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# **Per- and Polyfluoroalkyl Substances (PFAS) and Clean Water Act/Waters of the United States (WOTUS) 2023 Updates & 2024 Forecast**

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# 2023 PFAS Updates – By statute

- Toxic Substances Control Act
  - Proposed Rules
    - January 2023 – significant new use rule to prevent starting or resuming the manufacture or processing of 329 “inactive” PFAS without going through a full notice, review, and, if appropriate, risk management process (rule finalized in January 2024)
    - May 2023 – rule proposing several amendments to TSCA regulations, including:
      - Incorporating 2016 Lautenberg Act amendments to TSCA Section 5 regarding requirements for EPA to review and make safety determinations for all new chemicals and significant new uses of chemicals before manufacture or processing of such chemicals, including PFAS
        - See also: EPA’s June 2023 Framework for PFAS new chemicals and significant new use reviews
      - Removing exemptions that currently allow certain new PFAS (and other chemicals) to undergo a shorter and less robust, rather than a complete, safety review
  - Final Rules
    - October 2023 – rule requiring all manufacturers and importers of PFAS and PFAS-containing articles in any year since 2011 to report information to EPA on PFAS uses, production volumes, disposal, exposures, and hazards
    - October 2023 – rule eliminating an exemption that allowed facilities to avoid reporting information on 189 PFAS to Toxics Release Inventory (TRI) when those chemicals are used in small (or de minimis) concentrations
  - Other
    - June 2023 - National PFAS Testing Strategy (under TSCA Section 4 authority)
      - January and August 2023 – EPA issued the second and third test orders under this strategy



# 2023 PFAS Updates – By statute (cont.)

- Clean Water Act
  - January 2023 – EPA released Effluent Guidelines Program Plan 15, which includes plans for studies of PFAS discharges from multiple industrial categories (POTW influent study) and a new rulemaking to develop effluent guidelines and pretreatment standards to address PFAS discharges from landfills that discharge their leachate
- Clean Air Act
  - July 2023 – EPA proposed additional data collection from facilities that emit PFAS to the air through the Air Emissions Reporting Rule
- Bipartisan Infrastructure Law funding to address PFAS
  - In 2023 – EPA distributed nearly \$1 billion through the BIL State Revolving Fund Emerging Contaminants programs and announced the first \$2 billion in grant funding to states, Tribes, and territories through the new Small or Disadvantaged Communities Emerging Contaminants grant program



# 2023 PFAS Updates – By statute (cont.)

- Safe Drinking Water Act
  - March 2023 – proposed maximum contaminant levels (MCLs) for 6 PFAS
  - August & November 2023: first and second quarters of data released from Unregulated Contaminant Monitoring Rule 5 (UCMR5) sampling
- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
  - April 2023 – Advanced Notice of Proposed Rulemaking (ANPRM) seeking public input and data to inform decision-making on potential future regulation of PFAS under CERCLA
- Cleanup – CERCLA and Resource Conservation and Recovery Act (RCRA)
  - August 2023 – rescission of 2019 groundwater cleanup guidance—result is to revert to longstanding CERCLA and RCRA risk assessment, site-specific processes



# 2023 PFAS Updates – Cross-cutting

- August 2023 – PFAS National Enforcement and Compliance Initiative announced as one of EPA’s enforcement priorities for FY24-27
- PFAS Analytic Tools – released publicly January 2023, updated September 2023 with additional data



# 2024 PFAS Updates – Hot Off the Press

- More TSCA!

- January 9, 2024 – automatic addition of 7 PFAS to TRI chemicals list
- January 11, 2024 – final TSCA significant new use rule to prevent inactive PFAS from reentering commerce
  - Prevents starting or resuming the manufacture or processing of 329 “inactive” PFAS without a complete EPA review and risk determination



# 2024 PFAS Forecast – By statute

- **TSCA** – proposed significant new use rules to extend protective requirements to future manufacturers and processes of PFAS that have already been reviewed under the new chemicals program
- **CWA**
  - Effluent Guidelines Program Plan 15 studies and proposed landfills rulemaking likely to extend beyond 2024, but good to monitor
  - EPA rulemaking to formalize use of Method 1633 under the Clean Water Act
- **CAA** – EPA expects to finalize its Air Emissions Reporting Rule for data collection from facilities that emit PFAS to the air in mid-2024
- **SDWA**
  - Final MCL rulemaking anticipated early 2024
  - EPA will continue to quarterly update UCMR5 sampling results
- **CERCLA**
  - Final rule designating PFOA, PFOS as hazardous substances anticipated early 2024
    - Also look for: enforcement discretion policy
  - Continue to watch updates to Risk Screening Level tables for PFAS additions—currently 14 PFAS included
  - Watch for possible outcomes from EPA’s review of the public comments responding to the 2023 ANPRM
- **RCRA proposed rules**
  - One to designate certain PFAS as “hazardous constituents” under RCRA, which would make them subject to investigation and cleanup activities at permitted hazardous waste facilities
  - One to clarify that emerging contaminants such as PFAS can be cleaned up through RCRA corrective action



# 2024 PFAS Forecast – Cross-cutting

- Risk assessments for PFOA and PFOS in biosolids to be released for public comment in 2024
- PFAS National Enforcement and Compliance Initiative
- 2023 PFAS destruction and disposal guidance update
- Additional Bipartisan Infrastructure Law funding to address PFAS





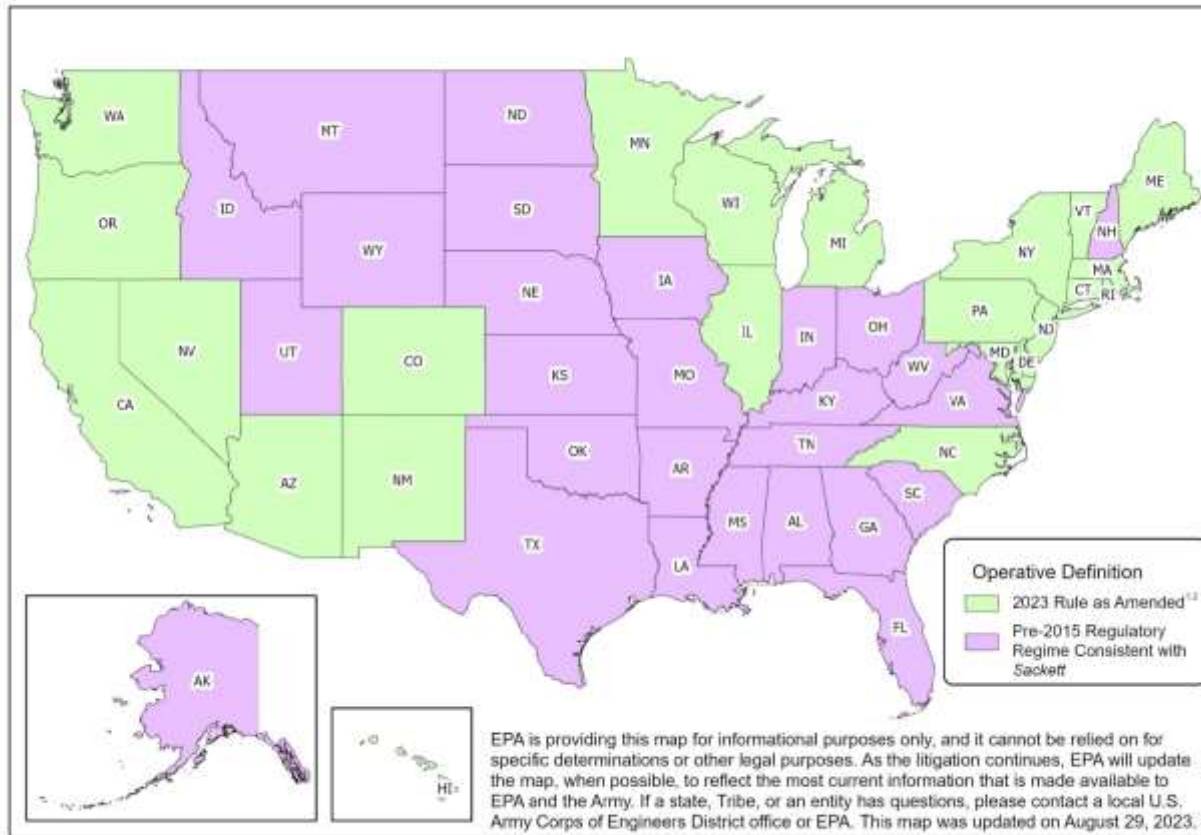
# 2023 WOTUS Updates – WOTUS Rule(s) & *Sackett*

- January 18, 2023 – EPA, Army issued final rule revising definition of “waters of the United States” (effective date March 20, 2023)
- May 25, 2023 - *Sackett v. EPA* SCOTUS decision
  - Decision: wetlands are subject to Clean Water Act jurisdiction when they 1) are adjacent to a water body that constitutes WOTUS, and 2) are indistinguishable from that WOTUS, i.e., have a continuous surface connection with that water body
    - overrides use of the “significant nexus” test
- September 8, 2023 – EPA, Army issued final rule to conform January 2023 WOTUS definition to the May 2023 *Sackett* decision (effective September 8, 2023)



# 2023 WOTUS Updates – WOTUS Rule(s) & *Sackett*

## 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 implemented consistent with *Sackett* 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).

2023 rule, as amended, is being implemented in 23 states, D.C., and U.S. Territories; and litigated in 27 states

In 27 litigation states, pre-2015 WOTUS definition and *Sackett* apply

Source: EPA website at <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>



# 2023 CWA Updates – *Maui* & EPA Guidance

- April 2020 – *County of Maui v. Hawai'i Wildlife Fund* SCOTUS decision
  - SCOTUS held that the Clean Water Act “require[s] a permit if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters.”
- November 27, 2023 – EPA published draft guidance applying *Maui* decision for public comment
  - Includes SCOTUS’s 7 factors for consideration in determining whether a discharge to groundwater is functionally equivalent to a direct discharge to navigable waters



# 2024 CWA/WOTUS Forecast

- WOTUS Rule (as amended) implementation
  - Watch for litigation updates
- *Maui* implementation guidance
  - Watch for public comments responding to EPA's draft guidance & EPA's follow-up in accounting for comments and finalizing guidance



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