



Commonwealth of Virginia

VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY

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MEMORANDUM

To: Stakeholders in the Commonwealth of Virginia

From: Mike Rolband

A handwritten signature in blue ink, appearing to read "M. Rolband".

Date: June 29, 2023

Re: Recent Supreme Court Decision *Sackett v. Environmental Protection Agency (EPA)* -
Effect in Virginia and How to Move Forward Without Economic Dislocation

Background:

On May 25, 2023, the United States Supreme Court issued its decision in the case titled *Sackett v. Environmental Protection Agency (Sackett)*. The opinion reduces the number of wetland acres that are protected under the federal Clean Water Act (CWA). The Court determined that the jurisdiction of the CWA "extends only to those wetlands with a continuous surface connection to bodies that are waters of the United States in their own right, such that they are indistinguishable from those waters." Although the opinion speaks to what wetlands are protected by the CWA, there is language that also appears to exclude smaller waterbodies, such as intermittent streams and tributaries of traditionally navigable waters, from CWA protection.

In contrast to the CWA, Virginia has a very broad and comprehensive statutory definition of state waters. Since at least 1968, state waters have been defined to include "all water, on the surface and under the ground, wholly or partially within or bordering the [Commonwealth] or within its jurisdiction." This definition was expanded in 2000 to include "all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands." Virginia law prohibits excavating, filling, draining, or other activities that cause significant alteration or degradation of existing wetland acreage or functions without a permit.

Since 2001, Virginia has regulated activities in surface waters (i.e., wetlands and streams) through the Virginia Water Protection Permit (VWPP) program. These permits require avoidance and minimization of wetland impacts to the maximum extent practicable and

compensation for any unavoidable loss of wetland functions. Neither the State law nor the VWPP regulation is affected by the *Sackett* decision.¹

EPA and Corps Status:

At this time, the Department of Environmental Quality (DEQ) does not know how the U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency (EPA) will implement the *Sackett* decision in permitting and delineation boundary decisions. We anticipate that there may be new federal guidance, checklists, field procedures, regulations and other information made public in the future. On May 26, 2023, the Corps Headquarters website stated only that “the agencies [the Corps and EPA] will interpret the phrase “waters of the United States” consistent with the Supreme Court’s decision in *Sackett*. The agencies continue to review the decision to determine next steps.”

Moving Forward in Virginia:

One of the immediate issues of concern is whether permit applications and jurisdictional determinations will be processed by the Corps in a timely, predictable, and consistent manner. The Norfolk District of the Corps has advised that permit applications may still be submitted with delineations, although it cannot provide a timeline for permit and delineation confirmation decisions. Also on May 25, 2023, independent from the *Sackett* decision, the Norfolk District of the Corps published a notice of its intended prioritization of jurisdictional determinations and confirmations of delineations of aquatic resources. The Corps’ public notice can be found at: <https://www.nao.usace.army.mil/Media/Public-Notices/Article/3402545/notification-to-the-public-of-changes-to-the-districts-regulatory-program-pract/>.

Virginia regulations ([9VAC25-210-80\(B\)\(1\)\(h\)\(5\)](#)) require a delineation map depicting all surface waters, including wetlands, identified on the project site using accepted Corps methodologies ([9VAC25-210-45](#)) for an application to be complete. Historically, DEQ and the Corps have coordinated on the review of delineations. The Virginia State Water Control Law ([62.1-44.15:21\(C\)](#)) allows DEQ to make its own State Surface Water Determinations (SSWDs) using accepted Corps field methods, or DEQ may accept a Corps confirmation. In many cases, the Corps’ boundary confirmation will suffice for DEQ’s permitting activities. DEQ will continue to accept delineation confirmations from the Corps, such as Preliminary Jurisdictional

¹ The Chesapeake Bay Preservation Area Designation and Management Regulations also do not use or rely on the jurisdictional language applicable to the CWA. In the Regulations there is a reference to the CWA in the Regulation’s definition for “non-tidal wetlands” as “those wetlands other than tidal wetlands that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions, as defined by the U.S. Environmental Protection Agency pursuant to § 404 of the federal Clean Water Act in 33 CFR 328.3b.” (9 VAC 25-830-40)

The Court’s *Sackett* decision does not affect the definition of Resource Protection Areas (RPAs) and Resource Management Areas (RMAs) as defined in the Chesapeake Bay Preservation Act and associated regulations. The Chesapeake Bay Preservation Act’s implementing regulations provide that some wetlands are components of the RPA and some are components of the RMA. The geographic extents of these wetland components are independent of federal jurisdictional determinations. In *Sackett* the Court was considering a question of jurisdiction, specifically, which wetlands were subject to the CWA and not the definition of wetlands. Indeed, the Court maintained the factual finding that there are wetlands on the plaintiff’s property, just not wetlands subject to the CWA.

Determinations (PJDs) and Approved Jurisdictional Determinations (AJDs). Additionally, for projects that can be authorized under the State Programmatic General Permits (SPGPs), applicants can use the Preliminary Screening Process available on the Norfolk District website: <https://www.nao.usace.army.mil/Missions/Regulatory/RBregional.aspx> prior to application submittal.

However, for projects that receive a delineation confirmation of limited geographic extent, or no delineation confirmation from the Corps, DEQ also will continue to use the SSWD process. In response to *Sackett* and the uncertainty around the Corps' field implementation of the *Sackett* decision, when a SSWD request is submitted by a Professional Wetland Delineator (PWD)² using Attachment 1 of this letter, DEQ will strive to review each SSWD request within 30 days - which may involve field review. DEQ will also continue to accept SSWD requests from individuals who are not certified PWDs, but DEQ cannot provide a time frame on how long that review will take. The SSWD may be relied upon for DEQ permitting purposes. As workload permits, a portion of all delineations will be randomly selected for review in the field for Quality Control with the consultant who did the work. The Corps and other local, state or federal agencies may or may not accept DEQ's SSWD for their purposes.

Due to an unknown number of Nationwide Permit requests that will now become VWPP General Permits, DEQ expects an increase in workload. Similarly to the Corps, projects with minimal impact to the environment will have limited levels of review, with randomly-selected projects subject to additional scrutiny for Quality Assurance purposes.

It is our current understanding that the Norfolk District of the Corps will process permit applications during this period of uncertainty in cooperation with DEQ in accordance with the process outlined above. Since the wetlands and/or streams and other water bodies regulated by the Corps will likely be a subset of DEQ's geographic extent of state waters, we believe this should avoid project delays. However, if challenges to Corps jurisdictional areas are necessary, the 404 portion of the permit process controlled by the Corps could be delayed. DEQ, however, will make every effort to continue its VWPP process.

Importantly, the *Sackett* decision does not affect any mitigation requirements in existing and future VWPP permits.

Our goal is straightforward: *healthy state and local economies and healthy waterways are integrally related; balanced economic development and water quality protection are not mutually exclusive.*

Please contact Dave Davis at (804) 698-4105 or Dave.Davis@deq.virginia.gov if you have any questions or need additional assistance.

² The Department of Professional and Occupational Regulation (DPOR) certifies PWDs in Virginia. DPOR estimates that there are 118 PWDs in Virginia, with over 100 PWDs in the private sector.

Attachment 1: Complete Delineation Report Requirements

The Virginia Water Protection Permit Program Regulation requires that *wetland* boundaries will be determined in accordance with the U.S. Army Corps' of Engineers (Corps) 1987 Wetland Delineation Manual and any regional supplements approved for use by the Corps. Two [regional supplements](#) are currently in use in Virginia: the Atlantic and Gulf Coastal Plain Supplement, generally used east of Interstate 95, and the Eastern Mountains and Piedmont Supplement, generally used west of Interstate 95.

The wetland delineation manual and supplements are methods to determine wetland boundaries and are not used to identify stream channels or other surface waters. Delineations for other surface waters are to be conducted in accordance with applicable DEQ/Corps guidance or policy. Note that wetland delineations provide only the *geographic* extent of wetlands on the site; the *jurisdictional* extent will depend on each agency's independent statutory and regulatory authority, policies and guidance.

Delineations for surface waters other than wetlands (streams, open water, etc.) shall take into consideration the location of an ordinary high-water mark, if present. Please use the DEQ Stream Identification Field Data Form (below) to delineate state surface waters other than wetlands.

The State Surface Waters Determination (SSWD) request involves review of a Final Delineation Report, including maps, field data sheets, and the SSWD checklist (<https://www.deq.virginia.gov/home/showpublisheddocument/16312/638012658327670000>), to determine whether all necessary information has been provided. If all the information requirements are complete, DEQ will review the SSWD request using appropriate desktop review methods and online resources and issue a written State Surface Waters Determination (SSWD). In many cases, DEQ's desktop verification and written SSWD will complete the final delineation boundary confirmation process. In some cases, DEQ may schedule a site visit to field verify the state waters delineation. Instances where field verification may be scheduled include, but are not limited to, situations where:

1. DEQ has concerns with inconsistencies observed between the Final Delineation Report, including map(s) and photographs, and DEQ's desktop analysis
2. DEQ has concerns with delineation data sheets/Stream ID forms that appear to lead to a different conclusion from that made in the Final Delineation Report

All field verifications require a signed Property Access Agreement before a field visit can be scheduled. The Property Access Agreement can be found at the end of the SSWD Request Checklist.

For the purposes of this voluntary prioritized review, a complete delineation report includes:

1. Identification of who conducted the delineation, their qualifications, and PWD certification number; the date(s) of the site visit(s); recent weather conditions within approximately two weeks prior to, as well as during, the delineation field work
2. Discussion of delineation methods used (i.e., routine, comprehensive, atypical, or problem areas), and the reasons for any deviation from accepted methods and standards

3. A vicinity map with the subject site outlined showing the project location and text identifying the street address, latitude/longitude, and any other location information necessary to identify the project site
4. General description of the project vicinity and project site, and a summary of precipitation information that may affect the report's conclusions
5. Findings from all desktop sources reviewed, including all figures, photographs, and screenshots with the project site location clearly outlined, a scale, a north arrow, and legend
6. Photographs, appropriately labeled with date/time stamps, and georeferenced
7. Field conditions and observations, including hydric soils, wetland hydrology, and hydrophytic vegetation data presented on wetland field data sheets (using the appropriate Corps Regional Supplement); stream bed, stream bank, and ordinary high water mark data presented on stream identification data sheets (see attachment)
8. All completed field data forms for the project site, and corresponding to sample point geolocations identified on one or more mapping resources in the report
9. Cowardin Classification of field observed wetlands, and discussion of any deviation from desktop sources
10. Other relevant information that supports the PWD decision on the state surface water/upland boundary
11. A narrative description of results and conclusions, including a thorough description of all state surface waters, including isolated wetlands (if any); characteristics and acreage of each wetland and non-wetland area; characteristics and linear footage of each stream; consistency of the field observations with the desktop resources; and, if applicable, the possible reasons for any inconsistencies between field observations and desktop resources
12. References and sources for all information used
13. Final Delineation Map, georeferenced to the parcel boundary, at a scale no larger than one-inch equals four hundred feet (1" = 400'), which depicts all delineated and surveyed state surface water boundaries on the project site. Survey accuracy shall be sub-meter or better.
14. Certification statement

All Final Delineation Reports submitted to DEQ by certified PWDs shall include the following statement:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Professional Name: _____

Certification No.: _____

Signature: _____

Date: _____

DEQ Stream Identification Field Data Form

Project/Site: _____ City/County: _____ Date: _____

Applicant/Owner: _____

Investigator(s): _____

Landform (hillslope, terrace, etc.): _____

Local relief (concave, convex, none): _____ Slope (%): _____

Lat: _____ Long: _____ Datum: _____

<p>SUMMARY OF FINDINGS – Attach site map showing sampling point locations within and upstream of the head of the stream.</p> <p>Stream bed present: <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>Stream bank present: <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>OHWM present: <input type="checkbox"/> Yes <input type="checkbox"/> No</p>	<p>Stream Identified: <input type="checkbox"/> Yes <input type="checkbox"/> No</p>
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<p>Site overview from remote and online resources.</p> <p>Check boxes for online resources used to evaluate site:</p> <p><input type="checkbox"/> Gage data <input type="checkbox"/> LIDAR</p> <p><input type="checkbox"/> Regional Curve Data <input type="checkbox"/> Soil Survey</p> <p><input type="checkbox"/> Climatic data <input type="checkbox"/> Topographic Maps</p> <p><input type="checkbox"/> Aerial photos <input type="checkbox"/> Other</p>	<p>Describe land use and flow regime conditions from online resources. Were there any recent extreme events (flooding or drought)?</p>
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Check the boxes next to the field indicators used in stream determination:

Geomorphic Indicators:

Channel Bank Features

- Natural line impressed on bank (above or below bankfull)
- Undercut bank
- Break in slope (on bank or at valley bottom)
- Continuous bed and bank
- Shelving (Top of bank, natural levee, or other)
- Clear bankfull storm event indicators present

Channel Bars

- Shelving (on bar)
- Unvegetated (on bar)
- Vegetation transition (on bar)
- Sediment transition or sorting (on bar)
- Upper limit of deposition (on bar)

Channel Bed / Bedload Transport Evidence

- Depositional (deposited sediment, lateral bars, mid channel bars, etc.)
- Bedform features (riffle, pool, steps, etc.)
- Erosional (scour, smoothing, etc.)
- Secondary channel (lateral or parallel along the same valley or floodplain)
- Evidence of thalweg
- Headcuts (with other evidence)
- Hydric soil development (changes in the character of soil)
- Mudcracks (found within an unvegetated flow path/channel)
- Changes in particle-size distribution (sediment sorting)

Vegetation Indicators:

- Change in Vegetation Type / Density**
 - Vegetation absent (channel bed)
 - Vegetation matted down or bent (channel bed or bars)
 - Exposed roots below intact soil layer (channel banks)
 - Destruction of terrestrial vegetation (channel banks, top of bank, etc.)
 - Change in plant community (transition from channel bed to floodplain)

Ancillary Indicators:

- Wracking/presence of organic litter (along channel banks or floodplain)
- Presence of obstacle marks (i.e. erosion/sedimentation around large obstacles in flow path)
- Leaf litter disturbed or absent
- Water staining
- Weathered clast or bedrock
- Deposited sediment within leaf pack (floodplain)

Other observed Indicators and/or additional observations?

Describe rationale for location of stream and provide supporting evidence for stream identification:

Note: Please refer to the "USACE 2022 National OHWM Field Delineation Manual for Rivers and Streams: Interim Version" at <http://dx.doi.org/10.21079/11681/46102> for detail on terminology.