

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 a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

**BRIEF OF *AMICI CURIAE*
AMERICAN FARM BUREAU FEDERATION,
AMERICAN PETROLEUM INSTITUTE,
NATIONAL ASSOCIATION OF HOME
BUILDERS, NATIONAL MINING
ASSOCIATION, AND
UTILITY WATER ACT GROUP
IN SUPPORT OF PETITIONER**

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Ecosystem Marketplace, State of Biodiversity Markets: Offset and Compensation Programs Worldwide (2010), <i>available at</i> http://www.ecosystemmarketplace.com/documents/acrobat/sbdmr.pdf	18, 19
Gibson, James, Gibson & Skordal, Letter to Justin Cutler, Project Manager, Delta Office, U.S. Army Corps of Eng'rs, Sacramento Dist. (Aug. 17, 2000)	14
Jewell, Michael, Chief, California/Nevada Section, U.S. Army Corps of Eng'rs, Sacramento Dist., Letter to James Gibson, Gibson & Skordal (Aug. 13, 2001)	14
McCarthy, Gina, <i>Clearer Protections for Clean Water</i> , Huffington Post (Mar. 25, 2014), http://www.huffingtonpost.com/gina-mccarthy/clearer-protections-for-c b 5029328.html	11
Merriam-Webster, http://www.merriam-webster.com/dictionary/binding	13

- Sunding, David, Review of EPA’s Preliminary Economic Analysis of Guidance Clarifying the Scope of CWA Jurisdiction (July 26, 2011), *available at* <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-3514> 18
- Sunding, David & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59 (2002) 17
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- U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 08-02, Jurisdictional Determinations (June 26, 2008), *available at* <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/GuidanceLetters.aspx> 4, 8, 11, 12, 13
- U.S. Environmental Protection Agency & U.S. Army Corps of Engineers, Economic Analysis of Proposed Revised Definition of Waters of the United States (Mar. 2014), *available at* <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-0003> 18
- U.S. General Accounting Office, GAO-04-297, Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction (Feb. 2004) 10, 11, 13

INTERESTS OF *AMICI CURIAE*¹

This case presents a question of significant national importance warranting this Court’s review – whether judicial review is available under the Administrative Procedure Act (“APA”) when the government makes a final and binding decision that it has Clean Water Act (“CWA”) jurisdiction over a particular tract of land. *Amici curiae* represent a broad cross-section of the nation’s agriculture, energy, construction, home building, mining, and business sectors that are vital to a thriving national economy and provide much-needed products, services, and jobs across the country.

Amici’s members often need to know whether their property contains jurisdictional waters because any determination of CWA jurisdiction not only impacts how *amici*’s members can use land, but has other legal and economic implications, as well. As such, *amici* and their members have a vital interest in this case.

¹ The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of *amici curiae*’s intention to file this brief. Petitioner has filed a letter granting blanket consent to the filing of amici briefs; written consent of respondent to the filing of this amici brief is being submitted contemporaneously with this brief. Pursuant to Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part, and no such counsel or other party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *amici curiae* or their members made a monetary contribution intended to fund its preparation or submission.

American Farm Bureau Federation (“AFBF”), a not-for-profit, voluntary general farm organization, was founded to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 states and Puerto Rico, representing over 6 million member families.

The American Petroleum Institute is a nationwide, non-profit trade association that represents over 600 companies involved in all aspects of the petroleum and natural gas industry, from the largest integrated companies to the smallest independent oil and gas producers.

The National Association of Home Builders represents over 140,000 builder and associate members throughout the United States. Its members include individuals and firms that construct and supply single-family homes, and apartment, condominium, multi-family, commercial, and industrial builders, land developers, and remodelers.

The National Mining Association is a national trade association whose members produce most of America’s coal, metals, and industrial and agricultural minerals. Its membership also includes manufacturers of mining and mineral processing machinery and supplies, transporters, financial and engineering firms, and other businesses involved in the nation’s mining industries.

The Utility Water Act Group (“UWAG”) is an unincorporated group of electric utilities and trade associations of electric utilities. UWAG and its trade

association members' utility members generate and deliver the vast majority of electricity used by residential, business, and government customers throughout the country.

Because of the nationwide scope of their projects and land usage, *amici* have extensive experience with the administration of the CWA regulatory program. Therefore, *amici* are keenly interested in ensuring that the U.S. Army Corps of Engineers ("Corps") and the U.S. Environmental Protection Agency ("EPA") (collectively, the "Agencies") act within the scope of their CWA authority when applying costly CWA regulatory requirements to their members' land. For these reasons, *amici* have a substantial interest in this case.

INTRODUCTION AND SUMMARY

The Court should grant the Petition of Kent Recycling Services, LLC ("Kent") for a Writ of *Certiorari* to confirm the strong presumption favoring judicial review of agency action under the APA. *Sackett v. Evtl. Prot. Agency*, 132 S. Ct. 1367 (2012).

Contrary to that long-standing presumption, the U.S. Court of Appeals for the Fifth Circuit concluded that a CWA "approved jurisdictional determination" ("AJD") does not warrant judicial review, as it is not final agency action. *Belle Co. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 386 (5th Cir. 2014). Two conditions must generally be satisfied for agency action to be final. First, the action must mark the consummation of the agency's decisionmaking process. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Second, the

action must be one by which rights or obligations have been determined, or from which legal consequences will flow. *Id.* at 178.

The *Belle* court held that an AJD represents the consummation of the Corps' decisionmaking, but it is not an action "by which rights or obligations have been determined," or one from which "legal consequences will flow." *Belle Co.*, 761 F.3d at 394. The court neglected to give full consideration to the substantial effects and legal consequences that flow from an AJD, and thus erred in its holding that AJDs are not reviewable actions under the APA.

It is well established that the precise boundaries of CWA jurisdiction are uncertain and subject to significant discretion and case-by-case judgment by the Corps. The Corps has authorized its district engineers to issue formal determinations whether, and to what geographic extent, an area of land is subject to CWA jurisdiction. 33 C.F.R. § 320.1(a)(6). The Corps' regulations confirm that an AJD sets forth a final binding determination whether jurisdictional "waters of the United States" are (or are not) present on a parcel. *Id.*; RGL 08-02 at 1-2.²

An AJD has direct and substantial legal consequences. A positive finding of jurisdiction immediately affects how and where land can be used. An activity considered lawful one day (*e.g.*, earthmoving)

² Corps, Regulatory Guidance Letter No. 08-02, Jurisdictional Determinations at 1 (June 26, 2008) ("RGL 08-02"), available at <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/GuidanceLetters.aspx>.

becomes illegal the next, thereby changing the legal position of the AJD recipient. A finding of jurisdiction also decreases land values, affects investments, imposes project delays and other costs, and results in significant regulatory requirements should the landowner or project proponent seek a permit to use the land. Thus, an AJD has significant real-world effects and legal consequences.

In this Court's most recent decision interpreting the broad scope of APA judicial review, it confirmed that a landowner has the right to judicial review of an agency assertion of CWA jurisdiction. *Sackett* reversed years of contrary case law and held that the assertion of CWA jurisdiction set forth in a compliance order constitutes final agency action subject to judicial review under the APA. *Sackett*, 132 S. Ct. at 1373-74. Of particular import here, the Court recognized that, at base, the issue in *Sackett* was whether EPA had authority to assert CWA jurisdiction over the Sacketts' land. *Id.* at 1374. The same fundamental question is at the heart of this case: whether the Corps has CWA authority (here, asserted through an AJD) over Belle's farmland.

Amici support *certiorari*. This case involves significant issues of national importance arising under the CWA. In particular, the sweeping repercussions of delaying judicial review of AJDs make the Petition particularly worthy of this Court's attention.

ARGUMENT**I. Jurisdictional Determinations Are Final Agency Action Subject to Judicial Review Under the APA.**

The Supreme Court has “repeatedly acknowledged the strong presumption that Congress intends judicial review of administrative action.” *Traynor v. Turnage*, 485 U.S. 535, 542 (1988) (quotations omitted). That presumption was reinforced in *Sackett*, which concerned the reviewability of an agency determination of CWA jurisdiction set forth in a compliance order. *Sackett*, 132 S. Ct. 1367 (2012). “The APA, we have said, creates a presumption favoring judicial review of administrative action...” *Id.* at 1373 (quotations and citation omitted). Indeed, during oral argument, Justice Breyer (and several other justices) noted multiple times that the government, in arguing that the compliance order was unreviewable, was flouting 75 years of settled APA law that presumes that final agency action is reviewable. Transcript of Oral Argument at 41, 49, *Sackett v. EPA*, 132 S. Ct. 1367 (2012) (No. 10-1062) (“Tr. Of Oral Arg.”).

The APA entitles any “person ... adversely affected or aggrieved by agency action” to judicial review. 5 U.S.C. § 702. Specifically, the APA permits a court to “hold unlawful and set aside agency action ... found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* § 706(2). The APA thus effectuates Congress’ intent for broad judicial review of agency action:

Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.

Administrative Procedure Act, SEN. REP. NO. 752 at 26 (1945).

In accordance with Congress' intent, "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) (citations omitted). Accordingly, a court should presume that agency action is reviewable unless there is clear evidence Congress intended otherwise. There is no such evidence here.

Pursuant to the APA, "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. § 704. The Court has noted that we are to apply "the 'finality' element" in a "flexible" and "pragmatic way." *Abbott Labs.*, 387 U.S. at 149-50. "The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992).

Under *Bennett*, courts generally look at two factors in determining whether there is "final agency

action.” The first is finality: the action must “consummat[e]” the agency’s decisionmaking process. *Bennett*, 520 U.S. at 177–78. The second is effect: the action must have an “effect on the day-to-day business of the party challenging it.” *Nat’l Ass’n of Home Builders v. U.S. Army Corps of Eng’rs*, 417 F.3d 1272, 1278 (D.C. Cir. 2005) (quotations and citations omitted).

This Court should grant *certiorari* to confirm that an AJD meets both of these tests. AJDs are final agency actions that fundamentally alter the day-to-day conduct and legal obligations of citizens who receive them. Moreover, there is no other adequate remedy for review in a court. Thus, AJDs are “final agency action” judicially reviewable under the APA.

A. Jurisdictional Determinations Mark the Consummation of the Corps’ Decisionmaking Process as to Jurisdiction.

An AJD marks the consummation of the Corps’ decisionmaking process. *Belle Co.*, 761 F.3d at 390. Specifically, an AJD “marks the consummation of a formal procedure for parties to solicit the Corps’ official position about the scope of CWA jurisdiction.” *Id.* at 389 (quoting *Fairbanks N. Star Borough v. U.S. Army Corps of Eng’rs*, 543 F.3d 586, 592 (9th Cir. 2008)). Through an AJD, the Corps asserts its “final position on the facts underlying jurisdiction – that is, the presence or absence ... of waters of the United States as defined in the CWA” on a particular parcel. *Id.* at 390; RGL 08-02 at 1. Once an AJD proceeds through the Corps’ administrative appeals

process, it is not subject to further agency review, and the public can rely on that determination as “a Corps final agency action.” *Belle Co.*, 761 F.3d at 390 (quotations omitted); 33 C.F.R. § 320.1(a)(6).

The conclusion that an AJD is the consummation of the Corps’ decisionmaking process is undisputed and reinforced by the reasoning in *Sackett* “that the findings and conclusions in the EPA compliance order, which included a finding that the property was subject to CWA jurisdiction, ‘were not subject to further agency review.’” *Belle Co.*, 761 F.3d at 390 (quoting *Sackett*, 132 S. Ct. at 1372). Accordingly, an AJD marks the consummation of the Corps’ decisionmaking.

B. Jurisdictional Determinations Have the Requisite Effects to Meet the Second Prong of the *Bennett v. Spear* Test.

The Court of Appeals erred in its application of the second prong of the *Bennett* test, which focuses on whether the agency action is “one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” *Bennett*, 520 U.S. at 178 (citations omitted). These elements are not to be applied mechanically. Instead, they are meant to inform the fundamental, pragmatic inquiry whether or not the agency made a “definitive” decision on some matter that “has a direct and immediate ... effect on the day-to-day business of the party challenging it.” *Nat’l Ass’n of Home Builders*, 417 F.3d at 1278 (quotations and citations omitted).

Contrary to the Court of Appeals' holding, there can be no question that the Corps' exercise of discretion to establish jurisdiction in an AJD "alter[s] the legal regime" to which the regulated party is subject, and thus is an action by which "rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 178 (quotations omitted).

1. An AJD Is a Legally Binding Determination of CWA Jurisdiction and the Boundaries of that Jurisdiction on a Particular Parcel.

The CWA is a strict liability statute. It *prohibits* all non-permitted "discharges" into statutory "navigable waters," 33 U.S.C. § 1311, defined as "the waters of the United States." *Id.* at § 1362(7). There is no dispute that the meaning and scope of "the waters of the United States" are unclear, particularly following the Court's decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC"), and *Rapanos v. United States*, 547 U.S. 715 (2006). Tellingly, the *Rapanos* Court was split on what areas constitute "waters of the United States."³ 547 U.S. at

³ For decades, proceeding largely case-by-case and through guidance, the Agencies "stretched the term 'waters of the United States' beyond parody." *Rapanos*, 547 U.S. at 734 (plurality). Guidance defining the term "waters of the United States" has been unclear and inconsistently applied, leading to varied interpretations by regulatory offices within a single State and between regulators in the same office. See, *e.g.*, U.S. General Accounting Office, GAO-04-297, Waters and Wetlands: Corps

734 (Scalia, J., plurality); *id.* at 781-82 (Kennedy, J., concurring). Even EPA Administrator McCarthy has acknowledged that “over the last decade, the Clean Water Act has been bogged down by confusion,” noting that “[t]wo complex court decisions ... muddled everyone’s understanding of what waters are – or are not – covered under the law.”⁴

In light of this uncertainty, a Corps determination is needed to establish whether or not a particular parcel of land contains jurisdictional waters and, if so, where those waters begin and end. Accordingly, Corps district engineers are authorized to issue formal determinations concerning the applicability of the CWA to particular tracts of land. 33 C.F.R. § 320.1(a)(6). The Corps defines an AJD as “an official Corps determination that jurisdictional ‘waters of the United States,’ or ‘navigable waters of the United States,’ or both, are either present or absent on a particular site.” RGL 08-02 at 1. The Corps’ regulations further provide that AJDs “shall constitute a Corps final agency action.” 33 C.F.R. § 320.1(a)(6).

Corps RGL 08-02 explains that, among other things, an AJD:

- is “the Corps’ official, written representation that the JD’s findings are correct;”

of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction, at 26 (Feb. 2004) (“GAO Report”).

⁴ Gina McCarthy, *Clearer Protections for Clean Water*, Huffington Post (Mar. 25, 2014), http://www.huffingtonpost.com/gina-mccarthy/clearer-protections-for-c_b_5029328.html.

- “can be relied upon by a landowner, permit applicant, or other ‘affected party’ ... who receives an approved JD;”
- “can be used and relied on by the recipient of the approved JD ... if a CWA citizen’s lawsuit is brought in the Federal Courts against the landowner or other ‘affected party,’ challenging the legitimacy of that JD or its determinations; and”
- is binding on the Agencies.

RGL 08-02 at 2; 33 C.F.R. § 320.1(a)(6).

Importantly, if the landowner or project proponent disputes the Corps’ CWA jurisdiction, the AJD may be immediately appealed through an administrative appeals process established by regulation.⁵ 33 C.F.R. pt. 331; RGL 08-02 at 2. It is inconceivable that the government would establish such an intensive review process, invest the time and resources necessary to implement it, and be bound by the resulting determination, if an AJD did not mean some-

⁵ The formality of the AJD process stands in sharp contrast to a jurisdictional claim that can be the basis of an EPA compliance order. Jurisdiction established in a compliance order may be based on “any information available,” 33 U.S.C. § 1319(a)(3), which can mean “a staff report, newspaper clipping, anonymous phone tip, or anything else.” *Sackett v. U.S. Evtl. Prot. Agency*, 622 F.3d 1139, 1145 (9th Cir. 2010), *rev’d*, 132 S. Ct. 1367 (2012). Yet, *Sackett* held that the assertion of CWA jurisdiction through an EPA compliance order is subject to judicial review. 132 S. Ct. at 1372, 1374-75. If the jurisdictional claim in *Sackett* is subject to review, a formal administrative decision such as an AJD should certainly be subject to review.

thing – for landowner and regulator alike.⁶ Indeed, if there are no legal consequences flowing from an AJD, what is it binding the government to?

The Corps claims that an AJD does nothing more than establish what was already the case – that a particular feature is a “water of the United States” But, whether a feature is a “water of the United States” (and, if so, the boundaries of that “water of the United States”) depends upon the agency’s decisionmaking.⁷ The Agencies have published a proposed rule to define “the waters of the United States” to “make the process of identifying ‘waters of the United States’ less complicated and more efficient” and to “increas[e] CWA program transparency, predictability, and consistency.” 79 Fed. Reg. 22,188, 22,190 (Apr. 21, 2014) (“Proposed Rule”). The proposal thus acknowledges the extent by which the Corps today exercises case-by-case judgment in determining CWA jurisdiction. Indeed, the Proposed Rule continues to rely on “case-specific analysis” and expressly leaves key jurisdictional terms to the

⁶ “Binding” is defined by Merriam-Webster’s Dictionary as “imposing an obligation.” <http://www.merriam-webster.com/dictionary/binding>. The government’s own terminology establishes that an AJD imposes an obligation. See RGL 08-02 at 2.

⁷ See *Rapanos*, 547 U.S. at 727 (“The Corps’ enforcement practices vary somewhat from district to district because ‘the definitions used to make jurisdictional determinations’ are deliberately left ‘vague.’”) (quoting GAO Report at 26).

Agencies’ “best professional judgment.”⁸ *Id.* at 22,198, 22,208. Abundant anecdotal evidence establishes how the Agencies routinely exercise discretion in making “waters of the United States” determinations through AJDs.⁹ All of which demonstrates that

⁸ The Corps endorses the use of individual “best professional judgment” in the Proposed Rule, for example, in determining whether a water is jurisdictional based on its location within a floodplain or riparian area, or based on its hydrologic connection. *Id.* at 22,208.

⁹ For example, in California’s Central Valley, the Corps determined, prior to *SWANCC*, that two cattle waste ponds were jurisdictional waters because they were used by migratory birds, while acknowledging that a nearby farm ditch was non-jurisdictional. Letter from Justin Cutler, Project Manager, Delta Office, U.S. Army Corps of Eng’rs, Sacramento Dist., to James Gibson, Gibson & Skordal (Aug. 24, 2000) at Br. of *Amici Curiae* Found. for Env’tl. & Econ. Progress, *et al.*, *Rapanos v. United States*, 547 U.S. 715 (2006) (No. 04-1034) (“*Rapanos Amici Br.*”), App. 5a; Letter from James Gibson, Gibson & Skordal, to Justin Cutler, Project Manager, Delta Office, U.S. Army Corps of Eng’rs, Sacramento Dist. (Aug. 17, 2000) at *Rapanos Amici Br.*, App. 4a. After *SWANCC*, the property owner asked the Corps to disclaim jurisdiction over the ponds, only to be told that the ditch was now a tributary subject to jurisdiction and, thus, the waste ponds remained jurisdictional because they were “adjacent” to a tributary (the previously non-jurisdictional ditch). Letter from Michael Jewell, Chief, California/Nevada Section, U.S. Army Corps of Eng’rs, Sacramento Dist., to James Gibson, Gibson & Skordal (Aug. 13, 2001) at *Rapanos Amici Br.*, App. 7a-8a. The Corps’ expanded view of CWA jurisdiction occurred without *any* alteration in the regulatory definition, demonstrating the extent by which the jurisdictional status of features has been established by the exercise of discretion (rather than the plain language of the CWA or its implementing regulations).

an AJD is not simply an objective exercise, or ministerial identification of jurisdiction, but often a subjective process that establishes where CWA jurisdictional lines occur, and thereby fixes legal requirements and restrictions.

An AJD is a property-specific, intensive application of the Agencies' discretionary authority to make a binding final determination of jurisdiction, and the boundaries of that jurisdiction, on a particular tract of land. That determination creates obligations and has legal effect.

2. An AJD Alters the Recipient's Legal Position.

An AJD alters the legal position of a recipient in several significant ways.

First, an AJD puts a recipient on notice that the Corps has determined that its parcel contains jurisdictional waters. If the landowner disagrees with that determination and begins development activity, the Corps will likely argue in any later enforcement proceeding that the landowner was on notice and therefore should be assessed a greater civil penalty. 33 U.S.C. § 1319(d) (noting "good faith" as a factor and authorizing civil penalties of \$37,500 per day per violation¹⁰). For example, in *United States v. Ciampitti*, 669 F. Supp. 684, 699 (D.N.J. 1987), a substantial civil penalty was justified based upon the defendant's knowing disregard of the CWA. Perhaps even more importantly, any "knowing" violation of

¹⁰ 78 Fed. Reg. at 66,643, 66,647 (Nov. 6, 2013).

the CWA is punishable by imprisonment for not more than three years.¹¹ 33 U.S.C. § 1319(c)(2). Thus, because an AJD establishes knowledge of CWA jurisdictional waters, it has legal effect.

Second, if a landowner or project proponent wants to proceed with a project that impacts areas deemed “waters of the United States” in an AJD, he must seek a CWA permit. 33 U.S.C. § 1344. If the AJD concludes that any part of the land constitutes wetlands or any other “special aquatic site,” applicable regulations *presume* that there are alternatives to the project not involving “special aquatic sites,” and the Corps may not issue a permit because there are alternatives with less adverse impact. *Butte Env'tl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 945 (9th Cir. 2010); 40 C.F.R. pt. 230, subpt. E. The applicant bears the burden to rebut this legal presumption, which is triggered by an AJD establishing the presence of “special aquatic sites.” *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1269 (10th Cir. 2004). If no “special aquatic sites” are present, the presumption does not apply. Thus, the presumption is a legal effect of the AJD, and any eventual pursuit of a permit will be hindered by that presumption.

¹¹ The risk of criminal penalties is not theoretical. See, e.g., *United States v. Pozsgai*, 999 F.2d 719, 723 (3d Cir. 1993) (defendant sentenced to three years' imprisonment and fined \$200,000 for depositing fill without CWA permit); *United States v. Ellen*, 961 F.2d 462, 464 (4th Cir. 1992) (consultant sentenced to 6 months' imprisonment and one year of supervised release for supervising filling of wetlands).

3. An AJD Changes How Land Can Be Used.

An AJD often causes a recipient to change how it uses its land. An AJD draws a line on a map: on one side of the line, the land may be used freely; on the other, use is restricted, oftentimes in a manner that prohibits its use entirely. If an entity wants to use the restricted land, that use will likely require a CWA permit, which typically takes a year or more, costs hundreds of thousands of dollars, and requires the support of expert consultants.¹² A party may have to modify its project to avoid alleged jurisdictional waters, or give up the project entirely. Therefore, AJDs dictate how land may be used.

A project proponent must also assume the significant losses and costs associated with avoidance, minimization, and mitigation measures required to obtain CWA permits. Avoidance requirements involve leaving some portion of an area proposed for development in an undisturbed condition, which can result in a net loss of developable land. 40 C.F.R. §

¹² See David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59, 74 (2002) (concluding that the average applicant spent \$271,596 (\$337,577 in 2011 dollar values) to prepare a CWA section 404 individual permit application and \$28,915 (\$35,954 in 2011 dollar values) to prepare a nationwide permit application). Applying for a permit also triggers mandatory consultation with multiple agencies under, for example, the National Environmental Policy Act, the Endangered Species Act (“ESA”), and the National Historic Preservation Act.

230.10(a)(1). The cost of avoidance can range from \$400,000 per acre in Southern California to over \$1 million per acre in some cities.¹³

Minimization requirements mandate that permittees minimize potential adverse impacts, *id.* § 230.10(d), and may force the permittee to change the location of the project; the material to be discharged, the method of dispersion, and technology used; control the material after the discharge; or downsize the project. *Id.* §§ 230.70-77.

Mitigation requirements obligate permittees to undertake compensatory actions, *id.* § 230.91(c)(3), and the costs can be significant. According to EPA estimates, nationwide average mitigation costs range from \$24,989 to \$49,207 per acre of wetlands mitigation and \$177 to \$265 per linear foot of stream mitigation.¹⁴ In the Sacramento region, mitigation bank prices for seasonal wetlands are over \$200,000 per acre.¹⁵

¹³ David Sunding, Review of EPA's Preliminary Economic Analysis of Guidance Clarifying the Scope of CWA Jurisdiction at 3 (July 26, 2011) *available at* <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-3514> (“Sunding Analysis of EPA Guidance”).

¹⁴ EPA and Corps, Economic Analysis of Proposed Revised Definition of Waters of the United States, at 17 (Mar. 2014), *available at* <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-0003>.

¹⁵ Sunding Analysis of EPA Guidance at 4; see also Ecosystem Marketplace, State of Biodiversity Markets: Offset and Compensation Programs Worldwide, at 13 (2010), *available at*

Conversely, where an AJD establishes that there is no CWA jurisdiction, the landowner has the “right” to use that land immediately and without restriction. Courts have routinely held that AJDs that find no jurisdiction are final agency action subject to judicial review.¹⁶ The same should hold true for AJDs establishing jurisdiction.

4. An AJD Affects the Value of Land.

A finding of CWA jurisdiction, and its concomitant restrictions and requirements, can also substantially decrease land value. For example, banks have called loans, or demanded more collateral to secure a loan, where the mortgaged property is subject to CWA regulation. In Norfolk, Virginia, the appraisal value of mortgaged land was reduced from over \$32 million to less than \$1 million when the Corps determined that the land contained “waters of the United States.” AJDs may also impact property values by affecting tax assessments and triggering SEC reporting requirements under 17 C.F.R. § 229.103.¹⁷

http://www.ecosystemmarketplace.com/documents/acrobat/sbd_mr.pdf (estimating average price of \$74,535 per credit-acre for wetland mitigation banks across the country).

¹⁶ See, e.g., *Golden Gate Audubon Soc’y, Inc. v. U.S. Army Corps of Eng’rs*, 717 F. Supp. 1417 (N.D. Cal. 1988); *Nat’l Wildlife Fed’n v. Hanson*, 623 F. Supp. 1539 (E.D.N.C. 1985).

¹⁷ See, e.g., *Bergen Cnty. Assocs. v. Borough of E. Rutherford*, 12 N.J. Tax 399, 403, 411, 418 (N.J. Tax Ct. 1992) (land valued at \$47,500,000 reduced to \$2,029,800 based on “waters of the United States” determination).

In sum, AJDs concretely alter the day-to-day conduct of regulated parties. If the Corps' determination of jurisdiction is erroneous or exceeds its statutory authority, the AJD unlawfully imposes these significant effects and legal consequences on the landowner or project proponent.

C. Judicial Review of AJDs Pursuant to the APA Is the Only Adequate Remedy.

To be final, an agency action must be one for which there is “no other adequate remedy in a court.” 5 U.S.C. § 704. The Court of Appeals held that Kent could challenge jurisdiction in a later permit process and, thus, may have an adequate judicial remedy. *Belle Co.*, 761 F.3d at 394 n.4. Other courts have held that, alternatively, a party has the option of challenging jurisdiction in an enforcement proceeding. *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 963 F. Supp. 2d 868, 878 (D. Minn. 2013). Neither of these paths provides an adequate remedy.

Importantly, a party should not be forced to choose between knowingly violating the law and risking an enforcement action, or undergoing the time consuming and costly process of seeking a permit it may not be lawfully required to obtain.

For example, as part of his due diligence in assessing options for his land, a farmer sought an AJD for farmland that should be excluded from CWA jurisdiction because it is “prior converted cropland.” 33 C.F.R. § 328.3(a)(8) (“Waters of the United States do not include prior converted cropland.”). However, in

the AJD, the Corps claimed jurisdiction over hundreds of acres of farm ditches crisscrossing the land. Thus, the AJD established a jurisdictional checkerboard across the fields, effectively rendering the land unusable for anything other than farming. The AJD decreased the value of the land, altered future land use options, and imposed costs and delay.

Moreover, the effects of the AJD in this example are even more egregious because the farmer (like Kent) does not agree with the assertion of jurisdiction. Under the Court of Appeals' analysis, the farmer (and Kent) would be forced to seek a permit he does not believe is lawfully required, or move forward without a permit and risk enforcement, before obtaining judicial review. Neither of these paths provides an adequate remedy.

1. *Sackett* Recognized the Unfairness of Requiring a Landowner to Obtain a Permit for Areas Where Jurisdiction Is Questioned.

In *Sackett*, several justices recognized the unfairness of requiring a landowner to apply for and obtain a permit for areas they believe should not require a permit in the first place. Justice Kagan acknowledged the “weirdness ... of making [the Sacketts] go get a permit for something [they] don’t think [they] need a permit for.” Tr. of Oral Arg. at 56. Justice Alito remarked that it “seems very strange ... for a party to apply for a permit on ... the ground that they don’t need a permit at all.” *Id.* at 14. The unanimous Court held that “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.

This commonsense response is consistent with longstanding case law on the relationship between administrative agencies and the citizens subject to their actions. In *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 418-19 (1942), the Court recognized that pre-announced conditions for receiving a permit– such as the determination of jurisdiction – have the “force of law” even before an individual seeks a permit. Observing “that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails,” the Court concluded that “the expected conformity to [the permitting requirements] causes injury cognizable by a court of equity.” *Id.*

Kent seeks judicial review of the Corps’ jurisdictional claim, which he believes to be unlawful. Requiring Kent to seek a permit would “strong-arm[] [him] into ‘voluntary compliance’ without the opportunity for judicial review.” *Sackett*, 132 S. Ct. at 1374. That is not a legitimate remedy.

2. A Regulated Entity Should Not Be Forced to Ignore an AJD and Await Enforcement to Obtain Judicial Review.

A landowner could, alternatively, simply ignore the AJD if he disagreed with the assertion of jurisdiction, proceed with his project, and challenge jurisdiction in a later enforcement action. However, the Court has made clear that requiring the regulated community to challenge a possibly void regulation in the posture of defense to an enforcement action risks harming the regulated community “severely and unnecessarily.” *Abbott Labs.*, 387 U.S. at 152-53.

This is especially true where, as here, the party is forced to defy a strict liability statute and “risk serious criminal and civil penalties.” *Id.* at 153. A party that violates the CWA is subject to a fine of \$37,500 *per day* and up to 3 years’ imprisonment. 33 U.S.C. § 1319(c)(2); 78 Fed. Reg. at 66,647. Each day the fill remains in place is treated as a separate violation that doubles when the government prevails against a party that has been issued a compliance order, but failed to comply. 33 U.S.C. § 1319(d). Indeed, the severity of the CWA’s penalties effectively leaves a party with no choice but to concede to the imposition of jurisdiction. *Riverside Irrigation Dist. v. Stipo*, 658 F.2d 762, 767 (10th Cir. 1981) (“The defendants argue that plaintiffs could proceed ... and test the validity of the Engineer’s position by incurring the civil and criminal penalties.... this is an unrealistic position.”).

Ignoring an AJD and challenging jurisdiction in a later enforcement action is not a legitimate remedy. Further, it is patently unfair and poor public policy to expose citizens to potential criminal liability to obtain judicial review.¹⁸ Accordingly, there is no “other adequate remedy in a court,” and the APA’s generous review provisions should allow judicial review.

II. A Jurisdictional Determination, Like the Biological Opinion at Issue in *Bennett v. Spear*, Is Judicially Reviewable Final Agency Action.

The denial of judicial review and narrow interpretation of final agency action are contrary to the promise of the APA and seemingly contradict *Bennett v. Spear*. To conclude that agency action that stems from a statute is not final agency action subject to judicial review would immunize nearly all agency decisionmaking from judicial scrutiny. That is contrary to the promise of the APA. Agency action, by its very nature, should arise from an authorizing statute.

At issue in *Bennett* was a Fish and Wildlife Service (“FWS”) biological opinion concluding that operation of an irrigation project would likely “jeopardize the continued existence” of two fish species unless “reasonable and prudent alternatives”

¹⁸ We should not expect (or want) our citizens to disobey the law, and risk civil and criminal penalties, to obtain judicial review of an AJD. See *Ex parte Young*, 209 U.S. 123, 146 (1908) (recognizing that a citizen should not be required to violate the law to test the validity of government action).

were imposed.¹⁹ *Bennett*, 520 U.S. at 159. The Court found that the biological opinion imposed rights and obligations and thus was reviewable under the APA. *Id.* at 178.

Importantly, the Court recognized that, while a biological opinion “theoretically serves an ‘advisory function’ ... in reality it has a powerful coercive effect.” *Id.* at 169. The FWS was “to put it mildly, keenly aware of the virtually determinative effect of its biological opinions.” *Id.* at 170. Thus, while a party was “technically free to disregard the Biological Opinion and proceed with its proposed action,” it “d[id] so at its own peril.” *Id.*

The exact same logic applies to AJDs. While the prohibition against discharges into navigable waters without a permit arises from the CWA, an AJD determines, on a case-specific basis, which areas are “waters of the United States” subject to the CWA’s prohibition. Just as with biological opinions, the Agencies do not “choose[] to deviate” from AJDs. *Id.* at 169. A landowner or project proponent who ignores an AJD, “does so at its own peril.” *Id.* at 170. The Corps is well aware that AJDs shape a landowner’s future actions with respect to his property. As such, AJDs should be subject to judicial scrutiny.

¹⁹ Federal obligations to avoid jeopardy and develop a biological opinion derive from the ESA. 16 U.S.C. §§ 1536(a)(2), (b)(3)(A).

CONCLUSION

For the reasons set forth above, the Court should grant the requested petition and confirm that an AJD is final agency action subject to judicial review.

Respectfully submitted,

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Subject: FW: FL Incoming Litigation
Date: Monday, December 01, 2014 1:37:41 PM
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Kent Recycling v. USACE (8-554):

Brief of Amici Curiae American Farm Bureau Federation, American Petroleum Institute, Nat'l Ass'n of Home Builders, Nat'l Mining Ass'n & Utility Water Act Group in Support of Petitioner

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Subject: No 14-493 Kent Recycling v US Army Corps of Engineers Amicus Brief

The attached Amicus Brief, No. 14-493 has been HAND FILED at the Supreme Court on December 1, 2014. Service parties will receive hard copy service per rule 29.5.

No. 14-493

IN THE

Supreme Court of the United States

KENT RECYCLING SERVICES, LLC,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Respondent.

AFFIDAVIT OF SERVICE

I hereby certify that on December 1, 2014, three (3) copies of the BRIEF OF AMICI CURIAE

AMERICAN FARM BUREAU FEDERATION, AMERICAN PETROLEUM INSTITUTE, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL MINING ASSOCIATION, AND UTILITY WATER ACT GROUP IN SUPPORT OF PETITIONER in the above-captioned case were served, as required by U.S. Supreme Court Rule 29.5(c), on the following:

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