

# WOTUS: WHERE ARE WE NOW?



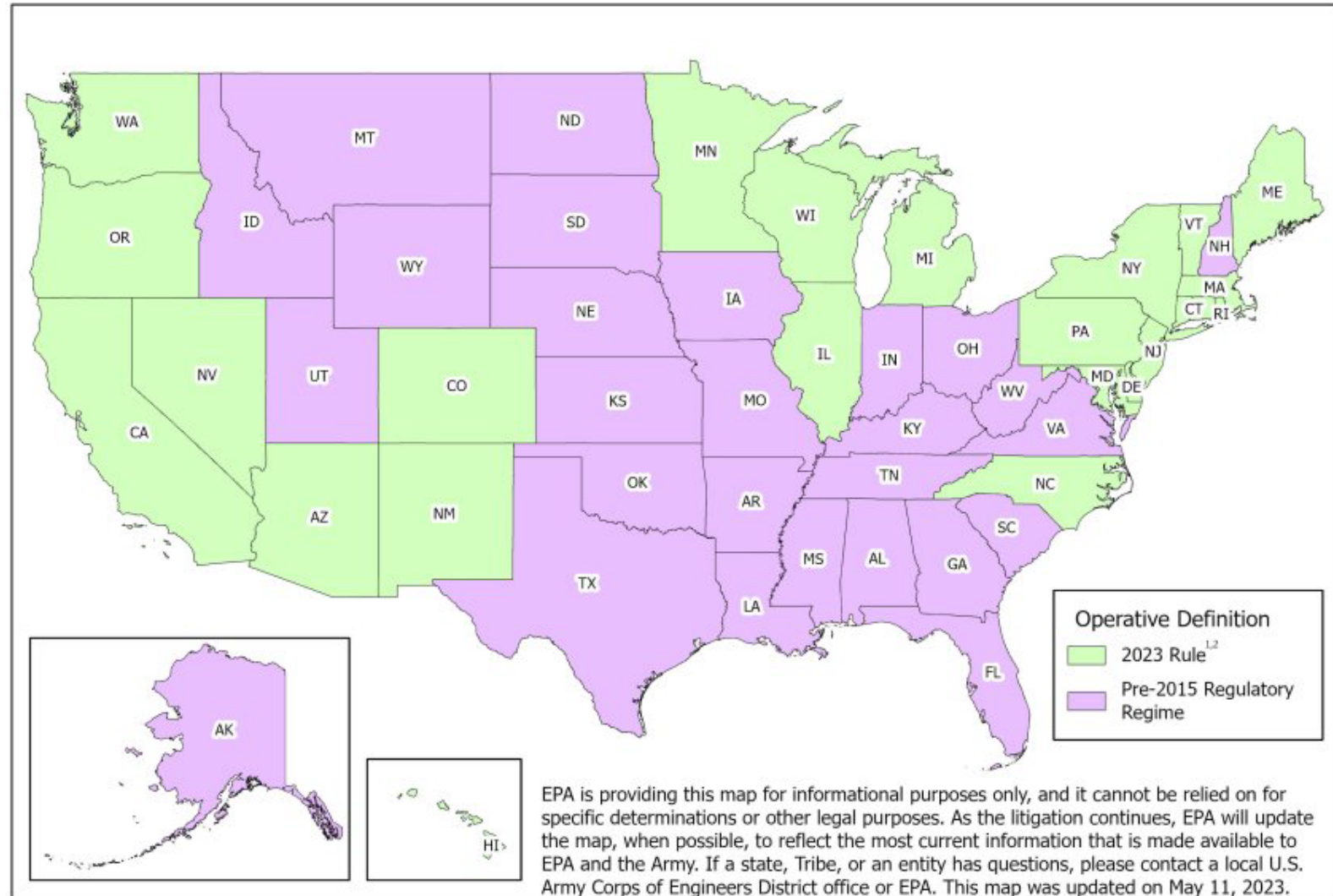
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Current regulations  
in use after 2023  
WOTUS litigation  
in TX, ND, and KY

- Courts have  
placed litigation in  
abeyance.

## Operative Definition of "Waters of the United States"



<sup>1</sup> Also operative in the U.S. territories and the District of Columbia

<sup>2</sup> The pre-2015 regulatory regime is operative for the Commonwealth of Kentucky and Plaintiff-Appellants in Kentucky Chamber of Commerce, et al. v. EPA (No. 23-5345) and their members (Kentucky Chamber of Commerce, U.S. Chamber of Commerce, Associated General Contractors of Kentucky, Home Builders Association of Kentucky, Portland Cement Association, and Georgia Chamber of Commerce).



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# AND THEN THERE WAS SACKETT...

- US EPA currently working on amendments to the 2023 WOTUS definition with a target date of September 1, 2023, for issuance of the final rule.
- Partial pause on issuance of Approved Jurisdictional Determinations.
- Preliminary Jurisdictional Determinations and previously issued Approved JDs (except NWPR) are unaffected.



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# APPROVED JURISDICTIONAL DETERMINATIONS

- AJDs can be processed for excluded waters and dry land ONLY:
  - All exclusions in paragraph (b) of the 2023 rule (ILLINOIS ONLY).
  - “Preamble waters” from 1986 regulations (IN, KY):
    - a) Non-tidal drainage and irrigation ditches excavated on dry land.
    - (b) Artificially irrigated areas which would revert to upland if the irrigation ceased.
    - (c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
    - (d) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.
    - (e) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States (see 33 CFR 328.3(a)).



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# PRIOR CONVERTED CROPLAND



**MEMORANDUM TO THE FIELD  
BETWEEN THE U.S. DEPARTMENT OF AGRICULTURE, NATURAL RESOURCES  
CONSERVATION SERVICE (NRCS), THE U.S. DEPARTMENT OF THE ARMY,  
CORPS OF ENGINEERS (CORPS), AND THE U.S. ENVIRONMENTAL PROTECTION  
AGENCY (EPA) CONCERNING ISSUES RELATED TO IMPLEMENTATION OF  
SECTION 404 OF THE CLEAN WATER ACT (CWA) AND THE FOOD SECURITY  
ACT OF 1985, AS AMENDED (FSA)**

16 DEC 2022



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# PCC CONTINUED

## Indiana and Kentucky (pre-2015 regulatory regime):

- 16 DEC 2022 Ag Memo is only *partially* applicable:

1) Continue to rely on PCC determinations from USDA-NRCS. Only wetlands identified within the PCC areas can be excluded (any portion of wetland identified outside of a PCC area does not meet the exclusion). All other aquatic resource types do not meet the PCC exclusion under the CWA.

2) “Abandonment” defined pursuant to 1993 WOTUS regulations.

## Illinois (2023 WOTUS):

- The 16 DEC 2022 Ag Memo is fully applicable:

1) Continue to rely on PCC determinations from USDA-NRCS. Same as pre-2015 #1 above.

2) “Abandonment” relies on USDA-NRCS determination/definition.

3) Change in Use.

4) Mandatory language added to AJD letters [see 16 DEC 2022 Ag Memo, Section V(D)]



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# PCC: “ABANDONMENT”

## Pre-2015 Regulatory Regime (IN, KY):

- Pursuant to 1993 WOTUS regulations (58 FR, 45034), “PC cropland which now meets wetland criteria is considered to be abandoned unless: For once in every five years the area has been used for the production of an agricultural commodity, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquacultural, grasses, legumes or pasture production.”
- PCC is recaptured upon abandonment and reversion to wetlands.

## 2023 WOTUS (IL):

- Rely on current USDA-NRCS determination (if it isn't PCC, Corps will evaluate whether the site contains aquatic resources that may be WOTUS).



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# PCC: “CHANGE IN USE” (ILLINOIS ONLY)

- Definition only applies under 2023 WOTUS.
- Per the 16 DEC 2022 Ag Memo, Change in Use is defined, “...as an action that would make the prior converted cropland no longer available for the production of an agricultural commodity...” (see further discussion in preamble to 2023 WOTUS section IV.C.7.a).
  - + This includes *intent* to develop or modify an area for purposes such as residential, commercial or industrial use; mining, energy infrastructure, or other non-agricultural uses that do not meet the standard of availability for crop production.



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# QUESTIONS?

SCOTT MATTHEWS  
U.S. ARMY CORPS OF ENGINEERS  
INDIANAPOLIS REGULATORY OFFICE  
8902 OTIS AVENUE, SUITE S106B  
INDIANAPOLIS, IN 46216  
317-543-9424, X2  
SCOTT.A.MATTHEWS@USACE.ARMY.MIL



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