

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
SOUTHERN DIVISION  
No. 7:01-CV-36-BO (3)

NORTH CAROLINA SHELLFISH )  
GROWERS ASSOCIATION and )  
NORTH CAROLINA COASTAL )  
FEDERATION )  
 )  
Plaintiffs )  
 )  
vs. )  
 )  
HOLLY RIDGE ASSOCIATES, L.L.C., )  
And JOHN A. ELMORE )  
 )  
Defendants )  
\_\_\_\_\_ )

**PLAINTIFFS’ MEMORANDUM  
OF LAW IN SUPPORT OF  
PARTIAL SUMMARY  
JUDGMENT ON LIABILITY**

Plaintiffs have moved for partial summary judgment on Defendants’ liability for discharging pollutants from point sources into waters of the United States. This Memorandum describes the undisputed facts and the abundant legal authority that support the motion.<sup>1</sup>

**STATEMENT OF FACTS**

Plaintiffs refer to and incorporate by reference the general historical facts concerning the Defendants’ activities on the Morris Landing Tract and Plaintiffs’ interests in those activities that are set forth in Plaintiffs’ Memorandum of Law in Support of Motion for Summary Judgment on Standing and the evidentiary materials submitted with these motions. Additional facts pertinent to the specific issues of jurisdiction and liability under Clean Water Act (“CWA”) Section 402, 33 U.S.C. § 1342, for discharges of pollutants from point-sources without a permit, and under

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<sup>1</sup> Plaintiffs have also moved for summary judgment on standing. The grounds for that motion are set out in a separate memorandum of law. Three volumes of exhibits are submitted in support of both motions.

CWA Section 404, 33 U.S.C. § 1344, for discharges of fill material in wetlands, are set forth in connection with each of those arguments below. Other issues and theories not presented in these materials are reserved for trial, as specified in this Memorandum.

### ARGUMENT

The standard for addressing a motion for summary judgment is set out in Plaintiffs' Memorandum of Law in Support of Summary Judgment on Standing, filed contemporaneously with this Memorandum.

**I. DEFENDANTS' ACTIVITIES ARE SUBJECT TO THE JURISDICTION OF THE CLEAN WATER ACT BECAUSE THEY DISCHARGED AND CONTINUE TO DISCHARGE POLLUTANTS INTO "WATERS OF THE UNITED STATES."**

**A. "Waters of the United States" Has Been Interpreted Broadly.**

Clean Water Act jurisdiction for discharges of pollutants, covered by § 402 of the Act, 33 U.S.C. § 1311, and dredged or fill material, covered by § 404, 33 U.S.C. § 1344, is predicated on the discharges occurring in "waters of the United States." "Waters of the United States" is defined broadly in both the United States Environmental Protection Agency ("EPA"), United States Army Corps of Engineers ("Corps") regulations as including:

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;**
- (2) All interstate waters, including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands,** sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
  - (i) Which are or could be used by interstate or foreign travelers for recreation or other purposes;
  - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
  - (iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

**(4) All impoundments of waters otherwise defined as waters of the United States under this definition;**

**(5) Tributaries of waters identified in paragraphs (a) through (d) of this definition;**

(6) The territorial seas; and

**(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.**

33 C.F.R. § 328.3(a) (Corps); 40 C.F.R. § 122.2 (EPA) (emphasis added). “Wetlands,” in turn, are defined as lands 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. § 323.2(c); 40 C.F.R. § 122.2.

The statutory and regulatory provisions defining “waters of the United States” have been interpreted broadly to fulfill the purpose of Congress “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” CWA § 101, 33 U.S.C. § 1251. In the landmark case of United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), the Supreme Court upheld the Corps’ regulation that extended the Corps’ reach to “all wetlands adjacent to navigable or interstate waters and their tributaries.” *Id.* at 130. In doing so, the Court recognized that Congress sought to protect water quality and aquatic ecosystems and that the “regulation of activities that cause water pollution cannot rely on ... artificial lines ... but must focus on all waters that together form the entire aquatic ecosystem.” *Id.* at 132-33 (quoting 42 Fed. Reg. 37128 (1977)). Thus, the Court found that the Corps’ conclusion “that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water,” *id.* at 134, is a permissible construction of the Act.

Other courts, both before and after Riverside Bayview Homes, have examined the legislative history of the Act and similarly concluded that waters that are not themselves navigable in fact may properly fall under the jurisdiction of the CWA. See e.g., United States v. Eidson, 108 F.3d 1336, 1341 (11<sup>th</sup> Cir. 1997)(“Congress intended to regulate the discharge of pollutants into all waters that may eventually lead to waters affecting interstate commerce.”); Texas Mun. Power Agency v. EPA, 836 F.2d 1482, 1487 (5<sup>th</sup> Cir. 1988)(“[The definition of waters] is expansive and, in keeping with the intent of Congress, the courts construe it liberally to give the broadest possible reach to EPA regulations”). The Sixth Circuit found as early as 1974,

It would, of course, make a mockery of [Congress’ interstate commerce] powers if its authority to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste.

United States v. Ashland Oil, 504 F.2d 1317, 1326 (6<sup>th</sup> Cir. 1974). Continuing this trend, the Eleventh Circuit in 1997 found in Eidson that CWA jurisdiction extends to man-made tributaries as well as natural routes and that “there is no reason to suspect that Congress intended to exclude from ‘waters of the United States’ tributaries that flow only intermittently. Pollutants need not reach interstate bodies of water immediately or continuously in order to inflict serious environmental damage.” 108 F.3d at 1342.

The Supreme Court, in its recent decision in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001)[hereinafter SWANCC], reaffirmed the broad holdings of Riverside Bayview Homes and its progeny even as it invalidated the “Migratory Bird Rule” as beyond the scope of the authority allowed the Corps by

Congress.<sup>2</sup> In SWANCC, the Court was called on to determine whether seasonal ponds which formed in depressions at an abandoned gravel mine and were used as habitat by migratory birds, while not wetlands, nevertheless fell under the jurisdiction of the CWA. Id. at 164-65. Again noting “Congress’ concern for the protection of water quality and aquatic ecosystems,” the Court affirmed Riverside Bayview Homes’ support for regulation of wetlands “inseparably bound up with the ‘waters’ of the United States,” excluding from federal regulation only those wetlands without a “significant nexus” to navigable waters. Id. at 167-68.

Most courts, including the Fourth Circuit, have read SWANCC as invalidating only the “Migratory Bird Rule” and have continued to apply the CWA broadly to “waters of the United States” as defined by 40 C.F.R. § 122.2 (EPA) and 33 C.F.R. § 328.3 (Corps). See e.g., Headwaters v. Talent Irrigation Dist., 243 F.3d 526 (9<sup>th</sup> Cir. 2001)(finding irrigation canals are tributaries and not isolated waters as in SWANCC); Cnty. Ass’n for Restoration of the Env’t v. Henry Bosma Dairy, 305 F.3d 943 (9<sup>th</sup> Cir. 2002)(upholding connection to waters through canals and drains); United States v. Lamplight Equestrian Ctr., 2002 U.S. Dist. LEXIS 3694 (N.D. Ill. March 8, 2002)(finding drainage ditches establish adjacency for regulation of wetlands);<sup>3</sup> Cal. Sportfishing Prot. Alliance v. Diablo Grande, Inc., 209 F. Supp. 2d 1059 (E.D. Cal. 2002)(holding that SWANCC did not affect regulation of tributaries and that flow through underground pipeline does not break connection to waters); United States v. Buday, 138 F. Supp.

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<sup>2</sup> Under the “Migratory Bird Rule,” the Corps asserted jurisdiction over isolated intrastate wetlands used as habitat by migratory birds because such use “could affect” interstate commerce under 33 C.F.R. § 328.3(a)(3). The Fourth Circuit in United States v. Wilson, 133 F.3d 251 (4<sup>th</sup> Cir. 1997), decided prior to SWANCC, held that the “could effect” language of 33 C.F.R. § 328.3(a)(3) exceeded Congress’ power under the Commerce Clause. Neither the Migratory Bird Rule or the “could effect” part of subsection (a)(3) is at issue in this case.

<sup>3</sup> Pursuant to Local Rule 5.04, copies of all unpublished opinions are being furnished to the court and to opposing counsel as attachments to this Memorandum.

2d 1282 (D. Mont. 2001)(finding jurisdiction over wetlands adjacent to tributaries distant from but connected to navigable waters); Aiello v. Brookhaven, 136 F. Supp. 2d 81 (E.D.N.Y. 2001)(finding jurisdiction over pond connected to navigable waters through tributaries). But see Rice v. Harken, 250 F.3d 264 (5<sup>th</sup> Cir. 2001); United States v. Newdunn Assoc., 195 F. Supp. 2d 751 (E.D. Va. 2002), *appeal pending*, 4<sup>th</sup> Cir. Nos. 02-1480, 02-1594; United States v. RGM Corp., 222 F.Supp. 2d 780 (E.D. Va. 2002); United States v. Rapanos, 190 F.Supp. 2d 1011 (E.D. Mich. 2002), *appeal pending*, 6<sup>th</sup> Cir. No. 02-1377. Notably, the Fourth Circuit, in United States v. Interstate General Co. (IGC), 2002 U.S. App. LEXIS 13232 (4<sup>th</sup> Cir., July 2, 2002), explicitly rejected the claim that SWANCC effected any change in the law other than invalidation of the Migratory Bird Rule.

Under the language of the CWA and its implementing regulations, as well as under the extensive case law interpreting these broadly to effectuate the intent of Congress, Defendants in this case have clearly caused discharges of both pollutants and dredged or fill material into “waters of the United States” without a permit, thereby violating the CWA.

**B. Waters on the Morris Landing Tract are Waters of the United States.**

The undisputed facts demonstrate that Defendants have discharged pollutants and dredged or fill material into four different types of “waters of the United States” on the Morris Landing Tract: wetlands adjacent to navigable in fact waters, tributaries of navigable in fact waters, wetlands adjacent to tributaries of navigable in fact waters, and impoundments of tributaries of navigable in fact waters. These waters are all included in EPA’s jurisdictional definition of “waters of the United States” under 40 C.F.R. § 122.2(d),(e) and (g), and in the Corps’ definition at 33 C.F.R. § 328.3(a)(4),(5) and (8).

The primary navigable-in-fact water associated with the Tract is Stump Sound, which includes the Atlantic Intracoastal Waterway (“AIWW”). (Wilgis Decl. ¶4, provided as Ex. 9). Stump Sound, on which the HRA property fronts, is navigable and classified by the State of North Carolina as an “SA” water, indicating that it is a saltwater of high quality suitable for the production and harvesting of shellfish for human consumption. (Wilgis Decl. ¶¶3, 4) The tidal waters of Stump Sound are used regularly for fishing, shellfishing, and other commercial navigation. (Wilgis Decl. ¶¶2,4.).<sup>4</sup>

The Morris Landing Tract is hydrologically connected to Stump Sound by two primary paths. First, the southern portion of the Tract drains directly to the tidal marsh that is part of Stump Sound. The lake on the Tract also drains to the tidal marsh by way of a drainage outlet which leaves the lake, travels by pipe under the road, and down a drainageway to Stump Sound.<sup>5</sup> The rest of the Tract drains to Stump Sound via a series of tributaries which flow off the tract to connect with Batts Mill Creek, another navigable-in-fact waterway, which then flows into Stump Sound. Any discharges occurring in or to the tidal marsh adjacent to Stump Sound, in or to the lake that drains to Stump Sound, in or to tributaries that connect to the AIWW via Batts Mill Creek, or in or to wetlands adjacent to those tributaries are discharges occurring in “waters of the United States” for purposes of the CWA.

1. Wetlands Adjacent to Stump Sound.

Regulations define “adjacent” as “bordering, contiguous, or neighboring” and explicitly provide that “[w]etlands separated from other waters of the United States by man-made dikes or

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<sup>4</sup> The Memorandum in Support of Plaintiffs’ Motion for Summary Judgment on Standing summarizes further evidence regarding the uses and navigability of these waters.

<sup>5</sup> See Morris Landing Tract Stormwater Management Plan, prepared by Defendants’ expert Davis Fennell of Cape Fear Engineering, dated 27 Nov. 2001, and provided as Ex.6.

barriers, natural river berms, beach dunes and the like are adjacent wetlands.” 33 C.F.R. § 328.3(c); 40 C.F.R. § 122.2. Citing this definition and the Riverside Bayview Homes standard of “reasonable proximity,” the Fourth Circuit has stated that “the statute does not limit adjacency to literal bordering.” Hobbs v. United States, 1991 U.S. App. LEXIS 27696, \*14-15 (4<sup>th</sup> Cir. 1991) (citing 424 U.S. at 133-34). See also United States v. Banks, 115 F.3d 916, 920-921 (11<sup>th</sup> Cir. 1997)(finding adjacency to water approximately one half mile away based on groundwater connection, with surface connection during severe storm events); United States v. Ciampitti, 583 F. Supp. 483, 494 (D.N.J. 1984)(finding adjacency despite railroad embankment which may prevent tidal flow to wetlands), *aff’d*, 772 F.2d 893 (3d Cir. 1985).

According to Defendants’ version of the wetland boundaries in the site, as depicted on Cape Fear Engineering’s map WET-1,<sup>6</sup> Ditch 17, located on the southern portion of the tract, is excavated at least partly in wetlands that directly border Stump Sound. The outfall of Ditch 17 is in wetlands and its close proximity to the navigable waters of Stump Sound is shown in photographs taken by EPA official Mike Wylie. (Wylie Field Notes at 7, and photographs identified as WP61.17.P96.<sup>7</sup> Water leaves the ditch continuously and enters undisturbed portions of the tidal marsh. (Wylie Field Notes at 7; WP64.D17.P103, P104, P105.) Given the broad reading of adjacency supported by the regulatory definition and the courts, there is no question

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<sup>6</sup> The map called WET-1 was prepared by Defendants’ expert Davis Fennell. It shows certain features of the property that are generally undisputed, such as the location of the property boundaries, roads, and the ditch excavation. The map also shows Defendants’ version of wetland boundaries, which are disputed. WET-1 is provided as Ex. 7.

<sup>7</sup> Wylie photographs are labeled by the specific waypoint and ditch at which they were taken and the photo number for that inspection visit. For example, the designation WP19.D4.P29 identifies a photo taken at waypoint 19 on Ditch 4 which has been labeled photo 29. Field notes accompanying these photos explain what is depicted. Mr. Wylie’s field notes, cited photographs, and a map showing way points at which the photographs were taken are collectively marked Ex. 19.

that any discharge into the wetland portions of Ditch 17, or from Ditch 17 into the tidal marsh, is a discharge into a wetland adjacent to a navigable in fact water.

2. Tributaries of Navigable in Fact Waters

The Morris Landing Tract is also connected to Stump Sound through a series of tributaries. Cypress Branch is the largest natural tributary on the Tract, running alongside much of the Tract and intersecting with or coming within close proximity to the outfalls of several of the ditches. When Cypress Branch leaves the Tract, it flows southwestward to intersect with Batts Mill Creek, a navigable-in-fact creek up to its intersection with Cypress Branch. (See generally Wilgis Decl. ¶¶13-22; Fennell Depo. at 42-51, provided as Ex. 20; WET-1.) Although the extent of channelized surface flow between Cypress Branch and Batts Mill Creek is disputed, the fact that a continuous hydrological connection and at least intermittent surface flow exists and has the potential to transport pollutants to navigable waters is undisputed and is abundantly clear from official government publications, evidence presented by Plaintiffs, and admissions of Defendants' expert witnesses.

Defendants stipulated this hydrological connection in the Contested Case they initiated in the North Carolina Office of Administrative Hearings, challenging violations and penalties issued against them under the North Carolina Sedimentation Pollution Control Act. In Factual Stipulation 2 from their Pretrial Order, Defendants agreed, "The tract drains to the AIWW and to Cypress Branch, a perennial stream that forms the southern boundary of much of the tract. Cypress Branch is a tributary of Batts Mill Creek, which flows into the AIWW..."<sup>8</sup> While Defendants have appealed the final agency decision affirming Defendants' violations of the

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<sup>8</sup> This stipulation is set forth in the Recommended Decision adopted by NC DENR as its Final Agency Decision, at page 11, and is attached to the Declaration of Todd Miller as Attach. A. The Miller Declaration is provided as Ex. 8.

SPCA, they have not sought to alter this stipulation nor raised it as an issue on appeal. It is thus binding on them in those related proceedings and should bind them here as well.

- a. Cypress Branch is and long has been recognized as a “blue line” stream.

According to official federal government documents, Cypress Branch is a continuous “blue line” stream from upstream of the Morris Landing Tract, along the boundary of the Tract, and to its connection with Batts Mill Creek. (Wilgis Decl. ¶14 & Attach. A, U.S. Geological Survey topographic map; Wilgis Decl. ¶15 & Attach. B, Onslow County Soil Survey Map prepared by U.S. Dep’t of Agric. and Natural Res. Conservation Serv.) Cypress Branch also has been classified as a stream with the water quality classification of “SA” by the State of North Carolina. (Wilgis Decl. ¶14). Such official recognition has been used to help establish jurisdiction under the CWA. See e.g. United States v. TGR Corp., 171 F.3d 762, 765 (2<sup>nd</sup> Cir. 1999)(aerial photos and maps helped identify brook as natural water course); United States v. Pozsgai, 1991 U.S. Dist. LEXIS 8255, \*4 (E.D.Pa. 1991) (aerial photos support finding of hydrological connection).

- b. The presence of a “wetland flat” in Cypress Branch behind the former mill pond dam does not sever the hydrological connection between Cypress Branch and Batts Mill Creek.

Just as it is undisputed that official documents have historically recognized Cypress Branch as a continuous stream, (Fennell Dep. at 45-49) it is similarly undisputed that a mill dam was at some point constructed to impound Cypress Branch in order to create Batts Mill Pond. (Id. (admitting that dams typically go at a place where they can impound water and create a pond); Wilgis Decl. ¶19 & Attach. D.) The dam and the mill pond did not prevent Cypress Branch from being shown as continuous from above the Tract to Batts Mill Creek on official government maps. (See e.g., Wilgis Decl. ¶14 & Attach. A (1997 U.S.G.S. topographical map);

¶15 & Attach. B (1983 Onslow County Soil Map); ¶19 & Attach D (1984 land survey).) Nor did the dam or mill pond eliminate CWA jurisdiction. See 33 C.F.R. § 328.3(a)(4)(waters of the U.S. include “impoundments of waters otherwise defined as waters of the United States”); 40 C.F.R. § 122.2(d). While the dam was in place, sediment accumulated behind the structure, slowing the flow of water and creating a wetland. (Fennell Dep. at 43-44; Wilgis Decl. ¶18.) Continuous channelized flow began to be restored after the dam was breached. (Fennell Dep. at 45; Wilgis Decl. ¶18; Daniel Smith Dep. at 134-35, provided as Ex. 21.)

Defendants’ expert and others who have visited the site have noted the existence of flow through the location of the old mill dam and on to the navigable portion of Batts Mill Creek. (Fennell Dep. at 45 (acknowledging unimpeded channel through old dam site); Wilgis Decl. ¶17 (“Cypress Branch is a continuous channel four to six feet deep up to and beyond the old mill dam and is navigable by canoe in that section (although down tree trunks cross the waterway in some places). In the vicinity of the dam, the water is approximately chest-deep.”) In the swampy area formed by sediment accumulation behind the old mill dam, the stream flattens out and becomes a braided system for a distance before it returns to a single channel. (Wilgis Decl. ¶¶20-21.) Daniel Smith, a North Carolina Department of Water Quality staff member with expertise in stream origin determinations, testified that such braiding and spreading out into a wetland area “is a very natural stream [flow] response” and that in this situation where the dam was breached, he would expect the water level in the pond to decrease and the stream channels to “move around in these flat bottoms and braid,” reestablishing a channel over time. (D. Smith Dep. at 132, 135). Defendants’ expert agreed that this is a common characteristic of low-lying coastal streams and acknowledged such braiding occurs on Cypress Branch itself upstream from the old mill pond basin. (Fennell Dep. at 49.)

Regardless of whether this braided network is named Cypress Branch or is the beginning of an “unnamed tributary,” with Cypress Branch dispersing and flooding the wetland area from which the new tributary emerges (Fennell Dep. at 49), this hydrological network provides the type of connection found by other courts to establish jurisdiction under the CWA. As an initial matter, Defendant’s expert Fennell admits that what he calls a “new channel” is consistent with the historical pathway of Cypress Branch. (Fennell Dep. at 45-49.) Even if it is a separate stream, flow through multiple tributaries or over great distance does not undermine CWA jurisdiction. See e.g., IGC, 2002 U.S. App. LEXIS 13232, \*5 (flow from headwaters of small streams into larger creeks, into Potomac River, into Chesapeake Bay); Eidson, 108 F.3d at 1342 (flow from sewer drain to drainage ditch, to drainage canal, to Picnic Island Creek, to Tampa Bay); Buday, 138 F. Supp. at 1283 (flow from Fred Burr Creek to Clark Fork River which travels 190 miles before becoming navigable). Flow that alternates between surface and underground flow is also sufficient to establish CWA jurisdiction. See TGR Corp., 171 F.3d at 765 (finding jurisdictional water where brook channeled into underground pipes in places); Quivira Mining Comp. v. United States, 765 F.2d 126, 129-30 (10<sup>th</sup> Cir. 1985)(finding jurisdiction on continuous underground flow and occasional surface flow); Cal. Sportfishing Prot. Alliance v. Diablo Grande, 209 F. Supp.2d at 1075-76 (tributary flowing through underground pipeline on way to navigable water does not defeat hydrological connection).

Furthermore, Fennell admits that “[s]torm water discharge from higher return period storm events I believe will fill these low-lying areas and eventually discharge [at the channel leaving the old mill basin].” (Fennell Dep. at 50). Such intermittent flow, which is capable of flushing pollutants downstream during rain events, is sufficient for CWA jurisdiction by itself. “Pollutants need not reach interstate bodies of water immediately or continuously in order to

inflict serious environmental damage....Rather, as long as the tributary would flow into the navigable body of water ‘during significant rainfall, it is capable of spreading environmental damage and is thus a ‘water of the United States’ under the Act.” Eidson, 108 F.3d at 1342 (drainage ditch that flowed only during high tide and heavy rains was tributary). See also Headwaters, 243 F.3d at 534 (occasional blockage of irrigation canals doesn’t prevent jurisdiction); 33 C.F.R. § 328.3(a)(3) (listing “intermittent streams” as potentially jurisdictional).

A district court in Illinois also recently granted summary judgment in a case similar to the one before this court, in which CWA jurisdiction was found over wetlands adjacent to drainage ditches that ended fifty feet from a drainage swale connecting to navigable waters. Noting that “[w]ater need not flow in an unbroken line at all times to constitute a sufficient connection to a navigable water or its tributaries,” the court found jurisdiction because the defendants admitted that “at least sometimes, [there was] an unbroken line of water from the wetlands [to the tributary].” Lamplight Equestrian, 2002 U.S. Dist. LEXIS 3694, \*21-23. The admissions of Defendants’ expert provide ample undisputed evidence that at least intermittently there is unbroken surface water flow from the Morris Landing Tract to Batts Mill Creek and Stump Sound.

c. “Tributaries” Includes Ditches Connected to Waters

As found repeatedly by numerous courts, tributaries need not be natural to be jurisdictional under the CWA. The Eleventh Circuit made clear in Eidson, “There is no reason to suspect that Congress intended to regulate only the natural tributaries of navigable waters. Pollutants are equally harmful to this country’s water quality whether they travel along man-made or natural routes.” 108 F.3d at 1342. See also, Headwaters, 243 F.3d at 533 (holding that SWANCC did not affect man-made tributaries’ status as waters); Lamplight Equestrian, 2002

U.S. Dist. LEXIS 3694 (finding drainage ditches tributaries). In accordance with extensive prior caselaw, all of Defendants' ditches which occasionally transport water to Cypress Branch are waters of the United States.

According to Defendants' expert Dr. Russell Lea, at least ditches 2, 9/10, and 11/12, flow to Cypress Branch, established as a tributary above. See Section II.A, infra (describing undisputed evidence of sediment discharging from the outfalls of ditch 2, 9/10, and 11/12). Because these ditches are themselves tributaries to Cypress Branch and part of the unbroken pathway which leads to the navigable in fact waters of Stump Sound, any discharges of pollutants into these ditches is a pollutant into "waters of the United States" and in violation of the Clean Water Act. Other ditches on the Tract are tributaries to the on-site lake, which as discussed below, is also a "water of the United States."

3. Wetlands Adjacent to Tributaries of Waters are also jurisdictional.

Just as CWA jurisdiction encompasses wetlands adjacent to navigable in fact waters and tributaries to navigable in fact waters, it also encompasses wetlands adjacent to tributaries of navigable in fact waters. The Supreme Court in Riverside Bayview Homes accepted this proposition when it held that "a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act." 474 U.S. at 135. The Fourth Circuit's ruling in IGC recently confirmed this interpretation and clarified that it was in no way undermined by SWANCC. 2002 U.S. App. LEXIS 13232, \*11(finding SWANCC limited to "Corps's jurisdiction over an *isolated* intrastate body of water"(emphasis in original)).

According to Defendants' wetlands map, wetlands directly adjacent to Cypress Branch extend along most of the southwestern boundary of the Tract, forming an expansive and largely

continuous network that extends throughout the Tract. Ditches 9/10 and 11/12 are depicted as ending at or in these adjacent wetlands. Ditch 4 is also partly excavated in these adjacent wetlands. Ditch 16 is excavated in wetlands adjacent to the on-site lake, which as described below, is also a water of the United States. While all ditches which flow to tributaries or impoundments of tributaries are themselves tributaries and hence “waters of the United States,” ditches excavated in wetlands adjacent to waters, are jurisdictional as both tributaries and wetlands, meaning that even with no surface flow they are themselves “waters of the United States.” 33 C.F.R. § 328.3(a); 40 C.F.R. § 122.2.

Furthermore, under the broad reading of adjacency endorsed by the EPA and Corps regulations and repeatedly by the courts, these wetlands are also adjacent to Batts Mill Creek. Just as wetlands border Cypress Branch along the southwestern border of the Tract, they continue to border Cypress Branch and Batts Mill Creek all the way down to Stump Sound. (See “Onslow County Wetland Functional Significance” map, Attach. E to Wilgis Decl.; Wilgis Decl. ¶22.) This continuous wetland area stretching from the Tract down to Batts Mill Creek and on to Stump Sound demonstrates that even if the Court were to find that Cypress Branch is not a tributary to navigable waters due to the mill basin wetland, CWA jurisdiction still exists over its adjacent wetlands.

#### 4. Impoundments of Tributaries to Navigable Waters

Finally, pursuant to 33 C.F.R. § 328.3(a)(4) and 40 C.F.R. § 122.2, “[a]ll impoundments of waters otherwise defined as waters of the United States under [the regulatory] definition” are also waters of the United States. Defendants’ maps WET-1 and SW-1 both depict an on-site lake located in the southern portion of the Morris Landing Tract that receives flow from ditches 13, 14, 15, and 16. Defendants’ stormwater map also depicts the drain connecting the lake directly

to Stump Sound.<sup>9</sup> Because the lake and its tributaries – ditches 13, 14, 15, and 16 – are “impoundments of waters” and also have a surface flow connection to Stump Sound, they are jurisdictional waters under the CWA.

For the foregoing reasons demonstrating that there are no material issues of fact to be tried, summary judgment should be granted establishing that Stump Sound, Batts Mill Creek, Cypress Branch, the on-site lake, wetlands adjacent to any of the waters listed here, all ditches excavated in such wetlands, and all ditches that drain to any of the waters listed here are “waters of the United States” under the meaning of the CWA, and hence subject to its jurisdiction. The undisputed facts establish that these ditches include at least 2, 4, 9/10, 11/12, 13, 14, 15, 16, and 17. Disputed facts remain concerning the full extent of the jurisdictional wetlands on the Tract and the extent of CWA jurisdiction over ditches 1, 3, 5, 7, and 8.

## **II. HRA HAS VIOLATED SECTIONS 301 AND 402 OF THE CWA BY DISCHARGING POLLUTANTS FROM POINT SOURCES TO THESE JURISDICTIONAL WATERS WITHOUT A PERMIT.**

The CWA prohibits the discharge of a pollutant to waters of the United States from a point source, except in compliance with a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to CWA Section 402. 33 U.S.C. §§ 1311(a). It is undisputed that Defendants have not obtained a discharge permit. (Defs.’ Ans. ¶46). To establish a violation of § 1311, Plaintiffs must prove that Defendants (1) discharged (2) a pollutant (3) from a point source (4) into waters of the United States. See Nat’l Wildlife Fed. v. Gorsuch, 693 F.2d 156, 165 (D.C.Cir. 1982). Waters of the United States has been discussed above. The remaining elements are analyzed below.

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<sup>9</sup> While WET-1 does not depict this drain, no evidence exists to show that the drain has somehow been disabled or otherwise broken the connection to navigable waters.

**A. Defendants' Have Discharged and Continue to Discharge Pollutants into Waters of the United States.**

To constitute the discharge of a pollutant, the CWA requires that the pollutant be added to waters of the United States. 33 U.S.C. § 1362(12)(A). Such an “addition” may be the introduction of new material, as where Defendants’ expert Dr. Lea testified that the sediment he observed at the terminus of Ditch 2 was “not [] native soil, [] it was new soil.” (Lea Dep. at 57, provided as Ex. 22.) The addition of pollutants to waters of the United States may occur, however, even if the material is not “new.”

The record is replete with undisputed evidence that sand and sediment have been discharged into waters of the United States. State and federal agency officials inspected the site and reported the absence of erosion controls and the presence of silt, sand, and sediment plumes at the termini of ditches and in wetlands and streams. As one example, an inspector with the NC Division of Land Resources reported that she observed a large sediment deposit at the terminus of Ditch 11/12, measuring 50 feet wide and one foot deep, that emptied into either Cypress Branch or a tributary of Cypress Branch. (NC Division of Land Resources inspection report of 9/10/99 and photos 13-17, provided as Ex. 1.) In another example, EPA enforcement staff documented that Ditch 4, which was excavated partly in a wetland, is filled with sediment and conveys sediment out of the ditch into a small stream channel. (Wylie Field Notes at 2-3; Photos WP19.D4.P29-30, WP21-22.D4.P33-35.) Photographs taken by EPA enforcement staff and the accompanying field notes and report further document the excessive sedimentation that occurred as a result of the ditching and grading of the Site. (See Wylie field notes and photos WP2.D1.P2, WP11.D2.P12 and 14 (over 4 feet of sediment accumulated), D2.P 18-21 (silt and sediment accumulated in blackwater stream), WP21.D4.P33 (over 4 feet of sediment in bottom of the ditch), WP30.D9.P43 (over 4 feet of sediment accumulated at rip-rap structure), WP41-

49.D11/12.P67-78 (sediment accumulating at and discharged downgradient of check dam), WP48.D.11/12.P77-78 (sediment accumulation and fan at confluence of ditch), and WP64.D17.P103 (ditch entering AIWW with 6-7 feet of sediment accumulated.) The EPA observations affirm that sediment has been deposited into streams and adjacent wetlands (Wylie Field Notes at 8 (“significant sedimentation of streams has been observed at several locations, including: the terminus of ditches 9/10, the terminus of ditch 2 and the lower loop off ditch 4”).)

HRA’s own experts made similar observations. Dr. Lea testified that at Ditch 2 and Ditch 9/10, sediment had moved from the termini of the ditches, through the sediment basins and streamside management zone, and had been deposited into Cypress Branch. (Ex. 23 at 1472-74; Ex. 22 at 57, 133.) He further confirmed that he had observed sediment leaving the ditches and entering the creek. (Ex. 22 at 116.) Dr. Lea also observed the deposition of sediment at the terminus of Ditch 11/12. Id. at 67. He testified that he observed the deposit of sediment from the ditch into a wetland. Id. at 71. Regarding Ditch 9/10, Dr. Lea states that there was a sediment deposit, and believed that sediment had been transported to the stream. Id. at 97-98.

Defendants’ expert James Spangler calculates that sediment from Ditch 11/12 may have flowed as much as 900 feet into adjacent wetlands, and that sediment from Ditch 9/10 may travel more than 600 feet from the terminus of the ditch. (Spangler Expert Report at 3-4, Ex. 24; Spangler Dep. at 96-98, Ex. 26.) Defendants’ consultant Gary Mitchell testified that his company documented several instances where sediment had accumulated at the outfalls of Ditches 9/10 and 11/12, depositing 90 feet of silt downstream into Cypress Branch in one instance, and depositing a sediment plume with dimensions of 30 feet in width and 12-18 inches deep into wetlands. (Mitchell Dep. at 151, 155, 157-63.) John Parker further testified that sediment had flowed 150-200 feet into a wetlands area as of December 17, 1999. (Parker Dep. at

80-81, Ex. 27.) He acknowledged that the site was not in compliance with the North Carolina Sediment and Erosion Control Act, as many of the ditches were too steep, unstabilized, and unvegetated, and the spoil piles had been left exposed. (Parker Dep. at 49-52, 74-75, 78.)

The massive sedimentation from the Morris Landing Tract is not the result of “natural erosion,” but rather the result of eroding and unstable ditch banks and spoil piles caused by the improper construction and maintenance of extensive drainage ditches. The numerous sediment traps (silt fences, check dams and risers) constructed on the Site are also discharging pollutants into waters of the United States. Several courts have addressed similar situations and ruled that where the actions of defendants caused the resuspension or redeposit of material, such actions constitute the addition of a pollutant within the meaning of the CWA. That many of the pollutants originated in the same waters into which they were subsequently discharged is of no consequence. See Rybachek v. EPA, 904 F.2d 1276, 1285 (9<sup>th</sup> Cir. 1990) (holding that redeposit of mine tailings was discharge of a pollutant because “even if the material discharged originally comes from the streambed itself, such resuspension may be interpreted to be an addition of a pollutant under the Act.”); Avoyelles Sportsman’s League, Inc. v. Marsh, 715 F.2d 897, 923 (5<sup>th</sup> Cir. 1983) (“The landowner’s redepositing activities would significantly alter the character of the wetlands and limit the vital ecological functions served by the tract.”); Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist., 13 F.3d 305, 308-09 (9<sup>th</sup> Cir. 1993) (holding that collecting and channelizing polluted surface water runoff from an abandoned mine through a dam structure into a reservoir constituted the discharge of a pollutant).

**B. The Substances Discharged on the Morris Landing Tract are Pollutants.**

The CWA defines pollutant as “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials,

heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” 33 U.S.C. § 1362(6). The ditches and other point sources that lace the Tract have delivered many substances to waters of the United States, including sand and sediment, fecal coliform, stormwater, and dredged and fill material. Each of these substances constitutes a pollutant under the CWA.

1. Sand and Sediment Are Pollutants That Have Been Discharged.

Sand and dirt, which are the primary components of sediment, are specifically listed as pollutants in the CWA and its regulations. See 33 U.S.C. § 1362(6); 40 C.F.R. § 122.2. Many courts have held that sediment and its components are pollutants under the CWA. See Driscoll v. Adams, 181 F.3d 1285, 1291 (11<sup>th</sup> Cir. 1999); Hudson River Fisherman’s Ass’n v. Arcuri, 862 F.Supp. 73, 76 (S.D.N.Y. 1994); Pronsolino v. Marcus, 91 F.Supp. 2d 1337, 1351 (N.D. Cal. 2000), *aff’d* 291 F.3d 1123 (9<sup>th</sup> Cir. 2002); Rybachek v. EPA, 904 F.2d 1276, 1285-86 (9<sup>th</sup> Cir. 1990); Matter of Alameda County Assessor’s Parcel Nos. 537-801-2-4 and 537-850-9, 672 F.Supp. 1278, 1284 (N.D. Cal. 1987); U.S. v. Bradshaw, 541 F.Supp. 880, 882 (D.Md. 1981).

2. Fecal Coliform Is a Pollutant That Has Been Discharged.

Fecal coliform is a biological material and thus a pollutant under the Act. 33 U.S.C. § 1362(6). Fecal coliform also is specifically listed as a conventional pollutant. § 1314(a)(4). As such, EPA and the States are required to develop ambient water quality standards setting the maximum allowable concentrations of fecal coliform for each water body classification pursuant to 33 U.S.C. § 1313, and fecal coliform is subject to effluent limitations for the issuance of NPDES permits pursuant to 33 U.S.C. § 1342(a).

Fecal coliform bacteria are present on the Site, originating from the droppings of birds, mammals, and other transitory animals. (Kirby-Smith Report ¶10.) Under natural (i.e., undisturbed) conditions, rainfall is consumed by vegetation or soaks into the soil, and thus would not transport bacteria to Batts Mill Creek and Stump Sound. *Id.* ¶13. The ditches serve to accelerate the transport of fecal coliform to adjacent waters, preventing the natural decomposition of the bacteria and resulting in higher bacterial loads in those waters. *Id.* ¶¶13-15, 18-21. Dr. Lea also testified that the ditches through the upland areas accelerate drainage, “pulling the surface water off that could have normally ponded on the site.” (Lea Dep. at 162.) See also United States v. Deaton, 209 F.3d 331, 336 (4<sup>th</sup> Cir. 2000) (“Given sufficient time, many ... of these pollutants will decompose, degrade, or be absorbed by wetland vegetation. When a wetland is dredged ... pollutants that had been trapped may suddenly be released.”) (citations omitted).

HRA’s ditching and draining of land leads to increased levels of fecal coliform bacteria in adjacent waters by bacteria flowing overland and through ditches when the land is disturbed and the normal flow patterns disrupted. (Kirby-Smith Report ¶¶18-21; Gilbert Decl. Attach. A at 1, 6 (suggesting increased fecal coliform counts in two areas of Stump Sound may have resulted from land disturbing activities).)<sup>10</sup> In fact, the most recent reports from the Shellfish Sanitation Section document marked increases in fecal coliform levels in Batts Mill Creek. (Gilbert Decl. at ¶11 & Attach. A, at 5. In a draft report summarizing fecal coliform sampling data from June 1997 through May 2002, Batts Mill Creek was found to have a 90<sup>th</sup> percentile fecal coliform count of 43 colonies per mL, the maximum allowable count for shellfish waters to remain open.

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<sup>10</sup> The report states: “It is possible that the installation of new sewer lines may have caused sufficient land disturbance to affect bacteriological results in the area near the swim bridge.” Gilbert Decl., Attachment A at 1, 5.

Id. If even more recent sampling data are factored in, the 90<sup>th</sup> percentile count is 45 and the area would be recommended for closure to shellfish harvesting. Id. at ¶11. By comparison, if the same method was applied to the data compiled in the report summary data for Stump Sound from November 1996 through February 1999, the 90<sup>th</sup> percentile fecal coliform count for Batts Mill Creek was 22. Id.

3. Stormwater is a Pollutant That Has Been Discharged.

Finally, stormwater itself is a pollutant under the CWA. 33 U.S.C. § 1342(p)(3)(A). As a matter of law, a permit is required for an industrial stormwater discharge, regardless of the pollutant load carried by the discharge, and regardless of the type of water (i.e., wetland, freshwater stream, or estuary) into which the water is discharged. Id.; see also 40 C.F.R. §§ 122.26(a)(6), (b)(14)(x); Natural Res. Def. Council v. U.S. EPA, 966 F.2d 1292 (9<sup>th</sup> Cir. 1992) (“[i]t is not necessary that storm water be contaminated or come into direct contact with pollutants; only association with any type of industrial activity is necessary”); Hughey v. JMS Dev. Corp., 78 F.3d 1523, 1525, n.1 (11<sup>th</sup> Cir. 1996) (“When rainwater flows from a site where land disturbing activities have been conducted, such as grading and clearing, it falls within [the] description” of “pollutant” under the CWA); San Francisco Baykeeper v. Tidewater Sand & Gravel Co., 1997 U.S. Dist. LEXIS 22602, \*19 (N.D.Ca. 1997) (holding that any discharge of even unpolluted stormwater associated with an industrial activity requires a permit).

Stormwater is collected in the Site’s ditches and conveyed away from the site into waters of the United States, including Cypress Branch, Stump Sound, the on-site lake, and the adjacent wetlands.

**C. Point Sources are Responsible for the Discharge of Pollutants.**

The CWA defines a “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). As with other CWA provisions, the definition of a point source should be broadly interpreted to effectuate the Act’s remedial purposes. See Concerned Area Residents for the Env’t v. Southview Farm, 34 F.3d 114 (2<sup>nd</sup> Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995). This broad definition encompasses many of the features of the Morris Landing Tract, including the ditches, sediment traps and unstabilized and eroding spoil piles constructed by Defendants, and the gullies and rills that have formed and that continue to form on the spoil piles and around the Site. The definition also encompasses the site itself.

1. The Morris Landing Tract is a Point Source

In 1987, Congress amended the CWA to address the threat of pollution carried by stormwater runoff into surface waters, requiring a permit for discharges that result from commercial or industrial activities that disturb more than five acres of land. 33 U.S.C. § 1342(p). In 1990, the EPA adopted regulations to implement the NPDES program for stormwater discharges, see 40 C.F.R. § 122.26, explaining:

Even a small amount of construction may have a significant negative impact on water quality in localized areas. Over a short period of time, construction sites can contribute more sediment to streams than previously deposited over several decades.

55 Fed. Reg. 47990, 47992 (Nov. 16, 1990).

In accordance with this regulatory program, a NPDES permit is required for any stormwater discharge associated with industrial activity, which encompasses “construction

activity including clearing, grading and excavation” of five acres or more of land. 40 C.F.R. §§ 122.26(a)(6), (b)(14)(x). The Morris Landing Tract is subject to the stormwater permitting requirements due to the ditching, clearing, and grading that have occurred on the site. These activities have resulted in the disturbance of at least 34.2 acres,<sup>11</sup> almost seven times the threshold requiring a permit under 40 C.F.R. § 122.26.

Because this construction site had disturbed more than five acres, a permit is required for the entire site rather than each of the site’s innumerable discrete conveyances. See Cal. Sportfishing Prot. Alliance v. Diablo Grande, Inc., 209 F.Supp.2d at 1077 (citing Na Mamo O’ Aha’ino v. Galiher, 28 F.Supp.2d 1258, 1261 (D. Haw. 1998) (holding that a construction site itself – in addition to the individual site features that met the definition – is a point source)); Molokai Chamber of Commerce v. Kukui, Inc. et. al, 891 F.Supp. 1389 (D. Haw. 1995). See also Cmty. Ass’n for the Restoration of the Env’t v. Bosma Dairy, 305 F.3d 943, 947 (9<sup>th</sup> Cir. 2002), (requiring Confined Animal Feeding Operation to obtain a stormwater permit for the entire facility, including manure storing vehicles, manure storing fields, and ditches used to store or transfer waste).

Defendants’ witnesses and exhibits establish that the Morris Landing Tract is laced with 17 ditch systems that collect and channel water off of the site and into adjacent waters, including wetlands, Cypress Branch, and Stump Sound. Because the water can be attributed to particular sources, and because it flows over land that has been altered by and is controlled by Defendants, the entire Morris Landing Tract constitutes a point source within the meaning of the CWA.

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<sup>11</sup> Defs.’ Erosion Control Permit App., provided as Ex. 28.

2. Ditches are point sources

The statutory definition of a point source specifically includes ditches. 33 U.S.C. § 1364(14); see also Molakai Chamber of Commerce v. Kukui, 891 F. Supp. at 1401 (“once a person creates a conduit for pollutants, no further act is necessary to violate the [CWA] ... the digging of the ditch creates circumstances where the pollutant ... continues to discharge into waters of the state each time it rains and therefore continues to pollute...”). The ditches on the Morris Landing Tract were dug precisely to move water off the site. They were designed to serve as conveyances, and in fact do serve to convey water, stormwater and pollutants off the site and into waters of the United States.

Ditches on the Morris Landing Tract are point sources even when they do not empty directly into waters, but have to travel as much as 50-100 feet over uplands before reaching waters of the United States. Mitchell testified that when he developed the schematic for the excavation and construction of the ditches on the Morris Landing Tract, he instructed the contractor to leave a 50-100 foot separation distance, or buffer, between the terminus of the ditches and waters of the United States, including wetlands. (Mitchell Dep. at 109-10.) Nevertheless, Mitchell concedes that sediment reached wetlands and Cypress Branch and its tributaries. Id. at 151-63. Spangler testified that according to his calculations, sediment may have traveled up to 900 feet from the terminus of ditch 11/12 to settle in Cypress Branch or its adjacent wetlands. (Spangler Dep. at 92, 96-98.)

“The concept of a point source was designed [to embrace] the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States.” United States v. Earth Sci., Inc., 599 F.2d 368, 373 (10<sup>th</sup> Cir. 1979). “Gravity flow, resulting in a discharge into a navigable body of water, may be part of a point source

discharge if the [landowner] at least *initially collected or channeled* the water and other materials.” Sierra Club v. Abston Const., Inc., 620 F.2d 41, 45 (5<sup>th</sup> Cir. 1980)(emphasis added). See also, Fischel v. Westinghouse Elec. Corp., 640 F. Supp. 442, 446 (E.D. Pa. 1986) (rejecting claim that lagoon overflow was “unchannelled and uncollected surface waste”); O’Leary v. Moyer’s Landfill, 523 F.Supp. 642, 655 (E.D. Pa. 1981) (“Notwithstanding that it may result from such natural phenomena as rainfall and gravity, the surface run-off of contaminated waters, once channeled or collected, constitutes discharge by a point source”). To hold otherwise would allow polluters to avoid CWA jurisdiction simply by ending a pipe that discharges even extremely hazardous pollutants just short of a watercourse.

### 3. Check Dams are point sources

Many check dams and sediment traps have been constructed in the ditches that drain the Tract. (See Ex. 19, Wylie Field Notes (describing the site and the locations of check dams) & WP11.D2.P11-12 (riser), D2.P17 (rock check dam), WP30.D9.P.43 (rip rap structure), WP32.D9.P47 (silt fence), WP41.D11/12.P67 (check dam); Fennell Dep. at 23-24 (describing series of check dams on Ditch 11/12).) These check dams, although intended to reduce the discharge of pollutants, are additional point sources for those pollutants into waters of the United States.

Constructed sediment retention basins or traps are point sources under the CWA. See Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist., 13 F.3d 305 (discharges from system designed to capture mine runoff is a point source); Abston Construction, 620 F.2d at 45 (“sediment basins ... designed to collect sediment are [] point sources ... even though the materials were carried away from the basins by gravity flow of rainwater”); Earth Sciences, 599 F.2d at 374 (pollutants from a system designed to catch runoff met the statutory definition of a

point source); Wash. Wilderness Coalition v. Hecla Mining Co., 870 F. Supp. 983, 988 (E.D. Wash. 1994) (tailing ponds discharging pollutants to waters of the U.S. are point sources).

Both Defendants' experts and agency witnesses have testified that in several places on the Morris Landing Tract, the check dams have been completely buried by sediment, and sediment has flowed into waters of the United States. (Parker Dep. at 80-81 (confirming that sediment flowed 150-200 feet into wetlands), 83-84 (sediment measures installed were insufficient to slow down water and trap sediment); Mitchell Dep. at 159-60 (describing collapsed check dam at terminus of Ditch 9/10 that discharged silt 90 feet downstream); Wylie field notes at 1-5 ("there are many of these structures and they are doing a poor job of controlling erosion") and photos WP11.D2.P11, D2.P17, WP28.D9.P40-41, WP30.D9.P43, WP32.D9.P47, WP41-42.D11-12.P67-70.)

#### 4. Gullies and rills are point sources

The gullies and rills that have formed naturally on the Tract and empty into ditches, wetlands and streams are also point sources. In Abston Construction, 620 F.2d at 44-45, the court held that "conveyances of pollution formed either as a result of natural erosion or by material means ... may fit the statutory definition and thereby subject operators to liability." In that case, the court found that there were "gullies and ditches running down the sides of steep spoil piles created by" the defendant, and the "gullies [carried] water and sediment toward the creek." Id. at 46-47. The court held that one is not relieved from liability simply because one has not actually constructed the conveyances, "so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water." Id. at 45.

Similar to the situation in Abston Construction, depressions, rills and gullies that formed on the Morris Landing Tract have collected and discharged pollutants into navigable waters.

Expert testimony has established that gullies and rills have formed along ditches all over the Tract, including on the banks of ditches, conveying runoff, sediment and other substances into the ditches and streams. (Fennell Dep. at 62-63 (describing unstable conditions and evidence of erosion on ditch banks); Parker Dep. at 50-51 (describing erosion of unvegetated ditch banks and spoil piles); Wylie photos and accompanying notes WP2.D1.P2 (rills and unstabilized bank slopes on ditches), D4.P27 (head cutting and instability); WP36.D10.P58 (extreme bank erosion), WP8.D2.P8 (unstable banks and rilling).)

For the foregoing reasons demonstrating that there are no material issues of fact to be tried, Plaintiffs are entitled to summary judgment that Defendants violated CWA § 402 by discharging pollutants from point sources into waters of the United States without a permit.

### **III. DEFENDANTS HAVE CAUSED THE DISCHARGE OF FILL MATERIAL INTO WATERS OF THE UNITED STATES THROUGH THEIR CONSTRUCTION OF ROCK CHECK DAMS.**

As discussed above, “the discharge of any pollutant by any person” except in accordance with a CWA permit requirements is unlawful. The discharge of dredged or fill material, in particular, is governed by CWA § 404, 33 U.S.C. § 1344, under a permitting system administered by the U.S. Army Corps of Engineers. “Fill material” is defined, in part, as “material placed in waters of the United States where the material *has the effect* of: (ii) Changing the bottom elevation of any portion of a water of the United States.” 33 C.F.R. § 323.2(e)(1)(ii)(emphasis added). Examples of fill material include, but are not limited to rock, sand, and soil. § 323.2(e)(2). “Discharge of fill material” further means “the addition of fill material into waters of the United States” and “generally includes, without limitation,” the “[p]lacement of fill that is necessary for the construction of any structure of infrastructure in a

water of the United States; the building of any structure, infrastructure or impoundment requiring rock, sand, dirt, or other material for its construction;...[and] dams and dikes...” § 323.2(f).

It is undisputed that Defendants have authorized and caused the construction of numerous rock check dams in ditches throughout the Morris Landing Tract. (See Sediment and Erosion Mitigation Plan by Cape Fear Engineering (3/26/01), provided as Exhibit 29.) Rock check dams are structures of rock and sand which have the effect of raising the bottom elevation of ditches. (See illustration on Ex. 29; Wylie photo D2.P17 (example of checkdam at Ditch 2).) Any such structures placed in waters of the United States, including ditches excavated through wetlands, fall under Corps regulations 33 C.F.R. §§323.2(e) and (f) and require a permit for their construction. See discussion at Section I.B.3, supra. It is undisputed both that Defendants have constructed at least three check dams in the confluence of ditch 9/10, which was excavated through wetlands (Ex. 29; Wiley field notes at 3-4 and WP28.D9.P40-41, WP.29.D9.P42), and that Defendants have not at any time applied for a permit for this activity which is otherwise in violation of CWA § 404. (Defs.’ Ans. ¶46). While Defendants may claim to have constructed the check dams in an attempt to comply with the North Carolina Sedimentation and Pollution Control Act, intent is irrelevant to the law’s effects-based definition of “fill.” Furthermore, the NCSPCA is a separate and distinct state law and does not create an exemption to the requirement that discharges of fill material which have the effect of raising the bottom level of waters of the United States are strictly forbidden unless authorized by a federal CWA permit from the Army Corps of Engineers. As previously determined by this Court in denying Defendants’ Motion to Dismiss, the State Sediment Act is not comparable to the federal CWA and does not have the same overall enforcement goals. Order dated Nov. 8, 2001, at 9-11.

Disputed facts remain regarding Plaintiffs' other claims of discharges of dredged spoil or fill material into wetlands.

### **CONCLUSION**

For the foregoing reasons demonstrating that there are no material issues of fact to be tried, Plaintiffs are entitled to summary judgement that:

- (1) waters of the Morris Landing Tract, including Stump Sound, Cypress Branch, its tributaries, adjacent wetlands, and ditches 2, 4, 9/10, 11/12, 13, 14, 15, 16, and 17 are subject to the jurisdiction of the CWA;
- (2) Defendants have discharged pollutants, including stormwater, sediment, sand, and fecal coliform, into these waters;
- (3) the discharges of pollutants have been from point sources, including the site itself, the ditches, check dams, and gullies and rills;
- (4) Defendants also discharged fill material into jurisdictional wetlands; and
- (5) the discharges occurred without permits in violation of sections 301, 401, 402, of the CWA, 33 U.S.C. §§ 1331, 1341, 1342, and 1344.

Plaintiffs reserve other issues and theories not discussed herein for consideration at trial.

Respectfully submitted this 2<sup>nd</sup> day of December, 2002

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