

**PRE-PUBLICATION NOTICE.** The EPA Administrator, Michael S. Regan, signed the following final rule on August 28, 2023, and the Assistant Secretary of the Army (Civil Works), Michael L. Connor, signed the following final rule on August 25, 2023, and EPA is submitting it for publication in the *Federal Register* (FR). EPA is providing this document solely for the convenience of interested parties. This document is not disseminated for purposes of EPA's Information Quality Guidelines and does not represent an Agency determination or policy. While we have taken steps to ensure the accuracy of this Internet version of the rule, it is not the official version of the final rule for purposes of compliance or effectiveness. Please refer to the official version in a forthcoming FR publication, which will appear on the Government Printing Office's govinfo website (<https://www.govinfo.gov/app/collection/fr>) and on Regulations.gov (<https://www.regulations.gov>) in Docket No. EPA-HQ-OW-2023-0346. Notwithstanding the fact that EPA is posting a pre-publication version, the final rule will not be promulgated until published in the *Federal Register*.

6560-50-P

## **DEPARTMENT OF DEFENSE**

### **Department of the Army, Corps of Engineers**

#### **33 CFR Part 328**

## **ENVIRONMENTAL PROTECTION AGENCY**

#### **40 CFR Part 120**

**[EPA-HQ-OW-2023-0346; FRL-11132-01-OW]**

**RIN 2040-AG32**

### **Amendments to the “Revised Definition of ‘Waters of the United States’”**

**AGENCY:** Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) and the Department of the Army (“the agencies”) are amending the Code of Federal Regulations (CFR) to conform the definition of “waters of the United States” to a 2023 Supreme Court decision. This conforming rule amends the provisions of the agencies’ definition of “waters of the United States” that are invalid under the Supreme Court’s interpretation of the Clean Water Act in the 2023 decision.

**DATES:** This final rule is effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** The agencies have established a docket for this action under Docket ID No. EPA-HQ-OW-2023-0346. All documents in the docket are listed on the <https://www.regulations.gov/> web site. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute.

Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <https://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Whitney Beck, Oceans, Wetlands and Communities Division, Office of Water (4504T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 564-2281; email address: [CWAwotus@epa.gov](mailto:CWAwotus@epa.gov), and Stacey Jensen, Office of the Assistant Secretary of the Army for Civil Works, Department of the Army, 108 Army Pentagon, Washington, DC 20310-0104; telephone number: (703) 459-6026; email address: [usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@army.mil](mailto:usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@army.mil).

**SUPPLEMENTARY INFORMATION:**

**I. Why are the agencies issuing this final rule?**

This action amends Code of Federal Regulations (CFR) provisions promulgated in “Revised Definition of ‘Waters of the United States,’” 88 FR 3004 (January 18, 2023) (“2023 Rule”), to conform to the 2023 Supreme Court decision in *Sackett v. EPA*, 598 U.S. \_\_\_, 143 S. Ct. 1322 (2023) (“*Sackett*”). The Administrative Procedure Act (APA) provides that, when an agency for good cause finds that public notice and comment procedures are impracticable, unnecessary, or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. 5 U.S.C. 553(b)(B). The Environmental Protection Agency (EPA) and the Department of the Army (“the agencies”) have determined that there is good cause under APA section 553(b)(B) to issue this final rule without prior proposal and opportunity for comment because such notice and opportunity for comment is unnecessary. Certain provisions of the 2023 Rule are invalid under the Supreme Court’s interpretation of the

Clean Water Act in *Sackett*. The effect of the *Sackett* decision was to render these provisions immediately inconsistent with the Supreme Court’s interpretation of the Clean Water Act.

Consistent with the agencies’ previously stated intent regarding the severability of the 2023 Rule in the event that provisions of that rule were held invalid, *see* 88 FR 3135, the agencies are conforming the 2023 Rule’s definition of the term “waters of the United States” to the Supreme Court’s decision. Specifically, the agencies are revising 40 CFR 120.2(a)(1)(iii), (a)(3) through (5), and (c)(2) and (6), and 33 CFR 328.3(a)(1)(iii), (a)(3) through (5), and (c)(2) and (6) to amend aspects of the definition as needed to conform to the Supreme Court’s interpretation of the Clean Water Act in *Sackett*. Because the sole purpose of this rule is to amend these specific provisions of the 2023 Rule to conform with *Sackett*, and such conforming amendments do not involve the exercise of the agencies’ discretion, providing advance public notice and seeking comment is unnecessary. A notice and comment process would neither provide new information to the public nor inform any agency decision-making regarding the aspects of the regulations defining “waters of the United States” that are invalid as inconsistent with the Clean Water Act under *Sackett*.

For similar reasons, there is good cause under the APA to make this rule immediately effective, 5 U.S.C. 553(d)(3), because this rule does not impose any burdens on the regulated community; rather, it merely conforms the 2023 Rule to the Supreme Court’s decision in *Sackett* by amending the provisions of the 2023 Rule that are invalid under the Supreme Court’s interpretation of the Clean Water Act. Making the rule immediately effective will also provide more clarity and certainty to the regulated community and the public following the *Sackett* decision. Many States and industry groups challenging the 2023 Rule have advocated in litigation for quick action by the agencies in light of *Sackett*, citing the need for regulatory

certainty and less delay in processing approved jurisdictional determinations and certain Clean Water Act permits. A delayed effective date for amendments to regulations defining “waters of the United States” to conform to *Sackett* would prolong confusion and potentially result in project delays for prospective permittees that seek approved jurisdictional determinations to evaluate whether their projects will result in discharges to “waters of the United States.” Making the rule immediately effective also avoids delaying provision of clarity to aid States and authorized Tribes administering Clean Water Act permitting programs and to members of the general public who seek to understand which waters are subject to the Clean Water Act’s requirements. It is thus appropriate for the agencies to revise the affected provisions in 40 CFR 120.2 and 33 CFR 328.3 to conform to *Sackett* as quickly as possible and to make those revisions immediately effective.

In 1972, Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Public Law No. 92–500, 86 Stat. 816, as amended, 33 U.S.C. 1251 *et seq.* (“Clean Water Act” or “Act”). Central to the framework and protections provided by the Clean Water Act is the term “navigable waters,” defined in the Act as “the waters of the United States, including the territorial seas.” 33 U.S.C. 1362(7). On January 18, 2023, the final “Revised Definition of ‘Waters of the United States’” rule was published in the *Federal Register*, and the rule took effect on March 20, 2023.<sup>1</sup>

In 2006, the Supreme Court addressed the scope of “waters of the United States” in *Rapanos v. United States*, 547 U.S. 715 (2006) (“*Rapanos*”). As the Court in *Sackett* noted, no position in *Rapanos* commanded a majority of the Court. *Sackett*, 143 S. Ct. at 1344. In *Rapanos*,

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<sup>1</sup> As a result of litigation, the 2023 Rule is enjoined in 27 States as of the date this final rule was signed. *See Texas v. EPA*, Nos. 23-00017 & 23-00020 (S.D. Tex. March 19, 2023); *West Virginia v. EPA*, No. 23-00032 (D.N.D. April 12, 2023); *Commonwealth of Kentucky v. EPA*, Nos. 23-5343/5345 (6th Cir. May 10, 2023).

all nine members of the Court agreed that the term “waters of the United States” encompasses some waters that are not navigable in the traditional sense. *Rapanos*, 547 U.S. at 731 (Scalia, J., plurality opinion) (“We have twice stated that the meaning of ‘navigable waters’ in the Act is broader than the traditional understanding of that term, *SWANCC*, 531 U.S. at 167; *Riverside Bayview*, 474 U.S. at 133.”). A four-Justice plurality in *Rapanos* interpreted the term “waters of the United States” as covering “relatively permanent, standing or continuously flowing bodies of water,” *id.* at 739, that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a “continuous surface connection” to such waterbodies, *id.* (Scalia, J., plurality opinion). The *Rapanos* plurality noted that its reference to “relatively permanent” waters did “not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought,” or “*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months.” *Id.* at 732 n.5 (emphasis in original). Justice Kennedy’s concurring opinion took a different approach, concluding that “to constitute “navigable waters” under the Act, a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.” *Id.* at 759. He concluded that wetlands possess the requisite significant nexus if the wetlands “either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” *Id.* at 780. The four dissenting Justices in *Rapanos* would have deferred to the agencies and also concluded that waters would be jurisdictional under “either the plurality’s or Justice Kennedy’s test.” *Id.* at 810 & n.14 (Stevens, J., dissenting).

The 2023 Rule incorporated the two jurisdictional standards from *Rapanos* into the definition of the term “waters of the United States.” First, under that rule, the “relatively

permanent standard” refers to the test to identify: relatively permanent, standing or continuously flowing tributaries connected to traditional navigable waters, the territorial seas, or interstate waters; relatively permanent, standing or continuously flowing additional waters with a continuous surface connection to such relatively permanent waters or to traditional navigable waters, the territorial seas, or interstate waters; and, adjacent wetlands and certain impoundments with a continuous surface connection to such relatively permanent waters or to traditional navigable waters, the territorial seas, or interstate waters. Second, the “significant nexus standard” under the 2023 Rule refers to the test to identify 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. The regulatory text also defined “significantly affect” for purposes of the significant nexus standard. 88 FR 3006. Under the 2023 Rule, waters were jurisdictional if they met either standard.

The 2023 Rule also defined the term “adjacent” with no changes from the agencies’ longstanding regulatory definition. “Adjacent” was defined as “bordering, contiguous, or neighboring.” 88 FR 3116-17. Wetlands separated from other “waters of the United States” by man-made dikes or barriers, natural river berms, beach dunes and the like were defined as “adjacent” wetlands. *Id.*

On May 25, 2023, the Supreme Court decided *Sackett v. EPA*. While the 2023 Rule was not directly before the Court, the Court considered the jurisdictional standards set forth in that rule. The enterprise of the 2023 Rule—to define “waters of the United States”—was the same as the Supreme Court’s enterprise in *Sackett*: “to identify with greater clarity what the Act means by ‘the waters of the United States.’” 143 S. Ct. at 1329; *see also id.* at 1331 (“The meaning of

[33 U.S.C. 1362(7)] is the persistent problem that we must address.”). The Supreme Court recognized the agencies’ definition and utilization of “adjacent” and “significant nexus” “as set out in [the agencies’] most recent rule,” the 2023 Rule, 143 S. Ct. at 1335, 1341, but concluded that the significant nexus standard was “inconsistent with the text and structure of the [Clean Water Act].” *Id.* at 1341. Instead, the Court “conclude[d] that the *Rapanos* plurality was correct: the [Clean Water Act]’s use of ‘waters’ encompasses ‘only those relatively permanent, standing or continuously flowing bodies of water “forming geographic[al] features” that are described in ordinary parlance as “streams, oceans, rivers, and lakes.”’” *Id.* at 1336 (quoting *Rapanos*, 547 U.S. at 739). The Court also “agree[d] with [the plurality]’s formulation of when wetlands are part of ‘the waters of the United States,’” *id.* at 1340-41: “when wetlands have ‘a continuous surface connection to bodies that are “waters of the United States” in their own right, so that there is no clear demarcation between “waters” and wetlands.’” *Id.* at 1344 (citing *Rapanos*, 547 U.S. at 742, 755). Thus, the Supreme Court concluded that “this interpretation”— *i.e.*, the interpretation of adjacent wetlands as “waters of the United States” set out in the 2023 Rule—“is inconsistent with the text and structure of the CWA” insofar as it incorporated the “significant nexus” test and defined “adjacent” other than as the *Rapanos* plurality defined the term. *Id.* at 1341.

The agencies are revising the 2023 Rule to remove the significant nexus standard and to amend its definition of “adjacent” as these provisions are invalid under the Supreme Court’s interpretation of the Clean Water Act in *Sackett*. See section II of this preamble for the specific amendments. Under the decision in *Sackett*, waters are not jurisdictional under the Clean Water Act based on the significant nexus standard. In addition, under the decision in *Sackett*, wetlands are not defined as “adjacent” or jurisdictional under the Clean Water Act solely because they are

“bordering, contiguous, or neighboring . . . [or] separated from other ‘waters of the United States’ by man-made dikes or barriers, natural river berms, beach dunes and the like.”

Therefore, under this conforming rule, waters cannot be found to be jurisdictional because they meet the significant nexus standard; nor can wetlands be found to be jurisdictional based on the definition of “adjacent” codified in the 2023 Rule. Furthermore, as a result of the decision in *Sackett* invalidating the significant nexus standard, the provision for assessment of streams and wetlands under the additional waters provision of paragraph (a)(5) is no longer valid as any jurisdictional streams and wetlands are covered by paragraphs (a)(1) through (4) of the 2023 Rule.<sup>2</sup>

Finally, the agencies are removing “interstate wetlands” from the 2023 Rule to conform with the decision in *Sackett*. The Supreme Court in *Sackett* examined the Clean Water Act and its statutory history and found the predecessor statute to the Clean Water Act covered and defined “interstate waters” as “all *rivers, lakes, and other waters* that flow across or form a part of State boundaries.” *Sackett* at 1337 (citing 33 U.S.C. 1160(a), 1173(e) (1970 ed.) (emphasis in original)). The Court concluded that the use of the term “waters” refers to such “open waters” and not wetlands. *Id.* As a result, under *Sackett*, the provision authorizing wetlands to be jurisdictional simply because they are interstate is invalid.

The agencies will continue to interpret the remainder of the definition of “waters of the United States” in the 2023 Rule consistent with the *Sackett* decision. And it is both reasonable and appropriate for the agencies to promulgate this rule in response to a significant decision of the Supreme Court and, to provide administrative guidance to address other issues that may arise

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<sup>2</sup> Lakes and ponds, however, may still be jurisdictional under paragraph (a)(5) if they do not fall within paragraphs (a)(1) through (3) of the 2023 Rule (for example, if they are not tributaries connected to waters identified in paragraphs (a)(1) or (2)) and they are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (3).



outside this limited rule. See *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020) (“EPA, too, can provide administrative guidance (within statutory boundaries) in numerous ways, including through, for example, grants of individual permits, promulgation of general permits, or the development of general rules.”). The agencies have a wide range of available approaches to address such issues, including: approved jurisdictional determinations and Clean Water Act permits (both of which are final agency actions subject to judicial review); guidance; notice and comment rulemaking; and, agency forms and training materials. The agencies intend to hold stakeholder meetings to ensure the public has an opportunity to provide the agencies with input on other issues they would like the agencies to address. The agencies are also committed to taking particular actions that have been requested by stakeholders to improve implementation of the definition of “waters of the United States.” For example, the agencies are working to improve coordination among Federal agencies through coordination memoranda and trainings. The agencies are also developing regionally-specific tools to facilitate implementation of the definition of “waters of the United States.” The agencies will continue to provide trainings to Tribes, States, and the public as appropriate to promote clarity and consistency. The agencies will continue to post materials and outreach opportunities to EPA’s website at <https://www.epa.gov/wotus>.

## **II. Which provisions are amended?**

This final rule amends the following provisions in the 2023 Rule: 40 CFR 120.2(a)(1)(iii), (a)(3) through (5), (c)(2) and (6), and 33 CFR 328.3(a)(1)(iii), (a)(3) through (5), (c)(2) and (6). A list of these revisions is provided below.

- *40 CFR 120.2(a)(1)(iii) and 33 CFR 328.3(a)(1)(iii)*: Removed the phrase “including interstate wetlands” from this provision. Made conforming edits to the

regulatory text so that it reads: “(iii) Interstate waters;”.

- *40 CFR 120.2(a)(3) and 33 CFR 328.3(a)(3)*: Removed the significant nexus standard from the tributaries provision. Made conforming edits to the regulatory text so that it reads: “(3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section that are relatively permanent, standing or continuously flowing bodies of water.”
- *40 CFR 120.2(a)(4) and 33 CFR 328.3(a)(4)*: Removed the significant nexus standard from the adjacent wetlands provision. Made conforming edits to the regulatory text so that it reads: “(4) Wetlands adjacent to the following waters: (i) Waters identified in paragraph (a)(1) of this section; or (ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3) of this section and with a continuous surface connection to those waters.”
- *40 CFR 120.2(a)(5) and 33 CFR 328.3(a)(5)*: Removed the significant nexus standard and streams and wetlands from the provision for intrastate lakes and ponds, streams, or wetlands not otherwise identified in the definition. Made conforming edits to the regulatory text so that it reads: “(5) Intrastate lakes and ponds not identified in paragraphs (a)(1) through (4) of this section that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3) of this section.”
- *40 CFR 120.2(c)(2) and 33 CFR 328.3(c)(2)*: Revised the definition of “adjacent” to read: “(2) Adjacent means having a continuous surface connection.” Note that the agencies recognize that revising the definition of adjacent creates redundancy

in 40 CFR 120.2(a)(4) and 33 CFR 328.3(a)(4), which already include the requirement for a “continuous surface connection,” but deleting existing regulatory text to reduce redundancy is outside the scope of the agencies’ determination in this rule that there is good cause under APA section 553(b)(B) to issue this final rule without prior proposal and opportunity for comment.

- *40 CFR 120.2(c)(6) and 33 CFR 328.3(c)(6)*: Removed the term “significantly affect” and its definition in its entirety.

### **III. Severability**

The purpose of this section is to clarify the agencies’ intent with respect to the severability of provisions of this rule and the 2023 Rule as amended by this final rule in the event of litigation. In the event of a stay or invalidation of any part of this rule, the agencies’ intent is to preserve the remaining portions of the rule to the fullest possible extent. Further, if any part of the 2023 Rule as amended by this rule is stayed or invalidated, the agencies’ intent is to preserve its remaining portions to the fullest possible extent. The agencies explained in the 2023 Rule that it was carefully crafted so that each provision or element of the rule is capable of operating independently. 88 FR 3135. None of the amendments made in this rule affects the 2023 Rule’s severability or undermines the ability of each part of this rule or the remaining parts of the 2023 Rule to operate independently.

The exclusive purpose of the 2023 Rule was to define “waters of the United States,” and this rule simply conforms that definition to *Sackett*. “Waters of the United States” is defined in paragraphs (a)(1) through (5), subject to the exclusions in paragraph (b), and using terms defined in paragraph (c). The categories (a)(1) through (5) are disjunctive, and while they may overlap, no one category (or subcategory) depends on another. The modifications to the 2023 Rule in this

rule do not alter those basic features of the regulatory text. Therefore, if any provision or element of this rule or of the 2023 Rule as amended by this rule is determined by judicial review or operation of law to be invalid, that partial invalidation will not render the remainder of this rule or the 2023 Rule, as amended, invalid. Further, if the application of any portion of this rule or the 2023 Rule, as amended by this rule, to a particular circumstance is determined to be invalid, the agencies intend that this rule and the 2023 Rule, as amended, remain applicable to all other circumstances.

For example, if paragraph (c)(2), which contains the revised definition of “adjacent,” were deemed invalid, it would affect implementation of paragraph (a)(4), which addresses “adjacent wetlands,” but it would not affect any other provision of this rule (or the 2023 Rule, as amended), all of which would continue to operate. As another example, if paragraph (a)(1)(iii), which provides that interstate waters (amended by this rule to no longer include interstate wetlands) are “waters of the United States,” were deemed invalid, every other provision of this rule (and the 2023 Rule as amended) could continue to operate. References to paragraph (a)(1) in paragraphs (a)(3) through (5), and (c)(2) would remain in effect, and paragraph (a)(1) would simply be read to consist of paragraphs (a)(1)(i) and (ii), without (iii) in whole or in part. As a third example, if one of the exclusions from “waters of the United States” in paragraph (b), or any part of one of the exclusions, were deemed invalid, the remainder of this rule, and thus, the 2023 Rule as amended, would remain in effect. The rationale for each exclusion in paragraph (b) is distinct and invalidating one exclusion would not have any practical impact on any other part of the definition of “waters of the United States.”

#### **IV. Statutory and Executive Orders Reviews**

Additional information about these statutes and Executive Orders can be found at

<https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

*A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14094:*

*Modernizing Regulatory Review*

This action is a significant regulatory action as defined in Executive Order 12866, as amended by Executive Order 14094. Accordingly, the agencies submitted this action to the Office of Management and Budget (OMB) for Executive Order 12866 review. Documentation of any changes made in response to the Executive Order 12866 review is available in the docket.

This conforming rule amends the provisions of the agencies' definition of "waters of the United States" that are invalid under the Supreme Court's interpretation of the Clean Water Act in *Sackett*. As such, it is the agencies' view that the rule does not by itself impose cost savings or forgone benefits.

*B. Paperwork Reduction Act (PRA)*

This action does not impose an information collection burden under the PRA because it does not contain any information collection activities. However, this action may change terms and concepts used by EPA and Army to implement certain programs. The agencies thus may need to revise some of their collections of information to be consistent with this action and will do so consistent with the PRA and implementing regulations.

*C. Regulatory Flexibility Act (RFA)*

This action is not subject to the RFA. The RFA applies only to rules subject to notice and comment rulemaking requirements under the APA, 5 U.S.C. 553, or any other statute. This rule is not subject to notice and comment requirements because the agencies have invoked the APA "good cause" exemption under 5 U.S.C. 553(b).

*D. Unfunded Mandates Reform Act (UMRA)*

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The definition of “waters of the United States” applies broadly to Clean Water Act programs, and this rule amending the definition of “waters of the United States” simply conforms to a decision of the Supreme Court. The action imposes no enforceable duty on any Tribal, State, or local governments, or the private sector.

*E. Executive Order 13132: Federalism*

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

This conforming rule amends the provisions of the agencies’ definition of “waters of the United States” that are invalid under the Supreme Court’s interpretation of the Clean Water Act in *Sackett*. Because the limited amendments in this rule do not involve the exercise of the agencies’ discretion, federalism consultation would neither provide new information nor inform any agency decision-making regarding the aspects of the regulations defining “waters of the United States” that are invalid under the Supreme Court’s interpretation of the Clean Water Act in *Sackett*. The agencies recognize, however, that changes to the definition of “waters of the United States” may be of interest to State and local governments. The agencies intend to hold discussions with State and local governments on implementation of the definition of “waters of the United States.”

*F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*

This rule amends the provisions of the agencies’ definition of “waters of the United States” that are invalid under the Supreme Court’s interpretation of the Clean Water Act in

*Sackett*. Because the amendments in this rule do not involve the exercise of the agencies’ discretion, in this instance Tribal consultation and coordination could not inform the decision-making in this final rule. The agencies recognize, however, that changes to the definition of “waters of the United States” may be of interest to Tribal governments. The agencies intend to hold discussions with Tribes on implementation of the definition of “waters of the United States.”

*G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks*

EPA and the Army interpret Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the agencies have reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order.

This conforming rule amends the provisions of the agencies’ definition of “waters of the United States” that are invalid under the Supreme Court’s interpretation of the Clean Water Act in *Sackett*. Because these amendments are necessary to conform to the Supreme Court’s decision and do not involve the exercise of the agencies’ discretion, the rule does not concern an environmental health risk or safety risk and is not subject to Executive Order 13045. Similarly, this action does not concern human health, and therefore EPA’s Policy on Children’s Health also does not apply.

*H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use*

This action is not a “significant energy action” because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

*I. National Technology Transfer and Advancement Act*

This rule does not involve technical standards.

*J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All*

Executive Order 12898 (59 FR 7629, February 16, 1994) directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on communities with environmental justice concerns. Executive Order 14096 (88 FR 25251, April 21, 2023) supplements the foundational efforts of Executive Order 12898 to address environmental justice.

EPA and the Army believe that it is not necessary to assess whether this action would result in disproportionate and adverse effects on communities with environmental justice concerns, as this is a conforming rule and the targeted amendments made do not reflect an exercise of agency discretion. In prior analyses of potential distributional impacts of the 2023 Rule (see *Economic Analysis for Final "Revised Definition of 'Waters of the United States'" Rule*, Docket ID No. EPA-HQ-OW-2021-0602-2489), the agencies examined whether the change in benefits due to that rule may be differentially distributed among communities with environmental justice concerns in the affected areas when compared to two baselines—the primary baseline of the pre-2015 regulatory regime and the secondary baseline of the 2020 Navigable Waters Protection Rule. In that prior analysis, for most of the wetlands and affected waters impacted at a hydrologic unit code (HUC)<sup>3</sup> 12 watershed level, there was no evidence of

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<sup>3</sup> HUC boundaries are established by the U.S. Geological Survey and Natural Resources Conservation Service.



potential environmental justice impacts from the 2023 Rule warranting further analysis when compared to both baselines.

The agencies recognize that the burdens of environmental pollution and climate change often fall disproportionately on communities with environmental justice concerns. Climate change will exacerbate the existing risks faced by communities with environmental justice concerns. However, this conforming rule merely amends the provisions of the agencies' definition of "waters of the United States" that are invalid under the Supreme Court's interpretation of the Clean Water Act in *Sackett*. As noted above, these amendments on their own do not result in any cost savings or forgone benefits not directed by the operation of law. Because this rule does not involve the exercise of the agencies' discretion, the agencies did not engage with communities with environmental justice concerns in developing this action.

#### *K. Congressional Review Act (CRA)*

This action is subject to the CRA, and the agencies will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a "major rule" as defined by 5 U.S.C. 804(2). The CRA allows the issuing agency to make a rule effective sooner than otherwise would be provided by the CRA if the agency makes a good cause finding that notice and comment public rulemaking procedures are impracticable, unnecessary, or contrary to the public interest (5 U.S.C. 808(2)). The agencies have made a good cause finding for this rule as discussed in section I of this preamble, including the basis for that finding.

## **List of Subjects**

### *33 CFR Part 328*

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These boundaries are numbered using nested codes to represent the scale of the watershed size. For example, HUC 12 watersheds are smaller than HUC 4 watersheds.

Administrative practice and procedure, Environmental protection, Navigation (water),  
Water pollution control, Waterways.

*40 CFR Part 120*

Environmental protection, Water pollution control, Waterways.

**Michael L. Connor,**  
Assistant Secretary of the Army (Civil Works),  
Department of the Army.

**Michael S. Regan,**  
Administrator,  
Environmental Protection Agency.

### **Title 33—Navigation and Navigable Waters**

For the reasons set out in the preamble, 33 CFR part 328 is amended as follows:

#### **PART 328—DEFINITION OF WATERS OF THE UNITED STATES**

1. The authority citation for part 328 continues to read as follows:

**Authority:** 33 U.S.C. 1251 *et seq.*

2. Section 328.3 is amended by:

- a. Revising paragraphs (a)(1)(iii), (a)(3), and (a)(4)(ii);
- b. Removing paragraph (a)(4)(iii);
- c. Revising paragraphs (a)(5) and (c)(2); and
- d. Removing paragraph (c)(6).

The revisions read as follows:

(a) \* \* \*

(1) \* \* \*

(iii) Interstate waters;

\* \* \* \* \*

(3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section that are relatively permanent, standing or continuously flowing bodies of water;

(4) \* \* \*

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3) of this section and with a continuous surface connection to those waters;

(5) Intrastate lakes and ponds not identified in paragraphs (a)(1) through (4) of this section that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3) of this section.

\* \* \* \* \*

(c) \* \* \*

(2) *Adjacent* means having a continuous surface connection.

\* \* \* \* \*

## **Title 40—Protection of Environment**

For reasons set out in the preamble, 40 CFR part 120 is amended as follows:

### **PART 120—DEFINITION OF WATERS OF THE UNITED STATES**

3 The authority citation for part 120 continues to read as follows:

**Authority:** 33 U.S.C. 1251 *et seq.*

4. Section 120.2 is amended by:

- a. Revising paragraphs (a)(1)(iii), (a)(3), and (a)(4)(ii);
- b. Removing paragraph (a)(4)(iii);
- c. Revising paragraphs (a)(5) and (c)(2); and
- d. Removing paragraph (c)(6).

The revisions read as follows:

(a) \* \* \*

(1) \* \* \*

(iii) Interstate waters;

\* \* \* \* \*

(3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section that are relatively permanent, standing or continuously flowing bodies of water;

(4) \* \* \*

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3) of this section and with a continuous surface connection to those waters;

(5) Intrastate lakes and ponds not identified in paragraphs (a)(1) through (4) of this section that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3) of this section.

\* \* \* \* \*

(c) \* \* \*

(2) *Adjacent* means having a continuous surface connection.

\* \* \* \* \*