

# Waters of the United States/Clean Water Act: U.S. Army Corps of Engineers Memorandum Providing Post-Sackett Guidance



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The Office of Assistant Secretary Civil Works of the U.S. Army Corps of Engineers (“Corps”) issued a March 22nd Memorandum titled:

*Civil Works Actions to Sustain and Advance the Nation’s Waters and Wetlands After the Sackett Decision.*

The Memorandum directs the Corps in carrying out its Civil Works missions to:

...use applicable authorities and available resources to engage in specific actions to protect, restore, and enhance our Nation’s waters and wetlands that are now more vulnerable, in addition to implementing the Regulatory Program in compliance with all laws and regulations.

The Memorandum details what it describes as examples of:

...how to carry out this directive to appropriately respond to the limited interpretation WOTUS contained in the Sackett decision...

The Memorandum is authored by the Assistant Secretary of the Army (“Civil Works”).

The United States Supreme Court’s May 25th opinion in *Sackett v. EPA, et al.*, addressed the scope of the Clean Water Act definition of “waters of the United States” (“WOTUS”). The Supreme Court majority opinion significantly narrowed the scope of what constitutes a WOTUS for the purposes of the Clean Water Act.

The majority articulated a two-part process for determining a WOTUS:

1. The CWA’s use of “waters” in § 1362(7) refers only to “geo-graphic[al] features that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes’ and to adjacent wetlands that are ‘indistinguishable’ from those bodies of water due to a continuance surface connection.”
2. To assert jurisdiction over adjacent wetland under the CWA, a part must establish “first, that the adjacent [body of water constitutes]... ‘water[s] of the United States’ (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult whether to determine whether the ‘water’ ends and the ‘wetland’ begins.”

Because of the Sackett decision, the United States Environmental Protection Agency and the Corps issued a Final Rule on August 29th revising the Clean Water Act definition of WOTUS. The rule significantly narrowed the scope of what constitutes a WOTUS for purposes of the Clean Water Act.

The March 22nd Corps Memorandum addresses:

- Civil Works Actions.
- Aquatic ecosystem restoration.
- Technical assistance programs.
- Nature-based solutions.
- Regulatory program actions.
- Approved jurisdictional determinations.
- Compensatory mitigation.
- Requirement that the Corps provide a comprehensive status update on the implications of the Sackett decision/actions taken under the directives in the Memorandum within one year of the date of its issuance.

A copy of the Memorandum can be downloaded [here](#).