



MEMORANDUM ON LRB-2021-01386

Summary

For LRB-2021-01386, 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 Buffalo District to re-evaluate whether “Wetland 1” and “Wetland 2” 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 concept of how to identify the wetland area which is then assessed under the jurisdictional standard was not affected by the decision in *Sackett*.¹ The direction in this memorandum is consistent with the Clean Water Act (CWA) and the amended 2023 rule² at 33 CFR 328.3 and 40 CFR 120.2. In providing this direction, we have also utilized relevant case law and existing guidance included within the January 2023 rule preamble, consistent with *Sackett*.

I. “Wetland 1” and “Wetland 2” Should Be Re-evaluated to Determine If They Are One Wetland

The draft approved JD covers an approximately 165-acre site located in the town of

¹ The concept of how to identify the wetland area for assessment was not affected by the decision in *Sackett* for either of the regulatory regimes that are currently operative across the country due to ongoing litigation (*i.e.*, the amended 2023 rule and the pre-2015 regulatory regime being implemented consistent with *Sackett*). See “Memorandum to Re-evaluate Jurisdiction for NWO-2003-60436,” available at https://www.epa.gov/system/files/documents/2024-01/nwo-2003-60436-joint-decision-memo_final_12-18-23_508c.pdf for discussion of the concept for purposes of the pre-2015 regulatory regime.

² The amended 2023 rule refers to the “Revised Definition of ‘Waters of the United States,’” (88 FR 3004, January 18, 2023; “January 2023 rule”) as amended by the final rule “Revised Definition of ‘Waters of the United States’; Conforming” (88 FR 61964, 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 New York.

Orchard Park, Erie County, New York at 42.75889 North latitude and -78.70072 West Longitude. The review area consists of multiple wetlands, streams, and upland areas, with previously permitted impacts for a subdivision road. The Buffalo District coordinated this draft approved JD with EPA Region 2, and Region 2 subsequently elevated the draft approved JD to the agencies' Headquarters offices for review.

The District determined that "Wetland 1" does not have a continuous surface connection to a water identified in paragraph (a)(1) or to a relatively permanent, standing or continuously flowing body of water identified in paragraph (a)(2) or (a)(3) of the Amended 2023 Rule. The draft approved JD indicates that Wetlands 2, 3, 4, and 5 are separated only by a subdivision road in certain locations in the review area. While delineated as separated wetlands, the draft approved JD notes that these wetlands are connected to each other via culverts and thus are one large wetland. Finally, the draft approved JD indicates that the large wetland consisting of Wetlands 2, 3, 4, and 5 abut Smoke Creek and unnamed tributaries of Smoke Creek, which are all relatively permanent tributaries that flow to Lake Erie, a traditional navigable water. "Wetland 1" is separated from the portion of the large wetland delineated as "Wetland 2" by a previously permitted road crossing that does not include culverts.

In accordance with section II of the joint coordination memorandum under the 2023 rule, as amended, the Buffalo District coordinated with EPA Region 2 regarding the wetlands evaluated under paragraph (a)(4) in this draft approved JD. EPA Region 2 subsequently elevated this coordinated draft approved JD, specifically for "Wetland 1," with questions regarding the appropriate approach in determining whether the areas identified as "Wetland 1" and "Wetland 2" are functioning as a single wetland.

Because the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard and the January 2023 rule preamble discussed the *Rapanos* plurality standard, the implementation guidance and tools in the January 2023 rule preamble that address the regulatory text that was not amended by the conforming rule, including the preamble relevant to the *Rapanos* plurality standard incorporated in paragraphs (a)(3), (4), and (5) of the amended 2023 rule, generally remain relevant to implementing the amended 2023 rule.³ With respect to the question of how to identify the wetland area which is then assessed under the jurisdictional standard, the January 2023 rule preamble states that⁴:

"For purposes of determining whether a wetland is "adjacent," artificial structures do not divide a wetland if a hydrologic connection is maintained between the divided portions of the wetland. Rather, the wetland is treated as

³ See "Joint Coordination Memorandum to the Field Between the U.S. Department of the Army, U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) on the January 2023 Rule, As Amended" at 1.

⁴ 88 FR 3094 (January 18, 2023).

one wetland. For example, if a wetland is divided by a road, a culvert could maintain a hydrologic connection. The agencies may also consider if a subsurface hydrologic connection is maintained, using indicators such as hydric soils, the permeability of the artificial structure, and/or the permeability of the soils below the artificial structure.”

In addition, the *Technical Support Document for the Final “Revised Definition of ‘Waters of the United States’” Rule* states that⁵:

“Under longstanding agency practice, a wetland is also delineated as a single wetland if a human-made levee or similar artificial structure divides it, but a hydrologic connection is maintained between the divided wetlands. *See, e.g.,* U.S. EPA and U.S. Army Corps of Engineers 2008. One example of this concept is a wetland that is divided by a road or railway bed. In this example, evidence of a potential hydrologic connection via a shallow subsurface connection could be observed if the wetland continued to function similarly and retain similar species on either side of the human-made structure. The wetland should thus be delineated as a single wetland for the purposes of assessing wetland adjacency.”

Although a culvert can be one way to demonstrate that a hydrologic connection is maintained between two or more wetland areas, as noted in the January 2023 rule preamble, other factors, including a shallow subsurface connection or indicators of a shallow subsurface connection, can also be utilized. Where, after assessing these factors, 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 2023 rule, as amended) 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. If two or more wetland areas are found to not be one wetland, then they would be individually assessed for jurisdiction.

II. Conclusion

The agencies are returning the draft approved JD to the Buffalo District to re-evaluate whether “Wetland 1” and the wetland area delineated as “Wetland 2” are one wetland. The draft approved MFR should include this evaluation. If “Wetland 1” and “Wetland 2” are one wetland, the wetland should be evaluated as a single unit for adjacency (along with the wetland areas delineated as Wetlands 3, 4, and 5, which have previously been determined to be one large wetland by the District). If “Wetland 1” and the wetland area delineated as “Wetland 2” are determined to not be one wetland, the District should revise the draft approved JD to document why “Wetland 1” and the wetland

⁵ Technical Support Document at 258. Available at https://www.epa.gov/system/files/documents/2022-12/TSD-FinalCombined_508.pdf.

area delineated as “Wetland 2” are not one wetland and can proceed to finalize the determination.

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