

The 2023 WOTUS Rule: Challenges in the Court and in the Field



UNTANGLING THE LEGAL STATUS OF WOTUS

Background

2015 CLEAN WATER RULE	2020 NAVIGABLE WATER RULE	2023 WOTUS RULE
<ol style="list-style-type: none"> 1. Traditionally navigable 2. Interstate waters and wetlands 3. Territorial seas 4. Impoundments of jurisdictional waters 5. Tributaries 6. Waters adjacent to jurisdictional waters 7. Case by case determination of significant nexus for: prairie potholes; Carolina/Delmarva bays; pocosins; vernal pools; coastal prairie wetlands; in 100-year flood plain; within 4,000 feet of high tide mark 	<ol style="list-style-type: none"> 1. Traditionally navigable / territorial seas 2. Tributaries 3. Lakes, ponds, impoundments of jurisdictional waters 4. Adjacent wetlands 	<ol style="list-style-type: none"> 1. Traditionally navigable 2. Territorial seas 3. Interstate waters and wetlands 4. Impoundments of jurisdictional waters 5. Tributaries (continuously flowing or with a significant nexus) 6. Adjacent wetlands (continuous surface connection or significant nexus) 7. Intrastate lands, ponds, streams or wetlands (continuous surface connection or significant nexus)

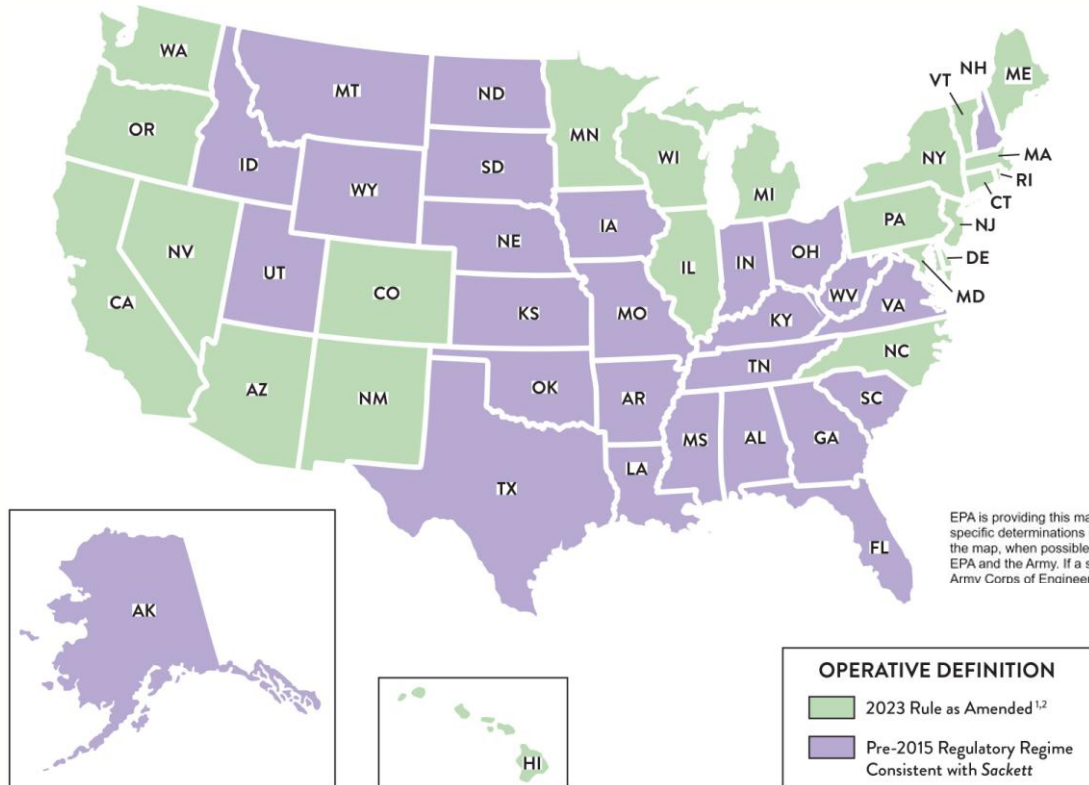
Challenges to WOTUS Rule

DATE	
June 22, 2020	Navigable Waters Protection Rule effective
August 30, 2021	Navigable Waters Protection Rule vacated
March 19, 2023	New WOTUS definition in the WOTUS Rule is effective (durable definition rule or Revised Definition of WOTUS rule)
March 19, 2023	WOTUS Rule enjoined in Idaho and Texas
April 12, 2023	WOTUS Rule enjoined in 24 other states
May 10, 2023	WOTUS Rule enjoined in Kentucky
May 25, 2023	<i>Sackett</i> decision is published (U.S. Supreme Court)
August 29, 2023	EPA issues the Conforming Rule (amended/revised version of WOTUS rule)
March 14, 2024	New citizen suit challenging Conforming Rule

WOTUS Rule vs. Conforming Rule

1. Waters currently or previously used for interstate or foreign commerce;
2. Territorial seas
3. Interstate Waters ~~and wetlands~~
4. Impoundments
5. Tributaries of (a)(1) waters and impoundments that are:
 - “relatively permanent, standing or continuously flowing bodies of water;” or
 - ~~“significantly affect the chemical, physical, or biological integrity” of (a)(1) waters~~
6. Wetlands
 - “adjacent” to (a)(1) waters
 - with a continuous surface water connection to impoundments or relatively permanent tributaries; or
 - ~~“significantly affect the chemical, physical, or biological integrity” of (a)(1) waters~~
7. Intrastate lakes and ponds, ~~streams or wetlands~~
 - “relatively permanent” and with a “continuous surface connection” to (a)(1) waters or relatively permanent tributaries; or
 - ~~“significantly affect the chemical, physical, or biological integrity” of (a)(1) waters~~

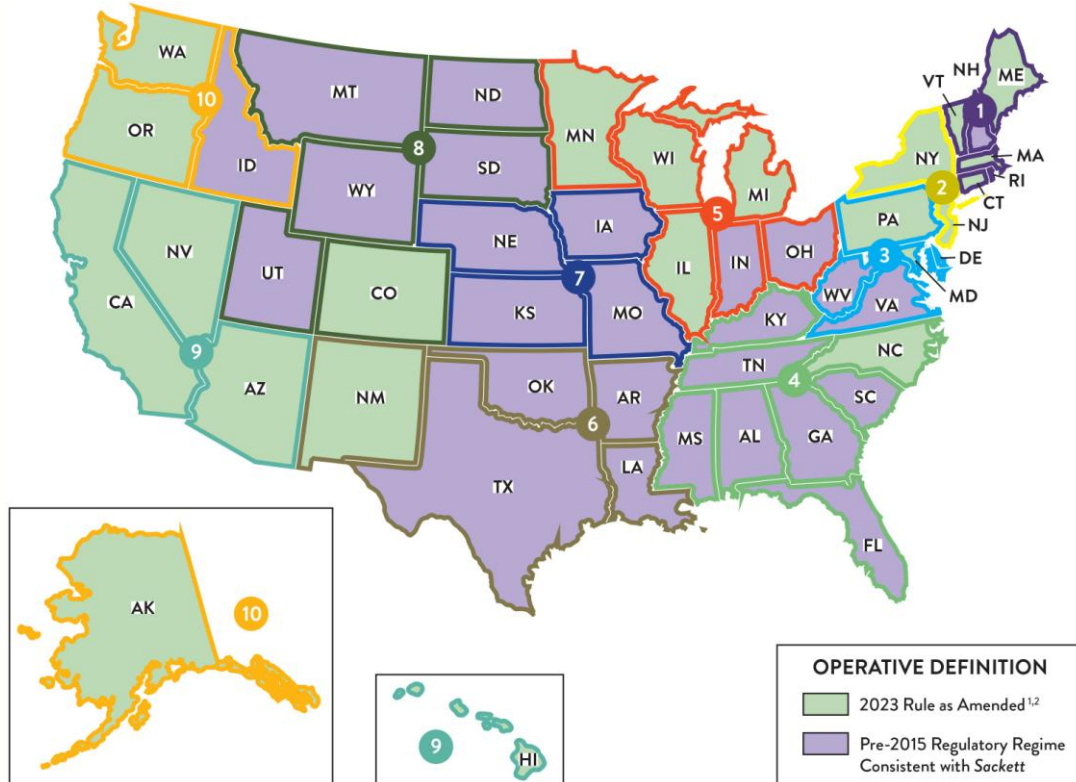
WOTUS by State



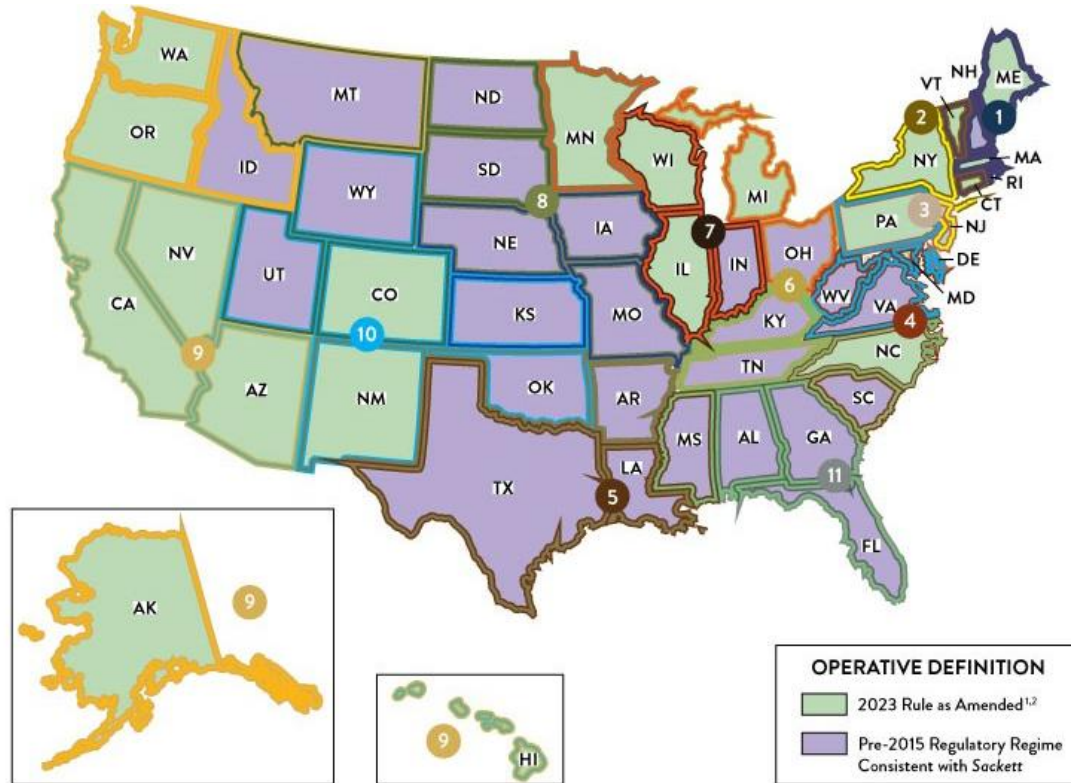
EPA is providing this map for informational purposes only, and it cannot be relied on for specific determinations or other legal purposes. As the litigation continues, EPA will update the map, when possible, to reflect the most current information that is made available to EPA and the Army. If a state, Tribe, or an entity has questions, please contact a local U.S. Army Corps of Engineers District office or EPA. This map was updated on August 29, 2023.

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).

WOTUS by EPA Region



WOTUS by EPA Region & Circuit Court



What does that mean for the 27 states?

- The WOTUS Rule was enjoined prior to *Sackett*
- Injunctions now apply to WOTUS and the Conforming Rule
- States under the enjoined rules are instead subject to “the pre-2015 regulatory regime and the *Sackett* decision until further notice”

Pre-2015 Regulations

- Waters currently or previously used for commerce
- Interstate waters and wetlands
- Intrastate waters such as “lakes, rivers, streams (including intermittent streams)” etc.
- Impoundments
- Tributaries
- Territorial seas
- Wetlands adjacent to any of the above waters

Pre-2015 Guidance

- [Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* - December 2, 2008](#)
- [January 2003 Legal Memorandum](#) (SWANNCC guidance)
- Headquarter Field Memos

Practically, for the pre-2015 states ...

- Will not assert jurisdiction over wetlands based on the significant nexus standard
- Will not assert jurisdiction over interstate wetlands solely because they are interstate waters
- Will interpret adjacent to require a continuous surface water connection
- Will limit scope of intrastate waters to “relatively permanent lakes and ponds” that do not fit the other categories

Outstanding Complications

- Ongoing litigation
- Anticipating guidance
- Federal Congressional hearings on WOTUS
- Potential WOTUS legislation
- Intersection with *Maui*

Clean Water Act Penalties

VIOLATION	TYPE OF PENALTY	PENALTY
Civil	Administrative Penalty	\$26,685 (per violation for Class I) or (per day Class II)
	Civil Penalty	\$66,712 per day per violation
Criminal: <u>Direct Discharge</u> OR <u>Indirect Discharge</u>	Negligence	Imprisonment of 1 year and/or fine of \$2,500 to \$25,000 per day
	Knowing	Imprisonment of 3 years and/or A fine of \$5,000 to \$50,000 per day
	Knowing Endangerment	15 years of imprisonment and/or A fine of \$250,000 (or \$1,000,000 for corporations)
	False Statements (knowingly)	2 years imprisonment and/or A fine of \$10,000

Clean Water Act Penalties for Oil or Hazardous Substances

VIOLATION	TYPE OF PENALTY	PENALTY
Civil Violations	Administrative Penalty	\$23,048 per violation
	Civil Penalty	\$57,617
	Civil Penalty, gross negligence	\$230,464 per barrel of oil or unit of reportable quantity of hazardous substances
Criminal Violations	Negligence	1 year imprisonment and/or A Fine of \$2,500 to \$25,000 per day
	Knowing	3 years imprisonment and/or A fine of \$5,000 to \$50,000 per day
	Failure to Report	5 years imprisonment and/or Fines ranging from \$5,000 (\$10,000 for organizations) for an infraction to \$250,000 (\$500,000 for organizations for a felony)

What are the states up to?

- Increasing Protections
 - Colorado – legislation authorizing creation of state dredge and fill program
 - North Carolina – executive order to preserve natural lands, including wetlands
- Protective Legislation Failed
 - Illinois – legislation to create state wetlands authorization program failed. May be considered again fall of 2024.
- Rolling Back Protections
 - Indiana – removed permitting requirements for lowest quality wetlands and reduced requirements for other categories
 - North Carolina – legislation adopting *Sackett* definition of wetlands and removed the permitting requirement for isolated non-jurisdictional waters





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