Agriculture, Drainage Districts, and the Clean Water Act:
Does What Happens in Des Moines Stay in Des Moines?
Co-authored by Harrison Pittman and Rusty Rumley[1]

I. Introduction

On January 9, 2015, Des Moines Water Works (DMWW)[2] communicated its intent to file a lawsuit involving several Iowa drainage districts "for the discharge of pollutants into the Raccoon River in violation of the Clean Water Act, Iowa Code § 455B.186, and for other claims under state statute and common law of nuisance, trespass, and negligence."[3] In March 2015, after the requisite sixty-day notice period mandated by the "citizen suit" provisions of the CWA had passed, DMWW filed its complaint in the United States District Court for the Northern District of Iowa.[4]

DMWW argues, *inter alia*, that the discharge of nitrates by the drainage districts at issue constitutes a discharge of a pollutant by a "point source" under the CWA, and, therefore must obtain an National Pollution Discharge Elimination System (NPDES) permit in order to lawfully discharge.[5] In so doing, DMWW asserts that the discharges at issue fall outside the "agricultural stormwater discharges" exemption under the CWA definition of "point source." Thus, as discussed in more detail below, the lawsuit offers a critical test of the boundaries of the CWA "agricultural stormwater discharges" exemption and, therefore, carries significant regulatory enforcement implications relative to agricultural production in Iowa and beyond.

This article provides a basic overview of the CWA provisions most relevant to the DMWW action, a discussion of the DMWW CWA arguments presented in the DMWW action, and highlights court decisions potentially relevant to the DMWW decision. In so doing, the article focuses on the CWA arguments raised in the January 2015 notice of intent to sue and the plaintiff's complaint[6] filed in March 2015.

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[1] Harrison Pittman is Director of the National Agricultural Law Center. Rusty Rumley is a Senior Staff Attorney at the National Agricultural Law Center. The National Agricultural Law Center (www.nationalaglawcenter.org) serves as the nation's leading source of agricultural and food law research and information.

[2] The DMWW was established in 1871 to serve as an independently owned and operated public utility. Today, DMWW is the largest water utility in Iowa and is managed by a five member Board of Trustees, each of whom is appointed by the Mayor of the City of Des Moines. *See* Complaint at 14, Board of Water Works Trustees of Des Moines, Iowa v. Sac County Board of Supervisors, et al, No. 5:15-cv-04020 (N.D. Iowa 2015).

[3] Letter from William Stowe, Sixty-day Notice of intent to Sue, (January 9, 2015) available at http://www.dmww.com/upl/documents/about-us/announcements/notice-of-intent-to-sue.pdf (hereinafter DMWW Letter). In its January 9, letter, DMWW sometimes refers only to the Raccoon River, but refers to both the Raccoon River and the Des Moines River at other times.

[4] 33 U.S.C.A. § 1365(b)(1)(A).

[5] In addition to the CWA claims, DMWW alleges several other causes of action. These include violation of Iowa statutory law, public nuisance, statutory nuisance, private nuisance, trespass, negligence, taking without just compensation, due process and equal protection, and injunctive relief. This article focuses only on the CWA claims.

[6] Complaint, Board of Water Works Trustees of Des Moines, Iowa v. Sac County Board of Supervisors, et al, No. 5:15-cv-04020 (N.D. Iowa 2015).

The article also highlights three related legal and policy issues that help inform the broader context in which the DMWW action arises. These issues include the jurisdictional scope of the CWA in the wake of the "waters of the United States" final rule issued by EPA and the U.S. Army Corps of Engineers in 2015, the intensification of the debate over the development of numeric nutrient water quality criteria, and the scope of EPA authority to develop Total Maximum Daily Loads (TMDLs) following the United States Court of Appeals for the Third Circuit decision in *American Farm Bureau Federation v. EPA*.[7] These issues are not immediately germane to the merits of the DMWW CWA arguments, but could be of added long-term legal and policy significance depending on the outcome of the DMWW action.

II. Clean Water Act: An Overview

In 1972, Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the nation's waters."[8] The CWA applies to "navigable waters", which is defined as "the waters of the United States, including the territorial seas."[9] The scope of what constitutes a "water of the United States", as discussed below, remains the subject of considerable controversy that continues to play out in the executive, judicial, and regulatory branches of government.[10]

The CWA distinguishes between "point source" and nonpoint source pollution.[11] The CWA defines "point source" – the crux of the DMWW CWA argument -- as follows:

> 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. *This term does not include agricultural stormwater discharges and return flows from irrigated agriculture*.[12] (emphasis added)

The CWA does not define nonpoint source pollution, but it is commonly defined as water runoff that emanates from broad areas such as that from agricultural and non-agricultural areas, rather than from a specific point of discharge.[13]

The CWA treats point source and nonpoint source pollution quite differently. Specifically, the CWA requires that a National Pollution Discharge Elimination System (NPDES) permit be obtained in order to lawfully discharge a "pollutant" from a "point source" into a navigable water.[14] The CWA defines

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[7] Am. Farm Bureau Fed'n v. U.S. E.P.A., 792 F.3d 281 (3d Cir. 2015).
[8] 33 U.S.C.A. § 1251(a).
[9] 33 U.S.C.A. § 1362(7).
[10] *See generally*, Claudia Copeland, *EPA and the Army Corps' "Waters of the United States Rule": Congressional Response and Options*, CONG. RES. SERV., July 24, 2015, *available at* http://nationalaglawcenter.org/wp-content/uploads//assets/crs/R43943.pdf.
[11] *See generally* Waterkeeper Alliance, Inc. v. U.S. E.P.A., 399 F.3d 486, 505 (2d Cir. 2005).
[12] 33 U.S.C.A. § 1362(14) (emphasis added).
[13] *See, e.g.,* League of Wilderness Defenders v. Forsgren, 309 F.3d 1181 (9th Cir. 2002) (stating that "nonpoint source pollution is . . . widely understood to be the type of pollution that arise from many dispersed activities over large areas, and is not traceable to any single discrete source. Because it arises in such a diffuse way, it is very difficult to regulate through individual permits.").
[14] *See, e.g.,* Ass'n to Protect Hammersley, Eld. & Totten Inlets v. Taylor Res., 299 F.3d 1007, 1009 (9th Cir. 2002) (stating that "[a] cornerstone of the Clean Water Act is that the 'discharge of any pollutant' from a 'point source' into navigable waters of the United States is unlawful unless the discharge is made according to the terms of an

"discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source."[15] The CWA authorizes EPA to issue an NPDES permit that allows a point source to lawfully discharge a pollutant into a water of the United States, subject to effluent limitations and restrictions contained in the NPDES permit.[16] Nonpoint source pollution is addressed through voluntary programs administered at the state level that do not involve permitting under the CWA.[17] The CWA defines "pollutant" to include the following:

> 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.[18]

The CWA also contains a "citizen suit" provision that allows private entities or individuals to file a legal action "against any person, including the U.S. Government or other government instrumentality for an alleged violation of an effluent standard or limitation or an order issued by EPA or a State."[19] The person bringing the citizen suit must provide 60 day notice of their intent to bring the action unless the issue is remedied such that it negates the need to bring the action.[20]

III. DMWW Lawsuit

On January 9, 2015, the DMWW Board of Trustees notified the Chairpersons for the Sac County Board of Supervisors, the Calhoun County Board of Supervisors, the Buena Vista County Board of Supervisors as well as other local and state officials of their intent to file a "citizen suit" regarding concerns about nitrate pollution entering the Raccoon River and the Des Moines River from drainage districts.[21] In the notice, DMWW detailed, *inter alia*, its concerns over nitrates in the water supply, the financial costs it claims it must bear to properly clean the water as a result of the presence of high concentrations of nitrates, and human health risks associated with high levels of nitrates.[22] The letter also stated that "[e]utrophication and the development of hypoxic conditions in the Gulf of Mexico's dead zone are also directly attributable to nutrient transport from agriculture into the tributaries of the Mississippi, including the Raccoon River and Des Moines River." While not germane to the merits of the DMWW's

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NPDES permit obtained from the United States Environmental Protection Agency . . . or from an authorized state agency.").

[15] 33 U.S.C. § 1362(7).

[16] Id. at § 1342.

[17] 33 U.S.C.A. § 1329(b).

[18] Id. at § 1311(a). *See* N. Plains Res. Council v. Fid. Exploration & Dev. Co., 325 F.3d 1155 (9th Cir. 2003). In that case, the defendant discharged groundwater extracted during the process of gathering coal bed methane. Even though the groundwater was discharged in an unaltered state, the natural minerals that the water carried were found to be a pollutant under the CWA and the water itself to be an industrial waste. This case may be of limited precedential value – i.e., the groundwater was from an industrial use instead of agricultural -- but the fact that unaltered groundwater may be a pollutant under the CWA could be relevant in the DMWW lawsuit.

[19] Id. at 1365(a)(1).

[20] Rusty sending this citation

[21] Needs a citation

[22] See DMWW Letter.

CWA claim, the mention of hypoxic conditions is noteworthy in light of the debate that EPA should develop federal numeric nutrient criteria throughout the Mississippi River Basin.[23]

On March 16, 2015, DMWW filed its complaint in the United States District Court for the Northern District of Iowa, seeking a declaratory judgment that the drainage districts have violated the CWA "by failing to comply with the effluent limitations prescribed by the . . . [CWA's] NPDES permit system . . ., injunctive relief, civil penalties, and the award of costs, including attorney and expert witness fees."[24]

The complaint details DMWW's concerns over nitrate pollution in the Raccoon and Des Moines Rivers and asserts the following:

> A major source of nitrate pollution in the Raccoon River watershed is the artificial subsurface drainage system infrastructure, such as those created, managed, maintained, owned and operated by the Drainage Districts, consisting of pipes, ditches, and other conduits that are point sources which transport high concentrations of nitrate contained in groundwater.[25]

To understand the legal issues raised in the DMWW action, one must have at least a cursory understanding of the use of tile drainage in agriculture.[26] The use of tile drainage in agricultural production is a longstanding and common practice in Iowa and many other states. Generally stated, tile drainage optimizes the productivity of agricultural lands by removing excess subsurface moisture from the soil. The tiles are typically located approximately one meter under the surface of the land throughout a field and transport water through numerous underground pipes until they exit into open ditches or other pathways. Farmers will install and maintain the drainage tile on their own property, which flow into ditches or other structures along the property's boundary. Drainage districts, such as the ones at issue in the DMWW action, are the administrative entities that typically oversee the construction and maintenance of the ditches and similar structures that facilitate drainage from the boundaries of many farm fields in the watershed to the final destination.[27]

The DMWW lawsuit targets the drainage districts and the counties that exercise administrative control over them, rather than tile drainage that emanate from privately-owned agricultural lands at issue or the farmers and landowners that own those lands.[28] That said, DMWW alleges that "[t]he primary purpose of the Drainage District infrastructure is to remove water from agricultural lands, including

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[23] *See* DMWW Letter. In light of the issues involved in *Gulf Restoration Network v. EPA*, discussed in more detail below, this is an important statement for DMWW to include in its notice of intent to sue. I

[24] Complaint at 2, , Board of Water Works Trustees of Des Moines, Iowa v. Sac County Board of Supervisors, et al., No. 5:15-cv-04020 (N.D. Iowa 2015).

[25] Complaint at 3, Board of Water Works Trustees of Des Moines, Iowa v. Sac County Board of Supervisors, et al., No. 5:15-cv-04020 (N.D. Iowa 2015).

[26] The explanation provided here is cursory in nature, and does not account for the varying types of legal status drainage districts may have from one jurisdiction to another.

[27] Drainage districts are but one type of "special water district" that could be eventually impacted by the DMWW decision. *See, e.g.,* John H. Davidson*, Using Special Water Districts to Control Nonpoint Sources of Water Pollution*, 65 Chi.-Kent. L. Rev. 503 (1989).

[28] Further, it should be noted that EPA regulations specifically exclude water flows from tile drainage as "waters of the United States", to wit: "Groundwater, including groundwater drained through subsurface drainage systems [is not a water of the United States]". *See* 40 C.F.R. § 122.2(2)(v).

groundwater containing a high concentration of nitrate. . . ."[29] It further alleges that "[s]ubsurface tile and pipe and surface ditches and channels created and maintained by the Drainage Districts are connected to private subsurface tiles to convey groundwater within each of the Drainage Districts to streams and rivers, and ultimately to the Raccoon River."[30]
If DMWW ultimately succeeds on its CWA argument that the drainage districts are a point source, one or more NPDES permits must be obtained that will establish effluent limitations and other restrictions with which the drainage districts must comply. It is an inescapable reality that the tile drainage located on privately owned farm fields would then become a focus of compliance efforts associated with the NPDES permit(s), although it is unclear how, as a practical matter, precisely how those fields would be impacted short-term or long-term. One possible outcome is that the drainage districts would assess fees against landowners that discharge into the drainage district to offset the costs of permit compliance.

DMWW acknowledges that the drainage districts transport stormwater and groundwater, "but little or no irrigation return flow" and, very importantly, that "the conveyance of nitrate is almost entirely by groundwater transport."[31] DMWW further alleges that because "stormwater flowing across a field or into a surface intake of a drainage district has little opportunity to dissolve nitrate produced by soil microorganisms or to interact with soil containing dissolved nitrate, only a very small concentration of nitrate can be found in agricultural stormwater runoff."[32] This is a basic, but important argument, because it demonstrates a key tactic in how DMWW seeks to avoid a determination that the discharges at issue fall outside the "agricultural stormwater discharges" exemption.

The DMWW CWA argument triggers the fundamental legal issue of whether the flows at issue – or some portion of those flows – are exempted from the statutory definition of point because they constitute "agricultural stormwater discharges." As noted, the outcome of this issue will be of great consequence to parties and stakeholders on both sides of the issue in the Des Moines area and throughout other jurisdictions as well. A ruling that the drainage districts constitute a point source would represent a significant shift into how drainage districts and other special water districts around the nation under the CWA.

The specific issue raised in the DMWW lawsuit is not directly addressed in existing case law, though there have been a handful of cases to examine the "agricultural stormwater discharges" exemption. Consequently, few decisions exist to provide guidance as to how this particular issue may be resolved in the DMWW action.[33]

In 2011, a similar action, *Pacific Coast Federation of Fishermen's Associations v. Glaser*,[34] was initiated in the United States District Court for the Eastern District of California. *Pacific Coast Federation* is distinguishable from the DMWW action, primarily because it involved the "return flows from irrigated

[29] Complaint at 23, Board of Water Works Trustees of Des Moines, Iowa v. Sac County Board of Supervisors, et al., No. 5:15-cv-04020 (N.D. Iowa 2015).
[30] Id.
[31] Id. at 23, 29.
[32] Id.
[33] Some of these cases are discussed below. The cases are not binding precedent for the United States District Court for the Northern District of Iowa. Further, the potentially fact sensitive nature of some aspects of the cases may present challenges in applying them to the DMWW facts and circumstances.
[34] Pac. Coast Fed'n of Fishermen's Associations v. Glaser, No. CIV S-11-2980-KJM, 2012 WL 3778963 (E.D. Cal. Aug. 31, 2012).

agriculture" exemption, but it may also offer important insight into the analysis the DMWW court could apply, assuming it reaches the point in which it considers the scope of the "agricultural stormwater discharges" exemption.[35]

In *Pacific Coast Federation* several environmental groups targeted the Grasslands Bypass Project, a project jointly administered by the U.S. Bureau of Reclamation and the San Luis & Delta-Mendota Water Authority (collectively defendants). The Grasslands Bypass Project "uses a tile drainage system, consisting of a network of perforated drain laterals underlying Valley farmland that catch water and direct it into the San Luis Drain, and from there, into the Mud Slough, the San Joaquin River, and the Bay-Delta."[36] Also similar to the DMWW lawsuit, the plaintiffs in *Pacific Coast Federation* asserted that the defendants' "purposeful collection of contaminated groundwater, unrelated to the application of surface water to the land, and its direction to Mud Slough and the San Luis Drain without an NPDES permit, violates the CWA."[37]

The defendants' chief argument in *Pacific Coast Federation* was that an NPDES permit was not required because the tile drainage system fell within the "irrigation return flows" exemption. The defendants in the DMWW lawsuit will raise the same argument, albeit for the "agricultural stormwater discharges" exemption.

In *Pacific Coast Federation,* the court issued a series of three procedural orders – one in 2012, 2013, and 2014, respectively -- in which it considered arguments that centered on what groundwater discharges, if any, were not related to crop production and, therefore, plausibly fell outside the return flows from irrigated agriculture exemption.[38] In the 2012 Order, "[t]he central dispute before the court . . . [was] whether the Project's long established method of channeling waters through a subsurface tile system may render that system a 'point source' under the CWA."[39]

The court analyzed legislative text and history specifically germane to the return flows from irrigated agriculture exemption and determined that, for purposes of the parties' procedural motions, "the court cannot conclude at this phase of the proceedings that intentional drainage of contaminated groundwater is subsumed in the irrigation flows exemption."[40] The 2012 Order is of minimal substantive value to the issues presented in the DMWW lawsuit, but is important in that it set the stage for the 2013 Order and signaled that the court was willing to examine more deeply whether some portion of subsurface tile drainage flows fell with the irrigated agriculture exemption.

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[35] In addition, a portion of the court's reasoning in the *Pacific Coast Federation* Orders, especially the 2013 Order, compared the language found in the CWA regarding discharges composed of "return flows from irrigated agriculture" and discharges composed "entirely of return flows from agriculture". An examination of the court's analysis on this issue is outside the scope of this article, but the distinction could be relevant in distinguishing *Pacific Coast Federation* from the issue presented in the DMWW lawsuit.

[36] 2013 Order at *2.

[37] In the Complaint: tile drainage facilities and agricultural ditches and drains" are point sources and, therefore "illegally discharge groundwater contaminated with selenium and other pollutants" because the discharge occurs without having obtained an NPDES permit

[38] these were procedural and were generally considered in the light most favorable to the plaintiff

[39] 2012 order at *1

[40] 2012 at *7

In the 2013 Order, the court recommenced its consideration of the core issue of whether the subsurface tile system employed by the Grassland Bypass Project was a point source under the CWA.[41] Here, the plaintiffs asserted that "some amount of the contaminated subsurface water, or groundwater, is unrelated to irrigation; hence, discharging it . . . without an NPDES permit violates the CWA."[42] The defendants countered that all discharges related to crop production fell under the return flows from irrigated agriculture exemption and were, therefore, not required to obtain an NPDES permit.[43] Further, one defendant conceded that some of the water discharged from the Grasslands Bypass Project constituted polluted groundwater, but that "the tile drains exist only because of the irrigation of agriculture and are therefore statutorily exempt."[44] The defendants in DMWW are likely to similarly argue that the tile drainage that empties into the ditches and other structures that comprise the drainage districts exists to drain the excess moisture caused by stormwater that seeps beneath the surface of soil.

Following a relatively detailed examination and analysis of legislative language and history specific to the return flows from irrigated agriculture exemption, the court stated the following:

> However, plaintiffs do not plead adequate facts to support a claim that some amount of the Project's discharges is unrelated to crop production. Plaintiffs' conclusory allegation is that some amount of the discharges is unrelated to irrigation. . . . Additionally, the complaint is not clear on whether the Project discharges when farmland is not being irrigated, for example, during winter months or when land is retired from crop production. . . . . The exhibit to the complaint might be read to imply the Project discharges during winter months when irrigation flows are at their lowest, but plaintiffs do not plead facts to support a claim that the discharges are unrelated to crop production. Defendant Authority, on the other hand, asserts the individual tile sumps underlying farmlands do not discharge at all when irrigation season ends or when farmers retire their land. . . . . *It may be that this dispute about off-season discharges is not material; for example, it may be relevant to the agricultural stormwater exception rather than the irrigated agriculture exemption. But a dearth of briefing on this issue precludes the court's addressing it at this juncture*.[45] (emphasis added)

The court then dismissed the plaintiffs' action without prejudice, ruling that it could file an amended complaint in line with the court's decision.

The plaintiff subsequently amended its complaint, which was at issue in the 2014 Order. In the 2014 Order, the plaintiffs argued that the Project discharges substantial amounts of groundwater not associated with irrigated agriculture. Specifically, these discharges were "groundwater that predates all farming in the area; . . . groundwater that is discharged in fall and winter when little or no irrigation occurs; and . . . groundwater that originates from parcels where no farming occurs because the parcels

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[41] 2013 order

[42] Id. at *2

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[44] Id. at *5 (internal citation omitted). *See also* Id. at *7 (The . . . [defendant] admits that the Project serves one purpose: subsurface drainage.") (internal citation omitted).

[45] 2013 Order at *16 (emphasis added).

are retired or fallow."[46] The defendants reasserted the argument that "the applicability of the exemption turns on whether the discharge was caused by an activity related to crop production or by some other activity, such as the disposal of solid waste."[47]

The court rejected the defendants' argument that all discharges related to crop production fell under the return flows from irrigated agriculture exemption. In so doing, the court stated that "if taken to its logical conclusion, the . . . interpretation would exempt any discharge made in the name of crop production without any closer inquiry into whether a majority of the total commingled discharge is in fact related to crop production. Such a loophole is not consistent with a fair reading of the CWA."[48]

With respect to the plaintiffs' arguments, the court determined the following:

> The court finds plaintiffs have pled sufficient facts to state a claim for violation of the CWA. The only dispute before the court is whether the Project is exempt from the NPDES permit requirement because it is covered by the "return flows from irrigated agriculture" exemption. This court has interpreted that exemption to cover discharges from irrigated agriculture that do not contain additional discharges related to crop production. . . . Plaintiffs plead new facts that, when accepted as true, suggest at least some amount of the Project's discharges may be unrelated to crop production. . . . [T]he court reasonably infers, as it must at this stage of the litigation, that the Project's discharges are not composed "entirely of return flows from irrigation agriculture" because they contain additional discharges from polluted groundwater originating from retired land that no longer supports irrigated agriculture. The exemption does not cover these resulting commingled discharges because it is plausible that discharges from retired land, which no longer supports agriculture, are not related to crop production.[49]

The court concluded that the plaintiffs' claim that "groundwater under fallow or retired land" was the "sole valid allegation upon which this case may proceed."[50]

In DMWW, it is unlikely that the "return flows from irrigated agriculture" exemption could similarly apply because irrigation is not a widespread practice in the watershed at issue.[51] However, the court could engage in the same or similar analytical approach charted in *Pacific Coast Federation* as it relates to the "agricultural stormwater discharges" exemption and consider whether, or to what extent, the discharges from tile drainage are related to agricultural production in the watersheds at issue in the DMWW watersheds.

In the 2013 Order, the *Pacific Coast Federation* court suggested that the Project discharges from groundwater under fallow or retired lands might fall under the "agricultural stormwater discharges"

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[46] Pac. Coast Fed'n of Fishermen's Associations v. Murillo, No. CIV. S-2:11-2980-KJM, 2014 WL 1302102, at *2 (E.D. Cal. Mar. 28, 2014).
[47] Id at *3.
[48] Id. at *5.
[49] Id. at *4.
[50] Id. at *5.
[51]

exemption. That issue, magnified in light of the DMWW lawsuit, was not addressed in the 2014 Order, which is currently the last pronouncement from the court.[52]

The United States Court of Appeals for the Second Circuit has also considered the "agricultural stormwater discharges" exemption on two occasions in the context of confined animal feeding operations (CAFOs). In *Concerned Area Residents for the Env't v. Southview Farm*,[53] a large dairy operation in New York attempted to use the agricultural stormwater exemption when heavy rains washed large amounts of manure into local streams. The court in the Southview Farm case held that the dairy in questions was a CAFO (a Confined Animal Feeding Operation) that by definition is a point source and subject to NPDES permitting requirements regardless of the agricultural stormwater exemption.[54]

About a decade later, the Second Circuit revisited the stormwater exemption in *Waterkeeper Alliance, Inc. v. EPA*.[55] In *Waterkeeper*, the court held: "[W]e believe it reasonable to conclude that when Congress added the agricultural stormwater exemption to the Clean Water Act, it was affirming the impropriety of imposing, on "any person," liability for agriculture-related discharges triggered not by negligence or malfeasance, but by the weather—even when those discharges came from what would otherwise be point sources."[56] Undoubtedly, the DMWW defendants will argue that the migration of nitrates to the drainage districts results from precipitation, citing the Second Circuit *Waterkeeper* decision as supporting precedent. [57]

In *Closter Farms*, the United States Court of Appeals for the Eleventh Circuit held that "the discharged groundwater and seepage can be characterized as 'return flow from irrigation agriculture'"[58] In *Closter Farms*, the defendants were drained land to facilitate sugar cane production and pumped excess irrigation water directly into Lake Okeechobee. The plaintiffs argued that this constituted a discharge that fell outside the scope of the "return flows from irrigated agriculture" exemption. The court held that discharges from agricultural operations that are either return flows from irrigated agriculture or agricultural stormwater discharges are by definition not point sources and, therefore, do not require a NPDES permit.[59]

IV. Related CWA Legal & Policy Issues

The DMWW lawsuit occurs at a time when other CWA-based litigation is occurring in other jurisdictions. These cases are relevant to the broader legal and policy context in which they arise, namely the ongoing debate over how best to address the water quality impacts of agricultural production practices. Three of these areas include (1) the scope of EPA authority regarding the development of "Total Maximum Daily Loads (TMDLs), (2) potential shift towards increased development of numeric nutrient criteria for impaired waters, specifically including the Des Moines River and other waterbodies in the Mississippi River Basin, and (3) the jurisdictional scope of the CWA. Each of these areas is briefly discussed below.

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[52] *Pacific Coast Federation* litigation continues, so it is possible that the court will rule on this issue while the DMWW litigation proceeds.
[53] Concerned Area Residents for Env't v. Southview Farm, 34 F.3d 114 (2d Cir. 1994).
[54] Concerned Area Residents for Env't v. Southview Farm, 34 F.3d 114, 122 (2d Cir. 1994).
[55] Waterkeeper Alliance, Inc. v. U.S. E.P.A., 399 F.3d 486 (2d Cir. 2005)
[56] Waterkeeper Alliance, Inc. v. U.S. E.P.A., 399 F.3d 486, 507 (2d Cir. 2005).
[57] Waterkeeper Alliance, Inc. v. U.S. E.P.A., 399 F.3d 486, 508 (2d Cir. 2005).
[58] *See* Closter Farms, 300 F.3d at 1297.
[59] Closter Farms, 300 F.3d at 1297-1298.

Numeric Nutrient Criteria

The CWA envisions considerable cooperation between the federal and state governments, specifically including the development and implementation of water quality standards. States assume the primary role in the water quality standard development process as they bear responsibility for "reviewing, establishing, and revising water quality standards."[60] The state-developed standards must be submitted to EPA to confirm that the standards will "protect the public health or welfare, enhance the quality of water," and otherwise fulfill the purposes of the CWA.[61] The CWA requires that states and develop water quality standards that, among other requirements, specify designated uses for water bodies. The states and tribes must also submit to EPA the water quality criteria that will be implemented to protect those designated uses. The water quality criteria are stated as narrative standards, numeric standards, or a combination of the two.

In the event that state-developed standards are deemed insufficient by EPA, the EPA communicates to the state the changes necessary to obtain approval or the EPA may establish federal water quality standards.[62] Consequently, states have a primary role in developing water quality standards while EPA has backstop authority in the event a state does not fulfill its role insofar as it can promulgate a federal standard, whether it be narrative or numeric.

An example of a narrative criteria is, "[s]urface waters shall be virtually free from floating non-petroleum oils of vegetable or animal origin, as well as petroleum-derived oils."[63] An example of numeric criteria is "[t]he ambient water quality criterion for cadmium is recommended to be identical to the existing drinking water standard, which is 10 µg/L (micrograms per liter)."[64] Consequently, numeric criteria focuses on establishing limits on the presence of specific pollutants in a water body, such as phosphorous or nitrogen that enter water bodies such as the Des Moines River, its tributaries, or adjacent water bodies. Additionally, numeric criteria are far more specific per pollutant – i.e., phosphorous, nitrates, nitrogen -- and traceable to the pollution source than narrative standards.

In 2008, several environmental organizations petitioned EPA to develop, among several other demands, revised numeric water standards for nitrogen and phosphorous for all navigable waters for which such standards have not been developed by states and approved by EPA.[65] In 2011, EPA denied the petition. In so doing, EPA agreed with the petitioners regarding water quality problems, specifically including within the Mississippi River Basin, but that "'it did not believe that the comprehensive use of federal rulemaking . . . [was] the most effective or practical means of addressing these concerns at this time.'"[66] EPA stated that the denial was not a determination that the new standards were not needed to meet CWA requirements but was "'exercising its discretion to allocate its resources in a manner that supports targeted regional and state activities to accomplish our mutual goals or reducing [nitrogen and

[60] 40 C.F.R. s 131.4(a).
[61] 33 U.S.C. s1313(c)(2)(a).
[62] Id. at s1313(c)(3).
[63] Environmental Protection Agency, http://water.epa.gov/learn/training/standardsacademy/mod3/page6.cfm.
[64] Environmental Protection Agency, http://water.epa.gov/learn/training/standardsacademy/mod3/page6.cfm.
[65] *See generally Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 231 (5th Cir. 2015).
[66] *Id.*

phosphorous] pollution and accelerating the development and adoption of state approaches to controlling [nitrogen and phosphorous]'".[67]

The environmental groups brought a legal action against EPA in the United States District Court for the Eastern District of Louisiana.[68] That action, since decided by the federal district court and appealed to the United States Court of Appeals for the Fifth Circuit, has not provided the victory sought by the environmental organizations. The matter is ongoing, however, and represents a significant intensification in the longstanding debate over whether, when, and under what circumstance numeric nutrient criteria should be developed by states or EPA.

Scope of EPA TMDL Authority

As noted, states maintain primary responsibility for developing water quality standards. In so doing, the states establish effluent limitations for point sources in order to help meet those standards.[69] The CWA requires states to then submit a list to EPA, commonly referred to as a § 303(d) list, of those waters in which the effluent limitations imposed on point sources are not sufficient to meet the water quality standards.[70] States must establish "Total Maximum Daily Loads" (TMDLs) for these waters that must be approved or disapproved by EPA.[71] If the TMDL is disapproved, EPA has authority to establish the TMDL. Since the 1990s, EPA has drafted "thousands of TMDLs, which the EPA has described as the 'the technical backbone' of its approach to cleaning the nation's waters."[72]

In 2010, EPA promulgated a TMDL for the seven-state Chesapeake Bay region through notice-and-comment rulemaking pursuant to the Administrative Procedures Act.[73] The TMDL "includes point and nonpoint source limitations on nitrogen, phosphorous, and sediment for 92 segments of the Bay identified as overpolluted and further allocates those limits to specific point sources and to nonpoint source sectors."[74] In addition to these allocations, the TMDL established deadlines and required "reasonable assurance" from the states that they would implement the TMDL.[75]

In *American Farm Bureau Federation v. U.S. EPA*, the American Farm Bureau Federation (AFBF) and several other agricultural organizations filed a citizen suit that challenged the legality of the Chesapeake Bay TMDL. The United States Court of Appeals for the Third Circuit described the plaintiffs' arguments as follows:

> Farm Bureau interprets the words "total maximum daily load" in the Clean Water Act . . . as unambiguous: a TMDL can only consist of number representing the amount of a pollutant that can be discharged into a particular segment of water and nothing more. Thus it argues that the EPA overstepped its statutory authority in drafting the Chesapeake Bay TMDL when the agency (1) included in the TMDL allocations of

[67] Id.
[68] *Gulf Restoration Network v. Jackson*, No. 12-677, 2013 WL 5328547 (E.D. La. Sept. 20, 2013).
[69] *See* 33 U.S.C. § 1311(b)(1)(A) and § 1362(11).
[70] Id. at § 1313(d).
[71] Id.
[72] American Farm Bureau Federation v. EPA, 792 F.3d 281, 291 (citing EPA Office of Water, *Total Maximum Daily Load (TMDL) Program Draft TMDL Program Implementation Strategy* § 1.2 (1996)).
[73] Id. at 287, 292.
[74] Id. at 292.
[75] Id.

> permissible levels of nitrogen, phosphorous, and sediment among different kinds of sources of these pollutants, (2) promulgated target dates for reducing discharges to the level the TMDL envisions, and (3) obtained assurance from the seven affected states that they would fulfill the TMDL's objectives.[76]

After extensive analysis, the court rejected the arguments raised by the plaintiffs. The court concluded that "[e]stablishing a comprehensive, watershed-wide TMDL – complete with allocations among different kinds of sources, a timetable, and reasonable assurance that it will actually be implemented—is reasonable and reflects a legitimate policy choice by the agency in administering a less-than-clear statute."[77]

In the wake of this decision, as it currently stands, EPA can more readily leverage its authority to establish TMDLs – in Iowa or other states – that contain deadlines, point source and nonpoint source allocations of different kinds of pollutants such as nitrogen and phosphorous, and can seek assurance from the state that the TMDL will be implemented. It bears noting, however, that the Chesapeake Bay states agreed that EPA would establish the TMDLs rather than EPA exercising its authority in the wake of disapproving a TMDL proposed by the states.

In the DMWW lawsuit, DMWW complains that the Iowa Reduction Nutrient Strategy lacks "(i) a timeframe for when the nutrient reduction will be achieved; (ii) numeric nutrient criteria standards; (iii) guidance on water quality monitoring; and (iv) any required conservation practices."[78] The numeric nutrient criteria and TMDL decision in *American Farm Bureau Federation* are not germane to the specific legal issue of whether the discharges at issue in the DMWW lawsuit, the broader long-term policy and legal implications of the outcome of the DMWW lawsuit.

Waters of the United States

As noted earlier, the jurisdictional scope of the CWA extends to "the waters of the United States, including the territorial seas."[79] The CWA does not further define "waters of the United States", leaving it to EPA and the United States Army Corps of Engineers to define. The issue of what waters fall under the jurisdictional scope of the CWA remains controversial and the subject of debate in the judicial, legislative, and executive branches of government. The EPA and the Corps have defined the term several times and the application of those definitions has been litigated on many occasions.

In 2001 and 2006, the United States Supreme Court issued rulings that interpreted the jurisdictional scope of the CWA more narrowly than the agency definition.[80] These decisions contributed to ongoing confusion regarding the jurisdictional scope of the CWA, and triggered, among other things, the EPA and the Corps to issue agency guidance documents in 2003 and 2008. As a general rule, waters that are usable in interstate commerce -- "traditional navigable waters" -- are accepted as being within the jurisdictional scope of the CWA. Likewise, the more isolated or removed waters are from being used in

[76] Id. at 294.
[77] Id. at 309.
[78] Complaint at 9.
[79] 33 U.S.C. § 1362(7).
[80] These decisions have been the subject of extensive legal literature and are not recounted here. For an excellent discussion of these cases and their impact, *see*

interstate commerce, the more likely there is to be disagreement between the agency and others regarding whether it is within the jurisdictional scope of the CWA.

Against this backdrop, the EPA and the Corps published a proposed rule on April 21, 2014 designed to define the jurisdictional scope of the CWA. On May 27, 2015, agencies finalized the rule and the rule became effective on August 28, 2015.[81] The agencies' perspective, generally stated, is that the new rule revises the definition of "waters of the United States" in a manner consistent with the 2001 and 2006 U.S. Supreme Court decisions and provides clarification to the ongoing confusion about scope of CWA jurisdiction. Others disagree, specifically including agricultural stakeholders, arguing, generally speaking, that the proposed rule is a regulatory overreach by the agency outside the scope of the CWA.

Regardless of one's view on the new rule, it would expand the jurisdictional scope of the CWA beyond the scope set out in the agency guidance document. For example, current implementation of the CWA includes, among other waters, a tributary to a traditional navigable water. The final rule broadens the definition of the term tributary beyond that which is currently implemented. Another example is that current CWA implementation includes *wetlands* that are adjacent to traditional navigable waters. The new rule modifies the scope of the CWA to include all *waters* adjacent to, among other waters such as interstate wetlands, traditional navigable waters.

The final rule is not at issue in the DMWW lawsuit. However, a determination that the drainage districts at issue are point sources would have far-reaching impacts in Iowa and elsewhere. At that time, the expanded definition of jurisdictional waters would be of increased importance.

V. Conclusion

The DMWW lawsuit is a significant legal development that warrants attention of stakeholders in Iowa and beyond, specifically including within the Mississippi River Basin states. The DMWW action tests the boundaries of the CWA agricultural stormwater exemption, as well as whether, or to what extent, drainage districts in Iowa and beyond may be point sources and, therefore, subject to NPDES permit requirements. The outcome of this issue alone raises serious implications for the agricultural sector, the conservation community, and others involved in the ongoing debate over the impact of agricultural production on water quality. The importance of the issue is heightened further when viewed in tandem with an expanding advocacy for the establishment of numeric nutrient criteria, the scope of EPA authority in promulgating TMDLs, and the scope of EPA jurisdiction over waters of the United States.

If the DMWW were to ultimately succeed on its CWA claim, the drainage districts at issue would be required to obtain a NPDES permits that placed limits on pollutants that flowed out of the drainage districts and into the Raccoon River and the Des Moines River. This would be a dramatic legal development that would reverberate throughout Iowa and other states. It would also represent a very significant shift in the environmental regulation of agriculture. That said, the DMWW legal process could take years to conclude, which will overlap with other legal and policy developments briefly discussed in this article.

[81] 33 C.F.R. Part 328, 40 C.F.R. Parts 110, 112, 116, 117, 122, 232, 300, 302, and 401.

Regardless of the outcome of any action DMWW ultimately pursues, the legal process will likely take years to conclude. And, assuming DMWW ultimately prevailed on its CWA argument, the role of the drainage districts in their post-NPDES permit world could also take years to address. As noted, this process would evolve at the same time as the ongoing issues of jurisdictional scope of the CWA and the development of numeric nutrient criteria, which are briefly discussed below.

The Clean Water Rule only protects the types of waters that historically have been covered under the Clean Water Act. The rule does not create any new permitting requirements for agriculture and maintains all previous exemptions and exclusions.It does not regulate most ditches and does not regulate groundwater, shallow subsurface flows, or tile drains. It does not make changes to current policies on irrigation or water transfers or apply to erosion in a field. The Clean Water Rule protects waters from pollution and destruction – it does not regulate land use or affect private property rights. These statements are supported by the text of the rule and its preamble.

A Clean Water Act permit is only needed if a protected water is going to be polluted or destroyed.

FACT: THE CLEAN WATER RULE DOES NOT REGULATE MOST DITCHES

Rule Text § 230.3(s)(2)(iii): "The following are not 'waters of the United States… the following ditches: (A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary. (B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands. (C) Ditches that do not flow, either directly or through another water, into [a traditional navigable water, interstate water, or the territorial seas.]"
Preamble page 169: "Moreover, since the agencies have focused in the final rule on the physical characteristics of excluded ditches, the exclusions will address all ditches that the agencies have concluded should not be subject to jurisdiction, including certain ditches on agricultural lands and ditches associated with modes of transportation, such as roadways, airports, and rail lines."

FACT: THE CLEAN WATER RULE DOES NOT CHANGE EXEMPTIONS FOR AGRICULTURE

Preamble page 8: "Congress has exempted certain discharges, and the rule does not affect any of the exemptions from CWA section 404 permitting requirements provided by CWA section 404(f), including those for normal farming, ranching, and silviculture activities. CWA section 404(f); 40 CFR 232.3; 33 CFR 323.4. This rule not only maintains current statutory exemptions, it expands regulatory exclusions from the definition of "waters of the United States" to make it clear that this rule does not add any additional permitting requirements on agriculture."

FACT: THE CLEAN WATER RULE DOES NOT REGULATE EROSIONAL FEATURES

Rule Text § 230.3(s)(2)(iv)(F): "The following are not 'waters of the United States' . . . erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary . . . ."
Preamble page 175: "While the proposed rule specifically identified gullies and rills, the agencies intended that all erosional features would be excluded. The final rule makes this clear."

FACT: THE CLEAN WATER RULE DOES NOT REGULATE GROUNDWATER

Rule Text § 230.3(s)(2)(v): "The following are not 'waters of the United States… groundwater, including groundwater drained through subsurface drainage systems."
Preamble page 176: "The agencies include an exclusion for groundwater, including groundwater drained through subsurface drainage systems."

FACT: THE CLEAN WATER RULE DOES NOT REGULATE FARM PONDS

Rule Text § 230.3(s)(2)(iv)(B): "The following are not 'waters of the United States… Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds . . . ."
Preamble page 173: "In the exclusion for artificial lakes or ponds, the agencies have removed language regarding 'use' of the ponds, including the term 'exclusively.' . . . [T]he agencies recognize that artificial lakes and ponds are often used for more than one purpose and can have other beneficial purposes . . .."

FACT: THE CLEAN WATER RULE DOES NOT REGULATE LAND USE

Preamble page 8: **"**The rule also does not regulate … land use."

FACT: THE CLEAN WATER RULE DOES NOT CHANGE POLICY ON IRRIGATION

Rule text § 230.3(s)(2)(iv)(A): "The following are not 'waters of the United States… artificially irrigated areas that would revert to dry land should application of water to that area cease . . . ."
Rule text § 230.3(s)(2)(iv)(B): "The following are not 'waters of the United States . . . Artificial constructed lakes and ponds created in dry land such as . . . irrigation ponds . . . ."
Preamble page 8: "The rule also does not . . . affect either the existing statutory or regulatory exemptions from NPDES permitting requirements, such as for agricultural stormwater discharges and return flows from irrigated agriculture . . . ."

FACT: THE CLEAN WATER RULE DOES NOT REGULATE PUDDLES

Rule Text § 230.3(s)(2)(iv)(G): "The following are not 'waters of the United States… puddles."
Preamble page 176: "The final rule adds an exclusion for puddles . . . . Numerous commenters asked that the agencies expressly exclude them in a rule. The final rule does so."

FACT: THE CLEAN WATER RULE DOES NOT CHANGE POLICY ON STORMWATER

Rule text § 230.3(s)(2)(vi): "The following are not 'waters of the United States… stormwater control features constructed to convey, treat, or store stormwater that are created in dry land."
Preamble page 177: "This exclusion responds to numerous commenters who raised concerns that the proposed rule would adversely affect municipalities' ability to operate and maintain their stormwater systems . . . . The agencies' longstanding practice is to view stormwater control features that are not built in 'waters of the United States' as non-jurisdictional."

FACT: THE CLEAN WATER RULE DOES NOT REGULATE WATER IN TILE DRAINS

Rule Text § 230.3(s)(2)(v): "The following are not 'waters of the United States… groundwater, including groundwater drained through subsurface drainage systems."

FACT: THE CLEAN WATER RULE DOES NOT CHANGE POLICY ON WATER TRANSFERS

Preamble page 8: **"**The rule also does not … affect either the existing statutory or regulatory exemptions from NPDES permitting requirements, such as for… water transfers."

MORE INFORMATION AT WWW.EPA.GOV/CLEANWATERRULE

WHY CLEAN WATER IS IMPORTANT

Clean water is vital to our health, communities, and economy. We need clean water upstream to have healthy communities downstream. The health of rivers, lakes, bays, and coastal waters depend on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities by trapping floodwaters, recharging groundwater supplies, filtering pollution, and providing habitat for fish and wildlife. People depend on clean water for their health: About 117 million Americans -- one in three people – get drinking water from streams that were vulnerable to pollution before the Clean Water Rule. Our cherished way of life depends on clean water: healthy ecosystems provide wildlife habitat and places to fish, paddle, surf, and swim. Our economy depends on clean water: manufacturing, farming, tourism, recreation, energy production, and other economic sectors need clean water to function and flourish.

WHAT IS THE CLEAN WATER RULE

Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. The Clean Water Rule protects streams and wetlands that are scientifically shown to have the greatest impact on downstream water quality and form the foundation of our nation's water resources. EPA and the U.S. Army are ensuring that waters protected under the Clean Water Act are more precisely defined, more predictable, easier for businesses and industry to understand, and consistent with the law and the latest science. The Clean Water Rule:

The Clean Water Act protects the nation's waters. A Clean Water Act permit is only needed if these waters are going to be polluted or destroyed.

- **Clearly defines and protects tributaries that impact the health of downstream waters**. The Clean Water Act protects navigable waterways and their tributaries. The rule says that a tributary must show physical features of flowing water – a bed, bank, and ordinary high water mark – to warrant protection. The rule provides protection for headwaters that have these features and science shows can have a significant connection to downstream waters.
- **Provides certainty in how far safeguards extend to nearby waters.** The rule protects waters that are next to rivers and lakes and their tributaries because science shows that they impact downstream waters. The rule sets boundaries on covering nearby waters for the first time that are physical and measurable.
- **Protects the nation's regional water treasures.** Science shows that specific water features can function like a system and impact the health of downstream waters. The rule protects prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands when they impact downstream waters.
- **Focuses on streams, not ditches.** The rule limits protection to ditches that are constructed out of streams or function like streams and can carry pollution downstream. So ditches that are not constructed in streams and that flow only when it rains are not covered.
- **Maintains the status of waters within Municipal Separate Storm Sewer Systems.** The rule does not change how those waters are treated and encourages the use of green infrastructure.

- **Reduces the use of case-specific analysis of waters.** Previously, almost any water could be put through a lengthy case-specific analysis, even if it would not be subject to the Clean Water Act. The rule significantly limits the use of case-specific analysis by creating clarity and certainty on protected waters and limiting the number of similarly situated water features.

The rule protects clean water without getting in the way of farming, ranching, and forestry. Farms across America depend on clean and reliable water for livestock, crops, and irrigation. Activities like planting, harvesting, and moving livestock have long been exempt from Clean Water Act regulation, and the Clean Water Rule doesn't change that. The Clean Water Rule provides greater clarity and certainty to farmers and does not add any new requirements or economic burden on agriculture.

The rule only protects waters that have historically been covered by the Clean Water Act. It does not interfere with or change private property rights, or address land use. It does not regulate most ditches or regulate groundwater, shallow subsurface flows or tile drains. It does not change policy on irrigation or water transfers. It does not apply to rills, gullies, or erosional features.

Subject	Old Rule	Proposed Rule	Final Rule
Navigable Waters	Jurisdictional	Same	Same
Interstate Waters	Jurisdictional	Same	Same
Territorial Seas	Jurisdictional	Same	Same
Impoundments	Jurisdictional	Same	Same
Tributaries to the Traditionally Navigable Waters	Did not define tributary	Defined tributary for the first time as water features with bed, banks and ordinary high water mark, and flow downstream.	Same as proposal except wetlands and open waters without beds, banks and high water marks will be evaluated for adjacency.
Adjacent Wetlands/Waters	Included wetlands adjacent to traditional navigable waters, interstate waters, the territorial seas, impoundments or tributaries.	Included all waters adjacent to jurisdictional waters, including waters in riparian area or floodplain, or with surface or shallow subsurface connection to jurisdictional waters.	Includes waters adjacent to jurisdictional waters within a minimum of 100 feet and within the 100-year floodplain to a maximum of 1,500 feet of the ordinary high water mark.
Isolated or "Other" Waters	Included all other waters the use, degradation or destruction of which could affect interstate or foreign commerce.	Included "other waters" where there was a significant nexus to traditionally navigable water, interstate water or territorial sea.	Includes specific waters that are similarly situated: Prairie potholes, Carolina & Delmarva bays, pocosins, western vernal pools in California, & Texas coastal prairie wetlands when they have a significant nexus. Includes waters with a significant nexus within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, as well as waters with a significant nexus within 4,000 feet of jurisdictional waters.
Exclusions to the definition of "Waters of the U.S."	Excluded waste treatment systems and prior converted cropland.	Categorically excluded those in old rule and added two types of ditches, groundwater, gullies, rills and non-wetland swales.	Includes proposed rule exclusions, expands exclusion for ditches, and also excludes constructed components for MS4s and water delivery/reuse and erosional features.

EPA and the Army Corps' "Waters of the United States" Rule: Congressional Response and Options

Claudia Copeland
Specialist in Resources and Environmental Policy

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Committees of Congress

Summary

On May 27, 2015, the Army Corps of Engineers (the Corps) and the Environmental Protection Agency (EPA) finalized a rule revising regulations that define the scope of waters protected under the Clean Water Act (CWA). Discharges to waters under CWA jurisdiction, such as the addition of pollutants from factories or sewage treatment plants and the dredging and filling of spoil material through mining or excavation, require a CWA permit. The rule was proposed in 2014 in light of Supreme Court rulings in 2001 and 2006 that created uncertainty about the geographic limits of waters that are and are not protected by the CWA. The rule, which becomes effective August 28, 2015, replaces EPA-Corps guidance that has governed permitting decisions since the Court's rulings.

According to EPA and the Corps, their intent in proposing the rule was to clarify CWA jurisdiction, not expand it. Nevertheless, the rule has been extremely controversial, especially with groups representing property owners, land developers, and agriculture, who contend that it represents a massive federal overreach beyond the agencies' statutory authority. Most state and local officials are supportive of clarifying the extent of CWA-regulated waters, but some are concerned that the rule could impose costs on states and localities as their own actions become subject to new requirements. Most environmental advocacy groups welcomed the proposal, which would more clearly define U.S. waters that are subject to CWA protections, but beyond that general support, some in these groups favor an even stronger rule. The final rule contains a number of changes to respond to criticisms of the proposal, but the revisions may not satisfy all critics of the rule.

Because of controversies over the rule, some in Congress favor halting EPA and the Corps' current approach to defining "waters of the United States." To do so legislatively, at least four options are available and are reflected in bills in the 114th Congress.

- **The Congressional Review Act**. If Congress passes a joint resolution disapproving a covered rule under procedures provided by the act, and the resolution becomes law, the rule cannot take effect or continue in effect. The agency may not reissue either that rule or any substantially similar one, except under authority of a subsequently enacted law. The Senate and House have passed such a joint resolution (S.J.Res. 22), but President Obama vetoed it on January 19.
- **Appropriations bill limitations**. A provision in an appropriations bill can be a mechanism to block or redirect an agency's course of action by limiting or preventing agency funds from being used for the rule. Bills with such limitations were reported in the Senate and House in 2015, but the FY2016 Consolidated Appropriations Act (P.L. 114-113) contained no such provisions.
- **Standalone targeted legislation**. Other legislation can take several forms, such as a bill similar to limits in an appropriations bill to prohibit EPA and the Corps from finalizing, implementing, or enforcing the proposed rule. Another approach could be legislation to address substantive aspects of the rule that have been criticized. The House has passed one such bill (H.R. 1732). Similar legislation was reported in the Senate, but failed to advance (S. 1140).
- **Broad amendments to the Clean Water Act**. Legislation to affirm or clarify Congress's intention regarding CWA jurisdiction would have broad implications for the CWA, since questions of jurisdiction are fundamental to all of the act's regulatory requirements.

These options and related legislative activity are discussed in this report. Each option faces a steep path to enactment, because President Obama likely would oppose legislation to halt or weaken a major regulatory initiative of the Administration such as the "waters of the United States" rule.

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Introduction

On May 27, 2015, the Army Corps of Engineers (the Corps) and the Environmental Protection Agency (EPA) finalized a rule revising regulations that define the scope of waters protected under the Clean Water Act (CWA). Discharges to waters under CWA jurisdiction, such as the addition of pollutants from factories or sewage treatment plants and the dredging and filling of spoil material through mining or excavation, require a CWA permit. The rule was proposed in 2014 in light of Supreme Court rulings that created uncertainty about the geographic limits of waters that are and are not protected by the CWA.

The revised rule became effective on August 28, 2015, 60 days after publication in the *Federal Register*, to allow time for review under the Congressional Review Act.[1] However, multiple legal challenges to the rule were filed in federal district and appeals courts around the country, and it is yet to be determined which court will hear the challenges. On October 9, a federal appeals court in Cincinnati issued an order granting a request by 18 states to stay the new rule nationwide, pending further developments, including determination of which federal court is the appropriate venue to review the rule. As a result, until legal proceedings are concluded or the court's order is modified, the new rule is not in effect, and prior regulations and agency guidance will govern determinations of CWA jurisdiction.

According to EPA and the Corps, the agencies' intent was to clarify CWA jurisdiction, not expand it. Nevertheless, the rule has been extremely controversial, especially with groups representing property owners, land developers, and the agriculture sector, who contend that it represents a massive federal overreach beyond the agencies' statutory authority. Most state and local officials are supportive of clarifying the extent of CWA-regulated waters, but some are concerned that the rule could impose costs on states and localities as their own actions (e.g., transportation or public infrastructure projects) become subject to new requirements. Most environmental advocacy groups welcomed the intent of the proposal to more clearly define U.S. waters that are subject to CWA protections, but beyond that general support, some favored even a stronger rule.

Many critics in Congress and elsewhere urged that the proposed rule be withdrawn, but EPA and the Corps pointed out that doing so would leave in place the status quo—with determinations of CWA jurisdiction being made pursuant to existing regulations, coupled with non-binding agency guidance, and many of these determinations involving time-consuming case-specific evaluation. Still, some in Congress favor halting the agencies' approach to defining "waters of the United States" and leaving the status quo in place or giving EPA and the Corps new directions on defining CWA jurisdiction. This report discusses several options that Congress could consider and that are reflected in bills in the 114th Congress.

Background[2]

The CWA protects "navigable waters," a term defined in the act to mean "the waters of the United States, including the territorial seas."[3] Waters need not be truly navigable to be subject to CWA

[1] Department of the Army, Corps of Engineers, and Environmental Protection Agency, "Clean Water Rule: Definition of 'Waters of the United States,' Final Rule," 80 *Federal Register* 37054-37127, June 29, 2015.

[2] The CWA and the proposed and final rules are more fully discussed in CRS Report R43455, *EPA and the Army Corps' Rule to Define "Waters of the United States,"* by Claudia Copeland. It includes a table that compares the current regulatory language that defines "waters of the United States" with language in the proposed and final rules.

[3] CWA §502(7); 33 U.S.C. §1362(7).

jurisdiction. The act's single definition of "navigable waters" applies to the entire law, including the federal prohibition on pollutant discharges except in compliance with the act (§301), permit requirements (§§402 and 404), water quality standards and measures to attain them (§303), oil spill liability and oil spill prevention and control measures (§311), and enforcement (§309). The CWA gave the agencies the authority to define the term "waters of the United States" more fully in regulations, which EPA and the Corps have done several times, most recently in 1986. While EPA is primarily responsible for implementing the CWA, EPA and the Corps share implementation of the dredge and fill permitting program in Section 404.

The courts, including the Supreme Court, generally upheld the agencies' implementation until Supreme Court rulings in 2001 and 2006 (*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, (SWANCC) 531 U.S. 159 (2001); and *Rapanos v. United States*, 547 U.S. 716 (2006), respectively). Those rulings interpreted the regulatory scope of the CWA more narrowly than the agencies and lower courts were then doing, and created uncertainty about the appropriate scope of waters protected under the CWA.[4]

In 2003 and 2008, the agencies issued guidance intended to lessen confusion over the Court's rulings. The non-binding guidance sought to identify, in light of those rulings, categories of waters that remain jurisdictional, categories not jurisdictional, and categories that require a case-specific analysis to determine if CWA jurisdiction applies. The Obama Administration proposed revised guidance in 2011; it was not finalized, but it was the substantive basis for the 2014 proposed rule. In proposing to amend the regulatory definition of "waters of the United States" rather than issue another guidance document, EPA and the Corps were not only acting to reduce the confusion created by *SWANCC* and *Rapanos*. They also appeared to be picking up on the suggestion of several of the justices in *Rapanos* that an amended rule would be helpful.

The final rule retains much of the structure of the agencies' existing definition of "waters of the United States."[5] It focuses particularly on clarifying the regulatory status of surface waters located in isolated places in a landscape and streams that flow only part of the year, along with nearby wetlands—the types of waters with ambiguous jurisdictional status following the Supreme Court's rulings. Like the 2003 and 2008 guidance documents and the 2014 proposal, it identifies categories of waters that are and are not jurisdictional, as well as categories of waters and wetlands that require a case-specific evaluation.

- Under the final rule, all tributaries to the nation's traditional navigable waters, interstate waters, the territorial seas, or impoundments of these waters would be jurisdictional *per se*. All of these waters are jurisdictional under existing rules, but the term "tributary" is newly defined in the rule.
- Waters—including wetlands, ponds, lakes, oxbows, and similar waters—that are adjacent to traditional navigable waters, interstate waters, the territorial seas, jurisdictional tributaries, or impoundments of these waters would be jurisdictional by rule. The final rule for the first time puts some boundaries on what is considered "adjacent."
- Some waters—but fewer than under current practice—would remain subject to a case-specific evaluation of whether or not they meet the legal standards for federal jurisdiction established by the Supreme Court. The final rule establishes

[4] For discussion of the legal background, see CRS Report RL33263, *The Wetlands Coverage of the Clean Water Act (CWA): Rapanos and Beyond*, by Robert Meltz and Claudia Copeland.

[5] The definition of "waters of the United States" is found at 33 C.F.R. §328.3 (Corps) and 40 C.F.R. §122.2 (EPA). The term is similarly defined in other EPA regulations, as is the term "navigable waters."

two defined sets of additional waters that will be a "water of the United States" if they are determined to have a significant nexus to a jurisdictional waters.

- The final rule identifies a number of types of waters to be excluded from CWA jurisdiction. Some are restatements of exclusions under current rules (e.g., prior converted cropland); some have been excluded by practice and would be expressly excluded by rule for the first time (e.g., groundwater, some ditches). Some exclusions were added to the final rule based on public comments (e.g., stormwater management systems and groundwater recharge basins). The rule makes no change and does not affect existing statutory exclusions: permit exemptions for normal farming, ranching, and silviculture practice and for maintenance of drainage ditches (CWA §404(f)(1)), as well as for agricultural stormwater discharges and irrigation return flows (CWA §402(l)).

The agencies' intention was to clarify questions of CWA jurisdiction, in view of the Supreme Court's rulings and consistent with the agencies' scientific and technical expertise. Much of the controversy since the Court's rulings has centered on the many instances that have required applicants for CWA permits to seek a time-consuming case-specific evaluation to determine if CWA jurisdiction applies to their activity, due to uncertainty over the geographic scope of the act. In the rule, the Corps and EPA intended to clarify jurisdictional questions by clearly articulating categories of waters that are and are not protected by the CWA and thus limiting the types of waters that still require case-specific analysis. However, critical response to the proposal from industry, agriculture, many states, and some local governments was that the rule was vague and ambiguous and could be interpreted to enlarge the regulatory jurisdiction of the CWA beyond what the statute and the courts allow.

Officials of the Corps and EPA vigorously defended the proposed rule. But they acknowledged that it raised questions that required clarification in the final rule. In an April 2015 blog post, the EPA Administrator and the Assistant Secretary for the Army said that the agencies responded to criticisms of the proposal with changes in the final rule, which was then undergoing interagency review. The blog post said that the final rule would make changes such as: defining tributaries more clearly; better defining how protected waters are significant; limiting protection of ditches to those that function like tributaries and can carry pollution downstream; and preserving CWA exclusions and exemptions for agriculture.[6] The final rule announced on May 27 does reflect a number of changes from the proposal, especially to provide more bright line boundaries and simplify definitions that identify waters that are protected under the CWA.[7] The agencies' intention has been to clarify the rules and make jurisdictional determinations more predictable, less ambiguous, and more timely. Based on press reports of stakeholders' early reactions to the final rule, it appears that some believe that the agencies largely succeeded in that objective, while others believe that they did not.[8]

Congressional interest in the rule has been strong since the proposal was announced in 2014. On February 4, 2015, the Senate Environment and Public Works Committee and the House Transportation and Infrastructure Committee held a joint hearing on impacts of the proposed rule on state and local governments, hearing from public and EPA and Corps witnesses. Other

[6] Gina McCarthy and Jo-Ellen Darcy, "Your Input Is Shaping the Clean Water Rule," *EPA Connect, The Official Blog of EPA's Leadership*, April 6, 2015, http://blog.epa.gov/epaconnect/2015/04/your-input-is-shaping-the-clean-water-rule/#more-3470.

[7] See CRS Report R43455, *EPA and the Army Corps' Rule to Define "Waters of the United States"* for discussion.

[8] See, for example, Amena H. Saiyid, "Obama Says Water Jurisdiction Rule Provides Clarity, Certainty; Critics Claim Overreach," *Daily Environment Report*, May 28, 2015, p. A-1.

hearings have been held by Senate and House committees in the 114th Congress. The proposal also was discussed at House committee hearings during the 113th Congress. As described below, a number of bills have been introduced, most of them intended either to prohibit the agencies from finalizing the 2014 proposed rule or to detail procedures for a new rulemaking.

Congressional Options

As noted earlier, some in Congress favor halting EPA and the Corps' current approach to defining "waters of the United States." To do so legislatively, there are at least four options available to change the agencies' course: a resolution of disapproval under the Congressional Review Act, appropriations bill provisions, standalone legislation, and broad amendments to the Clean Water Act.

Congressional Review Act[9]

The Congressional Review Act (CRA), enacted in 1996, establishes special congressional procedures for disapproving a broad range of regulatory rules issued by federal agencies.[10] Before any rule covered by the act can take effect, the federal agency that promulgates it must submit it to both houses of Congress and the Government Accountability Office (GAO).[11] If Congress passes a joint resolution disapproving the rule under procedures provided by the act, and the resolution becomes law,[12] the rule cannot take effect or continue in effect. Also, the agency may not reissue either that rule or any substantially similar one, except under authority of a subsequently enacted law.[13]

Joint resolutions of disapproval of the final clean water rule have been introduced in the House (H.J.Res. 59) and the Senate (S.J.Res. 22). On November 4, the Senate passed S.J.Res. 22, by a 53-44 vote, and the House passed S.J.Res. 22 on January 13, 2016, by a 253-166 vote. However, President Obama vetoed the joint resolution on January 19.

The CRA applies to major rules, non-major rules, final rules, and interim final rules. The definition of "rule" is sufficiently broad that it may define as "rules" agency actions that are not subject to traditional notice and comment rulemaking under the Administrative Procedure Act, such as guidance documents and policy memoranda. A joint resolution of disapproval must be

[9] This section, discussing the effect of the Congressional Review Act, the procedures under which a disapproval resolution can be taken up in the Senate, floor consideration in the Senate, and final congressional action, is adapted from CRS Report RL31160, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, by Richard S. Beth; and CRS In Focus IF10023, *The Congressional Review Act (CRA)*, by Alissa M. Dolan, Maeve P. Carey, and Christopher M. Davis.

[10] 5 U.S.C. §§801-808. The CRA applies to a "rule," as defined in 5 U.S.C. §804(3).

[11] Under the CRA, GAO is required to report on major rules, summarizing and assessing the procedural steps taken by the agencies. GAO completed its review of the final clean water rule on July 16. See Robert J. Cramer, Managing Associate General Counsel, GAO, letter to the Honorable Jim Inhofe, the Honorable Barbara Boxer, the Honorable Bill Shuster, and the Honorable Peter A. DeFazio, July 16, 2015, http://www.gao.gov/products/GAO-15-750R#mt=e-report.

[12] For the resolution to become law, the President must sign it or allow it to become law without his signature, or Congress must override a presidential veto.

[13] The CRA has been discussed as a tool for overturning EPA's regulatory actions on greenhouse gas emissions. See CRS Report R41212, *EPA Regulation of Greenhouse Gases: Congressional Responses and Options*, by James E. McCarthy.

introduced within a specific time frame: during a 60-days-of-continuous-session period beginning on the day the rule is received by Congress.[14]

The path to enactment of a CRA joint resolution is a steep one. In the nearly two decades since the CRA was enacted, only one resolution has ever been enacted.[15] The path is particularly steep if the President opposes the resolution's enactment, as is the case with a resolution disapproving the EPA-Corps rule to define "waters of the United States," which, as noted, the President vetoed on January 19.[16] Overriding a veto of a joint resolution, like any other bill, requires a two-thirds majority in both the House and Senate.[17] It is unclear when, or whether, the House and Senate will vote on a veto override.

The potential advantage of the CRA lies primarily in the procedures under which a resolution of disapproval can be considered in the Senate. Pursuant to the act, an expedited procedure for Senate consideration of a joint resolution of disapproval may be used at any time within 60 days of Senate session after the rule in question has been submitted to Congress and published in the *Federal Register*.[18] The expedited procedure provides that, if the committee to which a disapproval resolution has been referred has not reported it by 20 calendar days after the rule has been received by Congress and published in the *Federal Register*, the committee may be discharged if 30 Senators submit a petition for that purpose. The resolution is then placed on the Senate Calendar.

Under the expedited procedure, once a disapproval resolution is on the Senate Calendar, a motion to proceed to consider it is in order. Several provisions of the expedited procedure protect against various potential obstacles to the Senate's ability to take up a disapproval resolution. The Senate has treated a motion to consider a disapproval resolution under the CRA as not debatable, so that this motion cannot be filibustered through extended debate. After the Senate takes up the disapproval resolution itself, the expedited procedure of the CRA limits debate to 10 hours and prohibits amendments.[19]

The act sets no deadline for final congressional action on a disapproval resolution, so a resolution could theoretically be brought to the Senate floor even after the expiration of the deadline for the use of the CRA's expedited procedures. To obtain floor consideration, the bill's supporters would then have to follow the Senate's normal procedures, however.

There are no expedited procedures for initial House consideration of a joint resolution of disapproval. A resolution could reach the House floor through its ordinary procedures, that is,

[14] Days-of-continuous-session periods count every calendar day, including weekends and holidays, and only exclude days that either chamber (or both) is gone for more than three days, that is, pursuant to an adjournment resolution.

[15] See P.L. 107-5 (2001) (disapproving an Occupational Safety and Health Administration rule regarding ergonomics published at 65 *Federal Register* 68261).

[16] Executive Office of the President, *Veto Message from the President—S.J. Res 22*, January 19, 2016, https://www.whitehouse.gov/the-press-office/2016/01/19/president-obama-vetoes-sj-22.

[17] In addition to the one disapproval resolution that has been enacted since 1996, the Senate has considered such a resolution fewer than 15 times. A few of these passed the Senate, but none was enacted. In the other instances, the Senate debated the question of calling up the resolution or the resolution itself, and rejected the question.

[18] For purposes of CRA review, the final clean water rule was received by Congress on June 8. See Executive Communication EC-1843, *Congressional Record*, daily edition, vol. 161 (June 8, 2015), p. S3858.

[19] These provisions help to ensure that the Senate disapproval resolution will remain identical, at least in substantive effect, to a House joint resolution disapproving the same rule, and that no filibuster is possible on the resolution itself. In addition, once the motion to proceed is adopted, the resolution becomes "the unfinished business of the Senate until disposed of," and a non-debatable motion may be offered to limit the time for debate further. Finally, the act provides that at the conclusion of debate, the Senate automatically proceeds to vote on the resolution.

generally by being reported by the committee of jurisdiction (in the case of CWA rules, the Transportation and Infrastructure Committee). If the committee of jurisdiction does not report a disapproval resolution submitted in the House, a resolution could still reach the floor pursuant to a special rule reported by the Committee on Rules (and adopted by the House), by a motion to suspend the rules and pass it (requiring a two-thirds vote), or by discharge of the committee (requiring a majority of the House [218 Members] to sign a petition).

The CRA establishes no expedited procedure for further congressional action if the President vetoes a disapproval resolution. In such a case, Congress would need to attempt an override of a veto using its normal procedures for doing so.

As noted above, if a joint resolution of disapproval becomes law, the rule at issue cannot take effect or continue in effect, and neither that rule nor a substantially similar one may be promulgated, except under authority of a subsequently enacted law. While that outcome would please most critics of the "waters of the United States" rule, it also would leave the regulated community in the situation that many of them have faulted—subject to 1986 rules that are being interpreted pursuant to non-binding agency guidance that frequently requires case-specific evaluation to determine if CWA jurisdiction applies.

Appropriations Bills

Including a provision in an appropriations bill is a second option for halting or redirecting the proposed "waters of the United States" rule by limiting or preventing agency funds from being used for the rule. Congress has considered legislation to do so in the recent past, but no such restrictions have been enacted.

In the 114th Congress, on May 1, 2015, the House approved the FY2016 Energy and Water Appropriations bill (H.R. 2028) with a provision that would bar the Corps from developing, adopting, implementing, or enforcing any change to rules or guidance in effect on October 1, 2012, pertaining to the CWA definition of "waters of the United States." On June 18, the House Appropriations Committee approved the FY2016 Interior and Environment Appropriations bill (H.R. 2822) with a similar provision to bar EPA from developing, adopting, implementing, or enforcing any change to rules or guidance pertaining to the CWA definition of "waters of the United States." The House began debate on H.R. 2822 in July, but did not take final action. The Administration indicated that the President would veto both of these bills in their current form, based in part to objections to this provision.[20] The Senate Appropriations Committee included a similar provision in legislation providing FY2016 appropriations for EPA (S. 1645), which the committee approved on June 23. The full Senate did not consider this bill.

Full-year FY2016 appropriations for EPA and the Corps were provided in the Consolidated Appropriations Act, 2016, signed by the President on December 18 (P.L. 114-113). The legislation did not include any provisions concerning the "waters of the United States" rule.

Similar legislation was considered by the House in the 113th Congress. H.R. 4923, the FY2015 Energy and Water Appropriations Act, passed the House on July 10, 2014. Like the language passed by the House in May 2015, H.R. 4923 included a provision to restrict new rules to redefine "waters of the United States." Also, the FY2015 Interior and Environment

[20] Executive Office of the President, Office of Management and Budget, *Statement of Administration Policy on* H.R. 2028, *Energy and Water Development Appropriations Act, 2016*, April 28, 2015, and *Statement of Administration Policy on* H.R. 2822, *Department of the Interior, Environment, and Related Agencies Appropriations Act, 2016,* June 23, 2015.

Appropriations Act, providing funds for EPA and other agencies (H.R. 5171), contained a provision to similarly block EPA action on the "waters" rule. The House Appropriations Committee approved H.R. 5171 in July 2014. However, neither of these provisions was included in legislation that provided full-year funding for EPA and the Corps, the Consolidated and Omnibus Appropriations Act, 2015, enacted in December 2014 (P.L. 113-235).

Previous to the release of the proposed rule in 2014, the House passed appropriations bills in 2012 and 2013 with restrictions to prohibit the Corps from finalizing revised "waters of the United States" guidance that the Corps and EPA had proposed in 2011, which also was controversial with many stakeholder groups (H.R. 5325, providing FY2013 appropriations; and H.R. 2609, for FY2014 funds). In 2012, the House Appropriations Committee reported H.R. 6091, FY2013 Interior and Environment Appropriations, which included a provision to bar EPA from finalizing the same revised guidance. None of these limitations was enacted.

In comparison to a CRA resolution of disapproval, addressing an issue through an amendment to an appropriations bill may be considered easier, since the overall appropriations bill to which it would be included would presumably contain other elements making it "must pass" legislation, or more difficult for the President to veto. EPA and the Corps issued the final rule on May 27, 2015, before enactment of any FY2016 appropriations bills. A funding prohibition included in an FY2016 appropriations bill would not halt finalizing the rule, but it still could attempt to block funds for implementation. So far, however, congressional opponents of the rule have not succeeded in using appropriations measures to halt or delay it.

In recent years, controversies over a variety of environmental issues have led to inclusion of provisions in bills reported by the House Appropriations Committee or passed by the House to restrict funds for particular EPA programs, among other agencies. Few of these environmental provisions have been enacted, however, in part due to opposition in the Senate.[21] Some observers foresee a somewhat easier path for congressional consideration of such restrictions in the 114th Congress, with Republican majorities in both the House and Senate. However, a bill would still need the President's signature, or the votes of two-thirds majorities in both chambers to override his veto.

Standalone Legislation

A third option is standalone targeted legislation to redirect development of a "waters of the United States" rule, either by amending the CWA or in a free-standing bill. Such a bill could be similar to a limitation in an appropriations bill with provisions to bar or prohibit EPA and/or the Corps from finalizing, adopting, implementing, or enforcing the "waters of the United States" rule, the 2011 proposed revised guidance, or any similar rule. One such bill in the 114th Congress is H.R. 594.[22] It also would direct the Corps and EPA to consult with state and local officials on CWA jurisdiction issues and develop a report on results of such consultation.[23] Another bill in the 114th Congress is H.R. 2599. It would prohibit the obligation of unobligated funds from the office of the EPA Administrator until she withdraws the "waters of the United States" rule.

[21] See CRS Report R43709, *Environmental Protection Agency (EPA): FY2015 Appropriations*, by Robert Esworthy.

[22] Another 114th Congress proposal that includes a provision similar to H.R. 594 as part of a larger measure is S. 791/H.R. 1487.

[23] In the 113th Congress, similar legislation was introduced in the Senate (S. 2496). Also in the 113th Congress, several non-appropriation bills would have restricted EPA and the Corps from finalizing the guidance document that was proposed in 2011 but not issued (it was, however, the substantive basis for the 2014 proposed rule). Bills included H.R. 1829, H.R. 5077, S. 861, S. 1006, and S. 1514. There was no action on any of them.

In the 114th Congress, H.R. 1732, the Regulatory Integrity Protection Act, was approved by the House on May 12, 261-155.[24] It would require EPA and the Corps to develop a new rule, taking into consideration public comments on the 2014 proposal and supporting documents, and, in doing so, to provide for consultation with state and local officials and other stakeholders. Under the bill, when proposing a new rule, the agencies would have to describe the consultations in detail and explain how the new proposal responds to public comments and consultations. During markup of the bill, supporters said that they believe wide criticism of the current proposed rule means it is essential for the agencies to restart the rulemaking process. Opponents of the bill said that doing so now would foreclose the opportunity for Congress and the public to see how the final rule responds to those criticisms. Opponents also pointed out that Congress will have the opportunity to nullify the final rule through procedures under the CRA (see "Congressional Review Act"). During debate on the measure, the House adopted an amendment that would give states two years to come into compliance with a new rule without losing authority over their state permitting programs. The Obama Administration opposes H.R. 1732 and has said that the President would veto the bill.

In the Senate, the Federal Water Quality Protection Act (S. 1140) was approved by the Senate Environment and Public Works Committee on June 10. On November 3, the Senate voted 57-41 to take up S. 1140, thus falling short of the 60 votes needed to overcome a filibuster on the motion to proceed to the bill's consideration. (On November 4, the Senate did pass S.J.Res. 22, a Congressional Review Act resolution disapproving the rule, which is discussed above.)

Like H.R. 1732, S. 1140 would require the agencies to develop a new rule, taking into consideration public comments on the 2014 proposal. The bill would require the agencies to ensure that procedures established under executive orders and laws such as the Regulatory Flexibility Act, Unfunded Mandates Reform Act, and others are followed during the rulemaking. Unlike the House bill, S. 1140 identifies certain principles that must be adhered to in developing a new rule, especially identifying waters that should be included in defining "waters of the United States" (e.g., reaches of streams with surface hydrological connection to traditional navigable waters with flow in a normal year of sufficient volume, duration, and frequency that pollutants in the stream would degrade water quality of the traditional navigable water) and waters that should not be so included (e.g., groundwater, isolated ponds, and prior converted cropland). The principles in the bill reflect an overall narrow interpretation of the extent of CWA jurisdiction—for example, setting the jurisdictional limits of a stream's reach to waters that have a continuous surface hydrologic connection sufficient to deliver pollutants that would degrade the water quality of a traditional navigable water, as proposed in S. 1140, generally follows the test of jurisdiction stated by Justice Scalia in the *Rapanos* case.[25] Under the legislation, the agencies must make best efforts to publish a final rule by December 31, 2016. A rule not adhering to principles in the bill would have no force or effect.

Another approach is reflected in S. 1178. It would require EPA and the Army Corps to establish a commission, with membership appointed by the agencies and the Senate and House, to develop criteria for defining whether a waterbody or wetland has a significant nexus to a traditional navigable water. It would bar the agencies from developing, finalizing, implementing, or enforcing the 2014 proposed rule or a substantially similar rule prior to receiving a report from the commission. This bill responds in part to criticism that the science underlying the rule was not

[24] The House passed a similar bill in the 113th Congress, H.R. 5078.

[25] See CRS Report RL33263, *The Wetlands Coverage of the Clean Water Act (CWA): Rapanos and Beyond*, by Robert Meltz and Claudia Copeland.

thoroughly peer-reviewed and subject to public comment before the rule was proposed in 2014. (For discussion, see CRS Report R43455, *EPA and the Army Corps' Rule to Define "Waters of the United States"*.)

The obstacles for targeted bills are similar to those for an appropriations bill, but with the additional complication of needing to be included in non-appropriations legislation that is "must pass" or difficult for the President to veto, or that can receive two-thirds votes in both chambers to override a veto.

Targeted legislation might seek to address substantive aspects of the proposed rule that were widely criticized. For example, many stakeholder groups contended that key definitions in the 2014 proposed rule—such as "tributary," "floodplain," and "significant nexus"[26]—were ambiguous, and other terms—such as "upland," "gullies," and "rills"—were entirely undefined. Critics say that ambiguities could lead to agency interpretations that greatly expand the regulatory scope of CWA jurisdiction. However, such criticisms of the proposed rule for the most part were general in nature, rather than specific as to precise language that would clarify terms and definitions. For Congress to legislate solutions and codify remedies in the CWA is a challenge requiring technical expertise that legislators generally delegate to agencies and departments, which implement laws, but one that many in Congress believe the agencies failed to meet in this case.[27]

Other Clean Water Act Amendments

A fourth option could be legislation to amend the Clean Water Act more broadly. The statute has not been comprehensively amended since 1987 (the Water Quality Act of 1987, P.L. 100-4). Since the 2001 *SWANCC* and 2006 *Rapanos* rulings of the Supreme Court, many stakeholders have argued that what is needed is legislative action to affirm Congress's intention regarding CWA jurisdiction, not guidance or new rules. This type of legislation would have broad implications for the CWA, since questions of CWA jurisdiction are fundamental to all of the act's regulatory requirements.

Bills to address CWA jurisdictional issues, but taking different approaches, have been introduced in several Congresses since 2001. Versions of one proposal (the Clean Water Authority Restoration Act) were introduced in the 107th, 108th, 109th, 110th, and 111th Congresses. It would

[26] The concept of significant nexus is critical because courts have ruled that, to establish CWA jurisdiction of waters, there needs to be "some measure of the significance of the connection for downstream water quality," as Justice Kennedy stated in the 2006 *Rapanos* case.

[27] Another legislative option that is sometimes raised in consideration of changing major policy is budget reconciliation, which is a budget enforcement tool under the Congressional Budget Act of 1974. Its chief purpose is "to enhance Congress's ability to change current law in order to bring revenue and spending levels in conformity with the policies of the budget resolution." (See CRS Report RL30458, *The Budget Reconciliation Process: Timing of Legislative Action*, by Megan S. Lynch.) Generally reconciliation has been used to enact spending reductions in order to reduce the deficit, but occasionally for revenue increases and to increase spending in particular areas. The reconciliation process for the most part has applied to mandatory spending programs, not discretionary programs. Reconciliation legislation has been used in the past as a vehicle for enacting significant policy legislation that has budgetary implications. (See CRS Report R40480, *Budget Reconciliation Measures Enacted Into Law: 1980-2010*, by Megan S. Lynch.) The challenge for using budget reconciliation in the context of the "waters of the United States" issue is that the rule has limited budgetary implication, beyond agency resources to develop, implement, and enforce regulations (e.g., the Corps' regulatory budget in FY2015 is $200 million), making it difficult to identify the rule as a source for large budgetary savings. Moreover, spending for these activities is discretionary, not mandatory. For more information on the content constraints of reconciliation legislation, see CRS Report R43885, *Points of Order Limiting the Contents of Reconciliation Legislation: In Brief*, by James V. Saturno.

have provided a broad statutory definition of "waters of the United States"; would have clarified that the CWA is intended to protect U.S. waters from pollution, not just maintain their navigability; and would have included a set of findings to assert constitutional authority over waters and wetlands. In the 111th Congress, one of these bills was reported in the Senate (S. 787), but no further action occurred.

Other legislation intended to restrict regulatory jurisdiction was introduced in the 108th and 109th Congresses (the Federal Wetlands Jurisdiction Act, which was H.R. 2658 in the 109th Congress). Rather than broadening the statutory definition of "navigable waters," which is the key statutory term for determining jurisdiction, it would have narrowed the definition. It would have defined certain isolated wetlands that are not adjacent to navigable waters, or non-navigable tributaries and other areas (such as waters connected to jurisdictional waters by ephemeral waters, ditches or pipelines), as not being subject to federal regulatory jurisdiction. There was no legislative action on these bills.

In the 114th Congress, legislation titled the Defense of Environment and Property Act has been introduced (S. 980). This bill would clarify the term "navigable waters" in the CWA by defining the term so as to be consistent with Justice Scalia's plurality opinion in the 2006 *Rapanos* decision, which was the narrowest of the three major opinions in the case.[28] Similar bills were introduced in the 112th and 113th Congresses; there also was no legislative action on them.

Another such bill in the 114th Congress is H.R. 2705, which would repeal the final rule that was announced on May 27. Similar to S. 980, this bill would revise the CWA definition of "navigable waters" narrowly to mean waters that are navigable-in-fact or are permanent or continuously flowing bodies of water that are connected to navigable-in-fact waters.

Enacting legislation to either broaden or restrict CWA jurisdiction would likely require EPA and the Corps to issue new regulations, leading to another lengthy rulemaking process and potentially to more legal challenges in the future.

So far, congressional consensus on legislation to redefine CWA jurisdiction has been elusive. While the President might sign a bill such as the Clean Water Authority Restoration Act introduced in the past, passage of such legislation by the Senate and House in the 114th Congress is unlikely. On the other hand, if the House and Senate were to pass legislation to narrowly define CWA jurisdiction, President Obama likely would veto it. As with the other options previously discussed, a bill would need the President's signature, or the votes of two-thirds majorities in both chambers to override his veto.

Conclusion

This report has discussed four legislative options that Congress could consider to halt or redirect EPA and the Corps' "waters of the United States" rule: the Congressional Review Act, appropriations bill limitations, standalone legislation, and broad amendments to the Clean Water Act. Each option faces a steep path to enactment.

Finally, it is noteworthy that several of the options—a CRA resolution, appropriations bill limitations, and some current forms of standalone legislation—would not only block EPA and the

[28] Under this bill, CWA jurisdictional waters are waters that are navigable-in-fact or are permanent, standing, continuously flowing waters that connect to navigable-in-fact waters. See CRS Report RL33263, *The Wetlands Coverage of the Clean Water Act (CWA): Rapanos and Beyond*, by Robert Meltz and Claudia Copeland, for discussion of Justice Scalia's opinion in *Rapanos*.

Corps from adopting, implementing or enforcing the 2015 rule, but also would prohibit them from developing a similar rule. As described previously, blocking both the rule and future action (e.g., H.R. 594, H.J.Res. 59, and S.J.Res. 22), limiting the agencies through appropriations (e.g., H.R. 2028, H.R. 2822, and S. 1645), or requiring the agencies to restart the rulemaking process (e.g., H.R. 1732 and S. 1140) would leave in place the status quo, with determinations of CWA jurisdiction being made pursuant to existing regulations, non-binding agency guidance issued in 2003 and 2008, and jurisdictional determinations done by 38 separate Corps district offices that in many cases require time-consuming, case-specific evaluation by regulatory staff.

As described above, on October 9, a federal appeals court placed a nationwide stay on the clean water rule, pending further action, including the need to determine the court's own jurisdictional authority. The effect of the court's order is to achieve, at least temporarily, the goal of some of the legislation discussed in this report—to leave the status quo in place for determinations of CWA jurisdiction. Many critics of the new rule endorse that result. Other critics favor passage of legislation that would provide direction to EPA and the Corps to develop a different rule, because legal challenges to the 2015 rule may take years to resolve.

Stakeholder groups involved in the "waters of the United States" issue find agreement on few aspects of the issue. Some support the final rule, some prefer the status quo rather than a rule that they consider unclear, and some have concerns with the rule but do support clarifying the extent of CWA-regulated waters. The legislative activity in the Senate on S.J.Res. 22 and S. 1140 suggests that, even with the final rule on hold nationwide for now and judicial proceedings that could continue for quite some time, there is continuing interest in Congress to change the agencies' course of action.

Author Contact Information

Claudia Copeland
Specialist in Resources and Environmental Policy
ccopeland@crs.loc.gov, 7-7227

U.S. Supreme Court: Are CWA Jurisdictional Determinations Immediately Appealable?

John Juricich[1]

The U.S. Supreme Court courtesy of William Warby.

The U.S. Army Corps of Engineers regularly receives petitions for a Jurisdictional Determination (JD). That is, a petition for the Corps to make a determination of whether a certain property contains "waters of the United States" subjecting it to regulation under the Clean Water Act (CWA). Naturally, if a party receives a JD subjecting it to the CWA (CWA) and does not agree, the first instinct is to get a second opinion on the matter before expending time and money completing the permitting process. In this instance, the second opinion would take the form of judicial review. The issue, however, lies with the courts' jurisdictional scope: a court may only review a JD if it is "final agency action" subject to immediate review under the Administrative Procedure Act (APA).[2] It is unclear whether a JD is a "final agency action" subject to immediate judicial review. This issue has spawned a circuit split that the United States Supreme Court will hopefully suture later this year.[3]

Jurisdictional Determinations: Final Agency Action?

The CWA prohibits, among other things, the "discharge of any pollutant" into "navigable waters" unless authorized by a permit.[4] The CWA defines navigable waters as "waters of the United States."[5] Under Section 404 of the CWA, the Corps has authority to issue permits for the discharge of dredged or fill materials into navigable waters. The regulations governing the permitting process authorize the Corps to consult with potential permit applicants prior to receiving, processing, and issuing or denying individual permits.

The regulations also authorize the Corps to issue jurisdictional determinations, or "formal determinations concerning the applicability of the Clean Water Act . . . to activities or tracts of land and the applicability of general permits or statutory exemptions to proposed activities."[6] There lies the crux of the issue: if a regulated party requests and receives one of these JDs, can the party appeal the determination to a court before the party commences and finishes the permitting process? The answer to this question, simply put, is yes—if JDs are "final agency action."

Under the APA, a court only has jurisdiction over a "final agency action." According to the Supreme Court's finality test set out in *Bennett v. Spear*, two conditions must be satisfied for agency action to be final: "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow."[7]

Most recently, and directly pertinent to the discussion at hand, the Supreme Court in *Sackett v. EPA*, applied these finality factors to hold that a CWA compliance order was final agency action subject to immediate judicial review.[8] The Sacketts had filled a portion of their undeveloped property with dirt and rocks in preparation for building a house. The EPA then issued a compliance order containing findings that the property contained wetlands under the CWA and that the Sacketts had discharged fill material into the wetlands. The order directed the Sacketts to immediately undertake restoration of the property per an EPA plan and to provide EPA access to the site and all documentation relating to the site.

The Sacketts sued, and the Ninth Circuit affirmed the district court's dismissal for lack of subject-matter jurisdiction, holding that the CWA precludes pre-enforcement review of compliance orders. The Supreme Court reversed, holding that an EPA compliance order is a final agency action immediately reviewable under the APA because it satisfies both prongs of the *Bennett* finality test. Although the Court was analyzing a CWA compliance order, the Court's analysis is directly applicable to the question of whether CWA jurisdictional determinations are "final agency action."

The Circuit Split

Three Circuits have addressed the issue whether JDs are "final agency action"—like the compliance order in *Sackett*—subject to immediate judicial review. The Fifth and Ninth Circuits have ruled that CWA jurisdictional determinations do not satisfy *Bennett*'s second prong, and are therefore not "final agency action" subject to immediate judicial review.[9] The Eighth Circuit, however, noted the Fifth and Ninth Circuits' rationale and holdings, and ruled the exact opposite, cementing a circuit split on this issue. In *Hawkes Co. v. Corps of Engineers*, the Eighth Circuit held that the Fifth and Ninth Circuits misapplied the Supreme Court's holding in *Sackett* with regard to the issue of whether JDs constituted "final agency action."

In *Hawkes*, a peat mining company and related property owners brought a complaint seeking judicial review of the Corps' JD finding that property from which the company sought to mine peat constituted "waters of the United States." The U.S. District Court for the District of Minnesota granted the Corps' motion to dismiss the company's complaint, holding that the JD did not constitute "final agency action" subject to immediate judicial review. The Eighth Circuit reversed: "Absent immediate judicial review, the impracticality of otherwise obtaining review, combined with 'the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case . . . leaves most property owners with little practical alternative but to dance to the EPA's [or to the Corps'] tune.' In a nation that values due process, not to mention private property, such treatment is unthinkable."[10]

Implications of a Supreme Court Ruling

The Supreme Court granted certiorari in *Hawkes* in December 2015. If the Court were to agree with the Fifth and Ninth Circuit on this issue, regulated parties would be required to complete the permitting process before a court could address the threshold issue of whether the Corps made the proper determination that the party needed a permit in the first place. This would certainly be a blow for regulated parties, especially considering the fact that "the average applicant for an individual Corps permit 'spends 788 days and $271,596 in completing the process.'"[11] This time and money would be lost if a court eventually determined that the regulated party never needed a permit in the first place.[12]

Close-up photo of peat mining courtesy of Jolene Bragg.

The Supreme Court heard oral arguments for this case on March 30, 2016. With Justice Antonin Scalia's passing, however, the outcome of this case is uncertain at best. It takes five votes to accomplish most things at the Supreme Court, but left with only eight justices, there is a strong possibility of a stalemate at 4-to-4. If the result is 4-to-4, the Court can automatically affirm the decision under review without giving reasons and without setting a Supreme Court precedent, or it can set the case down for re-argument in the term starting in October in the hope that it will be decided by a full court. Curiously, Justice Alito, in his concurring opinion in *Sackett*, provided a guiding light to where he stands on the issue of whether JDs are final agency action: "The Court's decision provides a modest measure of relief. At least, property owners like petitioners *will have the right* to challenge the EPA's jurisdictional determination under the Administrative Procedure Act."[13] In any event, this is an interesting procedural quagmire in need of resolution—for both the agency and regulated parties.

Endnotes

[1] 2016 J.D. Candidate, University of Mississippi School of Law.

[2] *See* 5 U.S.C. § 704. The APA provides for judicial review of a "final agency action for which there is no other adequate remedy in a court." *Id.*

[3] *See* Hawkes Co. v. United States Army Corps of Engineers, 782 F.3d 994 (8th Cir. 2015), cert. granted, 136 S. Ct. 615 (2015) (holding CWA jurisdictional determination was final agency action immediately reviewable). *Cf* Belle Co. v. United States Army Corps of Engineers, 761 F.3d 383 (5th Cir. 2014) (holding CWA jurisdictional determination was not final agency action immediately reviewable); Fairbanks North Star Borough v. United States Army Corps of Engineers, 543 F.3d 586 (9th Cir. 2008) (same).

[4] 33 U.S.C. §§ 1311(a), 1344.

[5] 33 U.S.C. § 1362(7).

[6] 33 C.F.R. §§ 320.1(a)(6); 325.9.

[7] Bennett v. Spear, 520 U.S. 154, 177-78 (1997).

[8] Sackett v. EPA, 132 S. Ct. 1367 (2012).

[9] *See supra* note 3.

[10] *Hawkes*, 782 F.3d at 1002 (quoting *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring)).

[11] *Id.* at 1001 (quoting Rapanos v. U.S., 547 U.S. 715, 721 (2006)).

[12] *See Id.* ("Moreover, even if appellants eventually complete the permit process, seek judicial review of the permit denial, and prevail, they can never recover the time and money lost in seeking a permit they were not legally obligated to obtain.").

[13] *Sackett*, 132 S. Ct at 1374 (Alito, J., concurring) (emphasis added).

No. 15-290

In the Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,
PETITIONER

v.

HAWKES CO., INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
JOHN C. CRUDEN
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
GINGER D. ANDERS
Assistant to the Solicitor General
AARON P. AVILA
JENNIFER SCHELLER NEUMANN
ROBERT J. LUNDMAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

DAVID R. COOPER
Chief Counsel
United States Army Corps of Engineers
Washington, D.C. 20314

QUESTION PRESENTED

Whether the United States Army Corps of Engineers' determination that the property at issue contains "waters of the United States" protected by the Clean Water Act, 33 U.S.C. 1362(7); see 33 U.S.C. 1251 *et seq*., constitutes "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. 704, and is therefore subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq*.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 782 F.3d 994. The opinion of the district court (Pet. App. 22a-43a) is reported at 963 F. Supp. 2d 868.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2015. A petition for rehearing was denied on July 7, 2015 (Pet. App. 103a-104a). The petition for a writ of certiorari was filed on September 8, 2015, and the petition was granted on December 11, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-26a.

STATEMENT

1. Congress enacted the Clean Water Act (CWA or Act) "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a); see Pub. L. No. 92-500, § 2, 86 Stat. 816 (33 U.S.C. 1251 *et seq.*). Section 301 of the CWA prohibits the "discharge of any pollutant by any person" except in compliance with the Act. 33 U.S.C. 1311(a). "[D]ischarge of a pollutant" is defined to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12). The Act defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7); see *Rapanos* v. *United States*, 547 U.S. 715, 724-725 (2006) (plurality opinion); *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985).

The CWA provides that any pollutant discharge into the waters of the United States must be authorized, either by the statute itself or by a permit granted by the United States Army Corps of Engineers (Corps), the Environmental Protection Agency (EPA), or an authorized State. 33 U.S.C. 1344 (permit program for discharge of dredged or fill materials); see 33 U.S.C. 1342 (2012 & Supp. II 2014) (permit program for discharge of other pollutants). "Compliance with a permit issued pursuant to" Section 1344 "shall be deemed compliance" with, *inter alia*, Section 1311's general ban on discharges of pollutants into navigable waters.

33 U.S.C. 1344(p). The Act establishes an enforcement framework that subjects a landowner or other person who has engaged in an unauthorized discharge to civil penalties and, for certain negligent or knowing violations, criminal prosecution.[1] 33 U.S.C. 1319. In addition to establishing various government enforcement mechanisms, the CWA authorizes aggrieved private citizens to file suit against persons who are alleged to have made unlawful pollutant discharges into waters of the United States. See 33 U.S.C. 1365(a)(1) and (f); *Decker* v. *Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1333-1334 (2013). A landowner who plans to discharge pollutants therefore must determine whether its interests would be best served by seeking a permit, or whether it is sufficiently confident that its activities will not violate the CWA to proceed without first seeking a permit.

In making that determination, the landowner must assess, *inter alia*, whether the property in question contains waters of the United States, such that the CWA's provisions apply to discharges of pollutants into those waters. The CWA itself does not establish any mechanism whereby a property owner, without first seeking a permit or discharging without a permit, may obtain the government's view as to whether the Act applies to particular sites. See generally 33 U.S.C. 1319, 1344. In order to assist property owners in evaluating their statutory options, however, the

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[1] The CWA's provisions apply to any "person" who makes an unauthorized discharge into waters of the United States, regardless of whether the person owns the property on which the waters are found. See, *e.g.*, 33 U.S.C. 1319(a). For simplicity, this brief refers to "landowners" or "property owners" as examples of the persons to whom the Act applies.

Corps has long responded to inquiries concerning whether particular waters fall within the CWA's coverage. See, *e.g.*, Dep't of the Army, Office of the Chief of Eng'rs, & EPA, *Memorandum of Understanding, Geographical Jurisdiction of the Section 404 Program* 1 (1980) (*Memorandum*) (on file with the Office of the Solicitor General) (stating that the "District Engineer" will, in response to "pre-application inquiries," "establish the boundaries of the waters of the United States, as they apply to the inquiry, at the earliest possible date").

The Corps' regulations authorize (but do not require) the Corps to provide an inquiring party with a "[j]urisdictional determination" that expresses the agency's view on whether a particular property contains "waters of the United States" that are subject to the agency's regulatory authority under Section 404 of the CWA, 33 U.S.C. 1344. 33 C.F.R. 331.2 (emphasis omitted); see 33 C.F.R. 320.1(a)(6), 325.9; see also 33 C.F.R. Pt. 331, App. C. The applicable regulations define the term "jurisdictional determination" as "a written Corps determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. 1344) or * * * Section 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*)." 33 C.F.R. 331.2. That definition further provides that jurisdictional determinations "do not include determinations that a particular activity requires a * * * permit." *Ibid.* Neither the CWA nor its implementing regulations require a landowner to obtain a jurisdictional determination before discharging dredged or fill material.

An "[a]pproved jurisdictional determination" is "a Corps document stating the presence or absence of

waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel."[2] 33 C.F.R. 331.2 (emphasis omitted). An approved jurisdictional determination is valid for five years, 33 C.F.R. Pt. 331, App. C, "unless new information warrants revision of the determination before the expiration date." Corps, Regulatory Guidance Letter No. 05-02, ¶ 1 (June 14, 2005) (RGL 05-02). When the Corps issues an approved jurisdictional determination, an affected party may pursue an administrative appeal of that determination within the Corps. See 33 C.F.R. Pt. 331.

The Corps issues tens of thousands of approved jurisdictional determinations every year. See 80 Fed. Reg. 37,065 (June 29, 2015); Corps, *Regulatory—Protecting the Integrity of America's Waters* (Feb. 2, 2015), http://www.usace.army.mil/Portals/2/docs/civilworks/budget/strongpt/fy16sp_regulatory.pdf (*Regulatory*). Few approved jurisdictional determinations are appealed. The Corps informs this Office that in fiscal year 2015, interested parties filed eight adminis-

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[2] Where appropriate, this brief uses the term "affirmative jurisdictional determination" to refer to a Corps determination that waters of the United States are present at the relevant site, and "negative jurisdictional determination" to refer to a Corps determination that such waters are not present. The Corps' regulations also provide for issuance of preliminary jurisdictional determinations, which are "written indications that there may be waters of the United States on a parcel or indications of the approximate location(s) of waters of the United States on a parcel." 33 C.F.R. 331.2. Preliminary jurisdictional determinations thus may delineate waters on a site, but they do not reflect any considered assessment of whether "waters of the United States" are present. *Ibid.*; see Corps, Regulatory Guidance Letter No. 08-02, ¶¶ 4, 7 (June 26, 2008).

trative appeals of approved jurisdictional determinations issued outside of the permitting process.

2. Whether or not a jurisdictional determination has been requested or issued, a landowner planning to discharge dredged or fill material has two options under the CWA. It may seek a permit, or it may proceed without one.

a. Section 404 of the Act, 33 U.S.C. 1344, authorizes the Corps to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a); see 33 U.S.C. 1344(d); see also 33 C.F.R. Pts. 323, 325; 40 C.F.R. Pt. 230. Section 404 provides for both individual permits and general permits. 33 U.S.C. 1344(a) and (e). The effect of either an individual or general permit is to render lawful discharges undertaken in accordance with its terms. See 33 U.S.C. 1311(a), 1344(p).

The overwhelming majority of discharges are authorized under general permits, each of which authorizes a particular category of activity within a specified geographic area. The CWA authorizes the Corps to issue general permits on a state, regional, or nationwide basis. 33 U.S.C. 1344(e)(1); 33 C.F.R. Pt. 330 (nationwide permit program). The general-permit program serves to promptly authorize activities that involve pollutant discharges into covered waters but will have only minimal adverse effects on waters of the United States. 77 Fed. Reg. 10,268 (Feb. 21, 2012) ("Nationwide permits help relieve regulatory burdens on small entities who need to obtain [Corps] permits" by "provid[ing] an expedited form of authorization.").

When the Corps receives a Section 404 permit application, it first determines whether the proposed

discharge is covered by an existing general permit. 33 C.F.R. 330.1(f). If the Corps verifies that the discharge falls within the terms of a general permit, the landowner may proceed.[3] A discharge made in compliance with the conditions imposed by an applicable general permit thus may be lawfully undertaken without an individual permit. See generally 33 C.F.R. 330.1.

There are currently 50 nationwide general permits. 77 Fed. Reg. at 10,184 (reissuing 48 existing nationwide permits and issuing two new ones). They authorize, for example, minor discharges (Nationwide Permit 18), minor dredging (Nationwide Permit 19), certain restoration activities (Nationwide Permit 27), residential developments with minor impacts (Nationwide Permit 29), and agricultural activities with minor impacts (Nationwide Permit 40). *Id.* at 10,202-10,203, 10,214-10,218, 10,223-10,224, 10,273, 10,275-10,276, 10,279.

If a landowner files a permit application and no general permit covers the proposed discharge, the Corps then determines whether an individual permit should be issued. 33 U.S.C. 1344(a); 33 C.F.R. 330.1(c) and (d). An individual permit may be necessary for larger projects with a greater impact on waters of the United States. The individual-permit program ensures that an applicant avoids or minimizes impacts on waters of the United States and provides compensatory mitigation for any remaining unavoidable impacts

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[3] Some general permits provide that a person whose discharge meets the terms and conditions of the permit need not apply for the permit or otherwise notify the Corps before proceeding with the discharge. See 33 C.F.R. 330.1(e), 330.4(a).

on such waters. See, *e.g.*, 33 C.F.R. 320.4(r), 332.1; 40 C.F.R. Pt. 230.

In evaluating a permit application, the Corps considers, *inter alia*, the impact of the planned discharge on covered waters, available alternatives, and whether any conditions should be placed on the discharge. See generally 33 C.F.R. 320.4, Pt. 325; 40 C.F.R. 230.10. As part of the permit-application process, the landowner may place CWA coverage in issue by requesting a preliminary or approved jurisdictional determination. See 33 C.F.R. 331.2; Corps, Regulatory Guidance Letter No. 08-02, ¶¶ 1-4, 7 (June 26, 2008) (RGL 08-02). Thus, if the agency has not already provided a jurisdictional determination in response to the landowner's request, the Corps will prepare one upon request in the context of the permitting process. RGL 08-02 ¶ 2.

The Corps informs this Office that in fiscal year 2015, the Corps issued more than 54,000 general-permit verifications and 3100 individual permits. The majority of individual-permit applications were authorized within 120 days of application, and most requests for verification of general-permit authorizations were completed within 60 days. The Corps denied 97 permit applications. Permit denials are unusual because the Corps is ordinarily able to issue a permit authorizing the discharge, including by imposing conditions on the discharge that are developed in consultation with the applicant. If the Corps is unable to authorize the discharge or the applicant rejects the proposed conditions, the permit is denied. 33 C.F.R. 331.2.

If the applicant has exhausted administrative remedies and is dissatisfied with the Corps' final permit-

ting decision, it may seek judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* In such an APA challenge, the applicant may contest, *inter alia*, the Corps' determination that the property at issue contains waters protected by the CWA. 33 C.F.R. 331.5(a)(2); see, *e.g.*, *Carabell* v. *United States Army Corps of Eng'rs*, 391 F.3d 704, 706-707 (6th Cir. 2004), vacated on other grounds *sub nom. Rapanos* v. *United States*, 547 U.S. 715 (2006); 33 C.F.R. 331.12.

b. Alternatively, a landowner may proceed without seeking a permit. The landowner might do so because it believes that its property does not contain waters regulated by the CWA, or because it believes that its activities do not require a permit even if covered waters are present. The CWA exempts discharges into regulated waters resulting from numerous activities, including normal farming and certain road-maintenance activities, from the permitting requirements. 33 U.S.C. 1344(f). If a discharge into waters of the United States is not authorized by the statute or by a permit, however, the property owner may be liable for civil penalties that accrue each day the violation persists.[4] 33 U.S.C. 1319(d). If the government determines that a discharge violates the CWA, it may take enforcement action.

In such a circumstance, the government may proceed administratively, including by issuing a warning letter, a "cease and desist" order, 33 C.F.R. 326.3(c),

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[4] The Act initially authorized a per-day penalty of up to $25,000. 33 U.S.C. 1319(d). Congress subsequently authorized the EPA to adjust the maximum penalty for inflation, see 28 U.S.C. 2461 note, and the current maximum per-day penalty is $37,500. 74 Fed. Reg. 627 (Jan. 7, 2009).

or an administrative compliance order, see 33 U.S.C. 1319(a). The recipient of an EPA compliance order may bring suit under the APA to challenge the order, and it may contend that the property is not covered by the CWA. See *Sackett* v. *EPA*, 132 S. Ct. 1367, 1370-1371 (2012). The government also may institute an administrative proceeding to impose civil penalties. 33 U.S.C. 1319(g). The Act provides for judicial review of administrative penalty orders, 33 U.S.C. 1319(g)(8), and the landowner may challenge the order on the ground that the CWA does not apply to the property in question.

The government may also bring an enforcement action in district court to obtain injunctive and other relief. 33 U.S.C. 1319(b); 33 C.F.R. 326.5. At that time, the discharger may contend, *inter alia*, that its conduct did not violate the CWA because it did not involve a discharge into "waters of the United States." See, *e.g.*, *United States* v. *Deaton*, 332 F.3d 698, 701-703 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004). An aggrieved private plaintiff may also commence a citizen suit, alleging that the defendant unlawfully discharged pollutants into waters of the United States, see 33 U.S.C. 1365(a)(1) and (f), and the defendant may contest the issue of CWA coverage in that context as well.

In any of those enforcement proceedings, a landowner's prior receipt of an affirmative jurisdictional determination does not alter its rights or obligations or expose it to additional penalties if its conduct is found to have violated the CWA.

3. The APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court

are subject to judicial review." 5 U.S.C. 704. "As a general matter, two conditions must be satisfied for an agency action to be 'final'" under the APA. *Bennett* v. *Spear*, 520 U.S. 154, 177 (1997). "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Id.* at 177-178 (citation and internal quotations omitted). "And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 178 (citation and internal quotations omitted).

In *Sackett*, *supra*, this Court held that an EPA compliance order is "final agency action" subject to judicial review under the APA, 5 U.S.C. 704. See 132 S. Ct. at 1371-1372. A compliance order reflects the EPA's determination that a landowner has violated the CWA or a permit issued under the CWA. See *ibid.*; 33 U.S.C. 1319(a)(3). The Court in *Sackett* explained that the compliance order at issue in that case represented the "consummation" of the agency's decisionmaking process because the EPA's conclusion that the Sacketts had violated the CWA was not subject to further review within the agency. 132 S. Ct. at 1372 (quoting *Bennett*, 520 U.S. at 178) (internal quotation marks omitted). The Court also concluded that the compliance order "determined rights or obligations." *Id.* at 1371 (quoting *Bennett*, 520 U.S. at 178). The Court explained that the order by its terms imposed "the legal obligation to 'restore'" the property in question, and that the order required the Sacketts to give the EPA access to their property. *Ibid.* In addition, the order imposed "legal consequences" by "expos[ing] the Sacketts to double penalties in a future

enforcement proceeding" and "severely limit[ing] [their] ability to obtain a permit" under the CWA. *Id.* at 1371-1372.

4. a. Respondents Pierce Investment Company and LPF Properties, LLC, own 530 acres of land in Minnesota. Respondent Hawkes Co., Inc. (Hawkes), would like to mine a portion of that property for peat, which is formed in wetlands. Hawkes has an existing peat-mining operation nearby and would pay royalties to the respondent property owners. Pet. App. 5a-6a, 23a.

In December 2010, Hawkes applied for a Section 404 permit from the Corps. In March 2011, the Corps informed Hawkes of the Corps' preliminary determination that the property contains waters of the United States. Pet. App. 6a. In February 2012, after further meetings and visits to the property, the Corps provided Hawkes with an approved jurisdictional determination, which concluded that the property contains waters of the United States. *Id.* at 6a-7a. Respondents' complaint alleges that, during the process of developing the jurisdictional determination, Corps employees asserted that the permit process would be costly and time-consuming. *Id.* at 6a; J.A. 15-16 (Am. Compl. ¶ 40).

Respondents filed an administrative appeal of the approved jurisdictional determination. In October 2012, finding that the approved jurisdictional determination lacked sufficient analysis to support a finding of regulatory jurisdiction, the Corps' Mississippi Valley Division remanded the approved jurisdictional determination for reconsideration by the Corps' district office. Pet. App. 7a, 44a. In December 2012, the Corps issued a revised approved jurisdictional deter-

mination, which again concluded that the property contains waters of the United States. *Id.* at 7a-8a, 44a-102a. The revised approved jurisdictional determination explained that the property contains approximately 150 acres of wetlands that are adjacent to waters that flow directly or indirectly into traditional navigable waters. *Id.* at 50a-51a. The wetlands at issue are of "exceptional quality"—they are considered a "Rich Fen" with "high vegetative biodiversity," and they are "correctly given an outstanding statewide biodiversity significance ranking by the [State]." *Id.* at 64a. After examining the effect of the wetlands on the chemical, physical, and biological integrity of the traditionally-navigable Red River of the North, the Corps concluded that the wetlands have a significant nexus with that river. *Id.* at 83a-100a.

Respondents' permit application is currently pending. The State of Minnesota, which is jointly reviewing the project with the Corps, has requested that respondents provide certain additional information. Because that request is outstanding, the Corps has not yet made a decision on the permit.

b. In 2013, respondents filed this action, alleging that the Corps' jurisdictional determination was arbitrary and capricious under the APA, 5 U.S.C. 706(2). Pet. App. 8a, 27a. The Corps moved to dismiss the suit, arguing that the jurisdictional determination was not "final agency action" subject to judicial review under the APA, 5 U.S.C. 704, and that respondents' challenge to the jurisdictional determination was not ripe. Pet. App. 8a.

The district court dismissed the suit. Pet. App. 22a-43a. The court held that the Corps' jurisdictional determination was not final agency action under *Ben-*

nett. *Id.* at 31a. The court concluded that, although the jurisdictional determination "satisfies the first *Bennett* condition" because it marks the consummation of the agency's decisionmaking process, *id.* at 32a, it "does not satisfy the second *Bennett* condition" because "it does not determine [respondents'] rights or obligations," *id.* at 34a.

5. a. The court of appeals reversed. Pet. App. 1a-17a. The court held that a jurisdictional determination is a reviewable "final agency action" under the APA. *Id.* at 16a-17a. In the court's view, "the Court's application of its flexible final agency action standard in *Sackett*" indicated that a jurisdictional determination should be considered final agency action. *Id.* at 5a.

The court of appeals first held that the jurisdictional determination satisfied *Bennett*'s first prong because it "was the consummation of the Corps' decisionmaking process on the threshold issue of the agency's statutory authority." Pet. App. 9a. The court explained that the Corps' regulatory guidance describes an approved jurisdictional determination as a "definitive, official determination." *Ibid.* (citation omitted).

Turning to *Bennett*'s second prong, the court of appeals concluded that an approved jurisdictional determination determines "rights and obligations" and imposes "legal consequences." Pet. App. 10a. The court found little difference between "an agency order that compels affirmative action," such as the EPA compliance order at issue in *Sackett*, and a jurisdictional determination, which, in the court's view, "prohibits a party from taking otherwise lawful action." *Id.* at 11a. The court stated that a jurisdictional de-

termination "requires [respondents] either to incur substantial compliance costs (the permitting process), forego what they assert is lawful use of their property, or risk substantial enforcement penalties." *Ibid.*

The court of appeals also held that "there is no other adequate [judicial] remedy" if immediate judicial review of the Corps' jurisdictional determination is unavailable. Pet. App. 13a (citation omitted; brackets in original); see 5 U.S.C. 704. While acknowledging that respondents could seek a permit and then obtain judicial review of the Corps' decision on their application, the court asserted that, "as a practical matter, the permitting option is prohibitively expensive and futile." Pet. App. 14a. The court also stated that respondents' "other option—commencing to mine peat without a permit and await an enforcement action—is even more plainly an inadequate remedy" because respondents could incur "huge additional potential liability" by doing so. *Ibid.* (citing *Sackett*, 132 S. Ct. at 1372).

b. Judge Kelly filed a separate concurring opinion. Pet. App. 18a-21a. She described the reviewability issue presented here "as a close question." *Id.* at 18a. She observed that a jurisdictional determination does not alter the recipient's legal obligations in the way that the compliance order in *Sackett* did. *Id.* at 18a-20a. Judge Kelly concluded, however, that a jurisdictional determination should be immediately reviewable to provide the landowner an opportunity, before seeking a permit, "to show the CWA does not apply to its land at all." *Id.* at 20a.

6. The court of appeals denied the Corps' petition for rehearing en banc and for panel rehearing. Pet. App. 103a-104a.[5]

SUMMARY OF ARGUMENT

A Corps jurisdictional determination is not subject to judicial review under the APA because it is not "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704.

A. A landowner that wishes to discharge pollutants may seek a permit from the Corps if it wishes to ensure that its conduct complies with the CWA, or it may discharge without a permit if it is sufficiently confident that the relevant site does not contain waters of the United States. The Corps' issuance of a jurisdictional determination does not expand or contract the landowner's options; it simply provides additional information that the landowner may find useful in choosing between those alternative courses of conduct. Jurisdictional determinations thus are one of the many ways in which administrative agencies respond to inquiries from regulated parties concerning the application of a given legal framework to particular factual circumstances. Courts have generally

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[5] After the court of appeals issued its decision in this case, the Corps and the EPA issued a rule clarifying the agencies' interpretation of the scope of waters covered by the CWA. See 80 Fed. Reg. at 37,055; see also 79 Fed. Reg. 22,188 (Apr. 21, 2014). That rule is not relevant here because it governs jurisdictional determinations issued after its effective date, 80 Fed. Reg. at 37,054, 37,073-37,074, and the jurisdictional determination at issue here substantially predated the new rule. The Sixth Circuit has stayed the new rule. See *In re: EPA & Dep't of Def. Final Rule; "Clean Water Rule: Definition of Waters of the United States*," 80 Fed. Reg. 37,054 (June 29, 2015), at 6, No. 15-3799 (Oct. 9, 2015).

recognized both that such agency informational efforts inure to the public's benefit, and that allowing judicial challenges to this type of guidance would discourage agencies from responding to public inquiries.

B. A jurisdictional determination is not "final agency action" because it does not determine legal rights or obligations, or impose legal consequences. An affirmative jurisdictional determination states the Corps' conclusion that waters of the United States are present at the relevant site, but it does not direct the landowner to take or refrain from taking any particular action, and it does not affect the landowner's ability to seek and obtain a permit. If the landowner subsequently discharges pollutants and is subjected to some form of enforcement action alleging a violation of the CWA, the Corps' prior jurisdictional determination will not prevent the landowner from disputing the CWA's applicability, will not alter the burden of proof in the enforcement proceeding, and will not subject the landowner to additional penalties if a violation is found. In its lack of legal effect, a jurisdictional determination is similar to various types of informal agency guidance that courts have generally found to be non-"final" under the APA.

As a practical matter, a landowner who receives an affirmative jurisdictional determination may have a greater incentive to seek a permit before discharging pollutants than someone who has not received such a determination. But treating that sort of practical impact as a sufficient ground for deeming jurisdictional determinations to be "final agency action" would subvert the established understanding that informal agency guidance is not judicially reviewable,

since the core rationale for agency informational efforts is that regulated parties may give weight to the agency's views. This Court's decision in *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980), which held that a Federal Trade Commission (FTC) complaint was not reviewable "final agency action" even though it compelled the subject of the complaint to participate in an administrative hearing, *id.* at 239-240, reinforces the conclusion that a jurisdictional determination's practical impact is an insufficient ground for finding it to be "final."

In particular, a jurisdictional determination is unlike the biological opinion at issue in *Bennett* v. *Spear*, 520 U.S. 154, 157 (1997), or a discharge permit issued by the Corps pursuant to 33 U.S.C. 1344. Under the applicable statutory schemes, those agency actions have operative legal effect by legitimizing—*i.e.*, actually rendering lawful—private conduct that would otherwise be prohibited. A Corps jurisdictional determination, by contrast, reflects the agency's assessment of whether waters of the United States are present at a particular site, but it cannot change the actual legal status of any pollutant discharge. The court below cited no case in which this Court has treated as "final agency action" an agency communication like this one, which simply states the agency's non-binding view about the proper application of a pre-existing legal standard to a particular factual setting.

The court of appeals' reliance on *Sackett* v. *EPA*, 132 S. Ct. 1367 (2012), was also misplaced. The Court in *Sackett* found an EPA compliance order to be reviewable "final agency action." Unlike a jurisdictional determination, however, the compliance order di-

rected the recipient landowners to take specific actions, and it substantially increased the penalties to which they were potentially subject. The Court in *Sackett* relied on those operative legal effects, rather than on the landowners' practical incentive to conform their conduct to the agency's stated views, in holding that the compliance order was subject to APA review. *Id.* at 1371-1372.

C. Even if the Corps' jurisdictional determination were "final agency action," it would not be subject to judicial review because the statutory scheme provides other "adequate" avenues by which the issue of CWA coverage can be contested in court. A landowner can seek judicial review if the Corps denies its permit application, or issues a permit on conditions that the applicant opposes, and the landowner can argue in the judicial proceeding that the relevant tract does not contain waters of the United States. A recipient of an affirmative jurisdictional determination who elects to proceed with discharges may also obtain judicial review of the CWA coverage issue if the government brings an enforcement proceeding or an aggrieved private plaintiff commences a citizen suit. Since the CWA does not require the Corps to issue jurisdictional determinations at all, and nothing in the Act suggests that Congress specifically anticipated that practice, Congress evidently regarded those other avenues of judicial review as providing "adequate" opportunities to litigate disputed questions of CWA coverage.

ARGUMENT

A JURISDICTIONAL DETERMINATION IS NOT IMMEDIATELY REVIEWABLE UNDER THE APA BECAUSE IT IS NOT "FINAL AGENCY ACTION" AND BECAUSE THERE ARE OTHER ADEQUATE PATHS TO JUDICIAL REVIEW

The Corps issues jurisdictional determinations in response to requests from property owners, in order to inform the owners of the Corps' view on whether their property falls within the CWA's coverage. That salutary practice gives property owners additional information that may assist them in choosing among their available options, but receipt of a jurisdictional determination does not alter the recipient's legal obligations.

The court of appeals erred in concluding that the jurisdictional determination "requires [respondents] either to incur substantial compliance costs (the permitting process), forego what they assert is lawful use of their property, or risk substantial enforcement penalties." Pet. App. 11a. The jurisdictional determination does not create the quandary that concerned the court. Rather, the CWA itself requires a landowner to obtain a permit before discharging any pollutant into waters of the United States and imposes penalties for engaging in unpermitted discharges. The landowner faces precisely the same set of options, and precisely the same exposure to penalties for any CWA violations, whether or not it has received a jurisdictional determination. A jurisdictional determination is therefore not "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704.

A. Jurisdictional Determinations Assist Landowners To Assess Their Rights And Obligations Under The CWA

1. The CWA requires any person to obtain a permit before engaging in an unauthorized discharge of pollutants into waters of the United States, or to face statutory penalties for violating the Act. An entity who wishes to discharge pollutants thus has a choice. If it believes that the CWA may apply to waters on its property and that a discharge permit may be required, it may seek a permit from the Corps. As part of the permitting process, the property owner may argue that the CWA does not apply, and it may obtain an agency coverage determination that will be subject to judicial review along with the agency's ultimate permitting decision. 33 C.F.R. 331.5(a)(2).

Alternatively, the property owner may proceed without a permit if it believes either that the relevant site does not contain waters of the United States or that the discharge falls within a statutory or regulatory exception to the CWA's permitting requirement. See pp. 9-10, *supra*. In a suit for judicial review of an agency enforcement action, or in a judicial-enforcement suit alleging that the landowner's discharges were unlawful, the property owner may argue that its conduct did not violate the Act for either of those reasons. The landowner risks being subject to statutory penalties, however, if its view of the coverage question is ultimately rejected and it is found to have violated the CWA.

2. In order to assist landowners and others in evaluating their potential statutory obligations, the Corps allows them to request a jurisdictional determination that provides the agency's view on whether the property in question contains waters of the United

States. The CWA itself does not require the Corps to provide jurisdictional determinations to anyone. Rather, the Corps has historically provided the determinations on request, either as a standalone document or in the course of considering a permit application. See pp. 3-6, *supra*; see also *Memorandum* 1-2.

Neither the CWA nor any Corps regulation requires a landowner to request a jurisdictional determination under any circumstances. If a landowner believes that the site of its contemplated discharges does not contain waters of the United States, it may proceed with those discharges without first requesting or receiving confirmation that the Corps shares that view. A landowner also may apply for a permit without first requesting a jurisdictional determination.

A landowner who procures a jurisdictional determination, however, has the advantage of knowing the Corps' current, considered view as to whether there are waters of the United States on the landowner's property. The landowner can take that additional information into account in assessing the relative advantages and disadvantages of the options available to it. If the jurisdictional determination states the Corps' conclusion that waters of the United States are present at the relevant site, but the landowner disagrees with that assessment, the landowner is not required to conform its conduct to the agency's view. If the landowner instead proceeds to discharge pollutants without a permit, and the government commences some form of enforcement action, the dispositive question will be whether the landowner's conduct violated the Act, not whether it was consistent with the jurisdictional determination. In such a proceeding, the landowner's prior receipt of a jurisdictional

determination likewise will not increase its exposure to statutory penalties if a violation is ultimately found to have occurred. See Part B, *infra*. The frequency with which jurisdictional determinations are requested and received (the Corps issues tens of thousands of jurisdictional determinations every year, see *Regulatory*) attests to the usefulness of that mechanism to persons contemplating pollutant discharges.

Jurisdictional determinations are thus one example of the salutary administrative practice of responding to inquiries from potentially regulated parties concerning the application of a given legal framework to particular factual circumstances. See *American Fed'n of Gov't Emps., AFL-CIO* v. *O'Connor*, 747 F.2d 748, 754 (D.C. Cir. 1984) (R.B. Ginsburg, J.) (describing such actions as a "valuable public service"), cert. denied, 474 U.S. 909 (1985); *National Automatic Laundry & Cleaning Council* v. *Shultz*, 443 F.2d 689, 699 (D.C. Cir. 1971) ("This technique of apprising persons informally as to their rights and liabilities has been termed an excellent practice in administrative procedure.") (citation and internal quotation marks omitted). Courts have generally been reluctant to hold that such responses to public inquiries are immediately reviewable. See *O'Connor*, 747 F.2d at 753-754; see also *Holistic Candlers & Consumers Ass'n* v. *FDA*, 664 F.3d 940, 941-946 (D.C. Cir.) (canvassing cases), cert. denied, 133 S. Ct. 497 (2012); *Air Brake Sys., Inc.* v. *Mineta*, 357 F.3d 632, 644 (6th Cir. 2004) (Sutton, J.) (counsel letter requested by regulated party was not final agency action); pp. 33-35, *infra*.

To be sure, a party who disagrees with the agency's view might prefer to obtain a judicial determination of that party's rights and obligations immediately upon

learning of the agency's opinion. But where (as here) the agency's expression of its views does not affect the entity's legal obligations or increase the penalties to which it is potentially subject, the entity's disagreement with the agency does not in itself justify immediate judicial review. Cf. *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 811 (2003) (rejecting argument that "mere uncertainty as to the validity of a legal rule constitutes a hardship for purposes of the ripeness analysis" because "courts would soon be overwhelmed with requests for what essentially would be advisory opinions"). Courts have also recognized that agency informational efforts inure to the public's benefit, and that "[t]o permit suits for declaratory judgments upon mere informal, advisory, administrative opinions might well discourage the practice of giving such opinions, with a net loss of far greater proportions to the average citizen than any possible gain which could accrue." *Shultz*, 443 F.2d at 699 (citation omitted).

That is not an abstract concern here. Significant agency resources are necessary to perform the scientific and technical analysis required to produce the tens of thousands of jurisdictional determinations requested annually. Allowing immediate judicial review of each of those determinations could impose a substantial further strain on the Corps' limited resources. Particularly because nothing in the Act or the Corps' regulations requires the Corps to issue jurisdictional determinations, the Corps might reconsider the practice, or at least revisit its willingness to provide an approved jurisdictional determination to anyone who requests it. See *Belle Co.* v. *United States Army Corps of Eng'rs,* 761 F.3d 383, 394 (5th Cir.

2014) (immediate judicial review would "disincentivize the Corps from providing [jurisdictional determinations]," thereby "undermin[ing] the system through which property owners can ascertain their rights and evaluate their options"), cert. denied *sub nom. Kent Recycling Servs., LLC* v. *United States Army Corps of Eng'rs*, 135 S. Ct. 1548 (2015), petition for reh'g pending, No. 14-493 (filed Apr. 16, 2015).

B. A Jurisdictional Determination Is Not "Final Agency Action" Because It Does Not Determine Legal Rights Or Obligations, Or Impose Legal Consequences

The APA authorizes judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. Two conditions must be met for agency action to be "final." *Bennett* v. *Spear*, 520 U.S. 154, 177 (1997). "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 177-178 (citations and internal quotation marks omitted).

An approved jurisdictional determination for which administrative appeals have been completed may represent the consummation of the Corps' decisionmaking with respect to the presence of waters of the United States on particular property. The determination reflects the agency's official view, and it will remain in effect for five years unless conditions change or new information comes to light. See p. 5, *supra*; see also 33 C.F.R. 331.2, Pt. 331, App. C; RGL 05-02 ¶ 1. To be sure, if the recipient of an affirmative jurisdictional determination subsequently

discharges pollutants at the relevant site, the decision whether to initiate various types of enforcement proceedings might involve officials at other agencies (*e.g.*, EPA officials for an administrative compliance order, or Justice Department attorneys for a judicial-enforcement suit). Those officials might seek to confirm the presence of covered waters before commencing enforcement actions. But the issuance of an approved jurisdictional determination marks the culmination of the distinct process by which the Corps informs a landowner whether the Corps believes that covered waters are present on a specified tract.

The jurisdictional determination does not, however, satisfy *Bennett*'s second prong: it does not impose legal consequences or alter the recipient's legal obligations in any way. It does not contain any directives; it does not alter the landowner's exposure to penalties for violating the Act; and it does not change the standard of review that otherwise would govern any challenge to the agencies' final permitting or enforcement decisions. In holding to the contrary, the court of appeals conflated an affirmative jurisdictional determination's possible practical effect—namely, the increased incentive to obtain a permit—with the legal effects that this Court's decisions require.[6]

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[6] In so concluding, the court of appeals departed from decisions of the Fifth and Ninth Circuits. In *Belle*, the Fifth Circuit held that a jurisdictional determination is not final agency action, and that this Court's decision in *Sackett* v. *EPA*, 132 S. Ct. 1367 (2012), does not require a contrary conclusion. *Belle*, 761 F.3d at 393-394. The Ninth Circuit, in its pre-*Sackett* decision in *Fairbanks North Star Borough* v. *U.S. Army Corps of Engineers*, 543 F.3d 586 (2008), cert. denied, 557 U.S. 919 (2009), similarly held that a jurisdictional determination is not final. *Id.* at 589.

1. The CWA itself, not the jurisdictional determination, imposes legal obligations on respondents

An affirmative jurisdictional determination informs the landowner of the Corps' view that a particular property contains "waters of the United States" and is therefore subject to the CWA's ban on unauthorized pollutant discharges into those waters. 33 U.S.C. 1362(7); see 33 U.S.C. 1311(a). The determination addresses only the presence or absence of waters of the United States on the property. It does not announce any conclusion about whether the landowner's planned activities would require a permit, or whether the landowner's past activities, if any, have violated the Act. Nor does it direct the landowner to take (or refrain from taking) any action. See Pet. App. 46a-47a.

a. A jurisdictional determination does not alter a property owner's obligation, if any, to obtain a permit. If the property in fact contains waters of the United States, the CWA requires the landowner to obtain authorization under the Act and its implementing regulations before discharging pollutants into those waters, whether or not the landowner has requested or received a jurisdictional determination. 33 U.S.C. 1311(a), 1344; see 33 U.S.C. 1342 (2012 & Supp. II 2014); 33 C.F.R. 331.2. Conversely, if the property does not contain waters of the United States, but the Corps issues a jurisdictional determination that incorrectly finds covered waters to be present, pollutant discharges at the site remain lawful despite the Corps' expressed view.

A jurisdictional determination also does not address whether the property owner's planned activities would require a permit. See 33 C.F.R. 331.2 ("[Juris-

dictional determinations] do not include determinations that a particular activity requires a * * * permit."). Rather, an approved jurisdictional determination focuses exclusively on the conditions on the property and the scientific and legal evaluation necessary to ascertain the presence of waters of the United States. See, *e.g.*, Pet. App. 48a-102a. The Corps' statement of its conclusion that the property contains waters regulated by the CWA does not give rise to any necessary inference about the need for a permit, as some discharges into covered waters do not require a permit. See, *e.g.*, 33 U.S.C. 1344(f). The court of appeals was therefore incorrect in asserting that the jurisdictional determination "adversely affects [respondents'] right to use their property in conducting a lawful business activity." Pet. App. 13a.

Receiving a jurisdictional determination also does not affect the landowner's ability to obtain a permit. See 33 C.F.R. Pts. 320, 331 (describing criteria and procedures for granting permits without reference to whether a landowner has received a jurisdictional determination). A landowner may request a jurisdictional determination either before applying for a permit or during the permitting process. See RGL 08-02 ¶ 2. If the landowner seeks and receives a jurisdictional determination before applying for a permit, the Corps generally will not revisit CWA coverage as part of the permitting process except on the basis of new information. If the landowner applies for a permit without first obtaining a jurisdictional determination, and then places CWA coverage in issue during the permitting process, the Corps will issue a jurisdictional determination in response. Whichever way a landowner chooses to raise questions concerning CWA

coverage, the Corps will verify coverage through a jurisdictional determination. If the owner subsequently seeks, or continues to seek, a permit, the Corps will then consider whether, and on what conditions, the discharge should be authorized.[7]

After exhausting administrative remedies, the landowner may obtain judicial review of the permitting decision, including any predicate jurisdictional determination, if the permit is denied or the applicant declines a proffered permit. See *Carabell* v. *United States Army Corps of Eng'rs*, 391 F.3d 704, 706-707 (6th Cir. 2004), vacated on other grounds *sub nom. Rapanos* v. *United States*, 547 U.S. 715 (2006).

b. An affirmative jurisdictional determination does not expand or alter the range of enforcement mechanisms available to the agencies charged with administering the CWA.

Whether or not the Corps has previously issued a jurisdictional determination informing the landowner that a particular tract contains waters of the United States, the EPA may issue an administrative compliance order (of the sort at issue in *Sackett* v. *EPA*, 132 S. Ct. 1367 (2012)), or it may institute an

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[7] When the Corps makes a permit decision, the permit applicant can then administratively appeal the permit denial or the declined permit to the Corps' division engineer. 33 C.F.R. Pt. 331. In such an appeal, the applicant can again argue that the relevant site does not contain waters of the United States, even if the applicant previously (and unsuccessfully) appealed the standalone jurisdictional determination. The division engineer, who decides the appeal, reviews the question of CWA coverage again. 33 C.F.R. 331.5(a)(2) ("The reasons for appealing a permit denial or a declined permit may include jurisdiction issues, whether or not a previous approved [jurisdictional determination] was appealed.").

administrative penalty proceeding and impose a penalty. 33 U.S.C. 1319(a) and (g). Such enforcement actions are necessarily predicated on the EPA's assessment that the CWA applies to the waters in question, see RGL 08-02 ¶ 4.e; but the fact that the Corps has previously expressed that view in a jurisdictional determination does not affect the landowner's rights in an administrative-enforcement proceeding, see 33 U.S.C. 1319(a) and (g); *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 129-130 (1939). The landowner's exposure to administrative penalties likewise does not vary based on whether it has previously received an affirmative jurisdictional determination. 33 U.S.C. 1319(g)(2).

Both types of administrative action afford the landowner the opportunity to obtain judicial review of the agency's underlying conclusion that the property contains waters of the United States. See 33 U.S.C. 1319(g)(8) (providing for judicial review of administrative penalty decision); *Sackett*, 132 S. Ct. at 1371-1372 (compliance orders issued under 33 U.S.C. 1319(a) are reviewable under the APA); see also 5 U.S.C. 706(2)(A). In any such judicial-review proceedings, the EPA's coverage determination would be reviewed under the same arbitrary-and-capricious standard as the EPA's determination that the property owner had violated the CWA and that a particular penalty was appropriate. See 33 U.S.C. 1319(g)(8); see also, *e.g.*, *Kelly* v. *United States Envtl. Prot. Agency*, 203 F.3d 519, 523 (7th Cir. 2000). That standard of review would apply whether or not the Corps had issued an affirmative jurisdictional determination before the discharges occurred.

Alternatively, the United States may commence a judicial-enforcement action. In such an action, the United States bears the burden of establishing, *inter alia*, that the defendant's discharges occurred in waters of the United States. See 33 U.S.C. 1319(b); see also, *e.g.*, *United States* v. *Cundiff*, 555 F.3d 200, 213 (6th Cir.) (government "must prove that (1) a person (2) discharged a pollutant (3) from a point source (4) into waters of the United States (5) without a permit"), cert. denied, 558 U.S. 818 (2009). That standard of proof applies whether or not the Corps has previously issued a jurisdictional determination concerning the site at issue. See *Fairbanks N. Star Borough* v. *U.S. Army Corps of Eng'rs*, 543 F.3d 586, 594-595 (9th Cir. 2008) ("[W]e would not give the government's position that CWA regulatory jurisdiction exists any particular deference simply because the Corps' views on the matter were formulated in the context of an approved jurisdictional determination rather than, for example, a permit application or enforcement proceeding."), cert. denied, 557 U.S. 919 (2009) (*Fairbanks*).

If the landowner is ultimately found liable in a judicial-enforcement proceeding, it will not face any increased exposure to penalties by virtue of the prior jurisdictional determination. Because a jurisdictional determination contains no directives that could be violated, receipt of a jurisdictional determination cannot trigger any sanctions for violating the determination itself. Nor does the jurisdictional determination alter the landowner's legal exposure to sanctions under the CWA. See 33 U.S.C. 1319(d) (setting maximum per-day penalty without regard to prior

receipt of a jurisdictional determination); 74 Fed. Reg. 627 (Jan. 7, 2009) (same).

The court of appeals was therefore incorrect in stating that a jurisdictional determination increases "the penalties [respondents] would risk if they chose to begin mining without a permit" by exposing the landowner to "substantial criminal monetary penalties and even imprisonment for a knowing CWA violation." Pet. App. 15a. The CWA does provide that a court, in assessing an appropriate civil penalty for a violation, should consider, *inter alia*, "any good-faith efforts" to comply with the CWA's requirements. 33 U.S.C. 1319(d). The statute also imposes criminal penalties for knowing violations of the CWA, 33 U.S.C. 1319(c)(2). A landowner's receipt of a jurisdictional determination—and its consequent knowledge that the agency believes the CWA applies—could be offered as evidence of the owner's knowledge of the CWA's applicability. But the civil-penalty and criminal provisions do not mention, much less assign any particular evidentiary weight to, the Corps' prior issuance of a jurisdictional determination. The possibility that a landowner's receipt of a jurisdictional determination might be given evidentiary weight in some future proceeding is therefore contingent—not the sort of concrete legal consequence necessary to render the action final. See *Fairbanks*, 543 F.3d at 594-595. In any event, the potential knowledge-conferring aspect of a jurisdictional determination does not distinguish it from any number of informal statements that agencies offer in order to assist regulated entities in structuring their activities—or, for that matter, a private consultant's report, which

likewise could be offered as evidence that a regulated party knew its conduct to be unlawful.

c. In its lack of legal effect, an affirmative jurisdictional determination is similar to informal agency opinion letters and other statements, often issued in response to inquiries from the public, communicating the agency's views about the proper application of relevant statutory provisions to particular factual scenarios. Courts have generally held that those actions are not "final" under the APA because they have "no direct, binding effect on [regulated parties] and * * * no legal consequences * * * by virtue of the deference courts might give to them." *Air Brake Sys.*, 357 F.3d at 644 (counsel letter requested by regulated party was not final); see, *e.g.*, *Holistic Candlers*, 664 F.3d at 941-942 (FDA warning letters expressing agency's view that entity must obtain FDA approval before selling product were not final because they did not compel any action); *Florida Power & Light Co.* v. *EPA*, 145 F.3d 1414, 1419 (D.C. Cir. 1998) (EPA letters and statement of EPA's understanding of its statutory authority were not final because they had no legal effect on regulated party); *USAA Fed. Sav. Bank* v. *McLaughlin*, 849 F.2d 1505, 1508-1510 (D.C. Cir. 1988) (letter stating extent of regulatory jurisdiction, in response to inquiry, was not reviewable); *O'Connor*, 747 F.2d at 755-757.

To be sure, the agency process that culminates in an approved jurisdictional determination is more formal and structured than is the case with many more ad hoc agency communications. See pp. 3-5, *supra*. That feature of the jurisdictional determination is relevant to *Bennett*'s first prong, since it suggests that the determination is the consummation of

the Corps' decisionmaking process with respect to CWA coverage of the relevant site. But to be subject to immediate review under the APA, the jurisdictional determination must also satisfy *Bennett*'s second prong—it must determine legal rights or impose legal consequences. See *Air Brake Sys.*, 357 F.3d at 641 ("To say that a legal interpretation is final because it is not subject to further review within the agency, however, is not to say that it is 'final' in the sense that [Section 704] of the APA requires it to be."). In that regard, a jurisdictional determination is no different from the innumerable opinions that agencies offer to assist regulated entities in understanding the obligations imposed by the governing statute.[8] See, *e.g.*,

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[8] The Corps' regulations state that a jurisdictional determination constitutes "a Corps final agency action." 33 C.F.R. 320.1(a)(6). That provision does not purport to address whether a jurisdictional determination is "final agency action" under the APA. Rather, it clarifies that, because the Corps has "authorized its district engineers"—as opposed to higher-ranking Corps officials—to issue jurisdictional determinations, "the public can rely on" a district engineer's "determination" as reflecting the Corps' official view on CWA coverage. 51 Fed. Reg. 41,207, 41,220 (Nov. 13, 1986). In a later rulemaking, the Corps confirmed that it did not regard jurisdictional determinations as "final" for purposes of judicial review, stating that in its view, a challenge to a jurisdictional determination would not be ripe "until a landowner who disagrees with a [jurisdictional determination] has gone through the permitting process." 65 Fed. Reg. 16,488 (Mar. 28, 2000). In any event, even if the Corps had characterized a jurisdictional determination as final for APA purposes, "[w]hether an administrative decision is final is determined not by the administrative agency's characterization of its action, but rather by a realistic assessment of the nature and effect of the order sought to be reviewed." *Adenariwo* v. *Federal Mar. Comm'n*, No. 14-1044, 2015 WL 8744623, at *3 (D.C. Cir. Dec. 15, 2015) (citation and internal quotation marks omitted); *Ocean Cnty. Landfill Corp.* v.

Independent Equip. Dealers Ass'n v. *EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004) (Roberts, J.) (EPA letter articulating legal interpretation represented consummation of agency decisionmaking process, but it was not final because it "was purely informational in nature; it imposed no obligations and denied no relief").

2. Although an affirmative jurisdictional determination may have a practical effect on the recipient's assessment of the advantages and disadvantages of alternative courses of conduct, it does not have the legal effect necessary for final agency action

a. In concluding that a jurisdictional determination satisfies *Bennett*'s second prong, the court of appeals conflated the potential practical effects of a jurisdictional determination with the altered legal obligations that are required under *Bennett*. Pet. App. 11a-13a. It is true that, as a practical matter, a landowner who receives an affirmative jurisdictional determination may have a greater incentive to seek a permit than someone who has not received such a determination. But that incentive arises solely from the additional information that a jurisdictional determination conveys to the landowner about the agency's scientific and legal analysis and its ultimate view of the CWA's coverage. When an agency communication does not affect the legal obligations or sanctions to which the recipient is subject, that sort of practical effect is not sufficient to render the communication final agency action. See *National Ass'n of Home Builders* v. *Norton*, 415 F.3d 8, 14-15 (D.C. Cir. 2005) (incentive to comply voluntarily with agency's guidance concerning

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United States Envtl. Prot. Agency, 631 F.3d 652, 655 (3d Cir. 2011) (same).

underlying statutory obligation is insufficient to establish legal consequences under *Bennett*).

Indeed, whenever an agency endeavors to provide the regulated public with more information regarding the agency's interpretation of a governing statute, a potential practical consequence of the agency's efforts is that some parties may feel constrained to conduct themselves in accordance with the agency's stated view despite their disagreement with it. Yet the courts have not traditionally viewed administrative efforts to inform the public about statutory requirements as coercive. See, *e.g.*, *National Ass'n of Home Builders*, 415 F.3d at 14-15; *Florida Power & Light Co.*, 145 F.3d at 1419. To the contrary, courts have understood such actions to be a "valuable public service" that enables private parties to make more informed decisions about their best course of action in light of statutory requirements. *O'Connor*, 747 F.2d at 754.

Jurisdictional determinations thus do not inhibit private choice; they facilitate it. When a property owner discharges pollutants into waters of the United States, its conduct violates the CWA unless the discharge either has been authorized, generally by a permit, or falls within a statutory or regulatory exemption. That is so whether or not the Corps has previously issued an affirmative jurisdictional determination or otherwise communicated its view that covered waters are present. An affirmative jurisdictional determination simply gives the property owner more information on which to base its own assessment of its statutory obligations.

That additional information may influence the landowner's choice among alternative courses of con-

duct. But to treat that possible influence as sufficient to render the jurisdictional determination immediately reviewable would depart from the longstanding judicial encouragement of administrative efforts to aid the public in understanding statutory requirements. Agency informational statements would serve no useful purpose if the persons who requested those statements gave them no weight in choosing among alternative courses of conduct. If that potential impact rendered such statements final agency action, the Corps—and other agencies with similar practices—would have to consider whether to continue "to devote the limited resources of [the] office to this work." *O'Connor*, 747 F.2d at 754.

b. This Court's precedents concerning administrative complaints reinforce the conclusion that any practical effect arising from a jurisdictional determination does not justify judicial review. Even when an agency action *requires* a party to participate in an agency proceeding, the resulting practical burden is not sufficient by itself to render the action final.

In *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980), the Court held that an FTC complaint instituting an administrative hearing to determine whether the regulated party had violated the law was not final agency action. *Id.* at 239-240. The Court rejected the argument that the obligation to participate in the hearing was a legal consequence sufficient to render the action final. The Court explained that, although the "burden" of participating in the proceeding "certainly is substantial, it is different in kind and legal effect from the burdens attending what heretofore has been considered to be final agency action." *Id.* at 242; see, *e.g.*, *Aluminum Co. of Am.* v. *United States*, 790

F.2d 938, 941 (D.C. Cir. 1986) (Scalia, J.) ("It is firmly established that agency action is not final merely because it has the effect of requiring a party to participate in an agency proceeding."); see also *CSX Transp., Inc.* v. *Surface Transp. Bd.*, 774 F.3d 25, 30 (D.C. Cir. 2014) (same). That is so even when the regulated party argues that the agency lacks statutory authority to conduct the proceeding at all. See *Aluminum Co.*, 790 F.2d at 942 ("Nor does the claim that assumption of original jurisdiction is beyond the [Interstate Commerce Commission's] statutory authority make any difference."). If an agency assertion of statutory authority that requires a regulated party to shoulder the potentially "substantial" practical burden of participating in an agency proceeding does not impose legal consequences, it follows a fortiori that an affirmative jurisdictional determination, which may encourage permit applications but does not require the recipient to do anything, is not final.

c. The contrast between this case and *Bennett* is instructive. In *Bennett*, the Court considered a "[b]iological [o]pinion" that was prepared by one federal agency (the Fish and Wildlife Service (Service)) and that authorized another agency (the "action agency") to "take" endangered species "if (but only if) [the action agency] complie[d] with" terms and conditions prescribed in the biological opinion. 520 U.S. at 178. The biological opinion thus had the practical effect of "a permit authorizing the action agency to 'take' the endangered or threatened species," notwithstanding the general prohibition on taking such species imposed by the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, so long as the action agency abided by the specified terms and conditions. 520 U.S.

at 170. The Court held that the biological opinion was "final agency action" because it "alter[ed] the legal regime" by establishing the conditions upon which the action agency could lawfully "take" endangered species. *Id.* at 178.

The biological opinion in *Bennett* was found to be "final agency action" because its terms and conditions actually established the line of demarcation between lawful and unlawful action-agency conduct. Unlike a Corps jurisdictional determination, the biological opinion did not simply provide the Service's view as to what conduct the relevant statute independently allowed or prohibited. Rather, under the pertinent ESA provisions, the actual legality of any takings of endangered species that might occur during the relevant action-agency project turned on whether the action agency had complied with the terms and conditions set forth in the biological opinion. See 520 U.S. at 170 (explaining that, under the ESA provisions that address inter-agency consultation, "[a]ny taking that is in compliance with these terms and conditions 'shall not be considered to be a prohibited taking of the species concerned'") (quoting 16 U.S.C. 1536(*o*)(2)). By legitimizing takings that would otherwise have been unlawful, the Service's biological opinion had an operative legal effect that the Corps' jurisdictional determinations lack.

The Court in *Bennett* described the Service's biological opinion as "a permit authorizing the action agency to 'take' the endangered or threatened species so long as it respects the Service's 'terms and conditions.'" 520 U.S. at 170. As that language suggests, the biological opinion at issue in *Bennett* is more persuasively analogized to a CWA discharge permit than

to a Corps jurisdictional determination. If a CWA permit applicant believes that the permit conditions fashioned by the Corps are unreasonably onerous, it may file suit (after exhausting administrative remedies) under the APA. Unlike a jurisdictional determination, a CWA permit does not simply express the Corps' *opinion* about the proper application of some other legal rule. Rather, a CWA permit is "final agency action" because the *actual legality* of pollutant discharges depends on whether the permittee has complied with its terms. See 33 U.S.C. 1311(a), 1344(p). Because "[c]ompliance with a permit issued" by the Corps under Section 1344 "shall be deemed compliance * * * with," *inter alia*, Section 1311's restrictions on pollutant discharges, 33 U.S.C. 1344(p), the effect of a Corps permit is to *render lawful* conduct that the Act would otherwise prohibit.

Just as an affirmative jurisdictional determination does not impose any independent legal barrier to pollutant discharges, a negative jurisdictional determination does not have the legal effect of a permit issued by the Corps pursuant to 33 U.S.C. 1344. If a particular site in fact contains waters of the United States, but the Corps incorrectly concludes that it does not, unpermitted pollutant discharges into those waters remain unlawful (assuming that no exception to the statutory prohibition applies), even if the Corps' view is reflected in an approved jurisdictional determination. To be sure, the general practice of the federal agencies that enforce the CWA has been to refrain from commencing enforcement actions under these circumstances while a negative jurisdictional determination remains in effect. Unlike a CWA permit, however, a negative jurisdictional determination

does not cause otherwise-unlawful discharges to be lawful, and it does not insulate the landowner from potential liability in a citizen suit brought by an aggrieved private plaintiff. See 33 U.S.C. 1365(a)(1) and (f).

d. The other decisions on which the court of appeals relied (Pet. App. 11a-13a) are likewise distinguishable. In *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), the Court held that regulations setting forth prescription-drug-labeling requirements were final because they "ha[d] the status of law and violations of them carry heavy criminal and civil sanctions." *Id.* at 152. Similarly, the agency regulations at issue in *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407 (1942), had the "force of law" because they "require[d] [the Federal Communications Commission] to reject and authorize[d] it to cancel licenses on the grounds specified in the regulations without more." *Id.* at 418. And in *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956), the Court held that a generally-applicable order determining which commodities fell within a statutory "agricultural" exemption to a permitting requirement was final because the order established the generally-applicable rule that the agency would apply in determining whether the statute had been violated. *Id.* at 41-45. The court below cited no case in which this Court has treated as "final agency action" an agency communication like this one, which simply states the agency's non-binding view about the proper application of a pre-existing legal standard to a particular factual setting.

3. Sackett *does not suggest that a Corps jurisdictional determination is final agency action*

The court of appeals construed this Court's decision in *Sackett* as supporting the conclusion that a jurisdictional determination is immediately reviewable. The court of appeals' reliance on *Sackett* was misplaced. In holding that the EPA compliance order at issue in *Sackett* was final agency action, the Court did not rely on the pragmatic incentives that the Sacketts likely experienced when they were notified of the agency's allegations that their property contained covered waters and that they had violated the CWA. Rather, the Court found dispositive the fact that the compliance order materially increased both the landowners' legal obligations and the penalties to which they were potentially subject. 132 S. Ct. at 1371-1372. A jurisdictional determination does not have any similar legal effect.

The CWA provides that, when the EPA finds "that any person is in violation of" enumerated provisions of the Act, the agency may "issue an [administrative compliance] order requiring such person to comply with such section or requirement." 33 U.S.C. 1319(a)(3). A compliance order is thus a component of the CWA's enforcement framework, designed to "obtain quick remediation" of a CWA violation found by the agency. *Sackett*, 132 S. Ct. at 1374. As such, a compliance order directs the recipient to bring itself into compliance, and it exposes the recipient to additional penalties—beyond those that may be imposed for the statutory violation itself—if the recipient does not comply with the order. *Id.* at 1371-1372.

The *Sackett* Court relied on those aspects of the compliance order in holding that the order was "final

agency action." The Court explained that the order imposed a "legal obligation" on the Sacketts to "'restore' their property according to an agency-approved Restoration Work Plan," and to give the EPA access to their property and relevant documentation. 132 S. Ct. at 1371 (citation omitted). Those obligations arose "[b]y reason of the [compliance] order," not as a result of the CWA itself. *Ibid.* The *Sackett* Court further concluded that "'legal consequences . . . flow' from issuance of the [compliance] order" because a landowner can be liable for penalties for violating the compliance order, in addition to penalties for violating the Act. *Ibid.* (quoting *Bennett*, 520 U.S. at 178) (citation and internal quotation marks omitted). The compliance order also "severely limit[ed] the Sacketts' ability to obtain a permit for their fill" under Corps regulations that restrict the availability of permits for activities that are the subject of such an order. *Id.* at 1372.

A jurisdictional determination possesses none of the characteristics that were dispositive in *Sackett*. It is not a statutory enforcement tool through which the agency directs the recipient to alter its conduct. A jurisdictional determination is instead an agency creation, designed to assist regulated entities who seek the agency's opinion. It does not express any view about the lawfulness of the recipient's proposed activities, much less find a violation of the statute, and it does not instruct the recipient to take any action whatsoever. If the recipient of an affirmative jurisdictional determination later discharges fill at the relevant site and is ultimately found to have violated the CWA, its prior receipt of the jurisdictional determination does not expose it to any additional penalties beyond those

that the CWA establishes for violating the statute. 33 U.S.C. 1319(d). A jurisdictional determination also has no impact on the recipient's ability to seek and obtain a permit, since the regulations limiting permits following a compliance order do not accord the same effect to jurisdictional determinations. See 33 C.F.R. 326.3(e)(1)(iv).

The Court in *Sackett* also expressed concern that immediate judicial review of the compliance order was necessary to prevent "the strong-arming of regulated parties." 132 S. Ct. at 1374. That concern arose largely from the fact that the compliance order exposed the recipient to double the statutory penalties for each day the asserted violation persisted—yet, absent immediate review, the EPA would retain sole control over the timing of a judicial-enforcement action. *Id.* at 1372; *id.* at 1375 (Alito, J., concurring). A jurisdictional determination raises no comparable concerns. A recipient of a jurisdictional determination has the same legal and practical options the day it receives the determination as it had the day before; it simply has additional information to assist it in choosing among those options. Because jurisdictional determinations (unlike EPA compliance orders) do not direct the recipient to take or refrain from taking any action, and because they are typically provided only to persons who request them, they are not easily used to "strong-arm[]" regulated parties. *Id.* at 1374.

C. There Are Adequate Alternative Opportunities For Respondents To Obtain Judicial Resolution Of The Issue Of CWA Coverage

Even if a jurisdictional determination satisfied *Bennett*'s two-part test for identifying "final agency action," APA review would be available only if there is

"no other adequate [judicial] remedy." 5 U.S.C. 704. Contrary to the court of appeals' conclusion, Pet. App. 13a-16a, respondents possess adequate alternative opportunities to argue in court that their property does not contain CWA-protected waters.

1. The CWA contemplates that the permitting process will provide the primary avenue of obtaining judicial review of a jurisdictional determination.[9] The CWA establishes a comprehensive permit system that provides a "means of achieving and enforcing" the Act's discharge limitations. *EPA* v. *California*, 426 U.S. 200, 205 (1976). The Act is therefore designed to encourage regulated parties to seek permits, and to obtain judicial review of permitting decisions if they are dissatisfied with the disposition of their permit applications, before they discharge pollutants.

When the Corps denies a permit, or issues a permit subject to conditions that the applicant opposes, the applicant may seek judicial review of that decision, and may argue in court that any waters on its property are not covered by the Act. See 33 U.S.C. 1344(a); 33 C.F.R. 331.10, 331.12; see also *Precon Dev. Corp.* v. *United States Army Corps of Eng'rs*, 633 F.3d 278, 287-297 (4th Cir. 2011). Many parties have obtained judicial review of a CWA coverage issue through that

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[9] In *Sackett*, the Court concluded that the Corps' permitting process did not provide an adequate means of seeking review of an EPA compliance order. That holding, however, was based on a circumstance not present here. Because the EPA had issued the compliance order, the Court stated that judicial review of the Corps' permitting decision would not "provide an 'adequate remedy' for action already taken by another agency." 132 S. Ct. at 1372. Here, the Corps "issued the [jurisdictional determination], so it is not the case that the only alternative remedy is one provided by a different agency." *Belle*, 761 F.3d at 394 n.4.

route. See, *e.g.*, *Carabell*, 391 F.3d at 706-707. And if the Corps grants a permit on conditions that satisfy the applicant, judicial review of the threshold jurisdictional determination is unnecessary.

The court of appeals held that the permitting process is inadequate because it is "prohibitively expensive" and time-consuming. Pet. App. 14a. That reasoning ignores the statutory framework that Congress established. The CWA itself contains no reference to standalone jurisdictional determinations. Rather, Congress contemplated that the Corps would ordinarily determine CWA coverage as part of the permitting process, and that the property owner would obtain any necessary judicial review of that determination at the conclusion of that process. Having "considered the costs" of the permitting system, Congress evidently determined that the permitting process would provide an adequate avenue for obtaining review of the Corps' coverage determination as well as its decision on the permit. *West Va. Highlands Conservancy, Inc.* v. *Huffman*, 625 F.3d 159, 170 (4th Cir. 2010) (explaining that Congress decided, after weighing costs and benefits, that "a permitting scheme is the crucial instrument for protecting natural resources"). In finding the permitting process to be an inadequate avenue of judicial review, based solely on its own view that the attendant costs make that approach infeasible, the court of appeals improperly second-guessed Congress's conclusions.

In any event, the court of appeals misperceived the burden of seeking a permit. The court relied on the statement in the plurality opinion in *Rapanos* v. *United States*, 547 U.S. 715 (2006), that "the average applicant for an individual Corps permit 'spends 788

days and $271,596 in completing the process.'" Pet. App. 14a (citation omitted); see *Rapanos*, 547 U.S. at 721 (plurality opinion). Those figures originated in a 2002 article that examined 103 individual- and general-permit applications. See David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 73-74 (Sunding). For several reasons, the court of appeals' reliance on the Sunding figures was misplaced.

As an initial matter, individual permits are the exception, not the rule, especially for the smaller projects likely to be undertaken by individuals or small businesses. See pp. 6-7, *supra*. The Corps resolves the vast majority of permit applications—between 90% and 95% every year—by verifying that the proposed discharge falls within the scope of an existing general permit. Corps, Inst. for Water Res., *The Mitigation Rule Retrospective: A Review of the 2008 Regulations Governing Compensatory Mitigation for Losses of Aquatic Resources* 25 (Oct. 2015), http://www.iwr.usace.army.mil/Portals/70/docs/iwrreports/2015-R-03.pdf (*Retrospective*).

The general-permitting process is streamlined and requires significantly less of the applicant than the individual-permitting process. In 2015, for instance, the Corps reported that it issued 86% of general-permit verifications within 60 days after receiving a completed application.[10] *Regulatory*; cf. 77 Fed. Reg.

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[10] The Sunding article asserted that the average general-permit verification is granted in 313 days, but that figure included the time the applicant takes to prepare the application for submission and to complete it after submission. Sunding 75. The Sunding

at 10,268 (in 2010, average processing time was 32 days). And because general-permit applications typically contemplate a smaller impact and do not require the applicant to analyze alternate plans, the application process is less expensive than for an individual permit. While reliable and representative cost data are difficult to obtain—applicants do not report their costs to the agency, and costs will necessarily vary based on the nature of the project and choices made by the applicant—the Corps estimated in 2001 that the average applicant spent $3000 to $10,000 to obtain a general-permit verification. Corps, Inst. for Water Res., *Cost Analysis for the 2000 Issuance and Modification of Nationwide Permits* 14 (Aug. 2001) (*Cost Analysis*).[11] The Sunding article asserted, based on a sample of fewer than 100 general-permit applications (out of the tens of thousands each year), that the average cost of verifying the coverage of a general permit for that set was $28,915. Sunding 74.

With respect to the individual-permit data on which the court of appeals relied, there is reason to doubt that it is representative of the broad range of individual-permit applications. The Sunding article does not set forth the raw data on which its estimates were based, but it appears to have been drawn from

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article asserted that the Corps processes general-permit verifications within 16 days after receiving a completed application. *Ibid.*

[11] That estimate pertains to permit applications that affect three or fewer acres of waters of the United States, and it was "obtained through informal interviews with wetland permitting consultants and Corps district regulatory staff based around the country." *Cost Analysis* 13; see *id.* at 14. The overwhelming majority of general permits authorize activities that involve three or fewer acres of impacted waters. See, *e.g.*, *Retrospective* 35.

examples nominated by the regulated community, and to have included large projects, including public-works projects undertaken by public entities, that would have entailed more extensive analyses and therefore greater costs.[12] Sunding 73. The Corps' own 2001 study, which excluded projects affecting more than three acres, found that the average applicant for an individual permit spent $12,000 to $24,000 in fiscal year 1998, and that an average of 89 days elapsed between the Corps' receipt of a completed permit application and its issuance of a decision. *Cost Analysis* 14 & 15 n.6. The wide variance between the Corps' estimates and the Sunding estimates reflects the fact that individual-permitting costs vary widely based on the circumstances of the project. It also suggests the difficulty of drawing reliable inferences from cost estimates based on fewer than 100 permit applications out of the thousands filed annually.[13] In view of that uncertainty, it was particularly inappropriate for the court of appeals to rely on a single article's cost figures to discount the adequacy of the

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[12] The article stated that the median cost of seeking an individual permit ($155,000) was much lower than the average cost ($271,596), indicating that the largest projects were driving up the average. Sunding 74 & n.67.

[13] Considering "average" permitting costs in the abstract ignores important information—not only the extent and gravity of the projected impact on waters of the United States, but also the cost of the permit relative to the cost and scope of the project. A large project with a greater environmental impact will naturally give rise to higher CWA permitting costs, just as it may result in higher state and municipal building- or zoning-permit costs. When a project is itself large-scale, even a permitting cost that appears large in a vacuum may be a relatively minor portion of the overall planned expenditure.

permitting process that Congress has established as a means of obtaining judicial review.

2. A recipient of an affirmative jurisdictional determination who elects to proceed with discharges may also obtain judicial review of the CWA coverage issue if the government brings an enforcement proceeding or an aggrieved private plaintiff commences a citizen suit. If EPA assesses an administrative penalty, 33 U.S.C. 1319(g), or issues a compliance order, 33 U.S.C. 1319(a), those actions are immediately reviewable. See pp. 9-10, *supra*. The United States could also initiate a judicial-enforcement action, in which it would bear the burden of proving by a preponderance of the evidence that the property contains covered waters. 33 U.S.C. 1319(b). An aggrieved citizen likewise could file suit to allege that the landowner's discharges violated the CWA, see 33 U.S.C. 1365(a)(1) and (f), and the citizen plaintiff would bear the burden of proof on the coverage issue.

A landowner who discharges dredged or fill material without a permit may face monetary penalties if a court ultimately concludes that the discharges occurred into covered waters. 33 U.S.C. 1319(d). It is therefore understandable that persons in respondents' position would prefer a pre-permit, pre-discharge judicial ruling on the CWA coverage issue. Neither the CWA nor the applicable agency regulations, however, require the Corps to issue jurisdictional determinations, either in general or in any particular case. If respondents had not received a jurisdictional determination, they could have obtained a judicial ruling on the coverage question only through the routes described above, *i.e.*, by applying for a permit and then seeking judicial review of the Corps' decision on

that application, or by contesting the CWA's applicability in opposing any enforcement action. The fact that respondents voluntarily requested and received a jurisdictional determination does not make those avenues of review any less "adequate" than they would otherwise be.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
JOHN C. CRUDEN
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
GINGER D. ANDERS
Assistant to the Solicitor General
AARON P. AVILA
JENNIFER SCHELLER NEUMANN
ROBERT J. LUNDMAN
Attorneys

DAVID R. COOPER
Chief Counsel
United States Army Corps of Engineers

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APPENDIX

1. 5 U.S.C. 704 provides:

Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

2. 33 U.S.C. 1311(a) provides:

Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

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.

3. 33 U.S.C. 1319 provides in pertinent part:

Enforcement

(a) State enforcement; compliance orders

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

* * * * *

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with

such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

* * * * *

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(c) Criminal penalties

(1) Negligent violations

Any person who—

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of

this title by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations

Any person who—

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Ad-

ministrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

* * * * *

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, ,[1] or in a permit issued under section 1344 of this title by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

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[1] So in original.

(g) Administrative penalties

(1) Violations

Whenever on the basis of any information available—

(A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by a State, or

(B) the Secretary of the Army (hereinafter in this subsection referred to as the "Secretary") finds that any person has violated any permit condition or limitation in a permit issued under section 1344 of this title by the Secretary,

the Administrator or Secretary, as the case may be, may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.

(2) Classes of penalties

(A) Class I

The amount of a class I civil penalty under paragraph (1) may not exceed $10,000 per violation, except that the maximum amount of any class I civil penalty under this subparagraph

shall not exceed $25,000. Before issuing an order assessing a civil penalty under this subparagraph, the Administrator or the Secretary, as the case may be, shall give to the person to be assessed such penalty written notice of the Administrator's or Secretary's proposal to issue such order and the opportunity to request, within 30 days of the date the notice is received by such person, a hearing on the proposed order. Such hearing shall not be subject to section 554 or 556 of title 5, but shall provide a reasonable opportunity to be heard and to present evidence.

(B) Class II

The amount of a class II civil penalty under paragraph (1) may not exceed $10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed $125,000. Except as otherwise provided in this subsection, a class II civil penalty shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for a hearing on the record in accordance with section 554 of title 5. The Administrator and the Secretary may issue rules for discovery procedures for hearings under this subparagraph.

(3) Determining amount

In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

* * * * *

(5) Finality of order

An order issued under this subsection shall become final 30 days after its issuance unless a petition for judicial review is filed under paragraph (8) or a hearing is requested under paragraph (4)(C). If such a hearing is denied, such order shall become final 30 days after such denial.

(6) Effect of order

(A) Limitation on actions under other sections

Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any

provision of this chapter; except that any violation—

(i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,

(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or

(iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,

shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

* * * * *

(8) **Judicial review**

Any person against whom a civil penalty is assessed under this subsection or who commented on the proposed assessment of such penalty in accordance with paragraph (4) may obtain review of such assessment—

(A) in the case of assessment of a class I civil penalty, in the United States District Court for the District of Columbia or in the district in which the violation is alleged to have occurred, or

(B) in the case of assessment of a class II civil penalty, in United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business,

by filing a notice of appeal in such court within the 30-day period beginning on the date the civil penalty order is issued and by simultaneously sending a copy of such notice by certified mail to the Administrator or the Secretary, as the case may be, and the Attorney General. The Administrator or the Secretary shall promptly file in such court a certified copy of the record on which the order was issued. Such court shall not set aside or remand such order unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion and shall not impose additional civil penalties for the same violation unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion.

* * * * *

4. 33 U.S.C. 1344 provides in pertinent part:

Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

* * * * *

(e) General permits on State, regional, or nationwide basis

(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and

(B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

(2) No general permit issued under this subsection shall be for a period of more than five years after the date of its issuance and such general permit may be revoked or modified by the Secretary if, after opportunity for public hearing, the Secretary determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.

(f) Non-prohibited discharge of dredged or fill material

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material—

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

(D) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;

(E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;

(F) resulting from any activity with respect to which a State has an approved program under section 1288(b)(4) of this title which meets the requirements of subparagraphs (B) and (C) of such section,

is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).

(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having

as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

* * * * *

(p) Compliance

Compliance with a permit issued pursuant to this section, including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1317, and 1343 of this title.

* * * * *

(s) Violation of permits

(1) Whenever on the basis of any information available to him the Secretary finds that any person is in violation of any condition or limitation set forth in a permit issued by the Secretary under this section, the Secretary shall issue an order requiring such person to comply with such condition or limitation, or the Secretary shall bring a civil action in accordance with paragraph (3) of this subsection.

(2) A copy of any order issued under this subsection shall be sent immediately by the Secretary to the State in which the violation occurs and other affected States. Any order issued under this subsection shall

be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Secretary determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection is issued to a corporation, a copy of such order shall be served on any appropriate corporate officers.

(3) The Secretary is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction for any violation for which he is authorized to issue a compliance order under paragraph (1) of this subsection. Any action under this paragraph may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such acton[1] shall be given immediately to the appropriate State.

(4) Any person who violates any condition or limitation in a permit issued by the Secretary under this section, and any person who violates any order issued by the Secretary under paragraph (1) of this subsection, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider

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[1] So in original. Probably should be "action".

the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

* * * * *

5. 33 U.S.C. 1365 provides in pertinent part:

Citizen suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district shall have jurisdiction, without regard to the amount courts in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

* * * * *

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (7) a regulation under section 1345(d) of this title,.[1]

* * * * *

[1] So in original.

6. 33 C.F.R. 320.1(a)(6) provides:

Purpose and scope.

(a) *Regulatory approach of the Corps of Engineers.*

(6) The Corps has authorized its district engineers to issue formal determinations concerning the applicability of the Clean Water Act or the Rivers and Harbors Act of 1899 to activities or tracts of land and the applicability of general permits or statutory exemptions to proposed activities. A determination pursuant to this authorization shall constitute a Corps final agency action. Nothing contained in this section is intended to affect any authority EPA has under the Clean Water Act.

7. 33 C.F.R. 330.1 provides:

Purpose and policy.

(a) *Purpose.* This part describes the policy and procedures used in the Department of the Army's nationwide permit program to issue, modify, suspend, or revoke nationwide permits; to identify conditions, limitations, and restrictions on the nationwide permits; and, to identify any procedures, whether required or optional, for authorization by nationwide permits.

(b) *Nationwide permits.* Nationwide permits (NWPs) are a type of general permit issued by the Chief of Engineers and are designed to regulate with

little, if any, delay or paperwork certain activities having minimal impacts. The NWPs are proposed, issued, modified, reissued (extended), and revoked from time to time after an opportunity for public notice and comment. Proposed NWPs or modifications to or reissuance of existing NWPs will be adopted only after the Corps gives notice and allows the public an opportunity to comment on and request a public hearing regarding the proposals. The Corps will give full consideration to all comments received prior to reaching a final decision.

(c) *Terms and conditions.* An activity is authorized under an NWP only if that activity and the permittee satisfy all of the NWP's terms and conditions. Activities that do not qualify for authorization under an NWP still may be authorized by an individual or regional general permit. The Corps will consider unauthorized any activity requiring Corps authorization if that activity is under construction or completed and does not comply with all of the terms and conditions of an NWP, regional general permit, or an individual permit. The Corps will evaluate unauthorized activities for enforcement action under 33 CFR part 326. The district engineer (DE) may elect to suspend enforcement proceedings if the permittee modifies his project to comply with an NWP or a regional general permit. After considering whether a violation was knowing or intentional, and other indications of the need for a penalty, the DE can elect to terminate an enforcement proceeding with an after-the-fact auth-

orization under an NWP, if all terms and conditions of the NWP have been satisfied, either before or after the activity has been accomplished.

* * * * *

(e) *Notifications.* (1) In most cases, permittees may proceed with activities authorized by NWPs without notifying the DE. However, the prospective permittee should carefully review the language of the NWP to ascertain whether he must notify the DE prior to commencing the authorized activity. For NWPs requiring advance notification, such notification must be made in writing as early as possible prior to commencing the proposed activity. The permittee may presume that his project qualifies for the NWP unless he is otherwise notified by the DE within a 45-day period. The 45-day period starts on the date of receipt of the notification in the Corps district office and ends 45 calendar days later regardless of weekends or holidays. If the DE notifies the prospective permittee that the notification is incomplete, a new 45-day period will commence upon receipt of the revised notification. The prospective permittee may not proceed with the proposed activity before expiration of the 45-day period unless otherwise notified by the DE. If the DE fails to act within the 45-day period, he must use the procedures of 33 CFR 330.5 in order to modify, suspend, or revoke the NWP authorization.

(2) The DE will review the notification and may add activity-specific conditions to ensure that the ac-

tivity complies with the terms and conditions of the NWP and that the adverse impacts on the aquatic environment and other aspects of the public interest are individually and cumulatively minimal.

* * * * *

(f) *Individual Applications.* DEs should review all incoming applications for individual permits for possible eligibility under regional general permits or NWPs. If the activity complies with the terms and conditions of one or more NWP, he should verify the authorization and so notify the applicant. If the DE determines that the activity could comply after reasonable project modifications and/or activity-specific conditions, he should notify the applicant of such modifications and conditions. If such modifications and conditions are accepted by the applicant, verbally or in writing, the DE will verify the authorization with the modifications and conditions in accordance with 33 CFR 330.6(a). However, the DE will proceed with processing the application as an individual permit and take the appropriate action within 15 calendar days of receipt, in accordance with 33 CFR 325.2(a)(2), unless the applicant indicates that he will accept the modifications or conditions.

(g) *Authority.* NWPs can be issued to satisfy the permit requirements of section 10 of the Rivers and Harbors Act of 1899, section 404 of the Clean Water Act, section 103 of the Marine Protection, Research, and Sanctuaries Act, or some combination thereof.

The applicable authority will be indicated at the end of each NWP. NWPs and their conditions previously published at 33 CFR 330.5 and 330.6 will remain in effect until they expire or are modified or revoked in accordance with the procedures of this part.

8. 33 C.F.R. 331.2 provides in pertinent part:

Definitions.

* * * * *

Approved jurisdictional determination means a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. Approved JDs are clearly designated appealable actions and will include a basis of JD with the document.

* * * * *

Declined permit means a proffered individual permit, including a letter of permission, that an applicant has refused to accept, because he has objections to the terms and special conditions therein. A declined permit can also be an individual permit that the applicant originally accepted, but where such permit was subsequently modified by the district engineer, pursuant to 33 CFR 325.7, in such a manner that the resulting permit contains terms and special conditions that lead the applicant to decline the modified permit,

provided that the applicant has not started work in waters of the United States authorized by such permit. Where an applicant declines a permit (either initial or modified), the applicant does not have a valid permit to conduct regulated activities in waters of the United States, and must not begin construction of the work requiring a Corps permit unless and until the applicant receives and accepts a valid Corps permit.

* * * * *

Jurisdictional determination (JD) means a written Corps determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. 1344) or a written determination that a waterbody is subject to regulatory jurisdiction under Section 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*). Additionally, the term includes a written reverification of expired JDs and a written reverification of JDs where new information has become available that may affect the previously written determination. For example, such geographic JDs may include, but are not limited to, one or more of the following determinations: the presence or absence of wetlands; the location(s) of the wetland boundary, ordinary high water mark, mean high water mark, and/or high tide line; interstate commerce nexus for isolated waters; and adjacency of wetlands to other waters of the United States. All JDs will be in writing and will be identified as either pre-

liminary or approved. JDs do not include determinations that a particular activity requires a DA permit.

* * * * *

Preliminary JDs are written indications that there may be waters of the United States on a parcel or indications of the approximate location(s) of waters of the United States on a parcel. Preliminary JDs are advisory in nature and may not be appealed. Preliminary JDs include compliance orders that have an implicit JD, but no approved JD.

* * * * *

9. 33 C.F.R. 331.5(a) provides:

Criteria.

(a) *Criteria for appeal*—(1) *Submission of RFA.* The appellant must submit a completed RFA (as defined at § 331.2) to the appropriate division office in order to appeal an approved JD, a permit denial, or a declined permit. An individual permit that has been signed by the applicant, and subsequently unilaterally modified by the district engineer pursuant to 33 CFR 325.7, may be appealed under this process, provided that the applicant has not started work in waters of the United States authorized by the permit. The RFA must be received by the division engineer within 60 days of the date of the NAP.

(2) *Reasons for appeal.* The reason(s) for requesting an appeal of an approved JD, a permit denial, or a declined permit must be specifically stated in the RFA and must be more than a simple request for appeal because the affected party did not like the approved JD, permit decision, or the permit conditions. Examples of reasons for appeals include, but are not limited to, the following: A procedural error; an incorrect application of law, regulation or officially promulgated policy; omission of material fact; incorrect application of the current regulatory criteria and associated guidance for identifying and delineating wetlands; incorrect application of the Section 404(b)(1) Guidelines (see 40 CFR part 230); or use of incorrect data. The reasons for appealing a permit denial or a declined permit may include jurisdiction issues, whether or not a previous approved JD was appealed.

No. 15-290

In the
Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,

Petitioner,

v.

HAWKES CO, INC., et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE RESPONDENTS

NANCY QUATTLEBAUM BURKE
GREGORY R. MERZ
Of Counsel
Gray Plant Mooty
500 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
Telephone: (612) 632-3029

M. REED HOPPER
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
mrh@pacificlegal.org

MARK MILLER
Pacific Legal Foundation
8645 N. Military Trail, Ste. 511
Palm Beach Gardens, FL 33410
Telephone: (561) 691-5000
mm@pacificlegal.org

Counsel for Respondents

QUESTION PRESENTED

Is a Jurisdictional Determination, that is conclusive as to federal jurisdiction under the Clean Water Act, and binding on all parties, subject to judicial review under the Administrative Procedure Act?

THE PARTIES

Petitioner is the United States Army Corps of Engineers.

Respondents are Hawkes Co., Inc.; LPF Properties, LLC; and Pierce Investment Company.

CORPORATE DISCLOSURE STATEMENT

Respondents have no parent corporations and no publicly held company owns 10% or more of the stock.

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OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals (Pet. App. at 1a-21a), is reported at 782 F.3d 994. The opinion of the district court (Pet. App. at 22a-43a), is reported at 963 F. Supp. 2d 868.

JURISDICTION

The court of appeals entered its judgment on April 10, 2015. The court of appeals denied the United States Army Corps of Engineers' petition for rehearing on July 7, 2015 (Pet. App.103a-104a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Legal Background

The Clean Water Act authorizes the Corps of Engineers to regulate certain discharges to "navigable waters" or "waters of the United States." 33 U.S.C. §§ 1311(a) & 1362(7). The term "navigable waters" has been variously defined by the Corps over the years, but this Court redefined the term most recently in *Rapanos v. United States*, 547 U.S. 715 (2006). In *Rapanos*, the plurality defined "navigable waters" as Traditional Navigable Waters (capable of use in interstate commerce) and nonnavigable but relatively permanent rivers, lakes, and streams, as well as abutting wetlands, with a continuous surface water connection to Traditional Navigable Waters. *Id.* at 739-42. In a concurring opinion, Justice Kennedy opined that the Clean Water Act covered wetlands with a significant physical, biological, and chemical impact on Traditional Navigable Waters. *Id.* at 779. The Eighth Circuit has held the Corps can establish federal jurisdiction over wetlands under either the plurality's

"continuous surface water" test or Justice Kennedy's "significant nexus" test. *See United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009). In this case, the Corps relied on the "significant nexus" test.

The Clean Water Act is unique; it requires an expert "to determine if [it] even appl[ies] to you and your property." Pet. App. at 20a (Kelly, J., concurring). This is because the "reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified by [federal] employees as wetlands covered by the Act . . . ." *Sackett v. E.P.A.*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring). Since the inception of the Act in 1972, "[t]he Corps has [] asserted jurisdiction over virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow." *Rapanos*, 547 U.S. at 722. This implicates "the entire land area of the United States." *Id*. "Any plot of land containing such a channel may potentially be regulated as a 'water of the United States.'" *Id*.

To provide some clarity to agency officials and the regulated public for this expansive assertion of jurisdiction, that Congress did not intend and could not have foreseen, the "Corps has authorized its district engineers to issue formal determinations concerning the applicability of the Clean Water Act . . . to activities or tracts of land and the applicability of general permits or statutory exemptions to proposed activities." 33 C.F.R. § 320.1(a)(6). A formal Approved Jurisdictional Determination, or JD, provides a site-specific delineation of wetlands or other waters subject

to regulation under the Clean Water Act, along with detailed physical, chemical, and biological data in support of the determination. 33 C.F.R. § 331.2. The regulations themselves declare a "determination pursuant to this authorization shall constitute a Corps final agency action." 33 C.F.R. § 320.1(a)(6). The regulations also provide for Preliminary JD's that are written indications that there may be "waters of the United States" on a parcel. 33 C.F.R. § 331.2. But the Corps states these JD's are only "advisory in nature and may not be appealed." Pet. Opening Brief at 25(a).

The Corps not only interprets jurisdictional "waters of the United States" expansively, the Corps interprets jurisdictional waters inconsistently. This is confirmed by a report from the General Accounting Office (GAO) cited by this Court in *Rapanos*, 547 U.S. at 725. The report documents the Corps' local districts "differ in how they interpret and apply the federal regulations when determining what wetlands and other waters fall within the [Clean Water Act's] jurisdiction." U.S. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction* 3 (Feb. 2004). This is because "'the definitions used to make jurisdictional determinations' are deliberately left 'vague.'" *Rapanos*, 547 U.S. at 727 (citation omitted).

In its effect, a Jurisdictional Determination requires property owners to: (1) abandon all use of the regulated portion of the land (often at ruinous cost); (2) seek a potentially unnecessary permit (often at

ruinous cost)[1]; or, (3) proceed with an otherwise lawful use of the land (risking ruinous fines[2] and imprisonment).

Corps regulations authorize an administrative appeal of an Approved JD. The procedure for this appeal is the same for an appeal of a permit denial or a permit that is declined by the applicant. *See* 33 C.F.R. § 320.1(a)(2) ("A district engineer's decision on an approved jurisdictional determination, a permit denial, or a declined individual permit is subject to an administrative appeal by the affected party in accordance with the procedures and authorities contained in 33 C.F.R. part 331.").

An action brought in the federal courts is subject to the requirements of the Administrative Procedure Act (APA). The APA states "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. The general test for determining final agency action is often described as a two-prong analysis: "First, the action must mark the 'consummation' of the agency's decisionmaking process." And second, "the action must be one by which 'rights or obligations have been determined,'" *or* from which "'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citation omitted). Finally, the agency action must be

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[1] According to this Court, the "average applicant for an individual permit [as in this case] spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide [more general] permit spends 313 days and $28,915—not counting costs of mitigation or design changes." *Rapanos*, 547 U.S. at 719.

[2] The Clean Water Act authorizes fines up to $37,500 a day. Pet. Opening Brief at 9 n.4.

one for which there is no other remedy in court other than APA review.

This case involves a challenge to a formal Approved Jurisdictional Determination issued by the Corps after an administrative appeal. Respondent Hawkes argues the JD is invalid (as determined by a Corps Review officer) and the project site is not subject to the Clean Water Act under any relevant standard. The Corps defends its JD on the basis the determination is not final agency action under *Bennett* and Respondent Hawkes has an adequate remedy in court; Hawkes can seek a permit, then decline the permit and seek redress in court for the contested Jurisdictional Determination. Or, if the permit is denied, Hawkes can challenge the need for a permit in court. In other words, Hawkes must go through the costly and time-consuming permit process before a court can determine whether Hawkes was required to go through the costly and time-consuming permit process in the first instance.

The Eighth Circuit Decision

The trial court dismissed the challenge to the Jurisdictional Determination on a 12(b)(6) motion for lack of subject matter jurisdiction under the APA, However, the Eighth Circuit Court of Appeals held formal Approved Jurisdictional Determinations represent final agency action subject to immediate judicial review. According to the Eighth Circuit, the Jurisdictional Determination is conclusive as to federal jurisdiction under *Sackett* and Hawkes has no other adequate remedy in court:

> The Corps's assertion that the Revised JD is merely advisory and has no more effect than

> an environmental consultant's opinion ignores reality. "[I]n reality it has a powerful coercive effect." *Bennett*, 520 U.S. at 169, 117 S. Ct. 1154. Absent immediate judicial review, the impracticality of otherwise obtaining review, combined with "the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case . . . leaves most property owners with little practical alternative but to dance to the EPA's [or to the Corps'] tune." "In a nation that values due process, not to mention private property, such treatment is unthinkable." *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring). We conclude that an Approved JD is a final agency action and the issue is ripe for judicial review under the APA.

Pet. App. at 16a-17a.

The court determined the test for APA finality is based on "practical considerations" and the Corps grossly understated the impact of a JD by "exaggerating the distinction between an agency order that compels affirmative action," like the compliance order in *Sackett*, "and an order that prohibits a party from taking otherwise lawful action," like the JD in this case. The Eighth Circuit found "[n]umerous Supreme Court precedents confirm that this is not a basis on which to determine whether 'rights or obligations have been determined' or that 'legal consequences will flow' from agency action." *Id.* at 11a.

In her concurring opinion, Judge Kelly added:

> In my view, the Court in *Sackett* was concerned with just how difficult and confusing it can be for a landowner to predict whether or not his or her land falls within CWA jurisdiction—a threshold determination that puts the administrative process in motion. This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property. This jurisdictional determination was precisely what the Court deemed reviewable in *Sackett*. *See Sackett*, 132 S. Ct. at 1374-75 (Ginsburg, J., concurring). Accordingly, I concur in the judgment of the court.

Pet. App. at 20a-21a.

The judgment of the Eighth Circuit conflicts with *Belle Co. v. U.S. Army Corps of Engineers*, 761 F.3d 383 (5th Cir. 2014) (aka *Kent Recycling* now pending on petition in this Court, 14-493), and *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586 (9th Cir. 2008). This Court granted certiorari to resolve this conflict.

STATEMENT OF FACTS

The Property

The property at issue (the Property) is located in New Maine Township, Marshal County, Minnesota, and contains organic peat[3] found in wetland environments. JA at 13. In Minnesota, peat harvesting requires wetland replacement and restoration and is regulated under permits issued by the Minnesota Department of Natural Resources (MDNR). *Id.* The Property lies over 120 river miles from the nearest Traditional Navigable Water, the Red River of the North. *Id*. There is no continuous surface water connection between wetlands on the Property and a "water of the United States." *Id*. A farm, a separate, shallow ditch dug for farming purposes in an area the Corps concedes is upland at the border of the farm most distant from the Property, and another sizable upland area, are all located between the Property and the area the Corps claims is a "Relatively Permanent Water." *Id*. at 13-14.

Administrative Proceedings

In October, 2006, Hawkes obtained an option to purchase the Property, subject to receiving approval to conduct peat harvesting operations on the Property. *Id*. at 14. On March 20, 2007, Kevin Pierce, a Hawkes officer, met with representatives of the Corps and the Minnesota Department of Natural Resources. *Id*. The discussion at this meeting focused on potential

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[3] Peat is a "brown, soil-like material characteristic of boggy, acid ground, consisting of partly decomposed vegetable matter. It is widely cut and dried for use in gardening and as fuel[.]" *See* http://www.oxforddictionaries.com/us/definition/american_english/peat.

roadblocks to the plan to harvest peat on the Property, including discussion of the Property's status as a rich fen and a wetland. *Id.* at 14-15.

On January 15, 2008, Mr. Pierce again met with representatives of the Corps and the MDNR to review plans to conduct peat harvesting on the Property. *Id.* at 15. At this meeting, Mr. Pierce discussed with the Corps and MDNR representatives the high quality of the peat available at the Property and the importance to Hawkes' business of being able to harvest peat on the Property. *Id.* As Mr. Pierce explained, the peat available to Hawkes, as of January, 2008, provided the company approximately seven to ten years of future operations. *Id.* Mr. Pierce also explained that by expanding peat harvesting to the Property, Hawkes could extend the lifespan of its business by ten to fifteen additional years. *Id.*

On or about December 13, 2010, Hawkes applied for an individual permit from the Corps under Section 404 of the Clean Water Act to expand its existing peat harvesting operations to a portion of the Property—approximately 150 acres. *Id.* As part of its permit application, Hawkes identified fifteen sites that it had evaluated as potential alternatives to the Property. None of those sites provided a viable alternative to peat harvesting on the Property. *Id.*

In January, 2011, Mr. Pierce again met with the Corps and MDNR. *Id.* At that meeting, Corps representatives spent the majority of time attempting to persuade Mr. Pierce to abandon his plans to use the Property. *Id.* Corps representatives played up the cost associated with the permitting process; arguing there was no guarantee that a permit would ever be granted; and suggesting that, even if a permit were to be

granted, the process would take many years before it would be completed. *Id.* at 15-16. But Mr. Pierce stated his intent to proceed. *Id.*

On or about March 15, 2011, the Corps issued a letter to Hawkes stating the Corps had made a "preliminary determination" that the Property is a "water of the United States" and "is regulated by the Corps under Section 404 of the Clean Water Act." *Id.* at 16. The Corps' letter also stated that "at a minimum" an environmental assessment will be required. *Id.* Mr. Pierce again met with representatives of the Corps and the MDNR on April 23, 2011. *Id.* At that meeting, one of the Corps representatives, Tamara Cameron, stated the opinion that the Property would be completely and permanently destroyed if peat were to be harvested on the Property. *Id.* Ms. Cameron also stated it could take years before a permit would be granted and the process would be very costly. *Id.*

On May 31 through June 3, 2011, representatives of the Corps conducted a site visit of the Property. *Id.* At that time, a Hawkes employee told Steve Eggers, from the Corps, how important expanding operations to the Property was to Hawkes' ability to continue its business and how much he hoped that Hawkes would be able to begin harvesting soon. *Id.* In response, Mr. Eggers suggested the employee should start looking for another job, or words to that effect. *Id.*

On or about August 25, 2011, the Corps sent another letter to Hawkes with a list of nine additional information items that would be needed for the permit application. *Id.* at 17. These included hydrological assessments of the wetland and of groundwater flow spatially and vertically, functional resource assessments including vegetation surveys,

inventorying and analyzing the quality of wetlands in the entire watershed, evaluation of *upstream* potential impacts, and more. *Id*. The cost of performing all of these requirements is estimated to exceed $100,000. *Id*.

Faced with these overly burdensome demands by the Corps, Hawkes put its permit application on hold and asked the Corps to justify its preliminary Jurisdictional Determination. *Id*. On November 1, 2011, representatives of the Corps met with the then owner of the Property. *Id*. Although Mr. Pierce had asked to be present in any meeting between the Corps and the landowner, the Corps chose to exclude him from this meeting. *Id*. At the meeting, the Corps representatives stressed to the landowner the harm that would result if peat harvesting were to be permitted on the Property and insisted the landowner try to sell the Property to a wetlands bank or to another party. *Id*. The Corps made these statements even though the Corps representatives were aware Mr. Pierce had obtained an option to purchase the Property. *Id*. The Corps also indicated there is a very good possibility that a full Environmental Impact Statement would be required for the project that would delay issuance of any permit for several years. *Id*. at 17-18.

On November 8, 2011, the Corps provided Hawkes with a copy of a draft Jurisdictional Determination for the Property. *Id*. at 18. The draft JD claimed the Property was connected by a Relatively Permanent Water through a series of culverts and unnamed streams which flowed into the Middle River and then to a Traditional Navigable Water (the Red River of the North) 120 miles away. *Id*. The Corps, therefore,

deemed the Property subject to Corps' jurisdiction under the Clean Water Act. The draft JD did not determine whether there was a significant nexus between the Property and any navigable waters. *Id*.

On December 1, 2011, Corps representatives conducted a site visit of the Property for the purpose of making a formal Approved Jurisdictional Determination. *Id*. By correspondence dated December 19, 2011, Hawkes, through their wetland consultant, identified numerous errors in the draft JD and provided the Corps with additional information to be considered in connection with its formal site investigation. *Id*. This information showed there was no Relatively Permanent Water that connected the Property to a Traditional Navigable Water. *Id*.

On or about February 7, 2012, the Corps issued a formal Approved Jurisdictional Determination (the "Initial JD"), concluding there was a "significant nexus" between the Property and the Red River of the North and, accordingly, the Property was a "water of the United States" subject to Corps' jurisdiction. *Id*. On or about April 4, 2012, Hawkes filed a timely appeal of the JD under 33 C.F.R. § 331.6 setting forth the reasons why the Property is not a "water of the United States." *Id*. at 18-19.

On or about April 23, 2012, the Regulatory Appeals Review Officer sent Hawkes' consultant a letter stating the appeal was appropriate for consideration. *Id*. at 19. The parties presented their oral arguments before the Review Officer on July 24, 2012, and an Administrative Appeal Decision was issued on October 24, 2012, finding the appeal had merit and the administrative record "[did] not contain sufficient documentation/analysis to support a finding

of Clean Water Act jurisdiction." *Id*. The Administrative Appeal Decision noted, among other things:

> • "The [Administrative Record] does not contain data supporting flow regime, volume, duration, or frequency from the wetlands to the river. Additionally, the District states that indicators of the transport of energy, materials, and nutrients were observed during a site visit, but there is no quantitative date [sic] given to support the finding." (footnote omitted)
>
> • "While the [Administrative Record] provides information indicating an OHW [i.e., "ordinary high water"] mark for the unnamed tributary exists, it does not provide sufficient evidence to establish a significant nexus that the number of flow events, volume, duration, and frequency of water flowing through the tributary are such that it has an appreciable effect on the TNW [Traditional Navigable Water]." (footnote omitted)
>
> • "The [Administrative Record] included a description of the stream channel riparian corridor from the unnamed tributary to the TNW. However, the water flow regime information was not sufficient to indicate that a significant nexus exists." (footnote omitted)

Id. at 19-20.

Following remand, on or about December 31, 2012, the Corps issued a revised JD (the "Revised JD") and advised that the Revised JD is a "final Corps permit [sic] decision in accordance with 33 C.F.R. § 331.10."

Id. at 20. According to 33 C.F.R. § 331.21, Plaintiffs are considered to have exhausted their administrative remedies when a final decision is made pursuant to 33 C.F.R. § 331.10. JA at 20.

The Revised JD did not contain additional data that would support a significant nexus between the Property and the Red River of the North. *Id*. However, the Revised JD still purportedly relies on Justice Kennedy's "significant nexus" test to assert jurisdiction over the Property, which is described by the Revised JD as a "Non-Relatively Permanent [Water] that flow[s] directly or indirectly into [a] Traditional Navigable [Water]." *Id*.

The Revised JD did not correct the deficiencies of the Initial JD that would demonstrate how the Property, either quantitatively or qualitatively, significantly affects the physical, biological, and chemical integrity of the Red River of the North located 120 river miles from the Property. *Id*. at 20-21. Even though the Corps had two years to establish jurisdiction, its Revised JD, like the Initial JD, speaks only to the overall functions provided by wetlands and stream headwaters in general. *Id*. at 21. As the Review Officer found, it does "not speak to how the specific onsite wetland and tributaries have a significant nexus that is more than speculative or insubstantial on the chemical, physical or biological integrity of the downstream TNW." *Id*.

Any further efforts to obtain a permit to conduct peat harvesting on the Property would be futile, either because the Corps has already decided that it will not issue a permit or because the delay and expense of finally obtaining a permit would substantially impede,

if not prevent, Hawkes from proceeding with its plans to harvest peat on the Property. *Id*.

SUMMARY OF THE ARGUMENT

This case arises from a challenge to a formal Approved Jurisdictional Determination, or wetlands delineation, issued by the U.S. Army Corps of Engineers concluding peat bogs found on Respondents' property are subject to the Clean Water Act because the Property has a purported "significant nexus" with downstream "navigable waters." Hawkes contests this conclusion as contrary to the Act and Supreme Court precedent and seeks to have the JD overturned under the Administrative Procedure Act.

The APA "'creates a presumption favoring judicial review of administrative action.'" *Sackett v. Envtl. Prot. Agency*, 132 S. Ct. at 1373 (quoting *Block v. Community Nutrition Institute*, 467 U.S. 340, 349 (1984)). That presumption applies in this case. Like the Sacketts, Hawkes is subject to agency strong-arming under the law.

The Corps has conceded the Jurisdictional Determination is the agency's final word on jurisdiction. A plain reading of the APA should satisfy the "final agency action" requirement without further analysis. However, under *Bennett*, this Court has generally required such actions to have a particularized legal consequence. This Court employs a practical approach to determine if the agency action changes the legal regime or fixes a "right" or "obligation," even if the agency action does not have legal consequences independent of the underlying statute.

The JD in this case changes the legal regime by declaring through a formal site-specific adjudication that the Hawkes property contains "waters of the United States" subject to federal control under the Clean Water Act. The JD is conclusive as to federal jurisdiction and may be relied on for a period of five years. The JD has practical and legal consequences for the Corps and an inescapable coercive effect on Hawkes such that Hawkes is compelled to abandon any use of the Property (at ruinous cost), obtain an individual federal permit (at ruinous cost), or ignore the JD and proceed with the peat harvesting project without a permit and risk ruinous fines and criminal liability. The JD has other significant effects on Hawkes as well, including increased risk of liability, loss of an otherwise legal right to use the Property, and substantially increased costs.

Judicial review of the Jurisdictional Determination is consistent with this Court's case law, including *Sackett* and *Bennett*, and more particularly, *Abbott Labs.*, *Port of Boston*, and *Frozen Food Express*. The Corps has provided no contrary authority on facts analogous to this case. Therefore, the JD must be deemed "final agency action" under the APA.

Also, there is no "adequate remedy in court" that would justify any further delay in judicial review. The requirement that Hawkes go through a separate permit process before seeking judicial review, urged on this Court by the Corps, is nonsensical. The permit process is prohibitively costly in time and money, and punitive in effect. More importantly, it contributes nothing to the judicial resolution of the jurisdictional issue. It serves no litigation goal other than delay. The permit process does not, and cannot, advance the case

because it adds no relevant facts nor clarifies application of the law. The permit requirement is wasteful, unnecessary, and likely unconstitutional.

Additionally, the permit requirement undermines the presumption of reviewability and is tantamount to a decision on the merits in favor of the Corps. The primary reason to challenge the JD is to avoid the crippling cost and delay of an unnecessary permit. If Hawkes were to seek a permit and then successfully challenge the underlying Jurisdictional Determination in court, as the Fifth and Ninth Circuits require, Hawkes could never recover the needless expense of seeking the permit. This alone is sufficient to demonstrate the permit process is not an adequate remedy in court to challenge an erroneous jurisdictional claim.

Seeking judicial review by violating the Clean Water Act to trigger an enforcement action is likewise inadequate. The risk is too high. The penalties for discharging a pollutant without a permit are astronomical; tens of thousands of dollars a day in fines and criminal liability. Under *Ex parte Young*, a scheme requiring aggrieved parties to risk devastating fines and imprisonment to challenge the validity of a regulation is unconstitutional and invalid on its face.

Finally, the facts in this case give rise to numerous due process claims. This Court should rely on the constitutional avoidance canon and interpret the APA to avoid a constitutional conflict and allow immediate judicial review of the Jurisdictional Determination.

ARGUMENT

I

THE JURISDICTIONAL DETERMINATION IS FINAL AGENCY ACTION

The test for determining final agency action under the APA is generally described as a two-prong analysis: "First, the action must mark the 'consummation' of the agency's decisionmaking process." And second, "the action must be one by which 'rights or obligations have been determined,'" *or* from which "'legal consequences will flow.'" *Bennett*, 520 U.S. at 177-78 (citations omitted). The second prong of the *Bennett* test is written in the disjunctive. Even if new "legal consequences" do not flow, the agency action may still be final if it determines "rights" *or* "obligations."

In furtherance of the "generous review provisions" of the APA, *id*. at 163, and the Act's strong presumption of reviewability, this Court's decisions take a pragmatic approach to finding agency action is final under the APA. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148-50 (1967); *accord Bell v. New Jersey*, 461 U.S. 773, 779 (1983); and *Pacific Gas and Electric Co. v. State Energy Resource Conservation and Development Commission*, 461 U.S. 190, 200-01 (1983).

A. An Approved Jurisdictional Determination Is the Corps' Final Word on Jurisdiction

The Corps has abandoned its previous argument that an Approved Jurisdictional Determination is not the "consummation of the agency's decisionmaking process," as required under the first *Bennett* prong.

The Corps now concedes "the issuance of an approved jurisdictional determination marks the culmination of the distinct process by which the Corps informs a landowner whether the Corps believes that covered waters are present on a specified tract." Pet. Opening Brief at 26. This is a necessary concession because the argument is untenable under *Sackett*. In *Sackett*, this Court held a compliance order, that may be issued "on any information" and without any right of administrative review, is the agency's "last word" on jurisdiction, whereas the Jurisdictional Determination here is the result of a lengthy and detailed site-specific analysis concluding with an administrative appeal and remand.

> "As a logical prerequisite to the issuance of the challenged compliance order," the Sacketts contend, "EPA had to determine that it has regulatory authority over [our] property." *Id.*, at 54-55. The Court holds that the Sacketts may immediately litigate their jurisdictional challenge in federal court. I agree, for the Agency has ruled definitively on that question.

Sackett, 132 S. Ct. at 1374 (Ginsburg, J., concurring).

Under a literal reading of the APA, this should end the inquiry into the finality question. The APA states in relevant part that "final agency action[s] for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. This language is not ambiguous, and under the standard norms of statutory interpretation, the term "final" takes its ordinary meaning (i.e., conclusive or decisive). *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578 (1980) (holding the phrase "any other final action" in

§ 307(b)(1) of the Clean Air Act is clear and is to be construed in accordance with its literal meaning so as to reach any action of the Administrator that is final); *see also Sackett*, 132 S. Ct. at 1373 ("[T]he APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction."). Such a straightforward reading of the APA would give due deference to the presumption of reviewability on which the Act rests. *Id.*

Nevertheless, Hawkes addresses the second *Bennett* prong below.

B. Final Agency Action Does Not Require "Independent" Legal Consequences

Under the second *Bennett* prong, "the action must be one by which 'rights or obligations have been determined,'" *or* from which "'legal consequences will flow.'" *Bennett,* 520 U.S. at 178 (quoting *Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). In evaluating whether legal consequences flow from an Approved Jurisdictional Determination, the Corps misconstrues the *Bennett* test. The Corps asserts, in reliance on the Fifth and Ninth Circuits, that legal consequences must flow from the JD, independent of the Clean Water Act. This is not the test.

In *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d at 594, the court held a JD cannot satisfy the *Bennett* second prong because "Fairbanks' legal obligations arise directly and solely from the CWA and not from the Corps' issuance of an approved jurisdictional determination." Similarly, in *Belle Co.*, 761 F.3d at 391-92, the Fifth Circuit held the

JD was not reviewable under the APA because legal consequences did not flow "independently" from that determination but from the CWA. However, neither of these circuits nor the Corps cites any controlling authority for that proposition.

The language of the APA does not require "agency action" to have "independent" legal consequences, either expressly or impliedly. If such a requirement were imposed on the APA, it would preclude judicial review of most, if not all, interpretive or declaratory decisions and eviscerate the Act. *See* 5 U.S.C. § 551(13) (Defining "agency action" as "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent . . . ."); *id*. § 551(4) (Defining "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."); *id*. § 551(6) (Defining "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making."); and, *id*. § 551(11) (Defining "relief" as "the whole or a part of an agency—(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (B) recognition of a claim, right, immunity, privilege, exemption, or exception; or, (C) taking of other action on the application or petition of, or beneficial to, a person.").

Moreover, no Supreme Court precedent is cited in support of this interpretation. There is, however, express contrary precedent. *Bennett* itself relied on *Port of Boston*, 400 U.S. at 70-71, that rejected the argument that a commission order about dockside storage fees "lacked finality because it had no

independent effect on anyone." The Court stated that argument had the "hollow ring of another era." *Id.* More importantly, the Court acknowledged agency actions "that have no independent coercive effect are common" and this Court had found such actions final and reviewable. *Id.* at 71.

According to this Court, "the relevant considerations in determining finality are whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action." *Id.* If "rights," "obligations," or "legal consequences" do not flow "independently" from the agency action, they must flow from the underlying statute. Therefore, the question before this Court is not whether a JD has legal consequences beyond the Clean Water Act, but whether the JD determines if the "rights" and "obligations" imposed by the Act apply to aggrieved parties. Through "the orderly process of adjudication," that's exactly what the JD did here. *Id.* In *Abbott Labs.*, 387 U.S. at 148-54, this Court cited a string of cases that found agency action "final" under the APA that involved nothing more than an interpretation of a statute, including many of those cases relied on by the Eighth Circuit below.

C. An Approved Jurisdictional Determination Is Designed To Have Legal Consequences

A recurring theme in the Corps' argument is that, in its effect, an Approved Jurisdictional Determination is similar to an informal agency opinion or warning letter, or even a consultant's report, and is merely

advisory. *See* Pet. Opening Brief at 33. The Eighth Circuit rejected this argument:

> The Corps's assertion that the Revised JD is merely advisory and has no more effect than an environmental consultant's opinion ignores reality. "[I]n reality it has a powerful coercive effect." *Bennett*, 520 U.S. at 169.

Pet. App. at 16a.

The "powerful coercive effect" of the Jurisdictional Determination in this case is that Hawkes must suffer grave consequences no matter what it does. Under the JD, Hawkes' only options are: (1) abandon the peat harvesting project, at great loss; (2) complete the permit process at exorbitant cost with no certainty of success; or (3) proceed with the project without a permit and incur crushing civil and criminal liability. The Corps simply ignores that reality when it argues a JD has no legal consequences.

The Corps appears to be confusing an informal Preliminary JD with a formal Approved JD. Corps' regulations provide for issuance of Preliminary Jurisdictional Determinations, which are "written indications that there may be waters of the United States on a parcel or indications of the approximate location(s) of waters of the United States on a parcel." 33 C.F.R. § 331.2. Preliminary Jurisdictional Determinations do not reflect a final conclusion about whether "waters of the United States" are present. *Id.*; *see* U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 08-02, ¶¶ 4, 7 (June 26, 2008). Accordingly, Preliminary JD's "are advisory in nature and may not be appealed." Pet. Opening Brief at

25(a). This suggests that formal Approved JD's are something more than "advisory" in nature."

Contrary to a Preliminary JD that is more like an informal opinion letter, a formal Approved JD is based on a costly and extensive onsite investigation by the Corps itself: "Significant agency resources are necessary to perform the scientific and technical analysis required to produce" Jurisdictional Determinations. Pet. Opening Brief at 24. The investigator must consider the actual physical, chemical, and biological aspects of the site and draw complex factual and legal conclusions from the data gathered. *See* 33 C.F.R. § 331.9. Each investigation is different. Only an expert in this aspect of the law and science can make the final determination. "This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property." Pet. App. at 20a-21a (Kelly, J., concurring).

The Clean Water Act does not cover all waters. Therefore, jurisdictional waters must be determined on a case-by-case basis. This is the very purpose of the Jurisdictional Determination: "A landowner who procures a[n] [approved] jurisdictional determination, however, has the advantage of knowing the Corps' current, considered view as to whether there are waters of the United States on the landowner's property." Pet. Opening Brief at 22.

An Approved JD goes even further and determines what exemptions and permits apply: The "Corps has authorized its district engineers to issue formal determinations concerning the applicability of the Clean Water Act . . . to activities or tracts of land and the applicability of general permits or statutory

exemptions to proposed activities." *See* 33 C.F.R. § 320.1(a)(6).

The JD regulatory process even provides for a right of administrative appeal on exactly the same basis as a formal permit. *See* 33 C.F.R. § 320.1(a)(2) ("A district engineer's decision on an approved jurisdictional determination, a permit denial, or a declined individual permit is subject to an administrative appeal by the affected party in accordance with the procedures and authorities contained in 33 C.F.R. part 331."). Upon completion of an administrative appeal, Corps regulations declare a "determination pursuant to this authorization shall constitute a Corps final agency action." 33 C.F.R. § 320.1(a)(6). And, "[t]he determination reflects the agency's official view, and it will remain in effect for five years unless conditions change or new information comes to light." Pet. Opening Brief at 25.

An Approved JD has all the earmarks of final agency action: (1) it goes beyond the informal opinion of a Preliminary JD; (2) it is based on a costly and detailed site-specific analysis; (3) it addresses the "applicability of general permits or statutory exemptions;" (4) it represents the agency's "official view" on jurisdiction; (5) it is subject to the same administrative appeals process as a permit decision; (6) after appeal, the determination is considered "final agency action;" and (7) the JD can be relied on for five years. It is hard to believe the government would create such elaborate procedures and expend such extensive resources on a determination that was *not* intended to fix a legal "right" or "obligation." "It would be adherence to a mere technicality to give any

credence to [the government's] contention." *Abbott Labs.*, 387 U.S. at 152.

If the Act answered the question of whether a particular parcel contains jurisdictional wetlands, there would be no need for a Jurisdictional Determination. But there is such a need, as evidenced by the existence of the Corps regulations. It is the JD, not the Clean Water Act "that puts the administrative process in motion." Pet. App at 20a-21a (Kelly, J., concurring).

D. An Approved Jurisdictional Determination Has Legal Consequences for Permitting and Enforcement

The Corps repeatedly argues any relevant "rights" or "obligations" are determined by the Clean Water Act, not the Jurisdictional Determination. This is ironic in light of the Corps' admission that a JD is provided precisely because "[t]he CWA itself does not establish any mechanism whereby a property owner, without first seeking a permit or discharging without a permit, may obtain the government's view as to whether the Act applies to particular sites." Pet. Opening Brief at 3.

According to the Corps, a JD adds nothing to the Act, has no effect, and is not final agency action under the second *Bennett* prong. *See* Pet. Opening Brief at 20-44. But the same could be said of almost any agency action backed by statute, including a permit grant or a permit denial, which the Corps admits are reviewable under the APA. *Id.* at 45.

The JD here is reminiscent of the drug labeling requirement in *Abbot Labs.*, which the government argued was not reviewable because it could not be enforced directly but only when the Attorney General authorized "criminal and seizure actions for violations of the statute." *Abbott Labs.*, 387 U.S. at 151. This Court found "the argument unpersuasive" because "the agency does have direct authority to enforce this regulation in the context of passing upon applications for clearance of new drugs." *Id.* at 151-52.

Likewise, if a landowner discharges a pollutant into covered waters (as defined by the JD), without federal approval, the Corps has "direct authority" to rely on the JD in determining the nature of the violation. Moreover, with respect to the scope of covered waters, the Corps is legally bound by the JD during the permit process. *See* Pet. App. at 9a-10a. ("The Corps' Regulatory Guidance Letter No. 08-02, at 2, 5, described an Approved JD as a 'definitive, official determination that there are, or that there are not, jurisdictional "waters of the United States" on a site,' and stated that an Approved JD 'can be relied upon by a landowner, permit applicant, or other affected party . . . for five years'").

Also, a third party can rely on the JD as prima facie evidence of a violation of the Clean Water Act. *See* Pet. App. at 34(a) (The Corps views the JD as final agency action "in the sense the public may rely on the determination."); *see also* Pet. Opening Brief at 3 ("In addition to establishing various government enforcement mechanisms, the CWA authorizes aggrieved private citizens to file suit against persons who are alleged to have made unlawful pollutant discharges into waters of the United States. *See* 33

U.S.C. § 1365(a)(1)[.]"). Such waters are defined by the JD.

If, on the other hand, a landowner discharges a pollutant into waters the Corps has determined are not covered by the Act (i.e., through a negative JD), the landowner can raise an estoppel defense against any related Corps enforcement action. *See Fairbanks North Star Borough*, 543 F.3d at 597 ("A negative finding would effectively assure [the landowner] that the Corps would not later be able to fault [the landowner's] failure to seek a permit.").

An Approved JD has very real legal consequences for the Corps, the landowner, and even the public. Under *Bennett*, it is enough if the agency action "alter[s] the legal regime to which the [agency] is subject." *Bennett*, 520 U.S. at 156. Therefore, the JD is final agency action under the APA.

E. An Approved Jurisdictional Determination Increases the Landowner's Potential Liability

In *Sackett*, this Court determined legal consequences flowed from the compliance order because, among other things, it increased the petitioners' potential liability "in a future enforcement proceeding." *Sackett*, 132 S. Ct. at 1372. So does the JD here.

The Eighth Circuit stated below an Approved Jurisdictional Determination increases "the penalties [Hawkes] would risk if they chose to begin mining without a permit" by exposing the landowner to "substantial criminal monetary penalties and even imprisonment for a knowing CWA violation." Pet. App. at 15a. The Corps does not dispute that such a risk

exists. Rather, the Corps affirms the increased risk of liability:

> The CWA does provide that a court, in assessing an appropriate civil penalty for a violation, should consider, *inter alia*, "any good-faith efforts" to comply with the CWA's requirements. 33 U.S.C. 1319(d). The statute also imposes criminal penalties for knowing violations of the CWA, 33 U.S.C. 1319(c)(2). A landowner's receipt of a jurisdictional determination—and its consequent knowledge that the agency believes the CWA applies—could be offered as evidence of the owner's knowledge of the CWA's applicability.

Pet. Opening Brief at 32.

The only argument the Corps offers in mitigation of this risk is that the Clean Water Act does not assign any particular weight to a Jurisdictional Determination. *Id*. Therefore, the risk is only contingent. *Id*. But the Corps cannot deny that scienter is an element of a knowing violation and that landowners cannot claim ignorance or mistake once they are in receipt of an Approved JD. This necessarily increases the landowners' potential for increased liability, which is substantial. For example, a negligent violation of the Act limits civil fines to $37,500 per day, but allows a fine of up to $50,000 per day (or more when adjusted for inflation) for a knowing violation and increases jail time from 1 to up to 3 years. 33 U.S.C. § 1319. The Eighth Circuit was correct in holding the JD is like a compliance order in this respect and, under *Sackett*, the JD is subject to immediate review.

F. An Approved Jurisdictional Determination Has Other Legal Consequences

The effects of the Approved Jurisdictional Determination in this case are "direct and appreciable." *See Bennett*, 520 U.S. at 178.

The Jurisdictional Determination severely limits Hawkes' ability to use the Property for peat harvesting because Hawkes must now obtain an individual Clean Water Act (section 404) permit before the project can proceed. This is no small matter:

> The burden of federal regulation on those who would deposit fill material in locations denominated "waters of the United States" is not trivial. In deciding whether to grant or deny a permit, the U.S. Army Corps of Engineers (Corps) exercises the discretion of an enlightened despot, relying on such factors as "economics," "aesthetics," "recreation," and "in general, the needs and welfare of the people," 33 C.F.R. § 320.4(a) (2004). The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes. Sunding & Zilberman, The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process, 42 Natural Resources J. 59, 74-76 (2002).

Rapanos, 547 U.S. at 721 (footnote omitted).

Those costs will likely be higher in this case because of the nine hydrological studies requested by the Corps, estimated at more than $100,000, and the looming requirement for a lengthy and costly Environmental Impact Statement the Corps has threatened to impose. JA at 17-18.

The JD has other, equally severe, consequences for Hawkes. It is axiomatic that the JD decreases the value of the property for peat harvesting and increases production, carrying, and loan costs. These effects are real and, in the aggregate, can effectively rob the landowner of all viable economic use. Simply depositing a bucket of soil in the wetland areas is a violation of the law. To say the JD has no consequences is to deny the obvious.

G. APA Review of an Approved Jurisdictional Determination Is Supported by Numerous Supreme Court Cases

The Corps has failed to cite a single Supreme Court case where APA review was denied in a case like this, where the agency action involved a case-specific adjudication and the applicant exhausted all administrative remedies, including appeal and remand. *FTC v. Standard Oil Co. of California*, 449 U.S. 232 (1980), on which the Corps relies, is not such a case. Pet. Opening Brief at 37.

In *FTC*, the Federal Trade Commission served a number of oil companies with a complaint stating the Commission had "reason to believe" these companies violated the Federal Trade Commission Act. 449 U.S. at 234. However, that complaint did not purport to be the Commission's final word on the violation. Instead,

it provided the offending oil company with an opportunity to participate in an administrative hearing for the purpose of determining whether the oil company actually violated the Act. *Id*. at 241-43. An opportunity the oil company declined. *Id*. This Court held the complaint was not "final agency action" because it was not a final adjudicative decision and for that reason the complaint itself had no legal consequence. *Id*. at 243. But that is quite different from the JD in this case where the recipient has completed the administrative review process and the JD itself purports to be a final adjudicative decision on jurisdiction. *See* 33 C.F.R. § 320.1(a)(6). *FTC* is, therefore, not analogous to this case.

Having found no analogous Supreme Court case, the Corps goes to great lengths to distinguish this case from the compliance order in *Sackett* and the Biological Opinion in *Bennett*. But this misses the mark. Under the APA, a final agency action need not have the compulsory effects of a compliance order or the coercive effects of a Biological Opinion, although the JD is similar in effect. In her concurrence below, Judge Kelly observed that *Sackett* compelled judicial review of the JD in this case:

> In my view, the Court in *Sackett* was concerned with just how difficult and confusing it can be for a landowner to predict whether or not his or her land falls within CWA jurisdiction—a threshold determination that puts the administrative process in motion. This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property**.** This

> jurisdictional determination was precisely what the Court deemed reviewable in *Sackett*.

Pet. App. at 20a.

Although judicial review of a JD is consistent with *Sackett* and *Bennett*, this Court has granted judicial review of other agency actions more akin to the Jurisdictional Determination in this case.

In *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, cited by both *Sackett* and *Bennett*, this Court had to decide who had primary jurisdiction to review a rate order by the Maritime Commission and, in the process, this Court addressed the standard for determining final agency action. Relevant here is this Court's holding that agency orders need not create a new, independent legal consequence to be final. *Id*. at 70-71.

Citing *Frozen Food Express v. United States*, 351 U.S. 40 (1956), this Court concluded: "Agency orders that have no independent coercive effect are common" but that is not the "relevant consideration[] in determining finality." *Port of Boston*, 400 U.S. at 70-71. The relevant consideration, this Court stated, was "whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined." *Id.* at 71. In that case, there was "no possible disruption of the administrative process" because there was "nothing else for the Commission to do." *Id.* So it is in this case. No further administrative review of the JD is required or even allowed. Now that the Corps has issued the JD, it will not revisit that determination even during the permit process. *See* Pet. Opening Brief

at 28. The JD is conclusive as to jurisdiction and legally binding on Hawkes and the Corps.

As for agency action that has "no independent coercive effect," an examination of *Frozen Food Express*, 351 U.S. 40, is helpful because it is most analogous to the present case. Frozen Food Express was a motor carrier that transported certain "agricultural commodities" that were exempt from regulation by the Interstate Commerce Commission, much like the remote wetlands in this case. When the Commission issued a determination that certain commodities were no longer subject to the agricultural exemption, Frozen Food Express sought to challenge the order in court. In determining the order was final and subject to judicial review, this Court recited these facts: (1) that "the determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact on carriers who are transporting the commodities;" (2) that the "order" serves as a warning that transporting these commodities without authorization will subject the carrier to "civil and criminal risks;" (3) when unauthorized transportation occurs, the Commission can issue a cease and desist order enforceable in court; (4) that "[t]he 'order' of the Commission which classifies commodities as exempt or nonexempt is, indeed, the basis for carriers in ordering and arranging their affairs;" and (5) the "determination made by the Commission is not therefore abstract, theoretical, or academic." *Id.* at 43-44.

The facts here are remarkably similar to the facts in *Frozen Food Express*: (1) the determination that the wetlands on Hawkes' property are not exempt but

subject to federal jurisdiction has an immediate and practical effect on Hawkes' use of the Property, requiring federal approval to proceed; (2) the JD serves as a warning that anyone filling the wetlands at this site without authorization will be subject to civil and criminal liability; (3) when unauthorized filling occurs, the Corps can issue a cease and desist order enforceable in court; (4) a JD which classifies specific wetlands as subject to federal control is, indeed, the basis for Hawkes ordering and arranging its affairs; and (5) the JD is "not therefore abstract, theoretical, or academic." In its effect, the JD is virtually indistinguishable from the Commission's determination in *Frozen Food Express* that this Court found final and reviewable.

The only response the Corps offers to *Frozen Food Express* is that the ICC order in that case involved a rule of general applicability whereas this case does not. But, as the Eighth Circuit held below, the "JD is a determination regarding a specific property that has an even stronger coercive effect than the order deemed final in *Frozen Food Express*, which was not directed at any particular carrier." Pet. App. at 12a. In *Abbott Labs.*, this Court described the case this way:

> Although the dissenting opinion noted that this ICC order had no authority except to give notice of how the Commission interpreted the Act and would have effect only if and when a particular action was brought against a particular carrier, and argued that "judicial intervention (should) be withheld until administrative action has reached its complete development," 351 U.S., at 45, 76

> S.Ct. at 572, the Court held the order reviewable.

Abbott Labs., 387 U.S. at 150.

For the same reasons, the JD should be reviewable here.

Chicago and Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948), is another case relied on in *Bennett*. *Chicago* held that administrative determinations are reviewable if they "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." *Id.* at 113.

In this case, by reason of the Jurisdictional Determination, Hawkes is obliged to obtain a section 404 permit from the Corps if it wishes to proceed with its peat harvesting project. This obligation was only inchoate before the JD was issued. The Clean Water Act only requires a permit for discharges to "navigable waters" generally, which Hawkes can show do not exist on the Property. In contrast, the JD is an actual adjudicative decision requiring a federal permit for discharges on this specific property. It is a quintessential application of the law to the facts of the case. For the first time, this obligation is now final and conclusive; thereby denying Hawkes its legal right to proceed with the peat harvesting project without federal approval.

In addition to these cases, the Eighth Circuit relied on *Abbott Labs.* in which this Court held prescription drug labeling regulations were subject to pre-enforcement review as final agency action, because the regulations "purport to give an authoritative interpretation of a statutory provision" that puts drug

companies in the quandary of either incurring massive compliance costs or risking civil and criminal sanctions for distributing misbranded drugs. The Eighth Circuit found *Abbott Labs.* analogous to this case because the JD puts Hawkes in a similar quandary. In light of the JD, Hawkes must either "incur substantial compliance costs (the permitting process), forego what they assert is lawful use of their property, or risk substantial penalties." Pet. App. at 11a.

Finally, the Eighth Circuit relied on *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942), for the proposition that final agency action need not be self-executing, like the JD in this case. Pet. App. at 12a-13a. "Though the Revised JD is not-self-executing, 'the APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction.'" *Id.* at 13a (citing *Sackett*, 132 S. Ct. at 1373). Under this Court's precedents, the Jurisdictional Determination here has all the hallmarks of final agency action.

H. The Approved Jurisdictional Determination Has "Independent" Legal Consequences

If this Court decides, contrary to Supreme Court precedent, to accept the Corps' argument that the second *Bennett* prong requires final agency action to have independent legal consequences, this Court should take into account the facts of this case. The facts show the Corps did not carry its burden of demonstrating a "significant nexus" between the Hawkes property and the Red River of the North 120 miles away.

This is a 12(b)(6) dismissal case wherein the facts are taken as asserted, as the Eighth Circuit did below. *See Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (In a motion to dismiss, "a court must accept a complaint's allegations as true.").

The JD is based on the Corps' unsupported conclusion that the Property meets the "significant nexus" test proffered by Justice Kennedy in *Rapanos*. JA at 18-19. That test requires the Corps to show the Property has a significant impact on a Traditional Navigable Water. *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring). However, as alleged in the complaint, on appeal the Review Officer found: "the District states that indicators of the transport of energy, materials, and nutrients were observed during a site visit, but there is no quantitative [data] given to support the finding." JA at 48. The record "does not provide sufficient evidence to establish a significant nexus that the number of flow events, volume, duration, and frequency of water flowing through the tributary are such that it has an appreciable effect on the TNW [Traditional Navigable Water]." JA at 52-53. And, "the water flow regime information was not sufficient to indicate that a significant nexus exists." JA at 54. Nevertheless, on remand, the District Engineer issued the Approved JD without providing the missing data.

On these facts, the Corps should have issued a negative JD, finding no jurisdictional "waters of the United States" on Hawkes' property. Therefore, the permit requirement for Hawkes' peat harvesting project flows from the JD, not the Clean Water Act. But for the JD, Hawkes would be free to exercise its right to harvest the Property without federal approval.

The JD changed the legal regime and is final agency action under the APA.

II

THERE IS NO ADEQUATE REMEDY IN COURT

"Final" agency action is judicially reviewable under the APA if there is "no other adequate remedy in a court." 5 U.S.C. § 704. There is no such remedy for an Approved Jurisdictional Determination. The alternative of seeking a permit first or risking an enforcement action is not adequate. To the contrary, these approaches are prohibitive, wasteful, unnecessary, insupportable, and likely unconstitutional.

A. The Cost of Seeking a Permit Prior to Judicial Review of an Approved Jurisdictional Determination Is Prohibitive

In *Rapanos*, this Court relied on the Sunding Report that estimated the average cost of seeking an individual permit (like that required here) at more than $270,000 and two years to process. The report estimated that even a nationwide permit would cost almost $29,000 and take almost a year to process. *See Rapanos*, 547 U.S. at 721.

The Corps quibbles with Sunding's data but offers no better. The Corps admits it has no formal reporting data on permit costs—either for nationwide or individual permits. Pet. Opening Brief at 48. Instead, the Corps relies on anecdotal evidence of sample projects or ad hoc interviews. *Id.* 48-49. The Corps' 2001 study on the cost of individual permits

inexplicably "excluded projects affecting more than three acres." Pet. Opening Brief at 49. This would necessarily skew the data to show a lower than average cost for such permits. The Corps data is more unreliable than the Sunding data, giving the Court every reason to take the Sunding estimates at face value.

Also, the Corps puts great weight on the fact that most permits are of the general or nationwide variety that cost much less than an individual permit. *Id*. at 48-49. But the Corps ignores the fact that an individual permit is required in this case. This is undisputed. Hawkes actually commenced the permit process to harvest 150 acres of peat on the Property but put things on hold when the Corps asked for expensive hydrological studies (estimated at $100,000), played up the cost and delay from a full Environmental Impact Statement, and pointedly suggested the Corps might never grant the individual permit after years of study. JA at 16-19. Whatever the average cost of an individual or nationwide permit, in this case the cost became prohibitive, even punitive. And should Hawkes ultimately win the case in court, after obtaining a permit or permit denial, Hawkes can never recover the costs expended in the permit process. Pet. App. at 14a. Only those who can afford to seek a permit and the subsequent cost of litigation, which can also run into hundreds of thousands of dollars, can ever be vindicated. Therefore, Hawkes sought immediate judicial review of the JD in court.

B. Requiring a Landowner To Seek a Permit Prior to Judicial Review of an Approved Jurisdictional Determination Is Wasteful and Unnecessary

If a landowner wishes to contest an erroneous Jurisdictional Determination, it should be unnecessary for the landowner to seek a permit after the administrative appeal. The process is costly and time consuming yet it contributes nothing to the judicial resolution of the jurisdictional issue. The Corps admits it will not revisit the JD during the permit process, except in the unusual case of changed circumstances. *See* Pet. Opening Brief at 28. The permit process does not make a JD more fit for judicial review. It would neither add any relevant facts nor clarify application of the law. It's a costly and pointless exercise which the law does not abide.

Stated in various ways, the ancient maxim "lex non cogit ad inutilia," or "the law does not know useless acts," has been a fundamental tenet in Anglo-American jurisprudence for centuries. *See Seaconsar Far East, Ltd. v. Bank Markazi Jomhouri Islami Iran*, [1999] 1 Lloyd's Rep. 36, 39 (English Court of Appeal 1998); *People ex rel. Bailey v. Greene County Supervisors*, 12 Barb. 217, 221-22 (N.Y. 1851); *see also Ohio v. Roberts*, 448 U.S. 56, 74 (1980) ("The law does not require the doing of a futile act."); *Cary v. Curtis*, 44 U.S. (3 How.) 236, 246 (1845) ("[T]he law never requires . . . a vain act."); and *Stevens v. United States*, 2 Ct. Cl. 95, 100 (1866) ("[T]he law does not require the performance of a useless act.").

The Corps seeks to impose a useless permit requirement on landowners to delay or avoid its

untested claims of jurisdiction which are often wildly broad and unpredictable. This is because "'the definitions used to make jurisdictional determinations' are deliberately left 'vague.'" *Rapanos*, 547 U.S. at 727 (citing U.S. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction* 3 (Feb. 2004)).

There is no regulatory or statutory provision that requires Hawkes to seek a permit that has nothing to do with the underlying jurisdictional challenge, to obtain APA review. To the contrary, a JD, standing alone, is as fit for judicial review as any permit decision. *See* 33 C.F.R. § 320.1(a)(6) ("A [jurisdictional] determination pursuant to this authorization shall constitute a Corps final agency action."). Corps regulations acknowledge the JD as a separate, adjudicatory action on a par with a permit decision. They even provide for identical administrative appeal procedures as a predicate for judicial review. *See* 33 C.F.R. § 320.1(a)(2) ("A district engineer's decision on an approved jurisdictional determination, a permit denial, or a declined individual permit is subject to an administrative appeal by the affected party in accordance with the procedures and authorities contained in 33 C.F.R. Part 331. . . . An affected party must exhaust any administrative appeal available pursuant to 33 C.F.R. Part 331 and receive a final Corps decision on the appealed action prior to filing a lawsuit in the Federal courts (*see* 33 C.F.R. 331.12).").

It would be perverse, therefore, to require a landowner to go through the costly and time-consuming process of obtaining a JD and administrative appeal, then require the landowner to

run the gauntlet of a costly and time-consuming process of seeking a permit and another administrative appeal that has nothing to do with the question of jurisdiction. This approach is unnecessary and undermines the presumption of reviewability.

Moreover, rather than preserve private and judicial resources, the permit requirement squanders resources. First, it requires a costly and lengthy process that adds nothing to the case. This drains both private and agency resources to no beneficial end. Second, if a court ultimately decides a permit was not required, neither the landowner nor the Corps can recover the costs expended in processing an unnecessary permit. Pet. App. at 14a. Third, the issues surrounding a permit, such as mitigation, timing, restoration, etc., are all issues that are irrelevant to the jurisdictional question and are more likely to complicate rather than expedite the case. And fourth, the permit requirement defies commonsense. Why is it necessary to seek a permit to determine whether a permit was required in the first place? As Judge Kelly noted in her concurrence below, this is an odd and circuitous route to judicial review.

> Despite the[] dissimilarities with the circumstances in *Sackett*, I agree that Hawkes is left without acceptable options to challenge the JD, absent judicial review. Hawkes's choice is to either (1) follow through on their peat-mining plans until either the EPA issues a compliance order or the Corps commences an enforcement action, to both of which Hawkes could raise lack of CWA jurisdiction as a defense; or (2) apply for a permit (on the grounds that no permit is

> required) and, if the application is denied, appeal the denial in court. But what happens if Hawkes is, after all, granted a permit yet maintains it never needed one in the first place? It must decline the permit and challenge the original jurisdiction in court. This roundabout process does not seem to be an "adequate remedy" to the alternative of simply allowing Hawkes to bring the jurisdictional challenge in the first instance and to have an opportunity to show the CWA does not apply to its land at all.

Pet. App. at 20a.

C. Requiring a Landowner To Seek a Permit Prior to Judicial Review of an Approved Jurisdictional Determination Is Tantamount to a Decision on the Merits

The obvious purpose of seeking immediate judicial review of an Approved Jurisdictional Determination is to avoid the unnecessary cost and delay of seeking a permit. Given the expense and uncertainty associated with seeking a permit, very few would have the ability to pile on even more expense and delay in court just to determine whether the Corps's claim of jurisdiction was correct. The impact on Hawkes would be severe; expanding to the new property is essential to the company's future growth. JA at 14-15. A win in court is a hollow victory if the landowner has already endured the arduous permit process without any hope of recouping the attendant costs. But, this is by design:

> The prohibitive costs, risk, and delay of these alternatives to immediate judicial review

> evidence a transparently obvious litigation strategy: by leaving appellants with no immediate judicial review and no adequate alternative remedy, the Corps will achieve the result its local officers desire, abandonment of the peat mining project, without having to test whether its expansive assertion of jurisdiction—rejected by one of their own commanding officers on administrative appeal—is consistent with the Supreme Court's limiting decision in *Rapanos*. . . . The Court's decision in *Sackett* reflected concern that failing to permit immediate judicial review of assertions of CWA jurisdiction would leave regulated parties unable, as a practical matter, to challenge those assertions. The Court concluded that was contrary to the APA's presumption of judicial review. "[T]here is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction." 132 S. Ct. at 1374.

Pet. App at 15a-16a.

Requiring a permit before judicial review of a JD denies Hawkes any meaningful remedy in court.

D. Requiring a Landowner To Seek a Permit Prior to Judicial Review of an Approved Jurisdictional Determination Circumvents the Intent of Congress

Once it is acknowledged that an agency action is final, the only thing remaining is to ensure the aggrieved party has an "adequate remedy in a court." 5 U.S.C. § 704. This is not a limitation on judicial review. Rather, it is a mandate to ensure the intent of Congress is carried out—"[T]he APA provides for judicial review of all final agency actions." *Sackett*, 132 S. Ct. at 1373. Therefore, any process imposed on the aggrieved party must *facilitate* judicial review. But the permit requirement is not such a process. It obstructs judicial review.

The Jurisdictional Determination is valid for five years and the Corps cannot revisit the determination during the permit process, except in changed circumstances. *See* Pet. Opening Brief at 28. Therefore, the permit process cannot aid in resolving the underlying dispute—whether the Hawkes property contains "waters of the United States" subject to federal regulation under the Clean Water Act. Its sole purpose is to delay or deter judicial review.

Imposing the permit requirement on Hawkes allows the Corps, rather than Hawkes, to set the time for judicial review, contrary to congressional intent. The Corps can use the permit process to delay or avoid judicial review of a permit decision, and hence the jurisdictional question, indefinitely. The Corps can declare the permit application incomplete, or fail to process the application in a timely manner, or even refuse to issue a permit decision at all so as to avoid

judicial review of its jurisdictional decisions. By that means, the Corps can wear down the applicant so the applicant must accede to all Corps demands or walk away from the project at great loss.

This Court found the option of waiting on an enforcement action inadequate as a remedy in the *Sackett* case in part because of the landowners' inability to initiate judicial review. *See Sackett*, 132 S. Ct. at 1372. The same reasoning applies here. The pace of the permit process is dictated by the Corps.

To illustrate, in *Moore v. United States,* 943 F. Supp. 603 (E.D. Va. 1996), taxpayers sought a refund of taxes paid to the Internal Revenue Service, arguing they could claim as a loss the involuntary conversion of some of their investment property (called "the Boy Scout Tract") as a result of the land being reclassified as wetlands. *Id.* at 607. Though the Moores had not tried to obtain a section 404 permit, they argued the denial of a permit should not be a prerequisite to their claim, because seeking a permit would have been futile. As reported by the Court, several experienced individuals, including Bernard Goode, an environmental consultant that had been a Corps employee for 34 years, testified on the Moores' behalf:

> When asked for his opinion concerning the likelihood that [an individual] § 404 permit would be issued for the Boy Scout Tract, Goode testified: "It is my opinion that there was a very low likelihood that this project would have been approved." When asked about the likelihood that a § 404 permit for the Boy Scout Tract would have been formally denied, Goode testified:

"It has been my experience in studying this very issue nationwide that there was a very low likelihood that the Corps would have denied the application. Because the Corps can't reach that point until they have gone through the full analysis, which includes the mitigation sequencing.

"And it is a much more likely outcome that more and more information is requested until eventually the applicant loses staying power and either withdraws the application himself, or the Corps says because of the lack of information to continue the valuation, the Corps withdraws the application.

"And that is the outcome of well over half of the 404 applications.

"Here in the Norfolk district I looked at some statistics and there is [sic] over 3/4 of the cases [that] end up being withdrawn for section 404 permit applications. Only one percent end up being denied."

Goode's testimony on this latter point was corroborated by the Moores' other two expert witnesses. Robert Kerr ("Kerr"), an environmental consultant with experience in over sixty (60) § 404 permit applications, testified:

"We advised the [Moores] that there was no chance of getting a permit.

"We also told Mr. Moore [the Corps] would never reject the permit.

> "Because rejecting a permit could set a precedent also. And as the government's attorney stated, you have to have a permit denial to go for a taking.
>
> "Well, the Corps knows that and will not issue a denial, an open denial. They will just request additional information, and more additional information, and the more you give them the more they ask for . . . . They basically bleed a client to death financially until you have spent so much money on the alternatives analysis you've drained the profitability out of the project."
>
> Doug Davis ("Davis"), an environmental consultant who at one time worked in the Corps' wetlands program, testified that the likelihood of a permit being issued for the Boy Scout Tract was "as close to zero as it can get," and that a permit would not have been finally denied because projects like that contemplated for the Boy Scout Tract "just sort of wither on the vine and no final agency action is taken." In addition, both Kerr and Davis testified that completing the § 404 permit process in this case would have been a very lengthy and expensive proposition, costing hundreds of thousands of dollars.

Id. at 612 (citations omitted).

This excerpt demonstrates the remarkable leverage the Corps has over CWA permit applicants. With very little risk to the agency, the Corps can scuttle a project with dilatory practices or condition approval on extraordinary demands.

The inability of a landowner to seek judicial review of an Approved Jurisdictional Determination shields the Corps from suit and allows the agency to exercise plenary authority over disputed waters with impunity. The APA should not be read to allow such a blatant subversion of the law. This is not an adequate remedy in court.

E. Requiring a Landowner To Seek a Permit Prior to Judicial Review of an Approved Jurisdictional Determination Undermines the Presumption of Reviewability

In *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986), this Court discussed the legislative and common law history of the APA and concluded the Act is animated by "the strong presumption that Congress intends judicial review of administrative action." That presumption, ignored by the Corps, dictates that statutory limitations on judicial review of agency action should be interpreted narrowly. *See id*. ("'[J]udicial review of a final agency action by an aggrieved person shall not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'" (quoting *Abbott Labs.*, 387 U.S. at 140)). This strong presumption requires "that 'only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review [of administrative action].'" *Id.* at 671 (quoting *Abbott Labs.*, 387 U.S. at 141). But the Corps has provided no such evidence.

The Corps' argument that Congress intended the permit process to provide the sole means of access to the Courts for review of JD's has no support in the law.

Neither the CWA nor its implementing regulations show "clear and convincing evidence" that Congress intended judicial review of administrative decisions only after completion of the permit process. *See Sackett*, 132 S. Ct. at 1372 ("Nothing in the Clean Water Act *expressly* precludes judicial review under the APA or otherwise.").

In *Sackett*, this Court rejected EPA arguments that the Clean Water Act was intended to preclude review of nonpermit decisions. The EPA argued judicial review of compliance orders would undermine the Clean Water Act because such orders serve an informational purpose and are designed to encourage voluntary compliance and avoid judicial proceedings. *Id*. at 1372. The Corps says the same for Jurisdictional Determinations here. Pet. Opening Brief at 20. But this Court held, "It is entirely consistent with this function to allow judicial review when the recipient does not choose 'voluntary compliance.'" *Sackett*, 132 S. Ct. at 1373. "The Act does not guarantee the EPA that issuing a compliance order will always be the most effective choice." *Id.*

The EPA also argued the compliance order was not reviewable under the APA because the order was not self-executing. However, this Court rejected the argument outright observing "the APA provides for judicial review of all final agency actions, not just those that impose [] self-executing sanction[s]." *Id*. This is consistent with this Court's application of the APA in other cases, such as *Abbott Labs.*, *Bennett*, *Port of Boston*, and *Frozen Food Express* discussed above.

Finally, the EPA warned in *Sackett* it was less likely to use compliance orders if they are subject to immediate judicial review. This Court did not consider

that rationale a reason to preclude judicial review of compliance orders. *Id*. To the contrary, the Court explained, "That may be true—but it will be true for all agency actions subjected to judicial review." *Id*. at 1374. And, indeed, the Corps makes this same claim for Jurisdictional Determinations here. *See* Pet. Opening Brief at 37. But this Court held the presumption of reviewability trumps such concerns:

> The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into "voluntary compliance" without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction. Compliance orders will remain an effective means of securing prompt voluntary compliance in those many cases where there is no substantial basis to question their validity.

Sackett, 132 S. Ct. at 1374.

That conclusion applies equally to Jurisdictional Determinations. According to the agency, the "Corps issues tens of thousands of approved jurisdictional determinations every year. . . . [However] in fiscal year 2015, interested parties filed [only] eight administrative appeals of approved jurisdictional determinations issued outside of the permitting process." Pet. Opening Brief at 5-6.

The dearth of appeals does not indicate a lack of need for judicial review; rather, it demonstrates that opening the courthouse doors to judicial review of JDs will not undermine the Corps program in that few landowners challenge the Corps' decisions. Curtailment of the JD program is unlikely and would be counterproductive. It is the Corps that has the most to gain by continuing the JD program, even if JD's are subject to immediate judicial review. Statistically, all but a few recipients (i.e., eight in 2015) defer to the agency's determination on jurisdiction. This allows the Corps to implement the Clean Water Act with wide discretion without pursuing tens of thousands of enforcement actions that would result from curtailing or eliminating JDs. Therefore, providing judicial review of JDs will not deter Corps reliance on Jurisdictional Determinations, but it would potentially bring justice to those who have a legitimate grievance with the Corps over the scope of federal authority under the Clean Water Act.

The Clean Water Act does not "preclude judicial review" under the APA, 5 U.S.C. § 701(a)(1). The APA creates a "presumption favoring judicial review of administrative action." *Block v. Community Nutrition Institute*, 467 U.S. at 349. While this presumption "may be overcome by inferences of intent drawn from the statutory scheme as a whole," *id.*, the Corps' arguments do not support an inference that the Clean Water Act's statutory scheme precludes APA review.

F. An Enforcement Action Is Not An Adequate Remedy in Court

The Corps argues Hawkes has an adequate remedy in court because Hawkes can proceed with the project without federal approval and precipitate an

enforcement action by the Corps, the EPA, or a third-party citizen. In each case, the Corps maintains Hawkes could seek review of the jurisdictional question in any subsequent judicial proceeding. Pet. Opening Brief at 50. But this is far from adequate.

In *Sackett* this Court rejected the idea that the Sacketts could seek judicial review in an enforcement proceeding because they "[could not] initiate that process, and each day they wait for the agency to drop the hammer, they accrue, by the Government's telling, an additional $75,000 in potential liability," not to mention criminal sanctions. *Sackett*, 132 S. Ct. at 1372. The situation in this case is no better. If Hawkes proceeds with the peat harvesting project without a permit, Hawkes has no control over the timing or nature of the ensuing enforcement action. In *Sackett*, EPA officials issued a verbal cease and desist order but left the Sacketts hanging for more than six months before issuing a compliance order. The government could do the same here. Likewise, there is no telling if or when a third party may bring a citizen suit against Hawkes. But onerous penalties would accrue from the first day of the unauthorized discharge. An enforcement action could be delayed for years without judicial review, wearing down the landowner to compel compliance.

This Court rejected such an approach in *Ex parte Young*, 209 U.S. 123 (1908). In that case, this Court considered the validity of a shipping rate increase imposed on railroads by the state legislature. The railroads took the position the rates were "unjust, unreasonable, and confiscatory." *Id*. at 130. Anyone who refused to adhere to the rate increases, including the officers and employees of the railroads, would be

subjected to severe civil and criminal liability. *Id.* at 130-31. But the only way to test the validity of the rate orders was to disobey the order and risk such liability. This Court held the order raised a serious constitutional question:

> But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws.

Id. at 146.

This Court held: "when the remedy is so onerous and impracticable as to substantially give none at all, the law is invalid, although what is termed a remedy is in fact given." *Id.* at 147.

> It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

Id.

The enormity of the penalties for violating the Clean Water Act are well documented and may include penalties of tens of thousands of dollars a day and

imprisonment, with heightened sanctions for knowing violations. *See* 33 U.S.C. § 1319. Thus, under *Ex parte Young*, triggering an enforcement action to challenge the validity of a Jurisdictional Determination raises a constitutional question and is not an adequate remedy in court. Moreover, because the requirement to seek an individual permit in this case would itself be "unjust, unreasonable, and confiscatory," even that requirement would raise a constitutional question and fail to provide an adequate remedy in court.

G. The APA Should Be Interpreted To Avoid Constitutional Questions

In addition to the constitutional questions raised above under *Ex parte Young*, it should be observed that in *Kent Recycling Services v. U.S. Army Corps of Engineers* (14-493), now pending in this Court, the petitioner raised a due process challenge to the Jurisdictional Determination on facts nearly identical to the facts in this case. In that case, as in this case, the Corps issued a final Approved Jurisdictional Determination without correcting the deficiencies identified by the Corps Review Officer on administrative appeal. Kent Recycling Pet. at 9. The Approved JD was demonstrably invalid and its issuance deprived the landowner of the right to use its property without a fair hearing. *See Lassiter v. Dep't of Social Services*, 452 U.S. 18, 24 (1981) ("'[D]ue process has never been, and perhaps can never be, precisely defined. . . . [But] the phrase expresses the requirement of 'fundamental fairness.'"). Although Hawkes did not raise a due process challenge to the JD in this case, the case does give rise to such a claim. In fact, there are a number of circumstances in this case that raise constitutional questions:

First, the amended complaint alleges the final Approved Jurisdictional Determination was issued on remand without correcting the deficiencies the Corps Review Officer documented on administrative appeal. Hawkes was deprived of an impartial hearing.

Second, as the Eighth Circuit observed: "the Amended Complaint alleged that the Corps' District representative repeatedly made it clear to Kevin Pierce, to a Hawkes employee, and to the landowner that a permit to mine peat would ultimately be refused." Pet. App. at 14a. On these facts, it would be futile to impose a permit requirement on Hawkes to "ripen" the case for judicial review.

Third, the documented cost (in money and delay) of an individual permit is prohibitive and punitive, perhaps beyond the reach of Hawkes. If a permit is required for judicial review under the APA, that cost and delay could never be recovered. Pet. App. at 14a.

Fourth, the permit requirement does not and cannot advance the case because the Jurisdictional Determination is conclusive as to jurisdiction. The permit process serves no meaningful purpose; it is an arbitrary barrier to timely redress in court. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

And fifth, the permit requirement is inconsistent with the plain language of the APA and Corps regulations that say the JD is final agency action. *See* 33 C.F.R. §§ 320.1; 329.3.

In *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005), this Court cited the constitutional avoidance canon for the proposition that "when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail." According to this Court, "one of the canon's chief justifications is that it allows courts to *avoid* the decision of constitutional questions. It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Id.* at 381. And further, "[t]he canon is thus a means of giving effect to congressional intent, not of subverting it." *Id.* at 382.

In this case, this Court must choose between the implausible interpretation that the APA requires an aggrieved party to obtain a costly and needless permit as a predicate for judicial review, on the one hand, and immediate judicial review of a binding, site-specific adjudicative Jurisdictional Determination, on the other. The former raises a multitude of constitutional questions. The latter reinforces the purpose and intent of Congress—"the strong presumption that Congress intends judicial review of administrative action." *Bowen*, 476 U.S. at 670.

CONCLUSION

Landowners should have the right to challenge agency overreaching in court, especially a contested "threshold determination that puts the administrative process in motion." Pet. App. at 20a (Kelly, J., concurring). The only practical way for that to happen is through immediate judicial review of Approved

Jurisdictional Determinations under the APA. A JD has all the hallmarks of final agency action, but a landowner has no adequate remedy in court. *See* 5 U.S.C. § 704.

This Court should therefore sustain the Eighth Circuit decision below.

DATED: February, 2016.

Respectfully submitted,

NANCY QUATTLEBAUM BURKE
GREGORY R. MERZ
Of Counsel
Gray Plant Mooty
500 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
Telephone: (612) 632-3029

M. REED HOPPER
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
mrh@pacificlegal.org

MARK MILLER
Pacific Legal Foundation
8645 N. Military Trail, Ste. 511
Palm Beach Gardens, FL 33410
Telephone: (561) 691-5000
mm@pacificlegal.org

Counsel for Respondents

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

BOARD OF WATER WORKS TRUSTEES OF THE CITY OF DES MOINES, IOWA, Plaintiff vs. SAC COUNTY BOARD OF SUPERVISORS AS TRUSTEES OF DRAINAGE DISTRICTS 32, 42, 65, 79, 81, 83, 86, and CALHOUN COUNTY BOARD OF SUPERVISORS and SAC COUNTY BOARD OF SUPERVISORS AS JOINT TRUSTEES OF DRAINAGE DISTRICTS 2 AND 51 and BUENA VISTA COUNTY BOARD OF SUPERVISORS and SAC COUNTY BOARD OF SUPERVISORS AS JOINT TRUSTEES OF DRAINAGE DISTRICTS 19 and 26 and DRAINAGE DISTRICTS 64 and 105. Defendants.	NO.: 5:15-cv-04020 **COMPLAINT**

Plaintiff, Board of Water Works Trustees of the City of Des Moines, Iowa submits its Complaint as follows:

NATURE OF ACTION

1. This is a citizen enforcement action under 33 U.S.C. § 1365 of the Federal Water Pollution Control Act (commonly known as the "Clean Water Act" or the "CWA") and Iowa Code § 455B.111 against Sac County Board of Supervisors as Trustees of Drainage Districts 32, 42, 65, 79, 81, 83, 86, and Calhoun County Board of Supervisors and Sac County Board of Supervisors as Joint Trustees of Drainage Districts 2 and 51 and Buena Vista County Board of Supervisors and Sac County Board of Supervisors as Joint Trustees of Drainage Districts 19 and

26 and Drainage Districts 64 and 105 (collectively the "Drainage Districts") brought on behalf of the Board of Water Works Trustees of the City of Des Moines, Iowa ("Des Moines Water Works") for the discharge of nitrate pollution into the Raccoon River and the failure to obtain a National Pollution Discharge Elimination System ("NPDES") permit or other state permit in violation of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1342(a), Iowa Code § 455B.186, and state and federal regulations enacted thereunder.

2. This complaint seeks a declaratory judgment that the Drainage Districts have violated the Clean Water Act and the Iowa Code by failing to comply with the effluent limitations prescribed by the Clean Water Act's NPDES permit system and the state's NPDES program, injunctive relief, civil penalties, and the award of costs, including attorney and expert witness fees. This is also an action for civil claims for damages and other equitable and legal relief under the United States and Iowa Constitutions, federal statutes, and Iowa statutory and common law.

3. Des Moines Water Works is a regional water utility providing drinking water to approximately half a million Iowans, both by direct service and by wholesale service to other utilities and districts, that obtains its raw water supply primarily from the Raccoon and Des Moines Rivers.

4. This case concerns the detrimental impact of the activities of the Drainage Districts on the sources of raw water from the Raccoon River relied upon by Des Moines Water Works.

5. Under the Safe Drinking Water Act, 42 U.S.C. § 300f et seq. (1996), Des Moines Water Works is obligated to meet the maximum contaminant level ("MCL") standards set by the Environmental Protection Agency (the "EPA") in its finished water. The MCL for nitrate is 10

mg/L.

6. The health risks associated with nitrate contamination include blue baby syndrome and potential endocrine disruption impacts.

7. In addition to health risks to drinking water, nitrate pollution also causes eutrophication and the development of hypoxic conditions in public waters, including the Gulf of Mexico's "dead zone".

8. Over the last thirty years, Des Moines Water Works has invested millions of dollars in capital infrastructure and has developed strategies to manage periodic high nitrate levels in the Raccoon River.

9. Despite the investments and efforts of Des Moines Water Works, record nitrate peaks in the Raccoon River watershed in the summer of 2013, the fall of 2014, and the winter of 2015 have threatened and continue to threaten the security of the water supply and the ability of Des Moines Water Works to deliver safe water in reliable quantities at reasonable cost.

10. A major source of nitrate pollution in the Raccoon River watershed is the artificial subsurface drainage system infrastructure, such as those created, managed, maintained, owned and operated by the Drainage Districts, consisting of pipes, ditches, and other conduits that are point sources which transport high concentrations of nitrate contained in groundwater.

11. Although this problem has been scientifically studied and documented for decades there has been no adequate or effective response to nitrate pollution from drainage systems.

12. In order for Des Moines Water Works to continue to provide clean and safe water at reasonable cost, and to protect the State of Iowa and the United States from a further environmental and health crisis, the discharge of nitrate from drainage district infrastructure must be addressed.

13. As explained more fully below, the discharge of nitrate by the Drainage Districts is pollution by a point source in violation of the CWA and Iowa Code § 455B.186(1) and an NPDES permit or other permit is required for the ongoing discharges by the Drainage Districts.

14. Alternatively, in addition to relief under the CWA and Iowa Code Chapter 455B, the discharge of nitrate pollution into the Raccoon River by the Drainage Districts constitutes a nuisance, a trespass; negligence; an unconstitutional taking of rights secured to Des Moines Water Works by the constitution and laws of the United States and the State of Iowa, and a deprivation of rights under color of law.

JURISDICTION AND VENUE

15. This Court has jurisdiction in accordance with 33 U.S.C. § 1365(a) (action arises under the CWA's citizen suit provision), 28 U.S.C. § 1331 (action raises a federal question under the laws of the United States); and 28 U.S.C. §§ 2201, 2202 (action requests declaratory and injunctive relief in a case of actual controversy), 28 U.S.C. § 1343(a) (action for the vindication of civil rights); 28 U.S.C. § 1367 (supplemental jurisdiction over claims that are part of the same case or controversy under Article III of the United States Constitution), 28 U.S.C. § 1651 (authorizing the district court to issue all writs necessary in aid of its jurisdiction); and 42 U.S.C. §§ 1981, 1983 (action for the vindication of civil rights).

16. Venue is proper in the United States District Court for the Northern District of Iowa, Western Division, pursuant to 28 U.S.C. § 1391 because all of the defendants are residents of the state where the district is located, and a substantial part of the events giving rise to the claims occurred there.

17. Filing in the Western Division of the Northern District is proper under 28 U.S.C. § 95 because Buena Vista and Sac counties are within the Western Division and a substantial

part of the events giving rise to the claims occurred there.

18. The unlawful discharge of pollutants by the Drainage Districts occurred in the United States District Court judicial district for the Northern District of Iowa and therefore venue is proper under the CWA, 33 U.S.C. §1365(c)(1).

19. Des Moines Water Works has provided the Drainage Districts with a Notice of the Intent to Sue (the "Notice") for the violations alleged in this Complaint as required under 33 U.S.C. § 1365(b)(1)(A) and by Iowa Code § 455B.111(2). A copy of the Notice is attached as **Exhibit 1.** This Notice was sent to each of the Chairs of the Boards of Supervisors in Sac County, Calhoun County, and Buena Vista County, Iowa on January 9, 2015. Copies of the Notice were also mailed to the Administrator and Regional Administrator of the EPA and to the Iowa Department of Natural Resources.

20. More than sixty days have passed since the Notice was postmarked and mailed and based on information and belief the violations outlined in the Notice and alleged in this Complaint continue unabated and the Drainage Districts remain in violation of the CWA and Iowa Code Chapter 455B.

21. Neither the United States nor the State of Iowa has commenced or is diligently prosecuting a civil or criminal enforcement action to redress the asserted violations of 33 U.S.C. § 1365(b)(1)(B) and Iowa Code § 455B.111.

22. Des Moines Water Works has standing to assert the claims made herein in that it has a direct and pecuniary interest in the quality and purity of its source waters and it is directly injured by source water polluted by high levels of nitrate.

PARTIES

23. Des Moines Water Works is a municipal water utility in Des Moines, Iowa

organized and acting under Iowa Code Chapter 388, which provides water service regionally in the Des Moines area. It is located at 2201 George Flagg Parkway, Des Moines, IA 50321.

24. Des Moines Water Works has the statutory power to be a party to a legal action under Iowa Code § 388.4.

25. Drainage Districts 32, 42, 65, 79, 81, 83, 86, and 2-51, 19-26, 64-105 are managed or jointly managed by the Sac County Board of Supervisors, Buena Vista County Board of Supervisors, and Calhoun County Board of Supervisors as trustees under Iowa Code Chapter 468. They are political subdivisions of the State of Iowa located as shown in the map attached as **Exhibit 2**.

26. The Drainage Districts are each a "person" within the meaning of 33 U.S.C. § 1362(5) and Iowa Code § 455B.171(18).

27. The Drainage Districts are organized and existing under authority of Article I, § 18 of the Iowa Constitution and Iowa Code Chapter 468.

28. The Drainage Districts have created, operated and maintained drainage facilities which collect and discharge groundwater directly into ditches and streams, including discharges that reach the Raccoon River.

29. The Boards of Supervisors named herein, as governing trustees of the Drainage Districts, have power and control over the drainage infrastructure within their boundaries under Iowa Code § 468.526, and as such are legally responsible for compliance with applicable state and federal law, including but not limited to the CWA, Chapter 455B, and other statutory and common law.

30. Under Iowa Code § 468.89 a board of supervisors and the drainage districts the board represents may be named as defendants in an action concerning the drainage districts.

31. The Iowa Supreme Court has held, most recently in Chicago Cent. & Pacific R. Co. v. Calhoun County Bd. of Sup'rs, 816 N.W.2d 367 (Iowa 2012), that a drainage district is exempt from suit in tort and for money damages based on its "special and limited duties conferred by the Iowa Constitution," but as set forth herein such exemption either does not apply, or if otherwise applicable, would deprive Des Moines Water Works of due process of law, or the equal protection of law under the United States Constitution, the Constitution of the State of Iowa, or both.

FACTS

A. THE NATIONAL & STATE NITRATE PROBLEM

32. The pollution of the rivers and streams of Iowa by nutrients, including nitrate, is a problem of statewide and national significance.

33. Iowa's streams and rivers, including the Raccoon River, contribute significantly to hypoxia in the Gulf of Mexico.

34. The issue of Gulf hypoxia has been identified by federal law as a problem since at least 1998 by adoption of Title VI of the Coast Guard Authorization Act of 1998, Pub. L. No. 105–383, 112 Stat. 3411, as recently amended by the Harmful Algal Bloom and Hypoxia Research and Control Amendments Act of 2014, Pub. L. No. 113-124, 128 Stat. 1379 (June 30, 2014), codified at 33 U.S.C, § 4001, et seq.

35. Although the above cited provisions by their terms neither expand nor contract any regulatory authority as provided in 33 U.S.C. §§ 4006-4007, such Acts identify the national significance of nutrient pollution and the degree of federal concern.

36. By May of 1999, the National Oceanic and Atmospheric Administration established that agricultural drainage is a significant contributor to hypoxia in the Gulf of Mexico

as follows:

> Drainage of agricultural land by tile drains and other means contributes to the high nitrate concentration and flux in the Mississippi River. Tile drains short-circuit the flow of ground water by draining the top of the ground water system into tile lines and ditches and eventually to the Mississippi River. Tile drainage water can have very high nitrate concentrations.

Flux and Sources of Nutrients in the Mississippi-Atchafalaya River Basin, NOAA Coastal Ocean Program, Decision Analysis Series No 17 at xyi (May 1999), available at http://oceanservice.noaa.gov/products/hypox_t3final.pdf

37. Iowa has over 640 waters that are currently considered to be impaired, some by reason of nutrient pollution including nitrate. http://www.iowadnr.gov/Environment/WaterQuality/WaterMonitoring/ImpairedWaters.aspx

38. Scientific research and technical studies show that high nitrate concentrations in the Raccoon River watershed are a direct result of nitrate discharged from agricultural drainage district facilities.

39. The Iowa Nutrient Reduction Strategy (the "Strategy"), is a 204 page report developed by the Iowa Department of Agriculture, Iowa Department of Natural Resources, and Iowa State University to assess the issues of nutrients in Iowa waters and the Gulf of Mexico. Almost 160 pages of the Strategy are devoted to agricultural sources, such as drainage tile. The Strategy is available online at http://www.nutrientstrategy.iastate.edu/sites/default/files/documents/NRSfull-141001.pdf

40. According to the Strategy, sources not currently regulated as point sources create 92% of nitrate pollution entering Iowa's waterways. These sources include agricultural drainage, which is noted as a major contributor in the Strategy at page 9.

41. Despite its factual findings, the Strategy addresses agricultural pollution only

through voluntary measures implemented by private parties.

42. The Strategy lacks: (i) a timeframe for when the nutrient reduction will be achieved; (ii) numeric nutrient criteria standards; (iii) guidance on water quality monitoring; and (iv) any required conservation practices.

43. In the face of both growing national pressure regarding hypoxia in the Gulf of Mexico and within the state of Iowa regarding waters listed as impaired, an entirely voluntary "strategy" with no benchmarks or timeline to measure success is an inadequate response to a problem with a well-documented cause.

44. To address nitrate pollution in Iowa, agricultural drainage infrastructure and drainage districts can be, should be, and are required by law to be regulated as "point sources" under the Clean Water Act, Iowa Code Chapter 455B, and state regulation.

B. THE RACCOON RIVER WATERSHED & NITRATE POLLUTION

45. The Raccoon River drains 3,625 square miles or 2.3 million acres in west-central Iowa. It is a tributary of the Mississippi River Basin draining into the Gulf of Mexico. *Raccoon River Watershed Water Quality Master Plan, Agren, Inc. 2011.* http://www.iowadnr.gov/Portals/idnr/uploads/water/watershed/files/raccoonmasterwmp13.PDF

46. The Raccoon River receives water from portions of 17 Iowa counties including Buena Vista, Sac, and Calhoun. It flows approximately 186 miles from its origin in Buena Vista County to its mouth south of downtown Des Moines and its confluence with the Des Moines River. *Raccoon River Watershed Water Quality Master Plan, Agren, Inc. 2011.*

47. The main stem of the Raccoon River, also known as the North Raccoon, spans from its origin in northeastern Buena Vista County, flows into Sac County, then runs southeastward through Calhoun, Carroll, Green, and Dallas counties to the confluence with the

Des Moines River. *Raccoon River Watershed Water Quality Master Plan, Agren, Inc. 2011.*

48. The two main tributaries to the North Raccoon are the Middle and South. The Middle Raccoon River begins in northwestern Carroll County and flows southeastwardly for 74.5 miles through Guthrie and Dallas counties to join the South Raccoon near Redfield, Iowa. The South Raccoon rises in northeastern Audubon County and flows generally southeastwardly for 49.7 miles through Guthrie and Dallas Counties, past the town of Guthrie Center. *Raccoon River Watershed Water Quality Master Plan, Agren, Inc. 2011.*

49. The North Raccoon and South Raccoon forks join in Dallas County west of Van Meter and flow east into Polk County. *Raccoon River Watershed Water Quality Master Plan, Agren, Inc. 2011.*

50. The North, Middle, and South Raccoon Rivers are navigable bodies of water used by rafts, canoes, kayaks, and other recreational watercraft.

51. The watershed of the Raccoon River primarily includes drainage from two Iowa regions, the first defined by continental-scale glaciers in the eastern portion and the second defined by wind-blown loess in the western portion. *Raccoon River Watershed Water Quality Master Plan, Agren, Inc. 2011.*

52. The North and Middle Raccoon Rivers flow through the region of Iowa known as the Des Moines Lobe, an area covered by glaciers less than 14,000 years ago. The natural geology of the Des Moines Lobe consists of glacial drift composed of sand, silt, and clay. The low permeability of this geologic material coupled with a topography filled with closed depressions created very poor natural surface and subsurface drainage in the Des Moines Lobe. As a result, long-term water and nitrogen is stored on the landscape. *Raccoon River Watershed Water Quality Master Plan, Agren, Inc. 2011, at 19.*

53. Conversely the South Raccoon River drains a landscape characterized by uniform and finely grained soil, rolling hills, greater stream density, and well-developed drainage. *Raccoon River Watershed Water Quality Master Plan, Agren, Inc. 2011, at 19.*

54. In the North Raccoon, seven major tributary streams flow above its confluence with the Middle and South Raccoon rivers. One of the major tributary streams is Cedar Creek which drains just north of Sac City.

55. The United States Geological Survey (the "USGS") maintains a nationwide network of about 7,600 stream gages designed to "provide and interpret long-term, accurate, and unbiased streamflow information." *National Streamflow Information Program Implementation Status Report* *http://pubs.usgs.gov/fs/2009/3020/*.

56. In the Raccoon River watershed at least fifteen gages are maintained by the USGS including gauge 05482300, a monitoring station in the North Raccoon River near Sac City, Iowa. The drainage area for the Sac City gage is 700 square miles.

57. Daily data available from the Sac City gage includes temperature, discharge by cubic feet per second, and nitrate loads and concentrations. Some of the daily data available from the Sac City USGS site such as stream flow dates back to 1958; other information such as nitrate has only been maintained since 2008.

http://waterdata.usgs.gov/nwis/inventory/?site_no=05482300&agency_cd=USGS

58. Other USGS monitoring stations in the Raccoon River watershed south of Sac City include 05482500, North Raccoon near Jefferson, Iowa draining 1,619 square miles, 05483600 Middle Raccoon River at Panora, Iowa draining 440 square miles, and 05484500, Raccoon River near Van Meter, Iowa, draining 3,441 square miles.

http://maps.waterdata.usgs.gov/mapper/index.html?state=ia

59. Overall land use in the Raccoon River watershed is predominately agricultural consisting of corn and soybeans. Row crop land use comprises 85% of the land area in the North Raccoon River with 77% of row crop ground tile drained above Sac City while 61% of the area in the South Raccoon River is row cropped with 42% tile drained above Redfield. *Water Quality Improvement Plan for Raccoon River, Iowa; Iowa Department of Natural Resources Watershed Improvement Section; K.E. Shilling and C.F. Wolter (2008), available at* *http://www.epa.gov/waters/tmdldocs/IARaccoonRiverBasinTMDL.pdf*

60. The Raccoon River watershed is also characterized by intensive livestock production, with a total of 135 cattle feedlots and 424 confinement operations distributed across the watershed. *Water Quality Improvement Plan for Raccoon River, Iowa; Iowa Department of Natural Resources Watershed Improvement Section; K.E. Shilling and C.F. Wolter, (2008).*

61. Land applied manure generated by the livestock operations is a contributing source of nitrate and phosphorous in the watershed, minor nutrient inputs to the watershed occur from cattle grazing on pasture. *Water Quality Improvement Plan for Raccoon River, Iowa; Iowa Department of Natural Resources Watershed Improvement Section; K.E. Shilling and C.F. Wolter (2008)* (internal citations omitted*).*

62. In 2009, the Iowa Department of Natural Resources (the "IDNR") identified three segments of the Raccoon River as impaired by nitrate-nitrogen and established a Total Maximum Daily Load ("TMDL") target for nitrate in the Raccoon River at 9.5 mg/l to meet water quality standards.

63. The Raccoon River also appears on Iowa's 303(d), 33 U.S.C. § 1313(d), list of impaired waterways under the CWA.

64. There are at least seventy-seven (77) entities in the Raccoon River watershed with

NPDES permits. These sources include municipal, industrial, semi-public, sanitary district stormwater, agricultural, and operational permits. *Water Quality Improvement Plan for Raccoon River, Iowa; Iowa Department of Natural Resources Watershed Improvement Section; K.E. Shilling and C.F. Wolter (2008).*

65. These permitted point sources "do not contribute substantially to the nitrate impairment at Des Moines Water Works." *Water Quality Improvement Plan for Raccoon River, Iowa; Iowa Department of Natural Resources Watershed Improvement Section; K.E. Shilling and C.F. Wolter, at p. 45 (2008).*

66. The IDNR estimates that during periods when nitrate levels in the Raccoon River exceed 9.5 mg/L sources that are currently unpermitted contribute 89.7% nitrate while permitted entities contribute only 10.3%. *Water Quality Improvement Plan for Raccoon River, Iowa; Iowa Department of Natural Resources Watershed Improvement Section; K.E. Shilling and C.F. Wolter, at p. 45 (2008).*

67. Despite Iowa occupying less than 5% of the Mississippi River drainage basin, average annual export of nitrate from surface water in Iowa is estimated to range from approximately 204,000 to 222,000 Mg. or 25% of the nitrate that the Mississippi River delivers to the Gulf of Mexico. *K. E. Schilling & R.D. Libra. The relationship of nitrate concentrations in streams to row crop land use in Iowa. J.Environ. Qual. 29, 1846-1851 (2000).*

68. Nitrate-nitrogen export from the Raccoon River Watershed is among the highest in the United States with annual yields at 26.1 kg/ha/year which ranked as the highest loss of nitrate out of 42 Mississippi subwatersheds evaluated for a Gulf of Mexico hypoxia report and contributes to impairment of downstream water quality. *D.A. Goolsby, W.A. Battaglin, B.T. Aulenbach, and R.P. Hooper." "Nitrogen input to the Gulf of Mexico," J. Environ.Qual. 30,*

329-336 (2001); D.A. Goolsby, W.A. Battaglin, G.B. Lawrence, R.S. Artz, B.T. Aulenbach, R.P. Hooper, D.R. Kenney, G.J. Stensland. Flux and sources of nutrients in the Mississippi Atchalfalaya River Basin, White House Office of Science and Technology Policy Committee on Environmental and Natural Resources Hypoxia Work Group (1999).

C. DES MOINES WATER WORKS & NITRATE POLLUTION

69. Des Moines Water Works is an independently operated, municipal water utility providing drinking water to approximately 500,000 Iowans. It is the largest water utility in Iowa.

70. Des Moines Water Works began operating as a municipal water utility serving the Des Moines metro area in 1871 and since that time has obtained water from the Raccoon River for use as a public water supply.

71. Des Moines Water Works seeks to operate with fiscal discipline while delivering superior quality water in reliable quantities.

72. Des Moines Water Works primarily obtains its raw water supply from the Raccoon and Des Moines Rivers by means of direct river intake and by access to shallow alluvial aquifers and surface waters recharged by the rivers.

73. Des Moines Water Works takes water from the Raccoon River and sources influenced by the Raccoon River pursuant to a permit issued by IDNR pursuant to Iowa Code § 455B.261 et seq.

74. Des Moines Water Works' treatment plants and real estate are located in central Iowa approximately 100 miles from the Drainage Districts.

75. Des Moines Water Works maintains and utilizes three treatment plants: Fleur Drive Treatment Plant (the "Fleur Plant"), LD McMullen Treatment Plant at Maffitt Reservoir (the "McMullen Plant"), and its newest plant is at Saylorville Reservoir (the "Saylorville Plant").

76. The Fleur Plant has the capacity to pump 75 million gallons of water per day, the McMullen Plant 25 million gallons per day, and the Saylorville Plant 10 million gallons per day.

77. The main source of water at the McMullen and Saylorville Plants is shallow groundwater collected from the Raccoon River by wells located along the river. Course sand and gravel filter the groundwater and naturally remove river sediment prior to treatment.

78. In addition to shallow groundwater, the McMullen plant also relies on a river–influenced surface water source originally created as quarry pit, and known within Des Moines Water Works as "Crystal Lake." Crystal Lake is managed to provide reduced nitrogen water through natural biologic processes.

79. The Dale Maffitt Reservoir is a 200 acre man-made lake located at the intersection of Polk, Warren, Dallas, and Madison Counties, used as an emergency backup water source with a potential to provide 1.3 billion gallons to the McMullen Plant.

80. The main sources of water at the Fleur Plant are the Raccoon River and Des Moines River through direct intake and an infiltration gallery laid underground along the banks of the Raccoon River.

81. The infiltration gallery is an underground collection system that has been in use since the late 1880s. The gallery system consists of a long series of pipes that run parallel to the Raccoon River roughly 32 feet below surface grade. Water from the Raccoon River collects in the pipes and the water benefits from the bankside filtration which removes much of the solid and suspended matter present. Water from the Raccoon River is also diverted to a series of constructed ponds that lie above the gallery which saturates the soil structure and increases water yield.

82. Permanent direct intakes on the Raccoon and Des Moines River supplement the

infiltration galleries' supply of source water to the Fleur Plant.

83. Except for an initial pretreatment step the water treatment process at the Fleur and the McMullen Plant is similar.

84. At the Fleur Plant and at the McMullen plant when surface water is used, powdered activated carbon is applied to the river or surface water to reduce dissolved organic matter resulting from decayed leaves and vegetation in addition to agricultural and municipal wastewater discharges.

85. The next step in the water treatment process is lime softening which ameliorates the water's hardness and kills viruses. Next the water is filtered through sand and gravel to remove all particles.

86. When nitrate levels are unusually high, a fraction of water at the Fleur Plant undergoes an ion exchange process and is blended with post-filtered water to stay safely below the nitrate health standard. Water at the McMullen Plant can be blended with nitrate-free water from Maffitt Reservoir to remain below the MCL standard when needed.

87. The final step in the water treatment process at the Fleur and McMullen Plants is the addition of fluoride to help prevent dental cavities and chlorine to disinfect the water.

88. The water treatment process at the Saylorville Plant relies on different technologies than the McMullen Plant or Fleur Plant.

89. At the Saylorville Plant, water pumped from collector wells undergoes a pre-treatment step to oxidize and remove iron and manganese. After pre-treatment, the water is passed through ultra-filtration which removes any non-dissolved particles and then through reverse osmosis filtration. The final step in the process is the addition of fluoride, chlorine to disinfect the water, and sodium hydroxide to adjust the pH. Unlike the other plants the

Saylorville Plant does remove nitrate but has far more limited treatment capacity.

90. Throughout the treatment process at each of the three facilities, Des Moines Water Works' state certified laboratory staff performs fifty to one hundred tests each day to ensure the highest quality water is produced. An additional series of tests on the untreated water sources allows Des Moines Water Works plant operators and laboratory staff to select the river source that has the highest quality water before it enters the plants.

91. The mix of raw water sources and treatment plant options available to Des Moines Water Works allow Des Moines Water Works to manage its sources of water to create the highest quality water and to meet water quality standards under many conditions that it encounters.

92. Despite constant monitoring and advanced treatment technologies the nutrient levels in Des Moines Water Works source water have necessitated greater protections, particularly when water demand is high or nitrate concentrations are high, or both.

93. In 1991, faced with increasing levels of nitrate in its source water, Des Moines Water Works constructed the world's largest ion exchange facility to remove nitrate from its finished water.

94. The nitrate removal facility became operational in 1992.

95. At a cost of $4.1 million, the nitrate removal facility was designed to operate on an as needed basis with a maximum capacity of 10 million gallons per day and a cost of up to $7,000 per day to operate.

96. From 1995 to 2005, the nitrate removal facility operated over 500 days.

97. In June of 2005, the utility again nearly violated the nitrate standard when the level of nitrate in the Raccoon River exceeded 10 mg/L for over 94 days concurrent with high

water demand. This near violation precipitated an extensive review of long-term flow and nitrate data for the Raccoon River. USGS flow data dating back to 1919 along with nitrate data generated from Des Moines Water Works testing laboratory dating to 1931 provided a data source to evaluate the relationship between water discharge and flow and nitrate levels. *Nitrate-nitrogen patterns in the Raccoon River Basin related to agricultural practices." J.L. Hatfield, L.D. McMullen, & C.S. Jones, J. of Soil and Water Conservation vol. 64, no. 3, 190-199 (2009).*

98. Since the 1970s, the concentration of nitrate in the Raccoon River at Des Moines Water Works intake points has steadily increased as depicted in **Exhibit 3**.

99. From 1995 to 2014, nitrate concentrations in the Raccoon River at the Des Moines Water Works intake points exceeded the 10 mg/L standard for drinking water at least 1,636 days or 24% of the time. From 1995 to 2014, the nitrate removal facility has operated a total of 673 days with protracted use in 1995, 1998, 1999, 2001, 2002, 2003, 2005, 2006, and most recently 2013, 2014, and 2015.

100. In 2013 and 2014, persistent peaks in nitrate levels reached record highs with the Raccoon River reaching 24 mg/L and the Des Moines River reaching 18.6 mg/L.

101. In the summer of 2013, the nitrate load in Des Moines Water Works' raw water supply in one week was greater than the *entire* nitrate load in 2012. In order to comply with the Safe Drinking Water Act, Des Moines Water Works was forced to rely on its nitrate removal facility for 74 days during peak demand in the summer, when customer demands average 80 million gallons daily.

102. A voluntary conservation request was issued in the summer of 2013 in order to control demand, and Des Moines Water Works expended over $500,000 to treat the source water burdened by excessive nitrate levels.

103. In 2014, despite a difference in both average temperature and precipitation from 2013, the nitrate load in Des Moines Water Works' water supply was again record setting.

104. In July 2014 the average nitrate concentration in Des Moines in the Raccoon River was 11.98 mg/L, the 3rd highest average in the last forty years. Similarly, in September, October, November, and December 2014, the average nitrate concentration was 11.89 mg/L, 13.23 mg/L, 13.43 mg/L and 12.56 mg/L respectively.

105. On December 4, 2014, Des Moines Water Works had to again rely on its nitrate removal facility and continuous use of the facility was required as nitrate concentrations continued to exceed safety standards until March 10, 2015. The continuous operation for a total of 96 days is the longest in the history of the facility's operation during the winter season.

106. Due to its age and the limited capacity of the existing nitrate removal facility, Des Moines Water Works anticipates that it will need to design and construct a new nitrate removal facility with a 50 million gallon per day capacity at a capital cost of between $76 million and $183.5 million before 2020. Operation and maintenance costs will be in addition to the initial estimated capital cost.

107. Nitrate discharged into the Raccoon River watershed is a permanent, physical invasion of and impairment to Des Moines Water Works' real estate and its right to withdraw water from the Raccoon River.

D. DRAINAGE DISTRICTS GENERALLY

108. There are approximately 3,000 drainage districts, including the ten named Drainage Districts, which are primarily concentrated in the Des Moines Lobe, generally paralleling the Raccoon and Des Moines River watersheds.

109. Drainage in Iowa began in the 1800s when early settlers found the region to be

nearly uninhabitable due to the swampy landscape resulting from glaciers previously covering the state which melted to form a prairie pothole region in the Des Moines Lobe.

110. The settlers realized that with the help of artificial drainage the soil found under the wetlands was ideal for cultivation. Under the Swamp Land Acts enacted in the middle of the 19th century to encourage drainage and development of wetlands for agricultural purposes, widespread agricultural drainage projects were facilitated. Thereafter, networks of agricultural tile were installed to turn native wetlands into a terrain suitable for farmland.

111. The original purpose for drainage was limited to improving the natural waterlogged conditions of the land, but by the end of the 19th century the practice of drainage expanded to water management, raising crop yields, broadening the range of land use, and lowering production costs.

112. Today, subsurface drainage has the effect of lowering the water table and removing water from the root zone of corn and soybean plants.

113. By lowering the water table or the level at which soil is entirely saturated with water, subsurface drainage tile permits groundwater to drain. This drainage creates less interference with root growth and development of field crops which require both water and air for production.

114. At the turn of the 19th century, the installation of drainage was costly, labor intensive, and required cooperation so legislation was enacted in Iowa to facilitate the formation and financing necessary to install drainage district infrastructure across multiple parcels of land.

115. The State of Iowa enacted drainage legislation in 1873 authorizing the creation of drainage districts and in 1908 the Iowa Constitution was amended to provide drainage districts with the authority necessary to carry out the purposes of the drainage districts as provided by

statute. Iowa Constitution, Article I, § 18.

116. By 1930, 22% of all farmland in the state of Iowa was drained and 18% of farmland was included in a drainage district. *C.D. Ikenberry, M.L. Soupir, K.E. Schilling, C.S. Jones, A. Seeman, Nitrate-Nitrogen Export: Magnitude and Patterns from Drainage Districts to Downstream River Basins, J. of Environ. Qual. 43:2024-2033 (2014) (citing McCorvie and Lant, 1993).*

117. Drainage of the prairie pothole ecosystem enabled the central part of the state to become one of the most agriculturally productive areas in the world.

118. Under the Iowa Code there are nearly seventy-five pages of law and 500 sections detailing the purpose and creation of drainage districts and the construction, administration, and maintenance of levees, drains, drainage tiles, and drainage ditches within each district.

119. Under the Iowa Code any county board of supervisors is authorized to establish a drainage district for public utility or for public health, convenience, and welfare. Iowa Code § 468.1.

120. Included in this power is the authority to construct levees, ditches, drains, water courses and settling basins as well as straightening, widening, deepening, or changing of a natural water course. Iowa Code § 468.1.

121. Costs associated with installation, maintenance, or repair of drainage tile, drains, or ditches are defrayed by levying assessments on property owners within the district in proportion to the benefit that accrues to each property owner. *See* Iowa Code §§ 468.1, 468.50.

122. The Drainage Districts are empowered to issue bonds and levy to cover costs and expenses necessary to discharge its duties pursuant to the Iowa Code. Iowa Code §§ 468.74, 468.527.

123. To establish a drainage district within a watershed area, two or more landowners file a petition with the county auditor's office and the board of supervisors in the county where the district is located. Iowa Code § 468.6.

124. When a drainage district is established the board of supervisors serves as trustees unless the landowners in a district petition the county auditor to call for a special election to elects trustees from the membership of the landowners in the district. Iowa Code §§ 468.1, 468.500, 486.501.

125. When the boundaries of a drainage district fall in two or more counties, control of the district is exercised jointly by the board of supervisors or boards of trustees in each county. *E.g.,* Iowa Code § 468.281.

126. The authority and responsibility to construct, improve, and make repairs is the same for joint or inter-county drainage districts as it is for intra-county drainage districts. *E.g.*, Iowa Code §§ 468.277, 486.281.

E. POINT SOURCE NITRATE POLLUTION BY THE DEFENDANT DRAINAGE DISTRICTS

127. The Drainage Districts named in this Complaint have been established as provided by law and are managed or jointly managed by the Boards of Supervisors in Calhoun, Buena Vista, and Sac Counties.

128. The Drainage District have created and operate and maintain infrastructure consisting of tiles, pipes, drains, collector mains, surface ditches, culverts and other conveyances of water.

129. The locations of the Drainage Districts are described more particularly below and depicted in maps obtained from the Sac County Auditor's Office in exhibits C-1, C-2, C-3 to the Notice, **Exhibit 1** hereto.

130. The primary purpose of the Drainage District infrastructure is to remove water from agricultural lands, including groundwater containing a high concentration of nitrate, but under the Iowa Code such infrastructure may also drain non-agricultural land.

131. Subsurface tile and pipe and surface ditches and channels created and maintained by the Drainage Districts are connected to private subsurface tiles to convey groundwater within each of the Drainage Districts to streams and rivers, and ultimately to the Raccoon River.

132. Privately owned subsurface tiles consist primarily of perforated pipes installed in a parallel configuration at intervals four to six feet beneath the surface of a field.

133. These privately owned pipes drain to a system of larger sub-collector tiles and to collector mains made of clay, concrete, steel or plastic owned and operated by the Drainage District.

134. Sub-collector tiles and collector mains outlet to open ditches and streams also maintained by the Drainage Districts, which discharge into the Cedar Creek and the Raccoon River.

135. The infrastructure of the Drainage Districts transports both groundwater and stormwater, but little or no irrigation return flow.

136. The location of the Drainage Districts are as follows:

a. Drainage District 86 lies in Sac County in Iowa. The watershed of the district is located in Sections including 13, 14, 23, and 24 of Cedar Township (T-88-N, R-35-W).

b. Joint Drainage Districts 2 and 51 lie over the boundary of Calhoun and Sac Counties in Iowa. The watershed of the joint districts is located in Sections including 10, 11, 12, 13, 14, 15, 23, 24 of Cedar Township (T-88-N, R-35-W) in Sac County and

Sections including 7, 8, 18 of Garfield Township (T-88N, R-34W) in Calhoun County.

c. Drainage District 81 lies in Sac County in Iowa. The watershed of the district is located in Sections including 3, 4, 5, 6, 9 of Cedar Township (T-88-N, R-35-W), Section 1 of Jackson Township (T-88-N, R-36-W), and Sections including 22, 23, 24, 25, 26, 27, 28, 33, 34, 35, 36 of Douglas Township (T-89-N, R-35-W) in Sac County.

d. Drainage District 42 lies in Sac County in Iowa. The watershed of the district is located in Sections including 23, 25, 26 in Douglas Township (T-89-N, R-35-W).

e. Drainage District 65 lies in Sac County in Iowa. The watershed of the district is located in Sections including 20, 21, 28, 29, 32, and 33 of Douglas Township (T-89-N, R-35-W).

f. Drainage District 79 lies in Sac County in Iowa. The watershed of the district is located in Sections including 26, 27, 28, 33, 34, 35 of Douglas Township (T-89-N, R-35-W).

g. Drainage District 83 lies in Sac County in Iowa. The watershed district is located in Sections including 7, 8, 17, 18, 20, 21 in Douglas Township (T-89-N, R-35-W).

h. Joint Drainage Districts 19 and 26 lie over the boundary of Sac and Buena Vista Counties in Iowa. The watershed of the joint districts is located in Sections including 28, 29, 30, 31, 32, 33 of Newell Township (T-90-N, R-35-W) in Buena Vista County and Sections including 4, 5, 6, 7, 8, 9, 16, 17, 18, 20, 21, 22, 27, 28 of Douglas Township (T-89-N, R-35-W) in Sac County.

i. Joint Drainage Districts 64 and 105 lie over the boundary of Sac and

Buena Vista Counties in Iowa. The watershed of the joint districts is located in Sections including 1, 2, and 3 of Delaware Township (T-89-N, R-36-W) in Sac County and Sections including 34, 35, 36 in Providence Township (T-90-N, R-36-W) in Buena Vista County.

j. Drainage District 32 lies in Sac County, Iowa. The watershed of the joint districts is located in Sections including 7 and 18 in Douglas Township (T-89-N, R-35-W).

137. From March 28, 2014, until December 30, 2014, Des Moines Water Works staff drew water samples on 40 separate occasions from 72 sample site locations in drainage districts in Sac, Calhoun, and Buena Vista counties.

138. The samples from each site visit were processed by Des Moines Water Works laboratory staff and blind tested by the Iowa Soybean Association.

139. The following data from nine sample sites reflects that groundwater containing nitrate in excess of 10 mg/L was discharged from a pipe or ditch from the following Drainage Districts on at least the following dates:

Date	Location	Drainage District/s	Nitrate (Mg/L)
7/15/14	Drainage Ditch at 240th St and Xavier (SC15)	86 & 2 (Sac County) and 51 (Calhoun County)	37.67
7/15/14	Drainage Ditch – Wadsley Ave 0.4 miles North of 220th St (SC19)	81, 79, 83 and 19-26	18.77
7/15/14	Drainage Ditch – Wadsley Ave 200 feet North of 210th St (SC20)	42	17.31
7/15/14	Drainage Ditch – Union Ave 0.2 miles North of 200th St (SC32)	83 and 19-26	21.49
7/15/14	Tile Discharge – 200th St. 0.9 miles West of Voss (SC34)	79	22.09
7/15/14	Drainage Discharge – 220th St. 0.6 miles West of Sierra Ave. (SC36)	65	21.16
7/15/14	Tile at North end of Ditch – Sierra Ave. 0.3 miles North of 170th St. (SC43)	19 (Sac County) and 26 (Buena Vista County)	28.8

Date	Location	Drainage District/s	Nitrate (Mg/L)
7/15/14	Drainage Discharge – 170th St. 400 feet East of Quincy Ave. (SC47)	32	24.53
7/15/14	Stream – 170th St. 0.8 miles West of Quincy Ave. (SC52)	64 (Sac County) and 105 (Buena Vista County)	21.44
9/9/14	Drainage Ditch at 240th St and Xavier (SC15)	86 & 2 (Sac County) and 51 (Calhoun County)	31.8
9/9/14	Drainage Ditch – Wadsley Ave 0.4 miles North of 220th St (SC19)	81, 79, 83 and 19-26	20.07
9/9/14	Drainage Ditch – Wadsley Ave 200 feet North of 210th St (SC20)	42	17.58
9/9/14	Drainage Ditch – Union Ave 0.2 miles North of 200th St (SC32)	83 and 19-26	20.39
9/9/14	Tile Discharge – 200th St. 0.9 miles West of Voss (SC34)	79	27.61
9/9/14	Drainage Discharge – 220th St. 0.6 miles West of Sierra Ave. (SC36)	65	20.68
9/9/14	Tile at North end of Ditch – Sierra Ave. 0.3 miles North of 170th St. (SC43)	19 (Sac County) and 26 (Buena Vista County)	20.46
9/9/14	Drainage Discharge – 170th St. 400 feet East of Quincy Ave. (SC47)	32	20.6
9/9/14	Stream – 170th St. 0.8 miles West of Quincy Ave. (SC52)	64 (Sac County) and 105 (Buena Vista County)	16.36
10/15/14	Drainage Ditch at 240th St and Xavier (SC15)	86 & 2 (Sac County) and 51 (Calhoun County)	32.17
10/15/14	Drainage Ditch – Wadsley Ave 0.4 miles North of 220th St (SC19)	81, 79, 83 and 19-26	19.12
10/15/14	Drainage Ditch – Wadsley Ave 200 feet North of 210th St (SC20)	42	19.58
10/15/14	Drainage Ditch – Union Ave 0.2 miles North of 200th St (SC32)	83 and 19-26	21.31
10/15/14	Tile Discharge – 200th St. 0.9 miles West of Voss (SC34)	79	28.66
10/15/14	Drainage Discharge – 220th St. 0.6 miles West of Sierra Ave. (SC36)	65	19.82
10/15/14	Tile at North end of Ditch – Sierra Ave. 0.3 miles North of 170th St. (SC43)	19 (Sac County) and 26 (Buena Vista County)	22.36
10/15/14	Drainage Discharge – 170th St. 400 feet East of Quincy Ave. (SC47)	32	19.69

Date	Location	Drainage District/s	Nitrate (Mg/L)
10/15/14	Stream – 170th St. 0.8 miles West of Quincy Ave. (SC52)	64 (Sac County) and 105 (Buena Vista County)	16.76
12/17/14	Drainage Ditch at 240th St and Xavier (SC15)	86 & 2 (Sac County) and 51 (Calhoun County)	28.15
12/17/14	Drainage Ditch – Wadsley Ave 0.4 miles North of 220th St (SC19)	81, 79, 83 and 19-26	14.76
12/17/14	Drainage Ditch – Wadsley Ave 200 feet North of 210th St (SC20)	42	12.97
12/17/14	Drainage Ditch – Union Ave 0.2 miles North of 200th St (SC32)	83 and 19-26	16.13
12/17/14	Tile Discharge – 200th St. 0.9 miles West of Voss (SC34)	79	22.42
12/17/14	Drainage Discharge – 220th St. 0.6 miles West of Sierra Ave. (SC36)	65	14.43
12/17/14	Tile at North end of Ditch – Sierra Ave. 0.3 miles North of 170th St. (SC43)	19 (Sac County) and 26 (Buena Vista County)	15.44
12/17/14	Drainage Discharge – 170th St. 400 feet East of Quincy Ave. (SC47)	32	16.92
12/17/14	Stream – 170th St. 0.8 miles West of Quincy Ave. (SC52)	64 (Sac County) and 105 (Buena Vista County)	13.71

140. The location of the nine sample sites are detailed in exhibit B to the Notice, **Exhibit 1** hereto.

141. Photographs of the areas from which samples were taken are attached as **Exhibit 4-A, 4-B, 4-C, 4-D, 4-E, 4-F, 4-G, 4-H, 4-I**.

142. Other similar discharges are detailed in exhibit A-1, A-2, A-3 to the Notice, **Exhibit 1** hereto.

143. After taking into account transport times and weather events the above data also correlates with excessive nitrate concentrations observed at Des Moines Water Works Raccoon River intake points.

144. Nitrate is a soluble ion of Nitrogen (N) found in the soil that moves only with water. This allows it to be both readily available for plant consumption but also easily leached

through groundwater.

145. Nitrate primarily occurs in groundwater and streams receive this pollutant because streams receive the majority of their yearly discharge from groundwater in moist temperate climates such as Iowa.

146. Under natural hydrologic conditions very little nitrate is discharged from groundwater to streams, but artificial subsurface drainage short-circuits the natural conditions that otherwise keep nitrate from entering streams and rivers.

147. Subsurface drainage tile artificially lowers the water table by removing water from the saturated zone and expanding the volume of soil in which mineralization of organic matter, including plant residues and manure can generate nitrate in the unsaturated zone.

148. Rapid mineralization in the unsaturated zone in the absence of perennial vegetation to consume it provides a large source of nitrate and continuous drainage allows little opportunity for natural attenuation or de-nitrification.

149. Seasonally large concentrations of nitrate occur in the Raccoon River watershed because mineralization rates increase as temperatures rise in spring and remain high late into autumn.

150. The presence of subsurface tiles provides a continuous mechanism for transporting nitrate to streams only reduced during the relatively short (60-70 days) annual-crop growing season when mineralization rates may be in balance with crop uptake demands.

151. After a rainfall event nitrate concentration in ditches, streams, and rivers is diluted when stormwater increases flow; subsequently nitrate concentrations rise as tile carrying groundwater diverts nitrate from the water table into surface waters.

152. Because stormwater flowing across a field or into a surface intake of a drainage

district has little opportunity to dissolve nitrate produced by soil microorganisms or to interact with soil containing dissolved nitrate, only a very small concentration of nitrate can be found in agricultural stormwater runoff.

153. Elimination of natural subsurface storage and acceleration of groundwater removal from soils by the Drainage Districts' infrastructure short-circuits deep groundwater recharge and substantially increases discharge to streams and open ditches having the additional hydraulic effect of increasing stream velocity.

154. Although infrastructure of the Drainage Districts transports both stormwater and groundwater into streams and rivers, the conveyance of nitrate is almost entirely by groundwater transport.

155. The discharges by the Drainage Districts observed to contain high nitrate concentrations are almost entirely groundwater.

156. To the extent stormwater was included in the water sampled it would have diluted and thus reduced the observed concentration of nitrate.

F. INJURY AND DAMAGES TO DES MOINES WATER WORKS

157. There is no foreseeable likelihood that the Drainage Districts will voluntarily alter or reduce the discharge of nitrate into the Raccoon River watershed and the discharge of nitrate is a permanent invasion of Des Moines Water Works' use of property.

158. The existence and persistence of high concentrations of nitrate in the Raccoon River caused by the operation of the Drainage Districts have caused injury to Des Moines Water Works in the following respects and particulars:

a. By requiring the design, construction and operation of a nitrate removal facility that costs $4.5 million to construct and approximately $4,000- $7,000 per day to

operate;

b. By requiring Des Moines Water Works to design and maintain operational modifications to remain in compliance with safe drinking water requirements, including source water collection improvements, and utilization of technically complex and high cost treatment systems at the Saylorville Plant;

c. By creating a waste stream from the operation of its nitrate removal facility that requires a disposal or discharge permit, the continuing availability and cost of which are uncertain;

d. By reducing the availability of safe drinking water for delivery to customers during periods of high demand;

e. By diminishing the reputation of Des Moines Water Works as a provider of safe, abundant and affordable water, resulting in the direct loss of revenue and potential revenue and the indirect loss of revenue to the extent economic growth is adversely impacted by concerns respecting availability of water; and

f. By imposing on Des Moines Water Works a need to replace and augment its ability and capacity to remove nitrate in the future at expected capital costs currently estimated to range between $76 million and $183 million.

COUNT I: CLEAN WATER ACT

159. Des Moines Water Works repleads all prior paragraphs as if fully set forth herein.

160. The Clean Water Act was created by Congress to protect sources of drinking water and the quality of the waters of the United States. To achieve its objectives the CWA relies upon the NPDES permit program that controls water pollution by regulating "point sources" that discharge pollutants.

161. As alleged more particularly herein, the facilities of the Drainage District are point sources, as "discrete conveyances" of nitrate pollution under the CWA that are not exempt from regulation and are required to have an NPDES permit.

162. The stated objective of the CWA is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters" by, among other things, achieving the goal of "eliminat[ing]" "the discharge of pollutants into the navigable waters." 33 U.S.C. § 1251(a).

163. Under the CWA and implementing regulations, the discharge of a pollutant by any person is prohibited, except in compliance with other sections of the CWA, including 33 U.S.C. § 1342 which governs activities subject to the issuance of NPDES permits.

164. A "pollutant" is defined to include, "among other things … industrial, municipal, and agricultural waste." 33 U.S.C. § 1362(6).

165. The "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12).

166. Under the CWA, "navigable waters" is defined as "the waters of the United States." 33 U.S.C. § 1362(7).

167. A "point source" is generally defined to include "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, [or] channel . . . from which pollutants are or may be discharged." However, the term "does not include agricultural stormwater discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362(14).

168. Under 33 U.S.C. § 1342 the Administrator of the EPA may issue NDPES permits that authorize the discharge of pollutants from a point source into navigable waters of the United States, subject to the conditions and limitations set forth in such permits.

169. Effluent limitations, as defined in 33 U.S.C. § 1362(11), are established on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters.

170. Effluent limitations, monitoring, and reporting discharges are among the conditions and limitations prescribed in an NPDES permit under 33 U.S.C. § 1342(a) and under state NPDES programs.

171. The CWA provides that a state may establish its own permit program, and after receiving EPA's approval, may administer its own NPDES permits. 33 U.S.C. § 1342(b).

172. In 1978, under the authority of CWA, 33. U.S.C. § 1342(b), the EPA approved the State of Iowa's permit program and today the IDNR administers its own NDPES permits. Iowa Code § 455B.197.

173. Under the Code of Federal Regulations, a "facility or activity" is defined as any "NPDES point source or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program." 40 C.F.R. § 122.2.

174. Under the Code of Federal Regulations the "owner or operator" of any "facility or activity" is subject to regulation under the NPDES program. 40 C.F.R. § 122.2.

175. The Raccoon River is a navigable water as defined in the CWA. 33 U.S.C. § 1362(7).

176. The Cedar Creek is a navigable water as defined in the CWA. 33 U.S.C. § 1362(7).

177. Nitrate is an agricultural waste and a pollutant under the CWA. 33 U.S.C. § 1362(6).

178. The Drainage Districts are point sources of nitrate pollution as defined by, and

under, the CWA, 33 U.S.C. § 1362(14), because they are discernible, confined and discrete conveyances and the discharge of nitrate pollutants is neither agricultural stormwater discharge nor return flow from irrigated agricultural.

179. The Drainage Districts are managed or jointly managed by the Sac County Board of Supervisors, Buena Vista County Board of Supervisors, and Calhoun County Board of Supervisors. 40 C.F.R. § 122.2.

180. The Drainage Districts are the "owners" and "operator[s]" of the drainage facilities and infrastructure as defined by 40 C.F.R. 122.2.

181. Discharges from the Drainage Districts' facilities constitute "discharge of pollutants" within the meaning of the CWA, 33 U.S.C. § 1362(12).

182. The Drainage Districts have discharged, and are discharging on a regular basis, nitrate into ditches and streams which lead directly to the Cedar Creek and the Raccoon River without an NPDES permit issued under 33 U.S.C. § 1342(a) and Iowa's NPDES programs in violation of the CWA. 33 U.S.C. § 1311(a).

183. Upon information and belief, these discharges will continue after the date of filing of this Complaint. 33 U.S.C. § 1362(6), (12).

184. Under the CWA citizen suit provision a civil action may be maintained against the Drainage Districts. 33 U.S.C. § 1365.

185. By committing these acts and omissions alleged above, the Drainage Districts are subject to an assessment of civil penalties pursuant to 33 U.S.C. § 1319(d) and 40 C.F.R. § 19.4, Table 1.

186. The Drainage Districts are subject to the Clean Water Act pursuant to Article VI of the United States Constitution.

WHEREFORE, the Plaintiff, Des Moines Water Works, respectfully prays that the Court grant the following relief under this Count I:

A. Declare the Drainage Districts to have violated and continue to be in violation of the Clean Water Act;

B. Enjoin the Drainage Districts from any and all ongoing and future violations of the CWA by ordering compliance with the CWA and the NPDES permit program limitations under 33 U.S.C. § 1342(a) and under Iowa's NPDES program;

C. Assess civil penalties under 33 U.S.C. § 1319(d) and 40 C.F.R. § 19.4, Table 1 payable to the U.S. Treasury for each continuing day of violation;

D. Award litigation costs and reasonable attorneys' fees to Des Moines Water Works as authorized by the CWA; and

E. Grant such other relief as is deemed just, equitable, and proper by the Court.

COUNT II: CHAPTER 455B

187. Des Moines Water Works repleads all prior paragraphs as if fully set forth herein.

188. Chapter 455B is the principal Iowa statute enacted to protect the quality of the waters of the State of Iowa, including navigable waters of the United States within Iowa, both by enforcement of delegated authority under the CWA and by establishment of standards under the state's sovereign authority over the waters of the state.

189. As alleged more particularly herein, the Drainage Districts are point sources of nitrate pollution under Chapter 455B, not exempt from regulation and required to have a permit under Iowa state law and regulation.

190. Under Iowa law, IDNR maintains jurisdiction over the surface and groundwater of the state to "prevent, abate, and control water pollution by establishing standards for water

quality… and by regulating potential sources of water pollution through a system of general rules or specific permits… the discharge of any pollutant to a water of the state requires a specific permit from the department unless exempted by the department." Iowa Admin. Code r. 567-60.1(455B); *see also* Iowa Code § 455B.172(2), (5).

191. Under Chapter 455B water pollution is "the contamination or alteration of the physical, chemical, biological, or radiological integrity of any water of the state by a source resulting in whole or in part from the activities of humans, which are harmful, detrimental, or injurious to public, health, safety, or welfare…" Iowa Code 455B.171(40).

192. Under the Iowa Code "a pollutant shall not be disposed of by dumping, depositing, or discharging such pollutant into any water of the state" without a permit issued by the director of the IDNR. Iowa Code § 455B.186(1).

193. Under the Iowa Code, a pollutant is defined as "sewage, industrial waste, or other waste." Iowa Code § 455B.171(20). "Other waste" is defined as "heat, garbage, municipal refuse, lime, sand, ashes, offal, oil, tar, chemicals, and all other wastes which are not sewage or industrial waste." Iowa Code § 455B.171(17).

194. Although the term is not defined by Code Chapter 455B, under IDNR Rules 60.2, "discharge of a pollutant" is defined as "an addition of any pollutant or combination of pollutants to navigable waters or waters of the state from any point source" including "discharges through pipes, sewers, or other conveyances owned by a state, municipality, or other person which do not lead to a treatment works." Iowa Admin. Code r. 567-60.2(455B).

195. As defined by Iowa Code § 455B.171(19), "Point source" means "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."

196. Under IDNR Rule 60.2, the definition of "point source" mirrors the definition under Iowa Code Chapter 455B but specifically excludes from the definition "return flows from irrigated agriculture or agricultural stormwater runoff." Iowa Admin. Code r. 567-60.2(455B).

197. The Iowa Code defines "water of the state" as any stream, lake, pond, marsh, watercourse, waterway, well, spring, reservoir, aquifer, irrigation system, drainage system, and any other body or accumulation of water, surface or underground, natural or artificial, public or private, which are contained within, flow through or border upon the state or any portion thereof." Iowa Code § 455B.171(39).

198. Under the rules issued pursuant to Iowa Code Chapter 455B, an "NPDES permit" is defined as an "operation permit, issued after the department has obtained approval of its National Pollutant Discharge Elimination System (NDPES) program from the administrator that authorizes the discharge of any pollutant into a navigable water." Iowa Admin. Code r. 567-60.2(455B).

199. Under IDNR Rule 62.1(1) "the discharge of any pollutant from a point source into a navigable water is prohibited unless authorized by an NPDES permit." Iowa Admin. Code r. 567-62.1(1)(455B).

200. Under IDNR Rule 64.4(1), "[a]n individual NPDES permit is required when there is a discharge of a pollutant from any point source into navigable waters" except a discharge of a pollutant is exempt from permitting when it introduces "pollutants from non-point source agricultural and silvicultural activities, including stormwater runoff from orchards, cultivated crops, pastures, range lands, and forest lands…." Iowa Admin. Code r. 567-64.4(1)(e)(455B).

201. Under IDNR Rule 60.2, a "nonpoint source" is defined as "a source of pollutants

that is not a point source." Iowa Admin. Code r. 567-60.2(455B).

202. Under the rules issued pursuant to Iowa Code Chapter 455, an "operation permit" is a "written permit . . . authorizing the operation of a wastewater disposal system or part thereof or discharge source and, if applicable, the discharge of wastes from the disposal system or part thereof or discharge source to waters of the state. An NPDES permit will constitute the operation permit in cases where there is a discharge to a water of the United States and an NPDES permit is required by the Act [Federal Water Pollution Control Act]." Iowa Admin. Code r. 567-60.2(455B).

203. Under IDNR Rule 60.2, a "disposal system" is defined as "a system for disposing of sewage, industrial waste, or other wastes, or for the use or disposal of sewage sludge. 'Disposal system' includes sewer systems, treatment works, point sources, dispersal systems, and any systems designed for the usage or disposal of sewage sludge." Iowa Admin. Code r. 567-60.2(455B).

204. Under IDNR Rule 64.3, an operation permit is required for any person who shall "operate a wastewater disposal system or part thereof without, or contrary to the condition of, an operation permit" subject to enumerated exclusions including discharges from geothermal heat pump discharge, water well construction, and the application of biological and chemical pesticides, none of which apply here. Iowa Admin. Code r. 567-64.3(1)(d), (e),(f)(455B).

205. Under Iowa law, a citizen shall have standing to commence an action if the person is adversely affected by the alleged violation of Iowa Code Chapter 455B or rule adopted pursuant to Iowa Code Chapter 455B. Iowa Code § 455B.111(3).

206. Under Iowa law, Des Moines Water Works is a person adversely affected by a violation of Iowa Code Chapter 455B or rule adopted pursuant to, with standing to commence an

action against the Drainage Districts. Iowa Code § 455B.171(18).

207. The Raccoon River, its tributary streams including Cedar Creek, and all waters flowing into such waters are part of the waters of the state under Iowa Code Chapter 455B and state regulations.

208. The "drainage system" in the Drainage Districts is part of the waters of the state under Iowa Code Chapter 455B and state regulations.

209. Nitrate is a "pollutant" under Iowa Code Chapter 455B and state regulation.

210. The Drainage District facilities are point sources of nitrate pollution under Iowa Code Chapter 455B and state regulations.

211. The Drainage Districts have discharged and are discharging nitrate pollutants into ditches and streams which lead directly to Cedar Creek and the Raccoon River on a regular basis.

212. The discharge of nitrate by the Drainage Districts is neither return flows from irrigated agriculture nor agricultural stormwater runoff.

213. The discharge of nitrate by the Drainage Districts is not a non-point source from agricultural and silvicultural activities or stormwater runoff from orchards, cultivated crops, pastures, range lands, and forest lands.

214. The Drainage Districts have discharged and continue to discharge nitrate into ditches and streams without an NPDES or state operating permit in violation of Chapter 455B and state regulations.

215. Upon information and belief, these discharges will continue after the date of filing of this Complaint.

216. Unless the Drainage Districts desist in violations of Chapter 455B Des Moines Water Works will suffer irreparable harm.

WHEREFORE, the Plaintiff, Des Moines Water Works, respectfully prays that the Court grant the following relief under this Count II:

A. Declare the Drainage Districts to have violated and continue to be in violation of Chapter 455B;

B. Enjoin the Drainage Districts from any and all ongoing and future violations of Iowa Code Chapter 455B and state regulation by ordering compliance with state law including ceasing all discharges of nitrate that are not authorized by an NPDES or state operating permit;

C. Assess civil penalties for each continuing day of violation;

D. Award litigation costs and reasonable attorney fees to Des Moines Water Works as authorized by citizen suit provision pursuant to Iowa Code Chapter 455B; and

E. Grant such other relief as is deemed just, equitable, and proper by the Court.

COUNT III: PUBLIC NUISANCE

217. Des Moines Water Works repleads all prior paragraphs as if fully set forth herein.

218. Nitrate discharged by the Drainage Districts has caused public harm by contributing to eutrophication and the development of hypoxic conditions in waters, including the Gulf of Mexico's "dead zone," rendering water in the Raccoon River unsafe for human consumption, and costing the City of Des Moines economic development opportunities.

219. The Drainage Districts are created for the purpose of modifying the existing flow of water and for effecting drainage of water. *See* Iowa Code 468.1 et seq.

220. The Drainage Districts normal and intended operation results in nitrate discharge in excess of 10mg/L to be conveyed to Raccoon River.

221. The Boards of Supervisors for Buena Vista, Calhoun, and Sac Counties, as trustees of the Drainage Districts have acted for the purpose of conveying water to the Raccoon

River.

222. The Boards of Supervisors for Buena Vista, Calhoun, and Sac Counties know that by maintaining and operating the Drainage Districts they convey water to the Raccoon River, and are substantially certain that the Drainage Districts convey groundwater to the Raccoon River and that affects downstream users such as Des Moines Water Works.

223. The Boards of Supervisors for Buena Vista, Calhoun, and Sac Counties know that that conveyance of groundwater by the Drainage Districts causes unsafe concentrations of nitrate to enter the Raccoon River, and continue to operate the Drainage Districts so that they discharge unsafe concentrations of nitrate to the Raccoon River.

224. The harm caused by the discharge of nitrate by the Drainage Districts into the Raccoon River watershed is not outweighed by the public benefit from the Drainage Districts' drainage of land in the Raccoon River watershed.

225. Nitrate discharged by the Drainage Districts presents a threat to human health.

226. Iowa Code § 455B.262(2) provides that the water resources of the State of Iowa are for the beneficial use of the public.

227. Iowa Code §455E.3(1) recognizes that the water resources of the State of Iowa are a precious and vulnerable resource and that its protection is essential to the health, welfare, and economic prosperity of the public. Iowa Code § 455E.5(3) grants all persons in the State of Iowa the right to lawful use of groundwater unimpaired by the activities of any other person that render the water unsafe or unpotable.

228. Iowa Code §§ 468.1, .2, .11, .21, .22, .24, and .64 require drainage districts to be operated in the interests of public health and welfare.

229. The present operation of the Drainage Districts is unlawful and antisocial because

it is contrary to the public health and welfare.

230. The discharge of nitrate by the Drainage Districts into the Raccoon River watershed creates a foreseeable and unreasonable risk of harm to public health, safety, comfort, and convenience because the discharge contains nitrate concentrations that pose a danger to the public's health and welfare.

231. The discharge of nitrate by the Drainage Districts affects a substantial number of persons because Des Moines Water Works distributes water from the Raccoon River to over 500,000 people in central Iowa.

232. Des Moines Water Works and the public have been injured by the Drainage Districts' public nuisance.

233. The conduct of the Drainage Districts together with the conduct of similarly situated drainage districts contributes to a single, indivisible harm making the Drainage Districts jointly and severally liable for the damage caused to Des Moines Water Works.

WHEREFORE, the Plaintiff, Des Moines Water Works, respectfully prays that the Court grant the following relief under this Count III:

A. Declare that the Drainage Districts have created and continue to maintain and operate a public nuisance;

B. Order the Drainage Districts to take all actions necessary to abate the public nuisance;

C. Award damages to Des Moines Water works in an amount required to compensate Des Moines Water Works for the unlawful discharge of nitrate by all drainage districts in the Raccoon River watershed together with interest as provided by law;

D. Award the costs of this action to Des Moines Water Works; and

E. Grant such other relief as is deemed just, equitable, and proper by the Court.

COUNT IV: STATUTORY NUISANCE

234. Des Moines Water Works repleads all prior paragraphs as if fully set forth herein.

235. The Drainage Districts normal and intended operation results in nitrate discharge in excess of 10 mg/L to be conveyed to Raccoon River.

236. The Drainage Districts exist within real estate legally described in the fact sections above.

237. Concentrations of nitrate in the Raccoon River watershed exceed levels that are safe for human consumption and, without treatment, the levels of nitrate in the Raccoon River are dangerous to human health.

238. Such concentrations of nitrate render water in rivers and streams flowing to the Raccoon River corrupt, unwholesome, and impure in violation of Iowa Code Chapter 657.

239. The discharge of nitrate by the Drainage Districts into the Raccoon River is an obstruction that unreasonably interferes with Des Moines Water Works' statutory right to withdraw water from the Raccoon River, and is an obstruction that unreasonably interferes with Des Moines Water Works' use of its real estate and treatment plants by requiring Des Moines Water Works to undertake costly and elaborate treatment processes to remove the excess nitrate from water drawn from the Raccoon River.

240. Des Moines Water Works has been injured and suffered damages by the Drainage Districts' statutory nuisance.

241. The conduct of the Drainage Districts together with the conduct of similarly situated drainage districts contributes to a single, indivisible harm making the Drainage Districts jointly and severally liable for the damage caused to Des Moines Water Works.

WHEREFORE, the Plaintiff, Des Moines Water Works, respectfully prays that the Court grant the following relief under this Count IV:

A. Declare that the Drainage Districts have created and continue to maintain and operate a statutory nuisance;

B. Order the Drainage Districts to take all actions necessary to abate the public nuisance;

C. Award damages to Des Moines Water works in an amount required to compensate Des Moines Water Works for the unlawful discharge of nitrate by all drainage districts in the Raccoon River watershed together with interest as provided by law;

D. Award the costs of this action to Des Moines Water Works; and

E. Grant such other relief as is deemed just, equitable, and proper by the Court.

COUNT V: PRIVATE NUISANCE

242. Des Moines Water Works repleads all prior paragraphs as if fully set forth herein.

243. Addition of high concentrations of nitrate by operation of the Drainage Districts to the Raccoon River is a substantial and unreasonable interference with Des Moines Water Works' property right to withdraw high quality water from the Raccoon River and with Des Moines Water Works' real estate and treatment plants because Des Moines Water Works must implement elaborate, costly, and burdensome treatment processes to remove the excess nitrate.

244. Des Moines Water Works has been injured and suffered damages by the Drainage Districts' private nuisance.

245. The conduct of the Drainage Districts together with the conduct of similarly situated drainage districts contributes to a single, indivisible harm making the Drainage Districts jointly and severally liable for the damage caused to Des Moines Water Works.

WHEREFORE, the Plaintiff, Des Moines Water Works, respectfully prays that the Court grant the following relief under this Count V:

A. Declare that the Drainage Districts have created and continue to maintain and operate a private nuisance;

B. Order the Drainage Districts to take all actions necessary to abate nitrate pollution;

C. Award damages to Des Moines Water works in an amount required to compensate Des Moines Water Works for the unlawful discharge of nitrate by all drainage districts in the Raccoon River watershed together with interest as provided by law;

D. Award the costs of this action to Des Moines Water Works; and

E. Grant such other relief as is deemed just, equitable, and proper by the Court.

COUNT VI: TRESPASS

246. Des Moines Water Works repleads all prior paragraphs as if fully set forth herein.

247. Nitrate conveyed into the Raccoon River by the Drainage Districts is a substantial physical invasion of Des Moines Water Works' exclusive use and enjoyment of its real estate and personal property.

248. The discharge of nitrate to the Raccoon River by operation of the Drainage Districts is an intentional physical invasion of Des Moines Water Works' property right to withdraw water from the Raccoon River and an intentional physical invasion to the real estate and treatment plants operated by Des Moines Water Works.

249. The physical invasion is ongoing so long as the Drainage Districts continue to discharge nitrate unabated.

250. The Drainage Districts' physical invasion of Des Moines Water Works' property

is a reasonably foreseeable consequence of the operation of the Drainage Districts.

251. Des Moines Water Works has suffered substantial damage from the Drainage Districts' trespass.

252. The conduct of the Drainage Districts together with the conduct of similarly situated drainage districts contributes to a single, indivisible harm making the Drainage Districts jointly and severally liable for the damage caused to Des Moines Water Works.

WHEREFORE, the Plaintiff, Des Moines Water Works, respectfully prays that the Court grant the following relief under this Count VI:

A. Declare that the Drainage Districts have created and continue to maintain and operate a trespass;

B. Order the Drainage Districts to take all actions necessary to abate nitrate pollution;

C. Award damages to Des Moines Water works in an amount required to compensate Des Moines Water Works for the unlawful discharge of nitrate by all drainage districts in the Raccoon River watershed together with interest as provided by law;

D. Award the costs of this action to Des Moines Water Works; and

E. Grant such other relief as is deemed just, equitable, and proper by the Court.

COUNT VII: NEGLIGENCE

253. Des Moines Water Works repleads all prior paragraphs as if fully set forth herein.

254. The Drainage Districts have a duty under Iowa and federal law not to discharge nitrate pollution into Raccoon River watershed that represents a threat to public health and welfare, and impairs downstream users such as Des Moines Water Works.

255. The Drainage Districts have breached their duty to Des Moines Water Works by

failing to exercise ordinary care in the construction and operation of the network of drainage facilities which now collect and discharge harmful concentrations of nitrate into the Raccoon River watershed.

256. The Drainage Districts provide a direct and artificial means of transport for nitrate to the Raccoon River watershed.

257. The Drainage Districts' conduct causes harm to Des Moines Water Works.

258. The Drainage Districts know their operation conveys unsafe levels of nitrate to the Raccoon River watershed and those levels will affect downstream users such as Des Moines Water Works.

259. The harm to Des Moines Water Works is a reasonably foreseeable consequence of the Drainage Districts' normal and intended operation.

260. Des Moines Water Works has been damaged by the Drainage Districts' breach of their duty.

261. The conduct of the Drainage Districts together with the conduct of similarly situated drainage districts contributes to a single, indivisible harm making them jointly and severally liable for the damage caused to Des Moines Water Works.

WHEREFORE, the Plaintiff, Des Moines Water Works, respectfully prays that the Court grant the following relief under this Count VII:

A. Declare that the Drainage Districts have acted negligently and caused harm to Des Moines Water Works;

B. Order the Drainage Districts to take all actions necessary to abate nitrate pollution;

C. Award damages to Des Moines Water works in an amount required to compensate

Des Moines Water Works for the unlawful discharge of nitrate by all drainage districts in the Raccoon River watershed together with interest as provided by law;

D. Award the costs of this action to Des Moines Water Works; and

E. Grant such other relief as is deemed just, equitable, and proper by the Court.

COUNT VIII: TAKING WITHOUT JUST COMPENSATION

262. Des Moines Water Works repleads all prior paragraphs as if fully set forth herein.

263. The Drainage Districts are persons within the meaning of 42 U.S.C. § 1983 as interpreted by Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 690 (1978), because, pursuant to Iowa Code Chapter 468, they are political subdivisions of the State of Iowa.

264. The Drainage Districts at all times relevant to this case acted under color of state law within the meaning of 42 U.S.C. § 1983 because they are operated pursuant to Iowa Code Chapter 468.

265. The Drainage Districts are operated independently of the State of Iowa by trustees who are the respective county boards of supervisors.

266. The Drainage Districts' policy and practice of discharging unregulated quantities of nitrate in high concentrations into the Raccoon River watershed causes harm to Des Moines Water Works and the general public.

267. The State of Iowa is not obligated to pay the indebtedness of the Drainage Districts; the Drainage Districts are self-funding and their finances are separate and independent from the finances of the State of Iowa.

268. The discharge of nitrate by the Drainage Districts into the Raccoon River watershed is permanent, physical invasion of and impairment to Des Moines Water Works' real estate and its right to withdraw water from the Raccoon River, and restricts Des Moines Water

Works' use of its real estate and property.

269. The discharge of nitrate by the Drainage Districts into the Raccoon River watershed has a substantial negative economic impact on Des Moines Water Works.

270. The discharge of nitrate by the Drainage Districts into the Raccoon River watershed interferes with Des Moines Water Works' expectation that it will have source water free of excess pollutants and unnaturally high concentrations of nitrate.

271. The character of the Drainage Districts' conduct is a physical invasion of Des Moines Water Works' property because nitrate discharged by the Drainage Districts interferes with the ownership interests of Des Moines Water Works.

272. The Drainage Districts' benefits to public health and welfare from draining the land do not justify the substantial harm to public health and welfare caused by nitrate discharge into the Raccoon River watershed.

273. The Drainage Districts have not compensated Des Moines Water Works for the taking of Des Moines Water Works' property.

274. The conduct of the Drainage Districts together with the conduct of similarly situated drainage districts contributes to a single, indivisible harm making them jointly and severally liable for the damage caused to Des Moines Water Works.

275. The discharge of nitrate by the Drainage Districts into the Raccoon River watershed is a regulatory and physical taking within the meaning of the Fifth Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment to the United States Constitution and Article I, § 18 of the Constitution of the State of Iowa, and therefore Des Moines Water Works is entitled to just compensation for the permanent invasion of its property.

WHEREFORE, the Plaintiff, Des Moines Water Works, respectfully prays that the Court grant the following relief under this Count VIII:

A. Declare that the Drainage Districts have taken property and continue to take property of Des Moines Water Works without just compensation in violation of the United States and Iowa Constitutions;

B. Award just compensation to Des Moines Water works in an amount required to compensate Des Moines Water Works for the unlawful discharge of nitrate by all drainage districts in the Raccoon River watershed together with interest as provided by law;

C. Award the costs of this action to Des Moines Water Works;

D. Award reasonable attorneys' fees; and

E. Grant such other relief as is deemed just, equitable, and proper by the Court.

COUNT IX: DUE PROCESS & EQUAL PROTECTION

276. Des Moines Water Works repleads all prior paragraphs as if fully set forth herein.

277. The Drainage Districts are person within the meaning of 42 U.S.C. § 1983, and at all times relevant to this case have acted pursuant to a policy and practice under color of state law that deprives Des Moines Water Works of its rights guaranteed by the United States Constitution.

278. The Iowa Code and decisions of the Iowa Supreme Court have developed a constitutionally defective immunity for drainage districts that violates Des Moines Water Works' due process and equal protection rights.

279. To the extent the Drainage Districts have and enjoy any immunity from suit for claims herein, such immunity violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, the Due Process and Equal Protection

Clauses of the Iowa Constitution. U.S. Const., amend XIV; Iowa Const., art. I, §§ 6, 9.

280. Des Moines Water Works is being deprived of its substantive right to just compensation for governmental takings under the Iowa and United States Constitutions.

281. Granting the Drainage Districts immunity from suit in tort and for damages is not necessary to aid any compelling governmental interest because the discharge of nitrate creates a demonstrated hazard to the public health and welfare.

282. The benefits derived from providing Des Moines Water Works redress against the Drainage Districts outweighs any harm to the Drainage Districts because they are already subject to injunctive and other forms of equitable relief based on their failure to discharge their duties, and because they are already permitted to institute litigation as a plaintiff by Iowa Code § 468.90.

WHEREFORE, the Plaintiff, Des Moines Water Works, respectfully prays that the Court grant the following relief under this Count IX:

A. A declaration from the Court that the Drainage Districts are subject to suit at law and equity for damages in tort and other relief resulting from their tortious conduct;

B. Award damages to Des Moines Water works in an amount required to compensate Des Moines Water Works for the unlawful discharge of nitrate by all drainage districts in the Raccoon River watershed together with interest as provided by law;

C. Award the costs of this action, including reasonable attorneys' fees, to Des Moines Water Works; and

D. Grant such other relief as is deemed just, equitable, and proper by the Court.

COUNT X: INJUNCTIVE RELIEF

283. Des Moines Water Works repleads all prior paragraphs as if fully set forth herein.

284. The discharge of nitrate by the Drainage Districts into the Raccoon River watershed is a breach of the duties of the Drainage Districts and an invasion of the public interest and the rights of Des Moines Water Works in all of the respects and particulars set forth in Counts I through IX.

285. Des Moines Water Works has suffered, and will continue to suffer, substantial damage.

286. In the alternative to the remedies requested in the prior Counts and to the extent no other adequate remedy is provided herein, remedies at law are inadequate to redress the ongoing and perpetual nature of the harm the Drainage Districts will cause Des Moines Water Works.

287. The Drainage Districts will not suffer unreasonable hardship if they are required to mitigate the discharge of nitrate into the Raccoon River or to obtain a permit, or both.

288. The public interest in reducing nitrate pollution is substantial given the dangerous health effects of nitrate and the number of people Des Moines Water Works serves.

289. Des Moines Water Works will succeed on the merits of its claims as set forth in the prior Counts.

290. The Court may frame an injunction that permits sufficient flexibility for the Drainage Districts to comply with the injunction without undertaking an unreasonable burden.

WHEREFORE the Plaintiff, Des Moines Water Works, respectfully prays that the Court grant the following relief under this Count X:

A. A permanent, prospective injunction enjoining the Drainage Districts to take all steps reasonably necessary within a reasonable period of time to reduce the discharge of nitrate to the Raccoon River to concentrations that do not exceed 10 mg/L;

B. Award the costs of this action to Des Moines Water Works; and

C. Grant such other relief as is deemed just, equitable, and proper by the Court.

Dated: March 16, 2015

By: /s/ Richard A. Malm

Richard A. Malm, AT004930
John E. Lande, AT0010976
OF
DICKINSON, MACKAMAN, TYLER & HAGEN, P.C.
699 Walnut Street, Suite 1600
Des Moines, Iowa 50309-3986
Telephone: (515) 244-2600
FAX: (515) 246-4550
rmalm@dickinsonlaw.com
jlande@dickinsonlaw.com

ATTORNEYS FOR PLAINTIFF, BOARD OF WATER WORKS TRUSTEES OF THE CITY OF DES MOINES, IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

BOARD OF WATER WORKS TRUSTEES OF THE CITY OF DES MOINES, IOWA, Plaintiff, vs. SAC COUNTY BOARD OF SUPERVISORS AS TRUSTEES OF DRAINAGE DISTRICTS 32, 42, 65, 79, 81, 83 and 86, et al., Defendants.	No. C15-4020-LTS **ORDER SETTING BENCH TRIAL, FINAL PRETRIAL CONFERENCE, AND REQUIREMENTS FOR THE PROPOSED FINAL PRETRIAL ORDER**

IT IS ORDERED:[1]

***I. TRIAL DATE*:** This case has been placed on the calendar of United States District Judge Leonard T. Strand for a bench trial scheduled to commence in Courtroom Three of the United States Courthouse in Sioux City, Iowa, on the **8th day of August, 2016**.

***II. CONTINUANCE OF TRIAL OR FINAL PRETRIAL CONFERENCE DATES*:** Unless requested within **14 days** after the date of this order, no continuance of the trial date will be granted except upon written application and for exceptional cause.

***III. FINAL PRETRIAL CONFERENCE*:** A final pretrial conference (FPTC) is

[1] ***NOTE: This order was revised as of February 15, 2016. The parties are directed to review the requirements of this order carefully and to comply fully with those requirements.***

scheduled before Judge Strand on the **26th day of July, 2016, at 3:00 p.m.** The FPTC will be held in person at the United States Courthouse in Sioux City, Iowa, unless the parties agree in advance to a telephonic FPTC, and so notify Judge Strand at least **five court days** before the FPTC. Depending on the nature of the case, Judge Strand may require that the FPTC must be held in person even if the parties request to participate by phone.

***IV. FINAL PRETRIAL ORDER*:** The parties are jointly responsible for the preparation of the proposed Final Pretrial Order. Before the FPTC, *pro se* parties and counsel for represented parties must prepare, agree upon, and sign a proposed Final Pretrial Order prepared for Judge Strand's signature in the format attached to this order. The proposed order must not be filed, but must be e-mailed, in MS Word format, to Judge Strand (Leonard_Strand@iand.uscourts.gov) at least **two court days** before the FPTC. The parties' exhibit lists, prepared as set forth below in this order, must be attached to the proposed final pretrial order, with the entire order, including the exhibit lists, constituting a single document.

***V. WITNESS AND EXHIBIT LISTS*:** Exhibit lists must be attached to, and witness lists must be included as part of, the proposed Final Pretrial Order, in accordance with the instructions in the attached form order. The parties are not required to list rebuttal witnesses or impeachment exhibits. Proposed witness and exhibit lists must be exchanged by the parties (but not filed) at least **21 days** before the FPTC. At the time the parties exchange their exhibit lists, they also must give written notice to all adverse parties of any intent to use a declaration under Federal Rules of Evidence 803(6), 902(11), or 902(12) to establish foundation for records of regularly-conducted activities, and immediately thereafter they must make the records and the declaration available for inspection.

***VI. EXHIBITS*:** Exhibits must be prepared for trial in accordance with the

following instructions:

A. Marking of Exhibits. All exhibits must be marked by the parties before trial. The plaintiff(s) should use numbers and the defendant(s) should use letters, unless the parties agree to use a different exhibit identification scheme. Exhibits also must be marked with the case number. ***All exhibits longer than one page must contain page numbers at the bottom of each page.***

B. Elimination of Duplicates. The parties must compare their exhibits and eliminate duplicates. If more than one party wants to offer the same exhibit, then it should be marked with a number and listed as a joint exhibit on the exhibit list of the plaintiff(s).

C. Listing of Exhibits and Objections. Exhibits must be listed separately, unless leave of court is granted for a group exhibit. If a party objects to parts of an exhibit but not to other parts, the offering party must prepare separate versions of the exhibit, one that includes the parts to which objections are being asserted and the other that redacts those parts.

D. Exhibits referenced in deposition testimony. All references to exhibits in deposition testimony that is offered into evidence must correspond to the exhibit designation for trial. The parties are directed to number their exhibits accordingly.

E. Copies for the Court and Clerk. The parties must bring to the FPTC trial notebooks containing copies of all exhibits to be used at trial. The court's copies of exhibits should be placed in a ringed binder with a copy of the exhibit list at the front and with each exhibit tabbed and labeled. The parties must supply the Clerk of Court with a second set of exhibits, also tabbed and labeled in a ringed binder, to be used as the original trial exhibits in the official records of the court. If the FPTC is conducted by telephone, the parties must arrange to have both sets of exhibits delivered to Judge Strand's chambers before the FPTC.

***VII. TRIAL BRIEFS*:** If the trial of the case will involve significant issues not adequately addressed by the parties in connection with dispositive motions or other pretrial motions, the parties must prepare trial briefs addressing such issues. Trial briefs must be filed at or before the FPTC.

VIII. PROTOCOL FOR WITNESSES: An attorney who may call a witness to testify at trial must, before the witness testifies, advise the witness of the accepted protocol for witnesses testifying in this court. This advice should include the following information: (A) the fact that the witness will be placed under oath; (B) that the witness should adjust the witness chair and the microphone so the microphone is close to and directly in front of the witness's mouth; (C) that the witness should speak only in response to a question; (D) that the witness should wait for a ruling on any objections before proceeding to answer a question; (E) that the witness should answer all questions verbally; and (F) that substances such as food, beverages, and chewing gum should not be brought into the courtroom. The attorney also must advise the witness of proper dress for the courtroom.

***IX. RESTRICTIONS ON WITNESSES*:**

A. Exclusion of Witnesses. A witness who may testify at the trial or at an evidentiary hearing must not be permitted to hear the testimony of any other witnesses before testifying, and is excluded from the courtroom during the trial or hearing until after the witness has completed his or her testimony, unless exclusion of the witness is not authorized by Federal Rule of Evidence 615 or unless the court orders otherwise. A witness who is excluded from the courtroom pursuant to this paragraph also is prohibited from reviewing a verbatim record of the testimony of other witnesses at the trial or hearing until after the witness has completed his or her testimony at the trial or evidentiary hearing, unless the court orders otherwise.

B. ***Restrictions on Communications with Witnesses***. Unless the court orders otherwise, after the commencement of the trial or an evidentiary hearing and until the conclusion of the trial or hearing, a witness who may testify at the trial or hearing is prohibited from communicating with anyone about what has occurred in the courtroom during the trial or hearing. If the witness does testify at the trial or hearing, after the witness is tendered for cross-examination and until the conclusion of the witness's testimony, the witness is prohibited from communicating with anyone about the subject matter of the witness's testimony. A witness may, however, communicate with his or her attorney about matters of privilege, and may communicate with anyone if the right to do so is guaranteed by the United States Constitution.

C. ***Parties***. The restrictions on witnesses in paragraphs (A) and (B) of this section do not apply to the parties.

D. ***Duties of Counsel***. An attorney who may call a witness to testify at the trial or evidentiary hearing must, before the trial or hearing, advise the witness of the restrictions in this section.

X. ***TESTIMONY BY DEPOSITION*****:** In most cases, it is a waste of time for the parties to read deposition testimony to the court during a bench trial. Instead, and unless otherwise ordered, deposition testimony will be made part of the record by filing the transcripts, with Judge Strand reading the designated portions privately. Any party intending to present testimony by deposition shall, at least **28 days** before trial, serve on the opposing parties a written designation, by page and line number, of those portions of the deposition the offering party intends offer into evidence. At least **21 days** before trial, any opposing party who objects to the intended testimony must serve on the offering party any objections to the designated testimony and a counter-designation, by page and line number, of any additional portions of the deposition which the opposing party intends

to offer into evidence. At least **14 days** before trial, the party offering the deposition testimony must serve upon the opposing parties any objections to the counter-designated testimony and a written designation, by page and line number, of any additional portions of the deposition the offering party intends to have read into evidence. At least **10 days** before trial, the parties must consult, either personally or by telephone, and attempt to work out any objections to the proposed deposition testimony.

At least **five days** before trial, the party intending to offer the deposition testimony must provide Judge Strand with a copy of the deposition, with the parts of the deposition to be offered into evidence clearly indicated on the deposition, together with a statement listing all unresolved objections. Judge Strand will review any objections, make any necessary rulings and make whatever record may be necessary to establish which portions of the deposition testimony are being received into evidence.

If, in a particular case, a party believes it to be important to read deposition testimony aloud in open court, that party shall raise that issue during the FPTC.

***XI. MOTIONS IN LIMINE*:** Judge Strand discourages the use of motions in limine in advance of a bench trial unless it is very apparent that the resolution of novel, unusual or complex evidentiary issues in advance of trial will substantially streamline the presentation of evidence at trial. Such motions, if any, must be served and filed at least **21 days** before the FPTC. Resistances to such motions must be served and filed within **10 days** after service of the motion.

XII. OPENING STATEMENTS; CLOSING ARGUMENTS: Opening statements are limited to **30 minutes** and closing arguments are limited to **one hour**. **A request for additional time for opening statements or closing arguments must be made at the FPTC.**

XIII. COURTROOM TECHNOLOGY: The courtrooms in this district are well-equipped for the use of technology and such use is welcomed. However, the court will not tolerate substantial delays in the proceedings caused by technology glitches or user error. Any party intending to use technology during trial has an affirmative obligation to work with Clerk's office IT staff in advance to ensure compatibility and smooth operation.

***XIV. SETTLEMENT CONFERENCE*:** The court's primary ADR procedure is private mediation. *See* Local Rule 16.2(a). Thus, the parties are encouraged to arrange for private mediation if they believe it would be beneficial to involve a neutral party in their settlement negotiations. If, for some reason, private mediation is not a viable option, any party may contact the chambers of the United States Magistrate Judge assigned to this case to request a settlement conference. Such contact may be ex parte for the sole purpose of inquiring about a settlement conference. Absent extraordinary circumstances, a settlement conference will not be scheduled unless all parties express a willingness to participate. Even if all parties agree, the court retains discretion to decline to conduct a settlement conference. If conducted, a settlement conference will be subject to Local Rule 16.2, along with any additional requirements and limitations that may be imposed by the judicial officer who agrees to conduct the conference.

***XV. SETTLEMENT DEADLINE*:** The court hereby imposes a settlement deadline of **5:00 p.m., 5 days** before the first scheduled day of trial. If the case is settled after that date, the court may enter an order to show cause why costs and sanctions should not be imposed on the party or parties causing the delay in settlement.

IT IS SO ORDERED.

DATED this 23rd day of February, 2016.

LEONARD T. STRAND
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT OF IOWA
_____ DIVISION

[***INSERT PARTIES AND CASE NUMBER***]

FINAL PRETRIAL ORDER (PROPOSED)

[*NOTE: Instructions for preparing this form appear in brackets and should not be reproduced in the proposed Final Pretrial Order. All material not appearing in brackets should be reproduced in the proposed Final Pretrial Order.*]

This final pretrial order was entered after a final pretrial conference held on [date]. The court expects the parties to comply fully with this order. [***Full compliance with the order will assist the parties in preparation for trial, shorten the length of trial, and improve the quality of the trial. Full compliance with this order also will help "secure the just, speedy, and inexpensive determination" of the case. Fed. R. Civ. P. 1.***]

The following counsel, who will try the case, appeared at the conference:

1. For plaintiff(s):
   Name(s)
   Street Number, Street Name and/or Box Number
   City, State and Zip Code
   Phone Number [include area code]
   Facsimile Number [include area code]
   E-mail address

2. For defendant(s):
   Name(s)
   Street Number, Street Name and/or Box Number
   City, State and Zip Code
   Phone Number [include area code]
   Facsimile Number [include area code]

E-mail address

I. STIPULATION OF FACTS: The parties agree that the following facts are true and undisputed:**[***The parties are to recite all material facts as to which there is no dispute. Special consideration should be given to such things, for example, as life and work expectancy, medical and hospital bills, funeral expenses, cause of death, lost wages, back pay, the economic value of fringe benefits, and property damage. The parties should stipulate to an undisputed fact even if the legal relevance of the stipulated fact is questioned by one or more party, but in such instances the stipulated fact should be followed by an identification of the objecting party and the objection (e.g. "Plaintiff objects to relevance.")***]**

A.
B.

II. EXHIBIT LIST: The parties' exhibit lists are attached to this Order.**[***The parties are to **attach to this order** (not include in the body of the order) exhibit lists that list all exhibits (except for impeachment exhibits) each party intends to offer into evidence at trial. Exhibit lists are to be prepared in the attached format, indicating objections using the categories described in the form.*

*All exhibits are to be made available to opposing counsel for inspection at least **twenty-one days** before the date of the FPTC. Failure to provide an exhibit for inspection constitutes a valid ground for objection to the exhibit, and should be noted on the exhibit list.*

*Copies of all exhibits as to which there may be objections must be brought to the FPTC. If an exhibit is not brought to the FPTC and an objection is asserted to the exhibit at the FPTC, the exhibit may be excluded from evidence by the court. Any exhibit not listed on the attached exhibit list is subject to exclusion at trial. The court may deem any objection not stated on the attached exhibit list as waived.***]**

III. WITNESS LIST: The parties intend to call the following witnesses at trial:**[***Each party must prepare a witness list that includes all witnesses (except for rebuttal witnesses) whom the party intends to call to testify at trial. The parties are to exchange their separate witness lists at least **twenty-one days** before the date of the FPTC. The witness*

lists are to be included in the following format. A witness testifying by deposition must be listed in the witness list with a designation that the testimony will be by deposition.]

A. Plaintiff(s) witnesses [*list name, **substance of testimony**, whether any party objects to the witness, and the nature of and grounds for any objection*]:

1.

2.

B. Defendant(s) witnesses [*list name, **substance of testimony**, whether any party objects to the witness, and the nature of and grounds for any objection*]:

1.

2.

All parties are free to call any witness listed by an opposing party. A party listing a witness guarantees his or her presence at trial unless it is indicated otherwise on the witness list. ***Any objection to the offer of testimony from a witness on the witness list is waived if it is not stated on this list.***

IV. RESTRICTIONS ON WITNESSES: A witness who may testify at the trial shall not be permitted to hear the testimony of any other witnesses before testifying, and is excluded from the courtroom during the trial until after the witness has completed his or her testimony, unless exclusion of the witness is not authorized by Federal Rule of Evidence 615 or the court orders otherwise. A witness who is excluded from the courtroom pursuant to this paragraph also is prohibited from reviewing a verbatim record of the testimony of other witnesses at the trial until after the witness has completed his or her testimony, unless the court orders otherwise.

Unless the court orders otherwise, after the commencement of trial and until its conclusion, a witness who may testify at the trial is prohibited from communicating with anyone about what has occurred in the courtroom during the trial. If the witness does testify at the trial, after the witness is tendered for cross-examination and until the conclusion of the witness's testimony, the witness is prohibited from communicating with anyone about the subject matter of the witness's testimony. A witness may, however, communicate with his or her attorney about matters of privilege, and may communicate with anyone if the right to do so is guaranteed by the United States Constitution.

These prohibitions do not apply to the parties. An attorney who may call a witness to testify at trial must, before the trial, advise the witness of these restrictions.

V. EVIDENTIARY AND OTHER LEGAL ISSUES:

A. Plaintiff(s) Issues:

1.
2.

B. Defendant(s) Issues:

1.
2.

[*The parties must list all unusual evidentiary and legal issues which are likely to arise at trial, including such things as disputes concerning the admissibility of evidence or testimony under the Federal Rules of Evidence; the elements of a cause of action; whether recovery is barred as a matter of law by a particular defense; disputes concerning the measure, elements, or recovery of damages; and whether the Statute of Frauds or the Parol Evidence Rule will be raised. The purpose of this listing of issues is to advise the court in advance of issues and problems that might arise at trial.***]**

VI. COURTROOM TECHNOLOGY: Prior to trial, attorneys and witnesses who intend to utilize the technology available in the courtroom must familiarize themselves with the proper manner of operation of the equipment. Instruction and training on the proper use of the equipment may be obtained at a training session set up by prior appointment with the Clerk's IT staff, who may be reached through the Clerk's office. Information also may be obtained from the court's website: *www.iand.uscourts.gov*.

VII. OPENING STATEMENTS; CLOSING ARGUMENTS: Opening statements are limited to **30 minutes** and closing arguments are limited to **one hour**. **A request for additional time for opening statements or closing arguments must be made at the FPTC.**

VIII. PROTOCOL FOR WITNESSES: An attorney who may call a witness to testify at trial must, before the witness testifies, advise the witness of the accepted protocol for

witnesses testifying in this court. This advice should include the following information: (A) the fact that the witness will be placed under oath; (B) that the witness should adjust the witness chair and the microphone so the microphone is close to and directly in front of the witness's mouth; (C) that the witness should speak only in response to a question; (D) that the witness should wait for a ruling on any objections before proceeding to answer a question; (E) that the witness should answer all questions verbally; and (F) that substances such as food, beverages, and chewing gum should not be brought into the courtroom. The attorney also must advise the witness of proper dress for the courtroom. Proper dress does not include blue jeans, shorts, overalls, T-shirts, collarless shirts, shirts with printed words or phrases on the front or back, tank tops, or the like.

IX. DEMONSTRATIVE AIDS: A party using a demonstrative aid during a jury trial must, before the demonstrative aid is displayed to the jury, show the demonstrative aid to representatives of all other parties participating in the trial. The term "demonstrative aid" includes charts, diagrams, models, samples, and animations, but does not include exhibits admitted into evidence or outlines of opening statements or closing arguments. Any disputes or objections concerning demonstrative aids shall be brought to the court's attention and resolved before the demonstrative aid is displayed to the jury.

IT IS SO ORDERED.

DATED this _____ day of _____, 20____.

_____

LEONARD T. STRAND
UNITED STATES DISTRICT JUDGE

(PLAINTIFF'S) (DEFENDANT'S) EXHIBIT LIST [*Form*]

The following categories have been used for objections to exhibits:

A. **Category A.** These exhibits already will be in evidence at the commencement of the trial, and will be available for use by any party at any stage of the proceedings without further offer, proof, or objection.

B. **Category B.** These exhibits are objected to on grounds **other than** foundation, identification, or authenticity. This category **has been** used for objections such as hearsay or relevance.

C. **Category C.** These exhibits are objected to on grounds of foundation, identification, or authenticity. This category **has not** been used for other grounds, such as hearsay or relevance.

(Plaintiff's)(Defendant's) Exhibits	Objections [Cite Fed. R. Evid.]	Category A, B, C	Offered	Admit/Not Admitted (A) - (NA)
1. [*describe exhibit*]				*
2. [*describe exhibit*]				
3. [*describe exhibit*]				
4. [*describe exhibit*]				
5. [*describe exhibit*]				

[**This column is for use by the trial judge at trial. Nothing should be entered in this column by the parties.*]

OHIO STATE UNIVERSITY EXTENSION

Law Bulletin

OSU EXTENSION AGRICULTURAL & RESOURCE LAW PROGRAM

March 2015

FAA Proposes Regulations for Small Unmanned Aerial Systems

Peggy Kirk Hall, Asst. Professor and Field Specialist
OSU Extension Agricultural & Resource Law Program

After much anticipation, the Federal Aviation Administration (FAA) has published proposed regulations that would govern the operation of drones used for agricultural and other activities. The proposal would allow farmers and ranchers to operate drones, referred to in the rule as "unmanned aircraft" and "unmanned aircraft systems" (UAS), subject to requirements intended to address public safety and national security concerns.

Under the proposed small UAS rule, operators must comply with a certification process, register and maintain aircraft, and follow limitations on aircraft operation. Of the proposed limitations, agricultural operators might have concerns about a "visual line-of-sight" rule requiring that operators have visual contact with aircraft, a flight ceiling of 500 feet above ground level and prohibitions against night flights. Additionally, the proposal fails to address privacy issues and the potential use of drones for surveillance activities on another person's property.

The following provisions are the major components of the proposed rule, which would apply to unmanned aircraft weighing less than 55 pounds that are used for non-hobby and non-recreational purposes:

Operator Certification and Reporting

Certification. An operator of a UAS must have an "unmanned aircraft operator certificate with a small UAS rating," which requires:

- Meeting eligibility requirements: the applicant is at least 17 years old, speaks English, has no state or federal drug offenses, has no physical or mental condition to prevent safe UAS operation, and the applicant's identity is verified by the FAA.
- Passing an initial aeronautical knowledge test at an FAA-approved knowledge testing center, which covers: (1) applicable regulations relating to small UAS rating privileges, limitations, and flight operation; (2) airspace classification and operating requirements, obstacle clearance requirements, and flight restrictions affecting small UAS operation; (3) official sources of weather and effects of weather on small UAS performance; (4) small UAS loading and performance; (5) emergency procedures; (6) crew resource management; (7) radio communication procedures; (8) determining the performance of small UAS; (9) physiological effects of drugs and alcohol; (10) aeronautical decision-making and judgment; and (11) airport operations.
- Passing a recurrent aeronautical knowledge test every 24 months.

Reporting. An operator must report an accident to the FAA within 10 days of any operation that results in injury or property damage.

Aircraft Requirements

- *Aircraft registration*. A small unmanned aircraft must be registered with the FAA.
- *Markings*. A small unmanned aircraft must display nationality and registration markings.
- *Aircraft condition*. An operator must maintain a small unmanned aircraft in a condition for safe operation.

Operation Requirements

Pre-flight requirements. Before a flight, an operator must conduct a pre-flight inspection and assessment that includes:

- Inspection of the links between the unmanned aircraft and its control station.
- Verification of sufficient power to operate the aircraft at least 5 minutes beyond the intended operational time period.
- Assessment of the operating environment, including local weather conditions, local airspace and flight restrictions, locations of persons and property on the ground and other ground hazards.
- A briefing to all persons involved in the aircraft operation that addresses operating conditions, emergency procedures, contingency procedures, roles and responsibilities and potential hazards.

Visual line of sight requirement. An operator must maintain a "visual line-of-sight" with the unmanned aircraft, using only human vision that is unaided by any device other than glasses or contact lenses.

Use of visual observer. An operator may use "visual observers" to assist with the visual line-of-sight requirement.

- An operator and visual observer must maintain constant communication, which may be made through communication-assisted devices.
- The aircraft must still remain close enough to the operator for the operator to be capable of maintaining the visual line-of-sight.

Operating limitations. An operator must not operate an unmanned aircraft:

- More than 500 feet above ground level.
- More than 100 mph.
- After daylight, which is the time between official sunrise and sunset.
- When there is not minimum weather visibility of 3 miles from the aircraft's control station.
- No closer than 500 feet below and 2,000 feet horizontally away from any clouds.
- Over any persons not directly involved in the operation and not under a covered structure that would protect them from a falling UAS.
- From a moving aircraft or vehicle, unless the moving vehicle is on water.
- Within Class A airspace; or within Class B, C, or D airspace or certain Class E airspace designated for an airport, without prior authorization from the appropriate Air Traffic Control facility.
- Carelessly or recklessly, including by allowing an object to be dropped from the aircraft in a way that would endanger life or property.

"Micro" UAS

In the proposed rule, the FAA also presents the possibility of including regulations in the final rule for "micro-UAS," or unmanned aircraft weighing no more than 4.4 pounds that are composed of "frangible" materials that yield on impact and present minimal safety

hazards. The micro-UAS category would require operators to self-certify their familiarity with the aeronautical knowledge testing areas; would limit operation to: 1,500 feet within the visual line-of-sight of the operator, no more than 400 feet above ground, only in Class G (uncontrolled) airspace and at least 5 miles from an airport; and would allow flight over people not involved in the operation. The agency invites comments on whether to include a micro-UAS category in the final rule.

What's not in the Proposed Rule?

Privacy concerns. Many in the agricultural community worry about the potential use of drones for surveillance activities that violate a property owner's privacy. The FAA states that privacy concerns about unmanned aircraft operations are beyond the scope of this rulemaking and that "state law and other legal protections for individual privacy may provide recourse for a person whose privacy may be affected through another person's use of a UAS."

The agency also notes the recent Presidential Memorandum issued by President Obama, *Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems* (February 15, 2015), which requires the FAA to participate in a multi-stakeholder engagement process led by the National Telecommunications and Information Administration to develop a framework for privacy, accountability, and transparency issues concerning the commercial and private use of UAS in the NAS. The memorandum also requires agencies to "ensure that policies are in place to prohibit the collection, use, retention, or dissemination of data in any manner that would violate the First Amendment or in any manner that would discriminate against persons based upon their ethnicity, race, gender, national origin, religion, sexual orientation, or gender identity, in violation of law."

External loads and towing operations. The FAA declined to propose new regulations for small unmanned aircraft with towing and external load capabilities. Instead, the agency invites comments, with supporting documentation, on whether external load and towing UAS operations should be permitted and whether their use should require airworthiness certification, higher levels of airman certification or additional operational limitations.

What's Next?

The FAA will accept public comments on the proposed small UAS rule until April 24, 2015. Issuing a final rule could take at least another year after the comment period closes. In the interim, FAA encourages operators to visit http://knowbeforeyoufly.org/ to understand current regulations for the use of small UAS, which remain in place until the FAA issues its final rule.

The proposed small UAS rule is available in the Federal Register online at http://www.gpo.gov/fdsys/pkg/FR-2015-02-23/pdf/2015-03544.pdf. To submit comments for the rule, Docket No. FAA–2015–0150, visit www.regulations.gov.

GEORGE A. KIMBRELL (*Pro Hac Vice* application pending)
Center for Food Safety
917 SW Oak Street, Suite 300
Portland, OR 97205
Telephone: (971) 271-7372
Facsimile: (971) 271-7374
Email: gkimbrell@centerforfoodsafety.org

AMY R. ATWOOD (*Pro Hac Vice* application pending)
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211-0374
Telephone: (971) 717-6401
Facsimile: (503) 283-5528
Email: atwood@biologicaldiversity.org

Counsel for Plaintiffs

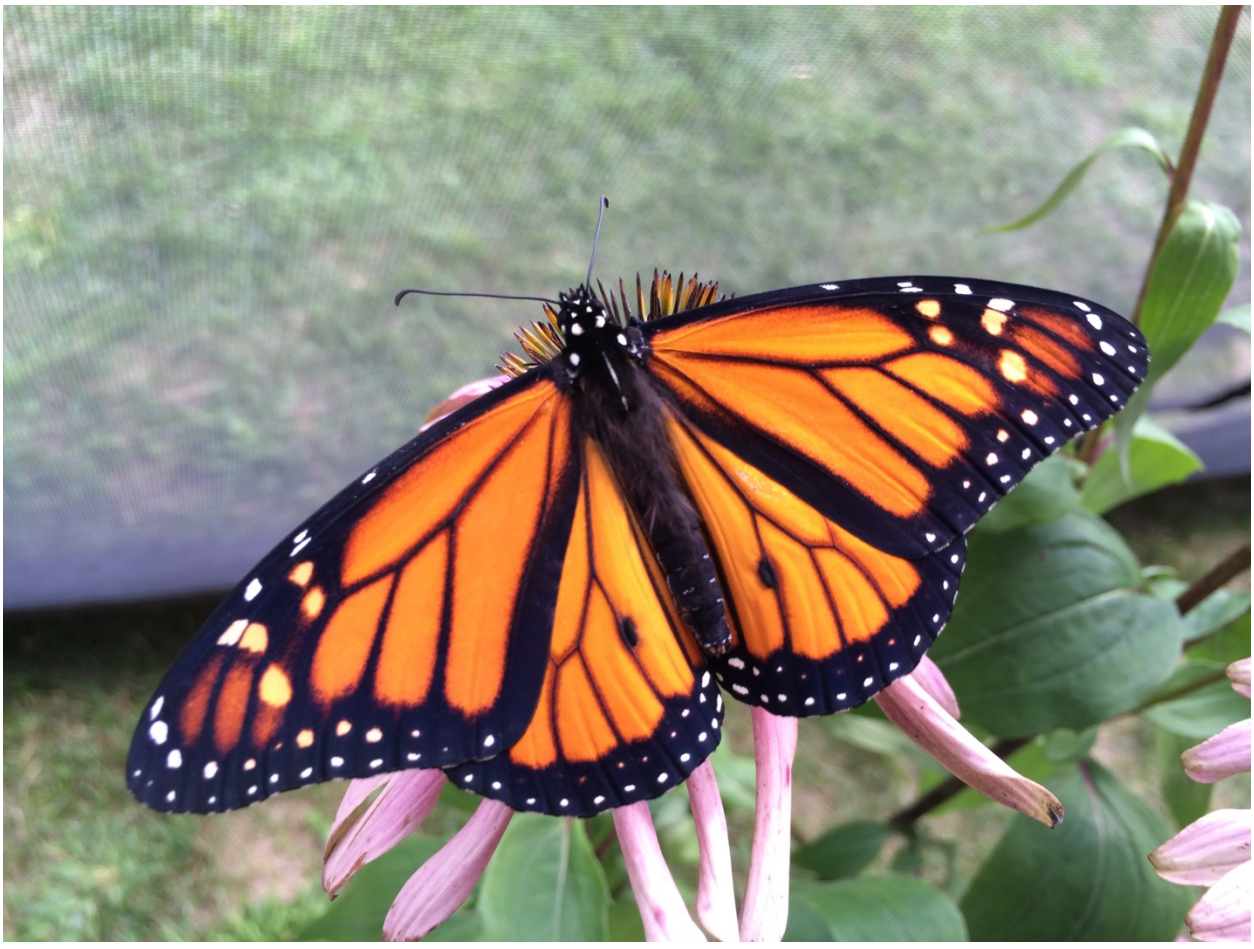
UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Center for Food Safety; and Center for Biological Diversity,	)	Case No.:
Plaintiffs,	)	COMPLAINT
v.	)	
Sally M.R. Jewell, Secretary of the United States Department of the Interior; and United States Fish and Wildlife Service,	)	
Defendants.	)	

1. Plaintiffs Center for Food Safety and Center for Biological Diversity (Plaintiffs or Centers) bring this action under the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (ESA), to challenge the failure of the Secretary of the United States Department of Interior (Secretary) and the U.S. Fish and Wildlife Service (FWS) to

comply with the nondiscretionary requirements of the ESA. Defendants have failed to take required action on Plaintiffs' petition to protect the monarch butterfly (*Danaus plexippus plexippus*) as a threatened species under the ESA. 16 U.S.C. § 1533(b)(3)(A) and (B). Plaintiffs therefore request this Court to order Defendants to comply by a date certain with the ESA's mandatory, nondiscretionary deadline to make a listing determination on the Centers' citizen petition to list the monarch butterfly as a threatened species under the ESA. *Id*. Compliance with this mandatory deadline is necessary to ensure the continued survival and recovery of the monarch butterfly.

2. The monarch, pictured below, is an iconic orange and black butterfly that is one of the most familiar butterflies in North America.



3. Once common, monarch numbers have declined dramatically since surveys began in 1994. Scientists survey the area of overwintering habitat in Mexico to assess monarch population trends over time. While monarch numbers have ticked slightly

upward during the past two years, the four lowest population counts over the past twenty-two years have occurred during the last decade. The butterfly faces many ongoing threats including: habitat loss and decline of the monarchs' host plant, common milkweed, in the butterfly's Midwest breeding grounds due to sharply increased use of herbicides on crops that are genetically engineered to be herbicide-resistant; habitat loss due to development; logging in the monarchs' wintering grounds; disease and predation; and global climate change.

4. In light of these threats and the butterfly's decline, on August 26, 2014, the Centers, joined by the Xerces Society for Invertebrate Conservation and preeminent monarch scientist Lincoln Brower, submitted a legal petition (Petition) to protect the monarch butterfly as a threatened species under the ESA. Drawing from hundreds of scientific articles, the 159-page Petition detailed the status of, and threats to, the monarch butterfly, demonstrating the urgent need for its federal protection under the ESA. *See* Petition to Protect the Monarch Butterfly (*Danaus plexippus plexippus*) under the Endangered Species Act (August 26, 2014), *available at* http://www.centerforfoodsafety.org/files/monarch-esa-petition-final_77427.pdf.

5. On December 31, 2014, Defendants published in the Federal Register a "90-day finding" pursuant to section 4(b)(3)(A) of the ESA, 16 U.S.C. § 1533(b)(3)(A), which determined that listing the monarch butterfly "may be warranted," and initiated a full status review. 79 Fed. Reg. 78,775 (Dec. 31, 2014). Since then, however, the agency has made no further findings regarding the butterfly's protection under the ESA.

6. Specifically, Defendants have not issued the required "12-month finding" under section 4(b)(3)(B) of the ESA, 16 U.S.C. § 1533(b)(3)(B). The 12-month finding was due December 31, 2015.

7. Therefore, Plaintiffs hereby seek declaratory and injunctive relief to enforce the mandatory deadline for Defendants to make a 12-month finding on their Petition to list the monarch butterfly under the ESA, and to compel Defendants to make a finding as to whether listing the butterfly as a threatened species under the ESA is warranted. 16 U.S.C. § 1544(b)(3)(B).

JURISDICTION AND VENUE

8. The Court has jurisdiction over this action pursuant to 15 U.S.C. §§ 1540(c), (g)(1)(C) (action arising under ESA citizen suit provision), 5 U.S.C. § 702 (review of agency action under the Administrative Procedure Act (APA)), and 28 U.S.C. § 1331 (federal question jurisdiction).

9. The Court may grant the relief requested under the ESA, 16 U.S.C. § 1540(g); the APA, 5 U.S.C. §§ 701-706; and 28 U.S.C. §§ 2201 and 2202 (declaratory and injunctive relief).

10. Plaintiffs provided sixty days' notice of their intent to file this suit pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(2)(C), by letter to Defendants dated January 5, 2016. Defendants responded by letter dated February 19, 2016, acknowledging receipt of the notice letter, but did not indicate any effort to remedy their continuing ESA violation. Therefore, an actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201.

11. Plaintiffs and their members are adversely affected or aggrieved by Defendants' violations of the ESA. Defendants' failure to make the statutorily required 12-month finding on the Petition prevents the completion of the listing process and the implementation of substantive measures pursuant to the ESA to protect the monarch butterfly. Without the protections of the ESA, monarch butterflies are more likely to continue to decline toward extinction. Plaintiffs are therefore injured because their scientific, professional, educational, recreational, aesthetic, moral, spiritual, and other interests in monarch butterflies, described below, are threatened by Defendants' failure to act. Defendants' failure to respond to the Petition has also resulted in informational and procedural injury to Plaintiffs, because Plaintiffs have been deprived of a timely opportunity to submit additional information and otherwise participate in the listing process in order to secure protective measures for the species. These are actual, concrete injuries to Plaintiffs, caused by Defendants' failure to comply with the ESA and its implementing regulations. The relief requested will fully redress those injuries.

12. The federal government has waived sovereign immunity in this action

pursuant to 16 U.S.C. § 1540(g) and 5 U.S.C. § 702.

13. Venue is proper in the United States District Court for the District of Arizona pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e), because one of the Plaintiffs resides in that district.

PARTIES

14. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (Center) is a nonprofit organization incorporated in California and headquartered in Tucson, Arizona, with field offices throughout the United States and Mexico, including Alaska; Arizona; California; Florida; Hawaii; Idaho; Minnesota; Nevada; New Mexico; New York, Oregon; Washington; Washington, D.C.; and La Paz, Baja California Sur, Mexico. The Center works through science, law, and creative media to secure a future for all species, great or small, hovering on the brink of extinction. The Center has more than 50,000 members. The Center and its members are concerned with the conservation of imperiled species, including the monarch butterfly, and with the effective implementation of the ESA.

15. Plaintiff CENTER FOR FOOD SAFETY (CFS) is a nonprofit public interest organization whose mission centers on protecting food, farmers, and the environment. To that end, CFS works to curb the adverse impacts of industrial agriculture on public health, the environment, and animal welfare, and instead promotes organic and other forms of sustainable agriculture. CFS and its over 750,000 members are concerned about the impacts of industrial agriculture on biodiversity generally, and on monarch butterflies specifically.

16. Plaintiffs' members and staff include individuals with interests in monarch butterflies and their habitat, ranging from scientific, professional, and educational to recreational, aesthetic, moral, and spiritual. Plaintiffs' members and staff enjoy, on an ongoing basis, the biological, scientific, research, education, economic, conservation, recreational, and aesthetic values of monarch butterflies, their epic migration, and the areas where they are found during it.

17. An integral aspect of Plaintiffs' members' enjoyment of monarch

butterflies is the expectation and knowledge that the species is able to complete its migration and travel in its native habitat during its migration. For this reason, Plaintiffs' enjoyment of monarch butterflies is dependent on the continued existence of healthy, sustainable populations in the wild.

18. Defendants' failure to comply with the ESA's nondiscretionary deadline for issuing a 12-month finding deprives monarch butterflies of statutory protections that are vitally necessary to the species' survival and recovery. Until the monarch is protected under the ESA, Plaintiffs' interests in its conservation and recovery are impaired. Therefore, Plaintiffs' members and staff are injured by Defendants' failure to make a timely determination as to whether to list the monarch, as well as by the ongoing harm to the monarchs and their habitat in the absence of such protections. The injuries described are actual, concrete injuries presently suffered by Plaintiffs and their members, and they will continue to occur unless this Court grants relief. These injuries are directly caused by Defendants' inaction. The relief sought herein—an order compelling a 12-month finding for the monarch—would redress these injuries. Plaintiffs and their members have no adequate remedy at law.

19. Defendant SALLY M.R. JEWELL is the Secretary of the United States Department of Interior and is the federal official in whom the ESA vests final responsibility for making decisions and promulgating regulations required by and in accordance with the ESA, including listing and critical habitat decisions. Secretary Jewell is sued in her official capacity.

20. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is the agency within the Department of the Interior that is charged with implementing the ESA for the monarch butterfly, as well as ensuring prompt compliance with the ESA's mandatory listing deadlines.

STATUTORY FRAMEWORK

21. The ESA is a comprehensive federal statute declaring that endangered and threatened species are of "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3). The purpose of the

ESA is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species." *Id*. § 1531(b).

22. To this end, ESA section 4 requires that the Secretary protect imperiled species by listing them as either "endangered" or "threatened." *Id.* § 1533(a).

23. The ESA's conservation measures apply only after the Secretary lists a species as threatened or endangered. For example, section 7 of the ESA requires all federal agencies to ensure that their actions do not "jeopardize the continued existence" of any listed species or "result in the destruction or adverse modification" of a species' "critical habitat." *Id.* § 1536(a)(2). Section 9 of the ESA prohibits, among other things, "any person" from intentionally taking listed species, or incidentally taking listed species without a lawful authorization from the Secretary. *Id.* §§ 1538(a)(1)(B) and 1539. Other provisions require the Secretary to designate "critical habitat" for listed species, 16 U.S.C. § 1533(a)(3); require the Secretary to "develop and implement" recovery plans for listed species, 16 U.S.C. § 1533(f); authorize the Secretary to acquire land for the protection of listed species, 16 U.S.C. § 1534; and authorize the Secretary to make federal funds available to states to assist in her efforts to preserve and protect threatened and endangered species, 16 U.S.C. § 1535(d).

24. To ensure the timely protection of species at risk of extinction, Congress set forth a detailed process whereby citizens may petition the Secretary to list a species as endangered or threatened. The process includes mandatory, nondiscretionary deadlines that the Secretary must meet so that species in need of protection receive the ESA's substantive protections in a timely fashion. The three required findings, described below, are the 90-day finding, the 12-month finding, and the final listing determination. The Secretary has delegated responsibility for making these findings to FWS.

25. Upon receipt of a listing petition, FWS must "to the maximum extent practicable, within 90-days" make an initial finding as to whether the petition "presents substantial scientific or commercial information indicating that the petitioned action may be warranted." *Id.* § 1533(b)(3)(A). If FWS finds that the petition does not present

substantial information indicating that listing may be warranted, the petition is rejected and the process ends.

26. If, on the other hand, as in this case, FWS determines that a petition does present substantial information indicating that listing may be warranted, then the agency must conduct a full scientific review of the species' status. *Id.* § 1533(b)(3)(A). Upon completion of this status review, and within twelve months from the date that it receives the petition, FWS must make one of three findings: (1) listing is "not warranted"; (2) listing is "warranted"; or (3) listing is "warranted but precluded" by other pending proposals for listing species, provided certain circumstances are present. *Id.* § 1533(b)(3)(B).

27. If FWS's 12-month finding concludes that listing is warranted, the agency must publish notice of the proposed regulation to list the species as endangered or threatened in the Federal Register for public comment. *Id.* § 1533(b)(3)(B)(ii). Within one year of publication of the proposed regulation, the ESA requires FWS to render its final determination on the proposal. *Id.* § 1533(b)(6)(A). At such time, FWS must either list the species, withdraw the proposed listing rule, or, if there is substantial disagreement about scientific data, delay a final listing determination for up to six months in order to solicit more scientific information. *Id.* §§ 1533(b)(6)(A)(i) and 1533(b)(6)(B)(i).

28. It is critical that Defendants follow scrupulously the ESA's listing procedures and deadlines if species are to be protected in a timely manner, because the ESA does not protect a species facing extinction until it is formally listed as endangered or threatened.

29. Defendants have regularly ignored statutory procedures and have missed statutory listing deadlines, leading to prior litigation to correct these deficiencies.

30. On July 12, 2011, Plaintiff Center for Biological Diversity and Defendants entered into a comprehensive stipulated settlement agreement that defines Defendants' responsibilities regarding future ESA statutory deadline litigation between these parties. This complaint is a "deadline suit" as defined in the parties' settlement.

31. Under the settlement, Plaintiff Center for Biological Diversity may file

deadline suits addressing up to ten species, and to obtain remedies from up to three deadline suits, in each fiscal year from 2012 through 2016. If the Center for Biological Diversity files suits addressing more than ten species, or obtains remedies from more than three suits in one of these fiscal years, negotiated deadlines that must be met by Defendants under the agreement may be pushed back to 2016. Under the settlement, a "remedy" means a stipulated settlement agreement or judicially enforceable order requiring Defendants to make any finding, listing determination, or critical habitat determination for a species before April 1, 2017.

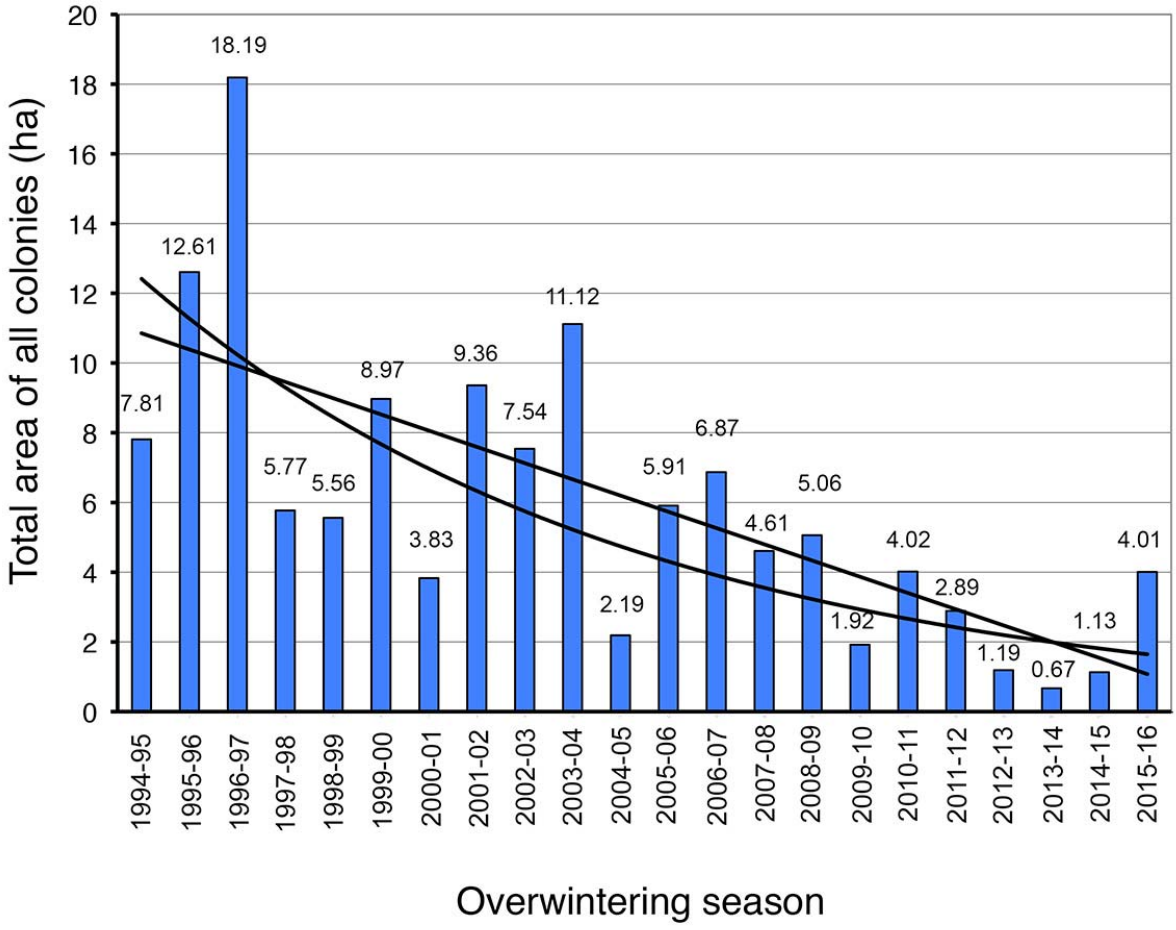
32. As of the date of this filing, during fiscal year 2016, Plaintiff Center for Biological Diversity has not yet filed a "deadline suit," within the meaning of the parties' settlement agreement.

FACTUAL BACKGROUND

33. The monarch is a large orange and black butterfly that was once one of the most familiar butterflies in North America. During summer monarchs can be found throughout the United States and southern Canada in most places where milkweeds (*Asclepias spp*.), its host plants, are available. For millennia, monarchs have undertaken an annual, spectacular multi-generational migration of thousands of miles to and from overwintering and breeding areas. Most monarchs east of the Rocky Mountains migrate from southern Canada and the northern United States to the mountains of interior Mexico to overwinter. Most monarchs west of the Continental Divide migrate to coastal California.

34. Monarchs east and west of the Rocky Mountains (Rockies) now face significant threats to their survival and recovery in both their summer and winter ranges, and, as illustrated in the graph below, their numbers have declined precipitously in recent years. The North American monarch population west of the Rockies has declined by thirty-nine percent from its long-term average. The eastern population shows a statistically significant decline of nine percent per year over the last twenty-two years, and that even with the minor uptick in the past two years, which is attributable to weather, that the population has declined seventy-eight percent from the population highs

of the mid-1990s. The four lowest population counts over the past twenty-two years have occurred in this decade. As with other insects, population trends are far more important than year-to-year fluctuations. For instance, experts had predicted a monarch rebound this year because of near-perfect climactic conditions—conditions that are unlikely to be common in the future. As the Petition details, the significant threats facing the monarch are high in magnitude and ongoing.



*Graph credited to Ernest Williams

35. Monarch habitat has been drastically reduced and degraded throughout the butterfly's summer and winter ranges and threats are ongoing. Monarch habitat is threatened by, among other things, intensive herbicide use associated with genetically engineered, herbicide-resistant crop systems, as well as by development, logging, and climate change.

36. A primary threat to the monarch is the drastic loss of milkweed caused by intensive use of glyphosate, known by the commercial name Roundup, in conjunction with widespread planting of genetically-engineered crops. Glyphosate is uniquely effective at killing milkweeds, the only plants monarch larvae can eat. In the monarchs' major Midwest breeding range, common milkweed has been nearly eradicated from cropland as a result of a massive increase in glyphosate use in conjunction with the nearly ubiquitous planting of glyphosate-resistant, "Roundup Ready" corn and soybeans. Glyphosate use on "Roundup Ready" cotton and alfalfa and in orchards has also destroyed milkweed in California, with a devastating impact on the monarch population west of the Rockies as well. Glyphosate use with genetically engineered crops is currently the greatest threat to the resiliency, redundancy, and prevalence of monarch butterflies in North America.

37. Monarchs are also threatened by habitat loss from residential, industrial, commercial, and other development. From 1982 to 2010, the developed acreage in the continental United States increased by roughly fifty-eight percent. Development causes direct loss of monarch butterfly habitat. It threatens monarch overwintering sites in coastal California and breeding, nectaring, and roosting sites throughout the country. For example, trees required for winter roosts are uprooted to make way for housing and other urban and suburban infrastructure. Areas with milkweed are converted to lawns, covered with concrete and asphalt, and otherwise made unsuitable for breeding and nectaring. Development also contributes to increased pesticide use which harms monarchs.

38. In addition to the disappearance of milkweed due to increased herbicide use, such as glyphosate, that is associated with genetically engineered crops, direct exposure to other pesticides threatens monarchs as well. Indeed, pesticides are widely used in modern agriculture, on rangelands, woodlands and other natural areas, waterways, golf courses, residential lawns and gardens, sports fields, roadsides, and on street trees.

39. Insecticides are of particular concern as they are neurotoxic chemicals that are designed to kill insects. Because many insecticides are specifically designed to

control lepidopteran crop pests, they are especially toxic to many butterflies, which are in the Order *Lepidoptera*. Neonicotinoids are a newer class of systemic insecticide that are absorbed by and move within plant tissues, acting as a neurotoxin to insects. Neonicotinoids are lethal to insects at very low doses and cause serious sub-lethal impacts at even lower exposures. Recent research has shown that monarch larvae are harmed by neonicotinoids found in milkweeds in agricultural areas, and in horticulture. Neonicotinoids are applied before planting as seed coatings to many crops such as corn and soybeans, are used in agriculture and landscaping as soil drenches and trunk injections, spread as granules in pastures and turf, added to irrigation water, and sprayed on leaves of crops and ornamentals. Neonicotinoids are now one of the most widely used classes of agricultural chemicals in North America both in industrial agriculture and residential areas, and can persist for long periods of time in plants and soil.

40. There are no existing regulatory mechanisms to adequately protect or restore monarch butterflies. While voluntary measures exist, they are not regulatory, nor are they sufficient to ensure the survival or bring about the recovery of monarchs to viable levels.

CLAIM FOR RELIEF

Violation of Endangered Species Act, 16 U.S.C. § 1533(b)(3)(B)
Failure to make a 12-Month Listing Determination on the Monarch Butterfly Petition

41. Plaintiffs re-allege and incorporate by reference all the allegations set forth in this Complaint.

42. The ESA expressly mandates that Defendants make the 12-month finding within twelve months of the date of receipt of a petition to list a species as endangered or threatened under the ESA. Defendants have violated that express statutory command.

43. Plaintiffs and their members are adversely affected by FWS's continued failure to issue the 12-month finding, violating Congress's mandate in the ESA that FWS issue that decision by an express deadline of 12-months.

44. The APA states that a reviewing court "shall" interpret statutes and "compel agency action unlawfully withheld or unreasonably delayed." *Id.* § 706(1).

45. Defendants' failure to make a 12-month finding on the Petition to list the Monarch butterfly as a threatened species is a violation of the ESA and its implementing regulations, 16 U.S.C. § 1533(b)(3)(B), and therefore also constitutes agency action that has been "unlawfully withheld or unreasonably delayed," within the meaning of the APA. 5 U.S.C. § 706(1).

REQUEST FOR RELIEF

Plaintiffs respectfully request that the Court enter Judgment for Plaintiffs providing the following relief:

A. Declare that Defendants violated the ESA and/or the APA by failing to issue a timely 12-month finding on the Petition to list the monarch butterfly under the ESA;

B. Order Defendants to issue, by a reasonable date certain, the 12-month finding on the Petition to list the monarch butterfly under the ESA, 16 U.S.C. § 1533(b)(3);

C. Grant Plaintiffs their attorneys' fees and costs in this action as provided by the ESA, 16 U.S.C. § 1540(g)(4), or the Equal Access to Justice Act, 28 U.S.C. § 2412; and

D. Provide such other relief as the Court deems just and proper.

Dated this 10th day of March, 2016

Respectfully submitted,

/s/ George A. Kimbrell

GEORGE A. KIMBRELL (*Pro Hac Vice* application pending)
Center for Food Safety
917 SW Oak Street, Suite 300
Portland, OR 97205
Telephone: (971) 271-7372
Facsimile: (971) 271-7374
Email: gkimbrell@centerforfoodsafety.org

/s/ Amy R. Atwood

AMY R. ATWOOD (*Pro Hac Vice* application pending)
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211-0374
Telephone: (971) 717-6401
Facsimile: (503) 283-5528
Email: atwood@biologicaldiversity.org

Counsel for Plaintiffs

Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment

MEMORANDUM FOR THE SECRETARY OF DEFENSE
THE SECRETARY OF THE INTERIOR
THE SECRETARY OF AGRICULTURE
THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY
THE ADMINISTRATOR OF THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

November 03, 2015

We all have a moral obligation to the next generation to leave America's natural resources in better condition than when we inherited them. It is this same obligation that contributes to the strength of our economy and quality of life today. American ingenuity has provided the tools that we need to avoid damage to the most special places in our Nation and to find new ways to restore areas that have been degraded.

Federal agencies implement statutes and regulations that seek simultaneously to advance our economic development, infrastructure, and national security goals along with environmental goals. As efforts across the country have demonstrated, it is possible to achieve strong environmental outcomes while encouraging development and providing services to the American people. This occurs through policies that direct the planning necessary to address harmful impacts on natural resources by avoiding and minimizing impacts, then compensating for impacts that do occur. Moreover, when opportunities to offset foreseeable harmful impacts to natural resources are available in advance, agencies and project proponents have more options to achieve positive environmental outcomes and potentially reduce permitting timelines.

Federal agencies can, however, face barriers that hinder their ability to use Federal resources for restoration in advance of regulatory approval of development and other activities (e.g., it may not be possible to fund restoration before the exact location and scope of a project have been approved; or there may be limitations in designing large-scale management plans when future development is uncertain). This memorandum will encourage private investment in restoration and public-private partnerships, and help foster opportunities for businesses or non-profit organizations with relevant expertise to successfully achieve restoration and conservation objectives.

One way to increase private investment in natural resource restoration is to ensure that Federal policies are clear, work similarly across agencies, and are implemented consistently within agencies. By encouraging agencies to share and adopt a common set of their best practices to mitigate for harmful impacts to natural resources, the Federal Government can create a regulatory environment that allows us to build the economy while protecting healthy ecosystems that benefit this and future generations. Similarly, in non-regulatory circumstances, private investment can play an expanded role in achieving public natural resource restoration goals. For example, performance contracts and other Pay for Success

approaches offer innovative ways to finance the procurement of measurable environmental benefits that meet high government standards by paying only for demonstrated outcomes.

Therefore, by the authority vested in me as President by the Constitution and the laws of the United States of America, and to protect the health of our economy and environment, I hereby direct the following:

Section 1. Policy. It shall be the policy of the Departments of Defense, the Interior, and Agriculture; the Environmental Protection Agency; and the National Oceanic and Atmospheric Administration; and all bureaus or agencies within them (agencies); to avoid and then minimize harmful effects to land, water, wildlife, and other ecological resources (natural resources) caused by land- or water-disturbing activities, and to ensure that any remaining harmful effects are effectively addressed, consistent with existing mission and legal authorities. Agencies shall each adopt a clear and consistent approach for avoidance and minimization of, and compensatory mitigation for, the impacts of their activities and the projects they approve. That approach should also recognize that existing legal authorities contain additional protections for some resources that are of such irreplaceable character that minimization and compensation measures, while potentially practicable, may not be adequate or appropriate, and therefore agencies should design policies to promote avoidance of impacts to these resources.

Large-scale plans and analysis should inform the identification of areas where development may be most appropriate, where high natural resource values result in the best locations for protection and restoration, or where natural resource values are irreplaceable. Furthermore, because doing so lowers long-term risks to our environment and reduces timelines of development and other projects, agency policies should seek to encourage advance compensation, including mitigation bank-based approaches, in order to provide resource gains before harmful impacts occur. The design and implementation of those policies should be crafted to result in predictability sufficient to provide incentives for the private and non-governmental investments often needed to produce successful advance compensation. Wherever possible, policies should operate similarly across agencies and be implemented consistently within them.

To the extent allowed by an agency's authorities, agencies are encouraged to pay particular attention to opportunities to promote investment by the non-profit and private sectors in restoration or enhancement of natural resources to deliver measurable environmental outcomes related to an established natural resource goal, including, if appropriate, as part of a restoration plan for natural resource damages or for authorized investments made on public lands.

Sec. 2. Definitions. For the purposes of this memorandum:

(a) "Agencies" refers to the Department of Defense, Department of the Interior, Department of Agriculture, Environmental Protection Agency, and National Oceanic and Atmospheric Administration, and any of their respective bureaus or agencies.

(b) "Advance compensation" means a form of compensatory mitigation for which measurable environmental benefits (defined by performance standards) are achieved before a given project's harmful impacts to natural resources occur.

(c) "Durability" refers to a state in which the measurable environmental benefits of mitigation will be sustained, at minimum, for as long as the associated harmful impacts of the authorized activity continue. The "durability" of a mitigation measure is influenced by: (1) the level of protection or type of designation provided; and (2) financial and long-term management commitments.

(d) "Irreplaceable natural resources" refers to resources recognized through existing legal authorities as requiring particular protection from impacts and that because of their high value or function and unique character, cannot be restored or replaced.

(e) "Large-scale plan" means any landscape- or watershed-scale planning document that addresses natural resource conditions and trends in an appropriate planning area, conservation objectives for those natural resources, or multiple stakeholder interests and land uses, or that identifies priority sites for resource restoration and protection, including irreplaceable natural resources.

(f) "Mitigation" means avoiding, minimizing, rectifying, reducing over time, and compensating for impacts on natural resources. As a practical matter, all of these actions are captured in the terms avoidance, minimization, and compensation. These three actions are generally applied sequentially, and therefore compensatory measures should normally not be considered until after all appropriate and practicable avoidance and minimization measures have been considered.

Sec. 3. Establishing Federal Principles for Mitigation. To the extent permitted by each agency's legal authorities, in addition to any principles that are specific to the mission or authorities of individual agencies, the following principles shall be applied consistently across agencies to the extent appropriate and practicable.

(a) Agencies should take advantage of available Federal, State, tribal, local, or non-governmental large-scale plans and analysis to assist in identifying how proposed projects potentially impact natural resources and to guide better decision-making for mitigation, including avoidance of irreplaceable natural resources. 4

(b) Agencies' mitigation policies should establish a net benefit goal or, at a minimum, a no net loss goal for natural resources the agency manages that are important, scarce, or sensitive, or wherever doing so is consistent with agency mission and established natural resource objectives. When a resource's value is determined to be irreplaceable, the preferred means of achieving either of these goals is through avoidance, consistent with applicable legal authorities. Agencies should explicitly consider the extent to which the beneficial environmental outcomes that will be achieved are demonstrably new and would not have occurred in the absence of mitigation (i.e. additionality) when determining whether those measures adequately address impacts to natural resources.

(c) With respect to projects and decisions other than in natural resource damage cases, agencies should give preference to advance compensation mechanisms that are likely to achieve clearly defined environmental performance standards prior to the harmful impacts of a project. Agencies should look for and use, to the extent appropriate and practicable, available advance compensation that has achieved its intended environmental outcomes. Where advance compensation options are not appropriate or not available, agencies should give preference to other compensatory mitigation practices that are likely to succeed in achieving environmental outcomes.

(d) With respect to natural resource damage restoration plans, natural resource trustee agencies should evaluate criteria for whether, where, and when consideration of restoration banking or advance restoration projects would be appropriate in their guidance developed pursuant to section 4(d) of this memorandum. Consideration under established regulations of restoration banking or advance restoration strategies can contribute to the success of restoration goals by delivering early, measurable environmental outcomes.

(e) Agencies should take action to increase public transparency in the implementation of their mitigation policies and guidance. Agencies should set measurable performance standards at the project and program level to assess whether mitigation is effective and should clearly identify the party responsible for all aspects of required mitigation measures. Agencies should develop and use appropriate tools to measure, monitor, and evaluate effectiveness of avoidance, minimization, and compensation policies to better understand and explain to the public how they can be improved over time.

(f) When evaluating proposed mitigation measures, agencies should consider the extent to which those measures will address anticipated harm over the long term. To that end, agencies should address the durability of compensation measures, financial assurances, and the resilience of the measures' benefits to potential future environmental change, as well as ecological relevance to adversely affected resources.

(g) Each agency should ensure consistent implementation of its policies and standards across the Nation and hold all compensatory mitigation mechanisms to equivalent and effective standards when implementing their policies.

(h) To improve the implementation of effective and durable mitigation projects on Federal land, agencies should identify, and make public, locations on Federal land of authorized impacts and their associated mitigation projects, including their type, extent, efficacy of compliance, and success in achieving performance measures. When compensatory actions take place on Federal lands and waters that could be open to future multiple uses, agencies should describe measures taken to ensure that the compensatory actions are durable.

Sec. 4. Federal Action to Strengthen Mitigation Policies and Support Private Investment in Restoration. In support of the policy and principles outlined above, agencies identified below shall take the following specific actions.

(a) Within 180 days of the date of this memorandum, the Department of Agriculture, through the U.S. Forest Service, shall develop and implement additional manual and handbook guidance that addresses the agency's approach to avoidance, minimization, and compensation for impacts to natural resources within the National Forest System. The U.S. Forest Service shall finalize a mitigation regulation within 2 years of the date of this memorandum.

(b) Within 1 year of the date of this memorandum, the Department of the Interior, through the Bureau of Land Management, shall finalize a mitigation policy that will bring consistency to the consideration and application of avoidance, minimization, and compensatory actions or development activities and projects impacting public lands and resources.

(c) Within 1 year of the date of this memorandum, the Department of the Interior, through the U.S. Fish and Wildlife Service, shall finalize a revised mitigation policy that applies to all of the U.S. Fish and Wildlife Service's authorities and trust responsibilities. The U.S. Fish and Wildlife Service shall also finalize an additional policy that applies to compensatory mitigation associated with its responsibilities under the Endangered Species Act of 1973. Further, the U.S. Fish and Wildlife Service shall finalize a policy that provides clarity to and predictability for agencies and State governments, private landowners, tribes, and others that take action to conserve species in advance of potential future listing under the Endangered Species Act. This policy will provide a mechanism to recognize and credit such action as avoidance, minimization, and compensatory mitigation.

(d) Within 1 year of the date of this memorandum, each Federal natural resource trustee agency will develop guidance for its agency's trustee representatives describing the considerations for evaluating whether, where, and when restoration banking or advance restoration projects would be appropriate as components of a restoration plan adopted by trustees. Agencies developing such guidance will coordinate for consistency.

(e) Within 1 year of the date of this memorandum, the Department of the Interior will develop program guidance regarding the use of mitigation projects and measures on lands administered by bureaus or offices of the Department through a land-use authorization, cooperative agreement, or other appropriate mechanism that would authorize a project proponent to conduct actions, or otherwise secure conservation benefits, for the purpose of mitigating impacts elsewhere. 6

Sec. 5. General Provisions. (a) This memorandum complements and is not intended to supersede existing laws and policies.

(b) This memorandum shall be implemented consistent with applicable law, and subject to the availability of appropriations.

(c) This memorandum is intended for the internal guidance of the executive branch and is inapplicable to the litigation or settlement of natural resource damage claims. The provisions of section 3 this memorandum encouraging restoration banking and advance restoration projects also do not apply to the selection or implementation of natural resource restoration plans, except to the extent determined appropriate in Federal trustee guidance developed pursuant to section 4(d) of this memorandum.

(d) The provisions of this memorandum shall not apply to military testing, training, and readiness activities.

(e) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(f) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(g) The Secretary of the Interior is hereby authorized and directed to publish this memorandum in the *Federal Register*.

BARACK OBAMA