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 CAUSE OF ACTION INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF CAUSE OF ACTION INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Pursuant to Supreme Court Rule 37.3, Cause of Action Institute ("CA Institute") respectfully submits this *amicus curiae* brief on behalf of itself and in support of Respondents.[1]

INTEREST OF THE *AMICUS CURIAE*

The *amicus curiae* CA Institute is a nonprofit, nonpartisan government oversight organization that uses investigative, legal, and communications tools to educate the public on how government accountability, transparency, and the rule of law protect liberty and economic opportunity.[2] As part of this mission, it works to expose and prevent government and agency misuse of power by, *inter alia*, appearing as *amicus curiae* before this and other federal courts. *See, e.g., McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1460 (2014) (citing brief).

CA Institute has a particular interest in opposing governmental overreach, protecting the rule of law, and advocating for both government transparency and citizen privacy. Consequently, it brings a unique

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[1] Under Rule 37.6 of this Court, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief. The letters of consent have been filed with the Clerk of Court.

[2] Cause of Action Institute, *About*, http://www.causeofaction.org/about (last visited March 1, 2016).

perspective on the protection of property rights, due process, and hence on the issues presented in this case.

SUMMARY OF ARGUMENT

Administrative law procedures balance the government need for efficient adjudication with the due process rights of affected private parties, including "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Here, the Court is confronted with an unconstitutional reading of the Administrative Procedure Act ("APA") by the U.S. Army Corps of Engineers (the "Corps").

Delayed judicial review of a revised approved jurisdictional determination creates a serious constitutional problem because it infringes Respondents' due process rights. By construing the Clean Water Act ("CWA") to allow immediate review under the APA, the due process violation resulting from the absence of such review can be avoided. The Court has stressed that liens, attachments, and other similar encumbrances on property warrant immediate due process protection. In this case, the Corps revised approved jurisdictional determination has the same effect as such encumbrances by reducing the value of the land and rendering it unsuitable for its intended legitimate use and economic purpose.

The canon of avoidance and due process require immediate APA reviewability of Corps revised approved jurisdictional determinations. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of

Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

ARGUMENT

I. THE CORPS CONSTRUCTION OF APA SECTION 704 RAISES A SERIOUS CONSTITUTIONAL PROBLEM.

In *Sackett v. EPA*, Justice Alito commented that prolonged inaccessibility of judicial review of an Environmental Protection Agency ("EPA") compliance order under the CWA violated due process. 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring) ("In a nation that values due process, not to mention private property, such treatment is unthinkable."). The Court held that the recipient of an EPA compliance order may immediately seek APA review, with the ability to contend that the property is not covered by the CWA. *Id.* at 1370-1371. The Court should similarly determine that the APA's "'strong presumption' favoring judicial review of administrative action" permits Respondents to seek immediate judicial review of the Corps revised approved jurisdictional determination. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986)); *Sackett*, 132 S. Ct. at 1373; *see also* 5 U.S.C. § 704. Respondents would then be able to meaningfully challenge the agency conclusion that the property at issue contains "waters of the United States" under the CWA. 33 U.S.C. § 1362(7); *see also* 33 U.S.C. § 1251 *et seq.*

The Court should not be swayed by the Corps argument that the revised approved jurisdictional determination does not satisfy the two-part analysis of APA finality under *Bennett v. Spear* because the

delayed reviewability that would result raises a serious constitutional problem; it would result in a due process violation. *See* Br. at 25 (citing *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997). The Court has held that "'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Edward J. DeBartolo Corp.*, 485 U.S. at 575 (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Avoiding interpretations that would render statutes unconstitutional "reflects the prudential concern that constitutional issues not be needlessly confronted." *Id.* Such an approach "also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution." *Id.* The Court "will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties." *Id.*

II. A DUE PROCESS VIOLATION WOULD RESULT IF IMMEDIATE APA REVIEW OF THE CORPS REVISED APPROVED JURISDICTIONAL DETERMINATION IS UNAVAILABLE.

A due process claim asks whether a party had protected interests and, if so, whether the procedures followed by the government in depriving that party of those interests comported with due process. *See Lujan v. G&G Fire Sprinklers, Inc.*, 532 U.S. 189, 195 (2001). The initial "inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999). Determining the amount of process that is due requires a balancing of three distinct factors:

> First, the private interest that will be affected by the official action; second, the risk of an

> erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335; *see also Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 242 (1988) (discussing significance of delay in due process analysis). Respondents articulated a cognizable property interest that has been infringed by the Corps revised approved jurisdictional determination. The process that is due to constitutionally permit such infringement is immediate APA review.

A. Respondents possess a cognizable property interest that has been infringed by the Corps revised approved jurisdictional determination.

The range of "property interests protected by procedural due process extend[s] well beyond actual ownership of real estate, chattels, or money." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 571-72 (1972); *see also Connecticut v. Doehr*, 501 U.S. 1, 12 (1991) ("[E]ven the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection"). "Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164

(1998) (citing *Bd. of Regents of State Colleges*, 408 U.S. at 577). The right of an owner to devote land to "any legitimate use is properly within the protection of the Constitution." *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928); *see* also *Northpointe Plaza v. Rochester*, 465 N.W.2d 686, 689 (Minn. 1991) (application for a land use permit that is conditioned only upon compliance with zoning ordinance is property interest protected by due process); *Hay v. Andover*, 436 N.W.2d 800, 804 (Minn. Ct. App. 1989) (special use permit); *Zumbrota v. Johnson*, 280 Minn. 390, 395-96 (Minn. 1968) (ownership of building).

Here, Respondents' amended complaint pleads a cognizable property interest in the land at issue. J.A. 7, 9 (Am. Compl. ¶¶ 1, 7).[3] Respondents own the land. J.A. 25 (Am. Compl. ¶ 75). They intend to use the land for the legitimate purpose of peat mining. J.A. 13, 25 (Am. Compl. ¶¶ 27, 77). They intend to process that peat for sale to the golf course industry for use in the construction of greens. J.A. 14 (Am. Compl. ¶ 32). Respondents have pleaded a property interest that is cognizable under due process – ownership, as well as the intention to put their land to a legitimate economic use.

In *Doehr*, the Court addressed the effects attributable to a nonfinal deprivation that could impinge upon the property rights of a landowner. *Doehr*, 501 U.S. at 11. The deprivation in *Doehr*, prejudgment attachment of real estate as surety against a future judgment, "clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit

[3] Courts accept as true all well-pleaded factual allegations in a complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

rating; reduces the chance of obtaining [a loan backed by the value of the property]; and can even place an existing mortgage in technical default." *Id.* The amended complaint herein contains allegations that the revised jurisdictional determination wrought similar effects. *See* J.A. 25 (Am. Compl. ¶¶ 76-77).

The Corps exercise of jurisdiction has decreased the value of the land. J.A. 25 (Am. Compl. ¶ 76). It has prevented Respondents from putting their land to a viable, legitimate use. *Id.* Respondents are continuously injured because they are precluded from lawfully conducting peat mining and using the land without fear of an enforcement action being brought against them. J.A. 25 (Am. Compl. ¶ 77). Respondents' property interest in the land at issue has been infringed by the Corps because, *inter alia*, the land has diminished in value and cannot be used to mine peat.

B. Immediate APA review is the Process that is Due.

The balancing of Respondents' private interest, the risk of erroneous deprivation with the existing procedure of delaying Article III review, and the governmental interests at stake requires immediate APA review.

Notwithstanding the deprivation of Respondents' property interest, the Corps revised approved jurisdictional determination serves to increase the likelihood that an enforcement action will be brought against Respondents if they put the land to its intended economic purpose. J.A. 25 (Am. Compl. ¶ 77). Likewise, it also increases the potential civil and criminal liability that Respondents could face if they currently mine peat on the land. *Id.* The cost of obtaining a permit is anticipated to exceed

$100,000.00. J.A. 17 (Am. Compl. ¶ 44). Respondents are thus faced with putting their land to a legitimate purpose at the risk of civil and criminal liability, or engaging in the time-consuming and expensive process of obtaining a Section 404 permit from the Corps before conducting their proposed activities. J.A. 25 (Am. Compl. ¶ 78). Additionally, the Corps informed Respondents of the substantial and expensive area-wide research projects that would be required as a prerequisite to obtain a Section 404 permit. J.A. 17 (Am. Compl. ¶ 44); J.A. 34 (Aug. 25, 2011 Corps letter).

There is a risk of erroneous deprivation of Respondents' property interest with the current delayed APA review procedures. On several occasions, Corps representatives made comments to Respondents, suggesting a preordained adverse adjudicatory result that ultimately came to be. J.A. 15-18 (Am. Compl. ¶¶ 40-50); Pet. App. 6a-7a. The resulting approved jurisdictional determination concluded that the land at issue contains "waters of the United States," regulated by the Corps under Section 404 of the CWA. J.A. 18 (Am. Compl. ¶ 50); 33 U.S.C. § 1362(7); *see also* 33 U.S.C. § 1251 *et seq.* After Respondents secured an administrative remand of the approved jurisdictional determination from the Regulatory Appeals Review Officer, the Corps issued its revised approved jurisdictional determination without curing the deficiencies identified by the Review Officer. J.A. 20-21 (Am. Compl. ¶¶ 54-57); Pet. App. 7a-8a. This case presents a situation of a "constitutionally intolerable choice" because "compliance is sufficiently onerous and coercive penalties are sufficiently potent." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994) (citing *Ex parte Young*, 209 U.S. 123, 148 (1908)).

It is probable that the additional procedural safeguard of immediate APA review will have a curative effect on wrongly-issued administratively final and exhausted Corps jurisdictional determinations. *See* 33 C.F.R. §§ 331.10 (final decision), 331.12 (exhaustion of administrative remedies). A federal court is the required next step to determine if the Corps revised approved jurisdictional determination is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," upon review of the administrative record. 5 U.S.C. § 706(2)(A).

The traditional governmental interests of protecting the public fisc and preserving administrative resources do not outweigh the other *Mathews* factors. *See Mathews*, 424 U.S. at 335. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Here, Article III review presents a limited burden on the Corps, obliging it only to compile an administrative record.

Concerns of stifling adjudicatory efficiency with the timing of judicial review are unfounded because there is little societal cost or administrative burden associated with the challenging of a Corps conclusion that land contains "waters of the United States." Br. at 5-6. In 2015, interested parties filed only "eight administrative appeals of approved jurisdictional determinations issued outside of the permitting process." *Id.* The immediate judicial review of such Corps adjudications would serve the public interest in deterring legally infirm Corps adjudications on an issue that carries potent consequences upon a finding of CWA applicability. Accordingly, immediate APA reviewability of the Corps revised approved jurisdictional determination is required.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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