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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CHANTELL and MICHAEL SACKETT, Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; and LISA P. JACKSON, in her official capacity as Administrator of the Environmental Protection Agency Defendants.	CIVIL ACTION No. CV 08-0185-EJL

UNITED STATES' REPLY MEMORANDUM IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

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ARGUMENT

The United States is entitled to summary judgment because the record establishes that the Environmental Protection Agency's ("EPA") issuance of an administrative compliance order ("the Order") to Michael and Chantell Sackett was reasonable. In the United States' Memorandum in Support of its Cross-Motion for Summary Judgment ("U.S. Mem.") [ECF 105], we set forth the basis for EPA's finding that the Sacketts violated the Clean Water Act ("CWA" or "the Act") by placing fill material in waters of the United States without a permit, and provided record support for each element of the violation. *See* U.S. Mem. at 11–13. In their response, Plaintiffs do not challenge any aspect of the Order other than the finding that the Property contained waters of the United States. Therefore, if the Court finds that EPA's determination that the Sacketts' property ("Property" or "Site") contained waters of the United States was reasonable, then the Order must be upheld. On that issue, the administrative record fully supports EPA's findings that (1) the Sackett Property contained wetlands; (2) those wetlands were adjacent to a traditional navigable water; and (3) those wetlands were adjacent to a tributary that ultimately flows into a traditional navigable water and, in combination with similarly situated wetlands, have a significant nexus with the traditional navigable water. The latter two EPA findings provide separate bases for jurisdiction, either one of which independently supports entry of summary judgment for EPA.

I. The Record Amply Supports EPA's Finding that the Sackett Property Contains Wetlands

Contrary to Plaintiffs' assertions, EPA properly followed the 1987 Wetlands Manual in determining that the Sackett Property contains wetlands. Moreover, the evidence in the record supports EPA's reasonable conclusion that the filled areas of the Property contained wetlands.

A. EPA's Wetland Determination at the Sackett Site Was Fully Consistent with the 1987 Wetlands Manual.

Although Plaintiffs contend that EPA did not follow the correct procedures in making their wetlands determination, *see* Plaintiffs' Combined Opposition to EPA's Cross-Motion for

Summary Judgment and Reply in Support of Their Motion for Summary Judgment ("Sackett Opp.") [ECF 109] at 2–7, Plaintiffs misinterpret both the nature and substance of the 1987 Wetlands Manual.[1] The Manual is a flexible guidance document. By its own terms, its generally suggested methodologies need not be used by the delineator, whose on-the-ground examination may call for alternative or additional data collection. The record here demonstrates that EPA followed the protocol outlined in the Manual in determining that the Sackett Site contains wetlands.

Plaintiffs refer to the "statutorily mandated requirements of the 1987 Manual," Sackett Opp. at 1, and state that the "1987 Manual provides the statutorily required methodology," *id.* at 2. But Plaintiffs do not cite any statute—or even a duly promulgated regulation—that mandates compliance with the 1987 Manual. There is no such statutory or regulatory requirement.[2] The Manual itself explains that it simply provides guidance for making wetland determinations, and repeatedly emphasizes the flexibility of its methodologies. *See* Manual, Part IV, Section F ¶ 51; *see also id.*, Report Documentation Page, box 19 ¶ 3 (explaining that the various methods described in the Manual "afford[] significant flexibility in method selection"); *id.*, Part I, ¶ 23 ("[S]ite-specific conditions may require modification of field procedures. . . . [T]he user has the flexibility to employ sampling procedures other than those described.").

Plaintiffs also incorrectly assert that EPA's methodology did not follow those guidelines. Sackett Opp. at 2–5. Rather than claiming an "exception" to the Manual as Plaintiffs contend, EPA simply followed the Manual's directive that "an alternative method must be employed in making wetland determinations" when "the vegetation, soils, and/or hydrology have been altered by recent human activities." Manual, Part I, ¶¶ 12 & 12(a). In such situations—which expressly

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

[2] The 1992 Energy and Water Development Appropriations Act does mention the 1987 Wetlands Manual, but nothing in the Act makes use of the Manual mandatory. Pub. L. No. 102-104, 105 Stat. 518 (1991).

include "unauthorized . . . removal or covering of indicators of one or more wetland parameters," Manual, Part IV, Section F, ¶ 71(a), as was the case here—the delineator should follow the guidelines provided in Section F of the manual, which is what EPA did in this case. To first complete an entire determination under Sections D or E, as Plaintiffs argue EPA must do, would be nonsensical. The Manual was designed to promote efficient and reliable wetlands determinations, not require pointless form-filling and factually impossible testing on atypical (i.e., disturbed) sites such as the Sacketts'. In fact, the Manual itself instructs users, at the end of Section B ("Preliminary Data Gathering and Synthesis"),[3] to skip over Sections C, D, and E for atypical sites: "[I]f there is evidence of recent significant hydrologic alteration due to human activities or natural events, PROCEED TO Section F. Otherwise, PROCEED TO Section C." Manual, Part IV, Section B, ¶ 55 Step 9. Section C entails a selection between the "Routine" and "Comprehensive" Methods described, respectively, in Sections D and E, and is thus a prerequisite to those Sections. If, as Plaintiffs allege, EPA must first complete a determination under either Section D or E before proceeding to Section F, surely the Manual would not direct users to skip Section C—and, by design, Sections D and E—when "evidence of recent significant hydrologic alteration due to human activities" is present.

That evidence was obvious and apparent during the first inspection of the Sackett Site on May 3, 2007. When EPA and Army Corps of Engineers ("Corps") inspectors arrived at the Site that day, "a dump truck was delivering a load of fill and an excavator operator was pushing fill

[3] Plaintiffs argue that EPA did not complete the preliminary work detailed in Section B. Sackett Opp. at 3. To the contrary, a considerable amount of data was gathered and synthesized in accordance with the Manual. *See* Manual, Part IV, Section B, ¶ 54 (listing the information that a delineator should obtain when available and applicable, including USGS quadrangle maps, National Wetlands Inventory ("NWI") maps, soil surveys, stream and tidal gauge data, other publications and maps, local individuals and experts, and USGS land use and cover maps); AR 10 at 149–150 (USGS quadrangle map); AR 37 & 38 (NWI maps); AR 5 at 116, 117, 121 (soil profile and map); AR 5 at 119 & AR 34 (stream gauge data); AR 1 (ecosystems conservation strategy publication of Idaho Department of Fish and Game); AR 3 & 4 (previous positive Corps jurisdictional determination of the Site); AR 5 (Priest Lake Subbasin Assessment); AR 35 at 344 (report reflecting consultation with the preeminent local expert); AR 29 (1932 aerial photos); AR 36 (aerial map showing stream locations); AR 39 (aerial photos showing land cover).

into excavated wetlands." AR 21 at 235. The record thus establishes beyond dispute that the Site had been disturbed by unauthorized activity. Accordingly, there was no need to follow the methodologies of Sections D or E, nor is there any justifiable basis for suggesting that further documentation was required. Plaintiffs have offered no support for their assertions to the contrary.

B. The Record Supports EPA's Determination that the Sackett Site Contains Wetlands.

Not only was the fact that the Site had been recently disturbed obvious and apparent, but so too was the fact that, prior to that disturbance, the Site contained wetlands. Despite the atypical situation, evidence in the record supports EPA's determination with respect to each of the three "general diagnostic environmental characteristics" for wetland identification—vegetation, soil, and hydrology—described by the Manual. *See* Manual, Part II, ¶ 26(b).

The presence of all three of these wetlands characteristics are demonstrated by the photographs and observations of the EPA and Corps inspectors who visited the Site on May 3, 2007. *See* AR 11 at 157–64; AR 21. As Carla Fromm of EPA noted in her report, the "strips of excavated ground [that] remained to be filled. . . . revealed wetland soils." AR 21 at 235. Those strips provided the observers with the same opportunity for visual inspection of the soil at a depth as would have been provided by drilling boreholes, which were unnecessary when the soil was made visible by excavation. The Sackett Site immediately abutted another property that was clearly a wetland, and a neighbor informed one of the EPA staff during the May 3, 2007 inspection that water flows from the wetland to the north into the filled Sackett Site, which the neighbor described as having looked exactly like his backyard—an obvious wetland. *See* AR 21 at 235; AR 11 at 157–59; AR 15 at 190–92, 194. The photographs show that excavated areas of the Site that had not yet been filled were largely inundated, further indicating wetland hydrology. EPA Wetlands Ecologist John Olson's subsequent site visit and report corroborate these conditions. AR 31 at 317; AR 35 at 342–43, 357, 358. Finally, the existence of wetland vegetation on the intact wetlands surrounding the Sackett Site on three sides, as documented by

the photographs and the Fromm Report, as well as the information received that same day from the neighbor that the Sackett Site used to look identical to his property, establish a strong inference that the Sackett Site contained wetlands vegetation prior to the unauthorized excavation. *See* AR 21 at 235; AR 11 at 157–64; AR 15 at 187–97; *see also* AR 31 at 342, 345 (corroborating that inference). This evidence of wetlands vegetation was sufficient, both as a practical matter and under the Manual, given that all vegetation had been removed from the Site as part of the unauthorized disturbance.

Further record evidence also supports EPA's determination that the Sackett Site contained wetlands. Over a period of more than a decade, professional observers of the Sackett Site unanimously agreed that the Site contained wetlands. *See*, *e.g.*, AR 2 at 92–93 (Field Inspection Report from 1996 showing Corps' determination that the Site contained wetlands); AR 4 at 94–95 (Corps letter informing previous owner that building on the Site, which contains "wetlands adjacent to Priest Lake," would require a permit). Those professionals include Tom Duebendorfer, a consultant solicited by the Sacketts themselves, who advised Chantell Sackett that "the site is part of a wetland" that is "not [] isolated" and "joins a wetland to the South and to the West across a road." AR 12 at 166–67 (timeline constructed by Ms. Sackett documenting her request that Mr. Duebendorfer visit the Site and advise her whether it is a wetland, and his unequivocal conclusion after visiting and reviewing maps that it is). Plaintiffs focus exclusively on whether Mr. Duebendorfer acted in a representative capacity for the Sacketts at the time he made that conclusion. Sackett Opp. at 7–8. However, it is irrelevant whether he had been formally retained by the Sacketts prior to his site visit or after; he is an experienced wetlands consultant who determined upon simple observation that wetlands were present on the Property and not isolated. Plaintiffs point to nothing in the record to undermine Mr. Duebendorfer's qualifications or the basis for his conclusions.

In addition to the evidence cited above, John Olson's subsequent May 15, 2008, visit and report buttress the conclusion, clear to the Corps staff who evaluated the site in 1996, to the team of experts who visited in May of 2007, and to the wetlands scientist solicited by the Sacketts

themselves to evaluate the Site, that the Sacketts' property contained wetlands. Plaintiffs have offered no evidence to counter that conclusion.

In fact, Plaintiffs have never—and do not now in their brief—deny the actual presence of wetlands on the Sackett Site. In her May 23, 2007 communication with Dean Hilliard of the Corps, Ms. Sackett merely questioned whether those wetlands were jurisdictional. According to her own account, she told Mr. Hilliard that "it seems to me that my property would be considered isolated *wetlands*." AR 12 at 171 (emphasis added); *see also id.* at 167 ("The property to the East of my property is *the same as mine, wetlands*, but there is no drainage for that." (emphasis added)). Plaintiffs' newfound argument that their jurisdictional objection extended to the actual presence of wetlands is unsubstantiated and disingenuous. *See* Sackett Opp. at 8.

II. The Sackett Wetlands are Waters of the United States Because the Wetlands Are Adjacent to a Traditional Navigable Water.

The record amply supports EPA's determination that the Sackett Site is adjacent to Priest Lake. Plaintiffs do not dispute that Priest Lake is a traditional navigable water, and they have made no attempt in their Opposition to refute the record evidence cited by EPA in support of its adjacency determination: 1) the wetlands maintain a shallow subsurface connection to Priest Lake; 2) the wetlands are separated from Priest Lake by man-made barriers; and 3) the wetlands are in reasonable proximity to Priest Lake supporting the science-based inference that they have an ecological interconnection with the jurisdictional waters. *See* U.S. Mem. at 19–21. Rather, Plaintiffs challenge EPA's and the Corps' ("the Agencies'")[4] long-standing interpretation of "adjacent," which is defined at 40 C.F.R. § 230.3(b) as "bordering, contiguous, or neighboring." The regulation goes on to clarify 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.* The plain text of the regulation contemplates that "adjacent" includes wetlands

[4] As co-administrators of Section 404 of the CWA, EPA and the Corps use identical definitions and interpretations. The Corps' identical definition of adjacency appears at 33 C.F.R. § 328.3.

that do not immediately abut a waterway, and the Agencies have interpreted it as such for decades.[5] That interpretation is reasonable and is entitled to deference. Plaintiffs' alternative interpretation, on the other hand, is contradicted by both the plain text of the regulation and by decades of Supreme Court precedent.

A. EPA's Interpretation of Adjacency Is Reasonable.

EPA's interpretation of adjacency is reasonable as a matter of law. The plain text of the regulation unambiguously states that a wetland need not directly abut a waterway in order to be considered adjacent to it: "Wetlands *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.'" 40 C.F.R. § 230.3(b) (emphasis added).

The Supreme Court first addressed the regulatory definition of CWA adjacency in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). The Court examined the Corps' determination that wetlands adjacent to navigable waters play a key role in protecting and enhancing water quality and upheld as reasonable the Corps' treatment of wetlands adjacent to navigable waterways as subject to jurisdiction under the Act. Noting that the Clean Water Act "demanded broad federal authority to control pollution," *id.* at 132–33, the *Riverside Bayview* Court found the question to be "an easy one," *id.* at 129.

Justice Kennedy agreed in *Rapanos v. United States*, 547 U.S. 715, 773 (2006), rejecting the plurality's insistence that adjacency *requires* a "continuous surface connection." Contrary to what Plaintiffs argue, Justice Kennedy explicitly approved the Corps' definition of "adjacent," which includes both those wetlands that directly abut waters of the United States and those separated from other waters "by man-made dikes or barriers, natural river berms, beach dunes

[5] *See, e.g.*, 42 Fed. Reg. 37,122, 37,129 (July 19, 1977) (preamble to the Corps' final rule defining the term "adjacent" to "include wetlands that directly connect to other waters of the United States, or that are in reasonable proximity to these waters but physically separated from them by man-made dikes or barriers, natural river berms, beach dunes, and similar obstructions").

and the like," 33 C.F.R. § 328.3(c). He pointed out that the *Riverside Bayview* Court recognized the value and reasonableness of a broader definition that "reaches wetlands holding moisture disconnected from adjacent water bodies." 547 U.S. at 773 (Kennedy, J., concurring). Following that reasoning, Justice Kennedy went on to explain that "filling in wetlands separated from another water by a berm can mean that floodwater, impurities, or runoff that would have been stored or contained in the wetlands will instead flow out to major waterways." *Id.* at 775. In light of these concerns, Justice Kennedy concluded that "the Corps' definition of adjacency is a reasonable one, for it may be the absence of an interchange of waters prior to the [] fill activity that makes protection of the wetlands critical to the statutory scheme." *Id.* at 775–76. [6]

Plaintiffs argue that the existence of dry land separating a wetland from a traditional navigable water necessarily defeats jurisdiction. Sackett Opp. at 12–14. This interpretation is contrary to the plain language of 40 C.F.R. § 230.3(b), *Riverside Bayview*, and Justice Kennedy's concurring opinion in *Rapanos*. Although the wetland at issue in *Riverside Bayview* "actually abut[ted]" a navigable waterway, 474 U.S. at 135, the holding of that case is not limited to such wetlands.[7] Rather, the Court held that it was reasonable for the Corps to exercise jurisdiction

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[6] Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, agreed with Justice Kennedy, deeming the Corps' definition of "adjacent" "plainly reasonable, both on its face and in terms of the purposes of the Act." 547 U.S. at 805 (Stevens, J., dissenting). In refuting the more limited definition put forth by the plurality—and advanced by Plaintiffs in this case—Justice Stevens quoted Webster's Second Dictionary, which states that "[o]bjects are ADJACENT when they lie close to each other, but *not necessarily in actual contact*." *Id.* (quoting Webster's Second 32) (emphasis added by Justice Stevens).

[7] Justice Scalia, writing for a plurality in *Rapanos*, placed great emphasis on the sole instance where the *Riverside Bayview* Court described the property at issue there as "actually abut[ting]" a navigable waterway. 547 U.S. at 725, 726, 740, 741 n.10, 747, 754 (quoting the phrase six times). But the Court in *Riverside Bayview* referred to the wetland simply as "adjacent" in the rest of the opinion, and mentioned that it "actually abuts on a navigable waterway" in order to demonstrate that it is indeed adjacent and thus subject to CWA jurisdiction. *Cf. id.* at 772 (Kennedy, J., concurring) (pointing out that in *Riverside Bayview* "the Court [] observed that adjacency could serve as a valid basis for regulation even as to 'wetlands that are not significantly intertwined with the ecosystem of adjacent waterways'" (quoting 474 U.S. at 135 n.9)).

over wetlands adjacent to—including, but not limited to, those actually abutting—traditional navigable waters.[8] *Id.* at 134; *see also Rapanos*, 547 U.S. at 766 (Kennedy, J., concurring) ("[T]he Court [in *Riverside Bayview*] held 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.'" (quoting *Riverside Bayview*, 474 U.S. at 134)); *id.* at 793 (Stevens, J., dissenting) ("[W]e acknowledged [in *Riverside Bayview*] that the Corps defined 'adjacent' as including wetlands 'that form the border of or are in reasonable proximity to other waters' and found that the Corps reasonably concluded that adjacent wetlands are part of the waters of the United States.").

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) ("*SWANCC*"), did not alter the *Riverside Bayview* holding.[9] The *SWANCC* Court rejected the Corps' exercise of jurisdiction over non-navigable, intrastate pools at an abandoned gravel pit completely isolated from any waters of the United States based solely on their use by migratory birds. But the Court found that those pools, in contrast to the wetlands in *Riverside Bayview*, had no "significant nexus" to traditional navigable waters and thus were not subject to the Clean Water Act. *Id.* at 167. In *Rapanos*, Justice Kennedy explained that such a significant nexus need not be specifically demonstrated for wetlands that are adjacent to a traditional navigable water. Rather, their connection is inferred: "As applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a

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[8] EPA's regulatory definition of "adjacent," which encompassed wetlands that do not abut navigable waters, had been in place for almost five years at the time *Riverside Bayview* was decided, and the Corps' definition of "adjacent" to include wetlands "in reasonable proximity to other waters" had been in place since 1977. 45 Fed. Reg. 85,336, 85,345 (Dec. 24, 1980); 42 Fed. Reg. 37,128 (June 19, 1977). Surely if the *Riverside Bayview* Court had meant to approve of the Corps' exercise of jurisdiction over only those adjacent wetlands that actually abut a navigable waterway—and not all those defined as adjacent—it would have said so.

[9] Nor did *SWANCC* alter *Riverside Bayview*'s holding on adjacency. The decision did not address adjacent wetlands under 33 C.F.R. § 328.3(a)(7). *See SWANCC*, 531 U.S. at 167 (noting "Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters").

reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone." *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring) ("That is the holding of *Riverside Bayview*.").

Plaintiffs misconstrue *Riverside Bayview* and the Court's subsequent treatment of it in *SWANCC* and *Rapanos*. In doing so, they rely on the arguments made by Justice Scalia's *Rapanos* plurality opinion, which was signed by only three other Justices. While wetlands may be "waters of the United States" under the plurality opinion if they have a continuous surface connection to another water of the United States, jurisdictional wetlands are not limited to such waters. A majority of Justices in *Rapanos* expressed disfavor for the narrow reading of *Riverside Bayview* now championed by Plaintiffs. Justice Kennedy explicitly rejected the theory that the Clean Water Act only allows jurisdiction over wetlands with a continuous surface connection to other jurisdictional waters, finding it "unpersuasive." *Rapanos*, 547 U.S. at 772. Justice Stevens, labeling the plurality's reading a "statutory invention," called it "arbitrary" and "revisionist." *Id.* at 793, 804. Plaintiffs' reliance on *SWANCC* is similarly unavailing. In *Rapanos*, Justice Kennedy rejected the view that *SWANCC* implicitly overruled *Riverside Bayview*'s favorable treatment of adjacency, *id.* at 774, and Justice Stevens pointed out that "*SWANCC* had nothing to say about wetlands, let alone about wetlands adjacent to traditionally navigable waters or their tributaries," *id.* at 794. Plaintiffs' argument that *Riverside Bayview*'s holding is limited to those adjacent wetlands that abut a traditional navigable water "so closely that it is impossible to say where one ends and the other begins" must fail.

In any event, the Ninth Circuit has held that Justice Kennedy's opinion in *Rapanos* establishes a standard by which the United States can establish regulatory jurisdiction under the Clean Water Act. *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 781 (9th Cir. 2011) (citing *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999–1000 (9th Cir. 2007)). And it cannot be disputed but that Justice Kennedy held that wetlands adjacent to traditional navigable waters are jurisdictional per se and that "adjacent" properly encompasses wetlands that are separated by man-made barriers from another protected water.

Here, EPA reasonably determined that the Site's wetlands are adjacent to Priest Lake. The man-made barriers separating the Sackett Site from Priest Lake consist of a road and a row of residential properties. Nothing about these structures indicates that they ought to fall outside of the category of "man-made barriers" explicitly included in the regulatory definition of adjacency. *See* 40 C.F.R. § 230.3(b); 33 C.F.R. § 328.3(c). Historical photographs and maps demonstrate that before these barriers were built and created a separation, the wetlands on the Sackett Site extended to Priest Lake. AR 29. Plaintiffs fail to offer support for their argument that a paved road and single row of structures—erected by humans and separating the wetland from Priest Lake—do not qualify as "man-made barriers." Sackett Opp. at 14. Indeed, an Eleventh Circuit panel has held that a paved road constituted just such a man-made barrier, *United States v. Banks,* 115 F.3d 916, 921 (11th Cir. 1997), and Plaintiffs offer no reason why this Court should not do the same.

B. EPA's Interpretation of "Adjacent" Is Entitled to Deference.

Plaintiffs also suggest that EPA's interpretation is not entitled to deference because it is nothing more than a "litigation position." Sackett Opp. at 15–16. That suggestion is wrong. EPA and the Corps have consistently interpreted adjacency as described above for decades. Plaintiffs fail to acknowledge, let alone address, the cited examples where the Corps (applying its identical definition of "adjacent") asserted jurisdiction over wetlands not immediately abutting a traditional navigable water. *See* U.S. Mem. at 21 n.10. One of those examples involved a wetland separated from the adjacent traditional navigable waterway by 2100 feet—over seven times the distance between the Sackett Site and Priest Lake. *Id.* The other five examples all include wetlands separated from a traditional navigable water by the same or a significantly greater distance than the Sackett wetlands' separation from Priest Lake. *Id.* Here, EPA determined that the wetlands at the Site are adjacent to Priest Lake in accordance with its well-established interpretation of its regulations. That determination cannot be fairly characterized as a response to this litigation, which had not yet begun at the time the determination was made.

EPA's long-standing interpretation of adjacency is reflected in the post-*Rapanos* Guidance issued in 2008. *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008) ("Guidance") at 5–6. That document, issued after notice-and-comment, was adopted not as part of any litigation, but rather to provide clarity to both regulators and the public in the wake of the fractured *Rapanos* decision. Plaintiffs make much of both the timing of the Guidance and its expressed purpose of assisting with implementation of *Rapanos*, arguing that as a result it cannot be read to support the adjacency determination made at the Sackett Site by EPA in 2007. Sackett Opp. at 15–16. Neither objection holds water. As to timing, EPA does not argue that the Post-*Rapanos* Guidance marked a new era of its interpretation of adjacency; rather, the Guidance *articulated* and *reinforced* that well-established interpretation.[10] The fact that a prior—and substantially similar—version of the Guidance was already in use when EPA made its assessment of the Sackett Site further supports its status as the agency-wide interpretation of adjacency and also confirms that it was not adopted as a post-hoc rationalization for use in this litigation.[11] As for Plaintiffs' argument that the Guidance was issued primarily to address other issues in response to *Rapanos*, this focus merely highlights the fact that EPA's interpretation of adjacency did not change in response to that opinion, in which five Justices endorsed the view that *Riverside Bayview*'s holding applies to all wetlands adjacent to a traditional navigable water. EPA's interpretation of 40 C.F.R. § 230.3(b) here is consistent with the regulation, the Guidance,

[10] In its discussion of the inference of ecological connectivity raised by a wetland's "reasonably close" proximity to a traditional navigable water, the Guidance cites *Riverside Bayview*, 474 U.S. at 134. Guidance at 5–6. The Guidance reflects EPA's view that the holding of that 20-year-old case went undisturbed by *Rapanos*. *Id.*

[11] *See* AR 35 at 346 (Olson Report, citing Joint Corps of Engineers and EPA Memorandum "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*," June 5, 2007); *see also* AR 33 at 331–32 (showing that on the date of the site visit, Mr. Olson filled out an Approved Jurisdictional Determination Form, which contains a section to "help[] determine whether or not the standards for jurisdiction established under *Rapanos* have been met").

Supreme Court precedent, and past adjacency determinations, and should be afforded deference under *Auer v. Robbins*, 519 U.S. 452 (1997).[12]

III. In Any Event, the Sackett Wetlands Are Subject to CWA Jurisdiction Because They Are Adjacent to a Tributary of Priest Lake and Have a Significant Nexus to Priest Lake.

As demonstrated in Part II, Clean Water Act jurisdiction over the Sackett wetlands is established simply by virtue of their being adjacent to the traditionally navigable Priest Lake. But the wetlands are also jurisdictional because they are adjacent to a tributary of Priest Lake and have a significant nexus to the Lake.[13] As Justice Kennedy explained in *Rapanos*, "wetlands can perform critical functions related to the integrity of other waters," 547 U.S. at 779, and thus may be deemed waters of the United States "if 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. Plaintiffs do not dispute that the Sackett wetlands are adjacent to the unnamed tributary that flows through the wetland complex into Priest Lake. The unnamed tributary is separated from the Sackett wetlands only by a 30-foot man-made road, and the water features are connected by shallow subsurface flow. Therefore, if the similarly situated wetlands (including the Sackett Site) possess a significant nexus to Priest Lake, jurisdiction is proper under the Act.

Plaintiffs do not attempt to refute the record evidence cited by EPA in support of that determination. *See* Sackett Opp. at 9–11; U.S. Mem. at 21–27. Instead, they challenge its sufficiency and argue that the Sackett wetlands are not similarly situated to the surrounding wetlands complex—including a wetland that Plaintiffs themselves claim is both adjacent to and

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[12] Plaintiffs' digression on the wisdom of *Auer*, Sackett Opp. at 16, is of no moment. *Auer* continues to be the law of the land and is binding on lower courts.

[13] Because the Sackett wetlands are adjacent to Priest Lake, a traditional navigable water, it is not necessary to establish a significant nexus. *See Rapanos*, 547 U.S. 780 (Kennedy, J., concurring). Nonetheless, the record supports EPA's determination that the wetlands have a significant nexus with Priest Lake and this affords an alternative basis for CWA jurisdiction.

hydrologically connected to the Sackett wetlands. Both arguments fail. EPA reasonably determined that the Sackett wetlands "possess the requisite nexus," 547 U.S. at 780, to Priest Lake.

A. The Sackett Wetlands Are Adjacent to a Tributary of Priest Lake and Are Similarly Situated with Wetlands to the East, West, and North.

Plaintiffs play a shell game with the facts in an attempt to discredit EPA's determination that the Sackett wetlands are similarly situated to wetlands on three sides. They argue that the Sackett Site cannot act "in combination" with the Kalispell Bay Fen because there is no sediment migration from the Site to the Fen and the unnamed tributary of Priest Lake. *See* Sackett Opp. at 10–11. Later in their brief, Plaintiffs assert that any wetlands on the Sackett Site are adjacent to the Kalispell Bay Fen by virtue of their being separated from it by a 30-foot road (a man-made barrier, they acknowledge, under 40 C.F.R. § 230.3(b)) and also by the existence of subsurface flow between the Fen and the Sackett Site. Sackett Opp. at 17 & n.6. Endeavoring to have their cake and eat it too, Plaintiffs claim that the Sackett wetlands are connected and adjacent to the Kalispell Bay Fen and yet not similarly situated with it.

This claim betrays Plaintiffs' fundamental misunderstanding of the nature of wetland hydrology and ecology. That very subsurface flow highlighted by Plaintiffs supports EPA's conclusion that the Sackett wetlands, the wetlands to the east and west, and the Kalispell Bay Fen to the north comprise one interconnected wetlands complex. In *Rapanos*, Justice Kennedy correctly recognized that wetlands can play a crucial role in supporting the health of nearby waters in a number of ways, not merely through a direct surface connection. *See* 547 U.S. at 773–75; *see also Precon Development Corp. v. U.S. Army Corps of Engineers*, 633 F.3d 278, 291 (4th Cir. 2011) ("*Precon I*") (holding that wetlands may be aggregated for the purpose of evaluating significant nexus whether they are actually abutting or merely adjacent to a jurisdictional tributary because "[a]s Justice Kennedy explained, abutting wetlands are not necessarily any more important than other adjacent wetlands" in their contributions to water quality (quoting *Rapanos*, 547 U.S. at 775)). Here, the record shows that the Sackett wetlands

and the Kalispell Bay Fen constituted a single wetlands complex until they were divided by construction of the Kalispell Bay Road, and they remain hydrologically connected by a shallow subsurface connection. *See* AR 35 at 342 (describing aerial photographs of the Sackett Site from 1932, AR 29, and stating that the wetlands on the property appear contiguous with the wetlands to the north and appear as a continuous wetland to Priest Lake); *id.* at 345 (explaining the scientific basis for concluding that a shallow subsurface flow exists between the Fen and the Sackett wetlands); *see also* Sackett Opp. at 17 & n.6. "Justice Kennedy's instruction—that 'similarly situated lands in the region' can be evaluated together—is a broad one, open for considerable interpretation and requiring some ecological expertise to administer." *Precon I*, 633 F.3d at 292.[14] EPA possesses just such "ecological expertise," and its conclusion that the Sackett wetland and the neighboring wetlands are similarly situated is reasonable, supported by the record, and entitled to deference.

B. The Wetlands Complex Encompassing the Sackett Wetlands Has a Significant Nexus to Priest Lake.

Justice Kennedy's significant nexus standard is a "flexible ecological inquiry." *Precon I*, 633 F.3d at 294 (citing *Rapanos*, 547 U.S. at 779–80). Quantitative or qualitative evidence may support jurisdiction. *Id.*; *see also United States v. Cundiff*, 555 F.3d 200, 211 (6th Cir. 2009) (holding that significant nexus need not be shown by "'laboratory analysis' of soil samples, water samples, or [] other tests"). In *Rapanos*, Justice Kennedy explained that wetlands possessing a significant nexus are those that "perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage." 547 U.S.

[14] In *Precon I*, the Fourth Circuit deferred to the Corps' decision to aggregate a much larger swath of wetlands—448 acres in total—on a record far less substantial than the one present here. 633 F.3d at 292–93 ("[T]he Corps' record on this point gives us a bare minimum of persuasive reasoning to which we might defer. It only notes, somewhat conclusorily, that the Site Wetlands 'continue to function as part of the entire' 448 acres."). While that panel then remanded to the Corps for reconsideration of its significant nexus determination, *id.* at 297, a subsequent panel upheld that determination on an expanded administrative record, *Precon Development Corp. v. U.S. Army Corps of Engineers*, 603 F. App'x 149 (4th Cir. 2015) ("*Precon II*").

at 779. For wetlands adjacent to non-navigable tributaries, such as the unnamed tributary north of the Sackett wetlands, Justice Kennedy stated that the Corps should consider the "quantity and regularity of flow in the adjacent tributaries," and "further evidence about the significance of the tributaries," including evidence of pollutant filtering, sediment trapping, nutrient recycling, flood peak diminution, flow augmentation, habitat values, and recreation impacts. *Id.* at 783–84, 786. Justice Kennedy further stated that the nexus may not be "speculative or insubstantial," and that "some measure of the significance of the connection" is required. *Id.* at 780, 784.

Here, the record evidence establishes both that a nexus exists between Priest Lake and the wetlands complex encompassing the Sackett wetlands, and that the nexus is significant. EPA provided specific examples of the significance of the nearby wetlands' contribution to the physical, chemical, and biological integrity of Priest Lake.[15] U.S. Mem at 24–27. Consistent with Justice Kennedy's opinion in *Rapanos*, EPA provided estimates of the flow volume of both

[15] Plaintiffs argue that *Rapanos* requires an independent showing of physical, chemical, *and* ecological nexus. Sackett Opp. at 9 n.3. Both subsequent case law and common sense understanding of biological systems belie this claim. While the Ninth Circuit panel in *Healdsburg* analyzed physical, ecological, and chemical connections in turn (finding all three satisfied), it declined to explicitly hold that all three are necessary. *See Benjamin v. Douglas Ridge Rifle Club*, 673 F. Supp. 2d 1210, 1217 n.4 (D. Or. 2009) ("The Ninth Circuit has not expressly addressed whether the significant nexus test requires a showing that a wetland share a chemical, physical, *and* biological connection with a navigable-in-fact waterway." (emphasis in original) (citing *Healdsburg*, 496 F.3d at 999–1000)). The integrity of a water body, as contemplated by the Clean Water Act and Justice Kennedy in *Rapanos*, can be significantly compromised by impacts to any of the three, which in turn often have interconnected effects on each other. For example, a change in the chemical makeup or physical flow of a stream is likely to affect the organisms that live there. The same footnote from *Benjamin* that provides Plaintiffs' sole support for their argument goes on to state definitively that "a showing of a significant chemical, physical, or biological connection satisfies Justice Kennedy's test." *Id.* Furthermore, that court noted that "[i]nterpreting Justice Kennedy's test as requiring a demonstration of a chemical, physical, *and* biological nexus is incongruous with the Act's objectives and inconsistent with the language in the Act. The Act seeks to protect each aspect of the Nation's water quality independently of the others." *Id.* (emphasis in original). *See also Precon II*, 603 Fed. App'x at 152 ("[A]lthough we evaluate the functions of the wetlands individually, the ultimate inquiry is whether the collective effect of these functions is significant.").

Kalispell Creek and the unnamed tributary that flows into it, which together contributed over 27,000 acre-feet to Priest Lake in 1995. *See* U.S. Mem at 24–25. In addition to the obvious physical effect of this contribution of base flow, the wetland complex also provided stability and continuity by storing runoff, which benefits fish habitat in Kalispell Creek, a spawning area for fish from Priest Lake. *Id.* EPA also pointed to the positive effect of the wetland complex in capturing sediment, filtering pollutants, and lowering water temperature, all of which impact the chemical integrity of Priest Lake and improve its biological community. *Id.* at 25–27. Fish moving between Priest Lake and its tributaries also benefit from the abundance of aquatic invertebrates produced by the wetlands, which provide an important food source for migrating salmonids. *Id.* at 27. The record also shows that Kalispell Creek is listed under CWA section 303(d) as an impaired salmonid fishery (i.e., impaired for cold water biota use) and, as a result, has a pollutant-restricting mechanism (known as a "total maximum daily load") to regulate sediment. AR 5 at 97, 108. Cutthroat and bull trout in Priest Lake rely on Priest Lake tributaries, including Kalispell Creek, for spawning and rearing. *Id.* at 97, 108, 115. Given these impacts on the physical, chemical, and biological integrity of Priest Lake, 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.

EPA's determination of what constitutes significance is entitled to deference. "[W]here, as here, a court reviews an agency action involv[ing] primarily issues of fact, and where analysis . . . requires a high level of technical expertise, [the Court] must defer to the informed discretion of the responsible federal agencies." *Vigil v. Leavitt*, 381 F.3d 826, 833 (9th Cir. 2004) (internal quotation marks omitted). The Court's deference "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 Mountain Biodiversity Project v. Allen*, 615 F.3d 1122, 1130 (9th Cir. 2010). Here, the record establishes the important chemical, biological, and physical interconnection between the Sackett wetlands (including

similarly situated wetlands) and Priest Lake. EPA's conclusion that this interconnection is significant is reasonable, supported by the record, and entitled to deference.

IV. The Existence of Other Adjacent Wetlands Does Not Negate Jurisdiction Under the Agencies' Regulations.

In its opening brief, EPA effectively refuted Plaintiffs' argument that the Sackett wetlands are excluded from CWA jurisdiction by a purported "wetlands adjacent to wetlands" exception pursuant to 40 C.F.R. § 230.3(s)(7).[16] U.S. Mem. at 27–30. Plaintiffs have all but abandoned this argument—making no effort to address the decision in *Universal Welding & Fabrication, Inc. v. U.S. Army Corps of Engineers*, No. 4:14-cv-00021 (D. Alaska Oct. 1, 2015). *See* Sackett Opp. at 17. That decision expressly limited *Great Northwest, Inc. v. U.S. Army Corps of Engineers*, No. 4:09-cv-0029, 2010 WL 9499372 (D. Alaska June 8, 2010), disagreed with its interpretation of the regulation, and roundly rejected all of Plaintiffs' near-identical arguments for excepting the Sackett wetlands under 33 C.F.R. § 328.3(a)(7). *Universal Welding* at 15 n.7 & 13–21. Like the wetlands in *Universal Welding*, the Sackett wetlands are not exempt from jurisdiction merely by virtue of their being adjacent to other jurisdictional wetlands.

The Agencies have long interpreted the parenthetical language of 40 C.F.R. § 230.3(s)(7) and 33 C.F.R. § 328.3(a)(7) to target situations where the sole basis for CWA jurisdiction would be adjacency to another wetland. It simply means that adjacency to another *wetland*—as opposed to adjacency to a *non-wetland,* § 230.3(s)(1) through § 230.3(s)(6) water—is not a basis for jurisdiction under § 230.3(s)(7). Nothing in § 230.3(s)(7) suggests that a wetland that is adjacent to a non-wetland jurisdictional water would be "exempted" or "excluded" from CWA jurisdiction simply because it is also adjacent to another wetland. This interpretation hews closely to congressional intent and comports with "the Ninth Circuit's instruction that '[c]laims of exemption, from jurisdiction or permitting requirements, of the CWA's broad pollution

[16] The Corps' identical regulation is at 33 C.F.R. § 328.3(a)(7).

prevention mandate must be narrowly construed to achieve the purposes of the CWA.'" *Universal Welding* at 16 (quoting *Healdsburg*, 496 F.3d at 1001).

As *Universal Welding* explained in detail, the agencies' interpretation avoids the bizarre result of a wetland that is adjacent to a jurisdictional tributary being excluded from CWA jurisdiction by the mere fact of it also bordering another wetland. *Id.* Applying such an exception to the Sackett wetlands, as Plaintiffs propose, would be even more absurd: not only would the wetlands be excluded from jurisdiction despite their adjacency to a jurisdictional tributary, but also despite their adjacency to Priest Lake itself, a traditional navigable waterway. It is well established that wetlands adjacent to traditional navigable waters are subject to Clean Water Act jurisdiction. *See, e.g.*, *Rapanos*, 547 U.S. at 731 (citing 33 U.S.C. § 1344(g)(1)); *see also N. Calif. River Watch v. Wilcox*, 633 F.3d 766, 774 (9th Cir. 2010) ("It is well established that the Corps may regulate 'wetlands adjacent to navigable waters and their tributaries.'" (quoting *Healdsburg*, 496 F.3d at 997 (citing *Riverside Bayview*, 474 U.S. at 121))). EPA's interpretation reasonably avoids the inconsistent result of excluding these waters long-held to be jurisdictional.

Universal Welding also elucidates how, contrary to the arguments recycled by Plaintiffs here, the Agencies' interpretation does not render the wetlands-adjacent-to-wetlands regulatory language meaningless. The language still applies to those wetlands that are only adjacent to a jurisdictional wetland. *Universal Welding* at 16. In contrast, Plaintiffs' interpretation of the regulation was rejected outright by *Universal Welding* as leading to results that are "entirely inconsistent with the purpose of the CWA." *Id.*; *see also N. Carolina Shellfish Growers Ass'n v. Holly Ridge Assocs., LLC*, 278 F. Supp. 2d 654, 674 n.5 (E.D.N.C. 2003) (labeling an identical argument "absurd" because "taken to its logical conclusion, [it] means that only the first millimeter of wetlands adjacent to a jurisdictional water could be covered by the CWA").

EPA's interpretation of its regulation is also entitled to deference under *Auer v. Robbins*, 519 U.S. at 461. As *Universal Welding* recognized, the language of 40 C.F.R. § 230.3(s)(7) and 33 C.F.R. § 328.3(a)(7) is ambiguous. *Universal Welding* at 15 n.87. As a result, EPA's

interpretation of its own regulation is controlling unless "plainly erroneous or inconsistent with the regulation." *Id.* at 15 (quoting *Auer*, 519 U.S. at 461). Plaintiffs' assertion, again, that EPA's interpretation is nothing but a litigation position adopted for the purpose of defeating their suit is false and fails to overcome the deference owed the agency. EPA and the Corps have consistently articulated this interpretation of its regulation to other courts—as Plaintiffs' counsel are surely familiar. *See, e.g.*, *Universal Welding* at 14.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court grant its Cross-Motion for Summary Judgment and deny Plaintiffs' Cross-Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February, 2016, I filed the foregoing United States' Reply Memorandum in Support of its Cross-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/
NICHOLAS J. WOYCHICK