CASE NO. 21-2184

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

NORTH CAROLINA COASTAL FISHERIES REFORM GROUP; JOSEPH WILLIAM ALBEA; DAVID ANTHONY SAMMONS; CAPTAIN SETH VERNON; CAPTAIN RICHARD ANDREWS; DWAYNE BEVELL,

Plaintiffs - Appellants,

v.

CAPT. GASTON LLC; ESTHER JOY, INC.; HOBO SEAFOOD, INC.; LADY SAMAIRA INC.; TRAWLER CAPT. ALFRED, INC.; TRAWLER CHRISTINA ANN, INC.; TRAWLERS GARLAND AND JEFF, INC.,

Defendants - Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA AT GREENVILLE

OPENING BRIEF OF APPELLANTS

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

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

No. 21-2184 Caption: NC Coastal Fisheries Reform Group, et al. v. Capt. Gaston LLC, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

North Carolina Coastal Fisheries Reform Group
(name of party/amicus)

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

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

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

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

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

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

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

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

Signature: /s/ James L. Conner II Date: November 3, 2021

Counsel for: Appellants

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No. 21-2184 Caption: NC Coastal Fisheries Reform Group, et al. v. Capt. Gaston LLC, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Joseph William Albea
(name of party/amicus)

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

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

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
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Signature: /s/ James L. Conner II Date: November 3, 2021

Counsel for: Appellants

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No. 21-2184 Caption: NC Coastal Fisheries Reform Group, et al. v. Capt. Gaston LLC, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

David Anthony Sammons
(name of party/amicus)

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

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

2. Does party/amicus have any parent corporations? ☐YES ☑NO
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Signature: /s/ James L. Conner II Date: November 3, 2021

Counsel for: Appellants

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No. 21-2184 Caption: NC Coastal Fisheries Reform Group, et al. v. Capt. Gaston LLC, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Captain Seth Vernon
(name of party/amicus)

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

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

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
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Signature: /s/ James L. Conner II Date: November 3, 2021

Counsel for: Appellants

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No. 21-2184 Caption: NC Coastal Fisheries Reform Group, et al. v. Capt. Gaston LLC, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Captain Richard Andrews
(name of party/amicus)

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

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

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Signature: /s/ James L. Conner II Date: November 3, 2021

Counsel for: Appellants

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No. 21-2184 Caption: NC Coastal Fisheries Reform Group, et al. v. Capt. Gaston LLC, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Dwayne Bevell
(name of party/amicus)

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

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

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Signature: /s/ James L. Conner II Date: November 3, 2021

Counsel for: Appellants

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Pursuant to 28 U.S.C. §§ 1291 and 1294(1), Plaintiffs-Appellants North Carolina Coastal Fisheries Reform Group, Joseph William Albea, David Anthony Sammons, Captain Seth Vernon, Captain Richard Andrews, and Dwayne Bevell ("Appellants") appeal from a final judgment entered by the United States District Court for the Eastern District of North Carolina, Eastern Division, case number 4:20-CV-151-FL.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1) Whether the Federal Water Pollution Control Act of 1972's ("Clean Water Act's" or "Act's"), 33 U.S.C. §§ 1251 *et seq*., prohibition against unpermitted pollutant discharges applies to Appellees Capt. Gaston LLC, Esther Joy, Inc., Hobo Seafood, Inc., Lady Samaira, Inc., Trawler Capt. Alfred, Inc., Trawler Christina Ann, Inc., and Trawlers Garland and Jeff, Inc.'s ("Appellees'" or "Appellee shrimp trawling companies'") discharges of large quantities of dead fish into navigable waters of the United States ("navigable waters").

2) Whether the Clean Water Act's prohibition against unpermitted discharges of dredged materials applies to the Appellee shrimp trawling companies' dragging of heavy trawling gear, dredging up navigable waters' bottoms, resuspending sediments, and causing those sediments to be redeposited in different locations in navigable waters.

3) Whether the District Court erred in granting the Appellees' motions to dismiss for failure to state a claim with respect to the Appellants' claim that Appellees' dead fish discharges constitute illegal pollutant discharges under the Clean Water Act.

4) Whether the District Court erred in granting the Appellees' motions to dismiss for failure to state a claim with respect to the Appellants' claim that Appellees' dragging of heavy trawling gear, dredging up navigable waters' bottoms, resuspending sediments, and causing those sediments to be redeposited in different locations constitute illegal discharge of dredged material under the Clean Water Act.

STATEMENT OF THE CASE

Appellants brought a citizen suit action against Appellee shrimp trawling companies in the Eastern District of North Carolina seeking to enforce the Clean Water Act's prohibition against unpermitted pollutant including dredged materials discharges in navigable waters of the United States. Appellant North Carolina Coastal Fisheries Reform Group is a non-profit membership organization dedicated to protecting the State's coastal and marine resources through education, advocacy, and action. The individual Appellants are recreational fishermen who live, work, and recreate in and around North Carolina's coastal waters and depend on the State's fisheries. Appellants Captain Seth Vernon, Captain Richard Andrews, and Dwayne

Bevell own and operate businesses that depend upon the environmental quality and health of these coastal waters and their fisheries.

Appellants specifically challenged Appellee shrimp trawling companies' large-scale disposal of bycatch into North Carolina's Pamlico Sound and the State's other coastal waters[1]. The term "bycatch" refers to the dead and dying, unwanted finfish and other marine species that Appellees catch in their trawl nets, bring onto their vessels, and then dispose of back into North Carolina's coastal waters. Appellants also challenge Appellees' discharges of dredged material via their dragging of heavy trawling gear along the coastal waters' bottom, which dredges up bottom materials and redeposits them in navigable waters. Both activities result in the illegal discharge of pollutants into navigable waters. Appellants now seek review and reversal of the District Court's dismissal of Appellants' Clean Water Act claims for failure to state a claim upon which relief can be granted.

SUMMARY OF ARGUMENT

The District Court improperly dismissed Appellants' claims that Appellees' discharges of large volumes of dead fish and dredged materials into navigable waters

[1] As used in this case, the terms "North Carolina coastal waters" or simply "coastal waters" refers to inshore waters, such as Pamlico Sound, as well as those ocean waters up to three nautical miles from the shore, all of which are subject to North Carolina's jurisdiction pursuant to relevant state and federal laws. North Carolina coastal waters include coastal fishing waters, as defined by N.C. Gen. Stat. § 113-129(4). These waters are navigable waters of the United States.

of the United States violate the Clean Water Act. The District Court set aside the Act's plain language, plain meaning, and relevant precedent, and instead relied on various other faulty rationales for this choice. In the present case, the reasons for relying on sources beyond the Act's plain language and relevant precedent do not exist. This Court should vacate the District Court's judgment dismissing Appellants' claims for failure to state a claim upon which relief can be granted and remand this case back to the District Court for the Eastern District of North Carolina for further proceedings, during which the parties can offer proof of their claims and defenses.

STANDARD OF REVIEW

The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint, but not to "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999) (quoting *Republican Party v. Martin,* 980 F.2d 943, 952 (4th Cir. 1992)). Accordingly, a district court should grant a Rule 12(b)(6) motion only "if, after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Id.* at 244.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face."

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* However, "[t]he plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that recovery is very remote and unlikely.'").

Ultimately, the controlling cases confirm that the plaintiff is not required to prove the claims set forth in his complaint at this initial pleading stage. *Robertson v. Sea Pines Real Est. Cos., Inc.*, 679 F.3d 278, 291 (4th Cir. 2012). Understanding this fact, this Court further has explained that:

> The requirement of nonconclusory factual detail at the pleading stage is tempered by the recognition that a plaintiff may only have so much information at his disposal at the outset. A "complaint need not 'make a case' against a defendant or '*forecast evidence* sufficient to *prove* an element' of the claim. It need only '*allege facts* sufficient to *state* elements' of the claim."

Id. (internal citations omitted) (emphasis in original). Therefore, a plaintiff simply must provide the court a reasoned, but preliminary, statement of the facts known at the outset of the litigation that tie the defendant to illegal actions.

ARGUMENT

I. Appellants' Complaint Sufficiently Alleged that Appellees' Discharges of Dead Fish into Navigable Waters of the United States Violate the Clean Water Act's Prohibition against Such Discharges.

A. The Clean Water Act's Statutory Language Confirms that Appellees' Actions Fall within the Scope of the Act.

The Clean Water Act was enacted to establish a comprehensive program for water pollution control to conserve and protect the nation's waters. 33 U.S.C. § 1252. Specifically, the Act's stated goal "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* § 1251. Fundamentally, the Clean Water Act prohibits "the discharge of any pollutant by any person." 33 U.S.C. § 1311(a). The Act broadly 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." *Id.* § 1362(6). Notably absent from this definition is an exclusion for wastes—including large quantities of dead animals-- generated by the shrimp trawling industry. The Act defines "discharge of a pollutant" as any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). The Act defines

"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." *Id*. § 1362(14).

Applying these provisions to the facts of this case, the Appellees' bycatch discharges are discharges of a pollutant. The bycatch is a "pollutant" because it is "biological material," as well as "garbage" and "solid waste." Federal courts have confirmed that "biological materials" do encompass dead fish discharged into the water. *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 586 (6th Cir. 1988) (holding that fish killed by and discharged from a dam's turbine system, having never left the water, were biological materials under the Act); *Ass'n of Pac. Fisheries v. E.P.A.*, 615 F.2d 794, 802 (9th Cir. 1980) (confirming that pollutants were added to a water of the United States when a seafood processor harvested fish from that water, processed them, and then placed the "heads, tails and internal residuals of the processed fish" back into the water); *U.S. PIRG v. Atl. Salmon of Me., LLC*, 215 F. Supp. 2d 239, 247 (D. Me. 2002); *see also Nw. Env't Advocs.*, 537 F.3d 1006, 1021 (9th Cir. 2008) (going one step further by holding that in the context of ballast water discharged from ships, the term "biological materials" includes live, invasive species).

Appellees' bycatch also qualifies as a solid waste and garbage. "Solid waste," like a few other terms in the Act, borrows from the Resource Conservation and Recovery Act, ("RCRA"), 42 U.S.C. §§ 6901 *et seq*.; *see* EPA, *Memorandum of Agreement Between EPA and the Army concerning Regulation of Discharges of Solid Waste under CWA*, https://www.epa.gov/cwa-404/memorandum-agreement-between-epa-and-army-concerning-regulation-discharges-solid-waste-under (last visited Dec. 18, 2021). Under RCRA, solid waste is defined as "any garbage or refuse, sludge from a wastewater treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, resulting from industrial, commercial, mining, and agricultural operations, and from community activities." Unquestionably, bycatch qualifies as "discarded material, resulting from . . . commercial . . . operations." "Garbage" is not separately defined under the Act. Merriam-Webster, however, defines the word as "discarded or useless material," practically the very definition of bycatch. Merriam-Webster, *garbage*, https://www.merriam-webster.com/dictionary/garbage (last visited Dec. 19, 2021).

The discard of the bycatch is the "discharge of a pollutant" because it is "the addition of any pollutant to navigable waters from any point source." There is no dispute that the Pamlico Sound and the other coastal waters in which Appellees trawl for shrimp are "navigable waters." The vessels operated by Appellees are "point sources" because the statute specifically lists "vessels" as a type of point source.

In its previous briefing before the District Court, Appellee Esther Joy, Inc. conceded that if the plain language of the statute is applied to the facts of this case, then the Appellants prevail. E.D.N.C. Dkt. #33 at 1 ("[T]he Act provides on its face that a discharge of "biological material" into the navigable waters of the United States is a pollutant and violates the Act."). It is well established that federal courts first look to the plain language of a statute when determining a statute's meaning. If the language is not ambiguous, then there is no need to apply any other canon of statutory interpretation, and the courts rule based upon the plain language.

> "The starting point for any issue of statutory interpretation ... is the language of the statute itself. In that regard, we must first determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute ... and our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent. We determine the 'plainness or ambiguity of statutory language ... by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."

Ignacio v. United States, 674 F.3d 252, 254 (4th Cir. 2012); *see also Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 25-26 (1989) ("As we have repeatedly noted, 'the starting point for interpreting a statute is the language of the statute itself.'") (holding that unambiguous language is not subject to interpretations based on what the statute should say according to one party); *Crespo v. Holder*, 631 F.3d 130, 133 (4th Cir. 2011) ("'When interpreting statutes we start with the plain language. It is well established that when the statute's language is plain, the sole function of the

courts-at least where the disposition required by the text is not absurd-is to enforce it according to its terms.'" In interpreting the plain language of a statute, we give the terms their "'ordinary, contemporary, common meaning, absent an indication Congress intended [it] to bear some different import.'") (citations omitted).

In reading a statute, former District of Columbia Circuit Court Judge Brett Kavanaugh offered the following guidance.

> Courts should try to read statutes as ordinary users of the English language might read and understand them. That inquiry is informed by both the words of the statute and conventional understandings of how words are generally used by English speakers. Thus, the "best reading" of a statutory text depends on (1) the words themselves, (2) the context of the whole statute, and (3) any other applicable semantic canons, which at the end of the day are simply a fancy way of referring to the general rules by which we understand the English language.

Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harvard L. Rev. 2118, 2144-45 (2016).

This Court has previously explained that courts must not "construe a statute on the basis of a mere surmise as to what the Legislature intended and to assume that it was only by inadvertence that it failed to state something other than what it plainly stated." *Ignacio*, 674 F.3d at 255. Similarly, the United States Supreme Court has confirmed that it is improper to read into the Clean Water Act an exemption that is not consistent with the actual language of the Act itself. *Cnty. of Maui v. Hawai'i Wildlife Fund*, 140 S. Ct. 1462 (2020). The *Maui* Court additionally noted that Congress determined enacting broad surface water

legislation was necessary because of the federal government and states' previous inability to ensure that waters of the United States were indeed fishable, swimmable, and drinkable in the years leading up to the Act's enactment. *See id.* at 1468 (noting that "[p]rior to the Act, Federal and State Governments regulated water pollution in large part by setting water quality standards," rather than by more broadly prohibiting pollution discharges.). Accordingly, "[t]he Act restructures federal regulation by insisting that a person wishing to discharge *any* pollution into navigable waters first obtain EPA's permission to do so." *Id.*

For these reasons, the Act's plain and unambiguous language establishes that Appellants did in fact state a valid claim under the Act. Notably, Appellees have not denied that they engage in the complained-of actions. Instead, they argue that they should not be regulated under the Act's pollution prohibition because they are regulated in other ways under other non-pollution laws. As explained below, those other laws work in concert, and not in conflict, with the Act, and do not preclude the Act's application to the Appellees.

B. Legislative History Does Not Override the Plain Language of an Enacted Statute.

As discussed above, an enacted statute's plain language is of primary importance when determining statutory meaning. Federal courts have long assumed that "Congress says in a statute what it means and means in a statute what it says there." *Kadel v. N.C. State Health Plan for Tchrs. & State Emps.*, 12 F.4th 422, 434

(4th Cir. 2021), *as amended* (Dec. 2, 2021) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)). Further, congressional intent is evidenced in the enacted statutory language. *Jones v. Rath Packing Co.,* 430 U.S. 519 (1977) (finding that congressional intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose").

Only in cases where statutory language is ambiguous is it proper to examine contemporaneous legislative history related to the subject matter at issue. *See, e.g.*, *Green v. Bock Laundry Mach. Co.,* 490 U.S. 504, 508-09 (1989) ("We begin by considering the extent to which the text of [the disputed provision] answers the question before us. Concluding that the text is ambiguous with respect to [that question], we then seek guidance from legislative history"). In the present case, that subject matter is pollution discharges in navigable waters.

However, the weight given to relevant legislative history necessarily remains secondary to the language of a final, enacted statute. *Exxon Mobil Corp. v. Allapattah Servs., Inc*., 545 U.S. 546, 568 (2005). The Supreme Court has cautioned against undue reliance on legislative history, pointing to the realities of the legislative process and the fact that the best expression of the collective understanding of the legislative body is the actual statute.

> As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of

> otherwise ambiguous terms. Not all extrinsic materials are reliable sources of insight into legislative understandings, however, and legislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in "'looking over a crowd and picking out your friends.'" Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.

Id. (citation omitted); *accord Blanchard v. Bergeron*, 489 U.S. 87, 97-98 (1989) (Scalia, J., concurring).

Additionally, even when used, not all types of legislative history are considered equal. First, the Supreme Court has rejected excerpted legislative history as an authoritative source for statutory interpretation. *P.R. Dep't of Consumer Affs. v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988) (explaining "we have never [looked for] congressional intent in a vacuum, unrelated to the giving of meaning to an enacted statutory text"). Second, the statement of a single representative is not to be afforded the same weight as pronouncements that may be properly attributed to the whole governing body. *See Allapattah Servs., Inc.*, 545 U.S. at 568. Third, post-enactment statements do not control statutory meaning. *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 118 n.13 (1980) (dismissing as not "entitled to much weight here" a hearing statement by the bill's sponsor and conference report

language on amendments made four years after enactment); *NLRB v. Health Care & Ret. Corp.*, 511 U.S. 571, 582 (1994) (holding that an "isolated statement" in a committee report is not "authoritative interpretation" of previously-enacted language); *Bread Pol. Action Comm. v. FEC*, 455 U.S. 577, 582 n.3 (1982) (confirming that later-made statements represent only the "personal views" of the legislator).

It logically follows then that post-legislation statements made by congressional representatives who were not present during a statutes' enactment should be given little weight. *Barber v. Thomas*, 560 U.S. 474, 486 (2010) ("And whatever interpretive force one attaches to legislative history, the Court normally gives little weight to statements, such as those of the individual legislators, made after the bill in question has become law.") (citation omitted). Additionally, statements of such congressional representatives that are made in response to *entirely different* statutes dealing with different subject matter should be given none.

Yet, the District Court relied on such statements to support its reasoning. Significantly, the court pointed to, and seemed to rely upon in determining the meaning of the Act's provisions, excerpted statements from Representative Don Young made in relation to the Magnuson-Stevens Fishery Conservation and Management Act's ("MSA's"), 16 U.S.C. §§ 1801 *et seq*., reauthorization in 1997—twenty-five years after the Clean Water Act's enactment. J.A. 882, 886.

Representative Young, elected a year after the Clean Water Act's passage, offered comments related to the MSA reauthorization's bycatch provisions, which in turn were offered following his framing of the legislation as that which will better prevent overfishing and protect the long-term economic viability of fish stocks. *Shannon v. United States*, 512 U.S. 573, 583 (1994) (confirming that the Court will not give "authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute"). The District Court erred by relying upon Representative Young's later, unrelated statements.

C. The Clean Water Act's Cooperative Federalism Design Is Not Undermined by Appellants' Challenge.

In reaching its judgment, the District Court leaned heavily on the notion that the states' authority under the Act reigned supreme to that of the federal government's. J.A. 880-87. However, this understanding of the Act disregards its cooperative federalism design. *New York v. United States*, 505 U.S. 144, 167 (1992) (citing *Arkansas v. Oklahoma*, 503 U.S. 91, 101, 112 S. Ct. 1046, 1054 (1992) (Clean Water Act "anticipates a partnership between the States and the Federal Government, animated by a shared objective")); *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 288 (3d Cir. 2015) ("Under th[e Clean Water Act], the EPA and the states participate in a 'cooperative federalism' framework working together to clean the Nation's waters."). Although the states are enabled to take primary regulatory authority over the pollution discharge permitting program, they are not entitled to

disregard the Act's requirements—EPA retains ultimate authority over delegated federal programs under the Act. "Following the approval of a state-run NPDES[2] program, the EPA has continuing oversight responsibilities, in that '[t]he State must advise the EPA of each permit it proposes to issue, and the EPA may object to any permit,' and '[i]f the State cannot address the EPA's concerns, authority over the permit reverts to the EPA.'" *Champion Int'l Corp. v. U.S. E.P.A.*, 850 F.2d 182, 185 (4th Cir. 1988) (quoting *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 650 n. 1 (2007)); 40 C.F.R. pt. 123 (providing state program requirements for a state to obtain and maintain delegated authority). This authority extends to EPA's ability to assume jurisdiction in cases where unresolved disagreements emerge between a state and EPA's Administrator. *Id.*

Further, the Act's citizen suit provision prevents state programs from subverting national standards with which states must comply to maintain their end of the cooperative federalism bargain. *Piney Run Pres. Ass'n v. Cnty. Comm'rs ("Piney Run II"),* 523 F.3d 453, 456 (4th Cir.2008) ("Although the primary responsibility . . . rests with the state and federal governments, private citizens provide a second level of enforcement and can serve as a check to ensure the state and federal governments are diligent in prosecuting Clean Water Act violations.") (citing *Sierra Club v. Hamilton Cnty. Bd. of Cnty. Comm'rs,* 504 F.3d

[2] "NPDES" stands for National Pollutant Discharge Elimination System.

634, 637 (6th Cir.2007)). "This citizen-suit provision is a critical component of the CWA's enforcement scheme, as it 'permit[s] citizens to abate pollution when the government cannot or will not command compliance.'" *Env't Conservation Org. v. Dallas*, 529 F.3d 519, 526 (5th Cir. 2008) (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.,* 484 U.S. 49, 62 (1987)).

Here, the Appellants brought this lawsuit in keeping with the Clean Water Act's citizen suit provision to address violations that have gone unenforced by state and federal agencies. The District Court interpreted this challenge as one that would disrupt the state-federal balance established by the Act if Appellants were to succeed. However, the District Court's reasoning revealed its misunderstanding of the respective roles of state and federal government agencies, namely that the states maintain superior authority to that of the federal government under the Act. To the contrary, the states only may implement designated parts of the Act subject to the approval and continuing oversight by EPA. With respect to Section 404 permits, as discussed below, the federal government through the U.S. Army Corps of Engineers ("USACE") implements that program with few exceptions.[3] Further, past courts have recognized that such citizen suits challenging private parties' discharges into

[3] EPA, *EPA Announces Historic Approval of Florida's Request to Administer the Clean Water Act Section 404 Program* (Dec. 17, 2020), https://www.epa.gov/newsreleases/epa-announces-historic-approval-floridas-request-administer-clean-water-act-section-404.

navigable waters may proceed in federal court without a state agency's involvement. *E.g.*, *Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1011-1015 (9th Cir. 2002) (holding that the state agency was not a necessary party to the citizen suit action challenging discharges from a shellfish producer's mussel harvesting facilities).

Confusingly, the District Court cites other federal statutes that also embrace cooperative federalism to suggest that the states maintain a level of independence not supported by the respective laws. J.A. 880-82 (citing to provisions in the MSA, Reaffirmation of State Regulation of Resident and Nonresident Hunting and Fishing Act of 2005, Fish and Wildlife Act of 1956, and federal submerged lands law that are substantially similar to language in the Clean Water Act, 33 U.S.C. § 1370, that states "[e]xcept as expressly provided in [the Act], nothing in [the Act] shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."). The court specifically points to these statutes' savings clauses to support its apparent understanding of federalism under the Act. *Id.* The cited language, however, does nothing more than explicitly confirm that the statutes' reach does not infringe upon those rights constitutionally reserved to the states or provided by statute. Put simply, Congress includes such language to avoid conflict with other laws. Appellants'

challenge does nothing to upset the Act's cooperative federalism framework or the states' authority under the Act.

D. Neither the Existence of Other Non-Pollution Statutes nor the Interpretive Principle of *Lex Specialis* Precludes the Clean Water Act's Application in this Case.

In reaching its judgment, the District Court reasoned that the existence of other laws that affect the same industry and natural resource preclude the Act's application to the Appellees' bycatch disposal and sediment dredging activities. The court pointed to the Magnuson-Stevens Fishery Conservation and Management Act, the primary fisheries management law in the United States, and applied the interpretive principle of *lex specialis derogat legi generali* ("*lex specialis*") to decide that the Act's prohibitions of unpermitted pollutant discharges and dredging were precluded in this case.

In statutory construction, the principle of *lex specialis* guides that a statute governing a more specific subject matter overrides one that governs more generally. *In re Lazarus*, 478 F.3d 12, 18–19 (1st Cir. 2007). *Lex specialis* may apply when either a direct conflict exists between two statutes, or when applying a general provision would undermine a more specific one. *Id*. (citing *Varity Corp. v. Howe,* 516 U.S. 489, 511 (1996)). However, *lex specialis* does not apply where two statutes complement each other when implemented independently. *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 111-16 (2014).

In *POM Wonderful*, the United States Supreme Court considered whether POM Wonderful could pursue a claim against Coca-Cola under the Lanham Act, which authorizes a market competitor to file suit against another competitor based on unfair competition arising from misleading product descriptions, even though Coca-Cola also was subject to the Federal Food, Drug, and Cosmetic Act's ("FDCA's") implementing regulations that prohibit food misbranding. *Id.* Coca-Cola argued that *lex specialis* argued that its compliance with FDCA regulations precluded any challenges under the Lanham Act. *See id.* at 112-15. The Court flatly rejected Coca-Cola's theory because each statute "has its own scope and purpose," does not cover the same regulatory field and does not conflict with the other. *Id*. at 114-15. To the contrary, because "[t]he Lanham Act and the FDCA complement each other in major respects," the Court found no barrier to allowing POM Wonderful's Lanham Act claim to go forward. *Id.* at 115 ("The structures of the FDCA and the Lanham Act reinforce the conclusion drawn from the text. When the two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other.") (citations omitted). The Court additionally reasoned that the two federal statutes' distinct functions and enforcement mechanisms created "synergies among multiple methods of regulation," and that enacting two different

statutes with their own mechanism to enhance the protection of the given subject matter is consistent with congressional design. *See id*. at 115-16.

Here, the District Court conflated fisheries management with water quality regulation. The MSA was enacted with the primary purposes of preventing overfishing, rebuilding overfished stocks, increasing the long-term economic and social benefits of healthy fisheries, supporting and encouraging the implementation of international fishery agreements, and ensuring a safe and sustainable supply of seafood. 16 U.S.C. § 1801(b). No provision within the MSA nor its implementing regulations, codified at 50 C.F.R. §§ 600.305-.355, address pollution discharges or dredging. Instead, the MSA's bycatch limitations are designed to prevent overfishing and, as a result, protect the commercial fishing industry from depleted fish stocks. *See* 16 U.S.C. § 1851(a). Equally important, the MSA is explicit in the fact that it does not grant to the Secretary of the U.S. Department of Commerce authority over programs that inherently affect fishery resources[4] but are reserved to other agencies. *Id.* § 1855(b)(2) (requiring that "[e]ach Federal agency shall consult with the Secretary [of Commerce] with respect to any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that may adversely affect any essential fish habitat identified under this chapter.");

[4] The term "fishery resource," as used in the MSA, is defined as "any fishery, any stock of fish, any species of fish, and any habitat of fish." 16 U.S.C. § 1802(15).

see also EPA, *Other Federal Laws that Apply to the NPDES Permit Program*, https://www.epa.gov/npdes/other-federal-laws-apply-npdes-permit-program (last visited Dec. 15, 2021) (confirming that the essential fish habitat ("EFH") provisions in the MSA require that "EPA consult with the National Marine Fisheries Service for any EPA-issued permits which may adversely affect essential fish habitat identified under the Magnuson-Stevens Act.").

By contrast and as explained above, the Clean Water Act was enacted to address unpermitted[5] discharges of pollutants to navigable waters and dredging in those waters. Like the MSA, the Act explicitly acknowledges that the navigable water resources under the Environmental Protection Agency's jurisdiction inevitably affect the same natural resources also regulated by other agencies. 33 U.S.C. § 1321(b)(1) (addressing oil and hazardous materials that would affect resources under the MSA's regulatory scope); *id.* § 1344(c) (with respect to dredging, authorizing the Administrator to limit disposal sites when unacceptable adverse effects will result to fisheries). Thus, Congress' awareness of the interrelationship between water quality and fishery health, and the fact that

[5] The particular permit needed to discharge pollutants to a navigable water is an NPDES permit issued by the U.S Environmental Protection Agency or a delegated state agency. The permit needed to discharge dredged material into a navigable water is a Clean Water Act Section 404 permit issued by the U.S. Army Corps of Engineers with few exceptions. Only Florida, Michigan, and New Jersey have applied for and received 404 permitting authority. *Supra* note 3.

management of many ecosystems components which affect the productivity and abundance of fish populations, such as water quality and wetlands, are outside the authority of fishery managers, is made plain in the Act. *See also* Reauthorization Issues for the Cong. Research Serv., R43565, Magnuson Stevens Fishery Conservation and Management Act 16 (2014), available at https://crsreports.congress.gov/product/pdf/R/R43565/4 ("Moreover, management of many ecosystems components which affect the productivity and abundance of fish populations *such as water quality* or wetlands are outside the authority of fishery managers.") (emphasis added).

The District Court's focus on fisheries management overlooks the fact that this case is about water quality. Further, while it may be appropriate at times to review the broader body of law into which a statute fits, *Green v. Bock Laundry Machine Co*., 490 U.S. 504, 528 (1989), doing so in this case confirms that the Act stands alone as the sole federal law regulating pollution discharges into navigable waters. There is no redundancy in between the Act and MSA. There is no conflict between the statutes. For this reason, *lex specialis* does not apply and the MSA does not occupy the regulatory space with respect to the Appellees' pollution discharges and dredging.

E. Absurd Results Would Not Manifest If Appellants' Challenge Were Successful.

The District Court found that giving power to the plain language of the Clean Water Act would create an "absurd result." The court used the examples of a guppy caught, killed and thrown back into the water, and of a floating crab pulled out of the water, examined, and then put back, and hypothesized about litigation or enforcement activities over such innocent acts.

But this case is not about a single guppy nor a single crab, nor one hundred guppies or crabs. Instead, it is about the annual discharge of vast quantities of dead marine organisms into North Carolina coastal waters—approximately 740,000,000 dead fish, or 34 million pounds of dead fish, into the Pamlico Sound alone. J.A. 23 ¶ 42.

The plain language of a statute may be ignored—or interpreted away—because of an allegedly absurd result *only if* the result of applying the plain language would produce "an outcome that is so gross as to shock the general moral or common sense." *Lara-Aguilar v. Sessions*, 889 F.3d 134, 144 (4th Cir. 2018). Results that are merely "surprising or anomalous" are not sufficient to undo the plain language of a statute, and "an interpretation that produces plausible results cannot violate the absurd result rule of statutory construction." *Id.* It follows that results that are disfavored or inconvenient for some do not render the application of a statute's plain meaning absurd.

The Act is a statute whose stated purpose is to

> restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—
>
> (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
>
> (2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

33 U.S.C. § 1251. The Act goes on to provide very broad prohibitions on discharges to achieve the goals and intent of the law. *Id.* § 1311(a) ("Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.").

That the Act would apply to the discharge of hundreds of millions of dead fish into a single body of water is not surprising, much less shocking to the general moral or common sense. Indeed, what is surprising, and perhaps even shocking to the general moral or common sense, is that EPA has heretofore failed to act, and therefore these discharges have been allowed to continue for so long.

If it is granted that protecting the Pamlico Sound from the annual discharge of hundreds of millions of dead fish falls within the Act's gambit, what are we to make of the single guppy problem? Again, this case is not about incidental or *de minimis* discharges. Each of the Appellees in this matter discharges something on

the order of a million dead fish per year into the waters in question. But courts are appropriately interested in examining whether a decision will result in unintended consequences.

In the environmental field, the undersigned's field of practice for over thirty-five years, it is almost universal that any given restriction on pollution or environmental destruction could be applied to *de minimis*, or unnecessarily small, actions. Sulfur dioxide is a harmful chemical, the emission of which is regulated by the Clean Air Act ("CAA"). Lighting a single match emits sulfur dioxide. No court has ever refused to apply the CAA because of the hypothetical absurdity of applying it to the lighting of a single match, nor has EPA ever untaken an enforcement action over the lighting of a single match.

The Act is implemented via regulations promulgated by EPA and the USACE. These federal agencies know very well how to deal with *de minimis* situations and do it routinely. For example, with regard to the discharged of dredged material, the Act itself does not have a *de minimis* exception. But courts have not refused to give life to Section 404 of the Act because of hypothetical absurdity of applying it to single-guppy-type actions. Instead, the courts have trusted the agencies to create sensible rules interpreting the statute, and those agencies have done so. In the case of dredged material discharges, USACE has promulgated regulations to exempt *de*

minimis discharges. Those very regulations were cited at length by the District Court. J.A. 896 (citing 33 C.F.R. § 323.2).

The District Court for the Southern District of West Virginia summarized the ability of EPA to make *de minimis* exceptions to statutory standards:

> Moreover, the EPA argues, in the absence of statutory or regulatory language to the contrary, courts have generally held that an administrative agency has inherent authority to make *de minimis* exceptions to statutory or regulatory standards. In *Alabama Power Co. v. Costle,* 636 F.2d 323 (D.C. Cir. 1979), the D.C. Circuit held that "exemptions may . . . be permissible as an exercise of agency power, inherent in most statutory schemes, to overlook circumstances that in context may fairly be considered *de minimis*." *Id.* at 360. *See also Ober v. Whitman,* 243 F.3d 1190, 1193–95 (9th Cir. 2001) (holding that even though the Clean Air Act "makes no explicit provision for a '*de minimis*' exception," the EPA had the discretion to "exempt *de minimis* sources of PM– 10 from pollution controls."); *Environmental Defense Fund, Inc. v. EPA,* 82 F.3d 451, 466–67 (D.C. Cir. 1996) (endorsing *de minimis* exceptions in the absence of express statutory language to the contrary). A noted commentator summarized the caselaw with the following "default rule" for agency authority to craft *de minimis* rules: "Unless Congress has clearly said otherwise, agencies will be permitted to make *de minimis* exceptions to statutory requirements by exempting small risks from regulatory controls." Cass R. Sunstein, *Cost–Benefit Default Principles,* 99 Mich. L. Rev. 1651, 1668 (2001).

Ohio Valley Env't Coal. v. Horinko, 279 F. Supp. 2d 732, 767-68 (2003).

Another way agencies handle *de minimis* or merely technical violations of one of the statutes it enforces is the use of general permits. EPA and USACE have issued many general permits under the Act and in accordance with the cooperative federalism scheme previously described. For example, USACE issues a variety of

Nationwide Permits[6] which regulate discharges of dredge and fill materials to navigable waters. *See* USACE, *2021 Nationwide Permits Final Rule Summary Chart*, https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/ (last visited Dec. 19, 2021). For point source discharges to navigable waters, the North Carolina Department of Environmental Quality ("DEQ"), the state agency with delegated permitting authority, issues NPDES permits for discharges within its borders. DEQ currently issues nine general NPDES permits covering low impact discharges. DEQ, *General Permits*, https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/npdes-wastewater/npdes-permitting-process/general-permits (last visited Dec. 17, 2021).

In short, the fact that we can imagine hypothetical applications of the Act to apply to inconsequential events is not a reason to, nor a justification for, sidestepping the plain language of the Act. The implementing agencies have the power to exempt *de minimis* events and those actions that cause no meaningful harm, and a well-documented history of doing so.

F. Other Courts' Interpretations Do Not Support the District Court's Dismissal of Appellants' Challenge.

Though the District Court examined and compared cases from other courts on the issue of whether large volumes of dead fish dumped into North Carolina's coastal

[6] Nationwide permits are USACE's equivalent of EPA's general permits issued pursuant to the Act.

waters violate the Act, it found those cases inconclusive and rested instead on other analysis. The District Court, however, should not have dismissed those cases so easily. The two issues for which those cases stand are whether dead fish are "biological materials" under the Act and whether discarding dead fish back into the water constitutes a "discharge," which encompasses it being an "addition."

Federal courts have confirmed that "biological materials" do encompass dead fish discharged into the water. *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 586 (6th Cir. 1988) (holding that fish killed by and discharged from a dam's turbine system, having never left the water, were biological materials under the Act). Other decisions go further, holding that even live non-native species constitute biological materials. For example, in *U.S. PIRG v. Atl. Salmon of Me., LLC*, a district court held that the release of non-native salmon species constituted the addition of a pollutant. 215 F. Supp. 2d 239, 247 (D. Me. 2002); *see also Nw. Env't Advocs.*, 537 F.3d at 1021 (holding that in the context of ballast water discharged from ships, the term "biological materials" includes invasive species). In fact, neither the District Court nor Appellees in their briefs below cited any case holding that dead fish (nor live fish, for that matter) are not "biological materials" under the Act.

The District Court placed much weight on the Ninth Circuit case *Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007 (9th Cir. 2002). That case, however, did not involve the discharge or disposal of dead

fish into the water, but instead examined the contention that when creatures living in the water defecated in that water, and underwent other natural processes such as molting, the emissions from those living creatures constituted "biological materials" and thereby "pollutants" under the Act. *Id*. at 1010. After a lengthy analysis, the court "conclude[d] that Taylor's mussel shells and the byproduct from these living mussels are not 'biological materials' under the Act because these materials come from the natural growth and development of the mussels and not from a transformative human process." *Id*. at 1017-18. The court did not consider whether the mussels themselves, if removed from the water by humans, killed and then returned to the water would be biological materials, because those facts were not before it, and therefore its holding is not applicable to the instant matter.

The *Hammersley* court went on to contrast the situation before it with other cases in which courts had held that fish and various other organic matter were "biological materials." For example, the court specifically noted the decision in *Association of Pacific Fisheries v. E.P.A*., 615 F.2d 794, 802 (9th Cir. 1980), which confirmed that pollutants were added to a water of the United States when a seafood processor harvested fish from that water, processed them, and then placed the "heads, tails and internal residuals of the processed fish" back into the water from which they came.

The District Court heavily emphasized the *Hammersley* court's contrasting the natural processes of shellfish, which released wastes and other detritus, with situations in which the materials are transformed by human activity. In the instant case, human activity results in the ultimate transformation of living organisms: their removal from their habitat by humans, and their death in and on the machines built and operated by humans. J.A. 22 ¶ 39.

The District Court further noted two Second Circuit decisions that illustrate the wide range of organic matter that qualifies as "biological materials" under the Act. In *Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 117 (2d Cir. 1994), the Second Circuit determined that liquid manure spread on farm fields met the definition of pollutant as it was "solid waste, ... sewage, ... biological materials, ... and agricultural waste discharged into water." This decision also demonstrates that a particular pollutant may be covered by more than one term within the Act's definition of "pollutant." That is, the Second Circuit identified which descriptors provided in 33 U.S.C. § 1362(6) might apply to liquid manure but did not conclude that only one fit that pollutant.

The Second Circuit also determined that human blood contained in glass vials that were discharged into the Hudson River constituted "biological material" under the Act. *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 645 (2d Cir. 1993) (also citing *United States v. Frezzo Bros., Inc.*, 602 F.2d 1123, 1125 (3d Cir. 1979)

(confirming that runoff from a pile of "mushroom compost" was a discharge of "biological materials" and "sewage" under the Act, and that a specific pollutant may warrant more than one descriptor under the Act's definition of "pollutant")).

Based on the totality of what the Ninth Circuit considered in *Hammersley*, the Ninth Circuit's analysis does not support a conclusion that the Appellee's dead fish discharges are not biological materials under the Act. It does support, however, that the dead fish the Appellees discharge into North Carolina's coastal waters constitute "solid waste" and "garbage" in addition to "biological materials." *See* n. 2 (providing the definition of "solid waste"). "Garbage" is defined by Merriam-Webster as "discarded or useless material," practically the very definition of dead fish in this scenario. Merriam-Webster, *garbage*, https://www.merriam-webster.com/dictionary/garbage (last visited Dec. 19, 2021).

Including dead fish within the meaning of "biological materials," "garbage," or "solid waste" is consistent with the Act's stated goal to "restore and maintain the . . . integrity of the Nation's waters" and of protecting water quality to protect and enable the propagation of "fish, shellfish, and wildlife." 33 U.S.C. §§ 1251(a), (a)(2). Further, the Act's definition of "pollutant" includes explicit exclusions. *Id.* § 1362(6). Shrimp trawling and its dead fish discharges are not included in those explicit exclusions.

The District Court also relied on the *Consumers Power* decision, discussed above, that concluded that the entrained fish from a dam's turbine were biological materials, but did not constitute an "addition" of a pollutant because their disposal was a mere redistribution of their bodies in the water that they never left. 862 F.2d at 585-86 ("In contrast, the Ludington facility [the dam in question] never removes the fish from the water of the United States."). The *Consumers Power* case is inapplicable to the facts of this case, where Appellees remove the fish from the water over several miles of trawling, killing most of them, and then discharge them (add them) into the water at other locations.

In addition, the District Court did not account for the three Circuit Courts, including the Fourth Circuit, that have disagreed with or distinguished *Consumers Power*. Those Circuit Courts have concluded that removing or disturbing biological materials within a water of the United States and redepositing, or redistributing, those materials back into the same water constitute an "addition" of a pollutant in contravention of the Act. The Fourth Circuit, for example, held that sidecasting, the removal of dredged or excavated material from a wetland (a water of the United States) and redistributing that material back into the same wetland, constitutes a discharge of a pollutant. *United States v. Deaton*, 209 F.3d 331, 335-37 (4th Cir. 2000). The Fourth Circuit so held even though sidecasting does not result in a net increase in materials in the wetland, and the material sidecast was the very same

material that had just been removed from inches away in the same wetland (waters). The *Deaton* court specifically considered and rejected the argument that "no pollutant is discharged unless there is an introduction of new material into the area, or the increase in the amount of material that is already present." *Id.* at 335 (internal quotation marks and citations omitted). The District Court seemed to recognize *Deaton's* significance in the present case, stating: "Under *Deaton*, if shrimp trawling is analogous to sidecasting and the transformation of 'earth and vegetable matter,' via piling the excavated material on either side of a ditch, into 'dredged spoil' is akin to the transformation of living fish and marine species, via incidental taking during shrimp trawling, into carrion, the Clean Water Act arguably requires a permit for the return of bycatch carrion into coastal waters." J.A. 894-95. Yes. Exactly.

The Fifth and Ninth Circuits have ruled similarly. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983) (holding that landowners' vegetation removal in wetlands and redistribution of that material constituted a discharge of a "fill material" subject to regulation under the Act , and that the vegetation removal constituted "dredging."); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 813-15 (9th Cir. 2001) (holding that using bulldozers to deep rip through soil, thereby redistributing it, can constitute the discharge of a pollutant under the CWA even though it does not result in the net increase of material in a wetland).

In summary, the case law, without exception, supports the classification of the dead fish discharged into the waters of the United States by Appellees as "biological materials" and the definitions also support its classification as "solid waste" or "garbage." These classifications are all subsets of "pollutant." The bycatch—dead organisms—discharged by Appellees is certainly a pollutant under the Act. In addition, the case law supports a conclusion that the bycatch is in fact "discharged" into the waters of the United States.

II. Appellants' Complaint Sufficiently Alleged that Appellees' Discharge of Dredged Material in Navigable Waters Violate the Clean Water Act's Prohibition.

The District Court focused on one primary issue in addressing and dismissing Appellants' dredged material claim: that the material dredged up, suspended in the water, and redeposited by the dragging of heavy gear across the sea floor is merely "incidental fallback." J.A. 896-98. "Incidental fallback" is an exemption from the requirement to obtain a Section 404 permit to "discharge . . . dredged or fill material into the navigable waters." 33 U.S.C. § 1344 (originally Section 404 of the Act). The incidental fallback exemption is memorialized in the Corps of Engineers regulations implementing Section 404. 33 C.F.R. § 323.2(d).

As part of its analysis, the District Court went awry in going to some lengths to define "addition" narrowly not to include the redeposit of material. This is in direct conflict with the regulation, which states "the term discharge of dredged

material means any addition of dredged material into, *including redeposit* of dredged material other than incidental fallback *within, the waters of the United States*. *Id.* § 323.2(d)(1) (emphasis added). The regulation goes on to specify that the term includes, *inter alia,* "[a]ny addition, including redeposit other than incidental fallback, of dredged material . . . into waters of the United States which is *incidental* to any activity." *Id*. § 323.2(d)(1)(iii) (emphasis added). So, the fact that discharge occurs incidentally to an activity does not exempt it; in fact, these incidental discharges are specifically included.

To be exempt, the discharge must not only be incidental, it must be "incidental fallback." Both the agencies and the courts have given us guidance on the meaning of 'incidental fallback." The decisions in *National Mining* invalidated the agencies' previous attempt to regulate all redeposits of dredged material, requiring the agency to create an 'incidental fallback' exemption. *Am. Mining Cong. v. U.S. Army Corps of Eng'rs*, 951 F. Supp. 267 (D.D.C. 1997), *aff'd sub nom*, *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998).

In their 1999 revisions to the Act's regulatory definition of 'Discharge of Dredged Material", the EPA and USACE created and explained this exemption, with reference to both the District Court case and the D.C. Circuit case that affirmed it. Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material," 64 Fed. Reg. 25,120, 25,120-25,123 (May 10, 1999) (codified at 33

C.F.R. pt. 323 and 40 C.F.R. pt. 232). In explaining 'incidental fallback', the agencies quoted the district court's description of incidental fallback: "Incidental fallback is the incidental soil movement *from excavation*, such as the soil that is disturbed when dirt is shoveled, or the back-spill that comes off a bucket and falls back into the same place from which it was removed." *Am. Mining Cong.*, 951 F. Supp. at 270; 64 Fed. Reg. at 25,121 (emphasis added). The emphasis is on excavation, and a small subset of the excavated material that falls back to its original location. The D.C. Circuit confirmed this emphasis, saying

> [w]e agree with the plaintiffs, and with the district court, that the straightforward statutory term "addition" cannot reasonably be said to encompass the *situation in which material is removed* from the waters of the United States *and a small portion of it* happens to fall back. Because incidental fallback represents a net withdrawal, not an addition, of material, it cannot be a discharge.

Nat'l Mining Ass'n, 145 F.3d at 1404 (emphasis added). The instant case involves neither the excavation nor removal (or "net withdrawal'") of dredged material from the navigable waters of the United States.

The D.C. Circuit took pains to be clear that it was not excluding all redeposited materials, but only incidental fallback.

> They correctly note that since dredged material comes from the waters of the United States, 33 CFR § 323.2(c), any discharge of such material into those waters could technically be described as a "redeposit," at least on a broad construction of that term. The Fifth Circuit made a similar observation fifteen years ago: "'[D]redged' material is by definition material that comes from the water itself. A requirement that all pollutants must come from outside sources would effectively

> remove the dredge-and-fill provision from the statute." *Avoyelles Sportsmen's League v. Marsh,* 715 F.2d 897, 924 n. 43 (5th Cir. 1983). But we do not hold that the Corps may not legally regulate some forms of redeposit under its § 404 permitting authority. We hold only that by asserting jurisdiction over "*any* redeposit," including incidental fallback, the *Tulloch* Rule outruns the Corps'[] statutory authority. Since the Act sets out no bright line between incidental fallback on the one hand and regulable redeposits on the other, a reasoned attempt by the agencies to draw such a line would merit considerable deference.

Id. at 1405.

The Eleventh Circuit examined a situation in which tugboats working for a construction company pushing barges had dug up the bottom of the shallow waterway with their large propellers, displacing the dredged spoil "onto the adjacent sea grass beds" simply by the force of the propeller's action. *United States v. M.C.C. of Fla.*, 772 F.2d 1501, 1506 (11th Cir. 1985), *vacated on other grounds*, 481 U.S. 1034 (1987), *readopted in relevant part on remand*, 848 F.2d 1133 (11th Cir. 1988). The court found this to constitute dredging and to be a violation of the Act. There was no indication that this dredging was intentional; rather it was incidental to the work the boats were doing pushing the barges. This case is on all fours with the instant case: bottom sediments dredged and displaced incidentally by commercial boats, and which sediments are redeposited by naturally falling out of the water column in a different section of the same waterway. The *National Mining Association* court reviewed this case and commented that it did not involve

incidental fallback, but was "a displacement that seems analytically more similar to sidecasting than to fallback." 145 F.3d at 1406.

So, the sediment and other bottom materials dredged up by the Appellees' trawling gear, which is suspended in the water, moved by currents, wind, and the motion of the trawling gear, and then redeposited in various areas, is not incidental fallback under the law. It is not exempt from Section 404's requirement that the discharger of dredged material obtain a permit.

The District Court's Order also briefly (for two sentences) delves into a separate exemption, that for incidental discharge of dredged material that "does not have or would not have the effect of destroying or degrading an area of waters of the United States as defined in paragraphs (d)(4) and (d)(5) of this section." J.A. 896 (citing 33 C.F.R. § 323.2(d)(3)(i)). This is not the incidental fallback provision, but a separate exemption. Appellants do not claim that Appellees' discharge of dredged material meets the Section 323.2(d)(4) definition of destroying an area of waters, but the discharges certainly meet the Section 323.2(d)(5) definition of degrading an area. That definition states "[f]or purposes of this section, an activity associated with a discharge of dredged material degrades an area of waters of the United States if it has more than a de minimis (i.e., inconsequential) effect on the area by causing an identifiable individual or cumulative effect on any aquatic function." *Id.* § 323.2(d)(5).

Merriam-Webster defines "inconsequential" as "of no significance: unimportant" and "irrelevant." Merriam-Webster, *inconsequential*, https://www.merriam-webster.com/dictionary/inconsequential (last visited Dec. 18, 2021). With Appellants' allegations taken as true, and all inferences made in Appellants' favor, the Appellants certainly allege the degradation of navigable waters of the United States. Among other things, Appellants allege the deposition of large volumes of sediment in waters that are essential spawning and nursery habitat for many finfish species, J.A. 21-22 ¶ 36, in an estuary designated by Congress as of "national significance." J.A. 21 ¶ 34. Appellants allege that the dredging and the re-suspended sediments pollute coastal waters, including the Pamlico Sound, degrade North Carolina's marine and estuarine environments, and harm fish and other marine species, threatening and endangering their ability to propagate and maintain their populations, and result in "[d]egraded marine and estuarine habitats." J.A. 24-25, 28 ¶¶ 48, 51, 52, 54, 70.[7]

[7] The District Court repeated almost verbatim an erroneous assertion in the brief below of Appellees Capt. Gaston LLC *et al*. that suggests that Section 404 should only apply to "open water disposal of material removed during the digging or deepening of navigable waters." J.A. 897 (using the same language offered in E.D.N.C. Dkt. 38 at 22). That this is not true is evident from the discussion above, the rules in 33 C.F.R. pt. 323, and the rich history of court decisions since 1972. Since this is only mentioned by the District Court in passing, and the judgment does not appear to be based on it, Appellants will not further address it.

Appellants have adequately alleged that Appellees have, without the required permitting, discharged dredged material into waters of the United States. No exemption is evident from the allegations of the Complaint. This claim should not have been dismissed.

CONCLUSION

For the reasons stated herein, Appellants urge this honorable Court to vacate the District Court's judgment dismissing Appellants' claims for failure to state a claim upon which relief can be granted and remand this case back to the District Court for the Eastern District of North Carolina for discovery and evidentiary proceedings.

REQUEST FOR ORAL ARGUMENT

Appellants respectfully request that this Court allow for oral argument in this case.

Respectfully submitted this the 20th day of December, 2021.

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CERTIFICATE OF COMPLIANCE

1. This Opening Brief of Appellant has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman, 14 point.

2. Exclusive of the table of contents; table of citations; certificate of compliance and the certificate of service, this Opening Brief of Appellant contains 9,937 words.

3. I understand that a material misrepresentation can result in the court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the brief and a copy of the word or line printout.

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