ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 20, 2011

No. 10-5341

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,
Plaintiffs-Appellants,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Defendants-Appellees.

Appeal from the U.S. District Court for the
District of Columbia, No. 09-C00548 (Hon. Ricardo M. Urbina)

BRIEF FOR THE DEFENDANTS-APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties and Amici*. The parties, intervenors (none), and amici (none) appearing before the district court and in this Court are listed in the Appellants' Opening Brief except that the following public officials have been automatically substituted for the named parties holding the relevant offices: Nancy Stoner, in her official capacity as Acting Assistant Administrator for Water of EPA; Maj. Gen. Merdith W.B. Temple, in his official capacity as Commanding General and Chief of Engineers of the Corps; and Col. R. Mark Toy, in his official capacity as District Commander of the Corps, Los Angeles District.

B. *Rulings*. The ruling under review, decided August 18, 2010, is *Nat'l Ass'n of Home Builders v. EPA*, 731 F. Supp. 2d 50, 54 (D.D.C. 2010), Judge Ricardo M. Urbina presiding. The slip opinion is reproduced in the Appendix at pp. 145-150.

C. *Related Cases*. The Defendants-Appellees are unaware of any related cases.

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CASES:

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GLOSSARY

APA	Administrative Procedure Act
CWA	Clean Water Act, 33 U.S.C. §§ 1251-1387
Corps	U.S. Army Corps of Engineers
EPA	U.S. Environmental Protection Agency
JD	Jurisdictional determination
NAHB	National Association of Home Builders
SAHBA	Southern Arizona Home Builders Association
TMDL	Total maximum daily load
TNW	Traditional navigable waters, *i.e.*, a water body defined in 33 C.F.R. § 328.3(a)(1); 40 C.F.R. § 230.3(s).

STATEMENT OF JURISDICTION

Plaintiffs-Appellants the National Association of Home Builders (NAHB), the Southern Arizona Home Builders Association (SAHBA), and the Home Builders Association of Central Arizona (collectively, Home Builders) alleged jurisdiction under 28 U.S.C. § 1331 and the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. Appendix (APP) 5. The district court dismissed this action for lack of subject matter jurisdiction on the ground that judicial review under the APA is precluded by the Clean Water Act (CWA).[1] The parties also dispute whether the district court had jurisdiction under Article III of the U.S. Constitution. As set forth *infra* Part II, Home Builders have failed to establish that they have standing to sue.[2]

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[1] While this Court has held that the exception from APA review for action committed to agency discretion by law, 5 U.S.C. § 701(a)(2), pertains to the APA's cause of action and not a court's subject matter jurisdiction, *see Oryszak v. Sullivan*, 576 F.3d 522, 524-526 (D.C. Cir. 2009), this Court has held, based on Supreme Court case law, that the exception for matters on which other statutes preclude review, 5 U.S.C. § 701(a)(1), is jurisdictional, *see Amador County v. Salazar*, 640 F.3d 373 (D.C. Cir. 2011).

[2] The parties also dispute whether the challenged action is a final agency action reviewable under the APA. *See infra* Part III. In the United States' view, the APA's final agency action requirement in 5 U.S.C. § 704 is a limitation on the APA's waiver of sovereign immunity in 5 U.S.C. § 702 and is jurisdictional. Under the precedent of this Court, however, the final agency action requirement is a limitation only on the APA cause of action, and a dismissal for lack of final agency action is a dismissal for failure to state a claim. *See Trudeau v. FTC*, 456 F.3d 178, 183-185 (D.C. Cir. 2006).

Defendants-Appellees the United States Environmental Protection Agency (EPA); Lisa P. Jackson, in her official capacity as Administrator of EPA; Nancy Stoner, in her official capacity as Acting Assistant Administrator for Water of EPA; the United States Army Corps of Engineers (Corps); John McHugh, in his official capacity as Secretary of the United States Department of the Army; Maj. Gen. Merdith W.B. Temple, in his official capacity as Commanding General and Chief of Engineers of the Corps; and Col. R. Mark Toy, in his official capacity as District Commander of the Corps, Los Angeles District[3] (collectively, the Corps and EPA) agree with Home Builders' statement of jurisdiction as it pertains to the jurisdiction of this Court.

STATUTES AND REGULATIONS

Applicable statutes and regulations are contained in the addendum to Home Builders' brief.

STATEMENT OF THE ISSUES

Home Builders challenge a determination made by the Los Angeles District of the Corps and affirmed by EPA that two segments of the Santa Cruz River in Arizona are traditional navigable waters (TNWs) under the relevant CWA regulations, 33 C.F.R. § 328.3(a)(1); 40 C.F.R. § 230.3(s)(1). The district court

[3] Pursuant to Fed. R. App. P. 43(c)(2), this list reflects the automatic substitution of individuals succeeding to public officials named as defendants.

dismissed for lack of jurisdiction, holding that the CWA precludes judicial review of this pre-enforcement action. The Appellees support this basis for the dismissal and provide two alternative bases for dismissal as well. The issues presented herein are:

1. Whether the CWA precludes judicial review under the APA of the TNW determination.

2. Whether Home Builders have failed to establish that they have Article III standing to bring this suit.

3. Whether Home Builders' complaint fails to state a claim under the APA because the TNW determination is not a final agency action.

STATEMENT OF THE CASE

In May 2008, the Corps' Los Angeles District Commander signed a memorandum setting forth the Corps' determination that two reaches stretches of the Santa Cruz River in Arizona are TNWs as defined under CWA regulations. In August 2008, EPA informed the Corps that it would review the Los Angeles District's determination, and in December 2008, EPA affirmed the determination that the two reaches are TNWs. The Corps and EPA made the TNW determination to aid them in determining the scope of their CWA jurisdiction in the Santa Cruz River watershed.

On March 23, 2009, Home Builders filed suit alleging that the TNW determination (1) is unlawful under the APA because the agencies made it without complying with notice-and-comment rulemaking procedures and (2) is arbitrary and capricious, unsupported by sufficient evidence, and exceeds the agencies' statutory authority under the CWA. APP 106-125. Home Builders did not contend that the Santa Cruz River is not subject to regulation under the CWA. APP 106. Rather, Home Builders alleged that the TNW determination has the effect of expanding the agencies' CWA jurisdiction to reach upstream tributaries of the Santa Cruz River with intermittent or ephemeral flows. *Id.*

On January 11, 2010, the Corps and EPA moved to dismiss for lack of subject matter jurisdiction on multiple grounds. Docket Entry (DE) 18. On August 18, 2010, the district court granted the dismissal motion, holding that the CWA precludes the pre-enforcement review sought by Home Builders. APP 139-150. The Court recognized that judicial review under the APA is unavailable when it is precluded by statute and agreed with other federal district and appellate courts that "have routinely held that the CWA precludes 'pre-enforcement review' of agency actions taken under its authority." *Nat'l Ass'n of Home Builders v. EPA*, 731 F. Supp. 2d 50, 54 (D.D.C. 2010) (APP 145).

STATEMENT OF FACTS

A. Statutory and Regulatory Background: Clean Water Act

1. Scope of CWA Regulatory Jurisdiction

Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Its stated objectives evince a "broad, systemic view of the goal of maintaining and improving water quality." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985); *see Solid Waste Agency of N. Cook County v. U.S. Army Corps*, 531 U.S. 159, 166 (2001). To that end, Section 301(a) of the CWA prohibits the "discharge of any pollutant by any person" except as the CWA specifically allows. 33 U.S.C. § 1311(a). The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). The CWA defines "navigable waters" as all "waters of the United States, including the territorial seas." *Id.* § 1362(7).

The Corps and EPA have adopted identical regulatory definitions of the term "waters of the United States." 33 C.F.R. § 328.3(a); 40 C.F.R. § 230.3(s)(1).[4] That definition encompasses, *inter alia*, traditional navigable waters,[5] which

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[4] For convenience, the citations that follow are only to the Corps' regulations.

[5] We use this term to avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, *see* 33 U.S.C. § 1362(7); 33

include tidal waters and waters susceptible to use in interstate commerce; "tributaries" of traditional navigable waters; and wetlands that are "adjacent" to traditional navigable waters or their tributaries. 33 C.F.R. § 328.3(a)(1), (5), (7).

The Supreme Court has affirmed Congress's intent to regulate, under the CWA, waters that are not navigable as traditionally defined, including wetlands adjacent to traditional navigable waters. *See Riverside Bayview*, 474 U.S. at 133; *see also Int'l Paper Co. v. Ouelette*, 479 U.S. 481, 486 n.6 (1987). In *Riverside Bayview*, the Court specifically upheld the exercise of CWA jurisdiction over wetlands that "actually abut[ted]" traditional navigable waters. 474 U.S. at 135.

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Supreme Court rejected the Corps' construction of "waters of the United States" to encompass "isolated" non-navigable intrastate waters based solely on their use as habitat for migratory birds.[6] The Court did not address jurisdiction over tributaries of traditional navigable waters or wetlands adjacent to such tributaries.

C.F.R. § 328.3(a), and the traditional use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, *see* 33 C.F.R. § 328.3(a)(1).

[6] *SWANCC* was an action under the APA challenging the Corps' assertion of jurisdiction under 33 C.F.R. § 328.3(a)(3), a provision not at issue here.

The Court most recently construed the CWA term "waters of the United States" in *Rapanos v. United States*, 547 U.S. 715 (2006). *Rapanos* involved two consolidated cases in which the CWA had been applied to discharges into wetlands adjacent to non-navigable tributaries of traditional navigable waters. *See id.* at 729-730 (plurality opinion). All Members of the Court reaffirmed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. *See id.* at 731 (plurality opinion); *id.* at 767-768 (Kennedy, J., concurring in the judgment); *id.* at 793 (Stevens, J., dissenting).

A four-Justice plurality in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water," 547 U.S. at 739 (plurality opinion), that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a continuous surface connection to such water bodies, *id.*[7] Justice Kennedy interpreted the term to encompass wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (Kennedy, J., concurring in the judgment); *see id.* at 779-780 (wetlands "possess the requisite

[7] The *Rapanos* plurality noted that its reference to "relatively permanent" waters "d[id] not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." 547 U.S. at 732 n.5 (emphasis in original).

nexus" 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'"). Justice Kennedy also concluded that the Corps' assertion of jurisdiction over "wetlands adjacent to navigable-in-fact waters" is sustainable "by showing adjacency alone," and that the Corps' definition of adjacency "is a reasonable one." *Id.* at 775, 780. The four dissenting Justices, who would have affirmed the court of appeals' application of the pertinent regulatory provisions, also concluded that the term "waters of the United States" encompasses, *inter alia*, all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy. *See id.* at 810 & n.14 (Stevens, J., dissenting). The Court reversed and remanded for consideration of the evidence in light of the appropriate legal standard.[8] *Id.* at 757.

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[8] In the wake of *Rapanos*, the First and Eighth Circuits have held that CWA jurisdiction may be established under the standards of either the plurality or Justice Kennedy's concurring opinion in *Rapanos*. *See United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009). The Seventh, and Ninth Circuits have analyzed CWA jurisdiction under the standard of Justice Kennedy's concurring opinion but have left open the potential for jurisdiction to be established under the plurality standard. *See United States v. Gerke Excavating*, 464 F.3d 723, 725 (7th Cir. 2006); *Northern California River Watch v. Wilcox*, 633 F.3d 766, 781 (9th Cir. 2011). The Fifth and Sixth Circuits have analyzed jurisdiction under both standards and found it unnecessary to decide which applied. *United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008); *United States v. Cundiff*, 555 F.3d 200, 210 (6th Cir. 2009). The Fourth Circuit has applied the standard of Justice Kennedy's opinion based on the parties' agreement that it was applicable. *Precon Development Corp. v. U.S. Army Corps*

2. CWA Permitting and Enforcement Authority

The CWA allows discharges under two complementary permitting provisions. Section 404(a) authorizes the Secretary of the Army, acting through the Corps, or a State with an approved program to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). Under Section 402, any discharge of pollutants other than dredged or fill material generally must be authorized by a permit issued by EPA or an approved State. *Id.* § 1342.

The CWA and its implementing regulations provide the agencies with a number of different enforcement alternatives. *S. Pines Assocs. v. United States*, 912 F.2d 713, 715 (4th Cir. 1990). The Corps may issue a "cease-and-desist" order pursuant to 33 C.F.R. § 326.3(c) in response to a violation of the CWA for filling waters of the United States without a permit. The Corps may also refer matters to the Department of Justice for judicial enforcement. 33 C.F.R. § 326.5.

The CWA, at 33 U.S.C. § 1319, provides EPA with discretion to pursue various enforcement alternatives. Section 1319(a)(3) authorizes EPA to issue an administrative compliance order or to bring a civil action in response to a violation

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of Engineers, 633 F.3d 278, 288 (4th Cir. 2011). The Eleventh Circuit has held that CWA jurisdiction may be established only under the standard of Justice Kennedy's opinion. *See United States v. Robison*, 505 F.3d 1208, 1222 (11th Cir. 2007).

of the CWA:

> Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

33 U.S.C. § 1319(a)(3). CWA Section 1319(b) authorizes EPA to initiate a judicial enforcement action for appropriate relief, including a temporary or permanent injunction, for any violation for which EPA is authorized to issue a compliance order under CWA Section 1319(a). 33 U.S.C. § 1319(b). Section 1319(c) authorizes the agencies to initiate a criminal prosecution for a negligent or knowing violation of the CWA. 33 U.S.C. § 1319(c). Section 1319(d) authorizes a district court to impose civil penalties for violation of the CWA and for violation of an administrative order issued pursuant to Section 1319(a)(3). 33 U.S.C. § 1319(d). CWA Section 1319(g) authorizes the agencies to issue an administrative penalty order for a violation of the CWA, and specifically provides a right to judicial review to the recipient of such an order. 33 U.S.C. § 1319(g)(8).

Administrative compliance orders issued under CWA Section 1319(a)(3) are neither self-executing nor self-enforcing. If a recipient fails to comply with an

administrative compliance order, EPA's recourse is to file a civil action under Section 1319(b) to obtain injunctive relief for violation(s) of the CWA and, pursuant to Section 1319(d), to seek penalties for violation of the Act and for failure to comply with an administrative order. In any such judicial proceeding, the alleged violator may raise all defenses, including any challenges to the United States' assertion of jurisdiction over the activity at issue and any constitutional challenges to the issuance of the order.

B. Factual Background

The Santa Cruz River originates in Arizona, flows south into Mexico, and then flows north again into Arizona until it meets the Gila River near Phoenix. APP 8. The challenged determination involves two reaches of the Santa Cruz River after its reentry into Arizona, referred to as Study Reach A and Study Reach B. *Id.* Study Reach A is approximately 22 miles in length and runs from a gauge station in Tubac, Arizona north to another gauge station in Continental, Arizona. APP 9. Study Reach B, downstream from Study Reach A, is approximately 32 miles in length and runs from a wastewater treatment plan in the Tucson area to the border of Pima and Pinal counties.[9] APP 10.

[9] The agencies did not make any TNW determination for the remainder of the river, much of which is on Indian reservations. APP 84.

On May 23, 2008, the district commander of the Corps' Los Angeles District signed a document entitled "Memorandum for the Record." APP 8-80. The memorandum set forth the Corps' determination that the two study reaches are TNWs under CWA regulations at 33 C.F.R. § 328.3(a)(1).[10] The memorandum and its exhibits addressed a host of factors about the river, including its navigational history, physical characteristics, water flow data, and public accessibility. The determination was made in response to requests from several landowners in the watershed who wanted to know the jurisdictional status of waters adjacent to their properties (although the TNW determination did not actually address those properties) and to aid the Corps in addressing a backlog of jurisdictional determinations.[11] APP 84, 86.

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[10] Both the plurality and concurring opinions in *Rapanos* recognized that 33 C.F.R. § 328.3(a)(1) describes "traditional navigable waters" as used within the meaning of *Rapanos*. *See* 547 U.S. at 724 (noting that the Corps' regulations "interpret 'the waters of the United States' to include * * * traditional interstate navigable waters, 33 CFR § 328.3(a)(1) (2004)") (plurality opinion); *see id.* at 760 (noting that "the Corps has construed the term 'waters of the United States' to include * * * waters susceptible to use in interstate commerce" and citing 33 C.F.R. § 328.3(a)(1)) (Kennedy, J., concurring).

[11] The Corps' regulations authorize a district engineer to make a jurisdictional determination to opine on whether a putative "water of the United States" is within its regulatory jurisdiction under the CWA and thus whether a permit is necessary. 33 C.F.R. §§ 320.1(a)(6), 325.9.

In August 2008, EPA informed the Corps that it would review the Los Angeles District's determination. APP 100-101. In doing so, EPA – invoking procedures established in a memorandum of agreement between the agencies – designated the Santa Cruz River as a "special case," which thus allowed EPA to make the final determination of its jurisdictional status. APP 100, 102. On December 3, 2008, EPA, through its Assistant Administrator for Water, affirmed the Corps district's determination that the two study reaches are TNWs. APP 102-103. EPA concluded that "the Study Reaches are susceptible to being used in the future for commercial navigation, including commercial water-borne navigation," and that this conclusion "is supported by evidence that is clearly documented, and not insubstantial or speculative." APP 103. EPA directed EPA Region 9 to begin immediately to implement the decision and transmitted it to the Corps for use in completing pending and future jurisdictional determinations for the Santa Cruz River watershed. APP 103.

C. The District Court Decision

In August 2010, the district court dismissed Home Builders' complaint for lack of subject matter jurisdiction."[12] APP 140. The court recognized that judicial

[12] Because the court determined that the CWA precludes judicial review, it did not reach the government's alternative grounds for dismissal, based on lack of standing, ripeness, or a final agency action. APP 140 n.2.

review under the APA is unavailable when it is precluded by statute. APP 145 (citing 5 U.S.C. § 701(a)(1)). The district court agreed with other courts that "have routinely held that the CWA precludes 'pre-enforcement review' of agency actions taken under its authority." *Id.* (citing cases). The district court noted the similarity of the CWA to other environmental statutes that have been interpreted to preclude pre-enforcement review of EPA remedial actions and concluded that "the structure of these statutes demonstrates Congress's intent to protect the EPA from unnecessary entanglement in litigation." APP 146. It also looked to the CWA's specific authorization of judicial review when either EPA or the Corps assesses administrative penalties or initiates an enforcement action in district court, which the court found "impliedly preclude[s]" pre-enforcement judicial review. *Id.* (quoting *Southern Ohio Coal Co. v. Office of Surface Mining*, 20 F.3d 1418, 1426-27 (6th Cir. 1994), quoting *Hoffman Group, Inc. v. EPA*, 902 F.2d 567, 569 (7th Cir. 1990)) (internal quotations omitted).

The district court rejected Home Builders' contention that this case is distinguishable from the decisions of other courts because it involves pre-enforcement review of a TNW determination, not a compliance order. The district court relied on the decisions of several other courts – including the Seventh Circuit's decision in *Rueth Development Co. v. Environmental Protection Agency*,

13 F.3d 227 (7th Cir. 1993) – that held that the CWA precludes review of agency CWA jurisdictional determinations and other assertions of jurisdiction because such determinations are preliminary to a compliance order. APP 147. The court found that "TNW determinations are more preliminary than compliance orders, cease-and-desist orders, or even the JDs [jurisdictional determinations] on which the issuance of those orders is based." *Id.* The court concluded that, because compliance orders are not reviewable until the enforcement stage, an earlier TNW determination – which ultimately aids the agencies in determining whether to issue a compliance order – must also be unreviewable. APP 147-148. The district court also rejected Home Builders' contention that precluding review of the TNW determination now would insulate those decisions from future review, finding that the determination would be reviewable in a future enforcement action or challenge to a permitting action. "Until then," the court concluded "the agencies must be able to administer the CWA without becoming entangled in premature litigation." APP 149.

SUMMARY OF THE ARGUMENT

This case arises from EPA's decision affirming the Corps Los Angeles District's determination that two reaches of the Santa Cruz River in Arizona are traditional navigable waters. The determination was made to aid the agencies in

determining the scope of their CWA jurisdiction in the Santa Cruz River watershed, and thus will assist them in their permitting and enforcement responsibilities. The determination was not, however, made as part of the grant or denial of any CWA permit or any action to enforce against a violation of the statute. The determination does not compel or prohibit potential dischargers of pollutants from making discharges into the watershed and does not define any legal standard that such dischargers must meet. The determination represents the agencies' views on the scope of their regulatory authority under the CWA, but injunctive relief or penalties against CWA violations are available only for discharges into waters that a court determines are "waters of the United States" within the meaning of the statute. Given the preliminary and non-binding nature of the TNW determination, the district court correctly dismissed Home Builders' complaint, and that dismissal may be affirmed on multiple grounds.

1. The district court correctly held that the CWA precludes pre-enforcement judicial review of the TNW determination. Courts have unanimously held that CWA Section 1319, which provides EPA the option of addressing CWA violations by either issuing an administrative compliance order *or* pursuing a district court enforcement action, precludes review of compliance orders under the APA. That is because Section 1319, together with the objectives and structure of

the Act, demonstrates Congress's intent to give the agencies the choice to use compliance orders to address environmental problems quickly and without becoming immediately entangled in litigation. Courts also have unanimously extended this rule to assertions of CWA jurisdiction by the agencies, reasoning that, if an agency compliance order is not reviewable until the enforcement stage, an agency's preliminary determination that it has authority to either require a permit or issue orders in the absence of a permit application must also be unreviewable. Otherwise, allowing parties to challenge the existence of CWA jurisdiction would entangle the agency in litigation in the same manner as would litigation contesting a compliance order.

The district court correctly applied this unanimous jurisprudence to the TNW determination here. A TNW determination is equivalent to a jurisdictional determination for the waters determined to be traditionally navigable themselves, and is generally a necessary antecedent to a jurisdictional determination for upstream tributaries and their adjacent wetlands which do not themselves constitute TNWs.[13] Thus, the rationale that courts have applied to jurisdictional determinations applies equally to TNW determinations. It is immaterial that the

[13] By regulation, jurisdiction extends to certain waters, including interstate waters, and their tributaries and adjacent wetlands regardless of whether they are traditional navigable waters. 33 C.F.R. § 328.3(a).

TNW determination here was not made as part of an agency compliance order. A TNW determination is preliminary to an enforcement action, and generally necessary for such action to be sustained, and allowing a pre-enforcement challenge to it would frustrate Congress's intent to enable the agencies to act against unauthorized discharges without entanglement in litigation.

2. In the alternative, the district court's dismissal for lack of jurisdiction should be affirmed on the ground that Home Builders have failed to establish that they have standing to sue. Home Builders' allegation that they have suffered an injury to their procedural interest in fair-decisionmaking by the agencies fails because Supreme Court law precludes basing standing on an alleged procedural harm in the absence of accompanying substantive injury.

Home Builders' allegation that they have standing based on injury to their members fails because they have not identified any member who they allege is specifically harmed by the determination. In addition, Home Builders can show no concrete and imminent injury that the determination may cause to their members, because it is speculative whether the agencies will exercise broader CWA jurisdiction than they would have absent the TNW determination. And Home Builders' assertion that their members now have to apply for a permit or risk civil or criminal penalties is factually wrong because the TNW determination represents

only the agencies' views of CWA jurisdiction, the scope of which is ultimately determined by courts based on the statutory language. And even if the determination did increase the risk of penalties, Home Builders cannot establish standing based on a threat of enforcement in the absence of a specific credible and imminent threat of enforcement, which they have not established.

Finally, Home Builders fail to establish that they have suffered injury to themselves as associations resulting from their response to the TNW determination – which constituted the submission of one letter to the Corps disputing the Los Angeles District's analysis. To sustain associational standing, an organization must allege an injury other than self-inflicted harm resulting from its decision to spend funds opposing the challenged action, which Home Builders do not do. Moreover, neither Home Builders' complaint nor declarations allege that any or their organizational activities have been deprived of resources because of the work Home Builders have undertaken to address the TNW determination, let alone establish the essential fact that any part of their programs have been perceptibly impaired by such work.

3. The district court's dismissal may also be affirmed on grounds that the TNW determination is not a final agency action, and that Home Builders thus fail to state a claim. The TNW determination is not an action that determines rights

or obligations or from which legal consequences flow. A property does not become more or less subject to the CWA simply because the Corps or EPA determines and states its views on the scope of its CWA regulatory authority – including the existence of downstream TNWs – in advance of any permit or enforcement proceedings. The legal rights and obligations of potential dischargers are precisely the same the day after a TNW determination or other jurisdictional determination is issued as they were the day before. Thus, courts that have reached the issue have unanimously held that jurisdictional determinations are not final agency actions under the APA, and this Court should hold the same with respect to the TNW determination at issue here.

STANDARD OF REVIEW

This Court reviews dismissal of a complaint for lack of subject matter jurisdiction de novo. *Ass'n of Civilian Technicians, Inc. v. Federal Labor Relations Authority*, 283 F.3d 339, 341 (D.C. Cir. 2002). This Court may affirm the district court's dismissal of a complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) if dismissal is otherwise proper based on failure to state a claim under Rule 12(b)(6). *Karst Environmental Education and Protection, Inc. v. EPA*, 475 F.3d 1291, 1298 (D.C. Cir. 2007).

ARGUMENT

I. The Clean Water Act precludes pre-enforcement review of a TNW determination.

The district court correctly held that Congress precluded pre-enforcement judicial review of administrative determinations, such as the TNW determination at issue here.

The APA provides for judicial review of final agency action, 5 U.S.C. § 704, except where "statutes preclude judicial review." *Id.* § 701(a)(1). Nothing in the APA "confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702(2). There is a strong presumption that Congress intends judicial review of administrative action, which may be overcome only upon a showing of clear and convincing evidence of a contrary legislative intent. *Bowen v. Michigan Academy of Physicians*, 470 U.S. 667, 670 (1986); *Amador County v. Salazar*, 640 F.3d 373, 380 (D.C. Cir. 2011). Any presumption favoring judicial review, however, is overcome "whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" *Block v. Community Nutrition Inst.*, 467 U.S. 340, 351 (1984) (citation omitted); *United States v. Fausto*, 484 U.S. 439, 452 (1988) (quoting same); *Lepre v. Dept. of Labor*, 275 F.3d 59, 72 (D.C. Cir. 2001). Determining whether congressional intent to preclude judicial review is fairly

discernible is a question of statutory construction that is determined "not only from [the statute's] express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block*, 467 U.S. at 345; *Fausto*, 484 U.S. at 443-44.

Federal courts including the Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits have uniformly held that congressional intent to preclude judicial review of pre-enforcement administrative actions is fairly discernible in the CWA. *E.g.*, *Sackett v. U.S. EPA*, 622 F.3d 1139, 1143 (9th Cir. 2010) (EPA compliance order), *cert. granted* 79 U.S.L.W. 3514 (June 28, 2011); *Greater Gulfport Props., LLC v. U.S. Army Corp of Engineers*, 194 Fed. Appx. 250 (5th Cir. 2006)[14] (Corps jurisdictional determination); *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564, 565-66 (10th Cir. 1995) (EPA compliance order); *S. Ohio Coal*, 20 F.3d at 1425-28 (same); *Rueth* 13 F.3d at 229-30 (EPA compliance order and EPA assertion of CWA jurisdiction); *S. Pines Assocs.* 912 F.2d at 715-17 (same); *Hoffman Group*, 902 F.2d at 69 (same); *Sharp Land Co. v. United States*, 956 F. Supp. 691, 693-94 (M.D. La. 1996) (Corps cease-and-desist order and EPA compliance order); *Child v. United States*, 851 F. Supp. 1527, 1535 (D. Utah 1994) (Corps jurisdictional

[14] Although the Fifth Circuit's decision in *Greater Gulfport* is not published, under the Fifth Circuit's current local rules and those in effect at the time *Greater Gulfport* was decided, the Fifth Circuit's unpublished dispositions may be cited as persuasive authority. *See* 5th Cir. Local R. 47.5.4 (2006 & 2011).

determination); *Bd. of Managers v. Bornhoft*, 812 F. Supp. 1012, 1013-14 (D.N.D. 1993) (Corps cease-and-desist order), *aff'd*, 48 F.3d 1223 (8th Cir. 1995); *Howell v. U.S. Army Corps*, 794 F. Supp. 1072, 1074 (D.N.M. 1992) (same); *Leslie Salt Co. v. United States*, 789 F. Supp. 1030, 1033–34 (N.D. Cal. 1991) (same); *Mulberry Hills Dev. Corp. v. United States*, 772 F. Supp. 1553, 1557-58 (D. Md. 1991) (same); *Lotz Realty v. United States*, 757 F. Supp. 692, 696 (E.D. Va. 1990) (Corps jurisdictional determination and instruction to seek permit); *Route 26 Land Dev. Ass'n v. United States*, 753 F. Supp. 532, 539 (D. Del. 1990), *aff'd*, 961 F.2d 1568 (3d Cir. 1992) (Corps cease-and-desist order); *McGown v. United States*, 747 F. Supp. 539, 541-43 (E.D. Mo. 1990) (same); *Fiscella & Fiscella v. United States*, 717 F. Supp. 1143, 1147 (E.D. Va. 1989) (same).[15] Home Builders cite no case in which a court found jurisdiction to review a jurisdictional determination or other pre-enforcement administrative activity under the CWA.

Thus, as every other court to address the question of pre-enforcement judicial review under the CWA has found, suits like Home Builders' are inconsistent with the CWA's enforcement provisions. Under Section 1319(a)(3), when EPA finds that any person is in violation of the CWA or a CWA permit, it

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[15] *See also Salt Pond Assocs. v. U.S. Army Corps of Engineers*, 815 F. Supp. 766, 771 n.16 (D. Del. 1993) (recognizing CWA precludes pre-enforcement judicial review).

has two options: it may issue a compliance order or initiate an enforcement action in district court. 33 U.S.C. § 1319(a)(3). The first option is distinguished by the expeditious fashion in which it can be employed, as EPA need not go to court or engage in a prior adjudicatory process to issue a compliance order. By issuing such an order, EPA can act to protect the environment from violations of the CWA quickly. When issuing the order does not prove effective, EPA retains discretion to ask a court to assess penalties or award injunctive relief. *Id.* § 1319(b), 1319(d).

As the Fourth Circuit explained in *Southern Pines Associates*, "[t]he structure of [the CWA and other] environmental statutes indicates that Congress intended to allow EPA to act to address environmental problems quickly and without becoming immediately entangled in litigation."[16] 912 F.2d at 716; *see S. Ohio Coal*, 20 F.3d at 1426-27; *Howell*, 794 F. Supp. at 1074; *McGown*, 747 F. Supp. at 542. Allowing judicial review of administrative compliance orders would defeat such congressional intent by "eliminat[ing] th[e] choice" afforded to EPA between issuing a compliance order (and thereby possibly avoiding litigation) and

[16] The Fourth Circuit noted that its conclusion regarding pre-enforcement review under the CWA was consistent with case law under the Clean Air Act and the Comprehensive Environmental Response, Compensation, and Liability Act. 912 F.2d at 716; *see S. Ohio Coal*, 20 F.3d at 1426. Indeed, the CWA's enforcement provisions were modeled on those in the Clean Air Act. S. Rep. No. 92-414, at 63 (1971), *reprinted at* 1972 U.S.C.C.A.N. 3668, 3730; *compare* 33 U.S.C. § 1319(a)(3) *with* 42 U.S.C. § 7413(a)(3).

bringing an enforcement action in district court. *Hoffman Group*, 902 F.2d at 569; *see Laguna Gatuna*, 58 F.3d at 566 ("Judicial review of every unenforced compliance order would undermine the EPA's regulatory authority.").

The fact that Congress did not intend to allow review of all pre-enforcement activity is made further clear by the fact that Congress in the CWA specified particular instances when judicial review would be available. Under CWA Sections 1319(b) and (d), a district court may adjudicate alleged violations of the CWA and assess penalties when the United States initiates an action in that court. 33 U.S.C. § 1319(b), (d). Furthermore, under Section 1319(g)(8), when the agencies assess a penalty administratively, the party penalized may seek judicial review. *Id.* § 1319(g)(8). Thus, the Seventh Circuit recognized:

> Congress chose to make assessed administrative penalties subject to review while at the same time it chose not to make a compliance order judicially reviewable unless the EPA decides to bring a civil suit to enforce it. . . . Having provided a detailed mechanism for judicial consideration of a compliance order via an enforcement proceeding, Congress has impliedly precluded judicial review of a compliance order except in an enforcement proceeding.

Hoffman Group, 902 F.2d at 569; *see S. Ohio Coal*, 20 F.3d at 1426; *Howell*, 794 F. Supp. at 1074.[17] Congress's detailed specification of when judicial review

[17] The Seventh Circuit also found that precluding pre-enforcement review would not prejudice a party subject to an administrative order because the party would have a full and fair opportunity to raise challenges to the order's validity in any enforcement action. *Hoffman Group*, 902 F.2d at 569-70; *see also S. Ohio Coal*,

would be available shows that Congress did not intend to allow review in other instances, as the Supreme Court has held in similar circumstances. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207-09 (1994) (pre-enforcement challenge was precluded given that statute "established detailed structure for reviewing violations" but was "facially silent with respect to pre-enforcement claims" and affirmatively provided for district court jurisdiction only in limited circumstances).

The CWA's bar to pre-enforcement review applies not only to compliance orders themselves, but also to jurisdictional determinations or other assertions of jurisdiction by the agencies' identification of "waters of the United States." The Seventh and Fifth Circuits each rejected arguments that the Corps' or EPA's assertion of jurisdiction was reviewable even if an administrative compliance order was not. The Seventh Circuit declined to distinguish between a compliance order and assertion of regulatory jurisdiction, concluding that "Congress intended judicial review of challenges to agency administrative actions only after the agency seeks judicial enforcement of a compliance order or the agency seeks to enforce administrative penalties" *Rueth*, 15 F.3d at 230. The *Rueth* Court accepted the district court's reasoning that "if agency compliance orders are not reviewable until the enforcement stage, an agency's initial determination that it has authority

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20 F.3d at 1426-27; *S. Pines Assocs.*, 912 F.2d at 715-16 & n.3.

to either require permitting or issue orders in the absence of a permit application must also be unreviewable." *Id.* at 229 (internal quotations and citation omitted).

Rueth relied in part on *Southern Pines*, which rejected distinctions between the nature of a challenge to EPA's jurisdiction to issue a compliance order, because in either case, "[a]llowing the parties to challenge the existence of EPA's jurisdiction would delay the agency's response in the same manner." 912 F.2d at 717. As the *Southern Pines* court explained, such parties "can contest the existence of EPA's jurisdiction if and when EPA seeks to enforce the penalties provided by the Act." *Id. See also Greater Gulfport*, 194 Fed. Appx. 250 (holding that the CWA precluded review of a Corps jurisdictional determination).

Every district court to address the question has reached the same result. *See Child*, 851 F. Supp. at 1533-34 (relying on the rationale of *Rueth*); *Lotz Realty*, 757 F. Supp. at 695 (observing that "[b]ecause *Southern Pines* tells us that judicial review of a compliance order is pre-enforcement review prohibited by the statute, then it necessarily follows that judicial review at a stage even more preliminary is also precluded."); *McGown*, 747 F.Supp. at 542 (noting that "allowing the landowner to litigate the existence of agency jurisdiction prior to the institution of

enforcement proceedings would frustrate agency efforts to reach an amicable resolution of disputes concerning compliance with the CWA.").[18]

Based on this reasoning, the district court correctly concluded that the TNW determination, like a jurisdictional determination, is a pre-enforcement action that, if immediately challengeable, would entangle the agencies in litigation and eliminate the discretion that Congress intended them to be able to exercise. First, the TNW determination represents the agencies' view that they have CWA jurisdiction over the two study reaches of the Santa Cruz River, and in that sense it is essentially a jurisdictional determination itself with regard to those waters. Second, under *Rapanos*, CWA jurisdiction over tributaries, and their adjacent wetlands, of the Santa Cruz River that are not themselves TNWs depends on their connection to other TNWs, so that the TNW determination is an antecedent to the exercise of CWA jurisdiction over such waters. Allowing Home Builders to challenge TNW determinations would frustrate Congress's intent that the agencies' efforts to address potentially unlawful discharges not be hindered by pre-enforcement litigation.

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[18] Federal courts have also declined to review Corps jurisdictional determinations on grounds that they are not final agency actions subject to review under the APA. *See infra* Part III. No court has held that a jurisdictional determination is reviewable under any theory.

Home Builders recognize (Br. 31-35) that every federal court of appeals to address the question has held that the CWA precludes judicial review of the Corps' or EPA's issuance of a compliance order, and they do not argue that this conclusion is incorrect. Rather, Home Builders contend, first (Br. 28-29, 38-39), that preclusion does not extend to determinations – including, apparently, jurisdictional determinations – that precede an enforcement action, because that would conflict with decisions of this Court reviewing EPA or Corps regulations governing incidental fallback from dredging activities, issuance of nationwide permits, and establishment of total maximum daily loads (TMDLs), which Home Builders contend also constitute pre-enforcement actions that could not be challenged under the district court's rationale.

This argument fails as an initial matter because the question of pre-enforcement preclusion was not addressed in the decisions of this Court on which Home Builders rely. In addition, as established *infra* Part III, the examples provided by Home Builders are distinguishable from the TNW determination because they, unlike the TNW determination, are final agency actions.

Moreover, none of the agency actions in the cases on which Home Builders rely is akin to a TNW determination. A TNW determination is generally a prerequisite to sustaining an enforcement action, unlike the other actions cited by

Home Builders.[19] The nationwide permit example is plainly inapposite because such a permit merely establishes requirements that dischargers may meet to avoid a violation of the Act that might subject them to enforcement. Thus, unlike a TNW determination, which can be and often is made at the time of enforcement, a decision on a nationwide permit is a separate administrative action necessarily taken independent of any enforcement proceeding. A TMDL is even farther removed from an enforcement action. TMDLs are "primarily informational tools" that are often developed before permit limits are established and serve as an implementation link between water quality standards and such permit limits and other non-regulatory controls. *Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir. 2002). Thus, TMDLs are relevant to an enforcement action only if and when they have been used to establish effluent limitations in CWA permits – in which case they, like nationwide permits, play a role in determining requirements to be met to comply with the Act. As such, actions like issuance of nationwide permits and approval of TMDLs are pre-enforcement actions only in the most literal sense that they occur at some point before such enforcement actions, not in the sense that they are necessary to sustain an enforcement action.

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[19] The agencies may issue a compliance or cease-and-desist order to halt discharges before they have finalized a determination that they have jurisdiction, but the compliance action cannot be sustained if the agencies' ultimately determine that they lack jurisdiction.

Another distinction is that the issuance of nationwide permits and approval of TMDLs constitute the establishment of legal rules that ultimately govern discharges rather than the application of a legal rule to a particular discharge to determine whether it violates the CWA. This is also the case for the Home Builders' example of the incidental fallback regulations. Those regulations were fundamentally different from a TNW determination in that they were part of the agencies' overarching legal rule, defining what constitutes a "discharge" under the CWA, against which the agencies could assess compliance on a case-by-case basis. The comparable agency action with respect to determining what constitutes "waters of the United States" is the promulgation of the regulations at 33 C.F.R. § 328.3(a) that define that term, including § 328.3(a)(1) which describes the scope of waters considered to be traditional navigable waters under the CWA. A TNW determination, in contrast, merely applies the relevant portion of that regulation to particular waters, a typical type of determination that may be part of a jurisdictional determination or a decision to issue a compliance order. Thus, a ruling that the CWA precludes review of a TNW determination in no manner threatens to impinge on reviewability of a broad range of other agency actions as contended by Home Builders.

Second, Home Builders contend (Br. 35-36) that, even if review of jurisdictional determinations is precluded, review of the TNW determination here is not precluded because it was not made in the context of a project-specific jurisdictional determination or issuance of a compliance order. This purported distinction is unfounded and nonsensical. As noted *supra* p. 28, the TNW determination *is* equivalent to a jurisdictional determination with respect to the two study reaches of the Santa Cruz River themselves, so the TNW determination is indistinguishable in that respect from a jurisdictional determination generally.

In addition, it is immaterial that the TNW determination, which may be a necessary element of a CWA jurisdictional determination, was not made in the context of a particular proposed or actual discharge to a specific body of water or compliance order. There is no requirement that the agencies make a TNW determination in advance of any such action. Thus, the agencies could avoid judicial review of a stand-alone TNW determination by wrapping the TNW determination into a project-specific jurisdictional determination or compliance order. For this same reason, Home Builders are incorrect that a TNW determination differs from a jurisdictional determination in that it impacts more than just an individual site. A jurisdictional determination may necessarily identify a waterway that is a TNW, as well as tributaries that have a "significant nexus"

with the TNW under Justice Kennedy's concurring opinion in *Rapanos*, and/or tributaries that are "relatively permanent" waters that connect to a TNW under the standard of the *Rapanos* plurality opinion. In that respect, a site-specific jurisdictional determination may also provide the agency's view on the jurisdictional status of those waters generally. Accordingly, the context in which a TNW determination is made does not provide a basis for determining whether or not the CWA precludes judicial review of the determination.

As every court to address the question has recognized, allowing judicial review of agency decisions on fact-specific regulatory jurisdictional questions would subvert Congress's intent to prevent EPA and the Corps from becoming entangled in pre-enforcement litigation. The district court's dismissal of Home Builders' suit on that basis was correct.

II. Home Builders lack Article III standing.

The jurisdiction of federal courts is limited to "cases" and "controversies." U.S. Const., Art. III, § 2, cl. 2. No case or controversy exists where a plaintiff lacks standing to make the claims asserted. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing, at a minimum Home Builders must establish: that they or one of their members have suffered an "injury in fact" – an invasion of a legally protected interest which is concrete and particularized and

actual or imminent (not conjectural or hypothetical); a causal connection between the injury and the conduct complained of – the injury must be fairly traceable to the action of the defendant and not the result of some action of a third party; and that it is likely the injury will be redressed by a favorable decision. *Id.* at 560-61.

Home Builders contend that they have (1) procedural standing based on alleged harm to the interest of them and their members in fair and open decisionmaking; (2); representational standing based on the alleged potential impact of the TNW on Home Builders' members; and (3) associational standing based on the alleged impact of the TNW determination on Home Builders' themselves. Each of these bases fails.

A. Home Builders and their members cannot establish standing based on procedural harm.

Home Builders first allege (Br. 52, 55) that they have standing because they and their members have a right under the APA to "open and fair decision-making," which has been impaired by the Corps' and EPA's alleged violation of the notice and comment provisions of the APA. That allegation is insufficient to establish standing because it fails to identify any concrete interest of Home Builders that was harmed as a result of the alleged procedural failure.

"The omission of a procedural requirement does not, by itself, give a party standing to sue." *Center for Biological Diversity v. U.S. Dept. of Interior*, 563

F.3d 466, 479 (D.C. Cir. 2009). Rather, to allege a cognizable procedural harm, a plaintiff must identify an injury that follows the violation of a procedural right, which was afforded to it by statute and designed to protect its threatened concrete interest. *Center for Law & Education v. Dept. of Education*, 396 F.3d 1152, 1157 (D.C. Cir. 2005). A procedural right accorded by Congress may "loosen the strictures of the redressability prong of the standing inquiry." *Summers v. Earth Island Institute*, 555 U.S. 488, 129 S. Ct. 1142, 1151 (2009). That is, when a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant. *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007); *see also Sugar Cane Growers Cooperative of Fla. v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002) (litigant alleging procedural violation need show only "that the procedural step was connected to the substantive result"). But the "deprivation of a procedural right without some concrete interest that is affected by the deprivation – a procedural right *in vacuo* – is insufficient to create Article III standing." *Summers,* 129 S. Ct. at 1151.

It is clear, then, that Home Builders' allegation that they or their members have been harmed by their inability to participate in the TNW determination is insufficient to establish their standing to bring this suit. That precise argument, in

fact, is precluded by the Supreme Court's decision in *Summers*, which held that plaintiffs could not establish standing based on an agency's alleged violation of statutory notice and comment requirements. *Id.* Home Builders' reliance on this Court's decision in *Electric Power Supply Ass'n v. FERC*, 391 F.3d 1255, 1262 (D.C. Cir. 2004) (*EPSA*), for the contrary proposition is misplaced. *EPSA* addressed whether utilities had standing to challenge a FERC regulation that allowed certain *ex parte* communications in the context of adjudicatory hearings. This Court recognized that the utilities regularly participated in contested FERC hearings "on the basis of their financial interests," and sought to "enforce procedural requirements designed to protect [their] *concrete interest* in the *outcome* of hearings" to which they were a party. 391 F.3d at 1262 (emphasis added). Thus *EPSA* did not eliminate the requirement that a party must show a substantive concrete interest that could be affected by the contested procedure. In any event, *Summers* – decided after *EPSA* – governs here and precludes Home Builders from establishing standing based solely on an alleged interest in obtaining the benefit of APA notice and comment procedures.

B. Home Builders have not established that they have representational standing.

"[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the

interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). Home Builders fail to establish that they have representational standing because they fail to show that their members have a concrete and particularized injury that would give them standing in their own right.

Home Builders do not contend that any of their members have been injured by the denial of a permit or an enforcement action based on the TNW determination. Rather, Home Builders' complaint alleges only that many of their members "have or will attempt to obtain permits under Section 404 that authorize discharges of fill materials into waters within the federal CWA jurisdiction," without even specifying whether they have members within the Santa Cruz River watershed. APP 115-117. Declarations submitted in response to the government's motion to dismiss provide little more. In one, the declarant – a vice-president of NAHB – says he is "personally aware of NAHB members that recently applied for and received authorization to discharge stormwater under CWA Section 402 in connection with construction activities on lands within the Santa Cruz River watershed and where the receiving water was identified as the Santa Cruz River."

APP 128 ¶ 9. In the other, the declarant – president of the Southern Arizona Home Builders Association (SAHBA) – states that "SAHBA members undertake construction and improvement activities that [i]n many cases * * * cannot be conducted without impacting desert washes and other ephemeral drainage features, which are found on many parcels of land within the Santa Cruz River watershed" APP 135-136, that "SAHBA members own land within this area, and thus will be impacted by" the TNW determination, and that she has "personal knowledge of at least one SAHBA member that owns land within the Santa Cruz River watershed and is applying for a Clean Water Act permit in connection with development activities on its land." APP 137. Neither declaration identifies any particular individual who has suffered an injury from the TNW determination that is either "concrete and particularized" or "actual or imminent." To the contrary, the declarations indicate that Home Builders' members applied for and obtained CWA permits in the watershed before the TNW determination and are continuing to do so.

In the absence of any specific allegations of harm, Home Builders contend that the TNW determination injures their members because they "are now prevented from demonstrating that there is no significant nexus (and therefore no jurisdiction) between desert washes in the watershed and the Colorado River –

likely the nearest TNW before the TNW Determination." Br. 59. Home Builders assert that their members thus "have the choice of applying for a permit for activities that are outside the scope of the agencies' authority under the CWA or face significant civil or criminal enforcement penalties for failing to do so." *Id.*

This argument fails on multiple grounds. First, as previously noted, Home Builders have identified no individual member who has specific plans to undertake a discharge into any waters of the Santa Cruz watershed who even could be affected in the manner that Home Builders allege.

Second, Home Builders' contention that the TNW determination subjects potential dischargers of pollutants into tributaries of the Santa Cruz River to a choice between obtaining a permit or risking civil or criminal enforcement penalties is incorrect as a factual matter. As discussed in Part III of this brief, addressing final agency action, the TNW determination has no legal effect on the scope of CWA jurisdiction. It provides the agencies' own view of an element of their CWA jurisdiction, but any question of whether a discharge violates the CWA and is subject to civil or criminal penalties is a question to be determined by a court based on the statutory scope of jurisdiction. *See, e.g., Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586, 594 (9th Cir. 2008). The

Home Builders and their members are just as able to demonstrate that there is no significant nexus to a TNW as they were before the agencies' TNW determination.

Third, prior to the TNW determination, potential dischargers faced the same choice posited by Home Builders: whether to obtain a permit or to discharge without a permit and risk an enforcement action. Even assuming the agencies' view of their jurisdiction did pose some additional burden on potential dischargers, the prior absence of a TNW determination for the Santa Cruz River segments did not mean that potential dischargers could assume that the agencies would not, when faced with an unpermitted discharge, determine that the segments were TNWs.

Moreover, the existence of the TNW determination does not determine whether or not the agencies will exercise jurisdiction over other portions of the Santa Cruz River watershed than they would have without such a determination. It is true that the TNW determination means that the agencies have concluded that a permit is required for discharges into the relevant segments of the Santa Cruz River itself. But Home Builders' complaint specifically disclaims such a conclusion as the basis for its suit, stating "this case does not concern whether particular discharges into the Santa Cruz River are subject to regulation under the CWA." APP 106.

Instead, Home Builders contend that the TNW determination will allow the agencies to exercise jurisdiction over upstream intermittent and ephemeral tributaries, which they assert would not otherwise be subject to jurisdiction under *Rapanos*. But that contention is speculative. Although the record contains a remark from one Corps employee that the TNW determination is necessary for the Corps' assertion of jurisdiction over intermittent and ephemeral streams in the watershed, it is speculative whether the agencies would or would not have asserted jurisdiction over such waters in the absence of the TNW determination. In fact, at this point, it is speculative whether or to what extent the agencies will assert CWA jurisdiction upstream of the Santa Cruz River even after having made the TNW determination.

Finally, Home Builders' standing argument fails because they claim harm based on potential enforcement efforts in the absence of even a threat of any such enforcement. Where a plaintiff has yet to face an enforcement action under a challenged legal rule, the plaintiff is required to establish Article III standing by alleging an intention to engage in conduct proscribed by the rule and demonstrating that there exists a credible and imminent threat of prosecution thereunder. *See Ord v. District of Columbia*, 587 F.3d 1136, 1140-41 (D.C. Cir. 2009) (addressing pre-enforcement standing to challenge statute based on threat of

criminal prosecution). To prove that a threat is both credible and imminent, plaintiffs must demonstrate that they have been singled out or uniquely targeted by the government for enforcement action. *Id.* at 1141. Home Builders have not even identified members who might be subject to an enforcement action, let alone show that they have been singled out or uniquely targeted for such action, and thus wholly fail to establish standing to bring a pre-enforcement challenge against the TNW determination.

C. Home Builders have not established that they have associational standing.

Home Builders can sue as associations on their own behalf only if they meet the same standing requirements as an individual. *See, e.g., Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Just as individuals lack standing to assert generalized grievances, "an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III." *Simon v. East Kentucky Welfare Rights Org.*, 426 U.S. 26, 40 (1976). And "'[t]he mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization.'" *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995) (quotation in parenthetical; quoting *Ass'n for Retarded Citizens v. Dallas County Mental Health*

& Mental Retardation Center Bd. of Trustees, 19 F.3d 241, 244 (5th Cir. 1994)). Rather, an organization must demonstrate that the "defendant's actions 'perceptibly impaired' the plaintiff organization's programs by making its 'overall task more difficult.'" *Equal Rights Center v. Post Properties, Inc*, 633 F.3d 1136, 1139 (D.C. Cir. 2011) (quoting *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994)).

Home Builders lack standing to sue on their own behalf because they have not shown that they have suffered legally cognizable injury caused by the TNW determination. In their complaint, Home Builders allege that they:

> [H]ave suffered actual and concrete injuries in their own right, insofar as their advocacy functions have been impinged. One of Home Builders' central functions is to provide regulatory assistance and compliance advice to its members, including the scope of federal regulatory jurisdiction under the Clean Water Act. In this case, and unsolicited by any formal request for comments from the public, Home Builders submitted a detailed letter and background materials to the Corps after learning of the Corps TNW Determination.

APP 114-115. This allegation fails on its face to establish any injury from the TNW determination because it identifies no manner in which the TNW determination has impinged on Home Builders' advocacy function; in any event, this allegation at best appears to address Home Builders' claim to have suffered procedural harm, which we established above is not a cognizable injury for standing purposes.

In addition, Home Builders submitted the declaration of Thomas J. Ward, an NAHB vice-president, which purports to provide a basis for associational standing.[20] The declaration describes NAHB's extensive education program "to respond to the government's broad assertion of CWA jurisdiction over private property and to respond to the government's misinterpretation of the phrase traditional navigable waters," after which it states that "NAHB has limited resources, when it uses its resources to educate its members and the public on CWA jurisdiction, it cannot use those resources for other home builder education." APP 129-130. This part of the declaration fails to establish an injury from the TNW determination because it does not state that NAHB used its resources to educate its members and/or the public about the TNW determination. And even if it did, as discussed below, that would not be enough to establish a cognizable injury to Home Builders for standing purposes.

The declaration also describes NAHB legislative and regulatory advocacy activities pertaining to CWA jurisdiction. APP 130-131. Here, the declaration again notes that NAHB sent a letter to the Corps on July 25, 2008 explaining

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[20] On a 12(b)(1) motion to dismiss, the court may allow the plaintiff to supply by affidavit particularized allegations of fact to support its standing after which, if standing is not adequately established from the record, the complaint must be dismissed. *Warth v. Seldin*, 422 U.S. 490, 501-502 (1975); *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987).

Home Builders' view on the Corps' TNW determination, this time stating that Home Builders hired outside counsel to assist in its preparation. APP 131. The declaration then states that "[w]hen NAHB expends resources lobbying the federal government and providing comments on rulemakings concerning the agencies' treatment of CWA jurisdiction, such as the traditional navigable waters determination for the Santa Cruz River, it cannot use those resources to address other issues which are important to NAHB and its members." APP 132.

This portion of the declaration is also insufficient to establish Home Builders' associational standing. As an initial matter, the declaration alleges no harm resulting from the expenditure of association monies on the July 25, 2008 letter. While it states, indirectly, that resources used on that letter could not be used to address other issues important to NAHB, it does not state that resources were diverted from any other issue or that any other NAHB matter received less resources than it would have otherwise. But even assuming that the declaration could be read to aver that resources were diverted to preparing the letter on the TNW determination, that would not be sufficient to establish a cognizable injury, because the diversion would constitute no more than a voluntary decision to address a particular matter as part of its ordinary program costs. *See BMC Marketing*, 28 F.3d at1268 (organization's budgetary choices, diverting money

from one program to another, is a "self-inflicted" harm that does not confirm standing); *Nat'l Taxpayers Union*, 68 F.3d at 1434 (organization could not "convert its ordinary program costs into an injury in fact").

The record establishes that NAHB's efforts on the TNW determination are part of their ordinary program costs. Such an effort is part and parcel of Home Builders' overall mission and practice. *See* APP 111-114, 126-127, 130. There would seem to be no limiting principle if Home Builders' expenditure of time and resources to undertake advocacy on the very matters that their advocacy program is intended to address were sufficient to establish its standing. *See Equal Rights Center v. Post Props., Inc.*, 657 F. Supp. 2d 197, 201 (D.D.C. 2009) ("[w]ere an association able to gain standing merely by choosing to fight a policy that is contrary to its mission, the courthouse door would be open to all associations") (internal quotations and citation omitted). That is not, and cannot be, the law. *See KERM, Inc. v. F.C.C.*, 353 F.3d 57, 61 (D.C. Cir. 2004) (complainant "cannot establish standing simply by asserting a role as public ombudsman").

Indeed, this Court rejected a similar claim of standing in *National Taxpayers Union*, in which an organization asserted it had standing to challenge a tax provision based on the "self-serving observation that it ha[d] expended resources to educate its members and others regarding" that tax provision. 68 F.3d

at 1434. This Court held that such an assertion "does not present an injury in fact" because the tax provision "ha[d] not forced [the organization] to expend resources in a manner that [kept the organization] from pursuing its true purpose of monitoring the government's revenue practices." *Id.* Similarly, here, Home Builders do not show that the TNW determination has kept it from pursuing its true mission. An assertion that funds were diverted "does not present an injury in fact" where the challenged action did not force the organization "to expend resources in a manner that [kept it] from pursuing its true purpose. *Id.*

This Court has recognized that an organization may be able to establish standing where a defendant's alleged conduct injures the organization's interest and the organization used its resources to "counteract that harm." *Equal Rights Center*, 633 F.3d at 1140. A drain on an organization's resources, however, constitutes a cognizable injury for standing purposes only if it springs from the organization's injury to its interests apart from its interest in addressing the particular activity in question. *Id.* at 1141 n.2. Thus, an organization claiming standing to challenge a regulation "is not injured by expending resources to challenge the regulation itself," because this Court "does not recognize such self-inflicted harm." *Abigail Alliance for Better Access to Development Drugs v. Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006). Home Builders claim that they

were harmed solely by spending resources on the TNW determination they challenge here is not sufficient to establish their standing to sue.

Finally, an organization must show that the challenged conduct "perceptibly impaired" the organization's program by making its overall task more difficult. *Equal Rights Center*, 633 F.3d at 1139. It is implausible that the resources Home Builders spent to write one letter to the Corps on the TNW determination for two segments of one river perceptibly impaired the overall program of an organization of the size and with the national scope of NAHB. Not surprisingly, Home Builders assert no such harm. Thus, their claim to have associational standing fails.

III. The TNW determination is not a final agency action subject to suit under the APA.

Even if this Court has subject matter jurisdiction over this action, the district court's dismissal should be affirmed on the alternate ground that Home Builders' complaint fails to state a claim. *See Trudeau v. FTC*, 456 F.3d 178, 187 (D.C. Cir. 2006) (noting Rule 12(b)(1) dismissal for lack of jurisdiction may be affirmed if dismissal is proper under 12(b)(6) for failure to state a claim). This Court may affirm the district court's dismissal on any basis supported by the record. *See Carney v. American University*, 151 F.3d 1090, 1096 (D.C. Cir. 1998). Because the agencies' TNW determination does not constitute a final agency action, Home Builders fail to state a cause of action under the APA.

Under the law of this Court, the APA at 5 U.S.C. § 704 limits causes of action under the APA to "final agency action." *Trudeau*, 456 F.3d at 188. To be "final" within the meaning of the APA, the agency action must both (1) mark the consummation of the agency's decisionmaking process and (2) be an action by which rights or obligations have been determined, or from which legal consequences flow. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks and citations omitted). The TNW determination is not a final agency action because it is not an action that determines legal rights or obligations or from which legal consequences flow.

No court has addressed whether a TNW determination *per se* is a final agency action. But several courts have addressed whether a jurisdictional determination is a final agency action, and each has held that it is not. *See Fairbanks*, 543 F.3d at 593; *Greater Gulfport*, 194 Fed. Appx. 250; *St. Andrews Park, Inc. v. U.S. Army Corps of Engineers*, 314 F. Supp. 2d 1238, 1244-45 (S.D. Fla. 2004); *Child*, 851 F. Supp. at 1534-35; *Hampton Venture No. One v. United States,* 768 F. Supp. 174, 175 (E.D. Va. 1991); *Lotz Realty*, 757 F. Supp. at 696-97; *Fercom Aquaculture v. United States*, 740 F. Supp. 736, 739 (E.D. Mo. 1990); *Fiscella & Fiscella*, 717 F. Supp. at 1147. Because the TNW determination here is equivalent to a jurisdictional determination with respect to the waters determined

to be traditionally navigable, and because a TNW determination is generally a necessary part of a jurisdictional determination for upstream tributaries that are not themselves TNWs, the rationale of these decisions holding that a jurisdictional determination is not a final agency action applies with equal force to a TNW determination as well.

A TNW determination, like a jurisdictional determination, is not a decision that determines legal rights or obligations or from which legal consequences flow because it does not establish any legal standard or requirement but merely "'expresse[d] [the agency's] view of what the law requires.'" *Fairbanks*, 543 F.3d at 594 (quoting *AT&T Co. v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001)). A property does not become more or less subject to the CWA simply because the Corps or EPA determines and states its view on the existence of downstream TNWs in advance of any permit or enforcement proceedings.[21] As other courts have confirmed, "[t]he legal rights and obligations of the parties were precisely the same the day after the jurisdictional determination was issued as they were the day before." *St. Andrews Park,* 314 F. Supp. 2d at 1245; *see, e.g.*, *Child*, 851 F. Supp. at 1535; *Hampton Venture*, 768 F. Supp. at 175; *Lotz Realty*, 757 F. Supp. at 696.

[21] This is particularly true in this case, in which the Home Builders do not base their challenge on the impact on discharges into the Santa Cruz River, but only into upstream waters, the jurisdictional status of which the agencies have not determined.

And as this Court has recognized, the type of injury required to create the legal consequences necessary for the existence of a final agency action under the APA "typically is not caused when an agency merely expresses its view of what the law requires of a party, even if that view is adverse to the party." *AT&T*, 270 F.3d at 975; *see also Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1279 (D.C. Cir. 2005) (no final agency action where agency issues "a definitive, but otherwise idle, statement of agency policy").

Because the TNW determination merely expresses the agencies' views, it leaves potentially regulated parties in the same position they were in prior to the determination, and with the same two options under the CWA regulatory regime. First, a potential discharger can apply for a discharge permit. If its application is denied, the applicant can appeal administratively and then seek judicial review under the APA. In any later judicial review, the TNW determination may explain the agencies' views on the issue but the fact that they previously issued such a determination will have no independent legal consequences. To the contrary, the reviewing court will review the issue of regulatory jurisdiction, including the status of the Santa Cruz River reaches as TNWs, under normal standards of APA review. *See, e.g.*, *Bowles v. U.S. Army Corps of Engineers*, 841 F.2d 112, 116 (5th Cir. 1988); *City of Shoreacres v. Waterworth*, 332 F. Supp. 2d 992, 1018-19 (S.D.

Tex. 2004), *aff'd*, 420 F.3d 440 (5th Cir. 2005).

Second, if a potential discharger does not agree with the TNW determination, it can proceed to discharge without applying for a permit. Again, the fact that the agencies previously issued a TNW determination would have no legal effect. With or without the TNW determination, the Corps and EPA would retain the discretion of deciding whether to pursue an enforcement action. 33 U.S.C. § 1319; 33 C.F.R. §§ 326.3(c), 326.5. In any such action, a landowner could defend itself by contesting the agency's jurisdiction over the property, including contesting the TNW determination. *See, e.g.*, *United States v. Deaton*, 332 F.3d 698, 701-02 (4th Cir. 2003).

Home Builders briefly address the issue of finality in their opening brief, contending (Br. 44-45) that the TNW determination is a final agency action that "altered the legal landscape, causing increased delay or project modifications, and affecting the investment and project development choices of landowners and developers within the Santa Cruz River watershed." But the determination does *not* alter the legal landscape. Like a jurisdictional determination, the TNW determination "does not itself command [a potential discharger] to do or forbear from anything; as a bare statement of the agency's opinion, it can be neither the subject of 'immediate compliance' nor of defiance." *Fairbanks*, 543 F.3d at 593-

594 (quoting *FTC v. Standard Oil Co.*, 449 U.S. 232, 239-40 (1980)). As the Ninth Circuit explained with respect to jurisdictional determinations:

> At bottom, [a discharger] has an obligation to comply with the CWA. If its property contains waters of the United States, then the CWA requires [the discharger] to obtain a * * * discharge permit; if its property does not contain those waters, then the CWA does not require [the discharger] to acquire that permit. In either case, [the discharger's legal obligations arise directly and solely from the CWA, and not from the Corps' issuance of an approved jurisdictional determination.

543 F.3d at 594. The same is true with respect to a TNW determination. Perhaps some potential dischargers will choose to alter their behavior based on the TNW determination, out of concern that the determination may be correct or a desire to avoid a potential administrative compliance action that an agency might take against an unpermitted discharge, but that does not convert the public expression of the agencies' view that the study reaches are TNWs into an action with legal effect.[22] As this Court has held, "if the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purpose of judicial review." *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005). Thus, where an agency order "'does not itself adversely affect

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[22] Home Builders' argument that the TNW determination is a final agency action is in tension with, if not wholly contrary to their assertion elsewhere (Br. 37) that an administrative compliance order is "a non-binding directive that has no legal consequences unless and until the government brings an enforcement suit under 33 U.S.C. § 1319."

complainant but only affects his rights adversely on the contingency of future administrative action,'" the order is not final. *Id.* (quoting *DRG Funding Corp. v. Sec'y of Housing and Urban Dev.*, 76 F.3d 1212, 1214 (D.C. Cir. 1996)). Neither the desire of potential dischargers to avoid the permitting process or to be free from the possibility of being subjected to an administrative compliance order converts the TNW determination into a final agency action under the APA. *See Standard Oil Co.*, 449 U.S. at 239-43 (agency's complaint requiring company to respond in administrative adjudication is not final agency action); *Aluminum Co. v. United States*, 790 F.2d 938, 941 (D.C. Cir. 1986) ("It is firmly established that agency action is not final merely because it has the effect of requiring a party to participate in an agency proceeding.").

Finally, in the district court, Home Builders contended that the TNW determination is a final agency action because the Corps' regulations state that a jurisdictional determination "shall constitute a Corps final agency action." Even if the Corps intended to indicate that such a determination is subject to immediate judicial review, an agency declaration that jurisdictional determinations are final does not and cannot establish that any such determination (or a TNW determination) actually meets the established judicial criteria governing finality for purposes of review under the APA. *See Route 26 Land Development Ass'n*,

753 F. Supp. at 539. In any event, the Corps had no such intent: the preamble to the regulation stated that jurisdictional determinations are final in the sense that "the public can rely on [a] determination as a Corps final agency action," not that the APA would allow review. 51 Fed. Reg. 41,206, 41,207 (Nov. 13, 1986). And in subsequent regulatory changes, the Corps responded to comments "urg[ing] that approved JDs be recognized as 'final agency actions' * * * under the view that JDs could thereby be immediately appealed in Federal court," by stating that the Corps "ha[s] decided not to address in this rulemaking when a JD should be considered a final agency action." 65 Fed. Reg. 16,486, 16,488 (Mar. 28, 2000). Courts that have considered this regulation have agreed that the regulatory language Home Builders rely on does not create APA finality. *See Fairbanks*, 543 F.3d at 592 n.6; *Hampton Venture*, 768 F. Supp. at 175; *Lotz Realty*, 757 F. Supp. at 697; *Route 26 Land Development Ass'n*, 753 F. Supp. at 539.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B)(iii) and 32(a)(7)(C), and Circuit Rule 32(a)(1), I certify that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 12,946 words according to WordPerfect X3.

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2011, I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, causing the following registered users to be served by the CM/ECF system:

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