

## Agencies Issue Final Rule to Amend the 2023 “Waters of the United States” Definition

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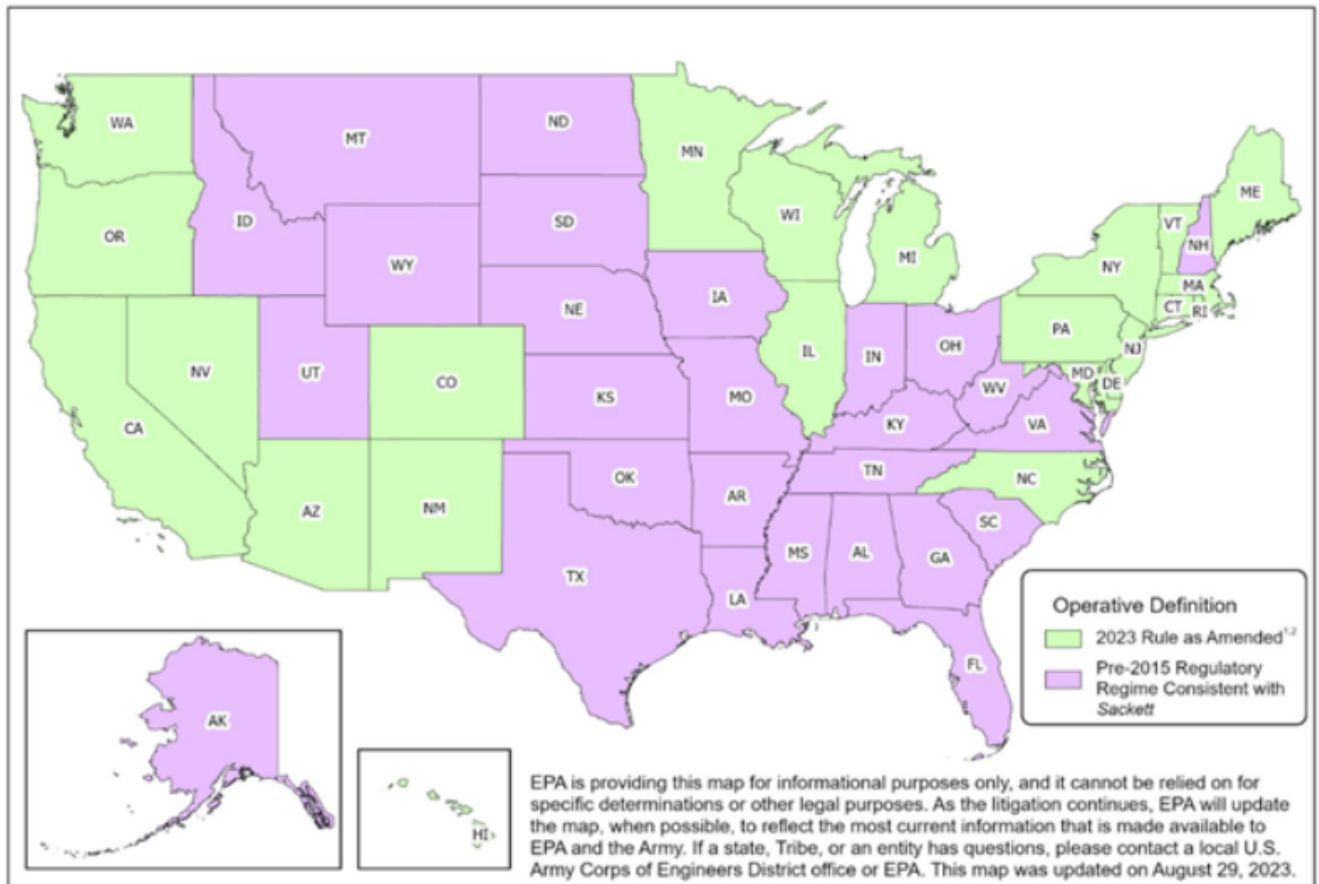
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On September 8, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (together, the Agencies) published a [final rule](#) in the *Federal Register* to amend the Agencies’ January, 2023 “waters of the United States” (WOTUS) definition (Amended Rule). 88 Fed. Reg. 61,964 (Sep. 8, 2023).[i] According to the Agencies, these amendments conform that definition to the Supreme Court’s *Sackett* decision.

The Amended Rule is effective immediately (as of September 8, 2023), but only in those states where the 2023 Rule[ii] was not enjoined and not for the plaintiffs[iii] in *Kentucky Chamber of Commerce, et al. v. EPA*, No. 23-5345 (6th Cir.) and their members (Plaintiffs) (see Figure 1 below). In the 27 states where the 2023 Rule is enjoined (and nationwide for the Plaintiffs), the Agencies state that they will apply the pre-2015 regulatory regime, as amended by *Sackett*.

**Figure 1[iv]**

# 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).

## Background

**Waters of the United States.** The Clean Water Act (CWA) regulates certain activities (such as discharges of pollutants) in waters within and bordering the United States that are “navigable waters,” defined as “the waters of the United States” (or “WOTUS”). 33 U.S.C. § 1362(7). Federal regulation under the CWA has included features that would traditionally be considered federal waters, such as coastal ocean waters and navigable rivers, but also tributaries and adjacent wetlands. Discharges of soil and other pollutants into WOTUS are generally prohibited by the CWA unless authorized by a CWA permit.

One of the challenging aspects of CWA regulation is determining which waters are WOTUS. Over the decades there have been numerous federal court decisions, including Supreme Court decisions, interpreting the geographic reach of the term WOTUS, and the Agencies have issued varying rules to define the term through regulations.

**2006 *Rapanos* Decision.** Prior to *Sackett*, the Supreme Court most squarely addressed this question in *Rapanos* (2006). There, the Supreme Court rejected an assertion of CWA jurisdiction by EPA but split 4-4-1 on the grounds for the decision (the holding), with a four-justice plurality opinion (written by Justice Scalia) and a concurring opinion (by Justice Kennedy) establishing different tests (or prerequisites) for jurisdiction.

- Justice Scalia’s opinion stated that WOTUS includes only “waters,” and that “waters” includes only relatively permanent, standing, or flowing bodies of water; and does NOT

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include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage or rainfall. With regard to “adjacent wetlands,” the Scalia opinion emphasized that only those wetlands with a continuous surface connection to bodies that are WOTUS in their own right are WOTUS. The four-justice opinion authored by Justice Scalia rejected Justice Kennedy’s “significant nexus” test.

- Justice Kennedy agreed that the features at issue were not WOTUS, but asserted that jurisdiction over wetlands should be determined based on whether there is a significant nexus between the wetlands in question and navigable waters in the traditional sense. Justice Kennedy asserted that wetlands possess the requisite significant nexus (and therefore are WOTUS) if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable.

**2023 Rule.** The Biden Administration issued a rule defining WOTUS in January 2023. This rule adopted one of the broadest possible interpretations of the Supreme Court’s decision in *Rapanos* by allowing jurisdiction to rest on either the Scalia plurality’s “relatively permanent” requirement or Justice Kennedy’s “significant nexus” test. The 2023 Rule was challenged in multiple federal district courts and preliminarily enjoined in 27 states and, nationwide, as to the Plaintiffs. Those challenges remain pending but were put in abeyance while the Agencies amended the 2023 Rule to address the Supreme Court’s decision in *Sackett*.

***Sackett*.** On May 25, 2023, the Supreme Court in *Sackett* unanimously rejected the “significant nexus” test described in Justice Kennedy’s concurring opinion in *Rapanos* and EPA’s reliance on that test to assert CWA jurisdiction. Further, the Court adopted the *Rapanos* plurality’s “continuous surface connection” requirement for adjacent wetlands and held that WOTUS are limited to the following three categories:

- *Traditional Interstate Navigable Waters.* A term defined by prior Supreme Court decisions cited in the *Sackett* majority opinion;
- *Relatively Permanent Waters.* Relatively permanent, standing, or continuously flowing bodies of water which form a geographic feature described in ordinary parlance as a stream, ocean, river, or lake and the body of water is connected to a traditional navigable water; and
- *Adjacent Wetlands.* Wetlands with a continuous surface connection to a relatively permanent or traditional navigable water making it difficult to determine where the water ends and the wetland begins. As described by the minority opinion, which disagreed with this approach, the majority opinion reads the concept of adjacency as actually requiring wetlands to adjoin the relatively permanent water.

As a result, the Court held that EPA’s position – that adjacent wetlands are jurisdictional when they possess a significant nexus to traditional navigable waters and that wetlands are “adjacent” when they are “neighboring” such waters – lacks merit.

### **Summary of Amended Rule**

The Amended Rule strikes certain provisions of the 2023 Rule that the Agencies have deemed to be inconsistent with *Sackett* and adds language the Agencies consider required by *Sackett* (the strikethrough version below shows the Agencies’ changes to the WOTUS definition in the Code of Federal Regulations). In particular, the Amended Rule:

- Removes the “significant nexus” standard from the tributaries, adjacent wetlands, and “other

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waters” provisions

- Narrows the definition of “adjacent” to mean “having a continuous surface connection”
- Removes provisions allowing jurisdiction over “interstate wetlands”
- Amends the “other waters” category to include only lakes and ponds (and not other tributaries and wetlands) that are relatively permanent, standing, or continuously flowing bodies of water with a continuous surface connection to traditional navigable waters or jurisdictional tributaries
- Removes the “significantly affect” definition
- Continues to assert jurisdiction, with certain clarifications, over “tributaries,” “impoundments,” and “ditches”

The 2023 Rule, as amended by the Amended Rule, now expressly asserts jurisdiction over:

- Waters which are currently used, or were used in the past, or may be susceptible to use, in interstate or foreign commerce;
- Territorial seas;
- Interstate waters;
- Impoundments;
- Tributaries of traditional navigable waters or impoundments that are relatively permanent, standing, or continuously flowing bodies of water;
- Wetlands with continuous surface connection to traditional navigable waters or relatively permanent, standing, or continuously flowing bodies of water qualifying as jurisdictional impoundments or tributaries
- Intrastate lakes and ponds not identified above that are relatively permanent, standing, or continuously flowing bodies of water with a continuous surface connection to jurisdictional traditional navigable waters or tributaries

### **Agencies Claim Good Cause to Bypass Notice and Comment Rulemaking Process**

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). This language has been narrowly construed by a number of courts. *See, e.g., Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) (quoting *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001) (The good cause exception “is to be narrowly construed and only reluctantly countenanced.”)).

The Agencies claim in the Amended Rule’s preamble that there is “good cause” to issue the final Amended Rule without prior proposal and opportunity for comment. They assert public notice and opportunity for comment is unnecessary because the Agencies are simply conforming the 2023 Rule to the *Sackett* decision, and such conforming amendments “do not involve the exercise of the agencies’ discretion.” The Agencies further claim that there is “good cause” under the APA to make the Amended Rule immediately effective “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* . . .” The Agencies note that many states and industry groups challenging the 2023 Rule have advocated for quick action by the Agencies in light of *Sackett*, and suggest that this approach provides that certainty.

### **Next Steps**

Unless litigation changes the ability for the government to apply the rule in some states, it is expected that additional implementation guidance will be issued. The Agencies have announced stakeholder meetings to provide the public with an opportunity to provide “input on other issues they would like the agencies to address.” 88 Fed. Reg. at 61,966. The Agencies also state that they are developing “regionally-specific tools to facilitate implementation” of the WOTUS definition. *Id.*

It remains to be seen what new litigation steps may be taken regarding the Amended Rule, whether in already filed litigation challenging the 2023 Rule or in other litigation.

[Click here to see a redline of the revisions to the regulatory text.](#)

[i] Hunton Andrews Kurth LLP represents certain parties challenging the *Revised Definition of Waters of the United States*, 88 Fed. Reg. 3,004 (Jan. 18, 2023). This blog post represents the personal views of the authors and not the views of these parties.

[ii] For purposes of this blog post, we refer to the Agencies’ latest rule as the “Amended Rule” and the January 2023 WOTUS Rule as the “2023 Rule.”

[iii] 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.

[iv] Definition of “Waters of the United States”: Rule Status and Litigation Update, available at <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update> (last visited, September 7, 2023).

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