Lewis et al v. United States of America et al

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UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF LOUISIANA GARRY LEWIS, BRENDA GAYLE LEWIS, G. LEWIS LOUISIANA, LLC, ROBERT BEARD, CAROLYN MILTON, AND TOWN OF LIVINGSTON, LA CIIVIL ACTION VERSUS NO. 17-1644-JWD-RLB UNITED STATES OF AMERICA AND UNITED STATES ARMY CORPS OF ENGINEERS

RULING AND ORDER This matter comes before the Court on the Motion to Partially Dismiss First Amended Complaint, (Doc. 26), by Defendants, United States of America and United States Army Corps of Engineers under Rule 12(b)(1) and Rule 12(b)(6). Plaintiffs, Garry Lewis, Brenda Gayle Lewis, G. Lewis Louisiana, LLC, Robert Beard, Carolyn Milton, and Town 1

opposed the motion. (Doc. 28). Defendants replied. (Doc. 29). Oral argument is not necessary. For the following reasons, the motion is granted in part and denied in part. I. PROCEDURAL BACKGROUND AND REGULATORY FRAMEWORK Plaintiffs filed their initial Complaint on November 9, 2017. (Doc. 1). Plaintiffs own certain real property in Livingston Parish with r declared regulatory jurisdiction over some of the land pursuant to the Clean Water Act and obstructed connection to municipal water supplies. (Id.). Plaintiffs further allege that the Corps

1 The Court notes that the pleadings and memoranda frequently do not distinguish among the various Plaintiffs or to d further claim that the

(Doc. 1, p. 2).

original Complaint with a motion for partial dismissal on February 5, 2018. (Doc. 13). 12(b)(6) for failure to state a claim upon which relief may be granted. This Court granted the

motion in part and denied the motion in part. The Court dismissed Counts II (the alleged bias of Defendants) and III (claim of estoppel) of the Complaint and dismissed Counts IV (unreasonable delay) and V -and-desist order) as to the EPA. Plaintiffs were ordered to amend their Complaint Plaintiffs amended their Complaint on September 6, 2018. 2

(Doc. 23). Defendants responded with the instant motion for partial dismissal. (Doc. 26). (Doc. 22,

pp. 1-3). The Court reproduces same herein in addressing Def dismissal.

See 33 U.S.C. § 1311(a). addition of any pollutant to navigable waters from any source point 2

amendment to the Complaint doubles the factual and legal allegations from that contained in the original C presently before the Court. see also Rapanos v. United

States, 547 U.S. 715, 730-

The CWA and its associated regulations authorize the Corps to issue permits for the discharge of fill material into the waters of the United States. See 33 U.S.C. § 1344(a); Rapanos, to

under Section 1344. 33 U.S.C. §

1344(f)(1)(A). C.F.R. §§ 325.9; 331.2 (defining approved jurisdictional determination). Federal regulations also

indications that there may be waters of the United States on a par 331.2 (defining preliminary jurisdictional determination). Approved jurisdictional determinations are 331.2; 331.5(a)(1). However, preliminary jurisdictional determinations are characterized as

331.2; 331.5(b)(9). When the Corps detects unauthorized activity requiring a permit, it is authorized to take

-and-desist order; a cease- and- 326.3(c)(1), (c)(2). The Corps has several options for addressing unauthorized activity, including

ordering initial corrective measures, accepting an after-the-fact permit application, or recommending civil or criminal litigation to obtain penalties or require compliance. 33 C.F.R. §§ 326.3(d), (e), 326.5(a). II. FACTUAL BACKGROUND 23, pp. 5-23). The following is a sket

jurisdictional determination concerning the property at issue in this matter, Milton Lane. (Doc. 23, p. 5). The intention behind the request was to prepare to begin construction of a water line. (Doc. 23, p. 6). Plaintiffs allege that the C their own published guidelines. (Id.).

Defendants allegedl focused on parts of land outside of the area at issue. Because Defendants allegedly made

Id.). representatives of (Doc. 23, p. 8). On October 14, 2015, the Corps issued a preliminary jurisdictional determination stating accepted a permit application concerning activities that Plaintiffs wished to conduct on the

property [constructing] a water tower and water lines to serve both existing and future (Id.).

the property did not qualify for the noted that a proposed project at the site included . (Id.; Doc. 1-19).

On November 25, 2015, the EPA responded to the November 6 th

request, agreeing that the operation did not fall within the exemption. (Doc. 1-20). After receiving this letter, the Corps iss - ease and that you [Garry Lewis] are

and side casting of material from a waterway locally known as Switc Id., p. 1). prohibits the discharge of fill materials into a waterway unless authorized by a permit. The letter then orders Plaintiffs to cease and desist from such activity until a permit is obtained. (Id.). Plaintiffs allege that t that Plaintiffs allege are not prohibited by the

CWA. (Doc. 23, p. 9). (which is referring to the permit application to build the water tower and water lines), the Corps issued a cease and desist order

and utility line to provide access to water. (Doc. 23, p. 9). Plaintiffs allege in the First Amending Complaint that the referred to different tracts of land than the permit application which the judicial determination and permits were requested. (Doc. 23, pp. 9-10). Plaintiffs identify various items of correspondence that allegedly mis-construe the significance of the EPA letter to by EPA counsel) has ruled the EPA letter has no legal effect, and thus dismissed EPA from this ac (Doc. 23,

pp. 10-11). (Doc. 23, pp. 12-13). Plaintiffs claim that they were denied a proper mapping of the wetlands;

a dry tract to be used as emergency flood housing. (Doc. 23, p. 14). In September of 2016, Plaintiffs requested an appealable jurisdictional determination which . judicially required tests, and equitable estoppel should prevent them from seeking remand for them

to do it now and waste more time Plaintiffs aver with particularity management company TSWS LLC d/b/a Pot-O-Gold Rentals LLC -O-

. For example, Plaintiffs claim that lot 11A users were allowed to conduct waste operations on wetlands; the CWA was applied differently to lot 11A users; lot 11A users were allowed to pollute, never received cease-and-desist letters (Doc. 23, pp. 17-18). Plaintiffs aver that the Corps of silviculture non-compliance by EPA contained in an EPA letter dated November 25, 2015 or

. (Doc. 23, p. 2 (citing Doc. 22, pp. 19-20)). The present dispute arises

[:] (1) obstructing needed construction of a municipal water project to replace contaminated well water[;] (2) obstructing Timber farming/silviculture on the lands[;] (3) obstructing the land]s use for aintiffs] collective damages enabled an adjacent Waste management facility to operate and pollute and fill conceded wetlands by intentionally enforcing the CWA unequally Id.). Further, Plaintiffs aged Plaintiffs and even obstructed appeal Id.). Plaintiffs, Town of Livingston, Robert Beard, and

Carolyn Milton, have rights in Milton cont [:] determination that Federal jurisdiction is absent under the CWA and judicial interpretation thereof

regulated Federal waters wetlands identification of the whole lands is an unlawful failure to delineate boundaries of wetland - a staying of all actions of Defendant s unlawful, and commanding timely actions where lawful, and (4) setting aside an unlawful or unconstitutional Cease and Desist order[;] (5) [m]onetary relief for damages caused by unlawful conduct where appropriate, or retain jurisdiction thereover until ripe under the Federal Tort Claims Id.). III. STANDARDS OF REVIEW A. Rule 12(b)(1) Standard Federal courts are courts of limited jurisdiction; without jurisdiction conferred by statute, they lack the power to adjudicate claims. In re FEMA Trailer Formaldehyde Prods. Liab. Litig., 668 F.3d 281, 286-87 (5th Cir. 2012)(citing Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994); Stockman v. FEC, 138 F.3d 144, 151 (5th Cir. 1998), Hall v. Louisiana, 12 F.Supp.3d 878 (M.D. La. 2014)). Under Federal Rule of Civil -matter jurisdiction when the court lacks the statutory or constit Id. (quoting Home , 143 F.3d 1006, 1010 (5th Cir. 1998)). The Fifth Circuit Court of Appeal has explained the standard for motions pursuant to Rule 12(b)(1) as follows:

Motions filed under Rule 12(b)(1) of the Federal Rules of Civil Procedure allow a party to challenge the subject matter jurisdiction of the district court to hear a case. Fed. R. Civ. P. 12(b)(1). Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by Barrera-Montenegro v. United States, 74 F.3d 657, 659 (5th Cir. 1996). The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. McDaniel v. United States, 899 F.Supp. 305, 307 (E.D. Tex. 1995). Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist. Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 511 (5th Cir. 1980). When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits. Hitt v. City of Pasadena, 561 F.2d 606, 608 (5th Cir. 1977)(per curiam). In re FEMA Trailer Formaldehyde Prods. Liab. Litig., 668 F.3d at 286-87. In examining a Rule 12(b)(1) motion, the district court is empowered to consider matters of fact which may be in dispute. Williamson v. Tucker, 645 F.2d 404, 413 (5th Cir. 1981). Ultimately, a motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief. ., 143 F.3d 1006, 1010 (5th Cir. 1998). Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001). B. Rule 12(b)(6) Standard In Johnson v. City of Shelby, Mississippi, the S ed

-47 (2014)(citations omitted).

Interpreting Rule 8(a), the Fifth Circuit Court of Appeal has explained:

The complaint (1) on its face (2) must contain enough factual matter (taken as true) (3) to raise a

reasonable hope or expectation (4) that discovery will reveal relevant evidence of each element of a claim. ble grounds to infer [the element of a claim] does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that

Lormand v. U.S. Unwired, Inc., 565 F.3d 228, 257 (5th Cir. 2009)(quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007)). Applying the above case law, the Western District of Louisiana has stated:

Therefore, while the court is not to give the factual allegations remain so entitled. Once those factual allegations are identified, judicial experience and common sense, the analysis is whether those facts, which need not be detailed or sp the reasonable inference that the defendant is lia [Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)]; Twombly, [550] U.S. at 556, 127 S.Ct. at 1965. This analysis is not substantively different from that set forth in Lormand, supra, nor does this jurisprudence foreclose the option that discovery must be undertaken in order to raise relevant information to support an element of the claim. The standard, under the specific language of Fed. R. Civ. P. 8(a)(2), remains that the defendant be given adequate notice of the claim and the grounds must make that, with or without discovery, the facts set forth a plausible claim for Lormand, 565 F.3d at 257; Twombly, [550] U.S. at 556, 127 S.Ct. at 1965.

Diamond Servs. Corp. v. Oceanografia, S.A. De C.V., 2011 WL 938785, at *3 (W.D. La. Feb. 9, 2011)(quoting Barber v. Bristol-Myers Squibb, Civ. Act. No. 09-1562 (W.D. La. 2010)). More recently, in Thompson v. City of Waco, Texas, 764 F.3d 500 (5th Cir. 2014), the Fifth Circuit summarized the standard for a Rule 12(b)(6) motion:

We accept all well-pleaded facts as true and view all facts in the light most favorable to the facts to state a claim for relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Our task, then, is to determine whether the plaintiff states a legally cognizable claim

Id. at 502-03 (citations and internal quotations omitted). IV. A. Defendants move that it is inconsistent -1, p. 1). Specifically,

Defendants move to dismiss: - Count II, a new claim of substantive due process; (3) Count III, a claim that Defendants argue claim ronmental Protection Agency , a new claim for statutory violations of the Clean Water Act. (Doc. 26-1, p. 1). Defendants regulatory taking claim, under both Rule 12(b)(1) for lack of jurisdiction and Rule 12(b)(6) for

failure to state a claim. (Doc. 26-1, p. 8). Regarding jurisdiction, Defendants argue that takings claims against the federal government are premature until the property owner has availed itself of the process under the Tucker Act, 28 U.S.C. § 1491. (Doc. 26-1, p. 8 (citing ity, 473 U.S. 172, 195 (1985); see

also Preseault

v. ICC, 494 U.S. 1, 11 (1990))). Defendants argue that Plaintiffs have not plead facts establishing whether their purported damages are greater than or less than $10,000; therefore, Defendants aver that Plaintiffs have not established jurisdiction. (Doc. 26-1, p. 8 (explaining that the Court of Federal Claims has exclusive jurisdiction over takings claims over $10,000 and has concurrent jurisdiction with district courts for claims under $10,000)). Plaintiffs injunctive and declaratory relief only, not compensatory damages. Therefore, Defendants argue,

Plaintiffs have not established jurisdiction in the pleading of their case. (Doc. 26-1, p. 9). Defendants also argue s claim is not ripe completed. Simply asserting regulatory jurisdiction

possibility of a permit. Defendants argue that only when a permit is denied to prevent -1, pp. 9-10 (citing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127 (1985)). deprivation of silviculture rights but argue that . (Doc. 26-1, p. 10 (referring to Doc. 22); see Doc. 26-1, pp. 11-). Defendants also argue First Amended Complaint (See Doc. 26-1, pp. 13-14 for the

Therefore, Defendants seek dismissal proceed. (Doc. 26-1, pp. 10, 14).

Regarding Count II, ss do -1, p. 15 (citing City of Sacramento v. Lewis, 523 U.S. 833, 846 (1998)). Specifically, Plaintiffs claim that Corps personnel showed bias against Lewis based upon the following: (1) an email in which the chief of the Regulatory Branch of the New Orleans -1, p. 15 (citing Doc. 23, ¶ 59)); (2) a statement

facilitate future devid. at ¶ 60); (3) different treatment of a neighboring landowner, (id. at ¶ 61); and (4) temporary flood shelter. (Id. at ¶ 62). Defendants argue that as plead, the allegations do not

support viable claims of bias. (Doc. 26-1, pp. 15-17). Plaintiffs (Doc. 23, ¶ 63). Defendants argue, however, that the Court stated in its prior Order, (Doc. 22, p. 16), -1, p. 17). Because the EPA is not named as a party in the caption of the First Amended Complaint, Defendants argue that the EPA is no longer a named Defendant. (Doc. 26-1, p. 17). However, since Count IV and Paragraph 66 contain allegations of unreasonable delay by the EPA, Defendants move to dismiss this claim adverse to the EPA. Defendants argue that this Court dismissed this claim in its prior Order. (Id. (citing Doc. 22, p. 17)). Further, Defendants argue that because the EPA was not required to provide a hearing on an advisory letter that it issued or to in taking these non-required actions. (Doc. 26-1, p. 18). Finally, Defendants Act should be dismissed for failure to state a claim. Plaintiffs do not plead a cause of action and/or

state a basis of relief. (Doc. 26-1, p. 18). Because Plaintiffs did not identify a cause of action, there is no waiver of sovereign immunity by the United States which is required for it to be sued. (Doc. 26-1, p. 19). Id.).

B. As to whether Plaintiffs have established jurisdiction, Plaintiffs do not address the issue of concurrent or exclusive jurisdiction and the $10,000 threshold amount. Rather, Plaintiffs argue their regulatory takings claim is subject to equitable relief. (Doc. 28, p. 5 (citing U.S. v. Charles George Trucking Co., Inc., 682 F.Supp. 1260 (D. Mass. 1988), n. 2)). Plaintiffs rely upon Duke Power Co. v. Carolina Env. Study Group, 438 U.S. 59, 71 (1978), n. 15, arguing that Plaintiffs are taking actions , notwithstanding the lack of a Tucker Act money takings claim. (Doc. 28, p. 6

(citing Alto El Dorado Partners v. City of Santa Fe, 644 F.Supp.2d 1313, 1327 (D. N.Mex. 2009))). Plaintiffs conclude their address of the jurisdictional The worse that can be said

Plaintiffs argue that this Court was correct in finding that the loss of timber rights was a denial of property without due process. (Doc. 28, p. 6 (citing La. C.C. Art. 463)). Plaintiffs also amended their Complaint to clarify that their claim regarding access to drinking water is a liberty right . (Doc. 28, p. 6 (citing Juliana v. United States, 2017 WL 2483705, at *26, 44-48 (D. Or. 2017))) (Doc. 28, p. 7).

Plaintiffs maintain that their allegations of bias violate their substantive due process rights, arguing that is shocking speaks for itself. Bureaucratic torment is not insulated.

does, i.e., here no drinking water access or timber harvesting as a result of agency standstills. R

prior ruling. (Doc. 28, pp. 7-8 (citing Doc. 22, p. 16)). Plaintiffs also clarify should be denied as moot. (Doc. 28, p. 8).

Regarding Count VI, Plaintiffs governed by the Department of Agriculture and Forestry in Louisiana and land use rights governed by political subdivisions in the State, are the basis for Count VI. These constitutional rights must be upheld against federal government overregulation C. Defendants disagree with s claim is subject to equitable relief. highlight that the caselaw upon which Plaintiffs rely, United States v. Charles George Trucking Co Claims Court, pursuant to the Tucker Act -2 (citing United States v. Charles

George Trucking Co., 682 F.Supp. 1260, 1271 (D. Mass. 1988))). s claim is not ripe. Defendants argue that the Corps did not order silviculture to stop indefinitely Instead, Defendants argue that

authorized by the Clean Water Act (i.e., depositing fill material into wetlands without a permit), and that the CWA Defendants also argue that Duke Power Co. v. Carolina Environmental Study Group, Inc., relied- argument. First, the United States Supreme Court did not reach the issue of a taking because the

alleged taking was hypothetical and had not yet occurred. Further, the Supreme Court stated that Tucker Act compensation was available in the event such a claim arose. (Doc. 29, p. 2 (citing Duke Power, 438 U.S. 59, 94 (1978))). established a deprivation of property; have not identified a deprivation

of silvicultural rights; and

if the deprivation cannot yet be determined, then the due process claim is not ripe. (Doc. 29, p. 3). Id.). Def process claim is procedurally appropriate, and Defendants argue that Plaintiffs do not meet the

(Doc. 29, pp. 3-4).

a party; therefore, any claims in Count IV adverse to the EPA should be dismissed. (Id.). Defendants argue that Plaintiffs assert an unspecified violation of the Clean Water Act in Count VI of its First Amended Complaint but argue a violation of the Tenth Amendment as Count VI in its opposition. Defendants suggest that this proves their point that Plaintiffs have not plead a cause of action in Count VI. Neither the original Complaint, nor the First Amended Complaint plead a claim of a violation of the Tenth Amendment or a violation of the Clean Water Act.

that do not identify a legal cause of action and to which Defendants are not able to respond. (Doc. 29, p. 5). V. ANALYSIS A. Count I Regulatory Taking and Procedural Due Process 1. Regulatory Taking :

Said Plaintiffs formerly marketed and sold timber harvests which now remain actions on their land. Under U.S. Supreme Court precedents a taking exists because: (1) the nature of the taking here is as applied and regulatory, (2) the economic impact of the regulation is to deprive owners of all value in their standing timber rights through harvests, and (3) said plaintiffs investment in the property since 2012 and prior investment for timber rights was justified to them through the silviculture exemption in the Clean Water Act, 33 U.S.C. § 1344(f). Therefore, Plaintiffs Lewis have suffered an actual and regulatory taking of property rights without just compensation. Said plaintiffs do not seek compensation at this time, but pray for injunctive and declaratory relief due to a government violation of the U.S. Constitution on several counts as alleged herein. (Doc. 23, pp. 25-26). Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536, 125 S.Ct. 2074, 2080 (2005)

governmental interference with property rights per se, but rather to secure compensation in the

Id. at 537 (emphasis in original). a direct, physical an owner's property interests, depriving the owner of the rights to possess, use and dispose of the

Horne v. Department of Agriculture, U.S. , 135 S.Ct. 2419, 2427, 192 L.Ed.2d 388

(2015), citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). falls into the second category. Plaintiffs allege that they were deprived of all value in their timber rights -and-desist order, delays and non- e requests for jurisdictional determination. (Doc. 23, p. 25). The Supreme Court has explained that when a government regulation goes too far, it constitutes a regulatory taking. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). However, in 90 years of takings jurisprudence, the Supreme Court has generally eschewed any out in Penn Central

Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978) (looking to factors to determine whether a taking occurred such as the economic impact on the claimant, interference with distinct investment-backed expectations, and the character of the government action). The public interest behind the Penn Central, 438 U.S. at 125. Ultimately, whether a regulatory taking has occurred will depend largely on the particular circumstances of each case. Id. at 124. public purpose, it has a categorical duty to compensate the former owner ... regardless of whether

the interest that is taken constitutes an entire parcel or merely a part Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 322, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002), citing U.S. v. Pewee Coal Co., 341 U.S. 114, 115, 71 S.Ct. 670, 95 L.Ed. 809 (1951). Thus, where a regulation restricts the use but does not completely deprive an owner Supreme Court has long p Id., quoting Andrus v. Allard,

444 U.S. 51, 65 66, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979). Once there is a taking, as when there is a physical appropriation, payment from the government becomes an issue of just compensation. Horne, 135 S.Ct. at 2429 e market value Id., quoting United States v. 50 Acres of Land, 469 U.S. 24, 29, 105 S.Ct. 451, 83 L.Ed.2d 376 (1984). its thereof are important sticks in the , alone, may not amount to a taking. See Tahoe-Sierra Preservation Council,

Inc., 535 U.S. at 322, quoting Andrus, 444 U.S. at 65- only. (Doc. 23, p. 25). Plaintiffs do

not allege a complete taking of the property attempt to assert a regulatory takings claim,

a more detailed, fact-intensive analysis under Penn Central is required to determine whether the allegations rise to the level of a regulatory taking See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015-1019 (1992).

Nevertheless, regardless of the classification of the taking, a takings claim under the Fifth Amendment must first be ripe for adjudication. Severance v. Patterson, 566 F.3d 490, 496 (5th Cir. 2009). The Supreme Court has adopted a test for ripeness under the Fifth Amendment's takings are not ripe until (1) the relevant governmental unit [administrative agency] has reached a final decision as to how the regulation will be applied to the land owner, and (2) the plaintiff has sought compensation for the alleged taking through whatever adequate procedures the Williamson County Reg'l Planning Comm's v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985); see also Urban Developers, LLC v. City of Jackson, Miss., 468 F.3d 281, 292 93 (5th Cir. 2006); Robinson v. City of Baton Rouge, No. 13-375, 2016 WL 6211276, *25 (M.D. La. Oct. 22, 2016). Plaintiffs fail to show that their regulatory takings claim is ripe for adjudication. First, in their opposition, Plaintiffs -and-desist order as stopping silviculture a regulatory taking. (Doc. 28, p. 5). in its opposition. The addresses the deposition of fill material into wetlands without a permit and orders

Lewis to cease from depositing fill materials into wetlands until a permit is obtained. (Doc. 1-14).

neither addresses silviculture operations in total, nor does it address the issue of access to drinking water. However, a -and-desist order constituted (Doc. 22, p. 21 (citing Lane v. Halliburton, 529 F.3d 548, 557 (5th Cir. 2008))). This Court found

that Plaintiffs adequately allege that the cease-and- constituted - and legal conclusions that Plaintiffs wish to challenge. Therefore, under the applicable

jurisprudential authority, this Court concluded that Plaintiffs made a plausible showing of a final order. (Doc. 22, pp. 21-23 (citing U.S. Army Corps of Engineers v. Hawkes Co., __ U.S. __, 136 S.Ct. 1807, 1815 (2016); Frozen Food Express v. United States, 351 U.S. 40, 44-45 (1956); Louisiana State v. United States Army Corps of Engineers, 834 F.3d 574, 580-81 (5th Cir. 2016))). Even though Plaintiffs meet the first prong of the ripeness test, Plaintiffs do not meet the second prong. Plaintiffs are clear in both their First Amended Complaint as well as their opposition to this motion that they seek injunctive and declaratory relief, not compensation. Thus, the second element of the ripeness test is absent. Plaintiffs argue that the case of Duke Power Co. v. Carolina Env. Study Group, 438 U.S. 59, 71 (1978), allow Duke Power is not applicable

to this matter because the Supreme Court declined to resolve the taking claim because the alleged taking had not occurred. Defendants 29, p. 2). In Duke Power, the Supreme Court their opposition. (Doc. 28, p. 6). In addressing

jurisdiction, which the Supreme Court raised on its own motion, the Supreme Court stated:

For purposes of determining whether jurisdiction exists under § 1331(a) to resolve appellees' claims, it is not necessary to decide whether appellees' alleged cause of action against the NRC based directly on the Constitution is in fact a cause of action Bell v. Hood, 327 U.S. 678, 682, 66 he cause of action alleged is so patently without merit as to justify . . . the court's dismissal for want Hagans v. Lavine, 415 U.S. 528, 542 543, 94 S.Ct. 1372, 1382, 39 L.Ed.2d 577 (1974) quoting Bell v. Hood, supra, at 683, 66 S.Ct., at 776. (Emphasis added.) See also Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666, 94 S.Ct. 772, 778, 39 L.Ed.2d 73 (1974) (test is whether right claimed is so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy). In light of prior decisions, for example, Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) and Hagans v. Lavine, supra, as well as the general admonition that where federally protected rights have been invaded . . . courts will be alert to adjust their remedies so as to grant the necessary relief, Bell v. Hood, supra, 327 U.S., at 684, 66 S.Ct., at 777, we conclude that appellees' allegations are sufficient to sustain jurisdiction under § 1331(a). The further question of whether appellees' cause of action under the Constitution is one generally to be recognized need not be decided here. The question does not directly implicate our jurisdiction, see Bell v. Hood, supra, was not raised in the court below, was not briefed, and was not addressed during oral argument. As we noted last Term in a similar context, questions of this sort should not be resolved on such an inadequate record; leaving them unresolved is no bar to full

consideration of the merits. See Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 278 279, 97 S.Ct. 568, 571 572, 50 L.Ed.2d 471 (1977). It is enough for present purposes that the claimed cause of action to vindicate appellees' constitutional rights is sufficiently substantial and colorable to sustain jurisdiction under § 1331(a). Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 70 72, 98 S. Ct. 2620, 2629, 57 L. Ed. 2d 595 (1978). The Court finds more helpful guidance from the Northern District of Texas, where that court succinctly stated:

Plaintiff claims that the enactments violate Ash Grove's substantive due process rights because they amount to a regulatory taking. The City of Arlington and Dallas County Schools have moved to dismiss that portion of Plaintiff's case claiming that such a claim, if viable at all, is nonetheless not ripe for decision. In this, Defendants are correct. See Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186,194, 105 S.Ct. 3108, 87 L.Ed.2d 126, (1985); Severance, 566 F.3d at 496 500. Under Williamson County, [a] takings claim is not ripe until (1) the relevant governmental unit has reached a final decision as to how the regulation will be applied to the landowner, and (2) the plaintiff has sought compensation for the alleged taking through whatever adequate procedures the state provides. Id. It does not matter whether the taking is styled as a regulatory taking or as condemnation of real property. Severance, 566 F.3d at 496. Plaintiff has not pled that it sought compensation through state procedures nor alleged that those procedures are unavailable or inadequate. See Williamson County, 473 U.S. at 197; Severance, 566 F.3d at 498. Ash Grove argues this is not required because it is seeking only a declaration that the enactments violate the Takings Clause. This is insufficient. The state procedural requirement is applicable to both injunctive and declaratory relief on taking claims. Williamson 473 U.S. at 195; Severance, 566 F.3d at 497. Accordingly, its pursuit of a regulatory takings claim in this Court is not ripe under Williamson County and Severance and should be dismissed. Ash Grove Texas, LP v. City of Dallas, 2009 WL 3270821, at * 11 (N.D. Tex. Nov. 9, 2009). Any potential takings claim under the Fifth Amendment must be dismissed for lack of jurisdiction under Rule 12(b)(1) and for failure to state a claim under 12(b)(6) if it is not ripe. Hidden Oaks Ltd. v. City of Austin, 138 F.3d 1036, 1041 (5th Cir. 1998). Such is the case here. For the reasons stated above, because Plaintiffs have not sought compensation for the alleged taking through whatever adequate procedures the states provides. Ripeness is part of subject matter jurisdiction, which must be established by the party invoking federal jurisdiction. Abdelhak v. City of San Antonio, 2011 WL 13124298, at *10 (W.D. Tex. Dec. 6, 2011). Plainti s claim is dismissed under Rule 12(b)(1) for lack of jurisdiction. 2. Procedural Due Process they may be deprived Plaintiffs identify the of which they were allegedly deprived: right to use their own property and their own road rights of way to construct and install pipes to provide drinking water and/or a water tower (Doc. 23, p. 23); and their right of land use for silviculture purposes without first conducting a

hearing, (Doc. 23, p. 24). Plaintiffs allege that Defendants unlawfully refused

permits, and in improperly denying a silviculture exemption without first conducting a hearing. (Doc. 23, p. 24). Plaintiffs also aver that Defendants denied and deprived them of proper administrative appeals. (Doc. 23, p. 25). Defendants contend in their motion that Plaintiffs fail to identify a

deprivation of a protected interest for which they are entitled to due process protection. (Doc. 26-1, p. 10). Specifically, other alleged deprivations that this Court previously rejected. (Doc. 26-1, p. 10).

Procedural Due Process. When Plaintiffs assert a due process violation, identify a life, liberty, or property interest protected by the Fourteenth Amendment and then

Blackburn v. City of Marshall, 42 F.3d 925, 935 (5th Cir. 1995). The Fifth Circuit has explained:

In order for a person to have a property interest within the ambit of the Fourteenth A have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). Property interests are not created by the Constitution; rather, they stem from independent sources such as state statutes, local ordinances, existing rules, contractual provisions, or mutually explicit understandings. Perry, 408 U.S. at 599-601, 92 S.Ct. at 2699- Bishop v. Wood, 426 U.S. 341, 344, 96 S.Ct. 2074, 2077, 48 L.Ed.2d 684 (1976)

(footnote omitted). Id. at 936-37 (citation omitted). determines whether that interest rises to the

Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 757 (2005) (emphasis in original). The Supreme Court has recognized th Id. at 756.

Silviculture rights. Complaint with a motion to dismiss, arguing that (Doc. 13). In :

However, a central issue in this case is whether the silviculture exemption was deprived Plaintiffs of or even implicated any protected right to conduct silviculture activities would be to prejudge this case. The Court cannot conclude that Plaintiffs have failed to state a plausible claim under the standards applicable at this stage. See Lormand, 565 F.3d at 257. (Doc. 22, p. 13). This Court also found that Plaintiffs sufficiently plead claims of inadequate process due to the alleged delays, denial of hearings and appeals, and lack of timely response to the requests for jurisdictional determinations. (Doc. 22, pp. 13-14). Since then, Plaintiffs have enhanced their allegations and supporting facts of their claim regarding the deprivation of their due process rights, specifically their silvicultural property rights. and the amended Complaint. The Court finds no cause for revising its earlier ruling. regard to silviculture rights is denied.

Right to access drinking water. of deprivation of their right to access drinking water should be dismissed because this Court already disposed of this claim. In its prior ruling, this Court found that Plaintiffs had alleged a right to clean drinking water, but the facts presented better supported a claim for the right to construct a water tower and utility line to access clean water. (Doc. 22, p. 13). At that time, Plaintiffs had not plead facts or authority that supported such a right or protection. (Id.). Plaintiffs have now amended their complaint and supplemented their claim by pleading a access clean drinking water. (Doc. 23, p. 23 (citing Juliana v. United States, 2017 WL 2483705, at *26, 44-48

(D. Or. 2017)); Doc. 28, pp. 6-7). Defendants challenged (Doc. 26-1, p. 13). Rather, Defendants argue, again, that

the alleged due process p Id. (citing ., 447 U.S. 773, 789 (1980)); Doc. 29, p. 3). Plaintiffs cite the Court to Juliana v. United States, No. 15-01517, 2017 WL 2483705 (D. Ore. June 8, 2017) in support of a Juliana at this cite is a brief opinion by District Judge Aiken regarding motions for stay,

certification for appeal, and expedited consideration of pending motions. Specifically, the issue before that court was the proper standard to apply in consideration of a recommendation from the Magistrate Judge. The opinion makes no mention of rights to drinking water. Defendants suggest that the proper opinion to consider is Juliana v. United States, 217 F.Supp.3d 1224, 1250 (D. Or. 2016). The Court agrees. Judge Aiken first noted that Juliana The question before the court was whether the defendants were responsible for the harm caused by climate change. Juliana, 217 F.Supp.3d at 1235. It is readily apparent that the context of Juliana is hardly comparable to the matter presently before this Court. Nevertheless, Juliana addressed rights of drinking water as follows:

Fundamental liberty rights include both rights enumerated elsewhere in the Constitution and rights and liberties which are either (1) deeply rooted in this Nation's history and tradition or (2) fundamental to our scheme of ordered liberty[.] McDonald v. City of Chicago, Ill., 561 U.S. 742, 767, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (internal citations, quotations, and emphasis omitted). The Supreme Court has cautioned that federal courts must exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into judicial policy preferences. Washington v. Glucksberg, 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (citation and quotation marks omitted). Juliana, 217 F. Supp. 3d at 1249. However, the court went on to state:

In this opinion, this Court simply holds that where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process violation. To hold otherwise would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink. Plaintiffs have adequately alleged infringement of a fundamental right. Juliana v. United States, 217 F. Supp. 3d at 1250. Juliana v. United States does not address the issue that is presently before this Court, whether Plaintiffs, landowners, have a fundamental due process right to construct water towers and utilities in order to access water and to provide same to their area. The issue in Juliana was not one of whether government or administrative action was impeding access to specific water sources, but whether government action was damaging the climate system to the extent that it poisoned the drinking water. As Judge Aiken noted, Juliana was no ordinary lawsuit; Juliana does not support Juliana, 217 F.Supp.3d at 1235. As this Court acknowledged in its prior ruling, the Court agrees with Defendants that the alleged deprivation of the right to drinking water was an indirect effect of

governmental action. (Doc. 22, p. 12). Also, as stated in the prior ruling and as remains applicable here, Plaintiffs must

Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972))). As the Court questioned in its ruling on the construction of a new water tower and utility line to access water? (Doc. 22, p. 13).

amendment to their complaint does not answer this question. The amended complaint avers that ne right deprived of is the right to use its own property and its own road rights of way to construct and install 8 inch pipes to provide pure drinking water and or a water tower, to provide access to water where such water was previously unavailable due to (Doc.

23, p. 23). Even a simple reading of the amended complaint shows that facts and authority supporting an entitlement to construct new pipes and a water tower to access water is not plead. hat when the government invades a process of law. Zinermon v. Burch, 494 U.S. 113, 125, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). Plaintiffs allege a protected interest in liberty, although the Court also considers whether there is whether a given interest qualifies as a property or liberty interest for purposes of procedural due process. See Bowlby v. City of Aberdeen, 681 F.3d 215, 220 (5th Cir.2012). The second inquiry is Id. Because the Court does not find a

recognized property or liberty right, it is not necessary for the Court to discuss the process.

Plaintiffs entire argument is that they have a liberty right to drinking water and that -7). The amended complaint does not set forth facts that support that Plaintiffs had access, permission to access, or a promise to be able to access a new source of water by constructing a water tower and new pipes and then such access was revoked or rescinded. Neither the a opposition sheds any light on how the government allegedly

the purported new water source. The pleadings reflect that Plaintiffs wish to construct their own utilities and facilities to access other water sources and that they have requested jurisdictional determinations and permits in furtherance of this new construction to access water, with no response. (Doc. 23, pp. 5-8). The allegations of the amended complaint do not show that Plaintiffs were approved for, granted, or promised the alleged construction to access water and then it was revoked or not provided. The amended complaint and argument of Plaintiffs do not explain how Plaintiffs were entitled to this construction and access to another water source and how any action by Defendants invaded that entitlement or right. The amended complaint and record only suggest that Plaintiffs would like to construct a water tower and water pipes to access a new water source for the anticipated use by Plaintiffs on their property. Walsh v. La. High Sch. Athletic Ass'n, 616 F.2d 152, 159 (5th Cir.1980) sources such as state statutes, local ordinances, existing rules, contractual provisions, or mutually Blackburn v. City of Marshall, 42 F.3d 925, 936 37 (5th Cir.1995). Plaintiffs have not pointed to any Louisiana caselaw, statutes, or a local ordinance that creates a right to construct and access water service.

Transcon. Gas Pipe Line Corp. v. Transp. Ins. Co., 953 F.2d 985, 988 (5th Cir.1992). Louisiana

has acknowledged a basis for a contract claim to remediate contaminated water or property, Marin v. Exxon Mobil Corp., 48 So.3d 234, 239 (La. 10/19/10), and supports a claim where a specific ordinance or contract deprives a petitioner of the right of access to their own property without due process of law and without compensation. See Otis v. Sweeney, 20 So. 229, (La. June 1, 1896). However, there is no support for a fundamental property right to access water by construction of utilities or facilities without a showing of some ordinance or contract granting such a right. If there is authority for the proposition that a property right exists in accessing or obtaining water service without any further showing, the legal support is a stranger to the parties' briefing and to the Court. In fact, Plaintiffs have not argued that such a right exists, as they have amended their complaint to allege that they have been denied a liberty right to drinking water. The Court has not been provided and is not aware of any support utilities and facilities to access water.

Plaintiffs have not only failed to show a fundamental right to access water, but also to show that such permits to construct the water line are something to which the Plaintiffs are clearly entitled. Although Plaintiffs insinuate that they expect to ultimately receive approval to construct the utilities and facilities to access the water protected property interest. Blackburn, 42 F.3d at 936. The failure to identify a protected property

interest or liberty right is fatal to procedural due process claim. See Baldwin v. Daniels, 250 F.3d 943, 946 47 (5th Cir.2001). The Court further notes that within the Fifth Circuit, the jurisprudence relevant to claims of drinking water pertain to the quality of drinking water (an existing water supply) and the procedure of processing such claims, not to a right to construct access to other water sources. See, e.g., Matter of Bell Petroleum Services, Inc., 3 F.3d 889 (5th Cir. 1993); ACORN v. Edwards, 81 F.3d 1387 (5th Cir. 1996). This Court has not been provided any legal authority or support for a finding of a fundamental right to life, liberty or property, to construct utilities and facilities to access and provide drinking water to a specific location. pleading of For the reasons set forth above, the Court agrees with Defendants

that Plaintiffs have failed to sufficiently state a claim of denial of due process to construct utilities and facilities to access water. B. Count II Substantive Due Process In Count II of their First Amended Complaint, Plaintiffs allege that: Plaintiffs were called the Corps and EPA acted in a biased fashion in detriment to Plaintiffs, (Doc. 23, p. 27); and Defendants did not treat Plaintiffs equally to their neighboring landowners, i.e., Pot-O-Gold Waste Management which Doc. 23, pp. 27-28). allega Court in its prior ruling. (Doc. 26-1, p. 14). Defendants are correct in this regard. Plaintiffs alleged in their original Complaint the same allegations of unfair bias and unequal treatment of Plaintiffs and their neighboring landowners, Pot-O-Gold. (Doc. 1, pp. 15-16). Plaintiffs argued substantive due process rights under the APA and CWA. (Doc. 16, pp. 4-5). This Court dismissed

these claims so as to rise to the level of a viable substantive due process claim ims

In amending their complaint, Plaintiffs re-urged these same claims but added the phrase or standard does not a well- plead, plausible claim make. Plaintiffs must plead the facts which support their contention that the complained- See United States v. Salerno, 481 U.S. 739, 746 (1987); Cty. Of Sacramento v. Lewis, 523 U.S. 833, 846 (1998). Not only have Plaintiffs failed to do this, but no party has provided to the Court any caselaw or legal support for the proposition that calling one certain landowners, and/or exhibiting presumed deferential treatment to one landowner over

another Further, the Court has already considered and ruled upon these allegations. (See Doc. 22, p. 15). The Court concludes that, when viewed in the light most favorable to Plaintiffs, First Amended Complaint does not plausibly allege a set of facts that state a claim for conscience- shocking actions that are actionable under the Fourteenth Amendment. These claims were previously dismissed, and renewed motion under Rule 12(b)(6) is granted. C. Count III Estoppel Plaintiffs acknowledge in Count III of their First Amending Complaint that this Court dismissed their prior pleading of a claim of equitable estoppel. (Doc. 23, p. 28 (citing Doc. 22)). In their First Amending Complaint, Plaintiffs

- 1, p. 17). Plaintiffs concede that equitable estoppel is not a claim and that they are not alleging a toppel in future proceedings, as necessary. (Doc. 28, pp. 7-8). cause of action and dismissal of same, as well as Plaintiffs concession that they are not pleading a

II should be

to the extent that the Complaint asserts equitable estoppel as a standalone claim, the claim must be dismissed. Since the purpose of a motion under Federal Rul R. Civ. P. 12, the Court need not determine at this time whether equitable estoppel or its

The same holds true here. Any cause of action for equitable estoppel that Plaintiffs attempted to plead in their original Complaint has already been dismissed. Also, the Court need not determine at this time whether the argument of equitable estoppel is motion on this issue is denied as moot. D. Count IV Unreasonable Delay adverse to the EPA , Defendants also seek to dismiss Plaintif unreasonable delay claim adverse to the EPA. This claim was previously dismissed by this Court,

in the First Amended Complaint, whether Plaintiffs were attempting to re-plead this same claim against the EPA. (Doc. 26-1, p. 17). 28, p. 8). This Court agrees with Plaintiffs. The claim of unreasonable delay adverse to the EPA

has previously been dismissed. (Doc. 22). Plaintiffs are not re-pleading any claim of unreasonable on this issue is denied as moot. E. Count VI Violation of the Clean Water Act and Sovereign Immunity Waiver Plaintiffs plead a p. 31). Plaintiffs allege the following and restriction beyond wetlands to

restrict non-wetlands; and refusing to delineate specific

boundaries for wetlands, not mapping, and not delineating . (Id.). Plaintiffs do not cite to specific statutory provisions within the CWA. Also, of the CWA appear to be duplicative of allegations in support of Counts I V. In their First Amending Complaint, is to regulate wetlands, and if identified[,] preserve them, but if not wetlands[,] there is no such authority to regulate them. To require a permit to regulate a 38% wetlands tract has no basis in law, and violates due process as well [as] the 10 th

Amendment of the [C] Plaintiffs fur for C&Ds without a determination of jurisdiction is unlawful, as occurred here. The Courts have explicitly determined the Corps must have jurisdiction to regulate. 10 th

Amendment of the Constitution so requires it Id.). concept of fair notice , and concludes by meting out punishments not lawful

Defendants move to dismiss Count VI for alleged violations of the CWA because Plaintiffs fail to state a claim upon which relief can be granted. Defendants argue that Plaintiffs have not adequately stated a claim because they have not identified a legal basis which entitles them to the relief sought. (Doc. 26-1, p. 18 (citing Fed. R. Civ. P. 8(a)(2))). Further, Defendants argue that there can be no waiver of sovereign immunity -1, p. 19 (citing , 155 124 (5th Cir. 2005))).

In their opposition, Plaintiffs argue that their pleading of Count VI is a claim under the 10 th Amendment:

All Plaintiffs merely state is the Corps exceeded the 10 th

Amendment in the U.S. See Bond v. U.S., 131 U.S. 2355, 2366-2367 (2011) (citizens with standing can allege 10 th

amendment rights). The APA at 5 U.S.C. § 706(1)(B) here in conjunction with 28 U.S.C. § 1331 (federal question jurisdiction), create [federal] court jurisdiction over agency violations of constitutional rights. The federal invasion of timber management rights governed by the Department of Agriculture and Forestry in Louisiana and land use rights governed by political subdivisions in the State, are the basis for Count VI. These constitutional rights must be upheld against federal government overregulation. The motion should be denied. (Doc. 28, p. 9). Plaintiffs do not directly address sovereign immunity or mention the CWA. Defendants interpret argument as their attempt to amend their First Amended Complaint and convert their claim of statutory violations of the CWA to a constitutional claim. Defendants conclude that state a viable claim. (Doc. 29, p. 5).

The Court will first address whether Plaintiffs have stated a plausible claim for which relief may be granted under the Clean Water Act and then whether Plaintiffs have sufficiently addressed waiver of

sovereign immunity. 3

At the outset, the Court notes that VI are not clear and are poorly plead. As the Court stated in its r

to dismiss, clearly plead. (Doc. 22, p. 14 (citing United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991) to search through the Complaint to see if Plaintiffs have eked out claims beyond those identified with at least some specificity.)).

1. CWA Claim Under Rule 8, the pleading rules call for a short and plain statement of the claim showing that the pleader is entitled to relief. The complaint need not be a perfect statement of the legal theory supporting the claim asserted. Johnson, 135 S.Ct. at 346-47. The complaint, on its face, must contain enough factual matter (taken as true) to raise a reasonable expectation that discovery will reveal relevant evidence of the elements of the claim. Lormand, 565 F.3d at 257. it bears repeating that: the CWA makes it unlawful to discharge pollutants into navigable waters, which includes wetlands, 33 U.S.C. §§ 1311(a), 1362(6), (7) and (12)(A); the Corps is authorized to issue permits for the discharge of fill material into waters, 33 U.S.C. § 1344(a); the discharge of fill

3 26-1, pp. 18-20). Defendants do not specifically challenge any 10th Amendment claim, to the extent such a claim has been asserted. Therefore, the Court will not address any potential 10th Amendment claim. Further, the Court will not these claims are duplicative and have been addressed. material from normal silviculture activities is generally not prohibited, 33 U.S.C. § 1344(f)(1)(A); the Corps is authorized to issue jurisdictional determinations stating whether waters are considered wetlands, 33 C.F.R. §§ 325.9, 331.2; and, the Corps may issue a cease-and-desist for violations, 33 C.F.R. § 326.3(c)(1) and (2). There is no requirement for Plaintiffs to plead the specific statutory provisions applicable -regulation , as that term is defined and interpreted under the CWA,

to assist Plaintiffs in responding to the cease-and-desist order, fall within the scope of the CWA statutory provisions and the CFRs cited above. Plaintiffs allege facts that a jurisdictional determination was requested and a permit application was submitted with no response. (Doc. 23, pp. 5-8). Plaintiffs allege that a cease-and-desist order was issued regarding deposition of fill material into wetlands. Plaintiffs allege that they responded by seeking deliniation of the wetlands on their property, which was allegedly met with an insufficient response. (Doc. 23, p. 16). Plaintiffs allege that the activities for which they received the cease-and-desist -and-desist

order. (Doc. 23, p. 9). While Count VI is poorly plead and confusing in terms of the actual purported statutory violation, there is enough factual matter to raise a reasonable expectation that discovery will reveal Although vague, the Court is able to draw a reasonable inference that Defendants may be liable

for the improper procedures and over-regulation alleged. In Inc. v. Marsh, 715 F.2d 897, 901-903 (5th Cir. 1983), the plaintiffs brought a suit against a number of Corps and EPA officials, as well as

against private landowners, claiming that land-clearing activities would result in the discharge of dredged and fill material into the waters of the United States in violation of Sections 301(a) and 404 of the CWA, and also result in the discharge of pollutants into the waters of the United States in violation of Section 402 of the CWA. The plaintiffs requested a declaration that the tract was a wetland within the scope of the CWA, that the private defendants could not engage in their land-clearing activities without obtaining a permit from the EPA or the Corps, and that the federal defendants had failed wetland and to order the private defendants to cease and desist from discharging pollutants and dredged materials. The plaintiffs also sought injunctive relief against the federal defendants to require them to exercise their jurisdiction over the property and to issue cease-and-desist orders until the private defendants obtained the requisite permits. Avoyelles, 715 F.2d at 901-02.

The allegations advanced in Avoyelles are similar to those asserted by Plaintiffs in this matter, illustrating of statutory violations of the CWA in this matter. See also, Louisiana Wildlife Federation, Inc. v. York, 761 F.2d 1044, 1046-47 (5th Cir. 1985)(The Fifth Circuit addressed the considerations and purposes of depositing fill in wetlands and the permitting process related to same, supporting the plausibility

of a claim adverse to the Corps related to its cease-and-desist order and the permitting process); Save Our Community v. U.S. E.P.A., 971 F.2d 1155 (5th Cir. 1992)(Citizens brought suit challenging the draining of wetlands, seeking a preliminary injunction and a declaratory judgment under the CWA. Citizens alleged that the defendant land operator failed to obtain a permit and sought a declaration that the Corps and EPA failed to perform their duty to enforce provisions of the CWA. Citizens presented the issue of whether the Corps properly interpreted the CWA and whether the draining was a regulated activity under the CWA or not.); Orleans Audubon Soc. v. Lee, 742 F.2d 901, 905 (5th Cir. 1984)(The facts of Orleans Audubon span a much longer timeframe and were more complicated than those presently before the Court. While the district court in Orleans Audubon development of the record and ample opportunity for discovery to shed light upon Orleans ; Save Our Wetlands, Inc. v. Sands, 711 F.2d 634 (5th Cir. 1983); Buttrey v. U.S., 690 F.2d 1170 (5th Cir. 1982) (where discovery and development of were allowed before dismissal on merits). Plaintiffs here should be allowed the opportunity for discovery and the presentation of evidence to better develop their claims under the CWA as well. The Court claim of violations of the CWA is poorly plead and -1, p. 20). However, based on the foregoing statutory language of the CWA, the jurisprudence, and pleading of Count VI for alleged violations of the CWA, the Court finds that Plaintiffs have sufficiently stated a claim under the CWA for purposes of Rule 12(b)(6). 2. Sovereign Immunity Plaintiffs do not address the issue of sovereign immunity in the First Amending Complaint. Plaintiffs argue that they are seeking injunctive and declaratory relief arising out of th

, which Plaintiffs imply is excepted from the doctrine of sovereign immunity under the APA. (Doc. 28, p. 9). The Court notes that arguments of counsel in a brief are not a substitute for properly pleaded e amended by briefs in opposition to a Becnel v. St. Charles Par. Sheriff's Office, No. 15-1011,

2015 WL 5665060, at *1 n.3 (E.D. La. Sept. 24, 2015) (quoting In re Enron Corp. Sec., Derivative & ERISA Litig., 761 F. Supp. 2d 504, 566 (S.D. Tex. 2011) (collecting cases)). Because a Rule 12(b)(6) motion will not consider allegations that appear for the first time in plaintiffs' briefing. Servicios Azucareros de Venezuela, C.A. v. John Deere Thibodeaux, Inc., 702 F.3d 794, 806 (5th Cir. 2012). However, where a complaint fails to cite the statute conferring jurisdiction, the omission will not defeat jurisdiction if the facts alleged in the complaint satisfy the jurisdictional requirements of the statute. Doss v. S. Cent. Bell Tel. Co., 834 F.2d 421, 424 (5th Cir. 1987)(citing Hildebrand v. Honeywell, 622 F.2d 179, 181 (5th Cir. 1980)). It is sufficient to argue the waiver of sovereign immunity under the APA as long as the facts plead establish that the agency actions are specifically alleged and are a final agency action. See Belle Co., LLC v. U.S. Army Corps of Engineers, 761 F.3d 383, 395-96 (5th Cir. 2014)(citing Taylor-Callahan-Coleman Counties Dist. , 948 F.2d 953, 956 (5th Cir. 1991); Stockman v. FEC, 138 F.3d 144, n. 13 (5th Cir. 1998)). Alabama-Coushatta Tribe of Tex. v. United States, 757 F.3d 484, 488 (5th Cir. 2014)(quoting

Koehler v. United States, 153 F.3d 263, 265 (5th Cir. 1998)). immunity is that the United States cannot be sued at all without Block

v. North Dakota ex rel. Bd. of Univ. & Sch. Lands immunity is jurisdictional in nature, Congress's waiver of it must be unequivocally expressed in

statutory text and will not be St. Tammany Parish, ex rel. Davis v. Fed. Emergency Mgmt. Agency, 556 F.3d 307, 316 (5th Cir. 2009) (citations and internal quotation marks omitted). It is the P Id. at 315. Where the Court lacks express waiver of sovereign immunity under the CWA, jurisdiction may be based upon the Administrative Procedures Act, 5 U.S.C. § 702, citing Vieux Carre Property Owners v. Brown, 875 F.2d 453 (5th Cir. 1989) cert. denied, 493 U.S. 1020, 110 S.Ct. 720, 107 L.Ed.2d 739 (1990). See also, Saveourselves, Inc. v. U.S. Army Corps of Engineers, No. CIV. A. 90-637-A, 1991 WL 398773, at *1 (M.D. La. Feb. 27, 1991). Section 702 of the APA

of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against for actions against federal government agencies, seeking nonmonetary relief, if the agency conduct

Alabama-Coushatta Tribe of Tex., 757 F.3d at 488 (citing Sheehan v. Army & Air Force Exch. Serv., 619 F.2d 1132, 1139 (5th Cir. 1980), grounds, 456 U.S. 728, 102 S.Ct. 2118, 72 L.Ed. 2d 520 (1982)). The rule in numerous circuits

as well as the Fifth Circuit is that Section 702 is a waiver of immunity for causes of action against federal agencies arising under 28 U.S.C. § 1331. See id. (citing Sheehan, 619 F.2d at 1139); see ., 194 F.3d 622, 624 n. 2 (5th Cir. 1999)(quoting Sheehan t [to § 702] waives sovereign immunity for actions against federal government agencies, seeking nonmonetary relief,

The Fifth Circuit has prescribed limits on the waiver of sovereign immunity contained in Section

702. The Fifth Circuit has explained:

Section 702 contains two separate requirements for establishing a waiver of sovereign immunity. , 497 U.S. 871, 882, 110 judicial review. Id urposes of § 702 is set forth by wrong because of the challenged agency action, or is adversely affected or Lujan, 497 U.S. at 883, 110 S.Ct. 3177 (internal quotation marks omitted). These requirements apply to any waiver of sovereign immunity pursuant to § 702. Section 702 also waives immunity for two distinct types of claims. It waives immunity for claims conclude that there was a waiver of sovereign

immunity pursuant to the first type of waiver in § 702. Lujan, 497 U.S. at 882, 110 in the substantive statute, but only under the general review provisions of the APA, . Both Lujan and our most applicable case, Sierra Club, applied specifically to situations where review was sought pursuant only to the general provisions of the APA. See id.; Sierra Club v. Peterson, 228 F.3d 559, 565 (5th Cir. 2000)(en banc). adversely affected § 702. This type of waiver applies when judicial review is sought pursuant to a statutory or non-statutory cause of action that arises completely apart from the general provisions of the APA. See Sheehan, 619 F.2d at 1139; Trudeau, 456 F.3d See Trudeau and has been read into § 702 in cases where review is sought pursuant only to the general provisions of the APA. See Sierra Club, 228 F.3d at 565; Amer. Airlines, Inc. v. Herman, 176 F.3d 283, 287 (5th Cir. 1999). Instead, for this type of waiver there only nee See Lujan, 497 U.S. at 882, 110 S.Ct. 3177. Alabama-Coushatta Tribe of Texas, 757 F.3d at 489. Here, Plaintiffs plead statutory violations of the CWA. Plaintiffs argue that the APA creates jurisdiction over the alleged agency violations. (Doc. 28, p. 9). Plaintiffs imply that Section 702 Plaintiffs do not plead grievances of agency action completely apart from the general provisions of the APA. Therefore, with regard to sovereign immunity, the Court looks to Alabama-Coushatta, 757 F.3d at 489 (citing 5 U.S.C. to conclude that there was a waiver of sovereign immunity. Alabama-Coushatta, 757 F.3d at 489 (citing Lujan, 497 U.S. at 882). a. Final agency action

Plaintiffs must first identify , including the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act . This agency action must be final. Second, Plaintiffs must show that they have suffered legal wrong because of the final agency action or are adversely affected or aggrieved by the final agency action. Lujan, 497 U.S. at 882- 83.

Plaintiffs generally allege that the applicable rules have not been followed, nor applied consistently; that excessive delay is a violation of the CWA; extending land use and restriction beyond wetlands to restrict non-wetlands is a violation of the CWA; and refusing to delineate specific boundaries for wetlands is a violation of the CWA. (Doc. 23, p. 31). Plaintiffs do not cite to a specific agency rule or order. Plaintiffs more specifically allege that act upon its request for a jurisdictional determination or mapping of the wetlands on its tract of

land -and-desist order, both on the grounds that the CWA does not prohibit usual silviculture activities without a permit and because the cease-and- Id. Plaintiffs allege that the cease-and-desist

order did not specifically identify the site at issue or the specific conduct at issue. (Doc. 23, p. 33). Plaintiffs allege that the Corps failed to respond to its Id.

In order for the agency action to qualify in the waiver of sovereign immunity analysis, a specific agency action must be identified. Alabama-Coushatta, 757 F.3d at 491. The identified agency actions must not be directed simply te action applying the regulation to the

Id. (citing Lujan, 497 U.S. review appropriate. Id. (citing Sierra Club, 228 F.3d at 568). See also, Alexander v. Trump, 753

Fed.Appx. 201 (5th Cir. 2018)(where allegations that the FBI failed to investigate in violation of constitutional rights was found to be an agency action). See also, Hawkes Co., Inc. v. U.S. Army Corps of Engineers permitting dec Based on the allegations of the Complaint,

Plaintiffs specifically identified ir requests for a jurisdictional determination and on their permit application. Also, Plaintiffs specifically identified cease-and-desist order, which qualifies as an agency action by definition. 5 U.S.C. § 551(13). The

Court finds that Plaintiffs sufficiently allege specific agency action that allegedly harmed Plaintiffs. The issue then becomes

decision- Bennett v. Spear, 520 U.S. 154, 178, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) Lujan, 497 U.S. at 899, 110 S.Ct. 3177. Absent a specific and final agency action, the Court lacks jurisdiction to consider a challenge to agency conduct. See American Airlines, 176 F.3d at 287. In certain circumstances, agency inaction may be sufficiently final to make judicial review appropriate. See 5 U.S.C. § 706(1) agency action unlawfully withheld Sierra Club v. Thomas, 828 F.2d 783, 792 96 (D.C.Cir.1987) (discussing different forms of agency inaction). See Sierra Club v. Peterson, 228 F.3d 559, 568 (5th Cir. 2000)(suggesting that the failure of an agency to issue a land resource management plan would constitute a final agency action). However, an agency action with which a party disagrees cann Sierra Club v. Peterson, 228 F.3d at 568 (citations omitted).

As set forth above in takings claim, this Court has previously found the cease-and-desist order to be a final agency

action. (Doc. 22, p. 21 (citing Lane v. Halliburton, 529 F.3d 548, 557 (5th Cir. 2008)). This Court found that the cease-and- of - Plaintiffs wish to challenge, and, therefore, is a final order. (Doc. 22, pp. 21-23 (citing U.S. Army

Corps of Engineers v. Hawkes Co., __ U.S. __, 136 S.Ct. 1807, 1815 (2016); Frozen Food Express v. United States, 351 U.S. 40, 44-45 (1956); Louisiana State v. United States Army Corps of Engineers, 834 F.3d 574, 580-81 (5th Cir. 2016)). request for a jurisdictional determination or mapping of the

wetlands and permit application, jurisdictional determinations made by the Corps and permits issued by the Corps with regard to the applicability of the CWA are considered a final agency action. The issuance of a jurisdictional determination or permit Texas v. Equal Employment Opportunity Commission, 2019 WL 3559629, *5 (5th Cir. 2019)(citing United States Army Corps of Engineers v. Hawkes Co., 136 S.Ct. 1807, 1814). Here, the complaint of Plaintiffs is that the Corps failed to act upon the request for a jurisdictional determination or mapping of the wetlands and failed to issue a permit. 5 U.S.C. § 551(13). is properly

understood as a failure to take an agency action that is, a failure to take one of the agency actions (including their equivalents) defined in Section 551(13). Norton v. S. Utah Wilderness All., 542 U.S. 55, 62, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004). In failing to conduct a failing to provide relief, act on the request, and issue the permit, the Corps alleged failure to act and to provide relief or a remedy to Plaintiffs could be construed as a final agency action in and of itself under the APA. However, consummated in issuance of the cease-and-desist letter, a final decision and action. b. Suffered legal wrong; adversely affected or aggrieved The second and final step in the waiver of sovereign immunity analysis is that Plaintiffs must show that they have suffered legal wrong, were adversely affected or aggrieved by the final agency action. Here, Plaintiffs allege that due to the cease-and-desist order, the Corps asserted jurisdiction over 19 acres improperly, which prohibited Plaintiffs from using their land and right- of- request for a jurisdictional determination on this issue because it denied Plaintiffs the appeal rights

to have the error reviewed. The total time period over which Plaintiffs have suffered the inability to use their land is four years. (Doc. 23, p. 16). Plaintiffs claim that they have sustained financial loss from an inability to complete timber farming that was not properly managed during this time. (Doc. 23, p. 20). Not only were Plaintiffs

allegedly affected plead that they were issuing a jurisdictional determination prior to the cease-and-desist letter, by not conducting a

hearing, and by failing to respond in a timely fashion to the requests and permit application. affected or aggrieved to designate those who have standing to challenge or appeal an agency decision, within the agency

Dir., Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 126, 115 S.Ct. 1278, 131 L.Ed.2d 160 (1995). r in combination, have a long history in federal administrative

law, dating back at least to the Federal Communications Act of 1934, § 402(b)(2) (codified, as amended, 47 U.S.C. § 402(b)(6)). They were already familiar terms in 1946, when they were embodied within the judicial review provision of the Administrative Procedure Act (APA), 5 U.S.C. § 702 alone conveys; but is rather an acknowledgment of the fact that what constitutes adverse effect or

aggrievement varies from statute to statute. The Supreme Court has interpreted Section 702 as requiring a litigant to show, at the outset of the case, that he is injured in fact by agency action and that the interest he seeks to vindicate is arg Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970); see also Clarke v. Securities Industry **1284 Assn., 479 U.S. 388, 395 396, 107 S.Ct. 750, 754 755, 93 L.Ed.2d 757 (1987). The relevant statute at issue here is the CWA. As set forth above in the preceding section regarding whether Plaintiffs plead a plausible cause of action under the CWA, the statute and jurisprudence support a plausible claim for injunctive and declaratory relief for persons challenging a cease-and-desist order or the permitting process under the CWA. An inability to utilize land and the resulting loss of financial resources due to the administrative actions and findings of the Corps is a complaint of an injury or damages, and the interests that the Plaintiffs seek to vindicate, those of the landowners, are within the zone of interests protected and regulated by the CWA. waters. 33 U.S.C. § 1311(a). This is specifically what the Corps has ordered Plaintiffs to cease-

and-desist from doing. However, the CWA also provides that the discharge of fill materials from normal silviculture activities is not prohibited by or subject to regulation. 33 U.S.C. § 1344(f)(1)(4). Plaintiffs contest the cease-and-desist order due to was issued and the scope of the order since which

is not prohibited by regulation. Plaintiffs also because of the failure to obtain a jurisdictional determination or mapping of the wetlands. Plaintiffs aver and believe that the Corps has mis-identified the wetlands area and tract of land at issue and made the subject of the permit application. jurisdictional determinations stating whether waters or wetlands are present on a particular parcel.

33 C.F.R. §§ 325.9; 331.2. As this matter is before the Court on a Rule 12(b)(6) motion, the Court finds that Plaintiffs have sufficiently plead an effect or aggrievement as a result of a final agency action that is within the zone of protection afforded by the CWA. Plaintiffs have plead facts sufficient to support a finding of a waiver of sovereign immunity under Section 702 of the APA.

VI. CONCLUSION For these reasons, IT IS ORDERED Amended Complaint (Doc. 26) is GRANTED IN PART and DENIED IN PART. Particularly,

with regard to Count I, the motion to dismiss the regulatory taking claim under Rule 12(b)(1) is GRANTED, and this claim is dismissed without prejudice; the motion to dismiss the procedural due process claims under Rule 12(b)(6) is DENIED as to the silviculture rights and GRANTED as to the right to access drinking water. The motion is DENIED AS MOOT with regard to Count III (equitable estoppel) and Count IV (unreasonable delay claims adverse to the EPA). The motion with regard to Count VI is DENIED.

JUDGE JOHN W. deGRAVELLES UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF LOUISIANA Signed in Baton Rouge, Louisiana, on September 25, 2019.