



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
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WASHINGTON DC 20310-0108

SACW

22 March 2024

MEMORANDUM FOR COMMANDING GENERAL, U.S. ARMY CORPS OF
ENGINEERS

SUBJECT: Civil Works Actions to Sustain and Advance the Nation's Waters and
Wetlands After the Sackett Decision

1. References:

- a. Revised Definition of "Waters of the United States"; Conforming (88 FR 61964)
(Conforming Rule)
- b. *Sackett v. EPA*, 598 U.S. ___, 143 S. Ct. 1322 (2023) (*Sackett*)
- c. Compensatory Mitigation for Losses of Aquatic Resources; Final Rule (73 FR
19594) (2008 Mitigation Rule)

2. Background.

The Clean Water Act set forth goals and objectives for the restoration and maintenance of the chemical, physical, and biological integrity of the Nation's waters. "Waters of the United States" is a threshold term in the Clean Water Act that establishes the geographic scope of federal jurisdiction under the Act, but the Act does not define the term. The Environmental Protection Agency and the Department of the Army have defined "waters of the United States" through regulations since the 1970s, including most recently in a rule issued on September 8, 2023 (reference 1.a.). The definition affects most programs that protect waters under the Act, including the U.S. Army Corps of Engineers (Corps) permitting program for the discharge of dredged and/or fill material under Section 404 of the Clean Water Act.

All our Nation's waters and wetlands are valuable resources, regardless of jurisdictional status under the Act. They provide vital functions in protecting and improving water quality; absorbing and reducing flood waters; providing critical habitat for an abundance of species; and storing water in an era of water scarcity. As a result, wetlands support economic activity; supply drinking water; maintain essential agricultural and industrial water supplies; and improve opportunities for people to enjoy nature and hunt and fish. The *Sackett* decision (reference 1.b.) limited federal protections under the Clean Water Act over the Nation's waters and wetlands by narrowing which wetlands fall under the definition of "waters of the United States" (WOTUS). Wetlands without a continuous surface connection to jurisdictional

SACW

SUBJECT: Civil Works Actions to Sustain and Advance the Nation's Waters and Wetlands After the Sackett Decision

waters are no longer covered under this ruling. Despite the lack of protection under the Act, these aquatic resources continue to be of vital importance to the functioning of healthy watersheds and ecosystems. As a result, this 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. Specific examples of how to carry-out this directive to appropriately respond to the limited interpretation of WOTUS contained in the *Sackett* decision follows.

3. Civil Works Actions.

a. Aquatic Ecosystem Restoration. The Corps' Aquatic Ecosystem Restoration mission inherently serves to meet the purpose and intent of this memorandum. The Corps will seek to increase support for Ecosystem Restoration projects, including those under Section 206 of the Continuing Authorities Program (CAP), through both project and budget development¹. In particular, the Corps will consider the needs of the watershed in light of the *Sackett* decision through these actions. For example, projects restoring hydrologic connectivity for floodplain wetlands and improving the physical and biological integrity of certain ephemeral streams will be prioritized within the Corps' Aquatic Ecosystem Restoration Business Line. These projects would have public interest considerations as the health of these waters, and the ecosystems they support, are at greater risk in light of the *Sackett* decision. There are currently CAP resources still available through the Infrastructure Investment and Jobs Act (IIJA) to support this effort. In addition, the Fiscal Year 2025 President's Budget includes \$13 million in Section 206 funding for this effort. The Corps is directed to report back within four months on projects identified consistent with this section for potential implementation under the CAP 206 authority.

b. Technical Assistance Programs. The Corps' technical assistance programs, including the Tribal Partnership Program, Floodplain Management Services Program, and Planning Assistance to States Program, can provide assistance to eligible entities to further the objectives in this memorandum. In particular, the Corps can provide eligible entities with watershed and restoration planning assistance, which can benefit aquatic resources which are most impacted in a post-*Sackett* environment. In addition, the Corps has vast experience in implementing regulations related to the definition of WOTUS which gives them the expertise to provide technical assistance to eligible entities as they work to develop new or revised water-related programs or regulations in response to the *Sackett* decision. These technical assistance programs can provide

¹ I would also highlight that the Corps has the opportunity to support the restoration actions of state, local, and private entities through its permitting programs, particularly the section 408 program to review non-Federal alterations of Corps Civil Works projects. A specific example is the 408 permission issued by Sacramento District for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project in 2021.

SACW

SUBJECT: Civil Works Actions to Sustain and Advance the Nation's Waters and Wetlands After the Sackett Decision

meaningful services to communities and state agencies, particularly those with environmental justice concerns, who may experience a disproportionate burden of reduced water quality, access to nature, and other challenges related to their interactions with our Nation's waters and wetlands due to the *Sackett* decision. The Corps will incorporate and highlight these opportunities when conducting outreach with eligible entities under the technical assistance programs. I have reserved \$5 million from the IJA Planning Assistance to States resources to support this effort. The Corps is directed to report back within six months on any identified opportunities to provide technical assistance consistent with this section.

c. Nature-based Solutions. Consistent with ongoing efforts and research and development initiatives, the Corps will identify those current initiatives in place to promote the development and integration of more nature-based solutions into Civil Works project planning, design, and construction activities as integral features of project function and/or mitigation. This includes strategies to increase the beneficial use of dredged material as set forth in the Chief of Engineers "Beneficial Use of Dredged Material Command Philosophy Notice" (25 Jan. 2023). These nature-based solutions can serve to construct, restore, and/or use wetlands to enhance and protect some of the resources no longer considered jurisdictional as a result of the *Sackett* decision. I will be sending a follow-on memorandum in the near term specific to nature-based solutions providing direction to accelerate efforts in this area. In addition, the Corps is directed to brief me within 60 days of the date of this memorandum on the implications of a policy directive that would require Civil Works recommended studies to avoid the creation of non-jurisdictional waters and wetlands through constructed project features.

4. Regulatory Program Actions.

a. Approved Jurisdictional Determinations. Transparency in issuing approved jurisdictional determinations will provide the regulated public, interested parties, and state, local, and tribal entities, the information necessary to assess the full impact of the *Sackett* decision on aquatic resources and to develop strategies and actions to compensate for reduced federal jurisdiction. When issuing approved jurisdictional determinations, the Corps shall continue to make information regarding approved jurisdictional determinations available to the public, including posting on their website the Corps' document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. The posting will also allow the Corps to track jurisdictional status of aquatic resources to inform potential future actions.

b. Compensatory Mitigation. As provided in the 2008 Mitigation Rule (reference 1.c.), jurisdictional status is not determinative for whether aquatic resources can serve as compensatory mitigation for the unavoidable impacts to waters of the United States authorized by Corps permits. Waters, wetlands, and other types of natural resources (e.g., non-wetland riparian areas and upland buffers) perform a wide variety of

SACW

SUBJECT: Civil Works Actions to Sustain and Advance the Nation's Waters and Wetlands After the Sackett Decision

ecological functions and services, which can be restored, enhanced, established, and preserved to provide compensatory mitigation through mitigation banks, in-lieu fee projects, and permittee-responsible mitigation. The performance of those ecological functions and services occurs regardless of whether those waters, wetlands, and other natural resources are subject to Clean Water Act jurisdiction. In a post-*Sackett* environment, given hydrologic realities and the fact that water resources are connected in many ways including sub-surface flows, the development, restoration, and/or creation of any aquatic resources is likely to further the objective of the Clean Water Act to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. Accordingly, the Corps will continue to evaluate compensatory mitigation proposals to determine whether the proposal is sufficient to offset losses of aquatic resource functions and services caused by permitted activities, regardless of jurisdictional status of the aquatic and other resources provided by a compensatory mitigation project. The definition of "waters of the United States" is limited to the question of Clean Water Act jurisdiction, not for deciding what categories of resources can be restored, enhanced, established, or preserved to provide compensatory mitigation.

Both jurisdictional and non-jurisdictional aquatic and other resources to serve as compensatory mitigation can support a watershed-based approach under the Mitigation Rule. Non-jurisdictional aquatic resources may be even more valuable as compensatory mitigation after the *Sackett* decision as they are currently without federal protection under the Clean Water Act, and including these resources as compensatory mitigation helps protect them from direct alteration through site protection instruments and other provisions in the 2008 Mitigation Rule. Including non-jurisdictional aquatic resources as compensatory mitigation, in particular for existing and future mitigation banks and in-lieu fee projects, ensures these resources continue to provide critical functions and services to the watershed. The Corps will continue to follow the provisions in the 2008 Mitigation Rule regarding the ability of the Corps to approve the use of non-jurisdictional aquatic resources and other resources to provide compensatory mitigation for Department of the Army permits.

The Corps is directed to report back within 120 days of the date of this memorandum on compliance status across Corps districts with this mitigation policy; to include how many Corps districts have been following this policy since the issuance of the 2008 Mitigation Rule; if Corps districts have not been following the policy what next steps should occur to achieve compliance; and the number and locations of existing mitigation banks and in lieu fee projects.

5. The Corps will provide a comprehensive status update on the implications of the Sackett decision and the actions taken under the directives in this memorandum within one year of the date of this memorandum.

SACW

SUBJECT: Civil Works Actions to Sustain and Advance the Nation's Waters and Wetlands After the Sackett Decision

6. Questions regarding this matter may be directed to Stacey Jensen, Acting Director for Policy and Legislation, Office of the Assistant Secretary of the Army (Civil Works), at (703) 459-6026 or stacey.m.jensen.civ@army.mil.



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