



MEMORANDUM ON NWK-2024-00392

Summary

For NWK-2024-00392, 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 Kansas City District for any revisions that may be necessary, consistent with this memorandum regarding when certain swales and non-relatively permanent streams can provide the requisite continuous surface connection for wetlands evaluated as paragraph (a)(7) adjacent wetlands under the pre-2015 regulatory regime, consistent with the Supreme Court’s decision in *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023).¹

On May 25, 2023, the Supreme Court decided *Sackett* and concluded that the plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), established the proper jurisdictional standard under the Clean Water Act (CWA) for relatively permanent waters and adjacent wetlands. To be covered under the CWA, adjacent wetlands must satisfy the standard first established by the plurality in *Rapanos* and now adopted by a majority of the Court in *Sackett*—that the wetlands have a continuous surface connection to waters that are “waters of the United States” in their own right. The direction in this memorandum is consistent with the CWA, the agencies’ regulations under the pre-2015 regulatory regime at 33 CFR 328.3 (2014) and 40 CFR 230.3 (2014), and *Sackett*. 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)*, consistent with *Sackett*.²

¹ 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. The pre-2015 definition of “waters of the United States” is also referred to as the Corps’ 1986 regulations and EPA’s 1988 regulations, inclusive of the exclusion for prior converted cropland, which both agencies added in 1993. See 33 CFR 328.3 (2014) and 40 CFR 230.3(s) (2014). It is the pre-2015 regulatory regime that is currently operative in the State of Missouri. The Clean Water Act and EPA and Corps regulations, interpreted consistent with the *Sackett* decision, contain legally binding requirements. This memorandum does not substitute for those provisions or regulations, nor is it a regulation itself. Thus, this memorandum does not impose legally binding requirements on EPA, the Corps, Tribes, States, or the regulated community, and may or may not apply to a particular situation based upon the circumstances.

² There are two regulatory regimes that are operative across the country due to ongoing litigation: the “amended 2023 rule” which is the “Revised Definition of ‘Waters of the United States,’” 88 Fed. Reg. 3004 (January 18, 2023) (“2023 rule”) as amended by the final rule “Revised Definition of ‘Waters of the United States’; Conforming,” 88 Fed. Reg. 61,964 (Sept. 8, 2023) (“conforming rule”) (codified at 33 CFR 328.3 (Corps) & 40 CFR 120.2 (EPA)); and the pre-2015 regulatory regime.

I. Assessment of “Adjacent” Wetlands Consistent with *Sackett*

Under the pre-2015 regulatory regime, and consistent with the *Rapanos* plurality and *Sackett*, adjacent wetlands are jurisdictional when they have a continuous surface connection with traditional navigable waters, the territorial seas, interstate waters, relatively permanent jurisdictional impoundments, or relatively permanent tributaries. See 33 CFR 328.3(a)(4) and 40 CFR 120.2(a)(4). *Sackett*: (1) adopted the “continuous surface connection” requirement from the *Rapanos* plurality; (2) held that adjacent wetlands must have a “continuous surface connection” with covered waters to qualify as “waters of the United States”; and (3) explained that wetlands are “as a practical matter indistinguishable from waters of the United States”—and therefore are themselves covered—“when” there is a “continuous surface connection” between wetlands and covered waters “so that there is no clear demarcation between ‘waters’ and wetlands.” 598 U.S. at 678 (quoting *Rapanos*, 547 U.S. at 742, 755). Under *Sackett*, the phrase “as a practical matter indistinguishable” is not a separate element of adjacency, nor is it alone determinative of whether adjacent wetlands are “waters of the United States”; rather, the phrase (among others the Supreme Court uses) informs the application of the “continuous surface connection” requirement. The *Rapanos* plurality (which *Sackett* followed) uses phrases like “physical-connection requirement” and “physical-connection criterion” to describe the continuous surface connection requirement. See *Rapanos*, 547 U.S. at 751 n.13 (referring to “our physical-connection requirement”); *id.* at 747 (referring to “a wetland’s physical connection to covered waters”); *id.* at 753 (stating that *Riverside Bayview* held that “all physically connected wetlands are covered” (emphasis in original)); *id.* at 755 (describing wetlands with a “physical connection” to covered waters as practically “indistinguishable” from them); see also, *Sackett*, 598 U.S. at 667 (referencing the *Rapanos* plurality’s conclusion that CWA coverage includes “wetlands with such a close physical connection to [covered] waters”). *Sackett* does not require the agencies to prove that wetlands and covered waters are visually identical. Indeed, as *Sackett* notes, courts have long regarded wetlands that abut covered waters as meeting the continuous surface connection requirement. See, e.g., *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). Further, as judicial decisions applying the familiar test since 2006 illustrate, see, e.g., *United States v. Cundiff*, 555 F.3d 200, 212-13 (6th Cir. 2009), the demonstration that wetlands have a continuous surface connection and so are indistinguishable as a practical matter is a fact-specific one.

As noted above, precedent and the agencies’ experience applying the continuous surface connection requirement demonstrate that the continuous surface connection requirement can be met by a wetland abutting a jurisdictional water. In addition, while the CWA does not require a continuous surface *water* connection between wetlands and covered waters, such evidence can suffice to meet the continuous surface connection requirement. See, e.g., *United States v. Lucas*, 516 F.3d 316, 326-27 (5th Cir. 2008) (considering evidence of kayaking in relatively permanent tributaries and their connected wetlands). Further, depending on the factual context, the requirement can be met when a channel, ditch, swale, pipe, or culvert (regardless of whether such feature would itself be jurisdictional) serves as a physical connection that maintains a continuous surface connection

Because the agencies are interpreting both regulatory regimes that are operative across the country consistent with *Sackett* and the direction in this memorandum is consistent with both operative regulatory regimes, the direction in this memorandum with respect to when a when swales and non-relatively permanent streams can serve as a continuous surface connection for adjacent wetlands is also applicable to the amended 2023 rule.

between an adjacent wetland and a covered water, such as a relatively permanent water connected to a traditional navigable water. *See, e.g., Cundiff*, 555 F.3d at 212-13 (considering evidence of a channel with surface water flow and surface connections between wetlands and relatively permanent water bodies “during storm events, bank full periods, and/or ordinary high flows” and also concluding that “it does not make a difference whether the channel by which water flows from a wetland to a navigable-in-fact waterway or its tributary was manmade or formed naturally;” and, “it does not mean that only perpetually flowing creeks satisfy the plurality’s test”).

II. Depending on the Factual Context, Certain Swales and Non-Relatively Permanent Streams Can Provide the Necessary Continuous Surface Connection

The draft approved JD covers an approximately 23.3-acre study area located in Cole County, Missouri at 38.544480 North latitude and -92.102161 West longitude. The draft approved JD covers several aquatic resources, but this memorandum focuses on Wetland A, which is approximately 0.46 acre in size. The Kansas City District coordinated this draft approved JD with EPA Region 7, and Region 7 subsequently elevated the draft approved JD to the Headquarters offices of EPA and the Corps for review. EPA Headquarters subsequently requested that the draft approved JD be coordinated with the OASACW.

According to the draft approved JD, Wetland A has a continuous surface connection with a downstream relatively permanent tributary that is connected to the Missouri River, a traditional navigable water. The draft approved JD indicates that water flows from the wetland through a 45-foot-long well-defined drainage swale that connects with Stream 1, a non-relatively permanent tributary located within the review area. Stream 1 is described in the draft approved JD as flowing for 305 feet within the review area and an additional 375 feet outside of the review area before connecting to a relatively permanent tributary that connects to a traditional navigable water (as referenced in the paragraph above). The approved JD notes that in total, the relatively permanent tributary is located 725 feet downstream of Wetland A via the swale and Stream 1, a non-relatively permanent tributary. Information in the draft approved JD indicates that Stream 1 has a clear ordinary high water mark with strong evidence of surface water flows in response to precipitation. The draft approved JD concluded that Wetland A is jurisdictional as a paragraph (a)(7) adjacent wetland under the pre-2015 regulatory regime consistent with *Sackett* based on the continuous surface connection ultimately (*i.e.*, via the drainage swale and Stream 1) with the downstream relatively permanent tributary of the Missouri River.

Non-relatively permanent swales and non-relatively permanent streams are features that can serve as all or part of a continuous surface connection depending on the factual context because they can provide evidence that flow is occurring between the wetland and the requisite covered water,³ such that the two features are, as a practical matter, indistinguishable. This is because these features can have physical indicators of flow that provide evidence that the features continuously, physically connect wetlands to jurisdictional waters including during storm events, bank full periods, and/or ordinary high flows. Depending on the factual context, including the length of the connection and

³ As used in this memorandum, a requisite covered water means a traditional navigable water, the territorial seas, an interstate water, a relatively permanent jurisdictional impoundment, or a relatively permanent jurisdictional tributary.

physical indicators of flow, more than one feature⁴ such as a swale or non-relatively permanent tributary can serve as part of a continuous surface connection where they together provide an unimpaired, continuous physical connection to a jurisdictional water.

As a basis for the finding for Wetland A, the draft approved JD indicates that the wetland has a continuous surface connection to the downstream relatively permanent tributary via the approximately 45-foot well-defined drainage swale and the 680-foot non-relatively permanent tributary (Stream 1) described above. The draft approved JD states that the total length of the surface connection between Wetland A and the relatively permanent tributary is 725 feet. The number of connections, the types of connections, the indicators of flow, and length of the connection can all inform whether the continuous surface connection requirement is met. As the length of the connection increases, even with stronger indicators of flow (including actual flow, indicators of ordinary high water mark, etc.), the length of the connection can become no longer physically close (see *Sackett*, 598 U.S. at 667, referenced above), such that the discrete features are no longer providing a continuous physical connection. After consideration of flow, the number, the types, and the length of connection, the 725-foot length of connection here between this wetland and the requisite covered water is not physically close enough to meet the continuous surface connection requirement. Thus, Wetland A does not have a continuous surface connection to the downstream relatively permanent tributary and, consistent with *Sackett*, is not “adjacent.”

III. Conclusion

The agencies are returning the draft approved JD to the Kansas City District for any revisions that are necessary, consistent with this memorandum.

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⁴ Other features, such as certain culverts, pipes, and wetlands can also serve as part of a continuous surface connection, depending on the factual circumstances. See, e.g., “Memorandum on NAP-2023-01223” (June 25, 2024) and “Memorandum on LRB-2023-00451” (September 3, 2024).