

2016

Muddying the Water, Clearing the Way . . . for Judicial Review of Clean Water Act Jurisdictional Determinations: *Hawkes Co. v. U.S. Army Corps of Engineers*, 782 F.3d 994 (8th Cir. 2015)

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Note*

Muddying the Water, Clearing the Way . . . for Judicial Review of Clean Water Act Jurisdictional Determinations: *Hawkes Co. v. U.S. Army Corps of Engineers*, 782 F.3d 994 (8th Cir. 2015)

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I. INTRODUCTION

By the late 1960s, the waters of the United States were in an environmental crisis.¹ To put it lightly, governmental intervention to stop a downward spiral of environmental degradation was becoming increasingly necessary.² To frame it in more dire (and perhaps, more accurate) terms, the need for significant environmental legislation addressing surface water quality had become the most pressing public health issue of a generation.³

The infamous burning of northeast Ohio's Cuyahoga River on June 22, 1969, in Cleveland sparked public concern for the state of the nation's waterways, and galvanized public interest in environmental protection efforts.⁴ On that date, a fire broke out on the river when

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1. Robert L. Glicksman & Matthew R. Batzel, *Science, Politics, Law, and the Arc of the Clean Water Act: The Role of Assumptions in the Adoption of a Pollution Control Landmark*, 32 WASH. U. J.L. & POL'Y 99, 99–100 (2010).
 2. *See id.* (discussing one scholar's view on the need for public action to improve water quality as the 1960s drew to a close).
 3. *Id.* at 99–101 (“According to Hines, most of the surface waters within the United States were only marginally suitable for even low-quality uses such as irrigation, stockwatering, and industrial intake Hines cited to warnings by public health officials that water pollution rendered the country vulnerable to serious health problems arising from ‘the disease carrying capacity of our polluted water-courses.’”). The Federal Water Pollution Control Act Amendments of 1972, popularly known as the Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1387 (2012)), was in no way the first federal foray into regulation of navigable surface waters. Federal regulation of surface waters began with the passage of the Rivers and Harbors Act in 1899, ch. 425, 30 Stat. 1121 (1899), which regulated “projects and activities in navigable waters and harbor and river improvements, such as placing dredged or fill material in waterways, altering channels, and constructing dams, bulkheads, jetties, and other structures.” *Introduction to the Clean Water Act*, U.S. ENVTL. PROTECTION AGENCY 3–4, <http://cfpub.epa.gov/watertrain/pdf/modules/introtocwa.pdf> [<https://perma.unl.edu/FAE3-UHJM>].
 4. *Introduction to the Clean Water Act*, *supra* note 3, at 3; Christopher Maag, *From the Ashes of '69, a River Reborn*, N.Y. TIMES (June 20, 2009), http://www.nytimes.com/2009/06/21/us/21river.html?_r=0. Most observers consider the Cuyahoga fire, among other environmental disasters, to be one of the most influential events leading up to the passage of Clean Water Act in 1972. *Id.* (“The Cuyahoga River fire was a spark plug for environmental reforms around the country.”); Dan

“oil-soaked debris” floating on the river’s surface ignited.⁵ The fire was extinguished in thirty minutes and led to less than \$50,000 in damage, but caused Cleveland considerable public embarrassment.⁶ Despite the attention it brought to the Cuyahoga’s environmental degradation, the 1969 burning was not an isolated or novel event. There were, in fact, thirteen fires on the Cuyahoga beginning around 1868.⁷ The largest Cuyahoga fire had occurred seventeen years earlier, in 1952, causing damages topping \$1 million.⁸ Perhaps worse than the flammable floating milieu of debris, entire stretches of the Cuyahoga were entirely devoid of fish in the 1950s and 1960s.⁹

Congress responded to water pollution problem by passing the Federal Water Pollution Control Act Amendments of 1972,¹⁰ popularly known as the Clean Water Act (CWA).¹¹ Among the CWA’s ambitious goals were to eliminate “discharge of pollutants” into navigable waterways by 1985; achieve water quality that protects fish, shellfish, and wildlife and allows for recreation “in and on the water” wherever possible by July 1983; and to expedite creation of programs to control non-point sources of pollution.¹²

Today, the Cuyahoga is billed as a success story. More than forty-five years after the 1969 fire on the Cuyahoga and forty years after passage of the CWA, there has been considerable improvement in the

Bobkoff, *Ohio’s Burning River in Better Health 40 Years Later*, NPR (June 22, 2009, 11:39 AM), <http://www.npr.org/templates/story/story.php?storyId=105750930>.

5. Maag, *supra* note 4.

6. *Id.* (“The fire turned Cleveland into ‘The Mistake by the Lake,’ a national punchline that would endure for decades.”). Perhaps more concerning is that the 1969 burning was not an isolated or novel event. There were, in fact, 13 fires on the Cuyahoga beginning as early as 1868. The largest Cuyahoga fire had occurred more than 15 years earlier, in 1952, causing damages topping \$1 million. *Introduction to the Clean Water Act*, *supra* note 3, at 3.

7. *Introduction to the Clean Water Act*, *supra* note 3, at 3; *see also* Bobkoff, *supra* note 4 (“Never mind that in the middle of the 20th century, rivers in industrial cities caught on fire all the time.”).

8. *Introduction to the Clean Water Act*, *supra* note 3, at 3. A famous photo of the burning of the Cuyahoga River ran one month after the 1969 fire on the cover of TIME Magazine. According to the Center for Public History & Digital Humanities at Cleveland State University, the cover photo (which depicts flames engulfing a ship) was not even a photo of the 1969 fire, but rather a photo of the much more serious conflagration of November 1952. Michael Rotman, *Cuyahoga River Fire*, CLEVELAND HISTORICAL, <http://clevelandhistorical.org/items/show/63#.Vep8xhFVhBd> [<https://perma.unl.edu/P4WH-MXF9>]. Interestingly, Rotman writes that no known photos of the 1969 blaze exist. *Id.*

9. *Introduction to the Clean Water Act*, *supra* note 3, at 3.

10. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816.

11. Glicksman & Batzel, *supra* note 1, at 100.

12. 33 U.S.C. § 1251 (2012).

river's water quality.¹³ The Cuyahoga turnaround is just one example of significant environmental improvement in U.S. waters. The CWA is now credited with reducing discharge of pollutants into the nation's waters, leading to significant water quality enhancements.¹⁴ As of 2004, discharge of organic wastes from municipal waste treatment facilities dropped 46%, and similar discharges from industry sources have dropped by an astounding 98%.¹⁵ Progress in industrialized urban areas has been the most dramatic, as these areas have benefitted the most from the CWA's permitting of point source discharge.¹⁶ Annual wetlands loss—presumably from activities including depositing fill materials—fell 77% by 1997 from average annual losses in the mid-1970s to 1980s (calculated as a decade-long average).¹⁷ Of the three “iconic statutes” of environmental reform, the Clean Air Act of 1970¹⁸, National Environmental Policy Act of 1969¹⁹, and the Clean Water Act, many environmental law experts believe that the CWA was the “best designed and most artfully drafted.”²⁰

However, according to some commentators, continued progress will require more aggressive control of non-point source pollution and wetlands degradation.²¹ Most observers believe the EPA has not

13. See Maag, *supra* note 4 (“Today, the Cuyahoga is home to more than 60 species of fish”); see also Bobkoff, *supra* note 4 (noting that the EPA considers parts of the river fully restored).

14. William L. Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?*, 55 ALA. L. REV. 537, 538 (2004).

15. *Id.* at 591.

16. See *id.*

17. For a ten-year period running from the mid-1970s to mid-1980s, the U.S. experienced annual averages wetlands losses of 254,770 acres per year. For an eleven-year period running from 1986 to 1997, U.S. losses fell to 58,545 acres per year. NAT'L RESEARCH COUNCIL, COMPENSATING FOR WETLAND LOSSES UNDER THE CLEAN WATER ACT 17 tbl.1-1 (2001). Over the same period, wetlands losses stemming from agriculture fell from about 138,000 annually to about 15,000 acres annually. *Id.* at 17.

18. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676.

19. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970).

20. N. William Hines, *History of the 1972 Clean Water Act: The Story Behind How the 1972 Act Became the Capstone on a Decade of Extraordinary Environmental Reform*, GEO. WASH. J. ENERGY & ENVTL. L., Summer 2013, at 80, 80.

21. See Glicksman & Batzel, *supra* note 1, at 133 (“Two prominent environmental law scholars have drawn the conclusion that ‘one inevitably is left with the conclusion that politics has driven the CWA’s failure to take on nonpoint pollution in any meaningful way.’”).

achieved its stated policy goal of “no net loss” of wetlands²² for various reasons, including limitations on jurisdiction inherent in the CWA.²³

In *Hawkes Co. v. U.S. Army Corps of Engineers*,²⁴ the Eighth Circuit Court of Appeals considered whether judicial review was available immediately following an adverse CWA jurisdictional determination concluding that the Hawkes Co. property constituted wetlands subject to Army Corps of Engineers (the Corps) regulation.²⁵ Resolution of that question first required the court to decide whether a jurisdictional determination made by the Army Corps of Engineers under the CWA is a “final agency action” for which judicial review is available under section 704 of the Administrative Procedure Act.²⁶ Second, the court had to decide the related—but distinct—question of whether the claim was ripe for judicial review.²⁷ In a unanimous judgment,²⁸ the Eighth Circuit panel held that: (1) a jurisdictional determination was a final agency action within the meaning of Section 704; and (2) plaintiff Hawkes Co.’s claim was ripe for review. Notably, this decision conflicted with the Fifth Circuit’s decision in *Belle Co. v. U.S. Army Corps of Engineers*²⁹—rendered during pendency of the *Hawkes Co.* appeal on nearly identical facts³⁰—and the Ninth Circuit’s decision in *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*.³¹

22. NAT’L RESEARCH COUNCIL, *supra* note 17, at 2–3. Since the administration of George H.W. Bush, it has been the stated policy of the administration to achieve “no net loss” of wetlands. *Id.*; *Wetlands*, U.S. DEP’T OF AGRIC., NAT. RESOURCES CONSERVATION SERV., <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/water/wetlands/> [<https://perma.unl.edu/XTT9-BWG7>].

23. Andreen, *supra* note 14, at 545–46 (arguing the continuing loss of wetlands is due to a number of factors, including “less than aggressive enforcement” and the “problems of jurisdiction,” that is, the scope of the dredge-and-fill permit program created by the CWA).

24. 782 F.3d 994 (8th Cir. 2015), *aff’d sub nom.* U.S. Army Corps of Eng’rs v. Hawkes Co., 136 S. Ct. 1807 (2016).

25. A party seeking clarification as to whether property is subject to Clean Water Act jurisdiction may ask the Army Corps of Engineers to make a jurisdictional determination (sometimes called a “wetlands delineation”). An approved jurisdictional determination is subject to administrative appeal. *See generally* 33 C.F.R. §§ 331.1–331.3 (2015) (describing jurisdictional determinations and the administrative appeal of such determinations).

26. 5 U.S.C. § 704 (2012).

27. *See Hawkes Co.*, 782 F.3d at 1002.

28. Judge Loken wrote the majority opinion, which Judge Bright joined. Judge Kelly filed a concurring opinion. *See id.*

29. 761 F.3d 383 (5th Cir. 2014).

30. *See id.* Like the plaintiffs in *Hawkes Co.*, Belle Co. sought a permit under the CWA’s section 404 dredge-and-fill permit program. Belle sought to use the property as a solid-waste landfill. When they received an adverse jurisdictional determination, Belle sought review under § 704 of the APA. *Id.* at 386–88.

31. 543 F.3d 586 (9th Cir. 2008).

This Note will analyze the Eighth Circuit's holding in *Hawkes Co.* in light of the Supreme Court's existing jurisprudence, focusing its attention on the Section 704 finality issue, since the Eighth Circuit concluded that justiciability analysis was coextensive with the analysis it completed to resolve the finality issue.³² This Note concludes that the Eighth Circuit correctly held that judicial review was available in *Hawkes Co.*

To facilitate an understanding of the practical implications of the *Hawkes Co.* decision, Part II of this Note explores jurisdiction under the CWA, including recent EPA rulemaking efforts which have been met with resistance from diverse areas of industry. Further, Part II also examines the availability of judicial review of agency actions under the Administrative Procedure Act, including relevant Supreme Court precedents on what constitutes a "final agency action" under Section 704.

Part III will turn to the *Hawkes Co.* case, discussing the facts of the case, the district court's ruling, the case's procedural posture on appeal, and the majority opinion. Judge Kelly's concurring opinion, which raises compelling points regarding the legal doctrine at work in the *Hawkes Co.* case is also discussed.

Finally, Part IV argues that the Supreme Court was justified in its decision to grant certiorari to resolve the core issue of finality in the *Hawkes Co.* case, and that the Court should avoid a 4-4 decision which would leave the conflict between the circuit courts unresolved. Further, this Note takes the position that the Court should explicitly extend its holding in *Sackett v. EPA*³³ to cover threshold determinations of jurisdiction, making judicial review of adverse jurisdictional determinations immediately available to property owners.

II. BACKGROUND

While this Note will focus its attention and analysis on the procedural issues inherent in landowner challenges to jurisdictional determinations under the CWA, an understanding of the underlying jurisdictional controversy adds depth and context for understanding the practical impact of these administrative challenges.³⁴

32. See *infra* text accompanying note 85.

33. 132 S. Ct. 1367 (2012).

34. As Justice Scalia put it in his majority opinion in *Sackett*, readers "will be curious, however, to know what all the fuss is about." *Sackett*, 132 S. Ct. at 1370. While a more concise treatment of this case might have avoided the substantive disputes underlying the procedural issues in this case, this Note takes the position that the practical effects of allowing (or disallowing) judicial review are essential to any court's decision on § 704 finality. See *infra* section IV.B.

A. The Clean Water Act's Jurisdictional Uncertainty

The provisions of the CWA generally apply to the “navigable waters” of the United States.³⁵ Of course, “navigable waters” takes a different meaning today than it did in the Clean Water Act’s predecessor statute. “Navigable waters” no longer means “navigable in fact or readily susceptible of being rendered so,” as had been the interpretation of that phrase in the Clean Water Act’s predecessor statute.³⁶ Section 502(7) of the CWA defines navigable waters to include all “waters of the United States, including the territorial seas.”³⁷ The meaning of this phrase, and in turn the extent of the CWA’s reach, has been the subject of significant disputes.³⁸

While uncertainty still remains, the meaning of “waters of the United States” has been clarified by a few Supreme Court decisions. First, *United States v. Riverside Bayview Homes, Inc.*,³⁹ presented the Court with the question of whether a wetland adjacent to a “navigable water” was subject to Corps’ jurisdiction under the Act. In *Riverside*, the Corps’ interpretation asserted that the regulatory definition of “waters of the United States” operative at that time extended its jurisdiction under the CWA to “all wetlands adjacent to navigable or interstate waters and their tributaries.”⁴⁰ The Court found the Army Corps’ interpretation to be reasonable and supported by the statutory grant of authority, because Congress’s choice to define “navigable waters” as the “waters of the United States” indicated an intent to regulate “at least some waters” which would not have been considered “navigable” in the usual sense of the term.⁴¹ In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*,⁴² the Court held that the Army Corps exceeded its authority under the CWA by promulgating a rule that extended the definition of “navigable waters” to include intrastate waters which provide or would provide “habitat for migratory birds.”⁴³

35. For example, section 404 of the CWA, 33 U.S.C. § 1344 (2012), requires those seeking to deposit “dredge or fill materials” into the “navigable waters” to obtain a permit.

36. See *Rapanos v. United States*, 547 U.S. 715, 723 (2006).

37. Clean Water Act § 502(7), 33 U.S.C. § 1362(7); *Rapanos*, 547 U.S. at 723.

38. See generally *Rapanos*, 547 U.S. at 724–29 (recounting the ever expanding and retracting definition of “waters of the United States” through the Corps’ and court actions). For additional discussion of the Corps and EPA’s recent rulemaking defining “waters of the United States,” see *infra* section II.B of this Note.

39. 474 U.S. 121 (1985).

40. *Id.* at 129.

41. *Id.* at 132–34.

42. 531 U.S. 159 (2001).

43. *Id.* at 167. Petitioners in *Solid Waste Agency of Northern Cook County* sought a permit under Section 404(a) of the Clean Water Act, 33 U.S.C. § 1344 (2012), to discharge dredged or fill material into “navigable waters.” *Id.*

After *Riverside Bayview*, the Army Corps continued to search for the limits of its regulatory jurisdiction under the CWA, forcing the Supreme Court to again address the propriety of a regulation construing “waters of the United States.” In *Rapanos v. United States*,⁴⁴ the Court considered whether a wetland eleven to twenty miles from the nearest body of navigable water could be considered a wetland adjacent to waters of the U.S. under the then-effective regulation.⁴⁵ A plurality of four justices announced a new standard for determining if a wetland was “adjacent” to a “water of the United States,” holding that for the wetland in question to be covered, it must share a continuous surface connection to a “relatively permanent body of water connected to traditional interstate navigable waters.”⁴⁶ Justice Kennedy’s concurring opinion announced a different standard, the “significant nexus” test. In his view, the Corps must “establish a significant nexus on a case-by-case basis” when it seeks to regulate wetlands adjacent to non-navigable tributaries.⁴⁷ Currently, the Circuit Courts of Appeals apply different standards, with some applying only Justice Kennedy’s test, some applying the Kennedy test and leaving the validity of the plurality’s standard for another day; still others, including the Eighth Circuit have held that jurisdiction exists if either standard is satisfied, and two more circuits have avoided the issue by holding that the wetland at issue would satisfy either test.⁴⁸

44. 547 U.S. 715 (2006).

45. *Id.* at 722–25.

46. *Id.* at 742.

47. *Id.* at 782.

48. ROBERT MELTZ & CLAUDIA COPELAND, CONG. RESEARCH SERV., RL33263, THE WETLANDS COVERAGE OF THE CLEAN WATER ACT (CWA): *Rapanos* and Beyond 7 & nn.32–34 (2014). The Congressional Research Service summed up the lower court holdings as follows: The Eleventh Circuit and Seventh Circuit have determined that Justice Kennedy’s “significant nexus” test alone controls. *See United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006). Two more circuits, the Ninth and Fourth Circuits, applied the Kennedy test, but did not address whether the plurality’s standard was also valid. *See N. Cal. River Watch v. Wilcox*, 633 F.3d 766 (9th Cir. 2011), *clarifying* *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007); *Precon Dev. Corp. v. U.S. Army Corps of Eng’rs*, 633 F.3d 278 (4th Cir. 2011). Three circuits, the Third, Eighth, and First Circuits, have held that a wetland satisfying either Justice Kennedy’s test or the plurality’s test is a jurisdictional wetland. *See United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011); *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009); *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006). According to the Congressional Research Service, no circuit has applied the plurality’s standard exclusively, and the Supreme Court has not granted certiorari to resolve this split of authority. MELTZ & COPELAND, *supra*, at 7–8.

B. Recent Regulatory Action

As might be expected, these decisions (the fractured *Rapanos* decision, in particular) have injected considerable uncertainty into determining the limits of CWA jurisdiction.⁴⁹ In accordance with section 553 of the Administrative Procedure Act,⁵⁰ the EPA and Army Corps responded to this uncertainty by issuing a Notice of Proposed Rulemaking in April 2014 to redefine “waters of the United States” in the CWA regulatory scheme.⁵¹

The waters of the U.S. proposal (the “WOTUS” rule⁵²) was met with considerable backlash from regulated industries.⁵³ Agriculture groups, builders, energy companies, and other industries opposed the rule from its release,⁵⁴ creating a groundswell of congressional opposition to the proposed rule, amid fears that the rule would give federal officials expansive new powers over private property and farmland.⁵⁵ In particular, agriculture groups, including the Nebraska Farm Bureau, expressed concern about regulation of so-called ephemeral streams (those streams that run only intermittently) and whether the proposed rule would extend the CWA’s reach such that farmers would be required to obtain permits to complete normal farming activities

49. See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,055–56 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pts. 110, 112, 116, et al.) (preamble). The definition of “waters of the United States” appears in part 33 of the Army Corps’ regulations. 33 C.F.R. § 328.3(a)(7) (2015).

50. 5 U.S.C. § 553 (2012).

51. Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. 22,188 (proposed Apr. 21, 2014) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pts. 110, 112, 116, et al.).

52. EPA originally dubbed the rule the “Waters of the United States” Rule, and then later rebranded the regulatory effort as the “Clean Water Rule” upon release of the proposed final rule.

53. See Timothy Cama, *Fears of EPA ‘Land Grab’ Create Groundswell Against Water Rule*, THE HILL (June 21, 2014, 1:01 PM), <http://thehill.com/policy/energy-environment/210130-fears-of-epa-land-grab-create-groundswell-against-water-rule> [<https://perma.unl.edu/KF7E-7NSS>] (“The House has held a series of hearings on the water rule to highlight the fierce opposition from agriculture groups, the stone industry, developers and local governments.”).

54. See, e.g., Press Release, Am. Farm Bureau Fed’n, *American Farm Bureau Tells Members to ‘Ditch’ EPA Water Rule* (Apr. 22, 2014), http://www.fb.org/newsroom/news_article/42/ [<https://perma.unl.edu/H5ZT-XTGA>]; Press Release, Nat’l Ass’n of Home Builders, *Clean Water Act Proposal Skirts Federal Law, Harms Small Businesses* (May 29, 2014), <http://www.nahb.org/en/news-and-publications/Press-Releases/2014/april/clean-water-act-proposal-skirts-federal-law—harms-small-businesses.aspx> [<https://perma.unl.edu/S7DC-6GZ2>]; Press Release, Associated Gen. Contractors of Am., *Ditches, Stormwater BMPs and Potholes are Not Waters of the U.S.* (Nov. 14, 2014), <https://www.agc.org/news/2014/11/14/ditches-stormwater-bmps-and-potholes-are-not-waters-us> [<https://perma.unl.edu/Z2TP-348F>].

55. Cama, *supra* note 53.

such as crop tillage and fencing.⁵⁶ In one multi-organization comment, industry groups argued the proposal represented an “unjustified expansion” of federal jurisdiction under the CWA that would shoulder businesses with “expansive new definitions” while increasing—not reducing—regulatory uncertainty.⁵⁷

The EPA and the Army Corps of Engineers published the finalized rule in June 2015.⁵⁸ EPA Administrator Gina McCarthy publicly argued the rule would expand the CWA’s coverage by just 3%⁵⁹ while maintaining and expanding exclusions for farming, ranching, and forestry.⁶⁰ In a press release accompanying the release of the final rule, the EPA claimed the rule would not regulate ditches, shallow subsurface flows, or tile drains.⁶¹ The EPA also maintained that the rule would not create any new permitting requirements for agriculture, while maintaining “all previous exemptions and exclusions.”⁶²

Predictably, the EPA’s assurances did little to placate industry fears of regulatory overreach.⁶³ On August 28, 2015, the revised definition of “waters of the United States” became effective.⁶⁴ Court challenges to the final rule immediately followed: In September 2015, the federal district court in North Dakota temporarily enjoined enforcement of the rule in thirteen states.⁶⁵ About a month later, the Sixth

56. *See id.* (“The rule would place features such as ditches, ephemeral drainages, ponds (natural or man-made [sic], prairie potholes, seeps, flood plains, and other occasionally or seasonally wet areas under federal control,’ the House lawmakers wrote in their letter.”).

57. William L. Kovacs, Jeffrey Gunnulfsen & Kraig R. Naasz, Comment Letter on Proposed Rule: Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. 22,188 (April 21, 2014); Docket No. EPA-HQ-OW-2011-0080 (Nov. 12, 2014), https://www.uschamber.com/sites/default/files/11.12.14_multi-organization_comments_to_epa_and_usace_on_proposed_rule_definition_of_waters_of_the_united_states.pdf [<https://perma.unl.edu/Q2BZ-GP69>].

58. *See supra* note 49.

59. Jenny Hopkinson, *Obama’s Water War*, POLITICO (May 27, 2015, 10:41 AM), <http://www.politico.com/story/2015/05/epa-waterways-wetlands-rule-118319> [<https://perma.unl.edu/CRP3-B45Q>].

60. Devin Henry, *EPA Chief: We Made ‘Substantial Changes’ to Water Regulations*, THE HILL (May 27, 2015, 3:54 PM), <http://thehill.com/policy/energy-environment/243247-epas-mccarthy-touts-substantial-changes-to-water-rule> [<https://perma.unl.edu/BRV5-S6HV>].

61. Press Release, U.S. Evtl. Prot. Agency, Clean Water Rule Protects Streams and Wetlands Critical to Public Health, Communities, and Economy (May 27, 2015), <http://yosemite.epa.gov/opa/admpress.nsf/0/62295CDDD6C6B45685257E52004FAC97> [<https://perma.unl.edu/7TRQ-DPVU>].

62. *Id.*

63. *See* Hopkinson, *supra* note 59.

64. The EPA’s final WOTUS rule was published in the Federal Register for Monday, June 29, and became effective sixty days thereafter. *See* Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,054 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pts. 110, 112, 116, et al.).

65. *North Dakota v. U.S. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015).

Circuit Court of Appeals, hearing a challenge to the rules in a multi-district consolidated action, entered a nationwide stay on enforcement of the rule.⁶⁶ Petitioners challenged both the substance of the rule and the process used by the EPA and the Army Corps in adopting the rule.⁶⁷

While this Note does not purport to address the propriety or wisdom of the EPA and the Corps' rulemaking effort, the public interest in the proposed rule shows that the exact reach of the CWA remains controversial. If the rules are upheld, it is possible that the rules would reduce uncertainty around jurisdictional determinations. However, this conclusion is far from certain, since prior iterations have hardly reduced jurisdictional controversy.⁶⁸ Even if the final Waters of the United States rule is ultimately deemed a valid exercise of the EPA and the Corps' rulemaking authority under the statute, landowners may still initiate challenges to seek review of the Corps' jurisdictional determinations. Their ability to do so immediately upon receiving an adverse jurisdictional determination is addressed directly by the *Hawkes Co.* case.

C. Issues

Judicial review of federal agency action is limited by the case or controversy requirement of Article III of the United States Constitution⁶⁹ as well as provisions of the Administrative Procedure Act⁷⁰ (APA), enabling legislation, and judicially-created doctrines. The APA provides for judicial review of "agency action made reviewable by statute" and "final agency action for which there is no other adequate remedy in a court."⁷¹ In cases seeking immediate judicial review of a jurisdictional determination where an agency's enabling statute does

66. *Ohio v. U.S. Army Corps of Eng'rs (In re EPA)*, 803 F.3d 804 (6th Cir. 2015). Apparently preferring to first litigate the matter in federal district court, challengers had moved for both stay of the rule and dismissal of their own petition in the consolidated action, arguing that the Sixth Circuit lacked subject matter jurisdiction under 33 U.S.C. § 1369(b)(1). *Id.* at 806. Section 1369(b)(1) provides for review of certain administrative actions taken pursuant to the Clean Water Act in the "Circuit Courts of Appeals of the United States." 33 U.S.C. § 1369(b)(1) (2012).

67. *Ohio*, 803 F.3d 804.

68. Just as may be the case with the new definition of "waters of the United States," regulations defining the "waters of the United States" in *Solid Waste Agency of Northern Cook County* and *Rapanos* were sold to the public as clarifications of existing law and were later applied by the Corps and EPA in ways that were found to exceed the agencies' statutory authority. See *Rapanos v. United States*, 547 U.S. 715, 758 (2006); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 164 (2001).

69. U.S. CONST. art. III, § 2.

70. Administrative Procedure Act, 5 U.S.C. §§ 551–706 (2012).

71. *Id.* § 704.

not specifically provide for or preclude judicial review, the court must first decide if the jurisdictional determination is a “final agency action” that leaves plaintiffs with no other adequate remedy in a court. Second, the court must consider whether the plaintiff’s claim is ripe for review.⁷²

D. “Final Agency Action”

1. *The Bennett Test of Final Agency Action*

In *Bennett v. Spear*,⁷³ the court synthesized its prior holdings on final agency action to develop a two-part test for determining when an action is a “final agency action.” Specifically, the *Bennett* court held that in order for an agency action to be reviewable as such, the agency action must: (1) represent the consummation of the agency’s decision-making process (i.e., not be tentative or interlocutory in nature) and (2) determine the rights and obligations of the parties or have legal consequences to the parties.⁷⁴ The *Bennett* test is well-established; the majority opinion in *Hawkes Co.* also discussed several other decisions it felt were critical in deciding the finality question.⁷⁵ However, the decision that was relied on most heavily by the *Hawkes Co.* appellant-plaintiffs in their brief⁷⁶ was the Supreme Court’s relatively recent decision in *Sackett v. EPA*.⁷⁷

72. The district court did not reach this question, because it found that the final jurisdictional determination was not a final agency action, rendering any question relating to ripeness immaterial. *Hawkes Co. v. U.S. Army Corps of Eng’rs*, 963 F. Supp. 2d 868, 870 (D. Minn. 2013), *rev’d*, 782 F.3d 994 (8th Cir. 2015), *aff’d sub nom.* *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016). The Courts of Appeal are divided over whether § 704’s final agency action requirement is jurisdictional—meaning that, if agency action is nonfinal, the court is deprived of subject matter jurisdiction—or not, meaning that an action challenging nonfinal agency action would be dismissed for failure to state a claim.

73. 520 U.S. 154 (1997).

74. *Id.* at 177–78 (holding that the action must “mark the ‘consummation’ of the agency’s decisionmaking process” and that “the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow’”).

75. *See* *Hawkes Co. v. U.S. Army Corps of Eng’rs*, 782 F.3d 994, 1000–01 (8th Cir. 2015) (citing and discussing *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967), *abrogated on other grounds by* *Califano v. Sanders*, 430 U.S. 99 (1977); *Frozen Food Express v. United States*, 351 U.S. 40 (1956); *Columbia Broad. Sys. v. United States*, 316 U.S. 407 (1942)), *aff’d sub nom.* *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016).

76. Appellant’s Opening Brief, *Hawkes Co. v. U.S. Army Corps of Eng’rs*, 782 F.3d 994 (8th Cir. 2015) (No. 13-3067), 2013 WL 6069374; *see also* Brief of Amici Curiae American Farm Bureau Federation et al. in Support of Plaintiffs-Appellants, and Reversal of the U.S. District Court for the District of Minnesota, *Hawkes Co. v. U.S. Army Corps of Eng’rs*, 782 F.3d 994 (8th Cir. 2015) (No. 13-3067), 2013 WL 6221825 [hereinafter Brief of Amici Curiae].

77. 132 S. Ct. 1367 (2012).

2. Sackett v. EPA *Opens the Door*

In *Sackett*, plaintiffs Michael and Chantell Sackett brought action to challenge an administrative compliance order issued to them by the EPA.⁷⁸ The Sacketts filled part of a lot they owned in Bonner County, Idaho in preparation to build a house.⁷⁹ Asserting that their properties were not “waters of the United States” subject to the permitting requirements of section 404 of the CWA, the Sacketts deposited fill materials on the property without obtaining a permit. The EPA, understanding the property to be within its jurisdiction, issued a pre-enforcement compliance order,⁸⁰ requiring the Sacketts to undertake restoration activities and carrying a penalty of up to \$37,500 per day for violating the CWA and an additional \$37,500 per day or violating the compliance order.⁸¹

The Supreme Court concluded that the compliance order had all the “hallmarks of APA finality” that prior opinions had established.⁸² Importantly, the Supreme Court’s conclusion in *Sackett* that pre-enforcement compliance orders were reviewable final agency action conflicted with every federal circuit to consider the issue.⁸³ The Court also rejected argument that the CWA’s statutory scheme precluded judicial review.⁸⁴

E. Ripeness

The justiciability of a claim for review is distinct from the issue of finality. Ripeness is, of course, a judicially-created doctrine which flows from Article III’s cases and controversies requirement. Courts evaluate the “fitness of the issues for judicial decision” and the “hardship to the parties of withholding court consideration,” factors that can both be seen as encompassed by the *Bennett* test of finality.⁸⁵ The Eighth Circuit concluded that—at least in the *Hawkes Co.* case—its analysis of the finality question “resolve[d] the ripeness issue as well” as the two issues were functionally coextensive.⁸⁶ Accordingly, this

78. *Id.* at 1369.

79. *Id.* at 1370.

80. *See Sackett v. U.S. EPA*, 622 F.3d 1139, 1143 (9th Cir. 2010) (collecting cases), *rev’d sub nom. Sackett v. EPA*, 132 S. Ct. 1367 (2012).

81. *Sackett v. EPA*, 132 S. Ct. 1367, 1369–70 (2012).

82. *Id.* at 1371–72.

83. *See Sackett v. U.S. EPA*, 622 F.3d at 1143 (collecting cases).

84. *Id.* at 1373.

85. *See Hawkes Co. v. U.S. Army Corps of Eng’rs*, 782 F.3d 994, 1002 n.2 (8th Cir. 2015) (citing *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 201 (1983); *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)), *aff’d sub nom. U.S. Army Corps of Eng’rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016).

86. *See id.*

Note does not provide separate, extensive treatment of the ripeness issue, other than to recognize it as an issue in the case.

III. *HAWKES CO. V. U.S. ARMY CORPS OF ENGINEERS*

A. Facts and Administrative History

According to the plaintiffs' complaint, plaintiff Hawkes Co., Inc. mines peat from wetlands for use in construction of golf greens.⁸⁷ In March 2007, Hawkes Co. sought permission from the Army Corps of Engineers to mine peat on a 530-acre property⁸⁸ owned by plaintiffs LPF Properties, LLC and Pierce Investment Co. in Marshall County, Minnesota.⁸⁹ Hawkes Co. believed that this property could supply enough high-quality peat to sustain its mining operation for ten to fifteen additional years.⁹⁰

Predictably, Hawkes Co.'s mining operation would involve the filling or discharge of material on the property.⁹¹ Section 404(a) of the CWA prohibits the discharge of "dredged or fill material" into "navigable waters,"⁹² and the Army Corps is authorized to issue permits for the discharge of such material into navigable waters, including wetlands.⁹³ Hawkes Co. applied for a permit to mine the property in December 2010.⁹⁴

The Army Corps made a preliminary jurisdictional determination (the "preliminary JD") in 2011, finding that it had CWA jurisdiction over the property because it was connected to the Red River of the North, a traditional navigable water.⁹⁵ In 2012, the Corps issued an "approved jurisdictional determination" (the "approved JD"). The dis-

87. *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 963 F. Supp. 2d 868, 870 (D. Minn. 2013), *rev'd*, 782 F.3d 994 (8th Cir. 2015), *aff'd sub nom.* U.S. Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807 (2016).

88. Plaintiffs Pierce Investment Co. and LPF Properties, LLC own the property in question. Under the proposed arrangement, Hawkes Co. would pay royalties to Pierce and LPF to mine peat on the property. All three entities (Pierce Investment Co., LPF Properties, LLC, and Hawkes Co.) are closely-held corporations owned by members of the Pierce family. *Id.*

89. *Id.* Marshall County covers 1,675 square miles in northwest Minnesota and is bordered on its western edge by the Red River of the North. *See History*, MARSHALL COUNTY MINN., http://www.co.marshall.mn.us/residents_visitors/history/index.php [<https://perma.unl.edu/S53K-3Z5V>].

90. *Hawkes Co.*, 963 F. Supp. 2d at 870.

91. *Id.*

92. Clean Water Act § 404(a), 33 U.S.C. § 1344 (2012).

93. *Id.*

94. *Hawkes Co.*, 963 F. Supp. 2d at 870. According to the complaint, the parties also met in January 2011, when Hawkes Co. alleges that the Corps "attempted to dissuade Plaintiffs from expanding their mining operations, in part by stressing the time and cost involved in the permitting process." *Id.*

95. *Id.* at 871. Plaintiffs disputed this finding, arguing that their property had no continuous connection "to a 'relatively permanent water.'" *See id.*

district court observed that the Corps apparently abandoned its continuous connection theory, instead concluding in the approved JD that the property had a “significant nexus” with the Red River of the North.⁹⁶ Following an administrative appeal, the case was remanded to the Corps district office for additional fact-finding. The Corps issued a revised approved jurisdictional determination (the “revised JD”) in December 2012, concluding that jurisdiction existed.⁹⁷ The Army Corps indicated that this was their final determination and that no further appeals could be taken.⁹⁸

Plaintiffs then filed suit in the United States District Court for the District of Minnesota, seeking declaratory judgment and injunctive relief.⁹⁹ The Corps moved to dismiss plaintiffs’ complaint for failure to state a claim.¹⁰⁰

B. District Court Decision

In order to resolve the “final agency action” question, the district court applied the two-part test from *Bennett v. Spear*.¹⁰¹ Under that test, an agency action is “final” when it (1) “‘mark[s] the consummation of the agency’s decisionmaking process,’ meaning it must be more than ‘tentative or interlocutory’ in nature”¹⁰² and (2) the action must determine rights and obligations or be “one from which ‘legal consequences will flow.’”¹⁰³ Construing the *Bennett* test narrowly to restrict access to judicial review, the court found that the plaintiffs could not establish both prongs of the test.

Agreeing with the Ninth Circuit and borrowing much of its logic in *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*,¹⁰⁴ the district court held that the plaintiffs could establish that the revised JD “marked the consummation of the Corps’ decisionmaking process” and satisfied the first *Bennett* prong.¹⁰⁵ The district court

96. *Id.* Recall that either the “continuous surface connection” test or the “significant nexus” test is sufficient for exercise of jurisdiction under the CWA in the Eighth Circuit. *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009).

97. *Hawkes Co.*, 963 F. Supp. 2d at 871.

98. *Id.*

99. *Id.* at 870.

100. A party may move for dismissal for “failure to state a claim upon which relief can be granted.” FED. R. CIV. P. 12(b)(6). On a motion to dismiss under Rule 12(b)(6), a court construes the pleadings in the light most favorable to the non-moving party, taking all well-pleaded facts as true. *See generally* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007) (explaining sufficient factual allegations, when such allegations are assumed to be true despite disbelief, must be raised to overcome a 12(b)(6) motion).

101. 520 U.S. 154 (1997).

102. *Hawkes Co.*, 963 F. Supp. 2d at 872 (quoting *Bennett*, 520 U.S. at 177–78).

103. *Id.*

104. 543 F.3d 586 (9th Cir. 2008).

105. *Hawkes Co.*, 963 F. Supp. 2d at 873.

reasoned that the jurisdictional determination process is not “necessarily contiguous” with the permit application process.¹⁰⁶ In its view, the jurisdictional determination process was a distinct and separate action leading to a determination that would “remain in place” through the passage of time, changes in ownership, or other future events.¹⁰⁷

However, the district court found that the revised JD was not a “final agency action” because, in its view, the revised JD did not “fix [the] rights or obligations” of the parties and no legal consequences would flow from the revised JD.¹⁰⁸ The district court observed that the revised JD does not order the plaintiffs to take action, and does not obligate them to proceed with the permit process.¹⁰⁹ The district court did acknowledge the difficult choice the plaintiffs were forced to make;¹¹⁰ it nonetheless reasoned that the revised JD did not “substantially change” the courses of action available to them. The district court wrote that despite the Army Corps’ decision, the physical characteristics of the property and legal standards for determining jurisdictional limits of the CWA remained unchanged.¹¹¹ Accordingly, the Corps had not interjected any requirement on the property owners which had not been provided for in the law.

The district court dismissed plaintiffs’ *Sackett* argument¹¹² as unpersuasive, paying little attention to the strong policy overtones in the *Sackett* majority opinion. In doing so, it reasoned that the compliance order at issue in *Sackett* was distinguishable from the revised JD at issue in *Hawkes Co.*, because the legal consequences flowing from the *Sackett* compliance order were more concrete, unavoidable, and immediate than those stemming from the pre-enforcement determination before the court in this case.¹¹³ Further, the court contended that unlike the petitioners in *Sackett*, the plaintiffs in *Hawkes Co.* were not left without “other adequate remedy in a court,”¹¹⁴ because plaintiffs may proceed with the permit process and challenge the assertion of jurisdiction at the consummation of the permit process, or continue with the planned mining and wait to challenge jurisdiction when and

106. *Id.*

107. *Id.* at 873–74.

108. *Id.* at 874–75.

109. *Id.* at 875.

110. *Id.* (“While Plaintiffs do have a difficult choice to make regarding how to proceed, their options did not substantially change because of the jurisdictional determination.”).

111. *Id.*

112. *Id.* (“Plaintiffs argue the Supreme Court’s recent holding in *Sackett v. EPA* . . . overruled these decisions.”).

113. *Id.* at 876–77.

114. *See* 5 U.S.C. § 704 (2012). A party seeking judicial review must not only show that the agency action they challenge is a “final agency action,” but also that they have no other adequate remedy in court. *Id.*

if the EPA brings an enforcement action.¹¹⁵ In *Sackett*, the Supreme Court held the latter to be an insufficient remedy,¹¹⁶ but the district court in *Hawkes Co.* reasoned that since the plaintiffs have at least one other remedy, the determination was not reviewable.¹¹⁷ The district court then dismissed the action.¹¹⁸

C. Eighth Circuit's Opinion and Holding

Plaintiffs appealed from dismissal to the Eighth Circuit Court of Appeals. On appeal, the Eighth Circuit held that the revised JD was a “final agency action” for which judicial review was immediately available and that the claim was ripe for review.¹¹⁹ Accordingly, the Eighth Circuit reversed and remanded for further proceedings.

Judge Loken's majority opinion takes a practical, law-in-action approach in applying the two-prong *Bennett* test, injecting far more discussion regarding the regulatory impact of denying judicial review after the issuance of a final, approved JD than the *Belle* court.¹²⁰ Like the district court (and every other Circuit Court to consider the issue¹²¹) the Eighth Circuit panel agreed with plaintiffs that the first prong of the *Bennett* test was satisfied.¹²² In support of this, the court noted that the Army Corps itself describes approved JDs as “definitive, official determination that there are, or that there are not, jurisdictional ‘waters of the United States’ on a site” which “can be relied upon by a landowner.”¹²³ Further the court found that the Army Corps' argument that the JD could be revised in the future was of little consequence, since the possibility of reconsideration is not enough to strip the revised JD at issue in *Hawkes Co.* of its “final” status.¹²⁴

However, in contrast to the district court, the Eighth Circuit held that the second part of the *Bennett* test was satisfied.¹²⁵ In its view,

115. *Hawkes Co.*, 963 F. Supp. 2d at 877.

116. *Sackett v. EPA*, 132 S. Ct. 1367 (2012).

117. *Hawkes Co.*, 963 F. Supp. 2d at 878. The district court in *Hawkes Co.* noted at the end of its opinion that *Sackett* may open the door to a third option—begin mining on the property, wait for a compliance order from EPA, and challenge it in court. *Id.* Presumably, this would not necessarily absolve the landowner of potential liability which occurs as a result of beginning mining.

118. *Id.*

119. *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 1002 (8th Cir. 2015), *aff'd sub nom.* *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016).

120. *See id.* at 1000–01.

121. *See Belle Co. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 389–91 (5th Cir. 2014); *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 591 (9th Cir. 2008).

122. *Hawkes Co.*, 782 F.3d at 999.

123. *Id.*

124. *Id.*

125. *See id.* at 1001.

the lower court seriously underestimated the impact of the revised JD when it reached its conclusion that no rights or obligations were determined and that no legal consequences would flow from the revised JD.¹²⁶ In the majority's view, the district court exaggerated the distinction between "an agency order that compels *affirmative* action, and an order that *prohibits* a party from taking [an] otherwise lawful action."¹²⁷ A close reading of the opinion suggests that the majority construes "rights and obligations" and "legal consequences" more broadly than the lower court.

The Eighth Circuit also took issue with the district court's finding that the revised JD left plaintiffs with an adequate judicial remedy.¹²⁸ On this point, the court found *Hawkes Co.* virtually indistinguishable from *Sackett*. In its view, neither of the options available to the plaintiffs to obtain further review (completing the permitting process or commencing mining, running the risk of enforcement action by EPA) was an adequate judicial remedy.¹²⁹ Again, the majority discussed the practical implications of its decision. Specifically, the court referred back to the plaintiffs' amended complaint and inferred from the Corps' statements to plaintiffs that the permit "*would ultimately be refused.*"¹³⁰ Taking all well-pleaded factual allegations as true (as is proper on a motion to dismiss), it made little sense to the majority why the lower court felt that going through the permitting process, at significant cost and sacrifice of time,¹³¹ was an adequate judicial remedy.¹³² The court reacted even less enthusiastically to the lower court's suggestion that the plaintiffs could commence peat mining and wait for enforcement action, since the majority believed that this would subject appellants to significant potential liability.¹³³ Specifically, the majority raised a cautionary note regarding such a strategy. Commencing mining and choosing to disregard the revised JD would expose plaintiffs to "substantial criminal monetary penalties and even imprisonment for a knowing CWA violation."¹³⁴ This, in turn, led the majority to posit that the Corps' actions amounted to a litigation strat-

126. *Id.* at 1000.

127. *Id.* (emphasis added).

128. *See id.* at 1001. Recall that § 704 provides for judicial review of "final agency action for which there is no other adequate remedy in court." 5 U.S.C. § 704 (2012).

129. *Hawkes Co.*, 782 F.3d at 1001.

130. *Id.* (emphasis in original).

131. *See Rapanos v. United States*, 547 U.S. 715, 721 (2006) ("The average applicant for an individual permit spends 788 days and \$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915—not counting costs of mitigation or design changes.").

132. *Hawkes Co.*, 782 F.3d at 1001.

133. *Id.*

134. *Id.* As the majority pointed out, this would be the plaintiffs' reward for being forthright and seeking a JD in the first place. *Id.*

egy that leaves property owners with little remedy except to comply with Army Corps demands to drop the project, or begin the permitting process.¹³⁵ *Sackett*, the court said, was concerned with how the lack of judicial review would in effect allow the EPA and the Corps to “strong-arm[]” parties into compliance.¹³⁶ The court concluded that similar practical impacts to the plaintiffs logically dictated the same result here, and found that the revised JD was a “final agency action” for which judicial review was available.¹³⁷

The majority disposed of the ripeness issue in just a few sentences. In a footnote, the court acknowledged the standard for ripeness, and found that as applied in this case, the analysis required for an assessment of ripeness was functionally coextensive with its “final agency action” analysis.¹³⁸ In turn, this issue was resolved with little additional analysis.¹³⁹

D. Judge Kelly’s Concurring Opinion

While agreeing with the outcome and generally agreeing with the majority’s opinion, Judge Kelly displayed that she had some misgivings about the doctrinal basis for the majority’s conclusion.¹⁴⁰ In her concurring opinion, Judge Kelly wrote that like the majority, she could not countenance the position in which disallowing immediate judicial review would place the plaintiffs, finding that none of the district court’s proffered “adequate remed[ies]” were truly adequate as applied to Hawkes Co. and the other plaintiffs.¹⁴¹

Like the district court and majority, Judge Kelly saw the critical issue of the case to be the resolution of the second prong of the *Bennett* test—whether the revised JD at issue in the case was an order by which rights and obligations of the parties were determined or from which legal consequences would flow.¹⁴² This, Judge Kelly reasoned, made the ultimate decision of whether the revised JD constituted a “final agency action” a “close question,” and in explaining her reasoning, she acknowledged as valid the rationale advanced by the district

135. *Id.* at 1001–02.

136. *Id.* at 1002.

137. *Id.*

138. *Id.* at 1002 n.2.

139. *Id.* at 1002.

140. *Id.* at 1002–03 (Kelly, J., concurring). In particular, Judge Kelly expressed concern that unlike *Sackett v. EPA*, the potential for increased civil penalties resulting from disregarding a jurisdictional determination were more “speculative” than those present in *Hawkes Co.* *Id.* at 1003.

141. *Id.*

142. *Id.* at 1002–03.

court, while in some regards exposing the weaknesses of the majority's reasoning.¹⁴³

Specifically, Judge Kelly noted the heavy reliance that the majority placed on the practical outcome that would befall the plaintiffs *in this case*, implying that this reliance may lead to short-sightedness with regard to the legal precedent established by the majority.¹⁴⁴ In the end, however, practical impacts won the day: "In my view, the Court in *Sackett*," Judge Kelly wrote, "was concerned with just how difficult and confusing it can be for a landowner to predict whether or not his or her land falls within CWA jurisdiction This jurisdictional determination was precisely what the Court deemed reviewable in *Sackett*."¹⁴⁵

IV. ANALYSIS

A. Supreme Court Review of *Hawkes Co.*

As previously mentioned, the Army Corps filed a petition for certiorari¹⁴⁶ in September 2015 with the Supreme Court, seeking review of the Eighth Circuit's decision. In December 2015, the Supreme Court granted the Government's petition for certiorari.¹⁴⁷ The Supreme Court later affirmed the decision of the Eighth Circuit, relying on much the same logic as the Eighth Circuit.¹⁴⁸ This piece focuses on the Eighth Circuit's initial decision, which this Note argues correctly opened the door to expanded judicial review in these cases.

It is clear that the Supreme Court was justified in granting certiorari in this case. Specifically, the existence of a substantial and important federal question, an irreconcilable split of authority among three of the federal circuit courts, and a potential misapplication of

143. *Id.* ("However, I question how much weight should be given to the futility of the permit application for an individual applicant, or the time and cost spent applying, in determining whether or not the JD constitutes a final agency action. . . . I agree with the other courts that have considered this issue that any penalties resulting from a JD are far more 'speculative' than those threatened in *Sackett*.").

144. *Id.*

145. *Id.*

146. *See* Petition for Writ of Certiorari, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 615 (U.S. Sept. 8, 2015) (No. 15-290), 2015 WL 5265284. The Supreme Court today grants certiorari on only about one percent of the petitions for review it receives. Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 14 (2011).

147. *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994 (8th Cir. 2015), *cert. granted*, 84 U.S.L.W. 3119 (U.S. Dec. 11, 2015) (No. 15-290).

148. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016). Tracking the Eighth Circuit, the Court held that the revised JD was final agency action, *id.* at 1813-14, and that the alternatives to judicial review available to *Hawkes Co.* were inadequate. *Id.* at 1815.

the Court's prior holding in *Sackett* support authoritative resolution of this issue—and not a 4–4 split leaving the circuit split unresolved.

As discussed previously, at least three federal circuit courts have now ruled on the narrow question of whether a pre-enforcement action (i.e., the final approved jurisdictional determination) is final agency action for which there is no adequate remedy in court.¹⁴⁹ Importantly, two of these courts (the Eighth and Fifth Circuits) had the benefit of the Court's prior decision in *Sackett*, and still reached opposite conclusions.¹⁵⁰ The Ninth Circuit, reviewing this same question in its *Fairbanks North Star Borough* decision, sided with the government and held that an approved jurisdictional determination issued by the Army Corps was not a reviewable agency action.¹⁵¹

Resolution of conflicts amongst the federal circuit courts of appeals and state courts concerning the meaning of federal law remains the “principal purpose” of the Court's certiorari jurisdiction.¹⁵² Even though Congress can resolve a split of authority resulting from competing interpretations of a statute like section 704, the Court has said that the task of resolving a conflict is “initially and primarily” within its purview.¹⁵³

The government's petition for certiorari¹⁵⁴ in this case was also enhanced because of the substantial and important federal question advanced by the *Hawkes Co.* case. While the Court rarely offers rationale for its certiorari decisions,¹⁵⁵ cases which raise questions relating to the administration of federal law and the construction of federal statutes rather routinely lead to grants of certiorari,¹⁵⁶ as one

149. With the Eighth Circuit's decision in the *Hawkes Co.* case, the Eighth, Fifth, and Ninth Circuits have decided this question in previous cases.

150. The Fifth Circuit in *Belle Co.* found that the second prong of the *Bennett* test was not satisfied. See *Belle Co. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 393–94 (5th Cir. 2014).

151. See *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 593–96 (9th Cir. 2008).

152. *Braxton v. United States*, 500 U.S. 344, 347 (1991) (mentioning SUP. CT. R. 10.1). Indeed, Justice White publicly advanced his view that the Supreme Court should resolve as many circuit splits as possible. Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1242 (2012). Justice White voted to grant plenary review an average of 215.6 times each Term between 1986 and 1992. *Id.* at 1241 n.92.

153. *Braxton*, 500 U.S. at 348.

154. See Petition for Writ of Certiorari, *supra* note 146.

155. See Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1248 (1979) (“The Court then grants or denies the petition for certiorari, almost always without an opinion for the Court. . . . The Supreme Court has always been reticent about the process by which it decides whether to grant the petition for certiorari.”).

156. See, e.g., *Donaldson v. United States*, 400 U.S. 517, 522 (1971) (“Certiorari was granted . . . because the case appeared to raise important questions relating to the administration and enforcement of the revenue laws, and because the courts

would expect. Resolution of the narrow question of finality presented in *Hawkes Co.* has the potential to bring the confines of “final agency action” under Section 704 into greater focus. Further, the interest of amici curiae¹⁵⁷ in this case at the Court of Appeals level indicate the national importance and significance of the Court’s resolution of this matter.

Finally, the potential misapplication of the Supreme Court’s prior holding in *Sackett* provides strong support for authoritative resolution of this issue.¹⁵⁸ As noted previously, the plaintiffs in *Hawkes Co.* maintained, and the Eighth Circuit agreed, that the *Sackett* holding controlled the outcome of *Hawkes Co.*¹⁵⁹ While the *Belle* court distinguished *Sackett* by contrasting the compliance order at issue in that case with the final jurisdictional determination in *Belle*, it seems likely that five justices from the unanimous opinion in *Sackett* may see fit to resolve the conflict and further clarify their holding in *Sackett*. In particular, Justice Alito delivered a strong critique of the government’s position in *Sackett*, reasoning in his concurrence that the government’s view would subjugate private property rights to EPA bureaucrats.¹⁶⁰

B. Revisiting *Hawkes Co.* in the Supreme Court

Hawkes Co. presented the Court with an administrative question with important impacts for property owners, and for various reasons, this Note takes the position that the Court correctly affirmed the Eighth Circuit’s decision. Specifically, this Note argues that (1) *Sackett*’s holding is broad enough to encompass the issues presented by *Hawkes Co.*; (2) Supreme Court precedents construing Section 704 have advanced the pragmatic approach to finality employed by the Eighth Circuit in *Hawkes Co.*; and (3) the legislative history of the APA reflects Congressional intent to create a presumption of judicial reviewability.

of appeals have differed in their reading . . .”), *superseded by statute on other grounds*, 26 U.S.C. § 7609 (2012); *United States v. Muniz*, 374 U.S. 150, 151 (1963) (“Because the decision below involves an important question in the construction of the Federal Tort Claims Act and because two Courts of Appeals had previously reached a contrary result, we granted certiorari.”).

157. Before the Eighth Circuit, the American Farm Bureau Federation, American Petroleum Institute, Foundation for Environmental and Economic Progress, National Association of Home Builders, National Mining Association, and Utility Water Group submitted a joint brief in support of the plaintiffs-appellants, *Hawkes Co.* Brief of Amici Curiae, *supra* note 76.
158. See SUP. CT. R. 10(c) (noting that certiorari may be justified where a “United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions” of the Supreme Court).
159. See *Hawkes Co. v. U.S. Army Corps of Eng’rs*, 782 F.3d 994, 1002 (8th Cir. 2015), *aff’d sub nom.* *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016).
160. *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring).

1. Sackett Controls

First, the Court's prior ruling in *Sackett* is likely broad enough to encompass the issues presented by *Hawkes Co.*, because, as the Eighth Circuit found, the same factors which led the Court to find that the EPA's compliance order was subject to judicial review in *Sackett* are also present in *Hawkes Co.* The plaintiffs in *Hawkes Co.* presented several compelling arguments that *Sackett* resolves the finality question, since in its view, the jurisdictional determination at issue in *Hawkes Co.* is functionally indistinguishable from the compliance order in *Sackett*.¹⁶¹

a. Applying the First Prong of the Bennett Test

In order for the revised jurisdictional determination at issue in *Hawkes Co.* to be a "final agency action," under section 704, plaintiffs must have shown that the action "mark[s] the 'consummation' of the agency's decisionmaking process."¹⁶² While the Corps takes pains to advance the argument that the jurisdictional determination does not satisfy this prong, a number of courts (including the *Hawkes Co.* trial court) applying the *Bennett* test of finality to jurisdictional determinations have concluded that the jurisdictional determination does in fact mark the consummation of agency action.¹⁶³

Specifically, the Corps argues that the jurisdictional determination is "only the beginning of the administrative process, not the end," and that the jurisdictional determination is an informational tool designed to help plaintiffs "navigate potential permitting issues."¹⁶⁴ As plaintiffs in *Hawkes Co.* correctly observe, the *Sackett* court focused on the lack of additional formal agency review mechanisms for the compliance order.¹⁶⁵ The Eighth Circuit agreed that the revised jurisdictional determination, deemed "final" by the Army Corps itself, represented the consummation of an agency decision making process.¹⁶⁶

It is this focus on the availability of further formal agency review which guided the Supreme Court's analysis of this prong of the test in *Sackett*, and which applies with equal force to this case. The Corps itself has informed the *Hawkes Co.* plaintiffs that they have exhausted

161. See generally Appellant's Opening Brief, *supra* note 76.

162. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

163. See *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 963 F. Supp. 2d 868, 873 (D. Minn. 2013), *rev'd*, 782 F.3d 994 (8th Cir. 2015), *aff'd sub nom.* U.S. Army Corps of Eng'rs v. *Hawkes Co.*, 136 S. Ct. 1807 (2016); *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 591 (9th Cir. 2008).

164. See Brief for Defendant-Appellee U.S. Army Corps of Eng'rs at 45, *Hawkes Co.*, 782 F.3d 994 (No. 13-3067), 2013 WL 6823950 [hereinafter Brief for Appellee].

165. See Appellant's Opening Brief, *supra* note 76, at 11.

166. *Hawkes Co.*, 782 F.3d at 999.

their administrative appeals with regard to the jurisdictional determination. The government's arguments, with their focus on the early-stage nature of the jurisdictional determination in the entire CWA permitting process¹⁶⁷ miss the salient point: as to the threshold determination of Corps' jurisdiction under the CWA, the agency's revised jurisdictional determination represents the consummation of its decision-making process *on that issue*. As Justice Scalia wrote in *Sackett*, "[t]he mere possibility that an agency might reconsider . . . does not suffice to make an otherwise final agency action nonfinal."¹⁶⁸ It is untenable to imagine that the Army Corps would go through the effort of an initial administrative appeal (which the *Hawkes Co.* plaintiffs availed themselves of) and label a determination as "final," simply to later consider the product of such efforts preliminary or interlocutory in nature.¹⁶⁹ Thus, *Sackett* supports the holding of courts which had previously found that jurisdictional determinations satisfy the first-prong of the *Bennett* test.

b. Applying the Second Prong of the Bennett Test

The second prong of the *Bennett* test, and the one on which the Eighth Circuit focused the bulk of its analysis, asks whether the agency action in question is one by which "legal consequences will flow" *or* by which "rights or obligations have been determined."¹⁷⁰ As a preliminary matter, it is worth highlighting a key feature of this prong of the *Bennett* test; a party must show that legal consequences will flow from the agency action *or* that the agency action is one which determines rights or obligations. Thus, it seems that either condition is sufficient to satisfy this portion of the *Bennett* test.

The Government vigorously contends, and the trial court agreed, that the distinct legal obligations created by the compliance order at issue in *Sackett* distinguished that case from *Hawkes Co.*¹⁷¹ This view, rejected by the Eighth Circuit,¹⁷² asserts that because the compliance order required the landowners to take affirmative action to

167. Brief for Appellee, *supra* note 164, at 45–46.

168. *Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012).

169. *See Hawkes Co.*, 782 F.3d at 997–98. The Army Corps first provided the *Hawkes Co.* plaintiffs with a preliminary jurisdictional determination (JD), then a "draft" JD, and then an "Approved JD." *Id.* at 998. The Army Corps later revised its findings in a revised JD, and told the appellants that this was the "final Corps permit decision." *Id.*

170. *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

171. *See Hawkes Co. v. U.S. Army Corps of Eng'rs*, 963 F. Supp. 2d 868, 874–75 (D. Minn. 2013), *rev'd*, 782 F.3d 994 (8th Cir. 2015), *aff'd sub nom.* *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016).

172. *See Hawkes Co.*, 782 F.3d at 1000 ("By contrast, the district court reasoned, appellants 'face no such obligations or changes in their rights as a result of their jurisdictional determination.'").

restore the property or face penalties, it was different from a jurisdictional determination that require plaintiffs to continue the permitting process to seek review or risk enforcement action.¹⁷³

However, a close reading of *Sackett* reveals that this contrast may be nothing more than a distinction without a difference. As the Eighth Circuit observed, the Corps may simply exaggerate the distinction between orders requiring affirmative action and those prohibiting action.¹⁷⁴ While *Sackett* imposes legal consequences insofar as the landowners in that case face penalties for any failure to comply with the Government's order, if the plaintiffs in *Hawkes Co.* plan to go forward with their plan to mine peat on their property, they must subject themselves to a permitting process or run the risk of facing the very same penalties as the parties in *Sackett*. While it is true that the Supreme Court has said that requiring participation in an administrative process is not a legal consequence,¹⁷⁵ cases evincing this view are factually dissimilar from the facts of this case, where the imposition of a permitting requirement could cost the *Hawkes Co.* plaintiffs hundreds of thousands and months of delays.¹⁷⁶ As a practical matter, the permitting requirement does not require mere participation in an adjudication, but rather the financing of expensive and time consuming environmental reviews which, based on statements of local Corps employees,¹⁷⁷ may prove futile in actually netting *Hawkes Co.* and its affiliates the permit they desire.

Further, as the Eighth Circuit acknowledged, disregarding the jurisdictional determination has serious consequences for the property owners, including risks of criminal sanctions resulting from a knowing

173. See Brief for Appellee, *supra* note 164, at 23–29 (alteration in original) (“The jurisdictional determination does not command *Hawkes* to take any action, and it does not prohibit *Hawkes* from taking any action. . . . The jurisdictional determination ‘does not itself command [the property owner] to do or forbear from anything’”).

174. See *Hawkes Co.*, 782 F.3d at 1000 (“In our view, this analysis seriously understates the impact of the regulatory action at issue by exaggerating the distinction between an agency order that compels affirmative action, and an order that prohibits a party from taking otherwise lawful action.”).

175. See Brief for Appellee, *supra* note 164, at 26 (citing *FTC v. Standard Oil Co.*, 449 U.S. 232, 239–43 (1980)).

176. See *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (“The average applicant for an individual permit spends 788 days and \$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915—not counting costs of mitigation or design changes.”).

177. According to the plaintiffs’ amended complaint, an Army Corps representative told *Hawkes Co.* management that a permit would take years and be very costly. On another occasion, an Army Corps representative allegedly told a *Hawkes Co.* employee that “he should start looking for another job,” implying that the proposed peat mining site would not be permitted by EPA and the Army Corps. *Hawkes Co.*, 782 F.3d at 998.

violation of the CWA.¹⁷⁸ The Government argued in its Eighth Circuit brief that it is the CWA itself which creates these penalties, not the jurisdictional determination.¹⁷⁹

This argument does little to refute the core premise of the landowners. They argue that because the jurisdictional determination puts the landowner on notice of the Corps' position with regard to its jurisdiction, the parties are forced into a permitting process required by a statute which they maintain does not apply to their property.¹⁸⁰ As a consequence, just as the compliance order in *Sackett* was found to determine the parties' rights and obligations, the jurisdictional determination can be said to determine rights and obligations of the property owner by restricting the landowners' free use of their property until a final resolution is made.

c. *Sackett Contemplates Jurisdictional Determinations*

The argument which is perhaps most persuasive in showing that *Sackett* controls the outcome of *Hawkes* is language in both the unanimous opinion of the court and concurring opinions¹⁸¹ which indicates that the Justices understood their decision would not only open the door to judicial review in cases involving compliance orders, but also to those cases involving jurisdictional determinations, the question explicitly addressed in *Hawkes Co.*

As a matter of necessity, the compliance order in *Sackett* itself contains a jurisdictional determination.¹⁸² Such a conclusion is only logical; in order for the EPA to issue a compliance order, it must necessarily have thought the property in question was subject to its jurisdiction. The question addressed in *Sackett* was whether the Sacketts could challenge the jurisdictional determination upon receiving the compliance order. As the majority wrote, there is little reason to think that Congress intended to authorize the “strong-arming of regulated parties into ‘voluntary compliance’ without the opportunity for judicial review—even judicial review of the question [of] whether the regulated party is within the EPA’s jurisdiction.”¹⁸³ Justice Ginsburg clarified in her concurrence that she did not read the majority opinion to authorize the Sacketts to challenge the “terms and condi-

178. *Id.* at 1001.

179. See Brief for Appellee, *supra* note 164, at 23–26.

180. See Appellant's Opening Brief, *supra* note 76, at 17.

181. In *Sackett v. EPA*, 132 S. Ct. 1367 (2012), Justice Scalia wrote for a unanimous court. Justice Ginsburg and Justice Alito each wrote separate concurring opinions. *Id.* at 1374–76.

182. See *id.* at 1371 (“The Sacketts, who do not believe that their property is subject to the [Clean Water] Act, asked the EPA for a hearing, but that request was denied. They then brought this action in the United States District Court for the District of Idaho . . .”).

183. *Id.* at 1374.

tions of the compliance order,” at the pre-enforcement stage, but rather only the “EPA’s *authority to regulate their land*.”¹⁸⁴ If review of the compliance order’s terms was not in play, then what is? The answer is almost certainly the Corps’ jurisdiction in the first place.

Buttressing this claim, Justice Alito used the phrase “jurisdictional determination” explicitly, writing that the decision would afford property owners the right “to challenge the EPA’s jurisdictional determination” under the APA.¹⁸⁵ Taken together, these statements provide ample support for the Eighth Circuit’s decision to rely on *Sackett* in resolving the issues presented by *Hawkes Co.*

2. *The Supreme Court’s Finality Jurisprudence Has Always Embraced a Pragmatic Approach*

Both *Sackett* and earlier Supreme Court cases addressing finality of agency action have employed the same pragmatic approach to the issue of finality advanced by the Eighth Circuit. As previously discussed in section D of Part III, Judge Kelly of the Eighth Circuit Court of Appeals indicated her concern with resting so much of the court’s judgment on practical impacts that a contrary holding would have had on the landowners in that case.¹⁸⁶ Specifically, Judge Kelly noted that the Eighth Circuit resolved the close question of whether or not the agency action at issue was one from which “legal consequences flow” or by which the parties’ “rights or obligations” were fixed by looking extensively at the implications of the court’s decision on this case, openly wondering if the analysis employed by the majority gave too much weight to the “futility of the permit application for an individual applicant, or the time and cost spent applying”¹⁸⁷ While this represents a valid concern, especially since the decision rendered in this case has the potential to impact finality decisions made outside of the CWA regulatory scheme, the Supreme Court’s prior jurisprudence indicates that the Court has long taken a pragmatic approach to determining agency finality issues, including looking at the impacts of its finality decisions on the administrative process and litigants.¹⁸⁸

Before the Supreme Court synthesized its test of finality in *Bennett*, its decisions routinely evidenced a pragmatic view of finality. For example, in an early case, *Frozen Food Express v. United States*,¹⁸⁹ a federal agency determined that a commodity shipped by the plaintiff,

184. *Id.* at 1374–75 (Ginsburg, J., concurring) (emphasis added).

185. *Id.* at 1375 (Alito, J., concurring).

186. *Hawkes Co. v. U.S. Army Corps of Eng’rs*, 782 F.3d 994, 1002–03 (8th Cir. 2015) (Kelly, J., concurring), *aff’d sub nom.* *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016).

187. *Id.* at 1003.

188. *See, e.g.*, *Bell v. New Jersey*, 461 U.S. 773, 779 (1983).

189. 351 U.S. 40 (1956).

a motor carrier, was not exempt from regulation under the Interstate Commerce Act as agricultural commodity, and the motor carrier sued, seeking judicial review of this determination.¹⁹⁰ The Court found that the determination was subject to judicial review, specifically noting the “immediate and practical impact [of the determination] on carriers who are transporting the commodities.”¹⁹¹

*Abbott Laboratories v. Gardner*¹⁹² involved thirty-seven pharmaceutical companies who brought action to challenge mandatory labeling regulations promulgated under the Federal Food, Drug and Cosmetic Act.¹⁹³ The Court found that the regulations were final for purposes of Section 704.¹⁹⁴ Citing another early finality decision (one which predates the APA), *Columbia Broadcasting System v. United States*,¹⁹⁵ the Court found that the regulations were reviewable even though the promulgating agency had yet to take an enforcement action.¹⁹⁶ While it's perhaps more obvious that final rules are final agency action because of the distinct obligation those rules create, the pre-enforcement determination at issue in *Hawkes Co.* is comparable insofar as it acts as more than merely guidance or advice from the agency—it informs landowners of the Corps' position with respect to jurisdiction over the property and potentially opens the door to knowing violations of the Clean Water Act.

In *Bell v. New Jersey*,¹⁹⁷ the Court held that a State could seek judicial review of a Department of Education decision finding that the State misused federal funds. The States sought judicial review under provisions of the organic statutes at issue, the Elementary and Secondary Education Act and General Education Provisions Act, both of which the Court construed to required that agency action be “final” for the action to be reviewable, like APA Section 704.¹⁹⁸ Justice O'Connor, writing for the majority, explicitly noted that the Supreme Court's cases have “interpreted pragmatically” the requirement of administrative finality, with emphasis on whether judicial review at the relevant time would “disrupt the administrative process.”¹⁹⁹ Further, the *Bennett* case, which itself prescribes the two-part test used by the courts to resolve finality issues, takes a similar approach to finality of

190. *Id.* at 41–42.

191. *Id.* at 43–44.

192. 387 U.S. 136 (1967), *abrogated on other grounds* by *Califano v. Sanders*, 430 U.S. 99 (1977).

193. *Id.* at 137–38.

194. *Id.* at 149.

195. 316 U.S. 407 (1942).

196. *Id.* at 425.

197. 461 U.S. 773 (1983).

198. *See id.* at 777–78.

199. *Id.* at 779 (citing *FTC v. Standard Oil Co.*, 449 U.S. 232, 239 (1980); *Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

agency action. The Court found that the challenged agency action was final, in part, because the action “alter[ed] the legal regime” to which the litigants were subject.²⁰⁰

Tellingly, several of these cases were appropriately cited and discussed in the Eighth Circuit’s opinion.²⁰¹ Under the facts of *Hawkes Co.*, the agency’s decision disallowing judicial review in the *Hawkes Co.* case would have the practical effect of forcing *Hawkes Co.* to choose between two equally unappetizing options: proceed through the (perhaps entirely unnecessary) permitting process, at a substantial cost and delay, or go forward with the project, risking civil and criminal liability for violations of the CWA.²⁰² The negative and substantial effects of disallowing immediate judicial review are precisely the kinds of pragmatic considerations that have long led the Supreme Court to grant judicial review.

3. *Allowing Judicial Review is Consistent with the Legislative History of the APA*

Finally, the Eighth Circuit’s holding that the revised jurisdictional determination in *Hawkes Co.* is subject to immediate judicial review is consistent with Congress’s intent to make judicial review widely available to litigants through the APA. Modernly, it is well understood that agency actions are subject to a presumption of reviewability, and at least one plausible explanation for this is that the APA itself, through its judicial review provisions, codified a presumption of judicial reviewability.²⁰³

Perhaps the most powerful evidence in favor of a presumption of judicial reviewability is found in the legislative history of the APA. The history reflects a view that statutes “very rarely” withhold judicial review, since Congress itself has an interest in ensuring that its statutes are “judicially confined to the scope of authority granted or to the objectives specified.”²⁰⁴ Further, the legislative history rejects the “fundamental inconsistency” in forcing persons to continually exhaust administrative remedies.²⁰⁵ Both provisions support the assertion that Congress intended judicial review to be widely available, and that

200. *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

201. *See Hawkes Co. v. U.S. Army Corps of Eng’rs*, 782 F.3d 994, 1000–01 (8th Cir. 2015) (Kelly, J., concurring), *aff’d sub nom.* *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016).

202. *See id.* at 1001.

203. *See* Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1289–90, 1303 (2014). In his article, Bagley quibbles with this notion, however, arguing that the APA does not confer such a presumption. *Id.* at 1304–05.

204. H.R. REP. NO. 79-1980, at 275 (1946).

205. *Id.* at 277.

a presumption in favor of judicial review should operate to favor landowners in close cases like *Hawkes Co.*

V. CONCLUSION

Just as they were at the time of the CWA's enactment in 1972, water quality issues remain a national issue of foremost importance, with implications that affect every American citizen. More than forty years after its passage, the CWA can take credit for significant reductions in surface water pollution and wetlands losses. However, long-standing statutory uncertainty surrounding the jurisdictional reach of the CWA has led to conflict between landowners and the federal agencies responsible for protecting our nation's waters. While rulemaking may ultimately inject more certainty into the jurisdictional struggles, it is just as likely that landowners will continue to have colorable challenges to assertion of jurisdiction over their property under the CWA.

Before the Eighth Circuit ruled in *Hawkes Co. v. Army Corps of Engineers*, property owners receiving an adverse jurisdictional determination were faced with two unappetizing options. They could seek a permit under the CWA, at significant cost and delay, or commence possibly prohibited activities and face potential criminal and civil liability for violating the CWA. The Eighth Circuit's holding correctly applied the Supreme Court's 2012 decision in *Sackett v. EPA*, a case which addressed a clearly analogous set of facts.

Despite the modest relief that *Hawkes Co.* provided to landowners in Eighth Circuit, it also created a split of authority between the federal circuits on a question of national importance, making resolution of this issue important. The Supreme Court correctly affirmed the judgment of the Eighth Circuit, because the case is properly controlled by the Court's prior decision in *Sackett*. Further, the Court should affirm the Eighth Circuit because the Eighth Circuit properly took a pragmatic view of finality, in accordance with long-standing Supreme Court precedent. Finally, the legislative history of the APA supports a presumption of judicial reviewability, which favors allowing judicial review, particularly in a close case.

While the Eighth Circuit's decision in *Hawkes* may have "muddied the water" in the short run by creating a clear split of authority with two other federal circuits, it is possible that we will come to remember *Hawkes Co.* as the decision that cleared the way for more abundantly available judicial review of agency adjudications, checking federal regulatory agencies who overstep their authority under the law.