

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-2237

HANNELORE D'ANDREA;
ROCCO J. D'ANDREA,
Appellants

v.

UNITED STATES ARMY CORPS OF ENGINEERS;
THE STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL
PROTECTION

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 1:21-cv-09569)
District Judge: Honorable Joseph H. Rodriguez

Submitted Under Third Circuit L.A.R. 34.1(a) on May 7, 2024

Before: PORTER, MONTGOMERY-REEVES, and ROTH, *Circuit Judges*.

(Filed: October 2, 2026)

OPINION*

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

PORTER, *Circuit Judge*.

Rocco and Hannelore D’Andrea challenge a federal settlement agreement they entered into with the United States Army Corps of Engineers and a state administrative consent order they entered into with the New Jersey Department of Environmental Protection. For the reasons that follow, we will affirm the District Court’s order dismissing the complaint.

I

The D’Andreas co-own property in Middle Township, New Jersey. In December of 2011, the NJ DEP conducted compliance evaluations of the D’Andreas’s property and determined that state environmental regulations had been violated. On January 6, 2012, the NJ DEP notified the D’Andreas that they were in violation of N.J.A.C. § 7:7-2.3(a), N.J.A.C § 7:7A-2.6(a), and N.J.A.C. § 7:7A-2.2(a). Less than two weeks later, the D’Andreas sent the NJ DEP a response describing an alleged “clean up” of the property. App. at 119. In March of 2014, the NJ DEP representatives conducted a follow-up compliance inspection and determined that the violations had not been corrected.

In April of 2014, around the same time as the NJ DEP’s follow-up inspection, the Army Corps opened an investigation. In June, the Army Corps made a threshold jurisdictional determination that the D’Andreas’s property contains federally regulable wetlands. *See* 33 C.F.R. § 331.11. Afterwards, the Army Corps issued a cease-and-desist letter alleging that the D’Andreas unlawfully discharged fill into federal wetlands and ordered them to remove it. The D’Andreas denied these allegations.

In May of 2016, the Army Corps determined that the D’Andreas had not resolved the issue and referred the case to the U.S. Attorney’s Office for the District of New Jersey. On August 8, 2016, the Corps forwarded to the D’Andreas appeal documents that would enable them to challenge its threshold jurisdictional determination that their property contained regulable wetlands. The D’Andreas did not appeal.

The D’Andreas were threatened with criminal prosecution and civil enforcement actions. In response, the D’Andreas entered into separate agreements with state and federal regulators agreeing to clean up their property: they entered into an Administrative Consent Order (“ACO”) with the NJ DEP in October 2016, and a settlement agreement with the Army Corps in July 2017.

In 2019, the D’Andreas retained an environmental consulting group. The environmental consulting group produced a report (the “Lomax Report”) concluding that the relevant portions of the D’Andreas’s property were not wetlands, but in fact uplands. Because the Clean Water Act regulates the discharge of pollutants into “waters of the United States,” which includes “wetlands”—but not “uplands”—the Lomax Report essentially challenged the jurisdictional foundation of the settlement agreement between the D’Andreas and the Army Corps. 33 U.S.C. § 1362(7); 33 C.F.R. § 328.3(a)(4).

With the Lomax Report in hand, the D’Andreas asked the Army Corps to modify the federal settlement agreement and the NJ DEP to modify the ACO. The Army Corps and the NJ DEP considered, but ultimately disagreed with, the Lomax Report’s conclusions and informed the D’Andreas that they must finish the cleanup according to the terms of their earlier agreements.

The D’Andreas sued the Army Corps in April of 2021. They argued that the federal settlement agreement was based on a mutual mistake of fact and that the Army Corps’s refusal to consider the Lomax Report was arbitrary and capricious and violated their due process rights.

The District Court concluded that because the D’Andreas must comply with the ACO even if they successfully challenged the federal agreement, they failed the causation and redressability requirements of Article III standing. So the District Court dismissed the case without prejudice.

The D’Andreas subsequently amended their complaint to include the NJ DEP as a defendant. This amended complaint asserted claims for monetary relief under 42 U.S.C. § 1983 and asserted violations of their due process rights as secured by New Jersey’s constitution and the New Jersey Civil Rights Act.

The District Court concluded that each of the claims against the NJ DEP failed. Turning to the D’Andreas’s claims against the Army Corps, the District Court concluded once again that, because the D’Andreas would have to comply with the ACO, they lacked standing to challenge the federal settlement agreement. The D’Andreas appealed.¹

II

On appeal, the D’Andreas essentially argue that because the NJ DEP enforces federal law, it can be sued as a federal agency under the Administrative Procedure Act (APA) “for issues related to its role in enforcing” federal law. D’Andreas’s Opening Br.

¹ The District Court had subject matter jurisdiction under 28 U.S.C. § 1331 and we have jurisdiction over its final judgment under 28 U.S.C. § 1291.

at 22. And they contend that because, they can challenge the ACO, they do not lack standing against the Army Corps to challenge the federal settlement agreement. We disagree.

A²

1

The D’Andreas argue that the NJ DEP’s refusal to consider the Lomax Report constituted an arbitrary and capricious agency action reviewable under the federal APA. *See* 5 U.S.C. § 706(2)(A). This argument is meritless because the APA does not apply to state agencies like the NJ DEP.

Section 706(2)(A) of the APA grants a reviewing court the power to “hold unlawful and set aside *agency* action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

5 U.S.C. § 706(2)(A) (emphasis added). An “agency” within the meaning of the APA is “each authority of the Government of the United States.” 5 U.S.C. § 551(1). State agencies are not included in the APA’s definition of “agency” and are not subject to its provisions. *See, e.g., W. Penn Power Co. v. Train*, 522 F.2d 302, 310 (3d Cir. 1975) (“The APA does not extend to state agencies”).

² We “review de novo a district court’s grant of a motion to dismiss,” *Associated Builders & Contractors W. Pa. v. Cmty. Coll. of Allegheny*, 81 F.4th 279, 286 (3d Cir. 2023), and “accept as true all factual allegations in the complaint and ask whether, viewing those facts in the light most favorable to the plaintiffs, they are entitled to relief,” *Hickey v. Univ. of Pittsburgh*, 81 F.4th 301, 308 (3d Cir. 2023).

In response, the D’Andreas point to this Court’s decision in *Delaware Riverkeeper Network v. Secretary Pennsylvania Department of Environmental Protection*. 833 F.3d 360 (3d Cir. 2016). That decision, the D’Andreas argue, stands for the proposition that state agencies can “be sued in federal court for issues related to its role in enforcing the [Clean Water Act].” D’Andreas’s Opening Br. at 22 (cleaned up). This contention misreads our precedent.

In *Delaware Riverkeeper Network* we considered whether a state agency acts “pursuant to Federal law” when the state agency issues “Water Quality Certifications, permits, and Letters of Interpretation.” 833 F.3d at 371. That question was presented because Congress amended the Natural Gas Act to subject state agency permitting decisions of interstate natural gas pipeline projects to review by federal courts if, *inter alia*, the state agency acted “pursuant to Federal Law.” 15 U.S.C. § 717r(d)(1). We held that when a state agency issues a Water Quality Certification certifying compliance with state water quality standards that are promulgated under federal supervision as well as federal Clean Water Act requirements for an interstate Natural Gas pipeline project, it acts “pursuant to federal law.” *Del. Riverkeeper Network*, 833 F.3d at 371. Thus, while we exercised review of a state agency action related to the Clean Water Act in *Delaware Riverkeeper Network*, Congress had authorized that review. Congress has not authorized review here, so we do not exercise it.

In addition to their APA challenge, the D’Andreas also challenge their ACO with the NJ DEP on the following bases: (1) it was premised on a mutual mistake of fact; (2) it

was entered into under duress; (3) refusal to reconsider the ACO violates their federal due process rights; (4) refusal to reconsider the ACO violates due process rights conferred by state law; (5) enforcement of the ACO would be “inequitable”; and (6) the Declaratory Judgment Act otherwise authorizes a federal court to determine the D’Andreas’s rights vis-à-vis the NJ DEP. The District Court rejected each of these arguments on the merits. We do not consider these arguments on appeal because the D’Andreas forfeited them.

“‘[F]orfeiture is the failure to make the timely assertion of a right,’ an example of which is an inadvertent failure to raise an argument.” *Barna v. Bd. of Sch. Directors of Panther Valley Sch. Dist.*, 877 F.3d 136, 147 (3d Cir. 2017) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). We have explained that “a passing reference to an issue . . . will not suffice to bring that issue before this court.” *Higgins v. Bayada Home Health Care Inc.*, 62 F.4th 755, 763 (3d Cir. 2023) (quoting *Laborers’ Int’l Union of N. Am. v. Foster Wheeler Energy Corp.*, 26 F.3d 375, 398 (3d Cir. 1994)).

Except for their APA argument, the D’Andreas do not argue that the District Court erred in rejecting their other claims. Not once in their opening brief do the D’Andreas reference their arguments premised on mutual mistake, due process, that the agreement is “inequitable,” or the Declaratory Judgment Act. As such, these arguments are unambiguously forfeited.

Regarding their duress argument, the D’Andreas’s opening brief contains the following:

[In *Sackett v. EPA*, the Supreme Court] found that threats of enforcement by governmental agencies, even though the threats related to potential proceedings in the future, still placed the plaintiffs in the position of facing the legal consequences

of their actions or inaction. In this case, the [Army] Corps admitted below that the D'Andreas were faced with the prospect of losing what little approval they were able to wrangle out of the authorities and faced an ongoing threat of civil and criminal penalties.

D'Andreas's Opening Br. at 23. The D'Andreas's point seems to be that the Army Corps's alleged failure to consider the Lomax Report constituted a "final" agency action—something not at issue in this appeal. The opening sentence of the paragraph containing the quoted text reads, "As to the finality of the Agencies' [sic] actions, that issue was addressed squarely by the U.S. Supreme Court in the *Sackett* case." D'Andreas's Opening Br. at 23.

The D'Andreas's "passing reference" to duress fails to "bring that issue before this Court." *Higgins*, 62 F.4th at 763 (quoting *Foster Wheeler Energy Corp.*, 26 F.3d at 398) (determining that a single reference in an opening brief and in a reply brief is a "passing reference"); see also *Int'l Raw Materials, Ltd. v. Stauffer Chem. Co.*, 978 F.2d 1318, 1327 n.11 (3d Cir. 1992) (determining that only raising the argument in footnote is a passing reference).

B³

Considering that all their claims against the NJ DEP were properly dismissed, the D'Andreas do not have Article III standing to challenge the federal settlement agreement.

Plaintiffs have the burden of proving that jurisdiction exists. *Hartig Drug Co. v. Senju Pharm. Co.*, 836 F.3d 261, 269 (3d Cir. 2016). Article III standing has three

³ We review de novo dismissals for lack of subject matter jurisdiction, *Common Cause of Pennsylvania v. Pennsylvania*, 558 F.3d 249, 257 (3d Cir. 2009), and review findings of fact, including those relating to jurisdiction, for clear error, *CNA v. United States*, 535 F.3d 132, 139 (3d Cir. 2008).

elements. First, plaintiffs must demonstrate that they have “suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citation modified). Second, “there must be a causal connection between the injury and the conduct complained of” meaning that “the injury has to be fairly traceable to the challenged action of the defendant[.]” *Id.* (citation modified). Showing that an injury is fairly traceable “requires, at a minimum, that the defendant’s purported misconduct was a ‘but for’ cause of the plaintiff’s injury.” *Finkelman v. NFL*, 810 F.3d 187, 198 (3d Cir. 2016) (citation omitted). And third, “it must be likely as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Lujan*, 504 U.S. at 561 (citation modified).

A plaintiff who suffers an injury that was caused independently of the defendant and that cannot be remedied by a lawsuit therefore fails both the causation and redressability elements of standing. This logic applies in situations where two legal instruments impose overlapping obligations that cause an injury in fact, but the plaintiff challenges only one. For example, the Sixth Circuit held that a plaintiff does not have standing to challenge a federal statute prohibiting cockfighting because every state similarly prohibits cockfighting. *White v. United States*, 601 F.3d 545, 552 (6th Cir. 2010). The D.C. Circuit similarly held that a plaintiff lacks standing to challenge a federal regulation because another agency adopted a nearly identical regulation. *Delta Constr. Co. v. EPA*, 783 F.3d 1291, 1296–97 (D.C. Cir. 2015) (per curiam). And in another case, the D.C. Circuit held that a plaintiff cannot challenge a federal regulation

because he was subject to a consent decree that imposed identical legal obligations. *Crete Carrier Corp. v. EPA*, 363 F.3d 490, 492–93 (D.C. Cir. 2004).

Similarly, the D’Andreas do not have standing to challenge the federal settlement agreement because the ACO independently imposes the same legal obligation. Indeed, the federal settlement agreement incorporates the ACO.

The D’Andreas maintain, however, that they are separately injured by the federal settlement agreement because that agreement imposes different legal obligations than the ACO. First, the D’Andreas argue that the federal agreement touches a larger portion of their property than the ACO. According to the D’Andreas, the federal settlement agreement touches all but 1.58 acres of their property, whereas the ACO touches all but 2.91 acres of their property. This argument is based on the difference between the portions of the D’Andreas’s property that the Army Corps determined to be “wetlands” under federal law and the NJ DEP respectively determined to be “wetlands” under New Jersey state law. This argument, however, assumes that both the federal agreement and the ACO only touch those portions of the D’Andreas’s property that are wetlands. The record does not support that assumption. That is because the ACO reaches both “wetlands” and non-wetland areas classified as “wetlands transition areas.” In light of this fact, there is no evidence in the record to suggest that the federal settlement

agreement (touching federal-law “wetlands”) is broader than the ACO (touching both state-law “wetlands” and state-law “wetland transition areas”).⁴

Next, the D’Andreas argue the federal agreement—but not the ACO—requires the costly removal of de-contaminated “clean soil” from their property. The ACO only requires them to de-contaminate soil and does not require them, they argue, to subsequently remove, transport, and dispose of this de-contaminated soil offsite. In other words, the federal agreement requires both onsite remediation and offsite removal whereas the ACO only require onsite remediation. We are not convinced. The ACO requires the “[r]emoval of *all* unauthorized fill material.” App. at 120 (emphasis added). The federal agreement similarly requires the “remov[al] of *all* remaining unauthorized dredged and/or fill material.” App. at 78 (emphasis added). In the absence of other evidence in the record suggesting that the legal obligations imposed by the federal agreement and the ACO differ, we read this materially identical language to impose overlapping legal obligations.⁵

⁴ The D’Andreas state in their reply brief they had tried to upload evidence to “address the federal government’s mistaken position on state regulated wetland transition areas” with a declaration. D’Andreas’s Reply Br. at 4–5. The D’Andreas correctly note, that, “[a]pparently, however, the [d]eclaration did not upload onto the ECS system.” *Id.* at 5. Although they claim that they “were unaware of that fact” at the time, “at a bit of a loss to understand the reason that a portion of its filing did not properly upload,” and that “it is not entirely plaintiffs [sic] fault,” because that document is not within the record on appeal, we do not consider its purported contents. *Id.*

⁵ Indeed, the federal agreement incorporates the ACO, further suggesting that there is no delta between the legal obligations imposed by the federal agreement and ACO. The federal agreement in relevant part provides that:

[t]he D’Andreas agree to . . . remove all remaining unauthorized dredged and/or fill material identified by the Corps and the NJDEP on the D’Andreas property []

* * *

For these reasons, we will affirm the District Court's order dismissing the complaint.

and restore the site in strict accordance with the approved restoration plans [] identified as, 'Wetlands and Transition Area Restoration Plan' . . . , 'Planting Plan' . . . , 'Soil Erosion and Sediment Control Notes' . . . , and 'Soil Erosion and Sediment Control Detail and Notes.'

App. at 78. All four of these "approved restoration" plans are part of the ACO. **JA 127.**