

Sackett vs. Environmental Protection Agency, January 2024 Update

In January 2023, the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (the Agencies) published the [Revised Definition of "Waters of the United States"](#) (2023 Rule). With the 2023 Rule, the Agencies attempted to codify changes to the definition of waters of the U.S. (WOTUS) based on the scientific record, relevant Supreme Court of the United States (SCOTUS) case law, and the Agencies' experience and technical expertise implementing the regulations. This definition is critically important as it determines which of these surface water features are jurisdictional (i.e., WOTUS), and therefore subject to Clean Water Act (CWA) permitting authority. Shortly after the 2023 Rule went into effect, it was enjoined or stayed (i.e., stopped/suspended) in 27 states, but was still in effect in the other 23 states, thereby creating a fractured regulatory regime across the U.S.

In May 2023, the SCOTUS decision in [Sackett v. EPA](#) effectively reduced the scope of which waters (rivers, streams, lakes) and wetlands are protected under the CWA. To conform to key aspects of the Sackett v. EPA decision, the Agencies subsequently issued a rule that amends the 2023 Rule. [The Revised Definition of "Waters of the United States": Conforming](#) (referred to as the 'Amended 2023 Rule' or 'Conforming Rule') became effective on September 8, 2023 in 23 states. In the remaining 27 states, because the 2023 Rule had been stayed in those states, the Agencies are interpreting the definition of WOTUS consistent with the pre-2015 regulatory regime and the Sackett v. EPA decision (see graphic on Page 2).

This paper outlines the effects of the recent rule changes and the Sackett v. EPA decision on the definition of WOTUS and touches on how we expect the Agencies will implement these changes.

Effects of the Amended 2023 Rule and the Sackett v. EPA decision on the Definition of WOTUS

The Amended 2023 Rule revised the definition of WOTUS in the following ways:

- Removed the "significant nexus" standard: The "significant nexus" standard was a long-standing test used to determine if certain waters (such as ephemeral streams and isolated wetlands) are jurisdictional. In Sackett v. EPA, SCOTUS decided that the significant nexus standard was inconsistent with the text and structure of the CWA. The Amended 2023 Rule removed the significant nexus standard from the definition of WOTUS. By removing the significant nexus standard, only tributaries (i.e., streams that flow into traditionally navigable waters, territorial seas, or interstate waters) that are "relatively permanent, standing or continuously flowing bodies of water" are WOTUS. This change eliminates CWA protection of streams with an ephemeral flow regime. Removing the "significant nexus" standard also limits which wetlands are WOTUS. Only those wetlands that are "adjacent" to and have a "continuous surface connection" to WOTUS are jurisdictional.
- Changes the definition of "adjacent": The 2023 Rule defined the term "adjacent" as "bordering, contiguous, or neighboring." In Sackett v. EPA, SCOTUS decided (while not ruling on the 2023 Rule) that this interpretation was inconsistent with the CWA and caselaw. The Amended 2023 Rule revised the definition of "adjacent" to be a "continuous surface connection". Wetlands and other "relatively permanent, standing or continuously flowing bodies of water" such as lakes and ponds must have a continuous surface connection to other WOTUS (such as traditionally navigable waters and tributaries) to be jurisdictional.
- Removes "interstate wetlands" from the list of interstate waters that are considered to be WOTUS: In the Sackett v. EPA decision SCOTUS examined the CWA and its statutory history and found the predecessor statute to the CWA covered and defined "interstate waters" as "all rivers, lakes, and other waters that flow across or form a part of State boundaries." Thus, SCOTUS concluded that the use of the term "waters" in the CWA refers to such "open waters" and not wetlands. As a result, the Amended 2023 Rule removed interstate wetlands from the definition of WOTUS.

Implementing the Amended 2023 Rule and the Sackett v. EPA decision

The Agencies are developing regional-specific tools to facilitate implementation of the definition of WOTUS. Some recently developed or updated tools include:

- [Antecedent Precipitation Tool \(APT\)](#)
- [Streamflow Duration Assessment Methods \(SDAMs\)](#)
- [Updated Ordinary High Water Mark Manual](#)

Links to these tools can be found here: <https://www.epa.gov/wotus/implementation-tools-and-methods>. While use of these tools isn't required, we expect the Agencies will increasingly rely on them to make jurisdictional determinations, particularly for assessing flow regime.

