UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:22-cv-00512-M-KS

UNITED STATES OF AMERICA, Plaintiff, v. MELTON E. "VAL" VALENTINE, JR., MELTON E. "SKIP" VALENTINE, III, and INDIANTOWN FARM, LLC, Defendants.	)	**Defendants Melton E. "Val" Valentine, Jr., Melton E. "Skip" Valentine, III, and Indiantown Farm, LLC's Reply in Support of Their Motion for Judgment on the Pleadings Fed. R. Civ. P. 12(c)**

I. The Government may not selectively pick which portions of the *Sackett* test it wishes to comply with.

Sackett v. EPA, 598 U.S. 651 (2023), ended decades of Clean Water Act (CWA) uncertainty by articulating an easily administrable and jurisdiction-narrowing test to determine when the federal government may regulate wetlands. The government's response improperly seeks to turn back the clock and offers a distorted version of the *Sackett* test.

A. *Sackett* made clear that wetlands may only be regulated if they are "indistinguishable" from "waters of the United States."

Sackett definitively rejected the government's prior approach to CWA wetlands jurisdiction. Before, the government presumed that most wetlands were subject to regulation. *See, e.g.*, *Sackett*, 598 U.S. at 666 (noting that, historically, "the agencies had 'interpreted their jurisdiction over "the waters of the United States" to cover 270-to-300 million acres' of wetlands and 'virtually any parcel of land containing a channel or conduit . . . through which rainwater or drainage may occasionally or intermittently flow'" (quoting *Rapanos v. United States*, 547 U.S. 715, 722 (2006) (plurality opinion)). Although the Court tried to rein in that approach in *Rapanos*, it failed to reach a majority opinion and the resulting confusion led to

expansive application of complicated agency guidance documents. *See, e.g.*, *Sackett*, 598 U.S. at 667 ("[T]he agencies later admitted that 'almost all waters and wetlands across the country theoretically could be subject to a case-specific jurisdictional determination' under this guidance." (citation omitted)). *Sackett* directly resolved this problem by holding that a wetland may be regulated only if it has a "continuous surface connection" with a water of the United States *and* the two features are "indistinguishable." *Id.* at 678–79.

In reaching this conclusion, the Court noted that the pre-*Sackett* regime "put[] many property owners in a precarious position because it [was] 'often difficult to determine whether a particular piece of property contains waters of the United States.'" *Id.* at 669 (quoting *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 594 (2016)). Indeed, in the pre-*Sackett* days, "[e]ven [where] a property appear[ed] dry, application of the guidance in a complicated manual" ultimately determined jurisdiction. *Id.* In particular, the Court worried that the lack of an understandable legal standard raised due process and fair notice concerns. *See id.* at 680.

The government's response ignores how the *Sackett* test came to be, mainly arguing that the CWA historically regulated adjacent wetlands. ECF 48 at 12–14. Yet the entire point of *Sackett* was to reject much of what that history counselled. Charting a different regulatory course, *Sackett* held that the CWA's regulation of "waters" only includes "'relatively permanent, standing or continuously flowing bodies of water,'" *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739), and that wetlands are only regulable if they are "'waters of the United States' in their own right," meaning that "they must be indistinguishably part of a body of water that itself constitutes 'waters' under the CWA." *Id.* at 676.

Sackett was clear that a wetland must be "indistinguishable" from a "water" to be subject to federal jurisdiction. The government's argument to the contrary, ECF 48 at 9–10,

ignores the plain import of the *Sackett* majority opinion and the context in which the Court decided it. This Court must apply the *Sackett* test, not the government's obscuring gloss.

B. A continuous surface water connection is necessary but not sufficient to establish CWA wetlands jurisdiction.

The government advances three more implausible arguments directly contrary to *Sackett*. First, it posits that indistinguishability is not a separate part of the *Sackett* test, but rather the necessary outcome of a continuous surface connection. ECF 48 at 9–10. But as previously noted, *Sackett* made clear that the CWA exists to protect "waters"—rivers, lakes, and streams—while land, wet or otherwise, is presumptively outside the scope of the statute. *Sackett*, 598 U.S. at 671–78. If the government were correct that only a continuous surface connection is required, then a 100-acre piece of property that is distinguishable from any true water and that looks like dry land to lay eyes could be regulated as a "wetland" simply because one foot of the property is "continuously connected" to a water. That is precisely the type of overbroad jurisdictional claim that *Sackett* rejected. *Accord Rapanos*, 547 U.S. at 734 ("The plain language of the statute simply does not authorize this 'Land Is Waters' approach to federal jurisdiction.").

That the government maintains that the connection between water and wetland need not even be aquatic further undercuts its argument. ECF 48 at 13–15. It is logically impossible for two water features to be "indistinguishable" from one another absent an aquatic connection. And the government's reference to the *Sackett* exceptions for "low tides" and "dry spells" cuts against its argument—a "low tide" and a "dry spell" are both conditions of *water*, not *land*.

Second, the government ignores the important work that indistinguishability does in the *Sackett* test. Indeed, the word "indistinguishable" is used more often than the phrase "continuous surface connection" in the Court's recitation of the test—including in the Court's

ultimate reasoning that the Sacketts' land is not jurisdictional. *See Sackett*, 598 U.S. at 684 ("The wetlands on the Sacketts' property are distinguishable from any possibly covered waters."). Moreover, if indistinguishability were not a separate component of the test, then the Court's many descriptions of that factor would be inexplicable. But the Court took great pains to describe the distinct importance of a wetland being "indistinguishable" from "waters" *in addition to* the presence of a continuous surface connection between them. *See id.* at 678 (describing a connection where "it is difficult to determine where the water ends and the wetland begins," and further describing the connection as one where "there is no clear demarcation between 'waters' and wetlands.") (quoting *Rapanos*, 547 U.S. at 742) (internal quotation marks omitted).

Finally, the government argues that *Sackett* does not require "literal" indistinguishability between waters and wetlands because § 404(g) of the CWA mentions adjacent wetlands, which are "at least somewhat distinguishable from other covered waters." ECF 48 at 18. But *Sackett* considered and rejected this precise argument. 598 U.S. at 675–78.

In short, *Sackett* requires that a wetland be "indistinguishable" from a "water" to be subject to federal regulation. The government's attempts to wish that away are unpersuasive.

C. This Court is not bound by the government's cited pre- and post-*Sackett* case law.

The government also argues that it is not required to allege indistinguishability as a separate component because pre- and post-*Sackett* cases did not require it. ECF 48 at 20. Yet the Fourth Circuit has never considered this question. The only Fourth Circuit case the government cites applied the significant nexus test, not the *Rapanos* plurality. *See Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 288 (4th Cir. 2011) (holding that the

administrative record did not adequately demonstrate jurisdiction under the significant nexus test).[1]

Much of the government's authority supports the Valentines' position that waters and wetlands must be "indistinguishable" and the connection between them must be aquatic. *See United States v. Cundiff*, 555 F.3d 200, 211–13 (6th Cir. 2009) (noting that "the [*Rapanos*] plurality's test requires a topical flow of water"); *United States v. Brace*, No. 1:17-cv-00006, 2019 WL 3778394, at *24–25 (W.D. Pa. Aug. 12, 2019) (using language indicating indistinguishability by stating that "wetlands must connect sufficiently to 'mak[e] it difficult to determine where the 'water' ends and the 'wetland' begins.'") (quoting *Rapanos*, 547 U.S. at 742); *United States v. Bedford*, No. 2:07-cv-491, 2009 WL 1491224, at *11–13 (E.D. Va. May 22, 2009) (noting that *Rapanos* was satisfied because "the wetlands are adjacent to, contiguous with, directly abut, and drain into the Southern Tributary, *and* there is no clear demarcation between the wetlands at the Site and the Southern Tributary") (emphasis added). To the extent any of these cases support the government's position, nothing in them indicates that the landowners raised or contested the issue of whether indistinguishability must be separately alleged, thus undercutting their persuasive value.[2]

Characteristically, the government's approach in this case mirrors its behavior after prior Supreme Court losses over the CWA's scope. *See, e.g.*, *Sackett*, 598 U.S. at 666 ("Days after our decision, the agencies issued guidance that sought to minimize *SWANCC*'s

[1] The government also cites *United States v. Bailey*, 571 F.3d 791, 800–03 (8th Cir. 2009), for support of how courts have applied *Rapanos* before *Sackett*. ECF 48 at 19. But like *Precon Dev. Corp.*, *Bailey* did not apply the *Rapanos* plurality.

[2] *United States v. Bobby Wolford Trucking & Salvage, Inc.*, No. c18-0747-TSZ, 2023 WL 8528643, at *2 (W.D. Wash. Dec. 8, 2023), incorrectly viewed *Sackett* as not having an "impact on the applicable law," and *United States v. Andrews*, No. 3:20-cv-1300, 2023 WL 4361227, at *10 (D. Conn. June 12, 2023), did not consider whether the water and wetland were "indistinguishable." The defendants in *Andrews* were pro se and did not file an opposition.

impact."); *id*. at 667 ("In the decade following *Rapanos*, the EPA and the Corps issued guidance documents that 'recognized larger grey areas and called for more fact-intensive individualized determinations in those grey areas.'") (citation omitted); *Rapanos*, 547 U.S. at 758 ("Rather than refining its view of its authority in light of our decision in *SWANCC*, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency.") (Roberts, C.J., concurring). Nearly two decades ago, the *Rapanos* plurality tartly called out the government's penchant for "disregard[ing] the [Clean Water Act's] statutory language, [a habit which] has been so long manifested." *Rapanos*, 547 U.S. at 756 n.15 (plurality opinion). Evidently, the government still hasn't mended its ways.

The government's displeasure with *Sackett* is no license to ignore it. *Sackett* is clear that the CWA regulates only "waters," *Sackett*, 598 U.S. at 671, so that features like wetlands that are typically regarded as non-waters, *see id*. at 674, can be regulated only in those rare instances when they "qualify as 'waters . . .' in their own right," *id*. at 676, which occurs when "it is 'difficult to determine where the "water" ends and the "wetland" begins,'" "so that there is no clear demarcation between 'waters' and 'wetlands,'" *id*. at 678 (quoting *Rapanos*, 547 U.S. at 742). Because the government failed to allege that the connection between the waters and the alleged wetlands on the Valentines' property renders the two features "indistinguishable," ECF 33, this Court should grant the Valentines' 12(c) motion and resist the government's attempt to circumvent *Sackett*.

II. The United States has failed to state a claim under the CWA because this suit was brought on behalf of and is maintained by the Corps.

The government argues that the Valentines cannot raise their argument that EPA—not the Corps—must bring this suit because that is only properly raised as an affirmative defense. ECF 48 at 24. That is incorrect. The allegations contained within the complaint

determine whether the government has pled a valid cause of action. Here, the complaint is brought by an agency that has no statutory authority to bring such an action. That is an appropriate subject of a 12(c) motion. *See, e.g.*, *United States v. Solomon*, 563 F.2d 1121, 1124 (4th Cir. 1977) (considering the authority of the United States to maintain an action on a motion to dismiss).

The government argues that the Valentines' focus on § 309(b) is misplaced because § 301(a) contains the elements of its unpermitted discharge claim. ECF 48 at 25–26. This misses the point: the issue is not what the elements of the CWA claim are, but rather the source of the cause of action that authorizes such a claim. Without § 309(b), there would be no cause of action to enforce the government's CWA claim here—and § 309(b) specifically states that the Administrator of EPA—not the Corps—is authorized to commence a civil action under the CWA. *Id.* Indeed, neither the Corps nor the Attorney General is even mentioned in § 309(b).

The government is wrong that the district court in *LaPant* rejected this position. *LaPant*'s holding was limited to subject-matter jurisdiction. *See United States v. LaPant*, No. 2:16-CV-01498-KJM-DB, 2019 WL 1978810, at *6 (E.D. Cal. May 3, 2019) ("The court has jurisdiction over this case under 28 U.S.C. § 1345."). And this case cannot be resolved that way. Although 28 U.S.C. § 1345 is a jurisdictional statute, the Valentines don't argue that this Court lacks jurisdiction. Instead, they argue that the government has failed to state a claim because no authority exists for the Corps to bring or maintain this action. ECF 45 at 15. In any event, *LaPant* appears to proceed upon the unstated premise that "the United States" is impliedly authorized to bring a cause of action for any violation of law, a premise which the Fourth Circuit has rejected. *See Solomon*, 563 F.2d at 1124–25.

Similarly, the fact that the United States is the plaintiff does not resolve the complaint's defects. ECF 48 at 30–34. As noted above, the United States is not a "super

plaintiff" with plenary authority to sue under any statute in any way that it sees fit. This is especially true when Congress has specified exactly how the interests of the United States are to be vindicated. In § 309(b), Congress authorized EPA—and EPA alone—to sue for *unpermitted* violations of the CWA, while in § 404(s) it authorized the Corps to sue for violations *of a permit*. *See* 33 U.S.C. §§ 1319(b), 1344(s). If Congress intended the United States to have the plenary authority to sue at any time, both § 309(b) and § 404(s) would, contrary to the superfluity canon, *see generally Duncan v. Walker*, 533 U.S. 167, 174 (2001), be unnecessary because an action brought by the Administrator under § 309(b) is still styled as one brought by "the United States." *See* 33 U.S.C. § 1319(e) (referring to "a civil action brought by the United States under this section" and the only such action authorized under § 309 is that in §309(b)).

Further, the government's interpretation makes a hash of the CWA's diligent prosecution bar. Under that provision, a citizen suit cannot proceed if the defendant can show, among other things, that "*the Administrator* . . . has commenced and is diligently prosecuting a civil or criminal action" for the same alleged violation at issue in the citizen suit. *See* 33 U.S.C. § 1365(b)(1)(B) (emphasis added).[3] If the government's position were correct, such a citizen suit could still proceed so long as the diligent prosecution were conducted by the Corps or the Attorney General acting for the United States. Congress could not have intended such an arbitrary outcome.

Finally, the government makes much of the fact that EPA "concurs" with this action. But the government provides little detail about the nature of that support besides referencing a formal referral from EPA to the Corps and DOJ—which happened only after the Valentines

[3] Notably, citizen suits are not authorized for alleged violations of Corps permits, *Atchafalaya Basinkeeper v. Chustz*, 682 F.3d 356, 357 (5th Cir. 2012); this explains why the Act's diligent prosecution bar mentions only the EPA Administrator among federal actors.

filed their 12(c) motion—and vague statements that EPA has been "coordinating" with the Corps and DOJ in this matter.[4] ECF 48 at 2. Not only is the referral a fact outside the pleadings, but EPA is not even mentioned in the government's complaint, and the Corps is listed as agency counsel on all filings. ECF 33; ECF 48; *see also S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184–85 (4th Cir. 2013) ("It is well-established that parties cannot amend their complaints through briefing or oral advocacy."); *Med-Trans Corp. v. Benton*, 581 F. Supp. 2d 721, 728 (E.D.N.C. 2008) ("[A] court considering a motion for judgment on the pleadings must base its decision solely on information obtained from the pleadings."). At this stage, the referral is insufficient under the statute to maintain this action.

Because the government has failed to state a claim under the CWA, this Court should grant the Valentines' 12(c) motion.

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Respectfully submitted,

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[4] When counsel for the Valentines requested information about the nature of the coordination and collaboration between EPA and the Corps on the referral, DOJ declined to give specifics citing privilege. The information the Valentines have about the nature of EPA's involvement is that referenced in the government's response, and that the EPA was present for a site visit that took place over four years prior to commencement of this case.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.2(f)(3), I hereby certify this memorandum contains 2,796 words.

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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2024, I electronically filed the foregoing with the Clerk of the Court by using the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

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