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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SAN FRANCISCO BAYKEEPER, a California non-profit corporation,

Plaintiff,

v.

CITY OF SUNNYVALE, a municipality,

Defendant, and.

CITY OF MOUNTAIN VIEW, a municipality,

Defendant.

Lead Case No.: 5:20-cv-00824-EJD

Consolidated Case No.: 5:20-cv-00826-EJD

OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION

Judge: Hon. Edward J. Davila

Action Filed: 2/4/2020

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I. INTRODUCTION

In the Order Granting Plaintiffs' Motion for Partial Summary Judgment ("MSJ Opinion"), this Court found the Receiving Waters at issue in this litigation—South San Francisco Bay, Guadalupe Slough, Stevens Creek, Calabazas Creek, and Sunnyvale East Channel—are "waters of the United States," 33 U.S.C. § 1362(7) ("WOTUS"). Dkt. No. 139 at 17-23. The Cities' Motion for Reconsideration asks this Court to find that only South San Francisco Bay is protected by the Clean Water Act ("CWA") based on *Sackett v. U.S. Environmental Protection Agency,* 143 S. Ct. 1322 (2023). In doing so, the Cities attempt to change the Supreme Court's holding in *Sackett* to limit WOTUS to only commercially navigable waters that flow continuously throughout the year. *See* Dkt. No. 186-1 at 14-16. The Cities' reading, if adopted, would be more restrictive than *Sackett* and would elevate Justice Thomas' concurrence—a position that garnered just two of nine votes—into law.

Rather, *Sackett* has little effect on the Court's previous analysis and no effect on the Court's conclusion—all the Receiving Waters remain WOTUS. *Sackett* does not impact CWA coverage of South San Francisco Bay and Guadalupe Slough, which are traditionally navigable and tidally influenced waters. Further, protection still exists for seasonal rivers, creeks, and streams that are tributaries to covered waters. This Court found Stevens Creek, Calabazas Creek, and Sunnyvale East Channel flow for much of the year and the Cities offer no evidence to dispute this, nor do they deny they are tributaries to San Francisco Bay. Those facts control. And *Sackett* did not address whether manmade waters can be WOTUS—the precedent of this Circuit on that subject is binding.

Finally, none of the Cities' ancillary arguments are material. The Cities' claim that Baykeeper must show violations in a WOTUS is inapposite because the Receiving Waters are WOTUS. But even if that were not the case, the Municipal Stormwater General Permit ("MS4 Permit") requires compliance at the Cities' outfalls where Baykeeper took samples and where this Court found liability. The Cities' belief that the CWA should not apply to the Receiving Waters is immaterial. It is also wrong. And the Court's finding that Baykeeper's members did not testify to using Guadalupe Slough does not affect Baykeeper's standing in this action.

Sackett made no change to the law that could remove CWA jurisdiction over the Receiving Waters. Denial of the Cities' Motion for Reconsideration is appropriate.

II. LEGAL STANDARD

"A motion for reconsideration is an 'extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.'" *Redisegno.com, S.A. de C.V. v. Barracuda Networks, Inc.*, No. 5:20-cv-00316-EJD, 2022 U.S. Dist. LEXIS 74860 at *4 (N.D. Cal. Apr. 25, 2022) , quoting *Kona Enters. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2020); *citing Reeder v. Knapik*, No. 07-CV-362-L(LSP), 2007 U.S. Dist. LEXIS 51890, at *2 (S.D. Cal. July 18, 2007) ("A motion to reconsider is not another opportunity for the losing party to make its strongest case, reassert arguments, or revamp previously unmeritorious arguments.").

Local Rule 7-9 allows for reconsideration in three circumstances:

> (1) That at the time of the motion for leave, a material difference in fact or law exists from that which was presented to the Court before entry of the interlocutory order for which reconsideration is sought. The party also must show that in the exercise of reasonable diligence the party applying for reconsideration did not know such fact or law at the time of the interlocutory order; or
>
> (2) The emergence of new material facts or a change of law occurring after the time of such order; or
>
> (3) A manifest failure by the Court to consider material facts or dispositive legal arguments which were presented to the Court before such interlocutory order.

III. ARGUMENT

A. "Waters of the United States" After *Sackett*

The CWA protects "waters of the United States." 33 U.S.C. § 1362(7). "The CWA does not define WOTUS, and consequently it has presented a murky issue for the courts." MSJ Opinion, Dkt. No. 139 at 17:26-18:1. The Supreme Court has directly considered what is protected as "waters of the United States" on four occasions since 1985: *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers,* 531 U.S. 159 (2001) ("*SWANCC*"); *Rapanos v. United States,* 547 U.S. 715 (2006); and in *Sackett.* All but

SWANCC primarily concerned the CWA's jurisdiction over wetlands. *See Riverside Bayview*, 474 U.S. at 123-24, 139; *Rapanos*, 547 U.S. at 719-20; *Sackett*, 143 S. Ct. at 1331-32.

In *Rapanos*, the Supreme Court addressed what tributaries were jurisdictional to assess whether the wetlands at issue were WOTUS and offered two separate approaches to assessing which tributaries are WOTUS: (1) the "relatively permanent" test in the plurality opinion by Justice Scalia, 547 U.S. 715, and (2) the "significant nexus" test in the concurrence by Justice Kennedy, 547 U.S. at 759. In *Sackett,* the Supreme Court rejected the "significant nexus" test and adopted the "relatively permanent" one. *Sackett*, 143 S. Ct. at 1329. While the "relatively permanent" test is narrower than "significant nexus," the Court's determination as to the "outer reaches" of the CWA, *id.*, did not create a sea change in protection for "traditional" waters like the creeks at issue here.

After *Sackett,* WOTUS covers "relatively permanent, standing or continuously flowing bodies of water," *Rapanos,* 547 U.S. at 739 (Scalia, J.), that are connected to traditional navigable waters. *See Sackett*, 143 S. Ct. at 1336, citing *Rapanos* at 742. "Relatively permanent" waters do "not necessarily exclude streams, rivers, or lakes 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," *id*. at 732 n.5 (emphasis original). *Sackett* agreed. *See Sackett*, 143 S. Ct. at 1336 ("the *Rapanos* plurality was correct."). As the Ninth Circuit explained, although the decision was split, the *Rapanos* Court "unanimously agreed that intermittent streams (at least those that are seasonal) can be waters of the United States." *United States v. Moses*, 496 F.3d 984, 991 (9th Cir. 2007).[1]

B. The Court's Determination that South San Francisco Bay Is WOTUS Is Not Modified by *Sackett.*

In the MSJ Opinion, the Court found that San Francisco Bay is a traditionally navigable water and thus WOTUS. Dkt. No. 139 at 20:5-8; *see also* Dkt. No. 100-2, Facts 18-19. Navigable waters

[1] Hydrologically, the terms "seasonal" and "intermittent" have the same meaning. *See* Declaration of Ian Wren, filed herewith, ¶ 6(b) ("Wren Decl."). However, judicial opinions, including *Rapanos*, stray at times from those scientific definitions. Baykeeper uses "seasonal" here to avoid confusion.

remain jurisdictional after *Sackett*. *See Sackett*, 143 S. Ct. at 1337 (reaffirming "that the CWA extends to *more than* traditional navigable waters") (emphasis added). The Cities do not dispute that San Francisco Bay is a WOTUS. Dkt. No. 186-1 at 13:12-13.

C. The Court's Determination that Guadalupe Slough Is a WOTUS Is Not Modified by *Sackett.*

This Court determined Guadalupe Slough is a WOTUS because it is tidally influenced, Dkt. No. 139 at 20:6-7. The Cities now assert that "tidal influence may not be enough to determine that Guadalupe Slough is WOTUS." Dkt. No. 186-1 at 13:13-17 (citing to Dkt. No. 139 at 20:6-8 and 22:2-3; *Sackett* at 1329; *Sackett* at 1349 [Thomas, J. concurring]). Yet *Sackett* did not change the long-standing rule that tidally-influenced waters are WOTUS—and the cited page of the majority opinion, far from doubting whether tidal influence is enough, touts the success of the CWA and identifies questions about its outer reaches. That the page uses the word "slough" does not make the Cities' citation accurate, nor change that they rely exclusively on Justice Thomas' concurrence. The majority opinion in *Sackett* says nothing relating to the protection of tidally-influenced waters, even sloughs, and the Cities' assertion otherwise mischaracterizes the holding.

Guadalupe Slough meets the relatively permanent test, a fact the Cities do not dispute. It has a continuous surface connection to San Francisco Bay and has water year-round. *Sackett*, 143 S. Ct. at 1341; *see also* Wren Expert Report, Dkt. No. 92-10 at 15, 20, Dkt. No. 82, ¶ 30 (Guadalupe Slough is tidally influenced). Guadalupe Slough is a WOTUS.

D. The Court's Determination that Stevens Creek, Calabazas Creek, and Sunnyvale East Channel Are WOTUS Is Not Modified by *Sackett.*

This Court found that "Stevens and Calabazas Creeks are tributaries of a WOTUS, and therefore WOTUS." Dkt. No. 139 at 20:20-21. In doing so, the Court determined that undisputed facts demonstrated the Creeks were intermittent streams and held that "[w]aters with intermittent flow can also be WOTUS." Dkt. No. 139 at 21:10-19. Although the Court was not expressly applying the "relatively permanent" standard from *Rapanos* and adopted in *Sackett,* seasonal (or intermittent) streams meet this test. *See* Wren Decl., ¶ 6(b) (defining intermittent and seasonal).

The Cities argue that the Creeks are not WOTUS because (1) they are not navigable; and (2) they do not flow continuously year-round. *See* Dkt. No. 186-1 at 14-16. As explained below, both arguments are specifically rejected in *Sackett*.

1. The Cities' Argument that WOTUS Are Limited to Traditional Navigable Waters Improperly Applies the Thomas Concurrence, Not the Majority Opinion, in *Sackett*.

The Cities mischaracterize *Sackett* by claiming that WOTUS are limited to traditional navigable waters and by asserting that "traditionally navigable" means currently supporting interstate commerce. Dkt. No. 186-1 at 14. In fact, the language of the CWA, the *Rapanos* plurality, and the *Sackett* majority are all clear that the CWA applies to more than traditionally navigable waters. *Rapanos*, 547 U.S. at 730-31 (rejecting that waters must be navigable in fact); *Sackett*, 143 S. Ct. at 1337 ("the CWA extends to more than traditional navigable waters"). CWA protection of non-navigable tributaries has been consistent, both from the agencies in charge of implementing the statute and courts across the country. *See*, *e.g.*, *Rapanos*, 547 U.S. at 731; *Moses*, 496 F.3d at 988; *United States v. Hubenka*, 438 F.3d 1026, 1038 (10th Cir. 2006); *Gulf Restoration Network v. Hancock County Dev., LLC*, 772 F. Supp. 2d 761, 769 (S.D. Miss. 2011) (bayou that was tributary to river that emptied into Gulf of Mexico was protected); *United States v. Zanger*, 767 F. Supp. 1030, 1033 (N.D. Cal. 1991) (Pacheco Creek is tributary to Pacheco River, both of which are tributaries to Monterey Bay and the Pacific Ocean); Revised Definition of "Waters of the United States" 88 Fed. Reg. 3004, 3005 (Jan. 18, 2023) ("Current Rule") (making clear that the CWA has always regulated non-navigable waters to protect navigable ones).

In positing this argument, the Cities again rely on Justice Thomas' concurring opinion, not *Sackett*'s holding. Without evidence or citation, the Cities assert that the Creeks "have never been, and undeniably are not presently highways of interstate or foreign commerce." Dkt. No. 186-1 at 14:3-4.[2] They also misstate the law of navigability. A navigable-in-fact water includes: one that is "capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may

[2] The Cities provide no evidence or citation for the assertion that the Creeks are not navigable.

be conducted," *The Montello*, 87 U.S. 430, 441-42 (1847); one that contains "occasional natural obstructions" even if it is "not navigable at all seasons…or at all stages of the water," *Economy Light & Power Co. v. U.S.*, 256 U.S. 113, 122 (1921); one susceptible to use as a highway of commerce, even if a water has never been used for a commercial purpose, *see United States v. Utah,* 283 U.S. 64, 82 (1931); and, those where "reasonable improvements" are needed to create conditions suitable for interstate commerce, regardless of whether the improvements are "actually completed or even authorized," *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 407 (1940). Moreover, a waterbody is "legally" navigable even if it is no longer navigable in fact. *See United States v. Milner*, 583 F.3d 1174, 1195 n.15 (9th Cir. 2009). And the "construction of man-made barriers cannot divest Congress from its authority to regulate a waterway that is otherwise navigable in fact." *ONRC Action v. United States Bureau of Reclamation*, No. 97-3090-CL, 2012 U.S. Dist. LEXIS 118153 at *38 (D. Or. Jan. 17, 2012); *see also Moses*, 496 F.3d at 898-99 and ns.9-10 (applying the doctrine to tributaries under the CWA because "it is doubtful that a mere man-made diversion would have turned what was part of the waters of the United States into something else.").

2. *Sackett* Did Not Change the Fact that Seasonal Tributaries Are WOTUS.

Again misstating *Sackett*, the Cities say that to be considered "relatively permanent" and therefore WOTUS, creeks or streams must flow continuously year-round. To make this argument, the Cities take one line in *Rapanos* out of context to argue that the test excludes any water that does not flow continuously. Dkt. No. 186-1 at 16:5-7. In reality, the *Rapanos* plurality explained:

> By describing "waters" as "relatively permanent," we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months. . . . Common sense and common usage distinguish between a wash and seasonal river.

Rapanos, 547 U.S. at 732 n.5. Thus, *Rapanos* does not define and then exclude what the Cities call "intermittent streams."

Nor does *Sackett* define the exact line between tributaries that meet the "relatively permanent test" and those that do not. Like *Rapanos*, the question faced by the *Sackett* Court was whether wetlands that were separated from an unnamed, non-navigable tributary by a 30-foot road were jurisdictional under the CWA. *See Sackett*, 143 S. Ct. at 1331-32 ("We granted certiorari to decide the proper test for determining whether wetlands are 'waters of the United States.'").

Under the *Rapanos* plurality's "common sense" interpretation, most "creeks" are protected. *See United States v. Brink*, 795 F. Supp. 2d 565, 578 (S.D. Tex. 2011) (creeks are "clearly similar in nature to other bodies of water forming geographical features"). A creek that "flows throughout certain seasons of the year, . . . drying up in the summer months" is seasonal and protected. *Sequoia Forestkeeper v. U.S. Forest Serv.*, No. 09-392, 2011 U.S. Dist. LEXIS 26447 at *5 (E.D. Cal. Mar. 15, 2011). Tributaries of navigable waters that have "seasonal flow for at least three months" are "relatively permanent." *United States v. Mlaskoch*, No. 10-2669, 2014 U.S. Dist. LEXIS 43314 at *17 (D. Minn. Mar. 31, 2014). And the Ninth Circuit held a tributary creek flowing two months of the year to be relatively permanent. *See Moses*, 496 F.3d at 989.[3] Other decisions are in accord. *See, e.g.*, *Foster v. U.S. EPA*, No. 2:14-cv-16744, 2019 U.S. Dist. LEXIS 147416, *55-56 (S.D. W. Va. Aug. 29, 2019); *United States v. Vierstra*, 803 F. Supp. 2d 1166, 1170 (D. Idaho 2011) (finding a canal with flow six to eight months of the year, a bank, and a high water mark, to be "relatively permanent").[4]

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[3] While *Moses* acknowledged that Justice Kennedy's opinion in *Rapanos* was controlling under Ninth Circuit precedent at the time, *see Moses* 496 F.3d at 990, it did not rely on the significant nexus test in reaching its conclusion. *Moses,* 496 F.3d at 991.

[4] The Cities criticize the MSJ Opinion for relying on "several [significant nexus] cases," but cite only to *Headwaters, Inc. v. Talent Irrigation Dist.,* 243 F.3d 526 (9th Cir. 2001), which, according to the Cities, was discredited in *Rapanos*. *See* Dkt. No. 186-1 at 12:18-13:10. Of course, *Rapanos* is not a "change of law", since it was decided long before the MSJ Opinion. L.R. 7-9(b). And *Sackett* does not cite to *Headwaters*, let alone overrule it. The Cities' disagreement with the Court's application of *Rapanos* is insufficient for a motion for reconsideration.

Moreover, EPA has consistently defined "relatively permanent" waters to include seasonal waters, so long as they are not limited to flow solely in direct response to precipitation. *See* Navigable Waters Protection Rule: Definition of "Waters of the United States," 80 Fed. Reg. 22250, 22271 (April 21, 2020) ("2020 Rule") ("The agencies have determined that requiring surface water flow in a typical year from relatively permanent bodies of water to traditional navigable waters and wetlands adjacent to such waters as a core requirement of the rule is the most faithful way of interpreting the Federal government's CWA authority over a water."). The 2020 Rule found seasonal streams to be jurisdictional because they meet the relatively permanent test. *Id*. at 22251. Similarly, the Current Rule, also relying on the reasoning in the *Rapanos* plurality for tributaries, adopts a similar definition: "The relatively permanent standard encompasses tributaries that have flowing or standing water year-round or continuously during certain times of the year. Relatively permanent waters do not include tributaries with flowing or standing water for only a short duration in direct response to precipitation." 88 Fed. Reg. at 3080 (Jan. 18, 2023).

In sum, *Sackett*, the *Rapanos* plurality, post-*Rapanos* courts, and the regulating agencies have all determined that seasonal creeks that consistently flow during certain times of the year, as opposed to those that flow only in response to precipitation, are "relatively permanent."

3. Stevens Creek and Calabazas Creek Are Seasonal Tributaries that Flow to South San Francisco Bay Most of the Year.

In his declaration supporting Baykeeper's motion for summary judgment (Dkt. No. 81), Baykeeper's expert, Ian Wren, explained that Stevens and Calabazas Creeks are seasonal or intermittent because they have continuous flow during certain times of the year and not only in direct response to precipitation. Dkt. No. 82, ¶¶ 11-23. This Court relied on this undisputed evidence to hold that the Creeks are WOTUS. Dkt. No. 139 at 21:10-19; *see also* Dkt. No. 100-2, Facts 20-21 (Cities failing to provide any evidence that Creeks were not intermittent). The Cities did not provide any evidence to the contrary at summary judgment and do not do so now.

Mr. Wren's Expert Report, his declaration in support of Summary Judgment, and his declaration submitted here, all confirm that Stevens and Calabazas Creeks flow most of the year. Wren Decl., ¶¶ 10-21. Flow data from the last 80 years shows that Stevens Creek runs, on average, at

least five months out of the year. Wren Decl., ¶¶ 13-17. Similarly, flow data on Calabazas Creek also shows that it flows at least six months out of the year. Wren Decl., ¶¶ 20, 21. These gages are located between 0.1 and 1.6 miles of Baykeeper's sampling points on Stevens and Calabazas Creeks.[5] Wren Decl., ¶¶ 12, 19. Thus, the undisputed facts still show that Stevens and Calabazas Creeks meet the "relatively permanent" standard because they flow the vast majority of the year and maintain a surface connection with South San Francisco Bay, a traditional navigable water. Summary judgment finding the Creeks are WOTUS is still warranted and need not be reconsidered.

4. Sunnyvale East Channel Meets the Definition of a Seasonal Creek and Is a WOTUS.

To challenge this Court's determination that Sunnyvale East Channel is WOTUS, the Cities assert that Mr. Wren acknowledged as much in his declaration. Dkt. No. 186-1 at 15. To do so the Cities misstate the applicable standard, Mr. Wren's testimony, and the undisputed facts relating to flows in Sunnyvale East Channel.

In the MSJ Opinion, this Court found the undisputed facts demonstrated that Sunnyvale East Channel is a tributary to Guadalupe Slough and is a WOTUS. Dkt. No. 139 at 22:1-3, 17. This Court's analysis of Sunnyvale East Channel is the only point in which the Court determined a waterbody had a "significant nexus" to the Bay. *See id*. at 22:9-11 ("Sunnyvale East Channel also satisfies the pre-2015 "significant nexus" test set forth in *Rapanos* because it discharges to Guadalupe Slough, a downstream WOTUS.").

While the significant nexus test no longer applies, Sunnyvale East Channel is relatively permanent. Baykeeper previously provided undisputed evidence that Sunnyvale East Channel flows more than only in direct response to precipitation. Dkt. No. 82, ¶ 29; *see also* Dkt. No. 84-1 at 511-

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[5] Mr. Wren's Expert Report (Dkt. No. 92-10) and his declaration at Summary Judgment (Dkt. No. 82) analyzed flow data for Calabazas Creek, Stevens Creek, and Sunnyvale East Channel. Among the various sources he relied upon were stream gages for each of those waters. Mr. Wren's declaration filed herewith graphs the flow data referenced in his Expert Report, declaration, and the sources cited in them.

12 (study noting that Sunnyvale East Channel conveys groundwater, has a high-water mark); *see also* Wren Expert Report, Dkt. No. 92-10 at 20 (noting tidal influence) and 21 (noting discharges throughout the year); Dkt. No. 100-2, Fact 22 (Cities failing to provide evidence to dispute groundwater contributions or existence of high-water mark). Because Sunnyvale East Channel is tidally influenced, it is a WOTUS under *Sackett*, and the Court need not reconsider its prior ruling.

The Cities patently misconstrue Mr. Wren's testimony at his deposition to assert that he did not find that the flows through Sunnyvale East Channel met the definition of an intermittent water. Rather, Mr. Wren made clear that, under the 2020 Rule only, Sunnyvale East Channel would not be characterized as a WOTUS, because the 2020 Rule specifically excludes manmade waters from the definition. Dkt. No. 92-9 at 15:15-21; *see also* Dkt. No. 92-10 at 20 (stating that 2020 Rule defines manufactured stormwater features as non-jurisdictional waters). That exception was specific only to the 2020 Rule—a rule with no application here. The Cities admit that the Court should not apply the 2020 Rule to determine WOTUS in this case. Dkt. No. 186-1 at 12:7-17. Thus, Mr. Wren's testimony applying standards solely applicable to the 2020 Rule is no longer relevant, as the 2020 Rule was both vacated and later rescinded by subsequent rules and the *Sackett* decision.

Under longstanding precedent, the CWA can cover manmade structures, as the Court noted in its MSJ Opinion. *See* Dkt. No. 139 at 22:5-6 ("That Sunnyvale East Channel is manmade does not affect the analysis; manmade tributaries fall within the definition of WOTUS."). *Sackett* did not overturn or question precedent confirming that manmade structures can be WOTUS. *See Sackett,* 143 S. Ct. at 1329-43 (majority opinion does not mention artificial or manmade). The Federal Register notice for the Current Rule reiterates this longstanding interpretation of the CWA:

> The agencies' longstanding interpretation of the Clean Water Act includes tributaries that are natural, modified, or constructed waters. The Clean Water Act, in defining ''navigable waters,'' does not turn on any such distinctions, which have no bearing on a tributary's capacity to carry water (and pollutants) to paragraph (a)(1) waters. See, e.g., Technical Support Document section II.B.iv.3 (explaining that humanmade ditches ''perform many of the same functions as natural tributaries,'' including ''convey[ing] water that carries

> nutrients, pollutants, and other constituents, both good and bad, to downstream traditional navigable waters'').

88 Fed. Reg. at 3080 (emphasis added). That Sunnyvale East Channel is man-made is irrelevant to the Court's analysis pre- and post-*Sackett*.

But even if the Court concluded that *Sackett* requires reconsidering its finding that Sunnyvale East Channel was a WOTUS, the Court alternatively found—and the Cities conceded—that Sunnyvale East Channel is a point source. *See* Dkt. No. 139 at 22:24-23:1. This holding would in no way be affected by *Sackett* since it was not considering the definition of a point source. Moreover, treating Sunnyvale East Channel as a point source rather than a WOTUS would not change the Court's finding that Sunnyvale's discharges to Sunnyvale East Channel caused or contributed to exceedances in the downstream WOTUS, Guadalupe Slough. *See* Dkt. No. 100 at 16:9-19.

E. The MS4 Permit's Receiving Waters Limitations Compliance Point Is the Receiving Waters of the Discharge.

To support their argument that *Sackett* impacts the Court's finding of liability, the Cities argue that Baykeeper must demonstrate violations of bacteria water quality standards in WOTUS to demonstrate violations of the CWA. *See* Dkt. No. 186-1 at 14:26-28 ("The question is whether Baykeeper has proven any violations of water quality standards for bacteria in WOTUS caused by the Cities, which it has not.") As explained above, all Receiving Waters at issue here remain WOTUS post-*Sackett*. But even if the Creeks were not WOTUS, Baykeeper's evidence is sufficient to prove violations of Receiving Water Limitation B.2. There is no reasonable dispute that the Cities stormwater discharges flow to South San Francisco Bay, a WOTUS. *See* Dkt. No. 186-1 at 14:2. In making their argument, The Cities ignore that, unlike in *Sackett*, the Cities' discharges are regulated by an NPDES permit ("MS4 Permit"), which defines the point of compliance for its effluent limitations—Stevens Creek, Calabazas Creek, and Sunnyvale East Channel.

The Clean Water Act is a strict liability statute—non-compliance with an NPDES permit constitutes a violation of the CWA. Dkt. No. 139 at 3; 40 C.F.R. § 122.41; *Sierra Club v. Union Oil Co.*, 813 F.2d 1480, 1491-92 (9th Cir. 1987), *vacated*, 485 U.S. 931 (1989), *reinstated with minor amendment,* 853 F.2d 667 (9th Cir. 1989) (rejecting "upset defense" and "de minimus" theory); *Kelly*

v. U.S. EPA, 203 F.3d 519, 522 (7th Cir. 2000) ("nothing in the [CWA] makes good faith or a lack of knowledge a defense"). Further, a permittee may not challenge a permit term in an enforcement action. *GMC v. U.S. EPA*, 168 F.3d 1377, 1380 (D.C. Cir. 1999); *Waste Action v. Astro Auto Wrecking LLC*, No. C15-0796-JCC, 2016 U.S. Dist. LEXIS 169594 (W.D. Wash Dec. 6, 2016); *Cal. PIRG v. Shell Oil Co.*, 840 F. Supp. 712, 719 (N.D. Cal. 1993) (citing *Public Interest Research Group v. Star Enter.*, 771 F. Supp. 655, 666-68 (D.N.J. 1991)); *Natural Res. Def. Council, Inc. v. Outboard Marine Corp.*, 692 F. Supp. 801, 810-11 (N.D. Il. 1988); *Student PIRG of N.J. v. Monsanto Co.,* 600 F. Supp. 1479, 1483-84 (D.N.J. 1985).

Thus, the only question in front of the Court is whether the Cities complied with the terms of the MS4 Permit:

> Although the NPDES permitting scheme can be complex, a court's task in interpreting and enforcing an NPDES permit is not. NPDES permits are treated like any other contract…. If the language of the permit, considered in light of the structure of the permit as a whole, "is plain and capable of legal construction, the language alone must determine the permit's meaning." *Piney Run Pres. Ass'n,* 268 F.3d at 270 (citation omitted) … Our sole task at this point of the case is to determine what Plaintiffs are required to show in order to establish liability under the terms of this particular NPDES permit.

Natural Res. Def. Council, Inc. v. Los Angeles Cnty., 725 F.3d 1194, 1204-1205 (9th Cir. 2013). Finally, like contracts, NPDES permits must be interpreted in a manner consistent with the CWA and must reject interpretations that would render the MS4 Permit unenforceable. *Id*. at 1207.

There is no reasonable dispute that the MS4 Permit authorizes stormwater discharges to WOTUS, meeting the jurisdictional requirement. Dkt. 30-1 at 5 and 7 (2015 Permit, at Findings, ¶¶ 1, 12); Dkt. 153-1 at 18, 19, 21 (2022 Permit at Findings ¶¶ 1, 5, 13). The plain language of the MS4 Permit makes the compliance point for the Receiving Water Limitations governing those discharges to WOTUS—the effluent limitations that are the subject of this enforcement action—are the receiving waters of the Cities' discharges from their respective MS4s. Receiving Water Limitation B.2 states: "The discharge shall not cause or contribute to a violation of any applicable water quality

standard for receiving waters." Dkt. 30-1 at 9 (2015 Permit at 5). Thus, the bacteria water quality standards, which the Cities' discharges must meet, are measured in the receiving waters into which the Cities discharge. *See* Dkt. No. 139 at 23.

The compliance point for the Receiving Water Limitations for the Cities is further confirmed in the reissued 2022 Permit. The 2022 Permit requires water quality monitoring to determine whether Water Quality Standards for bacteria are met during both dry and wet weather. Dkt. 153-1 at 39 (2022 Permit at C.14-5). Samples must be collected from MS4 outfalls, including at least two rain events, from 14 sites. Dkt. 153-1 at 40 (2022 Permit at C.14-6). Further, receiving water sampling is mandated, at five locations in Stevens Creek, three locations in Calabazas Creek, and one in Sunnyvale East Channel. Dkt. 153-1 at 40, 41 (2022 Permit at C.14-6, C.14-7). Thus, it is clear the Regional Board has determined that compliance for Receiving Water Limitation B.2 must be met at the outfall and within Stevens Creek, Calabazas Creek, and Sunnyvale East Channel. The Cities may not challenge this permit requirement within the context of this enforcement action.

While flow data demonstrates that the two Creeks and the channel where the Court has found MS4 Permit violations are WOTUS, to evaluate permit compliance the Court need not rule on the status of the Receiving Waters. The MS4 Permit regulates discharges to WOTUS and set the compliance point for the Receiving Water Limitation in the Receiving Waters—waters tributary to WOTUS. The *Sackett* decision does not modify this permit requirement; thus, it has no impact on this Court's application of the requirements of an NPDES permit on the Cities.

F. Baykeeper's Standing in Guadalupe Slough Is Both Beyond the Court's Order Granting Leave to Seek Reconsideration and Irrelevant.

The Cities argue, almost in passing, that "no Baykeeper representatives or witnesses proved standing to claim injuries related to discharges to Guadalupe Slough or the San Francisco Bay near the connection to the upstream waterways." Dkt. No. 186-1 at 13:19-21, citing Dkt. No. 139 at 10, n.3-5; 17:21-23. The Cities' effort to relitigate standing here is neither appropriate nor relevant. The Court gave the Cities leave to seek reconsideration "solely to the question of whether *Sackett* affects the Court's conclusion that the bodies of water at issue in this case are "Waters of the United States." Dkt. No. 183 at 1:19-21. The Cities' arguments are beyond the limited scope for reconsideration as defined by the Court.

Further, the Cities' statement misstates the Court's MSJ Opinion, which found that Baykeeper members had standing in South San Francisco Bay. Dkt. No. 139 at 11:1-3. And the Court's ruling on Baykeeper's standing for Guadalupe Slough does not defeat standing for Baykeepers' claims generally. Again, Baykeeper members have standing for harms to South San Francisco Bay, into which Guadalupe Slough discharges. Dkt. No. 139 at 11:1-13. An interest in a downstream waterbody is sufficient to confer standing in CWA cases. *See Cal. Sportfishing Prot. All. v. Cal. Ammonia Co*., 2007 U.S. Dist. LEXIS 8845 (E.D. Cal. Jan. 26, 2007) (finding members' interests in San Joaquin River were sufficient although discharges entered upstream water); *see also Cal. Sportfishing Prot. All. v. Chico Scrap Metal*, 124 F. Supp. 3d 1007, 1015, 1019 (E.D. Cal. 2015) (members who recreated 19 miles downstream of discharge has a reasonable concern over discharges); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000) (member canoeing 40 miles downstream had standing); *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 874 F.3d 1083, 1093 (9th Cir. 2017) ("it suffices for EcoRights to demonstrate concrete and particularized injuries to its members' aesthetic and recreational enjoyment of San Francisco Bay as a whole.") (emphasis added). Therefore, Baykeeper has standing to pursue its claims based on the members' use of South San Francisco Bay alone.

G. The Cities' Policy Arguments Are Both Irrelevant and Misguided.

The Cities offer four pages of their opening brief arguing that the Court should determine the Receiving Water are not WOTUS for policy reasons. *See* Dkt. No. 186-1 at 16-20. Every aspect of these arguments is immaterial. By enacting the CWA, Congress has determined that regulating waters of the United States is in the nation's interest.

The Cities cherry-pick the sections of *Sackett* wherein the Court shows concern over the breadth of CWA jurisdiction, but wholly fail to acknowledge that the Court starts by noting that the statute has been a "success story," transforming the "Nation's rivers, lakes, and streams," from "formerly fetid bodies of water [into ones that] are safe for the use and enjoyment of the people." *Sackett,* 143 S.Ct. at 1329; *see also id.* at 1360 (Kagan, dissenting ["If you've lately swum in a lake, happily drunk a glass of water straight from the tap, or sat down to a good fish dinner, you can appreciate what the law has accomplished."]). This success comes from the combination of the

statute's "capacious definition of 'pollutant,' its low *mens rea*, and its severe penalties." *Id.* at 1331.

The Cities' unsupportable reading of *Sackett* seeks to eviscerate these successes by removing federal jurisdiction over any number of waters, starting with the local waterways that run through their own communities. But the Cities' deregulatory mission cannot result from a reasonable interpretation of *Sackett* or previous precedent. Instead, it would require a complete, legislative revision of the CWA. Where the Cities seek to pollute the creeks in their communities, they must say so publicly to the elected officials who make those decisions, not ask this Court to escape liability for their conduct based on misguided and self-serving "policy" concerns.

Baykeeper asks this Court to enforce clear requirements of the MS4 Permit and the CWA. Despite the Cities' baseless accusations otherwise, Baykeeper's purpose in bringing this suit is not to collect attorneys' fees. Rather, sampling shows indisputably that the Cities' discharges contribute to exceedances of bacteria water quality standards in the Receiving Waters, in violation of the MS4 Permit. Dkt. No. 139 at 35. Baykeeper has spent years investigating and attempting to bring the Cities into compliance with their legal obligations to protect local waterways—just as the CWA intended. *See generally* 33 U.S.C. § 1365. To facilitate public interest suits, Congress provided for recovery of attorneys' fees and costs to a prevailing Baykeeper. 33 U.S.C. § 1365(d). Baykeeper's prosecution of this case against permittees in violation of the CWA is furthering the purposes of the law and the public interest, not undermining it. The Cities' suggestions to the contrary, and their attempt to impugn the motives of Baykeeper, are irrelevant and absurd.

IV. CONCLUSION

There is no reason for the Court to reconsider its findings that the Receiving Waters are WOTUS, as the undisputed facts demonstrate they remain so after *Sackett*. Baykeeper respectfully requests that the Court deny The Cities' Motion for Reconsideration.

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