No. 12-2217

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Huron Mountain Club,
Plaintiffs-Appellants,

-v.-

United States Army Corps of Engineers, *et al.*,
Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
(HON. ROBERT HOLMES BELL)

ANSWERING BRIEF OF FEDERAL DEFENDANTS-APPELLEES

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GLOSSARY

APA	Administrative Procedure Act
Corps	United States Army Corps of Engineers
EPA	Environmental Protection Agency
ESA	Endangered Species Act
Fish and Wildlife Service	United States Fish and Wildlife Service
Kennecott	Kennecott Eagle Minerals Company
MDEQ	Michigan Department of Environmental Quality
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act

JURISDICTIONAL STATEMENT

Plaintiff-Appellant Huron Mountain Club alleges jurisdiction pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706 or, alternatively, under the Mandamus Act, 28 U.S.C. §§ 1361–62, and 28 U.S.C. § 1331. The district court entered its order and opinion denying Huron Mountain Club's motion for a preliminary injunction on July 25, 2012. [D.Ct. Opinion, Doc.48, PageID#1658 & Order, Doc.49, PageID#1659.] Huron Mountain Club timely filed a notice of appeal on September 20, 2012. [Notice of Appeal, Doc.54, PageID#1669.] This Court has jurisdiction over the denial of a motion for preliminary injunction under 28 U.S.C. § 1292.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion when it found that Huron Mountain Club was unlikely to prevail on the merits of its claims because the Corps had no mandatory duty to act?

    a. Whether the district court abused its discretion when it found that Huron Mountain Club was unlikely to prevail on the merits of its Rivers and Harbors Act claim because the Corps had no mandatory duty to initiate an enforcement action against Defendant-Appellee Kennecott Eagle

Minerals Company ("Kennecott") and the waters in question have not been found to be navigable within the meaning of the Rivers and Harbors Act?

b. Whether the district court abused its discretion because it found that Huron Mountain Club was unlikely to prevail on the merits of its Clean Water Act Section 404 claim because the Corps had no mandatory duty to initiate an enforcement action against Kennecott, EPA has approved the assumption of Section 404 permitting under the Act by the State of Michigan, and Huron Mountain Club failed to plead a facially valid Section 404 claim?

c. Whether the district court abused its discretion because it found that Huron Mountain Club was unlikely to prevail on the merits of its NEPA, NHPA, and ESA claims when it had identified no federal action that would trigger a duty under these statutes?

2. Whether the district court abused its discretion because it found that Huron Mountain Club had not suffered irreparable harm when it primarily based its claim on an alleged "procedural" injury

and lengthy state court proceedings determined that none of the other alleged harms were likely to occur?

3. Whether the district court abused its discretion because it found that the balance of harms and the public interest did not weigh in favor of granting an injunction?

STATEMENT OF THE CASE

Kennecott plans to construct a mine near and underneath the headwaters of the Salmon Trout River in Michigan's Upper Peninsula. The State of Michigan has reviewed and granted permits for the project, but Kennecott has not applied to the United States Army Corps of Engineers (the "Corps") for a federal permit for the project and the Corps has never brought any type of enforcement proceeding against Kennecott. Huron Mountain Club brought suit against the United States Army Corps of Engineers, Lieutenant Colonel Michael C. Derosier, the United States Department of the Interior, Kenneth Salazar, the United States Fish and Wildlife Service, and Daniel M. Ashe (collectively, the "Federal Defendants"). The suit alleged that the Corps had a mandatory duty to demand that Kennecott apply for permits under Section 404 of the Clean Water Act and Section 10 of the

Rivers and Harbors Act and that the Corps, along with the United States Fish and Wildlife Service ("Fish and Wildlife Service"), had a mandatory duty to complete certain studies under National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370h, the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470-470t, and the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1599.

STATEMENT OF FACTS

I. STATUTORY BACKGROUND

A. The Rivers and Harbors Act Section 10

Section 10 of the Rivers and Harbors Act of 1889, 33 U.S.C. §§ 401-426p, prohibits the creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of the waters of the United States. It further prohibits the dredging, filling, or other modifications to navigable waters of the United States unless authorized by the Secretary of the Army. 33 U.S.C. § 403. Likewise, it prohibits the construction of any structures, such as wharfs, piers, and jetties, in navigable waters of the United States unless authorized by the Secretary of the Army. *Id.* The Corps has promulgated regulations defining "navigable waters of the United States" subject to the Rivers and Harbors Act to include "those waters that are subject to the ebb and

flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4.

The term "obstruction" as used in Section 10 is read broadly and includes "any obstruction to the navigable capacity, and anything, wherever done or however done, within the limits of the jurisdiction of the United States, which tends to destroy the navigable capacity of one of the navigable waters of the United States." *United States v. Republic Steel Corp.*, 362 U.S. 482, 487–88 (1960). Any person who violates Section 10 is subject to fines and imprisonment and to injunctive relief pursuant to an action "instituted under the direction of the Attorney General of the United States." 33 U.S.C. §§ 406, 413.

B. The Clean Water Act

1. Section 404

Congress enacted the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To accomplish those goals, Section 301 of the Act prohibits the "discharge of any pollutant" into "navigable waters" unless authorized by a permit or specific exemption. *Id.* §§ 1311(a), 1362(12). "Navigable waters" is defined as the "the waters of the United States,"

which is broader than traditionally navigable waters that are regulated under the Rivers and Harbors Act. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985); *Rapanos v. United States*, 547 U.S. 715, 730–31 (plurality opinion), 767 (Kennedy, J., concurring in the judgment), 792 (Stevens, J., dissenting) (2006).

Pollutants subject to the Clean Water Act's prohibition on discharge into the waters of the United States include dredged or fill materials. *See* 33 U.S.C. §§ 1344(a), 1362(6). A person who violates this provision is subject to civil penalties of up to $37,500 a day, injunctive relief requiring mitigation or restoration of impacted waters, and criminal penalties. *Id.* § 1319; 74 Fed. Reg. 626-01, 627 (Jan. 7, 2009). A project proponent whose project will involve the discharge of dredged or fill materials (as opposed to other pollutants, which are governed by Section 402 of the Clean Water Act), into waters of the United States may avoid such sanctions by obtaining a permit to discharge such materials, pursuant to Section 404. *Id.* § 1344.

Clean Water Act Section 404 authorizes the Secretary of the Army, acting through the Corps, to issue permits for discharges of dredged or fill material into waters of the United States. 33 U.S.C.

§ 1344(a). The Corps and the Environmental Protection Agency ("EPA") have promulgated regulations governing the Corps's processing and issuance of Section 404 permits. *See* 33 C.F.R. pts. 320-25; 40 C.F.R. pt. 230. Upon completion of the Corps's review of a permit application, the Corps must determine whether to issue the permit with or without conditions, or deny the permit. *See* 33 C.F.R. § 326.3(e)(2).

The Corps and EPA share enforcement jurisdiction under Clean Water Act Section 404 and may take action if a party fails to obtain a required permit under Section 404.[1] *See, e.g.*, 33 U.S.C. §§ 1319, 1344(n), (s). The Clean Water Act and its implementing regulations provide the United States with a number of different alternatives when a party fails to obtain a required Section 404 permit. The Corps may notify a person of the agency's views that a particular activity at a particular site may involve a violation of Section 404 of the Clean Water Act or Section 10 of the Rivers, and issue a "cease-and-desist" order pursuant to 33 C.F.R. § 326.3(c). The Corps may also refer matters to EPA or the U.S. Department of Justice for administrative or judicial

[1] The Corps and EPA have entered into a Memorandum of Agreement setting forth which agency will be the lead agency for enforcement actions taken for unpermitted discharges. *See* http://water.epa.gov/lawsregs/guidance/wetlands/enfoma.cfm.

enforcement. 33 C.F.R. § 326.5. All of these enforcement mechanisms are discretionary.

2. Assumption of Section 404 permitting authority by the State of Michigan

Under Section 404 of the Clean Water Act, a State may assume the administration of the Section 404 permitting program for certain waters within its boundaries. 33 U.S.C. § 1344 (g), (h). Once such assumption is approved by EPA, the authority of the Corps to issue Section 404 permits is suspended, except for those waters exempted from the State's assumption. *Id*. § 1344 (h)(2)(A).

Michigan is one of only two states (New Jersey is the other) that have assumed Section 404 permitting authority for the discharge of dredged and fill material under the procedures outlined above. *Michigan Peat v. EPA*, 175 F.3d 422, 424 (6th Cir. 1999); 40 C.F.R. § 233.70 (codifying the Michigan assumption). Michigan's application to assume the 404 permitting program included a Memorandum of Agreement reached in 1983 that calls for the State of Michigan to "administer and enforce the 404 program" and to "take timely and appropriate enforcement action against persons . . . conducting unauthorized discharges of dredged or fill material into waters of the

United States over which the MDNR [Michigan Department of Natural Resources] has assumed jurisdiction under the State 404 program." [1983 Michigan-EPA Agreement, Doc13-1, PageID#382–83. *See also* 2011 Michigan-EPA Agreement, Doc13-1, PageID#433 (a 2011 update of the 1983 EPA-Michigan Agreement, which superseded the previous agreement)]; 49 Fed. Reg. 38,947 (Oct. 2, 1984) (Michigan's application for assumption of Section 404 permitting). In a separate agreement executed in 1984, the Corps and the State agreed that Michigan shall assume Section 404 permitting authority over all waters in the State except those listed on the exhibit to the 1984 Agreement. 40 C.F.R. § 233.70 (setting forth EPA's requirement that a state reach agreement with the Corps regarding which waters will be included in the assumption before an application can be approved). The Corps retained Section 404 permitting authority over the Salmon Trout River within two miles of its confluence with Lake Superior, but not upstream from that point. [Declaration of John Konik (hereafter "Konik Declaration), Doc.13-1, PageID#377.]

C. The National Environmental Policy Act, the National Historic Preservation Act, and the Endangered Species Act.

NEPA, the NHPA, and the ESA require federal agencies to conduct certain studies before proceeding with certain types of federal actions. NEPA requires federal agencies to consider the environmental effects of certain federal actions prior to making decisions. An agency may meet this obligation by completion of an Environmental Assessment and, if necessary, an Environmental Impact Statement. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.1. NEPA, however, applies only to "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

Like NEPA, the NHPA is a "procedural statute" triggered by certain types of federal actions. *Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 755 (D.C. Cir. 2003). Section 106 of the NHPA requires agencies to "take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register" "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license." 16 U.S.C. § 470f.

Although the ESA, unlike NEPA and the NHPA, has substantive components, the procedural duty to consult set forth in Section 7, the provision plead by Huron Mountain Club (Complaint, Doc. 1, PageID#31), is also triggered when a federal agency proposes to take some sort of action. *See* 16 U.S.C. § 1536(a)(2). If a species is listed as endangered or threatened under the ESA, the species is afforded certain legal protections. Section 7(a)(2) of the ESA provides one of those protections by requiring each federal agency, "in consultation with" the Fish and Wildlife Service, to "insure that any action authorized, funded, or carried out by [the] agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat. *Id*. § 1536(a)(2).[2] To meet this requirement, the "action agency" undertaking the proposed Federal action must evaluate each Federal action to determine whether it may affect a listed species or the designated critical habitat of a listed species. 50 C.F.R § 402.14(a). If

[2] Responsibility for administration of the ESA, including designation of species as endangered or threatened, is conferred upon the Secretaries of Commerce and Interior, depending upon the species in question. 16 U.S.C. §§ 1533(a), 1532(15). The Secretary of the Interior administers the ESA through the Fish and Wildlife Service.

the action agency determines consultation is required, it must make a written request to the Fish and Wildlife Service to initiate that consultation.

II. FACTUAL BACKGROUND

The relevant facts, as alleged by Huron Mountain Club, are as follows. Kennecott plans to construct and operate the Eagle Mine in Marquette County, on Michigan's Upper Peninsula. [Complaint, Doc.1, PageID#4.] The Eagle Mine project involves both surface and subsurface work, but Huron Mountain Club alleges that the Federal Defendants' duties are triggered only by the subsurface work. [Complaint, Doc.1, PageID#6; Opening Br. at 17.] The subsurface work involves the creation of a mine shaft tunnel that passes under the Salmon Trout River and associated wetlands. [Complaint, Doc.1, PageID#37.] Huron Mountain Club claims that this tunnel will impact the Salmon Trout River by drawing down the water table, reducing the flow of the river, and changing its water temperature and chemistry. [Complaint, Doc.1, PageID#22.]

The Corps's only involvement with the project at issue in this suit was a phone call in September of 2005 between the Detroit District of

the Corps, other federal agencies, and the Keweenaw Bay Indian Community. [Konik Declaration, Doc13-1, PageID#378.] During that call, the Corps explained that because the Eagle Mine was located approximately twenty-one miles from the navigable portion of the Salmon Trout River and the Corps did not retain Clean Water Act jurisdiction over the Salmon Trout River under the 1984 Michigan-Corps Agreement, the State of Michigan had authority for Clean Water Act Section 404 permitting and there was no basis for the Corps to assert regulatory authority under Section 10 of the Rivers and Harbors Act. *Id.*

Huron Mountain Club filed a complaint in federal district court alleging violations of the Rivers and Harbors Act, the Clean Water Act, NEPA, the ESA, and the NHPA. [Complaint, Doc.1, PageID#37–44.] It argued that the Corps violated the River and Harbors Act and the Clean Water Act by failing to require Kennecott to apply for permits under those statutes. [Complaint, Doc.1, PageID#37–39.] It further argued that issuance of the allegedly required permits under the Rivers and Harbors Act and the Clean Water Act would trigger further federal

duties under NEPA, the ESA, and the NHPA. [Complaint, Doc.1, PageID#39–44.]

On May 7, 2012, Huron Mountain Club filed a motion for a preliminary injunction and temporary restraining order, seeking an injunction ordering the Corps to require Kennecott to submit permit applications, conduct a NEPA review of the Eagle Mine, consult under the ESA, and complete a cultural evaluation under the NHPA. [Motion, Doc.3, PageID#54.] Huron Mountain Club also sought to enjoin Kennecott's construction of the Eagle Mine. [Motion, Doc.3, PageID#55.]

In response, the Federal Defendants argued that Huron Mountain Club could not establish a likelihood of success on the merits. [Response, Doc.13, PageID#343.] The Federal Defendants maintained, *inter alia*, that Huron Mountain Club could not show that the agencies had failed to take a nondiscretionary act required by statute and, therefore, neither the APA nor mandamus provided it with a remedy. [*Id.*] The Federal Defendants further argued that Huron Mountain Club had not established a likelihood of immediate and irreparable injury and that the balance of harms and the public interest did not weigh in

favor of granting the injunction. [Response, Doc.13, PageID#366 & 369–70.]

The district court agreed. In a lengthy ruling, the court rejected Huron Mountain Club's contention that the Rivers and Harbors Act and the Clean Water Act establish a mandatory duty on the Corps to initiate preconstruction permitting proceedings. [D.Ct. Opinion, Doc.48, PageID#1637–41.] It further held that the Corps's permitting authority under the Clean Water Act was suspended when Michigan assumed administration of the Section 404 permit program for the waters at issue, the waters in question are not navigable under the Rivers and Harbors Act, and that Kennecott's Eagle Mine project did not discharge dredged or fill material into waters of the United States within the meaning of Section 404 of the Clean Water Act. [D.Ct. Opinion, Doc.48, PageID#1643, 1647 & 1651.] The court found that because Huron Mountain Club's NEPA, NHPA, and ESA claims were entirely dependent on success on the Clean Water Act and Rivers and Harbors Act claims, there was also no likelihood of success on the merits of these claims.

Turning to the other factors under the preliminary injunction test, the district court held that Huron Mountain Club had not shown it would suffer irreparable harm in the absence of an injunction because it had shown no "procedural right" to studies under NEPA, the ESA, and NHPA and because the Eagle Mine was subject to state permitting that considered the substantive issues raised by Huron Mountain Club and provided monitoring of the project. [D.Ct. Opinion, Doc.48, PageID#1653–55.] The court also cited Huron Mountain Club's delay in bringing its suit in federal court. [*Id.*] With respect to the balance of harms and the public interest, the district court concluded that both factors weighed in favor of denying the injunction because of the costs that Kennecott and the local economy would suffer. [D.Ct. Opinion, Doc.48, PageID#1656–57.] Huron Mountain Club now appeals from that decision. There are currently no ongoing proceedings in the district court.

STANDARD OF REVIEW

This Court reviews the grant or denial of a preliminary injunction for an abuse of discretion. *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). A "district court's findings of

fact will stand unless found to be clearly erroneous, but its legal conclusions are reviewed de novo." *Id.*

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To obtain this extraordinary remedy, a plaintiff must "establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. *See also Bays v. City of Fairborn*, 668 F.3d 814, 818–19 (6th Cir. 2012).

Huron Mountain Club suggests that it need only show "the existence of serious questions on the merits" to be entitled to issuance of a preliminary injunction.[3] Opening Br. 22. However, the Supreme Court has clarified that a plaintiff seeking a preliminary injunction must show

[3] Huron Mountain Club cites *Jones v. Caruso*, 569 F.3d 258, 277 (6th Cir. 2009) in support of this contention. However, *Jones* only mentions the "substantial questions" standard when quoting a pre-*Winter* decision in the context of its evaluation of the balance of harms prong. *Jones*, consistent with the Supreme Court's holding in *Winter*, upheld the issuance of an injunction only after holding that the plaintiff had demonstrated he was "likely to succeed on the merits of his . . . claim." *Id.* at 275.

that he is "*likely* to succeed on the merits." *Winter*, 555 U.S. at 21–22 (emphasis added); *see also Munaf v. Geren*, 553 U.S. 674, 690–91 (2008).

Furthermore, in *Winter*, the Supreme Court expressly rejected case law that would relax the "irreparable harm" factor of the injunction test where a plaintiff made a strong showing on the merits factor. *Id.* at 21; *see also Abney v. Amgen, Inc.*, 443 F.3d 540, 552 (6th Cir. 2006) ("To demonstrate irreparable harm, the plaintiffs must show that . . . they will suffer 'actual and imminent' harm rather than harm that is speculative or unsubstantiated."). This leaves no room for this Court to relax the merits factor of the injunction test even if Huron Mountain Club were to make a strong showing on the irreparable harm factor, as Huron Mountain Club suggests. Opening Br. 22–23. However, this Court need not decide whether the relaxed standard survived the Supreme Court's decision in *Winter* because Huron Mountain Club cannot meet its burden under any formulation of the preliminary injunction test.

SUMMARY OF ARGUMENT

1. The district court did not abuse its discretion when it found that Huron Mountain Club was not likely to succeed on the merits of its

claims because Huron Mountain Club cannot show that the Federal Defendants had any duty to act. Suits against an agency alleging that agency action was "unlawfully withheld or unreasonably delayed" 5 U.S.C. § 706(1), "can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004).

The text of the Rivers and Harbors Act does not create a mandatory duty for the Corps to demand permit applications from project proponents. In addition, Huron Mountain Club has failed to identify any "discrete action," instead only vaguely alleging that the Corps must administer the permitting program. Finally, the Rivers and Harbors Act places enforcement within the discretion of the Corps and nothing in the statute overcomes the presumption in *Heckler v. Chaney*, 470 U.S. 821 (1985), that enforcement actions are to be left to the discretion of the administrative agencies.

Likewise, the Clean Water Act places no mandatory duty on the Corps to affirmatively demand permit applications from project proponents. The Act provides that the Corps "may" issue permits for dredge or fill activities. With this suit, Huron Mountain Club seeks to

control discretionary federal enforcement decisions, but neither the Clean Water Act nor the APA provide such a remedy.

Finally, even Huron Mountain Club acknowledges that its procedural NEPA, NHPA, and ESA claims are dependent upon its success on the merits of its Rivers and Harbors Act and Clean Water Act claims. In addition, to succeed on these claims, Huron Mountain Club must identify a final agency action that would trigger the application of these statutes, which it cannot do unless the Corps were to decide to *issue* a permit. Simply receiving a permit application or initiating the permit evaluation process would not be sufficient because it is impossible to know whether a permit would ultimately be issued.

2. Even if Huron Mountain Club had established a mandatory duty under the Clean Water Act or the Rivers and Harbors Act the district court still did not abuse its discretion when it found that Huron Mountain Club was not likely to succeed on the merits of its claims. First, Huron Mountain Club has not shown any evidence of a violation of Section 10 of the Rivers and Harbors Act. The waters near the Eagle Mine have not been found to be navigable waters of the United States. The Corps has determined that the Salmon Trout River is navigable

two miles upstream from Lake Superior; the Eagle Mine is twenty-three miles upstream from Lake Superior. The district court considered Huron Mountain Club's evidence of navigability farther up the river, but its finding that the evidence was ambiguous at best and insufficient to establish navigability was not clearly erroneous and must be upheld. The district court also did not clearly err when it found that Huron Mountain Club had not presented evidence showing that Kennecott's activities would impact the river's navigable capacity downstream.

Second, Huron Mountain Club has not pleaded a facially valid Clean Water Act claim. First, EPA approved Michigan's assumption of Section 404 permitting for the waters in question. That assumption is binding and valid and Michigan is the relevant Section 404 permitting authority, not the Corps. Second, a Section 404 permit is required only "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). Nowhere, however, does Huron Mountain Club even allege that Kennecott has—or even intends to—discharge dredged or fill material into the Salmon Trout River, associated wetlands, or waters of any kind regulated under the Clean Water Act. Thus, it could not succeed on its Section 404 claim.

3. The district court did not abuse its discretion when it found that Huron Mountain Club had not established it would suffer irreparable harm if the injunction did not issue. The Supreme Court has rejected the notion that irreparable harm can be assumed in cases alleging procedural environmental claims. Furthermore, this project has been the subject of extensive state proceedings that resulted in a finding by the Michigan Department of Environmental Quality ("MDEQ") that the environmental harms alleged by Huron Mountain Club were *unlikely* to occur. That finding was upheld by the Michigan courts.

4. The district court also did not abuse its discretion in finding that the balance of harms and the public interest do not support issuance of a preliminary injunction. Ordering the Corps to require Kennecott to apply for Clean Water Act and Rivers and Harbors Act permits and then conduct the requested environmental reviews, as Huron Mountain Club seeks, would be harmful to the Federal Defendants and the public. First, such actions would be contrary to the statutes at issue. In addition, allowing Huron Mountain Club to dictate prioritization of limited enforcement funds would strain public

resources and otherwise conflict with congressional directives that allow the agencies to set enforcement priorities.

ARGUMENT

I. HURON MOUNTAIN CLUB CANNOT ESTABLISH A LIKELIHOOD OF SUCCESS ON THE MERITS.

To succeed, Huron Mountain Club must demonstrate that it is *likely* to succeed on the merits of its claims. *Winter*, 555 U.S. at 21–22. If the Court finds that it has not met this burden, the analysis stops and the order denying the preliminary injunction must be affirmed; it is not necessary to consider the other three factors. *Gonzales v. Nat'l Bd. of Med. Examiners*, 225 F.3d 620, 632 (6th Cir. 2000); *Arkansas Dairy Co-op Ass'n, Inc. v. U.S. Dept. of Agr.*, 573 F.3d 815, 832 (D.C. Cir. 2009).

A. Huron Mountain Club has not shown that the Federal Defendants had any duty to act.

Huron Mountain Club does not allege that any action of the Federal Defendants violated the law. Instead, it claims that the Federal Defendants have violated certain federal statutes by their failure to act. Specifically, Huron Mountain Club points to the Federal Defendants' purported failure to require permits under the Rivers and Harbors Act and Clean Water Act and to conduct environmental reviews under

NEPA, NHPA, and the ESA. Huron Mountain Club brings its challenge under the APA or, alternatively, under the Mandamus Act, 28 U.S.C. § 1361-62. In order to obtain relief under *either* statute, it must establish that the Federal Defendants failed to perform a discrete action, required by law, and which leaves no room for exercise of agency discretion.

Claims for failure to act are authorized by the APA, but only where agency action is "unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). This remedy is very limited and "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004). These APA limitations were designed to "protect agencies from undue judicial interference with their lawful discretion." *Id.* at 66. Accordingly, absent a mandatory duty requiring the agency to take a specific non-discretionary act, the waiver of sovereign immunity afforded under the APA does not apply and the district court lacks jurisdiction. *Id. See also Heckler v. Chaney*, 470 U.S. 821 (1985); *Ohio Public Interest Research*

Group, Inc. v. Whitman, 386 F.3d 792, 797–99 (6th Cir. 2004); *Madison-Hughes v. Shalala*, 80 F.3d 1121, 1124–25 (6th Cir. 1996).

Likewise, "[t]he mandamus remedy [is] normally limited to enforcement of a specific, unequivocal command, the ordering of a precise, definite act about which an official had no discretion whatever." *S. Utah Wilderness Alliance*, 542 U.S. at 63 (citations, alterations, and quotations omitted); *Heckler v. Ringer*, 466 U.S. 602, 616 (1984). No action lies for mandamus absent a clear showing that the agency is statutorily mandated to take the designated action. *Harmon Cove Condo. Ass'n v. Marsh*, 815 F.2d 949, 951 (3d Cir. 1987); *United States v. Gomez-Gomez*, 643 F.3d 463, 471 (6th Cir. 2011) ("Mandamus is a drastic remedy that should be invoked only in extraordinary cases where there is a clear and indisputable right to the relief sought." (quotation omitted)).

Because the action that Huron Mountain Club seeks to compel—that the Corps demand that Kennecott seek permits—is not a discrete action specifically required by law, there is no APA or mandamus jurisdiction.

1. The Corps has no duty to act under Section 10 of the Rivers and Harbors Act.

Huron Mountain Club has no private right of action under Section 10 by which it could bring suit against Kennecott and compel it to seek a Rivers and Harbors Act permit. *California v. Sierra Club*, 451 U.S. 287, 297–98 (1981). Huron Mountain Club attempts to evade this roadblock by instead bringing suit against the *Corps* for failing to require Kennecott to seek a permit. [Complaint, Doc.1, PageID#37.] The Supreme Court has made clear that "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton*, 542 U.S. at 64 (emphasis in original). Huron Mountain Club can meet neither of these requirements.

a. Section 10 does not require any action on the part of the Corps.

Section 10 does not instruct the Corps to take any discrete action. Huron Mountain Club bases its theory on the language of Section 10, which declares that certain activities in navigable waters "shall not be lawful" without the approval of the Corps. 33 U.S.C. § 403. But that phrase is not directed at the Corps and does not direct the Corps to take any particular action. Section 10 says nothing about the duty of the

Corps to seek out parties that might be violating this provision. Instead, the statute places the onus on project proponents to ensure they have the proper authorization, not on the Corps.[4] There is simply no textual basis for Huron Mountain Club's reading.

No court has ever recognized a non-discretionary duty for the Corps to demand that project proponents seek Rivers and Harbors Act permits. Every court that has considered the question has consistently held that Section 10 places no duty on the Corps to affirmatively enforce its provisions, even after a permit has been issued. *See e.g.*, *Harmon Cove Condominium Ass'n, Inc. v. Marsh*, 815 F.2d 949, 952–53 ("Section 10 of the RHA does not impose a duty on the Secretary [the Corps] to enforce compliance with the provisions of the [Section 10] permit . . . ."); *Boll v. U.S. Army Corps of Engineers*, 255 F. Supp. 2d 520, 527–30 (W.D. Pa. 2003) aff'd sub nom. *Boll v. Safe Harbor Marina, LTD.*, 114 F.

[4] Huron Mountain Club's attempt to construe the Corps's regulations to support its reading is unavailing. Opening Br. 45. The provision cited is not discussing whether the Corps has a generalized duty to compel parties to submit permit applications, but instead is discussing the obligation of other federal agencies to secure Section 10 authorization from the Corps when undertaking covered activities. 33 C.F.R. § 322.3(c)(2).

App'x 467 (3d Cir. 2004); *New York v. DeLyser*, 759 F. Supp. 982, 991 (W.D.N.Y. 1991).

b. Huron Mountain Club has not identified any discrete action.

Huron Mountain Club does not identify a discrete action that the Corps failed to take. Instead, it vaguely alleges that the Corps must "administer the RHA and CWA permitting programs." Opening Br. 44. It does not explain how the Corps should deny or grant a permit when no permit application has been submitted. This is precisely the type of inchoate challenge that the Supreme Court held could not be maintained in *SUWA*. 542 U.S. at 62–64. Section 10 of the Rivers and Harbors Act provides no mechanism by which the Corps could compel submission of a permit. Accordingly, there is no identified discrete action that the Corps had a duty to undertake.

c. Enforcement of the Rivers and Harbors Act is committed to the Corps's discretion.

In the event a project proponent fails to secure the necessary authorization, the Corps may undertake an enforcement action. 33 U.S.C. § 406. But Huron Mountain Club expressly denies it is seeking to compel the Corps to exercise its enforcement discretion. Opening Br. 44. Huron Mountain Club disavows that it is seeking to compel

enforcement of the Rivers and Harbors Act because enforcement is committed to agency discretion by law; the Supreme Court has made clear that prosecutorial and enforcement discretion are not proper subjects for judicial review. The determination of whether to institute enforcement actions for violation of a statute is quintessentially a discretionary act not subject to court mandate through the APA or mandamus. *Chaney*, 470 U.S. at 832 (holding "an agency's decision not to take enforcement action is presumed immune from judicial review under § 701(a)(2)"). *See also Ohio Pub. Interest Research Group, Inc. v. Whitman*, 386 F.3d 792, 797 (6th Cir. 2004).

Huron Mountain Club's attempts to overcome this clear authority are unavailing. First, it argues that *Chaney* does not apply when an agency's refusal to take an enforcement action is based on its own jurisdictional determination. Opening Br. 42. As a preliminary matter, *Chaney* explains that if an agency refused "to institute proceedings based solely on the belief that it lacks jurisdiction" that would not automatically result in reviewability. Instead, "in those situations the statute conferring authority on the agency might indicate that such decisions were not 'committed to agency discretion.'" *Chaney*, 470 U.S.

at 833 n.4. Accordingly, even if the Corps's decision not to take an enforcement action was based on its own determination of its jurisdiction, Huron Mountain Club must *still* demonstrate that the Rivers and Harbors Act did not commit such a decision to the Corps's discretion.

In any event, Huron Mountain Club has failed to establish that the Corps decided not to bring an enforcement action *solely* because of the agency's jurisdictional determination. As evidence for its claim that the agency's decision was based solely on a jurisdictional determination, Huron Mountain Club cites to a declaration from a Corps employee submitted in the district court. [Konik Declaration, Doc13-1, PageID#379.] But the Corps has never issued a formal statement explaining why it has declined to take any enforcement action because it has had no occasion to do so. Furthermore, as the declaration makes clear, establishing jurisdiction over the waters for purposes of Section 10 would only be one step in the Corps's decisionmaking process. The Corps would also have to determine whether there had been a statutory violation and whether it would choose to exercise its discretion to pursue enforcement. This brings this case well within the purview of

Chaney, which explains that there are "many reasons" for the "general unsuitability for judicial review of agency decisions to refuse enforcement:"

> First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

Chaney, 470 U.S. at 831–32. All of these factors are present here.

Second, Huron Mountain Club claims the Corps's regulations trigger a mandatory duty to institute permitting proceedings. Opening Br. 46–47. The language Huron Mountain Club relies on simply explains what type of activities are regulated and require permits. 33 C.F.R. §§ 322.2 & 322.3. It does not transform a discretionary enforcement power into a mandatory one. While the regulations explain when a project proponent should seek a permit, they do not at all address what the Corps *must* do in the event a project proponent fails to

seek such a permit or when the Corps *must* take action in the absence of a permit application. Accordingly, they provide a court with no "law to apply" to the Corps's enforcement decisions and such decisions are unreviewable. *See Ohio Pub. Interest Research Group, Inc. v. Whitman*, 386 F.3d 792, 798 (6th Cir. 2004).

2. The Corps has no duty to act under Section 404 of the Clean Water Act.

Huron Mountain Club's Clean Water Act claim fails for much the same reason as its Rivers and Harbors Act claim. As above, Huron Mountain Club has failed to show that the Corps "failed to take a *discrete* agency action that it is *required to take*." *Norton*, 542 U.S. at 64 (emphasis in original).

First, the Clean Water Act does provide Huron Mountain Club with a potential remedy if it can prove that a violation has occurred and otherwise meet justiciability requirements. The Clean Water Act contains a citizen-suit provision, which Huron Mountain Club has *not* invoked in this case. Under Section 505 of the Act, "any citizen may commence a civil action on his own behalf against any person . . . who is alleged to be in violation of an effluent standard or limitation under this chapter . . . ." 33 U.S.C. § 1365(a)(1). An "effluent standard or limitation

under this chapter" is defined to include "an unlawful act under subsection (a) of section 1311," the very provision that Huron Mountain Club asserts Kennecott is violating by discharging fill without a Section 404 permit. *Bd. of Trustees of Painesville Twp. v. City of Painesville*, 200 F.3d 396, 399 (6th Cir. 1999). *See also Gulf Restoration Network v. Hancock County Dev., LLC*, 772 F. Supp. 2d 761 (S.D. Miss. 2011) (environmental group obtaining injunctive relief against a developer under 33 U.S.C. § 1365 for discharge of fill into waters of the United States without a section 404 permit).

"By creating a private right of action, § 505(a)(1) suggests that . . . [the CWA] was not intended to enable citizens to commandeer the federal enforcement machinery." *Dubois v. Thomas*, 820 F.2d 943, 949 (8th Cir. 1987). *See also Sierra Club v. Whitman*, 268 F.3d 898, 905 (9th Cir. 2001) ("By allowing citizens to sue to bring about compliance with the Clean Water Act, Congress implicitly acknowledged that there would be situations in which the EPA did not act. If that failure to act results from the desire of the Administrator to husband federal resources for more important cases, a citizen suit against the violator can still enforce compliance without federal expense."). Rather,

Congress envisioned that citizens would be able to bring their own enforcement actions against violators of the Act if the federal government did not bring an enforcement action.

Consistent with this framework, the Clean Water Act creates no mandatory duty for the Corps to demand that individuals submit Section 404 permit applications. Indeed, Section 404 explicitly grants the Corps discretion to issue permits and, accordingly, Huron Mountain Club cannot point to any required action the Corps must take. The section explains that the Corps "*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) (emphasis added). There is nothing in that provision—or any other provision of the Clean Water Act—that requires the Corps to either issue or demand an application for a Section 404 permit.

Similarly, while federal regulations set out certain enforcement policies applicable to the Corps, they center on outlining procedures for investigating potential violations, notifying parties of violations, determining initial corrective measures where appropriate, and allowing "after-the-fact" permit applications where alleged violations

are addressed. 33 C.F.R. § 326.3. The regulations do not mandate when and how the Corps must demand a permit or pursue enforcement; they simply outline the course of an enforcement action that the Corps may choose to undertake. Those regulations expressly state that nothing therein "shall establish a non-discretionary duty on the part" of the Corps nor shall they "give rise to a private right of action" against the Corps.[5] 33 C.F.R. § 326.1.

Huron Mountain Club claims that it has not relied on any of the regulations found in Part 326 of the Corps's regulations, Opening Br. 52, which regulate "enforcement policies and procedures applicable to activities performed without required Department of the Army permits." 33 C.F.R. §326.1. Instead, it claims to find authority for its claim solely in Parts 322 and 329. But Part 322 simply "prescribes . . . those special policies, practices, and procedures to be followed by the Corps of Engineers in connection *with the review of applications*" for Section 10 permits. 33 C.F.R. § 322.1 (emphasis added). And Part 329

[5] Huron Mountain Club's citation to *Gor v. Holder*, 607 F.3d 180, 188 (6th Cir. 2010), is not on point. *Gor* considered a situation in which *only* an agency's regulations committed a decision to agency discretion. Here, the relevant agency decision is committed to agency discretion by *statute*.

only provides the definition of "navigable waters of the United States" as used to define the regulatory jurisdiction of the Corps under the Rivers and Harbors Act (which is distinct from the Clean Water Act). 33 C.F.R. § 329.1. Huron Mountain Club has not identified, nor could it, any specific provision of Parts 322 or 329 that *requires* the Corps to take a *discrete action* with respect to demanding a permit application from project proponents under either the Rivers and Harbors Act or Clean Water Act regulations.

A project proponent who proceeds with an activity that may be in violation of Section 301 of the Clean Water Act without a Section 404 permit, does so at its own peril, and is subject to administrative, civil, and criminal enforcement by the Government. 33 U.S.C. § 1319. Huron Mountain Club asserts that the Corps's enforcement authority somehow transforms into a requirement that the agency demand a permit. But instead, the Act expressly provides for enforcement through penalties and other remedies in the event of an unpermitted discharge in violation of Section 301 occurs. Opening Br. 50–51. Allowing Huron Mountain Club to commandeer the agency's enforcement authority and discretionary decisionmaking is flatly inconsistent with the Supreme

Court's admonition in *SUWA*. Thus, requiring the Corps, or EPA for that matter (which is also tasked with enforcement of CWA violations, *see* 33 U.S.C. §§ 1251(d), 1319),[6] to enforce Section 404 permitting requirements as part of either agency's enforcement authority is beyond a court's jurisdiction.

Numerous courts have concluded that an action to require a federal official to enforce various requirements of the Clean Water Act, including permitting requirements, is not actionable. In *Sierra Club v. Whitman*, 268 at 901–03, the Ninth Circuit considered a challenge brought by environmental groups under the Clean Water Act's citizen suit provision to compel enforcement of permit terms. Relying on *Chaney*, the court held "that the Clean Water Act leaves it to the discretion of the EPA Administrator whether to find violations and to take enforcement action, and that these discretionary decisions are not subject to judicial review . . . ." *Id.* at 901. The court noted that:

> It is particularly difficult to review a federal agency's failure to take enforcement actions. . . . The EPA's decision not to take enforcement measures, like a prosecutor's decision not to indict, is one that is "typically committed to the agency's absolute discretion, such that a court would have no

[6] EPA has not been named as a defendant in this case.

> meaningful standard against which to judge the agency's exercise of discretion."

Sierra Club, 268 F.3d at 903 (quoting *Chaney*, 470 U.S. at 830–31). The vast weight of the authority supports this view.[7] *See, e.g.*, *Sierra Club v. Train*, 557 F.2d 485 (5th Cir. 1977) (finding no basis for mandamus, because enforcement of Clean Water Act requirements by the United States is discretionary); *Dubois*, 820 F.2d at 947–48 (requiring EPA to "expend its limited resources investigating multitudinous complaints, irrespective of the magnitude of their environmental significance" would result in EPA's inability "to investigate efficiently and effectively those complaints that EPA, in its expertise, considers to be the most egregious violations of the FWPCA"); *Bravos v. EPA*, 324 F.3d 1166,

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[7] Huron Mountain Club attempts to overcome the statutory language and overwhelming case law by citing to *Nat'l Wildlife Fed'n v. Hanson*, 859 F.2d 313, 315 (4th Cir. 1988). Opening Br. 50. But *Hanson*, a citizen suit brought under Section 505(a)(2) of the Clean Water Act, speaks only of a general duty to regulate dredge and fill material. It does not identify any discrete, nondiscretionary action that could support a Section 706(1) claim or mandamus, such as Huron Mountain Club has asserted here. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004). In any event, numerous courts that have considered *Hanson* have found its reasoning unpersuasive and refused to adopt it. *Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers*, 87 F.3d 1242, 1249 n.5 (11th Cir. 1996); *Alliance To Save Mattaponi v. U.S. Army Corps of Engineers*, 515 F. Supp. 2d 1, 6 (D.D.C. 2007); *Nat'l Wildlife Fed'n v. U.S. Army Corps of Engineers*, 404 F. Supp. 2d 1015, 1022 (M.D. Tenn. 2005).

1171 (10th Cir. 2003); *Harmon Cove*, 815 F.2d at 954; *Boll v. Army Corps of Engineers*, 255 F. Supp. 2d 520, 526-29 (W.D. Pa. 2003), *aff'd sub nom. Boll v. Safe Harbor Marina, LTD.*, 114 F. App'x 467 (3d Cir. 2004) (finding no action under the APA or mandamus to require the Corps to revoke a Clean Water Act or Rivers and Harbors Act permit or to otherwise take specific actions, because the Corps's authority is discretionary and thus "beyond the scope of our review").

In sum, Huron Mountain Club has failed to show that the Corps failed to take a discrete action that the Clean Water Act or its implementing regulations required it to take. As a result, Huron Mountain Club cannot show it is likely to succeed on its claim. The district court did not abuse its discretion when it found that Huron Mountain Club had not met its burden on this prong.

3. The Federal Defendants have no duty to act under NEPA, the NHPA, or the ESA.

Although NEPA, the NHPA and Section 7 of the ESA have different requirements, they share one commonality—each statute is only triggered when the federal government takes some sort of action. 42 U.S.C. § 4332(2)(C) (NEPA triggered by "major Federal actions significantly affecting the quality of the human environment"); 16

U.S.C. § 470f (NHPA triggered by "approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license"); 16 U.S.C. § 1536(a)(2) (Section 7 triggered by "any action authorized, funded, or carried out by [the] agency"). The deficiency of Huron Mountain Club's pleading is plain: Huron Mountain Club asserts a claim under Section 706(1) alleging the Federal Defendants have *failed to act*. Where the Federal Defendants have not acted, no duty under NEPA, NHPA, or the ESA arises because these statutes are only triggered in the event an agency *takes some action*.

As Huron Mountain Club admits, its NEPA, NHPA, and ESA claims are derivative—that is they can only succeed if the Rivers and Harbors Act or Clean Water Act claim succeeds. Opening Br. 58. Because Huron Mountain Club cannot show it is likely to succeed on its Rivers and Harbors Act or Clean Water Act claims, for this reason alone these derivative claims must fail as well.

In addition, NEPA and NHPA actions must be brought under the APA and must identify a "final agency action." *Karst Envtl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1295–96 (D.C. Cir. 2007). Because Huron Mountain Club has brought its ESA challenge under the APA as

well, it must also identify a final agency action to succeed on that claim. The Federal Defendants' duties under these statutes would only be triggered if the Corps *issued* a permit without complying.[8] Even assuming the Corps has a mandatory duty to demand that Kennecott submit permit applications, Huron Mountain Club's claims are premature because it is impossible to know what action the Corps would take in response to such an application. Huron Mountain Club cannot show that the district court abused its discretion when it held that it was unlikely to succeed on these claims.

B. Huron Mountain Club has not shown any evidence of a violation of Section 10 of the Rivers and Harbors Act.

Even if the Corps did have a mandatory duty to demand permit applications under the Rivers and Harbors Act, Huron Mountain Club's claim would still fail. Section 10 of the Rivers and Harbors Act applies only to the creation of obstructions that impact the "navigable capacity" of waters of the United States, the construction of structures in, or the

[8] Huron Mountain Club's claim against the Fish and Wildlife Service faces an additional hurdle: the Fish and Wildlife Service has no duty to consult with an action agency absent that agency's initiation of consultation. *See* 16 U.S.C. § 1536(a). An action agency that fails to initiate a required consultation may be in violation of Section 7, but the consulting agency (here, the Fish and Wildlife Service) is not.

excavation, filling, or other modifications to any navigable water of the United States. 33 U.S.C. § 403. The district court found that Huron Mountain Club had not shown that there will be any impact to the navigable capacity or any modification of navigable waters of the United States. Its finding was not clear error and should be upheld.

The phrase "navigable waters" is interpreted and applied differently under various federal statutes. *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1228–29 (2012). The term must be interpreted based on the purpose for which the concept of navigability is invoked under each particular statute. *Kaiser Aetna v. United States*, 444 U.S. 164, 170–71 (1979). With regard to the claims in this case, it is important to note that the scope of waters covered by the Rivers and Harbors Act is considerably narrower than those covered by the Clean Water Act:

> The terms "navigable waters of the United States" and "waters of the United States" are used frequently throughout these [Corps] regulations, and it is important from the outset that the reader understand the difference between the two. "Navigable waters of the United States" are defined in 33 CFR part 329. These are waters that are navigable in the traditional sense where permits are required for certain work or structures pursuant to Sections 9 and 10 of the Rivers and Harbors Act of 1899. "Waters of the United States" are defined in 33 CFR part 328. These waters

> include more than navigable waters of the United States and are the waters where permits are required for the discharge of dredged or fill material pursuant to section 404 of the Clean Water Act.

33 C.F.R. § 320.1(d). *See also 1902 Atl. Ltd. v. Hudson*, 574 F. Supp. 1381, 1392 (E.D. Va. 1983). Thus, for example, waters covered by the Rivers and Harbors Act, no matter how large, must allow for interstate commerce. *The Daniel Ball*, 77 U.S. 557, 563 (1870) (holding that waterways are "navigable waters of the United States" when they constitute "a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water").

As this Court has recognized, "[t]he Supreme Court has emphasized repeatedly that a navigable waterway of the United States must be 'of practical service as a highway of commerce.'" *Miami Valley Conservancy Dist. v. Alexander*, 692 F.2d 447, 449 (6th Cir. 1982) (quoting *Economy Light & Power Co. v. United States*, 256 U.S. 113, 124 (1921)). Sporadic and ineffective use does not confer navigability. *Id.* (relying on *United States v. Oregon*, 295 U.S. 1, 23 (1935)). In addition, navigability at some point of a river does not confer navigability on the

entire waterbody: "The character of a river will, at some point along its length, change from navigable to non-navigable." 33 C.F.R. § 329.11(b).

The view of the Corps as to what is navigable under the Rivers and Harbors Act is to be accorded substantial weight. *Hartman v. United States*, 522 F. Supp. 114, 117 (D.S.C. 1981); 33 C.F.R. § 329.14. In conjunction with the agreements with Michigan regarding its assumption of Clean Water Act Section 404 permitting authority, the Corps identified those "waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce . . . ." 33 U.S.C. § 1344(g). [1984 Michigan-Corps Agreement, Doc.13-1, PageID#394 & 2012 Michigan Corps Agreement Update, Doc.13-1, PageID#401.] Except for the two miles upstream from Lake Superior, the Corps has made no such finding for the Salmon Trout River. [Konik Declaration, Doc13-1, PageID#377.] Since the Eagle Mine project, and any purported obstruction or deposit of fill or dredged material associated with that project, would occur twenty-one miles upstream from the portion of the River inundated by the ordinary high waters of Lake Superior (approximately two miles from the confluence),

there is no basis for the Corps to presume that those waters are used or are susceptible to use for interstate commerce and, accordingly, assert Section 10 Rivers and Harbors Act regulatory authority.

Huron Mountain Club relies on 33 C.F.R. § 329.7 for the proposition that the entire length of all tributaries to the Great Lakes are navigable. Opening Br. 27. The regulation does not go so far. 33 C.F.R. § 329.7 states: "A waterbody may be entirely within a state, yet still be capable of carrying interstate commerce. This is especially clear when it physically connects with a generally acknowledged avenue of interstate commerce, such as the ocean or one of the Great Lakes, and is yet wholly within one state." Thus, this regulatory provision only makes clear that water bodies entirely within one state are not automatically precluded from status as a navigable water of the United States because they may connect to interstate waters.

Similarly, Huron Mountain Club misconstrues 33 C.F.R. § 329.11(a). Opening Br. 27. The regulation states: "Federal regulatory jurisdiction, and powers of improvement for navigation, extend laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark."

33 C.F.R. § 329.11(a). That regulation does not extend jurisdiction over the entire lengths of rivers with any navigable portion, but instead clarifies that where a water body is navigable, jurisdiction extends to the land and waters below the ordinary high water mark. [*See* 2012 Michigan-Corps Agreement Update, Doc.13-1, PageID#401 (providing an explanation of how this applies to Michigan waters).]

Huron Mountain Club further argues that evidence of commercial rafting and historic logging on the Salmon Trout River demonstrated the navigability of the river's upper reaches. First, the regulation relied on by Huron Mountain Club (33 C.F.R. § 329.6) simply provides criteria by which to evaluate navigability—the regulations make clear that the inquiry is not mechanical, but instead "depend[s] on the character of the region, its products, and the difficulties or dangers of navigation." The district court found that the evidence presented by Huron Mountain Club did not demonstrate commercial rafting at the site of or above the Eagle Mine Project. [D.Ct. Opinion, Doc.48, PageID#1647.] The court further found that Huron Mountain Club's evidence regarding transportation of logs in the vicinity of the Eagle Mine was "ambiguous at best." [D.Ct. Opinion, Doc.48, PageID#1648.] In reviewing a denial of

a request for a preliminary injunction, this court reviews the district court's factual findings for clear error. *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 540–41 (6th Cir. 2007). Huron Mountain Club has not shown that the district court's factual finding were clearly erroneous. As a result, the district court did not abuse its discretion when it determined that Huron Mountain Club was unlikely to prevail on the merits.

Finally, Huron Mountain Club incorrectly argues that it does not matter whether the Salmon Trout River is a navigable water of the United States at the site of the Eagle Mine because the activities "will affect the capacity of the [Salmon Trout River] further downstream." Opening Br. 32. Corps regulations explain that "permits are required under section 10 for structures and/or work in or affecting navigable waters of the United States." 33 C.F.R. § 322.3(a). Structures or work outside the limits of traditional navigable waters require permits "if these structures or work affect the course, location, or condition of the waterbody in such a manner as to impact on its navigable capacity." *Id.* *See also United States v. Republic Steel Corp.*, 362 U.S. 482, 487–88 (1960) (holding that the concept of "obstruction" is broad and "not a

prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and anything, wherever done or however done, within the limits of the jurisdiction of the United States, which tends to destroy the navigable capacity of one of the navigable waters of the United States" (quotation omitted)). The district court thoroughly considered the evidence presented by Huron Mountain Club that the downstream navigable portions of the Salmon Trout River would be impacted by the Eagle Mine. [D.Ct. Opinion, Doc.48, PageID#1648–49.] It concluded that the evidence did not show that Kennecott's activities would "impact the navigable capacity" of the river. *Id.* Huron Mountain Club's own expert testified that the impacts of the potential drawdown would be small—about 2 to 4 percent of stream flow—and would decrease downstream as water is added back to the river. [D.Ct. Opinion, Doc.48, PageID#1649.] The district court did not clearly err when it found that Huron Mountain Club did not present "any evidence to show that the mine will affect the Salmon Trout River 'in such a manner as to impact on its navigable capacity.'" [D.Ct. Opinion, Doc.48, PageID#1649.]

C. Huron Mountain Club has not established a valid Clean Water Act Section 404 claim.

Even if Huron Mountain Club were to succeed on its claim that the Corps has a nondiscretionary duty to demand that Kennecott submit a Section 404 permit application, its Clean Water Act claim would still fail. The power to issue such permits rests with the state of Michigan, not the Corps, and there is no evidence that construction of the Eagle Mine requires a Section 404 permit.

1. The Corps does not administer the Section 404 permit program in Michigan for the waters at issue.

The Corps does not have authority to issue permits under Section 404 for all waters of the State of Michigan, including the waters at issue in this case. As explained above, Michigan has assumed Section 404 permitting authority over all of the waters of the United States within its borders with the exception of those listed in the 1984 Agreement between the Corps and the State. [1984 Michigan-Corps Agreement, Doc.13-1, PageID#394. *See also* 2012 Michigan-Corps Agreement Update, Doc.13-1, PageID#401.] The Corps does retain Section 404 permitting authority over the last two miles of the Salmon Trout River, where the River is inundated by the ordinary high waters of Lake Superior. [1984 Michigan-Corps Agreement, Doc.13-1, PageID#397–99

& 2012 Michigan-Corps Agreement Update, Doc.13-1, PageID#412.] But this authority does not reach the area of the Eagle Mine project, where any fill from the project might be discharged, which is approximately twenty-one river miles farther upstream. [Konik Declaration, Doc13-1, PageID#378.]

a. The characteristics of the Eagle Mine do not alter the assumption of authority.

Huron Mountain Club raises two arguments to attempt to overcome the legal reality that it is the State that regulates the Salmon Trout River at the site of the mine. First, citing to an MDEQ training manual, it alleges that the Eagle Mine is of a nature that precludes Michigan's assumption of the Section 404 permitting program.[9] Opening Br. 55. This argument misunderstands the requirements of Section 404, the regulations, and the terms of the agreements between EPA and the State of Michigan. [2011 Michigan-EPA Agreement, Doc.13-1, PageID#435]; 40 C.F.R. § 233.50 (setting forth the procedures

[9] Huron Mountain Club claims that the Corps "delegated" authority to the State, but Michigan's assumption was approved (as required by the Clean Water Act) by EPA, not the Corps. [*See* 2011 Michigan-EPA Agreement, Doc.13-1, PageID#433.]

for EPA's review of and possible objection to state-issued Section 404 permits).

Under the terms of both the 1983 and 2011 EPA-Michigan Agreements and Section 404(j) of the Clean Water Act, EPA may (among other things) comment on and object to a permit application being considered by the State. These provisions provide that Michigan must provide notice to EPA for each permit application it receives for which review has not been waived pursuant to Section 404(k). 33 U.S.C. § 1344(k); [1983 Michigan-EPA Agreement, Doc13-1, PageID#383–84 & 2011 Michigan-EPA Agreement, Doc.13-1, 435.] In turn, EPA must provide copies of such applications to the Corps, the Fish and Wildlife Service, and the National Marine Fisheries Service. 33 U.S.C. § 1344(j); 40 C.F.R. § 233.50(b). Section 404(j) provides EPA with the opportunity to provide comments on an application and, if appropriate, object to its issuance.

Section 404(k) of the Clean Water Act allows EPA to waive the notice requirement of Section 404(j) for certain types of projects. 33 U.S.C. § 1344(k). Pursuant to both the 1983 and 2011 EPA-Michigan Agreements, EPA has waived its right to notice for many types of

permit applications, but not all. EPA retained its right to notice of permit applications and an opportunity to comment on projects with certain characteristics and Michigan is obligated to transmit those permit applications to EPA. *See* 40 C.F.R. § 233.51(b) (EPA regulation limiting which types of permit applications can have review waived). This retention of the right to receive notice under Section 404(j) does not, however, divest the State of its authority to administer the Section 404 permitting programs for these areas.

The training manual relied on by Huron Mountain Club, Opening Br. 55, is simply an explanation from MDEQ to its employees about the requirements of the 1983 EPA-Michigan Agreement, including the types of permit applications that must be transmitted to EPA for review.[10] [MDEQ Training Manual, Doc.43-4, PageID#1616–17.] The training manual does not alter the substance of the agreements reached by EPA and the State of Michigan regarding administration of Section 404 in State waters. Notably, this document was independently

[10] The training manual was last updated in 2006. [1983 Michigan-EPA Agreement, Doc13-1, PageID#1610.] It therefore reflects the terms of only the 1983 Agreement, which differ slightly from the terms of the 2011 Agreement. [*Compare* 1983 Michigan-EPA Agreement, Doc13-1, PageID#383–84 *with* 2011 Michigan-EPA Agreement, Doc13-1, PageID#435.]

prepared by the State of Michigan and could not be binding on the federal government. [*See* MDEQ Training Manual, Doc.43-4, PageID#1614 (explaining the manual was prepared by MDEQ).]

Contrary to Huron Mountain Club's assertions, nothing in Section 404(j) or the EPA-Michigan Agreements divests the authority of the State to continue to administer and enforce the Section 404 permitting program absent certain actions by EPA, requires EPA (or the Corps) to submit comments on a permit application, or vitiates the statutory suspension of the Corps's authority to issue Section 404 permits for those waters where Michigan has assumed permitting. In any event, even assuming Section 404(j) should have been complied with here and was not, that Section only places an obligation on *the State* to transmit a copy of the permit application.[11] 33 U.S.C. § 1344(j). It does not create any mandatory obligation for the Corps or the Fish and Wildlife Service to act. Nor does it automatically revoke a State's assumption if its terms are not met. Accordingly, Section 404(j)'s application has no relevance to the outcome of the claims made here.

[11] Here, there is not even a permit application to the State of Michigan for the State to transmit to EPA and it is difficult to imagine how Section 404(j) has any relevance whatsoever.

b. The Corps's determination that Michigan could assume Section 404 permitting over the upper reaches of the Salmon Trout River was valid.

Huron Mountain Club next claims that the Corps' identification of portions the Salmon Trout River subject to Michigan's permitting program was invalid. Opening Br. 56. Section 404(g) limits states' assumption of the Section 404 permitting program, which cannot include "waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce . . . ." 33 U.S.C. § 1344(g). EPA's regulations provide that, before a state's assumption can be approved, the Corps must enter into a Memorandum of Agreement with the state that includes "[a] description of waters of the United States within the State over which the Secretary [of the Army] retains jurisdiction, as identified by the Secretary." 40 C.F.R. § 233.14. Here the Corps and the State of Michigan entered into such an Agreement. [1983 Michigan-EPA Agreement, Doc13-1, PageID#393 & 2011 Michigan-EPA Agreement, Doc13-1, PageID#401.]

Huron Mountain Club's allegations have no merit.[12] As explained supra 44–47, the district court did not clearly err when it found that Huron Mountain Club had not presented sufficient evidence to support a finding that the Salmon Trout River at the location of the Eagle Mine is "presently used or are susceptible to use" for transporting interstate commerce. *See* 33 U.S.C. 1344(g). Because it has not been shown that the upper reaches of the Salmon Trout River meet this criteria, it was proper for the Corps to allow the State of Michigan to assume Section 404 permitting authority in that area. At the very least, the district court did not commit clear error when it found that Huron Mountain Club had not made such a showing.

2. There is no evidence of a Section 404 violation.

There is a third, independent reason why Huron Mountain Club cannot succeed on the merits of its Clean Water Act claim—it simply has not alleged a facially valid Section 404 claim. A Section 404 permit

[12] This assumes that such an action could even be brought at this time. Civil actions against the United States are barred unless brought within six years after the right of action first accrues. 28 U.S.C. § 2401(a). This includes cases brought under the APA, where such a right accrues at the time of "final agency action" (here the identification made by the Corps in 1984). *Sierra Club v. Slater*, 120 F.3d 623, 631 (6th Cir. 1997).

is required "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). Nowhere, however, does Huron Mountain Club allege that Kennecott has—or even intends to—discharge dredged or fill material into the Salmon Trout River, associated wetlands, or waters of any kind regulated under the Clean Water Act. Opening Br. 38–41. For this reason, the district court did not abuse its discretion in deciding that Huron Mountain Club was unlikely to prevail on its Clean Water Act claim.

In its attempt to overcome this fatal defect, Huron Mountain Club conflates and distorts several distinct concepts. First, Huron Mountain Club argues that there is Clean Water Act regulatory jurisdiction over the waters at issue, *i.e.* that they are waters of the United States. *See Rapanos v. United States*, 547 U.S. 715, 723 (2006); 33 C.F.R. pt. 328. The United States has never denied that the waters in question may be waters of the United States and subject to Clean Water Act regulatory authority. The question is whether Kennecott's *actions* constitute a "discharge of dredged or fill material" into those waters *not* whether there is authority over the waters for purposes of Section 404.

Huron Mountain Club goes on to argue that there is Clean Water Act jurisdiction over groundwater present in the area and that Kennecott will dredge and fill in that groundwater. Opening Br. 40. Groundwater is not directly regulated by the Clean Water Act. 56 Fed. Reg. 64,876, 64,892 (Dec. 12, 1991). Nonetheless, EPA has consistently interpreted the Act to cover discharges into groundwater, but only in certain limited instances. In the context of addressing the permitting requirement of Section 402, EPA has explained that "the CWA . . . regulate[s] discharges to surface water via groundwater where there is a direct and immediate hydrologic connection . . . between the groundwater and the surface water." 63 Fed. Reg. 7,858, 7,881 (Feb. 17, 1998). The requirement of a direct hydrologic connection means that Section 301 only applies to the release of pollutants into groundwater where those pollutants will *enter* nearby surface waters in relatively short order. *See* 63 Fed. Reg. at 7,878; 65 Fed. Reg. 17,010-01, 17,098 (March 30, 2000) (the term direct hydrologic connection includes situations where "groundwater infiltrates [from a source] and re-emerges to enter a surface waterbody within a short period of time"). "In these situations, the affected groundwaters are not considered

'waters of the United States' but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters." 56 Fed. Reg. at 64,892. Here, Huron Mountain Club has not alleged facts from which one could infer how dredged and fill material would even theoretically be transported through the groundwater and discharged into waters of the United States. Its argument is therefore unavailing and the district court did not abuse its discretion in finding that it was not likely to succeed on the merits of its claim.

II. HURON MOUNTAIN CLUB HAS NOT DEMONSTRATED THAT IT WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF AN INJUNCTION.

Because Huron Mountain Club has not shown a likelihood of success on the merits, or even substantial questions on the merits, the appeal may be decided on that basis alone and no further analysis is necessary. However, it has also failed to meet the remaining requirements for a preliminary injunction.

Preliminary injunctive relief cannot be presumed to be appropriate in cases raising procedural claims under environmental statutes, as Huron Mountain Club improperly suggests when it argues that infringement of its "procedural rights" is, in and of itself,

irreparable harm. Opening Br. 63. The Supreme Court has rejected such an approach, stating that "[n]o such thumb on the scales is warranted." *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756–57 (2010) (rejecting "the erroneous assumption that an injunction is generally the appropriate remedy for a NEPA violation"); *Small v. Operative Plasterers' & Cement Masons' Int'l*, 611 F.3d 483, 494 (9th Cir. 2010) ("we do not presume irreparable harm"). Under Huron Mountain Club's formulation, this prong of the preliminary injunction test would automatically be satisfied upon a showing of likelihood of success on the merits for any procedural environmental statute. This would ignore the Supreme Court's admonitions in *Monsanto*. Instead, Huron Mountain Club must show that irreparable harm is *likely* in the absence of an injunction; such harm cannot be presumed. *Winter*, 555 U.S. at 22.

Moreover, the district court did not abuse its discretion when it relied on the state court proceedings to reach its conclusion that irreparable harm was not "likely." While the Federal Defendants have not generally been involved with this project and therefore have not evaluated the project, the Eagle Mine has been the subject of extensive

State court proceedings. [*See Nat'l Wildlife Fed. v. MDEQ*, Ingham County District Court, Case No. 11-123-AA, Nov. 21, 2011, Doc.13-2, PageID#442–548.] As the district court correctly found (D.Ct. Opinion, Doc.48, PageID#1654), Huron Mountain Club cannot establish a likelihood that irreparable harm will occur when, after considering a mountain of testimony and materials, MDEQ has already found, and the State courts have already upheld, that: (1) "the mine is not likely to subside or collapse"; (2) "the mining operation will not have any severe adverse impact on the flora and fauna in the region"; (3) "the mining operation will not have any adverse impact on the wetlands in the region"; and (4) "there will be no severe adverse impact on the surface or ground waters in the region from Acid Rock Drainage." [*Nat'l Wildlife Fed. v. MDEQ*, Ingham County District Court, Case No. 11-123-AA, Nov. 21, 2011, Doc.13-2, PageID#450.]

Furthermore, the district court properly relied on the monitoring requirements in Kennecott's state-issued mining permit, which require "extensive monitoring" and "require Kennecott to stop all work if the monitoring shows a problem." [D.Ct. Opinion, Doc.48, PageID#1655.] Huron Mountain Club does not address this finding and does not

suggest that it was clear error for the district court to rely on the monitoring program in its consideration of whether Huron Mountain Club had established irreparable harm.

Additionally, none of Huron Mountain Club's allegations (Opening Br. 64), even if they should eventually materialize, relate to its legal claims against the Federal Defendants. None of these allegations relate to the navigability of the Salmon Trout River. Moreover, while the addition of certain pollutants to certain waters (*e.g.*, that might occur through the use of sulfide) or the effects on the water table or level of water in the river might be of concern under other provisions of the Clean Water Act, they do not implicate Section 404 of the Clean Water Act. Section 404, the only provision of the Clean Water Act alleged to have been violated by the Federal Defendants, requires a showing that dredged or material is or will be discharged into waters of the United States. Huron Mountain Club makes no allegation—and certainly no evidentiary showing—that the project involves any such discharge, let alone any imminent discharge causing imminent and irreparable harm. Based, therefore, solely on Huron Mountain Club's allegations, it is apparent that the alleged injury it purportedly will suffer is neither

non-speculative nor imminent. Thus, whatever the ultimate outcome of this case, there is no basis for a preliminary injunction.

III. THE BALANCE OF HARMS AND THE PUBLIC INTEREST DO NOT SUPPORT THE ISSUANCE OF A PRELIMINARY INJUNCTION.

In an action for an injunction or stay involving the Federal Government, the analysis of harm to the Government should a preliminary injunction be issued, and the determination of whether such an injunction would be in the public interest, generally is merged into a single analysis. *Nken v. Holder*, 556 U.S. 418, 435–36 (2009). Ordering the Corps to require Kennecott to apply for Clean Water Act and Rivers and Harbors Act permits and then conduct the requested environmental reviews would be harmful to the Federal Defendants and not in the public interest for several reasons.[13] First and foremost, the Corps is not the permitting authority for the Eagle Mine project. That authority has been assumed by the State of Michigan. Congress established a process under which a State could assume Section 404 responsibility and Michigan has secured such an assumption. Requiring the Corps, whose Section 404 permitting responsibilities have been

[13] Huron Mountain Club appears to be requesting interim relief that not only enjoins construction of the Eagle Mine, but also directs the Corps to begin a permitting process. [*See* Complaint, Doc.1, PageID#54.]

suspended by express operation of that statute, to nevertheless embark on its own permitting process in the face of Michigan's assumption of Section 404 permitting authority, would be in direct contravention of the terms of the statute and contrary to the public interest.

Allowing Huron Mountain Club to dictate how the Federal Defendants prioritize enforcement of the subject statutes, which is precisely what it seeks to do, would place undue strain on scarce government resources in direct contravention to the statutory schemes created by Congress. [*See* Konik Declaration, Doc13-1, PageID#379.] Congress afforded discretion to the agencies to make enforcement decisions without interference from interested parties, so as to ensure that scarce enforcement resources are properly directed. Indeed, if the mere existence of discretionary authority to regulate *required* federal agencies to take action every time they were notified of a potential violation of a regulatory requirement, the administrative burden could potentially be immense, and clearly not in the public interest.

In this case, *three* separate federal agencies would be required to expend limited resources to conduct proceedings and analyses under *five* separate statutes, all for a project that on its face does not implicate

any federal statutory review or permit requirement and has been the subject of extensive analysis at the State level, including under a federal program assumed by the State. Where, as here, Congress has established a clear structure as to how the statutes should be administered, the public interest would not be served by Huron Mountain Club's attempt to "commandeer the federal enforcement machinery." *Dubois*, 820 F.2d at 949.

CONCLUSION

For these reasons, we respectfully request that the judgment of the district court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION

This brief complies with the type volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Excepting the portions described in Circuit Rule 32(b)(1), the brief contains 13,078 words.

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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