



## MEMORANDUM ON NWP-2023-602

### Summary

For NWP-2023-602, 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 Portland District for revision, consistent with the factors in this memorandum regarding whether a subsurface storm drain that is part of a municipal storm sewer system can serve as part of a continuous surface connection 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 Clean Water Act, 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. See conforming rule (88 FR 61966).<sup>2</sup> 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 as well as the *Sackett* decision. In providing this direction, we have also utilized relevant case law

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<sup>1</sup> 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 Oregon.

<sup>2</sup> 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).

and existing guidance included within the January 2023 rule preamble, consistent with *Sackett*.<sup>3</sup>

**I. The Stormwater Sewer Below SE 1<sup>st</sup> Street and NE Kane Drive Cannot Serve as Part of a Continuous Surface Connection**

The draft approved JD covers an approximately 2.48-acre site located in the city of Gresham, Multnomah County, Oregon at 45.497166 North latitude and -122.400719 West longitude. According to the draft approved JD, this site includes a wetland (“Wetland 1”) that encompasses 0.33 acres onsite and that extends offsite to the northeast. The Portland District coordinated this draft approved JD with EPA Region 10, and Region 10 subsequently elevated the draft approved JD to the agencies’ Headquarters offices for review.

The draft approved JD concluded that Wetland 1 is adjacent to Kelly Creek, 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 Wetland 1 extends outside the review area to the northeast, where it is drained by a roadside ditch with non-relatively permanent flow. The ditch flows for approximately 50 feet until it drains into a culvert that connects to a stormwater drain. Subsurface flow continues in the storm sewer for approximately 0.21 mile before outflowing into a 100-foot swale that enters a separate off-site wetland abutting Kelly Creek, a relatively permanent tributary connected to the Sandy River, a traditional navigable water. The District determined in the draft approved JD that Wetland 1 has a continuous surface connection to Kelly Creek based on the flowpath described above.

In accordance with section II of the joint coordination memorandum under the 2023 rule, as amended, the Portland District coordinated with EPA Region 10 regarding the wetland evaluated under paragraph (a)(4) in this draft approved JD. EPA Region 10 subsequently elevated this coordinated draft approved JD, specifically for Wetland 1, to receive direction from the joint agencies’ Headquarters regarding the site-specific components of the physical features that potentially serve as a continuous surface connection between Wetland 1 and Kelly Creek.

Under the amended 2023 rule, “adjacent” is defined as “having a continuous surface connection,” consistent with *Sackett* and the *Rapanos* plurality. For purposes of this

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<sup>3</sup> The direction in this memorandum with respect to whether the specific subsurface storm drain at issue can serve as a continuous surface connection for adjacent wetlands is also applicable to 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*. Therefore, the direction in this memorandum is applicable to both the regulatory regimes that are 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*).

draft approved JD, EPA and OASACW have determined that subsurface flow through the city's storm sewer system does not qualify as flow through a discrete feature that can serve as a continuous surface connection. The information provided by the District on the storm sewer system indicates that multiple stormwater laterals drain into the city's storm sewer system before it reaches the outfall that eventually connects to Kelly Creek, including stormwater laterals draining from both SE 1<sup>st</sup> Street and NE Kane Drive. Thus, this particular storm sewer appears to convey stormwater on the subsurface from a variety of sources, including stormwater runoff from both SE 1<sup>st</sup> Street and NE Kane Drive. While there may be situations where a continuous surface connection is maintained despite a minor subsurface interruption, the agencies have determined that subsurface flow through the city's underground storm sewer system does not qualify as a continuous surface connection. Because this storm sewer system cannot serve as part of a continuous surface connection, the other aspects of the flowpath do not need to be evaluated to determine if they can serve as part of a continuous surface connection.

## II. Conclusion

The agencies are returning the draft approved JD to the Portland District to re-evaluate whether "Wetland 1" is an adjacent wetland, given that the city storm sewer system cannot serve as part of a continuous surface connection.

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