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

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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.

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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.

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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.