

# “Waters of the United States” Overview

August 2023

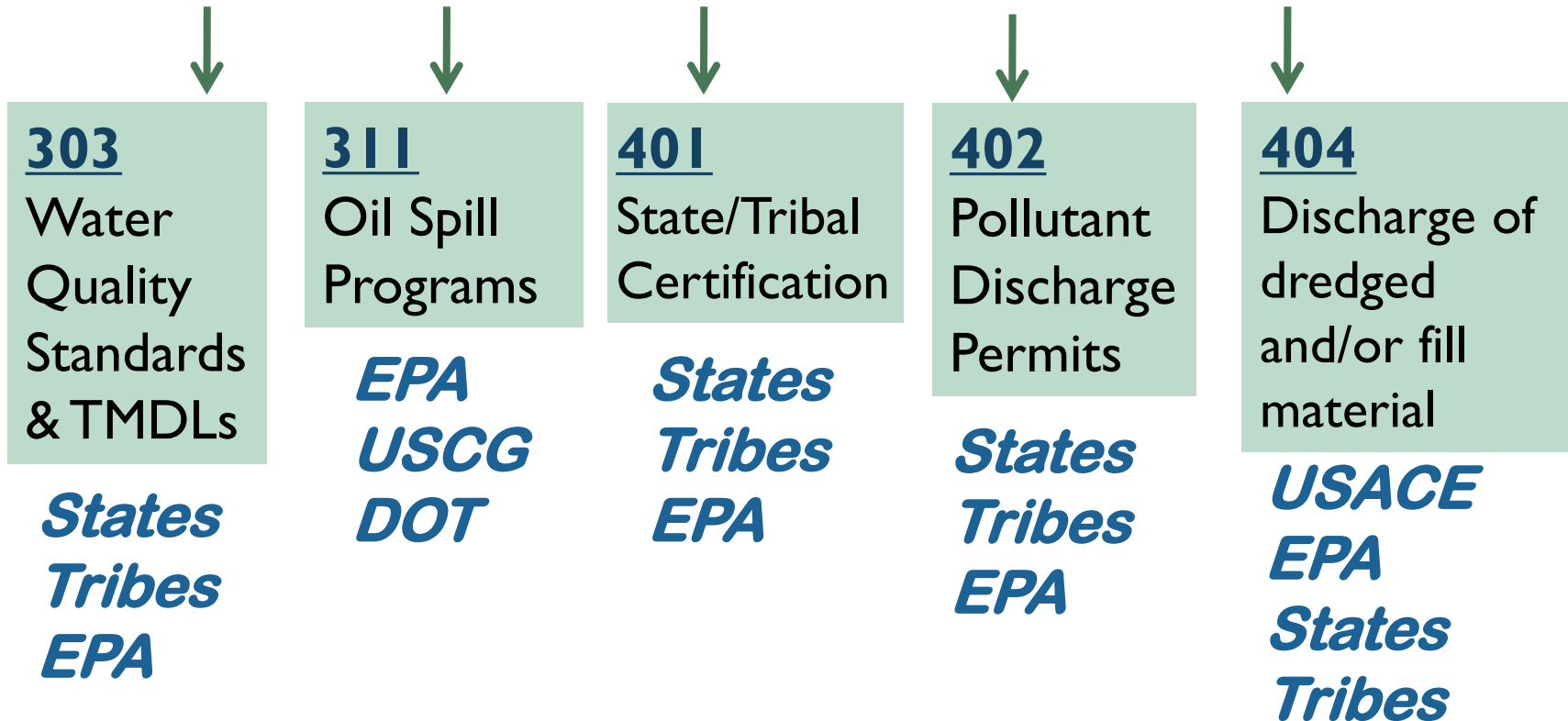
# Presentation Outline

- Background
- Final Jan. 2023 Rule Framework
  - Jurisdictional Waters
  - Exclusions
- Litigation update
- *Sackett* Decision



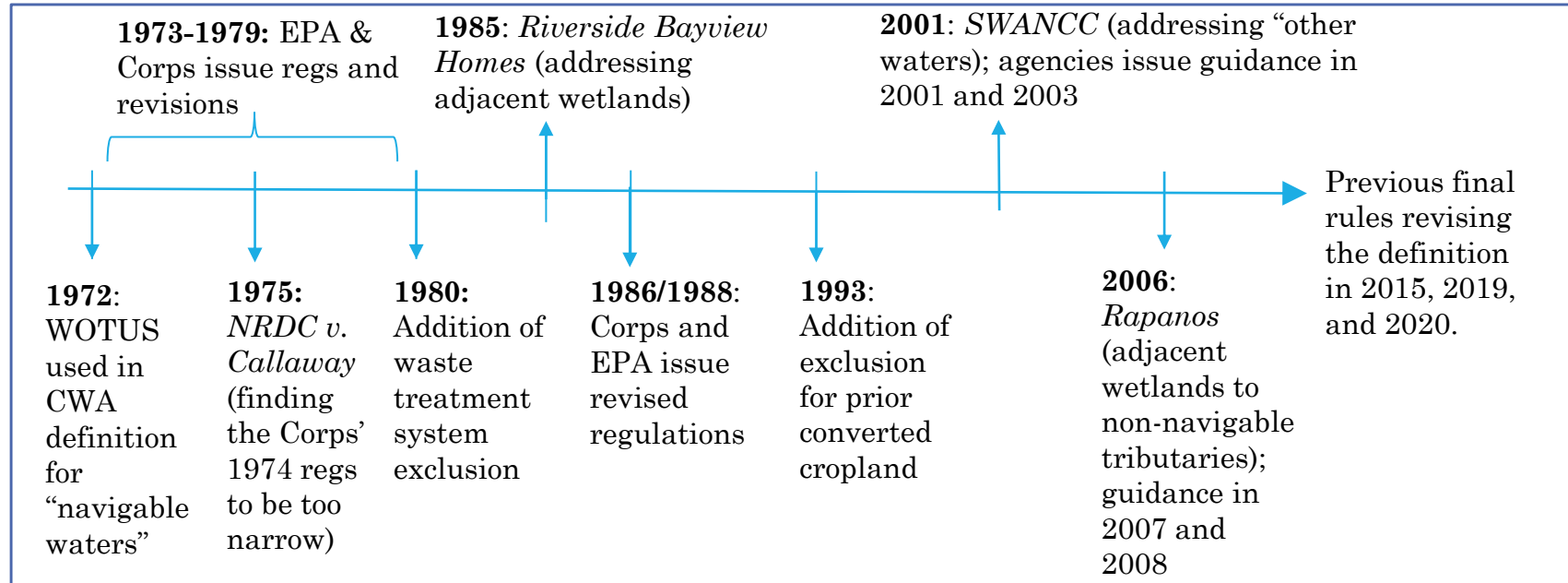
# Background: Why “Waters of the United States” Matters

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



# Background: “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.



# Final 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) Tributaries

(a)(4) Adjacent Wetlands

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



# Final 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 reflecting 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 final rule

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



# Final Rule Framework

## Definitions

(c)(1) Wetlands

(c)(2) Adjacent

(c)(3) High tide line

(c)(4) Ordinary high water mark

(c)(5) Tidal waters

(c)(6) **Significantly affect**

(c)(1) – (c)(5):  
Pre-2015 definitions,  
with no changes

(c)(6):  
**New term and definition  
in the final rule – *deleted  
from revised 2023 rule***



# Key Concepts

- The “relatively permanent standard” means relatively permanent, standing or continuously flowing waters connected to paragraph (a)(1) waters, and waters with a continuous surface connection to such relatively permanent waters or to paragraph (a)(1) waters. – ***Retained in revised rule***
- The “significant nexus standard” means waters that either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of paragraph (a)(1) waters. – ***Deleted in revised rule due to Sackett decision***





# WOTUS



## RULE STATUS AND LITIGATION UPDATE

On March 19, 2023, the U.S. District Court for the Southern District of Texas granted a motion preliminarily enjoining the 2023 final rule in TX and ID.

The Jan. 2023 rule took effect on **March 20, 2023**, except in TX and ID.

On April 12, 2023, the U.S. District Court for the District of North Dakota granted a motion preliminarily enjoining the 2023 final rule in 24 states: WV, ND, GA, IA, AL, AK, AR, FL, IN, KS, LA, MS, MO, MN, NE, NH, OH, OK, SC, SD, TN, UT, VA, and WY. And on May 10, 2023, KY was added to PI list.

In light of these preliminary injunctions, the agencies are interpreting “waters of the United States” consistent with the pre-2015 regulatory regime in these states until further notice.

# WOTUS



## RULE STATUS AND LITIGATION UPDATE, *cont'd*

- The U.S. Supreme Court issued their decision in the case of Sackett v. EPA on May 25, 2023. In light of this decision, EPA and the Dept. of Army are interpreting the phrase “waters of the United States” consistent with the Supreme Court’s decision.
- EPA and Army are developing a new rule to amend the final "Revised Definition of 'Waters of the United States'" rule, [published in the Federal Register](#) on January 18, 2023, consistent with the U.S. Supreme Court’s decision in the Sackett case.
- *The revised 2023 rule was announced on August 30, 2023.*



# In States where the 2023 is Enjoined Texas, the Agencies Are Implementing the Pre-2015 Regulatory Regime Until Further Notice

For Oil Spill Programs under 40 CFR 112, the pre-2015 regulatory regime utilizes the 1973 definition of “navigable waters.” EPA interprets Section 311 and the 1973 definition to have the same breadth as the phrase “navigable waters” used elsewhere in section 311, and in other sections of the Clean Water Act, and as defined by the agencies.

The term “navigable waters” includes:

- 1) All navigable waters of the United States, as defined in judicial decisions prior to the passage of the 1972 Amendments of the Federal Water Pollution Control Act (Pub. L. 92-500) also known as the Clean Water Act (CWA), and tributaries of such waters;
- 2) Interstate waters;
- 3) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; and
- 4) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce.

Supreme Court decisions in *Riverside Bayview*, *SWANCC*, *Rapanos* and *Sackett* and applicable guidance also play a role in jurisdictional decisions.

# Additional Information

- See <https://www.epa.gov/wotus> for additional information.
- Public webinar is currently scheduled for Sept. 12, 2023.
- Please contact [CWAwotus@epa.gov](mailto:CWAwotus@epa.gov) with any questions.