



Protecting Wetlands and Other Aquatic Resources after *Sackett*

DONNA DOWNING

NATIONAL ASSOCIATION OF WETLAND MANAGERS

What Waters Does the CWA Protect?

- CWA uses the term “navigable waters,” defined as “waters of the United States including the territorial seas.”
- EPA and Army Corps regulations further define, reflecting key Supreme Court concepts.
- WOTUS definition very controversial and frequently changing.
- 2023 Supreme Court decision in *Sackett* substantially reduced CWA protections for many wetlands and non-perennial waters.



What Did *Sackett* Hold?

- 1) *Sackett* focused on wetlands, but the decision affects jurisdictional status of all types of waters.
- 2) A relatively permanent stream or other body of water connected to interstate traditional navigable waters is considered a WOTUS.
- 3) Wetlands are WOTUS if they are “indistinguishable” from a WOTUS to which they are adjacent and have a “continuous surface connection” to that water.
- 4) The significant nexus standard is no longer valid for identifying WOTUS.



2023 WOTUS Regulatory Definition

WOTUS includes:

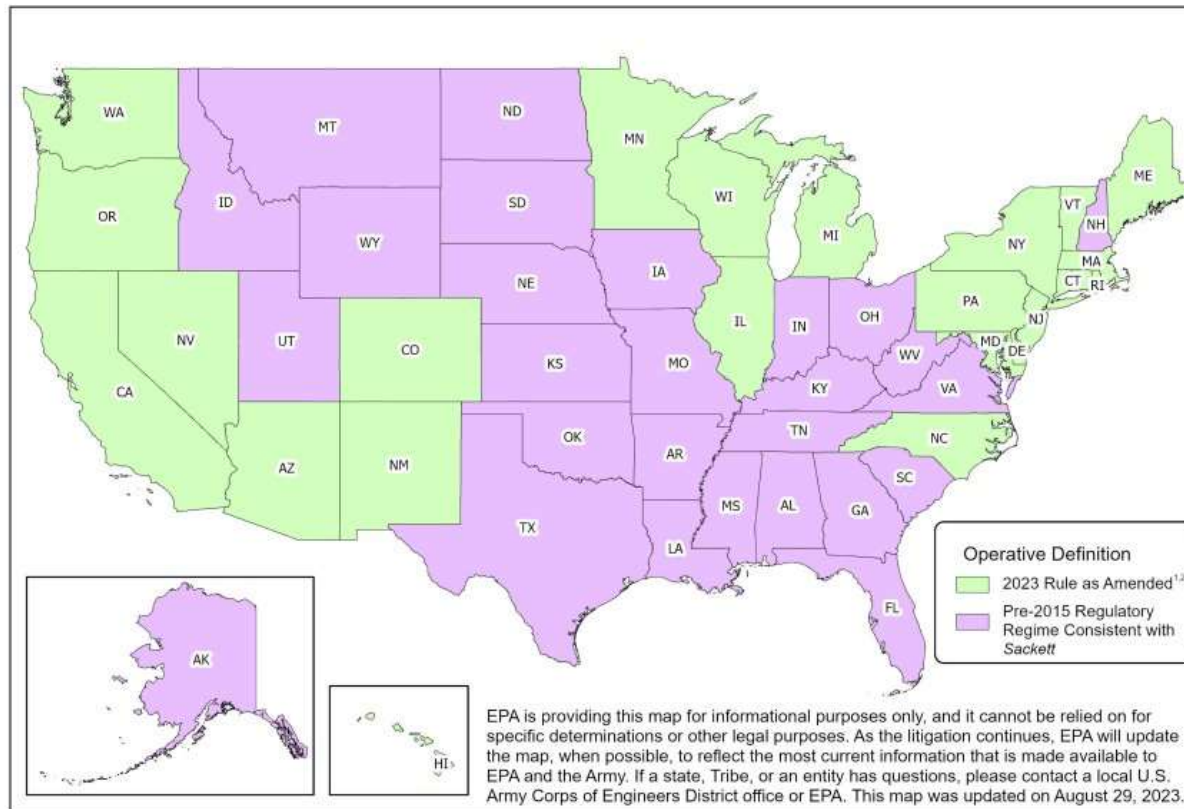
- Traditional navigable waters (TNWs);
- Interstate waters;
- Impoundments of jurisdictional waters;
- Relatively permanent tributaries to jurisdictional waters;
- Adjacent wetlands that have a continuous surface connection to a jurisdictional water;
and
- Relatively permanent intrastate lakes and ponds with a continuous surface connection to a jurisdictional water.

WOTUS has several exclusions, such as:

- Waste treatment systems; and
- Prior converted cropland (PCC).



Operative Definition of "Waters of the United States"



¹Also operative in the U.S. territories and the District of Columbia

²The 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).

Sources of Help Interpreting Applicable WOTUS Definitions

For the 2023 WOTUS definition, read the regulatory text and the preamble for tools and field techniques.

For the Pre-2015 WOTUS definition, consider existing guidance and agency practice implementing the “relatively permanent” standard since 2006. [Pre-2015 Regulatory Regime | US EPA](#)

Review webinars posted by EPA and the Army Corps on implementing the two WOTUS definitions. <https://youtu.be/3ULRXa5C1Ns>

See if EPA’s Approved Jurisdictional Determination website includes jurisdictional decisions under the applicable standard that are near a water you are evaluating. [CWA Approved JDs \(epa.gov\)](#)



What Are States Doing in Response to Changing WOTUS Definitions?

States and Tribes need to continue operating programs to protect wetland and other waters, even as WOTUS definitions evolve.

Many additional activities are focusing on data collection and tool development not tied to a specific WOTUS definition, such as:

- Mapping and assessing condition of wetlands and other waters;
- Assessing connectivity relationships among waters;
- Assessing functions and values of wetlands; and
- Expanding and enhancing education and outreach programs regarding benefits of protecting wetlands and waters.



What Are States Doing in Response to *Sackett*?

Some states are seeking state legislative authority for a permit program to protect waters of the state from pollutant discharges, including state waters that are not WOTUS.

- Some legislatures are seeking to expand protections for wetlands, while others are trying to enact “no more stringent than” limitations.

Some states are evaluating the potential to require project evaluations under state law similar to those under CWA section 401.

States currently with comprehensive programs are evaluating the additional administrative resources they will need to maintain levels of wetland protections due to the reduced federal presence.





QUESTIONS?

Donna Downing, Senior Legal Policy Advisor
National Association of Wetland Managers (NAWM)
(207) 894-7990
donna@nawm.org