

The Next Nine Months:

*Pending Actions, Foreseeable Opportunities, and
Developing Trends in Environmental Law, Regulation, and
Enforcement
in the Remainder of 2023*



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A presentation to the
American Society of Civil Engineers – Alabama Section
Winter Meeting – March 7, 2023

But first,
a diagnostic test . . .



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**Environmental Law Acronym or . . .
Foreign Intelligence Agency?**

FSB

**Федеральная служба безопасности
Российской Федерации**

**Environmental Law Acronym or . . .
Foreign Intelligence Agency?**

CAA

Clean Air Act

**Environmental Law Acronym or . . .
Foreign Intelligence Agency?**

DGSE

Direction générale de la Sécurité extérieure

**Environmental Law Acronym or . . .
Foreign Intelligence Agency?**

BND

Bundesnachrichtendienst

**Environmental Law Acronym or . . .
Foreign Intelligence Agency?**

NPDES

National Pollutant Discharge Elimination System

Looking Ahead

Waters of the United
States (WOTUS)

PFAS (Forever Chemicals)

Environmental Justice
and ESG

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What WOTUS, Otis?

By its terms, the Clean Water Act regulates discharges to “**navigable waters,**” with “navigable waters” defined in the CWA as “**waters of the United States,** including the territorial seas.” 33 U.S.C. §§ 1311(a), 1362(7), 1362(12).



Okay, but . . . just what are “**waters of the United States**”?

Searching for a Definition of WOTUS

The U.S. Army Corps of Engineers' 1986 Regulations (mirrored by EPA's 1988 Regulations)

U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985)

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001)

Rapanos v. U.S., 547 U.S. 715 (2006)

Clean Water Rule (Obama Admin.) (2015)

Navigable Waters Protection Rule (Trump Admin.) (2020)

Pascuai Yagui Tribe v. U.S. E.P.A. (D. Ariz. 2021)

“Revised Definition of WOTUS” (Biden Admin.) (eff. March 20, 2023) (REVDEF-WOTUS)



Revised Definition of Waters of the United States (REVDEF-WOTUS)

Traditional Navigable Waters

Impoundments

Tributaries

Adjacent Wetlands

Interstate Waters

<https://www.epa.gov/wotus/revising-definition-waters-united-states>

REVDEF-WOTUS

. . . and off to the races . . .

- House Resolution 27 introduced to nullify REVDEF-WOTUS pursuant to the Congressional Review Act on Feb. 2, 2023
- American Farm Bureau (and 16 other organizations) challenged the REVDEF-WOTUS with lawsuit in Galveston, Texas, on Jan. 18, 2023
- State of Texas sued same day in Galveston. Idaho later joins.
- West Virginia (and 24 other states) challenged the REVDEF-WOTUS with lawsuit in Bismarck, North Dakota on Feb. 16, 2023
- Kentucky challenged the REVDEF-WOTUS with lawsuit in Frankfort, Kentucky on Feb. 22, 2023
- Kentucky Chamber of Commerce, U.S. Chamber of Commerce, AGC of Kentucky, HBA of Kentucky, Portland Cement Association, and Georgia Chamber of Commerce challenged REVDEF-WOTUS with lawsuit in Frankfort, Kentucky on Feb. 22, 2023



Michael and Chantell Sackett v. United States (U.S. Supreme Court, No. 21-454) (2021)

“The Sacketts’ property contains no stream, river, lake, or similar waterbody. Yet EPA persists in its view that the Sacketts must obtain federal approval to build on their lot. It contends, and the Ninth Circuit agreed, that the Sacketts’ proposed house requires a Clean Water Act permit because: Priest Lake is a navigable water → A non-navigable creek connects to Priest Lake → The non-navigable creek is connected to a non-navigable, man-made ditch → The non-navigable, man-made ditch is connected to wetlands → These wetlands, though separated from the Sacketts’ lot by a thirty-foot-wide paved road, are nevertheless “similarly situated” to wetlands alleged to exist on the Sacketts’ lot → These alleged wetlands on the Sacketts’ property, aggregated with the wetlands across the street, bear a “significant nexus” to Priest Lake. As circuitous and strained as this theory is, it gets even worse. For, as EPA itself recognizes, no water at all—surface or subsurface—flows from the Sacketts’ lot to the wetlands or to the ditch across the street.” – Petitioners’ Brief, p. 4 (internal citations omitted)



*Michael and
Chantell Sackett
v. United States*
(U.S. Supreme
Court, No. 21-
454) (2021)

Question Presented

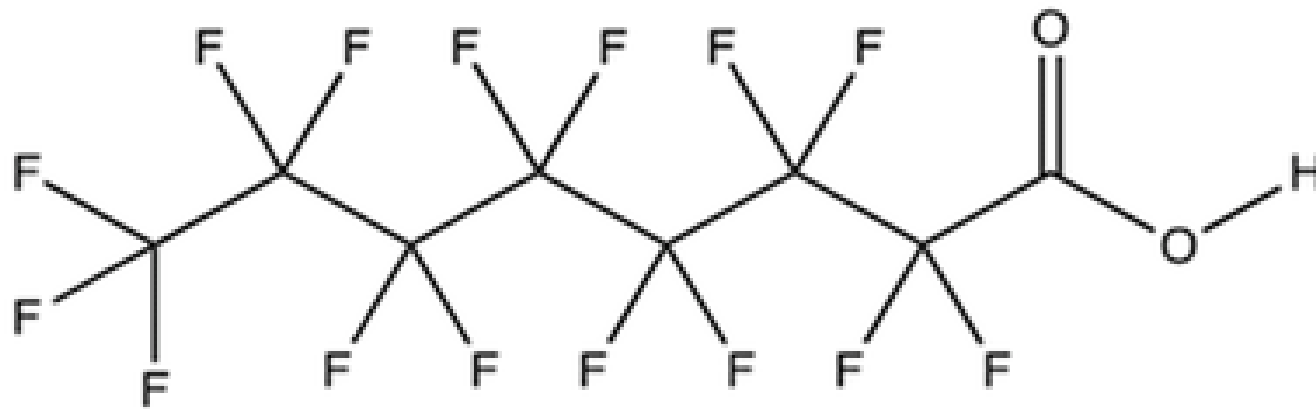
Did the Ninth Circuit set forth the proper test for determining whether wetlands are “waters of the United States” under the Clean Water Act, 33 U.S.C. § 1362(7)?

(“The Sacketts contended, among other points, that any wetlands on their property are beyond the Act’s ambit because the *Rapanos* plurality limits federal authority to wetlands that have a continuous surface-water connection to regulated waters, and their lot has no such connection.”)

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PFAS (“Forever Chemicals”)



PFOA

- Perfluoroalkyl substances and polyfluoroalkyl substances (“PFAS”). PFOAS and PFOS are subsets of PFAS.
- First developed in the 1940s
- More than 9,000 PFAS compounds

PFAS ARE IN:

- **Drinking water** – public drinking water systems and private drinking water wells.
- **Soil and water at or near waste sites** - at landfills, disposal sites, and hazardous waste sites.
- **Fire extinguishing foam** - in aqueous film-forming foams (AFFFs) used to extinguish fires at airports, shipyards, military bases, firefighting training facilities, chemical plants, and refineries)
- **Manufacturing or chemical production facilities that produce or use PFAS** – E.g., at chrome plating, electronics, and certain textile and paper manufacturers.
- **Food** –E.g., fish caught in water contaminated by PFAS; dairy products from livestock exposed to PFAS.
- **Food packaging** – E.g., grease-resistant paper, fast food containers/wrappers, microwave popcorn bags, pizza boxes, and candy wrappers.
- **Household products and dust** – E.g., stain and water-repellent used on carpets, upholstery, clothing, and other fabrics; cleaning products; non-stick cookware; paints, varnishes, and sealants.
- **Personal care products** – E.g., certain shampoo, dental floss, and cosmetics.
- **Biosolids** – E.g., fertilizer from wastewater treatment plants that is used on agricultural lands can affect ground and surface water and animals that graze on the land.

“PFAS Explained”

EPA's researchers and partners across the country are working hard to answer critical questions about PFAS:

- How to better and more efficiently detect and measure PFAS in our air, water, soil, and fish and wildlife
- How much people are exposed to PFAS
- How harmful PFAS are to people and the environment
- How to remove PFAS from drinking water
- How to manage and dispose of PFAS

This information will help EPA and state, local, and tribal partners make more informed decisions on how best to protect human health and the environment.

From EPA webpage at epa.gov/pfas/pfas-explained

And as for now regarding PFAS

- Lifetime Health Advisory values have decreased from 600 to 70 to even lower interim values (.004 PPT for PFOA, .02 PPT for PFOS).
- No drinking water standard (MCL) – may have one late in 2023 from EPA.
- EPA recently proposed in FR “Designation of PFOA and PFOS as CERCLA Hazardous Substances.” Comment period ended Nov. 7, 2022.
- ADEM has conducted in-stream monitoring and also testing of 400 public drinking water sources; NPDES permits for certain facilities will require PFAS monitoring, may require monitoring and minimization actions.

PFAS and the Bipartisan Infrastructure Law (BIL)

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On February 13, 2023, EPA announced the availability of \$2 billion from the BIL to address emerging contaminants in small and disadvantaged communities.

Address ECs through: Scoping and identification • Testing or sampling for baseline assessment • Research and testing • Planning and design • Treatment • Source • Storage • Water system restructuring, consolidation, or creation • Households access to drinking water services • Technical assistance • Public communication, engagement, and education.

This investment, which is allocated to states and territories, will be made available to communities as grants through EPA's Emerging Contaminants in Small or Disadvantaged Communities (EC-SDC) Grant Program.

Alabama's grant allotment for FY 2022 and FY 2023 (Combined) is \$52.6 million.

Examples of Activities that Could Be Funded

- Preliminary Engineering Reports, Alternatives Analysis, and Preliminary/Final Design
- Environmental and Archaeological Reviews
- Permit Fees
- Building New Treatment Facilities with EC Removal Capability
- Upgrade Existing Treatment Facilities to Add New Treatment Processes (e.g., Activated Carbon, Ion Exchange, and Reverse Osmosis)
- Treatment or Protection of a New Source
- Development of New Sources

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Environmental Justice and ESG

Environmental Justice: Defined by EPA as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”

ESG: A framework of factors and concerns (generally categorized as environmental, social, and governance) by which companies can be evaluated beyond typical corporate/financial metrics of success, value, and/or failure.

What does this mean for civil engineers?

Environmental Justice (Biden Administration)

- **Executive Order 13985** (Jan. 20, 2021) ("**Advancing Racial Equity and Support for Underserved Communities Through the Federal Government**"): Directs federal agencies to evaluate whether their policies produce racially inequitable results when implemented, and to make the necessary changes to ensure underserved communities are properly supported.
- **Executive Order 14008** (Jan. 27, 2021) ("**Tackling the Climate Crisis at Home and Abroad**")
 - Justice 40 Initiative
 - White House Environmental Justice Interagency Council
 - White House Environmental Justice Advisory Council
- **Greater organizational focus** on environmental justice at EPA and DOJ
- Re-energized **National Environmental Justice Advisory Council**

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Justice 40 Initiative

- 40 percent of the overall benefits of certain Federal investments flow to disadvantaged communities that are marginalized, underserved, and overburdened by pollution.
- The categories of investment are: climate change, clean energy and energy efficiency, clean transit, affordable and sustainable housing, training and workforce development, remediation and reduction of legacy pollution, and the development of critical clean water and wastewater infrastructure.

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Environmental Justice – What does this mean for civil engineers?

- Opportunities in the Justice 40 Initiative space.
- Increased scrutiny, through an “environmental justice lens,” of projects for the federal government or involving state or federal permitting, funding, etc.
- Regardless of state or federal involvement, permitting, or funding, increased scrutiny through the “environmental justice lens”
- Explicit analysis of environmental justice ramifications in the course of National Environmental Policy Act environmental analyses (EAs and EISs)
- Tribal involvement and increased potency in National Historic Preservation Act reviews
- A need for front-end participation in project development and planning.

Environment, Social, and Governance (ESG) – What Does It Mean for Civil Engineers?

Project-specific

- Will a client need or want its project to pass muster re: ESG?
- If so, what can be engineered into the project to support such goals?

Organizational

- Will your firm have its own direct ESG goals (or obligations?)
- Will your firm's ESG value/liabilities be imputed to the client?
- Will certain ESG metrics be required for government contracts

IN THE SOUTH'S ENVIRONMENT NEXT MONTH (MARCH 2023)

February 28, 2023

Volume IX, Issue 2

*Our monthly newsletter ends the current month by identifying pending meetings and deadlines for environmental and historical/cultural issues for the states of **Alabama, Florida, Georgia, Mississippi, and Tennessee** during the upcoming month – in this case, **March 2023**. But a word of warning – please be sure to independently identify or confirm any particular deadlines or meetings of relevance to you before you rely on this newsletter's information, particularly in light of any impacts of COVID-19, hurricane season, Chinese weather balloons, or the like. **In the South's Environment Next Month** is a publication of P48, LLC. For annual subscription information, contact Jim Noles at nolesjim@gmail.com.*

Alabama

On **March 2, 2023**, the **public comment period will end** regarding the **Alabama Department of Environmental Management's proposed issuance of a Consent Order to North Alabama Materials, Inc.**, the owner/operator of a limestone crushing, screening, and conveying facility currently under construction in **Lacey's Spring, Morgan County, Alabama**. ADEM has alleged that the facility conducted open burning of vegetation during a burn ban and is proposing a **civil penalty of \$6,000**.

On **March 7, 2023**, the **Alabama Public Service Commission** will meet for a **regularly scheduled session** at 10:00 a.m. in the Carl L. Evans Chief Administrative Law Judge Hearing Complex, RSA Union Building, Room 900, 100 North Union Street, Montgomery, Alabama.

On **March 8, 2023**, the **public comment period will end** regarding **ADEM's proposed reissuance of General NPDES Permit ALG640000**, which regulates **discharges of filter backwash, sedimentation basin wash water, and decant water from water treatment plants** discharging to waters of the State of Alabama (not designated Outstanding National Resource Water or Outstanding Alabama Water). Discharges from water treatment plants that use ion-exchange or reverse osmosis are not covered by this General Permit.

On **March 11, 2023**, at 9:00 am, the **Advisory Board to the Alabama Department of Conservation and Natural Resources** will hold a **regularly scheduled meeting** at Alabama State University 915 S. Jackson St., Montgomery in Ralph D. Abernathy Hall Annex Auditorium.

On **March 19, 2023**, the **public comment period will end** regarding ADEM's proposed issuance of a **Consent Order to Evonik Corporation**, the owner/operator of a chemical manufacturing production facility currently operating in **Theodore, Mobile County**,

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