

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA**

HOOSIER ENVIRONMENTAL)
COUNCIL, INDIANA AUDUBON)
SOCIETY, THOMAS CUTTS, DEBRA)
CUTTS, ALYSSA NYBERG, GUSTAF)
NYBERG, and STEVEN COWLEY,)

Plaintiffs / Petitioners,)

vs.)

NATURAL PRAIRIE INDIANA)
FARMLAND HOLDINGS, LLC; AARON)
W. DAMRILL, in his official capacity as Chief)
of the Regulatory Office, Michiana Branch,)
Detroit District of the United States Army)
Corps of Engineers; and GENERAL TODD)
T. SEMONITE, in his official capacity as)
Chief of Engineers and Commanding General)
of the United States Army Corps of)
Engineers; and the UNITED STATES)
ARMY CORPS OF ENGINEERS,)

Defendants.)

CASE NO. 4:19-cv-00071-TLS-JEM

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF, CIVIL
PENALTIES AND PETITION FOR
JUDICIAL REVIEW**

INTRODUCTION AND BACKGROUND

1. Plaintiffs bring this action pursuant to the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* as amended (“CWA”), and the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (“APA”).

2. Under the CWA, Plaintiffs bring this citizen suit pursuant to CWA Section 505(a)(1), 33 U.S.C. § 1365(a)(1) to address ongoing violations of CWA Section 404, 33 U.S.C. § 1344 and CWA Section 301(a), 33 U.S.C. § 1311(a) by Natural Prairie Indiana Farmland Holdings, LLC (“Natural Prairie”).

3. Under the APA, 5 U.S.C. § 702, Plaintiffs seeks judicial review of certain findings by the U.S. Army Corps of Engineers (“USACE”) in its Approved Jurisdictional Determination No. 2018-00719-156-A18 of August 17, 2018 (“the AJD”), attached hereto as Exhibit A, that are relevant to Natural Prairie’s CWA violations.

4. Natural Prairie’s CWA violations stem from its construction of a new concentrated animal feeding operation (“CAFO”) with 4,350 dairy cows, three production buildings, an outside waste lagoon covering more than nine acres for collecting millions of gallons of livestock waste, process wastewater and contaminated storm water, and other structures on the Natural Prairie property located at County Road 400 West and 400 North, in Lake Village, Newton County, Indiana (“the CAFO Site”).

5. The CAFO Site is located in one of the most ecologically sensitive and historically significant areas of Indiana—the lake bed of former, Beaver Lake. Beaver Lake once covered 30,000 acres of northern Newton County¹ making it the largest natural lake in Indiana before it was drained by the early 1900s for farming. Beaver Lake was also part of the Grand Kankakee Marsh, once the country’s largest inland marsh, dubbed the “Everglades of the North” due to its “untamed wetlands . . . which saturated nearly a million acres in Northern Indiana and part of Illinois.”²

6. The Nature Conservancy has restored more than 7,000 of these acres to their former native prairie and wetland status as part of the “Kankakee Sands” restoration project which surrounds the CAFO Site on its southern and eastern borders and is home to “over 100 rare, threatened or endangered species . . . including several important bird species” and provide habitat for migratory birds.³ These restored acres [also] serve as the connecting piece between Willow Slough Fish and Wildlife Area, Beaver Lake Nature Preserve, Conrad Savanna Nature Preserve, and The Nature Conservancy’s Conrad Station Savanna.

7. Notably, draining Beaver Lake was achieved by constructing Beaver Lake Ditch and tributary ditches that drain to the Kankakee River, two of which—Lawler Ditch and Bogus Island Ditch—are present at the CAFO Site. Lawler Ditch drains water from and across the CAFO Site in a

¹ <https://www.nature.org/en-us/get-involved/how-to-help/places-we-protect/kankakee-sands/>

² <http://lakeshorepublicmedia.org/programs/everglades-of-the-north-the-story-of-the-grand-kankakee-marsh/>.

³ <https://www.nature.org/en-us-get-involved/how-to-help/places-we-protect/kankakee-sands/>.

northward direction to Beaver Lake Ditch which flows through the Conrad Savanna Nature Preserve, the LaSalle Fish and Wildlife Area, and on to the Kankakee River and its adjacent wetlands. Bogus Island Ditch, in the eastern part of the CAFO Site, drains water from the property eastward into the adjacent Kankakee Sands and its extensive wetland areas, and northward to Beaver Lake Ditch, through the Conrad Savanna Nature Preserve, the LaSalle Fish and Wildlife Area, and then to the Kankakee River and its wetlands. The U.S. Army Corps of Engineers (“USACE”) has determined that both Lawler and Bogus Island ditches are waters of the U.S.⁴

8. Nevertheless, to construct its CAFO, and despite the ecological and historic significance of the CAFO Site and surrounding area, Natural Prairie discharged fill material into, and closed and tiled, nearly a half-mile of Bogus Island Ditch and filled and tiled tributaries of Bogus Island and Lawler ditches without obtaining a permit in violation of CWA Section 404, 33 U.S.C. § 1344 (“Section 404”) and CWA Section 301(a), 33 U.S.C. § 1311(a) (“Section 301”). None of the exemptions from Section 404’s permitting requirements are applicable to Natural Prairie’s ditch filling activities for purposes of building a CAFO.

9. Natural Prairie is also filling and building its CAFO in jurisdictional wetlands and “farmed wetlands” as those terms are defined in 16 U.S.C. 3822(e), 33 C.F.R. 328.3(c)(4), 40 C.F.R. 230.3, 7 C.F.R. 12.2, 7 C.F.R. 12.31, USACE 1987 Wetland Delineation Manual, and 58 FR 45008 (Aug. 25, 1993). No exemptions from the Section 404 permit requirement are applicable to the activity of building CAFO facilities on the Site’s wetlands. Yet Natural Prairie did not and has not obtained a permit to destroy these wetlands in violation of CWA Sections 404 and 301.

10. Natural Prairie’s unlawful filling of ditches and wetlands not only eliminates those jurisdictional waters and the hydrological services and functions they provide, but also alters soil and

⁴ Exhibit A: USACE, Approved Jurisdictional Determination (“AJD”)No. 2018-00719-156-A18 at pp. 1, 6-7 (August 17, 2018).

hydrologic conditions which threaten downstream water quality, wetlands, natural areas, and fish and wildlife habitat in the Kankakee River watershed. Accordingly, Plaintiffs seek declaratory and injunctive relief, the imposition of civil penalties, and an award of litigation costs including reasonable attorney fees pursuant to 33 U.S.C. § 1365(d).

11. In addition, pursuant to the APA, Plaintiffs seek judicial review of certain findings by the USACE in its AJD of August 17, 2018; specifically, that the CAFO Site has “irrigation canals” that are “excavated out of uplands” and that the site has no jurisdictional wetlands.⁵ These findings are unsupported by the facts and inconsistent with the CAFO Site’s well-known history as a low-lying lakebed and marsh (not upland) that was drained by a system of drainage ditches and subsurface drainage tiles (not irrigation canals). These findings are also inconsistent with hydrological and soil conditions at the CAFO Site confirming the presence of jurisdictional wetlands and farmed wetlands.

12. The AJD is a final agency action that is binding on USACE for five years and provides a five-year safe harbor for Natural Prairie. The AJD thus unlawfully allows Natural Prairie to build its CAFO on and in jurisdictional waters of the U.S. without a CWA Section 404 permit. Accordingly, Plaintiffs seek an order setting aside the AJD’s unlawful findings under 5 U.S.C. § 706(2) as arbitrary, capricious, an abuse of discretion, unwarranted by the facts, and contrary to law.

JURISDICTION AND VENUE

13. This Court has jurisdiction over the claims set forth herein pursuant to 33 U.S.C. § 1365(a)(1) (district court jurisdiction over citizen suits to enforce effluent standards or limitations under the CWA), 28 U.S.C. § 1331 (district court jurisdiction over civil actions arising under federal law), and 5 U.S.C. §§ 701-706 (district court review of final agency actions).

14. The relief sought by Plaintiffs is authorized by 33 U.S.C. § 1365(a), (d) (injunctive relief and civil penalties for CWA violations, costs and attorneys’ fees), 28 U.S.C. §§ 2201 and 2202

⁵ Exh. A: USACE AJD at p. 8.

(declaratory judgment), 5 U.S.C. §706(2) (setting aside unlawful agency findings and conclusions), 28 U.S.C. § 2412(d) (costs and attorneys' fees to prevailing party in judicial review proceedings).

15. In accordance with CWA Section 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A), and 40 C.F.R. § 135, Plaintiffs notified Defendant Natural Prairie of its CWA violations and of Plaintiffs' intent to bring a citizen suit to enforce those violations, by letter dated and sent to Natural Prairie via certified mail on April 17, 2019 ("Notice of Intent"). A true and accurate copy of the Notice of Intent is attached hereto as Exhibit B. Plaintiffs also sent copies of the Notice of Intent to the Administrator of the United States Environmental Protection Agency ("EPA"), EPA's Region V Administrator, and the Commissioner of the Indiana Department of Environmental Management ("IDEM").

16. More than sixty (60) days have passed since Plaintiffs mailed the Notice of Intent. However, Natural Prairie's ongoing CWA violations complained of in the Notice of Intent have not been addressed and Natural Prairie remains in violation of the CWA. And, as of the date of filing this Complaint, neither the EPA nor IDEM has commenced an enforcement action to redress the violations identified in the Notice of Intent.

17. Pursuant to 33 U.S.C. § 1365(c)(1) and 28 U.S.C. § 1391(e)(1), venue is appropriate in this Court because Natural Prairie's CAFO Site and the violations that are the subject of this Complaint are located in Newton County and within the judicial district of the District Court for the Northern District of Indiana.

PARTIES

Plaintiffs

18. Plaintiffs are "persons having an interest which is or may be adversely affected" by Natural Prairie's CWA violations and are, therefore, "citizens" as defined by 33 U.S.C. § 1365(g) authorized to bring this citizen suit against Natural Prairie.

19. Plaintiff **Hoosier Environmental Council (“HEC”)** is an Indiana 501(c)(3) non-profit, public interest and environmental advocacy organization. Since its formation in 1983, HEC has been, and continues to be, committed to protecting Indiana’s air, land, waterways and wildlife habitat through initiatives in education, research, technical assistance, public policy advocacy, and legal action including assuring the enforcement of federal and state laws that protect Indiana’s lakes, rivers, streams and wetlands. To further its mission, HEC actively seeks federal and state agency implementation and enforcement of the CWA and, when necessary, directly initiates enforcement actions on behalf of HEC and its members.

20. In this matter, HEC has already devoted substantial pro bono time and resources for nearly two years to help residents of Newton County address their concerns about the CAFO’s adverse impact on the Kankakee River Basin and its nature and wildlife areas. Specifically, HEC obtained and reviewed public records from involved government agencies regarding Natural Prairie’s CAFO, and held community meetings to inform citizens of Natural Prairie’s plans, the environmental impact of those plans, and potential avenues for addressing those environmental impacts. In addition, HEC submitted technical comments on behalf of concerned citizens to the Indiana Department of Environmental Management (“IDEM”) detailing environmental concerns with Natural Prairie’s application for a CAFO permit and has administratively appealed that permit. Finally, HEC has petitioned the Newton County Board of Zoning Appeals (“BZA”) to conduct a public hearing and determine whether Natural Prairie is violating conditions of its zoning special exception for the CAFO including the condition that Natural Prairie comply with all federal and state environmental laws.

21. Accordingly, HEC brings this action on behalf of its members who derive scientific, aesthetic, recreational, philanthropic, economic, and spiritual benefits from the natural lands and waters in the Kankakee River Basin, including the natural lands, wildlife habitat and waters threatened by Natural Prairie’s unlawful ditch filling and wetland impacts, and USACE’s AJD findings that

provide a five-year safe harbor for Natural Prairie’s unlawful ditch filling and wetland impacts (collectively, “the CWA violations”)—violations which are allowing a polluting CAFO to be built on land where it otherwise would not be allowed without a Section 404 permit.

22. HEC has 1,471 members statewide, and 52 members who live in Newton, Jasper, Lake and Porter counties. Some of these members, including Thomas Vanes and Plaintiffs Gustaf and Alyssa Nyberg, live and/or work near the CAFO Site, and regularly use and enjoy the Kankakee River and its tributaries, wetlands, and surrounding natural areas that are downstream of the CAFO Site—including the adjacent Kankakee Sands—for recreational, scientific, aesthetic, spiritual, and conservation purposes, including swimming, picnicking, hiking, camping, kayaking, viewing and enjoying wildlife and aquatic life in their natural environment, taking their children and grandchildren to these natural areas and waters, and they intend to do so on a regular basis in the future.

23. Specifically, HEC member, Thomas Vanes, has been a resident of Newton County since 2015 and resides at 3827 W 857 N, Lake Village, IN 46349. Thomas Vanes’ home and property are approximately 2.75 miles north-northeast of the CAFO Site.

24. Like most area residents, Thomas Vanes’ residential drinking water well draws off of the area’s shallow, sand aquifer known to be “highly susceptible to surface contamination” given its close proximity to the surface and sandy soils.⁶ The CAFO Site is within the aquifer boundary and upgradient of the Thomas Vanes’ property.

25. The CWA violations threaten the aquifer and Thomas Vanes’ drinking water by allowing a polluting CAFO and its waste lagoon to be built in and to destroy jurisdictional wetlands that would otherwise provide protection for the aquifer through groundwater recharge and filtration of pollutants.

⁶ IDNR, Map of *Unconsolidated Aquifer Systems of Newton County, Indiana* available at https://www.in.gov/dnr/water/files/Newton_County_UNC_AQSYS_text.pdf.

26. Thomas Vanes also regularly uses and enjoys the water resources, nature areas, and fish and wildlife preserves near the CAFO Site, including the adjacent Kankakee Sands, which is directly affected by the CWA violations. Specifically, Thomas Vanes is a volunteer at the Kankakee Sands where he devotes more than 50 hours per year to eradicating invasive plants and serving as a docent at the bison viewing area. He also leads hikes at least twice per year for visitors to the Kankakee Sands, and has hosted a meteor shower watch there. Thomas Vanes and his wife regularly hike the trails at the Kankakee Sands and enjoy observing wildlife. Thomas Vanes intends to continue volunteering and recreating at the Kankakee Sands because he enjoys the beauty and solitude of nature and the respite it provides from his stressful job working in the criminal justice system. He also derives fulfillment from giving back and working to protect this natural area from which he takes such enjoyment.

27. Thomas Vanes' ability to enjoy, recreate and volunteer at the Kankakee Sands will be adversely affected by the CWA violations. Specifically, Thomas Vanes is reasonably concerned that Natural Prairie's filling and tiling of Bogus Island ditch and its tributary ditches at the CAFO Site, its filling, grading and draining of wetlands at the CAFO Site, and constructing buildings and structures over and in these filled ditches and wetlands, have changed and will change water levels, drainage patterns, sediment flow, and soil conditions at and downstream of the CAFO Site. In addition, Thomas Vanes is reasonably concerned that these changes have degraded and will degrade downstream water quality and wetlands at the adjacent Kankakee Sands that provide critical habitat for birds, mammals, invertebrates and other wildlife, thereby diminishing their populations and, in turn, Thomas Vanes' recreation and volunteer work at, and use and enjoyment of the Kankakee Sands.

28. HEC members and Plaintiffs **Alyssa and Gustaf Nyberg ("the Nybergs")** have been residents of Newton County since 2001 and live on 60 acres at 742 W. 600 N., Lake Village, Indiana. As residents of the area, the Nybergs regularly use and enjoy the water resources, nature areas,

and fish and wildlife preserves near the CAFO Site including, among others, the adjacent Kankakee Sands.

29. The Nybergs' home and property are across the street from the Kankakee Sands and Alyssa Nyberg has been employed there since 1999 as a restoration ecologist. In that position, Alyssa Nyberg is responsible for ensuring that there are seeds and plants necessary for restoring and maintaining the native prairie and wetlands at the Kankakee Sands. She also is responsible for public outreach, including preparation of written educational materials, hosting visitor groups, and training/working with volunteers.

30. Both Gustaf and Alyssa Nyberg and their children regularly hike and bike the trails, and paddle streams at the Kankakee Sands including Beaver Lake Ditch. They also enjoy hiking and birding at the nearby LaSalle Fish and Wildlife Refuge and the Conrad Savanna Nature Preserve as well as paddling and wading in the Kankakee River. Indeed, Gustaf Nyberg, who is a biologist and used to work at the Kankakee Sands, took a recent paddling trip on Beaver Lake Ditch starting at 200 West and ending at the 725 North bridge, and made the following observations about the rich diversity of plants, fish and wildlife that he and his family enjoy and that depend on the waterway:

The trip took an hour and half on the water. A little over half way down on this trip, Beaver Lake Ditch intersects with Bogus Island Ditch, which is the drain in part of the proposed dairy operation. On the trip, I spotted a number of mammals including, a mother raccoon teaching her 2 kits how to hunt in shallow water, a solo raccoon scampering into the grass, numerous deer, and a pair of otter. I usually see a few muskrat on the creek at some point of a trip of this length, but didn't on this journey. For birds I saw a couple of families of ducks, great blue heron, a couple green heron, belted kingfisher, a couple of colonies of cliff swallows under the US 41 highway bridge, and lots of activity for the smaller songbirds in the sandbar willow thickets along the banks. Earlier in the year (spring), I have found the waterway to be a good place to see soft shell turtles (had a great experience for us, but maybe not the turtle, in which my son was able to touch a turtle that we floated up on, before the basking turtle pushed off into the water a few years back. In general, I see more turtles on Beaver Lake Ditch than I do on other waterways in the state). I do not fish anymore, but I see decent size smallmouth bass in the waters as well as a northern pike a couple of years ago, and a host of smaller fish (minnows, bass fry, etc.). I enjoy the aerial insects a lot and the waters can be absolutely filled with common green darners, widow skimmers, common whitetails, blue dashers, orange bluets on a sunny summer day in

the treeless areas, and where there are trees ebony jewelwings, with a few river jewelwings, American rubyspots and spreadwing damselflies take up the aerial flying. The smaller tree frogs do not seem to use Beaver Lake Ditch, as the fish tend to eat them, but Beaver Lake Ditch is important for northern leopard frogs, bull frogs and green frogs. I personally have not seen one in the wild, but I do know that the waterway is home to sirens, a fully aquatic salamander with only front legs. The feature I think is the most impressive about the system is the low gradient of the waterway which allows for various aquatic plants to flourish. Beaver Lake Ditch has extensive waving beds of coontail, water smartweed, various pondweed (Potamogeton), elodea as well as bur reed. These beds of aquatic plants allow for the small fry of the fish and aquatic organism to hide from the larger predators and the system to be as rich as it is.

31. The Nybergs' ability to use, enjoy, recreate and work at the Kankakee Sands will be adversely affected by the CWA violations. Specifically, the Nybergs are reasonably concerned that Natural Prairie's filling and tiling of Bogus Island ditch and its tributaries at the CAFO Site, its filling, grading and draining of wetlands at the CAFO Site, and constructing buildings and structures over and in these filled ditches and wetlands, have changed and will change water levels, drainage patterns, sediment flow, and soil conditions at and downstream of the CAFO Site. In addition, the Nybergs are reasonably concerned that these changes have degraded and will degrade downstream water quality and wetlands at the adjacent Kankakee Sands that provide critical habitat for birds, mammals, invertebrates and other wildlife, thereby diminishing their populations and the Nybergs' use and enjoyment of, and their work and recreation at the Kankakee Sands.

32. Plaintiff **Indiana Audubon Society ("IAS")** is an Indiana 501(c)(3) non-profit, public interest, environmental organization. Since its formation in 1898, IAS has been dedicated to protecting and conserving Indiana's natural resources including water, air, soil plants and wildlife, especially birds, through educational, scientific, investigative, literary, historical, philanthropic and charitable pursuits. Those pursuits include assuring enforcement of state and federal laws that protect Indiana's lakes, rivers, streams and wetlands, which provide critical habitat for birds.

33. IAS brings this action on behalf of its members who derive scientific, aesthetic, recreational, philanthropic, economic, and spiritual benefits from the natural lands and waters in the

Kankakee River Basin, including the natural lands, wildlife habitat and waters threatened by the CWA violations.

34. IAS has 1,300 members statewide, and 173 who live in Jasper, Lake and Porter counties. Many of these members, including Matt Kalwasinski and Barbara Lucas, enjoy fishing, sightseeing, birding, observing wildlife, and engaging in other recreational activities in and around the Kankakee River and its tributaries, wetlands, natural areas, and wildlife habitat—activities that will be curtailed and made less enjoyable due to the CWA violations.

35. IAS annually leads multiple birding field trips for its members to the adjacent and downstream Kankakee Sands. IAS staff and several IAS members including Matt Kalwasinski and Barbara Lucas have participated in these field trips every year for the last three years and have definite plans to continue doing so. IAS is also involved in a three-year marsh monitoring study at the Kankakee Sands, with IAS member participation, to monitor the secretive marsh birds that inhabit wetlands found at the Kankakee Sands that are threatened by the CWA violations. Executive Director Brad Bumgardner and IAS member Matt Kalwasinski have participated in the last two years of this study and will continue to participate in its third year.

36. IAS members' ability to use, enjoy, recreate on, and volunteer at, the Kankakee Sands will be adversely affected by the CWA violations. Specifically, IAS's members are reasonably concerned that Natural Prairie's filling and tiling of Bogus Island ditch and its tributaries at the CAFO Site, its filling, grading and draining of wetlands at the CAFO Site, and constructing buildings and structures over and in these filled ditches and wetlands, have changed and will change water levels, drainage patterns, sediment flow, and soil conditions at and downstream of the CAFO Site. In addition, IAS's members are reasonably concerned that these changes have degraded and will degrade downstream water quality and wetlands at the adjacent Kankakee Sands that provide critical habitat for birds, mammals, invertebrates, and other wildlife, thereby diminishing their populations, and

diminishing IAS members' use and enjoyment of, and their volunteer work and recreation at, the Kankakee Sands.

37. **Thomas and Debra Cutts (“the Cutts”)** have been residents of Newton County since 2013 and live on 7.8 acres at 8757 N. 384 W., Lake Village, Indiana. The Cutts' home and property are approximately 2.75 miles north-northeast of the CAFO Site.

38. Like most area residents, the Cutts' residential drinking water well draws off of the area's shallow, sand aquifer known to be “highly susceptible to surface contamination” given its close proximity to the surface and sandy soils.⁷ The CAFO Site is within the aquifer boundary and upgradient of the Cutts' property.

39. The CWA violations threaten the aquifer and the Cutts' drinking water by allowing a polluting CAFO and its waste lagoon to be built in and to destroy jurisdictional wetlands that would otherwise provide protection for the aquifer through groundwater recharge and filtration of pollutants.

40. Lawler Ditch flows north from the CAFO Site, through the Cutts' property and within 175 feet of their residential well.

41. Natural Prairie's ditch filling and destruction of wetlands at the CAFO Site threatens downstream water quality through increased sedimentation, flooding and erosion, decreased groundwater recharge and filtration, and otherwise adversely impacts the Cutts' property.

42. As residents of the area, the Cutts also regularly use and enjoy the water resources, nature areas, and fish and wildlife preserves near the CAFO Site including, among others, the adjacent Kankakee Sands, that depend on the Kankakee River and its tributaries and wetlands that have been and are being adversely affected by Natural Prairie's violations of the CWA, thereby diminishing the Cutts' use and enjoyment of those water resources and natural areas.

⁷ IDNR, Map of *Unconsolidated Aquifer Systems of Newton County, Indiana* available at https://www.in.gov/dnr/water/files/Newton_County_UNC_AQSYS_text.pdf.

43. **Steven Cowley** has been a resident of Newton County since 2009 and built his home on 10.8 acres at 5764 W. 800 N., in Lake Village, Indiana. Steven Cowley's home and property are approximately two miles north of the CAFO Site.

44. Like most area residents, Steven Cowley's residential drinking water well draws off of the area's shallow, sand aquifer known to be "highly susceptible to surface contamination" given its close proximity to the surface and sandy soils.⁸ The CAFO Site is within the aquifer boundary and upgradient of the Steven Cowley's property.

45. The CWA violations threaten the aquifer and Steven Cowley's drinking water by allowing a polluting CAFO and its waste lagoon to be built in and to destroy jurisdictional wetlands that would otherwise provide protection for the aquifer through groundwater recharge and filtration of pollutants.

46. Mr. Cowley also regularly uses and enjoys the water resources, nature areas, and fish and wildlife preserves near the CAFO Site including, among others, the adjacent Kankakee Sands, that depend on the Kankakee River and its tributaries and wetlands that have been and are being adversely affected by Natural Prairie's violations of the CWA, thereby diminishing the Mr. Cowley's use and enjoyment of those water resources and natural areas.

Defendants

47. **Natural Prairie Indiana Farmland Holdings, LLC ("Natural Prairie")** is a limited liability company registered in Indiana, with its principle office address at P.O. Box 659, Hartley, Texas, 79044.

48. The sole corporate member of Natural Prairie is Natural Prairie Dairy Farms, LLC ("Natural Prairie Dairy"), a Texas based company that is "part of AgriVision Farm Management"

⁸ IDNR, Map of *Unconsolidated Aquifer Systems of Newton County, Indiana* available at https://www.in.gov/dnr/water/files/Newton_County_UNC_AQSYS_text.pdf.

(“AgriVision”), also a Texas-based company that owns and/or operates various out-of-state CAFOs and CAFO-related businesses.

49. All three companies are owned, managed, operated and/or controlled by the De Jong family, including but not limited to Donald, Cheri and Will De Jong. See websites for Natural Prairie Dairy and AgriVision Farm Management at <http://naturalprairiedairy.com/our-story/> and <http://agrivision.farm/what-we-do/>.

50. **The U.S. Army Corps of Engineers (“USACE”)** is an Executive Department and agency of the United States as defined by 5 U.S.C. § 551(1). Defendant Lieutenant General Todd T. Semonite is named in his official capacity as the Chief of Engineers and Commanding General of the USACE. Defendant Semonite has the statutory duty to implement section 404 of the CWA, and is ultimately responsible for the arbitrary and capricious and unlawful acts described in this Petition and Complaint.

51. The Detroit District of USACE is a sub-agency within USACE. Defendant Aaron W. Damrill is named in his official capacity as the Chief, Michiana Branch, Detroit District of USACE. Defendant Damrill signed off on, and is also responsible for, the arbitrary and capricious AJD at issue in this Complaint. Defendant Semonite has supervisory responsibility over Defendant Damrill.

LEGAL FRAMEWORK

Section 404 of the Clean Water Act

52. Section 404 of the CWA requires a permit “for the discharge of dredged or fill material” into waters of the United States. 33 U.S.C. § 1344(a). Such waters include, among others: intrastate lakes, rivers, streams (including intermittent streams); wetlands, the use, degradation or destruction of which could affect interstate or foreign commerce; tributaries of U.S. waters; “wetlands adjacent to U.S. waters (other than U.S. waters that are themselves wetlands).” 33 C.F.R. § 328.3.

53. This definition includes ditches that flow directly or indirectly into a U.S. waters, 33 C.F.R. § 328.3(b)(3)(iii), and wetlands that have a “continuous surface connection” with a traditional navigable water or a relatively permanent body of water that is connected to (i.e., is a tributary of) a traditional navigable water. *Rapanos v. United States*, 547 U.S. 715, 742 (2006).

54. A “continuous surface connection” means there is a “topical flow of water” between the wetland and the traditional navigable water or its tributary. *United States v. Cundiff*, 555 F. 3d 200, 212 (6th Cir. 2009). And, the “topical flow of water” does not mean a perpetual flow but “some kind of dampness” such that polluting the wetland would have an effect on the waterway. *Id.*

55. “Wetlands” are defined for purposes of Section 404 as “areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under *normal circumstances* do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.” 33 C.F.R. § 328.3(c)(4) (emphasis added). USACE’s 1987 Wetland Delineation Manual (“1987 Manual”) defines “normal circumstances” as “the soil and hydrologic conditions that are normally present without regard to whether the vegetation has been removed.” 1987 Manual, Part 1, Introduction at 4.

56. As applied to areas that have been in crop production, such as the CAFO Site at issue here, the 1987 Manual’s definition of “normal circumstances” is based on the premise that “for certain altered wetlands, even though the vegetation has been removed by cropping, the basic soil and hydrological characteristics remain, to the extent that hydrophytic vegetation would return if the cropping ceased.” *Id.* (quoting USACE Regulatory Guidance Letter (“RGL”) No. 90-07 at 2).

57. Such areas are considered “farmed wetlands,” defined as wetlands that “were both manipulated and cropped before 23 December 1985, but which continue to exhibit important wetland values [and include] areas with 15 or more consecutive days (or 10% of the growing season, whichever is less) of inundation during the growing season.” *Id.*

58. Areas of the CAFO Site that meet this definition are subject to regulation under Section 404. *Id.*; see also *United States v. Hallmark Constr. Co.*, 30 F. Supp. 2d 1033, 1038 (N.D. Ill. 1998) (explaining the difference between “farmed wetlands” and “prior converted cropland,” the latter of which is exempt from regulation under Section 404 because the land has been so modified and degraded by farming activity “that it no longer exhibits its natural hydrology or vegetation”).

59. There are certain exemptions from Section 404’s permitting requirement applicable to waters of the U.S. for the “narrowly defined activities identified in paragraphs A-F [of Section 404(f)(1)] that [Congress concluded] cause little or no adverse effects either individually or cumulatively.” *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 949 (7th Cir. 2004) (quoting Env’tl. Policy Div. of the Cong. Research Serv. for the Senate Comm. on Env’tl. and Pub. Works, 95th Cong., 3 *A Legislative History of the Clean Water Act of 1977*, 420 (Comm. Print 1978)). These exempt activities include, in relevant part, the discharge of dredged or fill material associated with “normal farming activities,” the maintenance of drainage ditches, and the construction or maintenance of irrigation ditches. 33 U.S.C. § 1344(f)(1); 33 C.F.R. § 323.4.

60. These exemptions must be strictly construed given Congress’ intent that USACE not allow activities that would “convert more extensive areas of water into dry land or impede circulation or reduce the reach and size of a water body.” *Greenfield Mills*, 361 F.3d at 950.

61. Finally, parties seeking to avoid permitting “bear the burden of establishing that they qualify for one of the exemptions.” *Id.* at 949.

62. As discussed below, none of these exemptions apply to Natural Prairie’s filling of Bogus Island Ditch, tributaries of Bogus Island and Lawler ditches, and wetlands at the CAFO Site.

USACE’s Jurisdictional Determinations

63. The USACE specifies whether particular property contains “waters of the United States” by issuing “jurisdictional determinations” on a case-by-case basis. 33 C.F.R. § 331.2.

Jurisdictional determinations come in two varieties: “preliminary” and “approved.” *Id.* While preliminary determinations merely advise a property owner “that there may be waters of the United States on a parcel,” approved jurisdictional determinations (“AJDs”) definitively “stat[e] the presence or absence” of such waters. *Id.*

64. Unlike preliminary jurisdictional determinations, AJDs can be administratively appealed and are defined by regulation to “constitute a Corps final agency action.” 33 C.F.R. §§ 320.1(a)(6), 331.2.

65. USACE’s AJDs must include a “basis of jurisdictional determination” with the document, which is “a summary of the indicators that support the Corps [AJD].” 33 C.F.R. § 331.2. Such indicators include “indicators of wetland hydrology, hydric soils, and hydrophytic plant communities” and “indicators that the wetland or waterbody is part of a tributary system.” *Id.*

66. The findings and conclusions of an AJD are binding on the agency for five years. *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S.Ct. 1807, 1813 (2016) (citing the Corps, RGL No. 05–02, § 1(a), p. 1 (June 14, 2005) and 33 C.F.R. pt. 331, App. C).

67. “The definitive nature of [AJDs] also gives rise to ‘direct and appreciable legal consequences.’” *Hawkes*, 136 S.Ct. at 1814. An AJD stating that a party’s property does not contain jurisdictional waters is referred to as a “negative” JD. *Id.*

68. As the U.S. Supreme Court explained in *Hawkes*,

Under a longstanding memorandum of agreement between the Corps and EPA, [a negative AJD] will also be “binding on the Government and represent the Government's position in any subsequent Federal action or litigation concerning that final determination.” Memorandum of Agreement §§ IV–C–2, VI–A. A negative JD thus binds the two agencies authorized to bring civil enforcement proceedings under the Clean Water Act, see 33 U.S.C. § 1319, creating a five-year safe harbor from such proceedings for a property owner.

Id. at 1814.

69. As discussed below, the USACE's AJD findings that the CAFO Site contains non-jurisdictional irrigation canals excavated out of upland and no jurisdictional wetlands provide a five-year safe harbor for Natural Prairie's unlawful filling of tributaries of Lawler and Bogus Island ditches and jurisdictional wetlands at the CAFO Site.

FACT ALLEGATIONS

The CAFO Site

70. The CAFO Site is within the lakebed of the former Beaver Lake, which was fully drained by the early 1900s by constructing Beaver Lake Ditch and tributary ditches draining to the Kankakee River. Of particular relevance to the CAFO Site's history, a USACE report explains:

Beaver Lake covered between 14,000 and 25,000 acres at a water level between *665 MSL and 670 MSL elevations*. Originally, it included portions of *sections 1-24 in T30N R9W* [which includes the CAFO Site]; sections 33-35 in T31 R9W; and sections 7, 18, and 19 in T30N R8W. In 1853, *the first crude ditch was cut from the northwest corner of the lake to the Kankakee River in order to drain Beaver Lake*. At this time, approximately 8,000 acres were drained causing the shoreline to recede about 100 yards. By 1876, local farmers had drained Beaver Lake to only 1/10th its size. Historic materials conflict regarding the final dates of Beaver Lake's existence. However, it was not until after 1900 that Beaver Lake was completely gone.

The draining of Beaver Lake resulted in the cultivation of the former lake bed and establishment of fertile farms. Sand ridges and sandy loams with intermediate alluvial lake basins comprised the north area of former Beaver Lake. This formation coupled with alternate ridges and valleys provided an ideal farming environment. Much of the former bed of Beaver Lake is now owned by The Nature Conservancy. Of these areas, different parts of the project units are in pasture, row crops of corn or soybeans, or woods.⁹

71. Two of the drainage ditches constructed to drain Beaver Lake are present at the CAFO Site—Lawler Ditch and Bogus Island Ditch. Lawler Ditch conveys water from and across the CAFO property in a northward direction to Beaver Lake Ditch, which flows to the Kankakee River and its adjacent wetlands. Bogus Island Ditch, in the eastern part of the CAFO Site, conveys water from the

⁹ USACE, Phase I Archaeological Investigations on the Proposed Efroymsen Ecosystem Restoration Project Near Enos, Newton County, Indiana at 9 (2005).

property eastward into extensive wetland areas at the Kankakee Sands, northward to Beaver Lake Ditch, and then to the Kankakee River and its wetlands. There are also several tributary drainage ditches at the CAFO Site that flow to Bogus Island and Lawler ditches.

72. Both Lawler and Bogus Island ditches and their tributaries are waters of the U.S. as defined by C.F.R. § 328.3(b)(3)(iii) because they are ditches that flow directly or indirectly into the Kankakee River, which is a water of the U.S.

73. The CAFO Site also overlays an unconsolidated, sand aquifer that is part of the Kankakee Aquifer System, which supplies drinking well water for hundreds of area residents¹⁰ and is “highly susceptible to surface contamination” due to its high water table.¹¹ Soil testing at the CAFO Site confirms that the aquifer’s hydraulic head is “at or near” or “at or above” the ground surface in the majority of locations tested along with sands in all soil borings, confirming the connectivity between the ground surface and the underlying

74. aquifer.¹²

75. Soil testing also confirmed hydric (wetland) soils at the CAFO Site that are seasonally inundated in the root zone in the majority of borings—a finding consistent with the Newton County Soil Survey maps which indicate that a majority of soils at the CAFO Site are hydric.

76. Topographic maps of the area confirm that the elevation of the CAFO Site, like the rest of the surrounding Kankakee River Valley lake plain, is level and low.

77. The CAFO Site is also prone to frequent ponding and flooding and has areas that are inundated for at least 15 consecutive days or 10% of the time during the growing season.

¹⁰ IDNR, *Water Well Record Database* available at <https://www.in.gov/dnr/water/3595.htm>.

¹¹ IDNR, *Map of Unconsolidated Aquifer Systems of Newton County, Indiana* available at https://www.in.gov/dnr/water/files/Newton_County_UNC_AQSYS_text.pdf.

¹² See IDEM, *Geology Enclosure of Leo Kurylo, Request for Additional Information, Natural Prairie Dairy Farm Application for CFO/CAFO Approval* (July, 2017).

78. Based on these conditions, if cropping/land-disturbing activities ceased in these seasonally-inundated areas of the CAFO Site, hydrophytic plants would return. As such, these areas are “farmed wetlands.” *See* USACE 1987 Manual, Part 1, Introduction at 4.

79. The CAFO Site and its farmed wetlands are part of the Kankakee River watershed and have direct surface and groundwater connections to Bogus Island and Lawler ditches. As such, the CAFO Site’s farmed wetlands are jurisdictional wetlands. 33 C.F.R. § 328.3(c)(4); *Rapanos*, 547 U.S. at 742.

Natural Prairie’s Ditch-Filling Activities

80. Natural Prairie purchased the CAFO Site in February of 2016 for the purpose of building the CAFO.

81. On or about August 22, 2016, Natural Prairie submitted an application to the Newton County Board of Zoning Appeals (“BZA”) requesting zoning approval in the form of a special exception to allow Natural Prairie to use the CAFO Site to build and operate the CAFO. The BZA approved Natural Prairie’s special exception request on March 28, 2017.

82. Shortly thereafter, on May 16, 2017, Natural Prairie submitted its first application to the Indiana Department of Environmental Management (“IDEM”) for a Confined Feeding Operation Approval (“CFO Approval”) under Indiana’s CFO Rule at 327 IAC 19, *et. seq.*, which requires, among other things, that a CAFO’s livestock production buildings and other waste management structures must be set back 300 feet from surface waters. *See* 327 IAC 19-12-3(a)(2).

83. At some time between August and December of 2016 and before submitting its application for CFO Approval to IDEM, Natural Prairie filled 2,350 feet of Bogus Island Ditch and several tributary ditches of Bogus Island and Lawler ditches within the footprint of the planned CAFO and replaced those ditches with subsurface drainage tiles.

84. Natural Prairie filled and tiled those ditches without seeking a determination from USACE as to whether a Section 404 permit was necessary and without informing IDEM.

85. And, in submitting its application for CFO Approval to IDEM, Natural Prairie did not disclose its ditch filling and tiling activities thereby evading compliance with the surface water setback requirements of the CFO Rule.

86. It was not until September of 2018—after this setback issue was raised by the undersigned counsel to the BZA and to IDEM—that Natural Prairie consulted, nearly two years after-the-fact, with USACE about its ditch filling and tiling activities. Specifically, on September 17, 2018, Natural Prairie informed USACE’s Aaron Damrill that, “approximately 2500’ feet of the northern section of [Bogus Island Ditch] had been enclosed with a 12” tile” and Natural Prairie “wanted to know if a permit was necessary for the enclosure.”¹³

87. Mr. Damrill responded that he “was not sure” because “farming and agricultural operations are allowed certain exemptions for work associated with normal farming practices and [he] would need review these first, before determining if a permit was necessary.” Accordingly, Mr. Damrill asked Natural Prairie to send an “e-mail outlining the work that was done” along with “plans or aerials depicting the section of the ditch that was enclosed” and to provide “information concerning the characteristics of the ditch.”¹⁴

88. In Natural Prairie’s email response, also on September 17, 2018, it falsely represented to Mr. Damrill that it filled Bogus Island Ditch, not to build a CAFO, but for “crop reasons.”¹⁵

89. Natural Prairie’s false claim appears to be for the purpose of evading Section 404 permitting by representing its ditch filling as an exempt “normal farming activity” under Section

¹³ USACE public record, *Conversation Record* of discussion between USACE Aaron Damrill with Natural Prairie (Sept. 17, 2018).

¹⁴ *Id.*

¹⁵ USACE public record, email from Natural Prairie’s Director of Midwest Operations, Will De Jong, to Aaron Damrill (Sept. 17, 2018).

404(f)(1)(A), 33 U.S.C. 1344(f)(1)(A), which it categorically is not. *See Jones v. Thorn*, CV-97-1674-ST, 1999 U.S. Dist. LEXIS 18777, at *7 (D. Or. Nov. 5, 1999) (holding that none of the “normal farming activities” exempt from permitting under 404(f)(1)(A) include “building a barn”).

90. Thereafter, on November 16, 2018, Mr. Damrill and Natural Prairie representatives had another conversation wherein Mr. Damrill explained his conclusion that a permit was not needed for Natural Prairie’s filling of Bogus Island Ditch as follows:

In reviewing Regulatory Guidance Letter 07-02 (RGL 07-02), it appears the tiling of the ditch is not a regulated activity. The reason for this is, the ditch appears to function as an *irrigation ditch and is not part of a natural or man altered waterbody*. Looking at historical aerial photos the project area has been a continuous farming/agricultural operation *so the exemptions described in the regulations and RGL would apply*. I explained to both [Natural Prairie representatives] *that if Bogus Island Ditch was part of a larger tributary network* or if the work affected a water in such a way that met the “Recapture Provision” *it would likely require a permit*, but in this case it does not appear that both criteria for the Recapture Provision have been met. Since both have not been met, a permit is not required. In this instance the *tiling of the ditch is an exempt activity* per the Regulations and RGL 07-02. [Natural Prairie’s representative] asked me if I had spoken with [an unidentified representative of] IDEM and I told him I had. In my conversation [with the IDEM representative] I advised him of the determination this was *an exempt activity* and his response to me was that he was not sure what the State was going to do. [Natural Prairie’s representative] stated that they would reach out to IDEM to see what their plan is. We talked about what was needed from the Army COE and [Natural Prairie’s representative,] Michael asked if there was a letter or something that could be sent to state this. I said that we could send a letter saying that No Permit was required for the work, but with the Thanksgiving holiday approaching I may not be able to get it done until after the holiday. [Natural Prairie’s representative] stated that would be fine.¹⁶

91. As requested, Mr. Damrill sent a letter on November 27, 2018 to Natural Prairie stating that a Section 404 permit “is not required for the work indicated on the enclosed plans as the work does not involve the discharge of dredged and/or fill material into waters of the United States.” The “enclosed plans” refer to the information Natural Prairie provided in its September 17, 2018 email to Mr. Damrill regarding its filling of Bogus Island Ditch.

¹⁶ USACE public record, *Conversation Record* between two Natural Prairie representatives and Aaron Damrill (Nov. 16, 2018) (emphasis added).

92. Mr. Damrill's November 27, 2018 letter concluding that a permit is not needed to fill Bogus Island Ditch because it is not a waters of the U.S. contradicts Mr. Damrill's explanation on November 16, 2018 that a permit is not needed because filling the ditch is an exempt activity. As discussed above, the Section 404(f)(1) exemptions apply only to dredge and fill activities in waters of the U.S. Thus, if Bogus Island Ditch is not a waters of the U.S., then there is no need to consider whether filling it is an exempt activity.

93. Mr. Damrill's November 27, 2018 letter also references USACE's August 2018 AJD for the CAFO Site issued nearly a month *before* Natural Prairie had informed Mr. Damrill that it had filled Bogus Island Ditch.¹⁷ Indeed, the "supporting data reviewed" by Mr. Damrill in preparing the AJD does not and could not include the information subsequently provided by Natural Prairie on September 17, 2018 regarding its filling of Bogus Island Ditch.¹⁸ And the AJD does not mention Natural Prairie's filling of Bogus Island Ditch.

94. Furthermore, Mr. Damrill's conclusion on November 16, 2018 that filling Bogus Island Ditch is an exempt activity because the ditch is not "part of a larger tributary network" and Mr. Damrill's subsequent statement on November 27th that Bogus Island Ditch is not a waters of the U.S. are both inconsistent with the AJD, which expressly and correctly concludes that both Lawler Ditch and Bogus Island Ditch are jurisdictional waters of the U.S. because they are "relatively permanent waters (RPWs) that flows directly or indirectly into TNWs [traditional navigable waters;]"¹⁹ namely, the Kankakee River. In support of this correct finding, the AJD explains:

Lawler Ditch is depicted on the USGS 1:24000 topo map as a blue line stream which indicates a relatively permanent flow. The USDA-NRCS Soil Survey for Newton County also indicates the presence of Lawler Ditch. [sic] by mapping it has a stream/canal. The NBD map also shows that flow in Lawler Ditch is relatively permanent. Water is evident in Lawler Ditch in aeriels reviewed from the following years; 1939, 1952, 1963 and Google Earth images taken in April 1998, February 2005,

¹⁷ USACE letter to Will De Jong and cc'd to IDNR, Marty Maupin at IDEM and Michael Flint at Ice Miller.

¹⁸ Exh A: USACE AJD at pp. 1, 7.

¹⁹ Exh A: USACE AJD at pp. 1, 5-6.

June 2008, September 2013, May 2015, and April 2017. Water was observed flowing in Lawler Ditch during the July 19, 2018 site visit. Lawler Ditch is also a county regulated drain. In addition to the observed water flow, other OHWM indicators described in RGL 05-05 were observed such as a line impressed on the bank, shelving, etc ... The Indiana Drainage Handbook defines a regulated drain that is called a ditch as having permanent or intermittent flow. Bogus Island Ditch is depicted on the USGS 1:24000 topo map as a blue line stream which indicates a relatively permanent flow. The USDA-NRCS Soil Survey for Newton County also indicates the presence of Bogus Island Ditch by mapping it as a stream/canal. The NHD map also shows that flow in Bogus Island Ditch is relatively permanent. Water is evident in Bogus Island Ditch in aeriels reviewed from the following years; 1939, 1952, 1963 and Google Earth images taken in April 1998, February 2005, June 2008, September 2013, May 2015 and April 2017. Water was observed flowing in Bogus Island Ditch during the July 19, 2018 site visit and it has a defined bed and bank. In addition to the observed water flow, other OHWM indicators described in RGL 05-05 were observed such as a line impressed on the bank, shelving, etc... Bogus Island Ditch is also a county regulated drain. The Indiana Drainage Handbook defines a regulated drain that is called a ditch has having permanent or intermittent flow.²⁰

95. Accordingly, the AJD along with applicable statutory and regulatory provisions of the CWA confirm that Bogus Island Ditch is a water of the U.S. And, as discussed below, Natural Prairie's filling and tiling of Bogus Island Ditch and the tributaries of Bogus Island and Lawler ditches is not an exempt activity. Because Natural Prairie unlawfully filled and tiled jurisdictional ditches without obtaining a permit, and has yet to do so, it is in violation of Section 404.

Natural Prairie's Destruction of Wetlands and the USACE's AJD

96. At various times between purchasing the CAFO Site in 2016 and ongoing to the present time, Natural Prairie has installed subsurface drainage tiles and engaged in earthmoving activities at the Site for purposes of building the CAFO—activities that have drained and filled in jurisdictional farmed wetlands.

97. Natural Prairie drained and filled farmed wetlands at the CAFO Site without seeking a determination from USACE as to whether a Section 404 permit is necessary.

²⁰ Exh A: USACE AJD at pp. 1, 5-6.

98. It was not until on or about July 2, 2018—more than two years after Natural Prairie began installing drainage tiles and engaging in earth moving activities—that it sought a jurisdictional determination for the CAFO Site. On that date, Natural Prairie provided USACE’s Aaron Damrill with unidentified “[m]aps, plans, plots or plats” of the CAFO Site.²¹

99. Thereafter, on July 16, 2018, Natural Prairie provided USACE’s Mr. Damrill with a wetland delineation report prepared by its consultant Cardno (“the Cardno Report”),²² which states in relevant part:

A field survey was conducted on 06/27/2018. Specific areas were requested to be surveyed by the client. Additional observations were made during the site visit to document the current conditions or resources present. . .

Desktop analysis of the National Wetland Inventory (NWI) map shows that a Palustrine Emergent Persistent and Temporary Flooded (PEM1A) wetland may be present on site as well as an extensive ditch system. Upon surveying the area no wetland resources were documented and several ditches that have historically been present were no longer in existence. Upon review of the USDA Natural Resources Conservation Service (NRCS) for Newton County, soils are described as loamy sands, fine sands, and sand, with much of the area represented by historically hydric soils.

Two upland data points were completed to document the hydrological, vegetation and soil conditions. These data points are accompanied by photographs to document the visual conditions. The data points were taken in soils that do and vegetation that do not meet the criteria for wetland resources. . .

The NWI locations appear to have pinpointed on elevation and land use differences present in the landscape. The elevation and vegetation were different than the surrounding agricultural crops but were not consistent with those found in wetland resources. These locations did not exhibit wetland characteristics and it’s Cardno’s professional opinion that the areas surveyed contained no wetland resources.²³

100. On July 19, 2018, USACE’s Mr. Damrill conducted a “field determination” and then issued the AJD on August 17, 2018.²⁴

²¹ Exh. A: AJD at p. 7.

²² *Id.*

²³ Cardo Report (July 16, 2018) at p. 1 (emphasis added).

²⁴ Exh. A: AJD at p. 1.

101. As it pertains to wetlands and tributaries of Lawler and Bogus Island ditches, the AJD concludes that “[p]otentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional.”²⁵ In support of this finding, the AJD states:

*The project area has irrigation canals that were mapped on the NHD Maps. Review of the USDA-NRCS Soil Survey for Newton County maps the dominate soil type has Granby loamy fine sand. The Granby series is considered hydric 66% to 99% of the time. Review of aerial photos from 1939, 1952, 1963, and 1971 did not indicate the presence of potential wetland areas where the irrigation canals were located or within the defined project area. The Soil Survey indicates the potential presence of hydric soils and review of the aerial imagery did not indicate the presence of wetlands. Based on available information the irrigation canals were excavated out of uplands and not wetland areas. Canals and ditches excavated out of uplands and draining only uplands area not considered Waters of the United States. The NWI map for the site did indicate the presence of potential wetland area. A wetland delineation performed by the consultant Cardno on a portion of the project area including the NWI mapped wetland did not find any areas meeting wetland criteria has defined in the 1987 U.S. Army Corp of Engineers Wetland Delineation Manual and appropriate Regional Supplement. The area has been in continual agricultural production based on review of the 1939, 1952, 1963, and 1971 aerials along with GoogleEarth images from April 1998, February 2005, June 2008, September 2013, May 2015, and April 2017. No water was observed in the irrigation canals nor was an Ordinary High Water Mark indicator described in RGL 05-05 identified during the July 19, 2018 site visit. The irrigation canals do not meet the definition of an a(l)-a(6) water as defined in 33C.F.R. Part 328 and are not considered to be Waters of the United States.*²⁶

102. The AJD’s findings that the CAFO Site contains irrigation canals excavated out uplands and no wetlands are not supported by the information provided by Natural Prairie and other data and information available to USACE about the CAFO Site’s history and hydrological/soil conditions.

103. As an initial matter, it is unclear what “irrigation canals” the AJD is referring to given that Natural Prairie had already filled and tiled Bogus Island Ditch as well as numerous drainage ditches that flow to Bogus Island and Lawler ditches within the footprint of the CAFO buildings by the time of Mr. Damrill’s July 19, 2018 “field determination.”

²⁵ *Id.*

²⁶ Exh A; USACE AJD at p. 8 (emphasis added).

104. Furthermore, the National Hydrography Data (“NHD”) map of the CAFO Site relied on by Mr. Damrill confirms that the ditches at the CAFO Site are drainage ditches, not irrigation canals.

105. Aerial photos of the CAFO Site going back to 1939 do not support the AJD finding of “irrigation canals.” Those photos simply confirm the long-standing existence of ditches, not their purpose.

106. The Cardno Report likewise does not support the AJD finding of “irrigation canals.” The Cardno Report simply confirms that the CAFO Site had an “extensive ditch system” with “several ditches . . . no longer in existence” because Natural Prairie filled them. The Cardno Report does not characterize those ditches as irrigation canals.

107. Contrary to the AJD’s finding, there is substantial information from multiple sources confirming that ditches at the CAFO Site were constructed for the purpose of draining Beaver Lake and continued, thereafter, to drain the CAFO Site to allow for crop production. There is also ample data confirming that the CAFO Site has an extensive network of subsurface drainage tiles to lower the high water table.

108. In fact, to build its CAFO, Natural Prairie has installed additional subsurface drainage tiles to replace the drainage ditches it filled because Natural Prairie would not be able to build its CAFO at the CAFO Site—a low lying lake bed with a high water table that frequently ponds water and floods—without maintaining adequate drainage.

109. Likewise, the Cardno Report does not support the AJD finding of “no wetlands” at the CAFO Site. Instead, the Cardno Report confirms that most soils at the CAFO Site are hydric (wetland types), even at the two, small “upland data points” selected by Natural Prairie to be surveyed. And the Cardno Report’s conclusion that those two select areas do not contain wetland plants is unsurprising given that Natural Prairie’s installation of additional subsurface drainage tiles and earth

moving activities at the CAFO Site since 2016 have altered hydrology and prevented wetland plants from growing.

110. In any event, Cardno’s finding of hydric soils but no wetland plants in those two small areas does not mean that those areas are not farmed wetlands. Nor does it mean that there were no wetlands, farmed or otherwise, on the entire CAFO Site before Natural Prairie began draining and filling them.

111. Finally, the AJD finding that the CAFO Site is somehow an “upland” is contrary to the CAFO Site’s known history as a lake bed and to topographic maps confirming that the Site is part of the *low-lying and level* Kankakee River Valley lake plain, which is the antithesis of “upland.”

112. In sum, USACE’s Mr. Damrill made three findings in the AJD: (a) that Bogus Island and Lawler ditches are waters of the U.S. within CWA jurisdiction; (b) that the CAFO Site contains irrigation canals excavated out of upland; and (c) the CAFO Site does not contain any jurisdictional wetlands. The AJD’s first finding is correct. The second and third findings are unsupported by facts, arbitrary, capricious and contrary to law.

113. To build its CAFO, Natural Prairie unlawfully filled and tiled nearly a half-mile of Bogus Island Ditch, a waters of the U.S., has filled and tiled tributary ditches of Bogus Island and Lawler ditches, and has and is unlawfully filling and draining wetlands of Bogus Island and Lawler ditches. As discussed below, those discharges and wetland impacts are not exempt activities under Section 404(f)(1) and, even if they were, they are “recaptured” under Section 404(f)(2).

CWA SECTION 404(f)(1) EXEMPTIONS DO NOT APPLY

114. Natural Prairie cannot demonstrate that its ditch filling, tiling and destruction of wetlands to build a CAFO are exempt under Section 404(f)(1).

The “Normal Farming Activities” Exemption Does Not Apply

115. Under the “normal farming activities” exemption, any discharge of dredged or fill material from “normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices” are exempt from permitting under Section 404. 33 U.S.C. § 1344(f)(1)(A).

116. However, to fall within this exemption, these activities “must be part of an established (i.e., ongoing) farming, silviculture, or ranching operation.” 33 C.F.R. § 323.4(a)(1)(ii). Such an operation “ceases to be established when the area on which it was conducted has been converted to another use” including to another wetland use (i.e., silviculture to farming). 33 C.F.R. § 323.4(a)(1)(ii) and (iii)(C)(2).

117. Here, Natural Prairie purchased the property in February of 2016 specifically for the purpose of building the CAFO, not to continue growing crops. In August of 2016, Natural Prairie sought zoning approval to use the land for the CAFO and was granted that zoning approval in March 2017. Thus, the CAFO Site was converted from crop farming to CAFO at that time and Natural Prairie’s discharge activities to facilitate that conversion are not part of an ongoing farming operation.

118. Moreover, not one of the exempt “normal farming” activities includes building a CAFO. *See Jones v. Thorn*, CV-97-1674-ST, 1999 U.S. Dist. LEXIS 18777, at *7 (D. Or. Nov. 5, 1999) (holding that the “normal farming activities” exemption under 404(f)(1)(A) does not include “building a barn”).

119. Specifically, “plowing” is defined as “all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing, and similar physical means used on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting

of crops . . . [and categorically] *will never* involve a discharge of dredged or fill material,” much less for the purpose of building a CAFO. 40 C.F.R. § 232.3(d)(4) (emphasis added).

120. In turn, the definitions of “cultivating” soil and “harvesting” crops do not contemplate the discharge of dredged or fill material for purposes of building a CAFO. 40 C.F.R. § 232.3(d)(1) and (2).

121. The “normal farming activity” of “minor drainage” does contemplate the discharge of dredged or fill material that is “incidental to connecting upland drainage facilities to waters of the United States, adequate to effect the removal of excess soil moisture from upland croplands.” 40 C.F.R. § 232.3(d)(3).

122. However, this activity is not the same as Natural Prairie’s activities for two main reasons: (a) the *low-lying* Kankakee River Valley *lake plain*, of which the CAFO Site is a part, cannot in any way be characterized as “upland;” and (b) Natural Prairie’s discharge activities are for the purpose of building a CAFO, not to plant crops, upland or otherwise.

123. Furthermore, “minor drainage” does not include “the *construction* of any . . . *structure* which drains or otherwise significantly modifies a . . . waters of the United States” such that “[a]ny discharge of dredged or fill material into the waters of the United States *incidental to* the construction of any such structure or waterway requires a permit.” 33 C.F.R. § 323.4(a)(1)(iii)(C)(2) (emphasis added).

124. According to the USACE, such “construction” includes “ditch conversion into pipe,” Regulatory Guidance Letter (“RGL”) No. 07-02 at p. 4 (July 4, 2007), which is exactly what Natural Prairie did to a portion of Bogus Island Ditch and tributaries of Lawler and Bogus Island ditches.

125. In addition, filling, draining and grading wetlands adjacent to Bogus Island and Lawler ditches and their tributaries to construct CAFO buildings has and will destroy those wetlands and

significantly modify those U.S. waters. Thus, Natural Prairie’s wetland impacts and ditch filling activities are not “minor drainage” and the “normal farming” exemption does not apply.

The Exemption for Maintenance of Drainage Ditches and the Construction or Maintenance of Irrigation Ditches Does Not Apply

126. Natural Prairie’s filling and tiling of Bogus Island Ditch and tributary ditches of Lawler and Bogus Island ditches are likewise not exempt under Section 404(f)(1)(C). That exemption applies only to the “construction or maintenance of . . . irrigation ditches, or the maintenance [but not construction] of drainage ditches.” 33 U.S.C. § 1344(f)(1)(C); *see also United States v. Cundiff*, 555 F.3d 200, 215 (6th Cir. 2009) (confirming that only maintenance of drainage ditches is exempt, not construction). In that regard, a “drainage ditch” is defined as:

a ditch that conveys water (other than irrigation related flows) from one place to another. Where a ditch would have the effect of more than minor drainage [as discussed above] of wetlands (other than wetlands established due to the presence of irrigation water), the ditch would be considered a drainage ditch, not an irrigation ditch, even if used for irrigation.

USACE RGL No. 07-02 at p. 4. Conversely, an “irrigation ditch” is:

a man-made feature and/or an upland swale that either conveys water to an ultimate irrigation use or place of use, or that moves and/or conveys irrigation water (e.g., ‘run-off’ from irrigation) away from irrigated lands. . . . If a ditch carries *only* irrigation water, irrigation return flows, and overland flow (precipitation and/or snowmelt) that moves from an irrigated field either to or away from an area subject to irrigated agriculture (e.g., an irrigated field), that ditch would be considered an irrigation ditch, not a drainage ditch.

Id. (emphasis added).

127. Also helpful in understanding the difference between irrigation versus drainage ditches, USACE has explained that “wetlands established solely due to the presence of irrigation water, irrigated fields, or irrigation ditches do not qualify as wetlands for purposes of applying 404(f) exemption” and “artificially irrigated areas which would *revert to upland* if the irrigation ceased” are generally not considered waters of the U.S. *Id.* (quoting USACE Final Rule, preamble, 51 FR 41217 (Nov. 13, 1986)) (emphasis added).

128. Bogus Island and Lawler ditches were constructed to drain—not irrigate—an entire lake. The CAFO Site, which was part of the lakebed of that drained lake, is not and never was “upland” and could never, therefore, “revert to upland.” And, since that lake was *drained*, Bogus Island and Lawler ditches along with extensive subsurface *drainage* tiles have continued to provide *drainage* to lower the high water table at the CAFO Site.

129. Indeed, Natural Prairie replaced the filled portion of Bogus Island Ditch and tributary ditches with *drainage* tile to continue *draining* that groundwater away from the CAFO Site—the very antithesis of irrigation.

130. In any event, USACE’s AJD confirms that Bogus Island and Lawler ditches are “county regulated *drains*” with relatively permanent flow.²⁷ Thus, as drainage ditches, only “maintenance” of Bogus Island and Lawler ditches would be exempt under Section 404(f)(1)(C), not construction.

131. Ditch “maintenance” does not include “any modification that changes the character, scope, or size of the original fill design.” 33 C.F.R. § 323.4(a)(2). According to USACE, that includes only those activities that are intended to “keep the ditch in its existing state or proper condition, or to preserve it from failure or decline.” RGL No. 07-02 at p. 4. In other words, only the “physical preservation of the original, as-built configuration of the ditch and appurtenant structures, to restore the original function and the approximate capacity of the ditch” qualifies as maintenance. *Id.*

132. Natural Prairie’s filling of nearly a half-mile of Bogus Island Ditch and tributary ditches and replacing them with subsurface drainage pipe did not preserve the ditches’ “as built” configuration, but rather closed them entirely. Thus, the activity squarely falls within the definition of “construction,” which includes “ditch conversion to pipe.” *Id.* That construction requires a 404 permit, which Natural Prairie did not and has not obtained.

²⁷ AJD at pp. 1, 6-7.

The “Recapture” Provision Applies

133. Even if one or more of the foregoing Section 404(f)(1) exemptions applied to Natural Prairie’s ditch filling and destruction of wetlands, a permit would still be required under Section 404(f)(2)—known as the “recapture” provision. 33 U.S.C. § 1344(f)(2).

134. Specifically, the recapture provision provides that “any discharge of dredged or fill material into waters of the United States *incidental* to any of the [(f)(1) exempt] activities . . . must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, [and] where the flow or circulation of waters of the United States may be impaired or the reach of such waters reduced.” 33 C.F.R. § 323.4(c) (emphasis added).

135. Both conditions must be met for the otherwise exempt activity to be “recaptured,” and the party seeking to avoid permitting has the burden of showing that it is not. *Greenfield Mills, Inc.*, 361 F.3d at 949, 954.

136. Interpreting the first prong of the recapture provision, the 9th Circuit held that “[c]onverting ranch land to orchards and vineyards is clearly bringing the land into a use to which it was not previously subject.” *See Borden Ranch P’ship v. United States Army Corps of Eng’rs*, 261 F.3d 810, 815 (9th Cir. 2001).

137. Another court held that transforming land that had been previously logged into a red pine plantation constitutes a new use. *United States v. Huseby*, 862 F. Supp. 2d 951, 964 (D. Minn. 2012). In that case, the court explained that even if the logging had been ongoing as an established silviculture operation, developing the site as a tree farm would bring the site into a new use. *Id.* at 965.

138. Likewise, transforming the CAFO Site from cropland to a CAFO with 4,000+ cattle and a 9-acre waste lagoon brought the CAFO Site into a new use to which it was not previously subject. Thus, the first prong of the recapture provision is met.

139. As to the second prong, it is presumed that flow or circulation of regulated waters will be impaired when the discharge “will result in significant discernible alterations to flow or circulation” to those waters. 33 C.F.R. § 323.4(c).

140. Without question, filling and tiling nearly a half-mile of Bogus Island Ditch and its tributaries certainly altered its reach, flow, and circulation. Therefore, the second prong is met and the activity is “recaptured” and requires a Section 404 permit regardless of the (f)(1) exemptions.

141. Likewise, Natural Prairie’s destruction of jurisdictional wetlands meets the second prong and is recaptured. In *United States v. Huseby*, the court held that discharge of fill material into wetlands that had a continuous surface connection with a creek that is “a relatively permanent water and part of the Lake Superior tributary system” would alter the character and reduce the reach of those waters as contemplated by the second prong of the recapture provision. 862 F. Supp. 2d 951, 965 (D. Minn. 2012).

142. Here, the CAFO Site and its farmed wetlands are part of the Kankakee River watershed and have direct surface and groundwater connections to Bogus Island and Lawler ditches—both relatively permanent waters and tributaries of the Kankakee River, a traditional navigable water. As such, like the wetlands in *Huseby*, filling farmed wetlands at the CAFO Site will alter the flow, circulation, and reach of Lawler and Bogus Island ditches as well as of the Kankakee River.

143. In sum, to build its CAFO, Natural Prairie has filled and tiled 2,350 feet of Bogus Island Ditch, a waters of the U.S., has filled and tiled jurisdictional tributaries of Bogus Island and Lawler ditches, and is continuing to fill regulated wetlands. Those discharges are not exempt under Section 404(f)(1) and, even if they were, they are recaptured under Section 404(f)(2). Therefore, Natural Prairie’s failure to obtain a permit for its ongoing discharge activities violates Section 404 of the CWA.

CLAIMS FOR RELIEF

First Claim for Relief (CWA Citizen Suit Against Natural Prairie for Violations of Section 404)

144. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs 1 through 142 of this Complaint.

145. Natural Prairie has violated and is violating CWA Section 404, 33 U.S.C. § 1344 and CWA Section 301(a), 33 U.S.C. § 1311(a) which prohibit the discharge of dredge or fill material into waters of the United States without a Section 404 permit by:

- a. filling and tiling 2,350 feet of Bogus Island Ditch without obtaining a Section 404 permit;
- b. filling and tiling tributary ditches of Lawler and Bogus Island ditches without obtaining a Section 404 permit;
- c. filling and draining jurisdictional wetlands to build its CAFO without obtaining a Section 404 permit;
- d. continuing to fill and drain jurisdictional wetlands to build its CAFO without a Section 404 permit.

146. Section 505(a)(1) of the CWA authorizes “any citizen” to commence a civil action against “any person . . . who is alleged to be in violation of . . . an effluent standard or limitation” which includes violations of Section 404. 33 U.S.C. § 1365(a)(1),(f); 33 U.S.C. § 1311(a).

147. Natural Prairie is subject to civil penalties under CWA Section 309(d), 33 U.S.C. § 1319(d), of up to \$54,833 per day for each violation occurring since November 2, 2015 to the present time. 40 C.F.R. § 19.4, Table 2.

148. Natural Prairie’s violations began in 2016 and have continued up to the present. These violations will continue until they are enjoined by an order of this Court.

149. Under the CWA citizen suit provision, 33 U.S.C. § 1365(a), this Court has jurisdiction to enjoin Natural Prairie’s CWA violations and impose appropriate civil penalties, and such relief is warranted.

Second Claim for Relief
(Judicial Review Under the APA of USACE’s Arbitrary and Capricious AJD that Provides Safe-Harbor for Natural Prairie’s Unlawful Filling of Wetlands and Ditches)

150. Plaintiffs reallege and incorporate by reference each and every allegation in paragraphs 1 through 142 of this Complaint.

151. The Administrative Procedure Act (“APA”) provides that final agency action is subject to judicial review, and also provides the standards for judicial review and judicial remedies for this action. 5 U.S.C. §§ 701–706.

152. The APA requires courts to hold unlawful and set aside agency action, findings, and conclusions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2).

153. An agency’s decision is arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider; entirely failed to consider an important aspect of the problem; or offered an explanation for its decision that runs counter to the evidence or is implausible. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

154. USACE’s conclusion in the AJD that there are no wetlands on the project area is equivalent to a conclusion that there are no jurisdictional wetlands within the project area, for if there are no wetlands, there can be no jurisdictional wetlands.

155. USACE’s conclusions in the AJD that the CAFO Site contains non-jurisdictional irrigation canals excavated out of upland and no jurisdictional wetlands are unsupported by facts and run counter to the evidence. Furthermore, in reaching these conclusions, the USACE:

- a. failed to consider relevant data demonstrating that ditches at the CAFO Site were constructed for drainage, not irrigation;
- b. failed to consider relevant data demonstrating the CAFO Site is a former lake bed and part of a low-lying lake plain, and is not upland;
- c. failed to consider relevant data demonstrating the presence of wetlands and “farmed wetlands” on the CAFO Site;
- d. relied on inaccurate, insufficient, misleading, and partial information obtained from Natural Prairie;
- e. failed to consider all of the relevant regulatory factors for determining whether the CAFO Site contains wetlands and/or “farmed wetlands”;
- f. failed to rationally connect the facts found with its conclusion that there are non-jurisdictional irrigation canals at the CAFO Site;
- g. failed to rationally connect the facts found with its conclusion that no jurisdictional wetlands exist on the CAFO Site;
- h. failed to present a rational basis for its decision that there are non-jurisdictional irrigation canals at the CAFO Site;
- i. failed to present a rational basis for its decision that no jurisdictional wetlands exist on the CAFO Site.

101. Accordingly, the 2018 AJD issued by USACE for Natural Prairie’s CAFO Site is arbitrary, capricious, an abuse of discretion, and not in accordance with Section 404 the CWA, 33 U.S.C. § 1344 and, therefore, it must be set aside pursuant to the APA, 5 U.S.C. § 706.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that this Court:

- A. Declare that Natural Prairie has violated and is violating the CWA by filling and tiling 2,350 feet of Bogus Island Ditch, a waters of the U.S., to build its CAFO without obtaining a Section 404 permit;
- B. Declare that Natural Prairie has violated and is violating the CWA by filling and tiling jurisdictional tributaries of Bogus Island and Lawler ditches to build its CAFO without obtaining a Section 404 permit;
- C. Declare that Natural Prairie has violated and is violating the CWA by filling and draining jurisdictional wetlands to build its CAFO without a Section 404 permit;
- D. Declare USACE's findings and conclusions in the AJD that the CAFO Site contains non-jurisdictional irrigation canals and no jurisdictional wetlands are arbitrary, capricious, an abuse of discretion, and not in accordance with the CWA;
- E. Set aside USACE's findings and conclusions in the AJD that the CAFO Site contains non-jurisdictional irrigation canals and no jurisdictional wetlands as arbitrary, capricious, an abuse of discretion, and not in accordance with the CWA;
- F. Issue injunctive relief enjoining further construction of Natural Prairie's CAFO until such time that Natural Prairie obtains and complies with a Section 404 permit to prevent further illegal destruction of wetlands;
- G. Issue injunctive relief requiring Natural Prairie to remove the CAFO structures it has built over and in unlawfully filled jurisdictional ditches and wetlands if it is unable to obtain a Section 404 permit and take all appropriate measures to remediate those unlawfully filled ditches and wetlands;
- H. Impose civil penalties for Natural Prairie's illegal and unpermitted filling and tiling of jurisdictional ditches and wetlands in the amount of \$54,833 per day for each violation pursuant to 33 U.S.C. § 1319(d) and 40 C.F.R. § 19.4, Table 2.

- I. Maintain jurisdiction over this action until Natural Prairie and USACE are in compliance with the CWA, APA, and with every order of this Court;
- J. Award Plaintiffs' attorney fees and costs pursuant to CWA Section 505(d), 33 U.S.C. § 1365(d) and 28 U.S.C. § 2412; and
- K. Grant such additional and further relief to which Plaintiffs may be entitled.

DATED: July 29, 2019

Respectfully submitted,

/s/ Kim E. Ferraro

Kim E. Ferraro (IN Atty. No. 27102-64)

Aaron Corn (IN Atty. No. 30570-49)

Hoosier Environmental Council

541 South Lake Street

Gary, Indiana 46403

(219) 464-0104 [Voice]

(219) 464-0115 [Fax]

Email: kferraro@hecweb.org

acorn@hecweb.org