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# Wetlands Jurisdictional Determinations Reviewable Under the Administrative Procedure Act in *U.S. Army Corps of Engineers v. Hawkes*

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WETLANDS JURISDICTIONAL DETERMINATIONS  
REVIEWABLE UNDER THE ADMINISTRATIVE  
PROCEDURE ACT IN *U.S. ARMY CORPS  
OF ENGINEERS V. HAWKES*

I. INTRODUCTION

On May 31, 2016, the United States Supreme Court promulgated its unanimous opinion that U.S. Army Corps of Engineers' (Corps) jurisdictional determinations (JDs) are final agency actions under the Administrative Procedure Act (APA).<sup>1</sup> This decision not only resolves conflicts among federal circuit courts, but also provides landowners with the ability to appeal an approved JD, an option previously unavailable to them.<sup>2</sup>

The Clean Water Act (CWA) prohibits “‘the discharge of any pollutant’ without a permit into ‘navigable waters,’ which it defines, in turn, as ‘the waters of the United States.’”<sup>3</sup> The Corps has defined the “waters of the United States” (WOTUS) to include land areas “occasionally or regularly saturated with water[,] such as ‘mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, [and] playa lakes’—the ‘use, degradation, or destruction of which could affect interstate or foreign commerce.’”<sup>4</sup>

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1. *See generally* United States Army Corps of Eng'rs v. Hawkes Co., \_\_ U.S. \_\_, 136 S. Ct. 1807 (2016); *see also* Amy Antonioli and Daniel J. Deeb, *Corps v. Hawkes: Supreme Court Rules Clean Water Act Jurisdictional Determinations are Final and Appealable Agency Actions*, NAT'L LAW REV. (June 2, 2016), <http://www.natlawreview.com/article/corps-v-hawkes-supreme-court-rules-clean-water-act-jurisdictional-determinations-are> (discussing disposition of case). In deciding this case, the United States Supreme Court looked specifically to Section 704 of the APA, which states:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C.S. § 704.

2. *See* Sullivan & Cromwell LLP, *United States Army Corps of Engineers v. Hawkes Co.*, LEXOLOGY (June 1, 2016), <http://www.lexology.com/library/detail.aspx?g=9126f589-80ea-45b1-8e8a-0b6e403f2c23> (noting conflicts case resolves and remedies gained).

3. *See Hawkes*, 136 S. Ct. at 1811 (quoting 33 U.S.C. §§ 1311(a), 1362(7), (12)) (explaining CWA prohibits discharge into “navigable waters”).

4. *Id.* (explaining refined definition of WOTUS used by Corps).

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The definition of WOTUS can make it difficult for landowners to determine whether a piece of property contains such waters. The CWA imposes both criminal and civil penalties, usually in the form of fines, which can be substantial, making the consequences for an inaccurate determination by landowners severe.<sup>5</sup> Obtaining a permit is expensive, so landowners often will not seek one if this process can be avoided;<sup>6</sup> still, failing to obtain a permit and being incorrect in determining if there are WOTUS on the property can be an additional expense.<sup>7</sup> To help landowners determine whether their property contains WOTUS, Corps' regulations authorize the issuance of JDs.<sup>8</sup> The Corps issue these JDs on a case-by-case basis.<sup>9</sup> There are two different types of JDs: preliminary JDs and approved JDs.<sup>10</sup> Preliminary JDs advise if the property contains WOTUS, while approved JDs definitively state if the property contains WOTUS.<sup>11</sup> If the approved JD is positive and there are WOTUS on

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5. 33 U.S.C.S. § 1319(c)-(d) (outlining penalties); *see also* Harmony A. Mappes, Brian J. Paul, and Delmar R. Ehrich, *Supreme Court Decides United States Army Corps of Engineers v. Hawkes Co., Inc., et al.*, FAEGRE BAKER DANIELS (May 31, 2016), <http://www.faegrebd.com/supreme-court-decides-united-states-army-corps-of-engineers-v> (outlining civil and criminal penalties); *see also* CWA Section 404 Enforcement Overview, EPA, <https://www.epa.gov/cwa-404/cwa-section-404-enforcement-overview#case> (last visited Nov. 25, 2016) (explaining EPA's options for assessing fines under CWA).

Under Section 309(g), EPA can assess administrative civil penalties of up to [sixteen thousand dollars] per day of violation, with a maximum cap of \$187,500 in any single enforcement action. [ ] The agencies also have authority under Section 309(c) to bring criminal judicial enforcement actions for knowingly or negligently violating Section 404.

CWA Section 404 Enforcement Overview, EPA, <https://www.epa.gov/cwa-404/cwa-section-404-enforcement-overview#case> (last visited Nov. 25, 2016).

6. Mappes, Paul, and Ehrich, *supra* note 5 (noting why landowners avoid permits).

7. *Id.* (discussing positive and negative impacts of seeking permit); *see also* CWA Section 404 Enforcement Overview, *supra* note 5 (giving overview of how EPA and Corps shared authority of Section 404).

8. *See* Sullivan & Cromwell LLP, *supra* note 2 (explaining reasoning behind Corps' issuance of JDs).

9. Emily Deans and John Casey, *Corps Jurisdictional Determinations Reviewable*, NE. DEV. LAW BLOG (June 15, 2016), <https://www.northeastdevelopmentlaw.com/2016/06/army-corps-jurisdictional-determinations-reviewable/> (noting case-by-case basis of JD issuance).

10. *Hawkes*, 136 S. Ct. at 1812 (defining two types of JDs available to landowners seeking Section 404 permits).

11. *Id.* (identifying two different types of JDs); Jonah Brown, *United States Army Corps of Engineers v. Hawkes Co.*, 0 PUB. LAND AND RESOURCES REV. 1 (2016), <http://scholarship.law.umt.edu/plrlr/vol0/iss7/3/> (explaining difference between approved and preliminary JDs); *see also* Sullivan & Cromwell LLP, *supra* note 2 (noting purposes of approved and preliminary JDs).

the property, the landowner must either seek a permit or face penalties for failing to obtain a permit.<sup>12</sup>

## II. FACTS

The Respondents in *U.S. Army Corps of Engineers v. Hawkes*<sup>13</sup> are three peat-mining companies in Minnesota that own 530 acres of land that contain wetlands.<sup>14</sup> Peat is widely used for soil improvement and is burned as fuel.<sup>15</sup> To get to peat, companies drain wetlands and remove the top layer of vegetation before bringing in machines to shave or vacuum the peat.<sup>16</sup> In some cases, the extraction area is surrounded by earthen dikes or ditches, and pumps are used to lower the water within the extraction area to dry the peat.<sup>17</sup> Once dry, the peat can then be mined using excavating equipment.<sup>18</sup>

To drain the wetland to mine for peat, Respondents needed to receive a permit from the Corps.<sup>19</sup> Respondents applied for a Section 404 permit for the property in December 2010.<sup>20</sup> A Section 404 permit authorizes an individual or company to discharge dredged or fill material into navigable waters at specified disposal sites.<sup>21</sup> Corps officials from the district office communicated with the Respondents several times, both during in-person meetings and via mail, and indicated that the permitting process would be “very

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12. Brown, *supra* note 11, at 1-2 (noting what landowners must do if WOTUS are found on property).

13. *United States Army Corps of Eng’rs v. Hawkes Co.*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 1807 (2016) (holding JDs final agency actions under APA).

14. *Id.* (explaining situation of Respondents); *see also* Deans and Casey, *supra* note 9 (explaining status of property owners).

15. *Hawkes*, 136 S. Ct. at 1812 (noting uses of peat). In the majority opinion, Chief Justice Roberts remarked, “It can also be used to provide structural support and moisture for smooth, stable greens that leave golfers with no one to blame but themselves for errant putts.” *Id.*

16. Tom Robertson, *Peat could be northern Minnesota’s newest cash crop*, MINN. PUB. RADIO (Jan. 14, 2004), [http://news.minnesota.publicradio.org/features/2004/01/14\\_robertson\\_peat/](http://news.minnesota.publicradio.org/features/2004/01/14_robertson_peat/) (describing how peat mining works).

17. *Peat Mines*, FLA. DEP’T OF ENVTL. PROTECTION, <http://www.dep.state.fl.us/water/mines/peat.htm> (last visited Nov. 25, 2016) (explaining how extraction of peat is accomplished).

18. *Id.* (expanding on peat mining process).

19. *Obtain a Permit*, U.S. ARMY CORPS OF ENG’RS, <http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Obtain-a-Permit/> (last visited Nov. 25, 2016) (outlining general information on Corps’ role in Section 404 permitting).

20. *Hawkes*, 136 S. Ct. at 1813 (explaining timing of Section 404 permit request).

21. *Id.* (clarifying purpose of 404 permit).

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expensive and [would] take years to complete.”<sup>22</sup> The Corps additionally informed Respondents that they would need to submit “numerous assessments of various features of the property, which [R]espondents estimate[d] would cost more than [one hundred thousand dollars].”<sup>23</sup>

Two years later, in 2012, the Corps issued an approved JD that stated the wetlands on the property constituted WOTUS.<sup>24</sup> Because the approved JD definitively stated Hawkes’ property contained WOTUS, Respondents applied for and ultimately received a Section 404 permit from the Corps before mining on the property in order to comply with the CWA.<sup>25</sup> Respondents filed an administrative appeal with the Corps, disputing the presence of WOTUS on the property.<sup>26</sup> The Corps’ Deputy Commanding General for Civil and Emergency Operations sustained the appeal, concluding that “the administrative record ‘does not support [the District’s] determination that the subject property contains jurisdictional wetlands and waters,’ and remanding to the [d]istrict [court] ‘for reconsideration in light of this decision.’”<sup>27</sup> On December 31, 2012, the Corps issued a revised JD [RJD] that found a “significant nexus between the property and the Red River of the North, and advis[ed] [Hawkes] that the [RJD] was a ‘final Corps permit decision in accordance with [Title 33, Section 331.10 of the Code of Federal Reg-

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22. *Id.* (elaborating on conversations between Respondents and Corps); *see also* *Hawkes Co. v. United States Army Corps of Eng’rs*, 963 F. Supp. 2d 868, 870-71 (D. Minn. 2013) (explaining how Corps communicated with Hawkes company representatives). At a meeting in January 2011, the parties met to discuss Hawkes Co.’s plans for the property. *Id.* The Corps “attempted to dissuade [Hawkes] from expanding their mining operations, in part by stressing the time and cost involved in the permitting process.” *Id.*

23. *Hawkes*, 136 S. Ct. at 1813 (noting cost and other factors Corps communicated to Respondents about project); *see also* *Hawkes Co. v. United States Army Corps of Eng’rs*, 782 F.3d 994, 998 (8th Cir. 2015) (explaining Corps advised Hawkes that assessments included hydrological and functional resource assessments and evaluations of upstream potential impacts). For more information on how the Corps determines the existence of wetlands, *see infra* note 54 and accompanying text.

24. *Hawkes*, 136 S. Ct. at 1813 (determining that WOTUS were present on property). The Corps determined that the wetlands had a “significant nexus” to the Red River, 120 miles away from the Respondents’ property. *Id.* *See also* *Rapanos v. United States*, 547 U.S. 715 (2006); *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985); *Solid Waste Agency v. United States Army Corps of Eng’rs*, 531 U.S. 159 (2001) (discussing “significant nexus” test and origins).

25. *Hawkes*, 782 F.3d at 1001-02 (explaining failure to obtain permit would result in knowing violation of CWA since WOTUS were found on property).

26. *Id.* at 996 (describing disposition of Hawkes’ appeal).

27. *Id.* at 998 (explaining why JD remanded back to district office).

ulations],” which [indicated] their Hawkes’ administrative remedies were exhausted.”<sup>28</sup>

Respondents consequently sought judicial review of the RJD under the APA.<sup>29</sup> To determine if the RJD constituted a final agency action, the district court utilized the two-pronged test the Supreme Court established in *Bennett v. Spear*<sup>30</sup>, which outlines the conditions that must be satisfied to constitute a final action under the APA.<sup>31</sup> “First, the action must mark the consummation of the agency’s decision making process . . . And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.”<sup>32</sup> The district court found the action “satisfie[d] the first *Bennett* condition, but not the second [condition].”<sup>33</sup> Hawkes easily satisfied the first prong of the test because the RJD “would remain in place regardless of future operations, changes in ownership, or complete inactivity on the [p]roperty.” “The [RJD] is thus a discrete decision.”<sup>34</sup> Addition-

28. *Id.* (noting reasons for issuance of RJD); *see also* 33 C.F.R. § 331.10 (2016) (explaining administrative appeals process through Corps).

29. *Hawkes*, 136 S. Ct. at 1813 (explaining disposition of case).

30. *See generally* *Bennett v. Spear*, 520 U.S. 154 (1997) (espousing two-prong test for final agency actions under APA). *Bennett* examined a biological opinion issued by the Fish and Wildlife Service (FWS) under the Endangered Species Act (ESA) regarding an irrigation project that potentially impacted two endangered fish. *Id.* The biological opinion stated the irrigation project needed minimum water levels to protect the endangered species. *Id.* Petitioners claimed the FWS action was “arbitrary and capricious” under the APA. *Id.* The Government argued a claim under the APA could not be brought because the biological opinion was not a final agency action. *Id.* The United States Supreme Court relied on two prior cases to create each prong of the two-prong test in *Bennett*: *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 113 (1948) (stating “[f]irst, [ ] action must mark [ ] ‘consummation’ of [ ] agency’s [decision-making] process”) and *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970) (stating “[ ] action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow’”). The Court, applying these tests to the facts in *Bennett*, determined that the biological opinion was a final agency action and subject to judicial review. *Id.*

31. *Hawkes*, 136 S. Ct. at 1816 (noting use of *Bennett* test); *Bennett*, 520 U.S. at 154 (providing prongs of test); Brown, *supra* note 11, at 3 (highlighting test used by Court in certain types of cases).

32. *See* Brown, *supra* note 11, at 3 (quotation marks omitted) (quoting *Hawkes*, 136 U.S. at 1813) (outlining test set forth in *Bennett*). Courts frequently rely on the *Bennett* test. *See generally* *Star Enter. v. EPA*, 235 F.3d 139 (3d Cir. 2000); *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857 (N.D. Ohio 2009); *Ctr. for Biological Diversity v. Nat’l Marine Fisheries Serv.*, 977 F. Supp. 2d 55 (D.P.R. 2013); *Quicken Loans, Inc. v. United States*, 152 F. Supp. 3d 938 (E.D. Mich. 2015); *Pebble Ltd. P’ship v. United States EPA*, 604 F. App’x 623 (9th Cir. 2015) (highlighting reliance on *Bennett* test by courts).

33. *Hawkes*, 963 F. Supp. 2d at 873 (outlining district court holding).

34. *Id.* at 874 (explaining how first *Bennett* prong satisfied). The district court further noted that “[t]he only ways in which the [ ] [R]JD could be altered would

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ally, the Corps conceded that the language of the CWA regulations describes a RJD “as ‘a Corps final agency action.[’”<sup>35</sup> While not “final for [purposes of the] APA [ ],” the Corps argued RJDs’ finality is strictly for “the public [to] rely on the determination.”<sup>36</sup> The district court noted that “[i]f[,] [as the Corps argued,] a [RJD] is ‘final’ in the sense the public may rely on it, the determination must be more definitive than an advisory opinion.”<sup>37</sup>

Hawkes, however, could not satisfy the second prong of the *Bennett* test that determines whether the RJD constitutes a final action under the APA.<sup>38</sup> The district court opined that the

[RJD] does not fix [the Plaintiffs’] rights or obligations. The [RJD] 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. . . . Even if Plaintiffs had never approached the Corps, Plaintiffs would have still needed to decide whether to begin mining on a wetland possibly protected by the CWA or to pursue a permit.<sup>39</sup>

The Corps successfully argued that Hawkes had “two other adequate ways to contest the Corps’ [RJD] in court—[by] complet[ing] the permit process and appeal[ing] if a permit is denied, or [by] commenc[ing] peat mining without a permit and challeng[ing] the agency’s authority if it issues a compliance order or commences a

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be if: (1) new information surfaced regarding the [p]roperty, or (2) a party later successfully challenged jurisdiction in connection with a permit application or enforcement action.” *Id.*

35. *Id.* (quoting 33 C.F.R. § 320.1(a)(6)) (highlighting language of regulations); *see also* 33 C.F.R. § c320.1(a)(6) (noting language of CWA). The regulations state, in relevant part, that

[t]he Corps has authorized its district engineers to issue formal determinations concerning the applicability of the Clean Water Act or the Rivers and Harbors Act of 1899 to activities or tracts of land and the applicability of general permits or statutory exemptions to proposed activities. A determination pursuant to this authorization shall constitute a Corps final agency action.

33 C.F.R. § 320.1(a)(6).

36. *Id.* (footnote omitted) (highlighting Corps’ argument that “final” is not final in APA terms).

37. *Hawkes*, 963 F. Supp. 2d at 874 (explaining reliance makes JD definitive action).

38. *Id.* at 874-75 (noting Hawkes could not show RJD determines rights or obligations).

39. *Id.* at 875 (citation omitted) (explaining RJD does not control Hawkes ability to decide whether to seek permit).

civil enforcement action.”<sup>40</sup> Following this analysis, the district court held the “JD was not [a] ‘final agency action for which there is no other adequate remedy in court,’” and thus “dismissed [the case] for [lack] of subject matter jurisdiction[.]”<sup>41</sup>

On appeal, the Eighth Circuit looked to the district court’s analysis under the *Bennett* test and agreed that the RJD constituted the “consummation of the Corps’ [ ] decisionmaking process[.]”<sup>42</sup> The Eighth Circuit, however, found that the remedies for judicial review that the Corps successfully argued to the district court were highly inadequate.<sup>43</sup> First, the court noted that the Corps “ignore[d] the prohibitive cost of taking either of these alternative actions to obtain judicial review of the Corps’ assertion of CWA jurisdiction over the property [ ]” because “the permitting option is prohibitively expensive and futile.”<sup>44</sup> “Second, [the] other option [available to Hawkes] . . . [to] await an enforcement action [regarding mining peat without a permit] . . . is even more plainly an inadequate remedy.”<sup>45</sup> The court highlighted that “[b]ecause [Hawkes was] forthright in undertaking to obtain a permit, choosing now to ignore the [RJD] 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.”<sup>46</sup> The

40. *Hawkes*, 782 F.3d at 1001 (outlining Corps’ successful arguments to district court).

41. *Hawkes*, 136 S. Ct. at 1813 (quoting 5 U.S.C. § 704) (quoting *Hawkes*, 963 F. Supp. 2d at 872, 878); *see also* *Fairbanks N. Star Borough v. U.S. Army Corps of Eng’rs*, 543 F.3d 586 (9th Cir. 2008); *Coxco Realty, LLC v. United States Army Corps of Eng’rs*, 2008 U.S. Dist. LEXIS 16655, at \*4-5 (W.D. Ky. Mar. 3, 2008); *Hampton Venture No. One v. United States*, 768 F. Supp. 174, 175-76 (E.D. Va. 1991); *St. Andrews Park, Inc. v. U.S. Dep’t of Army Corps of Eng’rs*, 314 F. Supp. 2d 1238, 1244-45 (S.D. Fla. 2004); *Child v. United States*, 851 F. Supp. 1527, 1534-35 (D. Utah 1994); *Lotz Realty Co. v. United States*, 757 F. Supp. 692, 695-98 (E.D. Va. 1990); *Acquest Wehrle LLC v. United States*, 567 F. Supp. 2d 402, 409-11 (W.D.N.Y. 2008) (holding JD is not final agency action in which judicial review is not available).

42. *Hawkes*, 782 F.3d at 996, 999 (noting RJD was final agency action).

43. *Id.* at 1001-02 (elaborating on why Corps’ remedies for *Hawkes* deemed insufficient).

44. *Id.* at 1001 (explaining options presented by Corps are highly expensive on parties). *See also* *Hawkes*, 136 S. Ct. at 1812 (citing *Rapanos v. United States*, 547 U.S. 715, 721 (2006)) (providing more information on expense of permitting). The United States Supreme Court notes that, as cited in *Rapanos*, one study on Corps’ permitting found an average applicant “spends 788 days and \$271,596 in completing the process,” without “counting costs of mitigation or design changes.” *Id.* Even “general” permits took applicants, on average, 313 days and \$28,915 to complete. *Id.*

45. *Hawkes*, 782 F.3d at 1001 (noting why mining without permit after going through JD process is problematic).

46. *Id.* (discussing penalties for failure to obtain permit); *see also* 33 U.S.C.S. § 1319(c) (outlining penalties faced by parties for knowing violations of CWA).

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Eighth Circuit thus reversed the district court's finding, concluding that "[an] approved JD is a final agency action [and would be] reviewable [by federal courts] under the APA."<sup>47</sup>

### III. ANALYSIS

To determine if a JD is a final agency action, the United States Supreme Court utilized the *Bennett* test, which outlines the conditions that must be satisfied to constitute a final action under the APA.<sup>48</sup> "First, the action must mark the consummation of the agency's decision making process . . . And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow."<sup>49</sup>

The Court began its analysis by applying the first prong of the *Bennett* test.<sup>50</sup> It found that preliminary JDs do not constitute "a consummation of an agency's decision making process" under the first prong of the *Bennett* test "because it is merely an indeterminate conclusion."<sup>51</sup> Next, turning to approved JDs, the Court found that these were, in fact, "the consummation of the Corps' evaluation because [they] 'definitively' determine[d] that certain property contain[ed] jurisdictional waters."<sup>52</sup>

The Court subsequently addressed the second prong of the *Bennett* test, finding that because approved JDs are definitive in nature, "direct and appreciable legal consequences" result from them.<sup>53</sup> The Court further identified that "[b]oth positive and neg-

47. *Hawkes*, 136 S. Ct. at 1810 (citing United States Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807, 1813-16 (2016)) (noting holding of Eighth Circuit); Brown, *supra* note 11, at 3 (explaining further procedural history).

48. *Hawkes*, 136 S. Ct. at 1810, 1813-14 (outlining *Bennett* test); *Bennett v. Spear*, 520 U.S. 154, 154 (1997) (giving considerations for agency action to be final); Brown, *supra* note 11, at 3 (explaining test used by Court in certain types of cases).

49. See Brown, *supra* note 11, at 3 (quotation marks omitted) (quoting *Hawkes*, 136 S. Ct. at 1813) (outlining test set forth in *Bennett*).

50. *Hawkes*, 136 S. Ct. at 1813-14 (giving first consideration of *Bennett* test); Brown, *supra* note 11, at 3-4 (explaining first step in Supreme Court's reasoning).

51. Brown, *supra* note 11, at 3 (citing *Hawkes*, 136 S. Ct. at 1813) (addressing why preliminary JDs are not final agency actions).

52. Brown, *supra* note 11, at 3-4 (quoting *Hawkes*, 136 S. Ct. at 1813-14) (explaining why approved JDs are final agency actions). The opinion in *Hawkes* states the following: "Indeed, the Corps itself describes approved JDs as 'final agency action[ ]' [ . . . ] and specifies that an approved JD 'will remain valid for a period of five years[ ]'." *Hawkes*, 136 S. Ct. at 1814 (quoting 33 C.F.R. §§ 320.1(a)(6), 331.2) (quoting Corps, Regulatory Guidance Letter No. 05-02, §1(a), p. 1 (June 14, 2005)) (explaining binding nature of JDs on Corps).

53. *Hawkes*, 136 S. Ct. at 1814 (quotation marks omitted) (quoting *Bennett*, 520 U.S. at 178) (noting that definitive nature satisfies second prong of *Bennett* test).

ative [approved] JDs have consequences” for landowners seeking JDs.<sup>54</sup> Receiving a negative JD signifies that landowners will have less liability going forward with the permitting process because “they will not be subject to enforcement proceedings under the CWA for discharge into the corresponding wetlands during the established time period.”<sup>55</sup> By receiving a negative JD, landowners are further protected from CWA actions because “the Corps and the [Environmental Protection Agency] EPA [have] a memorandum of agreement that binds the two agencies to a five-year safe harbor from CWA enforcement proceedings if a negative JD is issued.”<sup>56</sup> The Court then noted that “positive JD[s] [also have] legal consequences as well[:] [receiving one effectively represents] a denial of protection from enforcement proceedings if the landowner is to discharge into those waters, and a violation may subject the owner to criminal and civil penalties if they fail to obtain a permit.”<sup>57</sup>

Additionally, an agency action is reviewable under the APA “only if there are no adequate alternatives to APA review in court.”<sup>58</sup> “[T]he Corps asserted that Respondents [in this case]

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54. See Brown, *supra* note 11, at 4 (endnote omitted) (explaining that both positive and negative JDs impact landowners); see also Environmental Laboratory, *Corps of Engineers Wetlands Delineation Manual, Wetlands Research Program Technical Report Y-87-1 (on-line edition)*, U.S. ARMY CORPS OF ENGINEERS (Jan. 1987), <http://www.cpe.rutgers.edu/Wetlands/1987-Army-Corps-Wetlands-Delineation-Manual.pdf> (giving full text of technical manual Corps uses during JD process).

55. See Brown, *supra* note 11, at 4 (endnote omitted) (discussing consequences of negative JDs).

56. *Id.* (endnote omitted) (explaining protections for landowners who receive negative JDs); see also *Memorandum of Agreement: Exemptions Under Section 404(F) of the Clean Water Act*, EPA, <https://www.epa.gov/cwa-404/memorandum-agreement-exemptions-under-section-404f-clean-water-act> (last updated Sept. 15, 2016) (outlining how EPA and Corps will determine geographic jurisdictional scope of WOTUS for purposes of Section 404). The United States Supreme Court notes that

[u]nder a longstanding memorandum of agreement between the Corps and EPA, [a JD] will also be ‘binding on the Government and represent the Government’s position in any subsequent Federal action or litigation concerning that final determination[ ]’. A negative JD thus binds the two agencies authorized to bring civil enforcement proceedings under the Clean Water Act[ ] [. . .] creating a five-year safe harbor from such proceedings for a property owner.

*Hawkes*, 136 S. Ct. at 1814 (quoting *Memorandum of Agreement: Exemptions Under Section 404(F) of the Clean Water Act*, EPA, <https://www.epa.gov/cwa-404/memorandum-agreement-exemptions-under-section-404f-clean-water-act> (last updated Sept. 15, 2016)) (citing 33 U.S.C. § 1319 (2016)).

57. See Brown, *supra* note 11, at 4 (endnote omitted) (reflecting on consequences arising from positive JDs).

58. *Hawkes*, 136 S. Ct. at 1815 (citing 5 U.S.C. § 704) (explaining how agency actions are reviewable under APA).

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had two viable alternatives: discharg[e] fill material without a permit with the assumption that the land does not require a permit, or apply for a permit and then seek review if the result [was] unsatisfactory.”<sup>59</sup> The Court, however, did not find either of the alternatives proposed by the Corps to be viable.<sup>60</sup> The Court explained that “[R]espondents need not wait for enforcement proceedings and expose themselves to steep civil penalties or criminal liabilities. Nor should they have to apply for a permit, which [the] process [of] can be ‘arduous, expensive, and long.’”<sup>61</sup>

#### IV. IMPACT

The United States Supreme Court’s decision in *Hawkes* is touted as “a victory for landowners and project proponents who will be able to immediately challenge an Army Corps jurisdictional determination.”<sup>62</sup> Because the Court found there are no adequate alternatives to judicial review for JDs, those wishing to challenge one may immediately seek review under the APA in a federal district court.<sup>63</sup> The Eighth Circuit espoused the importance of the immediate ability to challenge approved JDs, stating that without it, “the impracticality of otherwise obtaining review, combined with ‘the uncertain reach of the Clean Water Act and the draconian penalties imposed . . . leaves most property owners with little practical alternative but to dance to the [Environmental Protection Agency’s] [or to the United States Army Corps of Engineers’ tune].’”<sup>64</sup> Prior to this decision, landowners who received a positive JD had three undesirable options: apply for a costly permit, pro-

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59. Brown, *supra* note 11, at 4 (endnote omitted) (noting two alternatives proposed by Corps).

60. *Id.* (specifying proposed alternatives). The *Hawkes* opinion elaborates further, stating, “Respondents need not assume such risks while waiting for EPA to ‘drop the hammer’ in order to have their day in court.” *Hawkes*, 136 S. Ct. at 1815 (quoting *Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012)).

61. See Mappes, Paul, and Ehrich, *supra* note 5 (quoting *Hawkes*, 136 S. Ct. at 1815) (explaining why Corps alternatives were not feasible).

62. Duke K. McCall, III and Douglas A. Hastings, *US Supreme Court Holds US Army Corps Clean Water Act Determinations Reviewable*, MORGAN LEWIS (June 3, 2016), <https://www.morganlewis.com/pubs/us-supreme-court-holds-us-army-corps-clean-water-act-determinations-reviewable> (highlighting importance of decision for landowners).

63. Mappes, Paul, and Ehrich, *supra* note 5 (explaining why *Hawkes* has positive impact on landowners).

64. *Hawkes Co. v. United States Army Corps of Eng’rs*, 782 F.3d 994, 1002 (8th Cir. 2015) (discussing why judicial review of JDs is imperative). The Eighth Circuit further added that “[i]n a nation that values due process, not to mention private property, such treatment is unthinkable.” *Id.*

ceed without one and risk civil and criminal penalties, or abandon a project altogether.<sup>65</sup>

While landowners and companies applauded the decision in *Hawkes*, environmentalists and scholars have questioned whether the decision weakens the CWA.<sup>66</sup> For example, property rights proponents condemn the permit process as tedious and expensive, sometimes to the point that property owners withdraw their plans to apply for a permit from the Corps.<sup>67</sup> A wetland policy expert at the University of Wisconsin-Madison stated, “The Corps will say that’s the process working — the permit compensating for the impacts.”<sup>68</sup> Because the permit application process is so onerous, landowners are forced to think about the implications of their proposed projects and the construction processes used to complete them.<sup>69</sup> Now that the United States Supreme Court determined that JDs can be challenged in court, more companies may try to overturn Corps’ JDs of which waters should be protected and which should not, impacting the balance environmentalists see between the permitting process and completed projects.<sup>70</sup>

As a result of *Hawkes*, lawyers in the field believe that more litigation over the scope of the CWA will soon follow.<sup>71</sup> *Hawkes*

65. McCall and Hastings, *supra* note 62 (noting decision making process landowners went through before *Hawkes*). For more on the cost of permitting, see *supra* note 44 and accompanying text, as well as *infra* note 67 and accompanying text. Following *Hawkes*, landowners can now claim that under the APA, the agency action (the JD) is:

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in a case subject to sections 556 and 557 of Title 5 (Government Organization and Employees) of the United States Code or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. 5 U.S.C. § 706.

66. Tara Golshan, *This Supreme Court decision has the potential to weaken the Clean Water Act*, Vox (May 31, 2016, 10:32 AM), <http://www.vox.com/2016/5/31/11656624/united-states-army-corps-of-engineers-vs-hawkes-clean-water-act-supreme-court> (exploring whether decision effectively weakens protections of CWA).

67. See McCall and Hastings, *supra* note 62 (discussing how Supreme Court noted average applicant for individual permit in 2002 spent 788 days and \$271,596 to complete application process).

68. See Golshan, *supra* note 66 (noting deterrent of expense of permitting process).

69. *Id.* (explaining difficulty of permitting process).

70. *Id.* (noting *Hawkes* has opened up ability for companies to challenge JDs).

71. See McCall and Hastings, *supra* note 62 (explaining implications of Supreme Court decision on future litigation); see also Golshan, *supra* note 66 (noting

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opens the door not only to legal challenges by landowners with positive JDs, but also to environmental groups or other parties that seek judicial review of negative JDs.<sup>72</sup>

The Corps responded to *Hawkes* in October 2016 with a regulatory guidance letter (RGL), explaining the difference between approved and preliminary JDs.<sup>73</sup> The RGL explains:

[A] definitive, official determination from the Corps that there are, or that there are not, jurisdictional aquatic resources on a parcel and the identification of the geographic limits of jurisdictional aquatic resources on a parcel can only be made by means of an [approved JD].<sup>74</sup>

The RGL states that any individual who wishes to obtain a JD must specifically request it from the Corps.<sup>75</sup> The Corps “will then work with the requestor to determine what form of JD will best serve his or her needs.”<sup>76</sup> The RGL lists several factors that Corps employees should consider, including the “requestor’s preference and reasons for the request, whether a permit authorization is associated with the request and the characteristics of any proposed activity needing authorization.”<sup>77</sup> The RGL notes that the Corps’ district engineer has the sole discretion to issue a JD.<sup>78</sup> The RGL directs the district engineer to reasonably prioritize requests based on “the district’s workload and available regulatory resources,” and advises that district engineers may give JD requests accompanied by

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decision opens door for more companies to try and overturn Corps’ determinations); *see also* Taylor Pitts, *The Clean Water Act Is Under Fire And It’s Threatening Your Lineup*, STORMWATERONE (June 2, 2016), <http://stormwaterone.com/articles/the-clean-water-act-is-under-fire-and-its-threatening-your-lineup-the-inertia> (speculating more people may be willing to contest Corps determinations); *see also* Daniel Fisher, *Supreme Court Hands Big Win To Landowners In Wetlands* *see also* Challenges, FORBES (May 31, 2016, 11:50 AM), <http://www.forbes.com/sites/danielfisher/2016/05/31/supreme-court-says-landowners-can-sue-over-wetlands-determinations/#16b34b482617> (surmising increase in litigation as result of *Hawkes*).

72. *See* Golshan, *supra* note 66 (noting future challenges to Corps’ JDs); *see also* McCall and Hastings, *supra* note 62 (discussing nature of future cases regarding JDs).

73. Elizabeth Corey and Heather M. Palmer, *Army Corps Issues Regulatory Guidance Letter on Jurisdictional Determinations*, NAT’L LAW REV. (Nov. 2, 2016), <http://www.natlawreview.com/article/army-corps-issues-regulatory-guidance-letter-jurisdictional-determinations> (explaining Corps’ issuance of regulatory guidance letter).

74. *Id.* (notes role of approved JD).

75. *Id.* (explaining that approved JDs must specifically be sought from Corps).

76. *Id.* (outlining process for seeking approved JD).

77. *Id.* (listing factors to be considered for determining type of JD needed).

78. Corey and Palmer, *supra* note 73 (noting ultimate discretion of Corps district engineer).

permit requests higher priority.<sup>79</sup> It is still unclear, however, whether the heightened prospect of judicial review will make the process for obtaining approved JDs more onerous.<sup>80</sup>

Legal scholars also rightly speculate that the United States Supreme Court's decision in this case suggests that several justices would be willing to revisit the Court's precedent on CWA jurisdictional issues if a future challenge to the Army Corps' or EPA's jurisdiction went before the United States Supreme Court.<sup>81</sup> In *Hawkes*, Justice Anthony Kennedy stated that the CWA is “‘notoriously unclear’” and that it “continues to raise troubling questions regarding the [g]overnment's power to cast doubt on the full use and enjoyment of private property throughout the Nation.”<sup>82</sup> Since the United States Supreme Court's plurality opinion in *Rapanos v. United States*<sup>83</sup>, uncertainties about the jurisdictional reach of CWA persist.<sup>84</sup> *Rapanos* consisted of consolidated cases involving four Michigan wetlands located near ditches or man-made drains that eventually emptied into “traditional navigable waters.”<sup>85</sup> *Rapanos* resulted in several decisions with different reasoning from the Supreme Court: Justice Antonin Scalia authored the plurality opinion, Chief Justice John Roberts and Justice Kennedy authored concurrences, while Justice John Stevens and Justice Stephen Breyer authored dissents.<sup>86</sup>

Because *Rapanos* provided no rationale that a majority of the justices supported, lower courts were “extracting different rules and decisions,” prompting the EPA and the Corps to publish new rules defining what they considered to be WOTUS.<sup>87</sup> In May 2015, the

79. *Id.* (outlining further discretion Corps district engineer possesses).

80. *Id.* (highlighting unanswered questions post-*Hawkes*).

81. See McCall and Hastings, *supra* note 62 (noting Supreme Court's apparent willingness to revisit CWA jurisdictional issues).

82. See *United States Army Corps of Eng'rs v. Hawkes Co.*, \_\_ U.S. \_\_, 136 S. Ct. 1807, 1816-17 (2016); see also McCall and Hastings, *supra* note 62 (discussing CWA's ambiguities).

83. *Rapanos v. United States*, 547 U.S. 715, 719 (2006) (discussing regulation of wetlands under CWA).

84. *The Supreme Court Holds that Army Corps' Jurisdictional Determinations are Final Actions Subject to Judicial Review*, JACKSON WALKER, <https://www.jw.com/tag/united-states-army-corps-of-engineers-v-hawkes-co/> (last visited Nov. 6, 2016) (exploring problems in CWA jurisdiction since plurality in *Rapanos*).

85. *Rapanos*, 547 U.S. at 719 (discussing nature of consolidated cases).

86. *Id.* at 715 (describing resulting opinions and aftermath).

87. Robert Meltz and Claudia Copeland, *The Wetlands Coverage of the Clean Water Act (CWA): Rapanos and Beyond*, CONGRESSIONAL RESEARCH SERVICE (Sept. 3, 2014), <http://www.awwa.org/Portals/0/files/legreg/documents/CRSWetlandsCoverage.pdf> (discussing confusion created by plurality opinion in *Rapanos* in lower courts).

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EPA, the Corps, and the Obama administration announced the Clean Water Rule (CWR), designed to “provide the clarity . . . about which waters are protected by the [CWA].”<sup>88</sup> The primary goals of the new CWR are to “minimiz[e] delays and costs, mak[e] protection of clean water more effective, and improve[e] predictability and consistency for landowners and regulated entities.”<sup>89</sup> The new rule, however, continues to generate significant controversy;<sup>90</sup> states, industry groups, and environmental interest groups immediately filed challenges, all contending that “the rule either went too far or not far enough.”<sup>91</sup> There is currently a nationwide stay against enforcement of the CWR by the Sixth Circuit.<sup>92</sup> Due to confusion as to whether the cases should be heard in federal district or federal appellate courts, and potential inconsistencies with the holding in *Rapanos*, the Sixth Circuit believed a stay was necessary to

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88. Jenny Hopkinson, *Obama’s water war*, POLITICO (updated May 28, 2015, 2:56 pm), <http://www.politico.com/story/2015/05/epa-waterways-wetlands-rule-118319> (explaining purpose of Clean Water Rule).

89. Clean Water Rule, 80 FED. REG. 37,057 (highlighting goal of Clean Water Rule).

90. Susan Hori, *New ‘Waters of the US’ Rule on Hold: Enduring Debate Creates Uncertainty for Developers*, ENVIRONMENTAL LEADER (Dec. 14, 2015), <http://www.environmentalleader.com/2015/12/14/new-waters-of-the-us-rule-on-hold-enduring-debate-creates-uncertainty-for-developers/#ixzz3wa5ahcO> (discussing intended and unintended extent of Clean Water Rule).

91. *Id.*; see also Whitney Forman-Cook, *Twelve Lawsuits brought against EPA’s Clean Water Rule to be heard together*, AGRI-PULSE (July 31, 2015), <http://www.agripulse.com/Twelve-lawsuits-brought-against-EPAs-Clean-Water-Rule-to-be-heard-together-07312015.asp> (explaining twelve different challenges filed, and have since been consolidated by Judicial Panel on Multi-District Litigation and randomly assigned to Sixth Circuit). “Groups like the Natural Resources Defense Council (NRDC) and the National Wildlife Federation (NWF) called for more pollution protections, while other industry leaders, like Murray Energy Corp and the American Farm Bureau Federation, wanted narrower rules that will not interfere with business operations.” *Id.*; see also Barry M. Hartman, Tad J. Macfarlan, and Ankur K. Tohan, *Clean Water Rule Stayed Nationwide*, K&L GATES (Oct. 14, 2015), <http://www.klgates.com/clean-water-rule-stayed-nationwide-10-14-2015/> (explaining reasons and history of Sixth Circuit stay).

Shortly thereafter, a coalition of 18 states (Alabama, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, West Virginia, and Wisconsin) filed motions with the Court seeking (1) a stay of the rule during the pendency of the court’s proceedings and (2) a ruling from the Sixth Circuit that it lacked jurisdiction to hear their appeals (enabling pursuit of their cases before the district courts).

*Id.*

92. See generally Bebe Raupé, *Sixth Circuit Hears Oral Arguments on Water Rule*, BLOOMBERG BNA (Dec. 9, 2015), <http://www.bna.com/sixth-circuit-hears-n57982064762/> (giving background on Sixth Circuit’s stay of Clean Water Rule).

“temporarily silence[. . .] the whirlwind of confusion that springs from uncertainty about the requirements of the new Rule and whether they will survive legal testing[,]’ ‘honor[ ] the policy of cooperative federalism that informs the Clean Water Act[,]’ and ‘restore uniformity of regulation under the familiar, [. . .] pre-Rule regime, pending judicial review.’”<sup>93</sup>

The United States Supreme Court will inevitably address CWA issues in the near future, whether the case comes from the Sixth Circuit on certiorari, or in the form of an APA challenge to a Corps JD, but any decision made will inevitably impact landowners, environmentalists, and government agencies alike.<sup>94</sup>

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93. Hartman, Macfarlan, and Tohan, *supra* note 91 (explaining reasoning behind stay by Sixth Circuit). For more information on the Clean Water Rule and the Sixth Circuit’s stay, see *In re* Environmental Protection Agency and Department of Defense Final Rule; “Clean Water Rule: Definition of Waters of the United States,” 80 FED. REG. 37,054 (June 29, 2015), Nos. 15-3799/3822/3853/3887 (6th Cir. Oct. 9, 2015) (giving full text of Sixth Circuit case and Clean Water Rule).

94. See *Supreme Court Holds that Army Corps’ Jurisdictional Determinations are Final Actions*, *supra* note 84 (musing about future of CWA and Clean Water Rule in Supreme Court); see also Justin Jennewine, *Sixth Circuit Agrees to Hear Challenge to Clean Water Act*, SQUIRE PATTON BOGGS (Feb. 23, 2016), <http://www.sixthcircuitappellateblog.com/news-and-analysis/sixth-circuit-agrees-to-hear-challenge-to-clean-water-act/> (explaining Sixth Circuit’s decision to grant itself jurisdiction over Clean Water Rule).

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