

# Waters, Wetlands, and the English Language

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WATKINS & EAGER

# Agency Deference - A new landscape

- What is agency deference?
  - The courts' acknowledgement that the experience of the administrative agency gives it familiarity with the particularities of the issue, which the court can not replicate
  - Which results in the courts deferring to the agencies on regulatory interpretation, application and enforcement

# When should an Agency be given deference?

- In 1984 US Supreme Court establishes new standard on agency statutory interpretation – (Chevron USA v. NRDC)
  - First question the court must answer – is the intent of Congress clear?
  - Second question – if not, defer to the agency position if it was a permissible construction of the statute
- Over time the courts have deferred to agencies to a point .....beyond technical subject matter expertise
- Resulting in the courts allowing agency a long leash on developing new regulations

# Loper Bright Enterprises v Raimondo

US Supreme Court (2024)

- Courts must now “exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires.”
- With Chevron overruled what next?
  - What weight will be given agencies’ interpretations?
    - How will state agency interpretations be reviewed?
  - How broadly will Loper be applied?
  - What about previously decided matters?

# Response

- **“Supreme Court’s Agency Power Rulings Could Change Regulatory Landscape For Years to Come” - WSJ**
- **“In Flagrant Judicial Power Grab, Court Discards Chevron Doctrine, Undermining Congress and Agencies, and Threatening Government Programs that Protect Americans” - Constitutional Accountability Center**

# How will this affect Mississippi?

- Was – “.....reviewed *de novo*, but with great deference to the agency's interpretation.”
- Then - King v. Mississippi Military Department, Supreme Court of Mississippi. June 7, 2018
- Now - “..... in deciding no longer to give deference to agency interpretations, we step fully into the role the Constitution of 1890 provides for the courts and the courts alone, to interpret statutes.”
- So, how will Loper affect Mississippi agency decisions?

# *Sackett v EPA*

- Context of the Decision
- What did SCOTUS say?
- EPA/USACE Regulatory Response
- Brand New Development

# *Context of the Decision*

- January 2023 Rule
- Facts of the Case



# *January 2023 Rule*

- (Published in FR January 18; took effect March 20)
- Stated purpose was to return to the pre-2015 definition of WOTUS:

Changing regulatory definitions due to court decisions and final rules issued by the agencies in 2015, 2019, and 2020 have caused uncertainty that harmed communities and our nation's waters. The rule restores fundamental protections so that the nation will be closer to achieving Congress' direction in the Clean Water Act that our waters be fishable and swimmable. It will also ensure that our waters support recreation and wildlife.

# January 2023 Rule

Types of Waters	Features	Examples of Waters Likely to Be Jurisdictional Under the Final Rule	Regulatory Text Paragraph
<b>Traditional Navigable Waters</b>	Large rivers and lakes that could be used in interstate or foreign commerce, as well as waterbodies affected by tides.	Mississippi River, Erie Canal, Great Lakes	(a)(1)
<b>Territorial Seas</b>	Territorial seas that extend three miles out to sea from the coast.	Atlantic Ocean, Pacific Ocean	(a)(1)
<b>Interstate Waters</b>	Includes waters like streams, lakes, or wetlands that cross or form part of state boundaries.	Lake Tahoe, portions of the Columbia River, portions of Savannah River	(a)(1)
<b>Impoundments</b>	Impounded bodies of water created in or from “waters of the United States,” like reservoirs and beaver ponds.	Bear Gulch Reservoir in California	(a)(2)
<b>Tributaries</b>	Branches of creeks, streams, rivers, lakes, ponds, ditches, and impoundments that ultimately flow into traditional navigable waters, the territorial seas, interstate waters, or impoundments of jurisdictional waters. Tributaries are jurisdictional if they meet either the relatively permanent standard or significant nexus standard.	Wolftrap Run in Virginia, Puppy Creek in Arkansas	(a)(3)

Source: EPA

# January 2023 Rule

Ad.

These lakes, ponds, streams, or wetlands do not fit into the above categories. They are jurisdictional if they meet either the relatively permanent standard or the significant nexus standard.

**Additional Waters**

These lakes, ponds, streams, or wetlands do not fit into the above categories. They are jurisdictional if they meet either the relatively permanent standard or the significant nexus standard.

Certain local lakes, streams, wetlands, etc.

(a)(5)

# *January 2023 Rule*

**Significant Nexus is a test that** clarifies if certain waterbodies, such as tributaries and wetlands, are subject to the Clean Water Act based on their connection to and effect on larger downstream waters that Congress fundamentally sought to protect. A significant nexus exists if the waterbody (alone or in combination) significantly affects the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters.

# *Sackett*: Technically Unrelated

(But actually pretty related)

- Argued Oct 3, 2022
- Opinion May 25, 2023
- Case originated in Idaho in 2008
  - Landowners sought to build a home, began backfilling
  - EPA sent compliance order due to wetlands on the property
    - Required restoration plan, threatened \$40K/day penalty
  - Rule in effect at the time used “significant nexus” test

# *Sackett v EPA, 598 US 651*



Source: Google Earth

# Start with the Statutory Text

- At base, this is what the courts are supposed to do: apply the law to the facts
- 33 USC § 1344 (*i.e.*, Section 404 of the CWA)
  - § 1344(g)(1) refers to “navigable waters . . . Including wetlands adjacent thereto.”
- 33 USC § 1362 (*i.e.*, Section 502 of the CWA)
  - Defines “navigable waters” as “waters of the United States, including the territorial seas.”

# *Sackett v EPA*, 598 US 651

- EPA acknowledged under “significant nexus” test “almost all waters and wetlands’ are potentially subject to regulation.”
- Result is highly discretionary decision-making

Manual 84–85 (describing “not ... atypical” examples of wetlands that periodically lack wetlands indicators); see also *Hawkes Co. v. United States Army Corps of Engineers*, 782 F.3d 994, 1003 (C.A.8 2015) (KELLY, J., concurring) (“This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property”). And because the CWA can sweep broadly enough to criminalize mundane activities like moving



# *Sackett v EPA*, 598 US 651

- So the majority seeks to narrow the CWA's application:

explained below, we conclude that the *Rapanos* plurality was correct: the CWA's use of "waters" encompasses "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" 547 U.S., at 739, 126 S.Ct. 2208 (quoting Webster's New International Dictionary 2882 (2d ed. 1954) (Webster's Second); original alterations omitted).

- But what about wetlands?


3 Although the ordinary meaning of "waters" in § 1362(7) might seem to exclude all wetlands, we do not view that provision in isolation. The meaning of a word "may only become evident when placed in context," \*675 *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000), and statutory context shows that some wetlands \*\*1339 qualify as "waters of the United States."

# *Sackett v EPA*, 598 US 651

- Because §1344(g)(1) “includes” adjacent wetlands within the definition of WOTUS, “these wetlands must qualify as ‘waters of the United States’ in their own right.
- **In other words, they must be indistinguishably part of a body of water that itself constitutes ‘waters’ under the CWA.”**

# Sackett v EPA, 598 US 651

- But doesn't "adjacent" mean "next to?"



5 6 This understanding  
"adjacent" may mean either  
International Dictionary 26 (1993)  
"adjoining" and "neighboring."  
an exercise in ascertaining 'the  
131 S.Ct. 1177, 179 L.Ed.2d 1133 (1997).  
effect that is compatible with  
484 U.S. 365, 371, 108 S.Ct. 656 (1992).  
cannot be considered part of

acent." Dictionaries tell us that the term  
tionary 25; see Webster's Third New  
& Thesaurus 16 (2d ed. 2009) (listing  
"construing statutory language is not merely  
ibilities," *FCC v. AT&T Inc.*, 562 U.S. 397, 407,  
only one ... meanin[g] produces a substantive  
*v. Timbers of Inwood Forest Associates, Ltd.*,  
separate from traditional navigable waters  
by.

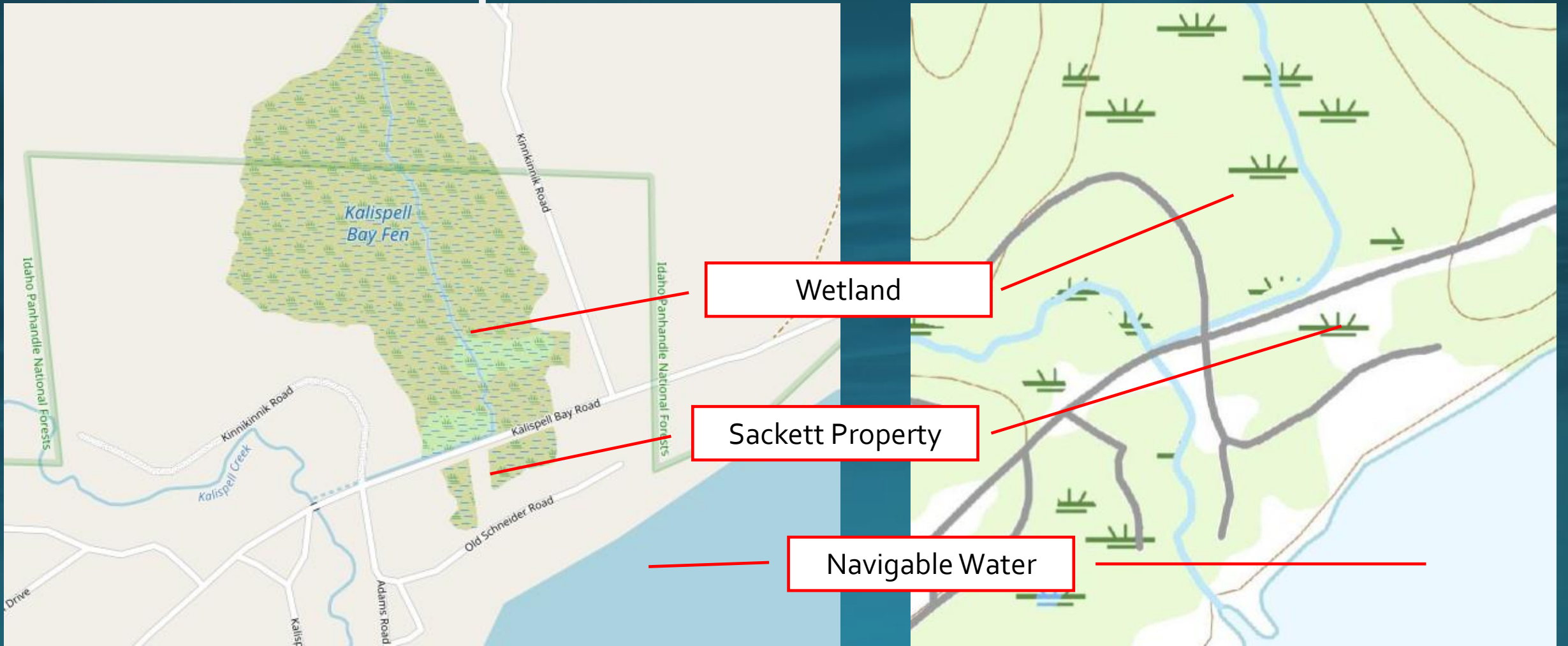
# *Sackett v EPA*, 598 US 651

- When is a wetland “indistinguishable” from traditional waters?
  - When there is a “**continuous surface connection**” such that “there is no clear demarcation between ‘waters’ and ‘wetlands.’”

# *Sackett v EPA*, 598 US 651

9 In sum, we hold that the CWA extends to only those wetlands that are “as a practical matter indistinguishable from waters of the United States.” *Rapanos*, 547 U.S., at 755, 126 S.Ct. 2208 (plurality opinion) (emphasis deleted). This requires the party asserting jurisdiction over adjacent wetlands to establish “first, that the adjacent [body of water constitutes] ... ‘water[s] of the United States,’ (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine \*679 where the ‘water’ ends and the ‘wetland’ begins.” *Id.*, at 742, 126 S.Ct. 2208.

# Sackett Opinion on its Own Terms



Source: Historic Aerials

# EPA/USACE: August 2023 Rule

- August 29, 2023: Final rule to amend the definition of WOTUS to “conform” with *Sackett*

## ***Changes that the agencies have made to the January 2023 Rule categories:***

<b>Jurisdictional Category</b>	<b>Key Changes to the January 2023 Rule Regulation Text</b>	<b>Regulatory Text Paragraph</b>
<b>Traditional Navigable Waters</b>	No changes	(a)(1)
<b>Territorial Seas</b>	No changes	(a)(1)
<b>Interstate Waters</b>	Removing interstate wetlands from the text of the interstate waters provision	(a)(1)
<b>Impoundments</b>	No changes	(a)(2)
<b>Tributaries</b>	Removing the significant nexus standard	(a)(3)
<b>Adjacent Wetlands</b>	Removing the significant nexus standard	(a)(4)
<b>Additional Waters</b>	Removing the significant nexus standard; removing wetlands and streams from the text of the provision	(a)(5)

# *EPA/USACE: August 2023 Rule*

- Similarly, the new rule is “immediately effective” pursuant to APA.
- Rulemaking acknowledges *Sackett* made clear that:
  - The “significant nexus” test is no longer viable
  - The regulatory definition of “adjacent” must be narrowed to continuous surface connection
  - Wetlands cannot be considered jurisdictional purely because they are interstate



# Post *Sackett* Implementation

# Corps of Engineers – internal memorandums

- 1<sup>st</sup> - strict interpretation of Sackett
  - Only surface connection – relatively permanent or continuously flowing
- A few days later - a 2<sup>nd</sup> much broader approach
  - No significant nexus necessary, only need connecting feature (does not matter how it flows)
  - Groundwater can make that connection
  - Using prior Corps Raponos guidance for “relatively permanent”

# EPA – Corps of Engineers September 27, 2023 Memorandum

**II. Specified Draft Approved Jurisdictional Determination Coordination Requirements: Local Level Review of Draft Approved Jurisdictional Determinations.** All draft approved JDs assessing wetlands under paragraph (a)(4) and waters under paragraph (a)(5) of the 2023 rule, as amended shall be coordinated at the local level in accordance with the procedures in this memorandum. Such draft approved JDs may be elevated to the headquarters level of the agencies (HQ) under section II.D below. Draft approved JDs shall be coordinated for the specified categories of waters if jurisdiction is being asserted, as well as if jurisdiction is not being asserted.

(4) Wetlands adjacent to the following waters:

(i) Waters identified in paragraph (a)(1) of this section; or

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3)(i) of this section and with a continuous surface connection to those waters;

(5) Intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) of this section:

(i) That are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3)(i) of this section; or

# EPA – Corps of Engineers September 27, 2023 Memorandum (pre-2015 regulatory regime)

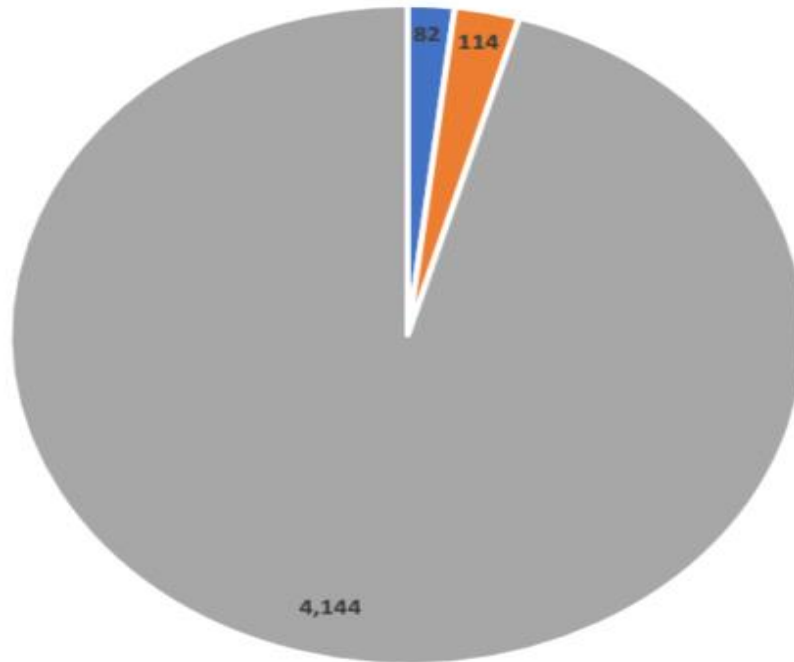
II. Specified Draft Approved Jurisdictional Determination Coordination Requirements: Local Level Review of Draft Approved Jurisdictional Determinations. All draft approved JDs assessing wetlands under paragraph (a)(7) and other waters under paragraph (a)(3) of the 1986 regulations shall be coordinated at the local level in accordance with the procedures in this memorandum. Such draft approved JDs may be elevated to the headquarters level of the agencies (HQ) under section II.D below. Draft approved JDs shall be coordinated for the previously specified categories of waters if jurisdiction is being asserted, as well as if jurisdiction is not being asserted.

(a)(7) **Wetlands adjacent** to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section;

(a)(3) All other waters such as intrastate lakes, **rivers, streams (including intermittent streams)**, mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

# August 2024 memo

Approved JDs Finalized and Draft Approved JDs Elevated to Headquarters Between September 8, 2023 and August 16, 2024



■ Unresolved Draft Approved JDs Elevated to HQ ■ Resolved Draft Approved JDs Elevated to HQ  
■ Total Approved JDs Finalized

# Secret Memos

- FOIA request (numerous independent parties) 1,128 response with most Corps pages redacted
- Local Corps districts instructed to not share this information



# Waters of the State

# Waters of the State

- Why is MDEQ proposing new regulations?
  - “Instead of decreasing regulatory uncertainty, actions at the federal level have increased regulatory uncertainty” – MDEQ November 2023
- Why is MDEQ concerned about this definition?
  - Section 402 NPDES permits
    - Industrial
    - Stormwater
  - Section 401 Water Quality Certifications

# MS Code Ann. §49-17-5(f)

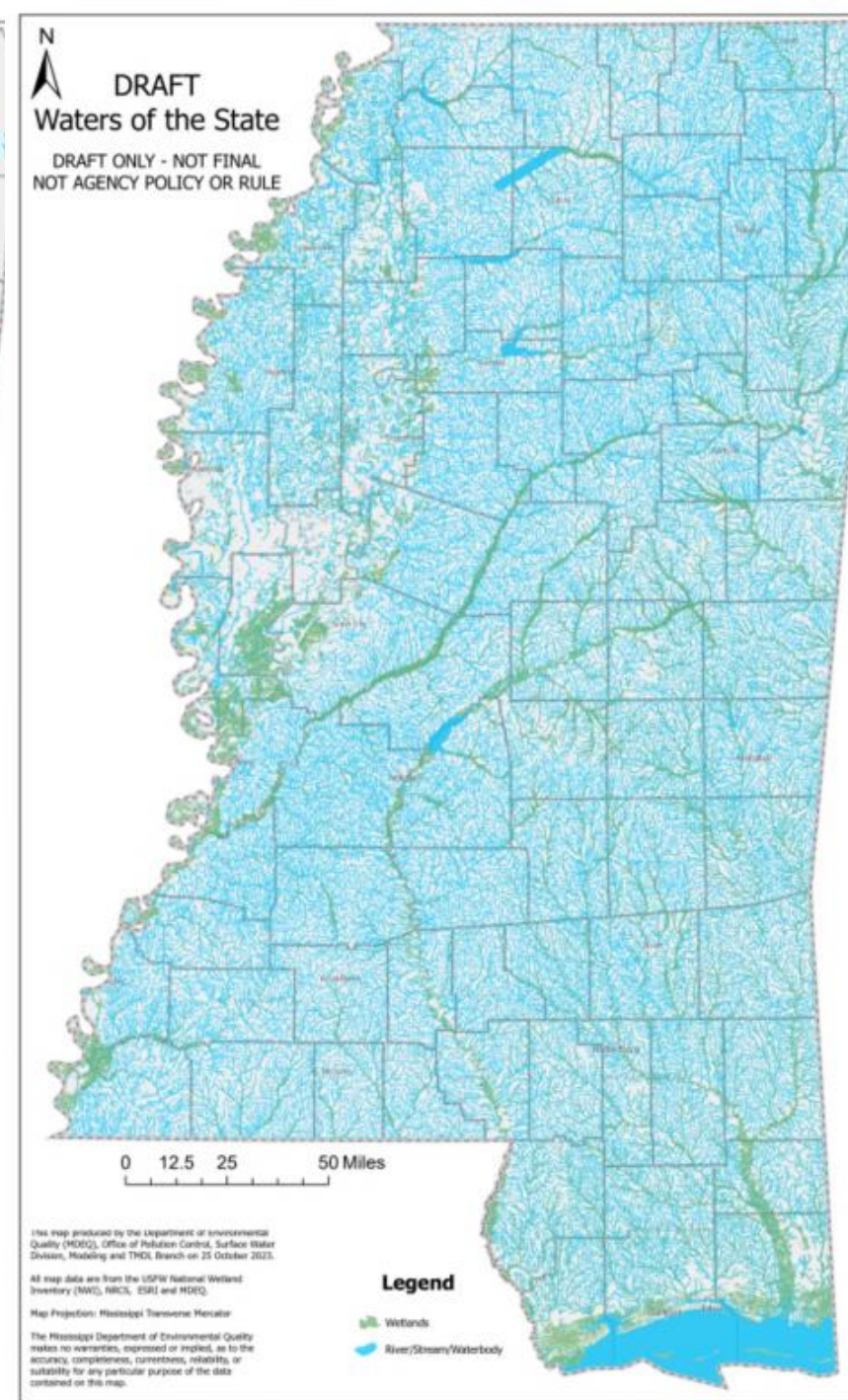
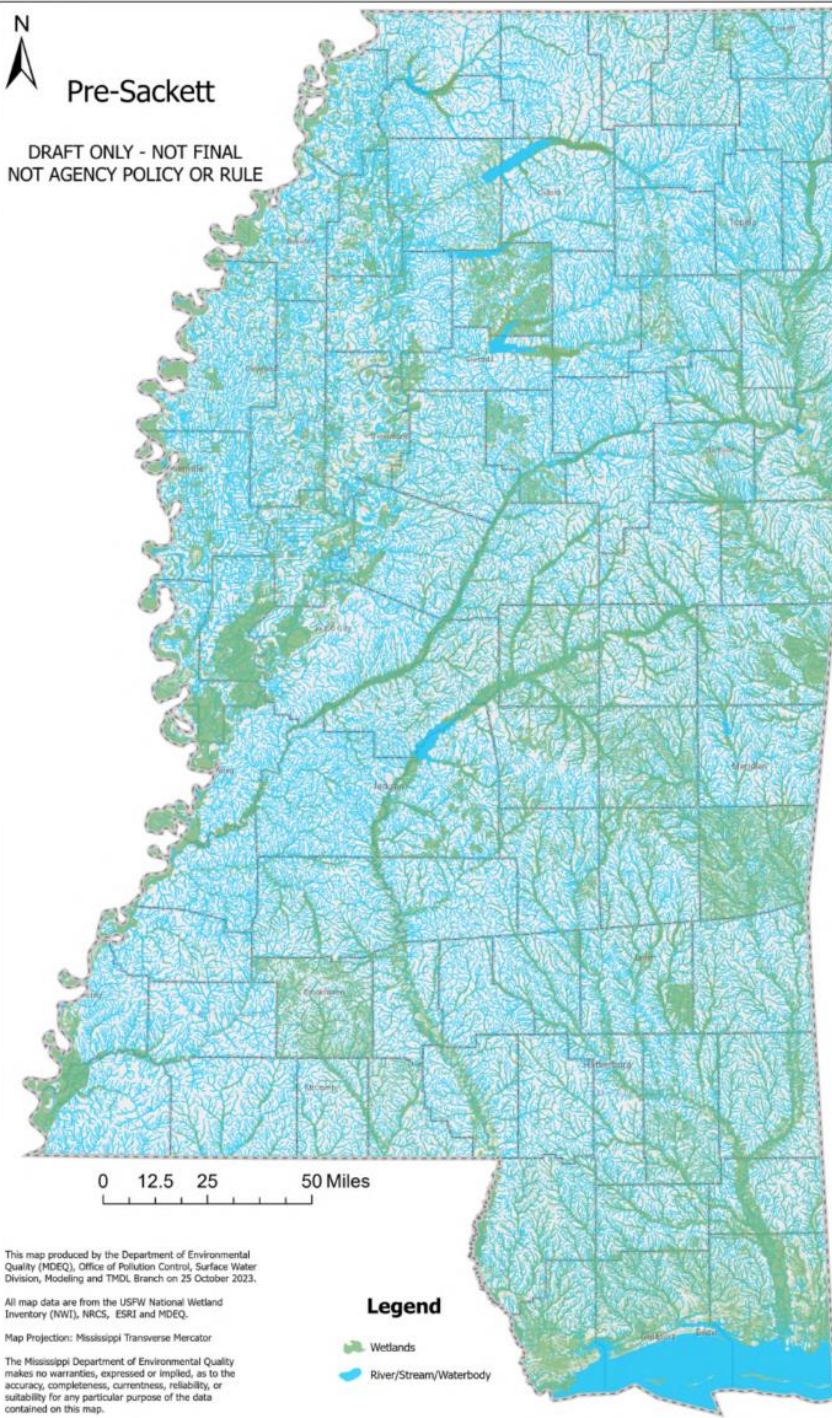
(f) "Waters of the state" means all waters within the jurisdiction of this state, including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, natural or artificial, situated wholly or partly within or bordering upon the state, and such coastal waters as are within the jurisdiction of the state, except lakes, ponds or other surface waters which are wholly landlocked and privately owned, and which are not regulated under the Federal Clean Water Act (33 U.S.C. 1251 et seq).

# Current Discussion

- Classification of waters
  - Type I – permanent or relatively permanent
  - Type II – Intermittent and seasonable connection to groundwater or flow in response to precipitation
  - Type III – standing water that may have seasonal connection to groundwater
  - Type IV – flowing for short periods after rainfall, no contact with groundwater

# Potentially Excluded Waters

- Landlocked and privately held
  - Exempted activities – agriculture
  - Stormwater conveyances not under MS<sub>4</sub>
- 
- BUT – then the MDEQ expresses concerns with such situations as private lakes with multiple owners or discharges into dry ditches that flow to rivers or tributaries



# Questions?

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