

1 ANTHONY L. FRANÇOIS (SBN 184100)
Email: TFrancois@pacificlegal.org
2 DAMIEN M. SCHIFF (SBN 235101)
Email: DSchiff@pacificlegal.org
3 JEFFREY W. MCCOY (SBN 317377)
4 Email: JMcCoy@pacificlegal.org
Pacific Legal Foundation
5 930 G Street
6 Sacramento, California 95814
Telephone: (916) 419-7111
7 Facsimile: (916) 419-7747

8 THERESE Y. CANNATA (SBN 88032)
Email: tcannata@cofalaw.com
9 KIMBERLY A ALMAZAN (SBN 288605)
Email: kalmazan@cofalaw.com
10 ZACHARY E. COLBETH (SBN 297419)
Email: zcolbeth@cofalaw.com
11 Cannata, O'Toole, Fickes & Almazan LLP
12 101 Pine Street, Suite 350
13 San Francisco, California 94111
Telephone: (415) 409-8900
14 Facsimile: (415) 409-8904
15 *Attorneys for Defendants,*
Roger J. LaPant, Jr., and J&J Farms

17 UNITED STATES DISTRICT COURT
18 EASTERN DISTRICT OF CALIFORNIA

19
20 UNITED STATES OF AMERICA,)
21 Plaintiff,)
22 v.)
23 ROGER J. LAPANT, JR., *et al.*,)
24 Defendants.)

Case No.: 2:16-cv-01498-KJM-DB
**LAPANT DEFENDANTS' REPLY IN
SUPPORT OF MOTION FOR
JUDGMENT ON THE PLEADINGS**

1 LaPant's motion and accompanying brief establish that this Court lacks subject matter
2 jurisdiction under each of the three statutes cited in the Complaint. 33 U.S.C. §§ 1319(b) and
3 1344(s)(3) provide mutually exclusive grants of jurisdiction that require the government to match
4 the type of claim involved with commencement by, or a request from, the agency responsible for
5 that type of claim. EPA must commence section 1319(b) claims, and the Army must commence
6 section 1344(s)(3) claims. Since the United States has brought a section 1319(b) claim commenced
7 by the Army, jurisdiction is lacking under section 1319(b). *See* LaPant's Memorandum in Support
8 of Motion for Judgment on the Pleadings (LaPant Brief) at 3-7, Dkt. # 59-1 at 9-13.

9 Tellingly, the United States offers no rebuttal to LaPant's arguments on section 1319(b)
10 jurisdiction, and no argument of its own in favor of this ground for jurisdiction. The United States
11 has waived this ground for jurisdiction. *See Watson v. Mukasey*, 589 F. Supp. 2d 43, 48
12 (D.D.C. 2008); *see generally, Harvick v. Am. Home Mortg. Servicing, Inc.*, No. 2:12-cv-03077-
13 MCE-CKD, 2013 WL 3283523, at *3 n.5 (E.D. Cal. June 27, 2013) (citing cases); *Tejeda-Puentes*
14 *v. Cty. of Sacramento*, No. 2:15-cv-00870-KJM-KJN, 2016 WL 1756958, at *2 (E.D. Cal. May 3,
15 2016) (same).

16 EPA's authority over section 1319(b) claims cannot be delegated to the Army, and the
17 1989 Enforcement Memorandum does not even purport to do so. *See* LaPant Brief at 7-19, Dkt.
18 # 59-1 at 13-15. The United States offers no response to LaPant's arguments on these points.

19 LaPant also demonstrated that *Kelcourse*¹, *Hallmark*², and *Reichelt*³ were wrongly decided,
20 nonbinding, and unrelieved-upon by any circuit court. LaPant Brief at 10-13, Dkt. # 59-1 at 16-19.
21 The United States cites these cases⁴ but offers no response to LaPant's demonstration that they are
22 wrongly decided.

23 ///

24 _____
25 ¹ *United States v. Kelcourse*, 721 F. Supp. 1472 (D. Mass. 1989).

26 ² *United States v. Hallmark Constr. Co.*, 14 F. Supp. 2d 1065, 1068 (N.D. Ill. 1998).

27 ³ *Reichelt v. United States Army Corps of Eng'rs*, 969 F. Supp. 519 (N.D. Ind. 1996).

28 ⁴ Oddly, as part of its argument for jurisdiction under 28 U.S.C. § 1345, which these cases do not
address or support.

1 LaPant cited *United States v. United Homes*⁵ for the proposition that suits commenced by
2 the Corps⁶ must satisfy the statutory requirements of section 1344(s)(3) in order to invoke district
3 court jurisdiction. LaPant Brief at 12-13, Dkt. # 59-1 at 18-19. The United States attempts to
4 distinguish *United Homes* on the ground that the case is about whether the government alleged a
5 discharge of dredge or fill material, not which agency commenced the suit. But the United States
6 does not contest the point for which LaPant cites *United Homes*: failure to allege the type of claim
7 described in section 1344(s)(3) is fatal to jurisdiction for an Army-commenced claim.

8 LaPant also demonstrated that under controlling Supreme Court and Ninth Circuit
9 precedent, federal question jurisdiction under 28 U.S.C. § 1331 is not available for suits arising
10 under the Clean Water Act. *Las Vegas v. Clark Cty.*, 755 F.2d 697, 703 (9th Cir. 1984) (citing
11 *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981)); *Middlesex Cty.*
12 *Sewerage Auth.*, 453 U.S. at 11-15 (Clean Water Act's unusually elaborate enforcement provisions
13 compel conclusion that Congress provided precisely the remedies it considered appropriate). *See*
14 LaPant Brief at 5-7, 13, Dkt. # 59-1 at 11-13, 19.

15 The United States attempts to distinguish *Middlesex Cty. Sewerage Auth.* and *Las Vegas*
16 on the purported ground that they are merely about jurisdiction over citizen suits. But LaPant has
17 already demonstrated this is not correct. The United States offers no rebuttal to LaPant's argument
18 that both of these cases apply a generally applicable rule about all litigation to enforce the Clean
19 Water Act, not a narrower rule germane only to citizen suits. Indeed, neither of these cases was
20 filed as a citizen suit, and both plaintiffs argued that their cases were not citizen suits. *See* LaPant
21 Brief at 6-7, Dkt. # 59-1 at 12-13.

22 None of the cases cited by the United States for jurisdiction under section 1331 involve
23 challenges to subject matter jurisdiction, analyze the question, or address the Ninth Circuit's

24 ⁵ *United States v. United Homes, Inc.*, No. 98 C 3242, 1999 WL 117701 (N.D. Ill. Mar. 1, 1999).

25 ⁶ The United States makes various internally inconsistent arguments about to who actually files
26 the complaint in a federal civil action to enforce the Clean Water Act, who the proper plaintiff is,
27 and the scope of the Attorney General's authority to commence and supervise litigation. These
28 "respond" to supposed positions which LaPant does not actually take in the motion. And, none of
these are germane. The motion before the Court is about subject matter jurisdiction, and no aspect
of it turns on the United States having authority to file suit.

1 controlling holding in *Las Vegas* that the district courts do not have jurisdiction under section 1331
2 over Clean Water Act enforcement suits.

3 Finally, LaPant demonstrated that jurisdiction does not lie under 28 U.S.C. § 1345 because
4 33 U.S.C. §§ 1319(b) and 1344(s)(3) clearly “provide otherwise.” The Clean Water Act’s two
5 mutually exclusive jurisdictional provisions clearly provide otherwise than section 1345’s
6 otherwise available grant of jurisdiction over suits filed by the United States. The inconsistency of
7 sections 1319(b) and 1344(s)(3) with the otherwise unconditioned grant of jurisdiction under
8 section 1345 is clear, as required by the Ninth Circuit and the Supreme Court. *United States v.*
9 *Alisal Water Corp.*, 431 F.3d 643, 650 (9th Cir. 2005) (“Any exception to the general rule of
10 section 1345 must be clear.”) (citing *Colorado River v. United States*, 424 U.S. 800, 808-09
11 (1976)). LaPant Brief at 14-16, Dkt. # 59-1 at 20-22.

12 The United States uniformly serves as the plaintiff in federal government Clean Water Act
13 enforcement actions. In that context, Congress’ precise division of enforcement authority between
14 EPA and the Army, coupled with clear and mutually exclusive grants of subject matter jurisdiction,
15 would be rendered meaningless if the government can evade the statute merely by the United States
16 bringing actions on behalf of the agencies. As the United States argues, statutes must be interpreted
17 to give effect to all of their provisions. But it is the United States’ reading of the Clean Water Act
18 that renders its jurisdictional provisions meaningless and superfluous.

19 The United States’ argument that 33 U.S.C. § 1319(b) and 1344(s)(3) merely add authority
20 for the agencies to bring their own suits, without “providing otherwise” than 28 U.S.C. § 1345, is
21 incorrect. Section 1345 provides jurisdiction over suits brought by agencies where a statute
22 authorizes them to bring suit. If the Clean Water Act merely provided this authorization, there
23 might be some merit to the argument. But, the Act also includes the two mutually exclusive grants
24 of subject matter jurisdiction which are tethered to the agency with authority to bring the applicable
25 claim. The Court might have subject matter jurisdiction over agency-filed suits under the
26 applicable provision of section 1345, if the Clean Water Act was silent on jurisdiction. But the
27 additional grants of subject matter jurisdiction in the Clean Water Act would be superfluous if they
28 did not also limit, or “provide otherwise” than, the general grant of jurisdiction over United States

1 filed suits in section 1345. LaPant’s reading is the one that ensures all parts of the statute have
2 meaning and cohere with each other.

3 LaPant does not argue that the United States may never serve as plaintiff in Clean Water
4 Act enforcements, or even that the Act entirely displaces section 1345. LaPant’s actual position is
5 far more reasonable: 33 U.S.C. §§ 1319(b) and 1344(s)(3) provide otherwise than the general grant
6 of jurisdiction in 28 U.S.C. § 1345 to the limited extent of adding a condition: when serving as the
7 plaintiff for a section 1319(b) or section 1344(s)(3) claim, the United States must be acting at the
8 request of the proper agency.

9 Many of the cases the United States cites for jurisdiction under 28 U.S.C. § 1345 are cases
10 where jurisdiction was not contested or analyzed. Others do not involve the proviso of section
11 1345 for acts of Congress that “provide otherwise.” The few that provide any helpful analysis
12 actually support LaPant’s position.

13 For example, *United States v. Rivera Torres*, 656 F. Supp. 251, 255 (D.P.R. 1987),
14 considers suits brought by the United States to enforce the Act to be subject to the jurisdictional
15 provisions of sections 1319(b) and 1344(s) in the same manner as would be suits brought by the
16 agency. And, that court’s analysis indicates that if Puerto Rico had adopted an approved program
17 to implement the dredge and fill permitting program under 33 U.S.C. § 1344(h), the court would
18 not have had subject matter jurisdiction over the United States’ suit. *Id.* at 256.

19 *United States v. Johnson*, 845 F. Supp. 864, 868 (M.D. Fla. 1994), confirms that even
20 where section 1345 would normally apply, “the government must still satisfy jurisdictional
21 conditions to bringing suit” and concluded that section 1345 applied because the relevant cabinet
22 secretary could have brought the claim.

23 And *United States v. S. Fla. Water Mgmt. Dist.*, 28 F.3d 1563, 1569 (11th Cir. 1994),
24 expressly states that the “phrase ‘Except as otherwise provided by Act of Congress,’ at the
25 beginning of the section was inserted to make clear that jurisdiction exists generally in the district
26 courts *in the absence of special provisions conferring it elsewhere.*” *Id.* (emphasis added) (quoting
27 *United States v. S. Fla. Water Management Dist.*, 847 F. Supp. 1567 (S.D. Fla. 1992)).

28 ///

1 These authorities support LaPant’s reading of the relevant statutes and show that the more
2 specific provisions of the Clean Water Act prevail over the general jurisdictional statutes in Title
3 28. LaPant’s motion should be granted.

4 DATED: June 8, 2018.

Respectfully submitted,

5
6 ANTHONY L. FRANÇOIS
7 DAMIEN M. SCHIFF
8 JEFFREY W. MCCOY

9 By /s/ Anthony L. François
10 ANTHONY L. FRANÇOIS

11 Pacific Legal Foundation
12 930 G Street
13 Sacramento, California 95814
14 Telephone: (916) 419-7111
15 Facsimile: (916) 419-7747
16 Email: alf@pacificlegal.org

17 THERESE Y. CANNATA
18 KIMBERLY A ALMAZAN
19 ZACHARY E. COLBETH
20 Cannata, O’Toole, Fickes & Almazan LLP
21 101 Pine Street, Suite 350
22 San Francisco, California 94111
23 Telephone: (415) 409-8900
24 Facsimile: (415) 409-8904
25 Email: tcannata@cofalaw.com

26 *Attorneys for Defendants,*
27 *Roger J. LaPant, Jr., and J&J Farms*
28

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that a copy of the foregoing **LAPANT DEFENDANTS' REPLY IN**
3 **SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS** has been served through
4 the Court's CM/ECF system on all registered counsel this 7th day of June, 2018.

5
6 DATED: June 7, 2018.

7 Respectfully submitted,

8 ANTHONY L. FRANÇOIS
9 DAMIEN M. SCHIFF
10 JEFFREY W. MCCOY

11 By /s/ Anthony L. François
12 ANTHONY L. FRANÇOIS

13 Pacific Legal Foundation
14 930 G Street
15 Sacramento, California 95814
16 Telephone: (916) 419-7111
17 Facsimile: (916) 419-7747
18 Email: alf@pacificallegal.org

19 THERESE Y. CANNATA
20 KIMBERLY A ALMAZAN
21 ZACHARY E. COLBETH
22 Cannata, O'Toole, Fickes & Almazan LLP
23 101 Pine Street, Suite 350
24 San Francisco, California 94111
25 Telephone: (415) 409-8900
26 Facsimile: (415) 409-8904
27 Email: tcannata@cofalaw.com

28 *Attorneys for Defendants,*
Roger J. LaPant, Jr., and J&J Farms