FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL SACKETT; CHANTELL SACKETT, *Plaintiffs-Appellants*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, Administrator,* *Defendants-Appellees*.	No. 19-35469 D.C. No. 2:08-cv-00185-EJL OPINION

Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding

Argued and Submitted November 19, 2020
Submission Withdrawn December 1, 2020
Resubmitted August 9, 2021
Seattle, Washington

Filed August 16, 2021

* Michael S. Regan has been automatically substituted for former Administrator Steven L. Johnson. Fed. R. App. P. 43(c)(2).

Before: Ronald M. Gould and Michelle T. Friedland, Circuit Judges, and Jill A. Otake,** District Judge.

Opinion by Judge Friedland

SUMMARY***

Mootness / Environmental Law

The panel affirmed the district court's summary judgment in favor of the Environmental Protection Agency ("EPA") in an action brought by plaintiff landowners, challenging an EPA compliance order that stated that plaintiffs' property contained wetlands subject to protection under the Clean Water Act ("CWA") and that directed them to remove fill and restore the property to its natural state.

When the parties were briefing this appeal, in a letter to plaintiffs, EPA abruptly withdrew its compliance order. The panel held that the EPA's withdrawal of the order did not moot this case. EPA's stated intention not to enforce the amended compliance order or issue a similar one in the future did not bind the agency, and EPA could potentially change positions under new leadership. In addition, the letter did nothing to alter EPA's litigation position

---

** The Honorable Jill A. Otake, United States District Judge for the District of Hawaii, sitting by designation.

*** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

that it has authority to regulate the plaintiffs' property. Accordingly, the panel could not conclude that it was "absolutely clear" that EPA would not either reinstate the amended compliance or issue a new one, and, therefore, this case was not moot. The panel rejected EPA's arguments to the contrary.

The panel next addressed the district court's refusal to strike a July 2008 Memo by EPA wetlands ecologist John Olson from the administrative record. The Memo contained observations and photographs from Olson's visit to plaintiffs' property. The panel held, pursuant to its review under the Administrative Procedure Act, that the district court did not abuse its discretion in permitting EPA to include the July 2008 Memo in the administrative record.

Turning to the entry of summary judgment on the merits, the panel held that, under *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993, 999–1000 (9th Cir. 2007), Justice Kennedy's understanding of "significant nexus" in his concurring opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), provided the governing standard for determining when wetlands are regulated under the CWA. The panel rejected plaintiffs' arguments that *Northern California River Watch v. City of Healdsburg* was no longer law of the circuit. Applying the significant nexus standard, the panel held that the requirements of the concurrence and the applicable regulations were satisfied here. The panel concluded that EPA reasonably determined that plaintiffs' property contained wetlands. It further determined that the record plainly supported EPA's conclusion that the wetlands on plaintiffs' property were adjacent

to a jurisdictional tributary and that, together with a similarly situated wetlands complex, they had a significant nexus to Priest Lake, a traditional navigable water, such that the property was regulable under the CWA and the relevant regulations.

COUNSEL

Anthony L. François (argued) and Damien M. Schiff, Pacific Legal Foundation, Sacramento, California, for Plaintiffs-Appellants.

Brian C. Toth (argued) and David Gunter, Attorneys; Eric Grant, Deputy Assistant Attorney General; Jean E. Williams, Acting Assistant Attorney General; Environment and Natural Resources Division, United States Department of Justice, Washington, D.C.; Karyn Wendelowski, Attorney, United States Environmental Protection Agency, Washington, D.C.; for Defendants-Appellees.

OPINION

FRIEDLAND, Circuit Judge:

Plaintiffs Chantell and Michael Sackett purchased a soggy residential lot near Idaho's Priest Lake in 2004. They planned to build a home on the property, but the project became entangled in a regulatory dispute. Shortly after the Sacketts began placing sand and gravel fill on the lot, they received an administrative compliance order from the Environmental Protection Agency ("EPA"). The order stated that the property contained wetlands subject to

protection under the Clean Water Act ("CWA"), and that the Sacketts had to remove the fill and restore the property to its natural state. Instead, the Sacketts sued EPA in 2008, contending that the agency's jurisdiction under the CWA does not extend to their property. The case has been winding its way through the federal courts ever since. When the parties were briefing this appeal, EPA abruptly withdrew its compliance order.

We first consider whether EPA's withdrawal of the compliance order, twelve years after it first issued, moots this case. We hold that it does not. We then decide whether jurisdiction under the CWA extends to the Sacketts' lot. We hold that it does and thus affirm the district court's grant of summary judgment in EPA's favor.

I.

A.

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act extends to all "navigable waters," defined as "waters of the United States, including the territorial seas," and it prohibits any person who lacks a permit from discharging pollutants, including rocks and sand, into those waters. *Id.* §§ 1311(a), 1362(6), (7), (12). If EPA finds that a violation is occurring, one of its enforcement options is to issue an administrative compliance order—as was issued to the Sacketts. *Id.* § 1319(a). A compliance order describes the nature of the violation and requires the recipient to cease the illegal discharge activity. *See id.* To enforce a

compliance order, EPA may bring an enforcement action in federal district court. *Id.* § 1319(b).

Since the CWA was enacted, agencies and courts have struggled to identify the outer definitional limits of the phrase "waters of the United States," which in turn defines the scope of the federal government's regulatory jurisdiction under the CWA. The U.S. Army Corps of Engineers (the "Corps") first issued regulations defining "waters of the United States" in the 1970s, shortly after the CWA took effect. Initially, the Corps determined that the CWA covered only waters that were navigable in fact, *see* 39 Fed. Reg. 12,115, 12,119 (Apr. 3, 1974), but the Corps later adopted different, broader interpretations that remained in effect at the time the Sacketts received the compliance order, *see* 42 Fed. Reg. 37,122, 37,144 (July 19, 1977); 51 Fed. Reg. 41,206, 41,250–51 (Nov. 13, 1986); 53 Fed. Reg. 20,764, 20,774 (June 6, 1988).

As relevant here, the regulations defined "waters of the United States" to include "wetlands" that are "adjacent" to traditional navigable waters and their tributaries. *See* 33 C.F.R. § 328.3(a)(1), (a)(5), (a)(7) (2008). "Wetlands" were defined as "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." *Id.* § 328.3(b). "Adjacent" was defined as "bordering, contiguous, or neighboring," and the regulations explicitly stated that "adjacent wetlands" included wetlands separated

from other waters of the United States by artificial dikes or barriers. *Id.* § 328.3(c).[1]

In several decisions, the Supreme Court has grappled with the proper interpretation of 33 U.S.C. § 1362(7)'s phrase "the waters of the United States." In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Court held that the Corps' interpretation of that phrase as including wetlands that were not themselves navigable, but which "actually abut[ted] on" traditional navigable waterways, was "a permissible interpretation" of the CWA. *Id.* at 131–35. Then, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of*

---

[1] In the years since the challenged compliance order issued, EPA and the Corps have continued to revise the regulatory definition of "waters of the United States" under the CWA. In 2015, the agencies proposed the Clean Water Rule, 80 Fed. Reg. 37,054 (June 29, 2015). But implementation of the Clean Water Rule was stayed pursuant to multiple court challenges, and two courts eventually decided that the rule was "unlawful" and remanded it to the agencies. *See Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1372 (S.D. Ga. 2019); *Texas v. EPA*, 389 F. Supp. 3d 497, 504–06 (S.D. Tex. 2019). The agencies ultimately repealed the Clean Water Rule and reinstated the pre-2015 regulatory definition. *See* 84 Fed. Reg. 56,626, 56,659–60 (Oct. 22, 2019).

On January 23, 2020, EPA and the Corps promulgated yet another regulatory definition of "waters of the United States." *See* 85 Fed. Reg. 22,250, 22,273 (Apr. 21, 2020). The agencies, however, are currently reevaluating that Rule, in keeping with President Biden's executive order Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 20, 2021). *See Definition of "Waters of the United States": Rule Status and Litigation Update*, U.S. EPA, https://www.epa.gov/nwpr/definition-waters-united-states-rule-status-and-litigation-update (last updated Apr. 23, 2021) ("Consistent with the Executive Order, EPA and the [Corps] are reviewing the [2020] Rule.").

Engineers, 531 U.S. 159 (2001), the Court rejected the Corps' attempt to regulate isolated sand and gravel pits that "seasonally ponded," holding that the term "waters of the United States" does not include "nonnavigable, isolated, intrastate waters." *Id.* at 164, 172–174.

Finally, and most relevant here, in *Rapanos v. United States*, 547 U.S. 715 (2006), the Court vacated two decisions upholding the application of the CWA to wetlands connected to distant navigable waters via ditches or artificial drains. *Id.* at 757. In his plurality opinion, Justice Scalia, joined by three other Justices, articulated one test for determining whether wetlands could be regulated under the CWA, *id.* at 739, while Justice Kennedy authored a concurrence articulating a different test, *id.* at 779–80. The parties here dispute which *Rapanos* opinion controls whether EPA has jurisdiction over the Sacketts' lot.

B.

In 2004, the Sacketts purchased a 0.63-acre lot near Priest Lake, one of the largest lakes in Idaho. The property is bounded by roads to the north and south. To the north, across Kalispell Bay Road, lies the Kalispell Bay Fen, a large wetlands complex that drains into an unnamed tributary. That tributary feeds Kalispell Creek, which, in turn, flows southwest of the Sacketts' property and then empties into Priest Lake. To the south, across another road, is a row of homes fronting Priest Lake. The Sacketts' property is 300 feet from the lake.

In May 2007, having obtained building permits from their county, the Sacketts began backfilling the

property with sand and gravel to create a stable grade. EPA and Corps officials soon visited the property and, believing the property contained wetlands that might be subject to the CWA, suggested that work stop absent a permit from the Corps.

Six months later, EPA issued the Sacketts a formal administrative compliance order. The order stated that the property contained wetlands subject to the CWA. It went on to explain that the Sacketts' placement of fill material onto half an acre of their property without a discharge permit constituted a violation of the CWA. The Sacketts were ordered to "immediately undertake activities to restore the Site" in keeping with a "Restoration Work Plan" provided by EPA, and they were given five months to complete the remediation. The order also informed the Sacketts that failure to comply could result in civil and administrative penalties of over $40,000 per day.

C.

On April 28, 2008, shortly before the deadline for compliance, the Sacketts sued EPA, seeking declaratory and injunctive relief. The Complaint alleged that the agency's issuance of the compliance order was arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), because it was premised on an erroneous assertion of jurisdiction under the CWA.[2]

---

[2] The Complaint also alleged violations of the Sacketts' substantive and procedural due process rights, but those claims were dropped in the Amended Complaint and are not at issue in this appeal. *See Sackett v. EPA*, 566 U.S. 120, 125 (2012).

On May 15, 2008, EPA and the Corps again inspected the site. EPA wetlands ecologist John Olson took field notes on the property and its surroundings, and he completed a seven-page jurisdictional determination ("JD"), in which he concluded that the Sacketts' lot contained wetlands subject to regulation under the CWA.

That same day, after Olson reported his findings to his superiors at the agency, EPA issued the Sacketts an amended compliance order that extended the dates for compliance but otherwise mirrored the original order. The amended order reiterated that the property contained wetlands subject to CWA regulation, that the Sacketts' discharge of fill material was pollution in violation of the CWA, and that their continued noncompliance could result in significant monetary sanctions. The amended compliance order "supersede[d] and replace[d]" the original compliance order.

Six weeks later, on July 1, 2008, Olson authored a memorandum (the "July 2008 Memo"), in which he memorialized his observations from the May site visit. The memo contains photographs from the visit that depict flooded soils and wetland vegetation on the Sacketts' lot in areas not yet covered with fill. Two such photos are included in an appendix to this opinion.

EPA moved to dismiss the Sacketts' lawsuit, contending that the original compliance order was not "final agency action . . . subject to judicial review"

under the APA.[3] 5 U.S.C. § 704. The district court granted the motion, and our court affirmed, concluding that the CWA precludes pre-enforcement judicial review of compliance orders. *See Sackett v. EPA*, 622 F.3d 1139, 1147 (9th Cir. 2010). But the Supreme Court granted certiorari and reversed, holding that the original compliance order constituted "final agency action" subject to judicial review under the APA. *Sackett v. EPA*, 566 U.S. 120, 131 (2012).

On remand, the Sacketts amended their Complaint to challenge the amended compliance order, and district court proceedings continued for seven more years. In March 2019, the district court entered summary judgment in EPA's favor, holding that the agency's issuance of the amended compliance order was not arbitrary or capricious. In the same order, the district court denied a motion by the Sacketts to strike from the administrative record the July 2008 Memo and materials referenced therein but also explained that summary judgment would have been appropriate even if those materials were not considered.

The Sacketts timely appealed both the grant of summary judgment and the denial of the motion to strike. Following an unsuccessful attempt at mediation, the Sacketts filed their opening brief in December 2019. After we granted EPA two filing extensions for its opposition brief, the agency sent the Sacketts a two-paragraph letter in March 2020, withdrawing the amended compliance order issued

---

[3] Because the Sacketts filed their Complaint before the amended compliance order issued, only the original compliance order was at issue at this stage in the court proceedings.

twelve years prior. In the letter, the agency explained that "several years ago EPA decided to no longer enforce the [order] against you." The letter assured the Sacketts that "EPA does not intend to issue a similar order to you in the future for this Site."

EPA then moved to dismiss the appeal as moot. According to the agency, its withdrawal of the amended compliance order effectively granted the Sacketts complete relief, which mooted the case. The Sacketts disagreed, explaining that the status of their property remains unsettled and that EPA did not withdraw the 2008 JD, in which Olson concluded that the agency has authority under the CWA to regulate the Sacketts' property.[4]

II.

A.

We review de novo whether a case has become moot. *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1173 (9th Cir. 2002). "A case that becomes moot at any point during the proceedings is 'no longer a "Case" or "Controversy" for purposes of Article III,' and is outside the jurisdiction of the federal courts." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S.

---

[4] In an unpublished order, a motions panel denied the motion to dismiss without prejudice to EPA's renewing the argument in opposition, which EPA did. That prior ruling does not eliminate the need for us to reassess this jurisdictional question. *See Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1032 n.3 (9th Cir. 1990) (explaining that a merits panel has an independent duty to determine whether it has jurisdiction, even if a motions panel already ruled on the issue).

85, 91 (2013)). A party asserting mootness "bears the heavy burden of establishing that there remains no effective relief a court can provide." *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 862 (9th Cir. 2017). "'The question is not whether the precise relief sought at the time the case was filed is still available,' but 'whether there can be any effective relief.'" *Id.* (quoting *McCormack v. Herzog*, 788 F.3d 1017, 1024 (9th Cir. 2015)).

The already "heavy burden" of establishing mootness is even heavier for EPA here because its mootness argument stems from its own voluntary conduct—namely its decision to withdraw the amended compliance order. When a defendant voluntarily ceases challenged conduct, mootness follows only "if subsequent events [make] it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (emphasis added) (quoting *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968)).

In deciding whether EPA has met its burden of establishing that its letter withdrawing the amended compliance order mooted this case, our decision in *Porter v. Bowen*, 496 F.3d 1009 (9th Cir. 2007), is instructive. In *Porter*, the operators of websites that encouraged interstate "vote swapping" for the 2000 presidential election brought a § 1983 action against the California Secretary of State after the Secretary had threatened one of them with criminal prosecution. *Id.* at 1012. While the lawsuit was pending, doubts apparently arose about whether California law

actually criminalized this activity, and the Secretary sent a letter to the Speaker of the California State Assembly explaining that the State would not pursue prosecutions unless the state legislature clarified the relevant election laws. *Id.* at 1016.[5] The district court held that this letter from the Secretary rendered the plaintiffs' claim for prospective relief moot. *Id.*

We reversed, holding that the Secretary "fail[ed] to carry the 'heavy burden' of establishing that it is 'absolutely clear' that California will not threaten to prosecute the owners of [the websites] if they create vote-swapping websites in the future." *Id.* at 1017. We explained that the letter "d[id] not suggest that it [wa]s binding on the Secretary of State," and that a new Secretary of State who had since entered office "could initiate the prosecution of vote-swapping websites at her discretion." *Id.* Finally, we observed that "the Secretary has maintained throughout the nearly seven years of litigation . . . that [the Secretary] had the authority under state law to threaten [the plaintiffs] with prosecution," a position that the plaintiffs believed violated their rights. *Id.*

The Sacketts' situation is directly analogous. EPA's stated intention not to enforce the amended compliance order or issue a similar one in the future does not bind the agency, and EPA could potentially change positions under new leadership. Further, the letter did nothing to alter EPA's position throughout this litigation that it has authority to regulate the Sacketts' property. Indeed, during oral argument, counsel for the agency was unwilling to represent that the agency lacked authority over the property and,

[5] Presumably this would have required a statutory amendment.

even after more than a decade of litigation, could not answer questions about whether the Sacketts could develop their land. The agency could have disavowed the JD, but it declined to do so. Accordingly, because we cannot conclude that it is "absolutely clear" that EPA will not either reinstate the amended compliance order (or issue a new one), this case is not moot.

EPA's arguments to the contrary are unavailing. First, EPA contends that the "inscribed-by-hand, unsigned, never-issued" JD, which it refused to disavow, cannot be considered "final agency action." But this is a red herring. Even if the 2008 JD itself would not constitute "final agency action" required to bring an APA claim because it lacks the "hallmarks of APA finality," *see Sackett*, 566 U.S. at 126, that is beside the point. The "final agency action" requirement was already satisfied by the original compliance order when the Sacketts filed this lawsuit, as the Supreme Court specifically held. *Id.* at 131; *see also United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. Shell Oil Co.*, 602 F.3d 1087, 1091–92 (9th Cir. 2010) (explaining that "post-filing developments" do not defeat statutory requirements for jurisdiction "if jurisdiction was properly invoked as of the time of filing"). The question we now face is whether the agency can end the litigation by voluntarily withdrawing the challenged order. As the Supreme Court has emphasized, whether a suit may be initiated and whether it may be terminated as moot are different inquiries. *Cf. Laidlaw*, 528 U.S. at 190 ("[T]here are circumstances in which the prospect that a defendant will engage in (or resume) harmful

conduct may be too speculative to support standing, but not too speculative to overcome mootness.").

Accordingly, we conclude that the JD is relevant not because of its potential to serve as "final agency action," but rather because it demonstrates EPA's refusal to concede that it lacks the authority to regulate the Sacketts' land. *See Fikre v. FBI*, 904 F.3d 1033, 1037 (9th Cir. 2018) (explaining that, when asserting mootness due to voluntary cessation, the government must "demonstrate that the change in its behavior is 'entrenched' or 'permanent'" (quoting *McCormack*, 788 F.3d at 1025)). As long as EPA avoids disclaiming authority to regulate the Sacketts' property, the core of this dispute is alive and well.

Second, EPA argues that the Sacketts already received "full relief" when the agency withdrew its amended compliance order. Again, we disagree. EPA's argument ignores the practical realities of the Sacketts' predicament. If we were to dismiss this case as moot, the Sacketts would not have prevailed in any meaningful sense; rather, they would be stuck in the same regulatory quagmire they have been in for the past thirteen years. As we have explained, nothing prevents the agency from reinstating the amended compliance order, issuing a new one, or possibly even pursuing another avenue of enforcement available to it under the CWA. Withdrawal of the amended compliance order, therefore, hardly affords the Sacketts "full relief." *See United States v. Tanoue*, 94 F.3d 1342, 1344 (9th Cir. 1996). By contrast, if we were to side with the Sacketts on the merits and grant the requested declaratory relief, they would finally be on solid ground when resuming construction.

The fact that the Sacketts' central legal challenge remains unresolved distinguishes this case from the authorities relied on by EPA. In *Oregon Natural Resources Council v. Grossarth*, 979 F.2d 1377 (9th Cir. 1992), for example, the plaintiffs challenged a proposed timber sale by the U.S. Forest Service, alleging in part that the Forest Service had failed to prepare a required Environmental Impact Statement ("EIS"). *Id.* at 1378. While the case was pending, the plaintiffs simultaneously pursued an administrative appeal and prevailed, causing the Forest Service to halt the sale and order that an EIS be prepared. *Id.* We held that this intervening administrative order mooted the appeal. *Id.* at 1379–80. We reasoned that the Forest Service's cancellation of the sale and its decision to prepare an EIS "was not a voluntary cessation within the meaning of that doctrine, but was instead the result of [the plaintiffs'] successful administrative appeal. Accordingly, [the plaintiffs'] invocation of the voluntary cessation theory [wa]s misplaced." *Id.* at 1379. We further held that, even if the Forest Service's conduct could be considered voluntary cessation, the record contained "no basis on which we could form a 'reasonable expectation' that there [would] be a recurrence of the same allegedly unlawful conduct by the Forest Service in the future." *Id.*

The situation facing the Sacketts is distinguishable in both respects. EPA's decision to withdraw the amended compliance order was not the result of a judgment from an intervening administrative proceeding. The agency provided no explanation for why, "several years ago," it resolved not to enforce the amended compliance order against

the Sacketts, but it appears to have been a voluntary agency decision. Moreover, there is evidence in the record from which we could form a "reasonable expectation" that the same allegedly unlawful conduct by EPA could recur, given that the agency apparently still believes it has authority under the CWA to regulate the Sacketts' property.

Third, to bolster its claim that the case is moot, EPA invokes the general presumption of good faith that the government traditionally enjoys in the context of mootness by voluntary cessation. *See Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010) ("The government's change of policy presents a special circumstance in the world of mootness. . . . [U]nlike in the case of a private party, we presume the government is acting in good faith."). But this presumption is by no means dispositive. In *Fikre*, for example, a district court had dismissed as moot a plaintiff's lawsuit challenging his placement on the No Fly List after the FBI restored the plaintiff's flying privileges during the litigation. *See* 904 F.3d at 1036–37. We reversed, and although we acknowledged that the FBI benefitted from a presumption of good faith, we explained that the "government must still demonstrate that the change in its behavior is 'entrenched' or 'permanent'" to moot a case. *Id.* at 1037–38 (quoting *McCormack*, 788 F.3d at 1025). We observed that the FBI's decision to remove the plaintiff from the list during the litigation was "an individualized determination untethered to any explanation or change in policy." *Id.* at 1039–40. We held that, absent an "explanation of [its] reasons . . . the government has not repudiated the decision to add [him] to the No Fly List and maintain him there

for approximately five years." *Id.* at 1040. We further reasoned that "[b]ecause there are neither procedural hurdles to reinstating [the plaintiff] on the No Fly List . . . nor any renouncement by the government of its . . . authority to do so, the voluntary cessation doctrine applies . . . [and the plaintiff's] due process claims are not moot." *Id.* at 1041.

Here, although we similarly presume EPA withdrew its amended compliance order in good faith, the agency's conduct prevents that presumption from carrying the day. As explained, we are not confident that the agency has permanently ceased attempting to regulate the Sacketts' land. In addition, we note that, although EPA represents that it resolved "several years ago" not to enforce the amended compliance order, it informed the Sacketts of this development only on the eve of EPA's filing deadline for its opposition brief—a deadline we had already extended twice, in response to requests from the agency that had not mentioned any change in the agency's enforcement intentions. *Cf. id.* at 1040. If we are to take EPA's letter at face value, the agency caused the Sacketts to litigate cross-motions for summary judgment in the district court, participate in mediation, and then pursue this appeal *after* the agency had already concluded it would never enforce the challenged compliance order. Forcing the Sacketts to engage in years of litigation, under threat of tens of thousands of dollars in daily fines, only to assert at the eleventh hour that the dispute has actually been moot for a long time, is not a litigation strategy we wish to encourage.

Lastly, EPA argues that the new definition of "waters of the United States" it adopted in 2020, *see* 85 Fed. Reg. 22,250, 22,273 (Apr. 21, 2020), governs its authority over wetlands such that any judicial decision regarding the prior regulation "would be purely advisory." But the Sacketts' primary legal argument is that they "are entitled to prevail as a matter of law based on the unambiguous text of the [CWA] as interpreted by the *Rapanos* plurality, no matter what regulatory interpretation EPA adopts." Therefore, a decision resolving whether the Sacketts' interpretation of the CWA is correct will not be purely advisory.

At bottom, the central dispute in this case remains unresolved. The Sacketts are still, thirteen years later, seeking an answer to whether EPA can prevent them from developing their property. Accordingly, we hold that this case is not moot.

B.

Before turning to the merits, we address the district court's refusal to strike Olson's July 2008 Memo from the administrative record.[6] We review that ruling for abuse of discretion. *Sw. Ctr. for*

[6] In the district court, the Sacketts moved to strike additional documents that were cited in the July 2008 Memo. On appeal, however, the Sacketts only provide argument on why the July 2008 Memo itself should be stricken. We therefore consider only whether that memo was appropriately included in the administrative record. *See Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir. 1986) ("The Court of Appeals will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief.").

Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1447 (9th Cir. 1996).

A court reviews agency action under the APA by considering the "whole record" that was before the agency when it undertook the challenged action. 5 U.S.C. § 706; *see also Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam) (holding that "the focal point for judicial review" of whether agency action is arbitrary and capricious "should be the administrative record already in existence, not some new record made initially in the reviewing court"). The Sacketts contend that, because the July 2008 Memo postdated the amended compliance order, it was wrongly included in the administrative record.

We hold that the district court did not abuse its discretion in permitting EPA to include the July 2008 Memo in the administrative record. Although the memo postdates the issuance of the amended compliance order by six weeks, it simply memorializes the observations and conclusions that Olson and a Corps official made during their May site visit and attaches other information available to EPA before the order issued. Specifically, the memo consists of photos Olson took during the May site visit, historical aerial photos that Olson had examined "[p]rior to visiting the site," general maps of the area, Olson's observations from the May site visit, and descriptions of the "[e]cology and hydrology of the Sackett wetland" based on observations made during that site visit. Thus, the memo does not contain the sort of "'post hoc' rationalizations" that do not belong in an administrative record. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971) (quoting

Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

Indeed, the record shows that the July 2008 Memo repeats the observations that informed the challenged agency action. Declarations from EPA officials establish that, shortly after his site visit, Olson called EPA's Regional Counsel to relay his findings and his conclusion that the Sackett property contained wetlands subject to the CWA. The Regional Counsel then relayed Olson's findings to EPA's Office of Ecosystems, Tribal, and Public Affairs, and recommended based on those findings that the Office issue the amended compliance order. Because the July 2008 Memo thus conveys the same information that the agency considered and relied on in issuing the amended compliance order, we cannot say the district court abused its discretion in declining to strike it from the record. *Cf. Thompson v. United States Dep't of Lab.*, 885 F.2d 551, 555 (9th Cir. 1989) (explaining that the "whole administrative record" for purposes of judicial review of agency action includes materials "directly or indirectly considered by agency decision-makers" (emphasis omitted) (quoting *Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, 33 (N.D. Tex. 1981))).

C.

We now turn to whether EPA was entitled to summary judgment on the merits. We review the district court's grant of summary judgment de novo. *Nw. Env't Advocs. v. EPA*, 537 F.3d 1006, 1014 (9th Cir. 2008). The Sacketts' core argument is premised on interpreting Justice Scalia's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), as

providing the governing standard for determining CWA jurisdiction over wetlands.[7] In *Rapanos*, the Court considered "whether four Michigan wetlands,

---

[7] The Sacketts also argue that EPA failed to comply with the Corps' 1987 Wetlands Delineation Manual when evaluating their property, and that their property does not contain wetlands at all. We reject both arguments. Even assuming the 1987 Manual was still operative, *but see Tin Cup, LLC v. U.S. Army Corp of Eng'rs*, 904 F.3d 1068, 1072 (9th Cir. 2018), EPA complied with the manual here. The manual identifies a procedure for identifying wetlands in "atypical situations," such as when "recent human activities" have resulted in "removal of vegetation" and "placement of dredged or fill material over hydric soils." In this circumstance, the agency is instructed to try and "determine the type of vegetation that previously occurred," including by consulting recent aerial photography, conducting onsite inspections, and observing adjacent vegetation. EPA did all of those things here.

As for EPA's conclusion that there were in fact wetlands on the property, we review the agency's conclusion for substantial evidence. *Ctr. for Biological Diversity v. Esper*, 958 F.3d 895, 910 (9th Cir. 2020). That standard is easily satisfied. The applicable regulations define wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b) (2008). During his May 2008 site visit, Olson "observed that all portions of the Sackett property where native soil was removed but fill material had not been placed . . . were inundated or ponded/saturated to the surface." Olson's photos from the site visit corroborate these observations. EPA's inspection report from the prior year further explained that "strips of excavated ground revealed wetland soils" on the Sacketts' lot and that the vegetation on the south end of the lot "consisted of the wetland species." Photos from the 2007 site visit reflect such conditions. Representative photos from both the 2007 and 2008 site visits are included in an appendix to this opinion. We therefore proceed on the understanding that the Sacketts' property contains wetlands.

which lie near ditches or man-made drains that eventually empty into traditional navigable waters, constitute[d] 'waters of the United States' within the meaning of the [CWA]." *Id.* at 729 (plurality opinion). The Sixth Circuit approved of the Corps' assertion of jurisdiction under the applicable regulations, which included as "waters of the United States" wetlands that were "adjacent" to any tributary that fed a navigable water. *Id.* at 729–30. The Court held that the Sixth Circuit had applied the wrong legal standard to evaluate whether the wetlands fell within the scope of the CWA, and that a remand was necessary. *Id.* at 757.

No opinion garnered a majority. Justice Scalia, writing for four Justices, rejected the regulatory definition of "adjacency" and instead concluded that, under the statute, "waters of the United States" extend only to "relatively permanent, standing or flowing bodies of water" and to wetlands with a "continuous surface connection" to such permanent waters. *Id.* at 739, 742.

Justice Kennedy concurred in the judgment. He accepted the regulatory definition of adjacency, *id.* at 775 (Kennedy, J., concurring in the judgment), but he rejected the Corps' position that wetlands are necessarily "waters of the United States" any time they are "bordering, contiguous [with], or neighboring" a tributary, 33 C.F.R. § 328.3(c) (2008), "however remote and insubstantial, that eventually may flow into traditional navigable waters." *Id.* at 778. Justice Kennedy interpreted the CWA as imposing an additional requirement for regulatory jurisdiction over wetlands: "jurisdiction over wetlands

depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." *Id.* at 779. This "significant nexus" inquiry would turn on whether 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.'"[8] *Id.* at 780.

Although the Scalia plurality did not entirely reject the concept of a "significant nexus," which derived from earlier Supreme Court caselaw, it opined that only wetlands with a "physical connection" to traditional navigable waters had the requisite nexus to qualify as "waters of the United States." *Id.* at 755 (plurality opinion).

The Sacketts argue that the Scalia plurality provides the governing legal standard. They further argue that, because their property does not contain wetlands with a continuous surface connection to any "waters of United States," the agency's assertion of jurisdiction over their property ran afoul of the CWA and the APA.

In interpreting *Rapanos* to evaluate this argument, we are not writing on a blank slate. In *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), we concluded that "Justice Kennedy's concurrence

---

[8] Consistent with *Riverside Bayview Homes*, Justice Kennedy infers that this significant nexus requirement is satisfied when a wetland directly abuts on a traditional navigable water. *Rapanos*, 547 U.S. at 780.

provides the controlling rule of law" from *Rapanos*. *Id.* at 999–1000. To reach this determination, we engaged in the inquiry the Supreme Court established in *Marks v. United States*, 430 U.S. 188 (1977), under which the controlling holding of a fractured decision is "the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases." *Healdsburg*, 496 F.3d at 999. In determining that narrowest ground, we relied heavily on the Seventh Circuit's decision in *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006) (per curiam), which likewise applied *Marks* to conclude that the Kennedy concurrence supplied the controlling rule in *Rapanos*. *Healdsburg*, 496 F.3d at 999–1000. Under *Healdsburg*, therefore, our circuit's law is that Justice Kennedy's understanding of "significant nexus" provides the governing standard for determining when wetlands are regulable under the CWA.

The Sacketts contend that a later en banc decision of our court fatally undermines *Healdsburg* such that it is no longer law of the circuit. In *United States v. Davis*, 825 F.3d 1014 (9th Cir. 2016) (en banc), we clarified how we perform a *Marks* analysis to interpret a fractured decision. We reflected "that the *Marks* inquiry at times has 'baffled and divided the lower courts that have considered it,'" and we observed that two approaches to applying *Marks* had come to predominate: a reasoning-based approach and a results-based approach. *Id.* at 1020–21 (quoting *Nichols v. United States*, 511 U.S. 738, 746 (1994)). Under the reasoning-based approach, courts "look to those opinions that concurred in the judgment and determine whether one of those opinions sets forth a

rationale that is the logical subset of other, broader opinions. When, however, no common denominator of the Court's reasoning exists, we are bound only by the specific result." *Id.* at 1028 (quotation marks omitted). Under the results-based approach, the controlling holding from the fractured case in question is the rule that "would necessarily produce results with which a majority of the Justices . . . would [have] agree[d]." *Id.* at 1021 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 694 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992)). Our court in *Davis* embraced the reasoning-based approach, *see id.* at 1028, and we remain bound by that holding.

The Sacketts argue that the court in *Healdsburg* did not employ a reasoning-based framework when performing its *Marks* analysis of *Rapanos*, and they contend that *Healdsburg* is therefore no longer good law after *Davis*. We disagree.[9] In our circuit, a three-judge panel may abandon the holding of a prior panel only when intervening higher authority is "clearly irreconcilable" with that earlier panel opinion. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). Therefore, we will disregard *Healdsburg* only if

[9] A prior decision of our court considered this precise question. In *United States v. Robertson*, 875 F.3d 1281 (9th Cir. 2017), we held that *Healdsburg* was not clearly irreconcilable with *Davis* and therefore remained law of the circuit. *Id.* at 1291–92. But the Supreme Court summarily vacated the judgment in that case because the defendant died while his petition for certiorari was pending. *See Robertson v. United States*, 139 S. Ct. 1543 (2019) (Mem.) (granting writ of certiorari, vacating the judgment, and remanding "for consideration of the question whether the case is moot").

it is clearly irreconcilable with our en banc decision in *Davis*.

It is not. We explained in *Davis* that the narrowest opinion for purposes of a Marks analysis is the opinion that concurs in the judgment that is "the logical subset of other, broader opinions," and which therefore represents "a common denominator of the Court's reasoning." *Davis*, 825 F.3d at 1028. In *Healdsburg*, our *Marks* analysis consisted of a single paragraph that endorsed the Seventh Circuit's *Marks* analysis in *Gerke*. *See Healdsburg*, 496 F.3d at 999–1000.

Gerke, in turn, elaborated on why the Kennedy concurrence articulated a narrower ground for reversing than did the Scalia plurality such that "the Kennedy concurrence is the least common denominator." *Gerke*, 464 F.3d at 725. The two opinions begin on common ground, as Justice Kennedy had himself expressed. *Rapanos*, 547 U.S. at 767 (Kennedy, J., concurring in the judgment) ("The plurality's opinion begins from a correct premise. As the plurality points out . . . in enacting the [CWA] Congress intended to regulate at least some waters that are not navigable in the traditional sense."). *Gerke* recognized that the plurality and the concurrence also agreed that for wetlands to fall within CWA jurisdiction, they had to share some connection with traditional navigable waters. *See* 464 F.3d at 724–25. As the Seventh Circuit further explained, "[t]he plurality Justices thought that Justice Kennedy's ground for reversing was narrower than their own. . . . Justice Kennedy expressly rejected two 'limitations' imposed by the plurality on

federal authority over wetlands under the Clean Water Act." *Id.* at 724 (quoting *Rapanos*, 547 U.S. at 768).

Admittedly, *Gerke*'s analysis does not fit neatly into either a reasoning-based or a results-based *Marks* framework, and portions of the opinion are consistent with the results-based *Marks* analysis that we rejected in *Davis*. *See, e.g.*, *id.* (explaining that Justice Kennedy's approach will yield a result that will command five votes "in most cases") (emphasis omitted). The results-based aspects of *Gerke* present some tension with *Davis*, but to be superseded under *Miller v. Gammie*, "[i]t is not enough for there to be some tension between the intervening higher authority and prior circuit precedent, or for the intervening higher authority to cast doubt on the prior circuit precedent." *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (citation and quotation marks omitted). Thus, although *Gerke* is not a paradigmatic example of a reasoning-based *Marks* analysis, it is not "clearly irreconcilable" with such an approach. And because *Healdsburg* adopted *Gerke*'s application of *Marks*, we conclude that *Healdsburg*'s "theory or reasoning" was likewise not clearly undercut by *Davis*. *Miller*, 335 F.3d at 900.

The Sacketts also contend that *Healdsburg* is clearly irreconcilable with intervening authority in another way. They argue that *Healdsburg* relied on the *Rapanos* dissent in its *Marks* analysis, and that shortly after *Davis*, we held that dissents could not be considered for purposes of a *Marks* analysis. The Sacketts cite to our decision in *Cardenas v. United States*, 826 F.3d 1164 (9th Cir. 2016), in which we

wrote that the "narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices *who support the judgment*." *Id.* at 1171 (emphasis added) (quoting *Davis*, 825 F.3d at 1020). But this language in *Cardenas* is no more than a direct quotation from *Davis*, a decision in which we explicitly reserved judgment on the very question that the Sacketts assert *Cardenas* decided. *Davis*, 825 F.3d at 1025 ("Here, we assume but do not decide that dissenting opinions may be considered in a *Marks* analysis."); *id.* at 1025 n.12 ("We note that . . . the D.C. Circuit explicitly stated that it was not free to combine a dissent with a concurrence to form a *Marks* majority. We emphasize here, however, that we do not decide that issue." (quotation marks and citation omitted)). Thus, *Davis* cannot stand for the proposition that dissents are off-limits in a *Marks* inquiry, and neither can *Cardenas*, which cited *Davis* only in passing and did not consider that question.[10]

Moreover, the Sacketts' argument mischaracterizes *Healdsburg* because *Healdsburg* does not directly or indirectly depend on the *Rapanos* dissent, even though *Healdsburg* does cite to the dissent in its *Marks* analysis. As explained above, *Healdsburg* relied heavily on *Gerke*. Later, when rejecting an argument that *Gerke* improperly used the *Rapanos* dissent in its *Marks* analysis, the Seventh Circuit clarified that *Gerke* had not relied on the dissent. The Seventh Circuit explained that, in *Gerke*,

---

[10] We also note that a three-judge panel decision such as *Cardenas* could not have superseded *Healdsburg*, an earlier decision of our court, because it is not an intervening *higher* authority. *See Miller*, 335 F.3d at 899.

the operative narrower-grounds inquiry compared the concurrence and the plurality, and that, although *Gerke* did make "the same narrower-grounds point in comparing the concurrence with the dissenting opinion . . . that comparison was not necessary to resolving the appeal, so it was dicta." *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 621 (7th Cir. 2014). Because *Healdsburg* primarily relied on *Gerke*, we similarly conclude that the mention of the *Rapanos* dissent in *Healdsburg* does not indicate that *Healdsburg* relied on that dissent.

For all these reasons, the Sacketts' arguments fail, and *Healdsburg* remains law of the circuit—meaning the Kennedy concurrence is still the controlling opinion from *Rapanos*.[11]

---

[11] The Sacketts further contend that County of *Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), makes clear that the Scalia plurality provides the Court's authoritative opinion on the meaning of the CWA. It is true that in *County of Maui*, all four opinions refer only to the *Rapanos* plurality when interpreting the CWA. *See, e.g.*, *id.* at 1478 (Kavanaugh, J., concurring) (noting that the majority's reading of "discharge" "adheres to the interpretation set forth in Justice Scalia's plurality opinion in *Rapanos*"). But *County of Maui* did not concern the scope of "waters of the United States." The question presented in *County of Maui* was an entirely different one—the meaning of pollution from a point source under the CWA, *id.* at 1468 (majority opinion)—so there was no reason to rely on the distinctions between the Scalia plurality and the Kennedy concurrence in *Rapanos*. *See Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737, 748 (9th Cir. 2018) ("In past cases, we have recognized Justice Kennedy's concurrence in *Rapanos* . . . as controlling. But we have only done so in the context of 'determin[ing] whether a wetland that is not adjacent to and does not contain a navigable-in-fact water is subject to the CWA.'" (quoting *Robertson*, 875 F.3d at 1288–89)), *vacated and remanded*, 140 S. Ct. 1462.

D.

We therefore apply Justice Kennedy's "significant nexus" inquiry to evaluate whether EPA has jurisdiction to regulate the Sacketts' property. In answering this question, we also use the regulations that were in effect when EPA issued the amended compliance order.[12] *See United States v. Lucero*, 989 F.3d 1088, 1104–05 (9th Cir. 2021) (holding that the definition of "waters of the United States" from the regulation that was in place at the time of the defendant's conduct applied, despite the promulgation of a new regulation that narrowed that definition while the case was pending on appeal). The Sacketts' only challenge to those regulations is premised on the Scalia plurality being the controlling opinion.

Under the APA, a court may set aside agency action if it is "arbitrary, capricious . . . or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "As a reviewing court, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir.

County of Maui is thus inapposite here and does not disturb our interpretation of *Rapanos*.

[12] The Sacketts object to the district court's citation to agency guidance issued after the amended compliance order. We need not address this argument because we do not rely for any part of our analysis on that agency guidance.

2014) (quotation marks omitted). "Where the agency has relied on relevant evidence . . . that a reasonable mind might accept as adequate to support a conclusion, its decision is supported by substantial evidence, and this court must affirm the agency's finding." *Ctr. for Biological Diversity v. Esper*, 958 F.3d 895, 910 (9th Cir. 2020) (quotation marks and brackets omitted).

It is clear that the requirements of the Kennedy concurrence and the applicable regulations are satisfied here. The record plainly supports EPA's conclusion that the wetlands on the Sacketts' property are adjacent to a jurisdictional tributary and that, together with the similarly situated Kalispell Bay Fen, they have a significant nexus to Priest Lake, a traditional navigable water.

First, there was nothing arbitrary about EPA's determination that the Sacketts' wetlands were adjacent to a jurisdictional tributary, and thus fell into the relevant regulatory definition of "waters of the United States." 33 C.F.R. § 328.3(a)(1), (5), (7) (2008) (defining a wetland that is adjacent to a tributary of a traditional navigable water as a water of the United States). At the time of the challenged compliance order, artificial barriers did not defeat adjacency. *See id.* § 328.3(c) ("Wetlands separated from other waters of the United States by man-made dikes or barriers . . . and the like are 'adjacent wetlands.'"); *see also Rapanos*, 547 U.S. at 780. EPA therefore properly concluded that the wetlands on the Sacketts' lot were adjacent to the unnamed tributary to Kalispell Creek thirty feet away, notwithstanding that Kalispell Bay Road lies in between the property

and the tributary.[13] Officials from the site visit also observed that the tributary is "relatively permanent" based on U.S. Geological Survey mapping as well as its flow, channel size, and form. Moreover, because this unnamed tributary eventually flows into Priest Lake, a traditional navigable water, via Kalispell Creek, the tributary is jurisdictional—that is, it is itself a water of the United States. *See* 33 C.F.R. § 328.3(a)(5) (explaining that tributaries to jurisdictional waters are themselves jurisdictional). Accordingly, EPA's conclusion that the Sacketts' lot was adjacent to a jurisdictional tributary was neither arbitrary nor capricious.

We turn next to Justice Kennedy's "significant nexus" inquiry: whether "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.'" *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment).

At the time of the amended compliance order, EPA had explained that "'[s]imilarly situated' wetlands include all wetlands adjacent to the same tributary." U.S. EPA & Army Corps of Engineers, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in* Rapanos v. United States *&* Carabell v. United States (June 5, 2007), https://www.epa.gov/sites/production/files/2016-04/do

---

[13] EPA and Corps scientists who inspected the site concluded that a "shallow subsurface flow is occurring" beneath the road, connecting the Sacketts' lot to the tributary and the Kalispell Bay Fen wetland system to the north. This bolsters the agency's conclusion that the road should not defeat adjacency.

cuments/rapanosguidance6507.pdf. Here, EPA appropriately concluded based on the observations from the site visit and maps of the area that, like the Sacketts' wetlands, the Kalispell Bay Fen is adjacent to the unnamed tributary to Kalispell Creek.[14] Therefore, the Sacketts' wetlands and the Fen are similarly situated for purposes of evaluating whether they have a significant nexus to Priest Lake.

The record further supports EPA's conclusion that these wetlands, in combination, significantly affect the integrity of Priest Lake. Water from these wetlands makes its way into Priest Lake via the unnamed tributary and Kalispell Creek. According to the July 2008 memo, these wetlands provide important ecological and water quality benefits; indeed, the memo identified this wetlands complex, which is one of the five largest along the 62-mile Priest Lake shoreline, as "especially important in maintaining the high quality of Priest Lake's water, fish, and wildlife." The agency's conclusion that the Sacketts' wetlands, combined with the similarly situated Fen, "significantly affect the chemical, physical, and biological integrity of" Priest Lake was a reasonable one which we will not second-guess. *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment); *see also San Luis & Delta-Mendota Water Auth.*, 747 F.3d at 621 (emphasizing that "we do not sit as a panel of referees on a professional scientific journal, but as a panel of generalist judges

[14] The July 2008 Memo further explained that the Sacketts' wetlands and the Fen remain interconnected via a subsurface flow, and historical aerial photographs establish that they used to be a single wetland complex, both of which reinforce the agency's conclusion that the two are similarly situated.

obliged to defer to a reasonable judgment by an agency" (brackets omitted) (quoting *City of Los Angeles v. Dep't of Transp.*, 165 F.3d 972, 977 (D.C. Cir. 1999))).

In sum, EPA reasonably determined that the Sacketts' property contains wetlands that share a significant nexus with Priest Lake, such that the lot was regulable under the CWA and the relevant regulations.

III.

For the foregoing reasons, we affirm the district court's grant of summary judgment in EPA's favor.

AFFIRMED.

APPENDIX

View south from Kalispell Bay Road along east edge of Sackett property, taken during 2008 site visit.

View north from Old Schneiders Road of south and west edges of property, taken during 2008 site visit.

East side of the lot showing strip of excavated ground
that was being filled when EPA officials arrived,
taken during 2007 site visit.

United States
Environmental Protection Agency

Menu

Search EPA.gov

Waters of the United States

CONTACT US <https://epa.gov/wotus/forms/contact-us-about-navigable-waters-protection-rule>

Definition of "Waters of the United States": Rule Status and Litigation Update

On January 20, 2021, President Joseph R. Biden Jr. signed Executive Order 13990 <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis/> on "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," which orders the agencies to immediately review, and as appropriate and consistent with applicable law, take action to address the previous administration's regulations and actions that conflict with important national environmental and public health objectives. Consistent with the Executive Order, EPA and the Department of the Army are reviewing the Navigable Waters Protection Rule.

The Navigable Waters Protection Rule became effective on June 22, 2020 and is being implemented

by EPA and the Army. On June 19, 2020, the U.S. District Court for the District of Colorado stayed the effective date of the Navigable Waters Protection Rule in the State of Colorado. On March 2, 2021, the Tenth Circuit Court of Appeals reversed and vacated the U.S. District Court for the District of Colorado's order. As a result, the Navigable Waters Protection Rule is in effect throughout the country. Read the final Navigable Waters Protection Rule <https://epa.gov/wotus/final-rule-navigable-waters-protection-rule>.

If a state, tribe, or an entity has specific questions about a pending jurisdictional determination or permit, please contact a local U.S. Army Corps of Engineers District office <https://www.usace.army.mil/locations.aspx> or the EPA.

Waters of the United States Home <https://epa.gov/wotus>

About Waters of the United States <https://epa.gov/wotus/about-waters-united-states>

Current Definition of Waters of the United States <https://epa.gov/wotus/current-implementation-waters-united-states>

Programs Utilizing the Definition of Waters of the United States <https://epa.gov/wotus/clean-water-act-programs-utilizing-definition-wotus>

Current Implementation of Waters of the United States <https://epa.gov/wotus/current-implementation-waters-united-states>

Training and Implementation Memos <https://epa.gov/wotus/training-and-implementation memos>

Implementation Tools and Methods <https://epa.gov/wotus/implementation-tools-and-methods>

Intention to Revise the Definition of Waters of the United States <https://epa.gov/wotus/intention-revise-definition-waters-united-states>

Public Outreach and Stakeholder Engagement Activities <https://epa.gov/wotus/public-outreach-and-stakeholder-engagement-activities>

Contact Us <https://epa.gov/wotus/forms/contact-us-about-navigable-waters-protection-rule> to ask a question, provide feedback, or report a problem.

United States Environmental Protection Agency

Discover.

Accessibility <https://epa.gov/accessibility>

Budget & Performance
<https://epa.gov/planandbudget>

Contracting <https://epa.gov/contracts>

EPA www Web Snapshot
<https://epa.gov/home/wwwepagov-snapshots>

Grants <https://epa.gov/grants>

No FEAR Act Data
<https://epa.gov/ocr/whistleblower-protections-epa-and-how-they-relate-non-disclosure-agreements-signed-epa-employees>

Privacy <https://epa.gov/privacy>

Privacy and Security Notice
<https://epa.gov/privacy/privacy-and-security-notice>

Connect.

Data.gov <https://www.data.gov/>

Inspector General <https://epa.gov/office-inspector-general/about-epas-office-inspector-general>

Jobs <https://epa.gov/careers>

Newsroom <https://epa.gov/newsroom>

Open Government <https://epa.gov/data>

Regulations.gov <https://www.regulations.gov/>

Subscribe <https://epa.gov/newsroom/email-subscriptions-epa-news-releases>

USA.gov <https://www.usa.gov/>

White House <https://www.whitehouse.gov/>

Ask.

Contact EPA <https://epa.gov/home/forms/contact-epa>

EPA Disclaimers <https://epa.gov/web-policies-and-procedures/epa-disclaimers>

Hotlines <https://epa.gov/home/epa-hotlines>

FOIA Requests <https://epa.gov/foia>

Frequent Questions <https://epa.gov/home/frequent-questions-specific-epa-programstopics>

Follow.

LAST UPDATED ON APRIL 26, 2021

United States Environmental Protection Agency

Department of the Army United States of America

Clean Water Act Jurisdiction
Following the U.S. Supreme Court's Decision
in
Rapanos v. United States &
Carabell v. United States

This memorandum provides guidance to EPA regions and U.S. Army Corps of Engineers ["Corps"] districts implementing the Supreme Court's decision in the consolidated cases *Rapanos v. United States* and *Carabell v. United States*[1] (herein referred to simply as "*Rapanos*") which address the jurisdiction over waters of the United States under the Clean Water Act.[2] The chart below summarizes the key points contained in this memorandum. This reference tool is not a substitute for the more complete discussion of issues and guidance furnished throughout the memorandum.

Summary of Key Points

The agencies will assert jurisdiction over the following waters:

- **Traditional navigable waters**
- **Wetlands adjacent to traditional navigable waters**

[1] 126 S. Ct. 2208 (2006).

[2] 33 U.S.C. §1251 *et seq*.

- **Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)**
- **Wetlands that directly abut such tributaries**

The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- **Non-navigable tributaries that are not relatively permanent**
- **Wetlands adjacent to non-navigable tributaries that are not relatively permanent**
- **Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary**

The agencies generally will not assert jurisdiction over the following features:

- **Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow)**
- **Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water**

The agencies will apply the significant nexus standard as follows:

- **A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters**
- **Significant nexus includes consideration of hydrologic and ecologic factors**

Background

Congress enacted the Clean Water Act ("CWA" or "the Act") "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[3] One of the mechanisms adopted by Congress to achieve that purpose is a prohibition on the discharge of any pollutants, including dredged or fill material, into "navigable waters" except in compliance with other specified sections of the Act.[4] In most cases, this means compliance with a permit issued pursuant to CWA §402 or §404. The Act defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source[,]"[5] and provides that "[t]he term 'navigable

[3] 33 U.S.C. § 1251(a).

[4] 33 U.S.C. § 1311(a), §1362(12)(A).

[5] 33 U.S.C. § 1362(12)(A).

waters' means the waters of the United States, including the territorial seas."[6]

In *Rapanos*, the Supreme Court addressed where the Federal government can apply the Clean Water Act, specifically by determining whether a wetland or tributary is a "water of the United States." The justices issued five separate opinions in *Rapanos* (one plurality opinion, two concurring opinions, and two dissenting opinions), with no single opinion commanding a majority of the Court.

The Rapanos Decision

Four justices, in a plurality opinion authored by Justice Scalia, rejected the argument that the term "waters of the United States" is limited to only those waters that are navigable in the traditional sense and their abutting wetlands.[7] However, the plurality concluded that the agencies' regulatory authority should extend only to "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters, and to "wetlands with a continuous surface connection to" such relatively permanent waters.[8]

Justice Kennedy did not join the plurality's opinion but instead authored an opinion concurring in the judgment vacating and remanding the cases to the

---

[6] 33 U.S.C. § 1362(7). *See also* 33 C.F.R. § 328.3(a) and 40 C.F.R. § 230.3(s).

[7] *Id.* at 2220.

[8] *Id.* at 2225-27.

Sixth Circuit Court of Appeals.[9] Justice Kennedy agreed with the plurality that the statutory term "waters of the United States" extends beyond water bodies that are traditionally considered navigable.[10] Justice Kennedy, however, found the plurality's interpretation of the scope of the CWA to be "inconsistent with the Act's text, structure, and purpose[,]" and he instead presented a different standard for evaluating CWA jurisdiction over wetlands and other water bodies.[11] Justice Kennedy concluded that wetlands are "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.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'"[12]

---

[9] *Id.* at 2236-52. While Justice Kennedy concurred in the Court's decision to vacate and remand the cases to the Sixth Circuit, his basis for remand was limited to the question of "whether the specific wetlands at issue possess a significant nexus with navigable waters." 126 S. Ct. at 2252. In contrast, the plurality remanded the cases to determine both "whether the ditches and drains near each wetland are 'waters,'" *and* "whether the wetlands in question are 'adjacent' to these 'waters' in the sense of possessing a continuous surface connection…." *Id.* at 2235.

[10] *Id.* at 2241.

[11] *Id.* at 2246.

[12] *Id.* at 2248. Chief Justice Roberts wrote a separate concurring opinion explaining his agreement with the plurality. *See* 126 S. Ct. at 2235-36.

Four justices, in a dissenting opinion authored by Justice Stevens, concluded that EPA's and the Corps' interpretation of "waters of the United States" was a reasonable interpretation of the Clean Water Act.[13]

When there is no majority opinion in a Supreme Court case, controlling legal principles may be derived from those principles espoused by five or more justices.[14] Thus, regulatory jurisdiction under the CWA exists over a water body if either the plurality's or Justice Kennedy's standard is satisfied.[15] Since *Rapanos*, the United States has filed pleadings in a number of cases interpreting the decision in this manner.

The agencies are issuing this memorandum in recognition of the fact that EPA regions and Corps districts need guidance to ensure that jurisdictional

---

[13] *Id.* at 2252-65. Justice Breyer wrote a separate dissenting opinion explaining his agreement with Justice Stevens' dissent. *See* 126 S. Ct. at 2266.

[14] *See Marks v. United States*, 430 U.S. 188, 193-94 (1977); *Waters v. Churchill*, 511 U.S. 661, 685 (1994) (Souter, J., concurring) (analyzing the points of agreement between plurality, concurring, and dissenting opinions to identify the legal "test … that lower courts should apply," under *Marks*, as the holding of the Court); *cf. League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2607 (2006) (analyzing concurring and dissenting opinions in a prior case to identify a legal conclusion of a majority of the Court); *Alexander v. Sandoval*, 532 U.S. 275, 281-282 (2001) (same).

[15] 126 S. Ct. at 2265 (Stevens, J., dissenting) ("Given that all four justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases — and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied — on remand each of the judgments should be reinstated if *either* of those tests is met.") (emphasis in original).

determinations, permitting actions, and other relevant actions are consistent with the decision and supported by the administrative record. Therefore, the 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. This approach is appropriate for a guidance document. The agencies intend to more broadly consider jurisdictional issues, including clarification and definition of key terminology, through rulemaking or other appropriate policy process.

Agency Guidance[16]

To ensure that jurisdictional determinations, administrative enforcement actions, and other relevant agency actions are consistent with the *Rapanos* decision, the agencies in this guidance address which waters are subject to CWA § 404 jurisdiction.[17] Specifically, this guidance identifies

---

[16] The CWA provisions and regulations described in this document contain legally binding requirements. This guidance does not substitute for those provisions or regulations, nor is it a regulation itself. It does not impose legally binding requirements on EPA, the Corps, or the regulated community, and may not apply to a particular situation depending on the circumstances. Any decisions regarding a particular water will be based on the applicable statutes, regulations, and case law. Therefore, interested persons are free to raise questions about the appropriateness of the application of this guidance to a particular situation, and EPA and/or the Corps will consider whether or not the recommendations or interpretations of this guidance are appropriate in that situation based on the statutes, regulations, and case law.

[17] This guidance focuses only on those provisions of the agencies' regulations at issue in *Rapanos* — 33 C.F.R. §§ 328.3(a)(1), (a)(5), and (a)(7); 40 C.F.R. §§ 230.3(s)(1), (s)(5), and (s)(7). This

those waters over which the agencies will assert jurisdiction categorically and on a case-by-case basis, based on the reasoning of the *Rapanos* opinions.[18] EPA and the Corps will continually assess and review the application of this guidance to ensure nationwide consistency, reliability, and predictability in our administration of the statute.

---

guidance does not address or affect other subparts of the agencies' regulations, or response authorities, relevant to the scope of jurisdiction under the CWA. In addition, because this guidance is issued by both the Corps and EPA, which jointly administer CWA § 404, it does not discuss other provisions of the CWA, including §§ 311 and 402, that differ in certain respects from § 404 but share the definition of "waters of the United States." Indeed, the plurality opinion in *Rapanos* noted that "… there is no reason to suppose that our construction today significantly affects the enforcement of §1342 … The Act does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" (emphasis in original) 126 S. Ct. 2208, 2227. EPA is considering whether to provide additional guidance on these and other provisions of the CWA that may be affected by the *Rapanos* decision.

[18] In 2001, the Supreme Court held that use of "isolated" non-navigable intrastate waters by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. *See Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). This guidance does not address *SWANCC*, nor does it affect the Joint Memorandum regarding that decision issued by the General Counsels of EPA and the Department of the Army on January 10, 2003. *See* 68 Fed. Reg. 1991, 1995 (Jan. 15, 2003).

1. Traditional Navigable Waters (i.e.,"(a)(1) Waters") and Their Adjacent Wetlands

Key Points

- **The agencies will assert jurisdiction over traditional navigable waters, which includes all the waters described in 33 C.F.R. § 328.3(a)(1), and 40 C.F.R. § 230.3 (s)(1).**
- **The agencies will assert jurisdiction over wetlands adjacent to traditional navigable waters, including over adjacent wetlands that do not have a continuous surface connection to traditional navigable waters.**

EPA and the Corps will continue to assert jurisdiction over "[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."[19] These waters are referred to in this guidance as traditional navigable waters.

The agencies will also continue to assert jurisdiction over wetlands "adjacent" to traditional navigable waters as defined in the agencies' regulations. Under EPA and Corps regulations and as

---

[19] 33 C.F.R. § 328.3(a)(1); 40 C.F.R. § 230.3(s)(1). The "(a)(1)" waters include all of the "navigable waters of the United States," defined in 33 C.F.R. Part 329 and by numerous decisions of the federal courts, plus all other waters that are navigable-in-fact (e.g., the Great Salt Lake, UT and Lake Minnetonka, MN).

used in this guidance, "adjacent" means "bordering, contiguous, or neighboring." Finding a continuous surface connection is not required to establish adjacency under this definition. The *Rapanos* decision does not affect the scope of jurisdiction over wetlands that are adjacent to traditional navigable waters because at least five justices agreed that such wetlands are "waters of the United States."[20]

2. Relatively Permanent Non-navigable Tributaries of Traditional Navigable Waters and Wetlands with a Continuous Surface Connection with Such Tributaries

Key Points

- **The agencies will assert jurisdiction over non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months).**
- **The agencies will assert jurisdiction over those adjacent wetlands that have a continuous surface connection to such tributaries (e.g., they are not separated by uplands, a berm, dike, or similar feature.)**

[20] *Id.* at 2248 (Justice Kennedy, concurring) ("As applied to wetlands adjacent to navigable-in-fact waters, 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.").

A non-navigable tributary[21] of a traditional navigable water is a non-navigable water body whose waters flow into a traditional navigable water either directly or indirectly by means of other tributaries. Both the plurality opinion and the dissent would uphold CWA jurisdiction over non-navigable tributaries that are "relatively permanent" — waters that typically (e.g., except due to drought) flow year-round or waters that have a continuous flow at least seasonally (e.g., typically three months).[22] Justice Scalia emphasizes that relatively permanent waters do not include tributaries "whose flow is 'coming and

---

[21] A tributary includes natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a traditional navigable water. Furthermore, a tributary, for the purposes of this guidance, is the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream). The flow characteristics of a particular tributary will be evaluated at the farthest downstream limit of such tributary (i.e., the point the tributary enters a higher order stream). It is reasonable for the agencies to treat the stream reach as a whole in light of the Supreme Court's observation that the phrase "navigable waters" generally refers to "rivers, streams, and other hydrographic features." 126 S. Ct. at 2222 (Justice Scalia, quoting *Riverside Bayview*, 474 U.S. at 131). The entire reach of a stream is a reasonably identifiable hydrographic feature. The agencies will also use this characterization of tributary when applying the significant nexus standard under Section 3 of this guidance.

[22] *See* 126 S. Ct. at 2221 n. 5 (Justice Scalia, plurality opinion) (explaining that "relatively permanent" does not necessarily exclude waters "that might dry up in extraordinary circumstances such as drought" or "seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months").

going at intervals ... broken, fitful.'"[23] Therefore, "relatively permanent" waters do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have continuous flow at least seasonally. However, CWA jurisdiction over these waters will be evaluated under the significant nexus standard described below. The agencies will assert jurisdiction over relatively permanent non-navigable tributaries of traditional navigable waters without a legal obligation to make a significant nexus finding.

In addition, the agencies will assert jurisdiction over those adjacent wetlands that have a continuous surface connection with a relatively permanent, non-navigable tributary, without the legal obligation to make a significant nexus finding. As explained above, the plurality opinion and the dissent agree that such wetlands are jurisdictional.[24] The plurality opinion indicates that "continuous surface connection" is a "physical connection requirement."[25] Therefore, a

---

[23] *Id.* (internal citations omitted).

[24] *Id.* at 2226-27 (Justice Scalia, plurality opinion).

[25] *Id.* at 2232 n.13 (referring to "our physical-connection requirement" and later stating that *Riverside Bayview* does not reject "the physical-connection requirement") and 2234 ("Wetlands are 'waters of the United States' if they bear the 'significant nexus' of physical connection, which makes them as a practical matter *indistinguishable* from waters of the United States.") (emphasis in original). *See also* 126 S. Ct. at 2230 ("adjacent" means "physically abutting") and 2229 (citing to *Riverside Bayview* as "confirm[ing] that the scope of ambiguity of 'the waters of the United States' is determined by a wetland's *physical connection* to covered waters…") (emphasis in original). A continuous surface connection does not require surface water

continuous surface connection exists between a wetland and a relatively permanent tributary where the wetland directly abuts the tributary (e.g., they are not separated by uplands, a berm, dike, or similar feature).[26]

3. Certain Adjacent Wetlands and Non-navigable Tributaries That Are Not Relatively Permanent

Key Points

- **The agencies will assert jurisdiction over non-navigable, not relatively permanent tributaries and their adjacent wetlands where such tributaries and wetlands have a significant nexus to a traditional navigable water.**
- **A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions**

---

to be continuously present between the wetland and the tributary. 33 C.F.R. § 328.3(b) and 40 C.F.R. § 232.2 (defining wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support … a prevalence of vegetation typically adapted for life in saturated soil conditions").

[26] While all wetlands that meet the agencies' definitions are considered adjacent wetlands, only those adjacent wetlands that have a continuous surface connection because they directly abut the tributary (e.g., they are not separated by uplands, a berm, dike, or similar feature) are considered jurisdictional under the plurality standard.

performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters.

- **"Similarly situated" wetlands include all wetlands adjacent to the same tributary.**
- **Significant nexus includes consideration of hydrologic factors including the following:**
  - **volume, duration, and frequency of flow, including consideration of certain physical characteristics of the tributary**
  - **proximity to the traditional navigable water**
  - **size of the watershed**
  - **average annual rainfall**
  - **average annual winter snow pack**
- **Significant nexus also includes consideration of ecologic factors including the following:**
  - **potential of tributaries to carry pollutants and flood waters to traditional navigable waters**
  - **provision of aquatic habitat that supports a traditional navigable water potential of wetlands to trap and filter pollutants or store flood waters**
  - **maintenance of water quality in traditional navigable waters**

- **The following geographic features generally are not jurisdictional waters:**
  - **swales or erosional features (e.g. gullies, small washes characterized by low volume, infrequent, or short duration flow)**
  - **ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water**

The agencies will assert jurisdiction over the following types of waters when they have a significant nexus with a traditional navigable water: (1) non-navigable tributaries that are not relatively permanent,[27] (2) wetlands adjacent to non-navigable tributaries that are not relatively permanent, and (3) wetlands adjacent to, but not directly abutting, a relatively permanent tributary (*e.g.*, separated from it by uplands, a berm, dike or similar feature).[28] As described below, the agencies will assess the flow characteristics and functions of the tributary itself, together with the functions performed by any wetlands adjacent to that tributary, to determine

---

[27] For simplicity, the term "tributary" when used alone in this section refers to non-navigable tributaries that are not relatively permanent.

[28] As described in Section 2 of this guidance, the agencies will assert jurisdiction, without the need for a significant nexus finding, over all wetlands that are both adjacent and have a continuous surface connection to relatively permanent tributaries. *See* pp. 6-7, supra.

whether collectively they have a significant nexus with traditional navigable waters.

The agencies' assertion of jurisdiction over non-navigable tributaries and adjacent wetlands that have a significant nexus to traditional navigable waters is supported by five justices. Justice Kennedy applied the significant nexus standard to the wetlands at issue in *Rapanos* and *Carabell*: "[W]etlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' 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.'"[29] While Justice Kennedy's opinion discusses the significant nexus standard primarily in the context of wetlands adjacent to non-navigable tributaries,[30] his opinion also addresses Clean Water Act jurisdiction over tributaries themselves. Justice Kennedy states that, based on the Supreme Court's decisions in

[29] *Id.* at 2248. When applying the significant nexus standard to tributaries and wetlands, it is important to apply it within the limits of jurisdiction articulated in *SWANCC*. Justice Kennedy cites *SWANCC* with approval and asserts that the significant nexus standard, rather than being articulated for the first time in *Rapanos*, was established in *SWANCC*. 126 S. Ct. at 2246 (describing *SWANCC* as "interpreting the Act to require a significant nexus with navigable waters"). It is clear, therefore, that Justice Kennedy did not intend for the significant nexus standard to be applied in a manner that would result in assertion of jurisdiction over waters that he and the other justices determined were not jurisdictional in *SWANCC*. Nothing in this guidance should be interpreted as providing authority to assert jurisdiction over waters deemed non-jurisdictional by *SWANCC*.

[30] 126 S. Ct. at 2247-50.

Riverside Bayview and *SWANCC*, "the connection between a non-navigable *water or wetland* may be so close, or potentially so close, that the Corps may deem the water or wetland a 'navigable water' under the Act. … Absent a significant nexus, jurisdiction under the Act is lacking."[31] Thus, Justice Kennedy would limit jurisdiction to those waters that have a significant nexus with traditional navigable waters, although his opinion focuses on the specific factors and functions the agencies should consider in evaluating significant nexus for adjacent wetlands, rather than for tributaries.

In considering how to apply the significant nexus standard, the agencies have focused on the integral relationship between the ecological characteristics of tributaries and those of their adjacent wetlands, which determines in part their contribution to restoring and maintaining the chemical, physical and biological integrity of the Nation's traditional navigable waters. The ecological relationship between tributaries and their adjacent wetlands is well documented in the scientific literature and reflects their physical proximity as well as shared hydrological and biological characteristics. The flow parameters and ecological functions that Justice Kennedy describes as most relevant to an evaluation of significant nexus result from the ecological inter-relationship between tributaries and their adjacent wetlands. For example, 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

---

[31] *Id.* at 2241 (emphasis added).

hold floodwaters, intercept sheet flow from uplands, and then release waters to tributaries in a more even and constant manner. Wetlands may also help to maintain more consistent water temperature in tributaries, which is important for some aquatic species. Adjacent wetlands trap and hold pollutants that may otherwise reach tributaries (and downstream navigable waters) including sediments, chemicals, and other pollutants. Tributaries and their adjacent wetlands provide habitat (e.g., feeding, nesting, spawning, or rearing young) for many aquatic species that also live in traditional navigable waters.

When performing a significant nexus analysis,[32] the first step is to determine if the tributary has any adjacent wetlands. Where a tributary has no adjacent wetlands, the agencies will consider the flow characteristics and functions of only the tributary itself in determining whether such tributary has a significant effect on the chemical, physical and biological integrity of downstream traditional navigable waters. A tributary, as characterized in Section 2 above, is the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream). For purposes of

[32] In discussing the significant nexus standard, Justice Kennedy stated: "The 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' …" 126 S. Ct. at 2248. Consistent with Justice Kennedy's instruction, EPA and the Corps will apply the significant nexus standard in a manner that restores and maintains any of these three attributes of traditional navigable waters.

demonstrating a connection to traditional navigable waters, it is appropriate and reasonable to assess the flow characteristics of the tributary at the point at which water is in fact being contributed to a higher order tributary or to a traditional navigable water. If the tributary has adjacent wetlands, the significant nexus evaluation needs to recognize the ecological relationship between tributaries and their adjacent wetlands, and their closely linked role in protecting the chemical, physical, and biological integrity of downstream traditional navigable waters.

Therefore, the agencies will consider the flow and functions of the tributary together with the functions performed by all the wetlands adjacent to that tributary in evaluating whether a significant nexus is present. Similarly, where evaluating significant nexus for an adjacent wetland, the agencies will consider the flow characteristics and functions performed by the tributary to which the wetland is adjacent along with the functions performed by the wetland and all other wetlands adjacent to that tributary. This approach reflects the agencies' interpretation of Justice Kennedy's term "similarly situated" to include all wetlands adjacent to the same tributary. Where it is determined that a tributary and its adjacent wetlands collectively have a significant nexus with traditional navigable waters, the tributary and all of its adjacent wetlands are jurisdictional. Application of the significant nexus standard in this way is reasonable because of its strong scientific foundation — that is, the integral ecological relationship between a tributary and its adjacent wetlands. Interpreting the phrase "similarly situated" to include all wetlands adjacent to the same tributary

is reasonable because such wetlands are physically located in a like manner (i.e., lying adjacent to the same tributary).

Principal considerations when evaluating significant nexus include the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to a traditional navigable water. In addition to any available hydrologic information (e.g., gauge data, flood predictions, historic records of water flow, statistical data, personal observations/records, etc.), the agencies may reasonably consider certain physical characteristics of the tributary to characterize its flow, and thus help to inform the determination of whether or not a significant nexus is present between the tributary and downstream traditional navigable waters. Physical indicators of flow may include the presence and characteristics of a reliable ordinary high water mark (OHWM) with a channel defined by bed and banks.[33] Other physical indicators of flow may include shelving, wracking, water staining, sediment sorting, and scour.[34] Consideration will also be given to certain

---

[33] *See* 33 C.F.R. § 328.3(e). The OHWM also serves to define the lateral limit of jurisdiction in a nonnavigable tributary where there are no adjacent wetlands. *See* 33 C.F.R. § 328.4(c). While EPA regions and Corps districts must exercise judgment to identify the OHWM on a case-by-case basis, the Corps' regulations identify the factors to be applied. These regulations have recently been further explained in Regulatory Guidance Letter (RGL) 05-05 (Dec. 7, 2005). The agencies will apply the regulations and the RGL and take other steps as needed to ensure that the OHWM identification factors are applied consistently nationwide.

[34] *See* Justice Kennedy's discussion of "physical characteristics," 126 S. Ct. at 2248-2249.

relevant contextual factors that directly influence the hydrology of tributaries including the size of the tributary's watershed, average annual rainfall, average annual winter snow pack, slope, and channel dimensions.

In addition, the agencies will consider other relevant factors, including the functions performed by the tributary together with the functions performed by any adjacent wetlands. One such factor is the extent to which the tributary and adjacent wetlands have the capacity to carry pollutants (e.g., petroleum wastes, toxic wastes, sediment) or flood waters to traditional navigable waters, or to reduce the amount of pollutants or flood waters that would otherwise enter traditional navigable waters.[35] The agencies will also evaluate ecological functions performed by the tributary and any adjacent wetlands which affect downstream traditional navigable waters, such as the capacity to transfer nutrients and organic carbon vital to support downstream foodwebs (e.g., macroinvertebrates present in headwater streams convert carbon in leaf litter making it available to species downstream), habitat services such as providing spawning areas for recreationally or commercially important species in downstream waters, and the extent to which the tributary and adjacent wetlands perform functions related to

---

[35] *See*, *generally*, 126 S. Ct. at 2248-53; *see also* 126 S. Ct. at 2249 ("Just as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries….") (citing to *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 524-25(1941)).

maintenance of downstream water quality such as sediment trapping.

After assessing the flow characteristics and functions of the tributary and its adjacent wetlands, the agencies will evaluate whether the tributary and its adjacent wetlands are likely to have an effect that is more than speculative or insubstantial on the chemical, physical, and biological integrity of a traditional navigable water. As the distance from the tributary to the navigable water increases, it will become increasingly important to document whether the tributary and its adjacent wetlands have a significant nexus rather than a speculative or insubstantial nexus with a traditional navigable water.

Accordingly, Corps districts and EPA regions shall document in the administrative record the available information regarding whether a tributary and its adjacent wetlands have a significant nexus with a traditional navigable water, including the physical indicators of flow in a particular case and available information regarding the functions of the tributary and any adjacent wetlands. The agencies will explain their basis for concluding whether or not the tributary and its adjacent wetlands, when considered together, have a more than speculative or insubstantial effect on the chemical, physical, and biological integrity of a traditional navigable water.

Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow) are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream

traditional navigable waters. In addition, ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters.[36] Even when not jurisdictional waters subject to CWA §404, these geographic features (e.g., swales, ditches) may still contribute to a surface hydrologic connection between an adjacent wetland and a traditional navigable water. In addition, these geographic features may function as point sources (i.e., "discernible, confined, and discrete conveyances"), such that discharges of pollutants to other waters through these features could be subject to other CWA regulations (e.g., CWA §§ 311 and 402).[37]

Certain ephemeral waters in the arid west are distinguishable from the geographic features described above where such ephemeral waters are tributaries and they have a significant nexus to downstream traditional navigable waters. For example, in some cases these ephemeral tributaries may serve as a transitional area between the upland environment and the traditional navigable waters. During and following precipitation events, ephemeral tributaries collect and transport water and sometimes sediment from the upper reaches of the landscape downstream to the traditional navigable waters. These ephemeral tributaries may provide habitat for wildlife and aquatic organisms in downstream

---

36 *See* 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).

37 33 U.S.C. § 1362(14).

traditional navigable waters. These biological and physical processes may further support nutrient cycling, sediment retention and transport, pollutant trapping and filtration, and improvement of water quality, functions that may significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters.

Documentation

As described above, the agencies will assert CWA jurisdiction over the following waters without the legal obligation to make a significant nexus determination: traditional navigable waters and wetlands adjacent thereto, non-navigable tributaries that are relatively permanent waters, and wetlands with a continuous surface connection with such tributaries. The agencies will also decide CWA jurisdiction over other non-navigable tributaries and over other wetlands adjacent to non-navigable tributaries based on a fact-specific analysis to determine whether they have a significant nexus with traditional navigable waters. For purposes of CWA §404 determinations by the Corps, the Corps and EPA are developing a revised form to be used by field regulators for documenting the assertion or declination of CWA jurisdiction.

Corps districts and EPA regions will ensure that the information in the record adequately supports any jurisdictional determination. The record shall, to the maximum extent practicable, explain the rationale for the determination, disclose the data and information relied upon, and, if applicable, explain what data or information received greater or lesser weight, and what professional judgment or assumptions were used

in reaching the determination. The Corps districts and EPA regions will also demonstrate and document in the record that a particular water either fits within a class identified above as not requiring a significant nexus determination, or that the water has a significant nexus with a traditional navigable water. As a matter of policy, Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.

All pertinent documentation and analyses for a given jurisdictional determination (including the revised form) shall be adequately reflected in the record and clearly demonstrate the basis for asserting or declining CWA jurisdiction.[38] Maps, aerial photography, soil surveys, watershed studies, local development plans, literature citations, and references from studies pertinent to the parameters being reviewed are examples of information that will assist staff in completing accurate jurisdictional determinations. The level of documentation may vary among projects. For example, jurisdictional

[38] For jurisdictional determinations and permitting decisions, such information shall be posted on the appropriate Corps website for public and interagency information.

determinations for complex projects may require additional documentation by the project manager.

s/Benjamin H. Grumbles
Benjamin H. Grumbles
Assistant Administrator
for Water
U.S. Environmental
Protection Agency

s/John Paul Wondley, Jr.
John Paul Wondley, Jr.
Assistant Secretary of
the Army (Civil Works)
Department of the Army

Filed March 31, 2019

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

CHANTELL and MICHAEL SACKETT, Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; *et al.*, Defendants.	Case No. 2:08-cv-00185-EJL ORDER

INTRODUCTION

Pending before the Court in the above entitled matter are Plaintiffs' Motion to Strike, Plaintiffs' Request for Judicial Notice, and the parties' Cross-Motions for Summary Judgment. (Dkt. 70, 103, 105.) The matters are ripe for the Court's consideration. Having fully reviewed the record herein, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. In the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, the Motions are decided on the record without oral argument.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Chantell and Michael Sackett filed the Complaint in this matter seeking declaratory and injunctive relief under the Clean Water Act (CWA), 33 U.S.C. § 1251, *et seq*., and the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq*. (Dkt. 1, 98.) The claims are made against Defendants the United States Environmental Protection Agency (EPA) and the EPA Administrator. The parties dispute whether certain real property owned by the Sacketts in northern Idaho contains wetlands subject to the CWA.

The Sacketts own an undeveloped 0.63 acre dirt lot parcel located at 1604 Kalispell Bay Road in Bonner County, Idaho north of Priest Lake. The Sacketts purchased the lot in 2004 intending to build a home. In May of 2007, the Sacketts had obtained building permits from Bonner County and began preparations for building by removing material from the lot and placing sand and gravel on the building site to create a stable grade. EPA officers came to the site on May 3, 2007 and stated they believed the site contained wetlands subject to CWA regulations and directed that work on the home stop until a permit was obtained from the United States Army Corps of Engineers (USACE). On November 26, 2007, the EPA issued its initial Administrative Compliance Order (Compliance Order) formally concluding the Sacketts' property contains wetlands subject to CWA regulations and that the Sacketts had illegally placed fill material on the property. (Dkt. 1, Att. A) (AR 23.) The Compliance Order directed Plaintiffs to remove the fill material by April 15, 2008 and conduct other

restoration measures by April 30, 2008. The Compliance Order stated that failure to comply may subject the Plaintiffs to administrative and civil penalties of up to $11,000 and $32,500 per day respectively.

Plaintiffs responded to the Compliance Order on April 1, 2008 contending the property is not a wetland nor subject to CWA jurisdiction. (Dkt. 1, Att. B) (AR 25.) The EPA disagreed with Plaintiffs' position but extended the deadlines for compliance to May 2008. (Dkt. 1, Att. C, D) (AR 26.)

On April 28, 2008, before the compliance deadline expired, Plaintiffs filed this action challenging the EPA's determination that the property is a wetland subject to CWA jurisdiction and seeking to declare the EPA's Compliance Order and amendments null and void. (Dkt. 1.) Thereafter, the EPA further extended the compliance deadlines.

On May 15, 2008, the EPA conducted a site visit to obtain additional research regarding its jurisdiction of the site. Following the site visit, but on the same day, the EPA issued an Amended Administrative Compliance Order (Amended Compliance Order) again concluding that the Sacketts' property contains wetlands subject to the CWA and directing Plaintiffs to remove the fill materials and replace the wetland soils. (AR 32.)

Defendants filed a Motion to Dismiss which was granted but later reversed on appeal and remanded for further proceedings. (Dkt. 21, 48, 49.) The case was then stayed at the request of the parties to facilitate settlement negotiations. (Dkt. 55, 57.) Those

negotiations were unsuccessful and the case was reopened and a new scheduling order was entered. (Dkt. 61.)

Plaintiffs then supplemented their Complaint adding new related facts which occurred after the operative pleading was filed. (Dkt. 88, 90, 94, 98, 101.) Plaintiffs also filed a Motion to Strike portions of the Administrative Record, a Request for Judicial Notice, and Notices of Supplemental Authority. (Dkt. 70, 76, 86, 113, 115.) Both sides have filed Cross-Motions for Summary Judgment. (Dkt. 103, 105.) The Court finds as follows.

DISCUSSION

1. Motion to Strike Materials From the Administrative Record

Judicial review pursuant to the APA is based solely on the "whole" administrative record in existence at the time of the agency's decision. 5 U.S.C. § 706; *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Friends of the Earth v. Hintz*, 800 F.2d 822, 828 (9th Cir. 1986). "The whole administrative record…consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position." *Thompson v. United States Dept. of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (internal citation omitted). That is to say, "'[t]he whole record' includes everything that was before the agency pertaining to the merits of the decision." *Portland Audubon Society v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993).

This review is "generally limited to examination of the administrative record as it existed when the agency made the relevant decision." *Cascadia Wildlands Proj. v. United States Forest Serv.*, 386 F.Supp.2d 1149, 1158 (D.Or. 2005) (citations omitted); *see also Citizens to Preserve Overton Park*, 401 U.S. at 419 (Review is "based on the full administrative record that was before the Secretary at the time he made his decision."); *Camp v. Pitts*, 411 U.S. at 142; *Southwest Ctr. for Biological Diversity v. United States Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014) ("review is limited to 'the administrative record already in existence, not some new record made initially in the reviewing court.'").[1]

Certain "narrow exceptions" allow supplementation of the administrative record with extra-record evidence in a few limited circumstances:

> (1) supplementation is necessary to determine if the agency has considered all factors and explained its decision; (2) the agency relied on documents not in the record; (3) supplementation is needed to explain technical terms or complex subjects; or (4) plaintiffs have shown bad faith on the part of the agency.

---

[1] Plaintiffs' Notice of Supplemental Authority argues *San Luis* requires exclusion of *post-hoc* expert testimony. (Dkt. 86.) Defendants maintain judicial review is based on the administrative record and the agency can rely upon its experts. (Dkt. 87.) The Court reviewed these filings and caselaw and has applied the legal standards as stated herein.

Fence Creek Cattle Co. v. United States Forest Serv., 602 F.3d 1125, 1131 (9th Cir. 2010); *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005). Although post-decision information may be admissible to the extent it can be "deemed a clarification or an explanation of the original information before the [a]gency," the Ninth Circuit has made clear that parties may not use "post-decision information as a new rationalization either for sustaining or attacking the agency's decision." *Hintz*, 800 F.2d at 829 (quoting *Assn. of Pac. Fisheries v. EPA*, 615 F.2d 794, 811–12 (9th Cir. 1980)). Material outside the record may, however, be considered when it is needed to explain "technical terms or complex subject matter." *Sw. Ctr. Biological Diversity*, 100 F.3d at 1450; *see also Bunker Hill Co. v. EPA*, 572 F.2d 1286, 1292 (9th Cir. 1977) (permitting extra-record evidence because it was "merely explanatory of the original record" and "[n]o new rationalization of the [agency's decision] was offered"); *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980) (Consideration of outside materials only for background information or to ascertain whether the agency "fully explicated its course of conduct or grounds of decision.").

The administrative record submitted by the government is entitled to a presumption of completeness which can be rebutted by clear evidence to the contrary. *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993); *McCrary v. Gutierrez*, 495 F.Supp. 2d 1038, 1041 (N.D. Cal. 2007) ("An agency's designation and certification of the administrative record is…entitled to a presumption of administrative regularity."). Plaintiffs have the burden of rebutting the presumption of completeness by clear evidence.

Bar MK, 994 F.2d at 740; *Pinnacle Armor, Inc. v. United States*, 923 F.Supp.2d 1226, 1232 (E.D. Cal. 2013).

On January 15, 2013, the Defendants filed the Administrative Record in this case. (Dkt. 62.) Plaintiffs seek to strike the following materials from the Administrative Record: 1) the July 2008 Memorandum, 2) the June 2008 StreamStats data, and 3) pre-decisional information.[2] Plaintiffs argue these materials were not considered by, within the knowledge of, nor before the agency decision-makers when the May 15, 2008 Amended Compliance Order was issued and, therefore, should be stricken. (Dkt. 70, 84.) Defendants maintain the items are properly included in the Administrative Record because the information was known to and considered by, either directly or indirectly, the decision-makers in issuing the Amended Compliance Order. (Dkt. 73.)

A. The July 2008 Memo

EPA wetland ecologist John Olson conducted the May 15, 2008 site visit of the Plaintiffs' property and neighboring properties to determine whether the property contained wetlands. (AR 31.) At the conclusion of the site visit, late in the day on May 15th, Mr. Olson telephoned the EPA's Regional Counsel, Ankur Tohan, in Seattle, Washington to relay his findings and conclusions that the property

[2] Plaintiffs' originally sought to strike fourteen documents but have withdrawn their objections to seven of the documents, namely: 3, 4, 8, 29-31, and 33. (Dkt. 70 and Dkt. 84 at 4, n. 1.) Plaintiffs now seek to strike only documents 1, 2, 5-7, 34, and 35. (Dkt. 70.) The Court previously took the Motion to Strike under advisement. (Dkt. 94.)

did in fact contain wetlands and was subject to CWA jurisdiction. (Dkt. 73-3, Dec. Olson.) On the same day, Mr. Tohan discussed the matter with the then Acting Director of EPA's Office of Ecosystems, Tribal, and Public Affairs, Richard Parkin, who ultimately signed the Amended Compliance Order. (Dkt. 73-2, Dec. Parkin) (Dkt. 73-3.) The Declaration of Michael Szerlog, Mr. Olson's supervisor, further establishes that Mr. Olson's findings from the site visit were relayed to Mr. Parkin. (Dkt. 73-1, Dec. Szerlog.) Mr. Parkin's Declaration confirms he was briefed by staff and signed the Amended Compliance Order on May 15, 2008 "based on the recommendations of my staff." (Dkt. 73-2 at ¶ 4.)

Thereafter, on July 1, 2008, Mr. Olson completed a report (the "July 2008 Memo") memorializing his conclusions from the site visit. The Government included the July 2008 Memo in the Administrative Record. (AR 35.)

Plaintiffs argue the July 2008 Memo contains new after-the-fact data and rationales to justify the Amended Compliance Order and, therefore, should not be included in the Administrative Record. (Dkt. 70, 84.) Defendants maintain the July 2008 Memo is properly included because it summarizes Mr. Olson's May 15, 2008 site inspection and conclusions and is based on information either learned during the inspection or Mr. Olson's general knowledge and experience all of which was considered when deciding to issue the Amended Compliance Order. (Dkt. 73.) The Court finds the July 2008 Memo is properly included in the Administrative Record.

The July 2008 Memo is clearly a formalized summation of Mr. Olson's field notes which were made contemporaneously with the May 15, 2008 site inspection. (AR 31, 33, 35.) Mr. Olson relayed his findings and conclusions from the site visit to his superiors who, in turn, decided to issue the Amended Compliance Order based on those findings. (Dkt. 73-1, 73-2, 73-3.) The information contained and referred to in the July 2008 Memo was available at the time of the site inspection, part of Mr. Olson's general knowledge, and was considered by Mr. Olson as well as the EPA's decision-makers when they issued the Amended Compliance Order. *Thompson*, 885 F.2d at 555; *Nat. Res. Def. Council v. Gutierrez*, No. C 01-0421 JL, 2008 WL 11358008, at *6 (N.D. Cal. Jan. 14, 2008) (interpreting "all documents directly or indirectly considered" to encompass the underlying work and recommendations of agency subordinates). For these reasons, the Court denies the Motion to Strike the July 2008 Memo. Regardless, even without the July 2008 Memo, the EPA's determination in this case is supported by the record and was not arbitrary or capricious.

If the July 2008 Memo is included in the Administrative Record, Plaintiffs request to be allowed to submit a Declaration from Ray Kagel of his expert opinion regarding the EPA's determination. (Dkt. 84 at 9.) Defendants oppose the request, arguing the Declaration is Mr. Kagel's interpretation of the EPA's decision and characterization of certain documents and not properly included in the Administrative Record. (Dkt. 85.) The Court grants Plaintiffs' request.

Mr. Kagel's Declaration was completed May 24, 2013, years after the EPA's May 15, 2008 site visit, Amended Compliance Order, and July 2008 Memo. (Dkt. 84-1, Dec. Kagel.) It therefore is not part of the Administrative Record as material that was before the decision-maker at the time the Amended Compliance Order was issued. *Sw. Ctr. Biological Diversity*, 100 F.3d at 1450; *Wildearth Guardians v. United States Forest Serv.*, 713 F.Supp.2d 1243, 1256 (D. Colo. 2010) ("[A] party moving to complete the record must show with clear evidence the context in which materials were considered by decision makers in the relevant decision making process."). The Declaration does, however, fall within the "relevant factors" and technical/scientific explanation exceptions and may be properly considered for those limited purposes. *Fence Creek Cattle*, 602 F.3d at 1030.

Extra-record evidence may be admitted under the relevant factors exception "only to help the court understand whether the agency complied with the APA's requirement that the agency's decision be neither arbitrary nor capricious." *See San Luis*, 747 F.3d at 993. "[T]he exception does not permit district courts to use extra-record evidence to judge the wisdom of the agency's action" or as "a basis for questioning the agency's scientific analysis or conclusions." *Id.*; *see also Asarco*, 616 F.2d at 1160 ("Consideration of [extra-record] evidence to determine the correctness or wisdom of the agency's decision is not permitted."). Similarly, supplemental materials necessary to explain technical terms or complex subject matter may also be considered. *San Luis*, 747 F.3d 993.

In his Declaration, Mr. Kagel discusses the importance of following the USACE's 1987 Wetlands Delineation Manual's methodology when making a wetland determination and states the EPA failed to do so in this case. (Dkt. 84-1, Dec. Kagel.) Specifically, Mr. Kagel states the EPA did not properly collect data concerning the soil's surface saturation, inundation, or ponding; excavate a soil pit to examine the soil saturation; or physically examine the property to determine if it had a peat layer at least 30 centimeters thick. The Court finds that information in the Declaration falls within the two narrow exceptions by providing background material and explanations of technical terms relating to the Court's evaluation of the integrity of the EPA's analysis in this case as to whether it considered all of the relevant factors and explained its decision. Therefore, the Court grants Plaintiffs request and has considered Mr. Kagel's Declaration for those limited purposes. The Court has not used Mr. Kagel's Declaration as a basis for questioning the correctness or wisdom of the EPA's analysis or conclusions. *Id.*

B. The June 2008 StreamStats Data

Plaintiffs seek to strike the June 23, 2008 StreamStats Ungaged Site Report from the Administrative Record, arguing it was not within the EPA's general or specific knowledge and is *post hoc* information. (Dkt. 84 at 4.)

The July 2008 Memo included flow data for an unnamed stream obtained from the United States Geological Survey's (USGS) web-based Geographic Information System site called "StreamStats." (AR 35 at 344.) Defendants included the StreamStats Report

in the Administrative Record. (AR 34.) While the StreamStats Report was generated after the May 15, 2008 site visit, the Court finds the information used from StreamStates in the July 2008 Memo — i.e. the estimate mean annual flow data for an unnamed stream — was within the EPA's indirect or direct general knowledge at the time it issued the Amended Compliance Order.

The StreamStats' data is an estimate of the stream's *annual* flow, not flow specific to June 23, 2008. The information simply provides detail to Mr. Olson's knowledge, field observations from the site visit, and conclusion that without the Kalispell Bay Road and the artificially constructed channel, the entire flow from the unnamed stream would have flown out of the south end of the Plaintiffs' property into Priest Lake. (AR 31, 34.) Regardless, even without the actual flow data from the StreamStats Report, Mr. Olson's field notes clearly demonstrate that he reached his conclusions regarding the stream's flow from the south end of the property during the site visit on May 15, 2008 and his Declaration establishes that he relayed the same to the decision-makers. (Dkt. 73-3) (AR 31.)

C. The Pre-Decisional Information in the July 2008 Memo

Plaintiffs seek to strike five documents from the Administrative Record which, they argue, are cited and/or discussed only in the July 2008 Memo but there is no indication the materials were considered by the decision-maker prior to issuing the Amended Compliance Order. (Dkt. 70, 84.) Defendants argue the documents are properly included because they

were available to and considered, either directly or indirectly, by the decision-makers prior to and/or on May 15, 2008. (Dkt. 73.)

The documents in question are the 1995 Ecosystem Conservation Strategy for the Idaho Panhandle Peatlands, a 1995 Groundwater Thesis-Freeman, the Priest River Subbasin Assessment and Total Maximum Daily Load, the 2005 Idaho Wetland Conservation Prioritization Plan, and a Fisheries Management Plan for 2007 to 2012. (AR 1, 2, 5-7.) The materials are cited in the July 2008 Memo. (AR 35.) Mr. Olson states he consider these materials, along with other information, in reaching his conclusions which he conveyed to his supervisors who made the final decision to issue the Amended Compliance Order. (Dkt. 73.)

The Court finds these documents are properly included in the Administrative Record. They existed prior to and were either directly or indirectly relied upon by the EPA when it made its decision to issue the Amended Compliance Order. (Dkt. 73.) The Motion to Strike is denied as to these materials.

Relatedly, the parties agree to include two pages of the concluding section from the 1995 Groundwater Thesis-Freeman in the Administrative Record. (Dkt. 84 at 9) (Dkt. 85 at 2, n. 2.) The Administrative Record is therefore supplemented with those additional pages. (Dkt. 84, Att. B.)

2. Requests for Judicial Notice

Plaintiffs have filed a Request asking the Court to take judicial notice of 1) the 1987 USACE's Wetland

Delineation Manual (1987 Manual) and 2) the May 2010 Regional Supplement to the 1987 Manual. (Dkt. 76, 77.) The Defendants do not oppose the request. (Dkt. 85 at 2, n. 1.) Therefore, the Request for Judicial Notice is granted.

3. Cross-Motions for Summary Judgment

In their Cross-Motions for Summary Judgment, the parties dispute whether the EPA correctly concluded that the Plaintiffs' property contains wetlands that are "waters of the United States" subject to CWA jurisdiction. Plaintiffs argue the EPA's determination is not in accord with its guidelines and manuals and/or not supported by the Administrative Record. (Dkt. 103.) Defendants maintain the record supports their conclusion. (Dkt. 105.)

A. The Standard of Review

Judicial review of the EPA's decision in this case is governed by the APA, under which the Court may set aside an agency's decision only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A decision is arbitrary and capricious where the agency "relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010) (citation omitted).

"The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43. An agency's decision is valid where it considered the relevant factors and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the agency's conclusions. *Ctr. for Biological Diversity v. Natl. Highway Traffic Safety Admin.*, 538 F.3d 1172, 1193 (9th Cir. 2008); *Nw. Ecosystem Alliance v. United States Fish & Wildlife Serv.*, 475 F.3d 1136, 1145 (9th Cir. 2007) (citation omitted). The Court gives the most deference when reviewing an agency's technical analysis, judgment, and scientific determinations on matters within its expertise. *Nat. Res. Defense Council, Inc. v. Pritzker*, 828 F.3d 1125, 1139 (9th Cir. 2016). It does not, however, "rubber-stamp...administrative decisions that [we] deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Id.* (quoting *Ocean Advocates v. United States Army Corps of Engineers*, 402 F.3d 846, 859 (9th Cir. 2005)). Additionally, agencies are entitled to deference in their interpretation of their own regulations. *Siskiyou Reg. Educ. Proj. v. United States Forest Serv.*, 565 F.3d 545, 554-555 (9th Cir. 2009) (citations omitted). The Court's review of an agency's regulatory interpretation is to ensure the interpretation is not plainly erroneous or inconsistent with the regulation, even if the regulation is susceptible to more than one meaning.

APA claims may be resolved via summary judgment pursuant to the standard set forth in Rule

56. *See Nw. Motorcycle Assn. v. United States Dept. Agric.*, 18 F.3d 1468, 1472 (9th Cir. 1994). Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See* Fed. R. Civ. P. 56(a). The APA requires that the agency action be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *League of Wilderness Defs. Blue Mnts. Biodiversity Proj. v. Allen*, 615 F.3d 1122, 1130 (9th Cir. 2010) (quoting 5 U.S.C. § 706(2)(A)).

B. The Clean Water Act

The CWA was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and prohibits the discharge of pollutants, including dredged or fill material, into "navigable waters" without a permit unless otherwise authorized under the CWA. 33 U.S.C. §§ 1251(a) and 1344. Section 404 of the CWA prohibits the discharge of "dredged or fill material" into navigable waters without a permit issued by the USACE. 33 U.S.C. § 1344. The EPA is authorized to issue administrative compliance orders requiring violators to comply with certain provisions of the CWA. 33 U.S.C. § 1319. Violators are also subject to significant criminal and civil penalties. *Id.* The EPA has jurisdiction under the CWA over "navigable waters."

The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Agency regulations further interpret "waters of the United States" to generally include:

- All traditional navigable waters, interstate waters, and the territorial seas;
- All impoundments of jurisdictional waters;
- All "other waters" such as lakes, ponds, and sloughs the "use, degradation or destruction of which could affect interstate or foreign commerce";
- Tributaries of traditional navigable waters, interstate waters, the territorial seas, impoundments, or "other waters"; and,
- Wetlands adjacent to traditional navigable waters, interstate waters, the territorial seas, impoundments, tributaries, or "other waters" (other than waters that are themselves wetlands).

33 C.F.R. § 328.3(a)(1)-(7); 40 C.F.R. § 230.3.[3]

[3] In 2015, USACE and EPA proposed The Clean Water Rule (the "2015 Rule") which amended the definition of "waters of the United States." *See* 80 Fed. Reg. 37,054, 2015 WL 3930456 (Jun. 29, 2015) (to be codified at 33 C.F.R. § 328). The 2015 Rule and its effective date have been the subject of many legal challenges. *See Natl. Assn. of Mfrs. v. Dept. of Defense*, 138 S.Ct. 617 (2018); *Puget Soundkeeper Alliance, et al. v. Andrew Wheeler, et al.*, No. C15-1342-JCC (W.D. Wash. Nov. 26, 2018). The 2015 Rule is currently subject to a preliminary injunction in 28 states including Idaho. 84 Fed. Reg. 4154-01, 2019 WL 587080 (Feb. 14, 2019). Therefore, the pre-2015 Rule Regulations and Guidance are currently in effect in Idaho.

C. The EPA Properly Concluded the Property Contains Wetlands Subject to CWA Jurisdiction

The EPA concluded the Sacketts violated § 301 of the CWA finding they are persons who discharged a pollutant from a point source into waters of the United States without the requisite permit. (AR 32.) Specifically, the EPA determined the Plaintiffs' property is subject to the CWA because it contains wetlands adjacent to Priest Lake, a traditionally "navigable water," and, additionally, their property is wetland adjacent to a tributary and similarly situated to other wetlands and has a significant nexus to Priest Lake. (AR 32.)

Plaintiffs challenge the EPA's determinations arguing their property is not a wetland subject to the CWA and, regardless, it is exempt from jurisdiction. (Dkt. 103, 109.) Defendants maintain the EPA's conclusions are correct. (Dkt. 105, 112.) For the reasons stated below, the Court finds the EPA's conclusions and determinations were not arbitrary or capricious and are supported by the record.

1. Plaintiffs' Property Contains Wetlands

Wetlands are defined as "those areas that are 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" and they "generally include swamps, marshes, bogs, and similar areas." 33 C.F.R. § 328.3; 40 C.F.R. §§ 122.2 & 232.2; (AR 32.)

Plaintiffs argue the Administrative Record does not support the EPA's wetlands delineation here and that the EPA failed to use the diagnostic criteria required by the 1987 Manual. Defendants maintain the EPA's wetlands determination is supported in the record and in accord with the 1987 Manual. The Court finds the EPA's determination was not arbitrary or capricious and is supported by the record.

The EPA's determinations and conclusions were made consistent with the 1987 Manual. (Dkt. 76-1, Ex. A) (Dkt. 77.) The 1987 Manual describes technical guidelines and methods using a multiparameter approach to identify and delineate wetlands for purposes of § 404 of the CWA. (Dkt. 76-1, Ex. A at vii, 1, 9-10.) When making wetland determinations "under normal circumstances," the manual directs the agency to consider and look for positive evidence of three parameters/indicators: hydrophytic vegetation, hydric soils, and wetland hydrology. (Dkt. 76-1, Ex. A at v, 3.) Where, however, land has been altered by recent human activities or natural events, the 1987 Manual provides alternative methods for making wetlands determinations. (Dkt. 76-1, Ex. A at 4, 73-82.) The EPA properly interpreted and employed the 1987 Manual's alternate wetlands determination method in this case.

Plaintiffs' property had clearly been altered due to recent human activities — namely the placement of fill material and possibly removal of vegetation and/or construction of a drainage system. (AR 10, 11, 12, 15, 21, 31, 35.) The EPA therefore correctly used the alterative procedures to examine the property for the presence of the three wetlands parameters in making

its determination. (Dkt. 76-1, Ex. A at 75-82) (removal of vegetation: aerial photography, onsite inspection, previous site inspections, adjacent vegetation, public); (soils: recent presence of fill material, removal of surface soil, soil surveys, prior soil data); (hydrology: ditching/channels/diversions, prior hydrology of the area, field indicators, aerial photography, historical records, public) (AR 10, 11, 15, 31, 33, 35.). The EPA conducted a site-specific field examination of the property and its findings and conclusions were made in accord with the applicable standards and procedures for making wetlands determinations. *Id.* Moreover, the EPA explained its conclusions and fully considered all of the relevant factors consistent with making the wetlands determination including its findings concerning the presence of the wetlands indicators and parameters as directed by the 1987 Manual.

The EPA's determination that Plaintiffs' property is a wetland is reasonable and supported by the materials in the Administrative Record. Plaintiffs' property was originally part of a large wetland complex called the Kalispell Bay Fen. (AR 10, 12, 29, 31, 35, 39.) That complex is now divided by Kalispell Bay Road. (AR 10, 11, 15, 21, 31, 35.) North of the road, the wetland remains mainly undisturbed. (AR 10.) Plaintiffs' property is located south of the road and has now been mostly filled and removed of vegetation. (AR 10, 11, 15.) During the EPA's field visits to Plaintiffs' property, however, the EPA personnel were still able to observe the presence of the three wetlands indicators. (AR 15, 31, 35.) The areas of the property where native soil had been removed but not yet filled were inundated/saturated/ponded

evidencing that the hydrology of the site was consistent with wetlands. (AR 15, 31.) EPA inspectors also observed strips of land on the property that had not yet been filled which revealed the presence of wetland soils. (AR 10, 11, 15, 21, 31.) There is also evidence of a shallow subsurface flow between the wetlands north of Kalispell Bay Road and the Plaintiffs' property. (AR 31, 35.) Further, the land abutting Plaintiffs' property to the east and west are properties with evident wetland characteristics; including wetland vegetation. (AR 10, 15, 21.) The land north of Kalispell Bay Road also contains wetland vegetation. (AR 15, 31.) These findings support the EPA's conclusion that Plaintiffs' property is a wetland.

Based on the foregoing, and as discussed elsewhere in this Order, the Court finds the EPA's determination that the property contains wetlands was not arbitrary or capricious and is supported by the materials in the Administrative Record.

2. Plaintiffs' Property is Adjacent to a Traditional Navigable Water

Defendants argue Plaintiffs' property is a "water of the United States" because it is a wetland adjacent to a traditional navigable body of water; namely, Priest Lake. Plaintiffs contend their property is not adjacent to Priest Lake because it is separated by dry land containing a road and a developed residential neighborhood. Plaintiffs further assert the EPA's interpretation of the definition and regulations for adjacency are erroneous and not entitled to deference.

The Administrative Record supports the EPA's determination that Priest Lake is a traditional navigable water. A "traditional navigable water" includes "[a]ll waters which are currently used, 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). Priest Lake has been and is used in interstate commerce. (AR 31, 35.)

The Administrative Record also supports the EPA's conclusion that Plaintiffs' land is adjacent to Priest Lake. "Adjacent" is defined as "bordering, contiguous, or neighboring" a water previously identified as a "water of the United States" including waters separated by "constructed dikes or barriers, natural river berms, beach dunes, and the like." 33 C.F.R. § 328.3(c)(1); 40 C.F.R. §§ 230.3 & 232.2. The EPA interprets that definition using an EPA Guidance Document issued on December 2, 2008 (Guidance Document) which applies Supreme Court caselaw to the definition of "waters of the United States." *See* Clean Water Act Jurisdiction Following the U.S. Decision in *Rapanos v. United States & Carabell v. United States*, (Dec. 2, 2008).[4]

---

[4] Plaintiffs' Second Notice of Supplemental Authority argues an October 2016 Regulatory Guidance Letter (No. 16-01) supersedes prior guidance documents and is binding on the USACE. (Dkt. 115.) The Court disagrees. The current guidance document is dated December 2, 2008 and can be found at: https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

Under the Guidance Document, wetlands are considered "adjacent" where one of three criteria are satisfied: 1) they have an unbroken surface or shallow sub-surface connection to jurisdictional waters, even if intermittent; 2) they are physically separated from jurisdictional waters by man-made barriers and the like; or 3) their proximity to a jurisdictional water is reasonably close so as to support a science-based inference of an ecological interconnection. *See* Guidance Document at 5-6. The EPA argues all three criteria are present here. The Court finds the EPA's interpretation, application, and determination of "adjacency" as to the Plaintiffs' property here was reasonable and supported by the record.

As to the first criteria, the record supports EPA's conclusion that there is a shallow subsurface connection between Plaintiffs' wetlands and Priest Lake. (AR 11, 15, 21, 31, 35.) The field inspections showed Plaintiffs' property is elevated above Priest Lake with a sufficient flow-gradient slope and highly permeable soil making it reasonable to conclude water flows from Plaintiffs' property downgradient to Priest Lake. The field notes further show the presence of high groundwater, indicative of the wetland's shallow subsurface connection to a downgradient waterbody, and drainage pipes to the south providing flow directly into Priest Lake. The property is also part of a larger wetlands complex that historically drained directly into Priest Lake but now does so through visible drainage mechanisms commonly used to discharge groundwater to a downgradient waterbody. (AR 11, 15, 21, 31, 35.)

As to the second criteria, the record supports the EPA's adjacency determination despite there being dry land to the south of Plaintiffs' property separating it from Priest Lake. The Old Schneider Road and residential properties lie between Plaintiffs' property and Priest Lake. Plaintiffs' property and the lake, however, do not have to be directly abutting in order to be "adjacent." "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.'" 33 C.F.R. § 328.3(c); 40 C.F.R. § 230.3; *see also* Guidance Document at 5. Here, the photographs, maps, field observations, and other materials contained in the record show the entire wetlands complex, which historically included Plaintiffs' property, extended to Priest Lake. (AR 10, 15, 29, 31, 35-39.) Plaintiffs' property is now physically separated from the lake only by man-made barriers. The record shows that without the man-made barriers, water would flow from the property directly into Priest Lake. In addition, there is a strong indication of a shallow subsurface flow from Plaintiffs' property to Priest Lake through the drainage pipes.

Finally, as to the third criteria, the EPA reasonably concluded the Plaintiffs' property is "reasonably close" and, therefore, adjacent to Priest Lake. Plaintiffs' Property is located only 300 feet from the shore of Priest Lake. *See* 33 C.F.R. § 328.3(c); 40 C.F.R. § 230.3 (Adjacent includes lands that are "neighboring."). It is also higher than Priest Lake and with evidence of a clear shallow subsurface flow from Plaintiffs' property downgradient into Priest Lake. The record, therefore, supports the EPA's conclusion that the reasonably close proximity of Plaintiffs'

property to Priest Lake gives rise to a science-based inference that Plaintiffs' wetlands have an ecological interconnection with the jurisdictional waters of Priest Lake. Guidance Document at 5-6; (AR 15, 31, 35.)

The EPA's determination that the property is adjacent to Priest Lake is reasonable and supported in the record. Because Plaintiffs' property is a wetlands adjacent to Priest Lake, a traditional navigable water, the EPA's conclusion that it has jurisdiction under the CWA is not arbitrary or capricious.

3. Plaintiffs' Property is Adjacent to a Jurisdictional Tributary and Similarly Situated with Other Wetlands that Together Have A Significant Nexus to Priest Lake

Defendants assert the EPA correctly determined the property is also subject CWA jurisdiction because it is adjacent to a jurisdictional tributary and similarly situated with other wetlands that, together, have a significant nexus to Priest Lake. Plaintiffs disagree arguing their property is not adjacent to a tributary or similarly situated to other wetlands nor is there a significant nexus with Priest Lake.

a. Plaintiffs' Property is Adjacent to a Jurisdictional Tributary and Similarly Situated with Other Wetlands

The EPA concluded the Plaintiffs' property is adjacent to an unnamed tributary that flows into

Priest Lake and is similarly situated with other wetlands. The EPA's conclusion is reasonable and supported by the Administrative Record.

North of Plaintiffs' property is the Kalispell Bay Fen which is a large wetlands complex that drains into an unnamed tributary running along the north side of Kalispell Bay Road, to Kalispell Creek, and then to Priest Lake. (AR 31, 33, 35, 36.) Prior to the construction of the road and tributary, the Kalispell Bay Fen was a unified wetlands complex that extended to Priest Lake and included Plaintiffs' property and the wetlands abutting Plaintiffs' property on the east and west. (AR 6, 15, 29, 31, 35, 39.) As discussed throughout this Order, the record shows evidence of hydrological and ecological connections between Plaintiffs' property, the surrounding wetlands, and the tributary which support the EPA's conclusions of adjacency and similarly situated wetlands.

Plaintiffs' property is physically separated from the tributary to the north by Kalispell Bay Road but is "reasonably close" in proximity being only thirty feet away. 33 C.F.R. § 328.3(c); 40 C.F.R. § 230.3; Guidance Document at 5-6. The road and tributaries are "man-made barriers" that do not defeat adjacency. *Id.* Further, Plaintiffs' property remains hydrologically connected to the wetlands despite the construction of the road and tributary through a shallow subsurface flow. The photographs, maps, and field observations in the Administrative Record show the presence of high groundwater on Plaintiffs' property indicative of a shallow subsurface flow connecting it to the other wetlands as well as evidence

of wetland soils and vegetation similar to the abutting wetlands. (AR 15, 21, 31, 35, 36, 39.) Without the construction of the tributary and road north of Plaintiffs' property, the entire flow from the wetlands complex historically did and would still flow out of the south end of Plaintiffs' property into Priest Lake. (AR 6, 15, 29, 31, 33, 35, 39.) For these reasons, the Court finds the Administrative Record supports the EPA's conclusion that Plaintiffs' property is adjacent to the tributary and/or similarly situated to other wetlands.

b. There is a Significant Nexus to Priest Lake

The EPA concluded Plaintiffs' property is subject to CWA jurisdiction because it, and other similarly situated wetlands and adjacent jurisdictional tributaries, have a significant nexus to Priest Lake. The Court finds the EPA's determination was not arbitrary or capricious and is supported by substantial evidence in the Administrative Record.

In determining whether wetlands that are isolated or adjacent only to a non-navigable tributary of a navigable waterway constitute "waters of the United States," the Court applies the "significant nexus test." *See Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999 (9th Cir. 2007).[5] Under that test, CWA jurisdiction over wetlands "depends upon the existence of a significant nexus between the

[5] Plaintiffs' arguments to the contrary have been rejected. (Dkt. 113); *see United States v. Robertson*, 875 F.3d 1281 (9th Cir. 2017) ("*City of Healdsburg* remains valid and binding precedent."); *United States v. HVI Cat Canyon, Inc.*, 314 F.Supp.3d 1049, 1057 (C.D. Cal. 2018).

wetlands in question and navigable waters in the traditional sense." *Rapanos v. United States*, 547 U.S. 715, 779 (2006) (J. Kennedy concurring).

> [A] significant nexus exists "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.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters."

City of Healdsburg, 496 F.3d at 1000 (quoting *Rapanos*, 547 U.S. at 779–80). Thus, to be a water subject to regulation under the CWA, the water or wetland must 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. The test has been extended to tributaries. *See United States v. Robertson*, 875 F.3d 1281, 1293 (9th Cir. 2017).

The EPA's significant nexus determination here is not arbitrary or capricious. Substantial evidence in the record shows that Plaintiffs' property, the adjacent tributary, and the similarly situated wetlands have significant physical and biological impacts on Priest Lake. (AR 31, 33, 35.) The Kalispell Bay Fen wetland complex, which Plaintiffs' property was historically part of and remains connected to, is rare in northern Idaho and provides significant hydrological, biological, and ecological influences on Priest Lake by contributing to base flow; providing

flow augmentation and flow attenuation; improving water quality through sediment retention which benefits fish; providing invertebrate inputs supporting fish and wildlife species; and improving fish movement. (AR 31, 35.)

The record establishes the existence of a hydrologic connection in the form of a substantial shallow subsurface flow between the wetlands, Plaintiffs' property, the adjacent tributary and the lake which significantly improves the physical, biological, and ecological integrity of Priest Lake. (AR 31, 33, 35.) Plaintiffs' property, the wetlands, and the tributary all lie at a higher elevation than the lake with a sufficient gradient for drainage from those areas down into the lake. (AR 31, 35.) The highly permeable soil surrounding the lake facilitates the groundwater drainage. During the field visit, the EPA observed substantial flow through the outlet stream north of the road into Kalispell Creek; high groundwater indicating a subsurface connection to a downgradient waterbody; and drainage pipes south of the property discharging groundwater into the lake. (AR 31, 33, 35.) Historical records also show flows from the wetlands complex went into the lake. (AR 14, 21, 31, 32, 33, 35, 36.)

This hydrologic connection significantly impacts Priest Lake by contributing base flow and improving water quality through sediment retention and nutrient uptake to runoff before it moves through the shallow subsurface flow into the lake. (AR 31, 35.) It also provides flow attenuation by retaining runoff and upstream shallow groundwater flow during high flow

periods which are released slowly into the lake. (AR 31, 35.)

There are also significant impacts on the biological and ecological characteristics of the lake through improved habitat and lifecycle support functions for fish and other species, increased water quality, and enrichment of the foodweb. During the field visit, the EPA observed trout and beaver activity in the adjacent outlet stream and creek, noting the presence of habitat for fish/spawn areas as well as substantial aquatic and wildlife habitat diversity. (AR 31, 33, 35.) The connectivity established in the record between the outlet stream, Plaintiffs' property, and the abutting wetlands to Priest Lake serves important functions in the form of fish movement to and from the lake, contributions to base flow with fisheries benefit, and providing substantial invertebrate production which supports the fish, wildlife, and overall foodweb for species in the area. (AR 31, 33, 35.)

Based on the foregoing, the Court finds the record supports the EPA's determination that Plaintiffs' property, adjacent tributary, and the similarly situated wetlands have a significant nexus to Priest Lake. The physical, hydrological, biological, and ecological impacts and connections established in the record provide significant and "critical functions" to the integrity of Priest Lake by improving water quality, flow attenuation, and benefits to fish and wildlife. *See Rapanos*, 547 U.S. at 779. Therefore, the EPA's conclusion that Plaintiffs' property is subject to CWA jurisdiction was not arbitrary or capricious and is supported by substantial evidence in the record.

4. Other Adjacent Wetlands Do Not Exempt Plaintiffs' Property

Plaintiffs contend that even if the property has wetlands, their property is excluded from the definition of jurisdictional wetlands because the land is adjacent to other wetlands; i.e., the Kalispell Bay Fen. (Dkt. 103.) Defendants counter arguing the existence of other adjacent wetlands does not negate CWA jurisdiction. (Dkt. 105 at 27.)

Plaintiffs rely on the language in the regulation's definition of the term "waters of the United States" which includes "wetlands adjacent to waters (*other than waters that are themselves wetlands*.)" 33 C.F.R. § 328.3(a)(7) (emphasis added); 40 C.F.R. § 230.3(s)(7). Plaintiffs' argument, however, has been rejected. *Universal Welding & Fabrication, Inc. v. United States Army Corps. of Engineers*, No. 4:14-cv-00021, 2015 WL 12661934 (D. Alaska Oct. 1, 2015) *affirmed by* 708 Fed. Appx. 301 (9th Cir. 2017). While this Court is not bound by the *Universal Welding* decision, the Court agrees with its reasoning and conclusion that the correct interpretation of the regulation's definition is that jurisdiction cannot be based solely on adjacency to another wetland; not, as Plaintiffs argue, that adjacency to other wetlands is an exclusion or exception to jurisdiction.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED as follows:

1) Plaintiffs' Motion to Strike (Dkt. 70) is **DENIED**.

2) Plaintiffs' Requests for Judicial Notice (Dkt. 76) is **GRANTED**.

3) Plaintiffs' Motion for Summary Judgment (Dkt. 103) is **DENIED**.

4) Defendants' Motion for Summary Judgment (Dkt. 105) is **GRANTED**.

DATED: March 31, 2019

/s/ Edward J. Lodge
Honorable Edward J. Lodge
U.S. District Judge

APPROVED JURISDICTIONAL DETERMINATION FORM
U.S. Army Corps of Engineers

This form should be completed by following the instructions provided in Section IV of the JD Form Instructional Guidebook.

SECTION I: BACKGROUND INFORMATION

A. REPORT COMPLETION DATE FOR APPROVED JURISDICTIONAL DETERMINATION (JD): 5/15/08

B. DISTRICT OFFICE, FILE NAME, AND NUMBER: CHANTELL / MICHAEL SACKETT
EPA DOCKET CWA-10-008-0014

C. PROJECT LOCATION AND BACKGROUND INFORMATION:

State: Idaho County/parish/borough: Bonner City:

Center coordinates of site (lat/long in degree decimal format): Lat. ○Pick List, Long. ○Pick List.
NE 1/4 Sec 12
T60N. R5W, B.M

Universal Transverse Mercator:

Name of nearest waterbody: UNNAMED TRIBUTARY TO KALISPELL CREEK

Name of nearest Traditional Navigable Water (TNW) into which the aquatic resource flows: PRIEST LAKE

Name of watershed or Hydrologic Unit Code (HUC):

□ Check if map/diagram of review area and/or potential jurisdictional areas is/are available upon request.

□ Check if other sites (e.g., offsite mitigation sites, disposal sites, etc...) are associated with this action and are recorded on a different JD form.

D. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):

□ Office (Desk) Determination. Date:

■ Field Determination. Date(s): 5/15/08

SECTION II: SUMMARY OF FINDINGS

A. RHA SECTION 10 DETERMINATION OF JURISDICTION.

There Pick List "*navigable waters of the U.S.*" within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area. [*Required*]

□ Waters subject to the ebb and flow of the tide.

□ Waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. Explain:

B. CWA SECTION 404 DETERMINATION OF JURISDICTION.

There Pick List "*waters of the U.S.*" within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area. [*Required*]

1. Waters of the U.S.

a. Indicate presence of waters of U.S. in review area (check all that apply): [1]

□ TNWs, including territorial seas

[1] Boxes checked below shall be supported by completing the appropriate sections in Section III below.

□ Wetlands adjacent to TNWs
□ Relatively permanent waters[2] (RPWs) that flow directly or indirectly into TNWs
□ Non-RPWs that flow directly or indirectly into TNWs
□ Wetlands directly abutting RPWs that flow directly or indirectly into TNWs
■ Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs
□ Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs
□ Impoundments of jurisdictional waters
□ Isolated (interstate or intrastate) waters, including isolated wetlands

b. Identify (estimate) size of waters of the U.S. in the review area:

Non-wetland waters: linear feet: width (ft) and/or acres.

Wetlands: / acres.

c. Limits (boundaries) of jurisdiction based on: Pick List

Elevation of established OHWM (if known):

[2] For purposes of this form, an RPW is defined as a tributary that is not a TNW and that typically flows year-round or has continuous flow at least "seasonally" (e.g., typically 3 months).

2. Non-regulated waters/wetlands (check if applicable):[3]

□ Potentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional. Explain:

SECTION III: CWA ANALYSIS

A. TNWs AND WETLANDS ADJACENT TO TNWs

The agencies will assert jurisdiction over TNWs and wetlands adjacent to TNWs. If the aquatic resource is a TNW, complete Section III.A.1 and Section III.D.1. only; if the aquatic resource is a wetland adjacent to a TNW, complete Sections III.A.1 and 2 and Section III.D.1.; otherwise, see Section III.B below.

1. TNW

Identify TNW:

Summarize rationale supporting determination:

2. Wetland adjacent to TNW

Summarize rationale supporting conclusion that wetland is "adjacent":

[3] Supporting documentation is presented in Section III.F.

B. CHARACTERISTICS OF TRIBUTARY (THAT IS NOT A TNW) AND ITS ADJACENT WETLANDS (IF ANY):

This section summarizes information regarding characteristics of the tributary and its adjacent wetlands, if any, and it helps determine whether or not the standards for jurisdiction established under *Rapanos* have been met.

The agencies will assert jurisdiction over non-navigable tributaries of TNWs where the tributaries are "relatively permanent waters" (RPWs), i.e. tributaries that typically flow year-round or have continuous flow at least seasonally (e.g., typically 3 months). A wetland that directly abuts an RPW is also jurisdictional. If the aquatic resource is not a TNW, but has year-round (perennial) flow, skip. to Section III.D.2. If the aquatic resource is a wetland directly abutting a tributary with perennial flow, skip to Section III.D.4.

A wetland that is adjacent to but that does not directly abut an RPW requires a significant nexus evaluation. Corps districts and EPA regions will include in the record any available information tit at documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.

If the waterbody[4] is not an RPW, or a wetland directly abutting an RPW, a JD will require additional data to determine if the waterbody has a significant nexus with a TNW. If the tributary has adjacent wetlands, the significant nexus evaluation must consider the tributary in combination with all of its adjacent wetlands. This significant nexus evaluation that combines, for analytical purposes, the tributary and all of its adjacent wetlands is used whether the review area identified in the JD request is the tributary, or its adjacent wetlands, or both. If the JD covers a tributary with adjacent wetlands, complete Section III.B.l for the tributary, Section III.B.2 for any onsite wetlands, and Section III.B.3 for all wetlands adjacent to that tributary, both onsite and offsite. The determination whether a significant nexus exists is determined in Section III.C below.

1. **Characteristics of non-TNWs that flow directly or indirectly into TNW**

   (i) General Area Conditions:
   Watershed size: Pick List 2-3 SQ. MILES
   Drainage area: Pick List
   Average annual rainfall: inches
   Average annual snowfall: inches

[4] Note that the Instructional Guidebook contains additional information regarding swales, ditches, washes, and erosional features generally and in the arid West.

(ii) Physical Characteristics:

(a) Relationship with TNW:

□ Tributary flows directly into TNW.

■ Tributary flows through Pick List 1 tributaries before entering TNW.

Project waters are Pick List river miles from TNW. 1/4-1/2 MILE
Project waters are Pick List river miles from RPW. 0
Project waters are Pick List aerial (straight) miles from TNW. 300'
Project waters are Pick List aerial (straight) miles from RPW. 30'
Project waters cross or serve as state boundaries. Explain:

Identify flow route to TNW[5]:
UNNAMED TRIBUTARY TO KALISPELL CREEK TO PRIEST LAKE
Tributary stream order, if known:
2ND

(b) General Tributary Characteristics (check all that apply):
Tributary is:
■ Natural - FROM WETLAND NORTH OF KALISPELL BAY ROAD UPSTREAM TO 1ST ORDER TRIBUTARIES

[5] Flow route can be described by identifying, e.g., tributary a, which flows through the review area, to flow into tributary b, which then flows into TNW.

■ Artificial (man-made). Explain: - FROM WETLAND TO KALISPELL CREEK (OUTLET CHANNEL CONSTRUCTED ALONG NORTH SIDE OF ROAD)
□ Manipulated (man-altered). Explain:

Tributary properties with respect to top of bank (estimate):
Average width: 6 feet
Average depth: 2 feet
Average side slopes: Pick List

Primary tributary substrate composition (check all that apply):
□ Silts ■ Sands □ Concrete
□ Cobbles ■ Gravel □ Muck
□ Bedrock □ Vegetation. Type/% cover:
□ Other. Explain:

Tributary condition/stability [e.g., highly eroding, sloughing banks]. Explain:
Presence of run/riffle/pool complexes. Explain:
Tributary geometry: Pick List
Tributary gradient (approximate average slope): %

(c) Flow:
Tributary provides for: Pick List
PERENNIALFOW PER USGS MAP AND SITE CONDITIONS AND MIKE DOHERTY

Estimate average number of flow events in review area/year: Pick List

Describe flow regime:

Other information on duration and volume:

Surface flow is: Pick List.
Characteristics:

Subsurface flow: Pick List. Explain findings: ·

□ Dye (or other) test performed:

Tributary has (check all that apply):

■ Bed and banks
□ OHWM[6] (check all indicators that apply):

- □ clear, natural line impressed on the bank
- □ changes in the character of soil
- □ shelving
- □ vegetation matted down, bent, or absent
- □ leaf litter disturbed or washed away
- □ the presence of litter and debris
- □ destruction of terrestrial vegetation
- □ the presence of wrack line
- ■ sediment sorting
- ■ scour
- ■ multiple observed or predicted flow events

[6] A natural or man-made discontinuity in the OHWM docs not necessarily sever jurisdiction (e.g., where the stream temporarily flows underground, or where the OHWM bas been removed by development or agricultural practices). Where there is a break in the OHWM that is unrelated to the waterbody's flow regime (e.g., flow over a rock outcrop or through a culvert), the agencies will look for indicators of flow above and below the break.

■ sediment deposition
□ water staining
□ other (list):

■ abrupt change in plant community

□ Discontinuous OHWM.[7] Explain:

If factors other than the OHWM were used to determine lateral extent of CWA jurisdiction (check all that apply):

□ High Tide Line indicated by:
- □ oil or scum line along shore objects
- □ fine shell or debris deposits (foreshore)
- □ physical markings/ characteristics
- □ tidal gauges
- □ other (list):

□ Mean High Water Mark indicated by:
- □ survey to available datum;
- □ physical markings;
- □ vegetation lines/changes in vegetation types.

(iii) Chemical Characteristics:

Characterize tributary (e.g., water color is clear, discolored, oily film; water quality; general watershed characteristics, etc.).

Explain:

Identify specific pollutants, if known:

(iv) Biological Characteristics. Channel supports (check all that apply):

■ Riparian corridor. Characteristics (type, average width): 2'

[7] lbid.

- ■ Wetland fringe. Characteristics: [unintelligible handwriting]
- ■ Habitat for:
  - □ Federally Listed species. Explain findings:
  - ■ Fish/spawn areas. Explain findings: - OBSERVED TROUT
  - □ Other environmentally-sensitive species. Explain findings:
  - ■ Aquatic/wildlife diversity. Explain findings: - TRIB. FLOWS THROUGH LARGE WELTAND AREA WITH SUBSTANTIAL HABITAT DIVERSITY

2. Characteristics of wetlands adjacent to non-TNW that flow directly or indirectly into TNW

(i) Physical Characteristics:

(a) General Wetland Characteristics:

Properties:

Wetland size: 3/4 acres

Wetland type. Explain: - ELIMINATED THROUGH EXCAVATION / FILL

Wetland quality. Explain: -

Project wetlands cross or serve as state boundaries. Explain:

(b) General Flow Relationship with Non-TNW:

Flow is: Pick List. Explain:

Surface flow is: Pick List

Characteristics:

Subsurface flow: Pick List. Explain findings: SEE FIELD NOTES (5/15/08)
□ Dye (or other) test performed:

(c) Wetland Adjacency Determination with Non-TNW:
□ Directly abutting
■ Not directly abutting
■ Discrete wetland hydrologic connection. Explain: SHALLOW SUBSURFACE FLOW (SEE FIELD NOTES 5/15/08)
□ Ecological connection. Explain:
■ Separated by berm/barrier. Explain: SEPARATED BY ROAD

(d) Proximity (Relationship) to TNW
Project wetlands are Pick List river miles from TNW. 1/4-1/2 MILE
Project waters are Pick List aerial (straight) miles from TNW. 300'
Flow is from: Pick List. UNNAMED TRIBUTARY TO KALISPELL CK TO PRIEST LAKE
Estimate approximate location of wetland as within the Pick List floodplain.

(ii) Chemical Characteristics:
Characterize wetland system (e.g., water color is clear, brown, oil film on surface; water quality; general watershed characteristics; etc.). Explain: WETLAND ELIMINATED
Identify specific pollutants, if known:

(iii) Biological Characteristics. Wetland supports (check all that apply):
WETLAND ELIMINATED
- □ Riparian buffer. Characteristics (type, average width):
- □ Vegetation type/percent cover. Explain:
- □ Habitat for:
  - □ Federally Listed species. Explain findings:
  - □ Fish/spawn areas. Explain findings:
  - □ Other environmentally-sensitive species. Explain findings:
  - □ Aquatic/wildlife diversity. Explain findings:

3. Characteristics of all wetlands adjacent to the tributary (if any)
All wetland(s) being considered in the cumulative analysis: Pick List
Approximately (35) acres in total are being considered in the cumulative analysis.

For each wetland, specify the following:

Directly abuts? (Y/N)	Size (in acres)	Directly abuts? (Y/N)	Size (in acres)
Y	35		

Summarize overall biological, chemical and physical functions being performed:
SEE FIELD NOTES (5/15/08)

C. SIGNIFICANT NEXUS DETERMINATION

A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of a TNW. For each of the following situations, a significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of a TNW. Considerations when evaluating significant nexus include, but are not limited to the volume, duration, and frequency of the flow of water in the tributary and its proximity to a TNW, and the functions performed by the tributary and all its adjacent wetlands. It is not appropriate to determine significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW). Similarly, the fact an adjacent wetland ties within or outside of a floodplain is not solely determinative of significant nexus.

Draw connections between the features documented and the effects on the TNW, as identified in the *Rapanos* Guidance and discussed in the Instructional Guidebook. Factors to consider include; for example:

- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to carry pollutants or flood waters to TNWs, or to reduce the amount of pollutants or flood waters reaching a TNW? YES

- Does the tributary, in combination with its adjacent wetlands (if any), provide habitat and lifecycle support functions for fish and other species, such as feeding, nesting, spawning, or rearing young for species that are present in the TNW? YES
- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to transfer nutrients and organic carbon that support downstream foodwebs? YES
- Does the tributary, in combination with its adjacent wetlands (if any), have other relationships to the physical, chemical, or biological integrity of the TNW?

Note: the above list of considerations is not inclusive and other functions observed or known to occur should be documented below:

1. Significant nexus findings for non-RPW that has no adjacent wetlands, and flows directly or indirectly into TNWs. Explain findings of presence or absence of significant nexus below, based on the tributary itself, then go to Section III.D:

2. Significant nexus findings for non-RPW and its adjacent wetlands, where the non-RPW flows directly or indirectly into TNWs. Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D:

3. Significant nexus findings for wetlands adjacent to an RPW but that do not directly abut the RPW. Explain findings of presence or absence of significant nexus below, based on the tributary in

combination with all of its adjacent wetlands, then go to Section III.D: SEE FIELD NOTES (5/15/08)

D. DETERMINATIONS OF JURISDICTIONAL FINDINGS. THE SUBJECT WATERS/ WETLANDS ARE (CHECK ALL THAT APPLY):

1. **TNWs and Adjacent Wetlands.** Check all that apply and provide size estimates in review area:
   □ TNWs: linear feet width (ft), Or, acres.
   □ Wetlands adjacent to TNWs: acres.

2. RPWs that flow directly or indirectly into TNWs.
   □ Tributaries of TNWs where tributaries typically flow year-round are jurisdictional. Provide data and rationale-indicating that tributary is perennial:
   □ Tributaries of TNW where tributaries have continuous flow "seasonally" (e.g.; typically three months each year) are jurisdictional. Data supporting this conclusion is provided at Section III.B. Provide rationale indicating that tributary flows seasonally:

   Provide estimates for jurisdictional waters in the review area (check all that apply):
   □ Tributary waters: linear feet width (ft).
   □ Other non-wetland waters: acres.
   Identify type(s) of waters:

3. Non-RPWs[8] that flow directly or indirectly into TNWs.

□ Waterbody that is not a TNW or an RPW, but flows directly or indirectly into a TNW, and it has a significant nexus with a TNW is jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional waters within the review area (check all that apply):

□ Tributary waters: linear feet width (ft).

□ Other non-wetland waters: acres.

Identify type(s) of waters:

4. Wetlands directly abutting an RPW that flow directly or indirectly into TNWs.

□ Wetlands directly abut RPW and thus are jurisdictional as adjacent wetlands.

□ Wetlands directly abutting an RPW where tributaries typically flow year-round. Provide data and rationale indicating that tributary is perennial in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW:

□ Wetlands directly abutting an RPW where tributaries typically flow "seasonally." Provide data indicating that tributary is seasonal in Section III.B and rationale in Section III.D.2, above. Provide rationale indicating that wetland is directly . abutting an RPW:

---

[8] See Footnote # 3.

Provide acreage estimates for jurisdictional wetlands in the review area: acres.

5. **Wetlands adjacent to but not directly abutting an RPW that flow directly or indirectly into TNWs.**
   - ■ Wetlands that do not directly abut an RPW, but when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

   Provide acreage estimates for jurisdictional wetlands in the review area: acres.

6. **Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs.**
   - □ Wetlands adjacent to such waters, and have when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

   Provide estimates for jurisdictional wetlands in the review area: acres.

7. **Impoundments of jurisdictional waters.**[9] As a general rule, the impoundment of a jurisdictional tributary remains jurisdictional.

---

[9] To complete the analysis refer to the key in Section III.D.6 of the Instructional Guidebook.

- □ Demonstrate that impoundment was created from "waters of the U.S.," or
- □ Demonstrate that water meets the criteria for one of the categories presented above (1-6), or
- □ Demonstrate that water is isolated with a nexus to commerce (see E below).

E. ISOLATED [INTERSTATE OR INTRA-STATE] WATERS, INCLUDING ISOLATED WETLANDS, THE USE, DEGRADATION OR DESTRUCTION OF WHICH COULD AFFECT INTERSTATE COMMERCE, INCLUDING ANY SUCH WATERS (CHECK ALL THAT APPLY):[10]

- □ which are or could be used by interstate or foreign travelers for recreational or other purposes.
- □ from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.
- □ which are or could be used for industrial purposes by industries in interstate commerce.
- □ Interstate isolated waters. Explain:
- □ Other factors. Explain:

[10] Prior to asserting or declining CWA jurisdiction based solely on this category, Corps Districts will elevate the action to Corps and EPA HQ for review consistent with the process described in the Corps/EPA *Memorandum Regarding CWA Act Jurisdiction Following Rapanos.*

Identify water body and summarize rationale supporting determination:

Provide estimates for jurisdictional waters in the review area (check all that apply):

- □ Tributary waters: linear feet width (ft).
- □ Other non-wetland waters: acres.
  - Identify type(s) of waters:
- □ Wetlands: acres.

F. NON-JURISDICTIONAL WATERS, INCLUDING WETLANDS (CHECK ALL THAT APPLY):

- □ If potential wetlands were assessed within the review area, these areas did not meet the criteria in the 1987 Corps of Engineers Wetland Delineation Manual and/or appropriate Regional Supplements.
- □ Review area included isolated waters with no substantial nexus to interstate (or foreign) commerce.
  - □ Prior to the Jan 2001 Supreme Court decision in "*SWANCC*," the review area would have been regulated based solely on the "Migratory Bird Rule" (MBR).
- □ Waters do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction. Explain:
- □ Other: (explain, if not covered above):

Provide acreage estimates for non-jurisdictional waters in the review area, where the sole potential basis of jurisdiction is the MBR factors (i.e., presence of migratory birds, presence of endangered species, use of water for irrigated

agriculture), using best professional judgment (check all that apply):

- □ Non-wetland waters (i.e., rivers, streams): linear feet width (ft).
- □ Lakes/ponds: acres.
- □ Other non-wetland waters: acres. List type of aquatic resource:
- □ Wetlands: acres.

Provide acreage estimates for non-jurisdictional waters in the review area that do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction (check all that apply):

- □ Non-wetland waters (i.e., rivers, streams): linear feet, width (ft).
- □ Lakes/ponds: acres.
- □ Other non-wetland waters: acres. List type of aquatic resource:
- □ Wetlands: acres.

SECTION IV: DATA SOURCES.

A. SUPPORTING DATA. Data reviewed for JD (check all that apply - checked items shall be included in case file and, where checked and requested, appropriately reference sources below):

- □ Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant:
- □ Data sheets prepared/submitted by or on behalf of the applicant/consultant.
  - □ Office concurs with data sheets/delineation report.
  - □ Office does not concur with data sheets/delineation report.
- □ Data sheets prepared by the Corps:

- □ Corps navigable waters' study:
- □ U.S. Geological Survey Hydrologic Atlas:
  - □ USGS NHD data.
  - □ USGS 8 and 12 digit HUC maps.
- ■ U.S. Geological survey map(s). Cite scale & quad name: PRIEST LAKE SW, ID 1996 1:24,000
- □ USDA Natural Resources Conservation Service Soil Survey. Citation:
- ■ National wetlands inventory map(s). Cite name: SAME AS USGS
- □ State/Local wetland inventory map(s):
- □ FEMA/FIRM map(s):
- □ 100-year Floodplain Elevation is: (National Geodectic Vertical Datum of 1929)
- ■ Photographs: ■ Aerial (Name & Date): 1932/ CURRENT GOOGLE EARTH IMAGERY
  or □ Other (Name & Date):
- □ Previous determination(s). File no. and date of response letter: (CDE PRIEST LAKE JD - SUPPORTS INTERSTATE COMMERCE)
- □ Applicable/supporting case law:
- □ Applicable/supporting scientific literature:
- □ Other information (please specify):

B. ADDITIONAL COMMENTS TO SUPPORT JD:

SEE FIELD NOTES (5/15/08)

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101-3140

Reply to: ETPA-083

May 15, 2008

SENT VIA CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Chantell and Michael Sackett
P.O. Box 425
Nordman, ID 83848-0368

Re: ***In the Matter of Chantell and Michael Sackett***
Amended Administrative Compliance Order,
EPA Docket No. CWA-10-2008-0014

Dear Mr. and Ms. Sackett:

With this letter, the U.S. Environmental Protection Agency (EPA) is issuing an amended administrative compliance order ("Amended Compliance Order") that supersedes and replaces the order issued to you on November 26, 2007. The Amended Compliance Order is issued pursuant Sections 308 and 309(a) of the Clean Water Act, 33 U.S.C. §§ 1318 and 1319(a). EPA is issuing this order in connection with the unauthorized placement of fill material into wetlands at your property located at

1604 Kalispell Bay Road near Kalispell Creek, Bonner County, Idaho ("Site").

It has become apparent that the amended dates for compliance detailed in my letter to you dated May 1, 2008, may not result in successful establishment of re-vegetated wetland species at the Site because of the short growing season in northern Idaho. Please note that this Amended Compliance Order removes the obligation that wetland vegetation be re-planted at the Site by July 1, 2008. In addition, the Amended Compliance Order extends the date for removal of fill material and replacement of original wetland soils to October 31, 2008 (ahead of the winter season when removal of fill material and replacement of wetland soils would be infeasible). Since replanting will not be required in the 2008 growing season, there is no need to require the immediate removal of fill material. This Amended Compliance Order will account for the ecological constraints in northern Idaho and will also remove the need for immediate judicial resolution of EPA's motion to dismiss the complaint (Case No. CV-08-0185-EJL) you filed on April 28, 2008.

Successful compliance with the Amended Compliance Order does not preclude EPA from bringing a formal enforcement action for penalties or further injunctive relief to address the Clean Water Act violations associated with your property located at the Site. Please also be aware that failure to comply with the Amended Compliance Order may subject you to civil penalties of up to $32,500 per day for each violation, administrative penalties of up to $11,000 per day for each day during which the violation

continues or a civil action in Federal court for injunctive relief, pursuant to Section 309 of the CWA, 33 U.S.C. §1319.

Should you have any questions concerning this matter, please have your attorney contact Mr. Ankur Tohan directly at 206-553-1796.

Sincerely,

/s/ Richard B. Parkin
Richard Parkin, Acting Director
Office of Ecosystems, Tribal,
and Public Affairs

cc: H. Reed Hopper, Pacific Legal Foundation
Damien Schiff, Pacific Legal Foundation
Leslie Weatherhead, Witherspoon, Kelley, Davenport & Toole
Greg Taylor, ID Dept. of Water Resources
Beth Reinhart, U.S. Army Corps of Engineers

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101

In the Matter of:	)	
	)	
CHANTELL AND	)	DOCKET NO.
MICHAEL SACKETT	)	CWA-10-2008-0014
	)	
Bonner County, Idaho	)	AMENDED
	)	COMPLIANCE
Respondents.	)	ORDER
	)	

The following FINDINGS AND CONCLUSIONS are made and ORDER issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by sections 308 and 309(a) of the Clean Water Act ("the Act"), 33 U.S.C. §§ 1318 and 1319(a). This authority has been delegated to the Regional Administrator, Region 10, and has been duly redelegated to the undersigned Director of the Office of Ecosystems, Tribal and Public Affairs. This AMENDED COMPLIANCE ORDER ("Order"') supersedes and replaces the Compliance Order issued under Docket Number CWA-10-2008-0014 to Respondents on November 26, 2007.

I. FINDINGS AND CONCLUSIONS

1.1 Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into waters of the United States by any person, except as authorized by a permit issued pursuant to section 402 or 404 of the Act, 33 U.S.C. §§ 1342 or 1344. The unpermitted discharge of any pollutant from a point source constitutes a violation of section 301(a) of the Act, 33 U.S.C. § 1311(a). Section 502(12), 33 U.S.C. § 1362(12), defines the term "discharge of any pollutant" to include "any addition of any pollutant to navigable waters from any point source." "Navigable waters" are defined as "waters of the United States." 33 U.S.C. § 1362(7).

1.2 Respondents Chantell and Michael Sackett (hereinafter collectively "Respondents") are "persons" within the meaning of Sections 301(a) and 502(5) of the Act, 33 U.S.C. §§ 1311(a) and 1362(5).

1.3 Respondents own, possess, or control real property identified as 1604 Kalispell Bay Road near Kalispell Creek, Bonner County, Idaho; and located within Section 12, Township 60 North, Range 5 West, Boise Meridian ("Site"). The Site is adjacent to Priest Lake, and bounded by Kalispell Bay Road on the north and Old Schneider Road on the south.

1.4 The Site contains wetlands within the meaning of 40 C.F.R. § 230.3(t) and 33 C.F.R. § 328.3(b); and the wetlands meet the criteria for jurisdictional wetlands in the 1987 "Federal Manual for Identifying and Delineating Jurisdictional Wetlands."

1.5 The Site's wetlands are adjacent to Priest Lake within the meaning of 40 C.F.R. § 230.3(s)(7) and 33 C.F.R. § 328.3(a)(7). 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.

1.6 In April and May, 2007, at times more fully known to Respondents, Respondents and/or persons acting on their behalf discharged fill material into wetlands at the Site. Respondents filled approximately one half acre.

1.7 Upon information and belief, Respondents and/or persons acting on their behalf used heavy equipment to place the fill material into the wetlands. The heavy equipment used to fill these waters is a "point source" within the meaning of section 502(14) of the Act, 33 U.S.C. § 1362(14).

1.8 The fill material that Respondents and/or persons acting on their behalf caused to be discharged included, among other things, dirt and rock, each of which constitutes a "pollutant" within the meaning of section 502(6) of the Act, 33 U.S.C. § 1362(6).

1.9 By causing such fill material to enter waters of the United States, Respondents have engaged, and are continuing to engage, in the "discharge of pollutants" from a point source within the meaning of sections 301 and 502(12) of the Act, 33 U.S.C. §§ 1311 and 1362(12).

1.10 Respondents' discharges of dredged and/or fill material was not authorized by any permit issued

pursuant to section 402 or 404 of the Act, 33 U.S.C. §§ 1312 or 1314.

1.11 Respondents discharge of pollutants into waters of the United States at the Site without a permit constitutes a violation of section 301 of the Act, 33 U.S.C. § 1311.

1.12 As of the effective date of this Order, the fill material referenced in Paragraph 1.6 above remains in place.

1.13 Each day the fill material remains in place without the required permit constitutes an additional day of violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

1.14 Taking into account the seriousness of this violation and Respondents' good faith efforts to comply with applicable requirements, the schedule for compliance contained in the following Order is reasonable and appropriate.

II. ORDER

Based upon the foregoing FINDINGS AND CONCLUSIONS and pursuant to sections 308 and 309(a) of the Clean Water Act, 33 U.S.C. §§ 1318 and 1319(a), it is hereby ORDERED as follows:

2.1 In compliance with the Clean Water Act, Respondents shall remove all unauthorized fill material placed within wetlands located at Section 12, Township 60 North, Range 5 West, Boise Meridian ("Site"). The removed fill material is to be moved to a location approved by the EPA representative

identified in Paragraph 2.8. To the maximum extent practicable, the Site shall be restored to its original, pre-disturbance topographic condition with the original wetlands soils that were previously removed from the Site. Acceptable reference topographic conditions exist on wetlands immediately adjacent to and bordering the Site.

2.2 Compliance activities described under Paragraph 2.1 must be completed no later than **October 31, 2008**.

2.3 At least 48 hours prior to commencing compliance activity on the Site, Respondents shall provide verbal notification to the EPA representative identified in Paragraph 2.8.

2.4 Within 7 days of completion of the compliance activities under Paragraph 2.1, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.8. The written notification shall include photographs of Site conditions prior to and following compliance with this Order.

2.5 Upon receipt of the notification referenced under Paragraph 2.4, EPA may schedule an inspection of the Site by EPA or its designated representative

2.6 Respondents shall provide and/or obtain access to the Site and any off-Site areas to which access is necessary to implement this Order; and shall provide access to all records and documentation related to the conditions at the Site and the restoration activities conducted pursuant to this

Order. Such access shall be provided to EPA employees and/or their designated representatives, who shall be permitted to move freely at the site and appropriate off-site areas in order to conduct actions that EPA determines to be necessary.

2.7 EPA encourages Respondents to engage in informal discussion of the terms and requirements of this Order. Such discussions should address any questions Respondents have concerning compliance with this Order. In addition, Respondents are encouraged to discuss any allegations herein which Respondents believe to be inaccurate or requirements which may not be attainable and the reasons why. Alternative methods to attain the objectives of this Order may be proposed. If acceptable to EPA, such proposals may be incorporated into amendments to this Order at EPA's discretion. After compliance with the requirements of this Order, Respondents are also encouraged to contact the EPA representative identified in Paragraph 2.8 to discuss restoration of the Site to its pre-disturbance, vegetative condition.

2.8 All submissions and notifications required by this Order shall be sent to:

John Olson
U.S. EPA, Idaho Operations Office
1435 North Orchard Street
Boise, ID 83706
Phone: (208) 378-5756
Fax: (208) 378-5744.

2.9 Prior to the completion of the terms of this Order, Respondents shall provide any successor in ownership, control, operation, or any other interest in

all or part of the Site, a copy of this Order at least 30 days prior to the transfer of such interest. In addition, Respondents shall simultaneously notify the EPA representative identified in Paragraph 2.8 in writing that the notice required in this Section was given. No real estate transfer or real estate contract shall in any way affect Respondent's obligation to comply fully with the terms of this Order.

2.10 This Order shall become effective on the date it is signed.

III. SANCTIONS

3.1 Notice is hereby given that violation of, or failure to comply with, the foregoing Order may subject Respondents to (1) civil penalties of up to $32,500 per day of violation pursuant to section 309(d) of the Act, 33 U.S.C. § 1319(d), and 40 C.F.R. Part 19; (2) administrative penalties of up to $11,000 per day for each violation, pursuant to section 309(g) of the Act, 33 U.S.C. § 1319(g), and 40 C.F.R. Part 19; or (3) civil action in federal court for injunctive relief, pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b).

3.2. Nothing in this Order shall be construed to relieve Respondents of any applicable requirements of federal, state, or local law. EPA reserves the right to take enforcement action as authorized by law for any violation of this Order, and for any future or past violation of any permit issued pursuant to the Act or of any other applicable legal requirements, including,

but not limited to, the violations identified in Part I of this Order.

Dated this 15th day of May, 2008

/s/ Richard B. Parkin
RICHARD PARKIN, Acting Director
Office of Ecosystems, Tribal and Public Affairs

Appendix E-1

Satellite photo of Sackett site.