



**Congressional
Research Service**

Informing the legislative debate since 1914

Waters of the United States (WOTUS): Frequently Asked Questions About the Scope of the Clean Water Act

Updated June 22, 2023

Congressional Research Service

<https://crsreports.congress.gov>

R47408



R47408

June 22, 2023

Kate R. Bowers
Legislative Attorney

Laura Gatz
Specialist in Environmental
Policy

Waters of the United States (WOTUS): Frequently Asked Questions About the Scope of the Clean Water Act

Congress established the Federal Water Pollution Control Act, also known as the Clean Water Act (CWA), to restore and protect the quality of the nation’s surface waters. The CWA protects “navigable waters,” defined in the statute as “waters of the United States, including the territorial seas.” The CWA does not further define the term *waters of the United States* (WOTUS), which determines which waters are federally regulated. Thus, in implementing the CWA, the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA)—the two agencies that administer the statute—have defined the term in regulations. However, Congress’s intent as to the meaning of WOTUS has been debated and litigated for more than four decades. The Supreme Court and lower courts have also weighed in on the scope of the term.

For much of the past several decades, regulations promulgated by the Corps and EPA in the 1980s have been in effect. (These regulations, as further interpreted by the courts and agencies are often referred to as the *pre-2015 rules*.) The agencies supplemented these regulations with guidance, which they developed in response to prior Supreme Court rulings related to the scope of the federal government’s ability to regulate WOTUS. The Corps and EPA acknowledged that their guidance did not provide the public or agency staff with the information needed to ensure timely, predictable, and consistent jurisdictional determinations. Diverse stakeholders and Members of Congress requested a formal rulemaking to revise existing regulations.

Successive presidential administrations have engaged in efforts to define WOTUS in regulation. Both the Obama Administration’s 2015 Clean Water Rule and the Trump Administration’s 2020 Navigable Waters Protection Rule prompted strong reactions from a variety of stakeholders, with numerous groups filing lawsuits challenging the rules. On January 18, 2023, the Corps and EPA, under the Biden Administration, issued a new rule (the 2023 WOTUS Rule) redefining WOTUS in the agencies’ regulations. The Corps and EPA asserted that their intent in promulgating the 2023 WOTUS Rule was to redefine WOTUS in a durable regulation, updating the pre-2015 rules to reflect consideration of past Supreme Court decisions, science, and the agencies’ experience and technical expertise. In general, the rule defines WOTUS more narrowly than the Clean Water Rule and more broadly than the Navigable Waters Protection Rule.

The 2023 WOTUS Rule went into effect on March 20, 2023, and was immediately challenged. Three courts have stayed implementation of the 2023 WOTUS Rule in a total of 27 states and as applied to several associations that are participating in the litigation. For those states and plaintiffs, the Corps and EPA are interpreting WOTUS consistent with the pre-2015 framework. While some stakeholders support the 2023 WOTUS Rule, others believe it defines WOTUS too broadly, does not provide regulatory clarity, and should not have been issued prior to the resolution of a Supreme Court case that was pending at the time the rule was promulgated.

In June 2023, that Supreme Court case—*Sackett v. EPA*—was decided. The majority in *Sackett* formally adopted the approach taken by a four-Justice plurality in the 2006 case *Rapanos v. United States* and rejected elements of the jurisdictional test that are present in the 2023 WOTUS Rule. While many questions about the implications of the Court’s decision remain, the ruling significantly narrows the scope of WOTUS in comparison not only to the 2023 WOTUS Rule but also to any of the regulations the agencies have promulgated to define WOTUS.

In the 118th Congress, Members have introduced legislation pertaining to WOTUS, including a joint resolution to revoke the 2023 WOTUS Rule through the Congressional Review Act, which passed both chambers but was vetoed by the President. Members have also introduced legislation to define the term through amendments to the CWA. Looking forward, Congress may seek to oversee the Biden Administration’s efforts to implement the Supreme Court’s decision in *Sackett v. EPA* or may consider introducing legislation to define the scope of WOTUS if it seeks to clarify its intent as to the scope of the term.

Contents

What Actions Have Previous Administrations Taken to Define WOTUS?	2
Pre-2015 Rules and Guidance	2
2015 Clean Water Rule.....	3
2020 Navigable Waters Protection Rule	4
How Does the 2023 WOTUS Rule Define WOTUS?.....	5
Jurisdictional Waters (WOTUS)	5
Traditional Navigable Waters, the Territorial Seas and Interstate Waters (Paragraph (a)(1) Waters)	6
Impoundments of Jurisdictional Waters.....	6
Tributaries, Adjacent Wetlands, and “Additional Waters”	7
Exclusions	8
Definitions.....	9
Which Rule Is in Effect Now?.....	10
Has the 2023 WOTUS Rule Been Challenged in Court?	12
How Does <i>Sackett v. EPA</i> Affect the Scope of CWA Jurisdiction?	14
How Have Adjacent Wetlands Been Addressed in Prior WOTUS Regulations?	16
What Options Are Available to Congress Regarding the Definition of WOTUS?	20

Figures

Figure 1. Status of 2023 WOTUS Rule as of June 22, 2023	11
---	----

Tables

Table 1. Jurisdictional Waters (WOTUS) Under the 2023 WOTUS Rule.....	5
Table 2. Scope of Adjacent Wetlands Under Waters of the United States (WOTUS) Regulations, Guidance, and in the <i>Sackett v. EPA</i> Decision.....	17

Contacts

Author Information.....	21
-------------------------	----

Congress established the Federal Water Pollution Control Act, also known as the Clean Water Act (CWA), to restore and protect the quality of the nation’s surface waters.¹ The Clean Water Act protects “navigable waters,” defined in the statute as “waters of the United States, including the territorial seas.”² The CWA does not define *waters of the United States* (WOTUS). The scope of the term determines which waters are federally regulated, and thus which waters are subject to CWA requirements and programs. These include CWA permitting requirements; water quality certifications; water quality standards, impaired waters, and total maximum daily loads; and other CWA and non-CWA programs.

Successive Administrations have struggled to interpret the term *waters of the United States* for the purpose of implementing various requirements of the CWA. Prior to the Biden Administration, executive branch efforts to define WOTUS administratively included regulations promulgated by the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) in the 1980s and supplemented with interpretive guidance developed in response to Supreme Court rulings; the 2015 Clean Water Rule; and the 2020 Navigable Waters Protection Rule.³ The agencies’ efforts to define WOTUS in regulation during both the Obama and Trump Administrations were controversial and led to litigation. Many observers viewed the Obama Administration’s 2015 Clean Water Rule as defining WOTUS too broadly, while many viewed the Trump Administration’s 2020 Navigable Waters Protection Rule as defining WOTUS too narrowly. A federal district court vacated the 2020 Navigable Waters Protection Rule in September 2021, after which the Corps and EPA announced that they had halted implementation of the rule.⁴

On January 18, 2023, the Corps and EPA published a new rule (the 2023 WOTUS Rule) revising the definition of WOTUS.⁵ The agencies asserted that their intent in promulgating the 2023 WOTUS Rule was to redefine WOTUS in a durable regulation, updating the pre-2015 rules to reflect consideration of Supreme Court decisions, science, and the agencies’ experience and technical expertise.⁶ Some stakeholders supported the 2023 WOTUS Rule, in some cases observing that the rule takes a middle road between the 2015 Clean Water Rule and the 2020 Navigable Waters Protection Rule.⁷ Others expressed opposition to the 2023 WOTUS Rule, arguing that it does not provide regulatory clarity, is overly broad, and that the Corps and EPA should have delayed issuing a rule pending the resolution of *Sackett v. EPA*, a Supreme Court case addressing aspects of the scope of WOTUS.

¹ 33 U.S.C. § 1251 *et seq.*

² 33 U.S.C. § 1362(7).

³ Army Corps of Engineers and EPA, “Clean Water Rule: Definition of ‘Waters of the United States’; Final Rule,” 80 *Federal Register* 37054, June 29, 2015 (hereinafter “2015 Clean Water Rule”); Army Corps of Engineers and EPA, “The Navigable Waters Protection Rule: Definition of ‘Waters of the United States,’” 85 *Federal Register* 22250, Apr. 21, 2020 (hereinafter “Navigable Waters Protection Rule”).

⁴ *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949 (D. Ariz. 2021).

⁵ Revised Definition of “Waters of the United States,” 88 *Federal Register* 3004, Jan. 18, 2023 (hereinafter “2023 WOTUS Rule”). The final rule was published on Jan. 18, 2023. The agencies released a pre-publication version of the rule on Dec. 30, 2022.

⁶ 2023 WOTUS Rule, p. 3019. See also Corps and EPA, *Final Rule: Revised Definition of ‘Waters of the United States’ Fact Sheet*, Dec. 2022, <https://www.epa.gov/system/files/documents/2022-12/Public%20Fact%20Sheet.pdf> (hereinafter “2022 WOTUS Fact Sheet”).

⁷ See, for example, David LaRoss, “Touting ‘Durable’ Approach, EPA Adopts Dual Tests in Revised WOTUS Rule,” *InsideEPA.com*, Dec. 30, 2022.

The 2023 WOTUS Rule went into effect on March 20, 2023, and was immediately challenged.⁸ While no court has issued a ruling on the merits of the rule, some courts have issued orders temporarily barring implementation of the rule while litigation is pending. In the 27 states and as to the associations and their members that are covered by those orders, the Corps and EPA are interpreting WOTUS consistent with the pre-2015 regulatory framework. Apart from the pending litigation challenging the 2023 WOTUS Rule, in May 2023, the Supreme Court issued its ruling in *Sackett v. EPA*. In *Sackett*, the Court construed the reach of the CWA more narrowly than the new or previous regulatory interpretations or the approach adopted by the courts of appeals following an earlier Supreme Court decision regarding WOTUS. While the Corps and EPA have not indicated what steps they will take to implement the Court's decision, the limitations imposed by the Court's ruling cast doubt on the continued validity of the 2023 WOTUS Rule. Many questions about the implications of the Court's decision remain, but the ruling significantly narrows the scope of WOTUS in comparison to any of the regulations the agencies have promulgated to define WOTUS.

This report addresses frequently asked questions about WOTUS, including actions taken by prior administrations, the 2023 WOTUS Rule, the Supreme Court's ruling in *Sackett v. EPA*, potential implications of the ruling, and options for Congress.

What Actions Have Previous Administrations Taken to Define WOTUS?

Pre-2015 Rules and Guidance

For much of the past several decades, regulations promulgated by the Corps and EPA in 1986 and 1988, respectively, have been in effect.⁹ The agencies have supplemented these regulations with interpretive guidance developed in response to Supreme Court rulings related to the scope of the federal government's ability to regulate WOTUS.¹⁰

One such Supreme Court case remains particularly relevant to the most recent efforts to redefine WOTUS. In *Rapanos v. United States*, the Court considered the extent of CWA jurisdiction over wetlands near ditches or man-made drains that emptied into traditional navigable waters.¹¹ The Court's decision in *Rapanos* yielded three different opinions, none of which garnered a controlling majority for a single standard to govern future jurisdictional disputes. Instead, the decision resulted in two alternative tests for evaluating jurisdictional waters: a "relatively permanent" test set forth by a four-Justice plurality in an opinion authored by Justice Antonin

⁸ *Texas v. EPA*, No. 3:23-cv-00017 (S.D. Tex.); *West Virginia v. EPA*, No. 3:23-cv-00032 (D.N.D.); *Kentucky v. EPA*, No. 3:23-cv-00007 (E.D. Ky.).

⁹ Army Corps of Engineers, "Final Rule for Regulatory Programs of the Corps of Engineers," 51 *Federal Register* 41206, Nov. 13, 1986 (hereinafter "1986 Corps Rule"); EPA, "Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations," 53 *Federal Register* 20764, June 6, 1988 (hereinafter "1988 EPA Rule").

¹⁰ Army Corps of Engineers and EPA, "Appendix A, Joint Memorandum," 68 *Federal Register* 1995, Jan. 15, 2003; Benjamin H. Grumbles, Assistant Administrator for Water, EPA, and John Paul Woodley Jr., Assistant Secretary of the Army (Civil Works), Department of the Army, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*, memorandum, Dec. 2, 2008 (hereinafter "2008 Rapanos Guidance").

¹¹ 547 U.S. 715 (2006).

Scalia, and a “significant nexus” test proposed by Justice Anthony Kennedy in a concurring opinion.

Rapanos and the Relatively Permanent and Significant Nexus Tests

The Plurality’s “Relatively Permanent” Test: Writing for a four-Justice plurality, Justice Scalia wrote that the word “waters” in “waters of the United States” means only “relatively permanent, standing or continuously flowing bodies of water”—that is, streams, rivers, and lakes.¹² Wetlands could be included only when they have a “continuous surface connection” to such waters.¹³

Justice Kennedy’s “Significant Nexus” Test: In a concurring opinion joined by no other Justice, Justice Kennedy wrote that the Corps should determine on a case-by-case basis whether wetlands have a “significant nexus” to traditionally navigable waters based on whether the wetland, either alone or in connection with similarly situated properties, significantly impacts the chemical, physical, and biological integrity of a traditionally navigable water.¹⁴

In response to the rulings, the agencies developed guidance to help clarify how EPA and Corps offices should implement the Court’s decisions. In particular, the agencies expressed the view that waters meeting *either* the relatively permanent standard articulated by Justice Scalia, *or* the significant nexus standard articulated by Justice Kennedy, were subject to federal jurisdiction under the act.¹⁵ However, the Corps and EPA acknowledged that their written guidance did not provide the public or agency staff with the information needed to ensure timely, predictable, and consistent jurisdictional determinations.¹⁶ Diverse stakeholders—including Members of Congress, states, the regulated community, and nongovernmental organizations—requested a formal rulemaking to revise the existing rules.¹⁷

2015 Clean Water Rule

In 2015, the Corps and EPA issued the Clean Water Rule, which redefined WOTUS in the agencies’ regulations for the first time since the 1980s.¹⁸ The Clean Water Rule retained aspects of the agencies’ earlier guidance and also incorporated new features, including a new definition of tributaries and definitions and criteria related to adjacency.¹⁹

Some stakeholders and observers viewed the Clean Water Rule as an expansion of CWA jurisdiction, while others argued that it excluded too many waters from federal jurisdiction.²⁰ Numerous parties challenged the Clean Water Rule, and some district courts issued preliminary injunctions temporarily barring the Clean Water Rule from taking effect in certain states.²¹ Two

¹² Id. at 739.

¹³ Id. at 742.

¹⁴ Id. at 782 (Kennedy, J., concurring).

¹⁵ 2008 Rapanos Guidance; see also *Rapanos*, 547 U.S. at 810 (Stevens, J., dissenting).

¹⁶ 2015 Clean Water Rule, p. 37056.

¹⁷ See EPA Web Archive at <https://archive.epa.gov/epa/cleanwaterrule/what-clean-water-rule-does.html>, which includes a list of stakeholders requesting a rulemaking (https://archive.epa.gov/epa/sites/production/files/2014-03/documents/wus_request_rulemaking.pdf).

¹⁸ 2015 Clean Water Rule.

¹⁹ 2015 Clean Water Rule, pp. 37057-37059, 37105-37106.

²⁰ See, for example, Carolina Bolado, “Fla., Others Sue EPA, Corps Over Clean Water Act Expansion,” *Law360*, June 30, 2015; Center for Biological Diversity, “EPA and Army Corps Issue Weak Clean Water Rule,” press release, May 27, 2015, https://www.biologicaldiversity.org/news/press_releases/2015/clean-water-rule_05-27-2015.html.

²¹ *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015); *Georgia v. Pruitt*, 326 F. Supp. 3d 1356 (S.D. Ga. 2018); *Texas v. EPA*, No. 3:15-cv-162, 2018 WL 4518230 (S.D. Tex. Sept. 12, 2018); *Or. Cattlemen’s Ass’n v. EPA*, No. 19-00564 (D. Or. July 26, 2019).

courts also remanded the rule to the Corps and EPA, concluding that it violated the Administrative Procedure Act (APA) and exceeded the agencies' statutory authority under the CWA.²² As a result, until its rescission, the Clean Water Rule was in effect in a patchwork of states. In states that were subject to a preliminary injunction or an order remanding the rule to the Corps and EPA, the pre-2015 regulatory framework applied.

2020 Navigable Waters Protection Rule

The Trump Administration described the Clean Water Rule as an example of federal “overreach,” and the Corps and EPA engaged in a two-step process to rescind and revise it.²³ In Step One, the Corps and EPA rescinded the Clean Water Rule and recodified the pre-2015 regulations.²⁴ Accordingly, the pre-2015 regulations and guidance were in effect beginning on the effective date of the Step One Rule (December 23, 2019), and until the agencies' redefinition of WOTUS went into effect. In April 2020, the Corps and EPA published a final Step Two Rule to redefine WOTUS, titled the Navigable Waters Protection Rule.²⁵ The rule went into effect on June 22, 2020, replacing the Step One Rule.

Overall, the Navigable Waters Protection Rule narrowed the scope of waters and wetlands that were considered WOTUS (and were therefore under federal jurisdiction) compared to both the Clean Water Rule and the pre-2015 rules. As with the Clean Water Rule, the Navigable Waters Protection Rule prompted a range of reactions from a variety of stakeholders and resulted in many lawsuits around the country.

President Biden signaled interest in reconsidering the Navigable Waters Protection Rule immediately upon taking office.²⁶ After announcing in June 2021 that they intended to revise the definition of WOTUS again, the Corps and EPA asked courts where legal challenges to the Navigable Waters Protection Rule were pending to remand the rule while they developed a new regulation.²⁷

On August 30, 2021, the U.S. District Court for the District of Arizona granted the agencies' request for voluntary remand, but also vacated the rule.²⁸ While the court did not issue a ruling on the merits of the Navigable Waters Protection Rule, it found that both the plaintiffs and the United States had identified concerns with the rule that involved fundamental, substantive, and incurable

²² *Georgia v. Wheeler*, 418 F. Supp. 3d 1336 (S.D. Ga. 2019); *Texas v. EPA*, 389 F. Supp. 3d 497 (S.D. Tex. 2019). In this context, to “remand” means to return the rule to the agencies to reconsider possible errors or defects in their action. A court order that remands a rule may or may not render the rule unenforceable during any further proceedings.

²³ For example, EPA, “EPA, U.S. Army Repeal 2015 Rule Defining ‘Waters of the United States’ Ending Regulatory Patchwork,” Sept. 12, 2019, <https://www.epa.gov/newsreleases/epa-us-army-repeal-2015-rule-defining-waters-united-states-ending-regulatory-patchwork>.

²⁴ Army Corps of Engineers and EPA, “Definition of ‘Waters of the United States’—Recodification of Pre-Existing Rules,” 84 *Federal Register* 56626, Oct. 22, 2019.

²⁵ Army Corps of Engineers and EPA, “The Navigable Waters Protection Rule: Definition of ‘Waters of the United States,’” 85 *Federal Register* 22250, Apr. 21, 2020.

²⁶ Executive Order 13990, “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,” 86 *Federal Register* 7037-7043, Jan. 20, 2021.

²⁷ EPA, “EPA, Army Announce Intent to Revise Definition of WOTUS,” press release, June 9, 2021, at <https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus> (hereinafter “June 2021 Press Release”); see also, e.g., Motion for Remand Without Vacatur, *Conservation Law Found. v. EPA*, No. 1:20-cv-10820 (D. Mass. June 6, 2021), ECF No. 112.

²⁸ *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949 (D. Ariz. 2021). One other court subsequently vacated the Navigable Waters Protection Rule, adopting similar reasoning to the *Pascua Yaqui* court. Memorandum Opinion and Order, *Navajo Nation v. Regan*, No. 2:20-cv-00602 (D.N.M. Sept. 27, 2021), ECF No. 43. In this context, to “vacate” the rule means to declare it invalid, as if the rule had never been in effect.

flaws.²⁹ In response to the order, the Corps and EPA announced that they had halted implementation of the Navigable Waters Protection Rule and would interpret WOTUS consistent with the pre-2015 regulatory regime until further notice.³⁰

How Does the 2023 WOTUS Rule Define WOTUS?

On January 18, 2023, the Corps and EPA, under the Biden Administration, published a new rule (the 2023 WOTUS Rule) redefining WOTUS in the agencies’ regulations.³¹ The rule went into effect on March 20, 2023, but was immediately challenged. The rule is currently in effect in 23 states, while the pre-2015 regulations are in effect in the remaining states and as applied to a group of industry associations that are participating in the pending litigation (see “Which Rule Is in Effect Now?”)

The Corps and EPA asserted that their intent in promulgating the 2023 WOTUS Rule was to redefine WOTUS in a durable regulation, updating the pre-2015 rules to reflect consideration of Supreme Court decisions, science, and the agencies’ experience and technical expertise.³² Overall, the definition of WOTUS in the 2023 WOTUS Rule is narrower in scope than the Clean Water Rule and broader than the Navigable Waters Protection Rule.

The 2023 WOTUS Rule is divided into three parts: jurisdictional waters (WOTUS), exclusions, and definitions. These parts are summarized below, and compared to the pre-2015 rules and guidance.

Jurisdictional Waters (WOTUS)

The 2023 WOTUS Rule includes seven WOTUS categories (**Table 1**).

Table 1. Jurisdictional Waters (WOTUS) Under the 2023 WOTUS Rule

Category of WOTUS	Description	Regulatory Text Paragraph
Traditional Navigable Waters	Waters, such as large rivers and lakes, which are, were, or could be used in interstate or foreign commerce, including waters affected by tides.	(a)(1)
Territorial Seas	The territorial seas are the belt of the seas extending three miles out from the coast.	(a)(1)
Interstate Waters	Waters, such as rivers, lakes, streams, or wetlands that flow across or form part of state boundaries.	(a)(1)
Impoundments of Jurisdictional Waters	Impounded waters created in or from jurisdictional waters, whether natural (e.g., beaver ponds) or artificial (e.g., reservoirs).	(a)(2)

²⁹ *Pascua Yaqui*, 557 F. Supp. 3d at 955.

³⁰ See EPA, “Definition of ‘Waters of the United States’: Rule Status and Litigation Update,” Dec. 30, 2022, <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>.

³¹ 2023 WOTUS Rule.

³² 2023 WOTUS Rule, p. 3019; and 2022 WOTUS Fact Sheet.

Category of WOTUS	Description	Regulatory Text Paragraph
Tributaries	Waters such as branches of creeks, streams, rivers, lakes, ponds, ditches, and impoundments that flow into traditional navigable waters, the territorial seas, interstate waters, or impoundments of jurisdictional waters. Tributaries are WOTUS if they meet either the relatively permanent standard or the significant nexus standard as described further in the 2023 WOTUS Rule.	(a)(3)
Adjacent Wetlands	Wetlands that are (1) adjacent to a traditional navigable water, the territorial seas, or an interstate water; (2) adjacent and with a continuous surface connection to either relatively permanent jurisdictional impoundments or jurisdictional tributaries that meet the relatively permanent standard; or (3) wetlands adjacent to jurisdictional impoundments or jurisdictional tributaries when the wetlands meet the significant nexus standard. Wetlands, defined in the rule, generally include swamps, marshes, bogs, and similar areas. Adjacent is defined in the rule to mean “bordering, contiguous, or neighboring.” The definition also specifies that wetlands separated from other WOTUS by man-made dikes or barriers, natural river berms, beach dunes, and the like are “adjacent wetlands.”	(a)(4)
“Additional waters”—intrastate lakes and ponds, streams, or wetlands	Lakes, ponds, streams, or wetlands that do not fall under one of the other WOTUS categories. Such waters are jurisdictional if they meet either the relatively permanent or significant nexus standard.	(a)(5)

Sources: CRS analysis; 2023 WOTUS Rule; 2022 WOTUS Fact Sheet.

Traditional Navigable Waters, the Territorial Seas and Interstate Waters (Paragraph (a)(1) Waters)

The 2023 WOTUS Rule retains three categories without changes to the text or substance from pre-2015 regulations.³³ These include the traditional navigable waters, the territorial seas, and interstate waters. However, the agencies restructured the rule to streamline the regulatory text, and combined these three still-separate categories under one paragraph (i.e., (a)(1) waters) because, as the agencies explain in the rule’s preamble, the jurisdictional status of other categories of waters relies on their connection to waters from one of these three categories.³⁴

Impoundments of Jurisdictional Waters

The 2023 WOTUS Rule also retains the impoundments of jurisdictional waters category with one change from the pre-2015 regulations.³⁵ The pre-2015 regulations included impoundments of any WOTUS, but the 2023 WOTUS Rule would exclude impoundments of waters determined to be jurisdictional under paragraph (a)(5), which the Corps and EPA in their fact sheet refer to as “additional waters.”³⁶ These “additional waters” are a subset of what was previously referred to as the “other waters” category. (See further discussion on “additional waters” below.)

³³ 2023 WOTUS Rule, p. 3068.

³⁴ Ibid.

³⁵ 2023 WOTUS Rule, pp. 3075-3076.

³⁶ 2023 WOTUS Rule, p. 3066; and 2022 WOTUS Fact Sheet, p. 2. Note that impoundments of (a)(5) waters may still be determined to be jurisdictional if they meet the requirements of another category of WOTUS.

Tributaries, Adjacent Wetlands, and “Additional Waters”

The remaining three categories—tributaries, adjacent wetlands, and “additional waters”—reflect the definition of WOTUS from pre-2015 regulations, but include changes that the agencies assert reflect Supreme Court precedent, science, and their technical expertise.³⁷ For example, the 2023 WOTUS Rule clarifies that the waters in these three categories may meet either the relatively permanent standard or the significant nexus standard for purposes of determining jurisdiction.³⁸ The Corps and EPA explained that this aspect of the 2023 WOTUS Rule is not an application or interpretation of the multiple opinions in *Rapanos*.³⁹ Instead, these standards are contained in the 2023 WOTUS Rule text and are informed by, but separate from, the two tests identified by the Supreme Court. In addition, the agencies made certain changes to each of the categories that constrain which waters are jurisdictional, in comparison to the pre-2015 regulations.

- **Tributaries:** A tributary is considered a WOTUS under the 2023 WOTUS Rule if it is a tributary of a traditional navigable water, the territorial seas, an interstate water, or an impoundment of a jurisdictional water and also meets either the relatively permanent or significant nexus standard.⁴⁰

As compared to the pre-2015 regulations, the 2023 WOTUS Rule adds the territorial seas to the list of waters to which a water may be a tributary. The agencies note that, in practice, this is not a significant change as most tributaries will reach a traditional navigable water before they reach the territorial seas.⁴¹

The 2023 WOTUS Rule also deletes the “additional waters” category from the list of waters to which a water may be a tributary.⁴² The pre-2015 regulations included the comparable “other waters” category on the list, and the “other waters” category itself was broader, as discussed below.⁴³

Similar to the pre-2015 regulations, the 2023 WOTUS rule does not contain a definition of “tributary.”⁴⁴ In addition, consistent with the pre-2015 regulations, the 2023 WOTUS rule does not include or exclude tributaries as WOTUS based on their flow regime (i.e., meaning whether they flow year-round, seasonally, or only in response to precipitation events).⁴⁵

³⁷ 2023 WOTUS Rule, pp. 3005-3006; and 2022 WOTUS Fact Sheet.

³⁸ *Ibid.*

³⁹ 2023 WOTUS Rule, p. 3022.

⁴⁰ 2023 WOTUS Rule, p. 3142.

⁴¹ 2023 WOTUS Rule, pp. 3079-3080.

⁴² *Ibid.*

⁴³ 1986 Corps Rule, p. 41250.

⁴⁴ 2023 WOTUS Rule, pp. 3080-3081. Both the Clean Water Rule and the Navigable Waters Protection Rule included a definition of “tributary.” In the preamble to the 2023 WOTUS Rule, the agencies concluded that a definition was not required because the agencies have decades of experience implementing the 1986 regulations, which also did not include a definition. Further, the agencies assert that they “articulate and explain the agencies’ well-established interpretation and practices for identifying tributaries” in the preamble.

⁴⁵ 2023 WOTUS Rule, pp. 3080-3081. The rule’s preamble clarifies that “a tributary for purposes of this rule includes rivers, streams, lakes, ponds, and impoundments, regardless of their flow regime, that flow directly or indirectly through another water or waters to a traditional navigable water, the territorial seas, or an interstate water.” Note that the Navigable Waters Protection Rule’s definition required that a tributary be *perennial* (i.e., flow year-round) or *intermittent* (i.e., flow continuously only during certain times of the year, such as seasonally) and excluded *ephemeral* (continued...)

- **Adjacent wetlands:** Under the 2023 WOTUS Rule, adjacent wetlands are considered WOTUS if (1) they are adjacent to traditional navigable waters, interstate waters, or the territorial seas; (2) they are adjacent to and with a continuous surface connection to jurisdictional impoundments or tributaries that meet the relatively permanent standard; or (3) they are adjacent to jurisdictional impoundments or tributaries and meet the significant nexus standard.⁴⁶ The pre-2015 regulations more broadly included wetlands adjacent to waters in any of the WOTUS categories, other than wetlands themselves.⁴⁷ (Note that the 2008 Rapanos Guidance provided additional specifics as to which wetlands were WOTUS, as discussed in **Table 2**.) Thus, in comparison to the pre-2015 regulations, the 2023 WOTUS Rule requires an additional demonstration for wetlands adjacent to waters that are not (a)(1) waters, that the wetlands have a continuous surface connection to a relatively permanent water or a significant nexus to an (a)(1) water.⁴⁸
- **“Additional waters”:** Under the 2023 WOTUS Rule, intrastate lakes, ponds, streams, or wetlands not identified in the other WOTUS categories similarly must meet either the relatively permanent standard or the significant nexus standard.⁴⁹ The agencies clarify that this category is substantially narrower than the non-exclusive list of “other waters” that was included under the pre-2015 regulations.⁵⁰ The agencies also replaced the broad Commerce Clause basis for jurisdiction from the pre-2015 regulations with the relatively permanent and significant nexus standards.⁵¹

Exclusions

The 2023 WOTUS Rule includes eight exclusions from the definition of WOTUS.⁵² Some are long-standing exclusions for prior converted cropland and waste treatment systems that were included in pre-2015 regulatory text. Others exclude features that were generally considered non-jurisdictional under the pre-2015 regime, but were listed as such in preamble language and guidance rather than the regulatory text.⁵³ Furthermore, these eight features were excluded in each of the subsequent rules defining WOTUS (the Clean Water Rule and the Navigable Waters Protection Rule), although the scope of some of these exclusions differed between rules.⁵⁴ The exclusions include

- **Waste treatment systems**, including treatment ponds or lagoons designed to meet the requirements of the CWA;

streams (i.e., those that flow only in response to precipitation events). The Clean Water Rule’s definition provided that a tributary could be perennial, intermittent, or ephemeral as long as other criteria in the definition were met.

⁴⁶ 2023 WOTUS Rule, p. 3142.

⁴⁷ 1986 Corps Rule, p. 41250.

⁴⁸ 2023 WOTUS Rule, pp. 3090, 3142.

⁴⁹ 2023 WOTUS Rule, p. 3142.

⁵⁰ 2023 WOTUS Rule, p. 3097.

⁵¹ *Ibid.* The pre-2015 regulatory framework included as jurisdictional waters “the use, degradation, or destruction of which could affect interstate or foreign commerce.” 1986 Corps Rule, p. 41250.

⁵² 2023 WOTUS Rule, pp. 3066-3067 and 3142-3143.

⁵³ *Ibid.*

⁵⁴ 2023 WOTUS Rule, p. 3103. See also 2015 Clean Water Rule, p. 37118; 2020 Navigable Waters Protection Rule, p. 22340. Note these exclusions were either explicitly listed, or were excluded under a broader exclusion category.

- **Prior converted cropland** (see discussion below);
- **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 pools 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 is abandoned and the resulting body of water meets the definition of WOTUS; and
- **Swales and erosional features** (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow.

Regarding prior converted cropland, in the 2023 WOTUS Rule, the agencies repromulgated the pre-2015 regulatory exclusion, but also made certain changes to the regulatory text in what the agencies described as an effort to improve clarity and consistency with the implementation by the U.S. Department of Agriculture (USDA) of the Food Security Act of 1985, as amended.⁵⁵ The Food Security Act includes a provision (the “Swampbuster” exception) which requires USDA to make determinations about whether wetland areas qualify as prior converted cropland.⁵⁶ The new regulatory text in the 2023 WOTUS Rule specifies that prior converted cropland designated by USDA is excluded. The regulatory text also clarifies that the exclusion would cease upon a change of use, meaning the area is no longer available for the production of agricultural commodities.⁵⁷ This change aligns the WOTUS regulatory exclusion with the Swampbuster exception for prior converted cropland.⁵⁸

Definitions

The 2023 WOTUS Rule includes six definitions. Five of the six definitions are unchanged from the pre-2015 regulations, including the definitions for “wetlands,” “adjacent,” “high tide line,” “ordinary high water mark,” and “tidal water.”⁵⁹

The 2023 WOTUS Rule newly defines the term “significantly affect,” for purposes of determining whether a water meets the significant nexus standard, to mean “a material influence on the chemical, physical, or biological integrity” of an (a)(1) water (i.e., traditional navigable waters, the territorial seas, or interstate waters).⁶⁰ The definition also identifies functions to be

⁵⁵ 2023 WOTUS Rule, pp. 3105-3107.

⁵⁶ See CRS In Focus IF11136, *Prior Converted Cropland Under the Clean Water Act*, by Laura Gatz and Megan Stubbs for more information.

⁵⁷ 2023 WOTUS Rule, p. 3142.

⁵⁸ 2023 WOTUS Rule, pp. 3105-3107.

⁵⁹ 2023 WOTUS Rule, pp. 3067, 3143.

⁶⁰ *Ibid.*

assessed and factors to be considered in determining whether waters, either alone or in combination with similarly situated waters in the region, significantly affect an (a)(1) water.⁶¹

Which Rule Is in Effect Now?

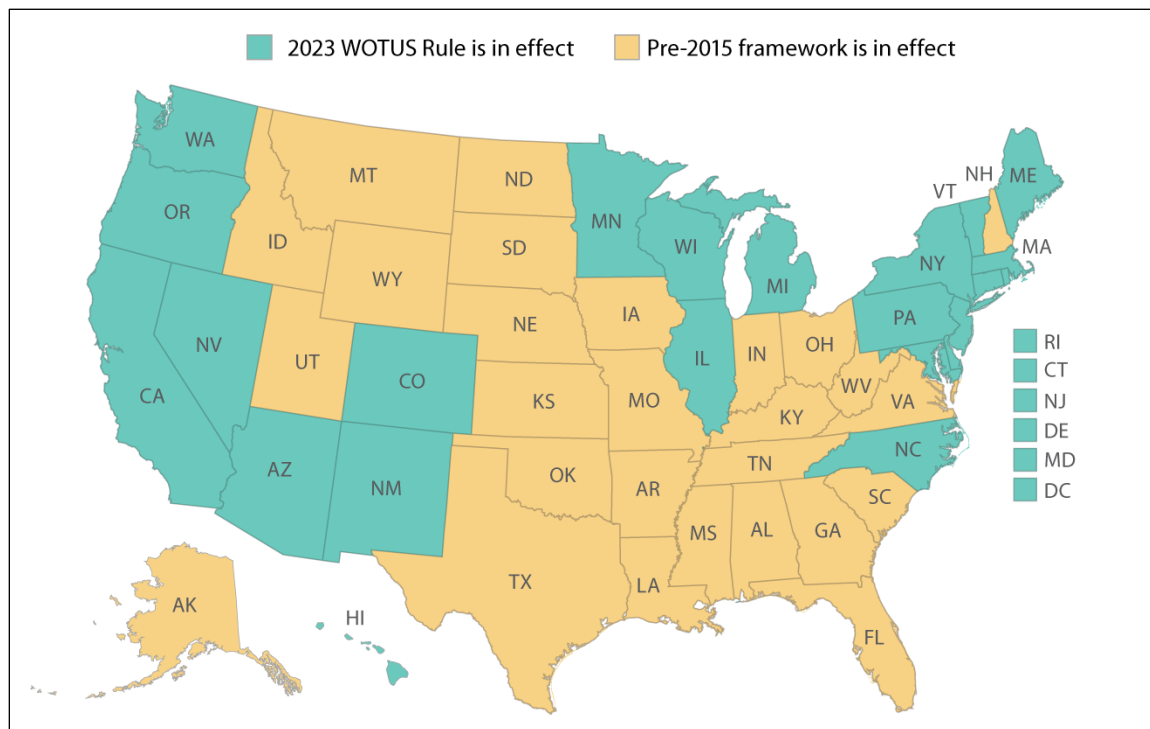
The 2023 WOTUS Rule went into effect on March 20, 2023. Litigation has changed which rule is in effect in some states, however. Two federal district courts have issued preliminary injunctions, and one court of appeals has issued an injunction pending appeal, that collectively bar implementation of the 2023 WOTUS Rule in 27 states.⁶² The injunction pending appeal also applies to several industry associations that are plaintiffs in that lawsuit, as well as to their members.⁶³ In those states and as to those associations and their members, the Corps and EPA stated that they would interpret WOTUS “consistent with the pre-2015 regulatory regime.”⁶⁴

⁶¹ *Ibid.* Functions, as listed in the rule, include contribution of flow; trapping, transformation, filtering, and transport of materials (including nutrients, sediment, and other pollutants); retention and attenuation of floodwaters and runoff; modulation of temperature in paragraph (a)(1) waters; or provision of habitat and food resources for aquatic species in paragraph (a)(1) waters. Factors, as listed in the rule, include the distance from a paragraph (a)(1) water; hydrologic factors such as the frequency, duration, magnitude, timing, and rate of hydrologic connections, including shallow subsurface flow; the size, density, or number of waters that have been determined to be similarly situated; landscape position and geomorphology; and climatological variables such as temperature, rainfall, and snowpack.

⁶² Memorandum Opinion and Order Granting Preliminary Injunction, *Texas v. EPA*, No. 3:23-cv-17 (S.D. Tex. Mar. 19, 2023), ECF No. 60; Order Granting Plaintiffs’ Motion for Preliminary Injunction, *West Virginia v. EPA*, No. 3:23-cv-00032 (D.N.D. Apr. 12, 2023), ECF No. 131; Order, *Kentucky v. EPA*, No. 23-5343 (6th Cir. May 10, 2023), ECF No. 24.

⁶³ Order, *Kentucky v. EPA*, No. 23:5343 (6th Cir. May 10, 2023), ECF No. 24.

⁶⁴ EPA, Definition of “Waters of the United States”: Rule Status and Litigation Update (last updated May 30, 2023), <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>.

Figure I. Status of 2023 WOTUS Rule as of June 22, 2023

Source: CRS.

Note: The Corps and EPA are also interpreting WOTUS consistent with the pre-2015 framework for the industry association plaintiffs in *Kentucky v. EPA*, No. 23-5343 (E.D. Ky.), and for their members.

The Supreme Court’s recent decision in *Sackett v. EPA* does not directly affect the status of the 2023 WOTUS Rule.⁶⁵ The majority’s opinion nevertheless rejects jurisdictional interpretations that are reflected in the 2023 WOTUS Rule, so the continued viability of the rule is uncertain. The decision also raises uncertainty regarding prior regulatory frameworks, which all extended jurisdiction to more wetlands than are covered under the *Sackett* majority’s interpretation. Following the Court’s decision, the Corps and EPA stated that they “will interpret the phrase ‘waters of the United States’ consistent with the Supreme Court’s decision in *Sackett*,” but the agencies have not provided any information regarding that interpretation.⁶⁶

A change in regulatory regime will not result in the retroactive application of a new rule to all potentially covered waters. In particular, the transition to the 2023 WOTUS Rule does not necessarily invalidate approved jurisdictional determinations (AJDs), which the Corps issues to identify whether a particular parcel of land contains WOTUS, and which may be used in the CWA permitting process.⁶⁷ Approved jurisdictional determinations completed when the Navigable Waters Protection Rule or pre-2015 regulatory framework were in effect will not be reopened before their expiration date unless they satisfy specific criteria for revision.⁶⁸

⁶⁵ See *infra*, “How Does *Sackett v. EPA* Affect the Scope of CWA Jurisdiction?”

⁶⁶ EPA, Definition of “Waters of the United States”: Rule Status and Litigation Update (last updated May 30, 2023), <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>.

⁶⁷ See 33 C.F.R. § 331.2.

⁶⁸ See EPA, “Current Implementation of Waters of the United States,” Jan. 18, 2023, <https://www.epa.gov/wotus/current-implementation-waters-united-states>; and U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 05-02 (June 14, 2005).

Additionally, enforcement actions for violations of the CWA are typically based on the statutory and regulatory framework that was in effect at the time the violations occurred, even if the rule has since changed.

Has the 2023 WOTUS Rule Been Challenged in Court?

Five pending lawsuits challenge the 2023 WOTUS Rule.⁶⁹ While no court has issued a ruling on the merits, preliminary orders have limited the implementation of the 2023 WOTUS Rule for some states and plaintiffs.

The first two lawsuits were filed on January 18, 2023, and have been consolidated in the U.S. District Court for the Southern District of Texas.⁷⁰ In the first suit, the State of Texas argues that the rule unlawfully expands the Corps and EPA's jurisdiction beyond the bounds of the CWA, violates the major questions doctrine⁷¹ because the CWA does not authorize the agencies to determine the scope of their own jurisdiction, intrudes upon state sovereignty, and violates due process by failing to provide adequate notice of what conduct is prohibited under the statute.⁷² In the second suit, a coalition of agricultural and industry groups argues that the rule is unsupported by law and scientific and economic evidence; violates the Commerce Clause, the Due Process Clause of the Fifth Amendment, the major questions doctrine, and the nondelegation doctrine;⁷³ exceeds the Corps' and EPA's statutory authority; and unlawfully fails to include a regulatory flexibility analysis.⁷⁴ An environmental group has intervened in the lawsuits in support of the Corps and EPA.⁷⁵

Third, a group of 24 states has challenged the 2023 WOTUS Rule in the U.S. District Court for the District of North Dakota.⁷⁶ In addition to arguments similar to those made by the Texas plaintiffs, the state plaintiffs allege that the rule violates the APA because the final rule is not a "logical outgrowth" of the rule the agencies proposed in December 2021 and that the rule violates the Tenth Amendment by asserting federal jurisdiction over intrastate waters and lands that are ordinarily regulated by the states.⁷⁷ The agricultural and industry groups challenging the rule in

⁶⁹ Prior rules defining WOTUS were the subject of numerous lawsuits filed by industry groups, environmental groups, and states. In 2018, the Supreme Court held that challenges to a rule defining WOTUS are typically governed by the APA and must be reviewed first in federal district court. *Nat'l Ass'n of Mfrs. v. Dept' of Def.*, 138 S. Ct. 617 (2018). That holding limited the degree to which the agencies, under rules of court procedure, can seek a single nationwide decision about the validity of the 2023 WOTUS Rule.

⁷⁰ Order, *Texas v. EPA*, No. 3:23-cv-00017 (S.D. Tex. Feb. 13, 2023), ECF No. 27.

⁷¹ Under the major questions doctrine, an agency must provide clear congressional authorization in certain cases when it seeks to decide an issue of major national significance. For additional background on the major questions doctrine, see CRS In Focus IF12077, *The Major Questions Doctrine*, by Kate R. Bowers.

⁷² Complaint, *Texas v. EPA*, No. 3:23-cv-00017 (S.D. Tex. Jan. 18, 2023), ECF No. 1.

⁷³ The nondelegation doctrine is the separation-of-powers principle that limits Congress's ability to cede its legislative power to other branches of government or nongovernmental entities. For further discussion of the nondelegation doctrine, see *Nondelegation Doctrine*, Constitution Annotated, https://constitution.congress.gov/browse/article-1/?anchor=I_S1_5#I_S1_5.

⁷⁴ First Amended Complaint, *Am. Farm Bureau Fed'n v. EPA*, No. 3:23-cv-00020 (S.D. Tex. Feb. 2, 2023), ECF No. 1.

⁷⁵ *Bayou City Waterkeeper Motion to Intervene*, *Texas v. EPA*, No. 3:23-cv-00017 (S.D. Tex. Feb. 9, 2023), ECF No. 20; *Bayou City Waterkeeper Motion to Intervene*, *Am. Farm Bureau Fed'n v. EPA*, No. 3:23-cv-00020 (S.D. Tex. Feb. 9, 2023), ECF No. 16; Order, *Texas v. EPA*, No. 3:23-cv-00017 (S.D. Tex. Feb. 14, 2023), ECF No. 30.

⁷⁶ Complaint, *West Virginia v. EPA*, No. 3:23-cv-00032 (D.N.D. Feb. 16, 2023), ECF No. 1.

⁷⁷ *Id.*

Texas have also intervened in the North Dakota litigation in support of the state plaintiffs, although the Corps and EPA have appealed the district court's order granting the groups' motion to intervene.⁷⁸

Fourth, the Commonwealth of Kentucky has challenged the 2023 WOTUS Rule in the U.S. District Court for the Eastern District of Kentucky, raising similar allegations to those made by Texas and the other state plaintiffs.⁷⁹ A fifth suit, filed in the Eastern District of Kentucky by a coalition of industry associations, was consolidated with the Commonwealth of Kentucky's lawsuit.⁸⁰

The plaintiffs in each lawsuit filed motions asking the courts to bar implementation of the 2023 WOTUS Rule while the litigation is pending.⁸¹ Two district courts have granted the motions and issued preliminary injunctions: The Texas district court granted Texas and Idaho's motion, and the North Dakota district court granted the state plaintiffs' motion.⁸²

In granting Texas and Idaho's motion, the Texas district court noted that the 2023 WOTUS Rule's extended the significant nexus standard beyond the breadth intended by Justice Kennedy in *Rapanos* and identified potential constitutional problems with the rule's coverage of all interstate waters.⁸³ The court denied the Texas industry plaintiffs' request for a nationwide injunction, however, holding that the industry associations had not demonstrated that they were entitled to injunctive relief beyond what was granted to the states.⁸⁴ In granting the state plaintiffs' motion for preliminary injunction, the North Dakota court agreed with the Texas court's analysis, expressed concerns about the 2023 Rule's treatment of tributaries and impoundments, and indicated that the agencies' interpretation was likely in excess of their statutory authority, arbitrary and capricious, and in conflict with various constitutional limitations.⁸⁵ The North Dakota district court has not yet ruled on the industry plaintiffs' motion. The Corps and EPA have appealed both the Texas and North Dakota preliminary injunctions.⁸⁶

The litigation in Kentucky has proceeded differently. In March 2023, the Kentucky district court denied both preliminary injunctions without prejudice and dismissed Kentucky and the industry plaintiffs' claims.⁸⁷ While the court noted that the plaintiffs' allegations "may very well present a federal cause of action" in the future, their alleged injuries were too speculative and generalized to support their claims of standing and ripeness.⁸⁸ Both Kentucky and the industry plaintiffs

⁷⁸ Order and Federal Defendants' Appeal from the Magistrate Judge's Order Granting Industry's Motion to Intervene, *West Virginia v. EPA* (D.N.D. March 22, 2023 and Apr. 5, 2023), ECF Nos. 110 and 129.

⁷⁹ Complaint, *Kentucky v. EPA*, No. 3:23-cv-00007 (E.D. Ky. Feb. 22, 2023), ECF No. 1.

⁸⁰ Complaint, *Kentucky Chamber of Commerce v. EPA*, No. 3:23-cv-00008 (E.D. Ky. Feb. 22, 2023); Order, *Kentucky v. EPA*, No. 3:23-cv-00007 (E.D. Ky. Feb. 28, 2023), ECF No. 16.

⁸¹ Motion for Preliminary Injunction, *Texas v. EPA*, No. 3:23-cv-00017 (S.D. Tex. Feb. 7, 2023), ECF No. 13; Motion for Preliminary Injunction, *Am. Farm Bureau Fed'n v. EPA*, No. 3:23-cv-00020 (S.D. Tex. Feb. 7, 2023), ECF No. 15; Plaintiff States' Motion for Preliminary Injunction, *West Virginia v. EPA*, No. 3:23-cv-00032 (D.N.D. Feb. 21, 2023), ECF No. 44; Motions for Preliminary Injunction, *Kentucky v. EPA*, No. 3:23-cv-00007 (E.D. Ky. Feb. 23 and Feb. 28, 2023), ECF Nos. 10 and 17.

⁸² Memorandum Opinion and Order Granting Preliminary Injunction, *Texas v. EPA*, No. 3:23-cv-00017 (E.D. Tex. Mar. 19, 2023), ECF No. 60; Order Granting Plaintiffs' Motion for Preliminary Injunction, *West Virginia v. EPA* (D.N.D. Apr. 12, 2023), ECF No. 131.

⁸³ Memorandum Opinion and Order Granting Preliminary Injunction at 19-26, *Texas v. EPA*.

⁸⁴ *Id.* at 34.

⁸⁵ Order Granting Plaintiffs' Motion for Preliminary Injunction at 17-29, *West Virginia v. EPA*.

⁸⁶ *Texas v. EPA*, No. 23-40306 (5th Cir. 2023), *West Virginia v. EPA*, No. 23-2411 (8th Cir. 2023).

⁸⁷ Opinion and Order, *Kentucky v. EPA*, No. 3:23-cv-00007 (E.D. Ky. Mar. 31, 2023), ECF No. 51.

⁸⁸ *Id.* at 1.

appealed those rulings to the U.S. Court of Appeals for the Sixth Circuit and sought a stay of the district court’s decision pending appeal. In May 2023, the Sixth Circuit granted an injunction pending appeal, holding that the plaintiffs’ general allegations of injury were likely sufficient at this stage of litigation.⁸⁹

As a result of the preliminary injunctions and injunction pending appeal, the pre-2015 framework is in effect in 27 states and as applied to the Kentucky industry plaintiffs and their members. Further proceedings in any of the pending lawsuits—or any newly filed lawsuits—could increase or decrease the number of states in which the 2023 WOTUS Rule is in effect.⁹⁰ It is also likely that further proceedings within the context of the pending lawsuits will address the effect of the Supreme Court’s ruling in *Sackett* on the continued viability of the 2023 WOTUS Rule.

How Does *Sackett v. EPA* Affect the Scope of CWA Jurisdiction?

On May 25, 2023, the Supreme Court decided *Sackett v. EPA*, a case with significant implications for the scope of federal jurisdiction under the CWA.⁹¹ In *Sackett*, landowners in Idaho challenged a compliance order and asked the Court to revisit *Rapanos* and adopt Justice Scalia’s plurality test for determining whether certain adjacent wetlands are WOTUS. Applying the significant nexus test articulated by Justice Kennedy in *Rapanos*, the U.S. Court of Appeals for the Ninth Circuit upheld EPA’s conclusion that the Sacketts’ property contained WOTUS that were subject to federal jurisdiction under the CWA and relevant regulations.⁹²

On review, the Supreme Court unanimously reversed the Ninth Circuit. Although all nine Justices agreed that the lower court applied the wrong standard for identifying WOTUS, the Court was split 5-4 on the appropriate test. In an opinion authored by Justice Alito, the majority formally adopted the approach taken by the *Rapanos* plurality. The majority held that “waters” under the CWA are limited to “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.”⁹³ The majority also held that the CWA covers only wetlands that qualify as WOTUS “in their own right.”⁹⁴ This limited covered wetlands to those that are “indistinguishably part of a body of water that itself constitutes ‘waters’ under the CWA.”⁹⁵ Quoting the *Rapanos* plurality, the majority concluded that WOTUS includes “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. 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.”⁹⁶ Accordingly, the majority ruled that CWA

⁸⁹ Order, *Kentucky v. EPA*, No. 23-5343 (6th Cir. May 10, 2023), ECF No. 24.

⁹⁰ Consistent with the statute of limitations for APA claims, potential litigants would generally be required to file suit within six years after their claims accrue. 28 U.S.C. § 2401(a). While additional lawsuits are thus possible, early lawsuits are the most likely to be closely watched, as they present the courts’ first opportunities to issue rulings that may be binding in later cases.

⁹¹ *Sackett v. EPA*, No. 21-454 (U.S. May 25, 2023). For a more in-depth discussion of *Sackett*, see CRS Legal Sidebar LSB10981, *Supreme Court Narrows Federal Jurisdiction Under Clean Water Act*, by Kate R. Bowers.

⁹² *Sackett v. EPA*, 8 F.4th 1075 (9th Cir. 2021).

⁹³ *Sackett v. EPA*, No. 21-454, slip op. at 14 (U.S. May 25, 2023).

⁹⁴ *Id.* at 19.

⁹⁵ *Id.* at 22.

⁹⁶ *Id.* at 21.

jurisdiction excludes wetlands that are neighboring to but separate from traditional navigable waters.⁹⁷

In addition to reaffirming the *Rapanos* plurality’s standard, the majority also rejected the significant nexus test.⁹⁸ The majority noted that Congress must “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” and further reasoned that the significant nexus test “gives rise to serious vagueness concerns in light of the CWA’s criminal penalties.”⁹⁹ According to the majority, the significant nexus test thus amounted to a “freewheeling inquiry” that “provides little notice to landowners of their obligations under the CWA.”¹⁰⁰

The Court’s ruling narrows the scope of jurisdiction under the CWA as compared to its long-standing regulatory implementation and narrows the interpretation adopted by lower courts post-*Rapanos*. While the precise extent of the change will depend on how the Corps and EPA implement various aspects of the decision, the majority’s exclusion of wetlands that are separated from covered waters by natural or artificial barriers means that fewer wetlands will be covered than under any regulatory framework developed by the Corps or EPA since the 1970s.¹⁰¹ Additionally, the majority’s definition of *waters* appears to exclude ephemeral waters, thus narrowing the scope of waters as compared to the 2023 WOTUS Rule, the 2015 Clean Water Rule, and the pre-2015 regulations and guidance.

Neither the 2023 Rule nor any prior regulation was presented to the Supreme Court for review in *Sackett*, so the Court’s decision does not automatically affect the status of the 2023 WOTUS Rule. The majority opinion nevertheless rejects jurisdictional interpretations that are reflected in the 2023 WOTUS Rule, so the continued viability of the rule is uncertain. The viability of the pre-2015 framework—to which the Corps and EPA have reverted in some parts of the country due to court orders temporarily barring implementation of the 2023 WOTUS Rule—is also uncertain, as the pre-2015 operative definition of WOTUS included more wetlands than are covered under the *Sackett* majority’s interpretation. Following the Court’s decision, the Corps and EPA issued a statement that they will “interpret the phrase ‘waters of the United States’ consistent with the Supreme Court’s decision in *Sackett*” and “continue to review the decision to determine next steps.”¹⁰² While the nature of those next steps remains to be seen, delays in CWA permitting and other CWA actions are possible. Following *Rapanos*, the Corps urged its district offices to delay issuing AJDs for areas beyond the limits of the traditional navigable waters until the agencies issued final guidance interpreting WOTUS in light of the Supreme Court’s decision.¹⁰³ Following *Sackett*, at least one Corps district office has delayed issuing AJDs until further notice.¹⁰⁴

The Supreme Court’s ruling could also affect regulation of waters at the state level. The CWA expressly reserves to states the right to issue more stringent regulations, and states may choose to

⁹⁷ *Id.* at 25.

⁹⁸ *Id.* at 22.

⁹⁹ *Id.* at 24.

¹⁰⁰ *Id.* at 25.

¹⁰¹ *Sackett v. EPA*, No. 21-454, slip op. at 6 (U.S. May 25, 2023) (Kavanaugh, J., concurring in the judgment).

¹⁰² EPA, Definition of “Waters of the United States”: Rule Status and Litigation Update (last updated May 30, 2023), <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>.

¹⁰³ U.S. Army Corps of Engineers, Interim Guidance on the *Rapanos* and *Carabell* Supreme Court Decision (July 5, 2006).

¹⁰⁴ U.S. Army Corps of Engineers, Chicago District Website, Jurisdictional Determinations, <https://www.lrc.usace.army.mil/Missions/Regulatory/Jurisdictional-Determinations/> (last visited June 15, 2023).

cover more waters in their own programs.¹⁰⁵ Some states regulate waters within their borders beyond the scope of federal jurisdiction and have indicated that they plan to continue or expand such protections following *Sackett*.¹⁰⁶ Other states have enacted laws barring environmental state agencies from promulgating regulations beyond what is federally required.¹⁰⁷ A narrowed definition of WOTUS at the federal level could thus result in greater state-level divergence in the scope of covered waters.

How Have Adjacent Wetlands Been Addressed in Prior WOTUS Regulations?

The Corps and EPA have long included adjacent wetlands as their own category in the regulations they have promulgated to define WOTUS. While some rules included a more expansive definition and others narrower definitions of *adjacent wetlands*, all of the rules have recognized adjacent wetlands as WOTUS. These rules have provided that wetlands separated from other WOTUS by “man-made dikes or barriers, natural river berms, beach dunes and the like” are adjacent wetlands.¹⁰⁸ The scope of adjacent wetlands in the *Sackett* decision, as previously discussed, diverges from long-standing regulations and practice by excluding wetlands separated from WOTUS. **Table 2** summaries the scope of adjacent wetlands in the pre-2015 regulations, the 2015 Clean Water Rule, the 2020 Navigable Waters Protection Rule, the 2023 WOTUS Rule, and the *Sackett v. EPA* decision.

¹⁰⁵ 33 U.S.C. § 1370.

¹⁰⁶ E.g., California State Water Resources Control Board, press release, State Water Board Statement: U.S. Supreme Court decision decreases federal wetlands protection (May 25, 2023), https://waterboards.ca.gov/press_room/press_releases/2023.html.

¹⁰⁷ See Corps and EPA, *Resource and Programmatic Assessment for the Navigable Waters Protection Rule: Definition of “Waters of the United States,”* January 23, 2020, p. 45-46, https://www.epa.gov/sites/production/files/2020-01/documents/rpa_-_nwpr_.pdf. Environmental Law Institute, *State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act*, May 2013, p. 1, <https://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf>.

¹⁰⁸ E.g., Army Corps of Engineers, “Final Rule for Regulatory Programs of the Corps of Engineers,” 51 *Federal Register* 41206, 412501, Nov. 13, 1986 (1986 Corps Rule).

Table 2. Scope of Adjacent Wetlands Under Waters of the United States (WOTUS) Regulations, Guidance, and in the Sackett v. EPA Decision

Source	Description of the Adjacent Wetlands WOTUS Category	Definition of Adjacent
Pre-2015 Regulations ^a	Wetlands adjacent to other jurisdictional waters other than waters that are themselves wetlands	<ul style="list-style-type: none"> • Bordering, contiguous, or neighboring^b • 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”
2008 <i>Rapanos</i> Guidance ^c	<ul style="list-style-type: none"> • Wetlands that were adjacent to traditional navigable waters and wetlands that abutted relatively permanent tributaries (described as those that flow year-round or have continuous flow at least seasonally) of such waters were categorically WOTUS • Wetlands adjacent to tributaries that are not relatively permanent and wetlands adjacent to but not directly abutting a relatively permanent tributary were subject to case-by-case significant nexus analysis to determine jurisdiction 	<p>Provided that adjacency was established by satisfying one of three criteria:</p> <ol style="list-style-type: none"> (1) An unbroken surface or shallow subsurface connection to jurisdictional waters (which may be intermittent); (2) Physical separation from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, or similar features; or (3) Proximity to a jurisdictional water that is reasonably close and supports a science-based inference of ecological interconnection.

Source	Description of the Adjacent Wetlands WOTUS Category	Definition of Adjacent
2015 Clean Water Rule ^d	<ul style="list-style-type: none"> • Broadened the category to adjacent <i>waters</i>, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters rather than just adjacent wetlands • Included waters adjacent to traditional navigable waters, interstate waters including interstate wetlands, jurisdictional impoundments, and jurisdictional tributaries 	<ul style="list-style-type: none"> • Defined <i>adjacent</i> to mean “bordering, contiguous, or neighboring” a traditional navigable water, interstate water including an interstate wetland, jurisdictional impoundment, or a jurisdictional tributary. • Included “waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like.” • Specified that for the purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. • Specified that adjacency was not limited to waters located laterally to a traditional navigable water, interstate water including an interstate wetland, jurisdictional impoundment, or a jurisdictional tributary. Instead, adjacent waters were to also include all waters that connect segments of one of the aforementioned waters or were located at the head of one of these waters and are bordering, contiguous, or neighboring. • Newly defined <i>neighboring</i>, which set new numeric standards for determining adjacency (i.e., all waters located within 100 feet of the ordinary high water mark of a traditional navigable water, interstate water including an interstate wetland, jurisdictional impoundment, or a jurisdictional tributary; or within the 100-year floodplain of one of the aforementioned waters and not more than 1,500 feet from the ordinary high water mark of such water).
2020 Navigable Waters Protection Rule ^e	Adjacent wetlands	<p>Defined <i>adjacent wetlands</i> to mean wetlands that:</p> <ol style="list-style-type: none"> (1) abutted a territorial sea or traditional navigable water, tributary, or a lake, pond, or impoundment of a jurisdictional water; (2) were inundated by flooding from one of the aforementioned waters in a typical year; (3) were physically separated from one of the aforementioned waters only by a natural berm, bank, dune, or similar natural feature; or (4) were physically separated from one of the aforementioned waters only by an artificial dike, barrier, or similar artificial structure so long as that structure allowed for a direct hydrological surface connection to the water in a typical year <p>Specified that an adjacent wetland is jurisdictional when a road or similar artificial structure divides the wetland so long as the structure allows for a direct hydrologic surface connection through or over that structure in a typical year</p>

Source	Description of the Adjacent Wetlands WOTUS Category	Definition of Adjacent
2023 WOTUS Rule ^f	Includes wetlands adjacent to: <ol style="list-style-type: none"> (1) traditional navigable waters, interstate waters, or the territorial seas; (2) and with a continuous surface connection to jurisdictional impoundments or tributaries that are relatively permanent, standing, or continuously flowing bodies of water; or (3) jurisdictional impoundments or tributaries when the wetlands alone or in combination with similarly situated waters meet the significant nexus standard 	<ul style="list-style-type: none"> • 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”
Sackett v. EPA ^g	Adjacent wetlands that are part of (i.e., indistinguishable from) waters of the United States	<ul style="list-style-type: none"> • “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. 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.” • Excludes wetlands that are neighboring to but separate from traditional navigable waters, such as those separated by a barrier.

Source: CRS analysis of WOTUS regulations, guidance, and the *Sackett v. EPA* decision.

Notes:

- a. Army Corps of Engineers, “Final Rule for Regulatory Programs of the Corps of Engineers,” 51 *Federal Register* 41206, Nov. 13, 1986 (1986 Corps Rule); EPA, “Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations,” 53 *Federal Register* 20764, June 6, 1988 (1988 EPA Rule).
- b. The 1988 EPA Rule did not define *adjacent*, but the 1986 Corps Rule defined it as described here.
- c. Benjamin H. Grumbles, Assistant Administrator for Water, EPA, and John Paul Woodley Jr., Assistant Secretary of the Army (Civil Works), Department of the Army, *Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States*, memorandum, Dec. 2, 2008.
- d. Army Corps of Engineers and EPA, “Clean Water Rule: Definition of ‘Waters of the United States’; Final Rule,” 80 *Federal Register* 37054, June 29, 2015.
- e. Army Corps of Engineers and EPA, “The Navigable Waters Protection Rule: Definition of ‘Waters of the United States,’” 85 *Federal Register* 22250, Apr. 21, 2020.
- f. Revised Definition of “Waters of the United States,” 88 *Federal Register* 3004, Jan. 18, 2023.
- g. *Sackett v. EPA*, No. 21-454 (U.S. May 25, 2023).

What Options Are Available to Congress Regarding the Definition of WOTUS?

Considering the numerous court rulings, ongoing legal challenges, and successive Administrations' efforts to define the scope of WOTUS, some stakeholders have urged Congress to more specifically define the term through amendments to the CWA. Others argue that the Corps and EPA, with their specific knowledge and expertise, are in the best position to determine the scope of the term. The *Sackett v. EPA* decision narrows the scope of WOTUS with regard to how the agencies may interpret the term moving forward but does not preclude Congress from amending the CWA to define the term with more clarity or specificity.

The scope of WOTUS has continued to be an issue of interest in the 118th Congress. On February 8, 2023, the House Transportation and Infrastructure Committee's Subcommittee on Water Resources and Environment held a hearing regarding the 2023 WOTUS Rule.¹⁰⁹ Other committees have held hearings where the topic of WOTUS has been discussed, including a hearing held by the House Committee on Agriculture.¹¹⁰

Members have introduced legislation related to WOTUS. Members in both chambers introduced joint resolutions of disapproval of the 2023 WOTUS Rule under the Congressional Review Act (CRA). In addition, some Members have introduced legislation that would enact the Navigable Waters Protection Rule's definition of WOTUS into law, reinstate the Navigable Waters Protection Rule, or amend the CWA to add a narrower definition of *navigable waters*. Another bill would establish an agricultural advisory committee to inform Congress of the impacts of WOTUS regulations on the agricultural sector.

- H.J.Res. 27 and S.J.Res. 7 are joint resolutions providing for congressional disapproval of the 2023 WOTUS Rule under the CRA.¹¹¹ They were sponsored or cosponsored by 170 Members of the House of Representatives and 49 Senators. In March 2023, both the House and the Senate passed the joint resolution of disapproval for the 2023 WOTUS Rule, which President Biden subsequently vetoed.¹¹² The House held a vote to override the veto, which failed to meet the two-thirds majority needed to pass.
- H.R. 1556, the Define WOTUS Act, and S. 1022, the Define WOTUS Act of 2023, are identical bills that would amend the CWA to change the definition of *navigable waters*. The language, as introduced, would narrow the scope of waters subject to CWA jurisdiction in comparison to any of the WOTUS regulatory

¹⁰⁹ U.S. Congress, House Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment, *Hearing on Stakeholder Perspectives on Impacts of the Biden Administration's Waters of the United States (WOTUS) Rule*, 118th Cong., 1st sess., Feb. 8, 2023.

¹¹⁰ U.S. Congress, House Committee on Agriculture, *For the Purpose of Receiving Testimony from The Honorable Michael Regan, Administrator, U.S. Environmental Protection Agency*, 118th Cong., 1st sess., Apr. 19, 2023.

¹¹¹ The CRA allows Congress to overturn certain agency actions in the form of a joint resolution of disapproval.¹¹¹ Under the CRA, if both houses pass a joint resolution for disapproval, it is sent to the President for signature or veto. If the President vetoes a resolution, Congress can vote to override the veto with a two-thirds majority in both chambers. If a joint resolution of disapproval is submitted within the CRA-specified deadline, passed by Congress, and signed by the President (or if Congress votes to override a presidential veto), the disapproved rule "shall not take effect (or continue)" and would be deemed not to have had any effect at any time. Furthermore, if a joint resolution of disapproval is enacted, the CRA provides that a rule may not be issued in "substantially the same form" as the disapproved rule unless it is specifically authorized by a subsequent law.

¹¹² See, Actions.

- regimes (pre-2015, Clean Water Rule, Navigable Waters Protection Rule, and 2023 WOTUS Rule). It would also amend the CWA to make changes to the Corps process for making jurisdictional determinations.
- S. 782, the FREE American Energy Act, would enact the Navigable Waters Protection Rule into law.
- S. 879, the Energy Freedom Act, would reinstate the Navigable Waters Protection Rule and provide that each of its provisions apply until the effective date of a subsequent final rule. It would also prohibit the Corps and EPA from issuing a new rule to redefine WOTUS for 15 years from the date of enactment.
- S. 1023, the Farmer-Informed WOTUS Act of 2023, would establish an advisory committee representative of the United States farming and ranching sectors to inform Congress of the impact of WOTUS regulations on U.S. agriculture.
- S. 1449, the RESTART Act, would amend the CWA to change the definition of *navigable waters*. The language, as introduced, closely aligns with the definition published in the Navigable Waters Protection Rule.

Moving forward, Congress may oversee the Biden Administration’s implementation of the Supreme Court’s ruling in *Sackett v. EPA* or may consider proposing legislation to either provide a definition of WOTUS or provide more specific instruction to the agencies and regulated parties as to the interpretation of the CWA. The Supreme Court’s increasing insistence on clear congressional intent to delegate regulatory authority, and its decreasing reliance on or reference to more deferential modes of judicial review, suggest that any regulatory actions taken pursuant to such legislation would be subject to close judicial scrutiny.

Author Information

Kate R. Bowers
Legislative Attorney

Laura Gatz
Specialist in Environmental Policy

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS’s institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.