



ELI WESTERN BOOT CAMP - MAY 1, 2024

Clean Water Act Primer

“Waters of the United States” and Section 404 Permitting and Enforcement

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CWA WOTUS and Section 404 Primer - Outline

- **CWA “Waters of the United States” (WOTUS) jurisdiction**
 - 1986 regulatory definition
 - SCOTUS 2006 *Rapanos* decision
 - Regulatory history, 2006-2022
 - 2023 SCOTUS *Sackett* decision and Biden WOTUS rule
 - Current WOTUS rule state of play
 - “Waters of the state” - California comparison
- **CWA Section 404 “dredge and fill” permitting and enforcement**
 - Jurisdiction
 - Exemptions
 - Permits
 - General and Nationwide Permits
 - Individual Permits and Compensatory Mitigation
 - Enforcement

Overview of WOTUS

- The Clean Water Act made it unlawful to discharge any pollutant from a point source into navigable waters unless a permit was obtained. “Navigable waters” as defined by Congress are “waters of the United States” or “WOTUS.”
- Determinations of whether a waterbody is WOTUS depends on both the features of the waterbody as well as the frequently changing WOTUS definition.

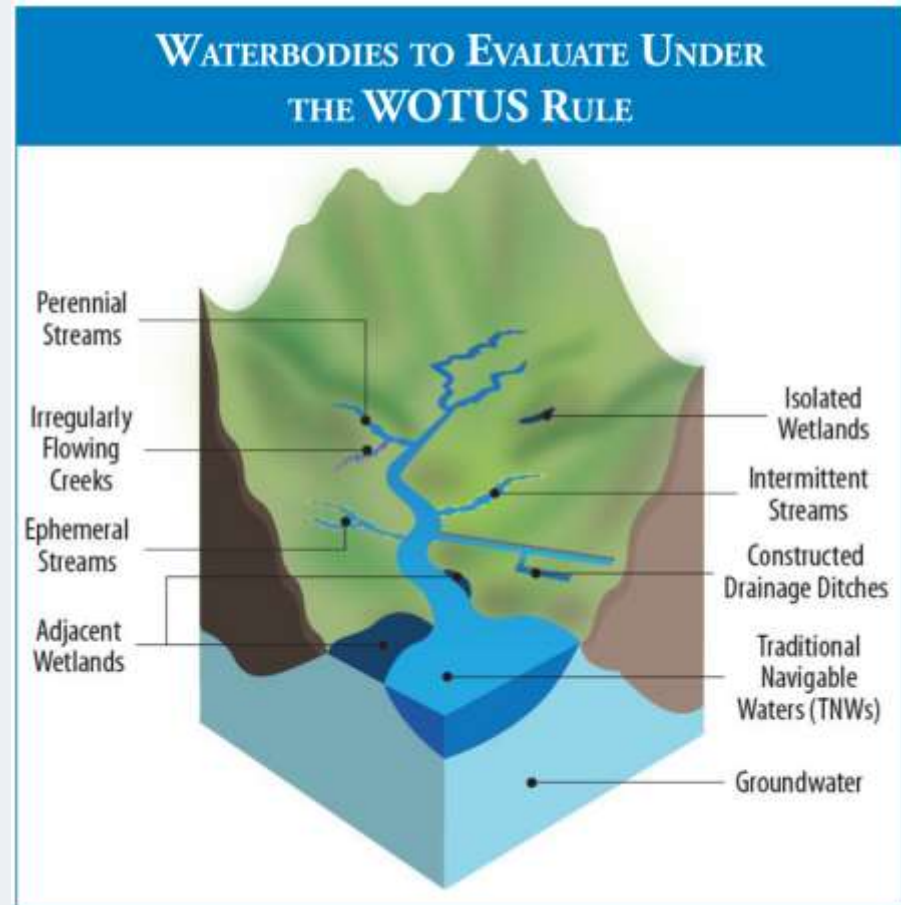


Figure by Kathleen A. Radloff and Matthew J. Mayo; Gradient Trends Issue 84 (Spring 2022).

1986 Regulatory Definition of WOTUS

See 40 CFR 230.3(s). WOTUS includes:

- (1) all waters that are currently used, were previously used, or may potentially be used in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) all interstate waters including interstate wetlands;
- (3) all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce;
- (4) all impoundments of waters otherwise defined as WOTUS under this definition;
- (5) tributaries of waters defined in (1)-(4);
- (6) the territorial sea; and
- (7) **wetlands adjacent to waters** defined in (1)-(6).

Rapanos v. United States, 547 U.S. 715 (2006)

- The *Rapanos* decision was a 4-1-4 decision.
- The case resulted in two tests for what constitutes WOTUS.

Dissent



Concurrence



Plurality



Rapanos - Scalia's Plurality Test

- The test resulting from Scalia's plurality dictates that "adjacent wetlands" includes only "**relatively permanent, standing or continuously flowing bodies of water**" connected to traditional navigable waters, and to "**wetlands with a continuous surface connection to such relatively permanent waters.**"
- A wetland must be so closely connected to some other regulated water body that you can't really tell them apart.
- Wetlands separated from traditional navigable waters by any dry land would not be WOTUS.

Rapanos - "Significant Nexus" Test

- The test resulting from Kennedy's concurrence is that "adjacent wetlands" "possess the **requisite** nexus" and should be considered as WOTUS "if the wetlands, either alone or in combination with similarly situated lands in the region, **significantly affect the chemical, physical, and biological integrity of other covered waters.**"
- Kennedy's so-called "significant nexus" test adheres to prior U.S. Supreme Court precedent.



Major Changes in the Regulatory Regime

Rapanos decided.

2006

Major Changes in the Regulatory Regime

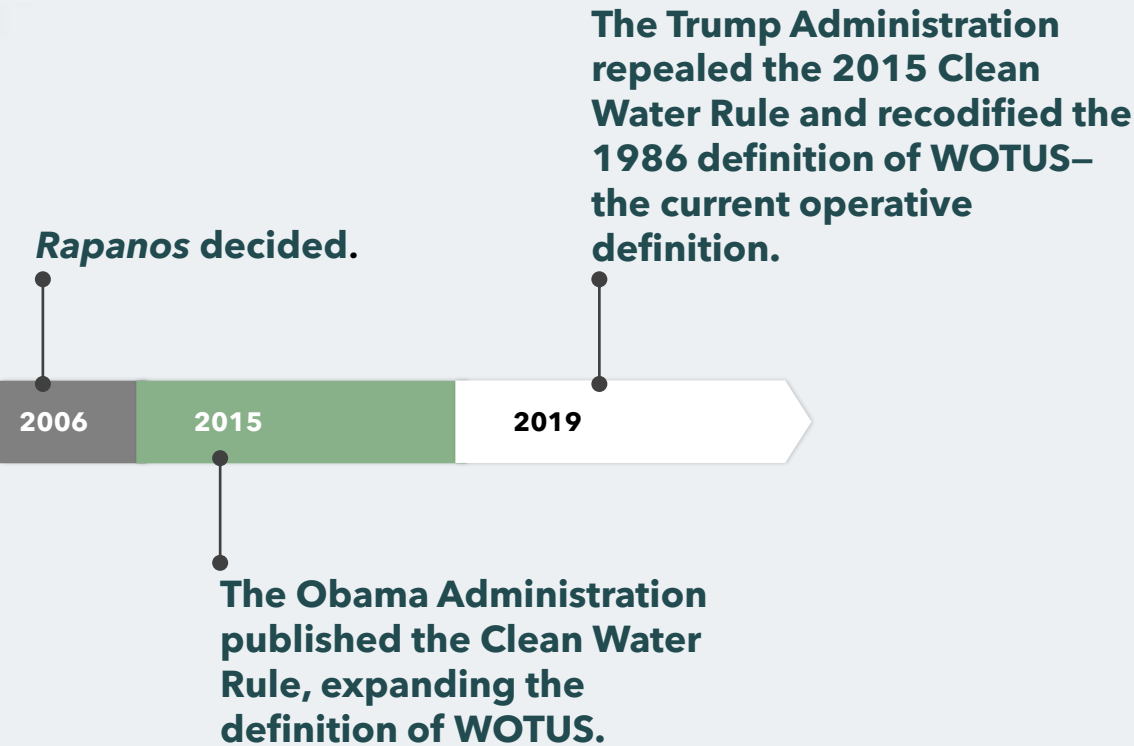
***Rapanos* decided.**

2006

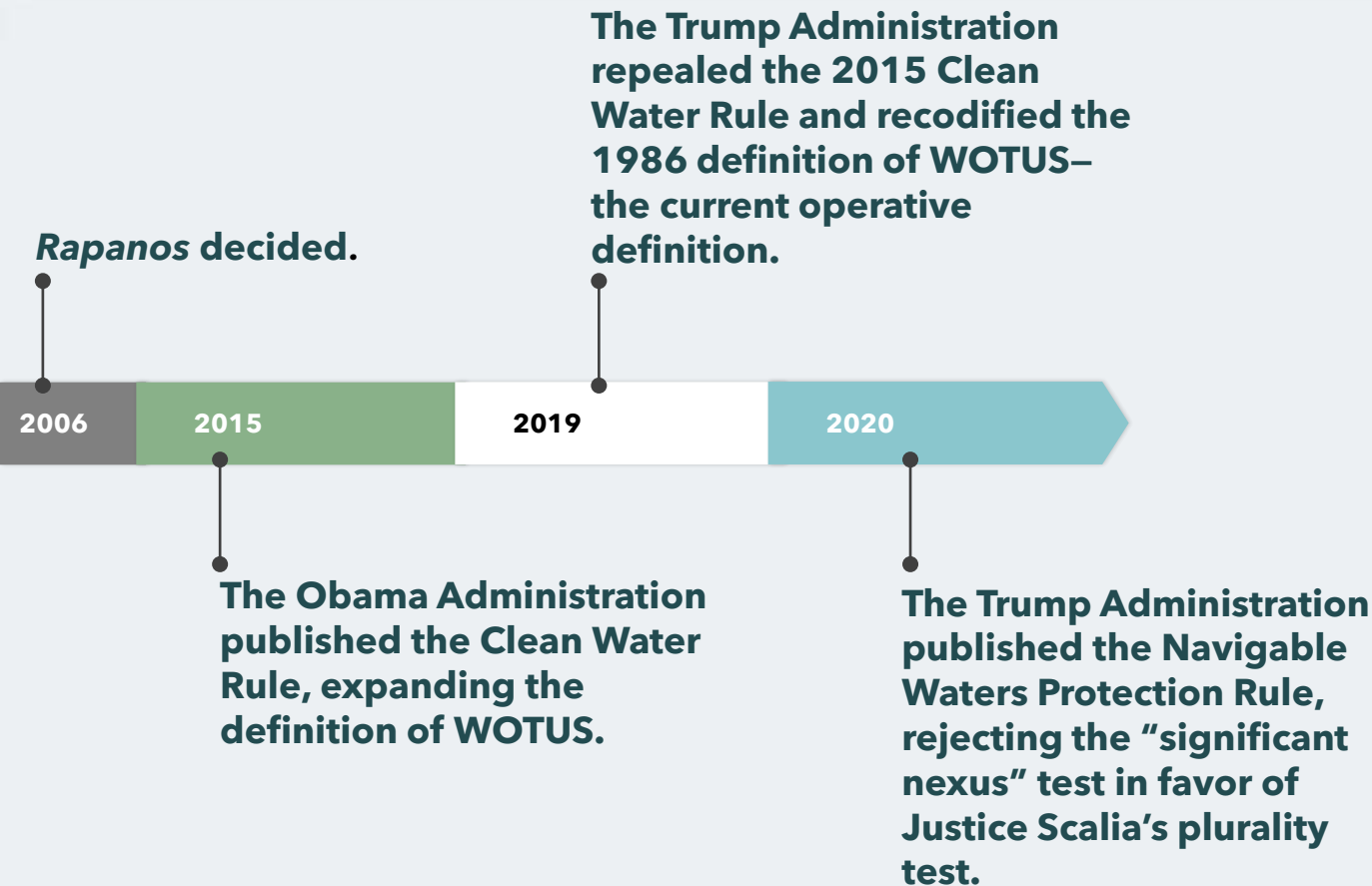
2015

The Obama Administration published the Clean Water Rule, expanding the definition of WOTUS.

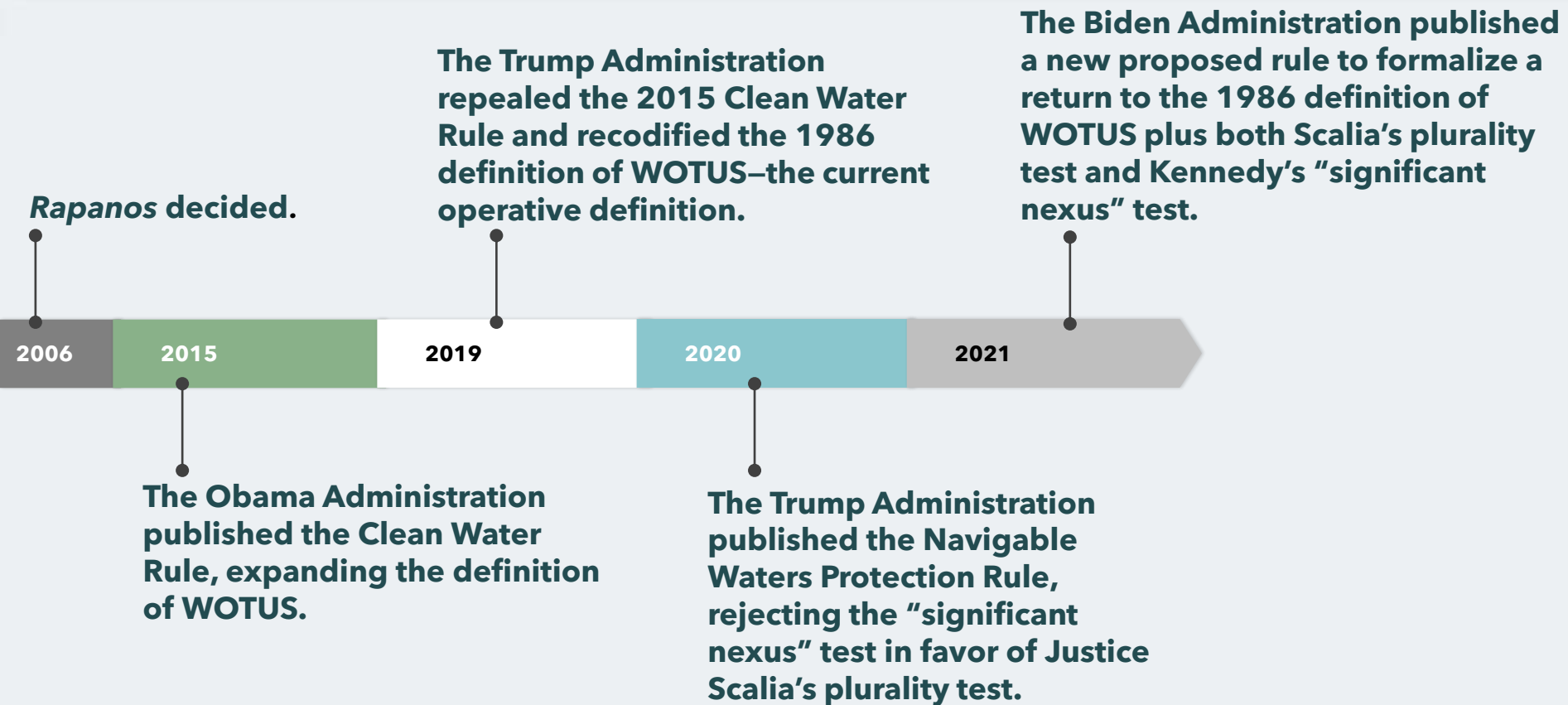
Major Changes in the Regulatory Regime



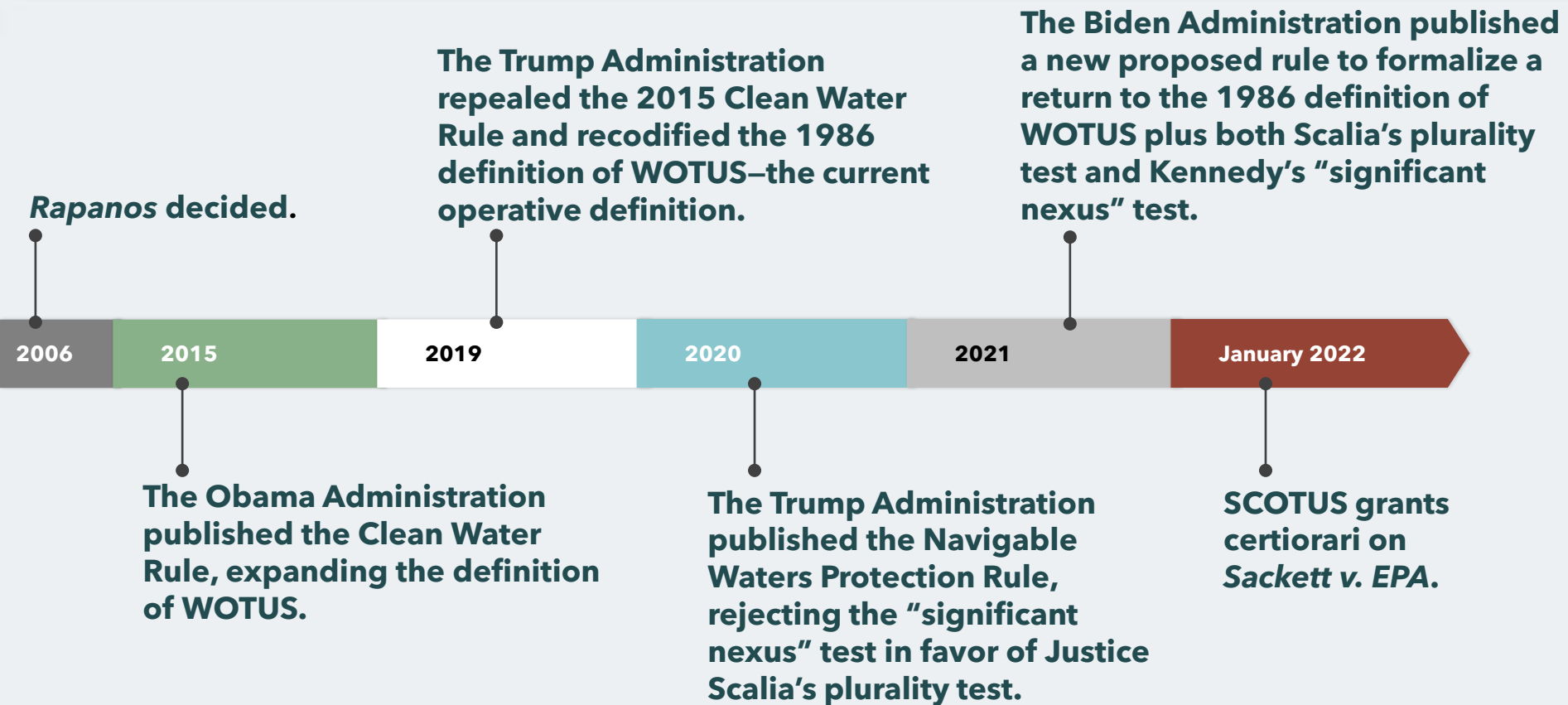
Major Changes in the Regulatory Regime



Major Changes in the Regulatory Regime

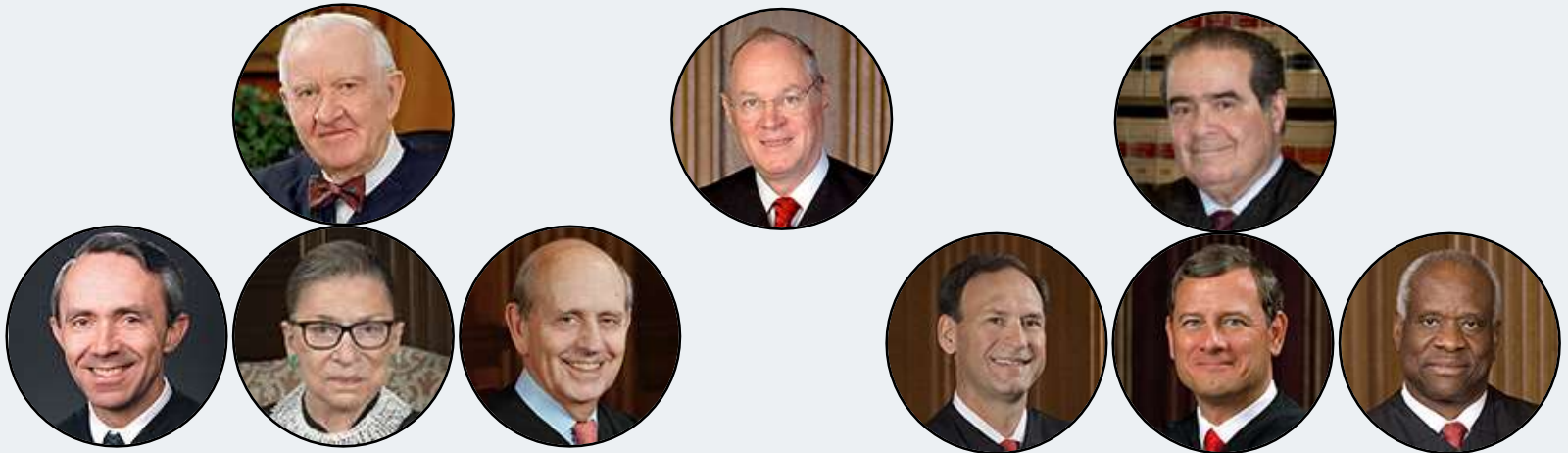


Major Changes in the Regulatory Regime

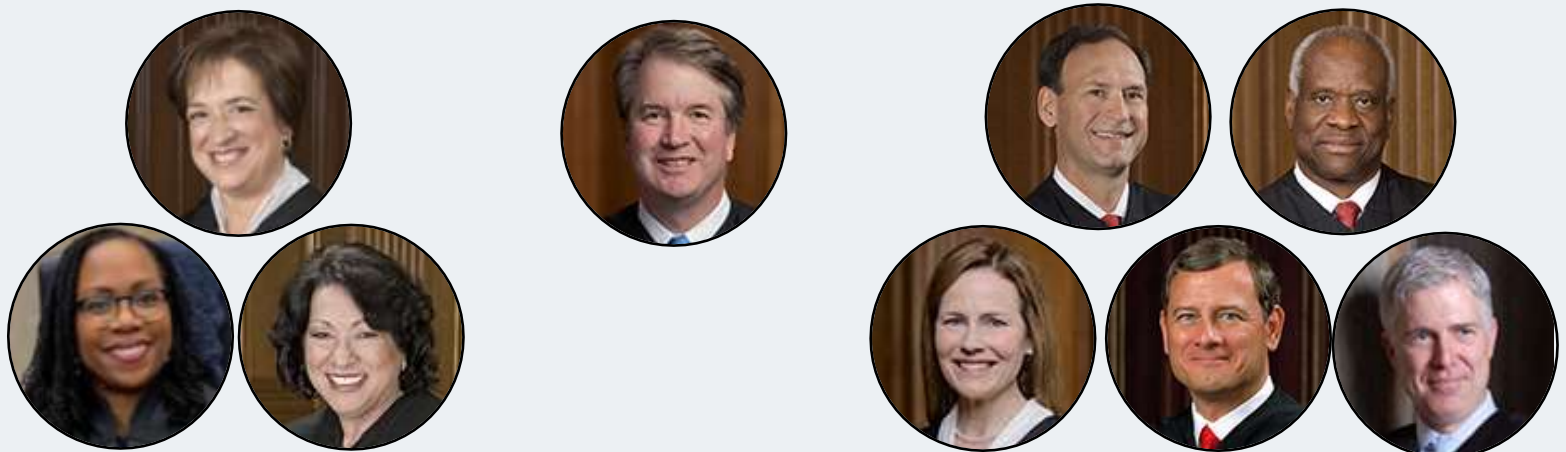


The Times, They are A-Changin....

**Rapanos
(2006)**



**Sackett
(2023)**



Sackett v. EPA, 598 U.S. 651 (2023)

- Majority opinion by Alito (w/Roberts, Thomas, Gorsuch, Barrett).
- Held: The Clean Water Act extends only to wetlands that are “**as a practical matter indistinguishable**” from a “**relatively permanent body of water connected to traditional interstate navigable waters,**” meaning:
 - **Adjacent** to waters of the United States and,
 - Having “**a continuous surface connection** with that water, **making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.**”
 - “**Significant nexus**” test is consigned to the dustbin of history.

(i.e. Scalia wins posthumously)

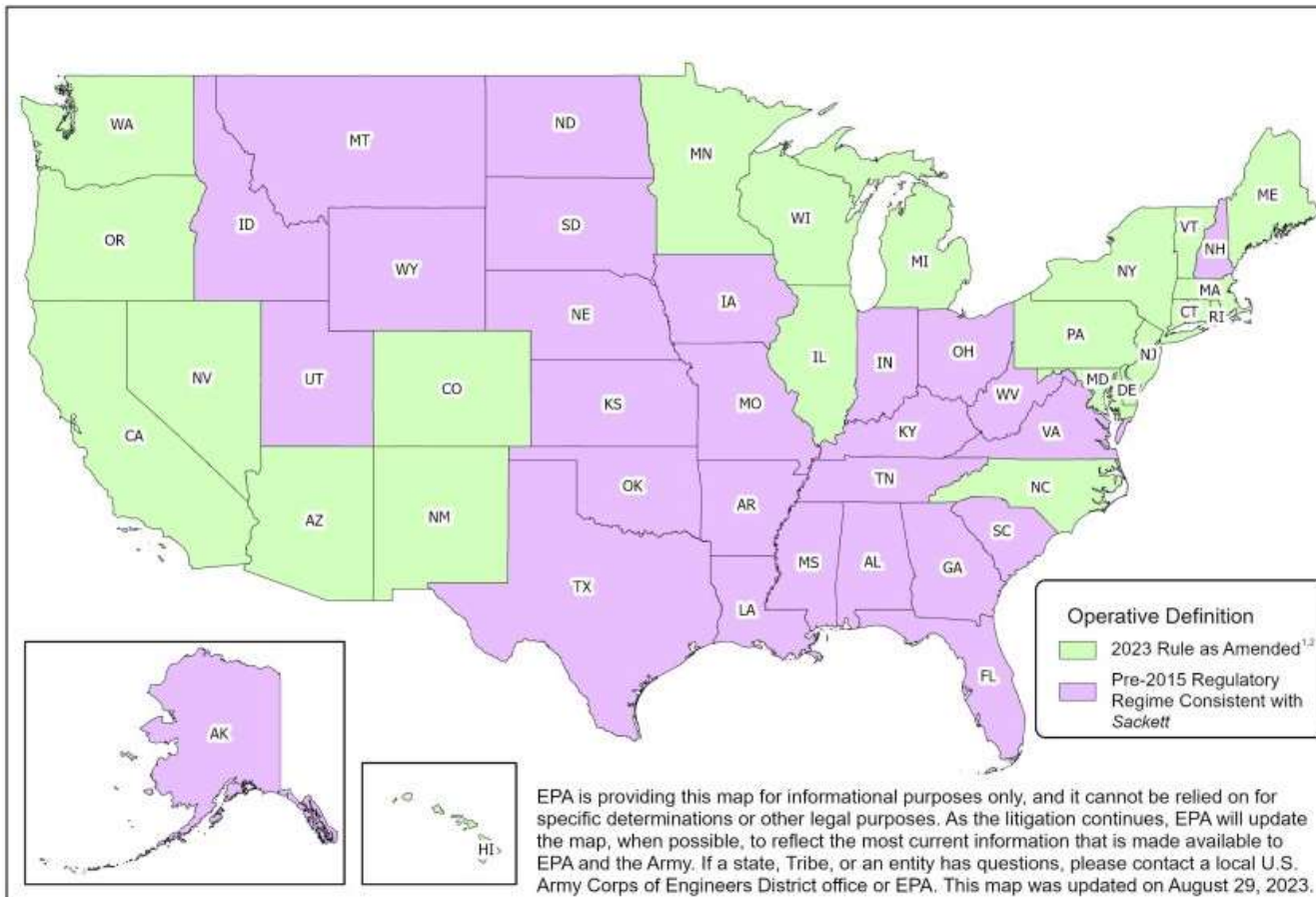


The Current Regulatory Regime (Biden 2023 Rule)

- **January 2023:** Biden WOTUS rule proposed in 2021 – which included wetlands under the “significant nexus” standard – finalized (88 Fed. Reg. 3004 (2023)), prior to *Sackett* decision.
- **August 2023:** the Biden rule was “conformed” to *Sackett*
<https://www.epa.gov/system/files/documents/2023-08/Regulatory%20Text%20Changes%20to%20the%20Definition%20of%20Waters%20of%20the%20United%20States%20at%2033%20CFR%20328.3%20and%2040%20CFR%20120.2.pdf>
(Above link - redline showing conforming changes against January 2023 version)
- WOTUS definition revised to:
 - (1) remove the significant-nexus standard;
 - (2) amend its definition of “adjacent” to mean a “continuous surface connection”;
and
 - (3) remove “interstate wetlands.”
- 2023 WOTUS rule **currently stayed in 27 states pending resolution of legal challenges.**
- 2023 WOTUS rule leaves open questions about the scope of CWA jurisdiction.
 - Cites *Sackett*’s “relatively permanent” requirement for WOTUS, but does not clarify how that language impacts jurisdiction over ephemeral and intermittent streams.

State of Play for WOTUS, State-by-State

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 implemented consistent with *Sackett* 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).

Compare: “Waters of the State” in California

State Policy for Water Quality Control: State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State

https://www.waterboards.ca.gov/water_issues/programs/cwa401/docs/2021/procedures.pdf

“Waters of the state” include any surface water or groundwater within the boundaries of the state, including:

- All “wetlands that meet the current definition, or any historic definition” of WOTUS;
- Natural wetlands;
- Wetlands created by modification of a surface water of the state;
- Artificial wetlands greater than one acre in size (with some exceptions); and
- Artificial wetlands less than one acre resulting from historic human activity that are not subject to ongoing operation/maintenance, and have become a relatively permanent part of the natural landscape.

CWA Section 404 (13 USC § 1344)

- Section 404 of the Clean Water Act prohibits the ***unpermitted discharge of dredged or fill material*** into WOTUS
- Section 404 is jointly administered by the U.S. Army Corps of Engineers (USACE) and the Environmental Protection Agency (EPA)
 - USACE issues permits (404(a); 33 CFR Parts 323 & 330)
 - EPA exercises permit oversight (404(b),(c); 40 CFR Parts 230-232)
 - Both USACE and EPA enforce against 404 violators
- States and tribes can assume control of 404 programs if approved by EPA (40 CFR Part 233)
 - Michigan, New Jersey, and (until February 2024) Florida

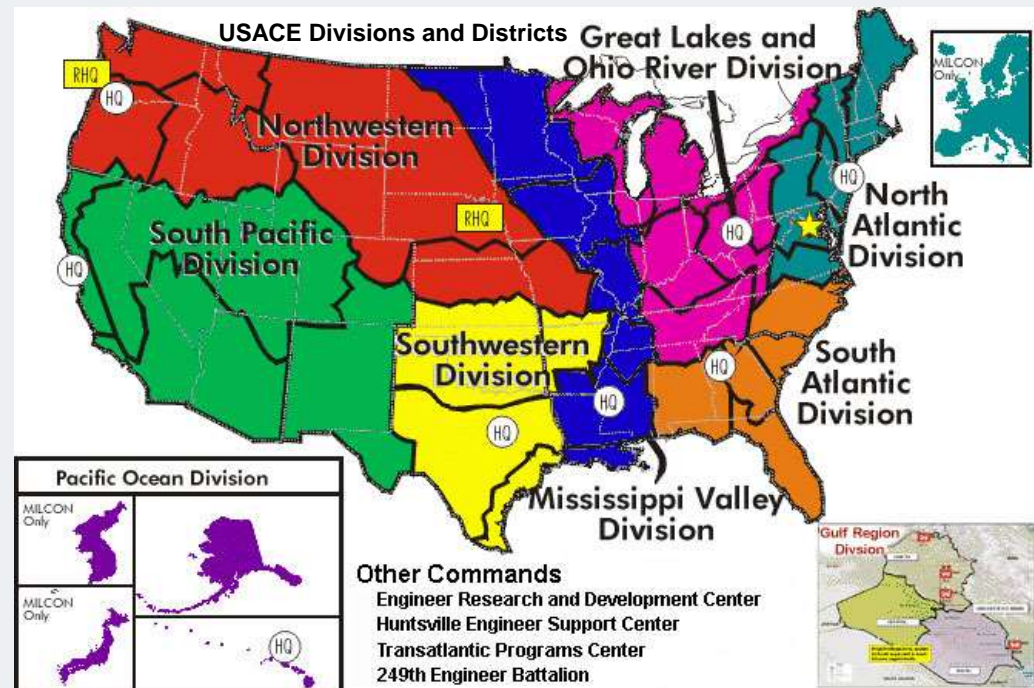
Section 404 Permitting Framework



- **Jurisdiction**
- **Exemptions**
- **General Permits**
 - Nationwide Permits
- **Individual Permits**

USACE Districts

- USACE utilizes 41 District offices to manage day-to-day responsibilities
- USACE Districts are based on geographical boundaries of one or more watersheds
- USACE jurisdiction:
 1. Wetland delineations
 2. Permit applications
 3. Enforcement



Jurisdiction - Type of Activity

Section 404 regulates ***“discharge of dredged or fill material into [WOTUS]”***

EPA and USACE interpret the term “discharge” to include:

- Fill for residential, commercial, or recreational developments
- Construction of revetments, breakwaters, levees, dams, dikes, weirs
- Placement of riprap and road fills
- Dredging
- Draining
- Landclearing
- Any addition of dredged material incidental to any activity



Jurisdiction - Wetland Delineations

The best method to achieve some certainty regarding 404 jurisdiction is to obtain a jurisdictional determination from the Corps. Two types:

(1) Approved Jurisdictional Determination (AJD)

- States the presence or absence of WOTUS
- Constitutes final USACE action that is administratively appealable
- Binding for five years on both USACE and EPA

(2) Preliminary Jurisdictional Determination (PJD)

- Advises that WOTUS may be present

Litigation Option: AJD may be challenged immediately in federal court.

- *United States Army Corps of Eng'rs v. Hawkes Co., Inc.*
136 S.Ct. 1807, 578 US 590 (2016)
- 7-1, Roberts opinion, Ginsburg concurring in part and in judgment (no ninth vote b/c Scalia had died shortly before arguments)

Exemptions

1. CWA Section 404(f) provides for certain exemptions from permit requirements
2. Recognized exemptions include:
 - Normal farming, silviculture, ranching activities
 - Maintenance and emergency reconstruction of “currently serviceable structures” such as dams, levees, transportation structures
 - Construction or maintenance of farm ponds or irrigation ditches, or maintenance of drainage ditches
 - Farm, forest, and temporary mining roads, constructed or maintained in accordance with best management practices
 - Actions authorized by approved state regulatory program
3. BUT exemption disallowed for any activity where a discharge changes the use of the WOTUS, if the activity either (a) impairs the WOTUS’s flow or circulation, or (b) reduces the reach of the WOTUS

General Permits

- USACE may issue general permits on a regional (RGP), programmatic (PGP), or nationwide (NWP) basis
- By statute, all general permits are valid for 5 years only
- General permits are designed to apply to categories of activity that are similar in kind and have minimally adverse effects on the environment
- **ACDEH Sacramento District RGP examples:** Emergency repair/protection; wildfire mitigation



Nationwide Permits (NWP)

- NWPs are general permits issued by USACE Headquarters in Washington, D.C. Most recent NWPs were published in 2021 (effective until March 2026): <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/>
- NWPs are in place for 59 different activities that have been determined to cause minimal adverse environmental effects.
 - NWPs authorize 40,000 reported activities per year and 30,000 activities that do not require reporting (USACE, 2022)
- Pre-construction notification (PCN) and AJD/PJD required for many NWPs
 - PCN requires submittal of approved AJD/PJD
 - Applicant can proceed if either:
 - (1) USACE issues written approval of use of NWP, or
 - (2) in most (but not all) instances, 45 days passes following PCN submittal without any response from USACE.

NWPs - Examples

- **NWP 3** - Maintenance of currently serviceable structures/fills & removal of sediments/debris in vicinity of existing structures
- **NWP 19** - Minor Dredging (<25 cubic yards)
- **NWP 34** - Cranberry Production Activities (<10 acres)
- **NWP 40** - Agricultural Activities (<0.5 acre)
- **NWP 43** - Stormwater Management Facilities (<0.5 acre)
- **NWP 46** - Discharges in Ditches (<1 acre)
- **NWP 52** - Water-Based Renewable Energy Generation Pilot Projects (<0.5 acre)
- **NWP 54** - Living Shorelines (shore erosion control with biological component)

Full summary chart:

<https://www.swf.usace.army.mil/Portals/47/docs/regulatory/Hot%20Topics/2021%20NWP%20Summary%20Table.pdf?ver=hYnhZyeHVwon3ob3O1nr8g%3D%3D>

Individual Permits

- Approximately 1-2 year process. Very expensive.
- Both USACE and EPA review each individual permit application.
- EPA and USACE regulations establish substantive and procedural criteria for permit applications.
- LEDPA: Least Environmentally Damaging Practicable Alternative, in light of project need and purpose.
 - ***Avoidance and minimization of impacts to aquatic resources*** is primary strategy.
 - Must ***mitigate any remaining impacts.***

Individual Permits - Compensatory Mitigation

USACE Mitigation Rule (33 CFR Part 332). Mitigation is:

- establishment of new wetlands in upland areas;
- restoration of existing wetlands;
- reestablishment of former wetlands;
- enhancement of functional values of degraded wetlands; of
- preservation of high-quality existing wetland.

Identify what would be “environmentally preferable,” based on what is “practicable.” Must consider:

- Likelihood of ecological success and sustainability;
- Location of the compensation site relative to the impact site and their significance within the watershed; and
- Costs of the mitigation project.

Individual Permits - Compensatory Mitigation

USACE goal: “No overall net loss” of wetlands

- At minimum, *one-for-one functional replacement* (no net loss of values) with an adequate margin of safety.
- Can require mitigation ratio of 1.5:1, 2:1, 3:1, or even greater, on *acreage* basis.
- States can have higher requirements. California has a “no overall net loss and long-term net gain” policy.

Mitigation options

1. Purchase credits from wetlands mitigation bank (owns site where wetlands areas are established, restored, enhanced, or preserved).
2. Pay fees to an approved in-lieu fee program (government or nonprofit natural resources management entity).
3. Land purchase/conservation easements.
4. Permittee-constructed mitigation project, onsite or offsite.

Section 404 Approval Triggers

1. **Water Quality Certification (Section 401)**

- State Agencies certify/waive/deny certification – purpose is to ensure compliance with state water quality standards
- Process normally adds conditions
- Corps must incorporate 401 conditions into permit
- Condition challenges must occur in state administrative and court forums

2. **CZMA consistency determination**

- Applies to defined coastal zone areas

Section 404 Approval Triggers

3. **Historic/Cultural Preservation**

- National Historic Preservation Act
- Consultation with State Historic Preservation Officer

4. **ESA Consultation**

- Section 7 Consultation - fish and wildlife agencies

5. **NEPA Review**

- NWPs - Normally categorically exempt
- Individual Permit - EA or EIS possible
 - Joint EIS/EIR may be possible (California)

USACE Enforcement (33 CFR Part 326)

- 1. Administrative orders (33 CFR § 326.4)**
 - Compliance orders, including requests for restoration/mitigation
- 2. Administrative civil penalty actions (33 CFR § 326.6)**
 - Penalties cannot exceed \$25,848 per violation (\$64,619 total)
 - Notice/comment required. Administrative hearing upon request.
- 3. Judicial civil penalty actions (33 USC § 1344(s))**
 - Referral to US DOJ to file federal court civil action
 - Fines up to \$64,619 per violation per day (currently; increases annually)
 - Injunctive relief (restoration/mitigation)
- 4. Criminal actions**
 - Fines and/or prison for both “negligent” and “knowing” violations

EPA Enforcement Authority

- EPA has concurrent 404 enforcement authority under its general CWA authority.
- January 1989 MOU Between USACE and EPA: *Federal Enforcement for the Section 404 Program of the CWA* (<https://www.epa.gov/cwa-404/federal-enforcement-section-404-program-clean-water-act>).
- Under the MOU, USACE is deemed lead enforcement agency for
 - (1) all violations of Corps-issued permits, and
 - (2) all unpermitted activity violations, except those involving:
 - Repeat violators;
 - Flagrant violations;
 - Where EPA requests a case or class of cases; and
 - USACE recommendation that EPA action may be warranted.



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Questions?

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