



MEMORANDUM ON LRB-2023-00451

Summary

For LRB-2023-00451, 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 Buffalo District for any revisions that may be necessary, consistent with the factors in this memorandum regarding when certain non-relatively permanent streams and certain wetlands provide the requisite continuous surface connection 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 Ohio. 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 rule”) as amended by the final rule “Revised Definition of ‘Waters of the United States’; Conforming” (88 Fed. Reg. 61,964,

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 “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 “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). *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 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 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

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 when non-relatively permanent streams and certain wetlands can serve as a continuous surface connection for adjacent wetlands is also applicable to the amended 2023 rule.

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, Non-Relatively Permanent Streams and Certain Wetlands Can Provide the Necessary Continuous Surface Connection

The draft approved JD covers an approximately 15-acre site located southwest of the intersection of McCauley Road and Hudson Drive in the City of Stow, Summit County, Ohio. The draft approved JD covers a variety of aquatic resources, but this memorandum focuses on Wetland 17 (0.030 acres). The Buffalo 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.

The draft approved JD concludes that Wetland 17 is jurisdictional as a paragraph (a)(7) adjacent wetland under the pre-2015 regulatory regime. As a basis for this finding, the draft approved JD indicates that Wetland 17 was observed to have a continuous surface connection to Stream 1,³ via the 95 linear feet of channel of Stream 3 (a non-relatively permanent stream) which flows into Wetland 16 which abuts Stream 1, the jurisdictional tributary. Based on the information in the draft approved JD, the total length of the physical connection between Wetland 17 and Stream 1 is approximately 195 linear feet. The District indicated that Stream 3 has an ordinary high water mark, with indicators including the destruction of terrestrial vegetation and matted/bent vegetation within the channel.

Certain non-relatively permanent streams and other non-relatively permanent channels can serve as all or part of a continuous surface connection depending on the factual context. This is 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 continuously, physically connect wetlands to jurisdictional waters including during storm events, bank full periods, and/or ordinary high flows.

In addition, depending on the factual context, certain wetlands that lie along the flowpath between the subject wetland and the requisite covered water⁴ (flowpath wetlands) can serve as part of a continuous surface connection. This can happen where there are physical indicators of flow through the flowpath wetland or there is evidence that a feature flows into and out of the flowpath wetland such that an unimpaired continuous surface connection to the requisite covered water can be identified. Physical indicators such as bent over or matted vegetation can help trace the flow through the flowpath wetland. Alternatively, where there are physical indicators that provide evidence that a non-relatively permanent ditch, a non-relatively permanent stream, or similar feature flows into and out of the flowpath wetland, it is reasonable to conclude that the flowpath continues through the

³ Stream 1 is a relatively permanent tributary connected to the Cuyahoga River, a traditional navigable water, that is not at issue in this elevation.

⁴ As used in this memorandum, a requisite covered water means a jurisdictional water that a wetland can be adjacent to under the regulations and *Sackett* – that is, a traditional navigable water, the territorial seas, an interstate water, a relatively permanent jurisdictional impoundment, or a relatively permanent jurisdictional tributary. Wetlands cannot be “adjacent” to another adjacent wetland under (a)(4) or an intrastate lake or pond under (a)(5) of the amended 2023 rule. Similarly, wetlands cannot be “adjacent” to another adjacent wetland under (a)(7) or an “other water” under (a)(3) of the 1986 regulations.

wetland to the outlet. When the wetland that lies along the flowpath of the subject wetland abuts a requisite covered water, physical indicators of flow at the inlet to the abutting wetland are sufficient to demonstrate that the wetland serves as part of the continuous surface connection. This is because abutting wetlands necessarily have an unimpaired continuous surface connection where they touch a requisite covered water. Depending on the factual context, including the length of the connection and physical indicators of flow, more than one non-relatively permanent stream or wetland can serve as part of a continuous surface connection where they together provide an unimpaired, continuous physical connection to a jurisdictional water.

Based on the District's draft approved JD, Wetland 17 is connected to a relatively permanent tributary (Stream 1) by a non-relatively permanent tributary (Stream 3) and Wetland 16. While not all non-relatively permanent streams and flowpath wetlands will provide the necessary continuous surface connection, in this case, physical indicators of an ordinary high watermark observed by the District demonstrate that sufficient levels of surface flow are occurring in Stream 3 during storm events, bank full periods, and/or ordinary high flows. In addition, Stream 3 flows into Wetland 16, which abuts the relatively permanent tributary (Stream 1), and together these physical indicators and site-specific circumstances provide evidence that surface flow can be conveyed from Wetland 17 to Stream 1. In this case, Stream 3 (the non-relatively permanent tributary) and Wetland 16 are features that provide an unimpaired, continuous physical connection between Wetland 17 and Stream 1, the relatively permanent water, and the length of the physical connection between Wetland 17 and the relatively permanent water is approximately 195 feet. Considering these factors together, and consistent with *Sackett*, the agencies concur with the District that in the factual context of Wetland 17, based on the number and type of connections, the relatively short length of the connections, and the physical indicators of flow, Stream 3 (the non-relatively permanent tributary) and Wetland 16 together serve as a continuous physical connection that meets the continuous surface connection requirement for Wetland 17 and the wetland is therefore "adjacent" to Stream 1, a relatively permanent tributary.⁵

III. Conclusion

The agencies concur with the District that Wetland 17 has a continuous surface connection to Stream

⁵ To be clear, Wetland 17 was not assessed for jurisdiction based on whether it was adjacent to Wetland 16; rather Wetland 17 was assessed for whether it had a continuous surface connection to a requisite water, and, as clarified in this memorandum, depending upon the factual circumstances, a wetland may serve as part of a continuous surface connection. Under the pre-2015 regulatory regime, the 1986 regulations limited the scope of jurisdictional adjacent wetlands to wetlands adjacent to waters "(other than waters that are themselves wetlands)." Under that provision, a wetland was not jurisdictional simply because it was adjacent to another adjacent wetland or to a wetland jurisdictional under paragraph (a)(3) of the 1986 regulations, but under the agencies' intent and longstanding interpretation of the parenthetical, the presence of more than one adjacent wetland did not exclude all other wetlands from jurisdiction as an adjacent wetland. See *Universal Welding & Fabrication, Inc. v. U.S. Army Corps of Eng'rs*, 708 Fed. Appx. 301, 303 (9th Cir. 2017) (observing that "[d]espite the subject wetland's adjacency to another wetland, the Corps determined that its regulatory authority was not precluded by the parenthetical language within [section] 328.3(a)(7), which it interpreted as prohibiting the exercise of jurisdiction over a wetland only if based upon that wetland's adjacency to another wetland" and holding that the Corps' interpretation is "the most reasonable reading of the regulation's text"). This memorandum is consistent with that longstanding position. With respect to the amended 2023 rule, the agencies removed the parenthetical "(other than waters that are themselves wetlands)" in the January 2023 rule because it has caused confusion for the public and the regulated community and is unnecessary. This memorandum, therefore, is also consistent with the Amended Regulations. Note that under both regimes, wetlands adjacent to tidal wetlands (which are traditional navigable waters) are jurisdictional, consistent with the 1986 regulations and longstanding practice. 88 Fed. Reg. 3092.

1, a relatively permanent water, and thus is a covered adjacent wetland. The agencies are returning the draft approved JD to the Buffalo District for any revisions that may be necessary, consistent with the factors in this memorandum regarding when certain non-relatively permanent streams and certain wetlands can meet the continuous surface connection requirement for wetlands evaluated as paragraph (a)(7) adjacent wetlands under the pre-2015 regulatory regime.

STACEY JENSEN Digitally signed by STACEY
JENSEN
Date: 2024.09.03 16:18:50 -04'00'

Stacey Jensen, Director
Oceans, Wetlands, and Communities Division
Office of Water
U.S. Environmental Protection Agency



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