Civil Action No. 24-09876

In the

United States Court of Appeals for the Twelfth Circuit

Swampland Preservation Association,

Appellant and Cross-Appellee.

v.

U.S. Army Corps of Engineers, an agency of the Department of Defense, **General Lucy Peabody**, in her official capacity as Chief of Engineers and Commanding General of the United States Army Corps of Engineers, and **Scott Zink**, in his official capacity as Division Commander of the United States Army Corp of Engineers, Utanidi Division

Appellees and Cross-Appellants.

On Appeal from the District Court for the Eastern District of North Kingston, Dist. Ct. Consolidated Case Nos. 2424 and 2428

BRIEF FOR THE APPELLEES

Team 7

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases8

United States Courts of Appeal Cases

United States District Court Cases

Federal Rules of Appellate Procedure

JURISDICTIONAL STATEMENT

This action arises under 28 U.S.C § 1291 granting federal courts of appeal review of federal district court decisions. 28 U.S.C § 1291. This action was properly filed in the District Court as the causes of action arise under federal law, specifically under the Clean Water Act ("CWA") and the National Environmental Protection Act ("NEPA"). 28 U.S.C. § 1331; 33 U.S.C. §1251 et seq.; 42 U.S.C. § 4321 et seq. The appeal is timely as the District Court ruled on summary judgment on July 15, 2024, and this Court ordered appellate review on August 9, 2024, falling within the thirty-day requirement to file appeal. *Swampland Pres. Ass'n v. U.S. Army Corps of Eng'rs*, No. 2424, 2428, slip op. at 19 (D.N. Kingston Jul. 15, 2024); Fed. R. App. P. 4(a)(1)(A). The United States District Court for the Eastern District of North Kensington granted partial summary judgment for the United States Army Corps of Engineers ("USACE") and partial summary judgment for Swampland Preservation Association ("SPA"). *Swampland Pres. Ass'n*, slip op. at 19. The District Court entered a final judgment ripe for appellate review. Fed. R. App. P. 28(a)(4)(A).

STATEMENT OF ISSUES PRESENTED

1. What is this Court's duty in reviewing agency decisions that result from a clear congressional mandate after *Loper Bright*?

2. Can the USACE's jurisdictional determination under the CWA be considered arbitrary, capricious, or not in accordance with the law when the Thicket Depressions do not have any continuous water flow?

3. Was the USACE permitted under NEPA to consider the environmental impacts of the KCT Line on the Thicket Depressions when those impacts were not within USACE's statutory purview?

4. Was the USACE permitted under NEPA to consider the environmental impacts of mining and disposing of hazardous materials needed for the proposed Mega Solar Array, the land use and habitat loss from the proposed Mega Solar Array, and the emissions from transporting imported modules from China that would be used in the Mega Solar Array?

5. Were considerations of climate change and environmental justice in the environmental impact statement impermissible despite Executive Orders and federal regulations counseling their inclusion?

6. Do the Phase 2 Rules violate the Major Questions Doctrine when they are part of the Council on Environmental Quality's congressionally mandated responsibilities under NEPA and do not alter NEPA's statutory scheme?

STATEMENT OF CASE

This case arises from an appeal filed by the SPA challenging the District Court's grant of partial summary judgment to the USACE and a cross appeal filed by the USACE challenging the District Court's grant of partial summary judgment to the SPA. *Swampland Pres. Ass'n v. USACE*, slip op. at 3-4. The dispute arises over the USACE's determinations under the CWA and NEPA regarding the proposed KCT Line. *Id.* at 4.

I. Statement of Facts

The Kingston Cross Transmission Line Project ("KCT Line") is a transmission line designed to carry electricity from the Mega Solar Array, a proposed power station, in North Kingston to the mid-Atlantic coast. *Id.* at 4. NKA, a regional transmission organization, determined that there is a public need for the transfer of electricity. *Id.* Not only is the line needed, but the line also reduces greenhouse gas emissions by replacing coal or gas use with electricity. *Id.* at 8. Mountain Power Gas & Electric ("Mountain PG&E") proposed the KCT Line, and Mega Solar LLC ("Mega Solar") proposed the Mega Solar Array. *Id.* at 4. Mega Solar contracted with TrikoSolar, a Chinese manufacturer, to supply the energy modules for construction of the Mega Solar Array. *Id.* Mega Solar did not provide the logistics regarding the transportation of these modules, and the agencies did not request this information during the Environmental Impact Statement ("EIS") process. *Id.* If the KCT Line is not built, then the Mega Solar Array will be significantly diminished or cannot be constructed. *Id.*

The KCT Line's right-of-way would run through Thicket Swamp in North Kingston and across the Utanidi River. *Id.* at 5. The KCT Line's right-of-way includes depressional wetlands, but these wetlands are not federally owned. *Id.* Rather, the wetlands are only connected to federal land by being upstream of the Utanidi Water Basin. *Id.* As such, Mountain PG&E requested an

Approved Jurisdictional Determination ("AJD") from the USACE to determine if the KCT Line would pass through jurisdictional waters under the CWA. *Id.* The USACE conducted two site visits in August 2022 and July 2023 and reviewed the groundwater evaluation provided by Mountain PG&E. *Id.* at 6.

The evaluation consisted of the seven wetlands that the KCT Line would cross. *Id.* USACE discovered that four of the wetlands consisted of swales, defined as holding no flowing water, and therefore, lacked any "continuous surface connection" to jurisdictional waters. *Id.* They found that the other three wetlands lacked any continuous flow in their drainage paths that run to jurisdictional waters. *Id.* The USACE discovered dry surface ground between four of the depressions, as well as no flowing water within the drainage channel of the other three depressions to any jurisdictional waters. *Id.* at 6-7. An expert report indicated that there was a wet surface connection from four of the depressions to tributaries for "part of the year." *Id.* at 7. As a result of the lack of continuous flow, the USACE determined the Thicket Depressions are outside of CWA jurisdiction. *Id.* at 6.

The USACE found that "the Final EIS included all considerations required under both existing and the soon-to-be-finalized draft Phase 2 rules." *Id.* at 7. Further, the USACE considered three alternatives as well as a "No Action" alternative. *Id.* Under Alternative #1, the KCT Line would pass through rural farmland and near the City of Buckington before crossing the Utanidi river. *Id.* at 8. Under Alternative #2, the KCT Line would pass through the Thicket Swamp and cross the Utanidi river. *Id.* Under Alternative #3, the KCT Line would pass through the Bullfrog National Wildlife Refuge and the Utanidi National Forest and cross the Utanidi river. *Id.*

The agency considered Alternative #1 by evaluating the air pollution effect on the City of Buckington, which they concluded was an environmental justice community. *Id.* Freed slaves founded Buckington after the Civil War, and the city "has a population that is nearly 70% Black and has experienced some of the worst air and water pollution of anywhere in North Kingston." *Id.* The agency further considered Alternative #3 to determine the effects on wildlife living on the lands within the agency's control—the Bullfrog National Wildlife Refuge. *Id.* For Alternative #3, the USACE considered in its evaluation the environmental impacts over which they had jurisdiction. *Id.* Under the No Action alternative, the USACE concluded the route would not have any impact on emissions, frustrating the purpose of the project. *Id.* The USACE finalized the EIS and selected Alternative #2 for the KCT Line as the best route to protect the environment. *Id.* at 8-9.

II. Procedural History

Swampland Preservation Association ("SPA") filed its first action against the USACE challenging its determination under the AJD that the swamplands through which the KCT Line would run are not jurisdictional waters under the CWA. *Id.* at 3. SPA filed its second action against the USACE challenging its Final EIS and approval for crossing the Utanidi River. *Id.* The USACE moved for summary judgment on all claims and the SPA filed a cross-motion for summary judgment. *Id.*

The District Court granted partial summary judgment for the USACE—holding that the AJD was not arbitrary and capricious, the USACE need not consider the environmental impacts on the Thicket Depressions in its NEPA review, the USACE properly weighed climate change impacts, and the EIS did not need to consider the environmental impacts of the Mega Solar Array Panels. *Id.*

The District Court granted partial summary judgment for SPA—holding that the USACE should have considered in the EIS and its ROD the environmental impacts of the Mega Solar Array and the import of PV panels, the USACE could not consider environmental justice concerns, and NEPA remains a substantive statute. *Id.* at 4.

III. Rulings Presented for Review

The matter before this Court addresses SPA's appeal of the grant of partial summary judgment to the USACE and the USACE's appeal of the grant of partial summary judgment to SPA. *Id.*

SUMMARY OF ARGUMENT

The USACE's findings under the CWA and NEPA were neither arbitrary nor capricious. Under the Administrative Procedure Act ("APA"), agency actions are not arbitrary and capricious provided the agency considered relevant data and provided a reasonable explanation for its decisions. The burden to prove that the USACE's decision is arbitrary or capricious rests with the Appellants, who must demonstrate that the agency's action lacks a rational basis or is inconsistent with legal standards.

The USACE's decision not to classify certain areas of the Thicket Swamp as "Waters of the United States" ("WOTUS") adheres to legal and procedural standards under the CWA. The USACE's expertise in regulating WOTUS requires this Court to give considerable deference to its determinations. Further, the USACE's AJD is not arbitrary and capricious because the decision is supported by substantial evidence, and their conclusion that the Thicket Depressions are not WOTUS is consistent with statutory history, Supreme Court precedent, and constitutional safeguards.

The USACE's decision not to address the environmental impacts of the KCT Line on the Thicket Depressions is consistent with NEPA. While NEPA necessitates an assessment of foreseeable impacts, it does not compel agencies to address issues outside their jurisdiction. Because the Thicket Depressions are outside of the USACE's statutory purview, it was neither arbitrary nor capricious for the USACE to exclude their consideration from the EIS. Similarly, it was neither arbitrary nor capricious for the USACE to exclude from consideration the environmental impacts of the construction of the Mega Solar Array, the mining and disposing of hazardous materials, and the emissions of transporting imported modules from China.

NEPA Rules requiring consideration of climate change and environmental justice are required by Executive Orders 12898, 1457, and 14096, which carry the force of law. As a result, it was neither arbitrary nor capricious for the USACE to consider environmental justice and climate change in their EIS for the KCT Line.

Further, NEPA's Phase 2 Rules describing the EIS as an "action-forcing" device do not violate the major questions doctrine because these rules are the result of express congressional authority delegated to the president under NEPA.

ARGUMENT

I. After *Loper Bright*, This Court May Not Hold an Agency Action to Be Arbitrary and Capricious When the Agency Considered the Relevant Data and Articulated a Reasonable Explanation for Their Decision.

The USACE properly considered the relevant data and articulated a reasonable explanation for each decision at issue; therefore, this Court may not overturn these decisions as arbitrary and capricious. Section 706 of the Administrative Procedure Act ("APA") counsels that a court may only overturn agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this standard, the question is whether the

agency adequately examined the relevant data and provided a rational explanation for its decision. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). In *Loper Bright Enterprises v. Raimondo*, the Supreme Court emphasized that 5 U.S.C. section 706 "does mandate that judicial review of agency policymaking and factfinding be deferential." 144 S. Ct. 2244, 2261 (2024). The appellants bear the burden of proving that an agency's action was arbitrary or capricious. *UnitedHealthcare Ins. Co. v. Becerra*, 16 F.4th 867, 882 (D.C. Cir. 2021). As a result, this Court may not substitute its judgment for that of the USACE on findings of fact unless it finds that the USACE's decision was arbitrary, capricious, or not in accordance with the law. *See State of Louisiana ex rel. Guste v. Verity*, 853 F.2d 322, 327 (5th Cir. 1988). As such, this Court must treat the USACE's determinations under the CWA and NEPA with deference.

The "arbitrary and capricious" review standard under the APA is limited and requires courts to give persuasive weight to the agency's decisions and reasoning. *Overton Park*, 401 U.S. at 416; *Loper Bright*, 144 S. Ct. at 2244; *Friends of Earth v. Hintz*, 800 F.2d 822, 945 (9th Cir. 1986). The weight given to the USACE's determination also depends on the thoroughness of the agency's consideration, the validity of its reasoning, and its consistency with previous and future pronouncements. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Loper Bright*, 144 S. Ct. at 2259.

Moreover, courts are particularly inclined to defer to an agency's expertise when the decision is based on specialized knowledge gained through experience. *Loper Bright*, 144 S. Ct. at 2267; *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 98 n.8 (1983). When reviewing scientific determinations, courts must exercise a higher degree of deference. *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983). Courts must

assess decisions not as experts in chemistry, biology, or statistics, but as reviewers to ensure the agency met basic standards of rationality. *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1976). The Supreme Court's decision in *Loper Bright* reaffirms that decisions based on scientific analysis such as the determination of jurisdictional waters are best handled by those who have "accumulated a considerable experience" and have a "knowledge of the customs" of such policy debates and decisions. *Loper Bright*, 144 S. Ct. at 2248; *Skidmore*, 323 U.S. at 137.

The Supreme Court's decision in *Loper Bright* addresses how courts review agencies' interpretations of the law. *Loper Bright*, 144 S. Ct. at 2248. However, *Loper Bright* did not disturb the deferential treatment given to questions of fact and questions of policy by agencies. *Id.* at 2261. Jurisdictional determinations by the USACE under the CWA are a question of fact. As such, the decision is only set aside if unsupported by substantial evidence. 5 U.S.C. § 706; *Loper Bright*, 144 S. Ct. at 2258 ("[T]he Court often treat[s] agency determinations of fact as binding on the courts, provided that there [is] 'evidence to support the findings.'"). The Supreme Court recently clarified the meaning of the Clean Water Act, holding that for wetlands to be considered "Waters of the United States," they must have a continuous surface connection with a relatively permanent body of water connected to traditional interstate navigable waters. *Sackett v. EPA*, 598 U.S. 651, 671 (2023). That interpretation of the CWA is binding. *Loper Bright*, 144 S. Ct. at 2266 ("[C]ourts use every tool at their disposal to determine the best reading of the statute."). Therefore, when the USACE applies the Supreme Court's interpretation of the CWA, to determine whether a specific wetland constitutes WOTUS, the agency is merely fact-finding. The USACE must assess whether specific wetlands meet the criteria established by the *Sackett* decision. This involves determining if the wetlands in question have the requisite continuous surface connection to a relatively permanent body of water. *Sackett*, 598 U.S. at 671.

The USACE's fact-finding in this situation parallels actions taken by other agencies, which were considered questions of fact. In *Weyerhaeuser Co. v. King County*, the court held that whether the facts of a case fall within the statutory terms "dumping" and "filling" is a question of fact. 592 P.2d 1108, 1112 (Wash. 1979). Similarly, in *Provena Health v. Illinois Health Facilities Planning Board*, the court noted that the Health Facilities Planning Board's decision to issue a building permit was a factual determination because the board only needed to ascertain whether the facts supported the issuance of a permit. 886 N.E.2d 1054, 1059 (Ill. App. Ct. 2008). In this case, the USACE acted in a similar fashion, merely ascertaining whether the facts about the Thicket Depressions' physical characteristics supported the extension of federal jurisdiction. Because the agency engaged in fact-finding, this Court is required under the APA to give the USACE deference, and the Court may only set aside its decision if it is unsupported by the evidence. 5 U.S.C. § 706.

While the USACE's jurisdictional determination under the CWA is a question of fact, their actions under NEPA reflect policy considerations. NEPA is an embodiment of Congressional environmental policy implemented through procedural requirements on agency decision-making. 42 U.S.C. §§ 4331, 4333. NEPA requires federal agencies to assess and disclose the environmental impacts of their actions through an EIS. *Id.* § 4336(b)(1). The EIS is one of several procedures that agencies must follow in their decision-making process. *Id.* The goal of the EIS is to ensure that agencies consider environmental effects, including "reasonably foreseeable" impacts, but it does not mandate how agencies should weigh those effects. *Id.* § 4332. When applying the arbitrary and capricious standard to NEPA, a court's role is limited to ensuring that the agency has taken a "hard look" at the environmental impacts of its actions. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

Essentially, the USACE's decision can only be deemed arbitrary and capricious if it

> relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Ky. Riverkeeper, Inc. v. Rowlette, 714 F.3d 402, 407 (6th Cir. 2013) (quoting *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007)). NEPA does not impose substantive environmental obligations, meaning the statute itself does not set enforceable environmental standards. *Center for Biological Diversity v. FERC*, 67 F.4th 1176, 1181 (D.C. Cir. 2023). Courts reviewing NEPA compliance must focus solely on whether the USACE adequately considered and disclosed the environmental impacts in its EIS. *Sierra Club v. DOE*, 867 F.3d 189, 197 (D.C. Cir. 2017).

As long as the agency's decision is based on a well-considered and informed process, courts typically uphold it. *See, e.g.*, *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 385 (1989) (holding that even if another decision maker would have reached a different result, the Court was not at liberty to disturb the findings of the USACE's EIS); *Audobon Naturalist Soc'y of Cent. Atl. States, Inc. v. U.S. Dep't of Transp.*, 524 F.Supp.2d 642, 665 (D. Md. 2007) (holding that the Federal Highway Administration did not violate NEPA by refusing to recalculate a traffic model because of a land use forecast approved right before the EIS release). The court's role is not to dissect the agency's environmental analysis for every small error but rather "to ensure that the agency has adequately considered and disclosed the environmental impact of its actions." *Sierra Club v. DOE*, 867 F.3d at 196. In the instant case, the USACE satisfied the requirements of the CWA and NEPA, and as such this Court may not substitute its judgment for that of the agency.

II. The USACE's Jurisdictional Determination Regarding the Thicket Depressions Was Not Arbitrary and Capricious Because the Agency Possesses Expertise, Carefully Considered the Meaning of the Clean Water Act, and Articulated the Correct Standard.

The USACE's determination that the Thicket Depressions were not covered by the CWA was neither arbitrary nor capricious. When the USACE determines whether a specific area constitutes WOTUS, that decision is a question of fact judicially reviewable under the standards set by the APA. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 592, 597, 600 (2016). Under the CWA, a section 404 permit from the USACE is required for any project that involves discharging dredged or fill material into WOTUS. 33 U.S.C. § 1344. However, the interpretation of WOTUS has been the subject of long-standing debate with ongoing disputes over its meaning. *See generally*, *Rapanos v. United States*, 547 U.S. 715 (2006). Fortunately, the USACE possesses specialized knowledge and expertise on this issue. *See The U.S. Army Corps of Engineers: A Brief History*, U.S. ARMY CORPS OF ENG'RS, https://www.usace.army.mil/About/History/Brief-History-of-the-Corps/Environmental-Activities (last visited Sept. 18, 2024) [hereinafter *USACE History*].

When Mountain PG&E requested an AJD concerning the seven depressional wetlands where the KCT Line would pass through the Thicket Swamp, the USACE relied on its expertise and properly determined none of the wetlands qualified as WOTUS because they do not have a continuous surface connection to navigable waters. *See Swampland Pres. Ass'n*, slip op. at 6. Because the USACE has specialized knowledge, the decision aligns with the Supreme Court's interpretation of the CWA, and the USACE supported their findings with substantial evidence and a reasonable explanation, the determination that the Thicket Depressions are not non-jurisdictional may not be set aside by this Court.

A. The USACE has specialized knowledge in determining the scope of Waters of the United States.

The USACE is owed deference because the agency is uniquely equipped to make jurisdictional determinations regarding wetlands due to its specialized technical expertise and long-standing experience in managing water resources. *Loper Bright,* 144 S. Ct. at 2252; *FLRA*, 464 U.S. at 98 n.8. For almost a century, courts have considered whether an agency's decision rests on factual premises within that agency's expertise, as this essential factor gives the agency a strong power to persuade. *Skidmore*, 323 U.S. at 134; *Loper Bright*, 144 S. Ct. at 2244; *FLRA*, 464 U.S. at 98.

The USACE has played a crucial role in protecting the nation's water resources for over a century, beginning with its authority under the Rivers and Harbors Act of 1899 to regulate obstructions to navigation. *USACE History.* Over time, the USACE's responsibilities expanded to include regulating wetlands under the CWA and leading environmental restoration efforts at military sites. *Id.* These changes solidified its role as a key agency in both water resource management and environmental protection. *Id.*

The USACE's expertise extends to making jurisdictional determinations, such as the one in the instant case. The "line-drawing problem" that arises when determining whether wetlands are within federal jurisdiction makes the determination particularly challenging. Jo Vonderhorst, *Sackett v. EPA: When "Adjacent" Means "Contiguous" and Property Rights Eclipse Clean Water Act Protections*, 83 MD. L. REV. 985, 993 (2024). Since water bodies exist on a continuum from large, navigable waters to smaller, more intermittent streams, the line-drawing problem refers to the challenge of deciding where to place the boundary between federal and non-federal waters. *Id.* Congress entrusted the USACE to make these jurisdictional determinations because they possess the technical expertise necessary to be able to define the outer limits of federal

authority over water resources. Emily Hammond, *Finding a Place for Expertise After Loper Bright*, 31 GEO. MASON L. REV. 559, 564-65 (2024). Agency decisions are particularly worthy of deference when the agency is uniquely positioned with policy and technical expertise. *Skidmore*, 323 U.S. at 134; *Loper Bright*, 144 S. Ct. at 2244; *FLRA*, 464 U.S. at 98.

The USACE is entitled to deference under the principles of *Skidmore* and *Loper Bright*, particularly due to their specialized technical expertise and extensive experience in managing water resources. *Skidmore*, 323 U.S. at 134; *Loper Bright*, 144 S. Ct. at 2244. The USACE spent decades making complex jurisdictional determinations. *USACE History*. As such, the USACE's determination that the Thicket Swamp does not qualify as WOTUS was not arbitrary and capricious.

B. The USACE correctly applied the Supreme Court's interpretation of the Clean Water Act.

The USACE's decision to exclude the Thicket Depressions from federal jurisdiction is proper and consistent with controlling Supreme Court precedent. The Clean Water Act explicitly defines WOTUS as "navigable waters, including wetlands adjacent thereto." 33 U.S.C. § 1344(g). 33 CFR section 328.3(c) defines "adjacent as "bordering, contiguous, or neighboring." 33 CFR § 328.3(c). After several decades of confused and inconsistent legal tests, the Supreme Court clarified the scope of WOTUS. *Sackett*, 598 U.S. at 716. The Court in *Sackett* held that WOTUS does not include wetlands separated from jurisdictional waters by natural or man-made barriers. *Id.* at 664. The CWA protects only waters that are relatively permanent, such as rivers, lakes, oceans, and wetlands, with a continuous surface connection to these waters. *Id.* at 651, 653, 671. The Supreme Court's interpretation of the CWA is binding on the agencies, as courts are tasked with "decid[ing] all relevant questions of law arising on review of agency action." *Loper Bright*, 144 S. Ct. at 2261.

The holding by the Supreme Court in *Sackett* reaffirms their plurality decision from *Rapanos*. 547 U.S. at 715. The plurality decision in *Rapanos* stated that an area must be a "relatively permanent, standing or flowing bod[y] of water," such as a stream, ocean, river, or lake, to be considered an adjacent wetland covered by the CWA. *Id.* at 732-33. There must be a "continuous surface connection" between the wetland and WOTUS, such that it is "difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* at 742. *Rapanos* also explicitly sets forth that "intermittent or ephemeral" water flows are not included. *Id.* at 733-34. Specifically, ephemeral swales do not constitute jurisdictional wetlands or jurisdictional connections between wetlands and navigable waters. 33 C.F.R. § 328.3(b)(8).

Moreover, Congress intentionally included the word "navigable" in the text of the CWA in order to narrow the scope of WOTUS. *Solid Waste Authority of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159, 171 (2001). Giving WOTUS an overly broad definition, by including all wetlands, would negate the inclusion of "navigable." *Id.* In *Solid Waste Authority,* the Supreme Court determined whether federal jurisdiction extended over an abandoned mining pit that seasonally formed a small pond. *Id.* at 163. The Supreme Court correctly concluded that the inclusion of such isolated, intrastate waters would require impermissibly reading the word navigable out of the CWA. *Id.* at 171.

The USACE's decision to exclude the wetlands in question from federal jurisdiction is consistent with Supreme Court precedent and the statutory definition of WOTUS. For the Thicket Depressions, the wetlands are only connected to federal land by their upstream position relative to the Utanidi Water Basin, which is insufficient to establish a "continuous surface connection." *Swampland Pres. Ass'n*, slip op. at 5. The lack of a direct connection necessarily

requires that the wetlands do not meet the criteria for federal jurisdiction under WOTUS. 33 U.S.C. § 328.3(a)(4).

The wetlands in this case are separated from navigable waters by swales and a seasonally dry drainage path. *Swampland Pres. Ass'n*, slip op. at 6. These intermittent barriers further establish the Thicket Depressions' non-jurisdictional status. The barriers prevent a substantial connection between the Thicket Swamp and navigable waters. *Solid Waste Authority,* 531 U.S. at 172. Since these wetlands do not have a continuous surface connection to navigable waters, they cannot be considered adjacent waters under the Supreme Court's definition of WOTUS. *Sackett*, 589 U.S. at 651, 653, 671. Thus, the USACE's determination properly excluded these wetlands from federal jurisdiction.

The Supreme Court's interpretation of the CWA, utilizing the "relatively permanent" and "continuous surface connection" test is consistent with constitutional principles of federalism and respects the historical limits on federal authority over intrastate water resources. Federal regulation of navigable waters historically reflects a limited scope of congressional authority. *Id.* at 659-62. Congress originally exercised authority over navigable waters to protect interstate commerce under the Constitution's Commerce Clause. *Id.*; U.S. CONST. art. I, § 98, cl. 3. The Refuse Act prohibited disposing of trash into navigable waters because it could interfere with the "nation's arteries of commerce." *Sackett*, 589 U.S. at 688-89. To be considered navigable waters, the act required surface water connection between tributaries and traditionally navigable waters. *Id.* at 690. The Supreme Court determined that "navigable" waters are those that serve or have the potential to serve as commercial highways, and this interpretation generally excluded wetlands. *Id.* at 693-94. The terms "navigable water," "navigable water of the United States," and "the waters of the United States" were used interchangeably to signify waters subject to

Congress' traditional authority over interstate commerce routes. *Id.* at 699. Until the 19th century, Congress had authority over navigable waters only for the limited "purpose of regulating and improving navigation." *Id.* at 688. However, courts and the EPA later expanded it to cover a broader range of activities indirectly affecting interstate commerce, reflecting a shift in federal jurisdiction over water regulation. *Id*. at 665, 702. Expanding federal jurisdiction even further to cover virtually all wetlands would impermissibly broaden the scope of WOTUS.

Extending federal jurisdiction over virtually all wetlands by broadening the scope of WOTUS would encroach on the States' "primary" role in regulating their own resources. *County of Maui v. Hawaii Fund,* 590 U.S. 165, 190-91 (2020). The Supreme Court recognized that "land and water use lies at the core of traditional state authority." *Sackett,* 598 U.S. at 679. It is also clear that Congress intended to respect the states' authority over their own land since the CWA explicitly states that it aims to "protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." *Id.* at 674; 33 U.S.C. § 1251(b). Broadening WOTUS to encompass isolated, intrastate wetlands, such as those in the Thicket Swamp, would improperly alter the balance between federal and state authority.

By adhering to the Supreme Court's interpretation of the CWA, the USACE correctly applied the law; so, the jurisdictional determination was neither arbitrary nor capricious. The decision aligns with the requirement that WOTUS must have a "continuous surface connection" to navigable waters, thus excluding isolated wetlands that do not meet these criteria. 33 CFR § 328.3(a)(4). Furthermore, USACE's decision upholds constitutional principles by maintaining a clear distinction between federal and state authority.

C. The jurisdictional determination, as a question of fact, may not be set aside as arbitrary and capricious because the USACE provided a reasonable explanation that is supported by substantial evidence.

This Court cannot hold that the USACE's determination regarding their own jurisdiction over wetlands is arbitrary and capricious if the Court gives the agency decision proper persuasive weight. The USACE provided a reasonable explanation for its decision after conducting a thorough review of all relevant information, and their due diligence deserves deference. *Overton Park*, 401 U.S. at 416.

The USACE satisfied the requirements to surpass the arbitrary and capricious standard because they thoroughly reviewed all available information and reasonably explained its conclusion. *Id.* The USACE reviewed and considered the groundwater evaluation obtained from Mountain PG&E. *See Swampland Pres. Ass'n*, slip op. at 6. The USACE visited the site of the project for inspection more than once, with a year in between each visit. *Id.* The depressional wetlands crossed by the proposed KCT Line lacked "continuous surface connection" or "continuous flow," a necessary requirement of extending federal jurisdiction over wetlands. *Id.* at 6; *Sackett*, 598 U.S. at 678. The waters within the Thicket Swamp are intermittent since they rise and fall only seasonally. *Swampland Pres. Ass'n*, slip op. at 5. The USACE explained further that four of the wetlands contained swales with no flowing water, while the other three wetlands included a drainage path with no flowing water. *Id.* at 6. Furthermore, the wetlands with the dried-up drainage path were found to be non-adjacent wetlands and, therefore, not covered by the CWA. *Id.*

The SPA complains that USACE did not conduct long-term monitoring of the streams, nor did the agency provide data on how often the swales and drainage channel were dry. *Id.* at 12 n.10. However, the burden is on SPA to demonstrate that the agency's action was arbitrary and

capricious. *See Becerra*, 16 F.4th at 882. Notably, SPA failed to provide evidence on how frequently the swales were saturated or how often the drainage channel flowed. *Swampland Pres. Ass'n*, slip op. at 12. The USACE conducted two visits about one year apart from each other; so, although they only visited in the summer months, they made a significant effort to collect relevant data. *Id.* at 6. Further, even if there was flow for some portion of the year, *Sackett* requires that the flow must be relatively permanent or continuous. *Sackett*, 589 U.S. at 651, 653, 671.

These facts all provide substantial evidence to support the USACE's determination, and therefore this Court may not hold the USACE's findings were arbitrary or capricious.

III. In Accordance with NEPA, the USACE Properly Declined to Consider the Environmental Impacts of the KCT Line on the Thicket Depressions Because USACE has no Authority to Prevent Dredge and Fill Material from Being Placed in the Thicket Depressions.

NEPA effectively bars the USACE from considering impacts of the KCT Line on the Thicket Depressions as part of their EIS. *See Dep't Transp. v. Public Citizen,* 541 U.S. 752, 770 (2004). As a result, the decision not to consider those impacts was neither arbitrary nor capricious because the agency adequately addressed the mandatory considerations outlined in NEPA and subsequent federal regulations. *Id.* However, agencies do not need to consider any effects beyond their control. *Id.* Since the USACE does not have jurisdiction over those waters, the USACE acted in accordance with NEPA's requirements when they declined to consider the impacts of the KCT Line on the Thicket Depressions.

The Supreme Court ruled on this issue in *Public Citizen*, holding that NEPA does not require agencies to consider environmental impacts over which they lack statutory jurisdiction. *Id.* In *Public Citizen*, President Bush announced that he would lift the U.S. ban on Mexican trucking companies after the Federal Motor Carrier Safety Administration ("FMCSA") implemented new

regulations. *Id*. at 760. In accordance with NEPA, the FMSCA examined the environmental impacts of their new regulations, but they did not consider the impacts of an increased number of trucks that would result from lifting the ban. *Id.* at 762. The Supreme Court unanimously held that the agency's decision was neither arbitrary nor capricious because the decision to lift the ban was not within their authority. *Id.* at 764.

Multiple circuit courts have applied this Supreme Court decision to other issues involving NEPA review. In *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, the plaintiffs challenged the USACE's finding that there was no significant impact from permits to fill WOTUS in furtherance of coal mining operations. 556 F.3d 177, 187 (4th Cir. 2009). The plaintiffs argued that the Corps did not adequately assess the adverse cumulative environmental impacts that would result from the mining operation as a whole. *Id.* at 187-88. The Fourth Circuit disagreed, holding that the appropriate scope of analysis for a NEPA review is to assess only impacts of the *specific activity* that requires a USACE permit, along with any parts of the project over which the USACE has control and responsibility. *Id.* at 194.

The Fourth Circuit instead agreed with the USACE's contention that its determination regarding the scope of its NEPA analysis deserved deference and that its conclusions were neither arbitrary nor capricious. *Id.* at 197. "Because NEPA is a procedural and not a results-driven statute, even agency action with adverse environmental effects can be NEPA-compliant so long as the agency has considered those effects and determined that competing policy values outweigh those costs." *Ohio Valley*, 556 F.3d at 191; *see also Kentuckians for the Commonwealth v. U.S. Army Corps of Engineers,* 746 F.3d 698, 710 (6th Cir. 2014) (determining that the USACE's decision to narrow the scope of its review to only the impacts directly caused by the specific activities within their jurisdiction–the dredge and fill activities–

was proper because the overall mine site was under the control and responsibility of the Kentucky Division of Mine Permits and not the USACE).

Applying these precedents to the USACE's decision regarding the KCT Line and the Thicket Depressions, it becomes clear that the USACE acted in accordance with NEPA. The USACE's refusal to consider the impacts on the Thicket Depressions was appropriate because the agency does not have jurisdiction over those waters, mirroring the rationale in *Ohio Valley* and *Kentuckians*. *See Ohio Valley,* 556 F.3d at 194; *see also Kentuckians,* 746 F.3d at 710. The USACE cannot prevent dredge and fill material from being placed in the waters of the Thicket Depressions since they determined that the depressions are not covered by the CWA. Therefore, "there is no decision to inform, and the agency need not analyze the effect in its NEPA review." *Sierra Club v. FERC*, 867 F.3d 1357, 1372 (D.C. Cir. 2017). Rather, the state of North Kingston retains jurisdiction over the Thicket Depressions and may undertake an environmental review of the impacts.

Consequently, the state can decide whether to allow or reject the project. *Ohio Valley*, 556 F.3d at 197. Agencies are not required "to elevate environmental concerns over other appropriate considerations . . . . [I]t require[s] only that the agency take a 'hard look' at the environmental consequences before taking a major action." *WildEarth Guardians v. Jewell*, 738 F.3d 298, 303 (D.C. Cir. 2013) (quoting *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983)). The agency's focus on the specific impacts of the KCT Line within its control confirms that the USACE's decision was neither arbitrary nor capricious.

IV. The USACE Properly Declined to Consider Activities Related to the Construction of the Mega Solar Array that are Outside of their Jurisdiction in Accordance with NEPA.

The construction of the Mega Solar Array Station is a separate project to the KCT line, and one which the USACE has no jurisdictional control. As a result, the USACE was not required to consider the impacts of construction of the Mega Solar Array or any collateral projects such as the greenhouse gas ("GHG") emissions from importing modules or the indirect effects from mining and disposing of the materials used in the manufacturing of solar PV Panels. *See Public Citizen*, 541 U.S. at 766 (holding that an agency is not required to consider as part of their environmental impact statement actions or events that are outside the agency's control). The EIS appropriately excluded the environmental impacts of the Mega Solar Array because the agency need not consider effects for which they have limited statutory authority over the relevant actions. *Id*. at 770.

The USACE does not possess regulatory authority over the construction of the Mega Solar Array; therefore, it was proper for USACE to exclude considerations of the construction from the EIS. In *Kentuckians for the Commonwealth v. U.S. Army Corps of Engineers*, the Sixth Circuit held that "agencies may reasonably limit their NEPA review to only those effects proximately caused by the actions over which they have regulatory authority." 746 F.3d at 710. In *New Jersey Department of Environmental Protection v. U.S. Nuclear Regulatory Commission*, the Third Circuit held that the Nuclear Regulatory Commission lacked the authority to regulate the airspace above its facilities. 561 F.3d 132, 139 (3d Cir. 2009). Both the Sixth and Third Circuits have held that agencies are exempt from considering as part of their EIS events and actions that fall outside of their regulatory purview.

Regulatory authority for the construction of the Mega Solar Array falls squarely under the purview of Federal Energy Regulatory Commission ("FERC") rather than the USACE. *See* 16 U.S.C. § 797. Because FERC is the regulatory body that will oversee the construction of the Mega Solar Array, not the USACE, the USACE was not required to address concerns about the Mega Solar Array as part of the EIS.

In the instant case, SPA is requesting that this Court extend the principles articulated by the D.C. Circuit in *Sierra Club v. FERC (Sabal Tail)* to possible emissions from the construction of Mega Solar Array. *See* 867 F.3d 1357, 1371 (D.C. Cir. 2017). In *Sabal Tail*, the court held that FERC must consider the effects of the gas burning in plants that fell outside FERC's regulatory authority in its review of a proposed natural gas pipeline. *Id.* However, *Sabal Tail* does not dictate that an agency is required to consider effects outside of its jurisdictional control, but that they must consider the downstream environmental effects of the action under review. *Id.* at 1374. In *Sabal Tail*, the court required FERC to consider the downstream GHG resulting from the pipeline's construction. *Id.* at 1373-74.

The District Court of Kingston extends the principle that an agency is required to consider reasonable downstream effects beyond the scope of what the Supreme Court established in *Public Citizen*. Instead, the District Court manipulated that statutory language of NEPA to require agencies to extend their analysis beyond the project at issue to projects that are under the purview and jurisdictional authority of another agency. *See Swampland Pres. Ass'n*, slip op. at 13-14.

This Court must reverse the District Court's ruling that USACE was required to consider the effects of the construction of the Mega Solar Array. Otherwise, construction of future projects will become impossible because every agency will be required to speculate about miniscule,

tangential aspects, inevitably forcing agencies to move beyond their statutory authority and infringe on the work of sister agencies. For these same reasons, USACE was not required to consider the greenhouse gas emissions of the to-be-built Mega Solar Array or the mining and disposal of silicon and other materials used to construct PV Panels to be used at the to-be-built plant.

V. The USACE Correctly Considered Climate Change and Environmental Justice Concerns Arising out of the KCT Line in their EIS.

The USACE properly included evaluations of climate change and environmental justice concerns in the environmental impact statement. Executive orders issued between 1994 and 2023 required the USACE to consider climate change and environmental justice in their EIS. *See* 59 FR 7629; 86 FR 70935; *and* 88 FR 25251. Because these executive orders must be treated with the force of law, in conjunction with the USACE's examination of appropriate data and satisfactory explanation, the USACE's decision to include analysis of the climate change and environmental justice impacts of the KCT Line was neither arbitrary nor capricious.

A. Executive Orders Require the USACE to Consider Environmental Justice and Climate Change Concerns.

A series of executive orders issued between 1994 and 2023 require the USACE to consider the impacts of climate change and environmental justice as part of their EIS for proposed projects. *See* 59 FR 7629; 86 FR 70935; *and* 88 FR 25251. These executive orders are enforceable under the APA because (1) they have a specific statutory foundation, (2) the statutory foundation and the executive order do not preclude judicial review, and (3) there is an objective standard by which this Court must judge the agency's action. *See Albuquerque v. U.S. Dep't Interior*, 379 F.3d 901, 913-14 (10th Cir. 2004); *City of Carmel-by-the-Sea v. U.S. Dep't Transp.*, 123 F.3d 1142, 1166 (9th Cir. 1997); *and* 5 U.S.C. § 701(a)(1)-(2).

i. NEPA Provides a Specific Statutory Foundation for Presidential Authority

Through NEPA, Congress established the Council on Environmental Quality ("CEQ") within the Executive Office of the President and conferred presidential authority to effectuate environmental policies. 42 U.S.C. § 4342. CEQ is tasked with implementing NEPA by "apprais[ing] programs and activities of the Federal Government …; [] be[ing] conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and []forumulat[ing] and recommend[ing] national policies to promote the improvement of the quality of the environment." *Id*. This same authority is effectuated through executive orders requiring agencies to consider environmental justice and climate change as part of their EIS.

Executive Order 12898, issued in 1994, requires agencies to "make achieving environmental justice part of its mission by identifying, addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States." 59 FR 7629. Executive Order 14057, issued in 2021, requires that "the Federal Government incorporate environmental justice considerations into sustainability and climate adaptation planning, programs, and operations." 86 FR 70935. Executive Order 14096, issued in 2023, requires agencies to address environmental justice by "identify[ing], analyz[ing], and address[ing] disproportionate and adverse human health and environmental effects (including risks) and hazards of Federal activities, including those related to climate change and cumulative impacts of environmental and other burdens on communities with environmental justice concerns." 88 FR 25251. Each of these concerns articulated fall squarely within the presidential authority Congress conferred in Section 202 of NEPA. Therefore, the executive orders requiring

the consideration of environmental justice and climate change concerns have a specific statutory foundation.

ii. The Statutory Authority Does Not Preclude Judicial Review

Neither NEPA nor any subsequent executive orders preclude judicial review of agency action. In *Albuquerque v. Department of Interior*, the Tenth Circuit held that "[t]here is a presumption favoring review unless 'the congressional intent to preclude judicial review is fairly discernable in the statutory scheme.'" 379 F.3d at 916 (quoting *Clarke v. Sec. Indus. Ass'n.*, 479 U.S. 388, 399-400 (1987)). In fact, section 108 of NEPA explicitly acknowledges the likelihood of judicial review by stating that "[w]hen an agency prepares a programmatic environmental document for which judicial review [is] available, the agency may rely on the analysis" of the document for five years before conducting subsequent review. 42 U.S.C. § 4336b. NEPA does not explicitly preclude judicial review. Instead, NEPA limits the scope for how long agencies may rely on the analysis of an EIS to five years in the event of judicial review.

As a result, Executive Orders 12898, 14096 and 14057 also do not preclude judicial review. Executive Orders 14096 and 14057 contain no language constraining judicial review of agency action. 88 FR 25251; 86 FR 70935. Executive Order 12898 does, however, contain language that states "[t]his order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order." 59 FR 7629. In *Albuquerque,* the Tenth Circuit held that such language could indicate preclusion of judicial review. 379 F.3d at 916. Even if that is the case, executive order 14096 and 14057 still require the USACE to consider climate change and environmental justice in their EIS. 88 FR 25251; 86 FR 70935. These orders do not contain

specific language precluding judicial review, and neither does the statutory authority on which they rest.

iii. There is an Objective Standard for the Judiciary to Evaluate the Agency's Actions

Section 701(a)(2) of the APA states that judicial review is unavailable when the agency action at issue is "committed to agency discretion by law." In *Heckler v. Chaney*, the Supreme Court held that the general exception to reviewability under section 701(a)(2) is narrow. 470 U.S. 821, 831 (1985). Similarly, in *Overton Park*, the Supreme Court held that this exception is applicable "only in those rare instances where the statutes are drawn in such broad terms that in a given case there is no law to apply." 401 U.S. at 410. In the instant case, there is clearly law to apply. NEPA provides the outline for the types of factors that must be considered in an EIS. 42 U.S.C. § 4332(c)(ii). NEPA requires agencies to consider "any adverse environmental effects which cannot be avoided should the proposal be implemented." *Id.* While the executive orders fill in the gaps regarding what specific concerns the agency must consider, these concerns must also fit within the scope of NEPA's statutory framework.

Executive Orders 12898, 14096, and 14057 (1) fall within the presidential statutory authority of NEPA, (2) do not preclude judicial review of agency action, and (3) have law to apply. Therefore, the USACE was required to comply with the executive orders mandate to consider environmental justice and climate change as part of their EIS for the KCT Line.

B. The USACE Properly Explained their Decision to Identify Buckington as an Environmental Justice Community.

In the EIS, the USACE correctly identified the City of Buckington as an Environmental Justice community. See *Swampland Pres. Ass'n*, slip op. at 9. As noted, the city "has experienced some of the worst air and water pollution of anywhere in North Kingston over the years." *Id*.

Because of this conclusion, USACE appropriately rejected alternative #1. This Court is not at liberty to substitute its analysis for the agency's own. *Gray v. Powell*, 314 U.S. 402, 412 (1941) (holding that when the determination of whether an entity is a producer of coal had been left by Congress to the Director of the Bituminous Coal Division, the court could not substitute its judgment for that of the Director). Instead, the Court must ensure that the agency properly considers the statutorily required factors as part of its decision-making process. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42-43 (1983). The USACE was bound to consider the effects of climate change and environmental justice because of Executive Orders 12898, 14057, and 14096, and the record indicates they did so. 59 FR 7629; 86 FR 70935; *and* 88 FR 25251. The Court's analysis must end there.

VI. The 2024 Phase 2 NEPA Rules That Describe the EIS as an "Action-Forcing" Device Do Not Turn NEPA from a Procedural to a Substantive Statute, Nor Do They Violate the Major Questions Doctrine.

The "action-forcing" function of the EIS is not a violation of the major questions doctrine. The major questions doctrine is implicated when the issue raised is one of deep economic and political significance, but an agency action is not automatically invalidated for implicating the major questions doctrine. *King v. Burwell*, 576 U.S. 473, 474 (2015). Instead, the Supreme Court held that such issues may be delegated to the agency if Congress does so explicitly. *Id.* The major questions doctrine "is a tool for discerning—not departing from—the text's most natural interpretation." *Biden v. Nebraska*, 600 U.S.__, 143 S. Ct. 2355, 2376 (2023) (J. Barrett concurring). Notably, in *Public Citizen*, the Supreme Court recognized that Congress intended NEPA's environmental impact statements "to serve as an action-forcing device to ensure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government." 54 U.S. at 769.

Phase 2 NEPA Rules fall securely within the statutory directive of NEPA, and they do not alter the core purpose of the statute. *See* 89 FR 35442 (May 1, 2024). In *West Virginia v. EPA*, the Supreme Court applied the major questions doctrine as a rule of statutory interpretation and held that unless the statute explicitly touches a major question of political and economic significance, the court will read the agency's authority narrowly to not address major questions. 597 U.S. 697, 727 (2022). There, the Court held that the EPA's regulation shifting performance requirements for powerplants was impermissible because it "effected a fundamental revision of the statute, changing it from one sort of regulation into an entirely different kind." *Id.* at 728 (internal quotations omitted).

The Phase 2 Rules do not alter the statutory scheme of NEPA. Instead, the regulations fall within the scope of 42 U.S.C. section 4334, which directs the types of concerns CEQ must address in their regulations and recommendations. There, Congress directed the CEQ to

> conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality; [and] to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes….

42 U.S.C. § 4344(5)-(6). Environmental justice falls clearly within the scope of these duties. Environmental justice efforts seek to marry the goals of environmental conservation with social and economic justice. Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN ENV'T L. J. 3 (1998). Environmental justice advocates point to "ongoing zoning practices and market dynamics [that] resulted in the eventual location of dangerous land use practices near people of color, exposing those communities to significantly higher environmental risks" as the reason such efforts are necessary. *Id.* As a result, advocates

argue that effective conservation and environmental preservation efforts must include consideration of social and economic justice concerns to be successful.

NEPA fulfills the responsibilities articulated in 42 U.S.C. section 4344 through the promulgation of regulations, such as the Phase 2 Rules at issue. The action-forcing effect of EIS is intertwined with the core purpose of NEPA, which is to effectuate a national policy that

> encourage[s] productive and enjoyable harmony between man and his environment; [] promote[s] efforts which will prevent or eliminate damage to the environment and biosphere and stimulate[s] the health and welfare of man; [] enrich[es] the understanding of the ecological systems and natural resources important to the Nation; [] establishes a Council on Environmental Quality.

42 U.S.C. § 4321. These goals are not incompatible with the congressional mandate of CEQ's responsibilities. CEQ is tasked with conducting investigations and ascertaining the underlying causes of changes in the natural environment. 42 U.S.C. § 4344. To accurately understand how and why the environmental harms disproportionately affect people of color, CEQ must consider environmental justice. Not only are environmental justice considerations permissible, but they are necessary for CEQ to fulfill its congressional mandate.

CONCLUSION

For the foregoing reasons, the USACE respectfully requests that this Court uphold summary judgment in part and reverse summary judgment in part.

Respectfully submitted,

ATTORNEYS FOR TEAM 7

C.A. No. 24-09876

In the United States Court of Appeals for the Twelfth Circuit

---

Swampland Preservation Association,

Appellant and Cross-Appellee,

v.

U.S. Army Corps of Engineers, an agency of the Department of Defense, **General Lucy Peabody**, in her official capacity as Chief of Engineers and Commanding General of the United States Army Corps of Engineers, and **Scott Zink**, in his official capacity as Division Commander of the United States Army Corp of Engineers, Utanidi Division,

Appellees and Cross-Appellants.

On Appeal from the District Court for the Eastern District of North Kingston, Dist. Ct. Consolidated Case Nos. 2424 and 2428

Brief of Appellees and Cross-Appellants, U.S. Army Corps of Engineers, General Lucy Peabody, and Scott Zink

Team No. 2
Counsel for Appellees and Cross-Appellants

September 23, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action under 28 U.S.C. § 1331. The court entered judgment on July 15, 2024, and the parties filed timely appeals. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. What standards should apply in reviewing the various agency actions challenged in these proceedings in light of the Supreme Court's recent decision in *Loper Bright v. Raimondo*;
2. Whether the U.S. Army Corps of Engineers (Army Corps) consideration of climate change and environmental justice, and NEPA rules requiring the consideration of these items, are arbitrary and capricious and/or violate the Major Questions Doctrine;
3. Whether the 2024 Phase 2 NEPA regulations that describe the EIS as an "action-forcing" device and require agencies to identify the environmentally preferred alternative before taking an action improperly turn NEPA from a procedural to a substantive statute and/or violate the Major Questions Doctrine;
4. Whether Army Corps' determination that the Thicket Depressions are not jurisdictional waters under the Clean Water Act was arbitrary, capricious, or not in accordance with the law;
5. Whether Army Corps' decision to not consider the environmental impacts of the KCT Line on the Thicket Depressions was arbitrary, capricious, or not in accordance with the law; and
6. Whether, in conducting the environmental review of the KCT Line, Army Corps was required to consider the environmental impacts of mining and disposing of the silicon and

other hazardous materials needed for the proposed Mega Solar Array, the land use and habitat loss from the Mega Solar Array, and the emissions from transporting imported modules from China that will be used in the Mega Solar Array.

STATEMENT OF THE CASE

Factual Background

The Kingston Cross Transmission Line Project (KCT Line) is a critical infrastructure initiative aimed at enhancing energy transmission from the proposed 500-megawatt Mega Solar Array in North Kingston to the Atlantic Connector Line, which serves much of the mid-Atlantic coastal population. R. at 4. Initiated by Mountain Power Gas & Electric (Mountain PG&E) in July 2020, the KCT Line encompasses a 333-mile route, with a total investment of $2.5 billion. R. at 4.

The Mega Solar Array, being developed by Mega Solar LLC, is designed to be powered by nine million photovoltaic (PV) modules sourced exclusively from TrikoSolar, a Chinese manufacturer. R. at 4. Mountain PG&E holds a 45% stake in the Mega Solar Array and has established a 25-year power purchase agreement for electricity generated by the solar facility. R. at 4. Notably, the CEO of Mountain Power Resources, a subsidiary of Mountain PG&E, testified that the approval of the KCT Line is a prerequisite for the Mega Solar Array's construction, with potential reductions in scale or abandonment if the transmission line is not approved. R. at 4. The proposed KCT Line’s right-of-way spans approximately 250 feet, traversing Thicket Swamp, an ecologically significant wetland ecosystem. R. at 4–5. This swamp is one of the largest blackwater swamps in the country, covering 338,000 acres, of which 70% is designated as wetlands, and supports various endangered species and migratory birds. R. at 5.

In 2021, Mountain PG&E sought an Approved Jurisdictional Determination from the U.S. Army Corps of Engineers to ascertain whether the KCT Line's proposed route intersects with federally regulated waters under the Clean Water Act (CWA). R. at 5. Following comprehensive evaluations, the Corps concluded in August 2023 that the seven depressional wetlands—referred to as Thicket Depressions—along the KCT Line are not jurisdictional waters of the United States. R. at 6. This determination, made despite evidence suggesting seasonal water conveyance between the depressions and tributaries, was supported by Army Corps Division Commander Scott Zink. R. at 6–7.

The Environmental Impact Statement (EIS) for the KCT Line, jointly prepared by the Department of Energy and the Army Corps, was finalized in January 2024, endorsing Alternative #2 as the environmentally preferred route. R. at 7–8. This decision considered the environmental justice implications of Alternative #1, which would have affected the predominantly Black community of Buckington, as well as potential ecological impacts associated with Alternative #3 crossing federal lands. R. at 8. The Army Corps' Record of Decision, issued on February 24, 2024, confirms the project's necessity to facilitate the transition to renewable energy and mitigate greenhouse gas emissions, essential for addressing climate change concerns. R. at 8–9.

Procedural History

Swampland Preservation Association ("SPA") brought two actions against the Army Corps of Engineers' ("Army Corps") final agency decisions about the proposed Kingston Cross Transmission Line ("KCT Line") in the U.S. District Court for the Eastern District of North Kingston. R. at 3. SPA challenged (1) the Army Corps' Approved Jurisdictional Determination ("AJD") that the areas of Thicket Swamp through which the KCT Line would run are non-

jurisdictional waters under the Clean Water Act and (2) the Army Corps' Final Record of Decision ("ROD") adopting the KCT Line's Final Environmental Impact Statement ("EIS") and approving the KCT Line crossing the Utanidi River. R. at 3. The two cases were consolidated on joint motion of the parties. R. at 3. The Army Corps, and co-defendants General Lucy Peabody and Scott Zink, moved for summary judgment on all claims. Mem. & Order at 3. SPA filed a cross-motion for summary judgment. R. at 3.

The district court granted partial summary for both SPA and the Defendants. R. at 3. The court granted partial summary judgment to SPA on its claims that (1) in the EIS and ROD the Army Corps inadequately considered the potential habitat loss, land use, and climate change impacts of the Mega Solar Array, (2) the Army Corps improperly considered environmental justice concerns under unlawful National Environmental Policy Act (NEPA) Rules, and (3) new NEPA Rules are invalid in their efforts to make NEPA a substantive statute. R. at 4. The court remanded these concerns for the Army Corps to address. R. at 4. The court granted partial summary judgment to the Defendants, holding that (1) the Army Corps' AJD was not arbitrary nor capricious, (2) the Army Corps was not required to consider the environmental impacts on Thicket Swamp posed by the KCT Line during its NEPA review, (3) the Army Corps properly weighed climate change considerations, and (4) the EIS was not required to considered the environmental impacts of mining nor component material disposal for solar panels. R. at 3. These appeals followed.

SUMMARY OF THE ARGUMENT

In *Loper Bright v. Raimondo*, the Supreme Court emphasized that courts must exercise independent judgment in reviewing agency actions under the Administrative Procedure Act, while also affording deference to agency policymaking and factfinding. This means that agency actions are presumptively valid unless found to be arbitrary, capricious, or contrary to law.

Courts are limited to assessing whether agencies adequately considered relevant data and provided satisfactory explanations for their decisions, without substituting their judgment for that of the agency. The burden lies with the challenging party to prove that agency actions were arbitrary or capricious. In the absence of Chevron deference, agency interpretations of ambiguous statutes receive Skidmore deference, meaning their weight depends on factors such as thoroughness, reasoning validity, and consistency. The Army Corps and the Council on Environmental Quality possess clear authority under the National Environmental Policy Act (NEPA) to interpret environmental impacts, including climate change and environmental justice.

The lower court incorrectly determined that the major questions doctrine applied here. The major questions doctrine is applicable only in extraordinary cases involving significant political and economic implications, requiring the challenging party to demonstrate the extraordinary nature of the agency's authority. SPA failed to meet this burden, lacking evidence of significant political or economic impacts related to the agency's actions.

The Army Corps properly considered climate change and environmental justice in its Environmental Impact Statement (EIS), aligning with NEPA's requirement for comprehensive environmental review. Recent amendments to NEPA clarify the necessity of assessing reasonably foreseeable environmental effects, which includes climate change. The Phase 2

NEPA rules do not impose substantive requirements on agencies or courts, nor do they violate the major questions doctrine. These rules reinforce NEPA's procedural nature, ensuring that agencies adequately consider environmental impacts without mandating specific outcomes.

The Army Corps correctly determined that the Thicket Depressions do not qualify as jurisdictional waters under the Clean Water Act (CWA). This conclusion followed a thorough examination of relevant data and adhered to the Supreme Court's definition of jurisdictional waters established in *Sackett v. EPA*. Army Corps is granted deference in its determination, as it involves scientific expertise. The CWA specifies that for a body of water to be jurisdictional, it must have a continuous surface connection to waters that are themselves jurisdictional, which the Thicket Depressions lack.

The Army Corps' decision not to evaluate the environmental impacts of the KCT Line on the Thicket Depressions was lawful. Under the NEPA, agencies are not required to assess impacts beyond their regulatory authority. This position is supported by precedent, including *Department of Transportation v. Public Citizen*, which confirms that agencies need only consider effects they can control. Similarly, ARMY CORPS was not obligated to consider the environmental impacts associated with the Mega Solar Array, including the mining and transportation of materials. The agency's scope of review is limited to impacts under its jurisdiction, which does not encompass these broader concerns. ARMY CORPS acted within its authority and legal bounds in determining that the Thicket Depressions are not jurisdictional waters and in its limited NEPA review regarding the KCT Line and the Mega Solar Array. The agency's decisions are consistent with established legal standards and should be upheld.

ARGUMENT

Standard of Review for Summary Judgment

Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Standard of Review for Agency Actions

Under *Loper Bright v. Raimondo*, the Supreme Court directed courts to follow the APA's instructions and "exercise their independent judgment in deciding whether an agency has acted within its statutory authority." 144 S.Ct. 2244, 2273 (2024). However, this review is not always *de novo*. *See* 5 U.S.C. § 706(2)(A), (E). The APA mandates "deferential judicial review of agency *policymaking and factfinding*." *Loper Bright*, 144 S.Ct. at 2261 (internal citations omitted) (emphasis added).

Policymaking and factfinding receive deference

Agency actions, which make substantive determinations of policy and fact, are afforded a great degree of deference so long as they follow an appropriate process. *See Loper Bright*, 144 S.Ct. at 2261. The APA commands a reviewing court to "set aside agency actions, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Supreme Court considers agency action arbitrary or capricious when it fails to "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Examining data and making policies with a nexus to that data are afforded deference. *Id.* Like the summary judgment standard, Courts only determine whether

agencies missed a material step in their policy decision-making. *Compare* Fed. R. Civ. P. 56(a) *with Motor Vehicle*, 463 U.S. at 43. Courts consider whether the agency "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle*, 463 U.S. at 43. The agency's explanation "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* The "standard of review is [] narrow," and the reviewing court "is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). The party challenging agency action bears the burden of proof. *See* 5 U.S.C. § 706(2)(A); *UnitedHealthcare Ins. Co. v. Becerra*, 16 F.4th 867, 882 (D.C. Cir. 2021). Therefore, SPA must show that the various agency processes were arbitrary or capricious. *Id.*

Statutory interpretation follows Skidmore deference unless the statute provides otherwise

Agency actions, which interpret an *ambiguous* statutory process and make material process choices from that interpretation, are given the judicial deference articulated by the Supreme Court in *Loper Bright*. 144 S.Ct. at 2273. In a world without *Chevron* deference, *Loper Bright*, 144 S.Ct. at 2273, an agency's persuasive authority for statutory interpretation typically follows the court's *Skidmore* approach. *Skidmore v. Swift & Co.*, 321 U.S. 134 (1944). "[A]lthough an agency's interpretation of a statute cannot bind a court, it may be especially informative to the extent it rests on factual premises within the *agency's expertise*." *Id.* at 2267 (quoting *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 98, n.8 (1983)) (internal quotations omitted) (emphasis added). Under *Skidmore*, the weight given an agency depends on "the thoroughness evident in its consideration, the validity of its reasoning, its

consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Loper Bright*, 144 S.Ct. at 2259 (quoting *Skidmore*, 323 U.S. at 140). Agency interpretations and opinions are given more weight when they are "made in pursuance of official duty" and "based upon . . . specialized experience" that "constitutes a body of experience and informed judgment to which courts . . . properly resort for guidance." *Id.* at 2267 (quoting *Skidmore*, 321 U.S. at 139–40). Additionally, Congress increases that weight when "the agency is authorized to exercise a degree of discretion" through a statute's text. *Id.* at 2263. Such is the case for the Army Corps' and CEQ's interpretations of the NEPA requirements.

The Major Questions Doctrine

The lower court improperly held that the SPA showed this case implicated the Major Questions Doctrine ("MQD"). R. at 10. The MQD belongs to a small category of "extraordinary cases in which the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." *West Virginia v. EPA*, 597 U.S. 697, 700 (2022) (citations omitted). From this, courts proceed through two steps in applying the MQD. *Id.* First, the reviewing court must determine whether the agency's assertion of authority is "extraordinary." *Id.* Next, if so, the court reviews the statutory authorization with heightened skepticism to determine whether clear congressional authorization exists for the action. *Id.*

"Extraordinary" Agency Authority

For agency authority to fall under the small bubble of "extraordinary," the moving party, here SPA, must provide the reviewing court evidence related to three factors: the political

significance of the agency's action, the overall economic impacts of the action, and the historical evidence of the agency's authority. *EPA*, 597 U.S. at 721.

First, the political significance factor asks whether the agency's action implicates a critical political issue. *Id.* The Supreme Court has not articulated when an issue rises to the level of a "major" question. *Id.* Still, the court relies on two sub-factors: whether Congress has repeatedly considered addressing the issue with each changing administration and whether the topic is controversial. *Id.* In *EPA*, the court recognized that Congress "consistently rejected proposals to amend the Clean Air Act to create" the agency's proposed scheme. *Id.* at 731. The EPA's action was thus political because it was still "the subject of an earnest and profound debate across the country." *Id.* (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997))).

Next, the economic impact factor asks whether the agency's action was "exorbitantly costly." *EPA*, 597 U.S. at 729. The cost level is unclear, but at minimum, the court only considers the impact on private costs. *Id.* In *EPA*, the CPP could have caused "billions of dollars in *compliance costs*." *Id.* at 714 (emphasis added). The court focused solely on the implications of the agency's actions on private industry and the resulting costs imposed on consumers. *Id.* Federal compliance concerns warranted no consideration. *Id.*

Finally, the historical question examines whether the agency's assertion of authority is unusual. Like the others, this factor is not well-defined, but it likely reflects a concern about the action being within the agency's area of expertise. *Compare Loper Bright*, 144 S.Ct. at 2267 *with EPA*, 597 U.S. at 729. In *EPA*, the court restricted its historical analysis to regulations with

dramatic process changes to the status quo without recent and relevant statutory amendments. *EPA*, 597 U.S. at 724–28. In that case, recent statutory amendments provided context for new regulations. *Id.* They also provide that here.

Clear Congressional Authorization

If agency authority is "extraordinary," the SPA must still show that the Army Corps lacks clear congressional authorization, which the SPA cannot do here. This question focuses on "the authority granted to the [a]gency" by statute. *EPA*, 597 U.S. at 735. This question is statute-specific, and, as discussed below, NEPA clearly provides congressional authority to the Army Corps and CEQ. *Id.*

Agency Actions and Relevant Standard of Review

As discussed in more depth later, agency actions entitled to judicial deference include the Corps' process in determining that the Thicket Depressions were not jurisdictional waters and the Corps' decision to prioritize specific environmental impacts over others. Next, the agencies' decisions to consider climate change and environmental justice within the EIS review are afforded particular weight as a matter clearly within their expertise. Finally, MQD does not apply to any of the Corps' actions, nor have CEQ's Phase 2 NEPA regulations violated it because NEPA's description of the EIS as an "action-forcing" device does not change the nature of the statutory scheme. Even if the standards flip, Appellees should still be granted summary judgment on all issues on appeal.

It was proper for Army Corps to consider climate change impacts and environmental justice

The Corps' EIS and subsequent ROD and Phase 2 Rules appropriately included climate change and environmental justice considerations based on the NEPA's text. Neither of these determinations violates the APA or the MQD.

The APA mandates "deferential judicial review of agency *policymaking and factfinding*." *Loper Bright*, 144 S.Ct. at 2261 (internal citations omitted) (emphasis added). Courts consider whether the agency "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle*, 463 U.S. at 43. The agency's explanation "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.*

The MQD belongs to a small category of "extraordinary cases in which the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." *EPA*, 597 U.S. at 721. For agency authority to fall under the small bubble of "extraordinary," the moving party, here SPA, must provide the reviewing court evidence related to three factors: the political significance of the agency's action, the overall economic impacts of the action, and historical evidence disproving the agency's authority. *Id.* SPA fails to meet that burden.

NEPA's amended text provides agency interpretive authority

By examining NEPA's text and legislative amendments, this Court should find climate change and environmental justice relevant factors that Congress clearly intended for the Army Corps and other federal agencies to review under NEPA's framework. 42 U.S.C. 4332(2)(c). It is "well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *see Citizens Against Burlington, Inc., v. Busey*, 938 F.2d 190, 193–94 (D.C. Cir. 1991). NEPA requires agencies to prepare a "detailed statement" in every report on "major Federal actions significantly affecting the *quality of the human environment*." 42 U.S.C. 4332(2)(c) (emphasis added). Therefore, an agency may proceed with a proposed action, even with adverse environmental impacts, if those impacts are "adequately identified and evaluated." *Robertson*, 490 U.S. at 349.

Initially, the statute required environmental impact statements to include an analysis of any "environmental impact" and unavoidable "adverse environmental effects" of the proposal's implementation. 42 U.S.C. 4332(C)(i) and (ii).. Through the 2023 amendments, Congress clarified the scope of an EIS and said the statement should analyze those "*reasonably foreseeable* environmental effects" of the proposed action. 42 U.S.C. 4332(2)(C)(i) (emphasis added); *see* Fiscal Responsibility Act of 2023 (2023 Act), Pub. L. No. 118-5, Div. C, Tit. III, § 321(a)(3)(B), 137 Stat. 38. Before 2023, longstanding CEQ regulations had similarly specified that agencies should consider their proposed actions' "reasonably foreseeable" environmental effects. 43 Fed. Reg. 55,978, 56,004 (Nov. 29, 1978) (40 C.F.R. 1508.8(b) (1979)). In 2020, CEQ revised the regulations to define "[r]easonably foreseeable" to mean "sufficiently likely to

occur such that a person of ordinary prudence would take it into account in reaching a decision." 85 Fed. Reg. 43,304, 43,376 (July 16, 2020) (40 C.F.R. 1508.1(aa) (2021)) (emphasis omitted). That definition remains in place today because Congress accepted CEQ's regulation and determination of reasonableness. *See* 40 C.F.R. 1508.1(aa).

Congress understood the expertise of CEQ in defining what factors are important to environmental impact statements. Congress's broad delegation of authority to agencies is evident by including the language "reasonably foreseeable" without stated exceptions to what constitutes an environmental effect. 42 U.S.C. 4332(2)(C)(i). When Congress looks to the rule of reason to determine outcomes, the court assumes the status quo guides its meaning. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 318 (2012) ("[T]he alteration of prior law must be clear"). Before the 2023 amendment, "[s]ection 101 of NEPA declare[d] a broad national commitment to protecting and promoting environmental quality." *Robertson*, 490 U.S. at 348 (citing 83 Stat. 852 (codified at 42 U.S.C. § 4331). This national commitment is clear "through various guidance papers *and* executive orders, [where] climate change and EJ have been considered in environmental reviews." R. at 16 (citing EO 13990 (Jan. 20, 2021), Protecting Public Health and the Environment and Restoring Science to Tackle Climate Crisis; EO 14096 (Apr. 26, 2023), Revitalizing Our Nation's Commitment to Environmental Justice for All; CEQ Interim NEPA guidance on considering greenhouse gas emissions and climate change into NEPA regulations, 88 Fed. Reg. 1196 (Jan. 9 2023)) (emphasis added).

The text of NEPA applicable in this case does not expressly limit examinable environmental effects of an action. 42 U.S.C. § 4332(c)(i). More accurately, the text that defines the scope of the required environmental review includes no limiting language. *Id.* As such,

agencies have had to create regulations to limit their own review. 40 C.F.R. § 1508.25 (2019); 40 C.F.R. § 1508.8(a) (2019); 40 C.F.R. § 1508.7 (2019). Under NEPA, an agency must examine its proposed action's direct, indirect, and cumulative effects. 40 C.F.R. § 1508.25 (2019); *see also Sierra Club v. FERC (Freeport)*, 827 F.3d 36, 40 (D.C. Cir. 2016). Direct effects "are caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a) (2019). Indirect effects "are caused by the action and are later in time or farther removed in distance but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b) (2019). Cumulative impacts are "the incremental impact[s] of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency ... or person undertakes such other actions." 40 C.F.R. § 1508.7 (2019).

Confining agencies' NEPA obligations to the consideration of environmental effects that they already directly regulate would contravene Congress's command that "all agencies of the Federal Government" shall "to the fullest extent possible" comply with the obligation to prepare an environmental impact statement in connect with major actions that have significant environmental effects. *Id.* Therefore, "[g]iven the evidence that (a) climate change is a threat to current and future generations, (b) GHG emissions are a primary driver of climate change, and (c) carbon-free electricity would be generated at Mega Solar, it was not arbitrary and capricious for Army Corps to identify and analyze [climate change] in the EIS." R. at 17.

Similarly, Congress granted authority for Phase 2 Rules to consider disparate treatment or environmental justice. As the lower court stated, environmental justice "has been a component in NEPA reviews since 1994," well before the 2023 amendments. R. at 17 (citing E.O. 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994), Federal Actions to Address Environmental Justice in Minority

Populations and Low-Income Populations; *El Puente v. U.S. Army Corps of Eng'rs*, 100 F.4th 236, 251 (D.C. Cir. 2024); *Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F. 3d 1357, 1368 (D.C. Cir. 2017)("*Sabal Trail*")). Although NEPA regulations did not define environmental justice, R. at 17, the term has been defined elsewhere. 40 C.F.R. § 1508.1(m). Environmental Justice considers the disparate policies on the environments of marginalized people. *Id.* Environmental injustice mimics NEPA's definition of "human environment": it not only includes what is traditionally thought of as non-human nature or natural resources (air, water, land) but also includes built and social environments. *Id.*; 42 U.S.C. 4331. The MQD and APA, like Congress, consider the entire landscape of an agency's expertise. *EPA*, 597 U.S. at 724–28. By cherry-picking which agency regulations it considered relevant context, the lower court went beyond the APA's standard of review and implemented its form of policymaking, which even circumvents the MQD. *Loper Bright*, 144 S.Ct. at 2261; *see also El Puente*, 100 F.4th at 246 (holding the task of courts "is not to flyspeck [the agencies'] environmental analysis for any deficiency no matter how minor" (internal citations omitted)).

Thus, Appellees are entitled to summary judgment because the Army Corps and the Phase 2 Rules permissibly considered climate change and environmental justice in conducting environmental reviews.

The Phase 2 Rules do not impose substantive NEPA requirements on agencies or courts, nor violate the Major Questions Doctrine

The Phase 2 NEPA rules do not seek or make the EIS an enforcement device, nor do they turn NEPA into a substantive rather than a procedural statute. *See* 40 C.F.R. 1502.1(a), 1500.1(a)(2), 1502.12.

Phase 2 Rules do not impose substantive NEPA requirements

It is "well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process." *Robertson*, 490 U.S. at 350; *see Busey*, 938 F.2d at 193-94. NEPA requires agencies to prepare a "detailed statement" in every report on "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(c). Therefore, an agency may proceed with a proposed action, even if there are adverse environmental impacts, if those impacts are "adequately identified and evaluated." *Robertson*, 490 U.S. at 349. The Phase 2 Rules do not change that understanding:

> The primary purpose of an environmental impact statement prepared pursuant to section 102(2)(C) of NEPA is to serve as an action-forcing device *by ensuring agencies consider the environmental effects of their action in decision making*, so that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government.

40 C.F.R. § 1502.1(a) (emphasis added); see also 40 C.F.R. § 1500.1(a)(2) (ensuring agencies implement processes to review environmental effects of their actions). The lower court and SPA incorrectly assume that this regulation imposes anything other than what Congress already requires. R. at 18–19. The Supreme Court in *Andrus* already acknowledged "the obligation to prepare an EIS as the required action." R. at 19 (citing *Andrus v. Sierra Club*, 442 U.S. 347, 350, 361 (1978); CEQ's preamble to the Phase 2 Rule, 89 Fed. Reg. At 35450). The text of this regulation operates no differently.40 C.F.R. § 1502.1(a).

MQD does not apply

The MQD belongs to a small category of "extraordinary cases in which the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant

to confer such authority." *EPA*, 142 S.Ct. at 2608. The two-step test is not satisfied in this case. For decades, the CEQ revised the EIS process. *See, e.g.*, Statements on Proposed Federal Actions Affecting the Environment, 36 Fed. Reg. 79 (proposed Apr. 23, 1971); Other Requirements of NEPA, 70 Fed. Reg. 136 (proposed July 18, 2005). It, therefore, does not fall within the "extraordinary" category of the MQD. Even if MQD did apply, the Congressional authority grants to the agencies are clear. CEQ can require the consideration of environmental impacts through the EIS because the text mandates it. 42 U.S.C. § 4332(2)(c).

The Phase 2 Rules do not recast an EIS as action-forcing and NEPA as substantive rather than procedural statute because they only require consideration of the EIS, not a decision based exclusively on the outcome of the EIS. As such, the MQD and the APA are not violated. Therefore, Appellees should be granted summary judgment.

Army Corps properly concluded that the Thicket Depressions are not jurisdictional waters under the Clean Water Act (CWA)

Because it examined the relevant data and provided a reasoned explanation, the Army Corps' determination that the Thicket Depressions are beyond its permitting authority was lawful and neither arbitrary nor capricious. Rather, its determination accorded with the definition for CWA jurisdictional waters set by the Supreme Court in *Sackett v. EPA,* 598 U.S. 651 (2023). Further, Army Corps is entitled to special deference because whether the Thicket Depressions are CWA jurisdictional waters falls within its scientific expertise. *See Diné Citizens Against Ruining Our Env't v. Haaland*, 59 F.4th 1016, 1030 (10th Cir. 2023). Determination of CWA jurisdictional waters follows consideration of "numerous permissible factors"—all of which are

matters of fact. *See Deerfield Plantation Phase II-B Prop. Owners Ass'n v. United States Army Corps of Eng'r*, 501 F. App'x 268, 271-75 (4th Cir. 2012).

In enacting the CWA, Congress sought "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Idaho Conservation League v. Poe*, 86 F.4th 1243, 1244 (9th Cir. 2023) (citing 33 U.S.C. § 1251(a)). The CWA regulates the discharge of pollutants into "waters of the United States," or "WOTUS," which are defined as traditional navigable waters, relatively permanent tributaries of such waters, and some wetlands adjacent to those waters. *See* 33 U.S.C. § 1362(7); 40 C.F.R. § 230.3(s) (1993); *Sackett*, 598 U.S. at 678 (citing *Rapanos v. United States*, 547 U.S. 715, 755 (2006)). "Navigable waters" are "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." 33 C.F.R. § 328.3(a)(1); 40 C.F.R. § 120.2(a)(1).

For a particular wetland or other body of water to be subject to CWA jurisdiction, it must fall within the bounds of the two-part test initially established in *Rapanos v. United States* and subsequently adopted in *Sackett v. EPA*. First, it must be adjacent to another body of water which independently qualifies as WOTUS, and second, it must have a "continuous surface connection" with the established WOTUS, such that it is "difficult to determine where the water ends and the wetland begins." *Sackett,* 598 U.S. at 678 (citing *Rapanos*, 547 U.S. at 755) (internal quotations omitted).

The Supreme Court's interpretation of WOTUS had been far from clear before *Sackett*. *Lewis v. United States*, 88 F.4th 1073, 1107 (5th Cir. 2023). While *Rapanos* "yielded a . . .

plurality opinion that narrowly construed the regulation of 'wetlands' under the overall CWA mantle[,] . . . Justice Kennedy's separate concurrence required only a 'significant nexus' between a property's 'wetland' and adjacent 'relatively permanent' waterways . . . ." *Id.* at 1107–78 (internal citation omitted). The *Sackett* Court ultimately rejected the test proposed in Justice Kennedy's *Rapanos* concurrence. 598 U.S. at 680. "As discussed, however, the meaning of 'waters' is more limited than the EPA believes. . . . And, in any event, the CWA never mentions the 'significant nexus' test, so the EPA has no statutory basis to impose it." *Id.* (citing *Rapanos*, 547 U.S., at 755-756).

The *Sackett* Court held that the CWA "extends to only those wetlands with a continuous surface connection to bodies that are [WOTUS] in their own right, so that they are indistinguishable from those waters." *Id.* at 684 (internal citation omitted). Indeed, "'intermittent' . . . streams . . . are not" within the definition of "relatively permanent." *Id.* at 732, n.5. A continuous surface connection is absent where there is "only an intermittent, physically remote hydrologic connection to [WOTUS]." *Rapanos*, 547 U.S. at 742. WOTUS "does not include channels through which waters flow intermittently or ephemerally." *Id.* at 739. "[D]ry channels" in which water flows only intermittently are not WOTUS. *Id.* at 733, n.6. "[R]elatively continuous flow is a necessary condition for qualification as a "water.'" *Id.* at 736 n.7 (plurality opinion). Finally, long-standing Army Corps guidance dictates that swales, ditches, or ponds created for aesthetic reasons are not WOTUS if they do not carry a relatively permanent flow to a traditional navigable water. *Deerfield Plantation Phase II-B Prop. Owners Ass'n v. United States Army Corps of Eng'rs*, 801 F. Supp. 2d 446, 462 (D.S.C. 2011).

Here, of the seven depressional wetlands through which the KCT would run, none fall under the jurisdiction of the CWA. Swales, observed to be absent of standing or flowing water during two inspections, separate four of the wetlands from WOTUS. R. at 6-7. The other three wetlands connect to WOTUS via a man-made drainage ditch that lacks a continuous flow of water. *Id.* Even if, at times, the swales do permit water to flow between the wetlands and WOTUS tributaries, and the drainage ditch, too, conveys water, the wetlands still do not qualify as CWA jurisdictional waters. Finally, swales and drainage ditches with only intermittent flow of water are explicitly excluded from the definition for WOTUS found within EPA's 2023 revised regulations. 40 C.F.R. § 120.2(b)(3)–(8).

Neither the swales nor the drainage ditch are relatively permanent tributaries of jurisdictional waters such that the seven depressional wetlands also fall within the purview of the CWA. Thus, Army Corps correctly determined the affected wetlands to be beyond its permitting authority.

Army Corps was not bound to consider the environmental impacts of the KCT Line on the Thicket Depressions

Army Corps' decision to not consider the environmental impacts of the KCT Line on the Thicket Depressions was proper and within the bounds of the law. Army Corps reasonably determined that it need not consider in its NEPA review any secondary effects which are beyond its authority to regulate. This determination is entitled to deference.

Under NEPA, agencies must take a "hard look" at the environmental consequences of their actions, but "the statute does not specify how an agency should determine the scope of its NEPA analysis." *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 194 (4th Cir.

2009). The "selection of the scope" of an agency's NEPA analysis is a "delicate choice and one that should be entrusted to the expertise of the deciding agency." *Selkirk Conservation All. v. Forsgren*, 336 F.3d 944, 962 (9th Cir. 2003). Army Corps' regulations instruct that its NEPA analysis must "address the impacts of the *specific* activity requiring a . . . permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review." 33 C.F.R. pt. 325, App. B, § 7(b)(1) (2020) (emphasis added). Army Corps' NEPA obligations are limited to the segments which are under its asserted CWA jurisdiction and do not require consideration of the entire project if it does not have sufficient control and responsibility over the entire project. *Red Lake Band of Chippewa Indians v. United States Army Corps of Eng'rs*, 636 F. Supp. 3d 33 (D.D.C. 2022).

Except here, for the reasons explained in the previous section, none of the seven depressional wetlands through which the KCT Line would run fall under CWA jurisdiction. Therefore, Army Corps need not consider the KCT Line's potential environmental impacts on the wetlands. Neither must it consider any potential environmental impacts to the Thicket Swamp at large.

Army Corps relies on *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004). "[W]here an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect. Hence, under NEPA and the implementing CEQ regulations, *the agency need not consider these effects*." 541 U.S. at 770 (emphasis added). No fewer than five Circuit Courts of Appeals have adopted in full the Supreme Court's reasoning in *Public Citizen*, each ruling that agencies may limit their NEPA review to only those effects over which they have regulatory

authority. *See Protect Our Parks v. Buttigieg*, 39 F. 4th 389 (7th Cir. 2022); *Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288 (11th Cir. 2019); *Kentuckians for the Commonwealth v. U.S. Army Corps of Eng'rs*, 746 F.3d 698 (6th Cir. 2014); *New Jersey Dept. of Env't Prot. v. U.S. Nuclear Regul. Comm'n*, 561 F.3d 132 (3d Cir. 2009); *Ohio Valley Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 196-97 (4th Cir. 2009).

An outlier Circuit Court of Appeals is the District of the District of Columbia, which in recent years has issued a series of decisions that—befuddlingly—both distinguish *Public Citizen* and yet also confound that distinction. For example, in *Sierra Club v. Federal Energy Regulatory Commission*, 867 F.3d 1357 (D.C. Cir. Aug. 22, 2017) ("Sierra Club (Sabal Trail)"), the majority of the three-judge panel distinguished *Public Citizen* when it found that FERC's NEPA analysis of the downstream emissions of power plants to be served by a proposed pipeline project was insufficient. *Id.* at 332. Even though FERC would have no regulatory authority over the power plants' future emissions, FERC still must conduct a quantitative inquiry into the future emissions because they are a "reasonably foreseeable" indirect effect of the agency's action to approve the pipeline. *Id.* However, in *Sierra Club v. FERC*, 827 F.3d 36 (D.C. Cir. 2016) ("Freeport"), *Sierra Club v. FERC*, 827 F.3d 59 (D.C. Cir. 2016) ("Sabine Pass"), and *EarthReports, Inc. v. FERC*, 828 F.3d 949 (D.C. Cir. 2016), the D.C. Circuit applied *Public Citizen* to hold that FERC has no obligation under NEPA to consider the environmental effects of natural gas exports from LNG export terminals because the DOE, not FERC, regulates such exports.

This Court should reject the D.C. Circuit's aberrant adoption of a "reasonably foreseeable" test, as outlined in *Sabal Trail*, and instead join the plurality of its sister circuits in applying *Public Citizen* without distinction. To require an agency to engage in open-ended

speculation about any potential future environmental impact consequential to agency action, without consideration of the limits to its regulatory authority over those impacts, is a bridge too far. The D.C. Circuit's legal reasoning in *Sabal Trail* is "questionable" and "fails to take seriously the rule of reason announced in *Public Citizen* . . . ." *Ctr. for Biological Diversity*, 941 F.3d at 1300. The D.C. Circuit "narrowly focused on the reasonable foreseeability of the downstream effects . . . while breezing past other statutory limits and precedents . . . clarifying what effects are cognizable under NEPA." *Id.*

Army Corps functioned squarely within the parameters set for it by *Public Citizen* when it decided to forego examining the environmental impacts of the KCT Line on the Thicket Depressions. Thus, Army Corps' action was proper and in accordance with the law.

Army Corps' decision to refrain from considering the environmental impacts related to the Mega Solar Array was reasonable and appropriate under the law

In conducting the environmental review of the KCT Line, Army Corps was not required to consider the environmental impacts of mining and disposing of the silicon and other hazardous materials needed for the proposed Mega Solar Array, the land use and habitat loss from the Mega Solar Array, and the emissions from transporting imported modules from China that will be used in the Mega Solar Array.

"Congress has charged [Army Corps] with the responsibility to maintain and regulate water resource development projects in accordance with 'the public interest.'" *McClung v. Paul*, 788 F.3d 822, 829 (8th Cir. 2015). Army Corps "is authorized to carry out projects for the protection, restoration, or enhancement of aquatic and associated ecosystems, including projects

for the protection, restoration, or creation of wetlands and coastal ecosystems." 16 U.S.C.S. § 3956. Congress, however, has *not* empowered Army Corps—outside of the context of regulating the nation's aquatic resources—to regulate mining, the disposal of hazardous materials, land use, wildlife, and the greenhouse gases emitted by importing equipment from China.

In the same way that Army Corps was not required to consider the environmental impacts of the KCT Line on the Thicket Depressions, so too is Army Corps not required to consider the environmental impacts of the Mega Solar Array. *Public Citizen* still controls: "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Pub. Citizen*, 541 U.S. at 770. Army Corps' decision to refrain from examining the environmental impacts of the Mega Solar Array was proper and in accordance with the law.

Conclusion

Army Corps' climate change and environmental justice considerations did not violate the MQD or the APA. Additionally, CEQ's 2024 Phase 2 NEPA regulations did not create an action-forcing device and thus did not violate the MQD. Finally, Army Corps' decisions that the Thicket Depressions did not fall under CWA jurisdiction and that it need not consider the environmental impacts of the KCT Line or the Mega Solar Array were proper and in accordance with the law. Therefore, this Court should reverse the district court and grant summary judgment in favor of Appellee on all claims.

C.A. No. 24-09876

United States Court of Appeals for the Twelfth Circuit

SWAMPLAND PRESERVATION ASSOCIATION,

Plaintiff-Appellant and Cross-Appellee

v.

U.S. ARMY CORPS OF ENGINEERS, an agency of the Department of Defense, GENERAL LUCY PEABODY, in her official capacity as Chief of Engineers and Commanding General of the United States Army Corps of Engineers, and SCOTT ZINK, in his official capacity as Division Commander of the United States Army Corp of Engineers, Utanidi Division,

Defendants-Appellees and Cross-Appellants

On Appeal from the District Court for the Eastern District of North Kingston, Dist. Ct. Consolidated Case Nos. 2424 and 2428,
Judge Jeremy A. Dodgecoin

BRIEF FOR PLAINTIFF-APPELLANT AND CROSS-APPELLEE

Team 5

Counsel for Plaintiff-Appellant and Cross-Appellee

September 23, 2024

QUESTIONS PRESENTED

1. Should the United States Army Corps of Engineers be granted any deference for its arbitrary and capricious findings of fact and unsound legal conclusions considering the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*?

2. Did the Army Corps of Engineers' Approved Jurisdictional Determination arbitrarily and capriciously find that the Thicket Depressions are not jurisdictional under the Clean Water Act when it only made visits during the dry season and did not consider relevant contradictory data?

3. Did the Army Corps of Engineers arbitrarily and capriciously decline to consider the Thicket Depressions, which are jurisdictional waters, in its Environmental Impact Statement?

4. Was the Army Corps of Engineers required to consider the reasonably foreseeable environmental impacts of (1) land use and habitat loss from the Mega Solar Array project, (2) greenhouse gas emissions resulting from the transportation of nine-million PV modules from China, (3) the mining of silicon and other hazardous materials in connection with the production of the modules, and (4) the disposal of the modules in its EIS as required by the National Environmental Procedure Act (NEPA)?

5. Was the Army Corps of Engineers' consideration of climate change and environmental justice—undertaken in compliance with the Phase 2 regulations that impermissibly transcend the Council of Environmental Quality's statutory authority—arbitrary and capricious, and/or violate the major questions doctrine?

6. Do the 2024 Phase 2 regulations that require agencies to select an environmentally-preferred route before taking action impermissibly transform NEPA from a procedural statute to a substantive statute, and/or violate the major questions doctrine?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Constitutional Provisions

Other Authorities

JURISDICTIONAL STATEMENT

The United States District Court for the Eastern District of North Kingston had subject matter jurisdiction over this action, Consolidated Case Nos. 2424 and 2428, pursuant to 28 U.S.C. § 1331, because this case arises under Federal law, specifically, the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), challenging the United States Army Corps of Engineers' Approved Jurisdictional Determination, Environmental Impact Statement, and Record of Decision as arbitrary, capricious, and not in accordance with the law.

United States Courts of Appeals have appellate jurisdiction over, *inter alia*, "all final decisions of the district courts of the United States." 28 U.S.C. § 1291. This Court has appellate jurisdiction over this appeal, No. 24-09876, pursuant to 28 U.S.C. § 1291 because this appeal is from a final order granting summary judgment by the District Court that "end[ed] the litigation on the merits and le[ft] nothing for the [District C]ourt to do but execute the judgment." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521–522 (1988) (citing *Catlin v. U.S.*, 324 U.S. 229, 233 (1945)).

STATEMENT OF THE CASE

The Kingston Cross Transmission Line (KCT Line) is a proposed 333-mile, 600-kV DC transmission line, intended to transport electricity from the proposed Mega Solar Array, a sprawling 500-megawatt photovoltaic facility located in rural North Kingston, to the Atlantic Connector Line, which serves a large portion of the mid-Atlantic population. (R. 4.) The KCT Line, proposed by Mountain Power Gas & Electric (Mountain PG&E) in July 2020, has become a critical project in facilitating the Mega Solar Array's development. (R. 4.) The $2.5 billion solar array, developed by Mega Solar LLC and partially owned by Mountain PG&E, will be powered by solar panels supplied by Chinese manufacturer TrikoSolar, that, despite being readily available knowledge, the details of which the United States Army Corps of Engineers (USACE, Army Corps, or Corps) declined to inquire about. (R. 4.)

Mountain PG&E has already secured the necessary state and local approvals, but Federal approval of the KCT Line's right-of-way (ROW) route through the Thicket Depressions, a vast, ecologically significant freshwater wetlands system, is needed for the project to proceed. (R. 5.) This proposed ROW through the Swamp is 250 feet wide, and the towers will require significant infrastructure, including new access roads and improvements to existing routes. (R. 4.)

The Thicket Swamp is one of the largest blackwater swamps in the country, spanning 338,000 acres, 70% of which is designated wetlands. (R. 5) The Swamp is upstream and intrinsically connected to the Utanidi River, as the water levels of the Swamp rise and fall with the river's seasonal flows, affecting both the local and downstream ecosystems. (R. 5.) Despite this, USACE, relying on Mountain PG&E's groundwater evaluation, issued an Approved Jurisdictional Determination (AJD) in August 2023, concluding that the Thicket Depressions did not qualify as "waters of the United States" (WOTUS) and therefore did not require Federal

permits under the Clean Water Act (CWA). (R. 6.) The Corps limited its consideration to the specific wetlands directly impacted by the KCT Line and did not assess the broader hydrological impact on the interconnected swamp system. (R. 6.)

The Environmental Impact Statement (EIS) for the KCT Line project as required under the National Environmental Policy Act (NEPA), jointly prepared by the Department of Energy (DOE), the USACE, and Mountain PG&E (as sponsor lead), considered three alternative routes and a "no action" alternative for the line. (R. 7–8.) The "no action" alternative would include the KCT line not being built and was rejected by the Corps due to climate change concerns, including the effects of using electricity generated by coal as opposed to electricity from the proposed Mega Solar Array. (R. 8.) Alternative #1, which would bypass the Swamp, was rejected due to concerns about potential environmental justice (EJ) impacts on the nearby community of Buckington, an EJ community with a population that is nearly 70% Black and has faced a history of environmental harm. (R. 8.) Alternative #3, which would have routed the line through the Utanidi National Forest and Bullfrog National Wildlife Refuge, was dismissed primarily because of anticipated wildlife impacts on Federally protected lands. (R. 8.) The Final EIS identified Alternative #2, which passes directly through the heart of Thicket Swamp, as the environmentally-preferred option, largely because it avoided crossing Federal land and thereby reduced the regulatory burden. (R. 8.)

On February 24, 2024, the Army Corps issued its Record of Decision (ROD), approving the Utanidi River crossing with Alternative #2. (R. 7.) Despite public opposition and significant environmental concerns raised by the Swampland Preservation Association (SPA) and others, the Corps largely deferred to the narrow scope of its AJD, disregarding the broader ecological impacts on Thicket Swamp. (R. 8–9.)

SPA initiated two actions in the District Court under the Administrative Procedure Act (APA). (R. 3.) The first challenged the USACE's determination that the Thicket Depressions do not constitute jurisdictional waters under the CWA. (R. 3.) The second challenged USACE's ROD, which approved the Final EIS for the KCT Line and authorized the crossing of the Utanidi River. (R. 3.) The district court consolidated the two proceedings. (R. 3.) After considering the parties' cross-motions for summary judgment, the court granted partial summary judgment in favor of both SPA and the USACE. (R. 3–4.) The court upheld USACE's jurisdictional determination, while rendering a split decision on SPA's claims regarding the EIS and ROD. (R. 3–4.)

SUMMARY OF THE ARGUMENT

Following the Supreme Court's recent *Loper* decision, this Court should not give any deference to USACE's legal interpretations or factual findings while reviewing this appeal. This Court should reverse the District Court's grant of summary judgment in part and affirm in part. The District Court's grant of summary judgment to the Corps should be reversed for the following reasons: (1) the Corps' AJD arbitrarily and capriciously excluded the Thicket Depressions from the CWA' jurisdiction, despite their clear qualification as WOTUS by ignoring relevant data, misinterpreting the CWA, and failing to provide a sound explanation for its finding; (2) the USACE violated the APA and NEPA because its EIS did not consider the environmental impacts of the KCT Line on the Thicket Depressions since they are jurisdictional waters under the CWA; (3) the Corps failed to include evaluations of environmental impacts resulting from mining and disposing of silicon and other hazardous materials in connection with the Mega Solar Array project in its EIS that it was required to include these as it is the "legally relevant cause," thus violating the APA as it is insufficient under NEPA; and (4) the Corps

improperly considered climate change in its EIS in accordance with the 2024 Phase 2 regulations because the Phase 2 regulations violate the major questions doctrine (MQD) and are not in accordance with the law.

The District Court's grant of summary judgment to SPA should be affirmed for the following reasons: (1) the Corps violated NEPA by failing to include the environmental impacts of the Mega Solar Array on wildlife and land use, as well as greenhouse gas (GHG) emissions from the transportation and environmental impacts from mining in relation to the production of solar modules in its EIS because it is the legally relevant cause of those reasonably foreseeable impacts; (2) the NEPA Phase 2 regulations requiring agencies to consider environmental justice impacts in their EIS are not in accordance with the law as they transform NEPA from a purely procedural statute into a substantive one, violating the APA and MQD; and (3) the Phase 2 regulations impermissibly turn an EIS into an "action-forcing" device by requiring agencies to select an environmentally-preferred route, violating the MQD because it is incompatible with Congress' intent.

ARGUMENT AND AUTHORITIES

I. THE USACE, BY VIRTUE OF ITS INCONSISTENT CONSIDERATIONS OF FACT AND UNTENABLE INTERPRETATIONS OF LAW, IS NOT ENTITLED TO ANY JUDICIAL DEFERENCE.

Acknowledging that agencies "whose zeal might . . . [carry] them to excesses not contemplated in legislation creating their offices," *United States v. Morton Salt Co*., 338 U.S. 632, 644 (1950), Congress enacted the Administrative Procedure Act (APA) in 1946 to avert agencies overstepping their statutory authority. *Loper Bright Enter. v. Raimondo*, 144 S. Ct. 2244, 2261 (2024). The APA provides a cause of action and review mechanism by which a court shall "[t]o the extent necessary to decision and when presented," review "all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action," and a court may overturn agency decisions should they be "arbitrary, capricious, . . . or otherwise not in accordance with law." 5 U.S.C. § 706, (2)(a). Whether an agency's action is arbitrary and capricious hinges on its adequate "examin[ation of] the relevant data," and "articulat[ion of] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014).

After the Supreme Court's 1984 *Chevron* decision, provided certain criteria were met, courts reviewing agency actions would defer to such agencies' interpretations of ambiguous language in their governing statutes. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Couns., Inc*., 467 U.S. 837, 842–843 (1984). This *Chevron* deference, however, met its demise in the Court's 2024 *Loper Bright Enterprises v. Raimondo* decision. *Loper,* 144 S. Ct. at 2263. In repudiating *Chevron* deference, the Court reasoned that because the APA textually omits statutory deference to agencies "in answering those legal questions" while mandating "judicial review of agency policymaking and factfinding be deferential," an agency's interpretation of ambiguous statutory

language *is not entitled* to any deference by a reviewing court. *Id.* at 2261. This is not to say that a reviewing court must decide questions of law on its own; a court may give persuasive weight to an agency's interpretation of law "depending upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Id.* at 2259. (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

This Court should not give any deference to USACE's arbitrary and capricious factual findings nor its inconsistent legal interpretations. With respect to the Corps' AJD, its finding that the Thicket Depressions are not jurisdictional waters under the CWA is not only arbitrary and capricious because the Corps failed to weigh all the evidence and articulate a satisfactory explanation since it deliberately obfuscated and ignored contradictory data thereby spoiling any possible satisfactory analysis, but the AJD involved the Corps' untenable interpretation of its governing statute. *See* discussion *infra* pp. 8–13. The Corps' AJD is foundationally incongruous with the law because its finding, *inter alia*, was based on a fallacious interpretation of *Sackett v. EPA*, and as such, the Corps was neither entitled to the deference improperly given by the District Court nor is it entitled to any deference by this Court. *See* discussion *infra* pp. 8–13. Furthermore, because the Corps based its decision to eschew considerations of the environmental impacts on the Swamp on an unsubstantiated determination in its AJD, *see* discussion *infra* pp. 8–13, this Court should not accord it any deference.

Regarding the rest of its EIS, USACE was not entitled to the deference given to it by the District Court nor to any deference by this Court whatsoever. First, the USACE did not consider the environmental impacts of the Mega Solar Array on land use, wildlife, GHG emissions, silicone mining, and PV module disposal. Because USACE is the "legally relevant cause" of

those impacts—meaning that the Corps has the autonomy to allow the project to proceed by either granting or denying the ROD—it had the duty under NEPA to consider those impacts in its EIS. Because the EIS did not include analyses of these impacts, it is arbitrary, capricious, and not in accordance with the law. *See* discussion *infra* pp. 17–22. Finally, the new Council of Environmental Quality's (CEQ) Phase 2 NEPA regulations require an acting agency to consider climate change and environmental justice in its EIS and select the environmentally-preferred alternative for its proposed action; the CEQ itself has called this new purpose "action-forcing." NEPA is intended as a purely procedural statute. The Phase 2 regulations, however, by requiring the selection of an environmentally-preferred route, turn it into a substantive statute, which is contrary to congressional intent and violates the major questions doctrine. Additionally, Phase 2's required considerations of climate change and environmental justice improperly elevates these specific impacts over other relevant impacts, violating NEPA. Because the Corps' EIS erroneously adheres to these Phase 2 regulations, its EIS is not in accordance with the law. *See* discussion *infra* pp. 23–26. For the foregoing reasons, this Court should not accord the Corps' disparate factual findings and untenable legal interpretations of NEPA any deference.

II. THE ARMY CORPS' APPROVED JURISDICTIONAL DETERMINATION IS ARBITRARY, CAPRICIOUS, AND NOT IN ACCORDANCE WITH THE LAW BECAUSE THE THICKET DEPRESSIONS ARE JURISDICTIONAL WATERS OF THE UNITED STATES.

This Court should reverse the District Court's grant of summary judgment to the USACE because its AJD—finding that the Thicket Depressions are not jurisdictional waters under the CWA—is arbitrary, capricious, and not in accordance with the law.

Prior to 1972, Federal regulation of water pollution "w[as] in practice only prohibited when [pollution] led to nuisances or water quality standard violations." Damien M. Schiff, *Sackett v. EPA II: Ascertaining the Scope of Wetlands Jurisdiction Under the Clean Water Act*,

Cato Sup. Ct. Rev., 2022–23, at 243. Congress' amendments to the Water Pollution Control Act "'total[ly] restructure[ed]' and 'complete[ly] rewr[ote]'" the Federal government's approach to preserving and maintaining the "chemical, physical and biological integrity" of United States' waters. *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (citations omitted); 33 U.S.C. § 1251 et seq. These amendments, colloquially dubbed the Clean Water Act (CWA), prohibits "the discharge of any pollutant" into "navigable waters." 33 U.S.C. §§ 1311(a), 1362(12)(A).

Given Congress' aim at protecting the nation's waters, the scope of the CWA includes not only those interstate waters Congress possesses explicit Constitutional authority over, U.S. Const. art. I, § 8, cl. 3 (Commerce Clause), but to some of those purely intrastate waters that feed into and affect interstate waters. S*ee generally Gonzales v. Raich*, 545 U.S. 1 (2005). As such, the CWA, enforced jointly by the EPA and USACE, extends to those "navigable waters which it defines as the waters of the United States, including the territorial seas." *Sackett v. EPA (Sackett II),* 598 U.S. 651, 661 (2023) (citations omitted). The EPA primarily deals with violations of the CWA after the fact by initiating civil actions or issuing compliance orders, *Id.*, while the USACE issues AJDs, 33 C.F.R § 320.1(a)(2), (6), and controls permits "for the discharge of dredged or fill material." 33 U.S.C. § 1344(a).

A hopefully evident, and emphatically litigated question has emerged out of the CWA's definition of navigable waters: what is a "waters of the United States?" The Supreme Court labored for decades to explicate the meaning of this nebulous definition, albeit not always successfully. *See Rapanos v. United States*, 547 U.S. 715 (2006) (plurality opinion).

Less than two decades after the Court's last attempt in *Rapanos v. United States*, the Court "return[ed] to the problem and attempt[ed] to identify with greater clarity what the [CWA] means by the waters of the United States" in *Sackett II*. 598 U.S. at 659. In 2004, Michael and

Chantel Sackett purchased land in Bonner County, Idaho and began backfilling their property to build a home. *Id.* at 662. The Sacketts' land was "adjacent to . . . an unnamed tributary" which feeds into a creek, and ultimately into Priest Lake. *Id.* at 662–663 (internal quotations omitted). Shortly thereafter, the EPA sent them a compliance order asserting that "their property contained protected wetlands," and that "their backfilling violated the CWA." *Id.* at 662. The Sacketts sued the EPA claiming the agency lacked jurisdiction over any wetlands on their property under the APA. *Id.* at 663.

Declaring that the EPA's "compliance order was not a final agency action," the trial court initially dismissed the Sackett's complaint. *Id.* In 2012, the Supreme Court overturned the trial court's dismissal, and "after seven years of additional proceedings on remand," the trial court "entered summary judgment for the EPA." *Id*.; *see generally Sackett v. EPA (Sackett I)*, 566 U.S. 120 (2012). On appeal, holding that the Sacketts' property satisfied the prior test under the CWA, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (holding WOTUS to "encompass wetlands adjacent to waters as more conventionally defined"), the Ninth Circuit affirmed. *Sackett II,* 598 U.S. at 663; *see generally Sackett v. EPA (Sackett I)*, 566 U.S. 120 (2012); *Sackett v. EPA*, 8 F.4th 1075 (9th Cir. 2020).

Reversing the Ninth Circuit's judgment, the Supreme Court vindicated Justice Scalia's plurality opinion in *Rapanos*, holding that "the CWA extends to only those wetlands that are as a practical matter indistinguishable from waters of the United States." *Sackett II,* 598 U.S. at 678 (citing *Rapanos*, 547 U.S. at 755) (internal quotations omitted). This crucial notion of indistinguishability, the Court illustrates, stems from "traditional notions of waters" that "are described in ordinary parlance as streams, oceans, rivers, and lakes," and the Court's history of "refer[ing] to similar bodies of water[] almost always in relation to ships." *Id.* at 671, 673

(citations omitted). This narrower, almost utilitarian, interpretation of what 'waters' are in relation to linguistic and commercial use, as the Court suggests, excludes isolated ponds and other remote bodies of open water like intrastate man-made creeks or puddles from being classified as WOTUS. *Id.* at 674. Not all wetlands connected to WOTUS, however, simply by virtue of that connection, are automatically WOTUS. *Id.* at 678. Conversely, a wetland does not cease to be a WOTUS should its connection to interstate navigable waters desist for a period of time. *Id*. As the Court acknowledged, wetlands that are WOTUS do not cease to be so due to "temporary interruptions in surface connection" that "may sometimes occur because of phenomena like low tides or dry spells." *Id.* In other words, wetlands affected by seasons, tides, or droughts do not cease to be WOTUS when there is a disruption in surface flow.

Ultimately, the Court reasoned that for wetlands to be WOTUS, (i.e., "indistinguishable from waters of the United States such that it is difficult to determine where the water ends and the wetland begins") the party asserting jurisdiction over such wetlands under the CWA must show that the wetlands are "a relatively permanent body of water connected to traditional interstate navigable waters," and "that the wetland has a continuous surface connection with that water." *Id.* at 678–679 (citing *Rapanos*, 547 U.S. at 742) (internal quotations omitted).

To refresh, an agency's action is arbitrary and capricious under the APA if it failed to: (1) "examine the relevant data," (2) "articulate a satisfactory explanation for its action including," (3) "a rational connection between the facts found and the choice made." *Del. Riverkeeper Network*, 753 F.3d at 1313; 5 U.S.C. § 706(2)(A). By analyzing each criterion in turn, it is obvious that the USACE's finding that the Thicket Depressions are not WOTUS was arbitrary, capricious, and not in accordance with the law.

First, the USACE failed to examine the relevant data because it only made two site visits during the dry season and did not acknowledge nor address critical contradictory information from the Robin Expert Report. While it is undisputed that "during some periods [of] the year," (R. 6.), the Swamp's channels are dry, it is likewise undisputed that at other times, those same channels "'convey water through a very wet surface connection from the four Depressions to tributaries for at least part of the year.'" (R. 7.) (citing Robin expert report, pp. 15, 18) Furthermore, "when the groundwater table is elevated," during the wet season, the drainage channel "likely has a continuous flow of a relatively significant volume of water," that is "more than in direct response to precipitation." (R. 7.) (citing Robin expert report, pp. 15, 18) This seasonal, dependable, and predictable flow of water from the Thicket Depressions is precisely the kind that the *Sackett* Court expressly includes within the definition of WOTUS despite "temporary interruptions in surface connections" that "may sometimes occur because of phenomena like low tides or dry spells." *Sackett II*, 598 U.S. at 678–679.

During the Swamp's wet season in the spring, the wetlands are indisputably connected to traditional interstate navigable waters, i.e., the Utanidi River, and that connection is continuous. (R. 7.) The Corps' failure to visit during the wet season and evaluate the Swamp's connection to the Utanidi River and then aver the Swamp is not a WOTUS is tantamount to a person visiting Oklahoma twice during the winter and proclaiming that the state is not in tornado alley.[1] Ultimately, this weighty and relevant factual data supporting a finding that the Thicket Depressions are a WOTUS is not reflected in the Corps' AJD.

[1] From December to February, Oklahoma averages less than one tornado per month since 1950. But Oklahoma averages seven to twenty-four tornadoes per month from April to June. The most tornadoes to ever occur in May was 105, compared to the most in February at 13. *See* National Weather Service, *Monthly Statistics for Tornados*, **NOAA** (last visited Sep. 13, 2024, 8:04 PM) https://www.weather.gov/oun/tornadodata-ok-monthlyannual/.

Second, the Corps' deliberate omission of this information in its AJD when it is included in the Robin Expert Report not only illustrates the Corps' failure to examine all the evidence, but its failure to articulate a satisfactory explanation of its finding that the Depressions are not a WOTUS. Because its AJD solely addresses those specific facts that support its conclusion while deliberately ignoring the Robin Expert Report data, the Corps' explanation for its AJD is necessarily spoiled. The fact that the sky is orange during a beautiful sunset does not confer logical validity to a person professing that the sun is always orange while experiencing it. Not only is the Corps' explanation spoiled by its suppression of the Robin Expert Report's data, but it is also inadequate since it does not comport with *Sackett II*. 598 U.S. at 678–679.

Both the Corps' and the District Court misinterpreted "relatively permanent" and "continuous surface connection" to refer only to a *physically* unbroken connection. *Id*. However, a proper reading of *Sackett II* necessitates that there be a *temporal* aspect to a wetland's relative permanence. *Id*. As the District Court conceded in its analysis, *Rapanos* does not exclude seasonal rivers from being a WOTUS. (R. 11–12.); *Rapanos*, 547 U.S. 715, 733 n.6 (2006). But, the District Court cited the Supreme Court's dicta from a plurality opinion's footnote to acknowledge this point and swiftly gloss over it, (R. 11–12.); *Rapanos,* 547 U.S. at 733 n.6, when this temporal facet of "relatively permanent" is made explicit and *binding* in *Sackett II*. *Sackett II,* 598 U.S. at 678–679. "[P]henomena like low tides or dry spells" that cause "temporary interruptions in surface connection," as the Court puts it, account for the exact fluctuations that affect the physical surface connection of water from the Depressions to the Utanidi River. *Id*. The Corps' and District Court's misleading characterization of the swales and drainage channel as "intermittent" and "ephemeral," (R. 11.), deceptively implies that the periods where water is flowing from the Swamp to the River occur sporadically, unpredictably, and

temporarily when that is categorically false. The question of when water is flowing from the Swamp to the River is not a matter of complex divination: it is during the wet season.

Finally, the Corps' disregard of those factual findings which support the Thicket Depressions being WOTUS, combined with the Corps' misreading of *Sackett II*, all told, cannot conceivably create a rational connection between the facts and the Corps' finding. Unlike the land in *Sackett II* that is "adjacent to . . . an unnamed tributary" which feeds into a creek, which feeds into a WOTUS, *Id*. at 662, here the Depressions themselves are a WOTUS because the Depressions are immediately adjacent to the Utanidi River and they "all rise and fall together, affected by the seasons, the weather, and the ebb and flow of the Utanidi River." (R. 5.) Here, there is not the three degrees of separation and intermediaries connecting the Sackett's property to Priest Lake. *Sackett II,* 598 U.S. at 662. The Depressions and River are so inextricably connected to one another that it is irrational for the Corps to make two visits during the dry season, ignore critically relevant data in the Robin Expert Report, and then definitively conclude that the Depressions are not WOTUS. This defective line of reasoning would exclude any proper jurisdictional water from the CWA that is affected by seasonal flow at all. The Utanidi River does not cease to be WOTUS if there were a disruption in the River's flow during the dry season, and neither do the Depressions.

Additionally, the District Court, in misguidedly giving the Corps' findings "extra persuasive weight" concerning "the Corps' determinations of relatively permanent and continuous surface connection" because they "are firmly with Army Corps' expertise," (R. 10.), is an erroneous misapplication of *Loper*. *See generally Loper Bright Enter. v. Raimondo*, 144 S. Ct. 2244 (2024). The District Court mischaracterizes the Corps' interpretation of "relatively permanent" and "continuous surface connection" as issues of fact, when they are actually issues

of law. (R. 11–12.) If *Loper* stands for anything, it stands for the principle that "[i]t is emphatically the province and the duty of the judicial department to say what the law is." *Loper*, 144 S. Ct. at 2257 (citing *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803)). It is antithetical to the Supreme Court's holding in *Loper* for the District Court to give deference to the Corps on an interpretation of law; the meanings of "relatively permanent" and "continuous surface connection" are not within the Corps 'expertise', but the courts'. *Id*. The question of whether "relatively permanent" and "continuous surface connection" contain an implicit temporal aspect is not an issue of fact that the Corps' 'expertise' can resolve. Not only was the Corps not entitled to any deference, but the District Court should not have given it any for the same reasons that the Corps' AJD is arbitrary and capricious.

The Corps' disregard of the data contradictory to its conclusion, only making two summer visits, and its misunderstanding and misapplication of *Sackett II* in totality make the Corps' AJD arbitrary, capricious, and not in accordance with the law. For these reasons, this Court should reverse the District Court's grant of summary judgment to the USACE and enter judgment for SPA.

III. THE USACE'S ENVIRONMENTAL IMPACT STATEMENT IS INSUFFICIENT UNDER NEPA, THEREBY VIOLATING THE APA, BECAUSE IT DOES NOT CONSIDER REQUIRED ENVIRONMENTAL IMPACTS AND ERRONEOUSLY COMPLIES WITH NEPA PHASE 2 REGULATIONS.

The USACE's EIS is arbitrary, capricious, and not in accordance with the law because: (1) it does not consider the environmental impacts of the KCT line on the Thicket Depressions, a WOTUS; (2) it does not consider the environmental impacts of the effects of certain aspects of the Mega Solar Array project, which it is required to do under NEPA as the "legally relevant cause" of those effects; and (3) it erroneously complies with the CEQ's Phase 2 regulations that,

because they transform NEPA from a purely procedural statute into a substantive one, are in violation of both the APA and the major questions doctrine.

In 1969, the House of Representatives and the Senate nearly unanimously enacted NEPA to further the harmonization of man's relationship with the environment. 89 FR 35442-01 (2024); 42 U.S.C. § 4321. NEPA obligates Federal agencies to consider the environmental impacts resulting from "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(c). If any agency action would have a significant impact on the quality of the environment, that agency must prepare an EIS. *Id.* Within an EIS, agencies must include, *inter alia*, (1) "reasonably foreseeable environmental effects of the proposed agency action," (2) "any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented," and (3) "a reasonable range of alternatives to the proposed agency action, including an analysis of any negative environmental impacts of not implementing the proposed agency action." *Id.* § (c)(i)–(iii).

The Code of Federal Regulations defines "effects" to include both direct and indirect effects, defining indirect effects as those which are "reasonably foreseeable," 40 C.F.R. § 1508(i)(1)–(2), such that they are "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision." *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016).

When the Biden Administration took over, the CEQ sought to remedy discrepancies in the Trump Administration's 2020 NEPA Regulations by reformulating the Regulations to reflect Congress' intent when it enacted NEPA. 86 FR 55757-01 (2021). The 2020 Rules established that agencies may choose to consider effects that are later in time or farther removed in distance,

but the subsequent paragraph stated that effects "should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain." *Id*. Biden's CEQ acknowledged that this created confusion, and change was needed. *Id*. The CEQ removed this "causal-chain" limitation in furtherance of NEPA's goals. *Id*. The 2020 Rules' limitations allowed for agencies to bypass their responsibility of analyzing critical areas of effects that "frustrat[es] NEPA's core purpose and Congressional intent." *Id*. The overall goal for changing the 2020 Rules was to ensure that agencies make decisions on the *full* range of reasonably foreseeable effects in order to implement NEPA's goal of environmental protection and harmony. *Id*.

A. The Corps' Decision Not to Consider the Environmental Impacts of the KCT Line on Jurisdictional Waters is Arbitrary, Capricious, and Not in Accordance with the Law.

As previously established, since the Thicket Depressions are a WOTUS under the CWA, *see* discussion *supra* pp. 13–15, the Corps must consider and include the reasonably foreseeable environmental impacts of the KCT Line on the Swamp in its EIS. (R. 8. n.6); *see* 42 U.S.C. § 4332(c). By not accounting for the environmental impacts on the Depressions in its EIS, the Corps violated the APA because it failed to comply with its statutory obligations under NEPA. As the District Court accurately noted, in order to construct the KCT Line through the Depressions, Mountain PG&E must first get a permit from the Corps, (R. 5–6.), because the KCT Line would be passing through WOTUS. *See* discussion *supra* pp. 13–15*;* 33 U.S.C. § 1344(a). Issuance of this section 404 dredge-and-fill permit is a major Federal action and a prerequisite to the construction of the KCT Line through the Thicket Depressions. (R. 5–6.) To borrow the District Court's words once more, construction of the KCT Line through the Swamp will have severe and adverse impacts on the Swamp including, "water pollution, wetlands destruction, lost tourism dollars, disrupti[on of] migratory bird patterns, interfer[ence] with view sheds, and degrad[ation]

of outdoor recreation activities." (R. 8. n. 6) That the Corps' EIS failed to include such impacts—including, but not limited to, those enumerated by the District Court—is not in accordance with the law, thereby violating NEPA and the APA.

For the foregoing reasons, this Court should reverse the District Court and remand to the USACE to supplement its EIS with data accounting for the reasonably foreseeable environmental impacts that the KCT Line will have on the Thicket Depressions.

B. The USACE is the Legally Relevant Cause of the Environmental Impact of the Mega Solar Array and Therefore Should Have Considered Those Impacts in its EIS.

While the Code of Federal Regulations defines those environmental "direct" and "indirect" impacts, *see* discussion *supra* p. 15, the exact scope of those effects that are "reasonably foreseeable" is contentious. In *Department of Transportation v. Public Citizen*, the Federal Motor Carrier Safety Administration (FMCSA) proposed new safety-inspection regulations following the President's lift of a moratorium previously passed by Congress that prohibited Mexican motor carriers from operating in the United States. 541 U.S. 752, 752–53 (2004).

Complying with NEPA, FMSCA issued an Environmental Assessment (EA), which is a limited EIS allowed under the CEQ's regulations. *Id.* at 752. Additionally, it issued a "finding of no significant impact (FONSI)," indicating that it believed the proposed regulations would have no significant environmental impacts. *Id.* Public Citizen, a nonprofit advocacy organization, challenged the adequacy of the EA and the FONSI, arguing that NEPA requires FMSCA to consider the "environmental effects of an increase in cross-border operations of Mexican motor carriers" in its EA. *Id*. at 753.

However, the FMSCA, the Court in *Public Citizen* reasoned, was only required to consider the environmental impacts of the new regulations if "a reasonably close causal

relationship" existed between the FMSCA and the increase in cross-border operations—i.e. the FMSCA must be the proximate cause of the environmental effect, with no other superseding causes that would usurp its responsibility over said effects. *Id*. at 767. In *Public Citizen*, there was a superseding cause—the President overturning the moratorium. *Id*. The FMSCA had no direct control over the increase in cross-border operations and its effects; it could not refuse to grant authorizations to carriers who complied with regulations, as it would violate Federal law. *Id.* ("FMSCA '*shall* register a person to provide transportation . . . as a motor carrier if [it] finds that the person is willing and able to comply with" the safety and financial responsibility requirements established by DOT.") Because, ultimately, "it is the President, not the FMCSA, who authorizes cross-border operations," the Court held that "the agency cannot be considered a 'legally relevant cause' of the effect . . . [and] the agency need not consider these effects . . . because [ ] the FMCSA has no authority to allow or deny the cross-border entry of Mexican trucks." *Id*. at 770.

However, there is currently a circuit split as to the interpretation and application of *Public Citizen* for when an agency is considered a "legally relevant cause." *See generally Protect Our Parks v. Buttigieg*, 39 F.4th 389 (7th Cir. 2022); *Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288 (11th Cir. 2019); *Ctr. for Biological Diversity v. Bernhardt*, 941 F.3d 723, (9th Cir. 2019). The District Court below followed the analysis and interpretation established by the D.C. Circuit in *Sierra Club v. FERC (Sabal Trail),* requiring agencies to consider environmental impacts in its EIS if they are a proximate cause of said effects, even though they lack the legal authority to prevent them. 867 F.3d 1357, 1373 (D.C. Cir. 2017). In *Sabal Trail*, the D.C. Circuit Court addressed whether the Federal Energy Regulatory Commission (FERC) adequately assessed GHG emissions and their impact on low-income

communities in an EIS for the approval of new gas pipelines. *Id*. at 1363. The court held that the FERC should have considered the impacts of burning gas in its EIS, even though the FERC has no statutory authority to prevent these effects, because FERC had the broad authority to grant or deny permits, which, in turn, would directly prevent or permit these effects from happening. *Id.* Such discretion in choice is the distinguishing factor that differentiates the FERC in *Sabal Trail* from the FMCSA in *Public Citizen. Id*. at 1371–72. In rejecting the opposing side of the circuit split, the court reasoned that because the FERC had autonomy and discretion to authorize or deny construction of the pipelines—unlike the FMCSA's inability to prevent the increase in cross-border carriers in *Public Citizen*—an autonomous agency action creates a meaningful distinction between *Sabal Trail* and *Public Citizen* such that *Public Citizen* does not wholly eschew an agency from including those effects it is the legally relevant cause of in its EIS. *Id. at 1373.* The D.C. Circuit has consistently held that an agency cannot avoid its responsibility imposed under NEPA by simply claiming that it lacks the authority to prevent those impacts. *See Eagle Cnty. v. Surface Transp. Bd.*, 82 F.4th 1152, 1180 (D.C. Cir. 2023).

An undisputed impact of the KCT line and its energy generation is that the project will occupy a considerable amount of land and will necessitate the transportation of nine million photovoltaic modules from China. (R. 14.); (R. 4.) These environmental impacts resulting from the KCT line and Mega Solar Array should have been considered in the USACE's EIS because the USACE was the legally relevant cause of said environmental impacts and these impacts were reasonably ascertainable. While the Corps argues that the details regarding the transportation of the Mega Solar Array's modules were unknown to them (including information necessary to evaluate GHG emissions resulting from the project), in actuality the Corps chose to remain blind to these details. This information was readily available, as PG&E had already entered a contract

with TrikoSolar for the transportation of the modules, yet the USACE failed to even attempt to inquire as to the answers to these questions. (R. 4.) The fact that the KCT line will be built is not only reasonably foreseeable, but it is the project's central purpose. *Sabal Trail*, 867 F.3d at 1372. The Corps' argument that the onus was on PG&E to provide this information of its own initiative is unfounded, as NEPA requires that agencies consider a project's upstream impacts or provide a satisfactory explanation of why they couldn't do so. *Eagle Cnty*, 82 F.4th at 1179 (citation omitted). The Corps' argument remains an unsatisfactory explanation for why it could not predict the GHG emissions that would result from the PV module transportation because all they needed to do was ask PG&E. By neglecting its due diligence, the USACE violated NEPA by inhibiting a well-informed and thorough analysis in its EIS.

The environmental impacts from mining silicone and other hazardous materials needed to manufacture the PV modules for the Mega Solar Array are exactly the kind of indirect effects that the CEQ and NEPA want agencies to contemplate in their EIS. In other words, the Corps has the autonomy to prevent the panels from being made by refusing to grant the ROD, which, in turn, would prevent the mining from occurring in the first place—unlike the FMSCA in *Public Citizen* that did not have a choice whether to promulgate regulations. By allowing this project to proceed, the Corps acts as a 'gatekeeper' and is the legally relevant cause of the upstream impacts of its actions. This level of forecasting is not too remote, but, rather, is a direct consequence of this project. These impacts are reasonably foreseeable to a person of ordinary prudence, as the silicon essential for creating these panels must come from somewhere, and, as such, the Corps should be required to account for the impacts of mining it and other hazardous materials in its EIS. Additionally, the Corps failed to ask if PG&E had any information concerning the location of the mines or its operations. (R. 15–16.) At the very least, the Corps

should have done its due diligence and asked if that information was available. It is well-known that mining, including silicon mining, has an adverse effect on the environment.[2] If PG&E lacked such information, the Corps should still have analyzed readily available data on the average or expected environmental impact of mining silicon.

The Corps should also have considered the impacts that will result from the inevitable disposal of these modules and their various components. The Corps attempts to shirk its responsibility by claiming that it cannot predict *when* the modules will need to be disposed of and concluding these are not reasonably foreseeable impacts. (R. 15–16.) This argument does not hold up to scrutiny nor does it comply with NEPA regulations. Nothing lasts forever. While these modules may have an average lifespan of 20 years, that is not a guarantee, as it is a very real possibility that the panels could fail and need to be disposed of sooner. (R. 16.) Inquiring into PG&E's disposal procedures could provide a basis for understanding the modules' environmental impacts today. But, again, the Corps failed to ask PG&E if it has a procedure in place for handling the disposal of the panels. (R. 16.) Nothing in the future is set in stone; everything in an EIS is a prediction of the reasonably foreseeable environmental impacts of an agency action and are included to enable better informed agency decisions. The panels will need to be disposed of one day—even if that day is 20 years away—and the impacts of that disposal should have been included by USACE in its EIS.

The USACE is the legally relevant cause of the impacts of the KCT line on land use, wildlife, GHG emissions, silicone mining, and PV module disposal, as they are the ones permitting the KCT line. These impacts are not "crystal ball inquiries." (R. 21.) Rather, they are

[2] Empirical study done in China found that mining of sand and other minerals contributed to 8% of the Global Warming Potential (GWP) in China from 1992–2015. Shen Zhao et al., *Environmental Impacts of Domestic Resource Extraction in China*, 5 Ecosystem Health and Sustainability 67, 67–78 (**2019**).

direct and indirect impacts on the environment resulting from the upstream and downstream effects of this project. Regardless of if these are "causal-chain" effects, the CEQ removed this limitations in the 2024 Rules in order to ensure these effects are considered in an EIS in furtherance of NEPA's tenets. 86 FR 55757-01 (2021). As the District Court acquiesces, albeit in a footnote, the Corps has no difficulty in forecasting the climate benefits of the Mega Solar Array project (in response to a 'no-action' alternative) but claims they are unable to use that same degree of forecasting when analyzing the upstream and downstream effects of the project. (R. 15. n. 12) As the Court says, "[s]urely those tools could allow them to quantify the [] harms from putting the same solar project together." (R. 15. n. 12)

With respect to the environmental impacts of the Mega Solar Array on land use, wildlife, and GHG emissions, because they are reasonably foreseeable direct and indirect impacts on the environment, the District Court's determination of these issues should be upheld. However, the District Court's conclusion regarding the mining of silicon and the disposing of the panels—finding that they are not reasonably foreseeable—should be reversed, as these are indirect upstream and downstream consequences of implementing the KCT line. Despite correctly adopting the D.C. Circuit's distinction of *Public Citizen* in *Sabal Trail* with respect to land use, wildlife, and GHG emissions, the District Court erroneously applied *Sabal Trail's* reasoning to the mining and disposing of silicon and other hazardous materials. Like the FERC, the USACE similarly lacks the authority to prevent these impacts directly, but they are the legally relevant cause because they have the autonomy to reject the project based on its significant environmental impacts. Therefore, it should be required to include these considerations in its EIS.

C. The 2024 Phase 2 NEPA Regulations Turn NEPA into a Substantive Statute, Violating the Major Questions Doctrine

NEPA achieves its primary objective, fully informed and thoroughly considered agency actions, *Ctr. for Biological Diversity v. FERC*, 67 F.4th 1176, 1181 (D.C. Cir. 2023), by "declar[ing] a national policy which will encourage productive and enjoyable harmony between man and his environment." 42 U.S.C. § 4321. The CEQ, under NEPA, develops and recommends policies to the President to further NEPA's goals. 42 U.S.C. § 4344 (4). Once the President approves these policies, the CEQ promulgates regulations to effectuate them. *Id*. The CEQ's regulations govern Federal agencies unless those regulations conflict with that agency's governing statute. Mark A. Chertok, *Overview of the National Environmental Policy Act: Environmental Impact Assessments and Alternatives*, CE013 ALI-CLE 281, 283-285 (2023).

In 2024, aiming to "promote sound Federal agency decision-making that is grounded in science," the CEQ introduced its NEPA Phase 2 regulations. 89 FR 35442-01(2024). These Rules require all agencies to evaluate climate change and environmental justice in an EIS. 40 C.F.R § 1502.16(a)(6), (13); *see* 89 FR 35442-01 at 35447. To justify these new regulations, the CEQ stated that these new regulations would further Congress' intent for agency decisions to be fully informed as to reasonably foreseeable environmental effects. 89 FR 35442-01.

However, because the Phase 2 Rules mandate consideration of specific effects, e.g. climate change and environmental justice, the CEQ overstepped its congressional authority under NEPA by transforming a purely procedural statute into a substantive one. Congress mandated that when an agency creates an EIS, it must consider the "reasonably foreseeable environmental effects of the proposed agency action." 42 U.S.C. § 4332(c)(i). Congress did not specify what these "reasonably foreseeable" effects are, but instead left it up to individual agencies who have the specialized knowledge to determine what these would be. *Loper,* 144 S. Ct. at 2263. NEPA

does not elevate any specific environmental concern over other relevant considerations. Chertok, *supra*, at 283. When Congress amended NEPA in 2023, it had every opportunity to enumerate those environmental impacts required in an EISs—but Congress did not. *See* 42 U.S.C. § 4332(c)(i). Rather, NEPA is a purely procedural statute: articulating only how to create an EIS, not what to include within it. *Ctr. For Biological Diversity v. FERC*, 67 F.4th at 1181. The CEQ, as a matter of law, did not have the statutory authority under NEPA to convert it into a substantive statute. *See generally* 42 U.S.C. § 4344 (enumerating the CEQ's authority).

Not only are the Phase 2 regulations contrary to Congress' intent to allow agencies to decide for themselves what effects are reasonably foreseeable, they violate the major questions doctrine. The District Court, in addressing whether the CEQ's regulations violated the MQD, found that the Phase 2 Rules requiring the consideration of climate change merely codified a practice that agencies have followed in recent years. (R. 17.) The MQD, however, requires that in cases involving extraordinary assertions of power, where "history and the breadth of the authority that [the agency] has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority," the agency must identify *clear* congressional intent authorizing such power. *West Virginia v. EPA*, 597 U.S. 697, 721 (D.C. Cir. 2022). The CEQ has failed to do this.

The District Court erred in finding that the CEQ was authorized to codify considerations of climate change in its Phase 2 Rules and should be reversed because it violates the MQD. Granted, while analyzing climate change in an EIS has long been a usual practice under NEPA, it has never been required per the statute. *See generally* 42 U.S.C. § 4332(c)(i) (amended in 2023). While this may be the practice of some agencies or required by some courts, neither the Corps nor the CEQ can point to clear congressional intent authorizing such power; the District Court

made the CEQ's argument for it. *See generally id*. The District Court erroneously misinterpreted Congress "conspicuously declining" to codify considerations of climate change because inaction is neither intent nor authorization for the CEQ to do so on its behalf. (R. 16.) Given that the CEQ did not even have the statutory authority in the first place to require substantive considerations, the District Court's reasoning that Congress' inaction is clear authorization is absurd. Congressional inaction is not a blank check.

The APA requires that a court set aside an agency's conclusion when it is not in accordance with the law. 5 U.S.C. § 706(2)(A). Because the Phase 2 requirements violate the major questions doctrine, following these regulations would not be in accordance with the law. It is undisputed that USACE's ROD included "a specific finding that the Final EIS included all considerations required under . . . [the] soon-to-be-finalized draft of Phase 2 rules." (R. 7.) (citing ROD, p. 2) Therefore, if the Corps included findings on climate change and environmental justice solely to comply with the Phase 2 rules, it should be required to amend its EIS with findings not influenced by Phase 2.

In addition to the CEQ's regulations requiring an analysis of climate change and EJ, the CEQ itself has stated that the Phase 2 regulations force the EIS into an "action-forcing" device. In accordance with Phase 2, the acting agency must select the environmentally-preferred alternative for its proposed actions, and this selection must be made in the EIS before the final agency decision. 40 C.F.R. §1502.1(a). NEPA guides agencies on how to create an EIS but does not allow the EIS to dictate a course of action. *See Lemon v. Geren,* 514 F.3d 1312, 1315 (D.C. Cir. 2008) ("Preparation of an environmental impact statement will never force an agency to change the course of an action it proposes"). With the Phase 2 regulations, an agency's EIS now determines its action. 40 C.F.R. § 1502.1(a). NEPA itself only requires one action from the

agency—the preparation of the EIS—not its use to dictate a decision on a preferred route. *See generally* 42 U.S.C. §4332.

The CEQ cannot assume the role of lawmaker, even if it believes that the Phase 2 Rules substantively effectuate NEPA's goals. *See* 42 U.S.C. §4344 (enumerating the CEQ's authority). The CEQ, and the Army Corps by extension, violated the MQD and the APA by mandating an analysis of climate change, environmental justice, and the selection of an "environmentally-preferred" alternative in the EIS.

In this context, the Army Corps' selection of an environmentally-preferred alternative (Alternative #2) in its Final EIS and the issuance of a ROD based on information collected in the EIS was not in accordance with the law in violation of the APA. The Army Corps' ROD should be disregarded, and it should be instructed to conduct findings and make decisions in accordance with NEPA, not the CEQ's Phase 2 rules.

CONCLUSION

This Court should **REVERSE** the District Court's grant of summary judgement to the Army Corps, order judgment to be entered in favor of SPA, and **AFFIRM** the District Court's grant of summary judgement to SPA.

CERTIFICATE OF SERVICE

This is to certify that the foregoing instrument has been served in compliance with Rule 25(b) and (c) of the Federal Rules of Appellate Procedure, on September 23, 2024, on all registered counsel of record, and has been transmitted to the Clerk of the Court.

Respectfully submitted,

Team 5
Counsel of Record for Plaintiff-Appellant and Cross-Appellee
Dated: September 23, 2024

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 30 Pages, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).
2. This brief also complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface with a 12 point font named Times New Roman.

Respectfully submitted,

Team 5
Counsel of Record for Plaintiff-Appellant and Cross-Appellee
Dated: September 23, 2024