

Justices Consider if Jurisdictional Determinations Are Appealable

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On March 30, the U.S. Supreme Court heard oral argument in the case of *U.S. Army Corps of Engineers v. Hawkes*, No. 15-290. The issue presented to the court was whether a determination by the U.S. Army Corps of Engineers that a specific wetland is a "water of the United States" and therefore within the jurisdictional reach of the Clean Water Act is an appealable final action of the agency. Because the Corps makes thousands of jurisdictional determinations annually, the decision will have significance for developers and other persons seeking to challenge the Corps' jurisdictional determinations. It may also establish precedent for when decisions of other agencies will be subject to judicial review.

The dispute in *Hawkes* arose out of Hawkes Co.'s plan to harvest peat from 530 acres of wetlands. The Clean Water Act prohibits the discharge of any pollutant to the "waters of the United States" from a point source without a permit. Pursuant to Section 404 of the act, the Corps issues permits establishing the conditions under which dredged or fill materials may be discharged into navigable waters. The Clean Water Act is not applicable and a permit from the Corps is not necessary where the wetlands or other waters into which material will be discharged are not waters of the United States, i.e., navigable waters. Hawkes contended that its activity did not require a federal permit because the wetland at issue was not a navigable water.

As the multiple opinions in *Rapanos v. United States*, 547 U.S. 715 (2006), illustrate, it is often difficult to determine when a waterbody or wetland is subject to Clean Water Act jurisdiction. To help remove the uncertainty, the Corps established a process to determine whether a permit is required for the discharge of material into a wetland at a particular site. On request, the Corps may issue an approved jurisdictional determination (JD). A JD identifies the limits of "waters of the United States" on a parcel of land and is valid for five years unless new information warrants revision. Corps regulations refer to the approved JD as final agency action and authorize an administrative appeal.

Hawkes initially sought a Section 404 permit, but in light of the cost, put its application on hold until the Corps issued a JD. The JD concluded that the peat bog at issue contained waters of the United States. Following administrative proceedings, Hawkes appealed the JD to federal district court. The district court dismissed the appeal on the ground that the JD did not constitute final agency action and was therefore not subject to review under the Administrative Procedure Act. The U.S. Court of Appeals for the Eighth Circuit reversed. The U.S. Supreme Court granted the United States' petition for certiorari.

Under Section 704 of the Administrative Procedure Act, an agency action is appealable if it is a "final agency action for which there is no other adequate remedy in a court." In *Bennett v. Spear*, 520 U.S. 154, 178 (1997), the Supreme Court explained that to be considered final, the action must mark the "consummation of the agency's decisionmaking process" and "must be one by which rights or obligations have been determined, or from which legal consequences will flow."

A key point of contention in the *Hawkes* case was whether *Sackett v. U.S. Environmental Protection Agency*, 132 S. Ct. 1367 (2012), controlled the outcome. In *Sackett*, the Supreme Court found a compliance order issued by the U.S. Environmental Protection Agency to be appealable where it required remedial action and would subject the recipient to additional penalties if it were disobeyed. Hawkes argued that the practical consequences of the JD, like the order in *Sackett*, would strong-arm a regulated entity into compliance with an erroneous government decision.

The United States disagreed. To be sure, the JD satisfied the first prong of the *Bennett* test: The JD constituted the conclusion of the Corps' decision-making process. Nevertheless, the government contended that the JD imposed no legal consequences and that "practical" consequences are not legally sufficient to support judicial review.

According to the government, the JD was tantamount to advice that the Corps was under no obligation to give and that Hawkes was free to ignore. All statutory options, including seeking a permit, remained available to Hawkes. Unlike the order in *Sackett*, the JD did not mandate any action or create a risk of double penalties. In the government's view, Congress established the permitting procedures as the mechanism for determining the regulated community's rights. Hawkes should not be able to add a pre-permit appeal mechanism to the statutory scheme.

Hawkes countered that one legal consequence of the JD was to bind the Corps, thereby eliminating any possibility of a favorable jurisdictional ruling during the permitting process. Hawkes contended that judicial review of the JD was the only means for it to vindicate its position that no jurisdictional wetlands were present. As several justices noted at oral argument, as a result of a memorandum of understanding between the EPA and the Corps, the EPA was likewise bound by the JD. Hawkes further emphasized that by delaying and increasing the expense of the administrative permitting process, the Corps could improperly burden Hawkes' efforts to obtain judicial relief.

Justice Stephen Breyer appeared supportive of Hawkes' argument that the JD had legal as well as practical consequences and that judicial review of the JD would not disrupt the administrative process. Based on the JD, Hawkes was left with the choice of abandoning use of the property, obtaining an individual permit from the Corps at considerable expense, or conducting the peat harvest without a permit at the risk of civil penalties or criminal sanctions. These options resulting from the JD constrained Hawkes' choices. The government, however, reiterated that these options were no different from those available to Hawkes in the absence of a JD.

Additional comments and questions at oral argument focused on whether the consequences of the JD were legal or purely practical, and whether practical consequences would alone be sufficient to support immediate judicial review. Chief Justice John Roberts noted that if Hawkes proceeded with its activities and faced an enforcement action, the JD might serve as evidence of Hawkes' knowledge, a factor relevant to civil and criminal sanctions. Justice Sonia Sotomayor suggested that had the JD found no jurisdiction, Hawkes could have harvested the peat without risk of sanctions.

Among the justices, Justice Elena Kagan seemed most troubled with Hawkes' effort to distinguish the JD from other situations in which an administrative agency issues informal advice that is ordinarily not subject to appeal. The prospect of opening the judicial gates to a flood of appeals of agency advice warranted caution. In this case, however, the fact that the JD constituted the Corps' final decision on jurisdiction, the formality of the JD process and the vague jurisdictional lines in the Clean Water Act were all mentioned as possible grounds for distinguishing the JD from ordinary agency advice.

Based on the inquiries at oral argument, it may be difficult for the *Hawkes* court to establish a bright-line rule for distinguishing those agency actions that are final and appealable from those that are merely advisory. The first *Bennett* prong, whether an agency action concludes the decision-making process, will prove fatal to many appeals. For other appeals, courts may need to scrutinize the agency action to decide whether it constitutes a formal decision with present or future consequences, or informal advice designed merely to assist the person requesting the advice. The relevance of "practical" consequences has yet to be clearly established, although the court seemed open to considering them.

At the end of the day, the *Hawkes* court may give weight to the potential coercive effect of the JD in requiring Hawkes to abandon the project or make painful concessions and expenditures to secure a permit that may not be legally required. In many instances, absent judicial review of an unfavorable JD, a project sponsor may conclude that the only practical alternatives are to accept the Corps' permit conditions or abandon the project. In either case, there would be no judicial review. The court is likely to find a way to moderate that result. •

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