

Environmental Regulatory Update

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**Federal Aviation
Administration**

Time of Great Change



FOCUS:



- **Clean Water Act (CWA)**
- **Definition of Waters of the US (WOTUS)**



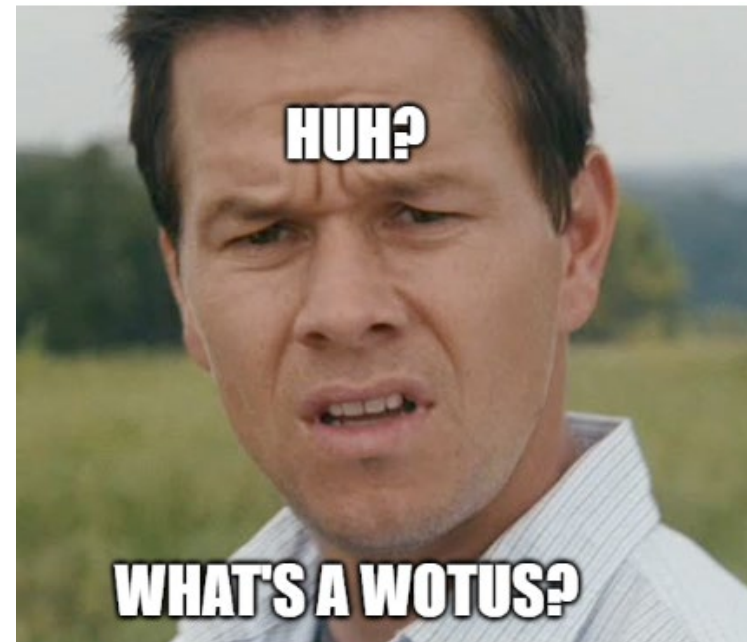
Background: Clean Water Act

- Clean Water Act (CWA) establishes the framework for regulation of discharges of pollutants into “Waters of the US” (WOTUS)
 - Section 401 Water Quality Certifications
 - Section 402 Stormwater Permits
 - Section 404 Dredge and Fill permitting (Army Corps)

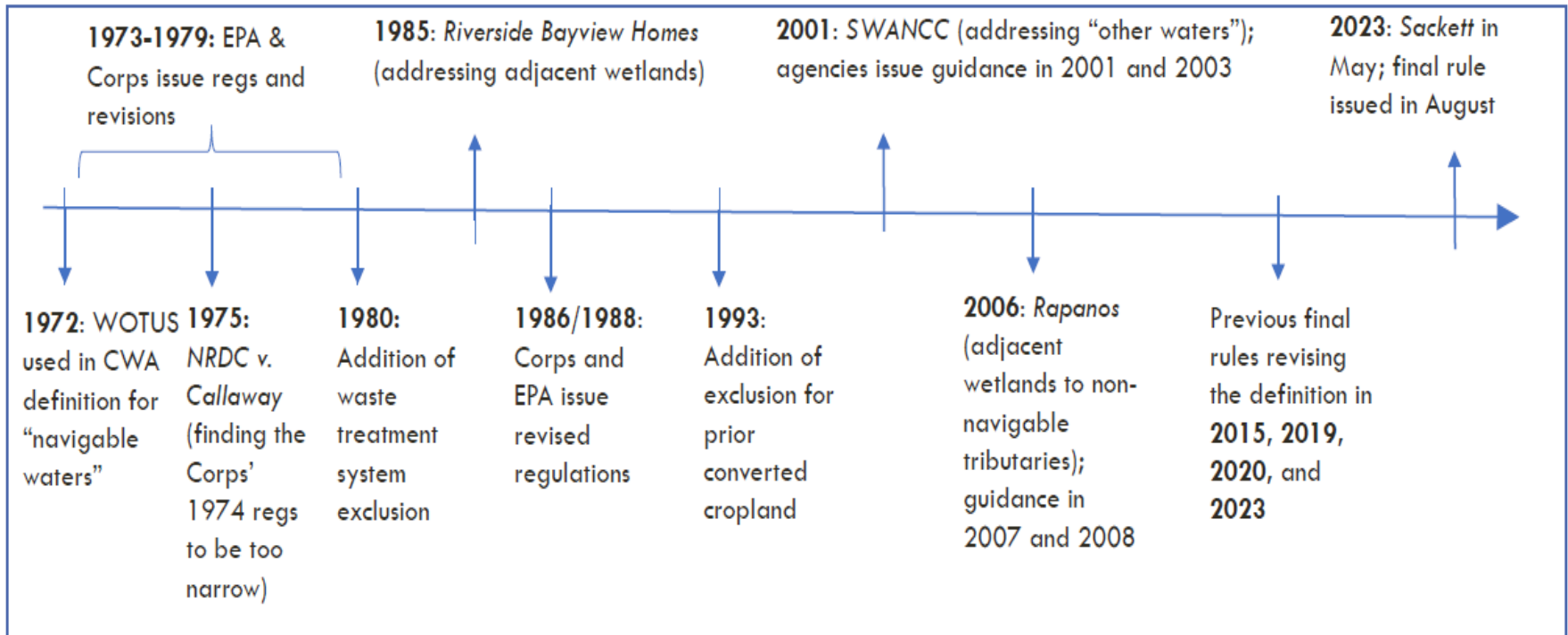


What's a WOTUS??

- Clean Water Act (CWA) establishes the framework for regulation of discharges of pollutants into “Waters of the US” (WOTUS)
 - “Waters of the US” = KEY term!
 - Establishes geographic scope of federal jurisdiction
 - Not defined in the Clean Water Act
 - Defined in EPA and Department of the Army rules.



CWA & WOTUS Over Time



Background: *Sackett v. EPA*

- The Supreme Court ruled unanimously in favor of the Sacketts. Rational varied, but all nine justices agreed that the specific wetlands in the case didn't qualify for protection. (Not WOTUS protected under CWA)
- The Court concluded:
 - “Waters” are only WOTUS when they are **relatively permanent, standing or continuously flowing bodies of water** forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes.
 - Wetlands are only WOTUS when they have a **continuous surface connection to bodies that are “WOTUS”** in their own right, so that there is **no clear demarcation between “waters” and wetlands**



Rule Changes based on Supreme Court Decision

Month	WOTUS Activity
May 2023	Supreme Court Decision in Sackett V. EPA
June 2023	EPA and Army Corps announce plans amend the (January) 2023 rule to be consistent with <i>Sackett</i> decision
September 2023	Final Amended Rule Published and In Effect



What does that mean?



- For ALL states, “...the agencies are interpreting the phrase “waters of the United States” consistent with ... the Supreme Court’s decision in Sackett.”
- Substantially fewer surface waters and wetlands will be subject to federal CWA regulation.



What does that mean to YOU?

Surface waters &/or wetlands on your site may no longer be subject to permitting.

- Are they “relatively permanent” standing (ponds) or continuously flowing (streams)?
- Do wetlands have a continuous surface connection to bodies that are “WOTUS” with no clear demarcation between “waters” and wetlands?



What does that mean to YOU?

Surface waters &/or wetlands on your site may no longer be subject to permitting. You may want to reassess.

- Talk to your consultant. Talk to the Corps.
- Seek a new Approved Jurisdictional Determination (AJD) for future projects
- Look into existing permits. Are they still appropriate?
- Look into existing compensatory mitigation. Is it still appropriate?*



Final Clean Water Act Thoughts:

- **If you need a permit, get a permit!**
- **Make sure you have your permit in hand!**
The sooner the better!
 - A CWA permit could materially change the design and change NEPA doc
 - Helps the contractor bid the project. Unknowns = higher costs
 - Lines of compliance responsibility are clear
 - Avoid construction shutdowns.
- **Be smart/strategic about complying with compensatory mitigation.**
 - Consider: safety, monitoring, adaptive management



Thank you! Questions?

<https://www.epa.gov/wotus>

Internet Search: Clean Water Act WOTUS 2023

