

WATERS OF THE U.S. WETLANDS JURISDICTION

Oppose Expansion of Federal Clean Water Act (CWA) Jurisdiction

Action Needed:

Tell Congress to reject the Biden administration's 2023 rule and clarify CWA jurisdiction. The current rule creates legal uncertainty, threatens construction projects nationwide and disregards recent Supreme Court rulings.

Background:

The Clean Water Act grants the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) jurisdiction over “navigable waters,” defined in the act as “Waters of the United States” (WOTUS) without further clarification. Federal agencies and courts have long struggled to define WOTUS, determining which waters fall under federal versus state and local control. Federal jurisdiction triggers all CWA programs (not just dredge and fill/wetlands permits) and imposes costly, time-consuming permitting and management requirements on construction sites.

The last four administrations have issued multiple, divergent definitions of WOTUS, causing significant regulatory uncertainty for construction projects and impacting contractors’ ability to plan and execute their work efficiently. The most recent effort, the Biden administration’s 2023 rule, greatly expanded federal reach over waters and wetlands, relying on the “significant nexus test” to assert federal jurisdiction over almost any wet area. The 2023 rule is on hold in 27 states in part due to AGC-supported litigation that challenged several key provisions of the rule, including significant nexus. Then a U.S. Supreme Court decision in a separate case (May 25, 2023, *Sackett v. EPA*) struck down the significant nexus test. The agencies released a “conforming” version of the 2023 rule but failed to address the rule’s broader legal flaws, and did not solicit public feedback on their revisions. As a result, AGC’s lawsuit is ongoing.

AGC Message:

- **The 2023 rule remains unlawful.** The 2023 rule was rejected by both chambers of Congress, and its core provisions were thrown out by the Supreme Court. The hastily drafted, minor edits to the rule do not address its significant legal flaws, nor fully implement the *Sackett* decision. Not only did the Court reject significant nexus, but the Justices clarified that isolated water features, non-adjointing wetlands, and ordinarily dry features are not WOTUS. Furthermore, the agencies finalized their revisions without accepting public comment—a practice typically reserved for only minor, non-controversial edits. Contractors must be given a seat at the table in the drafting of a truly durable definition of WOTUS.
- **The Administration is regulating through guidance.** Currently, the Administration is elevating some project permits for extensive review and then releasing field memos to describe how they may rule on specific scenarios where the 2023 rule remains unclear. This practice is akin to regulation through guidance, leaving stakeholders wading through unclear regulations and then analyzing scenario-based memos for clues on whether their project can move forward.