IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:22-CV-512-M-KS

UNITED STATES OF AMERICA, Plaintiff, v. MELTON E. "VAL" VALENTINE, JR., MELTON E. "SKIP" VALENTINE, III, and INDIANTOWN FARM LLC, Defendants.	)	PLAINTIFF UNITED STATES OF AMERICA'S OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS [L.R. 7.2]

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INTRODUCTION

The United States filed this action in December 2022 to enjoin Defendants' discharge of pollutants into waters of the United States without a permit, to require them to mitigate the damage they caused by restoring the impacted waters and wetlands, and to obtain an appropriate civil penalty. In November 2023, the United States filed a First Amended Complaint (Complaint) alleging that the wetlands at the site abut and are adjacent to traditional navigable waters – including the Roanoke River, Devils Gut, and Gardner Creek – and have a continuous surface connection with those waters of the United States. [D.E. 33 ¶¶ 44-45]; *see also Sackett v. EPA*, 598 U.S. 651, 678-79 (2023) (affirming that such wetlands are protected by the Clean Water Act). The Complaint added a Rivers and Harbors Act claim to address violations discovered during a May 2023 site visit. Defendants constructed a dock and pilings in Devils Gut, while filling additional wetlands adjacent to Devils Gut, as part of a project to construct a new fish camp, bulkhead, and elevated walkway – all for recreational purposes and with no permit. [D.E. 33 ¶ 56]. The Army Corps of Engineers (Corps) advised Defendants that they needed federal permits for these unauthorized activities, but Defendants proceeded to fill the wetlands without a permit and did not comply with the Corps' cease-and-desist directives.

In their Rule 12(c) motion, Defendants do not contest that the Rivers and Harbors Act claim is adequately pled but assert that the Complaint fails to state a claim upon which relief can be granted under the Clean Water Act for two reasons: (1) the Supreme Court's opinion in *Sackett* purportedly requires a complaint to use certain specific words from the opinion in addition to alleging that the wetlands are jurisdictional because a continuous surface connection exists between the traditional navigable waters and adjacent wetlands at the site; and (2) the Clean Water Act allegedly bars the United States from filing an action when the Corps obtains

evidence of unpermitted violations, as the Corps did here, and refers the matter to the Justice Department. [D.E. 45]. For several reasons, this Court should deny Defendants' motion.

First, the Complaint adequately states a Clean Water Act claim. [D.E. 33 ¶¶ 44-45]. Although Defendants contend that *Sackett* adopted a new "indistinguishability" requirement for wetlands, their proposed reading of the decision disregards the Court's holding, its rationale, and the precedent upon which it relied. [D.E. 45 at 5]. *Sackett* adopted the "continuous surface connection" test for regulation of adjacent wetlands, and indistinguishability is not a separate test, but rather the practical outcome of such a connection. 598 U.S. at 678. Under *Sackett*, adjacent wetlands are jurisdictional, and hence "as a practical matter indistinguishable from waters of the United States," *if* they have a continuous surface connection to waters that constitute waters of the United States in their own right (including traditional navigable waters). *Id*. Given the deferential review that applies at the pleading stage, Defendants have not shown that the United States has failed to state a Clean Water Act claim.

Second, Defendants' argument as to the Corps' authority to make referrals to the Department of Justice interposes a *disputed* affirmative defense, which is not appropriate in a Rule 12(c) motion. Defendants imply that EPA does not support the United States' claims, but the opposite is true. In fact, EPA and the Corps have coordinated in assessing the unauthorized activities, including by conducting a joint site visit in 2018, and both agencies concur with the violations alleged by the United States. EPA has formally confirmed this by recently requesting that the United States pursue the claims in this enforcement action. Although this means there is no need to reach the proposed statutory construction Defendants advocate, it is incorrect as a matter of law in all events. In the nearly 50-year history of EPA's and the Corps' shared enforcement of the Clean Water Act, not a single court has accepted Defendants' contention.

In sum, the Court should deny Defendants' Rule 12(c) motion and find that the Complaint satisfies the federal pleading standards. Discovery will not only be helpful to the Court in evaluating the relevant legal issues in a concrete factual setting but is also necessary to fairly adjudicate the merits of the United States' claims.

STANDARD OF REVIEW

The purpose of a Rule 12(c) motion is to test the legal sufficiency of a complaint, not to resolve conflicts of fact or decide the merits of the action. *Edwards v. City of Goldsboro*, 178 F.3d 231, 243-44 (4th Cir. 1999). The courts apply "the same standard" that applies to Rule 12(b)(6) motions. *Burbach Broad. Co. v. Elkins Radio Corp.*, 278 F.3d 401, 406 (4th Cir. 2002). To satisfy the Federal Rules of Civil Procedure's liberal pleading standards, a complaint need not contain "detailed factual allegations" but must be found legally sufficient if the factual averments – taken as true and with all inferences construed in the plaintiff's favor – show that there is more than a speculative right to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). Rule 12(c) motions are "disfavored" unless no material fact is disputed and the movant is entitled to judgment as a matter of law. *Nationwide Mut. Ins. Co. v. Wahome*, No. 5:15-CV-601-FL, 2018 WL 4689443, at *1 (E.D.N.C. Sept. 28, 2018). This is a "high standard"; the Court need only find "one issue of material fact" in dispute to deny Defendants' motion. *Sutton v. N.C. Dep't of Lab.*, No. 5:06-CV-308-FL, 2006 WL 8438801, at *2 (E.D.N.C. Dec. 27, 2006).

ARGUMENT

I. The United States has properly stated each element of its Clean Water Act claim.

To state a claim under Clean Water Act section 301(a), 33 U.S.C. § 1311(a), the Complaint must allege that Defendants are (1) persons who (2) discharged (3) a pollutant (4) from a point source (5) into navigable waters. *United States v. Cundiff*, 555 F.3d 200, 213 (6th

Cir. 2009); *United States v. Deaton*, 332 F.3d 698, 704 (4th Cir. 2003). The Act defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12), and defines "navigable waters" as "the waters of the United States," *id.* § 1362(7). Adjacent wetlands constitute waters of the United States when they have a continuous surface connection to waters that are themselves waters of the United States. *Id.* § 1344(g)(1); *Sackett*, 598 U.S. at 676; *see also Cundiff*, 555 F.3d at 213 (affirming liability for filling wetlands under the "continuous surface connection" test). Where the discharged pollutant consists of dredged or fill material, a section 404 permit is required. 33 U.S.C. § 1344(a), (d).

The Complaint sets out each of the required elements. It plainly states that Defendants are "persons" who have discharged dredged or fill material into waters of the United States without a section 404 permit. [D.E. 33 ¶¶ 51, 38, 43]. It correctly notes that dredged or fill material constitutes a "pollutant," [*id.* ¶¶ 13, 18], and that mechanized land-clearing and earthmoving equipment are "point sources." [*Id.* ¶ 47]. And the United States avers that Defendants' activities resulted in unauthorized discharges of dredged or fill material into waters of the United States, "including wetlands adjacent to the Roanoke River, Devils Gut, and Gardner Creek at the Site." [*Id.* ¶¶ 46-52]. As explained below, the Complaint unambiguously alleges that the impacted wetlands are "waters of the United States" consistent with *Sackett*.

A. The Complaint adequately alleges that Defendants filled wetlands that are "waters of the United States."

i. The Clean Water Act has long protected adjacent wetlands.

The Act does not define "waters of the United States." *See* 33 U.S.C. § 1362(7). Since 1978, the Corps has defined the term to include not only traditional navigable or navigable-in-fact waters, but also tributaries of such waters, and wetlands. 33 C.F.R. § 323.2(c) (1978) (stating that wetlands generally include "swamps, marshes, bogs and similar areas"). Four decades later,

the regulatory definition of "wetlands" is substantially identical: "wetlands" mean "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(c)(1) (2023); *see also* [D.E. 33 ¶ 15] (reciting the "wetlands" definition). To be jurisdictional, wetlands must meet both the regulatory definition and the definition of "waters of the United States." *See* 598 U.S. at 684.

In 1985, the Supreme Court confirmed that adjacent wetlands are covered by the Act. In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985), the Court explained:

> On a purely linguistic level, it may appear unreasonable to classify "lands," wet or otherwise, as "waters." Such a simplistic response, however, does justice neither to the problem faced by the Corps in defining the scope of its authority under § 404(a) nor to the realities of the problem of water pollution that the Clean Water Act was intended to combat. In determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs – in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of 'waters' is far from obvious.

The Supreme Court explained that the Corps' inclusion of wetlands within "waters of the United States" met the purpose of the Act – to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251 – and correctly noted Congress' recognition that "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." 474 U.S. at 133 (quoting S. Rep. No. 92-414, at 77 (1972)). The Court further upheld the Corps' understanding that adjacent wetlands "may affect the water quality of adjacent lakes, rivers, and streams even when the waters of those bodies do not actually inundate the wetlands. For example, wetlands that are not flooded by adjacent waters

may still tend to drain into those waters," and hence serve important functions, including food production, providing wildlife habitat, water filtration, and flood control. *Id.* at 134-35.

In 2006, the Supreme Court again agreed that at least some wetlands are "waters of the United States," in *Rapanos v. United States*, 547 U.S. 715 (2006). Although the case did not produce a majority opinion, all Justices agreed that "waters of the United States" include more than just navigable-in-fact waters. In Justice Scalia's plurality opinion, four Justices concluded that the Act should extend to "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters, and to "wetlands with a continuous surface connection to" those relatively permanent waters. *Id.* at 716, 742. Citing *Riverside Bayview*, the *Rapanos* plurality concluded that the Act protects 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." *Id.* at 742. Such a continuous surface connection, the plurality reasoned, would make it "difficult to determine where the 'water' ends and the 'wetland' begins," and hence would make jurisdictional wetlands "*as a practical matter indistinguishable* from waters of the United States." *Id.* at 742, 755 (emphasis added).

ii. *Sackett* adopted the *Rapanos* plurality opinion.

The Supreme Court expressly adopted and approved the *Rapanos* plurality test for determining when wetlands are "waters of the United States" in *Sackett*:

> In *Rapanos*, the plurality spelled out clearly when adjacent wetlands are part of covered waters. It explained that "waters" may fairly be read to include only those wetlands that 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." 547 U. S., at 742, 755. . . . *That occurs when* wetlands have "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." *Id*., at 742, 126 S. Ct. 2208; *cf*. 33 U.S.C. § 2802(5) . . . . We agree with this formulation of when wetlands are part of "the waters of the United States."

598 U.S. at 678-79 (emphases added; footnote omitted).[1]

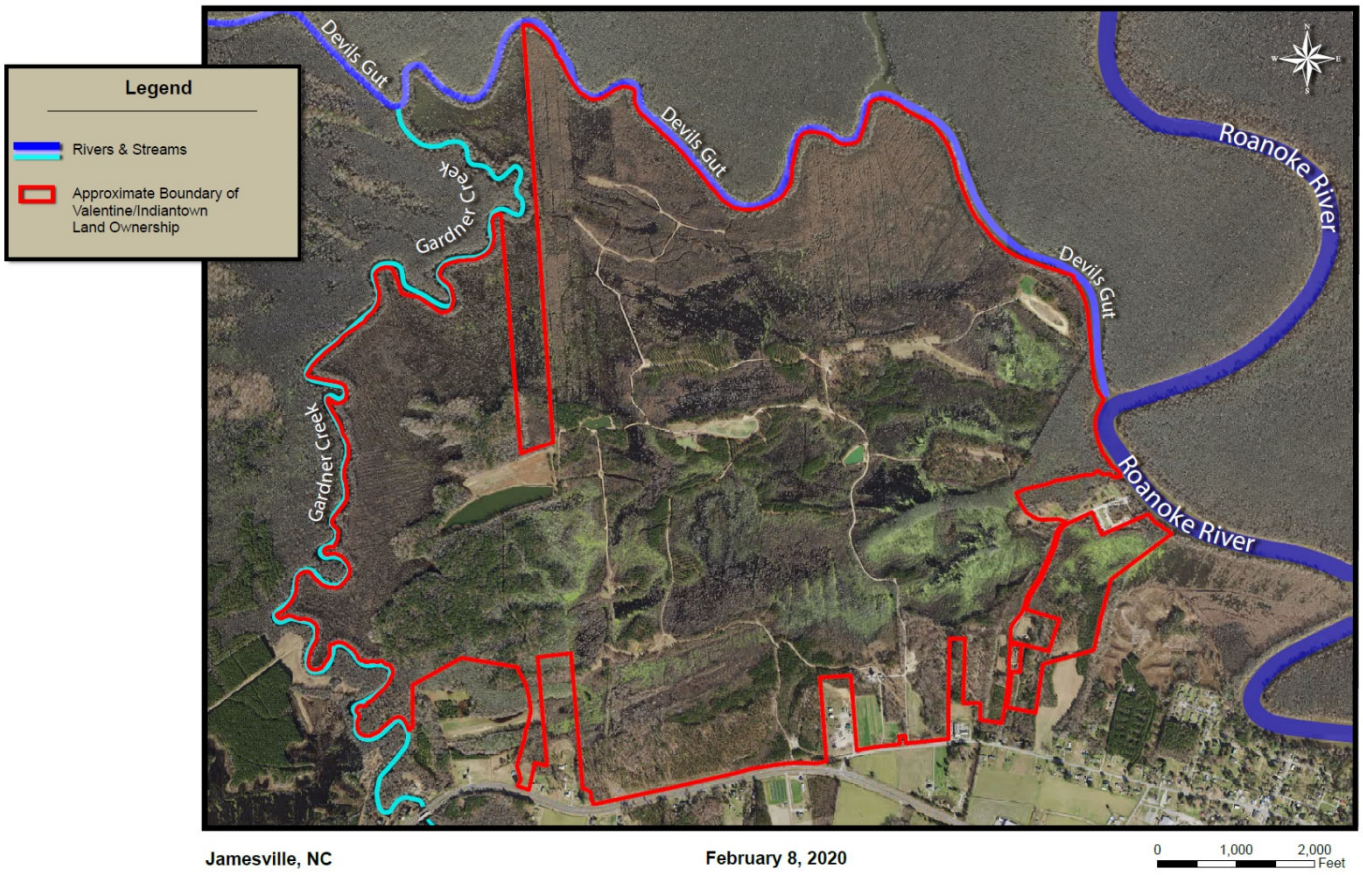
In adopting the *Rapanos* plurality, *Sackett* stated that the party asserting jurisdiction over adjacent wetlands must meet a two-part test: "first, that the adjacent body of water constitutes 'waters of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* at 678-79 (alterations omitted). The Court reiterated this test in its conclusion, explaining that when wetlands have a continuous surface connection to features that are waters of the United States in their own right, the wetlands are "indistinguishable" from those waters as a practical matter. *Id.* at 684 (quoting *Rapanos*, 547 U.S. at 742, 755).

iii. The Complaint states that the impacted wetlands are waters of the United States, consistent with *Sackett*.

The United States' Complaint meets both parts of the *Sackett* test. First, it alleges that the wetlands affected by unpermitted discharges are adjacent to bodies of water that constitute waters of the United States in their own right. *See id.* at 678. The Complaint alleges that the impacted wetlands "abut and are adjacent to the Roanoke River, Devils Gut, and Gardner Creek, which are traditionally navigable waters and waters of the United States within the meaning of the Act, as provided in 33 U.S.C. § 1362(7)." [D.E. 33, ¶ 44]. And it elaborates that the Roanoke River, which begins in Virginia and runs through North Carolina into the Atlantic Ocean, is and has been used in interstate commerce. [*Id.* ¶ 27]. Devils Gut, a tributary of the Roanoke, is itself traditionally navigable, and like the Roanoke, it has been used in interstate commerce. [*Id.* ¶ 29].

[1] *Sackett* did not alter the regulatory definition of "wetlands" in 33 C.F.R. § 328.3(c)(1), and Defendants' motion does not contend otherwise.

Gardner Creek, another tributary of the Roanoke, is also traditionally navigable. [*Id.* ¶ 30]. As illustrated in the figure below, the site is bounded by these three waters of the United States and is covered with wetlands adjacent to those waters.



Second, the Complaint alleges that "[a] continuous surface connection exists between the affected wetlands and the Roanoke River, its tributaries, and associated wetlands." [*Id.* ¶ 45]. Among other things, the abutting wetlands regularly receive, store, and return floodwaters to the Roanoke and its tributaries. [*Id.* ¶ 31]. These allegations, taken as true for purposes of the present motion, demonstrate that the United States has met both parts of the *Sackett* test, and hence has properly alleged a violation of the Clean Water Act. *See* 598 U.S. at 678-79.

B. *Sackett* does not require the United States to separately allege the wetlands are "indistinguishable" from waters of the United States.

Sackett, adopting the *Rapanos* plurality opinion, noted that adjacent wetlands that have a continuous surface connection to waters that are themselves "waters of the United States" are "as a practical matter indistinguishable" from those waters. *See id.* at 684 ("[T]he 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.") (emphasis added) (quoting *Rapanos*, 547 U.S. at 742, 755). Contrary to Defendants' assertions, *Sackett* contains no requirement that the United States separately plead that affected wetlands are "indistinguishable" from those waters. [D.E. 45 at 5-6]. Under *Sackett*, a continuous surface connection to waters of the United States *is what makes* a wetland "indistinguishable" from those other covered waters. *See* 598 U.S. at 684. *Sackett* did not add another magic word that must be invoked to state a proper Clean Water Act claim. Defendants are attempting to read into the Clean Water Act additional requirements that do not exist under governing law.

To the extent Defendants assert that wetlands must be *literally* indistinguishable from jurisdictional waters, that is not the law. The Act itself, its implementing regulations, and a long line of cases have recognized as a practical reality that waters of the United States can and do take different shapes and forms. An ocean does not have to be a lake and a wetland does not have to be a river to be eligible for protection. A "huge array of areas" can be covered, including what are commonly referred to as shallows, marshes, mudflats, swamps, bogs, and more. *Riverside Bayview*, 474 U.S. at 132.

Sackett did not depart from this pragmatic approach, while concluding that wetlands with a "continuous surface connection" to jurisdictional waters are properly covered by the Act. 598 U.S. at 678. This connection, the Court held, is what makes wetlands "*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.* (emphasis added) (internal quotations omitted). Neither *Sackett*, the *Rapanos* plurality opinion, nor any other case has stated that wetlands must be literally indistinguishable from open water. Indeed, the text of 33 U.S.C. § 1344(g) confirms that Congress considered "adjacent" wetlands to be at least somewhat distinguishable from other covered waters; otherwise, there would be no need to specifically reference adjacent wetlands. And it would run contrary to *Sackett*'s express recognition that "low tides" and "dry spells" can temporarily interrupt a surface connection without removing a wetland from the ambit of the Clean Water Act. *See* 598 U.S. at 678 & n.16 (further noting that although "a barrier separating a wetland from a water of the United States would ordinarily remove that wetland from federal jurisdiction, a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA").

C. Federal courts have been applying the continuous surface connection test for nearly twenty years.

Prior to *Sackett* resolving the question in 2023, many courts had held that *either* the standard from the *Rapanos* plurality *or* Justice Kennedy's concurrence would be sufficient. *See*, *e.g.*, *United States v. Donovan*, 661 F.3d 174, 175 (3rd Cir. 2011) (holding that "the property is 'wetlands' subject to the CWA if it meets either of the tests laid out in *Rapanos*"); *Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 288 (4th Cir. 2011). Thus, between 2006 and 2023, numerous courts issued decisions applying the *Rapanos* plurality's continuous surface connection test. It is telling that Defendants' motion ignores that the United States has been litigating Clean Water Act enforcement cases using that test – which the Court in *Sackett* adopted – for almost two decades. *See Donovan*, 661 F.3d at 185-86 (affirming summary judgment in favor of the United States and holding that the wetlands at issue had a "continuous

surface connection" to a covered body of water); *United States v. Bailey*, 571 F.3d 791, 800-03 (8th Cir. 2009) (affirming a judgment finding Clean Water Act liability); *Cundiff*, 555 F.3d at 211-13 (same); *United States v. Brace*, No. 1:17-cv-00006, 2019 WL 3778394, at *24-25 (W.D. Pa. Aug. 12, 2019) (a "continuous surface connection" may occur when a wetland "physically abuts" another regulated body of water) (quotation omitted), *aff'd*, 1 F. 4th 137 (3d Cir. 2021); *United States v. Bedford*, No. 2:07-cv-491, 2009 WL 1491224, at *11-13 (E.D. Va. May 22, 2009) (finding the defendant liable for filling wetlands under both *Rapanos* standards).

While there is no question that *Sackett* rejected the "significant nexus" test offered by Justice Kennedy in *Rapanos*, *see* 598 U.S. at 679, the Court did not express any disagreement with the way the federal courts have been applying the *Rapanos* plurality's continuous surface connection test. Nor did it purport to overrule the many prior decisions applying that test since 2006. It would be incongruous with *Sackett* for this Court to impose a new pleading requirement on top of the continuous surface connection test that originated in *Rapanos*, particularly when the test has been consistently applied without adopting Defendants' purported condition. And because *Sackett* expressly agreed with the *Rapanos* plurality's formulation, it is erroneous for Defendants to suggest that the Supreme Court changed the continuous surface connection test despite how it has been applied for more than a decade. *See generally United States v. Jeffery*, 631 F.3d 669, 676-67 (4th Cir. 2011) (finding nothing to suggest that the Supreme Court intended to "silently overrule" a previous line of cases); *Mickens v. Taylor*, 240 F.3d 348, 358 (4th Cir. 2001) (cautioning against an "overly literal" application of a Supreme Court decision that would effectuate an implied overruling), *aff'd*, 535 U.S. 162 (2002).

D. Courts interpreting *Sackett* have held that the Act protects wetlands with a continuous surface connection to waters of the United States.

District courts implementing *Sackett* in Clean Water Act enforcement cases have observed that it expressly endorsed and adopted the *Rapanos* plurality test, rather than creating a new test. For instance, in *United States v. Bobby Wolford Trucking & Salvage, Inc.*, No. C-18-0747-TSZ, 2023 WL 8528643, at *2 (W.D. Wash. Dec. 8, 2023), the district court rejected the defendants' arguments that *Sackett* undermined the partial summary judgment the court had granted under the *Rapanos* plurality test. The court held that wetlands on the subject property had the requisite continuous surface connection with the Skykomish River, and hence were "waters of the United States." *Wolford Trucking* did not find that *Sackett* imposed a new "indistinguishable" requirement. *Id.* at *3 (noting that Defendants' argument ignored that the term continuous surface connection "was coined by Justice Scalia and first articulated within the *Rapanos* plurality opinion"). Likewise, this Court should reject the assertion that meeting the *Rapanos* plurality standard is insufficient to state a claim. [D.E. 45 at 5].

In *United States v. Andrews*, No. 3:20-CV-1300, 2023 WL 4361227, at *10 (D. Conn. June 12, 2023), the district court similarly observed that *Sackett* adopted the plurality opinion in *Rapanos*, and held that under that standard, the United States was entitled to summary judgment on its claim that the defendant discharged pollutants into jurisdictional wetlands, based on presentation of undisputed evidence that the wetlands share a continuous surface connection with a relatively permanent tributary of a traditional navigable water. *Id.* Again, the court found no requirement to show that the wetlands were literally "indistinguishable" from waters of the United States. This is because meeting the two-part *Sackett* test means that wetlands are "as a practical matter indistinguishable" from those waters. *Cf. Sackett*, 598 U.S. at 678.

Lewis v. United States, 88 F.4th 1073, 1079 (5th Cir. 2023), does not support Defendants' contention that *Sackett* requires something more than an adjacent wetland's continuous surface connection to waters of the United States. There, the Fifth Circuit held that *Sackett* was dispositive based on a factual finding that the wetlands at issue did not satisfy the *Rapanos* plurality standard. *Id.* ("In its 2020 ruling . . . the district court found . . . that the *Rapanos* adjacency test could not be met[.]"). Here, by contrast, the United States has alleged ample facts regarding the impacted wetlands' continuous surface connection to traditional navigable waters bordering the Valentines' site. *Lewis* does not support dismissal.

Under post-*Sackett* decisions, the continuous surface connection test first articulated in the *Rapanos* plurality opinion establishes the minimum criteria for a cause of action. No court has required a plaintiff to allege that both parts of the *Sackett* test are met, *and* to separately allege that the affected wetlands are "indistinguishable" from waters of the United States. Such a requirement would require redundancy in pleading, straying from the Federal Rules' requirement of a "short and plain statement" of "the grounds for the court's jurisdiction," and of "the claim showing that the pleader is entitled to relief." *See* Fed. R. Civ. P. 8(a).

E. *Sackett* does not require the United States to specifically allege a continuous surface connection that is "aquatic."

Defendants also vaguely contend that the Complaint does not allege a continuous surface connection that is "aquatic." [D.E. 45 at 6]. But they did not attempt to define what they mean by that term, or explain this purported pleading issue with reference to any case law. The Clean Water Act does not define "aquatic," and primarily uses it to discuss organisms and ecosystems. *See*, *e.g.*, 33 U.S.C. § 1252(a) (referring to programs to conserve waters for protection of "fish and aquatic life and wildlife"); *id.* § 1268(c)(10) (requiring monitoring of disposal facilities, including "the diversity, productivity, and stability of aquatic organisms at the site"). The *Oxford*

English Dictionary defines "aquatic" only as "of or pertaining to water as a substance."[2] Consistent with that broad definition, *Riverside Bayview* observed that the Act encompasses "a huge array of areas that are *not wholly aquatic*." 474 U.S. at 132 (emphasis added).

The United States has alleged the requisite continuous surface connection between wetlands that are adjacent to, and abut, water bodies that are waters of the United States in their own right. [D.E. 33 ¶¶ 26, 30, 44, 45]. *Sackett* does not require the United States to plead specifically that wetlands are "aquatic"; it did not incorporate that word into its holding at all. Nor did *Sackett* silently change the "continuous surface connection" standard to require a "continuous surface *water* connection." The *Rapanos* plurality, adopted by the *Sackett* majority, repeatedly uses the phrase "continuous physical connection" when describing the "continuous surface connection" requirement and never uses the phrase "continuous surface water connection." *See* 547 U.S. at 747, 751 n.133, 755. Accordingly, Defendants should not be permitted to introduce a new element of confusion into pleading Clean Water Act violations.

Moreover, the United States' allegation that the impacted wetlands "regularly receive and absorb floodwaters from the Roanoke River Basin" does not contradict its allegation of a "continuous surface connection" between those waters and the adjacent wetlands. [D.E. 33 ¶¶ 31, 45]. That the subject wetlands regularly receive, store, and return floodwaters to the Roanoke and its tributaries is evidence of their continuous surface connection to traditional navigable waters; there is nothing in the Complaint alleging that the impacted wetlands' receipt of floodwaters is the *only* instance or evidence of such a connection to adjacent waters of the United States. Defendants' strained effort to draw negative inferences from the Complaint contravenes

[2] https://www.oed.com/search/dictionary/?scope=Entries&q=aquatic.

both its plain meaning as well as the standard of review, where all reasonable inferences must be made in favor of the United States.

Notably, in *Riverside Bayview*, the Supreme Court rejected the notion that adjacent wetlands must be "inundated" or experience "'frequent flooding' by the adjacent body of water." 474 U.S. at 129. In reversing the Court of Appeals on this point, the Supreme Court held that "wetlands that are not flooded by adjacent waters may still tend to drain into those waters," and that "wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water." *Id.* at 134. By focusing on a continuous surface connection between wetlands and the adjacent body of water, *Sackett* did not depart from the practical analysis endorsed in *Riverside Bayview*. *See Sackett*, 598 U.S. at 678.

F. Defendants improperly dispute the facts as alleged.

Contrary to the Rule 12 standard, Defendants also attempt to dispute whether a continuous surface connection exists between wetlands abutting the navigable-in-fact waters that surround the site. [D.E. 45 at 6-7]. At the pleading stage, the allegations in the Complaint are "taken as true," *Twombly*, 550 U.S. at 556, and a motion under Rule 12(c) is merely to "test the sufficiency of a complaint"; it does not resolve the merits of the plaintiff's claims or "contests surrounding the facts." *Edwards*, 178 F.3d at 243; *see supra* at 3. The only question before the Court now is whether the facts stated in the Complaint, taken as true, adequately allege an unpermitted discharge of pollutants into waters of the United States. The answer is yes, as the Complaint adequately addresses each required element of 33 U.S.C. § 1311(a).

The Complaint cites the regulatory definition of "wetlands," which includes inundation or saturation by surface or groundwater, and alleges that a "continuous surface connection" exists

between the affected wetlands and the Roanoke River and its tributaries. [D.E. 33 ¶¶ 15, 45]. The Complaint did not rule out that groundwater, rain, or other water sources contribute to the saturation of the wetlands at the site, as Defendants appear to suggest. Nor is Defendants' Rule 12 motion an appropriate vehicle to adjudicate a factual dispute regarding the presence of wetlands at the site or to decide whether there is a continuous surface connection to the Roanoke River, Devils Gut, and/or Gardner Creek. At a minimum, discovery is needed before any factual disputes can be presented and decided by the Court on a proper factual record.

II. The United States has authority to enforce the Clean Water Act.

Defendants' second argument contends that the United States has "failed to state a claim" for which relief can be granted "under 33 U.S.C. § 1319(b)" based on the proposition that *only* EPA, and not the Corps, is authorized to refer Clean Water Act violations to the Justice Department for potential enforcement. [D.E. 45 at 13].[3] As explained below, this is a premature effort to interpose an affirmative defense through a Rule 12 motion. *See Richmond, Fredericksburg & Potomac R.R. Co. v. Forst*, 4 F.3d 244, 250 (4th Cir. 1993) ("A motion under Rule 12(b)(6) is intended to test the legal adequacy of the complaint, and not to address the merits of any affirmative defenses."). The motion is also misdirected because the United States, not the Corps, is the Plaintiff here and the United States has alleged a claim under 33 U.S.C. § 1311(a), not 33 U.S.C. § 1319(b). Moreover, the motion cites but does not adhere to the applicable standard for evaluating the section 301(a) claim. [D.E. 45 at 8 (acknowledging that the "same standard of review applies under Rule 12(b)(6) and Rule 12(c)")].

In this procedural posture, the United States respectfully submits that the Court should

[3] Defendants do not question the United States' authority under the Rivers and Harbors Act and the motion seeks no relief with respect to the second claim. [D.E. 45 at 6 n.2].

not reach the underlying merits of this disputed affirmative defense. But if the Court does examine the issue, it should reject Defendants' argument because EPA – having participated with the Corps in a joint site inspection in 2018 and agreeing with the Corps' assessment of the violations – supports the United States' enforcement action and has recently requested, on a formal basis, that the Justice Department pursue the claims against Defendants.[4] At the pleading stage, it would be erroneous to accept Defendants' assertion. [D.E. 45 at 8 (acknowledging that Defendants must clearly establish that no material fact issues remain to be resolved)]. Although the United States possesses independent sources of litigation authority, the referrals from both the Corps and EPA should be the end of the matter. Defendants' affirmative defense provides no basis for them to avoid being held to account for the violations set forth in the Complaint.

A. The motion seeks a premature ruling on a disputed affirmative defense.

The motion miscasts this action as attempting to state a claim under 33 U.S.C. § 1319(b), but a correct understanding of the United States' claim is important in this context. *See*, *e.g.*, *Forst*, 4 F.3d at 250 (asserting an affirmative defense in a Rule 12(b)(6) motion faced a "procedural stumbling block"); *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464-66 (4th Cir. 2007) (reversing a Rule 12(b)(6) dismissal because the plaintiff was entitled to dispute the asserted defense raised in the motion).

To be precise, the United States' first cause of action alleges that Defendants have violated and continue to violate section 301(a), 33 U.S.C. § 1311(a), *not* section 309(b), 33

[4] Prior to filing this opposition, counsel for the United States contacted defense counsel and explained that the Corps and EPA have been coordinating regarding the filing of the claims and the conduct of this matter, and that in January 2024, the Regional Administrator formally joined in the Corps' referral and requested that the United States continue pursuing the claims on EPA's behalf. Although the United States believes that EPA's referral is dispositive of the issue, Defendants declined to withdraw the second argument in their motion.

U.S.C. § 1319(b). [D.E. 33 ¶¶ 10-11, 52-54]. Section 301(a) declares that "the discharge of any pollutant by any person shall be unlawful" except in compliance with the specified sections, including section 404. *See* 33 U.S.C. § 1311(a). Thus, under section 301(a), the United States must allege *only* that Defendants are: (1) a person or persons who (2) discharged a pollutant (3) from a point source (4) into navigable waters (5) without a section 404 permit, to state a claim. *See Cundiff*, 555 F.3d at 213; *Deaton*, 332 F.3d at 704; *Ogeechee-Canoochee Riverkeeper, Inc. v. T.C. Logging, Inc.*, No. 608-CV-064, 2009 WL 2390851, at *9-10 (S.D. Ga. Aug. 4, 2009). As shown above, the Complaint sufficiently states each prima facie element of a claim under section 301(a). *See supra* at 4-16 (discussing "navigable waters," the only element of the claim contested in Defendants' motion).

By invoking section 309(b) and arguing that the Corps cannot refer unpermitted violations to the Justice Department, Defendants are raising an issue that is not among the prima facie elements that the United States must plead under section 301(a). This argument therefore is an affirmative defense. As this Court recently recognized in another Clean Water Act case, an argument that "seeks to defeat liability by raising something outside the plaintiff's prima facie case" is an affirmative defense. *See United States v. White*, No. 2:23-CV-00001-BO, 2023 WL 8451744, at *5-6 (E.D.N.C. Dec. 6, 2023); *see also Small Bus. Fin. Sols., LLC v. Cavalry, LLC*, No. DKC-22-1383, 2023 WL 284449, at *11 (D. Md. Jan. 18, 2023) (defining an "affirmative defense" as an argument that – if successful – would defeat the plaintiff's claim even if the plaintiff proves its prima facie case). A correct characterization of the nature of Defendants' argument is not a trivial matter because the burdens of pleading and proving an affirmative defense rest squarely on Defendants, not the United States. *See Gomez v. Toledo*, 446 U.S. 635, 640-41 (1980) (refusing to impose an obligation on the plaintiff to allege any elements beyond

the plain terms required by the statute and holding that a complaint need not negate a potential affirmative defense prospectively); *see also Goodman*, 494 F.3d at 464-66.

Although Defendants might assert this is the rare case in which the Court can evaluate their defense on the face of the pleadings, that is incorrect. Nothing in the Complaint forecloses the United States from refuting Defendants' affirmative defense by showing, for example, that both EPA and the Corps approve of the United States' lawsuit (as they do) if that becomes necessary. *See Gomez*, 446 U.S. at 640-41; *Goodman*, 494 F.3d at 464-66 ("To require otherwise would require a plaintiff to plead affirmatively in his complaint matters that might be responsive to affirmative defenses even before the affirmative defenses are raised."); *see also generally Toth v. Stephens and Michaels Assocs., Inc.*, No. 2:13-cv-00372-GMN-VCF, 2014 WL 5687418, at *4 (D. Nev. Nov. 4, 2014) (denying a motion to dismiss a complaint as premature due to the fact that the plaintiff was entitled to dispute the affirmative defense raised in the motion).

In sum, Defendants' affirmative defense is "more properly reserved for consideration on a motion for summary judgment." *Forst*, 4 F.3d at 250. Because EPA joins in the Corps' referral and supports the United States' enforcement action, the United States contends that, as both a legal and evidentiary matter, Defendants lack a sound basis to assert section 309(b) as an affirmative defense. [D.E. 45 at 8, 13 (Defendants agreeing that the United States "can state a claim for relief" consistent with section 309(b) if EPA has "referred the matter to the Department of Justice")]. When advised after filing the motion that EPA formally joins in and agrees with the Corps' referral, defense counsel indicated they would change course and argue that even an EPA referral is insufficient to satisfy section 309(b), unless EPA is listed on the case pleadings and EPA is deemed to be the "lead" client agency by the Justice Department. Section 309(b) imposes no such requirements. Nor does section 309(b) impose any deadline or preclude the United

States from providing evidence to rebut assertions raised by Defendants' affirmative defense. In any event, this disputed defense, if pressed by Defendants, is unripe for resolution at this stage and should not be decided based only on the Complaint's allegations.

B. The affirmative defense should be rejected even if the Court does not deny the motion on procedural grounds.

Although the Court need not delve further into Defendants' challenge to the Corps' referral authority, the filing of the motion compels the United States to point out that this argument is unfounded. *See*, *e.g.*, *Reichelt v. U.S. Army Corps of Eng'rs*, 969 F. Supp. 519, 523 (N.D. Ind. 1996) ("The regulations provide that the Army Corps is authorized to refer cases" to the Justice Department). Defendants cannot carry their burden to prove their defense because they failed to address the statutory provisions cited in the Complaint as well as the legal authorities that vest the United States with broad authority to enforce the Clean Water Act. In addition, the Corps and EPA have provided appropriate input to the Justice Department and both agencies support the Clean Water Act claim brought by the United States in this lawsuit. *See generally* 33 U.S.C. § 1361(b) (allowing EPA to utilize officers and employees of other agencies, with the consent of such agencies, to assist in carrying out the Act's purposes).

1. The United States' claim is not barred by 33 U.S.C. § 1319(b).

Again, Defendants' motion rests on the false assumption that the United States is bringing a claim "under 33 U.S.C. § 1319(b)." [*See* D.E. 45 at 8-9, 17]. Although section 309(b) confirms that EPA can refer a matter for potential enforcement, as EPA recently did in this case, the United States' claim under section 301(a) is not dependent on section 309(b).[5] Rather, under

[5] The Complaint primarily cited section 309(b) as a reference in support of the United States' venue allegations because the violations occurred within this District, but the citations are not

section 301(a), it is legally irrelevant whether the Corps, EPA, a State agency, or a member of the public discovered the violations and brought them to the attention of the Justice Department, an agency that is clearly authorized to file and conduct a federal lawsuit on behalf of the United States and/or its agencies. 28 U.S.C. §§ 516 and 519 (reserving broad authority to conduct litigation involving the United States and its agencies to the Justice Department).

Because the entire statutory construction argument Defendants make is not germane to determining the sufficiency of the United States' claim, there is no need for the Court to consider Defendants' proposed interpretation of the two provisions of the Clean Water Act, 33 U.S.C. §§ 1319(b), 1344(s)(3), discussed in the motion. In a well-reasoned decision, the federal district court in Sacramento upheld the United States' independent authority to commence litigation to address Clean Water Act violations based on a Corps referral. *United States v. LaPant*, No. 2:16-CV-01498-KJM-DB, 2019 WL 1978810, at *3-5 (E.D. Cal. May 3, 2019). In rejecting the same argument Defendants assert here, *LaPant* concluded that "neither § 1319(b) nor § 1344(s)(3) mention the United States' authority to sue," and thus neither restricts the United States from considering and acting on a referral of Clean Water Act violations from the Corps. *Id.* at *4-5. Accordingly, Defendants are essentially posing a hypothetical question that need not be answered because this action was not "brought directly by the Corps" in its own name. *Id.* at *5 (holding that the court "need not" construe how the provisions may apply in a different context, such as when the agency rather than the United States is the Plaintiff).

Here, too, it would serve no purpose to parse the statute to determine when an agency can

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necessary to establish venue or any other aspect of the United States' claim. [D.E. 33 ¶ 4]. Even if the Complaint may contain instances of inartful pleading in citing section 309(b), this cannot be a basis for dismissal when EPA has supplied a referral and agrees with the Corps.

or cannot sue in its own name, separate from the United States, based on the fiction that the Corps is the Plaintiff in this lawsuit. In fact, this conclusion applies with even more force in this case than in *LaPant* because EPA, in addition to the Corps, has formally requested that the Justice Department pursue the Clean Water Act claims against Defendants. The Court therefore may deny the motion and is not required to render what would be an advisory opinion on an extraneous issue of statutory construction. *See generally Andrade v. Ocwen Loan Servicing, LLC*, C.A. No. 18-385 WES, 2021 WL 2117117, at *3 (D.R.I. May 25, 2021) (rejecting the defendant's "straw man" challenge to claims that the plaintiff did not allege).

2. The United States is the Plaintiff.

As the Complaint makes clear, *the United States* is the Plaintiff. [D.E. 33 at 1 ("Plaintiff United States of America, through its undersigned attorneys, files this First Amended Complaint . . . ."), ¶ 2 (describing the relief "the United States seeks" in this action), ¶ 6 (stating that "Plaintiff in this action is the United States of America.")]. Defendants take the Complaint's reference to suing "on behalf of" the Corps in Paragraph 6 out of context: that Paragraph is referencing the United States' independent enforcement authority, not asserting that a referral from the Corps was necessary. The Complaint mentions the Corps to provide background regarding the violations and to acknowledge the Corps' role in investigating and attempting to bring Defendants into compliance prior to this lawsuit. Discussing the Corps' involvement with the site in the Complaint does not allow Defendants to conflate the United States with the Corps, or to negate EPA's involvement in and concurrence with the Corps and the claims in this matter. Nor do the language or structure of the Clean Water Act support Defendants' request to restrict the United States' independent authority to enforce the law. *See United States v. Hercules, Inc.*, 961 F.2d 796, 798-99 (8th Cir. 1992) (contrasting statutory limitations on EPA's administrative

settlement authority under CERCLA with the Attorney General's plenary authority to resolve CERCLA litigation on behalf of the United States).

In ruling in the United States' favor on this same issue in *LaPant*, the court concisely explained that the defendants' argument "requires the court to treat the fact that the United States, not the Corps, is the Plaintiff in this suit as a distinction without a difference," and the court rejected that proposition. *See* 2019 WL 1978810, at *4 (denying a similar motion for judgment on the pleadings and allowing the United States' Clean Water Act claims to proceed).[6] The *LaPant* court correctly concluded that the United States and the Corps are not the same and the fact that the United States is the Plaintiff with its own litigating authority is dispositive in the Clean Water Act context.

3. The United States has authority to sue without any referral.

As the Plaintiff, the United States invoked 28 U.S.C. § 1345 as one of the bases for this action, and it is dispositive of Defendants' second argument. [D.E. 33 ¶ 3]. This statute says: "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress." 28 U.S.C. § 1345. Although "[s]pecial jurisdictional statutes confer power in the district courts over discrete categories of claims that also may be asserted by the United States," "the government need not have specific statutory authorization for a particular action inasmuch as general jurisdiction is conferred by Section 1345." 14 Fed. Prac. & Proc. Juris. § 3651 (4th ed.) (footnotes omitted); *see also United States v. Marchetti*, 466 F.2d 1309, 1313 (4th Cir. 1972) (holding that the United

[6] The Valentines' lead counsel in California represented the defendants in *LaPant*. There was no appeal of the court's ruling on this issue.

States may bring suit even if there is no specific authorization provided it is vindicating an interest sufficient to give it standing); *United States v. Am. Druggists' Ins. Co*., 627 F. Supp. 315, 319 (D. Md. 1985) (finding that Section 1345 "is, in effect, a safety net").

Section 1345 thus authorizes the United States to commence a Clean Water Act lawsuit in federal court. *See, e.g.*, *Donovan*, 661 F.3d at 180 n.5 (citing the statute); *United States v. Sea Bay Dev. Corp.*, No. 2:06-cv-624, 2007 WL 1169188, at *3 (E.D. Va. 2007) (denying defendant's motion to dismiss and recognizing the United States' authority to enforce the Clean Water Act under section 1345 and other provisions); *see also generally* 33 U.S.C. § 1319(e) (referring to "a civil action brought by the United States" within section 309's rubric, which is consistent with recognizing the United States' broad authority to enforce the requirements of section 301(a)).

After a thorough review of the same argument, the district court in *LaPant* agreed with the United States that section 1345 "alone is a sufficient basis to deny" dismissal of the United States' claims. 2019 WL 1978810, at *3. To be sure, the Clean Water Act does not clearly and unequivocally divest the United States' broad authority to enforce federal law as section 1345 and ample case law provides. *See id.* at *4-5 (explaining that the defendants' argument "turns the requisite jurisdictional analysis on its head"); *see also generally Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 808 (1976) (finding no repeal of the United States' general authority under section 1345 or irreconcilability between section 1345 and the statute at issue). The United States' overarching litigating authority is compatible with EPA's and the Corps' respective roles under the Clean Water Act, particularly when, as is the case here, both agencies have requested that the Justice Department conduct a federal lawsuit to enforce the Act against Defendants, but also when the Corps is the agency that investigates and initially identifies the

Clean Water Act violations at issue and refers them to the Justice Department.

To the extent Defendants contend that the Act negates the Justice Department's plenary authority to litigate on behalf of the United States in the present circumstances, the *LaPant* court offered sound analysis and this contention ultimately must fail given EPA's recent referral and formal request to maintain and pursue the relief requested in this lawsuit. But it is important to recognize too that Congress intended to preserve in the Clean Water Act – not impair – the authorities and functions that federal agencies possess or perform under other laws and regulations. *See* 33 U.S.C. § 1371(a) (cautioning against construing the Clean Water Act to limit such authority "under any other law or regulation not inconsistent with this chapter"). Considering that one of the Clean Water Act's primary purposes is to prevent pollutants from entering the waters of the United States, the government's broad authority to commence a lawsuit under section 1345 cannot be deemed "inconsistent" with the Act. Even Defendants do not deny that the "United States has an interest in protecting water quality." [D.E. 45 at 20].

In addition, there is a long line of precedent authorizing the United States to file a federal lawsuit – without a specific statutory authorization – to vindicate its proprietary or financial interests, or to protect the public. *See, e.g.*, *Sanitary Distr. v. United States*, 266 U.S. 405, 425-26 (1925) (citing *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 278-80 (1888)); *United States v. S. Fla. Water Mgmt. Dist.*, 28 F.3d 1563, 1569 (11th Cir. 1994); *Marchetti*, 466 F.2d at 1313.[7]

[7] One of Defendants' featured cases, *United States v. Solomon*, 563 F.2d 1121, 1126-27 (4th Cir. 1977), accepts this well-established principle. [D.E. 45 at 14]. Among other things, *Solomon* notes that the United States can sue to abate a public nuisance without a specific authorization, for example, and that the Supreme Court had upheld its authority to sue to enjoin a municipal sewage system that was endangering navigation on the Great Lakes. *Id.* The fact that *Solomon* did not find similar authority to sue the State of Maryland for allegedly violating the constitutional rights of involuntarily confined mental patients is inapposite here.

Enforcing the Clean Water Act against violators who the United States contends have discharged pollutants into waters of the United States without the required federal permit serves to vindicate important public interests. There is no question that the United States has a legitimate interest in protecting the Roanoke River and its adjacent wetlands.

In addition to seeking environmental restoration to remedy the subject violations, the United States is authorized to "commence an action for civil penalties against any person who violates CWA section 301(a), 33 U.S.C. § 1311(a)." [D.E. 33 ¶¶ 2, 20]; *see also* 28 U.S.C. § 1355(a) (creating federal jurisdiction over "any action" to recover a civil penalty incurred under federal law). The Clean Water Act provides that "[a]ny person who violates section 1311 [301] . . . shall be subject to a civil penalty" for each violation. 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4; *see United States v. Bayley*, 3:20-cv-05867-DGE, 2023 WL 3093126, at *11 n.9 (W.D. Wash. Apr. 26, 2023). If the alleged violations are established, the United States will be requesting an appropriate civil penalty to be determined by the Court.

Notably, the plain text of section 309(d) does not mention or require a referral. The United States has authority to seek civil penalties regardless of any referral. This is underscored by the fact that the civil penalties that are imposed under the Clean Water Act do not accrue to the benefit of the Corps, EPA, or any individual agency: they must be paid to the United States' general treasury. In fact, the United States receives the civil penalties awarded by courts even when a private party is the plaintiff, rather than the United States. *See Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1131 n.5 (11th Cir. 1990); *United States v. Smithfield*

Foods, Inc., 982 F. Supp. 373, 375-76 (E.D. Va. 1997).[8]

In sum, the United States has broad authority to enforce the Clean Water Act to vindicate important public interests, including seeking injunctive relief in the form of environmental restoration to protect the integrity of the Nation's waters and deterring future violations by collecting civil penalties that are paid to the United States' treasury.

4. The Corps has authority to refer violations.

Defendants concede that the Corps has legal authority to refer permit violations to the Justice Department under 33 U.S.C. § 1344(s). [D.E. 45 at 14, 16 (arguing that the Act allows "the Corps to sue" through the Justice Department for such violations]. Although they dispute that the Corps can address *unpermitted* violations, they point to no language in section 404 that cabins the Corps' authority in that way. The federal courts have declined to construe silence as a prohibition against the Corps' authority to request that the Justice Department take legal action in such circumstances, as that is reasonably related to the Corps' given role regarding the issuance (or non-issuance) of section 404 permits, including after-the-fact permits that the Corps may issues to resolve certain Clean Water Act violations. *See United States v. Hallmark Constr. Co.*, 14 F. Supp. 2d 1065, 1068 (N.D. Ill. 1998) (recognizing that the Corps' control over wetlands permitting logically extended to "unlawful permitless activity that endangers navigable

[8] Unlike when the United States is the plaintiff, citizen suits are dependent on compliance with a specific provision of the Clean Water Act that governs only that type of lawsuit. 33 U.S.C. § 1365. Accordingly, Defendants' reliance on *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), which involved a citizen suit, is misplaced. *See LaPant*, 2019 WL 1978810, at *6 (distinguishing *Sea Clammers*).

waters")[9]; *United States v. Kelcourse*, 721 F. Supp. 1472, 1476-78 (D. Mass. 1989) (finding that the Corps' role in addressing violations where a permit should have been obtained from the Corps was consistent with the Act's purposes); *Parkview Corp. v. U.S. Army Corps of Eng'rs*, 490 F. Supp. 1278, 1285 (E.D. Wis. 1980) (upholding the Corps' authority to address unauthorized fill in wetlands as "reasonably related to the [Corps'] permit granting authority"). Defendants' arguments to the contrary would add needless bureaucracy and frustrate the enforcement of the Clean Water Act in a way Congress never intended.

Defendants also fail to recognize that the Corps, as the agency Congress selected to manage section 404's permit program, possesses legal authority to issue regulations regarding that program. With respect to enforcement, the Corps did that decades ago. *See*, *e.g.*, 33 C.F.R. §§ 326.3 (discussing the Corps' surveillance to detect and encourage the reporting of unauthorized activities, as well as administrative enforcement), 326.5 (authorizing the Corps to refer violations to the Justice Department). Neither Congress nor any federal court has repudiated these enforcement regulations. *See*, *e.g.*, *Reichelt*, 969 F. Supp. at 523 (stating that the "regulations provide that the Army Corps is authorized to refer cases").

In all events, the Corps' regulations allowing the Corps to refer a suspected violation to the Justice Department reflects a reasonable interpretation of the statute, addressing ambiguity that otherwise may exist in section 404 as to unpermitted violations. Accordingly, the Corps' enforcement regulations reasonably fill a gap left by Congress with respect to referrals of

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[9] Defendants attempt to distinguish *Hallmark* on the ground that it relied in part on the Corps' authority to issue cease-and-desist orders, which they contend are "creatures" of regulation. [D.E. 45 at 20 n.7]. But *Hallmark* was interpreting the Corps' statutory authority under 33 U.S.C. § 1344(s)(1), *see* 14 F. Supp. 2d at 1068-69, and correctly ruled that the statute permitted the Corps to exercise its enforcement authority to refer violations.

suspected violations in this scenario and the Corps' interpretation is entitled to deference and respect. *See, e.g.*, *Decker v. Nw. Env't Def. Ctr.*, 568 U.S. 597, 613-14 (2013); *Deaton*, 332 F.3d at 709-11 (reviewing Clean Water Act regulations).

5. Defendants' argument is contrary to longstanding practice.

Finally, there is nothing remarkable about the United States commencing a lawsuit after the Corps discovered and referred Clean Water Act violations. *See*, *e.g., Riverside Bayview*, 474 U.S. at 131 (recognizing that the Corps is an agency "charged with enforcing" the Clean Water Act); *United States v. Cumberland Farms of Conn., Inc.*, 826 F.2d 1151, 1162-63 (1st Cir. 1987) (noting that the Corps is "properly seeking enforcement of the Clean Water Act"); *United States v. Akers*, 785 F.2d 814, 816-18 (9th Cir. 1986) (affirming an injunction obtained on behalf of the Corps to stop ongoing Clean Water Act violations).

For more than four decades, the federal courts have recognized that EPA and the Corps share responsibility for enforcing the Clean Water Act. During that time, not a single court has accepted Defendants' argument and barred the United States from bringing a Clean Water Act lawsuit to address violations of section 301(a) merely because the Corps discovered and referred the violations to the Justice Department. Moreover, EPA concurs with the Corps in this matter and supports the United States' commencement and continued litigation of the Clean Water Act claims against these Defendants, so their affirmative defense is no longer germane. Once a complaint is filed, the Justice Department has plenary authority to conduct the litigation on behalf of the United States. For all these reasons, the Court should not disrupt longstanding practice or disturb the reasonable division of labor that EPA and the Corps utilize to promote the public interest and further the Clean Water Act's important goals.

Dated: January 26, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on January 26, 2024, a copy of the foregoing document, Plaintiff United States of America's Opposition to Defendants' Motion For Judgment On The Pleadings, was filed with the Court and that notice of this filing will be sent to all parties by operation of the Court's Electronic Case Filing System, via electronic mail, including counsel for Defendants Melton E. "Val" Valentine, Jr., Melton E. "Skip" Valentine, III, and Indiantown Farm, LLC. Parties may access the filing through the Electronic Case Filing System.

Executed on this the 26th day of January 2024.

/s/ Alex J. Hardee
Trial Attorney
United States Department of Justice