



MEMORANDUM ON NWS-2023-923

Summary

For NWS-2023-923, the U.S. Environmental Protection Agency (EPA) 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 Seattle District for any revisions that may be necessary, consistent with this memorandum regarding when features may meet the waste treatment system exclusion under paragraph (b)(1) of the amended 2023 rule.¹

On May 25, 2023, the Supreme Court decided *Sackett v. Environmental Protection Agency* and concluded that the plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), established the proper jurisdictional standard under the Clean Water Act (CWA) for relatively permanent waters and adjacent wetlands. 598 U.S. 651 (2023). The question of how to apply the waste treatment system exclusion was not raised or affected by the decision in *Sackett*. This memorandum is consistent with the CWA, the amended 2023 rule at 33 CFR 328.3 and 40 CFR 120.2, and relevant case law and existing guidance.²

I. Background on Draft Approved Jurisdictional Determination

The draft approved JD covers an approximately 14.88-acre study area located in Burlington, Skagit

¹ The “amended 2023 rule” refers to the “Revised Definition of ‘Waters of the United States,’” 88 Fed. Reg. 3004 (January 18, 2023) (“2023 rule”) as amended by the final rule “Revised Definition of ‘Waters of the United States’; Conforming,” 88 Fed. Reg. 61964 (September 8, 2023) (“conforming rule”) (codified at 33 CFR 328.3 (U.S. Army Corps of Engineers (Corps)) & 40 CFR 120.2 (EPA)). It is the amended 2023 rule that is currently operative in the State of Washington. The Clean Water Act and EPA and Corps regulations, interpreted consistent with the *Sackett* decision, contain legally binding requirements. This memorandum does not substitute for those provisions or regulations, nor is it a regulation itself. Thus, this memorandum does not impose legally binding requirements on EPA, the Corps, Tribes, States, or the regulated community, and may or may not apply to a particular situation based upon the circumstances.

² There are two regulatory regimes that are operative across the country due to ongoing litigation: the amended 2023 rule and the “pre-2015 regulatory regime,” which is 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, consistent with *Sackett*. Because both regulatory regimes that are operative across the country contain an exclusion from the definition of “waters of the United States” for waste treatment systems, and this memorandum is consistent with both operative regulatory regimes, this memorandum with respect to when features qualify for the waste treatment system exclusion is also applicable to the “pre-2015 regulatory regime.” Note that the question of how to identify waste treatment systems for purposes of assessing them for jurisdiction was not affected by the decision in *Sackett* for either of the regulatory regimes.

County, Washington at 48.438278 North latitude and -122.284301 West longitude. The draft approved JD covers several aquatic resources, but this memorandum focuses on Ditch 3 (850 feet) and the storm water pond (1.3 acres). The Seattle District coordinated this draft approved JD with EPA Region 10, and Region 10 subsequently elevated the draft approved JD to the Headquarters offices of EPA and the Corps for review. EPA Headquarters subsequently requested that the draft approved JD be coordinated with the OASACW.

According to the draft approved JD, Ditch 3 and the storm water pond were determined to be excluded under paragraph (b)(1) of the amended 2023 rule as “waste treatment systems.” The draft approved JD indicates that Ditch 3 is a storm water conveyance ditch and that both Ditch 3 and the storm water pond were constructed in uplands. According to the draft approved JD, both Ditch 3 and the storm water pond are within the area covered by the City of Mount Vernon’s MS4 NPDES Permit. The draft approved JD further states that Ditch 3 connects to the storm water pond that connects to Trumpeter Creek, a relatively permanent tributary connected to the Skagit River, a traditional navigable water, south and west of the pond.

II. Waste Treatment System Exclusion

EPA promulgated the waste treatment system exclusion in a 1979 notice-and-comment rulemaking in response to a “frequently encountered comment” that “waste treatment lagoons or other waste treatment systems should not be considered waters of the United States.” 44 Fed. Reg. 32854, 32858 (June 7, 1979); *see also* 45 Fed. Reg. 48620, 48620 (July 21, 1980) (noting industry commenters’ concerns that they would be required, absent the waste treatment system exclusion, “to obtain permits for discharges into existing waste treatment systems, such as power plant ash ponds, which had been in existence for many years” and for which EPA had, in many instances, “issued permits for discharges *from*, not *into*, [such] systems” (emphasis added)). The exclusion has been maintained in the agencies’ various regulations defining “waters of the United States” over time, including the pre-2015 regulations and the 2023 rule. Under the amended 2023 rule, waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the CWA are not “waters of the United States.” 33 CFR 328.3(b)(1); 40 CFR 120.2(b)(1). To be covered by the regulatory exclusion, a waste treatment system must be “designed to meet the requirements of the Clean Water Act.” *Id.* A waste treatment system may be “designed to meet the requirements of the Clean Water Act” where, for example, it is constructed pursuant to a CWA section 404 permit, *Ohio Valley Env’tl. Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 214–15 (4th Cir. 2009), or where it is “incorporated in an NPDES [National Pollutant Discharge Elimination System] permit as part of a treatment system,” *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1001 (9th Cir. 2007). The agencies will continue to evaluate the application of the waste treatment system exclusion on a case-specific basis.³

The waste treatment system exclusion applies to a variety of systems that are functioning as waste treatment systems and are designed to meet the requirements of the CWA. For example, a 2006 letter from the EPA to OASACW clarifies that the waste treatment system exclusion continues to apply to the

³ The amended 2023 rule included a waste treatment system exclusion consistent with the 1986 regulations, and the preamble provided information on implementation of the waste treatment system exclusion, including a discussion of factors relevant to the agencies’ case-specific assessment of whether the exclusion applies to a particular feature, *see* 88 Fed. Reg. 3109-11. Where a feature does not meet the definition of “waters of the United States” under the amended 2023 rule, there is no need to consider whether the waste treatment system exclusion applies.

creation or use of a waste treatment system in waters below a valley fill permitted by the Corps under CWA section 404, whereby sediment enters the stream below the valley fill, and the sediment-laden water flows downstream to a settling pond located as close as practicable to the toe of the valley fill. Letter from Benjamin Grumbles, EPA Assistant Administrator for the Office of Water, to John Paul Woodley, Assistant Secretary of the Army (Civil Works) (Mar. 1, 2006).⁴ The letter further notes that EPA and states ensure that such waste treatment systems meet the requirements of the CWA through the section 404 permitting process for discharges of dredged or fill material, the section 402 permitting process for discharges from the sediment pond, and the section 401 certification process. All three programs ensure that the system is constructed and operated in compliance with the CWA.⁵

III. Assessing the Jurisdictional Status of Storm Water Features

In promulgating the waste treatment system exclusion, EPA did not exclude storm water features. See 58 Fed. Reg. 7610, 7621 (Feb. 8, 1993) (noting that “all waste treatment systems must segregate wastewater from other waters of the U.S., allowing the operator to maintain dominion over the waste prior to its discharge to waters of the U.S.”). EPA’s regulations provide that “storm water means storm water runoff, snow melt runoff, and surface runoff and drainage.” 40 CFR 122.26(b)(13). Conveying storm water is a natural function of all “waters of the United States” and does not convert such features into excluded waste treatment systems, even if the function of conveying storm water has been enhanced by human-made alterations. Thus, the existence of an NPDES permit for storm water discharges or for discharges from a municipal separate storm sewer system,⁶ does not automatically exclude waters that convey storm water under the waste treatment system exclusion.⁷ In general, storm water features implemented to comply with a Clean Water Act section 402(p) NPDES permit would not be eligible for the waste treatment system exclusion.

⁴ Available at <https://www.epa.gov/system/files/documents/2024-12/2006-grumbles-letter.pdf>.

⁵ The waste treatment system exclusion has also been applied to cooling ponds where, for example, the cooling pond is designed and constructed to be used as treatment for waste heat such that discharges from the pond, if any, comply with any applicable permit requirements. See, e.g., Order, *In re Arizona Public Service Co.*, No. 19-06 (EPA Env’tl. App. Bd., Sept. 30, 2020) (upholding application of the waste treatment system exclusion to a cooling pond serving a treatment function by dissipating waste heat discharged from a power plant). Note that the term “pollutant” under the CWA includes “heat,” and thus discharges of heated wastewater (i.e., thermal discharges) are regulated under the Act. 33 U.S.C. § 1362(6).

⁶ A municipal separate storm sewer system (MS4) is a conveyance or system of conveyances that is owned or operated by a public entity, designed and used to collect or convey storm water and discharge it to “waters of the United States.” An MS4 is often owned and/or operated by a municipality or county government, but other entities, such as large public institutions (e.g., military bases) and state departments of transportation, own and/or operate MS4s. MS4s often rely on a drainage network consisting of jurisdictional and non-jurisdictional waters, including constructed conveyance structures, to transport storm water. Where MS4s have incorporated jurisdictional waters, including otherwise jurisdictional creeks, streams, or rivers, which may be channelized, ditched, or otherwise modified within their drainage network, the agencies’ longstanding approach is to view those incorporated water features as jurisdictional waters even if they are considered to be a part of the MS4.

⁷ In some instances, an excluded waste treatment system may capture storm water runoff in addition to the discharges for which the system was designed. Indeed, the introduction of storm water runoff into an excluded waste treatment system may be unavoidable depending on its location and design (such as, for example, an uncovered settling pond that receives storm water, storm water runoff, and mine tailings). A waste treatment system that receives storm water or storm water runoff in addition to wastewater remains eligible for the waste treatment system exclusion so long as the system continues to serve the treatment function for which it was designed.

While storm water features are not excluded under the waste treatment system exclusion, they are not “waters of the United States” if they meet the requirements of another regulatory exclusion or if they do not meet the applicable definition of “waters of the United States,” consistent with *Sackett*.

The Clean Water Act and the amended 2023 rule do not include an exclusion specifically for storm water features, and storm water features must be assessed on a case-by-case basis to determine if they are jurisdictional. As part of this case-specific assessment, the agencies will continue to consider whether the feature in question is excavated or created in dry land, the flow of water in the feature, and other factors relevant under existing law.⁸ Many common storm water control features, such as rain barrels, urban sidewalk plant boxes, and the like, would not be considered “waters” and would clearly not be “waters of the United States.” In addition, some storm water features may already be covered by one or more of the exclusions. For example, some storm water features may fall within the (b)(3) exclusion for ditches (including roadside ditches) if they were excavated wholly in and draining only dry land and do not carry a relatively permanent flow of water. Similarly, some ponds that serve an incidental beneficial use of storing storm water may fall within the (b)(6) exclusion, which applies to artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons. Other storm water features may be bioswales that are characterized by low volume, infrequent, or short duration flow that would fall within the (b)(8) exclusion.

Storm water features that do not qualify for an exclusion would need to be assessed to see if they meet any of the jurisdictional categories.⁹ For example, even if they do not qualify for any of the exclusions, some storm water features are not jurisdictional as paragraph (a)(3) tributaries under the amended 2023 rule because they are not relatively permanent waters connected to a traditional navigable water, the territorial seas, or an interstate water. Other storm water features may be wetlands that lack a continuous surface connection to a requisite jurisdictional water and thus do not fall within the (a)(4) adjacent wetlands category. Some storm water ponds that are not part of the tributary network would not meet the criteria to be paragraph (a)(5) waters if they are not relatively permanent waters or if they do not have a continuous surface connection to a traditional navigable water, the territorial seas, interstate water, or a relatively permanent tributary.

IV. The Jurisdictional Status of Ditch 3 and the Storm Water Pond Should Be Re-Evaluated

The draft approved JD does not support the conclusion that Ditch 3 and the storm water pond are functioning as an excluded waste treatment system because, as noted above, the waste treatment system exclusion generally does not apply to storm water features, which must be assessed on a case-specific basis.¹⁰ Here, the district stated only that both Ditch 3 and the storm water pond are within the area covered by the City of Mount Vernon’s MS4 NPDES Permit. While on these facts the waste treatment system exclusion is not applicable, the district should also assess whether Ditch 3 and the storm water pond fall within other exclusions under paragraph (b)(1) of the amended 2023 rule, or do

⁸ See *supra* note 3.

⁹ Under both operative regulatory regimes, exclusions do not apply to traditional navigable waters, the territorial seas, or interstate waters.

¹⁰ See *supra* note 7.

not meet the applicable definition of “waters of the United States,” consistent with *Sackett*. But these features are not automatically excluded.

V. Conclusion

The agencies are returning the draft approved JD to the Seattle District to re-evaluate the jurisdictional status of Ditch 3 and the storm water pond, consistent with this memorandum regarding when features meet the waste treatment system exclusion under paragraph (b)(1) of the amended 2023 rule and factors related to the jurisdictional status of storm water features, including whether such features meet the requirements of another exclusion under the regulations or if they do not meet the applicable definition of “waters of the United States,” consistent with *Sackett*.

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