Nos. 19-2208 (Lead)
24-1998

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RON FOSTER; FOSTER FARMS, LLC; MARKETING & PLANNING SPECIALISTS LIMITED PARTNERSHIP,

Plaintiffs – Appellants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; LEE M. ZELDIN, in his official capacity as Administrator of the Environmental Protection Agency,

Defendants – Appellees.

On Appeal from the United States District Court
for the Southern District of West Virginia
Honorable John T. Copenhaver, Jr., Senior District Judge
(2:14-cv-16744)

APPELLANTS' OPENING BRIEF

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 19-2208 Caption: Ron Foster v. EPA

Pursuant to FRAP 26.1 and Local Rule 26.1,

Ron Foster, Foster Farms, LLC, Marketing & Planning Specialists Limited Partnership
(name of party/amicus)

who is Appellants, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Frank D. Garrison Date: 2/5/2025

Counsel for: Appellants Ron Foster, et al.

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction); *id.* § 2201 (authorizing declaratory relief); *id.* § 2202 (authorizing injunctive relief); *id.* § 1345 (United States as a plaintiff); *id.* § 1355 (fine, penalty or forfeiture); *id.* § 1367 (supplemental jurisdiction); 5 U.S.C. §§ 701–706 (judicial review provisions of the Administrative Procedure Act); and 33 U.S.C. § 1319(b) (Clean Water Act enforcement).

The Court of Appeals has jurisdiction under 28 U.S.C. § 1291 because this is an appeal from the District Court's final judgment. ECF No. 315. This appeal is timely because the notice of appeal was filed on October 3, 2024, 43 days after the District Court's final judgment entered on August 21, 2024. *See* Fed. R. App. P. 4(a).

ISSUE PRESENTED FOR REVIEW

Sackett v. EPA held that the federal government's regulatory authority under the Clean Water Act extends only to those "relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" 598 U.S. 651, 671–74 (2023) (quoting *Rapanos v. United States*, 547 U.S. 715, 739 (2006)). And to be regulable,

those "bodies of water" must be connected to "traditional interstate navigable waters." *Id.* at 678 (quoting *Rapanos*, 547 U.S. at 742).

The District Court held that a hydrogeographic feature labelled by Appellees as a "headwater stream"—which intermittently flows for four months a year, loses its features in the middle of a hayfield adjacent to Appellants' property, and lacks a connection to any traditionally navigable water—qualifies as a regulable "water of the United States." Is the District Court's judgment wrong as a matter of law?

INTRODUCTION

Since Congress passed the Clean Water Act, regulated parties have faced a system of vague and varying rules under which they have been exposed to significant civil and criminal penalties for engaging in ordinary activities. As the Supreme Court recently explained, the "CWA is a potent weapon," often imposing "'crushing' consequences 'even for inadvertent violations.'" *Sackett v. EPA*, 598 U.S. 651, 660 (2023) (quoting *Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 602 (2016) (Kennedy, J., concurring)).

Appellants' case is symbolic of the CWA's decades-long turbidity.[1] Like the Sacketts, Foster has been crunched in the Act's regulatory maw for well over a decade. In 2009, he bought property in West Virginia out of bankruptcy, spent tens of thousands of dollars remediating the past owner's environmental damage to parts of the property, and then spent hundreds of thousands of more dollars seeking to develop the property. Yet shortly after he began development, the Environmental Protection Agency, without permission, trespassed onto his land and determined it likely had "waters of the United States" regulated under the CWA—despite the nearest traditional navigable water being over three miles away and no water on the property having a relatively permanent continuous connection to that traditional navigable water.

Close to a decade-and-a-half of legal wrangling and litigation then ensued. During that time, Foster spent hundreds of thousands of dollars on expert witness and attorneys' fees to defend his livelihood and his property rights. Towards the end of this saga, the Supreme Court in *Sackett v. EPA* definitively clarified the meaning of "waters of the United

[1] Appellants include Ron Foster, Foster Farms, LLC, and Marketing & Planning Specialist. For ease of reference, all Appellants will be referred to collectively as "Foster."

States" and established the legal test for determining when "waters" fall within that meaning: the CWA only extends regulatory authority to those "waters" that are "relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" 598 U.S. at 671 (citing *Rapanos v. United States*, 547 U.S. 715, 739 (2006) (plurality opinion)).

The District Court below engaged in an incomplete and flawed legal analysis after *Sackett* to determine whether certain parts of Foster's property fall within the CWA's geographic ambit. The District Court held that its pre-*Sackett* analysis purporting to apply *Rapanos*'s plurality opinion confirmed that an intermittent "stream"—which ends in a hayfield and does not itself connect to any traditionally navigable water—is a regulable "water of the United States." In doing so, the District Court failed to apply the correct legal standard mandated by *Sackett* and should be reversed.

STATEMENT OF THE CASE[2]

A. The Clean Water Act

1. Congress passed the Clean Water Act in 1972. The Act's stated goal is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). At the same time, Congress made plain that this goal was not to be pursued at any cost. "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources[.]" *Id.* § 1251(b).

To implement the Act, Congress made illegal, unless otherwise permitted, the "discharge of any pollutant by any person" into "navigable waters." *Id.* §§ 1311(a), 1362(12). The statute broadly defines "pollutant" as, among other things, "dredged spoil," "rock," "sand," and "cellar dirt" that is "discharged into water." *Id.* § 1362(6). The "discharge of a pollutant" is "any addition of any pollutant to navigable waters from any

[2] All relevant statutory and regulatory provisions required by Fed. R. App. P. 28(f) and L.R. 28(b) are provided in an addendum at the end of this brief.

point source," *id.* § 1362(12)(A). The Act's jurisdiction extends to "navigable waters" which are defined as "the waters of the United States, including the territorial seas." *Id.* § 1362(7). Although the Act defines "territorial seas," *id.* § 1362(8), it does not further define "the waters of the United States." *See id.* § 1362.

2. The statute divides regulatory authority among federal agencies and the states. It delegates to the EPA authority to regulate "discharges" of "pollutants" from "point sources" to "navigable waters." *See* 33 U.S.C. §§ 1311(a), 1362(12). Nonexempt discharges to regulated waters (other than those of dredged or fill material) require a permit from the EPA—a National Pollutant Discharge Elimination System (NPDES) permit. *Id.* § 1342(a). Nonexempt discharges into regulated waters of dredged or fill material are regulated by the Army Corps of Engineers, which issues permits for those discharges. *Id.* § 1344(a). Obtaining a permit from the Corps is no simple task: it comes with "significant" costs and is "arduous, expensive, and long." *Sackett*, 598 U.S. at 661 (citing *Hawkes Co.*, 578 U.S. at 594–95).

3. Despite the split in upfront permitting authority, EPA is primarily charged with enforcing the statute. *See* 33 U.S.C. § 1319(a). To prove a

violation of the Act, EPA has the burden to show five elements: (1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source. *See North Carolina Coastal Fisheries Reform Group v. Capt. Gaston LLC*, 76 F.4th 291, 295 n.1 (4th Cir. 2023). If these elements are not met, a person is not subject to the Act.

4. If a person subject to the Act discharges pollutants without a required permit or violates permit conditions, he risks cease-and-desist orders, compliance orders, administrative penalties, significant civil penalties and injunctions, and criminal liability for even negligent violations. *See* 33 U.S.C. § 1319(a)–(d); 40 C.F.R. § 19.4 tbl.1 (allowing for civil penalties of over $60,000 per day per violation); *Sackett*, 598 U.S. at 660 (people who "negligently discharge 'pollutants' into covered waters may face severe criminal penalties including imprisonment"); *Rapanos*, 547 U.S. at 721 ("[T]he Clean Water Act imposes criminal liability, as well as steep civil fines, on a broad range of ordinary industrial and commercial activities.") (cleaned up).

B. History of "waters of the United States" under the Clean Water Act

1. At first, the Corps took a narrow view of its jurisdiction under the CWA and hewed to the traditional understanding of "navigable waters of

the United States," when construing the statute. *See Rapanos*, 547 U.S. at 723–24. Yet soon after, the agency began to follow EPA to broadly construe its regulatory authority—often in the vaguest way possible. For example, in several rulemakings, culminating in new regulations commonly known as the "1986 Regulations," *see* 88 Fed. Reg. 3004, 3005 & nn.3–4 (Jan. 18, 2023), the Corps and the EPA tried to extend their claimed authority to regulate "navigable waters" to the outer limits of Congress's power to regulate interstate commerce, *see Rapanos*, 547 U.S. at 724 (citing 42 Fed. Reg. 37,122, 37,144 n.2 (July 19, 1977)). They asserted authority not only over interstate waters, but also intrastate waters with various relationships to interstate or foreign commerce—as well as all tributaries of those waters, and all "wetlands" that are "adjacent"—bordering, contiguous, or neighboring—those waters. 33 C.F.R. § 323.2(a)(2)–(5), (d) (1978). *See also Rapanos*, 547 U.S. at 724.

2. The Supreme Court first addressed geographic scope of the Agencies' authority under the CWA in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). There, the Supreme Court concluded that the Agencies could regulate wetlands that are "inseparably bound up with the 'waters' of the United States," *id.* at 134—but clarified that the

Court's holding was limited to wetlands that abut traditional navigable waters, *see id.* at 131 & n.8.

Undaunted, the Agencies "responded to *Riverside Bayview* by expanding their interpretations even further," *Sackett*, 598 U.S. at 665, ultimately leading the Court to once again address the CWA's scope in *Solid Waste Agency of N. Cook County (SWANCC) v. United States Army Corps of Engineers*, 531 U.S. 159 (2001). After construing the CWA's text, applying a clear statement rule, and deploying constitutional avoidance, *SWANCC* rejected the Agencies' attempt to regulate "nonnavigable, isolated, intrastate waters," *id.* at 166–68, 172–74.

But just "[d]ays" after the Supreme Court issued its decision in *SWANCC*, the Agencies attempted to salvage their broad authority through "guidance that sought to minimize *SWANCC*'s impact." *Sackett*, 598 U.S. at 666. In doing so, the Agencies continued to assert jurisdiction over traditional navigable waters, their tributary systems, and waters neighboring traditional navigable waters and their tributaries. *See Rapanos*, 547 U.S. at 726.

The Agencies' continued reluctance to cabin their authority eventually led the Court to, for a third time, address the Act's scope in *Rapanos*. A

majority of the Court held the Agencies' 1986 Regulations to be *ultra vires*—at least as to their attempt to regulate all tributaries of traditionally navigable waters and all wetlands adjacent to those tributaries. *Id.* at 728 (plurality opinion); *id.* at 759 (Kennedy, J., concurring in the judgment). But no opinion of the Court garnered a majority.

Writing for the plurality, Justice Scalia noted that the Agencies' authority can extend no further than "waters," *id.* at 731, and that the ordinary meaning of "waters" includes "only 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 739 (quoting Webster's New International Dictionary 2882 (2d ed.1954)). "Wetlands" would not normally fall under this definition. *See Riverside Bayview*, 474 U.S. at 132. But the plurality reasoned there was a difference between considering a wetland on its own to be a "water," and concluding that some wetlands "bound up" with "traditional navigable waters" may be regulated as "waters"—given the "ambiguity in drawing the boundaries of [those] 'waters.'" *Rapanos*, 547 U.S. at 740. Even with this latter concession, however, "only those

wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." *Id.* at 742.

Justice Kennedy provided the fifth vote, but he disagreed with the plurality's reasoning. *Id.* at 759 (Kennedy, J., concurring in the judgment). Justice Kennedy proposed a broader "significant nexus" standard—under which a tributary or wetland may be federally regulated if it "significantly" affects the physical, chemical, and biological integrity of "waters more readily understood as 'navigable.'" *Id.* at 780.

3. Ever undaunted, shortly after *Rapanos*, the Agencies once again issued guidance purporting to explain how they would broadly assert their authority. *See* EPA & Army Corps, Memorandum re: Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* (Dec. 2008) (the "Post-*Rapanos* Guidance"). This guidance combined parts of Justice Scalia's *Rapanos* plurality and Justice Kennedy's concurrence. *See id.* Yet it did "not impose legally binding requirements on EPA, the Corps, or the regulated community . . . ." *See id.* at 4 n.17.

Switching course, the Agencies attempted two major rulemakings to define "navigable waters." *See* 80 Fed. Reg. 37,054, 37,056 (June 29, 2015); 85 Fed. Reg. 22,250 (Apr. 21, 2020). The 2015 Rule asserted "sweeping[ly]" broad authority over many features, wet or otherwise—"a muscular approach that would subject 'the vast majority of the nation's water features' to a case-by-case jurisdictional analysis," *Sackett*, 598 U.S. at 668. The 2020 Rule was more circumscribed. *See id.* Both rules, however, ultimately failed. *See West Virginia v. U.S. Env't Prot. Agency*, 669 F. Supp. 3d 781, 792 (D.N.D. 2023) (recounting history of preliminary injunctions and final judgments entered against these rules).

4. Finally, in May 2023, the Supreme Court issued its watershed decision in *Sackett*. 598 U.S. 651. The Supreme Court unanimously rejected the significant nexus test and the Agencies' claim of jurisdiction—after fifteen years of litigation—over the *Sacketts*' property. *Id.* at 684; *id.* at 715–16 (Kavanaugh, J., concurring).

Besides the Court's unanimous judgment, the majority largely adopted the *Rapanos* plurality's view of the federal government's regulatory authority under the CWA. The Court "conclude[d] that the *Rapanos* plurality was correct: the CWA's use of 'waters' encompasses

'only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" *Id.* at 671 (quoting *Rapanos*, 547 U.S. at 739). And for those bodies of water to be regulable, they must be "connected to traditional interstate navigable waters[.]" *Id.* at 678. The majority noted, as it had done in *SWANCC*, 531 U.S. at 172, that the test is derived from the CWA's "text and structure." 598 U.S. at 679.

But the majority did not stop with adopting the *Rapanos* plurality's textually driven test. It also held that two "background principles of construction" require EPA to "provide clear evidence that it is authorized to regulate in the manner it proposes." *Id.* First, when construing the CWA, the Court, and thus lower courts, require "Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property." *Id.* (cleaned up).

Second, an overly broad reading of "waters of the United States" creates "serious vagueness concerns" because of the statute's criminal provisions. *Id.* at 680. Thus, "[d]ue process requires Congress to define

penal statutes with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* at 680–81 (cleaned up). Accordingly, "[w]here a penal statute [like the CWA] could sweep so broadly as to render criminal a host of what might otherwise be considered ordinary activities, we have been wary about going beyond what 'Congress certainly intended the statute to cover.'" *Id.* at 681 (quoting *Skilling v. United States*, 561 U.S. 358, 404 (2010)).

At bottom, *Sackett* rejected the significant nexus test and clarified that the CWA extends to "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes,'" *id.* at 671—which are themselves "connected to traditional interstate navigable waters[.]" *Id.* at 678. And when applying that test, courts must refer to background principles of statutory construction respecting federalism, property rights, and due process. *Id.* at 679.

C. Relevant Factual and Procedural Background

1. Appellant Ron Foster is a citizen who resides in West Virginia; Foster Farms, LLC is a Kentucky limited liability company; and Marketing & Planning Specialists is a Nevada limited partnership authorized to do business in West Virginia. ECF No. 263 at 2 (Memorandum Opinion and Order and Findings of Fact and Conclusions of Law).[3]

2. Foster's plight began during the time between the Supreme Court's decision in *Rapanos* and the Court's decision in *Sackett*, which established the legal test that controls here. In October 2009, Foster bought around 90 acres of land, "Neal Run Crossing," near Parkersburg, West Virginia. *Id.* He bought the property from the Endurance Group, LLP. *Id.* Before Foster's purchase, Endurance had filled in and altered a stream on a separate part of the property without obtaining a Section 404 permit from the Corps. *Id.* But before EPA pursued any enforcement action against Endurance, Foster bought the Property out of bankruptcy with no transferred liability. He was required, however, to set aside

[3] The District Court found, and Appellants do not challenge here, that Mr. Foster "as a practical matter" is the decision maker for both Foster Farms, LLC and Marketing & Planning Specialists. *See id.* at 3.

$50,000 in a trust to fund restoration work to cure Endurance's alleged CWA violations. *See id.* at 3–4.[4]

3. The property is divided into five "pads" for development—but only "Pad 4" is relevant here. *Id.* at 3–4. Pad 4 is located on the westernmost part of Neal Run Crossing. *Id.* at 4. At the time he purchased the property, Pad 4 contained four small "streams" that were termed below as "Relevant Reaches." *Id.* Each relevant stream was individually labeled as "RR1–RR4." *Id.* Before Foster began work on his property, RR 1, 2, and 3 flowed into RR4. *Id.* RR4, in turn, exited the western boundary of his property, where it entered a neighbor's hayfield and allegedly "joined" Blackwell Creek (also termed below as an "Unnamed Tributary of Neal Run"). *Id.* Blackwell Creek joins a "second unnamed tributary" which then flows into the Little Kanawha River (a navigable water of the United States), which, in turn, flows into the Ohio River (another navigable water of the United States) at Parkersburg. *Id.* at 4–5.

4. In September 2010, two EPA inspectors, without permission, entered Neal Run Crossing. *Id.* at 5–6. The inspectors observed that parts of Pad 4 had been cleared of vegetation and partially filled. *Id.* at 6–7.

[4] Foster complied and the restoration work was completed in 2011. *Id.*

The EPA inspectors asked Foster's excavation contractor on site whether a Section 404 permit had been obtained for the work on Pad 4 and advised that they believed one would likely be required. *Id.* at 7–8.

Shortly after EPA came onto his property, Foster consulted a professional engineer who told him that no Section 404 permit would be required to continue work on Pad 4. Accordingly, Foster continued to develop the property. *Id.* at 8–11. He then hired a second environmental engineering firm which submitted a "wetland and stream delineation" report to the Corps in May 2011. *Id.* at 12–13. That same month, EPA counsel once again visited the site and determined that Foster had placed fill in the alleged regulable "waters." *Id.* at 14–15. EPA eventually issued an Administrative Compliance Order (ACO) to Foster in January 2012. *Id.* at 15. The ACO asserted that Foster had violated the CWA by filling the four alleged "waters" on Pad 4 without a required Section 404 permit. *Id.*

The jurisdictional dispute remained unresolved for several years, so in 2014 Foster sued the EPA in the U.S. District Court for the Southern District of West Virginia under the Administrative Procedure Act. ECF No. 1. As relevant here, he sought a declaration that the Pad 4 alleged

"waters" were not "waters of the United States" subject to CWA jurisdiction and an injunction to halt any enforcement action by the agency. *Id.* at 15. EPA then brought a counterclaim against Foster asserting that he had illegally discharged pollutants into "waters of the United States" in violation of the CWA, seeking injunctive relief and civil penalties. ECF No. 7 at 20.[5]

5. After a multi-day bench trial in August 2017, the District Court issued its findings of fact and conclusions of law in August 2019 and found Foster liable for violating the CWA. ECF No. 263 at 51–58. Lacking clear guidance from the Supreme Court and applying the more expansive "significant nexus" test from Justice Kennedy's concurrence in *Rapanos*, the court concluded that all four of the filled hydrogeographic features on Pad 4 were "waters" subject to CWA regulation. *Id.* The court, however, found only RR4 satisfied both the *Rapanos* plurality's standard and Justice Kennedy's broader "significant nexus" test. *Id.* at 57.

[5] Both pleadings were then amended but included the same claims relevant to this appeal. *See* ECF No. 153 (Foster Corrected Second Amended Complaint); ECF No. 156 (EPA Answer to Corrected Second Amended Complaint and Counterclaim). EPA's Counterclaim is the only issue addressed in this appeal.

In concluding that Foster violated the Act as to RR4, the court relied on EPA expert witnesses to find that RR4, an alleged "intermittent stream," is a "water of the United States" because it connects, through a hayfield, to "Blackwell Creek"—an intermittent-seasonal tributary of an unnamed tributary that connects to the Little Kanawha River, which eventually connects to the Ohio River. ECF No. 263 at 4–5. To reach this conclusion, the court found that the hayfield, in essence, was part of RR4 which then connects to Blackwell Creek. RR4 flows through a channel with a bed, bank, and ordinary high-water mark into the hayfield for around 125 feet. *Id.* at 20. But the court also found that, after those 125 feet, RR4 loses its ordinary high-water mark, bed, and bank and runs into a "confined concave pathway" for about 120 feet. *Id.* And only after those 120 feet does a "more defined channel with bed and bank and ordinary high water mark reappear[.]" *Id.* at 21.

To explain why RR4 disappears, the court cited EPA's experts who opined that the "hayfield is used to grow and harvest hay, and has been used for that purpose for decades." *Id.* It has been "cut once or twice a year . . . [and a] tractor is used to cut, rake, and bale the hay." *Id.* The experts also noted that "mowing and raking of the hayfield over time can

flatten the stream bed and obscure certain features." *Id.* In addition, the court credited EPA's experts' findings that the loss of all stream features in the middle of the hayfield is caused by "the change in speed and force of the flow as it comes from the sloped Pad 4 area into the flattened hayfield" which makes it "less able to carve a channel into the center of the hayfield." *Id.* at 22–23.

Ultimately, the court found that RR4 remains regulable despite its lengthy discontinuity, citing the Corps' "instructions for identifying jurisdictional waters [which] state that 'natural or manmade discontinuity in the OHWM does not necessarily sever jurisdiction (e.g., where the stream temporarily flows underground, or where the OHWM has been removed by development or agricultural practices).'" *Id.* at 23.

Along with the Liability Order, the District Court issued a separate Memorandum Opinion and Order on remedies. ECF No. 264. The Remedy Order imposed a substantial $100,000 civil penalty on Foster for the CWA violations. *Id.* at 2. It also required Foster to mitigate the environmental impacts of his activities by purchasing compensatory

mitigation "credits" in accordance with the West Virginia Stream and Wetland Valuation Metric. *Id.* at 2, 5, 11.[6]

6. As explained above, after the District Court's Liability Order, the legal landscape over CWA jurisdiction experienced a seismic shift when the Supreme Court issued its landmark decision in *Sackett*. As noted, *Sackett* rejected the "significant nexus" standard and largely adopted the *Rapanos* plurality as the controlling legal standard.

And in the wake of *Sackett*, the EPA reassessed its position on the streams at issue. Given that the District Court's prior order did not find that RR1, RR2, and RR3 satisfied the *Rapanos* plurality's test which *Sackett* had just largely adopted, EPA withdrew its request for injunctive relief as to those three features. ECF No. 314 at 9, 23 (Memorandum Opinion and Order). The Agency informed the court that it was now seeking compensatory mitigation credits only for RR4. *Id.* at 9. The court agreed and held that only RR4 remains a regulable water post-*Sackett*, while RR1, RR2 and RR3 are no longer subject to the EPA's authority.

[6] After the District Court's initial Liability and Remedies Orders, Foster filed an appeal with this Court as a protective measure. *See* No. 19-2208. That appeal was stayed until after issues over the remedy were litigated between the parties. This appeal followed the District Court's final judgment. *See* ECF No. 315.

Id. But the court engaged in no new legal analysis under *Sackett* with respect to RR4. It simply referred to its prior Liability Order. *Id.* at 7–9. The court then amended its remedy but still required Foster to purchase credits to compensate for impacts to RR4, as well as a slightly reduced $85,000 civil penalty. *Id.* at 57–58. This appeal followed.

SUMMARY OF THE ARGUMENT

The District Court erred in concluding that RR4, an "intermittent stream" on Foster's property, is a regulable "water of the United States" under the CWA. Under the Supreme Court's binding test in *Sackett v. EPA*, RR4 fails three required elements to fall within the Act's jurisdiction.

First, RR4 is not "relatively permanent" because it flows for a mere four months of the year. Under the *Rapanos* plurality, as adopted by *Sackett*, no reasonable person would consider a hydrogeographic feature that does not flow more than at least half the year to have the "ordinary presence of water" required for CWA regulation.

Second, the District Court incorrectly held that the hayfield was an extension of and thus part of RR4. RR4 loses all features of a stream when it leaves Foster's property and reaches the hayfield. Under *Sackett*'s

ordinary parlance test, no reasonable person using common sense would describe the middle of a hayfield—lacking any bed, bank, or ordinary highwater mark, as part of a "stream, river, ocean or lake." The hayfield is simply a field where RR4 ends.

Third, and related to the preceding point, RR4 lacks any connection to a traditional navigable water, the nearest of which is over three miles away. The discontinuity of RR4 in the hayfield severs any arguable hydrological connection to any traditional navigable water. Absent such a connection to a traditional navigable water, RR4 is at most an isolated intrastate water which, per *SWANCC*, the CWA does not regulate.

Finally, the District Court failed to apply the background canons of construction required by *Sackett* when assessing EPA's asserted jurisdiction. Regulating an intermittent "stream" that ends in a hayfield raises serious federalism and due process concerns. *Sackett* requires Congress to speak clearly if it intends to authorize such expansive federal authority over local land use and to criminalize ordinary conduct. No such clear statement exists here.

In sum, by disregarding *Sackett*'s binding test and clear statement rules, the District Court's conclusions of law were legal error. Its judgment should be reversed.

ARGUMENT

The District Court should be reversed because it failed to apply the correct legal standard to determine whether Foster's property contains a regulable "water of the United States."[7]

Because the CWA imposes severe sanctions, triggers potential criminal penalties, and stretches the bounds of our Constitution's federal structure, the Supreme Court in *Sackett* reaffirmed the importance of clearly demarcating its geographic reach—the meaning of the term "navigable waters." *See* 598 U.S. at 661 ("Due to the CWA's capacious definition of 'pollutant,' its low *mens rea*, and its severe penalties, regulated parties have focused particular attention on the Act's geographic scope.").

[7] In reviewing a judgment resulting from a bench trial, this Court reviews a district court's factual findings for clear error and its legal conclusions *de novo*. *See Billups v. City of Charleston, S.C.*, 961 F.3d 673, 682 (4th Cir. 2020). Foster does not contest the District Court's factual findings but only its legal conclusions.

Sackett did so by holding that, for a hydrologic feature to be considered a "water of the United States" under the CWA, it must be a (1) relatively permanent, (2) standing, or continuously flowing (3) body of water forming geographic features that are described in ordinary parlance as a stream, ocean, river, or lake, and be (4) connected to a traditional interstate navigable water. *See Rapanos*, 547 U.S. at 742; *Sackett*, 598 U.S. at 678–79. If these conditions are not met, there is no CWA authority and there is no violation.

This test should be viewed as one of "common sense and common usage." *Rapanos*, 547 U.S. at 732 n.5. When construing an agency's claimed authority under this test, a court must take into consideration "background principles of statutory construction" and ensure that the agency "provide[s] clear evidence that it is authorized to regulate in the manner it proposes." *Sackett*, 598 U.S. at 679.

Put differently, the test should allow a reasonable person to determine—without having to hire an expert—whether he is subject to the Act's "crushing" civil and criminal sanctions. *See Sackett*, 598 U.S. at 680–81. That is what is at issue here: whether the intermittent hydrologic feature on Foster's property—which flows less than half the

year, which loses its stream features in the middle of a hayfield, and which does not connect to a tradition navigable water—falls within the meaning of "waters of the United States." It does not. RR4 fails to satisfy *Sackett*'s test for CWA jurisdiction, and thus as a matter of law cannot be a "water of the United States." 33 U.S.C. §§ 1344(a), 1362(7). Because the District Court concluded otherwise through an erroneous understanding and application of *Sackett*, its judgment should be reversed.

A. RR4 is not a "water of the United States" because it is not "relatively permanent."

1. Following *Rapanos*, *Sackett* clarified that, for "waters" to be regulable, they must be "relatively permanent." 598 U.S. at 671. To be "relatively permanent," the ordinary presence of water is a necessary, *see Rapanos*, 547 U.S. at 734 ("That limited effect includes, at bare minimum, the ordinary presence of water."), though not sufficient, *see Sackett*, 598 U.S. at 674 ("Consider puddles, which are also defined by the ordinary presence of water even though few would describe them as 'waters.'"), condition for a features to qualify as "waters."

Thus, for a hydrogeographic feature to be regulable, it must be more likely than not to have water within it throughout most of the year. *See Rapanos,* 547 U.S. at 733 ("Even the least substantial of the definition's

terms, namely, 'streams,' connotes a continuous flow of water in a permanent channel ...."); Ordinary, Black's Law Dictionary (12th ed. 2024) ("*adj.* (15c) 1. Occurring in the regular course of events; normal, customary, and usual; of common everyday occurrence.").

While *Sackett* did not directly address the difference between non-regulable "intermittent streams" and regulable "relatively permanent waters," the *Rapanos* plurality expressly discussed how long water must be present to make a stream "relatively permanent":

> By describing "waters" as "relatively permanent," we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months—*such as the 290-day, continuously flowing stream* postulated by Justice Stevens' dissent.

Rapanos, 547 U.S. at 732 n.5 (second emphasis added).

The *Rapanos* plurality also states, more than once, that channels with intermittent flow are not regulable "waters." *See id.* at 733 ("All of these terms [such as 'streams' and 'rivers'] connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows."); *id.* at 733–34 ("[Waters of the United States] exclude[s] channels containing merely intermittent or

ephemeral flow"); *id.* at 739 (The phrase Waters of the United States "does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.").

2. Here, the District Court found that RR4 is an "intermittent stream," ECF No. 263 at 12, 14, 17, 37. Yet the court did not correctly implement the *Rapanos* plurality's analysis in its conclusions of law. Nor did it correctly implement *Sackett* when it later upheld that conclusion as to RR4. ECF No. 314 at 7–9. It simply failed to mention that part of *Rapanos*—adopted by *Sackett*—holding that "intermittent streams" are not "waters of the United States." 547 U.S. at 732 n.5. Nor did it mention, much less apply, *Sackett*'s "background canons." Rather, the District Court merely referred to its previous conclusions—based on a flawed view of *Rapanos* and several pre-*Sackett* out-of-circuit lower-court precedents—to find that RR4 was "relatively permanent" because, based on extrapolated evidence, the feature intermittently flowed for at "least four months a year on the Site[.]" ECF No. 263 at 53, 57. Yet no one, using "common sense and common usage," *Rapanos*, 547 U.S. at 732 n.5, would

consider that short time frame as marking the "ordinary presence of water." *Id.* at 734.

At bottom, an intermittent water feature that flows for a mere four months of the year is not substantial enough to qualify as among the "waters of the United States." *See Sackett*, 598 U.S. at 671; *Rapanos*, 547 U.S. at 739; *see also United States v. Sharfi*, No. 21-cv-14205, 2024 WL 4483354, at *12 (S.D. Fla. Sept. 21, 2024), *report and recommendation adopted*, No. 21-14205-CIV, 2024 WL 5244351 (S.D. Fla. Dec. 30, 2024) (holding that an intermittent stream with a seasonal flow for five months of the year was not "relatively permanent" and thus did not qualify as a "water of the United States"). The District Court can be reversed on this basis alone.

B. RR4 is not among the "waters of the United States" because it is not, in ordinary parlance, a body of water or stream once it reaches the hayfield.

1. For a hydrologic feature to be considered among the "waters of the United States," it not only must be "relatively permanent," it must be a "bod[y] of water 'forming 'geographic[al] features' that [is] described in *ordinary parlance* as [a] 'stream[], ocean[], river[], [or] lake[].'" *Sackett*, 598 U.S. at 671 (citing *Rapanos*, 547 U.S. at 739) (emphasis added). Put

differently, the issue is whether a reasonable person, using "common sense and common usage," would describe the pertinent hydrological feature as a "stream, ocean, river, or lake." *Id.* at 680–81.

2. The District Court relied on EPA expert witnesses to find that RR4 is among the "waters of the United States" because it connects, through a hayfield, to "Blackwell Creek"—an intermittent-seasonal tributary of an unnamed tributary that connects to the Little Kanawha River (a "navigable-in-fact" water) which eventually connects to the Ohio River. ECF No. 263 at 4–5, 20–26. To reach this conclusion, the court found that the hayfield was part of RR4 (an intermittent stream) which then connects to Blackwell Creek.

This conclusion does not conform to *Sackett* for several reasons. *First*, the court failed to faithfully apply the *Sackett/Rapanos* "ordinary parlance" test. Instead, it held that, based on extrapolated expert testimony, one could consider the hayfield part of the intermittent stream (RR4) because its features are merely cut off by a "natural or manmade discontinuity . . . ." *Id.* at 23. But in ordinary parlance, no reasonable person could look at a hayfield, in which an intermittent stream loses its "bed, bank, or ordinary high-water mark," and describe it as part of a

"body of water." It is a hayfield in which RR4 terminates. And under *Sackett*, whether the middle of the hayfield cutting off RR4 contains a "confined concave pathway" or a "swale" does not matter. *See id.* at 20–21. The hayfield, in ordinary parlance, simply cannot be described as a "body of water" that could be considered among the "waters of the United States." Consequently, RR4 is not regulable because it does not connect with the "waters of the United States."

Second, even if one took a more formalist view, the District Court's legal conclusion would still fail under *Sackett*'s "ordinary parlance" test. The court cited EPA's experts who noted that the "hayfield is used to grow and harvest hay and has been used for that purpose for decades." *Id.* at 21. And it has been "cut once or twice a year . . . [a] tractor is used to cut, rake, and bale the hay." *Id.* And "mowing and raking of the hayfield over time *can* flatten the stream bed and obscure certain features." *Id.* (emphasis added). In addition, the court credited EPA's experts' findings that the loss of the geographic features in the middle of the hayfield is caused by "the change in speed and force of the flow as it comes from the sloped Pad 4 area into the flattened hayfield" which makes it "less able to carve a channel into the center of the hayfield." *Id.* at 22–23. This, in

the court's view, meant that the hayfield could be considered part of RR4 because the Corps' "instructions for identifying jurisdictional waters state that "natural or manmade discontinuity in the OHWM does not necessarily sever jurisdiction (e.g., where the stream temporarily flows underground, or where the OHWM has been removed by development or agricultural practices)." *Id.* at 23.

But the Corps' manual is not the law, *Sackett* is. And under *Sackett*, the test is whether a reasonable person can tell, without the use of experts, whether "geographical features" could be labeled as a "stream, ocean, river, or lake." Thus, no matter how RR4 loses its "bank, bed, and ordinary high-water mark" in the hayfield, the fact is those features no longer exist—and have not existed since well before Foster bought Neal Run. *See id.* at 21 ("The hayfield is used to grow and harvest hay, and has been used for that purpose for decades."). Nor is Foster a scientist who could determine that "the speed and force of [RR4]'s flow" reduces its "energy" thus reducing its ability to "carve a channel in the center of the hayfield." *Id.* at 22.

At bottom, no reasonable person, in ordinary parlance, would describe the hayfield at issue here—which has no defined bed, bank, or ordinary

high-water mark through its middle—as a "bod[y] of water 'forming geographic[al] features' that [is] described in ordinary parlance as [a] 'stream[], ocean[], river[], [or] lake[].'" *Sackett*, 598 U.S. at 671. In ordinary parlance the hayfield is a field. Thus, even if RR4 is "relatively permanent," it is not among the "waters of the United States." The District Court can be reversed on this ground as well.

C. RR4 is not a "body of water" connected to a traditional navigable water.

1. When a "body of water" is not in its own right a traditional navigable water, it must have a continuous hydrological connection to such a water to be regulable. This flows from *Sackett*, which requires "the party asserting jurisdiction over adjacent wetlands to establish [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*")[.] 598 U.S. at 678 (emphasis added; cleaned up). This prong of the *Sackett* test also flows from *SWANCC*, which held that isolated, nonnavigable, intrastate bodies of water are not "waters of the United States." *See* 531 U.S. at 168.

2. Here, there is no "body of water" that connects to a "traditional navigable water." At best, a new hydrological feature forms at the point

where the hayfield meets Blackwell Creek. While the District Court found that water from the hayfield reaches Blackwell Creek, ECF No. 263 at 24–26, that feature is severed from RR4 by a "discontinuity." *Id.* at 23. Thus, because RR4 is the only "water" EPA alleged that Foster filled, the District Court's judgment must also be reversed on these grounds. In this respect, not only does the court's judgment not align with *Sackett* it conflicts with *SWANCC*. Because RR4 has no connection to any of the "waters of the United States"—even if it is a "relatively permanent body of water"—it is an "isolated, nonnavigable, intrastate" body of water. 531 U.S. at 168. This independently requires reversal of the District Court's judgment.

D. The District Court failed to apply required background canons of statutory construction when construing EPA's authority over Foster's property.

The District Court's judgment should be reversed because its legal conclusions conform to neither the CWA's text nor the Supreme Court's decision in *Sackett*. But if there were any ambiguity over the District Court's legal conclusions, this Court should engage in the "judicial task" required by *Sackett* and construe the CWA under "background principles

of construction" requiring "clear authorization" when EPA is arguing, as here, for a broad interpretation of the statute. 598 U.S. at 679.

1. *Sackett* reaffirmed that courts expect Congress to enact "exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property." *Sackett,* 598 U.S. at 679. The "[r]egulation of land and water use lies at the core of traditional state authority." *Id. See also Capt. Gaston, LLC*, 76 F.4th at 298 (quoting *SWANCC*, 531 U.S. at 172–73) ("Congress must be explicitly clear if it wishes to 'alter[] the federal-state framework by permitting federal encroachment upon a traditional state power.'"). An "overly broad interpretation of the CWA's reach would impinge on this authority." *Sackett*, 598 U.S. at 680.

That matters to individuals like Foster because, under our Constitution's structure, the "creation of two governments" and the allocation of power between them "enhances freedom." *Bond v. United States*, 564 U.S. 211, 221 (2011). Indeed, this vertical division of power "secures to citizens the liberties that derive from the diffusion of sovereign power." *Id.* (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)).

The District Court's judgment raises serious federalism and property rights concerns. Yet the court's decision does not address, much less apply, *Sackett*'s clear statement rules. The court did not do so in its original conclusions of law, despite the *Rapanos* plurality invoking *SWANCC*. *See* 547 U.S. at 737–38. Nor did it confront these clear statement principles when, post-*Sackett*, it affirmed its holding that RR4 is among the "waters of the United States." *See* ECF No. 314.

This Court should do so now because, if upheld, the District Court's decision will continue the same pathology that the Supreme Court sought to end in *Sackett*. Indeed, as evidenced by Foster's case, the District Court's acceptance of EPA's broad interpretation of the CWA has resulted in the regulation of an intermittent water channel that ends in a hayfield and is more than three miles from the nearest traditional navigable water. That judgment has prevented Foster from engaging in ordinary land-use activities—activities that are firmly within the states' traditional domain—for well over a decade. *See Sackett*, 598 U.S. at 679. Yet EPA never pointed to, and the District Court's judgment did not provide, any clear statement in the CWA to justify regulating Foster's property. This conflicts with both *Sackett* and this Court's recent

affirmation that "[it] must read the Clean Water Act . . . against a backdrop where Congress has time-and-time again confirmed that primary authority resides with the states." *Capt. Gaston, LLC*, 76 F.4th at 299.

2. Besides the federalism and property rights problems with the District Court's judgment, it raises serious fair notice concerns. "Due process requires Congress to define penal statutes with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Sackett*, 598 U.S. at 680 (cleaned up). And "[w]here a penal statute could sweep so broadly as to render criminal a host of what might otherwise be considered ordinary activities, [the Court has] been wary about going beyond what Congress certainly intended the statute to cover." *Id.* at 681 (cleaned up).

Under the District Court's judgment, it does not matter that an army of experts would be required to determine that an "intermittent stream"—flowing less than half the year—allegedly constitutes a regulable CWA water, even though it loses all its stream features in the middle of a hayfield. That judgment contains no limiting principle for

what conduct could be illegal. And it certainly does not allow an ordinary landowner to discern—without having to hire an expert—whether he or she is subject to the Act's harsh civil and criminal sanctions.

Simply put, after *Sackett*, EPA must point to a clear statement from Congress when it seeks to regulate private property as "waters of the United States." And these clear statement rules enunciated in *Sackett* mean that even if there were an ambiguity over whether RR4 is regulable, that ambiguity should have been resolved in favor of Foster. The District Court's contrary conclusion is error.

CONCLUSION

For these reasons, the District Court's judgment should be reversed.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument would aid this Court because this case presents an important, complex, and unresolved federal statutory issue after the Supreme Court's decision in *Sackett v. EPA*.

DATED: February 5, 2025.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 19-2208 **Caption:** Ron Foster v. EPA

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(s) Frank D. Garrison

Party Name Appellants Ron Foster, et al. Date: 2/5/2025

ADDENDUM

Table of Contents

33 U.S.C. § 1251(a)–(b)

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

33 U.S.C. § 1311(a)

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1319(a)–(d)

(a) State enforcement; compliance orders

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond

the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person—

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1322(p), 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In any case in which an order under this

subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5)(A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 1311(b)(1)(A) or (C) of this title, (B) that such person cannot meet the requirements for a time extension under section 1311(i)(2) of this title, and (C) that the most expeditious and appropriate means of compliance with this chapter by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator

may issue an order requiring such person to comply with this chapter at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(c) Criminal penalties

(1) Negligent violations

Any person who—

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1322(p), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations

Any person who—

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1322(p), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(3) Knowing endangerment

(A) General rule

Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1321(b)(3), 1322(p), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than $1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

(B) Additional provisions

For the purpose of subparagraph (A) of this paragraph—

(i) in determining whether a defendant who is an individual knew that his conduct placed another person in imminent danger of death or serious bodily injury—

(I) the person is responsible only for actual awareness or actual belief that he possessed; and

(II) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

except that in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information;

(ii) it is an affirmative defense to prosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of—

(I) an occupation, a business, or a profession; or

(II) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent;

and such defense may be established under this subparagraph by a preponderance of the evidence;

(iii) the term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons; and

(iv) the term "serious bodily injury" means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(4) False statements

Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than 2 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $20,000 per day of violation, or by imprisonment of not more than 4 years, or by both.

(5) Treatment of single operational upset

For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(6) Responsible corporate officer as "person"

For the purpose of this subsection, the term "person" means, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

(7) Hazardous substance defined

For the purpose of this subsection, the term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of this title, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of Title 42, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of this title, and (E) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15.

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1322(p), 1328,,1 or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any)

resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

33 U.S.C. § 1342(a)

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall

continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

33 U.S.C. § 1344(a)

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

33 U.S.C. § 1362

Except as otherwise specifically provided, when used in this chapter:

(1) The term "State water pollution control agency" means the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.

(2) The term "interstate agency" means an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

(3) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(4) The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 1288 of this title.

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in

association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

(8) The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

(9) The term "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone.

(10) The term "ocean" means any portion of the high seas beyond the contiguous zone.

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

(13) The term "toxic pollutant" means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available

to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

(15) The term "biological monitoring" shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

(17) The term "schedule of compliance" means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

(18) The term "industrial user" means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category of "Division D—Manufacturing" and such other classes of significant waste producers as, by regulation, the Administrator deems appropriate.

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

(20) The term "medical waste" means isolation wastes; infectious agents; human blood and blood products; pathological wastes; sharps; body parts; contaminated bedding; surgical wastes and potentially contaminated laboratory wastes; dialysis wastes; and such additional medical items as the Administrator shall prescribe by regulation.

(21) Coastal recreation waters

(A) In general

The term "coastal recreation waters" means—

(i) the Great Lakes; and

(ii) marine coastal waters (including coastal estuaries) that are designated under section 1313(c) of this title by a State for use for swimming, bathing, surfing, or similar water contact activities.

(B) Exclusions

The term "coastal recreation waters" does not include—

(i) inland waters; or

(ii) waters upstream of the mouth of a river or stream having an unimpaired natural connection with the open sea.

(22) Floatable material

(A) In general

The term "floatable material" means any foreign matter that may float or remain suspended in the water column.

(B) Inclusions

The term "floatable material" includes—

(ii) plastic;

(iii) aluminum cans;

(iv) wood products;

(iv) bottles; and

(v) paper products.

(23) Pathogen indicator

The term "pathogen indicator" means a substance that indicates the potential for human infectious disease.

(24) Oil and gas exploration and production

The term "oil and gas exploration, production, processing, or treatment operations or transmission facilities" means all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities.

(25) Recreational vessel

(A) In general

The term "recreational vessel" means any vessel that is—

(v) manufactured or used primarily for pleasure; or

(ii) leased, rented, or chartered to a person for the pleasure of that person.

(B) Exclusion

The term "recreational vessel" does not include a vessel that is subject to Coast Guard inspection and that—

(i) is engaged in commercial use; or

(ii) carries paying passengers.

(26) Treatment works

The term "treatment works" has the meaning given the term in section 1292 of this title.

(27) Green infrastructure

The term "green infrastructure" means the range of measures that use plant or soil systems, permeable pavement or other permeable surfaces or substrates, stormwater harvest and reuse, or landscaping to store, infiltrate, or evapotranspirate stormwater and reduce flows to sewer systems or to surface waters.

33 C.F.R. § 323.2

For the purpose of this part, the following terms are defined:

(a) The term waters of the United States and all other terms relating to the geographic scope of jurisdiction are defined at 33 CFR part 328.

(b) The term lake means a standing body of open water that occurs in a natural depression fed by one or more streams from which a stream may flow, that occurs due to the widening or natural blockage or cutoff of a river or stream, or that occurs in an isolated natural depression that is not a part of a surface river or stream. The term also includes a standing body of open water created by artificially blocking or restricting the flow of a river, stream, or tidal area. As used in this regulation, the term does not include artificial lakes or ponds created by excavating and/or diking

dry land to collect and retain water for such purposes as stock watering, irrigation, settling basins, cooling, or rice growing.

(c) The term dredged material means material that is excavated or dredged from waters of the United States.

(d)(1) Except as provided below in paragraph (d)(2), the term discharge of dredged material means any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States. The term includes, but is not limited to, the following:

(i) The addition of dredged material to a specified discharge site located in waters of the United States;

(ii) The runoff or overflow from a contained land or water disposal area; and

(iii) Any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

(2) The term discharge of dredged material does not include the following:

(i) Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill). These discharges are subject to section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps or applicable State section 404 program.

(ii) Activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material.

(iii) Incidental fallback.

(3) Section 404 authorization is not required for the following:

(i) Any incidental addition, including redeposit, of dredged material associated with any activity that does not have or would not have the effect of destroying or degrading an area of waters of the United States as defined in paragraphs (d)(4) and (d)(5) of this section; however, this exception does not apply to any person preparing to undertake mechanized landclearing, ditching, channelization and other excavation activity in a water of the United States, which would result in a redeposit of dredged material, unless the person demonstrates to the satisfaction of the Corps, or EPA as appropriate, prior to commencing the activity involving the discharge, that the activity would not have the effect of destroying or degrading any area of waters of the United States, as defined in paragraphs (d)(4) and (d)(5) of this section. The person proposing to undertake mechanized landclearing, ditching, channelization or other excavation activity bears the burden of demonstrating that such activity would not destroy or degrade any area of waters of the United States.

(ii) Incidental movement of dredged material occurring during normal dredging operations, defined as dredging for navigation in navigable waters of the United States, as that term is defined in part 329 of this chapter, with proper authorization from the Congress and/or the Corps pursuant to part 322 of this Chapter; however, this exception is not applicable to dredging activities in wetlands, as that term is defined at section 328.3 of this Chapter.

(iii) Certain discharges, such as those associated with normal farming, silviculture, and ranching activities, are not prohibited by or otherwise subject to regulation under section 404. See 33 CFR 323.4 for discharges that do not required permits.

(4) For purposes of this section, an activity associated with a discharge of dredged material destroys an area of waters of the United States if it alters the area in such a way that it would no longer be a water of the United States.

Note: Unauthorized discharges into waters of the United States do not eliminate Clean Water Act jurisdiction, even where such unauthorized discharges have the effect of destroying waters of the United States.

(5) For purposes of this section, an activity associated with a discharge of dredged material degrades an area of waters of the United States if it has more than a de minimis (i.e., inconsequential) effect on the area by causing an identifiable individual or cumulative adverse effect on any aquatic function.

(6) [Redesignated as subsection (d)(5) by 73 FR 79645]

(e)(1) Except as specified in paragraph (e)(3) of this section, the term fill material means material placed in waters of the United States where the material has the effect of:

(i) Replacing any portion of a water of the United States with dry land; or

(ii) Changing the bottom elevation of any portion of a water of the United States.

(2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.

(3) The term fill material does not include trash or garbage.

(f) The term discharge of fill material means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices

such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; placement of overburden, slurry, or tailings or similar mining-related materials; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (See § 323.4 for the definition of these terms). See § 323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

(g) The term individual permit means a Department of the Army authorization that is issued following a case-by-case evaluation of a specific project involving the proposed discharge(s) in accordance with the procedures of this part and 33 CFR part 325 and a determination that the proposed discharge is in the public interest pursuant to 33 CFR part 320.

(h) The term general permit means a Department of the Army authorization that is issued on a nationwide or regional basis for a category or categories of activities when:

(1) Those activities are substantially similar in nature and cause only minimal individual and cumulative environmental impacts; or

(2) The general permit would result in avoiding unnecessary duplication of regulatory control exercised by another Federal, State, or local agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal. (See 33 CFR 325.2(e) and 33 CFR part 330.)