IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA, Plaintiff, v. CHAMELEON LLC and GARY V. LAYNE, Defendants.	)	Civil Action No. 3:23cv763

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO STAY

PRELIMINARY STATEMENT

Like the landowners in *Sackett* and *Rapanos*, Mr. Layne has chosen to take a rare stand against the federal Government related to claims that he violated the wetlands provisions of the Clean Water Act ("CWA") regarding the use of his property. Mr. Layne's defense of this case as a whole, his first and successful Motion to Dismiss, and now the pending Motion to Dismiss the Amended Complaint all seek the answer to one basic question: has the Federal Government plausibly demonstrated that it has jurisdiction over his property under the CWA?

But the instant motion—Mr. Layne's Motion to Stay—is ancillary to the ultimate issue raised in the Motion to Dismiss the Amended Complaint. Here, Mr. Layne, an ordinary citizen taking a principled stand in challenging the Federal Government's jurisdiction, simply requests that this Court stay this matter until it disposes of the pending Motion to Dismiss the Amended Complaint on the merits. Without such relief, he will be subject to aggressive litigation tactics that will further drain his already limited resources.

The Government's Opposition demonstrates that a stay is appropriate for several reasons.

First, the Government's attempt to minimize the prejudice to Mr. Layne is both alarming and predictable. It is alarming because Mr. Layne (an ordinary citizen of limited resources) has already expended enormous amounts of his time, effort, and money, incurring well into seven figures worth of legal fees and expert witness expenses, to take a principled stand against the Government (with virtually unlimited resources). The vast majority of Mr. Layne's expenditures occurred during the pendency of the ***first*** Motion to Dismiss—which this Court ***granted***. If a stay is not granted, he is sure to expend dramatically more time, effort, and money so that the Government can continue to pursue its case in the absence of established jurisdiction. It is predictable because the Government has taken the opportunity to put Mr. Layne on trial by rack, utilizing every litigation ratchet available attempting to stretch Mr. Layne to the point of submission.

Second, the Government's argument regarding judicial economy is meritless. Mr. Layne obviously has a "clear and immediate" possibility of dismissal here. Briefing on Mr. Layne's Motion to Dismiss has been completed for nearly two weeks. The Government has completely failed to plead ***any*** facts that the critical 1.38 mile stretch of Lickinghole Creek and one of its branches (the "1.38 Mile Stretch") leading to the Site are "waters of the United States" ("WOTUS"). Indeed, in attempting to escape this argument in its Opposition Brief on the Motion to Dismiss the Amended Complaint, the Government could not point to any facts at all showing jurisdiction over this 1.38 Mile Stretch. Instead, it resorted to concocting a non-existent exception to *Rapanos* and *Sackett,* apparently trying to revive Justice Kennedy's soundly-rejected "significant nexus test" by claiming that the Government need not show every link in the chain of waters leading to the Site is jurisdictional. Moreover, they seek to thrust upon Mr. Layne an undefined and unsupported "seasonal" test for jurisdiction that simply leaves the Court and Mr.

Layne to guess as to when jurisdiction is or is not present. Not only that, but the Government ignores the history of this litigation—if allowed to proceed to discovery before any ruling on the Motion to Dismiss the Amended Complaint, the Parties will no doubt have to engage in costly meet-and-confer regarding the Government's discovery requests resulting in discovery disputes being brought before the Court for resolution. This is exactly what happened during the pendency of the original Motion to Dismiss and is the antithesis of judicial economy.

Third, the Government claims that the public interest disfavors a stay because a brief stay would "delay the remedy sought in this case." Having initiated its investigation five years ago, filed the original Complaint fifteen months ago (and months after the issuance of *Sackett*), this litigation remains at its inception because the Government could not meet its basic pleading requirements. Mr. Layne should not be forced to engage in further, extremely costly and time-consuming factual and expert witness discovery because of the Government's own shortcomings. Moreover, if the Government truly cared about a "remedy" (*i.e.*, resolution of any wetland impacts),[1] it should get out of the way and allow Mr. Layne work with the governmental entity that does have jurisdiction over the Site—the Commonwealth of Virginia. Mr. Layne has ***repeatedly*** stated that he would work with the Commonwealth to do so, but the Commonwealth will not move forward unless the Federal Government allows it to do so.

The Government offers a false "compromise" position that, in exchange for a limited stay, it be allowed an intensive and exhaustive, five-day Site visit (its ***third***) and that Mr. Layne be

[1] The Government claims, without citation, that Mr. Layne admits that he "filled the wetlands without authorization from either state or federal permitting authorities." (*See* Opp'n 1.) Mr. Layne did not make such an admission. While not pertinent to disposing of his Motion to Stay, Mr. Layne previously explained to the Government that he was given inconsistent feedback from the Corps and from other individuals at the National Resources Conservation Service at the USDA about the need for prior authorization and whether his actions may have been exempted.

required to answer extensive written discovery and produce documents. This is hardly a compromise—it is a demand that it be allowed to proceed with extensive fact and expert discovery. This of course begs the question—if this is the Government's idea of "limited" discovery, what sort of unbounded, burdensome discovery does the Government have in mind during the pendency of the second Motion to Dismiss? This request is also procedurally improper. The request simply underscores the Government's continued disregard for an ordinary citizen's limited resources and its failure and inability to plausibly demonstrate CWA jurisdiction in this litigation.

The Court should grant Mr. Layne's Motion to Stay.

ARGUMENT

I. The Motion To Stay Is Procedurally Proper.

The Government's primary argument against staying this matter pending Mr. Layne's Motion to Dismiss the Amended Complaint is a procedural one: that Mr. Layne did not comply with Local Rule 37. The Government's argument is misplaced for multiple reasons.

First, Mr. Layne's stay request is not to stay only discovery. Mr. Layne's Motion requests that the Court "stay this ***matter*** until disposition of Defendants' Motion to Dismiss the Amended Complaint." (Mem. 3 (emphasis added).) No doubt, discovery is but a piece of this ***matter***, but so too is a Rule 16 conference with the Court, which would require Mr. Layne to file an answer to the Amended Complaint, (*see* Doc. 15-1 ¶ I.B.1 (requiring that answer be filed once scheduling conference set)), and also set in motion the process for setting deadlines for experts, dispositive motions, and trial, (*see id.* at 3 & n.3 (noting that "there is no schedule in this matter")).

Indeed, during the pendency of the original Motion to Dismiss, the Parties engaged in more than just discovery-related tasks. The Parties participated in a lengthy Rule 16 scheduling conference with the Court. (*See* Doc. 23 (minute entry).) The Parties negotiated a proposed

scheduling order. (*See* Docs. 37, 39.) Mr. Layne filed an Answer. (*See* Doc. 16.) The Government moved to strike it. (*See* Docs. 31, 32.) Mr. Layne filed an Amended Answer to avoid unnecessary briefing on the Government's motion to strike. (*See* Doc. 38.) This is all more than just "discovery" and in addition to the numerous discovery disputes that the Parties had. (*See* Docs. 46, 50, 51.) Mr. Layne's request to stay this "matter" is an attempt to conserve judicial resources, avoid unnecessary expenditure of legal and expert witness fees and incurring duplicative costs unless and until the Court finds that the Government has plausibly alleged jurisdiction.

Second, the Government selectively quotes from Local Rule 37, ignoring its express purpose. Local Rule 37's title is "MOTIONS TO COMPEL AND SANCTIONS." The very first paragraph references objections to "a discovery request" and the obligation of the serving party "to place the matter before the Court by a proper motion pursuant to Fed. R. Civ. P. 37, ***to compel, answer, production, designation or inspection***." E.D. Va. L.R. 37(A) (emphasis added). In other words, the serving party must file a "discovery motion." But before filing a motion such a motion ("to compel, answer, production, designation or inspection"), *id.*, counsel must confer "to decrease in every way possible the filing of [an] unnecessary discovery motion[]," E.D. Va. L.R. 37(E). Although the Court's Pre-Trial Schedule A alters the process for bringing any discovery dispute before the Court by requiring a joint statement, nothing suggests that the joint statement requirement is meant to expand Local Rule 37 to cover more than specific disputes related to a discovery request. (*See* Doc. 15-1 ⁋⁋ III(2)-(3).)

Plainly, Mr. Layne's Motion to Stay does not simply concern "a discovery request" served by the Government. It is not a motion "pursuant to Fed. R. Civ. P. 37, to compel, answer, production, designation or inspection." Instead, it is one based on this Court's inherent power to manage its docket and proceedings before it. (*See* Mem. 5-6.) Nowhere does Mr. Layne request

any relief pursuant to a specific Federal Rule of Civil Procedure, much less Federal Rule 37 or Local Rule 37.

The Government's cited cases are telling. The Government cannot muster a single case where compliance with Local Rule 37 included a motion to stay litigation generally. Instead, the cited cases stand for the proposition that this Court does not tolerate procedural non-compliance with Local Rule 37 related to specific discovery disputes such as: permitting late designation of an expert witness, failing to appear for a deposition, and failing to respond to discovery. (*See* Opp'n 9-10 (discussing cases).)

The Government's argument that Mr. Layne's position is "inconsistent" with his own past practice, (Opp'n 9), also misses the mark. Indeed, the opposite is true. Previously, Mr. Layne, as a courtesy, informed the Government that he intended to seek a more limited discovery stay, told the Government that he did not view this request as requiring a joint statement under the Court's Pre-Trial Order as it related to a ***general*** case management issue, and invited the Government to raise any procedural non-compliance in opposition. Indeed, in moving for the discovery stay during the pendency of the original Motion to Dismiss, Mr. Layne was forthright with the Court on this very point:

> Defendants are cognizant of this Court's process for resolving specific discovery disputes through a joint filing. (*See* Doc. 15-1 ¶ 3(2).) Defendants understand that process to apply to specific discovery requests, such as a request for certain documents or response to an interrogatory. While Defendants seek relief related to discovery, Defendants view this as a general case management issue that can be raised by motion. Should the Court disagree and believe that this issue be resolved through the Court's joint filing process, Defendants will work with the Government to prepare a joint filing for resolution.

(Doc. 42 at 2 n.2.) In response, the Government said nothing. (*See generally* Doc. 45.)

Faced with this undeniable fact months later, the Government now clams that it simply did not respond so that it could "streamline" arguments against the previous stay motion. (*See* Exhibit

1, Email from A. Lineberry.) This *ex post facto* explanation simply ignores that the Government had ten additional pages with which it could have contested Mr. Layne's previous position on this exact point. (*Compare* E.D. Va. L.R. 7(F)(3) (allowing thirty pages for opposition briefs), *with* Doc. 45 (opposition length of twenty pages).) The Government wisely chose not to do so because its position on this subject is simply incorrect. Mr. Layne properly assumed that once the Government faced his written position on this subject and didn't respond whatsoever, it had correctly accepted his position with its silence.

The Motion to Stay should not be denied based on procedural impropriety.[2]

II. The Harm To Mr. Layne Is Significant.

The Government flippantly remarks that Mr. Layne incurring costs is of little concern when considering his request to stay this matter. (*See* Opp'n 15-16.) This is simply wrong.

Any assessment of a potential stay is performed on a case-by-case basis. *See Taylor v. Sethmar Transportation, Inc.*, 2020 WL 1181531, at *3 (S.D. W. Va. Mar. 11, 2020) (stating that courts assess stay requests "on a case-by-case basis because 'such an inquiry is necessarily fact-specific and depends on the particular circumstance and posture of each case'").

Here, the Government investigated Mr. Layne for five years, filed its Complaint months after *Sackett* despite its holdings which should have precluded the filing of this case, and failed to meet its CWA jurisdictional pleading requirements. Mr. Layne then incurred enormous defense costs in defending this case: engaging in numerous Rule 26(f) planning conferences to discuss

[2] In denying the previous request as moot, the Court did not comment on this procedural aspect. As mentioned in the Government's Opposition, the Parties met-and-conferred after Mr. Layne filed the instant motion and could not reach any compromise. Accordingly, any further meet-and-confer would simply result in the re-filing of the Motion to Stay. If the Government's position that this issue should be raised by a joint statement (which it is not), it would result in a joint statement raising these very issues and unnecessarily place form over substance.

proposed discovery plans, drafting a separate proposed discovery plan because the Government could not agree to a reasonable plan, (*see* Doc. 18), filing an answer, (*see* Doc. 16), filing an amended answer to avoid unnecessary briefing on a motion to strike, (*see* Doc. 38), negotiating an agreed schedule, (*see* Docs. 37, 39), engaging in numerous meet-and-confers with the Government regarding discovery, and drafting and filing numerous joint statements related to discovery disputes, (*see* Docs. 46, 50, 51). Mr. Layne also originally objected to the Government obtaining a second Site visit in May 2024, which resulted in numerous, lengthy meet-and-confers with the Government. (*See* Mem. 4.) Ultimately, Mr. Layne relented on the Site inspection issue, which then required numerous additional meet-and-confers with the Government to discuss process and protocol for the inspection. On top of that, Mr. Layne had to engage consultants to prepare for and attend the second Site inspection. And this was all for naught because the Court ultimately dismissed the Government's Complaint, a failing laying solely with the Government, and none with Mr. Layne. *See N. Am. Communications v. InfoPrint Solutions Co.*, 2011 WL 457127, at *3 (W.D. Pa. July 13, 2011) (granting motion to stay after commencement of discovery regarding original complaint but after filing of amended complaint because any delay in matter was "not due to any fault of Defendants").

Additionally, Mr. Layne is qualitatively different than the defendants in the sole case cited by the Government in support of its claim that running up the defense costs on Mr. Layne is but a passing consideration. In *City of Annapolis v. BP, P.L.C.*, defendants were "more than twenty 'major corporate members of the fossil fuel industry'" 2022 WL 4548226, at *1 (D. Md. Sept. 29, 2022). Contrast this with the defendants here—an individual, small business owner and his limited liability company of which he is the sole member. Without the requested relief, Mr. Layne's entire, limited resources to litigate are far more at risk than those of a "major" corporation.

Far from being minimal, the harm that Mr. Layne will endure absent a stay is significant.

III. The Government's Arguments Regarding Judicial Economy Are Meritless.

The Government asserts that a stay is contrary to judicial economy because there is not a "clear and immediate possibility" that dismissal will be granted. (*See* Opp'n 10-12. It claims that Mr. Layne's motion to dismiss will ultimately be denied because it raises "factual" disputes. (Opp'n 11.) But the Government assumes that there are ***facts*** supporting a valid legal theory in its Amended Complaint sufficient to state a claim.

There are plainly no ***facts*** related to at least 1.38 miles of Lickinghole Creek. (*See* Doc. 72 at 4-10.) The Amended Complaint completely ignores this 1.38 Mile Stretch. And the USGS maps incorporated by reference into the Amended Complaint establish that this 1.38 Mile Stretch has for, at least 60 years, been classified as an intermittent stream. (*See, e.g.*, Doc. 64 at 16-17.) Additionally, in opposing Mr. Layne's Motion to Dismiss the Amended Complaint, the Government could not even bring itself to acknowledge that this Court repeatedly stated that the "fossilized rule" is that intermittent streams are not WOTUS. (*See* Hr'g Tr. 11:18-19; *see also id.* 35:1, 39:7.) Instead, the Government's legal theory is to simply rewrite *Rapanos* and *Sackett* to meet its desired outcome by creating an exception that would swallow the rule by claiming that it need not show every link in the chain of water between traditionally-navigable waters and the Site is jurisdictional (*i.e.*, WOTUS). (*See, e.g.*, Doc. 64 at 24; Doc. 72 at 10-13.) The Government's exception would allow for an "indirect" connection to WOTUS to establish jurisdiction, but doing so would simply revive Justice Kennedy's now dead "significant nexus" test. (*See* Doc. 72 at 11-12.) If that was not enough, the Government also contends that it need only show "seasonal" flow, yet it does not even articulate a rule that defines what it means by seasonal, much less any facts to support its illusory test. (*See* Doc. 72 at 15-18.)

As much as the Government would like to wish away Mr. Layne's arguments, it cannot do so by asserting that there exists a "factual dispute." Based on the only facts properly before the Court related to the 1.38 Mile Stretch (sixty years of USGS maps showing this stretch is comprised only of intermittent streams) , zero facts alleged to the contrary and this Court's clear enunciation of the applicable law (intermittent streams are not WOTUS), there is no doubting the existence of a "present and clear" possibility of dismissal yet again. .

Moreover, the Government's position that judicial economy will benefit from moving forward is clearly wrong for many reasons, starting with the previous proceedings in this case. The Government's pursuit of extensive discovery during the pendency of the original Motion to Dismiss resulted in numerous discovery disputes. (*See* Docs. 46, 50, 51.) Those are in addition to ones that the Parties avoided—namely, Mr. Layne's conceding to a second Site inspection in May 2024. (*See* Mem. 2.) In proposing its "alternative" discovery position, the Government has only previewed what is to come should this matter not be stayed—extensive and onerous fact and expert witness discovery. The result is likely to mirror what occurred during the pendency of the original Motion to Dismiss—lengthy and expensive meet-and-confers regarding the Government's overbearing requests. All of these issues would need to be disposed of by the Court, which would be to the detriment of judicial economy. Not only that, but it creates an opportunity for further abusive discovery tactics seeking to bully Mr. Layne into submission. (*See, e.g.*, Opp'n 8 (explaining that courts consider "the danger of discovery abuse" in weighing stay request (quoting *Avalonbay Cmtys, Inc. v. San Jose Water Conservation Corp.*, 2007 WL 2481291, at *1 (E.D. Va. Aug. 27, 2007)).)

For all these reasons, judicial economy favors a brief stay.

IV. A Brief Stay Is Not Contrary To The Public Interest.

Here, the Government claims that a stay is contrary to the public interest. (*See* Opp'n 14-15.) But the only basis for this claim is that a brief stay "will delay the remedy sought in this case" and alleged "environmental harm[]" will continue. (Opp'n 15.) But the Government will suffer no prejudice from "delay" and any alleged harm is a result of the Government's own inaction.

A. The Government Will Not Suffer Prejudice.

The Government's only claim of prejudice from any "delay" is its alleged inability to engage in written discovery and conduct an extensive site visit from the Site during the "growing season." (Opp'n 12-14.) The former request is unfounded and the latter is incorrect and unwarranted.

First, The Government defines "growing season" as extending until November 2, 2025. (*See id.* at 5.) The Motion to Dismiss is ripe for decision. In other words, the Government lacks confidence that this Court cannot dispose of the Motion to Dismiss within the next seven months such that it cannot access the Site ***if*** the Motion to Dismiss is denied. Contrary to the Government's faith in this Court, Mr. Layne has full confidence that the Court will dispose of the Motion to Dismiss in a timely manner.

Moreover, the Government claims that it has been "forthcoming and consistent" in its requests to get on Site. (Opp'n 1.) But the Government has not been—the only consistency has been that it again requests an April date for a ***third*** Site inspection. (*See* Opp'n Ex. C.) And the Government has not explained why it cannot perform the Site inspection at any other point during the eight-month-long "growing season." Instead, the Government appears to want to return (again) to the Site during the "wet portion of the growing season." (Opp'n 18.) The Government's desires

bind neither this Court nor Mr. Layne, especially given the long period of time that the Government has identified for being able to perform a third Site inspection.

Second, the Government's claim of prejudice rings hollow because it has already had repeated and extensive access to the Site. The Government ***has already had access to the Site twice, for a total of nine days***. In 2021, this Court granted the Government a full eight days of unfettered access the Site to assess for jurisdiction. *See U.S. Environmental Protection Agency v. Chameleon LLC, et al.*, No. 3:21-mc-2 (E.D. Va. Mar. 15, 2021) (Docs. 1-3). Yet the Government only took three of the eight allotted days to conduct its Site investigation. (*See* Doc. 60 at 10.)

Then, earlier in this case during the pendency of the previous motion to dismiss, the Government accessed the Site again in May 2024. (*See* Doc. 60 at 13.) This was the result of ***extensive and expensive*** meet-and-confers on the issue, including significant involvement of environmental experts working for Mr. Layne. (*See* Mem. 4.) Now, the Government claims that it needs access to the Site ***again*** in the wet season, which will undoubtedly require ***additional extensive and expensive*** meet-and-confer if this matter moves forward. There is also the possibility that this meet-and-confer process results in disputes requiring Court resolution. If allowed, it will ***again*** require Mr. Layne to expend time, effort, and money for consultants and attorneys to accompany the Government for any visit, if even allowed.

Moreover, despite acknowledging that the Government has until the Fall to perform any additional Site inspection, the Government claims it (yet again) needs access "in early spring." (Opp'n 5.) This cherry-picking the wettest time of year only reinforces that the Government wants to visit the Site when there is water in the relevant tributaries as a result of rain. Yet no Site inspection can make up for the fact that the Government's failure to plead any facts supporting jurisdiction over the 1.38 Mile Stretch leading up to the Site forms the basis the Motion to Dismiss

the Amended Complaint. (*See* Mem. 4.) What the Government targets in a Site inspection cannot remedy any jurisdictional shortcomings and completely ignores what is dispositive of this case.

Third, the Government claims that it needs access to the Site to collect significant data to delineate wetlands. (*See* Opp'n 5.) But this again presupposes CWA jurisdiction. The Government should not be allowed to put the cart before the horse. Only if this Court determines that the Government has adequately alleged CWA jurisdiction (which the Government to this day has not done and cannot do), that is the time to discuss access to the Site.

Fourth, the Government's desire to engage in written discovery is also misplaced. Just because the Government's "alternative" discovery requests may not be numerous, it does not mean that they are not expansive and overly burdensome. As discussed more fully below, the proposed interrogatories and requests for production that the Government seeks to serve are far from "limited." The interrogatories seek detailed written responses detailing nearly everything that Mr. Layne has done on the Site over the last six years. (*See* Opp'n Ex. C.) The requests for production seek nearly every document related to the Site. (*See id.*) Far from limited, they are comprehensive and exhaustive. Moreover, if these requests are the "limited" ones, the "unlimited" requests (apparently forthcoming if the stay is denied) are by definition even more overbearing.

By tipping its hand on the scope of discovery it intends to serve if the motion to stay is denied, the Government also raises the possibility that unfettered discovery could lead to the possibility of discovery abuses. *See, e.g.* (Opp'n 8 (explaining that courts consider "the danger of discovery abuse" in weighing stay request (quoting *Avalonbay Cmtys, Inc.*, 2007 WL 2481291, at *1).) This is not a far-fetched concern either. The Parties engaged in significant back-and-forth on numerous discovery issues during the pendency of the original Motion to Dismiss, resulting in several filings with the Court. (*See, e.g.*, Docs. 46, 50, 51.) These were in addition to lengthy,

expensive meet-and-confers regarding the Site inspection, to which Mr. Layne ultimately relented. The Government's relentless pressing of all of these issues was abusive then and will be abusive in the future if allowed to move forward during the pendency of the Motion to Dismiss the Amended Complaint.

B. Any Alleged Environmental Harm Is A Result Of The Government's Inaction.

Any ongoing environmental harm is simply invoked to pressure Mr. Layne, but it is the result of the Government's own inaction.

The Government has been investigating Mr. Layne for five years, and any "delay" is of the Government's own making. It has been approximately fifteen months since the Government filed its Complaint, yet it still has not validly stated a claim. It had to file an Amended Complaint after this Court dismissed it. That is not Mr. Layne's fault. *See, e.g.*, *Bandalos v. Stony Brook Univ. Med. Ctr.*, 2024 WL 4276175, at *6 (E.D.N.Y. Sept. 24, 2024) (granting stay and finding no prejudice to plaintiff "especially since a motion to dismiss was previously granted for this case"); *N. Am. Communications, Inc.*, 2011 WL 4571727, at *4 (granting motion to stay after commencement of discovery regarding original complaint but after filing of amended complaint because any delay in matter was "not due to any fault of Defendants").

The Government is the only party standing in the way of any "remedy" regarding any alleged ongoing environmental harm. As Mr. Layne has repeatedly stated, if the Government would stand aside, he would get moving with the Commonwealth of Virginia on any "remedy" related to the wetlands on Site. (*See* Doc. 64 at 3.) But the Government refuses to do so, instead choosing to take the path of maximum pressure on Mr. Layne.

Despite boasting that it could "easily" amend the original, defective Complaint, (Doc. 19 at 28), the Government chose not to do so voluntarily, which it could have done under the Federal

Rules, *see* Fed. R. Civ. P. 15(a)(1)(B). Instead, it required the Court to dispose of the original Motion to Dismiss, which confirmed what Mr. Layne previously argued—that the Government had failed to state a claim. In filing the Amended Complaint, the Government did not even do the absolute minimum to add sufficient facts, completely ignoring the 1.38 Mile Stretch leading to the Site. (*See, e.g.*, Doc. 72 at 4-10.) It ignored that the definitive USGS maps incorporated by reference into the Amended Complaint have identified this long stretch as intermittent for decades. (*See, e.g.*, *id.* at 6-7.) The Government also ignored this Court's clear, unequivocal and repeated statement that the "fossilized rule" is that intermittent streams are not WOTUS. (*See* Hr'g Tr. 11:18-19; *see also id.* 35:1, 39:7.)

Moreover, under the guise of enforcement "discretion," (Doc. 67 at 5 n.2), the Government no longer pursues claims related to other wetlands on Site because it lacks jurisdiction over them through an intermittent portion of Campbell Creek, (*see* Doc. 64 at 13-14). It has readily left those non-jurisdictional wetlands to the Commonwealth. (*See* Doc. 67 at 5 n.2.) It could just as easily exercise its discretion related to the wetlands at issue in the Amended Complaint, yet it refuses to do so.

The reasons for any purported ongoing harm here are the Government's own failings—not Mr. Layne's.

V. The Government's Request For "Limited" Discovery Is Anything But.

The Government asks for this Court to allow "limited" discovery to proceed as an "alternative" approach. The Court should reject it.

The Government's request suffers from threshold and foundational failings: discovery in this matter has not commenced and there is no schedule in this matter. (*See* Mem. 3 n.3.) The Court has not entered any Pre-Trial Order related to the Amended Complaint. (*See id.*) And Mr.

Layne's request is to stay the ***entire matter*** pending the Court's finding of plausible CWA jurisdiction established in the Amended Complaint. The Government's request is best characterized as one for affirmative relief to serve its own discovery requests before the commencement of discovery, which cannot be raised by opposition to a motion and instead must be raised by separate motion. *See SJ Properties Suites v. Specialty Finance Group, LLC*, 733 F. Supp. 2d 1021, 1039 (E.D. Wis. 2010), *as revised*, (Aug. 25, 2010) (instructing party that requests for relief should be raised by proper motion and not included in briefs addressing other issues). Moreover, the purported Government's allegedly "limited" discovery is anything but. The Government requests an extensive ***third*** Site inspection. (Opp'n 17.) And the purported reason is that they need to get on Site to assess wetland impacts during the rainy season. (*See id.*) At the risk of sounding like a broken record, ***the Government has already had multiple opportunities to do exactly this during the rainy season***. This Court granted the Government a unilateral, eight-day inspection in April 2021. *See U.S. Environmental Protection Agency v. Chameleon LLC, et al.*, No. 3:21-mc-2 (E.D. Va. Mar. 15, 2021) (Doc. 1-3). Mr. Layne consented to an inspection in May 2024. (*See* Doc. 60 at 13.) The May 2024 Site inspection required Mr. Layne to engage multiple consultants to assess the Government's consultants' work across numerous fields. This included both pre-inspection work, supervision and review of the conduct of the inspection itself and post-inspection review of the Government consultants' alleged findings. All of this came with significant, attendant costs.

The new, third Site inspection request is simply a repeat of the request from the last two Site inspections, except this time it requests ***five full days***. (*See* Opp'n, Ex. C.) And the Government continues to assert this third Site inspection needs to occur in the rainy season—just as the other two did. It is quite telling about the Government's belief/non-belief in the existence

of perennial, jurisdictional streams leading to the Site—the Government only seeks a Site inspection during April showers.

Needless to say, this additional, third Site inspection would yet again drive-up costs unnecessarily on Mr. Layne during the pendency of a potentially-dispositive motion. It would (as it did before) require significant meet-and-confer regarding protocols for any Site inspection. It would (as it did before) require Mr. Layne to engage multiple consultants to support this meet-and-confer process. It would require (as it did before) attendance by his consultants and his attorneys to any Site visit to observe the Government's attorneys and consultants, which numbered a total of at least six experts and lawyers working in multiple groups in May 2024. Mr. Layne would incur extensive expert costs and legal fees for a five-day inspection alone. That is to say nothing about time negotiating a protocol or preparing for the inspection, and review of the propriety of the testing, sampling and other activities conducted on Mr. Layne's property by a host of Government experts and consultants. If the Court agrees with Mr. Layne on his Motion to Dismiss arguments (as it did before), these significant expenditures would all be for naught.

The Government also requests that Mr. Layne answer extensive written discovery. (*See* Opp'n at 18.) The Government does not assert that this information is "time-sensitive" because it is not. It can be taken during the regular course of discovery, should this matter even reach that point. Instead, it is just a pile-on request attached to the five-day Site inspection request. The interrogatories request detailed descriptions of the work that Mr. Layne performed on the Site over the last six years. (*See* Opp'n Ex. C.) The document requests effectively seek to have Mr. Layne produce ***every document*** related to the Site. (*See id.*) It is far from limited. The Government says that it seeks to minimize the cost on Mr. Layne, but it once again ignores the significant

expenditure of time, effort, and money that Mr. Layne, in conjunction with his attorneys, will need to expend to respond to these nearly limitless written requests.

The Government's request for "limited discovery" should be rejected.

CONCLUSION

For the reasons previously stated and for the reasons stated herein, the Court should grant Defendants' Motion to Stay pending resolution of their pending Motion to Dismiss the Amended Complaint.

Dated: February 17, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 17, 2025, I filed the forgoing electronically, which sent a notice of electronic filing to all counsel of record in this matter.

/s/ *Frank Talbott V*

Exhibit 1

Talbott, Frank V

From: Lineberry, Amanda (ENRD) <Amanda.Lineberry@usdoj.gov>
Sent: Thursday, January 23, 2025 9:58 AM
To: Talbott, Frank V
Cc: Mathews, Eugene E. III; Brown, Laura J.S. (ENRD); Buckley, Sarah (ENRD)
Subject: RE: Chameleon - Motion to Stay Discovery

Hi Frank,

Thanks for your response, and for acknowledging that we raised this exact issue in a meet-and-confer over your prior motion to stay. Your recollection of that meet-and-confer is partially incorrect: we repeatedly stated then, and still believe now, that a motion to stay discovery is, in fact, a discovery dispute. You are thus required to confer with us under Local Rule 37 and you are required to file a joint statement with us under the Court's pretrial order.

You are, of course, correct that we did not raise this issue in our opposition to your prior motion to stay discovery and waived it as a basis for denying that particular motion. We had a number of issues with your prior motion that we needed to address in our opposition and, to aid the court, we attempted to streamline our opposition accordingly.

That does not mean we've conceded that your previous motion to stay discovery—much less your current one—was procedurally proper. And, for the previous motion, you at least conferred with us prior to filing it, so there was no violation of Local Rule 37. This new motion to stay discovery came as a complete surprise to us, violating both the Court's pretrial order and Local Rule 37.

The Court did not indicate that your approach was (or is) proper. You filed your prior motion on June 18, and the Court implicitly declined to grant you any relief until it eventually denied your motion as moot on August 15.

For all these reasons, we respectfully request again that you withdraw your motion. We anticipate that we will raise these issues with the Court if we are forced to file a response to your motion.

The United States has zero interest in driving up Chameleon's and Mr. Layne's costs. We are not the ones filing motions without following court procedures or attempting to seek compromises. Rather, we are the ones seeking to briefly confer with you, as required, to find a solution that is amenable to both parties and avoids unnecessary motions practice altogether. We have reached compromises before—in agreeing to bifurcate this case, allowing US experts access to portions of the Site for certain purposes, and in jointly seeking extensions throughout this case, often to accommodate your schedules in other cases. We are acting in good faith to continue reaching compromises.

We appreciate your willingness to meet with us this week. We did see your out of office message and appreciate you finding time to confer during a busy week. US counsel is available from 2-3pm today and any time on Friday. We'll send you a meeting invite for 2-3pm today, but let us know if that doesn't work.

Thanks,

Amanda Lineberry
Trial Attorney
Environmental Defense Section

From: Talbott, Frank V <FTalbott@mcguirewoods.com>
Sent: Wednesday, January 22, 2025 9:12 PM
To: Lineberry, Amanda (ENRD) <Amanda.Lineberry@usdoj.gov>
Cc: Mathews, Eugene E. III <mmathews@mcguirewoods.com>; Brown, Laura J.S. (ENRD) <Laura.J.S.Brown@usdoj.gov>; Buckley, Sarah (ENRD) <Sarah.Buckley@usdoj.gov>; Mathews, Eugene E. III <mmathews@mcguirewoods.com>; Brown, Laura J.S. (ENRD) <Laura.J.S.Brown@usdoj.gov>; Buckley, Sarah (ENRD) <Sarah.Buckley@usdoj.gov>
Subject: [EXTERNAL] Re: Chameleon - Motion to Stay Discovery

Hi Amanda,

Hope you are doing well too. As you recall, I raised the issue of the motion to stay on a meet-and-confer call last summer before we moved for one during the pendency of the first motion to dismiss (which was granted). In response, you raised this exact issue, asking whether we viewed this as a discovery dispute requiring a joint statement. As I explained on that call, our view was that the requirement for a joint statement related to specific discovery disputes—not general case management issues. We invited you to raise that issue in opposition to our forthcoming motion if you felt differently. While you disagreed with our request for a stay, you did not express opposition to our position on the procedural process.

In our original memorandum in support of our motion to stay last summer, we reiterated that position to the Court—that our understanding was that the joint statement requirement applied specific discovery requests, such as requests for production or response to interrogatories. We viewed it the previous request (identical to this one) as general case management that could be raised by motion. We told the Court that should it disagree, we would be happy to file a joint statement. The Government did not oppose this previous request as being improper under the Court's Pre-Trial Order or under Local Rule 37 when filing its opposition. Accordingly, the Government waived any opposition on this point. Moreover, the Court did comment on our position as being incorrect. Accordingly, we proceeded under the assumption that the Government agreed with our position (having waived it) that this request need not be raised by a joint statement.

After twice remaining silent on the process after we raised it both verbally and in writing on another motion to stay, your position is now that it is procedurally improper. Unfortunately, this appears to be yet another attempt by the Government to unnecessarily drive up costs on Mr. Layne through unnecessary meet-and-confer having twice (during meet-and-confer and briefing) sat on its hands related to your below complaint.

That said, we appreciate the Government's willingness to reach a compromise and avoid further unnecessary briefing and meet-and-confer among the Parties. As I am sure you gathered by my out of office and my delay in responding, I have been in depositions and traveling until Thursday. We can make ourselves available Thursday afternoon or Friday to discuss.

Thanks,

Frank

On Jan 21, 2025, at 3:31 PM, Lineberry, Amanda (ENRD) <Amanda.Lineberry@usdoj.gov> wrote:

****EXTERNAL EMAIL; use caution with links and attachments****

Hi Frank,

Hope you are well. Your recent motion for a stay of discovery does not comply with the court's pretrial order, which (as you know) requires us to file a joint, 10-page statement to resolve discovery disputes. The motion also does not comply with Local Rule 37, which requires you to confer with us in person or by telephone to explore the possibility of resolving the discovery matter in controversy before filing any motion concerning discovery matters. We thus ask you to withdraw the motion.

We would like to set up a call to discuss a potential compromise. This is a good faith effort to resolve this dispute, as required under the court's order and the local rules. Please advise us of your availability tomorrow after 10am.

Thank you,

Amanda V. Lineberry
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U.S. Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
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