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EXPERT ANALYSIS

Supreme Court: Clean Water Act Jurisdictional Determinations Challengeable in Federal Court

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The Supreme Court of the United States ruled on May 31, 2016, in *United States Army Corps of Engineers v. Hawkes Co., Inc.*, No. 15- 290, slip op., 578 U.S. ___ (2016) that approved jurisdictional determinations (JDs) issued by the U.S. Army Corps of Engineers (Corps) under the Clean Water Act (CWA) constitute a final agency action that can be challenged in federal court.

The Court's unanimous decision is a positive development for entities — from land developers to energy companies — that wish to put property to productive use but whose plans have been complicated by the potential presence of jurisdictional "waters of the United States."

Previously, if the Corps issued a JD documenting the presence of jurisdictional waters on a property, the landowner had to 1) abandon or redesign the project to avoid impacting the jurisdictional waters; 2) pursue the "arduous, expensive, and long" process of applying CWA § 404 permit from the Corps to impact the jurisdictional water; or 3) disregard the JD and develop the project without a permit at the risk of incurring civil penalties and criminal punishments or fines that the Court acknowledged are "substantial" and that Justice Anthony Kennedy described as "crushing" in his concurring opinion.

For years, landowners had attempted with little success to obtain judicial review of JDs without having to spend resources on a permit that they may not want or need — and which can take years to obtain — or risk enforcement.

The ruling brings some welcome finality and follows a number of efforts to instill a greater sense of certainty under the CWA, the lack of which has continued to plague landowners and the courts following the Supreme Court's ruling in *Rapanos v. U.S.*, 547 U.S. 715 (2006). In *Rapanos*, the Court was unable to agree on a controlling test for determining the jurisdictional boundary of jurisdictional waters under the CWA.

Since that time, the Corps and the U.S. Environmental Protection Agency (EPA), which jointly implement the CWA, have issued a final rule attempting to better define the boundaries of "waters of the U.S." — the so-called "WOTUS Rule" (80 Fed. Reg. 37054) — which has been challenged by a number of states and is wending its way through the lower courts. *In re EPA*, 803 F.3d 804 (6th Cir. 2015).

Additionally, the Supreme Court also came down on the side of certainty and finality in *Sackett v. EPA*, 132 S. Ct. 1367 (2012), in which the Court held that a party subject to an EPA compliance order under the CWA could obtain pre-enforcement administrative review to challenge that order rather than face the difficult choice to proceed and assume its own determination was correct or instead wait to see if the EPA actually decided to enforce and then let the courts decide. With its ruling in *Hawkes*, the Supreme Court continues to chip away at the CWA uncertainty.

Highlights

- The Supreme Court ruled unanimously that U.S. Army Corps of Engineers issuance of a Jurisdictional Determination documenting the presence of "waters of the United States" on a property is a final agency action that may be challenged in court.
- In the face of continuing disagreement regarding the reach of the Clean Water Act (CWA), the ruling injects a modicum of welcome certainty and finality.
- Concurrence from Justice Anthony Kennedy that continues to express his concerns about the lack of clarity regarding the reach of the CWA could signal rough waters ahead for the government on the current challenges to its Waters of the United States rule.

LEGAL BACKGROUND

CWA Section 404 prohibits the discharge of dredged or fill material into jurisdictional "waters of the United States" without a CWA § 404 permit from the Corps. 33 U.S.C. § 1344. The task of delineating where jurisdictional waters end and non-jurisdictional waters begin is difficult and, as a practical matter, can vary from one regional division of the Corps or EPA to another.

The Corps determines the presence or absence of waters of the United States through preliminary or approved jurisdictional determinations. Preliminary JDs advise landowners of the potential presence of waters of the United States, often based on the Corps' review of existing maps and other limited information. Preliminary JDs can be used to obtain permits, but applicants waive the right to challenge the scope of jurisdiction.

The Corps issues an approved JD only after confirming the "presence or absence" of jurisdictional waters at a property, typically after extensive field visits. Approved JDs can be administratively appealed and are binding for five years on both the Corps and the EPA.

For years, landowners had attempted with little success to obtain judicial review of JDs without having to spend resources on a permit that they may not want or need — and which can take years to obtain — or risk enforcement.

The *Hawkes* case was brought by three companies in Minnesota that wanted to expand an existing peat mining operation into an adjacent waterlogged area. The Corps issued a JD finding that the proposed expansion area contained jurisdictional wetlands with a "significant nexus" to the traditionally navigable Red River of the North, which was 120 miles away.

The landowners filed an administrative appeal of this JD to the Corps' Mississippi Valley Division Commander, but the JD was ultimately affirmed.

The landowners then challenged the JD in federal court. The Corps opposed this legal challenge, claiming that an approved JD is not a final agency action that can be subjected to legal review under the Administrative Procedure Act (APA).

The Corps claimed that the landowners still had alternatives available to them, namely applying for a CWA § 404 permit and then seeking judicial review of the Corps' ultimate permit decision or proceeding with their peat mine expansion without a CWA § 404 permit if they were confident the JD was incorrect, albeit at the risk of incurring an enforcement action. This is the "Hobson's Choice" that many landowners face.

To determine whether an approved JD from the Corps is a final agency action, and is therefore subject to judicial review under the APA, the Court evaluated whether the JD 1) "marked the consummation of the agency's decision making process" and 2) is an action by which "rights or obligations have been determined, or from which legal consequences will flow." *Hawkes*, slip. op. 5.

The Corps conceded that an approved JD is a final agency action, because the agency issues a JD only after completing extensive fact finding regarding the property's physical and hydrological characteristics.

The Court found that an approved JD also produces legal consequences, because a JD finding that a property does not contain jurisdictional waters, pursuant to a longstanding memorandum of agreement between EPA and the Corps, is binding for five years and will also "represent the Government's position in any subsequent federal action or litigation concerning that final determination." *Hawkes*, slip. op. 6.

Next, the Court analyzed, but disagreed with, the Corps' claim that a property owner adversely affected by a JD has alternatives available that are sufficient to render judicial review of the JD unnecessary.

The Court determined that it is not a viable strategy for a landowner who disagrees with a JD to proceed with a project without a CWA § 404 permit, as doing so exposes the landowner to potential civil penalties of up to $37,500 for each day of violation on top of potential criminal penalties.

Similarly, the Court explained that the process of applying for a CWA §404 permit, which the Court noted is an "arduous, expensive, and long" process that can take an average of 788 days and cost $271,596, does not offer an affected landowner a reasonable alternative to judicial review. *Hawkes*, slip op. 2, 9. Accordingly, the Court held that approved JDs are final agency actions that are subject to judicial review.

The task of delineating where jurisdictional waters end and non-jurisdictional waters begin is difficult and, as a practical matter, can vary from one regional division of the Corps or EPA to another.

IMPLICATIONS OF THE *HAWKES* DECISION

The *Hawkes* decision complements the Court's prior decision in *Sackett*, in which the Court similarly considered whether a private party may challenge agency action taken under the CWA (thereby allowing for administrative review of a notice of violation), and is a positive development for landowners.

Prior to *Hawkes*, a JD that identified jurisdictional waters on a property forced the landowner to either abandon or redesign a project to avoid the jurisdictional waters or to dedicate significant time and resources to apply for a CWA § 404 permit that was rarely granted without imposing additional costs in the form of mitigation projects and other concessions.

Now, however, a landowner can seek judicial review of an approved JD in federal district court once the landowner exhausts the available administrative appeal process provided by the Corps.

Justice Kennedy authored a short but noteworthy concurring opinion in *Hawkes* in which he states that the reach of the CWA is "a cause for concern" and "notoriously unclear." *Hawkes*, (Kennedy, J., concurring) slip op. 1.

The comments from Justice Kennedy do not bode well for the fate of the 2015 WOTUS Rule that seeks to modify and in many ways broaden the CWA's definition of "waters of the United States." (See Holland & Knight's alert, Obama Administration Issues Final Rule on "Waters of the United States", June 9, 2015.)

The legal foundation for the WOTUS Rule was Justice Kennedy's plurality opinion in *Rapanos*. The rule is currently stayed pending the resolution of numerous legal challenges that the rule is arbitrary, capricious and contrary to law.

Justice Kennedy's observations in *Hawkes* regarding the expansive reach of the CWA suggest that EPA and the Corps may have misread the scope of their authority under *Rapanos*.

Finally, it is worth noting that the Corps advanced a third argument in support of its contention that approved JDs do not merit judicial review. The Corps pointed out that the CWA does not require

the Corps to issue approved JDs, but rather the Corps issues these standalone determinations as a matter of policy.

The implication of that position appears to be that something that the agency provides as a courtesy should not constitute final agency action. While the Court dismissed this as a "count your blessings argument," in light of this ruling, the Corps may re-examine its policy of voluntarily providing JDs now that they are a potential source of burdensome legal challenges.



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