No. 13-3067

IN THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

HAWKES CO., INC.; LPF PROPERTIES, LLC;
and PIERCE INVESTMENT COMPANY,
Plaintiffs-Appellants,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
Defendant-Appellee.

On Appeal from the U.S. District Court
for the District of Minnesota,
No. 13-cv-00107-ADM (Hon. Ann D. Montgomery)

PETITION FOR PANEL REHEARING AND REHEARING EN BANC BY DEFENDANT-APPELLEE UNITED STATES ARMY CORPS OF ENGINEERS

JOHN C. CRUDEN
Assistant Attorney General

DANIEL R. DERTKE
JENNIFER SCHELLER NEUMANN
ROBERT J. LUNDMAN
U.S. Department of Justice
Environment & Natural Resources Div.
P.O. Box 7415
Washington, DC 20044
Phone: (202) 514-2496
Fax: (202) 353-1873
robert.lundman@usdoj.gov

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STATEMENT

A panel of this Court reversed the district court's dismissal of this case and held that a jurisdictional determination issued by the United States Army Corps of Engineers (the Corps) stating that the property at issue contains waters of the United States under the Clean Water Act (CWA) is a final agency action under the Administrative Procedure Act (APA), 5 U.S.C. § 704. In so holding, Op. at 2, the panel acknowledged that it *created* a conflict among the circuits; that alone demonstrates that this case presents a question of exceptional importance and should be reheard by the panel or this Court sitting en banc. Fed. R. App. P. 35(b)(1) & 40. The panel concluded that the jurisdictional determination is a final agency action because it is an action "by which rights or obligations have been determined" or one from which "legal consequences will flow," as it must be in order to be final under *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The panel's decision on that is wrong because, as every other court of appeals to address the question has held, a jurisdictional determination neither determines obligations or rights nor has legal consequences. Instead, it is the CWA itself that imposes any obligations. *Belle Co. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383 (5th Cir. 2014), *cert. denied sub nom.*, *Kent Recycling Servs. LLC v. U.S. Army Corps of Eng'rs*, 135 S. Ct. 1548 (2015) (No. 14-493), *reh'g petition filed* (Apr. 16, 2015), *reh'g response requested* (May 18, 2015); *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586 (9th Cir. 2008), *cert denied*, 557 U.S. 919 (2009). This case therefore meets the criteria for panel rehearing and rehearing en

banc, Fed. R. App. P. 35 & 40, and the Court should grant this petition.

BACKGROUND

A. Statutory and Regulatory Background

The CWA prohibits the "discharge of any pollutant by any person" except as specifically allowed. 33 U.S.C. § 1311(a). "[P]ollutant[s]" include "dredged spoil," "rock," and "sand," and "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(6), (12).

The CWA defines the term "navigable waters" as all "waters of the United States, including the territorial seas." *Id.* § 1362(7). The regulatory definition of the term "waters of the United States" encompasses traditional navigable waters such as tidal waters and waters susceptible to use in interstate commerce, "tributaries" to traditional navigable waters, and wetlands that are "adjacent" to traditional navigable waters or their tributaries. 33 C.F.R. § 328.3(a)(1), (5), (7), (c); *see also* Clean Water Rule: Definition of "Waters of the United States," Final Rule Prepublication Version, *available at* http://www2.epa.gov/cleanwaterrule/prepublication-version-final-clean-water-rule (signed May 27, 2015, forthcoming in Federal Register).

The CWA permitting regime implicated in this case is set forth in Section 404(a) of the CWA, 33 U.S.C. § 1344(a). It authorizes the Corps to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." *Id.* § 1344(a). The Corps has promulgated regulations governing the permit application process under Section 404. 33 C.F.R. pts. 323, 325.

The Corps' regulations provide that the Corps may offer its opinion, when requested, on whether a piece of property contains "waters of the United States" within the Corps' regulatory jurisdiction. *Id.* §§ 320.1(a)(6), 325.9. Such an opinion is known as a "jurisdictional determination," which the regulations define 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 [the River and Harbors Act]." 33 C.F.R. § 331.2. Jurisdictional determinations are created solely by the Corps' regulations; they are not mentioned in the statute.

The Corps' regulations provide that the agency may issue two kinds of jurisdictional determinations: preliminary jurisdictional determinations (not at issue here) and approved jurisdictional determinations. An approved 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." *Id.* An affected party may administratively appeal an approved jurisdictional determination. *Id.*; *see also id.* pt. 331 (detailing administrative appeal process). Neither kind of jurisdictional determination determines "that a particular activity requires a [Corps] permit." *Id.* § 331.2.

An affected party may also administratively appeal a final permit decision proffering a permit with conditions or denying a permit. *Id.* §§ 331.1, 331.2. In that appeal, the party may challenge both the terms of a permit and CWA jurisdiction, "whether or not a previous approved JD was appealed." *Id.* § 331.5(a)(2).

If there is a discharge of dredged or fill material without a required permit under Section 404, the Corps or the Environmental Protection Agency (EPA) may take a variety of actions in response. The Corps may issue a "cease-and-desist" letter or otherwise notify the party of the violation, the EPA may issue an administrative compliance order, the EPA may issue an administrative penalty order, or the United States may bring a civil enforcement action or criminal action in district court. 33 U.S.C. § 1319(a)-(c), (g); 33 C.F.R. §§ 326.3(c), 326.5.

In addition to the CWA, the APA is relevant here. It 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.

B. Facts

As set forth in the panel's opinion and as alleged in the complaint, plaintiffs (collectively, Hawkes) plan to mine a 530-acre parcel for peat. Hawkes applied for a Section 404 permit in December 2010 for the proposed peat mine. After a preliminary jurisdictional determination, meetings, and visits to the property, the Corps provided Hawkes with an approved jurisdictional determination in February 2012, which concluded that the property contains waters of the United States. JA 9-12 (¶¶ 42-50). Hawkes filed an administrative appeal. The Corps' division office remanded the jurisdictional determination to the Corps' district office for reconsideration, based on a finding that the administrative record lacked sufficient documentation and analysis to support a finding of regulatory jurisdiction. JA 12-13

(¶¶ 51-53); JA 25-37. After the remand, the Corps' district office issued a revised approved jurisdictional determination in December 2012, which again concluded that the property contains waters of the United States. JA 13 (¶¶ 54-55); JA 42, 58.

C. District Court Proceedings and the Appeal

Hawkes's amended complaint alleged that the Corps' jurisdictional determination is arbitrary and capricious, contrary to law, and unsupported by substantial evidence, in violation of the APA, 5 U.S.C. § 706(2). JA 15 (¶ 62). The Corps moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted, arguing that there was no final agency action subject to judicial review under the APA and that Hawkes's challenge to the jurisdictional determination was not ripe. JA 38, 59.

The district court granted the motion to dismiss for failure to state a claim. JA 59-75. It held that the Corps' jurisdictional determination was not final agency action because the jurisdictional determination "does not determine [Hawkes's] rights or obligations," "does not order [Hawkes] to take any kind of action," and does not "affect the legal standards used by agencies and courts in determining where the CWA applies." JA 68-69. Hawkes appealed.

The panel reversed and remanded. The panel concluded that Hawkes faces "obligations or changes in [its] rights as a result of [the] jurisdictional determination." Op. at 8. The panel stated that a jurisdictional determination "alters and adversely affects [Hawkes's] right to use [its] property," but did not explain how the

jurisdictional determination—as opposed to the statute itself—does so. Op. at 10. Relying heavily on *Sackett v. EPA*, 132 S. Ct. 1367, 1370 (2012), the panel concluded that "the impracticality of otherwise obtaining review, combined with the uncertain reach" of the CWA and its "draconian" penalties, "compels the conclusion" that a jurisdictional determination is final agency action. Op. at 12.

Judge Kelly concurred, noting that she found finality to be a "close question." Op. at 13. She doubted the relevance of the panel's discussion of the alleged time, cost, and futility of a permit application. She also noted several differences between a jurisdictional determination and the compliance order at issue in *Sackett*. Judge Kelly concluded, however, that the jurisdictional determination was final agency action, even though she described the agency action here as the start of the process rather than its conclusion—that is, as "a threshold determination that puts the administrative process in motion." Op. at 14-15.

ARGUMENT

The panel acknowledged that it created a circuit conflict when it held that a jurisdictional determination is final under the second required prong of the test for finality set forth in *Bennett v. Spear*. It recognized that two other circuits, the Fifth Circuit in *Belle* and the Ninth Circuit in *Fairbanks*, have held that a jurisdictional determination is not final under *Bennett*'s second prong—that is, the jurisdictional determination is not final because it neither determines rights or obligations nor is a decision from which legal consequences will flow. *See Belle*, 761 F.3d at 390-94;

Fairbanks, 543 F.3d at 593-97.[1] Rehearing is necessary to correct the panel's erroneous creation of a circuit split.

The jurisdictional determination is not final agency action because it does not determine legal rights or obligations and it does not have any legal consequences. The jurisdictional determination does not impose any obligations, nor does it direct the landowner to take or refrain from taking any action. If a particular tract of land contains waters of the United States, the CWA obligates the landowner to obtain a permit before discharging pollutants into those waters, whether or not the landowner has requested or received a jurisdictional determination from the Corps. 33 U.S.C. § 1311(a); *see* 33 C.F.R. § 331.2 (jurisdictional determinations "do not include determinations that a particular activity requires a [Corps] permit"). Hawkes's property has always been subject to the CWA's restrictions; the jurisdictional determination did not change that. As the Ninth Circuit explained in *Fairbanks*, the landowner "has an obligation to comply with the CWA" and its "legal obligations

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[1] In addition to the Fifth and Ninth Circuits, every other court to have reached this issue has concluded that a jurisdictional determination that there are waters of the United States on a property is not a final agency action. *Comm'rs of Public Works v. United States*, 30 F.3d 129, 1994 WL 399118 (4th Cir. 1994) (unpublished); *St. Andrews Park, Inc. v. U.S. Dep't of the Army Corps of Eng'rs*, 314 F. Supp. 2d 1238, 1244-45 (S.D. Fla. 2004) ("the legal rights and obligations of the parties [are] precisely the same the day after [a] jurisdictional determination was issued as they were the day before"); *Acquest Wehrle LLC v. United States*, 567 F. Supp. 2d 402, 409-11 (W.D.N.Y. 2008); *Child v. United States*, 851 F. Supp. 1527, 1535 (D. Utah 1994); *Indus. Highway Corp. v. Danielson*, 796 F. Supp. 121, 128 (D.N.J. 1992), *aff'd*, 995 F.2d 217 (3d Cir. 1993) (table); *Hampton Venture No. One v. United States*, 768 F. Supp. 174, 175 (E.D. Va. 1991); *Lotz Realty Co. v. United States*, 757 F. Supp. 692, 695-98 (E.D. Va. 1990).

arise directly and solely from the CWA, and not from the Corps' issuance of an approved jurisdictional determination." 543 F.3d at 594; *accord Belle*, 761 F.3d at 391-94.

The jurisdictional determination also does not alter the manner in which the Corps or EPA may enforce the CWA, or the penalties to which a violator of the CWA is potentially subject. Whether or not the Corps has issued a jurisdictional determination, if the Corps or the EPA believes that a landowner has violated the CWA by discharging pollutants without a permit, the EPA may issue an administrative compliance order (of the sort at issue in *Sackett*), or it may institute an administrative penalty proceeding and impose a penalty. 33 U.S.C. § 1319(a), (g). Both those types of administrative action afford the landowner the opportunity to obtain judicial review of EPA's underlying conclusion that the land contains waters of the United States. *See id.* § 1319(g)(8); *Sackett*, 132 S. Ct. at 1371-72. Alternatively, the United States may file an enforcement action in court. In that suit, a previously issued jurisdictional determination would not alter the United States' burden of establishing that the land contains waters of the United States by a preponderance of the evidence. 33 U.S.C. § 1319(b); *see also Fairbanks*, 543 F.3d at 595.

In any of those proceedings, moreover, the only potential liability the landowner would face would be liability for violating the CWA. Because the jurisdictional determination does not contain any directive that could be violated, the CWA does not provide for additional penalties for violating the CWA after receiving a

jurisdictional determination. *See* 33 U.S.C. § 1319(d). Before and after a jurisdictional determination is issued, the landowner therefore faces the same legal regime, the same potential obligations, and the same legal exposure. As the Ninth Circuit explained, "[i]n any later enforcement action, [the landowner] would face liability only for noncompliance with the CWA's underlying statutory commands, not for disagreement with the Corps' jurisdictional determination." *Fairbanks*, 543 F.3d at 594-95; *see also Belle*, 761 F.3d at 391-94.

The panel does not offer a meaningful response to the vital point that it is the statute that imposes the relevant obligations regardless of whether the Corps has or has not issued a jurisdictional determination. The panel asserts incorrectly that the jurisdictional determination requires Hawkes to obtain a permit. Op. at 8. But it is the CWA—not the jurisdictional determination—that requires a permit prior to the discharge of dredged or fill material in a jurisdictional wetland.

Even if one assumes (incorrectly) that the jurisdictional determination triggered the requirement to apply for a permit, the burden of participating in an administrative process cannot transform the jurisdictional determination into final agency action within the meaning of the APA. It is well-established that an agency order is not final if the effect on the regulated party depends on the resolution of further administrative proceedings—that is, an action is not final if it is one that "does not itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action." *Am. Airlines v. Herman*, 176 F.3d 283, 288 (5th Cir. 1999)

(quoting *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 130 (1939)); *see also, e.g.*, *FTC v. Standard Oil Co.*, 449 U.S. 232, 239-43 (1980); *Aluminum Co. v. United States*, 790 F.2d 938, 941 (D.C. Cir. 1986).

As a practical matter, a landowner who receives a jurisdictional determination may feel more constrained to seek a permit than someone who has not received a similar determination. But that incentive arises solely from the additional information that a jurisdictional determination conveys about the agency's view of the CWA's coverage—not from any independent obligation to seek a permit imposed by the jurisdictional determination. That sort of practical effect, absent any actual legal obligation or consequence, is not sufficient to render the action final. *See Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 13-16 (D.C. Cir. 2005) (incentive to comply voluntarily with agency's guidance concerning underlying statutory obligation is insufficient to establish legal consequences under *Bennett*). As the Ninth Circuit explained, relying on the additional information provided by a jurisdictional determination "erroneously conflates a potential *practical* effect with a *legal* consequence." *Fairbanks*, 543 F.3d at 596; *see Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 732-33 (D.C. Cir. 2003) (explaining that the "practical consequences" that attach when a private party learns that the government believes that certain legal obligations apply to the party does not render the government action final).

The panel stated that the district court, whose reasoning closely mirrors the Ninth and Fifth Circuits' analyses in *Fairbanks* and *Belle*, erred "by exaggerating the distinction between an agency order that compels affirmative action, and an order that prohibits a party from taking otherwise lawful action." Op. at 8. The panel, however, did not explain how the jurisdictional determination here prohibits a party from taking otherwise lawful action. Just as it is the CWA, not the jurisdictional determination, that imposes any obligation, the jurisdictional determination does not prohibit any action. The statute prohibits the discharge of fill material into the waters of the United States whether or not the Corps has issued a jurisdictional determination. The panel is thus incorrect that the jurisdictional determination "requires [Hawkes] either to incur substantial compliance costs (the permitting process), [forgo] what [it] assert[s] is lawful use of [its] property, or risk substantial enforcement penalties." Op. at 8. The statute—not the jurisdictional determination—requires that of Hawkes.

The panel is also wrong that *Sackett* indicates that a jurisdictional determination either determines legal rights or obligations or has legal consequences. First, the portion of *Sackett* on which the panel relies (Op. at 3-4 (quoting 132 S. Ct. at 1373)) does not address the issue of finality, but instead the separate issue, not in dispute here, whether the CWA precluded review judicial review of the compliance order. Second, *Sackett* is distinguishable because the Supreme Court identified independent legal consequences of the administrative compliance order that materially increased the landowner's obligations and the potential legal consequences it faced for violating

the CWA. Jurisdictional determinations share none of the features that *Sackett* found dispositive. *Sackett* explained that the compliance order determined "rights or obligations" because it 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 the property and relevant documentation. 132 S. Ct. at 1371 (quoting *Bennett*, 520 U.S. at 178). The jurisdictional determination does not share these features, as it neither imposes a restoration obligation nor requires Hawkes to give the Corps or EPA access to its property. *Sackett* concluded that "'legal consequences . . . flow' from issuance of the order" because, under the CWA, a landowner can be liable for penalties for violating the compliance order itself, in addition to penalties for violating the statute. *Id.* (quoting *Bennett*, 520 U.S. at 178, and assuming without deciding that the Sacketts faced penalties for violating the order in addition to violating the CWA). The jurisdictional determination does not share that feature either, as there is nothing in a jurisdictional determination that can be violated or that provides for additional penalties for "violating" a jurisdictional determination. The *Sackett* compliance order also "severely limit[ed] the Sacketts' ability to obtain a permit for their fill" under Corps regulations. *Id.* at 1372. The jurisdictional determination has no such effect. In sum, a jurisdictional determination imposes none of the legal obligations that were dispositive in *Sackett*. *See Belle*, 761 F.3d at 391-94.[2]

[2] The concurring opinion here cites to Justice Ginsburg's concurring opinion in *Sackett*, which indicates that Justice Ginsburg believed that while the Sacketts "may

The panel also relies on two supposed consequences of the jurisdictional determination that are practical rather than legal, and thus do not satisfy the second prong of *Bennett*. First, the panel posits that, if Hawkes were to move forward with the projects without a permit, the jurisdictional determination means that its violations would be knowing, "expos[ing] them to substantial criminal monetary penalties and even imprisonment for a knowing CWA violation." Op. at 11. But the Act does not assign any weight or function to a jurisdictional determination; in fact, the Act does not mention jurisdictional determinations at all. And any number of non-final agency warnings or opinion letters—or even a private consultant's report—could have the same potential effect.

Second, the panel states that the jurisdictional determination has the required legal consequence because "[i]n reality it has a powerful coercive effect." Op. at 12 (quoting *Bennett*, 520 U.S. at 169). The jurisdictional determination, however, does not have any legally coercive effect, as it does not trigger any legal consequences beyond those imposed by the statute. Those statutory requirements—including the statutorily-imposed choice between applying for a permit or proceeding without one

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immediately litigate their jurisdictional challenge in federal court," the Court's opinion did not resolve whether the Sacketts could challenge the terms of the compliance order. 132 S. Ct. at 1374-75. Justice Ginsburg's concurrence, however, does not say that the Sacketts can bring that challenge because EPA's conclusion that the Sacketts' property contains waters of the United States effects a legal change. The Court's opinion, which she joined, explains why the administrative compliance order is final agency action under *Bennett*, relying on characteristics of the compliance order that are not found in the jurisdictional determination, as explained above.

and facing a potential enforcement action—are the same even if the Corps does not issue a jurisdictional determination.[3] Moreover, the panel's quote from *Bennett* comes from that opinion's discussion of standing, not finality, and the coercive effect of the agency action in *Bennett* was because of the agency action's "central role" in the "statutory scheme" and because the action "alter[ed] the legal regime" and functioned as a permit. *Bennett*, 520 U.S. at 169-70, 178.

The other cases cited by the panel (Op. at 9-10) to support its holding are inapposite; they address administrative orders and regulations that imposed immediate legal consequences not imposed by the statute itself. In *Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970), the Court addressed an agency order altering a fee structure, thus imposing immediate "legal consequences" not imposed by the statute itself. *Id.* at 70-71. Similarly in *Frozen Food Express v.*

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[3] To the extent that the panel is correct that ambiguity in the CWA or implementing regulations has the practical effect of coercing landowners to take or refrain from taking certain actions because the exact scope of the CWA's reach is not clear, Op. at 11-12, this would be at least equally if not more so in the *absence* of a jurisdictional determination. Any coercion thus does not stem from the jurisdictional determination itself. Moreover, any number of statutes contain ambiguities as to how they may apply in any given factual context and the mere fact that an agency responds to an individual's inquiry as to how a statute might apply to that individual says nothing as to whether *Bennett*'s requirements for final agency action under the APA have been met. Finally, the Corps and EPA have just promulgated a rule further defining "waters of the United States" that "provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities . . . would need to make jurisdictional determinations on a case-specific basis." Clean Water Rule: Definition of "Waters of the United States," Final Rule Prepublication Version, *available at* http://www2.epa.gov/cleanwaterrule/prepublication-version-final-clean-water-rule, at 3.

United States, 351 U.S. 40 (1956), the Court addressed an agency order exercising the agency's authority to determine the commodities that fell within a statutory exemption to a permitting requirement. *Id.* at 41-42. That order was final and reviewable because it established a rule of general applicability that had the force of law and would immediately cause the industry to alter its conduct. *Id.* at 44. And in both *Abbott Laboratories v. Gardner*, 387 U.S. 136, 150-53 (1967), and *Columbia Broadcasting System v. United States*, 316 U.S. 407, 411-12, 417-23 (1942), the Supreme Court addressed agency promulgations of regulations that changed legal standards. The jurisdictional determination at issue here, by contrast, simply expressed the agency's view as to whether a particular site contains waters within the CWA's coverage. It did not alter legal obligations or otherwise change any legal standards.

CONCLUSION

For all of these reasons, the Corps' jurisdictional determination does not determine legal rights or obligations, and legal consequences do not flow from it. It is the CWA itself that imposes obligations. The panel's erroneous application of *Bennett*'s second prong is wrong and conflicts with the decisions from the Fifth and Ninth Circuits. The Court should grant this petition.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General

/s/ Robert J. Lundman
DANIEL R. DERTKE
JENNIFER SCHELLER NEUMANN
ROBERT J. LUNDMAN
U.S. Department of Justice
Environment & Natural Resources Div.
P.O. Box 7415
Washington, DC 20044
Phone: (202) 514-2496
Fax: (202) 353-1873
robert.lundman@usdoj.gov

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a) & (c), 35(b)(2), AND 40(b), AND LOCAL RULE 28A(h) (VIRUS SCANNING)

1. This petition complies with the page limitation of Fed. R. App. P. 32(a) & (c), 35(b)(2), and 40(b) because it is 15 pages.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (14-point Garamond) using Microsoft Office Word 2013.

3. I have scanned the pdf of the petition that is being filed electronically for viruses and it is virus free.

/s/ Robert J. Lundman
ROBERT J. LUNDMAN
U.S. Department of Justice
Environment & Natural Res. Div.
P.O. Box 7415
Washington, DC 20044
Phone: (202) 514-5316
Fax: (202) 353-1873
robert.lundman@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2015, the foregoing document was served on all parties or their counsel of record through CM/ECF.

/s/ Robert J. Lundman
ROBERT J. LUNDMAN
U.S. Department of Justice
Environment & Natural Res. Div.
P.O. Box 7415
Washington, DC 20044
Phone: (202) 514-5316
Fax: (202) 353-1873
robert.lundman@usdoj.gov