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Supreme Court Provides for Judicial Review of Army Corps Determinations

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On May 31, 2016, the Supreme Court of the United States held that final determinations by the U.S. Army Corps of Engineers regarding the presence or absence of "waters of the United States" can be appealed to the courts. The case, *Army Corps of Engineers v. Hawkes Co.*, 578 U.S. ____ (2016), is likely to lead to a profusion of lawsuits by affected parties, and also revealed a view among the Justices that the definition of "waters of the United States" reaches too far.

Background

The Clean Water Act (CWA) regulates discharges to "navigable waters," defined as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). In 1985, the Court established that the term "navigable waters" includes more than just waters that would be deemed "navigable" in the "classical" or traditional sense. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985). But, despite several related Court decisions since then, *see, e.g., Rapanos v. United States*, 547 U.S. 715 (2006), *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001), the scope of the terms "navigable waters" and "waters of the United States" remains "notoriously unclear." *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (U.S. 2012) (Alito, J., concurring). The Corps and the U.S. Environmental Protection Agency (EPA) attempted to provide some clarity in May 2015 by issuing a new rule modifying the definition. But the new rule—commonly dubbed the WOTUS rule—remains mired in controversy, subject to challenges in federal district courts around the country and currently stayed nationwide. *See In re EPA*, 803 F. 804 (6th Cir. 2015).

Defining "navigable waters" and "waters of the United States" is important under several CWA programs, including those regulating discharges of dredged or fill material under Section 404 (administered jointly by the Corps and EPA), discharges of pollutants from "point sources" under Section 402 (delegated to most states for permitting under the National Pollution Discharge Elimination System, or NPDES), and spills of oil and other hazardous substances under Section 311.

Jurisdictional Determinations

While the terminology remains muddy, a project proponent can seek clarity by asking the Corps to

determine whether “waters of the United States” exist within a specific project area. In response to such requests, the Corps can provide a preliminary jurisdictional determination (JD), which advises the proponent as to whether “waters of the United States” *may* be present, or an approved JD, which is a “definitive, official determination that there are, or that there are not, jurisdictional 'waters of the United States' on a site.” Corps, Regulatory Guidance Letter, No. 08-02 (June 26, 2008). Under the Corps' regulations, preliminary JDs are non-binding and advisory in nature and cannot be appealed, *see* 33 C.F.R. § 331.2, while approved JDs “constitute a Corps final agency action” and can be administratively appealed, 33 C.F.R. §§ 320.1(a)(6), 331.2. Approved JDs can be relied upon for five years. Corps, Regulatory Guidance Letter No. 05-02 (June 14, 2005).

Judicial Review

In *Hawkes*, the Court concluded that approved JDs can be challenged in court under the Administrative Procedures Act (APA). The Court's analysis was based on a two-prong test set forth in *Bennett v. Spear*, 520 U.S. 154 (1997). Under that test, an agency action is final and judicially reviewable under the APA if it: (1) marks the consummation of the agency's decisionmaking process; and (2) causes rights or obligations to be determined, or legal consequences to flow. While there is no dispute that approved JDs satisfy the first prong, the Corps argued that approved JDs are just one step in a permitting process that ultimately provides for judicial review. The Corps also asserted that a project proponent could seek judicial review if it proceeded without a permit and eventually faced an enforcement action. Other courts have been convinced that these alternative remedies were adequate to counter the assertion of a right to judicial review of approved JDs under the APA. *See, e.g., Belle Co., L.L.C. v. United States Army Corps of Eng'rs*, 761 F.3d 383, 393-394 (5th Cir. 2014) (holding that a JD is not reviewable final agency action); *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 593 (9th Cir. 2008) (same); *Nat'l Ass'n of Homebuilders v. EPA*, 956 F. Supp. 2d 198, 209-212 (D.D.C. 2013) (explaining that a Corps determination that a property contains traditional navigable waters is practically indistinguishable from a JD and thus is not final agency action). But in *Hawkes*, the Court took a “pragmatic” approach and found the alternatives that the Corps proposed were inadequate in light of the resources required to navigate the permitting process and the potential liability that can arise in the CWA enforcement context. Accordingly, the Court concluded that an approved JD is a final agency action judicially reviewable under the APA.

Justice Roberts delivered the 8-0 opinion of the Court, affirming a decision by the Eighth Circuit. Justices Kennedy, Thomas and Alito added a concurrence to emphasize the need for certainty regarding “waters of the United States.” Justice Kagan added a concurrence to clarify that the second prong of *Bennett v. Spear* is satisfied based on a memorandum of agreement (MOA) between the Corps and EPA—the two agencies authorized to enforce the CWA—establishing that JDs are binding. Justice Ginsburg added a concurrence stating that approved JDs can be considered final regardless of the MOA.

Implications

The Court's decision is likely to lead to an increase in litigation. Project proponents, landowners and other affected parties that are unhappy with an approved JD can now challenge it in court. Project

opponents also are likely to rely on Hawkes to challenge the legitimacy of approved JDs. While at some point, the increased involvement of the courts may result in clearer rules for identifying and delineating waters of the United States, it seems likely in the coming years to unravel the Corps' efforts to develop consistent approaches and guidelines. *See, e.g.*, EPA/Corps, Revised Guidance on Clean Water Act Jurisdiction Following the Supreme Court Decision in*Rapanos v. U.S.*and*Carabell v. U.S.*(Dec. 2, 2008); Corps, Jurisdictional Determination Form Instructional Guidebook (May 30, 2007).

The *Hawkes* decision also provides a glimpse into how the WOTUS rule may be treated, if challenges to that rule eventually reach the Court. While EPA and the Corps claimed that "the scope of jurisdictional waters will decrease" under the WOTUS rule, 80 Fed. Reg. 37054, 37101 (June 29, 2015), that claim does not seem to be getting much traction in the courts. For example, in an August 2015 decision, a federal judge blocked the implementation of the rule, calling it "exceptionally expansive." *North Dakota v. United States EPA*, 127 F. Supp. 3d 1047, 1053 (D.N.D. 2015). In *Hawkes*, the Court signaled that it shares that view, reciting statistics on the expansive area encompassed by the Corps' jurisdiction ("half of Alaska and an area the size of California in the lower 48 States") and expressing (in the concurrence of Justices Kennedy, Thomas and Alito) that "the reach and systemic consequences of the Clean Water Act remain a cause for concern." If it gets the opportunity, the Court seems poised to narrow the definition of "waters of the United States."

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