

No. 20-426

**In The
Supreme Court of the United States**

WILLIAM L. HUNTRESS AND ACQUEST
DEVELOPMENT, LLC,

Petitioners,

v.

UNITED STATES OF AMERICA.

Respondent.

On Petition for A Writ of Certiorari to
the United States Court of Appeals
for the Second Circuit

BRIEF OF *AMICUS CURIAE*
NATIONAL ASSOCIATION OF HOME
BUILDERS OF THE UNITED STATES IN
SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, *Amicus* National Association of Home Builders of the United States (“NAHB”) states that it is a non-profit 501(c)(6) corporation incorporated in the State of Nevada, with its principal place of business in Washington, D.C. NAHB has no corporate parents, subsidiaries or affiliates, and no publicly traded stock. No publicly traded company has a ten percent or greater ownership interest in NAHB.

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INTEREST OF *AMICUS CURIAE*¹

The National Association of Home Builders of the United States (“NAHB”) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB’s goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB’s approximately 140,000 members are home builders or remodelers and construct approximately 80% of all new housing units in the United States.

A large part of building and selling homes consists of securing and preparing the land for construction. That land often contains “waters of the United States,” as the federal government has defined and interpreted that term. *See* 33 C.F.R. § 328.3(a); 40 C.F.R. § 122.2. Due to the Environmental Protection Agency and Corps of Engineers’ long-time policy opposing judicial review of Clean Water Act jurisdictional determinations landowners were “entirely at the mercy of Environmental Protection Agency (“EPA”) employees.” *Sackett v. Environmental Protection Agency*, 566 U.S. 120, 132

¹ Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*’s intention to file this brief. Letters of consent are on file with the Clerk. 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 curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

(2012) (J. Alito concurring). The Petitioners, like many of NAHB's members, found themselves at this mercy.

NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and amicus curiae to safeguard the constitutional and statutory rights and business interests of its members and those similarly situated.

ARGUMENT

I. PETITIONERS CHOOSE TO DISAGREE WITH EPA AND MET ITS WRATH.

The Petitioners' desire to develop private property epitomizes the struggle between regulatory agencies and regulated landowners over the "notoriously unclear" reach of the Clean Water Act ("CWA"). *Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito J., concurring). In 1997, when a Huntress-owned company, Acquest Wehrle LLC, entered into a purchase agreement for a commercially zoned property on Wehrle Drive in Amherst, New York, it had a solid understanding that jurisdictional "waters of the United States" were *not* present on the site. Its own pre-acquisition due diligence and a 1997 "negative" jurisdictional determination ("JD") from the Army Corp of Engineers ("Corps") helped to inform its purchase decision.² Out of an abundance of caution, following its purchase Acquest sought a permit for the discharge of fill material in connection with its proposed development project. In a letter dated June 29, 2001 the Corps' Regulatory Branch communicated that a permit was not necessary. It confirmed that wetland areas on the parcel "are isolated, non-navigable, intrastate waters that are not subject to regulation under Section 404 of the Clean Water Act." Letter from Arthur K. Marks, Army Corps of Eng'rs Chief, New York Application, Evaluation Section to Wayne I. Eisenbaum, Acquest

² A "negative" JD, as used by the Corps and EPA, is an approved JD stating that a parcel does not contain jurisdictional waters.

Dev. (June 29, 2001), *Acquest Wehrle v. U.S.*, No. 1:06-cv-00654 (W.D.N.Y. Sept. 29, 2006).

In 2001, a group of individuals from the town of Amherst brought an action under the CWA's citizen-suit provision challenging the Corps negative JD.³ At the governments' request the District Court agreed to vacate the JD and voluntarily remand the issue for reconsideration.⁴ From here the jurisdictional call was transferred to the EPA.

The EPA issued a Memorandum from Mario A. Paula, Environmental Scientist, USEPA Region 2 "Jurisdictional Determination and Special Case Designation", APP. A (Nov. 21, 2002) (original on file with author) finding a jurisdictional wetland of approximately 9.5 acres on the Wehrle Drive site. The attenuated hydrological connection supporting the EPA's JD involved an onsite "watercourse" flowing from the wetland "through the underground ditch along Wehrle Drive, through a culvert under the road, and into the town ditch, from which it flows via Ellicott Creek to the Niagara River, a traditionally navigable water." *Id.* at 9. Serious debate surrounds the question of whether a non-navigable tributary consisting of "man-made" structures can help form the basis of a JD. *See e.g.*, *Rapanos v. U.S.*, 547 U.S. 715, 735-36 (2006)

³ Complaint, *Suchyna, et al. v. U.S. Army Corps of Eng'rs, et al.*, No. 1:01-cv-00763 (W.D.N.Y. Oct. 26, 2001).

⁴ Order, *Suchyna, et al. v. U.S. Army Corps of Eng'rs, et al.*, No. 1:01-cv-00763 (W.D.N.Y. Jun. 24, 2002).

(discussing that a ditch cannot be a navigable water because a ditch is a “point source”).

Acquest disagreed with the EPA’s JD and challenged it in 2006. The District Court dismissed the claim, citing federal courts that have “repeatedly confirmed” that a JD does not constitute final agency action under the Administrative Procedure Act (“APA”). *Acquest Wehrle LLC v. U.S.*, 567 F.Supp.2d 402, 410 (W.D.N.Y. 2008). Thus, despite the agencies flip-flop on their jurisdictional positions, the questionable basis of the EPA’s final JD and the District Court’s entertainment of a jurisdictional challenge raised by a group of local citizens, the *owner* of the site at issue was denied its day in court. “In a Nation that values due process, not to mention private property, such treatment is unthinkable.” *Sackett*, 566 U.S. at 132 (Alito, J., concurring).

The District Court decision forced Petitioners into a dilemma—the same dilemma (at that time) faced by all landowners that disagree with a JD stating that the CWA applies. First, they could have abandoned their development plans and steered clear of any future land-use activities that might irk federal regulators. Second, they could comply with the time-consuming and expensive CWA permit application process.⁵ Thereafter, if the agency denied its permit

⁵ The average cost and time an applicant spends preparing a CWA section 404 individual “dredge or fill” permit application (excluding the significant losses and costs associated with avoidance, minimization and mitigation

application and if Petitioners exhausted all administrative remedies it could then challenge the basis of the permit that it believes was not required. Finally, Acquest Wehrle could have proceeded with development activities without obtaining a CWA permit and incur the risk of serious civil and criminal penalties. Only after being hauled into federal court could it then present its version of the facts and law. To require landowners to “bet the farm...by taking violative action” before “testing the validity of the law” finds no support in Article III. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007).

Petitioners took the last option and were met with the wrath of the EPA. In 2009, the EPA first sued Aquest Wehrle for alleged unlawful activities that occurred on the Wehrle site. The government voluntarily dismissed that lawsuit with prejudice. Decision and Order, *USA v. Acquest Wehrle, LLC*, No. 1:09-cv-00637 (W.D.N.Y. Nov. 1, 2017). Similarly, in 2009, the EPA brought a civil suit against Acquest Transit for actions it took on its Transit Road property that it claims were farming activities. To date, there has been no judicial determination that jurisdictional wetlands are present at that site. *United States v. Acquest Transit LLC*, No. 09CV55S, 2020 WL 3042673, at *31 (W.D.N.Y. June 4, 2020).

requirements) is \$271,596 and 788 days. *Rapanos*, 547 U.S. at 719 (plurality opinion).

The EPA, however, was not satisfied with just civil lawsuits. In 2011, the EPA filed a criminal indictment against the Petitioners for the activities that occurred on the Transit Road site. That indictment was dismissed, and the government then re-indicted the Petitioners in 2013. Cert. Pet. 6.

The EPA's retaliation was all in response to the Petitioners' decision not to accept the EPA's determination that wetlands were present on their properties. And that was a decision forced upon them due to the EPA's insistence that JDs could not be challenged in court.

However, this court unanimously ruled that approved JD's are "final agency action" subject to judicial review under the APA. *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S.Ct 1807 (2016). Similar to Petitioners' case, *Hawkes* involved a landowner that had its land-use plans stymied after the Corps issued a JD stating that its property contained jurisdictional wetlands with a "significant nexus" to a distant traditionally navigable water. *Hawkes* challenged the JD and the case was dismissed on the grounds that the JD was "not 'final agency action'" under the APA. *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 963 F.Supp. 2d 868, 877-78 (D. Minn. 2013). This Court affirmed the Eight Circuit and found that the JD was reviewable. The Court explained that:

As we have long held, parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of "serious criminal and civil

penalties.” [citation omitted]. If respondents discharged fill material without a permit, in the mistaken belief that their property did not contain jurisdictional waters, they would expose themselves to civil penalties of up to \$37,500 for each day they violated the Act, to say nothing of potential criminal liability. [citations omitted]. Respondents need not assume such risk while waiting for EPA to “drop the hammer” in order to have their day in court. [citations omitted]. Nor is it an adequate alternative to APA review for a landowner to apply for a permit and then seek judicial review in the event of an unfavorable decision.

Hawkes Co., Inc., 136 S.Ct at 1815 (2016).

Unfortunately for Petitioners this Court’s ruling in *Hawkes* has come ten years too late. They have essentially bet the farm and their freedom defending their property rights and the “enlightened despot” made them pay for it. *Rapanos*, 547 U.S. at 721 (2006).

II. THE CLEAN WATER ACT DOES NOT COVER “POTENTIAL WETLANDS.”

As explained, in 2011, the EPA indicted the Petitioners for “various crimes in connection with an alleged wetlands site in the Town of Amherst, New York.” *United States v. Acquest Dev., LLC*, 932 F. Supp. 2d 453, 456 (W.D.N.Y. 2013). That indictment was dismissed “due to the government’s interference with the grand jury’s independence . . .” *Id.* at 463.

In 2013, the EPA again indicted Mr. Huntress and Acquest. In this indictment the government charged the Petitioners with discharging dredge and fill material into “potential wetlands” located on the Transit Road site. Indictment, *The United States of America v. William L. Huntress, Acquest Dev., et al.*, No. 1:13-cr-00199 (W.D.N.Y. Sept. 19, 2013). The government did not simply make a passing reference to “potential wetlands.” It referred to “potential wetlands” at least 10 times in the Indictment. Thus, the 2011 indictment charged the Petitioners with taking unlawful activities in wetlands, but in 2013 the government charged them with violations that revolved around “potential wetlands.” Under the CWA, this is a considerable change. The Petitioners should be allowed to explore why it occurred.

Some, but not all wetlands fall under the jurisdiction of the CWA. *Rapanos*, 547 U.S. at 742. (Scalia, J., plurality) (“[O]nly those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act.”); *Id.* at 779 (J. Kennedy concurring) (“[T]he Corps’ jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense.”). By referencing “potential wetlands” the government may have been referring to areas that are wetlands, but do not currently fall under the jurisdiction of the CWA—but may in the future. Thus, they are “potential” because Congress could redefine the term “navigable waters” or the EPA or Corps could develop a new rule that

reinterprets the term “waters of the United States” in a way that covers these wetlands. Equally, “potential wetlands” could be areas that are not currently wetlands (i.e. uplands) but due to the climate and/or geography could turn into wetlands in the future. Either way, it is not a CWA violation to conduct activity in areas that are not currently jurisdictional or are currently uplands.⁶

The CWA provides that “navigable waters’ means the waters of the United States . . .” 33 U.S.C. § 1362 (7). Congress did not speak in terms of areas that may become “waters of the United States” or will be “waters of the United States.” To violate the CWA, a person must add pollutants to a geographic area that is currently a “water of the United States.” And the government knows this because there is a leading case from the Court of Appeals for the Second Circuit that deals with a similar situation.

Just as Congress intended only for the regulation of areas that are currently “navigable waters,” the Second Circuit’s interpretation of the term “discharge” also dictates that only actual, not potential navigable waters are covered by the CWA. In *Waterkeeper Alliance, Inc. v. U.S. Environmental Protection Agency*, 399 F.3d. 486 (2d Cir. 2005), petitioners challenged an EPA rule that required all

⁶ Maybe the government was predicting that the Petitioners would commit a crime in the future. Steven Spielberg, 2002. *Minority Report* [Film], 20th Century Fox & DreamWorks Pictures.

“CAFOs⁷ to either apply for NPDES permits or otherwise demonstrate that they have no *potential* to discharge.” *Waterkeeper Alliance*, 399 F.3d at 504 (emphasis added). The Second Circuit held that EPA’s CAFO Rule violated the CWA because it imposed “obligations on all CAFOs regardless of whether or not they have, in fact, added any pollutants to the navigable waters, i.e. discharged any pollutants.” *Id.* at 505. The court sharpened its point by explaining that “the Clean Water Act gives the EPA jurisdiction to regulate and control only *actual* discharges—not potential discharges . . .” *Id.* (emphasis in the original); *see also National Pork Producers Council v. U.S. Environmental Protection Agency*, 635 F.3d 738, 751 (5th Cir. 2011) (explaining that the “cases leave no doubt that there must be an actual discharge into navigable waters to trigger the CWA’s requirements and the EPA’s authority.”).

The CWA defines discharge as “any addition of any pollutant to navigable waters from any point source . . .” 33 U.S.C. § 1362(12)⁸. Thus, under *Waterkeeper Alliance* a person cannot violate the act unless she causes an actual “addition of any pollutant to navigable waters from any point source.” *Id.*

⁷ A CAFO is a concentrated animal feeding operation. The CWA defines CAFOs as “point sources.” 33 U.S.C. § 1362(14).

⁸ In 33 U.S.C. §1362(14) Congress clearly explained that “point sources” do not have to actually add pollutants as it defined them as discrete conveyances “from which pollutants are or may be discharged.”

Further, the series qualifier canon⁹ of construction advances that the adjective “actual” should be applied to each word in the series that defines discharge—addition, pollutant and navigable water. Thus, because *Waterkeeper Alliance* holds that the EPA may only assert CWA authority over actual discharges, it only has jurisdiction over the actual addition of actual pollutants to *actual navigable waters*.

By inserting the word “potential” before the word “wetland” in Count 1 of the 2013 indictment, the government failed to allege any CWA violation occurred in jurisdictional wetlands. Whether the government did so intentionally or mistakenly, the Petitioners deserve their day in court to determine why they were charged with a crime for taking actions in geographic areas that are not covered by the CWA.

⁹ “When there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 127 (2012).

CONCLUSION

For the foregoing reasons, Amicus respectfully requests that the petition for writ of certiorari be granted.

Dated: November 2, 2020

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Environmental Scientist, USEPA Region 2	
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APPENDIX A

Memorandum for the Record

Special Case Designation for 2220 Wehrle Drive Site

On June 29, 2001, the Buffalo District of the US Army Corps of Engineers (Corps) made a determination that certain wetlands on a site known as 2220 Wehrle Drive in Amherst, New York, were isolated and non-jurisdictional pursuant to Section 404 of the Clean Water Act (CWA). Because of ongoing litigation brought by neighboring landowners challenging that non-jurisdiction determination, a federal district court judge vacated the Corps' original determination at the government's request. The case was remanded for reconsideration, with a new determination to be completed no later than November 22, 2002. Region 2 has designated the parcel as a "special case" under an existing Memorandum of Agreement (MOA) with the Corps, allowing EPA to make the final determination of geographic jurisdiction. The Corps does not oppose such a designation.

Field investigations done by an interagency team led by the Corps and Region 2 in July 2002 showed that a large wetland of approximately 9.5 acres exists on the project site. EPA Region 2 believes that this wetland delineation is accurate. Additionally, EPA Region 2 has determined that this wetland is subject to jurisdiction under the CWA because it has a surface hydrological connection through a watercourse originating in the wetland, through

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ditches and culvert and into Ellicott Creek, to a traditional navigable water. Further, the wetland can be considered to be adjacent to Town Ditch 18 and subject to CWA jurisdiction on this basis as well. The technical basis for this decision is contained in the attached "Jurisdictional Determination and Special Case Designation for Wetlands and Aquatic Areas at 2220 Wehrle Drive, Amherst, NY."

Based on these conclusions, EPA Region 2 has determined that there are approximately 9.5 acres of CWA jurisdictional wetlands on the parcel at 2220 Wehrle Drive.

/s/ Jane M Kenny
Jane M. Kenney
Regional Administrator

Nov 22, 2002
Date

USEPA Region 2
Attachment

Memorandum for the Record Nov. 21, 2002

**Jurisdictional Determination and Special
Case Designation for Wetlands and Aquatic
Areas at 2220 Wehrle Drive, Amherst, NY**

1. Executive Summary

On June 29, 2001, the Buffalo District of the US Army Corps of Engineers (Corps) made a determination that certain wetlands on a site known as 2220 Wehrle Drive in Amherst, New York, were isolated and non-jurisdictional. Pursuant to ongoing litigation brought by neighboring landowners challenging that non-jurisdiction determination, the federal district court judge vacated the Corps' original determination at the government's request. The case was remanded for reconsideration, with a new determination to be completed no later than November 22, 2002. Region 2 designated the parcel as a "special case" under an existing Memorandum of Agreement (MOA), allowing the Environmental Protection Agency (EPA) to make the final determination of geographic jurisdiction. The Corps does not oppose such a designation.

Field investigations done by the Corps and EPA in July 2002 showed that a large wetland of approximately 9.5 acres exists on the project site. EPA concludes that this wetland delineation is accurate. EPA has determined that this wetland is subject to jurisdiction under the Clean Water Act (CWA) because it has a surface hydrological connection through a watercourse originating in the

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wetland, through ditches and a culvert into Ellicott Creek, to the Niagara River, a traditional navigable water. Further, the wetland can be considered to be adjacent to Town Ditch 18 and subject to CWA jurisdiction on this basis as well. Based on these conclusions, EPA has determined that there are approximately 9.5 acres of CWA jurisdictional wetlands on the parcel at 2220 Wehrle Drive.

2. Project background

This document is EPA's CWA geographic jurisdictional determination concerning wetlands located on an approximately 20-acre parcel at 2220 Wehrle Drive, Amherst, NY, a suburb of Buffalo. EPA has performed this jurisdictional determination pursuant to the 1989 Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act (January 19, 1989)(MOA)

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In 1983, when EPA funded the Southeast Amherst-Youngs Road Interceptor project, an environmentally sensitive area (ESA) grant condition was placed on the construction grant by EPA, restricting sewer hookups from new construction in ESAs. The wetlands on site were specifically identified as ESAs.

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The current landowner wants to build an office park on the site. The Town of Amherst applied for a waiver from sewer hookup restriction for the site in January 2002. Region 2 is currently evaluating this waiver application.

Because the planned project would involve placing fill in the wetlands, the Buffalo District Corps of Engineers evaluated the jurisdictional status of the wetlands. On June 29, 2001, the Corps of Engineers determined that the wetlands on this site are isolated, non-navigable, intrastate waters not regulated under Section 404, and therefore that a Section 404 permit would not be required to place fill in the wetlands. This determination did not affect the construction grant restriction; if the property owners wish to construct sewage-generating structures in the wetlands on site, a waiver from EPA is still required.

Homeowners who live adjacent to the site filed a lawsuit against the Corps, challenging their “non-jurisdiction” determination. (Suchyna v. U.S. Army Corps of Engineers, No. 01 CV 0763 S (F)(W.D. NY)). During preliminary stages of the litigation, the plaintiffs provided new data concerning the hydrology of the site. To enable the government to consider this new information, the parties to the litigation asked the court to vacate the Corps “non-jurisdictional determination” and remand the jurisdiction decision to the government to allow review of jurisdiction in light of the new information. On June 24, 2002, the district court issued an order vacating the Corps “non-jurisdictional

determination” and remanding the jurisdictional decision to the government, with the understanding that a final determination would be made by November 22, 2002. In July 2002, an EPA-Corps team visited the site to gather information about the extent of wetlands on the site as well as their connection to other waters. At the end of the fieldwork, a preliminary determination was made by the Corps that approximately 9.5 acres of wetlands exist on the site.¹ EPA believes that the Corps delineation of wetlands is accurate. As explained below, EPA has concluded that the large onsite wetland is a water of the United States subject to the CWA.

3. Regulatory Background.

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Under the CWA, a section 404 permit is required for a discharge of dredge or fill material into “waters of the United States.” The applicable regulations define “waters of the United States” to include:

- (1) All waters which are currently used, or 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;

¹ There is also a small depressional wetland, approximately 0.23 acres, on the northern border of the site, as well as two very small “satellite” wetlands west of the large jurisdictional wetland area. These three wetland areas are not considered jurisdictional, as explained below.

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* * *

(5) Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;

* * *

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section . . . [40 CFR 230.3(s)(1), (5) and (7)]:

Wetlands are defined by regulation as: “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas” (40 CFR 230.3(t))

The term “adjacent” is defined by regulation as “bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are ‘adjacent wetlands’” (40 CFR 230.3(b)).

EPA has the ultimate authority to determine the geographic scope of jurisdiction under Section 404 of the CWA (1979 opinion of Attorney General Benjamin Civiletti, 43 Op. Att’y Gen.15). In order to implement this opinion, EPA and the Corps in 1989 entered into the MOA mentioned above which outlines each agency’s responsibility regarding CWA jurisdictional determinations. The MOA gives the Corps primary responsibility for determining the

extent of CWA jurisdiction when making decisions to issue or deny permits under Section 404 of the CWA. But EPA reserved the authority to designate certain jurisdictional determinations as “special cases” where EPA will make the determination as to extent of waters of the United States. Such special cases include project-specific situations where significant issues exist concerning the determination of the geographic jurisdictional scope of waters of the US for purposes of Section 404.

The Corps’ disclaimer of jurisdiction was based in part on its belief that there was no discrete watercourse draining the wetland, as well as its belief that flow through the portion of the storm drain would in any event sever jurisdiction. Because of the lack of clear guidance on those issues, and because significant new information has been made available, the

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Corps had no objection to EPA’s declaring this a special case and making a new jurisdictional determination.

4. Extent of Wetlands on the Site

The Wehrle Drive site had been the subject of several wetland delineations with disagreements on the exact extent of wetlands. Therefore, the Buffalo Corps requested assistance from their technical group, the Waterways Experiment Station (WES) to help resolve the wetland delineation boundary. WES

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forwarded the request to the Army's Cold Region Research and Engineering Laboratory (CRREL) for evaluation and assistance. An interagency team was assembled on July 16-17, 2002 to perform the wetland delineation on the site. The team was comprised of CRREL, Buffalo Corps, EPA and Natural Resources Conservation Service personnel.

Prior to the site visit, all past wetland delineation boundaries were digitized and developed into a Geographic Information System (GIS) coverage by CRRL personnel for viewing in the field. This allowed the delineation field team to evaluate other delineators' boundaries to determine the level of accuracy of the various delineations. Using this baseline, the team decided to establish an independent boundary that accurately depicted the extent of the wetlands.

The methods and procedures applied at the Wehrle Drive site follow current federal wetland delineation methods required by the Corps and described in the Environmental Laboratory Corps of Engineers Wetland Delineation Manual (1987) and appropriate delineation guidance and clarifications presented in subsequent memoranda from Corps Headquarters.

The interagency delineation team evaluated the soils, vegetation and hydrology at various sampling locations on the site. It was found that some of the previous delineators (including those representing the current property owners) had misinterpreted hydric soil indicators and/or were uninformed about

recent guidance regarding hydric soil interpretation. Furthermore, it was found that some of the previous delineators misinterpreted or misapplied the methodologies used to determine the existence of wetland vegetation and hydrology. Additionally, many of the previous delineators did not survey the boundary or use Global Positioning System (GPS) to accurately determine its location.

The delineation boundary was first flagged by the interagency team at 10 meter intervals along its entire length. A GPS unit was then used to survey the boundary, and that boundary was subsequently compared to the previous delineations. The resulting wetland determination indicates that a large wetland of approximately 9.5 acres exists on the 2220 Wehrle Drive site. Near the northern border of the site is a small (approx. 0.23 acre) depressional wetland that was not

evaluated by the interagency team because previous delineators agreed on its occurrence and location.

EPA has reviewed the site delineation done by the interagency team in July 2002 and concurs with the conclusion that approximately 9.5 acres of wetlands exist on the site (see Fig. 1). This acreage value is greater than some of the previous delineations but the shape and form of the wetland area is similar to the most recent previous delineation done by the property owner's consultant. It should be noted that there was never a disagreement among the parties

as to the occurrence of wetlands on site, even if the acreage calculations have varied somewhat; rather the disagreement was about the extent of wetlands. These past acreage differences are not relevant for the purpose of deciding whether the site wetlands are jurisdictional.

5. CWA Jurisdiction Over the Site Wetlands

Physical description

The record shows that, at various times of the year, surface water drains from the large wetland on the site through a small watercourse, through a storm drain grate into an underground ditch that runs for approximately 200 feet along Wehrle Drive, then flows under Wehrle Drive via a box culvert into Amherst Town Ditch 18. Town Ditch 18 flows southward for several hundred feet until it empties into Ellicott Creek, a tributary of a navigable water, and ultimately into the Niagara River. The Niagara River is a traditional navigable river (The sequence described is presented in Fig. 2).

EPA paid particular attention to the new evidence of a watercourse connecting the large forested wetlands to the storm drain.² (Fig. 3) The existence of an ordinary high water mark is a factor which may be used to identify and delineate a watercourse. The Corps defines the ordinary high water mark (OHWM) as the line on the shores established by the

² The Corps, in its decision memorandum of June 29, 2001, based on the more limited information then available to it, had stated that “water only leaves the site via *overland* [emphasis added] flow during storm events and spring snow melt.”

fluctuations of water and indicated by physical characteristics such as:

- * a clear natural line impressed on the bank;
- * shelving;
- * changes in the character of the soil;
- * destruction of terrestrial vegetation;

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- * the presence of litter and debris;
- * or other appropriate means that consider the characteristics of the surrounding areas. (33 CFR 328.3(e))

The site inspection in July 2002 revealed that the watercourse draining the wetland at the southern end of the site has several of the above characteristics (a clear natural line impressed on the bank, changes in the character of the soil, destruction of terrestrial vegetation and the presence of litter and debris) which indicate that it contains an OHWM (See Fig. 3).

While rainfall in the vicinity and snowmelt are likely major contributors to the flow in the watercourse, the evidence (dated videotape and still photographs provided by plaintiffs/adjacent homeowners) shows flow throughout various times of the year, and not just immediately after rainfall. This videotape/photographic evidence indicates flow through the water and down through Ditch 18 for 20 dates from February 11, 2001 to April 14, 2002; flow through the watercourse was not found on one date;

ice cover in the watercourse obscured flow for another of the dates. The extended drought of 2001 stopped the flow through the watercourse for a number of the warmer months, and no observations were recorded.

In order to place these flow observations in context, EPA reviewed existing rainfall data from the National Weather Service at Buffalo Airport (NWS, Buffalo, NY 2002) and daily streamflow statistics for a station in Ellicott Creek (USGS #04218518), downstream of the project site and Ditch 18 (USGS Daily Streamflow Statistics, NY). Evaluating these data for the dates of the videotaped events, it appears that except for a few time periods (Feb. 11, 2001 and Feb. 21, 2002), the recorded precipitation and downstream flow data are consistent with normal climatological data for the time of the year. Therefore, it appears that flow in the watercourse did not occur just during extreme climatological events (i.e, extremely heavy rainfall or snowmelt).

Moreover, the watercourse begins inside the large forested wetland, where observations have shown that standing water occurs during significant portions of the year, including during the early portion of the growing season (the previous delineators reported standing water on portions of the site during the growing season). EPA personnel observed standing water during the site visits of May 7, 2001 and July 16-17, 2002. Both site visits occurred after periods of below average rainfall; the May 2001 observation came after the driest April in 66 years and the 4th driest in 100 years (National

Weather Service, Climate Summary for April 2001). This information indicates that the watercourse may begin at, or slightly below, the water table in the forested wetland. Fig. 4, taken on May 7, 2001, shows standing water in the forested wetlands onsite. In any event, whether the watercourse flows continually throughout the year, only in response to

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significant rainfall, or something in between is immaterial under the regulations; EPA's regulations do not define tributaries in terms of flow nor does 40 CFR 230.3(s)(5) distinguish between tributaries that flow perennially and those that flow intermittently or ephemeraly.

We also reviewed data concerning the historical hydrology of the area. The plaintiffs provided detailed information, including aerial photos, blueprints and US Geological Survey maps of the site dating from the 1920s to the present. Many of the maps and photos were apparently not available to the Corps when it was making its determination as to whether there was an historic surface connection between the site wetlands and navigable waters. This information (in particular a 1927 aerial photograph of the site and adjacent areas) appears to show that a "feeder" stream entered the site on the central-western portion, passed through the wetland complex, then exited (as an "outlet" stream) from the southeast portion of the site. That outlet stream then flowed in a southerly direction until it emptied into a tributary to Ellicott Creek. Figure 3,

an USGS map from 1948 also clearly shows a stream entering the site, flowing through the site, then exiting and flowing south until it empties into Ellicott Creek. During the July 2002 site visit, portions of the remnant outlet stream, now surrounded by development, were observed. (It should be noted that this outlet stream is not in the same location as the present watercourse draining the wetland to the south.)

The information provided shows that development over the past 40-50 years truncated both the feeder and outlet channel and Ditch 18 may have been constructed in part to remove drainage from the site. From the information reviewed, it appears that the site wetlands were historically connected via surface water flow to a “water of the U.S.” and that the current ditch along Wehrle Drive and Town Ditch 18 effectively reroute that historical flow for a short distance before returning it to Ellicott Creek.

6. Functions and Values of Wetlands on the Wehrle Drive Site

While it is not necessary to demonstrate the value of a particular adjacent wetland in order to establish jurisdiction (United States v. Riverside Bayview Homes, 474 U.S. 121 (1985)), the record shows that the wetlands onsite do have considerable ecological value. They appear to provide a variety of functions, including stormwater storage, water quality improvement and habitat complexity. The filling of these wetlands as a result of project construction

would have a negative impact on the site and on downstream waters of the US.

The following is a short description of the site's wetlands functions, as well as what impacts could be expected if the project is constructed as currently planned.

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a. Stormwater Storage- Since the site wetlands (and to some extent the undeveloped uplands) provide floodwater storage, their filling would mean that stormwater would go directly into the area's storm sewers, then into a ditch leading to Ellicott Creek and further downstream to the Niagara River. This could result in increased flooding downstream.

b. Water Quality- The stormwater storage function of the project site allows pollutants and nutrients in the received sediment to settle out and to be removed by the system, maintaining and improving downstream water quality.

c. Habitat Complexity- Mature forested wetlands, which form the majority of the wetlands on-site, are highly structured habitats which offer living space for an abundance and diversity of organisms. Specifically, forested wetlands provide a large area of canopy which may be used by birds (especially neotropical migrants), mammals, and insects; as well as shrub and herb layers, leaf litter, and usually numerous dead and decaying logs. These areas are difficult to replace due to the large number of years

required for late-successional tree species to reach maturity. The loss of these wetlands would have a negative effect on the area's ecosystem, particularly in light of the relatively rarity of this habitat in the area, a heavily-developed suburb of Buffalo.

7. Conclusions About CWA Jurisdiction.

The record shows that the large wetland on the site directly touches and flows into the onsite watercourse. That is, it is adjacent to the onsite watercourse, as well as functioning as a tributary to the watercourse. The record additionally shows that the onsite watercourse has the indicia of a regulated watercourse. Its flow then goes, for a brief distance, through the underground ditch along Wehrle Drive, through a culvert under the road, and into the town ditch, from which it flows via Ellicott Creek to the Niagara River, a traditional navigable water. Thus, the onsite watercourse is part of the tributary system to navigable waters, and therefore the wetland is adjacent to a tributary to navigable waters, as well as functioning as part of that tributary system. The courts have generally held that the fact that a tributary is routed for part of its length through a pipe or other manmade conveyance does not destroy its character as a tributary. Accordingly, under the facts here, where the wetland has historically flowed to Ellicott Creek, and continues to do so, and where that flow is capable of transporting pollutants downstream, it is appropriate to consider the onsite watercourse part of the tributary system, notwithstanding the facts

the flow is briefly routed through the underground ditch and under the road.

Even if, for sake of argument, the underground ditch and onsite watercourse were not considered to be part of the tributary system, the wetland is still adjacent to Town Ditch 18 because it is neighboring, and hydrologically connected, to the

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Ditch, and the Ditch is a tributary to navigable waters.

For the reasons above, EPA accepts the results of the wetland delineation done by the interagency team in July 2002. EPA also concludes that the large wetland on the 2220 Wehrle Dive site is adjacent to, and is part of, the tributary system to traditional navigable waters, and hence jurisdictional under 230.3(s)(1), (5), and (7), and that the watercourse draining it is a jurisdictional tributary under 230.3(s)(1) and (5).³ Accordingly, the large wetland and the water course are “waters of the US” subject to regulation under the CWA.

³ 230.3(s)(7) excepts wetlands which are adjacent to waters that are themselves wetlands. Therefore, since the only basis in the record for asserting jurisdiction over the “satellite” wetlands west of the large wetland and the small depressional wetland on the northern part of the site would be their adjacency to the large wetland, these small wetlands are not included in this jurisdictional determination. They are, however, still covered by the grant condition, as that is not limited to CWA wetlands.

App. 19

/s/ Mario A. Paula
Mario A. Paula, Environmental
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Section, USEPA Region 2

11/21/02

Date

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List of Figures

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2. Path of surface water from Wehrle Drive to Ellicott Creek
3. Picture of watercourse at southern end of site and stormdrain into which it flows
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5. USGS map (1946) showing streams entering and exiting wetland area on project site and ending in Ellicott Creek.

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