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## FEDERAL STATUTES AND REGULATIONS

### *Clean Water Act — Jurisdictional Determination — Finality — United States Army Corps of Engineers v. Hawkes Co.*

If *Mead* and *Chevron* guard the borders of the administrative state, its internal governance occurs through far less formalized means.<sup>1</sup> Yet tools like nonlegislative guidances, regulatory advisories, and agency determinations provoke their own concerns, most notably that such informal determinations often lack the clear procedural checks of their formal counterparts.<sup>2</sup> Courts have unsurprisingly struggled to determine when these procedures may be reviewed and how extensively such inquiries should consider functional effects.<sup>3</sup> Last Term, in *United States Army Corps of Engineers v. Hawkes Co.*,<sup>4</sup> the Supreme Court added further muddle to already murky waters. In this case, the Court held that one process, an approved jurisdictional determination (JD) of the Army Corps of Engineers (Corps) under the Clean Water Act<sup>5</sup> (CWA), represented final agency action per § 704 of the Administrative Procedure Act<sup>6</sup> (APA), and was thus available for judicial review. Although picayune in subject, *Hawkes* illustrates the difficulties in effective review of informal agency determinations. In particular, the Court's means of assessing why the JD was final combined functionalist inquiries into the procedure at issue with formalistic means of evaluating that procedure's consequences. This effort uncomfortably straddles a gap in reviews of other informal agency initiatives, and while the modesty of *Hawkes*'s issues prevented much slippage here, such ease belies what may be irreconcilable conflicts in the ordinary run of cases.

In the world of federal mandates, the Clean Water Act is notable both for the scope of its obligations and the difficulty of its application.

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<sup>1</sup> See William R. Andersen, *Informal Agency Advice — Graphing the Critical Analysis*, 54 ADMIN. L. REV. 595, 596 (2002) (expressing “the magnitude and ubiquity of informal advice and guidance”); see also Sean Croston, *The Petition Is Mightier than the Sword: Rediscovering an Old Weapon in the Battles over “Regulation Through Guidance,”* 63 ADMIN. L. REV. 381, 382–84 (2011) (same). In administrative law, “informal,” as in informal determinations, is a residual term, capturing all “actions not covered by the formal adjudicatory and rulemaking provisions of the [APA].” Alfred C. Aman, Jr., *Informal Agency Actions and U.S. Administrative Law — Informal Procedure in a Global Era*, 42 AM. J. COMP. L. SUPPLEMENT 665, 665 (1994).

<sup>2</sup> E.g., M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1397 (2004) (pointing to several causes of concern in the context of agency guidance documents).

<sup>3</sup> See Gwendolyn McKee, *Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine*, 60 ADMIN. L. REV. 371, 376–78 (2008) (bemoaning the current state of law as one of “doctrinal confusion and irrational procedural limitations on judicial review,” *id.* at 377).

<sup>4</sup> 136 S. Ct. 1807 (2016).

<sup>5</sup> 33 U.S.C. §§ 1251–1387 (2012).

<sup>6</sup> 5 U.S.C. § 704 (2012).

The CWA requires that the Corps issue a permit for any discharge of pollutants into “navigable waters,” defined as “the waters of the United States.”<sup>7</sup> These waters are not only the mighty interstate torrents, but also any “ephemeral channels and drains.”<sup>8</sup> Failure to properly identify a body can be perilous, since the CWA imposes significant penalties for discharge without permit.<sup>9</sup> To save citizens from the perils of faulty hydrology, the Corps has instituted a procedure, the JD, “a written Corps determination that a wetland and/or waterbody is subject to regulatory jurisdiction.”<sup>10</sup> A person may apply for a JD as general guidance, or the Corps may issue one as part of an individualized permit process.<sup>11</sup> Once issued, the Corps will treat a JD as binding for five years.<sup>12</sup> The Environmental Protection Agency (EPA) has also issued a memorandum recognizing a JD as binding.<sup>13</sup>

This scheme fell into controversy in northern Minnesota, where the Hawkes Corporation (Hawkes), along with two related companies, sought to mine a wetland for golf-green peat.<sup>14</sup> In 2010, Hawkes applied to the Corps for a CWA permit, to which the Corps responded first in 2011 with a “preliminary determination” that the land fell within the waters of the United States, and then in 2012 with an approved JD to that effect.<sup>15</sup> Hawkes filed an administrative appeal, sustained by the Corps’s internal adjudicator on grounds of insufficient factfinding.<sup>16</sup> In December 2012, the Corps issued a “Revised [Approved] JD” — a term undefined in law — concluding “without additional information” that the land fell within the Corps’s jurisdiction.<sup>17</sup> This new JD stated it was a “final Corps permit decision” and barred further administrative appeals.<sup>18</sup> Hawkes appealed to the U.S. District Court for the District of Minnesota for review of the JD, and the Corps moved to dismiss.<sup>19</sup>

Judge Montgomery granted the Corps’s motion.<sup>20</sup> She noted that under APA § 704, a court may review only “agency action made reviewable by statute and final agency action for which there is no other

<sup>7</sup> 33 U.S.C. § 1362(7); *see also id.* §§ 1311(a), 1362(12).

<sup>8</sup> *Rapanos v. United States*, 547 U.S. 715, 726 (2006) (plurality opinion).

<sup>9</sup> *See id.* at 721.

<sup>10</sup> 33 C.F.R. § 331.2 (2015).

<sup>11</sup> *Hawkes*, 136 S. Ct. at 1812.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* By contrast, a preliminary JD is not binding. *See id.*

<sup>14</sup> *Id.* The peat of this wetland is particularly prized for its ability to create “stable greens that leave golfers with no one to blame but themselves for errant putts.” *Id.*

<sup>15</sup> *Hawkes Co. v. U.S. Army Corps of Eng’rs*, 782 F.3d 994, 998 (8th Cir. 2015).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 999.

<sup>20</sup> *Hawkes Co. v. U.S. Army Corps of Eng’rs*, 963 F. Supp. 2d 868, 870 (D. Minn. 2013).

adequate remedy.”<sup>21</sup> Applying the well-established § 704 framework of *Bennett v. Spear*,<sup>22</sup> Judge Montgomery cited the two requirements for an action to be final: that it “mark the consummation of the agency’s decisionmaking process,” and that it “be one ‘by which rights or obligations have been determined,’ or one from which ‘legal consequences will flow.’”<sup>23</sup> Reviewing the issue herself, she determined that these circumstances met the first “consummation” prong, since the “jurisdictional determination would remain in place regardless of future [events].”<sup>24</sup> By contrast, she held that the JD failed the second “effects” prong, since a JD “does not fix [the plaintiffs’] rights or obligations.”<sup>25</sup> Judge Montgomery briefly distinguished *Sackett v. EPA*,<sup>26</sup> a recent Court decision holding that an EPA compliance order issued under CWA authority was final agency action because that order limited permitting rights and increased potential penalties.<sup>27</sup> Here, by contrast, Judge Montgomery asserted that “[p]laintiffs face no such obligations or changes in their rights as a result of their jurisdictional determination,” and thus had not reached “dead ends.”<sup>28</sup>

The Eighth Circuit reversed.<sup>29</sup> Writing for the panel, Judge Loken<sup>30</sup> agreed that *Bennett* controlled and “that the Revised JD clearly me[t] the first *Bennett* factor.”<sup>31</sup> On the consequences element, however, the court found that the lower court “seriously understated the impact of the regulatory action at issue.”<sup>32</sup> Judge Loken saw the JD as obliging plaintiffs “either to incur substantial compliance costs (the permitting process), forego what they assert is lawful use of their property, or risk substantial enforcement penalties.”<sup>33</sup> Focusing on “the prohibitive costs, risk, and delay of these alternatives,” the court interpreted *Sackett* as calling for “properly pragmatic analysis of ripeness and final agency action principles.”<sup>34</sup> In this view, the “impracti-

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<sup>21</sup> *Id.* at 872 (quoting 5 U.S.C. § 704 (2012)).

<sup>22</sup> 520 U.S. 154 (1997).

<sup>23</sup> *Hawkes*, 963 F. Supp. 2d at 872 (quoting *Bennett*, 520 U.S. at 177–78).

<sup>24</sup> *Id.* at 874.

<sup>25</sup> *Id.* at 875 (discussing *Fairbanks N. Star Borough v. U.S. Army Corps of Eng’rs*, 543 F.3d 586 (9th Cir. 2008)).

<sup>26</sup> 132 S. Ct. 1367 (2012).

<sup>27</sup> *Id.* at 1371–72.

<sup>28</sup> *Hawkes*, 963 F. Supp. 2d at 876–77.

<sup>29</sup> *Hawkes Co. v. U.S. Army Corps of Eng’rs*, 782 F.3d 994 (8th Cir. 2015).

<sup>30</sup> Judge Loken was joined by Judges Bright and Kelly.

<sup>31</sup> *Hawkes*, 782 F.3d at 999.

<sup>32</sup> *Id.* at 1000.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1001–02.

cality of otherwise obtaining review,” combined with the hefty consequences for violation, transformed the JD into a reviewable act.<sup>35</sup>

The Supreme Court affirmed. Writing for a unanimous court, Chief Justice Roberts<sup>36</sup> began by agreeing that *Bennett* applied and required an action both to be a consummation of process, and either to determine rights or obligations or to offer consequences.<sup>37</sup> By this stage, the Corps had conceded that an approved JD met the first factor.<sup>38</sup> The Chief Justice also saw no cause for concern in the Corps’s power to revise JDs, noting that the possibility of change is “a common characteristic of agency action.”<sup>39</sup>

Turning to the second issue of whether the JD offered “direct and appreciable legal consequences,” the Court held that the JD crossed this threshold.<sup>40</sup> The Chief Justice made this point by focusing on a so-called negative JD: an approved JD stating that a property definitively lacks waters of the United States.<sup>41</sup> Such determinations prevent the Corps from issuing an assessment to the contrary for five years, and the Chief Justice took particular note of the EPA-Corps Memorandum agreeing that a JD would be “binding on the Government and represent the Government’s position” in future challenges.<sup>42</sup> Where a JD affirmatively designates property as subject to the Corps’s jurisdiction, the Court likewise saw that JD as binding, in that it “represent[s] the denial of the safe harbor that negative JDs afford.”<sup>43</sup> This consideration was particularly compelling, the Chief Justice thought, given the “pragmatic” approach to finality expressed in seminal finality cases, which he read as advising that actions will be final where they pose “the risk of significant criminal and civil penalties.”<sup>44</sup> Such threats compelled a similar conclusion here.

Finally, the Court disagreed with the Corps’s assertion that even if the JD were final, alternatives to judicial review existed.<sup>45</sup> Under the

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<sup>35</sup> *Id.* at 1002. Judge Kelly briefly concurred to express factual differences between this case and *Sackett* but agreed with the judgment because “Hawkes is left without acceptable options to challenge the JD.” *Id.* at 1003 (Kelly, J., concurring).

<sup>36</sup> Chief Justice Roberts was joined by Justices Kennedy, Thomas, Breyer, Alito, Sotomayor, and Kagan.

<sup>37</sup> *Hawkes*, 136 S. Ct. at 1813.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1814 (citing *Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012)).

<sup>40</sup> *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* (quoting Memorandum of Agreement Between the Dep’t of the Army and the Env’tl. Prot. Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act § VI.A (Jan. 19, 1989) [hereinafter Memorandum of Agreement], <http://www.usace.army.mil/Portals/2/docs/civilworks/mous/404f2.pdf> [<https://perma.cc/94PJ-PQCP>]).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1815 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967); *Frozen Food Express v. United States*, 351 U.S. 40, 76 (1956)).

<sup>45</sup> *Id.* (citing 5 U.S.C. § 704 (2012)).

APA, judicial review may occur only if permitted by statute or where “there is no other adequate remedy.”<sup>46</sup> The Corps contended that Hawkes still had the options of applying for a permit or discharging without a permit and awaiting enforcement action.<sup>47</sup> While the Court accepted that waiting was an alternative, it disputed its adequacy, since the heavy burdens of potential enforcement meant Hawkes “need not assume such risks.”<sup>48</sup> Similarly, the Court viewed the permitting process as “arduous, expensive, and long,” and, even if concluded, “none of it will alter the finality of the approved JD, or affect its suitability for judicial review.”<sup>49</sup> With finality, then, the Court affirmed the Eighth Circuit.

Justice Kennedy concurred.<sup>50</sup> Joining the Chief Justice’s opinion in full, Justice Kennedy drew upon Justice Alito’s concurrence in *Sackett* to emphasize his view that “the reach and systemic consequences of the Clean Water Act remain a cause for concern.”<sup>51</sup> He criticized the Corps’s vacillation on the Memorandum’s effects as meaning that “the Act’s ominous reach would again be unchecked.”<sup>52</sup> The result, Justice Kennedy thought, was that *Hawkes* “continues to raise troubling questions regarding the Government’s power to cast doubt on the full use and enjoyment of private property throughout the Nation.”<sup>53</sup>

Justice Kagan also concurred in full. She wrote to express her view that the EPA-Corps Memorandum “is central to the disposition of this case,” since the negative JD consequences flowing from the Memorandum’s existence created a “safe harbor, which binds the agencies in any subsequent litigation,” and thus satisfied *Bennett*.<sup>54</sup>

Finally, Justice Ginsburg concurred in part and in the judgment. Unlike Justice Kagan, she objected to the reliance on the Memorandum since “[t]he Court received scant briefing about this Memorandum, and the United States does not share the Court’s reading of it.”<sup>55</sup> Nonetheless finding the JD “definitive” rather than “‘informal’ or ‘tentative,’” Justice Ginsburg concurred that the JD was final.<sup>56</sup>

At first glance, *Hawkes* appears to be a narrow case for a narrow Term.<sup>57</sup> Where some prior CWA cases have deeply divided the

<sup>46</sup> 5 U.S.C. § 704; see also *Abbott Labs.*, 387 U.S. at 140–41 (outlining standards for challenge).

<sup>47</sup> *Hawkes*, 136 S. Ct. at 1815.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 1815–16. The Court also noted that language in the CWA limited a subjected party’s opportunities for JD. *Id.* at 1816.

<sup>50</sup> Justice Kennedy was joined by Justices Thomas and Alito.

<sup>51</sup> *Hawkes*, 136 S. Ct. at 1816.

<sup>52</sup> *Id.* at 1817.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* (Kagan, J., concurring).

<sup>55</sup> *Id.* (Ginsburg, J., concurring).

<sup>56</sup> *Id.* at 1817–18 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 151 (1967)).

<sup>57</sup> See Josh Blackman, *The Supreme Court, 2015 Term — Comment: Gridlock*, 130 HARV. L. REV. 238, 303–04 (2016).

Court,<sup>58</sup> this decision was unanimous and likely overdetermined; after all, parties agreed on both facts and framework and disagreed only as to the second *Bennett* prong.<sup>59</sup> Yet the relative simplicity of the decision may disguise currents hiding beneath the surface. In particular, the Court's method for analyzing how the JD imposed appreciable consequences combines conflicting approaches as to how to treat informal agency determinations.

Where an agency imposes a formal rule of general or particular impact, the APA provides a broad set of procedural requirements, including at least some standards for judicial review.<sup>60</sup> Where reviews of an agency's proceedings turn on their impact (for example, whether they are actually legally binding), the results become nothing short of "conflicting and confusing."<sup>61</sup> Courts evaluating a purportedly informal agency determination face one of two essential choices. First, a court may conduct a searching inquiry about a proceeding's impact, assessing its effect to determine its proper characterization.<sup>62</sup> Alternatively, a judge can focus on bright-line questions about the sort of procedure to which an agency formally adhered and largely abjure challenging an agency's own description of its functions.<sup>63</sup> This latter bright-line analysis has enjoyed more attention in recent years, in part for its ability to prune overgrown doctrinal fields.<sup>64</sup> However, because the Court has failed to offer clear direction, courts can and do conduct both modes of review, to understandable doctrinal turmoil.<sup>65</sup>

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<sup>58</sup> See, e.g., *Rapanos v. United States*, 547 U.S. 715 (2006) (splitting over the meaning of "navigable waters" in the CWA); see also *The Supreme Court, 2005 Term — Leading Cases*, 120 HARV. L. REV. 125, 351–61 (2006) (discussing the Court's divisions in *Rapanos*).

<sup>59</sup> *Hawkes*, 136 S. Ct. at 1813.

<sup>60</sup> See 5 U.S.C. § 553 (2012) (providing procedural requirements); *id.* § 706 (2012) (establishing the scope of review).

<sup>61</sup> McKee, *supra* note 3, at 374.

<sup>62</sup> See *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (per curiam) (stating that such questions require "a principled exercise in interpretation").

<sup>63</sup> This position was famously first stated by then-Judge Starr. See *id.* at 950–51 (Starr, J., concurring in part and dissenting in part); cf. *Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999) (recognizing "the Agency's own characterization of the action" as one of three considered factors).

<sup>64</sup> The questions are most developed in the context of nonlegislative rulemaking, where courts are asked to determine whether a rule is legislative and thus binding, with legislative rules requiring more thorough procedure. Compare Stephen M. Johnson, *In Defense of the Short Cut*, 60 U. KAN. L. REV. 495, 497–98 (2012), and John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 927–98 (2004) (calling for relatively high-level reviews of agency guidance documents), with Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331 (2011) (arguing for more extensive review), and David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276 (2010) (same).

<sup>65</sup> See, e.g., *Wilderness Soc'y v. Norton*, 434 F.3d 584, 595–96 (D.C. Cir. 2006) (offering multiple levels of analysis in reviews of agency guidance materials); *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383–84 (D.C. Cir. 2002) (same); see also McKee, *supra* note 3, at 394–96 (assessing and critiquing the dominant approach).

JDs may be somewhat idiosyncratic in their design, but they present no less articulated concerns about the prior intensity of judicial review.<sup>66</sup> For example, in contexts of other informal determinations, a concern favoring functionalist inquiries is the “potential for agency abuse” should agencies feel free to choose procedures for themselves.<sup>67</sup> It might thus seem appropriate to scrutinize a JD’s effects vigorously, given that its critics argue it presents formal results in all but name.<sup>68</sup> Yet a more formalist approach also has attractions: notably, incentivizing otherwise nonmandated guidance and encouraging ex ante predictability.<sup>69</sup> Here, after all, JDs serve to offer notice to regulated entities by applying prospectively rather than in after-the-fact proceedings.<sup>70</sup> One might thus worry that an overburdened Corps would refuse to issue any JDs and leave citizens bearing burdens of potential violation — a point expressed by Justice Kagan at argument.<sup>71</sup> Regardless, the inquiries seem mutually exclusive: it is difficult to reward via streamlined review if one conducts that review extensively.

Instead, the Court split the difference. On one level, the opinion offers a highly functionalist inquiry into the JD’s purpose and effects. The Court speculated broadly about the effects of a “negative” JD and constructed the effects of the positive variety through negative implication of the negative counterpart.<sup>72</sup> By way of contrast, the Court might have said Hawkes’s inability to ask for more consideration

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<sup>66</sup> See 33 C.F.R. § 331.2 (2015) (defining JDs). The few scholars to examine JDs have largely ignored the administrative law issues. See, e.g., William Funk, *Make My Day! Dirty Harry and Final Agency Action*, 46 ENVTL. L. 313 (2016); Kenneth S. Gould, *Drowning in Wetlands Jurisdictional Determination Process: Implementation of Rapanos v. United States*, 30 U. ARK. LITTLE ROCK L. REV. 413 (2007). However, to the extent that informal determination covers categories not established by the APA, a JD would so qualify. Cf. Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 171–72 (2000) (articulating advantages between formality and informality). In an alternative taxonomy (cutting across the formal/informal divide) of legislative rules, nonlegislative rules, and adjudications, a JD may seem to fall closest to the last, although a JD does not itself impose an order, and informal adjudication usually also meets finality requirements.

<sup>67</sup> Seidenfeld, *supra* note 64, at 344; see also *id.* at 343–44.

<sup>68</sup> See ROBERT MELTZ & CLAUDIA COPELAND, CONG. RESEARCH SERV., RL33263, *THE WETLANDS COVERAGE OF THE CLEAN WATER ACT: RAPANOS AND BEYOND* 13 (2015) (describing a critique of the Corps’s approach to JDs as a “*de facto* rule”).

<sup>69</sup> See Johnson, *supra* note 64, at 526 (discussing incentives); Manning, *supra* note 64, at 927–29 (emphasizing predictability).

<sup>70</sup> See James J.S. Johnson et al., *Bogged Down Trying to Define Federal Wetlands*, 2 TEX. WESLEYAN L. REV. 481, 505 (1996). Notably, JDs were voluntarily adopted by Corps regulation rather than the CWA, see 33 C.F.R. § 331.2; see also Final Rule Establishing an Administrative Appeal Process for the Regulatory Program of the Corps of Engineers, 65 Fed. Reg. 16,486 (Mar. 28, 2000) (codified at 33 C.F.R. pts. 320, 325, 331), and could thus potentially be more easily repealed.

<sup>71</sup> Transcript of Oral Argument at 29–31, *Hawkes*, 136 S. Ct. 1807 (No. 15–250).

<sup>72</sup> *Hawkes*, 136 S. Ct. at 1815.

proved sufficiently binding.<sup>73</sup> Far from simply inquiring into a JD's procedures, however, the Court emphasized that its approach was — and deserved to be — equitable and pragmatic.<sup>74</sup> Such contextual considerations parallel those favored by advocates of expansive and functional-based approaches to informal agency actions.<sup>75</sup> Here, the simplicity and few factual disputes limited the relevant factors, but the Court's framework would seem to compel it to delve more intensely into a matter of greater factual or procedural complexity.

At the same time, *Hawkes* contains substantial reflections of a more formalist approach to review of informal procedures. If the centerpiece of the decision was the Court's understanding of the negative implications of a negative JD, then the guide to those impacts was the EPA-Corps Memorandum, identifying JDs as "binding on the Government and represent[ing] the Government's position."<sup>76</sup> Advocates for intensive review in other informal contexts have generally expressed skepticism about using similar representations on grounds that they allow agencies to set standards for their own judgments.<sup>77</sup> The facts of these cases might have given particular reason to discount the validity of the Memorandum, given that it had not been promulgated through a procedure like formally binding notice and comment, and the Corps asserted a power to change or even revoke that statement in the future.<sup>78</sup> Yet the Court proved willing to accept the Memorandum's declaration that a JD would be binding, even as it looked beyond to the face of the JD document to inquire whether the JD was final.

*Hawkes* thus appears to offer a middle ground between poles of judicial review of informal agency determinations: equitable and pragmatic regarding the functional effects of such actions, but also willing to accept formal second-order representations about what those effects would be. Such an approach has attractions. To start, it is probably most reflective of current law, at least as practiced in the D.C. Circuit.<sup>79</sup> Although academic debates often show a sharp divide between functional reviews and shorter, more procedurally based reviews, courts still combine both sorts of inquiries on case-by-case bases.<sup>80</sup> In theory, this middle-ground approach might seem to equilibrate be-

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<sup>73</sup> Cf. *Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012) (calling for judicial review because an order "w[as] not subject to further agency review").

<sup>74</sup> *Hawkes*, 136 S. Ct. at 1814–15 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149–50 (1967)).

<sup>75</sup> Cf. *Seidenfeld*, *supra* note 64, at 394 (arguing that courts should review "factors that are relevant and alternatives that are plausible").

<sup>76</sup> *Hawkes*, 136 S. Ct. at 1814 (quoting Memorandum of Agreement, *supra* note 42, at § VI.A).

<sup>77</sup> See *Seidenfeld*, *supra* note 64, at 343 ("[T]he policy becomes practically binding in that it induces compliance even though it does not command independent force of law.").

<sup>78</sup> *Hawkes*, 136 S. Ct. at 1817 (Kennedy, J., concurring).

<sup>79</sup> See *McKee*, *supra* note 3, at 394 (describing the current "combined test" as including both).

<sup>80</sup> See *Franklin*, *supra* note 64 (expressing and arguing against that predominance).

tween the sets of concerns polarizing the debate over court review. For example, *Hawkes*'s approach of functionalism for a JD's effects and formalism for its evidence might be easier to assess *ex ante* than a more *ad hoc* approach, while the intensity of ultimate review implies a real check on agency self-government.<sup>81</sup> One might thus see *Hawkes* as yet another instance of the Court muddling through.

Yet there are reasons why the combined approach generally finds few defenders.<sup>82</sup> Although they disagree on the reasons why, supporters of functionalist and formalist approaches robustly critique the current state of law surrounding the use of informal agency issuances.<sup>83</sup> Even those disposed to at least some degree of synthesis acknowledge the “smog and muddle” posed by an approach that combines inquiries.<sup>84</sup> As ever, there are obvious concerns with *ad hoc* standards.<sup>85</sup> Yet *Hawkes*'s particular blend of functionalism and formalism at different levels of the analysis poses its own set of risks. To start, a functionalist inquiry based on agency representations works only so far as those representations are credible: here, by way of illustration, some observers post-*Hawkes* have noted causes for uncertainty whether the Memorandum is as binding as portrayed.<sup>86</sup> In this sense, *Hawkes*'s approach may achieve the worst of both worlds: as inaccurate as a functionalist inquiry, but without any of the benefits of the short-cut review.

More notably, *Hawkes*'s unanimity may belie the fact that a synthesis-based approach generally divides more than it unites. Justice Kennedy's brief concurrence in *Hawkes* well illustrates this point. Justice Kennedy agreed with the Court that the JD was final largely because of the Memorandum, yet he expressed dissatisfaction with the EPA's position that it “can be revoked or amended at the Agency's unfettered discretion.”<sup>87</sup> Imagine, then, that the Memorandum had never been promulgated, or else were revoked before a future case. Justice Kennedy's concurrence suggests — though does not state outright — that he might still be willing to find that a JD was effectively binding on grounds that, as Justice Alito put it in *Sackett*, even a relatively informal CWA determination “leaves most property owners with little prac-

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<sup>81</sup> See *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111 (D.C. Cir. 1993) (stating these as reasons for the “legal effects” test).

<sup>82</sup> Cf. Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393 (2015) (critiquing a perceived calcification of administrative law in the D.C. Circuit).

<sup>83</sup> See Seidenfeld, *supra* note 64, at 332 (noting that some scholars simultaneously “bemoan judicial doctrines that enable agencies to issue [nonlegislative rules] too easily” while others “complain that courts have imposed arbitrary barriers to their use” (citations omitted)).

<sup>84</sup> See Franklin, *supra* note 64, at 324.

<sup>85</sup> Cf. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

<sup>86</sup> E.g., Emily S. Bremer, *Finality and the Virtues of Jurisdictional Declarations*, REG BLOG (July 12, 2016), <http://www.regblog.org/2016/07/12/bremer-finality-and-the-virtues-of-jurisdictional-declarations> [<https://perma.cc/4ZCT-DXLX>].

<sup>87</sup> *Hawkes*, 136 S. Ct. at 1817 (Kennedy, J., concurring).

tical alternative but to dance to the [agency]'s tune.”<sup>88</sup> Meanwhile, in a *Hawkes*-like case with a similarly effective determination without so extensive a Memorandum, a judge more favorable to formalistic methods might be compelled to come out the other way. Scholarship in other areas of informal agency determinations suggests that divergent results based on chosen inquiries are the norm rather than the exception.<sup>89</sup> That both inquiry and results aligned here facilitated this decision, but that felicitous result might not apply in the majority of cases.

One might be tempted to ask, of course, how much all this debate matters. *Hawkes* dealt with the timing of bringing a legal challenge rather than the essential merits of the JD at issue, and those challenges both were and remain valid. Even in its specialized field, *Hawkes*'s impact may be short lived, or even may now be mooted. In June of 2015, the Corps and the EPA finalized a new Clean Water Rule to overhaul CWA determinations and thereby significantly reduce need for JDs.<sup>90</sup> *Hawkes* may thus offer minimal practical impact, since the right to more swiftly challenge a JD means little if no JD exists in the first place. Perhaps the best way to view *Hawkes*, then, is as an opportunity missed. Scholars have critiqued the Court's "vaguely worded" approach to finality as causing "additionally restrictive and unnecessary tests" adopted by lower courts.<sup>91</sup> As agencies grow increasingly sophisticated in their use of informal procedures, such controversies over modes of judicial review will likely only multiply.<sup>92</sup> It may have been too much to ask for *Hawkes* to provide an entirely clear framework, but one could imagine a more productive decision providing some foothold for lower courts to evaluate issues in a more coherent way: endorsing either a fully substantive or fully formal analysis, or even simply offering reasons to favor one over the other. Yet by offering such a hodgepodge of analytical methods, with little explanation of why it chose what it applied, *Hawkes* supplied no help on an issue even more significant than the administrative rights of golf-green peat miners.

In sum, *Hawkes*'s apparently small-scale issues reflect larger currents in modern administrative law. *Hawkes* did not create the controversy, but its muddled analysis does little to move toward a more coherent solution. Although *Hawkes* may not go down in the list of canonical administrative law cases, the issues it presents are certain to be anything but final.

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<sup>88</sup> Sackett v. EPA, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring).

<sup>89</sup> See Manning, *supra* note 64, at 917–18 (pointing to divergent results based on chosen test).

<sup>90</sup> Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) (codified in scattered parts of 40 C.F.R.).

<sup>91</sup> McKee, *supra* note 3, at 378.

<sup>92</sup> See Rakoff, *supra* note 66, at 171.