



MEMORANDUM ON NWK-2022-00809

Summary

For NWK-2022-00809, 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 the factors in this memorandum regarding when non-relatively permanent ditches and culverts meet the continuous surface connection requirement for wetlands evaluated as paragraph (a)(7) adjacent wetlands under the pre-2015 regulatory regime.¹

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). To be covered under the CWA, adjacent wetlands must satisfy the standard first established by a plurality in *Rapanos v. United States*, 547 U.S. 715 (2006), 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 and the agencies’ regulations under the pre-2015 regulatory regime at 33 CFR 328.3 (2014) and 40 CFR 230.3 (2014), consistent with *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). 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). It is this regulatory regime that is currently operative in the State of Kansas. 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; “January 2023

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

Under the pre-2015 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 (2014) and 40 CFR 230.3 (2014). *Sackett*: (1) adopted the familiar “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 word “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 term (among others the Supreme Court uses) informs the application of the “continuous surface connection” requirement. The *Rapanos* plurality (which *Sackett* followed) uses phrases like continuous physical connection to describe the continuous surface connection requirement. See *Rapanos*, 547 U.S. at 747, 751 n.13, 755. *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. 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 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 between an adjacent wetland and a relatively permanent 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”).

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”) (33 CFR 328.3; 40 CFR 120.2); and the pre-2015 regulatory regime. 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 non-relatively permanent ditches can serve as a continuous surface connection for adjacent wetlands is also applicable to the amended 2023 rule.

II. Depending on the Factual Context, Non-Relatively Permanent Ditches and Culverts Can Meet the Continuous Surface Connection Requirement

The draft approved JD covers an approximately 1,153-acre site located in Douglas County, Kansas at 39.0221645 North latitude and -95.2525534 West longitude. The draft approved JD covers a variety of aquatic resources, but this memorandum focuses on Wetland W-D-4 (0.14 acres), Wetland W-D-5 (6.96 acres within the review area), and Wetland W-D-7 (0.75 acres). 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 OASACW.

The draft approved JD concluded that Wetlands W-D-4, W-D-5, and W-D-7 are non-jurisdictional and do not have a continuous surface connection to a requisite water. Wetland W-D-5 flows into S-D-6 (a non-relatively permanent channelized stream that is not at issue in this elevation). S-D-6 then flows through Wetlands W-D-4 and Wetland W-D-7, then exits the site where it connects to a series of off-site roadway ditches, railroad ditches, farm ditches, and culverts, then into a relatively permanent channelized tributary that ultimately flows into the Kansas River, a traditional navigable water. The total length of the connection between each of the wetlands and the downstream relatively permanent water is approximately 2.68 miles for Wetland W-D-5, 2.24 miles for Wetland W-D-4, and approximately 2.1 miles for Wetland W-D-7. The draft approved JD states that the extended flow path from the wetlands to the relatively permanent water has weak indicators of flow frequency and duration. Further, the draft approved JD states that the long distance and chain of features between the wetlands and the relatively permanent water are too extended and tenuous to constitute a continuous surface connection.

Non-relatively permanent ditches, other non-relatively permanent channels, and culverts are features that can serve as all or part of a continuous surface connection depending on the factual context, because these features often have physical indicators of flow (*e.g.*, bed and bank and other indicators of an ordinary high water mark) that provide evidence that the features physically connect wetlands to jurisdictional waters including during storm events, bank full periods, and/or ordinary high flows. Depending on the factual context, including length of the connection and physical indicators of flow, more than one such feature can serve as part of a continuous surface connection where they together provide an unimpaired, continuous physical connection to a jurisdictional water. In this case, for Wetland W-D-7, the approximately 2.1 mile physical connection between the wetlands and the relatively permanent water is long, and the connection is via ditches and culverts that have weak indicators of flow frequency and duration. Considering these factors together, and consistent with *Sackett*, the agencies concur with the District that in the factual context of Wetland W-D-7, the series of non-relatively permanent waters and culverts do not meet the continuous surface connection requirement for the Wetland W-D-7. Because the length of the potential connections to the relatively permanent water is even longer for Wetlands W-D-5 and W-D-4, the agencies concur with the District that Wetlands W-D-5 and W-D-4 do not have a continuous surface connection to the downstream relatively permanent water.

III. Conclusion

The agencies concur with the District that Wetlands W-D-4, W-D-5, and W-D-7 do not have a continuous surface connection to the downstream relatively permanent water. The agencies are returning the draft approved JD to the Kansas City District for any revisions that may be necessary, consistent with the factors in this memorandum.

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