MAKE MY DAY! *DIRTY HARRY* AND FINAL AGENCY ACTION

BY
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Historically, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) have attempted to obtain compliance with their view of their jurisdiction under the Clean Water Act by issuing compliance orders, cease-and-desist orders, or jurisdictional determinations to landowners. When landowners disagree with the government's view, they have attempted to obtain judicial review of those agency actions, but the agencies have maintained that no review is available because the action is not "final agency action" under the Administrative Procedure Act (APA). In Sackett v. U.S. Environmental Protection Agency *the Supreme Court unanimously rejected EPA's attempt to avoid review of a compliance order, and currently before the Supreme Court is* U.S. Army Corps of Engineers v. Hawkes Co. *in which the Corps is making the same argument regarding its jurisdictional determinations. This Article will explain how and why the Supreme Court should similarly reject the Corps' argument, but it will also suggest that this case presents a perfect opportunity for the Court to clarify what is necessary to constitute final agency action subject to judicial review under the APA more generally.*

I. INTRODUCTION

In 1971, Clint Eastwood starred in the movie *Dirty Harry*, in which he plays a policeman, Harry Callahan.[1] The movie begins and ends with Harry, gun in hand, facing a wounded gunman who has a gun within reach after an extended gun battle. It is not clear whether Harry still has any bullets left in

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1 DIRTY HARRY (Warner Bros. 1971).

his gun, so Harry tells the gunman, "You've got to ask yourself one question: 'Do I feel lucky?'"[2] In the first instance, the gunman surrenders only to find that Harry was indeed out of bullets; in the second instance, the gunman goes for his gun, and Harry shoots him dead. In a later movie, in a similar situation Harry simply says, "Go ahead, make my day."[3] The gunman surrenders.

What does this have to do with "final agency action"? When the Environmental Protection Agency (EPA) issued a compliance order to the Sacketts claiming that they were violating the Clean Water Act (CWA)[4] by placing fill on their property without a permit,[5] it was like Harry pointing the gun at the bad guy. If the Sacketts felt lucky, they could ignore the order and await EPA's enforcement of the order. Then, if the Sacketts were right, and they were not violating the CWA, they would be free. But if they were wrong, and EPA was correct, they would be subject to possible criminal penalties or significant civil fines. Trying to avoid this dilemma, the Sacketts sought judicial review of the compliance order. The government, however, argued among other things that the order was not final agency action under the Administrative Procedure Act (APA)[6] and therefore was not reviewable.[7] The Supreme Court unanimously rejected that argument, finding the order to be final agency action, in effect denying EPA the ability to extort compliance with its orders.[8]

Currently pending before the Supreme Court is another case, *U.S. Army Corps of Engineers v. Hawkes Co.* (*Hawkes Co.*).[9] In that case, the U.S. Army Corps of Engineers (Corps) had issued a formal jurisdictional determination (JD) that certain property was wetlands subject to its jurisdiction.[10] The property owners disagreed, but, like the property owners in *Sackett*, they faced a dilemma. If they ignored that determination, awaited enforcement against their development of their property, and were correct, they would be free, but if the Corps was correct, they would be subject to potential criminal penalties or significant civil fines.[11] So Hawkes sought judicial review, but the government, as it had in *Sackett*, argues that the Corps' JD is not final agency action under the APA and therefore not judicially reviewable.[12] The Eighth Circuit in *Hawkes Co.*, contrary to decisions in both the Fifth and Ninth Circuits, held the JD to be final agency action subject to review.[13] The Supreme Court will resolve this split in *Hawkes Co.* This

2 *Id.*

3 SUDDEN IMPACT (Warner Bros. 1983).

4 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012).

5 Sackett v. U.S. Envtl. Prot. Agency, 132 S. Ct. 1367, 1369 (2012).

6 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

7 *Sackett*, 132 S. Ct. at 1373 (discussing the EPA argument that a compliance order is a deliberative step rather than a final agency action); 5 U.S.C. § 704.

8 *Sackett*, 132 S. Ct. at 1374.

9 782 F.3d 994 (8th Cir. 2015), *cert. granted*, 136 S. Ct. 615 (2015) (mem.).

10 *See id.* at 996.

11 *Id.* at 997.

12 *Id.* at 999.

13 *Id.* at 1002.

Article will explain how and why the Supreme Court should affirm the *Hawkes Co.* decision, but it will suggest that this case presents a perfect opportunity for the Court to clarify what is necessary to constitute final agency action subject to judicial review under the APA more generally.

Part II of this Article describes how the CWA regulates the discharge of fill into the "waters of the United States" and how the Supreme Court has interpreted the extent of the jurisdiction of the CWA. It then explains the process by which the Corps issues its JDs. Part III describes how the Supreme Court has interpreted "final agency action" under the APA and how the circuits have applied that doctrine to challenges of JDs. Part IV presents how the Court is likely to resolve the split in the circuits over the reviewability of JDs. Part V concludes the Article.

II. THE CLEAN WATER ACT AND WATERS OF THE UNITED STATES

Section 301 of the CWA generally prohibits the discharge of any pollutant into "navigable waters" without a permit.[14] The term "navigable waters" is unhelpfully defined as "the waters of the United States, including the territorial seas."[15] If the pollutant is dredged or fill material, the permit must be issued by the Corps under section 404 of the Act.[16] As Justice Scalia wrote for the Court in *Rapanos v. United States*,[17] "[t]he burden of federal regulation on those who would deposit fill material in locations denominated 'waters of the United States' is not trivial."[18] Indeed, he quoted statistics to the effect that the average applicant for an individual 404 permit[19] spends 788 days and $271,596 to complete the process, while an average applicant for a nationwide permit spends 313 days and $28,915.[20] Moreover, if anyone discharges dredged or fill material into waters of the United States without a permit, they face possible civil and criminal liability, as well as requirements to undo or mitigate the harm they have done.[21] In light of the costs associated with obtaining a permit, if a permit can be obtained at all, and the penalties involved if one acts without a permit where one was required, it is critical for anyone contemplating development of an undeveloped site to determine whether the site contains waters of the United States.

14 33 U.S.C. § 1311(a) (2012).

15 *Id.* § 1362(7).

16 *Id.* § 1344(a).

17 547 U.S. 715 (2006) (plurality opinion).

18 *Id.* at 721.

19 A 404 Permit is a permit issued by the Corps of Engineers pursuant to section 404 of the CWA. 33 U.S.C. § 1344 (2012).

20 *Rapanos*, 547 U.S. at 721 (plurality opinion).

21 33 U.S.C. §§ 1251, 1319 (2012); U.S. Envtl. Prot. Agency, *CWA Section 404 Enforcement Overview*, http://www.epa.gov/cwa-404/cwa-section-404-enforcement-overview (last visited Apr. 9, 2016) ("Sections 309(b) and (d) and 404(s) give EPA and the Corps the authority to take civil judicial enforcement actions, seeking restoration and other types of injunctive relief, as well as civil penalties.").

What constitutes waters of the United States, however, is often unclear, especially when it comes to wetlands. Over the years, the Corps and EPA have issued regulatory definitions of the term.[22] In addition, the Supreme Court has interpreted the term three times. In *United States v. Riverside Bayview Homes, Inc.*,[23] the Court held that waters of the United States could include adjacent wetlands.[24] In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*),[25] however, the Court found that isolated waters or wetlands could not be waters of the United States simply because they were used by migratory fowl.[26] Finally, in *Rapanos v. United States*, the Court in a split decision addressed the extent to which wetlands could be considered wetlands adjacent to traditional navigable waters.[27] Given the split decision, with the plurality opinion and Justice Kennedy's opinion differing as the test to be used to determine what could be included in waters of the United States, EPA and the Corps offered guidance as to when they would exercise jurisdiction under the CWA. Most recently, the Corps and EPA engaged in rulemaking to establish a new and substantially more detailed definition of waters of the United States.[28] That rule is currently stayed by the Sixth Circuit[29] and preliminarily enjoined by the U.S. District Court for the District of North Dakota.[30] Whatever the ultimate outcome of these suits or the validity of the new rule, the problem of determining on the ground what constitutes waters of the United States will remain.

The difficulty in determining what land (or water) falls within the waters of the United States definition has long been recognized by the Executive Branch in general and the Corps in particular. President Clinton, shortly after coming into office, convened an interagency task force to address a number of problems related to the regulation of wetlands under the CWA.[31] The resulting August 1993 Plan, among other things, called upon the Corps to establish an administrative appeals process for persons unhappy with the Corps' JDs over particular lands and waters, as well as with its denials of permits under section 404.[32] In 1995, the Corps proposed

22 *See, e.g.*, 33 C.F.R § 328.3 (2000); 40 C.F.R § 230.3 (2015).

23 474 U.S. 121 (1985).

24 *Id.* at 135.

25 531 U.S. 159 (2001).

26 *Id.* at 171–72.

27 547 U.S. 715 (2006) (plurality opinion).

28 *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) (to be codified at 33 C.F.R. § 328.3).

29 *See In re* Envtl. Prot. Agency, 803 F.3d 804, 808–09 (6th Cir. 2015).

30 *See* North Dakota v. U.S. Envtl. Prot. Agency, No. 3:15–CV–59, 2015 WL 5060744 (D.N.D. Aug. 27, 2015).

31 *See* Proposal To Establish an Administrative Appeal Process for the Regulatory Programs of the Corps of Engineers, 60 Fed. Reg. 37,280, 37,280 (July 19, 1995).

32 *See id.*

such an administrative appeals system,[33] but it was not until 2000 that the Corps finally adopted the rule regarding administrative appeals of JDs.[34]

Under this regulation a landowner or a lease, easement, or option holder may request a District Engineer to issue an "approved Jurisdictional Determination,"[35] or JD, a written Corps determination that either a wetland, a waterbody, or both are subject to the Corps' regulatory jurisdiction. If the recipient is not satisfied with the JD, the recipient may appeal the JD to the appropriate Division Office within sixty days of receiving the JD.[36] The appeal is considered by a Review Officer who was not involved in the original JD.[37] The Review Officer may schedule an informal meeting with the appellant and relevant Corps regulatory personnel.[38] If the Review Officer believes a site visit would help clarify the record, he may conduct such a visit within sixty days of receipt of the appeal.[39] Within ninety days of the appeal the Review Officer reviews the record, and the Division Engineer or his designee renders a final appeal decision, unless the Review Officer undertook a site visit, in which case the final appeal decision is to be rendered within thirty days of the site visit.[40] This final appeal decision is stated to be final agency action under the Corps' regulations.[41] The issue then is whether this final agency action is judicially reviewable.

III. FINAL AGENCY ACTION

The APA provides for judicial review of final agency actions.[42] Although the Corps' regulation describes a final appeal decision regarding a JD to be final agency action, that denomination cannot govern its meaning in the APA. The Supreme Court has from time to time described the necessary requirements for something to be final agency action. In *Abbott Laboratories v. Gardner*[43] the Court said: "The cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way."[44] First, the agency action must be definitive, the conclusion of an agency process, not tentative or informal.[45] Second, "the impact of the [agency action] upon the petitioners [must be] sufficiently direct and immediate as to render the issue appropriate for judicial review at this

33 *See id.*

34 *See* Final Rule Establishing an Administrative Appeal Process for the Regulatory Program of the Corps of Engineers, 65 Fed. Reg. 16,486 (Mar. 28, 2000) (codified at 33 C.F.R. pt. 331).

35 *See* 33 CFR §§ 320.1(a)(6), 331.2 (2015).

36 *Id.* § 331.6(a).

37 *Id.* § 331.3(b).

38 *Id.* § 331.7(d).

39 *See id.* § 331.7(c).

40 *See id.* § 331.8.

41 *See id.* § 320.1(a)(6).

42 *See* 5 U.S.C. § 704 (2012).

43 387 U.S. 136 (1967).

44 *Id.* at 149.

45 *Id.* at 151.

stage," such as having "a direct effect on the day-to-day business" of a person.[46] Twenty-five years later, the Court in *Franklin v. Massachusetts*[47] repeated these statements as to the requirements for finality, summarizing the test as "[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties."[48] In *Bennett v. Spear*,[49] less than five years later and without citation to *Abbott Laboratories*, while repeating the first part of the test,[50] the Court stated the second part of the test in slightly different terms: "second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"[51] While there may be a high degree of overlap between agency actions that have direct and immediate practical effect on persons and those that have legal consequences, there are instances in which agency actions may have direct and immediate practical effects on persons but which do not technically have legal effect, most notably interpretive rules and statements of policy. In *Bennett*, the Court did not indicate any awareness of the difference between these two tests and cited instead to a non-APA case, *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*.[52] That case itself cited two pre-*Abbott Laboratories* cases in which the Court had held that where the agency process had reached a conclusion and that conclusion had legal effects that constituted final agency action.[53] But neither of the cases cited by *Port of Boston Marine Terminal* said that having legal effect was a necessary requirement for final agency action; rather, they said that having that effect was a sufficient condition.[54] This, of course, would not be inconsistent with *Abbott Laboratories* and *Franklin*'s test of direct and immediate effect on a person's day-to-day activities, because the legal effect of the decisions cited in *Port of Boston Marine Terminal*, as well as the decision in *Bennett*, would have had that direct and immediate effect.[55]

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46 *Id.* at 152.

47 505 U.S. 788 (1992).

48 *Id.* at 797.

49 520 U.S. 154 (1997).

50 *See id.* at 177–78 ("First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." (quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948))).

51 *Id.* at 178 (quoting Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970)).

52 *See id.* (citing *Port of Bos. Marine Terminal Ass'n*, 400 U.S. at 71).

53 *Port of Bos. Marine Terminal Ass'n*, 400 U.S. at 71 (citing Interstate Commerce Comm'n v. Atl. Coast Line R. Co. (*Atl. Coast Line R. Co.*), 383 U.S. 576, 602 (1966)); Rochester Tel. Corp. v. United States, 307 U.S. 125, 143 (1939)).

54 *Atl. Coast Line R. Co.*, 383 U.S. at 602 ("Commission orders determining a right or obligation so that legal consequences will flow therefrom are judicially reviewable." (internal quotation marks omitted)); *Rochester Tel. Corp.*, 307 U.S. at 143 ("A judgment rendered will be a final and indisputable basis of action as between the Commission and the defendant.").

55 *Atl. Coast Line R. Co.*, 383 U.S. at 602 (finding the administrative orders at issue had legal consequences and were therefore "unquestionably subject to review"); *Rochester Tel. Corp.*, 307 U.S. at 143 (providing that an administrative order rendering final judgment is reviewable,

The most recent statement by the Court as to finality was in *Sackett v. U.S. Environmental Protection Agency*.[56] In that case, EPA had issued a compliance order to the Sacketts, ordering them to "'restore' their property according to an agency-approved Restoration Work Plan, and [to] give the EPA access to their property and to 'records and documentation related to the conditions at the Site.'"[57] This, the Court said, demonstrated that the order determined rights or obligations. Moreover, legal consequences flowed from the order inasmuch as the order exposed the Sacketts to double penalties if they did not comply with it.[58] Consequently, the Court found the order to be final agency action.[59] The Court, however, did not say that legal obligations or legal consequences *must* be the result of the agency action for it to be final; it merely found that those obligations and consequences did exist and that was sufficient to show final agency action.[60]

Despite the above suggestion that the Supreme Court's statement of the test for finality in *Bennett* did not overrule the test in *Abbott Laboratories* and *Franklin*, but instead merely clarified one way of showing direct and immediate effect, lower courts have generally ignored the test of *Abbott Laboratories* and *Franklin* in favor of a test requiring an agency action to impose legal obligations or have legal consequences in order to be final agency action. Utilizing that test, the circuits have split over its application to judicial review of Corps JDs.

Two circuits have found no final agency action,[61] while one circuit has found final agency action.[62] In each case, the court found that the Corps' JD was the consummation of the agency's decision-making process, satisfying the first prong of *Bennett*'s test for final agency action.[63] Where they differed was on the second prong.

In the first of these cases, *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, which predated *Sackett*, the court said that the JD "does

regardless of whether the order is negative or affirmative); *Bennett*, 520 U.S. at 178 (finding a Biological Opinion to be a final agency actions because it "alter[s] the legal regime to which the action agency is subject, authorizing it to take the endangered species if (but only if) it complies with the prescribed conditions").

56 132 S. Ct. 1367 (2012).

57 *Id.* at 1371.

58 *Id.* at 1372.

59 *Id.* at 1374.

60 *See id.* at 1371–72.

61 *See* Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs, 543 F.3d 586 (9th Cir. 2008) (no final agency action); Belle Co. v. U.S. Army Corps of Eng'rs, 761 F.3d 383 (5th Cir. 2014) (same). Some earlier cases also denied review to challenges to Corps' jurisdiction but under theories expressly overruled in *Sackett*.

62 *See Hawkes Co.*, 782 F.3d 994 (8th Cir. 2015) (approved JD is final agency action). *See also* Baccarat Fremont Developers, LLC v. U.S. Army Corps of Eng'rs, 327 F. Supp. 2d 1121 (N.D. Cal. 2003) ("The Corps' assertion of regulatory jurisdiction over the wetlands is a final agency action subject to review under the APA."), *aff'd*, 425 F.3d 1150 (9th Cir. 2005).

63 *See Belle Co.*, 761 F.3d at 389–90; *Fairbanks*, 543 F.3d at 591–93; *Hawkes Co.*, 782 F.3d at 999.

not itself command Fairbanks to do or forbear from anything."[64] Rather, Fairbanks' obligation is to comply with the CWA:

> If its property contains waters of the United States, then the CWA requires Fairbanks to obtain a Section 404 discharge permit; if its property does not contain those waters, then the CWA does not require Fairbanks to acquire that permit. In either case, Fairbanks' legal obligations arise directly and solely from the CWA, and not from the Corps' issuance of an approved jurisdictional determination.[65]

Moreover, the court suggested that in the event of an enforcement action the JD would not have any legal consequence.[66] Finally, the court, while apparently acknowledging that the JD would have a *practical* effect, asserted that such an effect was insufficient to establish final agency action.[67]

The second case, *Belle Co. v. U.S. Army Corps of Engineers*, began by citing to a pre-APA Supreme Court case, *Rochester Telephone Corp. v. United States*,[68] in which the Court abolished the so-called "negative order doctrine."[69] It is doubtful whether *Rochester* should be cited at all in interpreting final agency action under the APA[70]; the Supreme Court has *never* cited it in explicating the meaning of the term, and if one actually looks at *Rochester* closely, rather than quoting certain passages out of context, one finds that it provides little support for the denial of review of the Corps' JDs.

In the course of the *Rochester* decision, the Court identified a category of cases that had been considered to involve negative orders.[71] One category was: "Where the action sought to be reviewed may have the effect of forbidding or compelling conduct on the part of the person seeking to review it, but only if some further action is taken by the [Federal Communications] Commission."[72] In those cases, "the order sought to be reviewed does not of itself adversely affect complainant but only affects his

64 *Fairbanks*, 543 F.3d at 593.

65 *Id.* at 594.

66 *See id.* at 595 (court would not give "any particular deference" to the JD; effect on amount of civil penalty as evidence of a lack of good faith is not a legal effect, just a practical effect).

67 *See id.* at 596.

68 307 U.S. 125, 130 (1939).

69 Under this doctrine, agency orders denying relief, such as an order refusing to relieve someone from a statutory or regulatory command that forbade or compelled conduct, were not judicially reviewable. *See* BERNARD SCHWARTZ, ADMINISTRATIVE LAW 566 (3d ed. 1991).

70 It must be admitted, however, that the Attorney General's Manual on the APA does cite to *Rochester* as providing an example of judicial construction of final agency action. *See Attorney General's Manual on the Administrative Procedure Act in* WILLIAM FUNK ET AL., FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK 138–39 (4th ed. 2008). The Manual specifically says that the meaning of "final" agency action "may be gleaned from the second and third sentences of section 10(c) [5 U.S.C. § 704]." Both of those sentences relate only to whether an agency action is preliminary, procedural, intermediate, or subject to intra-agency review, not to whether any legal consequences flow from the action.

71 *Rochester*, 307 U.S. at 129–30.

72 *Id.* at 129.

rights adversely on the contingency of future administrative action."[73] The Court said that in those cases judicial review was not available.[74] While the quoted language might appear applicable to the Corps' JDs, the Court provided examples of this category of cases that are clearly distinguishable: "[a] valuation made by the Interstate Commerce Commission [ICC] which has no immediate legal effect although it may be the basis of a subsequent rate order"[75] and "orders of the Interstate Commerce Commission setting a case for hearing despite a challenge to its jurisdiction, or rendering a tentative . . . valuation under the Valuation Act."[76] The second example is clearly nonfinal in the sense that these orders are not the consummation of any agency proceeding; they are indeed the beginning of the process.[77] The first example, a valuation of a carrier's property, while the final determination of the agency after an investigation, is clearly distinguishable from a Corps JD, because it does not have any effect on the conduct of the carrier. The valuation only comes into play in a later proceeding to set the carrier's rates in part based upon the valuation, and the valuation is subject to judicial review of that final agency action.[78] In other words, the valuation does not have any direct and immediate practical effects on the carrier. That is a far cry from a Corps JD that effectively concludes that a person's property cannot be disturbed without a permit from the Corps. Indeed, in *Rochester*, the Court held that judicial review was available in those "instances of statutory regulations which place restrictions upon the free conduct of the complainant[, and to] rid himself of these restrictions the complainant . . . asks the [agency] to place him outside the statute."[79] This is precisely the situation of a person receiving a Corps JD that states his property is subject to the statutory regulation requiring a permit.

The *Belle Co.* court then distinguished *Sackett*, saying, first, that an EPA compliance order imposed legal obligations on the Sacketts, whereas a "JD is a notification of the property's classification as wetlands but does not oblige Belle to do or refrain from doing anything to its property."[80] Belle argued that the JD did have legal consequences. Under Louisiana law, the Corps' determination that the land in question was a wetland subject to the CWA would require a modification to the state permit that Belle had already received.[81] The court, citing several circuit court decisions, held that state legal action resulting from federal action "does not transform [the] nonfinal

73 *Id.* at 130.

74 *Id.*

75 *Id.* at 129.

76 *Id.* at 130.

77 *See, e.g.*, Fed. Trade Comm'n v. Standard Oil Co. of Cal., 449 U.S. 232, 241 (1980) (holding that tentative or threshold determinations are not final agency actions).

78 *See, e.g.*, United States v. L.A. R.R., 273 U.S. 299, 309 (1927) (distinguishing a valuation order, as non-reviewable, from a later proceeding punishing violation of the order, which is reviewable).

79 *Rochester*, 307 U.S. at 132.

80 Belle Co. v. U.S. Army Corps of Eng'rs, 761 F.3d 383, 391 (5th Cir. 2014).

81 *Id.* at 387 (citing LA. ADMIN. CODE tit. 33, § 709(A)(7)–(8) (2009)).

federal-agency action into final action for APA purposes."[82] Second, the court distinguished *Sackett* on the ground that there the issuance of the compliance order potentially exposed the Sacketts to double penalties, whereas "the JD erects no penalty scheme."[83] Belle argued that a factor in setting civil penalties is a person's "good-faith efforts to comply" with the CWA,[84] and a violation of the Act after having been informed by the Corps that the land was subject to the Act's jurisdiction would undermine any claim of a good faith effort to comply.[85] The court said that the extent to which the JD would affect future penalties was speculative, as opposed to in *Sackett* where penalties would automatically accrue on a daily basis after issuance of the compliance order.[86] The court allowed, however, that "the speculative penalties could be a practical effect but not a legal consequence."[87] Third, the court distinguished *Sackett* because there the issuance of a compliance order severely limited the ability of the recipient to obtain a 404 permit, whereas a JD has no effect on the recipient's ability to obtain a permit.[88] Fourth, the court distinguished *Sackett* because a compliance order reflects both the agency's determination that the property involved is a wetland and that the recipient has violated the law by discharging into it without a permit, whereas the issuance of a JD only determines the property is a wetland; it does not make any determination that the recipient has violated the Act or must undertake any action.[89] Finally, in a footnote the Court noted that in order for something to be final agency action reviewable under the APA, there must be no other adequate remedy in a court.[90] In *Sackett*, the only other way the Sacketts could have had judicial review of the compliance order would have been as a defense to an enforcement action, which the Supreme Court said was not an adequate remedy.[91] Here, however, the court said that Belle could apply for a permit and, if it was denied, challenge the denial and jurisdiction in court.[92]

Hawkes Co., the most recent case, held that a JD is a final agency action under the APA.[93] It concluded that the court in *Belle Co.* misapplied *Sackett*.[94] It began by noting that the Supreme Court has on several occasions indicated that the approach to finality should be "pragmatic" and

82 *Id.* at 392 (citing Ocean Cty. Landfill Corp. v. U.S. Envtl. Prot. Agency, 631 F.3d 652, 656 (3d Cir. 2011); Resident Council of Allen Parkway Vill. v. U.S. Dep't of Hous. & Urban Dev., 980 F.2d 1043, 1055–56 (5th Cir. 1993); Vieux Carre Prop. Owners, Residents & Assocs., Inc. v. Brown, 875 F.2d 453, 456 (5th Cir. 1989)).

83 *Id.*

84 33 U.S.C. § 1319(d) (2012).

85 *Belle Co.*, 761 F.3d at 392.

86 *Id.*

87 *Id.*

88 *Id.* at 393.

89 *Id.*

90 *Id.* at 394 n.4.

91 Sackett v. U.S. Envtl. Prot. Agency, 132 S. Ct. 1367, 1372 (2012).

92 *Belle Co.*, 761 F.3d at 394.

93 *Hawkes Co.*, 782 F.3d 994, 1002 (8th Cir. 2015).

94 *Id.* at 996.

"flexible."[95] The *Hawkes Co.* court, as had the earlier courts, found the applicable second step in assessing finality is asking whether the agency action is one from "which rights or obligations have been determined, or from which legal consequences flow."[96] It, however, said that this step does not require the agency action to compel affirmative action.[97] While in *Sackett* that had been the case of the compliance order, "numerous Supreme Court precedents confirm" that this is not the only basis on which to find whether "'rights or obligations have been determined' or that 'legal consequences will flow' from agency action."[98] The court cited four Supreme Court cases, which it believed exhibited different ways to satisfy the second step.[99]

The first case was *Bennett v. Spear*, which involved the issuance of a Biological Opinion by the Fish and Wildlife Service applicable to the Bureau of Reclamation's management of the Klamath Irrigation Project.[100] The court's attempt to use this case to demonstrate its point is opaque. It said:

> [The Biological Opinion] required the Bureau of Reclamation to comply with its conditions and thereby had "direct and appreciable legal consequences." Though not self-executing, the biological opinion was mandatory. Likewise, here, the Revised JD requires appellants either to incur substantial compliance costs (the permitting process), forego [sic] what they assert is lawful use of their property, or risk substantial enforcement penalties.[101]

The second case was *Abbott Laboratories*, which the *Hawkes Co.* court said found final agency action because the regulations the agency had adopted "purport to give an authoritative interpretation of a statutory provision" that puts drug companies in the dilemma of incurring massive compliance costs or risking criminal and civil penalties for distributing misbranded drugs.[102] Of course, in *Abbott Laboratories*, the "authoritative interpretation" was contained in a regulation that explicitly required the drug companies to take certain action.[103] Thus, this was a case of an agency action that compelled affirmative action by those subject to the regulation.

The third case was *Frozen Food Express v. United States*.[104] That case involved a provision of the Interstate Commerce Act that exempted motor carriers from a requirement for a permit if they carried only agricultural commodities.[105] The ICC had issued an order that interpreted this provision,

95 *Id.* at 997 n.1.

96 *Id.* at 999 (quoting Bennett v. Spear, 520 U.S. 154, 177–78 (1996)).

97 *Id.* at 1000.

98 *Id.*

99 *Id.* at 1000–01.

100 *Bennett*, 520 U.S. at 157.

101 *Hawkes Co.*, 782 F.3d at 1000.

102 Abbott Labs. v. Gardner, 387 U.S. 136, 152 (1967).

103 *Id.* at 137–38 (statute was amended to "require manufactures of prescription drugs to print the 'established name' of the drug 'prominently and in type at least half as large as that used thereon for any proprietary name or designation for such drug,' on labels and other printed material" (quoting the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 502 (e)(1)(B) (1962)).

104 351 U.S. 40 (1956).

105 *Id.* at 41.

finding that certain commodities were not subject to this agricultural exemption. A carrier, asserting that their type of commodity was agricultural and therefore should be exempt, challenged this order.[106] The Court held that this was a reviewable order, saying: "The determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact on carriers who are transporting the commodities."[107] This case does indeed have a high degree of similarity to the situation of a person receiving a JD. In both cases the statute requires a permit in certain circumstances. In both cases the agency has determined that certain activities are not exempt from that permit requirement. In both cases the agency has not required any person to do anything or forbidden the person from doing anything. But in both cases a person has been told by the agency that unless he obtains a permit, the person's desired activity is unlawful.

The fourth case was *Columbia Broadcasting System v. United States*.[108] In that case, the Federal Communications Commission (FCC) had adopted a regulation that required the agency to refuse to grant a license to any broadcasting station that entered into certain types of contracts with any broadcasting network.[109] The regulation was challenged by a network, and the Government argued that it was not reviewable, because it was not self-executing, but required a court or administrative proceeding to enforce it.[110] The Court rejected the argument and found the regulation to be reviewable.[111] This pre-APA case presages *Abbott Laboratories*, because the Court held that the regulation had the force of law, clearly subjecting the broadcasting stations to a choice between severing their contracts with networks or losing their licenses. This case seems clearly distinguishable from the Corps' issuance of a JD. That is, there was no question that the FCC's regulation had legal effect from which legal consequences would flow,[112] but that is the central question with regard to JDs.

The court in *Hawkes Co.* went on to address the Corps' argument that a JD is not reviewable final agency action, because only actions "for which there is no other adequate remedy" in a court are reviewable under the APA.[113] According to the Corps, Hawkes had two other adequate remedies in court—either it could mine the peat on its land and challenge the agency's authority if it issues a compliance order or commences a civil enforcement action, or it could apply for a permit and appeal to a court if the permit was denied.[114] The first of these alternatives was effectively precluded by the

106 *Id.* at 40.

107 *Id.* at 43–44.

108 316 U.S. 407 (1942).

109 *Id.* at 407.

110 *Id.* at 418–20.

111 *Id.* at 421.

112 Actually, the FCC maintained that the regulation was merely a policy statement indicating what its general policy would be in future licensing proceedings, but the Court treated the regulation as requiring the FCC to prohibit issuing a license to a station with one of the identified types of contracts. *See id.* at 415–16, 422.

113 *Hawkes Co.*, 782 F.3d 994, 1001 (8th Cir. 2015).

114 *Id.*

Court in *Sackett*, which said that the landowners "cannot initiate that process, and each day they wait for the agency to drop the hammer, they accrue" substantial liabilities.[115] Indeed, the Court's decision in *Abbott Laboratories* effectively eliminated this option as an adequate remedy at law, because there too the challenger could have awaited enforcement of the agency's regulation and defended on the ground that the regulation was unlawful. While both *Sackett* and *Abbott Laboratories* involved agency actions that required specific actions of the challenger, that distinction is not relevant to whether defense to agency enforcement is an adequate remedy at law, because for the government to claim that this is an alternative way of obtaining review, the government must assume that in fact the government will enforce.

The other alternative—seeking a permit and appealing a denial—was likewise rejected in *Sackett*, but there the reasons for rejecting this alternative would not apply to the Hawkes situation.[116] The *Hawkes Co.* court instead rejected the alternative as being "prohibitively expensive and futile."[117] It quoted from *Rapanos* as to the length of time and cost of an average permit, and it cited the assertion from the complaint in *Hawkes Co.* that Corps representatives had allegedly told a Hawkes employee that any permit application would be denied.[118]

One member of the panel concurred in the court's conclusion but differed in her analysis. She believed that the cost and futility of seeking a permit was irrelevant. In her view:

> [T]he Court in *Sackett* 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 the CWA jurisdiction—a threshold determination that puts the administrative process in motion. This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property. This jurisdictional determination was precisely what the Court deemed reviewable in *Sackett*.[119]

She cited Justice Ginsburg's concurrence in *Sackett*, which essentially made this point.[120] She could as well have cited to Justice Alito's concurrence, which in more trenchant terms made the point even stronger.[121]

115 *Id.* (quoting Sackett v. U.S. Envtl. Prot. Agency, 132 S. Ct. 1367, 1372 (2012)).

116 In *Sackett*, the Court noted that it was EPA that issued the compliance order sought to be reviewed, so an appeal of a Corps denial of a permit would not directly relate to the EPA action. *See Sackett*, 132 S. Ct. at 1372. In addition, once a compliance order is issued, the Corps is not even supposed to process a permit request, unless doing so is clearly appropriate. *See* 33 C.F.R. § 326.3(e)(1)(iv) (2015).

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

118 *See id.* (quoting Rapanos v. United States, 547 U.S. 715, 721 (2006) (plurality opinion).

119 *Id.* at 1003 (Kelly, J., concurring) (citing *Sackett*, 132 S. Ct. at 1374–75 (Ginsburg, J., concurring)).

120 *Id.* (citing *Sackett*, 132 S. Ct. at 1374–75 (Ginsburg, J., concurring) (providing that a JD is a definitive agency ruling that may be challenged in federal court)).

IV. *HAWKES CO.* AND THE SUPREME COURT

The Supreme Court granted certiorari in the *Hawkes Co.* case on December 11, 2015, in order to resolve this split in the circuits.[122] The case was argued on March 30, 2016, and will likely be decided by the end of June.[123] The Court will almost certainly decide that JDs are final agency actions subject to judicial review under the APA,[124] as it indeed should.

The first error made by both the *Fairbanks North Star* and *Belle Co.* courts was to read the Supreme Court's cases to require the person challenging agency action to show that the agency action required it to do something or prohibited it from doing something. That was not the case in *Bennett v. Spear*. In *Bennett*, the ranchers were challenging a Biological Opinion (BiOp) issued by the Fish and Wildlife Service.[125] A BiOp is issued to a federal agency whose proposed action may adversely affect a threatened or endangered species.[126] The BiOp expresses the Fish & Wildlife Service's conclusion as to the effect of the agency action on a listed species.[127] If it concludes that the action would "jeopardize the continued existence of any [listed] species . . . or result in the destruction or adverse modification of [critical] habitat,"[128] the Service is to suggest any "reasonable and prudent" measures the agency might take to avoid that outcome.[129] If the BiOp concludes that the agency action will not result in jeopardy or adverse habitat modification, or if the BiOp indicates there are reasonable and prudent alternatives that would avoid such jeopardy or habitat modification, the BiOp is to include an Incidental Take Statement, which in essence allows a certain "take" of listed species incident to the agency action that would not amount to jeopardy.[130] The Incidental Take Statement includes conditions and limitations applicable to any such incidental take.[131]

As may be seen, the BiOp did not require the ranchers to do anything, nor did it prohibit them from doing anything. Indeed, it had no legal effect on the ranchers at all. It did have an effect on the Bureau of Reclamation, which

121 *See Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring) ("[P]roperty owners are at the [EPA's] mercy. . . . In a nation that values due process, not to mention private property, such treatment is unthinkable.").

122 *See supra* note 9 and accompanying text.

123 Oral Argument, U.S. Army Corps of Eng'rs v. Hawkes Co., No. 15-290 (argued Mar. 30, 2016), https://www.oyez.org/cases/2015/15-290#! (last visited May 3, 2016).

124 This sentence was written before Justice Scalia passed away. Given his prior rulings regarding the 404 Program, his vote in this case would have undoubtedly been to provide review. Absent his vote, it is still likely that the Court will affirm the circuit court in *Hawkes Co.*

125 *See* Bennett v. Spear, 520 U.S. 154, 157 (1997).

126 *See* Endangered Species Act of 1973, 16 U.S.C. § 1536(b)(3)(A) (2012) ("[T]he Secretary shall provide to the Federal agency . . . [an] opinion . . . detailing how the agency action affects the species or its critical habitat.").

127 *Id.*

128 *Id.* § 1536(a)(2).

129 *Id.* § 1536(b)(3)(A).

130 *Id.* § 1536(b)(4).

131 *Id.*

operated the Klamath Water Project, whose water the ranchers sought.[132] Even with respect to the Bureau of Reclamation, however, the BiOp did not legally prohibit or require any action. It notified the Bureau of the Service's view that the agency's proposed action would jeopardize the continued existence of two listed species, and it included recommended reasonable and prudent alternatives that would avoid that jeopardy and allowed for certain incidental takes.[133] The Court in *Bennett* recognized that the BiOp did not constitute a legal requirement, saying instead that it has "a powerful coercive effect on the action agency;"[134] that "the action agency is technically free to disregard the Biological Opinion and proceed with its proposed action, but it does so at its own peril;"[135] and that it has a "virtually determinative effect."[136] The Court concluded that, even if the BiOp did not actually compel or prohibit any action by the Bureau, it "alters the legal regime to which the action agency is subject,"[137] not the least by allowing some incidental take by the Bureau so long as it followed the conditions and limitations in the BiOp, so that the BiOp had "direct and appreciable legal consequences."[138]

This discussion by the Court of the effect of a BiOp was in response to the Government's argument that the ranchers lacked standing to challenge the BiOp due to a lack of causation (and redressability) between the BiOp and the Bureau's decision regarding water availability to the ranchers.[139] Nevertheless, it is directly relevant to the Court's consideration whether there was final agency action, because the Court, in its consideration of whether the BiOp was an action "from which legal consequences will flow,"[140] simply referred back to its discussion of the effect of the BiOp with respect to standing. It said this requirement was met "because, as we have discussed above, the Biological Opinion and accompanying Incidental Take Statement alter the legal regime to which the action agency is subject."[141]

If one relates this discussion of what satisfies the second step of *Bennett* to the situation involved with JDs, one can see that *Bennett* supports the conclusion that a JD is final agency action. In *Bennett*, the complained of action—the BiOp—did not impose any *legal* obligation on anyone, neither on the persons challenging the agency action nor on the agency that would appropriate the water. The BiOp did, however, have an important practical effect both on the agency appropriating the water and, by coercing the Bureau to reduce the water available to them, on the challengers. Likewise, a JD does not impose any legal obligation on the person receiving the JD, but it does have significant practical effects on the

132 Bennett v. Spear, 520 U.S. 154, 159 (1997).
133 *Id.* at 159.
134 *Id.* at 169.
135 *Id.* at 170.
136 *Id.*
137 *Id.* at 169.
138 *Id.* at 178.
139 *Id.* at 168.
140 *Id.* at 178 (internal quotation marks omitted).
141 *Id.*

landowner, as every court has recognized. Moreover, the "legal" effect found sufficient in *Bennett* was not a legal prohibition or requirement but simply a change in the "legal regime" that affected the agency that would appropriate the water.[142]

Similarly, the "legal effect" of a JD is not a prohibition or requirement on the property owner, but it does change the "legal regime" within which both the landowner and Corps will interact. On the one hand, the Corps has made a final, legal determination that the property involved is subject to its jurisdiction, requiring a permit in order for the landowner to proceed with its proposed action.[143] As the Court said in *Bennett* with regard to the Bureau, here the property owner "is technically free to disregard the JD and proceed with its proposed action, but it does so at its own peril."[144] On the other hand, having been apprised of the Corps' legal determination, if the property owner proceeds with its plans, it will have "knowingly" violated the CWA, a felony, potentially subjecting it to criminal penalties to which it would not otherwise have been subject.[145] Typically, felony cases brought for filling wetlands without a permit have involved a situation in which a person filled a wetland after having been told by the Corps that it was a jurisdictional wetland.[146] Indeed, it is very difficult for the government to establish the necessary mens rea for a felony prosecution for filling a wetland without the Corps first having informed the person that the property involved is subject to its jurisdiction.[147] Moreover, even in a civil proceeding, one factor in determining the amount of the penalty is the defendant's "good faith efforts to comply" with the Act.[148] To ignore a Corps' JD would disqualify a defendant from demonstrating such good faith efforts. The *Belle Co.* court found this effect insufficient to render a JD final, because it was speculative.[149] But in *Sackett*, one of the examples used by the Court to demonstrate that a compliance order effected a change in the legal regime was that a person who ignored a compliance order could be subject to double penalties (one for violating the order and one for violating the statute), even though there was no evidence that the government had ever sought such penalties.[150]

142 *Id.*

143 Indeed, the JD has the same legal effect on a landowner as the Corps and EPA rule defining waters of the United States, the reviewability of which has not been questioned. Neither imposes a duty or prohibition on the landowner; both legally determine, as far as the agency is concerned, that his land is subject to regulation.

144 *See Bennett*, 520 U.S. at 170.

145 33 U.S.C. § 1319(c)(2) (2012).

146 *See, e.g.*, United States v. Ellen, 961 F.2d 462 (4th Cir. 1992) (affirming conviction under 33 U.S.C. § 1319(c)(2)(A) where Corps had ordered defendant to stop filling wetlands).

147 *See* United States v. Wilson, 133 F.3d 251, 264 (4th Cir. 1997) (requiring proof that the defendant knew the property had the characteristics of a wetland and that he "was aware of the facts establishing the required link between the wetland and waters of the United States").

148 33 U.S.C. § 1319(d) (2012).

149 Belle Co. v. U.S. Army Corps of Eng'rs, 761 F.3d 383, 392 (5th Cir. 2014).

150 *See* Sackett v. U.S. Envtl. Prot. Agency, 132 S. Ct. 1367, 1372 (2012). In *Sackett*, the government apparently conceded that such double penalties could be imposed, but the

The *Belle Co.* court was correct in saying that *Sackett* is distinguishable from cases challenging a Corps' JD, because the EPA's legal compliance order in *Sackett* more clearly changes the legal regime than a Corps' JD.[151] However, the fact that such compulsory orders satisfy the second step of the *Bennett* test for final agency action does not suggest that compulsory orders are necessary to satisfy that step. Indeed, *Bennett* itself, which involved no compulsory order, demonstrates the fallacy of that idea. However, to say that *Sackett* is distinguishable does not mean that it is irrelevant to whether judicial review of JDs is available.

The Court in *Sackett* indicated that it saw no reason to believe Congress intended to strong-arm "regulated parties into 'voluntary compliance' without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the [agency's] jurisdiction."[152] Both Justice Ginsburg and Justice Alito, writing separately, stressed that what was involved in the case was the right of property owners to be able to contest that their property was subject to CWA jurisdiction. Justice Ginsburg characterized the case by saying: "The Court holds that the Sacketts may immediately litigate their jurisdictional challenge in federal court."[153] Justice Alito wrote: "At least, property owners like petitioners will have the right to challenge the [government's] jurisdictional determination under the Administrative Procedure Act."[154] As Judge Kelly recognized in her concurrence in *Hawkes Co.*: "This jurisdictional determination was precisely what the Court deemed reviewable in *Sackett*."[155] If the ability to challenge the agency's JD was the essence of the decision in *Sackett*, the ability to challenge a Corps' final JD should follow as a matter of course.

In *Belle Co.*, the court seemed influenced by the Corps' argument that allowing judicial review of JDs "would disincentivize the Corps from providing them . . . undermin[ing] the system through which property owners can ascertain their rights and evaluate their options with regard to their properties *before* they are subject to compliance orders and enforcement actions for violations of the CWA."[156] And indeed there is nothing that requires the Corps to issue JDs. A similar argument was made in *Sackett*, where EPA argued that compliance orders can obtain quick remediation through voluntary compliance, without subjecting persons to penalties for violating the CWA, and "EPA is less likely to use the orders if they are subject to judicial review."[157] But the Court was not moved: "That may be true—but it will be true for all agency actions subjected to judicial

government would have to concede as well that ignoring a JD would expose the landowner to higher penalties due to a lack of good faith compliance with the Act.

151 *Belle Co.*, 761 F.3d at 391–94.

152 *Sackett*, 132 S. Ct. at 1374.

153 *Id.* (Ginsburg, J., concurring).

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

155 *Hawkes Co.*, 782 F.3d 994, 1003 (8th Cir. 2015) (Kelly, J., concurring).

156 *Belle Co.*, 761 F.3d at 394.

157 *Sackett*, 132 S. Ct. at 1374.

review. The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all."[158]

While the Corps may argue that its use of JDs is for the benefit of property owners, and those owners will suffer if the Corps is more reluctant to issue them because of the threat of judicial review, it is relatively clear that, if given the opportunity, property owners would vote in favor of allowing judicial review. For property owners, litigation is still expensive, and judicial review will delay their desired land use, so judicial review is likely to be undertaken only when there are serious issues as to the Corps' jurisdiction under the CWA. Moreover, if the Corps knows that its JDs are potentially subject to judicial review, the Corps is likely to take its procedure more seriously and more greatly assure that it has a solid basis for its JD. Finally, if the Corps wished to make the availability of JDs contingent on the requester waiving pre-enforcement review of the decision, this should insulate it from review.

V. CONCLUSION

The above discussion should make clear that the Court should and will affirm the decision in *Hawkes Co.* and abrogate the opinions in *Fairbanks North Star* and *Belle Co.* The *Hawkes Co.* case, however, also provides an opportunity for the Court to clarify what is necessary to satisfy the second step of *Bennett* in cases unrelated to agency actions under the CWA regarding wetlands. For example, the D.C. Circuit has gone so far as to rule categorically that interpretive rules and statements of policy, which do not carry the force of law, are not judicially reviewable because they do not satisfy the second step in *Bennett* for final agency actions.[159] The statements in *Abbott Laboratories* and *Franklin* that the second step is satisfied if "the impact of the [agency action] upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage,"[160] or if the agency action has "a direct effect on the day-to-day business"[161] of a person, have been virtually forgotten. Moreover, lower courts have interpreted *Bennett*'s second step strictly, rather than pragmatically, so that the search is for the agency action to have binding legal effect on the challenger.[162] *Bennett*'s broader conception of legal effect, altering the legal regime, should be able to be satisfied in numerous ways that do not involve having a binding legal effect on the challengers, as was evidenced in *Bennett* itself. For example, an interpretive rule or a guidance document can change the legal regime by establishing what the agency will

158 *Id.*

159 *See* Ass'n of Flight Attendants-CWA v. Huerta, 785 F.3d 710, 713 (D.C. Cir. 2015) ("The Notice is nothing more than an internal guidance document that does not carry the 'force and effect of law.' Therefore, the Notice does not reflect final agency action.").

160 Abbott Labs. v. Gardner, 387 U.S. 136, 152 (1967).

161 *Id.*

162 *See supra* Part III (discussing how two circuits strictly applied the second step of *Bennett* and found that a Corps' JD is not a final agency action).

do, often simply by requiring its employees to act in conformance with the rule or statement. In such a circumstance, regulated entities may be placed in the same *practical* situation as the pharmaceutical companies in *Abbott Laboratories*, forced to choose between bowing to the agency's claim of right or running the risk of enforcement through imposition of penalties. In short, the Court can and should make clear in *Hawkes Co.* that the second step of *Bennett* does not require the imposition of legal compulsion on a regulated entity in order for the agency action to be final agency action under the APA.