



WATERS OF THE U.S. REGULATORY UPDATE

Richard Fontenot
WGA Environmental
March 7th, 2024



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REGULATORY UPDATE

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What Do You Believe Is The Most Significant Concern When Working With Wetlands?



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Predictability and Consistency

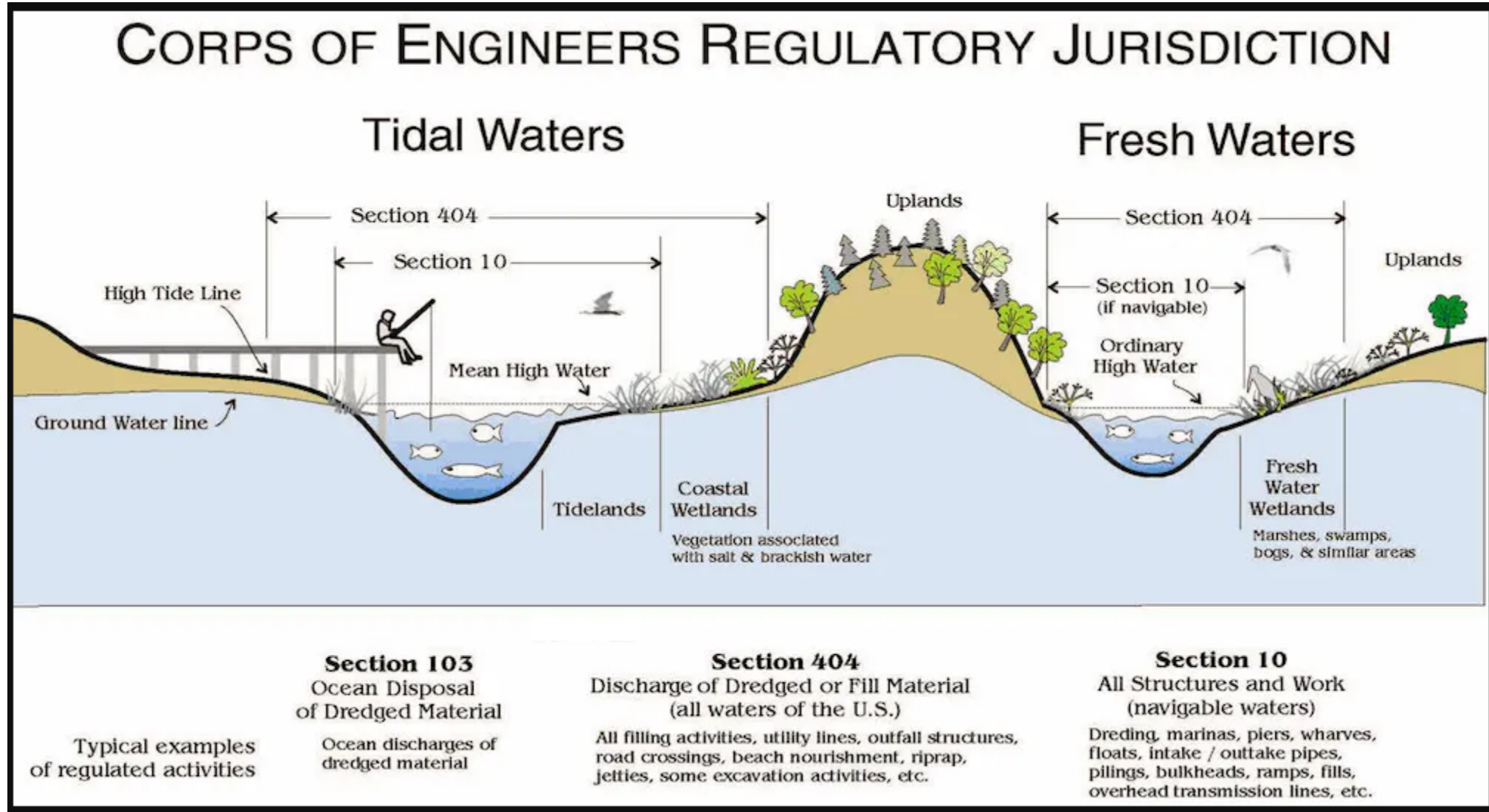


“Consistent with longstanding practice, the agencies will assess these waters based on the best professional judgment informed by the best available information.”

**- DEPARTMENT OF DEFENSE
Revised Definition of “Waters of the United States”
December 28, 2022**



CORPS OF ENGINEERS PERMITTING



WHAT IS A USACE & WOTUS WETLAND?



WETLAND DETERMINATION DATA FORM - Wetlands 1

Project Name: _____ City/County: _____ State: _____ Section: _____
 Investigator: _____ Title: _____ Stationing: _____
 Location (Address, Street, etc.): _____ Local water courses, stream, drainage, etc.: _____
 Date: _____
 Wetland Use Name: _____
 Are there hydrologic conditions on the site important to the use of it? Yes/No
 Are there hydrologic conditions on the site important to the use of it? Yes/No
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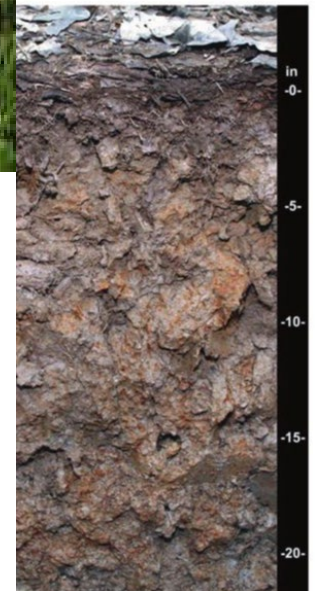
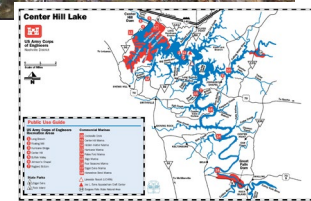
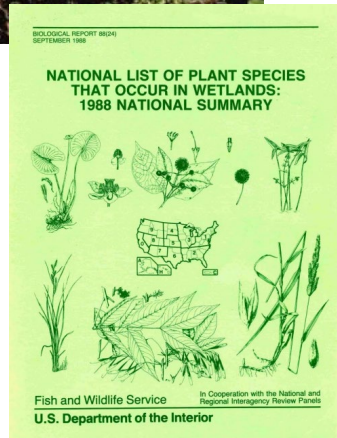
SUMMARY OF FINDINGS - Attach site map showing sampling points

Wetland Use Name: _____
 Wetland Use Name: _____
 Wetland Use Name: _____

VEGETATION - Use scientific names of plants.

Date/Station	Photo	Species	Abundance	Notes
1				
2				
3				
4				
5				
6				
7				
8				
9				
10				
11				
12				
13				
14				
15				
16				
17				
18				
19				
20				

US Army Corps of Engineers Hunter, Matthews, Yarnall, and Clark - Version 3.0



Vegetation

Hydrology

Soils

WHO MAKES THE RULES?

- Rules are constantly being challenged between Developers and Environmentalists and are often changing.
- EPA delegates authority and responsibility to the USACE
- POTUS influences EPA policy changes
- SCOTUS decisions affect policy interpretation and implementation of new rules



2 Current Recent Rule Changes

- EPA's New "Durable" Rule
- Sackett v. Environmental Protection Agency

WHO DECIDES WHAT IS A WETLAND?

Wetland ≠ Wetland



US Army Corps of Engineers®

- Defines “Wetlands” so that these features can be regulated as Waters of the U.S. by the Clean Water Act
- Limited EPA Database
- Must Meet all 3 of 3 Wetland Indicator Criteria
 - Vegetation
 - Hydrology
 - Soils
- Requires an On-The-Ground Field Survey
- Permitting requires a Wetlands Delineation Report

Differing Identification & Mapping Methodologies



- Congress enacted the Emergency Wetlands Resources Act of 1986 which directs the U.S. Fish and Wildlife Service to map America’s “Wetlands”
- Has An Excellent Online Database
- Just Needs 1 of 3 Wetland Indicator Criteria
 - Hydrology
- Aerial Photography Interpretation Is Good Enough
- No Survey & Mapping Accuracy Standard

"DURABLE" RULE

“This rule establishes a durable definition of “waters of the United States” that is grounded in the authority provided by Congress in the Clean Water Act, the best available science, and extensive implementation experience stewarding the nation’s waters.”

“On December 30, 2022, the agencies announced the final "Revised Definition of 'Waters of the United States'" rule. On January 18, 2023, the rule was published in the *Federal Register* and the rule took effect on March 20, 2023. More information about the final January 2023 Rule is available below. ”

600 Pages (Double Spaced)



https://www.epa.gov/wotus

An official website of the United States government [Here's how you know](#)

EPA United States Environmental Protection Agency

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CONTACT US

Waters of the United States

EPA and the Army Issue Final Rule to Amend 2023 Rule

On August 29, 2023, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers issued a final rule that amends the "[Revised Definition of 'Waters of the United States'](#)" to conform key aspects of the regulatory text to the U.S. Supreme Court's May 25, 2023 decision in the case of *Sackett v. Environmental Protection Agency*. The conforming rule, "Revised Definition of 'Waters of the United States'; Conforming," published in the *Federal Register* and became effective on September 8, 2023.

[Read the press release.](#)

[More information about the final conforming rule can be found here.](#)

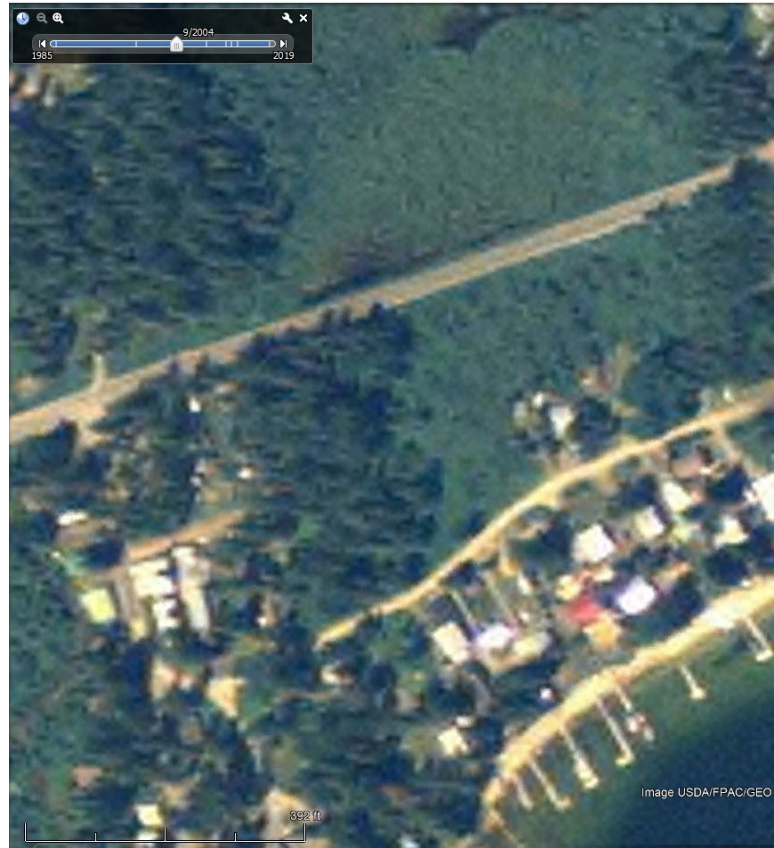
[Read the decision.](#)

“Consistent with longstanding practice, the agencies will assess these waters based on the best professional judgment informed by the best available information.”

**- DEPARTMENT OF DEFENSE
Revised Definition of “Waters of the United States”
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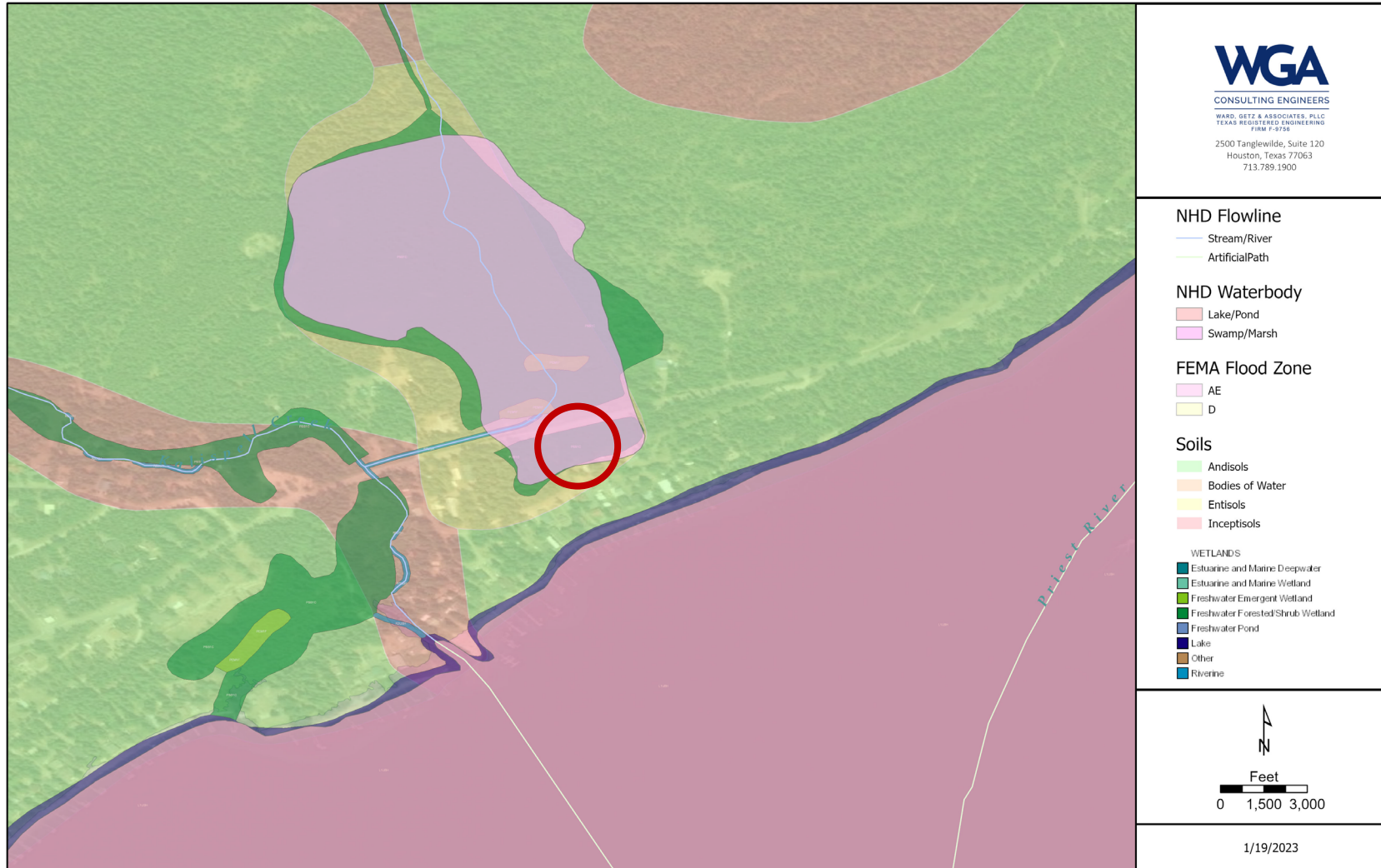
SACKETT V. EPA



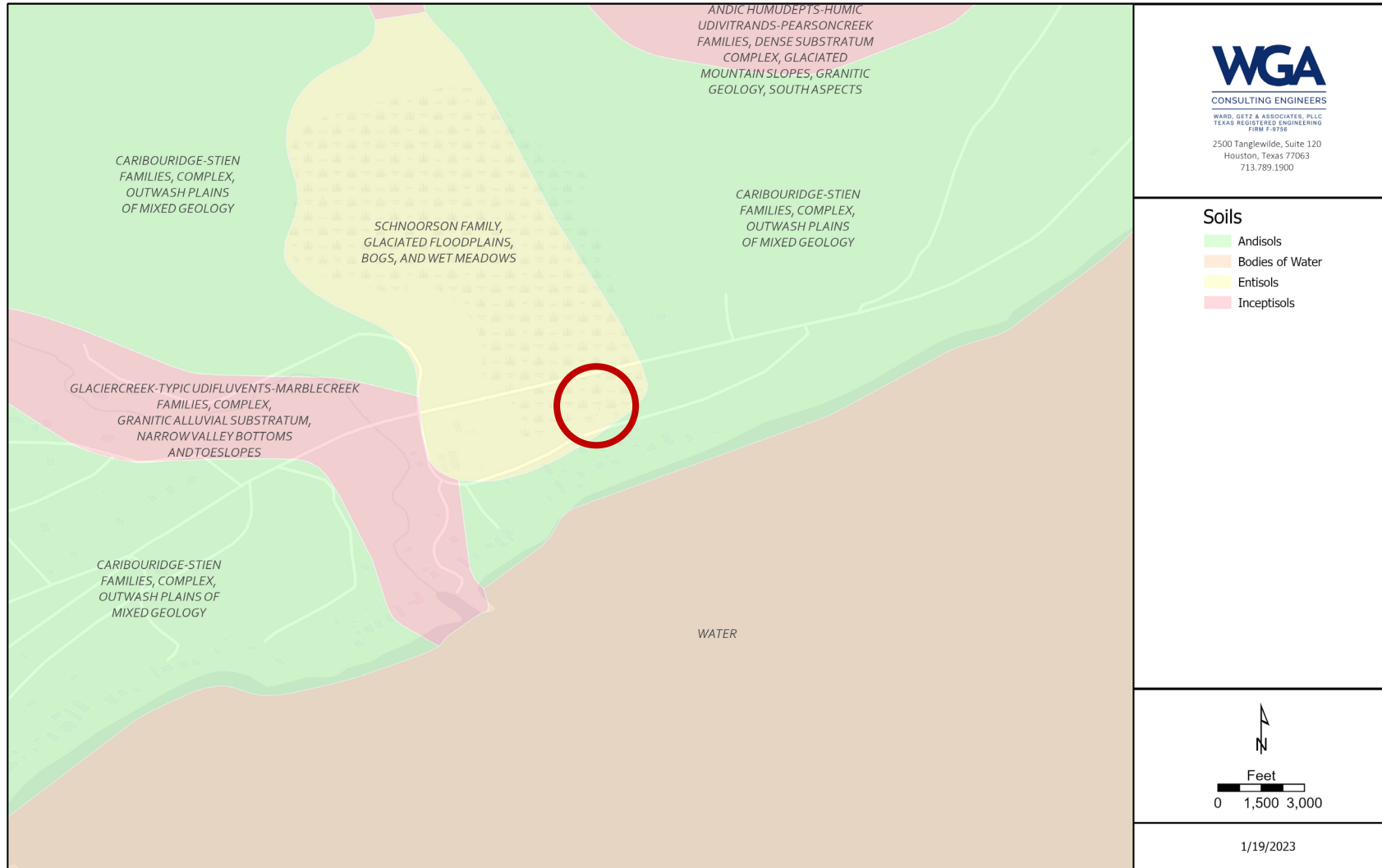
EVALUATION OF WOTUS



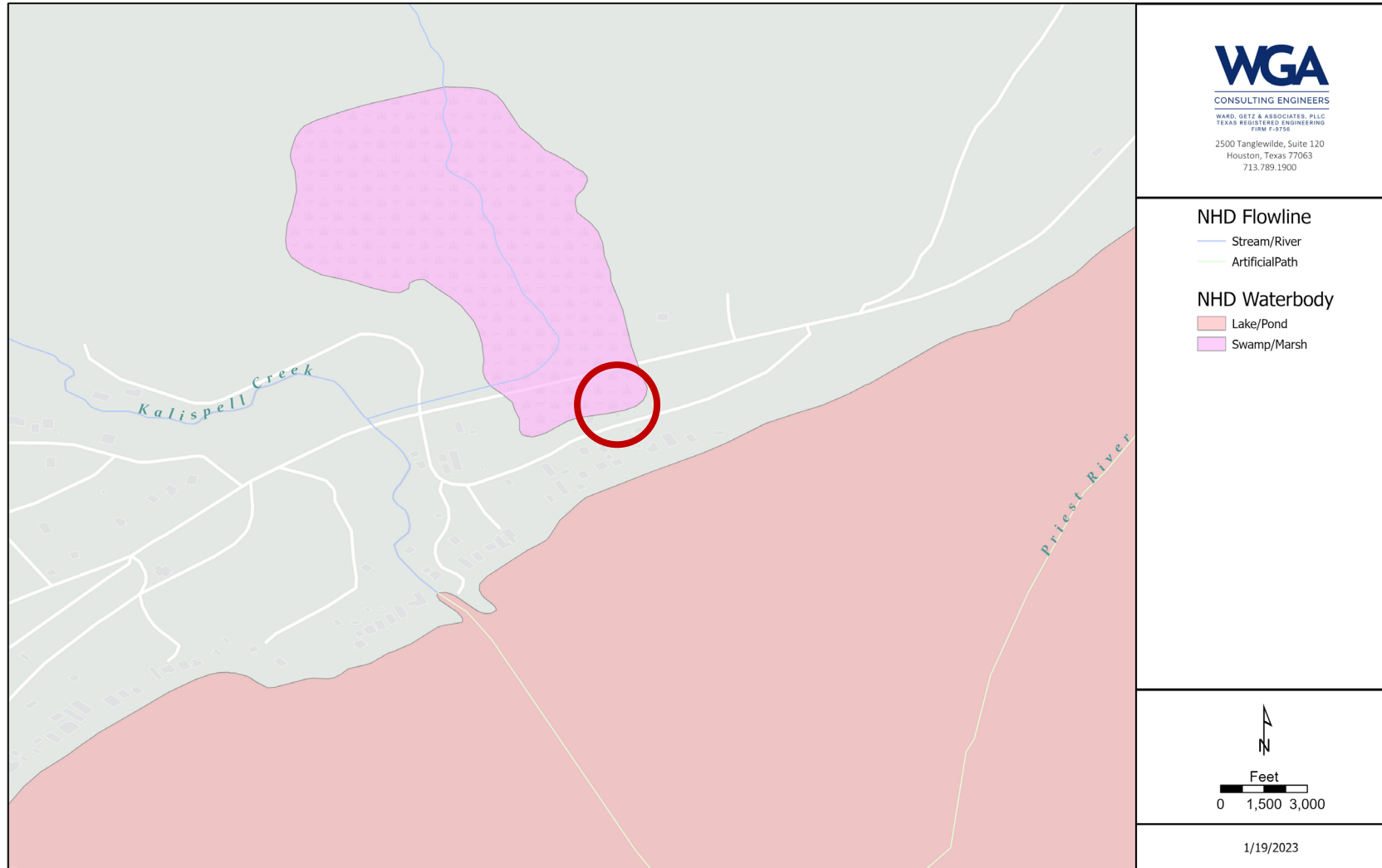
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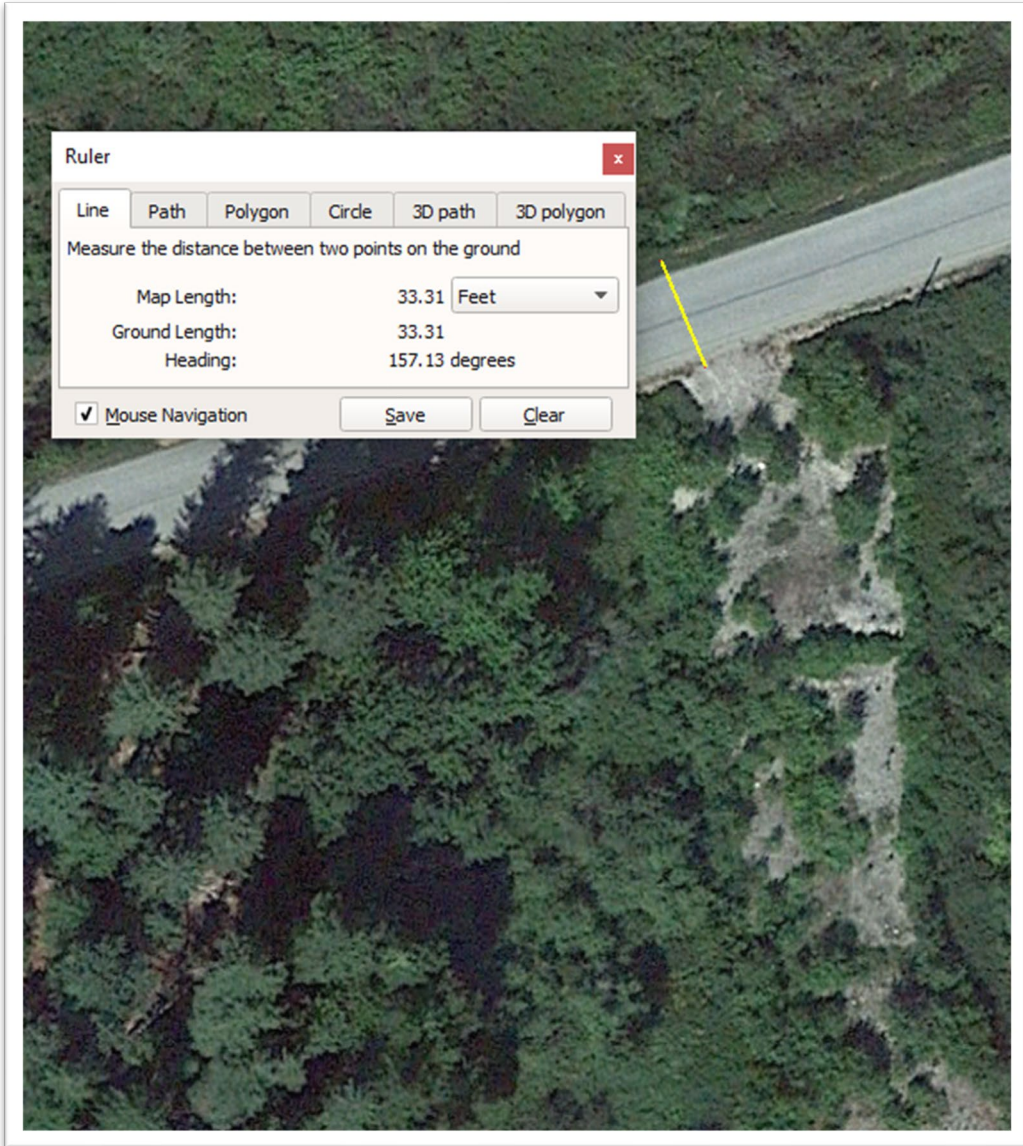
EVALUATION OF WOTUS



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SACKETT V. EPA



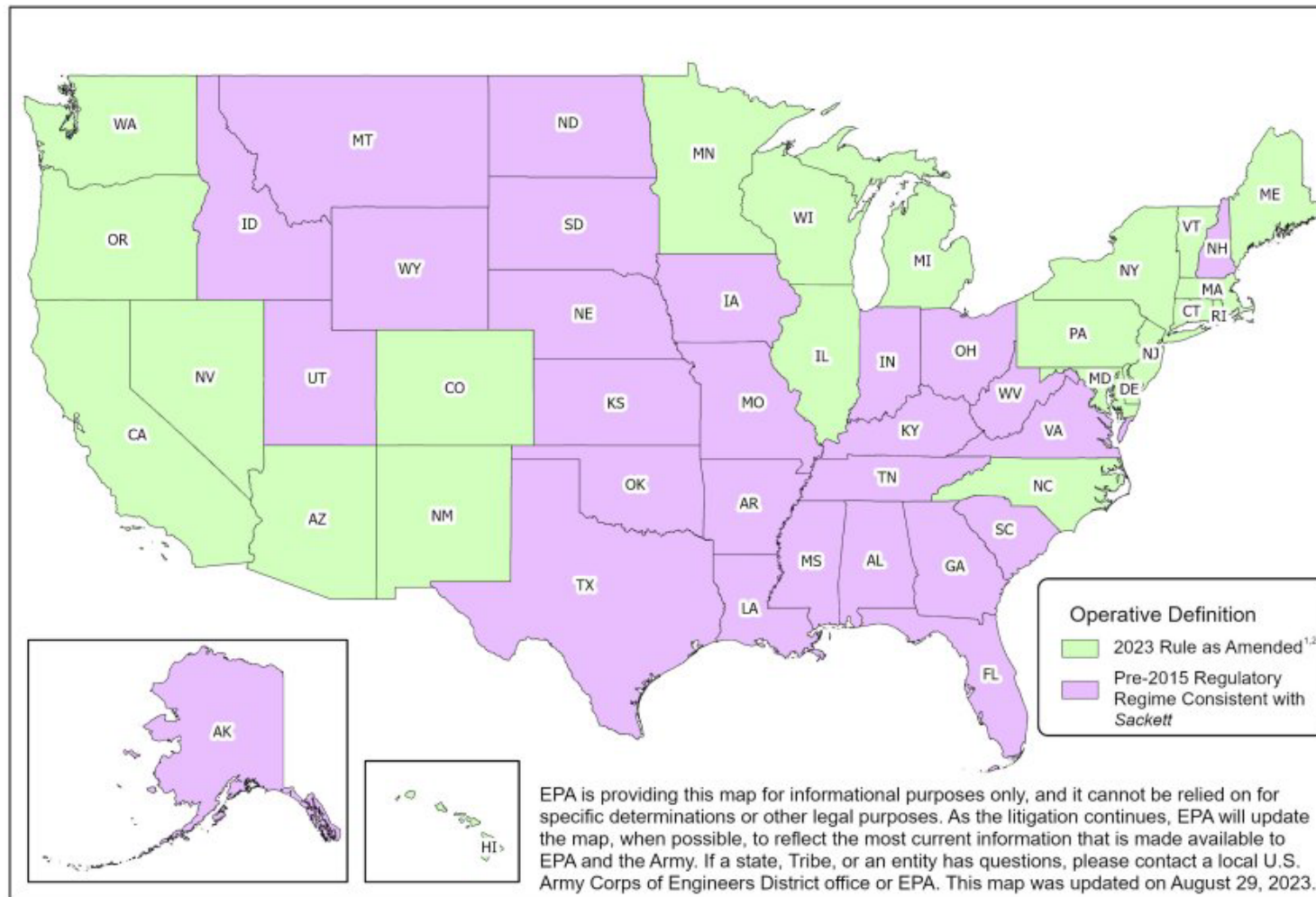
On August 29, 2023, the EPA issued a final rule to amend the final “Revised Definition of ‘Waters of the United States’” rule, published in the Federal Register on January 18, 2023.

This final rule conforms the definition of “waters of the United States” to the U.S. Supreme Court’s May 25, 2023, decision in the case of Sackett v. Environmental Protection Agency.

Parts of the January 2023 Rule are invalid under the Supreme Court’s interpretation of the Clean Water Act in the Sackett decision.

The conforming rule, “Revised Definition of ‘Waters of the United States’” became effective on September 8, 2023.

Operative Definition of "Waters of the United States"



¹Also operative in the U.S. territories and the District of Columbia

²The 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).

Changes that the agencies have made to the January 2023 Rule definitions:

Definition	Key Changes to the January 2023 Rule Regulation Text	Regulatory Text Paragraph
Wetlands	No changes	(c)(1)
Adjacent	Revised definition to mean "having a continuous surface connection."	(c)(2)
High tide line	No changes	(c)(3)
Ordinary high water mark	No changes	(c)(4)
Tidal waters	No changes	(c)(5)
Significantly affect	Deleted definition	(c)(6)

No Changes to the Exclusions from “Waters of the United States”

The amendments to the January 2023 Rule do not change the eight exclusions from the definition of “waters of the United States” that provide clarity, consistency, and certainty. **The exclusions are:**

- **Prior converted cropland**, adopting USDA’s definition and generally excluding wetlands that were converted to cropland prior to December 23, 1985.
- **Waste treatment systems**, including treatment ponds or lagoons that are designed to meet the requirements of the Clean Water Act.
- **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 that are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
- **Artificial reflecting pools or swimming pools**, and other small ornamental bodies of water created by excavating or diking dry land.
- **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 operation is abandoned and the resulting body of water meets the definition of “waters of the United States.”
- **Swales and erosional features** (e.g., gullies, small washes), that are characterized by low volume, infrequent, or short duration flow.

Targeted Changes to January 2023 Rule Jurisdictional Waters

(a)(3) tributaries revised to delete significant nexus standard →

(3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section:

~~(i) That~~ are relatively permanent, standing or continuously flowing bodies of water; ~~or~~

~~(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section;~~

Targeted Changes to January 2023 Rule Jurisdictional Waters

**(a)(5) additional waters
revised to delete significant
nexus standard and delete
streams and wetlands →**

(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~~

~~(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section.~~

EVALUATION OF WOTUS

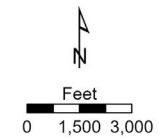


WGA

CONSULTING ENGINEERS

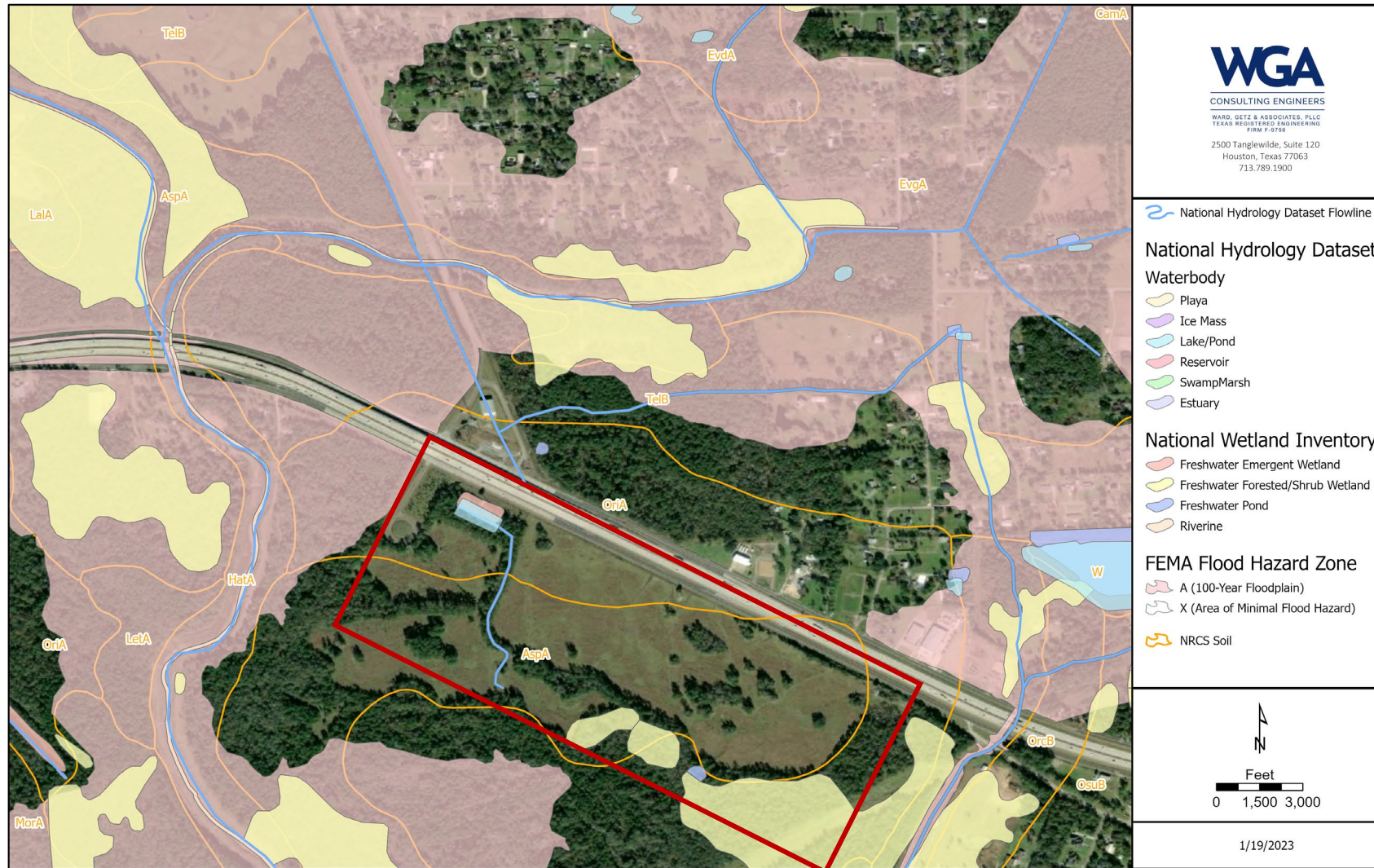
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1/19/2023

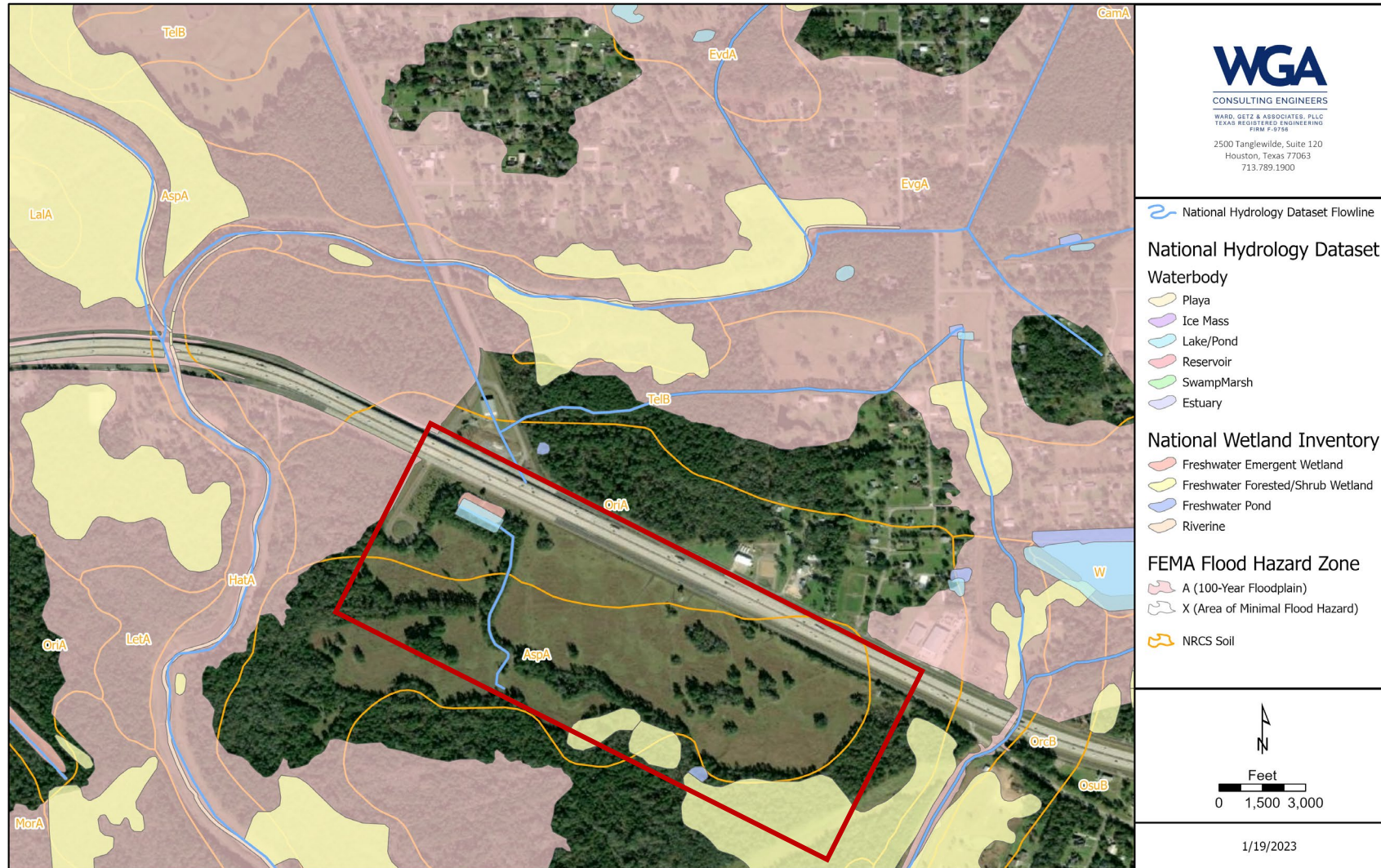
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info@wga-llp.com

Or contact me directly at

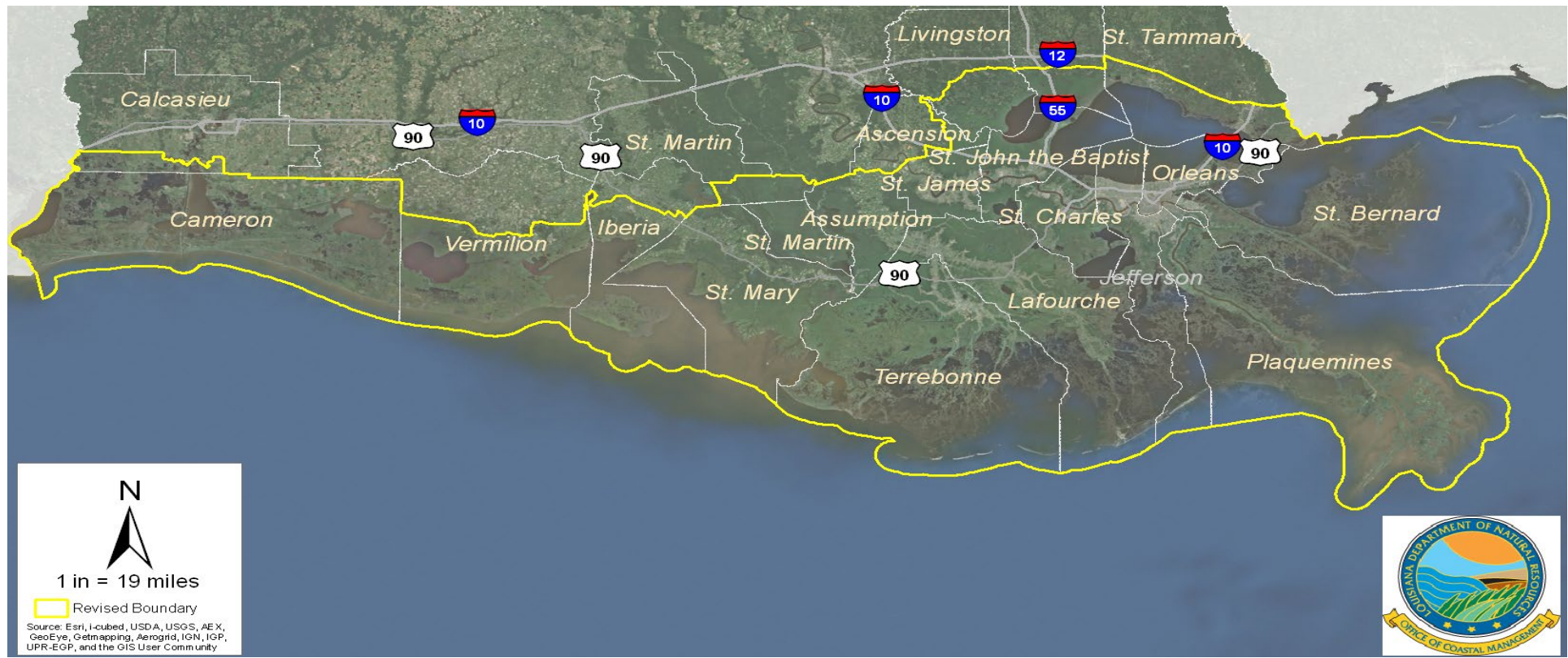
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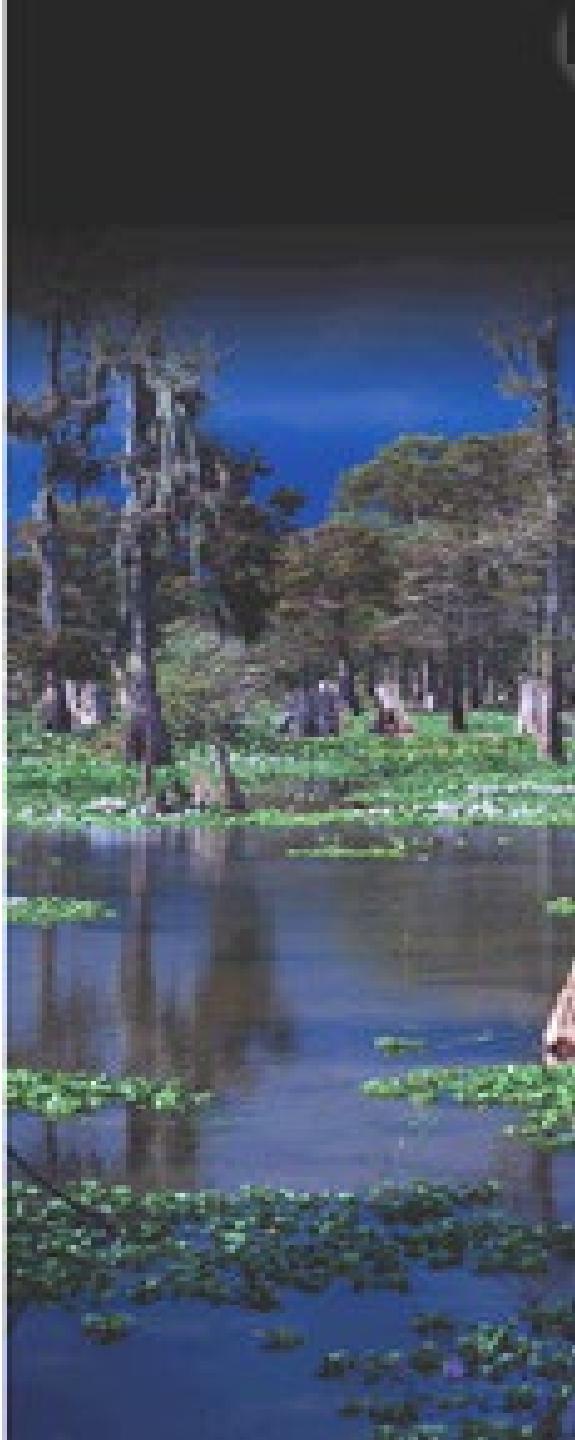
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The Louisiana Coastal Zone

Ascension, Assumption, Calcasieu, Cameron, Iberia, Jefferson, Lafourche, Livingston, Orleans, Plaquemines, St. Bernard, St. Charles, St. James, St. John the Baptist, St. Martin, St. Mary, St. Tammany, Tangipahoa, Terrebonne, Vermilion





OCM's Regulatory Role

Regulate all types of activities within the LA Coastal Zone that may have an impact on coastal resources

Balance Development vs. Conservation

Balance Multiple Uses vs. Limited Resources



OCM Objectives

AVOID

Can adverse impacts to coastal waters be avoided by relocating or redesigning project?

MINIMIZE

Can adverse impacts to coastal waters be minimized by utilizing less damaging construction techniques?

MITIGATE

Compensation for loss of habitat value