



MEMORANDUM ON EVALUATING JURISDICTION FOR LRL-2023-00466

Summary

For LRL-2023-00466, the U.S. Environmental Protection Agency 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 Louisville District for revision, as necessary, consistent with the factors and sources of information in this memorandum about when ponds can be evaluated as paragraph (a)(5) tributaries under the pre-2015 regulations.

On May 25, 2023, the Supreme Court decided *Sackett v. EPA* and concluded that the *Rapanos* plurality established the proper jurisdictional standard under the Clean Water Act for relatively permanent waters and adjacent wetlands. 598 U.S. 651 (2023). The question of when ponds are considered part of the tributary network was not affected by the decision in *Sackett*. In the jurisdictions and for the parties where the January 2023 Rule is enjoined, such as in Indiana, the agencies are interpreting "waters of the United States" consistent with the pre-2015 regulatory regime¹ and the Supreme Court's decision in *Sackett*. The direction in this memorandum is consistent with the Clean Water Act (CWA) and the agencies' regulations under the pre-2015 regulatory regime at 33 CFR 328.3 (2014) and 40 CFR 230.3 (2014). In providing this direction, we have also utilized relevant case law and existing guidance, including the legal memorandum *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* ("Rapanos Guidance").

I. Ponds Can Be Evaluated as Paragraph (a)(5) Tributaries When They Are Part of the Tributary Network

The draft approved JD site is located in Bluffton, Wells County, Indiana at 40.7504 North latitude and -85.1732 West longitude. According to the draft approved JD, this site includes a 4.38 acre pond that was constructed from dry, agricultural land for the purpose of obtaining sand and gravel. The pond discharges water through a 10-inch clay tile outfall, the water travels 4-5 feet through a discrete erosional feature, and then the water enters an

¹ The "pre-2015 regulatory regime" refers to 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. Additionally, the agencies are interpreting the phrase "waters of the United States" consistent with the Supreme Court's decision in *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023).

offsite stream that discharges to the Wabash River. The Louisville district voluntarily coordinated the draft approved JD with EPA Region 5 to obtain additional direction on when to evaluate ponds as paragraph (a)(5) tributaries.

In the draft approved JD, the pond was determined to be excluded because it was constructed from dry land for the purpose of obtaining sand and gravel but has since been abandoned, and the pond does not otherwise meet any of the seven categories of “waters of the United States” in the pre-2015 regulations. As part of the joint coordination process under the pre-2015 regulatory regime, EPA Region 5 elevated this approved JD and requested additional information regarding when to evaluate ponds as paragraph (a)(5) tributaries, particularly in the context of the pond subject to the draft approved JD for this site.

First, the district should clearly establish in the draft MFR whether the pond is a “generally non-jurisdictional” pond per the preamble to the 1986 regulations. The draft MFR says the pond is excluded but does not explain if it is a “generally non-jurisdictional” pond. Note that EPA and the Corps generally do not consider “waters of the United States” to include “waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States.” 51 FR 41217 (Nov. 13, 1986). Once the district has made this determination, they can determine whether the pond should be assessed under one of the jurisdictional categories of “waters of the United States.”

Under the pre-2015 regulatory regime, tributaries include natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a traditional navigable water.² The agencies have interpreted tributaries under the pre-2015 regulatory regime to include ponds with both an inlet and outlet connected to the tributary network, as well as ponds with an outlet connected to the tributary network, if such ponds contribute flow directly or indirectly through one or more waters or features that lie along the flowpath to a traditional navigable water, the territorial seas, or an interstate water. Waters through which a tributary may flow indirectly include, for example, impoundments, wetlands, lakes, ponds, and streams. A tributary may flow through one or more jurisdictional or non-jurisdictional downstream waters or features, including a non-jurisdictional tributary or non-jurisdictional features, such as a non-jurisdictional ditch or an excluded waste treatment system, and jurisdictional waters that are not tributaries, such as an adjacent wetland. However, the agencies do not interpret tributaries under the pre-2015 regulatory regime to include ponds that are connected to the tributary network by erosional features that lack indicators of an ordinary high water mark such as a non-wetland swale.

A pond that does not meet the criteria to be generally non-jurisdictional under the pre-2015 regime and the preamble to the 1986 regulations and that does not meet the criteria to be

² *Rapanos Guidance* at footnote 24.

evaluated under one of the other jurisdictional categories should be evaluated as a paragraph (a)(3) "other water" under the pre-2015 regulations.

II. Conclusion

The agencies are returning the draft approved JD to the Louisville District, and the district should make any necessary clarifying edits to the draft approved JD in light of the policy guidance included within this memorandum.

Russell L. Kaiser
Digitally signed by Russell L. Kaiser
Date: 2024.02.07 12:32:36 -05'00'

Russell Kaiser, Acting Director
Oceans, Wetlands, and Communities Division
Office of Water
U.S. Environmental Protection Agency

JENSEN.STACEY.MARIE.
Digitally signed by JENSEN.STACEY.MARIE.
Date: 2024.02.07 10:55:13 -05'00'

Stacey Jensen, Acting Director of Policy
and Legislation
Office of the Assistant Secretary of
the Army (Civil Works)
U.S. Department of the Army