

Updates for Tribes and States on “Waters of the United States”



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Presentation Outline

- Background
- Amended 2023 Rule
- Pre-2015 Regulatory Regime
- Additional Resources



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

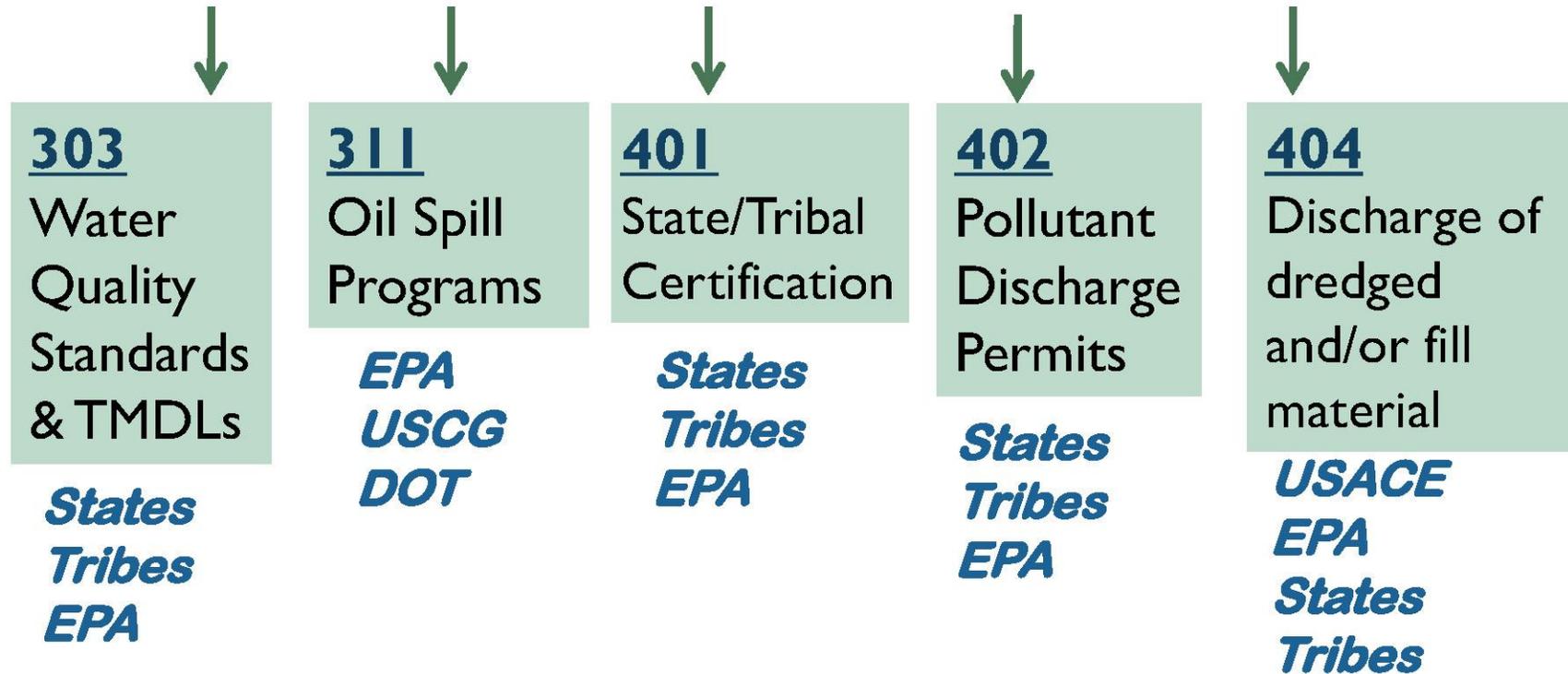
- “Waters of the United States” is a threshold term in the Clean Water Act that establishes the geographic scope of federal jurisdiction under the Act.
- Clean Water Act regulatory programs address “navigable waters,” defined in the statute as “the waters of the United States, including the territorial seas.”
- The Clean Water Act does not define “waters of the United States.”
- EPA and the Department of the Army have defined “waters of the United States” by regulation since the 1970s.



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Background: Why “Waters of the United States” Matters

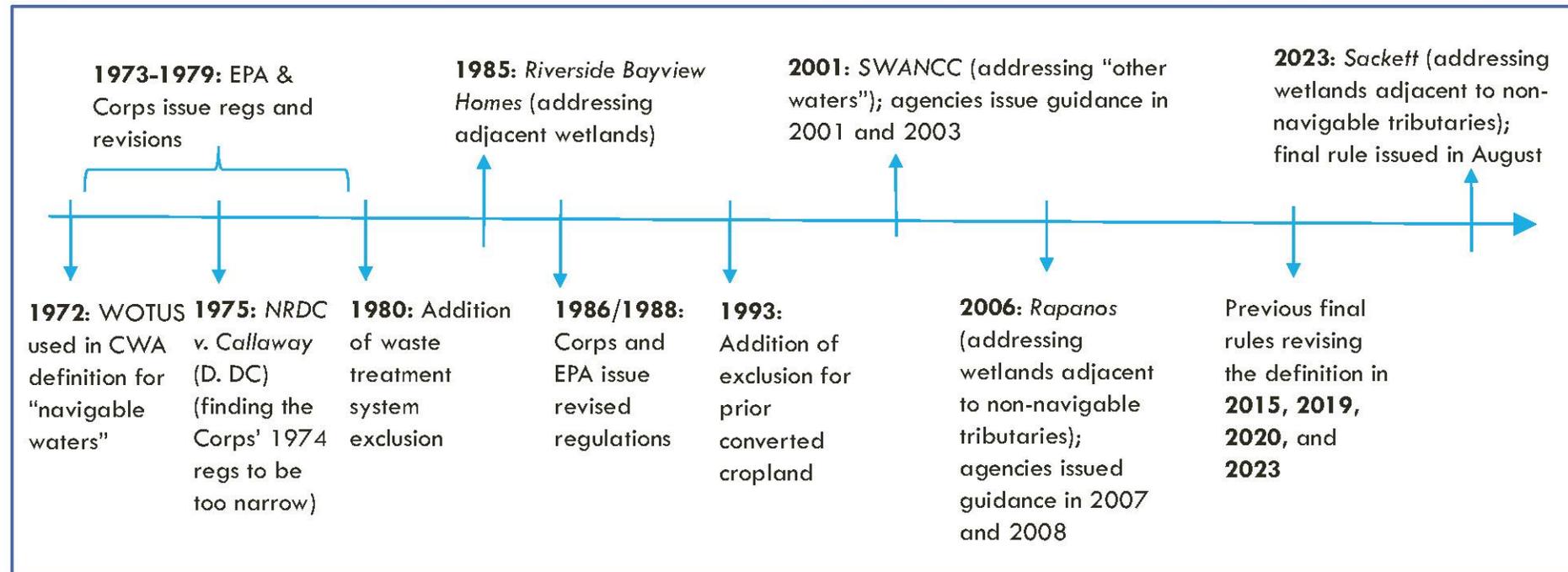
“Navigable Waters”: Waters of the United States, including Territorial Seas



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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.



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Background: Regulatory Regimes

- Prior to the 2015 Clean Water Rule, the Agencies implemented the pre-2015 regulations defining “waters of the United States” consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience—this is referred to as the “pre-2015 regulatory regime.”
- The Agencies revised their regulations in 2015, 2019, and 2020. In 2021, two district courts vacated the 2020 Navigable Waters Protection Rule. The Agencies then returned to implementing the pre-2015 regulatory regime nationwide.
- The 2023 Rule replaced the pre-2015 regulatory regime, and was amended in September 2023, but as the result of ongoing litigation, the Amended 2023 Rule is not operative in certain states and for certain parties.

<https://www.epa.gov/wotus/pre-2015-regulatory-regime>

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Background: Recent Events

January 2023	2023 Rule published – “Revised Definition of ‘Waters of the United States’”
March 2023	2023 Rule effective; operative in certain States
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

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Background: *Rapanos* Decision

- **Supreme Court decision in *Rapanos v. U.S.* (2006)**
 - The Justices were divided in a 4-1-4 opinion on the question of CWA jurisdiction over wetlands adjacent to nonnavigable tributaries of traditional navigable waters.
- **Scalia Plurality Opinion**

Considered “waters of the United States” to include:

 - “relatively permanent, standing or continuously flowing bodies of water forming geographic features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes’” and
 - Wetlands that 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.”
- **Kennedy Concurring Opinion**

Considered “waters of the United States” to include:

 - “a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.”
- **Dissent**
 - deferred to the Corps’ assertion of jurisdiction and concluded that the term “waters of the United States” encompasses all tributaries and wetlands that satisfy “either the plurality’s [standard] or Justice Kennedy’s.”
- **Guidance issued in 2007, revised 2008**
- **Circuit Court Decisions:** All eight circuit courts to address the issue held that jurisdiction was proper over at least those waters that satisfy the Kennedy standard; none held that the plurality was the sole basis that may be used to establish jurisdiction.

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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 adjacent 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.

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Background: Conforming Rule Amending January 2023 Rule

- September 8, 2023: EPA and Army Corps published a rule to amend the January 2023 definition of “waters of the United States” to conform with *Sackett*; rule was effective upon publication.
- In the conforming rule, the agencies determined that there is good cause under the Administrative Procedure Act to issue a final rule because certain provisions of the January 2023 Rule were invalid under the Supreme Court’s interpretation of the Clean Water Act in *Sackett*.
- Targeted changes to January 2023 Rule categories of “waters of the United States”:
 - (a)(1):
 - (i) Traditional navigable waters
 - (ii) Territorial Seas
 - (iii) Interstate Waters – **revised** to remove interstate wetlands
 - (a)(2) Impoundments of Jurisdictional Waters
 - (a)(3) Tributaries – **revised** to delete significant nexus standard
 - (a)(4) Adjacent Wetlands – **revised** to delete significant nexus standard
 - (a)(5) Additional Waters – **revised** to delete significant nexus standard and delete streams and wetlands
- Targeted changes to January 2023 Rule Definitions:
 - (c)(2) Adjacent – **revised** to mean “having a continuous surface connection”
 - (c)(6) Significantly affect – **deleted**
- No changes to January 2023 Rule Exclusions

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Background: Preamble to the Conforming Rule

- The preamble notes that the Court in *Sackett* “conclude[d] that the *Rapanos* plurality was correct.”
- 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.

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Amended 2023 Rule: Framework

Categories of Jurisdictional Waters

(a)(1)

- (i) Traditional Navigable Waters
- (ii) Territorial Seas
- (iii) Interstate Waters

(a)(2) Impoundments of Jurisdictional Waters

(a)(3) Tributaries

(a)(4) Adjacent Wetlands

(a)(5) Intrastate lakes and ponds that do not fall within (a)(1) – (a)(4)



***NOTE:** For efficiency, this slide's list of the categories of jurisdictional waters are shorthand for the jurisdictional categories in the regulations. See 33 CFR 328.3(a) and 40 CFR 120.2(a).

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Amended 2023 Rule: Framework

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 reflection or swimming pools or other small ornamental bodies of water

(b)(7) Certain waterfilled depressions

(b)(8) Swales and erosional features

(b)(1) – (b)(2):
Pre-2015 exclusions, modified
in the regulations

(b)(3) – (b)(8):
Pre-2015 “generally non-
jurisdictional features,” added
to the regulations as
exclusions

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Amended 2023 Rule: Framework

Definitions

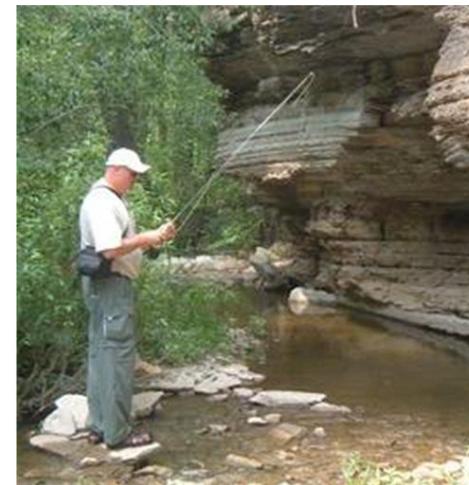
(c)(1) Wetlands

(c)(2) Adjacent

(c)(3) High tide line

(c)(4) Ordinary high water mark

(c)(5) Tidal waters



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Amended 2023 Rule: Joint Coordination Memorandum

- As is typical after a rule is promulgated, the agencies have entered into an agreement via a joint agency coordination memorandum to ensure the consistency and thoroughness of the agencies' implementation of this rule. [Coordination Memorandum \(September 27, 2023\)](#) EPA and Corps field staff will coordinate on certain draft approved jurisdictional determinations and the agencies will follow a process for elevating a subset of these determinations to headquarters for review as necessary.
- “Because the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard and the 2023 rule preamble discussed the *Rapanos* plurality standard, **the implementation guidance and tools in the 2023 rule preamble that address the regulatory text that was not amended by the conforming rule, including the preamble relevant to the *Rapanos* plurality standard incorporated in paragraphs (a)(3), (4), and (5) of the 2023 rule, as amended, generally remain relevant to implementing the 2023 rule, as amended.**”
- “Approved jurisdictional determinations (JDs) are case-specific determinations based on the record and factual questions or *Sackett* concerns may be raised in the context of a particular approved JD.”

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Amended 2023 Rule: (a)(1) Waters – Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

- **Traditional Navigable Waters**
 - Waters which are 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.
 - EPA and Army will continue to use the legal memorandum **Waters That Qualify as “Traditional Navigable Waters” Under Section (a)(1) of the Agencies’ Regulations** (formerly known as Appendix D) to provide guidance for identifying traditional navigable waters.



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Amended 2023 Rule: (a)(1) Waters – Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

- **The Territorial Seas**
 - Defined in section 502(8) of the Clean Water Act as “the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.”



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Amended 2023 Rule: (a)(1) Waters – Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

- **Interstate Waters**
 - “Waters of the United States” include interstate waters.
 - The conforming rule revised the January 2023 rule to remove “interstate wetlands” from the provision.
 - Lakes and ponds crossing state boundaries are jurisdictional as interstate waters in their entirety.
 - For rivers and streams, interstate waters include the portion of the river or stream that is of the same stream order as the point that crosses or serves as a state line.



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Amended 2023 Rule: (a)(2) Impoundments

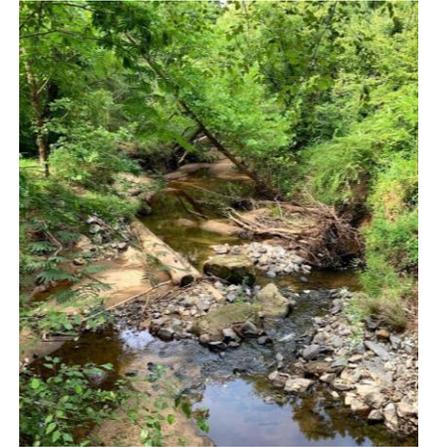
- “Waters of the United States” include impoundments of waters that otherwise meet the definition of “waters of the United States.”
- The agencies consider paragraph (a)(2) impoundments to include:
 - (1) Impoundments created by impounding one of the “waters of United States” that was jurisdictional under the Amended 2023 Rule’s definition at the time the impoundment was created, and
 - (2) Impoundments of waters that at the time of assessment meet the definition of “waters of the United States” under paragraph (a)(1), (a)(3), or (a)(4) of the Amended 2023 Rule, regardless of the water’s jurisdictional status at the time the impoundment was created.



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Amended 2023 Rule: (a)(3) Tributaries

- Tributaries include natural, man-altered, or man-made water bodies that flow directly or indirectly into (a)(1) waters or (a)(2) impoundments.
 - Tributaries can include rivers, streams, lakes, ponds, and impoundments.
 - Tributaries can also include ditches and canals.
- Jurisdictional tributaries must meet the relatively permanent standard.

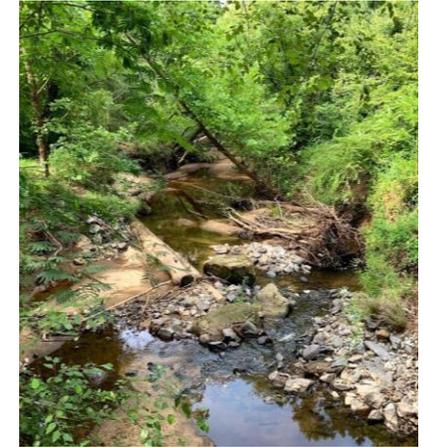


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Amended 2023 Rule: (a)(3) Tributaries

Relatively Permanent Standard

- Relatively permanent waters include tributaries that have flowing or standing water year-round or continuously during certain times of year.
- Relatively permanent waters do not include tributaries with flowing or standing water for only a short duration in direct response to precipitation.



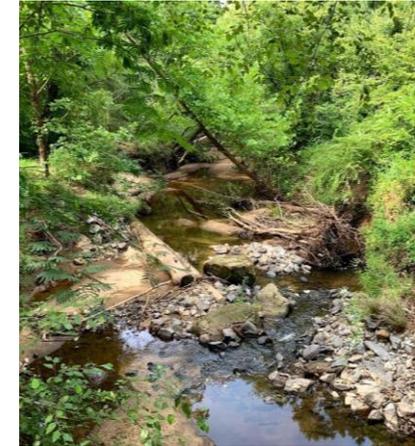
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Amended 2023 Rule: (a)(3) Tributaries

Relatively Permanent Standard – Duration and Timing of Flow

Relatively permanent waters include tributaries that have flowing or standing water year-round or continuously during certain times of year.

- “Certain times of the year” is intended to include extended periods of standing or continuously flowing water occurring in the same geographic feature year after year, except in times of drought.
- Relatively permanent flow may occur seasonally, but the phrase is also intended to encompass tributaries in which extended periods of standing or continuously flowing water are not linked to naturally recurring annual or seasonal cycles.



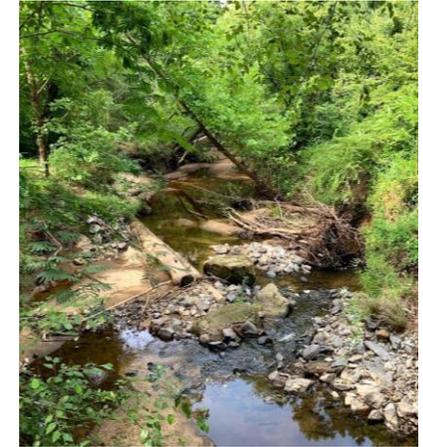
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Amended 2023 Rule: (a)(3) Tributaries

Relatively Permanent Standard – Duration and Timing of Flow

Relatively permanent waters do not include tributaries with flowing or standing water for only a short duration in direct response to precipitation.

- “Direct response to precipitation” is intended to distinguish between episodic periods of flow associated with discrete precipitation events versus continuous flow for extended periods of time.
- No minimum flow duration has been established because flow duration varies extensively by region.



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Amended 2023 Rule: (a)(4) Adjacent Wetlands

- **Wetlands** means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
- **Adjacent** has been revised by the conforming rule to mean having a continuous surface connection.
- **Jurisdictional adjacent wetlands** include:
 - Wetlands that are adjacent to an (a)(1) water, relatively permanent jurisdictional impoundment, or relatively permanent tributary.



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Amended 2023 Rule: (a)(4) Adjacent Wetlands

Continuous Surface Connection

- A **continuous surface connection** means the wetlands either physically abut or touch the paragraph (a)(1) or relatively permanent water, or are connected to the paragraph (a)(1) or relatively permanent water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert.
- Note that *Sackett* is clear that “a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA.”



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Amended 2023 Rule: (a)(5) Waters: lakes and ponds not identified in (a)(1) – (a)(4)

- Jurisdictional (a)(5) waters include intrastate lakes and ponds not identified in the other jurisdictional categories, that meet the relatively permanent standard.
- The conforming rule revised the January 2023 rule to remove “streams” and “wetlands” from the (a)(5) provision.

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Amended 2023 Rule: (a)(5) Waters: lakes and ponds not identified in (a)(1) – (a)(4)

Relatively Permanent Standard

- Lakes and ponds assessed under paragraph (a)(5) meet the relatively permanent standard if they are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to a paragraph (a)(1) water or tributary that is relatively permanent.
- The agencies will assess lakes and ponds under paragraph (a)(5) to determine if they are **relatively permanent** using a similar approach to the one described for tributaries.
- The agencies will assess a **continuous surface connection** between lakes and ponds assessed under paragraph (a)(5) and a paragraph (a)(1) water or a tributary that is relatively permanent using the approach described for wetlands.

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Amended 2023 Rule: Exclusions

- Excluded waters or features are not jurisdictional as “waters of the United States.”
- Exclusions do not apply to paragraph (a)(1) waters.
- The regulations include the pre-2015 regulatory exclusions:
 - Waste treatment exclusion, prior converted cropland exclusion
- The regulations contain exclusions for features that were “generally non-jurisdictional” under the pre-2015 regulatory regime:
 - Certain ditches, certain artificially irrigated areas, certain artificial lakes and ponds, certain artificial reflecting and swimming pools, certain waterfilled depressions, certain swales and erosional features

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Amended 2023 Rule: (b)(1) Exclusion: Waste Treatment Systems

- The regulations exclude waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.
- The 2023 rule preamble provides clarification on implementation:
 - Excluded waste treatment systems do not sever upstream jurisdiction.
 - The exclusion is generally available only to the permittee using the system for the treatment function for which such system was designed.

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Amended 2023 Rule: (b)(2) Exclusion: Prior Converted Cropland

- The regulatory exclusion for prior converted cropland only covers wetlands.
- Wetlands can be covered under the prior converted cropland exclusion if they meet USDA's longstanding definition of prior converted cropland.
- Prior converted cropland loses its exclusion status if there is a “change in use” – meaning the area is no longer available for the production of an agricultural commodity.

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Amended 2023 Rule: (b)(3) – (b)(8) Exclusions

- The regulations specify that features considered “generally non-jurisdictional” in the preamble to the pre-2015 regulations and in the pre-2015 guidance are excluded.
 - 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 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 or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States; and
 - Swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow.

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Pre-2015 Regulatory Regime: Terminology

The “**pre-2015 regulatory regime**” refers to the agencies’ pre-2015 definition of “waters of the United States,” implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience.

<https://www.epa.gov/wotus/pre-2015-regulatory-regime>

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Pre-2015 Regulatory Regime: Framework

Categories of Jurisdictional Waters*

- (a)(1) Traditional Navigable Waters
- (a)(2) Interstate Waters
- (a)(3) Other Waters
- (a)(4) Impoundments
- (a)(5) Tributaries
- (a)(6) The Territorial Seas
- (a)(7) Adjacent Wetlands



Categories of Non-Jurisdictional Waters*

Waste treatment systems and prior converted cropland

***NOTE:** For efficiency, this slide's list of the categories of jurisdictional and non-jurisdictional waters are shorthand for the categories in the regulations. See, e.g., 33 CFR 328.3 (2014) and 40 CFR 230.3(s) (2014).

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Pre-2015 Regulatory Regime: Joint Coordination Memo

- “Because the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard, and the agencies’ pre-2015 regulatory regime discussed the *Rapanos* plurality standard, **the agencies will implement the pre-2015 regulations generally consistent with the pre-2015 regulatory regime’s approach to the plurality standard, including relevant case law and longstanding practice, as informed by applicable guidance, training, and experience.**”
- “Under the pre-2015 regulatory regime, consistent with *Sackett*, the agencies:
 - will not assert jurisdiction based on the significant nexus standard,
 - will not assert jurisdiction over interstate wetlands solely because they are interstate,
 - will interpret “adjacent” to mean “having a continuous surface connection,” and
 - will limit the scope of the (a)(3) provision to only relatively permanent lakes and ponds that do not meet one of the other jurisdictional categories.”

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Pre-2015 Regulatory Regime: Joint Coordination Memo

- “Approved jurisdictional determinations (JDs) are case-specific determinations based on the record, and factual questions or *Sackett* concerns may be raised in the context of a particular approved JD.”
 - “With respect to final determinations of the geographic jurisdictional scope of “waters of the United States” for purposes of Section 404 that are not subject to this memorandum, Corps districts may choose to coordinate with EPA regions on draft approved JDs on a case-by-case basis and either the Corps districts or EPA regions may seek headquarters-level review or guidance on draft approved JDs at any time.”

https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-pre-2015-regulatory-regime_508c.pdf

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Pre-2015 Regulatory Regime:

(a)(1) – Traditional Navigable Waters

- Waters which are 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.
- EPA and Army will continue to use the legal memorandum **Waters That Qualify as “Traditional Navigable Waters” Under Section (a)(1) of the Agencies’ Regulations** (formerly known as Appendix D) to provide guidance for identifying traditional navigable waters.



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Pre-2015 Regulatory Regime: (a)(2) – Interstate Waters

- “Waters of the United States” include interstate waters.
- These are waters that cross or act as State boundaries.
- Under the pre-2015 regulatory regime, consistent with *Sackett*, the agencies will not assert jurisdiction over interstate wetlands solely because they are interstate.



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Pre-2015 Regulatory Regime:

(a)(3) – Other Waters

Paragraph (a)(3) of the pre-2015 regulations:

- All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
 - (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
 - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;”

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Pre-2015 Regulatory Regime:

(a)(3) – Other Waters

- Under the pre-2015 regulatory regime, consistent with *Sackett*, the agencies will limit the scope of the (a)(3) provision to assessing only relatively permanent lakes and ponds that do not meet one of the other jurisdictional categories.
- The agencies have not asserted jurisdiction over any (a)(3) other waters under the pre-2015 regulatory regime since the *SWANCC* decision was issued in 2001.

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Pre-2015 Regulatory Regime:

(a)(4) – Impoundments

- “Waters of the United States” include impoundments of waters otherwise identified as “waters of the United States.”
- Under the pre-2015 regulatory regime:
 - Impoundment of “waters of the United States” as a general matter does not affect the water’s jurisdictional status.
 - Documentation should 1) demonstrate that the impoundment was created from “waters of the United States,” 2) demonstrate that the water meets the criteria for another jurisdictional category, or 3) assess the impoundment under paragraph (a)(3).

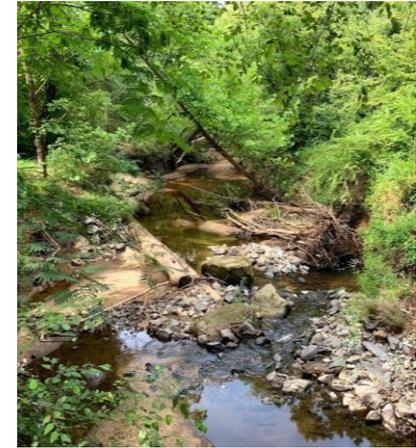


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Pre-2015 Regulatory Regime:

(a)(5) – Tributaries

- The regulatory text of this category includes tributaries of waters identified in paragraphs (a)(1) through (a)(4).
 - Under the pre-2015 regulatory regime, a tributary includes natural, man-altered, or man-made water bodies that flow directly or indirectly into a traditional navigable water (TNW).
 - Tributaries also include such water bodies that flow directly or indirectly into an interstate water, even when there is no connection to a TNW.
- Tributaries can include rivers, streams, lakes, ponds, and impoundments.
- Tributaries can also include ditches and canals.
- Jurisdictional tributaries must be relatively permanent.



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Pre-2015 Regulatory Regime: (a)(5) – Tributaries

Relatively Permanent

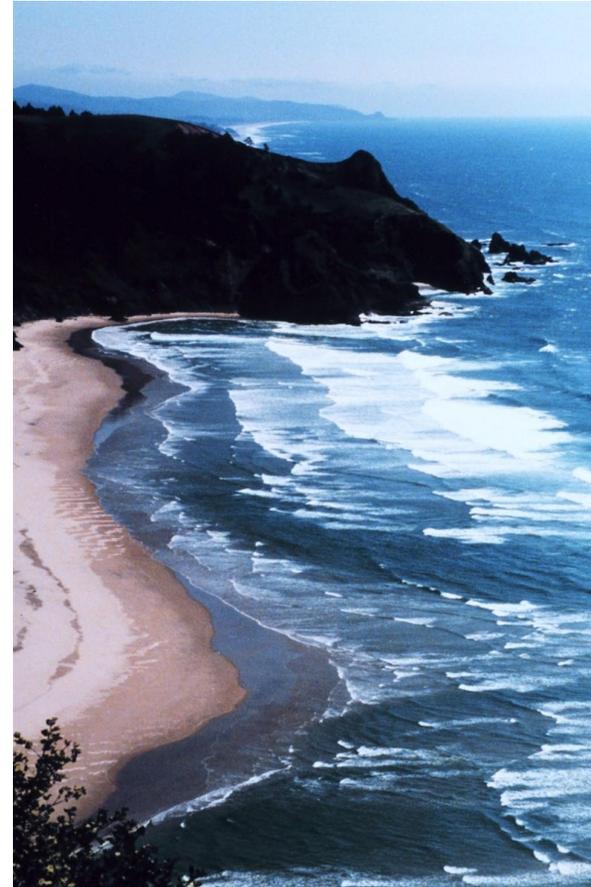
- Relatively permanent waters include tributaries that typically have flowing or standing water year-round or continuously at least seasonally (e.g., typically three months).
 - The duration of seasonal flowing or standing water may vary regionally, but the tributary must have predictable flowing or standing water seasonally.
- Non-relatively permanent tributaries are those that have flowing or standing water only in response to precipitation or that do not have continuously flowing or standing water at least seasonally.



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Pre-2015 Regulatory Regime: (a)(6) – the Territorial Seas

- Defined in section 502(8) of the Clean Water Act as “the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.”



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Pre-2015 Regulatory Regime:

(a)(7) Adjacent Wetlands

- **Wetlands** means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
- Under the pre-2015 regulatory regime, consistent with *Sackett*, **adjacent** will be interpreted to mean “having a continuous surface connection.”
- Jurisdictional adjacent wetlands include:
 - Wetlands that have a continuous surface connection to a traditional navigable water, interstate water, the territorial seas, or a relatively permanent tributary or impoundment.



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Pre-2015 Regulatory Regime:

(a)(7) Adjacent Wetlands

Continuous Surface Connection

- Wetlands have a continuous surface connection when they physically abut or touch a jurisdictional water.
- Abutting wetlands are those that “touch” a jurisdictional water (i.e., they are not separated by uplands, a berm, dike, or similar barrier from the OHWM of the water to which they are adjacent).
- Wetlands also have a continuous surface connection when they are connected to a jurisdictional water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert (per pre-2015 case law, see *United States v. Cundiff* (2009), and prior EPA practice).
- Note that *Sackett* is clear that “a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA.”



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Pre-2015 Regulatory Regime: Exclusions and Generally Non-Jurisdictional Features

- Regulatory exclusions include:
 - Waste treatment exclusion, prior converted cropland exclusion
- Features that are generally not jurisdictional per the 1986 preamble language and the 2008 *Rapanos* guidance include:
 - Certain ditches, certain artificially irrigated areas, certain artificial lakes and ponds, certain artificial reflecting and swimming pools, certain waterfilled depressions, certain swales and erosional features

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Pre-2015 Regulatory Regime: Exclusion: Waste Treatment Systems

- The regulations exclude waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.
- All waters that are upstream and downstream of the waste treatment system that were jurisdictional prior to the authorized activities and qualify as jurisdictional WOTUS under the pre-2015 regulatory regime, are still WOTUS and subject to the CWA.

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Pre-2015 Regulatory Regime: Exclusion: Prior Converted Cropland

- The regulatory exclusion for prior converted cropland only covers wetlands.
- Wetlands can be covered under the prior converted cropland exclusion if they meet USDA's longstanding definition of prior converted cropland.

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Pre-2015 Regulatory Regime: Exclusion: Prior Converted Cropland

- The Corps and EPA will continue to generally rely on valid prior-converted cropland (PCC) designations made by USDA-NRCS for making determinations of the applicability of the PCC exclusion, provided that the PCC has not been abandoned. However, the final authority regarding Clean Water Act (CWA) jurisdiction remains with EPA.
- Preamble to the 1993 WOTUS Regulations (58 FR, 45034): *“PC cropland which now meets wetland criteria is considered to be abandoned unless: For once in every five years the area has been used for the production of an agricultural commodity, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes or pasture production.”*

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Pre-2015 Regulatory Regime: Generally Non-Jurisdictional Features

- Waters that are generally non-jurisdictional per the preamble of the 1986 regulations and the 2008 *Rapanos* Guidance:
 - Artificially irrigated areas which would revert to upland if the irrigation ceased;
 - Artificial lakes or ponds created by excavating and/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 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 or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States;
 - Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water; and
 - Swales or erosional features (*e.g.*, gullies, small washes characterized by low volume, infrequent, or short duration flow)

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Tools and Resources

Examples of tools to determine whether tributaries or lakes and ponds are relatively permanent include:

- Direct observation
- Regional field observations
- [USACE Antecedent Precipitation Tool \(APT\)](#)
- [USGS Topographic Maps](#)
- [Regionalized streamflow duration assessment methods \(SDAMs\)](#)
- Aerial and satellite imagery
- [USGS National Hydrography Dataset \(NHD\)](#)
- Stream Gage data, including from [USGS](#)
- Regional regression analysis
- Hydrologic modeling tools such as [HEC-HMS](#)

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Tools and Resources

Examples of tools to determine whether tributaries or lakes and ponds are relatively permanent include:

- Elevation data and models, including [LIDAR](#) (for example, from the [USGS](#))
- State, tribal, and local data and maps
- [USGS StreamStats](#)
- [Probability of Streamflow Permanence \(PROSPER\) by the USGS](#) (including for the Pacific Northwest)
- NRCS hydrologic tools and [soil maps](#)
- NOAA national snow analyses maps
- NRCS snow sources
- [USEPA WATERS GeoViewer](#) and [How's My Waterway](#)
- [USGS National Map Viewer](#)

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Tools and Resources

Examples of tools to determine whether an adjacent wetland has a continuous surface connection to a jurisdictional water include:

- Direct observation
- Regional field observations
- [USGS Topographic Maps](#)
- Aerial and satellite imagery
- [USGS NHD](#)
- [USFWS National Wetlands Inventory \(NWI\)](#)
- Elevation data such as [LIDAR](#)-based topographic models
- State, Tribal, and local data and maps
- NRCS hydrologic tools and [soil maps](#)
- [FEMA flood zone](#) or other floodplain maps

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Additional Resources: Implementation Memoranda

- EPA and Army have prepared new **Coordination Memos** to ensure consistency of jurisdictional determinations under the 2023 Rule, as amended, and the Pre-2015 Regulatory Regime.
- EPA, Army, and USDA will continue to implement the 2022 **Agricultural Memo** that clarifies the agencies' roles and programs, and in particular clarifies the prior converted cropland exclusion.
- EPA and Army will continue to use the legal memorandum **Waters That Qualify as “Traditional Navigable Waters” Under Section (a)(1) of the Agencies’ Regulations** (formerly known as Appendix D) to provide guidance for identifying traditional navigable waters.
- EPA and Army are also retaining the **2020 Ditch Exemption Memo** clarifying implementation of the ditch exemption under Clean Water Act section 404(f).

<https://www.epa.gov/wotus>

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Questions

<https://www.epa.gov/wotus>

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