast Guard, Captain of the Port Savannah.*

[FR Doc. 2023-19392 Filed 9-7-23; 8:45 am]

**BILLING CODE 9110-04-P**

## DEPARTMENT OF DEFENSE

### Department of the Army, Corps of Engineers

#### 33 CFR Part 328

#### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Part 120

[EPA-HQ-OW-2023-0346; FRL-11132-01-OW]

**RIN 2040-AG32**

#### Revised Definition of “Waters of the United States”; Conforming

**AGENCY:** Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) and the Department of the Army (“the agencies”) are amending the Code of Federal Regulations (CFR) to conform the definition of “waters of the United States” to a 2023 Supreme Court decision. This conforming rule amends the provisions of the agencies’ definition of “waters of the United States” that are invalid under the Supreme Court’s interpretation of the Clean Water Act in the 2023 decision.

**DATES:** This final rule is effective on September 8, 2023.

**ADDRESSES:** The agencies have established a docket for this action under Docket ID No. EPA-HQ-OW-2023-0346. All documents in the docket are listed on the <https://www.regulations.gov/> website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <https://www.regulations.gov/>.

**FOR FURTHER INFORMATION CONTACT:** Whitney Beck, Oceans, Wetlands and

Communities Division, Office of Water (4504T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 564-2281; email address: [CWAwtus@epa.gov](mailto:CWAwtus@epa.gov), and Stacey Jensen, Office of the Assistant Secretary of the Army for Civil Works, Department of the Army, 108 Army Pentagon, Washington, DC 20310-0104; telephone number: (703) 459-6026; email address: [usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@army.mil](mailto:usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@army.mil).

#### SUPPLEMENTARY INFORMATION:

##### I. Why are the agencies issuing this final rule?

This action amends Code of Federal Regulations (CFR) provisions promulgated in “Revised Definition of ‘Waters of the United States,’” 88 FR 3004 (January 18, 2023) (“2023 Rule”), to conform to the 2023 Supreme Court decision in *Sackett v. EPA*, 598 U.S. , 143 S. Ct. 1322 (2023) (“*Sackett*”). The Administrative Procedure Act (APA) provides that, when an agency for good cause finds that public notice and comment procedures are impracticable, unnecessary, or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. 5 U.S.C. 553(b)(B). The Environmental Protection Agency (EPA) and the Department of the Army (“the agencies”) have determined that there is good cause under APA section 553(b)(B) to issue this 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 *Sackett*. The effect of the *Sackett* decision was to render these provisions immediately inconsistent with the Supreme Court’s interpretation of the Clean Water Act. Consistent with the agencies’ previously stated intent regarding the severability of the 2023 Rule in the event that provisions of that rule were held invalid, *see* 88 FR 3135, the agencies are conforming the 2023 Rule’s definition of the term “waters of the United States” to the Supreme Court’s decision. Specifically, the agencies are revising 40 CFR 120.2(a)(1)(iii), (a)(3) through (5), and (c)(2) and (6), and 33 CFR 328.3(a)(1)(iii), (a)(3) through (5), and (c)(2) and (6) to amend aspects of the definition as needed to conform to the Supreme Court’s interpretation of the Clean Water Act in *Sackett*. Because the sole purpose of this rule is to amend these specific provisions of the 2023

<sup>1</sup> These notifications of enforcement of the regulation can be found at: <https://regulations.gov> by searching for docket number USCG-2023-0719, and USCG-2023-0757.

Rule to conform with *Sackett*, and such conforming amendments do not involve the exercise of the agencies' discretion, providing advance public notice and seeking comment is unnecessary. A notice and comment process would neither provide new information to the public nor inform any agency decision-making regarding the aspects of the regulations defining "waters of the United States" that are invalid as inconsistent with the Clean Water Act under *Sackett*.

For similar reasons, there is good cause under the APA to make this rule immediately effective, 5 U.S.C. 553(d)(3), because this rule does not impose any burdens on the regulated community; rather, it merely conforms the 2023 Rule to the Supreme Court's decision in *Sackett* by amending the provisions of the 2023 Rule that are invalid under the Supreme Court's interpretation of the Clean Water Act. Making the rule immediately effective will also provide more clarity and certainty to the regulated community and the public following the *Sackett* decision. Many States and industry groups challenging the 2023 Rule have advocated in litigation for quick action by the agencies in light of *Sackett*, citing the need for regulatory certainty and less delay in processing approved jurisdictional determinations and certain Clean Water Act permits. A delayed effective date for amendments to regulations defining "waters of the United States" to conform to *Sackett* would prolong confusion and potentially result in project delays for prospective permittees that seek approved jurisdictional determinations to evaluate whether their projects will result in discharges to "waters of the United States." Making the rule immediately effective also avoids delaying provision of clarity to aid States and authorized Tribes administering Clean Water Act permitting programs and to members of the general public who seek to understand which waters are subject to the Clean Water Act's requirements. It is thus appropriate for the agencies to revise the affected provisions in 40 CFR 120.2 and 33 CFR 328.3 to conform to *Sackett* as quickly as possible and to make those revisions immediately effective.

In 1972, Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Public Law 92–500, 86 Stat. 816, as amended, 33 U.S.C. 1251 *et seq.* ("Clean Water Act" or "Act"). Central to the framework and protections provided by the Clean Water Act is the term "navigable waters," defined in the Act as "the waters of the

United States, including the territorial seas." 33 U.S.C. 1362(7). On January 18, 2023, the final "Revised Definition of 'Waters of the United States'" rule was published in the **Federal Register**, and the rule took effect on March 20, 2023.<sup>1</sup>

In 2006, the Supreme Court addressed the scope of "waters of the United States" in *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*"). As the Court in *Sackett* noted, no position in *Rapanos* commanded a majority of the Court. *Sackett*, 143 S. Ct. at 1344. In *Rapanos*, all nine members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. *Rapanos*, 547 U.S. at 731 (Scalia, J., plurality opinion) ("We have twice stated that the meaning of 'navigable waters' in the Act is broader than the traditional understanding of that term, *SWANCC*, 531 U.S. at 167; *Riverside Bayview*, 474 U.S. at 133."). A four-Justice plurality in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water," *id.* at 739, that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a "continuous surface connection" to such waterbodies, *id.* (Scalia, J., plurality opinion). The *Rapanos* plurality noted that its reference to "relatively permanent" waters did "not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months." *Id.* at 732 n.5 (emphasis in original). Justice Kennedy's concurring opinion took a different approach, concluding that "to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759. He concluded that wetlands possess the requisite significant nexus if the wetlands "either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780. The four dissenting Justices in *Rapanos* would have deferred to the agencies and also

concluded that waters would be jurisdictional under "either the plurality's or Justice Kennedy's test." *Id.* at 810 & n.14 (Stevens, J., dissenting).

The 2023 Rule incorporated the two jurisdictional standards from *Rapanos* into the definition of the term "waters of the United States." First, under that rule, the "relatively permanent standard" refers to the test to identify: relatively permanent, standing or continuously flowing tributaries connected to traditional navigable waters, the territorial seas, or interstate waters; relatively permanent, standing or continuously flowing additional waters with a continuous surface connection to such relatively permanent waters or to traditional navigable waters, the territorial seas, or interstate waters; and, adjacent wetlands and certain impoundments with a continuous surface connection to such relatively permanent waters or to traditional navigable waters, the territorial seas, or interstate waters. Second, the "significant nexus standard" under the 2023 Rule refers to the test to identify waters that, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters. The regulatory text also defined "significantly affect" for purposes of the significant nexus standard. 88 FR 3006. Under the 2023 Rule, waters were jurisdictional if they met either standard.

The 2023 Rule also defined the term "adjacent" with no changes from the agencies' longstanding regulatory definition. "Adjacent" was defined as "bordering, contiguous, or neighboring." 88 FR 3116–17. Wetlands separated from other "waters of the United States" by man-made dikes or barriers, natural river berms, beach dunes and the like were defined as "adjacent" wetlands. *Id.*

On May 25, 2023, the Supreme Court decided *Sackett v. EPA*. While the 2023 Rule was not directly before the Court, the Court considered the jurisdictional standards set forth in that rule. The enterprise of the 2023 Rule—to define "waters of the United States"—was the same as the Supreme Court's enterprise in *Sackett*: "to identify with greater clarity what the Act means by 'the waters of the United States.'" 143 S. Ct. at 1329; *see also id.* at 1331 ("The meaning of [33 U.S.C. 1362(7)] is the persistent problem that we must address."). The Supreme Court recognized the agencies' definition and utilization of "adjacent" and

<sup>1</sup> As a result of litigation, the 2023 Rule is enjoined in 27 States as of the date this final rule was signed. *See Texas v. EPA*, Nos. 23–00017 & 23–00020 (S.D. Tex. March 19, 2023); *West Virginia v. EPA*, No. 23–00032 (D.N.D. April 12, 2023); *Commonwealth of Kentucky v. EPA*, Nos. 23–5343/5345 (6th Cir. May 10, 2023).



“significant nexus” “as set out in [the agencies’] most recent rule,” the 2023 Rule, 143 S. Ct. at 1335, 1341, but concluded that the significant nexus standard was “inconsistent with the text and structure of the [Clean Water Act].” *Id.* at 1341. Instead, the Court “conclude[d] that the *Rapanos* plurality was correct: the [Clean Water Act]’s use of ‘waters’ encompasses ‘only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic[al] features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’”” *Id.* at 1336 (quoting *Rapanos*, 547 U.S. at 739). The Court also “agree[d] with [the plurality’s] formulation of when wetlands are part of ‘the waters of the United States,’” *id.* at 1340–41: “when 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.’” *Id.* at 1344 (citing *Rapanos*, 547 U.S. at 742, 755). Thus, the Supreme Court concluded that “this interpretation”—*i.e.*, the interpretation of adjacent wetlands as “waters of the United States” set out in the 2023 Rule—“is inconsistent with the text and structure of the CWA” insofar as it incorporated the “significant nexus” test and defined “adjacent” other than as the *Rapanos* plurality defined the term. *Id.* at 1341.

The agencies are revising the 2023 Rule to remove the significant nexus standard and to amend its definition of “adjacent” as these provisions are invalid under the Supreme Court’s interpretation of the Clean Water Act in *Sackett*. See section II of this preamble for the specific amendments. Under the decision in *Sackett*, waters are not jurisdictional under the Clean Water Act based on the significant nexus standard. In addition, under the decision in *Sackett*, wetlands are not defined as “adjacent” or jurisdictional under the Clean Water Act solely because they are “bordering, contiguous, or neighboring . . . [or] separated from other ‘waters of the United States’ by man-made dikes or barriers, natural river berms, beach dunes and the like.” Therefore, under this conforming rule, waters cannot be found to be jurisdictional because they meet the significant nexus standard; nor can wetlands be found to be jurisdictional based on the definition of “adjacent” codified in the 2023 Rule. Furthermore, as a result of the decision in *Sackett* invalidating the significant nexus standard, the provision for assessment of streams and wetlands under the additional waters provision of paragraph (a)(5) is no longer valid as

any jurisdictional streams and wetlands are covered by paragraphs (a)(1) through (4) of the 2023 Rule.<sup>2</sup>

Finally, the agencies are removing “interstate wetlands” from the 2023 Rule to conform with the decision in *Sackett*. The Supreme Court in *Sackett* examined the Clean Water Act and its statutory history and found the predecessor statute to the Clean Water Act covered and defined “interstate waters” as “all rivers, lakes, and other waters that flow across or form a part of State boundaries.” *Sackett* at 1337 (citing 33 U.S.C. 1160(a), 1173(e) (1970 ed.) (emphasis in original)). The Court concluded that the use of the term “waters” refers to such “open waters” and not wetlands. *Id.* As a result, under *Sackett*, the provision authorizing wetlands to be jurisdictional simply because they are interstate is invalid.

The agencies will continue to interpret the remainder of the definition of “waters of the United States” in the 2023 Rule consistent with the *Sackett* decision. And 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 this limited rule. See *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020) (“EPA, too, can provide administrative guidance (within statutory boundaries) in numerous ways, including through, for example, grants of individual permits, promulgation of general permits, or the development of general rules.”). The agencies have a wide range of available approaches to address such issues, including: approved jurisdictional determinations and Clean Water Act permits (both of which are final agency actions subject to judicial review); guidance; notice and comment rulemaking; and, agency forms and training materials. The agencies intend to hold stakeholder meetings to ensure the public has an opportunity to provide the agencies with input on other issues they would like the agencies to address. The agencies are also committed to taking particular actions that have been requested by stakeholders to improve implementation of the definition of “waters of the United States.” For

<sup>2</sup> Lakes and ponds, however, may still be jurisdictional under paragraph (a)(5) if they do not fall within paragraphs (a)(1) through (3) of the 2023 Rule (for example, if they are not tributaries connected to waters identified in paragraph (a)(1) or (2)) and they are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (3).

example, the agencies are working to improve coordination among Federal agencies through coordination memoranda and trainings. The agencies are also developing regionally-specific tools to facilitate implementation of the definition of “waters of the United States.” The agencies will continue to provide trainings to Tribes, States, and the public as appropriate to promote clarity and consistency. The agencies will continue to post materials and outreach opportunities to EPA’s website at <https://www.epa.gov/wotus>.

## II. Which provisions are amended?

This final rule amends the following provisions in the 2023 Rule: 40 CFR 120.2(a)(1)(iii), (a)(3) through (5), (c)(2) and (6), and 33 CFR 328.3(a)(1)(iii), (a)(3) through (5), (c)(2) and (6). A list of these revisions is provided below.

- **40 CFR 120.2(a)(1)(iii) and 33 CFR 328.3(a)(1)(iii):** Removed the phrase “including interstate wetlands” from this provision. Made conforming edits to the regulatory text.

- **40 CFR 120.2(a)(3) and 33 CFR 328.3(a)(3):** Removed the significant nexus standard from the tributaries provision. Made conforming edits to the regulatory text.

- **40 CFR 120.2(a)(4) and 33 CFR 328.3(a)(4):** Removed the significant nexus standard from the adjacent wetlands provision. Made conforming edits to the regulatory text.

- **40 CFR 120.2(a)(5) and 33 CFR 328.3(a)(5):** Removed the significant nexus standard and streams and wetlands from the provision for intrastate lakes and ponds, streams, or wetlands not otherwise identified in the definition. Made conforming edits to the regulatory text.

- **40 CFR 120.2(c)(2) and 33 CFR 328.3(c)(2):** Revised the definition of “adjacent”. Note that the agencies recognize that revising the definition of adjacent creates redundancy in 40 CFR 120.2(a)(4) and 33 CFR 328.3(a)(4), which already include the requirement for a “continuous surface connection,” but deleting existing regulatory text to reduce redundancy is outside the scope of the agencies’ determination in this rule that there is good cause under APA section 553(b)(B) to issue this final rule without prior proposal and opportunity for comment.

- **40 CFR 120.2(c)(6) and 33 CFR 328.3(c)(6):** Removed the term “significantly affect” and its definition in its entirety.

## III. Severability

The purpose of this section is to clarify the agencies’ intent with respect to the severability of provisions of this

rule and the 2023 Rule as amended by this final rule in the event of litigation. In the event of a stay or invalidation of any part of this rule, the agencies' intent is to preserve the remaining portions of the rule to the fullest possible extent. Further, if any part of the 2023 Rule as amended by this rule is stayed or invalidated, the agencies' intent is to preserve its remaining portions to the fullest possible extent. The agencies explained in the 2023 Rule that it was carefully crafted so that each provision or element of the rule is capable of operating independently. 88 FR 3135. None of the amendments made in this rule affects the 2023 Rule's severability or undermines the ability of each part of this rule or the remaining parts of the 2023 Rule to operate independently.

The exclusive purpose of the 2023 Rule was to define "waters of the United States," and this rule simply conforms that definition to *Sackett*. "Waters of the United States" is defined in paragraphs (a)(1) through (5), subject to the exclusions in paragraph (b), and using terms defined in paragraph (c). The categories in paragraphs (a)(1) through (5) are disjunctive, and while they may overlap, no one category (or subcategory) depends on another. The modifications to the 2023 Rule in this rule do not alter those basic features of the regulatory text. Therefore, if any provision or element of this rule or of the 2023 Rule as amended by this rule is determined by judicial review or operation of law to be invalid, that partial invalidation will not render the remainder of this rule or the 2023 Rule, as amended, invalid. Further, if the application of any portion of this rule or the 2023 Rule, as amended by this rule, to a particular circumstance is determined to be invalid, the agencies intend that this rule and the 2023 Rule, as amended, remain applicable to all other circumstances.

For example, if paragraph (c)(2), which contains the revised definition of "adjacent," were deemed invalid, it would affect implementation of paragraph (a)(4), which addresses "adjacent wetlands," but it would not affect any other provision of this rule (or the 2023 Rule, as amended), all of which would continue to operate. As another example, if paragraph (a)(1)(iii), which provides that interstate waters (amended by this rule to no longer include interstate wetlands) are "waters of the United States," were deemed invalid, every other provision of this rule (and the 2023 Rule as amended) could continue to operate. References to paragraph (a)(1) in paragraphs (a)(3) through (5), and paragraph (c)(2) would remain in effect, and paragraph (a)(1)

would simply be read to consist of paragraphs (a)(1)(i) and (ii), without paragraph (a)(1)(iii) in whole or in part. As a third example, if one of the exclusions from "waters of the United States" in paragraph (b), or any part of one of the exclusions, were deemed invalid, the remainder of this rule, and thus, the 2023 Rule as amended, would remain in effect. The rationale for each exclusion in paragraph (b) is distinct and invalidating one exclusion would not have any practical impact on any other part of the definition of "waters of the United States."

#### IV. Statutory and Executive Orders Reviews

Additional information about these statutes and Executive orders can be found at <https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

##### A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14094: Modernizing Regulatory Review

This action is a significant regulatory action as defined in Executive Order 12866, as amended by Executive Order 14094. Accordingly, the agencies submitted this action to the Office of Management and Budget (OMB) for Executive Order 12866 review. Documentation of any changes made in response to the Executive Order 12866 review is available in the docket.

This conforming rule amends the provisions of the agencies' definition of "waters of the United States" that are invalid under the Supreme Court's interpretation of the Clean Water Act in *Sackett*. As such, it is the agencies' view that the rule does not by itself impose cost savings or forgone benefits.

##### B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA because it does not contain any information collection activities. However, this action may change terms and concepts used by EPA and Army to implement certain programs. The agencies thus may need to revise some of their collections of information to be consistent with this action and will do so consistent with the PRA and implementing regulations.

##### C. Regulatory Flexibility Act (RFA)

This action is not subject to the RFA. The RFA applies only to rules subject to notice and comment rulemaking requirements under the APA, 5 U.S.C. 553, or any other statute. This rule is not subject to notice and comment requirements because the agencies have

invoked the APA "good cause" exemption under 5 U.S.C. 553(b).

##### D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The definition of "waters of the United States" applies broadly to Clean Water Act programs, and this rule amending the definition of "waters of the United States" simply conforms to a decision of the Supreme Court. The action imposes no enforceable duty on any Tribal, State, or local governments, or the private sector.

##### E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

This conforming rule amends the provisions of the agencies' definition of "waters of the United States" that are invalid under the Supreme Court's interpretation of the Clean Water Act in *Sackett*. Because the limited amendments in this rule do not involve the exercise of the agencies' discretion, federalism consultation would neither provide new information nor inform any agency decision-making regarding the aspects of the regulations defining "waters of the United States" that are invalid under the Supreme Court's interpretation of the Clean Water Act in *Sackett*. The agencies recognize, however, that changes to the definition of "waters of the United States" may be of interest to State and local governments. The agencies intend to hold discussions with State and local governments on implementation of the definition of "waters of the United States."

##### F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This rule amends the provisions of the agencies' definition of "waters of the United States" that are invalid under the Supreme Court's interpretation of the Clean Water Act in *Sackett*. Because the amendments in this rule do not involve the exercise of the agencies' discretion, in this instance Tribal consultation and coordination could not inform the decision-making in this final rule. The agencies recognize, however, that changes to the definition of "waters of the United States" may be of interest

to Tribal governments. The agencies intend to hold discussions with Tribes on implementation of the definition of “waters of the United States.”

*G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks*

EPA and the Army interpret Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the agencies have reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2–202 of the Executive order.

This conforming rule amends the provisions of the agencies’ definition of “waters of the United States” that are invalid under the Supreme Court’s interpretation of the Clean Water Act in *Sackett*. Because these amendments are necessary to conform to the Supreme Court’s decision and do not involve the exercise of the agencies’ discretion, the rule does not concern an environmental health risk or safety risk and is not subject to Executive Order 13045. Similarly, this action does not concern human health, and therefore EPA’s Policy on Children’s Health also does not apply.

*H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use*

This action is not a “significant energy action” because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

*I. National Technology Transfer and Advancement Act*

This rule does not involve technical standards.

*J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation’s Commitment to Environmental Justice for All*

Executive Order 12898 (59 FR 7629, February 16, 1994) directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on communities with environmental justice concerns. Executive Order 14096 (88 FR 25251, April 21, 2023) supplements the foundational efforts of Executive Order 12898 to address environmental justice.

EPA and the Army believe that it is not necessary to assess whether this action would result in disproportionate and adverse effects on communities with environmental justice concerns, as this is a conforming rule and the targeted amendments made do not reflect an exercise of agency discretion. In prior analyses of potential distributional impacts of the 2023 Rule (see *Economic Analysis for Final “Revised Definition of ‘Waters of the United States’” Rule*, Docket ID No. EPA–HQ–OW–2021–0602–2489), the agencies examined whether the change in benefits due to that rule may be differentially distributed among communities with environmental justice concerns in the affected areas when compared to two baselines—the primary baseline of the pre-2015 regulatory regime and the secondary baseline of the 2020 Navigable Waters Protection Rule. In that prior analysis, for most of the wetlands and affected waters impacted at a hydrologic unit code (HUC)<sup>3</sup> 12 watershed level, there was no evidence of potential environmental justice impacts from the 2023 Rule warranting further analysis when compared to both baselines.

The agencies recognize that the burdens of environmental pollution and climate change often fall disproportionately on communities with environmental justice concerns. Climate change will exacerbate the existing risks faced by communities with environmental justice concerns. However, this conforming rule merely amends the provisions of the agencies’ definition of “waters of the United States” that are invalid under the Supreme Court’s interpretation of the Clean Water Act in *Sackett*. As noted above, these amendments on their own do not result in any cost savings or forgone benefits not directed by the operation of law. Because this rule does not involve the exercise of the agencies’ discretion, the agencies did not engage with communities with environmental justice concerns in developing this action.

*K. Congressional Review Act (CRA)*

This action is subject to the CRA, and the agencies will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2). The CRA allows the issuing agency to make a rule

effective sooner than otherwise would be provided by the CRA if the agency makes a good cause finding that notice and comment public rulemaking procedures are impracticable, unnecessary, or contrary to the public interest (5 U.S.C. 808(2)). The agencies have made a good cause finding for this rule as discussed in section I of this preamble, including the basis for that finding.

**List of Subjects**

*33 CFR Part 328*

Administrative practice and procedure, Environmental protection, Navigation (water), Water pollution control, Waterways.

*40 CFR Part 120*

Environmental protection, Water pollution control, Waterways.

**Michael L. Connor,**

*Assistant Secretary of the Army (Civil Works), Department of the Army.*

**Michael S. Regan,**

*Administrator, Environmental Protection Agency.*

**Title 33—Navigation and Navigable Waters**

For the reasons set out in the preamble, 33 CFR part 328 is amended as follows:

**PART 328—DEFINITION OF WATERS OF THE UNITED STATES**

■ 1. The authority citation for part 328 continues to read as follows:

**Authority:** 33 U.S.C. 1251 *et seq.*

- 2. Section 328.3 is amended by:
- a. Revising paragraphs (a)(1)(iii), (a)(3), and (a)(4)(ii);
  - b. Removing paragraph (a)(4)(iii);
  - c. Revising paragraphs (a)(5) and (c)(2); and
  - d. Removing paragraph (c)(6).

The revisions read as follows:

**§ 328.3 Definitions.**

\* \* \* \* \*

(a) \* \* \*

(1) \* \* \*

(iii) Interstate waters;

\* \* \* \* \*

(3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section that are relatively permanent, standing or continuously flowing bodies of water;

(4) \* \* \*

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3) of this section and with a continuous surface connection to those waters;

(5) Intrastate lakes and ponds not identified in paragraphs (a)(1) through (4) of this section that are relatively

<sup>3</sup> HUC boundaries are established by the U.S. Geological Survey and Natural Resources Conservation Service. These boundaries are numbered using nested codes to represent the scale of the watershed size. For example, HUC 12 watersheds are smaller than HUC 4 watersheds.



permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3) of this section.

\* \* \* \* \*

(c) \* \* \*

(2) *Adjacent* means having a continuous surface connection.

\* \* \* \* \*

#### Title 40—Protection of Environment

For reasons set out in the preamble, 40 CFR part 120 is amended as follows:

### PART 120—DEFINITION OF WATERS OF THE UNITED STATES

■ 3 The authority citation for part 120 continues to read as follows:

**Authority:** 33 U.S.C. 1251 *et seq.*

■ 4. Section 120.2 is amended by:

■ a. Revising paragraphs (a)(1)(iii), (a)(3), and (a)(4)(ii);

■ b. Removing paragraph (a)(4)(iii);

■ c. Revising paragraphs (a)(5) and (c)(2); and

■ d. Removing paragraph (c)(6).

The revisions read as follows:

#### § 120.2 Definitions.

\* \* \* \* \*

(a) \* \* \*

(1) \* \* \*

(iii) Interstate waters;

\* \* \* \* \*

(3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section that are relatively permanent, standing or continuously flowing bodies of water;

(4) \* \* \*

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3) of this section and with a continuous surface connection to those waters;

(5) Intrastate lakes and ponds not identified in paragraphs (a)(1) through (4) of this section that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3) of this section.

\* \* \* \* \*

(c) \* \* \*

(2) *Adjacent* means having a continuous surface connection.

\* \* \* \* \*

[FR Doc. 2023-18929 Filed 9-7-23; 8:45 am]

BILLING CODE 6560-50-P

### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Part 52

[EPA-R05-OAR-2022-0580; FRL-11047-02-R5]

#### Air Plan Approval; Ohio; Approval of the Muskingum River SO<sub>2</sub> Attainment Plan

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is approving, under the Clean Air Act (CAA), a revision to the Ohio State Implementation Plan (SIP) intended to provide for attainment of the 2010 primary, health-based 1-hour sulfur dioxide (SO<sub>2</sub>) national ambient air quality standard (NAAQS or standard) for the Muskingum River SO<sub>2</sub> nonattainment area. This SIP revision (hereinafter referred to as Ohio's Muskingum River SO<sub>2</sub> attainment plan or plan), includes Ohio's attainment demonstration and other attainment planning elements required under the CAA. EPA is finding that Ohio has appropriately demonstrated that the plan provides for attainment of the 2010 1-hour primary SO<sub>2</sub> NAAQS in the Muskingum River, Ohio nonattainment area and that the plan meets the other applicable requirements under the CAA. EPA is also incorporating by reference Ohio Director's Final Findings and Orders (DFFOs), issued on May 23, 2023, into the Ohio SIP. The DFFOs set forth additional requirements at Globe Metallurgical (Globe) to verify appropriate source characterization for modeling purposes.

**DATES:** This final rule is effective on October 10, 2023.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA-R05-OAR-2022-0580. All documents in the docket are listed on the [www.regulations.gov](http://www.regulations.gov) website. Although listed in the index, some information is not publicly available, *i.e.*, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either through [www.regulations.gov](http://www.regulations.gov) or at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through

Friday, excluding Federal holidays and facility closures due to COVID-19. We recommend that you telephone Gina Harrison, Environmental Scientist, at (312) 353-6956 before visiting the Region 5 office.

**FOR FURTHER INFORMATION CONTACT:** Gina Harrison, Attainment Planning and Maintenance Section, Air Programs Branch (AR-18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353-6956, [harrison.gina@epa.gov](mailto:harrison.gina@epa.gov).

#### SUPPLEMENTARY INFORMATION:

Throughout this document whenever “we,” “us,” or “our” is used, we mean EPA.

#### I. Background

On January 18, 2022 (87 FR 2555), EPA partially approved and partially disapproved Ohio's SO<sub>2</sub> plan for the Muskingum River area submitted on April 3, 2015, and October 13, 2015, and supplemented on June 23, 2020. EPA's January 18, 2022, final rule provided an explanation of the applicable provisions in the CAA and the measures and limitations identified in Ohio's attainment plan to satisfy these provisions.

The partial disapproval started sanctions clocks for this area under CAA section 179(a)–(b), including a requirement for 2-for-1 offsets for any major new sources or major modifications 18 months after the effective date of this action, and highway funding sanctions 6 months thereafter, as well as initiated an obligation for EPA to promulgate a Federal Implementation Plan (FIP) within 24 months, under CAA section 110(c).

Ohio supplemented the attainment demonstration on June 24, 2022, substituting new measures in lieu of a land acquisition and modifying the air quality modeling to include the use of site-specific meteorological data. Ohio submitted additional supplemental information on July 28, 2022, and May 23, 2023, including revised DFFOs for Globe, issued on May 23, 2023, that supersede the June 23, 2020 DFFOs.

#### II. Proposed Rule

On June 22, 2023 (88 FR 40726), EPA proposed to approve Ohio's SIP attainment plan submission for the Muskingum River SO<sub>2</sub> nonattainment area, which the state submitted to EPA on April 3, 2015, October 13, 2015, and June 23, 2020, and supplemented on June 24, 2022, July 28, 2022, and May 23, 2023. The SO<sub>2</sub> attainment plan included Ohio's attainment





## Fact Sheet for the Final Rule: Amendments to the Revised Definition of “Waters of the United States”

August 2023



### Overview

On August 29, 2023, the U.S. Environmental Protection Agency (EPA) and Department of the Army (the agencies) announced a final rule amending the 2023 definition of “waters of the United States.”<sup>1</sup> The amendments conform with the U.S. Supreme Court’s May 25, 2023, decision in the case of *Sackett v. Environmental Protection Agency*. While EPA’s and Army’s 2023 rule defining “waters of the United States” was not directly before the Supreme Court, the decision in *Sackett* made clear that certain aspects of the 2023 rule are invalid. Therefore, the agencies have amended key components of the regulatory text to conform it to the Supreme Court decision. The final rule provides clarity for protecting our nation’s waters consistent with the Supreme Court’s decision while advancing infrastructure projects, economic opportunities, and agricultural activities.

### Changes to the “Waters of the United States” Categories and Definitions<sup>2</sup>

The agencies’ amendments change the parts of the 2023 definition of “waters of the United States” that are invalid under the *Sackett* decision. For example, the rule removes the significant nexus test from consideration when identifying tributaries and other waters as federally protected. It also revises the adjacency test when identifying federally jurisdictional wetlands, clarifies that interstate wetlands do not fall within the interstate waters category, and clarifies the types of features that can be considered under the “additional waters” category.

#### ***Changes that the agencies have made to the January 2023 Rule categories:***

Jurisdictional Category	Key Changes to the January 2023 Rule Regulation Text	Regulatory Text Paragraph
<b>Traditional Navigable Waters</b>	No changes	(a)(1)
<b>Territorial Seas</b>	No changes	(a)(1)
<b>Interstate Waters</b>	Removing interstate wetlands from the text of the interstate waters provision	(a)(1)
<b>Impoundments</b>	No changes	(a)(2)
<b>Tributaries</b>	Removing the significant nexus standard	(a)(3)
<b>Adjacent Wetlands</b>	Removing the significant nexus standard	(a)(4)
<b>Additional Waters</b>	Removing the significant nexus standard; removing wetlands and streams from the text of the provision	(a)(5)

<sup>1</sup> The “Revised Definition of ‘Waters of the United States’” rule published in the Federal Register on January 18, 2023.

<sup>2</sup> These tables are provided for informational purposes; the rule establishes the requirements defining “waters of the United States.”

***Changes that the agencies have made to the January 2023 Rule definitions:***

Definition	Key Changes to the January 2023 Rule Regulation Text	Regulatory Text Paragraph
<b>Wetlands</b>	No changes	(c)(1)
<b>Adjacent</b>	Revised definition to mean “having a continuous surface connection.”	(c)(2)
<b>High tide line</b>	No changes	(c)(3)
<b>Ordinary high water mark</b>	No changes	(c)(4)
<b>Tidal waters</b>	No changes	(c)(5)
<b>Significantly affect</b>	Deleted definition	(c)(6)

## **No Changes to the Exclusions from “Waters of the United States”**

The amendments to the January 2023 Rule do not change the eight exclusions from the definition of “waters of the United States” that provide clarity, consistency, and certainty. **The exclusions are:**

- **Prior converted cropland**, adopting USDA’s definition and generally excluding wetlands that were converted to cropland prior to December 23, 1985.
- **Waste treatment systems**, including treatment ponds or lagoons that are designed to meet the requirements of the Clean Water Act.
- **Ditches** (including roadside ditches), excavated wholly in and draining only dry land, and that do not carry a relatively permanent flow of water.
- **Artificially irrigated areas**, that would revert to dry land if the irrigation ceased.
- **Artificial lakes or ponds**, created by excavating or diking dry land that are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
- **Artificial reflecting pools or swimming pools**, and other small ornamental bodies of water created by excavating or diking dry land.
- **Waterfilled depressions**, created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction operation is abandoned and the resulting body of water meets the definition of “waters of the United States.”
- **Swales and erosional features** (*e.g.*, gullies, small washes), that are characterized by low volume, infrequent, or short duration flow.

Additionally, the agencies’ amended definition of “waters of the United States” does not affect the longstanding activity-based permitting exemptions provided to the agricultural community by the Clean Water Act.

## **For More Information**

Additional information is available on [EPA’s Waters of the United States website](#).

## **Amendments to 40 CFR 120.2 and 33 CFR 328.3**

The EPA Administrator, Michael S. Regan, signed the final rule amending the “Revised Definition of ‘Waters of the United States’” on August 28, 2023, and the Assistant Secretary of the Army (Civil Works), Michael L. Connor, signed the final rule on August 25, 2023. EPA is providing this document describing the amendments to the Code of Federal Regulations (CFR) solely for the convenience of interested parties. It is not a final rule. This document is not disseminated for purposes of EPA's Information Quality Guidelines and does not represent an Agency determination or policy. While we have taken steps to ensure the accuracy of this document, the official version of the final rule will be published in the *Federal Register* and will be available on Regulations.gov (<https://www.regulations.gov>) in Docket No. EPA-HQ-OW-2023-0346.

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This content is from the eCFR and is authoritative but unofficial.

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## Title 33 – Navigation and Navigable Waters

### Chapter II – Corps of Engineers, Department of the Army, Department of Defense

#### Part 328 – Definition of Waters of the United States

Authority: 33 U.S.C. 1251 et seq.

Source: 51 FR 41250, Nov. 13, 1986, unless otherwise noted.

#### § 328.3 Definitions.

For the purpose of this regulation these terms are defined as follows:

(a) *Waters of the United States* means:

(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;~~

(2) Impoundments of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under paragraph (a)(5) of this section;

(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;~~

(4) Wetlands adjacent to the following waters:

(i) Waters identified in paragraph (a)(1) of this section; or

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3) ~~(i)~~ of this section and with a continuous surface connection to those waters; ~~or~~

~~(iii) Waters identified in paragraph (a)(2) or (3) of this section when the wetlands 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;~~

(5) Intrastate lakes and ponds, ~~streams, or wetlands~~ not identified in paragraphs (a)(1) through (4) of this section:

~~(i) That are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3)(i) of this section. ; 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.~~

(b) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(2) through (5) of this section:

(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act;

(2) Prior converted cropland designated by the Secretary of Agriculture. The exclusion would cease upon a change of use, which means that the area is no longer available for the production of agricultural commodities. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA;

(3) Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;

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

(5) Artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(6) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons;

(7) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States; and

(8) Swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow.

(c) In this section, the following definitions apply:

(1) *Wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(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.”

(3) *High tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other

physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(4) *Ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(5) *Tidal waters* means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

~~(6) *Significantly affect* means a material influence on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section. To determine whether waters, either alone or in combination with similarly situated waters in the region, have a material influence on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section, the functions identified in paragraph (c)(6)(i) of this section will be assessed and the factors identified in paragraph (c)(6)(ii) of this section will be considered:~~

~~(i) Functions to be assessed:~~

~~(A) Contribution of flow;~~

~~(B) Trapping, transformation, filtering, and transport of materials (including nutrients, sediment, and other pollutants);~~

~~(C) Retention and attenuation of floodwaters and runoff;~~

~~(D) Modulation of temperature in waters identified in paragraph (a)(1) of this section; or~~

~~(E) Provision of habitat and food resources for aquatic species located in waters identified in paragraph (a)(1) of this section;~~

~~(ii) Factors to be considered:~~

~~(A) The distance from a water identified in paragraph (a)(1) of this section;~~

~~(B) Hydrologic factors, such as the frequency, duration, magnitude, timing, and rate of hydrologic connections, including shallow subsurface flow;~~

~~(C) The size, density, or number of waters that have been determined to be similarly situated;~~

~~(D) Landscape position and geomorphology; and~~

~~(E) Climatological variables such as temperature, rainfall, and snowpack.~~

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This content is from the eCFR and is authoritative but unofficial.

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**Title 40 – Protection of Environment**  
**Chapter I – Environmental Protection Agency**  
**Subchapter D – Water Programs**  
**Part 120 – Definition of Waters of the United States**

Authority: 33 U.S.C. 1251 et seq

Source: 85 FR 22340, Apr. 21, 2020, unless otherwise noted.

**§ 120.2 Definitions.**

For the purpose of this regulation these terms are defined as follows:

(a) *Waters of the United States* means:

(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;~~

(2) Impoundments of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under paragraph (a)(5) of this section;

(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;~~

(4) Wetlands adjacent to the following waters:

(i) Waters identified in paragraph (a)(1) of this section; or

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3) ~~(i)~~ of this section and with a continuous surface connection to those waters; ~~or~~

~~(iii) Waters identified in paragraph (a)(2) or (3) of this section when the wetlands 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;~~

(5) Intrastate lakes and ponds, ~~streams, or wetlands~~ not identified in paragraphs (a)(1) through (4) of this section:

Definitions.

~~(i) That are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3)(i) of this section. ; 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.~~

(b) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(2) through (5) of this section:

(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act;

(2) Prior converted cropland designated by the Secretary of Agriculture. The exclusion would cease upon a change of use, which means that the area is no longer available for the production of agricultural commodities. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA;

(3) Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;

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

(5) Artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(6) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons;

(7) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States; and

(8) Swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow.

(c) In this section, the following definitions apply:

(1) *Wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(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.”

(3) *High tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other



physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(4) *Ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(5) *Tidal waters* means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

~~(6) Significantly affect means a material influence on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section. To determine whether waters, either alone or in combination with similarly situated waters in the region, have a material influence on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section, the functions identified in paragraph (c)(6)(i) of this section will be assessed and the factors identified in paragraph (c)(6)(ii) of this section will be considered:~~

~~(i) Functions to be assessed:~~

~~(A) Contribution of flow;~~

~~(B) Trapping, transformation, filtering, and transport of materials (including nutrients, sediment, and other pollutants);~~

~~(C) Retention and attenuation of floodwaters and runoff;~~

~~(D) Modulation of temperature in waters identified in paragraph (a)(1) of this section; or~~

~~(E) Provision of habitat and food resources for aquatic species located in waters identified in paragraph (a)(1) of this section;~~

~~(ii) Factors to be considered:~~

~~(A) The distance from a water identified in paragraph (a)(1) of this section;~~

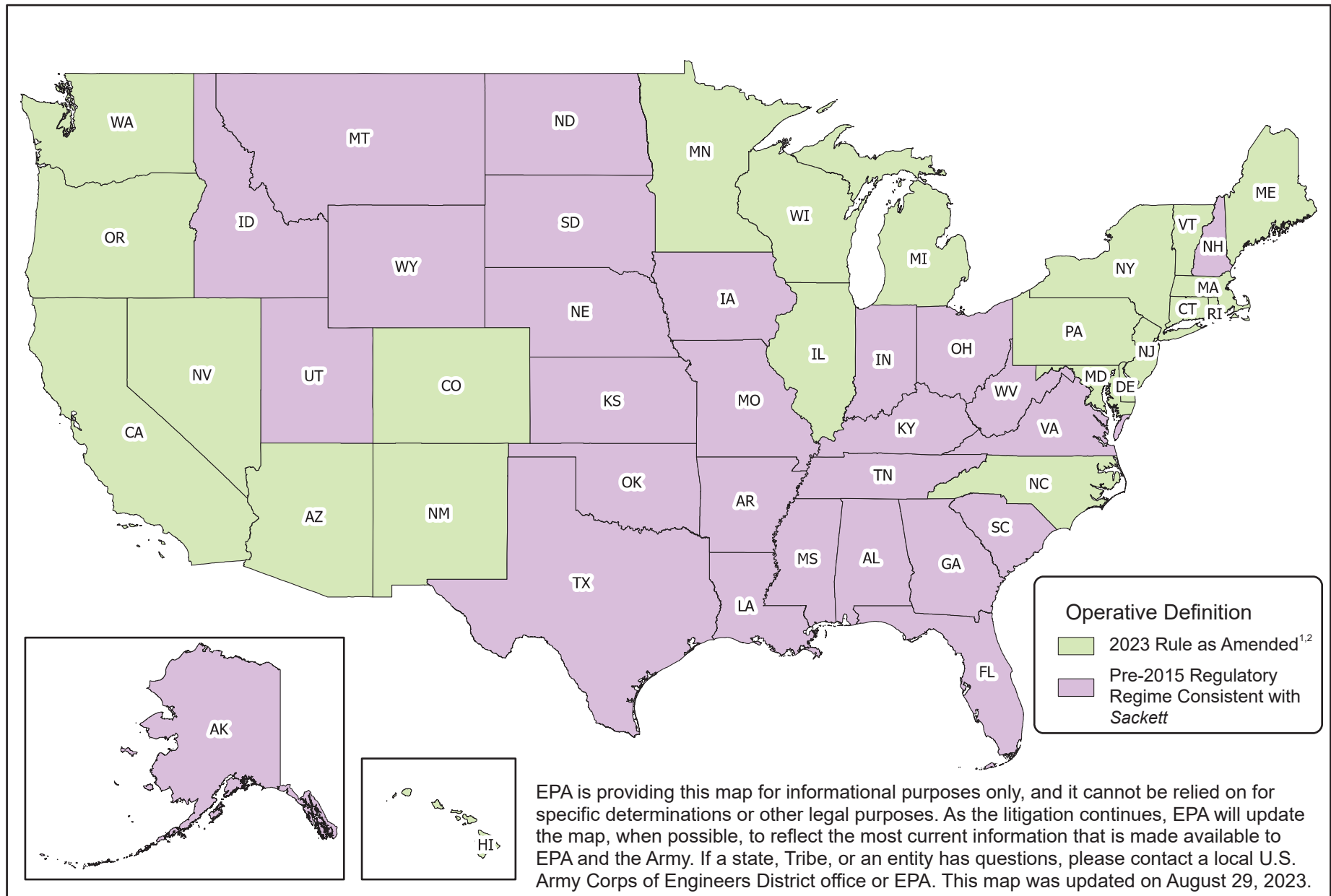
~~(B) Hydrologic factors, such as the frequency, duration, magnitude, timing, and rate of hydrologic connections, including shallow subsurface flow;~~

~~(C) The size, density, or number of waters that have been determined to be similarly situated;~~

~~(D) Landscape position and geomorphology; and~~

~~(E) Climatological variables such as temperature, rainfall, and snowpack.~~

# Operative Definition of "Waters of the United States"



<sup>1</sup>Also operative in the U.S. territories and the District of Columbia

<sup>2</sup>The 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 Georgia Chamber of Commerce).

(b)(5)



(b)(5)



(b)(5)



(b)(5)





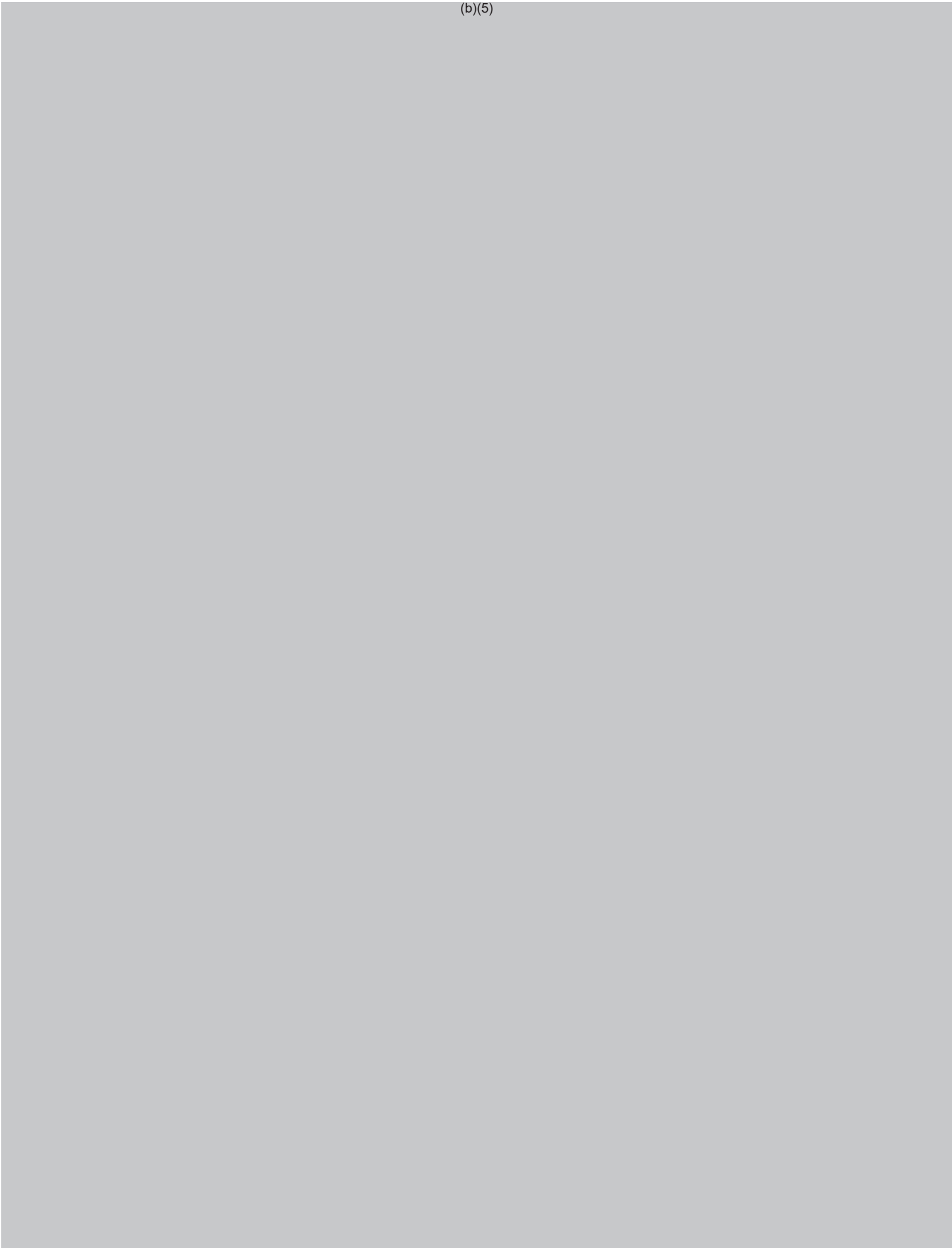


























Jacksonville, Florida. The Coast Guard is activating these safety zones in order to protect vessels and waterway users from the potential hazards created by reentry vehicle splashdowns and recovery operations. In accordance with the general regulations in 33 CFR part 165, subpart C, no U.S.-flagged vessel may enter the safety zones unless authorized by the COTP Savannah or a designated representative except as provided in § 165.T07–0806(d)(3). All foreign-flagged vessels are encouraged to remain outside the safety zones.

There are four other safety zones listed in § 165.T07–0806(a)(2) through (a)(5), which are located within the COTP St. Petersburg and Jacksonville AORs, that are being simultaneously activated through separate notifications of enforcement of the regulation document issued under Docket Numbers USCG–2023–0719, and USCG–2023–0757.<sup>1</sup>

Twenty-four hours prior to the Crew-6 recovery operations, the COTP Jacksonville, the COTP Savannah, the COTP St. Petersburg, or designated representative will inform the public that whether any of the five safety zones described in § 165.T07–0806, paragraph (a), will remain activated (subject to enforcement). If one of the safety zones described in § 165.T07–0806, paragraph (a), remains activated it will be enforced for four hours prior to the Crew-6 splashdown and remain activated until announced by Broadcast Notice to Mariners on VHF–FM channel 16, and/or Marine Safety Information Bulletin (as appropriate) that the safety zone is no longer subject to enforcement. After the Crew-6 reentry vehicle splashdown, the COTP or a designated representative will grant general permission to come no closer than 3 nautical miles of any reentry vehicle or space support vessel engaged in the recovery operations, within the activated safety zone described in § 165.T07–0806, paragraph (a). Once the reentry vehicle, and any personnel involved in reentry service, are removed from the water and secured onboard a space support vessel, the COTP or designated representative will issue a Broadcast Notice to Mariners on VHF–FM channel 16 announcing the activated safety zone is no longer subject to enforcement. The recovery operations are expected to last approximately one hour.

The Coast Guard may be assisted by other Federal, State, or local law

enforcement agencies in enforcing this regulation.

Dated: September 1, 2023.

**Nathaniel L. Robinson,**

*Commander, U.S. Coast Guard, Captain of the Port Savannah.*

[FR Doc. 2023–19392 Filed 9–7–23; 8:45 am]

**BILLING CODE 9110–04–P**

## DEPARTMENT OF DEFENSE

### Department of the Army, Corps of Engineers

#### 33 CFR Part 328

#### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Part 120

[EPA–HQ–OW–2023–0346; FRL–11132–01–OW]

**RIN 2040–AG32**

#### Revised Definition of “Waters of the United States”; Conforming

**AGENCY:** Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) and the Department of the Army (“the agencies”) are amending the Code of Federal Regulations (CFR) to conform the definition of “waters of the United States” to a 2023 Supreme Court decision. This conforming rule amends the provisions of the agencies’ definition of “waters of the United States” that are invalid under the Supreme Court’s interpretation of the Clean Water Act in the 2023 decision.

**DATES:** This final rule is effective on September 8, 2023.

**ADDRESSES:** The agencies have established a docket for this action under Docket ID No. EPA–HQ–OW–2023–0346. All documents in the docket are listed on the <https://www.regulations.gov/> website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <https://www.regulations.gov/>.

**FOR FURTHER INFORMATION CONTACT:** Whitney Beck, Oceans, Wetlands and

Communities Division, Office of Water (4504T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 564–2281; email address: [CWAwtus@epa.gov](mailto:CWAwtus@epa.gov), and Stacey Jensen, Office of the Assistant Secretary of the Army for Civil Works, Department of the Army, 108 Army Pentagon, Washington, DC 20310–0104; telephone number: (703) 459–6026; email address: [usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@army.mil](mailto:usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@army.mil).

#### SUPPLEMENTARY INFORMATION:

##### I. Why are the agencies issuing this final rule?

This action amends Code of Federal Regulations (CFR) provisions promulgated in “Revised Definition of ‘Waters of the United States,’” 88 FR 3004 (January 18, 2023) (“2023 Rule”), to conform to the 2023 Supreme Court decision in *Sackett v. EPA*, 598 U.S. , 143 S. Ct. 1322 (2023) (“*Sackett*”). The Administrative Procedure Act (APA) provides that, when an agency for good cause finds that public notice and comment procedures are impracticable, unnecessary, or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. 5 U.S.C. 553(b)(B). The Environmental Protection Agency (EPA) and the Department of the Army (“the agencies”) have determined that there is good cause under APA section 553(b)(B) to issue this 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 *Sackett*. The effect of the *Sackett* decision was to render these provisions immediately inconsistent with the Supreme Court’s interpretation of the Clean Water Act. Consistent with the agencies’ previously stated intent regarding the severability of the 2023 Rule in the event that provisions of that rule were held invalid, *see* 88 FR 3135, the agencies are conforming the 2023 Rule’s definition of the term “waters of the United States” to the Supreme Court’s decision. Specifically, the agencies are revising 40 CFR 120.2(a)(1)(iii), (a)(3) through (5), and (c)(2) and (6), and 33 CFR 328.3(a)(1)(iii), (a)(3) through (5), and (c)(2) and (6) to amend aspects of the definition as needed to conform to the Supreme Court’s interpretation of the Clean Water Act in *Sackett*. Because the sole purpose of this rule is to amend these specific provisions of the 2023

<sup>1</sup> These notifications of enforcement of the regulation can be found at: <https://regulations.gov> by searching for docket number USCG–2023–0719, and USCG–2023–0757.

Rule to conform with *Sackett*, and such conforming amendments do not involve the exercise of the agencies' discretion, providing advance public notice and seeking comment is unnecessary. A notice and comment process would neither provide new information to the public nor inform any agency decision-making regarding the aspects of the regulations defining "waters of the United States" that are invalid as inconsistent with the Clean Water Act under *Sackett*.

For similar reasons, there is good cause under the APA to make this rule immediately effective, 5 U.S.C. 553(d)(3), because this rule does not impose any burdens on the regulated community; rather, it merely conforms the 2023 Rule to the Supreme Court's decision in *Sackett* by amending the provisions of the 2023 Rule that are invalid under the Supreme Court's interpretation of the Clean Water Act. Making the rule immediately effective will also provide more clarity and certainty to the regulated community and the public following the *Sackett* decision. Many States and industry groups challenging the 2023 Rule have advocated in litigation for quick action by the agencies in light of *Sackett*, citing the need for regulatory certainty and less delay in processing approved jurisdictional determinations and certain Clean Water Act permits. A delayed effective date for amendments to regulations defining "waters of the United States" to conform to *Sackett* would prolong confusion and potentially result in project delays for prospective permittees that seek approved jurisdictional determinations to evaluate whether their projects will result in discharges to "waters of the United States." Making the rule immediately effective also avoids delaying provision of clarity to aid States and authorized Tribes administering Clean Water Act permitting programs and to members of the general public who seek to understand which waters are subject to the Clean Water Act's requirements. It is thus appropriate for the agencies to revise the affected provisions in 40 CFR 120.2 and 33 CFR 328.3 to conform to *Sackett* as quickly as possible and to make those revisions immediately effective.

In 1972, Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Public Law 92–500, 86 Stat. 816, as amended, 33 U.S.C. 1251 *et seq.* ("Clean Water Act" or "Act"). Central to the framework and protections provided by the Clean Water Act is the term "navigable waters," defined in the Act as "the waters of the

United States, including the territorial seas." 33 U.S.C. 1362(7). On January 18, 2023, the final "Revised Definition of 'Waters of the United States'" rule was published in the **Federal Register**, and the rule took effect on March 20, 2023.<sup>1</sup>

In 2006, the Supreme Court addressed the scope of "waters of the United States" in *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*"). As the Court in *Sackett* noted, no position in *Rapanos* commanded a majority of the Court. *Sackett*, 143 S. Ct. at 1344. In *Rapanos*, all nine members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. *Rapanos*, 547 U.S. at 731 (Scalia, J., plurality opinion) ("We have twice stated that the meaning of 'navigable waters' in the Act is broader than the traditional understanding of that term, *SWANCC*, 531 U.S. at 167; *Riverside Bayview*, 474 U.S. at 133."). A four-Justice plurality in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water," *id.* at 739, that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a "continuous surface connection" to such waterbodies, *id.* (Scalia, J., plurality opinion). The *Rapanos* plurality noted that its reference to "relatively permanent" waters did "not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months." *Id.* at 732 n.5 (emphasis in original). Justice Kennedy's concurring opinion took a different approach, concluding that "to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759. He concluded that wetlands possess the requisite significant nexus if the wetlands "either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780. The four dissenting Justices in *Rapanos* would have deferred to the agencies and also

concluded that waters would be jurisdictional under "either the plurality's or Justice Kennedy's test." *Id.* at 810 & n.14 (Stevens, J., dissenting).

The 2023 Rule incorporated the two jurisdictional standards from *Rapanos* into the definition of the term "waters of the United States." First, under that rule, the "relatively permanent standard" refers to the test to identify: relatively permanent, standing or continuously flowing tributaries connected to traditional navigable waters, the territorial seas, or interstate waters; relatively permanent, standing or continuously flowing additional waters with a continuous surface connection to such relatively permanent waters or to traditional navigable waters, the territorial seas, or interstate waters; and, adjacent wetlands and certain impoundments with a continuous surface connection to such relatively permanent waters or to traditional navigable waters, the territorial seas, or interstate waters. Second, the "significant nexus standard" under the 2023 Rule refers to the test to identify waters that, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters. The regulatory text also defined "significantly affect" for purposes of the significant nexus standard. 88 FR 3006. Under the 2023 Rule, waters were jurisdictional if they met either standard.

The 2023 Rule also defined the term "adjacent" with no changes from the agencies' longstanding regulatory definition. "Adjacent" was defined as "bordering, contiguous, or neighboring." 88 FR 3116–17. Wetlands separated from other "waters of the United States" by man-made dikes or barriers, natural river berms, beach dunes and the like were defined as "adjacent" wetlands. *Id.*

On May 25, 2023, the Supreme Court decided *Sackett v. EPA*. While the 2023 Rule was not directly before the Court, the Court considered the jurisdictional standards set forth in that rule. The enterprise of the 2023 Rule—to define "waters of the United States"—was the same as the Supreme Court's enterprise in *Sackett*: "to identify with greater clarity what the Act means by 'the waters of the United States.'" 143 S. Ct. at 1329; *see also id.* at 1331 ("The meaning of [33 U.S.C. 1362(7)] is the persistent problem that we must address."). The Supreme Court recognized the agencies' definition and utilization of "adjacent" and

<sup>1</sup> As a result of litigation, the 2023 Rule is enjoined in 27 States as of the date this final rule was signed. *See Texas v. EPA*, Nos. 23–00017 & 23–00020 (S.D. Tex. March 19, 2023); *West Virginia v. EPA*, No. 23–00032 (D.N.D. April 12, 2023); *Commonwealth of Kentucky v. EPA*, Nos. 23–5343/5345 (6th Cir. May 10, 2023).



“significant nexus” “as set out in [the agencies’] most recent rule,” the 2023 Rule, 143 S. Ct. at 1335, 1341, but concluded that the significant nexus standard was “inconsistent with the text and structure of the [Clean Water Act].” *Id.* at 1341. Instead, the Court “conclude[d] that the *Rapanos* plurality was correct: the [Clean Water Act]’s use of ‘waters’ encompasses ‘only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic[al] features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’”” *Id.* at 1336 (quoting *Rapanos*, 547 U.S. at 739). The Court also “agree[d] with [the plurality’s] formulation of when wetlands are part of ‘the waters of the United States,’” *id.* at 1340–41: “when 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.’” *Id.* at 1344 (citing *Rapanos*, 547 U.S. at 742, 755). Thus, the Supreme Court concluded that “this interpretation”—*i.e.*, the interpretation of adjacent wetlands as “waters of the United States” set out in the 2023 Rule—“is inconsistent with the text and structure of the CWA” insofar as it incorporated the “significant nexus” test and defined “adjacent” other than as the *Rapanos* plurality defined the term. *Id.* at 1341.

The agencies are revising the 2023 Rule to remove the significant nexus standard and to amend its definition of “adjacent” as these provisions are invalid under the Supreme Court’s interpretation of the Clean Water Act in *Sackett*. See section II of this preamble for the specific amendments. Under the decision in *Sackett*, waters are not jurisdictional under the Clean Water Act based on the significant nexus standard. In addition, under the decision in *Sackett*, wetlands are not defined as “adjacent” or jurisdictional under the Clean Water Act solely because they are “bordering, contiguous, or neighboring . . . [or] separated from other ‘waters of the United States’ by man-made dikes or barriers, natural river berms, beach dunes and the like.” Therefore, under this conforming rule, waters cannot be found to be jurisdictional because they meet the significant nexus standard; nor can wetlands be found to be jurisdictional based on the definition of “adjacent” codified in the 2023 Rule. Furthermore, as a result of the decision in *Sackett* invalidating the significant nexus standard, the provision for assessment of streams and wetlands under the additional waters provision of paragraph (a)(5) is no longer valid as

any jurisdictional streams and wetlands are covered by paragraphs (a)(1) through (4) of the 2023 Rule.<sup>2</sup>

Finally, the agencies are removing “interstate wetlands” from the 2023 Rule to conform with the decision in *Sackett*. The Supreme Court in *Sackett* examined the Clean Water Act and its statutory history and found the predecessor statute to the Clean Water Act covered and defined “interstate waters” as “all rivers, lakes, and other waters that flow across or form a part of State boundaries.” *Sackett* at 1337 (citing 33 U.S.C. 1160(a), 1173(e) (1970 ed.) (emphasis in original)). The Court concluded that the use of the term “waters” refers to such “open waters” and not wetlands. *Id.* As a result, under *Sackett*, the provision authorizing wetlands to be jurisdictional simply because they are interstate is invalid.

The agencies will continue to interpret the remainder of the definition of “waters of the United States” in the 2023 Rule consistent with the *Sackett* decision. And 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 this limited rule. See *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020) (“EPA, too, can provide administrative guidance (within statutory boundaries) in numerous ways, including through, for example, grants of individual permits, promulgation of general permits, or the development of general rules.”). The agencies have a wide range of available approaches to address such issues, including: approved jurisdictional determinations and Clean Water Act permits (both of which are final agency actions subject to judicial review); guidance; notice and comment rulemaking; and, agency forms and training materials. The agencies intend to hold stakeholder meetings to ensure the public has an opportunity to provide the agencies with input on other issues they would like the agencies to address. The agencies are also committed to taking particular actions that have been requested by stakeholders to improve implementation of the definition of “waters of the United States.” For

<sup>2</sup> Lakes and ponds, however, may still be jurisdictional under paragraph (a)(5) if they do not fall within paragraphs (a)(1) through (3) of the 2023 Rule (for example, if they are not tributaries connected to waters identified in paragraph (a)(1) or (2)) and they are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (3).

example, the agencies are working to improve coordination among Federal agencies through coordination memoranda and trainings. The agencies are also developing regionally-specific tools to facilitate implementation of the definition of “waters of the United States.” The agencies will continue to provide trainings to Tribes, States, and the public as appropriate to promote clarity and consistency. The agencies will continue to post materials and outreach opportunities to EPA’s website at <https://www.epa.gov/wotus>.

## II. Which provisions are amended?

This final rule amends the following provisions in the 2023 Rule: 40 CFR 120.2(a)(1)(iii), (a)(3) through (5), (c)(2) and (6), and 33 CFR 328.3(a)(1)(iii), (a)(3) through (5), (c)(2) and (6). A list of these revisions is provided below.

- **40 CFR 120.2(a)(1)(iii) and 33 CFR 328.3(a)(1)(iii):** Removed the phrase “including interstate wetlands” from this provision. Made conforming edits to the regulatory text.

- **40 CFR 120.2(a)(3) and 33 CFR 328.3(a)(3):** Removed the significant nexus standard from the tributaries provision. Made conforming edits to the regulatory text.

- **40 CFR 120.2(a)(4) and 33 CFR 328.3(a)(4):** Removed the significant nexus standard from the adjacent wetlands provision. Made conforming edits to the regulatory text.

- **40 CFR 120.2(a)(5) and 33 CFR 328.3(a)(5):** Removed the significant nexus standard and streams and wetlands from the provision for intrastate lakes and ponds, streams, or wetlands not otherwise identified in the definition. Made conforming edits to the regulatory text.

- **40 CFR 120.2(c)(2) and 33 CFR 328.3(c)(2):** Revised the definition of “adjacent”. Note that the agencies recognize that revising the definition of adjacent creates redundancy in 40 CFR 120.2(a)(4) and 33 CFR 328.3(a)(4), which already include the requirement for a “continuous surface connection,” but deleting existing regulatory text to reduce redundancy is outside the scope of the agencies’ determination in this rule that there is good cause under APA section 553(b)(B) to issue this final rule without prior proposal and opportunity for comment.

- **40 CFR 120.2(c)(6) and 33 CFR 328.3(c)(6):** Removed the term “significantly affect” and its definition in its entirety.

## III. Severability

The purpose of this section is to clarify the agencies’ intent with respect to the severability of provisions of this

rule and the 2023 Rule as amended by this final rule in the event of litigation. In the event of a stay or invalidation of any part of this rule, the agencies' intent is to preserve the remaining portions of the rule to the fullest possible extent. Further, if any part of the 2023 Rule as amended by this rule is stayed or invalidated, the agencies' intent is to preserve its remaining portions to the fullest possible extent. The agencies explained in the 2023 Rule that it was carefully crafted so that each provision or element of the rule is capable of operating independently. 88 FR 3135. None of the amendments made in this rule affects the 2023 Rule's severability or undermines the ability of each part of this rule or the remaining parts of the 2023 Rule to operate independently.

The exclusive purpose of the 2023 Rule was to define "waters of the United States," and this rule simply conforms that definition to *Sackett*. "Waters of the United States" is defined in paragraphs (a)(1) through (5), subject to the exclusions in paragraph (b), and using terms defined in paragraph (c). The categories in paragraphs (a)(1) through (5) are disjunctive, and while they may overlap, no one category (or subcategory) depends on another. The modifications to the 2023 Rule in this rule do not alter those basic features of the regulatory text. Therefore, if any provision or element of this rule or of the 2023 Rule as amended by this rule is determined by judicial review or operation of law to be invalid, that partial invalidation will not render the remainder of this rule or the 2023 Rule, as amended, invalid. Further, if the application of any portion of this rule or the 2023 Rule, as amended by this rule, to a particular circumstance is determined to be invalid, the agencies intend that this rule and the 2023 Rule, as amended, remain applicable to all other circumstances.

For example, if paragraph (c)(2), which contains the revised definition of "adjacent," were deemed invalid, it would affect implementation of paragraph (a)(4), which addresses "adjacent wetlands," but it would not affect any other provision of this rule (or the 2023 Rule, as amended), all of which would continue to operate. As another example, if paragraph (a)(1)(iii), which provides that interstate waters (amended by this rule to no longer include interstate wetlands) are "waters of the United States," were deemed invalid, every other provision of this rule (and the 2023 Rule as amended) could continue to operate. References to paragraph (a)(1) in paragraphs (a)(3) through (5), and paragraph (c)(2) would remain in effect, and paragraph (a)(1)

would simply be read to consist of paragraphs (a)(1)(i) and (ii), without paragraph (a)(1)(iii) in whole or in part. As a third example, if one of the exclusions from "waters of the United States" in paragraph (b), or any part of one of the exclusions, were deemed invalid, the remainder of this rule, and thus, the 2023 Rule as amended, would remain in effect. The rationale for each exclusion in paragraph (b) is distinct and invalidating one exclusion would not have any practical impact on any other part of the definition of "waters of the United States."

#### IV. Statutory and Executive Orders Reviews

Additional information about these statutes and Executive orders can be found at <https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

##### A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14094: Modernizing Regulatory Review

This action is a significant regulatory action as defined in Executive Order 12866, as amended by Executive Order 14094. Accordingly, the agencies submitted this action to the Office of Management and Budget (OMB) for Executive Order 12866 review. Documentation of any changes made in response to the Executive Order 12866 review is available in the docket.

This conforming rule amends the provisions of the agencies' definition of "waters of the United States" that are invalid under the Supreme Court's interpretation of the Clean Water Act in *Sackett*. As such, it is the agencies' view that the rule does not by itself impose cost savings or forgone benefits.

##### B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA because it does not contain any information collection activities. However, this action may change terms and concepts used by EPA and Army to implement certain programs. The agencies thus may need to revise some of their collections of information to be consistent with this action and will do so consistent with the PRA and implementing regulations.

##### C. Regulatory Flexibility Act (RFA)

This action is not subject to the RFA. The RFA applies only to rules subject to notice and comment rulemaking requirements under the APA, 5 U.S.C. 553, or any other statute. This rule is not subject to notice and comment requirements because the agencies have

invoked the APA "good cause" exemption under 5 U.S.C. 553(b).

##### D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The definition of "waters of the United States" applies broadly to Clean Water Act programs, and this rule amending the definition of "waters of the United States" simply conforms to a decision of the Supreme Court. The action imposes no enforceable duty on any Tribal, State, or local governments, or the private sector.

##### E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

This conforming rule amends the provisions of the agencies' definition of "waters of the United States" that are invalid under the Supreme Court's interpretation of the Clean Water Act in *Sackett*. Because the limited amendments in this rule do not involve the exercise of the agencies' discretion, federalism consultation would neither provide new information nor inform any agency decision-making regarding the aspects of the regulations defining "waters of the United States" that are invalid under the Supreme Court's interpretation of the Clean Water Act in *Sackett*. The agencies recognize, however, that changes to the definition of "waters of the United States" may be of interest to State and local governments. The agencies intend to hold discussions with State and local governments on implementation of the definition of "waters of the United States."

##### F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This rule amends the provisions of the agencies' definition of "waters of the United States" that are invalid under the Supreme Court's interpretation of the Clean Water Act in *Sackett*. Because the amendments in this rule do not involve the exercise of the agencies' discretion, in this instance Tribal consultation and coordination could not inform the decision-making in this final rule. The agencies recognize, however, that changes to the definition of "waters of the United States" may be of interest

to Tribal governments. The agencies intend to hold discussions with Tribes on implementation of the definition of “waters of the United States.”

*G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks*

EPA and the Army interpret Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the agencies have reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2–202 of the Executive order.

This conforming rule amends the provisions of the agencies’ definition of “waters of the United States” that are invalid under the Supreme Court’s interpretation of the Clean Water Act in *Sackett*. Because these amendments are necessary to conform to the Supreme Court’s decision and do not involve the exercise of the agencies’ discretion, the rule does not concern an environmental health risk or safety risk and is not subject to Executive Order 13045. Similarly, this action does not concern human health, and therefore EPA’s Policy on Children’s Health also does not apply.

*H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use*

This action is not a “significant energy action” because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

*I. National Technology Transfer and Advancement Act*

This rule does not involve technical standards.

*J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation’s Commitment to Environmental Justice for All*

Executive Order 12898 (59 FR 7629, February 16, 1994) directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on communities with environmental justice concerns. Executive Order 14096 (88 FR 25251, April 21, 2023) supplements the foundational efforts of Executive Order 12898 to address environmental justice.

EPA and the Army believe that it is not necessary to assess whether this action would result in disproportionate and adverse effects on communities with environmental justice concerns, as this is a conforming rule and the targeted amendments made do not reflect an exercise of agency discretion. In prior analyses of potential distributional impacts of the 2023 Rule (see *Economic Analysis for Final “Revised Definition of ‘Waters of the United States’” Rule*, Docket ID No. EPA–HQ–OW–2021–0602–2489), the agencies examined whether the change in benefits due to that rule may be differentially distributed among communities with environmental justice concerns in the affected areas when compared to two baselines—the primary baseline of the pre-2015 regulatory regime and the secondary baseline of the 2020 Navigable Waters Protection Rule. In that prior analysis, for most of the wetlands and affected waters impacted at a hydrologic unit code (HUC)<sup>3</sup> 12 watershed level, there was no evidence of potential environmental justice impacts from the 2023 Rule warranting further analysis when compared to both baselines.

The agencies recognize that the burdens of environmental pollution and climate change often fall disproportionately on communities with environmental justice concerns. Climate change will exacerbate the existing risks faced by communities with environmental justice concerns. However, this conforming rule merely amends the provisions of the agencies’ definition of “waters of the United States” that are invalid under the Supreme Court’s interpretation of the Clean Water Act in *Sackett*. As noted above, these amendments on their own do not result in any cost savings or forgone benefits not directed by the operation of law. Because this rule does not involve the exercise of the agencies’ discretion, the agencies did not engage with communities with environmental justice concerns in developing this action.

*K. Congressional Review Act (CRA)*

This action is subject to the CRA, and the agencies will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2). The CRA allows the issuing agency to make a rule

effective sooner than otherwise would be provided by the CRA if the agency makes a good cause finding that notice and comment public rulemaking procedures are impracticable, unnecessary, or contrary to the public interest (5 U.S.C. 808(2)). The agencies have made a good cause finding for this rule as discussed in section I of this preamble, including the basis for that finding.

**List of Subjects**

*33 CFR Part 328*

Administrative practice and procedure, Environmental protection, Navigation (water), Water pollution control, Waterways.

*40 CFR Part 120*

Environmental protection, Water pollution control, Waterways.

**Michael L. Connor,**

*Assistant Secretary of the Army (Civil Works), Department of the Army.*

**Michael S. Regan,**

*Administrator, Environmental Protection Agency.*

**Title 33—Navigation and Navigable Waters**

For the reasons set out in the preamble, 33 CFR part 328 is amended as follows:

**PART 328—DEFINITION OF WATERS OF THE UNITED STATES**

■ 1. The authority citation for part 328 continues to read as follows:

**Authority:** 33 U.S.C. 1251 *et seq.*

- 2. Section 328.3 is amended by:
- a. Revising paragraphs (a)(1)(iii), (a)(3), and (a)(4)(ii);
  - b. Removing paragraph (a)(4)(iii);
  - c. Revising paragraphs (a)(5) and (c)(2); and
  - d. Removing paragraph (c)(6).

The revisions read as follows:

**§ 328.3 Definitions.**

\* \* \* \* \*

(a) \* \* \*

(1) \* \* \*

(iii) Interstate waters;

\* \* \* \* \*

(3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section that are relatively permanent, standing or continuously flowing bodies of water;

(4) \* \* \*

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3) of this section and with a continuous surface connection to those waters;

(5) Intrastate lakes and ponds not identified in paragraphs (a)(1) through (4) of this section that are relatively

<sup>3</sup> HUC boundaries are established by the U.S. Geological Survey and Natural Resources Conservation Service. These boundaries are numbered using nested codes to represent the scale of the watershed size. For example, HUC 12 watersheds are smaller than HUC 4 watersheds.



permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3) of this section.

\* \* \* \* \*

(c) \* \* \*

(2) *Adjacent* means having a continuous surface connection.

\* \* \* \* \*

#### Title 40—Protection of Environment

For reasons set out in the preamble, 40 CFR part 120 is amended as follows:

### PART 120—DEFINITION OF WATERS OF THE UNITED STATES

■ 3 The authority citation for part 120 continues to read as follows:

**Authority:** 33 U.S.C. 1251 *et seq.*

■ 4. Section 120.2 is amended by:

■ a. Revising paragraphs (a)(1)(iii), (a)(3), and (a)(4)(ii);

■ b. Removing paragraph (a)(4)(iii);

■ c. Revising paragraphs (a)(5) and (c)(2); and

■ d. Removing paragraph (c)(6).

The revisions read as follows:

#### § 120.2 Definitions.

\* \* \* \* \*

(a) \* \* \*

(1) \* \* \*

(iii) Interstate waters;

\* \* \* \* \*

(3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section that are relatively permanent, standing or continuously flowing bodies of water;

(4) \* \* \*

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3) of this section and with a continuous surface connection to those waters;

(5) Intrastate lakes and ponds not identified in paragraphs (a)(1) through (4) of this section that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3) of this section.

\* \* \* \* \*

(c) \* \* \*

(2) *Adjacent* means having a continuous surface connection.

\* \* \* \* \*

[FR Doc. 2023–18929 Filed 9–7–23; 8:45 am]

BILLING CODE 6560–50–P

### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Part 52

[EPA–R05–OAR–2022–0580; FRL–11047–02–R5]

#### Air Plan Approval; Ohio; Approval of the Muskingum River SO<sub>2</sub> Attainment Plan

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is approving, under the Clean Air Act (CAA), a revision to the Ohio State Implementation Plan (SIP) intended to provide for attainment of the 2010 primary, health-based 1-hour sulfur dioxide (SO<sub>2</sub>) national ambient air quality standard (NAAQS or standard) for the Muskingum River SO<sub>2</sub> nonattainment area. This SIP revision (hereinafter referred to as Ohio's Muskingum River SO<sub>2</sub> attainment plan or plan), includes Ohio's attainment demonstration and other attainment planning elements required under the CAA. EPA is finding that Ohio has appropriately demonstrated that the plan provides for attainment of the 2010 1-hour primary SO<sub>2</sub> NAAQS in the Muskingum River, Ohio nonattainment area and that the plan meets the other applicable requirements under the CAA. EPA is also incorporating by reference Ohio Director's Final Findings and Orders (DFFOs), issued on May 23, 2023, into the Ohio SIP. The DFFOs set forth additional requirements at Globe Metallurgical (Globe) to verify appropriate source characterization for modeling purposes.

**DATES:** This final rule is effective on October 10, 2023.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2022–0580. All documents in the docket are listed on the [www.regulations.gov](http://www.regulations.gov) website. Although listed in the index, some information is not publicly available, *i.e.*, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either through [www.regulations.gov](http://www.regulations.gov) or at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through

Friday, excluding Federal holidays and facility closures due to COVID–19. We recommend that you telephone Gina Harrison, Environmental Scientist, at (312) 353–6956 before visiting the Region 5 office.

**FOR FURTHER INFORMATION CONTACT:** Gina Harrison, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–6956, [harrison.gina@epa.gov](mailto:harrison.gina@epa.gov).

#### SUPPLEMENTARY INFORMATION:

Throughout this document whenever “we,” “us,” or “our” is used, we mean EPA.

#### I. Background

On January 18, 2022 (87 FR 2555), EPA partially approved and partially disapproved Ohio's SO<sub>2</sub> plan for the Muskingum River area submitted on April 3, 2015, and October 13, 2015, and supplemented on June 23, 2020. EPA's January 18, 2022, final rule provided an explanation of the applicable provisions in the CAA and the measures and limitations identified in Ohio's attainment plan to satisfy these provisions.

The partial disapproval started sanctions clocks for this area under CAA section 179(a)–(b), including a requirement for 2-for-1 offsets for any major new sources or major modifications 18 months after the effective date of this action, and highway funding sanctions 6 months thereafter, as well as initiated an obligation for EPA to promulgate a Federal Implementation Plan (FIP) within 24 months, under CAA section 110(c).

Ohio supplemented the attainment demonstration on June 24, 2022, substituting new measures in lieu of a land acquisition and modifying the air quality modeling to include the use of site-specific meteorological data. Ohio submitted additional supplemental information on July 28, 2022, and May 23, 2023, including revised DFFOs for Globe, issued on May 23, 2023, that supersede the June 23, 2020 DFFOs.

#### II. Proposed Rule

On June 22, 2023 (88 FR 40726), EPA proposed to approve Ohio's SIP attainment plan submission for the Muskingum River SO<sub>2</sub> nonattainment area, which the state submitted to EPA on April 3, 2015, October 13, 2015, and June 23, 2020, and supplemented on June 24, 2022, July 28, 2022, and May 23, 2023. The SO<sub>2</sub> attainment plan included Ohio's attainment















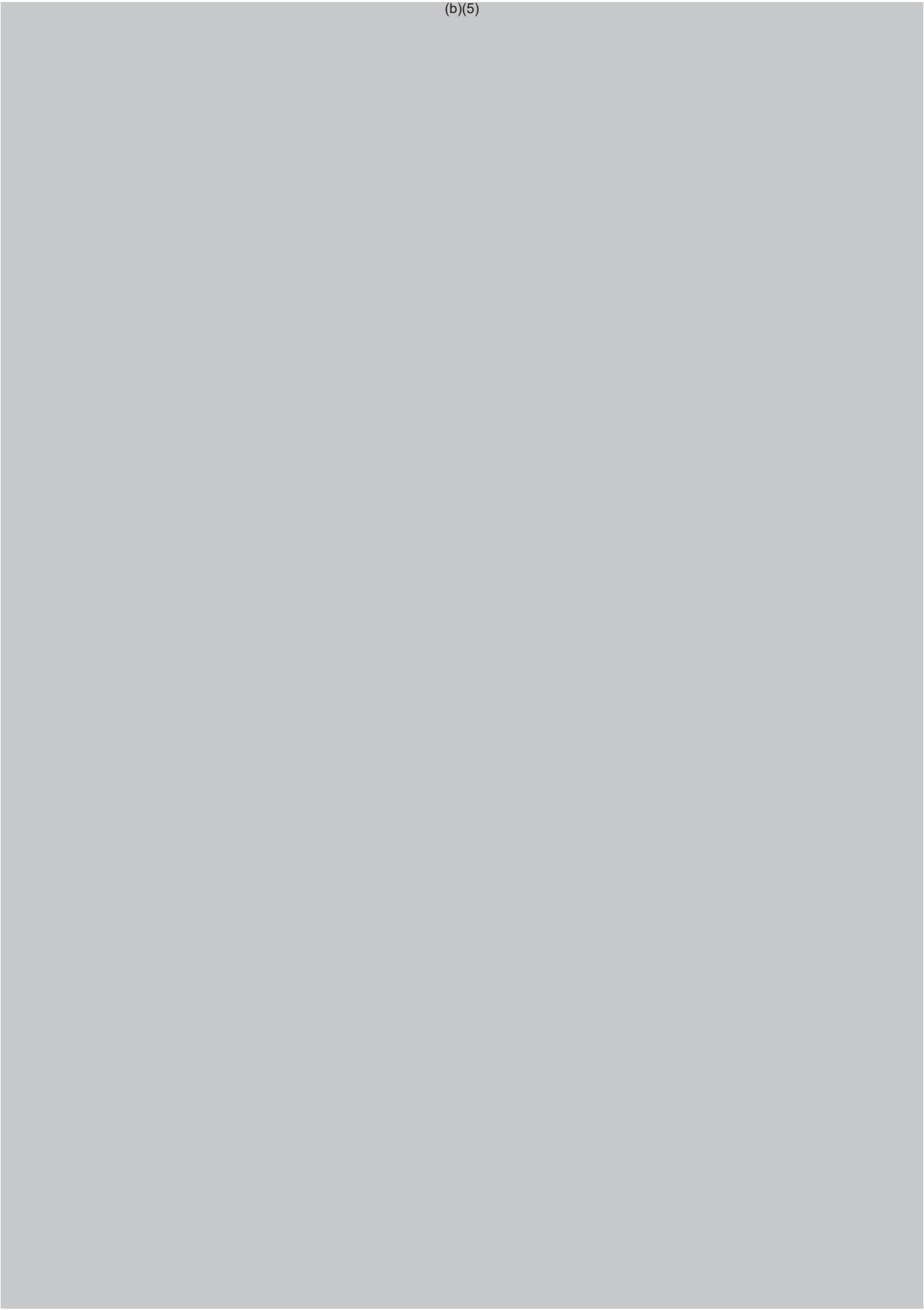
















(b)(5)



**From:** [Smith, Thomas Patrick SES USARMY USACE \(USA\)](#)  
**To:** [DLL-Division-&-Center-Commanders](#); [DLL-District & Battalion Commanders](#)  
**Cc:** [Spellmon, Scott A LTG USARMY CEHQ \(USA\)](#); [Graham, William H JR MG USARMY CEHQ \(USA\)](#); [Belk, Edward E Jr SES USARMY CEHQ \(USA\)](#); [Walker, William T Jr CIV USARMY CENAO \(USA\)](#); [Gaffneysmith, Margaret E CIV USARMY CEHQ \(USA\)](#); [Cooper, David R SES USARMY CEHQ \(USA\)](#); [Handura, James J COL USARMY CESP \(USA\)](#); [Perez, Pete G SES USARMY CEHQ \(USA\)](#); [Brown, Theodore A SES USARMY CEHQ \(USA\)](#); [Hill, Stephen L \(Steve\) SES USARMY CEHQ \(USA\)](#); [Bush, Eric L SES USARMY CEHQ \(USA\)](#); [DLL-MSD-Program-Directors](#); [Gaffneysmith, Margaret E CIV USARMY CEHQ \(USA\)](#)  
**Subject:** USACE Implementation "Revised Definition of 'Waters of the United States'; Conforming,"  
**Date:** Wednesday, September 13, 2023 3:44:32 PM  
**Attachments:** [FINAL WOTUS Public Webinar Slides 9-12-23.pptx](#)  
[WOTUS Talking Points 13 SEP 2023.docx](#)  
[USACE WOTUS Implementation Brief 13 SEP 2023.pptx](#)

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Commanders: This email complements the discussion with LTG Spellmon earlier today regarding USACE implementation of the "*Revised Definition of 'Waters of the United States'; Conforming.*" ([Federal Register :: Revised Definition of "Waters of the United States"; Conforming](#)). If you were able to join the discussion, you were reminded of the complexity and nuance to this implementation. I acknowledge the need for continuous communication with the field and updates based on new information when appropriate.

USACE HQ continues to engage with ASA(CW) and EPA on a draft coordination memo describing how EPA and Army/USACE will coordinate on draft approved jurisdictional determinations (AJDs) for wetlands. We expect a final coordination memo this week. The mechanism for coordination on jurisdictional determinations is familiar to the Regulatory Program, but will need additional attention in the initial stages of the implementation of the Conforming Rule. Coordination between USACE/Army and EPA will enable development of specific policy guidance based on applications from the public and draft determinations made in the field.

Tom Walker (Acting HQ Chief Regulatory) and MSD/District Regulatory Chiefs will continue to meet regularly to minimize challenges in implementation. Attached to this email are materials to assist in implementation.

- [WOTUS Public Webinar Briefing 12 SEP 2023](#). This briefing is an excellent summary of the history of the Clean Water Act and the changes made based on the Supreme Court decision on Sackett.
- [WOTUS Key Points 13 SEP 2023](#). Brief set of key points on the WOTUS effort and current status.
- [Updated USACE Implementation Briefing 13 SEP 2023](#). This briefing includes updated language that emphasizes USACE coordination of draft Approved Jurisdictional Determinations of wetlands with EPA.

Respectfully,

Tom

Thomas P. Smith, PE, PMP, SES

**Chief, Operations and Regulatory  
NAD and LRD Regional Integration  
US Army Corps of Engineers**

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**From:** Smith, Thomas Patrick SES USARMY USACE (USA)

**Sent:** Wednesday, August 30, 2023 5:28 PM

**To:** DLL-Division-&-Center-Commanders <(b) (6)>

**Cc:** Spellmon, Scott A LTG USARMY CEHQ (USA) <(b) (6)> Graham,  
William H JR MG USARMY CEHQ (USA) <(b) (6)> Belk, Edward E Jr SES  
USARMY CEHQ (USA) <(b) (6)> Walker, William T Jr CIV USARMY CENAO  
(USA) <(b) (6)> Gaffneysmith, Margaret E CIV USARMY CEHQ (USA)  
<(b) (6)> Cooper, David R SES USARMY CEHQ (USA)  
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<(b) (6)> Perez, Pete G SES USARMY CEHQ (USA)  
<(b) (6)> Brown, Theodore A SES USARMY CEHQ (USA)  
<(b) (6)> Hill, Stephen L (Steve) SES USARMY CEHQ (USA)  
<(b) (6)> Bush, Eric L SES USARMY CEHQ (USA)  
<(b) (6)> DLL-MSC-Program-Directors <(b) (6)>

**Subject:** Amendment to the Revised Definition of 'Waters of the US'

**Commanders:**

On Tuesday August 29, 2023, the U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army (the agencies) announced a final rule amending the 2023 definition of “waters of the United States” to conform with the recent Supreme Court decision in *Sackett v. EPA*. The agencies are committed to following the law and implementing the Clean Water Act to deliver the essential protections that safeguard the nation’s waters from pollution and degradation. This action provides the clarity that is needed to advance these goals, while moving forward with infrastructure projects, economic opportunities, and agricultural activities.

More information about the final rule is available here -

<https://www.epa.gov/newsreleases/conform-recent-supreme-court-decision-epa-and-army-amend-waters-united-states-rule> .

The agencies will host a public webinar on September 12, 2023 to provide updates on the definition of “waters of the United States.” The agencies also plan to host listening sessions this fall with co-regulators and stakeholders, focusing on identifying issues that may arise outside this limited rule to conform the definition of “waters of the United States” with the *Sackett v. EPA* decision.

Learn more about this action on [EPA’s “waters of the United States” website](#).



Tom Walker, Chief Regulatory at HQ USACE, will continue to share information and lead implementation discussions with the Regulatory Community of Practice.

Respectfully,

Tom

**Thomas P. Smith, PE, PMP, SES**  
**Chief, Operations and Regulatory**  
**NAD and LRD Regional Integration**  
**US Army Corps of Engineers**

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# Public Webinar: Updates on the Definition of “Waters of the United States”



**September 12, 2023**



# Introductions

## *U.S. Environmental Protection Agency*

- **Brian Frazer**, Director of the Office of Wetlands, Oceans, and Watersheds
- **Whitney Beck**, Clean Water Act Jurisdiction Team Lead

## *Department of the Army*

- **Elliott Carman**, Water Resources Regulation and Policy Advisor

# Presentation Outline

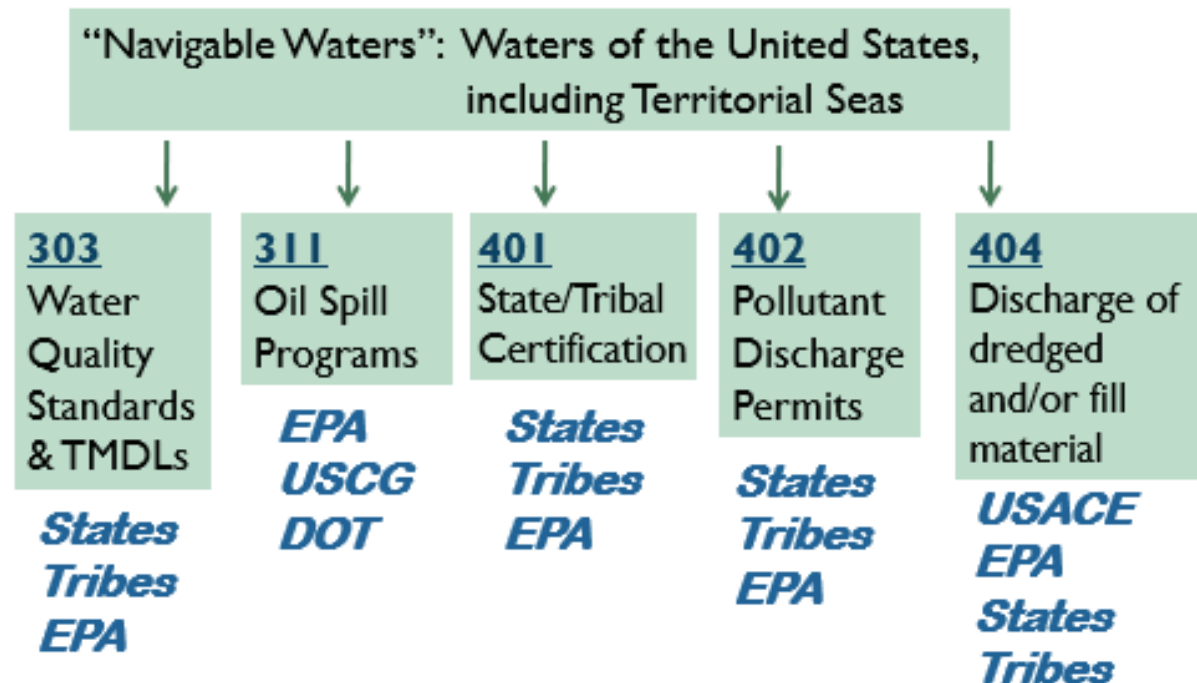
- Background
- Conforming Rule
- Additional Information



# Background: “Waters of the United States” and the Clean Water Act

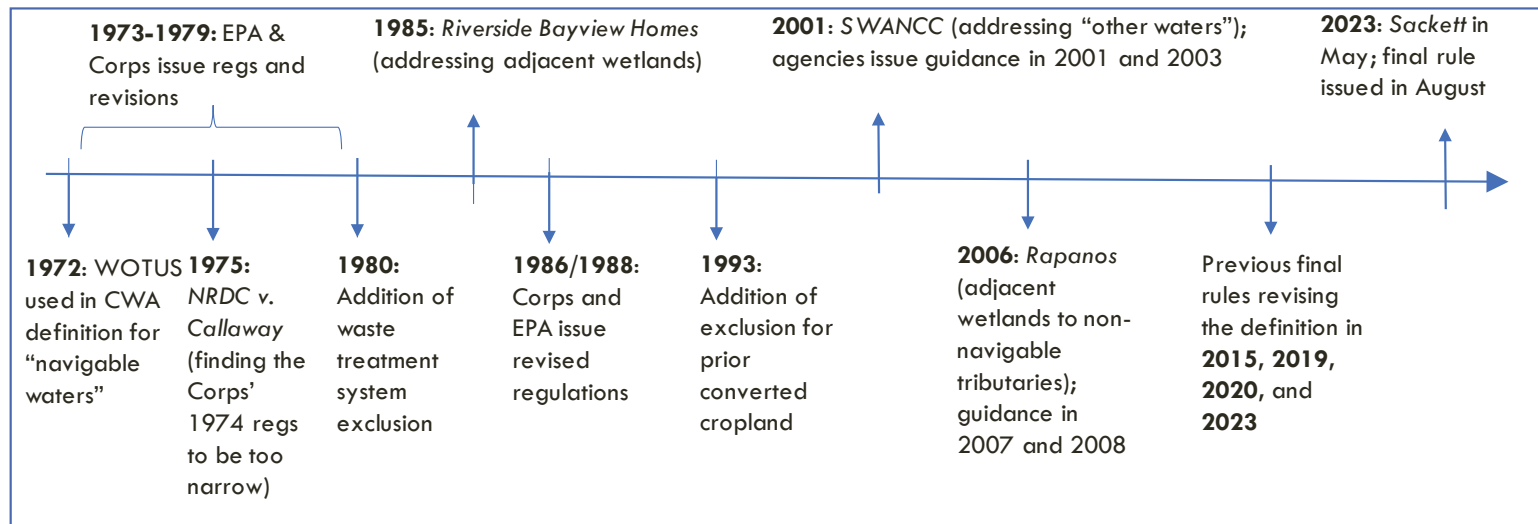
- “Waters of the United States” is a threshold term in the Clean Water Act that establishes the geographic scope of federal jurisdiction under the Act.
- Clean Water Act regulatory programs address “navigable waters,” defined in the statute as “the waters of the United States, including the territorial 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.

# Background: Why “Waters of the United States” Matters



# Background: “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 major Supreme Court cases.



## Background: Recent Events

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



## Background: 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.

# Background: *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 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.

## Background: Public Statement Issued After *Sackett* Decision

The Environmental Protection Agency and the U.S. Department of the Army (agencies) are in receipt of the U.S. Supreme Court's May 25, 2023, decision in the case of *Sackett v. Environmental Protection Agency*. In light of this decision, the agencies are interpreting the phrase “waters of the United States” consistent with the Supreme Court’s decision in *Sackett*. The agencies are developing a rule to amend the final "Revised Definition of 'Waters of the United States'" rule, published in the *Federal Register* on January 18, 2023, consistent with the U.S. Supreme Court’s May 25, 2023 decision in the case of *Sackett v. Environmental Protection Agency*. The agencies intend to issue a final rule by September 1, 2023.

<https://www.epa.gov/wotus>

# 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

- The agencies will continue to interpret the definition of “waters of the United States” consistent with the *Sackett* decision.
- 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.
- 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.

# Targeted Changes to January 2023 Rule Jurisdictional Waters

## Categories of Jurisdictional Waters

(a)(1)

- (i) Traditional Navigable Waters
- (ii) Territorial Seas
- (iii) Interstate Waters – **revised**

(a)(2) Impoundments of Jurisdictional Waters

(a)(3) Tributaries – **revised**

(a)(4) Adjacent Wetlands – **revised**

(a)(5) Additional Waters – **revised**

# Targeted Changes to January 2023 Rule Jurisdictional Waters

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

(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~~;



# Targeted Changes to January 2023 Rule Jurisdictional Waters

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



(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;~~

# Targeted Changes to January 2023 Rule Jurisdictional Waters

(a)(4) adjacent wetlands  
revised to delete significant  
nexus standard →

(4) Wetlands adjacent to the following waters:

(i) Waters identified in paragraph (a)(1) of this section; or

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3)(i) of this section and with a continuous surface connection to those waters; ~~or~~

~~(iii) Waters identified in paragraph (a)(2) or (3) of this section when the wetlands 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~~

# Targeted Changes to January 2023 Rule

## Jurisdictional Waters

(a)(5) additional waters  
revised to delete significant  
nexus standard and delete  
streams and wetlands →

(5) Intrastate lakes and ponds, ~~streams, or wetlands~~ not identified in paragraphs (a)(1) through (4) of this section:

~~(i) That~~ that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3) ~~(i)~~ of this section; ~~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.~~

# No Changes to January 2023 Rule Exclusions

## 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

# Targeted Changes to January 2023 Rule Definitions

## 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**

# Targeted Changes to January 2023 Rule Definitions

Revised definition of  
“adjacent” →

(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.”~~

# Targeted Changes to January 2023 Rule Definitions

Deleted definition of “significantly affect” → ~~(6) Significantly affect means a material influence on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section. To determine whether waters, either alone or in combination with similarly situated waters in the region, have a material influence on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section, the functions identified in paragraph (c)(6)(i) of this section will be assessed and the factors identified in paragraph (c)(6)(ii) of this section will be considered:~~

# Status Update: 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.



# Frequently Asked Questions

## Additional Information

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



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## Wilson, Matthew S CIV USARMY CEHQ (USA)

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**From:** Walker, William T Jr CIV USARMY CENAO (USA)  
**Sent:** Wednesday, September 13, 2023 5:50 PM  
**To:** CDL-REG-DISTRICT-CHIEFS  
**Cc:** DLL-CECW-CO-R  
**Subject:** USACE Implementation "Revised Definition of 'Waters of the United States'; Conforming,"  
**Attachments:** FINAL WOTUS Public Webinar Slides\_9-12-23.pptx; WOTUS Talking Points 13 SEP 2023.docx; USACE WOTUS Implementation Brief 13 SEP 2023.pptx

Chiefs,

FYSA, Mr. Smith this afternoon provided the attached and below to District and Division Commanders. PLEASE DO NOT SHARE THE ATTACHEMNTS TO THIS EMAIL OUTSIDE USACE. Please note, the slide deck titled "USACE WOTUS Implementation Brief 13 SEP 2023" is for internal deliberation only. (b)(5)

. You may use the talking points provided in the document titled "WOTUS Talking Points 13 SEP 2023" for responding to outside inquiries but please DO NOT SHARE THE DOCUMENT ITSELF outside USACE.

Thank You  
Tom

---

**From:** Smith, Thomas Patrick SES USARMY USACE (USA) <(b)(6)>  
**Sent:** Wednesday, September 13, 2023 4:44 PM  
**To:** DLL-Division-&-Center-Commanders <(b)(6)> >; DLL-District & Battalion Commanders <(b)(6)>  
**Cc:** Spellmon, Scott A LTG USARMY CEHQ (USA) <(b)(6)> Graham, William H JR MG USARMY CEHQ (USA) <(b)(6)> Belk, Edward E Jr SES USARMY CEHQ (USA) <(b)(6)> Walker, William T Jr CIV USARMY CENAO (USA) <(b)(6)> Gaffneysmith, Margaret E CIV USARMY CEHQ (USA) <(b)(6)> ; Cooper, David R SES USARMY CEHQ (USA) <(b)(6)> Handura, James J COL USARMY CEHQ (USA) <(b)(6)> Perez, Pete G SES USARMY CEHQ (USA) <(b)(6)> Brown, Theodore A SES USARMY CEHQ (USA) <(b)(6)> Hill, Stephen L (Steve) SES USARMY CEHQ (USA) <(b)(6)> Bush, Eric L SES USARMY CEHQ (USA) <(b)(6)> DLL-MSC-Program-Directors <(b)(6)> ; Gaffneysmith, Margaret E CIV USARMY CEHQ (USA) <(b)(6)>  
**Subject:** USACE Implementation "Revised Definition of 'Waters of the United States'; Conforming,"

Commanders: This email complements the discussion with LTG Spellmon earlier today regarding USACE implementation of the "Revised Definition of 'Waters of the United States'; Conforming." ([Federal Register :: Revised Definition of "Waters of the United States"; Conforming](#)). If you were able to join the discussion, you were reminded of the complexity and nuance to this implementation. I acknowledge the need for continuous communication with the field and updates based on new information when appropriate.

USACE HQ continues to engage with ASA(CW) and EPA on a draft coordination memo describing how EPA and Army/USACE will coordinate on draft approved jurisdictional determinations (AJDs) for wetlands. We expect a final coordination memo this week. The mechanism for coordination on jurisdictional determinations is familiar to the Regulatory Program, but will need additional attention in

the initial stages of the implementation of the Conforming Rule. Coordination between USACE/Army and EPA will enable development of specific policy guidance based on applications from the public and draft determinations made in the field.

Tom Walker (Acting HQ Chief Regulatory) and MSC/District Regulatory Chiefs will continue to meet regularly to minimize challenges in implementation. Attached to this email are materials to assist in implementation.

- WOTUS Public Webinar Briefing 12 SEP 2023. This briefing is an excellent summary of the history of the Clean Water Act and the changes made based on the Supreme Court decision on Sackett.
- WOTUS Key Points 13 SEP 2023. Brief set of key points on the WOTUS effort and current status.
- Updated USACE Implementation Briefing 13 SEP 2023. This briefing includes updated language that emphasizes USACE coordination of draft Approved Jurisdictional Determinations of wetlands with EPA.

Respectfully,

Tom

**Thomas P. Smith, PE, PMP, SES**  
**Chief, Operations and Regulatory**  
**NAD and LRD Regional Integration**  
**US Army Corps of Engineers**

COE (b)(6)

---

**From:** Smith, Thomas Patrick SES USARMY USACE (USA)

**Sent:** Wednesday, August 30, 2023 5:28 PM

**To:** DLL-Division-&-Center-Commanders

COE (b)(6)

**Cc:** Spellmon, Scott A LTG USARMY CEHQ (USA) <

COE (b)(6)

Graham, William H JR MG

USARMY CEHQ (USA) <

COE (b)(6)

Belk, Edward E Jr SES USARMY CEHQ (USA)

< COE (b)(6)

Walker, William T Jr CIV USARMY CENAO (USA) <

COE (b)(6)

Gaffneysmith, Margaret E CIV USARMY CEHQ (USA)

COE (b)(6)

; Cooper, David R SES

USARMY CEHQ (USA) <

COE (b)(6)

Handura, James J COL USARMY CEHQ (USA)

< COE (b)(6)

Perez, Pete G SES USARMY CEHQ (USA) <

COE (b)(6)

Brown,

Theodore A SES USARMY CEHQ (USA) <

COE (b)(6)

Hill, Stephen L (Steve) SES USARMY CEHQ

(USA) < COE (b)(6)

Bush, Eric L SES USARMY CEHQ (USA) <

COE (b)(6)

DLL-MSC-

Program-Directors

COE (b)(6)

**Subject:** Amendment to the Revised Definition of 'Waters of the US'

Commanders:

On Tuesday August 29, 2023, the U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army (the agencies) announced a final rule amending the 2023 definition of "waters of the United States" to conform with the recent Supreme Court decision in *Sackett v. EPA*. The agencies are committed to following the law and implementing the Clean Water Act to deliver the essential protections that safeguard the nation's waters from pollution and degradation. This action

provides the clarity that is needed to advance these goals, while moving forward with infrastructure projects, economic opportunities, and agricultural activities.

More information about the final rule is available here - <https://www.epa.gov/newsreleases/conform-recent-supreme-court-decision-epa-and-army-amend-waters-united-states-rule> .

The agencies will host a public webinar on September 12, 2023 to provide updates on the definition of “waters of the United States.” The agencies also plan to host listening sessions this fall with co-regulators and stakeholders, focusing on identifying issues that may arise outside this limited rule to conform the definition of “waters of the United States” with the *Sackett v. EPA* decision.

Learn more about this action on [EPA’s “waters of the United States” website](#).

Tom Walker, Chief Regulatory at HQ USACE, will continue to share information and lead implementation discussions with the Regulatory Community of Practice.

Respectfully,

Tom

**Thomas P. Smith, PE, PMP, SES**  
**Chief, Operations and Regulatory**  
**NAD and LRD Regional Integration**  
**US Army Corps of Engineers**

COE (b)(6)

# Public Webinar: Updates on the Definition of “Waters of the United States”



**September 12, 2023**



# Introductions

## *U.S. Environmental Protection Agency*

- **Brian Frazer**, Director of the Office of Wetlands, Oceans, and Watersheds
- **Whitney Beck**, Clean Water Act Jurisdiction Team Lead

## *Department of the Army*

- **Elliott Carman**, Water Resources Regulation and Policy Advisor

# Presentation Outline

- Background
- Conforming Rule
- Additional Information

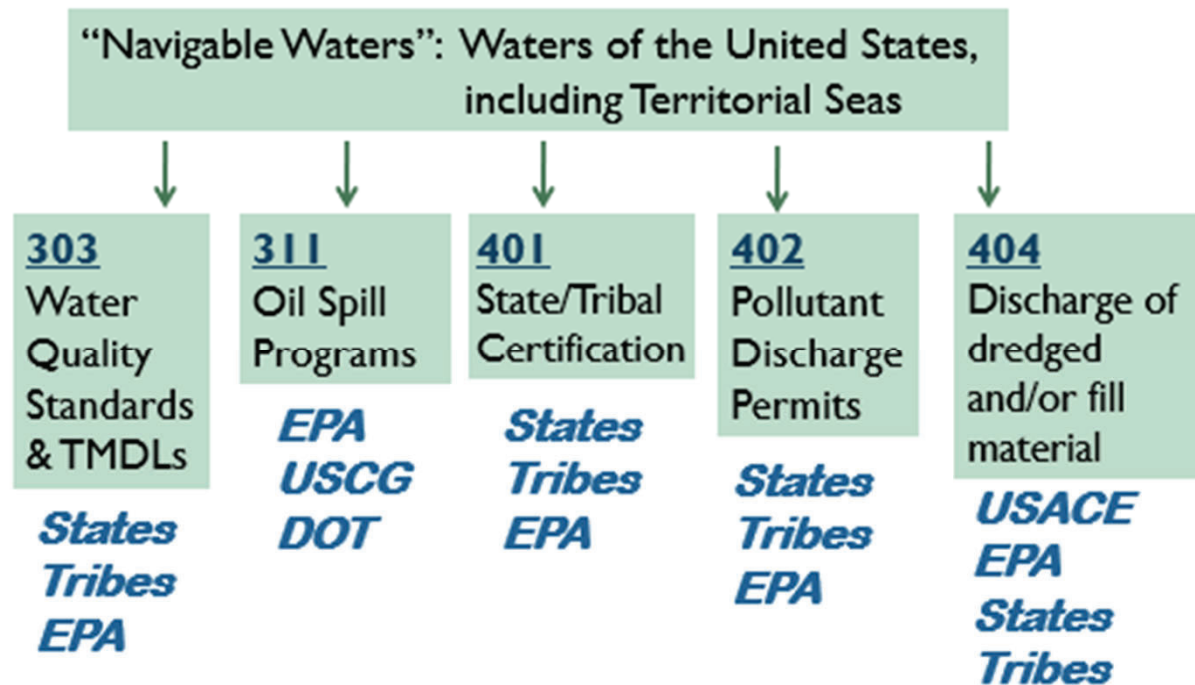




# Background: “Waters of the United States” and the Clean Water Act

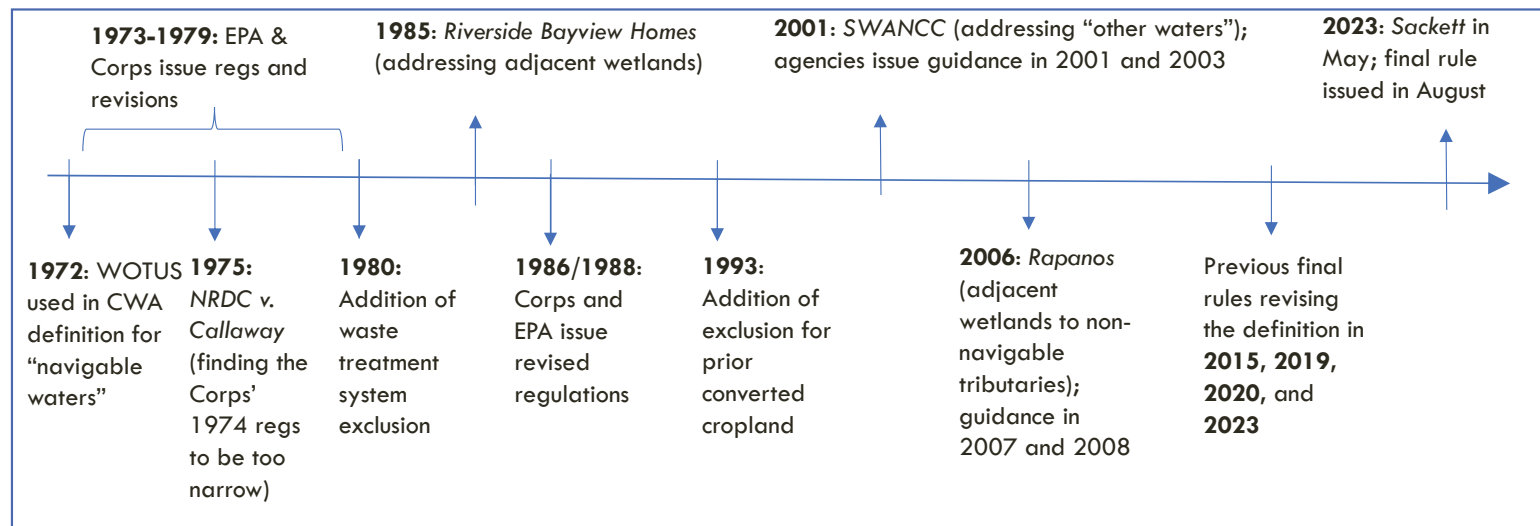
- “Waters of the United States” is a threshold term in the Clean Water Act that establishes the geographic scope of federal jurisdiction under the Act.
- Clean Water Act regulatory programs address “navigable waters,” defined in the statute as “the waters of the United States, including the territorial 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.

# Background: Why “Waters of the United States” Matters



# Background: “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 major Supreme Court cases.



## Background: Recent Events

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

## Background: 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.

## Background: *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 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.

## Background: Public Statement Issued After *Sackett* Decision

The Environmental Protection Agency and the U.S. Department of the Army (agencies) are in receipt of the U.S. Supreme Court's May 25, 2023, decision in the case of *Sackett v. Environmental Protection Agency*. In light of this decision, the agencies are interpreting the phrase “waters of the United States” consistent with the Supreme Court’s decision in *Sackett*. The agencies are developing a rule to amend the final "Revised Definition of 'Waters of the United States'" rule, published in the *Federal Register* on January 18, 2023, consistent with the U.S. Supreme Court’s May 25, 2023 decision in the case of *Sackett v. Environmental Protection Agency*. The agencies intend to issue a final rule by September 1, 2023.

<https://www.epa.gov/wotus>

# 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

- The agencies will continue to interpret the definition of “waters of the United States” consistent with the *Sackett* decision.
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  - approved jurisdictional determinations and Clean Water Act permits;
  - guidance;
  - notice and comment rulemaking; and
  - agency forms and training materials.
- 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.

# Targeted Changes to January 2023 Rule Jurisdictional Waters

## Categories of Jurisdictional Waters

(a)(1)

- (i) Traditional Navigable Waters
- (ii) Territorial Seas
- (iii) Interstate Waters – **revised**

(a)(2) Impoundments of Jurisdictional Waters

(a)(3) Tributaries – **revised**

(a)(4) Adjacent Wetlands – **revised**

(a)(5) Additional Waters – **revised**

# Targeted Changes to January 2023 Rule Jurisdictional Waters

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

(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~~;

# Targeted Changes to January 2023 Rule Jurisdictional Waters

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

(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;~~

# Targeted Changes to January 2023 Rule Jurisdictional Waters

(a)(4) adjacent wetlands revised to delete significant nexus standard →

(4) Wetlands adjacent to the following waters:

(i) Waters identified in paragraph (a)(1) of this section; or

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3)(i) of this section and with a continuous surface connection to those waters; ~~or~~

~~(iii) Waters identified in paragraph (a)(2) or (3) of this section when the wetlands 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~~

# Targeted Changes to January 2023 Rule Jurisdictional Waters

(a)(5) additional waters  
revised to delete significant →  
nexus standard and delete  
streams and wetlands

(5) Intrastate lakes and ponds, ~~streams, or wetlands~~ not identified in paragraphs (a)(1) through (4) of this section:

~~(i) That~~ that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3) ~~(i)~~ of this section; ~~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.~~

# No Changes to January 2023 Rule Exclusions

## 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



# Targeted Changes to January 2023 Rule Definitions

## 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**

# Targeted Changes to January 2023 Rule Definitions

Revised definition of  
“adjacent” →

(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.”~~

# Targeted Changes to January 2023 Rule Definitions

Deleted definition of  
“significantly affect” →

~~(6) Significantly affect means a material influence on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section. To determine whether waters, either alone or in combination with similarly situated waters in the region, have a material influence on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section, the functions identified in paragraph (c)(6)(i) of this section will be assessed and the factors identified in paragraph (c)(6)(ii) of this section will be considered:~~

# Status Update: 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.

# Frequently Asked Questions

## Additional Information

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



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**From:** Carman, Elliott N CIV USARMY HQDA ASA CW (USA) (b)(6)  
**Sent:** Tuesday, September 26, 2023 5:53 PM  
**To:** Walker, William T Jr CIV USARMY CENAO (USA)  
**Cc:** McElwain, Tunis W CIV USARMY CEHQ (USA); Wilson, Matthew S CIV USARMY CEHQ (USA); Jensen, Stacey M CIV USARMY HQDA ASA CW (USA); Larsen, Melinda M CIV USARMY CENWD (USA)  
**Subject:** Training Slides & ROS for the Corps  
**Attachments:** WOTUS Overview Internal Training\_9-26-23\_Amended 2023 Rule.pptx; WOTUS Overview Internal Training TPs\_9-26-23\_Amended 2023 Rule.docx

---

Tom:

As promised, please see attached for the Amended 2023 Rule training slides and ROS. (b)(5)  
The training slides can be shared with field staff and are marked as “do not distribute; internal use only.” You may want to clarify upon transmittal to staff that the new coordination memos are referenced in the slides, but have not yet been fully signed.

A reminder that the ROS should not be shared with field staff, but you (HQ) can use it for any additional trainings you would like to conduct as long as you don’t stray from the ROS. Please let us know if you have any questions. Thanks!

E-

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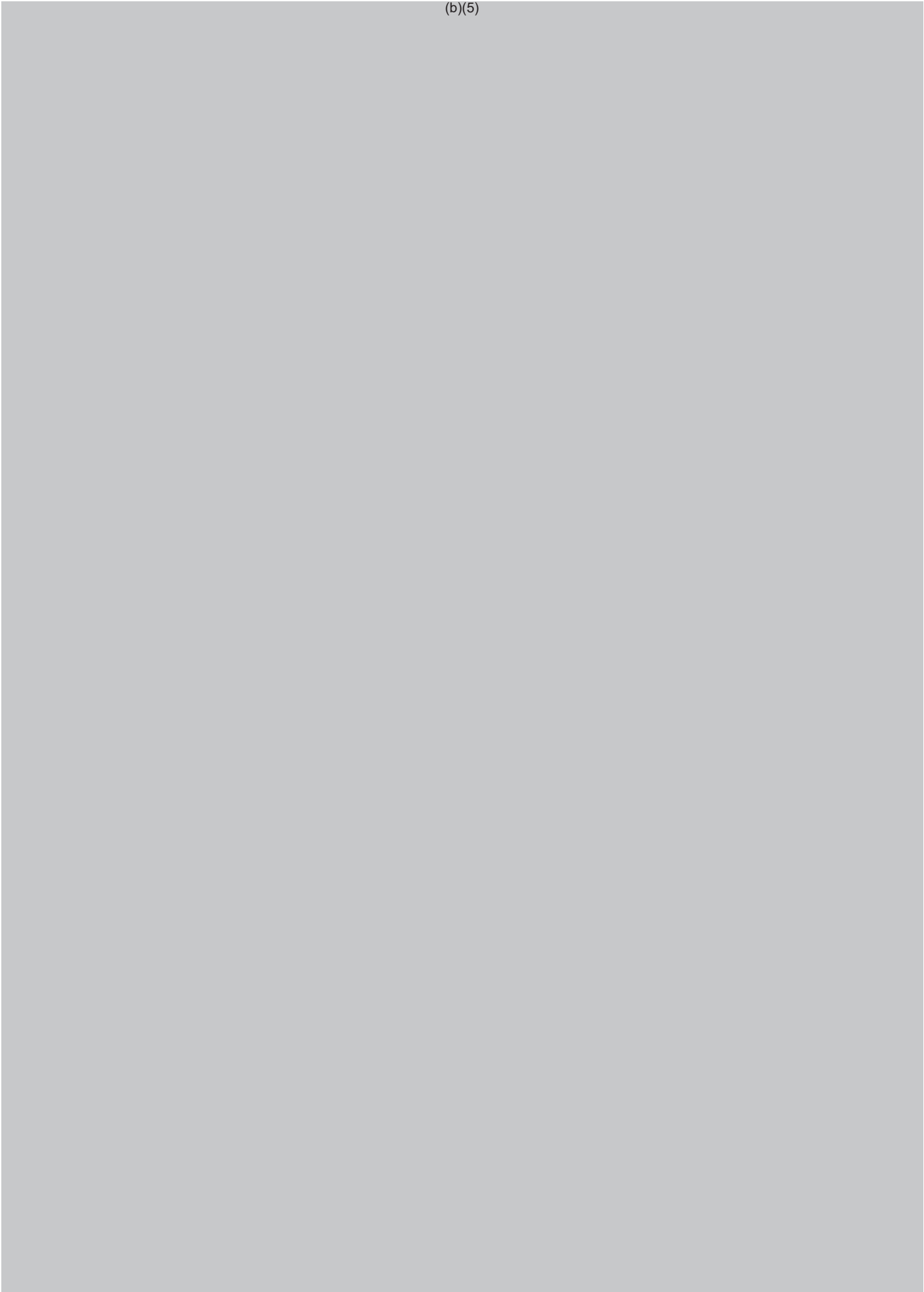










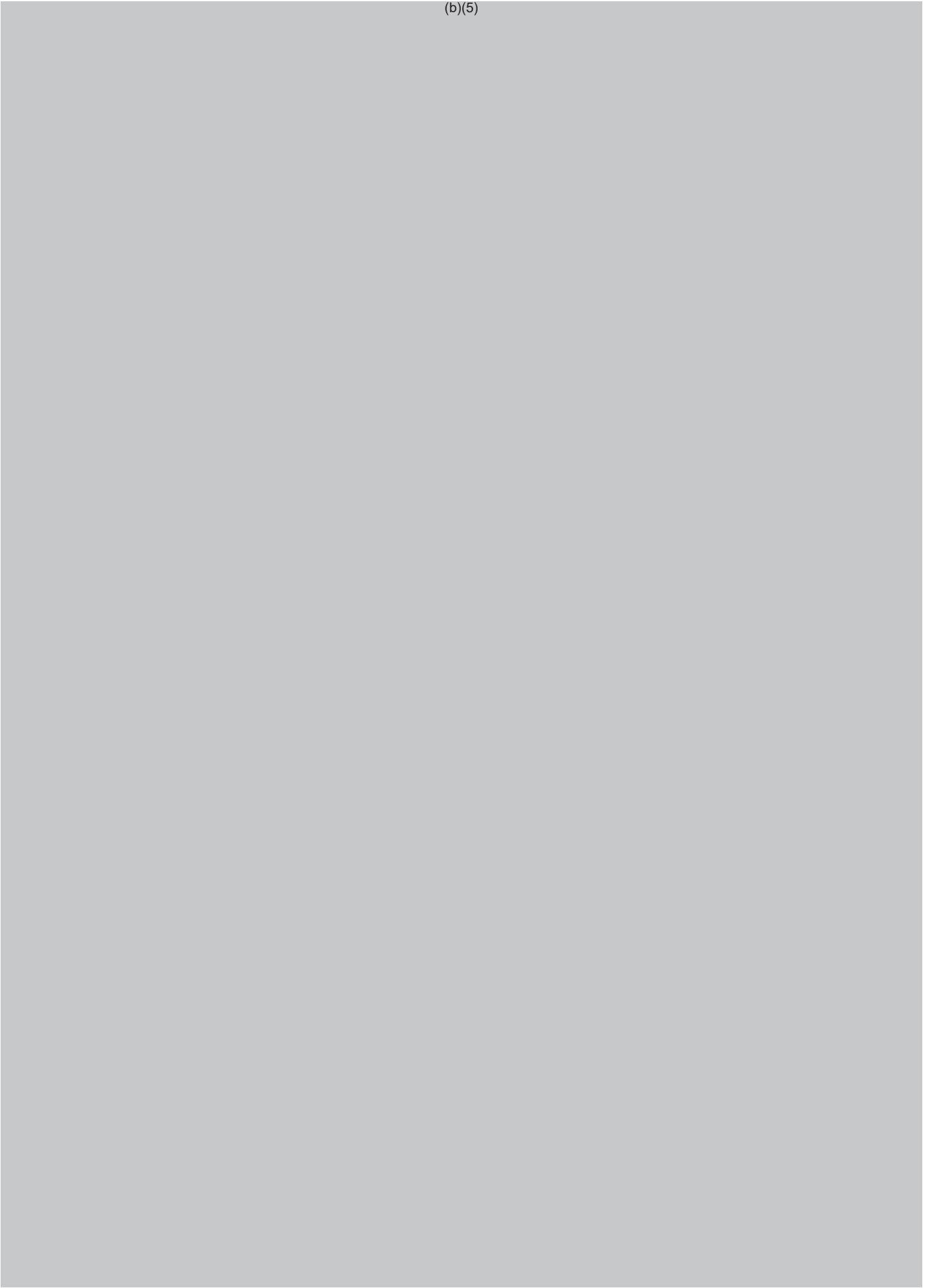




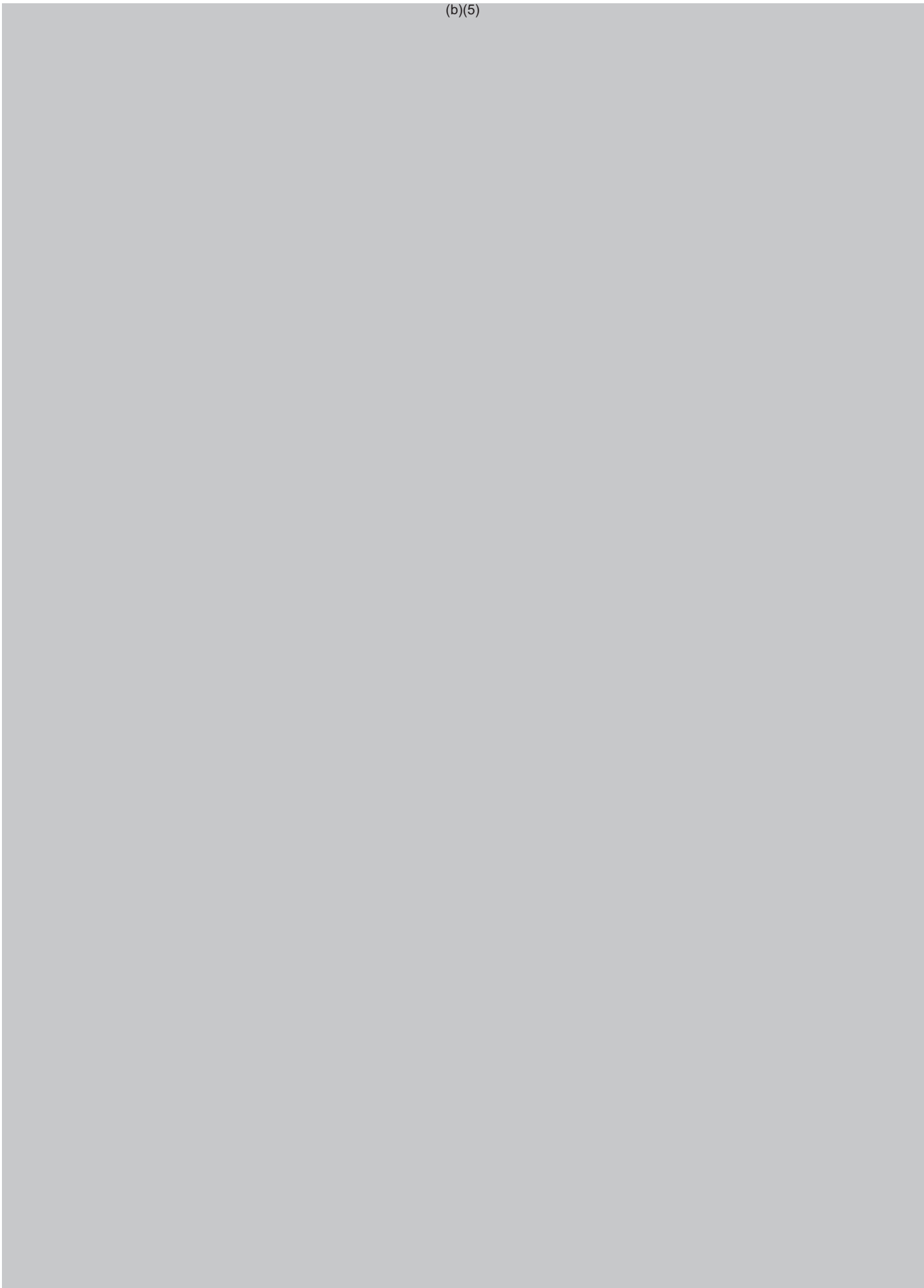








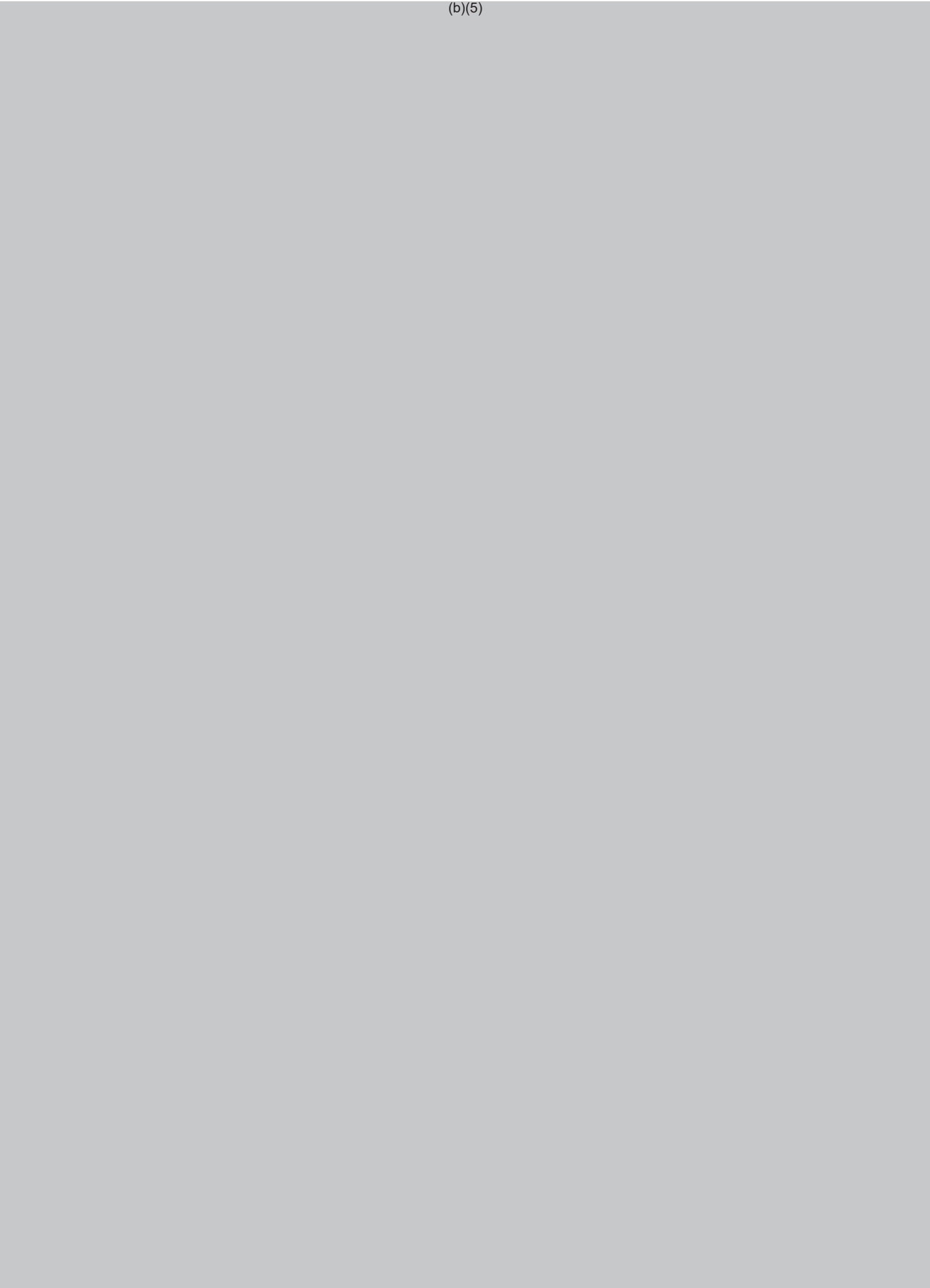






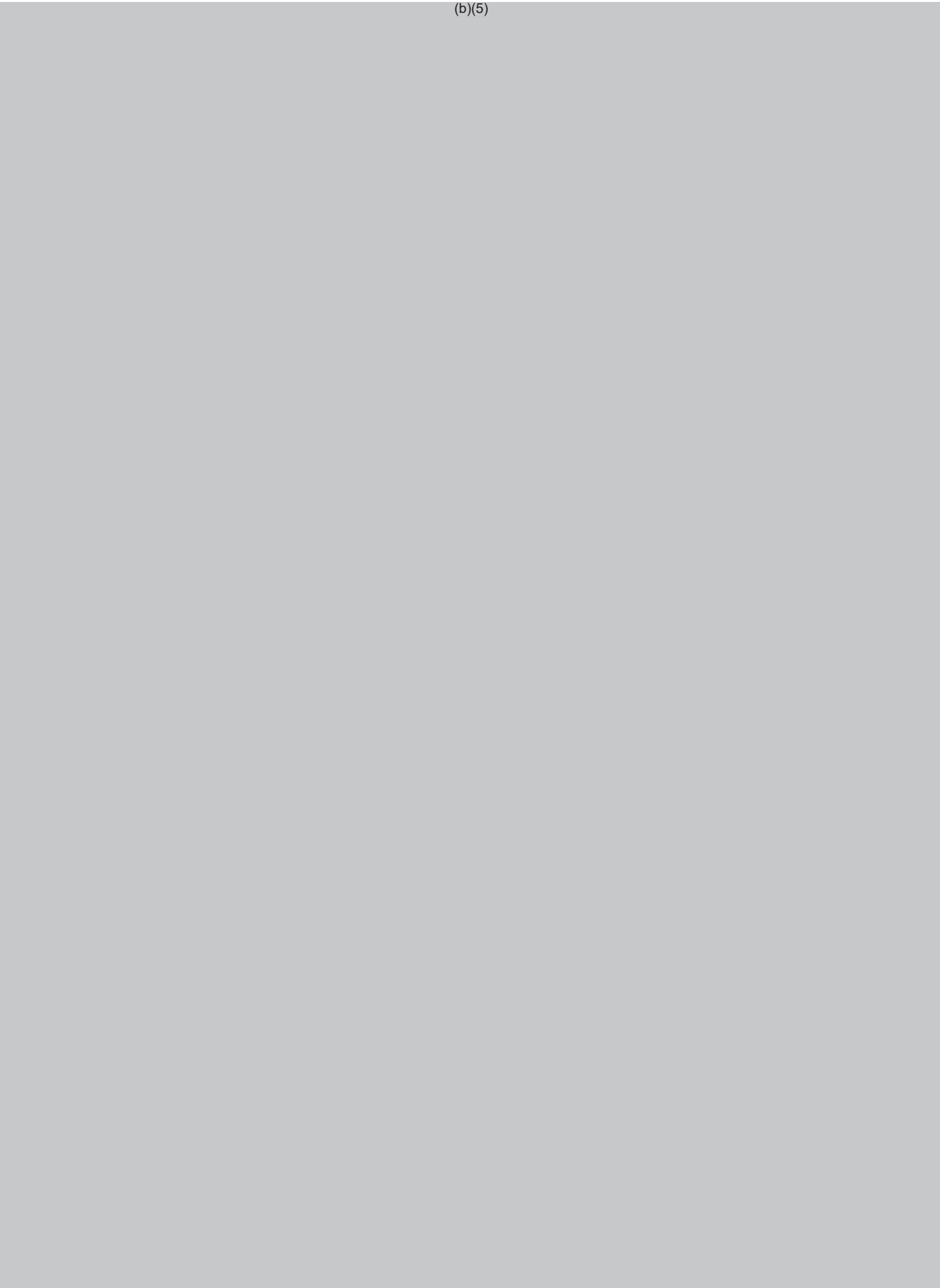














**From:** [Walker, William T Jr CIV USARMY CENAO \(USA\)](#)  
**To:** [CDL-REG-All](#)  
**Cc:** [Gaffneysmith, Margaret E CIV USARMY CEHQ \(USA\)](#); [Smith, Thomas Patrick SES USARMY USACE \(USA\)](#); [Boyd, Milton W CIV USARMY CEHQ \(USA\)](#); [Wilson, John Maxwell \(Max\) CIV USARMY CEHQ \(USA\)](#); [Inkelas, Daniel CIV USARMY CEHQ \(USA\)](#); [Zilioli, Erica M CIV USARMY CEHQ \(USA\)](#)  
**Subject:** AJD coordination memos and Training Slides - NOT TO BE RELEASED  
**Date:** Thursday, September 28, 2023 12:58:11 PM  
**Attachments:** [2023 Joint Coordination Memo - Pre-2015 Regulatory Regime September 2023.pdf](#)  
[2023 Joint Coordination Memo - Amended 2023 Rule September 2023.pdf](#)  
[WOTUS Overview Internal Training 9-26-23 Amended 2023 Rule.pptx](#)

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All,

PLEASE READ FULLY!

Attached please find the USACE/EPA Joint Coordination Memos for both the Pre-2015 Regulatory Regime, and the Amended 2023 Rule. These memos are fully in effect. For those draft AJDs that have been coordinated with HQ-Regulatory between 8 SEP and today, please do not coordinate the draft AJD per the Coordination Memo Procedures until you receive input from HQ-Regulatory. For all other draft AJDs, please follow the described coordination procedures beginning immediately. THESE MEMOS ARE NOT TO BE RELEASED OUTSIDE USACE OR POSTED TO THE WEB UNTIL FURTHER NOTICE!

The request to coordinate with HQ-Regulatory outside these memos is no longer in effect. (b)(5)

[REDACTED]

[REDACTED]

Also Attached please find the slide deck from the EPA/Army joint training provided Tuesday 26 SEP 2023. (b)(5)

[REDACTED]

Thank you  
Tom

William "Tom" Walker  
Chief, Regulatory Program (Acting)  
Headquarters, U.S. Army Corps of Engineers

441 G Street, NW

Washington, DC 20314

(b)(6)



September 27, 2023

**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)**

Subject: U.S. Department of the Army, U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency (EPA) Coordination of draft approved jurisdictional determinations under the “pre-2015 regulatory regime.”

**I. Purpose.** The purpose of this memorandum is to establish a process by which the Corps and EPA (“the agencies”) will coordinate on Clean Water Act (CWA) geographic jurisdictional matters to ensure accurate and consistent implementation of the pre-2015 regulatory regime where that regulatory regime is operative.<sup>1</sup> The “pre-2015 regulatory regime” refers to the agencies’ pre-2015 definition of “waters of the United States,”<sup>2</sup> implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience. The coordination procedures as outlined in the *SWANCC* Guidance (68 FR 1991, 1995 (January 15, 2003)) and the 2007 *Rapanos* Coordination Memorandum (available at <https://www.epa.gov/sites/default/files/2016-04/documents/rapanosmoa6507.pdf>), as amended by the 2008 Department of the Army Memorandum on *Rapanos* coordination (available at <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll5/id/1414>), are superseded by this coordination memorandum.

With respect to final determinations of the geographic jurisdictional scope of “waters of the United States” for purposes of CWA Section 404 that are not subject to this memorandum, this memorandum does not nullify or supersede the January 19, 1989 “Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of Geographic Jurisdiction and the Application of the Exemptions under Section 404(f) of the Clean Water Act” (1989 MOA), including its special case provisions,<sup>3</sup> nor does it supersede policy or individual

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<sup>1</sup> For more information about the operative definition of “waters of the United States” for specific geographic areas and parties in light of litigation, please visit <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>.

<sup>2</sup> The pre-2015 definition of “waters of the United States,” is also referred to as “the 1986 regulations,” inclusive of the exclusion for prior converted cropland, which both agencies added in 1993. See 33 CFR 328.3 (2014) and 40 CFR 230.3(s) (2014).

<sup>3</sup> Available at: <https://www.epa.gov/cwa-404/memorandum-agreement-determination-geographic-jurisdiction-section-404-program-and>.

permit elevations under the CWA Section 404(q) “Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency” (1992 404(q) MOA).<sup>4</sup>

Because the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard, and the agencies’ pre-2015 regulatory regime discussed the *Rapanos* plurality standard, the agencies will implement the pre-2015 regulations generally consistent with the pre-2015 regulatory regime’s approach to the plurality standard, including relevant case law and longstanding practice, as informed by applicable guidance, training, and experience. Under the pre-2015 regulatory regime, consistent with *Sackett*, the agencies will not assert jurisdiction based on the significant nexus standard, will not assert jurisdiction over interstate wetlands solely because they are interstate, will interpret “adjacent” to mean “having a continuous surface connection,” and will limit the scope of the (a)(3) provision to only relatively permanent lakes and ponds that do not meet one of the other jurisdictional categories. Approved jurisdictional determinations (JDs) are case-specific determinations based on the record, and factual questions or *Sackett* concerns may be raised in the context of a particular approved JD. With respect to final determinations of the geographic jurisdictional scope of “waters of the United States” for purposes of Section 404 that are not subject to this memorandum, Corps districts may choose to coordinate with EPA regions on draft approved JDs on a case-by-case basis and either the Corps districts or EPA regions may seek headquarters-level review or guidance on draft approved JDs at any time.

The procedures in this memorandum do not create any rights, either in substance or procedure, that are enforceable by any party. In addition, nothing in this memorandum is intended to diminish, modify, or otherwise affect statutory or regulatory authorities of either signatory agency. Furthermore, nothing in this memorandum is intended to affect the authority of a Tribe or State pursuant to an authorized CWA Section 401, 402, or 404 program, and nothing in this memorandum will be construed as indicating a financial commitment by the agencies for the expenditure of funds.

**II. Specified Draft Approved Jurisdictional Determination Coordination Requirements: Local Level Review of Draft Approved Jurisdictional Determinations.** All draft approved JDs assessing wetlands under paragraph (a)(7) and other waters under paragraph (a)(3) of the 1986 regulations shall be coordinated at the local level in accordance with the procedures in this memorandum. Such draft approved JDs may be elevated to the headquarters level of the agencies (HQ) under section II.D below. Draft approved JDs shall be coordinated for the previously specified categories of waters if jurisdiction is being asserted, as well as if jurisdiction is not being asserted.

**A. Information requirements.** To initiate the local-level coordination process, the Corps district shall provide the EPA region with the draft basis for jurisdiction (e.g., approved JD form, memorandum for record, or similar document explaining the full basis and rationale for asserting or not asserting jurisdiction) and any maps, as well as any easily available electronic information. Transmittal of this package serves as the “notification of coordination.” Within three business days of notification, the EPA region may request, if warranted, all additional information relied upon to inform the draft basis for jurisdiction, such as aerial or satellite imagery, site visit documentation, or other resources used to support the draft decision and rationale described on the draft basis for jurisdiction. The Corps district will make its best efforts to transmit the additional information as soon as possible after the request from the EPA region.

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<sup>4</sup> Available at: <https://www.epa.gov/cwa-404/cwa-404q-memorandum-agreement-resolving-disputes-1992>.

**B. Transmittal of information.** Both agencies will transmit all documents electronically in the most efficient manner (e.g., via email). The date of the Corps' notification of coordination to the EPA region initiates the time frames and deadlines described in section II.D below.

**C. Scope/level of EPA regional review.** The EPA region should review the information provided by the Corps district to ensure that the Corps' draft basis for asserting or not asserting jurisdiction reflects the requirements outlined in the pre-2015 regulatory regime. The EPA region may need to independently review additional sources of information to complete a thorough evaluation of the application of the pre-2015 regulatory regime.

**D. Coordination process.<sup>5</sup>**

**1.** The EPA region should notify the Corps district as soon as possible whether it intends to provide comments. If the EPA region has comments, it must provide those comments to the Corps district within 10 business days of the notification of coordination.

**2.** Even if the EPA region does not have comments on a draft approved JD, the EPA region may still choose to elevate the draft approved JD within the 10 business day coordination period per the procedures in section III below to obtain HQ review or guidance. If the EPA region does not have comments and the region does not intend to elevate the draft approved JD to HQ, it should notify the Corps district as soon as possible. If the region does not provide comments and does not elevate the draft approved JD within the 10 business day coordination period, or if the region notifies the district that it has no comments and does not intend to elevate the draft approved JD, the local-level coordination for the draft approved JD will be considered complete and the Corps district may finalize the approved JD.

**3.** If the EPA region provides comments within the 10 business day local-level coordination period:

**a.** The agencies must coordinate on matters of fact at the local level (region and district) and make every attempt to resolve any issues. When the EPA region transmits the comments to the Corps district, the EPA region may request a meeting to discuss comments with the Corps district. Any such meeting must be held within the 10 business day coordination period.

**b.** After the initial coordination has occurred:

**i.** Prior to the end of the 10 business day local-level coordination period, or within three business days of the transmittal of any comments from the EPA region or the meeting, whichever is later in time, the Corps district may notify the EPA region that it plans to reconsider the draft approved JD and is therefore withdrawing it from local-level coordination.<sup>6</sup>

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<sup>5</sup> Day one is the first business day after notification.

<sup>6</sup> The Corps may choose to withdraw and re-coordinate a draft approved JD, for example, if EPA's comments result in the district deciding to complete a field site visit or contact the requestor for additional information, and such action cannot be completed during the original coordination period. The revised draft approved JD will be subject to the coordination procedures in this memorandum.

ii. Unless the Corps district provides the EPA region with the notification of its intent to reconsider the draft approved JD as specified in section II.D.3.b.i above, the Corps district must transmit a revised draft approved JD to the EPA region within three business days of the transmittal of the EPA region's comments or the meeting, whichever is later in time, or notify the EPA region that the Corps district does not intend to revise the draft approved JD.

A) Within three business days of transmittal of a revised draft approved JD or a notification by the Corps district of no intent to revise, the EPA region may notify the Corps district that its concerns have been addressed, and the local-level coordination for the draft approved JD will be considered complete. This means the Corps district may proceed with finalizing the approved JD; or

B) Within three business days of transmittal of a revised draft approved JD or notification by the Corps district of no intent to revise, the EPA region may notify the Corps district that it is elevating the draft approved JD to the HQ level in accordance with section III below; or

C) If the EPA region does not provide any notification to the Corps as specified in A) or B) of this subsection within three business days of the transmittal of a revised draft approved JD or notification by the Corps district that it does not intend to revise the draft approved JD, the local-level coordination for the draft approved JD will be considered complete. This means the Corps may proceed with finalizing the approved JD.

**III. Specified Draft Approved Jurisdictional Determination Coordination Requirements: Headquarters-Level Joint Review of Draft Approved JDs.** If the draft approved JD for wetlands assessed under paragraph (a)(7) or waters assessed under paragraph (a)(3) of the 1986 regulations is elevated to the HQ level (to the chief level<sup>7</sup> or above) by an EPA region under section II.D, the EPA region should concurrently notify and transmit all relevant information described to both Corps HQ and EPA HQ.

A. Once information is transmitted, EPA HQ and Corps HQ shall have 10 business days to coordinate.<sup>8</sup> At any point during those 10 business days, EPA HQ and/or Corps HQ may request that the draft approved JD also be coordinated with relevant staff from the Office of the Assistant Secretary of the Army for Civil Works (OASACW). The requesting agency will notify and transmit the information to OASACW, who will then coordinate with EPA HQ on the draft approved JD, and the time period for additional HQ-level coordination will be five business days from notification by the requesting agency.<sup>9</sup>

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<sup>7</sup> "Chief level" refers to the Branch Chief responsible for geographic jurisdiction at EPA and the Corps Regulatory Chief.

<sup>8</sup> To facilitate effective coordination, time frames identified for this point of the elevation process through the end of section III.A can be modified if both parties mutually agree in writing for a specific elevated case. In such cases, Corps HQ shall inform the Corps district and EPA HQ shall inform the EPA region of any newly agreed upon time frames.

<sup>9</sup> Note that the language in the sub-sections below will refer to "Corps HQ or OASACW" to reflect that EPA will be coordinating either with Corps HQ or OASACW, depending on whether EPA and/or Corps HQ have submitted a request to OASACW.



1. If a mutual decision between EPA HQ and Corps HQ or OASACW is reached, EPA HQ and Corps HQ may issue a signed memorandum providing direction to all their respective regional and district offices. If a mutual decision between EPA HQ and OASACW is reached, EPA HQ and OASACW may issue a signed memorandum providing policy guidance to all their respective regional and district offices. Upon receipt of the jointly signed memorandum, the Corps district responsible for drafting the approved JD should determine what revisions are necessary and transmit to EPA HQ, Corps HQ and, if engaged, OASACW a final draft approved JD and a memorandum describing how the direction or guidance provided in the jointly signed memorandum was applied to the final draft approved JD.<sup>10</sup>

2. If a mutual decision between EPA HQ and Corps HQ or OASACW is not reached, EPA may issue a signed memorandum providing policy guidance that will be provided to all EPA regional and Corps district offices. Upon receipt of the signed memorandum, the Corps district responsible for drafting the approved JD should determine what revisions are necessary and transmit to EPA HQ, Corps HQ and, if engaged, OASACW a final draft approved JD and memorandum describing how guidance provided in the signed memorandum was applied to the final draft approved JD.

3. EPA HQ and the Corps HQ or OASACW will make best efforts to notify the Corps district as soon as possible if they do not intend to provide direction or policy guidance and the Corps district may finalize the draft approved JD. EPA HQ and the Corps HQ or OASACW may provide approved JDs that do not need further policy guidance to all EPA regional and Corps district offices for informational purposes. If neither EPA HQ nor the Corps HQ or OASACW notifies the Corps district that they intend to provide direction or policy guidance within the time period specified in section III.A (*i.e.*, 10 business days or the agreed upon timeframe specified in footnote 8), the Corps district may finalize the draft approved JD.

**B.** EPA retains ultimate administrative authority to construe geographic jurisdiction<sup>11</sup> and EPA HQ may notify Corps HQ or OASACW that it plans to make a project-specific jurisdictional decision covered by the draft approved JD, and consistent with 33 CFR 325.9(b). As soon as possible, and no later than 10 business days of notice of a revised draft approved JD pursuant to section III.A.1 or section III.A.2, EPA HQ shall notify Corps HQ or OASACW and the Corps district if EPA intends to make a site-specific jurisdictional decision pursuant to this section. Site-specific determinations made by EPA pursuant to this section of this memorandum will be binding on the federal government and represent the government's position in any subsequent federal action or litigation regarding the determination. EPA HQ will distribute a copy of any determination to all EPA regions and all Corps districts. If EPA HQ does not provide any notification to Corps HQ or OASACW and the Corps district within 10 business days of notice of a revised draft approved JD pursuant to section III.A.1 or section III.A.2, the coordination for the draft approved JD will be considered complete. This means the Corps district may proceed with finalizing the approved JD.

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<sup>10</sup> While this memorandum does not specify a period of time within which the district should submit the final draft approved JD and memorandum, the district should seek to submit the materials in a timely manner, generally within 90 calendar days unless there are extenuating circumstances.

<sup>11</sup> EPA retains ultimate administrative authority to construe the jurisdictional term "navigable waters." See Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act ("Civiletti Memorandum"), 43 Opp. Att'y Gen. 197 (1979).

**IV. Appeals.** A Corps district approved JD issued after consideration of HQ-level guidance received through the coordination process is an appealable action under 33 CFR 331 et seq. Any appeal can examine and question any matter or finding of fact, but the decision on appeal will not question or overturn any legal or policy guidance made by EPA HQ and/or Corps HQ or OASACW pursuant to this joint memorandum.

**V.** This memorandum will remain in effect for nine months after the memorandum has been signed by all signatories. No later than 30 calendar days prior to the termination date of this memorandum, the agencies shall initiate a joint HQ-level review to reevaluate various requirements in this memorandum, assess implementation effectiveness, and consider the need for further coordination. This joint HQ-level review shall be completed prior to the termination date of this memorandum. This memorandum and its outlined expectations may only be modified or extended by written agreement of both signatory agencies.



Michael L. Connor  
Assistant Secretary of the  
Army (Civil Works)



Radhika Fox  
Assistant Administrator,  
(Office of Water)  
U.S. Environmental Protection Agency





September 27, 2023

**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)**

Subject: U.S. Department of the Army, U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency (EPA) Coordination of draft approved jurisdictional determinations under the “Revised Definition of ‘Waters of the United States,’” as amended by the final rule “Revised Definition of ‘Waters of the United States’; Conforming” (the 2023 rule, as amended, 33 CFR § 328.3; 40 CFR §120.2).

**I. Purpose.** The purpose of this memorandum is to establish a process by which the Corps and EPA (“the agencies”) will coordinate on Clean Water Act (CWA) geographic jurisdictional matters to ensure accurate and consistent implementation of the 2023 rule, as amended.

With respect to final determinations of the geographic jurisdictional scope of “waters of the United States” for purposes of CWA Section 404 that are not subject to this memorandum, this memorandum does not nullify or supersede the January 19, 1989 “Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of Geographic Jurisdiction and the Application of the Exemptions under Section 404(f) of the Clean Water Act” (1989 MOA), including its special case provisions,<sup>1</sup> nor does it supersede policy or individual permit elevations under the CWA Section 404(q) “Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency” (1992 404(q) MOA).<sup>2</sup>

Because the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard and the 2023 rule preamble discussed the *Rapanos* plurality standard, the implementation guidance and tools in the 2023 rule preamble that address the regulatory text that was not amended by the conforming rule, including the preamble relevant to the *Rapanos* plurality standard incorporated in paragraphs (a)(3), (4), and (5) of the 2023 rule, as amended, generally remain relevant to implementing the 2023 rule, as amended.

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<sup>1</sup> Available at: <https://www.epa.gov/cwa-404/memorandum-agreement-determination-geographic-jurisdiction-section-404-program-and>.

<sup>2</sup> For purposes of implementing the 2023 rule, as amended, the coordination procedures as outlined in the *SWANCC* Guidance (68 FR 1991, 1995 (January 15, 2003)) and the 2007 *Rapanos* Coordination Memorandum (available at <https://www.epa.gov/sites/default/files/2016-04/documents/rapanosmoa6507.pdf>), as amended by the 2008 Department of the Army Memorandum on *Rapanos* coordination (available at <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll5/id/1414>), are immaterial.

Approved jurisdictional determinations (JDs) are case-specific determinations based on the record and factual questions or *Sackett* concerns may be raised in the context of a particular approved JD. With respect to final determinations of the geographic jurisdictional scope of “waters of the United States” for purposes of Section 404 that are not subject to this memorandum, Corps districts may choose to coordinate with EPA regions on draft approved JDs on a case-by-case basis and either the Corps districts or EPA regions may seek headquarters-level review or guidance on draft approved JDs at any time.

The procedures in this memorandum do not create any rights, either in substance or procedure, that are enforceable by any party. In addition, nothing in this memorandum is intended to diminish, modify, or otherwise affect statutory or regulatory authorities of either signatory agency. Furthermore, nothing in this memorandum is intended to affect the authority of a Tribe or State pursuant to an authorized CWA Section 401, 402, or 404 program, and nothing in this memorandum will be construed as indicating a financial commitment by the agencies for the expenditure of funds.

**II. Specified Draft Approved Jurisdictional Determination Coordination Requirements: Local Level Review of Draft Approved Jurisdictional Determinations.** All draft approved JDs assessing wetlands under paragraph (a)(4) and waters under paragraph (a)(5) of the 2023 rule, as amended shall be coordinated at the local level in accordance with the procedures in this memorandum. Such draft approved JDs may be elevated to the headquarters level of the agencies (HQ) under section II.D below. Draft approved JDs shall be coordinated for the specified categories of waters if jurisdiction is being asserted, as well as if jurisdiction is not being asserted.

**A. Information requirements.** To initiate the local-level coordination process, the Corps district shall provide the EPA region with the draft basis for jurisdiction (*e.g.*, approved JD form, memorandum for record, or similar document explaining the full basis and rationale for asserting or not asserting jurisdiction) and any maps, as well as any easily available electronic information. Transmittal of this package serves as the “notification of coordination.” Within three business days of notification, the EPA region may request, if warranted, all additional information relied upon to inform the draft approved JD, such as aerial or satellite imagery, site visit documentation, or other resources used to support the draft decision and rationale described on the draft basis for jurisdiction. The Corps district will make its best efforts to transmit the additional information as soon as possible after the request from the EPA region.

**B. Transmittal of information.** Both agencies will transmit all documents electronically in the most efficient manner (*e.g.*, via email). The date of the Corps’ notification of coordination to the EPA region initiates the time frames and deadlines described in section II.D below.

**C. Scope/level of EPA regional review.** The EPA region should review the information provided by the Corps district to ensure that the Corps’ draft basis for asserting or not asserting jurisdiction reflects the requirements outlined in the 2023 rule, as amended. The EPA region may need to independently review additional sources of information to complete a thorough evaluation of the application of the 2023 rule, as amended.

**D. Coordination process.<sup>3</sup>**

- 1.** The EPA region should notify the Corps district as soon as possible whether it intends to provide comments. If the EPA region has comments, it must provide those comments to the Corps district within 10 business days of the notification of coordination.
- 2.** Even if the EPA region does not have comments on a draft approved JD, the EPA region may still choose to elevate the draft approved JD within the 10 business day coordination period per the procedures in section III below to obtain HQ review or guidance. If the EPA region does not have comments and the region does not intend to elevate the draft approved JD to HQ, it should notify the Corps district as soon as possible. If the region does not provide comments and does not elevate the draft approved JD within the 10 business day coordination period or if the region notifies the district that it has no comments and does not intend to elevate the draft approved JD, the local-level coordination for the draft approved JD will be considered complete and the Corps district may finalize the approved JD.
- 3.** If the EPA region provides comments within the 10 business day local-level coordination period:
  - a.** The agencies must coordinate on matters of fact at the local level (region and district) and make every attempt to resolve any issues. When the EPA region transmits the comments to the Corps district, the EPA region may request a meeting to discuss comments with the Corps district. Any such meeting must be held within the 10 business day coordination period.
  - b.** After the initial coordination has occurred:
    - i.** Prior to the end of the 10 business day local-level coordination period, or within three business days of the transmittal of any comments from the EPA region or the meeting, whichever is later in time, the Corps district may notify the EPA region that it plans to reconsider the draft approved JD and is therefore withdrawing it from local-level coordination.<sup>4</sup>
    - ii.** Unless the Corps district provides the EPA region with the notification of its intent to reconsider the draft approved JD as specified in section II.D.3.b.i above, the Corps district must transmit a revised draft approved JD to the EPA region within three business days of the transmittal of the EPA region's comments or the meeting, whichever is later in time, or notify the EPA region that the Corps district does not intend to revise the draft approved JD.

**A)** Within three business days of transmittal of a revised draft approved JD or a notification by the Corps district of no intent to revise, the EPA region may notify the Corps district that its concerns have been addressed,

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<sup>3</sup> Day one is the first business day after notification.

<sup>4</sup> The Corps may choose to withdraw and re-coordinate a draft approved JD, for example, if EPA's comments result in the district deciding to complete a field site visit or contact the requestor for additional information, and such action cannot be completed during the original coordination period. The revised draft approved JD will be subject to the coordination procedures in this memorandum.

and the local-level coordination for the draft approved JD will be considered complete. This means the Corps district may proceed with finalizing the approved JD; or

**B)** Within three business days of transmittal of a revised draft approved JD or notification by the Corps district of no intent to revise, the EPA region may notify the Corps district that it is elevating the draft approved JD to the HQ level in accordance with section III below; or

**C)** If the EPA region does not provide any notification to the Corps as specified in A) or B) of this subsection within three business days of the transmittal of a revised draft approved JD or notification by the Corps district that it does not intend to revise the draft approved JD, the local-level coordination for the draft approved JD will be considered complete. This means the Corps may proceed with finalizing the approved JD.

**III. Specified Draft Approved Jurisdictional Determination Coordination Requirements: Headquarters-Level Joint Review of Draft Approved JDs.** If the draft approved JD for wetlands assessed under paragraph (a)(4) or waters assessed under paragraph (a)(5) of the 2023 rule, as amended, is elevated to the HQ level (to the chief level<sup>5</sup> or above) by an EPA region under section II.D, the EPA region should concurrently notify and transmit all relevant information described to both Corps HQ and EPA HQ.

**A.** Once information is transmitted, EPA HQ and Corps HQ shall have 10 business days to coordinate.<sup>6</sup> At any point during those 10 business days, EPA HQ and/or Corps HQ may request that the draft approved JD also be coordinated with relevant staff from the Office of the Assistant Secretary of the Army for Civil Works (OASACW). The requesting agency will notify and transmit the information to OASACW, who will then coordinate with EPA HQ on the draft approved JD, and the time period for additional HQ-level coordination will be five business days from notification by the requesting agency.<sup>7</sup>

**1.** If a mutual decision between EPA HQ and Corps HQ or OASACW is reached, EPA HQ and Corps HQ may issue a signed memorandum providing direction to all their respective regional and district offices. If a mutual decision between EPA HQ and OASACW is reached, EPA HQ and OASACW may issue a signed memorandum providing policy guidance to all their respective regional and district offices. Upon receipt of the jointly signed memorandum, the Corps district responsible for drafting the approved JD should determine what revisions are necessary and transmit to EPA HQ, Corps HQ and, if engaged, OASACW

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<sup>5</sup> “Chief level” refers to the Branch Chief responsible for geographic jurisdiction at EPA and the Corps Regulatory Chief.

<sup>6</sup> To facilitate effective coordination, time frames identified for this point of the elevation process through the end of section III.A can be modified if both parties mutually agree in writing for a specific elevated case. In such cases, Corps HQ shall inform the Corps district and EPA HQ shall inform the EPA region of any newly agreed upon time frames.

<sup>7</sup> Note that the language in the sub-sections below will refer to “Corps HQ or OASACW” to reflect that EPA will be coordinating either with Corps HQ or OASACW, depending on whether EPA and/or Corps HQ have submitted a request to OASACW.

a final draft approved JD and a memorandum describing how direction or guidance provided in the jointly signed memorandum was applied to the final draft approved JD.<sup>8</sup>

2. If a mutual decision between EPA HQ and Corps HQ or OASACW is not reached, EPA may issue a signed memorandum providing policy guidance that will be provided to all EPA regional and Corps district offices. Upon receipt of the signed memorandum, the Corps district responsible for drafting the approved JD should determine what revisions are necessary and transmit to EPA HQ, Corps HQ and, if engaged, OASACW a final draft approved JD and memorandum describing how guidance provided in the signed memorandum was applied to the final draft approved JD.

3. EPA HQ and the Corps HQ or OASACW will make best efforts to notify the Corps district as soon as possible if they do not intend to provide direction or policy guidance and the Corps district may finalize the draft approved JD. EPA HQ and the Corps HQ or OASACW may provide approved JDs that do not need further policy guidance to all EPA regional and Corps district offices for informational purposes. If neither EPA HQ nor the Corps HQ or OASACW notifies the Corps district that they intend to provide direction or policy guidance within the time period specified in section III.A (*i.e.*, 10 business days or the agreed upon timeframe as specified in footnote 8), the Corps district may finalize the draft approved JD.

**B.** EPA retains ultimate administrative authority to construe geographic jurisdiction<sup>9</sup> and EPA HQ may notify Corps HQ or OASACW that it plans to make a project-specific jurisdictional decision covered by the draft approved JD, and consistent with 33 CFR 325.9(b). As soon as possible, and no later than 10 business days of notice of a revised draft approved JD pursuant to section III.A.1 or section III.A.2, EPA HQ shall notify Corps HQ or OASACW and the Corps district if EPA intends to make a site-specific jurisdictional decision pursuant to this section. Site-specific determinations made by EPA pursuant to this section of this memorandum will be binding on the federal government and represent the government's position in any subsequent federal action or litigation regarding the determination. EPA HQ will distribute a copy of any determination to all EPA regions and all Corps districts. If EPA HQ does not provide any notification to Corps HQ or OASACW and the Corps district within 10 business days of notice of a revised draft approved JD pursuant to section III.A.1 or section III.A.2, the coordination for the draft approved JD will be considered complete. This means the Corps district may proceed with finalizing the approved JD.

**IV. Appeals.** A Corps district approved JD issued after consideration of HQ-level guidance received through the coordination process is an appealable action under 33 CFR 331 et seq. Any appeal can examine and question any matter or finding of fact, but the decision on appeal will not question or overturn any legal or policy guidance made by EPA HQ and/or Corps HQ or OASACW pursuant to this joint memorandum.

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<sup>8</sup> While this memorandum does not specify a period of time within which the district should submit the final draft approved JD and memorandum, the district should seek to submit the materials in a timely manner, generally within 90 calendar days unless there are extenuating circumstances.

<sup>9</sup> EPA retains ultimate administrative authority to construe the jurisdictional term "navigable waters." See Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act ("Civiletti Memorandum"), 43 Opp. Att'y Gen. 197 (1979).

V. This memorandum will remain in effect for nine months after the memorandum has been signed by all signatories. No later than 30 calendar days prior to the termination date of this memorandum, the agencies shall initiate a joint HQ-level review to reevaluate various requirements in this memorandum, assess implementation effectiveness, and consider the need for further coordination. This joint HQ-level review shall be completed prior to the termination date of this memorandum. This memorandum and its outlined expectations may only be modified or extended by written agreement of both signatory agencies.



Michael L. Connor  
Assistant Secretary of the  
Army (Civil Works)



Radhika Fox  
Assistant Administrator,  
(Office of Water)  
U.S. Environmental Protection Agency

(b)(5)



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(b)(5)



**From:** [Smith, Thomas Patrick SES USARMY USACE \(USA\)](#)  
**To:** [DLL-Division-&-Center-Commanders](#); [DLL-District & Battalion Commanders](#)  
**Cc:** [Spellmon, Scott A LTG USARMY CEHQ \(USA\)](#); [Graham, William H JR MG USARMY CEHQ \(USA\)](#); [Belk, Edward E Jr SES USARMY CEHQ \(USA\)](#); [Walker, William T Jr CIV USARMY CENAO \(USA\)](#); [Gaffneysmith, Margaret E CIV USARMY CEHQ \(USA\)](#); [Cooper, David R SES USARMY CEHQ \(USA\)](#); [Handura, James J COL USARMY CESP \(USA\)](#); [Perez, Pete G SES USARMY CEHQ \(USA\)](#); [Brown, Theodore A SES USARMY CEHQ \(USA\)](#); [Hill, Stephen L \(Steve\) SES USARMY CEHQ \(USA\)](#); [Bush, Eric L SES USARMY CEHQ \(USA\)](#); [DLL-MSD-Program-Directors](#); [Smith, Thomas Patrick SES USARMY USACE \(USA\)](#)  
**Subject:** (b)(5) USACE Implementation "Revised Definition of "Waters of the United States"; Conforming,"  
**Date:** Thursday, September 28, 2023 4:36:23 PM  
**Attachments:** [2023 Joint Coordination Memo - Pre-2015 Regulatory Regime September 2023.pdf](#)  
[2023 Joint Coordination Memo - Amended 2023 Rule September 2023.pdf](#)  
[WOTUS Overview Internal Training 9-26-23 Amended 2023 Rule.pptx](#)

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Commanders: earlier this week we received (b)(5) training materials on implementation of the Amended 2023 Rule, along with Joint EPA and Army/USACE Coordination Memorandums for approved jurisdictional determinations conducted under both the Amended 2023 Rule and the Pre-2015 Regulatory Regime. A few key points

- (b)(5)
- The Training slides and Coordination Memos are NOT TO BE RELEASED OUTSIDE USACE OR POSTED TO THE WEB UNTIL FURTHER NOTICE.
- USACE Regulatory intends to conduct additional USACE-internal implementation training through the Regulatory COP.
- USACE expects to receive updated training materials on the application of the Pre-2015 Regime which remains in place in 27 States.

It is important to work closely with your Regulatory Chiefs on the content of the Coordination Memos and the Training Slides. (b)(5)

Respectfully,

Tom

**Thomas P. Smith, PE, PMP, SES**  
**Chief, Operations and Regulatory**  
**NAD and LRD Regional Integration**  
**US Army Corps of Engineers**

(b)(6)

(b)(6)

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**From:** Smith, Thomas Patrick SES USARMY USACE (USA) <(b)(6)>  
**Date:** Wednesday, Sep 13, 2023 at 4:44 PM  
**To:** DLL-Division-&-Center-Commanders <(b)(6)> DLL-

District & Battalion Commanders (b)(6)

**Cc:** Spellmon, Scott A LTG USARMY CEHQ (USA) <(b)(6)> Graham, William H JR  
MG USARMY CEHQ (USA) <(b)(6)> Belk, Edward E Jr SES USARMY CEHQ (USA)  
<(b)(6)> Walker, William T Jr CIV USARMY CENAO (USA)  
<(b)(6)> Gaffneysmith, Margaret E CIV USARMY CEHQ (USA) <(b)(6)>  
<(b)(6)> Cooper, David R SES USARMY CEHQ (USA) <(b)(6)>  
Handura, James J COL USARMY CEHQ (USA) <(b)(6)> Perez, Pete G SES  
USARMY CEHQ (USA) <(b)(6)> Brown, Theodore A SES USARMY CEHQ (USA)  
<(b)(6)> Hill, Stephen L (Steve) SES USARMY CEHQ (USA)  
<(b)(6)> Bush, Eric L SES USARMY CEHQ (USA) <(b)(6)> DLL-  
MSC-Program-Directors <(b)(6)>

**Subject:** USACE Implementation "Revised Definition of 'Waters of the United States'; Conforming,"

Commanders: This email complements the discussion with LTG Spellmon earlier today regarding USACE implementation of the *"Revised Definition of 'Waters of the United States'; Conforming."* ([Federal Register :: Revised Definition of "Waters of the United States"; Conforming](#)). If you were able to join the discussion, you were reminded of the complexity and nuance to this implementation. I acknowledge the need for continuous communication with the field and updates based on new information when appropriate.

USACE HQ continues to engage with ASA(CW) and EPA on a draft coordination memo describing how EPA and Army/USACE will coordinate on draft approved jurisdictional determinations (AJDs) for wetlands. We expect a final coordination memo this week. The mechanism for coordination on jurisdictional determinations is familiar to the Regulatory Program, but will need additional attention in the initial stages of the implementation of the Conforming Rule. Coordination between USACE/Army and EPA will enable development of specific policy guidance based on applications from the public and draft determinations made in the field.

Tom Walker (Acting HQ Chief Regulatory) and MSC/District Regulatory Chiefs will continue to meet regularly to minimize challenges in implementation. Attached to this email are materials to assist in implementation.

- [WOTUS Public Webinar Briefing 12 SEP 2023](#). This briefing is an excellent summary of the history of the Clean Water Act and the changes made based on the Supreme Court decision on Sackett.
- [WOTUS Key Points 13 SEP 2023](#). Brief set of key points on the WOTUS effort and current status.
- [Updated USACE Implementation Briefing 13 SEP 2023](#). This briefing includes updated language that emphasizes USACE coordination of draft Approved Jurisdictional Determinations of wetlands with EPA.

Respectfully,

Tom

**Thomas P. Smith, PE, PMP, SES**  
**Chief, Operations and Regulatory**  
**NAD and LRD Regional Integration**  
**US Army Corps of Engineers**

(b)(6)

(b)(6)

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**From:** Smith, Thomas Patrick SES USARMY USACE (USA)

**Sent:** Wednesday, August 30, 2023 5:28 PM

**To:** DLL-Division-&-Center-Commanders <(b)(6)>

**Cc:** Spellmon, Scott A LTG USARMY CEHQ (USA) <(b)(6)> Graham,  
William H JR MG USARMY CEHQ (USA) <(b)(6)> Belk, Edward E Jr SES  
USARMY CEHQ (USA) <(b)(6)> Walker, William T Jr CIV USARMY CENAO  
(USA) <(b)(6)> Gaffneysmith, Margaret E CIV USARMY CEHQ (USA)  
<(b)(6)> Cooper, David R SES USARMY CEHQ (USA)  
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<(b)(6)> Perez, Pete G SES USARMY CEHQ (USA)  
<(b)(6)> Brown, Theodore A SES USARMY CEHQ (USA)  
<(b)(6)> Hill, Stephen L (Steve) SES USARMY CEHQ (USA)  
<(b)(6)> Bush, Eric L SES USARMY CEHQ (USA)  
<(b)(6)> DLL-MSC-Program-Directors <(b)(6)>

**Subject:** Amendment to the Revised Definition of 'Waters of the US'

**Commanders:**

On Tuesday August 29, 2023, the U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army (the agencies) announced a final rule amending the 2023 definition of “waters of the United States” to conform with the recent Supreme Court decision in *Sackett v. EPA*. The agencies are committed to following the law and implementing the Clean Water Act to deliver the essential protections that safeguard the nation’s waters from pollution and degradation. This action provides the clarity that is needed to advance these goals, while moving forward with infrastructure projects, economic opportunities, and agricultural activities.

More information about the final rule is available here -

<https://www.epa.gov/newsreleases/conform-recent-supreme-court-decision-epa-and-army-amend-waters-united-states-rule> .

The agencies will host a public webinar on September 12, 2023 to provide updates on the definition of “waters of the United States.” The agencies also plan to host listening sessions this fall with co-regulators and stakeholders, focusing on identifying issues that may arise outside this limited rule to conform the definition of “waters of

the United States” with the *Sackett v. EPA* decision.

Learn more about this action on [EPA’s “waters of the United States” website](#).

Tom Walker, Chief Regulatory at HQ USACE, will continue to share information and lead implementation discussions with the Regulatory Community of Practice.

Respectfully,

Tom

**Thomas P. Smith, PE, PMP, SES**  
**Chief, Operations and Regulatory**  
**NAD and LRD Regional Integration**  
**US Army Corps of Engineers**

(b)(6)

(b)(6)



September 27, 2023

**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)**

Subject: U.S. Department of the Army, U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency (EPA) Coordination of draft approved jurisdictional determinations under the “pre-2015 regulatory regime.”

**I. Purpose.** The purpose of this memorandum is to establish a process by which the Corps and EPA (“the agencies”) will coordinate on Clean Water Act (CWA) geographic jurisdictional matters to ensure accurate and consistent implementation of the pre-2015 regulatory regime where that regulatory regime is operative.<sup>1</sup> The “pre-2015 regulatory regime” refers to the agencies’ pre-2015 definition of “waters of the United States,”<sup>2</sup> implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience. The coordination procedures as outlined in the *SWANCC* Guidance (68 FR 1991, 1995 (January 15, 2003)) and the 2007 *Rapanos* Coordination Memorandum (available at <https://www.epa.gov/sites/default/files/2016-04/documents/rapanosmoa6507.pdf>), as amended by the 2008 Department of the Army Memorandum on *Rapanos* coordination (available at <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll5/id/1414>), are superseded by this coordination memorandum.

With respect to final determinations of the geographic jurisdictional scope of “waters of the United States” for purposes of CWA Section 404 that are not subject to this memorandum, this memorandum does not nullify or supersede the January 19, 1989 “Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of Geographic Jurisdiction and the Application of the Exemptions under Section 404(f) of the Clean Water Act” (1989 MOA), including its special case provisions,<sup>3</sup> nor does it supersede policy or individual

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<sup>1</sup> For more information about the operative definition of “waters of the United States” for specific geographic areas and parties in light of litigation, please visit <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>.

<sup>2</sup> The pre-2015 definition of “waters of the United States,” is also referred to as “the 1986 regulations,” inclusive of the exclusion for prior converted cropland, which both agencies added in 1993. *See* 33 CFR 328.3 (2014) and 40 CFR 230.3(s) (2014).

<sup>3</sup> Available at: <https://www.epa.gov/cwa-404/memorandum-agreement-determination-geographic-jurisdiction-section-404-program-and>.



permit elevations under the CWA Section 404(q) “Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency” (1992 404(q) MOA).<sup>4</sup>

Because the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard, and the agencies’ pre-2015 regulatory regime discussed the *Rapanos* plurality standard, the agencies will implement the pre-2015 regulations generally consistent with the pre-2015 regulatory regime’s approach to the plurality standard, including relevant case law and longstanding practice, as informed by applicable guidance, training, and experience. Under the pre-2015 regulatory regime, consistent with *Sackett*, the agencies will not assert jurisdiction based on the significant nexus standard, will not assert jurisdiction over interstate wetlands solely because they are interstate, will interpret “adjacent” to mean “having a continuous surface connection,” and will limit the scope of the (a)(3) provision to only relatively permanent lakes and ponds that do not meet one of the other jurisdictional categories. Approved jurisdictional determinations (JDs) are case-specific determinations based on the record, and factual questions or *Sackett* concerns may be raised in the context of a particular approved JD. With respect to final determinations of the geographic jurisdictional scope of “waters of the United States” for purposes of Section 404 that are not subject to this memorandum, Corps districts may choose to coordinate with EPA regions on draft approved JDs on a case-by-case basis and either the Corps districts or EPA regions may seek headquarters-level review or guidance on draft approved JDs at any time.

The procedures in this memorandum do not create any rights, either in substance or procedure, that are enforceable by any party. In addition, nothing in this memorandum is intended to diminish, modify, or otherwise affect statutory or regulatory authorities of either signatory agency. Furthermore, nothing in this memorandum is intended to affect the authority of a Tribe or State pursuant to an authorized CWA Section 401, 402, or 404 program, and nothing in this memorandum will be construed as indicating a financial commitment by the agencies for the expenditure of funds.

**II. Specified Draft Approved Jurisdictional Determination Coordination Requirements: Local Level Review of Draft Approved Jurisdictional Determinations.** All draft approved JDs assessing wetlands under paragraph (a)(7) and other waters under paragraph (a)(3) of the 1986 regulations shall be coordinated at the local level in accordance with the procedures in this memorandum. Such draft approved JDs may be elevated to the headquarters level of the agencies (HQ) under section II.D below. Draft approved JDs shall be coordinated for the previously specified categories of waters if jurisdiction is being asserted, as well as if jurisdiction is not being asserted.

**A. Information requirements.** To initiate the local-level coordination process, the Corps district shall provide the EPA region with the draft basis for jurisdiction (e.g., approved JD form, memorandum for record, or similar document explaining the full basis and rationale for asserting or not asserting jurisdiction) and any maps, as well as any easily available electronic information. Transmittal of this package serves as the “notification of coordination.” Within three business days of notification, the EPA region may request, if warranted, all additional information relied upon to inform the draft basis for jurisdiction, such as aerial or satellite imagery, site visit documentation, or other resources used to support the draft decision and rationale described on the draft basis for jurisdiction. The Corps district will make its best efforts to transmit the additional information as soon as possible after the request from the EPA region.

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<sup>4</sup> Available at: <https://www.epa.gov/cwa-404/cwa-404q-memorandum-agreement-resolving-disputes-1992>.

**B. *Transmittal of information.*** Both agencies will transmit all documents electronically in the most efficient manner (e.g., via email). The date of the Corps' notification of coordination to the EPA region initiates the time frames and deadlines described in section II.D below.

**C. *Scope/level of EPA regional review.*** The EPA region should review the information provided by the Corps district to ensure that the Corps' draft basis for asserting or not asserting jurisdiction reflects the requirements outlined in the pre-2015 regulatory regime. The EPA region may need to independently review additional sources of information to complete a thorough evaluation of the application of the pre-2015 regulatory regime.

**D. *Coordination process.***<sup>5</sup>

**1.** The EPA region should notify the Corps district as soon as possible whether it intends to provide comments. If the EPA region has comments, it must provide those comments to the Corps district within 10 business days of the notification of coordination.

**2.** Even if the EPA region does not have comments on a draft approved JD, the EPA region may still choose to elevate the draft approved JD within the 10 business day coordination period per the procedures in section III below to obtain HQ review or guidance. If the EPA region does not have comments and the region does not intend to elevate the draft approved JD to HQ, it should notify the Corps district as soon as possible. If the region does not provide comments and does not elevate the draft approved JD within the 10 business day coordination period, or if the region notifies the district that it has no comments and does not intend to elevate the draft approved JD, the local-level coordination for the draft approved JD will be considered complete and the Corps district may finalize the approved JD.

**3.** If the EPA region provides comments within the 10 business day local-level coordination period:

**a.** The agencies must coordinate on matters of fact at the local level (region and district) and make every attempt to resolve any issues. When the EPA region transmits the comments to the Corps district, the EPA region may request a meeting to discuss comments with the Corps district. Any such meeting must be held within the 10 business day coordination period.

**b.** After the initial coordination has occurred:

**i.** Prior to the end of the 10 business day local-level coordination period, or within three business days of the transmittal of any comments from the EPA region or the meeting, whichever is later in time, the Corps district may notify the EPA region that it plans to reconsider the draft approved JD and is therefore withdrawing it from local-level coordination.<sup>6</sup>

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<sup>5</sup> Day one is the first business day after notification.

<sup>6</sup> The Corps may choose to withdraw and re-coordinate a draft approved JD, for example, if EPA's comments result in the district deciding to complete a field site visit or contact the requestor for additional information, and such action cannot be completed during the original coordination period. The revised draft approved JD will be subject to the coordination procedures in this memorandum.

**ii.** Unless the Corps district provides the EPA region with the notification of its intent to reconsider the draft approved JD as specified in section II.D.3.b.i above, the Corps district must transmit a revised draft approved JD to the EPA region within three business days of the transmittal of the EPA region's comments or the meeting, whichever is later in time, or notify the EPA region that the Corps district does not intend to revise the draft approved JD.

**A)** Within three business days of transmittal of a revised draft approved JD or a notification by the Corps district of no intent to revise, the EPA region may notify the Corps district that its concerns have been addressed, and the local-level coordination for the draft approved JD will be considered complete. This means the Corps district may proceed with finalizing the approved JD; or

**B)** Within three business days of transmittal of a revised draft approved JD or notification by the Corps district of no intent to revise, the EPA region may notify the Corps district that it is elevating the draft approved JD to the HQ level in accordance with section III below; or

**C)** If the EPA region does not provide any notification to the Corps as specified in A) or B) of this subsection within three business days of the transmittal of a revised draft approved JD or notification by the Corps district that it does not intend to revise the draft approved JD, the local-level coordination for the draft approved JD will be considered complete. This means the Corps may proceed with finalizing the approved JD.

**III. Specified Draft Approved Jurisdictional Determination Coordination Requirements: Headquarters-Level Joint Review of Draft Approved JDs.** If the draft approved JD for wetlands assessed under paragraph (a)(7) or waters assessed under paragraph (a)(3) of the 1986 regulations is elevated to the HQ level (to the chief level<sup>7</sup> or above) by an EPA region under section II.D, the EPA region should concurrently notify and transmit all relevant information described to both Corps HQ and EPA HQ.

**A.** Once information is transmitted, EPA HQ and Corps HQ shall have 10 business days to coordinate.<sup>8</sup> At any point during those 10 business days, EPA HQ and/or Corps HQ may request that the draft approved JD also be coordinated with relevant staff from the Office of the Assistant Secretary of the Army for Civil Works (OASACW). The requesting agency will notify and transmit the information to OASACW, who will then coordinate with EPA HQ on the draft approved JD, and the time period for additional HQ-level coordination will be five business days from notification by the requesting agency.<sup>9</sup>

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<sup>7</sup> "Chief level" refers to the Branch Chief responsible for geographic jurisdiction at EPA and the Corps Regulatory Chief.

<sup>8</sup> To facilitate effective coordination, time frames identified for this point of the elevation process through the end of section III.A can be modified if both parties mutually agree in writing for a specific elevated case. In such cases, Corps HQ shall inform the Corps district and EPA HQ shall inform the EPA region of any newly agreed upon time frames.

<sup>9</sup> Note that the language in the sub-sections below will refer to "Corps HQ or OASACW" to reflect that EPA will be coordinating either with Corps HQ or OASACW, depending on whether EPA and/or Corps HQ have submitted a request to OASACW.

1. If a mutual decision between EPA HQ and Corps HQ or OASACW is reached, EPA HQ and Corps HQ may issue a signed memorandum providing direction to all their respective regional and district offices. If a mutual decision between EPA HQ and OASACW is reached, EPA HQ and OASACW may issue a signed memorandum providing policy guidance to all their respective regional and district offices. Upon receipt of the jointly signed memorandum, the Corps district responsible for drafting the approved JD should determine what revisions are necessary and transmit to EPA HQ, Corps HQ and, if engaged, OASACW a final draft approved JD and a memorandum describing how the direction or guidance provided in the jointly signed memorandum was applied to the final draft approved JD.<sup>10</sup>

2. If a mutual decision between EPA HQ and Corps HQ or OASACW is not reached, EPA may issue a signed memorandum providing policy guidance that will be provided to all EPA regional and Corps district offices. Upon receipt of the signed memorandum, the Corps district responsible for drafting the approved JD should determine what revisions are necessary and transmit to EPA HQ, Corps HQ and, if engaged, OASACW a final draft approved JD and memorandum describing how guidance provided in the signed memorandum was applied to the final draft approved JD.

3. EPA HQ and the Corps HQ or OASACW will make best efforts to notify the Corps district as soon as possible if they do not intend to provide direction or policy guidance and the Corps district may finalize the draft approved JD. EPA HQ and the Corps HQ or OASACW may provide approved JDs that do not need further policy guidance to all EPA regional and Corps district offices for informational purposes. If neither EPA HQ nor the Corps HQ or OASACW notifies the Corps district that they intend to provide direction or policy guidance within the time period specified in section III.A (*i.e.*, 10 business days or the agreed upon timeframe specified in footnote 8), the Corps district may finalize the draft approved JD.

**B.** EPA retains ultimate administrative authority to construe geographic jurisdiction<sup>11</sup> and EPA HQ may notify Corps HQ or OASACW that it plans to make a project-specific jurisdictional decision covered by the draft approved JD, and consistent with 33 CFR 325.9(b). As soon as possible, and no later than 10 business days of notice of a revised draft approved JD pursuant to section III.A.1 or section III.A.2, EPA HQ shall notify Corps HQ or OASACW and the Corps district if EPA intends to make a site-specific jurisdictional decision pursuant to this section. Site-specific determinations made by EPA pursuant to this section of this memorandum will be binding on the federal government and represent the government's position in any subsequent federal action or litigation regarding the determination. EPA HQ will distribute a copy of any determination to all EPA regions and all Corps districts. If EPA HQ does not provide any notification to Corps HQ or OASACW and the Corps district within 10 business days of notice of a revised draft approved JD pursuant to section III.A.1 or section III.A.2, the coordination for the draft approved JD will be considered complete. This means the Corps district may proceed with finalizing the approved JD.

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<sup>10</sup> While this memorandum does not specify a period of time within which the district should submit the final draft approved JD and memorandum, the district should seek to submit the materials in a timely manner, generally within 90 calendar days unless there are extenuating circumstances.

<sup>11</sup> EPA retains ultimate administrative authority to construe the jurisdictional term "navigable waters." *See* Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act ("Civiletti Memorandum"), 43 Opp. Att'y Gen. 197 (1979).

**IV. Appeals.** A Corps district approved JD issued after consideration of HQ-level guidance received through the coordination process is an appealable action under 33 CFR 331 et seq. Any appeal can examine and question any matter or finding of fact, but the decision on appeal will not question or overturn any legal or policy guidance made by EPA HQ and/or Corps HQ or OASACW pursuant to this joint memorandum.

**V.** This memorandum will remain in effect for nine months after the memorandum has been signed by all signatories. No later than 30 calendar days prior to the termination date of this memorandum, the agencies shall initiate a joint HQ-level review to reevaluate various requirements in this memorandum, assess implementation effectiveness, and consider the need for further coordination. This joint HQ-level review shall be completed prior to the termination date of this memorandum. This memorandum and its outlined expectations may only be modified or extended by written agreement of both signatory agencies.



Michael L. Connor  
Assistant Secretary of the  
Army (Civil Works)



Radhika Fox  
Assistant Administrator,  
(Office of Water)  
U.S. Environmental Protection Agency



September 27, 2023

**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)**

Subject: U.S. Department of the Army, U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency (EPA) Coordination of draft approved jurisdictional determinations under the “Revised Definition of ‘Waters of the United States,’” as amended by the final rule “Revised Definition of ‘Waters of the United States’; Conforming” (the 2023 rule, as amended, 33 CFR § 328.3; 40 CFR §120.2).

**I. Purpose.** The purpose of this memorandum is to establish a process by which the Corps and EPA (“the agencies”) will coordinate on Clean Water Act (CWA) geographic jurisdictional matters to ensure accurate and consistent implementation of the 2023 rule, as amended.

With respect to final determinations of the geographic jurisdictional scope of “waters of the United States” for purposes of CWA Section 404 that are not subject to this memorandum, this memorandum does not nullify or supersede the January 19, 1989 “Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of Geographic Jurisdiction and the Application of the Exemptions under Section 404(f) of the Clean Water Act” (1989 MOA), including its special case provisions,<sup>1</sup> nor does it supersede policy or individual permit elevations under the CWA Section 404(q) “Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency” (1992 404(q) MOA).<sup>2</sup>

Because the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard and the 2023 rule preamble discussed the *Rapanos* plurality standard, the implementation guidance and tools in the 2023 rule preamble that address the regulatory text that was not amended by the conforming rule, including the preamble relevant to the *Rapanos* plurality standard incorporated in paragraphs (a)(3), (4), and (5) of the 2023 rule, as amended, generally remain relevant to implementing the 2023 rule, as amended.

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<sup>1</sup> Available at: <https://www.epa.gov/cwa-404/memorandum-agreement-determination-geographic-jurisdiction-section-404-program-and>.

<sup>2</sup> For purposes of implementing the 2023 rule, as amended, the coordination procedures as outlined in the *SWANCC* Guidance (68 FR 1991, 1995 (January 15, 2003)) and the 2007 *Rapanos* Coordination Memorandum (available at <https://www.epa.gov/sites/default/files/2016-04/documents/rapanosmoa6507.pdf>), as amended by the 2008 Department of the Army Memorandum on *Rapanos* coordination (available at <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll5/id/1414>), are immaterial.



Approved jurisdictional determinations (JDs) are case-specific determinations based on the record and factual questions or *Sackett* concerns may be raised in the context of a particular approved JD. With respect to final determinations of the geographic jurisdictional scope of “waters of the United States” for purposes of Section 404 that are not subject to this memorandum, Corps districts may choose to coordinate with EPA regions on draft approved JDs on a case-by-case basis and either the Corps districts or EPA regions may seek headquarters-level review or guidance on draft approved JDs at any time.

The procedures in this memorandum do not create any rights, either in substance or procedure, that are enforceable by any party. In addition, nothing in this memorandum is intended to diminish, modify, or otherwise affect statutory or regulatory authorities of either signatory agency. Furthermore, nothing in this memorandum is intended to affect the authority of a Tribe or State pursuant to an authorized CWA Section 401, 402, or 404 program, and nothing in this memorandum will be construed as indicating a financial commitment by the agencies for the expenditure of funds.

**II. Specified Draft Approved Jurisdictional Determination Coordination Requirements: Local Level Review of Draft Approved Jurisdictional Determinations.** All draft approved JDs assessing wetlands under paragraph (a)(4) and waters under paragraph (a)(5) of the 2023 rule, as amended shall be coordinated at the local level in accordance with the procedures in this memorandum. Such draft approved JDs may be elevated to the headquarters level of the agencies (HQ) under section II.D below. Draft approved JDs shall be coordinated for the specified categories of waters if jurisdiction is being asserted, as well as if jurisdiction is not being asserted.

**A. Information requirements.** To initiate the local-level coordination process, the Corps district shall provide the EPA region with the draft basis for jurisdiction (*e.g.*, approved JD form, memorandum for record, or similar document explaining the full basis and rationale for asserting or not asserting jurisdiction) and any maps, as well as any easily available electronic information. Transmittal of this package serves as the “notification of coordination.” Within three business days of notification, the EPA region may request, if warranted, all additional information relied upon to inform the draft approved JD, such as aerial or satellite imagery, site visit documentation, or other resources used to support the draft decision and rationale described on the draft basis for jurisdiction. The Corps district will make its best efforts to transmit the additional information as soon as possible after the request from the EPA region.

**B. Transmittal of information.** Both agencies will transmit all documents electronically in the most efficient manner (*e.g.*, via email). The date of the Corps’ notification of coordination to the EPA region initiates the time frames and deadlines described in section II.D below.

**C. Scope/level of EPA regional review.** The EPA region should review the information provided by the Corps district to ensure that the Corps’ draft basis for asserting or not asserting jurisdiction reflects the requirements outlined in the 2023 rule, as amended. The EPA region may need to independently review additional sources of information to complete a thorough evaluation of the application of the 2023 rule, as amended.

#### **D. Coordination process.<sup>3</sup>**

- 1.** The EPA region should notify the Corps district as soon as possible whether it intends to provide comments. If the EPA region has comments, it must provide those comments to the Corps district within 10 business days of the notification of coordination.
- 2.** Even if the EPA region does not have comments on a draft approved JD, the EPA region may still choose to elevate the draft approved JD within the 10 business day coordination period per the procedures in section III below to obtain HQ review or guidance. If the EPA region does not have comments and the region does not intend to elevate the draft approved JD to HQ, it should notify the Corps district as soon as possible. If the region does not provide comments and does not elevate the draft approved JD within the 10 business day coordination period or if the region notifies the district that it has no comments and does not intend to elevate the draft approved JD, the local-level coordination for the draft approved JD will be considered complete and the Corps district may finalize the approved JD.
- 3.** If the EPA region provides comments within the 10 business day local-level coordination period:
  - a.** The agencies must coordinate on matters of fact at the local level (region and district) and make every attempt to resolve any issues. When the EPA region transmits the comments to the Corps district, the EPA region may request a meeting to discuss comments with the Corps district. Any such meeting must be held within the 10 business day coordination period.
  - b.** After the initial coordination has occurred:
    - i.** Prior to the end of the 10 business day local-level coordination period, or within three business days of the transmittal of any comments from the EPA region or the meeting, whichever is later in time, the Corps district may notify the EPA region that it plans to reconsider the draft approved JD and is therefore withdrawing it from local-level coordination.<sup>4</sup>
    - ii.** Unless the Corps district provides the EPA region with the notification of its intent to reconsider the draft approved JD as specified in section II.D.3.b.i above, the Corps district must transmit a revised draft approved JD to the EPA region within three business days of the transmittal of the EPA region's comments or the meeting, whichever is later in time, or notify the EPA region that the Corps district does not intend to revise the draft approved JD.

**A)** Within three business days of transmittal of a revised draft approved JD or a notification by the Corps district of no intent to revise, the EPA region may notify the Corps district that its concerns have been addressed,

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<sup>3</sup> Day one is the first business day after notification.

<sup>4</sup> The Corps may choose to withdraw and re-coordinate a draft approved JD, for example, if EPA's comments result in the district deciding to complete a field site visit or contact the requestor for additional information, and such action cannot be completed during the original coordination period. The revised draft approved JD will be subject to the coordination procedures in this memorandum.



and the local-level coordination for the draft approved JD will be considered complete. This means the Corps district may proceed with finalizing the approved JD; or

**B)** Within three business days of transmittal of a revised draft approved JD or notification by the Corps district of no intent to revise, the EPA region may notify the Corps district that it is elevating the draft approved JD to the HQ level in accordance with section III below; or

**C)** If the EPA region does not provide any notification to the Corps as specified in A) or B) of this subsection within three business days of the transmittal of a revised draft approved JD or notification by the Corps district that it does not intend to revise the draft approved JD, the local-level coordination for the draft approved JD will be considered complete. This means the Corps may proceed with finalizing the approved JD.

**III. Specified Draft Approved Jurisdictional Determination Coordination Requirements: Headquarters-Level Joint Review of Draft Approved JDs.** If the draft approved JD for wetlands assessed under paragraph (a)(4) or waters assessed under paragraph (a)(5) of the 2023 rule, as amended, is elevated to the HQ level (to the chief level<sup>5</sup> or above) by an EPA region under section II.D, the EPA region should concurrently notify and transmit all relevant information described to both Corps HQ and EPA HQ.

**A.** Once information is transmitted, EPA HQ and Corps HQ shall have 10 business days to coordinate.<sup>6</sup> At any point during those 10 business days, EPA HQ and/or Corps HQ may request that the draft approved JD also be coordinated with relevant staff from the Office of the Assistant Secretary of the Army for Civil Works (OASACW). The requesting agency will notify and transmit the information to OASACW, who will then coordinate with EPA HQ on the draft approved JD, and the time period for additional HQ-level coordination will be five business days from notification by the requesting agency.<sup>7</sup>

**1.** If a mutual decision between EPA HQ and Corps HQ or OASACW is reached, EPA HQ and Corps HQ may issue a signed memorandum providing direction to all their respective regional and district offices. If a mutual decision between EPA HQ and OASACW is reached, EPA HQ and OASACW may issue a signed memorandum providing policy guidance to all their respective regional and district offices. Upon receipt of the jointly signed memorandum, the Corps district responsible for drafting the approved JD should determine what revisions are necessary and transmit to EPA HQ, Corps HQ and, if engaged, OASACW

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<sup>5</sup> “Chief level” refers to the Branch Chief responsible for geographic jurisdiction at EPA and the Corps Regulatory Chief.

<sup>6</sup> To facilitate effective coordination, time frames identified for this point of the elevation process through the end of section III.A can be modified if both parties mutually agree in writing for a specific elevated case. In such cases, Corps HQ shall inform the Corps district and EPA HQ shall inform the EPA region of any newly agreed upon time frames.

<sup>7</sup> Note that the language in the sub-sections below will refer to “Corps HQ or OASACW” to reflect that EPA will be coordinating either with Corps HQ or OASACW, depending on whether EPA and/or Corps HQ have submitted a request to OASACW.

a final draft approved JD and a memorandum describing how direction or guidance provided in the jointly signed memorandum was applied to the final draft approved JD.<sup>8</sup>

2. If a mutual decision between EPA HQ and Corps HQ or OASACW is not reached, EPA may issue a signed memorandum providing policy guidance that will be provided to all EPA regional and Corps district offices. Upon receipt of the signed memorandum, the Corps district responsible for drafting the approved JD should determine what revisions are necessary and transmit to EPA HQ, Corps HQ and, if engaged, OASACW a final draft approved JD and memorandum describing how guidance provided in the signed memorandum was applied to the final draft approved JD.

3. EPA HQ and the Corps HQ or OASACW will make best efforts to notify the Corps district as soon as possible if they do not intend to provide direction or policy guidance and the Corps district may finalize the draft approved JD. EPA HQ and the Corps HQ or OASACW may provide approved JDs that do not need further policy guidance to all EPA regional and Corps district offices for informational purposes. If neither EPA HQ nor the Corps HQ or OASACW notifies the Corps district that they intend to provide direction or policy guidance within the time period specified in section III.A (*i.e.*, 10 business days or the agreed upon timeframe as specified in footnote 8), the Corps district may finalize the draft approved JD.

**B.** EPA retains ultimate administrative authority to construe geographic jurisdiction<sup>9</sup> and EPA HQ may notify Corps HQ or OASACW that it plans to make a project-specific jurisdictional decision covered by the draft approved JD, and consistent with 33 CFR 325.9(b). As soon as possible, and no later than 10 business days of notice of a revised draft approved JD pursuant to section III.A.1 or section III.A.2, EPA HQ shall notify Corps HQ or OASACW and the Corps district if EPA intends to make a site-specific jurisdictional decision pursuant to this section. Site-specific determinations made by EPA pursuant to this section of this memorandum will be binding on the federal government and represent the government's position in any subsequent federal action or litigation regarding the determination. EPA HQ will distribute a copy of any determination to all EPA regions and all Corps districts. If EPA HQ does not provide any notification to Corps HQ or OASACW and the Corps district within 10 business days of notice of a revised draft approved JD pursuant to section III.A.1 or section III.A.2, the coordination for the draft approved JD will be considered complete. This means the Corps district may proceed with finalizing the approved JD.

**IV. Appeals.** A Corps district approved JD issued after consideration of HQ-level guidance received through the coordination process is an appealable action under 33 CFR 331 et seq. Any appeal can examine and question any matter or finding of fact, but the decision on appeal will not question or overturn any legal or policy guidance made by EPA HQ and/or Corps HQ or OASACW pursuant to this joint memorandum.

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<sup>8</sup> While this memorandum does not specify a period of time within which the district should submit the final draft approved JD and memorandum, the district should seek to submit the materials in a timely manner, generally within 90 calendar days unless there are extenuating circumstances.

<sup>9</sup> EPA retains ultimate administrative authority to construe the jurisdictional term "navigable waters." *See* Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act ("Civiletti Memorandum"), 43 Opp. Att'y Gen. 197 (1979).

V. This memorandum will remain in effect for nine months after the memorandum has been signed by all signatories. No later than 30 calendar days prior to the termination date of this memorandum, the agencies shall initiate a joint HQ-level review to reevaluate various requirements in this memorandum, assess implementation effectiveness, and consider the need for further coordination. This joint HQ-level review shall be completed prior to the termination date of this memorandum. This memorandum and its outlined expectations may only be modified or extended by written agreement of both signatory agencies.



Michael L. Connor  
Assistant Secretary of the  
Army (Civil Works)



Radhika Fox  
Assistant Administrator,  
(Office of Water)  
U.S. Environmental Protection Agency











































































































































## Wilson, Matthew S CIV USARMY CEHQ (USA)

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**From:** Walker, William T Jr CIV USARMY CENAO (USA)  
**Sent:** Thursday, September 28, 2023 6:28 PM  
**To:** CDL-REG-DISTRICT-CHIEFS; CDL-REG-MS  
**Cc:** DLL-CECW-CO-R  
**Subject:** FW: (b)(5) USACE Implementation "Revised Definition of 'Waters of the United States'; Conforming,"

Chiefs and MSC PMs,

Forwarding this for awareness. This tracks with the information I provided you earlier today. I removed the attachments here as they were the exact ones on my e-mail.

Thanks  
Tom

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**From:** Smith, Thomas Patrick SES USARMY USACE (USA) (b)(6)  
**Sent:** Thursday, September 28, 2023 5:36 PM  
**To:** DLL-Division-&-Center-Commanders (b)(6); DLL-District & Battalion Commanders (b)(6)  
**Cc:** Spellmon, Scott A LTG USARMY CEHQ (USA) (b)(6); Graham, William H JR MG USARMY CEHQ (USA) (b)(6); Belk, Edward E Jr SES USARMY CEHQ (USA) (b)(6); Walker, William T Jr CIV USARMY CENAO (USA) (b)(6); Gaffneysmith, Margaret E CIV USARMY CEHQ (USA) (b)(6); Cooper, David R SES USARMY CEHQ (USA) (b)(6); Handura, James J COL USARMY CEHQ (USA) (b)(6); Perez, Pete G SES USARMY CEHQ (USA) (b)(6); Brown, Theodore A SES USARMY CEHQ (USA) (b)(6); Hill, Stephen L (Steve) SES USARMY CEHQ (USA) (b)(6); Bush, Eric L SES USARMY CEHQ (USA) (b)(6); DLL-MS-Program-Directors (b)(6); Smith, Thomas Patrick SES USARMY USACE (USA) (b)(6)  
**Subject:** EPA (b)(5) USACE Implementation "Revised Definition of 'Waters of the United States'; Conforming,"

Commanders: earlier this week we received (b)(5) training materials on implementation of the Amended 2023 Rule, along with Joint EPA and Army/USACE Coordination Memorandums for approved jurisdictional determinations conducted under both the Amended 2023 Rule and the Pre-2015 Regulatory Regime. A few key points

- (b)(5)
- The Training slides and Coordination Memos are NOT TO BE RELEASED OUTSIDE USACE OR POSTED TO THE WEB UNTIL FURTHER NOTICE.
- USACE Regulatory intends to conduct additional USACE-internal implementation training through the Regulatory COP.
- USACE expects to receive updated training materials on the application of the Pre-2015 Regime which remains in place in 27 States.

It is important to work closely with your Regulatory Chiefs on the content of the Coordination Memos and the Training Slides. (b)(5)

Respectfully,

Tom

**Thomas P. Smith, PE, PMP, SES**  
**Chief, Operations and Regulatory**  
**NAD and LRD Regional Integration**  
**US Army Corps of Engineers**

COE (b)(6)

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**From:** Smith, Thomas Patrick SES USARMY USACE (USA) COE (b)(6)  
**Date:** Wednesday, Sep 13, 2023 at 4:44 PM  
**To:** DLL-Division-&-Center-Commanders COE (b)(6), DLL-District & Battalion  
Commanders COE (b)(6)  
**Cc:** Spellmon, Scott A LTG USARMY CEHQ (USA) COE (b)(6) Graham, William H JR MG USARMY  
CEHQ (USA) COE (b)(6) Belk, Edward E Jr SES USARMY CEHQ (USA)  
COE (b)(6) Walker, William T Jr CIV USARMY CENAO (USA) COE (b)(6)  
Gaffneysmith, Margaret E CIV USARMY CEHQ (USA) COE (b)(6), Cooper, David R SES USARMY  
CEHQ (USA) COE (b)(6) Handura, James J COL USARMY CEHQ (USA)  
COE (b)(6) Perez, Pete G SES USARMY CEHQ (USA) COE (b)(6) Brown,  
Theodore A SES USARMY CEHQ (USA) COE (b)(6) Hill, Stephen L (Steve) SES USARMY CEHQ (USA)  
COE (b)(6) Bush, Eric L SES USARMY CEHQ (USA) COE (b)(6) DLL-MSD-Program-  
Directors COE (b)(6)  
**Subject:** USACE Implementation "Revised Definition of 'Waters of the United States'; Conforming,"

Commanders: This email complements the discussion with LTG Spellmon earlier today regarding USACE implementation of the *"Revised Definition of 'Waters of the United States'; Conforming."* ([Federal Register :: Revised Definition of "Waters of the United States"; Conforming](#)). If you were able to join the discussion, you were reminded of the complexity and nuance to this implementation. I acknowledge the need for continuous communication with the field and updates based on new information when appropriate.

USACE HQ continues to engage with ASA(CW) and EPA on a draft coordination memo describing how EPA and Army/USACE will coordinate on draft approved jurisdictional determinations (AJDs) for wetlands. We expect a final coordination memo this week. The mechanism for coordination on jurisdictional determinations is familiar to the Regulatory Program, but will need additional attention in the initial stages of the implementation of the Conforming Rule. Coordination between USACE/Army and EPA will enable development of specific policy guidance based on applications from the public and draft determinations made in the field.

Tom Walker (Acting HQ Chief Regulatory) and MSC/District Regulatory Chiefs will continue to meet regularly to minimize challenges in implementation. Attached to this email are materials to assist in implementation.

- WOTUS Public Webinar Briefing 12 SEP 2023. This briefing is an excellent summary of the history of the Clean Water Act and the changes made based on the Supreme Court decision on Sackett.
- WOTUS Key Points 13 SEP 2023. Brief set of key points on the WOTUS effort and current status.
- Updated USACE Implementation Briefing 13 SEP 2023. This briefing includes updated language that emphasizes USACE coordination of draft Approved Jurisdictional Determinations of wetlands with EPA.

Respectfully,

Tom

**Thomas P. Smith, PE, PMP, SES**  
**Chief, Operations and Regulatory**  
**NAD and LRD Regional Integration**  
**US Army Corps of Engineers**  
 COE (b)(6)

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**From:** Smith, Thomas Patrick SES USARMY USACE (USA)

**Sent:** Wednesday, August 30, 2023 5:28 PM

**To:** DLL-Division-&-Center-Commanders

**Cc:** Spellmon, Scott A LTG USARMY CEHQ (USA)

USARMY CEHQ (USA)

COE (b)(6)

Gaffneysmith, Margaret E CIV USARMY CEHQ (USA)

USARMY CEHQ (USA)

COE (b)(6)

Theodore A SES USARMY CEHQ (USA)

(USA) COE (b)(6)

Program-Directors

**Subject:** Amendment to the Revised Definition of 'Waters of the US'

Commanders:

On Tuesday August 29, 2023, the U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army (the agencies) announced a final rule amending the 2023 definition of “waters of the United States” to conform with the recent Supreme Court decision in *Sackett v. EPA*. The agencies are committed to following the law and implementing the Clean Water Act to deliver the essential protections that safeguard the nation’s waters from pollution and degradation. This action provides the clarity that is needed to advance these goals, while moving forward with infrastructure projects, economic opportunities, and agricultural activities.

More information about the final rule is available here - <https://www.epa.gov/newsreleases/conform-recent-supreme-court-decision-epa-and-army-amend-waters-united-states-rule> .

The agencies will host a public webinar on September 12, 2023 to provide updates on the definition of “waters of the United States.” The agencies also plan to host listening sessions this fall with co-

regulators and stakeholders, focusing on identifying issues that may arise outside this limited rule to conform the definition of “waters of the United States” with the *Sackett v. EPA* decision.

Learn more about this action on [EPA’s “waters of the United States” website](#).

Tom Walker, Chief Regulatory at HQ USACE, will continue to share information and lead implementation discussions with the Regulatory Community of Practice.

Respectfully,

Tom

**Thomas P. Smith, PE, PMP, SES**  
**Chief, Operations and Regulatory**  
**NAD and LRD Regional Integration**  
**US Army Corps of Engineers**

COE (b)(6)



## Hoja informativa de la Norma final: Modificación a la definición de «Aguas de los Estados Unidos»

Agosto, 2023



### Descripción general

El 29 de agosto de 2023, la Agencia de Protección Ambiental de los Estados Unidos (EPA, por sus siglas en inglés) y el Departamento del Ejército de los Estados Unidos (las Agencias) promulgaron una norma final que deroga la definición de 2023 de «Aguas de los Estados Unidos».<sup>1</sup> Esta reforma se ajusta a la decisión del Tribunal Supremo de los Estados Unidos del 25 de mayo de 2023 en el caso *Sackett contra la Agencia de Protección Ambiental* (566 U.S. 120). Si bien la norma de 2023 de la EPA y el Ejército que definió las «Aguas de los Estados Unidos» no fue cuestionada específicamente ante el Tribunal Supremo, la decisión del caso *Sackett* invalidó claramente ciertos aspectos de la norma de 2023. Por lo tanto, las agencias modificaron componentes claves del texto regulatorio para ajustarlo a la decisión del Tribunal Supremo. La norma final brinda claridad para proteger las aguas de nuestra nación de acuerdo con la decisión del Tribunal Supremo mientras que permite el avance de proyectos de infraestructura, oportunidades económicas y actividades agrícolas.

### Cambios en las categorías y definiciones de «Aguas de los Estados Unidos»<sup>2</sup>

Esta enmienda por las Agencias modifica las partes de la definición de 2023 de «Aguas de los Estados Unidos» que no son válidas bajo la decisión del caso *Sackett*. Por ejemplo, la norma elimina consideración de la “prueba del nexo significativo” para identificar afluentes y otras aguas protegidas a nivel federal. También se modifica la “prueba de adyacencia” para identificar humedales bajo jurisdicción federal, se aclara que los humedales interestatales no entran en la categoría de aguas interestatales, y se aclaran los tipos de características que pueden tenerse en cuenta en la categoría de «aguas adicionales».

#### **Cambios realizados por las Agencias en las definiciones de la Norma de enero de 2023:**

Categoría jurisdiccional	Cambios claves en el texto regulatorio de la Norma de enero de 2023	Párrafo del texto regulatorio
Aguas tradicionalmente navegables	Sin cambios	(a)(1)
Aguas territoriales	Sin cambios	(a)(1)
Aguas interestatales	Eliminación de humedales interestatales del texto de los artículos sobre aguas interestatales	(a)(1)
Embalses	Sin cambios	(a)(2)
Afluentes	Eliminación del estándar de nexo significativo	(a)(3)

<sup>1</sup> La definición corregida de la norma de las «Aguas de los Estados Unidos» publicada en el Registro Federal el 18 de enero de 2023.

<sup>2</sup> La tabla es incluida con fines informativos; La norma establece los requisitos detallados que definen las «Aguas de los Estados Unidos».

Categoría jurisdiccional	Cambios claves en el texto regulatorio de la Norma de enero de 2023	Párrafo del texto regulatorio
Humedales adyacentes	Eliminación del estándar de nexo significativo	(a)(4)
Aguas adicionales	Eliminación del estándar de nexo significativo; eliminación de los humedales y los arroyos del texto de los artículos	(a)(5)

***Cambios realizados por las Agencias a las definiciones de la Norma de enero de 2023:***

Definición	Cambios claves en el texto regulatorio de la Norma de enero de 2023	Párrafo del texto regulatorio
Humedales	Sin cambios	(c)(1)
Adyacente	Definición corregida para significar «que tiene una conexión continua en la superficie».	(c)(2)
Nivel de marea alta	Sin cambios	(c)(3)
Nivel máximo regular del agua	Sin cambios	(c)(4)
Mareas	Sin cambios	(c)(5)
Afectan significativamente	Definición eliminada	(c)(6)

## Sin cambios en las exclusiones de las «Aguas de Estados Unidos»

La modificación en la norma de enero de 2023 no cambia las ocho exclusiones de la definición de «Aguas de los Estados Unidos» que brindan claridad, coherencia y certeza. **Las exclusiones son las siguientes:**

- **Tierras de cultivo convertidas previamente**, se adopta la definición del Departamento de Agricultura de los Estados Unidos (USDA, por sus siglas en inglés) y, en general, se excluyen los humedales que se convirtieron en tierras de cultivo antes del 23 de diciembre de 1985.
- **Sistemas de tratamiento de residuos**, incluidos los estanques o lagunas de tratamiento cuyo diseño cumple con los requisitos de la Ley de Agua Limpia.
- **Zanjas** (incluidas las zanjas al borde de las carreteras), excavadas totalmente y drenando solamente en tierra firme y que no transportan un flujo de agua relativamente permanente.
- **Áreas con regadío artificial**, que se convertirían nuevamente en tierra firme al detener el riego.
- **Lagos o estanques artificiales**, creados mediante la excavación o construcción de diques en tierra firme que se utilizan exclusivamente para fines como provisión de agua para el ganado, riego, cuencas de sedimentación, o cultivo de arroz.
- **Estanques reflectantes o albercas**, y otras masas de agua ornamentales pequeñas creadas mediante excavación o construcción de diques en tierra firme.
- **Depresiones inundadas**, creadas en tierra firme de modo auxiliar a actividades de construcción y pozos excavados en tierra firme con el fin de obtener relleno, arena, o grava, a menos que la operación de construcción se abandone y la masa de agua resultante cumpla con la definición de «Aguas de los Estados Unidos», o hasta que esto suceda.

- **Canales y depresiones creadas por erosión** (p. ej., barrancos, arroyuelos), que se caracterizan por tener un volumen bajo, por ser poco frecuentes o por tener un caudal de corta duración.

Además, la definición modificada por las Agencias de «Aguas de Estados los Unidos» no afecta a las exenciones de permisos otorgados en base a actividades específicas que la Ley de Agua Limpia brinda a la comunidad agrícola.

### **Para obtener más información**

Encontrará más información en el [sitio web de Aguas de los Estados Unidos de la EPA](#).

(b)(5)





(b)(5)



(b)(5)



(b)(5)



(b)(5)



(b)(5)



(b)(5)



(b)(5)



(b)(5)





**From:** [Wilson, Matthew S CIV USARMY CEHQ \(USA\)](#)  
**To:** [CDL-REG-All](#)  
**Cc:** [Wilson, John Maxwell \(Max\) CIV USARMY CEHQ \(USA\)](#); [Inkelas, Daniel CIV USARMY CEHQ \(USA\)](#); [Zilioli, Erica M CIV USARMY CEHQ \(USA\)](#); [Wood, Lance D CIV USARMY CEHQ \(USA\)](#)  
**Subject:** WOTUS Implementation: Jurisdiction SharePoint Updates, New Coordination Memo Templates/Inboxes, and Update to Web Posting Procedures  
**Date:** Thursday, October 5, 2023 7:34:55 AM  
**Attachments:** [2023 Joint Coordination Memo - Amended 2023 Rule September 2023.pdf](#)  
[2023 Joint Coordination Memo - Pre-2015 Regulatory Regime September 2023.pdf](#)  
[Post-Sackett JD Coordination Inboxes-3OCT23.pdf](#)  
[AJD Coordination Request \(Amended 2023 Rule\) Template-3OCT23.docx](#)  
[AJD Coordination Request \(Pre-2015 Regime+Sackett\) Template-3OCT23.docx](#)  
[Instructions for Redacting Sensitive Content in Adobe.pdf](#)

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Regulators,

Thank you for your continued patience as we navigate the early stages of implementation of “waters of the United States” (WOTUS) following the Supreme Court’s decision in the case of *Sackett v. Environmental Protection Agency*.

Below are updates on three aspects relating to our implementation of WOTUS: Updates to the HQ Jurisdiction SharePoint, JD Coordination, and Requirements for Web Posting of Final Approved JDs.

### **HQ Jurisdiction SharePoint Updates:**

HQ is updating our Jurisdiction SharePoint page, which is located at:

(b)(5)

For the time being, we are retaining for historical purposes on the Jurisdiction SharePoint the sub-topics for the previous WOTUS Rules/Regimes that are no longer in effect (e.g., 2006 – Rapanos, 2015 – Clean Water Rule, 2020 – NWPR, 2021 – Pre-2015 Regime, and 2023 – January 2023 Rule).

To support our current implementation of WOTUS, two new sub-topics have been added to the HQ Jurisdiction SharePoint. Information relating to our implementation of the 2023 Rule (as amended) will be posted under the sub-heading named, “2023.08 – 2023 Rule, as amended” and information relating to our implementation of the pre-2015 regime + *Sackett* will be posted under the sub-heading named, “2023.08 – Pre-2015 Regime Post-Sackett.”

HQ will continue to update the HQ Jurisdiction SharePoint page as additional implementation and training materials become available.

### **New JD Coordination Templates & Inboxes:**

On 27 September 2023 the agencies issued two new coordination memos that establish requirements that USACE districts coordinate with EPA certain draft approved jurisdictional determinations (AJDs). One of the coordination memos establishes requirements for coordination of certain draft AJDs under the 2023 Rule (as amended by the conforming rule) and the other coordination memo establishes requirements for coordination of certain draft AJDs under the pre-2015 regime + *Sackett*. These two new coordination memos were transmitted to you by Tom Walker on 28 September 2023, and are attached here again for your reference.

As mentioned in Tom Walker’s 28 September email, these two coordination memos are fully in effect. For those draft AJDs that have been coordinated with HQ Regulatory between 8 September and today, please do not coordinate the draft AJD per the new coordination memo procedures until you receive input from HQ-Regulatory. For all other draft AJDs, please follow the coordination procedures in the new applicable coordination memo. The memos will be posted to the HQ Jurisdiction SharePoint and to the HQ webpage later this week.

Under the new coordination memos, coordination of draft AJDs is required for the following types of draft AJDs:

Amended 2023 Rule:

1. All draft approved JDs assessing wetlands under paragraph (a)(4) and waters under paragraph (a)(5) of the 2023 rule, as amended, shall be coordinated in accordance with the procedures in the coordination memo. Such draft approved JDs shall be coordinated if jurisdiction is being asserted, as well as if jurisdiction is not being asserted.
2. Corps districts may choose to coordinate with EPA regions on draft approved JDs on a case-by-case basis and either the Corps districts or EPA regions may seek headquarters-level review or guidance on draft approved JDs at any time.

Pre-2015 Regime + Sackett:

1. All draft approved JDs assessing wetlands under paragraph (a)(7) and other waters under paragraph (a)(3) of the 1986 regulations shall be coordinated in accordance with the procedures in the coordination memo. Such draft approved JDs shall be coordinated if jurisdiction is being asserted, as well as if jurisdiction is not being asserted.
2. Corps districts may choose to coordinate with EPA regions on draft approved JDs on a case-by-case basis and either the Corps districts or EPA regions may seek headquarters-level review or guidance on draft approved JDs at any time.

(b) (5)



Coordination Inboxes and Email Templates:

EPA has provided points of contact for each EPA Region that should be used to facilitate the coordination. The current regional POCs/general inboxes for AJD coordination are attached to this email.

Headquarters has developed JD coordination template emails that can be used to coordinate draft

AJDs as required by the memos. Use of the template emails is not required but is encouraged. The JD coordination template emails are attached here for your use. One JD coordination template email is for coordination of draft AJDs under the Amended 2023 Rule and the other JD coordination template email is for coordination of draft AJDs under the pre-2015 regime. The updated coordination inboxes and template coordination emails have also been posted to the applicable sub-topic on the HQ Jurisdiction SharePoint.

**Changes to Requirements for Web Posting of AJDs:**

(b) (5)

Instead, districts should post the AJD response letter that we provide to the requestor, along with any location map(s) and the final JD map(s) that show the lateral limits of the aquatic resources and/or features that were evaluated in the AJD.

The name and address information on the AJD response letter should be redacted before the letter is posted to the web.

Instructions for redacting information from a PDF document are attached and also are available at: <https://helpx.adobe.com/acrobat/using/removing-sensitive-content-pdfs.html>.

The JD response letter (with the requestor's name and address redacted) and the JD maps should be combined into a single PDF document to facilitate easy access by members of the public.

Even though the basis MFRs will not be posted, the basis MFRs should continue to be provided to the requestor along with the AJD.

HQ will continue to provide additional implementation information and tools as they become available.

Thank you for your continued patience as we make this transition.

Please contact me if you have any questions.

Matt

Matt Wilson  
Regulatory Program Manager  
Headquarters, U.S. Army Corps of Engineers  
441 G Street NW  
Washington, DC 20314-1000

COE (b)(6)



September 27, 2023

**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)**

Subject: U.S. Department of the Army, U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency (EPA) Coordination of draft approved jurisdictional determinations under the “Revised Definition of ‘Waters of the United States,’” as amended by the final rule “Revised Definition of ‘Waters of the United States’; Conforming” (the 2023 rule, as amended, 33 CFR § 328.3; 40 CFR §120.2).

**I. Purpose.** The purpose of this memorandum is to establish a process by which the Corps and EPA (“the agencies”) will coordinate on Clean Water Act (CWA) geographic jurisdictional matters to ensure accurate and consistent implementation of the 2023 rule, as amended.

With respect to final determinations of the geographic jurisdictional scope of “waters of the United States” for purposes of CWA Section 404 that are not subject to this memorandum, this memorandum does not nullify or supersede the January 19, 1989 “Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of Geographic Jurisdiction and the Application of the Exemptions under Section 404(f) of the Clean Water Act” (1989 MOA), including its special case provisions,<sup>1</sup> nor does it supersede policy or individual permit elevations under the CWA Section 404(q) “Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency” (1992 404(q) MOA).<sup>2</sup>

Because the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard and the 2023 rule preamble discussed the *Rapanos* plurality standard, the implementation guidance and tools in the 2023 rule preamble that address the regulatory text that was not amended by the conforming rule, including the preamble relevant to the *Rapanos* plurality standard incorporated in paragraphs (a)(3), (4), and (5) of the 2023 rule, as amended, generally remain relevant to implementing the 2023 rule, as amended.

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<sup>1</sup> Available at: <https://www.epa.gov/cwa-404/memorandum-agreement-determination-geographic-jurisdiction-section-404-program-and>.

<sup>2</sup> For purposes of implementing the 2023 rule, as amended, the coordination procedures as outlined in the *SWANCC* Guidance (68 FR 1991, 1995 (January 15, 2003)) and the 2007 *Rapanos* Coordination Memorandum (available at <https://www.epa.gov/sites/default/files/2016-04/documents/rapanosmoa6507.pdf>), as amended by the 2008 Department of the Army Memorandum on *Rapanos* coordination (available at <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll5/id/1414>), are immaterial.

Approved jurisdictional determinations (JDs) are case-specific determinations based on the record and factual questions or *Sackett* concerns may be raised in the context of a particular approved JD. With respect to final determinations of the geographic jurisdictional scope of “waters of the United States” for purposes of Section 404 that are not subject to this memorandum, Corps districts may choose to coordinate with EPA regions on draft approved JDs on a case-by-case basis and either the Corps districts or EPA regions may seek headquarters-level review or guidance on draft approved JDs at any time.

The procedures in this memorandum do not create any rights, either in substance or procedure, that are enforceable by any party. In addition, nothing in this memorandum is intended to diminish, modify, or otherwise affect statutory or regulatory authorities of either signatory agency. Furthermore, nothing in this memorandum is intended to affect the authority of a Tribe or State pursuant to an authorized CWA Section 401, 402, or 404 program, and nothing in this memorandum will be construed as indicating a financial commitment by the agencies for the expenditure of funds.

**II. Specified Draft Approved Jurisdictional Determination Coordination Requirements: Local Level Review of Draft Approved Jurisdictional Determinations.** All draft approved JDs assessing wetlands under paragraph (a)(4) and waters under paragraph (a)(5) of the 2023 rule, as amended shall be coordinated at the local level in accordance with the procedures in this memorandum. Such draft approved JDs may be elevated to the headquarters level of the agencies (HQ) under section II.D below. Draft approved JDs shall be coordinated for the specified categories of waters if jurisdiction is being asserted, as well as if jurisdiction is not being asserted.

**A. Information requirements.** To initiate the local-level coordination process, the Corps district shall provide the EPA region with the draft basis for jurisdiction (*e.g.*, approved JD form, memorandum for record, or similar document explaining the full basis and rationale for asserting or not asserting jurisdiction) and any maps, as well as any easily available electronic information. Transmittal of this package serves as the “notification of coordination.” Within three business days of notification, the EPA region may request, if warranted, all additional information relied upon to inform the draft approved JD, such as aerial or satellite imagery, site visit documentation, or other resources used to support the draft decision and rationale described on the draft basis for jurisdiction. The Corps district will make its best efforts to transmit the additional information as soon as possible after the request from the EPA region.

**B. Transmittal of information.** Both agencies will transmit all documents electronically in the most efficient manner (*e.g.*, via email). The date of the Corps’ notification of coordination to the EPA region initiates the time frames and deadlines described in section II.D below.

**C. Scope/level of EPA regional review.** The EPA region should review the information provided by the Corps district to ensure that the Corps’ draft basis for asserting or not asserting jurisdiction reflects the requirements outlined in the 2023 rule, as amended. The EPA region may need to independently review additional sources of information to complete a thorough evaluation of the application of the 2023 rule, as amended.

**D. Coordination process.<sup>3</sup>**

- 1.** The EPA region should notify the Corps district as soon as possible whether it intends to provide comments. If the EPA region has comments, it must provide those comments to the Corps district within 10 business days of the notification of coordination.
- 2.** Even if the EPA region does not have comments on a draft approved JD, the EPA region may still choose to elevate the draft approved JD within the 10 business day coordination period per the procedures in section III below to obtain HQ review or guidance. If the EPA region does not have comments and the region does not intend to elevate the draft approved JD to HQ, it should notify the Corps district as soon as possible. If the region does not provide comments and does not elevate the draft approved JD within the 10 business day coordination period or if the region notifies the district that it has no comments and does not intend to elevate the draft approved JD, the local-level coordination for the draft approved JD will be considered complete and the Corps district may finalize the approved JD.
- 3.** If the EPA region provides comments within the 10 business day local-level coordination period:
  - a.** The agencies must coordinate on matters of fact at the local level (region and district) and make every attempt to resolve any issues. When the EPA region transmits the comments to the Corps district, the EPA region may request a meeting to discuss comments with the Corps district. Any such meeting must be held within the 10 business day coordination period.
  - b.** After the initial coordination has occurred:
    - i.** Prior to the end of the 10 business day local-level coordination period, or within three business days of the transmittal of any comments from the EPA region or the meeting, whichever is later in time, the Corps district may notify the EPA region that it plans to reconsider the draft approved JD and is therefore withdrawing it from local-level coordination.<sup>4</sup>
    - ii.** Unless the Corps district provides the EPA region with the notification of its intent to reconsider the draft approved JD as specified in section II.D.3.b.i above, the Corps district must transmit a revised draft approved JD to the EPA region within three business days of the transmittal of the EPA region's comments or the meeting, whichever is later in time, or notify the EPA region that the Corps district does not intend to revise the draft approved JD.

**A)** Within three business days of transmittal of a revised draft approved JD or a notification by the Corps district of no intent to revise, the EPA region may notify the Corps district that its concerns have been addressed,

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<sup>3</sup> Day one is the first business day after notification.

<sup>4</sup> The Corps may choose to withdraw and re-coordinate a draft approved JD, for example, if EPA's comments result in the district deciding to complete a field site visit or contact the requestor for additional information, and such action cannot be completed during the original coordination period. The revised draft approved JD will be subject to the coordination procedures in this memorandum.

and the local-level coordination for the draft approved JD will be considered complete. This means the Corps district may proceed with finalizing the approved JD; or

**B)** Within three business days of transmittal of a revised draft approved JD or notification by the Corps district of no intent to revise, the EPA region may notify the Corps district that it is elevating the draft approved JD to the HQ level in accordance with section III below; or

**C)** If the EPA region does not provide any notification to the Corps as specified in A) or B) of this subsection within three business days of the transmittal of a revised draft approved JD or notification by the Corps district that it does not intend to revise the draft approved JD, the local-level coordination for the draft approved JD will be considered complete. This means the Corps may proceed with finalizing the approved JD.

**III. Specified Draft Approved Jurisdictional Determination Coordination Requirements: Headquarters-Level Joint Review of Draft Approved JDs.** If the draft approved JD for wetlands assessed under paragraph (a)(4) or waters assessed under paragraph (a)(5) of the 2023 rule, as amended, is elevated to the HQ level (to the chief level<sup>5</sup> or above) by an EPA region under section II.D, the EPA region should concurrently notify and transmit all relevant information described to both Corps HQ and EPA HQ.

**A.** Once information is transmitted, EPA HQ and Corps HQ shall have 10 business days to coordinate.<sup>6</sup> At any point during those 10 business days, EPA HQ and/or Corps HQ may request that the draft approved JD also be coordinated with relevant staff from the Office of the Assistant Secretary of the Army for Civil Works (OASACW). The requesting agency will notify and transmit the information to OASACW, who will then coordinate with EPA HQ on the draft approved JD, and the time period for additional HQ-level coordination will be five business days from notification by the requesting agency.<sup>7</sup>

**1.** If a mutual decision between EPA HQ and Corps HQ or OASACW is reached, EPA HQ and Corps HQ may issue a signed memorandum providing direction to all their respective regional and district offices. If a mutual decision between EPA HQ and OASACW is reached, EPA HQ and OASACW may issue a signed memorandum providing policy guidance to all their respective regional and district offices. Upon receipt of the jointly signed memorandum, the Corps district responsible for drafting the approved JD should determine what revisions are necessary and transmit to EPA HQ, Corps HQ and, if engaged, OASACW

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<sup>5</sup> “Chief level” refers to the Branch Chief responsible for geographic jurisdiction at EPA and the Corps Regulatory Chief.

<sup>6</sup> To facilitate effective coordination, time frames identified for this point of the elevation process through the end of section III.A can be modified if both parties mutually agree in writing for a specific elevated case. In such cases, Corps HQ shall inform the Corps district and EPA HQ shall inform the EPA region of any newly agreed upon time frames.

<sup>7</sup> Note that the language in the sub-sections below will refer to “Corps HQ or OASACW” to reflect that EPA will be coordinating either with Corps HQ or OASACW, depending on whether EPA and/or Corps HQ have submitted a request to OASACW.



a final draft approved JD and a memorandum describing how direction or guidance provided in the jointly signed memorandum was applied to the final draft approved JD.<sup>8</sup>

2. If a mutual decision between EPA HQ and Corps HQ or OASACW is not reached, EPA may issue a signed memorandum providing policy guidance that will be provided to all EPA regional and Corps district offices. Upon receipt of the signed memorandum, the Corps district responsible for drafting the approved JD should determine what revisions are necessary and transmit to EPA HQ, Corps HQ and, if engaged, OASACW a final draft approved JD and memorandum describing how guidance provided in the signed memorandum was applied to the final draft approved JD.

3. EPA HQ and the Corps HQ or OASACW will make best efforts to notify the Corps district as soon as possible if they do not intend to provide direction or policy guidance and the Corps district may finalize the draft approved JD. EPA HQ and the Corps HQ or OASACW may provide approved JDs that do not need further policy guidance to all EPA regional and Corps district offices for informational purposes. If neither EPA HQ nor the Corps HQ or OASACW notifies the Corps district that they intend to provide direction or policy guidance within the time period specified in section III.A (*i.e.*, 10 business days or the agreed upon timeframe as specified in footnote 8), the Corps district may finalize the draft approved JD.

**B.** EPA retains ultimate administrative authority to construe geographic jurisdiction<sup>9</sup> and EPA HQ may notify Corps HQ or OASACW that it plans to make a project-specific jurisdictional decision covered by the draft approved JD, and consistent with 33 CFR 325.9(b). As soon as possible, and no later than 10 business days of notice of a revised draft approved JD pursuant to section III.A.1 or section III.A.2, EPA HQ shall notify Corps HQ or OASACW and the Corps district if EPA intends to make a site-specific jurisdictional decision pursuant to this section. Site-specific determinations made by EPA pursuant to this section of this memorandum will be binding on the federal government and represent the government's position in any subsequent federal action or litigation regarding the determination. EPA HQ will distribute a copy of any determination to all EPA regions and all Corps districts. If EPA HQ does not provide any notification to Corps HQ or OASACW and the Corps district within 10 business days of notice of a revised draft approved JD pursuant to section III.A.1 or section III.A.2, the coordination for the draft approved JD will be considered complete. This means the Corps district may proceed with finalizing the approved JD.

**IV. Appeals.** A Corps district approved JD issued after consideration of HQ-level guidance received through the coordination process is an appealable action under 33 CFR 331 et seq. Any appeal can examine and question any matter or finding of fact, but the decision on appeal will not question or overturn any legal or policy guidance made by EPA HQ and/or Corps HQ or OASACW pursuant to this joint memorandum.

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<sup>8</sup> While this memorandum does not specify a period of time within which the district should submit the final draft approved JD and memorandum, the district should seek to submit the materials in a timely manner, generally within 90 calendar days unless there are extenuating circumstances.

<sup>9</sup> EPA retains ultimate administrative authority to construe the jurisdictional term "navigable waters." *See* Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act ("Civiletti Memorandum"), 43 Opp. Att'y Gen. 197 (1979).



V. This memorandum will remain in effect for nine months after the memorandum has been signed by all signatories. No later than 30 calendar days prior to the termination date of this memorandum, the agencies shall initiate a joint HQ-level review to reevaluate various requirements in this memorandum, assess implementation effectiveness, and consider the need for further coordination. This joint HQ-level review shall be completed prior to the termination date of this memorandum. This memorandum and its outlined expectations may only be modified or extended by written agreement of both signatory agencies.



Michael L. Connor  
Assistant Secretary of the  
Army (Civil Works)



Radhika Fox  
Assistant Administrator,  
(Office of Water)  
U.S. Environmental Protection Agency



September 27, 2023

**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)**

Subject: U.S. Department of the Army, U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency (EPA) Coordination of draft approved jurisdictional determinations under the “pre-2015 regulatory regime.”

**I. Purpose.** The purpose of this memorandum is to establish a process by which the Corps and EPA (“the agencies”) will coordinate on Clean Water Act (CWA) geographic jurisdictional matters to ensure accurate and consistent implementation of the pre-2015 regulatory regime where that regulatory regime is operative.<sup>1</sup> The “pre-2015 regulatory regime” refers to the agencies’ pre-2015 definition of “waters of the United States,”<sup>2</sup> implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience. The coordination procedures as outlined in the *SWANCC* Guidance (68 FR 1991, 1995 (January 15, 2003)) and the 2007 *Rapanos* Coordination Memorandum (available at <https://www.epa.gov/sites/default/files/2016-04/documents/rapanosmoa6507.pdf>), as amended by the 2008 Department of the Army Memorandum on *Rapanos* coordination (available at <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll5/id/1414>), are superseded by this coordination memorandum.

With respect to final determinations of the geographic jurisdictional scope of “waters of the United States” for purposes of CWA Section 404 that are not subject to this memorandum, this memorandum does not nullify or supersede the January 19, 1989 “Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of Geographic Jurisdiction and the Application of the Exemptions under Section 404(f) of the Clean Water Act” (1989 MOA), including its special case provisions,<sup>3</sup> nor does it supersede policy or individual

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<sup>1</sup> For more information about the operative definition of “waters of the United States” for specific geographic areas and parties in light of litigation, please visit <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>.

<sup>2</sup> The pre-2015 definition of “waters of the United States,” is also referred to as “the 1986 regulations,” inclusive of the exclusion for prior converted cropland, which both agencies added in 1993. See 33 CFR 328.3 (2014) and 40 CFR 230.3(s) (2014).

<sup>3</sup> Available at: <https://www.epa.gov/cwa-404/memorandum-agreement-determination-geographic-jurisdiction-section-404-program-and>.

permit elevations under the CWA Section 404(q) “Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency” (1992 404(q) MOA).<sup>4</sup>

Because the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard, and the agencies’ pre-2015 regulatory regime discussed the *Rapanos* plurality standard, the agencies will implement the pre-2015 regulations generally consistent with the pre-2015 regulatory regime’s approach to the plurality standard, including relevant case law and longstanding practice, as informed by applicable guidance, training, and experience. Under the pre-2015 regulatory regime, consistent with *Sackett*, the agencies will not assert jurisdiction based on the significant nexus standard, will not assert jurisdiction over interstate wetlands solely because they are interstate, will interpret “adjacent” to mean “having a continuous surface connection,” and will limit the scope of the (a)(3) provision to only relatively permanent lakes and ponds that do not meet one of the other jurisdictional categories. Approved jurisdictional determinations (JDs) are case-specific determinations based on the record, and factual questions or *Sackett* concerns may be raised in the context of a particular approved JD. With respect to final determinations of the geographic jurisdictional scope of “waters of the United States” for purposes of Section 404 that are not subject to this memorandum, Corps districts may choose to coordinate with EPA regions on draft approved JDs on a case-by-case basis and either the Corps districts or EPA regions may seek headquarters-level review or guidance on draft approved JDs at any time.

The procedures in this memorandum do not create any rights, either in substance or procedure, that are enforceable by any party. In addition, nothing in this memorandum is intended to diminish, modify, or otherwise affect statutory or regulatory authorities of either signatory agency. Furthermore, nothing in this memorandum is intended to affect the authority of a Tribe or State pursuant to an authorized CWA Section 401, 402, or 404 program, and nothing in this memorandum will be construed as indicating a financial commitment by the agencies for the expenditure of funds.

**II. Specified Draft Approved Jurisdictional Determination Coordination Requirements: Local Level Review of Draft Approved Jurisdictional Determinations.** All draft approved JDs assessing wetlands under paragraph (a)(7) and other waters under paragraph (a)(3) of the 1986 regulations shall be coordinated at the local level in accordance with the procedures in this memorandum. Such draft approved JDs may be elevated to the headquarters level of the agencies (HQ) under section II.D below. Draft approved JDs shall be coordinated for the previously specified categories of waters if jurisdiction is being asserted, as well as if jurisdiction is not being asserted.

**A. Information requirements.** To initiate the local-level coordination process, the Corps district shall provide the EPA region with the draft basis for jurisdiction (e.g., approved JD form, memorandum for record, or similar document explaining the full basis and rationale for asserting or not asserting jurisdiction) and any maps, as well as any easily available electronic information. Transmittal of this package serves as the “notification of coordination.” Within three business days of notification, the EPA region may request, if warranted, all additional information relied upon to inform the draft basis for jurisdiction, such as aerial or satellite imagery, site visit documentation, or other resources used to support the draft decision and rationale described on the draft basis for jurisdiction. The Corps district will make its best efforts to transmit the additional information as soon as possible after the request from the EPA region.

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<sup>4</sup> Available at: <https://www.epa.gov/cwa-404/cwa-404q-memorandum-agreement-resolving-disputes-1992>.

**B. Transmittal of information.** Both agencies will transmit all documents electronically in the most efficient manner (e.g., via email). The date of the Corps' notification of coordination to the EPA region initiates the time frames and deadlines described in section II.D below.

**C. Scope/level of EPA regional review.** The EPA region should review the information provided by the Corps district to ensure that the Corps' draft basis for asserting or not asserting jurisdiction reflects the requirements outlined in the pre-2015 regulatory regime. The EPA region may need to independently review additional sources of information to complete a thorough evaluation of the application of the pre-2015 regulatory regime.

**D. Coordination process.<sup>5</sup>**

**1.** The EPA region should notify the Corps district as soon as possible whether it intends to provide comments. If the EPA region has comments, it must provide those comments to the Corps district within 10 business days of the notification of coordination.

**2.** Even if the EPA region does not have comments on a draft approved JD, the EPA region may still choose to elevate the draft approved JD within the 10 business day coordination period per the procedures in section III below to obtain HQ review or guidance. If the EPA region does not have comments and the region does not intend to elevate the draft approved JD to HQ, it should notify the Corps district as soon as possible. If the region does not provide comments and does not elevate the draft approved JD within the 10 business day coordination period, or if the region notifies the district that it has no comments and does not intend to elevate the draft approved JD, the local-level coordination for the draft approved JD will be considered complete and the Corps district may finalize the approved JD.

**3.** If the EPA region provides comments within the 10 business day local-level coordination period:

**a.** The agencies must coordinate on matters of fact at the local level (region and district) and make every attempt to resolve any issues. When the EPA region transmits the comments to the Corps district, the EPA region may request a meeting to discuss comments with the Corps district. Any such meeting must be held within the 10 business day coordination period.

**b.** After the initial coordination has occurred:

**i.** Prior to the end of the 10 business day local-level coordination period, or within three business days of the transmittal of any comments from the EPA region or the meeting, whichever is later in time, the Corps district may notify the EPA region that it plans to reconsider the draft approved JD and is therefore withdrawing it from local-level coordination.<sup>6</sup>

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<sup>5</sup> Day one is the first business day after notification.

<sup>6</sup> The Corps may choose to withdraw and re-coordinate a draft approved JD, for example, if EPA's comments result in the district deciding to complete a field site visit or contact the requestor for additional information, and such action cannot be completed during the original coordination period. The revised draft approved JD will be subject to the coordination procedures in this memorandum.

ii. Unless the Corps district provides the EPA region with the notification of its intent to reconsider the draft approved JD as specified in section II.D.3.b.i above, the Corps district must transmit a revised draft approved JD to the EPA region within three business days of the transmittal of the EPA region's comments or the meeting, whichever is later in time, or notify the EPA region that the Corps district does not intend to revise the draft approved JD.

A) Within three business days of transmittal of a revised draft approved JD or a notification by the Corps district of no intent to revise, the EPA region may notify the Corps district that its concerns have been addressed, and the local-level coordination for the draft approved JD will be considered complete. This means the Corps district may proceed with finalizing the approved JD; or

B) Within three business days of transmittal of a revised draft approved JD or notification by the Corps district of no intent to revise, the EPA region may notify the Corps district that it is elevating the draft approved JD to the HQ level in accordance with section III below; or

C) If the EPA region does not provide any notification to the Corps as specified in A) or B) of this subsection within three business days of the transmittal of a revised draft approved JD or notification by the Corps district that it does not intend to revise the draft approved JD, the local-level coordination for the draft approved JD will be considered complete. This means the Corps may proceed with finalizing the approved JD.

**III. Specified Draft Approved Jurisdictional Determination Coordination Requirements: Headquarters-Level Joint Review of Draft Approved JDs.** If the draft approved JD for wetlands assessed under paragraph (a)(7) or waters assessed under paragraph (a)(3) of the 1986 regulations is elevated to the HQ level (to the chief level<sup>7</sup> or above) by an EPA region under section II.D, the EPA region should concurrently notify and transmit all relevant information described to both Corps HQ and EPA HQ.

A. Once information is transmitted, EPA HQ and Corps HQ shall have 10 business days to coordinate.<sup>8</sup> At any point during those 10 business days, EPA HQ and/or Corps HQ may request that the draft approved JD also be coordinated with relevant staff from the Office of the Assistant Secretary of the Army for Civil Works (OASACW). The requesting agency will notify and transmit the information to OASACW, who will then coordinate with EPA HQ on the draft approved JD, and the time period for additional HQ-level coordination will be five business days from notification by the requesting agency.<sup>9</sup>

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<sup>7</sup> "Chief level" refers to the Branch Chief responsible for geographic jurisdiction at EPA and the Corps Regulatory Chief.

<sup>8</sup> To facilitate effective coordination, time frames identified for this point of the elevation process through the end of section III.A can be modified if both parties mutually agree in writing for a specific elevated case. In such cases, Corps HQ shall inform the Corps district and EPA HQ shall inform the EPA region of any newly agreed upon time frames.

<sup>9</sup> Note that the language in the sub-sections below will refer to "Corps HQ or OASACW" to reflect that EPA will be coordinating either with Corps HQ or OASACW, depending on whether EPA and/or Corps HQ have submitted a request to OASACW.

1. If a mutual decision between EPA HQ and Corps HQ or OASACW is reached, EPA HQ and Corps HQ may issue a signed memorandum providing direction to all their respective regional and district offices. If a mutual decision between EPA HQ and OASACW is reached, EPA HQ and OASACW may issue a signed memorandum providing policy guidance to all their respective regional and district offices. Upon receipt of the jointly signed memorandum, the Corps district responsible for drafting the approved JD should determine what revisions are necessary and transmit to EPA HQ, Corps HQ and, if engaged, OASACW a final draft approved JD and a memorandum describing how the direction or guidance provided in the jointly signed memorandum was applied to the final draft approved JD.<sup>10</sup>

2. If a mutual decision between EPA HQ and Corps HQ or OASACW is not reached, EPA may issue a signed memorandum providing policy guidance that will be provided to all EPA regional and Corps district offices. Upon receipt of the signed memorandum, the Corps district responsible for drafting the approved JD should determine what revisions are necessary and transmit to EPA HQ, Corps HQ and, if engaged, OASACW a final draft approved JD and memorandum describing how guidance provided in the signed memorandum was applied to the final draft approved JD.

3. EPA HQ and the Corps HQ or OASACW will make best efforts to notify the Corps district as soon as possible if they do not intend to provide direction or policy guidance and the Corps district may finalize the draft approved JD. EPA HQ and the Corps HQ or OASACW may provide approved JDs that do not need further policy guidance to all EPA regional and Corps district offices for informational purposes. If neither EPA HQ nor the Corps HQ or OASACW notifies the Corps district that they intend to provide direction or policy guidance within the time period specified in section III.A (*i.e.*, 10 business days or the agreed upon timeframe specified in footnote 8), the Corps district may finalize the draft approved JD.

**B.** EPA retains ultimate administrative authority to construe geographic jurisdiction<sup>11</sup> and EPA HQ may notify Corps HQ or OASACW that it plans to make a project-specific jurisdictional decision covered by the draft approved JD, and consistent with 33 CFR 325.9(b). As soon as possible, and no later than 10 business days of notice of a revised draft approved JD pursuant to section III.A.1 or section III.A.2, EPA HQ shall notify Corps HQ or OASACW and the Corps district if EPA intends to make a site-specific jurisdictional decision pursuant to this section. Site-specific determinations made by EPA pursuant to this section of this memorandum will be binding on the federal government and represent the government's position in any subsequent federal action or litigation regarding the determination. EPA HQ will distribute a copy of any determination to all EPA regions and all Corps districts. If EPA HQ does not provide any notification to Corps HQ or OASACW and the Corps district within 10 business days of notice of a revised draft approved JD pursuant to section III.A.1 or section III.A.2, the coordination for the draft approved JD will be considered complete. This means the Corps district may proceed with finalizing the approved JD.

---

<sup>10</sup> While this memorandum does not specify a period of time within which the district should submit the final draft approved JD and memorandum, the district should seek to submit the materials in a timely manner, generally within 90 calendar days unless there are extenuating circumstances.

<sup>11</sup> EPA retains ultimate administrative authority to construe the jurisdictional term "navigable waters." See Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act ("Civiletti Memorandum"), 43 Opp. Att'y Gen. 197 (1979).



**IV. Appeals.** A Corps district approved JD issued after consideration of HQ-level guidance received through the coordination process is an appealable action under 33 CFR 331 et seq. Any appeal can examine and question any matter or finding of fact, but the decision on appeal will not question or overturn any legal or policy guidance made by EPA HQ and/or Corps HQ or OASACW pursuant to this joint memorandum.

**V.** This memorandum will remain in effect for nine months after the memorandum has been signed by all signatories. No later than 30 calendar days prior to the termination date of this memorandum, the agencies shall initiate a joint HQ-level review to reevaluate various requirements in this memorandum, assess implementation effectiveness, and consider the need for further coordination. This joint HQ-level review shall be completed prior to the termination date of this memorandum. This memorandum and its outlined expectations may only be modified or extended by written agreement of both signatory agencies.



Michael L. Connor  
Assistant Secretary of the  
Army (Civil Works)



Radhika Fox  
Assistant Administrator,  
(Office of Water)  
U.S. Environmental Protection Agency

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## Redact sensitive content (Acrobat Pro)

Redaction is the process of permanently removing visible text and graphics from a document. You use the **Redact** tools to remove content. In place of the removed items, you can have redaction marks that appear as colored boxes, or you can leave the area blank. You can specify custom text or redaction codes to appear over the redaction marks.

### Note:

If you want to locate and remove specific words, characters, or phrases, use the **Find Text** tool  instead.

Apple events (Macintosh only)	
To	Use this function
Determine whether an event handler is already installed for a specified event	F_AEGetEventHandler()
Install an event handler	F_AEInstallEventHandler()
Remove an event handler	F_AERemoveEventHandler()
Import element definitions to a book	F_ApiSimpleImportElementDefs()
Client-defined callback functions	
To	Use this function
Respond to the user choosing a menu item created by your client	F_ApiCommand()
Respond to the FrameMaker product's initialization message	F_ApiInitialize()
Respond to the user clicking a hypertext marker or inset	F_ApiMessage()
Respond to the user or another client executing operations such as Open or Save	F_ApiNotify()
Turn a notification on or off	F_ApiNotification()
Respond to the user interacting with a client-defined dialog box	F_ApiDialogEvent()
Set a callback function that is called for setting the username password information before performing the NetLib related authentication	F_ApiNetLibSetAuthFunction()
Set a return value for a client-defined callback function	F_ApiReturnValue()

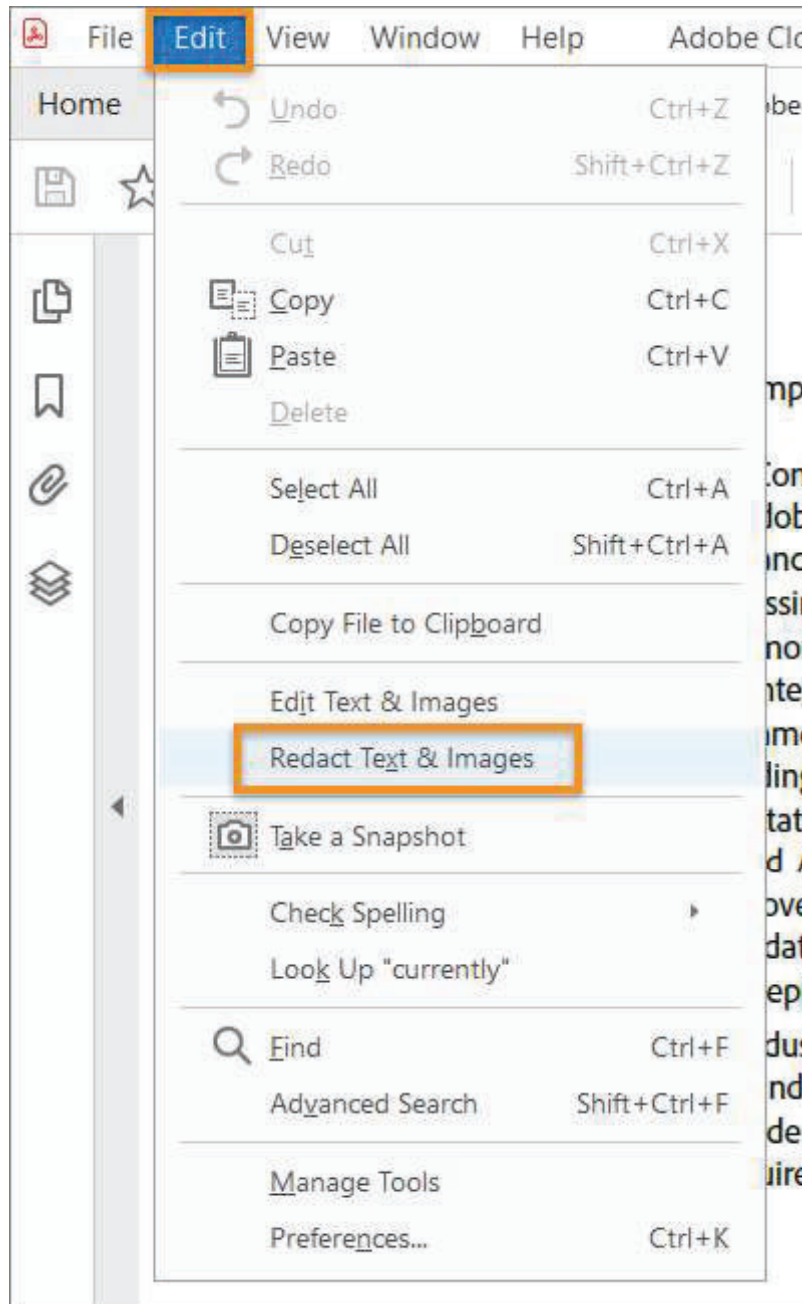
Client-defined callback functions	
To	Use this function
Respond to the user choosing a menu item created by your client	F_ApiCommand()
Respond to the FrameMaker product's initialization message	F_ApiInitialize()
Respond to the user clicking a hypertext marker or inset	F_ApiMessage()
Respond to the user or another client executing operations such as Open or Save	F_ApiNotify()
Turn a notification on or off	F_ApiNotification()
Respond to the user interacting with a client-defined dialog box	F_ApiDialogEvent()
Set a return value for a client-defined callback function	F_ApiReturnValue()

Text marked for redaction (left), and redacted (right)

1. Open the PDF in Acrobat, and then do one of the following:

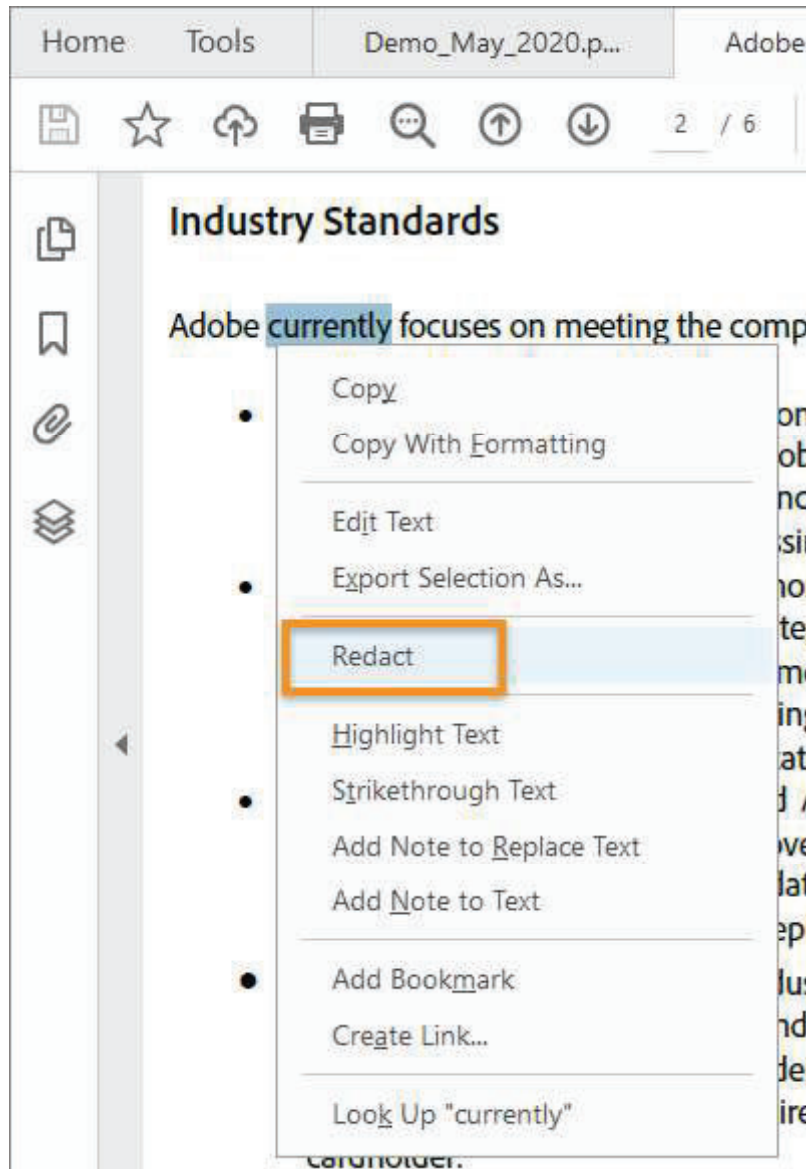
- Choose **Tools > Redact**.
- On the **Edit** menu, choose **Redact Text & Images**.
- Select the text or image in a PDF, right-click, and select **Redact**.
- Select the text or image in a PDF, choose **Redact** in the floating context-menu.

This Information Was Derived from Adobe at: <https://helpx.adobe.com/acrobat/using/removing-sensitive-content-pdfs.html>

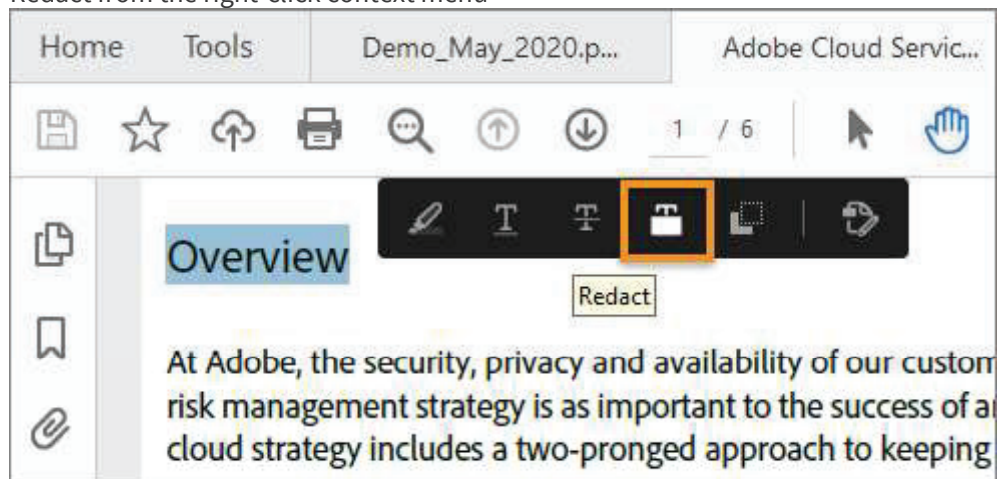


Redact from the Edit menu

This Information Was Derived from Adobe at: <https://helpx.adobe.com/acrobat/using/removing-sensitive-content-pdfs.html>



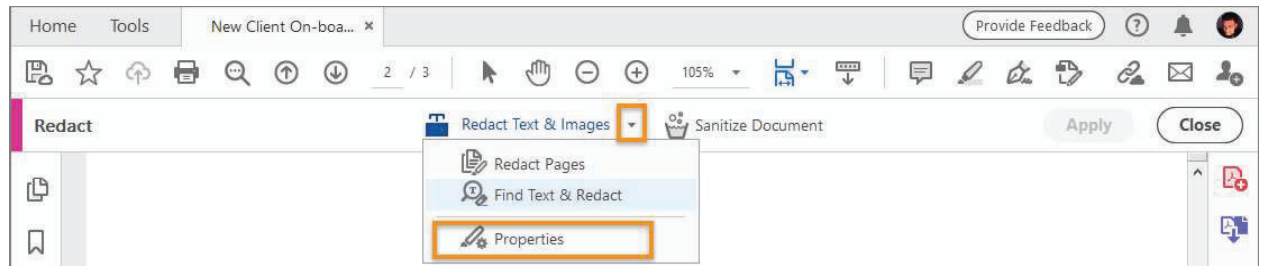
Redact from the right-click context menu



Redact from the floating menu

This Information Was Derived from Adobe at: <https://helpx.adobe.com/acrobat/using/removing-sensitive-content-pdfs.html>

- (Optional) To set the appearance of redaction marks, click the drop-down in the Redact toolset in the secondary toolbar, and choose **Properties**. (See [Change the look of redaction markers.](#))



- Mark items you want to remove by doing any of the following:

- Double-click to select a word or image.
- Drag to select a line, block of text, object, or area.

**Note:**

To preview how your redaction marks appear, hold the pointer over the marked area.

- To apply multiple code entries to a single redaction, right-click a redaction mark and select an option. For more information, see [Apply multiple code entries to a redaction.](#)
- (Optional) To repeat a redaction mark, right-click it and choose **Repeat Mark Across Pages**. This feature is convenient if a particular header, footer, or watermark appears in the same location on many pages.
- When you have finished marking the items you want to redact, click **Apply** in the secondary toolbar to remove the items. Alternatively, you can **Save** the document, and then choose **Apply & Save**.
- In the **Apply Redactions** dialog, choose if you want to **Sanitize And Remove Hidden Information** by clicking the toggle button, and then click **OK**.

The items aren't permanently removed from the document until you save it.

- The **Save As** dialog is displayed. Specify a filename and location. The suffix “**\_Redacted**” is appended to the filename. If you don't want to overwrite the original file, save the file with a different name, at a different location, or both.

**From:** [Wilson, Matthew S CIV USARMY CEHQ \(USA\)](#)  
**To:** [CDL-REG-All](#)  
**Subject:** RE: WOTUS Implementation: Jurisdiction SharePoint Updates, New Coordination Memo Templates/Inboxes, and Update to Web Posting Procedures  
**Date:** Friday, October 6, 2023 9:37:54 AM

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All,

With respect to the requirements for web posting of AJDs that are included in the below email, districts should also redact the name, contact information, and signature of the Corps representatives from the bottom of the AJD letter before posting to the web.

Please feel free to contact me by telephone or by email if you have any questions.

Matt Wilson  
Regulatory Program Manager  
Headquarters, U.S. Army Corps of Engineers  
441 G Street NW  
Washington, DC 20314-1000  
COE (b)(6)

---

**From:** Wilson, Matthew S CIV USARMY CEHQ (USA) <COE (b)(6)>  
**Sent:** Thursday, October 5, 2023 7:35 AM  
**To:** CDL-REG-All <COE (b)(6)>  
**Cc:** Wilson, John Maxwell (Max) CIV USARMY CEHQ (USA) <COE (b)(6)>  
Inkelas, Daniel CIV USARMY CEHQ (USA) <COE (b)(6)> Zilioli, Erica M CIV  
USARMY CEHQ (USA) <COE (b)(6)> Wood, Lance D CIV USARMY CEHQ (USA)  
<COE (b)(6)>  
**Subject:** WOTUS Implementation: Jurisdiction SharePoint Updates, New Coordination Memo  
Templates/Inboxes, and Update to Web Posting Procedures

Regulators,

Thank you for your continued patience as we navigate the early stages of implementation of “waters of the United States” (WOTUS) following the Supreme Court’s decision in the case of *Sackett v. Environmental Protection Agency*.

Below are updates on three aspects relating to our implementation of WOTUS: Updates to the HQ Jurisdiction SharePoint, JD Coordination, and Requirements for Web Posting of Final Approved JDs.

**HQ Jurisdiction SharePoint Updates:**

HQ is updating our Jurisdiction SharePoint page, which is located at:

For the time being, we are retaining for historical purposes on the Jurisdiction SharePoint the sub-topics for the previous WOTUS Rules/Regimes that are no longer in effect (e.g., 2006 – Rapanos, 2015 – Clean Water Rule, 2020 – NWPR, 2021 – Pre-2015 Regime, and 2023 – January 2023 Rule).

To support our current implementation of WOTUS, two new sub-topics have been added to the HQ Jurisdiction SharePoint. Information relating to our implementation of the 2023 Rule (as amended) will be posted under the sub-heading named, “2023.08 – 2023 Rule, as amended” and information relating to our implementation of the pre-2015 regime + *Sackett* will be posted under the sub-heading named, “2023.08 – Pre-2015 Regime Post-Sackett.”

HQ will continue to update the HQ Jurisdiction SharePoint page as additional implementation and training materials become available.

### **New JD Coordination Templates & Inboxes:**

On 27 September 2023 the agencies issued two new coordination memos that establish requirements that USACE districts coordinate with EPA certain draft approved jurisdictional determinations (AJDs). One of the coordination memos establishes requirements for coordination of certain draft AJDs under the 2023 Rule (as amended by the conforming rule) and the other coordination memo establishes requirements for coordination of certain draft AJDs under the pre-2015 regime + *Sackett*. These two new coordination memos were transmitted to you by Tom Walker on 28 September 2023, and are attached here again for your reference.

As mentioned in Tom Walker’s 28 September email, these two coordination memos are fully in effect. For those draft AJDs that have been coordinated with HQ Regulatory between 8 September and today, please do not coordinate the draft AJD per the new coordination memo procedures until you receive input from HQ-Regulatory. For all other draft AJDs, please follow the coordination procedures in the new applicable coordination memo. The memos will be posted to the HQ Jurisdiction SharePoint and to the HQ webpage later this week.

Under the new coordination memos, coordination of draft AJDs is required for the following types of draft AJDs:

#### **Amended 2023 Rule:**

1. All draft approved JDs assessing wetlands under paragraph (a)(4) and waters under paragraph (a)(5) of the 2023 rule, as amended, shall be coordinated in accordance with the procedures in the coordination memo. Such draft approved JDs shall be coordinated if jurisdiction is being asserted, as well as if jurisdiction is not being asserted.
2. Corps districts may choose to coordinate with EPA regions on draft approved JDs on a case-by-case basis and either the Corps districts or EPA regions may seek headquarters-level review or guidance on draft approved JDs at any time.

#### **Pre-2015 Regime + *Sackett*:**

1. All draft approved JDs assessing wetlands under paragraph (a)(7) and other waters under paragraph (a)(3) of the 1986 regulations shall be coordinated in accordance with the procedures in the coordination memo. Such draft approved JDs shall be coordinated if jurisdiction is being asserted, as well as if jurisdiction is not being asserted.
2. Corps districts may choose to coordinate with EPA regions on draft approved JDs on a case-by-case basis and either the Corps districts or EPA regions may seek headquarters-level review or guidance on draft approved JDs at any time.

coordinating with the EPA Region per the coordination memos on the below listed scenarios, you  
(b)(5)

[Redacted]

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[Redacted]

[Redacted]

[Redacted]

Coordination Inboxes and Email Templates:

EPA has provided points of contact for each EPA Region that should be used to facilitate the coordination. The current regional POCs/general inboxes for AJD coordination are attached to this email.

Headquarters has developed JD coordination template emails that can be used to coordinate draft AJDs as required by the memos. Use of the template emails is not required but is encouraged. The JD coordination template emails are attached here for your use. One JD coordination template email is for coordination of draft AJDs under the Amended 2023 Rule and the other JD coordination template email is for coordination of draft AJDs under the pre-2015 regime. The updated coordination inboxes and template coordination emails have also been posted to the applicable sub-topic on the HQ Jurisdiction SharePoint.

**Changes to Requirements for Web Posting of AJDs:**

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[Redacted]

[Redacted]

Instead, districts should post the AJD response letter that we provide to the requestor, along with any location map(s) and the final JD map(s) that show the lateral limits of the aquatic resources and/or features that were evaluated in the AJD.

The name and address information on the AJD response letter should be redacted before the letter is posted to the web.

Instructions for redacting information from a PDF document are attached and also are available at: <https://helpx.adobe.com/acrobat/using/removing-sensitive-content-pdfs.html> .

The JD response letter (with the requestor's name and address redacted) and the JD maps should be combined into a single PDF document to facilitate easy access by members of the public.

Even though the basis MFRs will not be posted, the basis MFRs should continue to be provided to the requestor along with the AJD.

HQ will continue to provide additional implementation information and tools as they become available.

Thank you for your continued patience as we make this transition.

Please contact me if you have any questions.

Matt

Matt Wilson  
Regulatory Program Manager  
Headquarters, U.S. Army Corps of Engineers  
441 G Street NW  
Washington, DC 20314-1000

COE (b)(6)

COE (b)(6)





























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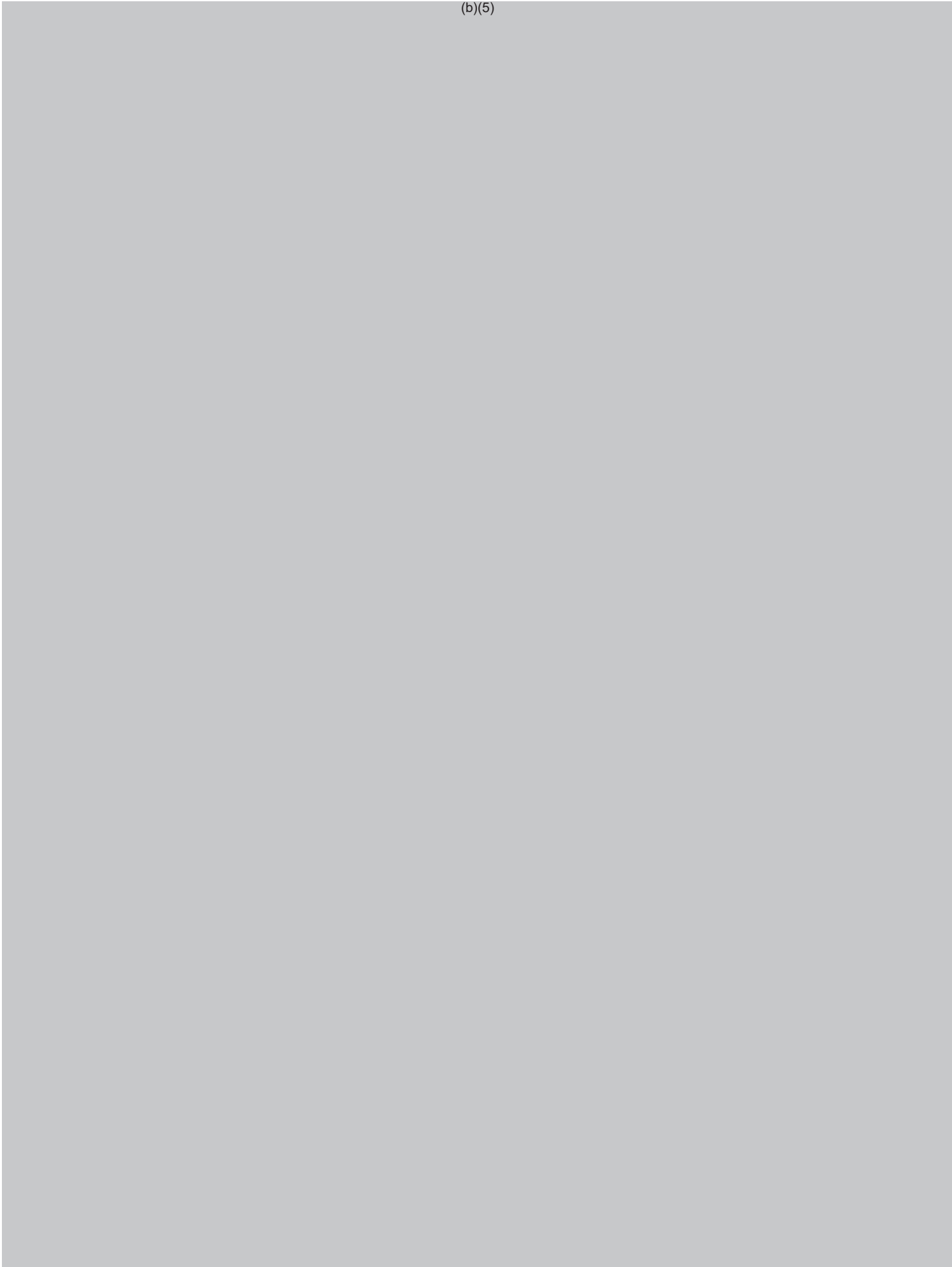


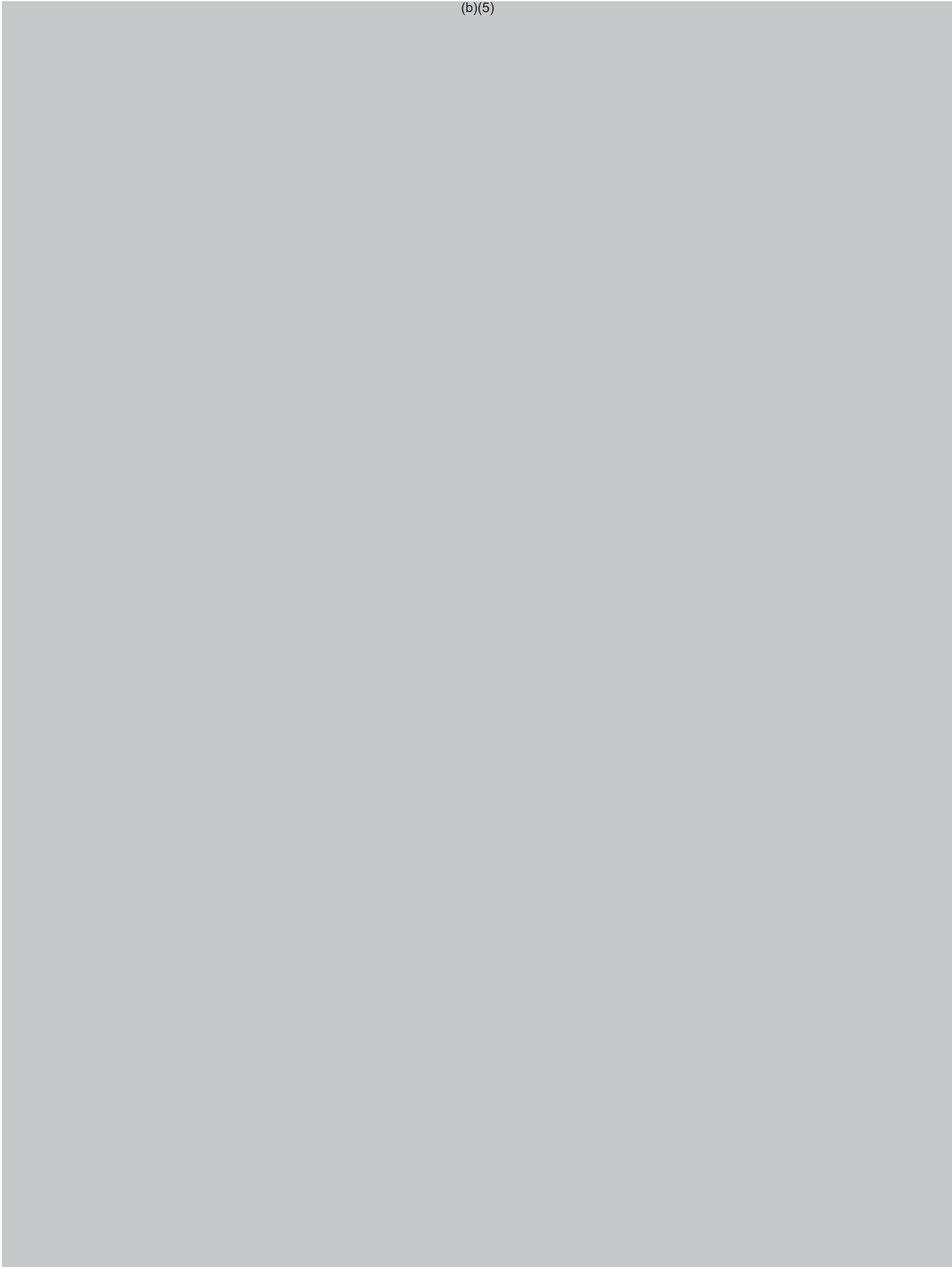






























## WOTUS 2023 Rule: Division Implementation Teams - Updated 23 October 2023

LRD	
Lead	Katie McCafferty
LRB	Susan Baker
LRC	Mike Machalek
LRE	Aaron Damrill
LRH	Kayla Osborne
LRL	Sarah Keller
LRN	Samantha Iskrzycki
LRP	Alyssa Barkley
R2	Robert (Bob) Montgomerie
R3	Christine Mazzarella
R4	Eric Somerville
R5	Melanie Burdick

NAD	
Lead	Andy Dangler
NAB	Frank Plewa
NAE	Paul Minkin
NAN	Adam Labatore
NAO	Taylor Hollingsworth
NAP	Mike Leggerio
R1	Erica Sachs
R2	Robert (Bob) Montgomerie
R3	Natalie Motely

SWD	
Lead	Jamie Hyslop
SWF	Fred Land
SWG	John Davidson
SWL	Mike Gala & Pablo Bacon
SWT	Eva Zaki-Dellitt
R6	Paul Kaspar
R7	Justin Kensinger

MVD	
Lead	Brian Oberlies
MVK	Bryton Hixon
MVM	Roger Allan
MVN	Mike Windham & Brad Guarisco
MVP	Brian Yagle
MVR	Al Frolich
MVS	Chad Lamontagne
R4	Kacy Sable
R5	Melanie Burdick
R6	Raul Gutierrez
R7	Jeannette Schafer

SAD	
Lead	Philip Shannin
SAC	Jeremy Kinney
SAJ	Jessica Cordwell
SAM	Courtney Shea
SAS	Adam White
SAW	Andy Williams
	Robert (Bob) Montgomerie
R2	Montgomerie
R4	Eric Somerville

NWD & POD	
Lead	Melinda Larsen
NWK	Patrick Trier
NWO	Phil Rezac
NWP	Maya Goklany
NWS	Brad Johnson
NWW	Jeff Nield
POA	Roberta Budnik
POH	Susan Gayagas
R7	Jeanette Schafer
R8	Rachel Harrington
R9	Joe Morgan
R10	Amy Jensen

SPD	
Lead	Travis Morse
SPA	Justin Riggs
SPK	Jamie Robb
SPL	Deanna Cummings
SPN	Bryan Matsumoto
R6	Lori Tanner
R8	Nolan Hahn
R9	Joe Morgan

**From:** [Wilson, Matthew S CIV USARMY CEHQ \(USA\)](#)  
**To:** [CDL-REG-All](#)  
**Cc:** [Wilson, John Maxwell \(Max\) CIV USARMY CEHQ \(USA\)](#); [Inkelas, Daniel CIV USARMY CEHQ \(USA\)](#); [Zilioli, Erica M CIV USARMY CEHQ \(USA\)](#); [Wood, Lance D CIV USARMY CEHQ \(USA\)](#)  
**Subject:** WOTUS Update: EPA/Army Training Slides for the Coordination Memos and for the Pre-2015 Regime Consistent with Sackett  
**Date:** Tuesday, October 24, 2023 2:15:29 PM  
**Attachments:** [Final Coordination Memo Webinar 10-12-23 fordistribution.pptx](#)  
[WOTUS Overview Internal Training 10-19-23 Pre-2015 Regulatory Regime.pptx](#)

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All,

Additional training and implementation materials are now available to assist with our implementation of “waters of the United States.”

Details are below:

-

EPA/Army Joint Training on the Coordination Memos:

Attached for your reference and use is the slide deck from the 12 October 2023 EPA/Army joint training on the recent coordination memos.

Please note that the slides are for internal use only and should not be distributed external to USACE.

-

EPA/Army Joint Training on the Pre-2015 Regime Consistent with Sackett:

Also attached for your reference and use is the slide deck from the 19 October 2023 EPA/Army joint training for the pre-2015 regulatory regime consistent with *Sackett*.

Please note that the slides are for internal use only and should not be distributed external to USACE.

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USACE HQ will provide a recap of the agencies’ 19 October 2023 training for the pre-2015 regime this Friday 27 October at 1pm (eastern time) and again next Friday 3 November at 1pm (eastern time).

The invitations to these two follow-up trainings were sent to the field earlier this week.

Each of these follow-up trainings will use the same slide deck and talking points that the EPA and Army used during the training that the agencies provided on 19 October.

Therefore, these follow-up trainings will essentially be a repeat of the training that the agencies provided on 19 October and will not provide any new implementation guidance that has not already been provided by the agencies.

Both sessions will present the same information. There is no need for district staff to attend both sessions.

At the end of each training session, Headquarters will be available to listen to district feedback and answer questions regarding our implementation of the pre-2015 regime consistent with *Sackett*.

HQ Jurisdiction SharePoint:

The materials discussed above have also been posted to the Headquarters Jurisdiction SharePoint, which can be accessed at: (b)(5)

Materials to support our implementation of the pre-2015 regime, including the agencies 19 October 2023 training slides, are located in the sub-topic named, "2023.08 – Pre-2015 Regime Post-Sackett." Materials to support our implementation of the Amended 2023 Rule, including the agencies 26 September 2023 training slides, are located in the sub-topic named, "2023.08 – 2023 Rule, as amended."

We sincerely appreciate your continued patience as we continue the transition to the new regulatory landscape.

USACE HQ is continuing to work with the agencies to develop additional WOTUS-related implementation and training materials for our field staff and for the public.

Thank you for all that you are doing to support of implementation of WOTUS and our Program!

Matt Wilson

Regulatory Program Manager

Headquarters, U.S. Army Corps of Engineers

441 G Street NW

Washington, DC 20314-1000

Office: COE (b)(6)

Cell: COE (b)(6)

COE (b)(6)

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**From:** [Wilson, Matthew S CIV USARMY CEHQ \(USA\)](#)  
**To:** [CDL-REG-CHIEFS](#)  
**Cc:** [Wilson, John Maxwell \(Max\) CIV USARMY CEHQ \(USA\)](#); [Inkelas, Daniel CIV USARMY CEHQ \(USA\)](#); [Zilioli, Erica M CIV USARMY CEHQ \(USA\)](#)  
**Subject:** WOTUS: Initial Approved Public Outreach Materials  
**Date:** Tuesday, November 7, 2023 5:09:12 PM  
**Attachments:** [WOTUS Update Slides LongerVersion 10-24-23.pptx](#)  
[WOTUS Update TPs Longer Version 10-27-23.docx](#)

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Chiefs,

Attached are slides and a “run of show” that were provided to USACE by the OASA-CW and that districts can use to provide outreach to the public for “waters of the United States.”

The OASA-CW has informed us that districts may use the attached slides and “run of show” to provide public outreach.

Districts may share the slides as PDFs. However, please do NOT share the run of show.

The agencies have informed USACE HQ that they are working on developing a broader slide deck with more detail than what is provided here.

In the meantime, the agencies have approved the attached materials for use until they provide the broader training that they are currently working on.

We hope this is helpful.

We will get additional materials to the field as soon as we are able.

Thank you and your staff for all that you are doing to manage this transition.

Please feel free to contact me by telephone or by email if you have any questions.

Matt Wilson  
Regulatory Program Manager  
Headquarters, U.S. Army Corps of Engineers  
441 G Street NW  
Washington, DC 20314-1000  
Office: [REDACTED] COE (b)(6)  
Cell: [REDACTED] COE (b)(6)  
[REDACTED] COE (b)(6)



# “Waters of the United States” Updates



Name  
Meeting Name  
Date

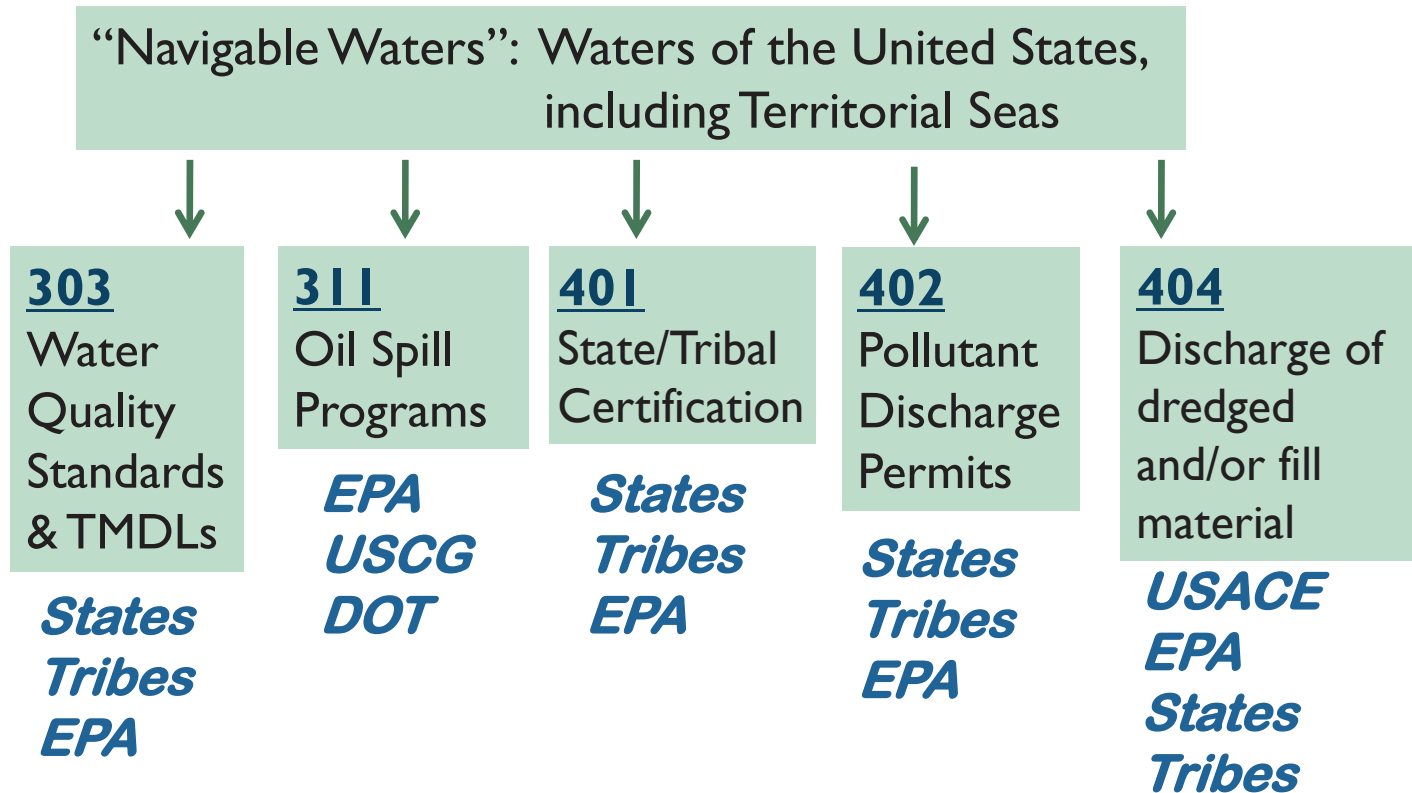
*The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of Sackett v. EPA may be raised in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with Sackett.*

# Background: “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.

*The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of Sackett v. EPA may be raised in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with Sackett.*

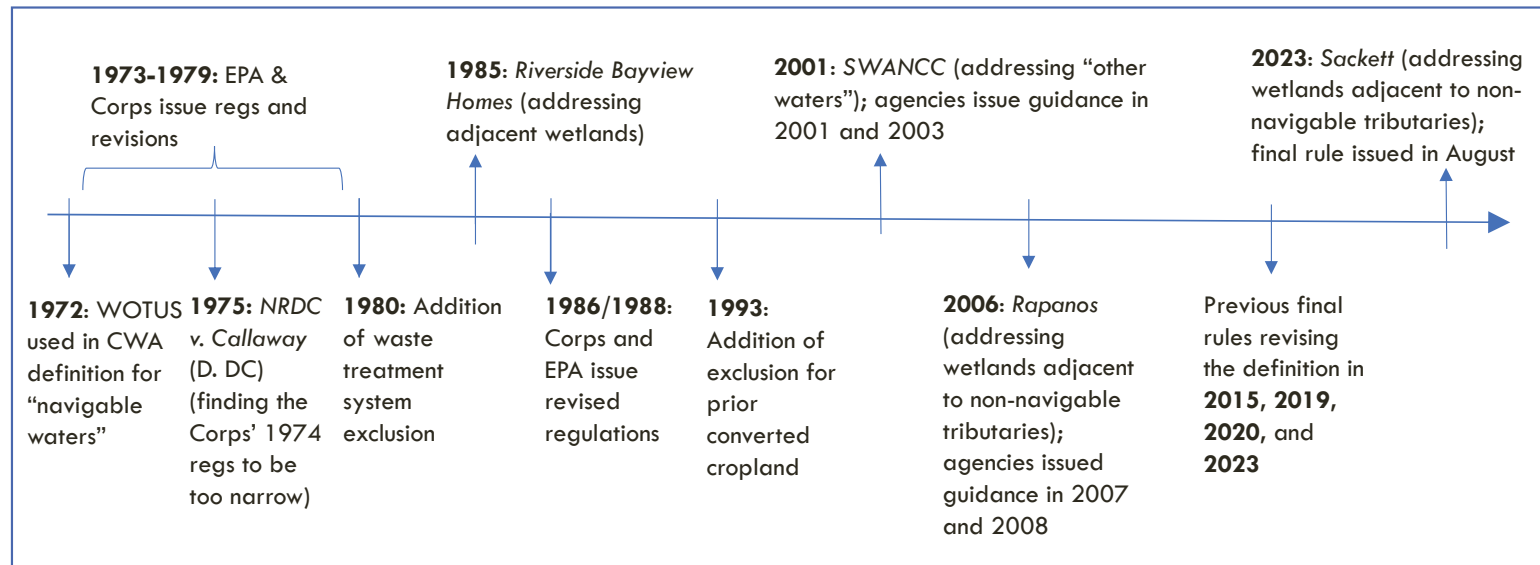
# Background: Why “Waters of the United States” Matters



*The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of Sackett v. EPA may be raised in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with Sackett.*

# Background: “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 major Supreme Court cases.



The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of *Sackett v. EPA* may be raised in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with *Sackett*.

# Background: Regulatory Regimes

- Prior to the 2015 Clean Water Rule, the Agencies implemented the pre-2015 regulations defining “waters of the United States” consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience—this is referred to as the “pre-2015 regulatory regime.”
- The Agencies revised their regulations in 2015, 2019, and 2020. In 2021, two district courts vacated the 2020 Navigable Waters Protection Rule. The Agencies then returned to implementing the pre-2015 regulatory regime nationwide.
- The 2023 Rule replaced the pre-2015 regulatory regime, and was amended by the Conforming Rule, but as the result of ongoing litigation, the Amended 2023 Rule is not operative in certain states and for certain parties.

<https://www.epa.gov/wotus/pre-2015-regulatory-regime>

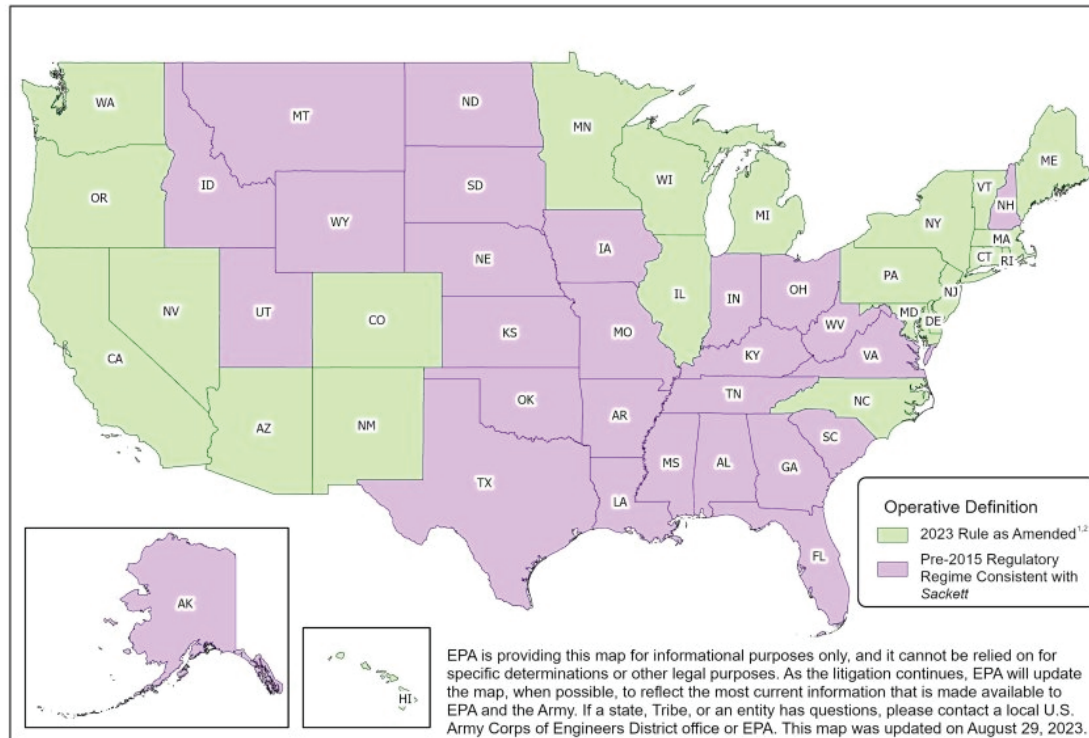
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## Background: Recent Events

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

*The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of Sackett v. EPA may be raised in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with Sackett.*

# Background: Operative Definition of “Waters of the United States”



<sup>1</sup>Also operative in the U.S. territories and the District of Columbia

<sup>2</sup>The 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 Georgia Chamber of Commerce).

<https://www.epa.gov/wotus/definition-waters-United-states-rule-status-and-litigation-update>

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# Background: *Rapanos* Decision

- **Supreme Court decision in *Rapanos v. U.S.* (2006)**

- The Justices were divided in a 4-1-4 opinion on the question of CWA jurisdiction over wetlands adjacent to nonnavigable tributaries of traditional navigable waters.

- **Scalia Plurality Opinion**

Considered “waters of the United States” to include:

- “relatively permanent, standing or continuously flowing bodies of water forming geographic features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes’” and
- Wetlands that 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.”

- **Kennedy Concurring Opinion**

Considered “waters of the United States” to include:

- “a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.”

- **Dissent**

- deferred to the Corps’ assertion of jurisdiction and concluded that the term “waters of the United States” encompasses all tributaries and wetlands that satisfy “either the plurality’s [standard] or Justice Kennedy’s.”

- **Guidance issued in 2007, revised 2008**

- **Circuit Court Decisions:** All eight circuit courts to address the issue held that jurisdiction was proper at least under the Kennedy standard; none held that the plurality was the sole basis that may be used to establish jurisdiction.

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## Background: *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 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.

*The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of Sackett v. EPA may be raised in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with Sackett.*

# 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.

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# Preamble to the Conforming Rule

- The agencies will continue to interpret the definition of “waters of the United States” consistent with the *Sackett* decision.
- 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.
- 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.

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# Targeted Changes to January 2023 Rule Jurisdictional Waters

## Categories of Jurisdictional Waters

(a)(1)

- (i) Traditional Navigable Waters
- (ii) Territorial Seas
- (iii) Interstate Waters – **revised**

(a)(2) Impoundments of Jurisdictional Waters

(a)(3) Tributaries – **revised**

(a)(4) Adjacent Wetlands – **revised**

(a)(5) Additional Waters – **revised**

*The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of Sackett v. EPA may be raised in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with Sackett.*

# No Changes to January 2023 Rule Exclusions

## 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

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# Targeted Changes to January 2023 Rule Definitions

## 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**

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# Amended 2023 Rule: Framework

## Categories of Jurisdictional Waters

### (a)(1)

- (i) Traditional Navigable Waters
- (ii) Territorial Seas
- (iii) Interstate Waters

### (a)(2) Impoundments of Jurisdictional Waters

### (a)(3) Tributaries

### (a)(4) Adjacent Wetlands

### (a)(5) Intrastate lakes and ponds that do not fall within (a)(1) – (a)(4)



**\*NOTE:** For efficiency, this slide's list of the categories of jurisdictional waters are shorthand for the jurisdictional categories in the regulations. See 33 CFR 328.3(a) and 40 CFR 120.2(a).

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## 2023 Joint Coordination Memo – Amended 2023 Rule

- “Because the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard and the 2023 rule preamble discussed the *Rapanos* plurality standard, the implementation guidance and tools in the 2023 rule preamble that address the regulatory text that was not amended by the conforming rule, including the preamble relevant to the *Rapanos* plurality standard incorporated in paragraphs (a)(3), (4), and (5) of the 2023 rule, as amended, generally remain relevant to implementing the 2023 rule, as amended.”
- “Approved jurisdictional determinations (AJDs) are case-specific determinations based on the record and factual questions or *Sackett* concerns may be raised in the context of a particular approved JD.”

*The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of Sackett v. EPA may be raised in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with Sackett.*

## Pre-2015 Regulatory Regime: Terminology

The "**pre-2015 regulatory regime**" refers to the agencies' pre-2015 definition of "waters of the United States," implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience.

<https://www.epa.gov/wotus/pre-2015-regulatory-regime>

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# Pre-2015 Regulations Defining “Waters of the United States”

## Categories of Jurisdictional Waters\*

- (a)(1) Traditional Navigable Waters
- (a)(2) Interstate Waters
- (a)(3) Other Waters
- (a)(4) Impoundments
- (a)(5) Tributaries
- (a)(6) The Territorial Seas
- (a)(7) Adjacent Wetlands



## Categories of Non-Jurisdictional Waters\*

Waste treatment systems and prior converted cropland

**\*NOTE:** For efficiency, this slide’s list of the categories of jurisdictional waters are shorthand for the jurisdictional categories in the regulations. See, e.g., 33 CFR 328.3 (2014) and 40 CFR 230.3(s) (2014).

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# Pre-2015 Regulatory Regime: Generally Non-Jurisdictional Features

- Waters that are generally non-jurisdictional per the preamble of the 1986 regulations and the 2008 *Rapanos* Guidance:
  - Artificially irrigated areas which would revert to upland if the irrigation ceased;
  - Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
  - Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons;
  - Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States;
  - Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water; and
  - Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow)

Exclusions and generally non-jurisdictional features were unaffected by *Sackett*.

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# 2023 Joint Coordination Memo – Pre-2015 Regulatory Regime

- “Because the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard, and the agencies’ pre-2015 regulatory regime discussed the *Rapanos* plurality standard, the agencies will implement the pre-2015 regulations generally consistent with the pre-2015 regulatory regime’s approach to the plurality standard, including relevant case law and longstanding practice, as informed by applicable guidance, training, and experience. ”
- “Under the pre-2015 regulatory regime, consistent with *Sackett*, the agencies:
  - will not assert jurisdiction based on the significant nexus standard,
  - will not assert jurisdiction over interstate wetlands solely because they are interstate,
  - will interpret “adjacent” to mean “having a continuous surface connection,” and
  - will limit the scope of the (a)(3) provision to only relatively permanent lakes and ponds that do not meet one of the other jurisdictional categories.”
- “Approved jurisdictional determinations (JDs) are case-specific determinations based on the record, and factual questions or *Sackett* concerns may be raised in the context of a particular approved JD.

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## Additional Information

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



















**From:** [Wilson, Matthew S CIV USARMY CEHQ \(USA\)](#)  
**To:** [CDL-REG-CHIEFS](#)  
**Cc:** [Wilson, John Maxwell \(Max\) CIV USARMY CEHQ \(USA\)](#); [Inkelas, Daniel CIV USARMY CEHQ \(USA\)](#); [Zilioli, Erica M CIV USARMY CEHQ \(USA\)](#)  
**Subject:** WOTUS: Additional (More Detailed) Approved Public Outreach Materials  
**Date:** Thursday, November 16, 2023 1:02:55 PM  
**Attachments:** [WOTUS Overview Presentation 11-15-23 EPA Corps Staff.pptx](#)  
[WOTUS Overview TPs 11-15-23 EPA Corps Staff.docx](#)  
[WOTUS Overview Tribes and States 11-15-23.pdf](#)

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Chiefs,

Attached are slides and a “run of show” that were provided to USACE by the OASA-CW and that districts can use to provide outreach to the public for “waters of the United States.”

The attached materials are somewhat more detailed than the outreach materials that USACE HQ transmitted to you on 7 NOV.

The OASA-CW has informed us that districts may use the attached slides and “run of show” to provide public outreach.

Please do not share the PowerPoint versions of the slide deck with external parties. Districts may share the slides as PDFs.

Districts may use the run of show as talking points when providing outreach. However, the OASA-CW has directed that the run of show document NOT be shared with external parties.

We hope this is helpful.

We will provide additional implementation and training materials to the field as soon as we are able.

Thank you and your staff for all that you are doing to manage this transition.

Please feel free to contact me by telephone or by email if you have any questions.

Matt Wilson  
Regulatory Program Manager  
Headquarters, U.S. Army Corps of Engineers  
441 G Street NW  
Washington, DC 20314-1000

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# Updates for Tribes and States on “Waters of the United States”



November 15, 2023





**Russell Kaiser**, Acting Director of the Oceans, Wetlands and Communities Division in EPA's Office of Water

**Whitney Beck**, Clean Water Act Jurisdiction Team Lead in EPA's Office of Water

**Rose Kwok**, Environmental Scientist in EPA's Office of Water

**Melinda Larsen**, Office of the Assistant Secretary of the Army (Civil Works)

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# Presentation Outline

- Background
- Amended 2023 Rule
- Pre-2015 Regulatory Regime
- Additional Resources



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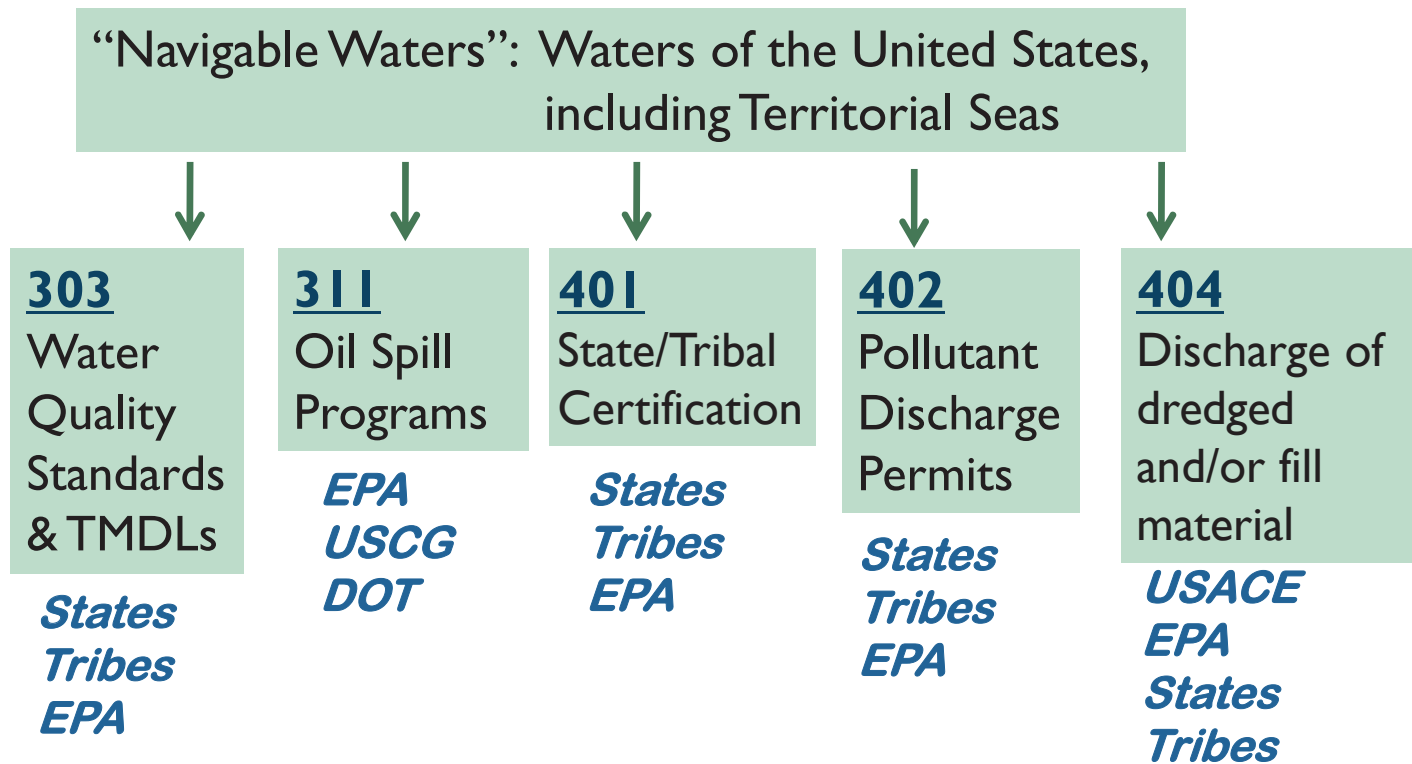
# Background: “Waters of the United States” and the Clean Water Act

- “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.”
- EPA and the Department of the Army have defined “waters of the United States” by regulation since the 1970s.



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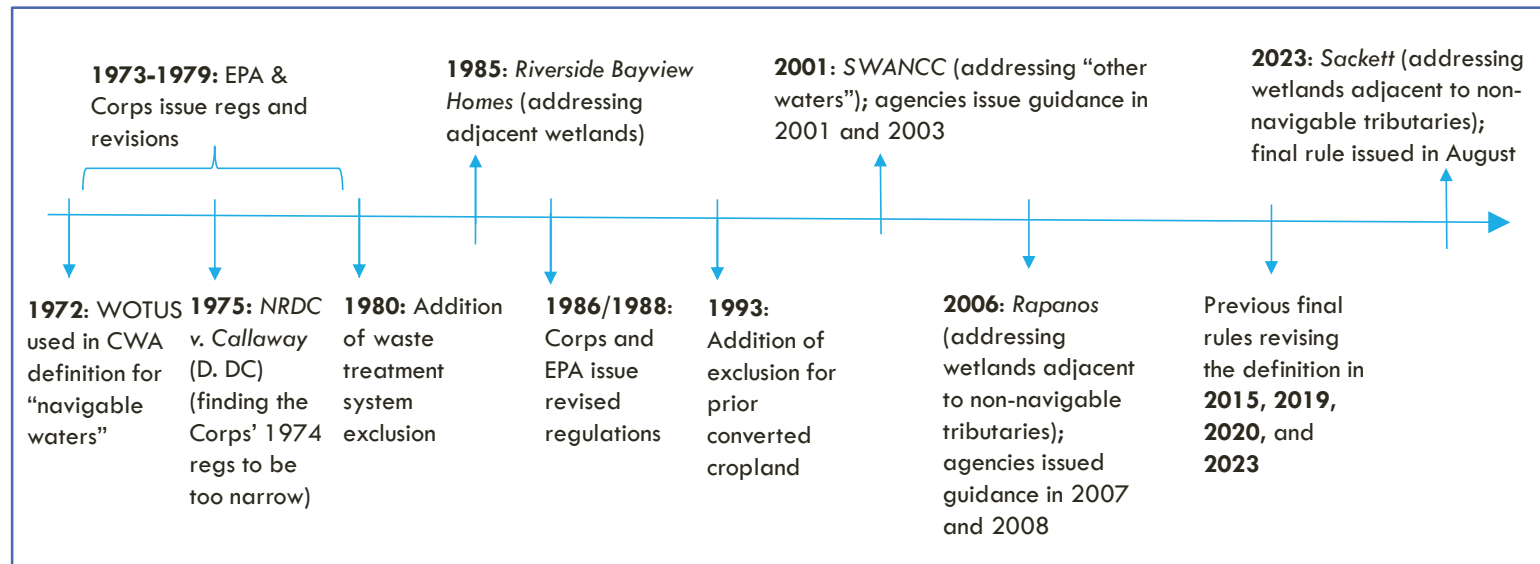
# Background: Why “Waters of the United States” Matters



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# Background: “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 major Supreme Court cases.



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# Background: Regulatory Regimes

- Prior to the 2015 Clean Water Rule, the Agencies implemented the pre-2015 regulations defining “waters of the United States” consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience—this is referred to as the “pre-2015 regulatory regime.”
- The Agencies revised their regulations in 2015, 2019, and 2020. In 2021, two district courts vacated the 2020 Navigable Waters Protection Rule. The Agencies then returned to implementing the pre-2015 regulatory regime nationwide.
- The 2023 Rule replaced the pre-2015 regulatory regime, and was amended in September 2023, but as the result of ongoing litigation, the Amended 2023 Rule is not operative in certain states and for certain parties.

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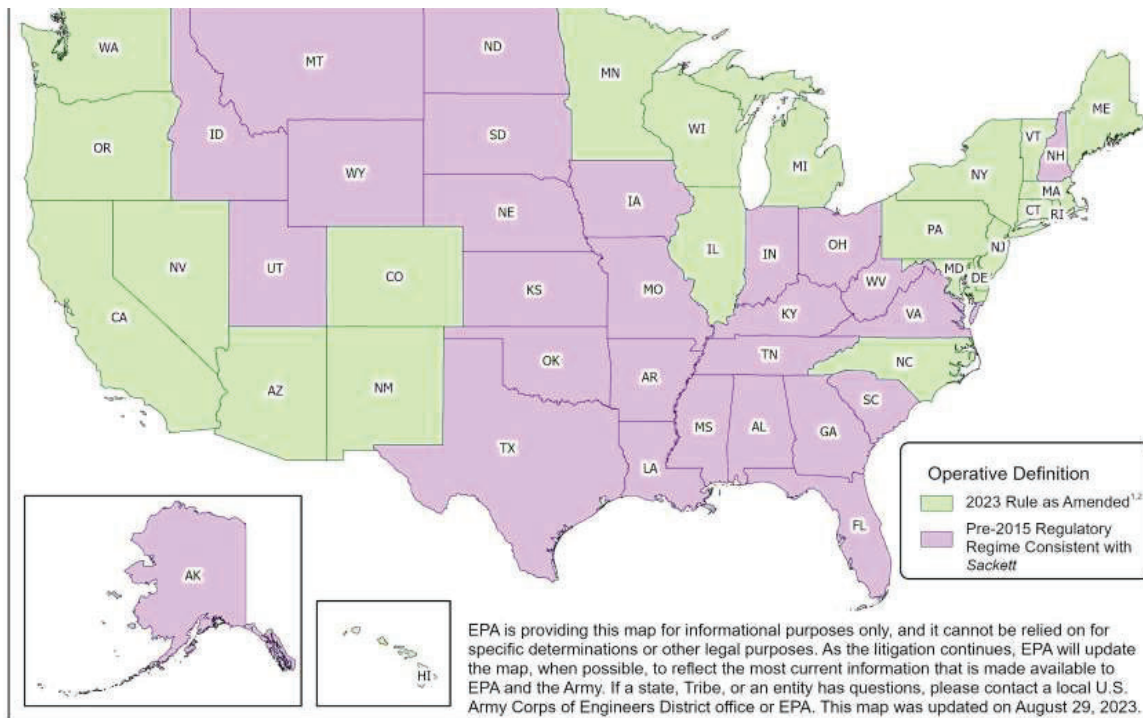
# Background: Recent Events

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



<sup>1</sup>Also operative in the U.S. territories and the District of Columbia.

<sup>2</sup>The 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 Georgia Chamber of Commerce).

<https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>

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# Background: *Rapanos* Decision

- **Supreme Court decision in *Rapanos v. U.S.* (2006)**
  - The Justices were divided in a 4-1-4 opinion on the question of CWA jurisdiction over wetlands adjacent to nonnavigable tributaries of traditional navigable waters.
- **Scalia Plurality Opinion**

Considered “waters of the United States” to include:

  - “relatively permanent, standing or continuously flowing bodies of water forming geographic features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes’” and
  - Wetlands that 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.”
- **Kennedy Concurring Opinion**

Considered “waters of the United States” to include:

  - “a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.”
- **Dissent**
  - deferred to the Corps’ assertion of jurisdiction and concluded that the term “waters of the United States” encompasses all tributaries and wetlands that satisfy “either the plurality’s [standard] or Justice Kennedy’s.”
- **Guidance issued in 2007, revised 2008**
- **Circuit Court Decisions:** All eight circuit courts to address the issue held that jurisdiction was proper over at least those waters that satisfy the Kennedy standard; none held that the plurality was the sole basis that may be used to establish jurisdiction.

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# Background: *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 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 adjacent 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.

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# Background: Conforming Rule Amending January 2023 Rule

- September 8, 2023: EPA and Army Corps published a rule to amend the January 2023 definition of “waters of the United States” to conform with *Sackett*; rule was effective upon publication.
- In the conforming rule, the agencies determined that there is good cause under the Administrative Procedure Act to issue a final rule because certain provisions of the January 2023 Rule were invalid under the Supreme Court’s interpretation of the Clean Water Act in *Sackett*.
- Targeted changes to January 2023 Rule categories of “waters of the United States”:
  - (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 delete significant nexus standard
  - (a)(4) Adjacent Wetlands – **revised** to delete significant nexus standard
  - (a)(5) Additional Waters – **revised** to delete significant nexus standard and delete streams and wetlands
- Targeted changes to January 2023 Rule Definitions:
  - (c)(2) Adjacent – **revised** to mean “having a continuous surface connection”
  - (c)(6) Significantly affect – **deleted**
- No changes to January 2023 Rule Exclusions

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# Background: Preamble to the Conforming Rule

- The preamble notes that the Court in *Sackett* “conclude[d] that the *Rapanos* plurality was correct.”
- The agencies will continue to interpret the definition of “waters of the United States” consistent with the *Sackett* decision.
- 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.
- 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.

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# Amended 2023 Rule: Framework

## Categories of Jurisdictional Waters

(a)(1)

- (i) Traditional Navigable Waters
- (ii) Territorial Seas
- (iii) Interstate Waters

(a)(2) Impoundments of Jurisdictional Waters

(a)(3) Tributaries

(a)(4) Adjacent Wetlands

(a)(5) Intrastate lakes and ponds that do not fall within (a)(1) – (a)(4)



**\*NOTE:** For efficiency, this slide's list of the categories of jurisdictional waters are shorthand for the jurisdictional categories in the regulations. See 33 CFR 328.3(a) and 40 CFR 120.2(a).

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# Amended 2023 Rule: Framework

## 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 reflection or swimming pools or other small ornamental bodies of water

(b)(7) Certain waterfilled depressions

(b)(8) Swales and erosional features

(b)(1) – (b)(2):  
Pre-2015 exclusions, modified  
in the regulations

(b)(3) – (b)(8):  
Pre-2015 “generally non-  
jurisdictional features,” added  
to the regulations as  
exclusions

**\*NOTE:** For efficiency, this slide’s list of the categories of exclusions are shorthand for the categories in the regulations. See 33 CFR 328.3(b) and 40 CFR 120.2(b).  
Exclusions do not apply to paragraph (a)(1) waters.

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# Amended 2023 Rule: Framework

## Definitions

(c)(1) Wetlands

(c)(2) Adjacent

(c)(3) High tide line

(c)(4) Ordinary high water mark

(c)(5) Tidal waters



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# Amended 2023 Rule: Joint Coordination Memorandum

- As is typical after a rule is promulgated, the agencies have entered into an agreement via a joint agency coordination memorandum to ensure the consistency and thoroughness of the agencies' implementation of this rule. [Coordination Memorandum \(September 27, 2023\)](#) EPA and Corps field staff will coordinate on certain draft approved jurisdictional determinations and the agencies will follow a process for elevating a subset of these determinations to headquarters for review as necessary.
- “Because the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard and the 2023 rule preamble discussed the *Rapanos* plurality standard, **the implementation guidance and tools in the 2023 rule preamble that address the regulatory text that was not amended by the conforming rule, including the preamble relevant to the *Rapanos* plurality standard incorporated in paragraphs (a)(3), (4), and (5) of the 2023 rule, as amended, generally remain relevant to implementing the 2023 rule, as amended.**”
- “Approved jurisdictional determinations (JDs) are case-specific determinations based on the record and factual questions or *Sackett* concerns may be raised in the context of a particular approved JD.”

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# Amended 2023 Rule: (a)(1) Waters – Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

- **Traditional Navigable Waters**
  - Waters which are 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.
  - EPA and Army will continue to use the legal memorandum **Waters That Qualify as “Traditional Navigable Waters” Under Section (a)(1) of the Agencies’ Regulations** (formerly known as Appendix D) to provide guidance for identifying traditional navigable waters.



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# Amended 2023 Rule: (a)(1) Waters – Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

- **The Territorial Seas**
  - Defined in section 502(8) of the Clean Water Act as “the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.”



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# Amended 2023 Rule: (a)(1) Waters – Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

- **Interstate Waters**
  - “Waters of the United States” include interstate waters.
  - The conforming rule revised the January 2023 rule to remove “interstate wetlands” from the provision.
  - Lakes and ponds crossing state boundaries are jurisdictional as interstate waters in their entirety.
  - For rivers and streams, interstate waters include the portion of the river or stream that is of the same stream order as the point that crosses or serves as a state line.



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# Amended 2023 Rule: (a)(2) Impoundments

- “Waters of the United States” include impoundments of waters that otherwise meet the definition of “waters of the United States.”
- The agencies consider paragraph (a)(2) impoundments to include:
  - (1) Impoundments created by impounding one of the “waters of United States” that was jurisdictional under the Amended 2023 Rule’s definition at the time the impoundment was created, and
  - (2) Impoundments of waters that at the time of assessment meet the definition of “waters of the United States” under paragraph (a)(1), (a)(3), or (a)(4) of the Amended 2023 Rule, regardless of the water’s jurisdictional status at the time the impoundment was created.



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# Amended 2023 Rule: (a)(3) Tributaries

- Tributaries include natural, man-altered, or man-made water bodies that flow directly or indirectly into (a)(1) waters or (a)(2) impoundments.
  - Tributaries can include rivers, streams, lakes, ponds, and impoundments.
  - Tributaries can also include ditches and canals.
- Jurisdictional tributaries must meet the relatively permanent standard.



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# Amended 2023 Rule: (a)(3) Tributaries

## Relatively Permanent Standard

- Relatively permanent waters include tributaries that have flowing or standing water year-round or continuously during certain times of year.
- Relatively permanent waters do not include tributaries with flowing or standing water for only a short duration in direct response to precipitation.



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# Amended 2023 Rule: (a)(3) Tributaries

## Relatively Permanent Standard – Duration and Timing of Flow

Relatively permanent waters include tributaries that have flowing or standing water year-round or continuously during certain times of year.

- “Certain times of the year” is intended to include extended periods of standing or continuously flowing water occurring in the same geographic feature year after year, except in times of drought.
- Relatively permanent flow may occur seasonally, but the phrase is also intended to encompass tributaries in which extended periods of standing or continuously flowing water are not linked to naturally recurring annual or seasonal cycles.



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# Amended 2023 Rule: (a)(3) Tributaries

## Relatively Permanent Standard – Duration and Timing of Flow

Relatively permanent waters do not include tributaries with flowing or standing water for only a short duration in **direct response to precipitation**.

- “Direct response to precipitation” is intended to distinguish between episodic periods of flow associated with discrete precipitation events versus continuous flow for extended periods of time.
- No minimum flow duration has been established because flow duration varies extensively by region.



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# Amended 2023 Rule: (a)(4) Adjacent Wetlands

- **Wetlands** means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
- **Adjacent** has been revised by the conforming rule to mean having a continuous surface connection.
- **Jurisdictional adjacent wetlands** include:
  - Wetlands that are adjacent to an (a)(1) water, relatively permanent jurisdictional impoundment, or relatively permanent tributary.



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# Amended 2023 Rule: (a)(4) Adjacent Wetlands

## Continuous Surface Connection

- A **continuous surface connection** means the wetlands either physically abut or touch the paragraph (a)(1) or relatively permanent water, or are connected to the paragraph (a)(1) or relatively permanent water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert.
- Note that *Sackett* is clear that “a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA.”



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## Amended 2023 Rule: (a)(5) Waters: lakes and ponds not identified in (a)(1) – (a)(4)

- Jurisdictional (a)(5) waters include intrastate lakes and ponds not identified in the other jurisdictional categories, that meet the relatively permanent standard.
- The conforming rule revised the January 2023 rule to remove “streams” and “wetlands” from the (a)(5) provision.

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# Amended 2023 Rule: (a)(5) Waters: lakes and ponds not identified in (a)(1) – (a)(4)

## Relatively Permanent Standard

- Lakes and ponds assessed under paragraph (a)(5) meet the relatively permanent standard if they are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to a paragraph (a)(1) water or tributary that is relatively permanent.
- The agencies will assess lakes and ponds under paragraph (a)(5) to determine if they are **relatively permanent** using a similar approach to the one described for tributaries.
- The agencies will assess a **continuous surface connection** between lakes and ponds assessed under paragraph (a)(5) and a paragraph (a)(1) water or a tributary that is relatively permanent using the approach described for wetlands.

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# Amended 2023 Rule: Exclusions

- Excluded waters or features are not jurisdictional as “waters of the United States.”
- Exclusions do not apply to paragraph (a)(1) waters.
- The regulations include the pre-2015 regulatory exclusions:
  - Waste treatment exclusion, prior converted cropland exclusion
- The regulations contain exclusions for features that were “generally non-jurisdictional” under the pre-2015 regulatory regime:
  - Certain ditches, certain artificially irrigated areas, certain artificial lakes and ponds, certain artificial reflecting and swimming pools, certain waterfilled depressions, certain swales and erosional features

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## Amended 2023 Rule: (b)(1) Exclusion: Waste Treatment Systems

- The regulations exclude waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.
- The 2023 rule preamble provides clarification on implementation:
  - Excluded waste treatment systems do not sever upstream jurisdiction.
  - The exclusion is generally available only to the permittee using the system for the treatment function for which such system was designed.

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## Amended 2023 Rule: (b)(2) Exclusion: Prior Converted Cropland

- The regulatory exclusion for prior converted cropland only covers wetlands.
- Wetlands can be covered under the prior converted cropland exclusion if they meet USDA's longstanding definition of prior converted cropland.
- Prior converted cropland loses its exclusion status if there is a “change in use” – meaning the area is no longer available for the production of an agricultural commodity.

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# Amended 2023 Rule: (b)(3) – (b)(8) Exclusions

- The regulations specify that features considered “generally non-jurisdictional” in the preamble to the pre-2015 regulations and in the pre-2015 guidance are excluded.
- Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;
- Artificially irrigated areas that would revert to dry land if the irrigation ceased;
- Artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
- Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons;
- Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States; and
- Swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow.

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# Pre-2015 Regulatory Regime: Terminology

The “**pre-2015 regulatory regime**” refers to the agencies’ pre-2015 definition of “waters of the United States,” implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience.

<https://www.epa.gov/wotus/pre-2015-regulatory-regime>

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# Pre-2015 Regulatory Regime: Framework

## Categories of Jurisdictional Waters\*

- (a)(1) Traditional Navigable Waters
- (a)(2) Interstate Waters
- (a)(3) Other Waters
- (a)(4) Impoundments
- (a)(5) Tributaries
- (a)(6) The Territorial Seas
- (a)(7) Adjacent Wetlands



## Categories of Non-Jurisdictional Waters\*

Waste treatment systems and prior converted cropland

**\*NOTE:** For efficiency, this slide's list of the categories of jurisdictional and non-jurisdictional waters are shorthand for the categories in the regulations. See, e.g., 33 CFR 328.3 (2014) and 40 CFR 230.3(s) (2014).

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# Pre-2015 Regulatory Regime: Joint Coordination Memo

- “Because the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard, and the agencies’ pre-2015 regulatory regime discussed the *Rapanos* plurality standard, the agencies will implement the pre-2015 regulations generally consistent with the pre-2015 regulatory regime’s approach to the plurality standard, including relevant case law and longstanding practice, as informed by applicable guidance, training, and experience.”
- “Under the pre-2015 regulatory regime, consistent with *Sackett*, the agencies:
  - will not assert jurisdiction based on the significant nexus standard,
  - will not assert jurisdiction over interstate wetlands solely because they are interstate,
  - will interpret “adjacent” to mean “having a continuous surface connection,” and
  - will limit the scope of the (a)(3) provision to only relatively permanent lakes and ponds that do not meet one of the other jurisdictional categories.”

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# Pre-2015 Regulatory Regime: Joint Coordination Memo

- “Approved jurisdictional determinations (JDs) are case-specific determinations based on the record, and factual questions or *Sackett* concerns may be raised in the context of a particular approved JD.”
  - “With respect to final determinations of the geographic jurisdictional scope of “waters of the United States” for purposes of Section 404 that are not subject to this memorandum, Corps districts may choose to coordinate with EPA regions on draft approved JDs on a case-by-case basis and either the Corps districts or EPA regions may seek headquarters-level review or guidance on draft approved JDs at any time.”

[https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-pre-2015-regulatory-regime\\_508c.pdf](https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-pre-2015-regulatory-regime_508c.pdf)

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# Pre-2015 Regulatory Regime:

## (a)(1) – Traditional Navigable Waters

- Waters which are 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.
- EPA and Army will continue to use the legal memorandum **Waters That Qualify as “Traditional Navigable Waters” Under Section (a)(1) of the Agencies’ Regulations** (formerly known as Appendix D) to provide guidance for identifying traditional navigable waters.



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## Pre-2015 Regulatory Regime: (a)(2) – Interstate Waters

- “Waters of the United States” include interstate waters.
- These are waters that cross or act as State boundaries.
- Under the pre-2015 regulatory regime, consistent with *Sackett*, the agencies will not assert jurisdiction over interstate wetlands solely because they are interstate.



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# Pre-2015 Regulatory Regime:

## (a)(3) – Other Waters

Paragraph (a)(3) of the pre-2015 regulations:

- All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
  - (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
  - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
  - (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;”

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## Pre-2015 Regulatory Regime: (a)(3) – Other Waters

- Under the pre-2015 regulatory regime, consistent with *Sackett*, the agencies will limit the scope of the (a)(3) provision to assessing only relatively permanent lakes and ponds that do not meet one of the other jurisdictional categories.
- The agencies have not asserted jurisdiction over any (a)(3) other waters under the pre-2015 regulatory regime since the *SWANCC* decision was issued in 2001.

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# Pre-2015 Regulatory Regime:

## (a)(4) – Impoundments

- “Waters of the United States” include impoundments of waters otherwise identified as “waters of the United States.”
- Under the pre-2015 regulatory regime:
  - Impoundment of “waters of the United States” as a general matter does not affect the water’s jurisdictional status.
  - Documentation should 1) demonstrate that the impoundment was created from “waters of the United States,” 2) demonstrate that the water meets the criteria for another jurisdictional category, or 3) assess the impoundment under paragraph (a)(3).



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## Pre-2015 Regulatory Regime: (a)(5) – Tributaries

- The regulatory text of this category includes tributaries of waters identified in paragraphs (a)(1) through (a)(4).
  - Under the pre-2015 regulatory regime, a tributary includes natural, man-altered, or man-made water bodies that flow directly or indirectly into a traditional navigable water (TNW).
  - Tributaries also include such water bodies that flow directly or indirectly into an interstate water, even when there is no connection to a TNW.
- Tributaries can include rivers, streams, lakes, ponds, and impoundments.
- Tributaries can also include ditches and canals.
- Jurisdictional tributaries must be relatively permanent.



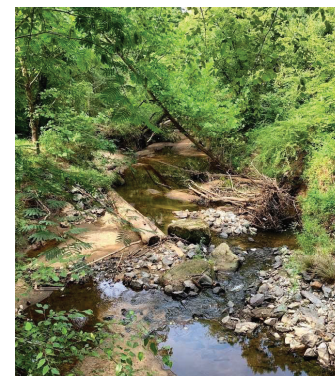
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# Pre-2015 Regulatory Regime:

## (a)(5) – Tributaries

### Relatively Permanent

- Relatively permanent waters include tributaries that typically have flowing or standing water year-round or continuously at least seasonally (e.g., typically three months).
  - The duration of seasonal flowing or standing water may vary regionally, but the tributary must have predictable flowing or standing water seasonally.
- Non-relatively permanent tributaries are those that have flowing or standing water only in response to precipitation or that do not have continuously flowing or standing water at least seasonally.



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## Pre-2015 Regulatory Regime: (a)(6) – the Territorial Seas

- Defined in section 502(8) of the Clean Water Act as “the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.”



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# Pre-2015 Regulatory Regime:

## (a)(7) Adjacent Wetlands

- **Wetlands** means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
- Under the pre-2015 regulatory regime, consistent with *Sackett*, **adjacent** will be interpreted to mean “having a continuous surface connection.”
- Jurisdictional adjacent wetlands include:
  - Wetlands that have a continuous surface connection to a traditional navigable water, interstate water, the territorial seas, or a relatively permanent tributary or impoundment.



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# Pre-2015 Regulatory Regime:

## (a)(7) Adjacent Wetlands

### Continuous Surface Connection

- Wetlands have a continuous surface connection when they physically abut or touch a jurisdictional water.
  - Abutting wetlands are those that “touch” a jurisdictional water (i.e., they are not separated by uplands, a berm, dike, or similar barrier from the OHWM of the water to which they are adjacent).
- Wetlands also have a continuous surface connection when they are connected to a jurisdictional water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert (per pre-2015 case law, see *United States v. Cundiff* (2009), and prior EPA practice).
- Note that *Sackett* is clear that “a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA.”



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# Pre-2015 Regulatory Regime: Exclusions and Generally Non-Jurisdictional Features

- Regulatory exclusions include:
  - Waste treatment exclusion, prior converted cropland exclusion
- Features that are generally not jurisdictional per the 1986 preamble language and the 2008 *Rapanos* guidance include:
  - Certain ditches, certain artificially irrigated areas, certain artificial lakes and ponds, certain artificial reflecting and swimming pools, certain waterfilled depressions, certain swales and erosional features

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## Pre-2015 Regulatory Regime: Exclusion: Waste Treatment Systems

- The regulations exclude waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.
- All waters that are upstream and downstream of the waste treatment system that were jurisdictional prior to the authorized activities and qualify as jurisdictional WOTUS under the pre-2015 regulatory regime, are still WOTUS and subject to the CWA.

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# Pre-2015 Regulatory Regime:

## Exclusion: Prior Converted Cropland

- The regulatory exclusion for prior converted cropland only covers wetlands.
- Wetlands can be covered under the prior converted cropland exclusion if they meet USDA's longstanding definition of prior converted cropland.

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## Pre-2015 Regulatory Regime: Exclusion: Prior Converted Cropland

- The Corps and EPA will continue to generally rely on valid prior-converted cropland (PCC) designations made by USDA-NRCS for making determinations of the applicability of the PCC exclusion, provided that the PCC has not been abandoned. However, the final authority regarding Clean Water Act (CWA) jurisdiction remains with EPA.
- Preamble to the 1993 WOTUS Regulations (58 FR, 45034): “*PC cropland which now meets wetland criteria is considered to be abandoned unless: For once in every five years the area has been used for the production of an agricultural commodity, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes or pasture production.*”

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# Pre-2015 Regulatory Regime: Generally Non-Jurisdictional Features

- Waters that are generally non-jurisdictional per the preamble of the 1986 regulations and the 2008 *Rapanos* Guidance:
  - Artificially irrigated areas which would revert to upland if the irrigation ceased;
  - Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
  - Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons;
  - Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States;
  - Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water; and
  - Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow)

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# Tools and Resources

Examples of tools to determine whether tributaries or lakes and ponds are relatively permanent include:

- Direct observation
- Regional field observations
- [USACE Antecedent Precipitation Tool \(APT\)](#)
- [USGS Topographic Maps](#)
- [Regionalized streamflow duration assessment methods \(SDAMs\)](#)
- Aerial and satellite imagery
- [USGS National Hydrography Dataset \(NHD\)](#)
- Stream Gage data, including from [USGS](#)
- Regional regression analysis
- Hydrologic modeling tools such as [HEC-HMS](#)

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# Tools and Resources

Examples of tools to determine whether tributaries or lakes and ponds are relatively permanent include:

- Elevation data and models, including [LIDAR](#) (for example, from the [USGS](#))
- State, tribal, and local data and maps
- [USGS StreamStats](#)
- [Probability of Streamflow Permanence \(PROSPER\) by the USGS](#) (including for the Pacific Northwest)
- NRCS hydrologic tools and [soil maps](#)
- NOAA national snow analyses maps
- NRCS snow sources
- [USEPA WATERS GeoViewer](#) and [How's My Waterway](#)
- [USGS National Map Viewer](#)

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# Tools and Resources

Examples of tools to determine whether an adjacent wetland has a continuous surface connection to a jurisdictional water include:

- Direct observation
- Regional field observations
- [USGS Topographic Maps](#)
- Aerial and satellite imagery
- [USGS NHD](#)
- [USFWS National Wetlands Inventory \(NWI\)](#)
- Elevation data such as [LIDAR](#)-based topographic models
- State, Tribal, and local data and maps
- NRCS hydrologic tools and [soil maps](#)
- [FEMA flood zone](#) or other floodplain maps

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# Additional Resources: Implementation Memoranda

- EPA and Army have prepared new **Coordination Memos** to ensure consistency of jurisdictional determinations under the 2023 Rule, as amended, and the Pre-2015 Regulatory Regime.
- EPA, Army, and USDA will continue to implement the 2022 **Agricultural Memo** that clarifies the agencies' roles and programs, and in particular clarifies the prior converted cropland exclusion.
- EPA and Army will continue to use the legal memorandum **Waters That Qualify as "Traditional Navigable Waters" Under Section (a)(1) of the Agencies' Regulations** (formerly known as Appendix D) to provide guidance for identifying traditional navigable waters.
- EPA and Army are also retaining the **2020 Ditch Exemption Memo** clarifying implementation of the ditch exemption under Clean Water Act section 404(f).

<https://www.epa.gov/wotus>

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# Questions

<https://www.epa.gov/wotus>

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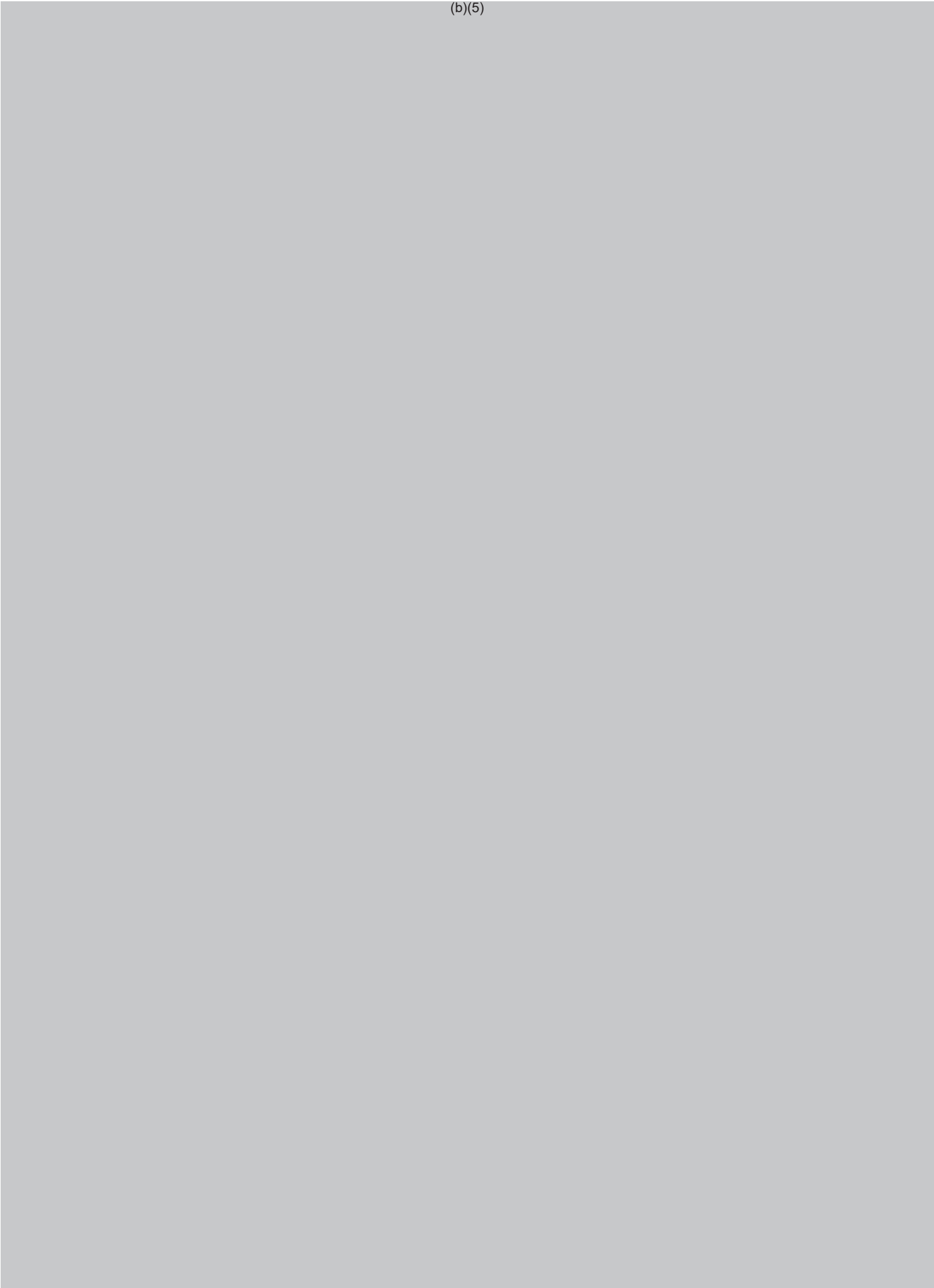
















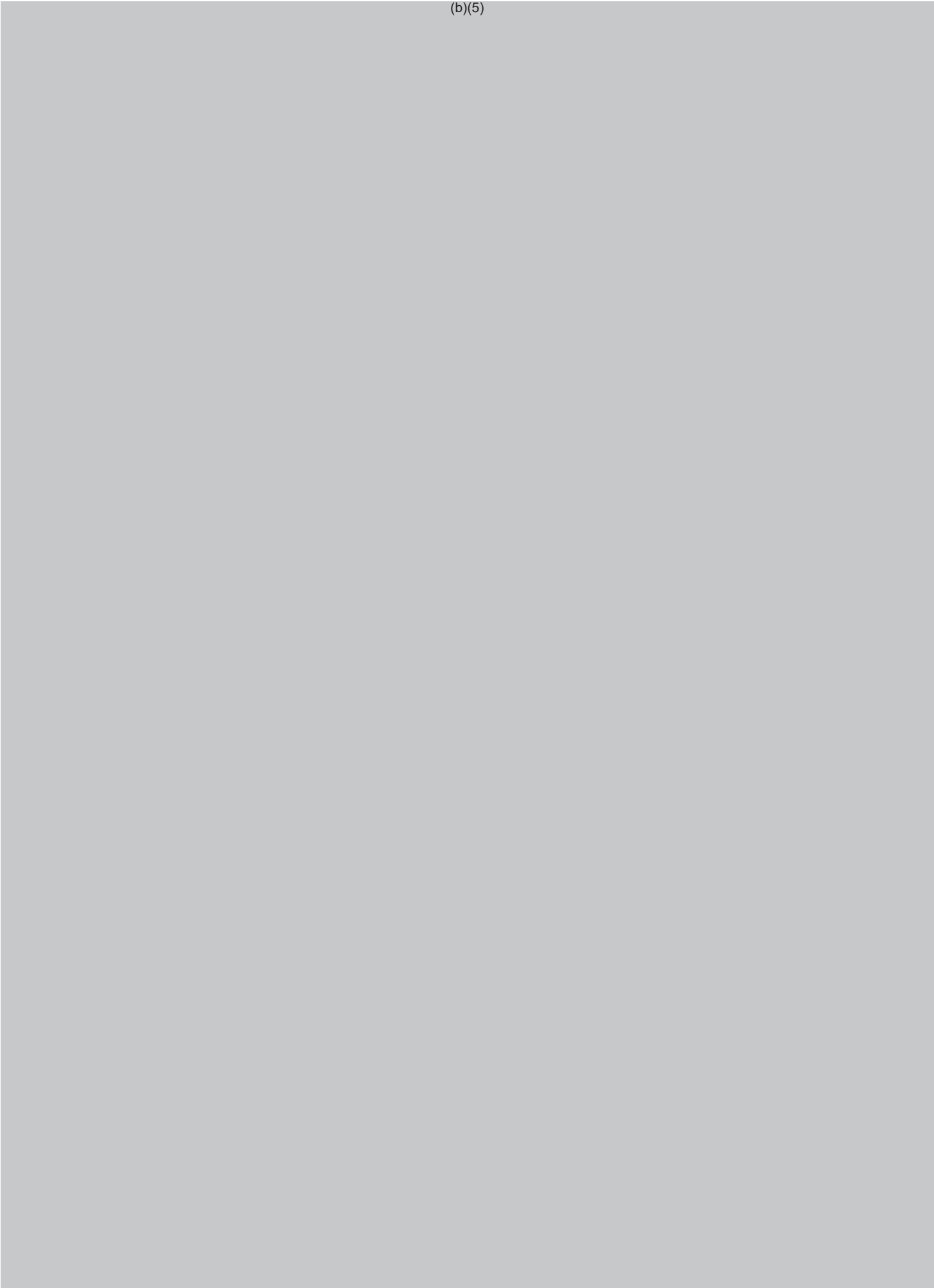
























# Updates for Tribes and States on “Waters of the United States”



November 15, 2023



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# Presentation Outline

- Background
- Amended 2023 Rule
- Pre-2015 Regulatory Regime
- Additional Resources



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# Background: “Waters of the United States” and the Clean Water Act

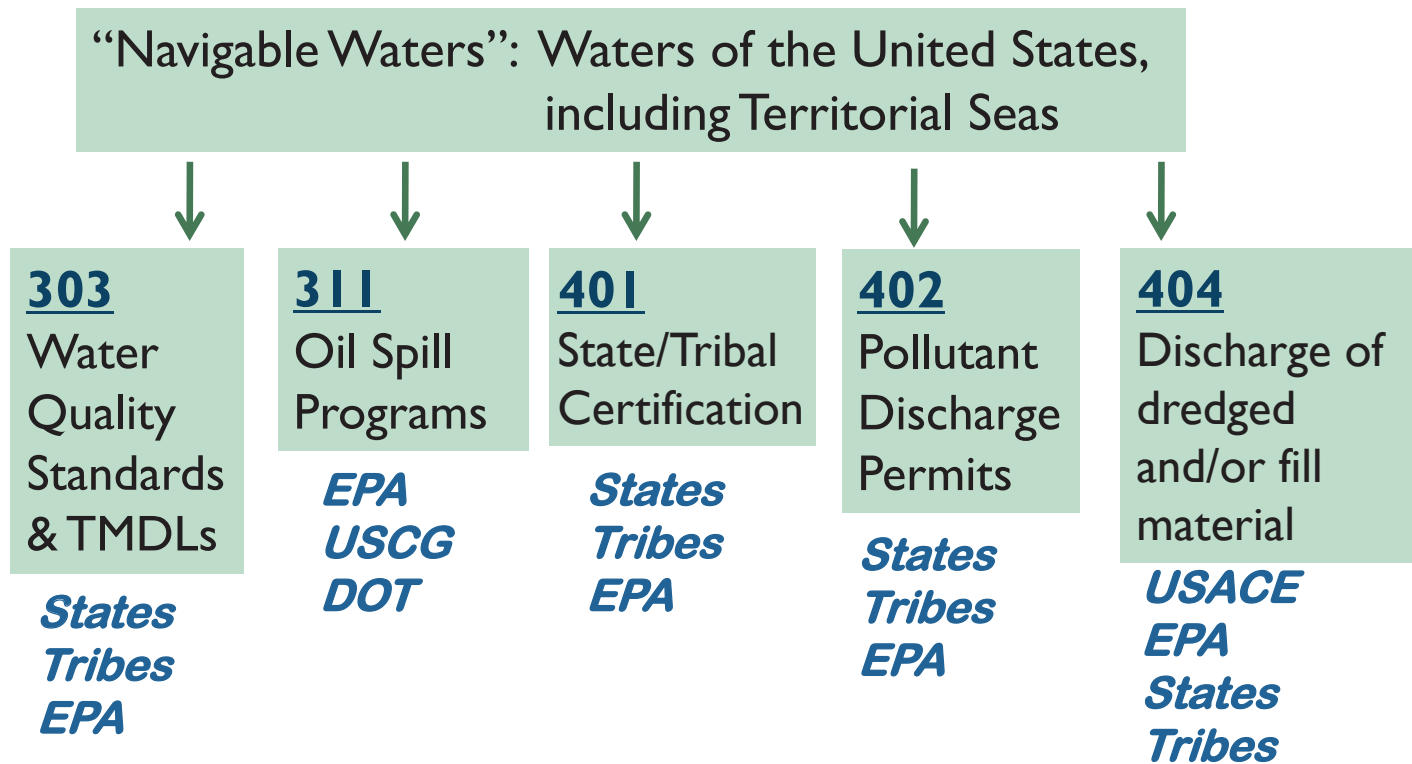
- “Waters of the United States” is a threshold term in the Clean Water Act that establishes the geographic scope of federal jurisdiction under the Act.
- Clean Water Act regulatory programs address “navigable waters,” defined in the statute as “the waters of the United States, including the territorial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



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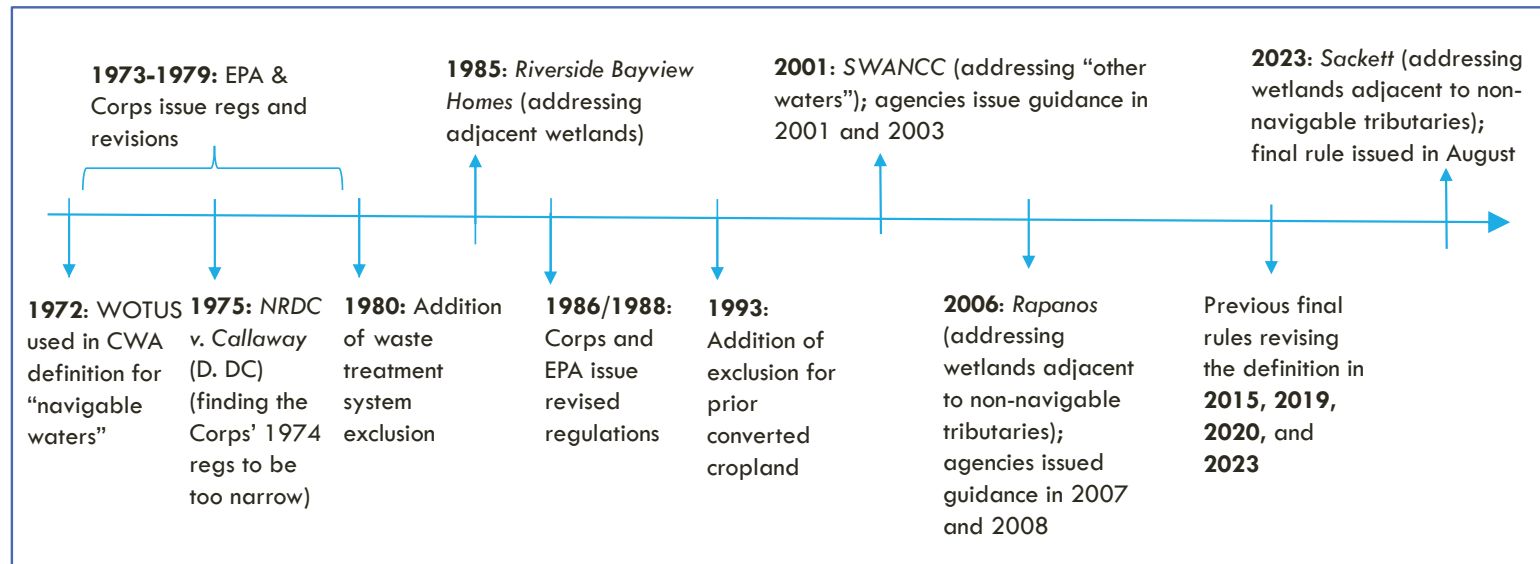
# Background: Why “Waters of the United States” Matters



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# Background: “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 major Supreme Court cases.



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# Background: Regulatory Regimes

- Prior to the 2015 Clean Water Rule, the Agencies implemented the pre-2015 regulations defining “waters of the United States” consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience—this is referred to as the “pre-2015 regulatory regime.”
- The Agencies revised their regulations in 2015, 2019, and 2020. In 2021, two district courts vacated the 2020 Navigable Waters Protection Rule. The Agencies then returned to implementing the pre-2015 regulatory regime nationwide.
- The 2023 Rule replaced the pre-2015 regulatory regime, and was amended in September 2023, but as the result of ongoing litigation, the Amended 2023 Rule is not operative in certain states and for certain parties.

<https://www.epa.gov/wotus/pre-2015-regulatory-regime>

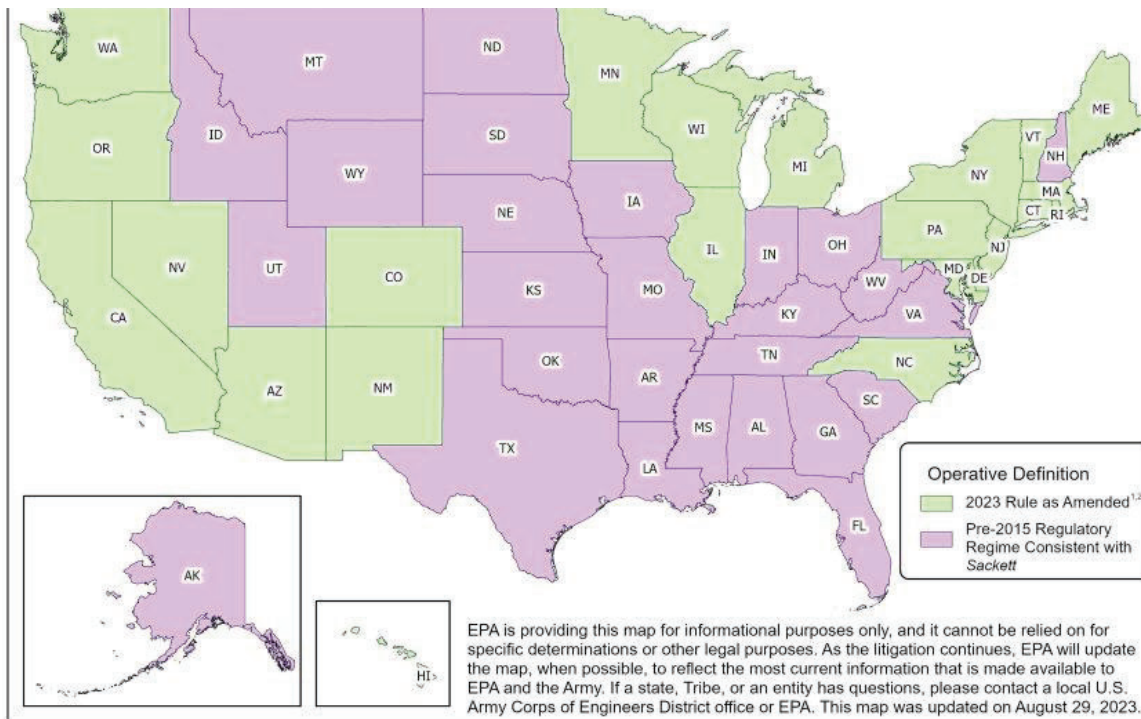
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# Background: Recent Events

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

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# Background: Operative Definition of “Waters of the United States”



<sup>1</sup>Also operative in the U.S. territories and the District of Columbia

<sup>2</sup>The 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 Georgia Chamber of Commerce).

<https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>

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# Background: *Rapanos* Decision

- **Supreme Court decision in *Rapanos v. U.S.* (2006)**
  - The Justices were divided in a 4-1-4 opinion on the question of CWA jurisdiction over wetlands adjacent to nonnavigable tributaries of traditional navigable waters.
- **Scalia Plurality Opinion**

Considered “waters of the United States” to include:

  - “relatively permanent, standing or continuously flowing bodies of water forming geographic features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes’” and
  - Wetlands that 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.”
- **Kennedy Concurring Opinion**

Considered “waters of the United States” to include:

  - “a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.”
- **Dissent**
  - deferred to the Corps’ assertion of jurisdiction and concluded that the term “waters of the United States” encompasses all tributaries and wetlands that satisfy “either the plurality’s [standard] or Justice Kennedy’s.”
- **Guidance issued in 2007, revised 2008**
- **Circuit Court Decisions:** All eight circuit courts to address the issue held that jurisdiction was proper over at least those waters that satisfy the Kennedy standard; none held that the plurality was the sole basis that may be used to establish jurisdiction.

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# Background: *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 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 adjacent 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.

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# Background: Conforming Rule Amending January 2023 Rule

- September 8, 2023: EPA and Army Corps published a rule to amend the January 2023 definition of “waters of the United States” to conform with *Sackett*; rule was effective upon publication.
- In the conforming rule, the agencies determined that there is good cause under the Administrative Procedure Act to issue a final rule because certain provisions of the January 2023 Rule were invalid under the Supreme Court’s interpretation of the Clean Water Act in *Sackett*.
- Targeted changes to January 2023 Rule categories of “waters of the United States”:
  - (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 delete significant nexus standard
  - (a)(4) Adjacent Wetlands – **revised** to delete significant nexus standard
  - (a)(5) Additional Waters – **revised** to delete significant nexus standard and delete streams and wetlands
- Targeted changes to January 2023 Rule Definitions:
  - (c)(2) Adjacent – **revised** to mean “having a continuous surface connection”
  - (c)(6) Significantly affect – **deleted**
- No changes to January 2023 Rule Exclusions

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# Background: Preamble to the Conforming Rule

- The preamble notes that the Court in *Sackett* “conclude[d] that the *Rapanos* plurality was correct.”
- The agencies will continue to interpret the definition of “waters of the United States” consistent with the *Sackett* decision.
- 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.
- 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.

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# Amended 2023 Rule: Framework

## Categories of Jurisdictional Waters

(a)(1)

- (i) Traditional Navigable Waters
- (ii) Territorial Seas
- (iii) Interstate Waters

(a)(2) Impoundments of Jurisdictional Waters

(a)(3) Tributaries

(a)(4) Adjacent Wetlands

(a)(5) Intrastate lakes and ponds that do not fall within (a)(1) – (a)(4)



**\*NOTE:** For efficiency, this slide's list of the categories of jurisdictional waters are shorthand for the jurisdictional categories in the regulations. See 33 CFR 328.3(a) and 40 CFR 120.2(a).

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# Amended 2023 Rule: Framework

## 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 reflection or swimming pools or other small ornamental bodies of water

(b)(7) Certain waterfilled depressions

(b)(8) Swales and erosional features

(b)(1) – (b)(2):  
Pre-2015 exclusions, modified  
in the regulations

(b)(3) – (b)(8):  
Pre-2015 “generally non-  
jurisdictional features,” added  
to the regulations as  
exclusions

**\*NOTE:** For efficiency, this slide’s list of the categories of exclusions are shorthand for the categories in the regulations. See 33 CFR 328.3(b) and 40 CFR 120.2(b).  
Exclusions do not apply to paragraph (a)(1) waters.

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# Amended 2023 Rule: Framework

## Definitions

(c)(1) Wetlands

(c)(2) Adjacent

(c)(3) High tide line

(c)(4) Ordinary high water mark

(c)(5) Tidal waters



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# Amended 2023 Rule: Joint Coordination Memorandum

- As is typical after a rule is promulgated, the agencies have entered into an agreement via a joint agency coordination memorandum to ensure the consistency and thoroughness of the agencies' implementation of this rule. [Coordination Memorandum \(September 27, 2023\)](#) EPA and Corps field staff will coordinate on certain draft approved jurisdictional determinations and the agencies will follow a process for elevating a subset of these determinations to headquarters for review as necessary.
- “Because the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard and the 2023 rule preamble discussed the *Rapanos* plurality standard, **the implementation guidance and tools in the 2023 rule preamble that address the regulatory text that was not amended by the conforming rule, including the preamble relevant to the *Rapanos* plurality standard incorporated in paragraphs (a)(3), (4), and (5) of the 2023 rule, as amended, generally remain relevant to implementing the 2023 rule, as amended.**”
- “Approved jurisdictional determinations (JDs) are case-specific determinations based on the record and factual questions or *Sackett* concerns may be raised in the context of a particular approved JD.”

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# Amended 2023 Rule: (a)(1) Waters – Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

- **Traditional Navigable Waters**
  - Waters which are 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.
  - EPA and Army will continue to use the legal memorandum **Waters That Qualify as “Traditional Navigable Waters” Under Section (a)(1) of the Agencies’ Regulations** (formerly known as Appendix D) to provide guidance for identifying traditional navigable waters.



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# Amended 2023 Rule: (a)(1) Waters – Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

- **The Territorial Seas**
  - Defined in section 502(8) of the Clean Water Act as “the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.”



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# Amended 2023 Rule: (a)(1) Waters – Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

- **Interstate Waters**
  - “Waters of the United States” include interstate waters.
  - The conforming rule revised the January 2023 rule to remove “interstate wetlands” from the provision.
  - Lakes and ponds crossing state boundaries are jurisdictional as interstate waters in their entirety.
  - For rivers and streams, interstate waters include the portion of the river or stream that is of the same stream order as the point that crosses or serves as a state line.



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# Amended 2023 Rule: (a)(2) Impoundments

- “Waters of the United States” include impoundments of waters that otherwise meet the definition of “waters of the United States.”
- The agencies consider paragraph (a)(2) impoundments to include:
  - (1) Impoundments created by impounding one of the “waters of United States” that was jurisdictional under the Amended 2023 Rule’s definition at the time the impoundment was created, and
  - (2) Impoundments of waters that at the time of assessment meet the definition of “waters of the United States” under paragraph (a)(1), (a)(3), or (a)(4) of the Amended 2023 Rule, regardless of the water’s jurisdictional status at the time the impoundment was created.



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# Amended 2023 Rule: (a)(3) Tributaries

- Tributaries include natural, man-altered, or man-made water bodies that flow directly or indirectly into (a)(1) waters or (a)(2) impoundments.
  - Tributaries can include rivers, streams, lakes, ponds, and impoundments.
  - Tributaries can also include ditches and canals.
- Jurisdictional tributaries must meet the relatively permanent standard.



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# Amended 2023 Rule: (a)(3) Tributaries

## Relatively Permanent Standard

- Relatively permanent waters include tributaries that have flowing or standing water year-round or continuously during certain times of year.
- Relatively permanent waters do not include tributaries with flowing or standing water for only a short duration in direct response to precipitation.



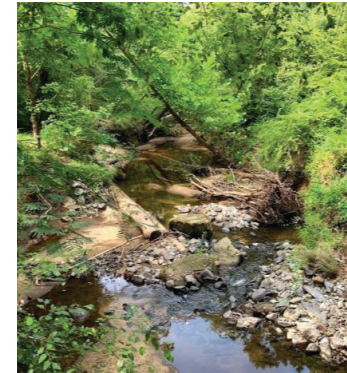
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# Amended 2023 Rule: (a)(3) Tributaries

## Relatively Permanent Standard – Duration and Timing of Flow

Relatively permanent waters include tributaries that have flowing or standing water year-round or continuously during certain times of year.

- “Certain times of the year” is intended to include extended periods of standing or continuously flowing water occurring in the same geographic feature year after year, except in times of drought.
- Relatively permanent flow may occur seasonally, but the phrase is also intended to encompass tributaries in which extended periods of standing or continuously flowing water are not linked to naturally recurring annual or seasonal cycles.



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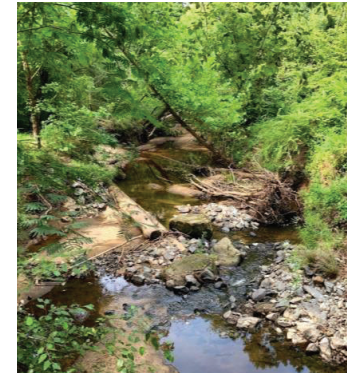


# Amended 2023 Rule: (a)(3) Tributaries

## Relatively Permanent Standard – Duration and Timing of Flow

Relatively permanent waters do not include tributaries with flowing or standing water for only a short duration in direct response to precipitation.

- “Direct response to precipitation” is intended to distinguish between episodic periods of flow associated with discrete precipitation events versus continuous flow for extended periods of time.
- No minimum flow duration has been established because flow duration varies extensively by region.



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# Amended 2023 Rule: (a)(4) Adjacent Wetlands

- **Wetlands** means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
- **Adjacent** has been revised by the conforming rule to mean having a continuous surface connection.
- **Jurisdictional adjacent wetlands** include:
  - Wetlands that are adjacent to an (a)(1) water, relatively permanent jurisdictional impoundment, or relatively permanent tributary.



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# Amended 2023 Rule: (a)(4) Adjacent Wetlands

## Continuous Surface Connection

- A **continuous surface connection** means the wetlands either physically abut or touch the paragraph (a)(1) or relatively permanent water, or are connected to the paragraph (a)(1) or relatively permanent water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert.
- Note that *Sackett* is clear that “a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA.”



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## Amended 2023 Rule: (a)(5) Waters: lakes and ponds not identified in (a)(1) – (a)(4)

- Jurisdictional (a)(5) waters include intrastate lakes and ponds not identified in the other jurisdictional categories, that meet the relatively permanent standard.
- The conforming rule revised the January 2023 rule to remove “streams” and “wetlands” from the (a)(5) provision.

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# Amended 2023 Rule: (a)(5) Waters: lakes and ponds not identified in (a)(1) – (a)(4)

## Relatively Permanent Standard

- Lakes and ponds assessed under paragraph (a)(5) meet the relatively permanent standard if they are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to a paragraph (a)(1) water or tributary that is relatively permanent.
- The agencies will assess lakes and ponds under paragraph (a)(5) to determine if they are **relatively permanent** using a similar approach to the one described for tributaries.
- The agencies will assess a **continuous surface connection** between lakes and ponds assessed under paragraph (a)(5) and a paragraph (a)(1) water or a tributary that is relatively permanent using the approach described for wetlands.

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# Amended 2023 Rule: Exclusions

- Excluded waters or features are not jurisdictional as “waters of the United States.”
- Exclusions do not apply to paragraph (a)(1) waters.
- The regulations include the pre-2015 regulatory exclusions:
  - Waste treatment exclusion, prior converted cropland exclusion
- The regulations contain exclusions for features that were “generally non-jurisdictional” under the pre-2015 regulatory regime:
  - Certain ditches, certain artificially irrigated areas, certain artificial lakes and ponds, certain artificial reflecting and swimming pools, certain waterfilled depressions, certain swales and erosional features

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## Amended 2023 Rule: (b)(1) Exclusion: Waste Treatment Systems

- The regulations exclude waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.
- The 2023 rule preamble provides clarification on implementation:
  - Excluded waste treatment systems do not sever upstream jurisdiction.
  - The exclusion is generally available only to the permittee using the system for the treatment function for which such system was designed.

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## Amended 2023 Rule: (b)(2) Exclusion: Prior Converted Cropland

- The regulatory exclusion for prior converted cropland only covers wetlands.
- Wetlands can be covered under the prior converted cropland exclusion if they meet USDA's longstanding definition of prior converted cropland.
- Prior converted cropland loses its exclusion status if there is a “change in use” – meaning the area is no longer available for the production of an agricultural commodity.

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# Amended 2023 Rule: (b)(3) – (b)(8) Exclusions

- The regulations specify that features considered “generally non-jurisdictional” in the preamble to the pre-2015 regulations and in the pre-2015 guidance are excluded.
- Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;
- Artificially irrigated areas that would revert to dry land if the irrigation ceased;
- Artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
- Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons;
- Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States; and
- Swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow.

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# Pre-2015 Regulatory Regime: Terminology

The “**pre-2015 regulatory regime**” refers to the agencies’ pre-2015 definition of “waters of the United States,” implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience.

<https://www.epa.gov/wotus/pre-2015-regulatory-regime>

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# Pre-2015 Regulatory Regime: Framework

## Categories of Jurisdictional Waters\*

- (a)(1) Traditional Navigable Waters
- (a)(2) Interstate Waters
- (a)(3) Other Waters
- (a)(4) Impoundments
- (a)(5) Tributaries
- (a)(6) The Territorial Seas
- (a)(7) Adjacent Wetlands



## Categories of Non-Jurisdictional Waters\*

Waste treatment systems and prior converted cropland

**\*NOTE:** For efficiency, this slide's list of the categories of jurisdictional and non-jurisdictional waters are shorthand for the categories in the regulations. See, e.g., 33 CFR 328.3 (2014) and 40 CFR 230.3(s) (2014).

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# Pre-2015 Regulatory Regime: Joint Coordination Memo

- “Because the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard, and the agencies’ pre-2015 regulatory regime discussed the *Rapanos* plurality standard, the agencies will implement the pre-2015 regulations generally consistent with the pre-2015 regulatory regime’s approach to the plurality standard, including relevant case law and longstanding practice, as informed by applicable guidance, training, and experience.”
- “Under the pre-2015 regulatory regime, consistent with *Sackett*, the agencies:
  - will not assert jurisdiction based on the significant nexus standard,
  - will not assert jurisdiction over interstate wetlands solely because they are interstate,
  - will interpret “adjacent” to mean “having a continuous surface connection,” and
  - will limit the scope of the (a)(3) provision to only relatively permanent lakes and ponds that do not meet one of the other jurisdictional categories.”

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# Pre-2015 Regulatory Regime: Joint Coordination Memo

- “Approved jurisdictional determinations (JDs) are case-specific determinations based on the record, and factual questions or *Sackett* concerns may be raised in the context of a particular approved JD.”
  - “With respect to final determinations of the geographic jurisdictional scope of “waters of the United States” for purposes of Section 404 that are not subject to this memorandum, Corps districts may choose to coordinate with EPA regions on draft approved JDs on a case-by-case basis and either the Corps districts or EPA regions may seek headquarters-level review or guidance on draft approved JDs at any time.”

[https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-pre-2015-regulatory-regime\\_508c.pdf](https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-pre-2015-regulatory-regime_508c.pdf)

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# Pre-2015 Regulatory Regime:

## (a)(1) – Traditional Navigable Waters

- Waters which are 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.
- EPA and Army will continue to use the legal memorandum **Waters That Qualify as “Traditional Navigable Waters” Under Section (a)(1) of the Agencies’ Regulations** (formerly known as Appendix D) to provide guidance for identifying traditional navigable waters.



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# Pre-2015 Regulatory Regime:

## (a)(2) – Interstate Waters

- “Waters of the United States” include interstate waters.
- These are waters that cross or act as State boundaries.
- Under the pre-2015 regulatory regime, consistent with *Sackett*, the agencies will not assert jurisdiction over interstate wetlands solely because they are interstate.



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# Pre-2015 Regulatory Regime:

## (a)(3) – Other Waters

Paragraph (a)(3) of the pre-2015 regulations:

- All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
  - (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
  - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
  - (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;”

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## Pre-2015 Regulatory Regime: (a)(3) – Other Waters

- Under the pre-2015 regulatory regime, consistent with *Sackett*, the agencies will limit the scope of the (a)(3) provision to assessing only relatively permanent lakes and ponds that do not meet one of the other jurisdictional categories.
- The agencies have not asserted jurisdiction over any (a)(3) other waters under the pre-2015 regulatory regime since the *SWANCC* decision was issued in 2001.

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# Pre-2015 Regulatory Regime:

## (a)(4) – Impoundments

- “Waters of the United States” include impoundments of waters otherwise identified as “waters of the United States.”
- Under the pre-2015 regulatory regime:
  - Impoundment of “waters of the United States” as a general matter does not affect the water’s jurisdictional status.
  - Documentation should 1) demonstrate that the impoundment was created from “waters of the United States,” 2) demonstrate that the water meets the criteria for another jurisdictional category, or 3) assess the impoundment under paragraph (a)(3).



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# Pre-2015 Regulatory Regime:

## (a)(5) – Tributaries

- The regulatory text of this category includes tributaries of waters identified in paragraphs (a)(1) through (a)(4).
  - Under the pre-2015 regulatory regime, a tributary includes natural, man-altered, or man-made water bodies that flow directly or indirectly into a traditional navigable water (TNW).
  - Tributaries also include such water bodies that flow directly or indirectly into an interstate water, even when there is no connection to a TNW.
- Tributaries can include rivers, streams, lakes, ponds, and impoundments.
- Tributaries can also include ditches and canals.
- Jurisdictional tributaries must be relatively permanent.



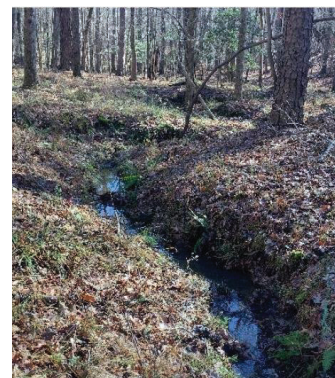
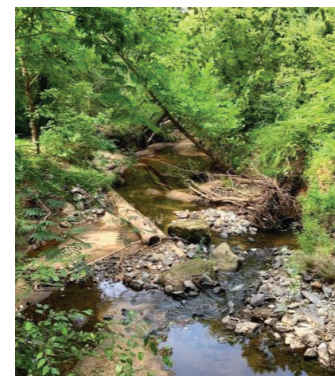
*The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of Sackett v. EPA may be addressed in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with Sackett.*

# Pre-2015 Regulatory Regime:

## (a)(5) – Tributaries

### Relatively Permanent

- Relatively permanent waters include tributaries that typically have flowing or standing water year-round or continuously at least seasonally (e.g., typically three months).
  - The duration of seasonal flowing or standing water may vary regionally, but the tributary must have predictable flowing or standing water seasonally.
- Non-relatively permanent tributaries are those that have flowing or standing water only in response to precipitation or that do not have continuously flowing or standing water at least seasonally.



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## Pre-2015 Regulatory Regime: (a)(6) – the Territorial Seas

- Defined in section 502(8) of the Clean Water Act as “the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.”



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# Pre-2015 Regulatory Regime:

## (a)(7) Adjacent Wetlands

- **Wetlands** means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
- Under the pre-2015 regulatory regime, consistent with *Sackett*, **adjacent** will be interpreted to mean “having a continuous surface connection.”
- Jurisdictional adjacent wetlands include:
  - Wetlands that have a continuous surface connection to a traditional navigable water, interstate water, the territorial seas, or a relatively permanent tributary or impoundment.



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# Pre-2015 Regulatory Regime:

## (a)(7) Adjacent Wetlands

### Continuous Surface Connection

- Wetlands have a continuous surface connection when they physically abut or touch a jurisdictional water.
  - Abutting wetlands are those that “touch” a jurisdictional water (i.e., they are not separated by uplands, a berm, dike, or similar barrier from the OHWM of the water to which they are adjacent).
- Wetlands also have a continuous surface connection when they are connected to a jurisdictional water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert (per pre-2015 case law, see *United States v. Cundiff* (2009), and prior EPA practice).
- Note that *Sackett* is clear that “a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA.”



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# Pre-2015 Regulatory Regime: Exclusions and Generally Non-Jurisdictional Features

- Regulatory exclusions include:
  - Waste treatment exclusion, prior converted cropland exclusion
- Features that are generally not jurisdictional per the 1986 preamble language and the 2008 *Rapanos* guidance include:
  - Certain ditches, certain artificially irrigated areas, certain artificial lakes and ponds, certain artificial reflecting and swimming pools, certain waterfilled depressions, certain swales and erosional features

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## Pre-2015 Regulatory Regime: Exclusion: Waste Treatment Systems

- The regulations exclude waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.
- All waters that are upstream and downstream of the waste treatment system that were jurisdictional prior to the authorized activities and qualify as jurisdictional WOTUS under the pre-2015 regulatory regime, are still WOTUS and subject to the CWA.

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## Pre-2015 Regulatory Regime: Exclusion: Prior Converted Cropland

- The regulatory exclusion for prior converted cropland only covers wetlands.
- Wetlands can be covered under the prior converted cropland exclusion if they meet USDA's longstanding definition of prior converted cropland.

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# Pre-2015 Regulatory Regime:

## Exclusion: Prior Converted Cropland

- The Corps and EPA will continue to generally rely on valid prior-converted cropland (PCC) designations made by USDA-NRCS for making determinations of the applicability of the PCC exclusion, provided that the PCC has not been abandoned. However, the final authority regarding Clean Water Act (CWA) jurisdiction remains with EPA.
- Preamble to the 1993 WOTUS Regulations (58 FR, 45034): “*PC cropland which now meets wetland criteria is considered to be abandoned unless: For once in every five years the area has been used for the production of an agricultural commodity, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes or pasture production.*”

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# Pre-2015 Regulatory Regime: Generally Non-Jurisdictional Features

- Waters that are generally non-jurisdictional per the preamble of the 1986 regulations and the 2008 *Rapanos* Guidance:
  - Artificially irrigated areas which would revert to upland if the irrigation ceased;
  - Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
  - Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons;
  - Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States;
  - Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water; and
  - Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow)

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# Tools and Resources

Examples of tools to determine whether tributaries or lakes and ponds are relatively permanent include:

- Direct observation
- Regional field observations
- [USACE Antecedent Precipitation Tool \(APT\)](#)
- [USGS Topographic Maps](#)
- [Regionalized streamflow duration assessment methods \(SDAMs\)](#)
- Aerial and satellite imagery
- [USGS National Hydrography Dataset \(NHD\)](#)
- Stream Gage data, including from [USGS](#)
- Regional regression analysis
- Hydrologic modeling tools such as [HEC-HMS](#)

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# Tools and Resources

Examples of tools to determine whether tributaries or lakes and ponds are relatively permanent include:

- Elevation data and models, including [LIDAR](#) (for example, from the [USGS](#))
- State, tribal, and local data and maps
- [USGS StreamStats](#)
- [Probability of Streamflow Permanence \(PROSPER\) by the USGS](#) (including for the Pacific Northwest)
- NRCS hydrologic tools and [soil maps](#)
- NOAA national snow analyses maps
- NRCS snow sources
- [USEPA WATERS GeoViewer](#) and [How's My Waterway](#)
- [USGS National Map Viewer](#)

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# Tools and Resources

Examples of tools to determine whether an adjacent wetland has a continuous surface connection to a jurisdictional water include:

- Direct observation
- Regional field observations
- [USGS Topographic Maps](#)
- Aerial and satellite imagery
- [USGS NHD](#)
- [USFWS National Wetlands Inventory \(NWI\)](#)
- Elevation data such as [LIDAR](#)-based topographic models
- State, Tribal, and local data and maps
- NRCS hydrologic tools and [soil maps](#)
- [FEMA flood zone](#) or other floodplain maps

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# Additional Resources: Implementation Memoranda

- EPA and Army have prepared new **Coordination Memos** to ensure consistency of jurisdictional determinations under the 2023 Rule, as amended, and the Pre-2015 Regulatory Regime.
- EPA, Army, and USDA will continue to implement the 2022 **Agricultural Memo** that clarifies the agencies' roles and programs, and in particular clarifies the prior converted cropland exclusion.
- EPA and Army will continue to use the legal memorandum **Waters That Qualify as “Traditional Navigable Waters” Under Section (a)(1) of the Agencies’ Regulations** (formerly known as Appendix D) to provide guidance for identifying traditional navigable waters.
- EPA and Army are also retaining the **2020 Ditch Exemption Memo** clarifying implementation of the ditch exemption under Clean Water Act section 404(f).

<https://www.epa.gov/wotus>

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# Questions

<https://www.epa.gov/wotus>

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**From:** [Smith, Thomas Patrick SES USARMY USACE \(USA\)](#)  
**To:** [DLL-Division-&-Center-Commanders](#); [DLL-District & Battalion Commanders](#)  
**Cc:** [Spellmon, Scott A LTG USARMY CEHQ \(USA\)](#); [Graham, William H JR MG USARMY CEHQ \(USA\)](#); [Belk, Edward E Jr SES USARMY CEHQ \(USA\)](#); [Walker, William T Jr CIV USARMY CENAO \(USA\)](#); [Gaffneysmith, Margaret E CIV USARMY CEHQ \(USA\)](#); [Cooper, David R SES USARMY CEHQ \(USA\)](#); [Handura, James J COL USARMY CESP \(USA\)](#); [Perez, Pete G SES USARMY CEHQ \(USA\)](#); [Brown, Theodore A SES USARMY CEHQ \(USA\)](#); [Hill, Stephen L \(Steve\) SES USARMY CEHQ \(USA\)](#); [Bush, Eric L SES USARMY CEHQ \(USA\)](#); [DLL-MSD-Program-Directors](#); [Prettyman-Beck, Yvonne J CIV \(USA\)](#)  
**Subject:** Updated Materials: USACE Implementation "Revised Definition of "Waters of the United States"; Conforming,"  
**Date:** Monday, November 20, 2023 3:23:58 PM  
**Attachments:** [WOTUS Overview Presentation 11-15-23 EPA Corps Staff \(003\).pdf](#)

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Commanders: Your Regulatory Chiefs have now been provided additional publicly releasable materials on implementation of the Amended 2023 Rule and Pre-2015 Regime (attached). These materials provide additional clarity on what constitutes a Continuous Surface Connection as part of jurisdictional determination (for example, slides 28 and 48). (b)(5)

they will greatly increase the public's understanding of our implementation practices. We continue to monitor and supporting draft AJD Coordination.

Glad to assist with any questions.

Respectfully,  
Tom

**Thomas P. Smith, PE, PMP, SES**  
**Chief, Operations and Regulatory**  
**NAD and LRD Regional Integration**  
**US Army Corps of Engineers**

COE (b)(6)

COE (b)(6)

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**From:** Smith, Thomas Patrick SES USARMY USACE (USA)

**Sent:** Thursday, September 28, 2023 5:36 PM

**To:** [DLL-Division-&-Center-Commanders](#) <(b)(6)>  
[DLL-District & Battalion Commanders](#) <[DLL-District--Battalion-Commanders@usace.army.mil](mailto:DLL-District--Battalion-Commanders@usace.army.mil)>  
**Cc:** [Spellmon, Scott A LTG USARMY CEHQ \(USA\)](#) <(b)(6)> [Graham, William H JR MG USARMY CEHQ \(USA\)](#) <(b)(6)> [Belk, Edward E Jr SES USARMY CEHQ \(USA\)](#) <(b)(6)> [Walker, William T Jr CIV USARMY CENAO \(USA\)](#) <(b)(6)> [Gaffneysmith, Margaret E CIV USARMY CEHQ \(USA\)](#) <(b)(6)> [Cooper, David R SES USARMY CEHQ \(USA\)](#) <(b)(6)> [Handura, James J COL USARMY CEHQ \(USA\)](#) <(b)(6)> [Perez, Pete G SES USARMY CEHQ \(USA\)](#) <(b)(6)> [Brown, Theodore A SES USARMY CEHQ \(USA\)](#) <(b)(6)> [Hill, Stephen L \(Steve\) SES USARMY CEHQ \(USA\)](#) <(b)(6)> [Bush, Eric L SES USARMY CEHQ \(USA\)](#) <(b)(6)> [DLL-MSD-Program-Directors](#) <[DLL-MSD-Program-](#)

Directors@usace.army.mil>; Smith, Thomas Patrick SES USARMY USACE (USA)

< [REDACTED] COE (b)(6) [REDACTED]>

**Subject:** [REDACTED] (b)(5) [REDACTED] USACE Implementation "Revised Definition of 'Waters of the United States'; Conforming,"

Commanders: earlier this week we received [REDACTED] (b)(5) [REDACTED] training materials on implementation of the Amended 2023 Rule, along with Joint EPA and Army/USACE Coordination Memorandums for approved jurisdictional determinations conducted under both the Amended 2023 Rule and the Pre-2015 Regulatory Regime. A few key points

- [REDACTED] (b)(5) [REDACTED]
- The Training slides and Coordination Memos are NOT TO BE RELEASED OUTSIDE USACE OR POSTED TO THE WEB UNTIL FURTHER NOTICE.
- USACE Regulatory intends to conduct additional USACE-internal implementation training through the Regulatory COP.
- USACE expects to receive updated training materials on the application of the Pre-2015 Regime which remains in place in 27 States.

It is important to work closely with your Regulatory Chiefs on the content of the Coordination Memos and the Training Slides. [REDACTED] (b)(5) [REDACTED]

Respectfully,

Tom

**Thomas P. Smith, PE, PMP, SES**  
**Chief, Operations and Regulatory**  
**NAD and LRD Regional Integration**  
**US Army Corps of Engineers**

[REDACTED] COE (b)(6) [REDACTED]

[REDACTED] COE (b)(6) [REDACTED]

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**From:** Smith, Thomas Patrick SES USARMY USACE (USA) < [REDACTED] COE (b)(6) [REDACTED]>

**Date:** Wednesday, Sep 13, 2023 at 4:44 PM

**To:** DLL-Division-&-Center-Commanders < [REDACTED] COE (b)(6) [REDACTED]> DLL-District & Battalion Commanders <[DLL-District--Battalion-Commanders@usace.army.mil](mailto:DLL-District--Battalion-Commanders@usace.army.mil)>

**Cc:** Spellmon, Scott A LTG USARMY CEHQ (USA) < [REDACTED] COE (b)(6) [REDACTED]> Graham, William H JR MG USARMY CEHQ (USA) < [REDACTED] COE (b)(6) [REDACTED]> Belk, Edward E Jr SES USARMY CEHQ (USA) < [REDACTED] COE (b)(6) [REDACTED]> Walker, William T Jr CIV USARMY CENAO (USA)

< [REDACTED] COE (b)(6) Gaffneysmith, Margaret E CIV USARMY CEHQ (USA) < [REDACTED] COE (b)(6)  
[REDACTED] Cooper, David R SES USARMY CEHQ (USA) < [REDACTED] COE (b)(6)  
Handura, James J COL USARMY CEHQ (USA) < [REDACTED] COE (b)(6) Perez, Pete G SES  
USARMY CEHQ (USA) < [REDACTED] COE (b)(6) Brown, Theodore A SES USARMY CEHQ (USA)  
< [REDACTED] COE (b)(6) Hill, Stephen L (Steve) SES USARMY CEHQ (USA)  
< [REDACTED] COE (b)(6) Bush, Eric L SES USARMY CEHQ (USA) < [REDACTED] COE (b)(6) DLL-  
MSC-Program-Directors < [REDACTED] COE (b)(6)

**Subject:** USACE Implementation "Revised Definition of 'Waters of the United States'; Conforming,"

Commanders: This email complements the discussion with LTG Spellmon earlier today regarding USACE implementation of the “*Revised Definition of 'Waters of the United States'; Conforming.*” ([Federal Register :: Revised Definition of “Waters of the United States”; Conforming](#)). If you were able to join the discussion, you were reminded of the complexity and nuance to this implementation. I acknowledge the need for continuous communication with the field and updates based on new information when appropriate.

USACE HQ continues to engage with ASA(CW) and EPA on a draft coordination memo describing how EPA and Army/USACE will coordinate on draft approved jurisdictional determinations (AJDs) for wetlands. We expect a final coordination memo this week. The mechanism for coordination on jurisdictional determinations is familiar to the Regulatory Program, but will need additional attention in the initial stages of the implementation of the Conforming Rule. Coordination between USACE/Army and EPA will enable development of specific policy guidance based on applications from the public and draft determinations made in the field.

Tom Walker (Acting HQ Chief Regulatory) and MSC/District Regulatory Chiefs will continue to meet regularly to minimize challenges in implementation. Attached to this email are materials to assist in implementation.

- [WOTUS Public Webinar Briefing 12 SEP 2023](#). This briefing is an excellent summary of the history of the Clean Water Act and the changes made based on the Supreme Court decision on Sackett.
- [WOTUS Key Points 13 SEP 2023](#). Brief set of key points on the WOTUS effort and current status.
- [Updated USACE Implementation Briefing 13 SEP 2023](#). This briefing includes updated language that emphasizes USACE coordination of draft Approved Jurisdictional Determinations of wetlands with EPA.

Respectfully,

Tom

**Thomas P. Smith, PE, PMP, SES**  
**Chief, Operations and Regulatory**



**NAD and LRD Regional Integration**  
**US Army Corps of Engineers**

COE (b)(6)

COE (b)(6)

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**From:** Smith, Thomas Patrick SES USARMY USACE (USA)

**Sent:** Wednesday, August 30, 2023 5:28 PM

**To:** DLL-Division-&-Center-Commanders <COE (b)(6)>

**Cc:** Spellmon, Scott A LTG USARMY CEHQ (USA) <COE (b)(6)> Graham, William H JR MG USARMY CEHQ (USA) <COE (b)(6)> Belk, Edward E Jr SES USARMY CEHQ (USA) <COE (b)(6)> Walker, William T Jr CIV USARMY CENAO (USA) <COE (b)(6)> Gaffneysmith, Margaret E CIV USARMY CEHQ (USA) <COE (b)(6)> Cooper, David R SES USARMY CEHQ (USA) <COE (b)(6)> Handura, James J COL USARMY CEHQ (USA) <COE (b)(6)> Perez, Pete G SES USARMY CEHQ (USA) <COE (b)(6)> Brown, Theodore A SES USARMY CEHQ (USA) <COE (b)(6)> Hill, Stephen L (Steve) SES USARMY CEHQ (USA) <COE (b)(6)> Bush, Eric L SES USARMY CEHQ (USA) <COE (b)(6)> DLL-MSD-Program-Directors <COE (b)(6)>

**Subject:** Amendment to the Revised Definition of 'Waters of the US'

**Commanders:**

On Tuesday August 29, 2023, the U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army (the agencies) announced a final rule amending the 2023 definition of “waters of the United States” to conform with the recent Supreme Court decision in *Sackett v. EPA*. The agencies are committed to following the law and implementing the Clean Water Act to deliver the essential protections that safeguard the nation’s waters from pollution and degradation. This action provides the clarity that is needed to advance these goals, while moving forward with infrastructure projects, economic opportunities, and agricultural activities.

More information about the final rule is available here -

<https://www.epa.gov/newsreleases/conform-recent-supreme-court-decision-epa-and-army-amend-waters-united-states-rule> .

The agencies will host a public webinar on September 12, 2023 to provide updates on the definition of “waters of the United States.” The agencies also plan to host listening sessions this fall with co-regulators and stakeholders, focusing on identifying issues that may arise outside this limited rule to conform the definition of “waters of the United States” with the *Sackett v. EPA* decision.

Learn more about this action on [EPA's “waters of the United States” website](#).

Tom Walker, Chief Regulatory at HQ USACE, will continue to share information and

lead implementation discussions with the Regulatory Community of Practice.

Respectfully,

Tom

**Thomas P. Smith, PE, PMP, SES**  
**Chief, Operations and Regulatory**  
**NAD and LRD Regional Integration**  
**US Army Corps of Engineers**

COE (b)(6)

COE (b)(6)

# Updates for Tribes and States on “Waters of the United States”



November 15, 2023



**Russell Kaiser**, Acting Director of the Oceans, Wetlands and Communities Division in EPA's Office of Water

**Whitney Beck**, Clean Water Act Jurisdiction Team Lead in EPA's Office of Water

**Rose Kwok**, Environmental Scientist in EPA's Office of Water

**Melinda Larsen**, Office of the Assistant Secretary of the Army (Civil Works)

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# Presentation Outline

- Background
- Amended 2023 Rule
- Pre-2015 Regulatory Regime
- Additional Resources



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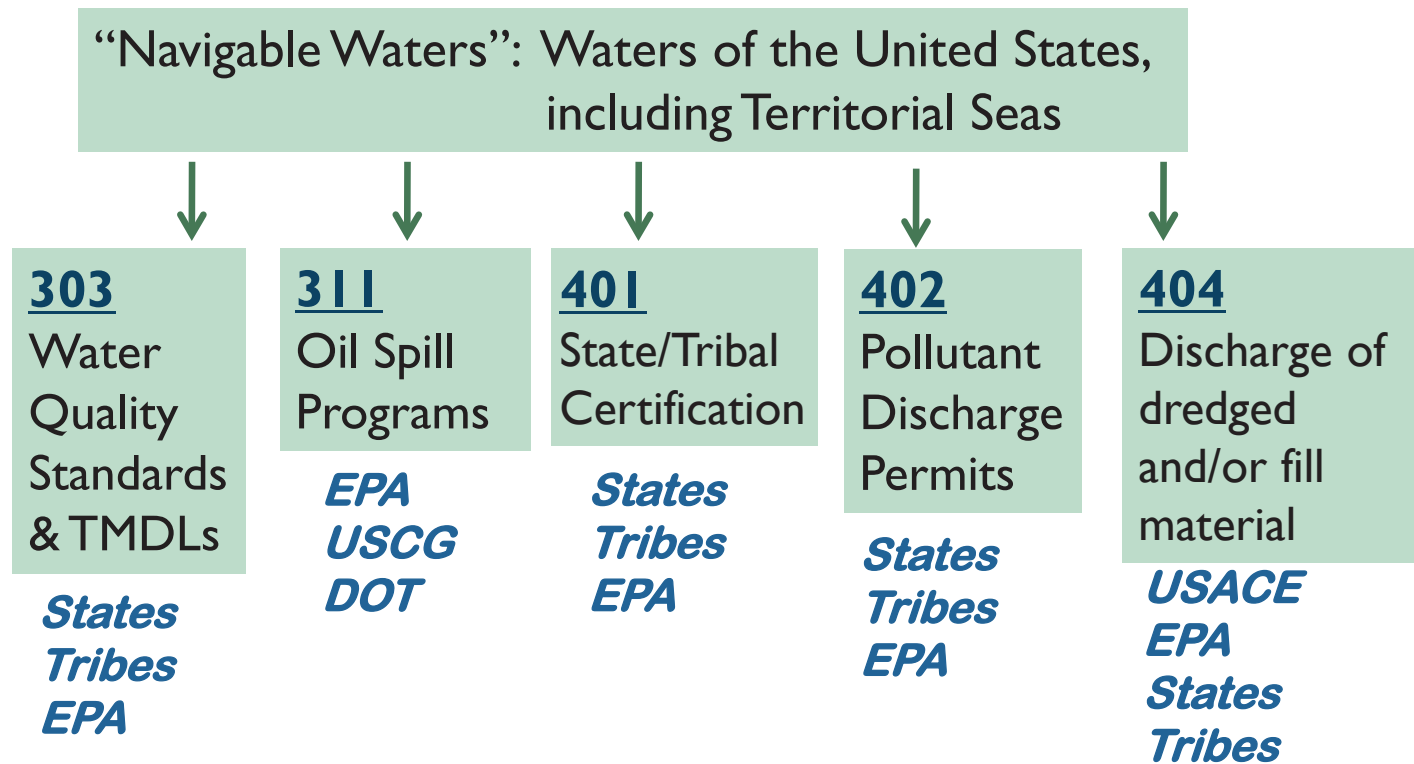
# Background: “Waters of the United States” and the Clean Water Act

- “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.”
- EPA and the Department of the Army have defined “waters of the United States” by regulation since the 1970s.



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# Background: Why “Waters of the United States” Matters

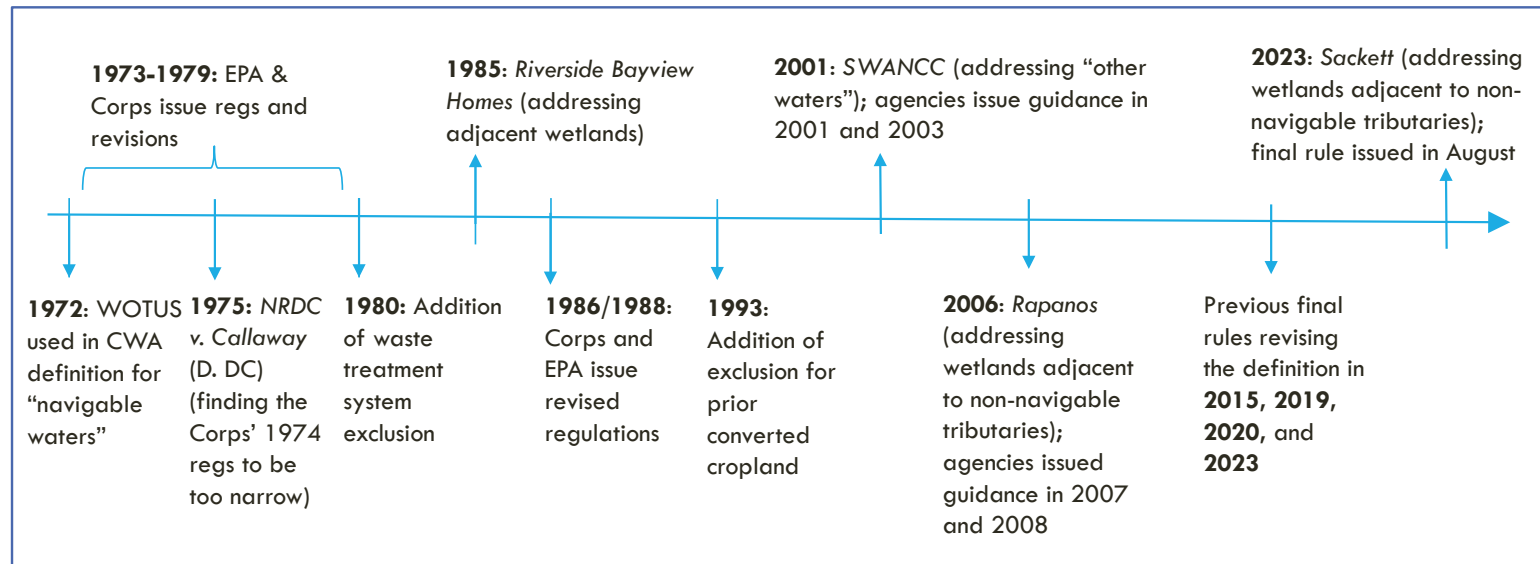


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# Background: “Waters of the United States” Over Time

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



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# Background: Regulatory Regimes

- Prior to the 2015 Clean Water Rule, the Agencies implemented the pre-2015 regulations defining “waters of the United States” consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience—this is referred to as the “pre-2015 regulatory regime.”
- The Agencies revised their regulations in 2015, 2019, and 2020. In 2021, two district courts vacated the 2020 Navigable Waters Protection Rule. The Agencies then returned to implementing the pre-2015 regulatory regime nationwide.
- The 2023 Rule replaced the pre-2015 regulatory regime, and was amended in September 2023, but as the result of ongoing litigation, the Amended 2023 Rule is not operative in certain states and for certain parties.

<https://www.epa.gov/wotus/pre-2015-regulatory-regime>

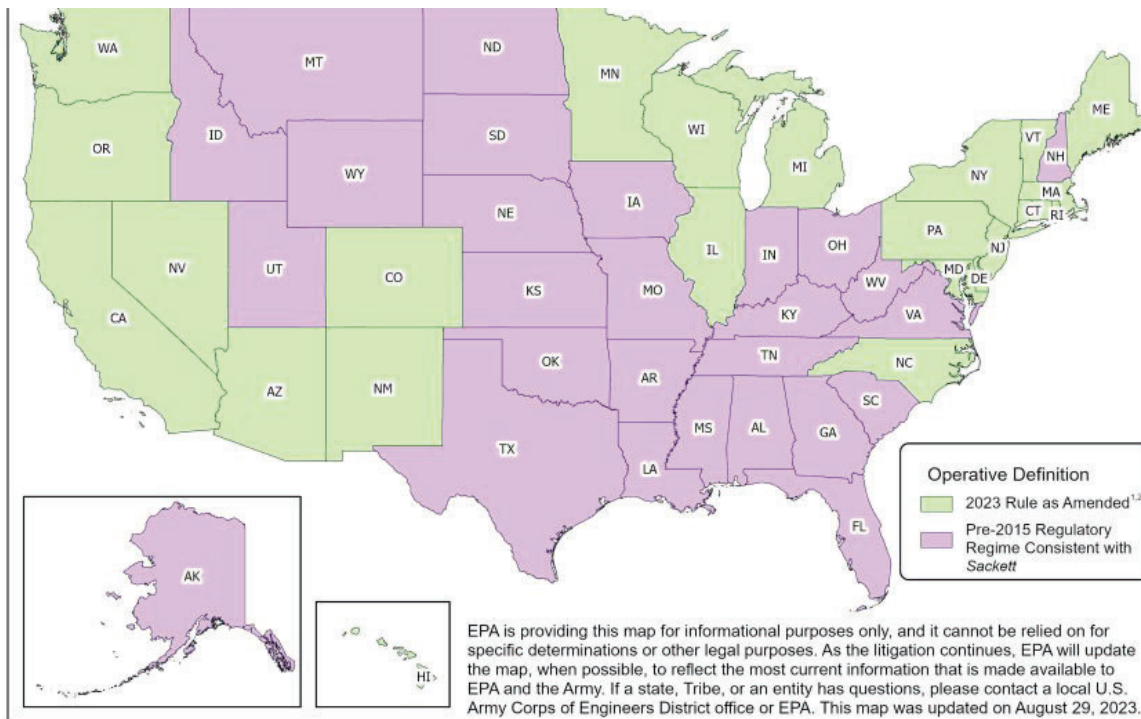
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# Background: Recent Events

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

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# Background: Operative Definition of “Waters of the United States”



<sup>1</sup>Also operative in the U.S. territories and the District of Columbia

<sup>2</sup>The 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 Georgia Chamber of Commerce).

<https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>

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# Background: *Rapanos* Decision

- **Supreme Court decision in *Rapanos v. U.S.* (2006)**
  - The Justices were divided in a 4-1-4 opinion on the question of CWA jurisdiction over wetlands adjacent to nonnavigable tributaries of traditional navigable waters.
- **Scalia Plurality Opinion**

Considered “waters of the United States” to include:

  - “relatively permanent, standing or continuously flowing bodies of water forming geographic features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes’” and
  - Wetlands that 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.”
- **Kennedy Concurring Opinion**

Considered “waters of the United States” to include:

  - “a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.”
- **Dissent**
  - deferred to the Corps’ assertion of jurisdiction and concluded that the term “waters of the United States” encompasses all tributaries and wetlands that satisfy “either the plurality’s [standard] or Justice Kennedy’s.”
- **Guidance issued in 2007, revised 2008**
- **Circuit Court Decisions:** All eight circuit courts to address the issue held that jurisdiction was proper over at least those waters that satisfy the Kennedy standard; none held that the plurality was the sole basis that may be used to establish jurisdiction.

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# Background: *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 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 adjacent 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.

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# Background: Conforming Rule Amending January 2023 Rule

- September 8, 2023: EPA and Army Corps published a rule to amend the January 2023 definition of “waters of the United States” to conform with *Sackett*; rule was effective upon publication.
- In the conforming rule, the agencies determined that there is good cause under the Administrative Procedure Act to issue a final rule because certain provisions of the January 2023 Rule were invalid under the Supreme Court’s interpretation of the Clean Water Act in *Sackett*.
- Targeted changes to January 2023 Rule categories of “waters of the United States”:
  - (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 delete significant nexus standard
  - (a)(4) Adjacent Wetlands – **revised** to delete significant nexus standard
  - (a)(5) Additional Waters – **revised** to delete significant nexus standard and delete streams and wetlands
- Targeted changes to January 2023 Rule Definitions:
  - (c)(2) Adjacent – **revised** to mean “having a continuous surface connection”
  - (c)(6) Significantly affect – **deleted**
- No changes to January 2023 Rule Exclusions

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# Background: Preamble to the Conforming Rule

- The preamble notes that the Court in *Sackett* “conclude[d] that the *Rapanos* plurality was correct.”
- The agencies will continue to interpret the definition of “waters of the United States” consistent with the *Sackett* decision.
- 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.
- 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.

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# Amended 2023 Rule: Framework

## Categories of Jurisdictional Waters

(a)(1)

- (i) Traditional Navigable Waters
- (ii) Territorial Seas
- (iii) Interstate Waters

(a)(2) Impoundments of Jurisdictional Waters

(a)(3) Tributaries

(a)(4) Adjacent Wetlands

(a)(5) Intrastate lakes and ponds that do not fall within (a)(1) – (a)(4)



**\*NOTE:** For efficiency, this slide's list of the categories of jurisdictional waters are shorthand for the jurisdictional categories in the regulations. See 33 CFR 328.3(a) and 40 CFR 120.2(a).

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# Amended 2023 Rule: Framework

## 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 reflection or swimming pools or other small ornamental bodies of water

(b)(7) Certain waterfilled depressions

(b)(8) Swales and erosional features

(b)(1) – (b)(2):  
Pre-2015 exclusions, modified  
in the regulations

(b)(3) – (b)(8):  
Pre-2015 “generally non-  
jurisdictional features,” added  
to the regulations as  
exclusions

**\*NOTE:** For efficiency, this slide’s list of the categories of exclusions are shorthand for the categories in the regulations. See 33 CFR 328.3(b) and 40 CFR 120.2(b).  
Exclusions do not apply to paragraph (a)(1) waters.

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# Amended 2023 Rule: Framework

## Definitions

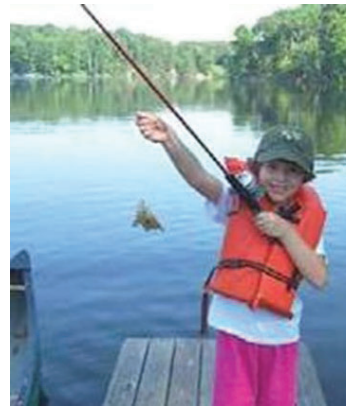
(c)(1) Wetlands

(c)(2) Adjacent

(c)(3) High tide line

(c)(4) Ordinary high water mark

(c)(5) Tidal waters



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# Amended 2023 Rule: Joint Coordination Memorandum

- As is typical after a rule is promulgated, the agencies have entered into an agreement via a joint agency coordination memorandum to ensure the consistency and thoroughness of the agencies' implementation of this rule. [Coordination Memorandum \(September 27, 2023\)](#) EPA and Corps field staff will coordinate on certain draft approved jurisdictional determinations and the agencies will follow a process for elevating a subset of these determinations to headquarters for review as necessary.
- “Because the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard and the 2023 rule preamble discussed the *Rapanos* plurality standard, **the implementation guidance and tools in the 2023 rule preamble that address the regulatory text that was not amended by the conforming rule, including the preamble relevant to the *Rapanos* plurality standard incorporated in paragraphs (a)(3), (4), and (5) of the 2023 rule, as amended, generally remain relevant to implementing the 2023 rule, as amended.**”
- “Approved jurisdictional determinations (JDs) are case-specific determinations based on the record and factual questions or *Sackett* concerns may be raised in the context of a particular approved JD.”

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# Amended 2023 Rule: (a)(1) Waters – Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

- **Traditional Navigable Waters**
  - Waters which are 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.
  - EPA and Army will continue to use the legal memorandum **Waters That Qualify as “Traditional Navigable Waters” Under Section (a)(1) of the Agencies’ Regulations** (formerly known as Appendix D) to provide guidance for identifying traditional navigable waters.



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# Amended 2023 Rule: (a)(1) Waters – Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

- **The Territorial Seas**
  - Defined in section 502(8) of the Clean Water Act as “the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.”



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# Amended 2023 Rule: (a)(1) Waters – Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

- **Interstate Waters**
  - “Waters of the United States” include interstate waters.
  - The conforming rule revised the January 2023 rule to remove “interstate wetlands” from the provision.
  - Lakes and ponds crossing state boundaries are jurisdictional as interstate waters in their entirety.
  - For rivers and streams, interstate waters include the portion of the river or stream that is of the same stream order as the point that crosses or serves as a state line.



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# Amended 2023 Rule: (a)(2) Impoundments

- “Waters of the United States” include impoundments of waters that otherwise meet the definition of “waters of the United States.”
- The agencies consider paragraph (a)(2) impoundments to include:
  - (1) Impoundments created by impounding one of the “waters of United States” that was jurisdictional under the Amended 2023 Rule’s definition at the time the impoundment was created, and
  - (2) Impoundments of waters that at the time of assessment meet the definition of “waters of the United States” under paragraph (a)(1), (a)(3), or (a)(4) of the Amended 2023 Rule, regardless of the water’s jurisdictional status at the time the impoundment was created.



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# Amended 2023 Rule: (a)(3) Tributaries

- Tributaries include natural, man-altered, or man-made water bodies that flow directly or indirectly into (a)(1) waters or (a)(2) impoundments.
  - Tributaries can include rivers, streams, lakes, ponds, and impoundments.
  - Tributaries can also include ditches and canals.
- Jurisdictional tributaries must meet the relatively permanent standard.



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# Amended 2023 Rule: (a)(3) Tributaries

## Relatively Permanent Standard

- Relatively permanent waters include tributaries that have flowing or standing water year-round or continuously during certain times of year.
- Relatively permanent waters do not include tributaries with flowing or standing water for only a short duration in direct response to precipitation.



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# Amended 2023 Rule: (a)(3) Tributaries

## Relatively Permanent Standard – Duration and Timing of Flow

Relatively permanent waters include tributaries that have flowing or standing water year-round or continuously during certain times of year.

- “Certain times of the year” is intended to include extended periods of standing or continuously flowing water occurring in the same geographic feature year after year, except in times of drought.
- Relatively permanent flow may occur seasonally, but the phrase is also intended to encompass tributaries in which extended periods of standing or continuously flowing water are not linked to naturally recurring annual or seasonal cycles.



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# Amended 2023 Rule: (a)(3) Tributaries

## Relatively Permanent Standard – Duration and Timing of Flow

Relatively permanent waters do not include tributaries with flowing or standing water for only a short duration in direct response to precipitation.

- “Direct response to precipitation” is intended to distinguish between episodic periods of flow associated with discrete precipitation events versus continuous flow for extended periods of time.
- No minimum flow duration has been established because flow duration varies extensively by region.



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# Amended 2023 Rule: (a)(4) Adjacent Wetlands

- **Wetlands** means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
- **Adjacent** has been revised by the conforming rule to mean having a continuous surface connection.
- **Jurisdictional adjacent wetlands** include:
  - Wetlands that are adjacent to an (a)(1) water, relatively permanent jurisdictional impoundment, or relatively permanent tributary.



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# Amended 2023 Rule: (a)(4) Adjacent Wetlands

## Continuous Surface Connection

- A **continuous surface connection** means the wetlands either physically abut or touch the paragraph (a)(1) or relatively permanent water, or are connected to the paragraph (a)(1) or relatively permanent water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert.
- Note that *Sackett* is clear that “a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA.”



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## Amended 2023 Rule: (a)(5) Waters: lakes and ponds not identified in (a)(1) – (a)(4)

- Jurisdictional (a)(5) waters include intrastate lakes and ponds not identified in the other jurisdictional categories, that meet the relatively permanent standard.
- The conforming rule revised the January 2023 rule to remove “streams” and “wetlands” from the (a)(5) provision.

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# Amended 2023 Rule: (a)(5) Waters: lakes and ponds not identified in (a)(1) – (a)(4)

## Relatively Permanent Standard

- Lakes and ponds assessed under paragraph (a)(5) meet the relatively permanent standard if they are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to a paragraph (a)(1) water or tributary that is relatively permanent.
- The agencies will assess lakes and ponds under paragraph (a)(5) to determine if they are **relatively permanent** using a similar approach to the one described for tributaries.
- The agencies will assess a **continuous surface connection** between lakes and ponds assessed under paragraph (a)(5) and a paragraph (a)(1) water or a tributary that is relatively permanent using the approach described for wetlands.

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# Amended 2023 Rule: Exclusions

- Excluded waters or features are not jurisdictional as “waters of the United States.”
- Exclusions do not apply to paragraph (a)(1) waters.
- The regulations include the pre-2015 regulatory exclusions:
  - Waste treatment exclusion, prior converted cropland exclusion
- The regulations contain exclusions for features that were “generally non-jurisdictional” under the pre-2015 regulatory regime:
  - Certain ditches, certain artificially irrigated areas, certain artificial lakes and ponds, certain artificial reflecting and swimming pools, certain waterfilled depressions, certain swales and erosional features

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## Amended 2023 Rule: (b)(1) Exclusion: Waste Treatment Systems

- The regulations exclude waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.
- The 2023 rule preamble provides clarification on implementation:
  - Excluded waste treatment systems do not sever upstream jurisdiction.
  - The exclusion is generally available only to the permittee using the system for the treatment function for which such system was designed.

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## Amended 2023 Rule: (b)(2) Exclusion: Prior Converted Cropland

- The regulatory exclusion for prior converted cropland only covers wetlands.
- Wetlands can be covered under the prior converted cropland exclusion if they meet USDA's longstanding definition of prior converted cropland.
- Prior converted cropland loses its exclusion status if there is a “change in use” – meaning the area is no longer available for the production of an agricultural commodity.

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# Amended 2023 Rule: (b)(3) – (b)(8) Exclusions

- The regulations specify that features considered “generally non-jurisdictional” in the preamble to the pre-2015 regulations and in the pre-2015 guidance are excluded.
- Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;
- Artificially irrigated areas that would revert to dry land if the irrigation ceased;
- Artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
- Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons;
- Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States; and
- Swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow.

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# Pre-2015 Regulatory Regime: Terminology

The “**pre-2015 regulatory regime**” refers to the agencies’ pre-2015 definition of “waters of the United States,” implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience.

<https://www.epa.gov/wotus/pre-2015-regulatory-regime>

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# Pre-2015 Regulatory Regime: Framework

## Categories of Jurisdictional Waters\*

- (a)(1) Traditional Navigable Waters
- (a)(2) Interstate Waters
- (a)(3) Other Waters
- (a)(4) Impoundments
- (a)(5) Tributaries
- (a)(6) The Territorial Seas
- (a)(7) Adjacent Wetlands



## Categories of Non-Jurisdictional Waters\*

Waste treatment systems and prior converted cropland

**\*NOTE:** For efficiency, this slide's list of the categories of jurisdictional and non-jurisdictional waters are shorthand for the categories in the regulations. See, e.g., 33 CFR 328.3 (2014) and 40 CFR 230.3(s) (2014).

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# Pre-2015 Regulatory Regime: Joint Coordination Memo

- “Because the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard, and the agencies’ pre-2015 regulatory regime discussed the *Rapanos* plurality standard, the agencies will implement the pre-2015 regulations generally consistent with the pre-2015 regulatory regime’s approach to the plurality standard, including relevant case law and longstanding practice, as informed by applicable guidance, training, and experience.”
- “Under the pre-2015 regulatory regime, consistent with *Sackett*, the agencies:
  - will not assert jurisdiction based on the significant nexus standard,
  - will not assert jurisdiction over interstate wetlands solely because they are interstate,
  - will interpret “adjacent” to mean “having a continuous surface connection,” and
  - will limit the scope of the (a)(3) provision to only relatively permanent lakes and ponds that do not meet one of the other jurisdictional categories.”

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# Pre-2015 Regulatory Regime: Joint Coordination Memo

- “Approved jurisdictional determinations (JDs) are case-specific determinations based on the record, and factual questions or *Sackett* concerns may be raised in the context of a particular approved JD.”
  - “With respect to final determinations of the geographic jurisdictional scope of “waters of the United States” for purposes of Section 404 that are not subject to this memorandum, Corps districts may choose to coordinate with EPA regions on draft approved JDs on a case-by-case basis and either the Corps districts or EPA regions may seek headquarters-level review or guidance on draft approved JDs at any time.”

[https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-pre-2015-regulatory-regime\\_508c.pdf](https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-pre-2015-regulatory-regime_508c.pdf)

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# Pre-2015 Regulatory Regime:

## (a)(1) – Traditional Navigable Waters

- Waters which are 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.
- EPA and Army will continue to use the legal memorandum **Waters That Qualify as “Traditional Navigable Waters” Under Section (a)(1) of the Agencies’ Regulations** (formerly known as Appendix D) to provide guidance for identifying traditional navigable waters.



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## Pre-2015 Regulatory Regime: (a)(2) – Interstate Waters

- “Waters of the United States” include interstate waters.
- These are waters that cross or act as State boundaries.
- Under the pre-2015 regulatory regime, consistent with *Sackett*, the agencies will not assert jurisdiction over interstate wetlands solely because they are interstate.



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# Pre-2015 Regulatory Regime:

## (a)(3) – Other Waters

Paragraph (a)(3) of the pre-2015 regulations:

- All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
  - (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
  - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
  - (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;”

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## Pre-2015 Regulatory Regime: (a)(3) – Other Waters

- Under the pre-2015 regulatory regime, consistent with *Sackett*, the agencies will limit the scope of the (a)(3) provision to assessing only relatively permanent lakes and ponds that do not meet one of the other jurisdictional categories.
- The agencies have not asserted jurisdiction over any (a)(3) other waters under the pre-2015 regulatory regime since the *SWANCC* decision was issued in 2001.

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# Pre-2015 Regulatory Regime:

## (a)(4) – Impoundments

- “Waters of the United States” include impoundments of waters otherwise identified as “waters of the United States.”
- Under the pre-2015 regulatory regime:
  - Impoundment of “waters of the United States” as a general matter does not affect the water’s jurisdictional status.
  - Documentation should 1) demonstrate that the impoundment was created from “waters of the United States,” 2) demonstrate that the water meets the criteria for another jurisdictional category, or 3) assess the impoundment under paragraph (a)(3).



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# Pre-2015 Regulatory Regime:

## (a)(5) – Tributaries

- The regulatory text of this category includes tributaries of waters identified in paragraphs (a)(1) through (a)(4).
  - Under the pre-2015 regulatory regime, a tributary includes natural, man-altered, or man-made water bodies that flow directly or indirectly into a traditional navigable water (TNW).
  - Tributaries also include such water bodies that flow directly or indirectly into an interstate water, even when there is no connection to a TNW.
- Tributaries can include rivers, streams, lakes, ponds, and impoundments.
- Tributaries can also include ditches and canals.
- Jurisdictional tributaries must be relatively permanent.



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# Pre-2015 Regulatory Regime:

## (a)(5) – Tributaries

### Relatively Permanent

- Relatively permanent waters include tributaries that typically have flowing or standing water year-round or continuously at least seasonally (e.g., typically three months).
  - The duration of seasonal flowing or standing water may vary regionally, but the tributary must have predictable flowing or standing water seasonally.
- Non-relatively permanent tributaries are those that have flowing or standing water only in response to precipitation or that do not have continuously flowing or standing water at least seasonally.



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## Pre-2015 Regulatory Regime: (a)(6) – the Territorial Seas

- Defined in section 502(8) of the Clean Water Act as “the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.”



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# Pre-2015 Regulatory Regime:

## (a)(7) Adjacent Wetlands

- **Wetlands** means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
- Under the pre-2015 regulatory regime, consistent with *Sackett*, **adjacent** will be interpreted to mean “having a continuous surface connection.”
- Jurisdictional adjacent wetlands include:
  - Wetlands that have a continuous surface connection to a traditional navigable water, interstate water, the territorial seas, or a relatively permanent tributary or impoundment.



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# Pre-2015 Regulatory Regime:

## (a)(7) Adjacent Wetlands

### Continuous Surface Connection

- Wetlands have a continuous surface connection when they physically abut or touch a jurisdictional water.
- Abutting wetlands are those that “touch” a jurisdictional water (i.e., they are not separated by uplands, a berm, dike, or similar barrier from the OHWM of the water to which they are adjacent).
- Wetlands also have a continuous surface connection when they are connected to a jurisdictional water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert (per pre-2015 case law, see *United States v. Cundiff* (2009), and prior EPA practice).
- Note that *Sackett* is clear that “a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA.”



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# Pre-2015 Regulatory Regime: Exclusions and Generally Non-Jurisdictional Features

- Regulatory exclusions include:
  - Waste treatment exclusion, prior converted cropland exclusion
- Features that are generally not jurisdictional per the 1986 preamble language and the 2008 *Rapanos* guidance include:
  - Certain ditches, certain artificially irrigated areas, certain artificial lakes and ponds, certain artificial reflecting and swimming pools, certain waterfilled depressions, certain swales and erosional features

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## Pre-2015 Regulatory Regime: Exclusion: Waste Treatment Systems

- The regulations exclude waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.
- All waters that are upstream and downstream of the waste treatment system that were jurisdictional prior to the authorized activities and qualify as jurisdictional WOTUS under the pre-2015 regulatory regime, are still WOTUS and subject to the CWA.

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# Pre-2015 Regulatory Regime:

## Exclusion: Prior Converted Cropland

- The regulatory exclusion for prior converted cropland only covers wetlands.
- Wetlands can be covered under the prior converted cropland exclusion if they meet USDA's longstanding definition of prior converted cropland.

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## Pre-2015 Regulatory Regime: Exclusion: Prior Converted Cropland

- The Corps and EPA will continue to generally rely on valid prior-converted cropland (PCC) designations made by USDA-NRCS for making determinations of the applicability of the PCC exclusion, provided that the PCC has not been abandoned. However, the final authority regarding Clean Water Act (CWA) jurisdiction remains with EPA.
- Preamble to the 1993 WOTUS Regulations (58 FR, 45034): *“PC cropland which now meets wetland criteria is considered to be abandoned unless: For once in every five years the area has been used for the production of an agricultural commodity, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes or pasture production.”*

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# Pre-2015 Regulatory Regime: Generally Non-Jurisdictional Features

- Waters that are generally non-jurisdictional per the preamble of the 1986 regulations and the 2008 *Rapanos* Guidance:
  - Artificially irrigated areas which would revert to upland if the irrigation ceased;
  - Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
  - Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons;
  - Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States;
  - Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water; and
  - Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow)

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# Tools and Resources

Examples of tools to determine whether tributaries or lakes and ponds are relatively permanent include:

- Direct observation
- Regional field observations
- [USACE Antecedent Precipitation Tool \(APT\)](#)
- [USGS Topographic Maps](#)
- [Regionalized streamflow duration assessment methods \(SDAMs\)](#)
- Aerial and satellite imagery
- [USGS National Hydrography Dataset \(NHD\)](#)
- Stream Gage data, including from [USGS](#)
- Regional regression analysis
- Hydrologic modeling tools such as [HEC-HMS](#)

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# Tools and Resources

Examples of tools to determine whether tributaries or lakes and ponds are relatively permanent include:

- Elevation data and models, including [LIDAR](#) (for example, from the [USGS](#))
- State, tribal, and local data and maps
- [USGS StreamStats](#)
- [Probability of Streamflow Permanence \(PROSPER\) by the USGS](#) (including for the Pacific Northwest)
- NRCS hydrologic tools and [soil maps](#)
- NOAA national snow analyses maps
- NRCS snow sources
- [USEPA WATERS GeoViewer](#) and [How's My Waterway](#)
- [USGS National Map Viewer](#)

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# Tools and Resources

Examples of tools to determine whether an adjacent wetland has a continuous surface connection to a jurisdictional water include:

- Direct observation
- Regional field observations
- [USGS Topographic Maps](#)
- Aerial and satellite imagery
- [USGS NHD](#)
- [USFWS National Wetlands Inventory \(NWI\)](#)
- Elevation data such as [LIDAR](#)-based topographic models
- State, Tribal, and local data and maps
- NRCS hydrologic tools and [soil maps](#)
- [FEMA flood zone](#) or other floodplain maps

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# Additional Resources: Implementation Memoranda

- EPA and Army have prepared new **Coordination Memos** to ensure consistency of jurisdictional determinations under the 2023 Rule, as amended, and the Pre-2015 Regulatory Regime.
- EPA, Army, and USDA will continue to implement the 2022 **Agricultural Memo** that clarifies the agencies' roles and programs, and in particular clarifies the prior converted cropland exclusion.
- EPA and Army will continue to use the legal memorandum **Waters That Qualify as “Traditional Navigable Waters” Under Section (a)(1) of the Agencies’ Regulations** (formerly known as Appendix D) to provide guidance for identifying traditional navigable waters.
- EPA and Army are also retaining the **2020 Ditch Exemption Memo** clarifying implementation of the ditch exemption under Clean Water Act section 404(f).

<https://www.epa.gov/wotus>

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# Questions

<https://www.epa.gov/wotus>

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**From:** [Walker, William T Jr CIV USARMY CENAO \(USA\)](#)  
**To:** [McElwain, Tunis W CIV USARMY CEHQ \(USA\)](#); [Wilson, Matthew S CIV USARMY CEHQ \(USA\)](#)  
**Subject:** FW: Updated Materials: USACE Implementation "Revised Definition of "Waters of the United States"; Conforming,"  
**Date:** Monday, November 20, 2023 3:26:01 PM  
**Attachments:** [WOTUS Overview Presentation 11-15-23 EPA Corps Staff \(003\).pdf](#)

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FYSA

Thanks  
Tom

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**From:** Smith, Thomas Patrick SES USARMY USACE (USA) <[REDACTED] COE (b)(6)>  
**Sent:** Monday, November 20, 2023 4:24 PM  
**To:** DLL-Division-&-Center-Commanders <[REDACTED] COE (b)(6)>  
DLL-District & Battalion Commanders <DLL-District--Battalion-Commanders@usace.army.mil>  
**Cc:** Spellmon, Scott A LTG USARMY CEHQ (USA) <[REDACTED] COE (b)(6)> Graham, William H JR MG USARMY CEHQ (USA) <[REDACTED] COE (b)(6)> Belk, Edward E Jr SES USARMY CEHQ (USA) <[REDACTED] COE (b)(6)> Walker, William T Jr CIV USARMY CENAO (USA) <[REDACTED] COE (b)(6)> Gaffneysmith, Margaret E CIV USARMY CEHQ (USA) <[REDACTED] COE (b)(6)> Cooper, David R SES USARMY CEHQ (USA) <[REDACTED] COE (b)(6)> Handura, James J COL USARMY CEHQ (USA) <[REDACTED] COE (b)(6)> Perez, Pete G SES USARMY CEHQ (USA) <[REDACTED] COE (b)(6)> Brown, Theodore A SES USARMY CEHQ (USA) <[REDACTED] COE (b)(6)> Hill, Stephen L (Steve) SES USARMY CEHQ (USA) <[REDACTED] COE (b)(6)> Bush, Eric L SES USARMY CEHQ (USA) <[REDACTED] COE (b)(6)> DLL-MSD-Program-Directors <[REDACTED] COE (b)(6)> Prettyman-Beck, Yvonne J CIV (USA) <Yvonne.Prettyman-Beck@usace.army.mil>  
**Subject:** Updated Materials: USACE Implementation "Revised Definition of 'Waters of the United States'; Conforming,"

Commanders: Your Regulatory Chiefs have now been provided additional publicly releasable materials on implementation of the Amended 2023 Rule and Pre-2015 Regime (attached). These materials provide additional clarity on what constitutes a Continuous Surface Connection as part of jurisdictional determination (for example, slides 28 and 48). [REDACTED] (b)(5)

[REDACTED] they will greatly increase the public's understanding of our implementation practices. We continue to monitor and supporting draft AJD Coordination.

Glad to assist with any questions.

Respectfully,  
Tom

**Thomas P. Smith, PE, PMP, SES**

**Chief, Operations and Regulatory  
NAD and LRD Regional Integration  
US Army Corps of Engineers**

COE (b)(6)

COE (b)(6)

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**From:** Smith, Thomas Patrick SES USARMY USACE (USA)

**Sent:** Thursday, September 28, 2023 5:36 PM

**To:** DLL-Division-&-Center-Commanders <COE (b)(6)>

DLL-District & Battalion Commanders <[DLL-District--Battalion-Commanders@usace.army.mil](mailto:DLL-District--Battalion-Commanders@usace.army.mil)>

**Cc:** Spellmon, Scott A LTG USARMY CEHQ (USA) <COE (b)(6)> Graham,  
William H JR MG USARMY CEHQ (USA) <COE (b)(6)> Belk, Edward E Jr SES  
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<COE (b)(6)> DLL-MSC-Program-Directors <COE (b)(6)>  
<COE (b)(6)> Smith, Thomas Patrick SES USARMY USACE (USA)

**Subject:** (b)(5) USACE Implementation "Revised Definition of 'Waters of the United States'; Conforming,"

Commanders: earlier this week we received (b)(5) training materials on implementation of the Amended 2023 Rule, along with Joint EPA and Army/USACE Coordination Memorandums for approved jurisdictional determinations conducted under both the Amended 2023 Rule and the Pre-2015 Regulatory Regime. A few key points

- (b)(5)
- The Training slides and Coordination Memos are NOT TO BE RELEASED OUTSIDE USACE OR POSTED TO THE WEB UNTIL FURTHER NOTICE.
- USACE Regulatory intends to conduct additional USACE-internal implementation training through the Regulatory COP.
- USACE expects to receive updated training materials on the application of the Pre-2015 Regime which remains in place in 27 States.

It is important to work closely with your Regulatory Chiefs on the content of the Coordination Memos and the Training Slides. (b)(5)

(b)(5)

Respectfully,

Tom

**Thomas P. Smith, PE, PMP, SES**  
**Chief, Operations and Regulatory**  
**NAD and LRD Regional Integration**  
**US Army Corps of Engineers**

COE (b)(6)

COE (b)(6)

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**From:** Smith, Thomas Patrick SES USARMY USACE (USA) <COE (b)(6)>  
**Date:** Wednesday, Sep 13, 2023 at 4:44 PM  
**To:** DLL-Division-&-Center-Commanders <COE (b)(6)> DLL-District & Battalion Commanders <[DLL-District--Battalion-Commanders@usace.army.mil](mailto:DLL-District--Battalion-Commanders@usace.army.mil)>  
**Cc:** Spellmon, Scott A LTG USARMY CEHQ (USA) <COE (b)(6)> Graham, William H JR MG USARMY CEHQ (USA) <COE (b)(6)> Belk, Edward E Jr SES USARMY CEHQ (USA) <COE (b)(6)> Walker, William T Jr CIV USARMY CENAO (USA) <COE (b)(6)> Gaffneysmith, Margaret E CIV USARMY CEHQ (USA) <COE (b)(6)> Cooper, David R SES USARMY CEHQ (USA) <COE (b)(6)> Handura, James J COL USARMY CEHQ (USA) <COE (b)(6)> Perez, Pete G SES USARMY CEHQ (USA) <COE (b)(6)> Brown, Theodore A SES USARMY CEHQ (USA) <COE (b)(6)> Hill, Stephen L (Steve) SES USARMY CEHQ (USA) <COE (b)(6)> Bush, Eric L SES USARMY CEHQ (USA) <COE (b)(6)> DLL-MS-Program-Directors <COE (b)(6)>  
**Subject:** USACE Implementation "Revised Definition of 'Waters of the United States'; Conforming,"

Commanders: This email complements the discussion with LTG Spellmon earlier today regarding USACE implementation of the "*Revised Definition of 'Waters of the United States'; Conforming.*" ([Federal Register :: Revised Definition of "Waters of the United States"; Conforming](#)). If you were able to join the discussion, you were reminded of the complexity and nuance to this implementation. I acknowledge the need for continuous communication with the field and updates based on new information when appropriate.

USACE HQ continues to engage with ASA(CW) and EPA on a draft coordination memo describing how EPA and Army/USACE will coordinate on draft approved jurisdictional determinations (AJDs) for wetlands. We expect a final coordination memo this week. The mechanism for coordination on jurisdictional determinations is familiar to the Regulatory Program, but will need additional attention in the initial stages of the implementation of the Conforming Rule. Coordination between USACE/Army and EPA will enable development of specific policy guidance based on

applications from the public and draft determinations made in the field.

Tom Walker (Acting HQ Chief Regulatory) and MSC/District Regulatory Chiefs will continue to meet regularly to minimize challenges in implementation. Attached to this email are materials to assist in implementation.

- WOTUS Public Webinar Briefing 12 SEP 2023. This briefing is an excellent summary of the history of the Clean Water Act and the changes made based on the Supreme Court decision on Sackett.
- WOTUS Key Points 13 SEP 2023. Brief set of key points on the WOTUS effort and current status.
- Updated USACE Implementation Briefing 13 SEP 2023. This briefing includes updated language that emphasizes USACE coordination of draft Approved Jurisdictional Determinations of wetlands with EPA.

Respectfully,

Tom

**Thomas P. Smith, PE, PMP, SES**  
**Chief, Operations and Regulatory**  
**NAD and LRD Regional Integration**  
**US Army Corps of Engineers**

COE (b)(6)

COE (b)(6)

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**From:** Smith, Thomas Patrick SES USARMY USACE (USA)

**Sent:** Wednesday, August 30, 2023 5:28 PM

**To:** DLL-Division-&-Center-Commanders <COE (b)(6)>

**Cc:** Spellmon, Scott A LTG USARMY CEHQ (USA) <COE (b)(6)> Graham,

William H JR MG USARMY CEHQ (USA) <COE (b)(6)> Belk, Edward E Jr SES

USARMY CEHQ (USA) <COE (b)(6)> Walker, William T Jr CIV USARMY CENAO

(USA) <COE (b)(6)> Gaffneysmith, Margaret E CIV USARMY CEHQ (USA)

<COE (b)(6)> Cooper, David R SES USARMY CEHQ (USA)

<COE (b)(6)> Handura, James J COL USARMY CEHQ (USA)

<COE (b)(6)> Perez, Pete G SES USARMY CEHQ (USA)

<COE (b)(6)> Brown, Theodore A SES USARMY CEHQ (USA)

<COE (b)(6)> Hill, Stephen L (Steve) SES USARMY CEHQ (USA)

<COE (b)(6)> Bush, Eric L SES USARMY CEHQ (USA)

<COE (b)(6)> DLL-MSC-Program-Directors <COE (b)(6)>

**Subject:** Amendment to the Revised Definition of 'Waters of the US'



Commanders:

On Tuesday August 29, 2023, the U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army (the agencies) announced a final rule amending the 2023 definition of “waters of the United States” to conform with the recent Supreme Court decision in *Sackett v. EPA*. The agencies are committed to following the law and implementing the Clean Water Act to deliver the essential protections that safeguard the nation’s waters from pollution and degradation. This action provides the clarity that is needed to advance these goals, while moving forward with infrastructure projects, economic opportunities, and agricultural activities.

More information about the final rule is available here -

<https://www.epa.gov/newsreleases/conform-recent-supreme-court-decision-epa-and-army-amend-waters-united-states-rule> .

The agencies will host a public webinar on September 12, 2023 to provide updates on the definition of “waters of the United States.” The agencies also plan to host listening sessions this fall with co-regulators and stakeholders, focusing on identifying issues that may arise outside this limited rule to conform the definition of “waters of the United States” with the *Sackett v. EPA* decision.

Learn more about this action on [EPA’s “waters of the United States” website](#).

Tom Walker, Chief Regulatory at HQ USACE, will continue to share information and lead implementation discussions with the Regulatory Community of Practice.

Respectfully,

Tom

**Thomas P. Smith, PE, PMP, SES**  
**Chief, Operations and Regulatory**  
**NAD and LRD Regional Integration**  
**US Army Corps of Engineers**

COE (b)(6)

COE (b)(6)

# Updates for Tribes and States on “Waters of the United States”



November 15, 2023



**Russell Kaiser**, Acting Director of the Oceans, Wetlands and Communities Division in EPA's Office of Water

**Whitney Beck**, Clean Water Act Jurisdiction Team Lead in EPA's Office of Water

**Rose Kwok**, Environmental Scientist in EPA's Office of Water

**Melinda Larsen**, Office of the Assistant Secretary of the Army (Civil Works)

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# Presentation Outline

- Background
- Amended 2023 Rule
- Pre-2015 Regulatory Regime
- Additional Resources



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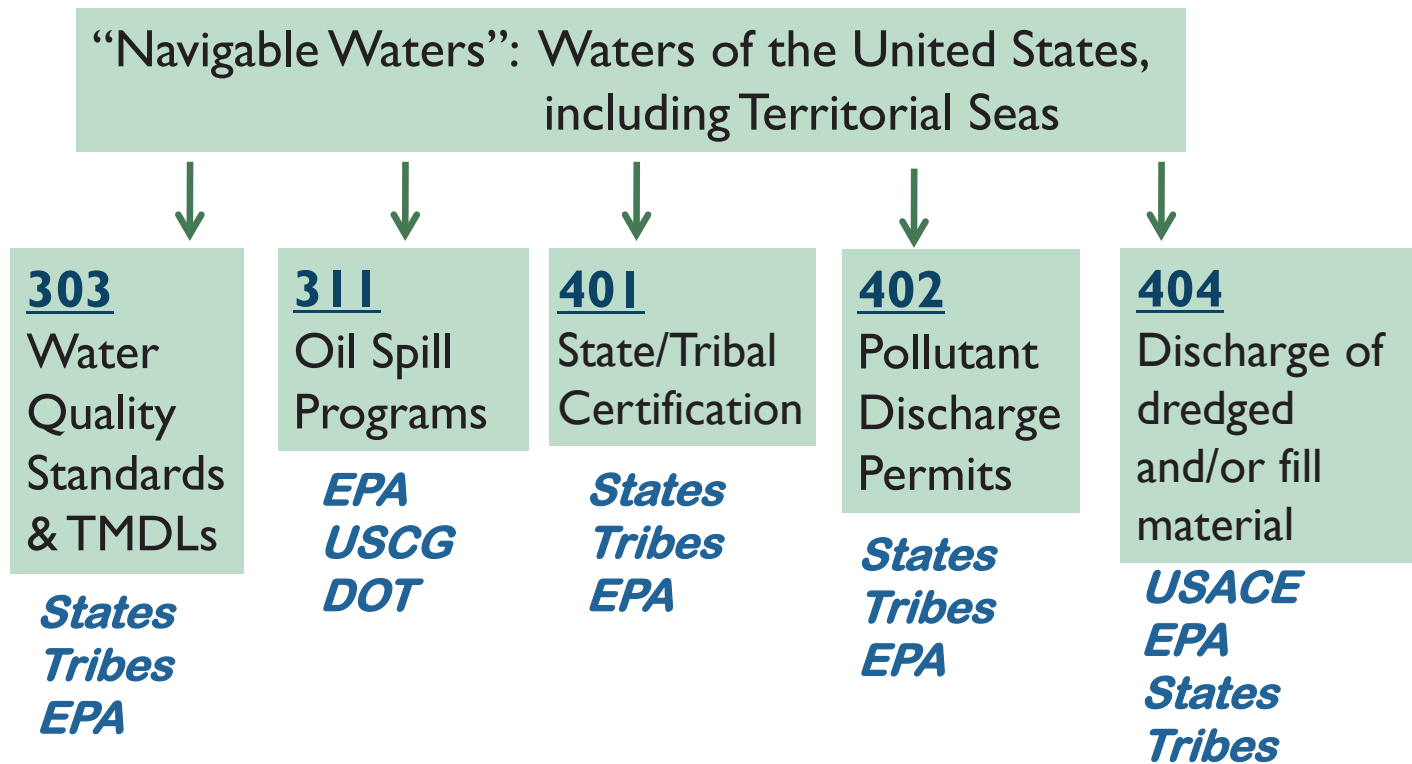
# Background: “Waters of the United States” and the Clean Water Act

- “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.”
- EPA and the Department of the Army have defined “waters of the United States” by regulation since the 1970s.



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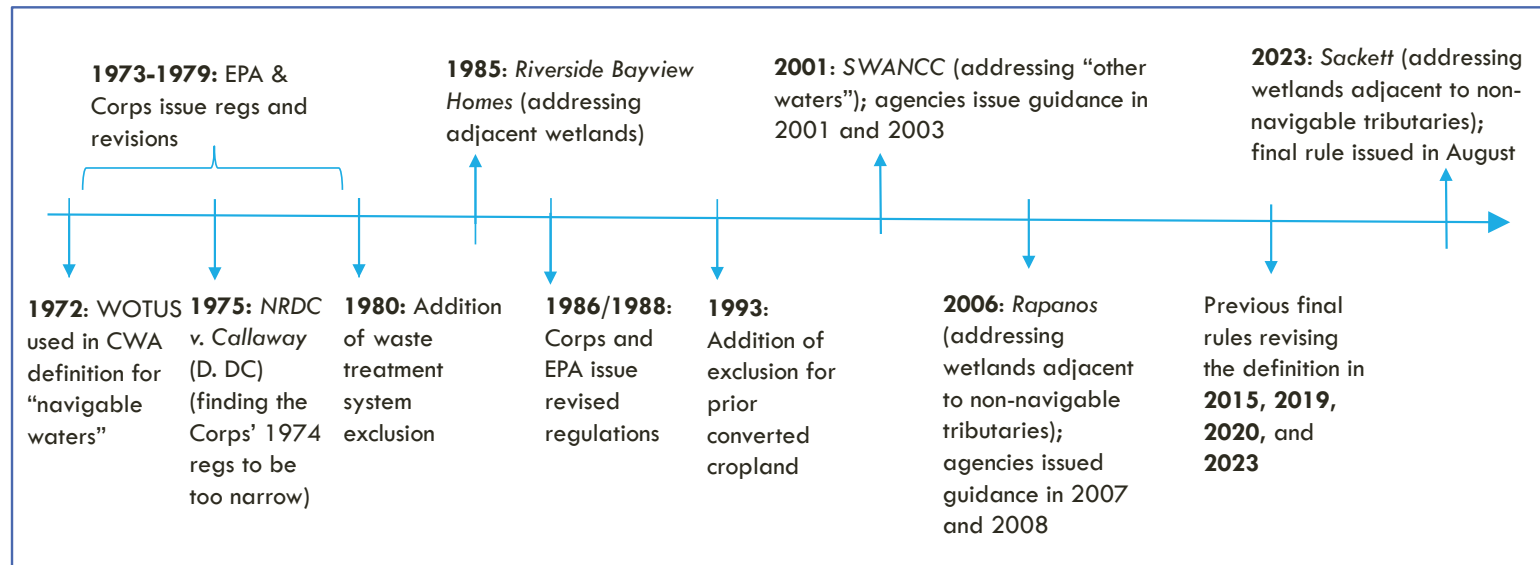
# Background: Why “Waters of the United States” Matters



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# Background: “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 major Supreme Court cases.



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# Background: Regulatory Regimes

- Prior to the 2015 Clean Water Rule, the Agencies implemented the pre-2015 regulations defining “waters of the United States” consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience—this is referred to as the “pre-2015 regulatory regime.”
- The Agencies revised their regulations in 2015, 2019, and 2020. In 2021, two district courts vacated the 2020 Navigable Waters Protection Rule. The Agencies then returned to implementing the pre-2015 regulatory regime nationwide.
- The 2023 Rule replaced the pre-2015 regulatory regime, and was amended in September 2023, but as the result of ongoing litigation, the Amended 2023 Rule is not operative in certain states and for certain parties.

<https://www.epa.gov/wotus/pre-2015-regulatory-regime>

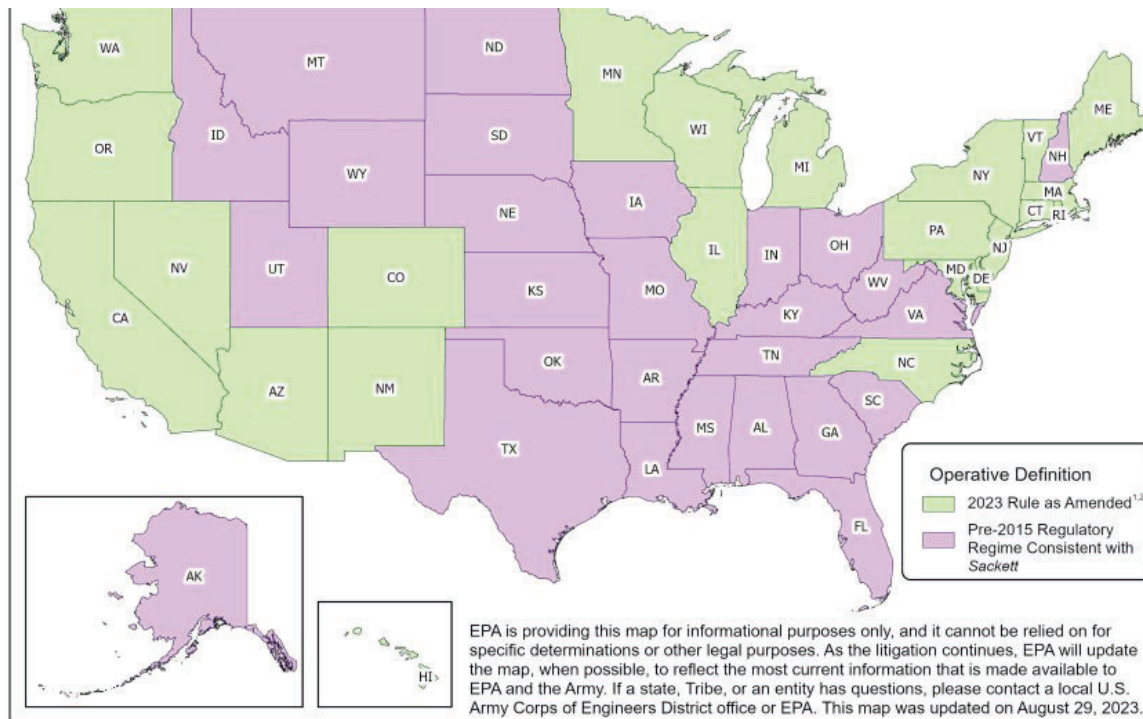
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# Background: Recent Events

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

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# Background: Operative Definition of “Waters of the United States”



<sup>1</sup>Also operative in the U.S. territories and the District of Columbia

<sup>2</sup>The 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 Georgia Chamber of Commerce).

<https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>

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# Background: *Rapanos* Decision

- **Supreme Court decision in *Rapanos v. U.S.* (2006)**
  - The Justices were divided in a 4-1-4 opinion on the question of CWA jurisdiction over wetlands adjacent to nonnavigable tributaries of traditional navigable waters.
- **Scalia Plurality Opinion**

Considered “waters of the United States” to include:

  - “relatively permanent, standing or continuously flowing bodies of water forming geographic features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes’” and
  - Wetlands that 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.”
- **Kennedy Concurring Opinion**

Considered “waters of the United States” to include:

  - “a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.”
- **Dissent**
  - deferred to the Corps’ assertion of jurisdiction and concluded that the term “waters of the United States” encompasses all tributaries and wetlands that satisfy “either the plurality’s [standard] or Justice Kennedy’s.”
- **Guidance issued in 2007, revised 2008**
- **Circuit Court Decisions:** All eight circuit courts to address the issue held that jurisdiction was proper over at least those waters that satisfy the Kennedy standard; none held that the plurality was the sole basis that may be used to establish jurisdiction.

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# Background: *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 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 adjacent 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.

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# Background: Conforming Rule Amending January 2023 Rule

- September 8, 2023: EPA and Army Corps published a rule to amend the January 2023 definition of “waters of the United States” to conform with *Sackett*; rule was effective upon publication.
- In the conforming rule, the agencies determined that there is good cause under the Administrative Procedure Act to issue a final rule because certain provisions of the January 2023 Rule were invalid under the Supreme Court’s interpretation of the Clean Water Act in *Sackett*.
- Targeted changes to January 2023 Rule categories of “waters of the United States”:
  - (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 delete significant nexus standard
  - (a)(4) Adjacent Wetlands – **revised** to delete significant nexus standard
  - (a)(5) Additional Waters – **revised** to delete significant nexus standard and delete streams and wetlands
- Targeted changes to January 2023 Rule Definitions:
  - (c)(2) Adjacent – **revised** to mean “having a continuous surface connection”
  - (c)(6) Significantly affect – **deleted**
- No changes to January 2023 Rule Exclusions

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# Background: Preamble to the Conforming Rule

- The preamble notes that the Court in *Sackett* “conclude[d] that the *Rapanos* plurality was correct.”
- The agencies will continue to interpret the definition of “waters of the United States” consistent with the *Sackett* decision.
- 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.
- 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.

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# Amended 2023 Rule: Framework

## Categories of Jurisdictional Waters

(a)(1)

- (i) Traditional Navigable Waters
- (ii) Territorial Seas
- (iii) Interstate Waters

(a)(2) Impoundments of Jurisdictional Waters

(a)(3) Tributaries

(a)(4) Adjacent Wetlands

(a)(5) Intrastate lakes and ponds that do not fall within (a)(1) – (a)(4)



**\*NOTE:** For efficiency, this slide's list of the categories of jurisdictional waters are shorthand for the jurisdictional categories in the regulations. See 33 CFR 328.3(a) and 40 CFR 120.2(a).

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# Amended 2023 Rule: Framework

## 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 reflection or swimming pools or other small ornamental bodies of water

(b)(7) Certain waterfilled depressions

(b)(8) Swales and erosional features

(b)(1) – (b)(2):  
Pre-2015 exclusions, modified  
in the regulations

(b)(3) – (b)(8):  
Pre-2015 “generally non-  
jurisdictional features,” added  
to the regulations as  
exclusions

**\*NOTE:** For efficiency, this slide’s list of the categories of exclusions are shorthand for the categories in the regulations. See 33 CFR 328.3(b) and 40 CFR 120.2(b).  
Exclusions do not apply to paragraph (a)(1) waters.

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# Amended 2023 Rule: Framework

## Definitions

(c)(1) Wetlands

(c)(2) Adjacent

(c)(3) High tide line

(c)(4) Ordinary high water mark

(c)(5) Tidal waters



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# Amended 2023 Rule: Joint Coordination Memorandum

- As is typical after a rule is promulgated, the agencies have entered into an agreement via a joint agency coordination memorandum to ensure the consistency and thoroughness of the agencies' implementation of this rule. [Coordination Memorandum \(September 27, 2023\)](#) EPA and Corps field staff will coordinate on certain draft approved jurisdictional determinations and the agencies will follow a process for elevating a subset of these determinations to headquarters for review as necessary.
- “Because the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard and the 2023 rule preamble discussed the *Rapanos* plurality standard, **the implementation guidance and tools in the 2023 rule preamble that address the regulatory text that was not amended by the conforming rule, including the preamble relevant to the *Rapanos* plurality standard incorporated in paragraphs (a)(3), (4), and (5) of the 2023 rule, as amended, generally remain relevant to implementing the 2023 rule, as amended.**”
- “Approved jurisdictional determinations (JDs) are case-specific determinations based on the record and factual questions or *Sackett* concerns may be raised in the context of a particular approved JD.”

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# Amended 2023 Rule: (a)(1) Waters – Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

- **Traditional Navigable Waters**
  - Waters which are 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.
  - EPA and Army will continue to use the legal memorandum **Waters That Qualify as “Traditional Navigable Waters” Under Section (a)(1) of the Agencies’ Regulations** (formerly known as Appendix D) to provide guidance for identifying traditional navigable waters.



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# Amended 2023 Rule: (a)(1) Waters – Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

- **The Territorial Seas**
  - Defined in section 502(8) of the Clean Water Act as “the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.”



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# Amended 2023 Rule: (a)(1) Waters – Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

- **Interstate Waters**
  - “Waters of the United States” include interstate waters.
  - The conforming rule revised the January 2023 rule to remove “interstate wetlands” from the provision.
  - Lakes and ponds crossing state boundaries are jurisdictional as interstate waters in their entirety.
  - For rivers and streams, interstate waters include the portion of the river or stream that is of the same stream order as the point that crosses or serves as a state line.



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# Amended 2023 Rule: (a)(2) Impoundments

- “Waters of the United States” include impoundments of waters that otherwise meet the definition of “waters of the United States.”
- The agencies consider paragraph (a)(2) impoundments to include:
  - (1) Impoundments created by impounding one of the “waters of United States” that was jurisdictional under the Amended 2023 Rule’s definition at the time the impoundment was created, and
  - (2) Impoundments of waters that at the time of assessment meet the definition of “waters of the United States” under paragraph (a)(1), (a)(3), or (a)(4) of the Amended 2023 Rule, regardless of the water’s jurisdictional status at the time the impoundment was created.



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# Amended 2023 Rule: (a)(3) Tributaries

- Tributaries include natural, man-altered, or man-made water bodies that flow directly or indirectly into (a)(1) waters or (a)(2) impoundments.
  - Tributaries can include rivers, streams, lakes, ponds, and impoundments.
  - Tributaries can also include ditches and canals.
- Jurisdictional tributaries must meet the relatively permanent standard.



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# Amended 2023 Rule: (a)(3) Tributaries

## Relatively Permanent Standard

- Relatively permanent waters include tributaries that have flowing or standing water year-round or continuously during certain times of year.
- Relatively permanent waters do not include tributaries with flowing or standing water for only a short duration in direct response to precipitation.



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# Amended 2023 Rule: (a)(3) Tributaries

## Relatively Permanent Standard – Duration and Timing of Flow

Relatively permanent waters include tributaries that have flowing or standing water year-round or continuously during certain times of year.

- “Certain times of the year” is intended to include extended periods of standing or continuously flowing water occurring in the same geographic feature year after year, except in times of drought.
- Relatively permanent flow may occur seasonally, but the phrase is also intended to encompass tributaries in which extended periods of standing or continuously flowing water are not linked to naturally recurring annual or seasonal cycles.



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# Amended 2023 Rule: (a)(3) Tributaries

## Relatively Permanent Standard – Duration and Timing of Flow

Relatively permanent waters do not include tributaries with flowing or standing water for only a short duration in direct response to precipitation.

- “Direct response to precipitation” is intended to distinguish between episodic periods of flow associated with discrete precipitation events versus continuous flow for extended periods of time.
- No minimum flow duration has been established because flow duration varies extensively by region.



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# Amended 2023 Rule: (a)(4) Adjacent Wetlands

- **Wetlands** means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
- **Adjacent** has been revised by the conforming rule to mean having a continuous surface connection.
- **Jurisdictional adjacent wetlands** include:
  - Wetlands that are adjacent to an (a)(1) water, relatively permanent jurisdictional impoundment, or relatively permanent tributary.



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# Amended 2023 Rule: (a)(4) Adjacent Wetlands

## Continuous Surface Connection

- A **continuous surface connection** means the wetlands either physically abut or touch the paragraph (a)(1) or relatively permanent water, or are connected to the paragraph (a)(1) or relatively permanent water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert.
- Note that *Sackett* is clear that “a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA.”



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## Amended 2023 Rule: (a)(5) Waters: lakes and ponds not identified in (a)(1) – (a)(4)

- Jurisdictional (a)(5) waters include intrastate lakes and ponds not identified in the other jurisdictional categories, that meet the relatively permanent standard.
- The conforming rule revised the January 2023 rule to remove “streams” and “wetlands” from the (a)(5) provision.

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# Amended 2023 Rule: (a)(5) Waters: lakes and ponds not identified in (a)(1) – (a)(4)

## Relatively Permanent Standard

- Lakes and ponds assessed under paragraph (a)(5) meet the relatively permanent standard if they are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to a paragraph (a)(1) water or tributary that is relatively permanent.
- The agencies will assess lakes and ponds under paragraph (a)(5) to determine if they are **relatively permanent** using a similar approach to the one described for tributaries.
- The agencies will assess a **continuous surface connection** between lakes and ponds assessed under paragraph (a)(5) and a paragraph (a)(1) water or a tributary that is relatively permanent using the approach described for wetlands.

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# Amended 2023 Rule: Exclusions

- Excluded waters or features are not jurisdictional as “waters of the United States.”
- Exclusions do not apply to paragraph (a)(1) waters.
- The regulations include the pre-2015 regulatory exclusions:
  - Waste treatment exclusion, prior converted cropland exclusion
- The regulations contain exclusions for features that were “generally non-jurisdictional” under the pre-2015 regulatory regime:
  - Certain ditches, certain artificially irrigated areas, certain artificial lakes and ponds, certain artificial reflecting and swimming pools, certain waterfilled depressions, certain swales and erosional features

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## Amended 2023 Rule: (b)(1) Exclusion: Waste Treatment Systems

- The regulations exclude waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.
- The 2023 rule preamble provides clarification on implementation:
  - Excluded waste treatment systems do not sever upstream jurisdiction.
  - The exclusion is generally available only to the permittee using the system for the treatment function for which such system was designed.

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## Amended 2023 Rule: (b)(2) Exclusion: Prior Converted Cropland

- The regulatory exclusion for prior converted cropland only covers wetlands.
- Wetlands can be covered under the prior converted cropland exclusion if they meet USDA's longstanding definition of prior converted cropland.
- Prior converted cropland loses its exclusion status if there is a “change in use” – meaning the area is no longer available for the production of an agricultural commodity.

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# Amended 2023 Rule: (b)(3) – (b)(8) Exclusions

- The regulations specify that features considered “generally non-jurisdictional” in the preamble to the pre-2015 regulations and in the pre-2015 guidance are excluded.
- Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;
- Artificially irrigated areas that would revert to dry land if the irrigation ceased;
- Artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
- Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons;
- Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States; and
- Swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow.

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# Pre-2015 Regulatory Regime: Terminology

The “**pre-2015 regulatory regime**” refers to the agencies’ pre-2015 definition of “waters of the United States,” implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience.

<https://www.epa.gov/wotus/pre-2015-regulatory-regime>

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# Pre-2015 Regulatory Regime: Framework

## Categories of Jurisdictional Waters\*

- (a)(1) Traditional Navigable Waters
- (a)(2) Interstate Waters
- (a)(3) Other Waters
- (a)(4) Impoundments
- (a)(5) Tributaries
- (a)(6) The Territorial Seas
- (a)(7) Adjacent Wetlands



## Categories of Non-Jurisdictional Waters\*

Waste treatment systems and prior converted cropland

**\*NOTE:** For efficiency, this slide's list of the categories of jurisdictional and non-jurisdictional waters are shorthand for the categories in the regulations. See, e.g., 33 CFR 328.3 (2014) and 40 CFR 230.3(s) (2014).

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# Pre-2015 Regulatory Regime: Joint Coordination Memo

- “Because the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard, and the agencies’ pre-2015 regulatory regime discussed the *Rapanos* plurality standard, the agencies will implement the pre-2015 regulations generally consistent with the pre-2015 regulatory regime’s approach to the plurality standard, including relevant case law and longstanding practice, as informed by applicable guidance, training, and experience.”
- “Under the pre-2015 regulatory regime, consistent with *Sackett*, the agencies:
  - will not assert jurisdiction based on the significant nexus standard,
  - will not assert jurisdiction over interstate wetlands solely because they are interstate,
  - will interpret “adjacent” to mean “having a continuous surface connection,” and
  - will limit the scope of the (a)(3) provision to only relatively permanent lakes and ponds that do not meet one of the other jurisdictional categories.”

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# Pre-2015 Regulatory Regime: Joint Coordination Memo

- “Approved jurisdictional determinations (JDs) are case-specific determinations based on the record, and factual questions or *Sackett* concerns may be raised in the context of a particular approved JD.”
  - “With respect to final determinations of the geographic jurisdictional scope of “waters of the United States” for purposes of Section 404 that are not subject to this memorandum, Corps districts may choose to coordinate with EPA regions on draft approved JDs on a case-by-case basis and either the Corps districts or EPA regions may seek headquarters-level review or guidance on draft approved JDs at any time.”

[https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-pre-2015-regulatory-regime\\_508c.pdf](https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-pre-2015-regulatory-regime_508c.pdf)

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# Pre-2015 Regulatory Regime:

## (a)(1) – Traditional Navigable Waters

- Waters which are 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.
- EPA and Army will continue to use the legal memorandum **Waters That Qualify as “Traditional Navigable Waters” Under Section (a)(1) of the Agencies’ Regulations** (formerly known as Appendix D) to provide guidance for identifying traditional navigable waters.



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# Pre-2015 Regulatory Regime:

## (a)(2) – Interstate Waters

- “Waters of the United States” include interstate waters.
- These are waters that cross or act as State boundaries.
- Under the pre-2015 regulatory regime, consistent with *Sackett*, the agencies will not assert jurisdiction over interstate wetlands solely because they are interstate.



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# Pre-2015 Regulatory Regime:

## (a)(3) – Other Waters

Paragraph (a)(3) of the pre-2015 regulations:

- All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
  - (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
  - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
  - (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;”

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## Pre-2015 Regulatory Regime: (a)(3) – Other Waters

- Under the pre-2015 regulatory regime, consistent with *Sackett*, the agencies will limit the scope of the (a)(3) provision to assessing only relatively permanent lakes and ponds that do not meet one of the other jurisdictional categories.
- The agencies have not asserted jurisdiction over any (a)(3) other waters under the pre-2015 regulatory regime since the *SWANCC* decision was issued in 2001.

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# Pre-2015 Regulatory Regime:

## (a)(4) – Impoundments

- “Waters of the United States” include impoundments of waters otherwise identified as “waters of the United States.”
- Under the pre-2015 regulatory regime:
  - Impoundment of “waters of the United States” as a general matter does not affect the water’s jurisdictional status.
  - Documentation should 1) demonstrate that the impoundment was created from “waters of the United States,” 2) demonstrate that the water meets the criteria for another jurisdictional category, or 3) assess the impoundment under paragraph (a)(3).



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# Pre-2015 Regulatory Regime:

## (a)(5) – Tributaries

- The regulatory text of this category includes tributaries of waters identified in paragraphs (a)(1) through (a)(4).
  - Under the pre-2015 regulatory regime, a tributary includes natural, man-altered, or man-made water bodies that flow directly or indirectly into a traditional navigable water (TNW).
  - Tributaries also include such water bodies that flow directly or indirectly into an interstate water, even when there is no connection to a TNW.
- Tributaries can include rivers, streams, lakes, ponds, and impoundments.
- Tributaries can also include ditches and canals.
- Jurisdictional tributaries must be relatively permanent.



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# Pre-2015 Regulatory Regime:

## (a)(5) – Tributaries

### Relatively Permanent

- Relatively permanent waters include tributaries that typically have flowing or standing water year-round or continuously at least seasonally (e.g., typically three months).
  - The duration of seasonal flowing or standing water may vary regionally, but the tributary must have predictable flowing or standing water seasonally.
- Non-relatively permanent tributaries are those that have flowing or standing water only in response to precipitation or that do not have continuously flowing or standing water at least seasonally.



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## Pre-2015 Regulatory Regime: (a)(6) – the Territorial Seas

- Defined in section 502(8) of the Clean Water Act as “the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.”



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# Pre-2015 Regulatory Regime:

## (a)(7) Adjacent Wetlands

- **Wetlands** means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
- Under the pre-2015 regulatory regime, consistent with *Sackett*, **adjacent** will be interpreted to mean “having a continuous surface connection.”
- Jurisdictional adjacent wetlands include:
  - Wetlands that have a continuous surface connection to a traditional navigable water, interstate water, the territorial seas, or a relatively permanent tributary or impoundment.



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# Pre-2015 Regulatory Regime:

## (a)(7) Adjacent Wetlands

### Continuous Surface Connection

- Wetlands have a continuous surface connection when they physically abut or touch a jurisdictional water.
  - Abutting wetlands are those that “touch” a jurisdictional water (i.e., they are not separated by uplands, a berm, dike, or similar barrier from the OHWM of the water to which they are adjacent).
- Wetlands also have a continuous surface connection when they are connected to a jurisdictional water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert (per pre-2015 case law, see *United States v. Cundiff* (2009), and prior EPA practice).
- Note that *Sackett* is clear that “a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA.”



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# Pre-2015 Regulatory Regime: Exclusions and Generally Non-Jurisdictional Features

- Regulatory exclusions include:
  - Waste treatment exclusion, prior converted cropland exclusion
- Features that are generally not jurisdictional per the 1986 preamble language and the 2008 *Rapanos* guidance include:
  - Certain ditches, certain artificially irrigated areas, certain artificial lakes and ponds, certain artificial reflecting and swimming pools, certain waterfilled depressions, certain swales and erosional features

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## Pre-2015 Regulatory Regime: Exclusion: Waste Treatment Systems

- The regulations exclude waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.
- All waters that are upstream and downstream of the waste treatment system that were jurisdictional prior to the authorized activities and qualify as jurisdictional WOTUS under the pre-2015 regulatory regime, are still WOTUS and subject to the CWA.

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# Pre-2015 Regulatory Regime:

## Exclusion: Prior Converted Cropland

- The regulatory exclusion for prior converted cropland only covers wetlands.
- Wetlands can be covered under the prior converted cropland exclusion if they meet USDA's longstanding definition of prior converted cropland.

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## Pre-2015 Regulatory Regime: Exclusion: Prior Converted Cropland

- The Corps and EPA will continue to generally rely on valid prior-converted cropland (PCC) designations made by USDA-NRCS for making determinations of the applicability of the PCC exclusion, provided that the PCC has not been abandoned. However, the final authority regarding Clean Water Act (CWA) jurisdiction remains with EPA.
- Preamble to the 1993 WOTUS Regulations (58 FR, 45034): *“PC cropland which now meets wetland criteria is considered to be abandoned unless: For once in every five years the area has been used for the production of an agricultural commodity, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes or pasture production.”*

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# Pre-2015 Regulatory Regime: Generally Non-Jurisdictional Features

- Waters that are generally non-jurisdictional per the preamble of the 1986 regulations and the 2008 *Rapanos* Guidance:
  - Artificially irrigated areas which would revert to upland if the irrigation ceased;
  - Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
  - Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons;
  - Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States;
  - Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water; and
  - Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow)

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# Tools and Resources

Examples of tools to determine whether tributaries or lakes and ponds are relatively permanent include:

- Direct observation
- Regional field observations
- [USACE Antecedent Precipitation Tool \(APT\)](#)
- [USGS Topographic Maps](#)
- [Regionalized streamflow duration assessment methods \(SDAMs\)](#)
- Aerial and satellite imagery
- [USGS National Hydrography Dataset \(NHD\)](#)
- Stream Gage data, including from [USGS](#)
- Regional regression analysis
- Hydrologic modeling tools such as [HEC-HMS](#)

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# Tools and Resources

Examples of tools to determine whether tributaries or lakes and ponds are relatively permanent include:

- Elevation data and models, including [LIDAR](#) (for example, from the [USGS](#))
- State, tribal, and local data and maps
- [USGS StreamStats](#)
- [Probability of Streamflow Permanence \(PROSPER\) by the USGS](#) (including for the Pacific Northwest)
- NRCS hydrologic tools and [soil maps](#)
- NOAA national snow analyses maps
- NRCS snow sources
- [USEPA WATERS GeoViewer](#) and [How's My Waterway](#)
- [USGS National Map Viewer](#)

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# Tools and Resources

Examples of tools to determine whether an adjacent wetland has a continuous surface connection to a jurisdictional water include:

- Direct observation
- Regional field observations
- [USGS Topographic Maps](#)
- Aerial and satellite imagery
- [USGS NHD](#)
- [USFWS National Wetlands Inventory \(NWI\)](#)
- Elevation data such as [LIDAR](#)-based topographic models
- State, Tribal, and local data and maps
- NRCS hydrologic tools and [soil maps](#)
- [FEMA flood zone](#) or other floodplain maps

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# Additional Resources: Implementation Memoranda

- EPA and Army have prepared new **Coordination Memos** to ensure consistency of jurisdictional determinations under the 2023 Rule, as amended, and the Pre-2015 Regulatory Regime.
- EPA, Army, and USDA will continue to implement the 2022 **Agricultural Memo** that clarifies the agencies' roles and programs, and in particular clarifies the prior converted cropland exclusion.
- EPA and Army will continue to use the legal memorandum **Waters That Qualify as "Traditional Navigable Waters" Under Section (a)(1) of the Agencies' Regulations** (formerly known as Appendix D) to provide guidance for identifying traditional navigable waters.
- EPA and Army are also retaining the **2020 Ditch Exemption Memo** clarifying implementation of the ditch exemption under Clean Water Act section 404(f).

<https://www.epa.gov/wotus>

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# Questions

<https://www.epa.gov/wotus>

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**From:** [Wilson, Matthew S CIV USARMY CEHQ \(USA\)](#)  
**To:** [CDL-REG-All](#)  
**Cc:** [Wilson, John Maxwell \(Max\) CIV USARMY CEHQ \(USA\)](#); [Inkelas, Daniel CIV USARMY CEHQ \(USA\)](#)  
**Subject:** WOTUS: Update to Web Posting Procedures for AJDs:  
**Date:** Thursday, February 22, 2024 8:44:48 AM

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Regulators,

USACE is implementing a change to our practices for posting approved jurisdictional determinations (AJDs) to the web.

This direction supersedes the direction for web posting of AJDs that was included in the 5 October email announcing the previous change to our AJD website posting procedures.

Going forward, districts should not post to the web the JD letter to the AJD requestor.

Instead, districts should post the final AJD Memorandum for Record (MFR) basis document, along with any location map(s) and the final JD map(s) that show the lateral limits of the aquatic resources and/or features that were evaluated in the AJD.

The MFR document and the associated JD maps should be combined into a single PDF document to facilitate easy access by members of the public.

Posting the MFR and supporting maps means it is no longer necessary to post the letter to the AJD requestor.

This is a prospective direction and is not to be implemented retroactively, meaning that for any AJDs that have already been posted to the web we do not need to go back and post the MFR retroactively.

USACE HQ will continue to provide additional implementation information and tools as they become available.

Thank you for your continued patience with the changes to our implementation.

Questions regarding this change would be most appropriately addressed through the district jurisdiction SMEs/DIT Teams.

Please feel free to contact me by telephone or by email if you have any questions that can't be resolved locally.

Thank you.

Matt

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