



## MEMORANDUM ON NAP-2023-01223

### Summary

For NAP-2023-01223, 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 Philadelphia District for any revisions that may be necessary, consistent with the factors in this memorandum regarding when a pipe or swale can meet the continuous surface connection requirement for wetlands evaluated as paragraph (a)(4) adjacent wetlands under the amended 2023 rule.<sup>1</sup>

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 amended 2023 rule at 33 CFR 328.3 and 40 CFR 120.2, consistent with *Sackett*. In providing this direction, we have also utilized relevant case law and existing guidance included within the January 2023 rule preamble, consistent with *Sackett*.<sup>2</sup>

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<sup>1</sup> The amended 2023 rule refers to 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, September 8, 2023; “conforming rule”) (33 CFR 328.3; 40 CFR 120.2). It is this rule that is currently operative in the State of Delaware. 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.

<sup>2</sup> 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,” 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* and the direction in this memorandum is consistent with both operative regulatory regimes, the direction in this memorandum with respect to when a pipe or swale can serve as a continuous surface connection for adjacent wetlands is also applicable to the “pre-2015 regulatory regime.”

**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 tributaries. See 33 CFR 328.3(a)(4) and 40 CFR 120.2(a)(4). *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 (5<sup>th</sup> 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 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”).

**II. Depending on the Factual Context, Pipes and Swales Can Meet the Continuous Surface Connection Requirement**

The draft approved JD covers an approximately 359.29-acre site located in Camden Wyoming, Kent County, Delaware at 39.104456 North latitude and -75.571677 West longitude. The draft approved JD covers a variety of aquatic resources, but this memorandum focuses on Wetlands Areas #6 and #8

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(2.5053 acres and 0.1618 acres, respectively). The Philadelphia District coordinated this draft approved JD with EPA Region 3, and Region 3 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 concluded that Wetlands Area #6 is adjacent to Red House Branch, a relatively permanent tributary, and is jurisdictional as a paragraph (a)(4) adjacent wetland under the amended 2023 rule. As a basis for this finding, the draft approved JD indicates that Wetlands Area #6 exhibits a continuous surface connection to Red House Branch via a piped connection under Willow Grove Road. The length of the piped connection is approximately 70 feet. Additionally, the draft approved JD notes that Wetlands Area #6 is the source of hydrology for Red House Branch.

Wetlands Area #6 serves as the source of hydrology for Red House Branch and is connected to it by a feature that conveys surface flow from Wetlands Area #6 to the relatively permanent tributary. Pipes and culverts are typically built under roads to help maintain hydrologic connection from the aquatic resource on one side of the road to the other in order to support the structural integrity of the road by preventing flooding, overtopping, undercutting, and erosion from the aquatic resource. Without the pipe or culvert, the flow of water from the wetlands could result in a road being degraded or washed away. Thus, in this case, the pipe is a type of feature that provides evidence that sufficient levels of surface flow are occurring between the wetland and the relatively permanent water during storm events, bank full periods, and/or ordinary high flows to warrant construction of these features. 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. The 70-foot length of the physical connection via the pipe is relatively short. Considering these factors together, and consistent with *Sackett*, the agencies concur with the District that in the factual context of Wetlands Area #6, the pipe directly connecting Wetland 6 and Red House Branch under a road serves as a physical connection that meets the continuous surface connection requirement for the wetland and the wetland is therefore “adjacent” to Red House Branch, a relatively permanent water.

The draft approved JD concluded that Wetlands Area #8 is adjacent to Waters Area #2, a relatively permanent impoundment of a jurisdictional water, and is jurisdictional as a paragraph (a)(4) adjacent wetland under the amended 2023 rule. As a basis for this finding, the draft AJD indicates that Wetlands Area #8 exhibits a continuous surface connection to Waters Area #2 via a non-relatively permanent swale.<sup>3</sup> The swale is approximately 350 feet in length and is characterized in the draft approved JD as a shallow feature that conveys water from the surrounding uplands and Wetlands Area #8 at low frequency and low volume. During a site visit by the District, the swale contained water flowing towards the (a)(2) impoundment as a result of a recent rain event.

Wetlands Area #8 is connected to a jurisdictional relatively permanent water by a feature (the non-relatively permanent swale) that was observed to carry flow after a precipitation event to the relatively permanent water. While not all swales will meet the continuous surface connection requirement, the observation of flow in the swale documented in the draft JD provides evidence that flow is occurring between the wetland and the relatively permanent water. The 350-foot length of the physical

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<sup>3</sup> The draft approved JD refers to this non-relatively permanent swale as an ephemeral drainage swale.

connection via the non-relatively permanent swale is relatively short. Note that while flow was observed within the swale and helped support a conclusion that a continuous surface connection is present in this instance, it is not required to meet the continuous surface connection requirement (See Section I. above). Evidence of flow is relevant, and may be observed in other ways, such as physical indicators of flow or the type of physical connection. Considering these factors together, and consistent with *Sackett*, the agencies concur with the District that in the factual context of Wetland 8, the 350 foot non-relatively permanent swale connecting Wetlands Area #8 and Waters Area #2 serves as a physical connection that meets the continuous surface connection requirement for the wetland.

### III. Conclusion

The agencies concur with the District that Wetlands Area #6 and Wetlands Area #8 each have a continuous surface connection to relatively permanent waters. The agencies are returning the draft approved JD to the Philadelphia District for any revisions that may be necessary, consistent with the factors in this memorandum regarding when a pipe or swale can meet the continuous surface connection requirement for wetlands evaluated as paragraph (a)(4) adjacent wetlands under the amended 2023 rule.

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