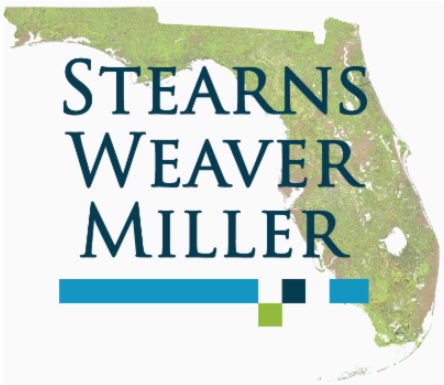


WHAT'S DEVELOPING?

Insights, Trends & Updates from Stearns Weaver Miller's Land Development, Zoning & Environmental Team

FALL 2023

NEW DEFINITION OF WATERS OF THE UNITED STATES HAS BEEN RELEASED - EFFECTIVE DATE UPDATE

Since our **News Update** on September 7, 2023, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) released the **revised definition** of "waters of the United States," effective September 8, 2023. This revised definition was promulgated as a direct final rule, intended to conform to the interpretation set forth by the U.S. Supreme Court in its May 25, 2023, decision, Sackett v. EPA, 598 U.S. 651 (2023).

As background, the Clean Water Act (CWA) regulatory program scope of jurisdiction is "navigable waters" which is defined as "waters of the United States, including territorial seas;" however, the term "waters of the United States" (WOTUS) is not defined by statute. The EPA and the Corps began defining WOTUS by regulation shortly after the CWA was passed, and almost immediately litigation over the definition began. In 2006, the U.S. Supreme Court issued Rapanos v. U.S., 547 U.S. 715 (2006), which included a definition of the term from Justice Scalia on behalf of a plurality of the Court as well as a definition from Justice Kennedy in his concurrence. Justice Scalia's plurality standard established a water is WOTUS when it has relatively permanent flows or, in the course of wetlands, has a continuous surface connection to a relatively permanent water. Justice Kennedy's concurrence standard established a water is WOTUS when it has a significant nexus to navigable water. Given convoluted rules on applying Supreme Court plurality decisions, Justice Kennedy's "significant nexus" test became the law of the land, and the EPA and Corps developed the 2008 *Rapanos* Guidance that claimed CWA jurisdiction if a wetland or water met either test. In 2015, the Obama EPA and Corps attempted to codify the *Rapanos* Guidance, which quickly led to a stay, and the 2015 rule was never effective in Florida.

Then came the 2020 Trump Administration definition, which adopted only the Scalia plurality test, and was briefly effective in this state—long enough for EPA to approve Florida's assumption of the CWA Section 404 (dredge and fill) regulatory program over certain state waters and wetlands—before it too was stayed by a federal court. The Biden Administration tried again; its regulatory definition of WOTUS again applied both of the *Rapanos* tests and became effective in March 2023. This definition included wetlands and other waters with a "significant nexus" to traditional navigable waters (the Kennedy concurring opinion test) as well as those with a relatively permanent, standing, or continuously flowing connection to such waters (the Scalia plurality opinion test).

In May 2023, the Supreme Court issued its decision in *Sackett* which formally rejected Justice Kennedy's "significant nexus" test and instead re-affirmed the *Rapanos* plurality's test. The Court held that only waters in the ordinary parlance (such as lakes, rivers or streams) with "relatively permanent standing or continuously flowing" connection to a traditional navigable water can be WOTUS and, in turn, only wetlands with a "continuous surface connection" to such waters can likewise be WOTUS. The *Sackett* Court stressed that, for a wetland to have such a "continuous surface connection," it must be "difficult to determine where the 'water' ends and the 'wetland' begins."

While the Biden EPA's regulatory definition of WOTUS was not directly before the Court in *Sackett*, the conflict between the Court's interpretation of WOTUS and the definition in the March 2023 rule caused the EPA and the Corps to state in June 2023 that an amended final rule—also known as a "conforming rule"—would be issued to conform the definition to the *Sackett* decision.

The EPA and Corps conforming rule revisions are very straightforward, affecting four categories of waters: interstate waters, tributaries, adjacent wetlands, and additional waters. Thus, WOTUS that are subject to regulation under the CWA has been revised to eliminate jurisdiction based on whether or not waters or wetlands "either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of" waters which are: (i) currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (ii) the territorial seas; or (iii) interstate waters. Interstate wetlands are no longer jurisdictional by virtue of that fact alone, and wetlands "adjacent" to a jurisdictional water are jurisdictional only if they have a "continuous surface connection" to it; the revised rule replaces the prior definition of "adjacent" with this narrower definition.

There are no changes to exclusions that were authorized in the 2023 rule; all will remain as previously written. Additionally, the definition of "significantly affected" was deleted. This language had been used to implement the significant nexus test. The following chart from the **public fact sheet** released by the EPA explains what has been revised in the rules, which can be found at 33 CFR s. 328.3 (Corps rule) and 40 CFR 120.2 (EPA rule):

Jurisdictional Category	Key Changes to the January 2023 Rule Regulation Text	Regulatory Text Paragraph
Traditional Navigable Waters	No changes	(a)(1)
Territorial Seas	No changes	(a)(1)
Interstate Waters	Removing interstate wetlands from the text of the interstate waters provision	(a)(1)
Impoundments	No changes	(a)(2)
Tributaries	Removing the significant nexus standard	(a)(3)
Adjacent Wetlands	Removing the significant nexus standard	(a)(4)
Additional Waters	Removing the significant nexus standard; removing wetlands and streams from the text of the provision	(a)(5)

Definition	Key Changes to the January 2023 Rule Regulation Text	Regulatory Text Paragraph
Wetlands	No changes	(c)(1)
Adjacent	Revised definition to mean "having a continuous surface connection."	(c)(2)
High tide line	No changes	(c)(3)
Ordinary high water mark	No changes	(c)(4)
Tidal waters	No changes	(c)(5)
Significantly affect	Deleted definition	(c)(6)

The new rule, as amended by the conforming rule, is effective in only 23 states. As a result of a temporary stay of the March 2023 WOTUS definition in states that challenged the definition, the pre-2015 regulatory definition will be used and implemented consistent with *Sackett* in 27 states, including Florida, and for certain other parties to the litigation until the litigation is resolved. The pre-2015 regulatory definition of WOTUS, can be **found here**. This pre-2015 definition relies heavily on the 2008 *Rapanos* Guidance noted above. It is not anticipated that the pre-2015 regulatory definition will be applied any differently than the revised Biden rule in those states.

The Corps has removed its freeze on issuing jurisdictional determinations as of the effective date of the conforming rule.

To justify the issuance of a final rule without prior notice or opportunity for comment, the federal agencies are citing to 5 U.S.C. 553(b)(3)(B), which states notice and comment procedures can be waived "when the agency for good cause finds … that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." The agencies find the opportunity for comment unnecessary because the sole purpose of the conforming rule is to bring it into compliance with *Sackett*, which does not involve exercise of agency discretion.

The conforming rule will likely be challenged by regulated interests on at least two points: (1) the lack of an exclusion for ditches and (2) the failure to define "adjacent" to add "and indistinguishable from," which was a key point in the *Sackett* opinion. The omission could significantly broaden the reach of that term. Interested persons can also be expected to challenge the adoption of the final rule without prior notice or public comment. In the meantime, the agencies have held stakeholder meetings to ensure the public had an opportunity to provide them with input on other issues they would like the agencies to address. The agencies have also taken action to improve implementation of the definition. Materials and outreach opportunities will continue to be posted on the **EPA's website**.

Our team is monitoring this important topic and has extensive experience navigating these regulatory matters. For more information, please **contact us**.

LEGAL UPDATES

Florida First DCA Holds that Street Parking Limitation was Not Covenant that Ran with the Land but Instead a Personal Promise of Developer

Homeowners routinely had a caregiver visit their home, who would park in front of their home on a public road that ran through the neighborhood. The homeowners' Home Owner's Association (HOA) and neighbors sued to stop the street-parking based on a parking limitation in the neighborhood's recorded covenants and restrictions. The trial court determined that the homeowners had violated the parking limitation and ordered them and their guests to stop parking on the public street. The homeowners appealed the trial court's determination. The First DCA held that the parking limitation was not a covenant that ran with the land but instead was an unenforceable personal promise of the developer. **View more.**

Florida Sixth DCA Held Declaration Allowed Association to Assess For Maintenance on Property it did not Own and Association Acted Within its Powers to Protect Value and Desirability of Entire Property

This suit arose between a master Homeowners Association (Stone Crest) in Winter Garden and one of its five sub-associations (Grovehurst). Stone Crest, pursuant to its master declaration of covenants, conditions, and restrictions (Master Declaration), contracted with four other sub-associations to provide landscaping on sub-association common areas which Stone Crest did not own. Although Grovehurst performed its own landscaping maintenance, Stone Crest assessed it a pro-rata charge for the costs. The trial court found that this was a valid exercise of Stone Crest's authority and the appellate court affirmed. **View more.**

Florida Fifth DCA Holds that Only Submitting Recalculations Showing Current Storm Water Management System Functioning with Increased Developed Lots for a Permit Application is Not a "Proposed Project"

The Fifth DCA concluded that merely submitting recalculations as a permit application without a proposal for physical changes to a stormwater structure or composition was not a "proposed project" for the Administrative Law Judge ("ALJ") to consider causing no departure from the essential requirements of the law. Also, there was no "stalemate" because the St. Johns River Water Management District could have granted or denied the proposal, but allowing new evidence to be considered after the ALJ's second recommended order would lead to "endless litigation" because it would begin the entire review process over again. **View more.**

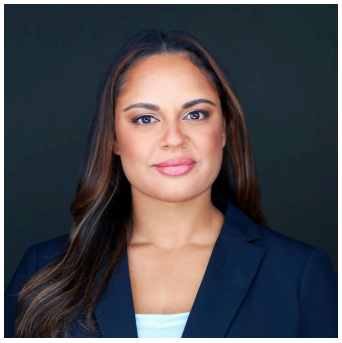
Court for a pronouncement on whether charges—which, if not paid can result in a lien on a homeowner's property—can include profit-generating fees. **View more.**

Florida Fourth DCA Held Easement Appurtenant Which Marina Held, as Dominant to Estate, to 75 Parking Spaces in Condominium Parking Garage Could Not Be Separately Transferred to Restaurant to Use the Parking Spaces

Inlet Harbor Marina submitted a site plan application to the City of Riviera Beach for the Inlet Harbor Marina Planned Unit Development (PUD). The PUD included a boat storage marina facility and a residential condominium unit. Once the PUD was approved, the marina and condominium entered into a development agreement; which, in part, reserved seventy-five parking spaces in the condo's parking garage for the marina in addition to granting an easement for access to the marina. Years later, the marina tried to assign its parking and access easement to a third party, Seven Kings. The condominium brought suit, seeking to have the assignment declared invalid. Both the trial and appellate courts found in favor of the condominium, holding that an easement appurtenant (which runs with the land) is not independently alienable. **View more.**

TEAM MEMBERS SPOTLIGHT

Please join us in welcoming the newest member to our team!



Fatou Calixte
Tallahassee
Email | View Bio
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Fatou's Practice: Fatou represents clients in complex commercial litigation, including land use and property rights as well as administrative law matters.

During law school, Fatou served as a Legislative Fellow for the Health & Human Services Committee of the Florida House of Representatives, where she provided bill analysis for proposed legislations and tracked bills as they went through committees. She was also a Judicial Extern for the Northern District of Florida Division of Administrative Hearings. Fatou worked as a law clerk in the Firm's Tallahassee office for two years while pursuing her J.D.

Prior to her legal career, Fatou worked for several years in various financial services roles.

Fun Fact: She has moved 9 times in 17 years, lived in 9 cities, 5 states, and 2 countries.

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Ken, Tina, David, Cynthia and Anastasia are highly experienced planners. Ken, Tina and Cynthia are AICP certified.
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Special thanks to our law clerks who assisted in the drafting of this alert:
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