

A scenic view of a river flowing through a rocky landscape. The river is in the foreground, surrounded by large, dark rocks. In the background, there is a steep, rocky hillside covered with sparse vegetation. The sky is bright and clear.

Re-defining the “Waters of the United States”

IOGCC

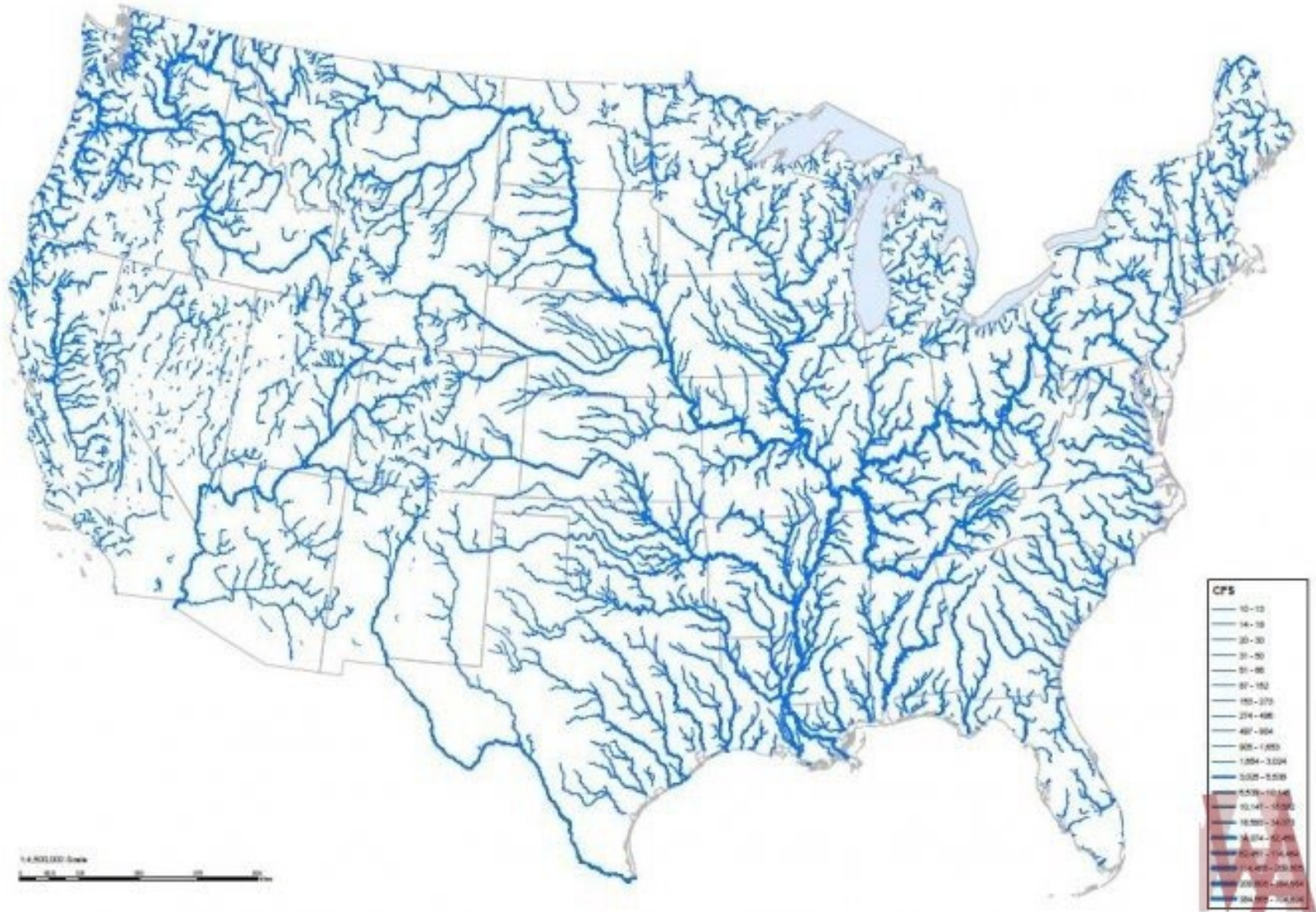
Oklahoma City, OK

May 23, 2023



CWA Jurisdiction

- To “restore and maintain the chemical, physical, biological integrity of the waters of the U.S. ... the discharge of any pollutant ... shall be unlawful” 33 U.S.C. § 1311(a)
- Act defines “navigable waters” as “the **Waters Of The United States**, including the territorial seas.” 33 U.S.C § 1362(7)
- What is “WOTUS” becomes essentially “the” question in determining the scope and application of the Act – when permitting is necessary?



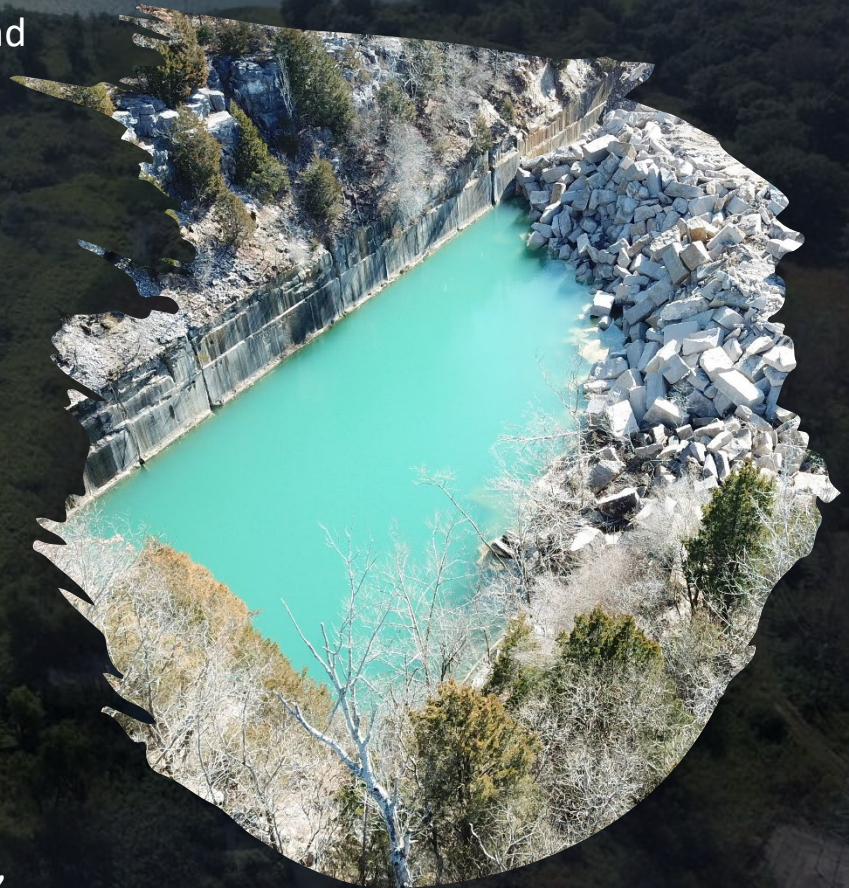


Defining WOTUS

- 1974 – “[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor” – **navigable in fact**
- 1975 – *NRDC v. Callaway*, (D.D.C.) not limited to traditional tests of navigability. CWA asserts jurisdiction over waters to the maximum extent permissible under Commerce Clause
- 1975 - 1986 – *waters used in interstate commerce...; all other waters the use, degradation, or destruction of which could affect interstate commerce;*

Defining WOTUS

- 1985 – *U.S. v Riverside Bayview Homes*
 - Wetland = WOTUS? Wetland adjacent to Lake St. Clair (navigable water).
 - Yes, adjacent wetlands “inseparably bound up with WOTUS” = significant nexus
 - Navigation of limited import.
 - What about non-adjacent wetlands?
- 1986 – EPA / Corps Migratory Bird Rule
 - Habitat for migratory birds
 - water for crops used in commerce
- 2001 – *Solid Waste Agency of Northern Cook County v. U.S.*
 - Do abandoned mine pits = WOTUS
 - SCOTUS: No, isolated waters with no connection to WOTUS cannot be WOTUS
 - Cannot read out “navigable” entirely
 - To invoke outer limits of Congress’ power, requires a clear indication that Congress intended that result



Defining WOTUS

- 2006 – *Rapanos v. United States*
 - Wetland connecting via man-made drainage to tributary to navigable waters.
 - WOTUS?
 - Remand decision, Corps must apply a test:
 - Scalia Plurality: “**relatively permanent**, standing or flowing bodies of water” and to wetlands with a “**continuous surface connection**” to such permanent waters
 - Kennedy: Jurisdiction extends to waters that alone or in combination with “similarly situated lands in the region” have a “**significant nexus**” to traditional navigable waters.



Defining WOTUS

- 2007- 08 – *Post Rapanos Guidance*
 - 1986 Rules remain in place, jurisdiction can be determined under either “relatively permanent” or “significant nexus” test
- 2015 Clean Water Rule (Obama)
 - Implement Justice Kennedy Significant Nexus Test
 - Categorically WOTUS
 - Navigable, Territorial seas,
 - Case-specific (significant nexus)
 - Categorically Non-WOTUS
 - certain ditches; artificially irrigated areas that would revert to dry land should application of water to that area cease; artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds ...



Defining WOTUS

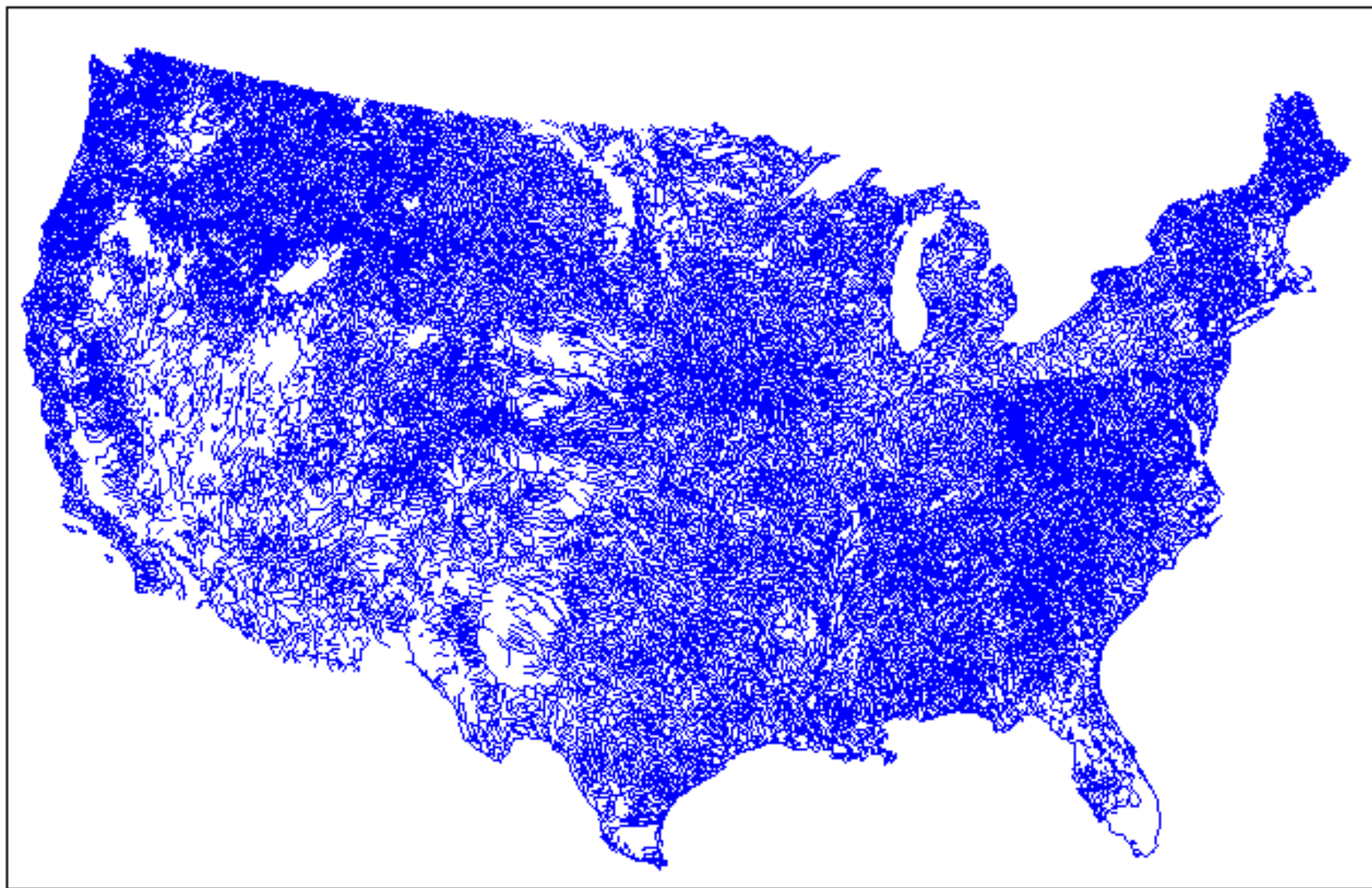
2015 Clean Water Rule

8 categories of jurisdictional waters

1. Traditional navigable waters (were/may be used in interstate/foreign commerce);
2. Interstate waters;
3. Territorial seas;
4. Impoundments of jurisdictional waters;
5. Tributaries;
6. Adjacent waters;
7. Case specific water;
8. Waters located within 100-year floodplain of 1-3, and within 4,000 ft of high tide/ordinary high-water mark of 1-5, which have a sig. nexus to 1-3

1-6 waters are per se jurisdictional—no additional analysis required.







Defining WOTUS

- 2019 Repeal Rule –revert to pre-Obama
- 2020 Nav Waters Protection Rule (Trump)
 - Generally implement Justice Scalia’s plurality test:
***relatively permanent** flowing and standing waterbodies that are traditional navigable waters in their own right or that have a specific **surface water connection** to traditional navigable waters, as well as wetlands that abut or are otherwise inseparably bound up with such relatively permanent waters*

Defining WOTUS

2020 Navigable Waters Protection Rule

Categories of jurisdictional waters (“the” list)

1. territorial seas and traditional navigable waters
2. tributaries of such waters
 - a river, stream, or similar naturally occurring surface water channel that contributes surface water flow to the territorial seas or traditional navigable water in a typical year either directly or indirectly through other tributaries, jurisdictional lakes, ponds, or impoundments, or adjacent wetlands. A tributary was required to be perennial or intermittent in a typical year
 - Excludes ephemeral streams
3. certain lakes, ponds, and impoundments of jurisdictional waters
 - standing bodies of water that contribute surface water flow in a typical year to a territorial sea or traditional navigable water either directly or through a tributary, another jurisdictional lake, pond, or impoundment, or an adjacent wetland
4. wetlands adjacent to other jurisdictional waters
 - wetlands that abut jurisdictional waters and those non-abutting wetlands that are (1) “inundated by flooding” from a jurisdictional water in a typical year, (2) physically separated from a jurisdictional water only by certain natural features (*e.g.*, a berm, bank, or dune), or (3) physically separated from a jurisdictional water by an artificial structure that “allows for a direct hydrologic surface connection” between the wetland and the jurisdictional water in a typical year



Defining WOTUS

2023 Revised Definition of WOTUS Rule (Biden)

- Re-implement Justice Kennedy’s Significant Nexus standard
- *waters that, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters, which are "traditionally navigable waters" identified in the text of the CWA*
- “significant affect” is defined as meaning “a material influence on the chemical, physical, or biological integrity of” the (a)(1) traditionally navigable waters.”



Defining WOTUS

2023 Revised Definition of WOTUS Rule

Categories of jurisdictional waters

1. **traditional navigable waters**, the territorial seas, and interstate water (a1 waters)
2. **impoundments** of "waters of the United States (a2 waters)
3. **tributaries**" to traditional navigable waters, the territorial seas, interstate waters, or paragraph (a)(2) impoundments
 - when the tributaries meet either the relatively permanent standard or the significant nexus standard (jurisdictional tribs)
4. **wetlands** "adjacent" to paragraph (a)(1) waters; wetlands adjacent to and with a continuous surface connection to relatively permanent paragraph (a)(2) impoundments or jurisdictional tributaries
 - when the jurisdictional tributaries meet the relatively permanent standard; and wetlands adjacent to paragraph (a)(2) impoundments or jurisdictional tributaries when the wetlands meet the significant nexus standard (jurisdictional adjacent wetlands)
5. **intrastate lakes and ponds, streams or wetlands** not identified in paragraphs (a)(1) through (4)
 - that meet either the relatively permanent standard or the significant nexus standard (a5 waters)



Defining WOTUS

2023 Revised Definition of WOTUS Rule

Excluded waters

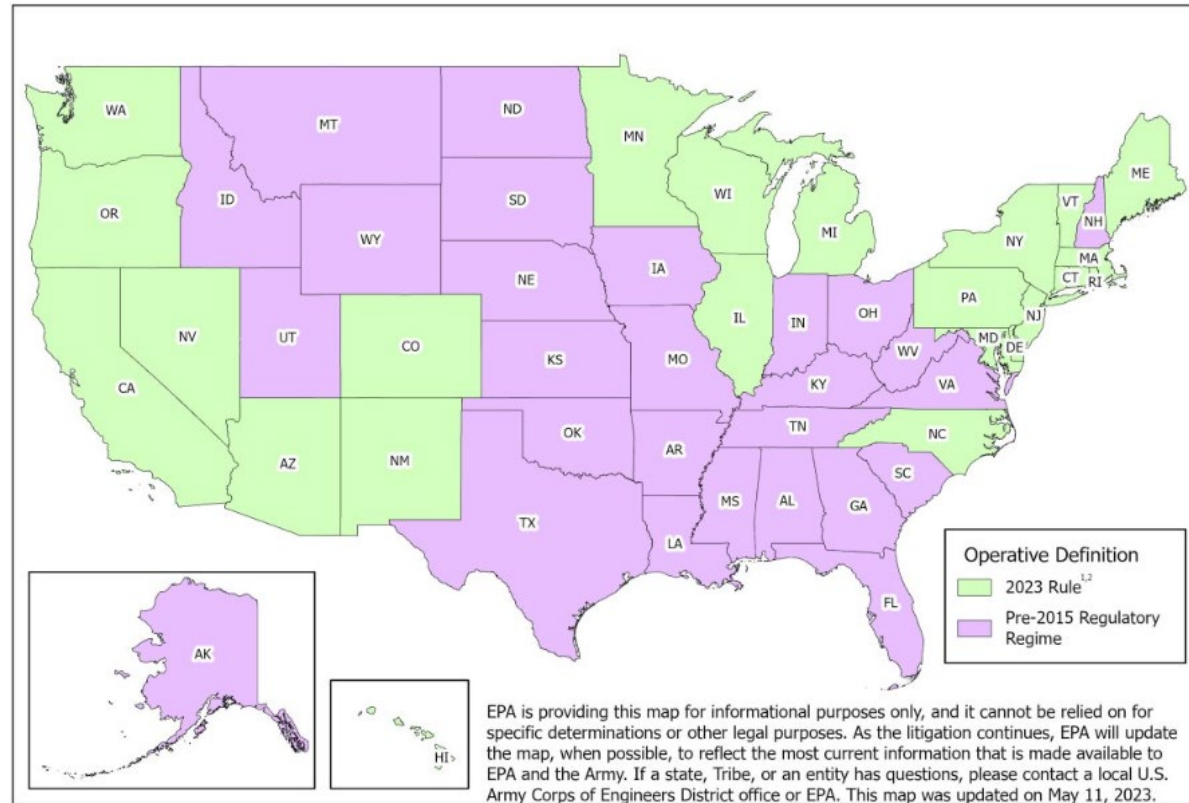
1. waste treatment systems
2. prior converted cropland designated by the secretary of agriculture
3. ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water
4. artificially irrigated areas that would revert to dry land if the irrigation ceased
5. artificial lakes or ponds created by excavating or diking dry land to collect and retain water and that are used exclusively for such purposes as **stock watering**, irrigation, settling basins or rice growing
6. artificial reflecting or **swimming pools** or other small ornamental bodies of water created by excavating or diking dry land to retain water for aesthetic reasons
7. water-filled depressions created in dry land incidental to construction activity and **pits** excavated in dry land for the purpose of obtaining fill, sand or gravel
8. swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent or short-duration flow



Defining WOTUS 2023 Revised Definition Status

- Rule enjoined in 27 states
 - pre-2015 Rapanos guidance applies (generally the 1986 regulatory regime + Rapanos guidance)
- 5 Pending cases:
 - *State of Texas v. EPA*, (S.D. Tex.)
 - *Kentucky Chamber of Commerce v. EPA*, (E.D. Ky.)
 - *State of West Virginia v. EPA*, (D. N.D.).
 - *American Farm Bureau Association v. EPA*, (S.D. Tex)
 - *Kentucky v. EPA*, (E.D. Ky.)

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 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).

Defining WOTUS

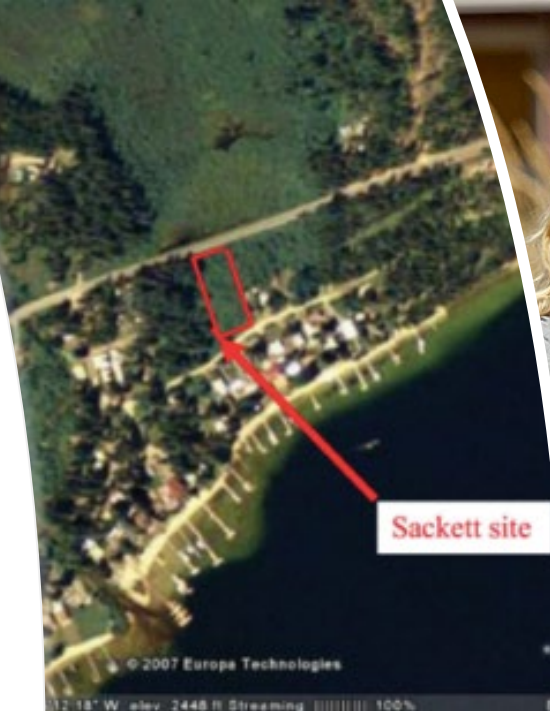
Pre-2015 Regime

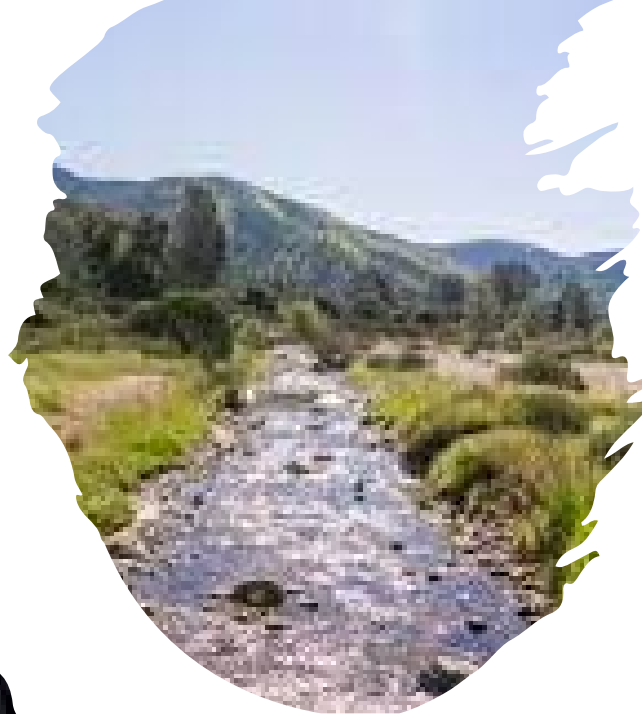
- Agencies will assert jurisdiction over:
 - Traditional navigable waters
 - Adjacent wetlands
 - Non-navigable tributaries of traditional navigable waters that are relatively permanent
 - Wetlands directly abutting such tributaries
- Jurisdiction based on fact-specific analysis
 - Non-navigable non-permanent tributaries
 - Wetlands adjacent to such tributaries
 - Wetlands adjacent but that do not abut relatively permanent tributaries
- Not WOTUS
 - Swales, erosional features
 - Ditches draining uplands that do not carry relatively permanent flow
- Significant Nexus applied
 - Asses flow and functions of water to determine if it affects the chemical, physical, biological integrity of downstream WOTUS
 - Considers both hydrologic and ecologic factors



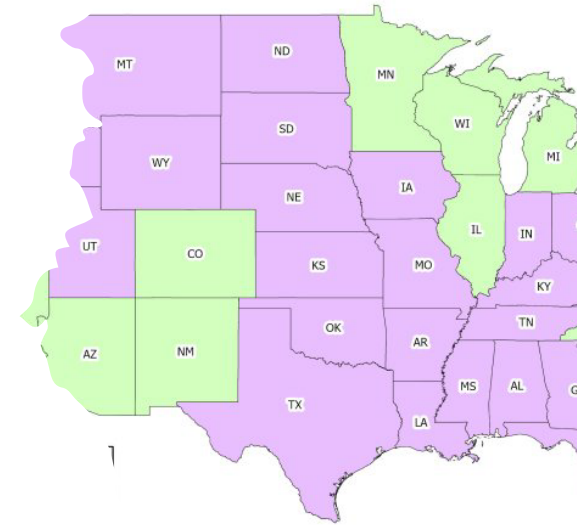
Sackett v. EPA

- Michael & Chantell Sackett seek to develop a lot near Priest Lake, ID
- 2007 EPA said no, it's WOTUS
- 2008 Sacketts sue, claiming not WOTUS
- 9th Circuit ruled in favor of EPA (Kennedy)
 - jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense.
- Sacketts argue that Scalia Plurality is the appropriate test
- SCOTUS oral argument Oct. 3 2022
- Waiting on SCOTUS...





Definition of "Waters of the U



EPA is providing this map for informational purposes only and does not constitute specific determinations or other legal purposes. EPA will update the map, when possible, to reflect the most current information available to EPA and the Army. If a state, Tribe, or an entity has information that is not reflected on this map, please contact the Army Corps of Engineers District office or EPA. The map is not intended to be used for any purpose other than informational.

of Kentucky and Plaintiff-Appellants in Kentucky Ch
* Commerce, Associated General Contractors of K

Defining WOTUS

- “It is unfortunate that no opinion commands a majority of the Court”
 - Chief Justice Roberts, Rapanos concurrence