

# Jurisdictional Determinations: An Important Battlefield in the Clean Water Act Fight

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*This Note provides a broad overview of section 404 of the Clean Water Act and the implications of its implementation regarding what constitutes “waters of the United States.” This Note focuses on the Environmental Protection Agency’s attempt to clarify the jurisdiction of the Clean Water Act through the Clean Water Rule. This Note then examines the Corps’s role in implementing section 404 of the Clean Water Act through the jurisdictional determination process. This Note discusses that process at length, and subsequently turns to the controversy that plagued the Corps’s jurisdictional determination process for years: when a potential section 404 permit applicant can challenge a Corps-issued approved jurisdictional determination in court. This Note describes the cases that led to the Circuit split, namely the Eighth Circuit’s decision in Hawkes v. U.S. Army Corps of Engineers. This Note discusses the implications for the plaintiffs and the Corps based on the Supreme Court’s ruling that approved jurisdictional determinations constitute reviewable final agency action under the Administrative Procedure Act. Last, this Note concludes that the Corps, rather than the courts, is in the best position to resolve the controversy surrounding whether wetlands are protected by section 404 of the Clean Water Act.*

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#### INTRODUCTION

Since the Clean Water Act's (CWA) inception in 1972, environmentalists, property owners, and businesses have repeatedly sued the agencies tasked with implementing it—the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps). Plaintiffs' claims range from alleging that the agency is failing to protect the waters of the United States to alleging that the agency is illegally using the CWA to regulate Americans' everyday lives.<sup>1</sup> The CWA is challenged frequently because it imparts federal jurisdiction over all “navigable waters,” in order to protect “the waters of the United States, including the territorial seas” and wetlands.<sup>2</sup> And, anything deemed to be “waters of the United States” is subject to the CWA and its regulations. These designations carry huge implications for landowners and developers, because a designation means that they have to comply with section 404 of the CWA, which is costly and resource-intensive.<sup>3</sup>

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1. Although the Federal Water Pollution Control Act was first enacted in 1948, it was extensively rewritten and expanded in 1972. This Note will refer to the Clean Water Act as enacted in 1972, and its subsequent amendments. See *Summary of the Clean Water Act*, EPA, <http://www2.epa.gov/laws-regulations/summary-clean-water-act> (last visited Apr. 23, 2016). There have been several notable challenges to federal implementation of the CWA. See *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

2. 33 U.S.C. § 1362(7) (2012). The EPA is still trying to define the phrase “waters of the United States,” but the definition is politically controversial. The current definition, which is being litigated in federal court, is listed in 40 C.F.R. §§ 230.3, 328.3 (2015) (final rule stayed in *In re EPA*, 803 F.3d 804 (6th Cir. 2015)).

3. Section 404 establishes a program to regulate all dredged or fill material that is put into waters of the United States. Unless the dredge or fill is exempted from the section 404 regulation, it needs to be permitted by the Corps. See *Section 404 Permit Program*, EPA, <http://www.epa.gov/cwa-404/section-404-permit-program> (last visited Apr. 23, 2016); see also *Rapanos*, 547 U.S. at 721 (“The

The Supreme Court has already decided several environmental law cases that delineate the CWA's jurisdiction.<sup>4</sup> After these decisions, the Corps and the EPA have modified their procedures for determining CWA jurisdiction by changing the jurisdictional determination (JD) process.<sup>5</sup> Since 1980, the EPA and the Corps have utilized the JD process to categorize a property as "waters of the United States," bringing it within the purview of CWA jurisdiction.<sup>6</sup> Approved JDs are crucial to the Corps's implementation of the CWA, because they are at the heart of the ongoing jurisdiction debates.<sup>7</sup> If a landowner or developer successfully challenges the approved JD's finding of CWA jurisdiction, they may avoid significant regulatory compliance costs by avoiding the need to comply with section 404 requirements.<sup>8</sup>

The JD process can be highly technical and fact specific. A memorandum of understanding between the Corps and the EPA in 1980 established the foundation for the current system of JDs.<sup>9</sup> Jurisdictional findings often turn on the significant nexus test.<sup>10</sup> Thus, it is one of the most controversial components of the CWA.<sup>11</sup> JDs are contentious because of the uncertainty surrounding what constitutes "waters of the United States." Under this system, the Corps is responsible for defining "waters of the United States" based on physical characteristics to determine when property is subject to CWA jurisdiction.<sup>12</sup> The Corps uses a variety of technical methods in making JDs and regularly updates its procedures to reflect the most current Court opinions.<sup>13</sup> Furthermore, in 2007, the Corps published an instructional

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average applicant for an individual permit spends 788 days and \$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915—not counting costs of mitigation or design changes.”).

4. Plaintiffs in *Riverside Bayview Homes*, 474 U.S. 121 (1985), *SWANCC*, 531 U.S. 159 (2001), *Rapanos*, 547 U.S. 715 (2006), and *Sackett v. EPA*, 132 S. Ct. 1367 (2012), to name a few, have challenged the EPA and the Corps's implementation of CWA jurisdiction.

5. See, e.g., U.S. ARMY CORPS OF ENG'RS, GUIDANCE HIGHLIGHTS FOR *RAPANOS* AND *CARABELL* DECISION (2007), [http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa\\_guide/guidhigh\\_06-05-07.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/guidhigh_06-05-07.pdf).

6. See Jurisdiction of Dredged and Fill Program; Memorandum of Understanding, 45 Fed. Reg. 45,018 (July 2, 1980).

7. See U.S. ARMY CORPS OF ENG'RS, NO. 08-02, REGULATORY GUIDANCE LETTER, JURISDICTIONAL DETERMINATIONS 1 (2008), <http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl08-02.pdf> (“An approved JD is 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.”).

8. For example, in *Hawkes Co. v. U.S. Army Corps of Engineers (Hawkes II)*, 782 F.3d 994, 998 (8th Cir. 2015), the Corps told the plaintiffs that section 404 permitting would be so expensive that it would make the peat mining operation uneconomical.

9. See Jurisdiction of Dredged and Fill Program; Memorandum of Understanding, 45 Fed. Reg. 45,018. The Corps's authority to determine “waters of the United States” is codified in 33 C.F.R. § 325.9 (2015).

10. § 328.3(c)(5).

11. The new Clean Water Rule, which seeks to clarify the significant nexus application, already faces challenges by eighteen states. *In re EPA*, 803 F.3d 804, 805 (6th Cir. 2015).

12. § 325.9.

13. The Corps headquarters' website features a section dedicated to CWA guidance in order to notify the Corps, EPA, and the public of the methods used to determine CWA jurisdiction. *CWA*

guidebook<sup>14</sup> that directs field staff on how to determine whether there is a significant nexus between traditionally navigable waters and the water body or wetland at issue.<sup>15</sup> Still, an approved JD that states that there are waters of the United States on a property imposes a significant burden on property owners because it officially determines the precise areas on a property that are subject to section 404. In considering the reasonable alternatives to the current JD process, two things are clear: first, some form of systematic jurisdiction determination under the CWA is necessary; and second, JDs are highly controversial.

On May 31, 2016, the Supreme Court decided that approved JDs constitute “final agency action” under the Administrative Procedure Act (APA).<sup>16</sup> This Note focuses on the implications of the Supreme Court’s decision. Because the Supreme Court ruled that approved JDs are reviewable final agency action, potential permit applicants are able to contest the Corps’s findings in Article III courts.<sup>17</sup> Had the Supreme Court ruled that approved JDs are not ripe for judicial review, potential applicants would have been stuck in their previous predicament: able to seek the Corps’s administrative review, but nothing more.<sup>18</sup>

Prior court decisions and existing policies and procedures mean that approved JDs will remain controversial regardless of the Supreme Court’s ruling. Nevertheless, even though the Court ruled that approved JDs are final agency action, courts will most likely defer to the Corps’s findings in the context of litigation. Furthermore, allowing for judicial review will only increase costs and delay for the Corps and plaintiffs alike. The Corps will likely need to invest additional resources to ensure that approved JDs are litigation

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*Guidance*, U.S. ARMY CORPS OF ENG’RS, <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/RelatedResources/CWAGuidance.aspx> (last visited Apr. 23, 2016).

14. EPA & U.S. ARMY CORPS OF ENG’RS, U.S. ARMY CORPS OF ENGINEERS JURISDICTIONAL DETERMINATION FORM INSTRUCTIONAL GUIDEBOOK (2007).

15. Justice Kennedy articulated the significant nexus test in his concurrence in *Rapanos*, 547 U.S. 715, 759 (2006). He wrote that “wetlands . . . come within the statutory phrase ‘navigable waters,’ if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’ When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’” *Id.* at 780. The new Clean Water Rule reflects Justice Kennedy’s significant nexus test through its use of his exact words from the *Rapanos* concurrence. The Rule states that “[a] water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified [in earlier paragraphs of the rule]” and goes on to list specific functions relevant to the significant nexus determination. § 328.3(c)(5) (2015).

16. *See* U.S. Army Corps of Engineers v. Hawkes Co. (*Hawkes III*), 136 S. Ct. 1807, 1811 (2016) (“The Corps contends that the revised JD is not ‘final agency action’ and that, even if it were, there are adequate alternatives for challenging it in court. We disagree at both turns.”).

17. *See* 5 U.S.C. § 704 (2012) (“Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”). *See also* *Hawkes III*, 136 S. Ct. at 1816 (discussing the APA’s presumption of reviewability).

18. *Cf. id.* (“A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.”).

proof, and plaintiffs will still have to dedicate an enormous amount of resources to challenging an approved JD. As a means for resolving the conflicts that result from the Corps's JD process, I argue that the Corps should instead amend its JD instructional guidebook to include more precise guidelines for its significant nexus test, to streamline the JD process.

This Note first provides the background from which the current JD framework arose, from the standpoint of CWA section 404, the accompanying Clean Water Rule, and the need for the Corps to determine CWA jurisdiction. From there, this Note discusses how the JD process works and analyzes how courts have historically dealt with issues of finality and reviewability that stem from the JD process. This Note then examines the circuit split between the Fifth and Eighth Circuit Courts of Appeal that led to the Supreme Court's granting certiorari, highlighting the shifting viewpoints of the courts. This Note discusses prior Supreme Court decisions that foreshadowed its ruling in *U.S. Army Corps of Eng'rs v. Hawkes Co. (Hawkes III)*. However, regardless of the Court's decision in *Hawkes III*, I propose that the best option moving forward, for both the Corps and potential section 404 permit applicants, is to revise and standardize the process for approved JDs, following the region-specific example set by the Corps's guidance for conducting wetland delineations.

#### I. CWA SECTION 404: CONFLICT AND CONTROVERSY

One of the most controversial aspects of the CWA is section 404, which prohibits the unpermitted discharge of dredge and fill materials into "navigable waters" and authorizes the Corps to issue permits for these activities in certain instances.<sup>19</sup> Section 404 asserts jurisdiction over all "navigable waters," which the CWA defines as "waters of the United States, including the territorial seas."<sup>20</sup> Property owners and developers particularly loathe section 404 because it constrains their ability to develop their property.<sup>21</sup> An especially contentious aspect of section 404 is the uncertainty regarding jurisdiction findings and the Corps's authority to require permits in the first place.

This Part first explains the requirements of the permitting process. Section 404 permitting is complicated by the fact-specific nature of each development site and project.<sup>22</sup> Potential permit applicants must demonstrate to the Corps the precise location of their project and the actions that project entails to apply for a development permit under section 404.<sup>23</sup> A project's location is crucial

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19. 33 U.S.C. § 1344 (2012).

20. § 1362.

21. The Court, in its opinion *Hawkes III*, cited studies finding that landowners and developers had spent thousands of dollars to comply with Corps's permit requirements. 136 S. Ct. at 1812.

22. For example, one type of section 404 permit, the "individual permit," "involves evaluation of individual, project specific applications." *Individual Permits*, U.S. ARMY CORPS OF ENG'RS, <http://www.swf.usace.army.mil/Missions/Regulatory/Permitting/IndividualPermits.aspx> (last visited Apr. 23, 2016).

23. "The [section 404 permit] application must include a complete description of the proposed activity including necessary drawings, sketches, or plans sufficient for public notice . . . ; the location,

because section 404 requires increased scrutiny when permitting a project if it takes place in waters of the United States.<sup>24</sup> Thus, as this Part goes on to explain, the Corps's jurisdiction under the CWA is a hotly contested issue.<sup>25</sup> Finally, this Part explains that recent efforts to modify the definition of "waters of the United States" have been met with staunch resistance, particularly from developers and business interests.<sup>26</sup>

A. *Section 404 Permit Requirements and Implications*

An approved JD identifying that waters of the United States are present on a property requires that landowners and developers comply with section 404 and obtain a project approval permit from the Corps before discharging any material into areas where jurisdictional waters are present.<sup>27</sup> In order to obtain a Corps's project approval permit, a property or landowner must show first that no "practicable alternative exists that is less damaging to the aquatic environment" and that "the nation's waters w[ill not] be significantly degraded."<sup>28</sup> Further,

For activities involving discharges of dredged or fill material into waters of the United States, the [section 404 permit] application must include a statement describing how impacts to waters of the United States are to be avoided and minimized. The application must also include either a statement describing how impacts to waters of the United States are to be compensated for or a statement explaining why compensatory mitigation should not be required for the proposed impacts.<sup>29</sup>

Section 404 permits demand extensive efforts from property owners to protect waters of the United States.<sup>30</sup> This constrains the types of activities that can be pursued on the land and reduces that land's utility.

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purpose and need for the proposed activity; scheduling of the activity; the names and addresses of adjoining property owners; the location and dimensions of adjacent structures; and a list of authorizations required by other federal, interstate, state, or local agencies for the work, including all approvals received or denials already made." 33 C.F.R. § 325.1(d)(1) (2015).

24. *Id.*

25. *Hawkes Co. v. U.S. Army Corps of Engineers*, 782 F.3d 994 (8th Cir. 2015), and *Belle Co. v. U.S. Army Corps of Engineers*, 761 F.3d 383 (5th Cir. 2014), both focus on this issue.

26. The fight over the new Clean Water Rule has made its way to Congress, where some members are trying to block the rule. So far, President Obama has vetoed congressional efforts to block the Clean Water Rule. Greg Korte, *Obama Vetoes Attempt to Kill Clean Water Rule*, USA TODAY (Jan. 19, 2016, 8:48 PM), <http://www.usatoday.com/story/news/politics/2016/01/19/obama-vetoes-attempt-kill-clean-water-rule/79033958/>.

27. 33 U.S.C. § 1344(a) (2012).

28. *Section 404 Permit Program*, EPA, <http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/> (last visited Apr. 23, 2016); *see also* § 1344.

29. 33 C.F.R. § 325.1(d)(7) (2015).

30. *See Rapanos v. United States*, 547 U.S. 715, 721 (2006) ("The average applicant for an individual Corps permit spends 788 days and \$271,596 in completing the process.").

B. *The Jurisdictional Problem*

Section 404 permits often require significant resource and labor investments by the landowner or developer, as demonstrated in the Eighth Circuit's decision in *Hawkes Co. v. U.S. Army Corps of Engineers (Hawkes II)*, which I discuss in full in Part III.<sup>31</sup> In this case, the plaintiff, Hawkes Company (Hawkes), a peat mining company, sought to mine peat<sup>32</sup> from a 530-acre property to use in a golf course.<sup>33</sup> In *Hawkes II*, the Corps determined that there was a significant nexus between wetlands on Hawkes' property and the Red River of the North, even though Hawkes's property was 120 miles away from the river.<sup>34</sup> This determination is illustrative of the CWA's potentially far-reaching jurisdiction.

Because the Corps's approved JD found that Hawkes' land contained waters of the United States, Hawkes would have had to apply for an individual permit to conduct peat mining.<sup>35</sup> Instead, Hawkes filed an administrative appeal of the approved JD. The Corps issued a revised JD, which again found

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31. The Corps is divided into nine divisions, each of which is subdivided into districts based on geographic location. *Where We Are*, U.S. ARMY CORP OF ENG'RS, <http://www.usace.army.mil/Locations.aspx> (last visited Apr. 23, 2016). There are several different types of section 404 permits, which fall under two main categories: general permits and individual permits. § 325.5. The Corps generally issues general permits for activities that have less intensive environment impacts. 40 C.F.R. § 230.7 (2015). If a project cannot meet the requirements of a general permit, the Corps will issue an individual permit to the applicant. 40 C.F.R. § 325.5 (discussing the different types of permits; individual permits are granted on an individual basis, while general permits are more broadly applicable). 33 C.F.R. § 320.4 describes the process of review for individual permit applications, which includes a multitude of "public interest review factors." These public interest factors include compliance with the National Environmental Policy Act, the National Historic Preservation Act, the Endangered Species Act, and others. § 320.4(j)(4). Individual permits may also require mitigation: "[c]onsideration of mitigation will occur throughout the permit application review process and includes avoiding, minimizing, rectifying, reducing, or compensating for resource losses. Losses will be avoided to the extent practicable. Compensation may occur on-site or at an off-site location." § 320.4(r)(1). There is some variability in practice between the different Corps's districts, but the overarching section 404 program is consistent throughout the United States. 33 C.F.R. § 325.4 (2015).

32. Peat is characteristic of bogs and marshy areas, which are a type of wetland under the CWA and therefore falls within CWA jurisdiction if the Corps determines that there is a significant nexus between the wetland and another established water of the United States. *See* U.S. Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807, 1812 (2016) ("Peat is an organic material that forms in waterlogged grounds, such as wetlands and bogs . . . It is widely used for soil improvement and burned as fuel."). *See also* 33 C.F.R. § 328.3 (2015) (defining "waters of the United States," which could include wetlands used for peat mining, if a significant nexus exists with another water of the United States.).

33. *Hawkes Co. v. U.S. Army Corps of Eng'rs (Hawkes I)*, 963 F. Supp. 2d 868, 870 (D. Minn. 2013).

34. The Corps's draft JD, which the court eventually upheld after the plaintiff's administrative appeal "[concluded] 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." *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 998 (8th Cir. 2015).

35. Hawkes "argued the JD [wa]s final by its own terms and that the JD changed [its] legal rights or obligations because [it was then] required to obtain an individual federal permit, at great cost, or subject [itself] to an enforcement action if it proceeded with the[] project without a federal permit." Appellants' Opening Brief at 5, *Hawkes II*, 782 F.3d 994 (8th Cir. 2015), No. 13-3067, 2013 WL 6069374, at \*5.

that Hawkes's project would require a section 404 permit application.<sup>36</sup> At this point, Hawkes had exhausted its administrative remedies, and filed a claim in federal court "seeking judicial review of the Revised JD, alleging that it d[id] not meet either of the applicable tests for the assertion of CWA jurisdiction established [by the Supreme Court] in *Rapanos*—the plurality's 'relatively permanent' test, or Justice Kennedy's 'significant nexus' test."<sup>37</sup>

Hawkes understandably chose to challenge the approved and revised JDs rather than rely on the permit process. Prior to the Corps issuing the approved JD, it had repeatedly told Hawkes that the proposed peat-mining operation was not suitable for the property, "emphasizing the delays, cost, and uncertain outcome of the permitting process."<sup>38</sup> The Corps also "sent Hawkes a letter advising that nine additional information items costing more than \$100,000 in total would be needed."<sup>39</sup> At a later meeting with the landowner, the Corps told Hawkes to "sell the property to a 'wetlands bank,' advising that an environmental impact statement would likely be required if the peat mining operation was to go forward, delaying the issuance of any permit for several years."<sup>40</sup> Finally, a "Corps representative told a Hawkes employee that 'he should start looking for another job.'"<sup>41</sup> This threat of financial burden and administrative delay was not unique to Hawkes' situation. Indeed, the Eighth Circuit in *Hawkes II* repeated the Supreme Court's observation from *Rapanos v. United States* that "the average applicant for an individual Corps permit 'spends 788 days and \$271,596 in completing the process.'"<sup>42</sup>

The Eighth Circuit characterized the Corps's interaction with Hawkes and the landowners as the agency "strong-arming . . . regulated parties into 'voluntary compliance' without the opportunity for judicial review," analogizing to a Supreme Court case that disapproved of similar agency behavior.<sup>43</sup> In *Hawkes II*, the Eighth Circuit was disconcerted by the compliance costs that section 404 imposed on Hawkes.<sup>44</sup> The Corps's regulatory authority under CWA section 404 has been characterized by both landowners and courts—like the Eighth Circuit in *Hawkes II*—as agency overreach because of the Corps's assertion of jurisdiction in questionable circumstances.<sup>45</sup> In an effort to reset the issues surrounding section 404

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36. *Hawkes II*, 782 F.3d at 998.

37. *Id.* at 999.

38. *Id.* at 998.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 1001 (quoting *Rapanos v. United States*, 547 U.S. 715, 721 (2006)).

43. *Id.* at 1002 (quoting *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012)); see also Richard Frank, *Supreme Court Sides with Property Owners in Wetlands Dispute with USEPA*, LEGAL PLANET (Mar. 21, 2012), <http://legal-planet.org/2012/03/21/supreme-court-sides-with-property-owners-in-wetlands-dispute-with-usepa/>. In *Hawkes II*, the Eighth Circuit did not directly apply the quote to the specifics of Hawkes' situation, but rather to the Corps's general approach to JDs. *Hawkes II*, 782 F.3d at 1002.

44. *Hawkes II*, 782 F.3d at 1001.

45. *Id.* at 1002.

jurisdiction, the EPA and the Corps elaborated upon the definition of the phrase “waters of the United States” in the Clean Water Rule.<sup>46</sup>

*C. The Clean Water Rule Does Not Fully Resolve the Issue of CWA Jurisdiction*

There has been widespread and continuous disagreement over what constitutes “waters of the United States.” The Supreme Court has attempted to resolve the uncertainty in several well-known CWA cases, but to no avail.<sup>47</sup> Observers have commented that the Court’s decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)* and *Rapanos* further muddied the understanding of “waters of the United States” and the limits of the agencies’ jurisdiction.<sup>48</sup> Commentators have also pointed out that because of the confusion left in the wake of *SWANCC* and *Rapanos*, additional guidance was needed to clarify CWA jurisdiction.<sup>49</sup> Thus, in response to requests by “[m]embers of Congress, developers, farmers, state and local governments, energy companies, and many others . . . to make the process of identifying waters subject to the CWA clearer, simpler, and faster,” the Corps and the EPA jointly promulgated the Clean Water Rule.<sup>50</sup>

The new Clean Water Rule attempts to reduce the number of instances where case-specific findings are necessary to determine CWA jurisdiction. It specifies the types of waterbodies that are subject to, and excluded from, CWA jurisdiction, and clarifies when case-specific analysis is needed.<sup>51</sup> The Corps and the EPA claim that “the scope of jurisdiction under this rule is narrower

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46. See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,056 (June 29, 2015) (codified at 33 C.F.R. pt. 328, 44 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, 401) [hereinafter Clean Water Rule] (“Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster . . . In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.”).

47. See *Rapanos v. United States*, 547 U.S. 715 (2006); *SWANCC*, 531 U.S. 159 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

48. Professor Christopher Brooks commented that “the *Rapanos* decision failed to establish a bright-line rule for jurisdiction and instead created two divergent tests that are difficult to apply with clarity and consistency. To this day, the ‘precise reach of the [CWA] remains unclear.’” Christopher Brooks, *Clean Water Act Confusion: Federal Courts Split on Application of the Rapanos Decision*, 18 No. 4 ABA Agric. Mgmt. Committee Newsl. 9, 9 (2014) (quoting *Sackett*, 132 S. Ct. at 1355 (alteration in original)).

49. Jennifer L. Baader, *Permits for Puddles?: The Constitutionality and Necessity of Proposed Agency Guidance Clarifying Clean Water Act Jurisdiction*, 88 Chi.-Kent L. Rev 621, 624 (2013).

50. Clean Water Rule, *supra* note 46.

51. The new rule “provides for case-specific determinations under more narrowly targeted circumstances based on the agencies’ assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditionally navigable waters, interstate waters, and the territorial seas.” Clean Water Rule, *supra* note 46 at 37,086.

than that under the existing regulation,”<sup>52</sup> while the new rule’s opponents from the development community claim the opposite.<sup>53</sup>

Unfortunately, it is unlikely that the new Clean Water Rule will resolve the uncertainty surrounding the “significant nexus” criteria established in *Rapanos*.<sup>54</sup> The new rule states that “[t]he term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water [previously identified as waters of the United States].”<sup>55</sup> So far, the new rule’s definition of “significant nexus” has been hotly contested<sup>56</sup> and skeptical courts will likely continue to chastise the EPA for the rule’s vagueness.<sup>57</sup> In addition, the Corps anticipates that the new rule will result in “an estimated increase of between 2.84 and 4.65 percent in positive jurisdictional determinations annually,” making it especially unpopular among land developers.<sup>58</sup> At the time of writing, eighteen states have sued the EPA in order to obtain an injunction against the rule,<sup>59</sup> vowing to get it revoked.<sup>60</sup> The controversy surrounding the new rule and its alleged inability to provide clear guidelines could mean that JDs will be contested more frequently than ever, at the expense of section 404 permit applicants—who may need to expend additional time and money when challenging the Corps’s JDs—and for the Corps as well.<sup>61</sup>

52. *Id.*

53. *In re EPA*, 803 F.3d 804, 806 (6th Cir. 2015).

54. Language that is inherently subject to disagreement still permeates the rule, and as a result, will probably lead to disagreements between landowners/developers and regulatory agencies. See 33 C.F.R. § 328.3(c)(5) (2015). In *Permits for Puddles?: The Constitutionality and Necessity of Proposed Agency Guidance Clarifying Clean Water Act Jurisdiction*, Jennifer Baader writes, “[s]ince significant nexus determinations often need to be made on a case-by-case basis, there is also a likelihood that application of the test will vary widely from court to court.” *Baader*, *supra* note 49 at 631.

55. *Id.*

56. See *In re EPA*, 803 F.3d at 807 (challenging § 328.3(c)(5)). Petitioners “claim that the Rule’s treatment of tributaries, ‘adjacent waters,’ and waters having a ‘significant nexus’ to navigable waters is at odds with the Supreme Court’s ruling in *Rapanos*.” *Id.* at 807.

57. See, e.g., *Hawkes Co. v. U.S. Army Corps of Eng’rs*, 782 F.3d 994, 1002 (8th Cir. 2015) (quoting *Rapanos v. United States*, 547 U.S. 715, 727–28 (2006)) (“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.’”).

58. Clean Water Rule, *supra* note 46 at 37,101.

59. The Sixth Circuit granted the petitioners’ request for a stay of the Clean Water Rule until the court completes its review of the rule. *In re EPA*, 803 F.3d at 806.

60. North Dakota Attorney General Wayne Stenehjem, referring to the U.S. District Court for the District of North Dakota’s injunction against the EPA, stated, “[t]his is a victory in the first skirmish, but it is only the first. There is much more to do to prevent this widely unpopular rule from ever taking effect.” Larry Dreiling, *EPA: Clean Water Rule in Effect Despite Court Ruling*, High Plains/Midwest Ag Journal (Sept. 7, 2015, 12:00 AM), [http://www.hpj.com/ag\\_news/epa-clean-water-rule-in-effect-despite-court-ruling/article\\_3264f283-a356-5794-b7a6-efaf0490c20b.html](http://www.hpj.com/ag_news/epa-clean-water-rule-in-effect-despite-court-ruling/article_3264f283-a356-5794-b7a6-efaf0490c20b.html).

61. M. Reed Hopper, Principal Attorney for the Pacific Legal Foundation, wrote: “In our view, the new [Clean Water Rule] is even more controversial than the current rules defining jurisdiction. So, I expect JDs to be highly controversial until the Supreme Court rules on the validity of the new rule.” E-

CWA jurisdiction over isolated wetlands under the new Clean Water Rule carries significant implications in regions like Northern Minnesota, an area that features many wetlands,<sup>62</sup> including the one in *Hawkes II*. Minnesota “has an estimated 7.5 million acres of peatlands” that “[provide a] significant economic benefit to the state, employing about 200 people and adding approximately \$10 million annually to the rural economy.”<sup>63</sup> Minnesota also contains “35 [percent] of the total peatlands in the lower [forty-eight] states.”<sup>64</sup> The University of Minnesota’s Natural Resources Research Institute recently wrote that the demand for its “Peat Group’s assistance with environmental review and permitting for expansions and new operations is steadily increasing as environmental regulations become more stringent and complex.”<sup>65</sup> Increasingly strenuous regulations mean increasing difficulties for peat mining because the mining takes place in bogs and wetlands that could be subject to CWA regulations.<sup>66</sup>

In October 2015, the Sixth Circuit issued a nationwide stay on the implementation of the Clean Water Rule while parties submit more information for the court to determine “the burden . . . and the impact on the public in general, implicated by the Rule’s effective redrawing of jurisdictional lines over certain of the nation’s waters.”<sup>67</sup> The Sixth Circuit’s eventual determination<sup>68</sup> on the validity of the new Clean Water Rule could have significant implications for peat-mining lands like the property in *Hawkes II*.<sup>69</sup> However, regardless of the ultimate outcome in the Clean Water Rule litigation, the unpredictability of significant nexus findings, made apparent in CWA JDs, will still loom large for property owners and developers.<sup>70</sup>

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mail from M. Reed Hopper, Principal Attorney, Pac. Legal Found., to author (Sept. 30, 2015, 9:35 AM) (on file with author).

62. Much of Minnesota’s peatlands are in its sparsely populated northern region. *See Peatlands, Bogs, and Fens*, MINN. DEP’T OF NAT. RESOURCES, <http://www.dnr.state.mn.us/snas/peatlands.html> (last visited May 31, 2016).

63. *Permitting Horticultural Peat Operations*, Univ. of Minn. Duluth, Ctr. for Applied Res. & Tech. Dev., <http://www.nri.umn.edu/cartd/peat/horticultural.htm>. (last visited Apr. 24, 2016).

64. KURT JOHNSON, Univ. of Minn., Duluth Nat. Res. Research Inst., *THE HORTICULTURAL PEAT INDUSTRY IN MINNESOTA*, <http://www.nri.umn.edu/cartd/peat/Reports/HortPeat06.pdf> (last visited Apr. 24, 2016).

65. *Permitting Horticultural Peat Operations*, *supra* note 63.

66. *See Mining in Minnesota*. MINN. DEP’T OF NAT. RES., <http://www.dnr.state.mn.us/education/geology/digging/mining.html> (last visited Apr. 24, 2016) (“Peat is formed by partially decomposing plant material in wet environments, such as bogs or fens, where more plant material is produced than is decomposed.”).

67. *In re EPA*, 803 F.3d 804, 808 (6th Cir. 2015).

68. In February 2016, the Sixth Circuit determined that it has jurisdiction to decide the issue, and has denied en banc review. *See* Amena H. Saiyid, *Full Sixth Circuit Won’t Review Water Rule Venue Question*, BLOOMBERG BNA (Apr. 22, 2016), <http://www.bna.com/full-sixth-circuit-n57982070204/>. *See In re U.S. Dep’t of Def.*, No. 15-3839, 2016 WL 723241 (6th Cir. Feb. 22, 2016).

69. If the Sixth Circuit upholds the new rule, there is a chance that peat-mining lands such as those at issue in *Hawkes* could fall within the CWA’s scope. *See In re EPA*, 803 F.3d 804, 808 (6th Cir. 2015); 33 C.F.R. § 328.3(a)(7) (2015).

70. Groups such as the American Farm Bureau are adamant in their efforts to repeal the new rule. *See DITCH THE RULE*, <http://ditchtherule.fb.org/> (last visited Apr. 24, 2016). However, if the Sixth

Determining what areas are subject to regulation under the CWA remains a contentious and unsettled issue despite the EPA's and the Corps's joint promulgation of the Clean Water Rule to resolve that very issue. This is an unfortunate phenomenon because the rule's ostensible purpose is to clarify what constitutes "waters of the United States"<sup>71</sup> and the definition of the term "significant nexus."<sup>72</sup>

## II. THE ROLE OF APPROVED JDS

JDs are necessary to determine the geographic boundaries of CWA jurisdiction, and they are a key component of the section 404 permitting process, but they remain controversial.<sup>73</sup> Some controversy stems from the inherently difficult question of what constitutes waters of the United States, and other controversy arises because of the administrative process that the Corps follows for JDs. Under the Corps's JD process, a landowner or developer has the option of requesting a preliminary or an approved JD.<sup>74</sup> Approved JDs (and, to a lesser extent, preliminary JDs) are necessary to minimize projects' impacts on water systems by demarcating where waters of the United States are (or in the case of preliminary JDs, may be) located.<sup>75</sup> If the landowner or developer is unsatisfied with an approved JD, he or she can challenge the findings via the Corps's administrative appeal process.<sup>76</sup>

### A. *The JD Process*

The Corps uses JDs to implement section 404 of the CWA.<sup>77</sup> Landowners, permit applicants, and "affected parties" can request that the Corps issue either

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Circuit holds that the rule is invalid, then the prior version of the rule will apply—which the EPA and the Corps, in the preamble to the Clean Water Rule, explained needed clarification. *See In re EPA*, 803 F.3d at 806 (6th Cir. 2015) (writing that the status quo is the time before the Clean Water Rule went into effect, on August 28, 2015).

71. "In this final rule, the agencies clarify the scope of 'waters of the United States' that are protected under the Clean Water Act (CWA), based upon the text of the statute, Supreme Court decisions, the best available peer-reviewed science, public input, and the agencies' technical expertise and experience in implementing the statute. This rule makes the process of identifying waters protected under the CWA easier to understand, more predictable, and consistent with the law and peer reviewed science, while protecting the streams and wetlands that form the foundation of our nation's water resources."

Clean Water Rule, *supra* note 46 at 37,055.

72. The new rule focuses extensively upon defining "significant nexus" and includes much discussion on how to apply the term. *See* Clean Water Rule, *supra* note 46. Significant-nexus determinations are a large portion of the total number of JDs. "The agencies . . . have made more than 400,000 CWA jurisdictional determinations since 2008. Of those, more than 120,000 are case-specific significant nexus determinations." *Id.* at 37,065.

73. *See* U.S. ARMY CORPS OF ENG'RS, *supra* note 7, at 1.

74. *Id.* at 1.

75. The purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251 (2012).

76. *See* U.S. ARMY CORPS OF ENG'RS, *supra* note 7, at 2.

77. *See id.* at 1.

a preliminary JD or an approved JD, which differ in terms of their purpose and reviewability.<sup>78</sup> Landowners, developers, and affected parties are not required to obtain JDs.<sup>79</sup> Rather, the Corps carries out JDs at the request of the landowner, developer, or affected party. The Corps's guidance documents state that the potential permit applicant can still obtain a section 404 individual or general permit authorization based on a preliminary JD, or even without a JD.<sup>80</sup> JDs, however, notify potential permit applicants of what to include in their permit application and the issues that could arise when developing or making changes to the relevant property. Finally, the Corps seems to indicate that, as long as the section 404 permit application is entirely compliant with section 404, the Corps will issue the permit without an approved JD.<sup>81</sup>

Although JDs are not required, they carry certain advantages for applicants. Preliminary JDs are not legally binding "written indications that there may be waters of the United States, including wetlands, on a parcel or indications of the approximate locations of waters of the United States or wetlands on a parcel."<sup>82</sup> Preliminary JDs treat all waters and wetlands as if they are waters of the United States so that the project can move forward without ascertaining—via an approved JD—whether a wetland area is subject to section 404.<sup>83</sup> Further, "[p]reliminary JDs are advisory in nature and may not be

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78. The Corps defines an "affected party" as "a permit applicant, landowner, a lease, easement, or option holder (i.e., an individual who has an identifiable and substantial legal interest in the property)." 33 C.F.R. § 331.2 (2015).

79. See U.S. ARMY CORPS OF ENG'RS, QUESTIONS AND ANSWERS ON REGULATORY GUIDANCE LETTER 08-02, at 1 (2008), [http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl08-02\\_qafinal.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl08-02_qafinal.pdf) ("For situations where there is no activity jurisdiction or an activity is exempt under Section 404(f) of the Clean Water Act and not recaptured, preparation of a 'no permit required' letter is adequate, and no JD is required, so long as that letter makes clear that it is not addressing geographic jurisdiction. If an activity is exempt from the requirement to obtain a Department of the Army permit, it is not necessary to do a formal JD because the jurisdictional status of the affected aquatic feature(s) does not weigh into the exemption decision.").

80. The Corps does not specify any circumstances that require the property owner, developer, or affected party to obtain a JD, but states that "in appropriate circumstances," the section 404 permit applicant can obtain the permit without a JD. The Corps further states that it "will determine what form of JD is appropriate for any particular circumstance based on all the relevant factors, to include, but not limited to, the applicant's preference, what kind of permit authorization is being used (individual permit versus general permit), and the nature of the proposed activity needing authorization." U.S. ARMY CORPS OF ENG'RS, *supra* note 7, at 2–3.

81. "While a landowner, permit applicant, or other 'affected party' can elect to request and obtain an approved JD, he or she can also decline to request an approved JD, and instead obtain a Corps individual or general permit authorization based on either a preliminary JD, or, in appropriate circumstances (such as authorizations by non-reporting nationwide general permits), no JD whatsoever. The Corps will determine what form of JD is appropriate for any particular circumstance based on all the relevant factors . . ."

*Id.* at 2–3.

82. 33 C.F.R. § 331.2 (2015).

83. See SAINT PAUL DIST., U.S. ARMY CORPS OF ENG'RS, REQUEST FOR CORPS OF ENGINEERS WETLAND DELINEATION REVIEW, [http://www.mvp.usace.army.mil/Portals/57/docs/regulatory/RegulatoryDocs/wet\\_del\\_con\\_submittal\\_v.2.pdf](http://www.mvp.usace.army.mil/Portals/57/docs/regulatory/RegulatoryDocs/wet_del_con_submittal_v.2.pdf) (last visited Apr. 24, 2016).

appealed.”<sup>84</sup> The main advantage of a preliminary JD for potential permit applicants is its expedited timeline.<sup>85</sup>

In contrast, an approved JD “is 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.”<sup>86</sup> Landowners, permit applicants, and other affected parties can rely on the JD for five years.<sup>87</sup> It can be immediately appealed through the Corps’s administrative appeals process, and it can be presented by the recipient as an official Corps’s finding if a party brings a CWA citizen’s suit to challenge the legitimacy of the JD or its findings.<sup>88</sup> Landowners, developers, and affected parties have the discretion to request either a preliminary or approved JD, and they will not be penalized for their choice.<sup>89</sup>

Although the Corps’s district offices employ slightly different procedures regarding the intricacies of JDs—such as the format of JD request forms—the overall standards apply nationwide.<sup>90</sup> Due to resource constraints and the complexity of wetland delineations, the Corps encourages potential section 404 permit applicants to use private environmental consultants to perform the initial wetland delineations, depending on the size of the parcel.<sup>91</sup> The Corps’s JD process, therefore, often consists of its review of environmental consultants’ prior wetland delineations.<sup>92</sup> This can save an enormous amount of time for both the Corps and party who requested the JD.<sup>93</sup> In theory, a landowner or developer could request a JD without providing these initial delineations to the Corps, but the agency’s resource and staff constraints mean that the application

84. § 331.2.

85. “A landowner, permit applicant, or other ‘affected party’ may elect to use a preliminary JD to voluntarily waive or set aside questions regarding CWA[ ] jurisdiction over a particular site, usually in the interest of allowing the landowner or other ‘affected party’ to move ahead expeditiously to obtain a Corps permit authorization.”

U.S. ARMY CORPS OF ENG’RS, *supra* note 7, at 3.

86. *Id.* at 2.

87. Subject to the limitation that approved JDs are valid for five years “unless new information warrants revision of the determination before the expiration date, or a District Engineer identifies specific geographic areas with rapidly changing environmental conditions that merit re-verification on a more frequent basis.” U.S. ARMY CORPS OF ENG’RS, REGULATORY GUIDANCE LETTER NO. 05-02, EXPIRATION OF GEOGRAPHIC JURISDICTIONAL DETERMINATIONS OF WATERS OF THE UNITED STATES 1 (2005), <http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl05-02.pdf>.

88. U.S. ARMY CORPS OF ENG’RS, *supra* note 7, at 2.

89. *See id.* at 3.

90. Telephone interview with Corps staff member, U.S. Army Corps of Eng’rs Headquarters, Washington, D.C., Regulatory (Permits) Section (Sept. 28, 2015).

91. For example, the Saint Paul District—the Corps district in which the Hawkes property is located—publishes an updated list of environmental consultants on its website. SAINT PAUL DIST., U.S. ARMY CORPS OF ENG’RS, WETLAND CONSULTANTS LIST (2015), <http://www.mvp.usace.army.mil/Portals/57/docs/regulatory/Consultants/05-August-2015%20Wetland%20Consultants%20List.pdf>.

92. *See* Margaret “Peggy” Strand & Lowell M. Rothschild, *What Wetlands Are Regulated? Jurisdiction of the §404 Program*, 40 ENVTL. L. REP. NEWS & ANALYSIS 10,372, 10,374 (2010) (“Frequently, property owners will use the services of a well-respected private consultant to prepare a JD, and submit that work to the appropriate Corps district office for review and approval.”).

93. *See* U.S. ARMY CORPS OF ENG’RS, *supra* note 79, at 1.

process would be unreasonably lengthy.<sup>94</sup> However, the environmental consultants charge the applicants for the work that the Corps would otherwise have to do, shifting the burden onto the applicant to produce all of the required findings necessary for a JD. Even though the Corps does not impose an application fee,<sup>95</sup> the potential permit applicant would need to spend money for consultant services in order to avoid particularly lengthy application waits.

Once issued, an approved JD can be contested through the Corps's administrative appeals process if the Corps issues a Notification of Appeal Process fact sheet, a Request for Appeal (RFA) form, and a basis for the JD.<sup>96</sup> A dissatisfied party can then appeal an approved JD by submitting a Request for Appeal (RFA) form.<sup>97</sup> For an appeal to be processed, the appropriate Corps division engineer must receive the appellant's RFA within sixty days of the date of the Notification of Appeal Process fact sheet.<sup>98</sup> The Corps then reviews the RFA and notifies the appellant within thirty days after receiving it whether the request for appeal is acceptable.<sup>99</sup> If the Corps determines that the appeal is acceptable, then the Corps may decide to meet with the appellant or conduct a subsequent site investigation.<sup>100</sup> The Corps's regulations specify that if a meeting is held between the appellant and the Corps to discuss the JD, "the appellant will bear his own costs associated with necessary arrangements, exhibits, travel, and representatives."<sup>101</sup> The Corps's reviewing officer renders a final decision on the merits within ninety days of the receipt of an acceptable RFA, either directing the Corps to remand the JD with specific instructions for reconsideration or upholding the Corps's decision.<sup>102</sup> At this point, the appellant has exhausted the Corps's administrative remedies.<sup>103</sup> The Corps maintains that at this point, the appellant has two options: (1) complete the section 404 permit process and, if the Corps denies the permit, challenge the decision in court; or (2) completely disregard the section 404 permit requirements and challenge any subsequent Corps's enforcement action in an Article III court.<sup>104</sup>

Both of these options will create justiciable claims under the APA. The APA allows for judicial review of final agency decisions by Article III courts

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94. Telephone Interview with Corps staff member, U.S. Army Corps Headquarters, Washington, D.C., Regulatory (Permits) Section (Sept. 28, 2015).

95. *Id.*

96. Only approved JDs can be appealed; preliminary JDs cannot be appealed. 33 C.F.R. § 331.4 (2015).

97. "An affected party appealing an approved JD, permit denial or declined permit must submit an RFA that is received by the division engineer within 60 days of the date of the NAP." § 331.6(a). An appellant cannot contest an approved JD without submitting an RFA. *See* § 331.5(a)(1).

98. § 331.5(a)(1).

99. § 331.8.

100. § 331.7(b)-(d).

101. § 331.7(d).

102. §§ 331.8, 331.10.

103. § 331.12.

104. *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 1001 (8th Cir. 2015).

unless a specific statute says otherwise.<sup>105</sup> However, ripeness standards also restrict courts from interfering with agency decision making.<sup>106</sup> In addition to satisfying finality and ripeness requirements, plaintiffs filing suit under the APA need to exhaust agency remedies before seeking judicial review of agency action.<sup>107</sup> Thus, under the APA, a plaintiff challenging agency action needs to show that (1) the action was final, not intermediate; (2) the case is ready, or “ripe”, for judicial review; and (3) the plaintiff exhausted all administrative remedies offered by the agency.<sup>108</sup>

Through the JD process, the Corps informs itself and the EPA, as well as potential section 404 permit applicants, where waters of the United States are or may be.<sup>109</sup> Private parties can appeal approved JDs under the Corps’s administrative appeals process, but until the Supreme Court’s decision in *Hawkes III*, courts had held that approved JDs were not final agency actions and therefore were not subject to judicial review.<sup>110</sup>

### B. *Practical Implications of the Corps’s JD Process, and the Corps’s Role in the Process*

The Corps’s regulatory guidance document on JDs states that approved JDs are the official, written representation that there are or are not waters of the United States on a particular site, and that they can be relied upon by landowners or permit applicants.<sup>111</sup> However, when JDs are challenged in court, the Corps had always maintained that approved JDs did not constitute

105. See 5 U.S.C. § 704 (2012) (“Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”).

106. Ripeness standards are about preventing courts, “through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized.” *Ohio Forestry Ass’n, v. Sierra Club*, 523 U.S. 726, 732–33 (1998) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967)).

107. APA section 704 states that “final agency action for which there is no other adequate remedy in a court are subject to judicial review.” 5 U.S.C. § 704 (2012). Thus, judicial review is only proper when all other remedies have been exhausted.

108. In *Darby v. Cisneros*, the Supreme Court held that statutes or agency regulations must specifically state that appellants need to exhaust the administrative appeal process before filing suit in Article III court; otherwise, final agency actions can be litigated without exhausting such remedies. *Darby v. Cisneros*, 509 U.S. 137, 146 (1993). The Court in *Sackett* and the Eighth Circuit in *Hawkes II* both held that appellants could immediately file suit in court to challenge the EPA’s compliance order and the Corps’s approved JD, respectively. See *Sackett v. EPA*, 132 S.Ct. 1367, 1374 (2012) (“We conclude that the compliance order in this case is final agency action for which there is no adequate remedy other than APA review, and that the Clean Water Act does not preclude that review.”); In *Hawkes II*, the Eighth Circuit held: “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.” 782 F.3d 994 at 1002. The Supreme Court affirmed the Eighth Circuit’s ruling. See *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016).

109. U.S. ARMY CORPS OF ENG’RS, *supra* note 7.

110. *Hawkes II*, 782 F.3d at 996; see also *Fairbanks N. Star Borough v. U.S. Army Corps of Eng’rs*, 543 F.3d 586, 594 (9th Cir. 2008).

111. U.S. ARMY CORPS OF ENG’RS, *supra* note 7, at 1.

final agency action.<sup>112</sup> Nevertheless, property owners and developers for many years challenged the reviewability of approved JDs.<sup>113</sup> In *Hawkes II* and *Belle*, the central issue was whether approved JDs are subject to judicial review.<sup>114</sup> The Supreme Court decided to respond to the issue in order to resolve a circuit split on whether approved JDs are reviewable final agency actions.<sup>115</sup> Although parties have previously petitioned the Court to resolve the issue of reviewability, the current case marks the first time the Court has granted certiorari on this issue.<sup>116</sup> The Supreme Court's grant of certiorari to decide the issue of reviewability of approved JDs underscores the issue's importance. The cases below discuss the history of the controversy, leading up to the Supreme Court's decision in *Hawkes III*.

The Ninth Circuit's 2005 decision in *Baccarat Fremont Developers v. U.S. Army Corps of Engineers* shows the impact that the Court's decision could have on private parties who are unable to challenge an approved JD in court.<sup>117</sup> In *Baccarat*, the plaintiff, Baccarat Fremont Developers, litigated the Corps's section 404 permit *approval* in order to challenge the approved JD,<sup>118</sup> which had found that certain areas of Baccarat's property were subject to section 404.<sup>119</sup> Baccarat exhausted the Corps's administrative appeals process in challenging the JD (which included an on-site meeting between the Corps and Baccarat, at Baccarat's expense)<sup>120</sup> to no avail and subsequently applied for a section 404 permit, which the Corps later issued. Baccarat then challenged the permit decision in court in order to sue the Corps over its approved JD.<sup>121</sup>

112. *Id.*; see also Petition for a Writ of Certiorari at 14, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 615 (2016) (No. 15-290) ("Receipt of a jurisdictional determination simply provides the landowner with additional information that may assist him in choosing among the available [section 404 permit] options.").

113. See, e.g., *Belle Co. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 391 (5th Cir. 2014) (listing courts that had ruled on the question of whether approved JDs constitute reviewable final agency action).

114. *Belle*, 761 F.3d 383; *Hawkes II*, 782 F.3d at 1001.

115. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 615 (granting certiorari); Response in Part Supporting the Petition and Seeking Consolidation with *Kent Recycling* (14-493) at 2-5, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 615 (2016) (No. 15-290); Petition for a Writ of Certiorari at 11, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 615 (2016) (No. 15-290).

116. The Supreme Court previously declined to hear petitioners' claims on the issue of whether approved JDs were reviewable final agency action in *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 557 U.S. 919 (2009) (denying certiorari), and in *Kent Recycling Services v. U.S. Army Corps of Engineers*, 135 S. Ct. 1548 (2015) (denying certiorari). See also *Belle*, 761 F.3d at 391 ("Prior to *Sackett*, all of the courts, including [the Fifth Circuit], that had considered the question held that a JD does not determine rights or obligations or have legal consequences and thus is not final agency action.").

117. See *Baccarat Fremont Developers v. U.S. Army Corps of Eng'rs*, 425 F.3d 1150, 1153 (9th Cir. 2005). In *Baccarat*, the plaintiff had to exhaust the administrative appeals process and then challenge the Corps's section 404 permit in order to challenge the Corps's jurisdictional determination. *Id.*

118. *Id.* at 1153.

119. *Id.* at 1153.

120. Appellants bear the costs of conducting on-site meetings. 33 C.F.R. § 331.7(d) (2015).

121. See *Baccarat Fremont Developers*, 425 F.3d at 1153 ("On February 6, 2002, the Corps offered Baccarat a permit to fill 2.36 acres of wetland, subject to the condition that it (1) create on-site a

Thus, while Baccarat did not argue that the approved JD was a final agency action,<sup>122</sup> it had to go through the process of applying for a section 404 permit and bear the resulting costs for the sole purpose of contesting the approved JD.<sup>123</sup> Additionally, the Corps also had to perform additional work in overseeing the appeals process and preparing and issuing Baccarat's section 404 permit.<sup>124</sup>

Furthermore, in a subsequent Ninth Circuit case, *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, the court held that the Corps's approved JD was not a final agency action, and therefore it was not reviewable in court.<sup>125</sup> In *Fairbanks*, the plaintiff, Fairbanks North Star Borough, sought to develop property for its residents' recreational use and requested the Corps's JD.<sup>126</sup> Fairbanks filed a timely administrative appeal of the approved JD, but the Corps found Fairbanks' appeal to be without merit.<sup>127</sup> Fairbanks did not apply for a section 404 permit, but instead contested the Corps's approved JD before an Article III court.<sup>128</sup> In determining whether the approved JD was a final agency action, the Ninth Circuit applied the Supreme Court's test from *Bennett v. Spear*,<sup>129</sup> which states that (1) "the action must mark the consummation of the agency's decisionmaking process" and cannot be "tentative or interlocutory in nature;" and (2) "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow."<sup>130</sup> The Ninth Circuit found that, although the approved JD was the culmination of the Corps's decision-making process, it did not impose a legal obligation on Fairbanks, and therefore was not a final agency action under the APA.<sup>131</sup> The Ninth Circuit worried that the opposite ruling—that approved JDs were reviewable—could set a precedent that would make it difficult for courts to determine when final actions were final, stating that "implicit in Fairbanks'

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minimum of 2.36 acres of seasonal freshwater wetland and (2) enhance the remaining 5.3 acres of existing brackish wetlands. Baccarat signed the permit, reserving the right to seek judicial review of the Corps's jurisdictional determination.").

122. After appealing the Corps's jurisdictional determination, Baccarat followed the Corps's appeal process, which confirmed that jurisdictional waters were present on Baccarat's property. The Corps then offered Baccarat a section 404 permit, which Baccarat signed, while "reserving the right to seek judicial review of the Corps's jurisdictional determination." *Id.*

123. A satellite search on Google Maps of the Baccarat Fremont-Cushing Plaza Project on September 29, 2015 revealed that construction had not begun on the project site (Google Maps does not post satellite imagery dates). However, satellite imagery from June 9, 2014 showed partially constructed buildings surrounded by dirt and construction vehicles, and a Google Earth Street View image search (with photos from March 2015) showed some completed buildings surrounded by raw dirt and construction equipment. Baccarat Fremont Developers purchased the land on the site for development in July 1997. See Appellant's Opening Brief at 2, *Baccarat Fremont Developers*, 425 F.3d 1150 (No. 03 16586), 2004 WL 545843, at \*2.

124. See *Baccarat Fremont Developers*, 425 F.3d at 1153.

125. *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 594 (9th Cir. 2008).

126. *Id.* at 589.

127. *Id.* at 590.

128. *Id.*

129. *Bennett v. Spear*, 520 U.S. 154, 177 (1997).

130. *Fairbanks N. Star Borough*, 543 F.3d at 591.

131. *Id.* at 597.

argument is the dubious premise that if an agency's decisionmaking process has multiple outcomes and any of these outcomes is judicially reviewable, then *all* of them must be judicially reviewable."<sup>132</sup> In this case, the court may have also been motivated to limit reviewability of approved JDs and other pre-enforcement challenges in order to conserve judicial resources.<sup>133</sup>

Instead of offering clarity, Supreme Court precedent further confused the circuit courts as they tried to determine whether approved JDs constitute reviewable final agency action. Both the Fifth Circuit in *Belle* and the Eighth Circuit in *Hawkes II* cite *Sackett v. EPA*, where the Court repeatedly emphasized the practical implications of the EPA's actions on landowners.<sup>134</sup> In *Sackett v. EPA*, the Sacketts sued the EPA after agency officials issued them an administrative compliance order, advising them that their parcel constituted wetlands subject to federal permit jurisdiction under section 404 of the CWA.<sup>135</sup> The order directed them to restore their land to its original condition without delay and threatened the Sacketts with substantial daily fines (quantified by the Solicitor General at oral argument as up to \$75,000/day) for noncompliance with the administrative order, which was a separate violation if the Sacketts were found to be violating the CWA.<sup>136</sup> Writing for a unanimous Court, Justice Scalia wrote that the EPA's compliance order constituted a reviewable final agency action, and the court criticized the EPA for its treatment of the Sacketts.<sup>137</sup> In *Sackett*, the Court applied the *Bennett* test, and then noted that the "APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all."<sup>138</sup> The Court held that, by the time they issued a compliance order, "the EPA's 'deliberation' over whether the Sacketts [were] in violation of the [CWA]" was at an end, and thus, the compliance orders were reviewable final agency action.<sup>139</sup>

In *Hawkes II*, the Eighth Circuit referred to the Court's reasoning as "the . . . application of [a] flexible final agency action standard."<sup>140</sup> According to the Eighth Circuit, the Supreme Court "ha[d] consistently taken a 'pragmatic' and 'flexible' approach to the question of finality, and to the related question of whether an agency action is ripe for judicial review."<sup>141</sup> Thus, the Eighth Circuit interpreted *Sackett* to mean that when assessing whether an agency decision is a reviewable final agency action for the APA,

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132. *Id.* at 596–97.

133. *Id.*

134. *Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012).

135. *Id.* at 1371.

136. *Id.* at 1370.

137. *Id.* at 1374.

138. *Id.*

139. *Id.* at 1373. A compliance order is similar to an approved JD in that both documents precede the action that the regulatory agency considers to be the final agency action. A compliance order precedes an enforcement action by the EPA, and an approved JD precedes a section 404 permit approval or denial. *See* 33 U.S.C. § 1319(a)(1) (2012).

140. *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 997 (8th Cir. 2015).

141. *Id.* at 197 n.1.

courts should consider the practical implications of the agency's action on the regulated individual or party. The Fifth Circuit also relied on *Sackett in Belle*. However, it held that approved JDs are not reviewable final agency action because legal consequences do not flow from them, discussed further in Part III.A. Both the Eighth and Fifth Circuits saw their contrary decisions as being in line with *Sackett's* holding.<sup>142</sup>

Until the Eighth Circuit decided in *Hawkes II* that approved JDs were reviewable final agency action, courts had been unanimous in finding that approved JDs were not subject to judicial review under the APA.<sup>143</sup> However, as both the Corps and the petitioners in *Hawkes II* pointed out in their petitions for certiorari to the Supreme Court, whether approved JDs are final agency action is a recurring issue with significant impacts on both the government and private parties.<sup>144</sup> The Supreme Court broke from lower courts' holdings that approved JDs are not reviewable in court and instead affirmed the Eighth Circuit's decision in *Hawkes II*.<sup>145</sup> In its decision, the Court wrote that its "conclusion tracks the 'pragmatic' approach we have long taken to finality,"<sup>146</sup> bringing to mind similar language it used in *Sackett*.<sup>147</sup> The Supreme Court's decision arose after lower court decisions in multiple cases described above and in Part III.

### III. CHALLENGING JDs: A CIRCUIT SPLIT

By granting certiorari, the Supreme Court recognized the need to resolve the impasse over whether to allow judicial review of approved JDs. In its 2014 decision in *Belle*, the Fifth Circuit held that approved JDs were not final agency action, and thus were not subject to judicial review.<sup>148</sup> The following year, in *Hawkes II*, the Eighth Circuit characterized the Fifth Circuit's reasoning on the issue as inconsistent with the Supreme Court's application of the *Bennett* test in *Sackett*.<sup>149</sup> The Eighth Circuit held that "a properly pragmatic analysis of ripeness and final agency action principles compels the conclusion that an approved JD is subject to immediate judicial review."<sup>150</sup> Both the Fifth and Eighth Circuits attempted to apply Supreme Court precedent in *Sackett*, and

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142. *Belle Co. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 394 (5th Cir. 2014).

143. *Id.* at 391.

144. See Response in Part Supporting the Petition and Seeking Consolidation with *Kent Recycling* (14-493) at 12, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S.Ct. 615 (2016) (No. 15-290); Petition for a Writ of Certiorari at 21–23, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S.Ct. 615 (No. 15-290).

145. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016).

146. *Id.*

147. See *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012) ("[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.").

148. *Belle*, 761 F.3d at 385.

149. *Hawkes II*, 782 F.3d at 996.

150. *Id.* at 1002.

came to opposite results, which set the stage for the Supreme Court's ruling on the issue.

A. *The Fifth Circuit Decision: Belle*

In *Belle*, the plaintiffs, a property owner and a developer, intended to use their property as a landfill.<sup>151</sup> After the Corps issued an approved JD for the land, Belle appealed the JD, exhausted the Corps's administrative appeals process, and subsequently filed a complaint in federal district court.<sup>152</sup> The plaintiffs contested the approved JD, alleging that it was "unlawful and should be set aside."<sup>153</sup> Prior to the Supreme Court's decision in *Hawkes III*,<sup>154</sup> the Fifth Circuit wrote that, in contrast to the compliance order at issue in *Sackett*, "the JD is a notification of the property's classification as wetlands but does not oblige Belle to do or refrain from doing anything to its property."<sup>155</sup> Like the courts in *Sackett* and *Hawkes II*, the Fifth Circuit applied the *Bennett* test, but found that, although the approved JD marked the consummation of the Corps's decision-making process, legal consequences did not flow from the determination, and thus failed to meet the test's second prong.<sup>156</sup> Although both circuit courts applied the *Bennett* test, they issued directly conflicting holdings as to whether an approved JD is reviewable final agency action.<sup>157</sup>

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151. *Belle*, 761 F.3d at 386.

152. *Id.* at 386. Belle initially submitted a section 404 permit application in 2009, but later abandoned its application when the Louisiana Department of Environmental Quality notified it that the Corps had determined that a large portion of the site was considered wetlands and that its solid waste permit would require "a major modification that reflected the wetlands requirements in Louisiana regulations," and that "Belle should submit its major-modification application no later than 120 days after it received a decision on its Section 404 permit application." *Id.* at 387. Almost two years later, Belle requested that the Corps inspect its property, and the Corps issued a JD confirming that wetlands were present and Belle would need to submit a section 404 permit application. *Id.* Belle contested the JD and exhausted the administrative appeal process, but the Corps maintained that the wetlands on the property required a section 404 permit. *Id.*

153. *See id.* at 385.

154. Following *Hawkes III*, the Supreme Court vacated the Fifth Circuit's decision in *Belle* and remanded the case to the Fifth Circuit "for further consideration in light of [*Hawkes III*]." *Kent Recycling Servs. v. U.S. Army Corps of Eng'rs*, 136 S. Ct. 2427 (2016) (mem.). The Fifth Circuit, adhering to the Supreme Court's directive, reversed its decision in *Belle*, vacating and remanding the case "to the district court for the Middle District of Louisiana for further proceedings consistent with the opinion of the Supreme Court." *Kent Recycling Servs. v. U.S. Army Corps of Eng'rs*, No. 13-30262, 2016 WL 4073301, at \*1 (5th Cir. July 29, 2016) (mem.). This Note primarily focuses on the Fifth Circuit's decision prior to the Supreme Court's determination on the issue to illustrate the complexity of jurisdictional determinations.

155. *Id.* at 391.

156. *Id.* at 394.

157. When the Eighth Circuit decided in favor of the property owners, *Kent Recycling Services* filed a petition to the United States Supreme Court for rehearing of its previously denied petition for certiorari in the *Belle* decision. *Petition for Rehearing, Kent Recycling Servs. v. U.S. Army Corps of Eng'rs*, 135 S. Ct. 1548 (2015) (No. 14-493); *see also Kent Recycling Servs.*, 135 S. Ct. 1548 (denying certiorari). On September 9, 2015, the Corps petitioned for writ of certiorari to the Supreme Court to appeal the *Hawkes II* decision. *Petition for a Writ of Certiorari, U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 615 (2016) (No. 15-290). On December 11, 2015, the Court granted certiorari to *Hawkes*

The Fifth Circuit's initial decision in *Belle*, however, reached the same conclusion as other courts that had previously decided the issue, while the Eighth Circuit in *Hawkes II* broke the trend.<sup>158</sup>

*B. The Eighth Circuit Decision: Hawkes*

In *Hawkes II*, the plaintiff, Hawkes, planned to mine peat from a wetland property, but was prevented from commencing with its operations after the Corps issued its approved JD, finding that 155 acres of the 530-acre property were "waters of the United States" under the CWA.<sup>159</sup> The Corps required Hawkes to obtain a permit<sup>160</sup> to discharge dredge or fill materials on the property.<sup>161</sup> The Corps's wetlands designation meant that Hawkes had two options moving forward in order to develop the wetlands on its property: (1) apply for a CWA section 404 permit, which, according to the Corps, would be very time consuming and costly to obtain; or (2) ignore the Corps's JD, mine the peat, and discharge dredged and fill materials without completing the CWA permit process, which would carry substantial enforcement penalties that could be challenged in court.<sup>162</sup>

After the Corps issued its approved JD, Hawkes submitted a timely administrative appeal, which the Corps sustained.<sup>163</sup> The Corps subsequently issued a revised JD which stated that there was a significant nexus between the property at issue and the Red River of the North and that Hawkes had exhausted its administrative remedies.<sup>164</sup> Hawkes then submitted a complaint in federal court seeking judicial review of the Corps's revised JD, alleging that it met neither the *Rapanos* plurality's "relatively permanent" test nor Justice Kennedy's "significant nexus" test.<sup>165</sup>

Hawkes brought this complaint under the APA, alleging that the Corps's approved JD was a "final agency action for which there [was] no other adequate remedy in a court," making it subject to judicial review.<sup>166</sup> The district court, however, ruled that the revised JD failed to meet the second *Bennett* factor because it did not produce legal consequences for Hawkes, and again, the plaintiff's judicial remedies were to either (1) complete the permit

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*II. U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 615 (granting certiorari). Also on March 23, 2015, the Court refused to grant certiorari to *Kent Recycling Services*. 135 S. Ct. 1548 (2015).

158. See *Belle*, 761 F.3d at 391 ("Prior to *Sackett*, all of the courts, including ours, that had considered the question held that a JD does not determine rights or obligations or have legal consequences and thus is not final agency action.").

159. Petition for a Writ of Certiorari at 46a, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 615 (2016) (No. 15-290) (Appendix C: approved jurisdictional determination (Dec. 31, 2012)) [hereinafter *Hawkes Approved JD*].

160. Under 33 U.S.C. §§ 1311(a), 1342, 1344 (2012).

161. *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 996 (8th Cir. 2015).

162. *Id.* at 1001.

163. *Id.* at 998.

164. *Id.*

165. *Id.* at 999.

166. *Id.* (quoting 5 U.S.C. § 704 (2012)).

process and appeal if the permit was denied, or (2) commence peat mining without a permit and challenge the Corps's authority if it issued a compliance order or civil enforcement action.<sup>167</sup>

Upon appeal, the Eighth Circuit reversed the district court's ruling.<sup>168</sup> The Eighth Circuit held that the revised JD was coercive and left the plaintiffs with no real judicial remedy, noting that the plaintiffs would likely have to spend huge amounts of money either obtaining a permit or defending a permit violation.<sup>169</sup> The Eighth Circuit subsequently denied the Corps's petitions for rehearing and rehearing en banc.<sup>170</sup>

The Eighth Circuit, like the district court, applied the two-step *Bennett* test to determine whether immediate judicial review was appropriate under the APA.<sup>171</sup> The Eighth Circuit agreed with the district court that the first *Bennett* condition was satisfied because the revised JD "was the consummation of the Corps's decisionmaking process on the threshold issue of the agency's statutory authority."<sup>172</sup>

However, the Eighth Circuit disagreed with the district court's holding on the second *Bennett* condition.<sup>173</sup> In reversing the district court's decision, the Eighth Circuit looked to the impacts on overall efficiency of the administrative process and the effect on regulated parties, as the Supreme Court did in *Sackett*.<sup>174</sup> The district court held that Hawkes faced neither the same obligations nor any compromises to its rights, unlike the plaintiffs in *Sackett*, and that the revised JD, therefore, had no legal implications for Hawkes.<sup>175</sup> In spite of this, the Eighth Circuit reversed the district court, holding that the approved JD was a final agency action because the two alternative remedies mentioned by the district court were plainly inadequate for Hawkes.<sup>176</sup> Whether it applied for a permit—and challenged the subsequent permit denial—or simply mined without a permit, Hawkes would likely incur heavy losses of time and money.<sup>177</sup> The district court's holding "ignore[d] the prohibitive cost of taking either of these alternative actions to obtain judicial review of the Corps's assertion of CWA jurisdiction over the property."<sup>178</sup> Maintaining *Sackett*'s emphasis on practical implications, the Eighth Circuit

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167. *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 963 F. Supp. 2d 868, 874–75, 877–78 (D. Minn. 2013).

168. *Hawkes II*, 782 F.3d at 996. Judge Kelly concurred in the court's opinion, noting that although there were factual differences between the Sacketts' situation and the situation in *Hawkes II*, Hawkes still deserved an immediate judicial remedy. *See id.* at 1003 (Kelly, J., concurring).

169. *Id.*

170. Order Denying Rehearing and Rehearing En Banc, *Hawkes II*, 782 F.3d 994 (July 7, 2015) (No. 13-3067).

171. *Hawkes II*, 782 F.3d at 999.

172. *Id.*

173. *Id.* at 1000.

174. *Id.* at 996; *see also* *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012).

175. *Hawkes II*, 782 F.3d at 1000.

176. *Id.* at 1002.

177. *Id.*

178. *Id.* at 1001.

referenced the statistics that the Supreme Court cited in *Rapanos*: “the average applicant for an individual Corps permit ‘spends 788 days and \$271,596 in completing the process.’”<sup>179</sup> Furthermore, even if a party were able to obtain a favorable ruling in court, “they c[ould] never recover the time and money lost in seeking a permit they would not have otherwise been legally obligated to obtain.”<sup>180</sup> The Eighth Circuit concluded that the revised JD was coercive and that “most property owners” were left “with little practical alternative but to dance to the [agencies’] tune.”<sup>181</sup>

Ultimately, the Eighth Circuit held that it makes more sense to allow a party who is contesting an approved JD to seek “immediate judicial review” rather than force the party through the section 404 permit process as a mere formality.<sup>182</sup> The Eighth Circuit’s emphasis on practicality echoes the Supreme Court’s unanimous decision in *Sackett*. The Supreme Court’s decision in *Sackett* is the root of the circuit split because, although both Circuits applied the *Bennett* test and emphasized the Court’s emphasis on efficiency and practicality, their applications led to different conclusions.<sup>183</sup>

C. *Resolving Whether JDs are Reviewable Final Agency Action—  
Sackett in the Circuit Split*

Pragmatic considerations continue to play an important role in determining the reviewability of approved JDs going forward because the Court places a huge emphasis on the practical impact that agency regulations have on regulated parties.<sup>184</sup> The Fifth and Eighth Circuits tried to apply this standard by relying heavily on the Supreme Court’s unanimous holding in *Sackett* when deciding *Belle* and *Hawkes II*.<sup>185</sup> In its most recent opinion on the matter—*Hawkes III*—the Supreme Court echoed this perspective, writing that the justices take a “‘pragmatic’ approach” to issues surrounding finality.<sup>186</sup>

The majority opinion in *Hawkes II* analogized the Corps’s JD process to the EPA’s compliance order process, which was at issue in *Sackett*.<sup>187</sup> The court in *Hawkes II* stated that the “prohibitive costs, risk, and delay of . . . alternatives to immediate judicial review evidence a transparently obvious

179. *Id.* at 1001 (quoting *Rapanos v. United States*, 547 U.S. 715, 721 (2006)).

180. *Id.* at 1001.

181. *Id.* at 1002 (quoting *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring)).

182. *Id.* at 1002.

183. *Id.*; *Belle Co. v. U.S. Army Corps of Eng’rs*, 761 F.3d 383, 391 (5th Cir. 2014).

184. The Court in *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012), wrote that judicial review of administrative agency actions works to prevent “strong-arming of regulated parties into ‘voluntary compliance.’” The Eighth Circuit in *Hawkes II*, 782 F.3d at 1002 wrote that “a properly pragmatic analysis of ripeness and final agency action principles compels the conclusion that an approved JD is subject to immediate judicial review.”

185. See *Belle*, 761 F.3d at 394 (“We conclude that, under . . . the current doctrine, especially *Sackett*, the JD is not an action by which rights or obligations have been determined, or from which legal consequences will flow”); see also *Hawkes II*, 782 F.3d at 996 (“We conclude that [*Belle*] misapplied the Supreme Court’s decision in *Sackett v. EPA*.”).

186. *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 136 S. Ct. 1807, 1810 (2016).

187. See *Sackett*, 132 S. Ct. at 1369.

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.”<sup>188</sup> The Court in *Sackett* similarly accused the EPA of bullying property owners when it wrote 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 party is within the EPA’s jurisdiction.”<sup>189</sup> The majority opinion in *Hawkes II* relied heavily on *Sackett* to argue that regulatory agencies are prohibited from “strong-arming” regulated parties into compliance.<sup>190</sup>

Although the *Hawkes II* court framed JDs as having very similar consequences for landowners as the EPA’s compliance orders, both the concurrence in *Hawkes II* and the Fifth Circuit majority in *Belle* noted that JDs and compliance orders affect landowners differently.<sup>191</sup> Judge Kelly, in her concurrence in *Hawkes II*, stated that the “penalties resulting from a JD are far more ‘speculative’ than those threatened in *Sackett*” and that *Hawkes* failed “to point to a single case in which increased civil penalties were levied against a party for ignoring a JD.”<sup>192</sup> Judge Kelly nevertheless agreed with the majority because, in her view, the complexity of the JD process warranted judicial review.<sup>193</sup>

Before the Supreme Court vacated the Fifth Circuit’s decision in *Belle*, the Fifth Circuit found that the EPA’s compliance order at issue in *Sackett* and the Corps’s approved JD differed in four main ways: first, the EPA’s compliance order “independently imposed legal obligations because it ordered the Sacketts promptly to restore their property according to an EPA-approved plan,” whereas a “JD is a notification of the property’s classification as wetlands but does not oblige Belle to do or refrain from doing anything to its property”;<sup>194</sup> second, “the compliance order in *Sackett* itself imposed, independently, coercive consequences for its violation because it ‘expose[d] the Sacketts to double penalties in a future enforcement proceeding,’” whereas “the JD erects no penalty scheme”;<sup>195</sup> third, “whereas the compliance order in *Sackett* severely limited the Sacketts’ ability to obtain a Section 404 permit from the Corps . . . the JD operates oppositely, informing Belle of the necessity of a Section 404 permit to avoid enforcement action”;<sup>196</sup> and fourth, “the

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188. *Hawkes II*, 782 F.3d at 1001.

189. *Sackett*, 132 S. Ct. at 1374.

190. *Hawkes II*, 782 F.3d at 1002.

191. *See id.* at 1003 (Kelly, J., concurring); *Belle Co. v. U.S. Army Corps of Eng’rs*, 761 F.3d 383, 391 (5th Cir. 2014) (“[U]nder the current doctrine, especially *Sackett*, the JD is not an action by which rights or obligations have been determined, or from which legal consequences will flow.”).

192. *Hawkes II*, 782 F.3d at 1003.

193. *Id.*

194. *Belle*, 761 F.3d at 391.

195. *Id.* at 392.

196. *Id.*

compliance order in *Sackett* determined that the Sacketts' property contained wetlands *and* that they had discharged material into those wetlands in violation of the CWA," but the approved JD neither stated that Belle was in violation of the CWA nor issued an order to comply with any terms or alter the property.<sup>197</sup>

The Supreme Court's decision in *Hawkes III* did in fact borrow heavily from the language and analysis used in *Sackett*.<sup>198</sup> In affirming the Eighth Circuit's decision that approved JDs are final agency action, the Court made it abundantly clear that the broad spirit of *Sackett* embraced by the Eighth Circuit will take precedence going forward. The *Sackett* decision provided that courts could strike down regulatory agency action in order to protect regulated parties from agency bullying.<sup>199</sup> The Fifth and Eighth Circuits both attempted to resolve the question of whether approved JDs are final agency action according to the Court's reasoning in *Sackett*, but reached contradictory conclusions. In the end, the Court favored the Eighth Circuit's interpretation.<sup>200</sup> However, this Note argues that the Supreme Court's decision will not resolve the controversy surrounding approved JDs. Rather, this Note contends that the best way to resolve the conflict is by streamlining the JD process, a task that can be undertaken by the Corps with the input of experts and the regulated community.

#### IV. JUDICIAL REVIEW WILL NOT SOLVE THE PROBLEM

Even though the Supreme Court ruled that approved JDs can be challenged in court, its ruling will not resolve the approved JD's inherent controversy: how to enable the Corps to determine the exact geographic scope of the CWA in the fairest way possible. Under the APA, a person can sue an agency<sup>201</sup> if they have been "adversely affected or aggrieved by agency action within the meaning of the relevant statute"<sup>202</sup> on the basis that "agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court" is subject to judicial review.<sup>203</sup> Conversely, a "preliminary, procedural, or intermediate agency action" is not subject to judicial review.<sup>204</sup> In reviewing agency determinations, courts generally use the arbitrary and capricious standard of review.<sup>205</sup> Even if the Court rules that

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197. *Id.* at 393.

198. "Respondents need not assume such risks [of harsh civil penalties] while waiting for EPA to 'drop the hammer' in order to have their day in court." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (quoting *Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012)).

199. *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012).

200. *Hawkes III*, 136 S. Ct. 1807, 1816 (2016).

201. *See* 5 U.S.C. § 701(b)(1) (2012) (defining "agency").

202. § 702.

203. § 704.

204. *See id.*

205. § 706(2)(A). ("Where . . . a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched . . . It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact finding bodies deprived of the advantages of prompt and definite action.")

approved JDs are reviewable final agency action, the Corps would be entitled to a high degree of deference on the substance of JD determinations from the courts. The Corps would also probably modify the approved-JD process to ensure that approved JDs would not be overturned in court, which could lead to the process becoming even more time- and resource-intensive.

A. *The Corps Would Be Entitled to a High (but Not Impenetrable) Degree of Deference from the Courts*

Although the Corps would probably enjoy considerable deference from the courts, it would still face judicial scrutiny to ensure that the approved JDs are neither arbitrary nor capricious.<sup>206</sup> Most likely, the Corps would face the greatest judicial skepticism over its significant nexus assessment in approved JDs, because it is “fraught with difficulties of implementation.”<sup>207</sup> Shortly after the Supreme Court issued its decision in *Rapanos*, creating the significant nexus test, the Corps published new guidance documents for JDs, which attempted to define significant nexus.<sup>208</sup> The Corps listed physical features that Corps staff could use to determine whether wetlands had a significant nexus with traditionally navigable waters—as opposed to a “speculative or insubstantial” connection.<sup>209</sup> Most recently, the Clean Water Rule also attempted to define, as clearly as possible, the physical features that constitute a

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Gray v. Powell, 314 U.S. 402, 412 (1941). The arbitrary and capricious “standard of review is highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision.” *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep’t of Agric.*, 499 F.3d 1108, 1115 (9th Cir. 2007) (citation omitted).

206. The APA states that reviewing courts shall “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” § 706(2)(A).

207. Kenneth S. Gould, *Drowning in Wetlands Jurisdictional Determination Process: Implementation of Rapanos v. United States*, 30 U. ARK. LITTLE ROCK L. REV. 413, 441, 444 (2008) (noting, among other things, a “lack of congruence between the Supreme Court’s terminology and that used by the scientists who must attempt to apply the Court’s standards”).

208. The Corps published a document intended to provide “guidance to CWA section 404 field staff promoting clarity and consistent application of legal mandates enunciated in the *Rapanos* decision.” See U.S. ARMY CORPS OF ENGINEERS, QUESTIONS AND ANSWERS FOR *RAPANOS* AND *CARABELL* DECISION (2007), [http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa\\_guide/qa\\_ig\\_06-05-07.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/qa_ig_06-05-07.pdf).

209. *Id.* These factors range from the very specific, see *id.* at 73 (“The agencies will first determine if there are physical indicators of flow, which may include the presence and characteristics of a reliable ordinary high water mark (OHWM) with a channel defined by bed and banks. Other physical indicators of flow may include such characteristics as shelving, wracking, water staining, sediment sorting, and scour.”), to the more generalized, see *id.* at 74 (“[T]he significant nexus evaluation must assess the aquatic functions performed by the tributary itself and in combination with the aquatic functions performed by the tributary’s adjacent wetland(s), as these functions relate to the chemical, physical, and biological integrity of a traditional navigable water.”), depending on the type of significant nexus the Corps is trying to determine. The Corps published additional documents in order to guide its staff in interpreting the Court’s “significant nexus” terminology when identifying waters of the United States. See *CWA Guidance*, U.S. ARMY CORPS ENGINEERS, <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/RelatedResources/CWAGuidance.aspx> (last visited Apr. 24, 2016) (listing guidance documents).

significant nexus.<sup>210</sup> However, because the Corps and the EPA are attempting to map legal standards onto scientific principles through the promulgation of rules and guidance documents, courts may be less deferential to the Corps than they would be in other situations, particularly when the agency is interpreting a plurality decision like *Rapanos*.<sup>211</sup>

*B. The Corps Would Strive to Make Approved JDs Litigation Proof*

Regardless of the Supreme Court's decision, the circuit split alone is enough to illustrate that approved JDs are controversial and that the Corps should do something to resolve the tension surrounding them.<sup>212</sup> It is highly doubtful that the Corps would simply do away with approved JDs because it needs a consistent method by which it can delineate the boundaries of CWA jurisdiction, and the approved JD provides the potential permit applicant with a legitimate determination of the precise locations on its property subject to the CWA.<sup>213</sup> Also, because the Corps relies on wetland delineations and JDs produced by local environmental consultants, such work has become a considerable part of the thriving environmental consulting industry in the United States and provides work for thousands of people across the country.<sup>214</sup> Due to ongoing litigation, the Corps stated that it would be inappropriate for it to discuss changes it would adopt if the Court found that approved JDs

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210. 33 C.F.R. § 328.3(c)(5) (2015); 40 C.F.R. § 230.3(o)(3)(v) (2015). The Corps and the EPA, in describing the new Clean Water Rule, stated that the finding of “[s]ignificant nexus is not a purely scientific determination. The opinions of the Supreme Court have noted that, as the agency charged with interpreting the statute, EPA and the Corps must develop the outer bounds of the scope of the CWA.” Clean Water Rule, *supra* note 46, at 37,060.

211. For example, attempts by the Corps to figure out how to interpret the *Rapanos* plurality decision “creat[ed] a jumble of deference issues and add[ed] to the confusion for lower courts already coping with [the decision].” Robin Kundis Craig, *Agencies Interpreting Courts Interpreting Statutes: The Deference Conundrum of a Divided Supreme Court*, 61 Emory L.J. 1, 65 (2011).

212. Criticism of Justice Kennedy’s significant nexus test, described in *Rapanos*, and the EPA’s and Corps’s implementation of the significant nexus standard, is not new. *See, e.g.*, Gould, *supra* note 207, at 444 (“Anecdotal evidence abounds that the significant nexus test has markedly strained the wetlands jurisdictional determination process.”).

213. Even shifting the responsibility of JDs to the EPA seems highly unlikely. The original Memorandum of Understanding (MOU) between the Corps and the EPA states that “the Corps of Engineers has significantly greater resources at the field level than EPA’s Section 404 Program . . . [and] the MOU recognizes that the District Engineer will continue to make the great majority of jurisdictional decisions.” Jurisdiction of Dredged and Fill Program; Memorandum of Understanding, 45 Fed. Reg. 45018, (July 2, 1980).

214. Within the United States, the environmental consulting industry is projected to post revenues of \$17 billion dollars in 2016 and employ over 125,000 people. *Environmental Consulting: Industry Performance*, IBIS WORLD, <http://clients1.ibisworld.com/reports/us/industry/currentperformance.aspx?entid=1427> (last visited Apr. 24, 2016). 42.5 percent of the industry’s revenues come from environmental assessments, natural resource management consulting services, environmental audits, and specialized environmental consulting services. *Id.*; *see also* SAINT PAUL DIST., U.S. ARMY CORPS OF ENG’RS, *supra* note 91; PITTSBURGH DIST., U.S. ARMY CORPS OF ENG’RS, WETLAND CONSULTANTS LIST (2013), <http://www.lrp.usace.army.mil/Portals/72/docs/regulatory/AddlResources/Wetland%20Consultant%20List%2011%20Mar%202013.pdf>.

constituted final agency action.<sup>215</sup> There are, however, multiple ways that the Corps could resolve the points of contention surrounding JDs. In the end, it seems most likely that the Corps would choose the most exhaustive approved-JD process feasible in order to ensure its success in the case of litigation.<sup>216</sup>

First, the Corps could shift the burden of proof onto section 404 permit applicants by requiring them to show where waters of the United States are on their property. This solution is not a significant departure from the current system, except that the section 404 permit applicant would be required to submit a wetland delineation report as part of its section 404 permit application.<sup>217</sup> The Corps would then review the application, including the approved-JD form, as one comprehensive application.<sup>218</sup> If the Corps adopted this method, all of the permit applicant's challenges would arise out of the Corps's denial of a section 404 permit application.<sup>219</sup> However, this option is unlikely to solve any of the problems related to the current JD process.<sup>220</sup> This change would not benefit section 404 permit applicants, because they would still have to apply for section 404 permits in order to challenge approved JDs.<sup>221</sup> Additionally, the Corps would still require inspection staff to review applicant-submitted JDs, which would not reduce administrative costs.<sup>222</sup> Furthermore, section 404 litigation probably would not decrease in this scenario because under these modifications all approved JDs could be challenged as part of the section 404 permit decision.<sup>223</sup>

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215. E-mail from Candice S. Walters, Public Affairs Specialist, U.S. Army Corps of Eng'rs Headquarters, to author (Oct. 1, 2015, 11:21 AM) (on file with author).

216. Because the Corps is "authorized to determine the area defined by the terms 'navigable waters of the United States' and 'waters of the United States,'" in order to determine CWA jurisdiction, it seems that adopting any lesser standard would only lead to an increased risk for the Corps in the case of litigation. *See* 33 C.F.R. § 325.9 (2015).

217. In the current process, the Corps issues a JD in order to delineate waters of the United States prior to development. *See* U.S. ARMY CORPS OF ENG'RS, *supra* note 77, at 2.

218. And, in doing so, would still be making the determination of the boundaries of CWA jurisdiction under 33 C.F.R. Section 325.9.

219. The section 404 permit is final agency action that meets both prongs of the *Bennett* test and can be contested in court. *See* *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 1001 (8th Cir. 2015).

220. This change would be consistent with the Corps's position that approved JDs alone are not final agency action, but that section 404 permits are final. *See* *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (discussing the Corps's argument that parties who disagree with the approved JD can "apply for a [section 404] permit and seek judicial review if dissatisfied with the results."). The Corps could render a decision to permit, permit with conditions, or deny based on the information presented to it by the landowner or developer, which the developer could then appeal in federal court after satisfying exhaustion requirements. *See* 33 C.F.R. § 331.12.

221. § 331.6 requires the appellant to submit a request for appeal and, in certain cases, a letter to the Corps's district engineer "explaining [the appellant's] objections to the permit." It follows that the appellant must have taken issue with a permit to request an appeal in the first place.

222. § 325.9 grants the Corps responsibility, in most cases (except those delegated to the EPA) to determine jurisdiction of the CWA.

223. *See* *Petition for a Writ of Certiorari at 44a, U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 615 (2016) (No. 15-290).

As a second alternative, the Corps could simply be more transparent about its JD process. Presumably, the Corps would be more successful in the impending litigation if it provided more evidentiary support for its JD findings.<sup>224</sup> Hawkes' counsel stated that "if . . . the [C]ourt rules [that] JDs are reviewable, the most likely outcome is that the Corps will do a better job of justifying its claim of jurisdiction."<sup>225</sup> However, such justification will likely come at the expense of property owners and developers.<sup>226</sup> The Corps would need to undertake a more thorough evaluation of each property, which would increase the backlog for approved JDs—and result in projects being further delayed.<sup>227</sup> For instance, the Corps observed that it experienced a significant backlog and decrease in efficiency following the *Rapanos* decision.<sup>228</sup> Furthermore, the Corps's approved-JD forms are multi-page documents that contain a multitude of highly technical jargon.<sup>229</sup> Hawkes' approved JD is fifty-nine pages in length without its associated diagrams, maps, and photographs.<sup>230</sup> On an annual basis, the Corps reviews a total of 55,000 to 60,000 JDs and processes between 15,000 and 20,000 approved JDs.<sup>231</sup> To offer greater transparency, the Corps would have to provide additional information for its findings.<sup>232</sup> This information would likely be extremely technical, as the Corps would be trying to establish that it had taken a "hard look" at all relevant information so as to protect against an arbitrary and capricious claim.<sup>233</sup> Unless Congress increases the Corps's budget so that it can hire and train hundreds of staff scientists and reviewing officers, a requirement

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224. "[I]n *Bowles v. Seminole Rock & Sand Co.* . . . the Supreme Court explained that 'the ultimate criterion' for judicial construction of an ambiguous regulation 'is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 613 (1996). Thus, the more evidence that the Corps has in its favor, the stronger its case will be. *See id.*

225. E-mail from M. Reed Hopper, Principal Attorney, Pac. Legal Found., to author (Sept. 30, 2015, 9:35 AM) (on file with author).

226. Without an increase in staff, the Corps would have more work to do if they were to evaluate every possible detail that could be relevant in an approved JD. The significant nexus test has led to many fact-specific inquiries, prompting Corps's estimation of the administrative burden of the significant nexus test. *See Gould, supra* note 207, at 445.

227. *See id.*

228. U.S. ARMY CORPS OF ENG'RS, *supra* note 5, at 2–3.

229. U.S. ARMY CORPS OF ENG'RS, APPROVED JURISDICTIONAL DETERMINATION FORM, [http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa\\_guide/app\\_b\\_approved\\_jd\\_form.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/app_b_approved_jd_form.pdf) (last visited Apr. 24, 2016).

230. Hawkes Approved JD, *supra* note 159, at 44a.

231. Letter from Damon Roberts, Counsel, U.S. Army Corps of Eng'rs Office of Counsel, to author (Nov. 16, 2015) (on file with author) (responding to Freedom of Information Act request and explaining that, as of November 13, 2015, "the Corps does not have an exact way to calculate costs associated with JD reviews, and can't provide estimated or actual costs with any certainty," and "the number [of approved JDs processed per year] has been decreasing over time").

232. E-mail from Candice S. Walters, Public Affairs Specialist, U.S. Army Corps of Eng'rs Headquarters, to author (Oct. 1, 2015, 11:21 AM) (on file with author).

233. *Id.*

for greater transparency would strain the agency's resources, thereby increasing the delay in the JD process.<sup>234</sup>

Lastly, the Corps could decide to maintain its JD program in its current form. If the Supreme Court decides that JDs are final agency actions, the process of overturning the Corps's decision is still no easy task, given the deference generally shown to agency decision making.<sup>235</sup> However, because even the strongest form of deference still means that a court could find an approved JD arbitrary or capricious, the Corps will likely evaluate and make changes so that approved JDs are as litigation-proof as possible.<sup>236</sup>

Even though the Supreme Court decided that approved JDs are reviewable final agency action, the controversy surrounding approved JDs will continue until agencies address the JD process at a more fundamental level.<sup>237</sup> To

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234. The Corps's Regulatory Program budget is \$200 million. U.S. ARMY CORPS OF ENG'RS, OVERVIEW OF FISCAL YEAR 2017 CIVIL WORKS BUDGET 3 (2016), <http://cdm16021.contentdm.oclc.org/cdm/ref/collection/p16021coll6/id/42>.

235. Courts have long accorded deference to agency interpretations, with the degree of deference depending on the context. *See, e.g.,* Manning, *supra* note 224, at 628 (“[R]eviewing courts must enforce an agency's interpretation of its own regulation unless the agency view is entirely out of bounds.”). Professor Richard J. Pierce, Jr. and Joshua Weiss conducted an empirical study on the outcomes of court decisions in which the court granted *Auer/Seminole Rock* deference, and found that district and circuit courts upheld the agency's position in 76 percent of their decisions, while Supreme Court was even more extraordinarily deferential, upholding 91 percent of decisions in favor of the agency action in those cases. Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 Admin. L. Rev. 515, 516, 519 (2011). As an agency statutorily authorized to implement the CWA, the Corps would enjoy considerable deference from the courts when defending its approved JDs; however, it will have to ensure that the JDs contain sufficient justification to stand up in court.

236. The Corps would probably make JDs even more thorough to lessen the risk of being overturned if the approved JD is challenged. A significant portion of the Corps's approved JD for Hawkes attempts to justify the Corps's finding that there is a significant nexus between the wetland review area and the Red River of the North. *See* Hawkes Approved JD, *supra* note 159, at 83a. In the approved JD, the Corps discusses the hydrogeomorphic qualities of the wetland, its stormwater storage capacity, and its biogeochemical qualities. *See id.* at 84a–87a. It then discusses common traits of headwater streams, before focusing on the stream leading from the Hawkes property, and then moves on to discuss that the Red River drains into a vast watershed that includes Hawkes' property. *See id.* at 92a. The Corps notes that the Red River of the North is listed as “impaired” for aquatic life and aquatic consumption. *See id.* at 95a. In its concluding paragraphs, the Corps wrote that “studies have shown that when the organic material (peat) is eroded, disturbed, or otherwise transported downstream there is a high potential to release nutrients and mercury into discharge waters and degrade downstream water quality.” *See id.* at 100a. However, the Corps notes that it did not “quantitatively assess [] the flow regime of the tributary” that leads from Hawkes' property to the Middle River that eventually reaches the Red River of the North. *See id.* at 87a. Now that approved JDs are reviewable final agency action, courts might conclude that the Corps acted arbitrarily and capriciously if they think that the Corps lacked information to support its findings, so it seems most likely that the Corps would try to fill as many potential information gaps as possible in its JD process rather than leave the process as is. *See* Motor Vehicles Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983) (“[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”) (quoting Burlington Truck Lines v. U.S. 156, 168 (1962)).

237. The Corps has attempted to address this confusion with multiple regulatory guidance letters after Supreme Court decisions such as *Carabell*, *Rapanos*, and *SWANCC*. *See Jurisdictional Information*, U.S. ARMY CORPS OF ENG'RS, [http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/juris\\_info.aspx](http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/juris_info.aspx) (last visited Apr. 24, 2016). However, controversy still

accomplish this, the Corps should adopt a more streamlined process for carrying out approved JDs that would enable the process to be less costly, less time consuming, and less controversial for the Corps and private parties alike.

#### V. THE CORPS, RATHER THAN THE COURTS, HOLDS THE KEY

Rather than expect the Supreme Court's decision to resolve the current and long-lasting tension over approved JDs, landowners and section 404 permit applicants should be advocating for the Corps to make its approved-JD process more efficient.<sup>238</sup> The JD process has become more complex over time, especially in light of the Supreme Court's holdings in *Riverside Bayview Homes*, *SWANCC*, and *Rapanos*.<sup>239</sup> The Supreme Court's decision that approved JDs constitute final agency action subject to judicial review will have implications for landowners, developers, and the Corps—by allowing approved JDs to be reviewed in court. Because the Court affirmed the Eighth Circuit's reading of *Sackett* and determined that approved JDs constitute reviewable, final agency action, the Corps will likely take additional precautions to ensure that approved JDs can withstand litigation. This Note argues that the Corps should expand upon the existing JD model to provide significant nexus information based on specific geographic location in order to clarify the JD process and render it less of a headache for regulators and the regulated community alike.

A way to make the JD process more efficient and predictable may be to standardize the JD process by dividing the country into divisions based on the Corps's jurisdiction and supplying guidance documents on JDs specific to each division. The Corps is composed of nine divisions.<sup>240</sup> Seven of these are located within the lower forty-eight states, and there is a direct relationship between the divisional jurisdiction and the country's geographical variations.<sup>241</sup> The Corps already supplements its wetland delineation manual with technical guidance according to geographic area.<sup>242</sup> These supplements are written to

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exists today on CWA jurisdiction despite such guidance. See *CWA Guidance*, U.S. ARMY CORPS OF ENG'RS, <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/RelatedResources/CWAGuidance.aspx> (last visited Apr. 24, 2016).

238. A 2009 report discusses the difficult time EPA and Corps staff had implementing Supreme Court precedent using the jurisdictional framework—notably, that the JDs are hugely time- and resource-intensive for the Corps and the EPA. EPA regions and Corps Districts experienced difficulty in carrying out JDs, highlighting the need for a more efficient system. See JANICE GOLDMAN-CARTER, NAT'L WILDLIFE FED'N, SR026 ALI-ABA 93, REPORT NO. 09-N-0149, CONGRESSIONALLY REQUESTED REPORT ON COMMENTS RELATED TO EFFECTS OF JURISDICTIONAL UNCERTAINTY ON CLEAN WATER ACT IMPLEMENTATION (2009).

239. Gould, *supra* note 207, at 444–45 (discussing the complexity of the Corps's guidance for applying the Court's rulings on determining the CWA's jurisdiction).

240. The Corps's Division and District map shows the geographically defined divisions. *Where We Are*, U.S. ARMY CORP OF ENG'RS, <http://www.usace.army.mil/Locations.aspx> (last visited Apr. 24, 2016).

241. *Id.*

242. The Corps has produced ten supplements to its wetland delineation manual: the Alaska Supplement, Arid West Supplement, Atlantic & Gulf Coast Supplement, Caribbean Islands Region

“provide[] technical guidance and procedures for identifying and delineating wetlands that may be subject to regulatory jurisdiction under Section 404 of the Clean Water Act.”<sup>243</sup> However, they do not provide information regarding significant nexus criteria. If the Corps decided to expand upon these supplements, it could consult with agencies such as the Natural Resource Conservation Service, outside experts, or even its existing staff to create definitive guides on the significant nexus criteria unique to each division. The resulting guides would likely streamline the current JD process, which often consists of case-specific findings.<sup>244</sup> The approved JD for Hawkes, for example, discussed the unique character of the Red River of the North’s drainage pattern.<sup>245</sup> I propose that these context-specific factors be accounted for in the amendments, which would make the process more streamlined, uniform, and transparent.

Defining region-specific criteria for significant nexus determinations would be an extensive undertaking by the Corps, but it would probably reduce litigation, administrative costs, and compliance costs for landowners and developers who currently have to hire environmental consultants to collect site-specific data.<sup>246</sup> Ideally, each region-specific determination procedure would be accurate enough that waters of the United States can be categorized with a minimum number of exceptions. This way, there would be fewer case-specific determinations, enabling the Corps to expend fewer resources in carrying out such determinations, and the process would be more predictable for private

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Supplement, Eastern Mountains and Piedmont Supplement, Great Plains Supplement, Hawaii and Pacific Islands Supplement, Mid-West Supplement, Northcentral and Northeast Supplement, and Western Mountains Supplement. See *Regional Supplements to Corps Delineation Manual*, U.S. ARMY CORPS OF ENG’RS, [http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/reg\\_supp.aspx](http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/reg_supp.aspx) (last visited Apr. 24, 2016).

243. U.S. Army Eng’r Res. & Dev. Ctr., U.S. ARMY CORPS OF ENG’RS. REGIONAL SUPPLEMENT TO THE CORPS OF ENGINEERS WETLAND DELINEATION MANUAL: MIDWEST REGION (VERSION 2.0) ii (2010), [http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg\\_supp/erdc-el-tr-10-16.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg_supp/erdc-el-tr-10-16.pdf).

244. 120,000 of the Corps’s 400,000 jurisdictional determinations completed since 2008 are case-specific significant nexus determinations. See Clean Water Rule, *supra* note 46, at 37,065. Even though Justice Kennedy in *Rapanos* wrote that “[a]bsent more specific regulations . . . the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries,” the proposed regional guidance for JDs would still require the Corps to justify their findings. 547 U.S. 715, 782 (Kennedy, J., concurring). The guidance would simply streamline the process. Furthermore, Justice Stevens’ dissent in *Rapanos* describes Justice Kennedy’s concurrence as requiring “case-by-case or category-by-category jurisdictional determinations.” *Id.* at 809 (Stevens, J., dissenting) (emphasis added).

245. “The Red River of the North is unique . . . [it] . . . collects the drainage of an extinct lake bed and remains a meandering stream that is small relative to its vast watershed.” Hawkes Approved JD, *supra* note 159, at 92a.

246. Standardizing the process would allow for less site-specific analysis, making the process faster and more efficient. This is similar to the need that the EPA has attempted to address through the Clean Water Rule, where it said: “Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster.” Clean Water Rule, *supra* note 46, at 37,056.

parties. The long-term objective would be to create a JD process that is less expensive, less time-consuming, and far less contentious.

Finally, I think the *Hawkes II* case would have turned out differently had there been a supplement for the Corps's *Jurisdictional Determination Form Instructional Guidebook* for this area. For example, the wetland delineation supplement for the Northcentral/Northeast region states that the region is differentiated from surrounding regions by its "glacially sculpted landscape,"<sup>247</sup> which is consistent with the analysis in the Corps's approved JD for Hawkes' property.<sup>248</sup> The Corps's JD supplement would have ideally standardized the JD process so that Hawkes' property could have been more easily categorized and would not have required a standalone JD. Although Hawkes could have still challenged the approved JD in this scenario—through the Corps's appeals process, and, because the Court ruled in favor of Hawkes, in court—the reviewing court would have an easier time deciphering the Corps's determination. Furthermore, potential permit applicants and Corps staff would probably find the JD process more predictable than it is now if there were established guidance by geographic area on how to determine jurisdictional waters within the U.S.<sup>249</sup> This approach could lead to fewer permit applicants feeling like they are subject to the unexpected whims of the Corps's regulatory authority and consequently lead to less litigation and lower costs of the JD process.<sup>250</sup>

#### CONCLUSION

The Supreme Court's decision that an approved JD constitutes final agency action subject to judicial review is proof of the high stakes surrounding the issue.<sup>251</sup> The argument between the Corps and the section 404 permit-

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247. U.S. ARMY CORPS OF ENG'RS. REGIONAL SUPPLEMENT TO THE CORPS OF ENGINEERS WETLAND DELINEATION MANUAL: NORTHCENTRAL AND NORTHEAST REGION (VERSION 2.0) 3 (2011), [http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg\\_supp/NCNE\\_supp2.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg_supp/NCNE_supp2.pdf).

248. The approved JD notes that the Red River of the North drains a very large glacial lake basin. Hawkes Approved JD, *supra* note 159, at 92a.

249. The Eighth Circuit in *Hawkes II* characterized the Corps's treatment of Hawkes as unpredictable and severe. ("[Hawkes] challenged the Corps's 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.") *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 998 (8th Cir. 2015).

250. *See id.*

251. Daniel Fisher, *Supreme Court to Hear Wetlands Challenge as "Waters of U.S." Expand*, *Forbes* (Dec. 11, 2015, 5:07 PM), <http://www.forbes.com/sites/danielfisher/2015/12/11/supreme-court-to-hear-wetlands-challenge-as-waters-of-u-s-expand/>.

seekers took place despite the new Clean Water Rule, which was supposed to help clarify difficult jurisdictional issues arising under the CWA.<sup>252</sup>

This Note argues that JDs will remain controversial regardless of the Court's holding. The Corps can resolve the conflict most effectively by promulgating region-specific criteria, following the same geographic structure as the Corps's current wetland delineation supplements.<sup>253</sup> By relying on a definitive categorical guide when implementing the JD process, the Corps's findings will be less case-specific, making them appear less discretionary, and therefore less vulnerable to attack. The CWA will probably remain contentious because of the constraints it inevitably imposes on land use and development. However, in the face of so much uncertainty, the Corps can alleviate some of the pressure on all parties by standardizing the JD process.

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252. "The [Clean Water] rule will . . . increase CWA program predictability and consistency by clarifying the scope of 'waters of the United States' protected under the [CWA]." Clean Water Rule, *supra* note 46, at 37,054.

253. The Corps could define the significant nexus determination according to the geographic divisions it established in promulgating its wetland delineations: the Alaska Supplement, Arid West Supplement, Atlantic & Gulf Coast Supplement, Caribbean Islands Region Supplement, Eastern Mountains and Piedmont Supplement, Great Plains Supplement, Hawaii and Pacific Islands Supplement, Mid-West Supplement, Northcentral and Northeast Supplement, and Western Mountains Supplement. See *Regional Supplements to Corps Delineation Manual*, U.S. ARMY CORPS OF ENG'RS, [http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/reg\\_supp.aspx](http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/reg_supp.aspx) (last visited Apr. 24, 2016).

