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Wetlands/Clean Water Act Enforcement: Federal Court Addresses Pleading Issue Associated with the Term "Waters of the United States"

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A United States District Court (Idaho) ("Court") in an August 29th Memorandum Decision and Order ("Order") addressed an issue arising out of a federal government Clean Water Act enforcement action. *See U.S. v. Ace Black Ranches, LLP*, WL 4008545.

The issue addressed was whether the United States Environmental Protection Agency and the United States Army Corps of Engineers (collectively, "Government") adequately pleaded the elements of the Clean Water Act definition of Waters of the United States ("WOTUS").

Ace Black Ranches ("Ranch") is described as operating an 800-acre ranch in Idaho. The Bruneau River ("River") and wetlands pass through the ranch. It has historically been used for agriculture and cattle grazing.

Subsequent to prior enforcement litigation, described in the Order, the Government obtained an Administrative Warrant to inspect the Ranch. The Government then commenced a civil action in the Court alleging that the Ranch discharged pollutants into Waters of the United States in violation of Sections 309(b) and (d) of the Clean Water Act.

The Complaint alleged that the Ranch:

- Constructed multiple road crossings in the River and wetlands, impeding the flow of water and polluting the River.
- Mined sand and gravel from the River.
- Disturbed the Riverbed, resulting in further pollution of the River while constructing an center pivot irrigation system.
- Cleared and leveled nearly all of the Ranch's wetlands.
- Undertook sand and gravel mining.
- Commenced mechanical scraping, pushing, or pulling of earth.

Such activities were alleged to be in and next to the River and adjacent wetlands.

The Ranch moved for dismissal of the Complaint arguing that it failed to state a claim upon which relief could be granted. This was based on the argument that the Government did not plausibly allege each required element to claim a violation of the Clean Water Act.

The Ranch contended that the Government failed:

...to plausibly allege that the wetlands where pollutants were allegedly discharged “have a continuous surface connection with the Bruneau River,” failing to satisfy the standard set forth in the Supreme Court’s recent decision.

The decision referenced was The United States Supreme Court decision in *Sackett v. EPA*, 598 U.S. 861 (2023).

The majority in *Sackett* articulated a two-part process for determining a WOTUS:

1. The CWA’s use of “waters” in §1362(7) refers only to “geo-graphic[al] features that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes’ ” and to adjacent wetlands that are “indistinguishable” from those bodies of water due to a continuous surface connection. *Rapanos v. United States*, 547 U. S. 715, 755, 742, 739.
2. To assert jurisdiction over an adjacent wetland under the CWA, a party must establish “first, that the adjacent [body of water constitutes] . . . ‘water[s] of the United States’ (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”

In analyzing a potential Rule 12(b)(6) dismissal, the Court noted that to successfully claim a violation of the Clean Water Act, satisfying the pleading standard, the Government must plausibly allege that:

1. A person;
2. Discharged pollutants;
3. From point sources;
4. To Waters of the United States;
5. Without a permit.

The Court described *Sackett*’s adjacency, which requires that wetlands be adjacent to and “indistinguishably part of a body of water that itself constitutes Waters under the Clean Water Act” citing that decision. Therefore, the Court stated that to successfully allege a violation of the Clean Water Act in a wetland there must be a plausible showing that the wetland was:

1. Adjacent to Waters of the United States; and,
2. That the wetland shares a continuous surface connection with that Water making it difficult to determine where the Water ends and the wetland begins.

The question was therefore whether the Government successfully alleged that the Ranch discharged pollutants into wetlands that are indistinguishable from, and have a continuous connection with, the River (to satisfy the adjacency test).

The Court noted that the Government’s Complaint alleged that the Ranch discharged pollutants into the River and adjacent wetlands. However, the Government did not specify that the wetlands have a continuous surface connection with the River to be considered indistinguishable from the River as necessary to satisfy the adjacency test.

The Order stated:

...Although the Court must accept the Government’s Complaint as true at this stage, “unwarranted inferences will not defeat an otherwise proper 12(b)(6) Motion to Dismiss.”

The Court held that until the Government provided more detailed allegations and information, the Complaint fails to state a claim upon which the relief can be granted and must be dismissed. However, the Government is allowed to file an Amended Complaint within 30 days to remedy the deficiencies.

A copy of the Order can be downloaded [here](#).