

# Waters of United States/Clean Water Act: U.S. Environmental Protection Agency/Corps of Engineers Announce Intent to Issue Final Rule in Response to Sackett by September 1st



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The United States Environmental Protection Agency and the United States Department of the Army Corps of Engineers (collectively “EPA”) announced that they are developing a rule to amend the final “revised definition of waters of the United States” that it had previously finalized. (See previous blog post [here.](#))

See 88 Fed. Reg. 3004 (Jn. 18, 2023).

EPA states that it will be issuing the rule in light of the United States Supreme Court (“SCT”) decision in *Sackett v. United States Environmental Protection*. (See previous blog post [here.](#))

The SCT issued an Opinion on May 25th in the *Sackett* case addressing the scope of the Clean Water Act definition of “waters of the United States” (“WOTUS”).

The majority articulated a two-part process for determining a WOTUS:

1. The CWA’s use of “waters” in §1362(7) refers only to “geo-graphic[al] features that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes’ ” and to adjacent wetlands that are “indistinguishable” from those bodies of water due to a continuous surface connection. *Rapanos v. United States*, 547 U. S. 715, 755, 742, 739.
2. To assert jurisdiction over an adjacent wetland under the CWA, a party must establish “first, that the adjacent [body of water constitutes] . . . ‘water[s] of the United States’ (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”

The definition of WOTUS is arguably one of the three critical jurisdictional terms of the Clean Water Act. The scope of the definition of WOTUS has been the subject of frequent litigation, legislative oversight, rulemakings and public policy debate since the enactment of the modern version of the Clean Water Act in 1972.

EPA states that they will interpret the phrase WOTUS consistent with the SCT’s decision in *Sackett*.

The United States Department of Justice (“DOJ”) on behalf of EPA filed on June 26th in the United States District Court for the District of North Dakota in litigation involving a challenge to EPA’s current WOTUS rule a pleading styled:

*Federal Defendants’ Motion for a Stay (“Motion”)*

DOJ is asking the United States District Court to stay the case because of EPA’s intent to issue a final rule on or before September 1st.

A copy of EPA’s announcement which includes a link to the DOJ’s *Motion* can be found [here](#).