



Waters of the US or a Ditch; What's the Latest Waters of the US Rule

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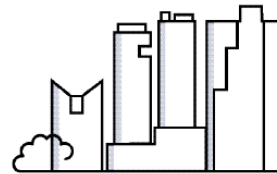
San Antonio



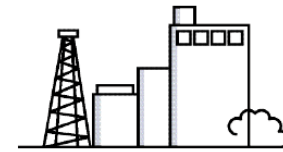
Austin



Dallas



Fort Worth



Midland



Farmersville

- WOTUS Rule(s) Timeline
- Recently Published and Amended Rule
- Sackett & Future Pieces



Rule(s) Timeline

- 1986 Summary
 - All navigable waters, the territorial seas, plus...
 - Their tributaries, impoundments, and adjacent wetlands and isolated waters where the use, degradation or destruction of such waters could affect interstate or foreign commerce.
 - Adjacent wetlands?
 - Isolated waters?



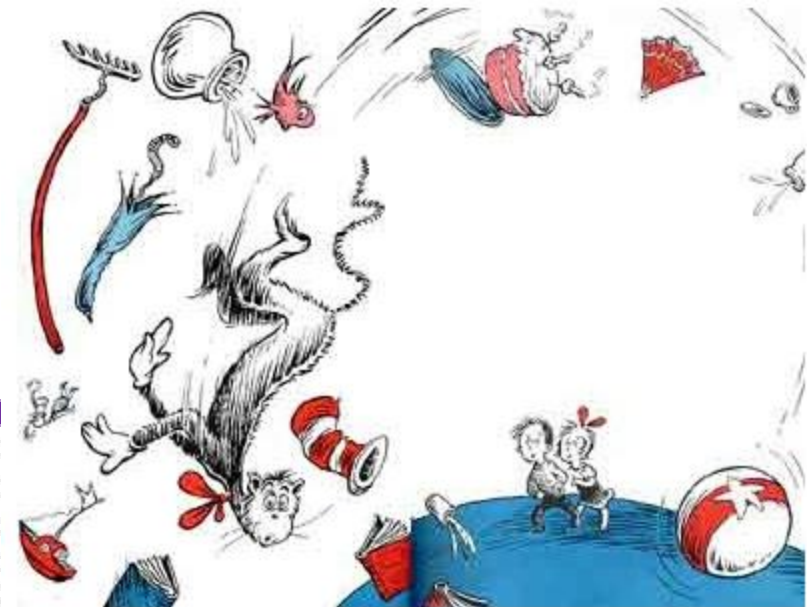
Rule(s) Timeline

- Migratory Bird Rule (1986)
- SWANCC (2001)
- Rapanos (2006, 2008 USACE Guidance)
- April 2014 – Draft Waters of the U.S. rule released (Obama Rule)
- Navigable Waters Protection Rule – Effective June 22, 2020 (Trump Rule)



Rule(s) Timeline

- “Revised Definition of ‘Waters of the United States’” published on January 18, 2023, effective March 20, 2023
- March 19 and April 12, 2023 – district court judge (Texas and North Dakota) issued an order preliminarily enjoining the 2023 Rule. Initially 2 states, now 24
- May 25, 2023 – Sackett decision
- August 29, 2023 – Final rule to amend the “revised Definition of ‘Waters of the United States’” rule



Sackett vs. EPA

- Limit jurisdiction to wetlands meeting the “reasonably permanent” test, excluding the “significant nexus” test.
- Case heard on October 3, 2022, decision May 25, 2023
- Justice Gorsuch to EPA Representative “If the federal government doesn’t know, how is a person subject to criminal time in federal prison supposed to know?” and “Their manuals, though, don’t tell us the answer.”
- Justice Kagan “things can be adjacent to each other without touching each other”



Sackett vs. EPA - Outcome

- Court split 5-4 over the definition of adjacent
- Five Justices – must have a continuous surface connection
- Four Justices – adjacent means very close to.
- Revised Waters of the US definition for adjacent – “having a continuous surface connection”



Sackett vs. EPA - Outcome

- Justice Alito – Justice Scalia’s definition of Waters of the US was the proper definition – any wetland that does not connect at its surface to another body of federally protected water doesn’t merit the same degree of protection.
- Justice Kavanaugh – took issue with “the Court’s rewriting of adjacent to mean adjoining” and SCOTUS decision may “leave long-regulated and long-accepted-to-be regulable wetlands suddenly beyond the scope of the agencies’ regulatory authority”
- Justice Kagan – “in ordinary language, one thing is adjacent to another not only when it is touching, but also when it is nearby. So, for example, one house is adjacent to another even when a stretch of grass and a picket fence separate the two”



Amended Published Rule

- Traditional Navigable Waters – Large Rivers and lakes that could be used in commerce.
- Territorial Seas – Territorial seas that extend three miles out to sea from the coast.
- Interstate Waters – Streams, lakes, or **wetlands** that cross or form part of state boundaries.
- Impoundments – Bodies of water created in or from “waters of the United States”, like reservoirs and beaver ponds.



Amended Published Rule (cont.)

- Tributaries – Branches of creeks, streams, rivers, lakes, ponds, ditches, and impoundments that ultimately flow into traditional navigable waters, the territorial seas, interstate waters, or impoundments of jurisdictional waters. **Tributaries are jurisdictional if they meet either the relatively permanent standard or ~~significant nexus standard~~.**
- Adjacent Wetlands – Can be next to, abutting, or near other jurisdictional waters or behind certain natural or constructed features. They are most often within a few hundred feet of jurisdictional waters. **These waters are jurisdictional if they meet either the relatively permanent standard or the ~~significant nexus standard~~, or where the wetland is adjacent to a traditional navigable water, the territorial seas, or an interstate water.**



Published Rule (cont.)

- Additional Waters – Lakes, ponds, ~~streams, or wetlands~~ do not fit into the above categories. **They are jurisdictional if they meet either the relatively permanent standard or the ~~significant nexus standard~~.**



Adjacent Definition

- Rule requires that an “adjacent wetland” be “~~bordering, contiguous, or neighboring~~”.
- Having a continuous surface connection



Two Standards

- ~~Significant Nexus – test that clarifies if certain waterbodies, such as tributaries and wetlands, are subject to the Clean Water Act based on their connection to and effect on larger downstream waters that Congress fundamentally sought to protect. A significant nexus exists if the waterbody (alone or in combination) significantly affects the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters.~~



Two Standards (cont.)

- Relatively Permanent – relatively permanent, standing, or continuously flowing bodies of water.



Exclusions

- Prior Converted Cropland
- Waste Treatment Systems
- Ditches – excavated wholly in and draining only dry land, and that do not carry a relatively permanent flow of water.
- Artificially Irrigated Areas
- Artificial lakes or ponds – created by excavating or diking dry land that are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.



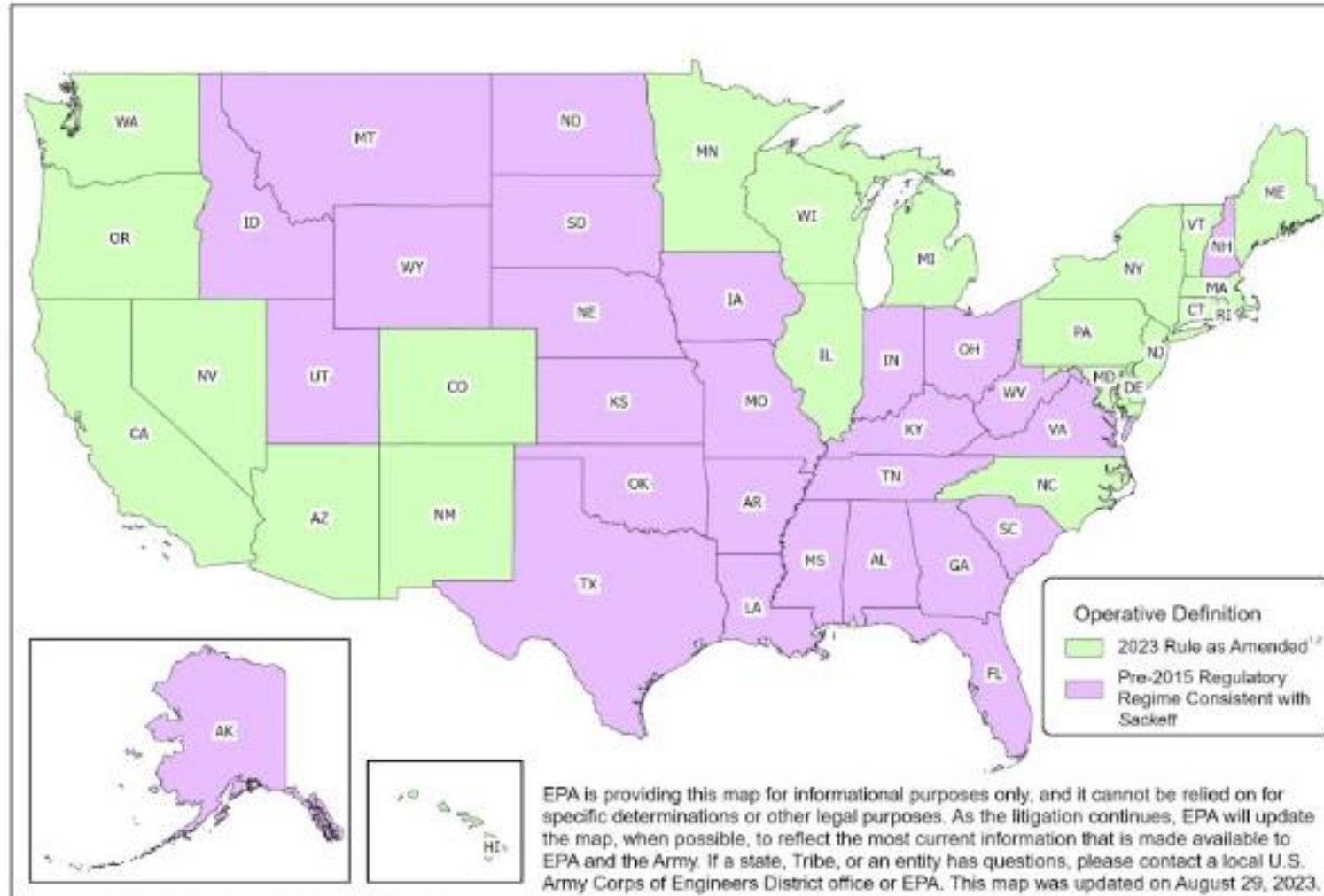
Exclusions (cont.)

- Artificial reflecting pools or swimming pools
- 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 operation is abandoned and the resulting body of water meets the definition of “waters of the United States”.
- Swales and erosional features



On-going Litigation

Operative Definition of "Waters of the United States"



¹Also operative in the U.S. territories and the District of Columbia

²The pre-2015 regulatory regime implemented consistent with Sackett is operative for the Commonwealth of Kentucky and Plaintiff-Appellants in Kentucky Chamber of Commerce, et al. v. EPA (No. 23-5345) and their members (Kentucky Chamber of Commerce, U.S. Chamber of Commerce, Associated General Contractors of Kentucky, Home Builders Association of Kentucky, Portland Cement Association, and Georgia Chamber of Commerce).



Examples



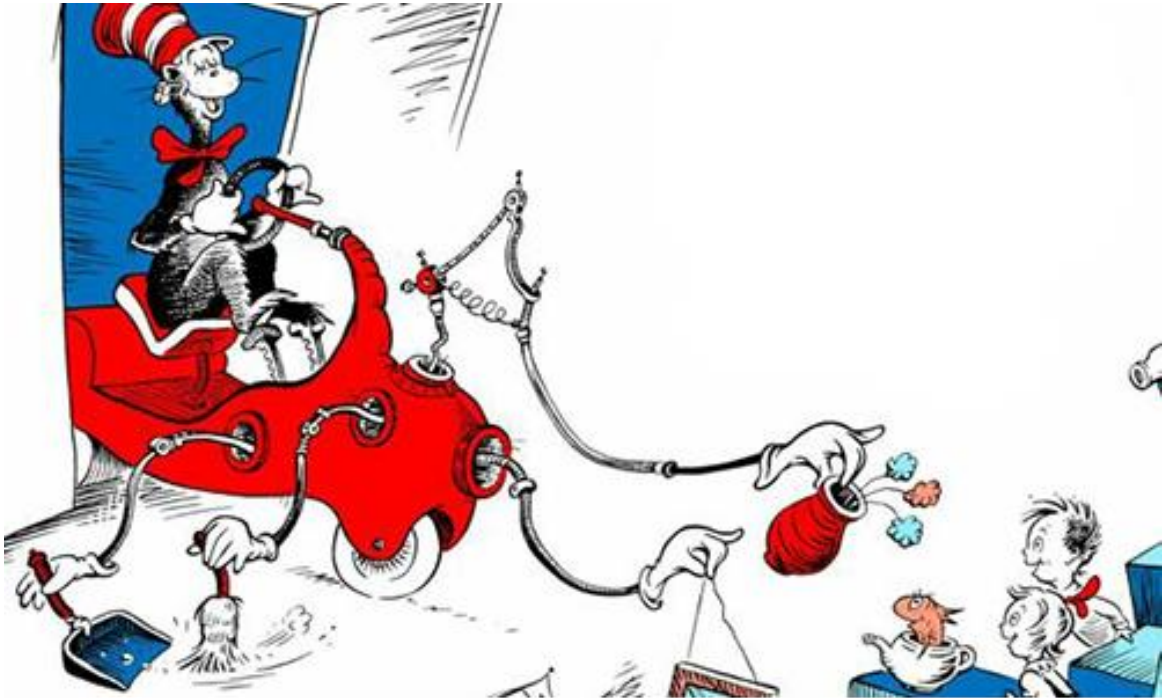
Unknowns

- What is “relatively permanent, standing or continuously flowing bodies of water”
- On-going litigation timing
- Future litigation



Did it get cleaned up or is another mess on the horizon?

Questions?



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