

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

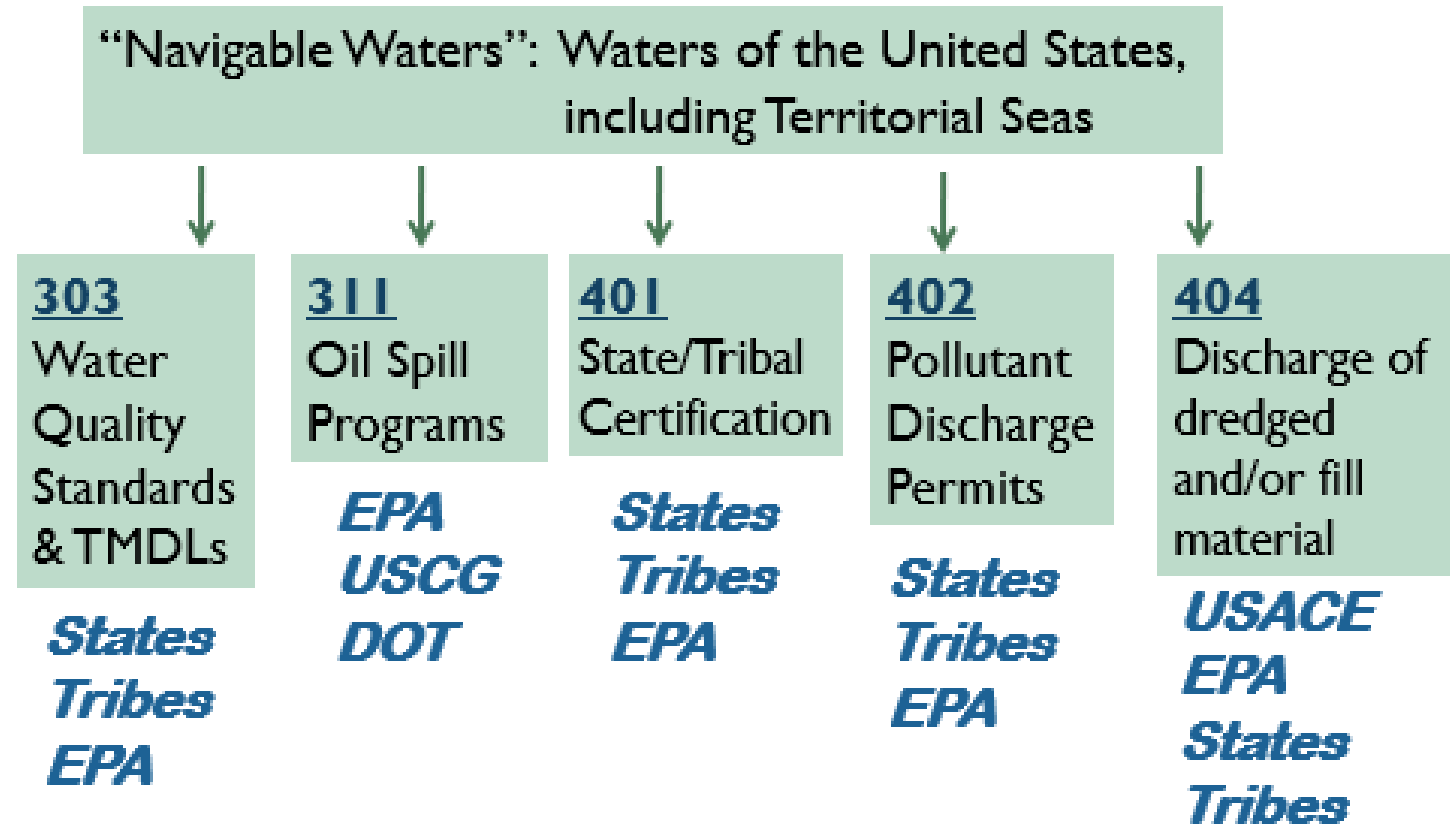
- Background
- Conforming Rule
- Additional Information



Background: “Waters of the United States” and the Clean Water Act

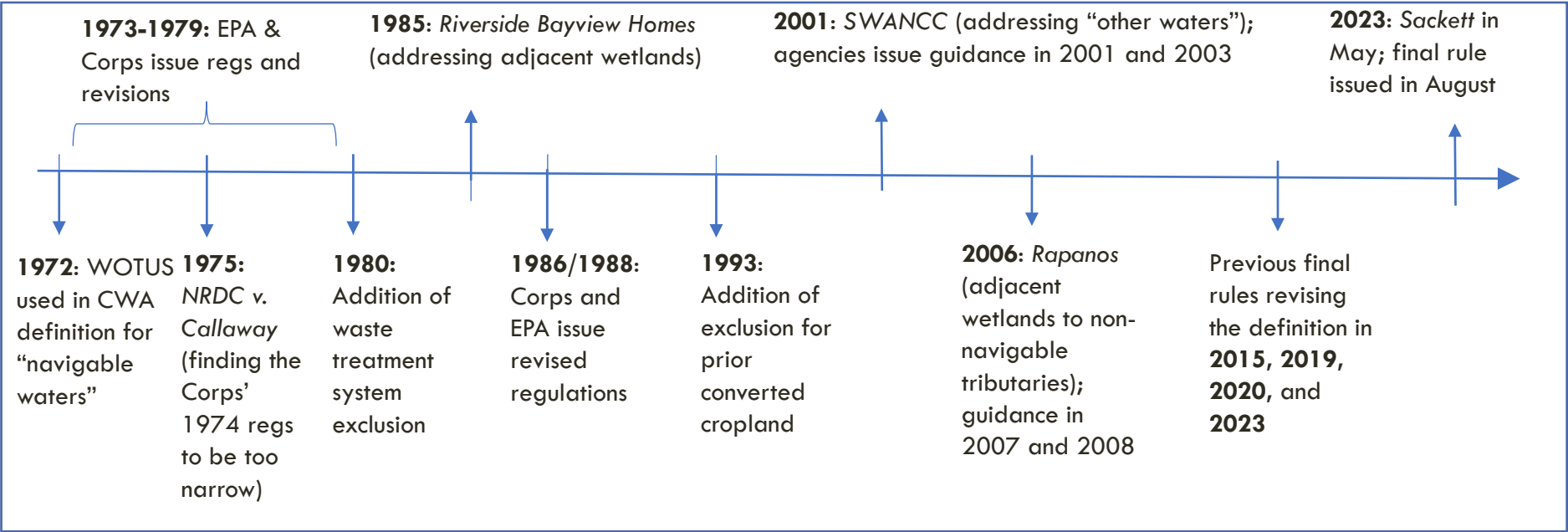
- “Waters of the United States” is a threshold term in the Clean Water Act that establishes the geographic scope of federal jurisdiction under the Act.
- Clean Water Act regulatory programs address “navigable waters,” defined in the statute as “the waters of the United States, including the territorial 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

January 2023	2023 Rule published – “Revised Definition of ‘Waters of the United States’”
March 2023	2023 Rule effective
May 2023	<i>Sackett</i> Supreme Court decision
June 2023	EPA and Army announce plans to issue a final rule amending the 2023 rule
August 2023	Final rule amending the 2023 rule: signature and announcement
September 2023	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~~ 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)(~~ii~~) 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 with any questions.