No. 15-290

In The
Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,

Petitioner,

v.

HAWKES CO., INC., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the United States Army Corps of Engineers' determination that the property at issue contains "waters of the United States" protected by the Clean Water Act, 33 U.S.C. § 1362(7); *see* 33 U.S.C. § 1251 *et seq*., constitutes "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704, and is therefore subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*.

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF HAWKES

Pursuant to Supreme Court Rule 37.3, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Respondents.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. MSLF has members who reside, own property, and work in all 50 states.

Since its creation in 1977, MSLF and its attorneys have been actively involved in litigation regarding the proper interpretation and implementation of the Administrative Procedure Act ("APA"), 5 U.S.C.

[1] Pursuant to Supreme Court Rule 37.3(a), all parties consent to the filing of this amicus curiae brief. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

§ 551 *et seq. E.g.*, *Mountain States Legal Found. v. Nat. Wildlife Fed'n*, 497 U.S. 1020 (1990). In fact, a substantial portion of the cases in which MSLF attorneys provide representation involved clients who are challenging agency action under the generous judicial review provisions of the APA. *E.g.*, *Herr v. U.S. Forest Serv.*, 803 F.3d 809 (6th Cir. 2015); *Minard Run Oil Co. v. U.S. Forest Serv*., 670 F.3d 236 (3d Cir. 2011), *as amended* (Mar. 7, 2012); *Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745 (D.C. Cir. 2007); *Northwest Mining Ass'n v. Babbitt*, 5 F. Supp. 2d 9 (D.D.C. 1998); *Shuler v. Babbitt*, 49 F. Supp. 2d 1165 (D. Mont. 1998); *Stupak-Thrall v. Glickman*, 988 F. Supp. 1055 (W.D. Mich. 1997).

MSLF and its attorneys have also been – and are currently – involved in litigation regarding the proper interpretation and implementation of the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq*. *E.g.*, *Decker v. Nw. Envtl. Def. Ctr.*, ___ U.S. ___, 133 S. Ct. 1326 (2013); *Sackett v. EPA*, ___ U.S. ___, 132 S. Ct. 1367 (2012); *Rapanos v. United States*, 547 U.S. 715 (2006) (plurality); *Riverside Irr. Dist. v. Andrews*, 758 F.2d 508 (10th Cir. 1985); *In re U.S. Dep't of Def., U.S. EPA Final Rule: Clean Water Rule: Definition of Waters of U.S.*, No. 15-3839, 2016 WL 723241 (6th Cir. Feb. 22, 2016) ("*In re: Definition of 'Waters of the United States'*"); *Johnson v. U.S. EPA*, No. 15-147 (D. Wyo.). MSLF brings a unique perspective to the case at bar by addressing the APA's presumption of judicial review, the courts' interpretation of the APA as providing for broad judicial review, and the

importance of judicial review to protect private property owners from unlawful agency action.

STATEMENT OF THE CASE

The CWA grants the Corps jurisdiction to regulate discharges into navigable waters, or "waters of the United States." 33 U.S.C. §§ 1311(a), 1362(7). Under the CWA, a permit is required for certain discharges into waters of the United States. 33 U.S.C. § 1342. The CWA imposes fines and penalties for unpermitted discharges, and knowing violations can incur civil and/or criminal penalties to the tune of $50,000 a day and up to three years imprisonment. 33 U.S.C. § 1319(c).

Hawkes Co., Inc. wishes to mine peat from a 530-acre property in northwestern Minnesota owned by two affiliated companies (collectively, "Hawkes"). Petitioner's Appendix ("Pet. App.") at 1a, 5a. Hawkes met with the Army Corps of Engineers ("Corps") to discuss agency jurisdiction and, exercising an abundance of caution, also applied for a CWA permit. Pet. App. at 6a. The Corps issued an approved jurisdictional determination concluding the subject property was a water of the United States because of its "significant nexus" to the Red River, a traditional navigable water some 120 miles away. Pet. App. at 7a. Hawkes timely filed an administrative appeal of the approved jurisdictional determination. Pet. App. at 7a. On appeal, the jurisdictional determination was

reversed, but the Corps issued a revised jurisdictional determination with essentially the same information and findings.[2] Pet. App. at 7a, 45a-47a.

Hawkes filed suit seeking judicial review of the jurisdictional determination as a final agency action under the APA. Joint Appendix ("Joint App." at 7-8). The Corps filed a motion to dismiss, and the district court granted that motion. Pet. App. 20a-31a. The Eighth Circuit Court of Appeals reversed and rejected the district court's reliance on *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586 (9th Cir. 2008) and *Belle Co., L.L.C. v. Army Corps of Engineers*, 761 F.3d 383 (5th Cir. 2014) as contrary to this Court's decision in *Sackett.* Pet. App. 11a-16a. Under *Sackett*, the Eighth Circuit held that a jurisdictional determination is a final agency action for which there is no other adequate judicial remedy under 5 U.S.C. § 704. Pet. App. 16a-17a. The Corps timely filed a petition for writ of certiorari. To resolve the circuit split, this Court granted certiorari.

SUMMARY OF ARGUMENT

The narrow issue presented by this case is whether the Corps has overcome the APA's strong presumption favoring judicial review of agency action.

[2] The revised jurisdictional determination stated that it was a "final Corps permit decision in accordance with 33 C.F.R. § 331.10." Pet. App. at 45a.

As the legislative history of the APA demonstrates, Congress intended the APA's judicial review provisions to be an important check on federal agencies' proclivity to exercise their powers arbitrarily or assume powers not granted. Indeed, Congress recognized that, in some circumstances, judicial review would be the only available protection against unwarranted governmental expansion into citizens' private lives.

The practical effect of a jurisdictional determination demonstrates that it does not fall within one of the APA's limited, enumerated exceptions to judicial review. The Corps' argument that a jurisdictional determination is not final agency action eschews the pragmatic interpretation of finality mandated by this Court, fails to appreciate the measurable legal consequences that flow from issuance of a jurisdictional determination, and ignores the Corps' own treatment of the jurisdictional determination as binding and final. The direct and immediate impact of the jurisdictional determination on Hawkes' use of its private property for peat mining *ipso facto* demonstrates that such determination constitutes final agency action.

The thrust of the Corps' argument rests on its erroneous attempt to distinguish between agency orders that compel affirmative action – which the Corps concedes are subject to judicial review – and agency orders that prohibit regulated parties from taking otherwise lawful action, which the Corps asserts are not subject to judicial review. The Corps' view of the APA conflicts with countless other

interpretations of the finality requirement of 5 U.S.C. § 704 and ignores the fundamental right of property owners to use their private property.

Finally, judicial review of agency actions such as jurisdictional determinations serves important public policy interests, especially in the context of agency attempts to assert jurisdiction under the CWA. In the absence of judicial review, agencies will be able to strong-arm private property owners into compliance with their decisions – no matter how arbitrary or abusive – because of the lack of other adequate remedies. Therefore, judicial review of jurisdictional determinations is necessary to protect regulated parties from agency overreach.

ARGUMENT

I. THE APA PROVIDES A BROAD PRESUMPTION FAVORING JUDICIAL REVIEW OF ADMINISTRATIVE ACTION.

The APA provides a right of judicial review of all "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704.[3] Thus, the

[3] There are only two limited exceptions to the APA's broad provision of judicial review: (1) where the statute precludes review; and (2) where agency action is committed to agency discretion by law. 5 U.S.C. § 701(a)(1), (2); *Bennett v. Spear*, 520 U.S. 154, 175 (1997) ("The APA, by its terms, provides a right to judicial review of all 'final agency action for which there is no other adequate remedy in a court,' and applies universally

(Continued on following page)

APA "creates a 'presumption favoring judicial review of administrative action. . . .'" *Sackett*, 132 S. Ct. at 1373 (quoting *Block v. Community Nutrition Institute*, 467 U.S. 340, 345 (1984)). Recently, this Court unanimously emphasized that "Congress *rarely* intends to prevent courts from enforcing its directives to federal agencies. For that reason, this Court applies a 'strong presumption' favoring judicial review of administrative action." *Mach Mining, LLC v. E.E.O.C.*, ___ U.S. ___, 135 S. Ct. 1645, 1651 (2015) (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986)) (emphasis added). And while the presumption is rebuttable, the agency bears a "'heavy burden'" to show that a plaintiff is not entitled to judicial review. *Id.* (quoting *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975)); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986) (holding that a "right of action" is "expressly created" by 5 U.S.C. § 704 "absent some clear and convincing evidence" to the contrary).

When Congress passed the APA, it did so in hopes of reining in what President Roosevelt referred to as the "'fourth branch' of the Government for which there is no sanction in the Constitution." S. Doc. No. 79-248, at 299 (1946). Senator McCarran, the architect of the bill, described one of the APA's four main functions as "set[ting] forth a simplified

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'except to the extent that [§ 701 applies].'") (quoting 5 U.S.C. §§ 704, 701(a)). The Corps has not asserted that either 5 U.S.C. § 701 exception applies here.

statement of judicial review designed to afford a remedy for *every* legal wrong." *Administrative Procedure Act: Hearings on S. 7 Before the House and Senate*, 79th Cong. 2d Sess. 304 (1946) ("*Hearings*") (emphasis added). In recommending the bill to Congress, the Senate Judiciary Committee stated that judicial review was "indispensable[,] since its mere existence generally precludes the arbitrary exercise of powers or assumption of powers not granted." S. Rep. No. 79-752, at 217 (1945). Congress's adoption of the APA recognized that judicial review is deeply rooted in American jurisprudence, and to allow the "barnacle growth" of unchecked agency authority could "foul[ ]" "the ship of state" and "endanger[ ]" "our institutions." S. Doc. No. 79-248, at 350 (1946); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) ("[W]hat is there, in the exalted station of an officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim . . . ?").

It is apparent from the APA's legislative history that Congress viewed judicial oversight of agency actions as the central mechanism by which the APA would protect Americans from agency overreach and abuse. S. Doc. No. 79-248, at 305 (1946) (Senator McCarran emphasizing that judicial review is "something in which the American public has been and is much concerned, harkening back, if we may, to the Constitution of the United States, which sets up the judicial branch of the Government for the redress of human wrongs and for the enforcement of human

rights."); *id.* at 347 (Representative Michener stating that "[t]he only aim and purpose of this bill is to see that the rank and file of American people receive the justice which our system of jurisprudence attempts to guarantee to them."). And this Court has consistently interpreted the APA as requiring judicial review of almost all agency actions. *See Heckler v. Chaney*, 470 U.S. 821, 843-44 (1985) (Marshall, J., concurring) ("The legislative material elucidating [the APA] manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the [APA]'s 'generous review provisions' must be given a 'hospitable interpretation. . . .'" (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977))); *Califano*, 430 U.S. at 104 (The APA "undoubtedly evinces Congress['s] intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials.").

Thus, the APA affords broad judicial review of agency action unless: (1) the agency action is not final; (2) existing statutes preclude judicial review; or (3) the agency action is committed to agency discretion by law. 5 U.S.C. §§ 701(a)(1), (2), 704. Only upon a showing of "'clear and convincing evidence'" that one of these exceptions applies "should the courts restrict access to judicial review." *Abbott Laboratories*, 387 U.S. at 141 (quoting *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962)). The limited exceptions to judicial

review in the APA demonstrate Congress's intent that such review serve as "a check against excess of power and abusive exercise of power in derogation of private right." Final Report of Attorney General's Comm. on Administrative Procedure, S. Doc. No. 8, at 76 (1941); *see also Hearings* at 307 ("In light of the great expansion of governmental activities into the private lives of our citizens, some protection of the citizen against these agencies should be provided. It is long overdue." (statement of Sen. Reed)).

Congress also intended agency action to be considered final for purposes of judicial review "whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority." 5 U.S.C. § 704; *Administrative Procedure Act, Hearings on H.R. 184, H.R. 339, H.R. 1117, H.R. 1203, H.R. 1206, and H.R. 2602 Before the H. Comm. on the Judiciary*, 79th Cong., 1st Sess. 76 (1945) (statement of Sen. McCarran); *cf. Darby v. Cisneros*, 509 U.S. 137, 137 (1993) (federal courts do not have the authority to require exhaustion of administrative remedies before a plaintiff may seek judicial review under the APA, where neither the relevant statute nor agency rules specifically mandate exhaustion as a prerequisite to judicial review). There is no indication in the legislative history that Congress intended the finality requirement to be applied in a "hypertechnical fashion" – to the contrary,

"the legislative history of [5 U.S.C.] § 704 suggest[s] that Congress was merely codifying the self-imposed judicial practice of exercising restraint in reviewing tentative agency action." *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435 n.7 (D.C. Cir. 1986). The APA's broad presumption of judicial review is therefore the starting point for any inquiry regarding an agency's claim that its action is not yet final. *Bland v. United States*, 412 U.S. 909, 912 (1973) (Douglas, J., dissenting from denial of certiorari) ("[U]nder the [APA] judicial review of the exercise of executive discretion is the rule and unreviewability is the exception." (internal quotation omitted)).

II. A JURISDICTIONAL DETERMINATION UNDER THE CWA IS THE QUINTESSENTIAL FINAL AGENCY ACTION SUBJECT TO JUDICIAL REVIEW UNDER THE APA.

A. A Jurisdictional Determination Is Final Agency Action.

Although judicial review under the APA is available only for "final" agency actions, 5 U.S.C. § 704, the APA's finality requirement is interpreted in a "flexible" and "pragmatic way." *Abbott Laboratories*, 387 U.S. at 149-51; *see also Ciba-Geigy*, 801 F.2d at 435 & n.7 (recognizing that 5 U.S.C. § 704 does not "convey[ ] some settled, inflexible meaning that precludes pragmatic or functional considerations."); *Board of Trade of City of Chicago v. S.E.C.*, 883 F.2d 525, 530 (7th Cir. 1989) ("'Finality' is a practical concept[ ]" that takes into consideration whether the

regulated individual or entity must "dance to [the agency's] tune"). The "core question" in determining finality "is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). In *Bennett*, this Court synthesized its prior precedents into a two-pronged inquiry, holding that agency action is final if it: (1) represents the consummation of agency decision-making on the matter; and (2) fixes legal rights or obligations, or is one from which legal consequences will flow. 520 U.S. at 177-78.

In the case at bar, the Corps concedes that the first prong of the *Bennett* test is satisfied. Corps' Br. at 25-26. However, the Corps argues that an approved jurisdictional determination under the CWA is not final because it does not "impose legal consequences" under the second *Bennett* prong. Corps' Br. at 26. The Corps' argument eschews a "pragmatic" interpretation of the finality requirement in favor of a rigid view that requires the plaintiff to demonstrate "legal consequences" or "penalties" as a result of the agency action. Corps' Br. at 26. Under the Corps' myopic interpretation, the jurisdictional determination is divorced from the CWA – the statute under which the Corps issued the jurisdictional determination in the first place – because any obligation to avoid discharge of pollutants into "waters of the United States" flows independently from the CWA itself, rather than the jurisdictional determination. Corps'

Br. at 27. According to the Corps, the jurisdictional determination merely expresses the Corps' opinion that a pre-existing obligation to avoid such discharges exists. Corps' Br. at 27-28.

In determining whether the agency action at issue "fixes legal rights or obligations," or is one from which legal consequences flow, *Bennett*, 520 U.S. at 177-78, this Court looks primarily to whether the agency's position is "definitive" and whether it has a "'direct and immediate . . . effect on the day-to-day business'" of the parties challenging the action. *F.T.C. v. Standard Oil Co. of Cal.*, 449 U.S. 232, 239 (1980) (quoting *Abbott Laboratories*, 387 U.S. at 152). Final agency actions have "the status of law" and "immediate compliance with their terms [is] expected." *Abbott Laboratories*, 387 U.S. at 152. A jurisdictional determination is clearly "definitive" in that it is the agency's final word on a specific property's jurisdictional status, and such determination will not be reconsidered during the CWA permitting process. *Sackett*, 132 S. Ct. at 1374 (agency's determination "that it has regulatory authority over [the] property" is a "definitive[ ]" ruling on that question) (Ginsburg, J., concurring). A jurisdictional determination also clearly conveys the impression that "compliance [is] expected" because the Corps does not contend that private property owners are free to disregard the jurisdictional determination and commence peat mining without consequences. *See Abbott Laboratories*, 387 U.S. at 151. To the contrary, violations for discharges into waters of the United States without a permit can

incur civil and/or criminal penalties of $50,000 a day and up to three years imprisonment. *See* 33 U.S.C. § 1319(c). As the D.C. Circuit has recognized, where a landowner "will be subject to an enforcement action and fines" if it does not conform to the agency's view – here, that Hawkes' property contains jurisdictional wetlands – then "the finality of [the agency's] position is clear enough." *Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d 45, 47-48 (D.C. Cir. 2000).

This Court has also considered whether the challenge to agency action presented a legal issue "fit for judicial resolution" and whether the parties bringing the challenge "represented almost all the parties affected," in which case, "'a pre-enforcement challenge [is] calculated to speed enforcement' of the relevant Act." *Standard Oil*, 449 U.S. at 239 (quoting *Abbott Laboratories*, 387 U.S. at 150). A final agency action is "'a final and binding determination'" rather than "'a tentative recommendation. . . .'" *Bennett*, 520 U.S. at 178 (quoting *Franklin*, 505 U.S. at 798). The jurisdictional determination at issue here is analogous to other final agency actions. For example, in *Bennett*, the agency action at issue was a biological opinion and accompanying incidental take statement issued by the Fish and Wildlife Service ("FWS").[4] *Id.*

[4] Notably, the biological opinion and incidental take statement at issue in *Bennett* were far more attenuated than the jurisdictional determination at issue here because they did not purport to apply to individual regulated parties but instead applied to other agencies. 520 U.S. at 157.

at 157. This Court held that the FWS's action met the second prong of its test because the action "alter[s] the legal regime to which the action agency is subject, authorizing it to take the endangered species if (but only if) it complies with the prescribed conditions." *Id.* at 178. Much like the legal effects that flowed from the biological opinion in *Bennett*, the legal effects that flow from the jurisdictional determination here is that Hawkes is able to commence peat mining activities if (but only if) it applies for and receives a CWA permit. Petitioner's Appendix ("Pet. App.") at 11a-13a; *see* Pet. App. at 83a (Jurisdictional determination expressly rejecting Hawkes' position that the land at issue was not a "waters of the United States"). Thus, the jurisdictional determination is "'a final and binding determination'" rather than "'a tentative recommendation[.]'" *Bennett*, 520 U.S. at 178 (quoting *Franklin*, 505 U.S. at 798); *see also Ciba-Geigy Corp.*, 801 F.2d at 436 ("Once the agency publicly articulates an unequivocal position . . . and expects regulated entities to alter their primary conduct to conform to that position, the agency has voluntarily relinquished the benefit of postponed judicial review."); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 586 (1980) (Agency's decision was final when it "rendered its last word on the matter.").

An analogous circuit court decision is *Center for Native Ecosystems v. Cables*, 509 F.3d 1310 (10th Cir. 2007), where the Forest Service had issued annual operating instructions ("AOIs") but not grazing permits for a specific area. *Id.* at 1328-29. Environmental

groups challenged the AOIs as final agency action under the APA. *Id.* The Tenth Circuit held the second prong of the *Bennett* test was satisfied because the AOIs set forth certain findings independent from – and not available in – the grazing permits, and thus conferred certain legal obligations. *Id.* at 1330. The court explained that AOIs are the agency's "last word" and "undoubtedly have clear and definite consequences" on regulated parties. *Id.* The same rationale is applicable to the jurisdictional determination here: While a CWA permit has not yet been granted or denied, the CWA permit process does not offer any opportunity for revision of the jurisdictional determination, and the Corps characterizes the jurisdictional determination as a discrete agency decision distinct from a CWA permit. Corps' Br. at 8-10.

Issuance of a jurisdictional determination also "presents a 'legal issue . . . fit for judicial resolution.'" *Center for Native Ecosystems*, 509 F.3d at 1330 (*Standard Oil*, 449 U.S. at 239). The jurisdictional determination at issue here is the Corps' stand-alone pronouncement of the jurisdictional status of Hawkes' property. Corps' Br. at 8-10. Thus, judicial review would not disrupt any ongoing administrative process. *See Bell v. New Jersey*, 461 U.S. 773, 779-80 (1983) (Agency action is final notwithstanding "[t]he possibility of further proceedings in the agency" on related issues, so long as "judicial review at the time [would not] disrupt the administrative process.").

The Corps argues that its jurisdictional determination is not final agency action because it is the

CWA that requires landowners to obtain permits to discharge into waters of the United States, not the jurisdictional determination. *See* Corps' Br. at 27. This argument is unavailing, because it contradicts the Corps' treatment of jurisdictional determinations as binding during its permit process.[5] *Compare Fairbanks*, 543 F.3d at 593 ("An approved jurisdictional determination upheld on administrative appeal is the agency's 'last word' on whether it views the property as a wetland subject to regulation under the CWA." (quoting *Sierra Club v. U.S. Nuclear Regulatory Comm'n*, 825 F.2d 1356, 1362 (9th Cir. 1987))), *with Bennett*, 520 U.S. at 178 (agency recommendations that are "binding" are final agency action). An agency's treatment of its own decision as final is a clear indication that it is, in fact, final.

[5] Additionally, because Hawkes' allegations must be taken as true for purposes of the Corps' motion to dismiss, this Court must take as true Hawkes' contention that their property does not contain jurisdictional wetlands that fall within the definition of "waters of the United States" under the CWA. *See* Joint App. at 8; *Ashcroft v. Iqbal*, 556 U.S. 662, 696 (2009) (in considering a motion to dismiss, the court "assum[es] the factual allegations are true"); *Nietzke v. Williams*, 490 U.S. 319, 327 (1989) ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations."). Therefore, it is the jurisdictional determination that (erroneously) purports to impose a permitting requirement on Hawkes, not the CWA. Pet. App. at 13a ("[T]he [jurisdictional determination] alters and adversely affects [Hawkes's] right to use [its] property in conducting a lawful business activity. The adverse effect is caused by agency action, not simply by the existence of the CWA.").

Whitman v. American Trucking Associations, 531 U.S. 457, 478-79 (2001). Indeed, even where an agency "has not dressed its decision with the conventional procedural accoutrements of finality, its own behavior [may] bel[y] the claim that its interpretation is not final." *Id.* (holding that EPA's "interim implementation policy" for national ambient air quality standards was final, given the agency's refusal to reconsider it in subsequent rulemakings, representation to commenters that its interpretation was conclusive, and adoption of the interpretation under the heading "final decision").

As a practical matter, the jurisdictional determination is final as to its effect on Hawkes' inability to use its property. Indeed, whether Hawkes chose to apply for a permit or proceed with peat mining without a permit and face the consequences, a jurisdictional determination would undoubtedly form the basis of the Corps' permitting process or, alternatively, the Corps' enforcement action. *See Frozen Food Exp. v. United States*, 351 U.S. 40, 44 (1956) (Agency decision is not "abstract, theoretical, or academic" where it forms "the basis for [regulated entities] in ordering and arranging their affairs."). When an agency decision is practically treated as final and binding as to both the agency and regulated parties, as jurisdictional determinations are, the impact "is sufficiently direct and immediate as to render the issue appropriate for judicial review. . . ." *Abbott Laboratories*, 387 U.S. at 152.

Moreover, legal consequences flow from a site-specific jurisdictional determination because it "substantially increase[s] the risk of regulation or enforcement relating to particular property. . . ."[6] *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 13-14 (D.C. Cir. 2011); *see also First Nat. Bank of Chicago v. Comptroller of Currency of U.S.*, 956 F.2d 1360, 1364 (7th Cir. 1992) (holding that comptroller's opinion letter to bank was final agency action because "the bank requested not advice, perhaps on a purely hypothetical course of action, but permission to go forward with a concrete proposal. . . . The Comptroller turned the bank down. He did not . . . offer a merely tentative view."). Thus, jurisdictional determinations are not only "definitive," but also have a "direct and immediate . . . effect on the day-to-day business" of affected property owners because they constitute direct pronouncements on the Corps' jurisdiction over the subject property. *See Abbott Laboratories*, 387 U.S. at 151-52.

The Corps repeatedly argues that, if judicial review of jurisdictional determinations is permitted, the Corps (and other agencies) will be discouraged from issuing jurisdictional determinations or conducting

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[6] As a practical matter, even if the Corps does not bring an enforcement action, a jurisdictional determination *ipso facto* subjects Hawkes to a greater risk of litigation under the CWA's citizen suit provisions because a decree that the subject property contains waters of the United States would provide the basis for such suit. 33 U.S.C. § 1365; *see, e.g.*, *Decker*, 133 S. Ct. at 1326.

other agency actions not mandated by statute. Corps' Br. at 24-25 (Asserting that, if jurisdictional determinations are considered final agency actions, "the Corps might reconsider the practice, or at least revisit its willingness to provide an approved jurisdictional determination to anyone who requests it."). However, this is the exact same argument unanimously rejected in *Sackett*, 132 S. Ct. at 1374, where the EPA "warn[ed] that [it] is less likely to use [compliance] orders if they are subject to judicial review." This Court reasoned, "[t]hat may be true – but it will be true for all agency actions subjected to judicial review. The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all." *Id.* And, as with the compliance order at issue in *Sackett*, judicial determinations will remain an effective means of informing private property owners of the presence of judicial waters of the United States in cases where "there is no substantial basis to question their validity." *Id.* The Corps' desire to issue jurisdictional determinations without fear of judicial review is not sufficient reason to deprive Hawkes of its day in court. *Cf. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010) ("[T]hat a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution, for convenience and efficiency are not the primary objectives – or the hallmarks – of democratic government." (quotations and alteration omitted)).

B. There Is No Adequate Remedy In Court Following The Issuance Of A Jurisdictional Determination.

The APA provides that judicial review under the APA is available where "there is no other adequate remedy in a court. . . . A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. § 704. The Corps argues that, although Hawkes has exhausted its administrative remedies and the jurisdictional determination is now final, Hawkes has other adequate recourse because it may now apply for a CWA permit.[7] Corps' Br. at 44-45. Then, the Corps argues, "[w]hen the Corps denies a permit, or issues a permit subject to conditions that the applicant opposes, the applicant may seek judicial review of that decision" and may argue at *that* time that the jurisdictional determination was erroneous. Corps' Br. at 45.

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[7] Alternatively, the Corps argues that Hawkes may decline to apply for a permit and may wait for the Corps to bring an enforcement action. Corps' Br. at 50. *Sackett* essentially rejected this option as an adequate remedy. *Sackett*, 132 S. Ct. at 1372 (noting that each day the regulated parties "wait for the agency to drop the hammer" following the issuance of a compliance order, "exorbitant civil and criminal penalties accrue"); *see also id.* at 1375 (The CWA's "draconian penalties for the sort of violations alleged in this case" leave property owners "with little practical alternative but to dance to the [agency's] tune.") (Alito, J., concurring).

As a preliminary matter, the very fact that the Corps has an administrative appeal process in place to review jurisdictional determinations and that Hawkes exhausted its administrative remedies counsels in favor of judicial review. *Darby v. Cisneros*, 509 U.S. 137, 146 (1993) ("When an aggrieved party has exhausted all administrative remedies expressly prescribed by statute or agency rule, the agency action is 'final for purposes of [5 U.S.C. § 704]' and therefore 'subject to judicial review. . . .'" (quoting 5 U.S.C. § 704)). Furthermore, the Corps' proffered "remedy" would be onerous and wasteful, and it fails to address Hawkes' contention that it is not legally required to apply for a CWA permit in the first place.[8] Upon receiving the Corps' judicial determination, Hawkes would face the unenviable choice of either proceeding with the CWA permit process – which Corps employees advised Hawkes would be costly, lengthy, and ultimately futile; *see* Pet. App. at 6a-7a – or proceeding with peat mining activities and facing civil and/or criminal penalties of up to $50,000 per day for knowing violations of the CWA (not to mention imprisonment for up to three years). *See* 33 U.S.C. § 1319(b), (c). Surely the APA's provision of judicial review sought to avoid exactly this Hobson's

[8] As Judge Kelly noted in her concurrence below, "what happens if Hawkes is, after all, granted a permit yet maintains it never needed one in the first place? It must decline the permit and challenge the original jurisdiction in court. This roundabout process does not seem to be an 'adequate remedy. . . .'" Pet. App. at 20a.

Choice. *See Bland*, 412 U.S. at 912 (Douglas, J., dissenting from denial of certiorari) ("One needs no reminder that government too can be lawless, that government cannot lead the way in law and order when it is the great malefactor. The [APA] is indeed part of the citizen's arsenal against lawless government.").

According to this Court, the "adequate remedy" requirement merely "makes it clear that Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). The Corps fails to explain how judicial review of a jurisdictional determination would duplicate existing procedures – there are no "special statutory procedures" in place regarding jurisdictional determinations. *Id.* Indeed, as the Corps vehemently argues, there is no authorization in the CWA for jurisdictional determinations at all. Corps' Br. at 3-4. Moreover, the Corps' interpretation is in stark contrast to Congress's clear intent in including the "adequate remedy" proviso: "The second sentence of [5 U.S.C. § 704] . . . was designed 'to negative any intention to make reviewable merely preliminary or procedural orders where there is a subsequent and adequate remedy at law available. . . .'" *Attorney General's Manual on the Administrative Procedure Act*, 103 (1947) (quoting S. Doc. No. 79-248 at 37 (1946)) (listing as examples "intermediate orders such as orders setting matters for hearing"); *see, e.g.*, *Western Radio Services Co., Inc. v. Glickman*, 123

F.3d 1189, 1196-97 (9th Cir. 1997) (Forest Service's notice proposing construction of an access road was not final agency action because it was preliminary to a decision whether to build the road); *Northcoast Environmental Center v. Glickman*, 136 F.3d 660, 669-70 (9th Cir. 1998) (holding that the Forest Service's preliminary research and development efforts to manage a specific tree do not constitute final agency action). The jurisdictional determination at issue was clearly not preliminary or intermediate. It purports to settle, once and for all, the question of whether the Corps has jurisdiction over Hawkes' property under the CWA. By the Corps' own characterization, it was final and binding, Pet. App. at 45a, and Hawkes exhausted the administrative review process before filing suit. Pet. App. at 8a. Therefore, the jurisdictional determination constituted final agency action for which there was no other adequate remedy, and the Corps has failed to overcome the APA's strong presumption of judicial review.

III. THE CORPS' ATTEMPT TO LIMIT JUDICIAL REVIEW UNDER THE APA TO AGENCY ACTIONS THAT COMPEL AFFIRMATIVE ACTION IS UNSUPPORTED BY THE CASE LAW AND IS IN DEROGATION OF PRIVATE PROPERTY RIGHTS.

The court below properly rejected the Corps' attempt to distinguish "between an agency order that compels affirmative action, and an order that prohibits a party from taking otherwise lawful action." Pet.

App. at 11a. The Corps would have this Court effectively limit *Sackett* to its facts and hold that, unless an agency action immediately imposes civil and/or criminal penalties on the regulated party, it is not final agency action under the second *Bennett* prong. *See* Corps' Br. at 25-27 (arguing that, until the recipient of a jurisdictional determination discharges pollutants at the relevant site and the agency decides to initiate enforcement proceedings, agency action is not final because the jurisdictional determination "does not contain any directives" or "alter the landowner's exposure to penalties").[9]

The Corps' proffered interpretation contradicts the basic principle that a party "may challenge [a] regulation without waiting for enforcement proceedings." *Herr*, 803 F.3d at 822 ("[C]ourts 'normally do not require plaintiffs to bet the farm . . . by taking the violative action before testing the validity of the law.'" (quoting *Free Enter. Fund*, 561 U.S. at 490-91)); *Steffel v. Thompson*, 415 U.S. 452, 459-60 (1974)

[9] As the court below recognized, the jurisdictional determination does in fact alter Hawkes' exposure to penalties. Pet. App. at 14a-15a ("Because appellants were forthright in undertaking to obtain a permit, choosing now to ignore the [jurisdictional determination] and commence peat mining without the permit it requires would expose them to substantial criminal monetary penalties and even imprisonment for a knowing CWA violation."). This impact is sufficient to render the jurisdictional determination final agency action. *See Sackett*, 132 S. Ct. at 1372 (the fact that an agency action exposed the regulated parties "to double penalties in a future enforcement proceeding[ ]" demonstrated that the second *Bennett* prong was satisfied).

(plaintiff was not required to violate statute and risk actual prosecution before he could seek a declaratory judgment regarding the constitutionality of a statute). The Corps' interpretation of the APA is also contradicted by the lower courts' frequent grants of judicial review to challenges of agency action that do not compel regulated parties to take affirmative action. *See, e.g.*, *Oregon Natural Desert Ass'n v. U.S. Forest Service*, 465 F.3d 977, 982-83 (9th Cir. 2006) (rejecting agency's argument that action is not final because it "is not a rule, order, license, sanction, or relief[ ]"); *Center for Native Ecosystems*, 509 F.3d at 1330 (annual operating instructions are final because they are "the last word before grazing begins and undoubtedly have clear and definite consequences for permittees, who need to make their plans based on what the [annual operating instructions] authorize"); *Minard Run*, 670 F.3d at 247-49 (agency statement that prohibited the exercise of private mineral rights was final agency action subject to judicial review); *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1279 (D.C. Cir. 2005) (Rejecting Corps' argument that nationwide permits were not final agency action because the Corps did not deny authorization to specific dischargers, and holding that nationwide permits "are not a definitive, but otherwise idle, statement of agency policy – they carry easily-identifiable legal consequences for . . . would-be dischargers."); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (Holding that EPA guidance is final agency action because it

"reflect[s] a settled agency position which has legal consequences both for . . . agencies administering their permit programs and for companies . . . who must obtain . . . permits in order to continue operating."). Each of these cases applied *Bennett*'s two-prong test, and none of them held that an agency's action must compel affirmative action in order to be considered final under 5 U.S.C. § 704.

Moreover, the Corps' interpretation ignores the simple fact that Hawkes' right to own property is a hollow right indeed without the right to use it. *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992) ("For what is the land but the profits thereof?" (internal quotation omitted)); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) ("For practical purposes, the right to coal consists in the right to mine it. . . . To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."). This Court has recognized that imposing restrictions on the right to use property is a slippery slope. *Lucas*, 505 U.S. at 1014 (If "the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].'" (quoting *Pennsylvania Coal Co.*, 260 U.S. at 415) (alterations in original)). It makes no practical difference to Hawkes whether the Corps' action is tantamount to an order that compels affirmative action, as in *Sackett*; or an order that

prohibits otherwise lawful action, as in this case. Either way, the agency's action "requir[es] land to be left substantially in its natural state . . . heighten[ing the] risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Lucas*, 505 U.S. at 1018. And in either situation, "the property owners are at the agency's mercy." *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring). Thus, judicial review of agency action is warranted regardless of whether the action at issue requires affirmative action or prohibits otherwise lawful action.

IV. BROAD JUDICIAL REVIEW OF AGENCY ACTION SERVES IMPORTANT PUBLIC POLICY INTERESTS.

As a matter of public policy, the APA's presumption of judicial review is more important today than ever before. There is an "evolution toward increasingly informal decisionmaking processes" underway in federal agencies. E. Gates Garrity-Rokous, *Preserving Review of Undeclared Programs: A Statutory Redefinition of Final Agency Action*, 101 Yale L. J. 643, 656 (1991); Richard E. Levy *et al.*, *Administrative Procedure and the Decline of the Trial*, 51 U. Kan. L. Rev. 473, 502 (2003) ("[W]ithin both general categories of agency decisionmaking – rulemaking and adjudication – the trend has been toward increasingly informal procedures."). In *Sackett*, the EPA sought to characterize its compliance order as nonfinal "in light of 'informal discussion' and invit[ing] contentions of

inaccuracy[,]" but this Court unanimously rejected that characterization as relevant, stating that those features "do[ ] not suffice to make an otherwise final agency action nonfinal." 132 S. Ct. at 1372. As Justice Alito noted in his concurrence, the *Sackett* issue arose because Congress had failed to "provide a reasonably clear rule regarding the reach of the Clean Water Act" and "the EPA ha[d] not seen fit to promulgate a rule providing a clear and sufficiently limited definition of the phrase[,]" so the agency had resorted to "informal guidance."[10] *Id.* at 1375 (Alito, J., concurring).

The Corps attempts to characterize a jurisdictional determination as analogous to "various types of informal agency guidance that courts have generally found to be non-'final' under the APA." Corps' Br. at 17. However, the lower courts have rejected agency attempts to avoid judicial review merely by labeling its action "informal." *See, e.g.*, *Barrick Goldstrike Mines*, 215 F.3d at 47-48 ("[W]e reject[ ] the proposition that if an agency labels its action an 'informal' guideline it may thereby escape judicial review under the APA." (citing *Better Gov't Ass'n v. Dept. of State*, 780 F.2d 86, 93 (D.C. Cir. 1986))); *see also First Nat. Bank of Chicago*, 956 F.2d at 1364 (letter from Comptroller offering an interpretation of banking

[10] The informal guidance defining "waters of the United States" is now in rule form, but is currently enjoined pending judicial review. *See In re EPA*, 803 F.3d 804, 809 (6th Cir. 2015).

regulations was final agency action regardless of how "formal" it appeared); *Ciba-Geigy*, 801 F.2d at 436-39, 438 n.9 (a letter from an agency official stating the agency's position and stating the steps the regulated party would need to take to be in compliance constituted final agency action). And, even if the Corps' characterization were taken at face value, it should not be able to evade judicial review where an "informal" action is final and binding on private property owners.[11] *See* Garrity-Rokous, *Preserving Review of Undeclared Programs*, 101 Yale L. J. at 656 ("Administrative agencies' evolution toward increasingly informal decisionmaking processes is legitimate only if the judiciary maintains the oversight role contemplated by the APA.").

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[11] The D.C. Circuit has aptly described the troubling evolution of agency guidance that it characterizes as non-final:

> The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. . . . Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. . . . The agency may also think there is another advantage – immunizing its lawmaking from judicial review.

Appalachian Power Co., 208 F.3d at 1020.

The CWA in particular presents unique public policy concerns that necessitate judicial oversight. As *Sackett* noted, "there is no reason to think that the [CWA] was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review – even judicial review of the question whether the regulated party is within the EPA's jurisdiction." 132 S. Ct. at 1367. Recent litigation disputing the EPA's broad assertion of jurisdiction by adopting an almost limitless definition of "waters of the United States" highlights the important role of the courts in limiting agency overreach.[12] *See e.g., In re: Definition of "Waters of the United States,"* 2016 WL 723241, at *1. In addition, the CWA imposes harsh civil and criminal penalties for "'a broad range of ordinary industrial and commercial activities'" and regulated parties spend well over $1.7 billion a year attempting to obtain wetlands permits. *Rapanos*, 547 U.S. at 721 (quoting *Hanousek v. United States*, 528 U.S. 1102, 1103 (2000) (Thomas, J., dissenting from denial of certiorari)).[13] As Justice Alito observed in his concurrence in *Sackett*, judicial review of agency assertions

[12] As discussed *supra* and contemplated by the APA's legislative history, the "mere existence" of judicial review operates to discourage the agency from "the arbitrary exercise of powers or assumption of powers not granted." S. Rep. No. 79-752, at 217 (1945).

[13] If wetland permitting was a $1.7 billion per year industry in 2006 when *Rapanos* was decided, the cost is necessarily far greater a decade later.

of jurisdiction under the CWA is necessary because "[a]ny piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the [CWA]. . . . At least [under the majority's decision], property owners like petitioners will have the right to challenge the EPA's jurisdictional determination under the [APA]." 132 S. Ct. at 1375 (Alito, J., concurring).

The combination of the agencies' broad assertion of jurisdiction under the CWA and the draconian penalties imposed for violations of the CWA creates an administrative nightmare for regulated parties who wish to simply use their land. As this Court chillingly foretold in *Rapanos*:

> The[se] enforcement proceedings . . . are a small part of the immense expansion of federal regulation of land use that has occurred under the Clean Water Act – without any change in the governing statute during the past five Presidential administrations. In the last three decades, the Corps and the [EPA] have interpreted their jurisdiction over "waters of the United States" to cover 270-to-300 million acres of swampy lands in the United States – including half of Alaska and an area the size of California in the lower 48 States. *And that was just the beginning.*

547 U.S. at 722 (emphasis added). This Court has repeatedly been called on to rein in the EPA and the Corps' eager assertions of jurisdiction over private property, no matter how tenuous that property's

connection to jurisdictional waters. *Id.*; *see also Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 167-74 (2001) (rejecting Corps' argument that the CWA's definition of "navigable waters" includes "nonnavigable, isolated, intrastate waters"). As the court below reasoned, in the absence of judicial review, the agencies could prevail on assertions of jurisdiction unsupported by the CWA merely by exhausting the resources and patience of regulated parties:

> The prohibitive costs, risk, and delay of these alternatives to immediate judicial review evidence a transparently obvious litigation strategy: by leaving appellants with no immediate judicial review and no adequate alternative remedy, the Corps will achieve the result its local officers desire, abandonment of the peat mining project, without having to test whether its expansive assertion of jurisdiction – rejected by one of their own commanding officers on administrative appeal – is consistent with the Supreme Court's limiting decision in *Rapanos*.

Pet. App. at 15a. Such dilatory and bad faith tactics are undoubtedly the ills that Congress had in mind when it adopted the APA. Therefore, the APA's presumption of judicial review should be interpreted broadly to protect the rights of regulated parties who have no other recourse at law.

CONCLUSION

For the foregoing reasons, the Court should affirm the Court of Appeals and hold that a jurisdictional determination constitutes final agency action subject to judicial review under the APA.

Respectfully submitted,

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