

No. 14-493

In the
Supreme Court of the United States

—◆—
KENT RECYCLING SERVICES, LLC,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Respondent.

—◆—
**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

—◆—
PETITION FOR REHEARING
—◆—

JEREMY S. LACOMBE

Of Counsel

LaCombe Law Firm L.L.C.

Post Office Box 140

New Roads, LA 70760

Telephone: (225) 205-6161

Facsimile: (866) 235-6161

M. REED HOPPER

Counsel of Record

MARK MILLER

Pacific Legal Foundation

930 G Street

Sacramento, CA 95814

Telephone: (916) 419-7111

Facsimile: (916) 419-7747

E-mail: mrh@pacificlegal.org

E-mail: mm@pacificlegal.org

Counsel for Petitioner Kent Recycling Services, LLC

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
GROUNDS FOR REHEARING	1
I. THE COURT SHOULD GRANT REHEARING BECAUSE A CLEAR CIRCUIT SPLIT AROSE AFTER THE COURT DENIED CERTIORARI AND JUSTICE REQUIRES THIS COURT TO RESOLVE THE SPLIT	2
II. THE COURT SHOULD GRANT REHEARING AND CERTIORARI HERE BECAUSE THE GOVERNMENT WILL LIKELY NOT SEEK REVIEW OF THE EIGHTH CIRCUIT DECISION	7
CONCLUSION	9
CERTIFICATE OF COUNSEL	10
APPENDIX	

TABLE OF AUTHORITIES

Page

Cases

Abbott Labs. v. Gardner, 387 U.S. 136 (1967) 7

Bennett v. Spear, 520 U.S. 154 (1997) 5, 7

Columbia Broadcasting System v. United States,
316 U.S. 407 (1942) 7

*Fairbanks North Star Borough v. U.S. Army Corps
of Engineers*, 543 F.3d 586 (9th Cir. 2008) . . . 2-3

Flynn v. United States, 75 S. Ct. 285 (1955) 2

Frozen Food Express v. United States,
351 U.S. 40 (1956) 7

*Hawkes Co., Inc., et al. v. United States Army
Corps of Engineers*, Case No. 13-3067,
2015 WL _____ (8th Cir. Apr. 10, 2015) . . . 3-6

Rapanos v. United States,
547 U.S. 715 (2006) 1, 4-5

Sackett v. Environmental Protection Agency,
132 S. Ct. 1367 (2012) 1-2, 5-6

*Solid Waste Agency of Northern Cook County v.
U.S. Army Corps of Engineers*,
531 U.S. 159 (2001) 1

Rule

R. 44.2 1

Miscellaneous

Definition of “Waters of the United States”
Under the Clean Water Act,
79 Fed. Reg. 22188 (Apr. 21, 2014) 2

Pursuant to Rule 44.2, Kent Recycling Services, LLC (Kent), respectfully petitions for rehearing of the Court's order denying certiorari in this case.

GROUND FOR REHEARING

Petitions for rehearing of an order denying certiorari may be granted if a petitioner can demonstrate "intervening circumstances of a substantial or controlling effect." R. 44.2. Here an intervening circuit split arose among the Fifth, Eighth, and Ninth Circuits on the very question presented in the *Kent* petition: Is a Jurisdictional Determination [i.e., a wetlands delineation], that is conclusive as to federal jurisdiction under the Clean Water Act, and binding on all parties, subject to judicial review under the Administrative Procedure Act (APA)?

This new Circuit split creates substantial nationwide uncertainty as to a law this Court has said pushes the very limits of constitutional authority and puts landowners at the mercy of regulating agencies. This Court has repeatedly chastised the federal government for overreaching and abusing its power under the Act, but with little effect. *See Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (holding that regulation of remote ponds exceeds statutory authority and raises constitutional questions); *Rapanos v. United States*, 547 U.S. 715 (2006) (plurality holding that the agency's expansive interpretation of the Clean Water Act is over broad and creates federalism problems); and *Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367, 1375 (2012) (J. Alito concurrence opining that the "reach of the Clean Water Act is notoriously unclear" and that "[a]ny piece of land that is wet at least part of

the year” may be covered by the Act, putting “property owners [] at the agency’s mercy.”).

Under the Clean Water Act, the Army Corps of Engineers asserts regulatory authority over almost all waters (and much of the land) in the United States, including tributaries, ditches, ponds, ephemeral streams, drains, wetlands, riparian areas, undefined flood plains, and “other waters.” See Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. 22188 (Apr. 21, 2014). It is imperative, therefore, that this Court safeguards the right of landowners to challenge the government’s erroneous application of the law to their property by reconsidering the decision to deny certiorari in *Kent Recycling*. As this Court has stated, the right to petition for rehearing of an order denying certiorari “is not to be deemed an empty formality as though such petitions will as a matter of course be denied.” *Flynn v. United States*, 75 S. Ct. 285, 286 (1955) (Frankfurter, J., in chambers).

I

THE COURT SHOULD GRANT REHEARING BECAUSE A CLEAR CIRCUIT SPLIT AROSE AFTER THE COURT DENIED CERTIORARI AND JUSTICE REQUIRES THIS COURT TO RESOLVE THE SPLIT

Under the Clean Water Act, the Army Corps of Engineers may issue a site-specific Jurisdictional Determination (JD) delineating “waters of the United States” on private land subject to federal regulation. The Ninth Circuit in *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586 (9th Cir.

2008), and the Fifth Circuit, in *Kent Recycling*, hold that a Jurisdictional Determination is conclusive as to federal jurisdiction, but not reviewable under the Administrative Procedure Act as final agency action. This conclusion substantially affects landowners throughout the Country because a JD effectively prohibits landowners from using the regulated portion of their land without a federal permit. According to these Circuits, a landowner may bring a challenge to a Jurisdictional Determination in court only *after* making a prohibitively costly and time-consuming application for a permit, which the Corps has issued or denied. This application would be unnecessary, and outside the agency's power to decide, if the JD is wrong, as Petitioner contends in this case.

In conflict with these Circuits, however, the Eighth Circuit recently held in *Hawkes Co., Inc., et al. v. United States Army Corps of Engineers*, Case No. 13-3067, 2015 WL _____ (8th Cir. Apr. 10, 2015), that a Jurisdictional Determination is immediately reviewable in court under the APA. This conflict is particularly noteworthy because the facts in *Hawkes* and this case are nearly identical and the Eighth Circuit relied on this Court's unanimous decision in *Sackett*.

In this case, the Petitioner, Kent Recycling, appealed the original JD to the Corps reviewing officer who found the JD was factually and legally deficient. However, on remand, the Corps reissued the JD in final form without any additional information that would address these deficiencies. In *Hawkes*, the Corps showed the same disregard for the petitioners' due process rights by reissuing the deficient JD without correcting the errors noted on administrative

appeal. This left the landowners with three options: (1) abandon the proposed project, at great cost; (2) go through the pointless and costly permit process (averaging more than \$270,000); or (3) proceed without a permit, risking immense fines of \$37,500 a day and imprisonment. These are not legitimate options. They are punitive sanctions imposed on landowners who challenge federal jurisdiction under the Clean Water Act. Accordingly, the Eighth Circuit determined a JD was final agency action subject to judicial review because a JD is conclusive as to federal jurisdiction under *Sackett* (and several other Supreme Court decisions) and that *Hawkes* had no other adequate remedy in law:

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

feet of a tributary.” *Rapanos*, 547 U.S. at 727-28, quoting a GAO report. The Court’s decision in *Sackett* reflected concern that failing to permit immediate judicial review of assertions of CWA jurisdiction would leave regulated parties unable, as a practical matter, to challenge those assertions. The Court concluded that was contrary to the APA’s presumption of judicial review. “[T]here is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into ‘voluntary compliance’ without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA’s jurisdiction.” 132 S. Ct. at 1374.

In our view, a properly pragmatic analysis of ripeness and final agency action principles compels the conclusion that an Approved JD is subject to immediate judicial review. The Corps’s assertion that the Revised JD is merely advisory and has no more effect than an environmental consultant’s opinion ignores reality. “[I]n reality it has a powerful coercive effect.” *Bennett*, 520 U.S. at 169. Absent immediate judicial review, the impracticality of otherwise obtaining review, combined with “the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case . . . leaves most property owners with little practical alternative but to dance to the EPA’s [or to the Corps] tune.” “In a nation

that values due process, not to mention private property, such treatment is unthinkable.” *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring). We conclude that an Approved JD is a final agency action and the issue is ripe for judicial review under the APA.

Appendix at 13-15.

In her concurring opinion, Judge Kelly added this insight to the decision:

In my view, the Court in *Sackett* was concerned with just how difficult and confusing it can be for a landowner to predict whether or not his or her land falls within CWA jurisdiction—a threshold determination that puts the administrative process in motion. **This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property. This jurisdictional determination was precisely what the Court deemed reviewable in *Sackett*.** *See Sackett*, 132 S. Ct. at 1374-75 (Ginsburg, J., concurring). Accordingly, I concur in the judgment of the court.

Appendix at 17 (emphasis added).

II

**THE COURT SHOULD GRANT
REHEARING AND CERTIORARI
HERE BECAUSE THE GOVERNMENT
WILL LIKELY NOT SEEK REVIEW OF
THE EIGHTH CIRCUIT DECISION**

The Corps is unlikely to seek certiorari in the *Hawkes* case because of the likelihood that this Court would uphold the decision. Unlike the fiction relied on in the Fifth and Ninth Circuits, that a Jurisdictional Determination is simply advisory and has no legal or practical consequences, the Eighth Circuit meticulously and authoritatively demonstrated that a JD is final agency action warranting judicial review under the APA and this Court's precedents. In addition to *Sackett*, on which the court primarily relied, the Eighth Circuit cited four additional Supreme Court cases that support its decision, including *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-50 (1967); *Frozen Food Express v. United States*, 351 U.S. 40 (1956); and *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942). See Appendix at 10-11. The Corps has every incentive to limit this adverse decision to the Eighth Circuit.

Moreover, the Corps vigorously opposed Supreme Court review in the two conflicting cases—*Fairbanks* and this case, although the Corps admitted there is a conflict with other Circuits and even within the Fifth Circuit on the due process question raised in Kent's petition for certiorari. See Kent Reply at 10-11. Given the newly created multi-Circuit conflict, and the likelihood that *Hawkes* will not be appealed to this Court, *Kent Recycling* provides the perfect case for

resolving the present conflict in a timely manner. The ultimate question in this case is whether Kent can use the property without a federal permit. This is a purely legal question that can be resolved here and now without the unnecessary delay of another Jurisdictional Determination case coming to this Court, months or years from now. This is important because in this case, the denial of certiorari is effectively a decision on the merits. Unless Kent has the ability to challenge the admittedly erroneous JD in court, Kent will never have a practical means of seeking redress. Neither Kent nor thousands of similarly situated landowners should be subject to such a blatant injustice that is within this Court's power to correct. This case is the paradigmatic example of "justice delayed is justice denied." When a split among the Circuits raises an important question of law, affecting regular citizens across the Nation, this Court should, in all fairness and justice, resolve the conflict. Landowners should not have to wonder what the law allows when they seek to vindicate their statutory and constitutional rights.

CONCLUSION

For the foregoing reasons, this Court should reconsider this case and grant the writ of certiorari.

DATED: April, 2015.

Respectfully submitted,

JEREMY S. LACOMBE

Of Counsel

LaCombe Law Firm L.L.C.

Post Office Box 140

New Roads, LA 70760

Telephone: (225) 205-6161

Facsimile: (866) 235-6161

M. REED HOPPER

Counsel of Record

MARK MILLER

Pacific Legal Foundation

930 G Street

Sacramento, CA 95814

Telephone: (916) 419-7111

Facsimile: (916) 419-7747

E-mail: mrh@pacificlegal.org

E-mail: mm@pacificlegal.org

Counsel for Petitioner Kent Recycling Services, LLC

CERTIFICATE OF COUNSEL

Pursuant to Rule 44.2, Counsel certifies that the Petition is restricted to the grounds specified in the Rule with substantial grounds not previously presented. Counsel certifies that this Petition is presented in good faith and not for delay.

M. REED HOPPER
Counsel for Petitioner

TABLE OF CONTENTS

- A. Decision in *Hawkes Co., Inc. v. United States Army Corps of Engineers*, No. 13-3067 (8th Cir. Apr. 10, 2015)

Appendix A-1

United States Court of Appeals
For the Eighth Circuit

No. 13-3067

Hawkes Co., Inc., et al.
Plaintiffs - Appellants
v.
United States Army Corps of Engineers
Defendant - Appellee

American Farm Bureau Federation;
National Association of Home Builders;
National Mining Association; American Petroleum
Institute; Utility Water Act Group; Foundation
for Environmental and Economic Progress
Amici on Behalf of Appellants

Appeal from United States District Court
for the District of Minnesota - Minneapolis

Submitted: December 11, 2014
Filed: April 10, 2015

Before LOKEN, BRIGHT, and KELLY, Circuit
Judges.

LOKEN, Circuit Judge.

Appendix A–2

Hawkes Co., Inc. (Hawkes), wishes to mine peat from wetland property owned by two affiliated companies in northwestern Minnesota. The United States Army Corps of Engineers derailed that plan when it issued an Approved Jurisdictional Determination (“JD”) that the property constitutes “waters of the United States” within the meaning of the Federal Water Pollution Control Act (the “Clean Water Act” or “CWA”), and therefore appellants must have a permit to discharge dredged or fill materials into these “navigable waters.” *See* 33 U.S.C. §§ 1344(a), 1362(7). Appellants brought this action seeking judicial review of the JD and now appeal the district court’s grant of the government’s motion to dismiss their Amended Complaint. The district court concluded that an approved JD, though the consummation of the Corps’ jurisdictional decisionmaking process, was not a “final agency action” within the meaning of the Administrative Procedure Act, 5 U.S.C. § 704. While the appeal was pending, a panel of the Fifth Circuit reached the same conclusion. *Belle Co., LLC v. U.S. Army Corps of Eng’rs*, 761 F.3d 383 (5th Cir. 2014), *cert. denied*, 83 U.S.L.W. 3291 (U.S. Mar. 23, 2015) (No. 14-493).

We conclude that both courts misapplied the Supreme Court’s decision in *Sackett v. EPA*, 132 S. Ct. 1367 (2012). Therefore, we reverse.

I.

The CWA requires a permit from the Corps to discharge dredged or fill materials into “navigable waters,” and a permit from the Environmental Protection Agency (or an authorized state agency) to discharge any “pollutant” into navigable waters. *See* 33 U.S.C. §§ 1311(a), 1342, 1344. The statute defines

Appendix A–3

“navigable waters” to mean “the waters of the United States,” § 1362(7). This broad definition prompted the Corps and the EPA to make “sweeping assertions of jurisdiction” over every stream, ditch, and drain that can be considered a tributary of, and every wetland that is adjacent to, traditional navigable waters. *Rapanos v. United States*, 547 U.S. 715, 726-727 (2006) (plurality opinion).

In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985), the Supreme Court held that the Corps may require permits for the discharge of fill material into wetlands adjacent to the “waters of the United States.” But in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166 (2001), the Court rejected the Corps’ assertion of CWA jurisdiction over “nonnavigable, isolated, intrastate waters” where migratory birds are present. And in *Rapanos*, the Court concluded that the Corps’ asserted jurisdiction over “wetlands based on adjacency to nonnavigable tributaries” went beyond its statutory authority. 547 U.S. at 782 (Kennedy, J., concurring in the judgment). Because the Court’s plurality and Justice Kennedy adopted different narrower tests to determine when wetlands are “waters of the United States,” we held “that the Corps has jurisdiction over wetlands that satisfy either . . . test” in *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009).

The CWA imposes heavy civil and criminal penalties on a person who discharges into navigable waters without a required permit, or in violation of an issued permit. See 33 U.S.C. § 1319; *Rapanos*, 547 U.S. at 721. When the Corps or the EPA finds that a person is violating the CWA’s discharge restrictions, or

Appendix A-4

a permit issued under the CWA, the agency “shall issue an order requiring such person to comply,” as in *Sackett*, or bring a civil enforcement action, as in *Riverside Bayview Homes* and *Rapanos*. See 33 U.S.C. §§ 1319(a)(3) (EPA) and 1344(s) (Corps). In *Sackett*, the EPA issued an administrative compliance order against a person for depositing fill into jurisdictional wetlands without a permit, ordering, among other remedies, that the site be restored. The EPA persuaded the lower courts the order was not subject to “pre-enforcement judicial review.” Applying the test for determining a final agency action in *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997), a unanimous Court held that the compliance order was a final agency action subject to immediate judicial review under the APA:

[I]t is hard for the Government to defend its claim that the issuance of the compliance order was just “a step in the deliberative process” when the agency rejected the Sacketts’ attempt to obtain a hearing and when the *next* step will either be taken by the Sacketts (if they comply with the order) or will involve judicial, not administrative, deliberation (if the EPA brings an enforcement action). 132 S. Ct. at 1373.

The question in this case is whether the Court’s application of its flexible final agency action standard in *Sackett*¹ should also apply in this case, where

¹ The Court has consistently taken a “pragmatic” and “flexible” approach to the question of finality, and to the related question whether an agency action is ripe for judicial review. See *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-50 (1967); accord *Bell v. New* (continued...)

Appendix A-5

appellants seek judicial review of an adverse JD without either completing the CWA permit process or risking substantial enforcement penalties by mining peat and discharging dredged or fill materials without a permit. That question requires a close look at the allegations in their Amended Complaint.

II.

In reviewing the district court's Rule 12(b)(6) dismissal, we accept as true the facts alleged in the Amended Complaint. Hawkes is in the business of mining and processing peat, a "wetland dependant" activity regulated in Minnesota through permits issued by the Minnesota Department of Natural Resources. Pierce Investment Co. and LPF Properties, LLC, have property interests in a 530-acre parcel in northwestern Minnesota that contains high quality peat near Hawkes's existing peatmining operations. All three companies are owned by members of the Pierce family.

After obtaining an option to purchase the property subject to regulatory approval, Kevin Pierce and Hawkes met with Corps and MDNR representatives to discuss Hawkes's plan to expand its operations to include the property, which would extend the life of its peat mining ten to fifteen years. In December 2010, Hawkes applied to the Corps for a CWA permit. At a January 2011 meeting, Corps representatives urged Pierce to abandon his plan, emphasizing the delays, cost, and uncertain outcome of the permitting process. Pierce responded that he had an option to purchase

¹ (...continued)

Jersey, 461 U.S. 773, 779 (1983); *Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 200-201 (1983).

Appendix A–6

and intended to proceed. In March, the Corps sent a letter advising it had made a “preliminary determination” the wetland is a regulated water of the United States and, “at a minimum,” an environmental assessment would be required. At an April meeting, a Corps representative told Pierce a permit would take years and the process would be very costly. During a site visit in early June, another Corps representative told a Hawkes employee that “he should start looking for another job.” In August, the Corps sent Hawkes a letter advising that nine additional information items costing more than \$100,000 would be needed, including hydrological and functional resource assessments and an evaluation of *upstream* potential impacts. In November, Corps representatives met with the land owner and urged that he sell the property to a “wetlands bank,” advising that an environmental impact statement would likely be required, delaying the issuance of any permit for several years.

Appellants challenged the Corps’ preliminary determination. In November, the Corps provided a “draft” JD concluding the property was connected by a “Relatively Permanent Water” (a series of culverts and unnamed streams) that flowed into the Middle River and then into the Red River of the North, a traditional navigable water some 120 miles away. Appellants’ wetland consultant pointed out numerous errors in the analysis. Nonetheless, in February 2012 the Corps issued an Approved JD concluding the property was a water of the United States because of its “significant nexus” to the Red River. *See* 33 C.F.R. §§ 320.1(a)(6), 325.9. Appellants responded by filing a timely administrative appeal. *See* 33 C.F.R. §§ 331.2, 331.3, 331.6.

Appendix A–7

In October 2012, the Corps’ Deputy Commanding General for Civil and Emergency Operations sustained the appeal, concluding after detailed analysis that the administrative record “does not support [the District’s] determination that the subject property contains jurisdictional wetlands and waters,” and remanding to the District “for reconsideration in light of this decision.” On December 31, 2012, the Corps nonetheless issued a Revised JD concluding, without additional information, that there is a significant nexus between the property and the Red River of the North, and advising appellants that the Revised JD was a “final Corps permit decision in accordance with 33 C.F.R. § 331.10,” which meant their administrative remedies were exhausted. *See* 33 C.F.R. § 331.12.

Appellants then filed this action seeking judicial review of the Revised JD, alleging that it does not meet either of the applicable tests for the assertion of CWA jurisdiction established in *Rapanos*—the plurality’s “relatively permanent” test, or Justice Kennedy’s “significant nexus” test. The Corps moved to dismiss the complaint, arguing the Revised JD was not a final agency action and the issue was not ripe for judicial review. The district court dismissed the complaint for lack of final agency action. *Hawkes Co., Inc. v. U.S. Army Corps of Eng’rs*, 963 F. Supp. 2d 868, 871, 878 (D. Minn. 2013). This appeal followed.

III.

The APA provides for judicial review of a “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704. The APA “evinces Congress’ intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials.” *Califano v.*

Appendix A–8

Sanders, 430 U.S. 99, 104 (1977). When an agency action is final and, if final, appropriate for judicial review are issues that have arisen in a variety of federal agency contexts in the past one hundred years. See, e.g., *Port of Bos. Marine Terminal Ass’n v. Rederiaktiebolaget Transatl.*, 400 U.S. 62, 70-71 (1970); *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 132 n.11, 143-44 (1939). In *Bennett*, 520 U.S. at 177-78, the Court synthesized its prior precedents on the first issue:

As a general matter, two conditions must be satisfied for agency action to be “final”: First, the action must mark the consummation of the agency’s decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.

A. Though the Corps argues otherwise, we agree with the district court (and every court to consider the issue) that the Revised JD clearly meets the first *Bennett* factor—it was the consummation of the Corps’ decisionmaking process on the threshold issue of the agency’s statutory authority. See *Belle Co.*, 761 F.3d at 389-90; *Fairbanks N. Star Borough v. U.S. Army Corps of Eng’rs*, 543 F.3d 586, 591-93 (9th Cir. 2008). The regulations provide that an Approved JD “constitute[s] a Corps final agency action.” 33 C.F.R. § 320.1(a)(6). The Corps’ Regulatory Guidance Letter No. 08-02, at 2, 5, described an Approved JD as a “definitive, official determination that there are, or that there are not, jurisdictional ‘waters of the United States’ on a site,” and stated that an Approved JD “can be relied upon by

Appendix A–9

a landowner, permit applicant, or other affected party . . . for five years” (quotation omitted). Jurisdictional determinations and permitting decisions are discrete agency actions; a party may obtain a JD without seeking a permit, and may obtain a permit without seeking an Approved JD. *Fairbanks*, 543 F.3d at 593. Thus, when an Approved JD has issued, “the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication.” *Port of Bos.*, 400 U.S. at 70-71; see *Ohio Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998). The possibility that the agency might informally reconsider its decision “does not suffice to make an otherwise final agency action nonfinal.” *Sackett*, 132 S. Ct. at 1372 (quotation omitted).

B. The district court concluded that the Approved JD does not satisfy *Bennett*’s second factor because it is not an agency action “by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” In *Sackett*, the EPA compliance order required petitioners to restore property they had altered without a permit and subjected them to the risk of \$75,000 per day in penalties if they chose to disobey. By contrast, the district court reasoned, appellants “face no such obligations or changes in their rights as a result of their jurisdictional determination.” They “may pursue a permit without a disadvantage.” 963 F. Supp. 2d at 876-77.

1. In our view, this analysis seriously understates the impact of the regulatory action at issue by exaggerating the distinction between an agency order that compels affirmative action, and an order that

Appendix A–10

prohibits a party from taking otherwise lawful action. Numerous Supreme Court precedents confirm that this is not a basis on which to determine whether “rights or obligations have been determined” or that “legal consequences will flow” from agency action.

— In *Bennett*, the Court held that a Fish and Wildlife Service biological opinion satisfied the second factor because it required the Bureau of Reclamation to comply with its conditions and thereby had “direct and appreciable legal consequences.” 520 U.S. at 158, 178. Though not self-executing, the biological opinion was mandatory. Likewise, here, the Revised JD requires appellants either to incur substantial compliance costs (the permitting process), forego what they assert is lawful use of their property, or risk substantial enforcement penalties.

— In *Abbott Laboratories*, the Court held that prescription drug labeling regulations were a final agency action subject to pre-enforcement judicial review because they “purport to give an authoritative interpretation of a statutory provision” that puts drug companies in the dilemma of incurring massive compliance costs or risking criminal and civil penalties for distributing “misbranded” drugs. 387 U.S. at 152-53.

— In *Frozen Food Express v. United States*, 351 U.S. 40 (1956), plaintiff sought judicial review of an Interstate Commerce Commission order declaring that certain agricultural commodities were not exempt from regulations requiring carriers to obtain a permit to transport. *Id.* at 41-42. As in this case, the order “would have effect only if and when a particular action was brought against a particular carrier.” *Abbott Labs.*, 387 U.S. at 150. The Court nonetheless held the

Appendix A–11

order reviewable because the “determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact”; it “warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties.” *Frozen Food Express*, 351 U.S. at 43-44. Here, the Revised JD is a determination regarding a specific property that has an even stronger coercive effect than the order deemed final in *Frozen Food Express*, which was not directed at any particular carrier. In *Port of Boston*, 400 U.S. at 70-71, the Court rejected as having “the hollow ring of another era” the contention that an “order lacked finality because it had no independent effect on anyone,” citing *Frozen Food Express*.

— In *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942), the Court held that FCC regulations barring the licensing of stations that enter into network contracts, though not self-executing, were subject to immediate review. “It is enough that, by setting the controlling standards for the Commission’s action, the regulations purport to operate to alter and affect adversely appellant’s contractual rights and business relations with station owners whose application for licenses the regulations will cause to be rejected.” *Id.* at 422. Here, the Revised JD alters and adversely affects appellants’ right to use their property in conducting a lawful business activity. The adverse effect is caused by agency action, not simply by the existence of the CWA. Though the Revised JD is not-self-executing, “the APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction.” *Sackett*, 132 S. Ct. at 1373.

Appendix A–12

2. The Corps argues, and the district court further concluded, that the Revised JD is not a final agency action “for which there is no other adequate [judicial] remedy,” 5 U.S.C. § 704, because appellants have two other adequate ways to contest the Corps’ jurisdictional determination in court—complete the permit process and appeal if a permit is denied, or commence peat mining without a permit and challenge the agency’s authority if it issues a compliance order or commences a civil enforcement action. These other CWA remedies were held not to preclude judicial review of the EPA compliance order in *Sackett*, 132 S. Ct. at 1372.

In this case, the contention ignores the prohibitive cost of taking either of these alternative actions to obtain judicial review of the Corps’ assertion of CWA jurisdiction over the property. First, as a practical matter, the permitting option is prohibitively expensive and futile. The Supreme Court reported in *Rapanos*, 547 U.S. at 721, that the average applicant for an individual Corps permit “spends 788 days and \$271,596 in completing the process.” Moreover, the Amended Complaint alleged that the Corps’ District representatives repeatedly made it clear to Kevin Pierce, to a Hawkes employee, and to the landowner that a permit to mine peat *would ultimately be refused*. In our view, this alone demonstrates that the second *Bennett* factor is satisfied. Moreover, even if appellants eventually complete the permit process, seek judicial review of the permit denial, and prevail, they can never recover the time and money lost in seeking a permit they were not legally obligated to obtain. *Cf. Iowa League of Cities v. EPA*, 711 F.3d 844, 868 (8th Cir. 2013).

Appendix A-13

Second, appellants' other option—commencing to mine peat without a permit and await an enforcement action—is even more plainly an inadequate remedy. Appellants “cannot initiate that process, and each day they wait for the agency to drop the hammer, they accrue” huge additional potential liability. *Sackett*, 132 S. Ct. at 1372. Because appellants were forthright in undertaking to obtain a permit, choosing now to ignore the Revised JD and commence peat mining without the permit it requires would expose them to substantial criminal monetary penalties and even imprisonment for a knowing CWA violation. Thus, like the compliance order at issue in *Sackett*, the Revised JD increases the penalties appellants would risk if they chose to begin mining without a permit. See 33 U.S.C. § 1319(c).

The prohibitive costs, risk, and delay of these alternatives to immediate judicial review evidence a transparently obvious litigation strategy: by leaving appellants with no immediate judicial review and no adequate alternative remedy, the Corps will achieve the result its local officers desire, abandonment of the peat mining project, without having to test whether its expansive assertion of jurisdiction—rejected by one of their own commanding officers on administrative appeal—is consistent with the Supreme Court's limiting decision in *Rapanos*. For decades, the Corps has “deliberately left vague” the “definitions used to make jurisdictional determinations,” leaving its District offices free to treat as waters of the United States “adjacent wetlands” that “are connected to the navigable water by flooding, on average, once every 100 years,” or are simply “within 200 feet of a tributary.” *Rapanos*, 547 U.S. at 727-28, quoting a GAO report. The Court's decision in *Sackett* reflected

Appendix A-14

concern that failing to permit immediate judicial review of assertions of CWA jurisdiction would leave regulated parties unable, as a practical matter, to challenge those assertions. The Court concluded that was contrary to the APA's presumption of judicial review. "[T]here is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction." 132 S. Ct. at 1374.

In our view, a properly pragmatic analysis of ripeness and final agency action principles compels the conclusion that an Approved JD is subject to immediate judicial review. The Corps's assertion that the Revised JD is merely advisory and has no more effect than an environmental consultant's opinion ignores reality. "[I]n reality it has a powerful coercive effect." *Bennett*, 520 U.S. at 169. Absent immediate judicial review, the impracticality of otherwise obtaining review, combined with "the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case . . . leaves most property owners with little practical alternative but to dance to the EPA's [or to the Corps'] tune." "In a nation that values due process, not to mention private property, such treatment is unthinkable." *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring). We conclude that an Approved JD is a

Appendix A–15

final agency action and the issue is ripe for judicial review under the APA.²

The judgment of the district court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

KELLY, Circuit Judge, concurring.

I view whether a JD is reviewable under the APA as a close question. In *Sackett*, the Supreme Court concluded that a compliance order issued by the EPA “severely limits [petitioners’] ability to obtain a permit for their fill from the Army Corps of Engineers [because] [t]he Corps’ regulations provide that, once the EPA has issued a compliance order with respect to certain property, the Corps will not process a permit application for that property unless doing so ‘is clearly appropriate.’” *Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012) (internal citation omitted) (quoting 33 C.F.R. § 326.3(e)(1)(iv)).³ The record in the present case does not reveal that a similar impediment to receiving a permit exists once a JD has been issued. In *Sackett*, the Corps had a published policy regarding the

² The question of ripeness “turns on ‘the fitness of the issues for judicial decision’ and ‘the hardship to the parties of withholding court consideration.’” *Pac. Gas & Elec. Co.*, 461 U.S. at 201, quoting *Abbott Labs.*, 387 U.S. at 149. The issues of ripeness and final agency action are distinct, but in this case, our analysis of the final agency action factors in *Bennett* resolves the ripeness issue as well.

³ “No permit application will be accepted nor will the processing of an application be continued when the district engineer is aware of enforcement litigation that has been initiated by other Federal, state, or local regulatory agencies, unless he determines that concurrent processing of an after-the-fact permit application is clearly appropriate.” 33 C.F.R. § 326.3(e)(1)(iv).

Appendix A–16

decreased likelihood of receiving a permit; here, the record includes case-specific facts, such as informal comments made by Corps representatives, suggesting that a permit application made by Hawkes might be “futile.” *See* Majority Opinion, *supra*, slip op. at 10. However, I question how much weight should be given to the futility of the permit application for an individual applicant, or the time and cost spent applying, in determining whether or not the JD constitutes a final agency action. If a JD is a final agency action, an applicant who is likely to obtain a permit would still be in a position to seek judicial review of the JD. Similarly, it must be the case that were the Corps to take steps to make the permit process both more efficient and less costly, the reviewability of the JD would not change.

I also note other differences between the compliance order in *Sackett* and the JD in the present case. A compliance order, once issued, begins the accumulation of penalties (potentially doubled) for each day the landowner remains in violation. *Id.* A JD, however, has no such penalty scheme. Indeed, 33 U.S.C. § 1319(d), the CWA’s enforcement section on civil penalties, makes no mention of JDs. While the existence of a JD may affect a court’s assessment of a party’s “good faith” while determining civil penalties, I agree with the other courts that have considered this issue that any penalties resulting from a JD are far more “speculative” than those threatened in *Sackett*. *Belle Co., LLC v. U.S. Army Corps of Eng’rs*, 761 F.3d 383, 392 (5th Cir. 2014); *see also, Fairbanks N. Star Borough v. U.S. Army Corps of Eng’rs*, 543 F.3d 586, 595 (9th Cir. 2008). The Appellants fail to point to a single case in which increased civil penalties were levied against a party for ignoring a JD.

Appendix A-17

Despite these dissimilarities with the circumstances in *Sackett*, I agree that Hawkes is left without acceptable options to challenge the JD, absent judicial review. Hawkes's choice is to either (1) follow through on their peat-mining plans until either the EPA issues a compliance order or the Corps commences an enforcement action, to both of which Hawkes could raise lack of CWA jurisdiction as a defense; or (2) apply for a permit (on the grounds that no permit is required) and, if the application is denied, appeal the denial in court. But what happens if Hawkes is, after all, granted a permit yet maintains it never needed one in the first place? It must decline the permit and challenge the original jurisdiction in court. This roundabout process does not seem to be an "adequate remedy" to the alternative of simply allowing Hawkes to bring the jurisdictional challenge in the first instance and to have an opportunity to show the CWA does not apply to its land at all.

In my view, the Court in *Sackett* was concerned with just how difficult and confusing it can be for a landowner to predict whether or not his or her land falls within CWA jurisdiction—a threshold determination that puts the administrative process in motion. This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property. This jurisdictional determination was precisely what the Court deemed reviewable in *Sackett*. *See Sackett*, 132 S. Ct. at 1374-75 (Ginsburg, J., concurring). Accordingly, I concur in the judgment of the court.