



MAWWG – NEBAWWG Joint Meeting
2024, Northampton, MA

Panel: State Estimates of Impacts to Federal Wetlands Jurisdictional Extent post-*Sackett v. EPA*

FEDERAL FIELD SPECIFIC DETERMINATIONS AND LITIGATION
UPDATE POST SACKETT

Federal Guidance on implementation of “conforming” 2023 WOTUS Rule:

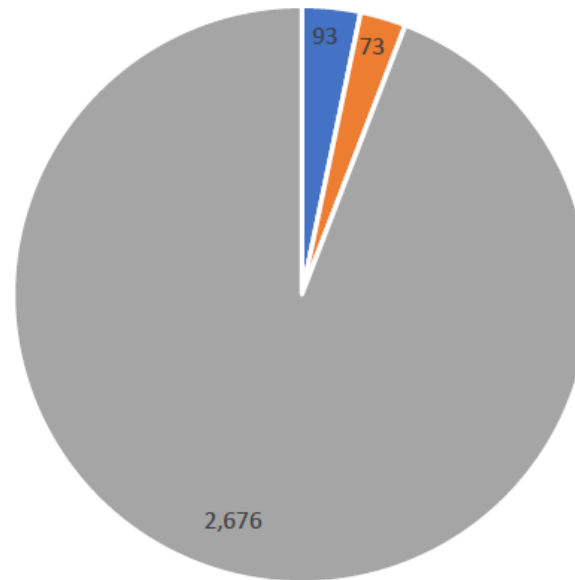
None?

- Information between States and Corps Districts has been mixed on geographic affects of Sackett and revised rule. Appear to be more significant concerns in the West.
- Presentations provided by EPA and Corps on revised rule:
https://www.epa.gov/system/files/documents/2024-09/wotus-overview_9-24-24_508c.pdf
- JD Coordination Process Updated (August 2024):
https://www.epa.gov/system/files/documents/2024-04/ajdcoordinationupdatereport_april2024.pdf



Total Corps JDs vs HQ Coordinated

Approved JDs Finalized and Draft Approved JDs Elevated to Headquarters Between September 8, 2023 and April 23, 2024



- Unresolved Draft Approved JDs Elevated to HQ
- Resolved Draft Approved JDs Elevated to HQ
- Total Approved JDs Finalized

Figure 1: This figure shows approved JDs finalized by the Corps as well as draft approved JDs that have been elevated to the agencies' headquarters between September 8, 2023 and April 23, 2024. Of the 166 draft approved JDs that have been elevated to headquarters, 73 elevations have been resolved.



Memoranda to the Field Implementing the 2023 Rule, as Amended:

- [Memorandum on LRB-2021-01386 \(pdf\)](#) - This memorandum addresses the concept of how to identify the wetland area which is then assessed under the jurisdictional standard.
- [Memorandum on MVS-2023-00288 \(pdf\)](#) - This memorandum addresses the concept of how to identify tributary reaches for purposes of assessing tributaries.
- [Memorandum on NWP-2023-602 \(pdf\)](#) - This memorandum addresses whether the specific subsurface storm drain at issue can serve as a continuous surface connection for adjacent wetlands.
- [Memorandum on NAP-2023-01223 \(pdf\)](#) - This memorandum addresses whether site specific discrete features can provide a continuous surface connection for adjacent wetlands.



Memoranda to the Field Implementing the Pre-2015 Regulatory Regime Consistent with *Sackett*:

- [Re-evaluate Jurisdiction NWO-2003-60436 \(pdf\)](#) - This memorandum addresses the concept of how to identify the wetland area which is then assessed under the jurisdictional standard.
- [Evaluating Jurisdiction LRL-2023-00466 \(pdf\)](#) - This memorandum addresses the concept of when ponds are considered part of the tributary network.
- [Re-evaluate Jurisdiction SAS-2001-13740 \(pdf\)](#) - This memorandum addresses the concept of how to apply the waste treatment system exclusion.
- [Memorandum on NWK-2022-00809 \(pdf\)](#) - This memorandum addresses whether site specific discrete features can provide a continuous surface connection for adjacent wetlands.
- [Memorandum on SWG-2023-00284 \(pdf\)](#) - This memorandum addresses whether site specific discrete features can provide a continuous surface connection for an adjacent wetland.
- [Memorandum on LRB-2023-00451 \(pdf\)](#) - This memorandum addresses whether certain site specific features can provide a continuous surface connection for an adjacent wetland.



Examples of information w/ Coordination Memos (Site Specific)

- ❖ JD related to hydrologic connectivity of a wetlands through a storm sewer system where the District found jurisdiction based on connectivity. HQ concluded that this did not create a connection b/c the flow could not be attributed to the wetlands in question and called the wetlands non-regulated. ;
- ❖ wetlands which were separated by roadways which did not have culverts connecting the wetlands. The memos state that culverts are not required if there is hydrologic connectivity between the wetland systems through the man-made barrier and referred these non-JD calls back to the District for re-evaluation based on the pre-amble and post Rapanos guidance concerning man-made structures separating a wetlands system;
- ❖ memo opines on the term “indistinguishable” and states that it *“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*”;
- ❖ Corps utilized a wetland as part of the connection to RPW analysis and determined it was a flowpath wetland which they describe as having *“physical indicators of flow through the flowpath wetland or there is evidence that a feature flows into and out of the flowpath wetland”*



Implementation Tools and Methods

- **Antecedent Precipitation Tool (APT)** - support decisions as to whether field data collection and other site-specific observations occurred under normal climatic conditions.
<https://github.com/erdc/Antecedent-Precipitation-Tool/releases/latest>
- **Streamflow Duration Assessment Methods (SDAMs)** - observable in a single site visit, to classify streamflow duration as perennial, intermittent, or ephemeral at the reach scale.
<https://www.epa.gov/streamflow-duration-assessment>
- **Ordinary High Water Mark Manuals** - defines the lateral limits of jurisdiction in non-tidal “waters of the United States.” <http://dx.doi.org/10.21079/11681/46102>
- 1987 Corps Wetland Delineation Manual and applicable regional supplements to the delineation manual.

Other: Post Rapanos Guidance – Note NRP tribes and SigNex is out; Literature: “Identifying invertebrate indicators for streamflow duration assessments in forested headwater streams” (Fritz et.al.); “Macroinvertebrates at the source: flow duration and seasonality drive biodiversity and trait composition in rheocrene springs of the Western Allegheny Plateau, USA” (Pond, Krock, Ettema); “Larval salamanders and channel geomorphology are indicators of hydrologic permanence in forested headwater streams” (Johnson et.al.)



Current Litigation:

- ***Texas v. EPA*, Nos. 23-00017 & 23-00020 (S.D. Tex.)**
 - Plaintiffs: Texas & Idaho; industry coalition led by Am. Farm Bureau Fed'n
- ***West Virginia v. EPA*, No. 23-00032 (D.N.D.)**
 - Plaintiffs: West Virginia, North Dakota, Georgia, Iowa, Alabama, Alaska, Arkansas, Florida, Indiana, Kansas, Louisiana, Mississippi, Montana, Nebraska, New Hampshire, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Wyoming, and the Commonwealth of Virginia
 - Intervenor-defendants: Chickaloon Village Traditional Council, Rappahannock Tribe, Tohono O'Odham Nation, & White Earth Band of Minnesota Chippewa Tribe
- ***White v. EPA*, No. 24-00013 (E.D.N.C.)** Plaintiff: Landowner represented by Pacific Legal Foundation
- It is anticipated that Kentucky will file an amended complaint challenging the Amended 2023 Regulations before the end of the calendar year (their initial complaint against the January 2023 Rule in *Kentucky v. EPA* was dismissed for lack of standing by the Eastern District of Kentucky).
- *Lewis v. United States*, for example, the Fifth Circuit first acknowledged that *Sackett* requires the wetland be indistinguishable from a WOTUS to be jurisdictional but then continued to recognize that a continuous surface connection to jurisdictional water "represents the *Sackett* adjacency test."
- *Glynn Environmental Coal, Inc. v. Sea Island Acquisition, LLC*, where the United States District Court for the Southern District of Georgia also acknowledged that a wetland must be "practically indistinguishable" and then held that the property did not meet that definition because it failed the continuous surface connection test.
- **Note**: No lower court thus far has read *Sackett* to mandate a wetland must have both a continuous surface connection to a jurisdictional water and be indistinguishable to be "adjacent" and WOTUS

