

Contrary to the agencies' March 12, 2025 Memorandum announcing their intention to further limit jurisdiction over adjacent wetlands,⁷³ neither *Sackett* nor *Rapanos* stand for the proposition that only adjacent wetlands that abut or physically touch another WOTUS can be determined to have a continuous surface connection. In *Sackett*, the Court expressly announced the following test for asserting jurisdiction: "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 to determine where the 'water' ends and the 'wetland' begins."⁷⁴ It is settled that this is a physical-connection requirement,⁷⁵ as opposed to a constant-hydrologic one, and that non-jurisdictional streams, ditches, culverts, and similar features can "serve as a physical connection that maintains a continuous surface connection between an adjacent wetland and a relatively permanent water."⁷⁶ Natural berms or similar natural landforms that provide evidence of a continuous surface connection do not sever jurisdiction for similar reasons.⁷⁷ If the Court had wanted to impose the alternative or additional requirement that the adjacent wetland physically touch the jurisdictional "water of the United States," the Court would have expressly stated that requirement. It did not.

Moreover, both *Rapanos* and *Sackett* build upon the Court's decision in *Riverside Bayview*, which expressly stated that Clean Water Act jurisdiction over adjacent wetlands was not limited solely to wetlands that border "other waters of the United States." The Court found the Corps' basis for asserting jurisdiction over adjacent wetlands, which was stated as follows, to be reasonable and "an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act":⁷⁸

The regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . but must focus on **all waters that together form the entire aquatic system**. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, **regardless of whether it is above or below an ordinary high**

⁷³ EPA & DEP'T OF THE ARMY, MEMORANDUM TO THE FIELD BETWEEN THE U.S. DEPARTMENT OF THE ARMY, U.S. ARMY CORPS OF ENGINEERS AND THE 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 (2025), <https://www.epa.gov/system/files/documents/2025-03/2025cscguidance.pdf>.

⁷⁴ *Sackett*, 598 U.S. at 678-79.

⁷⁵ *Rapanos*, 547 U.S. at 751 n.13.

⁷⁶ January 2023 Definition, 88 Fed. Reg. at 3095 ("This approach to the continuous surface connection is supported by the scientific literature, case law, and the agencies' technical expertise and experience. As the Court of Appeals for the Sixth Circuit has explained, 'it does not make a difference whether the channel by which water flows from a wetland to a navigable-in-fact waterway or its tributary was manmade or formed naturally.' *United States v. Cundiff*, 555 F.3d 200, 213 (6th Cir. 2009) ('Cundiff') (holding wetlands were jurisdictional under the *Rapanos* plurality where plaintiff created a continuous surface connection by digging ditches to enhance the acid mine drainage into the creeks and away from his wetlands).").

⁷⁷ *Id.* at 3095.

⁷⁸ *Riverside Bayview*, 474 U.S. at 134.