Ashley Peck

Partner
801.799.5913
Salt Lake City
aapeck@hollandhart.com

What You Need to Know About the Supreme Court's Clean Water Act Decision in Hawkes

Publication — 06/14/2016

Co-Authored by Chelsea Davis

You likely already know that, on May 31, 2016, the U.S. Supreme Court in *United States Army Corps of Engineers v. Hawkes*[1] unanimously held that an approved jurisdictional determination (JD) under the Clean Water Act (CWA) is final agency action subject to judicial review under the federal Administrative Procedure Act (APA). Under *Hawkes*, a property owner with grounds to challenge an agency determination that his or her property is subject to the CWA can now do so in federal court prior to engaging in the often long and expensive CWA permitting process or risking a CWA enforcement action.

The decision has broad implications for permitting under the CWA Section 404 program and will undoubtedly generate more judicial review of substantive decisions regarding the jurisdictional scope of the CWA. However, although *Hawkes* expands pre-enforcement challenges under the CWA, the Court's decision is narrowly tailored and, as a result, might not be applied to expand pre-enforcement review in matters outside of the CWA. The following is a summary of the major points from the *Hawkes* decision that every business with operations potentially regulated by the CWA should know.

Background

The CWA prohibits the discharge of any pollutants, including dredge and fill material, into “waters of the United States” without a permit issued under the statute.[2] The determination of what waters and wetlands constitute “waters of the United States” can be a complicated process, [3] and the extent of the CWA's jurisdiction has long been the subject of litigation.[4] The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps), who jointly administer the CWA, recently addressed the subject in a rule that is currently under appeal in several courts.[5]

In *Hawkes*, three companies engaged in peat mining sought judicial review of an agency finding that portions of their property constituted “waters of the United States.”[6] The Court of Appeals for the Eighth Circuit reversed the trial court's decision and held that the agency decision was final agency action reviewable under the APA.[7] The Supreme Court granted certiorari in order to resolve a split of authority between the Eighth Circuit's decision and the Fifth Circuit's opposite conclusion in *Belle Co. v. United States Army Corps of Engineers*.[8]

The Supreme Court unanimously affirmed the Eighth Circuit's decision.[9] The Court found that the approved JD at issue in the case passed the two-

part legal test for finality, as outlined in *Bennett v. Spear,*[10] by (1) "mark[ing] the consummation of the agency's decisionmaking process," and (2) yielding "legal consequences."[11] There are several key takeaways from the Court's decision as discussed below.

Key Takeaways

1. Only "Approved" JDs are Immediately Reviewable Under the APA

Property owners obtain JDs from the Corps in order to determine whether land is subject to CWA jurisdiction. A property owner can obtain either a "preliminary" JD, which states that waters "may" be present on the property, or an "approved" JD, which states definitively "the presence or absence of such waters."[12] Although a preliminary JD is a non-binding indication that jurisdictional waters may be present or absent on a property, a property owner may elect to proceed with permitting without a formal decision if that property owner does not intend to contest jurisdiction.

The *Hawkes* decision concerned an approved JD and does not allow for APA review of a preliminary JD.[13] The Court relied on the fact that, "[u]nlike preliminary JDs, approved JDs can be administratively appealed and are defined by regulation to 'constitute a Corps final agency action.'"[14] As the Court notes in *Hawkes*, an approved JD "warns [property owners] that if they discharge pollutants onto their property without obtaining a permit . . . , they do so at the risk of significant criminal and civil penalties."[15] While an approved JD effectively mandates CWA compliance, a negative JD provides a property owner with a five-year "safe harbor" from CWA implementation pursuant to a Memorandum of Agreement (MOA) between the Corps and the EPA.[16] Property owners seeking APA review of a JD must exercise their option to obtain an approved JD in order to have their day in court.[17]

2. The *Hawkes* Decision Is Narrower Than the Eighth Circuit's Decision Below and the Court's Prior Decision in *Sackett*

In *Hawkes*, the Corps did not dispute that a JD met the first prong of *Bennett* by representing the consummation of the Corps' decisionmaking, but the question remained whether sufficient "legal consequences" flowed from a JD in order to constitute finality.[18] The Eighth Circuit relied on the risk of noncompliance penalties as a primary legal consequence flowing from an approved JD in its analysis.[19] Yet the Supreme Court's decision in *Hawkes* avoided broader reliance on the risk of noncompliance penalties in its analysis of legal consequences. Instead, the majority of the justices focused on the legal consequences of the benefit or denial of the five-year safe harbor resulting from a negative or approved JD pursuant to the MOA.[20]

Although the Court in *Hawkes* generally followed its analysis in another recent CWA decision, *Sackett v. EPA*,[21] it implicitly diverged with regard to its consideration of legal consequences. In *Sackett*, the Court found that a compliance order issued under the CWA exposed the property owner to the risk of double penalties and also hindered the property owner's ability

to obtain a CWA permit.[22] Given these legal consequences, the Court in *Sackett* found that the compliance order passed the second prong of the *Bennett* test, holding that the action constituted final agency action subject to judicial review.[23]

Similar to the compliance order in *Sackett*, the Court acknowledged that an approved JD also exposes a property owner to potential enforcement and noncompliance costs,[24] but focused its analysis of legal consequences on a JD's effective denial or grant of the five-year safe harbor from CWA permitting and enforcement.[25] By implicitly declining to rely on potential noncompliance penalties in its analysis of legal consequences, *Hawkes* makes a noteworthy shift from *Sackett* and implies that a JD (or other agency decision) may not produce legal consequences sufficient to find finality absent the safe harbor provided in the MOA.

3. *Hawkes* Could Ultimately Narrow the Standard for Finality Under the APA

The Court's reliance on the MOA and the five-year safe harbor narrows the holding to approved JDs under the CWA. However, the Court's implicit decision not to rely on noncompliance penalties in its analysis of legal consequences could be applied by future litigants to argue that agency action that does not produce something equivalent to the five-year safe harbor under the MOA is not sufficient to constitute finality under *Bennett*. If future courts construe *Hawkes* as requiring that an agency decision produce something more than a risk of noncompliance penalties, this would narrow the standard for finality under *Bennett* for review of agency action. Thus, it is possible that *Hawkes* could ultimately make it may be more difficult for parties to challenge agency action in the future—under the CWA or other statutes.

4. *Hawkes* May Not be the Last Word on the Issue

It is noteworthy that the Supreme Court concentrated its analysis in *Hawkes* on the MOA despite this issue receiving little attention in the briefing.[26] The Government suggested during oral argument, however, that it could simply issue a new MOA clarifying a JD's effect and potentially modify the five-year safe harbor. Justice Kennedy's concurring opinion criticizes the Government's position and goes so far as to express concern about the agencies' use of the CWA to “cast doubt on the full use and enjoyment of private property throughout the Nation.”[27] Nevertheless, the Court's decision does not expressly foreclose future amendments to the MOA, and it is possible that the agencies could attempt to narrow the Court's decision further with future administrative action. Should the agencies alter the MOA to remove the five-year safe harbor or otherwise alter the effect of an approved JD, it would remove the primary legal consequence analyzed under *Hawkes* and potentially reopen the question whether a JD creates legal consequences sufficient to constitute finality.

---

[1] No. 15-290 (May 31, 2016),

http://www.supremecourt.gov/opinions/15pdf/15-290_6k37.pdf.

[2] *See* Clean Water Act, 33 U.S.C. §§ 1311(a), 1342, 1344, 1362(6)–(7), (12).

[3] *See Hawkes*, slip op. at 1 (majority opinion) ("[I]t can be difficult to determine whether a particular parcel of property contains such waters . . . .").

[4] *See, e.g., Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cty. (SWANCC) v. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

[5] *See* Clean Water Rule: Definition of "Waters of the United States," 40 C.F.R. § 230.3 (2015). The 6th Circuit recently determined that it has jurisdiction to hear challenges to the Clean Water Rule. *In re U.S. Dep't of Def. & U.S. EPA Final Rule: Clean Water Rule: Definition of "Waters of the United States,"* 817 F.3d 261, 274 (6th Cir. 2016).

[6] *Hawkes*, slip op. at 3–4 (majority opinion).

[7] *Hawkes Co. v. U.S. Army Corps of Eng'rs,* 782 F.3d 994, 1000 (8th Cir. 2015), *aff'd*, No. 15-290 (May 31, 2016).

[8] The Courts of Appeal for the Eighth and the Fifth Circuits had different holdings regarding whether a JD constitutes final agency action reviewable under the APA. *Compare Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 1000 (8th Cir. 2015) (holding that a JD is reviewable final agency action), *aff'd*, No. 15-290 (May 31, 2016), *with Belle Co. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 397 (5th Cir. 2014) (holding that a "JD is not reviewable final agency action"), *vacated*, No. 14-493, 2016 WL 3128836 (June 6, 2016).

[9] *Hawkes*, slip op. at 10 (majority opinion). Justices Kennedy, Kagan, and Ginsburg filed concurring opinions.

[10] 520 U.S. 154 (1997).

[11] *Id.* at 178 (internal quotation marks and citation omitted).

[12] *Hawkes*, slip op. at 3 (majority opinion) (internal quotation marks and citation omitted); *see* 33 C.F.R. § 331.2 (2016).

[13] *Hawkes*, slip op. at 3 (majority opinion).

[14] *Id.* (citation omitted).

[15] *Id.* at 8.

[16] *See* U.S. EPA, Memorandum of Agreement: Exemptions Under Section 404(F) of the Clean Water Act §VI(A), (D) (1989).

[17] U.S. Army Corps of Eng'rs, Regulatory Guidance Letter, No. 08-02

(2008) (“a landowner . . . requests an approved JD by name”).

[18] *Hawkes*, slip op. at 5–7 (majority opinion).

[19] *See Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 1000–01 (8th Cir. 2015), *aff'd*, No. 15-290 (May 31, 2016).

[20] *See Hawkes*, slip op. at 6–7 (majority opinion).

[21] 132 S. Ct. 1367 (2012).

[22] *Id.* at 1372.

[23] *Id.* at 1374.

[24] *See Hawkes*, slip op. at 8 (majority opinion).

[25] *Id.* at 7.

[26] *See id.* at 1 (Ginsburg, J., concurring).

[27] *Id.* at 2 (Kennedy, J., concurring).