

Supreme Court Rules that Clean Water Act Jurisdictional Determinations Are Reviewable in Court

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The U.S. Supreme Court ruled on May 31, 2016 that an approved jurisdictional determination issued by the U.S. Army Corps of Engineers under the Clean Water Act is a final agency action subject to judicial review. *Hawkes Co., Inc. v. U.S. Army Corps of Engineers*, 578 U.S. ____ (2016). The Supreme Court's decision resolves a circuit split on the issue, and it has important implications for landowners, developers and regulators.

Jurisdictional Determinations under the Clean Water Act

An "approved jurisdictional determination" is an official determination by the Corps (or in some cases, the Environmental Protection Agency) that identifies whether water features on a particular piece of property are covered by the Clean Water Act's permitting requirements. Some courts had held that an approved JD was not a final agency action subject to judicial review. These courts reasoned that an approved JD merely put the landowner on notice that a Clean Water Act permit would be required if he or she chose to fill the jurisdictional waters on the property. Under this line of reasoning, the landowner could wait to challenge an approved JD until the Corps made a final decision on a Clean Water Act permit application. Alternatively, the landowner could proceed with development without seeking a permit, and then raise a challenge to the approved JD as a defense in an enforcement action.

But in the *Hawkes* case, the U.S. Court of Appeals for the Eighth Circuit reached the opposite conclusion, deciding that an approved JD has a "powerful coercive effect" and should be subject to "immediate judicial review."

The Supreme Court's Decision in *Hawkes*

In its May 31 decision, the Supreme Court unanimously upheld the Eighth Circuit's decision and ruled that an approved JD is judicially reviewable. The case involved a 530-acre property in Minnesota where three peat mining companies sought review of an approved JD that they believed represented an overly expansive view of federal permitting jurisdiction.

The Supreme Court began by noting that "it is often difficult to determine whether a particular piece of property contains waters of the United States, but there are important consequences if it does." The Supreme Court observed that the time and costs for obtaining a Clean Water Act permit can be significant. For example, one study found that the average applicant for an individualized, site-specific permit spends more than two years and over \$270,000 to complete the process. Moreover, there are substantial civil and criminal penalties for filling a jurisdictional water without a permit.

The Supreme Court next outlined the two conditions that must be satisfied for an agency action to be final and thus judicially reviewable under the federal Administrative Procedure Act. The action must: (1) "mark the consummation of the agency's decisionmaking process" and (2) "be one by which rights or obligations have been determined, or from which legal consequences will flow."

With respect to the first condition, the Corps conceded that a jurisdictional determination marks the consummation of the agency's decisionmaking on the question of whether a property contains jurisdictional waters. Thus, the Court's analysis focused on the second condition and whether an approved jurisdictional determination also gives rise to "direct and appreciable legal consequences."

In addressing this issue, the Court found that both a negative approved JD (which determines that there are no jurisdictional waters on a particular piece of property) and an affirmative approved JD (which finds that there are jurisdictional waters) have real and meaningful consequences. A negative JD binds the government for five years and prevents it from requiring a permit or seeking penalties. Conversely, an affirmative JD represents the government's definitive denial of the legal safe harbor that a negative JD would afford.

The Court also emphasized that there was no adequate alternative to judicial review. The Court explained that having to wait for a final permit decision was an inadequate remedy for the landowner, since the permit process is often "arduous,

expensive, and long.” Proceeding without a permit and waiting for an enforcement action reflected an even more problematic remedy according to the Court. This approach would compel the landowners to expose themselves to civil penalties of up to \$37,500 for each day that a jurisdictional water body remained illegally filled, “to say nothing of potential criminal liability.” The Court stated bluntly that landowners “need not assume such risks while waiting for EPA to drop the hammer in order to have their day in court.”

Moreover, the Court rejected the Corps’ argument that seeking review in an enforcement action or at the end of the permitting process would be the only avenues for review if the Corps had not adopted the practice of issuing standalone jurisdictional determinations, which is not required by the Clean Water Act. The Court responded: “True enough. But such a ‘count your blessings’ argument is not an adequate rejoinder to the assertion to the right of judicial review.”

Three associate justices (Kennedy, Thomas and Alito) published a concurring opinion to express their concern over the fact that the reach of the Clean Water Act remains “notoriously unclear” and “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.”

Implications

The Court’s decision obviously provides landowners and developers with an avenue to challenge an approved JD. Such a challenge presumably would make it clear whether or not a permit is required, without having to go through a long permit process or risky enforcement proceeding.

But it also is possible that the Corps will respond to the decision by ceasing or curtailing the longstanding practice of issuing approved jurisdictional determinations. If the Corps reacts in this way, landowners and developers would lose a valuable tool for learning relatively early on in the process what the Corps’ position is on its jurisdiction over a particular piece of property. Without this tool, landowners and developers would either have to submit a permit application to ascertain the Corps’ view on the matter or proceed with development while risking an enforcement proceeding—precisely the situation that the Corps warned about in arguing against judicial review. Rather than make the process clearer, this approach could very well lead to increased uncertainty as to the scope of the Clean Water Act’s permitting requirements.

It remains to be seen whether the Court’s ruling will help or hurt those who seek greater clarity on the key question of when the Clean Water Act applies and when it does not.

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