UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 21-CV-14205-MARRA/MAYNARD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BENJAMIN K. SHARFI, in his personal and fiduciary capacity as Trustee of the Benjamin Sharfi Trust, and NESHAFARM, INC.,

Defendants.
_____/

OMNIBUS REPORT AND RECOMMENDATION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This case involves claims that Defendants violated the Clean Water Act, 33 U.S.C. § 1251 *et seq.* ("CWA") by discharging dredged or fill material from their property in Martin County, Florida into waters of the United States without a permit. A threshold issue to be decided is whether wetlands located on Defendants' property constitute "waters of the United States" ("WOTUS") under the CWA for purposes of federal agency jurisdiction. Plaintiff argues yes and seeks to enforce the alleged violations of the CWA occurring on Defendants' property. Defendants sharply disagree and argue that the wetlands located on their property are not part of federally regulable WOTUS.

The question of which wetlands are considered part of WOTUS has been the subject of evolving case law. On May 25, 2023, over two years after this case was filed, the Supreme Court issued a decision in *Sackett v. EPA*, 598 U.S. 651 (2023) to address the "nagging question about the outer reaches of the [CWA]" in a case involving wetlands on a property located near a lake in

Idaho. In finding that the wetlands in that case were not WOTUS, *Sackett* adopted the test first pronounced by a plurality in *Rapanos v. U.S.*, 547 U.S. 715 (2006):

> [W]e hold that the CWA extends to only those wetlands that are 'as a practical matter indistinguishable from waters of the United States.' *Rapanos*, 547 U.S., at 755, 126 S.Ct. 2208 (plurality opinion) (emphasis deleted). This requires the party asserting jurisdiction over adjacent wetlands to 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." *Id.*, at 742, 126 S.Ct. 2208.

Sackett, 598 U.S. at 678-79.

Against this legal backdrop, the parties here have filed cross-motions for summary judgment. In moving for summary judgment, Plaintiff asserts that the undisputed material facts establish that the wetlands located on Defendants' property are within the jurisdiction of the CWA and that Defendants are liable for violating the CWA as a matter of law. DE 150. Meanwhile, Defendants assert that the wetlands on their property are not part of WOTUS and, even if they were, there are genuinely disputed material facts on other necessary elements of Plaintiff's claim precluding entry of summary judgment for Plaintiff. DE 154. The parties' respective positions are based on vastly differing interpretations of the Supreme Court's holding in *Sackett* and the application of that holding to the facts in this case.

Presiding U.S. District Judge Kenneth A. Marra has referred the summary judgment motions to me for appropriate disposition. DE 172. At the parties' request, I held oral argument on July 23, 2024. Having carefully considered the record, all relevant filings, the evidence of record, counsels' arguments, and the applicable law, I respectfully recommend that final summary judgment be entered in Defendants' favor for the reasons explained in this report.

PROCEDURAL HISTORY

On May 12, 2021, Plaintiff filed this action under the CWA alleging that Defendant Benjamin K. Sharfi ("Sharfi"), in his individual capacity and as Trustee of the Benjamin K. Sharfi Trust ("Sharfi Trust"), and Defendant NeshaFarm, Inc. ("NeshaFarm") violated the CWA by causing discharges of dredged spoil, rock, sand, earthen matter and other pollutants into a wetland complex located in Martin County, Florida. DE 1.

On August 18, 2021, Plaintiff filed the operative Amended Complaint alleging a single count against Sharfi and NeshaFarm for violating § 301(a) of the CWA by discharging pollutants into WOTUS, including wetlands, without a permit. DE 21. For redress, the Government seeks injunctive relief, including an order prohibiting further discharge of pollutants except in compliance with the CWA, restoration and mitigation of impacted WOTUS, and imposition of civil penalties.

On November 1, 2021, Defendants filed Answers to the Amended Complaint. DE 40, DE 41, DE 42. On November 2, 2022, the Court issued an order staying the case pending the Supreme Court's decision in *Sackett*. DE 142. On July 28, 2023, after *Sackett* was decided, the Court issued an Order establishing a schedule for the parties' exchange of supplemental expert reports to address *Sackett*[1] and the filing of cross-motions for summary judgment. DE 149. The parties thereafter filed the instant summary judgment motions.

[1] Per the Court's Order, the parties' supplemental expert reports were to address solely whether Defendants' Site contained regulable WOTUS under the *Sackett* test using previously collected facts and data. *See* DE 149 (stating that the supplemental reports "may not rely on facts or data collected after service of that expert's previous report in this action").

STATEMENT OF UNDISPUTED MATERIAL FACTS

The following material facts draw from the undisputed portions of the parties' respective factual statements and their attached supporting evidentiary submissions. DE 151, DE 153, DE 159, DE 165. The evidentiary submissions include photographs, an aerial video, topographical maps, hydrology maps, surveys, emails, permitting documentation, data forms, corporate documents, letters, a manual, expert reports with supporting documentation, and deposition testimony.

A. Defendants Purchase the Site

On April 24, 2017, Sharfi—in his capacity as trustee of the Sharfi Trust—acquired a 9.92-acre parcel of real estate in Martin County, Florida (the "Site"). DE 151 ¶ 2, DE 153 ¶ 2, DE 151-43 (Warranty Deed). The Sharfi Trust is a revocable trust governed by Florida law and Sharfi is its sole grantor and authorized trustee. DE 151 ¶ 3, DE 153 ¶ 3, DE 151-74 (Stipulation Regarding Sharfi Trust). On January 14, 2019, a quit claim deed transferred ownership of the Site to NeshaFarm, a Florida corporation with Sharfi as its chief executive officer. DE 151 ¶¶ 4-6, DE 153 ¶¶ 4-6, DE 42 (NeshaFarm's Answer), DE 151-71 at 14-15 (Sharfi Tr.).

B. Areas Surrounding the Site—Including Countess Joy Area, Bessey Creek, Excavated Ditches, and HWTT Facility

For reference, below is a visual depiction of the Site and its surrounding areas:

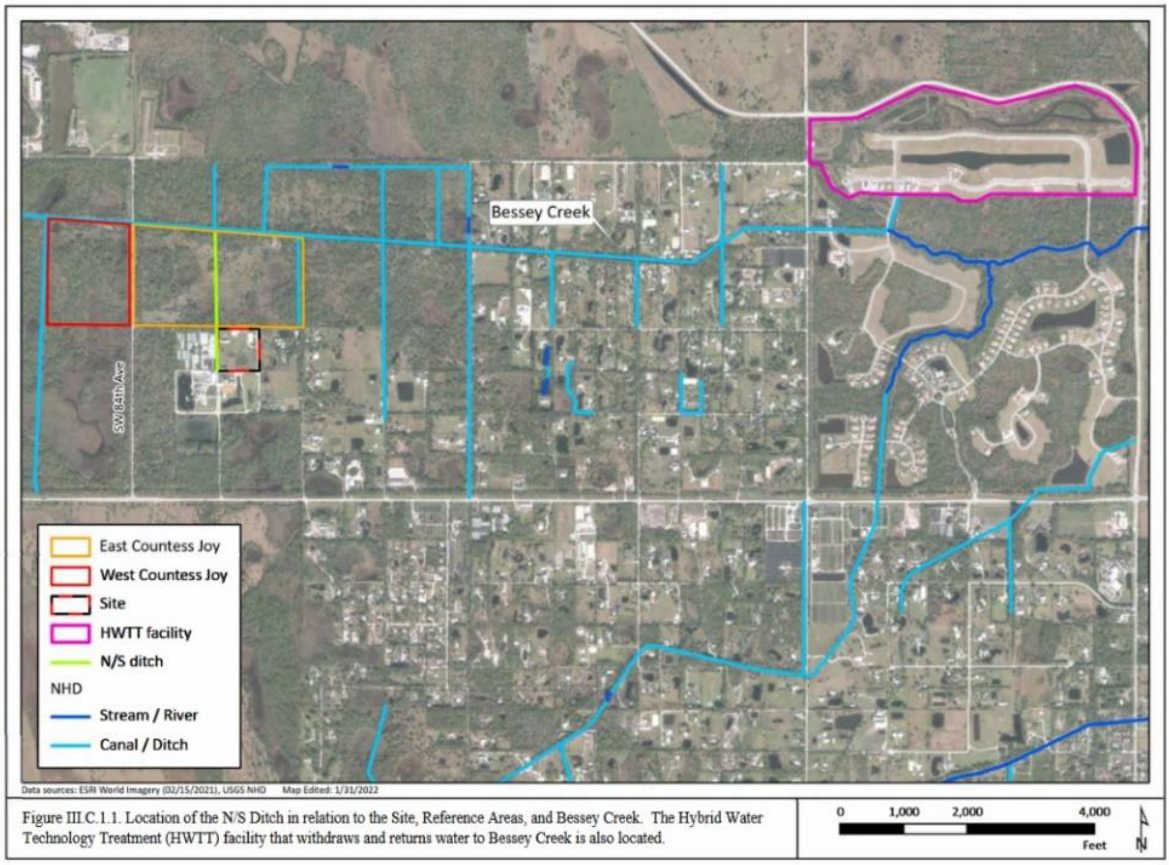

Figure III.C.1.1. Location of the N/S Ditch in relation to the Site, Reference Areas, and Bessey Creek. The Hybrid Water Technology Treatment (HWTT) facility that withdraws and returns water to Bessey Creek is also located.

DE 151-11 (Plaintiff's Summary Judgment Exhibit No. 10, Figure III.C.1.1).[2] Defendants' Site is bordered in black and red. Immediately north of the Site is a larger undeveloped property bordered in gold and red that is owned by Countess Joy LLC. This separate property is used to graze cattle and the parties refer to it as the Countess Joy reference area.

[2] This map is one of several maps submitted by Plaintiff in support of its factual overview and it is one of the selected maps used as a helpful demonstrative at oral argument before me to provide general context for the geographic area surrounding Defendants' Site. This map is attached as Exhibit A to a supplemental expert report, dated September 15, 2023, authored by Plaintiff's expert Wade Nutter, DE 151-81, and is also referenced by defense expert W. Michael Dennis in his supplemental report, dated September 15, 2023, DE 151-79.

Bessey Creek is a natural waterway that flows into the St. Lucie River which then flows east and then southeast for approximately 10.9 miles to join the St. Lucie Inlet and the Atlantic Ocean, all of which are traditional navigable waters. DE 151 ¶ 17, DE 153 ¶ 17. The nearest traditional navigable water to the Site is the tidally-influenced portion of Bessey Creek, which is located approximately 4½ miles from the Site where Bessey Creek flows under the SW Murphy Bridge. DE 151 ¶¶ 15-16, DE 153 ¶¶ 15-16. Upstream of the tidally-influenced portion of Bessey Creek are freshwater portions of the creek. DE 153 ¶ 92, DE 159 ¶ 92. The closest natural channel of Bessey Creek to the Site is located approximately two miles away, near a Hybrid Wetland Treatment Technology facility ("HWTT Facility").[3] *Id.* The natural channel of Bessey Creek is a relatively permanent water. *Id.*, DE 151-79 at 11 (Dennis Supp. Report).

Between Bessey Creek and the Site are several manmade drainage ditches that were excavated years ago. North of the Site running through the Countess Joy area is an east-west oriented drainage ditch that joins Bessey Creek approximately two miles east of the Site. Defendants refer to this ditch as the "East-West Ditch," which I will use throughout this Report and Recommendation.[4] Other drainage ditches connect to the East-West Ditch. One of those ditches is a north-south oriented ditch that runs from the East-West Ditch south through the middle of the Countess Joy area and along the western boundary of the Site. DE 151 ¶¶ 74-75, DE 153 ¶¶ 74-75. Both parties refer to this as the "North-South Ditch." Approximately a quarter mile west of the North-South Ditch is another north-south oriented ditch that is next to SW 84th Avenue

[3] The HWTT Facility utilizes water quality technology to clean water from Bessey Creek before it reaches the St. Lucie River.

[4] Plaintiff refers to the East West Ditch as the "upstream reach of Bessey Creek."

and connects to the East-West Ditch in the Countess Joy area. DE 151 ¶ 84, DE 153 ¶ 84. The parties refer to this as the "84th Avenue Roadside Ditch." As you travel east between the Site and Bessey Creek, there are multiple other north-south oriented ditches that connect to the East-West Ditch. DE 153 ¶ 111, DE 159 ¶ 111.

The drainage ditches do not have the same level of water year-round. The parties and their experts generally agree that the ditches have seasonal flow, meaning higher flow on average in rainy seasons and little to no flow on average in dry seasons. DE 153 ¶¶ 106, 108-109, DE 159 ¶¶ 106, 108-109. The only data regarding year-round water flow provided by Plaintiff are estimates for 2004-2009 at the HWTT facility located near the junction of the East-West Ditch and Bessey Creek two miles east of the Site. DE 151-81 (Nutter Suppl. Rep.) (describing and relying upon charts and data submitted in connection with a prior permit issued by SFWMD to construct the HWTT facility). The parties agree that this area of the East-West Ditch near the HWTT facility typically has more water than the portions of the East-West Ditch further west in the Countess Joy property to the north of Defendants' Site. DE 153 ¶ 114, DE 159 ¶ 114.

Defendants submitted an aerial video taken in April 2022 (during the dry season) by a helicopter traveling north/northwest from the Site until reaching the East-West Ditch and then traveling eastward along that ditch and Bessey Creek until reaching St. Lucie River. DE 153-2, video accessible at: https://carltonfields.app.box.com/s/dk7p4a8jimvkf7h1t52e2652nz4peol5. The approximately fifteen-minute video depicts a helicopter flyover shortly above treetop level starting from the northwest corner of Defendants' Site, flying up the North-South Ditch through the Countess Joy property and then turning east to fly over the East-West Ditch until reaching Bessey Creek and ultimately the St. Lucie River. The video includes an embedded Google map

image on the right-hand side to simultaneously show where the helicopter is located in relation to Defendants' Site at all times in the video. The video shows mostly trees, shrubs, and obviously dry conditions for the first five minutes until reaching a point along the East-West Ditch where the area becomes noticeably more residential closer in to the HWTT Facility and Bessey Creek.

C. Defendants' On-Site Activities

In 2018, Defendants began activities to accomplish their stated plans to use the Site for agricultural use. DE 151 ¶ 20, DE 153 ¶ 20, DE 151-46. These activities included clearing out vegetation, building a perimeter road around the Site, depositing road rock, evening out the ground surface, and constructing farm buildings. DE 151 ¶¶ 20-24, DE 153 ¶¶ 20-24.

On February 12, 2018, Mr. Sharfi submitted a permit application to the U.S. Army Corps (the "Corps") outlining plans for the site. Specifically, he planned to construct an agricultural fence on the Site, clear a small area on the Site's southwestern corner to build a metal structure for sheltering grazing animals, and clean a manmade "ditch/conveyance" running along the Site's western boundary and "eventually leading to Bessey Creek and later to tide in the North Fork of the St. Lucie River." DE 151 ¶ 25, DE 153 ¶ 25, DE 151-47 (permit application). Around this same time, in February 2018, Defendants hired an environmental consultant, Danna Small, to delineate the geographic extent of wetlands on the Site and obtain an informal verification of her assessment from SFWMD. DE 151 ¶ 26, DE 153 ¶ 26. On March 9, 2018, Ms. Small visited the Site and completed data forms, took observation notes, took photos, and placed "flags" to demarcate her assessment of the extent of wetlands located on the Site. DE 151-3 (Ms. Small's photos from March 2018 Site visit), DE 151-66 at 15-16 (Small Tr.). During Ms. Small's visit, a bulldozer was clearing trees in an on-Site area that she assessed as wetlands. DE 151 ¶ 29, DE

153 ¶ 29. Ms. Small testified that before leaving the Site that day, she called Defendants' representative and "strongly recommended" that the ongoing work she observed in the wetlands area be stopped. DE 151-66 at 21 (Small Tr.).

On March 17, 2018, the Corps sent a letter advising Defendants that the permit application was incomplete and requesting specific supplemental information, including additional descriptions, narratives, figures, and exhibits. DE 151-49. On April 19, 2018, the Corps withdrew the permit application for lack of a timely response by Defendants. DE 151 ¶ 36, DE 153 ¶ 36.

On April 25, 2018, two wetland specialists from South Florida Water Management District ("SFWMD") and Ms. Small went to the Site for an informal wetland determination field visit to verify Ms. Small's identification of wetlands on the Site. DE 151-66 at 61. During this visit, land-clearing "work being performed in the wetlands had expanded" and photos were taken. DE 151 ¶¶ 38-40, DE 153 ¶¶ 38-40, DE 151-4, DE 151-5 (photos from April 2018 Site visit). On April 26, 2018, SFWMD issued an "informal wetland determination" stating that "jurisdictional wetlands" as defined under Florida law existed in the southwestern area of the Site "[b]ased on the information provided and the results of the [joint] site inspection." DE 151-51, *see also* SFWMD ePermitting website, application no. 180402-436, Exhibit 2 "Wetlands Map" available at: https://my.sfwmd.gov/ePermitting/SearchPermit.do (link to permit application materials, including "Exhibit 2" identifying boundaries of "mixed wetland hardwoods" on Defendants' Site).

On April 26, 2018, a Corps' representative sent an email to Defendants stating that "significant earth work has begun" at the Site without authorization. DE 151-53 at 3. On April 30, 2018, the Corps issued a cease-and-desist letter advising Defendants to stop the unauthorized discharge of fill material into WOTUS. DE 151-54. In email correspondence that same day, Mr.

Sharfi disagreed with the Corps' position but indicated that Defendants were "sensitive" to the wetlands issue and would work "all the way with the Corps and any other agencies." DE 151-55.

On May 3, 2018, Ms. Small sent a letter in response to the Corps' request for specific information about on-Site activities. DE 151-57. Ms. Small described the Site generally including reference to neighboring properties and a preexisting "drainage ditch" on the west property line which "drains north to a canal which eventually connects with Bessey Creek to the east (approx.. 1.8 miles east)." *Id.* Ms. Small said this ditch had reduced functionality due to overgrown vegetation and sediment deposits and she described Defendants' proposed maintenance on this ditch to restore its capacity. *Id.* Ms. Small acknowledged the presence of wetlands "on the southern side" of the Site and summarized her wetland delineation process.

On November 28, 2018, the Corps sent Mr. Sharfi an email stating that the Corps had "reason to believe you have continued work in jurisdictional wetlands without the benefit of a permit" and invited Mr. Sharfi to a meeting. DE 151-60. Mr. Sharfi declined the meeting invitation. *Id.*

Defendants thereafter built interior dirt roads within the Site, graded areas to plant vegetation, cleared additional vegetation, placed sod, deposited sand that was spread in nearby horse stables, created dirt piles, constructed buildings, and excavated ponds. DE 151 ¶¶ 52-57, DE 153 ¶¶ 52-57. The work was done with mechanical equipment such as bulldozers and box blades and by workers using hand tools. *Id.* The below before and after photographs show the Site in 2017, when Defendants bought it, and more recently in 2021:

Photograph 5-7. 2017 – 51 Year Regrowth of Forested & Scrub/Shrub Mosaic
[Source – Martin County Web Mapper - https://geoweb.martin.fl.us/general/]

Photograph 5-19. November 29, 2021 – Developed Conditions
Source - Martin County Pictometry Viewer [https://www.pa.martin.fl.us/-code/property-search/pictometry.php?x=-80.3622271079&y=27.1664672568]

DE 151-2 at 9, 22. As shown in the above 2021 photo, Defendants have fenced approximately one acre of wetlands in the southwestern corner of the Site. DE 153 ¶ 128, DE ¶ 128.

D. U.S. Expert Team Site Inspection in 2021

Plaintiff hired a team of experts to inspect the Site, which included three field investigations of the Site and its surrounding areas in August, September, and October 2021. DE 151-80 at 4 (Wylie Suppl. Rep.), DE 151-81 at 4-5 (Nutter Suppl. Rep.), DE 151-82 15–17, 23-31 (U.S. Expert Team Report). In nineteen (19) locations on the Site, the U.S. expert team observed hydrology, vegetation, and soil conditions, all recorded on wetland determination data forms. DE 151-41. The U.S. Expert team determined that there were wetlands on 5-6 acres of the Site extending to the northern boundary line prior to Defendants' on-Site activities as shown in the below figure: DE 151 ¶ 63, DE 153 ¶ 63, DE 151-17.[5]

[5] This is a close up of Defendants' Site as depicted in the box bordered in black and red in first map inserted above. The North-South Ditch runs along the entire western border of Defendants' Site.

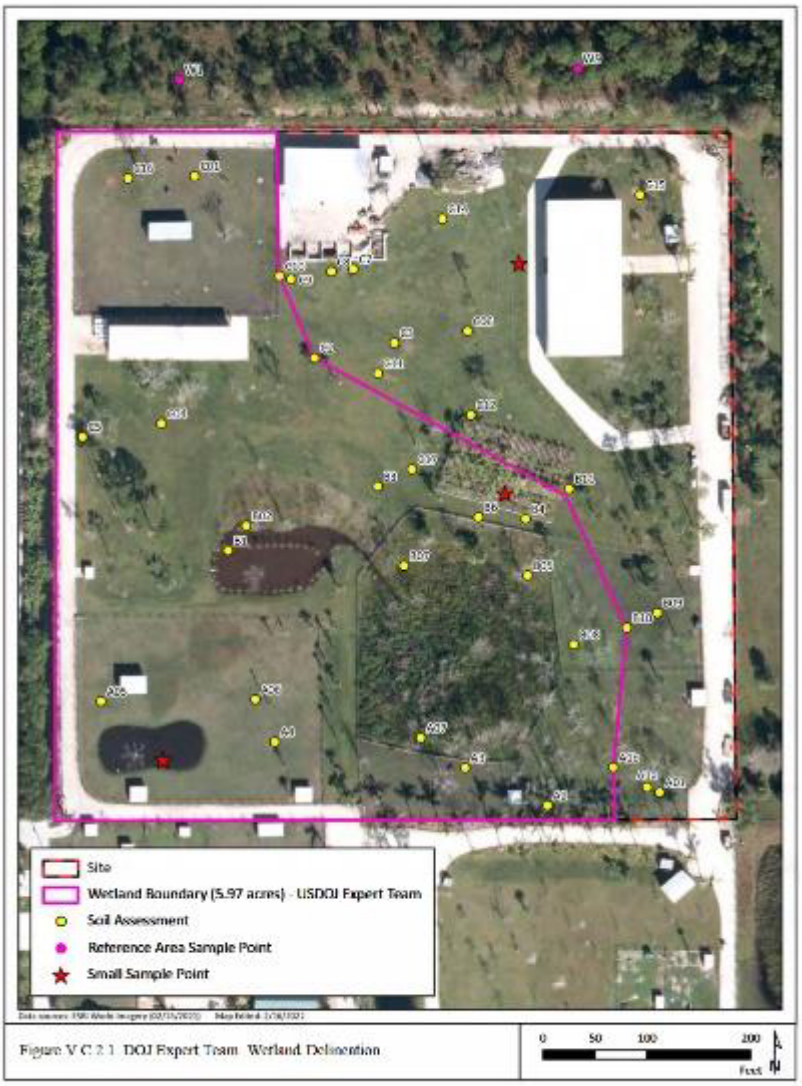

Figure V.C.2.1 DOJ Expert Team Wetland Delineation

E. Wetlands On and Around Defendants' Site

It is undisputed that there are wetlands on Defendants' Site, but the parties dispute the size and location of these wetlands. Defendants posit that the on-Site wetland is smaller and does not extend to the boundary with the Countess Joy property based on Ms. Small's 2018 delineation described above, which was verified in the field by two SFWMD wetland specialists. DE 153 ¶¶ 124, 126. On the other hand, Plaintiff posits that the wetlands cover most of Defendants' Site and

extends to the Sites' northern property boundary where it allegedly becomes part of a larger wetland to the north and extends through the neighboring Countess Joy property all the way up to the East-West Ditch. This position is based on Plaintiff's expert team inspection conducted in 2021 described above. Regarding the neighboring Countess Joy property, it is undisputed that there are wetlands there, but once again, the parties dispute the location and extent of the wetlands. Official maps produced by the U.S. Fish and Wildlife Service for the National Wetland Inventory and U.S. Geological Survey show pockets of wetlands on and around Defendants' Site. DE 151-72 at 57, 68 (maps included in Dennis Supp. Expert Report).

DISCUSSION

Below I will first set forth the familiar summary judgment standard of review before discussing the Supreme Court's decisions leading up to the newly governing *Sackett* test used to determine if wetlands are WOTUS for purposes of CWA jurisdiction. I will then discuss why applying the *Sackett* test to the undisputed facts of this case leads me to conclude that the wetlands on Defendants' Site do not qualify as WOTUS, thereby entitling Defendants to final summary judgment in their favor.

I. SUMMARY JUDGMENT STANDARD OF REVIEW

Summary judgment is proper if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The existence of a factual dispute is not by itself sufficient grounds to defeat a motion for summary judgment; rather, "the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A dispute is genuine if a "reasonable trier of fact could return judgment for the non-moving party." *Miccosukee Tribe of Indians of Fla. v. U.S.*,

516 F.3d 1235, 1243 (11th Cir. 2008) (citing *Anderson*, 477 U.S. at 247-48). A fact is material if "it would affect the outcome of the suit under the governing law." *Id.* (citing *Anderson*, 477 U.S. at 247-48); *Kerr v. McDonald's Corp.*, 427 F.3d 947, 951 (11th Cir. 2005).

In deciding a summary judgment motion, the Court views the facts in the light most favorable to the non-moving party and draws all reasonable inferences in that party's favor. *See Furcron v. Mail Ctrs. Plus, LLC*, 843 F.3d 1295, 1304 (11th Cir. 2016); *Davis v. Williams*, 451 F.3d 759, 763 (11th Cir. 2006). The Court does not weigh conflicting evidence or make credibility determinations. *Furcron*, 843 F.3d at 1304; *Skop v. City of Atlanta*, 485 F.3d 1130, 1140 (11th Cir. 2007). If a genuine dispute of material fact exists, the Court must deny summary judgment. *Skop*, 485 F.3d at 1140.

The standard of review for cross-motions for summary judgment is the same. A cross-motion for summary judgment may be granted only if "one of the parties is entitled to judgment as a matter of law on facts that are not genuinely disputed." *Torres v. Rock & River Food Inc.*, 244 F. Supp. 3d 1320, 1327–28 (S.D. Fla. 2016). A court reviewing cross-motions for summary judgment "must consider each motion on its own merits, resolving all reasonable inferences against the party whose motion is under consideration." *Id.*

When a motion for summary judgment is presented to the court, it opens the entire record for consideration, and the Court may enter judgment in favor of the nonmoving party on any grounds apparent in the record, even where there is no formal cross motion. *See Burton v. City of Belle Glade*, 178 F.3d 1175, 1204 (11th Cir. 1999).

II. DETERMINING WHEN WETLANDS ARE WOTUS

A. Defining WOTUS under the CWA

The CWA is the principal federal water pollution statute. Enacted in 1972, its goal is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA prohibits "the discharge of any pollutant by any person" without a permit into "navigable waters," defined by statute as "the waters of the United States [WOTUS], including the territorial seas." *Id.* §§ 1311(a), 1342(a)(1), 1362(12). The term "pollutant" includes traditional contaminants like chemical wastes and radioactive materials, as well as more mundane materials like "rock, sand," and "cellar dirt." *Id.* § 1362(6).

The CWA does not define WOTUS. Thus, the agencies responsible for enforcing it—the Corps and the EPA—have promulgated regulations over the years attempting to define the phrase. "As it turns out, defining that statutory phrase—a central component of the [CWA]—is a contentious and difficult task." *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 583 U.S. 109, 116 (2018). As recognized in *Sackett*, "the outer boundaries of the [CWA's] geographical reach have been uncertain from the start. The [CWA] applies to 'the waters of the United States,' but what does that mean?" *Sackett*, 598 U.S. at 658.

B. Pre-Sackett Supreme Court Caselaw: Riverside Bayview (1985), SWANCC (2001), and Rapanos (2006)

The Supreme Court sought to clarify the meaning of WOTUS in three cases preceding *Sackett*. In *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 124 (1985), the Supreme Court considered whether wetlands are included in the definition of WOTUS under the CWA. Though noting that "[o]n a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or

otherwise, as 'waters,'" the Supreme Court deferred to the Corps' interpretation of the term "waters" as including "wetlands adjacent to waters" based on "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems." *Id*. at 131-33.[6] The Court concluded that "the language, policies, and history of the [CWA] compel a finding" that WOTUS includes wetlands adjacent to traditional navigable waters. *Id.* at 131. Because the landowner's property in that case was part of a wetland that "actually abut[ted] on a navigable waterway," the Supreme Court found that the wetland was WOTUS under the CWA. *Id.* at 133.

After *Riverside Bayview*, the agencies adopted even broader definitions of WOTUS. For instance, in 1986 the Corps announced a "Migratory Bird Rule" extending its jurisdiction to any intrastate waters used as a habitat by migratory birds. In *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 164 (2001) ("SWANCC"), the Supreme Court revisited the meaning of WOTUS in a case involving application of the Migratory Bird Rule to an abandoned gravel mining pit in northern Illinois. The Corps argued that the abandoned mining pit qualified as WOTUS because it had seasonal ponds used as habitat by migratory birds that cross state lines. *Id.* at 164-65. In support, the Corps relied on its own prior regulations defining WOTUS to include "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the

[6] In making this determination, the Supreme Court relied on *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), which directed courts to defer to an agency's reasonable interpretation of an ambiguity in a law that the agency enforces. Notably, this *Chevron* deference doctrine was recently overturned during the 2023-24 Supreme Court Term. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) (overruling *Chevron* deference and instructing that courts "may not defer to an agency interpretation of the law simply because a statute is ambiguous.")

United States, the degradation or destruction of which could affect interstate commerce." *Id.* at 168 (quoting 33 C.F.R. § 323.2(a)(5) (1978)).

The Supreme Court disagreed with the agency regulation. In rejecting the Migratory Bird Rule, the Supreme Court found that the CWA did not apply to seasonal isolated ponds "that are not adjacent to open water." *Id.* at 168. The Supreme Court reasoned that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172. Permitting the Corps to claim federal jurisdiction over ponds and mudflats under the Migratory Bird Rule "would result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 174.

Next, in *Rapanos*, the Supreme Court considered whether "four Michigan wetlands, which lie near ditches or man-made drains that eventually empty into traditional navigable waters" were WOTUS under the CWA. *Rapanos*, 547 U.S. at 729. The Corps argued that the wetlands with "sometimes-saturated soil conditions" were WOTUS because they were "adjacent" to navigable waters, in that they were near ditches and drains that eventually emptied into traditional navigable waters 11-20 miles away. *Id.* at 729-30. It was not clear if the connections between the wetlands and the nearby ditches and drains were continuous or intermittent, or if the nearby drains and ditches contained continuous or merely occasional flows of water. *Id.* at 729. The Sixth Circuit agreed that the wetlands were covered by the CWA because they were "adjacent to neighboring tributaries of navigable waters" and had a "significant nexus" to WOTUS. *Id.* at 730.

The Supreme Court reversed, finding that WOTUS "cannot bear the expansive meaning that the Corps would give it." *Id.* at 731-32. A majority of the justices could not agree on what

the definition should be, but a plurality concluded that ditches and drains that eventually empty into traditional navigable waters were not WOTUS. Rather, WOTUS:

> includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographical features" that are described in ordinary parlance as "streams, oceans, rivers and lakes." The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The corps' expansive interpretation of the "the waters of the United States" is thus not based on a permissible construction on of the statute.

Id. at 739 (citations omitted). The plurality explained that the terms "streams," "oceans," "rivers," "lakes," and "bodies" of water "forming geographical features" connote "continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows." *Id*. at 733. It further noted that "[n]one of these terms encompasses transitory puddles or ephemeral flows of water." *Id.* at 733. According to the plurality:

> The restriction of "the waters of the United States" to exclude channels containing merely intermittent or ephemeral flow also accords with the commonsense understanding of the term. In applying the definition to "ephemeral streams," "wet meadows," storm sewers and culverts, "directional sheet flow during storm events," drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term "waters of the United States" beyond parody. The plain language of the statute simply does not authorize this "Land Is Waters" approach to federal jurisdiction.

Id. at 733.[7]

[7] The *Rapanos* plurality clarified that by describing "waters" as "relatively permanent," it did 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—such as the 290-day, continuously flowing stream postulated by Justice Stevens' dissent." *Id.* at 733 n.5. The plurality did not decide "exactly when the drying-up of a streambed is continuous and frequent enough to disqualify the channel as a 'water of the United States," however the plurality held that "'intermittent' and 'ephemeral' streams—that is, streams whose flow is 'coming and going at intervals ... broken, fitful,' or 'existing only, or no longer than, a day; diurnal ... short-lived'—are not." *Id*. The plurality reasoned that "no one contends that federal jurisdiction appears and evaporates along with the water in such regularly dry channels." *Id.*

Applying the "relatively permanent" definition to adjacent wetlands, the plurality held that "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." *Id.* at 742. "Wetlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States'" are not wetlands covered under the CWA. *Id.* Thus, to establish that adjacent wetlands are covered by the CWA, the enforcer must show that: (1) "the adjacent channel contains a 'wate[r] of the United States,' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters);" and (2) "the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* The plurality remanded the case to the Sixth Circuit for findings on those issues.

In a concurring opinion, Justice Kennedy advocated the use of a "significant nexus" test instead of the plurality's "relatively permanent" test. *Id.* at 779-80 (Kennedy, J., concurring). In Justice Kennedy's view, courts should decide if wetlands or waters are covered by considering whether they, "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.'" *Id.* The lack of a consensus in *Rapanos* on "precisely how to read Congress' limits on the reach of the Clean Water Act," left "[l]ower courts and regulated entities … to feel their way on a case-by-case basis." *Rapanos*, 547 U.S. at 758 (Roberts, C.J, concurring). Without a majority opinion, the agencies proceeded with Justice Kennedy's more jurisdictionally friendly "significant nexus" test. *White v. U.S. EPA*, 2024 WL 3049581 (E.D.N.C. June 18, 2024) (citing Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg.

37054, 37060-061 (June 29, 2015)). Lower courts continued to use both the "relatively permanent" and "significant nexus" tests. *San Francisco Baykeeper v. City of Sunnyvale*, 2023 WL 8587610, at * 2 (N.D. Cal. Dec. 11, 2023).

C. Sackett v. EPA, 598 U.S. 651 (2023)

Seventeen years after *Rapanos*, the Supreme Court issued an opinion in *Sackett* agreeing with the *Rapanos* plurality and setting forth a definitive test for courts to use to determine whether wetlands are WOTUS. *Sackett*, 598 U.S. at 678. In *Sackett*, Michael and Chantell Sackett bought a lot near Priest Lake, Idaho in 2004 and began backfilling their lot with dirt and rocks to build a home. *Sackett*, 598 U.S. at 661-62. A few months later, the EPA informed the Sacketts that their backfilling activity violated the CWA because their lot contained protected wetlands. *Id.* at 662. According to the EPA, the wetlands on the Sacketts' lot were covered because they were near, but separated by a 30-foot road from, an unnamed tributary, which fed into a non-navigable creek, which ran into Priest Lake, a traditionally navigable water. *Id.* at 662-63. Relying on Justice Kennedy's "significant nexus" test, the EPA argued that the Sacketts' wetlands, together with a nearby wetland complex, "significantly affected" the water quality of Priest Lake creating a "significant nexus" between the wetlands and Priest Lake. *Id*. The Sacketts argued that the EPA lacked jurisdiction because any wetlands on their property were not WOTUS. *Id.* at 663. After multiple rounds of litigation, the district court granted summary judgment for the EPA. *Id.*

On appeal, the Ninth Circuit affirmed. *Id.* Applying Justice Kennedy's "significant nexus" test, the Ninth Circuit held that the Sacketts' wetlands qualified as WOTUS because they were "adjacent to a jurisdictional tributary and . . . together with the similarly situated [nearby wetland

complex], they have a significant nexus to Priest Lake." *Sackett v. EPA*, 8 F.4th 1075, 1079, 1088-89, 1092 (9th Cir. 2021).

The Supreme Court granted certiorari "to decide the proper test for determining whether wetlands are [WOTUS]" and to determine if the Sacketts' wetlands fell within the jurisdiction of the CWA. *Sackett,* 598 U.S. at 663. The Supreme Court ruled in favor of the Sacketts and agreed that the Sacketts' wetlands did not fall within the jurisdiction of the CWA.[8] This landmark case clarified the jurisdictional scope of the CWA in two key respects. First, the majority concluded that the *Rapanos* plurality was correct that the CWA's use of "waters" included "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739). Second, the *Sackett* majority held that "some wetlands qualify as [WOTUS]"—but only those with a "continuous surface connection" with one of the relatively permanent bodies of water just mentioned, such that the wetland is "indistinguishably part of a body of water that itself constitutes 'waters' under the CWA." *Id.* at 674-76, 678-79.

Ultimately, the *Sackett* Court set forth the following test for use in determining if wetlands are WOTUS and thus subject to CWA jurisdiction:

> In sum, we hold that the CWA extends to only those wetlands that are 'as a practical matter indistinguishable from waters of the United States.' *Rapanos*, 547 U.S., at 755, 126 S.Ct. 2208 (plurality opinion) (emphasis deleted). This requires the party asserting jurisdiction over adjacent wetlands to establish 'first, that the adjacent

[8] The Supreme Court reversed and remanded the lower court's decision in a 9-0 opinion. Justice Alito delivered the opinion of the Court, in which Chief Justice Roberts and Justices Thomas, Gorsuch, and Barrett joined. Justice Thomas filed a concurring opinion, in which Justice Gorsuch joined. Justice Kagan filed an opinion concurring in the judgment, in which Justices Sotomayor and Jackson joined. Justice Kavanaugh filed an opinion concurring in the judgment, in which Justices Sotomayor, Kagan, and Jackson joined.

> [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.' *Id.*, at 742, 126 S.Ct. 2208.

Id. at 678-79.[9]

III. DEFENDANTS ARE ENTITLED TO FINAL SUMMARY JUDGMENT

The *Sackett* test is binding Supreme Court precedent that applies here.[10] *See Harper v. VA Dep't of Tax'n*, 509 U.S. 86, 97 (1993) ("When [the Supreme Court] applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."); *see also Glynn Env't*

[9] In adopting this test, the majority declined for several reasons to defer to an EPA regulation defining WOTUS under the "significant nexus" test. *Id.* at 679-80. For one, as discussed above, the Court found that the EPA's interpretation was inconsistent with the CWA's text. *Id.* at 679. Additionally, the EPA rule clashed with "background principles of construction" for interpreting statutory provisions. *Id.* One principle is that Congress must use "exceedingly clear language" to alter the balance of federal versus state authority over private property. *Id.* at 679-80. Additionally, the EPA's "freewheeling" interpretation provided landowners little notice of their obligations under the CWA giving "rise to serious vagueness concerns in light of the CWA's criminal penalties[.]" *Id.* at 681. The *Sackett* majority then rejected the EPA's two final arguments. First, the fact that Congress amended § 1344(g)(1) in 1977 to include "adjacent" wetlands did not mean that Congress "implicitly ratified" the Corps' pre-1977 wetlands regulation, which defined "adjacent" wetlands as those that were "bordering, contiguous, or neighboring" to covered waters. *Id.* at 681-82. That was because (1) the text of the relevant provisions foreclosed that interpretation, as discussed above; (2) prior cases had rejected similar arguments regarding other terms in § 1344(g)(1); and (3) the EPA could not provide the "overwhelming evidence of acquiescence" necessary to establish congressional ratification. *Id.* at 682-83. Second, the EPA's policy arguments about the environmental impact of a narrower definition of adjacent were rejected because "the CWA does not define the EPA's jurisdiction based on ecological importance, and we cannot redraw the [CWA's] allocation of authority." *Id.* at 683.

[10] In moving for summary judgment, Plaintiff predominantly cites pre-*Sackett* authority and agency guidance. For instance, Plaintiff makes a buried-in-a-footnote argument that "[f]or purposes of determining Defendants' liability, the pre-2015 regulatory regime, implemented consistent with *Sackett*, governs the scope of WOTUS." DE 150 at 17-18 n. 3 (citing 33 CFR § 328.3). This argument is misleading and unpersuasive. For one, the Supreme Court has rejected multiple subsections of that cited regulation in different cases. *See, e.g.*, *SWANNC*, 531 U.S. at 174 (holding that the migratory bird rule in 33 CFR § 328.3(a)(3) exceeded agency authority under the CWA); *Sackett*, 598 U.S. at 681-83 (rejecting definition of "adjacent" set forth 33 CFR § 328.3(c)). More importantly, the Supreme Court in *Sackett* expressly declined to defer to agency interpretation of the CWA and instead set forth a clear test for determining if a wetland is part of the WOTUS.

Coal., Inc. v. Sea Island Acquisition, 2024 WL 1088585, at *4 (S.D. Ga. Mar. 1, 2024) ("Because the Supreme Court applied a rule of federal law—its interpretation of the CWA—to the parties before it in *Sackett*, this Court must give full retroactive effect to the decision."). Applying the *Sackett* test, the undisputed facts establish that the wetlands on Defendants' property are not WOTUS and thus do not fall within CWA jurisdiction.

Under *Sackett*, the CWA "extends to only those wetlands that are 'as a practical matter indistinguishable from waters of the United States." *Sackett*, 598 U.S. at 678. To make this determination, the *Sackett* test requires Plaintiff to establish (1) first, that an adjacent body of water constitutes WOTUS (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); *and* (2) 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. *Id.* at 678-79. Both requirements must be met for Plaintiff to establish jurisdiction under the CWA.

A. Adjacent Body of Water Constituting WOTUS

Turning to the first requirement, the *Sackett* Court stated that the term "waters" includes "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers and lakes.'" *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739). The term "ditch" is noticeably excluded from this list. In fact, at the outset of *Sackett*, the majority grouped "ditches" with "swimming pools and puddles" in considering the "outer boundaries of the [CWA's] geographical reach," *Sackett*, 598 U.S. at 659. This coincides with the *Rapanos* plurality opinion's citation to lower court cases upholding "the Corps' sweeping assertions of jurisdiction over ephemeral channels and drains as 'tributaries'" to make the point that "[i]n applying the definition

to … man-made drainage ditches, ... the Corps has stretched the term [WOTUS] beyond parody." *Rapanos*, 547 U.S. at 726-27, 734. To further emphasize the point, the *Rapanos* plurality pointed out that the CWA defines "point source" to include "ditches," "channels" and "conduits," 33 U.S.C. § 1362(14), and this "separate classification … shows that these are, by and large, not [WOTUS]." *Id.* at 735-36. These statements suggest that the Supreme Court has drawn a distinction between natural bodies of water like streams and rivers (which are regulated) and manmade channels like roadside drains and ditches (which are not). As suggested in a footnote within *Rapanos*, the only exception would be ditches, channels, and conduits that permanently or intermittently hold water, such as a manmade moat around a castle or a manmade canal used for navigation. *See id.* at n.7. While moats and canals are technically excavated ditches, they nonetheless contain a "relatively continuous flow" of water. *Id.*

Relevant here, Bessey Creek indisputably flows into the St. Lucie River which flows into the St. Lucie Inlet and eventually the Atlantic Ocean, all of which are traditional navigable waters. DE 151 ¶ 17, DE 153 ¶ 17. The parties agree that the closest traditional navigable water to Defendants' Site is the tidally-influenced portion of Bessey Creek, which is located approximately 4.5 miles away from the Site. DE 151 ¶¶ 15-16, DE 153 ¶¶ 15-16. The parties further agree that freshwater portions of Bessey Creek located further upstream and in the area where the East-West Ditch meets Bessey Creek just south of the HWTT Facility and approximately two miles away from the Site are relatively permanent waters subject to CWA jurisdiction. DE 153 ¶ 92, DE 159 ¶ 92. These bodies of water clearly and indisputably count as WOTUS.

The parties disagree, however, regarding whether manmade ditches connected to the above bodies of water and located closer to and along the boundary of Defendants' Site also count as

WOTUS. Plaintiff argues that the wetlands on Defendants' Site "physically abut … at least one and, indeed, three tributaries with relatively permanent flow to traditional navigable waters." DE 150 at 17. What Plaintiff refers to as three "tributaries" are more fairly characterized as three manmade ditches. That is, the East-West Ditch located north of the Site, the North-South Ditch running along the Site's western boundary, and the 84th Avenue Ditch located further west of the Site and running parallel to the North-South Ditch.

Contrary to Plaintiff's arguments, the undisputed material evidence shows that the areas of these ditches closest to Defendants' Site do not meet the definition of "relatively permanent water" under *Sackett* for at least two reasons. **First**, the ditches are not geographical features ordinarily described as streams, oceans, rivers, or lakes. It is undisputed that these ditches are all manmade drainage ditches that were excavated in straight lines well before Defendants acquired the Site. DE 153 ¶¶ 92-96, DE 159 ¶¶ 92-96. Historical aerials and maps submitted by both parties confirm that the natural portions of Bessey Creek follow a winding, non-straight course that is characteristic of natural bodies of water, whereas the manmade ditches are oriented in straight lines. It is undisputed that the ditches have discontinuous earthen berms[11] of soil along their sides that can function as physical barriers to surface flow where they are present. DE 153 ¶¶ 100-103. Although Plaintiff and its experts refer to the East-West Ditch north of Defendants' Site as "the upstream reach of Bessey Creek," Plaintiff does not dispute that certain objective maps used by Plaintiff's expert team identify the East-West Ditch as a "ditch" or "canal" and not "the upstream reach of

[11] A berm is an environmental term meaning "a flat or raised strip of land, often created in order to separate or protect an area." *See* "Berm" defined, Cambridge Dictionary, Cambridge University Press, available at: https://dictionary.cambridge.org/us/dictionary/english/berm (last accessed 8/7/2024).

Bessey Creek." DE 153 ¶¶ 97-99, DE 159 ¶¶ 97-99, DE 151-72 at 28, 42 (maps and figures attached to Plaintiff's Expert Report identifying East-West Ditch as the "East-West Canal/Ditch").

Second, and perhaps more importantly, the ditches are not relatively permanent, standing, or continuously flowing bodies of water. *Sackett* made clear that adjacent WOTUS must be "relatively permanent, standing or continuously flowing bodies of water." *Sackett*, 598 U.S. at 671. The evidence submitted by the parties shows that the ditches here have at most seasonal water flow. For example, Plaintiff's expert testified that he observed "water flowing" in the East-West Ditch north of the Site and closest to Bessey Creek for at least five months of the year, including in the dry season of December. DE 153-1 at 14 (Nutter Tr.). This same expert admitted, however, that there are "times during the typical year that the portion of the East-West Ditch near the Countess Joy property and the defendants' site has *no* flow" particularly in extended dry periods of low seasonal rainfall. *Id.* (emphasis added). This statement is corroborated by an aerial video of the relevant area of the ditches closest to Defendants' Site in April 2022, which shows completely dry conditions and no water other than isolated puddles. *See* DE 153-2, video accessible at: https://carltonfields.app.box.com/s/dk7p4a8jimvkf_7h1t52e2652nz4peol5. Data collected in connection with the permitting process for the HWTT Facility indicates that the daily average water flow at the HWTT Facility near the East-West Ditch and considerably closer to the natural reaches of Bessey Creek from 2004-2009 had periods of higher flows for parts of the year, followed by long periods of little to no flow. DE 151-81 at 46 (exhibit attached to Nutter Supp. Report). However, this data is for an area that is approximately two miles away from Defendants' Site. If anything, this data may support the idea that portions of the East-West Ditch that connect

to the natural portions of Bessey Creek could potentially qualify as "relatively permanent water" but the same is not true for areas of this ditch geographically closer to Defendants' Site.

Plaintiff argues that seasonal (or intermittent) flow in the ditches is enough for them to qualify as WOTUS. The *Sackett* decision does not squarely address seasonal flow but the *Rapanos* plurality expressly discussed this issue. Specifically, the *Rapanos* plurality wrote:

> 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—such as the 290–day, continuously flowing stream postulated by Justice Stevens' dissent.

Rapanos, 547 U.S. at n.5 (emphasis in original). Initially, I note that this footnote regarding seasonality, by its own terms, applies to rivers and not ditches. The footnote describes the *extraordinary* circumstances of a drought as perhaps causing a stream, river, or lake to "dry up." Moreover, the *Rapanos* plurality states more than once that channels with intermittent flow are not WOTUS. *See id.* at 733 ("All of these terms [such as 'streams' and 'rivers'] connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows."), 733-34 (WOTUS "exclude[s] channels carrying merely intermittent or ephemeral flow"), 739 (the phrase WOTUS "does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."). Here, the undisputed material evidence establishes that the area of ditches in this case closest to Defendants' Site are, at most, "intermittent" or "ephemeral" ditches or channels with seasonal flow. This does not meet the *Sackett* standard of "relatively permanent, standing or continuously flowing body of water" to qualify as WOTUS. *See Sackett*, 598 U.S. at 671;

Rapanos, 547 U.S. at 739. This being the case, any wetlands located on Defendants' Site are not adjacent to any regulated WOTUS and the first part of the *Sackett* test is therefore not met. On this ground alone, Defendants are entitled to final summary judgment.

B. Continuous Surface Connection

Even assuming *arguendo* that the ditches near Defendants' wetlands qualify as adjacent bodies of water constituting WOTUS, there is no evidence to show a continuous surface connection between the wetlands on Defendants' Site and any of these ditches. *Sackett* provides that a wetland is subject to federal regulation only if it "has a continuous surface connection with [the adjacent WOTUS], making it difficult to determine where the 'water' ends and the 'wetland' begins." *Sackett*, 598 U.S. at 678-79 (quoting *Rapanos*, 547 U.S. at 742).

The parties all agree that Defendants' Site contains wetlands but there is disagreement on the location, size, and extent of the wetlands. Defendants rely principally on the spring 2018 delineation performed by Ms. Small, which was confirmed informally by SFWMD and identifies wetlands on the southwestern portion of Defendants' Site. DE 151 ¶ 48, DE 153 ¶ 48, DE 151-51. By contrast, based on a 2021 determination made by Plaintiff's team of experts, Plaintiff asserts that the wetlands on Defendants' Site extend north and is part of a larger "contiguous" wetland located on nearby Countess Joy property. DE 151-80 at 6-8 (Wylie Supp. Report), DE 151-81 at 6 (Nutter Supp. Report). It should be noted that Plaintiff's assertion of a large contiguous wetland is inconsistent with an objective National Wetlands Inventory Map showing Defendants' Site and its surrounding "wetlands." *See* DE 151-72 at 57.

Moreover, even accepting Plaintiff's theory that the ditches qualify as adjacent WOTUS and that the wetlands on Defendants' Site are part of a larger wetland complex running

continuously north to the East-West Ditch, there is no evidence of any continuous surface connection between any wetlands and a nearby relatively permanent water even including the East-West Ditch. As pointed out by Defendants at oral argument, multiple photographs taken of the Countess Joy property at specific reference locations near the East-West Ditch show that any water located on the wetlands is below ground level even during the rainy/wet season when the ditches have water in them. By way of example, Plaintiff submitted the below photograph purportedly showing a Countess Joy "wetland sampling point abutting Bessey Creek."

Figure V.C.2.9. Countess Joy East Reference Area W7 wetland sampling point abutting Bessey Creek (Photograph source: USAEXPERTS 0000687).

DE 151-21. In this photo as in other similar photos and diagrams submitted by Plaintiff, the label "Bessey Creek" is misleading as the water depicted is actually the manmade East-West Ditch running along the northern boundary of the Countess Joy property. *See* DE 151-13 at 2 (figure showing location of reference plots used by Plaintiff's expert team at the Countess Joy Reference Areas, including "W7 wetland sampling point"). The natural branches of Bessey Creek are over one mile away to the east from this photo. And notably, this photo and others like it show no

visible surface connection between the purported adjacent WOTUS and wetlands "making it difficult to determine where the 'water' ends and the 'wetland' begins." *See Sackett*, 598 U.S. at 678-79.

I disagree with Plaintiff's argument that that the "continuous surface connection" required by *Sackett* does not require a continuous *water* surface connection and instead requires only that the adjacent regulated body of water "abut" the wetlands. DE 158 at 32-34 (arguing that "the *Sackett* majority opinion never even uses the term 'continuous surface water connection'" and that "[a] continuous surface connection includes where a wetland actually abuts another covered water, as is the case at several locations here"). It is true that the *Sackett* majority never uses the phrase "continuous surface water connection," but Plaintiff's argument ignores the latter half of the second part of the *Sackett* test, which requires that the continuous surface connection be one which *makes it difficult to determine where the "water" ends and the "wetland" begins*. *Id.* at 678-79 (quoting *Rapanos*, 547 U.S. at 742, 755) (emphasis added). *Sackett* plainly held that "the CWA extends only to those wetlands that are 'as a practical matter *indistinguishable* from waters of the United States.'" *Sackett*, 598 U.S. at 678 (citing with approval this quote from the *Rapanos* plurality opinion and stating "[w]e agree with this formulation"), 684 ("In sum, we hold that the CWA extends to only those 'wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right,' so that they are 'indistinguishable' from those waters.'"). Plaintiff ignores this indistinguishability requirement, which becomes meaningless if abutment alone establishes a "continuous surface connection." Further, in explaining the requirement of a "continuous surface connection" to wetlands, the *Sackett* majority expressly "acknowledge[d] that temporary interruptions in surface connection may sometimes occur because

of phenomena like low tides or dry spells." *Sackett*, 598 U.S. at 684. This acknowledgement of temporary interruptions only makes sense if the surface connection is through water because low tides and dry spells occur when a tide of water goes out temporarily or there is a temporary dry spell causing the waters to recede from the surface of the wetland. In proper context, then, a qualifying continuous surface connection must render the two things being connected—in this case, wetlands and adjacent regulated WOTUS—indistinguishable from one another except for *temporary* disturbances, which plainly and necessarily requires a surface connection involving water.[12]

Plaintiff has presented no evidence to show that wetlands on Defendants' Site share a qualifying continuous surface connection with an adjacent body of regulated water as required under *Sackett*. Just as in *Sackett*, where "[t]he wetlands on the Sacketts' property are distinguishable from any possibly covered waters[,]" *id.*, the undisputed facts here similarly show that the wetlands on Defendants' property are distinguishable from any possibly covered waters.

CONCLUSION

The CWA is a well-intentioned statute aimed at the vitally important goal of protecting our nation's waterways from pollution. Over the years, courts have been confronted with varying

[12] The requirement of a continuous surface connection also coincides with the *Sackett* majority's rejection of the EPA's request for the Supreme Court to defer to its agency rule extending federal jurisdiction to adjacent wetlands with a "significant nexus" to traditional navigable waters. *Id.* at 679-82. Among other things, the *Sackett* majority noted that the EPA's interpretation "gives rise to serious vagueness concerns in light of the CWA's criminal penalties." *Id.* at 680. The *Sackett* majority described the significant-nexus test as being rooted in vague and uncertain concepts "based on a variety of open-ended factors that evolve as scientific understandings change" leading to a "freewheeling inquiry provid[ing] little notice to landowners of their obligations under the CWA." *Id.* at 681. Requiring a continuous surface connection that renders the wetlands and federally regulated waters indistinguishable enables landowners such as Defendants to know and understand when and if wetlands on their land are subject to federal CWA regulation.

situations regarding the jurisdictional reach of this statute and, relevant here, when the statute applies to wetlands. Pre-*Sackett*, courts routinely considered ecological and scientifically-based connections between wetlands and nearby U.S. waterways to make this determination. However, the binding case of *Sackett* created a bright line test that requires a party asserting federal jurisdiction over wetlands to show an adjacent body of water constituting WOTUS *and* a continuous surface connection between the waters and the wetlands such that the two are indistinguishable. Following careful review, I find that the undisputed material facts establish that federal jurisdiction does not exist here under the CWA. Specifically, the evidence shows (1) no adjacent body of water constituting WOTUS (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters), and (2) no continuous surface connection with any wetlands located on Defendants' Site. I thus respectfully recommend that Plaintiff's Motion for Summary Judgment, DE 150, be **DENIED**, Defendants' Motion for Summary Judgment, DE 154, be **GRANTED**, and that final summary judgment be entered in favor of Defendants. I further recommend that all other pending motions be **DENIED AS MOOT** and that this case be **CLOSED**.

NOTICE OF RIGHT TO OBJECT

The parties shall have fourteen (14) days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with U.S. District Judge Kenneth A. Marra. Failure to file objections timely shall bar the parties from a *de novo* determination by the District Judge of an issue covered in the Report and Recommendation and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this Report and Recommendation. *See* 28 U.S.C. § 636(b)(1); *Henley v. Johnson*, 885 F.2d 790,

794 (11th Cir. 1989); 11th Cir. R. 3-1 (2016). **Conversely, if a party does not intend to object to this Report and Recommendation, then that party shall file a Notice of such within five (5) days of the date of this Report and Recommendation.**

DONE AND RECOMMENDED in Chambers at Fort Pierce, Florida, this 21st day of September, 2024.

SHANIEK MILLS MAYNARD
U.S. MAGISTRATE JUDGE