

The background of the slide is an aerial photograph of a lush, green forested landscape. A river winds through the forest, and a small pond is visible in the foreground. The sky is a warm, golden color, suggesting a sunrise or sunset. A dark blue semi-transparent rectangle is overlaid on the bottom left of the image, containing the title and speaker information.

The WOTUS Conforming Rule Implementation Issues

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Amended 2023 Rule: (a)(1) – (a)(5)

(a) *Waters of the United States* include:

(1) Waters which are:

- (i) Traditional navigable waters
- (ii) Territorial seas; or
- (iii) Interstate waters

(2) Impoundments

(3) Tributaries

(4) Adjacent wetlands

(5) Additional waters

Amended 2023 Rule: (a)(1) – (a)(4)

(a) ***Waters of the United States*** means:

(1) Waters which are:

- (i) Currently used, or were used in the past, or may be susceptible to use in **interstate or foreign commerce**,
- (ii) The **territorial seas**; or
- (iii) **Interstate waters**;

(2) **Impoundments** of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under paragraph (a)(5) of this section;

(3) **Tributaries** of waters identified in paragraph (a)(1) or (2) of this section that are **relatively permanent, standing or continuously flowing** bodies of water;

(4) Wetlands **adjacent** to the following waters:

- (i) Waters identified in paragraph (a)(1) of this section; or
- (ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3) of this section and with a **continuous surface connection** to those waters;

(a) ***Waters of the United States*** means:

(5) Intrastate lakes and ponds not identified in paragraphs (a)(1) through (4) of this section 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) of this section.

[This was revised to delete streams and wetlands.]

NOTE: The significant nexus standard has been removed for all types of waters.

Amended 2023 Rule: Exclusions are unchanged

- **Prior converted cropland**, adopting USDA's definition and generally excluding wetlands that were converted to cropland prior to December 23, 1985.
- **Waste treatment systems**, including treatment ponds or lagoons that are designed to meet the requirements of the Clean Water Act.
- **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 that are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
- **Artificial reflecting pools or swimming pools**, and other small ornamental bodies of water created by excavating or diking dry land.
- **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 operation is abandoned and the resulting body of water meets the definition of "waters of the United States."
- **Swales and erosional features** (e.g., gullies, small washes), that are characterized by low volume, infrequent, or short duration flow.

Note that, as time goes on, wetlands that are otherwise excluded can “become” jurisdictional, depending on conditions. Examples include waste treatment systems, artificial ponds, ditches.

November 15, 2023 Updates for Tribes and States on "Waters of the United States."

https://www.epa.gov/system/files/documents/2023-11/wotus-overview_tribes-and-states_11-15-23_508.pdf

September 12, 2023 Public Webinar: Updates on the Definition of "Waters of the United States"

https://www.epa.gov/system/files/documents/2023-09/FINAL%20WOTUS%20Public%20Webinar%20Slides_9-12-23.pdf

From Sackett v. EPA

- “[T]he Court concludes that the CWA’s use of “waters” encompasses “only those relatively permanent, standing or continuously flowing bodies of water ...described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’”

■ From the EPA/USACE November 15, 2023 Update

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

From the EPA/USACE November 15, 2023 Update

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

From the EPA/USACE November 15, 2023 Update

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.

From the EPA/USACE November 15, 2023 Update

If RPW and non-RPW both occur within the same stream order, the entire reach will be designated according to whichever has the greater length (RPW or non-RPW) – 50% or greater.

From the EPA/USACE November 15, 2023 Update

- 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.

From the EPA/USACE November 15, 2023 Update

- Jurisdictional adjacent wetlands include: Wetlands that are adjacent to an (a)(1) water, relatively permanent jurisdictional impoundment, or relatively permanent tributary.

From the EPA/USACE November 15, 2023 Update

- **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 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.

Sackett v. EPA

[T]he wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."

From the EPA/USACE November 15, 2023 Update

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

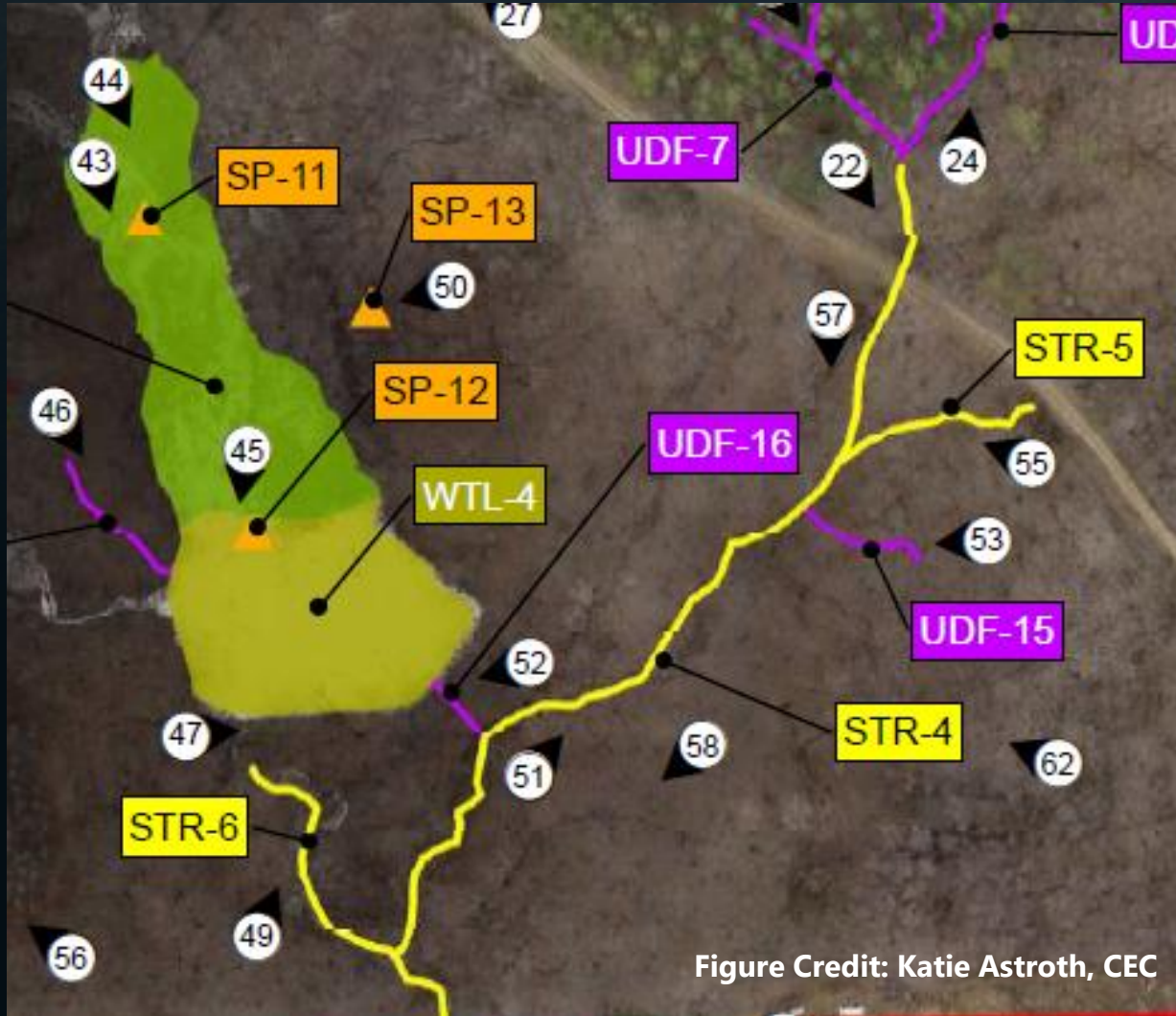


Figure Credit: Katie Astroth, CEC

Pre-Sackett vs Post Sackett

Wetland is relatively permanent
Streams are ephemeral [$>50\%$ NRP]
No continuous surface connection
between WTL-4 and stream.



Pre-Sackett vs Post Sackett

Wetland is relatively permanent

No continuous surface connection

In addition, the January 2023 Rule, as amended by the conforming rule, is not currently operative in certain states and for certain parties due to litigation, and the pre-2015 regulatory regime is being implemented instead consistent with the Supreme Court's decision in Sackett.

<https://www.epa.gov/wotus/pre-2015-regulatory-regime>, accessed 12/4/2023

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

https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-pre-2015-regulatory-regime_508c.pdf, accessed 12/4/2023

404 permitting triggers the state water quality certification process under Section 401 of the Clean Water Act. In the absence of the 404 permit, other federal actions on the project or state requirements may still trigger 401 or other water quality demonstration.

Section 7 of the Endangered Species Act is the federal agency process that the USACE follows when processing a 404 permit.

Section 10, applies to private entities; depending on the project, Incidental Take Permit/ Habitat Conservation Plan may be required

State conservation requirements may also apply.

In the absence of a 404 permit, National Historic Preservation Act, as well as state historic preservation laws may still apply.

December 6, 2023 – USACE Civil Works Tribal Consultation Policy

- USACE Antecedent Precipitation Tool (APT) - calculates precipitation normalcy using a standardized methodology to inform a decision of whether climatic conditions are normal
- Regionalized streamflow duration assessment methods (SDAMs) - rapid field assessment methods that use hydrological, geomorphological, and/or biological indicators, observable in a single site visit, to classify streamflow duration as perennial, intermittent, or ephemeral at the reach scale
- USGS StreamStats - spatial analytical tools that are useful for water-resources planning and management
- <https://www.epa.gov/wotus/2023-rule-revised-definition-waters-united-states-training-presentations>