

Army Corps' Jurisdictional Determinations Are Immediately Appealable

By Hayley Easton

On May 31, 2016, in a unanimous ruling, the eight-member United States Supreme Court held that a final determination by the United States Army Corps of Engineers ("Army Corps") as to whether a property contains "waters of the United States," subject to Clean Water Act regulations, is a final agency action subject to judicial review under the Administrative Procedure Act. *See U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. ____ (2016).

The Clean Water Act prohibits the discharge of pollutants without a permit into "navigable waters," which the Act further defines as "waters of the United States." 33 U.S.C. §§1311(a), 1362(7), (12). Many development projects result in the discharge of pollutants into waters of the United States. When a landowner seeks to develop his land, he can proceed without a permit, but may instead desire certainty that he will not be subjected to civil or criminal penalties for violating the Clean Water Act by illegally discharging pollutants into waters of the United States. He can do so by identifying and delineating wetlands early in the project planning process, and verifying those delineations with the Army Corps.

The Army Corps' verification of those delineations is contained in a document called an "approved jurisdictional determination." *See* 33 CFR §331.2 and pt. 331, App. C (2015). A landowner may also seek to Army Corps' opinion through an informal, or preliminary, jurisdictional determination, but only an approved jurisdictional determination states the agency's definitive view as to the presence or absence of jurisdictional "waters of the United States" on a given parcel of land. In other words, the documents declare the agency's view as to whether a given parcel of land is subject to the Clean Water Act's jurisdiction. Property owners are entitled to rely on the Army Corps' so-called approved jurisdictional determinations, which are valid for five years.

When the Army Corps issues a "negative" jurisdictional determination, stating that a given parcel does not contain waters of the United States, the property owner can plan a given development project knowing that he does not need a permit for at least five years, at which time he can seek another jurisdictional determination.

Prior to the ruling in *Hawkes*, once the Army Corps deemed a parcel to contain waters of the United States by issuing a "positive" jurisdictional determination, the landowner would need to begin the lengthy and expensive permitting process to be able to develop his land while complying with the Act. In *Hawkes*, the Court noted that to receive an individual permit under the Act, an applicant spends on average slightly over two years and close to \$300,000 to complete the permitting process, without taking into account the costs of mitigation or design changes. For a more readily available general permit, an applicant spends on average slightly less than one year, and close to \$30,000 to complete the permitting process.

Hawkes involved three companies engaged in peat mining in Marshall County, Minnesota who own a 530-acre tract of land near their existing mining operations. The tract includes wetlands, which are part of the waters of the United States if they are adjacent to traditional navigable waters, interstate waters, territorial seas, or tributaries, which are always considered waters of the United States. So in December 2010 the companies applied to the Corps for a Section 404 permit in order to “discharge . . . dredged or fill material into the navigable waters at specified disposal sites.” 33 U.S.C. §1344(a). As part of the permitting process, the Army Corps issued an approved jurisdictional determination finding that the property contained “waters of the United States” because the wetlands had a “significant nexus” to the Red River of the North, a traditionally navigable water located approximately 120 miles away. The companies administratively appealed, but ultimately the Army Corps reaffirmed its initial approved jurisdictional determination finding that the companies’ property contained waters of the United States.

The companies then sought judicial review of the revised approved jurisdictional determination under the Administrative Procedure Act (“APA”), 5 U.S.C. §500 *et seq.* The APA allows for judicial review of “final agency action for which there is no other adequate remedy in a court.” *See* 5 U.S.C. §704. The district court in *Hawkes* held that the companies could not seek judicial review of the revised approved jurisdictional determination because it did not constitute “final agency action for which there is no other adequate remedy in a court.” *See* 963 F. Supp. 2d 868 (Minn. 2013). The Eighth Circuit Court of Appeals reversed, 782 F. 3d 994 (2015), and the Supreme Court granted certiorari, 577 U.S. ____ (2015).

Chief Justice John Roberts, writing for the Court, reasoned that an approved jurisdictional determination qualifies as a “final agency action” that is subject to judicial review under the APA because it represents the Corps’ ultimate decision as to whether a property contains waters of the United States, and the Corps itself refers to such documents as “final agency action.”

The Corps unsuccessfully argued that adequate alternatives to judicial review exist to preclude judicial review in federal court of the Corps’ jurisdictional determinations. The Corps argued that there were two adequate alternatives. A land owner could either begin the permitting process, or simply proceed with development (and discharge fill material) without a permit and later argue to the government in any enforcement action that a permit was not required. The Court dismissed these arguments, finding that neither alternative was adequate. In doing so, the Court recognized that proceeding with development without a permit carried the risk of serious criminal and civil penalties under the Clean Water Act, and the permitting process can often be arduous, expensive, and time-consuming. The Court further recognized that these two options would be the only options available to a land owner if the Corps had not created the jurisdictional determination practice, but that did not change the fact that such a determination is a final agency action subject to judicial review under the APA.

This ruling only affects a landowner's ability to challenge *federal* determinations by the Army Corps of the extent of the waters of the United States. Under the Clean Streams Law, Pennsylvania regulates all waters as "waters of the Commonwealth," including groundwater. A federal jurisdictional determination might be relevant to state permitting on such issues as the extent of wetlands, but all of the issues arising from connections to actually navigable waters are federal only.

The *Hawkes* ruling is particularly significant to landowners in light of ongoing litigation over the Obama Administration's attempt to refine the jurisdictional scope of the Clean Water Act through the Waters of the United States Rule ("WOTUS Rule"). See Clean Water Rule: Definition of Waters of the United States, 80 Fed. Reg. 37054. In 2015, the Army Corps, together with the United States Environmental Protection Agency, issued the WOTUS Rule. The Rule was promulgated to clarify years of uncertainty over the meaning of the term "waters of the United States"—an issue that has reached the Supreme Court multiple times—and to reduce the need for case-specific jurisdictional determinations by the Army Corps.

Certain waters, namely traditionally navigable waters, interstate waters, territorial seas, impoundments, and tributaries have always been considered waters of the United States. Likewise, certain waters, such as waste treatment systems, converted croplands, and ditches, were excluded from the definition of waters of the United States. However, whether wetlands adjacent to or isolated from jurisdictional waters has been the subject of a great deal of debate and litigation. See, e.g., *Rapanos v. United States*, 547 U.S. 715 (2006). The WOTUS Rule attempted to clearly define the boundaries of the Clean Water Act's jurisdiction by clarifying which types of wetlands are included, and by expanding certain exclusions.

The Rule was immediately challenged by industry groups, states, and environmental groups alike throughout the country as arbitrary, capricious, and contrary to law, resulting in a nationwide stay of the Rule. In February, the Sixth Circuit Court of Appeals ruled that it has jurisdiction to hear the merits of the challenges, and the Supreme Court is expected to ultimately weigh in on the WOTUS Rule's fate.

Until it does so, a landowner should continue to carefully consider seeking a jurisdictional determination from the Army Corps prior to beginning a development project. After *Hawkes*, the landowner can rest assured knowing that the Army Corps' decision will be subject to judicial review as a final agency action under the APA.