



MEMORANDUM ON POH-2023-00187

Summary

For POH-2023-00187, 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 Honolulu District for any revisions that may be necessary, consistent with this memorandum regarding when ditches and culverts can provide the requisite continuous surface connection for wetlands evaluated as paragraph (a)(4) adjacent wetlands under the amended 2023 rule, consistent with the Supreme Court’s decision in *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023).¹

On May 25, 2023, the Supreme Court decided *Sackett* and concluded that the plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), established the proper jurisdictional standard under the Clean Water Act (CWA) for relatively permanent waters and adjacent wetlands. To be covered under the CWA, adjacent wetlands must satisfy the standard first established by the plurality in *Rapanos* 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, the amended 2023 rule at 33 CFR 328.3 and 40 CFR 120.2, and *Sackett*. In providing this direction, we have also utilized relevant case law and existing guidance included within the 2023 rule preamble, consistent with *Sackett*.²

¹ The “amended 2023 rule” refers to the “Revised Definition of ‘Waters of the United States,’” 88 Fed. Reg. 3004 (January 18, 2023); “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”) (codified at 33 CFR 328.3 (Corps) & 40 CFR 120.2 (EPA)). It is the amended rule that is currently operative in the Commonwealth of the Northern Mariana Islands. 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.

² 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 certain ditches and culverts 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 “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 phrase “as a practical matter 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 phrase (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); see also, *Sackett*, 598 U.S. at 667 (referencing the *Rapanos* plurality’s conclusion that CWA coverage includes “wetlands with such a close physical connection to [covered] waters”). *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. See, e.g., *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). 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) “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;" and, "it does not mean that only perpetually flowing creeks satisfy the plurality's test").

II. Depending on the Factual Context, Certain Culverts and Ditches Can Provide the Necessary Continuous Surface Connection

The draft approved JD covers an approximately 12.9-acre site located in Achugao and San Roque, Island of Saipan, Commonwealth of the Northern Mariana Islands at 15.24728 North latitude and 145.76955 East longitude. The draft approved JD covers the San Roque Wetland (9.7 acres), which is the subject of this memorandum. The Honolulu District coordinated this draft approved JD with EPA Region 9, and Region 9 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 the San Roque Wetland is adjacent to the Saipan Lagoon, a traditional navigable water, 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 the San Roque Wetland exhibits a continuous surface connection to the Saipan Lagoon via a discrete, man-made ditch³ approximately 150 meters (490 feet) long. Additionally, the draft approved JD notes that the maintained ditch passes through a boxed culvert under a private driveway between the wetland and the lagoon. There is also a ditch gate or other structure approximately 30 meters (98 feet) from the outlet to the lagoon, but the structure does not impede flow through the ditch based on the District's observation of sediment plumes extending from the outlet of the ditch to the lagoon, which, as noted above, is a traditional navigable water.

Certain non-relatively permanent ditches, other non-relatively permanent channels, and culverts are features that can serve as all or part of a continuous surface connection depending on the factual context because they can provide evidence that flow is occurring between the wetland and the requisite covered water,⁴ such that the two features are, as a practical matter, indistinguishable. 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. Physical indicators of flow, such as sediment plumes downstream or an ordinary high water mark, can provide evidence that flow is occurring between the wetland and the requisite covered water. Ditches are often created to drain water and to prevent water from accumulating on the surface, directing water to flow through the ditch and helping to reduce flooding. The presence of a defined channel, such as that shown in site photographs associated with the draft approved JD, demonstrates the ability of the ditch to move water from the wetland to the lagoon. Ditches are maintained by removing material, including vegetation, sediment, and debris, from the constructed channel to help prevent flow blockages. In addition, culverts are typically built under roads and driveways to help maintain hydrologic connection from the aquatic resource on one side of the

³ Note that the District did not have access to the ditch, and the ditch is not visible in satellite or aerial imagery due to heavy tree cover, so the District was unable to determine if flow in the ditch is relatively permanent.

⁴ As used in this memorandum, a requisite covered water means a traditional navigable water, the territorial seas, an interstate water, a relatively permanent jurisdictional impoundment, or a relatively permanent jurisdictional tributary.

driveway to the other to support the structural integrity of the driveway by preventing flooding, overtopping, undercutting, and erosion from the aquatic resource. Without the culvert, the flow of water from the wetland and from the ditch could result in a driveway being degraded or washed away. Depending on the factual context, including length of the connection and physical indicators of flow, more than one feature⁵ such as a non-relatively permanent ditch, other non-relatively permanent channel, or culvert 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, the length of the physical connection between the San Roque Wetland and the traditional navigable water is 490 feet and is composed of a ditch and a culvert. The large sediment plumes observed at the outlet of the ditch to Saipan Lagoon provide evidence that flow from the wetland does reach the traditional navigable water. The District also noted that the ditch is well-maintained, that Saipan receives approximately 80 inches or more of rainfall per year, and that the ditch is located in a very frequent flood area according to the Federal Emergency Management Agency. This information together provides evidence that there is sufficient flow in the ditch and culvert between the San Roque Wetland and the traditional navigable water to warrant construction and maintenance of these features. Together, this information shows evidence of an unimpaired, continuous physical connection, including during not only storm events, but also during bank full periods, and/or ordinary high flows. In this case, the ditch and culvert are features that provide an unimpaired, continuous physical connection between the San Roque Wetland and the Saipan Lagoon, a traditional navigable water. Considering these factors together, the agencies concur with the District that in the factual context of the San Roque Wetland, based on the number and type of connections, the 490-foot length of the connection from the wetland to the requisite covered water, and the physical indicators of flow, the ditch and culvert together serve as a physical connection that provides the necessary continuous surface connection for the San Roque Wetland and the wetland is therefore, consistent with *Sackett*, “adjacent” to Saipan Lagoon, a traditional navigable water.

III. Conclusion

The agencies concur with the District that the San Roque Wetland has a continuous surface connection to a traditional navigable water. The agencies are returning the draft approved JD to the Honolulu District for any revisions that may be necessary.

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⁵ Other features, such as certain swales, pipes, and wetlands can also serve as part of a continuous surface connection, depending on the factual circumstances. See, e.g., “Memorandum on NAP-2023-01223” (June 25, 2024) and “Memorandum on LRB-2023-00451” (September 3, 2024).