



## REVISED WOTUS RULE FINALLY ISSUED

Nov 26, 2025 | Gary Pasheilich

**On November 20, US EPA and the Army Corps of Engineers published a proposed rule amending the definition of “waters of the United States” in response to the U.S. Supreme Court’s previous *Sackett* decision.**

Ever since President Trump took office in January, interested parties have eagerly awaited the Trump EPA’s response to the May 2023 U.S. Supreme Court decision in *Sackett v. EPA*, which revised the definition of “waters of the United States” (“WOTUS”) under the Clean Water Act. While prior administrations took a more expansive view of WOTUS based upon broad agency discretion, the *Sackett* decision significantly narrowed the inquiry.

In *Sackett*, the Court eliminated the so-called “Significant Nexus Test,” which was one of two tests for determining WOTUS established in the prior *Rapanos* high court decision. The *Sackett* Court summarized that “the CWA extends to only those wetlands that are as a practical matter indistinguishable from waters of the United States [requiring] the party asserting jurisdiction over adjacent wetlands to 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 new proposed rule reaffirms the Continuous Surface Connection Test, and US EPA states that “[i]t will fully implement the direction provided by [*Sackett*] ... [and] protect water quality by striking balance between federal and state authority, recognizing that states and tribes are best positioned to appropriately manage their local land and water resources.” The new rule offers definitions for “relatively permanent” (i.e., waters that are standing or continuously flowing year-round or at least during the “wet season”), and “continuous surface connection,” which means waters must abut a jurisdictional water and must have surface water at least during the wet season.

Additionally, the proposed rule removes interstate waters from federal jurisdiction as a mere consequence of crossing state lines, excludes ditches constructed or excavated in dry land, clarifies the meaning of “excluded prior converted cropland” such that only abandoned cropland that reverts to wetlands loses its designation, and excludes groundwaters from federal jurisdiction, among other changes.

The impact of the new rule is expected to be significant. Projections in the regulatory impact analysis accompanying the rule suggest an 81% decrease in total wetland acreage subject to federal wetland projection. As highlighted in the rule’s preamble, the rationale for such drastic reductions is in part based upon the idea that state authority should primarily make decisions regarding water resources (which was also a key theme within the *Sackett* decision). Reliance on “wet season” data is a recognition of this regionalization principle where US EPA cedes authority and flexibility to state decisionmakers.

Administrator Zeldin has stated that his goal in crafting the proposal “was to come up with a definition that no matter what would happen in November of ’28 or November 2032 that you’re going to keep this definition. This wasn’t about taking a pendulum and swinging it as far as you can up against another edge. It’s about getting it right, and I think that our farmers, our ranchers, our landowners in these states absolutely deserve it.” However, as with prior iterations of the WOTUS rule, the new rule will almost certainly be subject to legal challenges. In particular, the meaning of “wet season” is not clearly defined in the rule and, thus, is likely to become a new battleground. To that end, US EPA has specifically invited comment on “the concept of a ‘seasonal’ flow duration and what the term may include,” and what implementation tools could be used to identify flow duration. Further, with the onus of wetland regulation shifting more heavily towards state EPAs, it remains to be seen how individual states react to the new rule and whether more expanded regulation will occur at the state level.

US EPA is taking public comments through January 5, 2026. The agency will also hold two in-person public meetings with options for virtual participation (which have not yet been announced). Accordingly, interested





parties should review the proposed rule and consider whether to contribute comments to US EPA prior to finalization of the rule.

For more information, please feel free to contact any of Roetzel's EHS attorneys: Terry Finn, Shane Farolino, Amanda Ferguson and Gary Pasheilich.

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