

Surface Water Advisory Panel

August 19, 2024



FORREST LUNA
REGULATORY PROJECT MANAGER
USACE, ALBUQUERQUE DISTRICT
19 AUGUST 2024



“The views, opinions and findings contained in this report are those of the author and should not be construed as an official Department of the Army position, policy or decision, unless so designated by other official documentation.”

Presentation Outline

- Background
- Amended 2023 Rule
- Types of Permits
- Permit Review Process



The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of Sackett v. EPA may be addressed in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with Sackett.

Background: “Waters of the United States” and the Clean Water Act

- “Waters of the United States” is a threshold term in the Clean Water Act that establishes the geographic scope of federal jurisdiction under the Act.
- The Clean Water Act does not define “waters of the United States.”
- EPA and the Department of the Army have defined “waters of the United States” by regulation since the 1970s.



The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of Sackett v. EPA may be addressed in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with Sackett.

Amended 2023 Rule: (a)(1) Waters – Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

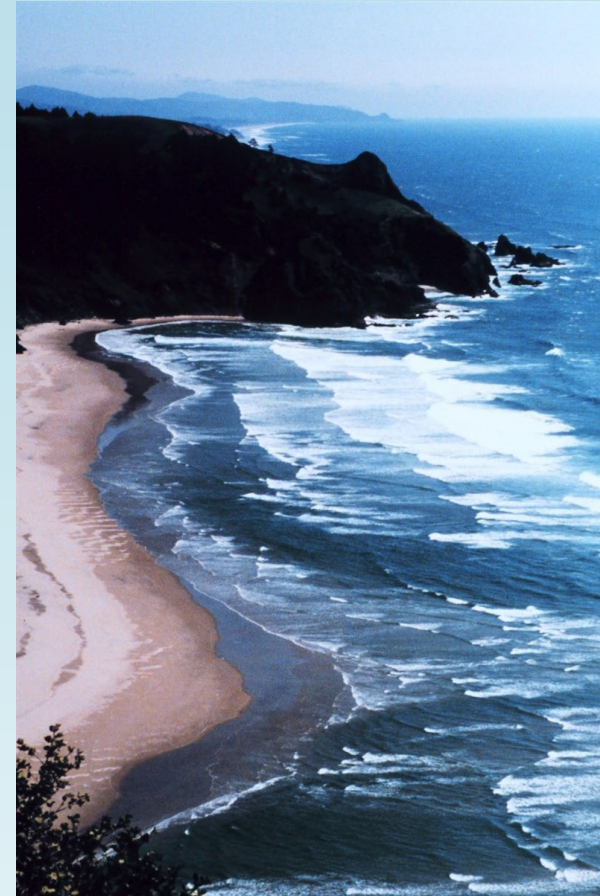
- **Traditional Navigable Waters**
 - Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.
 - EPA and Army will continue to use the legal memorandum **Waters That Qualify as “Traditional Navigable Waters” Under Section (a)(1) of the Agencies’ Regulations** (formerly known as Appendix D) to provide guidance for identifying traditional navigable waters.



The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of Sackett v. EPA may be addressed in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with Sackett.

Amended 2023 Rule: (a)(1) Waters – Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

- **The Territorial Seas**
 - Defined in section 502(8) of the Clean Water Act as “the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.”



The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of Sackett v. EPA may be addressed in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with Sackett.

Amended 2023 Rule: (a)(1) Waters – Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

- **Interstate Waters**
 - “Waters of the United States” include interstate waters.
 - The conforming rule revised the January 2023 rule to remove “interstate wetlands” from the provision.
 - Lakes and ponds crossing state boundaries are jurisdictional as interstate waters in their entirety.
 - For rivers and streams, interstate waters include the portion of the river or stream that is of the same stream order as the point that crosses or serves as a state line.



The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of Sackett v. EPA may be addressed in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with Sackett.

Amended 2023 Rule: (a)(2) Impoundments

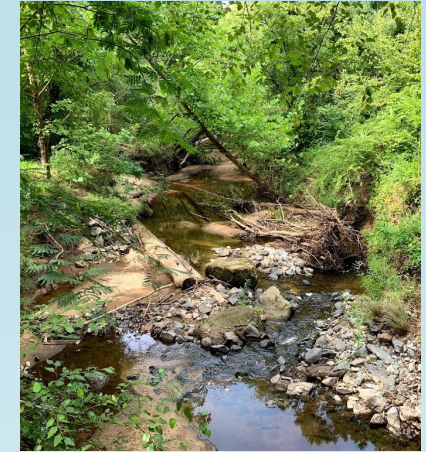
- “Waters of the United States” include impoundments of waters that otherwise meet the definition of “waters of the United States.”
- The agencies consider paragraph (a)(2) impoundments to include:
 - (1) Impoundments created by impounding one of the “waters of United States” that was jurisdictional under the Amended 2023 Rule’s definition at the time the impoundment was created, and
 - (2) Impoundments of waters that at the time of assessment meet the definition of “waters of the United States” under paragraph (a)(1), (a)(3), or (a)(4) of the Amended 2023 Rule, regardless of the water’s jurisdictional status at the time the impoundment was created.



The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of Sackett v. EPA may be addressed in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with Sackett.

Amended 2023 Rule: (a)(3) Tributaries

- Tributaries include natural, man-altered, or man-made water bodies that flow directly or indirectly into (a)(1) waters or (a)(2) impoundments.
 - Tributaries can include rivers, streams, lakes, ponds, and impoundments.
 - Tributaries can also include ditches and canals.
- Jurisdictional tributaries must meet the relatively permanent standard.



The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of Sackett v. EPA may be addressed in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with Sackett.

Amended 2023 Rule: (a)(3) Tributaries

Relatively Permanent Standard

- Relatively permanent waters include tributaries that have flowing or standing water year-round or continuously during certain times of year.
- Relatively permanent waters do not include tributaries with flowing or standing water for only a short duration in direct response to precipitation.



The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of Sackett v. EPA may be addressed in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with Sackett.

Amended 2023 Rule: (a)(3) Tributaries

Relatively Permanent Standard – Duration and Timing of Flow

Relatively permanent waters include tributaries that have flowing or standing water year-round or continuously during **certain times of year.**

- “Certain times of the year” is intended to include extended periods of standing or continuously flowing water occurring in the same geographic feature year after year, except in times of drought.
- Relatively permanent flow may occur seasonally, but the phrase is also intended to encompass tributaries in which extended periods of standing or continuously flowing water are not linked to naturally recurring annual or seasonal cycles.



The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of Sackett v. EPA may be addressed in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with Sackett.

Amended 2023 Rule: (a)(3) Tributaries

Relatively Permanent Standard – Duration and Timing of Flow

Relatively permanent waters do not include tributaries with flowing or standing water for only a short duration in direct response to precipitation.

- “Direct response to precipitation” is intended to distinguish between episodic periods of flow associated with discrete precipitation events versus continuous flow for extended periods of time.
- No minimum flow duration has been established because flow duration varies extensively by region.



The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of Sackett v. EPA may be addressed in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with Sackett.

Amended 2023 Rule: (a)(4) Adjacent Wetlands

- **Wetlands** means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
- **Adjacent** has been revised by the conforming rule to mean having a continuous surface connection.
- **Jurisdictional adjacent wetlands** include:
 - Wetlands that are adjacent to an (a)(1) water, relatively permanent jurisdictional impoundment, or relatively permanent tributary.



The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of Sackett v. EPA may be addressed in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with Sackett.

Amended 2023 Rule: (a)(4) Adjacent Wetlands

Continuous Surface Connection

- A **continuous surface connection** means the wetlands either physically abut or touch the paragraph (a)(1) or relatively permanent water, or are connected to the paragraph (a)(1) or relatively permanent water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert.
- Note that *Sackett* is clear that “a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA.”



The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of Sackett v. EPA may be addressed in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with Sackett.

Amended 2023 Rule: (a)(5) Waters: lakes and ponds not identified in (a)(1) – (a)(4)

- Jurisdictional (a)(5) waters include intrastate lakes and ponds not identified in the other jurisdictional categories, that meet the relatively permanent standard.
- The conforming rule revised the January 2023 rule to remove “streams” and “wetlands” from the (a)(5) provision.

The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of Sackett v. EPA may be addressed in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with Sackett.

Amended 2023 Rule: (a)(5) Waters: lakes and ponds not identified in (a)(1) – (a)(4)

Relatively Permanent Standard

- Lakes and ponds assessed under paragraph (a)(5) meet the relatively permanent standard if they are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to a paragraph (a)(1) water or tributary that is relatively permanent.
- The agencies will assess lakes and ponds under paragraph (a)(5) to determine if they are **relatively permanent** using a similar approach to the one described for tributaries.

The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of Sackett v. EPA may be addressed in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with Sackett.

No Changes to January 2023 Exclusions

Exclusions*

(b)(1) Waste treatment systems

(b)(2) Prior converted cropland

(b)(3) Certain ditches

(b)(4) Artificially irrigated areas that would revert to dry land if irrigation ceased

(b)(5) Certain artificial lakes and ponds

(b)(6) Artificial reflection or swimming pools or other small ornamental bodies of water

(b)(7) Certain waterfilled depressions

(b)(8) Swales and erosional features

(b)(1) – (b)(2):

Pre-2015 exclusions, modified in the regulations

(b)(3) – (b)(8):

Pre-2015 “generally non-jurisdictional features,” added to the regulations as exclusions

***NOTE:** For efficiency, this slide’s list of the categories of exclusions are shorthand for the categories in the regulations. See 33 CFR 328.3(b) and 40 CFR 120.2(b). Exclusions do not apply to paragraph (a)(1) waters.

The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of Sackett v. EPA may be addressed in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with Sackett.

Amended 2023 Rule: (b)(1) Exclusion: Waste Treatment Systems

- The regulations exclude waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.
- The 2023 rule preamble provides clarification on implementation:
 - Excluded waste treatment systems do not sever upstream jurisdiction.
 - The exclusion is generally available only to the permittee using the system for the treatment function for which such system was designed.

The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of Sackett v. EPA may be addressed in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with Sackett.

Amended 2023 Rule: (b)(2) Exclusion: Prior Converted Cropland

- The regulatory exclusion for prior converted cropland only covers wetlands.
- Wetlands can be covered under the prior converted cropland exclusion if they meet USDA's longstanding definition of prior converted cropland.
- Prior converted cropland loses its exclusion status if there is a “change in use” – meaning the area is no longer available for the production of an agricultural commodity.

The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of Sackett v. EPA may be addressed in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with Sackett.

Amended 2023 Rule: (b)(3) – (b)(8) Exclusions

- The regulations specify that features considered “generally non-jurisdictional” in the preamble to the pre-2015 regulations and in the pre-2015 guidance are excluded.
- Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;
- Artificially irrigated areas that would revert to dry land if the irrigation ceased;
- Artificial lakes or ponds created by excavating 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;
- Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons;
- 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; and
- Swales and erosional features (*e.g.*, gullies, small washes) characterized by low volume, infrequent, or short duration flow.

The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of Sackett v. EPA may be addressed in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with Sackett.

Types of Permits

1. Individual Permits: For significant impacts, with a detailed review process.

2. General Permits:

1. Nationwide Permits: For minor impacts, nationwide applicability.

2. Regional General Permits: Regional specifics.

Individual Permits

- **Definition:** These are tailored permits issued for activities that may have significant impacts on waters of the U.S. and wetlands.
- **Application:** Requires a detailed application process, including an environmental impact assessment.
- **Review:** Involves public notice, review, and coordination with other federal and state agencies.
- **Examples:** Large-scale developments, major dredging operations, or significant wetland fills.

General Permits

- **Definition:** These permits cover multiple similar activities that have minor impacts and are generally issued on a regional or nationwide basis.
- **Types:**
 - **Nationwide Permits (NWPs):** Broadly applicable permits for activities with minimal individual and cumulative impacts, like minor discharges of dredged or fill material.
 - **Regional General Permits (RGPs):** Specific to a particular region or type of activity, tailored to local conditions and needs.
- **Application:** Simplified process compared to individual permits.
- **Examples:** Small dredging projects, maintenance of existing structures, or installation of utility lines.

Nationwide permit issuance

The U.S. Environmental Protection Agency (EPA) does not directly issue Nationwide Permits (NWP). Instead, the U.S. Army Corps of Engineers (USACE) issues them, while the EPA provides oversight and approval. NWPs are typically updated on a 5-year cycle. Here's a more detailed breakdown of the timing and process:

Nationwide Permit Cycle

- **Five-Year Review Cycle**
 - **Frequency:** NWPs are reviewed and potentially updated every five years.
 - **Purpose:** The review ensures that the permits remain relevant and effective in regulating activities with minimal environmental impact, while also adapting to new environmental standards, policies, and scientific understanding.

Nationwide permit issuance

- **Review Process**

- **Pre-Review Preparation:** Prior to the review, the USACE assesses the performance of existing NWRPs, including their effectiveness in protecting the environment and any issues or concerns that have arisen.
- **Consultation and Drafting:** The USACE drafts proposed revisions to the NWRPs in consultation with the EPA and other federal and state agencies. They also seek input from stakeholders and the public.

- **Public Notice and Comment**

- **Public Comment Period:** A notice is published in the Federal Register, and a public comment period typically lasts 60 days. During this time, the public, stakeholders, and other interested parties can review and comment on the proposed changes.
- **Review of Comments:** The USACE reviews all comments received and makes necessary revisions based on feedback.

- **Finalization**

- **Issuance of Final Rule:** After considering public comments and making any necessary revisions, the USACE issues the final rule for the updated NWRPs. This also includes a Federal Register notice.
- **EPA Approval:** The EPA reviews and approves the final NWRPs to ensure they comply with the Clean Water Act and other regulatory requirements

Nationwide permit issuance

Key Steps

- **Drafting and Consultation:** USACE drafts NWPs, consults with EPA and other agencies.
- **Public Notice:** USACE publishes a notice and solicits public comments.
- **Review and Revision:** Comments are reviewed, and NWPs are revised if needed.
- **Finalization and EPA Approval:** Final NWPs are issued, and EPA ensures compliance with the Clean Water Act.
- **Implementation and Monitoring:** NWPs are implemented, and their effectiveness is monitored.

The collaborative process ensures that Nationwide Permits are both effective in facilitating activities with minimal environmental impacts and compliant with federal regulations aimed at protecting water resources.

Permit Review Process

- **Step 1. Pre-Application Phase**
- **Initial Consultation**
 - Contact local USACE office
 - Pre-application meeting for guidance
- **Determining Permit Type**
 - Nationwide Permit (NWP)
 - Regional General Permit (RGP)
 - Individual Permit

Permit Review Process

- **Step 2: Application Submission**
- **Prepare Application**
 - Complete forms and gather documentation
 - Include project plans, impact analyses, and mitigation measures
- **Submit Application**
 - Submit to USACE office

Permit Review Process

- **Step 3: Application Review**

- **Initial Review**

- Completeness check
- Request additional information if needed

- **Technical Review**

- Assess environmental impacts
- Coordinate with other agencies
 - Section 7 of the Endangered Species Act
 - For any determination other than no effect, the Corps must consult with the U.S. Fish and Wildlife Service
 - Section 106 of the National Historic Preservation Act
 - For any determination other than No Potential to Cause Effect the Corps must consult with the State historic Preservation Officer

Permit Review Process

- **Step 4: Public Notice and Comment(Individual Permits)**
- **Public Notice**
 - Issued in Federal Register/Corps District Website
 - Includes project details and comment instructions
- **Public Comment Period**
 - Typically 30
 - Review and address comments

Permit Review Process

- **Step 5: Permit Decision**
- **Draft Permit**
 - Prepare based on review and comments
- **Final Decision**
 - Issue final permit with conditions or deny application
 - There are General Conditions for the Nationwide Permits
 - There are Regional Conditions for certain Nationwide Permits
 - Special conditions can be added to any NWP Verification letter
 - Permit Conditions are attached to Individual Permits

Permit Review Process

- **Step 6. Permit Implementation and Monitoring**
- **Implementation**
 - Follow permit conditions
- **Monitoring**
 - USACE oversight for compliance
 - Reporting requirements
- **Enforcement**
 - Address non-compliance

Permit Review Process

Step 7: Post-Permit Review

- **Review and Adjustments**
 - Assess project impacts and mitigation effectiveness
 - Make adjustments if needed

Additional Information

- See <https://www.epa.gov/wotus> for additional information of the definition of Waters of the United States
- See <https://www.spa.usace.army.mil/Missions/Regulatory-Program-and-Permits/> for additional information on permitting in the USACE Albuquerque District

The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of Sackett v. EPA may be addressed in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with Sackett.