

History and Current Status of the WOTUS Rule

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Topics to be Covered

- Origins and History of the WOTUS Rule
- Regulatory Changes over Time
- Major Supreme Court Rulings on the WOTUS Rule
- Current WOTUS Definition
- Trump Administration's Proposed 2025 Rule
- Most recent action on the Proposed 2025 Rule
- Significance of the WOTUS Definition and the Proposed Changes

Impact of WOTUS Definition

- Section 402 and 404 Permit Implications
- Channel reconstruction and maintenance impacts
- Ditch, wetland and tributary jurisdiction
- Project timing, cost, mitigation and enforcement

WOTUS Timeline 1972-2026

- 1972 – Clean Water Act
- 1985 – S.C. Riverside Bayview Decision
- 2001 – S.C. SWANCC Decision
- 2006 – S.C. Rapanos Decision
- 2015 – Clean Water Rule
- 2020 – NWPR
- 2023 – S.C. Sackett Decision
- 2023 – Biden Administration Revision Definition and post-Sackett Conforming Amendment
- 2025 – Proposed Rule based on Sackett
- 2026 – Revised WOTUS definition sent to OMB

WOTUS Definition

- "Waters of the United States" (WOTUS): defines the geographic scope of federal jurisdiction under the Clean Water Act (CWA), 33 U.S.C. § 1362(7), yet Congress never defined the term in the statute itself.
- Since 1974, EPA and the Army Corps of Engineers have issued multiple, often conflicting regulatory definitions, each challenged in federal court.
- WOTUS definition has oscillated between broad and narrow interpretations across **five major regulatory iterations**, shaped by **four landmark Supreme Court decisions**.
- Current operative regulation, effective September 8, 2023, found at 33 C.F.R. § 328.3: requires that covered wetlands have a **continuous surface connection** to a relatively permanent body of water connected to traditional navigable waters — a standard mandated by the Supreme Court in *Sackett v. Env't Prot. Agency*, 598 U.S. 651 (2023).

Statutory Framework

- Clean Water Act prohibits the discharge of any pollutant except in compliance with specified sections of the Act, including the permit requirements of 33 U.S.C. § 1342. 33 U.S.C. § 1311(a).
- CWA defines **navigable waters** as *the waters of the United States, including the territorial seas*. 33 U.S.C. § 1362(7). CWA does not define the *waters of the United States*, leaving that task to EPA and the Army Corps of Engineers. The scope of WOTUS determines which water bodies trigger federal permitting obligations under both programs.

Section 404 — Corps of Engineers

The Corps administers the Section 404 dredge-and-fill permit program, 33 U.S.C. § 1344, regulating the discharge of dredged or fill material into waters of the United States. This is the primary permitting mechanism for wetland-filling activities.

Section 402 — EPA (NPDES)

EPA administers the NPDES permit program under Section 402, 33 U.S.C. § 1342, regulating point-source discharges of pollutants into navigable waters. The scope of WOTUS determines which water bodies trigger permitting obligations under both programs.

Five Versions of WOTUS Definition (1974- 2023)

Version 1: Pre-2015 (1974–2015)

Seven categories including waters used in interstate commerce, tributaries, impoundments, and adjacent wetlands. The 1986 Migratory Bird Rule extended jurisdiction to isolated intrastate waters used by migratory birds — later invalidated by SWANCC.

1

2

Version 3: 2019 Repeal Rule

First Trump Administration repealed the 2015 rule and reinstated the pre-2015 definition as a transitional measure pending a new rule.

3

4

Version 5: 2023 Revised Definition

Biden Administration restored pre-2015 framework with significant nexus test, then issued a post-*Sackett* conforming amendment (Sept. 8, 2023) eliminating that test and requiring continuous surface connection — the current operative rule at 33 C.F.R. § 328.3.

5

Version 2: 2015 Clean Water Rule

Obama Administration expanded jurisdiction with eight categories, categorical rules for waters within 100 feet of ordinary high water marks and within 100-year floodplains within 1,500 feet of navigable waters, plus a case-by-case significant nexus category. Immediately controversial.

Version 4: 2020 NWPR

Most restrictive modern definition: four categories — traditional navigable waters, perennial/intermittent tributaries, certain lakes/ponds, and adjacent wetlands. Excluded ephemeral streams, groundwater, and diffuse stormwater. Vacated by two federal courts in 2021.

Landmark Supreme Court Decisions

- **Riverside Bayview Homes (1985)**
 - Unanimously upheld Corps jurisdiction over wetlands *adjacent* to navigable waters.
 - Applied Chevron deference; held adjacent wetlands are "inseparably bound up with the waters of the United States."
 - Congress's rejection of narrowing amendments in 1977 signaled acquiescence. Established that WOTUS extends beyond waters navigable in fact.

Landmark Supreme Court Decisions

- **SWANNC (2001)**
 - 5-4 decision held the Migratory Bird Rule exceeded Corps authority.
 - CWA does not extend to nonnavigable, isolated, intrastate waters based solely on migratory bird habitat use.
 - Applied the clear statement rule: where an interpretation invokes the outer limits of Congress's commerce power, a clear congressional statement is required.
 - Distinguished *Riverside Bayview* — the significant nexus absent in SWANCC's isolated ponds.

Landmark Supreme Court Decisions

- **Rapanos (2006)**
 - Fractured 4-1-4 decision left lower courts without a clear standard for 17 years.
 - **Scalia plurality:** WOTUS includes only relatively permanent waters and wetlands with a *continuous surface connection*.
 - **Kennedy concurrence:** the *significant nexus* test — wetlands qualify if they significantly affect the chemical, physical, and biological integrity of navigable waters. No majority emerged.

Landmark Supreme Court Decisions

- Sackett (2023)
 - Resolved post-*Rapanos* uncertainty by adopting the plurality's **continuous surface connection test** and definitively rejecting the significant nexus test.
 - To assert jurisdiction over an adjacent wetland, a party must establish: (1) the adjacent water is WOTUS (relatively permanent, connected to traditional navigable waters); and (2) the wetland has a continuous surface connection making it difficult to determine where water ends and wetland begins.
 - The Sacketts' wetlands, separated from Priest Lake by a ditch and creek, failed this test.

Challenges to January 2023 Rule

- The Biden administration's January 2023 WOTUS rule was immediately challenged by a coalition of states.
- In *W. Virginia v. U.S. Env't Prot. Agency*, 669 F. Supp. 3d 781 (D.N.D. 2023), the District of North Dakota granted a preliminary injunction in 24 states, finding the rule's use of the significant nexus test for interstate waters — extending jurisdiction to all interstate waters regardless of navigability — likely exceeded statutory authority.
- In *Texas v. United States Env't Prot. Agency*, 662 F. Supp. 3d 739 (S.D. Tex. 2023), the Southern District of Texas granted a preliminary injunction in Texas and Idaho, finding the rule likely violated the CWA by replacing the interstate commerce test with the significant nexus test.
- These injunctions meant the 2023 rule never went into full nationwide effect before the post-*Sackett* conforming amendment superseded it.

Post-Sackett Lower Court Decisions

- Following *Sackett*, lower courts have applied the continuous surface connection test in enforcement and permitting contexts.
- In *United States v. Valentine*, 751 F. Supp. 3d 617 (E.D.N.C. 2024), the Eastern District of North Carolina held that the government plausibly alleged wetlands into which fill material had been discharged maintained a continuous surface connection with WOTUS, satisfying the *Sackett* standard at the pleading stage.
- In *White v. United States Env't Prot. Agency*, 737 F. Supp. 3d 310 (E.D.N.C. 2024), the same court applied the test and denied a preliminary injunction, explaining it requires establishing both that the adjacent body constitutes WOTUS and that the wetland has a continuous surface connection making it difficult to determine where water ends and wetland begins.
- In *Inland Empire Waterkeeper v. Corona Clay Co.*, No. 24-6090, 2026 WL 2251545 (9th Cir. Aug. 5, 2026), the Ninth Circuit held the WOTUS element of a CWA claim is a statutory element, not a jurisdictional requirement, and remanded for trial under the *Sackett* standard.

Current WOTUS Definition: 33 C.F.R. § 328.3

Effective September 8, 2023, the current operative regulation codified at 33 C.F.R. § 328.3 implements the *Sackett* continuous surface connection standard. The regulation defines *adjacent* as "having a continuous surface connection" and defines *wetlands* as "areas inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(c)(1), (2).

1

Traditional Navigable Waters

Waters currently used, previously used, or susceptible to use in interstate or foreign commerce, including tidal waters.

2

Territorial Seas

The territorial seas as defined by statute.

3

Interstate Waters

Interstate waters and their tributaries.

4

Impoundments

Impoundments of waters otherwise defined as WOTUS under this definition.

5

Relatively Permanent Tributaries

Tributaries of categories (1)–(3) that are relatively permanent, standing or continuously flowing bodies of water.

6

Adjacent Wetlands

Wetlands adjacent to waters in categories (1)–(3), or adjacent to relatively permanent tributaries or impoundments, with a *continuous surface connection* to those waters.

7

Intrastate Lakes & Ponds

Intrastate lakes and ponds that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to waters in categories (1) or (3).

What is Generally Excluded?

- Ephemeral features flowing only from rainfall
- Many isolated wetlands
- Features lacking continuous surface connection
- Certain ditches and artificial conveyances

2025 Proposed Rule

- The Trump administration's second term has initiated another round of WOTUS rulemaking.
- In March 2025, EPA and the Army Corps issued joint guidance modifying how field personnel determine whether a continuous surface connection exists, limiting circumstances under which wetlands may be deemed connected to WOTUS.
- The agencies announced a new rulemaking, and after nine public listening sessions and over 45,000 comments, announced in June 2025 a plan to propose a new WOTUS rule with the goal of finalizing it by end of 2025.

Definition of “Relatively Permanent”

- “Standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season.”
- Objections raised over the inclusion of “wet season”

Definition of “Continuous Surface Connection”

- “Having surface water at least during the wet season and abutting (i.e., touching) a jurisdictional water.”
- Two part test: (1) abutment; and (2) temporality of surface water.
- Second reference to wet season.

Regulatory Impact Analysis

- Projects significant national losses in the universe of wetlands compared to the state-level National Wetland Inventory
- Expect an approximately 81 percent decrease from total wetland acreage subject to federal wetland protections
- 404 program likely will see the most changes from the proposed rule, with projected reduction in number of permits and required mitigation relative to baselin

Latest Development on 2025 Proposal

- June 30, 2026 – EPA sends updated definition of WOTUS to OMB
- New version not yet public
- EPA Water Chief: EPA and ACOE “are on a path to finalize a durable definition of [WOTUS] that fully adheres to the Supreme Court’s direction in Sackett, cuts bureaucratic red tape, and protects water quality while recognizing that states and Tribes know their water resources best.”

Implications of Proposed Changes

- Less permitting
- Less mitigation
- Limited federal protection of waters
- Additional state legislation?

Questions?



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