

Waters of the United States: *Sackett* and the Post-*Sackett* Landscape

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“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.

SEC. 404 [33 U.S.C. 1344] Permits for Dredged or Fill Material.

(a) The Secretary may issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill material into the *navigable waters* at specified disposal sites.

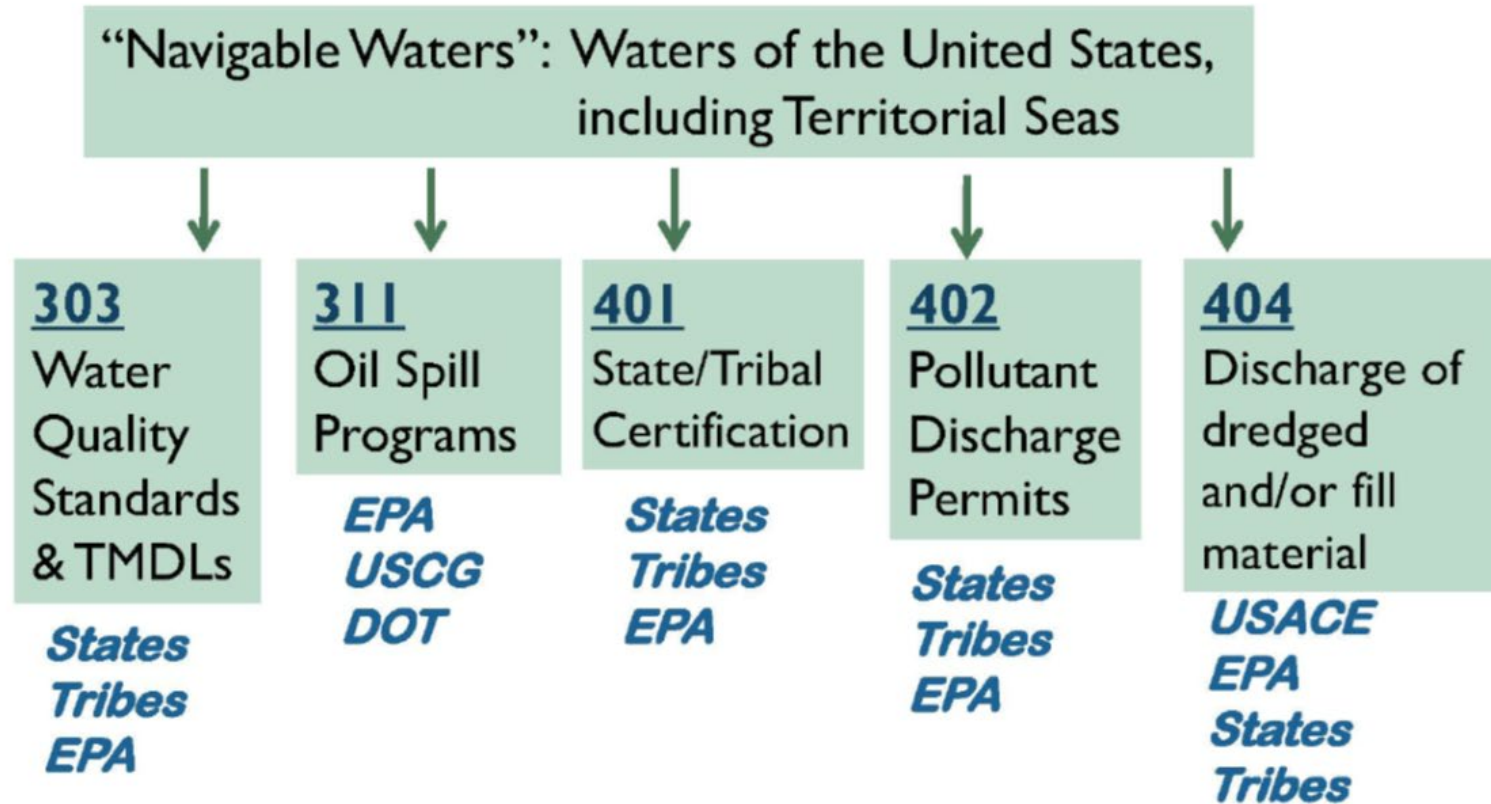
SEC. 502 [33 U.S.C. 1362] General Definitions.

(7) The term "navigable waters" means *the waters of the United States*, including the territorial seas.



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Background: Why “Waters of the United States” Matters



Adjacent Wetlands

404 (g) [A]ny State desiring to administer its own ... permit program for the discharge of dredged or fill material into the navigable waters (*other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement, as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto*) within its jurisdiction may submit to the Administrator a ... complete description of the program it proposes to establish and administer under State law or under an interstate compact.



“Waters of the United States” issues have included:

- non-navigable tributaries to what are obviously navigable rivers
- intermittent streams and tributaries
- isolated water bodies - from lakes to ponds to “prairie potholes”
- wetlands/“adjacent” wetlands
- groundwater
- flood plains*

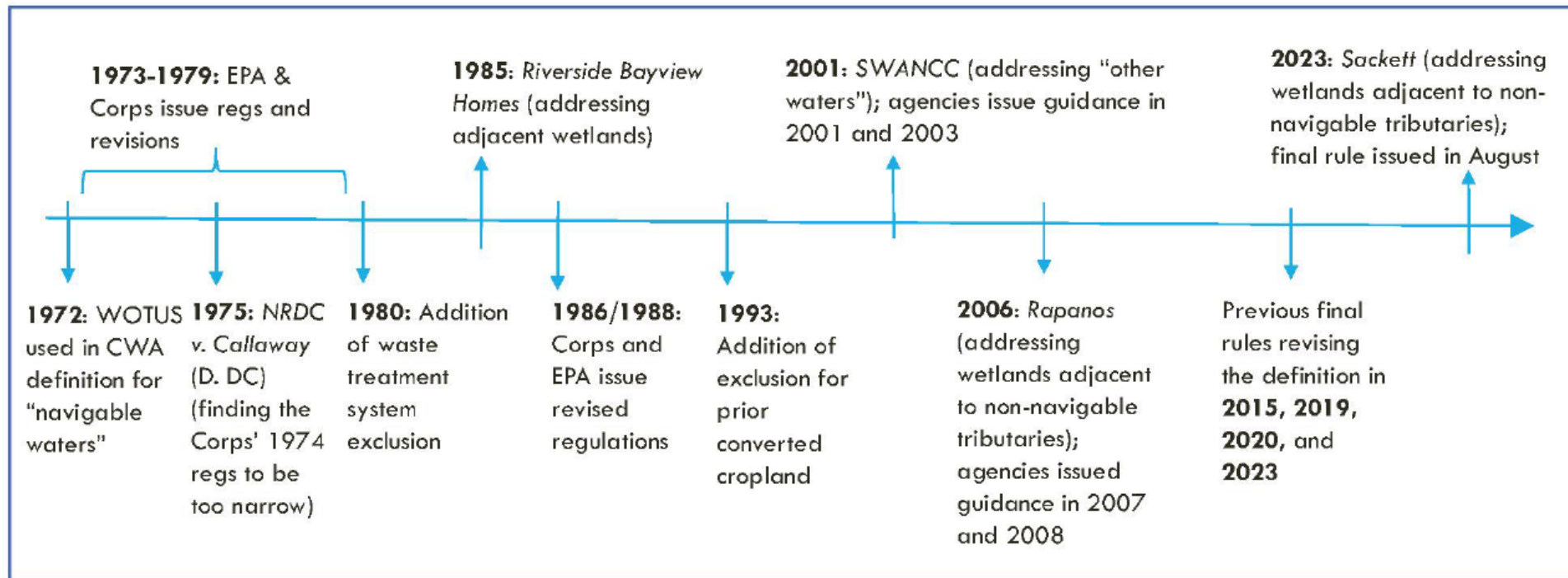


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Background: “Waters of the United States” Over Time

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



An aerial photograph of a wide, winding river flowing through a lush, forested landscape. The river meanders from the upper left towards the lower right, with several smaller tributaries and islands. The surrounding land is covered in dense green trees, and the sky above is filled with soft, white clouds. The overall scene is serene and natural.

Sackett v EPA

United States Supreme Court (May 2023)

Although we have acknowledged that the CWA extends to more than traditional navigable waters, we have refused to read “navigable” out of the statute, holding that it at least shows that Congress was focused on “its traditional jurisdiction over waters that were or had been navigable in fact which could reasonably be so made.” At a minimum, then, the use of “navigable” signals that the definition principally refers to bodies of navigable water like rivers, lakes, and oceans.

The CWA’s use of “waters” encompasses only those *relatively permanent, standing or continuously flowing bodies of water* ‘forming geographic[al] features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes.

An aerial photograph of a large body of water, likely a bay or estuary, with a winding river or channel cutting through it. The water is a light, milky color, and the surrounding land is covered in dense green forest. In the foreground, a road or path curves along the left side. The sky is overcast with grey clouds.

Sackett v EPA

United States Supreme Court (May 2023)

Because the adjacent wetlands ... are “includ[ed]” within “the waters of the United States,” these wetlands must qualify as “waters of the United States” in their own right. In other words, they must be indistinguishably part of a body of water that itself constitutes “waters” under the [Act].

Wetlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby.

An aerial photograph of a wide river winding through a landscape. The river is surrounded by lush green wetlands and forested areas. The sky is overcast with grey clouds. The text is overlaid on the image in a white, serif font.

Sackett v EPA

United States Supreme Court (May 2023)

“[W]aters” may fairly be read to include only those wetlands that are “as a practical matter indistinguishable from waters of the United States,” such that it is “difficult to determine where the ‘water’ ends and the ‘wetland’ begins.” That occurs when 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.”

[We] hold that ... the party asserting jurisdiction over adjacent wetlands [must] establish “*first, that the adjacent [body of water constitutes] . . . ‘water[s] of the United States,’ (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.*”

Sackett v EPA

United States Supreme Court (May 2023)

We also acknowledge that temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells.



An aerial photograph of a large body of water, possibly a lake or a wide river, with several small islands and peninsulas. The water is a light, milky color. The surrounding land is covered in dense evergreen forests. In the foreground, there are some buildings and a road. The sky is overcast with grey clouds.

Sackett v EPA

United States Supreme Court (May 2023)

The CWA is a potent weapon. It imposes what have been described as “crushing” consequences “even for inadvertent violations.”

By the EPA’s own admission, nearly all waters and wetlands are potentially susceptible to regulation under this test, putting a staggering array of landowners at risk of criminal prosecution for such mundane activities as moving dirt.

And because the CWA can sweep broadly enough to criminalize mundane activities like moving dirt, this unchecked definition of “the waters of the United States” means that a staggering array of landowners are at risk of criminal prosecution or onerous civil penalties.

DEPARTMENT OF DEFENSE
Department of the Army, Corps of
Engineers
33 CFR Part 328

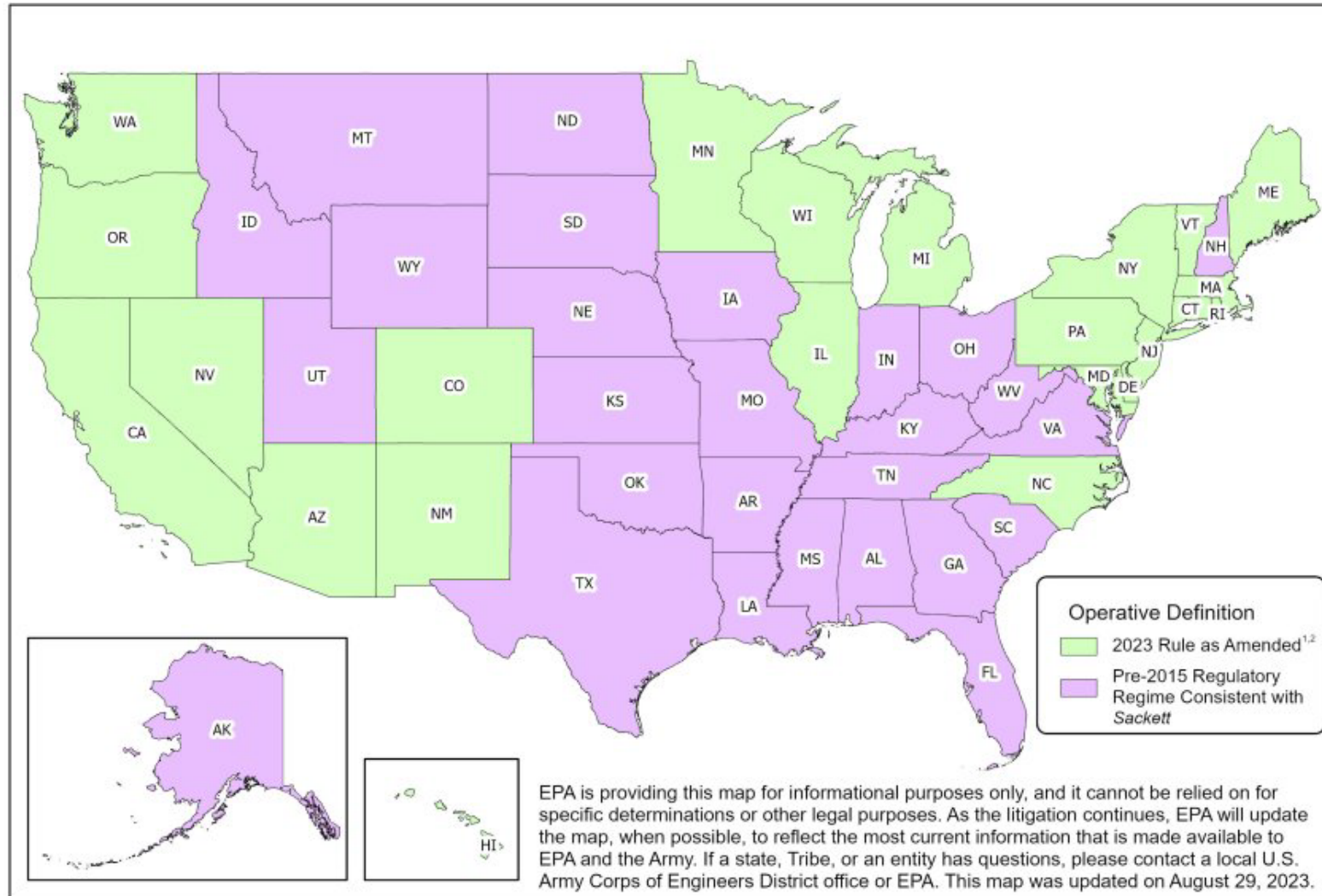
ENVIRONMENTAL PROTECTION
AGENCY
40 CFR Part 120

Revised Definition of “Waters of the
United States”; Conforming

Federal Register / Vol. 88, No. 173 Page
61964 / Friday, September 8, 2023



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).

EPA/Corps amended WOTUS rule (Sept 2023):

- 1) Traditional Navigable Waters; Territorial Seas; Interstate Waters**
- 2) Impoundments of Jurisdictional Waters**
- 3) Tributaries**
- 4) Adjacent Wetlands**
- 5) Intrastate lakes and ponds that do not fall within (1) – (4)**



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Category (1) including “Interstate Waters”

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.



(3) Tributaries

Tributaries include natural, man-altered, or man-made water bodies that flow *directly or indirectly* into [category] (1) waters or (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*.

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



(4) 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.

Jurisdictional adjacent wetlands include wetlands that are adjacent to a [category] (1) water, relatively permanent jurisdictional impoundment, or *relatively permanent tributary*

(4) Wetlands (con't)

Adjacent has been revised by the conforming rule to mean having a continuous surface connection.

A continuous surface connection means the wetlands either physically abut or touch the [category] (1) or *relatively permanent water*, or are connected to the [category] (1) or *relatively permanent water* by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert.

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(4) Wetlands (con't)

[from EPA presentation:] 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.”

But, the same footnote 16 in *Sackett* also began:
“Although a barrier separating a wetland from a water of the United States would ordinarily remove that wetland from federal jurisdiction...”

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Litigation resumes ...

State of Texas v EPA

US District Court, Southern
District of Texas, Galveston
Division
(and Idaho)

State of West Virginia v EPA

US District Court, North
Dakota, Eastern Division
(and 22 other states)

State of Kentucky v EPA

Sixth Circuit Court of Appeals



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Litigation arguments/issues:

- bad process – direct rule; no notice and comment opportunity
- categories are either clearly inconsistent with *Sackett* or too uncertain to be enforceable
- traditional category (1) includes all “interstate waters,” which appears to cover waters even if minor/not navigable?
- category (2) includes all impoundments, even if on an “interstate water” that is not navigable? and not required to have “continuous surface connection”



Litigation issues (cont'd):

- tributaries that flow “indirectly” into navigable waters? and, “relatively permanent” too indeterminate?
- adjacent wetlands definition allows too many linkages between wetlands and category (1) waters that dilute the *Sackett* requirement to have a continuous surface connection that makes them indistinguishable from surface waters
- “relatively permanent” definition too vague and uncertain to know when you have such a water body

