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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION

CHANTELL and MICHAEL SACKETT, Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Defendants.	) Case No. 2:08-cv-00185-N-EJL))) PLAINTIFF'S COMBINED) OPPOSITION TO EPA'S CROSS-) MOTION FOR SUMMARY) JUDGMENT AND REPLY IN) SUPPORT OF THEIR MOTION) FOR SUMMARY JUDGMENT)

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INTRODUCTION

Plaintiffs Michael and Chantell Sackett oppose EPA's motion for summary judgment, and submit this combined brief in opposition and reply in support of their motion for summary judgment. The only issue before the Court is whether the Record in this case establishes the presence of wetlands on the Sackett Site over which EPA has jurisdiction under the Clean Water Act. As set forth in the Sacketts' brief in support of their summary judgment motion, the Record fails to establish the existence of any such wetland. EPA's summary judgment motion and brief identify no evidence in the Record to the contrary. The Record is clear that (a) EPA did not comply with the statutorily mandated requirements of the 1987 Manual; (b) there is no significant nexus between the Sackett Site and Priest Lake; (c) the Sackett Site is not adjacent to Priest Lake; and (d) any wetland on the Sackett Site would be excluded from the regulatory definition of "waters of the United States."

I

THE RECORD ESTABLISHES THAT NO WETLAND DELINEATION PURSUANT TO THE 1987 MANUAL WAS DONE ON THE SACKETT SITE

The 1987 Wetlands Delineation Manual (1987 Manual) provides the legal standard for establishing the presence of wetlands that are subject to EPA regulation under the Clean Water Act, as explained in detail in the Sacketts' Brief in Support of Motion for Summary Judgment (Sackett Brief), ECF 103-1, at 6, 14-17. EPA does not argue against this point. EPA Opposition to Sackett Motion for Summary Judgment (EPA Opp.), ECF 105-1, at 8 (generally describing the 1987 Manual). Instead, EPA makes the unsupported assertion that the 1987 Manual does not apply to the Sackett Site. EPA Opp. at 8 (asserting an "exception" from the 1987 Manual for investigation of unauthorized activities); 16 ("standard methodologies identified in the Manual are not applicable

in this case"). EPA is incorrect—the 1987 Manual provides the statutorily required methodology for investigating and determining the presence of jurisdictional wetlands on disturbed sites.

A. The 1987 Manual, as Applied to this Case, Requires EPA to Attempt a Comprehensive Wetland Determination Before the Alternate Methodology for Atypical Situations Is Applicable

The 1987 Manual provides specific procedures for investigating and making wetlands delineations on sites that are disturbed as the result of unauthorized activities, particularly where vegetation has been removed. 1987 Manual ¶ 71(a). In particular, the Manual specifies that the methodology for atypical situations, including unauthorized activities, "should only be used when a determination has already been made in Section D or E that positive indicators of hydrophytic vegetation, hydric soils, and/or wetland hydrology could not be found due to effects of recent human activities or natural events." 1987 Manual ¶ 71. Section D of the Manual deals with routine determinations. 1987 Manual ¶ 59. Section E deals with comprehensive determinations. 1987 Manual ¶ 67. Comprehensive determinations are the appropriate selection when, among other factors, the determination requires rigorous documentation. 1987 Manual ¶ 56 (Selection of Method), 67.

Rigorous documentation is necessary when, in cases like this, EPA states that no permit could be issued to the Sacketts to build their home, orders the Sacketts to restore the Site and fence it off for three years, and threatens them with tens of millions of dollars in fines if they do not comply. It would raise serious due process issues if EPA were able to impose such absolute restrictions on property use, and deploy bankrupting penalties to coerce compliance, without rigorous documentation. *See* 1987 Manual ¶ 67 (comprehensive determination "will result in maximum information for use in making determinations, and the information will usually be

quantitatively expressed."). *See generally*, *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (right to hearing encompasses the right to confront agency's evidence).

A comprehensive determination requires that the agency already have carried out all applicable steps in Section B of the Manual, dealing with preliminary data gathering. 1987 Manual ¶ 67. Section B's requirements include gathering USGS quadrangle maps, National Wetland Inventory materials, soil surveys, and a variety of other materials. 1987 Manual ¶ 54. The next step under Section B is to synthesize the data collected to determine whether the vegetation, soils, and hydrology of the project site have been adequately characterized. 1987 Manual ¶ 55.

The Record before the Court in this case does not even reflect this preliminary work being done. AR 15, the one page Fromm Report which is the sole basis for the issuance of the Order, fails to reflect any such preliminary data gathering or synthesis beyond the attachment of a topographic map of the Site. AR 15, p. 00187. In particular, the 1987 Manual directs the preparation of a base map, on which the project boundaries are marked.[1] 1987 Manual ¶ 55, Step 2. But the maps either show no detail of the Sackett Site, AR 10, p. 00149, or fail to show the actual location of the Sackett Site relative to wetlands depicted on the map, AR 10, p. 00150 (pointing generally to Sackett Site but without outlining its actual location). Nothing in AR 15 addresses the Manual requirement to determine whether the maps and aerial photos adequately characterize the conditions on the Site. *See* 1987 Manual ¶ 55.

Once the preliminary steps are complete under the 1987 Manual, additional data collection and analyses are required, for either a routine or comprehensive determination. 1987 Manual ¶ 59 (applicable preliminary steps assumed to be completed before doing routine determination); 1987

[1] This base map is one of the required materials for even the most cursory routine determinations, *see* 1987 Manual ¶ 60 (Routine Determination method, no onsite inspection), ¶ 61 (base map required for this method).

Manual ¶ 67 (same as to comprehensive determinations). Both routine and comprehensive determinations involve the use of the above described base map, and the use of Data Forms 1 and 2. 1987 Manual ¶ 61 (routine determination without onsite inspection); 63 (routine determination with onsite inspection), 69 (comprehensive determinations). Copies of Data Forms 1 and 2 can be seen at 1987 Manual Appendix B, pages B4-5. The form for making routine wetland determinations is at Appendix B, pages B2-3. Not one of these forms appears anywhere in the Record in this case. The after-the-fact Olson Report, prepared to support EPA's litigation position in this case, does not even use Data Forms 1 or 2, nor do Mr. Olson's field notes use these documents. AR 35 (Olson Report), AR 31 (Olson Field Notes).

The Record also shows that EPA omitted most if not all of the actual methodological steps for carrying out either a routine or comprehensive determination. *See* Sackett Brief at 14-16. But, before the agency may even resort to the Manual methods for atypical situations, it is required to carry out several data collection and analytical steps associated with either routine or comprehensive determinations, which the Record reflects were not done, and to conclude based on those analyses that at least one wetland parameter is absent. 1987 Manual ¶ 72 (use procedures for atypical situations, including unauthorized activities, after determining under either a routine or comprehensive determination that at least one of the wetland parameters is absent). So, based on the Record, since EPA never did an actual wetland determination, there is no evidence to support the agency's use of the procedures for atypical situations to establish the existence of jurisdictional wetlands.

Nor does an atypical situation excuse EPA from compliance with the 1987 Manual. Rather, in atypical situations, after the agency has concluded, as the result of either a routine or comprehensive determination, that at least one wetland parameter is absent, the Manual provides

alternative procedures that the agency must use to determine whether that parameter was present before the unauthorized activities. 1987 Manual ¶ 72. So, the fact of site alteration as the result of unauthorized activity does not allow the agency to determine the presence of wetlands in a less-documented fashion or in any other way exempt the determination from the methodology of the 1987 Manual. Rather, significantly more documentation is required to determine the presence of wetlands in such circumstances. The 1987 Manual certainly does not allow a wetland determination based exclusively on the preliminary data collection (maps and soil surveys, etc.) in place of a proper and complete determination using either the routine or comprehensive methodology. And, EPA points to nothing in the Record as complying with the alternate data collection or analytical methods required by the section of the 1987 Manual for atypical situations.

In short, the Record demonstrates that at most, agency staff made a cursory preliminary collection of data and then relied almost exclusively on this preliminary data collection to issue the Order, instead of doing a proper wetland determination using the prescribed methodology in the Manual.

B. EPA's Brief Demonstrates That No Wetland Determination According to the 1987 Manual Was Done

EPA offers a vain argument that staff observations of the Site reflected in the Record are adequate to establish the existence of jurisdictional wetlands on the Sackett Site. EPA Opp. at 16-17. But the record fails to reflect that any of these casual observations were made in accordance with the Manual. EPA essentially concedes that they were not, by failing to cite to any provision of the Manual in discussing any of the three wetland parameters. EPA Opp. at 16-17. Indeed, each of EPA's three brief paragraphs demonstrates that the Record fails to establish the presence of all three of the required wetland parameters.

EPA argues, at EPA Opp. at 16, that its staff observed the soils that had not been covered on May 3, 2007, and then asserts, with no foundation in the Record, that "[d]igging bore holes was not necessary, as the . . . strips of excavated ground revealed wetland soils (thick dark soils with saturation to surface)." But this statement is merely the argument of counsel - the Record does not contain it, and it is the Record on which the agency must base its decision, and which the Court must review. AR 15, the one-page Fromm Report, says nothing of this nature. Contrary to EPA counsel's assertion that soil pits were not required, the 1987 Manual requires digging soil pits of a specified depth (as described in Appendix D of the Manual) and then the application of hydric soil indicators contained in paragraphs 44 and/or 45 of the Manual. 1987 Manual ¶ 65, Steps 13-15 (routine determination with onsite inspection, requiring use of Data Form 1); 1987 Manual ¶ 70, Steps 11, 14 (comprehensive determination, requiring use of Data Form 1). AR 15 provides no record of any such soil pits being dug (or any exposed soil conditions meeting the requirements of Appendix D for proper soil pits), no record of any application of the hydric soil indicators in paragraphs 44 and/or 45 of the Manual, and no examples of Data Form 1 completed for the Site. AR 31 (Olson Field Notes) likewise is devoid of any of these required elements. The Record lacks any evidence that EPA established the existence of hydric soils on the Sackett Site.

EPA argues, at EPA Opp. at 17, that Mr. Olson's May 15, 2008 observations establish the presence of wetland hydrology. What the record reflects is that on May 1, 2008, snow coverage at the Site was too deep to allow the Sacketts to begin any restoration work. AR 28 (EPA letter to Sacketts, extending deadlines for restoration due to snow cover). Two weeks later, on the warmest day of the year so far, with this litigation pending, Mr. Olson visited the Site and found no snow on the ground, and standing water in the low areas of the Sackett Site. AR 31 (Olson field notes), p. 00320. Mr. Olson's four pages of handwritten field notes include no copies of Data Form 1,

which is required for determinations of wetland hydrology. *See* 1987 Manual ¶ 65, Steps 10-11; ¶ 70, Steps 12, 15. Absent these data forms, and the observations that are required to be recorded on them, the agency has no basis on which to determine that wetland hydrology is present according to the 1987 Manual. *See Rapanos v. United States*, 547 U.S. 715, 762 (2006) (Kennedy, J., concurring in judgment) ("wetlands are not merely moist patches of earth").

The Record establishes that EPA failed to make a wetland determination according to the 1987 Manual. This violates applicable law requiring the use of the 1987 Manual in making wetland determinations, and the Sacketts are entitled to summary judgment that the Order (and its subsequent amendments) are arbitrary, capricious, and contrary to law.

C. EPA's Argument That a Wetland Consultant Admitted That the Sackett Site Contains Jurisdictional Wetlands, Is Factually Belied by the Record and Inadequate as a Legal Matter

The wetland consultant referred to, at EPA Opp. at 14, is Mr. Tom Dubendorfer. He is referred to in Chantell Sackett's May 23, 2007 letter to Dean Hilliard of the Army Corps of Engineers, at AR 12, p. 00166. Mr. Dubendorfer reported his opinion to Chantell Sacket that he thought the Site contained wetlands, which report she then forwarded to the Army Corps. AR 12, p. 00167. She also asked him to report his opinion to EPA. *Id*. But, Mr. Dubendorfer was never retained by the Sacketts to do a wetland determination on the Site. AR 14, p. 00180-81 (notes of Fromm meeting with "Tom D" on May 28, 2007) ("He doesn't have a contract w/ Sacketts;" will send RIO guidance "after she hires him.") The Record clearly reflects that EPA was aware at the time that Mr. Dubendorfer did not speak for the Sacketts as to the Site. EPA's repeated replacement of his name in its brief with the expression "[their consultant]" misrepresents Mr. Dubendorfer's capacity, which the agency knows not to have been effective as to the Site. *Compare* EPA Opp. at 4, 14, *with* AR 14, p. 00180-81.

The only work that the Record discloses Mr. Dubendorfer conducted in a representative capacity for the Sacketts was his letter arguing that the location, where material removed from the Site was deposited, is not a jurisdictional wetland. *See* AR 19 (Dubendorfer June 16, 2007 letter to Army Corps of Engineers). Mr. Dubendorfer did not perform a wetland determination for the Sackett Site according to the 1987 Manual, and his summary opinion that the Site contains jurisdictional wetlands is even more cursory and undocumented than Carla Fromm's one page memo at AR 15.[2] EPA offers no authority for the proposition that it is excused from its legal obligation to perform a proper wetland determination pursuant to the 1987 Manual based on an unsupported opinion of a consultant that it knows did not represent the property owner.

Further, the EPA is incorrect that the Sacketts do not dispute the presence of jurisdictional wetlands on the Site. Chantell Sackett's memo to Dean Hilliard on May 23, 2007 does not designate the Site as wetlands, despite labeling adjacent property and property across Kalispell Bay Road as wetlands. The Record establishes that Chantell Sackett made numerous requests to EPA that it substantiate its claim of jurisdiction over the Site. *See* Fromm notes, AR 14, p. 00182 ("She wants a letter from us regarding why we think we have jurisdiction"); AR 22 (Chantell Sackett August 24, 2007 letter to Carla Fromm requesting information from EPA regarding the Site). The Record is devoid of any evidence of a response to these requests. Through Counsel, the Sacketts specifically disputed the finding in the Order that the Site contains jurisdictional wetlands, on April 1, 2008. AR 25. And the Sacketts' motion for summary judgment is specifically focused on the absence of jurisdictional wetlands from the Site. ECF 103-1.

[2] Interestingly, though, his report on the deposit site contains the types of data collection and analysis that one would expect in any EPA determination related to the Sackett Site.

II

THERE IS NO SIGNIFICANT NEXUS BETWEEN ANY WETLANDS ON THE SACKETT SITE AND PRIEST LAKE

If there were wetlands on the Sackett Site, they would not be subject to jurisdiction under the Clean Water Act as the result of any significant nexus between the Site and Priest Lake. The Sacketts' brief in support of their summary judgment motion exhaustively reviews the Record and demonstrates that the Record fails to establish a nexus with Priest Lake, or the significance of any such nexus. *See* Sackett Brief, at 18-24. In summary, the Record fails to show the three required elements of physical, biological, and chemical nexus with Priest Lake,[3] and contains no information on the significance of any such nexus.

A. EPA Identifies No Evidence in the Record for Significance, and Inadequate Evidence for the Three Required Elements of Nexus

EPA's argument related to significant nexus, at EPA Opp. at 23-27, fails to offer any argument as to the significance of any nexus. *See Precon v. Corps of Eng'rs*, 633 F.3d 278, 294 (4th Cir. 2011) (citing *Rapano*s, 574 U.S. at 780) (evidence required in record both for nexus and significance). EPA discusses physical nexus at EPA Opp. at 24-25, chemical nexus at 25-26, and biological nexus at 26-27, all without addressing how any nexus that might exist is significant to the physical, chemical, and biological integrity of Priest Lake. By contrast, the Sackett Brief highlights the size and functions of the Sackett Site, relates these to Priest Lake, and demonstrates that the

[3] EPA must show the existence of all three types of nexus to satisfy the Kennedy significant nexus test. *Rapanos*, 541 U.S. at 780 (significant nexus present if wetland significantly affects "the physical, biological *and* chemical integrity of" downstream traditional navigable waterway) (emphasis added). EPA's citation to *Benjamin v. Douglas Ridge Rifle Club*, 673 F. Supp. 2d 1210, 1217 n.4 (D. Or. 2009), is puzzling, since the same footnote EPA cites says that "in *City of Healdsburg*, the Ninth Circuit implicitly held that the significant nexus test requires evidence of all three." *Id*. (citing *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007)).

Record fails to provide any evidence of the significance of the Site to the Lake. *See* Sackett Brief, at 18-24. The Record's failure to establish the significance of any nexus entitles the Sacketts to summary judgment that the Site fails the Kennedy test for jurisdiction under the Clean Water Act.

Setting aside significance, EPA's effort to show nexus fails as well. The most significant facts on this issue, amply demonstrated in the Record, is that there is no surface connection between the Site and the Kalispell Bay Fen (Fen) to the north across Kalispell Bay Road (Road), and there is no subsurface contribution from the Site to the Fen. Any subsurface connection runs in the direction from the Fen to the Site. *See* AR 15, p. 00187-88; AR 21, p. 00235; AR 35, pp. 00345, 348-349. From these facts, it is impossible to demonstrate that the Site has any physical or chemical nexus with Priest Lake through the Fen or the drainage ditch, because no water moves from the Site to the Fen or to the Ditch. And, a biological nexus is suspect, because without a surface water connection, the Sackett Site could provide no fish habitat with a nexus to the Lake.

B. The Sackett Site Is Not Similarly Situated with Kalispell Bay Fen

EPA tries to sidestep these facts by treating the Site as similarly situated with the Fen, and then using the Fen's connections to the Ditch to establish a nexus. But, none of these connections are applicable to the Site itself. For example, because there is no surface water connection between the Site and the Lake, the Site cannot provide base surface water flow or attenuate surface water surge flow. It cannot provide habitat for fish to migrate to and from the Lake, and cannot contribute or withhold sediment to or from the Lake. Since Kalispell Bay Road separates the Sackett Site from the Fen and Drainage Ditch, no sediment would migrate from the Site to the Fen or the Ditch, whether or not there is wetland on the Site. Only the Fen, which has a surface water connection to the Lake through the Ditch, provides any of these functions to the Lake, and so if the Site is not similarly situated to the Fen, no nexus can be established.

EPA is incorrect in asserting that the Site is similarly situated with the Fen. To satisfy Justice Kennedy's allowance for consideration of similarly situated wetlands, they must have the same types of connection to the traditionally navigable waterway. Justice Kennedy tellingly uses the term "in combination" with similarly situated wetlands. *Rapanos*, 541 U.S. at 780. "Combination" to achieve an effect implies that those wetlands which are combined must each contribute something to the effect. If a particular wetland contributes nothing to the effect, there is no purpose in being combined with others to assess the effect achieved. *Merriem-Webster Dictionary* defines "combine" as "to act together."[4] If a wetland does not "act together" with other wetlands by contributing something to the physical, chemical, and biological effect that they have on downstream navigable waters, there is no purpose to combining it with them, and they are not similarly situated.

Since the Site lacks any contribution to the effects that the Fen has on downstream waters, it does not combine with the Fen to achieve the Fen's effects and is not similarly situated for the purposes of Justice Kennedy's test. Since the Site is not similarly situated with the Fen, EPA is limited to showing a significant nexus to Priest Lake based on the Site alone. As demonstrated in the Sackett Brief, the Record provides no evidence of a nexus between the Site alone and Priest Lake, and no evidence for the significance of any such nexus. Absent such evidence, the Sacketts are entitled to summary judgment on the issue of whether the Site has a significant nexus with Priest Lake.

[4] Http://www.merriam-webster.com/dictionary/combine.

III

THE SACKETT SITE IS NOT ADJACENT TO PRIEST LAKE

EPA argues that the Site is adjacent to Priest Lake, 300 feet away and separated by several home sites and built homes. This argument is in error for several reasons. First, under *Riverside Bayview Homes* and *SWANCC*, adjacent wetlands are only subject to jurisdiction under the Act where the wetland abuts a traditional navigable waterway so closely that it is impossible to say where one ends and the other begins. Second, EPA's interpretation of the regulation defining "adjacent" is foreclosed by Supreme Court precedent and appropriate canons of construction.

A. Under Supreme Court Precedent, Wetlands Separated from Navigable Waters by Dry Land Are Not Adjacent

In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Supreme Court of the United States upheld the Corps of Engineer's regulations defining waters of the United States to include adjacent wetlands. The Supreme Court expressly disclaimed that its decision in the case dealt with whether jurisdiction exists under the Act over bodies of water that are not adjacent to navigable waters. *Id*., 474 U.S. at 131 n.8. The Court relied heavily, in its analysis of whether the Corps' interpretation of the Act was reasonable, on the difficulty in distinguishing between where a navigable water body ends and another water body begins. *Id*. at 132 ("[be]tween open waters and dry land lie . . . a huge array of areas that are not wholly aquatic but nevertheless fall short of being dry land."). Given this analysis, and the Court's express disclaimer of addressing the question of non-adjacent wetlands, *Riverside Bayview Homes* is properly read as categorizing non-adjacent wetlands as those where dry land intervenes between the wetland and open waters.

Then, in *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (*SWANCC*), the Supreme Court held that the Act's jurisdiction does not extend to isolated ponds, in the specific context of the government's argument that the rationale of *Riverside Bayview*

Homes should be extended to non-adjacent waters. *SWANCC*, 531 U.S. at 167-68 (text of the Act does not allow extension of jurisdiction to ponds that are not adjacent to open water). In analyzing this question, the Supreme Court interpreted its prior decision in *Riverside Bayview Homes* as resting on the commingling between adjacent wetlands and navigable waters. That is, the majority of the Court used the shorthand term "significant nexus" to describe *Riverside Bayview Homes*' description (and approval of regulation under the Act) of adjacent wetlands as those where it is difficult to determine exactly where open waters ended and dry land began. *SWANCC*, 531 U.S. at 167. The Supreme Court concluded, as to non-adjacent or isolated ponds, that the term "navigable" as applied to "waters" in the Act had to be read to limit the extent of the Act's coverage over waters that are not themselves navigable. *Id*. at 172. The Supreme Court also refused to grant *Chevron* deference to the Corps of Engineers' interpretation of the Act as covering non-adjacent waters, on the dual grounds that the Act itself was clear in limiting its coverage to only those waters with some relation to navigable waters, and that a reading broad enough to encompass non-adjacent waters pushed the outer limits of Congress' Commerce Clause powers and would not be upheld absent a clear statement of Congress' intent to explore those outer limits. *Id*. at 172-73.

Most recently, the plurality in *Rapanos* stated that the "difficulty of delineating the boundary between water and land was central to our reasoning" in *Riverside Bayview Homes*. *Rapanos*, 547 U.S. at 740. And Justice Kennedy's concurrence characterizes *Riverside Bayview Homes* as applying (or anticipating) his significant nexus test categorically to wetlands adjacent to open waters. *Id*. at 780. Justice Kennedy's concurring opinion does not disagree with the plurality's characterization of what adjacency means in *Riverside Bayview Homes*. EPA is incorrect in arguing that Justice Kennedy's concurrence supports the proposition that wetlands that do not abut navigable waters are nevertheless adjacent to them.

Rather, *Riverside Bayview Homes*, as subsequently interpreted by *SWANCC* and *Rapanos*, establishes that wetlands are not adjacent to navigable waters if they are separated by dry land. Since the Site is separated from Priest Lake by 300 feet of dry land, including home sites and homes, it is not adjacent to the Lake as the Supreme Court has interpreted the term.

B. EPA's Interpretation of Its Regulation Defining Adjacent Is Erroneous

EPA's interpretation of its regulatory definition of "adjacent" in 40 C.F.R. § 230.3(b) is not correct. First, EPA is not correct that the word "neighboring" can be read to include wetlands that are separated from navigable or open water by dry land. As discussed above, the Supreme Court in *Riverside Bayview Homes* distinguished adjacent from non-adjacent wetlands on the basis of whether dry land intervenes between them. This forecloses a reading of "neighboring" in the definition of "adjacent" that would include wetlands separated from navigable waters by dry land, and defeats EPA's argument that the Site is adjacent to the Lake.

EPA is also in error in arguing that the Site is adjacent to the Lake because they are separated by man-made barriers under 40 C.F.R. § 230.3(b). The 300 feet of developed residential neighborhood between the Site and the Lake is not the type of man-made barrier described in the regulation. The regulation lists "man-made dikes or barriers, natural river berms, beach dunes, and the like." Under the canon *ejusdem generis*, the expression "the like" only includes barriers that are similar to those specifically listed: dikes and similar barriers, and natural river berms and beach dunes. *See generally Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001). All of the enumerated features are linear barriers, and none of them is similar to a residential neighborhood, nor does the Record identify any of the specific barriers from the regulation within the 300 feet separating the Site from the Lake. Since the neighborhood separating the Site from Priest Lake is not a "man-made barrier" as used in the regulation, the two are not adjacent.

C. EPA's Interpretation of Its Definition of "Adjacent" Is Not Entitled to *Auer* Deference

EPA argues that its 2008 Rapanos Guidance document establishes that the Sackett Site is adjacent to Priest Lake. This is in error. The 2008 Rapanos Guidance was not adopted when the Order was issued or amended, so the Record, unsurprisingly, contains no analysis of how the Guidance would apply to the Site. The Guidance also violates *Riverside Bayview Homes*, *SWANCC*, and *Rapanos* to the extent that it would classify wetlands separated from open water by dry land to be adjacent to open water. And, the Guidance is not entitled to deference because it is not an agency interpretation of the regulatory definition of adjacency. Finally, *Auer* deference itself is a suspect species of deference, and should not be accorded in this case.

EPA concedes that the 2008 Rapanos Guidance was not adopted until December of 2008, more than a year after EPA issued the Order and more than six months after it was last amended. EPA Opp. at 7 n.4. The Guidance is not referenced in either the Fromm Report, AR 15, 21, or the post-hoc Olson Report prepared to support the EPA's litigation position in this matter, AR 35[5]. EPA's argument from the 2008 Guidance is no more than another post-hoc rationalization without support in the Record. *United States v. Able Time, Inc.*, 545 F.3d 824, 836 (9th Cir. 2008) (no deference owed to agency when it is merely advancing a litigation position); *see also Auer v. Robbins*, 519 U.S. 452, 462 (1997) (post hoc positions in defense of litigation grounds to deny agency deference in interpretation of regulation).

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[5] The Olson Report does refer to a draft version of what eventually became the 2008 Guidance. *See* AR 35, p. 00346 (citing June 5, 2007 Joint EPA and Army Corps Memorandum). This document was only used to identify the appropriate reach of the Drainage Ditch to consider for a significant nexus analysis, and not for whether the Site is adjacent to Priest Lake. The June 2007 memo has no legal status and EPA does not argue for any deference to it in any event.

By its own terms, the 2008 Rapanos Guidance does not apply to EPA's regulatory definition of "adjacent" in 40 C.F.R. § 230.3(b). 2008 Rapanos Guidance at 4 n.18 (applies only to regulations at 40 C.F.R. § 230.3(s)(1), (5), and (7). And, the Guidance does not purport to address the scope of regulation of wetlands adjacent to traditional navigable waters, as *Rapanos* did not alter prior Supreme Court decisions on this topic. 2008 Rapanos Guidance at 5. Nor is the 2008 Rapanos Guidance properly speaking an agency interpretation of its regulations. Rather, it is an effort to apply the decision in *Rapanos* to the regulations. 2008 Rapanos Guidance at 3 ("[T]he agencies have evaluated the *Rapanos* opinions to identify those waters that are subject to CWA jurisdiction under the reasoning of a majority of the justices.") Application of judicial decisions is the province of the federal courts, not executive agencies. *Cf. Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp*., 333 U.S. 103, 113 (1948). No deference is due to EPA's application of the 2008 Rapanos Guidance in this case.

EPA argues that the 2008 Rapanos Guidance is entitled to deference under *Auer v. Robbins*. But, *Auer* deference has come under increasing scrutiny and skepticism by sitting justices of the Supreme court of the United States. *See, e.g, Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1338-39 (2013) (Roberts, CJ, concurring) ("It may be appropriate to reconsider [*Auer* deference] in an appropriate case."); *id* at 1339 (Scalia, J., concurring in part and dissenting in part) ("I believe it is time to [reconsider *Auer*]."); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210-11 (2015) (Alito, J., concurring in part) (judicial deference to agency interpretation of regulations ripe for Supreme Court review), *id*. at 1211-13 (Scalia, J., concurring in judgment) (judicial interpretation of regulations should be free of deference to agency interpretation), *id*. at 1213-1225 (Thomas, J., concurring in judgment) (judicial deference to agency interpretation of regulations violates separation of powers and should be revisited in appropriate case).

IV

THE SACKETT SITE, IF IT CONTAINS ANY WETLANDS, IS ADJACENT TO THE KALISPELL BAY FEN AND EXCLUDED FROM THE REGULATORY DEFINITION OF WATERS OF THE UNITED STATES

Plaintiffs demonstrate in their opening brief that any wetland on the Site would be adjacent to the Kalispell Bay Fen just across the Kalispell Bay Road to the north of the Site. The Fen in turn is adjacent to the Drainage Ditch, and under 40 C.F.R. § 230.3(s)(7). Sackett Brief at 17-18. EPA argues that this regulation does not apply, because the agency interprets it not to apply where some other basis for jurisdiction is argued for. EPA Opp. at 27.[6] But EPA offers no actual agency policy or other guidance providing any such official interpretation. The agency merely asserts this to be its interpretation, as its litigation position. A mere litigation position is not entitled to deference. *Able Time*, 545 F.3d at 836. Nor is such a position entitled to *Auer* deference. *Auer*, 519 U.S. at 462 (adoption of mere litigation position grounds to deny deference to agency interpretation of regulations).

EPA has offered no argument to which the Court owes deference for why the Site should not be excluded from the definition of waters of the United States under the "adjacent to adjacent waters" rule in 40 C.F.R. § 230.3(s)(7), and the Sacketts are entitled to summary judgment that any wetland on the Site is not waters of the United States based on this regulation.

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[6] EPA argues that the Site is not adjacent to the Fen across the street, but is instead adjacent to the Lake on the other side of the residential neighborhood hundreds of feet away This is a puzzling and internally inconsistent position. The photographs taken by Fromm in May of 2007 show that the Fen is immediately on the other side of the Road from the Site, AR 15, and the Olson Report, AR 35, says that the Site receives subsurface flow from the Fen (not from the Drainage Ditch). Kalispell Bay Road meets the regulatory definition of a man-made barrier in 40 C.F.R. § 230.3(b), such that the Road would not prevent any wetland on the Site from being adjacent to the Fen. Meanwhile, the 300 foot wide residential neighborhood between the Site and the Lake does not meet the regulatory definition of a man-made barrier in the regulation, and does prevent the Site from being adjacent to the Lake.

CONCLUSION

For the foregoing reasons, the Court should grant the Sacketts' motion for summary judgment, and deny EPA's motion.

DATED: December 22, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of December, 2015, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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