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NOTE

FOR PEAT’S SAKE!
JURISDICTIONAL DETERMINATIONS, HAWKES, AND
JUDICIAL REVIEW

Wesley A. Vorberger[†]

ABSTRACT

*Under the Clean Water Act, the U.S. Army Corps of Engineers (“Corps”) is vested with the power to regulate “waters of the United States” by administering a statutorily mandated permit process. A preliminary part of this permit process is the issuance of a Jurisdictional Determination (“JD”), which declares whether the property in question is considered to contain “waters of the United States” subject to the permit process. There are two types of JDs: preliminary and approved. JDs can also be revised by the Corps for various reasons. Until the Eighth Circuit issued its decision in *Hawkes v. U.S. Army Corps of Engineers*, only approved JDs could be appealed, and only through the Corps administrative appeal process. Prior to *Hawkes* and under *Belle Co. v. U.S. Army Corps of Engineers*, JDs were not subject to judicial review in the federal courts because according to the Fifth Circuit a JD is not a final agency action for which there is no other adequate remedy in a court, as required under the Administrative Procedure Act (APA). *Hawkes*, however, held that each of the criteria for reviewability was present in a JD, and that it was thus subject to judicial review. This split in the circuits will be short lived, as the Supreme Court has granted certiorari on *Hawkes* and will conclusively answer the question of a JD’s reviewability. The issue before the Court in *Hawkes* is whether a revised approved JD meets the requirements of finality and adequacy of remedy under the APA and is subject to judicial review.*

*This Note seeks to provide the best framework for analyzing the reviewability of a JD, using the strongest arguments in support of *Hawkes*’ holding, while, at the same time, delineating the court’s proper role and its power of judicial review. It is the position of this Note that *Hawkes* was ultimately correct in its holding that a JD is subject to judicial review under the APA. However, the court’s rationale in *Hawkes* is flawed in two main respects. First, *Hawkes* inappropriately emphasizes the regulatory burden and impact of the permit process, and fails to make the stronger argument that a JD is, by*

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its very nature, a final agency action. By focusing on the JD itself, the court could have clearly demonstrated that a JD not only creates an obligation to complete the permit process, but also determines rights of the landowner. Second, the court should have tempered its analysis with the concerns of Judge Kelly's concurring opinion and should not have been so critical of the Corps and the cost and efficiency of the entire regulatory scheme. In its prudential critique of this scheme, the court transgressed its constitutional power of judicial review by wrongly answering a political question. The court in Hawkes should have avoided this critique and addressed only the matter before it. While the Supreme Court should affirm the holding in Hawkes, it should avoid such a prudential critique in its analysis of the issue. Overall, a proper understanding of the strengths and flaws of Hawkes will help yield the correct outcome on appeal and illustrate the appropriate analysis that should be used in the process.

I. INTRODUCTION

Hawkes v. U.S. Army Corps of Engineers epitomizes the struggle between regulatory agencies and regulated citizens. In *Hawkes*, the plaintiff sought judicial review of a Jurisdictional Determination ("JD") made by the U.S. Army Corps of Engineers.¹ The JD declared the plaintiff's land was under the jurisdiction of the Clean Water Act and subject to an involved permit process.² The District Court held that the approved JD was not a "final agency action" and thus not reviewable.³ The Eighth Circuit Court of Appeals reversed the District Court's ruling, and held that the approved JD was a "final agency action" subject to judicial review.⁴

It is the position of this Note that the Eighth Circuit Court of Appeals in *Hawkes* reached the correct conclusion regarding the reviewability of the JD, contrary to the Fifth Circuit Court of Appeals in *Belle Co., LLC v. U.S. Army Corps of Engineers*.⁵ Since the Supreme Court of the United States has granted certiorari on *Hawkes* to settle the issue of a JD's reviewability under the APA,⁶

1. *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 996 (8th Cir. 2015), *cert. granted sub nom.*, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 615 (2015).

2. *Id.* at 998, 1000.

3. *Id.* at 996.

4. *Id.* at 1002.

5. *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).

6. The Supreme Court granted certiorari in *Hawkes* on the following question presented: Whether the United States Army Corps of Engineers' determination that the property at issue contains "waters of the United States" protected by the Clean

this Note will seek to provide a defense of *Hawkes*, albeit a critical one. This will be done by demonstrating the reviewability of a JD through precedential and statutory analysis as well as by scrutinizing the court's inappropriate prudential critique of the Corps' regulatory scheme. A proper resolution on appeal will not only provide the landowners with a new avenue to challenge the determination of the Corps, but also prevent the possibility of any regulatory abuse.

II. STATUTORY AND CASE LAW BACKGROUND

To properly understand what is happening in *Hawkes*, it is important to recognize the interplay between several relevant statutes and cases. These statutes and cases serve as the basis for any court deciding whether judicial review is appropriate for a JD. The two statutes relevant here are the Clean Water Act ("CWA")⁷ and the Administrative Procedure Act ("APA").⁸ These two acts work together for the regulatory purpose of "maintain[ing] the . . . integrity of the Nation's waters"⁹ under the CWA. To the extent not specified in the CWA, the APA controls the specific requirements and restrictions to which agencies must adhere in executing their congressionally delegated power. Furthermore, three relevant cases, *Sackett v. Environmental Protection Agency*,¹⁰ *Bennett v. Spear*,¹¹ and *Belle v. U.S. Army Corps of Engineers*,¹² provide the precedential constellation *Hawkes* must use to navigate the issue at hand. These cases build upon one another and lay the groundwork for the circuit split as to whether a JD is a final agency action, with no other adequate remedy in a court, subject to judicial review under the APA.

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- Water Act, 33 U.S.C. 1362 (7); see 33 U.S.C. 1251 *et seq.*, constitutes "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. 704, and is therefore subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*
- U.S. Army Corps of Engineers v. Hawkes Co., 136 S. Ct. 615 (2015).
7. See generally 33 U.S.C.A. §§ 1251 *et seq.* (West 2016).
 8. See generally 5 U.S.C.A. §§ 500 *et seq.* (West 2016).
 9. 33 U.S.C.A. § 1251(a) (West 2016).
 10. *Sackett v. E.P.A.*, 132 S. Ct. 1367 (2012).
 11. *Bennett v. Spear*, 520 U.S. 154 (1997).
 12. *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).

A. *The Clean Water Act*

The statutory authority for regulating wetlands, like the one at issue in *Hawkes*, comes from the CWA. The CWA purports to regulate for the purpose of maintaining and restoring the “chemical, physical and biological integrity of the Nation’s waters.”¹³ This ambitious goal was initially set out in 1948, under what was called the Federal Water Pollution Control Act.¹⁴ It was later amended, both in 1972 and 1977, and became what is now known as the CWA.¹⁵ At issue in *Hawkes* is 33 U.S.C. § 1344, which gives the Secretary of the Army, via the Chief of Engineers, authority to issue permits “for the discharge of dredged or fill material into the navigable waters at specified disposal sites.”¹⁶ The CWA exercises its enforcement power under 33 U.S.C. § 1319, which provides for various administrative, civil, and criminal penalties.¹⁷

A part of the permit process authorized by 33 U.S.C. § 1344 involves the issuance of a JD by the U.S. Army Corps of Engineers to landowners seeking a permit. All JDs fall into one of two categories:¹⁸ preliminary¹⁹ or approved.²⁰ Under the CWA, a JD is defined as “a written Corps determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. § 1344)”²¹ A JD is based on several factors such as “indicators of adjacency to navigable or interstate waters; indicators that the wetland or waterbody is of part of a tributary system; or indicators of linkages between isolated water bodies and interstate or foreign commerce.”²² Additionally, an approved (or final) JD is subject to an

13. 33 U.S.C.A. § 1251(a) (West 2016).

14. Jonathan D. Sater, *Sackett v. EPA: The Murky Confluence of Due Process and Administrative Compliance Orders Under the Clean Water Act*, 7 LIBERTY U. L. REV. 329, 339 (2013).

15. *Id.*

16. 33 U.S.C.A. § 1344(a), (d) (West 2016).

17. See 33 U.S.C.A. § 1319 (West 2016).

18. 33 C.F.R. § 331.2 (2016) (“All JDs will be in writing and will be identified as either preliminary or approved.”).

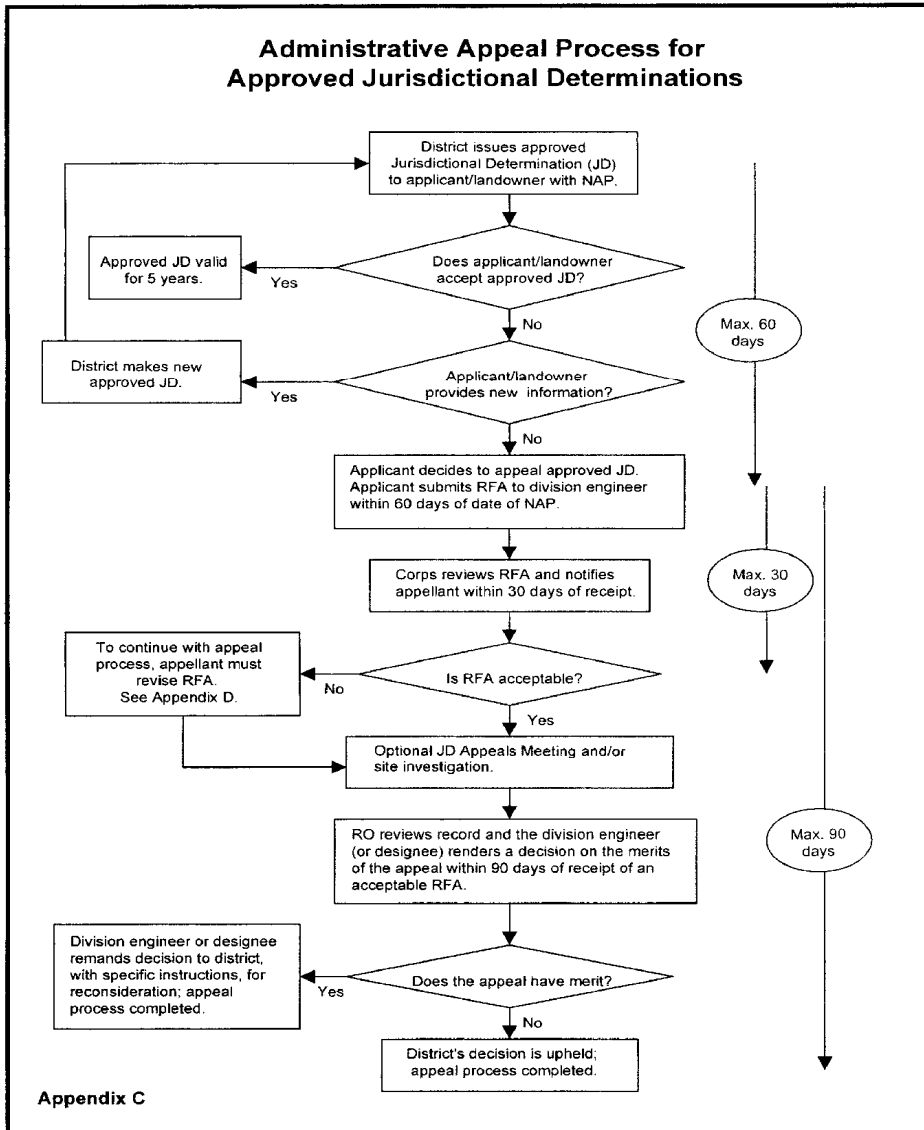
19. *Id.* (“Preliminary JDs are written indications that there may be waters of the United States on a parcel or indications of the approximate location(s) of waters of the United States on a parcel. Preliminary JDs are advisory in nature and may not be appealed. Preliminary JDs include compliance orders that have an implicit JD, but no approved JD.”).

20. *Id.* (“Approved jurisdictional determination means a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. Approved JDs are clearly designated appealable actions and will include a basis of JD with the document.”).

21. *Id.*

22. *Id.*

administrative appeal process.²³ This review process is well illustrated in Exhibit 1-1 which is provided as an appendix to the relevant Corps regulations.



23. See generally 33 C.F.R. § 331.7 (2016); 33 C.F.R. Pt. 331, App. C. (2016).

24. 33 C.F.R. Pt. 331, App. C. (2016).

It is important to clarify that the issue in *Hawkes* is whether a revised approved JD is appealable to a Federal Court and subject to judicial review under the APA, not whether it is appealable to the administrative agency under the CWA.²⁵

B. The Administrative Procedure Act

The APA has been called the “heart of administrative law,” and for good reason.²⁶ “The APA is the foundation of the administrative statutory scheme” from which government agencies derive their regulatory power.²⁷ The APA provides agencies with the ability to make legally binding orders.²⁸ Furthermore, the APA sets forth procedures for judicial review of those orders (unless otherwise specified in the agency’s governing statute).²⁹ Judicial review of an agency’s action may occur when “made reviewable by statute” or when it is a “final agency action for which there is no other adequate remedy in a court.”³⁰ Furthermore, the APA states that “[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.”³¹ Judicial review is permitted under the APA with two exceptions: preclusion by a subsequent statute or to the extent that “agency action is committed to agency discretion by law.”³²

In light of the APA requirements, parties seeking judicial review naturally encounter the dispositive questions of: (1) whether an agency action is considered to be “final” and (2) whether there is no other adequate remedy in a court (also referred to as “no reasonable alternative” to judicial review). Without satisfying the requirements of the APA, a court will lack subject matter jurisdiction and be unable to adjudicate a review of the administrative

25. See 33 C.F.R. § 331.7 (2016) for more information on the Corps administrative appeal process.

26. See Sater, *supra* note 14, at 337.

27. See *id.* at 336. Another commentator has rightly recognized the APA’s proper role and purpose: “Congress created the APA as a ‘working compromise, in which broad delegations of discretion were tolerated as long as they were checked by extensive procedural safeguards.’ As a result, Congress established procedural requirements in the APA that went beyond the obligations of due process.” Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 405-06 (1987).

28. Sater, *supra* note 14, at 338.

29. See 5 U.S.C.A. §§ 701-706 (West 2016).

30. See 5 U.S.C.A. § 704.

31. *Id.*

32. See 5 U.S.C.A § 701.

order. The Supreme Court's reasoning in *Sackett v. E.P.A.*³³ has been used as the standard for determining the reviewability of administrative orders. Furthermore, the Court in *Sackett* held that the CWA is subject to the judicial review provisions under the APA.³⁴

C. *Sackett v. E.P.A.*

In *Sackett*, the owners of a parcel in Idaho brought a civil action under the APA against the U.S. Environmental Protection Agency ("EPA") to challenge an administrative compliance order ("ACO").³⁵ The ACO stated that the landowner's property was subject to regulation under the CWA.³⁶ An ACO is a final agency action when it determines rights or obligations, or legal consequences flow from its issuance, and it marks the consummation of the agency's decision-making process.³⁷ The ACO in *Sackett* ordered the landowners to restore their property, which had fill material placed on it pursuant to an EPA "work plan."³⁸ The district court dismissed *Sackett's* civil action for want of subject matter jurisdiction, and the Ninth Circuit Court of Appeals affirmed.³⁹ Although *Sackett's* appeal arose out of a dispute regarding the scope of "navigable waters" under the CWA, the Supreme Court's analysis was limited only to the issue of whether the *Sacketts* could challenge the ACO in court.⁴⁰

33. *Sackett v. E.P.A.*, 132 S. Ct. 1367, 1369 (2012).

34. *Id.* at 1374 ("Here, there is no suggestion that Congress has sought to exclude compliance-order recipients from the Act's review scheme; quite to the contrary, the Government's case is premised on the notion that the Act's primary review mechanisms are open to [compliance-order recipients] The Clean Water Act does not preclude [APA] review.").

35. *Id.* at 1370-71. An "Administrative Compliance Order" is defined under the Clean Water Act as:

Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

33 U.S.C.A. § 1319(a)(3).

36. *Sackett*, 132 S. Ct. at 1369.

37. *Id.* at 1371-72.

38. *Id.*

39. *Id.* at 1371.

40. *Id.* at 1369.

The Court held that the ACO was, indeed, a final agency action without any adequate remedy apart from judicial review under the APA.⁴¹ Justice Scalia, delivering the unanimous opinion of the Court, analyzed the issue according to the standard he had set forth in *Bennett v. Spear* which defined when an agency action is final.⁴² The Court in *Bennett* stated succinctly that two conditions must be met for an action to be final: “First, the action must mark the ‘consummation’ of the agency’s decisionmaking process—it must not be of a merely tentative or interlocutory nature. Second, the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’”⁴³ The Court in *Sackett* analyzed the ACO against the *Bennett* test and held that the *Bennett* test was, indeed, satisfied.⁴⁴ The Court further held that the CWA did not expressly or impliedly preclude judicial review under the APA, finding the Government’s argument that the CWA was preclusive to be unpersuasive.⁴⁵ In so doing, the Court reversed the lower court’s judgment and remanded for further proceedings.⁴⁶ Understanding the Court’s precedent in *Sackett* is critical to the discussion in *Hawkes* because the ACO and the JD are often analogized to one another in determining reviewability.

D. Belle Co. v. U.S. Army Corps of Engineers

Subsequent to the decision in *Sackett*, and while *Hawkes* was on appeal to the Eighth Circuit Court of Appeals, the Fifth Circuit Court of Appeals determined in *Belle Company v. U.S. Army Corps of Engineers* that a JD is not considered a “final agency action” and thus is not reviewable under the APA.⁴⁷ In *Belle*, a JD was issued on a parcel of land which was owned by Belle Company and, in the event it could be used as a solid-waste landfill, subject to an option to purchase by Kent Recycling, LLC.⁴⁸ The land at issue had previously been evaluated by several State and Federal agencies who reached various conclusions as to its character. Initially, it was classified as non-wetlands not subject to the CWA by the Department of Agriculture and the EPA. It was then labeled as wetlands subject to the CWA by the Corps. Later it was declared to be “commenced-conversion cropland” by the Natural

41. *Id.* at 1374.

42. *Id.* at 1371-72. *See also* *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

43. *Bennett*, 132 S. Ct. at 177-78 (citations omitted).

44. *Sackett*, 132 S. Ct. at 1371-72.

45. *Id.* at 1372-74.

46. *Id.* at 1374.

47. *Belle Co. v. U.S. Army Corps of Eng’rs*, 761 F.3d 383, 397 (5th Cir. 2014).

48. *Id.* at 386.

Resources Conservation Service (NRCS). Finally, it was determined as having its status as a wetland (dependent upon how the land was used) by joint guidance from the Corps and NRCS.⁴⁹ After having already started and stopped an application for a permit before, the plaintiffs decided to pursue a CWA permit once again.⁵⁰ In response, the Corps issued a JD stating that the land was considered waters of the United States and subject to the entire permit process.⁵¹ Together, the two companies challenged the JD in U.S. District Court in Louisiana.⁵² The District Court granted the government's motion to dismiss and stated that the JD was not a "final agency action" reviewable under the APA.⁵³ The Court of Appeals affirmed the District Court and dismissed for lack of subject matter jurisdiction.⁵⁴

The court held, *inter alia*, that under *Sackett* and the current prevailing doctrine, a JD was not an action in which either rights or obligations were determined or an action from which legal consequences flowed, making it non-reviewable under the APA.⁵⁵ The court analyzed both of the *Bennett* conditions to reach its conclusion. In so doing, it relied on the pre-*Sackett* case of *Fairbanks North Star Borough v. U.S. Army Corps of Engineers* to hold that the JD did, in fact, serve as the consummation of the Corps' decision-making process.⁵⁶ However, the court in *Belle* distinguished the ACO in *Sackett* from the JD at issue and held that it did not determine rights or obligations, nor was it an action from which legal consequences flowed.⁵⁷ The court found that unlike an ACO, which ordered restoration of the property, the JD was merely a "notification of the property's classification" as a wetland under the CWA.⁵⁸ It further distinguished the JD from an ACO by stating that the JD created no "penalty scheme" and instead of inhibiting the plaintiff's obtaining of a permit, the JD encouraged it.⁵⁹ Lastly, the court

49. *Id.* at 386-87.

50. *Id.* at 387.

51. *Id.*

52. *Id.* See also *Belle Co., LLC v. U.S. Army Corps of Eng'rs*, No. CIV.A. 12-247-BAJ, 2013 WL 773730 (M.D. La. Feb. 28, 2013).

53. *Belle*, 761 F.3d at 387.

54. *Id.* at 397.

55. *Id.* at 394.

56. *Id.* at 389 (citing *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 591 (9th Cir. 2008)). It should also be noted that *Belle* comes to the same conclusion as *Fairbanks*. As such, the Eighth Circuit's conclusion in *Hawkes* runs against two other circuits (the Fifth Circuit and the Ninth Circuit).

57. *Id.* at 394.

58. *Id.* at 391.

59. *Id.* at 392-93.

noted that the ACO in *Sackett* notified the landowner of a violation, whereas the JD at issue in *Belle* does not state any violation.⁶⁰ Feeling it had sufficiently distinguished the JD from the ACO in *Sackett*, the court held that the JD was not a “final agency action” and affirmed the District Court’s granting of the Corps’ motion to dismiss.⁶¹

A proper understanding of the CWA, the APA, and of *Sackett*, *Bennett*, and *Belle* helps to frame the legal landscape for what occurs in *Hawkes*. Some regulatory agencies are granted authority under the CWA to issue permits allowing landowners to discharge dredged or fill material into navigable waters (or waters of the United States).⁶² Furthermore, those agencies are empowered through the APA to issue orders, like an ACO, to rectify or notify of non-compliance.⁶³ There is, however, a check on the agencies through judicial review. With few exceptions, judicial review is available when there is a “final agency action for which there is no other adequate remedy in a court.”⁶⁴ An agency action is considered “final” when it satisfies the *Bennett* test, as the Court applied it in *Sackett*, which requires that the order be the “consummation” of the agency’s decision making and that “legal consequence will flow” from the issuance, determining “rights or obligations.”⁶⁵ The court in *Belle* found the order in *Sackett* and the JDs issued by the Corps to be distinguishable, and held that a JD is not considered a “final agency action” appealable under the APA.⁶⁶ This set the stage for *Hawkes* and the ensuing split between the circuits.

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

A. *Hawkes in the District Court*

Before *Hawkes* was on the docket in the Eighth Circuit Court of Appeals, it was in the U.S. District Court in Minnesota.⁶⁷ The plaintiffs brought a cause of action against the U.S. Army Corps of Engineers seeking injunctive and declaratory relief regarding the Corps’ JD that the property owned by the

60. *Id.* at 393.

61. *Id.* at 394.

62. 33 U.S.C.A. § 1344(a), (d) (West 2016).

63. *See, e.g.*, 5 U.S.C.A. § 558 (West 2016).

64. *See* 5 U.S.C.A. §§ 701, 704.

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

66. *Belle Co. v. U.S. Army Corps of Eng’rs*, 761 F.3d 383, 392-94 (5th Cir. 2014).

67. *Hawkes Co. v. U.S. Army Corps of Engineers*, 963 F. Supp. 2d 868 (D. Minn. 2013) *rev’d and remanded*, 782 F.3d 994 (8th Cir. 2015).

plaintiffs was subject to the Corps' permitting process under the CWA.⁶⁸ The property in question was a 530-acre parcel which was undisputedly labelled a "wetland."⁶⁹ It was prized by Hawkes for its "high-quality peat," which was capable of supporting his business for "another 10-15 years."⁷⁰ In dispute, was whether the wetland constitutes "waters of the United States."⁷¹ The Corps contended that "waters of the United States" includes wetlands adjacent to navigable waters, which the District Court found to be convincing in light of Supreme Court precedent.⁷²

The chronology of events is one that can be considered reasonable only by government standards. In March 2007, the plaintiff, Hawkes Company ("Hawkes"), met with the Corps and the Minnesota Department of Natural Resources to discuss his plans, which included filling or discharging materials onto the property.⁷³ Hawkes then applied for a permit in December 2010.⁷⁴

In January 2011, Hawkes met with the Corps, which tried to convince him not to use the new property due to the cost and time involved in getting through the permit process.⁷⁵ In March 2011, the Corps notified Hawkes that it had determined the wetland property was connected to the Red River of the North and thus was regulated by the CWA.⁷⁶ This required that Hawkes go through the entire Corps permit process.⁷⁷ The parties then met several more times and Hawkes was required to conduct around \$100,000 in assessments on the property.⁷⁸ In November 2011, Hawkes received a "preliminary" JD from the Corps which stated that, because the property was connected to a "relatively permanent water," which connected it to the Red River of the North, which was a "navigable water," the land was under the jurisdiction of the CWA.⁷⁹ Hawkes responded by challenging the JD's

68. *Id.* at 870-71.

69. *Id.* at 870.

70. *Id.*

71. *Id.* at 870-71.

72. *Id.* at 870 (citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985)).

73. *Id.* at 870-71

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 871.

rationale and asserted that it was not connected to a “navigable water” by a “relatively permanent water.”⁸⁰

In February 2012, Hawkes received an approved JD from the Corps asserting they had jurisdiction under a new rationale (stating a “significant nexus” existed between the property and the Red River of the North).⁸¹ In April 2012, the plaintiffs subsequently appealed the approved JD under CWA regulations.⁸² In October of 2012, the Corps Review Officer rejected the plaintiff’s arguments but ultimately remanded the JD for further determination regarding the “[p]roperty’s chemical, physical, and biological effects on the Red River of the North.”⁸³ Finally, in December 2012, the Corps issued a revised JD, a “final Corps approved jurisdictional decision,” again stating that the Corps had jurisdiction over the property under the CWA.⁸⁴ The final revised, approved JD was not appealable.⁸⁵

Thus, in January 2013, over three years after starting the process, Hawkes brought his dispute to U.S. District Court for the District of Minnesota to challenge the JD of the Corps.⁸⁶ The district court in *Hawkes* dismissed the plaintiff’s claim, holding that it failed to pass the *Bennett* test.⁸⁷ Since *Hawkes* was considered a case of first impression within the Eighth Circuit, the district court relied heavily on an analogous case in the Ninth Circuit, *Fairbanks North Star Borough v. Army Corps of Engineers*.⁸⁸ Following the court’s rationale in *Fairbanks*, the district court found that the JD indeed represented the “consummation of the Corps’ decisionmaking process.”⁸⁹ “The court in *Fairbanks* reasoned that when the Corps issues a jurisdictional determination, and upholds it on administrative appeal, the Corps itself treats the determination as ‘final.’”⁹⁰ However, the district court found the second condition of the *Bennett* test unsatisfied.⁹¹ The court, citing to both *Fairbanks* and the district court opinion in *Belle*, asserted the “[JD] does not

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 873.

88. *Id.* at 872 (citing to *Fairbanks N. Star Borough v. U.S. Army Corps of Eng’rs*, 543 F.3d 586 (9th Cir. 2008)).

89. *Id.*

90. *Id.* at 872-73 (citing *Fairbanks N. Star Borough*, 543 F.3d at 592).

91. *Id.* at 874.

fix [the plaintiff's] rights or obligations. The Revised JD does not order Plaintiffs to take any kind of action. Although Plaintiffs may want to obtain a permit if they wish to expand their mining operations, the Corps has in no way obligated them to do so."⁹²

The district court also distinguished between the JDs in the present case and the ACOs at issue in *Sackett*.⁹³ While the JD lacked any penalty or obligation for Hawkes, the *Sackett* plaintiffs were under the risk of severe penalty for non-compliance if they refused to act.⁹⁴ The court further noted that the JD did not inhibit the plaintiffs from seeking to obtain a permit from the Corps.⁹⁵ This, the court concluded, further distinguished the case from *Sackett*, since the plaintiff could file suit through the administrative process by applying for a permit.⁹⁶ The failure to satisfy both *Bennett* conditions, and the availability of other "remedies," rendered the JD "not reviewable" in the eyes of the district court.⁹⁷ This set the stage for the plaintiff's appeal to the Eighth Circuit.

B. Hawkes in the Eighth Circuit Court of Appeals

The Eighth Circuit Court of Appeals addressed a narrow question on appeal: whether the finality standard in *Sackett* should also apply to JDs when the party has neither completed the permit process nor exposed itself to the risk of substantial penalties by avoiding the process.⁹⁸ At the outset of the opinion, the court reiterated the issues and holdings found by the district court and recognized that authority cited in support of the lower court's ruling (*Belle*) had since been affirmed by the Fifth Circuit Court of Appeals.⁹⁹ Nevertheless, the court concluded that both the lower court and the court in *Belle* misapplied *Sackett* and set out to justify its reversal of the lower court.¹⁰⁰

The court began by putting forth the relevant statutory law (the CWA) and then set the tone for the opinion by quoting *Rapanos v. United States*.¹⁰¹

92. *Id.* at 875.

93. *Id.*

94. *Id.*

95. *Id.* at 877.

96. *Id.*

97. *Id.* at 878.

98. *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 963 F. Supp. 2d 868 (D. Minn. 2013), *rev'd and remanded*, 782 F.3d 994, 997 (8th Cir. 2015), *cert. granted sub nom.*, *U.S. Army Corp of Engineers v. Hawkes Co.*, 136 S. Ct. 615 (2015).

99. *Id.* at 996-97. *See also Belle Co. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383 (5th Cir. 2014).

100. *Hawkes*, 782 F.3d at 996.

101. *Id.* at 996.

The court stated that the broad definition of “navigable waters” has empowered the Corps and EPA “to make ‘sweeping assertions of jurisdiction’ over every stream, ditch, and drain that can be considered a tributary of, and every wetland that is adjacent to, traditional navigable waters.”¹⁰² With that, the court recognized that although the Corps may require a permit to discharge materials into wetlands that are located adjacent to “waters of the United States,” it rejected the position that the Corps possessed jurisdiction under the CWA over “nonnavigable, isolated, intrastate waters.”¹⁰³ Indeed, although the appellate court accepted the facts as stated by the district court with little modification, it noted that the wetland in question was located 120 miles away from the allegedly “adjacent” navigable waters.¹⁰⁴

The court concluded its introduction by stating that two tests, both from *Rapanos*, were at play.¹⁰⁵ The two tests in *Rapanos* came from the plurality opinion written by Justice Scalia, the “relatively permanent” test,¹⁰⁶ and the concurring opinion by Justice Kennedy, the “significant nexus” test.¹⁰⁷ The court stated that since the Supreme Court “adopted different narrower tests to determine when wetlands are ‘waters of the United States,’ we held ‘that the Corps has jurisdiction over wetlands that satisfy either . . . test’”¹⁰⁸ The heart of the plaintiff’s contention was that the Corps failed both of these tests.¹⁰⁹ Yet the district court’s dismissal of the plaintiff’s claim was predicated on the fact that the district court did not consider the revised, approved JD a “final agency action” under both conditions of the *Bennett* test and thus not

102. *Id.* (quoting *Rapanos v. U.S.*, 547 U.S. 715, 726–727 (2006) (plurality opinion)).

103. *Id.* at 997.

104. *Id.* at 997–98.

105. *Id.* at 999.

106. The “relatively permanent” test states that “‘the waters of the United States’ include only relatively permanent, standing or flowing bodies of water,” such as “streams,” “oceans,” “rivers,” “lakes,” and “bodies” of water “forming geographical features.” *Rapanos v. U.S.*, 547 U.S. 715, 732–33 (2006) (plurality opinion).

107. The “significant nexus” test states that wetlands “constitute ‘navigable waters’ under the Act, a water or wetland must possess a “significant nexus” to waters that are or were navigable in fact or that could reasonably be so made.” Justice Kennedy further clarified stating, “wetlands possess the requisite nexus, and thus come within the statutory phrase ‘navigable waters,’ if the wetlands, alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters . . . understood as “navigable.” *Id.* at 759, 780 (Kennedy, J., concurring).

108. *Hawkes*, 782 F.3d at 997 (citing *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009)).

109. *Id.* at 999.

suitable for judicial review.¹¹⁰ It was on this point that the court of appeals focused its analysis.

The court of appeals agreed with the district court that the first condition, that the JD was the “consummation of the Corps’ decisionmaking,” was met in the Corps’ revised approved JD.¹¹¹ The court then scrutinized the district court’s holding that the JD did not satisfy the second *Bennett* condition. The court set forth a litany of cases that demonstrated the district court exaggerated the difference between an “agency order that compels affirmative action, and an order that prohibits a party from taking otherwise lawful action.”¹¹²

En route to finding the second *Bennett* condition satisfied, the court made several key observations in its flyover of relevant case law. First, the court noted that the revised approved JD forced the plaintiff to choose between either paying a substantial cost for the permit process, or to relent to the frustration and not use the land, or risk various penalties for non-compliant use.¹¹³ Next, the court recognized that the specificity of the order provided an “even stronger coercive effect” than a similar case involving an ambiguous agency regulation which required a permit (and which was ultimately deemed to satisfy the second *Bennett* condition).¹¹⁴ Lastly, the court found the order “adversely affect[ed] [the] appellant’s right to use their property in conducting lawful business activity.”¹¹⁵ Even though the court found the order was not “self-executing,” it cited to *Sackett* to reiterate that “the APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction.”¹¹⁶

The majority concluded its opinion by analyzing whether obtaining a permit or proceeding sans permit and challenging an eventual compliance order, were adequate remedies under the APA.¹¹⁷ The court recognized that the district court, and the defendant, failed to recognize the “prohibitive cost” in either “alternative.”¹¹⁸ The court stated the permit process was

110. *Id.*

111. *Id.*

112. *Id.* at 1000. The court noted that a “biological opinion,” “prescription drug labelling regulations,” an agency order declaring “certain agricultural commodities were not exempt from regulations,” and an agency regulation barring the “licensing of stations that enter into network contract,” all satisfied the second *Bennett* condition. *Id.* at 1000-01.

113. *Id.* at 1001-02.

114. *Id.*

115. *Id.* at 1001.

116. *Id.* (citing *Sackett v. E.P.A.*, 132 S. Ct. 1367, 1373 (2012)).

117. *Id.*

118. *Id.*

“prohibitively expensive”¹¹⁹ and the plaintiff’s amended complaint revealed that the Corps had informed Hawkes that the permit “would ultimately be refused.”¹²⁰ This information alone, the court stated, would be sufficient to satisfy the second *Bennett* condition.¹²¹ Furthermore, commencing the mining operation and waiting for an ACO would be, in the court’s words, “plainly an inadequate remedy.”¹²² Besides reeking of bad faith, since the plaintiff’s already knew of the permit process, it would expose the plaintiff to substantial risk of administrative, civil, and criminal penalties.¹²³

The court, channeling Justice Scalia’s righteous indignation at regulatory overreach in *Rapanos*, concluded by leveling an indictment against the Corps. The court is best heard in its own words:

The prohibitive costs, risk, and delay of these alternatives to immediate judicial review evidence a transparently obvious litigation strategy: by leaving appellants with no immediate judicial review and no adequate alternative remedy, the Corps will achieve the result its local officers desire, abandonment of the peat mining project, without having to test whether its expansive assertion of jurisdiction—rejected by one of their own commanding officers on administrative appeal—is consistent with the Supreme Court’s limiting decision in *Rapanos*. For decades, the Corps has “deliberately left vague” the “definitions used to make jurisdictional determinations,” leaving its District offices free to treat as waters of the United States “adjacent wetlands” that “are connected to the navigable water by flooding, on average, once every 100 years,” or are simply “within 200 feet of a tributary.”¹²⁴

The court finished its critique by stating the Corps’ view of the revised, approved JD “ignores reality” and ended by quoting Justice Alito’s concurring opinion in *Sackett*, stating that without judicial review “the impracticality of otherwise obtaining review, combined with ‘the uncertain reach of the [CWA] and the draconian penalties imposed for the sort of violations alleged in this case . . . leaves most property owners with little

119. The court stated: “the average applicant for an individual Corps permit ‘spends 788 days and \$271,596 in completing the process.’” *Id.* (citing *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion)).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* (citing *Rapanos*, 547 U.S. at 727–28).

practical alternative but to dance to the [agency's] tune.”¹²⁵ With that, the court reversed the dismissal and remanded the case to district court.¹²⁶

Judge Kelly concurred, but raised several legitimate concerns with the majority's reasoning. First, Judge Kelly questioned how much weight the majority should have put on the inherent difficulty in the permit process as it relates to determining whether the JD constituted a final agency action.¹²⁷ Next, Judge Kelly noted the difference between an ACO and a JD, stating that the former accrues a penalty and the latter possesses no attached penalty at all.¹²⁸ However, Judge Kelly ultimately agreed with the majority since there were no “acceptable options to challenge the JD, absent judicial review.”¹²⁹ In concluding there was no other adequate remedy, Judge Kelly pointed to *Sackett* and recognized a critical fact: the CWA is not just any other law.¹³⁰ “[M]ost 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*.”¹³¹

IV. THE SUPREME COURT SHOULD AFFIRM THE HOLDING IN *HAWKES*

The Supreme Court should affirm *Hawkes* and recognize that a JD determines both rights and obligations, and is the consummation of the Corps' decisionmaking process. For a JD to be subject to judicial review under the APA, it must be: (1) a final agency action; and (2) there must be no other adequate remedy available in court (often termed “no other reasonable alternative” to judicial review).¹³² As discussed above, to be considered a final agency action, the two finality conditions put forth in *Bennett* must be satisfied.¹³³ The Fifth and Ninth Circuits have both recognized that a JD satisfies the first *Bennett* condition (i.e. the JD is the consummation of the Corps' decisionmaking process.)¹³⁴ Thus, the court in *Hawkes* focused primarily on the second *Bennett* condition, and on whether there existed any other adequate remedy in a court.¹³⁵ Below, two critical points will illustrate

125. *Id.* at 1002-03 (citing *Sackett v. E.P.A.*, 132 S. Ct. 1367, 1375 (Alito, J., concurring)).

126. *Id.* at 1002.

127. *Id.* at 1003.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. See 5 U.S.C.A. § 704.

133. See *supra* Section II.C.

134. See *Belle Co. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 390 (5th Cir. 2014).

135. *Hawkes*, 782 F.3d at 1000-01.

that a JD satisfies the second condition of the *Bennett* test, and accordingly the holding in *Hawkes* should be affirmed for two reasons. First, because the JD determines the “rights” of the landowner, and second, because the JD determines the “obligations” of the landowner.

It should be noted at the outset, however, that the court in *Hawkes* rested its holding that the second *Bennett* condition was satisfied on the weak foundation of the JD’s regulatory impact.¹³⁶ This emphasis is misplaced. By focusing on the peripheral impact of the regulatory action, instead of the JD itself, the court missed an opportunity to analyze the JD for rights and obligations inherent within it. Comments pertaining to scope and impact are more relevant in determining whether any other adequate remedy exists to judicial review, as required by the APA. Yet, looking at the JD itself allows the courts to properly analyze finality and reviewability under the statutory framework of the APA and the CWA respectively.

A. *The JD Determines the Rights of the Landowner: It is More Than a Classification*

As previously stated, the second *Bennett* condition requires that the agency action determine “rights or obligations,” or that “legal consequences will flow” from its issuance, in order for an agency action to be considered final, and thus reviewable under the APA.¹³⁷ When a JD declares a landowner is subject to the permit process, courts curiously tend to scrutinize JDs in terms of their obligation-determining capacity without regard to their potential rights-determining capacity. In reading both *Belle* and *Hawkes* it appears that each court makes a similar assumption in its reasoning: that a JD declaring the landowner subject to the permit process would appear to establish solely an obligation to complete it (which both courts focus on in their analysis).¹³⁸ This is an unnecessarily restrictive interpretation of the second *Bennett* condition, one which should not hold future courts captive

136. *Id.* (“[The District Court’s] analysis seriously understates the impact of the regulatory action at issue by exaggerating the distinction between an agency order that compels affirmative action, and an order that prohibits a party from taking otherwise lawful action. Numerous Supreme Court precedents confirm that this is not a basis on which to determine whether ‘rights or obligations have been determined’ or that ‘legal consequences will flow’ from agency action Likewise, here, the Revised JD requires appellants either to incur substantial compliance costs (the permitting process), forego what they assert is lawful use of their property, or risk substantial enforcement penalties.”).

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

138. *Hawkes Co., Inc. v. U.S. Army Corps of Eng’rs*, 963 F. Supp. 2d 868 (D. Minn. 2013), *rev’d and remanded*, 782 F.3d 994 (8th Cir. 2015), *cert. granted sub nom.*, *U.S. Army Corp of Engineers v. Hawkes Co.*, 136 S. Ct. 615 (2015).

to neglecting consideration of the right-determining nature of the JDs. Courts should instead fully apply the *Bennett* test and consider both the obligation-determining *and* the right-determining aspects of the JD to see if either is present, thus satisfying the second condition under *Bennett*.

The court in *Belle* failed to truly grapple with the possibility of a JD declaring a land to *not* be considered waters of the United States. In this situation, a landowner would not be subject to the permit process. The court in *Hawkes* touched briefly on this possibility and referenced a Regulatory Guidance Letter (Letter) from the Corps stating:

The Corps' Regulatory Guidance Letter No. 08-02, at 2, 5, described an Approved JD as a "definitive, official determination that there are, or that there are not, jurisdictional 'waters of the United States' on a site," and stated that an Approved JD "can be relied upon by a landowner, permit applicant, or other affected party . . . for five years" (quotation omitted).¹³⁹

Although the main purpose of the Letter was to help landowners understand the differences between approved JDs, like the ones in both *Belle* and *Hawkes*, and preliminary JDs, which are issued earlier in the regulatory process, the Letter is powerful evidence of the right-determining nature an approved JD.¹⁴⁰

The Letter goes on to state that an approved JD "can be used and relied on by the recipient . . . if a CWA citizen's lawsuit is brought in the Federal Courts against the landowner or other 'affected party,' challenging the legitimacy of that JD or its determinations."¹⁴¹ Here, the Corps is clarifying that the

139. *Hawkes*, 782 F.3d at 999.

140. U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 08-02, June 26, 2008 at 1 ("This Regulatory Guidance Letter (RGL) explains the differences between these two types of JDs [preliminary and approved] and provides guidance on when an approved JD is required and when a landowner, permit applicant, or other "affected party" can decline to request and obtain an approved JD and elect to use a preliminary JD instead." (footnote omitted)). It should also be noted that courts have often recognized that administrative agencies, the Corps being one, are bound not only by the precepts of their governing statutes, but also by those of their regulations. See *Doraiswamy v. Sec'y of Labor*, 555 F.2d 832, 843 (D.C. Cir. 1976) ("Without a doubt, 'an administrative agency is bound not only by the precepts of its governing statute but also by those incorporated into its own regulations"). Although it is questionable whether the Regulatory Guidance Letter is itself a regulation, at the very least it illuminates the regulatory precept by which the Corps is bound. See also *Abbott-Nw. Hosp., Inc. v. Schweiker*, 698 F.2d 336, 342 (8th Cir. 1983).

141. U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 08-02, June 26, 2008 at 2.

approved JD can be used in defending the landowner from lawsuits regarding how the land is being used pursuant to or in violation of the CWA. If the approved JD did not determine the rights of the landowner, then how could it provide a defense for the landowner? The Corps states in the Letter that this determination is valid for five years, and that it can be “used and relied on” when its legitimacy has been challenged.¹⁴² Thus when a landowner is challenged in court, they can point to the JD and assert their rights as determined by the Corps. When the approved JDs in *Belle* and *Hawkes* requiring the landowners to complete the permit process are viewed together an approved JD that does not require the landowner to complete permit process, it becomes clear that a JD determines at least rights, if not also obligations, either of which is sufficient to satisfy the second *Bennett* condition.

Moreover, the court in *Belle* failed to truly address whether rights were determined. Instead, it focused mainly on whether obligations were determined by the JD.¹⁴³ The court merely noted:

[A]uthorizing judicial review of JDs, to the extent that it would disincentivize the Corps from providing them, would undermine 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.¹⁴⁴

Here the court curiously seems to explicitly recognize the role of JDs within the regulatory system: that their issuance determines the rights of the landowner prior to punishment under the CWA. Thus, since the JD “determines rights,” the second *Bennett* condition should have been considered satisfied, yet the court would go on to conclude just the opposite.¹⁴⁵

B. The JD Determines the Obligations of the Landowner: It is a Part of the Permit Process Subject to a Penalty under 33 USC § 1319

A JD issued by the Corps carries with it the obligation of completing the permitting process, and is a part of the larger penalty scheme under the APA.

142. *Id.* (stating that approved JD “can be relied upon by a landowner, permit applicant, or other ‘affected party’ (as defined at 33 C.F.R. § 331.2) who receives an approved JD for five years.”).

143. *Belle Co. v. U.S. Army Corps of Eng’rs*, 761 F.3d 383, 390-94 (5th Cir. 2014).

144. *Id.* at 394 (emphasis omitted) (emphasis added).

145. *Id.*

As stated above, the second *Bennett* condition requires that the agency action must determine “rights or obligations,” or that “legal consequences will flow” from its issuance, to be considered final.¹⁴⁶ The courts in *Hawkes* and *Belle* focused heavily on the second *Bennett* condition, specifically on whether obligations were determined, in evaluating whether the JD was reviewable. The Fifth Circuit relied on a mountain of precedent, both pre- and post-*Sackett*, in attempting to distinguish between a JD and an ACO and held that the JD was merely a “classification” and that regardless of the prohibitive cost of compliance with the permit process it was insufficient to consider the JD a final agency action.¹⁴⁷ The Eighth Circuit disagreed, holding that the sheer cost of compliance and the lack of ready alternatives to judicial review were sufficient to find that the second *Bennett* condition was satisfied.¹⁴⁸

The court in *Belle* drew a distinction between the JD at issue and the ACO in *Sackett* on grounds that a JD is merely a “classification [of the land in question] as wetlands . . . not [obligating] Belle to do or refrain from doing anything to its property.”¹⁴⁹ Yet, in the next sentence, the court stated that the JD “notifies Belle that a 404 permit will be required prior to filling, and [that the court was] cognizant that the Corps’s permitting process can be costly for regulated parties.”¹⁵⁰ These two statements are befuddling. How is it that no obligation is determined by the JD, yet the JD notifies the landowner that they are obligated to complete the permit process?

It appears that something even more elementary could be used to determine whether obligations are determined by the JD. That is, whether the JD contains any punitive power. If it can be said that a JD carries with it a punitive dimension, it must be said to determine obligations (either to act or refrain from acting). In *Belle*, the court found that a JD contains “no penalty scheme.”¹⁵¹ It went on to say that “[i]t imposes no penalties And neither the JD nor Corps regulations nor the CWA require [the landowner] to comply with the JD.”¹⁵² Judge Kelly’s concurring opinion in *Hawkes* echoed this position by asserting “[a] JD, however, has no such penalty scheme.”¹⁵³ Yet in light of the landowner’s reality, these statements seem more like half-truths. First, while the JD itself does not contain an explicit

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

147. *Belle Co. v. U.S. Army Corps of Eng’rs*, 761 F.3d 383, 390-92 (5th Cir. 2014).

148. *Hawkes Co. v. U.S. Army Corps of Eng’rs*, 782 F.3d 994, 1001 (8th Cir. 2015), *cert. granted sub nom.*, *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 136 S. Ct. 615 (2015).

149. *Belle Co.*, 761 F.3d at 391.

150. *Id.*

151. *Belle*, 761 F.3d at 392.

152. *Id.*

153. *Hawkes*, 782 F.3d at 1003.

penalty scheme—unlike the ACO—it does contain punitive dimensions. Second, although the JD does not in and of itself “require” compliance, it puts the landowner on notice that compliance is required.

The CWA, from which JDs derive their statutory authority, contains a specific provision that speaks to the Act’s enforcement and implementation. Under 33 U.S.C. § 1319, the Corps is given the power to issue orders,¹⁵⁴ notify the State and give public notice of infractions,¹⁵⁵ and bring a civil action against the landowner,¹⁵⁶ among several other punitive measures in the event of non-compliance.¹⁵⁷ Although the intricacies of § 1319 are beyond the scope of this Note, it is important to recognize the several civil, criminal, and administrative penalties that are included in § 1319. The court in *Hawkes* recognized that these penalties loom over the head of any landowner who would pursue a permit, receive an undesired result via the JD, and then ignore the agency action and do the activity anyways. They reasoned that “[b]ecause appellants were forthright in undertaking to obtain a permit, choosing now to ignore the Revised JD and commence peat mining without the permit it requires would expose them to *substantial* criminal monetary penalties and even imprisonment for a knowing CWA violation.”¹⁵⁸ This fact by itself clearly demonstrates that obligations are determined, and that legal consequences most certainly flow from the issuance of the JD.

This, however, does not answer *Belle*’s contention that the JD does not have a penalty scheme. Indeed, the JD itself does not. However, the critical distinction is that the JD, although by itself powerless, is a part of the larger CWA § 1319 penalty scheme, as it is part of the permit process. One need only look at the “knowing violations” under criminal penalties in § 1319(6)(c)(2) to recognize that a landowner who has read a JD, and willingly defied it, would easily satisfy the *mens rea* required by the statutory prohibitions against unpermitted discharging.¹⁵⁹ Thus, in the likely event of

154. 33 U.S.C.A § 1319(a)(1) (West 2016).

155. 33 U.S.C.A § 1319(a)(2).

156. 33 U.S.C.A § 1319(a)(3).

157. See generally 33 U.S.C.A § 1319(a)(6).

158. *Hawkes Co. v. U.S. Army Corps of Eng’rs*, 963 F. Supp. 2d 868 (D. Minn. 2013), *rev’d and remanded*, 782 F.3d 994 (8th Cir. 2015), *cert. granted sub nom.*, *U.S. Army Corp of Engineers v. Hawkes Co.*, 136 S. Ct. 615 (2015) (emphasis added).

159. In her concurring opinion, Judge Kelly stated that she agreed with other courts that the penalty for a JD is much more speculative than that found in *Sackett*, and asserted that the JD itself has no penalty scheme. *Id.* at 1003. Furthermore, Judge Kelly stated that *Hawkes* could provide a single case where increased penalties were issued against a landowner for violating a JD. *Id.* However, Judge Kelly’s position is more of an argument from silence than a death blow to the idea that there is no punitive dimension to a JD. Her position fails to acknowledge

conviction, the landowner would be subject to heavy fines and lengthy prison sentences.¹⁶⁰

Furthermore, to find as the court in *Belle* did that a JD does not “require” compliance, is much like saying a statute subjecting all cars on public roadways to registration does not “require” compliance from an aspiring driver. Indeed, the driver does have several theoretical options: he could not buy a car and use public transportation; he could buy a car but not drive it; he could buy a car but only drive it on his own land; or he could buy a car, not register it, and break the law until he is caught. Yet these options are absurd. They do not comport with the aspirations of the driver, the reality of car ownership, or the intent of the legislature. The statute clearly obliges the driver to register his or her car. Likewise, it is possible to say a JD does not

the role of the JD in the larger CWA penalty scheme, and wrongfully assumes that the JD itself must include a penalty within its statutory language to have any punitive or obligatory characteristics.

160. Two specific enforcement provisions, listed below in pertinent part, are particularly relevant for a landowner who knowingly fails to comply with a JD and does not complete the permit process:

(2) Knowing violations

Any person who--

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, . . . or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State;

...

shall be punished by a fine of not less than \$5,000 nor more than \$50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

33 U.S.C.A. § 1319(c)(2) (West 2016).

(3) Knowing endangerment

(A) General rule

Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1321(b)(3), 1328, . . . or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than \$1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

33 U.S.C.A. § 1319(c).

“require” compliance, but to do so would be disingenuous and does not comport with the reality of landownership, the aspirations of the landowner, or the true intent of the Corps. The JD clearly obliges the landowner to complete the permit process.

These two points, that the JD determines rights and is more than a “classification,” and that the JD is a part of the permit process subject to the larger statutory penalty scheme, are important in illustrating the finality of the JD under the *Bennett* conditions. Although the court in *Hawkes* ultimately rested its holding on the foundation that “no other adequate judicial remedy”¹⁶¹ existed to judicial review, it is important for the Supreme Court to recognize that there are aspects intrinsic to the JD itself, removed from the specific facts of *Hawkes*, which make it a final agency action reviewable under the APA. Finality under the *Bennett* conditions, however, is just one part of the court’s analysis in determining the reviewability of a JD. The other part of the court’s analysis centered on if any other adequate remedy existed, as required by the APA. This will be discussed in greater detail below, in the context of the court’s great analytical flaw.

V. THE SUPREME COURT SHOULD ABANDON ANY PRUDENTIAL CRITIQUE IN DETERMINING IF ANY OTHER ADEQUATE REMEDY EXISTS

Although the Eighth Circuit was ultimately correct in its holding that a revised, approved JD is a final agency action subject to judicial review under the APA, it went too far in analyzing the last requirement under the APA. In answering the question of whether there is any other adequate remedy in a court, the court transgressed its role as the judiciary in its analysis. In that analysis, the *Hawkes* court went beyond the parties involved to the larger regulatory framework within which the JD operates, concluding that the cost and efficiency of the permitting process rendered it an inadequate alternative to judicial review. Thus, the court improperly injected a prudential criticism of the executive branch’s regulatory scheme into what should have been a solely legal analysis of the executive’s actions. On appeal, the Supreme Court should look to procedural inefficiencies in appealing, not the regulatory inefficiencies and costs of permitting, in settling the issue of reviewability. The great irony of *Hawkes* is that in determining whether the JD is subject to judicial review, the court of appeals transgressed its own role as the judiciary, inappropriately using judicial review to tell the Executive Branch how to operate.

161. *Hawkes*, 782 F.3d at 1001.

Furthermore, Judge Kelly in her concurring opinion raised several valid points regarding the JD itself and the majority's reasoning, which would have avoided the issues created by the court while still reaching the conclusion that no other adequate remedy existed. Failing to integrate Judge Kelly's position, the majority unnecessarily blemishes an otherwise valid opinion with the hue of an invalid prudential critique. The Corps is simply acting within its legitimate delegation of power. Ultimately, any regulatory inefficiencies or burdensome costs should be legitimately remedied by the Executive or Legislative branches, and should not be considered dispositive in evaluating the final requirement for judicial review under the APA. The Supreme Court must recognize that any comment beyond the controversy before them is superfluous to its judicial role. Below, both the doctrine of judicial review and the role of the judiciary will be briefly elucidated to provide the basis for understanding the Eighth Circuit's inappropriate prudential critique of the Corps. Ultimately, it is this reasoning by the Eighth Circuit that should be abandoned by the Supreme Court, while holding that no other adequate remedy exists aside from judicial review.

A. *Marbury v. Madison and Judicial Review*

No case has influenced the doctrine of judicial review more than *Marbury v. Madison*.¹⁶² In *Marbury*, Chief Justice John Marshall set the standard for the Court's role as interpreter of the Constitution and as a check among the various branches of government. Obviously a full treatment of judicial review is beyond the scope of this Note. Indeed, many great treatments have already been undertaken.¹⁶³ Yet, it is important to broach the subject here because it runs to the heart of what the plaintiffs in *Hawkes* are seeking, and it is what the Eighth Circuit inappropriately used in analyzing the reviewability of the JD. Much like *Hawkes*, *Marbury* deals with the interplay of several facets of governmental mechanics.

Dean Jeffrey Tuomala summarizes the background of *Marbury* as follows:

In the waning days of his administration, President John Adams appointed William Marbury to serve as a Justice of the Peace for the County of Washington of the District of Columbia, an office created under the Judiciary Act of 1789. Adams signed Marbury's commission, and Secretary of State John Marshall affixed the seal of the United States to it but failed to deliver it to Marbury before

162. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

163. See, e.g., Jeffrey C. Tuomala, *Marbury v. Madison and the Foundation of Law*, 4 LIBERTY U. L. REV. 297 (2010).

Adams' successor, Thomas Jefferson, took office. Jefferson's Secretary of State, James Madison, refused to deliver the commission, so Marbury filed a lawsuit against Madison in the Supreme Court seeking a writ of mandamus ordering Madison to deliver the commission. Madison failed to answer Marbury's complaint, failed to respond to an order to show cause issued from the Court explaining why judgment should not issue against him, and failed to appear at trial, either personally or through counsel. The Court proceeded to trial in Madison's absence.¹⁶⁴

The Court in *Marbury* directly and indirectly addressed the issues of jurisdiction, separation of powers, and most notably judicial review proper, en route to deciding the fate of Marbury's commission. For the purposes of this Note, it is sufficient to recognize some of the main principles of *Marbury* and apply them to the court's reasoning in *Hawkes*. This is in an effort to demonstrate how the Eighth Circuit's rationale could have been stronger by omitting its prudential critique of the Corps' administrative process, while properly finding that no other adequate remedy existed aside from judicial review.

In *Marbury*, Chief Justice Marshall noted that the President is accountable only to the political will of the nation in the exercise of his political powers and therefore "political" subjects are outside the scope of judicial review.¹⁶⁵ It is the President's authoritative discretion executed through his or her own political will, or that which has been delegated to his or her officers, which is immune from judicial review.¹⁶⁶ In describing the nature of the three branches of government, Dean Tuomala rightly points out that by definition Executive and Legislative powers are "political or prudential" and are uniform in their "imposition of will."¹⁶⁷ This puts the discretionary, yet

164. *Id.* at 301-02.

165. *Marbury*, 5 U.S. (1 Cranch) at 165-66 (1803) ("By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.").

166. *Id.*

167. Tuomala, *supra* note 163, at 329-30 ("The executive and legislative powers . . . are political or prudential in nature. In addition to being forward-looking in nature, the political powers have in common the fact that they emphasize the imposition of will, though always circumscribed by law. . . . Congress, in exercising the legislative power, makes judgments as to

constitutional, acts of the Executive and Legislative branches beyond the reach of judicial review, and subject only to the political consequences of such an action.

At issue in *Hawkes* is a blend of Executive and Legislative decisions. The CWA (Legislative) endows the Corps (Executive) with the ability to promulgate regulations in the administration of the CWA permit process.¹⁶⁸ Challenging the reviewability of the JD invokes Chief Justice Marshall's caution in *Marbury* that political subjects "respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive."¹⁶⁹ It is not the role of the Judiciary to excuse absolute compliance with Executive agencies or Legislative enactments because they are too inefficient or cumbersome. It has rightly been recognized that "[j]udges may pass on the propriety of legislative acts or executive implementation only in a properly constituted judicial case. This requirement provides an internal check on judicial power."¹⁷⁰ *Hawkes* was no such case for the Eighth Circuit to critique the Corps' regulatory process.¹⁷¹

B. *The Judiciary's Role and its Purpose*

A brief survey of the roles of the three branches of government yields a clear paradigm through which to understand how the court in *Hawkes* transgressed its judicial role as it pertains to its critique of the Corps' regulatory process. The Legislative Branch serves in a forward-looking capacity, and operates to make rules with uniform application to further a

the best means of achieving constitutional objectives or ends. The President makes his best judgment in allocating resources and applying force to achieve those ends. *The necessity and expediency of those political judgments are not subject to judicial review.* The judicial power does not entail the exercise of will (courts do not make law; the law already exists), and it does not entail the use of force (courts do not execute their own judgments; they depend upon the executive branch). *Courts exercise only judgment—not political judgment that is forward-looking, but judicial judgment that is backward-looking in nature.*" (emphasis added)).

168. See generally, 33 U.S.C.A. § 1 (West 2015).

169. *Marbury*, 5 U.S. (1 Cranch) at 166.

170. Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1271 (1988).

171. A more appropriate case would be after the JD is conclusively recognized as reviewable, and the merits of the plaintiff's case are reached by the court. *Hawkes*, however, does not truly get to the merits of the case (whether the wetland owned by the plaintiff should be considered waters of the United States). Here, it is reviewability of the JD (essentially whether the court has subject matter jurisdiction) that is the question – not whether the regulatory determination of the Corps is itself legitimate.

lawful object or purpose.¹⁷² The Executive Branch looks forward, imposing its lawful will on the people in executing the rules put forth by the legislature.¹⁷³ Finally, the Judicial Branch operates solely looking backwards, adjudicating only the case or controversy before it, and giving no thought to future implications or purposes.¹⁷⁴ Furthermore, it is important to reiterate Chief Justice Marshall's timeless phrase that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"¹⁷⁵ while also recognizing that:

The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.¹⁷⁶

With this understanding of the three branches of government in mind, it becomes clear that great restraint is required to properly adjudicate such politically charged disputes as the one in *Hawkes*. Moreover, the court in *Hawkes* appears to be looking forward, not backwards, in its discussion of "reality" and pragmatism.¹⁷⁷ Regardless of how difficult it may be, the judiciary must avoid making political judgments on discretionary decision-making or disagreeable enactments by the Executive or Legislative Branches respectively.

C. *The Invalid Prudential Critique in Hawkes*

The principal issue in *Hawkes* is about the reviewability of a Corps determination, not the content of the JD, not the permit process, and not the

172. Tuomala, *supra* note 163, at 329 ("The action of legislating . . . is forward-looking or prospective in nature. . . . The focus is on formulating rules best designed to achieve some lawful object of government. The process of legislation may entail codifying preexisting law, be it inalienable rights or general principles of law, but its distinguishing characteristic is that it designs positive enactments to best achieve legitimate government objectives. The second characteristic that distinguishes the legislative from the judicial process is that legislation is framed in general terms regulating all persons similarly situated.").

173. *Id.*

174. *Id.*

175. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

176. *Id.* at 170.

177. *Hawkes Co., Inc. v. U.S. Army Corps of Eng'rs*, 963 F. Supp. 2d 868 (D. Minn. 2013), *rev'd and remanded*, 782 F.3d 994 (8th Cir. 2015), *cert. granted sub nom.*, *U.S. Army Corp of Engineers v. Hawkes Co.*, 136 S. Ct. 615 (2015).

Corps itself.¹⁷⁸ It is apparent that the Eighth Circuit's prudential reasoning inappropriately instructs the court's rationale, taints its holding, and transgresses the court's judicial role as defined in *Marbury*. It was clear from the Corps' discussion with the plaintiffs that, for all intents and purposes, the permit process was a sham and was going to be ultimately unsuccessful.¹⁷⁹ Armed with this information, in addition to the fact that rights were determined, obligations created, and no other alternative existed aside from breaking the law, it was clear that the JD should be considered a final agency action. Moreover, it is important to reiterate the Corps' admission that pursuit of a permit would ultimately be unsuccessful.¹⁸⁰ Yet, the court delved further into an analysis of the cost, the burden, and the efficiency of the permit process and declared it a hurdle too high for the plaintiff to clear.¹⁸¹

Furthermore, in trying to prove the point that government regulation has grown too unwieldy in the light of ambiguous precedent, the court lost credibility by declaring the permit process as a whole, not just as applied to the plaintiffs, an inadequate alternative remedy to judicial review.¹⁸² This pronouncement of virtual invalidity due to regulatory impracticability sounds of judicial will, not simply judicial review. As such, the court establishes a precedent that goes too far. The great irony of *Hawkes* is that in accusing the Corps' schematic regulatory overreach, it overreaches itself to tell the Executive Branch how to do its job.

Transgressing Chief Justice Marshall's exhortation in *Marbury*, the court in *Hawkes* goes beyond the parties at bar and pronounces a much wider indictment on the Corps:

The prohibitive costs, risk, and delay of [the permit process and its alternatives] to immediate judicial review evidence a transparently obvious litigation strategy: by leaving appellants with no immediate judicial review and no adequate alternative remedy, the Corps will achieve the result its local officers desire, abandonment of the peat mining project, without having to test

178. *Hawkes*, 782 F.3d at 997.

179. *Id.* at 1001.

180. *Id.* ("Moreover, the Amended Complaint alleged that the Corps' District representatives repeatedly made it clear to Kevin Pierce, to a Hawkes employee, and to the landowner that a permit to mine peat *would ultimately be refused*. In our view, this alone demonstrates that the second *Bennett* factor is satisfied." (emphasis original)).

181. *Id.* ("First, as a practical matter, the permitting option is prohibitively expensive and futile. The Supreme Court reported in *Rapanos*, that the average applicant for an individual Corps permit 'spends 788 days and \$271,596 in completing the process.'" (citations omitted)).

182. *Hawkes*, 782 F.3d at 1001.

whether its expansive assertion of jurisdiction For decades, the Corps has “deliberately left vague” the “definitions used to make jurisdictional determinations,” leaving its District offices free to treat as waters of the United States “adjacent wetlands” that “are connected to the navigable water by flooding, on average, once every 100 years,” or are simply “within 200 feet of a tributary.”¹⁸³

In transgressing the boundaries of judicial review, the court in *Hawkes* quotes extensively from *Rapanos* and *Sackett* in its holding that an approved JD is subject to Judicial Review under the APA. The court in *Rapanos* and *Sackett* spoke emphatically against governmental agencies that encroached upon the rights of citizens in the name of regulatory compliance.¹⁸⁴ The court in *Hawkes* channeled this sentiment with extensive quotations from both *Rapanos* and *Sackett* and, in this regard, does so to its detriment. One commentator has noted that “*Sackett* [was a] step by the Supreme Court in the direction of hindering the EPA’s enforcement capabilities [T]he EPA is doing a job that Congress empowered it to do.”¹⁸⁵

In concluding that a revised approved JD was reviewable under the APA, the court in *Hawkes* stated that it was compelled to do so by “reality” and “a properly pragmatic analysis.”¹⁸⁶ According to the court, the regulatory process is impracticable, unnavigable without undue cost or burden to the plaintiff.¹⁸⁷ But cost and efficiency should not change the reviewability of an action. In this regard, Judge Kelly’s concurring opinion recognizes the court’s glaring flaw.

Concurring in judgment, Judge Kelly remarked that the JD’s reviewability is a “close question,” but one which should ultimately be answered in favor

183. *Id.* at 1001-02.

184. See, e.g., *Sackett v. E.P.A.*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring); *Rapanos v. United States*, 547 U.S. 715, 726–727 (2006).

185. Jessica Pierce Quiggle, Note, *Sackett v. EPA Uses Statutory Interpretation to Limit the EPA’s Power over Wetlands, Overruling A Majority and Leaving Circuits Split over Due Process*, 14 FLA. COASTAL L. REV. 325, 328 (2013).

186. *Hawkes*, 782 F.3d at 1002. The court in *Hawkes* cites to *Bennett* to say that “[I]n reality [the JD] has a powerful coercive effect.” *Id.* (citing *Bennett v. Spear*, 520 U.S. 154, 169 (1997)). This quote, however, is misplaced. It is one thing to say that the JD “in reality” contains punitive dimensions, and thus satisfies the second *Bennett* condition (since it determines an obligation). See *supra* Section IV.B. It is quite another to say that the solely because the JD “in reality” coerces the landowner towards an impracticable regulatory scheme, that reviewability is now appropriate under the APA (since there is no other adequate remedy). *Hawkes*, 782 F.3d at 1002. This wrongly puts the emphasis on the agency instead of the action.

187. *Hawkes*, 782 F.3d at 1002.

of the plaintiff.¹⁸⁸ Judge Kelly rightly questioned the value of critiquing the permit process itself as a factor in determining reviewability. She skeptically questioned “how much weight should be given to the futility of the permit application for an individual applicant, or the time and cost spent applying, in determining whether or not the JD constitutes a final agency action.”¹⁸⁹ She further noted that “were the Corps to take steps to make the permit process both more efficient and less costly, the reviewability of the JD would not change.”¹⁹⁰ Although some comment pertaining to the regulatory impact or scope of the JD may be helpful in determining whether there is any other adequate remedy to judicial review, making cost and efficiency of those alternatives the dispositive factors is inappropriate.

Judge Kelly goes on to demonstrate that there is no reasonable alternative to judicial review, but does so without taking into consideration cost or efficiency of the regulatory process. Judge Kelly notes that Hawkes has only two options: (1) break the law, wait for an enforcement action, and raise a lack of jurisdiction under the CWA as a defense,¹⁹¹ or (2) to go through a “roundabout process” of applying and appealing:

[The landowners would have to] apply for a permit (on the grounds that no permit is required) and, if the application is denied, appeal the denial in court. But what happens if Hawkes is, after all, granted a permit yet maintains it never needed one in the first place? It must decline the permit and challenge the original jurisdiction in court. This roundabout process does not seem to be an “adequate remedy” to the alternative of simply allowing Hawkes to bring the jurisdictional challenge in the first instance and to have an opportunity to show the CWA does not apply to its land at all.¹⁹²

This is the path that the majority should have taken in its analysis of the final requirement for judicial review under the APA. Judge Kelly notes that it is the procedural inefficiencies of challenging the JD, not the regulatory inefficiencies of acquiring a permit, which demonstrate an inadequate remedy and satisfy the second requirement under the APA.

It is important, here, to return to Chief Justice Marshall’s main restraint on judicial review: “[q]uestions, in their nature political, or which are, by the

188. *Id.*

189. *Id.* at 1003.

190. *Id.*

191. *Id.*

192. *Id.*

constitution and laws, submitted to the executive, can never be made in this court.”¹⁹³ The court in *Hawkes* essentially answers a political question.¹⁹⁴ The court rests its holding not on backward-looking judgment, but on a present and forward-looking prudential critique of pragmatism and “reality.”¹⁹⁵ This transgresses the court’s proper judicial role. Considerations of cost and efficiency question the Executive’s discretion in how it has regulated and administered a congressionally enacted program. If the court takes issue with how the permit process operates, it should call on the President or Congress to remedy the situation through their respective constitutional avenues. Courts should not, however, make policy determinations from the bench. Thus, on appeal, the Supreme Court should look to procedural inefficiencies in appealing, not the regulatory inefficiencies and costs of permitting, in settling the issue of reviewability. As Judge Kelly rightly demonstrates, it is not required to critique the agency to recognize that its action is final and reviewable.¹⁹⁶

193. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

194. The political question that was answered was whether the Corps regulatory process was too burdensome, based on cost and efficiency, to complete the permit process before the landowner could appeal. It is helpful, here, to note the basic judicial definition of a political question. The court in *Baker v. Carr* provided such a definition and stated as follows:

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a *lack of judicially discoverable and manageable standards for resolving it*; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or *the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government*; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962) (emphasis added). The majority in *Hawkes* made an issue of both efficiency and cost, both of which were addressed by Judge Kelly in her concurring opinion. *Hawkes*, 782 F.3d at 1003. It is important to recognize that there is no judicially discoverable or manageable standard for determining when the permit process would be sufficiently painless or reasonably priced. Moreover, there is an explicit “lack of respect” for the discretion and judgment of Executive Branch, almost explicitly, in the court’s reasoning (particularly in its reliance on *Rapanos* and *Sackett*).

195. *Id.* at 1002.

196. *Id.* at 1003.

VI. CONCLUSION

The court in *Hawkes* was correct in holding that an approved JD by the Corps was a final agency action, without any other adequate remedy in a court, and is thus reviewable under the APA. The court, however, should have focused on the JD itself, and not on the regulatory impact of the action, in determining whether it should be considered a final agency action under the *Bennett* conditions. The JD is more than a mere classification, as it determines the rights of the landowner. Moreover, the JD also determines the obligations of the landowner as it is a part of the permit process subject to a penalty under 33 U.S.C. § 1319. Furthermore, the Eighth Circuit should have dispensed with its prudential critique of the regulatory scheme (referencing its cost and efficiency) in finding that no other adequate remedy existed, as such a critique falls outside the court's constitutional power of judicial review and its proper judicial role. The majority would have done better to align itself with the concerns of Judge Kelly's concurring opinion and omitted the discussion regarding regulatory efficiency in favor of a concise judicial interpretation of the law in light of the facts. Thus, the Supreme Court should affirm *Hawkes* not based on answering a political question of regulatory efficiency or affordability, but rather on the inadequacies of violating the law and the procedural inefficiencies of appealing. Then, perhaps, a landowner will finally be able to mine peat without fear of the government taking either his fortune or his freedom.

