

# **Updates on the Definition of “Waters of the United States”**

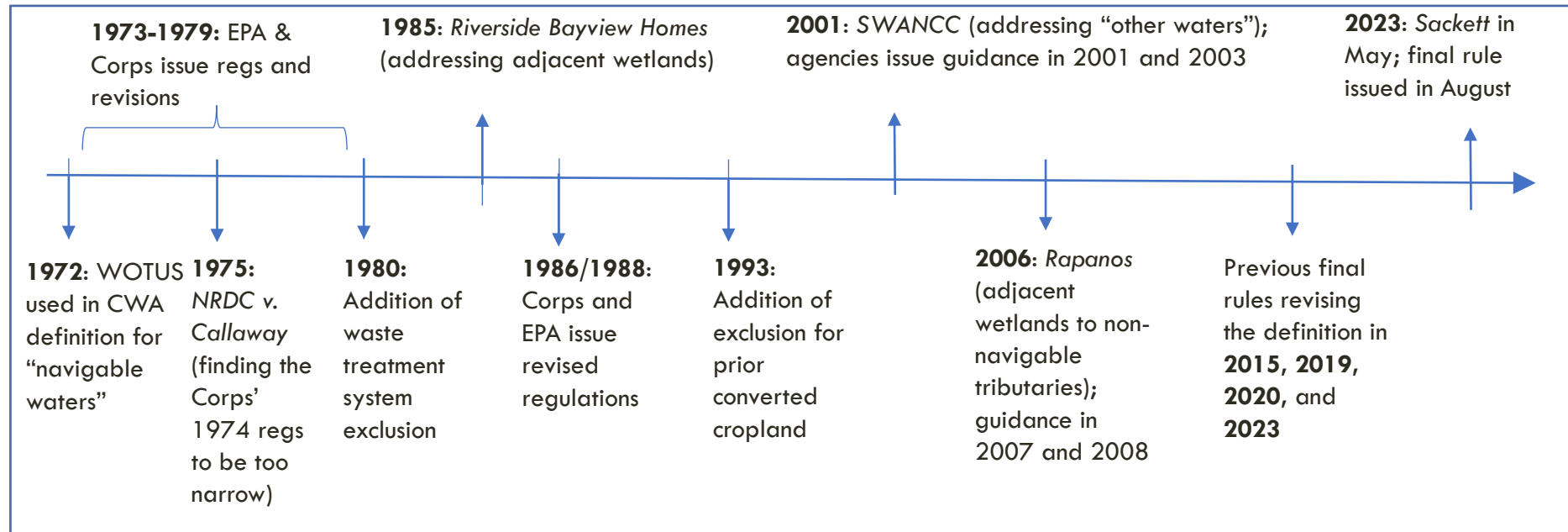
**R5 RRT Meeting  
October 18, 2023**

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

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

# Background: “Waters of the United States” Over Time

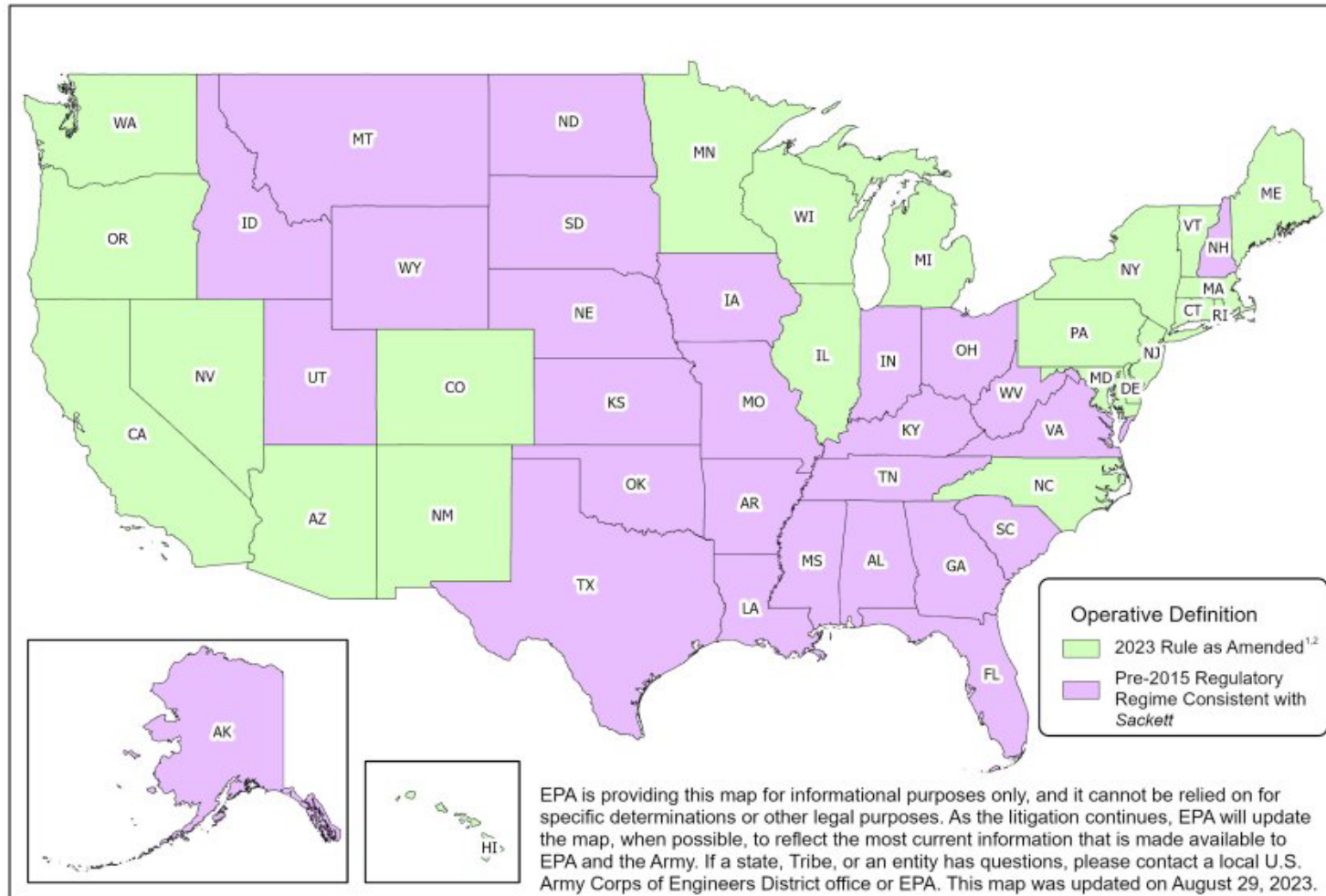
The definition of “waters of the United States” has been a subject of dispute and addressed in several major Supreme Court cases.



# Background: Recent Events

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

# Background: Operative Definition of “Waters of the United States”



<sup>1</sup>Also operative in the U.S. territories and the District of Columbia

<sup>2</sup>The 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).

# Background: *Sackett* Decision

- While the 2023 Rule was not directly before the Court, the Court considered the jurisdictional standards set forth in the rule.
- The Court concluded that the significant nexus standard was inconsistent with the Court's interpretation of the Clean Water Act (CWA).
- The Court concluded that the *Rapanos* plurality was correct: the CWA's use of "waters" encompasses only those **relatively permanent, standing or continuously flowing bodies of water** forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes.
- The Court also agreed with the *Rapanos* plurality that wetlands are "waters of the United States" when the **wetlands have a continuous surface connection to bodies that are "waters of the United States"** in their own right, so that there is no clear demarcation between "waters" and wetlands.

# Conforming Rule: Final Rule Amending the January 2023 Rule

- The agencies have determined that there is “good cause” under section 553(b)(B) of the Administrative Procedure Act to issue a final rule without prior proposal and opportunity for comment because such notice and opportunity for comment is unnecessary.
- Certain provisions of the 2023 Rule are invalid under the Supreme Court’s interpretation of the Clean Water Act in the *Sackett* decision.
- Providing advance public notice and seeking comment is unnecessary because the sole purpose of this rule is to amend these specific provisions of the 2023 Rule to conform with *Sackett*, and such conforming amendments do not involve the exercise of the agencies’ discretion.

# Preamble to the Conforming Rule

- I. Why are the agencies issuing this final rule?
- II. Which provisions are amended?
- III. Severability
- IV. Statutory and Executive Orders reviews



# Preamble to the Conforming Rule

- The agencies will continue to interpret the definition of “waters of the United States” consistent with the *Sackett* decision.
- It is both reasonable and appropriate for the agencies to promulgate this rule in response to a significant decision of the Supreme Court and to provide administrative guidance to address other issues that may arise outside of this limited rule. The agencies have a wide range of approaches to address such issues, including:
  - approved jurisdictional determinations and Clean Water Act permits;
  - guidance;
  - notice and comment rulemaking; and
  - agency forms and training materials.
- The agencies also intend to hold stakeholder meetings to ensure the public has an opportunity to provide the agencies with input on other issues to be addressed.

# Targeted Changes to January 2023 Rule Jurisdictional Waters

## Categories of Jurisdictional Waters

(a)(1)

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

(a)(2) Impoundments of Jurisdictional Waters

(a)(3) Tributaries – **revised**

(a)(4) Adjacent Wetlands – **revised**

(a)(5) Additional Waters – **revised**

# No Changes to January 2023 Rule Exclusions

## Exclusions

(b)(1) Waste treatment systems

(b)(2) Prior converted cropland

(b)(3) Certain ditches

(b)(4) Artificially irrigated areas that would revert to dry land if irrigation ceased

(b)(5) Certain artificial lakes and ponds

(b)(6) Artificial reflecting or swimming pools or other small ornamental bodies of water

(b)(7) Certain waterfilled depressions

(b)(8) Swales and erosional features

# Targeted Changes to January 2023 Rule Definitions

## Definitions

(c)(1) Wetlands

(c)(2) Adjacent – **revised**

(c)(3) High tide line

(c)(4) Ordinary high water mark

(c)(5) Tidal waters

(c)(6) Significantly affect – **deleted**

# Status Update: Corps Approved Jurisdictional Determinations (AJDs)

- After the *Sackett* decision was issued, the Corps paused issuance of all AJDs while the agencies determined next steps.
- After a short time, the Corps began issuing some types of AJDs:
  - Where no water resources are involved (dry land AJDs).
  - Where features meet the terms of the exclusions under the 2023 Rule or pre-2015 regulatory regime, where applicable.
- The Corps resumed issuing all types of AJDs on the effective date of the new rule.

# Additional Information

- See <https://www.epa.gov/wotus> for additional information.
- Please contact [wotus-outreach@epa.gov](mailto:wotus-outreach@epa.gov) with any questions.