Waters of the United States/Clean Water Act: U.S. Environmental Protection Agency/Corps of Engineers Memorandum Addressing Implementation of "Continuous Surface Connection"



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The United States Environmental Protection Agency and the United States Army Corps of Engineers (collectively, "EPA") issued guidance on March 12th entitled:

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 ("Guidance").

The stated purpose of the Guidance is to address implementation of the definition of "Waters of the United States" ("WOTUS") 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" consistent with the Supreme Court's decision in Sackett v. Environmental Protection Agency, 598 U.S. 651 (2023).

The definition of WOTUS is arguably one of the most critical jurisdictional terms in the Clean Water Act. Its importance is magnified since it is relevant to both NPDES permitting and non-NPDES programs such as:

- Section 404 of the Clean Water Act Wetland permits.
- Section 311-Oil/Hazardous Substance release requirements.
- Clean Water Act Spill Prevention Control and Countermeasure regulations.

As a result, the scope of the definition of WOTUS has been and continues to be the subject of frequent litigation, legislative oversight, rulemakings, and public policy debates since the enactment of the modern version of the Clean Water Act of 1972.

EPA states that the Guidance is being issued in response to a request for clarification in the implementation of the Clean Water Act with respect to adjacent wetlands in light of Sackett. The document contends that 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. They state that previously issued (during the Biden Administration) case-specific policy memoranda issued post-Sackett provided neither:

- National guidance on the topic.
- Clear and transparent direction for the public or the agencies.

The Guidance clearly seeks to narrow aspects of the Biden-era rulemaking in regard to a determination of Sackett's outline of when adjacent wetlands are jurisdictional.

The United States Supreme Court in Sackett articulated a two-part process for determining a WOTUS:

1. The CWA's use of "waters" in §1362(7) refers only to "geo-graphic[al] features that are described in ordinary parlance as 'streams, oceans, rivers, and lakes' " and to adjacent wetlands that are "indistinguishable" from those bodies of water due to a continuous sur-face connection. Rapanos v. United States, 547 U. S. 715, 755, 742, 739.

2. To assert jurisdiction over an adjacent wetland un-der the CWA, a party must establish "first, that the adjacent [body of water constitutes] . . . 'water[s] 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."

The components of the March 12th Guidance include:

- BACKGROUND.
- Sackett and Rapanos.
- 2008 Rapanos Guidance in the Pre-2015 Regulatory Regime.
- 2023 Rule.
- Guidance on Wetlands with a Continuous Surface Connection.

As would be expected, various organizations have diametrically opposed views on the Guidance.

The National Cattlemen's Beef Association quotes its Chief Counsel as stating in part:

…For years, NCBA has worked across the federal government – educating members of Congress, participating in agency rulemakings, and fighting for cattle producers in federal court – to secure a WOTUS definition that protects both our nation's natural resources and Americans' property rights. We are proud of the Trump Administration's effort to further conform the WOTUS definition to the Supreme Court's decision in Sackett v. EPA.

In contrast, the national environmental organization, Waterkeeper Alliance, states in part:

…this reinterpretation could exclude many streams, wetlands, and vital waterways from federal protection, leaving them vulnerable to pollution. Smaller rivers and wetlands, crucial for water filtration, flood control, and wildlife habitats, could lack oversight, threatening clean drinking water and agricultural needs for local communities.

A copy of the Guidance can be downloaded here.