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Filed March 19, 2025

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of March, two thousand twenty-five.

Present:

BARRINGTON D. PARKER,
MICHAEL H. PARK,
ALISON J. NATHAN,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Counter-Defendant-Appellee,

v. 24-1479

JEFFREY ANDREWS,

Defendant-Counter-Claimant-Appellant.[*]

FOR PLAINTIFF-APPELLEE: Arielle Mourrain Jeffries, *for* Todd Kim, Assistant Attorney General, United States Department of Justice, Washington, DC.

FOR DEFENDANT-APPELLANT: Jeffrey Andrews, pro se, Wallingford, CT.

Appeal from an order of the United States District Court for the District of Connecticut (Hall, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the district court is **AFFIRMED**.

In 2020, the United States, on behalf of the Environmental Protection Agency ("EPA"), filed a civil complaint against Jeffrey Andrews, claiming that he violated the Clean Water Act ("CWA") by (1) discharging pollutants into the waters of the United States, in violation of CWA Section 301(a); and

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[*] The Clerk of the Court is respectfully directed to amend the caption as set forth above.

(2) refusing to provide information and access required by the EPA, in violation of CWA Section 308.[1]

The district court granted the government's motion for summary judgment on Andrews's liability and entered an order on remedies and injunctive relief.[2] *See United States v. Andrews*, 677 F. Supp. 3d 74 (D. Conn. 2023). The district court later entered a "default and final judgment," reiterating the terms of the injunction and specifying that Andrews was jointly and severally liable with the other defendants for restoration costs. *See United States v. Andrews*, No. 3:20-CV-1300 (JCH), 2024 WL 2800232 (D. Conn. May 3, 2024). Proceeding pro se, Andrew now appeals the district court's May 3, 2024 order. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues on appeal.

I. Appellate Jurisdiction

The district court has not issued a "final decision" within the meaning of 28 U.S.C. § 1291 because it has

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[1] The complaint also named Andrews's wife and children. The district court granted default judgment against them. *See United States v. Andrews*, No. 3:20-CV-1300 (JCH), 2024 WL 2801708 (D. Conn. May 2, 2024). On appeal, Andrews at times refers to his wife and children, but we construe his brief as representing only himself and do not address the arguments he purports to raise on behalf of his family. *See Tindall v. Poultney High Sch. Dist.*, 414 F.3d 281, 284 (2d Cir. 2005) ("[A] parent not admitted to the bar cannot bring an action pro se in federal court on behalf of his or her child.").

[2] The district court later entered a partial final judgment as to liability and injunctive relief against Andrews, pursuant to Fed. R. Civ. P. 54(b). Andrews elected not to appeal until after the district court entered its judgment as to the other defendants. Neither his notice of appeal nor amended notice of appeal identifies the Rule 54(b) dismissal.

not decided whether to impose civil penalties and if so how much. *See RSS WFCM2018-C44-NY LOD, LLC v. Lexington Operating DE LLC*, 59 F.4th 586, 590 (2d Cir. 2023) ("[A] finding of liability is ordinarily not treated as a final decision for purposes of section 1291 when questions of remedy remain unresolved."). Still, we have jurisdiction over "[i]nterlocutory orders . . . granting, continuing, modifying, refusing, or dissolving injunctions." 28 U.S.C. § 1292(a)(1). And because the order Andrews appeals entered injunctive relief against him, "we may also address the summary judgment order that served as the district court's principal legal basis for granting the injunction." *Shakhnes v. Berlin*, 689 F.3d 244, 250 n.3 (2d Cir. 2012) (quotation marks omitted).

II. Liability

"We review *de novo* the District Court's grant of summary judgment." *1077 Madison St., LLC v. Daniels*, 954 F.3d 460, 463 (2d Cir. 2020). "Summary judgment is proper only when, construing the evidence in the light most favorable to the non-movant, there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Doninger v. Niehoff*, 642 F.3d 334, 344 (2d Cir. 2011) (quotation marks omitted).

Section 301 of the CWA prohibits the "discharge of any pollutant" into "navigable waters" without a permit issued by the EPA. 33 U.S.C. §§ 1311(a), 1342. Section 308 requires owners of "any point source" to provide information to the EPA as it "may reasonably require" to determine whether a violation has occurred. *Id.* § 1318(a). Here, Andrews admits that he never acquired a permit. And he does not deny his failure to comply with the EPA's requests for

information and access to his property. Instead, Andrews argues that the case should have been dismissed because there is no surface water on his property. *See* Appellant's Br. at 6-7. We disagree.

The CWA applies to wetlands that have "a continuous surface connection" with "relatively permanent bod[ies] of water connected to traditional interstate navigable waters." *Sackett v. EPA*, 598 U.S. 651, 678 (2023) (cleaned up). So the CWA does not require surface water but only soil that is regularly "saturated by surface or ground water." 33 C.F.R. § 328.3(c)(1). And Andrews fails to rebut the expert report concluding that his property had wetlands connected to traditional navigable waters.

Andrews next contends that the district court did not properly apply the Submerged Lands Act and Supreme Court precedent. *See* Appellant's Br. at 7-10, 12-13. But the Submerged Lands Act is inapposite to violations of the CWA. *See generally* 43 U.S.C. §§ 1301 *et seq.*; *Alaska v. United States*, 545 U.S. 75, 79 (2005). And the cases Andrews cites do not relieve his obligation to comply with the CWA. *See generally Koontz v. St. Johns River Mgmt.*, 570 U.S. 595 (2013); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

Andrews's constitutional arguments fare no better. His Fourth, Eighth, and Fourteenth Amendment claims are not properly before us because he failed to preserve those arguments. *See Green v. Dep't of Educ. of City of N.Y.*, 16 F.4th 1070, 1078 (2d Cir. 2021) (declining to reach claim raised for the first time on appeal by a pro se litigant). His Fifth and Ninth Amendment arguments fail because his answer—filed through counsel—abandoned his counterclaims. And

even if the restriction on the property amounted to a taking, the proper recourse would be to seek compensation.[3] *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129 n.6 (1985) ("[I]f the [government] has indeed effectively taken respondent's property, respondent's proper course is not to resist the . . . suit for enforcement by denying that the regulation covers the property, but to initiate a suit for compensation.").

In sum, Andrews has not shown that the district court erred by granting summary judgment to the government as to his liability under the CWA.

III. Restorative Injunction

We review the scope of a district court's injunction for abuse of discretion." *Shakhnes*, 689 F.3d at 250 (quotation marks omitted). "A district court abuses its discretion if it (1) bases its decision on an error of law or uses the wrong legal standard; (2) bases its decision on a clearly erroneous factual finding; or (3) reaches a conclusion that, though not necessarily the product of a legal error or a clearly erroneous factual finding, cannot be located within the range of permissible decisions." *Picard v. Magliano*, 42 F.4th 89, 96-97 (2d Cir. 2022) (quotation marks omitted).

Andrews does not explicitly challenge the district court's injunctive order. Nor does he argue that the district court abused its discretion in ordering the injunction. But to the extent that we construe his

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[3] The district court assumed without deciding that a taking occurred for the purpose of disposing of Andrews's Takings Clause argument. But the district court never found that there was a taking, and Andrews does not point to evidence about the CWA's economic impact on his use of the property.

arguments as challenging the injunction, such a challenge would be meritless. As explained above, Andrews fails to defeat the CWA claims, so we find no abuse of discretion in the district court's decision to order a restorative injunction.

Finally, Andrews requests a nationwide permanent injunction to prevent the Department of Justice, EPA, and Army Corps of Engineers from enforcing the CWA on private property. Because he did not seek such relief below, his request is forfeited.

* * *

We have considered Andrews's remaining arguments and conclude they are without merit. Accordingly, we **AFFIRM** the order of the district court, to the extent that it imposed injunctive relief against Andrews.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

/s/ Chatherine O'Hagan Wolfe

Filed June 12, 2023

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA, Plaintiff, v. JEFFREY ANDREWS, ET AL., Defendants.	CIVIL CASE NO. 3:20-CV-1300 (JCH) JUNE 12, 2023

RULING ON MOTION FOR SUMMARY JUDGMENT
(DOC. NO. 224)

I. INTRODUCTION

The plaintiff, the United States of America ("the Government"), brings this action against the defendant, Jeffrey Andrews ("Mr. Andrews"), alleging violations of sections 301 and 308 of the Clean Water Act (CWA). *See* 33 U.S.C. §§ 1311, 1319. In particular, the Government asserts that Mr. Andrews filled in approximately 13.3 acres of the 16.3 acres of jurisdictional wetlands on his property. *See* Memorandum in Support of Motion for Summary Judgment ("Pl.'s Mem.") at 1 (Doc. No. 224-1). The Government also claims that Mr. Andrews failed to comply with multiple requests for information about the site issued by the U.S. Environmental Protection Agency ("EPA"). *Id.*

Now before the court is the Government's Motion for Summary Judgment on liability only, *see* Motion for Summary Judgment at 1-2 ("Mot. for Summ. J.") (Doc. No. 224), which Mr. Andrews opposes, *see*

Defendant's Response to Motion for Summary Judgment ("Def.'s Resp.") (Doc. No. 240). For the reasons discussed below, the Government's Motion is granted.

II. BACKGROUND

Before delving into the factual and procedural background of the instant case, the court must address an issue regarding Mr. Andrews' response to the Government's Motion. The Rules of the United States District Court for the District of Connecticut set forth requirements relating to what a party opposing summary judgment must file. *See* D. Conn. L. Civ. R. 56(a)2. An opposition must include a document known as a "Local Rule 56(a)2 Statement of Facts in Opposition to Summary Judgment," which "shall include a reproduction of each numbered paragraph in the moving party's Local Rule 56(a)1 Statement followed by a response to each paragraph admitting or denying the fact and/or objecting to the fact as permitted by Federal Rule of Civil Procedure 56(c)." *Id.* Moreover, each:

> statement of material fact . . . in an opponent's Local Rule 56(a)2 Statement[ ] must be followed by a specific citation to (1) the affidavit of a witness competent to testify as to the facts at trial, or (2) other evidence that would be admissible at trial.

D. Conn. L. Civ. R. 56(a)3. The Local Rules also make clear that failure to comply with this requirement "may result in the Court deeming admitted certain facts that are supported by the evidence in accordance with Local Rule 56(a)1, or in . . . an order granting the motion if the motion and supporting materials show

that the movant is entitled to judgment as a matter of law." *Id.*

In support of its Motion, the Government sent Mr. Andrews the Notice to Self-Represented Litigants Regarding Summary Judgment, as required by the Local Rules. *See* Notice Regarding Unclaimed/ Returned Notice to Self-Represented Litigant at 1 (Doc. No. 232); D. Conn. L. Civ. R. 56(b). The Notice sets forth the requirements detailed above as well as the potential consequences for litigants who fail to comply with the Local Rules. *See* D. Conn. L. Civ. R. 56(b). However, the United States Postal Service returned the Notice, unopened, to the Government. *Id.* at 1-2. Accordingly, the court held an in-person status conference on December 14, 2022, for the sole purpose of ensuring that Mr. Andrews received copies of all documents relating to the Government's Motion and to set a deadline for the defendant's opposition. *See* Notice to Counsel/Pro Se Litigant (ECF No. 236). At the hearing, Mr. Andrews was handed a copy of the Motion—including the Notice to Self-Represented Litigants as well as the Federal and Local Rules pertaining to motions for summary judgment—and had his obligations explained to him directly. *See* Minute Entry for December 14, 2022 Proceedings (Doc. No. 237).

Despite these warnings in writing and in person, Mr. Andrews' opposition to the Government's Motion did not include a Local Rule 56(a)2 Statement. *See* Def.'s Resp. Indeed, the three-paragraph response makes no effort to comply with the Local Rules. *See id.* It fails to refer directly to any of the paragraphs in the Government's Local Rule 56(a)1 Statement of Undisputed Material Facts or to include any specific citation to evidence that would be admissible at trial.

See id. Indeed, the opposition does not mention any facts at issue in this case. *See id.*

While it is true that "a court is ordinarily obligated to afford a special solicitude to *pro se* litigants", *Tracy v. Freshwater*, 623 F.3d 90, 101 (2d. Cir. 2010), that does not absolve Mr. Andrews of his obligations under the Federal and Local Rules. *See Hanna v. Am. Cruise Lines, Inc.*, 2019 WL 6770132, at *3 (D. Conn. Dec. 12, 2019); *see also McNeil v. United States*, 508 U.S. 106, 113 (1993) ("[W]e have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel."). In light of Mr. Andrews' failure to comply with the requirements of the Local Rules, the court deems the Government's factual assertions—to the extent that they are supported by admissible evidence—admitted. *See* D. Conn. L. Civ. R. 56(a)3; *see also Johnson-Barnwell v. FCI Danbury*, 2014 WL 839247, at *3 (D. Conn. Mar. 4, 2014).

A. Factual Background

1. The Andrews' Property and Filling Activities

The property at issue in this case is land that spans approximately 72 acres across two parcels, which are located at 216 Northford Road in Wallingford, Connecticut, and 69 Woods Hill Road in North Branford, Connecticut. Plaintiff's Local Rule 56(a)1 Statement of Facts ("Pl.'s 56(a)1 Stmt.") ¶ 2 (Doc. No. 224-2). On December 28, 2011, Mr. Andrews and his wife, Lynn Cooke Andrews, transferred ownership of the parcels to their adult children—Wesley W.

Andrews, Colton C. Andrews, and Ellery E. Andrews[1]—in exchange for one dollar. *Id.* ¶ 4.

The Andrews' land is surrounded by largely undeveloped parcels, including state-designated watershed protection land. *Id.* ¶ 5. The Andrews' property is located within the watershed of an Unnamed Tributary of the Farm River and approximately 690 linear feet of the tributary falls within the boundaries of their land. *Id.* ¶ 7; Declaration of Raymond Putnam ("Putnam Dec.") ¶ 8 (Doc. No. 8-5). The Farm River, the Unnamed Tributary, and the Andrews' land are all a part of a South Central Water Authority public drinking water supply watershed. Pl.'s 56(a)1 Stmt. ¶ 8. Additionally, the land downstream from the Andrews' property is owned by the Water Authority for the purpose of safeguarding the area's supply of potable water. *Id.* ¶ 9.

Prior to the Andrews' activity on their land, the property contained a combination of upland—or non-wetland—areas and freshwater wetlands. *Id.* ¶ 6. Thomas Peragallo and Richard Kirby—experts in delineating disturbed wetlands and in wetland botany, respectively—conducted eight days of field work to determine the presence and scope of wetlands on the property. *Id.* ¶¶ 14-16. Based on their findings and his own analysis, Peter Stokely—an expert in

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[1] Mr. Andrews' wife and children—Lynn Cooke Andrews, Wesley W. Andrews, Colton C. Andrews, and Ellery E. Andrews—are also defendants in this case. However, the four co-defendants failed to appear following the withdrawal of their counsel, and, on May 31, 2022, the court directed the Clerk to enter default against them. *See* Ruling on Motion to Strike Answers and for Default Judgment on Liability Against Absent Defendants at 6 (Doc. No. 208).

aerial photography interpretation and geographic system analysis (GIS)—assessed that there were approximately 16.3 acres of wetlands on the Andrews' land prior to the family's filling activities. *Id.* ¶¶ 11-12. Those 16.3 acres of wetlands are adjacent to and directly abuts the Unnamed Tributary, which flows to the Farm River. *Id.* ¶¶ 27, 89.

Andrew Earles ("Dr. Earles"), a professional hydrologist and engineer, analyzed the property and surrounding tributaries, wetland, and watershed. *Id.* ¶¶ 21-22, 25. He identified the Farm River as a traditional navigable water, and the Unnamed Tributary to the Farm River as a perennial stream that would have year-round flow under normal hydrologic conditions. *Id.* ¶ 23-25, 91, 94. As part of his field work, Dr. Earles observed aquatic organisms—like caddisfly, mayfly, and stonefly larvae; crayfish; green frogs; and minnows—that suggest permanence of flow. *Id.* ¶ 26. Dr. Earles determined that the 13.3 acres of disturbed wetlands on the Andrews' property are "part of a wetland complex that provides a habitat for a range of aquatic organisms, exports detritus that supports the food chain, improves water quality by filtering runoff, and recharges shallow groundwater providing baseflows to the streams, among other functions." Exhibit D, Affidavit and Report of Andrew Earles ("Dr. Earles' Report") at 20 (Doc. No. 224-6 at 27); Pl.'s 56(a)1 Stmt. ¶¶ 28, 100. These wetlands, Dr. Earles added:

> along with similarly situated wetlands in the watershed, affect the physical, biological, and chemical characteristics of the Northeast Tributary, the Southern Tributary, the Unnamed Tributary, and the Farm River due to increased runoff (rate, volume, and

> frequency), reduced baseflow, degradation of water quality, and loss of habitat. These effects are significant and more than speculative.

Dr. Earles' Report at 20; Pl.'s 56(a)1 Stmt. ¶¶ 29, 100. Ultimately, Dr. Earles concluded that the 13.3 acres of "wetlands filled by the Andrews . . . [were] jurisdictional under 2015 Clean Water Rule and the NWPR, which similarly cover wetlands adjacent to otherwise jurisdictional waters." Dr. Earles' Report at 20; *see also* Pl.'s 56(a)1 Stmt. ¶ 87 ("Prior to disturbance, the Site contained 16.3 acres of freshwater wetlands that meet the CWA regulatory definition of wetlands, that includes the 13.3-acre violation area."); Pl.'s 56(a)1 Stmt. ¶ 96 ("Based on continuous surface flow paths during runoff events connecting the wetlands identified by Mr. Stokely with the Unnamed Tributary, the entire area of wetlands filled on the Andrews' property would be considered jurisdictional by application of the adjacency standard articulated [by the plurality] in *Rapanos*, as well as the 2015 Clean Water Rule.").

Mr. Stokely's aerial photographs show both pre-disturbance wetlands on the property as well as signs of "clear-cutting, stumping, grubbing, filling, and grading from 2010 to the present, including the presence of heavy machinery beside newly disturbed areas." *Id.* ¶¶ 31, 80. The filling of the 13.3 acres occurred principally between September 2010 and 2016, though aerial imagery indicates additional earthmoving and deposition of fill into or next to wetland areas up through 2020. *Id.* ¶¶ 32-34. In addition to Mr. Stokely's aerial imagery, EPA investigators documented red mineral soil being spread into the disturbed wetlands as well as windrows of topsoil that likely originated onsite. *Id.*

¶¶ 35-36. During a site visit, an EPA investigator observed that there "were no sediment and erosion control structures . . . to prevent erosion", Putnam Dec. ¶ 55, which allowed "for the transport of sediment, and possibly nutrients and pathogens, into the [U]nnamed [T]ributary." *Id.*

This comports with Mr. Peragallo's findings of soil disturbances as well. *See* Exhibit C, Declaration of Thomas Peragallo and LEC Environmental Consultants Report ("Peragallo and Kirby Report") at 19 (Doc. No. 224-5 at 21). At several wetland test sites, he documented stripping, which is the "removal of soil surface layers." *Id.*; Pl.'s 56(a)1 Stmt. ¶ 39. In addition, Mr. Peragallo found examples of regrading, which is the "[s]preading and leveling of stripped soil, with and without additional soil material from windrowed material, compost and borrow areas on the site." Peragallo and Kirby Report at 19; Pl.'s 56(a)1 Stmt. ¶ 41. The investigation also uncovered instances of soil material being added on top of wetlands: "[m]ostly native red soils that were transported from other locations on the Andrews' property, or from off-site locations . . . were placed over former wetlands and other low places in the landscape." Peragallo and Kirby Report at 19; Pl.'s 56(a)1 Stmt. ¶ 43. Finally, Mr. Peragallo observed the creation of "[d]rainage swales to direct excess runoff water and ground water seepage exposed by other excavation activity. . . ." Peragallo and Kirby Report at 19; Pl.'s 56(a)1 Stmt. ¶ 45.

On June 10, 2019, EPA investigators saw Mr. Andrews in an excavator atop newly spread fill

material,[2] which was placed directly into wetlands. *See* Putnam Dec. ¶¶ 61-62; Pl.'s 56(a)1 Stmt. ¶¶ 48-49, 66. Mr. Andrews proceeded to retract the excavator arm, drive out onto the road, and wave to the EPA inspector. Pl.'s 56(a)1 Stmt. ¶ 67. Evidence of new filling, approximately 1300 cubic yards of material, was spotted on June 17, 2019, as well. *Id.* ¶ 68. On July 29 and October 15, 2019, EPA investigators again observed new fill material and heavy machinery on the Andrews' property. *See* Putnam Dec. ¶¶ 65-66; Pl.'s 56(a)1 Stmt. ¶ 50-51.

2. Federal Law Enforcement Activity Related to the Andrews' Property

The U.S. Army Corps of Engineers (the "Corps") opened an enforcement file for the Andrews' property on April 27, 2010, following an inquiry from the Town of Wallingford wetland enforcement officer, who conveyed the family's noncompliance with local cease and desist orders. *See* Pl.'s 56(a)1 Stmt. ¶ 52. On April 15, 2011, the Corps visited the property for the first time, confirming the presence of wetlands as well as the filling of those wetlands without the requisite permit. *Id.* ¶¶ 53-54. During that visit, the Corps told Mr. Andrews that no further work should be conducted in the areas of the property under the regulatory jurisdiction of the CWA without prior authorization from the Corps. *Id.* ¶ 54. Mr. Andrews indicated to the Corps that he intended to continue working on his property, including in areas containing federally regulated waters and wetland. *Id.* ¶ 55.

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[2] This was done in contravention of an administrative warrant and order, as the court will discuss separately. *See*, *infra*, Section II(A)(2); Pl.'s 56(a)1 Stmt. ¶¶ 48-49.

On November 12, 2017, the Corps referred the matter to the EPA after finding that additional fill of wetlands had occurred on the property. *Id.* A Notice of Violation and Cease and Desist letter was issued by the Corps to Mr. and Mrs. Andrews on March 20, 2018. *Id.* ¶ 56. Nearly two months later, on May 16, 2018, the EPA sent notification letters to each member of the Andrews family reiterating the Corps' finding that additional filling of wetlands had occurred on the property and advising the defendants to consult the Corps before conducting any additional work in the wetland areas. *Id.* ¶ 57. Between May 2018 and April 2019, the EPA sought information—multiple times and by multiple means—from the defendants about the property and the family's actions on it. *Id.* ¶ 58. These EPA missives, sent pursuant to section 308 of the CWA, also requested access to the Andrews' property to conduct field work and to assess the presence of the jurisdictional wetlands as well as the extent of potential CWA violations. *Id.* Despite warnings that failure to reply could result in civil penalties, the Andrews family did not respond to any of the EPA's many section 308 requests. *Id.* ¶¶ 59, 105, 108; Putnam Dec. ¶ 97.

Faced with the Andrews family's unresponsiveness, the United States Attorney's Office for the District of Connecticut filed—on the EPA's behalf—an application for an *ex parte* administrative warrant and order on May 8, 2019. Pl.'s 56(a)1 Stmt. ¶ 60. The Application and Order were granted on the same day. *Id.* ¶ 61. In doing so, the court authorized an inspection period spanning from May 20, 2019, until June 17, 2019, and ordered that "no changes be made to the Property" until the completion of that period. *Id.* The EPA began executing its Compliance

Inspection—pursuant to the court's administrative warrant and order, which was hand delivered to Mr. and Mrs. Andrews—on May 20, 2019. *Id.* ¶ 62. Throughout the period, the EPA went to the property six times and was joined by the Corps as well as an EPA contractor on a few occasions. *Id.* ¶ 64. On multiple occasions, the EPA investigators saw evidence of new wetland filling during the inspection period. *See*, *supra*, Section II(A)(1); Pl.'s 56(a)1 Stmt. ¶¶ 48-49, 65-68, 73-74. Ultimately, the EPA's Compliance Inspection corroborated what investigators previously suspected: the Andrews' property included CWA jurisdictional wetlands, which had been filled without a permit from at least 2009 until the close of the inspection period in June 2019. Pl.'s 56(a)1 Stmt. ¶ 69.

After the inspection period concluded, the EPA sent the Andrewses a Notice of CWA Violations along with photographs of the property that show ongoing work in the wetland areas. *Id.* ¶ 70. The Notice laid out the scope of alleged CWA violations, informed the defendants that the EPA was considering enforcement options, instructed the Andrews family to consult with the Corps before conducting further work on the property, and directed them to respond immediately to the EPA's section 308 requests. *Id.* ¶¶ 71-72.

B. Procedural Background

The Government filed its Complaint in this case on September 2, 2020, seeking injunctive relief and civil penalties under the CWA. *See* Complaint (Doc. No. 1). The next day, the Government moved for a preliminary injunction to prevent the Andrewses from conducting unauthorized dredge and fill activities in jurisdictional waters pending the resolution of the

case. *See* Motion for Preliminary Injunction at 1 (Doc. No. 8). On December 29, 2020, after holding an evidentiary hearing on the issue, the court granted in part the Government's Motion for a Preliminary Injunction over the defendants' opposition, enjoining the defendants from placing additional dredge or fill material in jurisdictional waters in prescribed areas. *See* Order Granting in Part Preliminary Injunction (Doc. No. 46). The Andrewses requested and the court granted an extension of time to file a Motion for Reconsideration, but the Andrewses failed to file such a Motion. *See* Order Granting Motion to Extend (Doc. No. 49).

Subsequently, after twice amending their Answer, the Andrewses filed a Motion to Dismiss for Lack of Jurisdiction and Motion to Suppress ("3/31/21 Motion to Dismiss and Suppress") (Doc. No. 71) as well as a Motion to Stay (Doc. No. 93), which the court denied. *See* Ruling Denying Motions to Dismiss for Lack of Jurisdiction, to Suppress, and to Stay ("6/11/21 Ruling") (Doc. No. 97). In their Motions, the Andrewses argued that the court lacked jurisdiction over the Government's claims and that the court should suppress any evidence obtained by the Government during its search of their property pursuant to an administrative warrant. *See* 6/11/21 Ruling at 1-2. The court determined that it had federal question jurisdiction over the matter and that the administrative warrant was properly issued to the Government. *See* 6/11/21 Ruling 7-8, 11-12.

The Andrewses then sought an Emergency Protective Order to preclude the Government from entering onto their property for a limited period beginning on June 23, 2021, to conduct discovery. *See* Motion for Protective Order (Doc. No. 104). The court

denied the Andrewses' Motion, finding the Government's proposed activities reasonable, minimally intrusive, and within the bounds of permissible discovery contemplated by the Federal Rules of Civil Procedure. *See* Order Denying Emergency Rule 26(c) Motion for Protective Order (Doc. No. 110).

After the court denied the Andrewses' Motion for a Protective Order, the Government inspected the property. On July 6, 2021, the Government filed a Notice with the court alleging that it had observed approximately 15 dump truck loads of new fill material within the area subject to the court's preliminary injunction. *See* Notice (Doc. No. 112).

On August 13, 2021, Magistrate Judge Vatti granted in part and denied in part another Motion for a Protective Order (Doc. No. 75). *See* Order (Doc. No. 120). Judge Vatti ordered the defendants to produce documents and respond to the Government's first set of interrogatories by August 31, 2021. The Andrewses, however, failed to do so and, on September 16, the government moved to compel the Andrewses to comply.[3] *See* Motion to Compel Compliance (Doc. No. 128).

From the outset of the litigation, the Andrewses had been represented by counsel. However, the two

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[3] Though not directly relevant to the instant Motion, Mr. Andrews' failure to comply with this discovery request persisted and was the subject of the Government's July 11, 2022 Motion for Sanctions (Doc. No. 223). On October 25, 2022, the Motion was granted, and Mr. Andrews was barred from introducing into evidence information that would have been responsive to the Government's discovery requests, either in support of or in defense to the claims in this case. *See* Ruling on Motion for Sanctions (Doc. No. 229).

attorneys representing the Andrewses moved to withdraw on August 26, 2021. *See* Motion for Lawrence A. Kogan to Withdraw (Doc. No. 123); Motion for Rachel N. Baird to Withdraw (Doc. No. 124). On October 20, 2021, after a hearing and upon agreement by Jeffrey Andrews, the court granted both attorneys' Motions to Withdraw upon a finding of good cause. *See* Oct. 20, 2021 Transcript of Proceedings at 42-43 (Doc. No. 147). The court set a deadline of November 10, 2021, for new counsel to appear or for the individual defendants to file *pro se* appearances. *Id.* By November 12, neither counsel nor any of the defendants had filed appearances, so Judge Vatti ordered a telephonic status conference for November 22, 2021. *See* Notice of E-Filed Calendar (ECF No. 148). On November 15, Jeffrey Andrews filed an appearance (Doc. No. 151) along with a Motion to Dismiss (Doc. No. 150). Neither Mr. Andrews nor any of the other defendants appeared for the November 22 conference, so Judge Vatti rescheduled the proceeding to December 6, 2021. *See* Notice of Orders (ECF No. 158). On December 6, only Mr. Andrews and counsel for the government appeared. *Id.* To date, none of the other defendants have filed appearances.

Mr. Andrews then filed a Motion to Stay Discovery pending the resolution of his November 15 Motion to Dismiss. *See* Motion to Stay (Doc. No. 163). Judge Vatti denied the Motion to Stay on January 1, 2021, determining that Mr. Andrews had not shown good cause supporting the Motion. *See* Order (ECF No. 170). On the same day, Judge Vatti granted the Government's Motion to Compel Compliance with the Court's August 13, 2021 Order. *See* Order (ECF No. 167).

On March 7, 2022, Mr. Andrews moved to disqualify the undersigned and Judge Vatti due to lawsuits Mr. Andrews filed against them.[4] *See* Motion for Disqualification (Doc. No. 181). The Motion was denied due to the court's view that there was no basis for Mr. Andrews' claims in the then-pending lawsuits, *see* Ruling (Doc. No. 182), but Mr. Andrews still proceeded to move for a new judge, *see* Motion for New Judge (Doc. No. 186). This Motion, too, was denied for the same reason as the Motion for Disqualification. *See* Order (ECF No. 188).

Mr. Andrews moved for summary judgment on April 20, 2022, *see* Motion for Summary Judgment (Doc. No. 191), and, on May 2, he moved to dissolve the Preliminary Injunction, *see* Motion to Dissolve Preliminary Injunction (Doc. No. 197). On May 10, the

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[4] On February 15, 2022, Mr. Andrews filed two lawsuits against the undersigned. *See Andrews v. Hall*, 22-cv-267 (MPS); *Andrews v. Hall*, 22-cv-269 (MPS). As of October 25, 2022, Mr. Andrews had filed eight more lawsuits against the undersigned and other judges in this District. *See Andrews v. Dooley*, 22-cv-1185 (VAB); *Andrews v. Shea*, 22-cv-950 (KAD); *Andrews v. Vatti*, 22-cv-873 (KAD); *Andrews v. Vatti*, 22-cv-335 (MPS); *Andrews v. Vatti*, 22-cv-334 (MPS); *Andrews v. Vatti*, 22-cv-333 (MPS); *Andrews v. Vatti*, 22-cv-332 (MPS); *Andrews v. Hall*, 22-cv-280 (MPS). All but one of the lawsuits against the undersigned were dismissed, and Mr. Andrews appealed the dismissals. *See Andrews v. Hall*, 2023 WL 309609, at *1-2 (2d Cir. Jan. 19, 2023). On January 19, 2023, the Second Circuit affirmed the judgments of dismissal in all cases. *Id.* While there remains one case pending, *see id.* at 1 n.1, the claims against the undersigned in that lawsuit have all been dismissed with prejudice, *see* Order (ECF No. 6), *Andrews v. Vatti*, 22-cv-873 ("Therefore, the Court DISMISSES WITH PREJUDICE the claims against Judge Hall and Magistrate Judge Vatti as frivolous because those defendants are immune from suit and because the claims asserted against them have already been raised, and dismissed with prejudice, in earlier-filed lawsuits by this plaintiff.").

court denied his Motion for Summary Judgment, highlighting that Mr. Andrews "failed to submit a Statement of Facts as required under District of Connecticut Local Rule 56."[5] Order (ECF No. 205). The court went on to explain that Mr. Andrews offered "no discussion whatsoever of any facts relevant to his Motion", and that none of the cases to which he "copied and pasted block quotations from the syllabi . . . [were] even on point with respect to the instant matter." *Id.* That same day, the court also denied Mr. Andrews Motion to Dissolve the Preliminary Injunction, emphasizing that the defendant presented no new facts or circumstances justifying such an action. *See* Order (ECF No. 206).

On June 2, 2022, Mr. Andrews filed yet another Motion to Dismiss, this time asserting that the Government lacked standing. *See* Motion to Dismiss (Doc. No. 210). This Motion was denied on June 24, 2022, because "Congress has authorized the EPA to bring actions in federal court to enforce the Clean Water Act, *see* 33 U.S.C. §§ 1319(a)(3), (b) and (d), [thus] the Executive Branch need not incur a 'particularized injury' to carry out its duty under Article II to enforce federal law." Order (ECF No. 218) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-77 (1992)).

The court now considers the Government's Motion for Summary Judgment. *See* Mot. for Summ. J.; Pl.'s Mem.; Memorandum in Opposition to Motion to Dismiss (Doc. No. 239); Reply in Support of Motion for Summary Judgment ("Pl.'s Reply") (Doc. No. 241).

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[5] This renders Mr. Andrews failure to file a Statement of Facts in connection with the instant Motion for Summary Judgment especially troubling. *See*, *supra*, Section II.

Mr. Andrews opposes the Motion. *See* Def.'s Resp.; Motion to Dismiss as a Matter of Law ("Def.'s Mot.") (Doc. No. 233);

III. LEGAL STANDARD

A motion for summary judgment may be granted only when the moving party can establish that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Wright v. N.Y. State Dep't of Corr.*, 831 F.3d 64, 71-72 (2d Cir. 2016). If the moving party satisfies this burden, the nonmoving party must set forth specific facts demonstrating that there is indeed "a genuine issue for trial." *Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009). A genuine issue exists where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Cross Commerce Media, Inc. v. Collective, Inc.*, 841 F.3d 155, 162 (2d Cir. 2016). Unsupported allegations do not create a material issue of fact and cannot overcome a properly supported motion for summary judgment. *See Weinstock v. Columbia Univ.*, 224 F.3d 33, 41 (2d Cir. 2000). In assessing the record to determine whether there are disputed issues of material fact, the trial court must "resolve all ambiguities and draw all inferences in favor of the party against whom summary judgment is sought." *LaFond v. Gen. Physics Servs. Corp.*, 50 F.3d 165, 175 (2d Cir. 1995).

IV. DISCUSSION

A. Discharge of Pollutants Without a Permit

In support of its Motion for Summary Judgment, the Government avers that the undisputed material

facts show that Mr. Andrews violated the CWA by discharging dredge and fill material into the waters of the United States without the requisite permit. *See* Pl.'s Mem. at 26. Mr. Andrews counters—by citing cases related to takings claims that the court has already stated are not "on point with respect to the instant matter", Order (ECF No. 205)—that the law permits him to "build in wetlands and navigable waters" of the United States. Def.'s Mot. at 1; *see also* Def.'s Resp. at 1 ("The Supreme Court of the United States has stated on PRIVATE PROPERTY in wetlands you can by United States Constitutionally enumerated and protected rights build houses, commercial buildings, marinas, and cities such as but not limited to Walt Disney World, New Orleans, and Washington, DC (the swamp).").

The aim of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In furtherance of this goal, "it is unlawful for a party to discharge a pollutant into the nation's navigable waters" without a permit issued under the National Pollutant Discharge Elimination System ("NPDES"). *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 502 (2d Cir. 2017); *see* 33 U.S.C. §§ 1311(a), 1362(12); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 102 (2004) (noting that "NPDES requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters"). Thus, for the Government to establish liability for the CWA violation, it must show that Mr. Andrews: "(1) discharged a pollutant (2) from a point source (3) into navigable waters and (4)" without a NPDES

permit."[6] *Borough of Upper Saddle River, N.J. v. Rockland Cnty. Sewer Dist. # 1*, 16 F. Supp. 3d 294, 327 (S.D.N.Y. 2014). Additionally, unpermitted discharges of pollutants from a point source into navigable waters are assessed on a strict liability basis. *Id.*; *see also Coal. for a Liveable W. Side, Inc. v. N.Y.C. Dep't of Env't. Prot.*, 830 F.Supp. 194, 198 (S.D.N.Y. 1993) ("Courts have held that the CWA imposes strict liability").

1. Mr. Andrews Discharged Pollutants from a Point Source

The Government first argues that there is no genuine dispute of material fact that Mr. Andrews discharged a pollutant from a point source. Under the CWA, the phrase "discharge a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). More specifically, the CWA defines "pollutant" as "dredged spoil, . . . rock, sand, [and] cellar dirt. . . ." 33 U.S.C. § 1362(6). Meanwhile, a "point source" is broadly defined to mean "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). Moreover, in *Simsbury-Avon Pres. Soc'y, LLC v. Metacon Gun Club, Inc.*, the Second Circuit made clear that "the definition of a point

[6] The Government's Motion proposes that it must also show that Mr. Andrews is a person under the statute. *See* Pl.'s Mem. at 26. Because the CWA's definition of "person" includes individuals, *see* 33 U.S.C. § 1362(5), the court has no trouble concluding that Mr. Andrews qualifies.

source is to be broadly interpreted[.]" 575 F.3d 199, 219 (2d Cir. 2009) (internal quotation marks and citation omitted).

The Second Circuit has concluded that vehicles can constitute point sources. *See Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 118-19 (2d Cir. 1994) (citing *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983) (determining bulldozers and backhoes constitute point sources under the CWA)). Indeed, courts in this Circuit and beyond have consistently held that "[b]ulldozers, loaders, backhoes, or dump trucks that deposit or spread fill material are point sources." *United States v. Acquest Transit LLC*, 2009 WL 2157005, at *5 (W.D.N.Y. July 15, 2009); *see also, e.g.*, *United States v. Sweeney*, 483 F. Supp. 3d, 871, 917 (E.D. Cal. 2020) ("[T]he term 'point source' includes bulldozers, dump trucks, and other equipment used to place dredged or fill material in waters of the United States."); *United States v. Pozsgai*, 999 F.2d 719, 726 n.6 (3d Cir. 1993) ("Courts have consistently held that dump trucks and bulldozers, such as those used for depositing and spreading fill . . ., qualify as 'point sources.'") (collecting cases). Accordingly, "the use of mechanized equipment in wetlands resulting in the placing of dirt, sand, gravel or other materials into the waters of the United States constitutes the discharge of a pollutant from a point source within the meaning of the CWA." *United States v. Smith*, 2019 WL 6336884, at *10 (E.D.N.Y. Sept. 30, 2019) (quotation and citation omitted), *report and recommendation adopted*, 2019 WL 6124479, at *2 (E.D.N.Y. Nov. 19, 2019).

Here, aerial images in the record show signs of clear-cutting, stumping, grubbing, filling, and grading

from 2010 to the present, including the presence of heavy machinery beside newly disturbed areas. Pl.'s 56(a)1 Stmt. ¶¶ 31, 80. This imagery also indicates additional earthmoving and deposition of fill into or next to wetland areas up through 2020. *Id.* ¶¶ 32-34. From this undisputed evidence, Mr. Stokely concluded that 13.3 acres of wetlands on the property were filled by clearing and grading activity. *Id.* ¶ 81. Moreover, in May and June of 2019 in particular, EPA investigators saw "dump trucks, an excavator, and a bulldozer on the [property], and observed Mr. Andrews personally filling wetland areas with an excavator." *Id.* ¶ 85; *see also id.* ¶ 51 ("On October 15, 2019, and again on June 10, 2020, EPA observed new fill material and heavy machinery within the Aerial Photo Interpretation ("API") identified wetlands on the [property].").

Additionally, the Government sent Mr. Andrews a set of Requests for Admission—pursuant to Federal Rule of Civil Procedure 36—on March 22, 2022. *See* Fed. R. Civ. P. 36; Declaration of Redding Cates ("Cates Decl.") ¶ 2 (Doc. No. 224-3). Rule 36 makes clear that a "matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney." Fed. R. Civ. P. 36(a)(3). Here, Mr. Andrews failed to respond to the Requests for Admission within thirty days, *see* Cates Decl. ¶ 4, resulting in the material in the Government's Requests being deemed admitted by Mr. Andrews and conclusively established. *See* Fed. R. Civ. P. 36(b). Such admitted material includes that Mr. Andrews placed or directed others to place fill or dredged material from a "Point Source" into wetlands

that are hydrologically *connected by surface waters* to navigable waters, and that Mr. Andrews has controlled or had the right to control access to the property since 2001. *See* First Set of Requests for Admission to Jeffrey Andrews ("Requests for Admission") at 5 (Doc. No. 224-3 at 7) (emphasis added).

Thus, the court concludes that there is no genuine dispute of material fact that Mr. Andrews is liable[7] for the filling and earth-moving activity that took place on his property and that amounted to a discharge of a pollutant from a point source.

2. Mr. Andrews Discharged the Pollutants into Navigable Waters

After demonstrating that Mr. Andrews discharged pollutants from a point source, the Government must next show that he did so into navigable waters. This requires, first, that the Government demonstrate that the filling activities occurred in areas deemed "wetlands" under the CWA and attendant regulations. *See* Pl.'s Mem. at 30. Second, the Government must show that those wetlands are "waters of the United States"—such that they fall within the ambit of the CWA—under Supreme Court precedent. *Id.*

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[7] Courts in this Circuit and elsewhere have recognized that the CWA imposes liability on the person with responsibility for or control over the performance of the work that causes the CWA violation. *See, e.g.*, *United States v. Whitehill*, 2018 WL 459300, at *4 n.7 (W.D.N.Y. Jan. 18, 2018) (collecting cases). Given it is undisputed that Mr. Andrews "controlled or directed the activities" on the property "at all times during the violation period", Pl.'s 56(a)1 Stmt. ¶¶ 77, 86, the court concludes that he is liable if the violation is otherwise shown.

Wetlands are defined as 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. Wetlands generally include swamps, marshes, bogs, and similar areas." *See* 33 C.F.R. § 328.3(c)(1). In the case at bar, the undisputed evidence shows that there were approximately 16.3 acres of wetlands on the Andrews' land prior to the family's filling activities, *see* Pl.'s 56(a)1 Stmt. ¶¶ 11-12, 87, and that the wetlands on the property "had sufficient hydric soils and hydrology to support wetland vegetation", *id.* ¶ 88. Indeed, Dr. Earles concluded that the 13.3 acres of disturbed wetlands on the Andrews' property are "part of a wetland complex that provides a habitat for a range of aquatic organisms, exports detritus that supports the food chain, improves water quality by filtering runoff, and recharges shallow groundwater providing baseflows to the streams, among other functions." Exhibit D, Affidavit and Report of Andrew Earles ("Dr. Earles' Report") at 20 (Doc. No. 224-6 at 27); Pl.'s 56(a)1 Stmt. ¶¶ 28, 100.[8] As such, the court concludes that there is no genuine dispute of material fact that there are wetlands on Mr. Andrews' property.

Very recently, the U.S. Supreme Court redefined the precise scope of CWA as it pertains to wetlands,

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[8] It bears noting that, in 2003,the Andrewses hired private consultants to conduct a wetland delineation and inland wetland survey. *See* Exhibit C, Affidavit and Report of Peter M. Stokely ("Mr. Stokley's Report") at 1 (Doc. No. 224-4). Their consultants identified approximately 10 acres of wetlands on the property, including wetlands through which the Unnamed Tributary flows. *See id.* at 6, 19 (Figure 3), 21 (Figure 5).

emphasizing that it "extends to only those wetlands that are 'as a practical matter indistinguishable from waters of the United States.'" *Sackett v. EPA*, 598 U.S. ----, --- S. Ct. ----, 2023 WL 3632751, at *14 (U.S. May 25, 2023) (quoting *Rapanos v. United States*, 547 U.S. 715, 755 (2006) (plurality opinion)). In its opinion, the *Sackett* Court sought to clarify what precisely the CWA means when it defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7). In adopting the plurality position set forth in *Rapanos*, the *Sackett* Court held that the party asserting CWA jurisdiction over an adjacent wetlands must establish: (1) "that the adjacent [body of water constitutes] . . . 'water[s] of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and [(2)] that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Sackett*, 2023 WL 3632751, at *14 (quoting *Rapanos*, 547 U.S. at 742). The *Sackett* Court also limited the definition of "adjacent" to mean contiguous, rather than near or neighboring. *Id.* at *13.

Even with this narrow definition, the Government has demonstrated that there is no genuine dispute of material fact that the wetlands into which Mr. Andrews' discharged pollutants are "waters of the United States" under the CWA and the *Sackett* Court definition. *Id.* at *13-*14. As to prong one, there is undisputed expert evidence that "[a]ll 13.3 acres of wetlands filled on the Andrews Site are part of an approximately 16.3-acre continuous wetland complex that . . . directly *abuts* the Unnamed Tributary, which is a relatively permanent tributary to the Farm River.

. . ." Pl.'s 56(a)1 Stmt. ¶ 89 (emphasis added).[9] There is also undisputed evidence that the Unnamed Tributary is "relatively permanent," *id.* ¶ 92, and that it is a perennial stream that would flow year-round under "normal hydraulic conditions", Dr. Earles' Report at 11; *see also Sackett*, 2023 WL 3632751, at *10 ("[T]he CWA's use of waters encompasses only those relatively permanent, standing[,] or continuously flowing bodies of water forming geographic[al] features that are described in ordinary parlance as streams, oceans, rivers, and lakes.") (internal quotation marks and citation omitted). Similarly, the Farm River flows perennially

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[9] The wetlands identified by the Government's experts include wetlands that are clearly contiguous to the Unnamed Tributary. *See, e.g.*, Mr. Stokley's Report at 23 (Figure 6a), 38 (Figure 17). The figures prepared by Mr. Stokley, for example, plainly show wetlands filled by Mr. Andrews that abut the Unnamed Tributary to east and to the west. *See, e.g.*, *id.* at 38 (Figure 17).

The issue before the court in Count One is whether Mr. Andrews is liable for discharging pollutants from a point source into waters of the United States without a permit. *See, e.g.*, Pl.'s Mem. at 38 ("For the reasons stated above, the Court should grant the United States' motion for summary judgment on liability on Counts I and II of the Complaint"); Mot. for Summ. J. at 2 n.2 ("The United States suggests that upon a finding of liability, the parties submit briefs addressing the [appropriate] relief. . . . The Court can then determine whether any further proceedings are necessary to reach a final decision on the remedies for Defendant's CWA violations."). Based on the undisputed evidence, there is no question that Mr. Andrews filled wetlands that directly abut the Unnamed Tributary and have a continuous surface connection with that water. *See, e.g.*, *id.* at 38 (Figure 17); Dr. Earles' Report at 14. The court's analysis and conclusion on this point are based on this undisputed record. However, the court leaves for another day the issue of appropriate remedies, which will require a more thorough accounting of the precise scope of Mr. Andrews' CWA violation.

southward to the Long Island Sound and Atlantic Ocean, Pl.'s 56(a)1 Stmt. ¶ 7; Dr. Earles' Report at 8; Mr. Stokley's Report at 7, which are subject to the ebb and flow of the tide and are therefore "navigable water[s]." *See id.*; 33 C.F.R. § 329.4. Moreover, the Farm River, Long Island Sound, and the Atlantic Ocean "were used in the past, or may be susceptible to use, in interstate or foreign commerce or are adjacent to waters used in the past or susceptible to use, in interstate or foreign commerce." *Smith*, 2019 WL 6336884, at *12.

As to prong two, the Government has also put forward undisputed evidence showing that "continuous surface connection" exists between the wetlands and the Unnamed Tributary. In *Rapanos*, the plurality explained that a "continuous surface connection" requires that a wetland have a "continuous physical connection" to covered waters. *Rapanos*, 547 U.S. at 747, 751 n.13, 755. This requirement is easily satisfied by the undisputed evidence, which shows that continuous surface flow paths link the wetlands with the Unnamed Tributary, *see* Dr. Earles' Report at 14, as required by the *Sackett* Court's two-part test for adjacent wetlands.

Thus, the undisputed evidence demonstrates that the wetlands are jurisdictional under the CWA as they have a continuous surface connection to "a relatively permanent body of water connected to traditional interstate navigable waters." *Sackett*, 2023 WL 3632751, at *14 (quoting *Rapanos*, 547 U.S. at 742).

3. Mr. Andrews Did Not Secure a Permit

The last element the Government must show is that Mr. Andrews discharged a pollutant into a navigable water without a NPDES permit. In the

instant case, Mr. Andrews represented to the court that he did not secure such a permit. *See* Pl.'s 56(a)1 Stmt. ¶ 79. Mr. Andrews also admitted as much by virtue of failing to respond to the Government's Rule 36 Requests for Admission. *See* Cates Decl. ¶ 4; Requests for Admission at 5. Accordingly, there is no genuine dispute of material fact that Mr. Andrews did not secure a permit, as required by federal law.

4. Mr. Andrews's Objection and Motion to Dismiss

After the Government filed its Motion for Summary Judgment, Mr. Andrews filed both a response, *see* Def.'s Resp. at 1, and a Motion to Dismiss as a Matter of Law, *see* Def.'s Mot. at 1. The Motion to Dismiss is pursuant to Federal Rule of Civil Procedure 50, which articulates the standard for a "motion for judgment as a matter of law" during a jury trial. *See* Fed. R. Civ. P. 50. Mr. Andrews asserts that Rule 50 allows for such a Motion at "any time before the case is submitted to the jury." Def.'s Mot. at 1. However, this is not the case. As Rule 50 makes clear, such a Motion is only appropriate "[i]f a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a)(1). Where, as here, a proceeding has not advanced to trial, such a Motion is not permitted. Accordingly, the court denies Mr. Andrews' Motion to Dismiss as a Matter of Law (Doc. No. 233).

Still, in light of the obligation to construe Mr. Andrews' filings liberally due to his *pro se* status, *see McLeod v. Jewish Guild for the Blind*, 864 F.3d 154, 156 (2d Cir. 2017), the court will consider the

arguments raised in his Motion to Dismiss as part of his opposition to the Government's Motion for Summary Judgment. In both filings, Mr. Andrews argues that the Supreme Court has determined that a person can build on wetlands occurring on private property. *See* Def.'s Resp. at 1; Def.'s Mot. at 1. In support of this claim, Mr. Andrews points to the existence of cities as well as a theme park built well before the enactment of the CWA. In the years since the CWA's passage though, the Supreme Court has continually acknowledged that a person seeking to discharge dredged or fill material into "navigable waters" must have a permit to do so lawfully. *See, e.g.*, *Rapanos* 547 U.S. at 715 (2006). Indeed, the Government does not dispute that wetlands can be filled; only that a permit is required. *See* Pl.'s Reply at 4. On this point, Mr. Andrews offers no material facts to dispute that the wetlands on his property are adjacent to waters of the United States or that he did not seek a permit for the filling activities he undertook.

In arguing against the sufficiency of the Government's claims, Mr. Andrews also avers that the applicable regulation imposes "no enforceable duty on any state, local, or tribal governments, or [the] private sector." Def.'s Mot. at 1; 80 Fed. Reg. 37054-01 (June 29, 2015). Yet, the portion of the Federal Register from which Mr. Andrews quotes concerns the Unfunded Mandates Reform Act section of the 2015 Notice announcing a revised regulatory definition of the "waters of the United States." 80 Fed. Reg. 37054-01. This portion of the Notice simply states that the new Rule "does not contain any unfunded mandate . . . [because it] imposes no enforceable duty. . . ." *Id.* Instead, the definitional change imposes no directs

costs, and any costs that follow are "indirect, because the rule involves a definitional change to a term that is used in the implementation of CWA programs (i.e., sections 303, 305, 311, 401, 402, and 404)." *Id.* Crucially, it notes that "[e]ntities currently are, and will continue to be, regulated under these programs that protect 'waters of the United States' from pollution and destruction." *Id.* This includes the portions of the CWA discussed above. As such, this argument by Mr. Andrews fails.

Finally, Mr. Andrews' Response cites to Supreme Court precedent regarding the Fifth Amendment Takings doctrine. *See* Def.'s Resp. at 1. This line of argument is inapposite. As this court has already noted, "whether Mr. Andrews is entitled to compensation has no bearing on the claims in this case that he violated the Clean Water Act." Ruling on Motions to Dismiss at 8 (Doc. No. 200).

Thus, the court concludes that there is no genuine dispute of material fact concerning Mr. Andrews violation of section 308 of the CWA and grants the Government's Motion for Summary Judgment on this ground.

B. Failure to Provide Information Pursuant to Section 308 of the CWA

The Government also alleges that Mr. Andrews violated the CWA by failing to respond to the EPA's requests for information. *See* Pl.'s Mem. at 36. Section 308 of the CWA requires "the owner or operator of any point source to" provide the Administrator of the EPA with "information as he may reasonably require" to enforce the Act. *See* 33 U.S.C. § 1318(a)(4)(A). The section also affords the EPA "a right of entry to, upon, or through any

premises in which an effluent source is located or in which any records required to be maintained . . . are located, and may at reasonable times have access to and copy any records. . . ." *Id.* § 1318(a)(4)(B)(i)-(ii).

In the case at bar, the EPA sought information from the defendants about the property and the family's actions on it multiple times between May 2018 and April 2019. Pl.'s 56(a)1 Stmt. ¶ 58. The first request, sent on May 16, 2018, asked for "information concerning your involvement in discharge activities that may have impacted wetlands at the site" and sought 13 categories of information. *Id.* ¶ 102. The second section 308 request asked Mr. Andrews to allow the EPA access to the property to collect field data "necessary to evaluate the potential discharge and redeposit of soil and/or other dredged or filled materials into wetlands on the Site." *Id.* ¶ 104. When Mr. Andrews did not respond, the requests were renewed by the EPA in December 2018, *see id.* ¶ 106, as well as in March and April 2019, *see id.* ¶¶ 107-08. Despite these repeated requests and warnings about the consequences of his failure to reply, Mr. Andrews and the Andrews family did not respond. *Id* ¶¶ 59, 105, 108; Putnam Dec. ¶ 97.

The undisputed facts demonstrate that the EPA was pursuing information about potential CWA violations on the Andrews' property based on a referral by the Corps, who found that wetlands had been filled on the property between 2010 and 2017. *Id.* ¶¶ 52-55. The undisputed evidence in the record shows that these requests were reasonable and authorized by statute. Thus, the court grants summary judgment to the Government on its claim that Mr. Andrews violated section 308.

V. CONCLUSION

For the foregoing reasons, the court grants the Government's Motion for Summary Judgment (Doc. No. 224) on both counts. In addition, the court denies Mr. Andrews' Motion to Dismiss as a Matter of Law (Doc. No. 233) as untimely.

SO ORDERED.

Dated at New Haven, Connecticut this 12th day of June 2023.

/s/ Janet C. Hall
Janet C. Hall
United States District Judge

Filed May 3, 2024

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA, Plaintiff, v. JEFFREY ANDREWS, LYNN COOKE ANDREWS, WESLEY W. ANDREWS, COLTON C. ANDREWS, and ELLERY E. ANDREWS, Defendants.	CIVIL CASE NO. 3:20-CV-1300 (JCH) MAY 3, 2024

DEFAULT AND FINAL JUDGMENT

This matter of entry of default and final judgment came before the court as a result of the government's Motion for Default Judgment (Doc. No. 258) against defendants Lynn Cooke Andrews, Wesley W. Andrews, Colton C. Andrews, and Ellery E. Andrews, as well as the government's Motion for Summary Judgment (Doc. No. 224) and Brief Regarding Remedy (Doc. No. 250) against defendant Jeffrey Andrews.

After reviewing the papers, on May 31, 2022, defaults under Fed. R. Civ. P. 55(a) entered against defendants Lynn Cooke Andrews, Wesley W. Andrews, Colton C. Andrews, and Ellery E. Andrews for failure to appear.

Thereafter, the court entered a Ruling (Doc. No. 243) granting the government's Motion for Summary Judgment as to defendant Jeffrey Andrews's liability and issued its Ruling and Order (Doc. No. 256) setting

forth its remedial orders and injunctive relief against this defendant.

On May 2, 2024, the court entered a Ruling and Order (Doc. No. 260) granting the government's Motion for Default Judgment and Remedial Relief against defendants Lynn Cooke Andrews, Wesley W. Andrews, Colton C. Andrews, and Ellery E. Andrews. The court notes that, prior to the default entries, all five defendants voluntarily withdrew their counterclaims in the Second Amended Answer (Doc. No. 70).

Consistent with the foregoing Rulings and Orders, the court enters this Final Judgment in favor of the plaintiff, the United States of America, against the defendants, Jeffrey Andrews, Lynne Cooke Andrews, Wesley W. Andrews, Colton C. Andrews, and Ellery E. Andrews as follows:

A. Special Master and Dispute Resolution

A Special Master shall be appointed to oversee the restorative injunction against the defendants as set forth below. If the defendants oppose the appointment of a Special Master, they are ordered to show cause why a Special Master should not be appointed no later than 21 days after the date of this Order. The parties are directed, within 30 days of this Order, to submit, for the court's consideration: (1) suggested names of a possible Special Master and, practically speaking, how he or she will be compensated; and (2) a joint proposal prescribing the Special Master's role and duties.

B. Restorative Injunction

1. The defendants are to restore the disturbed wetlands on the Property located at 216 Northford

Road, Wallingford, Connecticut and 69 Woods Hill Road, North Branford, Connecticut, consistent with the United States' Conceptual Wetland and Tributary-Restoration Plan ("Conceptual Plan") as a substantive guide. *See* Pl.'s Attachment A, Conceptual Plan (Doc. No. 250-1). The defendants are ordered to retain the services of a qualified wetlands expert or professional within 30 days of this Order. If there are any questions regarding any element of the Conceptual Plan, the defendants are ordered to look to Mr. Schreiber's Declaration in the first instance. *See* Pl.'s Ex. 6, Declaration of Scott Schreiber. The objective of this mandatory injunction is to recover the loss of jurisdictional wetlands as well as their chemical, physical, and biological functions that resulted from the defendants' violative activities.

2. The costs associated with the Restoration Plan are to be apportioned as follows: Defendant Jeffrey Andrews is jointly and severally liable with the other defendants for one-hundred percent (100%) of the total cost. Defendant Lynn Cooke Andrews is jointly and severally liable with the other defendants for twenty-five percent (25%) of the total cost. Defendants Ellery E. Andrews, Wesley W. Andrews, and Colton C. Andrews are each jointly and severally liable with the other defendants for seventy-five percent (75%) of the total cost.

3. The defendants are each ordered to submit a verified financial statement to the expert and the government within 30 days of the expert's designation. Failure to obey the Order will be contempt of the court. If the expert finds that, due to financial constraints, the restoration cannot be completed within a year, the expert is to propose a

deadline to the government for consideration by the court.

4. Submission of Proposals

Within 75 days of this Order, the defendants shall, through a qualified wetlands expert, jointly propose to the United States a detailed submission including a schedule and plan for implementing the United States' Conceptual Restoration Plan, taking into account the current state of the wetlands. The United States shall, within 30 days of service of the proposal, provide the defendants with comments. If the United States does not provide comments, the defendants shall file their submission with the Special Master, if any, and the court, and comply with it. If the United States provides comments, the defendants shall revise their submission consistent with those comments and file the revised submission with the Special Master, if any, and the court within 14 days. Thereafter, the defendants shall comply with the revised Restoration Plan.

Additionally, within 30 days of filing the controlling Restoration Plan, the defendants shall, through a qualified wetlands expert, submit to the United States a detailed submission including a schedule and plan for the implementation of the seven-year period of monitoring and adaptive management of the wetlands. The submission shall include a schedule for filing status reports with the Special Master or, in the event no Special Master has been appointed, the court. The submission shall also propose the required contents of the status reports. The United States shall provide the defendants with comments within 30 days of service. If the United States provides comments, the defendants shall revise

the submission consistent with those comments and file the revised submission with the Special Master or, in the event no Special Master has been appointed, the court, and comply with the revised submission following the end of the restoration period.

C. Compliance-Assurance for Restorative Injunction & Deed Restriction

To ensure compliance with the restorative injunction, the court further orders the following:

1. The defendants must permit any representative of the United States and the Special Master the right to access and inspect, at all reasonable times and with reasonable advance notice of 5 days, the 16.3 acres of jurisdictional wetlands located within the properties at 216 Northford Road, Wallingford, Connecticut and 69 Woods Hill Road, North Branford, Connecticut.

2. No transfer of ownership or control of the properties located at 216 Northford Road 69 and Woods Hill Road, or any portion of such properties, including any interest less than fee-simple, such as an easement or lease, shall relieve the defendants of their obligation to comply with this Order absent the approval of the Special Master, and subject to appeal to the court. As a condition to any transfer of any interest in the properties, the defendants shall reserve all rights necessary to comply with the Order. If the defendants seek relief from their obligations under this Order before a transfer of an interest in the properties, they may file a motion with the court. Prior to a transfer of any interest, the defendants shall provide a true and complete copy of the Order and corresponding Rulings regarding remedies to the intended transferee, obtain the intended transferee's written acknowledgment thereof, provide written

notice to the EPA at least sixty calendar days prior to the effectuation of the transfer, and file proof of compliance with the Special Master, if any, and this court.

3. Within 45 days of this Order, the defendants are to provide the United States with a proposed deed restriction, which shall (1) cover the entire 16.3 acres of jurisdictional wetlands and be in effect for 25 years, (2) contain notice of the continuing obligations of the defendants upon transfer of any Property rights as discussed above, and (3) contain language regarding inspection and access rights for representatives of the United States. The government shall provide comments or approval within 14 days of service. If the parties cannot agree upon acceptable language, they shall jointly present the matter to the Special Master, and then to the court. If the defendants fail to submit proposed language, the government is ordered to submit its proposed language for the deed restriction no later than 21 days after the defendants' failure.

4. The deed restriction is to be recorded by Ellery Andrews, Wesley Andrews, and Colton Andrews in the Land Records of Wallingford, Connecticut and North Branford, Connecticut within 30 days of approval of the deed restriction. The Final Judgment is to be similarly recorded within 14 days of its entry.

D. Duration

The restorative injunction provided for in this Order is not permanent. If the defendants have substantially complied with the performance criteria, as set forth in the Conceptual Plan and the forthcoming Restoration Plan, has been met, the injunction will terminate automatically following the

period of adaptive management. The deed restriction is to have a duration of 25 years.

However, if the parties are unable to agree that all performance criteria has been met, the defendants may file a motion before the Special Master in the first instance, and then before the court, articulating their position that the restorative injunction should terminate.

If the defendants fail to comply with the court's Order, the United States may, at any time, file a motion with the Special Master and, whether there is a Special Master or not, with the court, seeking modification of the injunctive relief. On such a motion, the United States may renew its request for a permanent prohibitory injunction, or seek other appropriate relief, such as moving to hold the defendants in civil or criminal contempt. The United States bears the burden of showing modification is necessary and supported by the evidence. On a motion for permanent injunction in particular, the United States bears the burden to show the requisite elements for permanent injunctive relief.

E. Civil Penalties

The appropriate civil penalties assessed against the defendants will be determined after the Restoration Plan is completed, or at such earlier time if the government moves based on the defendants' failure to undertake the remedial action ordered by this court.

F. Retention of Jurisdiction

The court retains jurisdiction to resolve disputes and enforce the Order resolving this matter, and to enter civil penalties.

SO ORDERED.

Dated at New Haven, Connecticut this 3rd day of May 2024.

/s/ Janet C. Hall
Janet C. Hall
United States District Judge

Filed July 24, 2025

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of July, two thousand twenty-five,

Present: Barrington D. Parker,
Michael H. Park,
Alison J. Nathan,
Circuit Judges.

United States of America,
Plaintiff-Counter-Defendant-Appellee,

v.

Jeffrey Andrews,
Defendant-Counter-Claimant-Appellant.

ORDER
Docket No. 24-1479

Appellant Jeffrey Andrews having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court

/s/ Catherin O'Hagan Wolfe