

No. 13-3067

IN THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

HAWKES CO., INC.; LPF PROPERTIES, LLC;
and PIERCE INVESTMENT COMPANY,
Plaintiffs-Appellants,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
Defendant-Appellee.

On Appeal from the U.S. District Court
for the District of Minnesota,
No. 13-cv-00107-ADM (Hon. Ann D. Montgomery)

**PETITION FOR PANEL REHEARING AND
REHEARING EN BANC BY DEFENDANT-APPELLEE
UNITED STATES ARMY CORPS OF ENGINEERS**

JOHN C. CRUDEN
Assistant Attorney General

DANIEL R. DERTKE
JENNIFER SCHELLER NEUMANN
ROBERT J. LUNDMAN
U.S. Department of Justice
Environment & Natural Resources Div.
P.O. Box 7415
Washington, DC 20044
Phone: (202) 514-2496
Fax: (202) 353-1873
robert.lundman@usdoj.gov

TABLE OF CONTENTS

STATEMENT..... 1

BACKGROUND..... 2

 A. Statutory and Regulatory Background..... 2

 B. Facts 4

 C. District Court Proceedings and the Appeal..... 5

ARGUMENT 6

CONCLUSION 15

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

ATTACHMENT: PANEL OPINION

TABLE OF AUTHORITIES

CASES

<i>Abbott Labs. v. Gardner</i> , 387 U.S. 136 (1967)	15
<i>Acquest Webrle L.L.C. v. United States</i> , 567 F. Supp. 2d 402 (W.D.N.Y. 2008)	7
<i>Aluminum Co. of Am. v. United States</i> , 790 F.2d 938 (D.C. Cir. 1986)	10
<i>Am. Airlines, Inc. v. Herman</i> , 176 F.3d 283 (5th Cir. 1999)	9
<i>Belle Co. v. U.S. Army Corps of Eng’rs</i> , 761 F.3d 383 (5th Cir. 2014), <i>cert. denied sub nom., Kent Recycling Servs. LLC v. U.S. Army Corps of Eng’rs</i> , 135 S. Ct. 1548 (2015) (No. 14-493), <i>reh’g petition filed</i> (Apr. 16, 2015), <i>reh’g response requested</i> (May 18, 2015).....	1, 6, 8, 9, 11, 12
<i>Bennett v. Spear</i> , 520 U.S. 154 (1997)	1, 6, 10, 12-15
<i>Child v. United States</i> , 851 F. Supp. 1527 (D. Utah 1994)	7
<i>Columbia Broad. Sys., Inc. v. United States</i> , 316 U.S. 407 (1942)	15
<i>Comm’rs of Pub. Works v. United States</i> , 30 F.3d 129, 1994 WL 399118 (4th Cir. 1994) (unpublished)	7
<i>FTC v. Standard Oil Co. of Cal.</i> , 449 U.S. 232 (1980)	10
<i>Fairbanks N. Star Borough v. U.S. Army Corps of Eng’rs</i> , 543 F.3d 586 (9th Cir. 2008), <i>cert denied</i> , 557 U.S. 919 (2009).....	1, 6-11
<i>Frozen Food Express v. United States</i> , 351 U.S. 40 (1956)	14, 15

<i>Hampton Venture No. One v. United States</i> , 768 F. Supp. 174 (E.D. Va. 1991)	7
<i>Indus. Highway Corp. v. Danielson</i> , 796 F. Supp. 121 (D.N.J. 1992), <i>aff'd</i> , 995 F.2d 217 (3d Cir. 1993) (unpublished)	7
<i>Lotz Realty Co. v. United States</i> , 757 F. Supp. 692 (E.D. Va. 1990)	7
<i>Nat'l Ass'n of Home Builders v. Norton</i> , 415 F.3d 8 (D.C. Cir. 2005)	10
<i>Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic</i> , 400 U.S. 62 (1970)	14
<i>Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n</i> , 324 F.3d 726 (D.C. Cir. 2003)	10
<i>Rochester Tel. Corp. v. United States</i> , 307 U.S. 125 (1939)	10
<i>Sackett v. EPA</i> , 132 S. Ct. 1367 (2012)	6, 8, 11-13
<i>St. Andrews Park, Inc. v. U.S. Dep't of the Army Corps of Eng'rs</i> , 314 F. Supp. 2d 1238 (S.D. Fla. 2004)	7

STATUTES

Administrative Procedure Act

5 U.S.C. § 704..... 1, 4

5 U.S.C. § 706(2)..... 5

Clean Water Act

33 U.S.C. § 1311(a)..... 2, 7

33 U.S.C. § 1319(a)..... 4, 8

33 U.S.C. § 1319(a)-(c)	4
33 U.S.C. § 1319(b).....	8
33 U.S.C. § 1319(d).....	9
33 U.S.C. § 1319(g).....	4, 8
33 U.S.C. § 1319(g)(8).....	8
33 U.S.C. § 1344.....	3
33 U.S.C. § 1344(a).....	2, 3
33 U.S.C. § 1362(6).....	2
33 U.S.C. § 1362(7).....	2
33 U.S.C. § 1362(12).....	2

CODE OF FEDERAL REGULATIONS

33 C.F.R. § 320.1(a)(6)	3
33 C.F.R. pt. 323.....	3
33 C.F.R. pt. 325.....	3
33 C.F.R. § 325.9	3
33 C.F.R. § 326.3(c).....	4
33 C.F.R. § 326.5	4
33 C.F.R. § 328.3(a)(1), (5), (7)	2
33 C.F.R. § 328.3(c).....	2
33 C.F.R. pt. 331.....	3
33 C.F.R. § 331.1	4
33 C.F.R. § 331.2	3, 4, 7
33 C.F.R. § 331.5(a)(2)	3

RULES

Clean Water Rule: Definition of “Waters of the United States,” Final Rule
Prepublication Version, *available at* [http://www2.epa.gov/cleanwaterrule/
prepublication-version-final-clean-water-rule](http://www2.epa.gov/cleanwaterrule/prepublication-version-final-clean-water-rule) (signed May 27, 2015,
forthcoming in Federal Register) 2, 14

Fed. R. App. P. 35 2

Fed. R. App. P. 35(b)(1) 1

Fed. R. App. P. 40 1, 2

STATEMENT

A panel of this Court reversed the district court's dismissal of this case and held that a jurisdictional determination issued by the United States Army Corps of Engineers (the Corps) stating that the property at issue contains waters of the United States under the Clean Water Act (CWA) is a final agency action under the Administrative Procedure Act (APA), 5 U.S.C. § 704. In so holding, Op. at 2, the panel acknowledged that it *created* a conflict among the circuits; that alone demonstrates that this case presents a question of exceptional importance and should be reheard by the panel or this Court sitting en banc. Fed. R. App. P. 35(b)(1) & 40. The panel concluded that the jurisdictional determination is a final agency action because it is an action "by which rights or obligations have been determined" or one from which "legal consequences will flow," as it must be in order to be final under *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The panel's decision on that is wrong because, as every other court of appeals to address the question has held, a jurisdictional determination neither determines obligations or rights nor has legal consequences. Instead, it is the CWA itself that imposes any obligations. *Belle Co. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383 (5th Cir. 2014), *cert. denied sub nom.*, *Kent Recycling Servs. LLC v. U.S. Army Corps of Eng'rs*, 135 S. Ct. 1548 (2015) (No. 14-493), *reh'g petition filed* (Apr. 16, 2015), *reh'g response requested* (May 18, 2015); *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586 (9th Cir. 2008), *cert denied*, 557 U.S. 919 (2009). This case therefore meets the criteria for panel rehearing and rehearing en

banc, Fed. R. App. P. 35 & 40, and the Court should grant this petition.

BACKGROUND

A. Statutory and Regulatory Background

The CWA prohibits the “discharge of any pollutant by any person” except as specifically allowed. 33 U.S.C. § 1311(a). “[P]ollutant[s]” include “dredged spoil,” “rock,” and “sand,” and “discharge of a pollutant” is defined as “any addition of any pollutant to navigable waters from any point source.” *Id.* § 1362(6), (12).

The CWA defines the term “navigable waters” as all “waters of the United States, including the territorial seas.” *Id.* § 1362(7). The regulatory definition of the term “waters of the United States” encompasses traditional navigable waters such as tidal waters and waters susceptible to use in interstate commerce, “tributaries” to traditional navigable waters, and wetlands that are “adjacent” to traditional navigable waters or their tributaries. 33 C.F.R. § 328.3(a)(1), (5), (7), (c); *see also* Clean Water Rule: Definition of “Waters of the United States,” Final Rule Prepublication Version, *available at* <http://www2.epa.gov/cleanwaterrule/prepublication-version-final-clean-water-rule> (signed May 27, 2015, forthcoming in Federal Register).

The CWA permitting regime implicated in this case is set forth in Section 404(a) of the CWA, 33 U.S.C. § 1344(a). It authorizes the Corps to issue a permit “for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” *Id.* § 1344(a). The Corps has promulgated regulations governing the permit application process under Section 404. 33 C.F.R. pts. 323, 325.

The Corps' regulations provide that the Corps may offer its opinion, when requested, on whether a piece of property contains "waters of the United States" within the Corps' regulatory jurisdiction. *Id.* §§ 320.1(a)(6), 325.9. Such an opinion is known as a "jurisdictional determination," which the regulations define as "a written Corps determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. 1344) or [the River and Harbors Act]." 33 C.F.R. § 331.2. Jurisdictional determinations are created solely by the Corps' regulations; they are not mentioned in the statute.

The Corps' regulations provide that the agency may issue two kinds of jurisdictional determinations: preliminary jurisdictional determinations (not at issue here) and approved jurisdictional determinations. An approved jurisdictional determination is "a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel." *Id.* An affected party may administratively appeal an approved jurisdictional determination. *Id.*; *see also id.* pt. 331 (detailing administrative appeal process). Neither kind of jurisdictional determination determines "that a particular activity requires a [Corps] permit." *Id.* § 331.2.

An affected party may also administratively appeal a final permit decision proffering a permit with conditions or denying a permit. *Id.* §§ 331.1, 331.2. In that appeal, the party may challenge both the terms of a permit and CWA jurisdiction, "whether or not a previous approved JD was appealed." *Id.* § 331.5(a)(2).

If there is a discharge of dredged or fill material without a required permit under Section 404, the Corps or the Environmental Protection Agency (EPA) may take a variety of actions in response. The Corps may issue a “cease-and-desist” letter or otherwise notify the party of the violation, the EPA may issue an administrative compliance order, the EPA may issue an administrative penalty order, or the United States may bring a civil enforcement action or criminal action in district court. 33 U.S.C. § 1319(a)-(c), (g); 33 C.F.R. §§ 326.3(c), 326.5.

In addition to the CWA, the APA is relevant here. It provides that “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.” 5 U.S.C. § 704.

B. Facts

As set forth in the panel’s opinion and as alleged in the complaint, plaintiffs (collectively, Hawkes) plan to mine a 530-acre parcel for peat. Hawkes applied for a Section 404 permit in December 2010 for the proposed peat mine. After a preliminary jurisdictional determination, meetings, and visits to the property, the Corps provided Hawkes with an approved jurisdictional determination in February 2012, which concluded that the property contains waters of the United States. JA 9-12 (¶¶ 42-50). Hawkes filed an administrative appeal. The Corps’ division office remanded the jurisdictional determination to the Corps’ district office for reconsideration, based on a finding that the administrative record lacked sufficient documentation and analysis to support a finding of regulatory jurisdiction. JA 12-13

(¶¶ 51-53); JA 25-37. After the remand, the Corps' district office issued a revised approved jurisdictional determination in December 2012, which again concluded that the property contains waters of the United States. JA 13 (¶¶ 54-55); JA 42, 58.

C. District Court Proceedings and the Appeal

Hawkes's amended complaint alleged that the Corps' jurisdictional determination is arbitrary and capricious, contrary to law, and unsupported by substantial evidence, in violation of the APA, 5 U.S.C. § 706(2). JA 15 (¶ 62). The Corps moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted, arguing that there was no final agency action subject to judicial review under the APA and that Hawkes's challenge to the jurisdictional determination was not ripe. JA 38, 59.

The district court granted the motion to dismiss for failure to state a claim. JA 59-75. It held that the Corps' jurisdictional determination was not final agency action because the jurisdictional determination "does not determine [Hawkes's] rights or obligations," "does not order [Hawkes] to take any kind of action," and does not "affect the legal standards used by agencies and courts in determining where the CWA applies." JA 68-69. Hawkes appealed.

The panel reversed and remanded. The panel concluded that Hawkes faces "obligations or changes in [its] rights as a result of [the] jurisdictional determination." Op. at 8. The panel stated that a jurisdictional determination "alters and adversely affects [Hawkes's] right to use [its] property," but did not explain how the

jurisdictional determination—as opposed to the statute itself—does so. Op. at 10. Relying heavily on *Sackett v. EPA*, 132 S. Ct. 1367, 1370 (2012), the panel concluded that “the impracticality of otherwise obtaining review, combined with the uncertain reach” of the CWA and its “draconian” penalties, “compels the conclusion” that a jurisdictional determination is final agency action. Op. at 12.

Judge Kelly concurred, noting that she found finality to be a “close question.” Op. at 13. She doubted the relevance of the panel’s discussion of the alleged time, cost, and futility of a permit application. She also noted several differences between a jurisdictional determination and the compliance order at issue in *Sackett*. Judge Kelly concluded, however, that the jurisdictional determination was final agency action, even though she described the agency action here as the start of the process rather than its conclusion—that is, as “a threshold determination that puts the administrative process in motion.” Op. at 14-15.

ARGUMENT

The panel acknowledged that it created a circuit conflict when it held that a jurisdictional determination is final under the second required prong of the test for finality set forth in *Bennett v. Spear*. It recognized that two other circuits, the Fifth Circuit in *Belle* and the Ninth Circuit in *Fairbanks*, have held that a jurisdictional determination is not final under *Bennett*’s second prong—that is, the jurisdictional determination is not final because it neither determines rights or obligations nor is a decision from which legal consequences will flow. See *Belle*, 761 F.3d at 390-94;

Fairbanks, 543 F.3d at 593-97.¹ Rehearing is necessary to correct the panel’s erroneous creation of a circuit split.

The jurisdictional determination is not final agency action because it does not determine legal rights or obligations and it does not have any legal consequences. The jurisdictional determination does not impose any obligations, nor does it direct the landowner to take or refrain from taking any action. If a particular tract of land contains waters of the United States, the CWA obligates the landowner to obtain a permit before discharging pollutants into those waters, whether or not the landowner has requested or received a jurisdictional determination from the Corps. 33 U.S.C. § 1311(a); *see* 33 C.F.R. § 331.2 (jurisdictional determinations “do not include determinations that a particular activity requires a [Corps] permit”). Hawkes’s property has always been subject to the CWA’s restrictions; the jurisdictional determination did not change that. As the Ninth Circuit explained in *Fairbanks*, the landowner “has an obligation to comply with the CWA” and its “legal obligations

¹ In addition to the Fifth and Ninth Circuits, every other court to have reached this issue has concluded that a jurisdictional determination that there are waters of the United States on a property is not a final agency action. *Comm’rs of Public Works v. United States*, 30 F.3d 129, 1994 WL 399118 (4th Cir. 1994) (unpublished); *St. Andrews Park, Inc. v. U.S. Dep’t of the Army Corps of Eng’rs*, 314 F. Supp. 2d 1238, 1244-45 (S.D. Fla. 2004) (“the legal rights and obligations of the parties [are] precisely the same the day after [a] jurisdictional determination was issued as they were the day before”); *Acquest Webrle LLC v. United States*, 567 F. Supp. 2d 402, 409-11 (W.D.N.Y. 2008); *Child v. United States*, 851 F. Supp. 1527, 1535 (D. Utah 1994); *Indus. Highway Corp. v. Danielson*, 796 F. Supp. 121, 128 (D.N.J. 1992), *aff’d*, 995 F.2d 217 (3d Cir. 1993) (table); *Hampton Venture No. One v. United States*, 768 F. Supp. 174, 175 (E.D. Va. 1991); *Lotz Realty Co. v. United States*, 757 F. Supp. 692, 695-98 (E.D. Va. 1990).

arise directly and solely from the CWA, and not from the Corps' issuance of an approved jurisdictional determination.” 543 F.3d at 594; *accord Belle*, 761 F.3d at 391-94.

The jurisdictional determination also does not alter the manner in which the Corps or EPA may enforce the CWA, or the penalties to which a violator of the CWA is potentially subject. Whether or not the Corps has issued a jurisdictional determination, if the Corps or the EPA believes that a landowner has violated the CWA by discharging pollutants without a permit, the EPA may issue an administrative compliance order (of the sort at issue in *Sackett*), or it may institute an administrative penalty proceeding and impose a penalty. 33 U.S.C. § 1319(a), (g). Both those types of administrative action afford the landowner the opportunity to obtain judicial review of EPA's underlying conclusion that the land contains waters of the United States. *See id.* § 1319(g)(8); *Sackett*, 132 S. Ct. at 1371-72. Alternatively, the United States may file an enforcement action in court. In that suit, a previously issued jurisdictional determination would not alter the United States' burden of establishing that the land contains waters of the United States by a preponderance of the evidence. 33 U.S.C. § 1319(b); *see also Fairbanks*, 543 F.3d at 595.

In any of those proceedings, moreover, the only potential liability the landowner would face would be liability for violating the CWA. Because the jurisdictional determination does not contain any directive that could be violated, the CWA does not provide for additional penalties for violating the CWA after receiving a

jurisdictional determination. *See* 33 U.S.C. § 1319(d). Before and after a jurisdictional determination is issued, the landowner therefore faces the same legal regime, the same potential obligations, and the same legal exposure. As the Ninth Circuit explained, “[i]n any later enforcement action, [the landowner] would face liability only for noncompliance with the CWA’s underlying statutory commands, not for disagreement with the Corps’ jurisdictional determination.” *Fairbanks*, 543 F.3d at 594-95; *see also Belle*, 761 F.3d at 391-94.

The panel does not offer a meaningful response to the vital point that it is the statute that imposes the relevant obligations regardless of whether the Corps has or has not issued a jurisdictional determination. The panel asserts incorrectly that the jurisdictional determination requires Hawkes to obtain a permit. *Op.* at 8. But it is the CWA—not the jurisdictional determination—that requires a permit prior to the discharge of dredged or fill material in a jurisdictional wetland.

Even if one assumes (incorrectly) that the jurisdictional determination triggered the requirement to apply for a permit, the burden of participating in an administrative process cannot transform the jurisdictional determination into final agency action within the meaning of the APA. It is well-established that an agency order is not final if the effect on the regulated party depends on the resolution of further administrative proceedings—that is, an action is not final if it is one that “does not itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action.” *Am. Airlines v. Herman*, 176 F.3d 283, 288 (5th Cir. 1999)

(quoting *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 130 (1939)); *see also, e.g., FTC v. Standard Oil Co.*, 449 U.S. 232, 239-43 (1980); *Aluminum Co. v. United States*, 790 F.2d 938, 941 (D.C. Cir. 1986).

As a practical matter, a landowner who receives a jurisdictional determination may feel more constrained to seek a permit than someone who has not received a similar determination. But that incentive arises solely from the additional information that a jurisdictional determination conveys about the agency's view of the CWA's coverage—not from any independent obligation to seek a permit imposed by the jurisdictional determination. That sort of practical effect, absent any actual legal obligation or consequence, is not sufficient to render the action final. *See Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 13-16 (D.C. Cir. 2005) (incentive to comply voluntarily with agency's guidance concerning underlying statutory obligation is insufficient to establish legal consequences under *Bennett*). As the Ninth Circuit explained, relying on the additional information provided by a jurisdictional determination “erroneously conflates a potential *practical* effect with a *legal* consequence.” *Fairbanks*, 543 F.3d at 596; *see Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 732-33 (D.C. Cir. 2003) (explaining that the “practical consequences” that attach when a private party learns that the government believes that certain legal obligations apply to the party does not render the government action final).

The panel stated that the district court, whose reasoning closely mirrors the Ninth and Fifth Circuits' analyses in *Fairbanks* and *Belle*, erred “by exaggerating the distinction between an agency order that compels affirmative action, and an order that prohibits a party from taking otherwise lawful action.” Op. at 8. The panel, however, did not explain how the jurisdictional determination here prohibits a party from taking otherwise lawful action. Just as it is the CWA, not the jurisdictional determination, that imposes any obligation, the jurisdictional determination does not prohibit any action. The statute prohibits the discharge of fill material into the waters of the United States whether or not the Corps has issued a jurisdictional determination. The panel is thus incorrect that the jurisdictional determination “requires [Hawkes] either to incur substantial compliance costs (the permitting process), [forgo] what [it] assert[s] is lawful use of [its] property, or risk substantial enforcement penalties.” Op. at 8. The statute—not the jurisdictional determination—requires that of Hawkes.

The panel is also wrong that *Sackett* indicates that a jurisdictional determination either determines legal rights or obligations or has legal consequences. First, the portion of *Sackett* on which the panel relies (Op. at 3-4 (quoting 132 S. Ct. at 1373)) does not address the issue of finality, but instead the separate issue, not in dispute here, whether the CWA precluded review judicial review of the compliance order. Second, *Sackett* is distinguishable because the Supreme Court identified independent legal consequences of the administrative compliance order that materially increased the landowner's obligations and the potential legal consequences it faced for violating

the CWA. Jurisdictional determinations share none of the features that *Sackett* found dispositive. *Sackett* explained that the compliance order determined “rights or obligations” because it imposed a “legal obligation” on the Sacketts to “‘restore’ their property according to an agency-approved Restoration Work Plan,” and to give the EPA access to the property and relevant documentation. 132 S. Ct. at 1371 (quoting *Bennett*, 520 U.S. at 178). The jurisdictional determination does not share these features, as it neither imposes a restoration obligation nor requires Hawkes to give the Corps or EPA access to its property. *Sackett* concluded that “‘legal consequences . . . flow’ from issuance of the order” because, under the CWA, a landowner can be liable for penalties for violating the compliance order itself, in addition to penalties for violating the statute. *Id.* (quoting *Bennett*, 520 U.S. at 178, and assuming without deciding that the Sacketts faced penalties for violating the order in addition to violating the CWA). The jurisdictional determination does not share that feature either, as there is nothing in a jurisdictional determination that can be violated or that provides for additional penalties for “violating” a jurisdictional determination. The *Sackett* compliance order also “severely limit[ed] the Sacketts’ ability to obtain a permit for their fill” under Corps regulations. *Id.* at 1372. The jurisdictional determination has no such effect. In sum, a jurisdictional determination imposes none of the legal obligations that were dispositive in *Sackett*. See *Belle*, 761 F.3d at 391-94.²

² The concurring opinion here cites to Justice Ginsburg’s concurring opinion in *Sackett*, which indicates that Justice Ginsburg believed that while the Sacketts “may

The panel also relies on two supposed consequences of the jurisdictional determination that are practical rather than legal, and thus do not satisfy the second prong of *Bennett*. First, the panel posits that, if Hawkes were to move forward with the projects without a permit, the jurisdictional determination means that its violations would be knowing, “expos[ing] them to substantial criminal monetary penalties and even imprisonment for a knowing CWA violation.” Op. at 11. But the Act does not assign any weight or function to a jurisdictional determination; in fact, the Act does not mention jurisdictional determinations at all. And any number of non-final agency warnings or opinion letters—or even a private consultant’s report—could have the same potential effect.

Second, the panel states that the jurisdictional determination has the required legal consequence because “[i]n reality it has a powerful coercive effect.” Op. at 12 (quoting *Bennett*, 520 U.S. at 169). The jurisdictional determination, however, does not have any legally coercive effect, as it does not trigger any legal consequences beyond those imposed by the statute. Those statutory requirements—including the statutorily-imposed choice between applying for a permit or proceeding without one

immediately litigate their jurisdictional challenge in federal court,” the Court’s opinion did not resolve whether the Sacketts could challenge the terms of the compliance order. 132 S. Ct. at 1374-75. Justice Ginsburg’s concurrence, however, does not say that the Sacketts can bring that challenge because EPA’s conclusion that the Sacketts’ property contains waters of the United States effects a legal change. The Court’s opinion, which she joined, explains why the administrative compliance order is final agency action under *Bennett*, relying on characteristics of the compliance order that are not found in the jurisdictional determination, as explained above.

and facing a potential enforcement action—are the same even if the Corps does not issue a jurisdictional determination.³ Moreover, the panel’s quote from *Bennett* comes from that opinion’s discussion of standing, not finality, and the coercive effect of the agency action in *Bennett* was because of the agency action’s “central role” in the “statutory scheme” and because the action “alter[ed] the legal regime” and functioned as a permit. *Bennett*, 520 U.S. at 169-70, 178.

The other cases cited by the panel (Op. at 9-10) to support its holding are inapposite; they address administrative orders and regulations that imposed immediate legal consequences not imposed by the statute itself. In *Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970), the Court addressed an agency order altering a fee structure, thus imposing immediate “legal consequences” not imposed by the statute itself. *Id.* at 70-71. Similarly in *Frozen Food Express v.*

³ To the extent that the panel is correct that ambiguity in the CWA or implementing regulations has the practical effect of coercing landowners to take or refrain from taking certain actions because the exact scope of the CWA’s reach is not clear, Op. at 11-12, this would be at least equally if not more so in the *absence* of a jurisdictional determination. Any coercion thus does not stem from the jurisdictional determination itself. Moreover, any number of statutes contain ambiguities as to how they may apply in any given factual context and the mere fact that an agency responds to an individual’s inquiry as to how a statute might apply to that individual says nothing as to whether *Bennett’s* requirements for final agency action under the APA have been met. Finally, the Corps and EPA have just promulgated a rule further defining “waters of the United States” that “provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities . . . would need to make jurisdictional determinations on a case-specific basis.” Clean Water Rule: Definition of “Waters of the United States,” Final Rule Prepublication Version, *available at* <http://www2.epa.gov/cleanwaterrule/prepublication-version-final-clean-water-rule>, at 3.

United States, 351 U.S. 40 (1956), the Court addressed an agency order exercising the agency's authority to determine the commodities that fell within a statutory exemption to a permitting requirement. *Id.* at 41-42. That order was final and reviewable because it established a rule of general applicability that had the force of law and would immediately cause the industry to alter its conduct. *Id.* at 44. And in both *Abbott Laboratories v. Gardner*, 387 U.S. 136, 150-53 (1967), and *Columbia Broadcasting System v. United States*, 316 U.S. 407, 411-12, 417-23 (1942), the Supreme Court addressed agency promulgations of regulations that changed legal standards. The jurisdictional determination at issue here, by contrast, simply expressed the agency's view as to whether a particular site contains waters within the CWA's coverage. It did not alter legal obligations or otherwise change any legal standards.

CONCLUSION

For all of these reasons, the Corps' jurisdictional determination does not determine legal rights or obligations, and legal consequences do not flow from it. It is the CWA itself that imposes obligations. The panel's erroneous application of *Bennett's* second prong is wrong and conflicts with the decisions from the Fifth and Ninth Circuits. The Court should grant this petition.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General

/s/ Robert J. Lundman
DANIEL R. DERTKE
JENNIFER SCHELLER NEUMANN
ROBERT J. LUNDMAN
U.S. Department of Justice
Environment & Natural Resources Div.
P.O. Box 7415
Washington, DC 20044
Phone: (202) 514-2496
Fax: (202) 353-1873
robert.lundman@usdoj.gov

June 9, 2015
90-5-1-5-19701

**CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a) & (c),
35(b)(2), AND 40(b), AND LOCAL RULE 28A(h) (VIRUS SCANNING)**

1. This petition complies with the page limitation of Fed. R. App. P. 32(a) & (c), 35(b)(2), and 40(b) because it is 15 pages.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (14-point Garamond) using Microsoft Office Word 2013.
3. I have scanned the pdf of the petition that is being filed electronically for viruses and it is virus free.

/s/ Robert J. Lundman
ROBERT J. LUNDMAN
U.S. Department of Justice
Environment & Natural Res. Div.
P.O. Box 7415
Washington, DC 20044
Phone: (202) 514-5316
Fax: (202) 353-1873
robert.lundman@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2015, the foregoing document was served on all parties or their counsel of record through CM/ECF.

/s/ Robert J. Lundman
ROBERT J. LUNDMAN
U.S. Department of Justice
Environment & Natural Res. Div.
P.O. Box 7415
Washington, DC 20044
Phone: (202) 514-5316
Fax: (202) 353-1873
robert.lundman@usdoj.gov

Attachment: Panel Opinion

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.

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 “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 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 Sackett¹ should also apply in this case, where 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

¹The 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 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).

northwestern Minnesota that contains high quality peat near Hawkes's existing peat-mining 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 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.

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. 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 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 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 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.

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).

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 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.²

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

²The 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.

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 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.

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)

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.

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.
