

EPA and the Army Make More Waves on WOTUS

Update

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On March 12, the Environmental Protection Agency and the Office of the Assistant Secretary of the Army took steps to address lingering questions about the meaning and implementation of “waters of the United States” (WOTUS) following the US Supreme Court’s 2023 decision in *Sackett v. United States*. Although the *Sackett* decision narrowed the types of features that could be WOTUS, there are several implementation questions that remain on particular issues related to identifying WOTUS. Further, subsequent litigation over the prior administration’s WOTUS rule has resulted in the 2023 WOTUS rules (as amended after *Sackett*) applying in 24 states, while the pre-2015 rules, as consistent with *Sackett*, are applied in 26 states.

As the agencies begin a new effort to promote clarity and uniformity for Clean Water Act implementation across the country, EPA Administrator Lee Zeldin announced the availability of [new guidance](#) for implementing the “continuous surface connection” requirement outlined in *Sackett*. Administrator Zeldin also [announced](#) that the agencies will conduct listening sessions in March and April to solicit feedback and hear public comment on implementation issues that remain post-*Sackett*. The agencies hope that the guidance and the listening sessions will assist their efforts to arrive at both (a) legally comprehensible and durable provisions for identifying jurisdictional features governed by the Clean Water Act, and (b) effective, transparent, and predictable field implementation of the principles for identifying WOTUS.

The Guidance

Whether a wetland is jurisdictional under the Clean Water Act depends on the connection that the wetland has to another jurisdictional water — a traditional navigable water or a relatively permanent body of water connected to a

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navigable water. When the Supreme Court confirmed in *Sackett* that a wetland needed to have a continuous surface connection with other covered waters, it seemed to provide additional clarity with respect to wetland jurisdiction. But guidance documents issued by the prior administration continued to generate controversy by concluding that “continuous surface connection” did not only mean that a wetland had to abut a covered water, but that it could be connected by a “discrete feature,” like a non-jurisdictional ditch, to a jurisdictional waterway.

The new guidance clarifies that wetlands must be “adjacent” to, or “directly abut” a jurisdictional water like a river or tributary and prohibits non-jurisdictional intermediate features from qualifying as a continuous surface connection. The guidance emphasizes that, after *Sackett*, the test for the jurisdictional status of adjacent wetlands is twofold. First, the wetland must be adjacent to a body of water that is itself a traditionally navigable water or a “relatively permanent” body of water that is connected to a traditionally navigable water. Second, the wetland (which must meet the existing regulatory definitions of wetlands) must have a continuous surface connection to a jurisdictional water such that it is difficult to determine where the jurisdictional water ends and the wetland begins. This eliminates the “discrete feature” test.

This continuous surface connection guidance supersedes all other guidance documents on the issue. The agencies recognize that the second prong of the test, the “line-drawing problem” that exists between waters and wetlands, may present case-by-case challenges in identifying a continuous surface connection in the field. The agencies commit to working with stakeholders to resolving these line-drawing problems on a case-by-case basis and may provide additional guidance on the line-drawing problem in the future.

Listening Sessions

The agencies have announced a series of six listening sessions to take place in late March and April to receive public input on several WOTUS topics:

- **Relatively Permanent Waters.** To determine whether a tributary is a WOTUS, the agencies look to whether the tributary is a “relatively permanent water.” The agencies are soliciting feedback on what kinds of characteristics, like flow regime, flow duration, seasonality, or others should inform a definition of “relatively permanent.”
- **Continuous Surface Connection.** Although the new guidance is clear that discrete features connecting a wetland to a traditionally navigable water is not a basis for treating a wetland as jurisdictional, there are lingering questions on what it means for a wetland to “abut” a jurisdictional water. The agencies are seeking input on whether wetlands behind natural (not artificial) berms or other landforms would be considered “abutting,” and whether

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artificial flood control structures, pumps, and other features would remove a wetland behind the feature from Clean Water Act jurisdiction.

- **Jurisdictional Ditches.** The agencies are also seeking public response on whether flow regime, physical features, excavation location, biological indicators like the presence of fish, or other characteristics would make a ditch jurisdictional.

Listening sessions will be public and conducted in-person, as well as streamed. Individuals or organizations seeking to present comments will be selected on a first-come, first-served basis and will be required to limit their remarks to three minutes.