

**The Limitations of Federal Agencies and the Finality and Judicial Reviewability of Agency
Actions Under the Administrative Procedure Act:
U.S. Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807 (2016)**

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Abstract

This case note addresses a delayed clarification in administrative and agency jurisprudence, specifically dealing with the scope and reviewability of final agency actions under federal statutes. Part I of this case note discusses the Clean Water Act, the Administrative Procedure Act, and the U.S. Army Corps of Engineers' (Corps) jurisdiction. Part II analyzes a recent United States Supreme Court Decision, U.S. Army Corps of Eng'rs v. Hawkes Co., that further defined the rights of private landowners to challenge final agency actions. In U.S. Army Corps of Eng'rs v. Hawkes Co., the Court held that an approved jurisdictional determination issued by the Corps was a final agency action under the Administrative Procedure Act. Part III inquires into the history of the Corps' authority over "waters of the United States." Finally, Part IV argues why the Supreme Court correctly expanded the rights of private landowners to challenge a federal agency's actions and the current limitations of that decision.

Reporting Section

I. Introduction

The Clean Water Act (“CWA”) establishes the structure for regulating the discharge of pollutants into the waters of the United States and sets quality standards for surface waters.¹ The United States Army Corps of Engineers (“Corps”) issues jurisdictional determinations announcing the agency’s conclusive perspective on whether a parcel of property contains “waters of the United States.”² The Corps finds “waters of the United States” to include “mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, and playa lakes, which the use, degradation, or destruction of could affect interstate or foreign commerce.”³ If a specific parcel of property encompasses “waters of the United States”, the landowners are subject to several ramifications.⁴ The CWA imposes criminal and civil penalties for discharging pollutants into waters covered under the Act without a permit from the Corps.⁵

Landowners who wish to discharge or fill material into any waters that the Corps and the EPA have jurisdiction under the CWA are required to apply for a Section 404 permit.⁶ After individually examining each applicant’s property, Corps issue permits based on the jurisdictional determinations.⁷ It can issue a preliminary jurisdictional determination, determining the property may be within the waters of the United States, or can issue an approved jurisdictional determination, therefore definitively determining whether the property is within or is not within the waters of the United States.⁸ If a property owner receives an approved jurisdictional

¹U.S. Army Corps of Eng’rs v. Hawkes Co., 136 S. Ct. 1807, 1811 (2016) [Hawkes Co. I] (*citing* 33 U.S.C. §§ 1311(a), 1362(7), (12) (2016)).

²*Id.* (*citing* 33 C.F.R. § 331.2 (2016)).

³*Id.* (*citing* 33 C.F.R. § 328.3(a)(3) (2012)).

⁴*Id.* at 1812 (*citing* 33 U.S.C. §§ 1311(a), 1319(c)-(d), 1344(a) (2016)).

⁵*Id.*

⁶*Id.* (*citing* 33 U.S.C. §§ 1251, 1344(a) (2016)).

⁷*Id.* (*citing* 33 C.F.R. § 331.2).

⁸*Id.*

determination that they disagree with, they may appeal the decision.⁹ The Corps review the appeal and make a final agency decision.¹⁰ These final agency decisions are incumbent on the Corps and the Environmental Protection Agency (“EPA”) for five years.¹¹ This five year period is known as a “safe harbor” period.¹²

The Administrative Procedure Act (APA) sets out the standards of review courts are to use when examining all official actions taken by federal agencies.¹³ According to the APA, an “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.”¹⁴ Under the APA, an agency’s action that a court later determines to be unconstitutional, must be abrogated.¹⁵

In laying out the court’s standards of review, the APA specifically differentiates between “review of law” and “review of fact”—each of which has its own set of particular standards.¹⁶ The court generally will yield to the federal agency’s understanding and ultimate determination of their own powers.¹⁷ In making the decision as to whether or not to defer to the agency’s decision,

the court will consider the accuracy of the agency’s interpretation in the past, the extent to which Congress has entrusted the agency with policy decisions, the agency’s expertise and experience with respect to problems of similar nature, and the fairness of the agency’s interpretation.¹⁸

⁹*Id.*

¹⁰*Id.* (citing 33 C.F.R. §§ 320.1(a)(6), 331.2 (2016)).

¹¹*Id.*

¹²*Id.* (citing 33 U.S.C. §§ 1319, 1344(a)).

¹³JACOB A. STEIN & GLENN A. MITCHELL, TREATISE ON ADMINISTRATIVE LAW, Ch. 51, § 51.01 (Matthew Bender ed., 2016).

¹⁴5 U.S.C. § 704 (2016).

¹⁵STEIN & MITCHELL, *supra* note 9.

¹⁶*Id.*

¹⁷*Id.*

¹⁸*Id.*

Statement of Facts:

II. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016)

The respondents in this case are three companies that are engrossed in mining peat in Marshall County, Minnesota.¹⁹ The companies completed an application to acquire a Section 404 permit from the Corps to discharge material into navigable waters at various disposal sites.²⁰ Peat is an organic material that is commonly utilized for soil enhancement, fuel, and on golf courses to provide the foundation for the greens.²¹ Although there are advantages to mining peat, there are also environmental and ecological consequences, leading the industry to be regulated by federal and state environmental protection agencies.²²

Respondents Pierce and LPF mine a 530-acre parcel of land (the “Property”) that is comprised of wetlands.²³ Respondent Hawkes mines peat on a neighboring piece of land and decided to seek the allowance from the other respondents to mine on the Property in return for payment of royalties to Pierce and LPF.²⁴ Hawkes believed that the peat located on the Property was of a superior quality, allowing it to be used in the structure of golf greens.²⁵ All three companies are closely-held corporations owned and operated by the Pierce family.²⁶ Kevin Pierce (Pierce) is an officer within all three companies.²⁷

On March 20, 2007, and January 15, 2008, Pierce, representing Hawkes, met with the Corps and the Minnesota Department of Natural Resources (“MDNR”) to consider the

¹⁹Hawkes Co. I, 136 S. Ct. at 1812.

²⁰*Id.* at 1813.

²¹*Id.*

²²*Id.*

²³Hawkes Co. v. U.S. Army Corps of Eng'rs, 963 F. Supp. 2d 868, 870 (D. Minn. 2013) [Hawkes Co. III].

²⁴*Id.*

²⁵Hawkes Co. I, 136 S. Ct. at 1812.

²⁶Hawkes Co. III, 963 F. Supp. 2d at 870.

²⁷*Id.*

possibility of Hawkes mining peat from the Property.²⁸ During the meeting on January 15, Hawkes informed the Corps and MDNR that the revenue from the peat would be large enough to allow him to continue his enterprise for at least another 10 to 15 years.²⁹ However, Pierce's calculated plan would implicate the discharging or filling of material onto the Property.³⁰

Consequently, in December of 2010, Hawkes applied for a Section 404 permit from the Corps to discharge or fill material into navigable waters.³¹ The Corps informed respondents during a January 2011 meeting that the permit process would be a long and expensive process and if they continued to pursue the permit, the respondents would also have to pay for several expensive evaluations of the Property.³²

On March 15, 2011, the Corps briefed respondent Hawkes that it was choosing to issue a temporary determination that the Property was linked to the Red River of the North, a "water of the United States," which was regulated by the Corps.³³ The expensive evaluations of the Property were estimated to cost in \$100,000.³⁴

The Corps issued a preliminary jurisdictional determination to respondents indicating that the Corps had jurisdiction over the Property because it contained wetlands which joined "a relatively permanent water source" that connected to the Red River of the North.³⁵ In response, respondents sent a letter to the Corps disputing the preliminary determination.³⁶

²⁸*Id.*

²⁹*Id.*

³⁰*Id.*

³¹*Id.* (citing 33 U.S.C. § 1344(a) (2016)).

³²Hawkes Co. III, 963 F. Supp. 2d at 870.

³³*Id.*

³⁴*Id.* at 871.

³⁵*Id.*

³⁶*Id.*

Procedural History:

In February of 2012, the Corps executed an approved jurisdictional determination to respondents specifying that the parcel definitively contained “waters of the United States” as a result of the Property containing a “significant nexus to the Red River of the North.”³⁷ The decision was appealed by respondents in April of 2012 to the designated Corps’ officer, who in turn remanded it for additional examination.³⁸ In October of 2012, the Corps announced an appellate decision against the respondents, but recognized that the Corps had fallen short by not assessing “the Property’s chemical, physical, and biological effects on the Red River of the North.”³⁹ In failing to investigate these effects, the Corps did not efficiently determine whether there was a “significant nexus.”⁴⁰ The jurisdictional determination was remanded to the St. Paul District of the Corps.⁴¹

On remand, the Corps reaffirmed the approved jurisdictional determination, therefore upholding that that the Corps had jurisdiction over the Property under the CWA.⁴² Thereafter, the Corps filed a motion to dismiss the respondents’ suit and the district court granted the motion to dismiss.⁴³ The district court reasoned that the amended jurisdictional determination did not constitute a final agency action as required under the APA.⁴⁴ Furthermore, the court found the case was not ripe for adjudication and there were other remedies they could pursue.⁴⁵

³⁷*Id.*

³⁸*Id.*

³⁹*Id.*

⁴⁰*Id.*

⁴¹*Id.*

⁴²*Id.*

⁴³*Id.*

⁴⁴*Id.*

⁴⁵*Id.* at 878.

Respondents appealed the district court’s decision to grant the motion to dismiss and sought judicial review of the jurisdictional determination.⁴⁶ The Court of Appeals for the Eighth Circuit reversed, finding that the district court had incorrectly utilized the pertinent case law, concluding the issue was ripe for judicial review under the APA and the approved jurisdictional determination constituted as a final agency action.⁴⁷

The Supreme Court granted certiorari to determine whether an “approved jurisdictional determination issued by the Corps is a final agency action judicially reviewable under the APA.”⁴⁸

Holding:

In an unanimous decision written by Chief Justice Roberts, which contained three individual concurrences, the Court affirmed the Court of Appeals for the Eighth Circuit’s judgment finding that the approved jurisdictional determination was indeed a final agency action within the meaning of the APA.⁴⁹

Rationale:

The majority analyzed two conditions that must be satisfied for an agency action to be “final” under the APA and then considered whether there were other adequate alternatives other than judicial review.⁵⁰

Chief Justice Roberts begins by discussing the two provisions that must be fulfilled for an agency action to be “final” under the governing precedent.⁵¹ First, the action must commence the

⁴⁶ Hawkes Co. v. U.S. Army Corps of Eng’rs, 782 F. 3d 994, 1002 (8th Cir. 2015) [Hawkes Co. II].

⁴⁷ *Id.*

⁴⁸ Hawkes Co. I, 136 S. Ct. at 1813.

⁴⁹ *Id.* at 1816.

⁵⁰ *Id.* at 1810.

⁵¹ *Id.* at 1813.

“agency’s decision-making process,” meaning that it must not be open for consideration.⁵²

Second, the determination made by the agency must have legal ramifications for the plaintiffs.⁵³

In this case, the Corps did not disagree with respondents that an approved jurisdictional determination fulfills the first *Bennett* provision.⁵⁴ An approved jurisdictional determination undoubtedly commences the agency’s decision-making process as it is granted after a lengthy, comprehensive investigation by the Corps.⁵⁵ The Court reasoned that although the Corps may issue an amended jurisdictional determination within five years, the possibility of that occurring does not mean the decision is open for consideration.⁵⁶

Chief Justice Roberts reasoned that the second *Bennett* provision had also been satisfied because of the “definitive nature of approved jurisdictional determinations” and the legal ramifications that flow from its determination.⁵⁷ A negative jurisdictional determination limits the range of potential plaintiffs and restricts the liability a property owner can face for emptying pollutants without a permit.⁵⁸ Also, an approved jurisdictional determination has legal ramifications because it represents the denial of liability protection and therefore, because “legal consequences flow” from these jurisdictional determinations, are equivalent to a final agency action.⁵⁹

After concluding jurisdictional determinations issued by the Corps are final, the Court then examined whether there were adequate alternatives to an APA review in court—the next subsection of analysis.⁶⁰ The Corps argued that respondents had the choice to either avail

⁵²*Id.* at 1814 (*citing* *Bennett v. Spear*, 520 U.S. 154 (1997)).

⁵³*Id.* (*citing* *Spear*, 520 U.S. at 177-78).

⁵⁴*Id.* at 1813.

⁵⁵*Id.* at 1813-14.

⁵⁶*Id.* at 1814.

⁵⁷*Id.*

⁵⁸*Id.*

⁵⁹*Id.* (*citing* *Spear*, 520 U.S. at 178).

⁶⁰*Id.* at 1815.

themselves to EPA action by emptying pollutants without a permit and argue that a permit was not needed, or apply for a permit and seek judicial review if disappointed with the outcome.⁶¹

Chief Justice Roberts reasoned that both of these scenarios were unsuitable alternatives as the Court has consistently held that where litigation actions carry the risk of “serious criminal and civil penalties,” the parties don’t need to wait for those to begin before disputing a final agency action.⁶² The Court also stated that the second option argued by the Corps would not benefit the respondents as it would not change the finality of the approved jurisdictional determination or whether it was appropriate for judicial review.⁶³

To conclude, Chief Justice Roberts turned his attention to the Corps’ argument that Congress arranged in the CWA that a jurisdictional determinations would be created as a phase of the permit procedure and that the landowner would attain a judicial review of the decision if it was deemed appropriate at the culmination of that process.⁶⁴ The Court states that the CWA makes no mention of isolated jurisdictional determinations, so an individual has an insecure foundation for assuming something from it regarding the reassessment of a final agency action.⁶⁵

Finally, Chief Justice Roberts addressed the Corps’ conception that seeking review in a final agency action or at the conclusion of the permitting procedure would be the only applicable route for receiving review if the Corps did not choose to issue isolated jurisdictional determinations, ultimately deciding to disregard it’s argument as not being “an adequate rejoinder to an assertion of a right to judicial review under the APA.”⁶⁶

⁶¹*Id.*

⁶²*Id.* at 1815 (*citing* *Abbott Labs. v. Gardner*, 387 U.S. 136, 153 (1967)).

⁶³*Id.* at 1816.

⁶⁴*Id.*

⁶⁵*Id.*

⁶⁶*Id.*

Concurrence / Dissent:

Justice Kennedy, with whom Justice Thomas and Justice Alito joined, wrote a concurring opinion, joining the Court's opinion in full, but stipulating that the range and extensive ramifications of the CWA continued to worry him.⁶⁷ Justice Kennedy expressed concern about the Corps' argument that an approved jurisdictional determination has no binding effect on the EPA's enforcement decisions and therefore continues to create questions regarding the government's ability to inhibit the use and enjoyment of property in America.⁶⁸ Justice Kennedy also indicated that he was bothered by the CWA's "reach and systematic consequences", reiterating Justice Alito's similar feelings of the CWA being "notoriously unclear".⁶⁹

Justice Kagan wrote a separate concurring opinion, in which she joined the Court's opinion in full; however, she disagreed with Justice Ginsburg's concurrence that the Memorandum of Agreement between the Corps and EPA was not essential to the case.⁷⁰ She reasons that the memorandum establishes that jurisdictional determinations require the Government to uphold those in a consequential Federal action or litigation dealing with the final decision.⁷¹

Justice Ginsburg concurred in part and concurred in the judgment, joining the Court's opinion except for its dependence on the Memorandum of Agreement between the Corps and the EPA.⁷² Although Justice Ginsburg agreed with the court that the jurisdictional determinations was final, she reasoned that the agreement is not central to the case, as the Government only provided the court with a "scant briefing" and did not post what the Court received.⁷³

⁶⁷*Id.* (Kennedy, J., Concurring).

⁶⁸*Id.*

⁶⁹*Id.* at 1816.

⁷⁰*Id.* at 1817 (Kagan, J., Concurring).

⁷¹*Id.*

⁷²*Id.* (Ginsburg, J., Concurring).

⁷³*Id.*

III. History of the United States Clean Water Act's Jurisprudence

The Supreme Court addressed the CWA's authority over wetlands in *Rapanos v. U.S.*⁷⁴ Justice Scalia wrote the plurality opinion, in which the Court understood the phrase "waters of the United States" in 33 U.S.C. § 1362(7) to apply exclusively to permanent, standing, or continuously flowing bodies of water such as streams, oceans, rivers, and lakes.⁷⁵ However, the Court found that channels through which water flows sporadically or occasionally does not fall within this category.⁷⁶ Justice Kennedy wrote the concurring opinion which provided a broader understanding of the phrase "waters of the United States", stating that it included wetlands which had a "significant nexus" to navigable waters.⁷⁷ Justice Kennedy's concurring opinion is currently considered the controlling opinion of the Court.⁷⁸

The Court's ruling in *Rapanos* derives from two Sixth Circuit decisions—*Rapanos v. U.S.* and *Carabell v. U.S. Army Corps of Eng'rs*.⁷⁹ In both cases, the United States asserted that the petitioners disobeyed the CWA by disposing material onto wetlands.⁸⁰ However, it was found that the petitioners' property did not drain into a navigable waterway, but rather both were located several miles away from property that could meet such standards.⁸¹ The Court of Appeals for the Sixth Circuit established a tie with a conventional navigable waterway, therefore making the petitioners' property "wetlands" under the federal jurisdiction of the Corps.⁸²

⁷⁴FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW, Ch. 3, § 3.03[2][c] (Matthew Bender ed., 2016) (citing 547 U.S. 715 (2006)).

⁷⁵*Id.*

⁷⁶*Id.*

⁷⁷*Id.*

⁷⁸*Id.*

⁷⁹*Id.* (citing 391 F.3d 704 (6th Cir. 2004), *vacated and remanded*, 547 U.S. 715 (2006)).

⁸⁰*Id.*

⁸¹*Id.*

⁸²*Id.*

In the adjoining case, *Carabell v. U.S. Army Corps of Eng'rs*, property owners desired to obtain a Section 404 permit to construct a condominium complex.⁸³ The particular parcel of land that the engineers wanted to build the complex on contained 19 acres of tree-covered wetlands.⁸⁴ The Corps denied the permit application and the property owners filed an appeal contending that the property was not within the jurisdiction of the Corps because their property “had no hydrological connection with any navigable waterway because an artificial berm separated their property from a drainage ditch.”⁸⁵ The district court held the land was “adjacent to neighboring navigable waters” and contained “a significant nexus to waters of the United States.”⁸⁶ Therefore, the federal government had jurisdiction over the land.⁸⁷ The Court of Appeals for the Sixth Circuit affirmed the district court’s decision on the basis that the land was “adjacent” to navigable waters.⁸⁸

Justice Scalia rendered the plurality opinion and was joined by Chief Justice Roberts, Justice Thomas, and Justice Alito. The Justices recognized that the phrase “navigable waters” in the CWA was broader than the interpretation advanced by petitioners, but was narrower than the Corps’ understanding of the term to mean “general waters”, including “ephemeral streams, wet meadows, storm sewers and culverts.”⁸⁹ Next, the plurality found that only those lands which have “a continuous surface connection” to waters that have been established as “waters of the United States” in their own right, are “adjacent to” and therefore under the authority of the

⁸³*Id.*

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶*Id.*

⁸⁷*Id.*

⁸⁸*Id.*

⁸⁹*Id.*

Corps.⁹⁰ The Court developed a two-part test to distinguish wetlands that fell under jurisdiction of the federal government:

(1) the adjacent channel must contain a “water of the United States” as described above; and (2) the wetland must have a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins.⁹¹

As discussed above, Justice Kennedy wrote a concurring opinion in which he opined that the case should be remanded to the Sixth Circuit in regard with “the significant nexus test” introduced in the Court’s decision of *Solid Waste Agency v. U.S. Army Corps of Eng’rs*.⁹² In addition, Justice Kennedy suggested that Congress have a “bright line” test to exclude waterways that do not fall under the jurisdiction of the Corps.⁹³

Justice Stevens wrote the dissenting opinion and was joined by Justices Souter, Ginsburg, and Breyer.⁹⁴ Justice Stevens disagreed with the plurality’s dependence on *Solid Waste Agency v. U.S. Army Corps of Eng’rs*, reasoning that the case did not explicitly address wetlands and that the Corps’ jurisdiction over connected wetlands was fair.⁹⁵ In particular, Justice Stevens dissented from Justice Kennedy’s “significant nexus” test.⁹⁶

In June 2007, the Corps and the EPA issued a joint guidance memorandum regarding the Court’s decision in *Rapanos*.⁹⁷ The guidance memorandum distinguished that wetlands and streams that flow sporadically or are connected to navigable waters will be examined closely by the Corps and the EPA on an individual case basis in order to determine whether they fall under

⁹⁰*Id.*

⁹¹*Id.*

⁹²*Id.* (citing 531 U.S. 159 (2001)).

⁹³*Id.*

⁹⁴*Id.*

⁹⁵*Id.*

⁹⁶*Id.*

⁹⁷*Id.*

the jurisdiction of the CWA.⁹⁸ The agencies then will decide whether there is a “significant nexus.”⁹⁹

In January 2008, the Corps wrote another memorandum announcing that it would no longer allow the EPA to analyze whether or not a “significant nexus” existed nor allow the EPA to approve the permits.¹⁰⁰ Instead, the Corps instituted a new procedure that should the Corps proclaim jurisdiction after finding a significant nexus, it only needs to communicate that information to the applicable regional office of the EPA.¹⁰¹ That particular EPA office then has only 15 days to determine whether to make the final jurisdictional determination as a “special case.”¹⁰²

In June 2008, the Corps announced a guidance document that it would utilize an “approved jurisdictional determinate” to label whether a piece of property contains waters answerable to the CWA.¹⁰³ It further disclosed it would provide the jurisdictional determination to the landowner, permit applicant, or other affected party when the party requests it or challenges it.¹⁰⁴ In addition, it contends that the determination will be valid for a five-year period and can be appealed through the Corps’ appeal method.¹⁰⁵

In December 2008, the Corps circulated an amended guidance document that specified that “wetland is adjacent if it has an unbroken hydrologic connection to jurisdictional waters or is separated from those waters by a berm or similar feature or is reasonably close to a jurisdictional water.”¹⁰⁶

⁹⁸*Id.*

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹*Id.*

¹⁰²*Id.*

¹⁰³*Id.*

¹⁰⁴*Id.*

¹⁰⁵*Id.*

¹⁰⁶*Id.*

In April 2011, EPA and the Corps released prospective CWA guidance to extend protection to more bodies of water and to all CWA programs, including those dealing with “discharge permits, oil spill prevention and response, certification, and wetlands.”¹⁰⁷ The prospective CWA guidance renewed safeguards put in place for small streams that feed into larger bodies of water and for wetlands that depurate and safeguard communities from flooding.¹⁰⁸ In addition, it made an effort to answer what designates a “significant nexus to navigable waters.”¹⁰⁹ Under the prospective guidance, the subsequent bodies of water were protected by the CWA:

traditional navigable waters; interstate waters; wetlands adjacent to either traditional navigable waters or interstate waters; non-navigable tributaries to traditional navigable waters that are relatively permanent, meaning they contain water at least seasonally; and wetlands that directly abut relatively permanent waters. In addition, the following waters would be protected by the CWA if a fact-specific analysis determines they have a “significant nexus” to a traditional navigable water or interstate water: tributaries to traditional navigable waters or interstate waters; wetlands adjacent to jurisdictional tributaries to traditional navigable waters or interstate waters; and waters that fall under the “other waters” category of the regulations.¹¹⁰

The 2011 proposed guidance was never finalized and instead the EPA and Corps began a set rulemaking course of development in 2014 and issued a final regulation, the Clean Water Rule, in 2015 to go into effect on August 28, 2015.¹¹¹ A preliminary injunction was issued in North Dakota to enjoin the EPA and the Corps from putting the Clean Water Rule into action in 13 states and the North Dakota district court ruled that it had original jurisdiction and that the

¹⁰⁷*Id.*

¹⁰⁸*Id.*

¹⁰⁹*Id.*

¹¹⁰*Id.*

¹¹¹*Id.*

“states were likely to succeed on the merits because it appeared that EPA had violated its congressional grant of authority and had violated the APA.”¹¹²

In October 2015, the Sixth Circuit stayed the Clean Water Rule nationally finding that it was “far from clear” that the Clean Water Rule was consistent with Justice Kennedy’s opinion in *Rapanos*.¹¹³

In February 2016, the Court of Appeals for the Sixth Circuit held in a split decision that it had jurisdiction over the case by relying on Supreme Court precedent that the Clean Water Rule was an “other limitation,” therefore under the authority of the circuit courts of appeals.¹¹⁴ In addition, the court found the Clean Water Rule constituted as the process of the EPA issuing or denying a permit—a process already reviewable in the circuit courts.¹¹⁵

The Clean Water Rule created six different categories of waters it deemed “jurisdictional by rule,” meaning that permits dealing with these specific types of waters did not need to be individually analyzed.¹¹⁶ These waters included, “(1) traditional navigable waters; (2) interstate waters, including interstate wetlands; (3) the territorial seas; (4) impoundments of jurisdictional waters; (5) tributaries of traditional navigable waters, interstate waters, or the territorial seas; and (6) “adjacent” waters.”¹¹⁷

¹¹²*Id.*

¹¹³*Id.*

¹¹⁴*Id.*

¹¹⁵*Id.*

¹¹⁶*Id.*

¹¹⁷*Id.* The EPA and the Corps defined a tributary as “‘water that contributes flow, either directly or through another water’ to a traditional navigable water, interstate water, or the territorial seas, and that is ‘characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark.’” The agencies identified “adjacent” as “‘bordering, contiguous, or neighboring’ a traditional navigable water, an interstate water, the territorial seas, an impoundment of jurisdictional waters, or a jurisdictional tributary.” Furthermore, the EPA and Corps created two classifications of waters that the agencies must specifically determine whether they have a “significant nexus” to a “traditional navigable water, interstate waters, or territorial seas, either alone or ‘in combination’ with ‘similarly situated’ waters.” A body of water contains a “significant nexus” if “any function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical or biological integrity” of a neighboring body of water that constitutes as a body of water the Corps or EPA have jurisdiction over. Applicable functions include “sediment

Relevant Case Law

The main issue in *U.S. Army Corps of Eng'rs v. Hawkes Co.* is whether an approved jurisdictional determination issued by the Corps, definitively stating the presence or absence of waters of the United States on a specific piece of property is a final agency action judicially reviewable under the APA.¹¹⁸ The Corps exercises its authority to issue jurisdictional determinations for over “270-to-300 million acres of swampy lands in the United States.”¹¹⁹ The Court had previously determined two provisions that must be fulfilled for an agency action to be final under the APA in *Bennett v. Spear*.¹²⁰

The Supreme Court in 1979 decided that an agency’s action must commence the “agency’s decision-making process” and that the determination made by the agency must have legal ramifications for the plaintiffs.¹²¹ The issue in *Bennett* branches from the Endangered Species Act (“ESA”) and questioned whether private parties, who claim they have suffered from economic harm from enforcement of the ESA, can seek judicial review of the biological opinion.¹²² The ESA instructs the Secretary of the Interior to disseminate procedures classifying animals that meet certain criteria as “endangered” or “threatened” and appoint their “critical habitat.”¹²³ The ESA also mandates that each agency be sure that any action conducted by the agency not threaten the existence of an endangered or threatened animal or result in the

trapping; nutrient recycling; pollutant trapping, transformation, filtering, and transport; retention and attenuation of flood waters; runoff storage; contribution of flow; export of organic matter; export of food resources; and provision of life cycle dependent aquatic habit.” The first classification of waters is composed of classifications of water which should be considered “in combination” when making a determination— “prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands.” The second classification is comprised of bodies of water “within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, and waters within 4,000 feet of the high tide, or the ‘ordinary high water mark.’”

¹¹⁸*Hawkes Co. I*, 136 S. Ct. at 1811.

¹¹⁹*Id.* (quoting *Rapanos v. U.S.*, 547 U.S. 715, 722 (2006)).

¹²⁰520 U.S. 154, 177-78 (1997).

¹²¹*Id.*

¹²²*Id.* at 157.

¹²³*Id.* (citing 16 U.S.C. § 1533 (2016)).

eradication of that animal's habitat which is determined to be critical by the Secretary of the Interior.¹²⁴

If an agency concludes that an action may negatively affect a species of animal that is classified as being endangered or threatened, it is obligated to set up a formal appointment with the Fish and Wildlife Service ("Service"), which then will provide the agency with a Biological Opinion ("Opinion") disclosing how the suggested action will disturb the animal's habitat.¹²⁵ If it is determined that the proposed action will threaten an endangered animal's habitat, the Opinion will list plausible substitutes.¹²⁶ If the Opinion declares that the agency action will not result in harm to the animal's habitat or lists plausible substitutes to avoid ramifications, the Service will provide the agency with an Incidental Take Statement which must be adhered to by the federal agency.¹²⁷

The Petitioners were two Oregon irrigation districts that receive water from the Klamath Project, which is a project initiated by the Secretary of the Interior and executed by the Bureau of Reclamation ("Bureau") who oversees water resource management.¹²⁸ The Bureau cautioned the Service in 1992 that an upcoming project could possibly threaten two species of endangered fish and after a formal appointment with the Service, it issued an Opinion determining that the Klamath Project was likely to threaten the survival of the endangered fish species.¹²⁹ The Opinion listed plausible substitutes, including sustaining minimum water levels on two different reservoirs of the Klamath Project.

¹²⁴*Id.* (citing 16 U.S.C. § 1536 (a)(2)).

¹²⁵520 U.S. at 158.

¹²⁶*Id.*

¹²⁷*Id.*

¹²⁸*Id.* at 159.

¹²⁹*Id.*

The petitioners filed an action against the director and regional director of the Service and the Secretary of the Interior claiming that the Bureau has been implementing the same practices for sustaining minimum water levels at two different reservoirs and there is no evidence proving that the number of endangered species of fish are declining or have declined as a consequence of the Bureau's undertaking of the Klamath Project.¹³⁰ The petitioners also claimed that although there was no evidence proving that the water levels established by the Opinion have valuable impact on the particular endangered species of fish, the Bureau would continue to adhere to the restraints in place.¹³¹

The petitioners asked for three claims for relief including two claims declaring that the Service's jeopardy determination and the minimum water levels violated the ESA and one claim declaring that the encumbrance of the minimum water levels was an "implicit determination of critical habitat" for the two fish species which violated the ESA because it had neglected to take into account the classification's economic effect.¹³²

The District Court dismissed the complaint for lack of jurisdiction due to the fact that the petitioners did not have standing as their interests are not shielded by the ESA.¹³³ The Court of Appeals for the Ninth Circuit affirmed, holding that the interests test restricts the class of persons who may acquire judicial review under the APA and the ESA and that only individuals who declare an interest in the preservation of endangered or threatened animals fall within the interests guarded by the ESA.¹³⁴ The Supreme Court granted certiorari.¹³⁵

¹³⁰*Id.*

¹³¹*Id.* at 160.

¹³²*Id.*

¹³³*Id.* at 161.

¹³⁴*Id.* (citing *Bennett v. Plenert*, 63 F.3d 915, 919 (1995)).

¹³⁵*Id.* (citing *Bennett v. Plenert*, 517 U.S. 1102 (1996)).

Petitioners raised two important issues to the Court, including whether the interests test applies to claims filed under the citizen-suit division of the ESA and if that is true, whether petitioners have standing under that test if their interests are aligned with economic harm rather than preserving a threatened species.¹³⁶ Justice Scalia wrote the opinion for a unanimous Court, first addressing whether the petitioners lacked standing under the interests test directed by the ESA.¹³⁷

In order for a plaintiff to meet the “constitutional minimum of standing,” a plaintiff first must establish that he has suffered an injury that is attributable to the defendant and that the injury will in all probability be rectified by a decision in their favor.¹³⁸ Once this minimum standard is satisfied, the plaintiff’s grievance must be analyzed by the Court to see whether it meets the interest test or is managed by a statutory condition or constitutional assurance.¹³⁹ Justice Scalia addresses the history of the interests test which was first established in 1970 and whether the ESA’s citizen-suit division of the ESA nullifies the interests test.¹⁴⁰

The Court found that the first section of the provision that reads “any person may commence a civil suit” is remarkably less confining than Congress commonly uses.¹⁴¹ Justice Scalia relies on the Court’s previous ruling which broadened standing to the degree allowed under Article III by a clause of the Civil Rights Act of 1968 which recognized any individual who professes to have been harmed by a discriminatory housing process to sue for infractions of

¹³⁶520 U.S. at 161.

¹³⁷*Id.*

¹³⁸*Id.* at 162 (*citing* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471-72 (1982)).

¹³⁹*Id.*

¹⁴⁰*Id.* (*citing* Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970)).

¹⁴¹*Id.* at 165.

the Act.¹⁴² Justice Scalia reasoned that the wording of this specific provision makes the intent to allow individual enforcement even more clear.¹⁴³

The petitioners in the case are seeking to avoid the utilization of environmental constraints rather than their application.¹⁴⁴ The Court concluded that the court of appeals had erred in finding that petitioners lacked standing under the ESA utilizing the interests test.¹⁴⁵ It reasoned that because there is no textual foundation for stating that broadened standing only is relevant to environmentalists and not private citizens.¹⁴⁶

The Court found that the government's three substitute arguments—which included that petitioners fail to meet Article III standing requirements, ESA does not authorize judicial review, and judicial review is nonexistent under the APA—did not create a sound basis for affirmance.¹⁴⁷ Justice Scalia addressed each of the arguments in turn, finding that the petitioners' purported injury was reasonably traceable to the Opinion and could be changed by a judicial decision in their favor and therefore they met the Article III standing requirements.¹⁴⁸ Next, the Court argued that some of the petitioners' claims were reviewable under the ESA because it enables individuals to file suit against the Secretary for failing to perform specific duties.¹⁴⁹ In addition, some of their claims were found to be reviewable under the APA as well.¹⁵⁰ Justice Scalia found the petitioners were likely to endure economic injury resulting from an inaccurate jeopardy determination, which falls within the zone of interests protected by the ESA.¹⁵¹ Finally, the Court

¹⁴²*Id.* at 165-66 (*citing* *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972)).

¹⁴³*Id.* at 166.

¹⁴⁴*Id.*

¹⁴⁵*Id.*

¹⁴⁶*Id.*

¹⁴⁷*Id.*

¹⁴⁸*Id.* at 172.

¹⁴⁹*Id.*

¹⁵⁰*Id.*

¹⁵¹*Id.*

ruled the Opinion was a final agency action under the APA because it satisfied a two-part test by signifying the culmination of the agency's decision and having direct legal repercussions.¹⁵² The Court unanimously decided to reverse the court of appeals and remand the case as the petitioners had standing to ask for judicial review of the minimum water level provision under the ESA. Furthermore, the Court held that the Act explicitly allowed any individual to sue the government over an alleged violation and the petitioners' remaining claims were reviewable under the APA as well.¹⁵³

The next pertinent case for discussion is *Abbott Laboratories v. Gardner*.¹⁵⁴ The Court in *U.S. Army Corps of Eng'rs* utilized its decision in *Abbott Laboratories* to express its common practical approach in determining whether there is a final agency decision in a case.¹⁵⁵ The Court also used its ruling in *Abbott Laboratories* to reason that the Court has consistently held where litigation actions carry the risk of "serious criminal and civil penalties," the parties don't need to wait for those to begin before disputing a final agency action.¹⁵⁶ This case asked the Court to examine whether Congress authorized judicial review of the commissioner of the FDA's authority to require Abbott Laboratories to print the well-settled name of a drug every time its propriety name was employed.¹⁵⁷

In 1962, Congress amended the Federal Food, Drug, and Cosmetic Act to mandate drug manufacturers to display the well-settled name of the drug "prominent and in type at least half as large as that used thereon for any propriety name or designation for such drug on labels."¹⁵⁸ The "established name" is designated by the Secretary of Health, Education, and Welfare while the

¹⁵²*Id.* at 178.

¹⁵³*Id.* at 179.

¹⁵⁴387 U.S. 136 (1967).

¹⁵⁵*Hawkes Co. I*, 136 S. Ct. at 1815.

¹⁵⁶*Id.* (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 153 (1967)).

¹⁵⁷*Gardner*, 387 U.S. at 139.

¹⁵⁸*Id.* at 137-38.

“propriety name” is the name used to market the drug.¹⁵⁹ The intention of Congress with mandating this procedure was to make doctors and patients aware of the fact that drugs typically sold under their propriety name are indistinguishable from their established name counterparts.¹⁶⁰ Drugs advertised under their propriety names are typically sold for a notably lesser price.¹⁶¹ The Secretary assigned authority to the Commissioner of Food and Drugs Administration to publish principles to actualize the statute and its enforcement.¹⁶²

The petitioners were the Pharmaceutical Manufacturers Association and 37 of its prescription drug manufacturer members who supplied over 90% of the United State’s demand of prescription drugs.¹⁶³ The petitioners argued that the regulations put into place by the Commissioner overstepped his allotted powers.¹⁶⁴ The district court ruled the statute did not allow the Commissioner to mandate the established name be printed each time the trade mark name was mentioned and therefore granted both declaratory and injunctive relief.¹⁶⁵ The Court of Appeals for the Third Circuit reversed, finding that under the statutory proposal provided by the Federal Food, Drug, and Cosmetic Act, pre-enforcement review of the regulations is not permitted by the courts and for that reason, held that no actual controversy existed and no relief could be granted under the APA.¹⁶⁶ The Supreme Court granted certiorari.¹⁶⁷

The first issue raised by the Court is whether Congress intended to forbid pre-enforcement review by the Commissioner under the Federal Food, Drug, and Cosmetic Act. Precedent reviewed by the Court indicates that unless there is congressional intent to the

¹⁵⁹*Id.*

¹⁶⁰*Id.*

¹⁶¹*Id.*

¹⁶²*Id.*

¹⁶³*Id.* at 138-39.

¹⁶⁴*Id.* at 139.

¹⁶⁵*Id.*

¹⁶⁶*Id.*

¹⁶⁷*Id.*

contrary, judicial review of a final agency action by an injured individual will not be discontinued.¹⁶⁸ Judicial review of these types of cases was reinforced by the APA as it explicitly allows for both the review of an “agency action made reviewable by statute” and review of a “final agency action for which there is no other adequate remedy in court.”¹⁶⁹ As relied upon by the Court in *Hawkes Co. I*, “parties need not await enforcement proceedings before challenging a final agency action where such proceedings carry the risk of ‘serious criminal and civil penalties.’”¹⁷⁰

By examining the Act’s review terms, the Court rationalized the congressional intent for judicial review to cover an extensive range of administrative actions was clear and that this was consistent with their prior decisions.¹⁷¹ In general, the standard is “only upon a showing of ‘clear and convincing evidence’ of a contrary legislative intent should the courts restrict access to judicial review.”¹⁷² Applying this standard, the Court was not convinced by the Government’s argument that judicial review is forbidden in this particular case nor was a congressional purpose demonstrated that was intended to cut off the right to review these types of decisions.¹⁷³ The Court found that there was nothing in the Food, Drug and Cosmetic Act to inhibit judicial review.¹⁷⁴

After deciding that this particular issue was able to be judicially reviewed, the Court found the regulations in issue constitute as “final agency actions” in reach of the APA.¹⁷⁵ “An

¹⁶⁸*Id.* (citing *Rusk v. Cort*, 369 U.S. 367 (1962); *Leedom v. Kyne*, 358 U.S. 184 (1958); *Harmon v. Brucker*, 355 U.S. 579 (1958); *Brownell v. Tom We Shung*, 352 U.S. 180 (1956); *Heikkila v. Barber*, 345 U.S. 229 (1953); *Board of Governors v. Agnew*, 329 U.S. 441 (1947)).

¹⁶⁹*Id.* at 140.

¹⁷⁰*Id.* at 153.

¹⁷¹*Id.* at 141 (citing *Cort*, 369 U.S. 367; *Tom We Shung*, 352 U.S. 180; *Barber*, 345 U.S. 229; *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955); *U.S. v. Interstate Commerce Comm’n*, 337 U.S. 426, 433-35 (1949)).

¹⁷²*Id.* (citing *Cort*, 369 U.S. at 379-380).

¹⁷³*Id.* at 141.

¹⁷⁴*Id.* at 148.

¹⁷⁵*Id.* at 149.

‘agency action’ includes any ‘rule’, defined by the Act as ‘an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.’”¹⁷⁶ The Court references several previous cases managing the judicial review of administrative actions which have understood the “finality” component in a practical way and find that the present case directly flows from this precedent.¹⁷⁷ The Court ultimately held that the controversy was ripe for adjudication and the challenged provisions of the Act imposed an immediate change in petitioners’ conduct, carrying severe penalties for noncompliance and therefore the act was judicially reviewable. Moreover, it reversed the lower court’s judgment to dismiss the petitioners’ complaint.¹⁷⁸

The last case the Court analyzes before making its judgment is *Sackett v. EP*.¹⁷⁹ *Sackett v. EP* has a fact-pattern quite similar to *Hawkes Co. I*.¹⁸⁰ The petitioners in this case, the Sacketts, were issued a compliance order by the EPA after they started making improvements to their residential property.¹⁸¹ The order stated that the Sacketts’ residential property contained navigable waters, that their improvements violated the CWA, and as a result they would have to promptly reinstate the property following an EPA plan.¹⁸² The Sacketts desired both declarative and injunctive relief, arguing that the order from the EPA was “arbitrary and capricious” under

¹⁷⁶*Id.*

¹⁷⁷*Id.* at 150. (citing *U.S. v. Storer Broadcasting Co.*, 351 U.S. 192, 198 (1956) (ruling an FCC regulation declaring a Commission action that it would not issue a television license to an applicant owning five licenses, regardless of the fact that there was not an application before the Commission a final agency action and therefore judicially reviewable); *Frozen Food Express v. U.S.*, 351 U.S. 40, 45 (1956) (finding an Interstate Commerce Commission order identifying commodities that were exempt from their inspection was reviewable after an action was brought by a carrier who claimed to be transporting said commodities); *Columbiana Broadcasting System v. U.S.*, 316 U.S. 407, 418-19 (1942) (holding a regulation of the Federal Communications Commission declaring prohibited contractual arrangements between chain broadcasters and provincial stations as judicially reviewable).

¹⁷⁸*Id.* at 156.

¹⁷⁹566 U.S. 120 (2012).

¹⁸⁰*Id.* at 370.

¹⁸¹*Id.*

¹⁸²*Id.* at 370, 372.

the APA.¹⁸³ Furthermore, the Sacketts argued that the order deprived them of their right to due process.¹⁸⁴

The District Court dismissed the case for lack of subject-matter jurisdiction and the Court of Appeals for the Ninth Circuit affirmed, stating that the CWA inhibited judicial review of orders and that this prohibition did not violate the Sacketts' fifth amendment rights.¹⁸⁵ The Court granted certiorari to consider the whether the Sacketts may bring a civil action under the APA to challenge the EPA's compliance order under the CWA.¹⁸⁶

The section of property in question is a 2/3-acre residential lot in Idaho which is separated from a large lake by numerous other lots containing fixed buildings.¹⁸⁷ In the process of building a new family home, the Sacketts moved a significant amount of dirt and rocks on their residential lot in preparation of the construction.¹⁸⁸ Consequently, the EPA issued a compliance order which indicated that the family had "engaged in the discharge of pollutants" in violation of the CWA and therefore they had to immediately reinstate the property its original condition or be subject to severe fines.¹⁸⁹

The Sacketts asked the EPA for a hearing on the matter, but were denied the opportunity and brought this resulting case under the APA, which allows judicial review of a "final agency action for which there is no other adequate remedy in a court."¹⁹⁰ The Court first addresses the issue of whether the compliance order is a agency action and whether it is has a sense of finality.¹⁹¹

¹⁸³*Id.* at 370.

¹⁸⁴*Id.*

¹⁸⁵*Id.* at 370-71.

¹⁸⁶*Id.* at 372.

¹⁸⁷*Id.*

¹⁸⁸*Id.*

¹⁸⁹*Id.* at 373.

¹⁹⁰*Id.*

¹⁹¹*Id.* at 373-74.

Relying on previous decisions, the Court finds it is indeed a final agency action for a multitude of reasons.¹⁹² One of those reasons includes that the order issued by the EPA “determined” “rights or obligations.”¹⁹³ Legal ramifications flowed from the issuance delivery of the order such as if there had to be another enforcement procedure, the Sacketts would be susceptible to double fines and their ability to be secure a fill permit from the Corps would be restricted.¹⁹⁴ The issuance of the compliance order also completed the EPA’s determination process.¹⁹⁵

The Government unpersuasively argued the section of the order issued to the Sacketts which contained “Findings and Conclusions” encouraged the family to discuss the order with the EPA; however, the Court finds, this does not enable the family to gain a further agency review.¹⁹⁶ The APA’s judicial review section necessitates that the individual pursuing APA review of a “final agency action to have ‘no other adequate remedy in a court’” and in CWA implementation cases, judicial review is acquired by a civil suit brought by the EPA.¹⁹⁷ The Sackett family is unable to trigger the course of events that would allow a civil suit to be brought and as a result, their liability for not following the compliance order increases daily by \$75,000.¹⁹⁸ The family’s only other alternative to apply to the Corps for a permit and then file suit under the APA has also been denied by the Corps leaving the family with no other adequate remedy in court.¹⁹⁹

¹⁹²*Id.* at 374.

¹⁹³*Id.* (citing *Spear*, 520 U.S. at 178).

¹⁹⁴*Id.*

¹⁹⁵*Id.* (citing *Spear*, 520 U.S. at 178).

¹⁹⁶*Id.*

¹⁹⁷*Id.*

¹⁹⁸*Id.* at 375.

¹⁹⁹*Id.*

The majority notes there is no evidence of a provision in the CWA which would prevent judicial review under the APA and therefore, unless the APA's presumption favoring judicial review of final agency action is defeated by interpretations of statutory intent, judicial review is not prohibited.²⁰⁰ The Government proposes several explanations as to why the statutory intent of the CWA prohibits judicial review each of which the Court discredits.²⁰¹

The Government initially argues that because Congress allowed the EPA to select whether to initiate a judicial course of action or an administrative proceeding, if the Court allowed judicial review of the administrative position, it would frustrate the Act's intent of allowing the EPA to choose which method best suit their purpose.²⁰² The majority finds the Act does not promise that the EPA distributing compliance orders will be the most adequate choice and when the recipient does not chose "voluntary compliance" judicial review should be allowed.²⁰³

Next, the Government argues that compliance orders such as the one the Sackett family received are not self-executing and are required to be imposed by a full judicial action, implying Congress perceived a compliance order as a stage in the course of development instead of a forceful penalty that must be individually susceptible to judicial review.²⁰⁴ The Court reasons the APA allows judicial review all final agency procedures including those which enforce "self-executing sanctions" and because the Sacketts were denied a hearing in response to the compliance order, this was not just a stage in the course of the process but rather a final determination.²⁰⁵ In addition to this argument, the Government pressed the Court to analyze the

²⁰⁰*Id.*

²⁰¹*Id.* at 375-77.

²⁰²*Id.* at 375.

²⁰³*Id.*

²⁰⁴*Id.* at 376.

²⁰⁵*Id.* at 375-76.

idea that Congress solely allows judicial review when the EPA assigns fees to individuals after a hearing, but not after issuing compliance orders, relying on a string of cases which the Court deems to be quite dissimilar to the case at hand.²⁰⁶

Lastly, the Court rejects both of the the Government's notions that Congress solely passed the CWA to allow compliance orders to be issued to push voluntary conformity by those individuals to whom the orders had been received by and that the EPA would use compliance orders less if they were prone to judicial review by the courts.²⁰⁷ Rather the majority finds individuals will continue to voluntarily conform to compliance orders if they do not doubt their soundness.²⁰⁸ Ultimately, the Court reverses and remands the Court of Appeals' decision concluding the compliance order constitutes a final agency action and the CWA does not prohibit judicial review.²⁰⁹

IV. The Effects of *Hawkes Co. I*

Hawkes Co. I was a successful suit for landowners, the unanimous Court (8-0) holding that an approved jurisdictional determination is a final agency action reviewable under the APA. The decision was a victory in the eyes of landowners who sought assurance in their ability to challenge agency actions under the CWA. Also, owners hoping to obtain a jurisdictional determination regarding their private property are now provided with procedural due process

²⁰⁶*Id.* at 376. (citing *U.S. v. Fausto*, 484 U.S. 439, 448-49 (1988) (finding unlike their decision that employees in separate Claims Court actions are excluded from judicial review under the Civil Service Reform Act because it specifically excluded “non-preference employees”, there is no suggestion that Congress’ intent was to prohibit judicial review under the APA by individuals who had been issued compliance orders); *Block v. Community Nutrition Institute*, 467 U.S. 340, 345-48 (1984) (holding that because the Agricultural Marketing Agreement Act of 1937 specifically allowed milk handlers judicial review of all milk purchases, the review of milk market actions brought by consumers was prohibited because consumers are not subject to the regulatory process); *U.S. v. Erika, Inc.*, 456 U.S. 201, 206-08 (1982) (reasoning their decision that the Medicare statute specifically allowing judicial review of awards under Part A and prohibiting awards under Part B was not similar to the issuance of a compliance order and the assignment of sanctions under the CWA because there is not as strong of a correlation between the two)).

²⁰⁷*Id.* at 377.

²⁰⁸*Id.*

²⁰⁹*Id.*

under the CWA by the Court. Landowners that have been given an adverse jurisdictional determination can now have a fourth option—judicial review. Once a landowner receives a jurisdictional determination by the Corps stating the agency has jurisdiction, the landowner can: (1) desert the construction project(s); (2) apply for a permit, disbursing thousands of dollars on fees and costs; (3) continue any construction project(s) at the risk of civil and criminal penalties; or (4) appeal the jurisdictional determination.

Although the decision in *Hawkes Co. I* appears to be an overwhelming win for private landowners, the Court's dependence on the Memorandum of Agreement between the Corps and the EPA narrowly tailors its ruling in *Hawkes Co. I* compared to the Court's ruling in *Sackett v. EP*. The Court's choice to rely significantly on the memorandum in reaching its conclusion that legal consequences flow from jurisdictional determinations, was not entirely necessary because consequences flow from the jurisdictional determination absent the Memorandum of Agreement.

It is unclear whether in the future the Corps would simply be able to amend a Memorandum of Agreement to “fix” the harm of legal consequences the plaintiff is fighting. This type of analysis could give other litigants the opportunity to argue that memorandum of agreement that do not contain a similar five-year “safe harbor” stipulation is not final and therefore does not satisfy the the *Bennett* test. In addition, if litigants are able to contend that a federal regulatory agency's decision must have consequences larger than fines and penalties relating to disobedience, this would narrow the standard for finality under *Bennett* test for reviewing agency action. Ultimately, making the process that more burdensome for parties to question an agency's action.

Hawkes Co. I is a significant case for the Supreme Court regarding agency and administrative law. Although the reasoning behind the decision in *Hawkes Co. I* was not as clear

as some had hoped, the decision does make a significant stride towards protecting private property from the claims and efforts by federal agencies to place restrictions on other crucial aspects of property interests. This is the first case in which the Court has ruled that landowners have the right and ability to hold federal officials accountable under the CWA. The Court's decision maintains the momentum initiated by *Sackett* of allowing pre-enforcement challenges of agency action under the CWA by private landowners. In addition, this ruling resolves the conflict among the circuit courts who previously held that jurisdictional determinations are not subject to judicial review and can only be challenged if an application for a permit is denied. The Court may choose to build upon this particular case in the future to make the law fairer towards landowners seeking redress and to keep federal regulatory agencies who exceed their authority in check.

The Justices' references to *Rapanos* in the fractured majority opinion, indicate that the Court is concerned with the increasing scope of the CWA and the Corps' authority over almost 300 million acres of land within the United States. The amount of land that is under the scope of the CWA and the authority of the Corps is quite startling. This decision is a step in the direction of changing the course of administrative and agency law in this area and is further confining federal agencies, like the Corps, within bounds of reasonable authority established by the Supreme Court.