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Key Takeaways from the EPA and the Corps' New WOTUS Guidance Memo

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On March 12, 2025, the Environmental Protection Agency (“EPA”) and the Army Corps of Engineers (the “Corps”) issued a Memorandum[1] outlining new guidance on implementing the “continuous surface connection” standard in determining Clean Water Act (the "CWA") jurisdiction over adjacent wetlands. The agencies' Memorandum (the "Guidance") is available here. The Guidance provides much-needed clarity on “the phrase 'continuous surface connection' as used in the *Rapanos* and *Sackett* decisions” and outlines the test for jurisdictional adjacent wetlands under *Sackett*.[2] A prior Holland & Hart Client Alert addressing *Sackett v. EPA*, 598 U.S. 651 (2023), is available here.

Elimination of "Discrete Features" Standard

The most significant clarification made by the Guidance is to explicitly rescind previous interpretations of “continuous surface connection” that allowed for concluding there was jurisdiction over wetlands connected to other jurisdictional waters by "discrete features" like ditches, swales, pipes, or culverts. Under the Guidance, only wetlands that directly abut jurisdictional waters will qualify as waters of the United States ("WOTUS"), and wetlands separated by uplands, berms, dikes or similar features from jurisdictional waters will not. The Guidance rescinds a series of training materials and policy memoranda jointly issued by EPA and the Corps because it says they “contain conclusions which are inconsistent with the discussion of 'continuous surface connection' as described in the pre-2015 regulatory regime guidance documents and the *Sackett* decision.”[3] Specifically, “any components of guidance or training materials that assumed a discrete feature established a continuous surface connection are rescinded.”[4] The “discrete features” mentioned by the Guidance that cannot be used to skirt the “direct abutment requirement” include “a non-jurisdictional ditch, swale, pipe or culvert.”[5] Of course, distinguishing between jurisdictional and non-jurisdictional ditches, swales, pipes, and culverts has often been challenging for both wetlands scientists and regulators.

The Guidance further reiterates the two-part test from *Sackett* for adjacent wetlands as follows:

First, the adjacent body of water must be a “water of the United States,” which generally means traditional navigable waters, or a relatively permanent body of water connected to a traditional navigable water...

Second, the wetland, assuming it satisfies the agencies' longstanding

regulatory definition of "wetlands" at 33 C.F.R. 328.3 and 40 C.F.R. 120.2, must have a continuous surface connection to a requisite covered water, making it difficult to determine where the water ends and wetland begins.[6]

For step 1, the Guidance clarifies that the wetlands must be "physically abutting"[7] the traditional navigable water or relatively permanent body of water. Regarding step 2, to satisfy the "continuous surface connection" requirement, it must be "difficult to determine where the water ends and wetlands begins." As to the "difficult to determine" requirement, neither the Supreme Court nor the Guidance explain how this is satisfied, i.e., is it based on physical appearance using photographs without consideration of actual hydrologic evidence? The Guidance acknowledges that even the *Sackett* decision "recognized that there may be some instances where that line drawing problem is difficult, such as during periods of drought or low tide or in those instances where there may be temporary interruptions in surface connection. The agencies will work to resolve these scenarios on a case-by-case basis and provide further clarity when appropriate to guide future implementation."[8] Accordingly, not unlike prior efforts to define WOTUS in guidance and rulemaking over the last four decades, CWA jurisdictional determinations over some wetlands likely will remain challenging notwithstanding best intentions and aspirations to create a brightline test that property owners could easily apply to determine if wetlands on their property would be considered jurisdictional or not.

Potential Implications

This rescission of prior policy positions relying on "discrete features" to find a "continuous surface connection" will potentially prevent wetlands that are far removed, and in some cases not even connected to regularly flowing water, from being found jurisdictional. This further narrows the jurisdictional reach of the CWA, consistent with the *Sackett* decision, and should provide greater clarity for predicting whether impacts to certain wetlands will require permitting.

Although it provides clearer boundaries for determining jurisdiction, there may nonetheless continue to be challenges for properties with complex hydrology or modified drainage systems. The Guidance addresses only wetlands and does not address application of *Sackett* to tributaries of WOTUS. Currently, substantial confusion exists regarding CWA jurisdiction over intermittent streams, ditches, and swales, although CWA jurisdiction over ephemeral streams (which flow only as a consequence of precipitation events) appears to be eliminated.

While the Guidance does not explain the implications on prior jurisdictional determinations and permit decisions, yesterday the Corps issued a parallel press release explaining that "[p]reviously issued [approved jurisdictional determinations (AJDs)] that have not expired could also be reopened if the recipient of such an AJD requests that a new AJD be provided pursuant to the current regulatory regime (i.e., the January 2023 Rule, as amended by the conforming rule announced on August 29, 2023, or the pre-2015 regulatory regime implemented consistent with *Sackett*)."[9] Regarding CWA § 404 permit decisions, prior "[p]ermit decisions that relied on an AJD completed under the January 2023 Rule or the pre-2015 regulatory regime

will also not be reconsidered. The Corps may rely on an AJD completed prior to the March 12, 2025 joint agency memorandum on continuous surface connection and issued under the January 2023 Rule, the Amended 2023 Rule, or the pre-2015 regulatory regime to support pending or new permit decisions where the requestor wishes to do so."[10]

Future WOTUS Developments

The Guidance explained in its conclusion that "[t]he agencies will use a forthcoming Federal Register notice and recommendations docket on 'WOTUS Notice: The Final Response to SCOTUS' as well as other stakeholder engagement opportunities to identify areas of implementation challenges to be later addressed either through additional guidance or rulemaking."[11] The advance Federal Register notice announced a series of stakeholder "listening sessions" and other input the agencies request on the scope of "relatively permanent" waters, "continuous surface connection," "jurisdictional ditches" and related topics.[12] Accordingly, far from being the last word, the Guidance appears to be the first step in the new administration's regulatory measures to more fully implement the rollback of CWA jurisdiction envisioned by the *Sackett* decision.

We will monitor future WOTUS rulemaking actions which will commence shortly with publication of notice in the Federal Register. Here are some tips to keep in mind:

- We also encourage companies and trade associations to participate in the initial stakeholder engagement opportunities and in the notice and comment rulemaking process to follow.
- To avoid delays and ensure that pending and future projects take full advantage of the narrowed reach of CWA jurisdiction, monitor the Corps' application of the Guidance and work closely with counsel and wetlands consultants to prepare aquatic resources determinations that comport with the guidance and future analogous AJDs that rely on the Guidance.
- It will also be necessary to closely monitor how future litigants and courts apply or refuse to apply the Guidance in enforcement actions, citizen suits, and rulemaking challenges given the likelihood that courts will have the final say given Congress' long abdication of exercising legislative power in this area.

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[1] Memorandum to the Field Between the U.S. Department of Army, U.S Army Corps of Engineers and 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" (March 12, 2025), available here.

[2] Guidance at 2.

[3] *Id*. at 2, 5. The Guidance enumerates the rescinded training materials and guidance. *See* Guidance at 5 n.8.

[4] *Id*. at 5.

[5] *Id*. at 5 n.8.

[6] *Id*. at 6 (emphasis added).

[7] *Id*. at 3.

[8] *Id*. at 6.

[9] Army Corps of Engineers, "WOTUS UPDATE: Joint Agency Memorandum on Continuous Surface Connection and EPA Announcement on Next Steps for WOTUS" (March 12, 2025), available here.

[10] *Id*.

[11] *Id*. at 6.

[12] *See* EPA and Corps, Advance "WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations," *available here*.

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