No. 13-3067

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

HAWKES CO, INC., LPF PROPERTIES, LLC,
and PIERCE INVESTMENT COMPANY,

Appellants,

v.

U. S. ARMY CORPS OF ENGINEERS,

Respondent.

On Appeal from the United States District Court
for the District of Minnesota
Honorable Ann D. Montgomery, District Judge

REPLY BRIEF

M. REED HOPPER,
DAMIEN M. SCHIFF,
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
Email: mrh@pacificlegal.org
Email: dms@pacificlegal.org

Attorneys for Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Regulations

Miscellaneous

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The APA "creates a presumption favoring judicial review of administrative action." *Sackett v. EPA*, 132 S. Ct. 1367, 1373 (2012). The presumption applies in this case. Like the Sacketts, Hawkes is subject to agency strong-arming under the law. The facts show that the wetlands on Hawkes' property are not jurisdictional under the Clean Water Act. But the Corps has erroneously determined otherwise through a final and legally binding Jurisdictional Determination. Hawkes can take no action without incurring exorbitant expense and delay. Seeking a permit will cost hundreds of thousands of dollars and months or years in review. Proceeding with the project without a permit will subject Hawkes and its officers to both civil and criminal liability with potential fines of $37,500 per day and/or incarceration. Even no action is prohibitive because it means an end to the proposed project. Fairness requires, and the law demands, that Appellants be given "their day in court" to contest the Corps' illegal assumption of federal jurisdiction.

ARGUMENT

I

THE FIRST PRONG OF THE *BENNETT* FINALITY TEST HAS BEEN MET

The first prong of the finality test is whether the agency action "mark[s] the consummation of the agency's decisionmaking process." *Bennett v. Spear*, 520 U.S.

154, 177-178 (1997). Both the trial court in this case and the Ninth Circuit in *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586 (2008), flatly rejected the Corps' claim that the issuance of an approved Jurisdictional Determination is not the "consummation of the agency's decisionmaking process." The Ninth Circuit was clear: "There is no question that the Corps has asserted its ultimate administrative position regarding the presence of wetlands on Fairbanks' property 'on the factual circumstances upon which the [determination is] predicated[.]'" *Id*. at 591.

The Ninth Circuit observed that the approved Jurisdictional Determination states on its face that it "is valid for a period of five (5) years" and that the Corps' position would change only if "new information supporting a revision is provided." *Id*. at 592. The Ninth Circuit found the Jurisdictional Determination "devoid of any suggestion that it might be subject to subsequent revision" or "further agency consideration or possible modification." To underscore this conclusion, the court cited the agency's own regulations that deem an approved Jurisdictional Determination to be "final Corps agency action" and a "final Corps decision" for administrative purposes. 33 C.F.R. § 320.1(a)(2), (a)(6).

Accordingly, the Ninth Circuit held the "regulations thus delimit the stopping point of the Corps' decision-making process for the issuance and review of jurisdictional determinations." *Fairbanks*, 543 F.3d at 592. "An approved

jurisdictional determination upheld on administrative appeal is the agency's 'last word' on whether it views the property as a wetland subject to regulation under the CWA." *Id*. at 593. Therefore, "[n]o further agency decisionmaking on that issue can be expected, a clear indication that the first prong of the Bennett finality test is satisfied." *See id*.

Nevertheless, in *Fairbanks*, as in this case, the Corps maintains that an approved Jurisdictional Determination is merely preliminary and entails the possibility of further administrative proceedings, such as through the permit process. Opposition at 46-48. But the Fairbanks court rejected that argument because it "conflate[s] one . . . decision with a future yet distinct administrative process." *Fairbanks,* 543 F.3d at 593. "The Corps' regulations throughout treat jurisdictional determinations and permitting decisions as discrete agency actions." *Id*. "That Fairbanks might later decide to initiate some *other* Corps process after obtaining the approved jurisdictional determination does not detract from the definiteness of the determination itself." *Id*.

The Supreme Court is in accord with this conclusion. In *Sackett*, the government argued that the challenged compliance order was not final as to jurisdiction because the agency invited the property owner to provide comments on inaccuracies in the order. But the court found that did not change the finality of the compliance order's jurisdictional "Findings and Conclusions." *See Sackett*, 132 S.

Ct. at 1372 ("The mere possibility that an agency might reconsider in light of 'informal discussion' and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal").

Thus, the Ninth Circuit held that an "approved jurisdictional determination announces the Corps' considered, definite and firm position about the presence of jurisdictional wetlands . . . at the time it is rendered. Accordingly, we conclude that it marks the consummation of the agency's decisionmaking process as to that issue." *Fairbanks*, 543 F.3d at 593.

Ironically, the Corps admits this fact in its opposition brief: "The jurisdictional determination answers only the predicate question of whether the wetlands fall within the jurisdiction of the CWA." Opposition at 48. That "predicate question" is the only question at issue in this case. It is irrelevant that the Jurisdictional Determination does not address issues that would be addressed in the permit process. Appellants challenge is limited to the jurisdictional issue.

In addition to its unsupportable claim that a Jurisdictional Determination is just a first step in the decisionmaking process, the Corps also claims that its regulations don't mean what they say: "While Corps regulations state that a jurisdictional determination constitutes 'a Corps final agency action,' 33 C.F.R. § 320.1(a)(6), the Corps does not interpret Section 320.1(a)(6) as establishing that jurisdictional determinations are 'final' within the meaning of the APA." Opposition at 49.

Accordingly, the Corps continues, this Court must defer to the agency's interpretation of its own regulations "unless that interpretation is plainly erroneous or inconsistent with the regulation." *Id*. (citing *Decker v. Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013)). But this avails the Corps nothing because the Corps' interpretation is manifestly inconsistent with the regulation. The regulation is clear—a Jurisdictional Determination is "a Corps final agency action." Therefore it is not subject to interpretation and this Court owes the Corps no deference.

Strangely, the Corps asserts that Jurisdictional Determinations are final only as to the public: "In the preamble to this regulation, the Corps explained that this provision was intended to clarify that 'the public can rely on [a] determination as a Corps final agency action.' The Corps does not state, however, that a determination is final pursuant to the APA." *Id*. at 49 (citing 51 Fed. Reg. 41206, 41207 (Nov. 13, 1986).). But this just begs the question—how can "the public rely on [a] determination as a Corps final agency action" if it's just preliminary, subject to change and not final pursuant to the APA?

Finally, the Corps argues that "[i]n context, the informational jurisdictional determination does not answer the question of whether filling wetlands is or is not permissible; it is just an initial step on the way to answering that question." *Id*. at 52. This argument misses the point; a Jurisdictional Determination need not answer the question whether filling wetlands is permissible to be subject to APA review. As

Justice Ginsburg observed, the Supreme Court determined in *Sackett* that a final decision on jurisdiction will sustain a suit challenging jurisdiction:

> "As a logical prerequisite to the issuance of the challenged compliance order," the Sacketts contend, "EPA had to determine that it has regulatory authority over [our] property." *Id.*, at 54-55. **The Court holds that the Sacketts may immediately litigate their jurisdictional challenge in federal court. I agree, for the Agency has ruled definitively on that question**.

Sackett, 132 S. Ct. at 1374 (Ginsburg, J., concurring) (emphasis added).

Moreover, the Jurisdictional Determination *does* answer the question whether filling wetlands is permissible without going through the permitting process. Therefore, the Jurisdictional Determination satisfies the first prong of the *Bennett* finality test.

II

THE SECOND PRONG OF THE *BENNETT* FINALITY TEST HAS BEEN MET

Under the second prong of the *Bennett* finality test, "the action must be one by which 'rights or obligations have been determined,' " *or* from which " 'legal consequences will flow.' " *Bennett*, 520 U.S. at 177-178 (citation omitted). The Corps posits a number of arguments to support its claim that the Jurisdictional Determination does not satisfy the second prong of the finality test. But these arguments are based on a fiction.

A. The Jurisdictional Determination Is Not Merely a Restatement of the Act

According to the Corps, "Because Hawkes' rights and obligations are determined by the CWA, not the jurisdictional determination, the jurisdictional determination is not final agency action." Opposition at 23. This is a fiction. The same thing could be said about a permit denial which the Corps admits is subject to APA review.[1] The Clean Water Act does not identify jurisdictional wetlands. That can only be done on a case by case basis after a consideration of the physical, chemical and biological features of the regulated site. The Corps acknowledges this is the very purpose of the Jurisdictional Determination. *See id.* at 24. If the Act answered the question of whether a parcel contains jurisdictional wetlands, there would be no need for a Jurisdictional Determination. A Jurisdictional Determination is an adjudicative-type agency decision in that it applies the Act to a particular parcel. This is a quintessential application of the law to site-specific facts. The Jurisdictional Determination is not a simple restatement, summary or recitation of statutory or regulatory standards. Therefore, it is the Jurisdictional Determination, and not the Act, that determines Hawkes' rights or obligations, or from which legal consequences flow.

[1] A permit denial in this case is likely because of the animosity the Corps has shown toward this project. *See* JA at 6-14.

Nevertheless, the Corps argues that "Hawkes' property has always been subject to the CWA's restrictions; the jurisdictional determination did not change that." *Id.* at 24. But this too is a fiction. The facts show that Hawkes' property is not subject "to the CWA's restrictions," and never has been. *See* Appellants' Opening Brief at 7-8 (As the Review Officer found, "the District states that indicators of the transport of energy, materials, and nutrients were observed during a site visit, but there is no quantitative [data] given to support the finding." JA at 32; The record "does not provide sufficient evidence to establish a significant nexus that the number of flow events, volume, duration, and frequency of water flowing through the tributary are such that it has an appreciable effect on the TNW [traditional navigable water]." JA at 35; and, "the water flow regime information was not sufficient to indicate that a significant nexus exists." JA at 36.).

The Corps is assuming the outcome of the very issue in dispute—whether the Act applies to the Hawkes' property. It would be strange if an agency could evade judicial review by the simple expedient of claiming victory before the question is even considered by the court. And, of course, it would be contrary to the standard of review that applies to a 12(b)(6) motion to dismiss. *See Butler v. Bank of Am., N.A.*, 690 F.3d 959, 961 (8th Cir. 2012) ("The Court assumes all facts in the complaint to be true and construes all reasonable inferences from those facts most favorably to the

plaintiff."). Here the facts show that the Hawkes' property is not subject to the Clean Water Act. It is only made so through the erroneous Jurisdictional Determination.

Nevertheless, the Corps argues that the only proper approach to APA review of the Jurisdictional Determination is through the permit process. But this argument makes no sense because any permit decision will be based on the existing Jurisdictional Determination. It is conclusive as to jurisdiction. Barring new information, the permit process will not change the Jurisdictional Determination. Therefore, the determination is as binding and final as it will ever be and warrants review now.

B. The Jurisdictional Determination Need Not Have a Coercive Effect To Warrant APA Review

The Corps engages in still another fiction. The Corps claims: "The jurisdictional determination does not command Hawkes to take any action, and it does not prohibit Hawkes from taking any action." Opposition at 24. And yet the Corps cannot deny that as a result of the Jurisdictional Determination Hawkes must seek a permit before filling the wetlands on the property to avoid an enforcement action. Likewise, a Jurisdictional Determination that finds there are no jurisdictional wetlands on the subject property is a complete defense to filling those wetlands without federal approval. *See Fairbanks*, 543 F.3d at 597 ("A negative finding would effectively assure Fairbanks that the Corps would not later be able to fault Fairbanks'

failure to seek a permit."). The Jurisdictional Determination is neither inert nor benign. It puts Hawkes in a "Catch 22" where Hawkes can only act in accordance with the determination or face ruinous civil and criminal liability. This is the very predicament the APA was designed to prevent. As the Supreme Court observed in *Sackett*:

> The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And there 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*.

Sackett, 132 S. Ct. at 1374 (emphasis added).

But even if the Jurisdictional Determination is deemed to have no coercive effect on Hawkes, that does not spare the determination from judicial scrutiny. Again, the *Sackett* Court speaks to the issue:

> The Government also notes that compliance orders are not self-executing, but must be enforced by the agency in a plenary judicial action. It suggests that Congress therefore viewed a compliance order "as a step in the deliberative process[,] . . . rather than as a coercive sanction that itself must be subject to judicial review." *Id*. at 38. *But the APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction*.

Id. at 1373 (emphasis added).

Thus, to satisfy the second prong of the *Bennett* finality test, the agency action need not be one from which "legal consequences will flow." *Bennett*, 520 U.S. at

177-178. It is enough if the action is "one by which rights or obligations have been determined." *Id*. That is the case here.

Whereas the Clean Water Act itself does not require Hawkes to obtain a permit before filling wetlands on the subject site, because the wetlands are not jurisdictional "waters of the United States," the Jurisdictional Determination itself does so. This is not an insignificant obligation:

> The burden of federal regulation on those who would deposit fill material in locations denominated "waters of the United States" is not trivial. In deciding whether to grant or deny a permit, the U.S. Army Corps of Engineers (Corps) exercises the discretion of an enlightened despot, relying on such factors as "economics," "aesthetics," "recreation," and "in general, the needs and welfare of the people," 33 CFR § 320.4(a) (2004). The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes. Sunding & Zilberman, The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process, 42 Natural Resources J. 59, 74-76 (2002).

Rapanos v. United States, 547 U.S. 715, 721 (2006) (footnote omitted).

This case is likely to exceed even these average costs because the Corps requires Hawkes to conduct additional hydrological studies estimated to exceed $100,000. *See* JA at 10. The Corps may even require the preparation of an Environmental Impact Statement which would run in the tens of thousands of dollars. *Id.* at 11. Of equal importance, the Jurisdictional Determination, and not the Act, prevents Hawkes from filling the wetlands on the subject site free of federal regulation or liability. In

other words, the Jurisdictional Determination fixes a legal right. Under the APA, *Bennett*, and, more recently, *Sackett*, this is enough to require judicial review of the agency action.

Whether Hawkes can obtain judicial review of the Jurisdictional Determination after a lengthy and expensive permit review process is irrelevant. As the Ninth Circuit noted in *Fairbanks*, that is a separate agency action which Hawkes may choose not to pursue. *See Fairbanks* 543 F.3d at 593. The availability of a permit—especially one that is wholly unnecessary—does not change the character of the Jurisdictional Determination.

C. *Port of Boston, Frozen Foods,* and *Iowa League of Cities* Are Applicable to this Case

On another tack, the Corps goes to lengths to try to distinguish the Supreme Court's decisions in *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970), *Frozen Food Express v. United States*, 351 U.S. 40 (1956), and this Court's decision in *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013). The purported basis for distinguishing those cases from this case is that those cases addressed the finality of rules of general applicability while this case does not. *See* Opposition at 39-45. "[J]ust as in *Port of Boston* and *Frozen Food Express*, the Court in *Iowa League of Cities* viewed EPA as promulgating a rule of general applicability with binding effect on the regulated industry." Opposition at 44.

This is an odd distinction in light of the fact that the Corp argues in this case that permit decisions, which are not rules of general applicability, are subject to APA review. Nevertheless, according to the Corps, *Port of Boston* and *Frozen Foods* (as well as *Iowa League of Cities*) "stand for the proposition that agency orders establishing rules of general applicability with legal consequences for participants in the regulated industry are final." But this emphasis on rules of general applicability is at odds with the express holdings in those cases. In *Port of Boston*, for example, the Corps recites the holding of the court this way: "The Court held that the order was final because 'the Commission's action was expected to and did have legal consequences.'" Opposition at 41 (citing *Port of Boston,* 400 U.S. at 71). The Corps fails to note, however, that the Supreme Court did not limit its decision in any way to "rules of general applicability."

The significance of these cases lies in the fact that each court found the agency decisions were final under the APA even though the decisions require no affirmative action on the part of the regulated entity, like the Jurisdictional Determination in this case. The Corps acknowledged this fact then dismissed it as of no consequence—"To be sure, the Court in *Port of Boston* noted that the Commission order did not need to have 'independent coercive effect' in order to be final, as Hawkes points out. But here, there is nothing akin to the legal consequence in *Port of Boston*. The order at issue in *Port of Boston* was a rule of general applicability that established a legally

binding standard for a class of parties." Opposition at 41. The Corps misread these cases. It is irrelevant that the rule or agency determination is of general applicability to a class of parties. What is relevant is that the agency determination is legally binding. And of course, the Jurisdictional Determination in this case is as legally binding as the agency determinations in *Port of Boston*, *Frozen Foods*, and *Iowa League of Cities*, on the public, the agency, and the landowners. In this case, as in those cases, the Jurisdictional Determination changes the law by asserting jurisdiction over wetlands that do not meet the statutory or regulatory definition of covered waters. *See, e.g., Iowa League of Cities*, 711 F.3d at 861-65. For a complete discussion of these cases see Appellants Opening Brief at 18-21, 24-25.

D. The Courts Do Not Uniformly Hold that Jurisdictional Determinations Are Not Subject to APA Review

The Corps' claim that the courts have universally rejected challenges to Jurisdictional Determinations is only a half truth. A number of courts have shown a willingness to entertain challenges to Jurisdictional Determinations, especially when the determination shows there are no jurisdictional wetlands on the subject site. *See, e.g., Nat'l Ass'n of Home Builders v. E.P.A.*, 667 F.3d 6, 14 (D.C. Cir. 2011) ("We see no reason, however, that an individual landowner or developer may not contest the TNW [traditional navigable waterway] Determination in a challenge to a site-specific jurisdictional designation . . . "); *Deerfield Plantation Phase II-B*

Property Owners Ass'n, Inc. v. U.S. Army Corps of Engineers, 801 F. Supp. 2d 446, 459 (D.S.C. 2011) ("The undersigned is persuaded that legal consequences do flow from the Corps' 2010 JD ("negative" determination), as any developer of the property could conceivably immediately begin to fill and dredge the eighty-plus acres that the Corps determined to be non-jurisdictional."); *Nat'l Wildlife Fed'n v. U.S. Army Corps of Engineers*, 404 F. Supp. 2d 1015, 1023 (M.D. Tenn. 2005)("Indeed, the APA is the proper tool for evaluating the substance of jurisdictional determinations, such as the one made by the Corps in this case."); *National Wildlife Federation v. Hanson*, 859 F.2d 313, 316 (4th Cir.1988), ("The district court's review of the Corps' wetlands determination under APA standards was proper and did not alter the jurisdictional base of the court's judgment.").

For APA purposes, there is no principled reason to distinguish Jurisdictional Determinations that find jurisdictional wetlands from those that don't. Both are final agency action which fix a right or obligation or from which legal consequences flow. In the former case, the landowners would be deprived of their right to fill the wetlands without federal interference. In the latter case, the landowners could exercise their right to fill the wetlands without federal interference.

Even if the courts universally rejected challenges to Jurisdictional Determinations, as the Corps claims, it would suffice to observe that the same could be said of compliance orders before the Supreme Court's unanimous decision in

Sackett. To our knowledge, prior to *Sackett*, virtually every court that considered the reviewability of compliance orders held they were not reviewable under the APA. The lower courts uniformly favored administrative convenience over the rights of individuals. But all nine Justices in *Sackett* saw what the lower courts did not see—that the lower courts were applying the *Bennett* finality test too narrowly. *Sackett* changed the jurisprudential landscape by reinvigorating the presumption of reviewability under the APA. "The APA, we have said, creates a 'presumption favoring judicial review of administrative action.'" *Sackett*, 132 S. Ct. at 1373. But, more to the point:

> The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And there 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*.

Sackett, 132 S. Ct. at 1374 (emphasis added).

E. *Sackett* Changed the Trajectory of APA Review

The Corps misapprehends and misrepresents the *Sackett* case. Although the compliance order in *Sackett* imposed greater burdens on the landowners than the Jurisdictional Determination in this case, the Jurisdictional Determination is no less final. In *Sackett*, the Court held the compliance order constituted final agency action because it was an action that determined "rights or obligations" or from which legal

consequences flowed. *Sackett*, 132 S. Ct. at 1371-1372. The compliance order required the Sacketts to restore their property and to provide the government access to their property and records. It also increased their liability in the event of an enforcement action and "severely limited the Sackett's ability to obtain a permit from the Corps." *Sackett*, 132 S. Ct. at 1371-1372.

The Jurisdictional Determination in this case does not require Hawkes to take any immediate action as did the compliance order in *Sackett*, but it does increase Hawkes' liability in the event of an enforcement action because the agency has already determined that the Hawkes' property is subject to federal regulation. Prior to the Jurisdictional Determination, Hawkes was free to fill the wetlands on the subject property without fear of an enforcement action because the Clean Water Act itself does not apply to the property. The wetlands are not jurisdictional. The Clean Water Act covers the Hawkes' property now only because the Jurisdcitional Determination says it does.

Also, although the Jurisdictional Determination does not limit Hawkes' ability to obtain a permit, like the compliance order in *Sackett*, it does something more drastic—it makes it necessary for Hawkes to obtain a permit before filling the wetlands on the subject property, in direct conflict with the statute, the agency's own regulations, and Supreme Court precedent interpreting the scope of the Clean Water

Act. Under *Sackett*, this is sufficient to find the Jurisdictional Determination is final and subject to APA review.

Sackett is significant to this case not because a Jurisdictional Determination is the same as a compliance order, but because *Sackett* emphasizes the need for the courts to rely on the presumption of reviewability and reinforces the fact that under the *Bennett* finality test the action need not be coercive, even though the compliance order was. *See Sackett*, 132 S. Ct. at 1373-1374. The gravamen of APA review is that the action is one that "fixes a right or obligation" *or* is one from which "legal consequences flow." *Bennett*, 520 U.S. at 177-178. The lowers courts tend to focus on the latter while ignoring the former. In this case, the Jurisdictional Determination does both. Contrary to the statute, the Jurisdictional Determination (1) fixes a right in the Corps to bring an enforcement action against Hawkes if it proceeds with the proposed project without a permit; (2) it obligates Hawkes to seek a permit before proceeding with the project; and, (3) it increases Hawkes liability in an enforcement action while (4) denying Hawkes the right to proceed without a permit.

Moreoever, *Sackett* establishes that a finding by the agency of Clean Water Act jurisdiction is binding even if the agency claims it will reconsider the issue based on new information or in the permit process. *See id.* at 1372.

As to the Corps' claim that in *Sackett* "the Supreme Court does not even cite the finding of jurisdiction in the order as a relevant consideration in its finality

analysis," Opposition at 39, the Corps couldn't be more wrong. While noting that the only claim the Sacketts brought against the compliance order was a challenge to jurisdiction, the Supreme Court cited the agency jurisdictional "Findings and Conclusions" as the predicate for the order: "*On the basis of these findings and conclusions*, the order directs the Sacketts" to restore their property, etc. *Sackett*, 132 S. Ct. at 1370-1371 (emphasis added). Among other things, those "Findings and Conlcusions" stated: "[The Sacketts' property] contains wetlands within the meaning of 33 C.F.R. § 328.4(8)(b); [and] the wetlands meet the criteria for jurisdictional wetlands in the 1987 'Federal Manual for Identifying and Delineating Jurisdictional Wetlands.'" *Id*. at 1370. Although the Corps seems to have missed it, the Supreme Court relied on these jurisdictional "Findings and Conclusions" in its finality analysis:

> The issuance of the compliance order also marks the "'consummation'" of the agency's decisionmaking process. *Bennett*, *supra*, at 178, 117 S. Ct. 1154 (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113, 68 S. Ct. 431, 92 L. Ed. 568 (1948)). As the Sacketts learned when they unsuccessfully sought a hearing, the "Findings and Conclusions" that the compliance order contained were not subject to further agency review.

Id. at 1372.

Additionally, Justice Ginsburg observed that the Court decision turned on the jurisdictional question: "The Court holds that the Sacketts may immediately litigate

their jurisdictional challenge in federal court. I agree, for the Agency has ruled definitively on that question." *Id*. at 1374 (J. Ginsburg, concurring)[2].

III

THIS CASE IS RIPE FOR REVIEW

The Corps claims this case is not ripe. The trial court did not address the issue but the issue is easily resolved. A party seeking review must show both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *Pub. Water Supply Dist. No. 10 of Cass County v. City of Peculiar*, 345 F.3d 570, 575-73 (8th Cir. 2003). This case involves a single question—whether the wetlands on Hawkes' property are jurisdictional under the Clean Water Act. That question can be answered on the record in summary judgment. The Corps admits that the record can be made immediately available and that no new facts need be adduced as to jurisdiction. "To be sure, review of the jurisdictional determination under the APA would be based on the administrative record before the Corps and that record could be compiled now." Opposition at 55. Given the existing facts, the jurisdictional question is purely a legal inquiry ripe for review. *See Pub. Water*

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[2] The Corps suggests that Justice Ginsburg's concuring opinion should be given no weight because" no other Justice signed on to Justice Ginsburg's opinion." Opposition at n.6. But this is a strange position for the Corps to take in light of the fact that the Jurisdictional Determination is based entirely on the purported existence of a "significant nexus" which is based on Justice Kennedy's concurring opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), which no other Justice joined.

Supply 345 F.3d at 573 (The fitness factor rests primarily on whether a case would "benefit from further factual development," therefore cases presenting purely legal questions are more likely to be fit for judicial review.).

With respect to harm, the Corps would suffer none. Nor does the Corps assert it will suffer harm from judicial review of this case. Instead, the Corps claims that Hawkes will suffer no harm from delay because Hawkes has already submitted a permit application and the permit decision will be subject to review. But the Corps misunderstands the impact of the Jurisdictional Determination. As a precaution against undue delay in the proposed peat mining project, Hawkes has applied for a permit. But only because of the Jurisdictional Determination. As noted above, the costs and delays associated with obtaining a permit run into the tens, if not hundreds, of thousands of dollars and may take more than a year or two to complete. That is a severe economic burden that the Clean Water Act itself does not impose. Moreover, if Hawkes is required to complete the permit process to ripen its jurisdictional challenge, and wins, Hawkes will not be able to recover the costs or time expended in seeking a permit. This is an unnecessary and unjust burden. A favorable and timely decision by this Court will spare Hawkes the necessity of completing the permit process. Therefore, this case is ripe for review.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss should be denied.

DATED: January 9, 2014.

Respectfully submitted,

M. REED HOPPER
DAMIEN M. SCHIFF

By */s/ M. Reed Hopper*
M. REED HOPPER
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111

Attorneys for Appellants

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DATED: January 9, 2014.

/s/ M. Reed Hopper
Attorney for Appellants

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I further certify that some of the participants in the case are not registered CM/ECF users. On January 9, 2014, I mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

Ms. Amanda E. Aspatore
NATIONAL MINING ASSOCIATION
Suite 500 E.
101 Constitution Avenue, N.W.
Washington, DC 20001

Mr. Daniel R. Dertke
U.S. DEPARTMENT OF JUSTICE
Environmental & Natural Resources Division
Environmental Defense Section
L'Enfant Plaza Station
Post Office Box 23986
Washington, DC 20026-3986

Ms. Danielle Quist
AMERICAN FARM BUREAU FEDERATION
Suite 1000W
600 Maryland Avenue, S.W.
Washington, DC 20024

Ms. Ellen Steen
AMERICAN FARM BUREAU FEDERATION
Suite 1000W
600 Maryland Avenue, S.W.
Washington, DC 20024

Ms. Katie Sweeney
NATIONAL MINING ASSOCIATION
Suite 500 E.
101 Constitution Avenue, N.W.
Washington, DC 20001

Mr. Peter Tolsdorf
AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, DC 20005

Mr. Thomas J. Ward
NATIONAL ASSOCIATION OF HOME BUILDERS
1201 Fifteenth Street, N.W.
Washington, DC 20005

/s/ M. Reed Hopper
Attorney for Appellants