Case No. 12-2217

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

HURON MOUNTAIN CLUB

Plaintiff – Appellant

v.

UNITED STATES ARMY CORPS OF ENGINEERS; LIEUTENANT COLONEL MICHAEL C. DEROSIER; UNITED STATES DEPARTMENT OF THE INTERIOR; KEN SALAZAR; UNITED STATES FISH AND WILDLIFE SERVICE; DANIEL M. ASHE; KENNECOTT EAGLE MINERALS COMPANY

Defendants – Appellees

Appeal from the United States District Court
for the Western District of Michigan

APPELLANT'S BRIEF ON APPEAL

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I. CORPORATE DISCLOSURE STATEMENT

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 12-2217 Case Name: Huron Mountain Club v. U.S. Army Corp

Name of counsel: Frederick W. Addison, III

Pursuant to 6th Cir. R. 26.1, Huron Mountain Club
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on December 3, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Frederick W. Addison, III

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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IV. REQUEST FOR ORAL ARGUMENT

This appeal involves issues of first impression regarding federal court jurisdiction to review whether a federal agency has complied with "permitting mandates" under the Federal Rivers and Harbors Appropriations Act and Federal Water Pollution Control Act, commonly known as the Clean Water Act. The appeal further involves issues of first impression regarding federal court's jurisdiction to enjoin a third party from engaging in activities that violate the above-referenced statutes, when those violations are allowed to occur only by virtue of responsible-agency indifference.

Plaintiff-Appellant Huron Mountain Club ("HMC") respectfully requests oral argument to assist the Court with its consideration and resolution of both the novel legal, and complex fact, issues that give rise to this appeal.

V. JURISDICTIONAL STATEMENT

Defendant-Appellee Kennecott Eagle Minerals Company ("Kennecott") is constructing a nickel and copper mine in the "Yellow Dog Plains" of Marquette County, Michigan, which will be referred to as the "Eagle Mine." The subsurface components of the mine, almost in their entirety, will be located directly underneath the headwaters of a "water of the United States" known as the Salmon Trout River (hereinafter referred to as "STR"), which runs through HMC's property downstream from the location of the Eagle Mine.

Kennecott's subsurface construction activities under, or otherwise affecting, the STR fall within the jurisdiction of the United States Army Corps of Engineers (the "Corps"), the United States Interior Department ("Interior Department"), and United States Fish and Wildlife Service ("FWS") (collectively, the "Federal Defendants"). More specifically, Kennecott's conduct is illegal in the absence of "permits" issued by the Corps pursuant to the Rivers and Harbors Appropriations Act ("RHA"), 33 U.S.C. § 403, and Clean Water Act ("CWA"), 33 U.S.C. § 1344, as well as pre-permit evaluations all Federal Defendants must conduct pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332; Endangered Species Act ("ESA"), 16 U.S.C. § 1531; or National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470a.

Kennecott has neither applied for, nor has the Corps issued, the required RHA or CWA permit, and none of the Federal Defendants have conducted any of the mandatory evaluations that should have been prerequisites to Kennecott's ongoing construction activities. HMC therefore sued Kennecott and the Federal Defendants on May 6, 2012, in the United States District Court for the Western District of Michigan (the "District Court"), and moved for a preliminary injunction to stop Kennecott's illegal construction.

HMC's claims are based upon the federal Administrative Procedures Act ("APA"), 5 U.S.C. § 702; Declaratory Judgment Act, 28 U.S.C. § 2201; and, in the

alternative, Mandamus and Venue Act ("Mandamus Act"), 28 U.S.C. § 1361. The District Court had subject matter jurisdiction over this lawsuit under 28 U.S.C. § 1331, because this action arises under the laws of the United States, as HMC asserts claims actionable through the APA, or 28 U.S.C. § 2201, to declare rights regarding, remedy Defendants' respective violations of, or compel mandatory duties under, the RHA, CWA, NEPA, ESA, and NHPA. *See Shen v. Chertoff*, 494 F. Supp. 2d 592, 596 n.5 (E.D. Mich. 2007).[1] The District Court otherwise had subject matter jurisdiction over this lawsuit because the Mandamus Act, in itself, operates as a basis for jurisdiction. *See Maczko v. Joyce*, 814 F.2d 308, 310 (6th Cir. 1987).

The District Court denied HMC's application for preliminary injunction by "Order" dated July 25, 2012. That interlocutory ruling is appealable, and this Court has jurisdiction, pursuant to 28 U.S.C. § 1292.

Because the United States and its agencies are parties to this litigation, HMC's deadline to appeal was sixty days from the date of the District Court's Order. *See* FED. R. CIV. P. 4(a)(1)(B). HMC therefore filed a timely Notice of Appeal on September 20, 2012 and amended that Notice on the same day.

[1] HMC did not plead 28 U.S.C. § 2201 as a stand-alone basis for federal question jurisdiction. The statute instead operates as conduit to federal court jurisdiction, because HMC seeks to resolve substantive rights under separate federal statutes. *See, e.g., Zhang v. Sec'y of Homeland Sec.*, No. 1:07cv224, 2007 WL 2572179, *3 (N.D. Ohio Aug. 31, 2007).

VI. STATEMENT OF ISSUES

1. Whether Kennecott's subsurface construction of the Eagle Mine is regulated by section 403 of the RHA, when such construction will "affect" the STR?

2. Whether the excavation and redeposit of subsurface materials by Kennecott beneath the STR without a permit constitutes illegal "dredge or fill" activity regulated by section 404 of the CWA?

3. Whether the Corps has a nondiscretionary duty to comply with its congressionally mandated obligations to implement the RHA and CWA permitting programs when third party activity triggers jurisdiction under the statutes?

4. Assuming *arguendo* the Corps has discretion to implement the RHA and CWA, whether the statutes and their implementing regulations provide sufficient guidance regarding the Corps' duties to afford courts "law to apply" when reviewing the Corps' purportedly "discretionary" failure to undertake RHA or CWA permitting?

5. Whether the Corps' designation of its own enforcement duties as discretionary can deprive the district court of the power to review the Corps' failure to act?

6. Whether the Corps may delegate its CWA permitting authority to the State of Michigan when the features of the Eagle Mine exceed the criteria that would allow for a lawful delegation?

7. Whether the district court erred by denying HMC equitable relief?

VII. STATEMENT OF THE CASE

Kennecott's work will "affect" the navigable capacity of, and indeed could catastrophically alter, the STR and its corresponding wetlands. These activities are illegal in the absence of federal "permits" within the jurisdiction and responsibility of the Corps, and no such "permits" can be issued until the Corps, working independently and in concert with the Interior Department and FWS, completes *mandatory* environmental, species, and cultural evaluations.

HMC seeks equitable relief to halt further construction of the Eagle Mine until the violations of law are remedied; however, the District Court denied HMC's application for such relief. HMC appeals that ruling.

VIII. STATEMENT OF FACTS

A. The Huron Mountain Club

HMC is a not-for-profit entity formed more than 100 years ago as a retreat and wildlife preserve. *See* Page ID # 88, Affidavit of John R. Dykema, Jr. ("Dykema Affidavit"), RE 5-1; Page ID # 94, Affidavit of Dr. Mary O' Boyle, II ("O' Boyle Affidavit"), RE 5-2; Page ID # 105, Huron Mountain Club Bylaws, RE 5-4; Page ID # 128, Affidavit of Philip Power, RE 6-2. HMC owns approximately 19,000 acres of land within the Huron Mountains, including an eleven-mile stretch of the STR, which runs through HMC's property and empties into Lake Superior at the northeast corner of HMC's property. *See* Page ID # 88-

89, Dykema Affidavit, RE 5-1; Page ID # 96, O' Boyle Affidavit, RE 5-2; Page ID # 129-130, Affidavit of Philip Power, RE 6-2.

The STR is a direct tributary to Lake Superior; frequent focus of federally, state, and joint-funded scientific research; is considered a "world-class" trout stream; otherwise is a popular fishing and boating destination; and historically was used for commercial activities such as transportation of timber extracted from the surrounding forests, which was floated downstream and processed at sawmills bordering Lake Superior. *See* Page ID # 88-90, Dykema Affidavit, RE 5-1; Page ID # 98, O' Boyle Affidavit, RE 5-2; Page ID # 126-127, Affidavit of Philip Power, RE 6-2.

HMC's property is approximately 3.3 miles downstream on the STR, from the location where Kennecott is constructing the Eagle Mine. *See* Page ID # 89, Dykema Affidavit, RE 5-1; Page ID # 149, State of Michigan Office of Administrative Hearings and Rules Testimony ("Testimony") of Paul Townsend, RE 6-3.

B. The Eagle Mine

Through operation of the Eagle Mine, Kennecott intends to extract approximately 4,000,000 metric tons of a "sulfide" ore body and rock located directly underneath the headwaters of the STR, including adjacent wetlands. *See* Page ID # 89, Dykema Affidavit, RE 5-1; Page ID # 94-95, O' Boyle Affidavit, RE

5-2; Page ID # 127-128, Affidavit of Philip Power, RE 6-2; Page ID # 152, Kennecott Mining Permit Application, RE 6-4; Page ID # 161, Site Development Plan and Topographic Map, RE 6-5. An acknowledged, and expected, consequence of sulfide mining is that when sulfide ore is exposed to air and water, the ore produces sulfuric acid that leaches toxic metals from the ore and releases the toxins. *See* Page ID # 172-73, Testimony of Dr. Glenn C. Miller, RE 7-2. This phenomenon commonly is known as "acid rock drainage" or "acid mine drainage." *Id.*

In total, Kennecott projects the operational life of the Eagle Mine will be approximately eleven years. *See* Page ID # 152, Kennecott Mining Permit Application, RE 6-4. The facilities Kennecott has constructed, and intends to construct, to facilitate these operations can be categorized as "surface facilities" and "subsurface facilities." *Id*. at Page ID # 152-53.

1. The Eagle Mine Surface Facilities

Kennecott's surface facilities span approximately ninety-two acres. A fleet of forty, 56-ton ore trucks will transport crushed ore daily from the "subsurface facilities" (discussed below) to the surface of the Eagle Mine, then to another facility located in Marquette County for further processing. *See id.* at Page ID # 155; Page ID # 181, Testimony of Peter J. Kailing, RE 7-3. The surface facilities will include a "Mine Ventilation Air Raise," which is an exhaust stack that will

extend 65 feet above ground to emit exhaust containing toxic, metallic dust from underground mining operations. *See* Page ID # 155, Kennecott Mining Permit Application, RE 6-4; Page ID # 188-191, Testimony of Sub Vel, RE 7-4.

To construct the subsurface facilities, Kennecott will need to excavate approximately 378,914 tons of sulfide waste rock, which must be brought to the surface and stored in a six-acre "Temporary Development Rock Storage Area" at the site. *See* Page ID # 155, Kennecott Mining Permit Application, RE 6-4. That waste rock eventually will be re-deposited subsurface, along with additional pollutants such as fly ash, lime, and "Portland" cement, to fill voids created during excavation and mining operations. *See id*. at Page ID # 159; Page ID # 226, Testimony of Stephen V. Donohue, Ph. D., RE 8-3.

The State of Michigan administers various "permitting" programs that were triggered when Kennecott began constructing the surface facilities at the Eagle Mine. For instance, Part 632 of Michigan's Natural Resources and Environmental Protection Act, M.C.L. 324.63205, requires persons to obtain a "section 632" permit to "engage in the mining of nonferrous metallic minerals."

State proceedings do not, and indeed cannot for reasons discussed below, supplant the discrete *federal* laws and regulations at issue in this litigation. A relevant state permit Kennecott obtained actually mandates as much by admonishing: "Compliance with the provisions of [state mining law] *does not*

relieve the permittee of the obligation to comply . . . with all other applicable . . . federal . . . statutes, regulations, or ordinances." Page ID # 230, State of Michigan Mining Permit, RE 8-4 (emphasis added).

The state regulatory process nonetheless is of consequence, because state administrative proceedings were conducted before Kennecott began construction of its surface facilities, and during those proceedings, consultants retained by Kennecott and independently retained by the state provided information regarding the Eagle Mine's overall construction and operation. That information includes sworn testimony and documents, which provide conclusive evidence subsurface construction activities Kennecott begun in the months before HMC filed the underlying lawsuit, are subject to the federal laws and regulations at issue.

2. Subsurface, "Permit-dependent" Facilities

Kennecott's excavation and construction of the subsurface portion of the Eagle Mine, *see* Page ID # 193, 2011 Annual Mining and Reclamation Report, RE 7-5, are the activities that triggered the obligations at issue in this lawsuit. The "portal," or opening, to the Eagle Mine's mineshaft was the threshold that transitioned Kennecott's construction work from private conduct subject primarily to the above-referenced state-based regulation, to activity that demands extensive federal oversight and approval.

The portal is the entrance to the tunnel, which will extend approximately a half-mile subsurface into Kennecott's mineshaft. *See id.*; Page ID # 211, Testimony of Stanley J. Vitton, Ph. D., RE 8-1. The portal's opening is located near the base of a more than 1,000 year old, sacred, Native-American worship site known as "Eagle Rock." *See* Page ID # 94-95, O' Boyle Affidavit, RE 5-2; Page ID # 130, Affidavit of Philip Power, RE 6-2. Kennecott has cordoned off and otherwise restricted access to Eagle Rock and will continue to do so during the life of the Eagle Mine operations. *See* Page ID # 154, Kennecott Mining Permit Application, RE 6-4.

Kennecott's actual mineshaft "tunnel" will span at least one mile subsurface. *See* Page ID # 228, Testimony of Stephen V. Donohue, Ph. D., RE 8-3. The circumference of the tunnel will be approximately 15' x 15'. *Id*. at Page ID # 227. Whereas the portal opening, at ground surface, is located near the surface waters of the STR, the subsurface tunnel actually will intersect and run parallel directly underneath the STR or adjacent wetlands, which are the River's headwaters and therefore below the STR's ordinary high water mark. *See* Page ID # 161, Site Development Plan and Topographic Map, RE 6-5; Page ID # 168, Testimony of Cynthia Pryor, RE 7-1. Kennecott otherwise will conduct excavation and mining to access ore, essentially all of which is located directly underneath the STR and its corresponding wetlands. *See* Page ID # 126, Affidavit of Philip Power, RE 6-2.

Kennecott proposes to use the "longhole stope" method of mining, which involves the removal of ore in vertical sections from the bottom of the ore body upward. *See* Page ID # 157-158, Kennecott Mining Permit Application, RE 6-4. A series of primary voids, called "stopes," which will be approximately 33 feet wide, 98 feet high, and 164 feet long, and separated by sections of intact rock, will be created by sequential blasting to create the voids. *Id*.

Kennecott eventually will backfill these "primary" stopes with cemented fill, including imported aggregate. *See id.* at Page ID # 157-159. Explosives then will be used to remove the remaining rock, located between the backfilled primary stopes. *Id*.

Some of these "secondary" stopes eventually will be backfilled with a mixture of limestone and "development rock," which is the waste rock that will be excavated during construction of the mine tunnel and stored at the surface during mine operations. *See id*. Notwithstanding this general process, several miles of bored-out space, intentionally will not be backfilled by Kennecott, on the assumption those spaces will remain as open, empty voids—assuming they do not collapse. *See* Page ID # 228, Testimony of Stephen V. Donohue, Ph. D., RE 8-3. The prudence of this assumption is questionable, because consultants hired by the state have acknowledged the possibility that a "structure" that will be known as the "crown pillar," intended to support the mine, may be susceptible to collapse. *See*

Page ID # 247-250, 256-258, 259-260, 262-264, Testimony of William Blake, Ph. D., RE 9-1.

Even if this worst-possible case scenario never comes to pass, the very nature of Kennecott's construction and operations otherwise will cause dramatic environmental impacts. For instance, during excavation and construction of the subsurface facilities, and as a result of the massive excavation and mining operations, Kennecott will drawdown water in a manner that will lower the water table and diminish the capacity of the STR, as well as wetlands and other water bodies within the STR watershed. *See* Page ID # 249, 257-258, 261, Testimony of William Blake, Ph. D., RE 9-1; Page ID # 269-284, Testimony of Paul R. Adamus, Ph. D., RE 9-2. It also will reduce the flow of the River and change its temperature and water chemistry, while reducing its reach. Page ID # 269-284, Testimony of Paul R. Adamus, Ph. D., RE 9-2.

Because the subsurface work is the activity that triggers the RHA and CWA permitting requirements discussed below, that work hereafter will be referred to as the "Permit-dependent work."

IX. SUMMARY OF ARGUMENT

The District Court based its ruling on erroneous interpretations of the Corps' permitting duties under the RHA and CWA, and made erroneous factual findings in concluding that the Corps is not violating those duties. The District Court in turn

failed to properly apply the standard for issuance of a preliminary injunction by erroneously concluding HMC did not demonstrate the requisite likelihood of success on the merits, irreparable harm, public interest, and balance of harms that favors injunctive relief. Indeed, in many respects, the District Court linked its findings regarding the last three elements to its erroneous conclusion that HMC is not likely to succeed on the merits.

For these reasons, the district court's ultimate inferences and legal conclusions were based on legal error, which should be reversed.

X. STANDARD OF REVIEW

A. Standard of Review Under the Administrative Procedures Act

In reviewing the Federal Defendants' inaction regarding the Eagle Mine, this Court must determine whether the Federal Defendants' inaction was "arbitrary and capricious, *an abuse of discretion*, or otherwise *not in accordance with law*." 5 U.S.C. § 706 (emphasis added).

B. Standard for Preliminary Injunction

A preliminary injunction is warranted when a moving party can demonstrate that (1) it is likely to succeed on the merits, (2) it is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in its favor, and (4) an injunction is in the public interest. *See Winter v. NRDC*, 129 S. Ct. 365, 374 (2008). The Sixth Circuit recognizes these traditional criteria, and, as an alternative, holds that a party is entitled to a preliminary injunction if it

demonstrates (1) the existence of serious questions on the merits and (2) a balance of hardships tipping in its favor. *See Jones v. Caruso*, 569 F.3d 258, 277 (6th Cir. 2009).

Under the Sixth Circuit's "sliding-scale" approach, "the four considerations applicable to preliminary injunction decisions are factors to be balanced, not prerequisites that must be met." *Mich. Bell Tel. Co. v. Engler*, 257 F.3d 587, 592 (6th Cir. 2001) (quoting *Six Clinics Holding Corp., II v. Cafcomp Sys.*, 119 F.3d 393, 400 (6th Cir. 1997)). It follows, therefore, that the greater the hardship to plaintiffs, the less probability of success must be shown. *Id.*

Prior to *Winter*, courts commonly held that the traditional test could be satisfied upon a strong likelihood of success on the merits and the *possibility* of irreparable harm. *See, e.g., Earth Island Inst. v. United States Forest Serv.*, 442 F.3d 1147, 1159 (9th Cir. 2006) (emphasis added). In *Winter*, the Supreme Court held that "the Ninth Circuit's 'possibility' standard was too lenient. 129 S. Ct. at 375.

Winter did not change, however, the continued vitality of the "sliding scale." *Id*. at 392 (Ginsburg, J., dissenting).[2] As Justice Ginsburg explained in her dissent:

[2] Several district courts have addressed this issue post-*Winter*. *See Save Strawberry Canyon v. DOE*, 2009 U.S. Dist. LEXIS 38180, at *5 (N.D. Cal. Apr. 22, 2009) ("the required degree of irreparable harm increases as the probability of success decreases."); *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 11 (D.D.C. 2009) ("[T]he Court finds that the D.C. Circuit's sliding-scale standard remains viable even in light of the decision in *Winter*").

> consistent with equity's character, courts do not insist that litigants uniformly show a particular, predetermined quantum of probable success or injury before awarding equitable relief. Instead, courts have evaluated claims for equitable relief on a "sliding scale," sometimes awarding relief based on a lower likelihood of harm when the likelihood of success is very high . . . . This Court has never rejected that formulation, and I do not believe it does so today.

Winter, 129 S. Ct. at 392 (Ginsburg, J. dissenting).

An injunction is appropriate in this case under either formulation of the injunction standard (*Winter* or "sliding scale").

C. Standard of Review for Denial of a Preliminary Injunction

The denial of a preliminary injunction should be overturned if the lower court incorrectly applied the law, relied on clearly erroneous findings of fact, or otherwise abused its discretion. *See Washington v. Reno*, 35 F.3d 1093, 1098 (6th Cir.1994). Under this standard, review of the District Court's legal conclusions is *de novo* and review of its factual findings is for clear error. *See Taubman Co. v. Webfeats*, 319 F.3d 770, 774 (6th Cir. 2003).

XI. ARGUMENT

A. HMC Has Raised Serious Questions and Is Likely to Succeed on the Merits

HMC has raised serious questions about the legality of the Eagle Mine project and is likely to succeed on the merits. The District Court abused its discretion by finding against HMC on this prerequisite for injunctive relief.

1. Kennecott's activities under the STR are governed by the RHA

As discussed below, permitting mandates under the RHA are triggered when a person engages in activity that will impact "navigable waters" or "other waters" of the United Sates. The District Court concluded HMC did not have a likelihood of success on its RHA claim because HMC purportedly failed to establish that the STR (1) is navigable-in-fact in the vicinity of the Eagle Mine, or otherwise (2) will be affected "in such a manner as to impact on its navigable capacity." *See* Page ID # 1647-49, Opinion on Motion for Preliminary Injunction ("Opinion"), RE 48. With respect to the first finding, requiring HMC to establish that the STR is navigable-in-fact in the vicinity of the Eagle Mine, this was error because a waterbody may be "navigable" under the RHA even when the waterbody is not navigable-in-fact.

HMC should succeed on its RHA claim because it has established that the STR is navigable-in-law under the Corps' tests for "navigability," and because Kennecott's tunneling and excavation activities are considered to, and will indeed, have an impact on the navigable capacity of the STR.

a. *The STR and adjacent wetlands are "navigable waters" within the meaning of the RHA*

Section 403 of the RHA provides: "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the

waters of the United States is prohibited; . . . and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity . . . of the channel of any *navigable water* of the United States, unless the work has been recommended by the Chief of Engineers *and authorized by the Secretary of the Army* prior to beginning the same." 33 U.S.C. § 403 (emphasis added.

In reaching the conclusion that the STR is not "navigable," the District Court relied on the Corps' determination that only two miles of the STR are navigable upstream from Lake Superior. Page ID # 1645, Opinion, RE 48. This determination, however, was not binding on the District Court and should have been disregarded in light of independent evidence that the STR is indeed navigable under the Corps' own regulations. *See* 33 C.F.R. § 329.3 ("Precise definitions of 'navigable waters of the United States' or 'navigability' are ultimately dependent on judicial interpretation and cannot be made conclusively by administrative agencies."). The Corps itself recognizes "we must conduct an on-site verification to make a definitive determination of the extent of our jurisdiction." *See* Page ID # 401, List of Navigable Waters, RE 13-1. There is no indication, however, that Corps personnel have performed an on-site investigation of the navigability of the STR within the last forty years. *See* Page ID # 377-378, Affidavit of John Konik, RE 13-1.

The District Court also relied on 33 C.F.R. § 329.11(b), which provides that the "character of a river will, at some point along its length, change from navigable to non-navigable. Very *often* that point will be at a major fall or rapids, or other place where there is a marked decrease in the navigable capacity of the river." *See* Opinion, RE 48, Page ID # 1647 (emphasis added).

This generic measure of navigability "often" might apply, but it does not apply if other *specifically enumerated* tests for navigability under the Corps' regulations are satisfied. i.e., "The upper limit [of navigability] will therefore *often* be the same point traditionally recognized as the head of navigation, but may, *under some of the tests described above, be at some point yet farther upstream*." 33 C.F.R. § 329.11(b) (emphasis added).

The District Court failed to acknowledge that there are specifically enumerated tests that mandate the STR is navigable as far upstream as the location of the Eagle Mine. Indeed, under at least three separate tests for "navigability" enumerated in the Corps' regulations, the portion of the STR and corresponding wetlands above Kennecott's mine are navigable.

The STR and corresponding wetlands above the Eagle Mine are "navigable," because navigable status is given to tributaries of a Great Lake. *See* 33 C.F.R. § 329.7 ("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 Great Lakes*.") (emphasis added). A tributary of a Great Lake therefore is, *in itself*, deemed navigable as a matter of law, but without any proffered justification for disregarding the plain textual meaning of the Corps regulation dictating as much, the District Court declined to treat the STR (an undisputed tributary of Lake Superior) as a navigable water.

Furthermore, a river's "navigable" status, and the Corps' corresponding regulatory duties, "extend[s] laterally to the entire water surface and bed of [the] navigable waterbody, which includes all the land and waters below the ordinary high water mark . . . ." 33 C.F.R. § 329.11(a) (emphasis added). By operation of this standard, the wetlands bordering the STR at the site of the Eagle Mine are "navigable," because the wetlands are the headwaters that hydrologically feed the River or otherwise are hydrologically connected to the River—thus, they are within the STR's ordinary high water mark. *See* Page ID # 128, Affidavit of Philip Power, RE 6-2; Page ID # 161, Site Development Plan and Topographic Map, RE 6-5; Page ID # 271, Testimony of Paul R. Adamus, Ph. D., RE 9-2; Page ID # 286, Testimony of Donald Tilton, Ph. D., RE 9-3. The River and wetlands consequently are within the Corps' RHA jurisdictional responsibilities.

Additionally, the STR historically was used for logging, which satisfies a separate test for navigability. *See* 33 C.F.R. § 329.6 ("transportation of logs has

been a substantial and well-recognized commercial use of many navigable waters of the United States."). Logging occurred upstream on the River beyond HMC's property, and the logs were in fact transported *on* the River. *See* Page ID # 88-89, Dykema Affidavit, RE 5-1; Page ID # 95-96, 98, O' Boyle Affidavit, RE 5-2. Testimony elicited by Kennecott's own counsel during state administrative proceedings demonstrates that logging actually occurred at the location where the Eagle Mine *now* is located. *See* Page ID # 1425, Testimony of Kerry D. Woods, Ph. D., RE 35-1. The District Court acknowledged HMC had propounded evidence of this logging on the STR (though it *sua sponte* implied certain evidence was hearsay although no Defendant raised any such objection) but dismissed this specific criteria for navigability by suggesting the evidence was ambiguous as to whether the logs where transported in the actual portion of the STR in the vicinity of the Eagle Mine. There is no such qualification in the text of the "specific" test regarding logging—indeed, as discussed below, the Corps regulations expressly acknowledge that navigability is not compromised simply because a certain portion of a river is not suitable for the activities that otherwise make the river "navigable."

The STR otherwise has been, and still is, used for recreational activities such as boating and fishing, which satisfies yet another test for navigability. *See* 33 C.F.R. § 329.6 ("the presence of recreational craft may indicate that a waterbody is capable of bearing some forms of commerce, either presently, in the future, or at a

past point in time."). Rafting actually starts on the portion of the River *only one mile* downstream from the Eagle Mine. Page ID # 1428, Affidavit of Mary O' Boyle, II, RE 35-2.

Because the River at minimum satisfies *these* specific tests for navigability, the Corps' jurisdiction "extend[s] laterally to the entire water surface and bed of . . ." the River, and it therefore was improper for the District Court to rely upon the generic principle that some rivers can lose navigable status as they progress upstream. *See* 33 C.F.R. § 329.11(a). By operation of this standard, the headwaters and wetlands that border and feed the STR at the Eagle Mine site are "navigable," and within the Corps' RHA jurisdictional responsibilities.

Despite these controlling criteria, the District Court appeared to focus only on whether relevant portions of the STR are navigable in fact, i.e., whether a boat can traverse the entire stretch of a water. The Corps' own regulations demonstrate the impropriety of any such view, because the regulations define navigability to include waters that might not by navigable in fact, but are nonetheless deemed navigable at law based on the Corps' tests.

In 33 C.F.R. § 329.10, titled "Existence of obstructions," the Corps provides:

> A stream may be navigable despite the existence of falls, rapids, sand bars, bridges, portages, shifting currents, or similar obstructions. Thus, a waterway in its original condition might have had substantial obstructions which

> were overcome by frontier boats and/or portages, and nevertheless be a 'channel' of commerce, *even though boats had to be removed from the water in some stretches*, or logs be brought around an obstruction by means of artificial chutes.

(emphasis added).

Likewise, 33 C.F.R. § 329.11, which addresses, "Geographic and jurisdictional limits of rivers and lakes," provides: "Jurisdiction thus extends to the edge . . . of all such waterbodies, *even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation or other barriers*." (emphasis added).

After acknowledging that HMC presented evidence of commercial rafting and historic logging on the STR, the District Court nevertheless concluded HMC failed to demonstrate navigability because there was no evidence the Eagle Mine affected a navigable portion of the STR. *See* Page ID # 1647-48, Opinion, RE 48. HMC, in addition to demonstrating the STR is navigable-in-law, also proved the capacity of the navigable-in-fact portion of the STR is affected. For instance, it cited evidence that impacts from the mine will occur "far downstream" from the mine, including the navigable-in-fact portion of the STR used by recreational boaters within one mile of the site. *See* Page ID # 249, Testimony of William Blake, Ph. D, RE 9-1. This evidence, standing alone, is sufficient to satisfy

HMC's burden to demonstrate likelihood of success on the merits with respect to the navigability of the RHA.

b. *Kennecott's activities under the STR are subject to RHA permitting mandates*

Under the Corps' regulations, at 33 C.F.R. § 322.3(a), the Corps mandates that "[Department of the Army ("DA")] permits are required under [the RHA] for *structures* and/or *work* in or *affecting* navigable waters of the United States . . . ." (emphasis added). Subpart 322.2(b) then expansively defines "structures" to include all physical structures, "without limitation," and expansively defines "work," "without limitation," to include "excavation" "or other modification" – wherever located.

Excavation and tunneling "work" underneath a navigable water, construction of any "structure" underneath a navigable water, and any activities that otherwise affect the capacity of a navigable water are activities that require a RHA Permit. Specifically, 33 C.F.R. § 322.3(a) provides: "For purposes of a [RHA] permit, a tunnel or other structure or work *under* . . . a navigable water of the United States *is considered to have an impact on the navigable capacity of the waterbody*." (emphasis added).

As discussed above, Kennecott is engaging in "tunneling" work underneath the STR and adjacent wetlands that fall below the River's ordinary high water mark, is creating a mine "structure" underneath the STR and corresponding

wetlands, will excavate and mine ore located directly underneath the STR and wetlands, and otherwise will alter the navigable capacity of the River and wetlands by drawing down the water table and changing flow far downstream. Kennecott nevertheless does not have, and has failed even to seek, a RHA permit authorizing these regulated activities.

c. *Kennecott's activities, regardless where located, are governed by the RHA because such activities will affect the navigable capacity of a navigable water*

The Corps' regulations provide: "Structures or work" not physically in a "navigable water," nonetheless require a RHA permit, "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 . . . ." 33 C.F.R. § 322.3(a). Whether or not Kennecott is engaged in regulated conduct actually *under* a portion of the STR or wetlands that are navigable within the meaning of Corps' regulations, Kennecott will affect the capacity of the STR further downstream.

As a result of excavation and mining operations, Kennecott will drawdown water in a manner that will lower the water table of the STR, as well as wetlands and other waterbodies within the STR watershed. *See* Page ID # 231-242, Testimony of Gregory Council, RE 8-5; Page ID # 249, 257-258, 261, Testimony of William Blake, Ph. D, RE 9-1; Page ID # 269-284, Testimony of Paul R.

Adamus, Ph. D, RE 9-2. It also will reduce the flow of the STR and reduce its reach. *See* Page ID # 269-284, Testimony of Paul R. Adamus, Ph. D, RE 9-2.

The U.S. Supreme Court has held that construction in non-navigable portions of a waterbody, that in turn affect the navigable portions of the waterbody, is governed by the RHA:

> [The RHA] is 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, is within the terms of the prohibition.

United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 708 (1899) (emphasis added).

Furthermore, the Supreme Court recognized the importance of protecting the source waters of navigable streams:

> To infer therefrom that Congress intended to release its control over the navigable streams of the country and to grant in aid of mining industries and the reclamation of arid lands the right to appropriate the waters *on the sources of navigable streams* to such an extent as to destroy *their navigability*, is to carry those statutes beyond what their fair import permits.

Id. at 706 (emphasis added). Here, Kennecott's activities will impact the STR downstream from the Eagle Mine, because construction and operation at the site will (at minimum) drawdown groundwater that feeds the headwaters, i.e. a source,

of the River. *See* Page ID # 249, Testimony of William Blake, Ph. D, RE 9-1. Therefore, the RHA applies irrespective of whether the portion of the STR above the Eagle Mine is navigable, because Kennecott's activities have impacted, and are impacting, the navigable capacity of the STR downstream, in the portions of the River that are proven to satisfy tests for navigability.

The District Court actually acknowledged that HMC had propounded adequate evidence of these downstream impacts but then erroneously held RHA jurisdiction was not invoked because "[HMC] has not presented any evidence to show that the mine will affect the STR 'in such a manner as to impact on its navigable capacity.'" *See* Page ID # 1649, Opinion, RE 48 (citing 33 C.F.R § 322.3(a)). The District Court ostensibly read the word "significantly" into the regulations by requiring a showing not only that the navigable capacity of the River would be impacted (which HMC proved), but that the impact would be beyond some threshold nowhere mandated under the RHA or the Corps' implementing regulations. *Id.* Indeed, although the District Court's construction has no basis in the plain language of 33 C.F.R. § 322.3(a) or the RHA, it potentially will operate to provide a categorical exclusion the Corps can invoke to abdicate its permitting duties under the RHA. The District Court's construction would allow the Corps simply to declare an impact insignificant, rather than

properly analyzing *any* impact on navigable capacity through the permitting process—which is what is required under the RHA.

In sum, Kennecott's work and mine structure actually are *under* a portion of the STR and related wetlands, all of which are "navigable" within the meaning of the Corps' regulations. *No further evidentiary showing is required in light of this proof*, because "a tunnel or other structure or work *under* . . . a navigable water . . . is *considered* to have an impact on the navigable capacity . . . ." *See* 33 C.F.R. § 322.3(a) (emphasis added). Even assuming, however, the portion of the STR and wetlands above the Eagle Mine are not themselves navigable, HMC has proven Kennecott's work and structure otherwise will "affect" the "capacity" of navigable portions of the River downstream. Finally, the possibility of an entire collapse of the crown pillar exists, and such an event would destroy the source of the STR and result in the possible destruction of the river. *See* Page ID # 247-250, 256-258, 259-260, 262-264, Testimony of William Blake, Ph. D., RE 9-1. On any of these grounds, HMC has demonstrated a likelihood of success on its claim that Kennecott's construction triggers the Corps' jurisdiction under the RHA.

d. *Kennecott's conduct is illegal because Kennecott is constructing the Eagle Mine in "a water of the United States" without a permit*

Irrespective of whether the RHA is navigable in the vicinity of the Eagle Mine or downstream, Kennecott's activities are governed by the RHA for an

additional and independent reason – the Eagle Mine construction must be treated as work that creates an obstruction in "a water of the United States." Despite its historic interpretation, the plain language of the RHA does not limit jurisdiction solely to water which is navigable. Section 403 of the RHA instead brings both a "navigable river" and "other waters of the United States" within the Corps' jurisdiction. 33 U.S.C. § 403 ("it shall not be lawful to build or commence the building of any. . . structures in any . . . navigable river, or *other water of the United States* . . . .") (emphasis added).

"Waters of the United States" include: "All other waters such as *intrastate* lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, *degradation* or *destruction* of which could affect *interstate* or foreign commerce . . . ." *See* 33 C.F.R. § 328.3 (a)(3). The STR, and its corresponding wetlands above the Eagle Mine, collectively constitute a "water of the United States" given the evidence presented by HMC of logging, commercial rafting, boating and fishing located *downstream* on the River. *See* Page ID # 88-89, Dykema Affidavit, RE 5-1; Page ID # 95-96, 98, O' Boyle Affidavit, RE 5-2. Specifically, the degradation or destruction of the headwaters "could affect" the downstream portions of the STR that indisputably have proven utility for interstate commercial uses by virtue of Lake Superior.

These characteristics of the STR therefore independently bring all portions of the River within the purview of the RHA, because a limitation of the Corps' jurisdiction to only navigable waters would render the words "other water of the United States" superfluous. *Cf. TRW Inc. v. Andrews*, 534 U. S. 19, 31 (2001). Accordingly, even if not navigable in fact or law, the source waters of the STR are protected under section 403 because it is unlawful "to build or commence the building of any . . . structure . . . in any . . . other water of the United States."

Kennecott's mining and excavation activities otherwise must be treated as located "in" the STR because there is a direct hydrologic connection between the groundwater and surface water of the STR. Indeed, the STR is essentially a drainage system for the glacial aquifer located near the Eagle Mine. *See* Appendix, Testimony of Daniel W. Wiitala, p. 16; Appendix, Testimony of Robert Douglas Workman, pp. 22-23. Moreover, HMC presented evidence of a very clear loss of groundwater-fed wetlands near the mine as a result of Kennecott's excavation. Page ID # 270-71, 275, Testimony of Paul R. Adamus, Ph. D., RE 9-2. For this additional reason, Kennecott's subsurface mining and excavation requires a permit under the RHA, and the District Court erred by concluding that it did not.

2. Kennecott's excavation and re-deposit of subsurface materials underneath the Salmon Trout River and connected wetlands constitutes "dredge or fill" activity within the meaning of the CWA

Under the CWA, the "Secretary of the Army, acting through the Chief of Engineers" is the federal officer charged with assessing whether to issue a "permit" "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). The Secretary of the Army in turn has delegated responsibility for administering this "section 404" permitting program to respective District Engineers of the Corps. *See* 33 C.F.R. § 325.8 (b). Such activities consequently are permissible only if a person obtains a "dredge and fill" permit authorized by section 404 of the CWA.

Although Section 404 of the CWA refers to discharges into "navigable waters of the United States," common practice is to refer to section 404 jurisdiction in terms of discharges affecting "waters of the United States." *See* 33 C.F.R. § 328.1. This difference in nomenclature reflects a distinction without a difference in this case, because the Corps defines the scope of CWA jurisdiction in a manner that makes CWA jurisdiction coextensive with the RHA "navigable waters" *specifically at issue here*.

For instance, the Corps' CWA regulations mirror RHA regulations by defining jurisdictional waters to include, *inter alia*:

a) "All waters which are currently used, or were used in the past, or may be susceptible to use in interstate . . . commerce . . . ." *See* 33 C.F.R. § 328.3(a)(1).

b) "All other waters such as intrastate lakes, rivers, streams . . ., wetlands, . . ., or natural ponds, the use, degradation or destruction of which could affect interstate . . . commerce. *See* 33 C.F.R. § 328.3(a)(3) (emphasis added).

c) "Tributaries" of interstate waters. *See* 33 C.F.R. § 328.3 (a)(5).

d) "Wetlands adjacent to" jurisdictional waters. *See* 33 C.F.R. § 328.3(a)(7).

Consequently, the Corps has CWA jurisdiction over the STR and corresponding wetlands (which will be altered and otherwise affected by, *inter alia*, Kennecott's excavation, mining, and eventual backfill activities), because the STR has been used in interstate commerce through historic logging, commercial rafting, boating and fishing; could affect other jurisdictional waters if degraded or destroyed; and otherwise is a tributary of Lake Superior.

The wetlands associated with the STR otherwise fall within the Corps' section 404-permitting jurisdiction not only because they collectively are within the ordinary high water mark of the STR (which in itself is a "water of the United States" for the reasons discussed), but because under section 404, wetlands adjacent to a water of the United States are by default jurisdictional regardless of water mark: "When adjacent wetlands [to non-tidal waters] are present, the

jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands." *See* 33 C.F.R. § 328.3(c)(2).

Furthermore, Kennecott's sub-surface discharges to the groundwater of the STR require a CWA permit. The District Court recognized that courts in the Sixth Circuit have held that CWA jurisdiction applies to groundwater when the groundwater has a direct hydrologic connection to surface waters that are waters of the United States. *See* Page ID # 1650, Opinion, RE 48 (citing *Ass'n Concerned Over Res. & Nature, Inc. v. Tenn. Aluminum Processors, Inc.*, 2011 WL 1357690, at *17 (M.D. Tenn. April 11 , 2011)). Inexplicably, the District Court wrongfully concluded HMC failed to demonstrate proof of a hydrologic connection between surface and groundwater under this standard.

As previously mentioned, there is undisputed evidence of a hydrologic connection between the surface water and groundwater of the STR and adjacent wetlands. The impact of groundwater drawdown on the water table of the wetlands, and the capacity of the STR, *ipso facto*, demonstrates such a connection. Page ID # 270-71, 275, Testimony of Paul R. Adamus, Ph. D., RE 9-2. HMC likewise presented evidence of a very clear loss of groundwater-fed wetlands near the mine as a result of Kennecott's excavation. *Id.* at Page ID # 275. HMC also presented evidence that Kennecott's "longhole stope" method of mining will result in the excavation (i.e. "dredge") and redeposit of backfill (i.e. "fill") beneath the

STR and connected wetlands. *See* Page ID # 157-159, Kennecott Mining Permit Application, RE 6-4.

Regardless of depth, Corps responsibility and jurisdiction extend as far as interstate commerce where conduct violates the CWA. Consequently, Kennecott's method of mining falls within the scope of section 404—irrespective that subsurface activities in other context might not implicate CWA jurisdiction.

3. The RHA, CWA, and their implementing regulations provide mandatory duties and "meaningful standards" against which to judge the Corps' inaction

The Corps' failure to administer the RHA and CWA permitting programs related to Kennecott's unauthorized Permit-dependent work constitutes agency "inaction" or action "unlawfully withheld" within the meaning of, and actionable through, the APA. Section 702, 5 United States Code, provides:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or *failed to act* in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

(emphasis added).

Citing *Heckler v. Chaney*, 470 U.S. 821 (1985), the court below nonetheless concluded that it has no power to compel the Corps to act because neither the RHA, nor the CWA, purportedly impose mandatory duties upon the Corps. Page

ID # 1638, 1641, Opinion, RE 48. *Heckler*, however, contemplated a critical distinction between an agency's refusal to exercise *enforcement* authority (which is what the District Court mistakenly believed was at issue here) after jurisdiction has been established, versus an agency's refusal to institute proceedings *at all* based on the agency's belief that it lacks jurisdiction:

> We do not have in this case a *refusal by the agency to institute proceedings* based solely on the belief that it *lacks jurisdiction* . . . . Although we express no opinion on whether such decisions would be unreviewable under § 701(a)(2), we note that in those situations the statute conferring authority on the agency might indicate that such decisions were not "committed to agency discretion."

470 U.S. at 833 n.4 (emphasis added). This is precisely the circumstance present in this case – the Corps is refusing to institute proceedings based solely on the belief that it lacks jurisdiction. The "enforcement" principles discussed in *Heckler*, and applied in the many cases Kennecott and the Federal Defendants improperly relied upon in the District Court, consequently do not provide the proper analytical framework for analyzing the Federal Defendants' failure to act in this case—because the Supreme Court was careful to note that its holding in *Heckler* was not intended to reach factual scenarios like that at issue here.[3]

[3] By concurrence, Justice Brenan reiterated as much. *See* 470 U.S. at 839.

With respect to the Corps, the RHA and CWA both indicate that its permitting duties are not decisions "committed to agency discretion." In fact, the Corps has admitted that if the STR is navigable adjacent to the Eagle Mine, it would *have to* determine if the proposed activities of the project are subject to regulation. *See* Page ID # 379, Affidavit of John Konik, RE 13-1.

The District Court nevertheless cited two cases (*Sierra Club v. Whitman*, 268 F.3d 898 (9th Cir. 2001) and *Harmon Cove Condo. Ass'n, Inc. v. Marsh*, 815 F.2d 949 (3rd Cir. 1987)), which reveal that the District Court's perspective was incorrectly trained on "enforcement" principles not applicable here. The cases merely reflect that courts have concluded that a party *generally* cannot maintain an action under the APA to require a federal agency to engage in enforcement actions, and in those cases the enforcement action would have been pursuant to the actual enforcement sections of the RHA and CWA. Page ID # 1641, Opinion, RE 48.

These cases are inapposite because the agencies in *Whitman* and *Marsh* acknowledged jurisdiction but refused to take enforcement actions with respect to previously *issued* permits. Under those circumstances, the agencies had already performed the mandatory, threshold duties triggered by conduct subject to regulation under the RHA and CWA. *See Whitman*, 268 F.3d at 900; *Marsh*, 815 F.2d at 952. In stark contrast, here, the Corps is refusing to institute proceedings

or do anything at all based solely on the erroneous belief that it lacks jurisdiction that requires permitting.

The plain language of the RHA and CWA place a congressionally defined permitting mandate *on the Corps*, and the only germane principle that should be derived from *Heckler*, is that the Corps simply cannot ignore that mandate. Indeed, although the separate principles articulated in *Heckler* regarding when courts should review enforcement (or more accurately, "nonenforcement," decisions) are analytically inapposite, even if those principles are extended to the present factual context, the RHA, CWA, and their implementing regulations, provide the type of "meaningful standards" discussed in *Heckler,* against which a court can assess whether there is "law to apply" regarding the Corps' permitting duties.

a. *RHA Obligations*

RHA section 403 imposes a plainly stated duty *on the Corps* to issue section 403 permits *before* any person can engage in regulated activity. The section does not operate as a mere directive for the Corps to "enforce" the RHA, because "Enforcement" is covered in an entirely separate section of the RHA. *Compare* 33 U.S.C. § 403 ("Obstruction of navigable waters generally . . ."), *with* 33 U.S.C. § 413 ("Duty of United States attorneys and other Federal officers in enforcement of provisions; arrest of offenders").

More specifically, section 403 operates as a congressional permitting mandate, because it deems regulated conduct unlawful "unless the work has been recommended by the Chief of Engineers and *authorized* by the Secretary of the Army *prior to beginning the same*." *See* 33 U.S.C. § 403 (emphasis added). The Corps' own regulations recognize that "Congress has delegated to the Secretary of the Army . . . the *duty* to authorize or prohibit certain work or structures in navigable waters of the United States . . . ." 33 C.F.R. § 322.3(c)(2) (emphasis added).

Federal agencies consequently have no discretion whether to fulfill functions such as this, which Congress has assigned them—and case authorities providing as much provide the proper analytical framework for analyzing the Corps' threshold inaction here. For instance, in *Estate of Smith v. Heckler*, a court considered whether the Secretary of Health and Human Services could outright disregard a congressional mandate to promulgate nursing home regulations. 747 F.2d 583, 585 (10th Cir. 1984). The Tenth Circuit properly held the Secretary could not: "The statute vests broad discretion in the Secretary as to how that duty is best accomplished. . . . . This is not a question of controlling the Secretary's discretion because the Secretary *has failed to discharge her statutory duty altogether*. 747 F.2d at 591 (emphasis added).

Similarly, HMC did not request that the District Court direct the Federal Defendants "how" to act whenever they actually fulfill their congressionally mandated permitting and regulatory responsibilities—nor did HMC ask the District Court to take a position on whether the Corps should issue or deny the required permits or pre-determine that the necessary NEPA, ESA, and NHPA evaluations compel that the permits should be granted or denied. HMC merely asked the District Court to instruct the Corps that it cannot outright ignore its congressionally mandated responsibilities to administer the RHA and CWA permitting programs *when the facts of this case prove the Corps' jurisdiction has been triggered*, and instruct all Federal Defendants that they cannot ignore their corresponding obligations under NEPA, ESA, and the NHPA.

This dispute consequently has nothing to do with "how" the Federal Defendants should act. It relates solely to Federal Defendants' "fail[ure] to discharge [their] statutory duty altogether."

Even if this Court were to import principles from *Heckler*, which were intended only to gauge the reviewability of enforcement decisions (not threshold issues regarding an agency's refusal to act upon its jurisdiction), the Corps' own regulations provide exceedingly precise guidance regarding the fact that the Corps'

permitting duties indeed have been triggered.[4] For instance, the regulations clarify that "work" or a "structure" *in* a "navigable water" is regulated; work or a structure *under* a navigable water is regulated; and any other work or structure, *wherever located* in proximity to a navigable water, is regulated if it affects the "capacity" of the navigable water. *See* 33 C.F.R. § 322.3 (a).

The terms "work," "structure" and "navigable water" otherwise are expressly defined. *See* 33 C.F.R. § 322.2(b). Under subpart 322.3(a) of 33 C.F.R., the Corps further mandates that "[Department of the Army ("DA")] permits are *required* under [the RHA] for structures and/or work in or affecting navigable waters of the United States . . . ." (emphasis added). The Corps' regulations otherwise provide the above-discussed definitions and tests for "navigable waters" and "other waters of the United States."

Given the precise guidance provided in the Corps' regulations, assuming *arguendo* the *Heckler* principles can be extended to an analysis of an agency's decision not to act based on the mistaken belief it lacks jurisdiction, or even assuming the Federal Defendants' *permitting* and regulatory functions somehow are within their *enforcement* discretion, the "rebuttable presumption" against judicial review is overcome here. *Cf. Heckler*, 470 US at 833-34 ("[T]he

[4] This Court has held that an agency's own regulations may provide the "meaningful standards" and "law to apply" by which a court could review the agency's action or inaction. *See, e.g., Diebold v. United States*, 947 F.2d 787, 810 (6th Cir. 1991).

presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers.").

The District Court held otherwise, but in so doing, actually contradicted its proffered rationale. The District Court discussed in detail the Corps' regulations and purported to analyze the record evidence that HMC has propounded to satisfy the regulations. Page ID # 1634-40, Opinion, RE 48. That the regulations provided the District Court such guidance, in itself, illustrates that there are meaningful standards by which the District Court can assess whether the Corps acted beyond its discretion to, at minimum, comply with its own *permitting* regulations.

The District Court confused this issue because it improperly engrafted a secondary requirement on the "law to apply" standard, by suggesting that even if the Corps' regulations provided meaningful guidance regarding when its permitting jurisdiction is invoked, the regulations do not *also* provide sufficient guidance regarding when the Corps should enforce violations of its regulations. *See* Page ID # 1640, Opinion, Doc. 48. This is not the proper standard of review because it overlays *Heckler* enforcement concepts on more fundamental jurisdictional concepts, and no court has construed the "law to apply" standard in this manner.

Once the District Court determined (or should have determined based on the clarity of the Corps' regulations) that it had sufficiently meaningful guidance to assess the Corps' failure to implement the RHA permitting process, the APA standard for court oversight of agency discretion was satisfied. *Heckler* rejected the implication that *yet another* analysis should be undertaken to discern whether there is "law to apply" to direct a court regarding what might be appropriate to deal with the implications of the agency's erroneous decision not to act. This case provides a paradigmatic example of why no such secondary analysis is necessary, because once it is proven that Kennecott's activities invoke the Corps' RHA (and CWA) jurisdiction, the relief HMC seeks would not necessitate that the District Court compel the Corps to punish Kennecott's unpermitted construction through enforcement remedies provided for in entirely separate sections of the RHA and implementing regulations—though even under *Heckler* that may be appropriate. A permissible remedy (which HMC expressly prayed for) instead is equitable relief to enjoin Kennecott's construction until it either voluntarily initiates the permitting process, or the Corps responds to its jurisdictional trigger by directing Kennecott to cease construction while the Corps engages in permitting proceedings.

In either event, the District Court never would have to intrude upon the purportedly sacrosanct province of the Corps' enforcement powers. The District

Court consequently abused its discretion by failing to conclude that HMC has proven actionable RHA violations, which entitle HMC to prevail on the merits.

b. *CWA Obligations*

Under the CWA, the "Secretary of the Army, acting through the Chief of Engineers" is the federal officer charged with assessing whether to issue a "permit" "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a) (emphasis added). Section 404 does not make the permitting program under the section permissive. Although the section provides the "Secretary [of the Army] may issue permits . . .," *see* 33 U.S.C. § 1344(a), this language cannot be read to give the Corps license to implement the permitting program at its whim. The language instead conveys that simply because a person applies for a permit does not mean the Corps "must" or "shall" issue the permit.

As the Fourth Circuit made clear in *National Wildlife Federation v. Hanson*, "the Corps has the nondiscretionary duty to regulate dredged or fill material." 859 F. 2d 313, 16 (4th Cir. 1988). In *Hanson*, the National Wildlife Federation and several other environmental groups (collectively "NWF") challenged the Corps' determination that two tracts of land in North Carolina were not wetlands under section 404 of the CWA. *Id*. at 315. NWF also alleged that the Corps illegally condoned the unpermitted discharge of dredged and fill material. *Id*. The district

court concluded that the federal defendants failed to perform their statutory duties and enjoined any dredge and filling of the tracts until a proper determination was made and the necessary permits were obtained. *Id*.

On appeal, the Fourth Circuit affirmed:

> It is quite clear that both the Corps and the EPA are responsible for the issuance of permits under the CWA and enforcement of their terms. The Corps has the *nondiscretionary duty* to regulate dredged or fill material, and to fulfill that duty it must make reasoned wetlands determinations. The Corps has a *mandatory duty* to ascertain the relevant facts, correctly construe the applicable statutes and regulations, and properly apply the law to the facts . . . .

Id. at 315-16 (emphasis added).

Here, as in *Hanson*, the Federal Defendants are condoning unpermitted and illegal activities despite congressional mandates. Therefore, contrary to the District Court's holding, the court below has the authority to enjoin excavation under the STR and any dredge and fill activities in wetlands associated with the River because both the RHA and CWA impose mandatory, non-discretionary permitting duties upon the Corps.

4. The Corps cannot evade judicial review by labeling its own regulations as discretionary

To further support the conclusion that the Corps has no mandatory permitting or enforcement duties, the District Court cited a enforcement-specific regulation promulgated by the Corps, which deems *its own* enforcement powers

discretionary. Specifically, the lower court cited 33 C.F.R. § 326.1, which provides "nothing contained in this Part [326 Enforcement] shall establish a non-discretionary duty on the part of district engineers nor shall deviation from these procedures give rise to a private right of action against a district engineer." Page ID # 1640, Opinion, RE 48.

No weight should be given to the Corps' attempt to elude the reach of judicial review by conflating or self-labeling its mandatory permitting and regulatory responsibilities as discretionary. First, HMC has not pleaded nor contended any of the regulations under the "Enforcement" section are bases for HMC's claims.

With respect to the RHA, the regulations found at 33 C.F.R., Part 322 and 33 C.F.R., Part 329 provide the substantive criteria that compel the conclusion Kennecott's activities fall within the Corps' RHA jurisdiction. *See* Section XI(A)(3)(a) *supra*. The Corps promulgated those regulations under discrete "Parts" of its regulations respectively titled "Permits for Structures or Work in or Affecting Navigable Waters of the United States," and "Definition of Navigable Waters of the United States."

As the Federal Defendants concede, *see* Page ID # 345, Federal Defendants' Memorandum in Opposition to Plaintiff's Motion for a Preliminary Injunction, Doc.# 13, in an entirely separate "Part" of the Corps' regulations, the Corps

promulgated what it, *itself*, characterized as its "Enforcement" powers. Only as to those "Enforcement" regulations has the Corps attempted to suggest it has discretion: "*This* Part prescribes enforcement policies . . . and procedures applicable to activities performed without required Department of the Army permits . . . . Nothing contained in *this Part* shall establish a non-discretionary duty . . . ." 33 C.F.R. § 326.1 (emphasis added).

None of the regulations HMC relies upon contain an equivalent disclaimer. Accordingly, assuming it was legitimate for the Corps to include the disclaimer in Part 326, HMC has not relied on any of the provisions in *that* Part. The structure of the Corps' own regulations, therefore, belie any suggestion HMC seeks to compel the exercise of "enforcement" powers. HMC instead seeks to hold the Corps accountable for compliance with its own permitting regulations and statutory mandates.

The Corps' disclaimer, otherwise, is not legitimate for reasons that intersect any imprudent attempt to engraft the *Heckler* enforcement principles into a dynamic that in substance relates to an agency's obligation to fulfill a non-discretionary permitting mandate. The Sixth Circuit, in a slightly different context, has criticized analogous attempts by agencies to circumscribe judicial review: "*Heckler* . . . does not support a conclusion that an *agency can strip* a court of jurisdiction to review its own actions by enacting regulations that deem these

actions discretionary." *Gor v. Holder*, 607 F.3d 180, 188 (6th Cir. 2010) (emphasis added).

Courts have uniformly recognized such authority would fundamentally alter the constitutional checks and balances put in place by the separation of powers doctrine. *See, e.g.*, *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004) (holding that under the separation of powers doctrine, only Congress can expand or contract the subject-matter jurisdiction of a lower Article III court). Therefore, the court erred in its reliance on 33 C.F.R. § 326.1, not only because "enforcement" powers are not invoked by HMC, but also because the disclaimer of any non-discretionary duty originated from the Corps and not Congress.

5. The Corps has not and cannot delegate its CWA § 404 permitting authority over the STR to the State of Michigan

The district court erred by concluding HMC does not have a likelihood of success on the merits because the Federal Defendants' permitting authority has been transferred to the State of Michigan. First, under the Memorandum of Agreement (MOA) between the State of Michigan and the Corps, federal agencies *must* review large projects like the Eagle Mine. Second, the STR is beyond the scope of waters that are subject to delegation under the CWA. Therefore, it was error for the district court to conclude that HMC does not have a likelihood of success on the merits because the Corps' permitting authority has been transferred to the State of Michigan.

a. *The Corps has not delegated its CWA permitting authority to the State of Michigan in this case because of the characteristics of the Eagle Mine*

Michigan's delegation of authority under section 404 is addressed in 40 C.F.R. § 233.70, and section 233.70(c) specifically references an MOA between the Corps and Michigan Department of Natural Resources establishing the jurisdiction of each. No one disputes this document governs the specifics of the section 404 delegation, and according to the terms of the MOA, projects like the Eagle Mine have characteristics that foreclose, or otherwise are too expansive in scope to be subject to, the purported section 404 delegation.

The MDEQ and Corps have a "Joint Permit Application Training Manual," which specifies the characteristics of projects that will be deemed to "impact critical environmental areas, or which involve large quantities of fill," and thus remain under federal jurisdiction. *See* Page ID # 1617, MDEQ/USACE Joint Permit Application Training Manual, RE 43-4. Under this guidance, several characteristics of the Eagle Mine project require federal, rather than state, permitting. They include that the Eagle Mine project will involve discharges of dredge and fill material greater than 10,000 cubic yards; that the project involves designated habitat of threatened or endangered species or at minimum involves discharges that may affect listed species, and that the site may implicate National Historic Preservation Act protections. *Id*. at 1616-17.

Furthermore, the Michigan Department of Environmental Quality states as follows on its website:

> The department's 1983 Memorandum of Agreement with USEPA Region 5 outlines the procedures to be followed and program administration. This Agreement waives federal review of the vast majority of applications in areas under Michigan's 404 jurisdiction. *However, federal agencies must review projects which impact critical environmental areas, or which involve large quantities of fill.*

See Page ID # 1595-96, Plaintiff's Preliminary Injunction Post-Hearing Brief, Doc.# 42; *see also* http://michigan.gov/deq/0,4561,7-135-3313_3687-10801--,00.html (emphasis added). The District Court ignored this evidence.

The Corps consequently has not made an effective delegation of CWA authority that can excuse its failure to review the Eagle Mine project.

b. *The CWA precludes delegation of regulatory authority over the STR*

The CWA allows delegations only as to waters that *are not* "presently used, or are *susceptible to use* in their natural condition or by reasonable improvement as a means to transport interstate . . . commerce . . . ." 33 U.S.C. § 1344(g) (emphasis added). For the same reasons the portion of the STR and wetlands above the Eagle Mine are jurisdictional under the RHA and CWA for their interstate commercial qualities, those waters are beyond the scope of waters that are subject to state delegation.

The District Court misconstrued this issue and concluded HMC does not have a likelihood of success on the merits because: "Plaintiff has not presented any persuasive evidence that the waters of the STR *in the vicinity of the Eagle Mine* are presently used, or are susceptible to use, in their natural condition or by reasonable improvement as a means to transport interstate commerce." Page ID # 1643, Opinion, RE 48, (emphasis added). Such a showing is not required.

In *Economy Light & Power*, the Supreme Court held a waterway need not be continuously navigable; it is navigable even if it has "occasional natural obstructions or portages" and even if it is not navigable "at all seasons . . . or at all stages of the water." *Economy Light & Power Co. v. U.S.*, 256 U.S. 113, 122 (1921). Evidence presented by HMC established that there was logging near the Eagle Mine and that logs were transported on the STR. *See* Page ID # 98, O' Boyle Affidavit, RE 5-2. HMC also presented evidence of a commercial rafting operation, boating, canoeing, kayaking, and fishing on the STR. The commercial rafting begins a mere one mile downstream of the Eagle Mine. *Id.*; Page ID # 1428, Affidavit of Mary O' Boyle, II, RE 35-2; Page ID # 88, Dykema Affidavit, RE 5-1; Page ID #128, Affidavit of Philip Power, RE 6-2.

The District Court erred by suggesting HMC must present evidence of navigability-in-fact in what the court ostensibly considers the immediate vicinity of the Eagle Mine. Based on the historic and present commercial use of the STR,

both upstream and downstream of the Eagle Mine, the River is presently used and susceptible to use to transport interstate commerce. The portion of the STR and wetlands above the Eagle Mine are beyond the scope of waters that are subject to state delegation.

6. The Defendants are violating NEPA, NHPA, and the ESA

The District Court did not evaluate HMC's NEPA, ESA, and NHPA claims because the court concluded that such claims were derivative of its claims under the RHA and CWA, and HMC did not have a strong likelihood of success on its claims under these statutes. *See* Page ID # 1651, Opinion, RE 48. HMC does not disagree that the NEPA, ESA, and NHPA claims are derivative, but as demonstrated above, HMC does have a likelihood of success on its RHA and CWA claims. Therefore, an analysis of NEPA, NHPA, and the ESA is required, because all of the statutes mandate responsible federal agencies must undertake appropriate evaluations *before* allowing a private party to engage in regulated conduct. *See* 40 C.F.R. § 1501.1(b).

Although the Corps is the responsible agency related to Kennecott's Permit-dependent work, the Corps has not fulfilled any of its corresponding responsibilities under the other statutes, nor have the collective Federal Defendants fulfilled their responsibilities.

a. *NEPA Violations*

NEPA mandates that federal agencies must include in every recommendation for, or report on, "major federal actions" that will significantly affect the quality of the human environment, a detailed statement on: (1) the environmental impact of the proposed action, (2) the adverse environmental effects which cannot be avoided should the proposal be implemented, (3) alternatives to the proposed action, (4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (5) any irreversible and irretrievable commitment of resources which would be involved in the proposed action should it be implemented. *See* 42 U.S.C. § 4332 (C).

The White House Council on Environmental Quality ("CEQ") has promulgated regulations implementing NEPA (found at 40 C.F.R., Part 1500.1 - 1508.28), and those regulations unequivocally provide that they operate to "tell federal agencies what they *must* do to comply with the procedures and achieve the goals of NEPA." 40 C.F.R. § 1500.1(a) (emphasis added). The regulations further specify that "major federal action" mandating a NEPA evaluation are those "actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18.

Federal permits, such as RHA and CWA permits the Corps is responsible for issuing, are "major federal action" that require compliance with NEPA, because such "actions" include those "new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, *regulated*, or *approved* by federal agencies . . . ." 40 C.F.R. § 1508.18(a) (emphasis added). Additionally, 40 C.F.R. § 1501.1(b) mandates: "NEPA procedures *must* insure that environmental information is available to public officials and citizens *before* decisions are made and *before* actions are taken." (emphasis added).[5]

Indeed, even if "it is unclear whether a federal action will significantly affect the quality of the environment, the agency [still] should prepare an [initial] environmental assessment . . ." within the meaning of NEPA. *See Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 991 (6th Cir. 2011).

In the District Court, no party disputed that if the Corps' RHA or CWA jurisdiction has been triggered, then NEPA evaluations are required before Kennecott's ongoing work could be deemed permissible. No such evaluation has occurred.

Kennecott instead participated in *only* state administrative proceedings, but those proceedings *cannot* supplant or substitute for the NEPA process.

[5] In fact, 40 C.F.R. § 1506.1 prevents any action that would "have an adverse environmental impact" or "limit the choice of reasonable alternatives" prior to the issuance of a permit. Each prohibition has been violated by Kennecott's construction.

Kennecott's relevant state permit reflects as much. Page ID # 230, State of Michigan Mining Permit, RE 8-4. Moreover, Congress expressly legislated that even in narrow circumstances when state-based actors are authorized to prepare environmental materials that correspond with NEPA, responsible *federal* agencies still must: (a) furnish guidance and participate in such preparation, (b) *independently* evaluate such material prior to approval and adoption, and (c) retain responsibility for the scope, objectivity, and content of the material and any other responsibilities under NEPA. *See* 42 U.S.C. § 4332 (D). Here, the Corps has not played any role, at the state, federal, or any other level, with an evaluation mandated by NEPA.

b. *NHPA Violations*

The NHPA, like NEPA, requires responsible federal agencies to conduct a required evaluation *before* approving regulated conduct:

> the head of any Federal department or independent agency having authority to *license* any undertaking shall . . . *prior to the issuance of any license* . . . 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*.

16 U.S.C. § 470f (emphasis added). Indeed, a NHPA evaluation is often incorporated into the NEPA process. *See* 36 C.F.R. §§ 800.2(a)(4), 800.3(b), 800.8.

The District Court did not reach the issue of the NHPA violations, because it erroneously concluded the Corps purportedly had no permitting obligations under the present facts. It consequently was error for the District Court to discount HMC's likelihood of success on its NHPA claim.

c. *ESA Violations*

Various endangered species have been identified in the vicinity of the Eagle Mine. *See* Page ID # 297-302, EPA Endangered Species Act Informal Section 7 Consultation Letter, RE 9-4; Page ID # 286, Testimony of Donald Tilton, Ph. D., RE 9-3. The ESA requires a "procedural consultation" when any agency proposes an action that *may* affect an endangered species. *See* 16 U.S.C. § 1536; 50 C.F.R. § 402.12(b)(2); 50 C.F.R. § 402.14(a). As part of this process, an agency, such as the Corps, must consult with the FWS, if it has reason to believe an endangered species *may* be present in the area of a proposed action. *See* 16 U.S.C. § 1536(a)(3) and 1536(c)(1).

With respect to the Eagle Mine, the United States Environmental Protection Agency ("EPA") and FWS did engage in an ESA consultation related to *narrow* components of the Eagle Mine known as "underground injection wells." *See* Page ID # 297-302, EPA Endangered Species Act Informal Section 7 Consultation Letter, RE 9-4. In the District Court, even the Federal Defendants agreed *that* prior ESA consultation has no bearing on any ESA obligations that would be triggered if

RHA and CWA permits are required for the far broader Permit-dependent work at issue here. *See* Page ID # 362-366, Federal Defendants' Memorandum in Opposition to Plaintiff's Motion for a Preliminary Injunction, RE 13.

The District Court, once again, did not reach the ESA issue because of its rulings on HMC's purported lack of a likelihood of success on its RHA and CWA claims. This too was error.

HMC consequently has raised substantial questions about the inaction by the Federal Defendants. Under a proper application of the law, and factual record (including facts acknowledged by the District Court), HMC is likely to prevail on its claim that Kennecott's activities trigger the Federal Defendants' yet-to-be fulfilled jurisdictional obligations.

B. The District Court Abused Its Discretion by Ruling against HMC on the Remaining Prerequisites for Injunctive Relief

1. HMC will be immediately and irreparably harmed in the absence of an injunction

Courts consistently have held that federal agencies' failures to conduct required environmental and cultural evaluations before allowing a private party to engage in regulated conduct infringes upon plaintiffs' "procedural" rights, and that infringement is, in itself, "irreparable harm." *See, e.g., Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 23 (2008); *Sierra Club v. Marsh*, 872

F.2d 497, 499-504 (1st Cir. 1989) (Breyer, J.); *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1124-25 (9th Cir. 2005).

HMC's procedural rights are not, however, the only interests jeopardized by Kennecott's unauthorized subsurface construction activities. No one can dispute that the construction will, by design, lead to environmental impacts that at minimum alter the ecology of the STR watershed (contrary to its natural state), by lowering the water table in the STR and adjacent wetlands; reducing the reach of the River and wetlands; reducing the flow of the River; altering the temperature of the River; excavating and re-depositing materials in the subsurface portions of the River's bed; and potentially causing a catastrophic collapse of the River.

If the Federal Defendants and Kennecott are not subject to an injunction and other appropriate equitable relief immediately; not only will HMC and its members be denied (irreversibly) their procedural rights under NEPA, the NHPA, and ESA; there will be no meaningful way to undo the environmental modifications that Kennecott already has begun to cause.

The District Court did not disagree that any substantive violation of the RHA or CWA would constitute a procedural harm, but instead leveraged its finding that there purportedly were no such violations, against the procedural implications of the Federal Defendants' inaction. *See* Page ID # 1654, Opinion,

RE 48. This in itself is reversible error given the preceding discussion demonstrates such violations.

The District Court otherwise held it thought it unlikely that environmental degradation, beyond the procedural harms, will irreparably harm HMC, given the state administrative proceedings Kennecott previously completed. *See id*. This conclusion cannot be grounds to disregard procedural harm, because expressly legislated into NEPA, and at minimum implicit in the ESA and NHPA, is that federal agencies cannot abdicate their procedural duties (which protect persons like HMC's corresponding procedural rights) to complete required pre-activity evaluations.

Indeed, no matter how thorough the Federal Defendants or Kennecott might contend the separate state-review may have been, it was legal error for the District Court to suggest the state-review can mitigate against irreparable harm that arises by virtue of federal statutes that specifically prohibit the substitution of state proceedings to satisfy federal procedures. Neither the procedural nor environmental harms caused by Kennecott's ongoing construction should have been disregarded by the District Court.

2. The balance of harms weighs in favor of injunctive relief

HMC seeks conventional injunctive relief against only the Federal Defendants, and federal agencies hardly can claim undue hardship in response to a

directive to perform governmental functions expressly vested in them by Congress. Indeed, the Federal Defendants conceded as much. Page ID # 369, Federal Defendants' Memorandum in Opposition to Plaintiff's Motion for a Preliminary Injunction, RE 13 ("There is a considerable public interest in having federal statutes applied as enacted by Congress.").

As to equitable relief against Kennecott, the basis for that relief is the federal "All Writs Act" or a federal courts "inherent powers." Equitable relief of this kind is discrete from conventional injunctive relief and not contingent upon conventional considerations such as balance of harms. *See, e.g., Burr v. Blair*, 470 F.3d 1019, 1031 n.32 (11th Cir. 2006); *Zenith Elecs. Corp. v. U.S.*, 884 F.2d 556, 562-63 (Fed. Cir. 1989).

The District Court correctly acknowledged as much, but to the event this Court considers any purported harm Kennecott may claim to suffer, that harm almost certainly will be limited to financial loss, and Courts routinely have held such loss does not outweigh permanent environmental damage and degradation caused by inadequate federal oversight. *See, e.g., Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 166 (1978).

Moreover, Kennecott's harm should be considered self-inflicted because during Kennecott's planning process, it considered whether it needed a RHA or CWA permit, but decided it did not. *Cf. Davis v. Mineta*, 302 F.3d 1104, 1116

(10th Cir. 2002) (finding the balance of harm justified injunctive relief because the "entities involved in this case have 'jumped the gun' on the environmental issues by entering into contractual obligations that anticipated a pro forma result. In this sense, the . . . defendants are largely responsible for their own harm."); *Pappan Enters., Inc. v. Hardee's Food Sys., Inc.*, 143 F.3d 800, 806 (3d Cir. 1998) (holding that "[t]he self-inflicted nature of [defendant's] harm . . . weighs in favor of granting preliminary injunctive relief").

Equitable concepts such as laches are also no defense for Kennecott's illegal conduct. All of HMC's federal challenges to the Eagle Mine ripened when Kennecott began construction on its *sub-surface* facilities. Moreover, Kennecott's conduct either constitutes continuing violations of the RHA and CWA, or violations that violate those laws anew each day. In either event, neither laches nor the statute of limitations bar HMC's claims. *See Environmental Defense Fund v. Tennessee Val. Auth.*, 468 F.2d 1164, 1182-83 (6th Cir. 1972); *American Beverage Ass'n v. Snyder*, 793 F. Supp. 2d 1022, 1028 (W.D. Mich. 2011).

3. The public interest will be served by injunctive relief

The public interest will be best served by injunctive relief, because at its core, this case implicates federal agencies' obligations to fulfill their legitimate governmental functions in the interest of protecting the public welfare. *Cf. Sierra Club*, 645 F.3d at 997 ("just as important as the public interest in potential

economic gains is 'the public's confidence that its government agencies act independently, thoroughly, and transparently when reviewing permit applications."). The District Court acknowledged as much by recognizing: "The public interest might outweigh economic concerns if Plaintiff was likely to succeed on the merits of its underlying claim." Page ID # 1657, Opinion, RE 48.

It nonetheless held the public interest in economic gain weighed against injunctive relief given the District Court's rulings that there purportedly were no federal statutory violations to balance against such interest. Because that ruling was in error, the District Court's public interest finding was in error.

XII. CONCLUSION

In light of the record and controlling precedent, HMC respectfully requests that this Court enter injunctive relief and remand this matter for further proceedings consistent with the Court's ruling. In the alternative, HMC requests that the Court reverse based on the District Court's erroneous legal conclusions and factual findings such that the District Court can evaluate the necessity for injunctive relief based on the proper legal criteria and undisputed factual record.

December 3, 2012

Respectfully submitted,

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XIII. CERTIFICATE OF COMPLIANCE

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Huron Mountain Club

Dated: December 3, 2012

XIV. CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2012, I electronically re-submitted a corrected version of the foregoing document with the clerk of the court for the United States Court of Appeals for the Sixth Circuit using the electronic case files system of the Court. The electronic case files system sent a "Notice of Electronic Filing" to the individuals specified below, who by rule have consented to accept the Notice as service of this document by electronic means:

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