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 FOR
CALIFORNIA FARM BUREAU FEDERATION,
CALIFORNIA CATTLEMEN'S ASSOCIATION,
CALIFORNIA BUILDING INDUSTRY ASSOCIATION,
BUILDING INDUSTRY
LEGAL DEFENSE FOUNDATION, &
CALIFORNIA BUSINESS PROPERTIES ASSOCIATION
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI[1]

The California Farm Bureau Federation (CFBF) is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the state of California and to find solutions to the problems of the farm, the farm home, and the rural community. CFBF is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing more than 53,000 agricultural, associate, and collegiate members in 56 counties. CFBF strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources. Many of CFBF's members farm on lands that contain areas which the U.S. Army Corps of Engineers (Corps) maintains are jurisdictional under the Act, and rely on the exemptions and exclusions for farming in the Act and its implementing regulations.

The California Cattlemen's Association (CCA) is a mutual benefit nonprofit corporation organized in 1917 as an "agricultural and horticultural, nonprofit, cooperative association" to promote the interests of the beef cattle industry. Beef cattle producers operate on over 38 million of California's 100 million

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[1] No counsel for any party authored this brief in whole or in part, or made any monetary contribution intended to fund the preparation or submission of this brief. No person (other than the *amici curiae*, its members, or its counsel) made any such monetary contribution. Blanket consents from counsel for all parties to the filing of briefs amicus curiae are on file with the Clerk.

acres. They frequently will graze cattle on lands that are also used for crop production. Beef cattle producers also operate on lands that contain areas which the Corps maintains are jurisdictional under the Act, and rely on the exemptions and exclusions for farming in the Act and its implementing regulations.

The California Building Industry Association (CBIA) is a statewide, non-profit trade association representing over 3,000 businesses and employing more than 100,000 people involved in all aspects of residential and commercial construction. Its members include homebuilders, architects, engineers, sales agents, title and escrow companies, general and specialty contractors, lenders, attorneys, land planners, material suppliers, insurers and land developers. Collectively, CBIA's members are responsible for producing approximately 80% of all new homes built in California annually.

The Building Industry Legal Defense Foundation (BILD) was formed in 1987 as a California mutual benefit nonprofit corporation whose purposes are to monitor legal developments and to participate in litigation designed to improve the business climate for the building industry. BILD is a wholly owned subsidiary of the Building Industry Association of Southern California, Inc. Together, they represent more than 1,100 member companies.

California Business Properties Association (CBPA) is the designated legislative advocate for the International Council of Shopping Centers (ICSC), the Commercial Real Estate Developers Association (NAIOP), NAIOP of California, the Building Owners and Managers Association of California, the Retail Industry Leaders Association, the Institute of Real Estate Management, the Association of Commercial

Real Estate – Northern and Southern California, the National Association of Real Estate Investment Trusts and the California Association for Local Economic Development. CBPA currently represents over 10,000 members, making it the largest consortium of commercial real estate professionals in California.

The members of CBIA, BILD, and CPBA routinely engage with the Corps on Clean Water Act issues, including jurisdictional determinations.

All of the amici are concerned about the vagueness of the Clean Water Act, and with the difficulty in structuring their activities so as to comply. In the Ninth Circuit, that uncertainty is compounded by the fact that approved jurisdictional determinations are not reviewable in court because they are not considered final agency action. (*Fairbanks North Star Borough* v. *U.S. Army Corps of Eng'rs*, 543 F.3d 586, 589 (9th Cir. 2008).)

INTRODUCTION AND SUMMARY OF ARGUMENT

The Clean Water Act is a penal statute, imposing potentially ruinous criminal sanctions and civil penalties on landowners accused of violating it. Due process requires that penal statutes "define the criminal offense with sufficient definite-ness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforce-ment." (*Skilling* v. *United States*, 561 U.S. 358, 402-03 (2010) (quoting *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983)), internal brackets, numbers, and quotation marks omitted.) But ordinary people have practically no way of understanding in advance whether their activities would violate the Act, or lead to arbitrary or discriminatory enforcement by the Government or other private parties.

The Corps' litigation position would make this constitutional problem even worse. The Corps' regulations prescribe that approved jurisdictional determinations (JDs) are "final agency action", and the Corps has explained that the public can "rely on" them. But here, the Corps argues that approved JDs are not final agency action, and they should not be relied on. It even takes the position that landowners who rely on an approved JD, and are careful to avoid any property identified as jurisdictional, can still be subject to penal enforcement action if the Corps or any member of the public later asserts that additional jurisdictional areas exist on the property. This only adds to the uncertainty that the Act imposes on landowners.

To help mitigate the constitutional problem that this uncertainty would present, this Court should

interpret "final agency action" to include approved JDs.

ARGUMENT

TO MITIGATE THE POTENTIAL UNCONSTITUTIONAL VAGUENESS OF THE CLEAN WATER ACT AND ITS REGULATIONS, 'FINAL AGENCY ACTION' UNDER THE APA SHOULD BE CONSTRUED TO INCLUDE APPROVED JURISDICTIONAL DETERMINATIONS.

1. The Administrative Procedure Act (APA) "creates a presumption favoring judicial review of administrative action". (*Sackett* v. *EPA*, 132 S.Ct. 1367, 1373 (2012), internal citation and quotation marks omitted.) The APA defines "agency action" to include "relief" (5 U.S.C. 551(13)), and defines "relief", in turn, to include an agency's "grant of … assistance" (*id.* para. 11(A)).

Is an approved jurisdictional determination (JD) a grant of assistance or other form of agency action? Nine times in its merits brief the Corps characterizes approved JDs as being to "assist" landowners. (Pet. Br. at III, 3, 20, 21 (twice), 32, 34, 43, & 44.) This assistance is not general or informal, as agency brochures or reports might be; rather, it is the result of a formal, individual, site-specific, adjudicatory procedure, based upon an administrative record.[2]

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[2] The regulations governing jurisdictional determinations (only some of which are acknowledged in the Corps' brief) are instructive. They generally authorize Corps district engineers "to *determine* the area defined by the terms 'navigable waters of the United States' and 'waters of the United States'" (33 C.F.R. 325.9, emphasis added), and "the applicability of general permits or statutory exemptions to proposed activities" (33 C.F.R. 320.1(a)(6)). These are to be "*formal* determinations" that "constitute a

This assistance extends beyond just adjudicating jurisdiction under the Clean Water Act. It also includes adjudicating "the applicability of general permits or statutory exemptions to proposed activities". (33 C.F.R. 320.1(a)(6).) The Corps expects the public to "rely on" approved JDs. (51 Fed.Reg. 41,206, 41,207 (Nov. 13, 1986).) This assistance—intended as it is to be relied on by all as a formal adjudication of a landowners' rights and responsibilities under the Clean Water Act—is agency action presumptively subject to judicial review.[3]

It is also "final agency action" for which the APA provides a right to judicial review. (*See* 5 U.S.C. 704.) The Corps' own regulations prescribe that an approved JD is "a Corps final agency action." (33

Corps *final agency action*". (*Id.*, emphasis added.) They are subject to a formal appeal procedure intended to be "independent, objective, fair, prompt, and efficient." (33 C.F.R. 331.1(a).) Landowners are to be notified of their right to appeal, and of their "right to obtain a copy of the administrative record." (33 C.F.R. 331.4.) Appeals are to be reviewed by an officer who had no involvement in the "action being appealed." (33 C.F.R. 331.3(b).) The reviewing officer may call a meeting with the parties "to review and discuss issues directly related to the appeal". (33 C.F.R. 331.7(d).) Decisions on the merits of an appeal must be "in writing". (33 C.F.R. 331.9(b).) Meritorious appeals result in a remand. (33 C.F.R. 331.10(b).)

[3] Approved jurisdictional determinations also qualify as the type of "relief" that is agency action because they constitute the Corps' "recognition of a … right, immunity, … [or] exemption" (5 U.S.C. 551(11)(B)), and the "taking of other action on the application or petition of, and beneficial to, a person" (5 U.S.C. 551(11)(C)).

C.F.R. 320.1(a)(6).) Rightly so. It marks the consummation of the Corps' formal process for determining jurisdiction under the Act, and it determines landowners' rights or obligations under the Act, including "the applicability of general permits or statutory exemptions to proposed activities" (*id.*). (*See Bennett* v. *Spear*, 520 U.S. 154, 177-78 (1997).) Approved JDs should be subject to judicial review under the APA.

2. Although its regulations prescribe that approved JDs are "final agency action" which, it has explained, "the public can rely on", the Corps' core litigation position here is that its regulations are wrong. (*See* Pet. Br. at 34 n.8.) The Corps argues that approved JDs are not final agency action, largely because they *should not* be relied upon. As the Corps puts it:

> If a particular site in fact contains waters of the United States, but the Corps incorrectly concludes that it does not, unpermitted pollutant discharges into those waters remain unlawful (assuming that no exception to the statutory prohibition applies), even if the Corps' view is reflected in an approved jurisdictional determination. … [A] negative jurisdictional determination does not cause otherwise-unlawful discharges to be lawful, and it does not insulate the landowner from potential liability … .

(Pet. Br. at 40-41.) In other words, even if a landowner entirely limits his or her operations to the dry land (i.e., non-waters) identified in an approved JD, that landowner could still face an enforcement action by the Government or another private party, on the ground that the approved JD was wrong and additional waters are actually present.

3. The Corps' litigation position, if accepted, would make a serious constitutional problem with the Clean Water Act and its regulations even worse. The Act imposes potential criminal liability on violators (33 U.S.C. 1319(c)), as well as potentially massive civil penalties (*id.*, para. (d)) that are "criminal in nature" (*Tull* v. *United States*, 481 U.S. 412, 418-21 (1987)). "To satisfy due process, a penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." (*Skilling* v. *United States*, 561 U.S. 358, 402-03 (2010) (quoting *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983)), internal brackets, numbers, and quotation marks omitted.) But ordinary people have practically no way of understanding in advance whether their activities would violate the Act, or could lead to arbitrary or discriminatory enforcement by the Government or other private parties.

a. This uncertainty is partly because "[t]he reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act". (*Sackett* v. *EPA*, 132 S.Ct. at 1375 (Alito, J., concurring).) Ordinary landowners typically cannot determine for themselves whether their properties contain features the Corps may assert jurisdiction over. Judge Kelley, in her concurrence below, was quite correct to note that the Act is "unique" in that "most laws do not require the hiring of expert consultants to determine if they even apply to you or your property." (Pet. App. at 20a.) Any penal statute that requires ordinary people to hire expert consultants to understand it is constitutionally suspect.

In the arid West, the Corps asserts jurisdiction over vast swaths of land that are bone dry for many months at a time.[4] (During drought years such as these, such dryness can go on for years.) To even begin to understand whether their normally dry properties contain "wetlands" that might be regulated, landowners must hire experts to study the soils, hydrology, and vegetation.[5] Experts must then assess the physical, chemical, and biological relationships those wetlands may have to other lands in the region and to any traditionally navigable

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[4] *E.g.*, U.S. Army Corps of Engineers, *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region*, at 10 (2008) ("Nevada, for example, considered one of the drier states in the country, contains approximately 1.7 million acres of wetlands"), *available at* http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg_supp/trel08-28.pdf.

[5] To delineate wetlands, the Corps uses a 143-page national wetlands delineation manual. (U.S. Army Corps of Engineers, *Wetlands Delineation Manual* (1987), *available at* http://el.erdc.usace.army.mil/elpubs/pdf/wlman87.pdf.) That national manual must be read in conjunction with ten regional manuals (U.S. Army Corps of Engineers, *Regional Supplements to Corps Delineation Manual*, *available at* http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/reg_supp.aspx), and ever-changing lists of wetland soils (U.S. Natural Resource Conservation Service, *Lists of Hydric Soils*, *available at* http://www.nrcs.usda.gov/wps/portal/nrcs/main/soils/use/hydric/) and wetland plants (U.S. Army Corps of Engineers, *National Wetland Plant List, available at* http://rsgisias.crrel.usace.army.mil/NWPL/). None of this has undergone notice-and-comment rulemaking.

waters downstream.[6] Only then can the experts hazard any guess as to whether the wetlands on a property are jurisdictional under the Act. And if the experts guess wrong, or if other experts disagree, or if the Corps approves the JD but later changes its mind, the Act (as the Corps interprets it) invites anyone to bring a penal enforcement action.

The process can often get even messier. The Corps' local districts frequently apply different standards for determining jurisdiction under the Act. (Resp. Br. at 3, citing General Accounting Office report.) They also frequently apply standards that conflict with authority from this Court, as Hawkes alleges happened here. (Resp. Br. at 38.) Likewise, across much of northern California, the Corps still asserts jurisdiction over waters isolated from traditional navigable waters where "there is a potential connection to interstate commerce".[7] But in *Solid Waste Agency* v. *U.S. Army Corps of Eng'rs*, this

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[6] The Corps' current guidance on evaluating the physical, chemical, and biological relationships between properties and waters, for purposes of jurisdiction under the Act, is provided in a memorandum jointly published with EPA: *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in* Rapanos v. United States *&* Carabell v. United States (2008), *available at* http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/cwa_juris_2dec08.pdf.

[7] This quote is taken from deposition testimony of Matthew Kelley, the sole Corps staff person for five large California counties (Tehama, Plumas, Lassen, Shasta, and Modoc counties). It is accessible via PACER at page 38, lines 2-25, of document 115, in *Duarte Nursery, Inc.* v. *U.S. Army Corps of Eng'rs*, case 2:13-cv-2095 (E.D. Cal.) (Kelley Deposition).

Court rejected the Corps' argument that isolated waters could be regulated by the Act, even if those isolated waters are used for commerce that may have interstate effects. (531 U.S. 159, 173 (2001).)

So landowners trying to comply must contend not only with the vagaries of the reach of the Act, but with Corps staff who inconsistently apply, do not understand, or perhaps simply disagree with how this Court has interpreted the law.

b. The activities the Act regulates, even in unambiguously jurisdictional waters, can also be impossible for ordinary people to predict. The Act generally prohibits the "discharge of any pollutant" without a permit (33 U.S.C. 1311(a)), and authorizes the Corps to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites" (33 U.S.C. 1344(a))—except that no Corps permits are needed for certain exempted discharges (*id.* para. (f)).

The following real-world examples may give some sense of just how confused and unpredictable the Corps' implementation of these provisions can be:

- *Bicycling*. The Corps has taken the position that it "could require a permit to ride a bicycle across a wetland". (*Nat'l Mining Ass'n* v. *U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1404 n.4 (D.C. Cir. 1998).)

- *Driving*. Corps staff have testified that "[i]t would be pure speculation to know in advance whether you discharge something" as the result of "driving through a wetland".[8]

- *Plowing*. Corps regulations provide that

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[8] Kelley Deposition, *supra*, at page 167, lines 14-23.

"plowing" (defined as "breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops") "will never involve a discharge of dredged or fill material." (33 C.F.R. 323.4 (a)(1)(iii)(D).) But the Department of Justice is taking the position, in an enforcement action, that plowing is not "plowing" under this regulation, and thus *does* involve a discharge, if it creates "furrows and ridges".[9] How one could ever plow without creating furrows and ridges the Department of Justice has not ventured to explain.

• *"Normal" Farming Activities*. The Act generally exempts discharges associated with "normal farming, silviculture, and ranching activities" from the permit requirement. (33 U.S.C. 1344(f)(1)(A).) But Corps staff have testified that they "don't have a standard" for what's considered "normal" for purposes of this exemption.[10]

• *Incidental Fallback*. The Corps generally excludes "incidental fallback" from regulation under the Act. (33 C.F.R. 323.2(d)(2)(iii).) Three times the courts have invalidated the Corps' various attempts to define incidental fallback. (*N.*

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[9] United States' Memorandum In Opposition To Duarte's Motion For Summary Judgment On The Counterclaim, at page 13 line 14, Duarte Nursery, Inc. v. U.S. Army Corps of Eng'rs, No. 2:13-cv-2095 (E.D. Cal. Nov. 6, 2015), ECF No. 152.

[10] This quote is taken from deposition testimony of James Robb, a senior project manager with the enforcement unit of the Corps' Sacramento District. It is accessible (with its surrounding testimony for appropriate context) via PACER at page 62, line 23, through page 75, line 11, of document 113, in *Duarte Nursery, Inc.* v*. U.S. Army Corps of Eng'rs*, case no. 2:13-cv-2095 (E.D. Cal.).

> *Carolina Wildlife Fed.* v. *Tulloch*, Civil No. C90-713-CIV-5-BO (E.D.N.C. 1992) (invalidating 1986 regulations); *Nat'l Mining Ass'n*, 145 F.3d at 1410 (invalidating 1993 regulations); *Nat'l Ass'n of Home Builders* v. *U.S. Army Corps of Eng'rs*, No. 01-0274 (JR), 2007 U.S.Dist.LEXIS 6366, *11-*12 (D.D.C. Jan. 30, 2007) (invalidating 2001 regulations).) Rather than develop a new definition that might pass muster with the courts, the Corps, for more than seven years, has left the term completely undefined. (73 Fed.Reg. 79,641, 79,643 (Dec. 30, 2008).)

Landowners should not be left to guess whether their everyday activities violate the Act. The judgment of the Court of Appeals should be affirmed in order to improve landowners' ability to understand their obligations under the Act.

c. The Corps' litigation position here could also undermine the Act's 'permit shield' (33 U.S.C. 1344(p))—which deems compliance with a permit as compliance with the Act. This is because if, after a JD is approved, anyone can still assert that there are additional jurisdictional waters on a property, then they may also try to assert that any permitted project carried out on that property in the meantime thereby violated the permit and removed the permit shield. (*See* 33 C.F.R. part 325, App. A (Corps may "reevaluat[e]" a permit, and use "enforcement procedures", if "[s]ignificant new information surfaces which this office did not consider" when issuing the permit; permit must also contain "a description of the types and quantities of dredged or fill materials to be discharged in jurisdictional waters").)

4. "[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If

one of them would raise a multitude of constitutional problems, the other should prevail". (*Clark* v. *Suarez Martinez*, 543 U.S. 371, 380-81 (2005).) Here, interpreting the statutory phrase "final agency action" to include approved JDs would mitigate at least some of the concerns about the potentially unconstitutional vagueness of the Clean Water Act and its implementing regulations.

Interpreting "final agency action" in this way would bar the Government, at least, from relitigating, in an enforcement action, the issues of jurisdiction and "the applicability of general permits or statutory exemptions to proposed activities" (33 C.F.R. 320.1(a)(6)), which were adjudicated to finality in the approved JD. (*See B&B Hardware, Inc.* v. *Hargis Indus.*, 135 S.Ct. 1293, 1303 (2015) ("a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court", internal citation and quotation marks omitted).) Barring the Government from relitigating those issues once a JD is approved would give landowners at least some degree of certainty about which parts of their properties, and which activities carried out on them, are regulated by the Act.

Such an interpretation would also allow landowners to bring court challenges to approved JDs which misapply the law on the reach and scope of the Act. Allowing the courts to correct incorrect applications of the law should bring some needed clarity and consistency to the implementation of the Act.

If, however, the Corps' interpretation prevails here, the tremendous uncertainty that ordinary people already face in trying to understand how they

can structure their conduct so as to comply with the Act would only get worse. For a statute whose violation imposes potential criminal penalties, such uncertainty is constitutionally intolerable. This Court should help mitigate that problem by interpreting "final agency action" to include approved JDs.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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