



MEMORANDUM TO RE-EVALUATE JURISDICTION FOR SAS-2001-13740

Summary

For SAS-2001-13740, the U.S. Environmental Protection Agency (EPA) and the Office of the Assistant Secretary of the Army for Civil Works (OASACW) at the U.S. Department of the Army are returning the draft approved jurisdictional determination (JD) to the Savannah District to re-evaluate the jurisdictional status of Detention Pond 001, Detention Pond 002, and any ditches in the review area. The agencies also recommend re-evaluating Wetland 01 and Wetland 02.

On May 25, 2023, the Supreme Court decided *Sackett v. EPA* and concluded that the *Rapanos* plurality established the proper jurisdictional standard under the Clean Water Act (CWA) for relatively permanent waters and adjacent wetlands. 598 U.S. 651 (2023). The question of how to apply the waste treatment system exclusion was not affected by the decision in *Sackett*.¹ In the jurisdictions and for the parties where the January 2023 Rule is enjoined, such as in Georgia, the agencies are interpreting “waters of the United States” consistent with the pre-2015 regulatory regime² and the Supreme Court's decision in *Sackett*. The direction in this memorandum is consistent with the CWA and the agencies’ regulations under the pre-2015 regulatory regime consistent with *Sackett* at 33 CFR 328.3 (2014) and 40 CFR 230.3 (2014). In providing this direction, we have also utilized relevant case law and existing guidance, including the legal memorandum *Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States* (“*Rapanos Guidance*”).

¹ The question of how to identify waste treatment systems for purposes of assessing them for jurisdiction was not affected by the decision in *Sackett* for either of the regulatory regimes that are currently operative across the country due to ongoing litigation (i.e., the amended 2023 rule and the pre-2015 regulatory regime being implemented consistent with *Sackett*).

² The “pre-2015 regulatory regime” refers to the agencies’ pre-2015 definition of “waters of the United States,” implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience. Additionally, the agencies are interpreting the phrase “waters of the United States” consistent with the Supreme Court’s decision in *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023).

I. The Jurisdictional Status of Detention Pond 001, Detention Pond 002, and Any Ditches in the Review Area Should Be Re-Evaluated

The draft approved JD covers an approximately 69.18-acre site located in Flemington, Liberty County, Georgia at 31.8525 North latitude and -81.5707 West longitude. Detention Pond 001 (2.30 acres), Detention Pond 002 (2.92 acres), and ditches in the review area were determined to meet the waste treatment system exclusion under the pre-2015 regulations, based on the fact that they are part of approved CWA section 402 National Pollutant Discharge Elimination System (NPDES) permitted stormwater plans.

Under the pre-2015 regulations, waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA are not waters of the United States. 33 CFR 328.3 (2014). The pre-2015 regulations do not include an exclusion specifically for stormwater features, and stormwater features have been assessed on a case-by-case basis to determine if they are jurisdictional. For example, some stormwater features may qualify as “generally non-jurisdictional” ditches per the language in the 2008 *Rapanos* Guidance. As another example, some stormwater features may be jurisdictional as paragraph (a)(5) tributaries under the pre-2015 regulations.

In order to be covered by the regulatory exclusion, a waste treatment system must be “designed to meet the requirements of the Clean Water Act.” 33 CFR 328.3 (2014). A waste treatment system may be “designed to meet the requirements of the Clean Water Act” where, for example, it is constructed pursuant to a CWA section 404 permit, *Ohio Valley Envtl. Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 214–15 (4th Cir. 2009), or where it is “incorporated in an NPDES permit as part of a treatment system,” *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1001 (9th Cir. 2007).

However, waters that are part of an approved NPDES permit for stormwater are not automatically covered under the waste treatment system exclusion. As a threshold matter, the waters must function as a waste treatment system and serve a treatment purpose to be covered under the waste treatment system exclusion. Here, the draft approved JD does not provide sufficient evidence that Detention Pond 001, Detention Pond 002, and the ditches on site are functioning as a waste treatment system. Therefore, the draft approved JD does not provide sufficient evidence that the features are eligible for the waste treatment system exclusion.

The waste treatment system exclusion has been applied to a variety of systems that are functioning as waste treatment systems and are designed to meet the requirements of the CWA. For example, a 2006 letter³ from the EPA to OASACW clarifies that the waste treatment system exclusion continues to apply to the creation or use of a waste treatment system in waters below a valley fill permitted by the Corps under CWA

³ Letter from Benjamin Grumbles, EPA Assistant Administrator for the Office of Water, to John Paul Woodley, Assistant Secretary of the Army (Civil Works) (Mar. 1, 2006).

section 404, whereby sediment enters the stream below the valley fill, and the sediment-laden water flows downstream to a settling pond located as close as practicable to the toe of the valley fill.⁴ The waste treatment system exclusion has also been applied to cooling ponds where, for example, the cooling pond is designed and constructed to be used as treatment for waste heat⁵ such that discharges from the system, if any, comply with permit requirements.⁶

II. The Agencies Also Recommend Re-evaluating Wetland 01 and Wetland 02 to Determine If They Are “One Wetland”

The draft approved JD also evaluates the jurisdictional status of wetland areas identified as Wetland 01 and Wetland 02. The agencies recommend that the Savannah District review the “Memorandum to Re-evaluate Jurisdiction for NWO-2003-60436”⁷ and re-evaluate whether Wetland 01 and Wetland 02 are in fact “one wetland” connected by a culvert.

III. Conclusion

The agencies are returning the draft approved JD to the Savannah District to re-evaluate the jurisdictional status of Detention Pond 001, Detention Pond 002, and the ditches on site. If these waters and features are determined to be covered under the waste treatment system exclusion, specific supporting information, including information regarding how the waters are serving a treatment purpose, should be provided in the draft approved JD. The agencies also recommend re-evaluating Wetland 01 and Wetland 02.

⁴ The letter further notes that EPA and states ensure that the waste treatment systems meet the requirements of the CWA through the section 404 permitting process for discharges of dredged or fill material, the section 402 permitting process for discharges from the sediment pond, and the section 401 certification process. All three programs ensure that the system is constructed and operated in compliance with the CWA.

⁵ The term “pollutant” under the CWA includes “heat,” and thus discharges of heated wastewater (i.e., thermal discharges) are regulated under the Act. 33 U.S.C. § 1362(6).

⁶ See, e.g., Order, *In re Arizona Public Service Co.*, No. 19-06 (EPA Env'tl. App. Bd., Sept. 30, 2020) (upholding application of the waste treatment system exclusion to a cooling pond serving a treatment function by dissipating waste heat discharged from a power plant).

⁷ See https://www.epa.gov/system/files/documents/2024-01/nwo-2003-60436-joint-decision-memo_final_12-18-23_508c.pdf

MEMORANDUM TO RE-EVALUATE JURISDICTION FOR SAS-2001-13740

Russell L. Kaiser Digitally signed by Russell L. Kaiser
Date: 2024.02.16 16:23:44 -05'00'

Russell Kaiser, Acting Director
Oceans, Wetlands, and Communities Division
Office of Water
U.S. Environmental Protection Agency

JENSEN.STACEY.MARIE Digitally signed by JENSEN.STACEY.MARIE
Date: 2024.02.16 15:41:27 -05'00'

Stacey Jensen, Acting Director of Policy
and Legislation
Office of the Assistant Secretary of
the Army (Civil Works)
U.S. Department of the Army