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

THE UNITED STATES' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

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INTRODUCTION

The United States has sufficiently pled its claim and addressed the issues identified by the Court previously. Defendants still dispute the facts underlying that claim, this time proffering more than 60 pages of exhibits. Their request to dismiss the United States' claim because of factual disagreements is inappropriate at the pleading stage, when the Court must take the facts alleged in the complaint as true and make all reasonable inferences in the plaintiff's favor. Once again, Defendants "essentially ask the Court to determine what [certain] maps show, a question better left for summary judgment." *United States v. Chameleon, LLC*, No. 3:23-CV-763–HEH, 2024 WL 3835077, at *5 (E.D. Va. Aug. 15, 2024). This Court should again "decline to grant Defendants' Motion on these grounds," *id.*, and allow this case to proceed.

STANDARD OF REVIEW

I. Rule 12(b)(6) Standard

"A Rule 12(b)(6) motion 'does not resolve contests surrounding facts, the merits of a claim, or the applicability of defenses.'" *Chameleon*, 2024 WL 3835077, at *2 (quoting *Tobey v. Jones*, 706 F.3d 379, 387 (4th Cir. 2013)). To survive a 12(b)(6) motion to dismiss, a "complaint need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Moschetti v. Off. of the Inspector Gen.*, No. 3:22-cv-24-HEH, 2022 WL 3329926, at *2 (E.D. Va. Aug. 11, 2022) (quoting *Ray v. Roane*, 948 F.3d 222, 226 (4th Cir. 2020)). "In considering such a motion, a plaintiff's well-pleaded allegations are taken as true, and the complaint is viewed in the light most favorable to the plaintiff." *Id.* (citing *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009)). A Rule 12(b)(6) motion should be granted only "if, after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears

certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999).

II. Consideration of Matters Outside the Pleadings

In resolving a Rule 12(b)(6) motion, "a district court cannot consider matters outside the pleadings without converting the motion into one for summary judgment." *Occupy Columbia v. Haley*, 738 F.3d 107, 116 (4th Cir. 2013) (citing Fed. R. Civ. P. 12(d)). "A court may, however, consider a 'written instrument' attached as an exhibit to a pleading, *see* Fed. R. Civ. P. 10(c), 'as well as [documents] attached to the motion to dismiss, so long as they are integral to the complaint and authentic.'" *Id.* (quoting *Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009)). Typically, "'the types of exhibits incorporated within the pleadings by Rule 10(c) consist largely of documentary evidence, specifically, contracts, notes, and other writings on which a party's action or defense is based.'" *Id.* (quoting *Rose v. Bartle*, 871 F.2d 331, 339 n.3 (3d Cir. 1989)) (cleaned up).

When there is a conflict between an attached exhibit and the allegations of a complaint, the exhibit will prevail in many cases. *See Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 165 (4th Cir. 2016). "[B]efore treating the contents of an attached or incorporated document as true, the district court should consider the nature of the document and why the plaintiff attached it." *Id.* at 167. When a document "is not the subject of the claim, Rule 10(c) does not require a plaintiff to adopt every word within the exhibits as true for purposes of pleading[.]" *N. Ind. Gun & Outdoor Shows, Inc. v. City of S. Bend*, 163 F.3d 449, 455 (7th Cir. 1998). An exhibit "negates" a claim and "dismissal is appropriate" only when (1) the complaint "relies upon the document[] to form the basis for a claim or part of a claim," and (2) there is a "conflict between" the document and the complaint's allegations. *Goines*, 822 F.3d at 166 (citations omitted).

A court may take judicial notice of facts if they are "not subject to reasonable dispute," meaning they are "generally known within the trial court's territorial jurisdiction" or can be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). However, "judicial notice must not be used as an expedient for courts to consider matters beyond the pleadings and thereby upset the procedural rights of litigants to present evidence on disputed matters." *Goldfarb v. Mayor of Balt.*, 791 F.3d 500, 511 (4th Cir. 2015) (cleaned up) (citation omitted).

BACKGROUND

I. Statutory and Regulatory Background

Congress passed the Clean Water Act ("Act" or "CWA") in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act thus prohibits any person from discharging any pollutant from a point source to waters of the United States unless authorized by the Act, such as through a permit. *See* 33 U.S.C. § 1311(a). To establish a *prima facie* case that Defendants violated Sections 301(a) and 404 of the CWA, 33 U.S.C. §§ 1311(a) & 1344, the United States must show that Defendants are (1) persons (2) who discharged a pollutant (3) from a point source (4) to waters of the United States (5) without authorization. *See United States v. Cundiff*, 555 F.3d 200, 213 (6th Cir. 2009); *United States v. Deaton*, 332 F.3d 698, 704 (4th Cir. 2003); *Potomac Riverkeeper, Inc. v. Nat'l Cap. Skeet & Trap Club, Inc.*, 388 F. Supp. 2d 582, 585 (D. Md. 2005).

The only element in dispute in this case is the fourth: whether the polluted waters are waters of the United States. "Waters of the United States" has been defined by regulation and through a series of cases to include, *inter alia*, traditional navigable waters, relatively permanent tributaries of such waters, and certain wetlands adjacent to those waters. *See* 33 U.S.C.

§ 1362(7); 40 C.F.R. § 230.3(s) (1993); *Sackett v. EPA*, 598 U.S. 651, 678 (2023) (citing *Rapanos v. United States*, 547 U.S. 715, 755 (2006)).[1] The term "waters" in the CWA encompasses "relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739) (cleaned up). Though the Supreme Court has had "no occasion . . . to decide exactly when the drying-up of a streambed is continuous and frequent enough to disqualify the channel as" a water of the United States, *Rapanos*, 547 U.S. at 732 n.5, the *Rapanos* plurality clarified that relatively permanent waters "do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months." *Rapanos*, 547 U.S. at 732 n.5 (contrasting a seasonal river with a stream that is "broken, fitful," or "exist[s] only, or no longer than, a day"). *Sackett* adopted the *Rapanos* relatively permanent standard without alteration. *See Sackett*, 598 U.S. at 671 (concluding "the *Rapanos* plurality was correct").

Adjacent wetlands are considered "waters of the United States" when they (1) have "a continuous surface connection" to an adjacent water, and (2) that adjacent water itself is a "water of the United States." *Sackett*, 598 U.S. at 678-79 (quoting *Rapanos*, 547 U.S. at 742). "Wetlands" are "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R.

[1] As explained in the United States' previous opposition, ECF No. 19, the amended regulations defining "waters of the United States"— 40 C.F.R. § 120.2(a) (2023); 33 C.F.R. § 328.3(a) (2023)—are currently enjoined in Virginia. *See West Virginia v. EPA*, 669 F. Supp. 3d 781, 789, 819 (D.N.D. 2023) (enjoining the 2023 rule as to Virginia and 23 other states). EPA and the Corps are thus applying the "pre-2015" regulatory definition, consistent with the Supreme Court's decision in *Sackett*. *See* EPA, Pre-2015 Regulatory Regime (updated Nov. 22, 2024), available at https://perma.cc/6AWG-6HC4.

§ 328.3(c)(1); *see also* 33 C.F.R. § 328.3(b) (2014). "Wetlands perform a vital role in maintaining water quality by trapping sediment and toxic and nontoxic pollutants before they reach streams, rivers, or other open bodies of water." *United States v. Deaton*, 209 F.3d 331, 336 (4th Cir. 2000) (citation omitted).

II. Procedural History

In 2018, Defendants—Chameleon, LLC, and its sole owner, Gary Layne—purchased an approximately 102-acre tract of forested and undeveloped land ("the Site") located immediately west of Interstate 95 in Ashland, Virginia. Am. Compl. ¶¶ 25-27, ECF No. 60. In early 2019, Defendants (and/or persons acting on their behalf) cleared and grubbed much of the Site, dug ditches and sidecasted the material, and installed culverts, surface impoundments, and drainage pipes. *Id.* ¶ 29. Those activities impacted most of the 102 acres, including approximately 21 acres of wetlands in three areas. *Id.* One of those areas, identified as Wetland A, comprises 17 of those 21 impacted acres and is the subject of the United States' Amended Complaint. *Id.*[2]

Hanover County and the Virginia Department of Forestry reported Defendants' wetlands impacts to the Virginia Department of Environmental Quality ("VADEQ"), who in turn informed the United States Army Corps of Engineers (the "Corps"). *Id.* ¶¶ 34, 41. After repeated, failed attempts to obtain information about the wetland impacts from Defendants, the Corps referred the matter to EPA. *Id.* ¶¶ 41-43. Both VADEQ and EPA ultimately had to obtain warrants to access and inspect the Site. *Id.* ¶¶ 35-36, 44-51.[3] Even after VADEQ inspected the Site and told

[2] Defendants claim the United States dropped the other two wetland areas—identified previously as Wetlands B and C—from its Amended Complaint because it lacked regulatory jurisdiction over them. Mot. at 11, 14, ECF No. 64. Not true. The United States does not concede that it lacks jurisdiction over these wetlands. As a matter of enforcement discretion, the United States "is deferring to the Commonwealth of Virginia to address" those impacts. Am. Compl. ¶ 29 n. 2.

[3] Defendants apparently now concede they filled wetlands on Site and that Virginia has jurisdiction over those filled wetlands. Mot. at 3.

Defendants to stop work, Defendants began new timber harvesting activities in additional areas of the Site, including additional grubbing. *Id.* ¶ 37. Defendants also caused additional unauthorized discharges to wetlands on Site after EPA's inspection. *Id.* ¶ 57.

On November 13, 2023, the United States filed a Complaint alleging Defendants' unauthorized discharges to wetlands violated the CWA. ECF No. 1. On February 20, 2024, Defendants moved to dismiss the Complaint for lack of subject matter jurisdiction and for failure to state a claim. ECF Nos. 11, 12. On August 15, 2024, this Court granted in part and denied in part Defendants' motion. The Court denied Defendants' motion to dismiss for lack of subject matter jurisdiction, finding it had jurisdiction to hear the claim because it was brought by the United States and raised a question of federal law. *Chameleon*, 2024 WL 3835077, at *4. The Court also denied Defendants' motion to dismiss for failure to state a claim on the grounds that certain maps showed the United States' allegations were incorrect, finding that such disputes were "better left for summary judgment." *Id.* at *6. The Court granted Defendants' motion to dismiss the Complaint on the ground that some of the allegations were legal conclusions otherwise unsupported by alleged facts. *Id.* at *7. Because the United States could make additional factual allegations to support those conclusions, the Court granted leave to amend. *Id.*

The United States filed its Amended Complaint on November 15, 2024. *See* Am. Compl. It alleges that Defendants are (1) persons, *see, e.g., id.* ¶¶ 8-9, 79; (2) who discharged dredged and/or fill material, a pollutant, *see, e.g., id.* ¶¶ 28-31, 52, 81-82; (3) using and from mechanized equipment, *i.e.*, point sources, *see, e.g., id.* ¶¶ 28-30, 32, 52, 83; (4) to Wetland A, a water of the United States, *see id.* ¶¶ 26, 28-30, 51, 80, 87; (5) without authorization in the form of a permit or otherwise, *see id.* ¶¶ 33, 84. *See Cundiff*, 555 F.3d at 213; *Deaton*, 332 F.3d at 704; *Potomac Riverkeeper*, 388 F. Supp. 2d at 585.

To support its allegation that Wetland A is a water of the United States, the Amended Complaint alleges that (1) Wetland A "physically touches and abuts, and therefore has a continuous surface connection to, Unnamed Tributary 1;" (2) Unnamed Tributary 1 "is or was, at the time Defendants filled Wetland A, a perennial stream and therefore a relatively permanent water;" (3) Unnamed Tributary 1 "connects through other perennial tributaries"—Lickinghole Creek and Stony Run—"to the Chickahominy River, a traditional navigable water." Am. Compl. ¶ 77. To further support these allegations, the Amended Complaint pleads several facts, akin to lines of evidence, including: (1) the EPA inspectors' observations during their inspections of the Site and adjacent tributaries; (2) maps and data sets EPA consulted as part of its assessment, including screenshots of those maps and data sets; and (3) data EPA collected during its inspections of the Site and adjacent tributaries, including photographs, soil samples, macroinvertebrate samples, and other information. *See* Am. Compl. ¶¶ 61-77.[4]

On January 2, 2025, Defendants moved to dismiss the Amended Complaint for lack of subject matter jurisdiction[5] and for failure to state a claim. ECF No. 63.

ARGUMENT

I. The Amended Complaint sufficiently pleads a plausible claim for relief.

A complaint "need not forecast evidence sufficient to prove a claim." *Harbourt v. PPE Casino Resorts Md., LLC*, 820 F.3d 655, 658 (4th Cir. 2016) (cleaned up). The pleading standard in Rule 8 "does not require 'detailed factual allegations.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678

[4] The United States also alleges that Defendants' activities on Site damaged wetland indicators by removing vegetation, upsetting soils, and changing drainage on Site. Am. Compl. ¶¶ 53, 55. The inspection still indicated the presence of jurisdictional wetlands *prior to* the disturbances.

[5] Defendants "incorporate by reference" their prior argument that "the lack of CWA jurisdiction is an issue going to the Court's subject matter jurisdiction." Mot. at 3 n.3. This argument fails for the reasons articulated in our prior opposition, *see* ECF No. 19 at 12-16, and this Court's order denying Defendants' prior motion on these grounds, *see Chameleon*, 2024 WL 3835077, at *4-5.

(2009). A complaint needs "more than an unadorned, the-defendant-unlawfully-harmed-me accusation," but it is hornbook law that, to survive Defendants' 12(b)(6) motion, the Amended Complaint need only contain "sufficient factual matter, accepted as true, to state a claim to relief that is *plausible* on its face." *Id.* (cleaned up, emphasis added). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted); *see also Chameleon*, 2024 WL 3835077, at *2. The Amended Complaint does just that, first and foremost by methodically addressing each concern this Court identified in its August 15, 2024, opinion.

A. The Amended Complaint fully addresses this Court's concerns.

This Court found the original Complaint lacking in two discrete ways, both of which the Amended Complaint resolves. This Court dismissed the Complaint because it found that the Complaint pleaded as facts certain concepts that the Court considered legal conclusions, and the Complaint did not contain additional factual allegations to support those legal conclusions. *See id.* at *6. Specifically, the Court found that the United States did not allege "facts to substantiate the conclusions that a 'continuous surface connection' exists or that the tributaries are 'relatively permanent.'" *Id.* Though the Complaint pointed to two bases for its conclusions—reference to EPA's Site inspection and online mapping tools relied on by EPA inspectors—the Court concluded that the Complaint did not provide sufficient detail about the results or findings of the inspection, nor did it adequately explain the significance of the online mapping tools or provide images of the specific maps upon which EPA inspectors relied. *Id.* at *7. The Amended Complaint fully addresses these issues.

1. The Amended Complaint pleads sufficient facts to support the allegation that a continuous surface connection exists between Wetland A and a relatively permanent tributary.

The Amended Complaint sufficiently alleges that Wetland A has a continuous surface connection to a relatively permanent tributary, Unnamed Tributary 1. The Amended Complaint asserts that Wetland A physically touches and abuts that tributary, and it describes EPA inspectors' observations of the "unimpaired, physical surface connection" between Wetland A and Unnamed Tributary 1. Am. Compl. ¶ 77; *see also id.* ¶¶ 55, 66-68.

In *Sackett*, the Supreme Court affirmed that the CWA covers "wetlands" with a "continuous surface connection to" other waters of the United States, such that "there is no clear demarcation between 'waters' and wetlands." 598 U.S. at 678 (quoting *Rapanos*, 547 U.S. at 742). Such a continuous surface connection would make it "difficult to determine where the 'water' ends and the 'wetland' begins," such that jurisdictional wetlands are "as a practical matter indistinguishable from waters of the United States." *Id.* (quoting *Rapanos*, 547 U.S. at 742, 755). The Court adopted its articulation of the continuous surface connection standard from the *Rapanos* plurality without alteration. *Id.* at 671 (concluding "the *Rapanos* plurality was correct"); *id.* at 678-79 (reiterating the *Rapanos* criteria for a continuous surface connection).

This Court and others have consistently found that a wetland has a continuous surface connection with another body of water when it physically abuts or touches that body of water. *See, e.g.*, *United States v. Bedford*, No. 2:07-cv-491, 2009 WL 1491224, at *12 (E.D. Va. May 22, 2009) (holding that "there is a continuous surface connection between the wetlands on the Bedford Site and the Southern Tributary" because "the wetlands are adjacent to, contiguous with, directly abut, and drain into the Southern Tributary").[6]

[6] *See also United States v. Mlaskoch*, No. 10-cv-2669, 2014 WL 1281523, at *17 (D. Minn. Mar. 31, 2014) ("Because the affected wetlands abutted these tributaries, jurisdiction under the CWA is proper."); *United States v. Donovan*, No. 96-484, 2010 WL 3000058, at *4 (D. Del. July 23, 2010) ("A continuous surface connection exists when a wetland physically abuts another

That is what the Amended Complaint alleges for Wetland A. The Amended Complaint alleges that Wetland A "is a wetland that physically touches and abuts, and therefore has a continuous surface connection to, Unnamed Tributary 1."[7] Am. Compl. ¶ 77. It alleges that Unnamed Tributary 1 begins as a "curvilinear depressed feature," *i.e.*, channel, encompassed by Wetland A and is visible on the digital elevation model and the United States Geological Survey ("USGS") National Map with the "3DEP Elevation – Hillshade" ("Hillshade raster") data layer displayed. *Id.* ¶ 66. It further alleges that Unnamed Tributary 1 is "a channel containing water that flows through portions of Wetland A, flows from the Site through a culvert beneath Ashcake Road, and in turn connects, flows to, and is a tributary to Lickinghole Creek." *Id.* ¶ 68. In support of those allegations, the Amended Complaint explains that, during a 2021 Site inspection, EPA inspectors "observed c*hannelized streamflow in and from Wetland A* leaving the Site through a culvert in the southern portion of the Site, and the inspectors observed the stream channel further downstream from the culvert." *Id.* ¶ 55 (emphasis added); *see also id.* ¶¶ 66-67. In other words, EPA inspectors observed Wetland A physically touching and abutting the channel of Unnamed Tributary 1, such that it was difficult to determine where Unnamed Tributary 1

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regulated body of water.") (citations omitted), *R. & R. adopted*, 2010 WL 3614647 (D. Del. Sept. 10, 2010), *aff'd*, 661 F.3d 174 (3d Cir. 2011); *United States v. Brace*, No. 1:17-cv-00006, 2019 WL 3778394, at *24 (W.D. Pa. Aug. 12, 2019) (a "continuous surface connection" "may also occur when a wetland physically abuts another regulated body of water") (citation omitted), *aff'd on other grounds*, 1 F.4th 137 (3d Cir. 2021). Further, depending on the factual context, the requirement can be met when a channel, ditch, swale, pipe, or culvert (regardless of whether such feature would itself be jurisdictional) serves as a physical connection that maintains a continuous surface connection between an adjacent wetland and a relatively permanent water. *See Cundiff*, 555 F.3d at 212-13 (considering evidence of a channel with surface water flow and surface connections between wetlands and relatively permanent water bodies "during storm events, bank full periods, and/or ordinary high flows" and also concluding that "it does not make a difference whether the channel by which water flows from a wetland to a navigable-in-fact waterway or its tributary was manmade or formed naturally").

[7] The Amended Complaint also alleges that Wetland A has "an unimpaired, physical surface connection … by way of Unnamed Tributary 1, to Lickinghole Creek." Am. Compl. ¶ 77.

ended and where Wetland A began. EPA inspectors and consultants made similar observations during visits in March and April 2024. *Id.* ¶ 58. These allegations are sufficient to plead a continuous surface connection under Rule 8 and this Court's August 15, 2024, opinion. *See Chameleon*, 2024 WL 3835077, at *5-6.

Defendants effectively concede that the Amended Complaint's "continuous surface connection" allegations are sufficient. They only state in a footnote that the United States must sufficiently plead that the wetlands at issue have a continuous surface connection to the relevant, relatively permanent tributary. Mot. at 5 n.4.[8] In that same footnote, they weakly conclude that the United States "has not met this requirement either" for "the same reasons stated herein." *Id*. Under Fourth Circuit precedent, that footnote is insufficient to preserve their argument for consideration by the district court or on appeal. *See, e.g., Foster v. Univ. of Md.-E. Shore*, 787 F.3d 243, 250 n.8 (4th Cir. 2015) (holding that argument raised in an isolated footnote was waived) (citing *Wahi v. Charleston Area Med. Ctr., Inc.*, 562 F.3d 599, 607 (4th Cir. 2009)).

The Amended Complaint sufficiently alleges that Wetland A has a continuous surface connection to a relatively permanent tributary.

2. The Amended Complaint pleads sufficient facts to support the allegations that Unnamed Tributary 1 and Lickinghole Creek are relatively permanent waters.

The Amended Complaint amply alleges—with numerous factual allegations akin to lines of evidence, going beyond what Rule 8 requires—that Unnamed Tributary 1 and Lickinghole Creek both have (or had, prior to Defendants' impacts) perennial flow and are thus relatively

[8] Defendants never mention, much less address, the Amended Complaint's alternative explanation for CWA jurisdiction in Paragraph 77.

permanent waters.[9] Unlike Defendants' motion, the Amended Complaint uses scientific terms for stream flow in a manner consistent with Supreme Court precedent. In support of its allegations about Unnamed Tributary 1, the Amended Complaint describes: (1) EPA inspectors' observations of flow in the tributary; (2) EPA inspectors' and consultants' on-site evaluation of the stream as perennial; (3) macroinvertebrate samples collected by EPA inspectors and consultants indicating that insects and other macroinvertebrates that require regular flowing water live in the tributary; and (4) maps and data sets that support the presence of perennial flow in Unnamed Tributary 1. For its allegations about Lickinghole Creek, the Amended Complaint describes similar maps and data sets that support the presence of perennial flow in the creek, including historical maps identifying the creek by name dating back to 1895.

Terminology. First, a brief note on terminology, because Defendants have used stream classification terms erroneously to create confusion. The Amended Complaint uses the terms "perennial" and "seasonal" to factually describe the flow of Unnamed Tributary 1 and Lickinghole Creek. The Amended Complaint defines "perennial," for purposes of that pleading, as "year-round." Am. Compl. ¶ 73. Defendants improperly dispute these factual allegations, alleging these bodies of water are "intermittent" or "ephemeral" and assigning legal significance

[9] The *Sackett* majority and the *Rapanos* plurality provide that waters of the United States include any relatively permanent body of water "connected to" traditional navigable waters, *Sackett*, 598 U.S. at 678 (quoting *Rapanos*, 547 U.S. at 742), but neither opinion describes or elaborates on the nature of this downstream connection, and neither requires all connections downstream to be relatively permanent themselves. Nor does the *Sackett* majority or the *Rapanos* plurality discuss how to evaluate whether a water is a tributary of a downstream water. Thus, EPA and the Corps reasonably maintain their interpretation that a *tributary* must be relatively permanent and *connect*, directly or indirectly, to a traditional navigable water, but that *the connection* itself is not required to be relatively permanent. Rather, the Agencies have identified site-specific conditions relevant to ascertaining whether a tributary actually connects to downstream waters pursuant to the relatively permanent requirement. But this Court need not address this issue because, here, the United States alleges that Unnamed Tributary 1's connections—Lickinghole Creek and Stony Run—are perennial, and therefore relatively permanent. Am. Compl. ¶¶ 74-76.

to those terms—something the Supreme Court has expressly declined to do. *See Rapanos*, 547 U.S. at 732 n.5.

Definitions of "perennial," "intermittent," and "ephemeral" can vary across scientific literature and datasets.[10] Defendants fail to acknowledge that, as their own Exhibit D explains, these scientific definitions "may differ from regulatory definitions under the Clean Water Act," and the USGS mapping tool employing the USGS definitions cannot "be used as a standalone tool to determine the full scope of Clean Water Act jurisdiction." Mot. Ex. D at 3. In other words, a USGS classification may be probative, but it does not provide definitive data upon which to grant a motion to dismiss.

The USGS disclaimers highlight the disconnect between Defendants' arguments and the Supreme Court's statement that it had "no occasion" to opine on the "scientifically precise distinctions between 'perennial' and 'intermittent' flows" and the fact that the Court declined to adopt or otherwise define those scientific terms. *Rapanos*, 547 U.S. at 732 n.5. The Court has held that "waters of the United States" include "*relatively permanent*, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes." *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739) (cleaned up) (emphasis added). The *Rapanos* plurality also recognized that "seasonal rivers" may be "relatively permanent" under the CWA. *Rapanos*, 547 U.S. at 732 n.5. USGS does not define "seasonal" waters.

[10] For their definitions, Defendants rely on a 3-page exhibit from a 564-page document, which is in turn only summarizing other definitions. *See* Mot. Ex. D, ECF No. 64-4. Fuller USGS definitions of "perennial," "intermittent," and "ephemeral" are available online in the USGS Water Glossary. *See* USGS, *Water Basics Glossary* (updated June 17, 2013), available at https://water.usgs.gov/water-basics_glossary.html. The Amended Complaint's shorthand definition of "perennial" generally aligns with scientific resources' definition of that term.

Consistent with Supreme Court precedent, the Amended Complaint uses "perennial" or "seasonal" as factual descriptions supporting its allegations that Unnamed Tributary 1 and Lickinghole Creek are "relatively permanent" according to the Supreme Court's standard. Defendants' claims that the streams are intermittent or ephemeral not only fail to square with the Supreme Court's classifications, but they also fall far short of providing a basis for dismissal.

Unnamed Tributary 1. The Amended Complaint alleges that Unnamed Tributary 1 originates in Wetland A, flows into Lickinghole Creek, and contains perennial flow. Am. Compl. ¶¶ 66-67, 77. The United States alleges "Unnamed Tributary 1 is or was, at the time Defendants filled Wetland A, a perennial stream and therefore a relatively permanent water." *Id.* ¶ 77.[11]

The Amended Complaint includes many factual allegations—comparable to multiple lines of evidence—that support the allegation that Unnamed Tributary 1 has or had, prior to Defendants' impacts, perennial flow. First, it explains that "remote sensing data"—i.e., a digital elevation model and Hillshade Raster data shown in screenshots in the Amended Complaint, *id.* ¶ 66 (Figs. 5 & 6)—support the conclusion that Unnamed Tributary 1 had perennial flow prior to Defendants' impacts. *Id.* ¶¶ 69-70. Second, the Amended Complaint describes and provides photographs of EPA's 2021 inspection, during which EPA personnel observed that Unnamed Tributary 1's channel (on either side of Ashcake Road) contained flowing water, had an ordinary

[11] At trial, the United States need only show that Unnamed Tributary 1 was relatively permanent prior to Defendants' violations, which likely altered the flow of water running off the Site, *see* Am. Compl. ¶ 53, but which cannot sever federal jurisdiction. What is relevant is the character of the wetlands and Unnamed Tributary 1 at the time of the unauthorized discharges. *See* 40 C.F.R. § 232.2 ("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."); *see also Sackett,* 598 U.S. at 678 n.16 ("[A] landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA. Whenever the EPA can exercise its statutory authority to order a barrier's removal because it violates the Act, . . . that unlawful barrier poses no bar to its jurisdiction.").

high water mark and bed and banks, and had other characteristics "consistent with the regular presence of flow and more than in direct response to precipitation." *Id.* ¶ 71. Third, it describes EPA's observations of two reaches of Unnamed Tributary 1 on April 25, 2024, during which an EPA inspector (1) "observed flow in Unnamed Tributary 1," (2) "observed at both locations that Unnamed Tributary 1 had a well-defined channel with bed and banks" and an ordinary high water mark, (3) "identified aquatic insects (benthic macroinvertebrates) at both locations that require water flow for a portion of their lifecycle," and (4) noted the "absence of rooted vegetation within the channel"—all characteristics consistent with perennial flow. *Id.* ¶ 72. Finally, the Amended Complaint alleges EPA inspectors and consultants evaluated the flow of Unnamed Tributary 1 "using the North Carolina Division of Water Quality Methodology for Identification of Intermittent and Perennial Streams and their Origins," and "determined that Unnamed Tributary 1 possesses features consistent with perennial (year-round) flow." *Id.* ¶ 73. These detailed allegations, taken together and as true, fully support the claim that Unnamed Tributary 1 is perennial, as a factual matter, and thus relatively permanent, as a legal matter, under *Rapanos and Sackett*.

The Amended Complaint also asserts ample facts to support its allegations about the reach of Unnamed Tributary 1, *i.e.*, that it originates within Wetland A and connects with Lickinghole Creek. The Amended Complaint: (1) describes how a "curvilinear feature," or channel, "continues from the southern end of Wetland A until it connects with an unnamed tributary that flows southwest of the Site under Ashcake Road ('Unnamed Tributary 1')," *id.* ¶ 67; (2) provides screenshots of the curvilinear feature as portrayed in a digital elevation model and Hillshade Raster data, *id.* ¶ 66 (Figs. 5 & 6); (3) explains that StreamStats, a mapping website that provides spatial analytical tools for water-resource planning, depicts Unnamed

Tributary 1 "as originating within Wetland A, flowing south along [a] curvilinear feature . . . and then flowing from the Site under Ashcake Road in a southwesterly direction before connecting with Lickinghole Creek," *id* ¶ 67.; and (4) provides a screenshot of the StreamStats depiction, *id.* ¶ 67 (Fig. 7). In short, the Amended Complaint plausibly alleges that Unnamed Tributary 1 originates within Wetland A on the Site and connects with Lickinghole Creek.

Lickinghole Creek. The Amended Complaint alleges that Lickinghole Creek "is a named stream with an incised channel containing flow perennially or at least seasonally." *Id.* ¶ 74. It further notes that Lickinghole Creek—like Unnamed Tributary 1, which is upstream from Lickinghole Creek and field-verified by EPA as perennial—is depicted in StreamStats, Hillshade data, and a digital elevation model. *Id.* ¶ 74. The screenshots showing this data for Unnamed Tributary 1 also capture the upper portions of Lickinghole Creek. *Id.* ¶ 66 (Figs. 5 & 6), ¶ 67 (Fig. 7). In addition, the Amended Complaint points to Lickinghole Creek's strong historical presence, noting that it "consistently appears as a geographic feature on USGS topographic maps from 1895, 1938, and 1963, and more recent topographic maps including 2016, 2019, and 2022." *Id.* ¶ 74. In other words, Lickinghole Creek has been a "continuously present, fixed bod[y] of water," *Rapanos*, 547 U.S. at 733, for a very long time, such that it has appeared by name on maps *since 1895*.[12] All these facts informed EPA's plausible allegation that Lickinghole Creek is a perennial stream and a relatively permanent water. Am. Compl. ¶ 77.

In sum, the Amended Complaint addresses all the concerns that this Court identified in its prior opinion, provides more than enough facts and legal explanation to give Defendants "fair

[12] The segment of Lickinghole Creek veering towards and connecting to Unnamed Tributary 1 appears on these maps since at least 1963, more than 60 years ago. *See* Mot. Ex. C, ECF No. 64-3, at 10.

notice of what the . . . claim is and the grounds upon which it rests," *Ray*, 948 F.3d at 226 (quoting *Tobey*, 706 F.3d at 387) (cleaned up), and states a plausible claim for relief.

B. This Court should again decline Defendants' invitation to decide disputed facts.

Once again, Defendants ask this Court prematurely to resolve factual disputes. This Court should again decline to do so. *See Chameleon*, 2024 WL 3835077, at *5 ("At this stage, it is inappropriate for the Court to resolve these factual disputes."). Defendants raise many factual disputes in their attempt to disprove, at the pleading stage, that Unnamed Tributary 1 and a 1.38-mile stretch of Lickinghole Creek had or have contained relatively permanent flow. Disregarding the factual allegations described above, Defendants repeatedly insist that the Amended Complaint offers only "bare legal conclusions" that these three "segments" are "relatively permanent streams" with "zero" or "no" facts to support them. Mot. at 2-3, 16, 18. But Defendants tacitly recognize that the Amended Complaint pleads facts because they explicitly ask this Court not to accept those facts as true. *See* Mot. at 3 ("[T]he Court also should not accept these allegations since the polestar USGS NHD maps contradict them and control the analysis."). They isolate certain facts and, one by one, mischaracterize them in an attempt to obtain dismissal of the Amended Complaint in its entirety. The Court should reject that attempt.

"It should hardly need to be said again that we must proceed 'on the assumption that all the allegations in the complaint are true (even if doubtful in fact).'" *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 428 (4th Cir. 2015), *as amended on reh'g in part* (Oct. 29, 2015). But Defendants erroneously insist the United States prove its claim by preponderant evidence in the Amended Complaint without discovery or a trial. A Rule 12(b)(6) motion "does not resolve contests surrounding facts, the merits of a claim, or the applicability of defenses." *Tobey*, 706 F.3d at 387. Whether Unnamed Tributary 1 and Lickinghole Creek contain relatively permanent

flow, as EPA alleges, is a classic factual inquiry "best conducted with the benefit of discovery," not when evaluating the sufficiency of the Amended Complaint. *Robertson v. Sea Pines Real Est. Cos., Inc.*, 679 F.3d 278, 292 (4th Cir. 2012). "The maze of cross-references to exhibits and interpretations of specific provisions within them makes this case particularly ill-suited to adjudication at the motion to dismiss stage." *Goldfarb*, 791 F.3d at 510-11. As this Court has explained, "Defendants essentially ask the Court to determine what the maps show, a question better left for summary judgment." *Chameleon*, 2024 WL 3835077, at *5. This Court should again "decline to grant Defendants' Motion on these grounds." *Id*. "[T]he maps are not dispositive at this stage[.]" *Id*. Defendants' arguments fly in the face of federal pleading standards and this Court's prior opinion (which Defendants never even mention), and this Court should again reject them.

1. Defendants' factual disputes over the flow of Unnamed Tributary 1 do not contradict the United States' facially plausible allegations.

Defendants have essentially requested that this Court, in deciding a motion to dismiss, weigh and resolve in their favor four factual critiques of the United States' allegations about the flow of Unnamed Tributary 1: (1) some of the government's figures show drainage channels but not perennial flow, (2) the government's observations and evaluation of flow are "contradict[ed]" by "judicially-noticeable" rain data, (3) the United States' observations of flow in Unnamed Tributary 1 are too limited, and (4) the Amended Complaint describes the physical form of the tributary as a "channel" without being adequately specific about whether the channel actually contained flow. *See* Mot. at 18-29. The Court should dispense of the first two arguments because there is no "contradiction" between our alleged facts and the documents such that the exhibits-prevail rule would apply. The second two arguments fail because, in essence, they contravene established law by applying a preponderant evidence standard to the Amended Complaint.

There is no contradiction between the exhibits and the facts in the Amended Complaint. There is no "contradiction" between the facts alleged and the documents Defendants cite such that any exhibit (or judicially noticeable document) could "prevail" over the Amended Complaint's plausible allegations. *See N. Ind. Gun & Outdoor Shows*, 163 F.3d at 455.

Defendants argue that the United States' allegations about Hillshade data and StreamStats only show drainage channels, not relatively permanent streams. Here, again, there is no "contradiction" between the exhibits and the facts alleged. Defendants' argument selectively disregards the Amended Complaint, which alleges that "[t]he characteristics of a stream channel—as that channel appears in remote sensing data and as it appears in the field—provide information as to the frequency and duration of flow within that channel," and, specifically, "Unnamed Tributary 1 is a stream channel with characteristics demonstrating that, prior to Defendants' unpermitted activities upstream, contained flow perennially or at least seasonally." Am. Compl. ¶ 69. In other words, the Amended Complaint *never* alleges that the existence of a channel by itself demonstrates perennial flow. Rather, it alleges that the *characteristics* of the channel *provide information about* the frequency and duration of flow.[13] As explained above, the Amended Complaint plausibly alleges that Unnamed Tributary 1 has perennial flow and asserts multiple lines of evidence to support this allegation, citing remote sensing data consistent with the identification of a channel containing perennial flow, observations from EPA's inspection of the Site during which EPA observed flow and identified characteristics of a channel containing

[13] *See, e.g., Deerfield Plantation Phase II-B Prop. Owners Ass'n, Inc. v. U.S. Army Corps of Eng'rs, Charleston Dist.*, 501 F. App'x 268, 271-72, 273-75 (4th Cir. 2012) (not disturbing a government determination that two tributaries were waters of the United States because they had more than seasonal flow and the Corps considered "numerous permissible factors," such as clear channel definition, absence of vegetation in the channel, a defined high water mark, groundwater influx, and sinuosity, i.e., a ratio of valley to channel slope).

perennial flow, supporting figures and photographs, and a stream evaluation by consultants classifying the stream as perennial. *See id.* ¶¶ 66, 69-73, 77; Arg. I.B.ii, *supra*. "Simply put, this is not a situation in which it is readily apparent that dismissal is appropriate because the document attached to the complaint negates the claim." *United States ex rel. Aarow/IET LLC v. Hartford Fire Ins. Co.*, 838 F. App'x 736, 744 (4th Cir. 2020) (citation omitted) (cleaned up).

Defendants also ask this Court to evaluate—without expert testimony or other evidence—their assertions regarding the scientific significance of regional rain data to specific tributaries on specific days. This Court should reject that invitation and allow the United States to respond to Defendants' critique through expert analysis following discovery. *See Goldfarb*, 791 F.3d at 510-11 (vacating complaint's dismissal where district court relied on judicially-noticed government documents though the parties disputed the documents' "nature and scope," "putting at issue basic factual matters relevant to interpreting what those exhibits mean").

Factual allegations in the Amended Complaint should be taken as true, not evaluated using a preponderance of the evidence standard. "Courts must be careful . . . not to subject the complaint's allegations to the familiar 'preponderance of the evidence' standard." *SD3*, 801 F.3d at 425. "When a court confuses probability and plausibility, it inevitably begins weighing the competing inferences that can be drawn from the complaint." *Id.* That is not the Court's task when assessing the sufficiency of a complaint. *Id.* The Court should reject Defendants' invitation to weigh alleged facts and make factual findings at this stage.

Defendants ask the Court to evaluate their argument that the Amended Complaint contains an insufficient number of observations of flow by EPA inspectors and consultants to, standing alone, plausibly allege that Unnamed Tributary 1 is or was, prior to Defendants' impacts, perennial. But Defendants helpfully point out that, in addition to the alleged

observations of flow, a consultant observed flow in Unnamed Tributary 1 on at least three other occasions. *See* Mot. at 22 (citing Daniels Decl. ¶ 10, ECF No. 48-1). Defendants again disregard that the observations are one of many allegations supporting the conclusion in the Amended Complaint that Unnamed Tributary 1 contains relatively permanent flow. Tellingly, Defendants do not specify the number of observations they think would suffice *at the pleading stage*. In any event, a motion to dismiss is not the appropriate vehicle for arguing about preponderant proof.

Defendants also argue that our allegations are insufficient under *Rapanos* and *Sackett* because the Amended Complaint sometimes uses the word "channel" to describe Unnamed Tributary 1, which Defendants claim is insufficient because there must be "flow" in the tributary. This argument is unavailing. "Channel" is a word to describe the physical shape of the tributary. Indeed, the United States alleged that EPA inspectors observed flow *in the channel* of Unnamed Tributary 1 multiple times and included photographs of that flow in the Amended Complaint. *See* Am. Compl. ¶¶ 71-72. Defendants acknowledge as much in their motion by arguing, as previously discussed, that those observations are too few. Defendants never credibly explain why the United States' descriptions of Unnamed Tributary 1 as a channel somehow defeat its allegations about the flow in that channel. The Supreme Court has itself described geographic features carrying relatively permanent flow as "channels." *Rapanos*, 547 U.S. at 742 (explaining that establishing that wetlands are covered by the CWA requires showing "that the adjacent *channel* contains" a water of the United States) (emphasis added). There are no magic words under the CWA to describe a tributary. What is required at the motion to dismiss stage are allegations of relatively permanent flow. The United States provides that in spades.[14]

[14] In fact, Defendants never address the United States' allegations about the presence of macroinvertebrates requiring flowing water in Unnamed Tributary 1. *See* Am. Compl. ¶ 72.

This Court need only determine whether the facts, taken as true, state a plausible claim for relief under the Clean Water Act. They do. The Court should again "decline to grant Defendants' Motion on these grounds." *Chameleon*, 2024 WL 3835077, at *5.

2. Defendants' factual disputes over the flow of Lickinghole Creek do not contradict the United States' facially plausible allegations.

Nothing requires that the United States allege—or even prove—that every inch of the connection between a wetland and a downstream traditional navigable water contain relatively permanent waters. It is sufficient that the Amended Complaint alleges the wetlands have a continuous surface connection to a relatively permanent water (Unnamed Tributary 1) that in turn connects to a downstream traditional navigable water (Chickahominy River). *See* n.6, *supra.*

Still, in this case, the Amended Complaint plausibly alleges that Lickinghole Creek is a perennial stream with relatively permanent flow. It provides sufficient support for this assertion through numerous facts akin to multiple lines of evidence, including: (1) that Lickinghole Creek is a named stream with an incised channel; (2) it has a strong historical presence and has been mapped as a geographic feature since 1895; and (3) it is depicted in resources like StreamStats, Hillshade data, and a digital elevation model. *See* Am. Compl. ¶¶ 66-67, 74, 77; Arg. I.B.ii, *supra*. To dispute those facts, Defendants single out the USGS mapping, take screenshots from map layers the Amended Complaint does not reference or use, mischaracterize how to interpret that mapping, and then distort the "exhibits-prevail" rule to try to persuade this Court to dismiss the well-pleaded Amended Complaint. Defendants argue that, because the USGS maps depict portions of Lickinghole Creek as a dashed blue line—indicative of "intermittent" flow as USGS uses that term—the Court must take Defendants' interpretation of the USGS mapping as true and disregard what USGS says about its own mapping, as well as all of the factual allegations in the

Amended Complaint (including allegations that another USGS mapping resource, StreamStats, shows a stream ran through the Site).[15] Mot. at 12-18. Defendants' argument is meritless.

Before determining whether there is a contradiction between an exhibit and an allegation in the Amended Complaint, this Court "should consider the nature of the document and why the plaintiff attached it." *Goines*, 822 F.3d at 167. Reading the Amended Complaint in the light most favorable to the United States, it is clear that the Amended Complaint's allegations that Unnamed Tributary 1 and Lickinghole Creek are perennial do not hinge on the USGS mapping. Indeed, the United States does not rely on the mapping layers and screenshots that Defendants include in their exhibits for this point at all. In other words, Defendants' screenshots are "not integral to the complaint" and provide no basis to apply the exhibits-prevail rule in the first place. *Id.* at 166. The Court's inquiry should end there.

But even if the Court were to consider the USGS mapping data, it is, by its own definition, inconclusive here. Indeed, USGS admonishes—as set forth in the very Technical Support Document Defendants cite, *see* Mot. Ex. D[16]—that its mapping *cannot* be used alone for assessing CWA jurisdiction: "Despite being the most comprehensive available datasets of their kind, . . . neither the [USGS National Hydrography Dataset nor the National Wetlands Inventory] were designed to be regulatory datasets, *both have certain known limitations*, and *neither can be*

[15] Defendants treat two parts of Lickinghole Creek separately. Whether it is appropriate for them to do so is a question that this Court need not answer at this stage. The Amended Complaint talks about both sections of Lickinghole Creek as Lickinghole Creek.

[16] Defendants ask the Court to take judicial notice of the Technical Support Document, but that document is lengthy, detailed, and, as the name suggests, highly technical. Yet, Defendants quote it selectively. Mot. at 13. The Court should deny their request, as Defendants only provided the Court with a three-page excerpt, *see* Mot. Ex. D, of the 564-page document, and failed even to provide a link to the complete version. Denying the request for judicial notice is particularly appropriate here where Defendants do not explain to the Court what a hydrography dataset is, what that dataset includes, nor how that data relates to their (premature) factual arguments.

used as a standalone tool to determine the full scope of Clean Water Act jurisdiction." *Id.* at 3. The United States did not use these resources this way. Rather, the United States uses USGS mapping as a starting point, and as one of many resources to show that the named stream exists and where it is located. The United States *pairs* its reference to USGS maps with additional allegations about other maps and datasets to allege that Lickinghole Creek flows relatively permanently. *See* Am. Compl. ¶ 74.

Thus, when the nature of the USGS mapping and the reasons for attaching it are properly considered, there is again no "contradiction" between the facts alleged and the documents. *See N. Ind. Gun & Outdoor Shows*, 163 F.3d at 455 (declining to apply the exhibits-prevail rule when, "[t]aken together," the court "concluded the statements and letter did not contradict one another"). Again, "this is not a situation in which it is readily apparent that dismissal is appropriate because the document attached to the complaint negates the claim." *Hartford Fire Ins. Co.*, 838 F. App'x at 744 (cleaned up). The Amended Complaint's factual allegations about Lickinghole Creek are consistent with a nuanced, scientific evaluation considering multiple lines of evidence. Defendants' mischaracterization of the USGS mapping—using screenshots of data layers on which the United States did not rely in first place—should be rejected.

The Court also should disregard Defendants' red herring argument about Unnamed Tributary 3, which is not at issue in the Amended Complaint. Defendants argue that, because the United States, in documents *outside* the Amended Complaint, identified Unnamed Tributary 3 as "intermittent" and that identification agrees with some USGS tools, the Court must accept Defendants' allegation that USGS mapping *definitively* shows that *a different tributary*, a 1.38-mile stretch of Lickinghole Creek, is not perennial. This argument is full of holes. To start, the United States' evaluation of Unnamed Tributary 3 is, in no way, a "basis for" our claim, and

Defendants' argument for its inclusion—that they can rely on it because the United States "relies on its May 16, 2024, Site Inspection" in the Amended Complaint, Mot. at 14 n.9—stretches the "exhibits-prevail" rule to the point of distortion. *See Goines*, 822 F.3d at 166. An assessment of Unnamed Tributary 3—a different tributary not mentioned in the Amended Complaint—does not create a factual dispute as to Lickinghole Creek, let alone support dismissal of the Amended Complaint. More importantly, Defendants again ignore the Amended Complaint's allegations, which must be taken as true and flatly contradict Defendants' assertions. *See* Am. Compl. ¶ 74.

In short, Defendants' arguments defy common sense. They erroneously argue that because the USGS mapping and the United States' inspection results agree as to a different tributary, their mischaracterization of the import of the map's identification of intermittent streams must be correct—even though the tool itself *expressly* disclaims that it can be used alone for this purpose and despite the multiple other lines of evidence pleaded in the Complaint. The Court should reject Defendants' arguments.

II. Seasonal streams may be relatively permanent.

This Court does not need to reach the question whether streams that do not contain year-round flow may be relatively permanent under *Rapanos* and *Sackett* because the United States alleges, first and foremost, that the tributary Wetland A abuts is (or was, prior to Defendants' impacts) *perennial*, which, for purposes of the Amended Complaint means "year-round." *Id*. ¶ 73. As explained above, the Court need not and should not accept Defendants' invitation to resolve factual disputes at the motion to dismiss stage. The Amended Complaint never alleges that the relevant tributary is "intermittent." It alleges, in the alternative, that Unnamed Tributary 1 and Lickinghole Creek flow "perennially *or at least seasonally*." *Id*. ¶¶ 69, 74 (emphasis added). To the extent the Court decides to reach the United States' alternative pleading that

Unnamed Tributary 1 and Lickinghole Creek flow at least seasonally, the Amended Complaint is consistent with the instruction from *Rapanos* that "relatively permanent" waters do not necessarily exclude "seasonal rivers." *Rapanos*, 547 U.S. at 732 n.5. Thus, the motion to dismiss should be denied.

A. *Rapanos* and *Sackett* do not exclude waters that flow less than continuously.

While the Court in *Rapanos* did not quantify what duration, volume or frequency of flow would qualify as "relatively permanent," the *Rapanos* plurality opinion—adopted by the *Sackett* court—is clear that relative permanence (and, thus, the scope of the CWA) is not limited to waters with continuous, year-round flow.

The Court makes this clear in a number of ways. First, in a passage quoted in *Sackett,* the *Rapanos* plurality expressly distinguishes between "relatively permanent, standing *or* continuously flowing bodies of water"—using the conjunctive "or" to distinguish "relatively permanent" flow from continuous flow—and extends CWA coverage to all three. 598 U.S. at 671 (*quoting Rapanos,* 547 U.S. at 739) (emphasis added). Second, the *Rapanos* plurality states that its decision does "not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." *Rapanos,* 547 U.S. at 732 n.5. In other words, waters with "no flow during dry months" can be "relatively permanent." *Id.*[17]

Finally, in using the term "intermittent," the Court clearly did not limit CWA coverage to waters with year-round flow. The *Rapanos* plurality declined to assign any definition to the term "intermittent," much less adopt the definition Defendants use. *Id.* The *Rapanos* plurality opinion

[17] In other words, a tributary need not be "perennial," i.e., year-round, to qualify as "relatively permanent." Note, also, that the terms "intermittent" and "seasonal" could be used interchangeably, since a flow regime that is "seasonal" could be categorized scientifically as "intermittent," as some resources define that term, because it flows less than perennially.

distinguishes "streams, oceans, rivers, and lakes" from "channels through which water flows intermittently or ephemerally," *id.* at 739 (cleaned up), but specifically disclaims adopting any definition of those terms, *id.* at 732 n.5. In explaining its standard, the *Rapanos* plurality contrasted relatively permanent waters with "streams whose flow is '[c]oming and going at intervals . . . [b]roken, fitful,' or 'existing only, or no longer than, a day; diurnal . . . short-lived.'" *Id.* (citation omitted). In other words, the Court contrasted "relatively permanent" waters with flow regimes far less than "seasonal," as the Amended Complaint uses that term. The plurality recognizes that "scientifically precise distinctions between 'perennial' and 'intermittent' flows are no doubt available," but declines to opine on those scientific definitions and *explicitly* finds it had "no occasion" then "to decide exactly when the drying-up of a streambed is continuous and frequent enough to disqualify the channel" as waters of the United States. *Id.* Use of the term "intermittent" in USGS mapping—which USGS itself says does not conform with CWA regulatory terminology—cannot be dispositive of whether a water is "relatively permanent" under *Sackett* or *Rapanos*.

B. Applying *Rapanos*, courts have found seasonal streams to be waters of the United States.

Courts applying this standard have consistently found that relatively permanent flow does not have to be year-round. Several courts have concluded that "seasonal" flow qualifies. *See, e.g.*, *United States v. Moses*, 496 F.3d 984, 985, 991-93 (9th Cir. 2007) (holding that in *Rapanos* "the Supreme Court unanimously agreed that intermittent streams (at least those that are seasonal) can be waters of the United States" and upholding verdict that stream that flowed during a two-month period was a "water of the United States"); *United States v. Brink*, 795 F. Supp. 2d 565, 578 (S.D. Tex. 2011) (applying *Rapanos* standard and finding water was a "'seasonal' creek over which the Corps has jurisdiction, and not simply an 'intermittent' and

'ephemeral' waterway."); *Mlaskoch*, 2014 WL 1281523, at *17 (finding tributaries relatively permanent based on direct observation of flow over three months, a reasonable inference of flow in a prior month, and the presence of ordinary high-water marks and beds and banks); *S.F. Baykeeper v. City of Sunnyvale*, No. 5:20-cv-00824-EJD, 2023 WL 8587610, at *4 (N.D. Cal. Dec. 11, 2023) (explaining that "having a seasonally intermittent flow" to a water of the United States "qualifies as 'relatively permanent' under *Sackett* and *Rapanos*").

Other courts, including within this Circuit, have found tributaries that flow for at least two or three months of the year satisfy the relatively permanent standard. *See Foster v. EPA*, No. 2:14-cv-16744, 2019 WL 4145583, at *21 (S.D. W. Va. Aug. 29, 2019) (collecting cases). Indeed, the Fourth Circuit has twice accepted federal determinations (which applied previous agency guidance) that tributaries were relatively permanent in these circumstances. *See Precon Devel. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 288 (4th Cir. 2011) (accepting the government's conclusion that a ditch was relatively permanent because photographs demonstrated it had flowing water from February through April); *Deerfield Plantation*, 501 F. App'x at 271-72, 273-75 (not disturbing determination that two tributaries were waters of the United States where they had "continuous flow at least seasonally (e.g., typically 3 months)").

To the extent Defendants argue that only seasonal *rivers* may be waters of the United States, *see* Mot. at 23, 24 (citing *United States v. Sharfi*, No. 21-CV-14205, 2024 WL 4483354, at *12 (S.D. Fla. Sept. 21, 2024)), they are mistaken. Neither *Rapanos* nor *Sackett* provides any guidance as to how to distinguish a "river" from a "stream," and the decisions use the terms interchangeably. *See, e.g.*, *Rapanos,* 547 U.S. at 732-33 (explaining that a dictionary definition of "waters" "refers to water as found in 'streams,' 'oceans,' 'rivers,' 'lakes,' and 'bodies' of

water 'forming geographical features.'").[18] Defendants and the *Sharfi* decision create a line-drawing problem between types of waters that the *Rapanos* plurality does not raise or resolve, and one that is not appropriately resolved on a motion to dismiss. Moreover, *Sharfi* conflicts with the *Rapanos* plurality's clarification that the relatively permanent standard, adopted in *Sackett*, includes those waters "which contain continuous flow during some months of the year but no flow during dry months." 547 U.S. at 733 n.5. *Sharfi* is unpersuasive, out-of-circuit, and contradicted by years of jurisprudence interpreting *Rapanos* to extend to seasonal tributaries.

C. *Sackett* has not changed how the "relatively permanent" standard applies.

In *Sackett*, the Supreme Court adopted without change the *Rapanos* plurality's relatively permanent test. 598 U.S. at 671 (*quoting Rapanos,* 547 U.S. at 739). The decision did not purport to overrule the many decisions applying the *Rapanos* plurality's test since 2006.

Unsurprisingly, courts that have considered the relatively permanent test after *Sackett* have found that the standard for these fact-specific determinations is the same. *See, e.g.*, *United States v. Wolford*, No. C18-0747 TSZ, 2023 WL 8528643, at *2 (W.D. Wash. Dec. 8, 2023) (rejecting defendants' attempt to vacate a consent decree based on *Sackett* because they had the opportunity to contest jurisdiction under the same standard and did not); *City of Sunnyvale*, 2023 WL 8587610, at *4 (finding "that *Sackett* does not alter its conclusion that the remaining waters are [waters of the United States]—protection still exists for seasonal rivers, creeks, and streams that are tributaries to covered waters.").[19]

[18] USGS does not define these "generic" terms and, in fact, classifies "[a]ll 'linear flowing bodies of water'" as "streams" in its Geographic Names Information System. *See* USGS, *What is the difference between "mountain," hill," and "peak;" "lake" and "pond;" or "river" and "creek?"* (updated June 21, 2023), available at https://perma.cc/G4EL-4ZHP.

[19] Defendants' only "authority" to the contrary is a single law review article. Mot. at 17.

The analysis in *City of Sunnyvale*, 2023 WL 8587610, at *4, is particularly apt here. There, the court denied a motion for reconsideration premised on *Sackett*, explaining that "a seasonally intermittent flow" to a water of the United States "qualifies as 'relatively permanent' under *Sackett* and *Rapanos*." *Id.* The court explained that the creeks at issue "clearly differ from the 'ordinarily dry channels through which water occasionally or intermittently flows' or the 'transitory puddles or ephemeral flows of water' referenced in *Rapanos*" because they "flow intermittently in the sense that they flow seasonally, whereby they contain a continuous flow during some months and no flow during dry months, and more than in direct response to precipitation." *Id.* The same is true here.

In short, the "fossilized rule" here is that relatively permanent tributaries convey CWA jurisdiction. *Cf.* Mot. at 1, 11, 17. That is what the Amended Complaint alleges with sufficient facts to support those allegations. The Court should deny Defendants' motion.

III. If inclined to grant the Motion, the Court should do so with leave to amend.

If the Court is inclined to grant Defendants' motion, it should do so without prejudice so that the United States may amend its complaint in line with the Court's ruling. The United States painstakingly amended its allegations to address the Court's prior concerns. Should the Court decide that additional pleading is necessary for another reason, the United States requests the opportunity to address any shortcomings given the important environmental concerns at issue.

CONCLUSION

The Amended Complaint alleges a plausible claim for relief. This Court should reject Defendants' efforts to dispute facts at the pleading stage (again) and deny their motion in full.

Dated: January 17, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/ *Amanda V. Lineberry*
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