Hawkes v. U.S. Army Corps of Engineers: Is a Wetlands Jurisdictional Determination Reviewable Under the Administrative Procedure Act?

by Chris Dow

Chris Dow is an environmental attorney in San Francisco, California, with experience in wetlands permitting issues.

On March 30, 2016, the U.S. Supreme Court heard oral argument in *Hawkes Co. v. U.S. Army Corps of Engineers*.[1] This case from the U.S. Court of Appeals for the Eighth Circuit asks whether a wetlands jurisdictional determination (JD)—the U.S. Army Corps of Engineers' (the Corps') official stance on whether a wetlands areas is subject to Clean Water Act (CWA)[2] §404 permitting requirements—constitutes a final agency action that is subject to judicial challenge under the Administrative Procedure Act (APA).[3] Currently, there is a circuit split on this issue: The Eighth Circuit in *Hawkes* ruled that a JD is immediately reviewable under the APA, while the U.S. Court of Appeals for the Fifth Circuit and the U.S. Court of Appeals for the Ninth Circuit have held that a JD is not immediately reviewable.[4]

If the Court rules that a JD is a final agency action, a person who wishes to undertake fill activities in wetlands areas will be allowed to challenge the legal sufficiency of a JD before completing the §404 wetlands permitting process, and before facing an administrative enforcement action for alleged illegal filling of wetlands. From the Corps' perspective, if the Court so holds, the decision would introduce uncertainty and delay in the administration of the Corps' statutory charge under the CWA. Further, the prospect of litigation could have a chilling effect on the issuance of JDs in the first instance.

Environmental professionals only generally familiar with CWA and wetlands issues can quickly see how the *Hawkes* case is highly charged from an environmental policy perspective, with the government and environmental protection groups on one side and property developers and property rights advocates on the other. But notwithstanding the respective merits of the policy arguments on either side, an analysis of case law considering reviewability under the APA of government administrative determinations in the environmental regulatory arena suggests that a JD is not a proper subject of judicial review.

I. *Sackett v. EPA*: The Supreme Court Sets the Standard for Judicial Review of CWA Preenforcement Agency Action Under the APA

A. *The Sacketts Fill Their Lot*

The Sacketts owned property just north of a lake but separated from it by several lots with permanent structures.[5] In preparation for building a house, they filled in part of their property.[6] Months later, they received an administrative compliance order from the U.S. Environmental Protection Agency (EPA) stating that the Sacketts' residential property contains wetlands; the Sacketts' filling in of these wetlands violated the CWA; and the Sacketts must immediately remove the fill according to an EPA work plan.[7] The

1. 782 F.3d 994, 45 ELR 20070 (8th Cir. 2015), *cert. granted* (U.S. Dec. 11, 2015) (No. 15-290).
2. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
3. 5 U.S.C. §§551-559.
4. Belle Co., LLC v. U.S. Army Corps of Eng'rs, 761 F.3d 383, 44 ELR 20175 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1548 (2015); Fairbanks North Star Borough v. U.S. Army Corps of Eng'rs, 543 F.3d 586, 38 ELR 20239 (9th Cir. 2008).
5. Sackett v. U.S. Envtl. Prot. Agency (EPA), 132 S. Ct. 1367, 1370, 42 ELR 20064 (2012).
6. *Id.*
7. *Id.* at 1371.

order also required the Sacketts to provide all site records to EPA and allow EPA employees to access their property.[8]

The Sacketts did not believe their property was subject to the CWA, so they requested a hearing from EPA, which EPA denied.[9] The Sacketts sued EPA under the APA, which allows for judicial review of "final agency action for which there is no adequate remedy in a court."[10] The U.S. District Court for the District of Idaho dismissed all the claims for lack of subject matter jurisdiction, the Ninth Circuit affirmed, and the Supreme Court granted certiorari.[11]

B. An EPA Compliance Order Is Final Agency Action

The Supreme Court first considered whether the compliance order was a final agency action, and in light of its prior opinion, *Bennett v. Spear*,[12] unanimously concluded that the order "has all of the hallmarks of APA finality."[13] First, "[t]hrough the order, the EPA determined rights or obligations."[14] The order obliged the Sacketts to restore their property according to an EPA restoration work plan and to allow EPA access to their property as well as to any records regarding conditions at the property.[15] Second, the Court said, "legal consequences . . . flow" from the compliance order because it exposed the Sacketts to "double penalties in a future enforcement proceeding"; moreover, under Corps regulations, it subjected the Sacketts to a tougher standard in obtaining a fill permit than would be the case had the compliance order not issued.[16]

Addressing other indications of the EPA administrative compliance order's finality, the Court noted that the order's findings and conclusions section was not subject to further review by EPA, notwithstanding the fact that EPA had invited the Sacketts to engage in an informal discussion of the terms of the order.[17]

C. The Sacketts Had No Adequate Remedy Under the CWA

As to the APA's requirement that a litigant seeking review have no other adequate remedy in a court, the Court noted that the CWA does not allow the Sacketts to initiate judicial review of the compliance order; instead, the statute allows court review of the order only after EPA commences a civil enforcement action.[18] In the meantime, the Sacketts were accruing $75,000 per day in potential penalties for noncompliance with the EPA order.[19] Further, the Court noted that the possibility of the Sacketts applying for a Corps fill permit, and then filing suit under the APA in the event of a Corps denial, was not an adequate remedy, because "[t]he remedy for denial of action that might be sought from one agency does not ordinarily provide an 'adequate remedy' for action already taken by another agency."[20]

The government did not argue that the Sacketts had an adequate remedy under the CWA. Instead, EPA put forth several arguments that the CWA is a statute that precludes judicial review pursuant to APA §701(a)(1), which states that the APA applies except to the extent that another statute precludes judicial review.[21] The Court found none of the government's preclusion arguments meritorious.[22]

II. *Belle Co. v. U.S. Army Corps of Engineers*: The Fifth Circuit Rules That a Corps JD Does Not Meet the APA's Finality Requirement

A. Belle Co. Attempts to Build a Landfill

In 2009, Belle Co. applied to the Corps for a CWA §404 permit so as to construct a regional landfill on its property, but abandoned the application after the Louisiana Department of Environmental Quality informed Belle by letter that the Corps had determined that a large portion of the property contained wetlands.[23] The letter also informed Belle that its state solid waste permit would require a major modification to account for Louisiana's regulatory requirements for wetlands, and that Belle should send its major modification application to the state agency after it obtained a decision on its §404 permit.[24]

In 2011, Belle Co. requested the Corps issue a JD as to any wetlands present on its property.[25] After a field inspection at the property, the Corps issued an initial JD stating that part of the property contained wetlands, and that a §404 permit would be required before any fill activity could take place.[26] Belle appealed the JD through the Corps' administrative process, which found that part of Belle's appeal was meritorious.[27] Nevertheless, on remand, and after further field investigation, the Corps found that part of Belle's property contained jurisdictional wetlands.[28]

Belle brought suit against the Corps in the U.S. District Court for the Middle District of Louisiana. The court granted the Corps' motion to dismiss on the grounds that the court lacked subject matter jurisdiction over Belle's claims because a JD is not a final agency action reviewable under the APA.[29] Belle Co. appealed to the Fifth Circuit.

8. *Id.*
9. *Id.*
10. *Id.* (citing 5 U.S.C. §704).
11. *Id.*
12. 520 U.S. 154, 27 ELR 20824 (1997).
13. *Sackett*, 132 S. Ct. at 1371.
14. *Id.* (internal quotations omitted).
15. *Id.*
16. *Id.* at 1371-72 (internal quotations omitted).
17. *Id.* at 1372.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 1372-74.
23. Belle Co., LLC v. U.S. Army Corps of Eng'rs, 761 F.3d 383, 387, 44 ELR 20175 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1548 (2015).
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*

B. *A Corps JD Fails the* Bennett *Finality Test Because It Does Not Determine Rights or Obligations, nor Create Legal Consequences*

1. A Corps JD Is Final Agency Action

In determining whether the JD was a final agency action, the Fifth Circuit set forth the Supreme Court's two-prong rule in *Bennett*: "'First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.'"[30] The court also noted the APA requirement that the litigant who seeks review of final agency action must have "'no other adequate remedy in court.'"[31]

Belle Co. argued that a JD is reviewable under the Court's decision in *Sackett*.[32] The Fifth Circuit agreed that under *Sackett* and other decisional law, the first prong of the finality requirement in *Bennett* is satisfied, because a "JD is the consummation of the Corp's decisionmaking process."[33] The Fifth Circuit also noted that Corps regulations state that once a JD is subjected to the administrative review process, it is no longer subject to formal review by the Corps, and the public can rely on such a JD as a Corps final decision.[34]

2. A Corps JD Imposes No New Legal Requirements and Otherwise Leaves the Regulatory Landscape Unaltered

However, the Fifth Circuit found that the second prong of the finality requirement was not satisfied, based upon four facts distinguishing the final JD from the EPA compliance order that had been found to determine the Sacketts' rights and obligations.[35] Most important, unlike the compliance order that imposed legal obligations on the Sacketts (ordering them to restore their property according to an EPA plan and give the agency access to any records related to their fill activities), the final JD was a classification of Belle Co.'s property that did not compel Belle "to do or refrain from doing anything to its property."[36]

The court acknowledged that the JD informed Belle that a CWA §404 permit would be needed before filling, and that the permitting process can be expensive.[37] Nevertheless, the court concluded that the JD imposed no new obligation on Belle because the company would have had to comply with Corps permitting requirements, as well as meet any potential enforcement action for noncompliance, had Belle never requested the JD and had it not been issued.[38]

Next, the Fifth Circuit found that while the EPA compliance order in *Sackett* imposed double penalties for its violation in a future enforcement proceeding, the JD contained no penalty scheme.[39] Belle Co. argued that because the CWA factors in good-faith compliance efforts when calculating penalties in an enforcement action, the JD worked to deprive the company of this consideration since it alerted Belle to the presence of wetlands on the property. The court found this scenario speculative, noting that the EPA compliance order *itself* in *Sackett* "caused penalties to accrue pending the restoration of the property."[40]

The third distinction the Fifth Circuit made between the compliance order in *Sackett* and the JD is that whereas the latter placed no limits on the ability of Belle Co. to obtain a wetlands fill permit, the former subjected the Sacketts to a tougher standard for permit approval—requiring under Corps regulations that permit issuance be "clearly appropriate."[41]

Last, the court found that the compliance order stated that the Sacketts had violated the CWA, and from this flowed certain consequences; for example, they were subject to penalties and had to restore their property to its state prior to filling.[42]

Meanwhile, the JD did not "state that Belle is in violation of the CWA, much less issue an order to Belle to comply with any terms in the JD or take any steps to alter its property."[43] Thus, the JD in no way altered the legal regime to which Belle was subject.[44]

In coming to its conclusion that the JD left the legal regime unaltered, the Fifth Circuit noted that the JD "renders no regulatory opinion as to Belle's ultimate goal to build a landfill."[45] Further, the court found this unaltered regime adequate to address Belle Co.'s grievance. That is, if Belle's permit application was ultimately rejected, under Corps regulations, it could seek review of that decision, as well as the underlying JD, in court.[46]

The Fifth Circuit stated that this avenue of redress would be disrupted if Belle was allowed to first seek review of the JD under the APA, and was later allowed, in a second action, to challenge an adverse permit decision.[47] The court also worried that allowing Belle to challenge the final JD would make the Corps less likely to issue JDs, and thereby deprive a landowner of the ability to determine whether the Corps believes it is subject to CWA jurisdiction before

30. *Id.* at 388 (quoting Bennett v. Spear, 520 U.S. 154, 177-78, 27 ELR 20824 (1997)).
31. *Id.* at 388 (quoting Sackett v. EPA, 132 S. Ct. 1367, 1372, 42 ELR 20064 (2012)).
32. *Id.* at 389.
33. *Id.*
34. *Id.* at 389-90.
35. *Id.* at 391-94.
36. *Id.* at 391.
37. *Id.*
38. *Id.*
39. *Id.* at 392.
40. *Id.*
41. *Id.* at 393.
42. *Id.*
43. *Id.*
44. *Id.* at 394.
45. *Id.* at 393-94.
46. *Id.* at 394.
47. *Id.*

the landowner follows a path making it subject to agency compliance orders and attendant civil suits.[48]

III. *Hawkes* Allows Judicial Review of a Corps JD Under the APA

A. *Hawkes Co. Wants to Mine Peat*

Hawkes Co. had plans to mine peat from wetlands located in northwestern Minnesota.[49] These plans were derailed when the Corps issued a JD stating that the property contained wetlands subject to CWA jurisdiction.[50] Hawkes sought judicial review of the JD in the U.S. District Court for the District of Minnesota.[51] The court granted the government's motion to dismiss the complaint, finding that the JD was not a final agency action under the APA.[52]

The Eighth Circuit concluded that the lower court, as well as the Fifth Circuit in *Belle* (decided while Hawkes' appeal was pending), misapplied the Supreme Court's decision in *Sackett*, and reversed.[53] The court framed the issue in *Hawkes* thus:

> whether the Court's application of its flexible final agency action standard in *Sackett* should also apply in this case, where appellants seek judicial review of an adverse JD without either completing the CWA permit process or risking substantial enforcement penalties by mining peat, and discharging dredged or fill materials without a permit.[54]

The Eighth Circuit stated that resolution of this issue "requires a close look at the allegations" in Hawkes Co.'s amended complaint, each of which had to be taken as true in the review of the district court's Rule 12(b)(6) dismissal.[55] The court focused on several facts alleged in the amended complaint regarding the high costs of wetlands permitting and the Corps' dim view of the peat mining project.[56] These ultimately became the primary basis for the Eighth Circuit's decision that Hawkes had no adequate judicial remedy other than suit under the APA.[57]

Among the allegations were that the Corps urged Hawkes Co. to abandon the project, "emphasizing the delays, cost, and uncertain outcome of the permitting process"; told Hawkes that "a permit would take years and the process would be very costly"; advised a Hawkes employee that he should start looking for another job; and advised the owner of the property to sell to a wetlands bank because any permit would be delayed for several years due to the probable need for an environmental impact statement.[58]

The Eighth Circuit also focused on Hawkes' allegations that "the Corps sent Hawkes a letter advising that nine additional information items costing more than $100,000 would be needed, including hydrological and functional resource assessments and an evaluation of *upstream* potential impacts."[59] Additionally, the court noted that the Corps' deputy commanding general for civil and emergency operations had sustained Hawkes' administrative appeal from the Corps JD, stating that the record did not support the determination that the property contained jurisdictional wetlands, and remanded the JD to the Corps district office for reconsideration in accordance with the decision on appeal.[60] Nevertheless, citing no new information in the basis for its decision, the Corps district office issued a revised JD.[61]

Given that the Eighth Circuit focused on these allegations regarding the Corps district office's disagreeable posture toward Hawkes Co.'s permit, one wonders if these facts had a hand in ultimately persuading the court to rule against the weight of authority regarding APA reviewability, as discussed below. The concurrence in *Hawkes* suggests as much, finding that the impediment to obtaining a wetlands permit presented by the compliance order in *Sackett* is not presented by the JD in *Hawkes*, and questioning whether case-specific facts as to the Corps district office's disagreeable posture toward Hawkes' peat mining, and the costs of the permitting process, can properly inform the question of whether a JD is reviewable under the APA.[62] The concurrence states that if a JD is indeed a reviewable final agency action, an applicant's likelihood of obtaining a permit, as well as the efficiency and costliness of the §404 permitting process, should not change the prospect of reviewability.[63]

B. *The Eighth Circuit Finds That a Corps JD Fulfills the* Bennett *Finality Test*

1. Agreed, a Corps JD Is Final Agency Action

The Eighth Circuit briefly analyzed the APA, and interpreted case law to determine whether the revised JD is a final agency action for which there is no adequate judicial remedy.[64] The court stated its agreement with the district court, and every other court to consider the finality of a Corps JD, that the revised JD satisfied the first *Bennett* factor regarding finality because it marked "the consummation of the agency's decisionmaking process."[65]

48. *Id.*
49. Hawkes Co. v. U.S. Army Corps of Eng'rs, 782 F.3d 994, 996, 45 ELR 20070 (8th Cir. 2015).
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 997 (footnote omitted).
55. *Id.* at 997-98.
56. *Id.* at 998.
57. *Id.* at 998, 1001.
58. *Id.* at 998.
59. *Id.* (italics in original).
60. *Id.*
61. *Id.*
62. *Id.* at 1002-03 (Kelly, J., concurring).
63. *Id.* at 1003.
64. *Id.* at 999.
65. *Id.* (quoting Bennett v. Spear, 520 U.S. 154, 177-78, 27 ELR 20824 (1997)).

2. The Eighth Circuit Breaks With All Other Courts in Holding That a Corps JD Determines Rights and Obligations and Creates Legal Consequences

Addressing the second *Bennett* finality factor, the Eighth Circuit disagreed with the district court in its finding that the JD "is not an agency action by which rights or obligations have been determined, or from which legal consequences will flow."[66] The court rejected the district court's reasoning that the JD was nonfinal due to the fact that the EPA compliance order in *Sackett* required the property owners to restore their property to pre-fill conditions or risk daily monetary penalties for failure to do so, while the JD set forth no such obligation or penalties.[67] The Eighth Circuit stated that this analysis "seriously understates the impact of the regulatory action at issue by exaggerating the distinction between an agency order that compels affirmative action, and an order that prohibits a party from taking otherwise lawful action."[68] Thus, the court characterized the JD as an order that prohibits Hawkes Co.'s peat mining activities.

In finding the JD a prohibitive order that satisfies the second finality prong of *Bennett*, the Eighth Circuit disagreed with the rationale of *Belle* and earlier decisions that reached the opposite conclusion on this issue.[69] *Belle* and prior decisions highlight the fact that the issuance of a JD by the Corps, in and of itself, does nothing to alter the operable regulatory requirements applicable to land use projects that potentially impinge on jurisdictional wetlands. While the Corps' issuance of a JD is an official and final determination that real property contains wetlands, development activities on that property are subject to the same CWA §404 permitting requirements the day before issuance as they are the day after issuance.

It is true that the preparation and issuance of a JD may put a particular property on the Corps' radar, making it more likely that a property owner or developer will be subject to an enforcement action for wetlands permitting violations.[70] It is also true that development without a §404 permit on property known by the developer to contain jurisdictional wetlands may subject the developer to being charged with knowing violation of the CWA, carrying stiffer penalties than if the developer were in careless violation.[71] Nevertheless, such eventualities do not flow directly and inexorably from the four corners of a JD. That is, after issuance of a JD, the developer is free to not develop the property, to put it to an alternate use that is wetlands-friendly, or to develop the property in a manner that complies with CWA permitting.

On the other hand, the compliance order in *Sackett*, by its terms, required restoration of the property and imposed penalties for failure to do so. In view of the foregoing, the Eighth Circuit's *Hawkes* decision, in casting an approved JD as a prohibitive order that determines a party's rights or obligations, or from which legal consequences flow, at best takes an exceedingly broad view as to what constitutes government prohibition of action, and, at worst, commits legal error with this characterization.

3. Analysis: *Bennett* and Other Supreme Court Precedent Addressing Finality Are Factually Inapposite to *Hawkes*

Hawkes relies on readily distinguishable Supreme Court precedent to support its conclusion that an approved JD satisfies the second finality prong of *Bennett*. Unlike the approved JD at issue in *Hawkes*, all these cases involve government actions or orders that are prohibitive on their face. The Eighth Circuit in *Hawkes* states that, like the U.S. Fish and Wildlife Service biological opinion at issue in *Bennett*, the revised JD "requires appellants to either incur substantial compliance costs (the permitting process), forego what they assert is lawful use of their property, or risk substantial enforcement penalties."[72] But in *Bennett*, the biological opinion and incidental take statement at issue changed the legal regime faced by petitioners by authorizing the taking of an endangered species if, and only if, certain conditions as prescribed in the statement and opinion were met.[73] The revised JD in *Hawkes* contained no such new obligations, and left the wetlands permitting scheme unaltered.

Hawkes' reliance on earlier cases allowing APA review is similarly misplaced, as these cases involve an order or regulations that, on their face, altered the regulatory regime faced by the plaintiffs, and carried stiff penalties for noncompliance. *Abbott Laboratories v. Gardner* found APA reviewability for newly promulgated federal prescription drug regulations requiring manufacturers to include both the brand name and the established name of a drug on packaging, or risk significant penalties for misbranding.[74] *Frozen Food Express v. United States* found reviewability of an Interstate Commerce Commission order requiring commercial motor vehicle carriers of manufactured agricultural products to obtain a certificate or permit from the commission, or risk criminal penalties and loss of license.[75] *Columbia Broadcasting System v. United States* found reviewability

66. *Hawkes*, 782 F.3d at 1000 (quotations omitted).
67. *Id.*
68. *Id.*
69. *See* Belle Co., LLC v. U.S. Army Corps of Eng'rs, 761 F.3d 383, 394, 44 ELR 20175 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1548 (2015) (a JD is not an action that determines a party's rights or obligations, or from which legal consequences will flow); Fairbanks North Star Borough v. U.S. Army Corps of Eng'rs, 543 F.3d 586, 593, 38 ELR 20239 (9th Cir. 2008) (same); Acquest Wehrle LLC v. United States, 567 F. Supp. 2d 402, 410 (W.D.N.Y. 2008) (same); Coxco Realty, LLC v. U.S. Army Corps of Eng'rs, No. 3:06-CV-416-S, 2008 WL 640946, *5 (W.D. Ky. Mar. 4, 2008) (same).
70. *Fairbanks North Star Borough*, 543 F.3d at 596.
71. *Compare* 33 U.S.C. §1319(c)(1) (negligent violator "shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation") *and* (c)(2) (knowing violator "shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation").
72. Hawkes Co. v. U.S. Army Corps of Eng'rs, 782 F.3d 994, 1000, 45 ELR 20070 (8th Cir. 2015).
73. Bennett v. Spear, 520 U.S. 154, 178, 27 ELR 20824 (1997).
74. 387 U.S. 136, 152-53 (1967).
75. 351 U.S. 40, 41-44 (1956).

for Federal Communications Commission regulations that rendered null and void certain contract provisions existing between national television networks and their local affiliate stations, and prevented renewal of these provisions under penalty of loss of the affiliates' broadcast licenses.[76]

IV. Conclusion

One cannot predict whether the Supreme Court will read *Sackett* to cover the factual situation in *Hawkes* by ruling that the issuance of a JD is immediately reviewable under the APA, but it seems unlikely. *Sackett* was a 9-0 ruling, indicating that the Court as a whole was confident that a compliance order is reviewable under the APA. The Court denied certiorari in *Belle*, where the Fifth Circuit found a JD unreviewable under the APA. Therefore, it may be the case that the Court granted review of *Hawkes* so as to correct the conclusion of the Eighth Circuit on JD reviewability under the APA.

But to borrow a sports aphorism, they play the game for a reason, and the way events unfold in a game plan (or a journal article) may bear no resemblance to the outcome of a game (or arguments before the Court). It is possible that the Court's ruling might split on ideological grounds, with property rights-minded Justices on the one side, and more pro-government Justices on the other. Prior to the death of Justice Antonin Scalia, this would typically result in a 5-4 split in favor of a conservative majority. Now, such a breakdown could result in a 4-4 split, leaving the Eighth Circuit's determination (and the circuit split) standing, or with the *Hawkes* case potentially subject to reargument.

Political considerations aside, and comparing the facts of *Hawkes* to other recent and not so recent Supreme Court cases determining the proper scope of APA reviewability, as well as decisions from other courts such as *Belle*, it appears that a JD should not be deemed a final agency action that is reviewable under the APA. This is because a JD does not, on its face, compel a landowner to do or not do anything, nor does it alter the legal regime a landowner faces when undertaking land use activities that involve the filling of jurisdictional wetlands.

In sum, *Hawkes* could be headed for a correction because it doesn't comport with *Sackett*, *Belle*, and other cases considering APA reviewability of agency administrative action in environmental matters. As can be surmised from the opinion and concurrence in *Hawkes*, two factors that should not influence the finality analysis articulated in *Bennett* and *Sackett* may have led the Eighth Circuit to base relief for Hawkes on a permissive reading of the latter case. These factors are: (1) the Corps district office's alleged hostile posture toward Hawkes Co.'s permit application, including its rubber-stamping of the JD after the Corps appeal process found the JD unsupported by the record; and (2) the monetary cost of the wetlands permitting process.

76. 316 U.S. 407, 419-22 (1942). *Columbia Broadcasting* addressed reviewability of the subject regulations under the Urgent Deficiencies Act, 38 Stat. 219, 220. *Id*. *Abbott Laboratories* analogized to the Court's decision in *Columbia Broadcasting* when determining the question of final agency action under the APA. *Abbott Labs.*, 387 U.S. 136 at 150.