

Waters of the United States/Clean Water Act: U.S. Environmental Protection Agency/Corps of Engineers Final Rule Addressing Sackett Decision



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The United States Environmental Protection Agency and the United States Corps of Engineers (collectively “EPA”) issued a pre-Federal Register publication final rule on August 29th revising the Clean Water Act definition of waters of the United States (“WOTUS”).

The rule announced yesterday responds to the United States Supreme Court’s Opinion in *Sackett v. Environmental Protection Agency, et al.*, which significantly narrowed the scope of what constitutes a WOTUS for purposes of the Clean Water Act.

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.

The Majority in the *Sackett* decision articulated a two-part process for determining WOTUS:

1. The Clean Water Act’s use of “waters” in 1362(7) refers only to geographic 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.
2. To assert jurisdiction over an adjacent wetland under the Clean Water Act, a party must establish, first, that the adjacent body of water constitutes waters 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.

EPA had previously issued in January 2023 a rule revising the Clean Water Act definition of WOTUS. It previously had withdrawn revisions to the Clean Water Act definition of WOTUS promulgated during the Trump Administration. The Trump Administration had previously rescinded an O’Bama era revision of WOTUS.

Subsequent to the *Sackett* decision EPA announced that it was developing a rule to amend the final “revised definition of waters of the United States” that it had previously finalized in January 2023. The agencies stated their intent to interpret the phrase WOTUS consistent with the United States Supreme Court decision in *Sackett*.

In announcing the final rule yesterday (August 29th), EPA states that it:

. . . conforms the definition of “waters of the United States” to the U.S. Supreme Court’s May 25, 2023, decision in the case of *Sackett v. Environmental Protection Agency*.

EPA acknowledges that parts of the January 2023 rule are invalid under the United States Supreme Court’s interpretation of the Clean Water Act in the *Sackett* decision.

EPA further states that:

. . . as a result of ongoing litigation on the January 2023 Rule, the agencies will implement the January 2023 Rule, as amended by the conforming rule, in 23 states, the District of Columbia, and the U.S. territories. In the other 27 states and for certain parties, the agencies are interpreting “waters of the United States” consistent with the pre-2015 regulatory regime and the Supreme Court’s decision in *Sackett* until further notice.

Arkansas is listed as one of the states that will be subject to the pre-2015 regulatory regime.

A Fact Sheet prepared by EPA lists WOTUS jurisdictional categories and whether or not changes have been made to the January 2023 rule. The categories include:

- Traditional Navigable Waters (no change)
- Territorial Seas (no change)
- Interstate Waters (removing interstate wetlands from the text of the interstate waters provision)
- Impoundments (no changes)
- Tributaries (removing the significant nexus standard)
- Adjacent Wetlands (removing the significant nexus standard)
- Additional Waters (removing the significant nexus standard; removing wetlands and streams from the text of the provision)

The chart also addresses definitions, which include:

- Wetlands (no changes)
- Adjacent (revised definition to mean “having a continuous surface connection”)
- High tide line (no changes)
- Ordinary high water mark (no changes)
- Tidal waters (no changes)
- Significantly affect (Deleted definition)

The January 2023 Rule also provided a number of exclusions. EPA states that none of those exclusions were amended.

Note that many delegated states (including Arkansas) have their own statutes to authorize their environmental regulatory activities. Further, many of these states have key jurisdictional definitions that may in fact be broader than the corresponding federal terms.

An example is found in Arkansas.

The arguably corresponding statutory term “waters of the state” is broader than the current or prior definitions of WOTUS. The Arkansas Air and Water Pollution Control Act provides that “[i] shall be unlawful to place . . . waste in a location where it is likely to cause pollution of any waters of the state.”

Waters of the state are defined as:

All streams, lakes, marshes, ponds, water courses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies where accumulations of water, surface and underground, natural or artificial, public or private, which are confined within, flow through or border upon the state or any portion of the state.

As a result, non-Clean Water Act NPDES programs undertaken by Arkansas should not be affected by a change in the definition of WOTUS because they are driven by the state definition “waters of the state.”

A copy of the Fact Sheet can be downloaded [here](#) and the prepublication final rule [here](#).