

WOTUS – Post Sackett

Do we know what to expect?

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The Conforming Rule – Jurisdictional Waters

Changes that the agencies have made to the January 2023 Rule categories:

Jurisdictional Category	Key Changes to the January 2023 Rule Regulation Text	Regulatory Text Paragraph
Traditional Navigable Waters	No changes	(a)(1)
Territorial Seas	No changes	(a)(1)
Interstate Waters	Removing interstate wetlands from the text of the interstate waters provision	(a)(1)
Impoundments	No changes	(a)(2)
Tributaries	Removing the significant nexus standard	(a)(3)
Adjacent Wetlands	Removing the significant nexus standard	(a)(4)
Additional Waters	Removing the significant nexus standard; removing wetlands and streams from the text of the provision	(a)(5)

The Conforming Rule – Jurisdictional Waters

Changes that the agencies have made to the January 2023 Rule definitions:

Definition	Key Changes to the January 2023 Rule Regulation Text	Regulatory Text Paragraph
Wetlands	No changes	(c)(1)
Adjacent	Revised definition to mean “having a continuous surface connection.”	(c)(2)
High tide line	No changes	(c)(3)
Ordinary high water mark	No changes	(c)(4)
Tidal waters	No changes	(c)(5)
Significantly affect	Deleted definition	(c)(6)

Amended 2023 Rule: Exclusions

- **Prior converted cropland**, adopting USDA's definition and generally excluding wetlands that were converted to cropland prior to December 23, 1985.
- **Waste treatment systems**, including treatment ponds or lagoons that are designed to meet the requirements of the Clean Water Act.
- **Ditches** (including roadside ditches), excavated wholly in and draining only dry land, and that do not carry a relatively permanent flow of water.
- **Artificially irrigated areas**, that would revert to dry land if the irrigation ceased.
- **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.
- **Artificial reflecting pools or swimming pools**, and other small ornamental bodies of water created by excavating or diking dry land.
- **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** (e.g., gullies, small washes), that are characterized by low volume, infrequent, or short duration flow.

Does the Conforming Rule Conform?

- **(a)(3) Tributaries**

- Relatively permanent waters include tributaries that have flowing or standing water year-round or continuously during certain times of year.

Sackett v. EPA

- “[T]he Court concludes that the CWA’s use of “waters” encompasses only those relatively permanent, standing or continuously flowing bodies of water ...described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’

(a)(3) Tributaries

- Relatively permanent waters do not include tributaries with flowing or standing water for only a short duration in direct response to precipitation.

(a)(3) Tributaries

Relatively permanent waters include tributaries that have flowing or standing water year-round or continuously during **certain times of year**.

- "Certain times of the year" is intended to include extended periods of standing or continuously flowing water occurring in the same geographic feature year after year, except in times of drought.
- Relatively permanent flow may occur seasonally, but the phrase is also intended to encompass tributaries in which extended periods of standing or continuously flowing water are not linked to naturally recurring annual or seasonal cycles.

(a)(3) Tributaries

- Relatively permanent waters do not include tributaries with flowing or standing water for only a short duration in direct response to precipitation.

(a)(3) Tributaries

- **Relatively Permanent Standard – Duration and Timing of Flow**
- Relatively permanent waters do not include tributaries with flowing or standing water for only a short duration in direct response to precipitation.
- “Direct response to precipitation” is intended to distinguish between episodic periods of flow associated with discrete precipitation events versus continuous flow for extended periods of time.
- No minimum flow duration has been established because flow duration varies extensively by region.

Does the Conforming Rule Conform?

(a)(3) Tributaries

Relatively permanent and non-relatively permanent within the same order stream

(a)(4) Adjacent Wetlands

- **Wetlands Definition**
- Jurisdictional adjacent wetlands include: Wetlands that are adjacent to an (a)(1) water, relatively permanent jurisdictional impoundment, or relatively permanent tributary.

(a)(4) Adjacent Wetlands

- **Adjacent** has been revised to mean having a continuous surface connection.
- A **continuous surface connection** means the wetlands either physically abut or touch the paragraph (a)(1) or relatively permanent water or are connected to the paragraph (a)(1) or relatively permanent water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert.

Does the Conforming Rule Conform?

(a)(4) Adjacent Wetlands

A **continuous surface connection** means connected...by a **discrete feature** like a non-jurisdictional ditch, swale, pipe, or culvert.

Sackett v. EPA

[T]he wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."

Does the Conforming Rule Conform?

(a)(5) Waters: lakes and ponds not identified in (a)(1) – (a)(4)

Lakes and ponds assessed under paragraph (a)(5) meet the relatively permanent standard if they are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to a paragraph (a)(1) water or tributary that is relatively permanent.

- The agencies will assess lakes and ponds under paragraph (a)(5) to determine if they are **relatively permanent** using a similar approach to the one described for tributaries.
- The agencies will assess a continuous surface connection between lakes and ponds assessed under paragraph (a)(5) and a paragraph (a)(1) water or a tributary that is relatively permanent **using the approach described for wetlands.**

Pre-2015 Regulatory Regime:

The “pre-2015 regulatory regime” refers to the agencies’ pre-2015 definition of “waters of the United States,” implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience.

Pre-2015 Regulatory Regime:

In addition, the January 2023 Rule, as amended by the conforming rule, is not currently operative in certain states and for certain parties due to litigation, and the pre-2015 regulatory regime is being implemented instead consistent with the Supreme Court's decision in Sackett.

<https://www.epa.gov/wotus/pre-2015-regulatory-regime>, accessed 12/4/2023

Pre-2015 Regulatory Regime:

“[T]he agencies will interpreting *[sic]* the phrase “waters of the United States” consistent with the Supreme Court’s decision in Sackett.

<https://www.epa.gov/wotus/pre-2015-regulatory-regime>, accessed 12/4/2023

USACE/EPA September 27, 2023 Joint Coordination Memorandum

Pre-2015 Regulatory Regime:

Under the pre-2015 regulatory regime, consistent with Sackett, the agencies:

- will not assert jurisdiction based on the significant nexus standard,
- will not assert jurisdiction over interstate wetlands solely because they are interstate,
- will interpret “adjacent” to mean “having a continuous surface connection,” and
- will limit the scope of the (a)(3) provision to only relatively permanent lakes and ponds that do not meet one of the other jurisdictional categories

https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-pre-2015-regulatory-regime_508c.pdf, accessed 12/4/2023

Some Implications for Permitting

404 Dredge and Fill

401 Water Quality Certification

402 National Pollutant Discharge Elimination System

- USACE Antecedent Precipitation Tool (APT) - calculates precipitation normalcy using a standardized methodology to inform a decision of whether climatic conditions are normal
- Regionalized streamflow duration assessment methods (SDAMs) - rapid field assessment methods that use hydrological, geomorphological, and/or biological indicators, observable in a single site visit, to classify streamflow duration as perennial, intermittent, or ephemeral at the reach scale
- USGS StreamStats - spatial analytical tools that are useful for water-resources planning and management