

Summary of Amendments to the WOTUS Definition

On August 29, 2023, EPA and the Corps issued a final rule amending the recently revised¹ definition of “waters of the United States” (WOTUS). In the agencies’ view, these amendments conform that definition to the Supreme Court’s decision in *Sackett v. EPA* by removing provisions from the regulatory text that are invalid under *Sackett*. The final rule is effective upon publication in the *Federal Register*, and the agencies are not inviting public comment on the rule.

How are the agencies changing the definition of WOTUS?²

- **Elimination of significant nexus test**: The agencies have removed all references to the significant nexus test from the definition of WOTUS. They deleted the definition of “significantly affect” by removing paragraph (c)(6) from the regulations. They also removed language from paragraphs (a)(3), (a)(4), and (a)(5) that applied the significant nexus to tributaries, adjacent wetlands, and intrastate waters.
- **Narrower definition of “adjacent”**: The revised definition of “adjacent” now states that adjacent “means having a continuous surface connection.” The definition no longer uses the terms “bordering contiguous, or neighboring,” and it no longer says that wetlands separated from other WOTUS by dikes, berms, barriers, beach dunes, or similar features are considered “adjacent wetlands.”
- **Narrower “other waters” category**: In addition to clarifying that (a)(5) waters can only be jurisdictional if they satisfy the relatively permanent/continuous surface connection test, the agencies have removed streams and wetlands from the (a)(5) category. The (a)(5) category only covers lakes and ponds that satisfy the relatively permanent/continuous surface connection test. Thus, streams and wetlands can only be jurisdictional under (a)(1) through (a)(4) of the definition, as applicable.
- **Removal of interstate wetlands as a “foundational” water**: The agencies removed “interstate wetlands” from the (a)(1) category. The agencies acknowledge that under *Sackett*, wetlands cannot be jurisdictional merely because they cross state lines. The agencies nevertheless maintain that all interstate *waters* are jurisdictional regardless of whether they are navigable, and they do not explain why that is consistent with *Sackett*.

Did the agencies clarify what satisfies the relatively permanent standard following *Sackett*?

- **No**. The final rule does not discuss what it means for a water to be a relatively permanent, standing or continuously flowing body of water, or what it means for a wetland to have a continuous surface connection. The agencies mention that the January 2023 Rule previously incorporated the *Rapanos* plurality’s test, but that is the extent of the discussion in the final rule. As such, the regulatory text still does not define the key

¹ The agencies previously revised the definition in a final rule published on January 18, 2023.

² The addendum to this summary contains a redline of the regulatory text.

phrases “relatively permanent, standing or continuously flowing” and “continuous surface connection.”

- Because this final rule does not address the relatively permanent/continuous surface connection in any meaningful manner, stakeholders presumably must resort to the 2023 Rule preamble for guidance. That preamble did not set forth bright line or quantitative metrics for determining what constitutes relatively permanent flow and thus, there remains considerable ambiguity as to what satisfies that requirement and whether the interpretations in that preamble survive *Sackett*. To use just one example, some WAC members have reported that the agencies are unwilling to say that ephemeral streams cannot satisfy the relatively permanent standard. Similarly, in the 2023 Rule preamble, the agencies interpreted the continuous surface connection requirement expansively, so there remains considerable confusion as to whether that expansive interpretation is consistent with *Sackett*.

Are there two different relatively permanent standards in effect right now? Which one applies to me?

- Yes, there are currently two standards in effect as a result of multiple preliminarily injunctions on the 2023 Rule. In states where the 2023 Rule was preliminarily enjoined, the agencies should be applying the pre-2015 interpretation of “relatively permanent” from the 2008 *Rapanos* Guidance. In the rest of the country, the agencies appear to be applying the 2023 Rule’s interpretation of the “relatively permanent” standard.
- It is important to keep in mind that multiple industry groups and states have challenged the 2023 Rule’s interpretation of “relatively permanent” as being inconsistent with the *Rapanos* plurality (and now *Sackett*), and those cases remain pending. The litigants in those cases likely will try to restart proceedings and seek prompt rulings on their claims now that the agencies have opted to continue relying on the 2023 Rule’s interpretation of the “relatively permanent” standard.

Why is there no public comment period for this rule?

- The agencies invoked the “good cause” exception to notice-and-comment rulemaking under the Administrative Procedure Act (“APA”). That exception provides that notice-and-comment procedures do not apply “when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” In the agencies’ view, amending the rule to conform the WOTUS definition to *Sackett* is a non-discretionary action, and notice-and-comment proceedings would not provide new information to the public nor would it inform the agency’s decision-making as to what aspects of the WOTUS definition are inconsistent with the Clean Water Act under *Sackett*.
- It bears emphasis that the issuance of a final rule under the APA’s “good cause” exception is not the same as issuing a direct final rule or an interim final rule, which both require notice-and-comment. Under the APA, “good cause” rules are exempt from notice-and-comment.

Addendum: Regulatory Text Revisions

- (a) Waters of the United States means:
- (1) Waters which are:
 - (i) Currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
 - (ii) The territorial seas; or
 - (iii) Interstate waters, including interstate wetlands;
 - (2) Impoundments of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under paragraph (a)(5) of this section;
 - (3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section:
 - ~~(i) That are relatively permanent, standing or continuously flowing bodies of water; or~~
 - ~~(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section;~~
 - (4) Wetlands adjacent to the following waters:
 - (i) Waters identified in paragraph (a)(1) of this section; or
 - (ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3)(i) of this section and with a continuous surface connection to those waters; or
 - ~~(iii) Waters identified in paragraph (a)(2) or (3) of this section when the wetlands either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section;~~
 - (5) Intrastate lakes and ponds, ~~streams, or wetlands~~ not identified in paragraphs (a)(1) through (4) of this section:
 - ~~(i) That are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3)(i) of this section; or~~
 - ~~(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section.~~

The agencies did not make any changes to the exclusions set forth in subsection (b) of the definition.

In the definitions enumerated in subsection (c) of the definition, the agencies revised the definition of adjacent as follows:

- (2) *Adjacent* means **having a continuous surface connection.** ~~bordering, contiguous, or neighboring. 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.”~~