

No. \_\_\_\_\_

---

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

---

FAIRBANKS NORTH STAR BOROUGH,  
*Petitioner,*

v.

U.S. ARMY CORPS OF ENGINEERS;  
JOHN W. PEABODY; and KEVIN J. WILSON,  
*Respondents.*

---

**On Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit**

---

**PETITION FOR WRIT OF CERTIORARI**

---

JOSEPH W. MILLER  
Fairbanks North Star  
Borough  
P.O. Box 71267  
Fairbanks, Alaska 99707  
Telephone: (907) 459-1318  
Facsimile: (907) 459-1155

JAMES S. BURLING  
\*DAMIEN M. SCHIFF  
*Counsel of Record*  
Pacific Legal Foundation  
3900 Lennane Drive,  
Suite 200  
Sacramento, California 95834  
Telephone: (916) 419-7111  
Facsimile: (916) 419-7747

*Counsel for Petitioner*

---

### **QUESTION PRESENTED**

Is a Jurisdictional Determination under the Clean Water Act, finding that Petitioner's property is subject to that Act's strictures, a "final agency action" subject to judicial review under the Administrative Procedure Act, where the Jurisdictional Determination: (1) affords the landowner a viable estoppel defense in a future enforcement action; (2) decides whether a CWA permit is necessary; and (3) subjects the landowner to elevated penalties?

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED .....	i
TABLE OF AUTHORITIES .....	iv
PETITION FOR WRIT OF CERTIORARI .....	1
OPINIONS BELOW .....	1
JURISDICTION .....	1
STATUTORY AND REGULATORY PROVISIONS AT ISSUE .....	2
INTRODUCTION .....	5
STATEMENT OF THE CASE .....	7
REASONS FOR GRANTING THE WRIT .....	10
I. THIS COURT SHOULD GRANT THE PETITION TO SETTLE AN IMPORTANT QUESTION OF LAW, NAMELY, WHETHER A LANDOWNER MAY SEEK JUDICIAL REVIEW OF A JURISDICTIONAL DETERMINATION ....	10
A. Legal Consequences Flow from a Jurisdictional Determination .....	13
B. The Ninth Circuit’s Decision Conflicts with the Settled Rule That Agency Decisions on Permit Applications Are Subject to Judicial Review .....	15
II. THIS COURT SHOULD GRANT THE PETITION BECAUSE THE DECISION CONFLICTS WITH <i>LEEDOM v. KYNE</i> AND DECISIONS OF OTHER COURTS OF APPEALS .....	18

**TABLE OF CONTENTS—Continued**

	<b>Page</b>
CONCLUSION .....	21

**APPENDIX**

**Appendix A** - *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586 (9th Cir. 2008)

**Appendix B** - *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, Order Granting Defendants' Motion for Judgment on the Pleadings (D. Alaska May 18, 2007)

**Appendix C** - *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, Order (9th Cir. Nov. 20, 2008)

## TABLE OF AUTHORITIES

## Page

## Cases

<i>Bennett v. Spear</i> , 520 U.S. 154 (1997) . . . . .	5, 13
<i>Chicago &amp; S. Air Lines v. Waterman S.S. Corp.</i> , 333 U.S. 103 (1948) . . . . .	11
<i>Child v. United States</i> , 851 F. Supp. 1527 (D. Utah 1994) . . . . .	16, 18
<i>Fairbanks N. Star Borough v.</i> <i>U.S. Army Corps of Eng'rs</i> , 543 F.3d 586 (9th Cir. 2008) . . . . .	1, 9-11, 14-15, 17
<i>Gen. Elec. Co. v. EPA</i> , 290 F.3d 377 (D.C. Cir. 2002) . . . . .	13
<i>Hanson v. United States</i> , 710 F. Supp. 1105 (E.D. Tex. 1989) . . . . .	14
<i>Leedom v. Kyne</i> , 358 U.S. 184 (1958) . . . . .	6, 18-19
<i>Leslie Salt Co. v. United States</i> , 789 F. Supp. 1030 (N.D. Cal. 1991) . . . . .	18
<i>Michigan Peat, a Div. of Bay-Houston Towing</i> <i>Co. v. EPA</i> , 175 F.3d 422 (6th Cir. 1999) . . . . .	16
<i>Nat'l Ass'n of Home Builders v. U.S. Army Corps</i> <i>of Eng'rs</i> , 417 F.3d 1272 (D.C. Cir. 2005) . . . . .	16
<i>Or. Natural Desert Ass'n v. U.S. Forest Serv.</i> , 465 F.3d 977 (9th Cir. 2006) . . . . .	14
<i>Rapanos v. United States</i> , 547 U.S. 715 (2006) . . . . .	14
<i>Rueth v. EPA</i> , 13 F.3d 227 (7th Cir. 1993) . . . . .	18, 20

# TABLE OF AUTHORITIES—Continued

	<b>Page</b>
<i>S. Ohio Coal Co. v. Office of Surface Mining, Reclamation &amp; Enforcement, Dep't of Interior</i> , 20 F.3d 1418 (6th Cir. 1994) . . . . .	18, 20
<i>Sierra Club v. U.S. Army Corps of Eng'rs</i> , 935 F. Supp. 1556 (S.D. Ala. 1996) . . . . .	16
<i>Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs</i> , 531 U.S. 159 (2001) . . . . .	20
<i>United States v. Ciampitti</i> , 669 F. Supp. 684 (D.N.J. 1987) . . . . .	15
<i>United States v. Key West Towers, Inc.</i> , 720 F. Supp. 963 (S.D. Fla. 1989) . . . . .	14
<i>United States v. Tallmadge</i> , 829 F.2d 767 (9th Cir. 1987) . . . . .	13

## Statutes

5 U.S.C. § 704 . . . . .	2
28 U.S.C. § 1254(1) . . . . .	1
33 U.S.C. § 1251, <i>et seq.</i> . . . . .	1
§ 1311(a) . . . . .	2
§ 1319(d) . . . . .	14-15
§ 1344(a) . . . . .	2

## Regulations

33 C.F.R. § 320.1(a)(6) . . . . .	2-3
§ 331.2 . . . . .	3-4
§ 331.7(a) . . . . .	4-5

# **TABLE OF AUTHORITIES—Continued**

	<b>Page</b>
§ 331.9(c) . . . . .	5
<b>Federal Register</b>	
60 Fed. Reg. 37,280 (July 19, 1995) . . . . .	14
65 Fed. Reg. 16,486 (Mar. 28, 2000) . . . . .	12
<b>Miscellaneous</b>	
Corps' Jurisdictional Determinations, <i>available at</i> <a href="http://www.usace.army.mil/CECW/Documents/cecwo/reg/2003webcharts.pdf">http://www.usace.army.mil/CECW/  Documents/cecwo/reg/2003webcharts.pdf</a> (last visited Feb. 6, 2009) . . . . .	12
Sutton, Ian & Hill, Steven F., <i>Reevaluating  Judicial Review and the Corps'  Jurisdictional Determinations</i> , 22 Nat. Resources & Env't 29 (Sum. 2007) . . . .	12

## PETITION FOR WRIT OF CERTIORARI

Petitioner Fairbanks North Star Borough (Borough) respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

---

## OPINIONS BELOW

The panel opinion of the court of appeals is published at 543 F.3d 586 (9th Cir. 2008) (Appendix (App.) A). The panel opinion of the court of appeals denying the Petition for Rehearing En Banc is not published and is included in Appendix C. The opinion of the district court granting the motion for judgment on the pleadings is not published and is included in Appendix B.

---

## JURISDICTION

On May 18, 2007, the district court dismissed the Borough's complaint, holding that it lacked jurisdiction to review the Borough's challenge to a Jurisdictional Determination issued to the Borough by Respondent United States Army Corps of Engineers under the Clean Water Act, 33 U.S.C. § 1251, *et seq.* On September 12, 2008, the Ninth Circuit Court of Appeals affirmed the judgment of the district court. That court denied the Borough's Petition for Rehearing en Banc on November 20, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).



**STATUTORY AND  
REGULATORY PROVISIONS AT ISSUE**

The Clean Water Act (CWA) provides in pertinent part:

Except as in compliance with this section and section[] . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a) (CWA § 301(a)).

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.

33 U.S.C. § 1344(a) (CWA § 404(a)).

The Administrative Procedure Act (APA) provides in pertinent part:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

5 U.S.C. § 704.

The Corps's administrative regulations pertaining to JDs provide in pertinent part:

The Corps has authorized its district engineers to issue formal determinations concerning the applicability of the Clean Water Act or the Rivers and Harbors Act of 1899 to activities or tracts of land and the applicability of general permits or statutory

exemptions to proposed activities. A determination pursuant to this authorization shall constitute a Corps final agency action.

33 C.F.R. § 320.1(a)(6).

The terms and definitions contained in 33 CFR Parts 320 through 330 are applicable to this part. In addition, the following terms are defined for the purposes of this part:

. . . .

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 . . . 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.

33 C.F.R. § 331.2.

General. The administrative appeal process for approved JDs, permit denials, and declined permits is a one level appeal, normally to the division engineer. The appeal process will normally be conducted by the [Review Officer (RO)]. The RO will

document the appeal process, and assist the division engineer in making a decision on the merits of the appeal. The division engineer may participate in the appeal process as the division engineer deems appropriate. The division engineer will make the decision on the merits of the appeal, and provide any instructions, as appropriate, to the district engineer.

33 C.F.R. § 331.7(a).

The final decision of the division engineer on the merits of the appeal will conclude the administrative appeal process, and this decision will be filed in the administrative record for the project.

33 C.F.R. § 331.9(c).

---

## INTRODUCTION

This case concerns the exceptionally important matter of the meaning of “final agency action” under the APA, and the meaning of this Court’s decision in *Bennett v. Spear*, 520 U.S. 154 (1997). Specifically, can a landowner seek judicial review of a formal agency decision that authoritatively determines that the landowner’s property is subject to the strictures of the CWA, or must the landowner wait until some undefined point in the future to obtain judicial review of that agency decision. The regulations of the United States Army Corps of Engineers provide landowners with an administrative process whereby the Corps will determine if their property is subject to the CWA. This process, used by thousands of landowners across the

country every year, produces what is called a “Jurisdictional Determination.” A Jurisdictional Determination finding jurisdiction puts the landowner on notice that, prior to commencing any earthmoving or fill activity, the landowner must first obtain a permit from the Corps.

Here, the Borough, wishing to build playgrounds and an athletic field, requested a Jurisdictional Determination from the Corps. The agency responded with a Jurisdictional Determination finding that the site of the proposed development contained regulable wetlands under the CWA. The Borough disagreed with the Corps’s analysis and filed suit under the APA to challenge the Jurisdictional Determination. The district court dismissed the Borough’s complaint. The Ninth Circuit affirmed, concluding that the Jurisdictional Determination does not constitute final agency action because it does not change the legal rights or obligations of a party.

The Ninth Circuit’s finality analysis is seriously flawed, and has the immediate result of forcing landowners throughout the West to endure the heavy burden of the CWA permitting process, even where ultimately the Corps may have no jurisdiction. The Ninth Circuit’s decision creates this regulatory nightmare unnecessarily: a Jurisdictional Determination *does* constitute final agency action because it *does* change the rights and obligations of the party, most importantly by affording a landowner with an estoppel defense to avoid legal liability in any subsequent enforcement action. The Ninth Circuit’s decision also conflicts with the line of cases following *Leedom v. Kyne*, 358 U.S. 184 (1958), which holds that

judicial review is always immediately available to prevent gross abuses of agency power.

For these reasons, more fully set forth below, the Borough respectfully requests that this Court grant the Petition for Writ of Certiorari.

### STATEMENT OF THE CASE

The Fairbanks North Star Borough, a political subdivision of the State of Alaska, holds title to approximately 115,000 acres of land, some of which it develops, markets, and sells. The property at issue in this case comprises 2.1 acres which the Borough wishes to develop into playgrounds, athletic fields, restrooms, concessions, and related structures. On October 26, 2005, the Borough requested a Jurisdictional Determination from the Corps. Administrative Record (Admin. R.) at 68. On November 3, 2005, the Corps issued a positive preliminary Jurisdictional Determination. *Id.* at 62. The Borough subsequently requested a final determination. *Id.* at 60. On December 13, 2005, the Corps issued a positive final Jurisdictional Determination, finding that the Borough's entire parcel contains waters of the United States. *See id.* at 51. The appeal held that, notwithstanding the presence of permafrost on the Borough's property (meaning that the ground is frozen for most days of the year), the property contains regulable *wetlands*. On February 8, 2006, the Borough filed an administrative appeal, contending that the Jurisdictional Determination was inconsistent with the 1987 Wetlands Manual. *See id.* at 11. On May 26, 2006, the Corps's then-appellate officer, Brigadier General John W. Peabody, denied the appeal and upheld the Corps's final Jurisdictional Determination finding jurisdiction. *Id.* at 4.

The Borough then filed a complaint in the District of Alaska under the APA, seeking declaratory and injunctive relief. The Borough's principal claim was that the Corps had used an incorrect standard for determining whether the Borough's property contained jurisdictional wetlands. Specifically, the Borough contended that the Corps had used a metric for establishing the Fairbanks-area wetlands growing season that is inappropriate for extremely cold climates. Moreover, the Borough contended that the growing season standard used by the Corps for the Borough's Jurisdictional Determination conflicted with the Corps's authoritative 1987 Wetlands Manual.<sup>1</sup>

### **The District Court Decision**

Ruling on the Corps's motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure, the district court held that it lacked jurisdiction to review the Jurisdictional Determination. Specifically, the court held that (1) the Jurisdictional Determination did not constitute final agency action under the APA, App. at B-6, (2) the CWA affirmatively precluded review of the Jurisdictional Determination, *id.* at B-6–B-7, and (3) the Jurisdictional Determination was not ripe for review, *id.* at B-7–B-8.

---

<sup>1</sup> The Borough did not object to the entry of judgment on its Second Claim for Relief, which contended that the Corps's promulgation of the "Alaska Rule" (Special Public Notice 2003-05), a specialized rule applicable only to Alaska for identifying wetlands, was illegal because it had not been subjected to the APA's notice-and-comment procedures. The Borough conceded that the Corps's revocation of the Alaska Rule mooted that claim. *See* App. at B-3 n.4.

### **The Ninth Circuit's Decision**

The Borough appealed the dismissal to the Ninth Circuit, which affirmed, reaching only the issue of final agency action. Although agreeing with the Borough that, under this Court's *Bennett* decision, the Jurisdictional Determination represents the consummation of the Corps's decisionmaking process with respect to CWA jurisdiction over the Borough's property, the Ninth Circuit found that review must be withheld, because the Jurisdictional Determination purportedly does not affect the Borough's rights or obligations. *See Fairbanks N. Star Borough*, 543 F.3d at 593 (App. at A-12). In reaching this conclusion, the court reasoned that any legal obligation attaching to the Borough derives from the CWA, not from the Jurisdictional Determination, and that the Borough is not denied judicial review entirely, because it can raise the jurisdictional issue in a permit contest or enforcement proceeding. *See id.* at 593-95 (App. at A-12-A-15).

The Ninth Circuit rejected each of the Borough's arguments as to why the Jurisdictional Determination affects the Borough's rights and obligations. The court dismissed the Borough's argument that the Jurisdictional Determination may serve as the basis for an augmented penalty in a future enforcement proceeding, on the grounds that the "jurisdictional determination has no more legal effect on Fairbanks' ability eventually to assert a good faith defense than would, for example, a report by a private wetlands consultant informing Fairbanks that its property contained wetlands." *Id.* at 595 (App. at A-17). The court rejected the Borough's contention that the Jurisdictional Determination requires the Borough to



seek a CWA permit (which it otherwise would not apply for), on the grounds that “Fairbanks’ legal obligations—including any obligation to pursue a Section 404 dredge and fill material discharge permit—have always arisen solely on account of the CWA,” not from the Jurisdictional Determination. *Id.* at 596 (App. at A-18). Lastly, the court found no merit to the Borough’s argument that, had the Corps issued a Jurisdictional Determination finding no CWA jurisdiction, the Jurisdictional Determination would have provided the Borough with a good estoppel defense in a future enforcement action. Although such a Jurisdictional Determination would have legal consequences, *see id.* at 596 n.12 (App. at A-18–A-19), the court reasoned that, because the Borough’s Jurisdictional Determination found jurisdiction, and thus the Borough would have no need or opportunity to present an estoppel defense, the Borough’s Jurisdictional Determination does not have legal consequences.

## **REASONS FOR GRANTING THE WRIT**

### **I**

#### **THIS COURT SHOULD GRANT THE PETITION TO SETTLE AN IMPORTANT QUESTION OF LAW, NAMELY, WHETHER A LANDOWNER MAY SEEK JUDICIAL REVIEW OF A JURISDICTIONAL DETERMINATION**

The Ninth Circuit’s decision forces landowners throughout the western United States who believe that their property is not subject to the CWA (notwithstanding a Jurisdictional Determination to the contrary) into a dilemma: (1) abandon their

development plans; (2) agree to participate in the CWA permitting process, a process that even the panel decision conceded to be arduous and expensive, *Fairbanks N. Star Borough*, 543 F.3d at 596 n.11 (App. at A-17); or (3) proceed in spite of the Jurisdictional Determination, and incur the risk of significant penalties (without appealing the determination). The Ninth Circuit's conclusion that a Jurisdictional Determination does not have legal consequences, see *id.* at 593 (App. at A-12), raises an exceptionally important issue of law having far-reaching effect on land use and development throughout the western United States. Moreover, its conclusion conflicts with the settled rule that permit decisions are judicially reviewable.

The Ninth Circuit acknowledged that a Jurisdictional Determination finding no jurisdiction may well have legal consequences, yet strangely concluded that a Jurisdictional Determination finding jurisdiction does not. See *id.* at 596-97 (App. at A-18–A-19). But if (1) a landowner is *entitled under law* to a Jurisdictional Determination finding no jurisdiction (because his property does not contain jurisdictional wetlands), and (2) the Corps *wrongfully* issues a Jurisdictional Determination finding jurisdiction, then (3) the landowner should have an opportunity to contest the Corps's determination in court. Cf. *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 112-13 (1948) (“[A]dministrative orders are not reviewable unless and until they impose an obligation, *deny a right* or fix some legal relationship as a consummation of the administrative process.”) (emphasis added).

If the Ninth Circuit's reasoning were applied to a CWA permit denial, then such a denial would not be judicially reviewable. Yet a permit denial is reviewable precisely because, *if* the permit is granted, *then* the landowner has a legal right to fill wetlands free from liability. As shown below, neither the Corps nor the courts hold that CWA permit denials are beyond judicial review. So it should be with Jurisdictional Determinations. See Ian Sutton & Steven F. Hill, *Reevaluating Judicial Review and the Corps' Jurisdictional Determinations*, 22 Nat. Resources & Env't 29 (Sum. 2007).

The Jurisdictional Determination process is critically important for the regulated public. As of 2003 (the most recent year for which statistics are available), the Corps processed over 74,000 Jurisdictional Determinations.<sup>2</sup> But the process's value is substantially undercut if landowners cannot seek judicial review of Jurisdictional Determinations. Perhaps for that reason, the Corps, in promulgating regulations governing the Jurisdictional Determination administrative appeal process, "decided not to address . . . when a JD should be considered a final agency action." 65 Fed. Reg. 16,486, 16,488 (Mar. 28, 2000). If the Corps will not speak, this Court should. The Ninth Circuit's decision to withhold judicial review converts the Jurisdictional Determination process into a grand waste of time, money, and effort. Review in this Court is merited to decide the important question of reviewability of Jurisdictional Determinations.

---

<sup>2</sup> See <http://www.usace.army.mil/CECW/Documents/cecwo/reg/2003webcharts.pdf> (last visited Feb. 6, 2009).

**A. Legal Consequences Flow from  
a Jurisdictional Determination**

An agency action is final if it marks the consummation of the decisionmaking process and either determines rights or obligations, or is such that legal consequences flow from it. *Bennett*, 520 U.S. at 177-78. A Jurisdictional Determination both marks the culmination of the Corps's decisionmaking process regarding its CWA authority, and produces legal consequences. Whether a jurisdictional determination meets the second *Bennett* requirement for APA finality is an important question that can only be resolved by this Court.

Contrary to the decision below, this Court should grant certiorari to hold that the legal consequences prong is met because the Jurisdictional Determination process affords legal immunity to landowners through an estoppel defense. *See United States v. Tallmadge*, 829 F.2d 767, 773 (9th Cir. 1987) (noting that an estoppel defense “applies when an official tells the defendant that certain conduct is legal and the defendant believes the official”) (internal quotation marks omitted). *Cf. Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) (“In some circumstances, if the language of the document is such that private parties can rely on it as a norm or *safe harbor* by which to shape their actions, it can be binding as a practical matter.”) (emphasis added; internal quotation marks omitted).

Moreover, this Court should clarify that a Jurisdictional Determination directly and immediately alters a landowner's course of conduct, because it represents the authoritative determination of the responsible agency that the landowner is subject to

CWA strictures and thus must seek a permit to continue with his project.<sup>3</sup> See 60 Fed. Reg. 37,280, 37,282 (July 19, 1995) (“[A] jurisdictional determination . . . establishes whether a particular area is subject to regulatory authority under section 404 of the Clean Water Act . . .”). Cf. *Or. Natural Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977, 987 (9th Cir. 2006) (“[A]n agency action may be final if it has a direct and immediate . . . effect on the day-to-day business of the subject party.”) (internal quotation marks omitted).

Finally, this Court should resolve this issue because an unreviewed, positive Jurisdictional Determination substantially increases the likelihood that any civil fine assessed against the landowner will be greater than otherwise would be the case. See 33 U.S.C. § 1319(d) (noting “good faith” as one of the factors). Cf. *United States v. Key West Towers, Inc.*, 720 F. Supp. 963, 965-66 (S.D. Fla. 1989) (filling of wetlands in violation of Corps’s cease-and-desist letter justifies substantial civil penalty); *Hanson v. United States*, 710 F. Supp. 1105, 1109 (E.D. Tex. 1989) (upholding substantial administrative penalty owing in part to violation of three cease-and-desist orders);

---

<sup>3</sup> The CWA permitting process can be long and arduous. See *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion) (“The average applicant for an individual permit spends 788 days and \$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915—not counting costs of mitigation or design changes. Sunding & Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Natural Resources J. 59, 74-76 (2002).”); *Fairbanks N. Star Borough*, 543 F.3d at 596 n.11 (App. at A-17) (“We appreciate that navigating the CWA permitting process is no small task.”).

*United States v. Ciampitti*, 669 F. Supp. 684, 699 (D.N.J. 1987) (substantial civil penalty justified based upon defendant's knowing disregard of CWA). *Cf.* 33 U.S.C. § 1319(d) (authorizing civil penalties of \$25,000 per day per violation).

**B. The Ninth Circuit's Decision Conflicts with the Settled Rule That Agency Decisions on Permit Applications Are Subject to Judicial Review**

The Ninth Circuit agreed with the Borough that *one* outcome of the Jurisdictional Determination process—namely, a Jurisdictional Determination finding no jurisdiction—would likely be reviewable because it would provide the landowner with an estoppel defense in a subsequent enforcement action.

Fairbanks may be correct that an official Corps statement that a property is *not* a jurisdictional wetland subject to the CWA's permitting requirements could be the basis for an estoppel defense. When an authorized government official tells the defendant that a course of action is legal and the defendant reasonably relies to its detriment on that erroneous representation, then fairness and due process may prohibit the state from punishing the defendant for that unlawful conduct. Courts have recognized that finality can result if the language of the document is such that private parties can rely on it as a safe harbor by which to shape their actions.

*Fairbanks N. Star Borough*, 543 F.3d at 596 n.12 (App. at A-18–A-19) (citations, quotation marks, and ellipses)

omitted). Yet in a wholly inconsistent application of the law, the Ninth Circuit labeled as a “non sequitur” the Borough’s assertion that a Jurisdictional Determination finding jurisdiction is also judicially reviewable, reasoning that the assertion was based on “the dubious premise that if an agency’s decisionmaking process has multiple outcomes and *any* of these outcomes is judicially reviewable, then *all* of them must be judicially reviewable.” *See id.* at 596-97 (App. at A-19).

On this point, the holding of the lower court’s decision conflicts with the settled rule that CWA permit decisions are judicially reviewable. For the Ninth Circuit’s decision takes no account of the nearly perfect analogy between Jurisdictional Determinations and Corps permit decisions, which are judicially reviewable *regardless* of their outcome. *See, e.g., Nat’l Ass’n of Home Builders v. U.S. Army Corps of Eng’rs*, 417 F.3d 1272 (D.C. Cir. 2005) (issuance of CWA nationwide permits subject to judicial review); *Michigan Peat, a Div. of Bay-Houston Towing Co. v. EPA*, 175 F.3d 422 (6th Cir. 1999) (permit grant subject to judicial review); *Child v. United States*, 851 F. Supp. 1527, 1533 n.11 (D. Utah 1994) (permit denial subject to judicial review); *Sierra Club v. U.S. Army Corps of Eng’rs*, 935 F. Supp. 1556, 1565 n.10 (S.D. Ala. 1996) (permit grant subject to judicial review). The Corps below advanced the position that permit decisions are reviewable, *see* Corps Answering Brief at 14 (“[The Borough] can apply to the Corps for a permit under Section 404. If its application is denied, the Borough can appeal administratively and then seek judicial review under the APA.”), as did the Ninth Circuit’s decision. *See Fairbanks N. Star Borough*, 543 F.3d at 594-95 (App. at A-14–A-15) (“It is settled law

that the federal courts have the final say on the scope of the CWA. In exercising that authority, we would not give the government's position that CWA regulatory jurisdiction exists any particular deference simply because the Corps' views on the matter were formulated in the context of an approved jurisdictional determination rather than, for example, a permit application or enforcement proceeding.") (footnote omitted).

Just as a disappointed permittee can challenge in court the Corps's denial of his permit application, so too should the Jurisdictional Determination applicant be able to challenge in court the Corps's decision that his property is subject to the CWA. In the former instance, the permit denial precludes the landowner from legally discharging dredge-and-fill material into the waters of the United States, yet the legal rights and obligations of the landowner remain the same after the permit denial as before the permit was applied for. Nevertheless, both the Corps and the courts acknowledge that a permit denial is judicially reviewable. In the latter instance, the Jurisdictional Determination finding jurisdiction precludes the landowner from using the Jurisdictional Determination as the basis for an estoppel defense and proceeding with his development project without having to obtain a CWA permit. Just as in the permit context, where the particular outcome of the permit proceeding—grant or denial—does not affect whether that outcome is judicially reviewable, the same ought to be true with Jurisdictional Determinations.

The essential point is this: if an administrative proceeding is capable of producing an outcome that would constitute final agency action, and if a



participant in the concluded proceeding contends that, under the law, he has *a legal right* to a particular outcome that *would* constitute a final agency action, then the agency's denial of that outcome is itself a final agency action susceptible to judicial review. The logic of a contrary position would render every permit denial, in every circumstance, unreviewable. That has never been the law. *See, e.g., Child*, 851 F. Supp. at 1533 n.11; *Leslie Salt Co. v. United States*, 789 F. Supp. 1030, 1033 (N.D. Cal. 1991) (decision on permit application constitutes final agency action).

The Ninth Circuit's adoption of the contrary position therefore raises an issue of exceptional importance meriting the review of this Court.

## II

### **THIS COURT SHOULD GRANT THE PETITION BECAUSE THE DECISION CONFLICTS WITH *LEEDOM v. KYNE* AND DECISIONS OF OTHER COURTS OF APPEALS**

The Borough argued below that, even if a Jurisdictional Determination would normally not be subject to judicial review, any such bar should be removed given the magnitude of regulatory overreach produced by the Corps's theory justifying regulation of the Borough's property. The Ninth Circuit rejected *sub silentio* the argument. In doing so, the lower court's ruling conflicts with this Court's decision in *Leedom v. Kyne*, 358 U.S. 184, as well as the decisions of the courts of appeals in *Rueth v. EPA*, 13 F.3d 227 (7th Cir. 1993), and *Southern Ohio Coal Co. v. Office of Surface Mining, Reclamation and Enforcement, Department of Interior*, 20 F.3d 1418 (6th Cir. 1994).

*Leedom* requires that federal courts hear challenges to an agency’s jurisdiction when judicial review is necessary to protect a right conferred by Congress. *See* 358 U.S. at 191. The case concerned the National Labor Relations Board’s decision to include professional with nonprofessional workers into one collective bargaining unit without allowing the professional workers to vote upon the action, as required by Section 9(b)(1) of the National Labor Relations Act. The Supreme Court had previously held that Board orders do not constitute “final agency action,” and that the legality of Board orders can only be reviewed through the Act’s express provision—Section 10(c)—for challenging or reviewing enforcement orders or unfair labor practices. *See id.* at 187. Nevertheless, *Leedom* determined that the Board’s action was immediately reviewable.

Plainly, this was an attempted exercise of power that had been specifically withheld. It deprived the professional employees of a “right” assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given.

*Id.* at 189. The Court reasoned that in such circumstances, the inference would be strong that Congress intended the “general jurisdiction of [the federal] courts to control.” *Id.* at 190.

The Corps’s action in this case also merits review under the *Leedom* doctrine. The *Leedom* doctrine permits the exercise of general federal jurisdiction—here under the APA—to allow judicial review of agency action that implicates the fundamental right to use and enjoy property. As noted

above, *see, supra*, at 7-8, the Corps's theory for jurisdiction over the Borough's property—that permafrost can constitute regulable wetlands—would justify federal regulatory control over much private property in Alaska. Both the Seventh and Sixth Circuits have recognized the applicability of the *Leedom* doctrine in precisely this context of “[a] complete[] overexten[sion of] the[ agency’s] authority.” *Rueth*, 13 F.3d at 231. *See S. Ohio Coal Co.*, 20 F.3d at 1427.

For example, in *Rueth*, the Seventh Circuit declined to review a CWA compliance order asserting jurisdiction over the plaintiff's wetlands because the CWA, as then interpreted, extended CWA authority to all wetlands with even the most tenuous of connections to interstate waters. *See Rueth*, 13 F.3d at 231. But that rationale can no longer stand given the significant narrowing of the Corps's authority following subsequent decisions of this Court. *See Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (rejecting migratory bird rule); *Rapanos v. United States*, 547 U.S. 715 (2006) (rejecting hydrological connection rule). Similarly here, the Corps's assertion that permafrost can constitute regulable wetlands constitutes such a marked expansion of CWA authority as to justify this Court's review of the Jurisdictional Determination under *Rueth* and *Leedom*.<sup>4</sup>

Thus, the Ninth Circuit's *sub silentio* determination that the *Leedom* doctrine does not apply

---

<sup>4</sup> The Sixth Circuit in *Southern Ohio Coal Co.* found the *Leedom* doctrine inapplicable based upon its conclusion that the CWA's grant of enforcement authority presupposes a correlative grant of investigatory authority. *See* 20 F.3d at 1427-28.

therefore creates a conflict with the case law of this Court and of other courts of appeals, meriting certiorari.

### CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

DATED: February, 2009.

Respectfully submitted,

JOSEPH W. MILLER  
Fairbanks North Star  
Borough  
P.O. Box 71267  
Fairbanks, Alaska 99707  
Telephone: (907) 459-1318  
Facsimile: (907) 459-1155

JAMES S. BURLING  
\*DAMIEN M. SCHIFF  
*Counsel of Record*  
Pacific Legal Foundation  
3900 Lennane Drive,  
Suite 200  
Sacramento, California 95834  
Telephone: (916) 419-7111  
Facsimile: (916) 419-7747

*Counsel for Petitioner*