Supreme Court Unanimously Determines that Clean Water Act Approved Jurisdictional Determinations are Final Agency Actions and can be Challenged in Federal District Court

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United States Army Corps of Engineers v. Hawkes Co., Inc., 578 U.S. ___ (2016)

Yesterday, in a highly anticipated case related to the ongoing controversy over the reach of the Clean Water Act, the Supreme Court unanimously held that an approved Jurisdictional Determination ("JD") by the Corps of Engineers ("Corps") is a final agency action that is appealable to the federal district court. This is significant because it will allow parties seeking a JD to immediately appeal to a district court instead of incurring costs and time associated with a full-blown permit application and challenge in order resolve jurisdictional issues.

The Court held that, "unlike preliminary JDs, approved JDs can be administratively appealed and are defined by regulation to 'constitute a Corps final agency action.'"[1] This is because approved JDs definitively "stat[e] the presence or absence" of waters of the United States and "they are binding for five years on both the Corps and the Environmental Protection Agency which share authority to enforce the Clean Water Act."[2]

For a majority of the Justices, however, it appears that the finding that approved JDs are a final agency action is based on language in a 1989 Memorandum of Agreement ("MOA") between the Corps and EPA that binds the agencies to follow a JD's conclusions in enforcement actions and other litigation for at least five years after its publication.

This opens the door to the possibility that the EPA and Corps could amend their MOA to make it less binding on the agencies and may again call into question whether or not JDs can be challenged.

Background

The Clean Water Act regulates the discharge of pollutants into "the waters of the United States." The issue of whether waters are "waters of the United States" is complicated, and the Corps and EPA have adopted a new rule modifying the definition of the scope of waters covered by the Clean Water Act.[3] The rule is currently stayed pending the resolution of claims that it is arbitrary, capricious, and contrary to law.[4] Because of the complex nature of jurisdictional interpretations, the Corps makes JDs on a case-by-case basis determining if water bodies in question are "waters of the United States" subject to Clean Water Act's requirements. If the Corps makes a JD that waters are "waters of the United States," then the property owner must request a permit to discharge materials into those waters. According to the Court, "the permitting process can be arduous, expensive, and long."[5] If, on the other hand, the Corps issues a JD that a body of water is not a

water of the United States, then the determination acts as a "safe harbor" for five years allowing the property to be dredged, filled or developed without further process.

In the case before the Court, three mining companies sought to discharge materials onto wetlands within the property owned by the companies. The Corps gave the companies an approved JD which stated the wetlands at issue were "waters of the United States" and therefore required a permit if the companies wished to discharge the materials. The companies exhausted all possible administrative remedies and then requested that a district court review the JD, pursuant to the Administrative Procedure Act ("APA"). The district court dismissed the case for lack of jurisdiction. The district court held that the JD was not a final agency action for which there was no other adequate remedy in court, as required by the APA prior to judicial review. The Eighth Circuit reversed the district court's holding and the Supreme Court affirmed the Eighth Circuit.

Rationale

The Supreme Court held that an agency action is reviewable by a district court only if there are no adequate alternatives to APA review in court. The Corps argued that the companies had alternatives. The companies could have discharged the material without a permit and argued in a government enforcement action that a permit was not required. The companies also could have completed the long permit process and then requested judicial review.

The Court found that these alternatives were inadequate and that parties need not await enforcement proceedings before appealing a final agency action to a district court, especially where such proceedings carry the risk of "serious criminal and civil penalties."[6]

Relying on *Bennett v. Spear,* 520 U. S. 154 (1997) the Court held that two conditions must be satisfied for an agency action to be "final" under the APA:

> "First, the action must mark the consummation of the agency's decision making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow."[7]

All parties agreed that the first condition was satisfied; an approved JD marks the consummation of the Corps' decision making on the question of whether a property does or does not contain a water of the United States. The Corps itself "describes approved JDs as 'final agency action.'"[8]

The Supreme Court held that the second condition was also satisfied. The definitive nature of the JD gives rise to "direct and appreciable" legal consequences.[9] A JD stating that property does not contain a water of the United States grants the property owner a five–year safe harbor from liability under the Clean Water Act. On the other hand, a JD stating that a property does contain a water of the United States deprives property owners of that safe harbor.

Again, to reach the conclusion that the JD gave rise to "direct and appealable" legal consequences, Roberts and many of the concurring opinions relied to some degree on the language in the MOA and its binding nature on the agencies. The Court did not analyze what its holding would have been if the "waters of the United States" rule was upheld, and it left the door open to a different interpretation if the agencies amend the MOA.

Review the opinion here.

C.J. Donald, 2016 Summer Associate, contributed to this alert.

For more information, contact one of the lawyers listed below.

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[1]*See* United States Army Corps of Engineers v. Hawkes Co., Inc., 578 U.S. ___ (2016) (slip op at 3).
[2]*See id*.
[3]*See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg.37054, 37055–37056.
[4]*See* In re EPA, 803 F. 3d 804, 807–809 (6th Cir. 2015).
[5]*See* Hawkes, *supra* note 1, at 9.
[6]*See id.* at 8.
[7]*See id*. at 5.
[8]*See id*. at 6.
[9]*Id*.