

## U.S. Supreme Court Puts the Brakes on Corps' Wetlands Determinations

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**SUMMARY**

On May 31, 2016, in a (surprising) 8–0 decision, Chief Justice John Roberts, writing for the full Supreme Court, issued a ruling that will have far-reaching effects on landowners, real estate developers, farmers, oil and gas and mineral extraction companies, golf course owners and government agencies. In *United States Army Corps of Engineers v. Hawkes Co., Inc.*, No. 15–290 (May 31, 2016) [<http://tinyurl.com/USACEHawkes>], the United States Supreme Court ruled that preliminary “jurisdictional determinations” (JDs) regarding whether a particular property contains “waters of the United States” may be appealed to federal district court without first having to wind through a lengthy and expensive administrative process. This ruling is important since the U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency (EPA) have long held that preliminary JDs were not appealable. The decision will be far reaching and will have a lasting and significant impact.

**Background**

The basic facts are that in 2010, Hawkes Co. and related landowners sought to develop their property as a peat mine in Minnesota. Hawkes applied to the Corps for a section 404 permit for the property. The section 404 permit authorizes “the discharge of dredged or fill material into the navigable waters” of the United States. In 2012, the Corps issued a JD stating that the property contained waters of the United States because its wetlands had a “significant nexus” to the Red River of the North, located some 120 miles away. Hawkes appealed to federal district court.

The district court dismissed the case because it said that the JD was not a “final agency action for which there is no other adequate remedy in a court,” as required by the Administrative Procedures Act (APA) prior to the availability of judicial review. The Court of Appeals for the Eighth Circuit, however, reversed. Before the U.S. Supreme Court, the Corps contended that the JD is not a “final agency action” and that even if it were, there are adequate alternatives for challenging it in court. The U.S. Supreme Court disagreed and ruled in favor of the landowners.

**Important Takeaways**

Important takeaways from this decision are as follows:

- A JD of the Corps gives rise to “direct and appreciable legal consequences” satisfying the “ripeness” requirements of the courts.
- A Memorandum of Agreement that exists between the Corps and EPA is binding on the government and failure to comply with a JD may subject a property owner to lawsuits, including hefty civil penalties, criminal actions and citizen suits.

- Because “legal consequences flow” from approved JDs, they constitute final agency action.
- The Supreme Court rejected the Corps’ contention that landowners have alternatives to a judicial review, which the Corps maintained were as follows: (1) a landowner may discharge fill without a permit, risking an EPA enforcement action, during which they can argue that no permit was required; or (2) landowners may apply for a permit and seek judicial review if unsatisfied with the results.
- The Supreme Court noted that it has long held that parties need not await for enforcement proceedings before challenging final agency action where such proceedings carry the risk of “serious criminal and civil penalties.”
- Also, the landowner need not assume the risks of civil or criminal liability “while waiting for EPA to drop the hammer in order to have their day in court.”
- It is also not an adequate alternative for a landowner to be required to apply for a permit and then seek judicial review in the event of an unfavorable decision. As Corps officials indicated in their discussions with the landowners, “the permitting process can be arduous, expensive, and long.”
- Justice Kennedy (concurring, along with Justices Thomas and Alito) had this to say about the Clean Water Act: “The reach and systemic consequences of the Clean Water Act remain a cause for concern...The Act’s reach is ‘notoriously unclear’ and the consequences to landowners even for inadvertent violations can be crushing...The Act...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.”

## Conclusions

The Corps has long held the view that it is the only entity that can make jurisdictional determinations. Some parties have been justifiably shocked to find that their upland property, located hundreds of miles from the nearest “waters of the United States,” were wetlands which required a federal permit. This has resulted in significant delays to development activi-

ties, civil penalties, criminal violations and multiple permitting requirements. Until *Hawkes*, the playing field was anything but balanced. Now, parties will be in a position to challenge these jurisdictional determinations directly to federal district court. In the future, it is likely that the Corps will be more circumspect in finding connections to waters of the United States. On a long-term basis, we expect that the courts will render divergent rulings in response to challenges of jurisdictional determinations, and it will take time to establish a coherent set of judicial determinations. At least now there is the possibility of recourse. Given that, we hope to see a more even-handed manner in making jurisdictional determinations than we have seen from the Corps in the past.

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