

Waters of the United States (WOTUS): Frequently Asked Questions About the Scope of the Clean Water Act

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Waters of the United States (WOTUS): Frequently Asked Questions About the Scope of the Clean Water Act

Congress established the Federal Water Pollution Control Act, also known as the Clean Water Act (CWA), to restore and protect the quality of the nation’s surface waters. The CWA protects “navigable waters,” defined in the statute as “waters of the United States, including the territorial seas.” The CWA does not further define the term *waters of the United States* (WOTUS), which determines which waters are federally regulated. Thus, in implementing the CWA, the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA)—the two agencies that administer the statute—have defined the term in regulations. However, Congress’s intent as to the meaning of WOTUS has been debated and litigated for more than four decades. The Supreme Court and lower courts have also weighed in on the scope of the term.

For much of the past several decades, regulations promulgated by the Corps and EPA in the 1980s have been in effect. (These regulations, as further interpreted by the courts and agencies, are often referred to as the *pre-2015 regulations*.) The agencies supplemented these regulations with guidance, which they developed in response to Supreme Court rulings related to the scope of the federal government’s ability to regulate WOTUS (including the Court’s 2006 ruling in *Rapanos v. United States*, 547 U.S. 715). The Corps and EPA acknowledged that their guidance did not provide the public or agency staff with the information needed to ensure timely, predictable, and consistent jurisdictional determinations. Diverse stakeholders and some Members of Congress requested a formal rulemaking to revise existing regulations.

Successive presidential Administrations have engaged in efforts to define WOTUS in regulation. Both the Obama Administration’s 2015 Clean Water Rule and the Trump Administration’s 2020 Navigable Waters Protection Rule prompted strong reactions from a variety of stakeholders, with numerous groups filing lawsuits challenging the rules. In January 2023, the Corps and EPA, under the Biden Administration, also issued a rule redefining WOTUS in the agencies’ regulations (the 2023 WOTUS Rule). The Corps and EPA asserted that their intent in promulgating the 2023 WOTUS Rule was to redefine WOTUS in a durable regulation, updating the pre-2015 rules to reflect consideration of past Supreme Court decisions, science, and the agencies’ experience and technical expertise. In general, the 2023 WOTUS Rule defined WOTUS more narrowly than the 2015 Clean Water Rule and more broadly than the 2020 Navigable Waters Protection Rule. As with prior rulemaking efforts, the 2023 WOTUS Rule prompted strong stakeholder interest with varying views. The 2023 WOTUS Rule went into effect in March 2023 and was immediately challenged. Three courts stayed implementation of the 2023 WOTUS Rule in a total of 27 (later reduced to 26) states and as applied to several associations that were participating in the litigation.

In May 2023, the Supreme Court decided *Sackett v. EPA*, 598 U.S. 651, a case pertaining to the scope of WOTUS. The majority in *Sackett* formally adopted the approach taken by a four-Justice plurality in the 2006 case *Rapanos v. United States* and rejected elements of the jurisdictional test that are present in the 2023 WOTUS Rule. The Court’s ruling significantly narrowed the scope of WOTUS in comparison not only to the 2023 WOTUS Rule but also to all of the prior regulations the agencies had promulgated to define WOTUS. Following the *Sackett* decision, the Corps and EPA issued a final rule to amend the 2023 WOTUS Rule and conform the definition of WOTUS to the decision in *Sackett*. This final rule, the 2023 Conforming Rule, was published in the *Federal Register* on September 8, 2023, and went into effect the same day. As a result of ongoing litigation, the 2023 WOTUS Rule, as amended by the 2023 Conforming Rule, is in effect in 24 states, the District of Columbia, and the U.S. territories. In the other 26 states, the Corps and EPA are interpreting WOTUS consistent with the pre-2015 regulatory regime and the Supreme Court’s decision in *Sackett*.

On March 12, 2025, the second Trump Administration announced its intent to revise the definition of WOTUS again through a new rulemaking. The same day, the Corps and EPA issued new guidance to clarify how staff should implement certain aspects of the *Sackett* ruling.

In the 119th Congress, Members may seek to oversee the Corps and EPA’s efforts to implement existing regulations or their efforts to promulgate new regulations. Some in Congress may also consider introducing legislation to define the scope of WOTUS—to clarify its intent as to the scope of the term—given the challenges each of the past three Administrations has faced in establishing lasting regulations. Others may support maintaining the current statutory language.

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Congress established the Federal Water Pollution Control Act, also known as the Clean Water Act (CWA), to restore and protect the quality of the nation's surface waters.¹ The Clean Water Act protects “navigable waters,” defined in the statute as “waters of the United States, including the territorial seas.”² The CWA does not define *waters of the United States* (WOTUS). The scope of the term determines which waters are federally regulated, and thus which waters are subject to CWA requirements and programs. These include CWA permitting requirements; water quality certifications; water quality standards, impaired waters, and total maximum daily loads; and other CWA and non-CWA programs.

Successive Administrations have struggled to interpret the term *waters of the United States* for the purpose of implementing various requirements of the CWA. Prior to the Biden Administration, executive branch efforts to define WOTUS administratively included regulations promulgated by the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) in the 1980s and supplemented with interpretive guidance developed in response to Supreme Court rulings; the 2015 Clean Water Rule; and the 2020 Navigable Waters Protection Rule.³

The Corps and EPA's efforts to define WOTUS in regulation during both the Obama and first Trump Administrations were controversial and led to litigation. Many observers viewed the Obama Administration's 2015 Clean Water Rule as defining WOTUS too broadly, while many others viewed the first Trump Administration's 2020 Navigable Waters Protection Rule as defining WOTUS too narrowly. A federal district court vacated the 2020 Navigable Waters Protection Rule in September 2021, after which the Corps and EPA announced that they had halted implementation of the rule.⁴

On January 18, 2023, the Corps and EPA, under the Biden Administration, published a new rule (the 2023 WOTUS Rule) revising the definition of WOTUS.⁵ The agencies asserted that their intent in promulgating the 2023 WOTUS Rule was to redefine WOTUS in a durable regulation, updating the pre-2015 regulations to reflect consideration of Supreme Court decisions, science, and the agencies' experience and technical expertise.⁶

Some stakeholders supported the 2023 WOTUS Rule, in some cases observing that the rule took a middle road between the 2015 Clean Water Rule and the 2020 Navigable Waters Protection Rule.⁷ Others expressed opposition to the 2023 WOTUS Rule, arguing that it did not provide regulatory clarity and was overly broad. Some also argued that the Corps and EPA should have delayed issuing a rule pending the resolution of *Sackett v. EPA*, a Supreme Court case that was pending at the time the rule was issued and that would address aspects of the scope of WOTUS.

¹ 33 U.S.C. §§ 1251 *et seq.*

² 33 U.S.C. § 1362(7).

³ Army Corps of Engineers (Corps) and Environmental Protection Agency (EPA), “Clean Water Rule: Definition of ‘Waters of the United States’; Final Rule,” 80 *Federal Register* 37054, June 29, 2015 (hereinafter 2015 Clean Water Rule); Corps and EPA, “The Navigable Waters Protection Rule: Definition of ‘Waters of the United States,’” 85 *Federal Register* 22250, April 21, 2020 (hereinafter Navigable Waters Protection Rule).

⁴ *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949 (D. Ariz. 2021).

⁵ Corps and EPA, “Revised Definition of ‘Waters of the United States,’” 88 *Federal Register* 3004, January 18, 2023 (hereinafter 2023 WOTUS Rule). The final rule was published on January 18, 2023. The agencies released a prepublication version of the rule on December 30, 2022.

⁶ 2023 WOTUS Rule, p. 3019. See also Corps and EPA, *Final Rule: Revised Definition of “Waters of the United States” Fact Sheet*, December 2022, <https://www.epa.gov/system/files/documents/2022-12/Public%20Fact%20Sheet.pdf> (hereinafter 2022 WOTUS Fact Sheet).

⁷ See, for example, David LaRoss, “Touting ‘Durable’ Approach, EPA Adopts Dual Tests in Revised WOTUS Rule,” *InsideEPA.com*, December 30, 2022.

The 2023 WOTUS Rule went into effect on March 20, 2023, and was immediately challenged.⁸ While no court has issued a ruling on the merits of the rule, some courts have issued orders that temporarily bar implementation of the rule in 26 states while litigation is pending. Apart from the pending litigation challenging the 2023 WOTUS Rule, in May 2023, the Supreme Court issued its ruling in *Sackett v. EPA*.⁹ In *Sackett*, the Court construed the reach of the CWA more narrowly than the new or previous regulatory interpretations or the approach adopted by the courts of appeals following an earlier Supreme Court decision regarding WOTUS.¹⁰

Following the Court's ruling, the Corps and EPA published a conforming rule (hereinafter 2023 Conforming Rule) amending key aspects of the 2023 WOTUS Rule to align with the *Sackett* decision.¹¹ Currently, the 2023 WOTUS Rule, as amended by the 2023 Conforming Rule, is in effect in a patchwork of states. In states where courts have temporarily barred the 2023 WOTUS Rule, the Corps and EPA assert that they are implementing the pre-2015 regulations consistent with *Sackett*.¹²

On March 12, 2025, the second Trump Administration announced its intent to revise the definition of WOTUS again through new rulemaking.¹³ The same day, the Corps and EPA also issued new guidance, to clarify how Corps and EPA staff should implement certain aspects of the *Sackett* ruling, and announced they would be holding listening sessions to gather feedback from stakeholders on how to revise the definition of WOTUS.¹⁴

This report addresses frequently asked questions about WOTUS, including actions taken by the last several Administrations to define WOTUS, the Supreme Court's ruling in *Sackett v. EPA*, implementation of the *Sackett* decision, and options for Congress.

What Actions Have Previous Administrations Taken to Define WOTUS?

Pre-2015 Rules and Guidance

For much of the past several decades, regulations promulgated by the Corps and EPA in 1986 and 1988, respectively (often referred to as the pre-2015 regulations) have been in effect.¹⁵ The

⁸ *Texas v. EPA*, No. 3:23-cv-00017 (S.D. Tex.); *West Virginia v. EPA*, No. 3:23-cv-00032 (D.N.D.); *Kentucky v. EPA*, No. 3:23-cv-00007 (E.D. Ky.).

⁹ 598 U.S. 651 (2023).

¹⁰ *See id.* at 679.

¹¹ Corps and EPA, "Revised Definition of 'Waters of the United States'; Conforming," 88 *Federal Register* 61964, September 8, 2023 (hereinafter 2023 Conforming Rule).

¹² EPA, "Definition of 'Waters of the United States': Rule Status and Litigation Update," <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>.

¹³ EPA, "Administrator Zeldin Announces EPA Will Revise Waters of the United States Rule," press release, March 12, 2025, <https://www.epa.gov/newsreleases/administrator-zeldin-announces-epa-will-revise-waters-united-states-rule>.

¹⁴ Corps and EPA, *Memorandum to the Field Between the U.S. Department of the Army, U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency Concerning the Proper Implementation of "Continuous Surface Connection" Under the Definition of "Waters of the United States" Under the Clean Water Act*, March 12, 2025, <https://www.epa.gov/system/files/documents/2025-03/2025cscguidance.pdf> (hereinafter 2025 Continuous Surface Connection Guidance).

¹⁵ Corps, "Final Rule for Regulatory Programs of the Corps of Engineers," 51 *Federal Register* 41206, November 13, (continued...)

agencies have supplemented these regulations with interpretive guidance developed in response to Supreme Court rulings related to the scope of the federal government's ability to regulate WOTUS.¹⁶

One such Supreme Court case—*Rapanos v. United States*¹⁷—has been particularly relevant to the efforts of the last several Administrations to redefine WOTUS. In *Rapanos v. United States*, the Court considered the extent of CWA jurisdiction over wetlands near ditches or man-made drains that emptied into traditional navigable waters. The Court's decision in *Rapanos* yielded three different opinions, none of which garnered a controlling majority for a single standard to govern future jurisdictional disputes.¹⁸ Instead, the decision resulted in two alternative tests for evaluating jurisdictional waters: a “relatively permanent” test set forth by a four-Justice plurality in an opinion authored by Justice Antonin Scalia, and a “significant nexus” test proposed by Justice Anthony Kennedy in a concurring opinion (see **textbox** below).¹⁹

Rapanos and the “Relatively Permanent” and “Significant Nexus” Tests

The Plurality’s “Relatively Permanent” Test: Writing for a four-Justice plurality, Justice Scalia wrote that the word “waters” in “waters of the United States” means only “relatively permanent, standing or continuously flowing bodies of water”—that is, streams, rivers, and lakes.²⁰ Wetlands could be included only when they have a “continuous surface connection” to such waters.²¹

Justice Kennedy’s “Significant Nexus” Test: In a concurring opinion joined by no other Justice, Justice Kennedy wrote that the Corps should determine on a case-by-case basis whether wetlands have a “significant nexus” to traditionally navigable waters based on whether the wetland, either alone or in connection with similarly situated properties, significantly impacts the chemical, physical, and biological integrity of a traditionally navigable water.²²

In response to the rulings, the agencies developed guidance to help clarify how EPA and Corps offices should implement the Court's decisions. In particular, the agencies expressed the view that waters meeting *either* the relatively permanent standard articulated by Justice Scalia *or* the significant nexus standard articulated by Justice Kennedy were subject to federal jurisdiction under the act.²³ However, the Corps and EPA acknowledged that their written guidance did not provide the public or agency staff with the information needed to ensure timely, predictable, and consistent jurisdictional determinations.²⁴ Diverse stakeholders—including some Members of Congress, states, the regulated community, and nongovernmental organizations—requested a formal rulemaking to revise the existing rules.²⁵ The Corps and EPA, under successive

1986 (hereinafter 1986 Corps Rule); EPA, “Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations,” 53 *Federal Register* 20764, June 6, 1988 (hereinafter 1988 EPA Rule).

¹⁶ Corps and EPA, “Appendix A, Joint Memorandum,” 68 *Federal Register* 1995, January 15, 2003; Benjamin H. Grumbles, Assistant Administrator for Water, EPA, and John Paul Woodley Jr., Assistant Secretary of the Army (Civil Works), Department of the Army, *Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States*, memorandum, December 2, 2008 (hereinafter 2008 Rapanos Guidance); 2025 Continuous Surface Connection Guidance.

¹⁷ 547 U.S. 715 (2006).

¹⁸ *Id.* at 719, 757 (Roberts, C.J., concurring), 759 (Kennedy, J., concurring).

¹⁹ *Id.* at 739, 782 (Kennedy, J., concurring).

²⁰ *Id.* at 739.

²¹ *Id.* at 742.

²² *Id.* at 782 (Kennedy, J., concurring).

²³ 2008 Rapanos Guidance; *see also* *Rapanos*, 547 U.S. at 810 (Stevens, J., dissenting).

²⁴ 2015 Clean Water Rule, p. 37056.

²⁵ *See* EPA, “What the Clean Water Rule Does,” EPA Web Archive, <https://archive.epa.gov/epa/cleanwaterrule/what-continued...>

Administrations—including the Obama Administration, the first Trump Administration, and the Biden Administration—have promulgated new regulations to define WOTUS, but each of these regulations has been debated and challenged in court.

As discussed in more detail in later sections (see “Which Rule Is in Effect Now?”), the pre-2015 regulations, consistent with the Supreme Court ruling in *Sackett v. EPA*, are currently in effect in 26 states that are participating in a pending litigation rule related to the Biden Administration’s rule to define WOTUS. The 2023 WOTUS Rule, as amended by the 2023 Conforming Rule, discussed below (see “2023 WOTUS Rule and 2023 Conforming Rule”), is in effect in the remaining 24 states, the District of Columbia, and the U.S. territories.

2015 Clean Water Rule

In 2015, under the Obama Administration, the Corps and EPA issued the Clean Water Rule, which redefined WOTUS in the agencies’ regulations for the first time since the 1980s.²⁶ The Clean Water Rule retained aspects of the agencies’ earlier guidance and also incorporated new features, including a new definition of tributaries and definitions and criteria related to adjacency.²⁷

Some stakeholders and observers viewed the Clean Water Rule as an expansion of CWA jurisdiction, while others argued that it excluded too many waters from federal jurisdiction.²⁸ Numerous parties challenged the Clean Water Rule, and some district courts issued preliminary injunctions temporarily barring the Clean Water Rule from taking effect in certain states.²⁹ Two courts also remanded the rule to the Corps and EPA, concluding that it violated the Administrative Procedure Act (APA) and exceeded the agencies’ statutory authority under the CWA.³⁰ As a result, until its rescission in 2019 (see below), the Clean Water Rule was in effect in a patchwork of states. In states that were subject to a preliminary injunction or an order remanding the rule to the Corps and EPA, the pre-2015 regulatory framework applied.

2020 Navigable Waters Protection Rule

The first Trump Administration described the Clean Water Rule as an example of federal “overreach,” and the Corps and EPA engaged in a two-step process to rescind and revise it.³¹ In Step One, the Corps and EPA rescinded the Clean Water Rule and recodified the pre-2015

clean-water-rule-does.html; and EPA, *Persons and Organizations Requesting Clarification of “Waters of the United States” by Rulemaking*, US EPA Archive Document, https://archive.epa.gov/epa/sites/production/files/2014-03/documents/wus_request_rulemaking.pdf.

²⁶ 2015 Clean Water Rule.

²⁷ 2015 Clean Water Rule, pp. 37057-37059, 37105-37106.

²⁸ See, for example, Carolina Bolado, “Fla., Others Sue EPA, Corps over Clean Water Act Expansion,” *Law360*, June 30, 2015; Center for Biological Diversity, “EPA and Army Corps Issue Weak Clean Water Rule,” press release, May 27, 2015, https://www.biologicaldiversity.org/news/press_releases/2015/clean-water-rule_05-27-2015.html.

²⁹ *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015); *Georgia v. Pruitt*, 326 F. Supp. 3d 1356 (S.D. Ga. 2018); *Texas v. EPA*, No. 3:15-cv-162, 2018 WL 4518230 (S.D. Tex. Sept. 12, 2018); *Or. Cattlemen’s Ass’n v. EPA*, No. 19-00564 (D. Or. July 26, 2019).

³⁰ *Georgia v. Wheeler*, 418 F. Supp. 3d 1336 (S.D. Ga. 2019); *Texas v. EPA*, 389 F. Supp. 3d 497 (S.D. Tex. 2019). In this context, to “remand” means to return the rule to the agencies to reconsider possible errors or defects in their action. A court order that remands a rule may or may not render the rule unenforceable during any further proceedings.

³¹ For example, EPA, “EPA, U.S. Army Repeal 2015 Rule Defining ‘Waters of the United States’ Ending Regulatory Patchwork,” press release, September 12, 2019, <https://www.epa.gov/newsreleases/epa-us-army-repeal-2015-rule-defining-waters-united-states-ending-regulatory-patchwork>.

regulations.³² Accordingly, the pre-2015 regulations and guidance were in effect beginning on the effective date of the Step One Rule (December 23, 2019), and until the agencies' redefinition of WOTUS went into effect. In April 2020, the Corps and EPA published a final Step Two Rule to redefine WOTUS, titled the Navigable Waters Protection Rule.³³ The rule went into effect on June 22, 2020, replacing the Step One Rule.

Overall, the Navigable Waters Protection Rule narrowed the scope of waters and wetlands that were considered WOTUS (and were therefore under federal jurisdiction) compared to both the Clean Water Rule and the pre-2015 rules. As with the Clean Water Rule, the Navigable Waters Protection Rule prompted a range of reactions from a variety of stakeholders and resulted in many lawsuits around the country.

President Biden signaled interest in reconsidering the Navigable Waters Protection Rule immediately upon taking office.³⁴ After announcing in June 2021 that they intended to revise the definition of WOTUS again, the Corps and EPA asked courts where legal challenges to the Navigable Waters Protection Rule were pending to remand the rule while they developed a new regulation.³⁵

On August 30, 2021, the U.S. District Court for the District of Arizona granted the agencies' request for voluntary remand, but also vacated the rule.³⁶ While the court did not issue a ruling on the merits of the Navigable Waters Protection Rule, it found that both the plaintiffs and the United States had identified concerns with the rule that involved fundamental, substantive, and incurable flaws.³⁷ In response to the court's order, the Corps and EPA announced that they had halted implementation of the Navigable Waters Protection Rule and would interpret WOTUS consistent with the pre-2015 regulatory regime until further notice.³⁸

2023 WOTUS Rule and 2023 Conforming Rule

On January 18, 2023, the Corps and EPA, under the Biden Administration, published a new rule (the 2023 WOTUS Rule) redefining WOTUS in the agencies' regulations.³⁹ The rule went into effect on March 20, 2023, but was immediately challenged.

The Corps and EPA asserted that their intent in promulgating the 2023 WOTUS Rule was to redefine WOTUS in a durable regulation, updating the pre-2015 regulations to reflect

³² Corps and EPA, "Definition of 'Waters of the United States'—Recodification of Pre-Existing Rules," 84 *Federal Register* 56626, October 22, 2019.

³³ Corps and EPA, "The Navigable Waters Protection Rule: Definition of 'Waters of the United States,'" 85 *Federal Register* 22250, April 21, 2020.

³⁴ Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," 86 *Federal Register* 7037-7043, January 20, 2021.

³⁵ EPA, "EPA, Army Announce Intent to Revise Definition of WOTUS," press release, June 9, 2021, <https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus>; *see also, e.g.*, Motion for Remand Without Vacatur, *Conservation Law Found. v. EPA*, No. 1:20-cv-10820 (D. Mass. June 6, 2021), ECF No. 112.

³⁶ *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949 (D. Ariz. 2021). One other court subsequently vacated the Navigable Waters Protection Rule, adopting similar reasoning to the *Pascua Yaqui* court. Memorandum Opinion and Order, *Navajo Nation v. Regan*, No. 2:20-cv-00602 (D.N.M. Sept. 27, 2021), ECF No. 43. In this context, to "vacate" the rule means to declare it invalid, as if the rule had never been in effect.

³⁷ *Pascua Yaqui*, 557 F. Supp. 3d at 955.

³⁸ See EPA, "Definition of 'Waters of the United States': Rule Status and Litigation Update," <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>.

³⁹ 2023 WOTUS Rule.

consideration of Supreme Court decisions, science, and the agencies’ experience and technical expertise.⁴⁰ Overall, the definition of WOTUS in the 2023 WOTUS Rule was narrower in scope than in the Clean Water Rule and broader than in the Navigable Waters Protection Rule.

In May 2023, shortly after the issuance of the 2023 WOTUS Rule, the Supreme Court issued a decision in a WOTUS-related case—*Sackett v. EPA*.⁴¹ As discussed in more detail below (see “How Did *Sackett v. EPA* Affect the Scope of CWA Jurisdiction?”), the ruling significantly narrowed the scope of WOTUS in comparison to all prior regulatory regimes. Most notably, the Supreme Court rejected the significant nexus standard, adopted the *Rapanos* plurality’s relatively permanent standard, and narrowed the scope of adjacent wetlands that are considered WOTUS.⁴²

In response to the ruling, the Corps and EPA promulgated a new rule that amended the 2023 WOTUS Rule to conform the rule’s definition of WOTUS to the *Sackett* decision.⁴³ The agencies promulgated the rule (the 2023 Conforming Rule) without first publishing a proposed rule and providing an opportunity for public notice-and-comment procedures. The rule went into effect on September 8, 2023, the day it was published in the *Federal Register*.⁴⁴

The 2023 WOTUS Rule, as amended by the 2023 Conforming Rule, is divided into three parts: jurisdictional waters (WOTUS), exclusions, and definitions. These parts are summarized below and compared to the pre-2015 regulations and guidance.

Jurisdictional Waters (WOTUS)

The 2023 WOTUS Rule, as amended by the 2023 Conforming Rule, includes seven WOTUS categories (Table I).⁴⁵

Table I. Description of Jurisdictional Waters (WOTUS) Under the 2023 WOTUS Rule, as Amended by the 2023 Conforming Rule

Category of WOTUS	Description	Regulatory Text Paragraph ^a
Traditional Navigable Waters	Waters, such as large rivers and lakes, that are, were, or could be used in interstate or foreign commerce, including waters affected by tides.	(a)(1)
Territorial Seas	The belt of the seas extending three miles out from the coast.	(a)(1)
Interstate Waters	Waters, such as rivers, lakes, or streams, that flow across or form part of state boundaries.	(a)(1)

⁴⁰ 2023 WOTUS Rule, p. 3019; and 2022 WOTUS Fact Sheet.

⁴¹ *Sackett v. EPA*, 598 U.S. 651 (2023). For a more in-depth discussion of *Sackett*, see CRS Legal Sidebar LSB10981, *Supreme Court Narrows Federal Jurisdiction Under Clean Water Act*, by Kate R. Bowers.

⁴² *Sackett*, 598 U.S. at 678-79.

⁴³ 2023 Conforming Rule. The 2023 Conforming Rule does not rescind the 2023 WOTUS Rule, but rather amends the provisions of the rule that were invalid under the Supreme Court’s interpretation of the CWA in *Sackett*.

⁴⁴ 2023 Conforming Rule. The Corps and EPA took the position that notice-and-comment procedures were not required because the sole purpose of the 2023 Conforming Rule was to amend the 2023 WOTUS Rule to conform to *Sackett*, and because the amendments did not involve the exercise of the agencies’ discretion. The Corps and EPA also stated that good cause existed to make the rule immediately effective because the rule improved regulatory certainty and did not impose burdens on the regulated community. 2023 Conforming Rule, p. 61965.

⁴⁵ 2023 Conforming Rule. See also Corps and EPA, *Fact Sheet for the Final Rule: Amendments to the Revised Definition of “Waters of the United States,”* August 2023, https://www.epa.gov/system/files/documents/2023-08/FINAL_WOTUSPublicFactSheet08292023.pdf (hereinafter 2023 Conforming Rule Fact Sheet).

Category of WOTUS	Description	Regulatory Text Paragraph ^a
Impoundments of Jurisdictional Waters	Impounded waters created in or from jurisdictional waters (other than (a)(5) waters), whether natural (e.g., beaver ponds) or artificial (e.g., reservoirs).	(a)(2)
Tributaries	Waters, such as branches of creeks, streams, rivers, lakes, ponds, ditches, and impoundments, that flow into traditional navigable waters, the territorial seas, interstate waters, or impoundments of jurisdictional waters. Tributaries are WOTUS if they meet the relatively permanent standard.	(a)(3)
Adjacent Wetlands	Wetlands that are (1) adjacent to a traditional navigable water, the territorial seas, or an interstate water; or (2) adjacent and with a continuous surface connection to either relatively permanent jurisdictional impoundments or jurisdictional tributaries that meet the relatively permanent standard. Wetlands, as defined in the rule, generally include swamps, marshes, bogs, and similar areas. <i>Adjacent</i> is defined in the rule to mean “having a continuous surface connection.” Therefore, in order to be jurisdictional, wetlands adjacent to traditional navigable waters, interstate waters, or the territorial seas must also have a continuous surface connection with those waters.	(a)(4)
“Additional waters”—intrastate lakes and ponds, streams, or wetlands	Intrastate lakes and ponds that do not fall under one of the other WOTUS categories. Such waters are jurisdictional if they meet the relatively permanent standard and have a continuous surface connection to certain jurisdictional waters—(a)(1) or (a)(3) waters.	(a)(5)

Sources: CRS analysis; Army Corps of Engineers (Corps) and Environmental Protection Agency (EPA), “Revised Definition of ‘Waters of the United States,’” 88 *Federal Register* 3004, January 18, 2023; Corps and EPA, *Final Rule: Revised Definition of “Waters of the United States” Fact Sheet*, December 2022; Corps and EPA, “Revised Definition of ‘Waters of the United States’; Conforming,” 88 *Federal Register* 61964, September 8, 2023; Corps and EPA, *Fact Sheet for the Final Rule: Amendments to the Revised Definition of “Waters of the United States,”* August 2023.

Notes: WOTUS = waters of the United States.

a. Agency regulations defining WOTUS are codified at 33 C.F.R. § 328.3 and at 40 C.F.R. § 120.1.

Traditional Navigable Waters, the Territorial Seas, and Interstate Waters (Paragraph (a)(1) Waters)

The 2023 WOTUS Rule retained three categories without changes to the text or substance from pre-2015 regulations.⁴⁶ These categories include traditional navigable waters, the territorial seas, and interstate waters. However, the agencies restructured the rule to streamline the regulatory text and combined these three still-separate categories under one paragraph (i.e., (a)(1) waters) because, as the agencies explain in the rule’s preamble, the jurisdictional status of other categories of waters relies on their connection to waters from one of these three categories.⁴⁷

In the 2023 Conforming Rule, the Corps and EPA deleted *interstate wetlands* from the interstate waters category to align with the ruling in *Sackett*.⁴⁸ In contrast, the text of the pre-2015 regulations still includes interstate wetlands as part of the interstate waters category.⁴⁹ However,

⁴⁶ 2023 WOTUS Rule, p. 3068.

⁴⁷ 2023 WOTUS Rule, p. 3068.

⁴⁸ 2023 Conforming Rule, p. 61966.

⁴⁹ 1986 Corps Rule, p. 41250; 1988 EPA Rule, p. 20774.

the Corps and EPA have indicated that even where the pre-2015 regulations are in place, the agencies are interpreting WOTUS consistent with *Sackett*.⁵⁰ As specified in a September 27, 2023, guidance memorandum, “under the pre-2015 regulatory regime, consistent with *Sackett*, the agencies ... will not assert jurisdiction over interstate wetlands solely because they are interstate.”⁵¹

Impoundments of Jurisdictional Waters

The 2023 WOTUS Rule also retained the impoundments of jurisdictional waters category with one change from the pre-2015 regulations.⁵² The pre-2015 regulations included impoundments of any WOTUS, but the 2023 WOTUS Rule excluded impoundments of waters determined to be jurisdictional under paragraph (a)(5), which the Corps and EPA in their fact sheet referred to as “additional waters.”⁵³ These “additional waters” are a subset of what was previously referred to as the “other waters” category. (See further discussion on “additional waters” below.) The 2023 Conforming Rule did not make any changes to the impoundments of jurisdictional waters category.⁵⁴

Tributaries, Adjacent Wetlands, and “Additional Waters”

The remaining three categories in the 2023 WOTUS Rule—tributaries, adjacent wetlands, and “additional waters”—reflect the definition of WOTUS from pre-2015 regulations, but include changes that reflect Supreme Court precedent, science, and the Corps and EPA’s technical expertise, according to the agencies.⁵⁵ For example, the 2023 WOTUS Rule clarified that the waters in these three categories could meet either the relatively permanent standard or the significant nexus standard for purposes of determining jurisdiction.⁵⁶

However, in the 2023 Conforming Rule, the Corps and EPA removed the significant nexus standard to align with the ruling in *Sackett*. Accordingly, the waters in these three categories must meet the relatively permanent standard to be jurisdictional. Guidance applicable to areas where the pre-2015 regulations are in place also specifies that “the agencies will not assert jurisdiction based on the significant nexus standard.”⁵⁷ In addition to changes specific to the jurisdictional tests, in promulgating the 2023 WOTUS Rule, the agencies also made certain changes to each of the categories that constrained which waters are jurisdictional, in comparison to the pre-2015 regulations. These changes are described below.

Tributaries. A tributary is considered a WOTUS under the 2023 WOTUS Rule, as amended by the 2023 Conforming Rule, if it is a tributary of a traditional navigable water, the territorial seas, an interstate water, or an impoundment of a jurisdictional water and also meets the relatively

⁵⁰ EPA, “Pre-2015 Regulatory Regime,” <https://www.epa.gov/wotus/pre-2015-regulatory-regime>.

⁵¹ Corps and EPA, *Joint Coordination Memorandum to the Field Between the U.S. Department of the Army, U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA)*, September 27, 2023, p. 2, https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-pre-2015-regulatory-regime_508c.pdf (hereinafter *Joint Coordination Memorandum to the Field*, September 27, 2023).

⁵² 2023 WOTUS Rule, pp. 3075-3076.

⁵³ 1986 Corps Rule, p. 41250; 1988 EPA Rule, p. 20774; 2023 WOTUS Rule, p. 3066; and 2022 WOTUS Fact Sheet, p. 2. Note that impoundments of (a)(5) waters may still be determined to be jurisdictional if they meet the requirements of another category of WOTUS.

⁵⁴ 2023 Conforming Rule, p. 61968.

⁵⁵ 2023 WOTUS Rule, pp. 3005-3006; and 2022 WOTUS Fact Sheet.

⁵⁶ 2023 WOTUS Rule, pp. 3005-3006; and 2022 WOTUS Fact Sheet.

⁵⁷ *Joint Coordination Memorandum to the Field*, September 27, 2023, p. 2.

permanent standard.⁵⁸

As compared to the pre-2015 regulations, the 2023 WOTUS Rule, as amended by the 2023 Conforming Rule, added the territorial seas to the list of waters to which a water may be a tributary. The agencies stated that, in practice, this was not a significant change, as most tributaries will reach a traditional navigable water before they reach the territorial seas.⁵⁹

The 2023 WOTUS Rule, as amended by the 2023 Conforming Rule, also deletes the “additional waters” category from the list of waters to which a water may be a tributary.⁶⁰ The pre-2015 regulations included the comparable “other waters” category on the list, and the “other waters” category itself was broader, as discussed below.⁶¹

Similar to the pre-2015 regulations, the 2023 WOTUS rule, as amended by the 2023 Conforming Rule, does not contain a definition of *tributary* in the rule text.⁶² The 2023 WOTUS rule, consistent with the pre-2015 regulations, also did not include or exclude tributaries as WOTUS based on their flow regime (i.e., meaning whether they flow year-round, seasonally, or only in response to precipitation events).⁶³

However, following the *Sackett* ruling, the Corps and EPA indicated that in eliminating the significant nexus test, jurisdictional tributaries must meet the relatively permanent standard.⁶⁴ This is true for areas that fall under the 2023 WOTUS Rule, as amended by the 2023 Conforming Rule, as well as in areas that fall under the pre-2015 regime.⁶⁵ The agencies defined “relatively permanent” in the 2023 WOTUS Rule preamble to encompass “surface waters that have flowing or standing water year-round or continuously during certain times of the year.”⁶⁶ The agencies further specified that “relatively permanent waters do not include surface waters with flowing or standing water for only a short duration in direct response to precipitation.”⁶⁷

Adjacent wetlands. Under the 2023 WOTUS Rule, as amended by the 2023 Conforming Rule, adjacent wetlands are considered WOTUS if (1) they are adjacent to traditional navigable waters, interstate waters, or the territorial seas; or (2) they are adjacent to and have a continuous surface connection to jurisdictional impoundments or tributaries that meet the relatively permanent

⁵⁸ 2023 WOTUS Rule, p. 3142; 2023 Conforming Rule, pp. 61966, 61968.

⁵⁹ 2023 WOTUS Rule, pp. 3079-3080.

⁶⁰ 2023 WOTUS Rule, pp. 3079-3080.

⁶¹ 1986 Corps Rule, p. 41250; 1988 EPA Rule, p. 20774.

⁶² 2023 WOTUS Rule, pp. 3080-3081. Both the Clean Water Rule and the Navigable Waters Protection Rule included a definition of “tributary.” In the preamble to the 2023 WOTUS Rule, the agencies concluded that a definition was not required because the agencies have decades of experience implementing the 1986 regulations, which also did not include a definition. Further, the agencies asserted that they “articulate[d] and explain[ed] the agencies’ well-established interpretation and practices for identifying tributaries” in the preamble.

⁶³ 2023 WOTUS Rule, pp. 3080-3081. The rule’s preamble clarifies that “a tributary for purposes of this rule includes 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.” Note that the Navigable Waters Protection Rule’s definition required that a tributary be *perennial* (i.e., flow year-round) or *intermittent* (i.e., flow continuously only during certain times of the year, such as seasonally) and excluded *ephemeral* streams (i.e., those that flow only in response to precipitation events). The Clean Water Rule’s definition provided that a tributary could be perennial, intermittent, or ephemeral as long as other criteria in the definition were met.

⁶⁴ 2023 Conforming Rule, pp. 61965-61966, 61968.

⁶⁵ Corps and EPA, “Updates for Tribes and States on Waters of the United States,” presentation, November 15, 2023, https://www.epa.gov/system/files/documents/2023-11/wotus-overview_tribes-and-states_11-15-23_508.pdf, pp. 23-26.

⁶⁶ 2023 WOTUS Rule, p. 3084.

⁶⁷ 2023 WOTUS Rule, p. 3084.

standard.⁶⁸ The 2023 Conforming Rule also redefined *adjacent* to mean “having a continuous surface connection.”⁶⁹ The new definition for *adjacent* means that wetlands must have a continuous surface connection to traditional navigable waters, interstate waters, or the territorial seas to be jurisdictional.

The pre-2015 regulations more broadly included wetlands adjacent to waters in any of the WOTUS categories, other than wetlands themselves, and had a broader definition of “adjacent.”⁷⁰ (Note that the 2008 Rapanos Guidance provided additional specifics as to which wetlands were WOTUS, as discussed in **Table 2**.) However, following the *Sackett* ruling, the Corps and EPA issued a number of guidance documents clarifying which adjacent wetlands are considered jurisdictional under both the pre-2015 regime and under the 2023 WOTUS Rule, as amended by the 2023 Conforming Rule.⁷¹

On March 12, 2025, the Corps and EPA issued guidance (the 2025 Continuous Surface Connection Guidance) specific to implementation of the *continuous surface connection* requirement.⁷² Specifically, the guidance provides that for an adjacent wetland to be jurisdictional,

First, the adjacent body of water must be a “water of the United States,” which generally means traditional navigable waters, or a relatively permanent body of water connected to a traditional navigable water. Second, the wetland, assuming it satisfies the agencies’ longstanding regulatory definition of “wetlands” ... must have a continuous surface connection to a requisite covered water making it difficult to determine where the water ends and wetland begins.⁷³

“Additional waters.” Under the 2023 WOTUS Rule, as amended by the 2023 Conforming Rule, intrastate lakes and ponds not identified in the other WOTUS categories must meet the relatively permanent standard and have a continuous surface connection to traditional navigable waters, the territorial seas, interstate waters, or jurisdictional tributaries.⁷⁴ The agencies clarified in the 2023 WOTUS Rule preamble that this category is substantially narrower than the nonexclusive list of “other waters” that was included under the pre-2015 regulations.⁷⁵ The agencies also noted in the 2023 WOTUS Rule preamble that they replaced the broad Commerce Clause basis for jurisdiction from the pre-2015 regulations with the relatively permanent and significant nexus standards.⁷⁶ The 2023 Conforming Rule further limited the basis to the relatively permanent standard.⁷⁷

⁶⁸ 2023 WOTUS Rule, p. 3142; 2023 Conforming Rule, pp. 61966, 61968.

⁶⁹ 2023 Conforming Rule, p. 61969.

⁷⁰ 1986 Corps Rule, pp. 41250-41251; 1988 EPA Rule, p. 20774.

⁷¹ EPA, “Current Implementation of Waters of the United States,” section on “Guidance Documents and Memoranda Used to Implement the Current Definition of ‘Waters of the United States,’” <https://www.epa.gov/wotus/current-implementation-waters-united-states#Guidance>.

⁷² 2025 Continuous Surface Connection Guidance.

⁷³ 2025 Continuous Surface Connection Guidance, p. 5.

⁷⁴ 2023 WOTUS Rule, p. 3142; 2023 Conforming Rule, pp. 61966, 61968.

⁷⁵ 2023 WOTUS Rule, p. 3097.

⁷⁶ 2023 WOTUS Rule, p. 3097. The pre-2015 regulatory framework included as jurisdictional waters those waters “the use, degradation, or destruction of which could affect interstate or foreign commerce.” 1986 Corps Rule, p. 41250; 1988 EPA Rule, p. 20774.

⁷⁷ 2023 Conforming Rule, pp. 61966, 61968.

Exclusions

The 2023 WOTUS Rule provides eight exclusions from the definition of WOTUS.⁷⁸ The 2023 Conforming Rule did not make any changes to these exclusions.⁷⁹ Some are long-standing exclusions for prior converted cropland and waste treatment systems that were codified in pre-2015 regulatory text. Others exclude features that were generally considered nonjurisdictional under the pre-2015 regime, but that were listed as such in preamble language and guidance rather than in the regulatory text.⁸⁰ Furthermore, these eight features were excluded in each of the subsequent rules defining WOTUS (the Clean Water Rule and the Navigable Waters Protection Rule), although the scope of some of these exclusions differed between rules.⁸¹ The exclusions include

- **waste treatment systems**, including treatment ponds or lagoons designed to meet the requirements of the CWA;
- **prior converted cropland** (see discussion below);
- **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 to collect and retain water and that are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
- **artificial reflecting pools or swimming pools or other small ornamental bodies of water** created by excavating or diking dry land to retain water for primarily aesthetic reasons;
- **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 is abandoned and the resulting body of water meets the definition of WOTUS; and
- **swales and erosional features** (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow.

Regarding prior converted cropland, in the 2023 WOTUS Rule, the agencies repromulgated the pre-2015 regulatory exclusion, but also made certain changes to the regulatory text, in what the agencies described as an effort to improve clarity and consistency with the implementation by the U.S. Department of Agriculture (USDA) of the Food Security Act of 1985, as amended.⁸² The Food Security Act includes a provision (the “Swampbuster” exception) that requires USDA to

⁷⁸ 2023 WOTUS Rule, pp. 3066-3067, 3142-3143.

⁷⁹ 2023 Conforming Rule; 2023 Conforming Rule Fact Sheet.

⁸⁰ 2023 WOTUS Rule, pp. 3066-3067, 3142-3143.

⁸¹ 2023 WOTUS Rule, p. 3103. See also 2015 Clean Water Rule, p. 37118; 2020 Navigable Waters Protection Rule, p. 22340. Note these exclusions were either explicitly listed, or were excluded under a broader exclusion category.

⁸² 2023 WOTUS Rule, pp. 3105-3107. In 1993, the Corps and EPA codified into regulation the existing policy that prior converted cropland (PCC) is not WOTUS. See Corps and EPA, “Clean Water Act Regulatory Programs,” 58 *Federal Register* 45008, August 25, 1993. In the rule’s preamble, the agencies referenced the definition of PCC from USDA’s 1988 National Food Security Act Manual, which defines PCC as wetlands that “were both manipulated (drained or otherwise physically altered to remove excess water from the land) and cropped before 23 December 1985, to the extent that they no longer exhibit important wetland values.” For more information on the CWA PCC exclusion, see CRS In Focus IF11136, *Prior Converted Cropland Under the Clean Water Act*, by Laura Gatz and Megan Stubbs.

make determinations about whether wetland areas qualify as prior converted cropland.⁸³ The regulatory text in the 2023 WOTUS Rule specified that prior converted cropland designated by USDA is excluded. The regulatory text also clarified that the exclusion would cease upon a change of use, meaning the area is no longer available for the production of agricultural commodities.⁸⁴ This change aligns the WOTUS regulatory exclusion with the Swampbuster exception for prior converted cropland.⁸⁵ The 2023 Conforming Rule did not make any changes to the prior converted cropland exemption.⁸⁶

Definitions

The 2023 WOTUS Rule included six definitions. Five of the six definitions were unchanged from the pre-2015 regulations, including the definitions for *wetlands*, *adjacent*, *high tide line*, *ordinary high water mark*, and *tidal water*.⁸⁷ The 2023 WOTUS Rule also newly defined the term *significantly affect* for purposes of determining whether a water met the significant nexus standard.⁸⁸

The 2023 Conforming Rule deleted the definition for *significantly affect*, and it revised the definition of *adjacent*, as noted above, to mean “having a continuous surface connection.”⁸⁹ The 2023 Conforming Rule made no changes to the remaining four definitions.⁹⁰

Which Rule Is in Effect Now?

The 2023 WOTUS Rule went into effect on March 20, 2023, and the 2023 Conforming Rule went into effect on September 8, 2023.⁹¹ Litigation has changed which rule is in effect in some states, however. Two federal district courts issued preliminary injunctions that collectively bar implementation of the 2023 WOTUS Rule in 26 states.⁹² Following the issuance of the 2023 Conforming Rule, the Corps and EPA stated that they would interpret WOTUS consistent with the pre-2015 regulatory regime and the decision in *Sackett v. EPA* as to those 26 states.⁹³ As to the other 24 states, the District of Columbia, and the U.S. territories, the Corps and EPA have stated

⁸³ For more information, see CRS In Focus IF11136, *Prior Converted Cropland Under the Clean Water Act*, by Laura Gatz and Megan Stubbs.

⁸⁴ 2023 WOTUS Rule, p. 3142.

⁸⁵ 2023 WOTUS Rule, pp. 3105-3107.

⁸⁶ 2023 Conforming Rule; 2023 Conforming Rule Fact Sheet.

⁸⁷ 2023 WOTUS Rule, pp. 3067, 3143.

⁸⁸ 2023 WOTUS Rule, pp. 3067, 3143.

⁸⁹ 2023 Conforming Rule, pp. 61966, 61969. See also 2023 Conforming Rule Fact Sheet.

⁹⁰ 2023 Conforming Rule; 2023 Conforming Rule Fact Sheet.

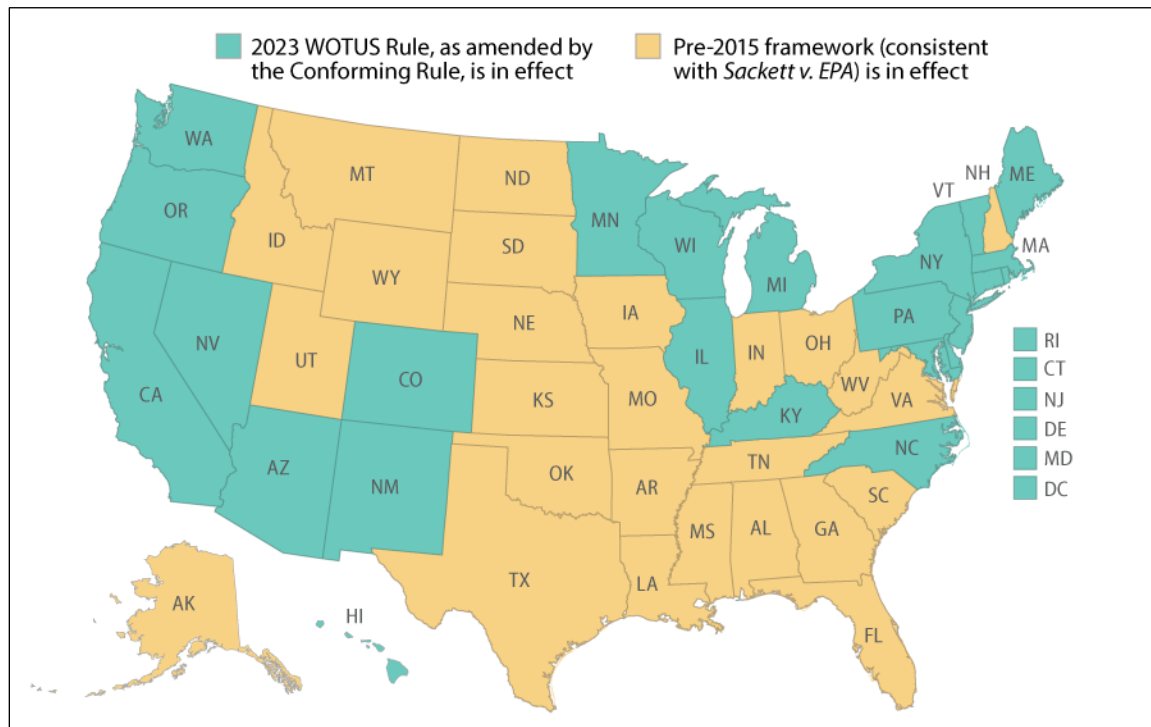
⁹¹ 2023 Conforming Rule, p. 61964.

⁹² Memorandum Opinion and Order Granting Preliminary Injunction, *Texas v. EPA*, No. 3:23-cv-17 (S.D. Tex. Mar. 19, 2023), ECF No. 60; Order Granting Plaintiffs’ Motion for Preliminary Injunction, *West Virginia v. EPA*, No. 3:23-cv-00032 (D.N.D. Apr. 12, 2023), ECF No. 131. In addition to the district court preliminary injunctions, the U.S. Court of Appeals for the Sixth Circuit stayed the 2023 WOTUS Rule pending appeal as to Kentucky and several industry associations that were plaintiffs in that lawsuit, as well as to their members. Order, *Kentucky v. EPA*, No. 23-5343 (6th Cir. May 10, 2023), ECF No. 24. On September 23, 2024, after remanding the matter to the district court, the Sixth Circuit issued a mandate lifting the stay order, bringing the number of states subject to the pre-2015 regulations down from 27 to 26. Mandate, *Kentucky v. EPA*, No. 23-5343 (6th Cir. Sept. 23, 2024), ECF No. 57.

⁹³ EPA, “Definition of ‘Waters of the United States’: Rule Status and Litigation Update,” <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>.

that they are implementing the 2023 WOTUS Rule, as amended by the 2023 Conforming Rule.⁹⁴ **Figure 1** shows which regulatory regime is operative in each state across the United States.

Figure 1. Status of the Waters of the United States (WOTUS) Regulatory Regime in Effect as of June 23, 2025



Source: CRS.

The Supreme Court's decision in *Sackett v. EPA* did not directly affect the status of the 2023 WOTUS Rule.⁹⁵ The majority's opinion nevertheless rejected jurisdictional interpretations that were reflected in the 2023 WOTUS Rule, as well as in aspects of prior regulatory frameworks, which all extended jurisdiction to more wetlands than were covered under the *Sackett* majority's interpretation. Following the Court's decision, the Corps and EPA issued the 2023 Conforming Rule, to align the definition of WOTUS to *Sackett*, and stated that they "will interpret the phrase 'waters of the United States' consistent with the Supreme Court's decision."⁹⁶

A change in regulatory regime will not result in the retroactive application of a new rule to all potentially covered waters. In particular, the transition to the 2023 WOTUS Rule and the 2023 Conforming Rule does not necessarily invalidate approved jurisdictional determinations (AJDs), which the Corps issues to identify whether a particular parcel of land contains WOTUS, and which may be used in the CWA permitting process.⁹⁷ Approved jurisdictional determinations completed when the Navigable Waters Protection Rule or pre-2015 regulatory framework were in effect will not be reopened before their expiration date unless they satisfy specific criteria for

⁹⁴ EPA, "Definition of 'Waters of the United States': Rule Status and Litigation Update," <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>.

⁹⁵ See *infra*, "How Did *Sackett v. EPA* Affect the Scope of CWA Jurisdiction?"

⁹⁶ EPA, "Definition of 'Waters of the United States': Rule Status and Litigation Update," <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>.

⁹⁷ See 33 C.F.R. § 331.2.

revision, or unless a recipient of an AJD (e.g., a landowner or project proponent) requests that a new AJD be provided pursuant to the current regulatory regime.⁹⁸ Additionally, enforcement actions for violations of the CWA are typically based on the statutory and regulatory framework that was in effect at the time the violations occurred, even if the rule has since changed.

Have the 2023 WOTUS Rule or 2023 Conforming Rule Been Challenged in Court?

Five pending lawsuits challenge the 2023 WOTUS Rule and the 2023 Conforming Rule.⁹⁹ While no court to date has issued a ruling on the merits, preliminary orders have limited the implementation of the 2023 WOTUS Rule for some states. All of the pending litigation has been stayed while the Trump Administration considers taking further action with respect to the scope of WOTUS.

The first two lawsuits were filed on January 18, 2023, and have been consolidated in the U.S. District Court for the Southern District of Texas.¹⁰⁰ In the first suit, the States of Texas and Idaho argue that the 2023 WOTUS Rule unlawfully expands the Corps and EPA's jurisdiction beyond the bounds of the CWA; violates the major questions doctrine,¹⁰¹ because the CWA does not authorize the agencies to determine the scope of their own jurisdiction; intrudes upon state sovereignty; and violates due process by failing to provide adequate notice of what conduct is prohibited under the statute.¹⁰²

In the second suit, a coalition of agricultural and industry groups argues that the rule is unsupported by law and scientific and economic evidence; violates the Commerce Clause, the Due Process Clause of the Fifth Amendment, the major questions doctrine, and the nondelegation doctrine;¹⁰³ exceeds the Corps' and EPA's statutory authority; and unlawfully fails to include a regulatory flexibility analysis.¹⁰⁴ An environmental group has intervened in the lawsuits in support of the Corps and EPA.¹⁰⁵

⁹⁸ See EPA, "Current Implementation of Waters of the United States," <https://www.epa.gov/wotus/current-implementation-waters-united-states>; and U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 05-02 (June 14, 2005).

⁹⁹ Prior rules defining WOTUS were the subject of numerous lawsuits filed by industry groups, environmental groups, and states. In 2018, the Supreme Court held that challenges to a rule defining WOTUS are typically governed by the APA and must be reviewed first in federal district court. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018). That holding limited the degree to which the agencies, under rules of court procedure, can seek a single nationwide decision about the validity of the 2023 WOTUS Rule.

¹⁰⁰ Order, *Texas v. EPA*, No. 3:23-cv-00017 (S.D. Tex. Feb. 13, 2023), ECF No. 27.

¹⁰¹ Under the major questions doctrine, an agency must provide clear congressional authorization in certain cases when it seeks to decide an issue of major national significance. For additional background on the major questions doctrine, see CRS In Focus IF12077, *The Major Questions Doctrine*, by Kate R. Bowers.

¹⁰² First Amended, *Texas v. EPA*, No. 3:23-cv-00017 (S.D. Tex. Feb. 27, 2023), ECF No. 32.

¹⁰³ The nondelegation doctrine is the separation-of-powers principle that limits Congress's ability to cede its legislative power to other branches of government or nongovernmental entities. For further discussion of the nondelegation doctrine, see Congressional Research Service, "Art.I.S1.5. Nondelegation Doctrine," *Constitution Annotated*, https://constitution.congress.gov/browse/article-1/?anchor=I_S1_5#I_S1_5.

¹⁰⁴ First Amended Complaint, *Am. Farm Bureau Fed'n v. EPA*, No. 3:23-cv-00020 (S.D. Tex. Feb. 2, 2023), ECF No. 1.

¹⁰⁵ Bayou City Waterkeeper Motion to Intervene, *Texas v. EPA*, No. 3:23-cv-00017 (S.D. Tex. Feb. 9, 2023), ECF No. 20; Bayou City Waterkeeper Motion to Intervene, *Am. Farm Bureau Fed'n v. EPA*, No. 3:23-cv-00020 (S.D. Tex. Feb. 9, 2023), ECF No. 16; Order, *Texas v. EPA*, No. 3:23-cv-00017 (S.D. Tex. Feb. 14, 2023), ECF No. 30.

Third, a group of 24 states challenged the 2023 WOTUS Rule in the U.S. District Court for the District of North Dakota.¹⁰⁶ In addition to arguments similar to those made by the Texas plaintiffs, the state plaintiffs allege that the rule violates the APA, because the final rule is not a “logical outgrowth” of the rule the agencies proposed in December 2021, and that the rule violates the Tenth Amendment by asserting federal jurisdiction over intrastate waters and lands that are ordinarily regulated by the states.¹⁰⁷ The agricultural and industry groups challenging the rule in Texas have also intervened in the North Dakota litigation in support of the state plaintiffs, although the Corps and EPA have appealed the district court’s order granting the groups’ motion to intervene.¹⁰⁸

Fourth, the Commonwealth of Kentucky challenged the 2023 WOTUS Rule in the U.S. District Court for the Eastern District of Kentucky, raising similar allegations to those made by Texas and the other state plaintiffs.¹⁰⁹ A fifth suit, filed in the Eastern District of Kentucky by a coalition of industry associations, was consolidated with the Commonwealth of Kentucky’s lawsuit.¹¹⁰

The plaintiffs in each lawsuit filed motions asking the courts to bar implementation of the 2023 WOTUS Rule while the litigation is pending.¹¹¹ Two district courts granted the motions and issued preliminary injunctions: The Texas district court granted Texas and Idaho’s motion, and the North Dakota district court granted the state plaintiffs’ motion.¹¹²

In granting Texas and Idaho’s motion, the Texas district court stated that the 2023 WOTUS Rule extended the significant nexus standard beyond the breadth intended by Justice Kennedy in *Rapanos* and identified potential constitutional problems with the rule’s coverage of all interstate waters.¹¹³ The court denied the Texas industry plaintiffs’ request for a nationwide injunction, however, holding that the industry associations had not demonstrated that they were entitled to injunctive relief beyond what was granted to the states.¹¹⁴

In granting the state plaintiffs’ motion for preliminary injunction, the North Dakota court agreed with the Texas court’s analysis, expressed concerns about the 2023 Rule’s treatment of tributaries and impoundments, and indicated that the agencies’ interpretation was likely in excess of their

¹⁰⁶ Complaint, *West Virginia v. EPA*, No. 3:23-cv-00032 (D.N.D. Feb. 16, 2023), ECF No. 1.

¹⁰⁷ *Id.*

¹⁰⁸ Order and Federal Defendants’ Appeal from the Magistrate Judge’s Order Granting Industry’s Motion to Intervene, *West Virginia v. EPA* (D.N.D. Mar. 22, 2023 and Apr. 5, 2023), ECF Nos. 110 and 129.

¹⁰⁹ Complaint, *Kentucky v. EPA*, No. 3:23-cv-00007 (E.D. Ky. Feb. 22, 2023), ECF No. 1.

¹¹⁰ Complaint, *Kentucky Chamber of Commerce v. EPA*, No. 3:23-cv-00008 (E.D. Ky. Feb. 22, 2023); Order, *Kentucky v. EPA*, No. 3:23-cv-00007 (E.D. Ky. Feb. 28, 2023), ECF No. 16.

¹¹¹ Motion for Preliminary Injunction, *Texas v. EPA*, No. 3:23-cv-00017 (S.D. Tex. Feb. 7, 2023), ECF No. 13; Motion for Preliminary Injunction, *Am. Farm Bureau Fed’n v. EPA*, No. 3:23-cv-00020 (S.D. Tex. Feb. 7, 2023), ECF No. 15; Plaintiff States’ Motion for Preliminary Injunction, *West Virginia v. EPA*, No. 3:23-cv-00032 (D.N.D. Feb. 21, 2023), ECF No. 44; Motions for Preliminary Injunction, *Kentucky v. EPA*, No. 3:23-cv-00007 (E.D. Ky. Feb. 23, 2023 and Feb. 28, 2023), ECF Nos. 10 and 17.

¹¹² Memorandum Opinion and Order Granting Preliminary Injunction, *Texas v. EPA*, No. 3:23-cv-00017 (E.D. Tex. Mar. 19, 2023), ECF No. 60; Order Granting Plaintiffs’ Motion for Preliminary Injunction, *West Virginia v. EPA* (D.N.D. Apr. 12, 2023), ECF No. 131. The North Dakota industry plaintiffs withdrew their motion for preliminary injunction after the district court granted the state plaintiffs’ motion. Intervenor-Plaintiffs’ Notice of Withdrawal of Their Motion for Preliminary Injunction, *West Virginia v. EPA*, No. 3:23-cv-00032 (D.N.D. Apr. 18, 2023), ECF No. 135.

¹¹³ Memorandum Opinion and Order Granting Preliminary Injunction at 19-26, *Texas v. EPA*.

¹¹⁴ *Id.* at 34.

statutory authority, arbitrary and capricious, and in conflict with various constitutional limitations.¹¹⁵

The litigation in Kentucky proceeded differently. In March 2023, the Kentucky district court denied both preliminary injunction motions without prejudice and dismissed Kentucky's and the industry plaintiffs' claims.¹¹⁶ While the court noted that the plaintiffs' allegations "may very well present a federal cause of action" in the future, their alleged injuries were too speculative and generalized to support their claims of standing and ripeness.¹¹⁷

Both Kentucky and the industry plaintiffs appealed those rulings to the U.S. Court of Appeals for the Sixth Circuit and sought a stay of the district court's decision pending appeal. In May 2023, the Sixth Circuit granted an injunction pending appeal, holding that the plaintiffs' general allegations of injury were likely sufficient at this stage of litigation.¹¹⁸ On July 29, 2024, the Sixth Circuit vacated the district court's ruling.¹¹⁹ The Sixth Circuit ruled that the district court had improperly dismissed the plaintiffs' complaints and remanded the matter to the district court with instructions that the plaintiffs file notice of their intent to file a new suit, amend their complaint, "or dispense with this litigation altogether" in light of the Corps and EPA's issuance of the 2023 Conforming Rule.¹²⁰

Following the issuance of the 2023 Conforming Rule, plaintiffs in the pending cases have amended their complaints to argue that the 2023 WOTUS Rule as amended remains unlawful.¹²¹ The plaintiffs argue, among other things, that the relatively permanent standard as stated in the amended rule is vague and overly broad and that the agencies failed to adhere to notice-and-comment requirements in issuing the 2023 Conforming Rule.¹²²

As a result of the preliminary injunctions, the pre-2015 regulations, consistent with *Sackett*, are in effect in 26 states. Further proceedings in any of the pending lawsuits could increase or decrease the number of states in which the 2023 WOTUS Rule and the 2023 Conforming Rule are in effect.¹²³ Further proceedings within the context of the pending lawsuits could also address whether the 2023 Conforming Rule adequately amends the 2023 WOTUS Rule to conform to the Supreme Court's ruling in *Sackett*. It is also possible that no court will reach the merits of the plaintiffs' challenges to the 2023 WOTUS Rule as amended. After the change in Administration

¹¹⁵ Order Granting Plaintiffs' Motion for Preliminary Injunction at 17-29, *West Virginia v. EPA*.

¹¹⁶ Opinion and Order, *Kentucky v. EPA*, No. 3:23-cv-00007 (E.D. Ky. Mar. 31, 2023), ECF No. 51.

¹¹⁷ *Id.* at 1.

¹¹⁸ Order, *Kentucky v. EPA*, No. 23-5343 (6th Cir. May 10, 2023), ECF No. 24.

¹¹⁹ *Kentucky v. EPA*, No. 23-5343, 2024 WL 3569525 (6th Cir. Jul. 29, 2024).

¹²⁰ *Id.* at *2.

¹²¹ Second Amended Complaint and Petition for Review, *Texas v. EPA*, No. 3:23-cv-00017 (S.D. Tex. Nov. 13, 2023), ECF No. 90; Second Amended Complaint for Declaratory Relief, *Texas v. EPA*, No. 3:23-cv-00017 (S.D. Tex. Nov. 13, 2023), ECF No. 91; Amended Complaint, *West Virginia v. EPA*, No. 3:23-cv-00032 (D.N.D. Nov. 13, 2023), ECF No. 176; Intervenor Plaintiffs' Amended Complaint for Declaratory Relief, *West Virginia v. EPA*, No. 3:23-cv-00032 (D.N.D. Nov. 13, 2023), ECF No. 175; First Amended Complaint, *Kentucky v. EPA*, No. 3:23-cv-00007 (E.D. Ky. Nov. 8, 2024), ECF No. 78. Following the Sixth Circuit's ruling, the industry plaintiffs in the Kentucky litigation voluntarily dismissed their suit. Private-Sector Plaintiffs' Notice of Voluntary Dismissal Without Prejudice, *Kentucky v. EPA*, No. 3:23-00007 (E.D. Ky. Oct. 4, 2024), ECF No. 73.

¹²² *E.g.*, Second Amended Complaint and Petition for Review, *Texas v. EPA*, No. 3:23-cv-00017 ¶¶ 77-79 (S.D. Tex. Nov. 13, 2023), ECF No. 90; Second Amended Complaint for Declaratory Relief, *Texas v. EPA*, No. 3:23-cv-00017 ¶ 9 (S.D. Tex. Nov. 13, 2023), ECF No. 91.

¹²³ Consistent with the statute of limitations for APA claims, potential litigants would generally be required to file suit within six years after their claims accrue. 28 U.S.C. § 2401(a). While additional lawsuits are thus possible, early lawsuits are the most likely to be closely watched, as they present the courts' first opportunities to issue rulings that may be binding in later cases.

in 2025, the Corps and EPA asked the courts to stay each case to allow the agencies time to brief new leadership about the issues presented in the case; in the Kentucky litigation, the parties also sought to extend the stay following the issuance of the 2025 Continuous Surface Connection Guidance to allow the agencies to conduct listening sessions, receive public comments, and take further action as appropriate.¹²⁴ All three district courts have granted stays, pausing the litigation pending further action by the parties or the courts.¹²⁵

How Did *Sackett v. EPA* Affect the Scope of CWA Jurisdiction?

On May 25, 2023, the Supreme Court decided *Sackett v. EPA*, a case with significant implications for the scope of federal jurisdiction under the CWA.¹²⁶ In *Sackett*, landowners in Idaho (the Sacketts) challenged a compliance order and asked the Court to revisit *Rapanos* and adopt Justice Scalia’s plurality test for determining whether certain adjacent wetlands are WOTUS. Applying the significant nexus test articulated by Justice Kennedy in *Rapanos*, the U.S. Court of Appeals for the Ninth Circuit upheld EPA’s conclusion that the Sacketts’ property contained WOTUS that were subject to federal jurisdiction under the CWA and relevant regulations.¹²⁷

On review, the Supreme Court unanimously reversed the Ninth Circuit. Although all nine Justices agreed that the lower court applied the wrong standard for identifying WOTUS, the Court was split 5-4 on the appropriate test. In an opinion authored by Justice Alito, the majority formally adopted the approach taken by the *Rapanos* plurality. The majority held that “waters” under the CWA are limited to “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.”¹²⁸

The majority also held that the CWA covers only wetlands that qualify as WOTUS “in their own right.”¹²⁹ This limited covered wetlands to those that are “indistinguishably part of a body of water that itself constitutes ‘waters’ under the CWA.”¹³⁰ Quoting the *Rapanos* plurality, the majority concluded that WOTUS includes

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

¹²⁴ Defendants’ Motion to Stay the Case or, in the Alternative, to Extend the Supplemental Briefing Deadline by 14 Days, *Texas v. EPA*, No. 3:23-cv-00017 (S.D. Tex. Feb. 3, 2025), ECF No. 135; Defendants’ Motion to Stay Case, *West Virginia v. EPA*, No. 3:23-cv-00032 (D.N.D. Feb. 4, 2025), ECF No. 250; Defendants’ Consent Motion to Stay Case, *Kentucky v. EPA*, No. 3:23-cv-00007 (E.D. Ky. Feb. 3, 2025), ECF No. 89; Joint Status Report, *Kentucky v. EPA*, No. 3:23-cv-00007 (E.D. Ky. Mar. 28, 2025), ECF No. 92.

¹²⁵ Order, *Texas v. EPA*, No. 3:23-cv-00017 (S.D. Tex. Feb. 4, 2025), ECF No. 136; Order Granting Defendants’ Motion for Stay, *West Virginia v. EPA*, No. 3:23-cv-00032 (D.N.D. Feb. 18, 2025), ECF No. 256; Order, *Kentucky v. EPA*, No. 3:23-cv-00007 (E.D. Ky. Feb. 10, 2025), ECF No. 90; Order, *Kentucky v. EPA*, No. 3:23-cv-00007 (E.D. Ky. Apr. 3, 2025).

¹²⁶ *Sackett v. EPA*, 598 U.S. 651 (2023). For a more in-depth discussion of *Sackett*, see CRS Legal Sidebar LSB10981, *Supreme Court Narrows Federal Jurisdiction Under Clean Water Act*, by Kate R. Bowers.

¹²⁷ *Sackett v. EPA*, 8 F.4th 1075 (9th Cir. 2021).

¹²⁸ *Sackett v. EPA*, 598 U.S. at 671.

¹²⁹ *Id.* at 676.

¹³⁰ *Id.*

waters of the United States in their own right, so that there is no clear demarcation between waters and wetlands.¹³¹

Accordingly, the majority ruled that CWA jurisdiction excludes wetlands that are neighboring to but separate from traditional navigable waters.¹³²

In addition to reaffirming the *Rapanos* plurality's standard, the majority also rejected the significant nexus test.¹³³ The majority noted that Congress must "enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property" and further reasoned that the significant nexus test "gives rise to serious vagueness concerns in light of the CWA's criminal penalties."¹³⁴ According to the majority, the significant nexus test thus amounted to a "freewheeling inquiry" that "provides little notice to landowners of their obligations under the CWA."¹³⁵

The Court's ruling narrowed the scope of jurisdiction under the CWA as compared to its long-standing regulatory implementation and narrowed the interpretation adopted by lower courts post-*Rapanos*. While the precise extent of the change will continue to depend on how the Corps and EPA implement various aspects of the decision (including through guidance or a new rule), the majority's exclusion of wetlands that are separated from covered waters by natural or artificial barriers means that fewer wetlands will be covered than under any regulatory framework developed by the Corps or EPA since the 1970s.¹³⁶ Additionally, the majority's definition of *waters* appears to exclude ephemeral waters, thus narrowing the scope of waters as compared to the 2023 WOTUS Rule, the 2015 Clean Water Rule, and the pre-2015 regulations and guidance.

Neither the 2023 Rule nor any prior regulation was presented to the Supreme Court for review in *Sackett*, so the Court's decision did not automatically affect the status of the 2023 WOTUS Rule. The majority opinion nevertheless rejected jurisdictional interpretations that were reflected in the 2023 WOTUS Rule as well as in certain elements of the pre-2015 operative definition of WOTUS. The 2023 Conforming Rule and implementation guidance issued by the Corps and EPA (including the 2025 Continuous Surface Connection Guidance, discussed below under "What Actions Has the Second Trump Administration Taken to Define WOTUS?") both represent efforts by the Corps and EPA to address the interpretation of WOTUS in light of *Sackett*.

The Supreme Court's ruling could affect—and, in some cases, already has affected—regulation of waters at the state level. The CWA expressly reserves to states the right to issue more stringent regulations, and states may choose to cover more waters in their own programs.¹³⁷ Some states regulate waters within their borders beyond the scope of federal jurisdiction and have indicated that they plan to continue or expand such protections following *Sackett*; in some cases, states have already expanded protections.¹³⁸ Other states have enacted laws barring environmental state

¹³¹ *Id.* at 678.

¹³² *Id.* at 679.

¹³³ *Id.*

¹³⁴ *Id.* at 680.

¹³⁵ *Id.* at 681.

¹³⁶ *Id.* at 720 (Kavanaugh, J., concurring in the judgment).

¹³⁷ 33 U.S.C. § 1370.

¹³⁸ E.g., California State Water Resources Control Board, "State Water Board Statement: U.S. Supreme Court Decision Decreases Federal Wetlands Protection," press release, May 25, 2023, https://waterboards.ca.gov/press_room/press_releases/2023.html. On June 4, 2025, the California Senate passed a bill (SB 601) to protect certain state waterways following *Sackett*, but the bill had not been enacted into law at the time of publication of this report. In May 2024, Colorado became the first state to enact legislation restoring protections to certain wetlands and streams following the *Sackett* decision (Colorado House Bill 24-1379).

agencies from promulgating regulations beyond what is federally required.¹³⁹ A narrowed definition of WOTUS at the federal level could thus result in greater state-level divergence in the scope of covered waters.

What Actions Has the Second Trump Administration Taken to Define WOTUS?

On March 12, 2025, the second Trump Administration announced its intent to revise the definition of WOTUS again through new rulemaking.¹⁴⁰ In an EPA press release, the Administration promised to ensure a revised definition that “follows the law, reduces red-tape, cuts overall permitting costs, and lowers the cost of doing business in communities across the country while protecting the nation’s navigable waters from pollution.”¹⁴¹ EPA also committed to focus its regulatory revision on “clarity, simplicity and improvements that will stand the test of time.”¹⁴²

The same day, the Corps and EPA issued new guidance to field staff to help implement *Sackett*.¹⁴³ The Administration asserted that the preamble to the 2023 Conforming Rule, and the agencies’ case-specific policy memoranda issued after *Sackett* under the Biden Administration, did not provide clear or transparent direction for the public or the agencies on the meaning of the *continuous surface connection* requirement.¹⁴⁴ The guidance, a joint memorandum to field staff, focused on implementation of the meaning of the continuous surface connection requirement for determining which wetlands are considered jurisdictional adjacent wetlands.

The guidance reiterates the two-part test provided in the *Sackett* ruling for determining CWA jurisdiction over adjacent wetlands: (1) the adjacent body of water must be a WOTUS, “which generally means traditional navigable waters or a relatively permanent body of water connected to a traditional navigable water”; and (2) the wetland “must have a continuous surface connection to a requisite covered water making it difficult to determine where the water ends and the wetland begins.”¹⁴⁵ The guidance also clarifies that adjacent wetlands are WOTUS only if they directly abut certain jurisdictional waters and are not separated from such waters by uplands, a berm, a dike, or a similar feature.¹⁴⁶

Additionally, the agencies rescinded prior guidance and training materials issued under the Biden Administration that asserted that a wetland also has a continuous surface connection to a jurisdictional water if it is connected to that water through a “discrete feature” (e.g., a nonjurisdictional ditch, swale, pipe, or culvert). Per the new guidance, a wetland that has a

¹³⁹ See Corps and EPA, *Resource and Programmatic Assessment for the Navigable Waters Protection Rule: Definition of “Waters of the United States,”* January 23, 2020, pp. 45-46, https://www.epa.gov/sites/production/files/2020-01/documents/rpa_-_nwpr_.pdf; Environmental Law Institute, *State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act*, May 2013, p. 1, <https://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf>.

¹⁴⁰ EPA, “Administrator Zeldin Announces EPA Will Revise Waters of the United States Rule,” press release, March 12, 2025, <https://www.epa.gov/newsreleases/administrator-zeldin-announces-epa-will-revise-waters-united-states-rule> (hereinafter March 2025 EPA Press Release).

¹⁴¹ March 2025 EPA Press Release.

¹⁴² March 2025 EPA Press Release.

¹⁴³ 2025 Continuous Surface Connection Guidance.

¹⁴⁴ 2025 Continuous Surface Connection Guidance, p. 1.

¹⁴⁵ 2025 Continuous Surface Connection Guidance, p. 5.

¹⁴⁶ 2025 Continuous Surface Connection Guidance, p. 5.

continuous surface connection to a jurisdictional water through a “discrete feature” but does not abut the covered water is not jurisdictional.¹⁴⁷

The Corps and EPA also announced a *Federal Register* notice publicizing a series of six listening sessions and a 30-day recommendations docket to solicit feedback on key aspects of the definition of WOTUS. The Corps and EPA published the *Federal Register* notice on March 24, 2025.¹⁴⁸ It announced listening sessions for April and May 2025, as well as the availability of the recommendations docket, opened until April 23, 2025, to accept written recommendations from the public.¹⁴⁹ The agencies organized the six listening sessions by stakeholder groups—states, tribes, industry and agricultural stakeholders, environmental and conservation stakeholders, local governments, and the public.¹⁵⁰

How Have Adjacent Wetlands Been Addressed in Each of the WOTUS Regulations?

The Corps and EPA have long included adjacent wetlands as their own category in the regulations they have promulgated to define WOTUS. While some rules included a more expansive definition and others narrower definitions of *adjacent wetlands*, all of the rules have recognized adjacent wetlands as WOTUS. These rules have provided that wetlands separated from other WOTUS by “man-made dikes or barriers, natural river berms, beach dunes and the like” are adjacent wetlands.¹⁵¹ The scope of adjacent wetlands in the *Sackett* decision, as previously discussed, diverges from long-standing regulations and practice by excluding wetlands separated from WOTUS.

Table 2 summarizes the scope of adjacent wetlands in the pre-2015 regulations, the 2008 Rapanos Guidance, the 2015 Clean Water Rule, the 2020 Navigable Waters Protection Rule, the 2023 WOTUS Rule, the *Sackett v. EPA* decision, the 2023 Conforming Rule, and the 2025 Continuous Surface Connection Guidance.

¹⁴⁷ 2025 Continuous Surface Connection Guidance, p. 5.

¹⁴⁸ Corps and EPA, “WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations,” 90 *Federal Register* 13428, March 24, 2025.

¹⁴⁹ EPA Docket, “Implementation of the Definition of Waters of the United States,” EPA-HQ-OW-2025-0093, <https://www.regulations.gov/document/EPA-HQ-OW-2025-0093-0001/comment>.

¹⁵⁰ EPA, “Public Outreach and Stakeholder Engagement Activities,” <https://www.epa.gov/wotus/public-outreach-and-stakeholder-engagement-activities>.

¹⁵¹ E.g., 1986 Corps Rule, pp. 41206, 41251.

Table 2. Scope of Adjacent Wetlands Under Waters of the United States (WOTUS) Regulations and Guidance and in the *Sackett v. EPA* Decision

Source	Description of the Adjacent Wetlands WOTUS Category	How Adjacent Is Defined
Pre-2015 Regulations ^a	Wetlands adjacent to jurisdictional waters, other than waters that are themselves wetlands	<p>The regulations</p> <ul style="list-style-type: none"> define <i>adjacent</i> as “bordering, contiguous, or neighboring”^b; and specify that “wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like” are <i>adjacent wetlands</i>.
2008 Rapanos Guidance ^c	<ul style="list-style-type: none"> Wetlands that were adjacent to traditional navigable waters and wetlands that abutted relatively permanent tributaries (described as those that flow year-round or have continuous flow at least seasonally) of such waters were categorically WOTUS Wetlands adjacent to tributaries that were not relatively permanent, and wetlands adjacent to but not directly abutting a relatively permanent tributary, were subject to case-by-case significant nexus analysis to determine jurisdiction 	<p>The guidance provided that adjacency was established by satisfying one of three criteria:</p> <ol style="list-style-type: none"> (1) the wetland had an unbroken surface or shallow subsurface connection to jurisdictional waters (which may be intermittent); (2) the wetland was physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, or similar features; or (3) the wetland’s proximity to a jurisdictional water was reasonably close and supported a science-based inference of ecological interconnection.

Source	Description of the Adjacent Wetlands WOTUS Category	How Adjacent Is Defined
2015 Clean Water Rule ^d	<ul style="list-style-type: none"> • Adjacent <i>waters</i>, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters, rather than just adjacent wetlands • Included waters adjacent to traditional navigable waters; interstate waters, including interstate wetlands; jurisdictional impoundments; and jurisdictional tributaries 	<p>The rule</p> <ul style="list-style-type: none"> • defined <i>adjacent</i> to mean “bordering, contiguous, or neighboring” a traditional navigable water, an interstate water (including an interstate wetland), a jurisdictional impoundment, or a jurisdictional tributary; • included “waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like”; • specified that for the purposes of adjacency, an open water such as a pond or lake included any wetlands within or abutting its ordinary high water mark; • specified that adjacency was not limited to waters located laterally to a traditional navigable water, an interstate water (including an interstate wetland), a jurisdictional impoundment, or a jurisdictional tributary; instead, adjacent waters were to also include all waters that connect segments of one of the aforementioned waters or that were located at the head of one of these waters and were bordering, contiguous, or neighboring; and • newly defined <i>neighboring</i>, setting new numeric standards for determining adjacency—waters were considered to be <i>neighboring</i> if they were located within 100 feet of the ordinary high water mark of a traditional navigable water, an interstate water (including an interstate wetland), a jurisdictional impoundment, or a jurisdictional tributary; or if the water was located within the 100-year floodplain of one of the aforementioned waters and not more than 1,500 feet from the ordinary high water mark of such water.

Source	Description of the Adjacent Wetlands WOTUS Category	How Adjacent Is Defined
2020 Navigable Waters Protection Rule ^e	Adjacent wetlands	<p>The rule defined <i>adjacent wetlands</i> to mean wetlands that</p> <ul style="list-style-type: none"> (1) abutted a territorial sea or traditional navigable water, tributary, or a lake, pond, or impoundment of a jurisdictional water; (2) were inundated by flooding from one of the aforementioned waters in a typical year; (3) were physically separated from one of the aforementioned waters only by a natural berm, bank, dune, or similar natural feature; or (4) were physically separated from one of the aforementioned waters only by an artificial dike, barrier, or similar artificial structure, so long as that structure allowed for a direct hydrological surface connection to the water in a typical year. <p>The rule specified that an adjacent wetland was jurisdictional when a road or similar artificial structure divided the wetland, so long as the structure allowed for a direct hydrologic surface connection through or over that structure in a typical year.</p>
2023 WOTUS Rule ^f	<p>Wetlands that are adjacent to</p> <ul style="list-style-type: none"> (1) traditional navigable waters, interstate waters, or the territorial seas; (2) jurisdictional impoundments or tributaries that are relatively permanent, standing, or continuously flowing bodies of water and with a continuous surface connection to those waters; or (3) jurisdictional impoundments or tributaries when the wetlands alone or in combination with similarly situated waters meet the significant nexus standard 	<p>The rule</p> <ul style="list-style-type: none"> • defines <i>adjacent</i> as “bordering, contiguous, or neighboring”; and • specifies that 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.”
<i>Sackett v. EPA</i> ^g	Adjacent wetlands that are part of (i.e., indistinguishable from) waters of the United States	<p>The decision</p> <ul style="list-style-type: none"> • Specifies that adjacent wetlands include <ul style="list-style-type: none"> 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. • Excludes wetlands that are neighboring to but separate from traditional navigable waters, such as those separated by a barrier.

Source	Description of the Adjacent Wetlands WOTUS Category	How Adjacent Is Defined
2023 Conforming Rule ^h	Wetlands adjacent to (1) traditional navigable waters, interstate waters, or the territorial seas; or (2) jurisdictional impoundments or tributaries that are relatively permanent, standing, or continuously flowing bodies of water and with a continuous surface connection to those waters	The rule defines <i>adjacent</i> as “having a continuous surface connection.”
2025 Continuous Surface Connection Guidance ⁱ	Adjacent wetlands that have a continuous surface connection because they directly abut certain jurisdictional waters and are not separated from the adjacent WOTUS by uplands, a berm, a dike, or a similar feature	<p>The guidance provides a two-part test for determining jurisdiction over <i>adjacent wetlands</i>:</p> <ul style="list-style-type: none"> the adjacent body of water must be a WOTUS, which generally means traditional navigable waters or a relatively permanent body of water connected to a traditional navigable water; and the wetland (assuming it meets the long-standing regulatory definition) must have a continuous surface connection to a requisite covered water, making it difficult to determine where the water ends and the wetland begins. <p>Per the guidance, a wetland that has a continuous surface connection to a jurisdictional water through a “discrete feature” (e.g., a nonjurisdictional ditch, swale, pipe, or culvert), but does not abut the covered water, is not jurisdictional.</p>

Source: CRS analysis of WOTUS regulations, WOTUS guidance, and the *Sackett v. EPA* decision.

Notes:

- a. Army Corps of Engineers (Corps), “Final Rule for Regulatory Programs of the Corps of Engineers,” 51 *Federal Register* 41206, November 13, 1986 (1986 Corps Rule); Environmental Protection Agency (EPA), “Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations,” 53 *Federal Register* 20764, June 6, 1988 (1988 EPA Rule).
- b. The 1988 EPA Rule does not define *adjacent*, but the 1986 Corps Rule defines it as described in the table.
- c. Benjamin H. Grumbles, Assistant Administrator for Water, EPA, and John Paul Woodley Jr., Assistant Secretary of the Army (Civil Works), Department of the Army, *Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States*, memorandum, December 2, 2008.
- d. Corps and EPA, “Clean Water Rule: Definition of ‘Waters of the United States’; Final Rule,” 80 *Federal Register* 37054, June 29, 2015.
- e. Corps and EPA, “The Navigable Waters Protection Rule: Definition of ‘Waters of the United States,’” 85 *Federal Register* 22250, April 21, 2020.
- f. Corps and EPA, “Revised Definition of ‘Waters of the United States,’” 88 *Federal Register* 3004, January 18, 2023.
- g. *Sackett v. EPA*, 598 U.S. 651 (2023).
- h. Corps and EPA, “Revised Definition of ‘Waters of the United States’; Conforming,” 88 *Federal Register* 61964, September 8, 2023.

- i. Corps and EPA, *Memorandum to the Field Between the U.S. Department of the Army, U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency Concerning the Proper Implementation of “Continuous Surface Connection” Under the Definition of “Waters of the United States” Under the Clean Water Act*, March 12, 2025, <https://www.epa.gov/system/files/documents/2025-03/2025cscguidance.pdf>.

What Options Are Available to Congress Regarding the Definition of WOTUS?

Considering the numerous court rulings, ongoing legal challenges, and successive Administrations' efforts to define the scope of WOTUS, some stakeholders have urged Congress to more specifically define the term through amendments to the CWA. Others argue that the Corps and EPA, with their specific knowledge and expertise, are in the best position to determine the scope of the term. The *Sackett v. EPA* decision narrows the scope of WOTUS with regard to how the agencies may interpret the term moving forward, but the decision does not preclude Congress from amending the CWA to define the term with more clarity or specificity.

The scope of WOTUS has continued to be an issue of interest in recent Congresses. In the 119th Congress, the Senate Environment and Public Works Committee held a hearing on the federal permitting process, which included a discussion of the implementation of the *Sackett* ruling and WOTUS.¹⁵² The House Transportation and Infrastructure Committee's Subcommittee on Water Resources and Environment also held a hearing—more narrowly focused on CWA permitting—which included a discussion of the definition of WOTUS and stakeholder views on the implementation of the Biden Administration's rules post-*Sackett*.¹⁵³

In the 118th Congress, the Senate Environment and Public Works Committee held a hearing to examine the implications of the *Sackett* decision for CWA protections of wetlands and streams, and the House Transportation and Infrastructure Committee's Subcommittee on Water Resources and Environment held a hearing regarding the 2023 WOTUS Rule.¹⁵⁴ Other committees held hearings at which the topic of WOTUS was discussed, including a hearing held by the House Committee on Agriculture.¹⁵⁵

Members have also introduced legislation related to WOTUS in recent Congresses. In the 119th Congress, S. 795, the Farmers Freedom Act of 2025, as introduced, would amend the CWA to statutorily exclude prior converted cropland from the definition of WOTUS and codify details about what conditions would lead prior converted cropland to lose its exemption status. H.R. 3898, the Promoting Efficient Review of Modern Infrastructure Today (PERMIT) Act, as introduced, would codify four WOTUS exclusions—waste treatment systems (including treatment ponds or lagoons), ephemeral features, prior converted cropland, and groundwater—and would specify that the EPA Administrator or the Secretary of the Army, acting through the Chief of Engineers, could determine other exclusions.

¹⁵² U.S. Congress, Senate Environment and Public Works Committee, *Improving the Federal Environmental Review and Permitting Process*, hearing, 119th Cong., 1st sess., February 19, 2025.

¹⁵³ U.S. Congress, House Transportation and Infrastructure Committee, Water Resources and Environment Subcommittee, *America Builds: Clean Water Act Permitting and Project Delivery*, hearing, 119th Cong., 1st sess., February 11, 2025, H.Hrg. 119-6.

¹⁵⁴ U.S. Congress, Senate Environment and Public Works Committee, *Examining the Implications of Sackett v. U.S. Environmental Protection Agency for Clean Water Act Protections of Wetlands and Streams*, hearing, 118th Cong., 1st sess., October 18, 2023, S.Hrg. 118-266; U.S. Congress, House Transportation and Infrastructure Committee, Water Resources and Environment Subcommittee, *Hearing on Stakeholder Perspectives on Impacts of the Biden Administration's Waters of the United States (WOTUS) Rule*, 118th Cong., 1st sess., February 8, 2023.

¹⁵⁵ U.S. Congress, House Committee on Agriculture, *For the Purpose of Receiving Testimony from The Honorable Michael Regan, Administrator, U.S. Environmental Protection Agency*, hearing, 118th Cong., 1st sess., April 19, 2023.

In the 118th Congress, Members in both chambers introduced joint resolutions of disapproval of the 2023 WOTUS Rule under the Congressional Review Act (CRA).¹⁵⁶ In addition, some Members introduced legislation that would have enacted the Navigable Waters Protection Rule's definition of WOTUS into law, reinstated the Navigable Waters Protection Rule, amended the CWA to add a narrower definition of *navigable waters*, or amended the CWA to establish a broader jurisdictional scope of waters protected under the statute. Other bills in the 118th Congress would have established an agricultural advisory committee to inform Congress of the impacts of WOTUS regulations on the agricultural sector, or would have required the Corps and EPA to issue guidance on the implementation of the 2023 Conforming Rule.

Below are summaries of legislation related to WOTUS in the 118th Congress.

- H.J.Res. 27 and S.J.Res. 7 were joint resolutions providing for congressional disapproval of the 2023 WOTUS Rule under the CRA.¹⁵⁷ They were sponsored or cosponsored by 170 Members of the House of Representatives and 49 Senators. In March 2023, both the House and the Senate passed the joint resolution of disapproval for the 2023 WOTUS Rule, which President Biden subsequently vetoed.¹⁵⁸ The House held a vote to override the veto, which failed to meet the two-thirds majority needed to pass.
- H.R. 1556, the Define WOTUS Act, and S. 1022, the Define WOTUS Act of 2023, were identical bills that would have amended the CWA to change the definition of *navigable waters*. The language, as introduced, would have narrowed the scope of waters subject to CWA jurisdiction in comparison to any of the WOTUS regulatory regimes (pre-2015, Clean Water Rule, Navigable Waters Protection Rule, and 2023 WOTUS Rule). It would also have amended the CWA to make changes to the Corps process for making jurisdictional determinations.
- H.R. 5983, the Clean Water Act of 2023, would have replaced the term *navigable waters* with *protected water resources* throughout the CWA. It also would have defined the term *protected water resources* to mean
 - all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters (and their tributaries), including lakes, rivers, streams (including intermittent and ephemeral streams), wetlands, and all impoundments of the foregoing, to the fullest extent that these waters are subject to the legislative power of Congress under the Constitution.
- H.R. 7023, the Creating Confidence in Clean Water Permitting Act, would have required the Corps and EPA to issue guidance on the implementation of the 2023 Conforming Rule. It also would have required the agencies to solicit and respond to public comment on the guidance prior to issuance.

¹⁵⁶ 5 U.S.C. §§ 801-808.

¹⁵⁷ 5 U.S.C. §§ 801-808. The CRA allows Congress to overturn certain agency actions in the form of a joint resolution of disapproval. Under the CRA, if both houses pass a joint resolution for disapproval, it is sent to the President for signature or veto. If the President vetoes a resolution, Congress can vote to override the veto with a two-thirds majority in both chambers. If a joint resolution of disapproval is submitted within the CRA-specified deadline, passed by Congress, and signed by the President (or if Congress votes to override a presidential veto), the disapproved rule “shall not take effect (or continue)” and would be deemed not to have had any effect at any time. Furthermore, if a joint resolution of disapproval is enacted, the CRA provides that a rule may not be issued in “substantially the same form” as the disapproved rule unless it is specifically authorized by a subsequent law. For more information, see CRS In Focus IF10023, *The Congressional Review Act (CRA): A Brief Overview*, by Maeve P. Carey and Christopher M. Davis.

¹⁵⁸ See H.J.Res 27 under “Actions.”

- S. 782, the FREE American Energy Act, would have enacted the Navigable Waters Protection Rule into law.
- S. 879, the Energy Freedom Act, would have reinstated the Navigable Waters Protection Rule and provided that each of its provisions applied until the effective date of a subsequent final rule. It would also have prohibited the Corps and EPA from issuing a new rule to redefine WOTUS for 15 years from the date of enactment.
- S. 1023, the Farmer-Informed WOTUS Act of 2023, would have established an advisory committee representative of the United States farming and ranching sectors to inform Congress of the impact of WOTUS regulations on U.S. agriculture.
- S. 1449, the RESTART Act, would have amended the CWA to change the definition of *navigable waters*. The language, as introduced, closely aligned with the definition published in the Navigable Waters Protection Rule.
- S. 3366, the Farmers Freedom Act of 2023, would have required the Corps and EPA to ensure that any definition of WOTUS would exclude prior converted cropland and would have the meaning given the term in the Navigable Waters Protection Rule.

Moving forward, Congress has several options to take action regarding the definition of WOTUS, in addition to the option of maintaining the status quo. Congress may oversee the Corps and EPA's efforts to implement existing regulations, including the 2023 WOTUS Rule, as amended by the 2023 Conforming Rule, and the pre-2015 regulations implemented consistent with *Sackett*. This may include oversight of guidance the Corps and EPA have issued or any new guidance the agencies opt to issue. Given the second Trump Administration's announcement to issue revised regulations, Congress may also oversee the Corps and EPA's efforts to promulgate such revised regulations, as well as their efforts to implement the 2025 Continuous Surface Connection Guidance.

Some in Congress may consider proposing legislation to either provide a definition of WOTUS or provide more specific instruction to the agencies and regulated parties as to their interpretation of the CWA, particularly given the challenges that each of the past three Administrations has faced in establishing lasting regulations that could withstand legal challenges. Legislative proposals could include providing a specific definition of WOTUS, specific exemptions from WOTUS, and/or definitions of certain key terms that have been included in past and current regulations. Alternatively, legislative proposals could clarify congressional intent for specific implementation issues (e.g., what kinds of characteristics, such as flow duration, tributaries should have to be jurisdictional). The Supreme Court's increasing insistence on clear congressional intent to delegate regulatory authority, and its elimination of the *Chevron* framework, which required courts to defer to reasonable agency interpretations of ambiguous statutes,¹⁵⁹ suggest that any regulatory actions taken within the current statutory framework would be subject to close judicial scrutiny. Amending the CWA to provide more specificity would allow Congress to choose the policy it prefers rather than leaving the courts to interpret ambiguities in the statute.

¹⁵⁹ *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024). For additional information, see CRS Report R48320, *Loper Bright Enterprises v. Raimondo and the Future of Agency Interpretations of Law*, by Benjamin M. Barczewski. See also *West Virginia v. EPA*, 597 U.S. 697 (2022).

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