

# Agencies Issue Guidance Clarifying Sackett Implementation

Article By:

Andrew J. Turner

Karma B. Brown

Brian R. Levey

---

The U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) (jointly, “the Agencies”) issued [guidance](#) on March 12, 2025 addressing implementation of the definition of “waters of the U.S.” (WOTUS) under the Clean Water Act (CWA). The guidance addresses the jurisdictional requirement that, for a wetland to be subject to Corps jurisdiction, the wetland must have a “continuous surface connection” to and directly abut an otherwise jurisdictional water (a traditional navigable water or a relatively permanent body of water connected to a traditional navigable water). The jurisdictional requirement addressed by the new guidance can have substantial time and cost implications for projects.

Consistent with the Supreme Court’s 2023 decision in [Sackett v. EPA](#),<sup>[1]</sup> the Agencies state that WOTUS includes “only those adjacent wetlands that have a continuous surface connection because they directly abut the [requisite jurisdictional water].” An adjacent wetland that is separated from the jurisdictional water by uplands, a berm, dike or similar feature does not directly abut covered waters and is not, therefore, jurisdictional. This interpretation provides a plain language reading of *Sackett*, and departs from and narrows the prior Administration’s interpretation, which allowed for jurisdiction over adjacent wetlands separated from a jurisdictional waterbody by a berm or similar feature.

The Agencies also published a *Federal Register* [notice](#) announcing upcoming listening sessions and soliciting feedback to inform potential future administrative action to provide additional clarification on the WOTUS definition. Written recommendations on the meaning of key terms must be received by the Agencies on or before April 23, 2025. The listening sessions for various stakeholder groups will be held as web and in-person conferences in April-May 2025. Registration instructions and dates are available at this [website](#).

## Background

The Supreme Court’s *Sackett* decision limited CWA jurisdiction over WOTUS to: (1) traditional interstate navigable waters; (2) relatively permanent bodies of water connected to traditional interstate navigable waters; and (3) wetlands with a continuous surface connection to such waters. The Court held that the CWA extends only to wetlands that are practically indistinguishable from

---

WOTUS, which requires a party asserting jurisdiction over adjacent wetlands to establish that (1) the adjacent body of water is a WOTUS in its own right; and (2) the wetland has a continuous surface connection with that water, making it practically impossible to tell where the water ends and the wetland begins.

Following *Sackett*, the Agencies issued a rule amending the 2023 WOTUS Rule. To “conform with” the *Sackett* decision, the 2023 Amended WOTUS Rule struck portions of the earlier 2023 Rule the Agencies acknowledged were inconsistent with the *Sackett* decision.

Importantly, the Agencies’ interpretation and use of concepts not directly addressed in *Sackett* to continue to assert jurisdiction over a variety of features created significant confusion about WOTUS jurisdiction. Specifically, on September 27, 2023, the Agencies issued implementation memos setting forth coordination practices among the Corps Districts, EPA Regions, and EPA and Corps Headquarters, and providing for Headquarters’ review of certain Approved Jurisdictional Determinations. Under the prior Administration, the Agencies occasionally published “policy memoranda” resulting from this coordination process, in which EPA and Corps Headquarters provided direction to the Corps Districts on how to implement the WOTUS regime for certain types of features. Some of the issues discussed in the memos are ones flagged as open questions by Justice Kavanaugh in *Sackett*, including whether a continuous surface connection can be established by a ditch, swale, pipe or culvert; how difficult it has to be to discern a wetland boundary; and how temporary interruptions in a surface connection can be.

The Agencies’ recent guidance seeks to clarify some of this confusion and, as discussed below, rescinds many of these field memos.

### **Guidance on “Continuous Surface Connection” for Purposes of Determining “Adjacency”**

*Sackett* states that the CWA “extends to only those wetlands that are ‘as a practical matter indistinguishable from waters of the United States,’” 598 U.S. at 678, and to make this determination, the Agencies must establish that (1) an adjacent body of water constitutes WOTUS; and (2) the wetland has a continuous surface connection with that water. Thus, under *Sackett*, adjacent wetlands are only jurisdictional if they have a continuous surface connection to waters that are WOTUS in their own right (e.g., traditional navigable waters, the territorial seas, interstate waters, relatively permanent jurisdictional impoundments or relatively permanent tributaries).

The guidance provides clarification on implementation of “continuous surface connection” and took effect immediately. It states that WOTUS only includes those adjacent wetlands that have a continuous surface connection to a jurisdictional water because they directly abut that jurisdictional water. Guidance at 5. If the adjacent wetlands are separated from the jurisdictional water by uplands, a berm, dike, or similar feature, the wetlands are not jurisdictional because they do not have the “necessary connection” to covered waters to trigger CWA jurisdiction. *Id.*

Under the prior Administration, the Agencies took the position that, “depending on the factual context, ... a channel, ditch, swale, pipe or culvert [can] serve[] as a physical connection that maintains a continuous surface connection between an adjacent wetland and a relatively permanent water.” See, e.g., [Memorandum on POH-2023-00187 \(Nov. 20, 2024\)](#). This position is explicitly rescinded by the guidance, and the case-specific memoranda to the field that addressed continuous surface connection and jurisdiction over “discrete features” are rescinded. Guidance at 5 n.8.

In the guidance, the Agencies recognize that there may be some instances where the “line drawing”

to determine where the water ends and the wetland begins may be difficult to ascertain – including during periods of drought or low tide, or where there may be temporary interruptions in surface connection. The Agencies state that they will work to resolve those scenarios on a case-by-case basis and provide further clarity when appropriate. Guidance at 5-6.

[1] 598 U.S. 651 (2023).

Copyright © 2025, Hunton Andrews Kurth LLP. All Rights Reserved.

---

National Law Review, Volume XV, Number 97

Source URL: <https://natlawreview.com/article/agencies-issue-guidance-clarifying-sackett-implementation>