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Garrett Pratt

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**To Peat Mine or Not to Peat Mine: The Supreme Court’s Opportunity to Determine if a “Clean Water Act” Approved Jurisdictional Determination Affects a Landowner’s Legal Rights**

*Hawkes Co., Inc., et al v. United States Army of Engineers*<sup>1</sup>

Garrett Pratt

I. INTRODUCTION

The Clean Water Act (“CWA”) requires a landowner to receive a permit from the United States Army Corps of Engineers (“Corps”) before he or she conducts any activity on his or her land if that activity may affect “waters of the United States.”<sup>2</sup> Why, then, would a Corps officer determine that a parcel of land – located over 100 miles away from qualifying jurisdictional waters – is subject to CWA permitting? Moreover, when a landowner appeals such a determination and a reviewing Corps officer decides that the Corps’ local office was incorrect, why is it acceptable for the Corps to do no additional investigation and hold that its “Approved Jurisdictional Determination” (“AJD”) is accurate and final?

This is the current situation of Hawkes Company, Inc. (“Hawkes”). Hawkes filed a lawsuit against the Corps and the Environmental Protection Agency (“EPA”) seeking judicial review of the Corps’ AJD as a “final agency action” under the Administrative Procedures Act (“APA”). The Corps maintains that an AJD is not a “final agency action” under the APA because an AJD does not affect a landowner’s “legal rights or obligations, [n]or is a decision from which legal consequences flow.”<sup>3</sup> Hawkes contends that its legal rights and obligations are substantially affected by its AJD.<sup>4</sup>

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<sup>1</sup> 782 F.3d 994 (8th Cir. 2015).

<sup>2</sup> See 33 U.S.C. § 1251 *et seq.* (2012); 33 U.S.C. § 1344(a) (2012).

<sup>3</sup> *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

<sup>4</sup> *Hawkes*, 782 F.3d at 996.

## TO PEAT MINE OR NOT TO PEAT MINE

In 2015, there were two cases on writ of certiorari before the United States Supreme Court, each reaching a different conclusion concerning whether a landowner may receive judicial review of a Corps' AJD.<sup>5</sup> The Court should resolve this split by affirming the Eighth Circuit's decision in *Hawkes Co., Inc. v. United States Army Corps of Engineers*, which correctly determined that an AJD affects a landowner's legal rights.

This note will outline the facts in *Hawkes*, the relevant legal history on the intersection of the CWA and the APA, and the Eighth Circuit's legal analysis in *Hawkes*. This note's discussion of *Hawkes* supports the conclusions that: (1) an AJD affects a landowner's legal rights; (2) judicial review is an effective incentive for the Corps to ensure the accuracy of AJD; (3) judicial review ensures the accuracy of AJD; (4) and alternatively, to avoid judicial review, the EPA could create a second AJD administrative appeal before a landowner brings a lawsuit against the agencies.

### II. FACTS AND HOLDING

Appellant, Hawkes Co., Inc. ("Hawkes"), is a peat-mining company located in northwestern Minnesota.<sup>6</sup> Hawkes desired to expand its peat-mining activities to a nearby 530-acre parcel of wetland ("the parcel") owned by two of Hawkes' affiliated companies.<sup>7</sup> Under Minnesota law, peat mining is a "wetland dependent" activity regulated by permits granted by the local Army Corps of Engineers ("Corps") and other state and federal regulatory agencies.<sup>8</sup> The Clean Water Act ("CWA") defines a "jurisdictional wetland" as a parcel of land subject to permitting regulations "as waters of the United States."<sup>9</sup>

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<sup>5</sup> *Hawkes*, 782 F.3d at 994 *cert. granted*, 136 S.Ct. 615 (2015); *Kent Recycling Services v. United States Army Corps of Engineers petition for cert. filed* 2014 WL 5475208 (U.S.); *cert. refiled sub nom Kent Recycling Services v. United States Army Corps of Engineers*, 761 F.3d 383 (2015); *cert. denied* 135 S. Ct. 1548 (2015).

<sup>6</sup> *Hawkes*, 782 F.3d at 996.

<sup>7</sup> *Id.* at 998. Pierce Investment Co. ("Pierce") and LPF Properties, LLC ("LPF") are closely-held corporations owned by members of the Pierce family. *Id.*

<sup>8</sup> *Id.* at 997. The development of wetlands in Minnesota is also subject to regulations and permits required by Environmental Protection Agency and the Minnesota Department of Natural Resources ("MDNR"). *Id.*

<sup>9</sup> *Id.* (citing 33 U.S.C. §§ 1344(a), 1362(7) (2014)).

In December 2010, Hawkes began the CWA permit application process with the Corps' local office.<sup>10</sup> After Hawkes filed its permit application, Corps officials repeatedly indicated to Hawkes, from January to August 2011, that it should abandon its expansion plans because the permitting process would be expensive, lengthy, and it was uncertain whether Hawkes would receive a permit.<sup>11</sup> In a draft Jurisdictional Determination, the Corps concluded that the parcel was connected to a "relatively permanent water source" via a series of culverts and unnamed streams that flowed into the Middle River, which flowed into the Red River — a river located 120 miles away from the parcel.<sup>12</sup> Hawkes found this determination extreme and questioned its accuracy.<sup>13</sup> Hawkes' environmental consultant cited several errors in the Corps' analysis.<sup>14</sup> Nevertheless, the Corps released its Approved Jurisdictional Determination ("AJD") in February 2012, affirming that the parcel was a jurisdictional wetland because a "significant nexus" existed between the parcel and the Red River.<sup>15</sup>

Hawkes filed a timely administrative appeal of the AJD, and in October 2012, the Corps' Deputy Commanding General for Civil and Emergency Operations sustained Hawkes' appeal.<sup>16</sup> The Corps' reviewing officer remanded the matter for reconsideration because the Corps had not amassed sufficient "[factual] support ... to determine that the [parcel] contained jurisdictional wetlands and waters."<sup>17</sup> However, the Corps, in December 2012, issued an amended AJD reaffirming its position that the parcel contained jurisdictional wetlands without providing additional information.<sup>18</sup> The AJD also stated that Hawkes had exhausted its

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<sup>10</sup> *Id.* at 998.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

administrative remedies, and that the present determination was the Corps' final jurisdictional decision concerning the parcel.<sup>19</sup>

Hawkes subsequently filed a lawsuit against the Corps seeking judicial review of the AJD in the United States District Court of Minnesota.<sup>20</sup> The Corps moved to dismiss the complaint, arguing that Hawkes had not exhausted its administrative remedies because the AJD was not a "final agency action."<sup>21</sup> The district court applied the two-prong test in *Bennett v. Spear*<sup>22</sup> to determine if the Corps' AJD was a "final agency action" under the APA. The court found that the Corps' AJD met the first prong of the *Bennett* test because the AJD reflected the "consummation of the Corps' decision-making process."<sup>23</sup> However, the second prong of the *Bennett* test, that the agency's decision affected the legal rights of the aggrieved party, was not met because the Corps' decision did not require Hawkes to take any sort of action.<sup>24</sup> Additionally, the court stated that Hawkes could continue in the CWA permit process or pursue its mining operations on the parcel without a CWA permit, but it would assume the potential risk of incurring CWA penalties.<sup>25</sup> Because the *Bennett* test was not met, the AJD was not subject to judicial review. The AJD was not a final agency action, and the district court dismissed Hawkes' action, which Hawkes timely appealed to the Eighth Circuit Court of Appeals.<sup>26</sup>

The Eighth Circuit reviewed the district court's motion to dismiss and reversed the decision.<sup>27</sup> As such, precedent was established that a Corps'

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 994.

<sup>21</sup> *Id.* (citing *Hawkes Co., Inc. v. U.S. Army Corps of Engineers*, 963 F.Supp.2d 868, 871, 878 (D. Minn. 2013)).

<sup>22</sup> *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). First, the action must mark the consummation of the agency's decision-making process — it must not be of a merely tentative or interlocutory nature. *Id.* Second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow. *Id.*

<sup>23</sup> *Hawkes*, 963 F.Supp.2d at 871.

<sup>24</sup> *Id.* at 873-74 (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)).

<sup>25</sup> *Id.* at 875.

<sup>26</sup> *Hawkes*, 782 F.3d at 999.

<sup>27</sup> *Id.*

AJD is a final agency action that qualifies for immediate judicial review because it affects a landowner's legal rights and obligations.<sup>28</sup>

### III. LEGAL BACKGROUND

This section outlines the legislative history and the relevant statutory and regulatory components of the Clean Water Act ("CWA") and the Administrative Procedures Act ("APA"). The section concludes with a discussion of the only cases that have assessed whether a CWA Approved Jurisdictional Determination ("AJD") is a "final agency action."<sup>29</sup>

#### A. *Competing Definitions of "Jurisdictional Waters" Under the "Clean Water Act"*

Congress enacted the CWA in 1972 to restore and maintain the "chemical, physical and biological integrity of the Nation's waters" and to acknowledge and ensure "the primary responsibilities and rights of the States . . . to plan the development and use . . . of land and water resources."<sup>30</sup> The CWA prohibits the discharge of pollution into "the navigable waters of the United States" without a permit.<sup>31</sup> A landowner who makes an unpermitted discharge is subject to an Environmental Protection Agency ("EPA") compliance order, and can be fined up to \$75,000 for each day he or she is in violation of the CWA.<sup>32</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> Two cases were before the Supreme Court in its 2016 session: (1) *Hawkes Co., Inc., et al v. United States Army of Engineers*, 782 F.3d 994 (8th Cir. 2015); and (2) *Belle Co., LLC v. U.S. Army Corps of Engineers* *petition for cert. filed* 2014 WL 5475208 (U.S.); *cert. refiled sub nom Kent Recycling Services v. United States Army Corps of Engineers*, 761 F.3d 383 (2015) *cert. denied* 135 S. Ct. 1548 (2015). However, the Supreme Court denied Certioari in *Kent Recycling. Id.*

<sup>30</sup> 33 U.S.C. § 1251(a)-(b) (2012).

<sup>31</sup> *See* 33 U.S.C. §§ 1311, 1344 (2012).

<sup>32</sup> *See* 33 U.S.C. §§ 1319(a)(3), (d) (2012).

## TO PEAT MINE OR NOT TO PEAT MINE

The CWA’s jurisdiction only extends to “navigable waters of the United States.”<sup>33</sup> This phrase was not defined within the CWA and has been subject to two interpretations over its 40-year history: (1) the traditional definition and (2) the Corps/EPA modern definition.<sup>34</sup> Prior to the CWA, “navigable waters of the United States” meant “interstate waters that are ‘navigable in fact’ or readily susceptible of being rendered so.”<sup>35</sup> The traditional definition construed water narrowly to only include “relatively permanent bodies of water, as opposed to ordinarily dry channels through which water occasionally . . . flows.”<sup>36</sup> The United States Supreme Court expanded the traditional definition of “navigable waters” to include wetlands that are physically adjacent to traditional navigable waters.<sup>37</sup> Specifically, the Supreme Court’s plurality opinion in *Rapanos v. United States* held that the traditional definition, with the physically adjacent wetlands expansion, is the only definition consistent with the CWA’s stated policy goals.<sup>38</sup>

On the other hand, the modern Corps/EPA definition is far more expansive than the traditional definition. While the Corps and the EPA initially adopted the traditional definition, the agencies have significantly expanded the statute’s meaning to include “virtually any land feature over which rainwater or drainage passes and leaves a visible mark.”<sup>39</sup> Presently, the Corps and the EPA intentionally allow local Corps offices to have their own interpretations.<sup>40</sup> As a result, there is great variation in definitions across local Corps offices.<sup>41</sup>

### B. *The Two-Prong Bennett v. Spear Test*

The Administrative Procedures Act (“APA”) was adopted in 1946, and it ensures protection of the constitutional rights of those who are subject to an administrative agency’s regulation.<sup>42</sup> The APA permits judicial review

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<sup>33</sup> 33 U.S.C. § 1362(7) (2012).

<sup>34</sup> *See generally* *Rapanos v. United States*, 547 U.S. 715 (2006).

<sup>35</sup> *Id.* at 723 (citing *The Daniel Ball*, 77 U.S. 557, 563 (1870)).

<sup>36</sup> *Id.* at 716.

<sup>37</sup> *Id.* at 734-35 (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985)).

<sup>38</sup> *Id.* at 731-32.

<sup>39</sup> *Id.* at 725 (citing 33 CFR §328.3(e) (2014)).

<sup>40</sup> *Id.* at 727.

<sup>41</sup> *Id.*

<sup>42</sup> Pat McCarran, Congressional Record Citation, March 12, 1946. “[T]he purpose of which

of a “final agency action for which there is no other adequate remedy in a court.”<sup>43</sup> Through this legislation, Congress intended that judicial review be widely available to challenge federal agency actions.<sup>44</sup> The Supreme Court in *Bennett v. Spear* created a two-prong test to determine if an agency action was final. First, the action must mark the consummation of the agency's decision-making process — it must not be of a merely tentative or interlocutory nature.<sup>45</sup> Second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.<sup>46</sup>

*C. Case Law is Split on Whether an AJD is a “Final Agency Action”*

Only two cases have addressed whether an AJD is a final agency action under the two-prong *Bennett* test. The Supreme Court determined that an AJD is a final agency action in *Sackett v. EPA* and held that it is not in *Belle Co., LLC v. U.S. Army Corps of Engineers*.<sup>47</sup> First, in *Sackett v. EPA*, the EPA issued a compliance order to a landowner who filled one half-acre of her land with dirt and rock while building a house.<sup>48</sup> The EPA claimed that the landowner polluted waters subject to EPA permitting requirements.<sup>49</sup> If the landowner did not comply, she would have been subject to fines of up to \$75,000 per day she was in violation.<sup>50</sup> The landowner sought judicial review of the compliance order and its underlying AJD.<sup>51</sup>

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is to improve the administration of justice by prescribing fair administrative procedure, is a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal government. It is designed to provide guarantees of due process in administrative procedure.” *Id.*

<sup>43</sup> 5 U.S.C. § 704 (2012).

<sup>44</sup> See generally *Califano v. Sanders*, 430 U.S. 99 (1977); see also *Block v. Community Nutrition Institute*, 467 U.S. 340, 349 (1984) (affirming that the APA creates a “presumption favoring judicial review of administrative action”).

<sup>45</sup> *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

<sup>46</sup> *Id.*

<sup>47</sup> *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012); *Belle Co., LLC v. U.S. Army Corps of Engineers*, 761 F.3d 383, 390 (5th Cir. 2014).

<sup>48</sup> *Sackett v. EPA*, 132 S. Ct. 1367, 1370 (2012).

<sup>49</sup> *Id.* at 1371.

<sup>50</sup> *Id.* at 1372.

<sup>51</sup> *Id.* at 1374.

The Supreme Court held that the compliance order was a final agency action that satisfied the two-prong *Bennett* test.<sup>52</sup> First, the EPA’s issuance of the compliance order represented the consummation of its decision-making process because the pronouncement that the landowner’s property was subject to CWA permitting was not subject to any further agency review.<sup>53</sup> The Court determined the agency’s decision-making was final even though the EPA had not filed a civil enforcement action against the landowner.<sup>54</sup> Second, the Court said that the landowner’s legal rights and obligations were affected by the EPA’s compliance order because the landowner had to restore her property according to the agency’s requirements, permit the EPA access to her property, and potentially pay “double penalties in future enforcement proceedings.”<sup>55</sup> The Court stated that the APA’s presumption of judicial review was not preempted by any CWA provision that would result in “strong-arming . . . regulated parties into ‘voluntary compliance’ without the opportunity for judicial review — even judicial review of the question whether the regulated party is within the EPA’s jurisdiction.”<sup>56</sup>

The second case which has addressed whether an AJD is a final agency action is *Belle Co., LLC v. U.S. Army Corps of Engineers*.<sup>57</sup> In *Belle*, a landowner sought judicial review of a Corps AJD that would force the landowner to receive a CWA permit before it could use a portion of the property as a landfill.<sup>58</sup> The Fifth Circuit determined that the AJD represented the consummation of the agency’s decision-making process for the same reasons the Supreme Court outlined in *Sackett*.<sup>59</sup> However, the Fifth Circuit determined that the second prong of the *Bennett* test was not satisfied because the AJD did not affect the landowner’s legal rights or obligations in the same manner as the EPA compliance order in *Sackett*.<sup>60</sup> The Fifth Circuit gave four reasons why the two cases were distinguishable.

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1372.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1371-72.

<sup>56</sup> *Id.* at 1374.

<sup>57</sup> *Belle Co., LLC v. U.S. Army Corps of Eng’rs*, 761 F.3d 383, 386 (5th Cir. 2014).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 389.

<sup>60</sup> *Id.* at 391.

First, an AJD alone does not obligate the landowner to take or abstain from taking any action on his or her property.<sup>61</sup> The court reinforced its analysis by claiming that prior to *Sackett*, all courts addressing the issue determined that an AJD did not sufficiently affect the legal rights or obligations of a party.<sup>62</sup> Second, an AJD does not generate “a penalty scheme” or compel the landowner’s compliance with the determination.<sup>63</sup> Third, an AJD does not independently preclude the landowner from obtaining necessary permits.<sup>64</sup> Fourth, the landowner in *Sackett* had dumped material into wetlands in violation of the CWA and was consequently liable for incurring penalties.<sup>65</sup> The court stated that Belle seeking judicial review of the AJD was inconsistent with the established regulatory review procedure.<sup>66</sup> The court also noted the court would discourage the Corps from providing an AJD before a landowner became subject to a compliance order or an enforcement action for a CWA violation.<sup>67</sup> As a result, the landowner could not receive judicial review of the AJD.<sup>68</sup>

*Hawkes* is factually similar to *Belle* because both cases touch upon whether a landowner may receive judicial review of a Corps’ AJD. Both appellate court opinions also agreed that the determinations represented the consummation of the Corps’ decision-making process. However, the Fifth Circuit in *Belle* held that an AJD does not affect a landowner’s legal rights and obligations, whereas the Eighth Circuit in *Hawkes* determined that it does.<sup>69</sup> Both cases characterize the policy objectives of the APA and the CWA differently, and both claim its interpretation of *Sackett* is superior.<sup>70</sup>

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<sup>61</sup> *Id.* at 390.

<sup>62</sup> *Id.* at 391.

<sup>63</sup> *Id.* at 392.

<sup>64</sup> *Id.* at 393.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 394.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Hawkes Co., Inc., et al v. U.S. Army Corps of Eng’rs*, 782 F.3d 994, 999 (8th Cir. 2015); *Belle Co., LLC v. U.S. Army Corps of Eng’rs*, 761 F.3d 383, 390 (5th Cir. 2014).

<sup>70</sup> *Compare* *Hawkes Co., Inc., et al v. U.S. Army Corps of Eng’rs*, 782 F.3d 994, 996-97, 1000 (8th Cir. 2015) *with* *Belle Co., LLC v. U.S. Army Corps of Eng’rs*, 761 F.3d 383, 390, 392 (5th Cir. 2014).

## IV. INSTANT DECISION

The Eighth Circuit determined that Hawkes' Clean Water Act ("CWA") Approved Jurisdictional Determination ("AJD") was a final agency action subject to judicial review.<sup>71</sup> The court applied the two-prong *Bennett* test<sup>72</sup> to determine if the AJD was a final agency action: "[T]he action must mark the consummation of the agency's decision-making process . . . [and] the action must be one by which rights or obligations have been determined, or from which legal consequences flow."<sup>73</sup>

First, the Eighth Circuit determined the first prong of the *Bennett* test was met because CWA regulations state that an AJD constitutes a Corps' final agency action.<sup>74</sup> The court also cited a Corps Regulatory Guidance Letter that stated an AJD may be "relied on by a landowner, permit applicant, or other affected party."<sup>75</sup> Second, the Eighth Circuit determined that Hawkes satisfied the second prong of the *Bennett* test because Hawkes' legal rights and obligations were determined by the Corps' AJD.<sup>76</sup> The Eighth Circuit gave four reasons why the AJD affected Hawkes' legal rights and obligations.

The court first cited the significant cost, time delay, and unlikely positive outcome to Hawkes if it were to pursue completing the permit process.<sup>77</sup> The Eighth Circuit relied on *Rapanos v. United States*, in which the Supreme Court found that the Corps permit applicants generally spend more than three-quarters of a million dollars and two years to complete the permitting process.<sup>78</sup> The court was also unwilling to deny Hawkes judicial review when the record indicated that multiple Corps officials told Hawkes that it inevitably would be denied a permit.<sup>79</sup> This alone satisfied the second prong of the *Bennett* test, because Hawkes would never be able to recover

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<sup>71</sup> *Hawkes Co., Inc., et al v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 999 (8th Cir. 2015).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)).

<sup>74</sup> *Id.* (citing 33 CFR § 320.1(a)(6) (2012)).

<sup>75</sup> *Id.* (quoting Regulatory Guidance Letter No. 08-02, at 2, 5).

<sup>76</sup> *Id.* at 1000-01

<sup>77</sup> *Id.* at 1001.

<sup>78</sup> *Id.* (citing *Rapanos v. U.S.*, 547 U.S. 715, 721 (2006)).

<sup>79</sup> *Id.*

lost time or money in seeking a permit it was not legally obligated to obtain.<sup>80</sup>

The second reason the Eighth Circuit determined that the AJD affected Hawkes' legal rights was that the AJD increased the penalties Hawkes would incur if it mined without a permit.<sup>81</sup> The court rejected the Corps' argument that Hawkes had an adequate remedy in choosing to commence peat-mining without a permit because doing so would force it to await agency enforcement and cause Hawkes to incur significant criminal penalties, including imprisonment, for knowingly violating the CWA.<sup>82</sup> When the district court agreed with this argument, it grossly mischaracterized the regulatory action's force and conflated the difference between an agency action that "compels affirmative action and an order that prohibits a party from taking otherwise lawful action."<sup>83</sup> The Eighth Circuit also stated that the district court's determination was inconsistent with relevant Supreme Court precedent.<sup>84</sup> Ultimately, because of "the [CWA's] draconian penalties

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 1000.

<sup>84</sup> *Id.* at 1000-01. First, the court cited that in *Bennett v. Spear*, 520 U.S. 154, 158 (1997), a Fish and Wildlife Service biological opinion that made compliance with its orders mandatory on the Bureau of Reclamation met the second part of the *Bennett* test because the agency opinion had "direct and appreciable legal consequences." *Id.* at 1000 (quoting *Bennett*, 520 US at 158). In the instant case, the AJD required Hawkes to either pay the significant fees associated with the permitting process, give up its pursuit of using its land for peat-mining, or proceed to mine but incur substantial enforcement penalties. *Id.*

Second, prescription drug labeling regulations constituted a judicially reviewable final agency action because they "purport to give an authoritative interpretation of a statutory provision" that places drug companies in a catch-22 of either incurring massive compliance costs or risking criminal and civil penalties for violating the regulation. *Id.* (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152-53 (1967)).

Third, the Supreme Court held in *Frozen Food Express v. United States*, 351 U.S. 40, 76 (1956), that an Interstate Communications Commission order claiming that certain types of agricultural commodities were subject to regulations requiring carriers to obtain a permit to transport such materials was a reviewable final agency action. *Id.* at 1000. The court held this even though the order was issued generally to all interstate transporters of agricultural commodities and enforcement would only occur when the Commission would identify a non-complying entity and later bring an enforcement action against the carrier because the order had an immediate and practical impact because of the risk of penalties. *Id.*

imposed for the sort of violations alleged in this case . . . [the CWA] leaves most property owners with little practical alternative but to dance to the EPA [or the Corps'] tune.”<sup>85</sup>

Further, the Eighth Circuit’s third reason that the AJD affected Hawkes’ legal rights was that the record strongly indicated that the Corps intended to prevent Hawkes’ peat-mining operation from commencing and avoid judicial scrutiny of the accuracy of its AJD.<sup>86</sup> The court acknowledged that the Corps’ own officers, on appeal, determined the AJD was insufficient.<sup>87</sup> The Corps has granted broad authority to local Corps representatives in determining the agency’s jurisdiction.<sup>88</sup> Therefore, by allowing such unchecked authority, it would make it nearly impossible for parties potentially subject to regulation to challenge these administrative decisions by judicial review.<sup>89</sup> The Eighth Circuit explained that the Corps has intentionally given local Corps offices broad discretion to claim permitting restrictions, which has led to claims of jurisdiction on “adjacent wetlands . . . connected to navigable water by flooding . . . [occurring once every century].”<sup>90</sup> Allowing such unfettered agency authority to remain judicially unchecked is inapposite to the APA’s presumption of immediate

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In the present case, the court noted that the Corps’ AJD is more likely to affect the substantial rights of Hawkes than the order in *Frozen Food Express* because the jurisdictional determination pertained to Hawkes specifically and its property and violation of the action would guarantee Hawkes’ civil and criminal liability, whereas the order in *Frozen Food Express* was only a general order to all carriers. *Id.*

Fourth, *Columbia Broadcasting v. United States*, 316 U.S. 407 (1942), held that a Federal Communications Commission regulation that barred the licensing of stations that entered into network contracts, though not self-executing, was subject to immediate judicial review because the regulation would effectively change and adversely impact the appellant’s contractual rights and business relationships. *Id.* at 1000-01 (citing *Columbia Broadcasting*, 316 U.S. at 422). The court in the instant case drew strong parallels between these two cases because the jurisdictional determination has impacted Hawkes’ lawful use of its property to conduct a lawful business. *Id.* at 1000-01. The court again cited *Sackett v. E.P.A.*, 132 S. Ct. 1367, 1372 (2012), to underscore that final agency actions are not only reviewable when they are self-executing. *Id.* at 1001.

<sup>85</sup> *Id.* at 1002 (quoting *Sackett v. E.P.A.*, 132 S. Ct. 1367, 1375 (2012) (Alito, J. concurring)).

<sup>86</sup> *Id.* at 998.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 1001-02.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* (citing *Rapanos v. United States* 547 U.S. 715, 727-28 (2006)).

judicial review of final agency actions<sup>91</sup> and inconsistent with the APA's legislative intent.<sup>92</sup>

Finally, the Eighth Circuit reasoned that continuance of such an unfettered agency power exerted over private land owners was difficult to reconcile in a nation that values due process and private property.<sup>93</sup>

The Eighth Circuit reversed the district court's decision and remanded the case for further proceedings.<sup>94</sup> Circuit Judge Jane Kelly filed a concurring opinion in which she distinguished the factual circumstances of the present case from *Sackett*.<sup>95</sup> Judge Kelly nevertheless concluded that immediate judicial review of the Corps determination was warranted because review of whether a piece of land is under the jurisdiction of the CWA is the very reason the Supreme Court in *Sackett* deemed jurisdictional determinations as judicially reviewable.<sup>96</sup>

#### V. COMMENT

The Supreme Court should affirm *Hawkes* and disagree with *Belle*.<sup>97</sup> Specifically, the Court should hold that an Approved Jurisdictional Determination ("AJD") affects a party's legal rights and, therefore, makes it a "final agency action" subject to immediate judicial review. Six legal arguments support this position. Two policy arguments also support the conclusion that judicial review of an AJD serves as an effective limitation upon the Corps and the EPA's (collectively "the agencies") broad discretion over the definition of jurisdictional "waters of the United States." It also incentivizes Corps officers to ensure the accuracy of its AJD. Alternately, if the agencies want to avoid judicial review, they should create an additional

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 999. Congress intended that judicial review be "widely available to challenge actions of federal administrative officials." *Id.* at 999 (quoting *Califano v. Sanders* 430 U.S. 99, 104 (1977)).

<sup>93</sup> *Id.* at 1002 (citing *Sackett*, 132 S. Ct. at 1375 (Alito, J. concurring)).

<sup>94</sup> *Id.* at 1002.

<sup>95</sup> *Id.* at 1002-03 (Kelly, J. concurring).

<sup>96</sup> *Id.*

<sup>97</sup> *Belle Co. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383 (5th Cir. 2014), cert. denied sub nom. *Kent Recycling Servs., LLC v. U.S. Army Corps of Eng'rs*, 135 S. Ct. 1548 (2015).

administrative appeal for landowners to contest an AJD. Whether the agencies create the additional administrative appeal or not, judicial review of Corps AJD should be available to landowners.

*A. An AJD Affects the Conduct of Landowners,  
Third Parties, and Agencies*

Clean Water Act (“CWA”) regulations and Corps administrative guidance documents reveal that the agencies intend an AJD to be legally binding upon landowners, third parties, and agencies themselves. This weakens the Corps’ position when it claims that an AJD does not affect the landowner. CWA regulations state that a local Corps officer’s assessment of a land’s potential for CWA jurisdiction “shall constitute a Corps final agency action”<sup>98</sup> so that “the public can rely on that determination as a Corps final agency action.”<sup>99</sup> Indeed, the Corps and the EPA state that “decisions concerning whether or not a waterbody is subject to the CWA have consequences for State, tribal, and local governments, and for private parties.”<sup>100</sup> A Corps Regulatory Letter explains a landowner or other “affected party”<sup>101</sup> may rely on an AJD if he or she brings a federal civil action contesting the accuracy of an AJD.<sup>102</sup> An AJD is also binding on the agencies.<sup>103</sup> The combination of the agencies’ intention to bind themselves to an AJD, the significant time and resources a local Corps office invests in an AJD, and the Corps’ creation of an immediate administrative appeal for a landowner to contest an AJD strongly indicate that an AJD “mean[s] something – for landowners and regulators alike.”<sup>104</sup>

The Corps’ argument that a landowner’s rights are not affected by the Corps’ positive determination that it has CWA jurisdiction over the land is contrary to the Corps’ position that it intends for an AJD to be final and

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<sup>98</sup> 33 C.F.R. § 320.1(a)(6) (2015).

<sup>99</sup> Final Rule for Regulatory Programs of the Corps of Eng’rs, 51 Fed. Reg. 41,206, 41,207 (Nov. 13, 1986).

<sup>100</sup> EPA and Corps Draft Guidance on Identifying Waters Protected by the Clean Water Act, at 2, available at <http://www.regulations.gov/#!searchResults;rpp=25;po=0; s=EPA-HQ-OW-2011-0409-0002;fp=true;ns=true>.

<sup>101</sup> U.S. Army Corps of Eng’rs RGL 08-02, at 2 (quoting 33 CFR § 331.2 (2014)).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Amicus Curiae Brief Supporting Appellee at 13, *Hawkes Co. Inc. v. U.S. Army Corps of Eng’rs*, 782 F.3d 994 (8th Cir. 2015) (No. 13-3067), 2013 WL 6221825 at \*13.

relied upon by the landowner. The Corps has indicated that it intends an AJD be final and relied upon by a landowner in use of his or her property. Additionally, when land is determined to be under CWA jurisdiction, the Corps has indicated third parties, the public at large, the Corps, and the EPA should rely on the Corps' determination. One likely reason that the Corps maintains such contrary positions is that it is attempting to avoid judicial review of its AJDs. If the Corps ever had to litigate against a landowner contesting its jurisdiction, the Corps would very likely attempt to argue that its "conclusions of jurisdiction are entitled to the benefit of significant deference," therefore avoiding a court's intense scrutiny.<sup>105</sup> The Corps in *Hawkes* likely wants to avoid judicial review because it erroneously authorized an AJD even though the local Corps officers provided no additional facts to prove the Corps' jurisdiction over Hawkes' parcel.<sup>106</sup> The Eighth Circuit also suggested that the Corps may try to avoid judicial review of its AJD to preserve its autonomy in making such determinations.<sup>107</sup> The Court should reject the Corps' argument that an AJD is not a final agency action because the Corps treats an AJD as a final agency decision that affects a landowner, third parties, and the agencies themselves.

#### B. *An AJD Affects a Landowner's Use of His or Her Land*

The second reason an affirmative CWA AJD affects a landowner's legal rights and obligations is that an AJD significantly affects a landowner's use of his or her land. An AJD changes the land's potential regulatory burden and the land's fair market value.<sup>108</sup> An AJD affirming the presence of jurisdictional waters likely indicates the landowner must seek a CWA permit to use the land in any form. Estimated CWA permitting costs can be as high

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<sup>105</sup> *Id.* See also *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) ("[A]n agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency.") (*quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944)); see also *Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 297 (4th Cir. 2011) (agreeing with *Corps* that its jurisdictional determination was entitled to deference). See generally *National Wildlife Federation v. Hanson* 623 F.Supp. 1539, 1544 (E.D.N.C. 1985).

<sup>106</sup> *Hawkes Co. Inc. et al. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 998 (8th Cir. 2015).

<sup>107</sup> *Id.* at 999.

<sup>108</sup> Amicus Curiae Brief Supporting Appellee, *supra* note 103, at 2.

## TO PEAT MINE OR NOT TO PEAT MINE

as \$300,000 and the permitting process may take between one<sup>109</sup> and two-and-a-half years.<sup>110</sup> Landowners may incur additional costs and time delays by modifying their plans for the land's use, or they may have to abandon use of the property altogether.<sup>111</sup> This was the impression local Corps officers gave Hawkes on multiple occasions.<sup>112</sup> A landowner may also incur additional costs to meet avoidance, minimization, and mitigation requirements under CWA regulations.<sup>113</sup> These costs vary<sup>114</sup> and may range between \$400,000 and \$1 million per acre.<sup>115</sup>

Third, a CWA jurisdiction determination may affect the property's fair market value.<sup>116</sup> In one instance, a CWA jurisdiction determination reduced a land parcel's appraisal from \$32 million to \$1 million dollars.<sup>117</sup> Tax assessments and Security and Exchange Commission reporting requirements may also indirectly and significantly affect a land's fair market

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<sup>109</sup> See David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59, 74 (2002) (concluding that the average applicant spent \$271,596 (\$337,577 in 2011 dollar values) to prepare a CWA section 404 individual permit application and \$28,915 (\$35,954 in 2011 dollar values) to prepare a nationwide permit application).

<sup>110</sup> *Id.* at 76.

<sup>111</sup> Amicus Curiae Brief Supporting Appellee, *supra* note 103, at 17.

<sup>112</sup> *Hawkes Co., Inc., et al. v. United States Army Corps of Engineers*, 782 F.3d 994, 998 (8th Cir. 2015).

<sup>113</sup> 40 C.F.R. § 230.10(a)(1) (2014).

(a) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.

(1) For the purpose of this requirement, practicable alternatives include, but are not limited to:

(i) Activities which do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters;

(ii) Discharges of dredged or fill material at other locations in waters of the United States or ocean waters.

<sup>114</sup> Sunding & Zilberman, *supra* note 108, at 74.

<sup>115</sup> David Sunding, Review of EPA's Preliminary Economic Analysis of Guidance Clarifying the Scope of CWA Jurisdiction at 3 (July 26, 2011) *available at* <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-3514> ("Sunding Analysis of EPA Guidance").

<sup>116</sup> Amicus Curiae Brief Supporting Appellee, *supra* note 103, at 2.

<sup>117</sup> *Id.* at 18-9.

value.<sup>118</sup> The decrease in the fair market value reflects the use limitations an AJD imposes on land. Given this, an AJD affects a landowner's ability to use his or her land.

*C. Peat-Mining Without a CWA Permit is Likely a "Knowing" CWA Violation*

The Corps has put Hawkes on notice that its parcel contains jurisdictional waters through the AJD. Combined with the strict liability nature of the CWA, which expressly prohibits "discharges" into statutory "navigable waters,"<sup>119</sup> Hawkes would be in "knowing" violation of the CWA and acting in bad faith<sup>120</sup> if it were to commence peat mining on its land. This would subject Hawkes to up to "\$37,500 per day per violation" and potential criminal liability of up to three years imprisonment.<sup>121</sup> As the Corps argues, and *Belle* held, because a looming agency enforcement action does not automatically trigger these penalties, there is no statutory or regulatory restriction limiting the Corps' ability to begin tolling penalties from when the landowner begins to knowingly violate the CWA.<sup>122</sup> Given the costs and time required to go through the CWA permit process,<sup>123</sup> and the \$1.7 billion the EPA generates collecting permitting fees and CWA penalties annually,<sup>124</sup> the agencies have strong incentives to force a landowner through the permitting process. The *Kent Recycling* court and the district court in *Hawkes* were incorrect when they held that a landowner may mine without a permit and incur no penalties; a landowner may, in fact, be subject to penalties for knowingly violating the CWA.

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<sup>118</sup> See *Bergen Cnty. Assocs. v. Borough of E. Rutherford*, 12 N.J. Tax 399, 403, 411, 418 (N.J. Tax Ct. 1992) (land that had been valued at \$47,500,000 reduced to \$2,029,800 based on determination that land included "waters of the United States").

<sup>119</sup> 33 U.S.C. § 1311 (2012).

<sup>120</sup> 33 U.S.C. § 1319(c)(2) (2012).

<sup>121</sup> *U.S.v. Ciampitti*, 669 F. Supp. 684, 699 (D.N.J. 1987).

<sup>122</sup> *Id.*

<sup>123</sup> *Rapanos v. United States* 547 U.S. 715, 721 (2006).

<sup>124</sup> *Id.*

*D. If Hawkes Pursued a CWA permit, It Would Do So At a Disadvantage Compared to Other Applicants*

Hawkes is at a disadvantage compared to other permit applicants because it would have to overcome a presumption in litigation that:

“[N]o discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem . . . therefore the Corps may not issue a permit because there are “alternatives that would have less adverse impact.”<sup>125</sup>

An AJD requires a landowner to prove why he or she should be granted a permit for discharging dredged or fill material when there are alternative uses of the parcel that would not affect jurisdictional waters.<sup>126</sup> Applicants without an AJD would not have to overcome such a presumption, thus hindering Hawkes. The *Kent Recycling* court ignores Supreme Court precedent on this issue when it says that a landowner who has received an AJD is in the same position as a CWA permit applicant who has not received an AJD. In contrast, the Eighth Circuit in *Hawkes* acknowledged the great time and cost associated with applying for a permit and the potential liability that a landowner may create for himself or herself by peat mining without a permit. Combined with the presumption that a landowner with an AJD has to overcome a higher burden in subsequent litigation compared to CWA applicants without an AJD, the Eighth Circuit in *Hawkes* properly recognizes the legal effect an AJD has on a landowner.

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<sup>125</sup> Amicus Curiae Brief Supporting Appellee, *supra* note 99, at 2; *see also Butte Envtl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 945 (9th Cir. 2010); *see also* 40 C.F.R. § 230.10(a)(1) (2014) (“Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.”).

<sup>126</sup> *Greater Yellowstone Coal v. Flowers*, 359 F.3d 1257, 1269 (10th Cir. 2004) (citing *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1186--87 (10th Cir. 2002)).

*E. The Corps' Position is Inapposite to the CWA and APA's Presumption of Judicial Review*

The Corps' position is inapposite to the CWA and APA's presumptions of judicial review. The APA intends that judicial review be widely available to contest federal agency decisions.<sup>127</sup> The Corps' attempt to preserve its broad discretion in defining jurisdictional waters of the United States at the cost of a landowner's free use of his or her land is done in opposition to the CWA and APA's presumptions of judicial review. The APA is consistent with Congress' intent to have broad judicial review of agency actions.<sup>128</sup>

As a result, absent a "showing of 'clear and convincing evidence' of a contrary legislative intent," judicial review requests should be interpreted as strongly favoring granting judicial review.<sup>129</sup> The Corps has yet to argue that judicial review is contrary to congressional intent. The absence of such an argument by the Corps indicates that the Corps is likely aware that arguing so, as Justice Breyer stated, is in open disregard to "seventy five years of settled APA law that presumes that final agency action is reviewable."<sup>130</sup> The *Sackett* court also explained that, "the APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all."<sup>131</sup> The Supreme Court should acknowledge that the Corps has not provided clear and convincing evidence that granting judicial review is contrary to the APA's or the CWA's legislative intent. As a result, the Court has an opportunity here to agree with *Hawkes* because the Eighth Circuit's decision is consistent with the acts' legislative intent.

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<sup>127</sup> *Hawkes*, 782 F.3d at 999 (quoting *Califano v. Sanders*, 430 U.S. 99, 104 (1977)).

<sup>128</sup> Administrative Procedure Act, Sen. Rep. No. 752 at 26 (1945) ("Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.")

<sup>129</sup> *Abbott Labs v. Gardner*, 387 U.S. 136, 141 (1967).

<sup>130</sup> Transcript of Oral Argument at 41, 49, *Sackett v. EPA*, (No. 10-1062) (Jan. 9, 2012) ("Tr. Of Oral Arg.").

<sup>131</sup> *Sackett v. EPA*, 132 S.Ct. 1367, 1374 (2012).

F. *The Eighth Circuit in Hawkes Correctly Applied Sackett v. E.P.A.*

The Eighth Circuit in *Hawkes* correctly applied the *Sackett v. E.P.A.* holding, while the *Kent Recycling* court mischaracterized *Sackett*. The *Kent Recycling* court and the *Hawkes* district court held that *Sackett* is distinguishable because *Sackett* involved a landowner seeking judicial review of an EPA enforcement action that required the landowner to take affirmative action on her property. The courts, however, mischaracterize the basis upon which the *Sackett* court made its decision. In determining that *Sackett* lacked no adequate remedy other than judicial review, the Court explained that “there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into ‘voluntary compliance’ without the opportunity for judicial review — even judicial review of the question whether the regulated party is within the EPA’s jurisdiction.”<sup>132</sup>

The *Sackett* court plainly stated that review of the question whether a party is within the EPA’s jurisdiction may be reviewed judicially. This defeats the Corps’ argument and the *Kent Recycling* court’s holding that an AJD is not binding on a landowner. Enforcement of such a determination only comes with future agency action because *Sackett* acknowledges that the core issue in determining whether or not a compliance order is judicially reviewable is “whether [the] EPA had authority to assert CWA jurisdiction over the [landowner]’s land.”<sup>133</sup> It is clear that the Eighth Circuit in *Hawkes* correctly applied *Sackett*, and the Supreme Court should make this clear by affirming *Hawkes*.

G. *Judicial Review of AJD Protects a Landowner’s Rights Against Otherwise Unfettered Agency Discretion*

The Corps and the EPA’s decentralized and expansive definition of what parcels of land are sufficiently connected to jurisdictional “waters of the United States” is a standard that infringes upon a landowner’s use of his or

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*; See also Amicus Curiae Brief Supporting Appellee, *supra* note 99, at 21-2.

her land.<sup>134</sup> The Corps argued that Hawkes’s parcel was sufficiently connected to “waters of the United States” via a series of unnamed culverts and streams spanning 120 miles.<sup>135</sup> Such a determination is difficult for a landowner to anticipate. The Corps’ AJD also seems to minimally protect the bodies of water over which the CWA has jurisdiction given the significant degree of attenuation between the parcel and jurisdictional waters. The CWA does not grant the Corps jurisdiction over all water in the United States, nor any piece of land upon which water travels.<sup>136</sup>

As the Supreme Court stated in *Rapanos v. United States*, in the last 30 years, the agencies have expanded their jurisdiction “to cover 270-to-300 million acres of swampy lands in the United States – including half of Alaska and an area the size of California.”<sup>137</sup> This expansive definitional power allows the agencies to generate nearly two billion dollars in permitting fees and CWA fines.<sup>138</sup> The Corps’ current practice also forces landowners to expend costs to hire environmental experts or to depend on local Corps’ officials’ determinations on whether or not their parcel is subject to CWA permitting. This process is confusing and AJD outcomes are unpredictable. Allowing the Corps to retain unfettered authority in deciding whether it has jurisdiction over a parcel significantly diminishes a landowner’s use of his or her land. As a result, the Supreme Court should affirm the Eighth Circuit that judicial review is an appropriate limitation upon the Corps and the EPA’s regulatory power.

#### H. *Judicial Review of AJD Incentivizes the Corps to Ensure the Accuracy of its Determinations*

Judicial review of AJD serves as an incentive for local Corps offices to ensure the accuracy of their determinations. The agencies should also take greater efforts to ensure the accuracy of their AJD to avoid spending government resources defending against landowners who seek judicial review of an AJD. The agencies could avoid frequent judicial review of AJDs

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<sup>130</sup> *Sackett*, 132 S.Ct. at 1375.

<sup>135</sup> *Hawkes*, 782 F.3d at 998.

<sup>136</sup> *Rapanos v. United States*, 547 U.S. 715, 721 (2006).

<sup>137</sup> *Id.* at 722.

<sup>138</sup> *Id.* at 721.

## TO PEAT MINE OR NOT TO PEAT MINE

by creating a second administrative appeal for landowners to contest an AJD. Allowing a landowner to have a second administrative appeal would likely increase the accuracy of AJDs and lower the number of cases landowners file against the agencies for judicial review.

An additional internal appeal procedure would also increase revenue the agencies could make in the CWA permitting process. While increased permitting costs are somewhat harmful to applicants, paying for a second administrative appeal would likely be cheaper than suing the Corps in federal court. However, the decentralized organization of the Corps makes it difficult to compare the Corps' current practice to the appeal and permitting procedures of other federal agencies. Adding this appeal step would greater protect a landowner's rights and likely avoid outcomes like in *Hawkes*. Regardless of whether the agencies adopt a second administrative appeal procedure, judicial review of AJD serves as an effective mechanism for ensuring the quality of a Corps' AJD and it protects landowners from the potential burdens of an affirmative AJD.

## VI. CONCLUSION

The Supreme Court should affirm the Eighth Circuit's decision in *Hawkes* and effectively disagree with *Kent Recycling*. The six above legal arguments strongly indicate that an AJD affects a landowner's legal rights and obligations. This outcome is not only legally correct, but it also creates the proper limitations on the broad discretion agencies have over the definition of "waters of the United States" that protect landowners' rights. Judicial review also incentivizes the Corps to make accurate AJDs because otherwise the Corps will be subject to judicial scrutiny of its decisions. In addition, the agencies could adopt a second administrative appeal. This would better protect a landowner's rights and generate more revenue for the agencies. However, given that such an additional administrative appeal procedure is uncommon, the agencies may not consider this option. Regardless, judicial review of AJDs should remain available to landowners to protect their rights, and the Supreme Court can ensure this by affirming the Eighth Circuit's decision in *Hawkes*.