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What All the Fuss Isn't About: The Eighth Circuit's Misapprehension of APA Purposes in *Hawkes Co. v. U.S. Army Corps of Engineers*

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WHAT ALL THE FUSS ISN'T ABOUT: THE EIGHTH CIRCUIT'S MISAPPREHENSION OF APA PURPOSES IN *HAWKES CO. v. U.S. ARMY CORPS OF ENGINEERS*

Abstract: On April 10, 2015, in *Hawkes Co. v. U.S. Army Corps of Engineers*, the U.S. Court of Appeals for the Eighth Circuit held that a U.S. Army Corps of Engineers jurisdictional determination made pursuant to the Clean Water Act is subject to judicial review as final agency action under the Administrative Procedure Act. Jurisdictional determinations are threshold decisions of the Corps assessing whether a piece of land is subject to regulation under the Clean Water Act. The Eighth Circuit's decision contradicts a previous decision of the U.S. Court of Appeals for the Fifth Circuit, which held pre-enforcement judicial review of Corps jurisdictional determinations improper under the Administrative Procedure Act. This Comment argues that the Eighth Circuit's analysis inappropriately relied on the costs of permitting under the Clean Water Act. This Comment urges the U.S. Supreme Court to reverse the Eighth Circuit's decision and to follow instead the reasoning of the Fifth Circuit. Not only would the Eighth Circuit's decision in this case disrupt the system of review in place for agency action under the Administrative Procedure Act, it would complicate jurisdictional jurisprudence by creating two discrete sets of jurisdictional case law subject to different standards of review in the courts.

INTRODUCTION

Chapter 7 of the Administrative Procedure Act (APA) provides interested parties with the right to judicial review of final agency action.¹ Determining when any given agency action is final, and thus eligible for Chapter 7 review, has proven difficult for the courts.² In 2015, in *Hawkes Co. v.*

¹ See Government Organization and Employees, Pub. L. No. 89-554, 80 Stat. 392 (1966) (codified as amended at 5 U.S.C. § 704 (2012)). The Administrative Procedure Act (APA), passed in 1946, makes uniform the creation and enforcement of agency regulations across many disparate U.S. agencies with often divergent goals. See Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.); S. REP. NO. 79-752, at 187-89 (1945).

² Compare *Jama v. Dep't of Homeland Sec.*, 760 F.3d 490, 497 (6th Cir. 2014) (holding intermediate decision terminating refugee status by U.S. Citizenship and Immigration Services not reviewable under Chapter 7 until the conclusion of the proceedings), and *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 17 (D.C. Cir. 2005) (holding Fish and Wildlife Service recommended survey protocols insufficiently final to receive Chapter 7 review), with *Sharkey v. Quarantillo*, 541 F.3d 75, 89 (2d Cir. 2008) (holding Immigration and Naturalization Service's District Adjudications Officer's cancellation of plaintiff's immigration status reviewable under Chapter 7).

U.S. Army Corps of Engineers, the U.S. Court of Appeals for the Eighth Circuit considered the application of Chapter 7 review to the jurisdictional determinations of the U.S. Army Corps of Engineers (“Corps”) when enforcing the regulations of the Clean Water Act of 1977 (“CWA”).³ The CWA is designed to restore and maintain the integrity of the nation’s waters by requiring permits for discharging pollutants into U.S. waters.⁴ When the Corps makes a jurisdictional determination under the CWA, it decides as a threshold matter whether or not a piece of property is subject to the CWA.⁵ Interested parties seek pre-enforcement judicial review of adverse jurisdictional determinations because land within the scope of the CWA requires expensive permitting through the Corps for most industrial uses, while land falling outside the scope of the CWA requires no such permitting.⁶ The jurisdictional reach of the CWA has remained an open question.⁷

See generally Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1287, 1329–40 (2014) (discussing the policy implications of expanding or narrowing judicial review of agency action).

³ *See* *Hawkes Co. v. U.S. Army Corps of Eng’rs (Hawkes II)*, 782 F.3d 994, 996 (8th Cir.), *cert. granted*, 136 S. Ct. 615 (2015) (mem.). A jurisdictional determination is a threshold decision by the Army Corps of Engineers (“Corps”) as to whether a piece of property is subject to the jurisdiction of the Clean Water Act of 1977 (“CWA”). *See* 33 C.F.R. § 331.2 (2015). The Army Corps of Engineers is an executive branch agency governed by the procedural rules of the APA. *See* 5 U.S.C. § 551 (2012) (defining “agency” for purposes of the APA); NICOLE T. CARTER & BETSY A. CODY, CONG. RESEARCH SERV., RS20866, *THE CIVIL WORKS PROGRAM OF THE ARMY CORPS OF ENGINEERS: A PRIMER 1* (2005) (explaining that the Corps is an executive branch agency and part of the Department of Defense).

⁴ *See* Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended at 33 U.S.C. § 1251 (2012)). Under the CWA, discharging any pollutant, whether radioactive waste or cellar dirt, into the navigable waters of the United States is unlawful without a permit allowing such discharge. *See* 33 U.S.C. §§ 1311, 1342, 1362 (2012). The statute defines the navigable waters only as the waters of the United States. *See* 33 U.S.C. § 1362.

⁵ *See* 33 C.F.R. § 331.2. Land is subject to the jurisdiction of the CWA if it comprises waters of the United States. *See* 33 U.S.C. §§ 1311, 1362.

⁶ *See* *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion) (explaining the significant consequences of CWA enforcement regulations for property owners); *see also* David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59, 74–76 (2002) (studying the time and expense of the CWA permitting process).

⁷ *See* *Sackett v. EPA*, 132 S. Ct. 1367, 1370 (2012). *See generally* *Rapanos*, 547 U.S. at 757–58 (Roberts, C.J., concurring) (outlining the recent back-and-forth of Corps regulations and Court decisions trying to define the reach of the CWA). Defining the bounds of the waters of the United States has long plagued the U.S. Supreme Court, the Corps, and property owners. *See Sackett*, 132 S. Ct. at 1370. *See generally* Kenneth S. Gould, *Drowning in Wetlands Jurisdictional Determination Process: Implementation of Rapanos v. United States*, 30 U. ARK. LITTLE ROCK L. REV. 413 (2008) (discussing the impact of lack of Supreme Court or regulatory guidance on CWA jurisdictional determinations); Margaret “Peggy” Strand & Lowell M. Rothschild, *What Wetlands Are Regulated? Jurisdiction of the S404 Program*, 40 ENVTL. L. REP. NEWS & ANALYSIS 10,372 (2010) (providing a history of Corps and EPA regulations defining CWA wetland jurisdiction). When most recently faced with the question of the CWA’s scope, the U.S. Supreme Court narrowed the reach of the CWA without a majority opinion to direct future assessments of scope. *See*

In *Hawkes*, the Eighth Circuit concluded that Corps jurisdictional determinations are final agency actions eligible for judicial review under Chapter 7 prior to enforcement.⁸ In contrast, in 2014, the Court of Appeals for the Fifth Circuit determined in *Belle Co. v. U.S. Army Corps of Engineers* that Corps jurisdictional determinations are not final agency actions and denied pre-enforcement judicial review.⁹

This Comment argues that the Eighth Circuit incorrectly held that a Corps jurisdictional determination is a final agency action within the meaning of Chapter 7 when it reversed the lower court's opposite decision.¹⁰ This Comment argues that the Eighth Circuit's reliance on CWA ambiguity in *Hawkes* was inappropriate and overextended the intended reach of Chapter 7 review.¹¹ Part I of this Comment outlines current Chapter 7 jurisprudence, the current state of CWA jurisdictional law, and the factual and procedural history of *Hawkes*.¹² Part II examines the split between the Fifth and Eighth Circuits in determining whether a Corps jurisdictional determination pursuant to the CWA constitutes a final agency action under Chapter 7.¹³ Finally, Part III argues that the Eighth Circuit erred in granting pre-enforcement judicial review of the Corps's jurisdictional determination under the CWA and that the U.S. Supreme Court should reverse the Eighth Circuit's decision and deny Chapter 7 review.¹⁴

Rapanos, 547 U.S. at 758 (Roberts, C.J., concurring). In *Rapanos*, Chief Justice Roberts noted his fears that the current state of law under the CWA leaves interested parties without guidance on Congress's intended limits on the reach of the CWA. *Id.* (stating that the CWA leaves parties to "feel their way on a case-by-case basis").

⁸ Compare *Hawkes II*, 782 F.3d at 1002 (holding Corps jurisdictional determination reviewable under Chapter 7 prior to enforcement), with *Belle Co. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 394 (5th Cir. 2014) (denying pre-enforcement Chapter 7 review of Corps jurisdictional determination), *cert. denied sub nom. Kent Recycling Servs. v. U.S. Army Corps of Eng'rs*, 135 S. Ct. 1548 (2015) (mem.).

⁹ See *Belle*, 761 F.3d at 394 (denying pre-enforcement judicial review of Corps jurisdictional determination).

¹⁰ See *infra* notes 73–90 and accompanying text.

¹¹ See *infra* notes 73–90 and accompanying text.

¹² See *infra* notes 15–55 and accompanying text (outlining Chapter 7 jurisprudence and CWA jurisdictional law).

¹³ See *infra* notes 56–72 and accompanying text (examining the circuit split between interpretations of the CWA).

¹⁴ See *infra* notes 73–90 and accompanying text (arguing that the Eighth Circuit erred in granting pre-enforcement judicial review under the CWA, and urging the U.S. Supreme Court to reverse).

I. CHAPTER 7 REVIEW, JURISDICTIONAL AMBIGUITY, AND *HAWKES*

The Hawkes Company's dispute with the Corps arises at the juncture of two legislative schemes: the CWA and the APA.¹⁵ Section A describes the current legal landscape for judicial review of final agency action under the APA.¹⁶ Section B introduces CWA jurisdictional law ambiguity.¹⁷ Section C traces the Hawkes Company's case from its request for a jurisdictional determination from the Corps to its appeal to the Eighth Circuit.¹⁸

A. Judicial Review Under the Administrative Procedure Act as Held in Sackett v. EPA

The APA governs the regulatory activities of federal agencies.¹⁹ Under Chapter 7 of the APA, a party may seek judicial review of an agency action only if it is made reviewable by statute or if it is a "final agency action for which there is no other adequate remedy in a court."²⁰ The text of the CWA does not provide explicitly for judicial review of jurisdictional determinations.²¹ Therefore, pre-enforcement judicial review of jurisdictional determinations made pursuant to the CWA is available to interested parties only if a jurisdictional determination is found to be a final agency action within the meaning of Chapter 7.²²

¹⁵ See *Hawkes II*, 782 F.3d at 999 (describing the multiple U.S. Supreme Court tests for CWA jurisdiction and the variety in Chapter 7 application).

¹⁶ See *infra* notes 19–34 and accompanying text (describing the standard for judicial review of final agency action under the APA).

¹⁷ See *infra* notes 35–43 and accompanying text (introducing CWA jurisdictional ambiguity).

¹⁸ See *infra* notes 44–55 and accompanying text (providing factual and procedural history of *Hawkes II*).

¹⁹ See 5 U.S.C. § 553 (2012) (governing agency rule making).

²⁰ See 5 U.S.C. § 704 (2012). The girth of the federal administrative state necessarily requires some flexibility in practice. See S. REP. NO. 79-752, at 189. But see generally Dru Stevenson & Sonny Eckhard, *Standing as Channeling in the Administrative Age*, 53 B.C. L. REV. 1357 (2012) (discussing agency autonomy in limiting suits against itself through policy choice).

²¹ See *Belle*, 761 F.3d at 387 (noting that no relevant law provides expressly for judicial review). Jurisdictional determinations may be issued at the discretion of the agency and are often issued at a property owner's request. See *id.*; Strand & Rothschild, *supra* note 7, at 10,374 (explaining the Corps practice of providing preliminary jurisdictional determinations); Sunding & Zilberman, *supra* note 6, at 64 (explaining the Corps practice of encouraging property owners to meet with the Corps before embarking on the permitting process); see also 33 C.F.R. pt. 331 app. C (2011) (diagramming process for approved jurisdictional determinations).

²² See *Belle*, 761 F.3d at 387–88 (noting that no relevant law expressly provides for judicial review of jurisdictional determinations and that the APA provides only for review of final agency actions in such circumstances). See generally Paula M. Feldmeier, *U.S. Army Corps of Engineers-Issued Jurisdictional Determinations Post Sackett v. EPA: Are They Subject to Judicial Review?*, A.B.A. WATER QUALITY & WETLANDS COMMITTEE NEWSL., May 2014 (discussing historical shift in the perception of the courts of the reviewability of Corps jurisdictional determinations). The jurisdictional determination could also receive judicial review during later Chapter 7 review of a subsequent permitting decision. See 5 U.S.C. § 704; *Belle*, 761 F.3d at 394. The APA allows

Following the U.S. Supreme Court's 1997 decision in *Bennett v. Spear*, courts use a two-pronged test to assess the finality of agency action within the meaning of Chapter 7 ("*Bennett test*").²³ To constitute a final agency action, an administrative decision must (1) mark the consummation of the agency's decision-making process, and (2) be an action by which rights or obligations have been determined or from which legal consequences will flow.²⁴ The Fifth and Eighth Circuit Courts of Appeals disagree as to the application of the second prong of the *Bennett test* to Corps jurisdictional determinations.²⁵

In 2012, in *Sackett v. EPA*, the Supreme Court applied this two-pronged test to a compliance order issued by the EPA while enforcing the CWA.²⁶ In order for a compliance order to be issued against a party, the EPA must determine that the non-compliant party's property falls within the scope of the CWA and that their actions have violated the CWA's prohibi-

all intermediate agency actions to be reviewed by the courts during judicial review of a final agency action. See 5 U.S.C. § 704 ("A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action."). Because permitting decisions are entitled to judicial review as final agency actions, a party could appeal a jurisdictional determination underpinning a Corps permitting decision if they sought Chapter 7 review of such permitting decision. See *Belle*, 761 F.3d at 394 (noting that the Belle Company would be able to challenge the CWA's underlying jurisdiction if they were denied a permit and brought suit to challenge the permitting decision); 33 C.F.R. § 331.12 (2015) (allowing permit denials and proffered permits appeal to the federal courts).

²³ See *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (establishing two-pronged test for deciding whether an administrative action is sufficiently final to warrant judicial review under Chapter 7 ("*Bennett test*"). See generally Bagley, *supra* note 2 (discussing federal court review of agency actions).

²⁴ See *Bennett*, 520 U.S. at 177–78 (setting out the two-pronged test for final agency action). The *Bennett test* addresses only the threshold finality inquiry and does not address whether the administrative action has any other adequate remedies in court. See 5 U.S.C. § 704 (allowing judicial review when agency action is final and without other adequate court remedy); *Sackett*, 132 S. Ct. at 1372 (addressing the question of other adequate remedies after applying the *Bennett test*). Because not all courts reach the adequate remedy inquiry when assessing whether an administrative decision is eligible for Chapter 7 review, this Comment focuses on the finality inquiry. See *Belle*, 761 F.3d at 394 (concluding its Chapter 7 analysis without reaching the question of adequate court remedy upon deciding that the agency action was not final under *Bennett*); *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 593 (9th Cir. 2008) (holding that a Corps jurisdictional determination is not an action by which rights or obligations have been determined or from which legal consequences will flow, and then holding "[f]rom this it follows that judicial review under the APA is unavailable").

²⁵ Compare *Hawkes II*, 782 F.3d at 1001 (holding a jurisdictional determination meets the second prong of the *Bennett test* and is reviewable under Chapter 7), with *Belle*, 761 F.3d at 394 (holding a jurisdictional determination of the Corps fails to meet the second prong for finality under Chapter 7).

²⁶ See *Sackett*, 132 S. Ct. at 1371–72. Compliance orders are issued by the EPA when a party is discharging, or has discharged, pollutants into the waters of the United States without a permit or outside the bounds of a permit. See 33 U.S.C. § 1319 (2012). The EPA may also bring enforcement actions. See *id.*

tions.²⁷ An EPA compliance order asserts CWA jurisdiction even when the Corps has not issued a formal jurisdictional determination for a party.²⁸

In *Sackett*, a family who had filled their property in order to build a house was issued a compliance order by the EPA stating that they had filled the property in violation of the CWA.²⁹ Without a statutory right to judicial review, the Sacketts sought review of the compliance order on the basis that it was a sufficiently final agency action for which judicial review was available under Chapter 7.³⁰

The Supreme Court held the EPA compliance order sufficiently final to receive Chapter 7 review because it satisfied both prongs of the *Bennett* test.³¹ As to the first prong, the Court held that the compliance order marked the consummation of the agency's decision-making process because the Sacketts could not bring any further agency review of the issued order.³² The EPA compliance order satisfied the second prong of the test because it obligated the property owners to an expensive restoration plan, imposed penalties for failure to restore, and effectively barred the building of their home.³³ The only way for the Sacketts to contest the compliance order and

²⁷ See 33 U.S.C. § 1319 (detailing EPA compliance order issuance procedure under the CWA).

²⁸ See 33 C.F.R. § 331.2 (noting that compliance orders may include implicit jurisdictional assessments even without approved jurisdictional determination). An informal jurisdictional determination of this sort is considered a preliminary, rather than approved, jurisdictional determination. *Id.* In *Sackett*, the Corps asserted findings of jurisdiction in the compliance order itself. See Administrative Compliance Order, EPA Docket No. CWA-10-2008-0014 at 1.4, 1.5 (Nov. 26, 2007). The compliance order issued in *Sackett* requires that an implicit jurisdictional determination was made that the Sacketts' property is subject to the regulation of the CWA. See 33 U.S.C. § 1319; EPA Docket No. CWA-10-2008-0014 at 1.4, 1.5. In *Sackett*, the plaintiffs sought to contest the underlying jurisdictional determination. See 132 S. Ct. at 1371.

²⁹ *Sackett v. EPA*, No. 08-CV-185-N-EJL, 2008 WL 3286801, at *1–2 (D. Idaho 2008), *aff'd*, 622 F.3d 1139 (9th Cir. 2009), *rev'd*, 132 S. Ct. 1367; see Complaint for Declaratory and Injunctive Relief ¶¶ 6, 27, *Sackett*, No. 08-CV-185-N-EJL, 2008 WL 2814724.

³⁰ See *Sackett*, 2008 WL 3286801, at *2. The compliance order issued against the Sacketts required they restore the property according to an EPA work plan or face up to \$70,000 per day in civil fines for the violation. Complaint for Declaratory and Injunctive Relief, *supra* note 29, ¶ 35; EPA Docket No. CWA-10-2008-0014 at 1.4, 1.5.

³¹ See *Sackett*, 132 S. Ct. at 1371–72.

³² *Id.* at 1372.

³³ *Id.* at 1371–72. In deciding on the second prong of the test, the Court noted that the order obligated the Sacketts to undertake the expensive restoration of their property and to allow EPA access to the property, exposed the Sacketts to double penalties during any subsequent EPA enforcement action against the Sacketts, and limited the Sacketts' ability to successfully undertake the permitting process because Corps practice directs that permits applied for subsequent to an EPA compliance order should not be granted unless doing so "is clearly appropriate." *Id.* at 1372 (citing 33 C.F.R. § 326.3(e)(iv) (2012)). Although the regulation applies when enforcement litigation is brought, the government conceded and the Court noted that the same generally applies to compliance orders. See *id.* at 1372 n.3. The Court did not decide that this was an appropriate reading of the regulation, but assumed that the compliance order had effectively barred the Sacketts from successfully permitting, thus denying them the building of their home. See *id.* at 1372 & n.3.

its underlying jurisdiction was to wait for the EPA to bring an enforcement action, accruing potential liability each day.³⁴

B. The Jurisdictional Ambiguity of the Clean Water Act

In *Sackett*, the Court held that Chapter 7 provided for the Sacketts' federal court appeal of the EPA compliance order issued against them, but it did not consider the underlying issue: whether or not the Sacketts' land falls under the jurisdiction of the CWA.³⁵ Land is subject to the regulations of the CWA if it comprises waters of the United States.³⁶ The waters of the United States have proven difficult to define, a salient ambiguity for property owners who must determine if building on their property will require expensive permitting through the Corps.³⁷

The U.S. Supreme Court has allowed agency interpretations of the waters of the United States to include navigable-in-fact waters and wetlands adjacent to navigable-in-fact waters.³⁸ The Court, however, has not articulated a single test for assessing just how adjacent a wetland property must be to navigable-in-fact waters to fall under the jurisdiction of the CWA.³⁹ In 2006, in *Rapanos v. United States*, the U.S. Supreme Court articulated two tests to assess the reach of the CWA to wetland property, neither of which garnered a majority.⁴⁰ Chief Justice Roberts noted his concerns, in his concurring opinion, that the current state of the law under the CWA leaves in-

³⁴ See *id.* at 1372.

³⁵ See *id.* at 1370, 1374.

³⁶ See 33 U.S.C. § 1311 (making discharge of pollutants unlawful); *id.* § 1342 (providing for permitting of discharge into “navigable waters”); *id.* § 1362 (defining the regulated waters as the waters of the United States). If land comprises waters of the United States, it is regulated by the CWA and discharging any pollutants on the land (including dirt) requires permitting through the Corps. See *id.* § 1342.

³⁷ See *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring); see also *supra* note 7 and accompanying text (discussing the Corps's, Supreme Court's, and Congress's shared difficulty of defining the scope of the CWA). See generally Gould, *supra* note 7 (discussing the impact of lack of Supreme Court or regulatory guidance on CWA jurisdictional determinations). The U.S. Supreme Court has interpreted the waters of the United States to include navigable-in-fact waters and wetlands adjacent to navigable-in-fact waters. See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985).

³⁸ See *Riverside Bayview Homes, Inc.*, 474 U.S. at 139 (affirming a regulation that construed freshwater wetlands adjacent to navigable-in-fact waters within the scope of the CWA).

³⁹ See *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring).

⁴⁰ *Id.* at 742 (plurality opinion) (requiring wetland waters be connected to a relatively permanent waterway by a continuous surface connection to be waters of the United States within the meaning of the CWA); *id.* at 759 (Kennedy, J., concurring) (requiring wetland waters have a significant nexus to traditional navigable-in-fact waters to be waters of the United States within the meaning of the CWA).

terested parties without guidance on Congress's intended limits on the reach of the CWA.⁴¹

It is under this ambiguous analytical framework that entities doing any construction must assess whether or not they are required to pursue CWA permitting to remain in compliance with the law.⁴² Such parties risk (1) proceeding to fill or dredge lands without securing a permit from the CWA, because they do not believe their wetland property constitutes "waters of the United States," when the Corps may later assess their land within the CWA and issue an expensive compliance order, or (2) the long and costly permitting process which might or might not result in a favorable permit.⁴³

C. The Jurisdictional Determination in Hawkes and Subsequent Court Filing

In 2015, in *Hawkes Co. v. U.S. Army Corps of Engineers*, the U.S. Court of Appeals for the Eighth Circuit considered whether a standalone jurisdictional determination of the Corps is subject to Chapter 7 review.⁴⁴ The Hawkes Company, plaintiff in *Hawkes*, manages peat mines in Northern Minnesota.⁴⁵ Seeking to expand their peat mining operations, the Hawkes Company entered into a contract to mine peat from a piece of land adjacent to their current mining operations and to pay the owner royalties for its use.⁴⁶ Foreseeing the risks of permitting compliance because of wetlands on the property, the contract was contingent upon a favorable decision from the Corps that the land would be permitted under the CWA to allow peat mining, should the wetlands fall within the jurisdiction of the CWA.⁴⁷

⁴¹ *Id.* at 758 (Roberts, C.J., concurring) (stating that the CWA leaves parties to "feel their way on a case-by-case basis").

⁴² See *Sackett*, 132 S. Ct. at 1370. In Justice Scalia's words, this is "what all the fuss is about." *Id.*

⁴³ See Mark A. Latham, *(Un)restoring the Chemical, Physical, and Biological Integrity of Our Nation's Waters: The Emerging Clean Water Act Jurisprudence of the Roberts Court*, 28 VA. ENVTL. L.J. 411, 435 (2010) ("[R]egulators, property owners, counsel, and the courts continue struggling to determine the jurisdictional reach of the CWA post-Rapanos.").

⁴⁴ *Hawkes II*, 782 F.3d at 999.

⁴⁵ *Hawkes Co. v. U.S. Army Corps of Eng'rs (Hawkes I)*, 963 F. Supp. 2d 868, 870 (D. Minn. 2013), *rev'd*, 782 F.3d 994, *cert. granted*, 136 S. Ct. 615. Peat mining is considered a wetland dependent operation and for that reason often occurs on lands subject to the regulations of the CWA. See *Hawkes II*, 782 F.3d at 998 (noting that the Minnesota Department of Natural Resources considers peat mining wetland dependent).

⁴⁶ *Hawkes I*, 963 F. Supp. 2d at 870. The property itself is owned by plaintiffs Pierce Investment Company and LPF Companies. *Id.* All three companies are closely held corporations of the Pierce family. *Id.*

⁴⁷ *Hawkes II*, 782 F.3d at 998; see *Hawkes I*, 963 F. Supp. 2d at 870. The Corps ultimately determined that the wetlands on the Hawkes Company's property were connected to a traditional navigable water some 120 miles away and thus fell under the purview of the CWA as a water of the United States. See *Hawkes I*, 963 F. Supp. 2d at 870–71.

The Corps provided the Hawkes Company with a series of preliminary determinations that the property fell under the jurisdiction of the CWA, culminating in an approved jurisdictional determination concluding that the property comprised waters of the United States and was therefore subject to the permitting requirements of the CWA.⁴⁸ The Hawkes Company filed a timely administrative appeal contesting the jurisdictional determination.⁴⁹ The appeal was sustained and the issue was remanded for reconsideration.⁵⁰ After reconsideration, the district office issued a revised jurisdictional determination again concluding that the Hawkes Company's property was a water of the United States subject to the jurisdiction of the CWA.⁵¹ The Hawkes Company then sought judicial review of the revised jurisdictional determination from the U.S. District Court for the District of Minnesota, alleging that the Corps had erroneously concluded that the property was a water of the United States subject to the jurisdiction of the CWA.⁵²

The district court granted the Corps's motion to dismiss on the grounds that the revised jurisdictional determination was not a final agency action appropriate for judicial review.⁵³ On appeal, the Eighth Circuit reversed the district court, holding the revised jurisdictional determination sufficiently final to be reviewable under Chapter 7 of the APA, and remanded the jurisdictional issue to the district court.⁵⁴ The U.S. Supreme Court granted the Corps's petition for writ of certiorari and is scheduled to hear oral argument in the case during the 2016 Term.⁵⁵

⁴⁸ *Hawkes I*, 963 F. Supp. 2d at 870–71. The Corps may also issue preliminary jurisdictional determinations, which are only advisory in nature and are not appealable through the agency's internal appeals mechanism. 33 C.F.R. § 331.2.

⁴⁹ *Hawkes I*, 963 F. Supp. 2d at 871; see 33 C.F.R. § 331.2 (granting by right review of approved jurisdictional determinations); *id.* § 331.6 (allowing sixty days for an administrative appeal).

⁵⁰ *Hawkes I*, 963 F. Supp. 2d at 871; Administrative Appeal Decision Hawkes Peat Company Inc. Jurisdictional Determination, File No. MVP 2007-01914-DJS (Oct. 24, 2012). The administrative appeals officer found that the record did not support the Corps's claim. Administrative Appeal Decision Hawkes Peat Company Inc. Jurisdictional Determination, File No. MVP 2007-01914-DJS (finding that the record did not support the Corps's claim that the property contained waters of the United States).

⁵¹ *Hawkes I*, 963 F. Supp. 2d at 871. The district office is not bound to a new decision on appeal, but must only "further analyze" the remanded action. See 33 C.F.R. § 331.10 (2015). See generally 33 C.F.R. pt. 331 app. C (mapping Corps administrative appeals process for jurisdictional determinations).

⁵² See *Hawkes I*, 963 F. Supp. 2d at 871 (seeking a declaratory judgment and injunctive relief from the jurisdictional decision).

⁵³ See *id.* at 874–75 (deciding that the jurisdictional determination failed to determine the rights or obligations of the plaintiffs and therefore did not meet the second prong of the *Bennett* test).

⁵⁴ See *Hawkes II*, 782 F.3d at 1002 (holding that the jurisdictional determination meets both prongs of the *Bennett* test and is eligible for Chapter 7 review).

⁵⁵ *Hawkes Co. v. U.S. Army Corps of Engr's*, 136 S. Ct. at 615 (granting certiorari).

II. CIRCUITS DISAGREE ON APPLICATION OF FINALITY PRONGS TO JURISDICTIONAL DETERMINATIONS UNDER THE CWA

Almost two decades after the U.S. Supreme Court's 1997 decision in *Bennett v. Spear* outlined the test for assessing the finality of agency action under Chapter 7, lower courts are still struggling to apply the flexible standard to the many agency decisions made every day.⁵⁶ Recently, the U.S. Courts of Appeals for the Fifth and Eighth Circuits heard cases applying the Court's two-pronged standard to Corps jurisdictional determinations under the CWA, disagreeing only as to the application of the second prong.⁵⁷ Section A of this Part examines the Fifth Circuit's 2014 holding in *Belle Co. v. U.S. Army Corps of Engineers* that a Corps jurisdictional determination is not a final agency action eligible for review under Chapter 7.⁵⁸ Section B then explores

⁵⁶ See 5 U.S.C. § 704 (2012); *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (establishing the *Bennett* test, a two-pronged test for Chapter 7 finality). Compare *Jama v. Dep't of Homeland Sec.*, 760 F.3d 490, 497 (6th Cir. 2014) (denying Chapter 7 review of intermediate decision terminating refugee status by U.S. Citizenship and Immigration Services), and *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 17 (D.C. Cir. 2005) (denying Fish and Wildlife Service agency protocols Chapter 7 review), with *Sharkey v. Quarantillo*, 541 F.3d 75, 89 (2d Cir. 2008) (allowing Chapter 7 review of Immigration and Naturalization Service's District Adjudications Officer's cancellation of plaintiff's immigration status). See generally Gwendolyn McKee, *Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine*, 60 ADMIN. L. REV. 371, 385–89 (2008) (discussing the lack of coherence in finality common law).

⁵⁷ Compare *Hawkes Co. v. Army Corps of Eng'rs (Hawkes II)*, 782 F.3d 994, 1001 (8th Cir.) (holding a jurisdictional determination meets the second prong of the finality test and is reviewable under Chapter 7), *cert. granted*, 136 S. Ct. 615 (2015) (mem.), with *Belle Co. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 394 (5th Cir. 2014) (holding a jurisdictional determination of the Corps fails to meet the second prong for finality under Chapter 7), *cert. denied sub nom. Kent Recycling Servs. v. U.S. Army Corps of Eng'rs*, 135 S. Ct. 1548 (2015) (mem.). Nearly every court facing the issue has held that the first prong of the test, that the agency action must mark the consummation of the agency's decision-making process, has been met by Corps jurisdictional determinations. See, e.g., *Belle*, 761 F.3d at 389–90 (deciding jurisdictional determination constitutes consummation of agency's decision-making process); *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 593 (9th Cir. 2008) (holding that the jurisdictional determination met only the first prong of the *Bennett* test); *Hawkes Co. v. U.S. Army Corps of Eng'rs (Hawkes I)*, 963 F. Supp. 2d 868, 873 (D. Minn. 2013) (holding that a jurisdictional determination meets the first prong of the *Bennett* test), *rev'd*, 782 F.3d 994, *cert. granted*, 136 S. Ct. 615. In 2008, in *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, the U.S. Court of Appeals for the Ninth Circuit held that a Corps jurisdictional determination was not subject to Chapter 7 review because, though it met the first prong of the finality test for agency action, it failed to meet the second. 543 F.3d at 593. Although the Fifth Circuit's reasoning and decision in *Belle* parallels the Ninth Circuit's analysis, *Fairbanks* was heard and decided prior to the U.S. Supreme Court's decision in *Sackett v. EPA*, 132 S. Ct. 1367 (2012). See *Fairbanks*, 543 F.3d at 593; see also *Belle*, 761 F.3d at 391–92.

⁵⁸ See *infra* notes 60–66 and accompanying text (examining the Fifth Circuit's decision to deny Chapter 7 review of jurisdictional determinations).

the Eighth Circuit's conflicting decision holding that a jurisdictional determination is final agency action reviewable under Chapter 7.⁵⁹

A. Fifth Circuit Holds Jurisdictional Determinations Are Merely Notifications, Not Final Agency Actions

In *Belle*, the U.S. Court of Appeals for the Fifth Circuit held that the Corps's jurisdictional determination failed to meet the Supreme Court's two-pronged test for Chapter 7 final agency action.⁶⁰ The Fifth Circuit held that while the first *Bennett* prong was met, the second prong was not.⁶¹

In rejecting the Belle Company's claim that the Corps's final jurisdictional determination was an action by which rights or obligations had been determined or from which legal obligations would flow, the Fifth Circuit focused on the pre-enforcement nature of the jurisdictional determination.⁶² The compliance order issued by the Corps and evaluated in the U.S. Supreme Court's 2012 decision in *Sackett v. EPA* obligated the Sacketts to a remedial plan and assigned penalties to the family.⁶³ No such obligations flowed from the jurisdictional determination itself to the Belle Company, as the jurisdictional determination resolved only that the Belle Company's property was subject to the CWA but not that the CWA had been violated.⁶⁴

The Fifth Circuit expressly rejected the notion that the requirements of permitting were a legal obligation that flowed from the jurisdictional determination.⁶⁵ The court noted that the legal obligations of permitting flowed directly from the CWA and that the jurisdictional determination of the Corps did no more than alert the Belle Company to those obligations.⁶⁶

⁵⁹ See *infra* notes 67–72 and accompanying text (evaluating the Eighth Circuit's decision to allow Chapter 7 review of jurisdictional determinations).

⁶⁰ See *Belle*, 761 F.3d at 394 (holding a jurisdictional determination of the Corps fails to meet the second prong for finality under Chapter 7).

⁶¹ *Belle*, 761 F.3d at 390 (deciding the jurisdictional determination marked the consummation of the agency's decision-making process), 394 (deciding the jurisdictional determination did not determine the plaintiff's rights or obligations under the CWA).

⁶² See *Sackett*, 132 S. Ct. at 1370 (relying on the consequences of a compliance order rather than the jurisdictional finding); *Belle*, 761 F.3d at 393 (distinguishing a jurisdictional determination underlying a compliance order from the directives of such compliance order).

⁶³ *Belle*, 761 F.3d at 391. The Fifth Circuit considered the four obligations that the U.S. Supreme Court noted flowed from the compliance order issued in *Sackett*: a requirement that the Sacketts take immediate remedial action on their property, the doubling of the penalty for the Sacketts's CWA violation, the reduced likelihood that the Sacketts would receive a permit to build, and the determinations both that the Sacketts's property included wetlands and that those wetlands had been improperly filled. See *id.* at 391–94 (citing *Sackett*, 132 S. Ct. at 1371–72).

⁶⁴ See *id.* at 393.

⁶⁵ *Id.* at 391 (“We are cognizant that the Corps's permitting process can be costly for regulated parties.”).

⁶⁶ See *id.* (stating that the effect of the Corps's jurisdictional determination was to notify the Belle Company of their obligations under the CWA).

B. Eighth Circuit Holds Jurisdictional Determinations Sufficiently Final for Review Focusing on Costs and Risks of Permitting Process

Conversely, in 2015, in *Hawkes Co. v. U.S. Army Corps of Engineers*, the United States Court of Appeals for the Eighth Circuit decided that a jurisdictional determination from the Corps satisfies both the first and second prongs of the *Bennett* test and is entitled to Chapter 7 review.⁶⁷ The Eighth Circuit, concerned by the costs and risks of the CWA permitting process, held that a jurisdictional determination sufficiently allocates legal rights and obligations, thus satisfying the second prong of the *Bennett* test.⁶⁸ The Eighth Circuit declined to follow both the district court's rejection of the costs of permitting as a legal obligation unto themselves and the Fifth Circuit's reasoning in *Belle*.⁶⁹

In its analysis, the Eighth Circuit cited four prior U.S. Supreme Court decisions affirming pre-enforcement judicial review of agency actions in other regulatory schemes.⁷⁰ In each of these cases, the agency action in question left the party with a choice of massive compliance costs or a substantial risk of enforcement costs.⁷¹ The Eighth Circuit extended these deci-

⁶⁷ See *Hawkes II*, 782 F.3d at 1002 (holding Corps jurisdictional determination reviewable under Chapter 7 prior to enforcement).

⁶⁸ See *id.* at 1001. The Eighth Circuit was concerned with the risks and costs associated with permitting discussed by Justice Scalia in his 2006 plurality opinion in *Rapanos v. United States*. See *id.* (citing 547 U.S. 715, 719 (2006) (plurality opinion)). On average, securing the appropriate permits takes 788 days and costs parties \$271,596. *Rapanos*, 547 U.S. at 721 (citing Sunding & Zilberman, *supra* note 6, at 74–76). The Hawkes Company anticipated it would spend more than \$100,000 in preparing the ten necessary ecological assessments to undertake the permitting process. See Amended Complaint for Declaratory and Injunctive Relief ¶ 44, *Hawkes I*, 963 F. Supp. 2d 868 (No. 0:13-cv-00107).

⁶⁹ See *Hawkes II*, 782 F.3d at 996 (noting disagreement with the Fifth Circuit's reasoning and decision in *Belle*); *id.* at 1000 (disagreeing with the district court's analysis of the second *Bennett* prong).

⁷⁰ See *Abbott Labs. v. Gardner*, 387 U.S. 136, 152–53 (1967) (allowing judicial review of Commissioner of Food and Drugs regulation that made vague the requirements for what drugs required labeling); *Frozen Food Express v. United States*, 351 U.S. 40, 43–44 (1956) (allowing judicial review of Interstate Commerce Commission's directive that certain commodities could not be exempt from permitting requirements); *Columbia Broad. Sys. v. United States*, 316 U.S. 407, 422 (1942) (allowing immediate review of regulations not yet enforced against any parties); *Hawkes II*, 782 F.3d at 1000–01 (citing *Bennett*, 520 U.S. at 158, 178 (holding a Fish and Wildlife Service biological opinion final because it altered the relevant legal regime)).

⁷¹ See *Hawkes II*, 782 F.3d at 1000–01. The Eighth Circuit framed the decision for the Hawkes Company as one between massive and risky permitting costs and the risk of substantial civil fines for violation. See *id.* at 1001. In the cases the Eighth Circuit cited, the plaintiffs were left facing messy regulatory schemes, unsure of whether they could proceed lawfully or if they would be liable for expensive sanctions. See *id.* at 1000–01 (citing *Bennett*, 520 U.S. at 158, 178 (allowing Chapter 7 review of Fish and Wildlife Service biological opinion that altered the relevant legal regime); *Abbott Labs.*, 387 U.S. at 152–53 (allowing Chapter 7 review of Commissioner of Food and Drugs regulation that unsettled the law for required drug bottle labeling); *Frozen Food Express*, 351 U.S. at 43–44 (holding Interstate Commerce Commission's directive that cer-

sions to the CWA, holding that exactly such a dilemma existed for the Hawkes Company and that therefore Chapter 7 review is available for jurisdictional determinations.⁷²

III. REVERSING THE EIGHTH CIRCUIT ON APPEAL

The United States Court of Appeals for the Eighth Circuit inappropriately focused on the burdens of the CWA permitting process in holding in 2015 in *Hawkes Co. v. U.S. Army Corps of Engineers* that a Corps jurisdictional determination warrants Chapter 7 review.⁷³ The U.S. Supreme Court should reverse the Eighth Circuit's decision.⁷⁴ Jurisdictional determinations do not impose permitting burdens.⁷⁵ It is the CWA, ambiguous CWA jurisdictional law, and the characteristics of a piece of property that impose permitting burdens.⁷⁶ The Eighth Circuit's misapprehension of the origin of the permitting obligations led them to misapply the second prong of the test outlined in the U.S. Supreme Court's 1997 decision in *Bennett v. Spear*, and to incorrectly allow Chapter 7 judicial review of the Corps's jurisdictional determination.⁷⁷ Future courts should follow the reasoning the United States Court of Appeals for the Fifth Circuit articulated in 2014 in *Belle Co. v. U.S.*

tain commodities could not be exempt from permitting requirements reviewable under the Administrative Procedure Act); *Columbia Broad. Sys.*, 316 U.S. at 422 (allowing judicial review of regulations not yet enforced where legal consequences attach to the agency action)). The Eighth Circuit reasoned that current CWA jurisdictional law mimics these messy regulatory schemes. See *Columbia Broad. Sys.*, 316 U.S. at 422 (allowing judicial review of regulations not yet enforced where legal consequences attached to the agency action); *Hawkes II*, 782 F.3d at 1000–01.

⁷² See *Hawkes II*, 782 F.3d at 1000–01 (framing the assertion of CWA jurisdiction as a choice between compliance costs or enforcement risk); cf. Theodore L. Garrett, *Sacketts Win Right to Pre-Enforcement Review: A Victory for "Ordinary Americans,"* NAT. RESOURCES & ENV'T, Spring 2014, at *3, *3–5 (discussing the oral argument in *Sackett* to the same effect).

⁷³ See *Hawkes Co. v. Army Corps of Eng'rs (Hawkes II)*, 782 F.3d 994, 996 (8th Cir.), cert. granted, 136 S. Ct. 615 (2015) (mem.); *Belle Co. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 390–94 (5th Cir. 2014) (denying pre-enforcement Chapter 7 review of Corps jurisdictional determination), cert. denied sub nom. *Kent Recycling Servs. v. U.S. Army Corps of Eng'rs*, 135 S. Ct. 1548 (2015) (mem.); Petition for Writ of Certiorari at 13–14, *Hawkes II*, 782 F.3d 994 (No. 15-290) [hereinafter *Hawkes II* Petition for Writ of Certiorari] (“The jurisdictional determination does not create the quandary that concerned the court . . .”).

⁷⁴ See *Belle*, 761 F.3d at 391 (determining that a jurisdictional determination is not subject to Chapter 7 review as final agency action); *Hawkes II* Petition for Writ of Certiorari, *supra* note 73, at 14 (arguing that Chapter 7 review of jurisdictional determinations is incorrect).

⁷⁵ See *Belle*, 761 F.3d at 391; *Hawkes II* Petition for Writ of Certiorari, *supra* note 73, at 14.

⁷⁶ See *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 596 n.11 (9th Cir. 2008) (“Yet, we must keep in mind that these are the costs of statutory compliance with the CWA.”); *Hawkes II* Petition for Writ of Certiorari, *supra* note 73, at 14 (arguing that a property owner faces the same options under the CWA regardless of whether they have or have not received a jurisdictional determination from the Corps); cf. Garrett, *supra* note 72, at *3–5 (discussing the costs of the permitting process under the CWA).

⁷⁷ See *Fairbanks*, 543 F.3d at 594, 596 n.11. *Contra Hawkes II*, 782 F.3d at 1001 (“The adverse effect is caused by agency action, not simply by the existence of the CWA.”).

Army Corps of Engineers and deny judicial review of jurisdictional determinations.⁷⁸

Because permitting requirements flow directly from the CWA to property, the Eighth Circuit should not have factored permitting costs into their analysis of the second *Bennett* prong.⁷⁹ The Eighth Circuit factored the costs and risks of permitting into their analysis of the legal obligations flowing from a Corps jurisdictional determination.⁸⁰ The costs and risks of permitting, however, do not flow from a Corps jurisdictional determination.⁸¹ Rather, permitting requirements flow directly from the CWA to a piece of property.⁸² A jurisdictional determination does not alter the legal obligations of a party, but merely alerts them to their obligations under the CWA.⁸³

The U.S. Supreme Court should follow the reasoning of the Fifth Circuit and deny Chapter 7 review of Corps jurisdictional determinations.⁸⁴ In *Belle*, the Fifth Circuit correctly held that a Corps jurisdictional determina-

⁷⁸ See *Belle*, 761 F.3d at 390–94 (denying pre-enforcement Chapter 7 review of Corps jurisdictional determination); see also Petition for Writ of Certiorari at 12–14, *Belle Co.*, 761 F.3d 383 (No. 14-493) (arguing Fifth Circuit decision denying judicial review is correct); Rita Ann Cicero, *Supreme Court Will Decide Jurisdictional Question in Clean Water Act Case*, 36 WESTLAW J. ENVTL., no. 11, 2015, at *1, *2 (explaining Corps argument to deny review).

⁷⁹ See *Fairbanks*, 543 F.3d at 594, 596 n.11. *Contra Hawkes II*, 782 F.3d at 1001.

⁸⁰ *Hawkes II*, 782 F.3d at 1001. Permitting under the CWA poses many risks: it is expensive in time and money, it may or may not be successful, and a party may choose to take it on only to find that their property never required permitting in the first place. See *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion); *id.* at 758 (Roberts, C.J., concurring); see also Gould, *supra* note 7, at 423–49 (discussing the ambiguity of CWA jurisdictional law and its impact); Sunding & Zilberman, *supra* note 6, at 74–76 (studying the time and expense of the CWA permitting process).

⁸¹ See *Belle*, 761 F.3d at 391 (“But even if *Belle* had never requested the [jurisdictional determination] and instead had begun to fill, it would not have been immune to enforcement action by the Corps or EPA.”); *Fairbanks*, 543 F.3d at 594 (“[The plaintiff’s] legal obligations arise directly and solely from the CWA, and not from the Corps’s issuance of an approved jurisdictional determination.”); *Hawkes II* Petition for Writ of Certiorari, *supra* note 73, at 14. The legal quandary that the Eighth Circuit attributes to the jurisdictional determination is more likely the result of vague and inconsistent promulgated regulations. See *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring); Gould, *supra* note 7, at 449 (stating the jurisdictional determination process could be clarified by regulation, legislation, or the Supreme Court); cf. *Hawkes II* Petition for Writ of Certiorari, *supra* note 73, at 10–11 (discussing the effect of newly promulgated Corps regulations). Following a multi-year process, and published after the *Hawkes II* decision, the Corps and the EPA issued a new rule clarifying the agencies’ interpretation of the scope of the waters covered in the CWA, considering the statute and relevant Supreme Court jurisprudence. See Definition of Waters of the United States, 80 Fed. Reg. 37,055, 37,105 (June 29, 2015) (codified at 33 C.F.R. § 328.3 (2015)). The new rule is intended to provide guidance on assessing the reach of the CWA to one’s own property. See *id.* at 37,055 (explaining the intent, authority, and scope of the new rule).

⁸² See *Belle*, 761 F.3d at 391; *Fairbanks*, 543 F.3d at 594; *Hawkes II* Petition for Writ of Certiorari, *supra* note 73, at 14. The reach of Congress’s CWA to an entity’s land imposes these costs with or without notice from the Corps. See *Belle*, 761 F.3d at 391.

⁸³ See *Belle*, 761 F.3d at 391.

⁸⁴ See *id.* at 390–94; *Hawkes II* Petition for Writ of Certiorari, *supra* note 73, at 14.

tion is not a final agency action appropriate for Chapter 7 judicial review because jurisdictional determinations serve only as notification to a party that their land is subject to the regulations of the CWA but do not assign any penalties or duties to a property owner.⁸⁵ Because an interested party's legal obligations under the CWA are not altered by a jurisdictional determination, it is correct to deny Chapter 7 review of jurisdictional determinations.⁸⁶

Finally, Chapter 7 review of jurisdictional determinations would allow duplicative judicial review of agency action, an outcome never contemplated by the APA scheme.⁸⁷ Chapter 7 review of jurisdictional determinations inappropriately relies on costly ambiguities in CWA jurisdictional law, a problem better solved by legislation, regulation, or judicial decision than untimely review.⁸⁸ The decision to consider a jurisdictional determination final agency action under Chapter 7 as a remedy for ambiguous CWA law only serves to complicate APA jurisprudence.⁸⁹ Future courts should follow

⁸⁵ See *Belle*, 761 F.3d at 391 (noting that the jurisdictional determination is a notice giving instrument); see also *Fairbanks*, 543 F.3d at 595 n.10 (“By contrast, the Corps’s approved jurisdictional determination imposes no new or additional legal obligations on Fairbanks. It at most ‘simply reminds affected parties of existing duties’ imposed by the CWA itself and commands nothing of its own accord.” (quoting *Citizens to Save Spencer Cnty. v. EPA*, 600 F.2d 844, 876 n.153 (D.C. Cir. 1979))); Alex Horowitz, *Army Corps’ Wetlands Determination Not Subject to Court Review, Panel Says (C.A.5)*, WESTLAW ENERGY & ENV’T DAILY BRIEFING, Aug. 7, 2014, 2014 WL 3858373 (clarifying the Fifth Circuit’s precedential analysis in the *Belle* Company dispute). The Fifth Circuit noted that the land would be subject, as a matter of fact, to permitting burdens without any Corps action if the land comprises waters of the United States. *Belle*, 761 F.3d at 394. *Contra Hawkes II*, 782 F.3d at 1001 (“The adverse effect is caused by agency action, not simply by the existence of the CWA.”).

⁸⁶ *Belle*, 761 F.3d at 394 (holding that a jurisdictional determination fails to meet the second prong of the test outlined in *Bennett v. Spear*); see also Horowitz, *supra* note 85 (explaining the Fifth Circuit’s denial of Chapter 7 review).

⁸⁷ See *Belle*, 761 F.3d at 394 (“Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action.” (quoting *Beall v. United States*, 336 F.3d 419, 427 n.9 (5th Cir. 2003))); *Hawkes II* Petition for Writ of Certiorari, *supra* note 73, at 22. The court in *Belle* held that allowing a party to seek judicial review of the Corps’s wetlands decision at the jurisdictional determination phase and to later allow judicial reassessment of that same decision when appealing a permitting decision would disrupt the APA’s regulatory review system. 761 F.3d at 394; see also *Hawkes II* Petition for Writ of Certiorari, *supra* note 73, at 21–22 (arguing that judicial review of standalone jurisdictional determinations would disrupt the Corps’s ability to assess whether a property owner might be exempt from permitting requirements, even when subject to the CWA’s reach, before unnecessary and protracted litigation of the jurisdiction ensues).

⁸⁸ See *Hawkes II* Petition for Writ of Certiorari, *supra* note 73, at 22; cf. *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) (explaining the regulatory and judicial trouble with defining the reach of the CWA).

⁸⁹ See *Sackett v. EPA*, 132 S. Ct. 1367, 1370 (2012) (Alito, J., concurring) (allowing Chapter 7 review of an EPA compliance order but noting that “only clarification of the reach of the Clean Water Act can rectify the underlying problem”); *Hawkes II* Petition for Writ of Certiorari, *supra* note 73, at 22 (arguing that judicial review of jurisdictional determinations will not resolve the issue of CWA coverage). Chapter 7 review of jurisdictional determinations at this early stage would be reviewed under the deferential “arbitrary and capricious” standard whereas suits brought

the reasoning of the Fifth Circuit and deny Chapter 7 review of jurisdictional determinations.⁹⁰

CONCLUSION

Chapter 7 of the Administrative Procedure Act of 1946 should not provide judicial review to jurisdictional determinations made by the Army Corps of Engineers when enforcing the Clean Water Act of 1977. The Eighth Circuit inappropriately considered the costs and risks of the Clean Water Act in allowing such review in *Hawkes Co. v. U.S. Army Corps of Engineers*. The vagaries of the Clean Water Act's reach should not be used to provide judicial review for agency action never otherwise intended to be captured by Chapter 7 review. Future courts should follow the analysis of the Fifth Circuit when applying the requirements of Chapter 7 review to Corps jurisdictional determinations. The U.S. Supreme Court should reverse the Eighth Circuit's decision and deny judicial review of Corps jurisdictional determinations as final agency action.

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when challenging a permitting decision would be reviewed under the preponderance of the evidence standard. See *Hawkes II* Petition for Writ of Certiorari, *supra* note 73, at 22. This would create two distinct lines of cases and lead to duplicative judicial review. See *id.*

⁹⁰ See *Belle*, 761 F.3d at 390–94; *cf. Hawkes II* Petition for Writ of Certiorari, *supra* note 73, at 14 (arguing that the U.S. Supreme Court should deny judicial review of jurisdictional determinations).