

Norman M. Semanko (ISB No. 4761)
nsemanko@parsonsbehle.com
Garrett M. Kitamura (ISB No. 11502)
gkitamura@parsonsbehle.com
PARSONS BEHLE & LATIMER
800 W. Main Street, Suite 1300
Boise, Idaho 83702
Telephone (208) 562-4900
Facsimile (208) 562-4901

Ivan L. London
Mountain States Legal Foundation [admitted pro hac vice]
ilondon@mslegal.org
2596 S. Lewis Way
Lakewood, Colorado 80227
Telephone (405) 249-6691

Attorneys for Defendant

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ACE BLACK RANCHES, LLP,

Defendant.

Case No.: 1:24-cv-00113-DCN

**MEMORANDUM IN SUPPORT OF
ACE BLACK RANCHES, LLP’S
MOTION TO DISMISS**

Defendant Ace Black Ranches, LLP (“Defendant” or “ABR”), through its counsel of record and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, respectfully submits this memorandum in support of its motion to dismiss Plaintiff United States of America’s (“Plaintiff”) claims in its Complaint (ECF No. 1).

Plaintiff alleges an entitlement to relief for “discharges of pollutants in violation of Section 301(a)” into “adjacent wetlands,” but Plaintiff fails to state a claim upon which relief can be granted because Plaintiff has not plausibly alleged a required element of its claims. Specifically, Plaintiff has failed to plausibly allege that ABR discharged pollutants into any

wetland that has a continuous surface connection with the Bruneau River such that it is difficult to determine where the River ends and the wetland begins. Accordingly, dismissal is appropriate.

I. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a) requires a “short and plain statement” of the grounds for a party’s claims. Rule 12(b)(6) provides for dismissal for “failure to state a claim upon which relief can be granted.” “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint states a plausible claim when “the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* In this Circuit, a complaint is sufficient when it alleges “well-pleaded facts, not legal conclusions, that plausibly give rise to an entitlement to relief.” *Whitaker v. Tesla Motors, Inc.*, 985 F.3d 1173, 1176 (9th Cir. 2021) (citations omitted). It is not enough for a plaintiff to make superficial allegations that are “merely consistent with a defendant’s [alleged] liability” under the plaintiff’s legal theory; instead, the plaintiff must get “across the line” of “conceivable,” and show that there is sufficient support for its allegations to make its claims “plausible.” *See Iqbal*, 556 U.S. at 683.

In the context of a claim arising under Section 301 of the Clean Water Act, 33 U.S.C. § 1311 (the “Act”), as applied to “adjacent wetlands,” the plaintiff must plausibly plead two elements:

First, that the adjacent body of water constitutes waters 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.”

Sackett v. EPA, 598 U.S. 651, 678–79 (2023) (quoting *Rapanos v. United States*, 547 U.S. 715, 742 (2006)) (cleaned up). “This formulation represents the *Sackett* ‘adjacency’ test. From a legal

standpoint, this test significantly tightens the definition of federally regulable wetlands, as compared with the ‘significant nexus’ test and interim administrative regulations.” *Lewis v. United States*, 88 F.4th 1073, 1078 (5th Cir. 2023); *see also Glynn Env’t Coal., Inc. v. Sea Island Acquisition, LLC*, 2024 WL 1088585, at *4 (S.D. Ga. Mar. 1, 2024) (applying the adjacency test to a dispositive motion under Rule 12(b)(6)).

II. ARGUMENT

Dismissal is proper here because Plaintiff has not bothered to allege, much less plausibly allege, that ABR discharged any pollutants into wetlands that have a continuous surface connection with the Bruneau River such that it is difficult to determine where the River ends and the wetlands begin. And dismissal is important here for a broader policy reason: Plaintiff’s conclusory allegations show an abusive approach to federal regulation that the Supreme Court looked to curb a year ago in *Sackett v. EPA*, 598 U.S. 651 (2023).

A. Plaintiff has not plausibly alleged that ABR discharged any pollutants into wetlands that have a sufficient connection with the Bruneau River.

To maintain its action, Plaintiff must allege that any wetland that ABR allegedly discharged pollutants into has such a continuous surface connection with the Bruneau River that it is difficult to determine where the River ends and the wetland begins. *See Sackett*, 598 U.S. at 678–79, and must do so by alleging *facts* that show its claims are plausible—more than just conceivable, *see Iqbal*, 556 U.S. at 678; *Whitaker*, 985 F.3d at 1176. Plaintiff has not done that in this case.

A federal district court’s recent decision in *Glynn Environmental Coalition, Inc. v. Sea Island Acquisition, LLC*, No. 2:19-cv-50, 2024 WL 1088585 (S.D. Ga. Mar. 1, 2024), provides a useful example of applying the adjacency test to a dispositive motion arguing failure to state a

claim.¹ In that case, a citizen-suit plaintiff sued the defendant alleging that the defendant had conducted “unpermitted filling activities” of a wetland in violation of the Clean Water Act. *Id.* at *1. Considering the Supreme Court’s *Sackett* opinion, the defendant moved to dismiss per Fed. R. Civ. P. 12(b)(6) because the plaintiff’s allegations did not plausibly allege the second element of the adjacency test. *Id.* at *2. The court found that the plaintiff had failed to plead factual allegations sufficient to show that the wetland at issue had a continuous surface connection with a jurisdictional water such that the wetland and jurisdictional water were indistinguishable. *Id.* at *5. Without such meaningful allegations, the court held that the plaintiff’s claims “d[id] not invoke the [Clean Water Act]’s protections,” thereby negating the need for litigation of whether the defendants violated the Act. *See id.*

In *Glynn Environmental Coalition*, the plaintiff alleged (and it was undisputed for purposes of the Fed. R. Civ. P. 12(b)(6) motion) that there was a relevant jurisdictional water: the Dunbar Creek. *Id.* at *4. Thus, the plaintiff met its obligation to plead the first element of the adjacency test. *Id.* But as to the second element—continuous surface connection making the wetland indistinguishable from Dunbar Creek—the plaintiff argued that it met its burden by alleging (1) “water from the [wetland] flows via both surface runoff and groundwater to the salt marsh adjacent to Dunbar Creek,” (2) an expert had opined that “there is a direct connection between the [wetland] and the adjacent salt march via culverts and pipes,” and (3) the wetland “and Dunbar Creek are in the same basin.” *Id.* The district court held that the plaintiff’s allegations were not sufficient to warrant litigation of the plaintiff’s Clean Water Act claims. The

¹ In this Circuit, consistent with *Glynn Environmental Coalition*, a federal district court has held that Fed. R. Civ. P. 12(b)(6)—rather than, e.g., Fed. R. Civ. P. 12(b)(1)—is the proper basis to test whether a plaintiff has adequately alleged *Sackett*’s two elements prerequisite to litigation over an alleged Clean Water Act violation. *See Inland Empire Waterkeeper v. Corona Clay Co.*, 2023 WL 8125772, at *2 (C.D. Cal. Oct. 26, 2023) (“Whether or not Temescal Creek is a WOTUS is an element of a claim for relief under the CWA, not a threshold determination that would deprive this Court of jurisdiction to hear Plaintiff’s [Clean Water Act] claims at all.”).

district court found that the facts alleged by the plaintiff, including the opinion provided by the plaintiff's expert, did not contend the necessary premise: the plaintiff had to allege facts showing it was plausible that "the [wetland] has a continuous surface connection with Dunbar Creek, making it difficult to determine where Dunbar Creek ends and the [wetland] begins." *Id.* at *5.

Although the district court's judgment in *Glynn Environmental* is pending appeal before the Eleventh Circuit,² its reasoning is correct and applies similarly to this case. *Sackett* makes clear that *not all wetlands* are "adjacent wetlands" invoking the Clean Water Act; rather, the U.S. Supreme Court's adjacency test "significantly tightens" the geographic scope of federal jurisdiction to enforce the Act. *Lewis*, 88 F.4th at 1078. So, it is not enough for a plaintiff to merely allege that wetlands are *ipse dixit* "adjacent wetlands" and then round out the allegations by mirroring the plaintiff's chosen legal theory. *See Sackett*, 598 U.S. at 678–79; *Iqbal*, 556 U.S. at 678.

Here, there is similarly no need for litigation as to whether ABR violated the Clean Water Act by allegedly discharging pollutants into wetlands.

For purposes of the present motion, ABR does not dispute Plaintiff's allegation that the Bruneau River is a traditional navigable water, and thus a water of the United States in its own right, meeting the **first element of *Sackett***. *See* Compl. ¶¶ 55–58. At issue here is Plaintiff's failure to plausibly allege that ABR discharged pollutants into any wetland that has such continuous surface connection with the Bruneau River that it is difficult to determine where the River ends and the wetland begins. In its Complaint, Plaintiff makes the conclusory and overly general assertion that the River "and adjacent wetlands" are waters of the United States within

² The Eleventh Circuit Court of Appeals has docketed the appeal as No. 24-10710.

the meaning of the Clean Water Act. Compl. ¶ 59.³ But Plaintiff does not allege anything to get “across the line” and show that its claims meet the *second element of Sackett*. See *Iqbal*, 556 U.S. at 678.

The most meaningful allegation that Plaintiff makes regarding wetlands is the following: (1) “Prior to Defendant’s violations of the Clean Water Act”—*that is*, at some indeterminable an unspecified time that would be beyond the applicable statute of limitations; (2) “wetlands on the Site”—*that is*, maybe the wetlands that ABR allegedly discharged pollutants into, maybe not, who knows; (3) “had a continuous surface connection to the Bruneau River”—*that is*, there is no allegation regarding wetlands that *have* a continuous surface connection to Bruneau River, and no allegation that the connection rendered such wetlands indistinguishable from the River. See Compl. ¶ 54.

In contrast, the Court can focus on what Plaintiff *does not* allege. Here, Plaintiff *does not* allege in its Complaint that ABR discharged any pollutant into a wetland that has (or, at the time of the discharge, even had) such a continuous surface connection with the Bruneau River that it is (or was) difficult to determine where the Bruneau River ends and the wetland begins. See *Sackett*, 598 U.S. at 678–79.

- Into which wetlands did ABR allegedly discharge pollutants?

Plaintiff does not say.

- When ABR allegedly discharged pollutants into a wetland, was the wetland indistinguishable from the Bruneau River?

Plaintiff does not say.

³ Plaintiff makes several such conclusory, general, and unsupported allegations, evidently trying to will the alleged discharges into Clean Water Act jurisdiction. See Compl. ¶¶ 6–8, 59–60, 62, 66, 69, 77–78, 84–85, 86–88, 90, 93–96, 99–100 (Claim 1), 112–114 (Claim 2), Relief Sought ¶ 4.

- Did the wetland even have a continuous surface connection with the Bruneau River?

Plaintiff does not say.

- Going further, when ABR allegedly discharged pollutants into a wetland, was that one of the wetlands that was *ever* indistinguishable from the Bruneau River, *see* Compl. ¶ 54?

Plaintiff does not say.

- Going even further, when ABR allegedly discharged pollutants into a wetland, was that one of the wetlands that *ever* had a continuous surface connection—or a connection at all—with the Bruneau River, *see id.*?

Plaintiff does not say.

The same deficiency is true of Plaintiff’s allegation that ABR “used heavy machinery to clear and level dozens of acres of wetlands to install roads and center-pivot irrigation systems.” *See id.*, ¶ 6. Did that alleged activity occur in wetlands that were indistinguishable from the Bruneau River, or that *ever* had any connection *at all* with the Bruneau River? *Plaintiff does not say.*

With respect to gravel mining, did ABR allegedly “operate[] heavy gravel mining, processing, and hauling equipment in and around” wetlands that were indistinguishable from the Bruneau River, or that *ever* had any connection *at all* with the Bruneau River? *See id.*, ¶ 7. *Plaintiff does not say.* Did ABR’s alleged “sand and gravel mining operation also cause[] storm water discharges from gravel piles to” wetlands that were indistinguishable from the Bruneau River, or that *ever* had any connection *at all* with the Bruneau River? *See Id. Plaintiff does not say.*

Simply put, each of Plaintiff’s two claims for relief alleges violations of the Clean Water Act stemming from alleged discharges of pollutants into wetlands. *See id.*, ¶¶ 98–119. But

Plaintiff has not made the allegations necessary to state claims showing that the Clean Water Act applies to those alleged discharges.

Nor is Plaintiff's failure to state a claim due to merely failing to say any magic words. *See Iqbal*, 556 U.S. at 678. There are no fact allegations in the Complaint that would allow the Court to draw a reasonable inference that ABR discharged pollutants into any wetland that is or *ever was* indistinguishable from the Bruneau River. *See Sackett*, 598 U.S. at 678–79; *Iqbal*, 556 U.S. at 678; *Whitaker*, 985 F.3d at 1176. At most, Plaintiff alleges legal conclusions, and then purports to support those conclusions with vague assertions that are “merely consistent” with Plaintiff's legal theory. *See Iqbal*, 556 U.S. at 678. The allegations are not about anything *real*, and they do not “state a claim to relief that is plausible on its face.” *See id.*

What's more, Plaintiff alleges that *it did* go onto ABR's property. For three days in 2021, Plaintiff inspected ABR's property “and collected evidence,” and then Plaintiff spent four more days in 2023 inspecting ABR's property and “collect[ing] additional evidence”—that is, Plaintiff spent at least seven days on ABR's property inspecting and collecting evidence. Compl. ¶¶ 52–53; *see also id.* at ¶¶ 61–62. What evidence did Plaintiff collect? *Plaintiff does not say.* Did Plaintiff collect any earth samples showing that water was at least near the surface of any area where there was an alleged discharge? *Plaintiff does not say.* Did Plaintiff take any pictures showing that any wetlands where there was an alleged discharge were indistinguishable from Bruneau River, or that there was any connection at all between the wetlands where there was an alleged discharge and the Bruneau River? *Plaintiff does not say.*

What would Plaintiff's inspectors say in discovery? Did they even *see* a wetland that was indistinguishable from the Bruneau River, much less a wetland where there was an alleged discharge? *Plaintiff does not say.* Rather, Plaintiff merely relies on its conclusory legal

conclusion that it “observed” actions “in adjacent wetlands.” *See, e.g., id.*, ¶ 62. Did any land on ABR’s property even “squish” under the inspectors’ toes? *Plaintiff does not say.*

Despite seven days of inspections and evidence collection, and despite conclusory allegations that ABR discharged pollutants into *some* wetlands and that *some* wetlands—maybe the same wetlands, maybe not—are or were at some time “adjacent wetlands,” Plaintiff does not plead factual content that would allow the Court to “draw the reasonable inference” that ABR discharged any pollutants into any wetlands that had any connection *at all* with the Bruneau River, much less that any such discharge was into wetlands that were or are indistinguishable from the Bruneau River. *See Iqbal*, 556 U.S. at 678; *see also Sackett*, 598 U.S. at 678–79. The Court should dismiss Plaintiff’s claims for relief stemming from such alleged discharges.

B. Plaintiff’s conclusory allegations show an abusive approach to federal regulation that the U.S. Supreme Court looked to curb.

In *Sackett*, the U.S. Supreme Court expressed concern that overzealous federal assertions of Clean Water Act violations impose significant costs on landowners, “arduous, expensive, and long” regulatory procedures, and “crushing” consequences. *Sackett*, 598 U.S. at 660–61 (quoting *Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 601-2 (2016)). Under an approach like Plaintiff’s approach to this case, even “mundane activities like moving dirt” would expose “a staggering array of landowners [to] risk of criminal prosecution or onerous civil penalties.” *Id.* at 669–70. The Court adopted a long-desired and simple rule to help landowners figure out whether their actions on alleged “wetlands” on their properties invoked the Act. *See, e.g., id.* at 663 (“we revisit what has been a contentious and difficult task” and which “sparked decades of agency action and litigation”). Put another way, before a farmer or rancher installs a more water-efficient center-pivot irrigation system on her land, *see* Compl. ¶ 6, she should have a clear feel for whether doing so would create a risk of civil—or even criminal—liability for violating the Clean

Water Act. *See Sackett*, 598 U.S. at 660–61, 669–70. And that makes sense. The Act “only extends to wetlands that are indistinguishable from ‘waters of the United States’ as a practical matter.” *Glynn Env’t Coal., Inc.*, 2024 WL 1088585, at *4.

Here, Plaintiff’s allegations show a disregard for the Supreme Court’s attempt to make the law clear. Plaintiff has been harassing ABR for at least three years. *See* Compl. ¶ 50. And now, despite spending at least seven days inspecting ABR’s property and “collecting evidence,” *see id.*, ¶¶ 52–53, Plaintiff has sued ABR for allegedly discharging pollutants into wetlands covered by the Clean Water Act without *actually* alleging any factual content that would allow the Court to “draw the reasonable inference” that Plaintiff is correct. *See Iqbal*, 556 U.S. at 678; *see also Sackett*, 598 U.S. at 678–79. If allowed to stand, Plaintiff’s allegations will likely further subject ABR to years of expensive litigation, including retaining expert witnesses, taking and defending depositions, that are not warranted. The Clean Water Act does not apply to any of ABR’s alleged discharges of pollutants into wetlands, and further litigation of these allegations is wholly unwarranted.

Rather than endorsing Plaintiff’s disregard of the law and of ABR’s right to be free from unlawful federal regulation, the Court should dismiss Plaintiff’s claims for relief stemming from alleged discharges into “adjacent wetlands.”

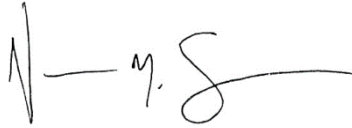
III. CONCLUSION

For the reasons described in this motion, ABR respectfully asks the Court to dismiss Plaintiff’s claims alleging an entitlement to relief for “discharges of pollutants in violation of Section 301(a)” into “adjacent wetlands” for a failure to state a claim upon which relief can be granted.

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DATED this 29th day of April, 2024.

PARSONS BEHLE & LATIMER



Norman M. Semanko; Garrett M. Kitamura

MOUNTAIN STATES LEGAL FOUNDATION

/s/ Ivan L. London

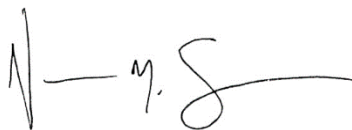
Ivan L. London

Attorneys for Defendant Ace Black Ranches, LLP

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of April, 2024, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

Todd Kim, Assistant Attorney General Joshua D. Hurwit, U.S. Attorney Christine G. England, Assistant U.S. Attorney District of Idaho 1290 W. Myrtle Street, Suite 500 Boise, ID 83702-7788	Fax – 208/334-9375 Email – Christine.England@usdoj.gov
Natalie Baughman Jeffrey Hammons U.S. DEPARTMENT OF JUSTICE P. O. Box 7611 Washington, DC 20044	Fax – 202/514-8865 Email – Natalie.Baughman@usdoj.gov ; Jeffrey.Hammons@usdoj.gov
Sonya J. Shea, Senior Attorney U.S. DEPARTMENT OF JUSTICE 999 18 th Street, South Terrace, Suite 370 Denver, CO 80202	Email – Sonya.Shea@usdoj.gov



Norman M. Semanko