



MEMORANDUM ON MVR-2023-0828

Summary

For MVR-2023-0828, 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 Rock Island District for any revisions that may be necessary, consistent with this memorandum regarding when certain natural banks and similar natural landforms can provide evidence of the requisite continuous surface connection for wetlands evaluated as paragraph (a)(4) adjacent wetlands and for lakes and ponds evaluated as paragraph (a)(5) waters under the amended 2023 rule, 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. In addition, lakes and ponds assessed under paragraph (a)(5) of the amended 2023 rule must be relatively permanent and have a continuous surface connection to a requisite covered water² in order to be covered under the CWA. The direction in this memorandum is consistent with the CWA, the amended 2023 rule at 33 CFR 328.3 and 40 CFR 120.2, and *Sackett*. In providing this direction, we have also utilized relevant case law and existing guidance included within the 2023 rule preamble, consistent with *Sackett*.³

¹ The “amended 2023 rule” refers to 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 (September 8, 2023); (“conforming rule”) (codified at 33 CFR 328.3 (Corps) & 40 CFR 120.2 (EPA)). It is the amended 2023 rule that is currently operative in the State of Illinois. The Clean Water Act and EPA and U.S. Army Corps of Engineers (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 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.

³ There are two regulatory regimes that are operative across the country due to ongoing litigation: the amended 2023 rule and the “pre-2015 regulatory regime” which is the agencies’ pre-2015 definition of “waters of the United States,”

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

Under the amended 2023 rule, 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 jurisdictional 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) “serve[s] as a physical connection that maintains a continuous surface connection between an adjacent

implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience, consistent with *Sackett*. Because the agencies are interpreting both regulatory regimes that are operative across the country consistent with *Sackett*, the direction in this memorandum with respect to when certain natural banks and similar natural landforms can serve as a continuous surface connection for adjacent wetlands is also applicable to that inquiry in the “pre-2015 regulatory regime,” as implemented consistent with *Sackett*.

wetland and a relatively permanent water.” Revised Definition of “Waters of the United States,” 88 Fed. Reg. 3004, 3095 (January 18, 2023); *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. Assessment of Lakes and Ponds under Paragraph (a)(5) of the Amended 2023 Rule, Consistent with *Sackett*

Under the amended 2023 rule, and consistent with the *Rapanos* plurality and *Sackett*, intrastate lakes and ponds are jurisdictional under paragraph (a)(5) if they do not fall within paragraphs (a)(1) through (3) and they are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to traditional navigable waters, the territorial seas, interstate waters, or relatively permanent tributaries.⁴ *See* 33 CFR 328.3(a)(5) and 40 CFR 120.2(a)(5). The agencies assess a continuous surface connection between waters assessed under paragraph (a)(5) and a paragraph (a)(1) water or a tributary that is relatively permanent using the same approach as for adjacent wetlands.⁵

III. Depending on the Factual Context, Certain Natural Banks and Similar Natural Landforms Can Provide the Necessary Continuous Surface Connection

A. Background on Draft Approved JD

The draft approved JD covers three adjoining sections composed of 21 parcels totaling approximately 882.3 acres located in Brookfield Township, City of Marseilles, LaSalle County, Illinois. The first section has an approximate center of 41.30706 North latitude, -88.66412 West longitude, the second section has an approximate center of 41.3091 North latitude, -88.6507 West longitude, and the third section has an approximate center of 41.278367 North latitude, -88.660893 West longitude. The draft approved JD covers a variety of aquatic resources, but this memorandum focuses on Wetlands W-WRL-001 and W-WRL-017 and Pond P-WRL-002. The Rock Island District coordinated this draft approved JD with EPA Region 5, and Region 5 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.

⁴ The comparable paragraph (a)(3) category of the pre-2015 regulatory regime applies to “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.” *See* 33 CFR 328.3(a)(3) (2014) and 40 CFR 230.3(s)(3) (2014). Under the pre-2015 regulatory regime, consistent with *Sackett*, the agencies intend to assess only relatively permanent lakes and ponds that do not meet one of the other jurisdictional categories under the (a)(3) category of waters. These (a)(3) waters can only be jurisdictional if they meet the requirements of this regulatory provision and are relatively permanent and have a continuous surface connection to a requisite covered water.

⁵ Note that certain intrastate lakes and ponds are a type of feature that may serve as part of a continuous surface connection depending on the factual context and consistent with the direction in “Memorandum on NAP-2023-01223” (June 25, 2024), “Memorandum on NWK-2022-00809” (June 25, 2024), “Memorandum on SWG-2023-00284” (June 25, 2024), “Memorandum on LRB-2023-00451” (September 3, 2024), “Memorandum on POH-2023-00187” (November 20, 2024), and “Memorandum on NWK-2024-00392” (November 21, 2024).

The draft approved JD concluded that Wetlands W-WRL-001 and W-WRL-017 are both adjacent to the Illinois River, a traditional navigable water, and are jurisdictional as paragraph (a)(4) adjacent wetlands under the amended 2023 rule. The draft approved JD also concluded that Pond P-WRL-002 is a relatively permanent pond with a continuous surface connection to the Illinois River, a traditional navigable water, and is jurisdictional as a paragraph (a)(5) water. As a basis for these findings, the draft approved JD indicates that Wetlands W-WRL-001 and W-WRL-017 touch the natural bank of the Illinois River, a traditional navigable water. The draft approved JD further states that evidence of a continuous surface connection for the wetlands to the Illinois River includes sediment deposition patterns consistent with water elevation changes of the Illinois River, a lack of emergent vegetation, the presence of wrack lines, and visible water staining on trees. According to information from the District, for both wetlands W-WRL-001 and W-WRL-017, the Illinois River at normal water elevation is approximately 30-feet laterally from the nearest edge of each wetland, though, under high-water events the wetlands are likely inundated by the Illinois River. Information collected by the District indicated that the wetlands had likely been inundated by flooding from the Illinois River approximately 43 days (over 10 instances) over the course of the 2024 calendar year as of early November 2024. Regarding Pond P-WRL-002, the information in the draft approved JD indicates that the pond touches the natural bank of the Illinois River, a traditional navigable water. According to the draft approved JD, evidence of a continuous surface connection for Pond P-WRL-002 to the Illinois River includes sediment deposition patterns consistent with water elevation changes of the river, the presence of wrack lines, and visible water staining on trees. The District indicated that the distance between the edge of P-WRL-002 and the relatively normal water elevation of the Illinois River is approximately 30-feet measured laterally and that the pond is also likely to be inundated by the Illinois River during high water events, at a similar frequency as Wetlands W-WRL-001 and W-WRL-017 as discussed above.

B. Natural Banks and Similar Natural Landforms and the Continuous Surface Connection Requirement

A natural berm, bank, dune, or similar natural landform between an adjacent wetland or a paragraph (a)(5) lake or pond and a requisite covered water “does not sever a continuous surface connection to the extent it provides evidence of a continuous surface connection.” See 88 Fed. Reg. at 3095 (January 18, 2023).⁶ Certain natural banks and similar natural landforms are indicators of a direct hydrologic surface connection between the wetland⁷ and the requisite covered water, as natural banks and similar natural landforms are formed through repeated hydrologic events. Natural banks can also provide evidence of a continuous surface connection because the processes that result in their formation can also be representative of the interconnected relationship between the wetlands and the requisite covered water. The surface water flow of a stream or river over time can erode a channel, which creates a bank separating the requisite covered water from the adjacent wetland. Every flowing stream or river transports not only water, but sediment—eroding and rebuilding its banks and floodplains continually, including any wetlands that lie on top of the bank. Those wetlands may have been formed at the same time as the natural bank or after the formation of the natural river bank due

⁶The Navigable Waters Protection Rule similarly concluded that a natural berm, bank, dune, or similar natural landform between an adjacent wetland and a requisite covered water would not sever a continuous surface connection to the extent it provides evidence of a continuous surface connection. 85 Fed. Reg. at 22311 (April 21, 2020) (vacated *see Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949 (D. Ariz. 2021)).

⁷ For simplicity, this paragraph will discuss wetlands, but the language regarding continuous surface connection also applies to lakes and ponds assessed under paragraph (a)(5) of the amended 2023 rule.

to repeated overtopping and the impeded return flow created by the bank. Thus, physically close wetlands may be separated by a bank from a requisite covered water due to an elevation difference between the bank and the water (including when the stream is incised) that is caused by natural processes, but the natural bank does not sever the continuous surface connection where, for example, there is evidence of a regular surface hydrologic connection such as flooding or overtopping between the aquatic resources. A natural river berm can be created by repeated flooding and sedimentation events when a river overtops its banks and deposits sediment between the river and a wetland. All of these processes and the resulting natural berm, bank, dune, or similar natural landform indicate that the wetlands are integrated and “inseparably bound up” with requisite covered waters. *See Rapanos*, 547 U.S. at 732. Physical indicators of flow, such as sediment deposition, a lack of emergent vegetation, visible water staining on trees, and inundation by flooding can provide evidence that flow is occurring between the wetland and the requisite covered water despite the presence of the natural landform. Certain natural landforms can provide evidence of a continuous surface connection depending on the factual context because their formation and continued presence demonstrate that flow is occurring between the wetland and the requisite covered water, such that the two features are, as a practical matter, indistinguishable. This is because the formation and continued presence of certain natural landforms along with physical indicators of flow between the wetland and requisite covered water provide evidence that the wetlands are continuously, physically connected to jurisdictional waters including during storm events, bank full periods, and/or ordinary high flows. 88 Fed. Reg. at 3095-3096.

Not all natural berms, banks, dunes, and similar natural landforms demonstrate evidence of a continuous surface connection. For example, an adjacent wetland may be separated from a requisite covered water by a relict landform like a natural berm that no longer interacts hydrologically with the tributary network. Such relict barriers do not demonstrate evidence of a continuous surface connection and would in fact sever the continuous surface connection in absence of other evidence of a continuous surface connection (*e.g.*, a pipe or other discrete feature). Wetlands separated from jurisdictional waters by cliffs, bluffs, or canyon walls also typically do not have a continuous surface connection. However, if these cliffs, bluffs, or canyon walls have gaps or built structures (*e.g.*, culverts, pipes, or waterfalls) that physically connect the adjacent wetlands and the requisite covered water, this type of connection could satisfy the continuous surface connection requirement.⁸

C. Assessment of Natural Banks and Similar Natural Landforms and the Necessary Continuous Surface Connection for the Aquatic Resources in the Draft Approved JD

Based on the District’s draft approved JD, Wetlands W-WRL-001 and W-WRL-017 and the relatively permanent Pond P-WRL-002 are separated from the Illinois River, a traditional navigable water, by a

⁸ Gaps can allow for surface hydrologic connections between wetlands and requisite covered waters during storm events, bank full periods, and/or ordinary high flows. Similarly, for wetlands behind dikes and other artificial barriers, gaps in the artificial barriers or structural components that can satisfy the continuous surface connection requirement depending on the factual context of the physical connection. For example, an upland levee that separates an adjacent wetland from a tributary that is relatively permanent may have gaps along the length of the levee that provide for a physical connection between the wetlands and the tributary that satisfies the requirement for a continuous surface connection. Similarly, a flood gate, a tide gate, culvert, or pump that allows for and is used to maintain a direct hydrologic surface connection between a wetland and a jurisdictional covered water provides a physical connection between the wetland and the jurisdictional covered water that satisfies the continuous surface connection requirement. *See* 88 Fed. Reg. at 3095-3096.

naturally formed river bank. Sediment deposition patterns consistent with water elevation changes of the Illinois River, a lack of emergent vegetation, visible water staining on trees, and regular inundation overtopping the river bank by flooding provide evidence of a continuous surface connection to the Illinois River for Wetlands W-WRL-001 and W-WRL-017. Sediment deposition patterns consistent with water elevation changes of the river, the presence of wrack lines, visible water staining on trees, and regular inundation overtopping the river bank by flooding provide evidence of a continuous surface connection to the Illinois River for Pond P-WRL-002. In this context, these are all evidence of the recurring hydrologic events which provide a continuous surface connection for the wetlands and pond because they all demonstrate that the river regularly overtops and floods along the natural river bank. These indicators demonstrate that flow from the traditional navigable water does reach the wetlands and the pond, and the natural bank's formation and continued presence is a result of the direct hydrologic connection. Together, this information shows evidence of an unimpaired, continuous physical connection, including during not only storm events, but also during bank full periods, and/or ordinary high flows. In this case, the natural river bank does not sever the continuous surface connection and provides evidence of a continuous surface connection to the Illinois River, a traditional navigable water. Considering these factors together, the agencies concur with the District that in the factual context of Wetlands W-WRL-001 and W-WRL-017 and Pond P-WRL-002 have the necessary continuous surface connection to the Illinois River. Therefore, consistent with *Sackett*, Wetlands W-WRL-001 and W-WRL-017 are both "adjacent" under paragraph (a)(4) to the Illinois River, a traditional navigable water, and Pond P-WRL-002 is jurisdictional as a paragraph (a)(5) water.

IV. Conclusion

The agencies concur with the District that Wetlands W-WRL-001 and W-WRL-017 and Pond P-WRL-002 each have a continuous surface connection to a traditional navigable water. The agencies are returning the draft approved JD to the Rock Island District for any revisions that may be necessary.

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