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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CHANTELL and MICHAEL SACKETT, Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; *et. al*, Defendants.	CIVIL ACTION No. CV 08-0185-EJL

UNITED STATES' COMBINED MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF THE UNITED STATES' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The United States Environmental Protection Agency ("EPA") issued an administrative compliance order (the "Order") to Michael and Chantell Sackett ("Sacketts" or "Plaintiffs") pursuant to Section 309 of the Clean Water Act, 33 U.S.C. §§ 1251-1387 ("CWA"), upon determining that they had placed fill material into waters of the United States without having obtained the required CWA permit. Rather than complying with the Order, Plaintiffs filed this action alleging that EPA had no jurisdiction to issue the Order because the wetlands on their property were not waters of the United States.

Plaintiffs' Motion for Summary Judgment [ECF No.103] should be denied because the record before the Court supports EPA's determination that the Sacketts' property contains wetlands (or did contain wetlands, prior to the illegal filling) and that the wetlands are waters of the United States within the meaning of the CWA. In addition, the United States' Cross-Motion for Summary Judgment should be granted because the record establishes that EPA's issuance of the Order was reasonable. The record supports EPA's findings that the Sacketts violated the CWA by placing fill material into waters of the United States without having obtained a necessary permit.

STATEMENT OF FACTS

The Site

The Sacketts' property ("the Site" or "the Property") is located at 1604 Kalispell Bay Road, Priest Lake, Idaho. AR 18 at 203.[1] The Site is approximately 300 feet from Priest Lake, a navigable-in-fact water, or traditional navigable waterway ("TNW"). The Property is bounded on the north by Kalispell Bay Road, and on the south by Old Schneider Road. The north boundary of the Property is adjacent to an unnamed tributary that flows westward along the north

[1] "AR" refers to the Administrative Record that was filed with this Court on January 15, 2013 [ECF No. 62]. AR references are to the document number in the record, with pin cites to the bates numbered pages, where a particular page is referenced.

side of Kalispell Bay Road and drains into Kalispell Creek, a perennial stream that flows southward into Priest Lake. AR 35 at 345.

Immediately across Kalispell Bay Road is a large wetland known as "Kalispell Bay Fen"[2] that has standing water much of the year. AR 11 at 162; AR 15 at 195; AR 35 at 343. The National Wetlands Inventory map for the area and historical aerial photos show that the Sackett Property was once part of that large wetland complex that extended all the way to Priest Lake. *See* AR 35 at 342 and *id*. at 355, 356 (1932 aerial photographs of the Site, prior to the building of Kalispell Bay Road and Old Schneider Road). The Sackett Property was separated from the wetland complex to the north by the building of Kalispell Bay Road, and was separated from Priest Lake on the south by the development of Old Schnieder Road and lake front houses. *See* AR 10 at 150 (topographic map of the area showing the wetland complex and the location of the roads). *See also* AR 10 at 151; AR 36 at 371; AR 37 at 372 (aerial photographs of the Site, prior to the filling of wetlands on the Sackett Property) and AR 39 at 374, 375 (satellite images of the area prior to the filling of wetlands on the Sackett Property).

The Sacketts purchased the Property sometime in 2004 to build a home. AR 20 at 228, no. 11. They did not seek a jurisdictional determination from the United States Army Corps of Engineers ("Corps") or otherwise seek guidance from the regulators prior to beginning construction.[3] Had they done so, they would have learned that in 1996, the Corps determined the

[2] Kalispell Bay Fen is one of the Idaho Panhandle region's rare valley peatlands that generally occur around lakes and ponds. Peatlands are rare in Northern Idaho and have great importance because of their rich flora, contribution to water quality, and their role as carbon sinks. AR 1 at 5, 11. *See also*, AR 35 at 344.

[3] The Corps' regulations provide that a potential applicant for a permit may obtain advice from the Corps regarding the regulatory process. 33 C.F.R. § 325.1(b). 33 C.F.R. § 320.1(a)(6) gives the District Engineer the authority to issue an opinion on application of the CWA to certain activities and tracts of land; 33 C.F.R. § 331.2 defines "Approved Jurisdictional Determinations" and the factors considered in making that determination. The Corps' website contains plentiful information regarding permitting, and recommends that "when in doubt as to whether a permit is required or what you need to do, don't hesitate to call one of our Corps Field offices for further assistance." http://www.nww.usace.army.mil/BusinessWithUs/RegulatoryDivision/FAQ.aspx.

Site to be a wetland and advised a prior owner of the Property that a CWA Section 404 permit would be required to place fill material on the Property. AR 3 at 92-93; AR 4 at 94-95.

The Violation

On May 1–2, 2007, Plaintiffs removed from the Site approximately 1,010 cubic yards of soft earthen material that was unsuitable for building, and trucked in approximately 1,714 cubic yards of gravel and sand to fill the wetland and prepare the Site for building.[4] AR 20 at 227-28 (nos. 3 and 6). *See also* AR 12 at 172 (handwritten note from Mrs. Sackett estimating that 20,436 square feet of the wetland had been filled in).

In response to a complaint from a neighboring property owner, representatives of EPA and the Corps inspected the Site on May 3, 2007. AR 15 at 187. Photographs taken on that date show water ponded next to the fill material that the Sacketts had placed on the Property. AR 10 at 154-56; AR 11 at 157-64. The inspectors determined that the workers on the Site were placing fill material into wetlands. AR 15 at 187. After further evaluation, including review of the information provided by Mrs. Sackett to the Corps, the EPA inspector informed Mrs. Sackett that EPA had jurisdiction over the Site because the Property did contain wetlands, and that the wetlands were not isolated but, rather, were connected via groundwater to the Lake or the adjacent wetlands. AR 14 at 180.

Following that inspection, the Sacketts hired a wetlands consultant who inspected the Site, advised the Sacketts that the Site was subject to CWA jurisdiction, and recommended that they should not do any work at the Site until consulting with the Corps of Engineers. AR 12 at 167. Specifically, the consultant determined that "[t]he site is part of a wetland. That the site is not an isolated wetland and that it joins a wetland to the South and to the West across a road."

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[4] A standard dump truck load holds eight to ten cubic yards of fill material http://wiki.answers.com/Q/What_is_the_average_VOLUME_of_dump_truck. Therefore, if the Sacketts used a ten-cubic-yard dump truck, they would have imported approximately 170 truck loads of fill material to the Site to make it suitable for building.

Id. Mrs. Sackett advised the Corps that "[their consultant] had come to the site and that he did determine the site to be part of a wetland." *Id.* She also asked the consultant to inform the EPA inspector "that he did determine the site to be part of a wetland." *Id.* Mrs. Sackett provided EPA with a hand drawn map on which she labeled the surrounding properties as wetlands. AR 12 at 170. Later, the Sacketts' wetlands consultant performed a wetlands determination on a nearby property where the Sacketts had disposed of the soil excavated from the Site. He then referred to the Site as their "wetland property" and referred to the material they removed from the Site as "wetlands soils." AR 19 at 214.

On May 15, 2008, EPA inspector John Olson conducted a follow-up Site inspection with Michael Doherty from the Corps of Engineers. AR 31 at 317-320 (Olson field notes). Mr. Olson observed the Site and its relationship with the surrounding streams, wetlands, and Priest Lake; he took photographs to document his observations; and he made field notes and recorded information for a determination of jurisdiction. Based on that inspection and his expertise, Mr. Olson concluded that the Site met the requirements for establishing jurisdiction under the CWA. AR 33 (Approved JD Form); AR 34 (Olson field notes); AR 35 (Olson Site inspection report).[5]

The Order

On November 26, 2007, EPA issued a CWA Section 309(a) administrative compliance order to the Sacketts, instructing them to remove the 1,700 cubic yards of dry fill material, and to restore the Site. AR 23 at 237-48. That order was amended on April 4, 2008, (AR 26), again on May 1, 2008, (AR 28), and then again on May 15, 2008. AR 32.

[5] The Site inspection report dated July 1, 2008, was prepared based on Mr. Olson's field notes that were made at the May 15, 2008 Site inspection. Mr. Olson's findings and conclusions were communicated to the Acting Director of the Office of Ecosystems, Tribal, and Public Affairs for EPA, Region 10 on that date, before the Order was issued. *See* United States' Response to Plaintiffs' Motion to Strike Materials From the Administrative Record [ECF No. 37] at 4-5 (and Declarations referenced therein).

STATUTORY AND REGULATORY BACKGROUND

I. The Clean Water Act

The CWA establishes a comprehensive program to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA prohibits the discharge of pollutants, including dredged or fill material, to "navigable waters" unless authorized under the Act. 33 U.S.C. § 1311(a). Section 404 of the CWA authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). CWA section 309(a), 33 U.S.C. § 1319(a), authorizes EPA to issue administrative compliance orders requiring the violator to comply with CWA section 301(a), 33 U.S.C. § 1311.

The CWA defines "discharge of pollutants" to mean, *inter alia*, "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). The Act further defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

II. The CWA Regulations

Consistent with Congress' broad objectives, the Corps and EPA have issued regulations further defining "waters of the United States" to include, among others, all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce; tributaries of such waters; and wetlands adjacent to such waters. 33 C.F.R. § 328.3(a)(1), (5), (7); 40 C.F.R. § 230.3(o)(1)(i), (v), (vii).[6] The regulations define "adjacent" as "bordering, contiguous, or neighboring" and provide that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 33 C.F.R. § 328.3(c)(1); 40 C.F.R. § 232.2.

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[6] The agencies recently amended the definition of "waters of the United States," but the rule containing that amendment has been stayed nationwide pending further order by the Sixth Circuit. *In re: Envtl. Protection Agency and Dep't of Defense Final Rule; "Clean Water Rule: Definition of Waters of the United States*," 80 Fed. Reg. 37,054 (June 29, 2015), Nos. 15-3799, 15-3887, 15-3822, and 15-3853, 2015 WL 5893814 (6th Cir. Oct. 9, 2015).

III. The *Rapanos* Decision

In *Rapanos v. United States*, 547 U.S. 715 (2006), the Supreme Court addressed the scope of the term "waters of the United States" in two consolidated cases involving discharges to wetlands adjacent to non-navigable "ditches or man-made drains" that eventually flowed into traditional navigable waters. *Id.* at 729. Four Justices, in a plurality opinion written by Justice Scalia, concluded that the phrase "waters of the United States" encompassed "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters, *id.* at 739, and also wetlands with a continuous surface connection to such water bodies, *id.* at 742. Justice Scalia explained that the phrase "relatively permanent" does not necessarily exclude streams that dry up in times of drought or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." *Id.* at 732 n.5 (emphasis in original).

Justice Kennedy wrote a separate concurring opinion setting out a different standard for evaluating CWA jurisdiction. *Id.* at 776. Justice Kennedy concluded that jurisdiction extends to wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759. This "significant nexus" exists where "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780. However, evidence of a significant nexus is not required when the wetlands are adjacent to navigable-in-fact waters, because "the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone." *Id.* *See also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131–33 (1985), in which the Supreme Court unanimously upheld the Corps' regulations defining "waters of the United States" as encompassing wetlands adjacent to other protected waters, reasoning that "the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides

an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act." *Id.* at 134.

The four dissenting Justices in *Rapanos* concluded that the term "waters of the United States" encompasses, *inter alia*, all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy. 547 U.S. at 810. The Ninth Circuit has held that CWA regulatory jurisdiction may be established under the Kennedy standard, but has not foreclosed use of the plurality standard. *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 769 (9th Cir. 2011) (*citing N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999–1000 (9th Cir. 2007)).

IV. Post-*Rapanos* Guidance

Following the Court's decision in *Rapanos*, EPA and the Corps jointly issued a guidance document "to ensure that jurisdictional determinations, administrative enforcement actions, and other relevant agency actions are consistent with the *Rapanos* decision." *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*" (Dec. 2, 2008) ("Post-*Rapanos* Guidance") at 4.[7]

In the Post-*Rapanos* Guidance, the agencies interpret the regulatory definition of "adjacent" to include wetlands if one of three criteria is present: (1) "an unbroken surface or shallow sub-surface connection to jurisdictional waters" (which may be intermittent); (2) a "physical[] separat[ion] from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like"; or (3) "proximity to a jurisdictional water [that] is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters." *Id.* at 5–6.

[7] http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/RelatedResources/CWAGuidance.aspx. The Guidance was not final at the time the Order was issued in this case and, in any event, is not binding as a regulation. Nonetheless, it provides the Corps' and EPA's authoritative interpretation of their regulation in light of the *Rapanos* decision.

V. The 1987 Wetlands Manual

The 1987 Wetlands Manual[8] provides technical guidelines for identifying wetlands. Generally, a positive wetland determination requires evidence of three parameters: (1) a prevalence of hydrophytic plants; (2) hydrological conditions suited to such plants; and (3) the presence of hydric soils. *See United States v. Banks*, 115 F.3d 916, 920 (11th Cir. 1997). The Manual provides indicators for each parameter (vegetation, soils, and hydrology). However, the Manual also provides an exception to the delineation procedure for "atypical situations," when one or more of the parameters have been sufficiently altered by recent human activities or natural events so as to preclude the presence of wetland indicators of the parameter. *See Manual* (Appendix A2). There are three types of atypical situations: unauthorized activities, natural events, and man-induced wetlands. *Manual* ¶ 71. Unauthorized activities include "alteration or removal of vegetation" and the "placement of dredged or fill material over hydric soils." *Id.* When it is impossible to determine the existence of one or more parameters due to alterations, the parameters can be met through "Section F Atypical Situation" criteria instead of using the standard indicators.

STANDARD OF REVIEW

The Sacketts challenge only EPA's assertion of jurisdiction over the Property. That challenge is governed by the Administrative Procedure Act ("APA"), which provides that final agency action must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1521 (9th Cir. 1995). The Ninth Circuit only finds a decision arbitrary or capricious if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not

[8] U.S. Army Corps of Engineers Delineation Manual (Jan. 1987), http://acwc.sdp.sirsi.net/client/en_US/search/asset/1005069.

be ascribed to a difference in view or the product of agency expertise." *Dioxin/Organochlorine*, 57 F.3d at 1521 (quoting *Motor Vehicle Mfr. Ass'n v. State Farm Ins*., 463 U.S. 29, 44 (1983)).

The agency action is presumed valid, with the burden of overcoming that presumption on the party challenging the action. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971); Envtl. Def. Fund v. Costle, 657 F.2d 275, 283 (D.C. Cir. 1981). *See also Indep. Acceptance Co. v. State of California*, 204 F.3d 1247, 1251 (9th Cir. 2000) (noting standard of review is highly deferential with a judicial presumption that an agency's action is valid where a reasonable basis exists for agency's decision). Even if the "[agency] made missteps . . . the burden is on [the plaintiff] to demonstrate that the [agency's] ultimate conclusions are unreasonable." *George v. Bay Area Rapid Transit*, 577 F.3d 1005, 1011 (9th Cir. 2009).

The Court's deference to the agency "is highest when reviewing an agency's technical analyses and judgments involving the evaluation of complex scientific data within the agency's technical expertise." *League of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1130 (9th Cir. 2011). "Agencies have discretion to rely on their own experts' reasonable opinions to resolve a conflict between or among specialists, even if [a reviewing court] find[s] contrary views more persuasive. *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1148 (9th Cir. 2010). "[W]here, as here, a court reviews an agency action involve[ing] primarily issues of fact, and where analysis of the relevant documents requires a high level of technical expertise, we must defer to the informed discretion of the responsible federal agencies." *Vigil v. Leavitt*, 381 F.3d 826, 833 (9th Cir. 2004) (internal quotations omitted). The Ninth Circuit has said "we must defer to the agency's finding on these matters unless the record shows that the agency's findings were not supported by substantial evidence—i.e., unless the evidence in the record 'would compel a reasonable finder of fact to reach a contrary result.'" *Ursack Inc. v. Sierra Interagency Black Bear Grp.*, 639 F.3d 949, 958 (9th Cir. 2011) (quoting *Gebhart v. SEC*, 595 F.3d 1034, 1043 (9th Cir. 2010)). The "substantial evidence" standard is the most stringent standard that can apply to questions of evidentiary sufficiency for factual determinations. *See Dickinson v. Zurko*, 527 U.S. 150, 164 (1999); *see*

also Utah Shared Access Alliance v. Carpenter, 463 F.3d 1125, 1134 (10th Cir. 2006); *Ass'n of Data Processing Svc. Orgs. v. Bd. of Governors*, 745 F.2d 677, 683-84 (D.C. Cir. 1984). That standard is more deferential even than the "clearly erroneous" standard for appellate review of trial court findings. *Zurko*, 527 U.S. at 162, 164.

An agency's interpretation of its own regulations is "controlling" unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *accord Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 274–75 (2009) (accepting EPA's interpretation of its CWA regulations as correct because it is not "plainly erroneous or inconsistent with the regulation"); *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003) ("[J]udicial review of an agency's interpretation of its own regulations is limited to ensuring that the agency's interpretation is not plainly erroneous or inconsistent with the regulation.").[9] Indeed, "[i]t is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail." *Decker v. Nw. Envt'l Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013).

Although the Sacketts have challenged only the assertion of jurisdiction over the wetlands on their Property, EPA is entitled to summary judgment on all aspects of CWA liability as found in the Order. Summary judgment must be granted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When the dispute requires review of an administrative record, as is the case here, "summary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did." *City & Cty. of San Francisco v. United*

[9] Plaintiffs incorrectly argue that EPA's assertion of jurisdiction is not entitled to deference because its action was not informed by regulations promulgated following notice and comment. Pltf. Br. at 4-5. In fact, EPA's finding that the Sackett wetlands are subject to CWA jurisdiction is informed by the regulations defining "waters of the United States," 40 C.F.R. § 230.3, and by the Post-*Rapanos* Guidance which, although not promulgated as a regulation, was subject to notice and comment. *See* Post-*Rapanos* Guidance, note 1. That Guidance provides the agencies' authoritative interpretation of the regulations following the *Rapanos* decision, and is therefore entitled to deference. *Coeur Alaska, Inc.*, 557 U.S. at 274–75.

States, 130 F.3d 873, 877 (9th Cir. 1977) (quoting *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 770 (9th Cir. 1985), *See, e.g.*, *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 959 (9th Cir. 2005) (reviewing district court ruling on cross-motions for summary judgment).

ARGUMENT

I. The United States is Entitled to Summary Judgment Because the Record Supports EPA's Findings that the Sacketts Violated the CWA.

EPA is entitled to summary judgment upholding the Order in its entirety, because the record fully supports EPA's findings regarding each element for establishing that the Sacketts violated CWA section 301, 33 U.S.C. § 1311. EPA reasonably found that the Sacketts are (1) persons (2) who added a pollutant (3) from a point source (4) to waters of the United States (5) without the necessary permit. *See, e.g., Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983). Liability for violating the Act is strict; the unpermitted discharge does not need to be intentional, knowing, or negligent. *United States v. Brace*, 41 F.3d 117, 122 (3d Cir. 1994); *Avoyelles Sportsmen's League*, 715 F.2d at 922. The record in this case supports EPA's findings on each of these issues.

A. <u>The Sacketts are "persons".</u>

The CWA defines "person" as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5). A person is liable under CWA section 301(a) if he or she has either: (1) performed the work; or (2) exercised responsibility for or control over performance of the work. *See Sierra Club v. MasTec North Am.*, No. 03-1697, 2007 WL 4387428 *3 (D. Or. Dec. 12, 2007) ("Liability is predicated on either performance of the work or control over performance of the work . . . . MasTec cannot avoid liability under the CWA by contracting away its compliance with applicable law.").

As the Site owners who solicited and paid for the work in question to be performed, the Sacketts exercised responsibility for, and control over, the performance of the work. The

Sacketts claim ownership of the equipment that was used for excavating and filling the wetlands, and they directed the clearing of the site and supervised the equipment operator. AR 20 (Sacketts' response to EPA Request for Information) at 228, nos. 9, 10. Throughout the investigation and litigation regarding the alleged violation, the Sacketts have never suggested that the responsibility for the violation rests with or is shared with any other person or entity. Therefore, the Sacketts are "person[s]" under the Act. 33 U.S.C. § 1362(5).

B. The fill material placed on the Site is a "pollutant."

The CWA defines "pollutant" broadly to include an array of materials such as "dredged spoil," "rock," "sand," and "biological materials." 33 U.S.C. § 1362(6). Dredged and fill materials are pollutants requiring a permit under the Act. 33 U.S.C. § 1344(a). "Dredged material" is defined by regulation as "material that is excavated or dredged from waters of the United States." 33 C.F.R. § 323.2(c); 40 C.F.R. § 232.2. Further, "fill material" is defined by regulation as "material placed in waters of the United States where the material has the effect of . . . [r]eplacing any portion of a water of the United States with dry land." 33 C.F.R. § 323.2(e)(1); 40 C.F.R. § 232.2.

The Sacketts used mechanized equipment to excavate wetland soil and biological materials at the site and to import material, including gravel, to fill the wetlands at the Site. AR 15 at 187 (June 1, 2007 inspection report); AR 15 at 190–92 (photographs taken on May 3, 2007 showing excavating equipment and dump trucks); *see also* AR 20 (Sacketts' response to EPA Request for Information) at 227, no. 3; AR 20 at 228, no. 7 & 10. The discharged materials had the effect of replacing the wetlands with dry land, and are therefore fill material. Accordingly, the Sacketts discharged "pollutant[s]" to the Site. 33 U.S.C. § 1362(6) & (12).

C. The equipment used to place the fill on the Site is a "point source."

The CWA defines a "point source" as "any discernible, confined and discrete conveyance." 33 U.S.C. § 1362(14). Under this "extremely broad" statutory definition mechanized equipment such as bulldozers and tractors are "point sources." *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 815 (9th Cir. 2001), *aff'd*, 537 U.S. 99

(2002); *United States v. Huebner*, 752 F.2d 1235, 1243 (7th Cir. 1985); *Avoyelles Sportsmen's League*, 715 F.2d at 922. Here, the Sacketts used mechanized equipment such as a bulldozer and an excavator to discharge the fill material into the wetlands. AR 15 at 187 (June 1, 2007 inspection report); AR 15 at 190–92 (photographs taken on May 3, 2007 showing excavating equipment and dump trucks). *See also* AR 20 (Sacketts' response to EPA Request for Information) at 227 & 228, nos. 3 & 9. Accordingly, pollutants were discharged from a "point source" at the Site. 33 U.S.C. § 1362(14).

D. The fill was placed into "waters of the United States."

"Waters of the United States" include, among other things: (1) traditional navigable waters ("TNWs"); (2) "tributaries" of TNWs; and (3) wetlands "adjacent" to other jurisdictional waters. 33 C.F.R. § 328.3(a); 40 C.F.R. § 232.2. Wetlands are defined by regulation as areas "inundated or saturated by surface or groundwater 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." 33 C.F.R. § 328.3(b); 40 C.F.R. §§ 122.2 & 232.2. As demonstrated in Argument II, below, the Sacketts' Property included wetlands that were adjacent to other jurisdictional waters and thus were waters of the United States subject to jurisdiction under the CWA.

E. The fill was placed without the required permit.

The Sacketts never applied for or received a permit from the Corps of Engineers to engage in filling wetlands at the Site. As such, their discharges of pollutants from point sources into waters of the United States did not comply with CWA section 404, 33 U.S.C. § 1344, and constitute violations of CWA section 301, 33 U.S.C. § 1311.

II. Plaintiffs' Motion for Summary Judgment Must Be Denied Because the Record Supports EPA's Determination that the Sacketts' Property Is a Water of the United States.

The Sacketts have not challenged any findings set forth in the Order other than EPA's assertion of jurisdiction. *See* Pltf. Br. at 3 ("The Sacketts now bring this motion for summary judgment on their APA claim against the EPA, and ask the Court to rule that the Administrative

Record fails to establish the presence of jurisdictional wetlands on the Sackett Home Site."). Plaintiffs' motion must be denied because the record fully supports EPA's determination that the Sackett Site contains jurisdictional wetlands.

A. The Sackett Property contained wetlands.

In issuing the Order, EPA made an affirmative determination that the Sackett Site contained wetlands:

> [The Sacketts' property] contains wetlands within the meaning of 33 C.F.R. § 328.4(8)(b); the wetlands meet the criteria for jurisdictional wetlands in the 1987 "Federal Manual for Identifying and Delineating Jurisdictional Wetlands."

Order at ¶ 1.4, AR 32 at 324. Significantly, Plaintiffs do not deny that the Site contained wetlands. On the contrary, the presence of wetlands was confirmed by the Sacketts' own consultant and admitted by Chantell Sackett. AR 12 at 165-72 (fax dated May 23, 2007 from Chantell Sackett to Dean Hilliard, Corps of Engineers). Following the EPA site inspection on May 3, 2007, the Sacketts hired a wetlands consultant who performed a wetlands determination, advised the Sacketts that the Site was subject to CWA jurisdiction, and suggested that they do no further work on the Property until after consulting with the Corps of Engineers. The consultant determined that "[t]he site is part of a wetland; that the site is not an isolated wetland and that it joins a wetland to the South and to the West across a road." AR 12 at 167. Mrs. Sackett advised the Corps that "[their consultant] had come to the site and that he did determine the site to be part of a wetland." *Id.* She also asked the consultant to inform the EPA inspector "that he did determine the site to be part of a wetland." *Id.* Mrs. Sackett provided EPA with a hand drawn map on which she labeled the surrounding properties as wetlands. *Id*. at 170. Later, the Sacketts' wetlands consultant performed a wetlands determination on nearby property where the Sacketts had disposed of the soil excavated from the Site. He then referred to the Site as their "wetland property" and referred to the material they removed from the Site as "wetlands soils." AR 19 at 214.

In their motion for summary judgment, Plaintiffs do not deny that the Site contained wetlands; rather, they assert that the administrative record fails to establish the presence of wetlands. Pltf. Br. at 14. They are wrong, because the record here amply supports EPA's determination that the Site contains wetlands (or did contain wetlands, prior to the unauthorized filling). The Sackett Property was once part of a large wetland complex known as the Kalispell Bay Fen, which extended from north of the Site to Priest Lake. *See* AR 10 at 150 (topographic map showing the Kalispell Bay Fen); *id*. at 151 (satellite imagery showing the Site, prior to the filling of the wetlands on Site, as within the wetland complex). *See also* AR 35 at 342; id. at 344, 355 (USGS photographs); AR 29 at 269–72. The wetland complex is now divided by Kalispell Bay Road. The portion of the wetland to the north of Kalispell Bay Road remains undisturbed. *See* AR 11 at 162 (photographs taken at the May 3, 2007 site inspection showing a view westward from Kalispell Bay Road with the wetlands on the right, and a view eastward from Kalispell Bay Road with the wetlands on the left). Although the Sackett wetland on the south of Kalispell Bay Road has been filled, the abutting properties to the immediate east and west of the Sackett Site have evident wetland characteristics. *See* AR 10 at 153–56; AR 11 at 157–64 (photographs taken during the May 3, 2007 site inspection showing the wetlands on the east and west of the Site from various angles); *see also* AR 15 at 187 (documenting the presence of wetland vegetation on the neighboring properties).

Plaintiffs argue that the record in this case fails to identify the "three general diagnostic environmental characteristics of vegetation, soil, and hydrology" as required by the 1987 Wetlands Manual. Pltf. Br. at 14. Plaintiffs are mistaken for three reasons. First, the methods identified in the 1987 Manual are not strict requirements. On the contrary, the introduction to Part IV identifies several different methods for making a wetland determination, and expressly provides that:

> Significant flexibility has been incorporated into PART IV. The user is presented in Section B with various potential sources of information that may be helpful in making a determination, but not all identified sources of

> information may be applicable to a given situation. *Note: The user is not required to obtain information from all identified sources.*

Manual, Part IV, Section A, ¶ 51 (emphasis in original).

Second, the standard methodologies identified in the Manual are not applicable in this case, because the Site presents an "atypical situation" as defined in the Manual at Part IV, Section F. Paragraph 71(a) describes an "atypical situation" resulting from "unauthorized activities":

> Unauthorized activities: Unauthorized discharges requiring enforcement actions may result in the removal or covering of indicators of one or more wetland parameters. Examples include, but are not limited to: (1) alteration or removal of vegetation; (2) placement of dredged or fill material over hydric soils; and/or (3) construction of levees, drainage systems, or dams that significantly alter the area hydrology.

Manual, Part IV, Section F. ¶ 71(a). It is obvious from review of the photographs taken at the site visit on May 3, 2007 (AR 10 at 152–56; AR 11 at 157–64) that such unauthorized discharges had occurred. The vegetation had been removed, the hydric soils had been excavated, and fill material had been placed on the Site. These activities were also acknowledged by Mrs. Sackett. AR 12 at 165–72.

Third – and most importantly – the record shows that, notwithstanding the atypical situation presented, EPA and the Corps did make appropriate findings with respect to each of the three indicators identified in the Manual:

(1) Hydric soils – At the time of the site inspection on May 3, 2007, the EPA and Corps inspectors observed that strips of the Site along the east and west borders had not yet been filled. Digging bore holes was not necessary, as the ground had been excavated in preparation for filling, and the strips of excavated ground revealed wetland soils (thick dark soil with saturation to surface). AR 15 at 187; AR 10 at 152–56; AR 11 at 157–64; AR 15 at 190–96 (photographs). Similar conditions were observed during the Site inspection on May 15, 2008. *See* AR 31 at 317 (Olson field notes); AR 35 at 342 (Olson Site Inspection report); AR 35 at 357–58 (photographs). *See also* AR 19 at 214, where the Sacketts' own consultant referred to the excavated material as "wetland soils."

(2) Hydrology – During the Site inspection on May 15, 2008, EPA's inspector Mr. Olson observed that all portions of the Site where native soil was removed, but fill material had not been placed, were inundated or ponded/saturated to the surface. He noted that the soils were inundated on the east side, where surface levels of the fill area appeared to be approximately 6 to 12 inches higher than the water surface level along the west side of the fill, and on the west side of the fill area the soils were saturated to the surface and ponded. AR 35 at 342–43. Mr. Olson's observations are documented in his field notes, AR 31 at 317, his site inspection report, AR 35 at 342, and the photographs he took on that day, AR 35 at 357, 358. Mr. Olson also observed that the south side of the Site along Old Schneider Road was inundated. AR 35 at 343. Mr. Olson's observations are consistent with and corroborate Site conditions documented by the EPA and Corps inspectors at the May 3, 2007 site inspection. AR 15 at 190–94 (photographs).

(3) Vegetation – At the time of the site inspection on May 3, 2007, most of the vegetation had been removed from the Site by excavation. However, the properties immediately abutting the Site on the east and west, and the area on the south end of the Site itself, supported wetland species, including red osier and dogwood and alder. AR 15 at 187. *See also id.* at 196 (photograph of vegetation on the west side of the Site) & 197 (photograph of wetland vegetation on the south end of the Site). During the subsequent Site inspection on May 15, 2008, the wetland on the north of Kalispell Bay Road exhibited abundant wetland vegetation, dominated by willow, dogwood, and spirea. AR 31 at 317.

In sum, the record clearly supports EPA's determination that the Sackett Site contained wetlands prior to the illegal filling.

B. The Sackett wetlands are waters of the United States because the wetlands are adjacent to a traditional navigable water.

"Waters of the United States" is defined, by regulation, to include wetlands that are adjacent to other waters of the United States. 33 C.F.R. § 328.3(a)(7); 40 C.F.R. § 230.3(o)(1)(vii). Under Justice Kennedy's standard in *Rapanos*, wetlands are "waters of the United States" whenever there is a "significant nexus between the wetlands in question and

navigable waters in the traditional sense." *Rapanos*, 547 U.S. at 770 (Kennedy, J., concurring in judgment). When the wetlands are "adjacent to navigable-in-fact waters" the significant nexus is established "by reasonable inference of ecological interconnection," and jurisdiction "is sustainable under the Act by showing adjacency alone," without the need to demonstrate a particularized "significant nexus." *Id*. at 782; *see also id.* at 780 (describing the foregoing as the holding in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131–32 (1986)); *Baccarat Fremont Developers, LLC v. U.S. Army Corps of Eng'rs*, 425 F.3d 1150, 1154-55 (9th Cir. 2005); *City of Healdsburg*, 496 F.3d at 999–1000. The record supports EPA's assertion of jurisdiction over the Sackett wetlands because the wetlands are adjacent to Priest Lake, which is a traditional navigable water.

1. Priest Lake is a traditional navigable water.

Traditional navigable waters include "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." 33 C.F.R. § 328.3(a)(1); 40 C.F.R. § 230.3(o)(1)(i). Priest Lake is approximately 23,000 acres (36.5 square miles) in surface area and over 300 feet deep. The lake is susceptible to and actually does support substantial commerce, including boat rentals, fishing guides, public campgrounds and public boat ramps, and private marinas. AR 35 at 346. Previous jurisdictional determinations performed by the Corps for properties around Priest Lake have determined that Priest Lake is a traditional navigable water. *Id.*

2. The Sackett wetlands are adjacent to Priest Lake.

In the Order, EPA affirmatively determined that the Sackett wetlands were adjacent to Priest Lake:

> The Site's wetlands are adjacent to Priest Lake within the meaning of 33 C.F.R. § 328.4(8)(c). Priest Lake is a "navigable water" within the meaning of section 502(7) of the Act, 33 U.S.C. § 1362(7), and "waters of the United States" within the meaning of 40 C.F.R. § 232.2.

Order, at ¶ 1.5, AR 32 at 324-25. EPA and Corps regulations define waters of the United States to include "adjacent wetlands." 33 C.F.R. § 328.3(a)(7); 40 C.F.R. § 230.3(o)(1)(vii). "Adjacent" is defined by regulation as "bordering, contiguous, or neighboring. 33 C.F.R. § 328.3(c)(1); 40 C.F.R. § 230.3. The regulations further provide that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" *Id.* Adjacency may be demonstrated by any one of three criteria: (1) there is an unbroken surface or shallow sub-surface connection to jurisdictional waters, although the hydrologic connection may be intermittent; (2) the wetlands are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like; or (3) the wetlands' proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters. Guidance at 5-6.

The record in this case supports EPA's conclusion that the Sackett wetlands are "bordering, contiguous or neighboring" Priest Lake and are thus adjacent to Priest Lake. 33 C.F.R. § 328.3(c)(1); 40 C.F.R. § 230.3. And the record establishes that all three of the criteria identified in the Post-*Rapanos* Guidance are satisfied.

a. There is a hydrologic connection between the wetland and Priest Lake.

The record supports EPA's determination that there is a shallow subsurface connection between the wetlands and Priest Lake. First, the Site is elevated above Priest Lake, thus gravity alone would cause drainage from the Site to the Lake. AR 35 at 349. Second, the typical soils underlying the stream valley surrounding Priest Lake are gravelly and highly permeable so as to facilitate groundwater flow downgradient. *Id.* Third, the high groundwater observed at the Sackett wetland is expected in areas where a wetland has a shallow subsurface connection between the wetland and discharge to a downgradient waterbody. *Id.* Fourth, the historical records indicate flow from the wetland complex to the Lake. The Sackett wetland, as well as the larger wetland to the north, were once part of a single wetland complex that extended to the shores of the Lake, and photographs show that the groundwater flow and surface water runoff

drained through and over the wetlands and into the Lake before the man-made barriers were constructed. AR 29; AR 35 at 342, 344. Finally, there are visible drainage pipes discharging groundwater directly into the Lake due south of the Site. *Id.* at 343. Although the origin of the pipes and the source of the water discharged through the pipes is not known, such pipes are typically used to provide drainage for high groundwater conditions that exist in areas where a wetland has a shallow subsurface connection with a downgradient waterbody. *Id.* at 349.

b. The wetlands are separated from Priest Lake by man-made barriers.

Although the Site is now separated from Priest Lake by a road and a row of residential structures, "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 33 C.F.R. § 328.3(c); 40 C.F.R. § 230.3. *See also* Guidance at 5; *United States v. Moses*, 496 F.3d 984, 989 (9th Cir. 2007) (a manmade diversion cannot eliminate jurisdiction over a water of the United States); *United States v. Banks*, 115 F.3d at, 921 (wetland separated from TNW by a paved road was "adjacent" to the TNW).

The road and the structures that are now separating the Sackett wetlands from Priest Lake are man-made barriers, and thus do not defeat adjacency. The record shows that the Old Schneider Road and structures on the south side of the road were built prior to the passage of the CWA. AR 10 at 151 (aerial map). Indeed, the historical records show that, in the absence of the man-made barriers, the Sackett wetland would drain directly into Priest Lake. AR 35 at 344. *See also, id.* at 355, 356 (1932 photographs). Interpreting the 1932 photographs, a U.S. Forest Service hydrologist explained: "You can clearly see the wetland and a couple of older trails. I think the wetland almost reached the lake and probably had either a short single thread channel leading into it or met the lake." AR 29 at 270.

c. The Sackett wetlands are reasonably close to Priest Lake.

The regulations define "adjacency" to include not only wetlands that are "bordering" or "contiguous", but also those that are "neighboring", 33 C.F.R. § 328.3(c); 40 C.F.R. § 230.3, thus the agencies interpret adjacency to include wetlands when "proximity to a jurisdictional

water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with the jurisdictional waters." Guidance at 5–6. The Sackett Site is only 300 feet from the shore of Priest Lake. Numerous jurisdictional determinations have been predicated on wetlands located farther than 300 feet from the traditional navigable water.[10]

In sum, the record demonstrates that Sackett wetland is adjacent to Priest Lake and that Priest Lake is a traditional navigable water. Therefore, jurisdiction is established by adjacency alone. *See Rapanos*, 547 U.S. at 780 ("the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone."); *see also Riverside Bayview*, 474 U.S. at 134 ("the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters [of the United States] under the Act.").

C. The Sackett wetlands are subject to CWA jurisdiction because they are adjacent to a jurisdictional tributary and have a significant nexus to Priest Lake.

In addition to being adjacent to Priest Lake, EPA also reasonably determined that the Sackett wetlands were adjacent to the unnamed tributary that flows into Priest Lake and that the

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[10] *See, e.g.*, Memorandum to Assert Jurisdiction For 2007-657-1JT (five interdunal wetlands located 100, 210, 300, 600, and 800 feet from TNW) *available at:* http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/TNW_SAC-2007-657-1JT.pdf; Memorandum to Assert Jurisdiction For SWG-2008-00138 (six adjacent wetlands between 100 and 800 feet from TNW) *available at*: http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/SWG-2008-0138.pdf; Memorandum to Assert Jurisdiction For SWG-2007-1623 (six interdunal wetlands between 1400 to 2100 feet from TNW) *available at:* http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/swg-2007-1623.pdf; Memorandum to Assert Jurisdiction For NWS-2007-749-CRS (wetlands 100-300 feet from TNW) *available at:* http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/Kennedy_N_RPW_NWS-2007-749-CRS.pdf; Memorandum to Assert Jurisdiction For SWG-2008-00648 (wetlands 1,605 feet or more, with other jurisdictional wetlands in between) (not available online); Memorandum to Assert Jurisdiction For SAS-2007-670 (wetlands up to 1,320 feet from TNW) (not available online). For the Court's convenience, the referenced jurisdictional determinations are attached as exhibits.

wetlands had a significant nexus to Priest Lake. These determinations provide an alternative and independent basis for EPA's assertion of Clean Water Act jurisdiction here.

1. The Sackett wetlands are adjacent to a jurisdictional tributary and are similarly situated with other wetlands in the area.

In *Rapanos*, Justice Kennedy concluded that jurisdiction extends to wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Rapanos*, 547 U.S. at 759 (Kennedy, concurring). This "significant nexus" exists where "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780. *See also* Guidance at 8. As explained below, the Sackett wetlands are both adjacent to a tributary that flows to Priest Lake, and the Sackett wetlands are similarly situated with other wetlands that are adjacent to the tributary.

a. The Sackett wetlands are adjacent to the unnamed tributary.

The Sackett wetlands are "bordering, contiguous or neighboring," and thus adjacent to, the unnamed tributary that runs along the north side of Kalispell Bay Road. 33 C.F.R. § 328.3(c); 40 C.F.R. § 230.3. The Sackett Site is separated from the tributary only by the man-made feature of Kalispell Bay Road, ([w]etlands separated from other waters of the United States by man-made dikes or barriers … are adjacent wetlands," 33 C.F.R. 328.3(c)); AR 35 at 345; the Site is only 30 feet from the tributary (the approximate width of Kalispell Bay Road), *id*., which is reasonably close by any measure; and a shallow groundwater aquifer continues to connect the wetlands on both sides of the unnamed tributary. AR 35 at 345.[11] Indeed, Plaintiffs

[11] The hydrological connection is evidenced by: (a) the shared wetland plant community (dominated by willow, dogwood, and spirea) that exists on both the north and south sides of the road; (b) the area draining into the Sackett wetland from the hill slope to the east of the Sackett Site is not sufficient by itself (i.e., without flow from the area north of the road) to provide the amount of water necessary to account for the extent of observed wetland hydrology; and (c) the high permeability of the underlying sands and gravel from granitic outwash that underlies the stream valleys around Priest Lake provide substantial shallow subsurface flow. AR 35 at 345.

acknowledge that the record supports the finding of a hydrological connection between the wetlands on the north side of the road and the wetlands on the south side of the road, including the Sackett Site. Pltf. Br. 17–18.

b. The Sackett wetlands are similarly situated with other wetlands.

EPA reasonably concluded that the wetlands on the Site and wetlands abutting the Site on the east and west are part of a complex of similarly situated wetlands encompassing the larger Kalispell Bay Fen wetland on the north side of Kalispell Bay Road. In fact, aerial photographs show that prior to the building of the man-made barrier (Kalispell Bay Road), the wetlands were all connected. That wetland complex, in turn, is physically connected to Priest Lake via the unnamed tributary that flows through the wetland complex and, as explained above, the wetlands are connected by shallow subsurface aquifer.

2. The Sackett wetlands, together with similarly situated wetlands and jurisdictional tributaries, have a significant nexus to Priest Lake

A "significant nexus" is established by a showing of a significant chemical, physical, or biological effect on a traditional navigable water. In characterizing the significant nexus standard, Justice Kennedy stated: "[t]he required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the [CWA] to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters' . . . ." 547 U.S. at 779. Because Congress intended the CWA to "restore and maintain" all three forms of "integrity," 33 U.S.C. § 1251(a), the CWA protection extends to waters that could compromise the integrity of a traditional navigable water in any one of the three forms identified in the statute. Thus, a significant nexus can be demonstrated by evidence of a significant effect on any one of the three protected attributes. *Benjamin v. Douglas Ridge Rifle Club*, 673 F. Supp. 2d 1210, 1217, n.4 (D. Or. 2009) (a significant nexus can be established by showing a physical, chemical *or* biologica1 effect on water quality; it is not necessary to establish all three). In *City of Healdsburg*, the Ninth Circuit upheld the district court's significant nexus findings based on evidence of a hydrological connection (i.e., a "physical" nexus), evidence of ecological benefits provided by

the wetland to the water quality (i.e., a "biological" nexus), and evidence that the water body at issue contributed to increased chloride levels in the traditional navigable water (i.e., a "chemical" nexus), but did not require proof of significance of all three impacts. 496 F.3d 1000. Although a significant nexus may be established by showing only one type of effect on the integrity of the traditional navigable water, the record in this case supports a finding on all three effects.[12]

(a) The significant physical nexus to Priest Lake

The record shows that the unnamed tributary that flows through the wetland complex establishes a physical connection between the wetland complex, including the Sackett wetlands, and Priest Lake. EPA concluded that the unnamed tributary is probably a perennial stream, based on the amount of flow and the channel size and form. AR 35 at 344, 345. The stream is also mapped as perennial on the USGS Priest Lake SW Quadrangle. *Id.* at 344, 352. The tributary flows westward into Kalispell Creek, which is approximately 700 feet west of the Site. Kalispell Creek is a perennial stream that flows directly into Priest Lake approximately 1000 feet from where it is intersected by the unnamed tributary. The relatively short distance between the point at which the unnamed tributary intersects Kalispell Creek, and the short distance from that intersection to where Kalispell Creek flows into Priest Lake, establishes a direct surface flow between the unnamed tributary and Priest Lake.

Justice Kennedy explained that for wetlands adjacent to non-navigable tributary, such as the unnamed tributary that flows through the wetland complex here, evidence of the wetlands functions "should permit the establishment of a significant nexus with navigable-in-fact waters, particularly if supplemented by further evidence about the significance of the tributaries to which the wetlands are connected" and specifically refers to the "quantity and regularity of flow in the adjacent tributaries" as important in assessing the nexus." *Rapanos* at 783-84, 786. *See also*

[12] A significant nexus may be established qualitative, rather than quantitative, physical evidence. *See Precon Development Co. v. United States*, 633 F.3d 278, 293-94 (4th Cir. 2011); *United States v. Cundiff*, 555 F.3d 200, 210-11 (6th Cir. 2009).

Guidance at 9 ("The duration, frequency, and volume of flow in a tributary, and subsequently the flow in downstream navigable waters, is directly affected by the presence of adjacent wetlands that hold floodwaters, intercept sheet flow from uplands, and then release waters to tributaries in a more even and constant manner." EPA estimated the volume of flow in the unnamed tributary at approximately 5-10 cubic feet per second. AR 35 at 343. The estimated flow of Kalispell Creek, into which the tributary flows, is estimated at 15-20 cubic feet per second, peak spring runoff is estimated at 130-150 cubic feet per second, and the annual volume of water delivered from Kalispell Creek in 1995 was estimated at 27,460 acre feet. *Id.* at 346; AR 5 at 101.

The wetland complex, including the Sackett wetlands, are peatlands with waterlogged substrates and large amounts of organic material. *See* AR 1 at 006. These characteristics allow the subject wetlands to hold large amounts of water as spring peak runoff occurs in the drainage area. The wetlands store water from snow and from wet-season discharges and release it more slowly to the tributary. The baseflow contributions from the wetlands provide a more stable and continuous base flow throughout the year to downstream waters through Kalispell Creek (as well as shallow subsurface flow to Priest Lake).

Accordingly, it was reasonable for EPA to conclude that the Sackett wetlands, in combination with the similarly situated wetlands on the north side of Kalispell Bay Road and the unnamed tributary that flows between them, have a significant physical nexus with Priest Lake.

(b) The significant chemical nexus to Priest Lake

The record also supports EPA's conclusion that the wetlands have a significant chemical nexus with Priest Lake. Because the Sackett wetlands and similarly situated wetlands are located near the bottom of the drainage area for the unnamed tributary and are relatively flat, the wetlands' ability to attenuate flow by storing water during peak runoff provides an additional function of capturing sediment, nutrients, and other water-borne pollutants within the wetland before it enters Kalispell Creek and Priest Lake. AR 35 at 347; AR 37 and 38 (NWI maps showing wetlands position in the drainage area); AR 10 at 149-50 (aerial maps showing topography of the drainage area and subject wetlands).

Although Priest Lake still maintains relatively high water quality, excessive sediment load from tributary streams can impact the integrity of Priest Lake. Kalispell Creek is listed as impaired for cold water biota beneficial use due to sediment. AR 35 at 346; AR 5 at 108. Fish sampling data suggests an impaired salmonid fishery due to excessive streambed load of sand. Excessive sediment, along with suppressed cutthroat trout populations in Priest Lake, have reduced the quality of Kalispell Creek to native salmonids.

Additionally, water quality sampling in Kalispell Creek revealed high total phosphorus for Priest Lake basin at peak flow, high phosphorus at base flow, and moderate nitrogen. *Id.* Because of the their ability to attenuate flow, the subject wetlands have the capacity to capture sediment and other pollutants and prevent their discharge into Kalispell Creek and Priest Lake, and therefore play an important role in maintaining the water quality of Priest Lake and are a critical component to restoring the trout fishery in the Lake.

(c) The significant biological nexus to Priest Lake

The record evidences substantial ecological benefits to Priest Lake served by the wetland complex. *See* AR 35 at 346–49. One of the ecological benefits of the subject wetlands' contribution to base flow and the resulting stable and continuous direct surface flow between the unnamed tributary and Priest Lake, as described above, is that it allows fish the opportunity to move back and forth between these two habitats. Historical populations of cutthroat and bull trout in Priest Lake were adfluvial, residing in the Lake and entering Priest Lake tributaries to spawn. *See* AR 7 at 135. Maintaining the hydrologic connectivity between Priest Lake and the unnamed tributary can be especially important for protecting the cutthroat and bull trout fishery in Priest Lake.

An additional ecological benefit is that during the summer months, base flow from the subject wetlands can help lower water temperatures in the unnamed tributary and other downstream waters, including Kalispell Creek and Priest Lake. Cutthroat and bull trout in Priest Lake rely on cold water in Priest Lake tributaries, including Kalispell Creek, for spawning and rearing. AR 5 at 097, 108, 115. The Idaho Department of Environmental Quality placed a

temperature sensor near the mouth of Kalispell Creek from August through October 1997, which revealed that EPA's temperature criteria for bull trout was exceeded for the entire period from August through September. *Id.* at 100. The elimination of the wetland complex could result in higher base flow temperatures, which in turn could further diminish habitat quality for cold water dependent fish that reside in Priest Lake but reproduce in the Lake's tributaries.

The subject wetlands also provide aquatic food base support to Priest Lake fisheries through invertebrate production. Peatlands in the Idaho panhandle provide habitat for an array of invertebrate species. AR 1 at 023-24. Aquatic invertebrate production in the Kalispell Bay Fen is likely substantial due to its size (approximately 30 to 35 acres) and the amount of inundation in the wetland. AR 15 at 195 (photographs). The invertebrate production supports salmonid fish species that occur within the wetlands (e.g., AR 1 at 024, peatlands can contain populations of cutthroat and brook trout) and the unnamed tributary (e.g., AR 35 at 343 "a relatively large trout … was observed near the upstream end of the [unnamed tributary]") before they migrate back through Kalispell Creek and into Priest Lake.

Accordingly, the record supports EPA's determination that the wetlands on the Sackett Site, in combination with similarly situated wetlands and jurisdictional waters, have a significant nexus with Priest Lake.

D. <u>The existence of other adjacent wetlands does not negate CWA jurisdiction.</u>

In a futile attempt to challenge EPA's assertion of jurisdiction, Plaintiffs argue that the Sackett wetlands fall outside of CWA jurisdiction because they are adjacent to other wetlands, relying on 33 C.F.R. § 328.3(a)(7) and 40 C.F.R. § 230.3(o)(1)(vii), which define waters of the United States to include "wetlands adjacent to waters (other than waters that are themselves wetlands)." Plaintiffs have misinterpreted the "wetlands adjacent to wetlands" provision. The agencies have interpreted the provision to mean that jurisdiction cannot be based *solely* on adjacency to another wetland. It would apply, for example, when the subject wetland is adjacent to another wetland, but there is no other independent basis for asserting jurisdiction over the subject wetland. Here, however, jurisdiction is based on adjacency to Priest Lake, a traditional

navigable water (as discussed above in Argument II. B.), and on adjacency to the unnamed tributary (as discussed above in Argument II.C.). The fact that the Sackett wetlands may also be adjacent to the wetlands on the north side of Kalispell Bay Road does not negate the other established bases for assertion of jurisdiction. Plaintiffs' interpretation would lead to the bizarre result that a wetland adjacent to a traditional navigable water would not be subject to jurisdiction if it was also adjacent to another wetland.

Plaintiffs' reliance on *Great Northwest, Inc. v. United States Army Corps of Engineers*, No. 4:09-cv-0020, 2010 WL 9499372 (D. Alaska June 8, 2010), an unpublished, non-binding decision, is misplaced. In that case, the subject wetlands were separated from the traditional navigable water by man-made barriers of railroad tracks and a channel, and on the other side of the railroad tracks and channel was another wetland that was adjacent to the traditional navigable water. The Corps asserted jurisdiction over the subject wetlands based on adjacency to the traditional navigable water. Jurisdiction was not based on adjacency to the channel, as the channel had not been determined to be a water of the United States. The *Great Northwest* court rejected the Corps' assertion of jurisdiction based on adjacency to the traditional navigable water, and found that the subject wetland was only adjacent to the wetland on the other side of the railroad tracks and channel. While the United States believes that the case was wrongly decided, it is nonetheless distinguishable from this case in several respects.

First, jurisdiction in this case is premised on adjacency to a traditional navigable water, as explained in Argument II.B., above. There are no jurisdictional wetlands between the Sackett wetlands and the traditional navigable water, as was the case in *Great Northwest*. There are only man-made barriers (Old Schneider Road and the residential structures) which do not negate adjacency. 33 C.F.R. § 328.3(c); 40 C.F.R. § 232.2.

Second, jurisdiction in this case is also premised on adjacency to the unnamed tributary, which is itself a water of the United States and has a direct hydrologic connection to the traditional navigable water, as explained in Argument II.C., above. The wetlands on the north

side of Kalispell Bay Road do not lie between the Sackett wetlands and the unnamed tributary, and thus cannot interfere with the adjacency of the Sackett wetlands to that tributary.

In any event, the *Great Northwest* case has been appropriately narrowly construed by the recent decision in *Universal Welding & Fabrication, Inc. v. United States Army Corps of Engineers*, Case No 4:14-cv-00021, (D. Alaska Oct. 1, 2015).[13] In *Universal Welding*, the subject wetlands were separated from other jurisdictional wetlands by a road, and beyond those other wetlands was a tributary that flowed to the traditional navigable water. Although there was a road and another wetland between the subject wetland and the tributary, the court found that the record supported the finding of adjacency to the tributary.[14] In contrast to the *Great Northwest* court, the *Universal Welding* court afforded appropriate deference to the Corps' interpretation of its own regulation – i.e, that the adjacent wetlands exception did not apply because the wetlands on the subject property, in addition to being adjacent to the jurisdictional wetlands across the road, were also adjacent to a flowing tributary that was itself a water of the United States. The Corps explained that "[n]othing in [33 C.F.R. § 328.3] (a)(7) suggests that a wetland that is adjacent to a non-wetland jurisdictional water would be 'exempted' or 'excluded' from the CWA." *Universal Welding* at 14. The court recognized that an agency's interpretation of its own regulations is "controlling" unless "plainly erroneous or inconsistent with the regulation." *Id.* at 15 (quoting *Auer v. Robbins*, 519 U.S. at 461, and holding that the Corps' interpretation was not plainly erroneous or inconsistent with the regulation, especially in light of the Ninth Circuit's instruction that "[c]laims of exemption, from jurisdiction or permitting requirements, of the CWA's broad pollution prevention mandate must be narrowly construed to achieve the purposes of the CWA"); *see also id.* at 16 (quoting *City of Healdsburg*, 496 F.3d at

[13] The *Universal Welding* court narrowly interpreted the *Great Northwest* holding, but also correctly noted that even if the decision is viewed more broadly, it was not binding on that court (citing *Hart v. Massanari*, 266 F.3d 1155, 1174 (9th Cir. 2001)), and thus would not change the court's opinion. *Universal Welding* at 20, n. 106.

[14] The facts before the Court in this case are more compelling, as there is no other wetland between the Sackett Site and the unnamed tributary or between the Site and Priest Lake.

1001 (citing *United States v. Akers*, 785 F.2d 814, 819 (9th Cir. 1986))). Thus, because the Sackett wetland is adjacent to the unnamed tributary, which is a water of the United States, it does not matter that it may also be adjacent to other wetlands.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment should be denied, and the United States' Cross-Motion for Summary Judgment should be granted.

Dated: November 20, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November, 2015, I filed the foregoing United States' Memorandum in Support of Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment with the Clerk of Court using the CM/ECF system which will cause a copy to be served upon counsel of record.

/s/ Danielle Narkin
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