



MEMORANDUM TO RE-EVALUATE JURISDICTION FOR NWO-2003-60436

Summary

For NWO-2003-60436, the U.S. Environmental Protection Agency 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 Omaha District to re-evaluate whether “Wetland 1e” and “Wetland 3” are in fact one wetland.

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 for relatively permanent waters and adjacent wetlands. 598 U.S. 651 (2023). The question of how to identify the wetland area which is then assessed under the jurisdictional standard was not addressed in or affected by the decision in *Sackett*. The direction in this memorandum is consistent with the Clean Water Act (CWA) and the agencies’ regulations under the pre-2015 regulatory regime¹ 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”)*, and the joint policy memorandum, “Memorandum to Re-evaluate Jurisdiction for NWP-2007-428.”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. 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).

² U.S. Environmental Protection Agency and U.S. Army Corps of Engineers. “Memorandum to Re-evaluate Jurisdiction for NWP-2007-428” (February 2008). Available at <https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll5/id/1435>.

I. “Wetland 1e” and “Wetland 3” Should Be Re-evaluated to Determine If They Are One Wetland

The draft approved JD site is located in Pembina, Pembina County, North Dakota at 48.97375 North latitude and 97.237454 West longitude. “Wetland 1e” (2.89 acres) has a continuous surface connection to the Red River of the North (a traditional navigable water) and is separated from “Wetland 3” (1.19 acres) by a dirt track road and a seasonally plowed field. The distance between the delineated Wetland 1e and Wetland 3 is approximately 57 feet. The road is 15 feet wide. The delineation report further notes there is not a culvert to maintain a connection between Wetland 3 and the Red River of the North. A sample point on the dirt road showed the road to have upland features; however, it is unknown whether these upland features included all three wetland delineation criteria not being met or simply one criterion not being met. The plowed field and road have evidence in historical aerial imagery (2005, 2006) of being inundated by the Red River. A large levee system exists to the West of the site to protect the surrounding neighborhoods from floodwaters.

A single wetland may be divided by, for example, ditches, berms, and road crossings.³ It is therefore often necessary to utilize multiple pieces of evidence to assess whether divided wetland areas are separate, distinct wetlands or are functioning as one wetland. Topographic maps and satellite or aerial imagery can provide valuable information about historic conditions (*e.g.*, whether two or more portions of a divided wetland were originally one wetland). Indicators that a divided wetland is functioning as one wetland⁴ include, but are not limited to, a hydrologic connection, including discrete features like pipes or culverts or through a shallow subsurface connection, similarities in plant communities between the divided portions of the wetland, slope and topography (for example, the slope and topography would direct shallow subsurface movement of water from one wetland area to another), soils (for example, the soils exhibit indicators of high transmissivity over an impermeable surface, allowing for a shallow subsurface connection), and hydrologic indicators (for example, seepage on the downhill side of the artificial barrier artificially separating the wetland areas which demonstrates movement of water through or beneath the barrier from one part of the divided wetland to the other). Topographic maps and satellite or aerial imagery can also inform whether a divided wetland is functioning as one wetland.

Where, after assessing these factors and sources of evidence, the two or more wetland areas are found to be one wetland, the wetland would then be assessed for Clean Water Act jurisdiction under the relevant regulatory regime (in this case, the pre-2015 regulatory regime consistent with *Sackett*) to see if it has a continuous surface connection to a traditional navigable water, interstate water, the territorial seas, or a relatively permanent tributary or impoundment to determine if the wetland is adjacent.

³ *Rapanos Guidance* at 6.

⁴ *See supra* note 2.

The agencies consider the entire wetland to be “adjacent” if any part of the wetland is “adjacent.”⁵ If two or more wetland areas are found to not be one wetland, then they would be individually assessed for jurisdiction.

Though the Omaha District did state in the draft approved JD that the dirt track road did not have wetland indicators and lacked culverts, that in and of itself is insufficient to demonstrate that Wetland 1e and Wetland 3 are not functioning as one wetland. Therefore, the Omaha District should consider the factors and sources of information described above and re-evaluate the draft approved JD to see if the two areas are functioning as one wetland and as such would be identified as a single wetland.

II. Conclusion

The agencies are returning the draft approved JD to the Omaha District to re-evaluate whether Wetland 1e and Wetland 3 are one wetland. The draft approved MFR should include this evaluation. If Wetland 1e and Wetland 3 are one wetland, the wetland would be considered adjacent to the Red River of the North, a traditional navigable water, and thus the wetland would be jurisdictional. If Wetland 1e and Wetland 3 are determined to not be one wetland, the District should revise the draft approved JD to document why Wetland 1e and Wetland 3 are not one wetland and can proceed to finalize the determination.

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⁵ If two or more wetland areas are found to be one wetland and then determined to be adjacent, any upland portion dividing the one wetland would not be included in calculations for impacts and compensatory mitigation needs in a permit evaluation under Section 404 of the Clean Water Act.