

No. _____

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

—◆—
OZARK MATERIALS RIVER ROCK, LLC,

Petitioner,

v.

DAVID BENHAM,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

—◆—
PETITION FOR WRIT OF CERTIORARI

—◆—
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QUESTIONS PRESENTED

Whether the doctrine of primary jurisdiction under *United States v. Western Pac. R.R. Co.* 352 U.S. 59, 64, 77 S.Ct. 161 (1956) applies and the lower courts should have initially abstained from enforcement of a citizen suit under section 404 of the Clean Water Act because the claims contained questions and issues Congress intended for the Army Corps to address including a jurisdictional determination of wetlands (a JD) or a section 404 permit even though the Army Corps issued Letters of No Violation prior to the commencement of the suit.

Whether the lower courts' decisions are clear error when the testimonial admission of the citizen's expert that he had no evidence to distinguish whether the deposition of gravel into the alleged wetlands was caused by Ozark or was deposited and filled in by natural causes such as the deposition of tons of rock and gravel from upstream flooding.

PARTIES TO THE PROCEEDINGS

Petitioner Ozark Materials River Rock, LLC was Defendant, and Appellant below. Respondent, David Benham, was Plaintiff and Appellee below.

RULE 29.6 DISCLOSURE

No parent or publicly owned corporation owns 10% or more of the membership in Ozark Materials River Rock, LLC.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Ozark Materials River Rock, LLC, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this matter.



OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reprinted in the Appendix hereto, pp. 1-16.

The orders of the United States District Court for the Northern District of Oklahoma are reprinted in the Appendix hereto, pp. 17-51.



JURISDICTION

The judgment of the Court of Appeals was entered on March 22, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).



CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant statutory and regulatory provisions are reproduced in the Appendix to this Petition.



INTRODUCTION

Congress established a permit system and intended to give the Army Corps authority for regulating activities within jurisdictional waters and discretion to issue permits for the placement of dredge or fill material into waters of the United States, including wetlands. The Army Corps has primary jurisdiction to determine jurisdictional waters and wetlands, administer in its discretion the issuance or non-issuance of Section 404 permits, and develop policy and guidance relating to its jurisdictional waters and whether an operator is required or not required to be issued a Section 404 permit.

Here the Army Corps regulated the activities of Ozark Materials. When questioned by a citizen that Ozark was violating the Clean Water Act, the Army Corps conducted a site inspection (and several more after that) and concluded that Ozark was not required to have a Section 404 permit, that the areas the citizen suggested were wetlands, were not wetlands, and that the Army Corps issued a No Violation letter to the citizen and to Ozark.

Not content with the No Violation letter, the citizen filed a Citizen Suit Notice and did not serve it on the Army Corps. Subsequently, still not content, the citizen filed a lawsuit alleging among other claims, that Ozark was discharging dredge and fill material into the waters of the United States including wetlands without a permit.

Prior to the commencement of the citizen suit, there was no wetland delineation, the Army Corps did not consider the area to be any wetlands, the Army Corps did not require, and specifically advised Ozark that it was not required, to apply for a Section 404 Permit, and the Army Corps never made a final jurisdictional determination (JD) whether affirmative or negative.

Ozark filed a motion to stay the district court proceedings and allow the Army Corps to address the issues for which Congress intended the Army Corps to address, namely jurisdictional determination (JD) and whether a Section 404 permit was required during the pendency of the court case. Ozark maintained that questions and issues such as the issuance or non-issuance of Section 404 permits and whether the Army Corps' final agency action even accepts or rejects the area's alleged wetlands as jurisdictional wetlands should be initially administered by formal proceedings at the agency charged by Congress to make these two decisions. Ozark again requested before trial that the district court stay the proceedings on grounds of primary jurisdiction in its trial brief.

The lower courts denied Petitioner's request to stay the action on grounds of primary jurisdiction. The lower courts committed error because Respondent's expert admitted at trial that he could not determine and had no evidence as to whether the deposition of

gravel into the alleged wetlands was from Ozark's operation or natural causes such as upstream flooding.



STATEMENT OF THE CASE

Ozark conducts a gravel mining operation along Saline Creek in Mayes County, Oklahoma. Ozark has a permit issued to it by the Oklahoma Department of Mines to engage in mining gravel. The United States Department of Defense Army Corps of Engineers (Tulsa District) (Army Corps) has been designated by Congress to regulate and to determine in its discretion whether wetlands are jurisdictional waters under its jurisdiction (a JD affirmative or negative) and whether operations such as Ozark's require a CWA Section 404 Permit. (App. 2 and 34)

On October 6, 2010 the Army Corps, after receiving a complaint letter from the Respondent, conducted an on-site inspection of Ozark's operations, reviewed the inspection findings, relative to Section 404 of the CWA and the Sand and Gravel Mining in Oklahoma Waterways Guidelines for Operators and determined that "No violations of the CWA or the Guidelines were observed." (App. 3 and 26)

In fact, the Army Corps made several onsite inspections of the Ozark mining operation prior to 2010 and during the pendency of the district court lawsuit. (App. 3 and 25-26) In fact, the Army Corps had previously issued a Section 404 permit to Ozark prior to the year 2005, but determined that such permit was no

longer required. The Army Corps never performed a wetland delineation and did not make a final jurisdictional determination (“JD”; 33 C.F.R. § 331.1). (App. 25)

Sometime in March 2011, Ozark received from Benham a Citizen Suit Notice. However, the certificate of mailing of the notice demonstrates that Benham never served the Army Corps with the required Citizen Suit Notice; the agency charged with administering Section 404 permits and making jurisdictional determinations. (App. 3, 7)

Benham alleged in his notice that certain specific areas within Ozark’s mining operations were wetlands, including the current and former washing sites including the roadway used for transporting mining equipment. (App. 7) Not content with the Army Corps reply that there were no dredge and fill of wetlands and thus No Violation (Notice of No Violation) Benham filed this lawsuit on June 1, 2011. (App. 3)

On June 28, 2012, and during the pendency of this lawsuit, the Army Corps again inspected Ozark’s operations and concluded that “No violations of the CWA or the [Sand and Gravel Mining in Oklahoma Waterways] Guidelines [for Operators] were observed.” (App. 3) (Aplt. App. 10th Cir. 241)

Again and during the pendency of this present litigation on July 3, 2013, Ed Parisotto of the Army Corps conducted an on-site inspection, all relative to Section 404 of the CWA and the Sand and Gravel Mining in Oklahoma Waterways Guidelines for Operations dated

May 20, 2010 and determined that there were no violations.

During the lawsuit and upon request of the Army Corps, Ozark hired a firm to conduct a Preliminary Wetland Delineation and identified four areas (areas w1, w2, w3, and w4) that likely, but not formally, be identified as .46 of acre possible jurisdictional wetlands (none of these areas were identified in the Citizen Suit Notice and none of these areas were accepted as jurisdictional wetlands by the Army Corps). (Aplt. App. 10th Cir. 176) (App. 23-24)

Notwithstanding and after reviewing the Enercon information, Mr. Parisotto of the Army Corps conducted a fifth on-site inspection of the Ozark mining operation and expressed the following findings in his report. (Aplt. App. 10th Cir. 146, 245)

I inspected the areas of potential CWA violation referenced in the NOI [Citizen Notice of Intent to Sue] as areas 1 thru 4. I found no evidence any discharge of dredge or fill in these areas. No disturbance was found within areas previously identified in the November 1, 2011 Preliminary Jurisdictional Determination as potential special aquatic sites completed by Enercon Services, Inc. These areas are currently supporting good vegetation growth. I also noticed changes to previously existing gravel bars, specifically the gravel bar [the roadway] connecting the east mining site to the abandoned west mining site (referenced in the NOI as area #1. Large portions of this gravel bar are now gone. Apparently, high

spring flows eroded these features downstream or into Lake Hudson. I also inspected the stream channel where recent gravel excavation has occurred. Incidental fall back of gravel was present in the area, but no excessive amounts, as compared to normal excavation activities, were found. Overall, I found no CWA violations during the site inspection.

Even assuming *arguendo*, the .46 of the preliminary wetland delineation area was a jurisdictional wetland (which the Army Corps did not make a determination), the Army Corps did not find any evidence of the placement of dredge and fill material in these areas. (Aplt. App. 10th Cir. 147) The only areas identified in the Citizen Suit Notice as wetlands were the former sorting site (which was admitted at trial it was not a wetland), the current sorting site (which was admitted at trial it was not a wetland), and the gravel bar or roadway (which was admitted at trial it was not a wetland). (Aplt. App. 10th Cir. 167-68)

And Benham failed to amend his Citizen Suit Notice before the trial so as to include any other alleged violations or any other specified wetland areas, specific dates, or specific amounts of fill into any additional alleged possible jurisdictional wetlands. (Aplt. App. 10th Cir. 166) The District Court acknowledged that Benham abandoned his allegations in his Citizen Suit Notice. (Aplt. App. 10th Cir. 176)

At trial, Mr. Patterson, Benham's own expert, testified under oath he did not have any evidence as to whether Ozark discharged dredge or fill material into

w1, w2, w3, or w4, (areas that were not even identified in the Citizen Suit Notice (Aplt. App. 10th Cir. 162)) let alone any scientific evidence that proved it was Ozark and not any natural cause such as flooding. (Aplt. App. 10th Cir. 151-57)

Mr. Patterson failed to record any acreage of gravel that was allegedly deposited into any of the alleged possible wetlands 1, 2, 3, or 4 or whether such was deposited there by natural causes such as flooding and did not distinguish or determine the actual cause of what he observed. (Aplt. App. 10th Cir. 155-59)

Q. You didn't record the amount of gravel that you allege was actually deposited into any of the wetlands 1, 2, 3 or 4, did you?

A. No. * * *

Q. You didn't monitor or record any tonnage of debris that Saline Creek carries onto the Eastman property, did you?

A. No.

Mr. Patterson admitted that Saline Creek does carry tons of gravel and rock from upstream and deposits it onto Ozark's mining operation and into the alleged wetlands. He admitted that the Army Corps has not accepted his mapping of potential jurisdictional wetlands. (Aplt. App. 10th Cir. 158-62)

Patterson failed to observe Ozark removing any wetlands and has no evidence that Ozark removed or was operating in a wetland. He alleged that there was

.10 of a wetland that was gone (wetland 4); but he failed to determine whether or not the wetland was actually still there but just flooded at the time he was conducting his inspection and report. He failed to determine any acreage of impact or disturbance to wetlands 3, 2, or 1. (Aplt. App. 10th Cir. 158-62)

He admitted that his allegations of erosion, channel modification, scarping and headcutting were not identified in the Plaintiff's Citizen Suit Notice. He admitted that even wetland 1, 2, 3, and 4 were not identified in the Plaintiff's Citizen Suit Notice. (Aplt. App. 10th Cir. 162) He admitted and understood that the only specific areas identified in the Notice were in fact not wetlands. Patterson testified that only a .10 of acre was gone, also known as wetland 4 and that he did not have any evidence that Ozark caused the loss of the .10 acre of wetland 4. (Aplt. App. 10th Cir. 151-52)

After a bench trial, the district court found that there were jurisdictional wetlands requiring an individual permit. (App. 9) It also found that even though the citizen's expert admitted under oath that he could not distinguish the deposition of fill from natural causes or from the operations of Ozark, the court still found Ozark liable. The district court ordered Ozark to pay a civil penalty of \$35,000, ordered Ozark to file an application for Section 404 permit with the Army Corps, and ordered a restoration plan. Respondent citizen has also filed for an award of attorneys' fees and costs in excess of \$200,000 that is currently pending before the district court.

During the district court proceedings, Ozark filed a motion to stay the proceedings on grounds of primary jurisdiction and the district court denied Ozark's motion. (App. 47-50)

Petitioner maintains that the decision to issue or not issue a Section 404 permit and the decision to first determine which waters are Army Corps jurisdictional waters (JD) are unequivocally issues Congress intended to be within the jurisdiction of the administrative body. 33 U.S.C. § 1344; 33 C.F.R. § 331.1. Congress also intended the Army Corps and not the courts to decide whether a Section 404 permit is required. 33 U.S.C. § 1344; 33 C.F.R. §§ 330, 331.

Ozark appealed to the Tenth Circuit. The Tenth Circuit affirmed the district court.



REASONS FOR GRANTING THE PETITION

The lower courts' decisions illustrate the confusion the district and circuit courts have regarding the application of this Court's doctrine of primary jurisdiction in the context of a citizen suit under the Clean Water Act or other environmental statutes with the statutory bar of failure to diligently prosecute, failure to exhaust administrative remedies, *Chevron* deference, dismissal, and referral. The lower courts erred by failing to "refer" issues and questions underlying the citizen's claims to the Army Corps as it relates to a determination of jurisdictional waters of the United States in the context of the Army Corps administrative

authority to make decisions identifying jurisdictional wetlands (JDs).

Here the agency charged by Congress with authority to determine jurisdictional wetlands and unpermitted discharges, Army Corps, instructed the business that it was not in violation of discharges into wetlands and issued a Letter of No Violation to the business and to the citizen prior to commencement of the citizen suit; upon which the business relied to its detriment.

The nature of these issues makes this case a compelling vehicle by which to provide the lower courts much needed guidance when there is clear overlapping jurisdiction between the EPA/Army Corps in the administration of its comprehensive environmental regulatory scheme and the courts.

It is without doubt the Petitioner relied on the Army Corps' Letters of No Violation. Whether such agency Letters of No Violation should be a safe harbor defense to a citizen suit for alleged violation of the Clean Water Act for a civil penalty, restoration order and attorneys' fee award or mitigation of these court findings similar to a negative jurisdictional determination presents a compelling question for this Court.

The lower courts also made clear error by finding a violation of unpermitted discharges when the Respondent's expert testified under oath that he could not determine whether the deposition of gravel into the alleged wetlands or waters was from the activities of Ozark or from naturally occurring causes of upstream

flooding and deposition of gravel directly into the wetlands and the creek.

This Court should grant the petition and reverse the court below.

I. The Tenth Circuit's Decision Contravenes and Misconstrues this Court's Doctrine of Referral under Primary Jurisdiction with the Doctrines of Diligent Prosecution, Exhaustion of Administrative Remedies, *Chevron* Deference in the Context of a Citizen Suit under the Clean Water Act

The Petitioner, a small business owner, is caught in the middle of a jurisdictional conflict between the administrative agency charged with regulating the business which issued several guidance Letters of No Violations of the CWA to this Petitioner, and its reliance on the guidance letters on the one hand; and, the court's jurisdiction to proceed by means of a citizen suit on the other hand.

Primary jurisdiction should apply under the circumstances of this case because although the claim may be cognizable in the courts under the citizen suit provision, the courts should abstain from making any final rulings until such time as the agency resolves the underlying issues Congress intended the agency to resolve under the comprehensive regulatory scheme.

The opinion below contravenes not only its own Tenth Circuit primary jurisdiction precedent, *Williams Pipe Line Co. v. Empire Gas Corp.*, 76 F.3d 1491 (1996) and *TON Services, Inc. v. Qwest Corp.*, 493 F.3d 1225, 1238-39 (2007), but also conflicts with this Court's precedent in *United States v. Western Pac. R.R. Co.* 352 U.S. 59, 64, 77 S. Ct. 161 (1956). The courts are confused and have loosely and erroneously based denial of request for invocation of primary jurisdiction on grounds that primary jurisdiction would "bar" a citizen or plaintiff from pursuing his claim, or that such request for primary jurisdiction is a request to "defer" to an agency decision, order or opinion, or as the Tenth Circuit in this case misconstrued the doctrine by opining that the motion to stay was a request for "exhaustion of a citizen's administrative remedies" and therefore primary jurisdiction was somehow improper.

"Primary jurisdiction requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 353 (1963). This Court also explained in *Texas and Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) that the Interstate Commerce Commission (ICC) alone was competent to decide whether a carrier rate was unreasonable; and in doing so concluded that rates "might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise." *Id.* at 441. According to this Court, this conflict would obviate the

congressional delegation to the ICC to administer the statute with uniformity. *Id.*

This Court also established that even though uniformity might not be a concern, primary jurisdiction is still appropriate when the expertise of an agency will minimize the risk of judicial error. *Far East Conference v. United States*, 342 U.S. 570 (1952). The court's rationale was that a decision would implicate considerations generally unfamiliar to the judiciary, but well understood by the administrative body that is trained and experienced in the intricate and technical facts. *Id.* at 573-74.

In *Western Pac. R.R. Co.*, this Court reversed the court of claims refusal to suspend the action holding that the issues should first be referred to the ICC, and in doing so it outlined the framework of primary jurisdiction:

Primary jurisdiction . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolutions of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

The Tenth Circuit explained in *TON Services*, that the purpose of the doctrine is to allow the agencies to render opinions on issues underlying and related to the cause of action that is pending in the court and

within its particular area of expertise before returning jurisdiction to the court. *Id.* citing *Williams Pipe Line*, 76 F.3d at 1496. The doctrine exists for the proper distribution of power between judicial and administrative bodies. *Id.* It is concerned with promoting proper relationships between courts and administrative agencies charged with particular regulatory duties. *Id.* citing *Western Pac. R.R. Co.*, 352 U.S. at 63. Courts should apply the doctrine of primary jurisdiction involving questions and issues that Congress has assigned to a specific agency. *National Communications Ass’n, Inc. v. American Tel. and Tel. Co.*, 46 F.3d 220, 223 (2d Cir. 1995) citing *Far East Conference*, 342 U.S. at 574.

Petitioner maintains that Congress intended and conferred authority on the EPA/Army Corps through a comprehensive regulatory scheme to make jurisdictional determinations (JDs) and issue permits for the discharge into waters and wetlands of the United States.

The Army Corps “specifies whether particular property contains ‘waters of the United States’ by issuing ‘jurisdictional determinations’ (JDs).” *United States Army Corps of Engineers v. Hawkes Co.*, 578 U.S. ___, 136 S. Ct. 1807 (2016); 33 C.F.R. § 331. Preliminary JDs (and also preliminary wetland delineations) merely advise a property owner that there *may* be waters of the United States on a parcel, while approved JDs *definitively* state the presence or absence of such jurisdictional waters. *Id.* See 33 C.F.R. § 331.2. An approved JD clearly marks the consummation of the Army Corps decision making process. *Id.* “It is issued

after extensive fact-finding by the Corps regarding the physical and hydrological characteristics of the property, *see* U.S. Army Corps of Engineers, Jurisdictional Determination Form Instructional Guidebook 47-60 (2007). . . .” *Id.*

A recipient of a jurisdictional determination (JD) (assuming it is affirmative and not negative) who elects to proceed with discharges on his property may also seek judicial review of the CWA coverage issue if he is the subject of an agency-initiated enforcement proceeding. The definitive nature of approved JDs also give rise to direct and appreciable legal consequences. *Hawkes Co.*, 136 S. Ct. 1807 (syllabus 2). A negative JD (an approved JD stating the property does not contain jurisdictional waters) creates a five-year safe harbor from civil enforcement proceedings and limits the potential liability a property owner fares under the CWA. *Id.*

Indeed, the Army Corps could have formally determined a negative JD which would have provided a definitive five-year “safe harbor” to Ozark. The Army Corps issues thousands of JDs each year and should have in this instance.

With regards to the Section 404 permitting process for discharges into jurisdictional wetlands, under 33 U.S.C. § 1344 and 33 C.F.R. § 325, the Army Corps has comprehensive procedures in place to conduct *public hearings* in the evaluation of proposed permit actions. 33 C.F.R. § 325.9 expressly provides authority to determine jurisdiction. “District engineers are authorized to

determine the area defined by the terms “navigable waters of the United States” and “waters of the United States.” *Id.* 33 C.F.R. § 325.8 expressly provides the Secretary of the Army has authorized the Chief of Engineers to issue or deny permits . . . for the discharge of dredged and fill material into waters of the United States pursuant to Section 404 of the Clean Water Act.” “District engineers will add special conditions to Department of the Army permits when such conditions are necessary to satisfy legal requirements or to otherwise satisfy the public interest.” *Id.* at § 325.4. “The public notice is the primary method of advising all interested parties of the proposed activity. . . .” *Id.* at § 325.3. And “If the activity would involve the discharge of dredged or fill material into the waters of the United States . . . the public notice shall also indicate that the evaluation of the impact of the activity on the public interest will include application of the guidelines promulgated by the Administrator or EPA. . . .” *Id.* The public has the right to object. *Id.* at (3). And “the processing procedures . . . apply to any Department of the Army permit.” *Id.* at § 325.1(a).

Under Section 320.4(a), the first section includes a provision for public interest review. Subsequent sections require comprehensive evaluation and the agency’s balance of public and private needs, effect on wetlands, effect on fish and wildlife, effect on water quality, effect on historic, cultural, scenic, and recreational values, consideration of property ownership, floodplain management, and economics among other issues. *Id.*

The comprehensive procedures for evaluating nationwide permits are contained in 33 C.F.R. § 330.1 et seq. The comprehensive procedures and policies that relate to discharges that require other permits is contained in 33 C.F.R. § 323.3, and for exemptions of discharges not requiring permits such as construction or maintenance of farm roads, forest roads or *roads for moving mining equipment* (specifically implicated here), where such roads are constructed and maintained in accordance with best management practices. 33 C.F.R. § 323.4(a)(6). Subsection (6) specifically exempts discharges related to gravel roadways that are *used for moving mining equipment*.

The Army Corps is the agency with regulatory authority to decide jurisdictional waters (JD) and then based on that decision whether a Section 404 permit is necessary; both such decisions are intended by Congress to be completed by the Army Corps; thus primary jurisdiction lies with the agency charged by Congress to perform its regulatory functions.

The Army Corps actively regulated Ozark for many years and engaged in regular site inspections. In fact, the Army Corps has in the past issued a Section 404 permit to Ozark. The Army Corps actually took action upon notice that Ozark was operating in violation of its Section 404 permit in 2005 and issued a cease letter to Ozark and required Ozark as a result of the 2005 violation to engage in remediation at the Ozark mining site.

The district court stated that the citizen's main contention was that the Army Corps is simply wrong in its failure to recognize a violation of the CWA. (App. 48) The problem is that the citizen did not have a prior basis to allege a violation as the citizen did not have a prior wetland determination (as there was none); and it was merely suspicion and not a clear violation of the CWA. Also, the citizen did not allege that the operator was in violation of already issued permit. Moreover, the Army Corps issued a Letter of No Violation prior to the commencement of the lawsuit.

This matter is not as if the agency had determined that a permit was required and Ozark had not yet complied. And it is not as if the agency had made a final jurisdictional determination (JD), and yet Ozark continued to operate in contravention of the agency's determination of a clear violation. And it is not as if Ozark had been issued a Section 404 permit and yet Ozark was violating the terms or scope of the permit; and it is not as if the agency decided not to pursue an enforcement action.

Rather, here, there was no wetland delineation prior to the commencement of the citizen suit, the agency specifically found no violation prior to the citizen suit; and there was no final jurisdictional determination (JD), affirmative or negative, upon which to base an allegation of a clear violation; thus, there were no grounds for agency enforcement action prior to the commencement of the citizen suit.

Contrary to the Tenth Circuit ruling, this is not a matter of failure of the agency to diligently prosecute under the citizen suit provision. Here, the underlying grounds for such an “alleged” violation of the CWA by the citizen necessarily relied on whether the alleged surface areas were jurisdictional wetlands under the Army Corps jurisdiction in the first instance; and, whether activity required a Section 404 permit in the second instance. In fact, the alleged wetland areas were not and had never before prior to the commencement of the citizen suit been deemed jurisdictional wetlands.

Contrary to the Tenth Circuit’s opinion (App. 15-16) Ozark does not contest the subject matter jurisdiction of the citizen suit, or whether Benham should be barred or prohibited from bringing his citizen suit; or that the suit be dismissed on grounds of primary jurisdiction. Ozark’s request to stay is not based on an exhaustion of administrative remedies or on the diligent prosecution statutory bar. (App. 16) (the Tenth Circuit explaining that “Section 505 contains the ‘diligently prosecuting’ requirement, not an administrative exhaustion requirement”) The Tenth Circuit misconstrued the doctrine of “primary jurisdiction” with “exhaustion of administrative remedies” and with the “diligent prosecution statutory bar.”

As this Court explained in *United States v. W.Pac. R.R. Co.*, 352 U.S. at 63-64 and the Tenth Circuit did in *TON Services*, 493 F.3d at 1238-39 “exhaustion of administrative remedies” is quite distinct doctrine from a request to invoke “primary jurisdiction.” They are

two distinct and separate doctrines, and exhaustion of administrative remedies is not in play. Ozark never requested or suggested that the citizen failed to exhaust his administrative remedies. The citizen was not himself seeking a permit, was not himself denied a permit, and was not himself subject to agency action. That is not what Ozark requested in the district court.

Also contrary to the court of appeal decision, Ozark's request to stay on grounds of primary jurisdiction does not relate to whether the agency is diligently prosecuting. Diligent prosecution of a clear violation is quite distinct from the doctrine of primary jurisdiction. Again the Tenth Circuit misconstrues the doctrine of primary jurisdiction and Ozark's contention.

Likewise the district court misconstrued Ozark's primary jurisdiction argument by suggesting Ozark was seeking "deference" to the agency. (App. 49) ("Hence there is in essence no agency action to which the Court should defer.") Ozark simply moved the district court to stay the proceedings to allow the agency to render opinions on issues underlying and related to the cause of action. The Tenth Circuit in *TON Services* previously explained that invoking primary jurisdiction is a "referral" of questions and issues related to the agency's comprehensive authority; it is not a question of "deference" (at least not at the point of the request to invoke primary jurisdiction). "When the primary jurisdiction doctrine is invoked, 'the judicial process is suspended pending *referral* of such issues to the administrative body for its views.'" *TON Services, Inc.*, 493 F.3d at 1238-39. "*Referral* does not

automatically divest the court of jurisdiction.” *Id.* at 1239. “Referral” to the agency is quite distinct from *Chevron deference* to the agency. Deference is a legal doctrine that may come *after* referral and *after* an agency opinion on the underlying issues.

But in this case with regard to the motion to stay under the doctrine of primary jurisdiction the below courts erroneously misconstrued and confused the doctrines of “failure to diligently prosecute,” “statutory bar,” “exhaustion of administrative remedies,” “deference” and “referral and temporary abstention.”

In an attempt to distinguish exhaustion and referral in *Reiter v. Cooper*, 507 U.S. 258 (1993) Justice Scalia explained primary jurisdiction:¹

It requires the court to enable a “referral” to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling. *See Western*

¹ *See also* fn. 3 in *Reiter v. Cooper*, 507 U.S. 258 (1993): “Use of the term ‘referral’ to describe this process seems to have originated in *Western Pacific*, which asserted that, where issues within the special competence of an agency arise, ‘the judicial process is suspended pending referral of such issues to the administrative body for its views.’” *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 64 (1956). At the conclusion of that passage, the *Western Pacific* Court cited *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940), which in turn cited *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U.S. 247 (1913). *Mitchell Coal* spelled out the actual procedure contemplated, holding that further action by the district court should “be stayed so as to give the plaintiff a reasonable opportunity within which to apply to the Commission for a ruling as to the reasonableness of the practice.” *Id.* at 267.

Pac. R.R., 352 U.S., at 63-64; *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 291, 302 (1973); *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 65, 68 (1970). “Referral” of the issue to the administrative agency does not deprive the court of jurisdiction; it has discretion either to retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice. (citations omitted)

After “referral” and once the agency addresses the factual and legal issues requested by the court, and should the facts demonstrate at that point, then the citizen can pursue the enforcement action or challenge the decision in court under the citizen suit provisions or alternatively, under the Administrative Procedures Act, 5 U.S.C. § 701 et seq.; 33 U.S.C. § 1365(a); *United States Army Corps of Engineers v. Hawkes Co.*, 578 U.S. ___, 136 S. Ct. 1807 (2016) (This Court concluded that a final JD by the Army Corps is subject to the APA). The court of appeal decision that a citizen is not an affected person without recourse for an internal agency appeal of a denial of permit has nothing to do with whether the court retains subject matter jurisdiction over the issues that the agency is charged with first addressing before a final decision by the court.

Moreover, this is not a case where the agency or administrator identified a violator of the CWA and issued a compliance order. Nor is this a case where the agency because it issued such compliance order failed to assess or otherwise seek civil penalties or other remedial remedies for the alleged discharge into

wetlands. In fact, just the opposite occurred here. Thus, the notice of intent to sue in this instance directly conflicted with the Army Corps October 2010 Letter of No Violation sending conflicting messages to the business prior to the citizen issuing a notice of intent to sue and prior to the commencement of this lawsuit.

The district court explained that under 40 C.F.R. § 135.3 the purpose of the notice to the alleged violator is to give it an opportunity to bring itself into compliance and render a citizen suit unnecessary. (App. 35) *Id.* citing *Karr v. Hefner*, 475 F.3d 1192, 1200 (10th Cir. 2007). However, under these facts here such premise begs the question how does one bring itself into compliance when the administrative agency instructs it that it is in compliance and that no permit is necessary as there was no evidence that the specific areas the citizen complained of in the notice were jurisdictional wetlands (and as it turned out the areas were not jurisdictional wetlands and the citizen's expert admitted this at the trial).

Assuming that the district court had invoked primary jurisdiction upon request of Ozark and assuming the agency did its job by making a final wetland jurisdictional determination and assuming it issued a compliance order or assuming it issued an acceptance or rejection of an application for a Section 404 permit, then the need for the trial of this suit would not have been necessary unless Ozark failed to comply with an agency compliance order and the agency failed to diligently prosecute a clear violation.

Additionally, because the Respondent citizen requested an injunction and declaratory judgment, the posture of such suit strengthens the case for primary jurisdiction. Federal declaratory judgments are available as a matter of judicial discretion, not as of right, and are not to be used to preempt and prejudge issues that are committed for initial decision to an administrative body or special tribunal. *Public Service Comm. v. Wycoff Co.*, 344 U.S. 237, 241 (1952); 28 U.S.C. § 2201 (“any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration”).

The Petitioner’s reliance on the Letters of No Violation before the commencement of the citizen suit and during the proceedings should also strengthen the case for demonstrating that the lower courts erred by failure to refer the questions to the Army Corps for clarification and further determination of jurisdiction waters (JD). Moreover, the question of reliance on the agency Letters of No Violation should provide the business a defense to civil enforcement proceedings or safe harbor no different than if the Army Corps had issued a “negative” JD or at least provide a mitigation that the district court failed to address. *See United States Army Corps of Engineers v. Hawkes Co.*, 578 U.S. ___, 136 S. Ct. 1807 (2016) (Syllabus: A “negative” JD – *i.e.*, an approved JD stating that property does not contain jurisdictional waters – creates a five year safe-harbor from civil enforcement proceedings brought by the Government and limits the potential liability a property owner faces for violating the Clean Water Act.)

The question is not whether the citizen can bring his suit in the first instance, or whether the district court has subject matter jurisdiction. Petitioner does not contend that the citizen suit is barred as a result of an enforcement action being brought by the agency (because there was none). But rather the question is whether primary jurisdiction should apply under the circumstances of this case because although the claim may be cognizable in the courts under the CWA citizen suit provision, the courts should abstain from making any final rulings until such time as the agency resolves issues Congress intended the agency to resolve under the comprehensive regulatory scheme.²

If assuming the court had invoked primary jurisdiction and referred questions to the agency; and then the agency made an affirmative JD, and the business failed to bring itself in compliance by failing to apply for and/or acquire a Section 404 permit; and then if the agency chose not to pursue an enforcement action (after it first made the determination of an affirmative JD and issued a compliance order) then the citizen suit may commence. Thus, a stay would not have prejudiced or unfairly disadvantaged the citizen.

² See generally, *Allnet Comm. Serv. Inc., v. National Exchange Carrier Assoc, Inc.*, 965 F.2d 1118 (D.C. Cir. 1992) (agency “. . . is best suited to make the initial decision on the issues in dispute, even though the district court had subject matter jurisdiction. . . . The Commission is clearly in a better position than we are to resolve any potential conflict between the staff letter and the . . . order); See generally, Note, Michael Penney *Application of the Primary Jurisdiction Doctrine to Clean Air Act Citizen Suits*, 29 B.C. Env'tl L. Rev. 399 (2002)

Such process would be consistent with Congressional intent to allow the Army Corps to pursue an enforcement action after deciding on an affirmative or negative JD, and/or granting or denial of a 404 permit. Then at that time it would be clear as to whether the agency was diligently prosecuting a clear violation of the CWA.

This would promote the twin purposes announced in *Western Pac. R.R. Co.*, 352 U.S. at 64, to (1) ensure desirable uniformity in determinations of certain administrative questions, and (2) promote resorting to agency experience and expertise where the court is presented with a question outside its jurisdiction relating to Army Corps Section 404 permitting and jurisdictional determination of waters of the United States. *Id.*

Primary jurisdiction balances overlapping jurisdiction in the attempt to promote efficiency, uniformity, consistency and guidance to all the stakeholders involved. It does not divest the court of its jurisdiction nor does it divest the administrative agency of its jurisdiction. It permits the exercise of both in the attempt to resolve a claim for which both have overlapping jurisdiction.

It allows the agency, businesses, private land owners, farmers, the public, and the courts the basis to implement the policies and goals of the Clean Water Act as it relates to citizen enforcement actions with uniformity and consistency. It promotes efficiency and balance to the relationship between administrative

agencies and courts where their jurisdictions overlap *W. Pac. R.R. Co.*, 352 U.S. 59, 63; and especially where, as is the case here, the business owner is directly caught in the middle of a dispute between the agency and the courts.

It is one thing for a citizen suit to supplement an agency's regulatory authority, and quite another to supplant it. Congress did not intend for a citizen suit provision in the CWA or any environmental statute to supplant an administrative agency's jurisdiction. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987) (noting citizen suits should "supplement" rather than "supplant" public litigation).

Here, the lower courts supplanted the primary jurisdiction of the agency charged with authority to regulate this business because there was a direct conflict between what the citizen alleged and what the agency instructed the business. The lower courts erred by failing to "refer" the issues of jurisdictional determination (JD) and review of any 404 permit application to the agency charged with making those decisions.

II. The Lower Courts Committed Clear Error by Failing to Accept the Respondent's Own Expert's Testimonial Admission that He Could Not Determine Specific Causation of Deposition of Gravel into Alleged Wetlands

Petitioner maintains that the district court's finding of unpermitted discharges was caused by Ozark is clearly erroneous as Respondent's own expert testified

under oath that he did not have any evidence and could not distinguish whether the deposition of gravel into the alleged wetlands was caused by Ozark or whether it was naturally caused by upstream flooding. He simply did not know. *United States v. United Gypsum Co.*, 333 U.S. 364, 394-95 (1948); *Anderson v. City of Bessemer*, 470 U.S. 564 (1985). This is clear error because the Respondent at trial had the burden of proof and he failed to prove specific causation as his own expert testified under oath that he could not determine whether the deposition of gravel was caused by Ozark or upstream flooding.

At the trial Respondent asserted that the areas identified as w1, w2, w3, and w4 (areas that were not even identified in the Citizen Suit Notice as those areas were admitted not to be wetlands) were areas that were alleged to have been filled by Ozark. However, the Respondent's own expert, Patterson, failed to determine any acreage of impact or disturbance to alleged wetlands 3, 2, or 1. And with regard to alleged wetland 4 Patterson observed it was in his words "gone." He admitted that wetland 4 was simply inundated with water and wetlands do become inundated with water, and that he failed to determine and did not know whether the alleged area of wetland 4 was still there or covered in water. (Aplt. App. 10th Cir. 151, 160-61)

More importantly, however, Patterson testified that he did not have any evidence that Ozark Materials caused the alleged loss of the .10 acre of wetland 4. (Aplt. App. 10th Cir. 151-52)

Respondent also failed to offer any evidence of the amount of cubic yards of gravel or percentage of acreage that Ozark allegedly discharged into any other wetlands. Patterson testified that he did not and could not testify as to whether Ozark deposited dredge and fill material into wetland 3; and he did not have any recorded dates of dredge and fill being deposited into wetland 3 even assuming there was dredge and fill material, and he did not and could not testify that what he saw was dredge and fill material in wetland 3. And to the extent that Patterson testified that he “thought” it looked like fill had been deposited in wetland 3, he could not and was not able to testify what date, if and when any discharge occurred into wetland 3. Patterson also failed to calculate any acreage or percent of acreage that was dredge and fill material. Patterson does not know and could not testify to how much of a percentage of the wetland 3 was disturbed, even assuming it was. Patterson failed to record any tons or acreage of gravel that was allegedly deposited into any of the alleged possible wetlands 1, 2, 3, or 4; it could have been a layer of 1 inch; he simply failed to calculate this. (Aplt. App. 10th Cir. 153-54, 157-59, 160-61)

For these reasons the lower courts’ decisions were clearly erroneous.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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