

# **“Waters of The United States” Federalism Kick-off Meeting**

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April 3, 2025

# Federalism Kick-Off Meeting for “Waters of the United States”

- Roll Call
- Welcome
- Opening Remarks
- Presentation
- Discussion and Questions

Executive Order 13132 sets out considerations for consultations with state and local governments.



**This webinar is being recorded for our own internal purposes.**

# “Waters of the United States” and the Clean Water Act

- “Waters of the United States” is a threshold term in the Clean Water Act that establishes the geographic scope of federal jurisdiction under the Act.
- Clean Water Act regulatory programs address “navigable waters,” defined in the statute as “the waters of the United States, including the territorial seas.”
- The Clean Water Act does not define “waters of the United States.”
- The EPA and the Department of the Army have defined “waters of the United States” by regulation since the 1970s.



# Why “Waters of the United States” Matter

“Navigable Waters”: Waters of the United States, including the Territorial Seas



**303**  
Water Quality  
Standards & TMDLs



**311**  
Oil Spill  
Programs



**401**  
State/Tribal  
Certification



**402**  
Pollutant  
Discharge  
Permits



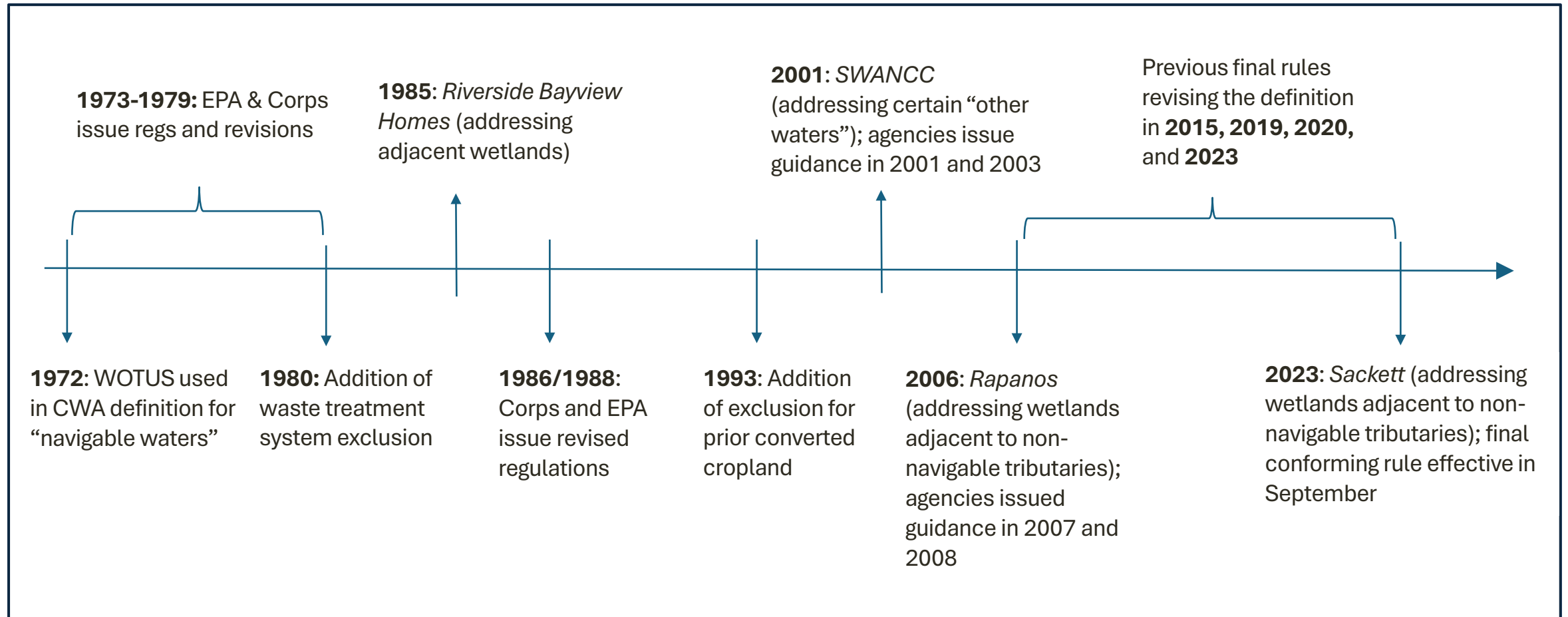
**404**  
Discharge of  
Dredged and/or  
Fill Material

## Definition of “Waters of the United States”

- Affects the extent to which CWA provides protection over waters for the listed programs
- Influences how States and authorized Tribes for certain CWA programs can implement those programs
- May influence how States and Tribes strategize for protecting their resources into the future—such as whether to pursue authorization for additional CWA programs

# “Waters of the United States” Over Time

The definition of “waters of the United States” has been a subject of dispute and addressed in several major Supreme Court cases.



# The *Rapanos* Decision (2006)

- The Supreme Court was divided in a 4-1-4 opinion on the question of CWA jurisdiction over wetlands adjacent to non-navigable tributaries of traditional navigable waters.
- The Plurality Opinion considered “waters of the United States” to include:
  - “**relatively permanent**, standing or continuously flowing bodies of water forming geographic features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes’” and
  - wetlands that have “a **continuous surface connection** to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands.”
- The Kennedy Concurring Opinion considered “waters of the United States” to include:
  - “a water or wetland must possess a ‘**significant nexus**’ to waters that are or were navigable in fact or that could reasonably be so made.”
- The agencies issued guidance in 2007, which was revised in 2008.
- EPA and Army promulgated a definition of “waters of the United States” in 2023 that used both *Rapanos* standards.

# The *Sackett* Decision (2023)

- While the 2023 Rule was not directly before the Court, the Court considered the jurisdictional standards set forth in the rule.
- The Court concluded that **the significant nexus standard was inconsistent** with the Court's interpretation of the Clean Water Act (CWA).
- The Court concluded that the *Rapanos* plurality was correct: the CWA's use of "waters" encompasses only those **relatively permanent**, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes.
- The Court also agreed with the *Rapanos* plurality that adjacent wetlands are "waters of the United States" when the wetlands have a **continuous surface connection** to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between "waters" and wetlands.

# Amended 2023 Rule: Framework

## Categories of Jurisdictional Waters

(a)(1)

- (i) Traditional Navigable Waters
- (ii) Territorial Seas
- (iii) Interstate Waters

(a)(2) Impoundments of Jurisdictional Waters

(a)(3) Relatively Permanent Tributaries

(a)(4) Adjacent Wetlands

(a)(5) Intrastate lakes and ponds that do not fall within (a)(1) – (a)(4)



\*NOTE: For efficiency, this slide's list of the categories of jurisdictional waters are shorthand for the jurisdictional categories in the regulations. See 33 CFR 328.3(a) and 40 CFR 120.2(a).



# Amended 2023 Rule: Framework

## Exclusions\*

(b)(1) Waste treatment systems

(b)(2) Prior converted cropland

(b)(3) Certain ditches

(b)(4) Artificially irrigated areas that would revert to dry land if irrigation ceased

(b)(5) Certain artificial lakes and ponds

(b)(6) Artificial reflection or swimming pools or other small ornamental bodies of water

(b)(7) Certain waterfilled depressions

(b)(8) Swales and erosional features

(b)(1) – (b)(2):  
Pre-2015 exclusions, modified  
in the regulations

(b)(3) – (b)(8):  
Pre-2015 “generally non-  
jurisdictional features,” added to  
the regulations as exclusions

\*NOTE: For efficiency, this slide’s list of the categories of exclusions are shorthand for the categories in the regulations. See 33 CFR 328.3(b) and 40 CFR 120.2(b). Exclusions do not apply to paragraph (a)(1) waters.

# Amended 2023 Rule: Framework

## Definitions

(c)(1) *Wetlands*

(c)(2) *Adjacent* means having a continuous surface connection

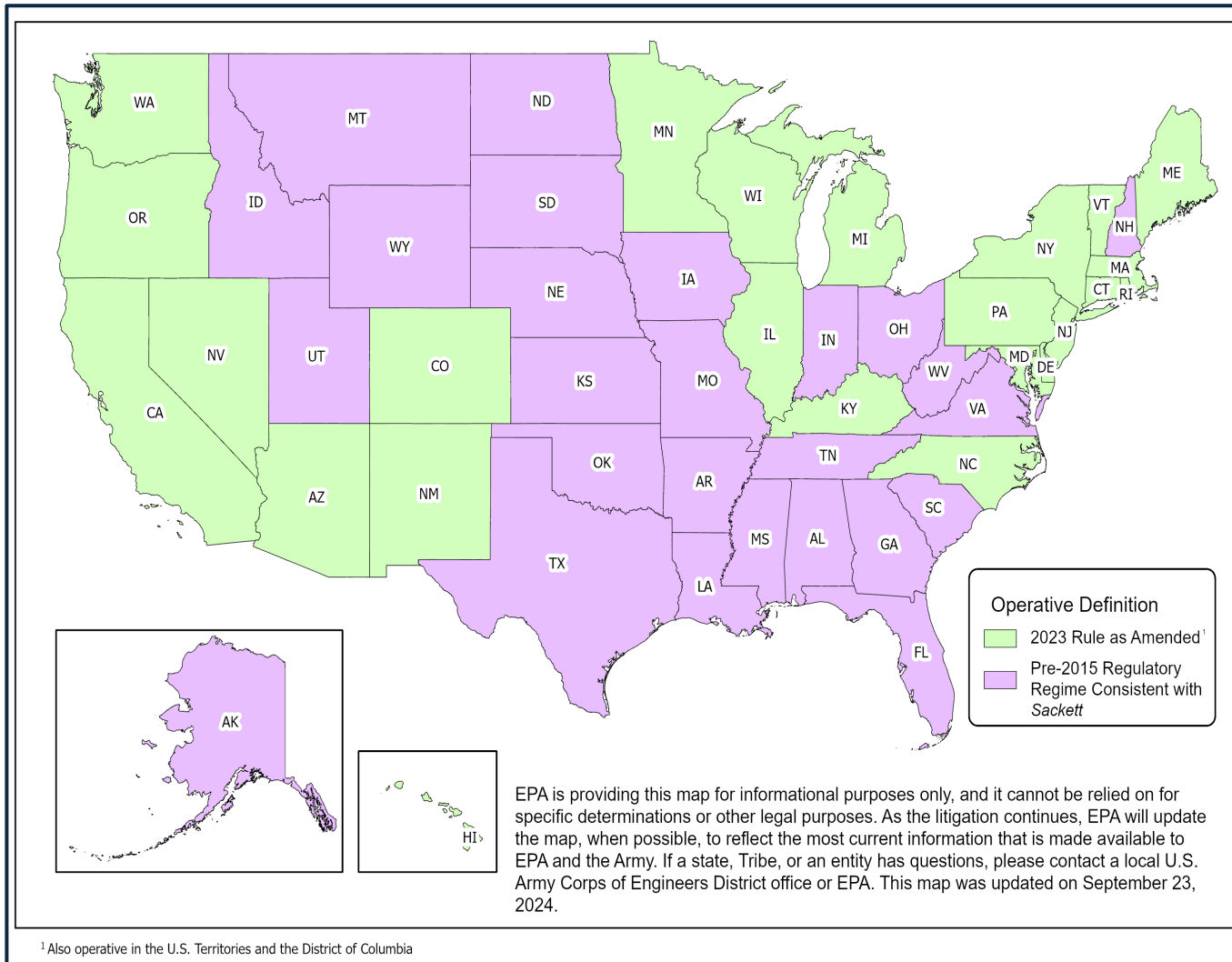
(c)(3) *High tide line*

(c)(4) *Ordinary high water mark*

(c)(5) *Tidal waters*



# Current Implementation: Operative Definition of “Waters of the United States”



- As the result of ongoing litigation, the Amended 2023 Rule is not operative in certain states.
- In the jurisdictions where the 2023 Rule is enjoined, the agencies are interpreting "waters of the United States" consistent with the pre-2015 regulatory regime and the Supreme Court's decision in *Sackett*.
  - 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.

# EPA and Army's Recent Events in "Waters of the United States" – March 2025

- March 12, 2025
  - Issued "continuous surface connection" guidance
  - Announced new rulemaking effort
  - Signed WOTUS Notice announcing listening sessions and recommendations docket in preparation for rulemaking (published March 24, 2025)
- March 21, 2025
  - Federalism Consultation and Tribal Consultation letters signed

# Revising the Definition Once And for All

- Ensure implementation aligns with the *Sackett* decision
- Focus on clarity, simplicity and improvements that will stand the test of time
- Prioritize practical implementation approaches
- Provide for durable, stable and more effective and efficient jurisdictional determinations and permitting actions
- Consider experiences of and input received from Tribes, States, local governments, diverse stakeholder groups, and the public

# Seeking State and Local Government Input on Three Key Areas

- **The Scope of “Relatively Permanent” and to What Features This Phrase Applies**
  - Characteristics to inform definition
  - How to identify “relatively permanent” tributaries in the field
- **The Scope of “Continuous Surface Connection” and to Which Features This Phrase Applies**
  - Definition of “continuous surface connection”
  - Scope of “connection to”
  - Definition of “adjacent”
  - Recommendations for implementation
- **The Scope of Jurisdictional Ditches**
  - Characteristics for clear and implementable distinctions between jurisdictional and non-jurisdictional ditches
  - Definition of “ditch”

# Discussion and Clarifying Questions

- Feedback and considerations for the agencies
- Clarifying questions
- Thoughts on future engagement

# Federalism Next Steps

- **EPA and Army are accepting written feedback on this consultation until June 2, 2025.**
- Please email federalism comments to [CWAwotus@epa.gov](mailto:CWAwotus@epa.gov).

For more information on the rulemaking or to register for listening sessions, please visit <https://www.epa.gov/wotus>.



# Additional Engagement Opportunities on Recommendations Docket

- Upcoming listening sessions are planned for April and May 2025.
  - A listening session for States will be held on April 29, 2025 from 9:30 AM-12 PM ET.
  - States are also welcome to attend the listening sessions for the public and local governments, which are being scheduled.
  - Registration information available at <https://www.epa.gov/wotus/public-outreach-and-stakeholder-engagement-activities>.
- There is also a public docket open (Docket No. EPA-OW-2025-0093) until April 23, 2025 for written recommendations.
  - Go to <https://www.regulations.gov/commenton/EPA-HQ-OW-2025-0093-0001> and follow the online instructions for submitting feedback.

# Closing Remarks

- For more information, please visit <https://www.epa.gov/wotus>.
- If you have questions, please send an email to [CWAwotus@epa.gov](mailto:CWAwotus@epa.gov).