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 STATES OF NORTH DAKOTA, ALASKA, COLORADO, SOUTH DAKOTA, NEBRASKA, AND IDAHO AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

WAYNE STENEHJEM
Attorney General
JENNIFER L. VERLEGER
MARGARET I. OLSON
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
500 N. 9th Street
Bismarck, ND 58501

PAUL M. SEBY
Counsel of Record
Special Assistant Attorney General
GREENBERG TRAURIG, LLP
1200 17th Street, Suite 2400
Denver, CO 80202
Telephone: 303.572.6584
SebyP@gtlaw.com

Counsel for Amicus Curiae
State of North Dakota

[Additional *Amici* Listed On Inside Cover]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

CRAIG W. RICHARDS
Attorney General
123 Fourth Street
PO Box 110300
Juneau, AK 99811

Counsel for Amicus Curiae State of Alaska

CYNTHIA H. COFFMAN
Attorney General
1300 Broadway, 10th Floor
Denver, CO 80203

Counsel for Amicus Curiae State of Colorado

MARTY J. JACKLEY
Attorney General
STATE OF SOUTH DAKOTA
1302 E. Highway 14, Suite 1
Pierre, SD 57501

Counsel for Amicus Curiae State of South Dakota

DOUGLAS J. PETERSON
Attorney General
DAVE BYDALEK
Deputy Attorney General
JUSTIN D. LAVENE
Assistant Attorney General
2115 State Capitol Building
PO Box 98920
Lincoln, NE 68509

Counsel for Amicus Curiae State of Nebraska

LAWRENCE G. WASDEN
Attorney General
DOUGLAS M. CONDE
Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF ENVIRONMENTAL QUALITY
1410 N. Hilton, 2nd Floor
Boise, ID 83706

Counsel for Amicus Curiae State of Idaho

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.*

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

UNITED STATES SUPREME COURT

FEDERAL CIRCUIT COURT OF APPEALS

FEDERAL DISTRICT COURT

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF THE *AMICI CURIAE*[1]

The Clean Water Act ("CWA") establishes a system of cooperative federalism that recognizes states have the "primary responsibilities and rights" to "prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources" and to "consult with the administrator in the exercise of [her] authority under this chapter." 33 U.S.C. § 1251(b). This system of cooperative federalism authorizes the *Amici* States (as defined below) to promulgate water quality standards, designate impaired waters, issue total maximum daily loads, and certify federal permits as compliant with state law.

The States of North Dakota, Alaska, Colorado, South Dakota, Nebraska, and Idaho (collectively, "*Amici* States") are themselves property owners potentially subject to CWA jurisdiction and also administer delegated permitting programs under the CWA. The *Amici* States enforce their state laws regarding clean water, land use, and permitting. The scope and burden of the *Amici* States' authority and obligations under the CWA relies entirely upon the definition of "waters of the United States" under the CWA.

---

[1] No party's counsel authored any part of this brief. No person other than the *Amici Curiae* contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters indicating consent are on file with the Clerk.

An Army Corps of Engineers ("Corps") determination that it has jurisdiction over a particular property or waterway deprives *Amici* States of their historic authority to govern their own lands and waters in accordance with their own laws and priorities. At the same time, this jurisdictional determination places a significant administrative burden on the *Amici* States, who must process permit applications, water quality certifications, and take other administrative actions. Jurisdictional determinations also directly impede state interests by requiring states to apply for federal permits for much-needed state and local infrastructure projects, burden these projects with the need to prepare extensive Environmental Impact Statements, require states to invest significant amounts of time and money, and expose the states to litigation risk.

The Corps and Environmental Protection Agency ("EPA") (collectively, "Agencies") have recently issued their Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015), codified at 33 C.F.R. 328.1 *et seq*. ("WOTUS Rule" or "Rule"). *Amici* States and other states challenged the WOTUS Rule on the grounds that (i) it exceeds the authority granted to the Corps by Congress in the CWA, (ii) that it was promulgated in violation of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*. ("APA"), as the WOTUS Rule itself is arbitrary and capricious because the final rule that was adopted is not a "logical outgrowth" of the proposed rule, and (iii) because the Agencies did not comply with National

Environmental Policy Act ("NEPA"). On the eve of the rule taking effect, a federal district court granted a preliminary injunction, finding that the state challengers had a substantial likelihood of succeeding on the merits and would suffer irreparable harm both to their sovereign authority to manage their lands and to their concrete financial and administrative interests. *North Dakota v. U.S. E.P.A.*, No. 3:15-cv-00059-RRE-ARS, 2015 WL 5060744 at *4, *8 (D.N.D. Aug. 27, 2015) (publication pending). The Agencies elected not to appeal.

The challenges to the WOTUS Rule demonstrate that the question of which waters fall within the scope of the CWA is one of enormous importance to state governments as well as private citizens. The need for judicial review of jurisdictional determinations will only grow as the Agencies, the states, and eventually the courts figure out how to apply the WOTUS Rule to individual situations. Without judicial review, the Corps, often acting through individual local agents, will have the incentive to push the boundaries of federal regulatory jurisdiction, secured with the knowledge that challenging their assertions of jurisdiction would be both expensive and risky. And with each new jurisdictional determination, the states' traditional power to regulate their lands and waters will shrink accordingly.

The WOTUS Rule magnifies this problem by asserting jurisdiction over a wide range of dry creek beds and other features. It is clear from the public reaction to the WOTUS Rule, both from state governments

and private citizens, and even from environmental activists, that everyone understands that when the Corps claims jurisdiction, the claim – for better or worse – has a large and immediate impact on the actual legal rights and options of everyone involved in land use and planning.

The *Amici* States, which are potentially subject to the Agencies' expansive assertion of jurisdiction, have a sovereign interest in protecting their ability to govern their lands and waters in the manner chosen by their citizens. Judicial review of jurisdictional determinations by the Corps will provide an important protection for that interest. The *Amici* States therefore urge this Court to affirm the holding of the Eighth Circuit that jurisdictional determinations are judicially reviewable under the APA.

SUMMARY OF THE ARGUMENT

"Regulation of land use is a function traditionally performed by local governments[.]" *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001) (quoting *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994)). When the CWA is interpreted expansively, "to claim federal jurisdiction over ponds and mudflats" this "result[s] in a significant impingement of the States' traditional and primary power over land and water use." *Id*. at 161.

The decision of the Eighth Circuit upholds a powerful and important protection for state sovereignty

and the authority of local governments to make local land use decisions without the permission of the federal government. Judicial review is an indispensable bulwark against such "federal encroachment upon a traditional state power." *Id*. at 173. To be effective, however, it must actually enable litigants to challenge the jurisdiction of the Corps over their lands and waters – without having to first submit to that jurisdiction and undergo a protracted and costly permitting process or risk criminal prosecution. *Amici* States urge this Court to affirm.

The parties and the Eighth Circuit all agree that the question of whether an individual jurisdictional determination under 33 C.F.R. 331.2 *et seq*., is a final agency action subject to judicial review under the APA turns on whether it is an agency action "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) (quotation omitted). This question exists in the shadow of a larger debate over a new rulemaking that articulates a sweeping new definition of the statutory term "waters of the United States."

The Corps has shown a consistent pattern of adopting an interpretation of the CWA that "invokes the outer limits of Congress' power," rather than construing the statute more narrowly to avoid potential constitutional problems "unless such construction is plainly contrary to the intent of Congress." *Solid Waste Agency of N. Cook Cty.*, 531 U.S. at 172-73 (quotation omitted). And on June 29, 2015, the Corps

and the EPA issued the WOTUS Rule – thereby effectively expanding the definition of "waters of the United States" and dramatically displacing state authority over water quality and land and water resources. The question in this case – whether an individual jurisdictional determination under 33 C.F.R. 331.2 *et seq*., is a final agency action subject to judicial review under the APA – thus exists in the shadow of a larger debate over the WOTUS Rule's sweeping new definition of the statutory term "waters of the United States."

Amici States and other states have been at the forefront of litigation over the WOTUS Rule, which they are challenging in the District of North Dakota. *North Dakota v. U.S. E.P.A.*, No. 3:15-cv-00059-RRE-ARS. Last summer, that district court issued an order granting a temporary injunction in that case, finding that "[t]he States are likely to succeed on the merits of their claim that the EPA has violated its grant of authority in its promulgation of the Rule," *North Dakota v. U.S. E.P.A.*, No. 3:15-cv-00059-RRE-ARS, 2015 WL 5060744 at *4 (D.N.D. Aug. 27, 2015) (publication pending); there is "irreparable harm" because "the States will lose their sovereignty over intrastate waters" and will "incur monetary losses as a result of an unlawful exercise of regulatory authority," *id*. at *7; and that the balance of harms favors the States because the harm is "both imminent and likely," *id*. at *8. The Sixth Circuit has also granted a temporary stay of the WOTUS Rule on the same grounds. *In re E.P.A.*, 803 F.3d 804, 808-09 (6th Cir. 2015).

Whatever the outcome of these challenges, the WOTUS Rule will inevitably spawn a new set of controversies over the scope of CWA jurisdiction, as parties challenge the validity of the WOTUS Rule and its application in specific situations. If the WOTUS Rule is invalidated, any new rule that is promulgated will also ultimately require clarification and application. But if the Court adopts the Corps' position in this case, there will be a long and unnecessary period of confusion and frustration as parties wishing to challenge new jurisdictional determinations under the WOTUS Rule work their way through a costly and complicated permit process – or face the risk of monetary penalties and jail time. Allowing jurisdictional determinations to be challenged as final agency actions, on the other hand, will permit courts to efficiently and authoritatively answer important questions regarding the validity and proper scope of federal regulatory authority. Such clarity is critical for cooperative federalism, state sovereignty, and the rights and responsibilities of everyday citizens.

The debates over the WOTUS Rule directly address the issue before this Court – namely, whether jurisdictional determinations give rise to legal consequences such that they are subject to judicial review. To be sure, in many ways, the WOTUS Rule is simply a jurisdictional determination, applied nationwide, that effectively expands the definition of "waters of the United States" and provides vague, questionable standards regarding how and when CWA jurisdiction applies to different terrain across the country. Yet the

public reaction to the WOTUS Rule confirms that jurisdictional determinations impose severe legal restrictions on their recipients. A Corps jurisdictional determination – whether it be in the form of application of the WOTUS Rule or an individual determination – is made without denying a permit or imposing any immediate penalties that could otherwise be challenged, yet both impose very real costs. Thus, many of the statements made regarding the sweeping effects of the WOTUS Rule apply equally to ordinary jurisdictional rulings such as the one at issue here. The debates surrounding the WOTUS Rule, and the comments provided by parties on all sides of the political spectrum, shed light on the legal and economic effects of rulings regarding jurisdictional waters and belie the Corps' assertion that no real legal consequences flow from its jurisdictional determinations. This larger controversy also illustrates the very real economic and administrative costs of the uncertainty surrounding CWA jurisdiction, and the way that this uncertainty empowers federal agency officials at the expense of both the states and private actors.

Just as the WOTUS Rule imposes imminent and substantial harms on *Amici* States and others, the Hawkes Co., Inc. jurisdictional determination and thousands of other jurisdictional rulings made by the Corps have imminent and substantial legal effects on their recipients – making them final agency actions under the APA.

Amici States respectfully submit this brief to ensure the Court is aware of the other important recent developments in this area of law, the importance that judicial review takes on in this evolving area of jurisdiction, and the evidence that has emerged during the debates over the WOTUS Rule that further demonstrates the very real and immediate effects of the Corps' jurisdictional determinations.

ARGUMENT

I. The WOTUS Rule underscores the critical need for judicial review.

The ongoing legal challenges to the WOTUS Rule are valid and ripe under the APA, whether or not individual jurisdictional determinations are found to be final agency actions, because it is a final rulemaking that is intended to carry the force of law. 5 U.S.C. § 704.

The WOTUS Rule, which was scheduled to go into effect on August 28, 2015, WOTUS Rule, 80 Fed. Reg. at 37,054, has now been stayed and enjoined temporarily by two courts. *In re E.P.A.*, 803 F.3d 804, 808-09 (6th Cir. 2015); *North Dakota v. U.S. E.P.A.*, No. 3:15-cv-00059-RRE-ARS, 2015 WL 5060744 at *8 (D.N.D. Aug. 27, 2015) (publication pending).

Under the WOTUS Rule, the Corps will not reopen currently valid jurisdictional determinations or revoke valid permits, but "jurisdictional

determinations and requests for authorization requiring an approved jurisdictional determination issued on or after the effective date of this rule will be made consistent with this rule." WOTUS Rule, 80 Fed. Reg. at 37,074. Thus, depending on the outcome of the legal challenges, the Corps will soon begin to issue new jurisdictional determinations applying its new and complicated regulation, or, if that is struck down, applying existing law or whatever replacement regulation is ultimately adopted.

If the WOTUS Rule is not invalidated, it will spawn hundreds, perhaps thousands, of smaller challenges to clarify its application in particular circumstances, and a ruling in favor of the Corps in this case would significantly impede judicial review of those challenges.

A. Judicial review of jurisdictional determinations will assist in implementing the CWA.

Even if the WOTUS Rule is found to be properly promulgated and consistent with the CWA as a whole – not a result *Amici* States think likely – that does not mean it will be found lawful as applied to each particular situation. It will be necessary not only to look at the WOTUS Rule in general and the question of whether it is a reasonable interpretation of the CWA, but also to determine whether the application of the WOTUS Rule to a particular pothole or arroyo exceeds the Corps' jurisdiction under the CWA. "[T]he

entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the rain falls, [and] [a]ny plot of land containing such a channel may potentially be regulated as a 'water of the United States.'" *Rapanos v. United States*, 547 U.S. 715, 722 (2006).

Allowing judicial review of jurisdictional determinations will allow courts to authoritatively resolve disputes over the WOTUS Rule without first waiting years for permit applications to work their way through the system or dealing with the complications of heavy civil and criminal penalties. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983). Where the Corps overreaches its jurisdiction, the courts may step in and say so thereby establishing helpful precedent that will guide future cases. Similarly, when the Corps properly asserts its jurisdiction, the courts will help prevent needless challenges to the Corps' lawful exercise of its authority. In a system that depends largely on voluntary compliance, it is important for the people who receive jurisdictional determinations to be secure in the knowledge that the Agencies appreciate the limits of their authority.

Either way, controversies can be considered and efficiently resolved. In the presence of a sweeping and controversial new rulemaking, "a pre-enforcement challenge . . . is calculated to speed enforcement." *Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967). When the government prevails, it has a binding

decision to encourage compliance, and if it loses it can make prompt changes to the initial decision. *Id*.; *see Thomas v. Union Carbide Agr. Products Co*., 473 U.S. 568, 581 (1985) ("Doubts about the validity of [the Federal Insecticide, Fungicide, and Rodenticide Act]'s data-consideration and compensation schemes have plagued the pesticide industry and seriously hampered the effectiveness of FIFRA's reforms of the registration process."); *see also Bell v. New Jersey*, 461 U.S. 773, 780 (1983).

As the Corps, state governments, and landowners grapple with the problem of interpreting and applying the WOTUS Rule, they will benefit from the ability to obtain judicial review of jurisdictional determinations without the complications that come with the enforcement of civil and criminal penalties.

B. The WOTUS Rule will not end the controversy over the meaning of the term "waters of the United States" and will require extensive and highly controversial case-by-case application.

Judicial review will be necessary and valuable even if, as the Agencies claim, the WOTUS Rule ultimately does "provide[ ] 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." WOTUS Rule, 80 Fed. Reg. at 37,054. Even well-written, straightforward rules

require interpretation when they deal with a question as complicated as CWA jurisdiction, as new and unexpected issues arise and need to be resolved.

But it is hard to believe the WOTUS Rule will actually create the desired clarity. Many commenters and others have expressed concern that the WOTUS Rule raises as many questions as it answers; inevitably, these questions are likely to lead to further litigation. *See, e.g.*, Public Comment Letter, Re: Comments Of The Attorneys General Of West Virginia, Nebraska, Oklahoma, Alabama, Alaska, Georgia, Kansas, Louisiana, North Dakota, South Carolina, And South Dakota And The Governors Of Iowa, Kansas, Mississippi, Nebraska, North Carolina, And South Carolina On The Proposed Definition Of "Waters of the United States" (Docket No. EPA-HQ-OW-2011-0880) (dated Oct. 8, 2014), available at http://www.ago.wv.gov/pressroom/Documents/WOTUS%20Comment%20Letter%2010-8-FINAL.pdf.

As just one example, the district court in North Dakota credited testimony that language in the WOTUS Rule might cover previously non-jurisdictional prairie and desert features, finding that the Rule would involve "vast expenditures to map and survey large portions of the state" and lead to "expansion of permitting, oversight, technical and legal analysis for reclamation and development projects." *North Dakota v. U.S. E.P.A.*, No. 3:15-cv-00059-RRE-ARS, 2015 WL 5060744 at *7 (D.N.D. Aug. 27, 2015) (publication pending).

The reasons for concern and confusion about the WOTUS Rule's new sweeping effects and consequences are also obvious from the face of the Rule. The WOTUS Rule declares that "[a]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide" as well as "[a]ll interstate waters, including interstate wetlands" and "the territorial seas" are per se jurisdictional waters. 80 Fed. Reg. at 37,104. All intrastate "tributaries" of primary waters are per se jurisdictional waters. *Id*. The term "tributary" has been one focus of the debate.

The WOTUS Rule defines "tributary" as "a water that contributes flow, either directly or through another water" to a primary water and "is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark." *Id*. at 37,105. A water is defined as a tributary even if it has man-made or natural interruptions, or breaks, "so long as a bed and banks and an ordinary high water mark can be identified upstream of the break." *Id*. at 37,106. An "ordinary high water mark" ("OHWM") is defined as "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means." *Id*.

Thus, the WOTUS Rule's definition of tributary sweeps within the Agencies' authority ephemeral

streams and channels that are usually dry. It also makes man-made features such as ditches, not specifically excluded, per se jurisdictional by sweeping them into the definition of tributary. Under the WOTUS Rule, all intrastate waters "adjacent" to primary waters, impoundments, or tributaries are per se jurisdictional. 80 Fed. Reg. at 37,104. "[A]djacent waters" are waters "bordering, contiguous, or neighboring" primary waters, impoundments, or tributaries. *Id*. at 37,105. The category includes "waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like." *Id*. It also includes wetlands within or abutting the ordinary high water mark of an open water, such as a pond or lake. *Id*.

These definitions are neither simple nor straightforward to apply, and they have already been challenged in the pending WOTUS Rule litigation as incompatible with the language of the CWA and traditional state authority over land use and water. And even if these definitions were perfectly clear, numerous determinations are still left to case-by-case application. The WOTUS Rule permits the Agencies to exercise authority on a case-by-case basis over a water not covered by any other part of the Rule – i.e., not already included in a per se category – that alone or in combination with other similarly situated waters have a "significant nexus" to a primary water. 80 Fed. Reg. at 37,104-105.

This includes five enumerated geographic features, including prairie potholes, regardless of how

remote they are to a primary water. The WOTUS Rule also includes within federal jurisdiction, on a case-by-case basis, "[a]ll waters [at least partially] located within the 100-year floodplain of a" primary water that have a significant nexus with a primary water. *Id*. at 37,105. It further includes, on a case-by-case basis, "all waters [at least partially] located within 4,000 feet of the high tide line or ordinary high water mark of a" primary water, impoundment, or tributary that have a significant nexus to a primary water. *Id*.

The case-by-case test the Agencies will apply under the WOTUS Rule is whether waters alone or in combination with "similarly situated waters in the region . . . significantly affect[ ] the chemical, physical, or biological integrity" of a primary water. *Id*. at 37,106. "Region" is defined as "the watershed that drains to the nearest [primary water]." *Id*. Waters with only a shallow sub-surface connection or no hydrologic connection whatsoever to a primary water, impoundment, or tributary can satisfy this test.

This new, complex patchwork of language will inevitably give rise to a new set of applications for jurisdiction determinations. Judicial review is the only way to ensure that these disputes are handled promptly and in an even-handed and consistent fashion.

That is particularly true given that the Corps has earned a reputation for using unclear rules to give its local agents more discretion: "The Corps' enforcement

practices vary somewhat from district to district because 'the definitions used to make jurisdictional determinations' are deliberately left 'vague.'" *Rapanos*, 547 U.S. at 727 (quoting U.S. General Accounting Office, Report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulating Affairs, Committee on Government Reform, House of Representatives, Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction, GAO-04-297, at 22, 26 (Feb. 2004)). Judicial review of jurisdictional determinations will provide important sideboards to guide the Corps in its application of the WOTUS Rule, facilitate uniformity across agencies, and provide a critical check on federal regulatory discretion.

As the CWA and the courts recognize, states have a constitutional right to maintain their "traditional and primary power over land and water use." *Solid Waste Agency of N. Cook Cty.*, 531 U.S. at 174; *see, e.g.*, *Hess*, 513 U.S. at 44 ("[R]egulation of land use [is] a function traditionally performed by local governments"). Consistent with this authority, the states have enacted comprehensive regulatory schemes to protect, maintain, and improve the quality of waters in their state, consistent with the CWA's overall goal to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Each time the Corps makes a jurisdictional determination, it deprives the states of further authority over their own land. And if the Corps'

jurisdictional determination is excessive, it wrongly deprives states of that authority.

There are excellent reasons why state and local governments are often better situated to determine whether diverting a creek or draining a puddle is a good balance between environmental protection and economic development: They have greater familiarity with the climate and geography of their own countryside, and they are more answerable to the local electorate and the needs of the people in their communities. Alaska is but one salient example: The State has over 174 million acres of wetlands – more than all the other states combined – many of which are remotely located far from any navigable waterbody. Because Alaska's wetlands comprise 43% of the State's surface areas, more often than not important public infrastructure development projects like water and sewer, roads, or airport projects involve work in wetlands or non-navigable waters. And many of the State's wetlands are underlain with permafrost, which form a nearly impervious frozen layer of soil that creates seasonally saturated soil conditions above the frozen layer during Alaska's short summer months. Alaska is the *only* state with lands affected by pervasive permafrost conditions, and has long protected these and other important resources under its own statutory and regulatory authority. *See*, *e.g.*, 33 U.S.C. § 1341 (CWA Section 401 certification authority); AS 46.03.100 (wastewater discharge permitting authority); 18 AAC 70 (Alaska Water Quality Stanards); 18 AAC 772

(wastewater disposal); and 18 AAC 83 (Alaska Pollutant Discharge Elimination System Program (APDES)).

Judicial review of jurisdictional determinations is therefore necessary to preserve the proper balance between state and federal authority that is fundamental to the scheme of cooperative federalism that Congress enacted in the CWA.

II. In the context of the WOTUS Rule, both the Corps and courts have made findings that official decisions of the Corps regarding the scope of its jurisdiction determine the "rights or obligations" of parties and give rise to "legal consequences."

A jurisdictional determination is a final agency action, subject to judicial review under the APA, if it "mark[s] the consummation of the agency's decisionmaking process . . . [and is] one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 178 (quotation omitted). It is undisputed that a jurisdictional determination is "the consummation of the Corps' decisionmaking process on the threshold issue of the agency's statutory authority." *Hawkes Co. v. U.S. Army Corps of Engineers*, 782 F.3d 994, 999 (8th Cir. 2015); Brief for the Petitioner at 25. So, this case turns on whether legal consequences flow from the Corps' determination that it has CWA jurisdiction.

In its opening brief, the Corps attempts to characterize its jurisdictional determinations as helpful

suggestions – rather than legal decisions that impose real obligations on their recipients. The horrified reaction of these recipients when they receive this "help," however, is revealing. Nowhere is this more clearly seen than in the public, and judicial, reaction to the Corps' WOTUS Rule.

The legal effects of the WOTUS Rule (particularly its per se rules) are, in many respects, the same as the legal effects of the jurisdictional determination at issue here. The WOTUS Rule conclusively determines the existence of "waters of the United States" and the application of the CWA, without itself being a permit grant or an enforcement action. *See* 80 Fed. Reg. at 37,056 (stating the Rule will replace the need for jurisdiction determinations in many cases). "This final rule does not establish any regulatory requirements, [but] [i]nstead it is a definitional rule that clarifies the scope of the 'waters of the United States.'" *Id*. at 37,054.

A. Across the political spectrum, there is general agreement that jurisdictional determinations are highly consequential and impose significant restrictions.

Although the Agencies describe the WOTUS Rule as a "clarification" and repeatedly state that they do not believe that it significantly expands jurisdiction, this claim has been met with widespread skepticism. It appears the Corps is the only one attempting to argue the WOTUS Rule is inconsequential. Whether

they favor or oppose the WOTUS Rule, nearly everyone agrees that a determination that a particular wetland or ditch falls within the CWA jurisdictional waters will have serious consequences for the parties involved. Even the Agencies admit that the WOTUS Rule would have significant consequences: "The rule will ensure protection for the nation's public health and aquatic resources, and increase CWA program predictability and consistency." *Id*.

Outside groups from all parts of the political spectrum have not been shy about stating the very substantial effects that this jurisdictional regulation will have. The New York Times described it as "a sweeping new clean water regulation meant to restore the federal government's authority to limit pollution in the nation's rivers, lakes, streams and wetlands." Coral Davenport, *Obama Announces New Rule Limiting Water Pollution*, N.Y. Times, May 27, 2015, available at http://www.nytimes.com /2015/05/28/us/obama-epa-clean-water-pollution.html.

The Sierra Club issued a press release proclaiming that "[t]he new rule will finally restore protections, as originally intended, to almost all of the nation's fresh waters – ensuring safe drinking water for 117 million Americans." Press Release, Sierra Club, Proposed Rule Will Protect Drinking Water for 117 Million Americans (March 25, 2014), available at http://content.sierraclub.org/press-releases/2014/03/sierra-club-praises-new-clean-water-safeguards. The Chamber of Commerce, on behalf of 375 organizations, worried that the WOTUS Rule would transform the

Corps into "a central authority that makes the key decisions on many kinds of land and water uses." Public Comment Letter, Re: Proposed Rule: Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188 (April 21, 2014); Docket No. EPA-HQ-OW-2011-0880 (Nov. 12, 2014), at 2, available at https://www.uschamber.com/sites/default/files/11.12.14-_multi-organization_comments_to_epa_and_usace_on_proposed_rule_definition_of_waters_of_the_united_states.pdf.

This intense interest in the Corps' jurisdictional determination is shared by state Attorneys General and Governors, who fear that the Corps "seeks to place the lions' share of intrastate water and land management in the hands of the Federal Government." Public Comment Letter, Re: Comments Of The Attorneys General Of West Virginia, Nebraska, Oklahoma, Alabama, Alaska, Georgia, Kansas, Louisiana, North Dakota, South Carolina, And South Dakota And The Governors Of Iowa, Kansas, Mississippi, Nebraska, North Carolina, And South Carolina On The Proposed Definition Of "Waters of the United States" (Docket No. EPA-HQ-OW-2011-0880) (Oct. 8, 2014), available at http://www.ago.wv.gov/pressroom/Documents/WOTUS%20Comment%20Letter%2010-8-FINAL.pdf.

"Inclusion of a water as a 'water of the United States' triggers the CWA's onerous permitting requirements . . . an expensive and uncertain process, which can take years and cost tens and hundreds of thousands of dollars." *Id*. "If a pollution event occurs,

it must be dealt with; however, this rule creates the potential for federal permitting, penalties, and responsibility surrounding every waterbody[.]" Public Comment Letter, Re: Comments of the State of North Dakota on the Proposed Definition of Waters of the United States (Docket ID No. EPA-HQ-OW-2011-0880) (Nov. 14, 2014) at 3, available at http://www.nd.gov/ndic/ic-press/WOTUS-comments.pdf. "EPA and cooperating federal agencies are appropriating for themselves the authority to become the arbiter of all economic enterprises and the power to impede or vet them at will." *Id*. at 3-4.[2] "[A]ny efforts to redefine or clarify CWA jurisdiction have, on their face, numerous federalism implications that have the potential to significantly impact states and alter the distribution of power and responsibilities among the states and the federal government[.]" Resolution of the Western States Water Council regarding Clean Water Act

[2] The facts of this current case validate the concern that the Corps can use its jurisdictional determination power to vet and veto economic activity. "At a January 2011 meeting, Corps representatives urged [Kevin] Pierce[, part owner of two companies attempting to develop,] to abandon his plan, emphasizing the delays, cost, and uncertain outcome of the permitting process . . . In March, the Corps sent a letter advising it had made a 'preliminary determination' the wetland is a regulated water of the United States and, 'at a minimum,' an environmental assessment would be required. At an April meeting, a Corps representative told Pierce a permit would take years and the process would be very costly. During a site visit in early June, another Corps representative told a Hawkes [Co. Inc.]employee that 'he should start looking for another job.' " *Hawkes Co. v. U.S. Army Corps of Engineers*, 782 F.3d 994, 998 (8th Cir. 2015).

Jurisdiction, Position No. 369 (July 18, 2014), at 1, available at http://www.westernstateswater.org/wp-content/uploads/2012/10/369_WSWC-CWA-Jurisdiction-Resolution_2014July18.pdf.

A particularly revealing comment was submitted to the Corps from the Hawaii Department of Transportation ("HDOT"), beseeching the Corps to clarify that its municipal sewer system is not a water of the United States because "[o]nce a ditch is under federal jurisdiction, the Section 404 permit process can be extremely cumbersome, time-consuming and expensive, leaving HDOT vulnerable to citizen lawsuits if the federal permit process is not significantly streamlined."[3] Public Comment of HDOT, (Docket ID No. EPA-HQ-OW-2011-0880) (Oct. 20, 2014), Doc. 10184, at 36 available at http://www.epa.gov/sites/production/files/2015-06/documents/cwr_response_to_comments_6_ditches.pdf.

There thus appears to be a public consensus, from across the political spectrum, including both private organizations and state governments, that formal determinations of jurisdiction by the Corps

[3] Hawaii was one of seven states that filed a motion to intervene in the Sixth Circuit in support of the WOTUS Rule. *See In re: Environmental Protection Agency and Department of Defense*, Case No. 15-3751 (6th Cir.), Motion by States of New York, Connecticut, Hawaii, Massachusetts, Oregon, Vermont, and Washington, and the District of Columbia, to Intervene in Support of Respondents in Docket No. 15-3751 and In Each of the Related Cases, Aug. 28, 2015, Doc. No. 19.

impose immediate and severe legal obligations on state and local governments, landowners, and project proponents. The Agencies appear to be almost alone in their attempt to argue otherwise. Because these jurisdictional determinations are formal and final determinations with real and substantial consequences, they ought to be treated as final agency action under the APA.

B. Courts considering the WOTUS Rule have found, based on evidence presented, that assertions of jurisdiction will result in immediate and significant economic harms, as well as injury to the authority of states to manage their own lands and waters.

Courts considering challenges to the WOTUS Rule, similarly, have not had any difficulty concluding that this jurisdictional rule would inflict a substantial and immediate impact – an "irreparable injury" – on both the states bringing the challenges and other regulated parties. This injury would occur independent of any decision that the Corps might later make regarding permits or enforcement actions.

When the District of North Dakota recently enjoined the WOTUS Rule, it found the Rule would result in irreparable injury. *North Dakota v. U.S. E.P.A.*, No. 3:15-cv-00059-RRE-ARS, 2015 WL 5060744 at *7 (D.N.D. Aug. 27, 2015) (publication pending). The Sixth Circuit reached a similar conclusion and stayed the WOTUS Rule nationwide until jurisdictional

briefing could be completed. "[T]he sheer breadth of the ripple effects caused by the Rule's definitional changes counsels strongly in favor of maintaining the status quo for the time being." *In re E.P.A.*, 803 F.3d 804, 808-09 (6th Cir. 2015). The District of North Dakota specifically found that there would be irreparable injury to the sovereign interests of states, to their direct financial interests, and to the taxpayers and citizens. *North Dakota v. U.S. E.P.A.*, No. 3:15-cv-00059-RRE-ARS, 2015 WL 5060744 at *7-8 (D.N.D. Aug. 27, 2015) (publication pending). These same types of injuries arise – on a smaller scale – from all jurisdictional determinations.

First, and most importantly, each expansion of federal jurisdiction comes at the expense of the ability of state and local governments to control their own lands and waters. The CWA establishes a system of cooperative federalism that recognizes states have the "primary responsibilities and rights" to "prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources" and to "consult with the administrator in the exercise of [her] authority under this chapter." 33 U.S.C. § 1251(b). When a water, or pothole, does not fall under CWA jurisdiction, it is regulated under state and local law. *See* Alaska Stat. 46.03.050 *et seq*.; N.D. Cent. Code §§ 61-28-01 *et seq*.; Wyo. Stat. Ann. §§ 35-11-301 *et seq*.; Mont. Code Ann. §§ 75-5-101 *et seq*.; N.M. Stat. Ann. §§ 74-6-4 *et seq.*; S.D. Codified Laws §§ 34A-2-1 *et seq*.; Mo. Rev. Stat. §§ 644.006 *et seq*.; Ark. Code Ann. § 8-4-101 *et seq*.

"Once the Rule takes effect, the States will lose their sovereignty over intrastate waters that will then be subject to the scope of the Clean Water Act." *North Dakota v. U.S. E.P.A.*, No. 3:15-cv-00059-RRE-ARS, 2015 WL 5060744 at *7 (D.N.D. Aug. 27, 2015) (publication pending). "Immediately upon the Rule taking effect, the Rule will irreparably diminish the States' power over their waters." *Id*. An individual jurisdictional determination similarly has the immediate legal effect of displacing state authority – whether or not the Corps ultimately grants a permit or brings an enforcement action. That is a concrete legal effect, no less than the impact of the WOTUS Rule.

The district court in North Dakota also found that the WOTUS Rule would inflict irreparable monetary harm. *Id.* "These losses are unrecoverable economic losses because there is neither an alternative source to replace the lost revenues nor a way to avoid the increased expenses." *Id*. The court made this finding based on evidence submitted by state officials charged with administering environmental programs and programs that frequently require CWA permits. For example, the North Dakota State Engineer, who is charged with "managing and directing all responsibilities of water appropriation, floodplain management, regulation of dikes, dams, and drainage, and determination of the ordinary high water mark and sovereign lands management" submitted a declaration describing his experiences with the CWA permitting system. *North Dakota v. U.S. E.P.A.*, No.

3:15-cv-00059-RRE-ARS, at Doc. No. 33-8, at 1-2. He explained that when a prairie pothole or drainage wash is found to be a jurisdictional water, the need to obtain a § 404 permit automatically triggers NEPA, "which creates additional expense and delay for state planning and infrastructure as the agency must provide necessary information to support an Environmental Impact Statement or Environmental Assessment." *Id*. at 4. "The significant delays associated with this process will interfere with the various ongoing infrastructure projects throughout the state." *Id*.

Similar declarations were submitted by environmental and infrastructure agencies in several other states as well, describing the very significant financial and regulatory burdens imposed by the CWA upon a finding of jurisdiction.

The WOTUS Rule's adverse financial impacts on state and local governments further reflect the real-world consequences flowing from the Corps' assertion of federal regulatory authority. Local officials have no choice but to react to the claim of federal jurisdiction and respond to it. For the Agencies to suggest this does not impose a "legal consequence," or determine "rights and obligations," defies reality. That is no less true when the Corps asserts federal authority pursuant to a jurisdictional determination. Judicial review therefore should be, and indeed must be, available under the APA.

The Corps mistakenly contends that "[a]n 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." Brief for the Petitioner at 17. But at the end of the day, "[t]he burden of federal regulation on those who would deposit fill material in locations denominated 'waters of the United States' is not trivial." *Rapanos*, 547 U.S. at 721. As this Court has recognized, a jurisdictional determination confers on the Corps "the discretion of an enlightened despot[.]" *Id*. And when the Corps flexes its extraordinary regulatory muscle in this manner – regardless of whether it has properly exercised that authority – it alters the legal landscape, compromises a landowner's interest in his or her property, undermines a state's sovereign regulatory authority, and triggers real and immediate costs and consequences that merit judicial review under the APA.

CONCLUSION

The Eighth Circuit correctly decided that jurisdictional determinations are final agency actions, with immediate and serious legal consequences, and subject to review. This review will be particularly

important in the next few years, as the Corps moves to implement it new regulatory scheme.

Respectfully submitted,

WAYNE STENEHJEM
Attorney General
JENNIFER L. VERLEGER
MARGARET I. OLSON
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
500 N. 9th Street
Bismarck, ND 58501

PAUL M. SEBY
Counsel of Record
Special Assistant Attorney General
GREENBERG TRAURIG, LLP
1200 17th Street, Suite 2400
Denver, CO 80202
Telephone: 303.572.6584
SebyP@gtlaw.com

Counsel for Amicus Curiae
State of North Dakota

CRAIG W. RICHARDS
Attorney General
123 Fourth Street
PO Box 110300
Juneau, AK 99811

Counsel for Amicus Curiae
State of Alaska

CYNTHIA H. COFFMAN
Attorney General
1300 Broadway, 10th Floor
Denver, CO 80203

Counsel for Amicus Curiae
State of Colorado

MARTY J. JACKLEY
Attorney General
STATE OF SOUTH DAKOTA
1302 E. Highway 14, Suite 1
Pierre, SD 57501

Counsel for Amicus Curiae
State of South Dakota

DOUGLAS J. PETERSON
Attorney General
DAVE BYDALEK
Deputy Attorney General
JUSTIN D. LAVENE
Assistant Attorney General
2115 State Capitol Building
PO Box 98920
Lincoln, NE 68509

Counsel for Amicus Curiae
State of Nebraska

LAWRENCE G. WASDEN
Attorney General
DOUGLAS M. CONDE
Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF
ENVIRONMENTAL QUALITY
1410 N. Hilton, 2nd Floor
Boise, ID 83706

Counsel for Amicus Curiae
State of Idaho