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PUBLISH
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAVID BENHAM,
Plaintiff-Appellee,

v.

OZARK MATERIALS
RIVER ROCK, LLC,
Defendant-Appellant.

No. 17-5069

**Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 4:11-CV-00339-JED-FHM)**

(Filed Mar. 22, 2018)

Wilfred Wright, Claremore, Oklahoma, for Defendant-Appellant.

Krystina Phillips (Jason B. Aamodt and Dallas L.D. Strimple of Indian and Environmental Law Group, PLLC, with her on the brief), Tulsa, Oklahoma, for Plaintiff-Appellee.

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Before **BRISCOE, KELLY**, and **BACHARACH**, Circuit Judges.

KELLY, Circuit Judge.

Defendant-Appellant Ozark Materials River Rock, LLC, appeals from the district court's order approving Plaintiff-Appellee David Benham's proposed restoration plan of unlawfully filled wetlands in Saline Creek, *Benham v. Ozark Materials River Rock, LLC* (*Benham II*), No. 11-CV-339-JED-FHM (N.D. Okla. June 1, 2017), ECF No. 184. Ozark raises several issues on appeal challenging the district court's order and underlying findings of fact and conclusions of law, *Benham v. Ozark Materials River Rock, LLC* (*Benham I*), No. 11-CV-339-JED-FHM, 2015 WL 235759 (N.D. Okla. Jan. 16, 2015), ECF No. 160. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

Background

This appeal arises from a private enforcement action under Section 505 of the Clean Water Act (CWA), 33 U.S.C. § 1365. Ozark is a sand and gravel mining company that operates on property adjacent to Saline Creek in Oklahoma. Mr. Benham recreates in Saline Creek and claims that Ozark's operations have degraded his ability to do so. In March 2011, Mr. Benham served Ozark with a notice letter pursuant to Section 505, informing the company that it was violating

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Section 404 of the CWA, 33 U.S.C. § 1344. Section 404 requires a permit from the Army Corps of Engineers to discharge dredge or fill material into navigable waters if the activity disturbs more than one-half acre of wetland, and Ozark does not have a Section 404 permit.

The Army Corps of Engineers had inspected Ozark's operations in 2010 (and would do so again in 2012 and 2013) by driving through the property, but it found no CWA violations. Nevertheless, after receiving Mr. Benham's notice, Ozark hired an environmental consulting firm to perform a Section 404 impact analysis of Ozark's Saline Creek operations. By June 1, 2011, Ozark had not addressed the CWA violations that Mr. Benham alleged in his notice, so he filed the instant citizen suit, as authorized by Section 505.

The district court held a bench trial and issued findings of fact and conclusions of law determining that Ozark violated Section 404 by disturbing more than one-half acre of wetland through the discharge of dredge and fill material. *Benham I*, 2015 WL 235759, at *9. Specifically, the court found that Ozark's construction of a roadway in Saline Creek and the filling of its surrounding wetlands without a permit constitute a continuing violation of the CWA. *Id.* The district court imposed a civil penalty of \$35,000 and ordered briefing on a restoration plan for the unlawfully filled wetlands. *Id.* at *10. On June 1, 2017, the district court issued an order adopting (substantially all of) Mr. Benham's proposed restoration plan. *Benham II*, slip op. at 1. One element of the plan created a conservation easement for the restoration site. *Id.* at 9–10.

Discussion

Ozark raises six issues on appeal, contending that (1) Mr. Benham lacks Article III standing, (2) Mr. Benham's citizen suit notice letter was inadequate, (3) the district court erroneously found that Ozark violated the CWA, (4) the district court erroneously admitted evidence prepared by Ozark's withdrawn expert, (5) the district court's order is unconstitutional, and (6) Mr. Benham's suit falls within the primary jurisdiction of the Army Corps of Engineers. For the following reasons, we reject Ozark's arguments and affirm.

A. Mr. Benham Has Article III Standing

Whether a plaintiff has Article III standing is a jurisdictional question that we review de novo. *Wilderness Soc'y v. Kane County*, 632 F.3d 1162, 1168 (10th Cir. 2011). Article III standing requires showing (1) an "injury in fact" that is (2) "fairly traceable to the challenged action of the defendant" and is (3) likely to "be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). The injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* at 180. "The party invoking federal jurisdiction bears the burden of establishing these elements . . . with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). At the final stage of litigation, the evidence

produced at trial must adequately support the facts establishing standing. *Id.*

“[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons ‘for whom the aesthetic and recreational values of the area will be lessened’ by the challenged activity.” *Laidlaw*, 528 U.S. at 183 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). Here, Mr. Benham has shown injury in fact by maintaining that he regularly swims and fishes in Saline Creek and that his ability to do so has been diminished by Ozark’s discharge of material into the creek and its surrounding wetlands. Such recreational impairments constitute injury in fact for a plaintiff filing a citizen suit under the CWA. *See id.* at 181–83.

To satisfy the traceability requirement, the defendant’s conduct must have caused the injury. *Lujan*, 504 U.S. at 560. Mr. Benham testified that the quality of Saline Creek did not begin to decline until after Ozark began its mining operations, and Mr. Benham’s expert testified that Ozark’s mining operations caused the degradation in quality. This, coupled with the district court’s finding that Ozark unlawfully discharged materials into Saline Creek’s wetlands, *Benham I*, 2015 WL 235759, at *7–9, sufficiently demonstrates that Mr. Benham’s injury is fairly traceable to Ozark’s unlawful actions.

Finally, the redressability element is handily met: the injunctive relief and civil penalties sought by Mr. Benham and ordered by the district court will restore

the unlawfully filled wetlands and deter future violations. *See Laidlaw*, 528 U.S. at 185–86. Altogether, Mr. Benham has Article III standing to bring his citizen suit.

B. Mr. Benham’s Citizen Suit Notice Letter Was Adequate

Under Section 505 of the CWA, a plaintiff must provide notice of a violation before commencing a citizen suit. 33 U.S.C. § 1365(b) (2012). We review the adequacy of a citizen suit notice letter de novo. *Karr v. Hefner*, 475 F.3d 1192, 1196 (10th Cir. 2007). An adequate notice provides “sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, [and] the date or dates of such violation.” *Id.* at 1200 (alteration in original) (quoting 40 C.F.R. § 135.3(a) (2006)). The purpose of this notice is to give an alleged violator of the CWA “an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit.” *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987). A notice, then, must not merely “generally orient[] the agency or violator as to the type of violation.” *Karr*, 475 F.3d at 1200 (quoting *Cal. Sportfishing Prot. All. v. City of West Sacramento*, 905 F. Supp. 792, 799 (E.D. Cal. 1995)). Rather, “the notice’s identification of the alleged violations must be clear.” *Id.*

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In relevant part, Mr. Benham's notice provided:

Discharges of dredged or fill material into waters of the United States may only occur if permitted by the Army Corps of Engineers (herein the "ACOE"). 33 U.S.C. § 1311(a); 33 U.S.C. § 1344(a). Waters of the United States, as defined in section 404, includes wetlands, which are areas "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." 33 C.F.R. § 328.3(b); *see also U.S. v. Riverside Bayview Homes*, 474 U.S. 121, 131–32 & n.8 (1985). Saline Creek is surrounded by wetlands. A significant portion of your mining operations have both dredged and filled these designated wetlands. *See* Attachment 2. The ACOE has no record of you being issued a section 404 permit for these dredge and fill activities.

Any action which results in the filling of waters of the United States, including wetlands such as the ones you have filled, must be permitted through the ACOE. 33 U.S.C. [§] 1311(a); 33 U.S.C. [§] 1342. You have violated this section by placing large amounts of dirt, sand, and gravel into the center of Saline Creek without a permit in order to form a more convenient access road for [your] trucks. This road stretches underneath the S 4437 road and connects land owned by the Grand River Dam Authority with land owned by you. The attached photograph shows you filling

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this wetland on September 14, 2006. *See* Attachment 3. The location of your illegal discharges of fill material is identified on the attached air photo at approximately the point labeled “1.” *See* Attachment 2.

1 Aplee. Supp. App. 19. The notice describes the specific pollutants (dirt, sand, and gravel), specific locations (a road identified by description and aerial photograph), the specific sections of the CWA that were violated (33 U.S.C. §§ 1311(a), 1342, 1344(a)), and a specific date of a violation (September 14, 2006). These details provided Ozark with sufficient information to clearly identify the violation and thus constitute adequate notice. *See Karr*, 475 F.3d at 1201 (comparing cases and approving of a notice that listed “specific pollutants, specific locations, and specific permits the defendant was alleged to have violated”).

Ozark also contends that the district court erred by allowing Mr. Benham to prosecute claims that were not identified in his notice. But Mr. Benham’s notice specifically mentions the road created within Saline Creek. Accordingly, the district court’s determination that Mr. Benham’s “allegations regarding the roadway within Saline Creek and the filling of its surrounding wetlands are within the scope of the Notice Letter,” *Benham I*, 2015 WL 235759, at *9, is fully supported.

C. The District Court Did Not Clearly Err by Finding That Ozark Violated the CWA

We review the district court's legal conclusions de novo and its factual findings for clear error, giving great deference to credibility determinations. *Raytheon Aircraft Co. v. United States*, 590 F.3d 1112, 1118, 1120 (10th Cir. 2009). We may reverse only if the district court's finding "is without factual support in the record or if, after reviewing all the evidence, we are left with a definite and firm conviction that a mistake has been made." *Aquila, Inc. v. C.W. Mining*, 545 F.3d 1258, 1263 (10th Cir. 2008) (quoting *Keys Youth Servs., Inc. v. City of Olathe*, 248 F.3d 1267, 1274 (10th Cir. 2001)).

After a bench trial, the district court found that the testimony of Mr. Benham's expert witness and the records regarding the existence of filled wetlands "establish that the half-acre threshold for filled wetlands requiring an individual permit has been surpassed" and that "Ozark has discharged dredge and fill materials into Saline Creek in excess of one-half of an acre without an individual permit as required under the CWA." *Benham I*, 2015 WL 235759, at *6–7. This finding came after the district court heard conflicting testimony at trial regarding the construction of the roadway in Saline Creek. Ozark's CEO testified that a neighboring landowner had built the road prior to Ozark's purchase of the land in 1991. *Id.* at *6. But one of the landowner's employees attested that the landowner did no such thing and that "he has observed Ozark employees maintaining, rebuilding, and driving on the road." *Id.* Further, Mr. Benham testified that

Ozark began building the road in 2005 and extended it over time as it mined gravel, and the road can be seen in an aerial photograph taken in 2006 but does not appear in a photograph taken in 1991. *Id.* Based on this evidence, the district court found that “Ozark constructed the road by placing dredge and fill material into Saline Creek.” *Id.* at *7. It found Mr. Benham’s testimony credible because it was detailed and corroborated by photographs; by contrast, it found that the CEO’s testimony “was often evasive and suffered from a lack of recollection as to key issues” and was contradicted by the testimony of the neighboring landowner’s employee. *Id.* The district court’s findings are not clearly erroneous.

The district court then concluded that “Ozark’s deposition of dredge and fill material in excess of . . . one-half acre . . . constitutes a continuing violation of Section 404 of the CWA that renders Ozark subject to liability.” *Id.* at *9. It determined that Ozark’s violation was “continuing” based on the premise that “[u]ntil a pollutant, such as fill material, that has been placed in a wetland is removed, its presence constitutes a continuing violation.”¹ *Id.* at *8 (citing *Sasser v. Adm’r, U.S. EPA*, 990 F.2d 127, 129 (4th Cir. 1993)). Ozark does not contest this definition of a “continuing” violation;

¹ Language from Justice Scalia’s concurrence in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), supports such a ruling: “When a company has violated an effluent standard or limitation, it remains . . . ‘in violation’ of that standard or limitation so long as it has not put in place remedial measures that clearly eliminate the cause of the violation.” 484 U.S. at 69 (Scalia, J., concurring).

instead, it challenges the adequacy of factual support for such a finding. Having reviewed the underlying support, we affirm the district court's conclusion that the roadway and filling of wetlands in Saline Creek constitute a continuing violation of the CWA.

D. The District Court Did Not Abuse Its Discretion by Admitting Evidence Prepared by Ozark's Withdrawn Expert

We review a district court's admission of evidence for abuse of discretion. *Prager v. Campbell Cty. Mem'l Hosp.*, 731 F.3d 1046, 1054 (10th Cir. 2013). The district court's finding that Ozark violated the CWA was based, in part, on evidence created by Enercon, an environmental consulting firm that Ozark hired after receiving Mr. Benham's citizen suit notice letter. See *Benham I*, 2015 WL 235759, at *7 ("[T]he records regarding the existence of filled wetlands created by Enercon establish that the half-acre threshold for filled wetlands requiring an individual permit has been surpassed."). Ozark initially intended to call Enercon as an expert witness at trial but later changed its mind. On February 12, 2014, Ozark notified the court that it was withdrawing its expert. It also objected to several of Mr. Benham's trial exhibits that contained material previously obtained from Enercon on the basis that Federal Rule of Civil Procedure 26(b)(4)(C)–(D) protected the documents from disclosure. Ozark renewed its Rule 26 objections at trial and added that the exhibits were inadmissible hearsay; the district court overruled its objections.

Ozark’s reliance on Rule 26 as a means of excluding expert material is misplaced. Rule 26(b)(4)(C) and (D) protect against the disclosure of attorney communications with testifying experts and facts known and opinions held by nontestifying experts, respectively. But while they protect against the *discovery* of this expert material, they have nothing to do with the *admissibility* of already-disclosed material. Mr. Benham states that he acquired the Enercon documents through an unopposed subpoena on August 19, 2012. If the documents contained attorney-expert communications, a Rule 26(b)(4)(C) objection would have been appropriate at that time. And had Ozark withdrawn its expert before the subpoena, a Rule 26(b)(4)(D) objection would also have been well founded. Nearly two years after disclosure, though, Rule 26(b)(4) provides no protection against admitting the documents as evidence at trial—even if Ozark no longer planned to call its expert as a witness. *Cf. SEC v. Koenig*, 557 F.3d 736, 744 (7th Cir. 2009) (“Disclosure of the report ends the opportunity to invoke confidentiality.”).

Additionally, Ozark has waived its hearsay argument by inadequately briefing the issue. Federal Rule of Appellate Procedure 28(a)(8)(A) requires an argument to contain “appellant’s contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies.” Ozark’s brief mentions that the district court admitted the documents over Ozark’s hearsay objection but offers no explanation for why this was erroneous. As a result, Ozark has waived its argument that the

documents were inadmissible hearsay, *see SCO Grp., Inc. v. Novell, Inc.*, 578 F.3d 1201, 1226 (10th Cir. 2009) (“An issue or argument insufficiently raised in a party’s opening brief is deemed waived.”), and we are unable to say that the district court abused its discretion by admitting them into evidence.

E. Ozark Forfeited Its Constitutional Arguments

For the first time on appeal, Ozark argues that the district court’s order of a conservation easement violates the Due Process and Takings Clauses of the Fifth Amendment. As Ozark did not raise this theory before the district court,² the theory was forfeited and our review of the district court’s order is for plain error. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128 (10th Cir. 2011). But Ozark did not argue for plain error review in its brief, and “the failure to argue for plain error and its application on appeal . . . marks the end of the road for an argument for reversal not first presented to the district court.” *Id.* at 1131. Consequently, we decline to consider Ozark’s constitutional arguments.³

² Ozark had the opportunity to raise this argument in its objection to Mr. Benham’s proposed mitigation plan, *Benham v. Ozark Materials River Rock, LLC*, No. 11-CV-339-JED-FHM (N.D. Okla. Dec. 29, 2016), ECF No. 180, and its objection to Mr. Benham’s supplement to his proposed mitigation plan, *Benham v. Ozark Materials River Rock, LLC*, No. 11-CV-339-JED-FHM (N.D. Okla. Jan. 26, 2017), ECF No. 183—but did not.

³ At oral argument, the parties were uncertain of the conservation easement’s duration. Our disposition does not prevent the

F. The District Court Did Not Abuse Its Discretion by Not Invoking the Primary Jurisdiction Doctrine

We review a district court's decision to invoke the primary jurisdiction doctrine for abuse of discretion. *TON Servs., Inc. v. Qwest Corp.*, 493 F.3d 1225, 1239 (10th Cir. 2007). The primary jurisdiction doctrine allows courts to stay proceedings or dismiss an action without prejudice when “a decision by a court would threaten the uniformity of a regulatory scheme or require the court to confront issues of fact outside of its conventional experience” so that the parties can “seek a decision before the appropriate administrative agency.” *S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 751 (10th Cir. 2005). Here, there are no threats to the uniformity of a regulatory scheme or issues outside the conventional experience of the courts. In fact, Section 505 of the CWA explicitly contemplates that district courts have jurisdiction to hear citizen suits. *See* 33 U.S.C. § 1365. Accordingly, the district court did not abuse its discretion by refusing to stay proceedings or dismiss the action without prejudice under the primary jurisdiction doctrine. *See Raritan Baykeeper v. NL Indus., Inc.*, 660 F.3d 686, 695 (3d Cir. 2011) (noting that the primary jurisdiction doctrine would apply to CWA citizen suits only in exceptional cases, such as where a suit would disrupt a formal administrative proceeding).

parties from seeking clarification from the district court on this issue.

Though framed as a primary jurisdiction issue, the essence of Ozark's argument is that Mr. Benham should be prohibited from bringing his citizen suit because the Army Corps of Engineers is primarily responsible for the enforcement of the CWA. While it is true that Section 505 would prohibit Mr. Benham's suit if the Corps were "diligently prosecuting" an enforcement action, *see* 33 U.S.C. § 1365(b)(1)(B), the facts presented at trial show that the Corps was *not* diligently pursuing an enforcement action against Ozark. The district court found that the Corps had conducted several inspections of Ozark's operations by driving through the property and had concluded each time that there were no CWA violations. *Benham I*, 2015 WL 235759, at *4. Consequently, the Corps was not diligently prosecuting an enforcement action, and Mr. Benham was entitled to bring his citizen suit.

For the first time on appeal, Ozark argues that the CWA violation in the instant case covers the same set of facts as a 2005 violation. As an action for a "wholly past" violation would deprive the court of subject matter jurisdiction, *see Gwaltney*, 484 U.S. at 64, this argument can be made at any stage of the litigation, *see Champlin Petroleum Co. v. Ingram*, 560 F.2d 994, 996 (10th Cir. 1977). However, even assuming that Mr. Benham's suit overlaps with the 2005 violation (which Mr. Benham contests), this is not an action for a "wholly past" violation. Rather, the district court found that Ozark's deposits of dredge and fill material constitute a "continuing" violation of the CWA, *Benham I*, 2015 WL 235759, at *9, over which a federal court has

subject matter jurisdiction, *see Gwaltney*, 484 U.S. at 59. Consequently, the district court properly exercised jurisdiction over Mr. Benham’s citizen suit.

Ozark also attempts to frame its primary jurisdiction argument as a ripeness issue, contending that the Army Corps of Engineers has not made a final agency determination regarding the delineation of wetlands in Saline Creek. But Mr. Benham is not an “affected party” subject to the Corps’s exhaustion of administrative remedies provision. *See* 33 C.F.R. §§ 331.2, 331.12 (2017). Moreover, Section 505 contains the “diligently prosecuting” requirement, not an administrative exhaustion requirement. And the evidence shows that the Corps was *not* diligently prosecuting an enforcement action against Ozark. The Corps’s CWA enforcement responsibilities therefore have no bearing on whether Mr. Benham was able to bring suit in this case.

In sum, the district court had jurisdiction over Mr. Benham’s citizen suit, and invoking the primary jurisdiction doctrine would not have been appropriate.

AFFIRMED.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

DAVID BENHAM,	)	
Plaintiff,	)	
v.	)	Civil Case No.
OZARK MATERIALS	)	11-CV-339-JED-FHM
RIVER ROCK, LLC,	)	
Defendant.	)	

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

(Filed Jan. 16, 2015)

Plaintiff, David Benham, filed this citizen suit seeking injunctive relief and civil penalties under §§ 402 and 404 of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (“CWA”). Benham claims that defendant Ozark Materials River Rock, LLC’s mining activities along Saline Creek have adversely affected the environmental health of the creek and surrounding land. On September 24, 2013, the Court dismissed Benham’s § 402 claim as moot. (Doc. 122). On April 29 and 30, 2014, a nonjury trial was held on Benham’s § 404 claim. Having considered the evidence and the parties’ submissions, the Court hereby enters its findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52.¹

¹ At trial, Benham was given leave to submit the affidavit of Steven Stough as an evidentiary supplement to that which was received at trial. That submission was received on May 30, 2014. (Doc. 157). On June 27, 2014, the parties submitted their respective

I. Findings of Fact²

1. As noted, this is an action seeking injunctive relief and civil penalties pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (“CWA”), alleging discharges of dredge and fill material into Saline Creek and its surrounding wetlands in Mayes County, Oklahoma. (*See* Complaint, Doc. 2 at ¶44).

2. Saline Creek has been designated as a “High Quality Water” by the Oklahoma Water Resources Board and serves as a reference stream for the State of Oklahoma. (Transcript (“Tr.”) at 117:17-18; 229:8-16).

**Plaintiff Benham’s
Relationship to Saline Creek**

3. Plaintiff David Benham grew up on property along Saline Creek and spent a significant amount of his youth swimming, hunting, fishing, and otherwise recreating in and alongside the creek. (Tr. at 221:17 – 222:1). Benham testified that he continues to recreate in Saline Creek, but that Ozark’s operations have degraded his ability to do so. (Tr. at 229:22 – 230:12). For example, he stated that the creek is shallower and slower and that wildlife such as minnows and crawdads are scarcer. (Tr. 230:18 – 231:3). Benham also testified that the number of areas deep enough for

proposed findings of fact and conclusions of law. (Docs. 158 and 159).

² Any conclusion of law more appropriately characterized as a finding of fact shall be incorporated herein.

swimming in the creek has been severely reduced. (Tr. at 236:16-22).

4. Benham also testified about Saline Creek's importance to the local Cherokee culture. The confluence of Big Saline and Little Saline, which becomes Saline Creek, harbored two giant American Elm trees that the Cherokees had historically used for cultural rituals. (Tr. 235:22 – 236:8). The erosion of the creek has washed out one of the elms and left the other "half alive." (Tr. at 236:10-13).

5. Benham intends to recreate in Saline Creek in the future. (Tr. at 239:20-22).

Ozark's Mining Operation

6. Defendant Ozark Materials River Rock, LLC ("Ozark") is a sand and gravel mining company that operates on property adjacent to Saline Creek. (Tr. at 20:8-22). Ozark's gravel mining operation is located in Section 30, Township 21 North, Range 21 East, Mayes County, Oklahoma. (Pretrial Order, Doc. 139 at 2). Ozark dredges sand and gravel from the bed of Saline Creek and processes the materials through a screening plant on site, washing and separating the materials for marketing. (Tr. at 21:24 – 22:12).

7. Brad Eastman is the chief executive of Ozark. (Tr. at 20:8-10). Eastman testified that Ozark took over a pre-existing mining operation in September 1991 and that excavation had taken place in the same or

similar locations under the previous ownership. (Tr. at 268:1-13).

8. Ozark operates under a non-coal mining permit issued by the Oklahoma Department of Mines. (Defendant's Exhibits 21 and 22).

9. Ozark does not currently have an individual Section 404 permit, but did at some point "[a] long time ago." (Tr. at 30:9-13). Mr. Eastman testified that he was told by the Army Corps of Engineers ("ACOE") that he did not need such a permit. (Tr. at 30:9-13). A letter regarding a Section 404 violation on the part of Ozark issued by the ACOE dated March 2, 2005, suggests, but does not explicitly state, that Ozark did not have a permit at that time. (Defendant's Exhibit 19).

The Notice Letter

10. On or about March 8, 2011, Ozark was served with a Notice of Intent to Sue (the "Notice Letter") from Benham, pursuant to Section 505 of the CWA. (Pretrial Order, Doc. 139 at 2).

11. With respect to Benham's Section 404 claim, the Notice Letter stated as follows:

Discharges of dredged or fill material into waters of the United States may only occur if permitted by the Army Corps of Engineers (herein the "ACOE"). 33 U.S.C. § 1311(a); 33 U.S.C. § 1344(a). Waters of the United States, as defined in section 404, includes wetlands, which are areas "inundated or saturated by

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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.” 33 C.F.R. § 328.3(b); *see also U.S. v. Riverside Bayview Homes*, 474 U.S. 121, 131-32 & n. 8 (1985). Saline Creek is surrounded by wetlands. A significant portion of your mining operations have both dredged and filled these designated wetlands. *See* Attachment 2. The ACOE has no record of you being issued a section 404 permit for these dredge and fill activities.

Any action which results in the filling of waters of the United States, including wetlands such as the ones you have filled, must be permitted through the ACOE. 33 U.S.C. 1311(a); 33 U.S.C. 1342. You have violated this section by placing large amounts of dirt, sand, and gravel in to the center of Saline Creek without a permit in order to form a more convenient access road for its trucks. This road stretches underneath the S 4437 road and connects land owned by the Grand River Dam Authority with land owned by you. The attached photograph shows you filling this wetland on September 14, 2006. *See* Attachment 3. The location of your illegal discharges of fill material is identified on the attached air photo at approximately the point labeled “1”. *See* Attachment 2. It is believed that you have discharged fill materials in numerous other areas along Saline Creek, but because of the secretive nature in which you conduct your business, those violations have been difficult

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to document. To the extent such documentation can be found, Mr. Benham intends to amend this notice so as to include those additional violations.

Additionally, it is believed that situs for the current washing and sorting site is a wetland. Thus, you currently are and have been engaging in sidecasting, which is the deposit of dredged or excavated material from a wetland into a different area of the same wetland. Sidecasting has been held to be a discharge of a pollutant that violates section 404 of the CWA. *See U.S. v. Deaton*, 209 F.3d 331, 332-333 (4th Cir. 2000). The location of your illegal discharges is identified on the attached air photo at approximately the point labeled "3". *See Attachment 2*. These activities began on or around May 15, 2010 and occur each time you excavate gravel from the stream and dump it in your washing and sorting site.

Moreover, it is believed that your previous washing and sorting site (located on land leased from the Grand River Dam Authority) was in a wetland. Such sidecasting activities occurred from approximately July 1, 2005 to May 15, 2010. The location of your illegal discharges is identified on the attached air photo

at approximately the point labeled “4”. *See* Attachment 2.

(Plaintiff’s Exhibit 1 at 5-6).³

12. The Court finds that the Notice Letter put Ozark on notice that it was being accused of having discharged dredge and fill material into Saline Creek and its surrounding wetlands in violation of Section 404.

13. Following receipt of the Notice Letter, Ozark consulted with the ACOE. (Plaintiff’s Exhibit 32). ACOE Regulatory Program Manager Ed Parisotto made a record of his April 4, 2011 conversation with Randall Beeson, Ozark’s environmental consultant, and Ozark’s legal counsel, which notes that “[i]t was suggested that Mr. Eastman hire an environmental professional/consultant to perform a wetland delineation to establish, in fact, if any jurisdictional wetlands or waters are located on the property and if so, their boundaries and possible impacts.” (Plaintiff’s Exhibit 32 at 2).

14. Following service of the Notice Letter, Benham timely filed this lawsuit on June 1, 2011. (Pretrial Order, Doc. 139 at 2).

Ozark’s Engagement of Enercon Services, Inc.

15. After Ozark’s meeting with the ACOE, Ozark engaged Enercon Services, Inc. (“Enercon”) to perform

³ Benham has abandoned the allegations in the Notice Letter with respect to the current and former washing and sorting sites being wetlands. (Doc. 159 at 3 n.1).

a Section 404 impact analysis. (Tr. at 37:1-6; Plaintiff's Exhibit 38). On October 17, 2011, Enercon provided Ozark with its "Analysis of Project Impacts, Section 404 Permit Application, and Preliminary Compensatory Mitigation Plan" (the "Mitigation Plan"). (Plaintiff's Exhibit 38). Enercon's Mitigation Plan noted that Ozark's operations had "affected likely jurisdictional wetlands and a perennial stream (Saline Creek) within the [Ozark] property." (Plaintiff's Exhibit 38 at 1). Enercon's Mitigation Plan proscribed restoration of wetlands and stream areas that were "degraded or altered" as a result of Ozark's operations. (*Id.*)

16. In connection with its Mitigation Plan, Enercon performed a wetlands delineation and generated a site map that shows aerial footage of Saline Creek and Ozark's area of operation. The aerial photograph contains an overlay depicting "Existing Wetlands" and "Filled Wetlands." (Plaintiff's Exhibit 17). The site map indicates four areas of "Filled Wetlands" totaling .58 of an acre. (*Id.*).

17. Enercon also created a document titled "Delineation of Potential Section 404 Issues" (the "Delineation"), dated November 1, 2011, which was provided to the ACOE. (Plaintiff's Exhibit 33; Tr. at 53:12-20).⁴ The Delineation identified four areas that the ACOE would likely deem jurisdictional wetlands. (Plaintiff's Exhibit 33). Specifically, the Delineation stated that

⁴ The ACOE refers to such delineations as "preliminary jurisdictional determinations" because they remain preliminary until the ACOE formally approves them. (Tr. at 52:21 – 53:11).

“[a]pproximately 0.46 acre of Section 404 technical wetlands were identified within the area of delineation.” (*Id.* at 4).

18. Enercon’s Delineation does not make reference to the .58 acre of “Filled Wetlands” that appears in the site map created for Ozark, nor is that site map included in the materials provided to the ACOE. (*See* Plaintiff’s Exhibit 33). The areas depicted as filled wetlands in the site map created for Ozark (Plaintiff’s Exhibit 17) are conspicuously absent from the site map contained in the Delineation. (*Compare* Plaintiff’s Exhibit 17 *with* Plaintiff’s Exhibit 33 at Figure 3, Bates-labeled Benham 002565). As such, the ACOE was never informed of the .58 acre of filled wetlands that Enercon had identified and Parisotto testified that he had never seen the site map depicting the filled wetlands. (Tr. at 57:16-19; 59:16-17). In fact, the Enercon Delineation provided to the ACOE contains no reference whatsoever to any wetlands having been filled or degraded. (*See* Plaintiff’s Exhibit 33).

The Army Corps of Engineers’ Actions with Respect to Ozark

19. The ACOE did not perform a wetlands delineation of any kind with respect to the Ozark mining site despite being asked to do so by Enercon. (Tr. at 58:22 – 59:15; 104:10-23).

20. The evidence at trial indicated that five site visits were made by the ACOE to the Ozark mining operation from 2010-on. The ACOE’s April 4, 2011 Record

of Conversation (Defendant's Exhibit 9) indicates that field inspections were made on June 17, June 29, and October 6 of 2010. The ACOE created a record of field inspection for the October 6, 2010 inspection and for inspections which occurred on June 28, 2012, and July 3, 2013. (Defendant's Exhibits 5, 6, and 7).

21. The ACOE's three records of field inspections are very similar. They note that each inspection was performed by Parisotto and consisted of him driving through the property and viewing the area where recent excavation activity had occurred. (*See* Defendant's Exhibits 5, 6, and 7). Each inspection concluded that "[i]ncidental fall back of gravel" was present in the area, but found no CWA violation. (*See* Defendant's Exhibit 5 at 2; Defendant's Exhibit 6 at 1-2; and Defendant's Exhibit 7 at 2).

22. Parisotto did not testify as an expert witness. (Tr. 97:19-24). When testifying about the October 6, 2010 site visit, he was clear that his inspection did not occur while excavation was taking place and agreed that, as such, he could not have witnessed "any placement of dredge or fill material" at that time. (Tr. at 98:17-23). It is unclear from the record whether excavation was taking place during his June 28, 2012 and July 3, 2013 visits.

23. The referenced 2012 and 2013 records of field inspections include photographs taken by Parisotto. It is unclear the extent to which the 2012 photographs include areas identified by Enercon as potential wetlands or filled wetlands. (*See* Defendant's Exhibit 6).

The 2013 photographs reference the “[a]reas identified by Enercon Services within the November 1, 2011 Preliminary Jurisdictional Determination as possible ‘wetland areas.’” (Defendant’s Exhibit 7 at 3). The report notes that the areas “seem to be functioning well.” (*Id.*). Parisotto testified that he “found no evidence of the placement of dredge or fill material” in those areas. (Tr. at 83:24 – 84:3). As noted, however, Parisotto also testified that he had not seen the areas identified by Enercon as *filled* wetlands until presented with Plaintiff’s Exhibit 17 at trial. (Tr. at 57:16-19; 59:16-17).

**Dr. Patterson’s Testimony Regarding
Saline Creek and its Surrounding Wetlands**

24. Dr. Steve Patterson testified as an expert witness on behalf of Benham.

25. The Court finds that Dr. Patterson is qualified as an expert in his field of restoration ecology, and his testimony has materially assisted the Court in reaching its decision. Ozark had no objection to Dr. Patterson’s admission as an expert. (Tr. at 112:15-16).

26. Dr. Patterson performed a wetlands delineation with respect to Ozark’s mining site and the respective area of Saline Creek. (Plaintiff’s Exhibit 58). He examined the areas previously identified by Enercon as wetlands that had not been filled (*see* Plaintiff’s Exhibit 33) and used those areas as a reference for comparison purposes. (Plaintiff’s Exhibit 58).

27. Dr. Patterson modified the delineations of the wetlands identified by Enercon as W-1, W-2, W-3, and W-4, finding that W-1 consisted of .2 acres, W-2 consisted of .51 acres, W-3 consisted of .25 acres, and W-4 was no longer existent as a result of the expansion of an open water pond. (Tr. 139:20-22; 163:1 – 166:25; *also compare* Plaintiff's Exhibit 58 at 9 *with* Plaintiff's Exhibit 33 at 5).

28. Dr. Patterson observed discharge of fill material into W-1 in "[m]ultiple locations" (Tr. at 145:22 – 147:6); "[i]n various locations along the perimeter" and in chunks throughout W-2 (Tr. at 152:15-22); and recently deposited fill material along the "whole northern edge" of W-3 (Tr. at 154:20 – 155:11). He stated that these discharges of fill material were such that they would probably not be seen if one were merely driving through the mining site, as the ACOE's records state Parisotto did. (Tr. at 143:21 – 144:1).

29. Dr. Patterson also opined about significant impacts of the Ozark mining site in the form of loss of riparian and wetland vegetation and reduction in linear feet of the stream channel. (*See* Plaintiff's Exhibit 58; Tr. at 169:17 – 175:3). These harms were not specifically referenced in Benham's Notice Letter. (*See* Plaintiff's Exhibit 1).

30. Dr. Patterson concluded that more than one-half acre of wetlands contained discharges of fill material and was otherwise disturbed, *i.e.*, earth having been moved and vegetation removed, by Ozark's mining activities. (Tr. 167:24 – 168:17).

31. Ozark did not present an expert in opposition to Benham's Section 404 claim.⁵

32. Benham's Section 404 claim asserts that the roadway from which Ozark's mining activities were, in part, conducted is, in itself, a violation of the CWA because Ozark placed dredge and fill material within Saline Creek to create the roadway. (*See* Doc. 2; Plaintiff's Exhibit 1 at 5). The road at issue stretches under S 4437 road (referred to as the "pumpback road" at trial) and connects land owned by the Grand River Dam Authority ("GRDA") with land owned by Ozark. (Plaintiff's Exhibit 1 at 5).

33. There was conflicting testimony at trial with respect to the construction of this roadway. Mr. Eastman testified that Ozark did not create the road and that it was constructed before he purchased the mining operation in 1991. (Tr. at 269:6-13). Eastman further stated that it was his belief that the GRDA had created the road. (Tr. at 277:11-16).

34. In contrast, Benham testified that he observed the road's construction in the years that followed Ozark's commencement of operations on the property in 1991. (Tr. at 224:7-24). He estimated that construction of the road began around 2005. (Tr. at 226:24 – 227:5). Benham stated that the road was constructed in small increments so that gravel could be mined in the adjacent area of Saline Creek, and when

⁵ Ozark elected to withdraw the expert it had identified, Randall Beeson, upon plaintiff's agreement that he would not call Mr. Beeson as a witness in his case-in-chief. (Tr. at 209:24-210:1).

the area was exhausted, new gravel would be placed in the creek to extend the road further. (Tr. at 224:12-24).

35. Benham was permitted at trial to submit a post-trial affidavit of a GRDA official because of difficulties in securing his attendance at trial as a rebuttal witness. (See page 1, footnote 1). Steve Strough, Superintendent of Field Construction and Excavation for the GRDA, has been involved in all field construction and excavation activities in and around Saline Creek since April 1989. (Doc. 157-1). Strough attested that he is familiar with the road at issue and that the GRDA *did not build the road* and does not maintain it, but that he has observed Ozark employees maintaining, rebuilding, and driving on the road. (*Id.* at 2). This stands in contrast to Eastman's testimony that he believed GRDA had constructed the road. (See Tr. at 277:11-16).

36. The aerial photographs of the mining site produced during trial appear to support Benham's testimony that the road was constructed after Ozark took over operations at the site. In Plaintiff's Exhibit 22, a photograph taken on October 6, 2006, the road is clearly present, whereas in Plaintiff's Exhibit 24, taken on March 31, 1991, the road does not appear to be present, though the photograph is low resolution and monochromatic. (*Compare* Plaintiff's Exhibits 22 and 24).

37. Based upon the foregoing, the Court accepts Benham's version of events with respect to construction of the road. Eastman's testimony that Ozark did

not construct the road was not credible in light of Benham's detailed testimony regarding how Ozark constructed the road; Plaintiff's Exhibit 24, which shows that the road was not present in 1991; and the GRDA testimony that GRDA did not construct the road. In addition, Eastman's testimony was often evasive and suffered from a lack of recollection as to key issues. Accordingly, the Court finds that Ozark constructed the road by placing dredge and fill material into Saline Creek.

38. The Court also finds that Ozark has discharged dredge and fill materials into Saline Creek in excess of one-half of an acre without an individual permit as required under the CWA.⁶ Dr. Patterson's testimony and the records regarding the existence of filled wetlands created by Enercon establish that the half-acre threshold for filled wetlands requiring an individual permit has been surpassed. While Mr. Parisotto testified that he did not observe wetlands containing dredge and fill material, he was not privy to Enercon's findings in that respect and the record does not establish that his inspections were performed with the same rigor as that of Dr. Patterson's and Enercon's investigations. Moreover, Parisotto did not perform a wetlands delineation, but delineations were performed by both Dr. Patterson and Enercon.

⁶ As will be discussed fully in the Conclusions of Law, the ACOE nationwide permit for non-coal mining permits up to one-half acre of impact to wetlands before an individual permit is required. (*See infra* Conclusions of Law, paragraph 8).

Factors Relevant to Civil Penalties

39. Ozark's mining operation had a gross income of \$1,670,411 between 2007 and 2012. This number being the total for reported incomes of \$292,920 in 2007; \$351,781 in 2008; \$203,926 in 2009; \$240,373 in 2010; \$289,813 in 2011; and \$291,598 in 2012. (Plaintiff's Exhibits 42-47).

40. Dr. Patterson estimated the costs of restoration of the filled wetlands to be \$7,500 for wetland creation and \$5,000 for wetland enhancement. (Plaintiff's Exhibit 58). No estimate was given with respect to remediation of the roadway constructed within Saline Creek.

41. Ozark was aware that it was in violation of the CWA as a result of Enercon's report dated October 17, 2011, in which CWA violations are identified and a mitigation plan is proposed, but did not provide this information to the ACOE. (Plaintiff's Exhibit 38).

42. Ozark has been found to be in violation of the CWA previously by the ACOE on March 2, 2005. (Defendant's Exhibit 19). Specifically, the ACOE found that Ozark's operations resulted in the placement of dredge and fill material within the jurisdictional limits of Saline Creek. (*Id.*).

II. Conclusions of Law⁷

1. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), as this action arises under the Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Venue is proper under 33 U.S.C. § 1365 because the complained of violations occurred within the Northern District of Oklahoma.

3. The Court has determined that Benham has standing to maintain this action and the facts elicited at trial reinforce the Court's prior conclusion. (*See* Doc. 122).

4. Under Section 1365 of the CWA, "[t]he district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title." *Id.* at § 1365(a).

5. The Clean Water Act is a pollution control statute that establishes a comprehensive program designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, the CWA prohibits the discharge of pollutants, including dredged or fill material, into navigable waters unless authorized by a

⁷ Any finding of fact more appropriately characterized as a conclusion of law shall be incorporated herein.

CWA permit. 33 U.S.C. § 1311(a); 33 U.S.C. § 1362(6) (listing rock and sand, among other things, as pollutants under the CWA).

6. The CWA defines “navigable waters” as “waters of the United States,” which term, in turn, is defined by regulation to include certain wetlands. 33 U.S.C. § 1362(7); 33 C.F.R. § 328.3(a)-(b). “The phrase ‘the waters of the United States’ includes only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes.’” *Rapanos v. United States*, 547 U.S. 715, 739 (2006) (alteration in original). Wetlands are covered by the CWA “if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” *Id.* at 780 (Kennedy, J., concurring).

7. Section 404 of the CWA authorizes the ACOE to regulate discharges of dredge and fill material into navigable waters through the issuance of permits. 33 U.S.C. § 1344. The ACOE may issue either individual permits on a case-by-case basis, or general permits for “categories of activities” on a state, regional, or nationwide basis. *Id.*

8. Effective June 5, 2000, the ACOE created a nationwide permit for mining activities, Nationwide Permit No. 44, which covers mining activities that do not disturb more than one-half acre of wetland or 300

linear feet of stream bed. *See* Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12818-01. Mining activity which exceeds these limits requires an individual permit under Section 404.

9. Until a pollutant, such as fill material, that has been placed in a wetland is removed, its presence constitutes a continuing violation. *Sasser v. Adm'r, U.S. E.P.A.*, 990 F.2d 127, 129 (4th Cir. 1993) (citing *United States v. Ciampitti*, 669 F. Supp. 684, 700 (D.N.J. 1987); *United States v. Cumberland Farms*, 647 F. Supp. 1166, 1183-84 (D. Mass. 1986), *aff'd* 826 F.2d 1151 (1st Cir.1987)); *see also United States v. Reaves*, 923 F. Supp. 1530, 1534 (M.D. Fla. 1996) (“discharge of dredged or fill materials into wetlands on the site is a continuing violation for as long as the fill remains”).

10. Under Section 404, notice must be given to violators before a citizen suit can be commenced. The notice must provide “sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, [and] the date or dates of such violation.” *Karr v. Hefner*, 475 F.3d 1192, 1200 (10th Cir. 2007) (quoting 40 C.F.R. § 135.3(a)). “The guiding principle is that the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit.” *Id.* (internal quotations omitted).

11. The Court finds that Saline creek and its surrounding wetlands are “waters of the United States” subject to regulation under the CWA.

12. The Court finds that Ozark’s deposition of dredge and fill material in excess of the one-half acre limit permitted under Nationwide Permit No. 44 constitutes a continuing violation of Section 404 of the CWA that renders Ozark subject to liability. Specifically, the Court finds that the roadway constructed within Saline Creek and the filling of wetlands identified by Enercon in Plaintiff’s Exhibit 17 and by Dr. Patterson constitute Section 404 violations committed by Ozark.⁸

13. The Court finds that Ozark was required to have an individual Section 404 permit as a result of these discharges, but did not and did not apply for one.

14. The Court finds that plaintiff’s allegations regarding loss of linear feet of stream channel and riparian vegetation (*see supra* Findings of Fact) are beyond the scope of the Notice Letter. Plaintiff’s allegations regarding the roadway within Saline Creek

⁸ Ozark objected to the admission of Plaintiff’s Exhibit 17 at trial, which the Court overruled at that time. (Tr. at 57:1-14). No objection was raised to the admission of this exhibit in the proposed pretrial order and Ozark therefore waived the right to object to its admission at trial. *See* Fed. R. Civ. P. 26(a)(3)(B) (“An objection not so made except for one under Federal Rule of Evidence 402 or 403 – is waived unless excused by the court for good cause.”). Ozark has not demonstrated good cause for its failure to timely object and the exhibit is not excludable under Rules 402 or 403.

and the filling of its surrounding wetlands are within the scope of the Notice Letter. The destruction of wetland vegetation is implicit in plaintiff's allegations regarding the filling of wetlands and is therefore within the scope of the Notice Letter.

15. Plaintiff seeks injunctive relief and civil penalties as a result of Ozark's Section 404 violations.

16. The restoration of unlawfully filled wetlands is an available type of injunctive relief contemplated by the CWA. 33 U.S.C. § 1319. "Courts have recognized a mandatory duty to restore intentionally filled wetlands, unless the equities weigh against restoration." *United States v. Donovan*, 466 F. Supp. 2d 595, 598 (D. Del. 2006) (citing *United States v. Cumberland Farms*, 826 F.2d 1151, 1161-65 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988); *United States v. Van Leuzen*, 816 F. Supp. 1171, 1180 (S.D. Tex. 1993)). When evaluating the propriety of ordering restoration, three factors are generally considered: "(1) whether the proposal will confer the maximum environmental benefits, (2) whether the proposal is achievable as a practical matter, and (3) whether the proposal bears an equitable relationship to the degree and kind of wrong it is intended to remedy." *Id.* (citing *United States v. Deaton*, 332 F.3d 698, 714 (4th Cir. 2003)).

17. Taking these factors into consideration, the Court finds that restoration should be and is hereby ordered. The extent of such restoration will be determined upon the filing of a proposed restoration plan by Ozark.

18. Ozark shall file its proposed restoration plan within 60 days of the date of this Opinion and Order. Such proposal shall take into account the three factors cited above: maximum environmental benefit, achievability of the proposal, and equities of restoration.

19. Benham shall submit its response to the proposed restoration plan within 30 days of the date that Ozark's plan is filed.

20. The parties have had significant difficulties in reaching consensus on issues throughout this litigation. Nevertheless, the Court directs the parties to confer with respect to a potential joint restoration plan that can be carried out more expeditiously and economically without the need for further disputes over issues that have now been determined by the Court.

21. The Court will thereafter determine an appropriate course of action with respect to restoration of the areas subject to the Section 404 violations.

22. The CWA also provides for civil penalties "not to exceed \$25,000 per day for each violation." 33 U.S.C. § 1319. The Act provides:

In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

Id.

23. Benham seeks civil penalties in the amount of \$2,573,750, which represents the alleged avoidance of \$1,029,500 in compliance costs multiplied by 2.5, on the basis that Ozark concealed evidence of its impacts to wetlands from the ACOE. Penalties within this range would be excessive and are rejected.

24. However, taking into account these factors and the Court's Findings of Fact with respect to Ozark's actions, the Court finds that imposition of a civil penalty is warranted in this case in the amount of \$35,000. This penalty is appropriate in light of Ozark's modest annual gross revenue and its level of culpability with respect to concealment of its violations.

SO ORDERED this 16th day of January, 2015.

/s/ John E. Dowdell

JOHN E. DOWDELL
UNITED STATES
DISTRICT JUDGE

**UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA**

DAVID BENHAM,	)	
Plaintiff,	)	
v.	)	Case No.
OZARK MATERIALS	)	11-CV-339-JED-FHM
RIVER ROCK, LLC,	)	
Defendant.	)	

OPINION AND ORDER

(Filed Sep. 24, 2013)

The Court has for its consideration defendant's (First) Motion to Stay Proceedings (Doc. 58), defendant's Motion to Strike Plaintiff's Response Brief to Defendant's Motion to Stay Along with Exhibits and Request for Emergent and Immediate Relief Including Admonishing Plaintiff's Lawyers for Failure to Comply with this Court's Standards of Conduct (Doc. 63), Plaintiff's Motion to Provide Supplemental Factual Information in Opposition to Defendant's Motion to Stay Proceedings (Doc. 66), and defendant's (Second) Motion to Stay Proceedings (Doc. 97).

BACKGROUND

Plaintiff David Benham filed this citizen suit seeking injunctive relief and civil penalties under §§ 402 and 404 of the Clean Water Act, 33 U.S.C. § 1251 et seq. ("CWA"). Benham claims that defendant Ozark

Materials River Rock, LLC's ("Ozark") mining activities along Saline Creek, which has been designated as a "High Quality Water" by the Oklahoma Water Resources Board, have adversely affected the environmental health of the creek and surrounding land.

Ozark is engaged in the business of gravel mining and thus excavates rock from the bed of Saline Creek and washes and sorts those materials on nearby land. Benham's lawsuit alleged that Ozark was and is operating its mining activities in and around Saline Creek in violation of the CWA by, among other things, discharging pollutants into the water, failing to obtain necessary permits, and discharging dredge and fill materials into the creek and surrounding wetlands without a permit. On September 24, 2013, the Court entered an Opinion and Order on defendant's Motion to Dismiss (Doc. 122), which dismissed plaintiff's § 402 claim as moot. Benham's claim under § 404, which alleges unlawful dredge and fill activity by Ozark, remains.

DISCUSSION

A. Defendant's [First] Motion to Stay (Doc. 58)

In its first stay motion, Ozark argues that this litigation should be stayed to make way for a legal malpractice action filed by Ozark against plaintiff's counsel in state court. Ozark argues that a stay will prevent an unnecessary expenditure of judicial resources and would not result in prejudice to plaintiff. Benham opposes a stay, arguing primarily that Ozark

has not met its burden of showing a likelihood of success on the merits or irreparable harm.

This Court has the inherent authority to control its docket, which includes the power to stay cases in the interests of judicial economy. *United Steelworkers of America v. Oregon Steel Mills, Inc.*, 322 F.3d 1222, 1227 (10th Cir. 2003). “The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). The Tenth Circuit has suggested several factors to guide courts when considering whether to issue a stay, including “[1] whether the defendants are likely to prevail in the related proceeding; [2] whether, absent a stay, the defendant will suffer irreparable harm; [3] whether the issuance of a stay will cause substantial harm to the other parties to the proceeding; and [4] the public interests at stake.” *United Steelworkers of America*, 322 F.3d at 1227.

The Court finds that Ozark has not made a strong showing of likelihood of success on the merits. Indeed, Ozark did very little to explain its claims in the collateral proceeding. Ozark’s legal malpractice claim appears to be premised upon the allegation that plaintiff’s counsel breached fiduciary duties owed to Ozark by taking a position adverse to Ozark where there is alleged to have been a prior attorney-client relationship between plaintiff’s counsel and Ozark. Plaintiff’s counsel, Jason Aamodt, and defendant’s counsel, Wilfred Wright, were formerly associated as Aamodt &

Wright, PC, in Tulsa, Oklahoma. In approximately November of 2007, Mr. Wright – Ozark’s counsel in this proceeding – began representing Ozark in connection with litigation which the Grand River Dam Authority (“GRDA”) brought against Ozark. Mr. Aamodt attests that he had no knowledge of this representation; he had no participation in the representation; and that Mr. Wright had begun essentially practicing alone in Claremore, Oklahoma, at the time – completely independent of Mr. Aamodt.¹ It was not until July 2008 that each attorney formed separate firms.

Benham argues that, under the circumstances, he breached no ethical rules or fiduciary duties. Using Oklahoma Rules of Professional Conduct 1.7 and 1.9 as guideposts, Benham posits that Ozark’s legal malpractice action is likely to fail because he neither gained confidential information with respect to Ozark, nor took a position adverse to a current client.² The Court agrees, in light of the record before it, that Ozark faces a very high hurdle with respect to prevailing on its claims against plaintiff’s counsel. Rule 1.9 states in pertinent part:

(b) A lawyer shall not knowingly represent a person in the *same or a substantially related matter* in which a firm with which the lawyer

¹ Mr. Aamodt also contends that no conflicts check was initiated by Mr. Wright, thus adding to Mr. Aamodt’s asserted ignorance of the litigation between Ozark and the GRDA.

² While the Rules do not form the basis for a cause of action for legal malpractice, they do serve as a relevant standard of conduct for attorneys and are often cited in legal malpractice cases.

formerly was associated had previously represented a client

- (1) whose interests are materially adverse to that person; and
- (2) *about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c)* that is material to the matter; unless the former client gives informed consent, confirmed in writing.

Okla. R. Prof. Cond. 1.9 (italics added). Simply stated, to violate this rule, a lawyer would have to represent a client that is adverse to a former client whom he gained confidential information from in a case that is substantially related to the current representation, and do so without informed consent. This litigation is unlikely to be considered substantially related to the GRDA litigation, which was essentially an eviction action involving land rights. The case before this Court concerns alleged violations of the CWA which have little, if anything, to do with the property rights of the GRDA. In addition, Mr. Aamodt has attested that he gained no information regarding Ozark which is protected by Rules 1.6 and 1.9(c).

Rule 1.7 likewise does not appear to be implicated under the circumstances before this Court. Rule 1.7 prohibits representing a current client who is directly adverse to another current client. According to Benham, Ozark contends that, at the time Mr. Aamodt began representing Benham in this litigation, he was also representing Ozark because Aamodt & Wright, PC

had not yet dissolved. Given that Mr. Aamodt and Mr. Wright started new firms in 2008 and practiced completely independently, this claim seems to this Court to be unlikely to succeed, especially given that the case *sub judice* was not filed until June of 2011.³

Ozark has not demonstrated that it is likely to succeed on the merits of its collateral lawsuit. Accordingly, this factor weighs against a stay of this litigation.

The remaining factors also counsel against a stay of this case. First, Ozark has failed to allege any irreparable harm. The harm alleged by Ozark – a continuing breach of fiduciary duties by plaintiff’s counsel – can be remedied by damages should it prevail in its legal malpractice case. Second, a stay will simply result in further delay for Benham in the prosecution of his claims against Ozark, and if Benham’s lawsuit is meritorious, further harm to the environment. Third, public interest favors compliance with federal environmental statutes and expeditious resolution of civil litigation. Given these considerations, a stay based upon the collateral state court litigation is unwarranted. Ozark’s first Motion to Stay (Doc. 58) is thus denied.

B. Defendant’s Motion to Strike (Doc. 63)

Ozark’s Motion to Strike (Doc. 63) asks the Court to strike plaintiff’s response to Ozark’s first Motion to

³ Aamodt & Wright, PC’s formal dissolution occurred in November, 2011, by order in Tulsa County District Court. (See Doc. 58, at 3).

Stay (Doc. 62). Ozark argues that the information contained in the response and some of the accompanying evidentiary materials which discuss the breakdown in relationship between former shareholders of Aamodt & Wright, PC, Jason Aamodt and Wilfred Wright, is scandalous and irrelevant. The Court finds that the materials do not warrant being stricken under Fed. R. Civ. P. 12(f) as they are not “redundant, immaterial, impertinent, or scandalous.” While the referenced information is only tangentially related to the issues presented in the Motion to Stay, the materials do not meet the standard for being stricken. Ozark’s Motion to Strike (Doc. 63) is therefore also denied.

C. Plaintiff’s Motion to Provide Supplemental Factual Information in Opposition to Defendant’s Motion to Stay Proceedings (Doc. 66)

Plaintiff seeks to supplement his response to defendant’s first Motion to Stay (Doc. 62). Plaintiff provides the supplemental information within his motion to supplement, which plaintiff argues demonstrates that Ozark’s corporate representative, Randy Beeson, acknowledged in his deposition that plaintiff’s counsel did not provide legal services to Ozark. Ozark filed its response out of time (*see* Doc. 76). Thus, plaintiff’s motion is deemed confessed. *See* LCvR 7.2. Plaintiff’s Motion to Provide Supplemental Factual Information in Opposition to Defendant’s Motion to Stay Proceedings (Doc. 66) is granted and the Court has considered the supplemental information provided within the motion.

D. Defendant's [Second] Motion to Stay Proceedings (Doc. 97)

Ozark seeks a second stay premised upon the doctrine of primary jurisdiction. Ozark argues that the Court should defer to the ODEQ and Army Corps' expertise in monitoring and enforcing compliance with the CWA issues presented by Benham's claims.

The common law doctrine of primary jurisdiction provides courts with flexible discretion to defer adjudication of certain matters while a specialized administrative agency is exercising jurisdiction over those matters. Specifically, primary jurisdiction applies "where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 64 (1956). Two policy goals underlie this doctrine: "(1) to ensure 'desirable uniformity in determinations of certain administrative questions;' and (2) to 'promote resort to agency experience and expertise where the court is presented with a question outside its conventional experience.'" *B.H. v. Gold Fields Mining Corp.*, 506 F. Supp. 2d 792, 803 (N.D. Okla. 2007) (quoting *Williams Pipe Line Co. v. Empire Gas Corp.*, 76 F.3d 1491, 1496 (10th Cir. 1996)). If an administrative agency has primary jurisdiction over a matter, the proper course for a court is to stay the case until the administrative agency has completed its work. *Id.*

Courts have generally analyzed five factors in determining whether the primary jurisdiction doctrine is applicable. *Id.*; see also *Marshall v. El Paso Natural Gas Co.*, 874 F.2d 1373, 1377 (10th Cir. 1989); *Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Railway*, 857 F.Supp. 838 (D.N.M. 1994). Those factors are: (1) whether the court is being called upon to consider factual issues outside the conventional experience of judges; (2) whether defendant could be subject to conflicting orders; (3) whether agency proceedings have already begun; (4) whether the agency has shown diligence in resolving the issue; and (5) the type of relief requested. *B.H.*, *supra*, 506 F. Supp. 2d at 803.

First, this case presents facts which venture somewhat outside the realm of typical judicial experience. Benham's remaining §404 claim is based upon alleged discharge of dredge and fill materials into Saline Creek and surrounding wetlands. While these issues are somewhat technical and specialized, they are not so complex as to warrant abstention.

Second, Ozark would not be subject to conflicting orders from the Court and the relevant agencies at issue because, as noted, plaintiff's § 402 claim has been dismissed. The issues raised by Benham's § 402 claim were the subject of ODEQ's Consent Order. The remaining claim relates to issues over which the Army Corps exercises jurisdiction. Benham's main contention in this respect seems to be that the Army Corps is simply wrong in its failure to recognize continuing violations of the CWA. The Army Corps has performed inspections of Ozark's operation and has thus far

declined to take action. Hence, there is, in essence, no agency action to which the Court should defer. Doing so would be akin to finding that plaintiff's claim lacks merit because the agency did not make a finding that there has been a violation – something the Court declined to do in response to the invitation presented by Ozark's motion to dismiss. Because the Army Corps has not placed Ozark under any order with respect to Benham's § 404 allegations, a favorable ruling for Benham would not result in a conflicting order.

Third, as noted above, the agency proceedings instituted by ODEQ are no longer relevant to the claim before the Court. No action has been taken by the Army Corps. Hence, this factor weighs against the application of primary jurisdiction.

Fourth, Benham has alleged in substance that the Army Corps has failed to act on the merits of his allegations. The materials submitted by Ozark demonstrate the Army Corps performed an inspection as recently as July of 2013. Benham disagrees with the conclusions reached by the Army Corps, but he has provided no evidence that the Army Corps has failed to act diligently on the information it has received.

Finally, the type of relief sought by Benham – injunctive relief and civil penalties – would ordinarily weigh in favor of primary jurisdiction abstention. "Primary jurisdiction will often be invoked when a plaintiff seeks injunctive relief, because there is the greatest likelihood that a court's order will interfere with administrative agency's proceedings." *B.H.*, 506

F. Supp. 2d at 805. However, because the Army Corps has not taken formal action regarding Benham's § 404 allegations – other than inspecting Ozark's operations – the Court could issue civil penalties and injunctive relief without interfering with any agency proceeding.

In light of the Court's analysis of the above factors, the Court finds that Benham's claims should not be stayed under the doctrine of primary jurisdiction. Accordingly, defendant's second Motion to Stay Proceedings (Doc. 97) is **denied**.

CONCLUSION

IT IS THEREFORE ORDERED that:

Defendant's (First) Motion to Stay Proceedings (Doc. 58) is **denied**.

Defendant's Motion to Strike Plaintiff's Response Brief to Defendant's Motion to Stay Along with Exhibits and Request for Emergent and Immediate Relief Including Admonishing Plaintiff's Lawyers for Failure to Comply with this Court's Standards of Conduct (Doc. 63) is also **denied**.

Plaintiff's Motion to Provide Supplemental Factual Information in Opposition to Defendant's Motion to Stay Proceedings (Doc. 66) is **granted**.

And Defendant's (Second) Motion to Stay Proceedings (Doc. 97) is **denied**.

IT IS FURTHER ORDERED THAT the deadline for trial briefs and exchange of demonstrative

exhibits, and the pretrial conference and trial settings are hereby stricken, to be reset following the Court's ruling as to the plaintiff's motion for partial summary judgment and related filings.

Finally, the "Unagreed Pretrial Order" submitted to the Court on September 20, 2013 is also stricken. A deadline for submission of an **Agreed** Pretrial Order shall be provided along with new scheduling deadlines.

SO ORDERED this 24th day of September, 2013.

/s/ John F. Dowdell

JOHN F. DOWDELL
UNITED STATES
DISTRICT JUDGE

(1) 33 U.S.C. § 1344

(a) DISCHARGE INTO NAVIGABLE WATERS AT SPECIFIED DISPOSAL SITES

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

* * *

(d) “SECRETARY” DEFINED

The term “Secretary” as used in this section means the Secretary of the Army, acting through the Chief of Engineers. * * *

(f) NON-PROHIBITED DISCHARGE OF DREDGED OR FILL MATERIAL

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material—

* * *

(B)

for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

* * *

(E)

for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices

* * *

(G)

To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement. * * *

(o) PUBLIC AVAILABILITY OF PERMITS AND PERMIT APPLICATIONS

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or portion thereof, shall further be available on request for the purpose of reproduction.

(2) 33 U.S.C. § 1365

(a) AUTHORIZATION; JURISDICTION Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—

(1) against any person * * * who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the

Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) NOTICE No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such

action to the Administrator * * * Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(3) 33 CFR § 323.4 Discharges not requiring permits.

(a) General. Except as specified in paragraphs (b) and (c) of this section, any discharge of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under section 404:

* * *

(6) Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained in accordance with best management practices (BMPs) to assure that flow and circulation patterns and chemical and biological characteristics of waters of the United States are not impaired, that the reach of the waters of the United States is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized. These BMPs * * * shall also include the following baseline provisions:

(i) Permanent roads (for farming or forestry activities), temporary access roads (for mining, forestry, or farm purposes) and skid trails (for logging) in waters of the U.S. shall be held to the minimum feasible number, width, and total length consistent with the purpose of specific farming, silvicultural or mining

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operations, and local topographic and climatic conditions;

(ii) All roads, temporary or permanent, shall be located sufficiently far from streams or other water bodies (except for portions of such roads which must cross water bodies) to minimize discharges of dredged or fill material into waters of the U.S.;

(iii) The road fill shall be bridged, culverted, or otherwise designed to prevent the restriction of expected flood flows;

(iv) The fill shall be properly stabilized and maintained during and following construction to prevent erosion;

(v) Discharges of dredged or fill material into waters of the United States to construct a road fill shall be made in a manner that minimizes the encroachment of trucks, tractors, bulldozers, or other heavy equipment within waters of the United States (including adjacent wetlands) that lie outside the lateral boundaries of the fill itself;

(vi) In designing, constructing, and maintaining roads, vegetative disturbance in the waters of the U.S. shall be kept to a minimum;

* * *

(4) 33 CFR § 325.2 Processing of applications.

(a) *Standard procedures.*

* * *

(3) The district engineer will consider all comments received in response to the public notice in his subsequent actions on the permit application. Receipt of the comments will be acknowledged, if appropriate, and they will be made a part of the administrative record of the application.

* * *

District engineers will ensure that all parties are informed that the Corps alone is responsible for reaching a decision on the merits of any application.

* * *

(4) The district engineer will follow Appendix B of 33 CFR part 230 for environmental procedures and documentation required by the National Environmental Policy Act of 1969. A decision on a permit application will require either an environmental assessment or an environmental impact statement unless it is included within a categorical exclusion.

(5) The district engineer will also evaluate the application to determine the need for a public hearing pursuant to 33 CFR part 327.

(6) After all above actions have been completed, the district engineer will determine in accordance with the record and applicable regulations whether or not the permit should be issued. He

shall prepare a statement of findings (SOF) or, where an EIS has been prepared, a record of decision (ROD), on all permit decisions. The SOF or ROD shall include the district engineer's views on the probable effect of the proposed work on the public interest including conformity with the guidelines published for the discharge of dredged or fill material into waters of the United States

* * *

(4) Once the district engineer has sufficient information to make his public interest determination, he should decide the permit application

* * *

(e) ***Alternative procedures.*** Division and district engineers are authorized to use alternative procedures as follows:

(1) ***Letters of permission.*** Letters of permission are a type of permit issued through an abbreviated processing procedure which includes coordination with Federal and state fish and wildlife agencies

* * *

(5) **33 CFR § 330.1 Purpose and policy.**

(a) ***Purpose.*** This part describes the policy and procedures used in the Department of the Army's nationwide permit program to issue, modify, suspend, or revoke nationwide permits; to identify conditions, limitations, and restrictions on the nationwide permits; and, to identify any procedures, whether required or optional, for authorization by nationwide permits.

(b) *Nationwide permits.* Nationwide permits (NWP) are a type of general permit issued by the Chief of Engineers and are designed to regulate with little, if any, delay or paperwork certain activities having minimal impacts. The NWPs are proposed, issued, modified, reissued (extended), and revoked from time to time after an opportunity for public notice and comment. Proposed NWPs or modifications to or reissuance of existing NWPs will be adopted only after the Corps gives notice and allows the public an opportunity to comment on and request a public hearing regarding the proposals. The Corps will give full consideration to all comments received prior to reaching a final decision.

(c) *Terms and conditions.* An activity is authorized under an NWP only if that activity and the permittee satisfy all of the NWP's terms and conditions. Activities that do not qualify for authorization under an NWP still may be authorized by an individual or regional general permit. The Corps will consider unauthorized any activity requiring Corps authorization if that activity is under construction or completed and does not comply with all of the terms and conditions of an NWP, regional general permit, or an individual permit. The Corps will evaluate unauthorized activities for enforcement action under 33 CFR part 326. The district engineer (DE) may elect to suspend enforcement proceedings if the permittee modifies his project to comply with an NWP or a regional general permit. After considering whether a violation was knowing or intentional, and other indications of the need for a

penalty, the DE can elect to terminate an enforcement proceeding with an after-the-fact authorization under an NWP, if all terms and conditions of the NWP have been satisfied, either before or after the activity has been accomplished.

(d) *Discretionary authority.* District and division engineers have been delegated a discretionary authority to suspend, modify, or revoke authorizations under an NWP. This discretionary authority may be used by district and division engineers only to further condition or restrict the applicability of an NWP for cases where they have concerns for the aquatic environment under the Clean Water Act section 404(b)(1) Guidelines or for any factor of the public interest. Because of the nature of most activities authorized by NWP, district and division engineers will not have to review every such activity to decide whether to exercise discretionary authority.

* * *

(6) 33 CFR § 330.2 Definitions.

(a) The definitions found in 33 CFR parts 320-329 are applicable to the terms used in this part.

(b) *Nationwide* permit refers to a type of general permit which authorizes activities on a nationwide basis unless specifically limited. (Another type of general permit is a “regional permit” which is issued by division or district engineers on a regional basis in accordance with 33 CFR part 325). (See 33 CFR 322.2(f) and 323.2(h) for the definition of a general permit.)

(c) **Authorization** means that specific activities that qualify for an NWP may proceed, provided that the terms and conditions of the NWP are met. After determining that the activity complies with all applicable terms and conditions, the prospective permittee may assume an authorization under an NWP. This assumption is subject to the DE's authority to determine if an activity complies with the terms and conditions of an NWP. If requested by the permittee in writing, the DE will verify in writing that the permittee's proposed activity complies with the terms and conditions of the NWP. A written verification may contain activity-specific conditions and regional conditions which a permittee must satisfy for the authorization to be valid.

(d) **Headwaters** means non-tidal rivers, streams, and their lakes and impoundments, including adjacent wetlands, that are part of a surface tributary system to an interstate or navigable water of the United States upstream of the point on the river or stream at which the average annual flow is less than five cubic feet per second. The DE may estimate this point from available data by using the mean annual area precipitation, area drainage basin maps, and the average runoff coefficient, or by similar means. For streams that are dry for long periods of the year, DEs may establish the point where headwaters begin as that point on the stream where a flow of five cubic feet per second is equaled or exceeded 50 percent of the time.

(e) **Isolated waters** means those non-tidal waters of the United States that are:

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(1) Not part of a surface tributary system to interstate or navigable waters of the United States; and

(2) Not adjacent to such tributary waterbodies.

(f) ***Filled area*** means the area within jurisdictional waters which is eliminated or covered as a direct result of the discharge (*i.e.*, the area actually covered by the discharged material). It does not include areas excavated nor areas impacted as an indirect effect of the fill.

(g) ***Discretionary authority*** means the authority described in §§ 330.1(d) and 330.4(e) which the Chief of Engineers delegates to division or district engineers to modify an NWP authorization by adding conditions, to suspend an NWP authorization, or to revoke an NWP authorization and thus require individual permit authorization.

(h) ***Terms and conditions***. The “terms” of an NWP are the limitations and provisions included in the description of the NWP itself. The “conditions” of NWPs are additional provisions which place restrictions or limitations on all of the NWPs. These are published with the NWPs. Other conditions may be imposed by district or division engineers on a geographic, category-of-activity, or activity-specific basis (See 33 CFR 330.4(e)).

(i) ***Single and complete project*** means the total project proposed or accomplished by one owner/developer or partnership or other association of

owners/developers. For example, if construction of a residential development affects several different areas of a headwater or isolated water, or several different headwaters or isolated waters, the cumulative total of all filled areas should be the basis for deciding whether or not the project will be covered by an NWP. For linear projects, the “single and complete project” (*i.e.*, single and complete crossing) will apply to each crossing of a separate water of the United States (*i.e.*, single waterbody) at that location; except that for linear projects crossing a single waterbody several times at separate and distant locations, each crossing is considered a single and complete project. However, individual channels in a braided stream or river, or individual arms of a large, irregularly-shaped wetland or lake, etc., are not separate waterbodies.

(j) ***Special aquatic sites*** means wetlands, mudflats, vegetated shallows, coral reefs, riffle and pool complexes, sanctuaries, and refuges as defined at 40 CFR 230.40 through 230.45.

(7) 33 CFR § 331.1 Purpose and policy.

(a) ***General.*** The purpose of this part is to establish policies and procedures to be used for the administrative appeal of approved jurisdictional determinations (JDs), permit applications denied with prejudice, and declined permits. The appeal process will allow the affected party to pursue an administrative appeal of certain Corps of Engineers decisions with which they disagree. The basis for an appeal and the specific policies and procedures of the appeal process are described

in the following sections. It shall be the policy of the Corps of Engineers to promote and maintain an administrative appeal process that is independent, objective, fair, prompt, and efficient.

(b) *Level of decision maker.* Appealable actions decided by a division engineer or higher authority may be appealed to an Army official at least one level higher than the decision maker. This higher Army official shall make the decision on the merits of the appeal, and may appoint a qualified individual to act as a review officer (as defined in § 331.2). References to the division engineer in this part shall be understood as also referring to a higher level Army official when such official is conducting an administrative appeal.

(8) 33 CFR § 331.2 Definitions.

* * *

Approved jurisdictional determination means a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. Approved JDs are clearly designated appealable actions and will include a basis of JD with the document.

Basis of jurisdictional determination is a summary of the indicators that support the Corps approved JD. Indicators supporting the Corps approved JD can include, but are not limited to: indicators of wetland hydrology, hydric soils, and hydrophytic plant communities; indicators of ordinary high water marks, high

tide lines, or mean high water marks; indicators of adjacency to navigable or interstate waters; indicators that the wetland or waterbody is of part of a tributary system; or indicators of linkages between isolated water bodies and interstate or foreign commerce. * * *

Jurisdictional determination (JD) means a written Corps determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. 1344) or a written determination that a waterbody is subject to regulatory jurisdiction under Section 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*). Additionally, the term includes a written reverification of expired JDs and a written reverification of JDs where new information has become available that may affect the previously written determination. For example, such geographic JDs may include, but are not limited to, one or more of the following determinations: the presence or absence of wetlands; the location(s) of the wetland boundary, ordinary high water mark, mean high water mark, and/or high tide line; interstate commerce nexus for isolated waters; and adjacency of wetlands to other waters of the United States. All JDs will be in writing and will be identified as either preliminary or approved. JDs do not include determinations that a particular activity requires a DA permit.

* * *

Preliminary JDs are written indications that there may be waters of the United States on a parcel or indications of the approximate location(s) of waters of the

United States on a parcel. Preliminary JDs are advisory in nature and may not be appealed. Preliminary JDs include compliance orders that have an implicit JD, but no approved JD. * * * after-the-fact (ATF) permit, where the application is accepted and evaluated by the Corps. The agreement states that the affected party agrees to have the statute of limitations regarding any violation associated with that approved JD or application “tolled” or temporarily set aside until one year after the final Corps decision, as defined at § 331.10. No ATF permit application or administrative appeal associated with an unauthorized activity will be accepted until a tolling agreement is furnished to the district engineer.
