



# WOTUS & Water Quality in the West in a Post- Sackett World

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**Is the new test clearer, or still muddy?**



## Sackett Court's Holding

- “In sum, we hold that the CWA extends to only those ‘wetlands with a continuous surface connection to bodies that are waters of the United States in their own right,’ so that they are ‘indistinguishable from those waters.’”

# The Sackett Two-Part Test

1. Establish that adjacent body of water (to wetlands) constitutes a relatively permanent body of water connected to a traditional interstate navigable water

2. Demonstrate wetland has a continuous surface connection with that water making it difficult to determine where the water ends and the wetlands begin

# Timeline of Recent Actions Post-Sackett



January 2023 – Biden Administration adopts Federal Regulations based on Significant Nexus Test (2023 Rule)



May 2023 – Supreme Court issues decision in *Sackett v. EPA*



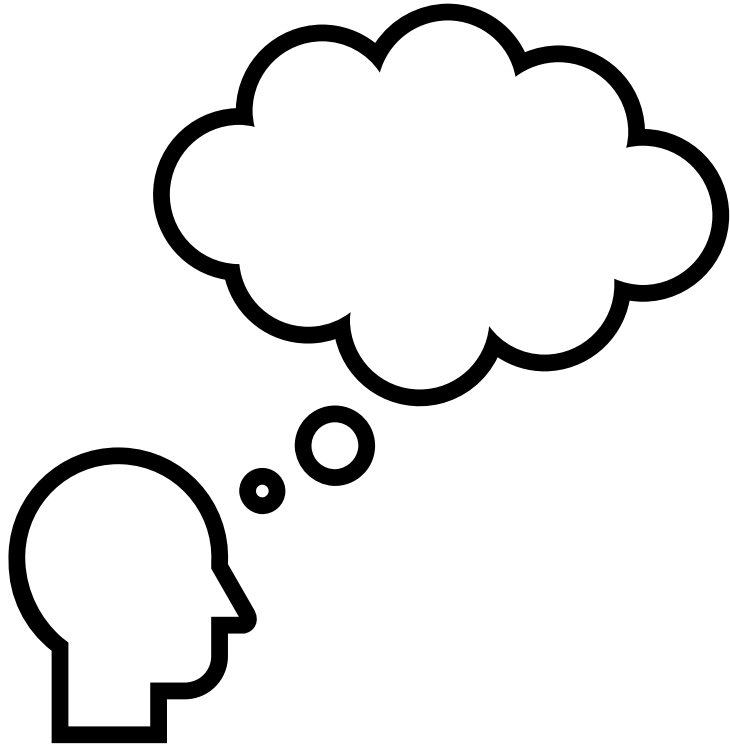
September 2023 – Biden Administration issues Amended Rule for conformance with *Sackett* (Amended Rule)



March 2025 – Army Corps & EPA Memorandum Concerning *Proper Implementation of “Continuous Surface Connection” under Definition of “Waters of the United States under the Clean Water Act”*



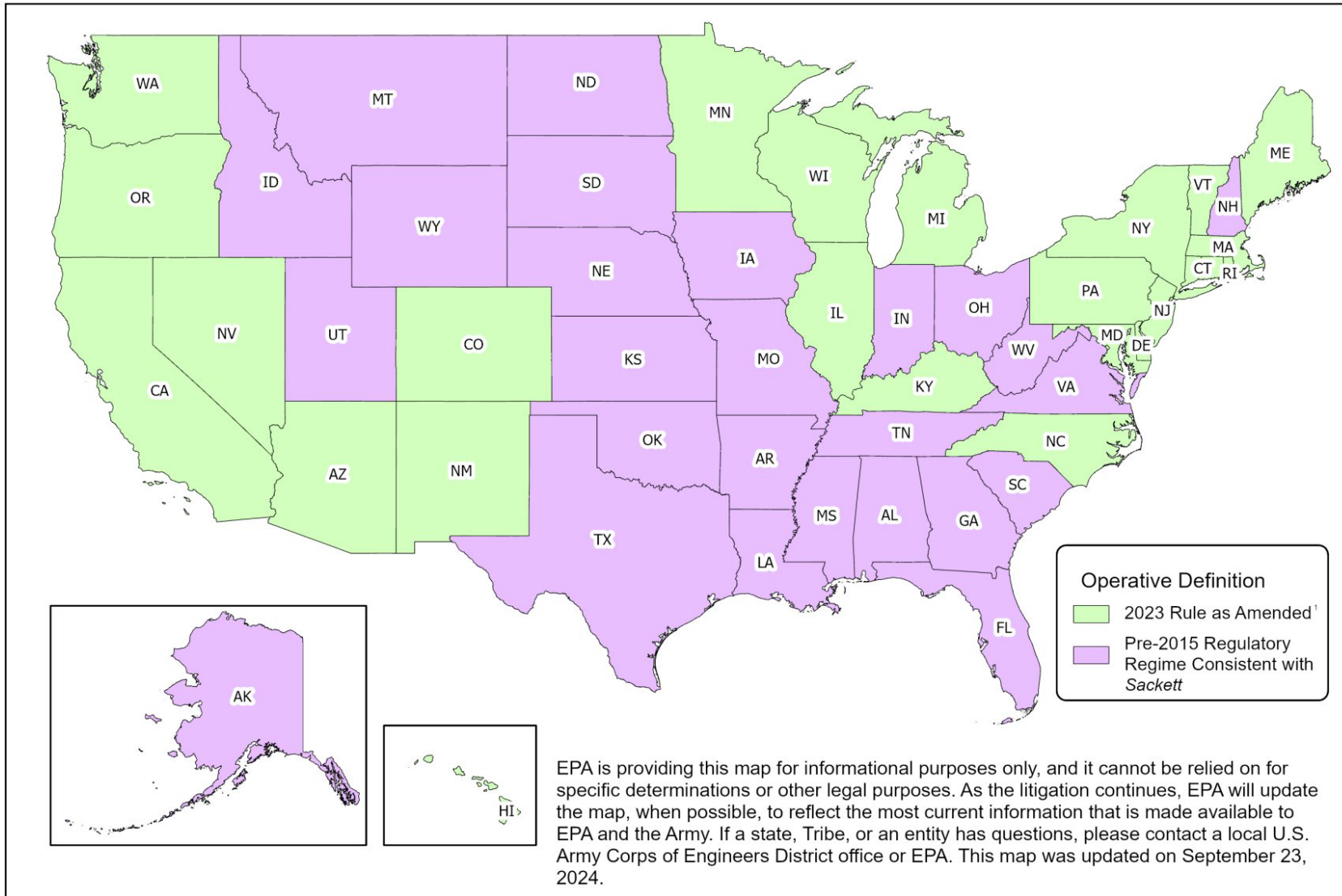
2025 and beyond – Federal notice for input, workshops, intent to prepare and publish a new rule



## So what rule do I follow? **IT DEPENDS!**

- September 2023 Rule
  - 24 States
  - District of Columbia
  - U.S. Territories
- Pre-2015 Rule
  - 26 States

# Operative Definition of "Waters of the United States"



<sup>1</sup> Also operative in the U.S. Territories and the District of Columbia

# 2025 Agency Guidance on Wetlands with a Continuous Surface Connection

- Waters of the United States include,

“...only those adjacent wetlands that have a continuous surface connection because they directly abut the [requisite jurisdiction water] (e.g., they are not separated by uplands, a berm, dike, or similar feature.”

“...wetlands meet the continuous surface connection requirement if they physically abut, or touch, a [requisite jurisdiction water].”

“...definition of ‘navigable waters’ includes ‘some wetlands – namely, those that directly ‘abut’ covered waters.’”



# Post-Sackett Court Decision Highlights

*United States v. Sweeney* (2024) 2024 U.S. Dist. LEXIS 190360

- Sackett did not affect protections for tidal waters & abutting tidal marsh wetlands
- Sackett did not revisit tidal waters
- Indistinguishable occurs when wetlands have continuous surface connection
- Temporary interruptions and man-made barriers do not remove wetlands from scope of Clean Water Act

# *Robert White v. EPA* (2024) 737 F. Supp. 3d 310

- Mr. White is subject to an Enforcement Action. Filed for a stay of the enforcement action after *Sackett* was decided, which was denied.
- Mr. White, with of Pacific Legal Foundation, filed for a Preliminary Injunction under the Administrative Procedures Act, challenging September 2023 Amended Rule and definition of “*Adjacent*”
- Mr. White’s Argument:
  - Continuous surface connection is one-part of *Sackett* test
  - Second-part is that wetland must also be “practically indistinguishable from [WOTUS] such that it is difficult to determine where water ends and wetland begins”



*Robert White v. EPA*  
(2024) 737 F. Supp.  
3d 310, Continued –  
Court’s Finding

- Court rejected White’s allegation that “practically indistinguishable” is a separate element of the test
- Rather, the continuous surface connection IS what makes a wetland practically indistinguishable from an adjacent WOTUS

What does this  
all mean...

Amended Rule is applicable in half  
of the country

Pre-2015 Rule applicable in half of  
the country

Trump administration working on a  
new rule

Litigation challenging any rule is  
status quo

# California Draft Legislation of Note – SB 601

- Sponsored by California Coastkeeper Alliance and Defenders of Wildlife
- Authored by Senator Allen (Santa Monica)
- Proposes to add to state law “nexus waters” and subject them to CWA permitting requirements through state law
- Proposes to add a Private Right of Action to state law like citizen suit enforcement provisions in Clean Water Act for nexus waters
- Proposes to make other changes to state water quality provisions for nexus and non-nexus waters



## Another case to watch: *PCFFA v. Strock* (2023) 657 F. Supp. 3d 1341 (fully briefed before the Ninth Circuit Court of Appeal)

- PCFFA alleges that discharges from San Luis Drain are subject to NPDES permit requirements under the CWA
- Alleges that the agricultural return flow exception does not apply because flows into the drain are not “entirely” made up of agricultural flows
- District Court Holding: There was no genuine dispute of material fact regarding whether plaintiffs’ alleged sources of pollutants constitute nonpoint sources or whether they stem from “activities related to crop production,” and thus, these alleged sources of pollutants do not prevent application of the Agricultural Return Flows Exception.

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