

Effective Immediately, EPA and Army Corps Drastically Reduce Federal Jurisdiction Over Wetlands

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The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) published in the September 8th Federal Register a [final rule](#) to amend the “Revised Definition of ‘Waters of the United States’” rule. Effective immediately, without any opportunity for public comment, this new final rule conforms key aspects of the regulations governing the agencies’ jurisdiction over waters of the United States (WOTUS) to the U.S. Supreme Court’s May 25, 2023 decision in [Sackett v. EPA](#).

As explained in our prior [client alert](#), on January 18, 2023, the agencies published a [rule](#) (the “January 2023 Rule,” effective March 20, 2023) revising the definition of WOTUS in a manner that expanded federal Clean Water Act (CWA) jurisdiction over wetlands. However, when the Supreme Court issued its decision in *Sackett v. EPA*, as described in our subsequent [client alert](#), the federal government’s jurisdiction over many wetlands nationwide was effectively eliminated.

While the agencies’ January 2023 Rule was not directly before the Supreme Court in *Sackett*, the decision in that case made clear that certain aspects of the January 2023 Rule are invalid. Therefore, the agencies promptly set out to amend the rule.

Since post-*Sackett* there are no legal federal regulations in place to govern wetlands, the agencies utilized the uncommon “good cause” exception to the usual Administrative Procedure Act requirement for notice and comment, which allows agencies to forgo public comment when a rule update is sufficiently urgent, and issued the final rule without first releasing a draft for public comment.

The agencies explained, “Certain provisions of the [January] 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.” Accordingly, the final rule took effect immediately upon publication in the Federal Register.

The final rule [amends existing EPA and Corps regulations](#) in three important ways that dramatically reduce federal jurisdiction to comply with the *Sackett* decision:

1. It removes the “significant nexus” standard that was the basis of the January 2023 Rule and that was used to identify certain waters, such as tributaries and wetlands, as protected under the CWA
2. It requires that wetlands protected under the CWA have a continuous surface connection to navigable waterways
3. It removes interstate wetlands as WOTUS

EPA has published a [fact sheet](#) outlining the changes under the final rule.

The agencies will host three webinars in September to explain the final rule, recordings of which will be posted on EPA’s website. They also plan to host listening sessions this fall with co-regulators and stakeholders to identify issues that may be triggered by the final rule (such as impact on existing jurisdictional determinations).

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National Law Review, Volume XIII, Number 251

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