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

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

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I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 12(c), Defendants Melton E. "Val" Valentine, Jr., Melton E. "Skip" Valentine, III, and Indiantown Farm, LLC (collectively "Valentines") respectfully request this Court enter partial judgment on the pleadings.[1] Count I of the government's amended complaint presents an uncomplicated question of law regarding the application of the Clean Water Act ("CWA") to wetlands. That Count should be dismissed for failure to state a claim under the Supreme Court's recent decision in *Sackett v. EPA*, 598 U.S. 651 (2023), and under straightforward principles of statutory construction. Additionally, Count I should be dismissed because it was brought on behalf of the Army Corps of Engineers ("Corps") and not the Environmental Protection Agency ("EPA") as required by the CWA. For theses reasons, set forth in more detail below, this Court should grant the Valentines' motion for partial judgment on the pleadings.

II. FACTUAL AND LEGAL BACKGROUND

The government filed its initial complaint against the Valentines on December 13, 2022, alleging violations of the Clean Water Act. ECF 1, Complaint ¶¶ 1, 6. The Government later amended its complaint to add a claim under the Rivers and Harbors Act.[2] ECF 33, ¶¶ 1, 56 ("FAC"). The Valentines timely filed their Answer

[1] Counsel for the Valentines conferred with Counsel for Plaintiff regarding the filing of this motion. Counsel for Plaintiff indicated that they plan to oppose this motion.

[2] The Valentines are not seeking judgment on the pleadings with respect to the Rivers and Harbors Act claim.

to Plaintiff's First Amended Complaint on November 24, 2023, ECF 34, and, with Plaintiff's Rule 15(a) consent, filed an Amended Answer on January 2, 2024. ECF 42.

In the relevant portion of the FAC, Plaintiff United States alleges that the complaint is brought "on behalf of the Department of the Army, Army Corps of Engineers, Wilmington District (the "Corps") pursuant to 28 U.S.C. §§ 516 and 519." ECF 33, ¶ 6. It is a civil action under 33 U.S.C. § 1319(b), and alleges that the Valentines "have violated and continue to violate CWA section 301(a), 33 U.S.C. § 1311(a), by their unauthorized discharge of dredged or fill material into waters of the United States, including wetlands adjacent to the Roanoke River, Devils Gut, and Gardner Creek[.]" ECF 33, ¶¶ 19, 52. The government further alleges that "[t]he Valentine Defendants did not obtain a permit from the Corps for the discharges of dredged or fill material into waters of the United States at the Site." ECF 33, ¶ 48. But it does not allege that the connection between the Valentines' alleged wetlands and supposed jurisdictional waters renders the wetlands and waters "indistinguishable," nor does it allege that the suit was brought by or at the request of the Administrator of the EPA.

III. ARGUMENT

A. Standard of review.

Under Rule 12(c), "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). A party may move for partial judgment on the pleadings. *See, e.g.*, *Independence News, Inc. v. City of Charlotte*, 568 F.3d 148, 154-57 (4th Cir. 2009) (affirming a district court's grant of partial judgment on the pleadings). A motion for judgment on

the pleadings should be granted if "the moving party has clearly established that no material issue of fact remains to be resolved and the party is entitled to judgment as a matter of law.'" *Church Mutual Insurance Co. v. Lake Pointe Assisted Living, Inc.*, 517 F. Supp. 3d 467, 473 (E.D.N.C. 2021) (quoting *Progress Solar Sols. v. Fire Prot., Inc.*, 2020 WL 5732621, at *13 (E.D.N.C. Sept. 24, 2020). For a complaint "[t]o withstand a Rule 12(c) motion, [it] 'must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *People for the Ethical Treatment of Animals v. USDA*, 194 F. Supp. 3d 404, 408 (E.D.N.C. 2016) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

In evaluating a motion for judgment on the pleadings, a court must "take the facts in the light most favorable to the plaintiff," but "need not accept the legal conclusions drawn from the facts," or take "as true unwarranted inferences, unreasonable conclusions, or arguments." *Eastern Shore Markets, Inc. v. J.D. Associates Ltd. Partnership*, 213 F.3d 175, 180 (4th Cir. 2000). "The same standard of review applies under Rule 12(b)(6) and Rule 12(c)." *Church Mutual Insurance Co.*, 517 F. Supp. 3d at 473 (citing *Burbach Broad. Co. of Del. v. Elkins Radio Corp.*, 278 F.3d 401, 405-06 (4th Cir. 2002)).

B. The United States failed to state a claim under the CWA because there is no allegation that any wetlands on the Valentines' property are "indistinguishable" from covered waters as required by *Sackett v. EPA*.

The CWA, 33 U.S.C. §§ 1251-1388, regulates the discharge of "pollutants" from "point sources" to "navigable waters." *Id.* § 1311(a), § 1362(12). The Act defines "navigable waters" as "waters of the United States, including the territorial seas." *Id.*

§ 1362(7). Although the Act defines "territorial seas," it does not define "waters of the United States." *Id.* § 1362(8). The CWA divides authority between EPA and the Corps. For example, nonexempt discharges to "navigable waters" require a permit from EPA (called a National Pollutant Discharge Elimination System, or NPDES, permit), unless the discharge involves "dredged or fill material," in which case the permit comes from the Corps (commonly known as a § 404 permit). *Id.* § 1342(a), § 1344(a).

After years of uncertainty, the Supreme Court recently articulated a test to determine whether wetlands qualify as "waters of the United States" subject to federal regulation. In *Sackett v. EPA*, 598 U.S. 651 (2023), the Court held that wetlands are jurisdictional only if (1) they are among "those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes,'" *id.* at 671 (quoting *Rapanos v. United States*, 547 U.S. 715, 739 (2006)); and (2) they are "'as a practical matter indistinguishable from waters of the United States,' such that it is 'difficult to determine where the "water" ends and the "wetland" begins,'" *id.* at 678 (quoting *Rapanos*, 547 U.S. at 742). If a wetland does not satisfy these conditions, it is as a matter of law not a "water of the United States." *See id.* at 678 ("[W]e hold that the CWA extends to only those wetlands that are 'as a practical matter indistinguishable from waters of the United States.'") (quoting *Rapanos*, 547 U.S. at 755). *See also Lewis v. United States*, No. 21-30163, 2023 WL 8711318, at *2 (5th Cir. Dec. 18, 2023) ("In *Sackett*, the Supreme Court held that the Clean Water Act '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.'") (quoting *Sackett*, 598 U.S. at 678).

Here, the government has failed to assert the necessary jurisdictional requirement of indistinguishability. *See* ECF 33, ¶¶ 44-45. With respect to the CWA claim, the government alleges that the Valentines discharged dredged or fill material into wetlands adjacent to Devil's Gut and the Roanoke River, and that there is a continuous surface connection "between the affected wetlands and the Roanoke River, its tributaries, and associated wetlands." *Id.* But even if such a connection exists, that is legally insufficient to render a wetland jurisdictional under *Sackett*. And the government's amended complaint is devoid of any assertions about the character of the connection, much less an allegation that the connection rises to the level of "indistinguishability." Without sufficient facts to permit a finding of indistinguishability, the government's CWA claims cannot move forward.

The closest the government gets to this target is a series of vague assertions about the location of the Valentines' property within a "floodplain" and that the wetlands in that floodplain "abut" waters. ECF 33, ¶¶ 26, 44. But even accepting those descriptions as true, they are insufficient to amount to a plausible allegation that the "wetlands [ ] are 'as a practical matter indistinguishable from waters of the United States,' such that it is 'difficult to determine where the "water" ends and the "wetland" begins.'" *Sackett*, 598 U.S. at 678 (quoting *Rapanos*, 547 U.S. at 742, 755). Merely asserting that wetlands and waters "abut" is not enough—being next to

something is not the same as being indistinguishable from that thing. The failure to assert indistinguishability renders the complaint irretrievably defective under *Sackett*.

The sole reported appellate decision thus far to apply the *Sackett* test confirms this interpretation of the *Sackett* test. The Fifth Circuit in *Lewis* explained that the *Sackett* "test *significantly* tightens the definition of federally regulable wetlands, as compared with the 'significant nexus' test." *Lewis*, 2023 WL 8711318, at *2. *Lewis* also confirmed that the government must prove "indistinguishability." *Id.* And although the government attempted to amend its complaint to address the change in the law, it still failed to allege any facts that would permit the Court to infer that "'there is no clear demarcation between "waters" and "wetlands,"'" *id.* at *1 (quoting *Sackett*, 598 U.S. at 678).[3] *Lewis* confirms that the amended complaint's CWA claim here should be dismissed.

In addition to the foregoing, the government's CWA claim is defectively pled because it does not allege a continuous surface connection that is aquatic. The government's contention that there is a continuous surface connection between wetlands on the Valentines' property and the Roanoke River, its tributaries, and associated wetlands is contradicted by its allegation that the wetlands "regularly

[3] The government's initial complaint claimed that the Valentines' property was jurisdictional under the now defunct "significant nexus" test. *See* ECF 1, ¶ 40 ("A relatively permanent connection and significant nexus exists between the affected wetlands and the Roanoke River, its tributaries, and associated wetlands. The subject waters, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of downstream waters, including the Roanoke River and ultimately Albermarle Sound.").

receive and absorb floodwaters from the Roanoke River Basin," ECF 33, ¶ 31. If the waters from the Roanoke River Basin only reach the Valentines' property during periods of flooding, then by definition there is no *continuous* surface connection between the waters and the wetlands. *See, e.g.*, *Sackett*, 598 U.S. at 678 (referencing "coastal waters" as an example of a water with a continuous surface connection, and citing 33 U.S.C. § 2802(5), which defines "'coastal waters' to include wetlands 'having unimpaired connection with the open sea up to the head of tidal influence'"). Moreover, the exceptions to the continuous connection rule suggested in *Sackett* confirm that the connection must be water-based. *See id.* (acknowledging that "temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells," which are water-dependent conditions).

Thus, a water that only reaches wetlands due to flooding does not have the sort of "unimpaired" or "continuous" connection required to be considered a continuous surface connection. And even if such an allegation *were* sufficient under *Sackett* (and it is not), the government has failed to allege that such a connection renders any alleged wetlands on the Valentines' property "indistinguishable" from any regulable waters. Count I of the amended complaint should be dismissed.

C. The United States failed to state a claim under the CWA because this suit was brought on behalf of the Corps under 33 U.S.C. § 1319(b), which only authorizes the EPA, and not the Corps, to bring suit.

1. The plain text of 33 U.S.C. § 1319(b) unambiguously authorizes only the Administrator of the EPA to bring this type of CWA enforcement action.

The Valentines are also entitled to judgment on the pleadings on the CWA claim because the United States brought this action on behalf of the Corps, and not EPA. *See* ECF 33, ¶ 6. Under the CWA, the United States can state a claim for relief under 33 U.S.C. § 1319(b) only if it alleges that EPA, and not the Corps, referred the matter to the Department of Justice ("DOJ"). Section 1319 explicitly gives EPA the authority to file suit. That section provides that "[t]he Administrator is authorized to commence a civil action for appropriate relief . . . for any violation for which he is authorized to issue a compliance order under subsection (a) of this section." 33 U.S.C. § 1319(b).

The CWA is clear that the use of the title "Administrator" refers to the Administrator of the EPA exclusively. *See* 33 U.S.C. § 1251(d) ("Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called 'Administrator') shall administer this chapter."). Section 1319(b)'s reference to subsection (a) further confirms that Section 1319(b) only applies to the Administrator. *See, e.g.*, 33 U.S.C. § 1319(a) (detailing the authority of the Administrator to issue compliance orders, including for discharges without a permit). By contrast, there is no reference to the Corps anywhere in Section 1319(a) or (b).

Congress's delegation of authority to the Corps to file suit in Section 1344(s)(3) further confirms that it intended Section 1319(b)'s delegation of authority to be limited to the EPA. Section 1344(s)(3) begins with nearly identical language to Section 1319(b). *Compare* 33 U.S.C. § 1344(s)(3) ("The Secretary is authorized to commence a civil action for appropriate relief . . . for any violation for which he is authorized to issue a compliance order under paragraph (1) of this subsection."), *with* 33 U.S.C. § 1319(b) ("The Administrator is authorized to commence a civil action for appropriate relief . . . for any violation for which he is authorized to issue a compliance order under subsection (a) of this section."). The CWA defines "Secretary" as "the Secretary of the Army, acting through the Chief of Engineers." 33 U.S.C. § 1344(d). And under paragraph (1) of 1344(s), the Secretary of the Army may issue compliance orders only for violations of a permit. *Id.* § 1344(s)(1) ("Whenever . . . the Secretary finds that any person is in violation of any condition or limitation set forth in a permit issued by the Secretary . . . the Secretary shall issue an order . . . or the Secretary shall bring a civil action in accordance with paragraph (3) of this subsection.").

The distinction in language between "Administrator" in Section 1319 and "Secretary" in 1344(s)(3) is conclusive. Courts must presume that Congress's choice of words is intentional. *See, e.g.*, *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (quoting *Rubin v. United States*, 449 U.S. 424, 430

(1981)) (other citations omitted). Here, the Court should give effect to Congress's choice to differentiate between the EPA and the Corps.

The government's amended complaint against the Valentines turns this principle on its head. By bringing this suit on behalf of the Corps under Section 1319(b), it would have this Court read "Secretary" where Congress intentionally stated "Administrator." But "[a]n agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 325 (2014). Because Section 1319(b) only authorizes EPA to file an enforcement action, and because the Corps is not EPA, the government has no authority to bring this suit on behalf of the Corps, against the Valentines.

2. The structure of the CWA confirms that 33 U.S.C. § 1319 exclusively applies to the Administrator of the EPA.

If the clear language of Section 1319(b) is not enough to show that it only authorizes the EPA to bring suit, then the CWA's structure only adds to the weight of evidence demonstrating that only the EPA can sue under Section 1319. First, while both the EPA and the Corps enforce the CWA, their roles throughout the Act are distinct. *See, e.g.*, 33 U.S.C. §§ 1342(a), 1344(a). *See also Sackett*, 598 U.S. at 661 ("The EPA is tasked with policing violations after the fact, either by issuing orders demanding compliance or by bringing civil actions. . . . [T]he Corps controls permits for the discharge of dredged or fill material into covered waters."). The Supreme Court has noted that these distinct roles are exclusive and not interchangeable between the agencies. *See, e.g.*, *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 274 (2009) (deciding whether EPA or the Corps had the authority to issue a

permit for mining waste, and stating that the CWA "is best understood to provide that if the Corps has authority to issue a permit for a discharge under § 404, then the EPA lacks authority to do so under § 402"). "And '[j]ust as Congress' choice of words is presumed to be deliberate' and deserving of judicial respect, 'so too are its structural choices.'" *SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018) (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013)).

Second, the title of Section 1319 is "Enforcement," and the provisions of Section 1319 allow the EPA to both enforce the CWA and sue for violations of permitted *and unpermitted* discharges. *See, e.g.*, 33 U.S.C. § 1319(a)(3) ("Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311 . . . or is in violation of any permit condition . . . he shall issue an order requiring such person to comply . . . or he shall bring a civil action in accordance with subsection (b)[.]"). Section 1311—upon which the government rests its CWA claim against the Valentines, ECF 33, ¶ 52—makes unlawful the discharge of pollutants *without* a permit. Only EPA has delegated authority to enforce the CWA in such circumstances.

By contrast, Section 1344, which concerns the authority of the Corps, is titled "Permits for dredged or fill material." It permits the Corps to sue only for violations of a 404 permit, not for unpermitted discharges. *See* 33 U.S.C. §§ 1344(s)(3), 1344(s)(1). Indeed, from the title of Section 1344 to its specific provisions, Congress made clear that the Corps' CWA authority is limited to issuing permits and policing permit compliance, not targeting unpermitted discharges. This statutory context is

instructive because "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)).

Here, the language and context of Section 1319(b) unambiguously gives general CWA enforcement authority—including for unpermitted discharges—only to EPA. The language and context of Section 1344(s)(3) unambiguously limits the Corps' authority to permit violations. And under the well-established canon of *inclusio unius*, Congress's decision to provide express enforcement authority to the Corps only for violations of a permit means that it did *not* give the Corps the authority to enforce unpermitted discharges. *See, e.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.") (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

The Supreme Court has historically declined to read implied remedies and causes of action into the CWA. In *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, the Court held that the CWA's express provision for citizen suit remedies meant that implied remedies under the CWA were not available. 453 U.S. 1, 14-15 (1981). The Court explained that "it is an elemental canon of statutory construction that where a statute expressly provides a remedy or remedies, a court must be chary of reading others into it." *Id.* (quoting *Transamerica Mortgage*

Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979)). That canon, as well as the CWA's "elaborate enforcement provisions," led the Court to conclude "that Congress provided precisely the remedies it considered appropriate." *Id.*

The same is true here. Where a claim is brought for an alleged unpermitted discharge under 1319(b), it must be brought on behalf of EPA. The amended complaint alleges that the Valentines discharged dredged or fill material without a permit, ECF 33, ¶ 48, but nowhere alleges that the Administrator commenced the action or requested that the Attorney General do so.[4] Thus, Count I of Plaintiff's amended complaint, which is brought on behalf of the Corps, should be dismissed.

3. 28 U.S.C. § 516 and § 519 do not authorize the United States to bring suit on behalf of the Corps under 33 U.S.C. § 1319.

The other provisions that the United States cites for its authority to bring suit, 28 U.S.C. § 516 and § 519, ECF 33, ¶ 6, likewise do not grant authority for the Department of Justice, on behalf of the Corps, to sue for alleged unpermitted discharge of dredged or fill material. Rather, those statutes provide that as a matter of default, the Attorney General and his subordinates have the authority to represent the United States and its agencies. *See* 28 U.S.C. §§ 516,[5] 519.[6] But those statutes do

[4] Under Section 1366, the Administrator must request that the Attorney General appear and represent the United States in any civil action instituted under the CWA to which the Administrator is a party. 33 U.S.C. § 1366.

[5] 28 U.S.C. § 516 states: "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."

[6] 28 U.S.C. § 519 states: "Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party,

not confer authority for the Department of Justice to initiate suit on behalf of any agency for any reason. *See id.*; *see also United States v. Solomon*, 563 F.2d 1121, 1124 (4th Cir. 1977) (describing 28 U.S.C. §§ 516-519 as "merely a housekeeping provision," and further explaining that "(Section 516) does not explicitly provide that officers of the Department of Justice may conduct any litigation in which they believe the government has any interest; it merely provides that if any is conducted, it shall be done by the Department of Justice") (quoting *United States v. Daniel, Urbahn, Seelye & Fuller*, 357 F. Supp. 853, 858 (N.D. Ill. 1973)).

Moreover, the Fourth Circuit has held that for the Department of Justice to bring suit, it must have either the explicit or implicit authority to do so under the statute that the Attorney General is seeking to enforce. *See Solomon*, 563 F.2d at 1124-26. In *Solomon*, the Fourth Circuit considered whether the United States, in the absence of "specific statutory authorization," could bring suit on its own behalf to vindicate the constitutional rights of mentally handicapped people. *Id.* at 1123. The court explained that the statutes cited did not provide such authorization, and that while the government "has an interest, in the generic sense, in the subject matter of the suit," that generic interest wasn't enough because it was an issue "of authority and not simply of interest." *Id.* at 1125-26. The Fourth Circuit ultimately affirmed the district court's dismissal of the complaint on the basis that the government did not have authority to sue. *Id.* at 1129.

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and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties."

So too here, the CWA does not authorize the Department of Justice to bring suit on behalf of the Corps to enforce the statute against an alleged unpermitted discharge of dredge or fill material. *See* 33 U.S.C. §§ 1319(b), 1344(s)(3). While the United States has an interest protecting water quality, it still may only sue in the manner Congress authorizes it to sue. *See, e.g.*, *SAS Institute*, 138 S. Ct. at 1355 ("Where a statute's language carries a plain meaning, the duty of an administrative agency is to follow its commands as written, not to supplant those commands with others it may prefer."). As discussed above, civil enforcement under Section 1319(b), which the United States has invoked as its authority for this suit against the Valentines, is limited to the EPA's aegis.

And because Congress limited the authority to sue for unpermitted discharges to EPA, that authority cannot be transferred or delegated to another agency. Although some district courts have held that the Corps can sue for unpermitted discharges, those cases were incorrectly decided.[7] For example, in *United States v. Kelcourse*, the court rejected the argument that the court lacked subject matter jurisdiction to hear a claim for civil penalties under the CWA because the claim was brought by the Corps and not EPA. *United States v. Kelcourse*, 721 F. Supp. 1472, 1472-73, 20 Envtl. L. Rep. 20,208 (D. Mass. 1989). Key to the court's holding was a Memorandum of Agreement between the EPA and the Corps delegating the Corps

[7] In *United States v. Hallmark Construction Co.*, for example, the court held that the Corps could sue for unpermitted discharges because the Corps has the power to issue both permits and cease-and-desist orders. 14 F. Supp. 2d 1065, 1069, 29 Envtl. L. Rep. 20,274 (N.D. Ill. 1998). However, cease-and-desist orders are creatures of regulation, not statute, and that reasoning also renders superfluous the explicit statutory grant of authority given to the Corps in § 1344 to sue for violations of a permit.

the authority to bring civil enforcement actions for unpermitted discharges of dredged or fill material. *Id.* at 1478. But there are several reasons this Court should not follow *Kelcourse*'s reasoning.

First, in relying on the Memorandum of Agreement between the EPA and the Corps, the court ignored Congress's intentional division of labor in the CWA. As discussed above, Congress clearly and intentionally divided authority between the EPA and the Corps in the CWA. While the government might find it more "convenient" for the Corps to sue for unpermitted discharges, convenience and administrative preference cannot override and effectively rewrite the plain text of the statute. *See, e.g.*, *Biden v. Nebraska*, 143 S. Ct. 2355, 2368 (2023) (Agencies are not permitted to "rewrite [] statute[s] from the ground up.").

Second, the reasoning in *Kelcourse* is contrary to the reasoning in both *Middlesex County Sewerage* and *Coeur Alaska*, cases which emphasized Congress's intentional division of authority and remedies in the CWA. *See, e.g.*, *Middlesex County Sewerage*, 453 U.S. at 14-15; *Coeur Alaska*, 557 U.S. at 274.

Finally, *Kelcourse* ignored the separation of powers concerns that arise from an agency delegating its authority to another agency. While subdelegation within the same agency is generally allowed, 5 U.S.C. § 302, delegation to an entirely separate agency to circumvent Congress's express statutory design is not. *See generally*, *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) (noting the "important distinction between subdelegation to a *subordinate* and subdelegation to an *outside party*," and stating that "the case law strongly suggests that subdelegations to outside

parties are assumed to be improper absent an affirmative showing of congressional authorization"). Not only is there no congressional authorization for EPA's delegation to the Corps, but the delegation was contrary to Congress's division of authority within the CWA. Here, because the amended complaint states that the Corps and not EPA has brought this action, ECF 33, ¶ 6, it must be dismissed.

IV. CONCLUSION

The United States has failed to state a claim under 33 U.S.C. § 1311(a), and Count I of the amended complaint should be dismissed. Because the amended complaint did not claim that the connection between the alleged wetlands on the Valentines' property and the alleged jurisdictional waters is "indistinguishable," or appropriately continuous and aquatic, the United States failed to plausibly allege that any portion of the Valentines' property is subject to federal jurisdiction under the CWA. Additionally, the United States failed to state a claim under 33 U.S.C. § 1319(b) because the Department of Justice brought this suit on behalf of the Corps, and the amended complaint contains no allegation that the Administrator of the EPA commenced or requested this suit. Because only the Administrator of the EPA could have commenced or requested this suit against the Valentines, Count I of the amended complaint should be dismissed.

Dated: January 5, 2024.

Respectfully submitted,

/s/ Paige E. Gilliard

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.2(f)(3), I hereby certify this memorandum contains 4,819 words.

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CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2024, I electronically filed the foregoing with the Clerk of the Court by using the Court's CM/ECF system.

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

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