



2022 Revised Definition of Waters of the United States

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On December 30, 2022, EPA and the Army Corps of Engineers (“the agencies”) released their [final rule revising the definition of “waters of the United States” \(WOTUS\)](#). This final rule builds on the rule currently in effect and modifies some elements to reflect the agencies’ interpretations of the Clean Water Act (CWA), Supreme Court case law, and scientific and technical recommendations.¹ The agencies have jurisdiction under the CWA to regulate “navigable waters,” which the statute defines as “the waters of the United States, including the territorial seas.”² Though states and tribes may set more stringent standards for pollutants than the federal government’s, the definition of WOTUS is used to determine which waters receive CWA protection.³

This final rule comes as [the Supreme Court is considering *Sackett v. EPA*](#), which will likely clarify how EPA should determine if a wetland should be protected under the CWA.⁴ While it will be important to assess the implications of the *Sackett* decision, the agencies final rule allows for either of the two tests the Court is considering—Justice Kennedy’s significant nexus test or Justice Scalia’s relatively permanent standard.

In this paper, I examine the agencies’ legal basis for the new definition of WOTUS in the final rule. We will update our Regulatory Tracker page, [Defining Waters of the United States](#), with the Supreme Court decision.

Background

Both the Obama and Trump administrations promulgated revisions to WOTUS, including clarification of which wetlands are covered under the CWA, but neither rule is now in effect. In 2015, the Obama administration finalized its Clean Water Rule, but the Sixth Circuit stayed enforcement of the rule shortly after it took effect.⁵ The Trump administration later repealed the Obama administration’s rule and issued its own rule, the Navigable Waters Protection Rule.⁶ In August 2021, the District Court of Arizona vacated the Trump administration’s rule, which put the 1986 rule back in place.⁷ President Biden issued Executive Order 13990 in January 2021,⁸ directing the agencies to release a proposed definition of WOTUS, which they did in November 2021. This final rule incorporates stakeholder input on that proposal.

The agencies explain that in 2006, the Supreme Court’s *Rapanos v. United States* decision considered the agencies’ authority to define WOTUS under the CWA.⁹ Writing for four Justices, Justice Scalia’s plurality

¹ Revised Definition of “Waters of the United States,” 88 Fed. Reg. 3004 (Jan. 18, 2023) (to be codified at 33 C.F.R. § 328; 40 C.F.R. § 120), <https://www.federalregister.gov/documents/2023/01/18/2022-28595/revised-definition-of-waters-of-the-united-states>.

² 33 U.S.C. § 1362(7).

³ See 88 Fed. Reg. at 3009.

⁴ *Sackett v. EPA*, No. 19-35469. For more background on *Sackett*, see Anna Todd ‘23, *Sackett v. EPA and the Definition of Waters of the United States*, HARV. ENV’T & ENERGY L. P. (June 24, 2022) <https://eelp.law.harvard.edu/2022/06/sackett-v-epa-and-the-definition-of-waters-of-the-united-states/>.

⁵ Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37053 (June 29, 2015); Order, *Ohio v. U.S. Army Corps of Eng’rs*, Nos. 15-3799/3822/3853/3887 (6th Cir. Oct. 9, 2015).

⁶ Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56626 (Oct. 22, 2019). The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22250 (Apr. 21, 2020).

⁷ *Pasqua Yaqui Tribe v. United States Env’t Prot. Agency*, 557 F. Supp. 3d 949 (D. Ariz. 2021), *appeal dismissed sub nom.* *Pasqua Yaqui Tribe v. U.S. Env’t Prot. Agency*, No. 21-16791, 2022 WL 1259088 (9th Cir. Feb. 3, 2022).

⁸ Exec. Order No. 13,990, 86 Fed. Reg. 7037, 7041 (Jan. 25, 2021).

⁹ 88 Fed. Reg. at 3013, *citing* 547 U.S. 715 (2006).



opinion created a two-step test to determine which waters are covered under the CWA. This test asks: (1) whether “the adjacent channel contains a [WOTUS] (i.e., a relatively permanent body of water connected to traditional interstate navigable waters);” and (2) whether “the wetland has a continuous surface connection with that water.”¹⁰ This test—often referred to as the relatively permanent test—differed from Justice Kennedy’s significant nexus test, which concluded that there needs to be a “significant nexus” between the water or wetland and the traditionally navigable waters.¹¹

The agencies also explain in the final rule that Chief Justice Roberts’ concurring opinion stated that agencies “are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer” and have “plenty of room to operate in developing some notion of an outer bound to the reach of their authority.”¹² The Chief Justice also noted that the agencies could have avoided the Court’s disagreement about the proper standard if they had more clearly defined their authority to regulate wetlands.¹³

Litigation over which test should determine whether wetlands are WOTUS has continued, and the Supreme Court heard oral arguments on this issue on October 3, 2022 in *Sackett*.¹⁴ The agencies explain the two *Rapanos* tests have led to confusion in the lower court about which test should be used, with some courts adopting only Justice Kennedy’s significant nexus test, and other courts adopting both tests.¹⁵ While the Court’s *Sackett* decision will likely address which test applies, the agencies’ final rule does not discuss the questions before the Court. Rather, they frame the final rule as “durable” in that it is consistent with the agencies’ regulations since 1986 because their final rule is written to be consistent with the “law, science, and agency expertise.”¹⁶

In the final rule’s one mention of *Sackett*, the agencies note that the case is “not a direct challenge to any of the rules defining ‘waters of the United States,’ but instead presents the question of the Act’s jurisdictional standard for adjacent wetlands in the context of a challenge to an EPA administrative compliance order for the unauthorized discharge of a pollutant into ‘waters of the United States.’”¹⁷ The agencies explain that the lower courts in *Sackett* had found that under Justice Kennedy’s test, wetlands adjacent to tributaries “together with other similarly situated adjacent wetlands” have a significant nexus a traditional navigable water.¹⁸

¹⁰ *Rapanos*, 547 U.S. at 742.

¹¹ *Rapanos*, 547 U.S. at 779.

¹² 88 Fed. Reg. at 3013, quoting *Rapanos*, 547 U.S. at 38.

¹³ *Id.*

¹⁴ Oral Argument, *Sackett v. EPA*, No. 19-35469, https://www.supremecourt.gov/oral_arguments/audio/2022/21-454.

¹⁵ 88 Fed. Reg. at 3014, comparing *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999–1000 (9th Cir. 2007) and others with *United States v. Johnson*, 467 F.3d 56, 60 (1st Cir. 2006) and others.

¹⁶ 88 Fed. Reg. at 3020. Additionally, the rule states that all parts of the definition of jurisdictional waters are severable. 88 Fed. Reg. at 3135. “For example, if a court were to determine that a wetland cannot be treated as adjacent if it is separated from a jurisdictional water by a road or other barrier, the agencies intend that other categories of wetlands within the rule’s definition of ‘adjacent’ would remain subject to jurisdiction.” 88 Fed. Reg. at 3135.

¹⁷ 88 Fed. Reg. at 3016, n.35.

¹⁸ *Id.*



The Revised Definition of Waters of the United States

The final rule narrows certain definitions from the 1986 rule, broadens others, and clarifies certain aspects.¹⁹ In the table below, I compare the 1986 regulatory language to the final rule’s language and explain the differences.

Comparison of the 1986 and 2022 Definitions of WOTUS

Category ²⁰	1986 Regulatory Text ²¹	2022 Regulatory Text ²²	Description of Change
Traditional navigable waters, territorial seas, and interstate waters ²³ (§120.2(a)(1))	“All 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;” [traditional navigable waters] “all interstate waters including interstate wetlands;” “the territorial seas;”	No change. ²⁴	No change. ²⁵

¹⁹ 88 Fed. Reg. at 3066.

²⁰ The 2022 rule reorganizes the paragraphs of the WOTUS regulatory text.

²¹ All 1986 provisions from 88 Fed. Reg. at 3012, *citing* 33 C.F.R. § 328.3 (2014).

²² 88 Fed. Reg. at 3142. *Color and italics added to emphasize changes.*

²³ The rule does not redefine traditional navigable waters or territorial seas. 88 Fed. Reg. at 3069, 3072. The agencies interpret interstate waters to mean “‘all rivers, lakes, and other waters that flow across, or form a part of, State boundaries’ based on precursor water protection statutes and practice...Interstate waters thus include waters that cross or form a part of State boundaries with other States and with other countries (Canada and Mexico).” 88 Fed. Reg. at 3072.

²⁴ The 2022 rule consolidates what was previously paragraphs (a)(1), (a)(2), and (a)(6) into paragraph(a)(1) and adds subheadings to organize the new section.

²⁵ 88 Fed. Reg. at 3069. The agencies continue to seek comment on whether interstate waters should include waters that cross a state-tribal boundary. Right now, waters that cross state-tribal boundaries are only jurisdictional if they are jurisdictional under another section of the rule. 88 Fed. Reg. at 3075.



Category ²⁰	1986 Regulatory Text ²¹	2022 Regulatory Text ²²	Description of Change
Impoundments ²⁶ (§120.2(a)(2))	“All impoundments of waters otherwise defined as waters of the United States under this definition”	“ [] Impoundments of waters otherwise defined as waters of the United States under this definition, <i>other than impoundments of waters identified under paragraph (a)(5) of this section;</i> ” ²⁷	Excludes impoundments of some intrastate waters unless they meet either the relatively permanent standard or the significant nexus standard. ²⁸

²⁶ As the agencies describe, “[i]mpoundments are distinguishable from natural lakes and ponds because they are created by discrete structures (often human-built) like dams or levees that typically have the effect of raising the water surface elevation, creating or expanding the area of open water, or both. Impoundments can be natural (like beaver ponds) or artificial (like reservoirs).” 88 Fed. Reg. at 3075.

²⁷ The agencies clarify that the impoundments are WOTUS based on the status of the water “at the time the impoundment was created” or “at the time of assessment.” 88 Fed. Reg. at 3075.

²⁸ 88 Fed. Reg. at 3075-76. Impoundments of these intrastate waters meet the significant nexus or relatively permanent standard based on the implementing criteria for (a)(5) waters outlined at 88 Fed. Reg. at 3102. Additionally, if the impoundment of a paragraph (a)(5) water otherwise qualifies as a traditional navigable water, territorial sea, interstate water, or jurisdictional tributary, it is WOTUS. 88 Fed. Reg. at 3076.



Category ²⁰	1986 Regulatory Text ²¹	2022 Regulatory Text ²²	Description of Change
Tributaries ²⁹ (§120.2(a)(3))	<p>“Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;”</p> <p>This included tributaries of:</p> <ul style="list-style-type: none"> - traditional navigable waters - interstate waters - other waters that affect or could affect interstate or foreign commerce - impoundments that are WOTUS 	<p>“Tributaries of waters identified in <i>paragraph (a)(1) or (2)</i> of this section:</p> <p><i>(i) That are relatively permanent, standing or continuously flowing bodies of water; or</i></p> <p><i>(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section;”³⁰</i></p>	<p>Tributaries must meet either the relatively permanent or the significant nexus standard to be included.³¹ Clarifies that tributaries of the territorial seas are WOTUS, provided they meet one of these standards.³²</p>

²⁹ Like the 1986 rule, the agencies do not provide a definition of tributary, but interpret the term to include “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... [T]o be jurisdictional, the tributary must be part of a tributary system that eventually flows to a traditional navigable water, the territorial seas, or an interstate water.” 88 Fed. Reg. at 3080.

³⁰ To provide further clarity to the significant nexus standard, the agencies also provide a definition for “significantly affect” explaining that a water that significantly affects another will have “a material influence on the chemical, physical, or biological integrity of” the paragraph (a)(1) water.” 88 Fed. Reg. at 3067.

³¹ 88 Fed. Reg. at 3080. Tributaries of impoundments that are WOTUS under (a)(2) are included in this part of the rule. However, tributaries of impoundments of (a)(5) intrastate waters are only WOTUS if the impoundment also meets the relatively permanent or significant nexus standard. 88 Fed. Reg. at 3075.

³² 88 Fed. Reg. at 3080.



Category ²⁰	1986 Regulatory Text ²¹	2022 Regulatory Text ²²	Description of Change
Wetlands ³³ (§120.2(a)(4))	<p>“Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section;”</p> <p>This includes wetlands adjacent to:</p> <ul style="list-style-type: none"> - traditional navigable waters - interstate waters - other waters that affect or could affect interstate or foreign commerce - included impoundments - included tributaries - territorial seas 	<p>“Wetlands adjacent to the following waters []:</p> <p>(i) Waters identified in paragraph (a)(1) of this section; or</p> <p>(ii) <i>Relatively permanent, standing or continuously flowing bodies of water</i> identified in paragraph (a)(2) or (a)(3)(i) of this section <i>and with a continuous surface connection to those waters</i>; or</p> <p>(iii) <i>Waters identified in paragraph (a)(2) or (3) of this section when the wetlands either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section;</i>”</p>	<p>Clarifies that wetlands adjacent to tributaries and most impoundments are WOTUS only if they meet either the relatively permanent or the significant nexus standard.³⁴</p>

³³ The agencies do not redefine “wetland” or “adjacent.” “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.” 88 Fed. Reg. at 3089. “Adjacent means 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.’” 88 Fed. Reg. at 3089.

³⁴ For the wetland to meet the relatively permanent standard under this section, the adjacent tributary or impoundment must meet the relatively permanent standard. For the wetland to meet the significant nexus standard under this section, the wetland itself must meet the significant nexus standard. Only impoundments that are jurisdictional under section (a)(2) follow this rule. However, the rule does not specify under which section the tributary must be jurisdictional, and therefore (a)(3) and (a)(5) tributaries may be “jurisdictional tributaries” for this section. Like in the 1986 rule, tributaries of traditional navigable waters, the territorial seas, and interstate waters are jurisdictional whether or not they meet the relatively permanent standard or significant nexus standard. 88 Fed. Reg. at 3089-90.



Category ²⁰	1986 Regulatory Text ²¹	2022 Regulatory Text ²²	Description of Change
Other waters (§120.2(a)(5))	<p>“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:</p> <p>a. Which are or could be used by interstate or foreign travelers for recreational or other purposes; or</p> <p>b. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or</p> <p>c. Which are used or could be used for industrial purposes by industries in interstate commerce;”</p>	<p>“[] Intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) of this section:</p> <p><i>(i) That are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3)(i) of this section; or</i></p> <p><i>(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section.”</i></p>	<p>Clarifies that intrastate waters that meet either the relatively permanent standard or the significant nexus standard are WOTUS.³⁵</p>

³⁵ 88 Fed. Reg. at 3097. To meet the relatively permanent standard under this section, a water must be relatively permanent and have a continuous surface connection to a traditional navigable water, interstate water, territorial sea, or a relatively permanent tributary. To meet the significant nexus standard under this section, a water must significantly affect the chemical, physical, or biological integrity of a traditional navigable water, the territorial seas, or an interstate water. 88 Fed. Reg. at 3102. The rule shortens and makes exclusive the types of qualifying waters, but these broad categories could capture much of the 1986 list. 88 Fed. Reg. at 3097, 3100.



Category ²⁰	1986 Regulatory Text ²¹	2022 Regulatory Text ²²	Description of Change
<p>Exclusions from WOTUS (§120.2(b))</p>	<p>“Waters of the United States do not include prior converted cropland... Waste treatment systems, including treatment ponds or lagoons...”</p>	<p>“The following are not ‘waters of the United States’ ... (1) Waste treatment systems, including treatment ponds or lagoons...; (2) Prior converted cropland ...; <i>(3) Ditches...excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;</i>³⁶ <i>(4) Artificially irrigated areas that would revert to dry land if the irrigation ceased;</i> <i>(5) Artificial lakes or ponds... which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;</i>³⁷ <i>(6) Artificial reflecting or swimming pools or other small ornamental bodies of water...;</i>³⁸ <i>(7) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land...unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of [WOTUS];</i>³⁹ and (8) Swales and erosional features... characterized by low volume, infrequent, or short duration flow.”</p>	<p>Adds express exemptions for certain ditches; artificial waters; waterfilled depressions created in dry land, and other erosional features meeting certain criteria.⁴⁰</p>



Under this new framework, tributaries, many wetlands, intrastate lakes, intrastate ponds, intrastate streams, and some impoundments must meet either Justice Kennedy’s or Justice Scalia’s tests to be considered WOTUS. Thus, the rule will require waters to be: (i) relatively permanent and have a continuous surface connection to an included waterbody; **or** (ii) significantly affect the biological, physical, or chemical integrity of a traditional navigable water, the territorial seas, or interstate waters. The agencies explain one reason for adopting Justice Kennedy’s significant nexus test is that it fulfills the CWA’s objectives by relying on water quality effects to traditional navigable waters, territorial seas, and interstate waters.⁴¹ The agencies explain that Justice Scalia’s relatively permanent standard is “administratively useful” because it includes waters that will “virtually always significantly affect” traditional navigable waters, territorial seas, and interstate waters.⁴²

The final rule explains how it will implement these tests and other aspects of the rule.⁴³ For example, the agencies describe a wetland as adjacent if it has an “unbroken surface or shallow subsurface connection to a jurisdictional water,” if it is “physically separated from a jurisdictional water by human-made dikes or barriers, or natural landforms,” or if it is reasonably close to jurisdictional water and has “significant effects on water quality and the aquatic ecosystem.”⁴⁴ If any part of a wetland is adjacent, then the entire wetland is adjacent.⁴⁵

What’s Next

A decision in *Sackett* is expected this spring, and since the agencies’ release of the rule, the parties have explained to the Court how this final rule affects ongoing litigation. For example, on December 30, 2022, [the Department of Justice \(DOJ\) notified the Court of the final rule](#) and responded to Justice Kagan’s question from oral argument about which adjacent wetlands the agencies believe are WOTUS under the CWA. The DOJ explained that the executive summary, the section on wetlands, the regulatory definition of adjacent, and the guidance for landowners all respond to the Justice’s question.⁴⁶ In response, [the Sacketts argued the rule misconstrues the legislative history](#) related to the addition of “wetlands adjacent thereto” to the CWA in 1977.⁴⁷

³⁶ Includes roadside ditches. 88 Fed. Reg. at 3142.

³⁷ These artificial lakes are “created by excavating or diking dry land to collect and retain water.” 88 Fed. Reg. at 3142.

³⁸ These artificial pools are “created by excavating or diking dry land to retain water for primarily aesthetic reasons;” 88 Fed. Reg. at 3142.

³⁹ These waterfilled depressions are created “for the purpose of obtaining fill, sand, or gravel” 88 Fed. Reg. at 3142-43.

⁴⁰ 88 Fed. Reg. at 3103. Agency practice excluded these waters from the definition of WOTUS prior to 2015, but this section codifies the exemptions into regulation. The agencies also explained why they have not added other exceptions, such as groundwater, to the list. 88 Fed. Reg. at 3105.

⁴¹ 88 Fed. Reg. at 3034.

⁴² *Id.*

⁴³ See, e.g., 88 Fed. Reg. at 3095 (guidance for application of relatively permanent standard to wetlands); 88 Fed. Reg. at 3096 (guidance for application of significant nexus standard to wetlands).

⁴⁴ See 88 Fed. Reg. at 3103, *quoting* United States v. Riverside Bayview, 474 U.S. 121, 135 n.9 (1985). [C]onsistent with the text of the regulation, the underlying scientific rationale..., and pre-2015 practice,” to make these determinations, the agencies consider whether a wetland directly abuts or is reasonably close to jurisdictional water, whether any physical features separate the wetland and the jurisdictional water, and what kind of physical features or barriers are present. 88 Fed. Reg. at 3093-94.

⁴⁵ 88 Fed. Reg. at 3093.

⁴⁶ See 88 Fed. Reg. at 3004, 3088-90, 3130.

⁴⁷ The letter points to the 88 Fed. Reg. at 3026, 3090.



While stakeholders wait to see the Supreme Court's decision, litigation on the final rule has already begun. Texas filed a complaint in the Southern District of Texas arguing that it exceeds the agencies' statutory authority under the CWA and violates the Administrative Procedure Act and several provisions of the US Constitution.⁴⁸

In the coming months, we will watch for the Sackett opinion and analyze the opinion's effect on this rule and any subsequent actions by the agencies.

[For more information on this rule you can read our Regulatory Tracker page](#), and you can [subscribe to our Tracker Updates monthly email](#) for this and other rules.

⁴⁸ Texas v. EPA, No. 3:23-cv-17 (S.D. Tx.).