



U.S. Supreme Court's *Sackett* Decision Prompts Conforming WOTUS Rule

SEPTEMBER 11, 2023

[Liberty Quihuis](#), [Sophia Amberson](#) and [Duncan Greene](#)

On August 29, 2023, the Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("Corps") (collectively, the "Agencies") released a pre-publication version of their final rule defining the regulatory term "waters of the United States" ("WOTUS") under the Clean Water Act ("CWA") to conform to the U.S. Supreme Court's May 2023 decision in [Sackett v. Environmental Protection Agency](#), which limited the Agencies' authority to regulate wetlands and other waters as "WOTUS."

Before the *Sackett* decision, in January 2023, the Agencies adopted a final rule ("January 2023 Rule"), which reversed many of the regulatory changes made to the WOTUS definition during the Trump Administration and adopted a broader definition of WOTUS. As described in a previous [alert](#), however, the Supreme Court decision in *Sackett* adopted a narrower interpretation of WOTUS. While the January 2023 Rule was not directly challenged by the petitioners in *Sackett*, the Court made clear that certain aspects of the January 2023 Rule were invalid, describing it as "inconsistent with the text and structure of the CWA." The Agencies have now adopted a new rule amending the WOTUS definition and other key components of the CWA's regulatory text to conform to the Supreme Court's decision ("[Conforming Rule](#)").

Background

The CWA applies to "navigable waters," which is defined as "the waters of the United States, including the territorial seas, but the CWA does not further define WOTUS. This lack of statutory definition has resulted in ambiguity, protracted rulemaking, and decades of litigation over the breadth of WOTUS. The U.S. Supreme Court's 2006 decision in *Rapanos v. United States* resulted in two different tests—"significant nexus" and "continuous surface connection"—to determine whether a water falls under the definition of WOTUS and is therefore subject to CWA jurisdiction.

The past three administrations have attempted to clarify the scope of WOTUS through rulemakings in [2015](#), [2020](#), and [2023](#). Most recently, the Biden Administration repealed the Trump-era Navigable Water Protections Rule and adopted the January 2023 Rule. The January 2023 Rule restored the case-by-case "significant nexus" test, attempted to incorporate elements of the "relatively permanent" test, and extended CWA jurisdiction to wetlands that are separated from jurisdictional waters but still deemed "adjacent" to those waters because they are separated only by manmade or natural barriers.

Sackett and the Conforming Rule

While the January 2023 Rule was not before the Court in *Sackett*, the Court expressly rejected the January 2023 Rule's "significant nexus" test, holding that the CWA's use of "waters" encompasses "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographical features,'" such as streams, oceans, rivers and lakes. Similarly, *Sackett* concluded that the Agencies' definition of "adjacent" used to determine whether a wetland constituted a jurisdictional water under the CWA, was too broad, and affirmed that the "continuous surface connection" test is the appropriate standard.

To conform with the *Sackett* decision, the Conforming Rule eliminates the "significant nexus" standard and revises the definition of "adjacent" to remove the statement that wetlands separated from other waters of the United States by manmade or natural barriers "adjacent wetlands." Additionally, the Conforming Rule eliminates the provision subjecting intrastate streams and wetlands to CWA jurisdiction under the significant nexus test and removes "interstate wetlands" from the definition of "interstate waters." The table below summarizes the changes to 33 C.F.R. § 328.3 and 40 C.F.R. § 120.2:

	January 2023 Rule	Conforming Rule
Jurisdictional Categories – Defining Waters of the United States as waters which are:		
Interstate Waters (a)(1)(iii)	Interstate waters, including interstate wetlands	Interstate waters
Tributaries (a)(3)	Tributaries of [navigable waters, territorial seas, interstate waters, impoundments]: (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 [navigable waters, territorial seas, interstate waters, impoundments];	Tributaries of [navigable waters, territorial seas, interstate waters, or impoundments] that are relatively permanent, standing or continuously flowing bodies of water;
Adjacent Wetlands (a)(4)	Wetlands adjacent to the following waters: (i) [navigable waters, territorial seas, interstate waters, impoundments]; or (ii) Relatively permanent, standing or continuously flowing [impoundments or tributaries] and with a continuous surface connection to those waters; or (iii) [impoundments or tributaries] when the wetlands either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of [navigable waters, territorial seas, or interstate waters];	Wetlands adjacent to the following waters: (i) [navigable waters, territorial seas, interstate waters, impoundments]; or (ii) Relatively permanent, standing, or continuously flowing [impoundments or tributaries] and with a continuous surface connection to those waters;
Additional Waters (a)(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 [navigable waters, territorial seas, interstate waters, or tributaries]; or (ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of [navigable waters, territorial seas, or interstate waters].	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 [navigable waters, territorial seas, interstate waters, or tributaries].
Definitions		
Adjacent (c)(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."	Adjacent means having a continuous surface connection.
Significantly Affect (c)(6)	Significantly affect means a material influence on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section...	Definition Deleted

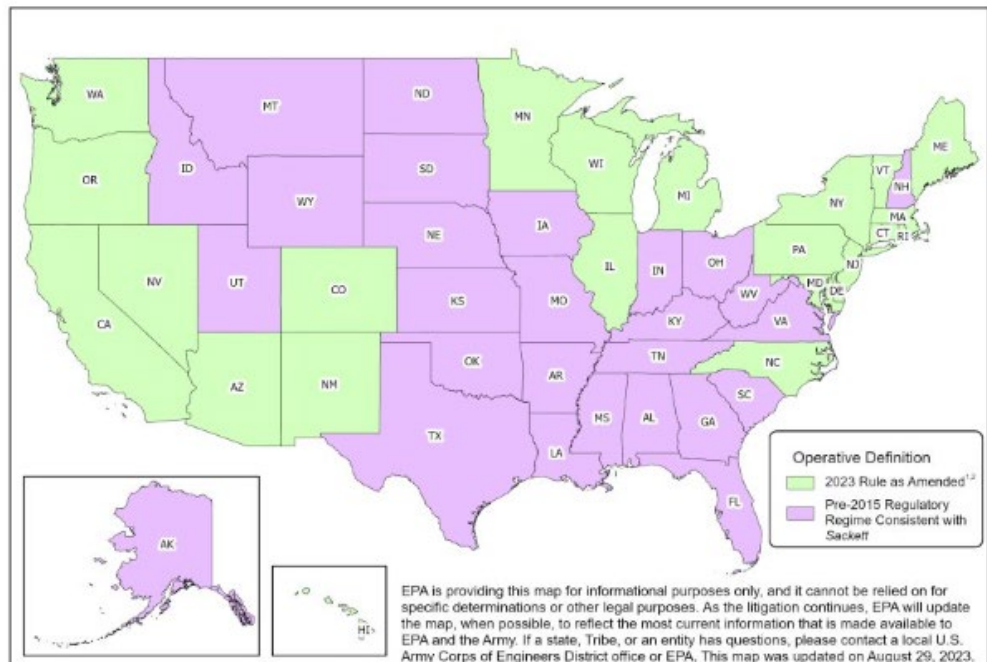
The Agencies noted that the Conforming Rule does not affect long-standing agricultural permitting exemptions. Nor does the Conforming Rule change the January 2023 Rule's adoption of WOTUS exclusions including prior converted cropland, waste treatment systems, ditches, artificially irrigated areas, artificial lakes or ponds, artificial reflecting pools or swimming pools, waterfilled depressions, and swales and erosional features.

Impact of Conforming Rule

The Conforming Rule will become effective immediately upon publication in the Federal Register, without any public comment. The Agencies concluded that no notice and opportunity for comment was necessary because the sole purpose of the Conforming Rule was to revise specific provisions of the January 2023 Rule to conform with *Sackett*, the resulting changes did not involve the exercise of agency discretion, and a notice and comment process would not provide new information nor inform the Agencies' decision making.

The January 2023 Rule still faces pending litigation, including the Sixth Circuit's May 2023 injunction against the use of the January 2023 Rule in 27 states. As a result of this ongoing litigation, the Agencies will only implement the Conforming Rule in 23 states, the District of Columbia, and the U.S. Territories. Although the Court and the Agencies have recognized the need for clarity and consistency in interpreting waters subject to CWA regulation, the Agencies will continue to interpret WOTUS in the 27 states subject to the Sixth Circuit's injunction under the [pre-2015](#) regulations. The Agencies have provided the map below to illustrate which definition of WOTUS is generally operative in each state pending the outcome January 2023 Rule litigation:

Operative Definition of "Waters of the United States"



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

The Agencies have also indicated their intent to continue providing administrative guidance on "other issues that may arise" outside the scope of the Conforming Rule, including potential notice and comment rulemaking as well as less formal administrative avenues such as approved jurisdictional determinations, CWA permits, agency guidance, agency forms and training materials. The Agencies explained they will hold stakeholder meetings, and are committed to improving coordination among federal agencies, developing regionally-specific tools, and providing training to Tribes, States, and the public.

With *Sackett* as the law of the land, the regulated community will now see some certainty and predictability on the WOTUS issues addressed in *Sackett*. On WOTUS issues outside the scope of *Sackett*, however, the Agencies' interpretation and application of WOTUS will be subject to two different

regulatory regimes in different states and Corps districts until the litigation surrounding the January 2023 Rule concludes.

For More Information

Van Ness Feldman closely monitors and counsels clients on water, air, and other environmental regulatory developments. If you would like more information about the implementation of the Clean Water Act, please contact [Duncan Greene](#), [Jenna Mandell-Rice](#), [Joseph Nelson](#), [Jonathan Simon](#), or any member of our Land Use, Water, or Natural Resources practices in Seattle, WA at (206) 623-9372 or Washington, D.C. at (202) 298-1800.

Follow us on Twitter [@VanNessFeldman](#)

© 2023 Van Ness Feldman, LLP. All Rights Reserved. This document has been prepared by Van Ness Feldman for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relationship.