



**MEMORANDUM TO THE FIELD BETWEEN
THE U.S. DEPARTMENT OF THE ARMY, U.S. ARMY CORPS OF ENGINEERS
AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY CONCERNING THE PROPER IMPLEMENTATION
OF “CONTINUOUS SURFACE CONNECTION” UNDER THE DEFINITION OF “WATERS OF THE UNITED
STATES” UNDER THE CLEAN WATER ACT**

March 12, 2025

PURPOSE

This memorandum provides guidance to the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency regarding the implementation of the definition of “waters of the United States” under both regulatory regimes currently operative across the country: the “Revised Definition of ‘Waters of the United States,’” as amended by the final rule “Revised Definition of ‘Waters of the United States’; Conforming” (the amended 2023 rule; 40 C.F.R. 120.2 and 33 C.F.R. 328.3) and the “pre-2015 regulatory regime”¹ consistent with the Supreme Court’s decision in *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023).²

This memorandum is being issued in response to requests for clarification on the implementation of the Federal Water Pollution Control Act, also known as the Clean Water Act, with respect to adjacent wetlands in light of the Supreme Court’s decision in *Sackett v. Environmental Protection Agency*. Specifically, the preamble to the 2023 Rule (“Revised Definition of ‘Waters of the United States,’” 88 FR 3004 (January 18, 2023)) and the preamble to the conforming rule (“Revised Definition of ‘Waters of the United States’; Conforming,” 88 FR 61964, September 8, 2023) did not include adequate direction or guidance on the meaning of the “continuous surface connection” requirement, and the agencies’ case-specific policy memoranda issued post-*Sackett* neither provided national guidance on the topic nor clear and transparent direction for the public or the agencies. The case-specific policy memoranda also contain conclusions which are inconsistent with the discussion of “continuous surface connection” as described in the pre-2015 regulatory regime guidance documents and the *Sackett* decision. In order to provide national consistency and eliminate confusion about the scope of “adjacent wetlands,” and

¹ The “pre-2015 regulatory regime” refers to the agencies’ definition of “waters of the United States” set forth in pre-2015 Corps and EPA regulations (the Corps’ 1986 regulations and the EPA’s 1988 regulations, inclusive of the exclusion for prior converted cropland, which both agencies added in 1993), implemented consistent with relevant case law, including *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006). It also refers to longstanding practice, as informed by applicable guidance, including “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* & *Carabell v. United States*” (Dec. 2, 2008) (2008 *Rapanos* Guidance), available at https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf. Additionally, the agencies interpret the phrase “waters of the United States” consistent with the Supreme Court’s decision in *Sackett v. Environmental Protection Agency*.

² For more information about the operative definition of “waters of the United States” for specific geographic areas in light of litigation, please visit <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>.

specifically the phrase “continuous surface connection” as used in the *Rapanos* and *Sackett* decisions across both currently operative regulatory regimes, we are providing the following direction. This will provide for more effective and efficient approved jurisdictional determinations, permitting actions and other relevant actions consistent with *Sackett*.³

In addition, the agencies plan to issue a public notice imminently in the *Federal Register* to establish a docket on “WOTUS Notice: The Final Response to SCOTUS,” outlining a process to gather recommendations on the meaning of key terms in *Sackett* to inform future administrative actions that will seek to conform the definition of “waters of the United States” to Supreme Court precedent.

This guidance represents the agencies’ views on the proper implementation of the definition of “waters of the United States” and is effective immediately. The EPA and the Department of the Army will apply this guidance when determining if a wetland has a “continuous surface connection” to a requisite jurisdictional water under the Clean Water Act.

BACKGROUND

Sackett and Rapanos

While the U.S. Supreme Court has issued numerous key decisions interpreting the phrase “waters of the United States,” the two cases that are of particular importance for purposes of this memorandum, especially as they relate to the “continuous surface connection” requirement for adjacent wetlands, are *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023), and *Rapanos v. United States*, 547 U.S. 715 (2006).

On May 25, 2023, the *Sackett* Court “conclude[d] that the *Rapanos* plurality was correct” and rejected Justice Kennedy’s “significant nexus” standard, calling it a “particularly implausible” “theory” and stating that “the CWA never mentions the ‘significant nexus’ test, so the EPA has no statutory basis to impose it.” *Sackett*, 598 U.S. at 680. As a result, the agencies can apply only the *Rapanos* plurality standard as informed by *Sackett* in determining when adjacent wetlands are subject to CWA jurisdiction. As explained by the plurality in *Rapanos*, this standard is also consistent with prior Supreme Court precedent interpreting “waters of the United States,” including the Court’s opinion in *Riverside Bayview*. See *Rapanos*, 547 U.S. at 734-35, 740-42, 746-48 (Scalia, J., plurality).

Sackett makes reference to the relationship between adjacent wetlands and covered waters on multiple occasions. The *Sackett* Court clarified that:

In *Rapanos*, the plurality spelled out clearly when adjacent wetlands are part of covered waters. It explained that “waters” may fairly be read to include only those wetlands that are “as a practical matter indistinguishable from waters of the United States,” such that it is “difficult to determine where the ‘water’ ends and the ‘wetland’ begins.” That occurs when wetlands have “a continuous surface connection to bodies that are ‘waters of the United States’ in their own

³ The Clean Water Act and the EPA and Corps regulations, interpreted consistent with the *Sackett* decision, contain legally binding requirements. This guidance does not substitute for those provisions or regulations, nor is it a regulation itself. Thus, it does not impose legally binding requirements on the EPA, the Corps, Tribes, states or the regulated community.

right, so that there is no clear demarcation between ‘waters’ and wetlands.” . . . We agree with this formulation of when wetlands are part of “the waters of the United States.

Id. at 678 (internal citations omitted).

The *Sackett* Court also found that “[w]etlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby,” *id.* at 678, and that “‘adjacent’ cannot include wetlands that are not part of covered ‘waters,’” *id.* at 682. The Court also recognized that in determining the jurisdictional status of wetlands, the *Riverside Bayview* Court “need[ed] to focus so extensively on the adjacency of wetlands to covered waters” to adhere to the proper interpretation of the Clean Water Act. *Id.* at 674.

This is why the plurality in *Rapanos* rejected the Corps’ practice of asserting jurisdiction over wetlands adjacent to features that themselves were not “waters of the United States” in their own right based on a hydrologic connection theory. The *Rapanos* plurality instead concluded:

[O]nly those wetlands with a continuous surface connection to bodies that are “waters of the United States” in their own right, so that there is no clear demarcation between “waters” and wetlands, are “adjacent to” such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to “waters of the United States” do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a “significant nexus” in *SWANCC* Thus, establishing that wetlands . . . are covered by the Act requires two findings: first, that the adjacent channel contains a “wate[r] of the United States,” (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins.

Rapanos, 547 U.S. at 742 (Scalia, J., plurality) (emphasis in original).

Additionally, the plurality said that “adjacent” means “physically abutting,” and used “abutting” and “adjacent” interchangeably. *Id.* at 748; see also *id.* at 742 (“*Riverside Bayview* rested upon the inherent ambiguity in defining where water ends and abutting (“adjacent”) wetlands begin[.]”). Most importantly, the plurality clarified that “the statutory definition [of ‘navigable waters’ at 33 U.S.C. §1362(7)] can be read to include *some* wetlands – namely, those that directly ‘abut’ covered waters.” *Id.* at 747, footnote 12 (emphasis in original).

2008 *Rapanos* Guidance in the Pre-2015 Regulatory Regime

Following *Rapanos*, on June 6, 2007, the agencies issued joint guidance entitled “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* and *Carabell v. United States*” to address the waters at issue in that decision. The guidance was reissued with minor changes on December 2, 2008, and a review of that guidance reveals how the agencies interpreted the *Rapanos* plurality’s “continuous surface connection” construct. “[O]nly those adjacent wetlands that have a continuous surface connection because they directly abut the [relatively permanent] tributary (e.g., they are not separated by uplands, a berm, dike, or similar feature) are considered jurisdictional under the plurality standard.” 2008 *Rapanos* Guidance at 7, footnote 29.

Additionally, the 2008 *Rapanos* Guidance applies the *Rapanos* plurality’s standard to assert jurisdiction over “[w]etlands that directly abut” “[n]on-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months).” *Id.* at 1.

The Corps’ pre-2015 Jurisdictional Determination Form Instructional Guidebook, which contained instructions to aid field staff in completing the associated Approved Jurisdictional Determination Form prior to *Sackett*, states “[t]he [*Rapanos*] decision provides two new analytical standards for determining whether water bodies that are not traditional navigable waters (TNWs), including wetlands adjacent to those non-TNWs, are subject to CWA jurisdiction: (1) if the water body is relatively permanent, or if the water body is a wetland that directly abuts (e.g., the wetland is not separated from the tributary by uplands, a berm, dike, or similar feature) a relatively permanent water body (RPW), or (2) if a water body, in combination with all wetlands adjacent to that water body, has a significant nexus with TNWs.”⁴

With significant nexus having been struck down by the Court in *Sackett*, we are left to determine what the pre-2015 regulatory regime’s approach to adjacency looked like without that evaluation. The Corps’ pre-2015 regulatory regime provides clarity on this point in the previously used *Rapanos* “Approved Jurisdictional Determination Form,” which states, “[a] wetland that is adjacent to but that does not directly abut an RPW requires a significant nexus test.”⁵ Removing the significant nexus portion from that statement leaves the simple fact that unless a wetland has a continuous surface connection – directly abutting a requisite jurisdictional water – it cannot be determined to be jurisdictional as an adjacent wetland.

2023 Rule

On January 18, 2023, the agencies issued the 2023 Rule to revise the definition of “waters of the United States.” The preamble to the 2023 Rule included limited guidance on the implementation of “continuous surface connection,” and stated:⁶

Under the relatively permanent standard for adjacent wetlands, wetlands meet the continuous surface connection requirement if they physically abut, or touch, a relatively permanent paragraph (a)(2) impoundment or a jurisdictional tributary when the jurisdictional tributary meets the relatively permanent standard, or if the wetlands are connected to these waters by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert.

The agencies’ “discrete features” language is in tension with the pre-2015 regime and *Sackett* and the purpose of this memo is to align the agencies’ interpretation of adjacency with *Sackett*.

⁴ U.S. ARMY CORPS OF ENGINEERS JURISDICTIONAL DETERMINATION FORM INSTRUCTIONAL GUIDEBOOK, 6 (May 30, 2007), available at <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll11/id/2310>.

⁵ U.S. ARMY CORPS OF ENGINEERS, APPROVED JURISDICTIONAL DETERMINATION FORM, 2, available at <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll11/id/2314>.

⁶ 88 FR 3004, 3090 (Jan. 18, 2023).

Guidance on Wetlands with a Continuous Surface Connection

Under either the amended 2023 regulatory definition of “waters of the United States” or the pre-2015 regulatory regime consistent with *Sackett*, the agencies are interpreting “waters of the United States” to include “only those adjacent wetlands that have a continuous surface connection because they directly abut the [requisite jurisdictional water] (e.g., they are not separated by uplands, a berm, dike, or similar feature).” 2008 *Rapanos* Guidance at 7, footnote 29; *see also* 88 FR 3090 (Jan. 18, 2023) (“wetlands meet the continuous surface connection requirement if they physically abut, or touch, a [requisite jurisdictional water]”). Additionally, pursuant to the *Rapanos* plurality, “[w]etlands with only an intermittent, physically remote hydrologic connection to ‘waters of the United States’ do not implicate the boundary-drawing problem of *Riverside Bayview*,” and thus do not have the “necessary connection” to covered waters that triggers CWA jurisdiction. *Rapanos*, 547 U.S. at 742 (Scalia, J., plurality). The plurality was even more clear that the CWA definition of “navigable waters” includes “some wetlands – namely, those that directly ‘abut’ covered waters.” *Id.* at 747, footnote 12 (Scalia, J., plurality) (emphasis in original).

Therefore, an interpretation of “continuous surface connection” which allows for wetlands far removed from and not directly abutting covered waters to be jurisdictional as adjacent wetlands has the potential to violate the direct abutment requirement for “adjacent wetlands” under the plurality’s standard and now *Sackett*’s endorsement of that standard.⁷ Therefore, any components of guidance or training materials that assumed a discrete feature established a continuous surface connection are rescinded.⁸

In summary, the Supreme Court in *Sackett* provided a clear two-part test for determining CWA jurisdiction over adjacent wetlands. First, the adjacent body of water must be a “water of the United States,” which generally means traditional navigable waters, or a relatively permanent body of water connected to a traditional navigable water. Second, the wetland, assuming it satisfies the agencies’ longstanding regulatory definition of “wetlands” at 33 C.F.R. 328.3 and 40 C.F.R. 120.2, must have a continuous surface connection to a requisite covered water making it difficult to determine where the water ends and wetland begins. The *Sackett* Court recognized that there may be some instances where that line drawing problem is difficult, such as during periods of drought or low tide or in those

⁷ The same is true for any reliance on *United States v. Cundiff*, 555 F.3d 200 (6th Cir. 2009) to evaluate wetlands that do not directly abut an otherwise covered water. Such reliance could create conflict with *Sackett*’s two-part test for jurisdiction over adjacent wetlands.

⁸ This rescission encompasses the relevant portions of the agencies’ “September 24, 2024, Presentation: Updates on ‘Waters of the United States’” (“[w]etlands also have a continuous surface connection when they are connected to a jurisdictional water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert...”). *Id.* at slide 47, available at https://www.epa.gov/system/files/documents/2024-09/wotus-overview_9-24-24_508c.pdf, and the agencies’ “Presentation – November 15, 2023, Updates for Tribes and States on ‘Waters of the United States’” (“[w]etlands also have a continuous surface connection when they are connected to a jurisdictional water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert...”). *Id.* at slide 48, available at https://www.epa.gov/system/files/documents/2023-11/wotus-overview_tribes-and-states_11-15-23_508.pdf. This directive also serves to rescind the following case-specific memoranda to the Field implementing the pre-2015 regulatory regime consistent with *Sackett* that apply the same “discrete features” test as the two trainings listed herein: “Memorandum on NWK-2022-00809,” “Memorandum on SWG-2023-00284,” “Memorandum on LRB-2023-00451” and “Memorandum on NWK-2024-00392,” as well as the following case-specific memoranda addressing continuous surface connection under the amended 2023 rule: “Memorandum on NWP-2023-602,” “Memorandum on NAP-2023-01223,” “Memorandum on POH-2023-00187” and “Memorandum on MVR-2023-0828.”

instances where there may be temporary interruptions in surface connection. The agencies will work to resolve these scenarios on a case-by-case basis and provide further clarity when appropriate to guide future implementation.

The agencies will use a forthcoming *Federal Register* notice and recommendations docket on “WOTUS Notice: The Final Response to SCOTUS” as well as other stakeholder engagement opportunities to identify areas of implementation challenges to be later addressed either through additional guidance or rulemaking.

Dated: March 12, 2025



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