No. 15-290

IN THE

Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,

Petitioner,

v.

HAWKES CO., INC., *et al.*,

Respondents.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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264279

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

STATUTES AND OTHER AUTHORITIES

Page

Page

Cited Authorities

Page

Cited Authorities

Page

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. More than 96% of the Chamber's members are small businesses with 100 or fewer employees. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

Many industries in which the Chamber's members operate regularly confront issues concerning the scope of the Clean Water Act and would be adversely affected if they were unable to challenge a jurisdictional determination by the Army Corp of Engineers. These industries include manufacturing, mining, asphalt production, food production, pulp and paper production, paint manufacturing, electricity production, energy development, water utilities, sand, stone, and gravel operations, road construction and maintenance, landfills, real estate development, railroads, industrial development, and agriculture.

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1. The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Without the timely ability to seek judicial review under the Administrative Procedure Act, the Chamber's members will be blocked from conducting routine activities on their property until they endure an expensive, vague, and time-consuming regulatory process. These burdens will cause substantial harm to the Chamber's members; indeed, in many instances, the cost of compliance or the risk of exorbitant penalties will force them to abandon valuable projects and activities altogether.

SUMMARY OF ARGUMENT

Approved jurisdictional determinations are final agency actions subject to judicial review because they have substantial real-world consequences on the legal rights and obligations of landowners. The Army Corps of Engineers ("Corps") seeks to minimize the impact of its jurisdictional determinations, but without the ability to seek immediate judicial review of an unfavorable jurisdictional determination, a landowner is left with three untenable options. First, the landowner can apply for a permit, submit to the attendant costs and delays, and seek judicial review of the jurisdictional determination when the permit process is complete, often years later. Second, the landowner can proceed without a permit and risk exposure to an enforcement action carrying significant penalties. Or third, the landowner can walk away from the endeavor altogether and thus forfeit the right to challenge the agency determination in court. As the Eighth Circuit correctly recognized, landowners should not be confined to these three options.

Landowners who decide to apply for permits and defer (or forego) any judicial review must be prepared

for long delays and high costs. As a plurality of the Court recognized in *Rapanos v. United States*, 547 U.S. 715 (2006), the average applicant for an individual Corps permit spends 788 days and $217,596 to complete the process. *Id.* at 721. There are myriad examples of businesses suffering such delays and expenses. For example, the Court of Federal Claims recently documented how one business spent seven years and millions of dollars seeking a Section 404 permit—only for a federal court to rule later that the Corps lacked jurisdiction all along. *See Res. Invs., Inc. v. United States*, 85 Fed. Cl. 447 (2009). Allowing prompt judicial review of jurisdictional determinations under the Administrative Procedure Act ("APA") would avoid this type of senseless delay and expense.

Some landowners might decline to seek a permit under the Clean Water Act ("CWA"), as the prospect of a long, expensive, and likely futile permitting process is simply not a viable option. But for many, it is not feasible to move forward with development plans and to risk severe civil and criminal penalties. Thus, the likely outcome if the Corps' position prevails and its jurisdictional determinations are insulated from judicial review is that landowners will simply abandon beneficial activities, resulting in unrealized economic potential and diminished faith in government.

The Corps' position not only misconstrues the timing and scope of judicial review under the APA, but if adopted by this Court, it also would inflict serious harms on American business, including increased permitting costs, depreciation in property values, and substantial delays of business activities. In light of the severe pragmatic consequences, this Court should hold that a jurisdictional

determination is a final agency action subject to immediate judicial review under the APA.

ARGUMENT

I. Jurisdictional Determinations Are Final Agency Actions Subject to Judicial Review.

The APA permits judicial review of a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Two conditions must be satisfied for agency action to be considered "final": "First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted). Jurisdictional determinations satisfy both prongs of this test for final agency action. *See* Brief of Respondent ("Resp. Br.") at 18-39.

As to the first prong, there is no question that a jurisdictional determination is the "consummation of the agency's decisionmaking process" and is not "merely tentative or interlocutory [in] nature." *Id*. When an agency has "asserted its final position on the factual circumstances underpinning" its action, that is a decisive indication that it has consummated the decisionmaking process. *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 483 (2004). Similarly, once an agency decision has completed the administrative appeal process—and therefore is not subject to further agency review—"the process of administrative decisionmaking has reached a

stage where judicial review will not disrupt the orderly process of adjudication." *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 70-71 (1970).

By its terms, a jurisdictional determination is "a written Corps determination that a wetland and/or waterbody is subject to regulatory jurisdiction" under the CWA. 33 C.F.R. § 331.2. Once a determination has wound its way through the administrative appeal process, it is final and not subject to further review by the agency. *See id.* § 331.9. That is precisely why Corps regulations provide that "the public can rely on that determination as a Corps final agency action." 51 Fed. Reg. 41,206. In short, through the jurisdictional determination, the Corps asserts its final position on the facts underlying jurisdiction—that is, the presence or absence of "waters of the United States" within the meaning of the CWA.

The jurisdictional determination at issue here demonstrates the finality of the agency action. The determination Respondent received was the product of several rounds of administrative review in response to an application for a Section 404 permit.[2] The Corps issued a "preliminary" determination in March 2011, a "draft" determination in November 2011, and, finally, an "approved" jurisdictional determination in February 2012. Petition Appendix ("Pet. App.") 6a-7a. Following

2. The CWA provides certain exceptions to its prohibition of "the discharge of any pollutant by any person." 33 U.S.C. § 1311(a). Section 402 of the CWA authorizes the EPA to "issue a permit for the discharge of any pollutant," and Section 404 authorizes the Corps to "issue permits ... for the discharge of dredged or fill material into the navigable waters at specified disposal sites." *Id.* §§ 1342, 1344.

an administrative appeal, the "approved" determination was reissued as a "revised" jurisdictional determination in December 2012. *Id.* at 7a. The "revised" determination provided that it was a "final Corps permit decision in accordance with 33 C.F.R. § 331.10." *Id.* at 7a-8a. In other words, the jurisdictional determination was a "definitive, official determination." U.S. Army Corps of Eng'rs: Regulatory Guidance Letter No. 05-02 (June 14, 2005).

Accordingly, every court of appeals to address this issue has held that these jurisdictional determinations satisfy the first prong of the *Bennett* test. *See Belle Co. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 389-90 (5th Cir. 2014); *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 591 (9th Cir. 2008). Indeed, despite repeatedly arguing to the contrary, *see, e.g.*, Pet. App. 9a, even the Corps now concedes that a jurisdictional determination satisfies this requirement, *see* Brief of Petitioner ("Pet. Br.") 25-26.

The jurisdictional determination likewise satisfies the *Bennett* test's second prong. It establishes "rights and obligations" and has "legal consequences." *Bennett*, 520 U.S. at 177-78. The Corps contends that a jurisdictional determination does not expand or contract the landowner's rights or options; according to the Corps, the determination merely "provides additional information that the landowner may find useful in choosing between those alternative courses of conduct." Pet. Br. 16.

But this is simply not true. As the Eighth Circuit understood, significant obligations and consequences follow from a jurisdictional determination. In particular, a determination requires landowners "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. Seeking a permit is expensive, time-consuming, and often futile (as it was here). *See infra* 15-24. Ignoring the determination and proceeding with the activity risks the imposition of massive civil and criminal penalties through a government enforcement action. *See infra* 24-25. And walking away from the project nullifies potentially beneficial opportunities for that property and deprives the landowner of his day in court. *See infra* 26-28. Limiting landowners to such untenable options, in other words, has "direct and appreciable legal consequences" and thus satisfies the second *Bennett* factor. Pet. App. 14a.

Moreover, the Corps' understatement betrays a fundamental failure to appreciate the practical realities facing landowners who must grapple with the real-world implications of complex and burdensome federal environmental regulation. It often is extremely "difficult and confusing … for a landowner to predict whether or not his or her land falls within CWA jurisdiction." Pet. App. 20a. Individuals and businesses seeking to undertake construction projects where wetlands are in the general vicinity must examine numerous factors to make this determination. This exercise often requires the involvement of lawyers, expert consultants and certified wetland delineators.

To say that a landowner with an unfavorable jurisdictional determination is free to treat it as carrying no more weight than a "private consultant's report," Pet. Br. 32, is simply not true. This Court's precedent does not require such a constrained reading of agency action.

See, e.g., *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-50 (1967) (finding that drug labeling regulations constituted a final agency action because they put drug companies in the dilemma of incurring massive compliance costs or risking criminal and civil penalties for distributing "misbranded" drugs); *Frozen Food Express v. United States*, 351 U.S. 40, 43-44 (1956) (finding an Interstate Commerce Commission order reviewable because "the determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact," as it "warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties").

Importantly, the Corps' unreasonably narrow conception of the second *Bennett* factor might harm more than just landowners. It could prevent environmental groups or neighboring property owners, for example, from challenging negative jurisdictional determinations (*i.e.*, that there are no "waters of the United States" on property). *Compare* Pet. Br. 40 ("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."), *with Deerfield Plantation Phase II-B Prop. Owners Ass'n v. U.S. Army Corps of Eng'rs*, 801 F. Supp. 2d 446, 459 (D.S.C. 2011) (finding that "legal consequences do flow from the Corps' 2010 JD ('negative' determination), as any developer of the property could conceivably immediately begin to fill and dredge the eighty-plus acres that the Corps determined to be non-jurisdictional"). *See also Fairbanks N. Star Borough*, 543

F.3d at 597; *National Wildlife Fed'n v. Hanson*, 859 F.2d 313, 316 (4th Cir. 1988).

In the end, the second *Bennett* factor must account for the attributes of the regulatory regime to which it is being applied. Whatever may be true in other settings, there can be no doubt that a jurisdictional determination by the Corps creates the kind of rights and obligations that are sufficient to warrant immediate judicial review. Forcing landowners to choose from a menu consisting of administrative purgatory, surrender of rights, or civil disobedience is inappropriate and unwarranted. A jurisdictional determination therefore is final agency action under the APA.

II. The Corps' Reading of "Final Agency Action" Would Insulate Its Decisions from Judicial Review.

The Corps forecasts dire consequences if its jurisdictional determinations are subject to immediate judicial review, including the possibility that the agency may cease making such determinations altogether. *See* Pet. Br. 24. But the Corps has it backwards. It is the individuals, businesses, landowners, and anyone else seeking legal certainty about the status of their property who will suffer if jurisdictional determinations are unreviewable.

Landowners interested in pursuing development projects are limited to four options: (1) decline to seek a jurisdictional determination in the hope that their land does not contain "waters of the United States"; (2) request a jurisdictional determination and, if unfavorable, apply for a permit under Section 404 and challenge the

determination in court if the permit is denied; (3) proceed with the plans and decline to seek a permit under Section 404 in the hope that the lands do not contain "waters of the United States," thus risking civil and criminal penalties, which could be challenged later; or (4) abandon the plans entirely. None of these options is tenable.

A. Landowners Might Decline to Request Jurisdictional Determinations if the Agency's Decisions Are Not Subject to Judicial Review.

Jurisdictional determinations are necessary because under the Corps' current approach to the CWA, landowners often have no idea whether their lands are subject to the law's requirements. *See* Pet. Br. 5, 23-24. The CWA prohibits "the discharge of any pollutant" into "navigable waters" without a federal permit. 33 U.S.C. §§ 1311(a), 1362(12); *id.* § 1362(7) (defining "navigable waters" to mean "the waters of the United States, including the territorial seas").

For most of American history, the meaning of "navigable waters" has been reasonably straightforward. Before the CWA, the Supreme Court had long interpreted the phrase "navigable waters of the United States" to refer to interstate waters that are "navigable in fact" or readily susceptible of being rendered so. *See The Daniel Ball*, 10 Wall. 557, 563 (1870); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406 (1940).

The Corps retained this understanding when, shortly after passage of the CWA in 1972, it promulgated rules adopting the traditional judicial definition of "navigable waters." *See* 33 C.F.R. § 209.120(d)(1) (1974) (defining

"navigable waters" to mean "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce"). In doing so, the Corps emphasized that "[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor." *Id.* § 209.260(e)(1). As a result, in the years immediately following the passage of the CWA, it was rarely disputed whether land contained "navigable waters."

But this certainty soon eroded. In 1975, the Corps adopted new regulations that extended the definition of "waters of the United States" to the outer limits of Congress's commerce power. Specifically, the Corps expanded "waters of the United States" to include navigable waters and their tributaries, as well as *non*-navigable intrastate waters that could affect intrastate commerce. 40 Fed. Reg. 31,324-25 (July 25, 1975); *see United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (upholding the Corps' classification of a Michigan wetland "characterized by saturated soil conditions and wetland vegetation [that] extended beyond the boundary of [the] property to … a navigable waterway" because the property was "part of a wetland that actually abuts on a navigable waterway"). In 1986, the Corps expanded the definition of "waters of the United States" even further, asserting jurisdiction over traditional navigable waters, tributaries of those waters, wetlands adjacent to those waters and tributaries, and waters used as habitats by migratory birds that either are protected by treaties or cross state lines. 51 Fed. Reg. 41,206 (Nov. 13, 1986).

This Court twice rejected the Corps' assertion of power as too broad. In *Solid Waste Agency of N. Cook County v. Army Corps of Eng'rs*, the Court concluded that the CWA did not give the Corps jurisdiction to regulate an abandoned sand and gravel pit that provided a habitat for migratory birds. 531 U.S. 159 (2001). And in *Rapanos v. United States*, the Court found that the CWA did not give the Corps jurisdiction over four Michigan wetlands that were "near ditches or man-made drains that eventually empt[ied] into traditional navigable waters." 547 U.S. 715, 729 (2006).

In the wake of *Rapanos*, the Environmental Protection Agency ("EPA") and the Corps issued new informal guidance as to how it would analyze "waters of the United States." *See* U.S. Envt'l Prot. Agency & U.S. Army Corps of Eng'rs, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008). The 2008 guidance, among other things, explained the approach the Corps would use to determine whether waters were subject to the CWA. The Corps recognized that further consideration of jurisdictional issues could be appropriate in the future, either through issuance of additional guidance or through rulemaking.

In June 2015, the EPA and the Corps released a final rule expanding the reach of "waters of the United States" under the CWA. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,053-37,127 (June 29, 2015) ("WOTUS Rule"). This rule broadens the definition of "waters of the United States" by, among other things, (1) adding a new category of waters "adjacent" to primary waters, including "neighboring" waters within

certain distances, 40 C.F.R. § 230.3(o)(1)(vi); (2) adding a new category of waters located within certain distances of primary waters, if the new category of waters has a "significant nexus" to a primary water, *id.* § 230.3(o)(1)(viii); and (3) redefining "tributaries" in a way that vastly expands federal jurisdiction over streams that are dry for most of the year, *id.* § 230.3(o)(3)(iii). In October 2015, the Sixth Circuit stayed this rule, *see In re: EPA*, 803 F.3d 804 (6th Cir. 2015), which is the subject of numerous federal lawsuits throughout the country.

Whether the Corps' 2008 guidelines control—as was the case for Respondent—or the new rules survive judicial challenge, there is no doubt that many landowners will remain uncertain about their obligations under the CWA. No longer may a landowner simply examine whether a water is "capab[le] of use by the public for purposes of transportation or commerce." 33 C.F.R. § 209.260(e)(1) (1974). Instead, jurisdictional determinations will require complex, fact-bound analysis and will often have no easy answer.

Jurisdictional determinations thus provide individuals and businesses with clarity regarding their regulatory obligations. *See* Pet. Br. 23-24. But if they are insulated from timely judicial review, then some landowners may fairly reconsider whether seeking them is worth the time and effort. After all, securing a jurisdictional determination is not easy. They "require documentation that identifies if there is the presence and/or absence of jurisdiction," such as "[m]aps, aerial photography, soil surveys, watershed studies, scientific literature, previous [jurisdictional determinations] for the review area, and local development plans." *U.S. Army Corps*

of Engineers Jurisdictional Determination Form Instructional Guidebook 47 (2007). And "jurisdictional determinations for more complex sites may require additional documentation," such as "documentation that evaluates if there is a significant nexus between the tributary/wetland system in question and the [traditional navigable waters]." *Id.*

Faced with such a process—and with dim prospects for meaningful judicial review if the outcome is unfavorable—some landowners might conclude that it is better to roll the dice, hope that the land at issue has no "waters of the United States," and then seek a permit or abandon the activity if the Corps later disagrees. Indeed, a review of the Corps' permitting process "suggest[s] that there is much truth in the old saying that it is better to ask for forgiveness (after the fact) than to seek permission (before the discharge)." Royal C. Gardner, *Lawyers, Swamps, and Money: U.S. Wetland Law, Policy, and Politics* 165 (2011).

But this path also has significant risks. Moving forward without certainty may invite a cease-and-desist order from the Corps. As a former wetland attorney for the Department of the Army has explained, the recipient of a Corps cease-and-desist order faces a difficult choice:

> [You can] stop your activities and apply for the [Section 404] permit, or continue with your activities and take your chances that you will prevail when the Corps or the EPA takes you to court. Neither option is attractive. Suspending development operations can be very expensive, especially if equipment and workers are idled for months, and banks and investors are

> looking to be repaid. But defending against an enforcement action will also be quite costly even if you prevail. Your attorney fees cannot be shifted to the government. And if you lose, you are facing thousands of dollars in penalties and restoration costs.

Id. at 164.

Of course, the better option for all concerned is to obtain certainty before undertaking these actions. It allows landowners and the Corps to work, often collaboratively, to evaluate the land in question and to formalize that process through a jurisdictional determination. But landowners might have less incentive to engage in that process without the availability of immediate judicial review in those situations where they disagree with the Corps' determination.

B. Enduring the Long, Expensive, and Often Futile Permitting Process Is Not a Viable Option.

If a landowner receives an unfavorable jurisdictional determination, the only option for challenging it without risking civil and criminal penalties is to suspend any activities and to seek a permit from the Corps. But the permitting process is long and costly, which may render it an unrealistic alternative in many situations. Nearly a decade ago, the average applicant for an individual Corps permit "spen[t] 788 days and $271,596 in completing the process." *Rapanos*, 547 U.S. at 721; *see also* Pet. App. 14a ("[T]he permitting option is prohibitively expensive and futile."). Moreover, this does not even account for the costs

of mitigation or design changes. The plurality in *Rapanos* noted that over $1.7 billion was spent annually to obtain wetlands permits. *See* 547 U.S. at 721 (quoting Sunding & Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Natural Resources J. 59, 74-76, 81 (2002)). The expense and processing time have not improved since the Court's decision in *Rapanos* almost a decade ago. *See* D. Sunding, *Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States* at 15-17 (May 15, 2014), http://goo.gl/PKBaWP. Indeed, Respondent here would need to spend more than $100,000 to complete the nine hydrological studies requested by the Corps and endure several years of delays to complete an Environmental Impact Statement. Resp. Br. 10-11; *see also* Kenneth S. Gould, *Drowning in Wetlands Jurisdictional Determination Process: Implementation of Rapanos v. United States*, 30 U. Ark. Little Rock L. Rev. 413, 444 n.142 (2008).

The Corps downplays the Court's finding in *Rapanos* and attempts to paint a rosy picture of the Section 404 permitting process. *See* Pet. Br. 46-50. But anyone who has had to endure this process knows full well the agony that comes with obtaining this approval. The permitting process contains numerous steps with countless opportunities for delay and increased expense. To appreciate more fully just how onerous it is to obtain a Section 404 permit, it is helpful to consider the seven steps it generally involves:

(1) Pre-Application Consultation. First, landowners ordinarily must have a pre-application meeting with Corps staff. The pre-application meeting is designed to

assist potential applicants in determining the extent of the Corps' jurisdiction and the applicant's obligations under the CWA. 33 C.F.R. § 325.1(b). The applicant must be prepared to discuss potential modifications to the project that would avoid any loss of aquatic resources. *Id.* §§ 320.4(r), 332.1; *see generally* Stephen M. Johnson, *Individual Permits* 192 (2005), in Kim D. Connolly, et al., *Wetlands Law and Policy: Understanding Section 404* (2005).

(2) Submission of Application. After the pre-application meeting, the landowner must prepare his permit application. An application must contain, among other things: (1) a complete description of the proposed activity, including necessary drawings, sketches, or plans sufficient for public notice; (2) the location, purpose, and need for the proposed activity; (3) a scheduling of the proposed activity; (4) the location and dimensions of adjacent structures; and (5) a list of authorization required by other federal, interstate, state, or local agencies for the work, including all approvals received or denials already made. 33 C.F.R. § 325.1(d)(1). Furthermore, because a Section 404 permit involves dredged or fill material, the application also must include: (1) the purpose of any discharge; (2) a description of the type, composition, and quantity of the material; (3) the method of transportation and disposal of the material; and (4) the location of the disposal site. *Id.* § 325.1(d)(4). Myriad additional information may be necessary depending on the proposed activity. *Id.* § 325.1.

(3) Completeness Review. Within 15 days of receiving the application, the Corps must determine that the application is complete or notify the applicant of any missing information. *See* 33 C.F.R. § 325.2(a)(2). The application process will not move forward until the

application is deemed "complete."

(4) Public Notice. Within 15 days of receiving a "complete" application, the Corps must issue a public notice and schedule a public comment period. 33 C.F.R. § 325.2(d). The comments and responses the Corps receives will be made part of the application's administrative record for consideration during the evaluation process. *Id.* § 325.2(a).

(5) Review of Comments and Public Hearing. After the Corps receives the comments on the permit application, the agency must inform the applicant about substantive comments it received and give the applicant an opportunity to provide additional information. *Id.* The Corps may also require the applicant to submit additional information to address specific issues raised in the public comments. The applicant must respond to the Corps' request for information within 30 days. *Id.* When the Corps reviews the comments, it will also determine whether it is necessary to hold a public hearing on the permit application. *Id.*

(6) Application Evaluation. In evaluating Section 404 permits, the Corps must comply with the Section 404(b)(1) Guidelines, which are promulgated by the EPA pursuant to 33 U.S.C. § 1344(b)(1), and incorporated by the Corps into its own regulations. *See* 40 C.F.R. pt. 230; 33 C.F.R. § 320.2(f). The Section 404(b)(1) Guidelines provide that the Corps may not permit discharges that "will cause or contribute to significant degradation of the waters of the United States." 40 C.F.R. § 230.10(c). Under the guidelines, a discharge contributes to significant degradation if it has "[s]ignificantly adverse effects" on human health

or welfare, life stages of aquatic life and other wildlife dependent on aquatic ecosystems, aquatic ecosystem diversity, productivity, and stability, or recreational, aesthetic, and economic values. *Id.*

In addition to reviewing permits under the 404(b)(1) Guidelines, the Corps will decide whether to grant or deny a permit based on a "public interest" review of the benefits and detriments of the proposed activity. Through the public interest review, the Corps evaluates the probable impacts on the public interest of the proposed activity and its use. The factors that the Corps weighs and balances as part of this public interest review include "conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, consideration of property ownership, and, in general, the needs and welfare of the people." *Id.* § 320.4(a). The Corps will not grant the permit if doing so would be contrary to the public interest. *Id.*

Although the Corps issues permits under Section 404 of the CWA, other federal laws require the Corps to consult with federal, state, and local agencies, and to undertake other studies during the permit review. These laws include, among others, the National Environmental Policy Act, the Fish and Wildlife Coordination Act, the Endangered Species Act, the Coastal Zone Management Act, and the National Historic Preservation Act. *Id.* The Corp must also coordinate its activities with federal, state, and local agencies. *Id.*; *see generally* Johnson, *supra*, at 197-202.

The Corps' regulations nominally require the agency to make a decision on a permit within 60 days after the agency receives a complete permit application. 33 C.F.R. § 325.2(a). But the Corps can (and usually does) extend that deadline. Johnson, *supra*, at 202. Indeed, the regulations do not require the Corps automatically to grant a permit if it does not make a decision within the 60-day period. As a result, the process often takes substantially longer. *See Rapanos*, 547 U.S. at 721.

(7) Appeal Process. If the Corps denies the permit application, the applicant must exhaust all applicable administrative remedies before filing legal action in federal court. 33 C.F.R. § 331.12. Applicants must appeal within 60 days. *Id.* § 331.6. Only after the administrative appeal process is complete may the applicant seek judicial review. *See id.* § 331.12.

In other words, the Section 404 permitting process is a long, arduous, multifaceted inquiry. The fact that the Corps seeks to require landowners to undertake all these steps—before they even can challenge the Corps statutory authority in the first place—shows just how much leverage the agency will hold over landowners who challenge its authority if jurisdictional determinations are not immediately reviewable.

And although the process is long and complicated on paper, the Section 404 permitting process is even more cumbersome in practice. Examples abound of individuals and businesses enduring the long, expensive permitting process. Indeed, the Court of Federal Claims recently documented the travails of one company, Resource Investments, Inc. ("RII"), that was forced to spend

millions of dollars and endure years of delay in the permit process, despite the fact that the Corps had no jurisdiction over the land. *See Res. Invs., Inc. v. United States*, 85 Fed. Cl. 447 (Fed. Cl. 2009).

RII's regulatory odyssey was long and tortuous. In the late-1980s, RII purchased land in order to operate a landfill in Pierce County, Washington. In September 1989, the Corps asserted jurisdiction over the land and told RII that it would need to obtain a Section 404 permit to construct the landfill. After concluding "that it would be unwise to proceed without a 404 permit," RII began the process of preparing its permit application. That application was not filed until August 1990. *Id.* at 460. Despite regulations requiring the Corps to issue a public notice within 15 days of the completed application, it did not issue the notice until March 1992—eighteen months after the application was filed. The public notice was issued only because RII "constantly badger[ed] and prodd[ed] the Corps to [do so]." *Id.* (citation omitted).

The permit process moved no faster following the public notice. "Over the next 14 months, the parties went back and forth over the necessity of revising the project purpose," a regulatory requirement that impacts the scope of the Corps' practicable alternative analysis under the Section 404(b)(1) Guidelines. *Id.* at 461. Finally, in February 1994, RII "acceded to the Corps' demand and changed [its] project purpose, recognizing that [it] ha[d] reached a stalemate and not wanting to delay the 404 process any further." *Id.*

A month later, "to [RII's] dismay, the Corps determined that it would require a federal [Environmental

Impact Statement ('EIS')]." *Id.* Because "the federal EIS took longer to draft than the initial schedule allotted," it did not issue until December 1995. *Id.* During the drafting of the federal EIS, RII "altered [its] landfill project plan, specifically attempting to address the Corps' stated concerns." *Id.* In particular, the revised plan "reduced impacted wetlands from 37 acres to 21.6 acres, abandoned plans to relocate the South Creek, a small stream on the project site, and modified the original wetlands mitigation plan." *Id.* Despite these changes, the Corps never accepted RII's federal EIS. *Id.*

Finally, in September 1996, the Corps denied RII's permit application—a full *seven years* after the Corps first asserted jurisdiction. The following month, RII filed a challenge to the Corps' decision in federal district court. Eleven months later, in September 1997, the district court upheld the Corps' denial.

In July 1998, almost *nine years* after the Corps first asserted jurisdiction, the Ninth Circuit reversed and held that the Corps had "unreasonabl[y]" asserted jurisdiction over the project site. *Res. Invs., Inc. v. U.S. Army Corps of Eng'rs*, 151 F.3d 1162, 1169 (9th Cir. 1998). Specifically, the court concluded that because the project in question was a solid waste landfill, rather than a fill or dredged material project, the Corps "lacked authority under section 404 of the CWA to require RII to obtain a permit from the Corps before constructing the solid waste landfill." *Id.* at 1168. Accordingly, the court reversed the district court and vacated the Corps' order. Three months later, in October 1998, RII finally began construction on the landfill—"approximately a decade after [they] began

the federal … permitting process." *Res. Invs., Inc.*, 85 Fed. Cl. at 462.[3]

The Corps' incorrect jurisdictional determination over RII's property is an example of the enormous costs that the Section 404 process can impose on landowners—and the clear need for judicial review. The Corps' permitting process was both long (about seven years) and incredibly expensive (costing "several millions of dollars"). *Id.*; *see also Res. Invs., Inc. v. U.S. Army Corps*, No. 96-5920, ¶ 319 (W.D. Wash. Oct. 31, 1996). The result was that RII's multi-million dollar investment in the project remained stranded, causing the company to lose "millions of dollars of revenue each year" that it could not obtain a permit from the Corps. *Res. Invs., Inc.*, 85 Fed. Cl. at 510. This is exactly the type of delay and expense that immediate review of a judicial determination would avoid.

Put simply, it is an understatement to say that the Section 404 permitting process is long and costly. It is impossible to know the full extent of the aggregate time, energy, and capital that landowners have dissipated in the administrative quagmire that is the Corps' CWA permitting process.[4] But even just a general description

3. Following the conclusion of the permitting process, RII sued the United States, claiming that the Corps' conduct in the permitting process constituted a regulatory taking. *See Res. Invs., Inc.*, 85 Fed. Cl. 447. After finding genuine issues of material fact, *see id.*, the Court of Federal Claims subsequently dismissed the case for lack of jurisdiction, *see Res. Invs., Inc. v. United States*, 114 Fed. Cl. 639, 644 (Fed. Cl. 2014). A petition for writ of certiorari is currently pending before this Court. *See Res. Invs., Inc. v. United States*, No. 15-802 (S. Ct.).

4. For reference, implementation of the WOTUS Rule alone was estimated by the agencies themselves to increase permitting costs

of the process itself and the example of RII's experience demonstrate that this path is an untenable option for many landowners.

C. Going Forward with a Project and Inviting Severe Civil and Criminal Penalties Is Not a Viable Option.

It also is not a tenable option for individuals or businesses to ignore a jurisdictional determination, to proceed with their planned activities, and then to await prosecution. Indeed, the Corps essentially concedes as much. *See* Pet. Br. 50-51. The CWA imposes severe criminal and civil liability for those who discharge materials without obtaining the required permits. *See, e.g.*, 33 U.S.C. § 1319(c)(1) (providing that any person who negligently violates the CWA may be imprisoned for up to one year); 74 Fed. Reg. 626, 627 (Jan. 7, 2009) (authorizing fines up to $37,500 per violation per day). Only the most fearless would press forward and simply "wait for the agency to drop the hammer." *Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012).

The Corps argues that a landowner choosing this path would not receive disfavor from the agency or a federal court. *See* Pet. Br. 30-31. But this is simply unrealistic. Federal caselaw is replete with instances in which courts have castigated individuals for ignoring agency jurisdictional determinations. *See, e.g.*, *United States*

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for affected businesses by $19.8 million to $52.0 million annually. *See* Economic Analysis of Proposed Revised Definition of Waters of the United States, U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, 13 (Mar. 2014).

v. Moses, 496 F.3d 984, 989, 991 (9th Cir. 2007) (noting that the defendant "should have listened" to the Corps "before he undertook to ignore the government's steady trickle of warnings," and disputing the defendant's "right to continue [his activities] after jurisdiction was duly asserted").

It simply is impracticable for individuals to invite government prosecution as a means of challenging jurisdictional determinations. Only those who are "courag[eous] or foolhard[y]," *id.* at 992, will ignore the Corps' assertion of jurisdiction and go forward with their business plans. Very few are willing to risk jail time and heavy fines in the face of federal demands. And even those who do go forward will have jurisdictional determinations held against them. Contrary to the Corps' representations, juries and courts will not view the receipt of a jurisdictional determination as just "additional information" that an individual was free to disregard. Pet. Br. 16. A landowner ignores a jurisdictional determination at his peril: he will be seen as showing "contempt" and "disdain" for federal law, *Moses*, 496 F.3d at 986, 992, and the punishments he receives will be fair because he "should have listened," *id.*, to the Corps before taking matters into his own hands.

Thus, although landowners might theoretically have the option to proceed with their plans in potential violation of the CWA, the material risk of exorbitant fines and even imprisonment makes this purported option illusory. If a jurisdictional determination leaves a landowner with the prospect of engaging in willful civil disobedience and accepting the attendant exposure to civil and criminal penalties, then it clearly is an agency action "from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 177-78 (citation omitted).

D. Abandoning Beneficial Activities and Foregoing Judicial Review Are Not Viable Options.

An individual facing an unfavorable jurisdictional determination has a final option: give up and accept defeat. Those who lack the time and money to navigate the permitting process or to endure a government enforcement action may well forego their activities entirely and leave the land fallow.

But such a decision would endanger myriad worthwhile activities that currently require a Section 404 permit. If "waters of the United States" are present, countless activities are swept within the Corps purview, including, among others (1) depositing fill, dredged, or excavated material; (2) grading or mechanized land clearing; (3) ditch excavation activities; (4) fill for residential, commercial, or recreational developments; (5) road fills and placement of rocks and other materials to prevent erosion; (6) the building of any infrastructure or impoundment requiring rock, sand, dirt, or other material for its construction; (7) site-development fills for recreational, industrial, commercial, residential or other uses; (8) causeways or road fills; (9) dams or dikes; (10) cultivation for idle areas; (11) forest roads to aid in timber harvest; (12) rock crushing activities that result in loss of natural drainage characteristics; (13) soil removal; and (14) certain vegetation-disturbing operations. *See, e.g.,* 33 C.F.R. § 323.2(f). The list goes on.

Following a jurisdictional determination, the "option" of surrendering potential productive uses of one's land is probably the most palatable alternative for risk-averse landowners. It also may have the greatest negative impact on the economy when considering the aggregate

consequences of the unrealized benefits of developing productive uses of land.

Indeed, one of the greatest challenges facing America in the 21st Century is the rebuilding of the nation's transportation infrastructure. "[S]imply put, transit gets people to their jobs, helps grow the economy in multiple ways, and gives people the opportunity to get to health care, school, recreation, and shopping." Testimony of Janet Kovinoky, U.S. Chamber of Commerce, before the U.S. Senate Committee on Banking, Housing, and Urban Affairs at 2 (Apr. 23, 2015), https://www.uschamber.com/sites/default/files/150422_kavinoky_testimony_to_senate_banking.pdf. But it is well documented that "the performance of the U.S. transportation system is not keeping pace with the demands on that system," as passenger travel and freight traffic have steadily grown but infrastructure investments have not. *Transportation Performance Index: Key Findings*, U.S. Chamber of Commerce (2010), https://www.uschamber.com/sites/default/files/legacy/lra/files/LRA_Transp_Index_Key_Findings.pdf. Indeed, the U.S. Department of Transportation estimates that $18 billion a year will be needed to bring public transit systems to a state of "good repair" by 2028. *See* U.S. Department of Transportation, 2010 Status of the Nation's Highways, Bridges, and Transit: Conditions and Performance (2010).

Despite this urgent need for transportation investments, infrastructure projects are frequently mired in red tape, as they "often require multiple permits and reviews from federal agencies and bureaus responsible for ensuring projects are built safely." White House Press Release, Fact Sheet—Building a 21st Century Infrastructure: Modernizing Infrastructure Permitting

(May 14, 2014); *see also* Kovinoky, *supra*, at 9 (highlighting the need for "transportation policies that cut through red tape at all levels of government so that projects move forward quickly"). These restrictions hamper the country's ability to build a national transportation network that both "supports jobs in the near term … [and] boosts economic growth and U.S. competitiveness over the long term." *Transportation Performance Index*, *supra*, at 7. This Court should not impose yet another roadblock in the completion of projects vital to this country.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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