DEFINING THE SCOPE OF WATERS OF THE UNITED STATES: SUPREME COURT TO DECIDE WHETHER FEDERAL COURTS WILL BE ABLE TO REVIEW CLEAN WATER ACT JURISDICTIONAL DETERMINATIONS

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For 30 years developers, agencies and courts have struggled over defining the purview of Clean Water Act jurisdiction ("CWA" or the "Act"). However, three U.S. Supreme Court rulings and a revised federal rule attempting to define the geographic scope of the "waters of the United States" have failed to settle the question.[1] Rather, the debate over the outer limits of federal authority under the Act—particularly as it relates to wetlands—remains a hotly contested area of environmental law.

On December 11, 2015, the U.S. Supreme Court announced it would hear an appeal that could allow landowners and developers easier access to federal court to contest CWA jurisdiction. Specifically, the Court will decide whether landowners and developers can challenge the U.S. Army Corps of Engineers' (the "Corps") determinations about CWA jurisdiction.

Until a recent ruling from the 8th Circuit Court of Appeals (*Hawkes Co. v. United States Army Corps of Engineers*) appellate courts have held that the Corps' jurisdictional determinations ("JDs") were not final agency actions immediately subject to judicial review. Rather, prior to *Hawkes*, any challenge to a Corps' JD had to wait until the landowner or developer obtained a permit, which could then be challenged; or until the Corps or the U.S. Environmental Protection Agency ("EPA") took an enforcement action against a landowner or developer for proceeding to work without a permit.

When the Supreme Court rules on the *Hawkes* challenge, it likely will consider its analysis in *Sackett v. EPA*, 132 S. Ct.1367 (2012), where the Court unanimously held that administrative orders issued under the Clean Water Act are final agency actions subject to judicial review. The rationale that the Court applied in *Sackett* may well lead it to conclude that the Corps' JDs also are final actions subject to judicial review. The Corps, however, is expected to argue that the rationale of *Sackett* should not be extended to JDs because such determinations do not create the same legal consequences or conclude an agency's action in the same way as an administrative order.

The outcome of this case could substantially impact interactions between landowners/developers and the Corps. In accordance with prevailing practice prior to *Hawkes*, a developer having obtained a positive JD with which it disagreed had two basic options, other than abandoning a project altogether: (1) seek a permit from the Corps to authorize any discharge into the area determined by the Corps to be a water of the United States, or (2) proceed without a permit and risk subsequent enforcement for any discharge into such area. The first option

could involve substantial project delay, while the second would expose the developer to considerable enforcement risk (even though the developer might believe that the Corps had gotten the JD wrong). The ruling in *Hawkes*, if upheld by the Supreme Court, would allow developers in this situation a third option of immediately challenging the JD in court to resolve the scope of the agency's jurisdiction.

SETTING THE STAGE: SACKETT AND PRE-ENFORCEMENT REVIEW

Before the U.S. Supreme Court's *Sackett* decision, every federal court that faced the question ruled that recipients of a Clean Water Act Administrative Order could not challenge it in court.[2]

Prior to *Sackett*, landowners and developers faced a difficult choice when they received a unilateral Section 309 order from the EPA: comply with the order or potentially face an enforcement action for penalties. Section 309 orders are far from toothless. Failing to comply with their terms and conditions can carry penalties of up to $37,500 per day for each day the order goes unfulfilled. Those penalties are potentially compounded by an additional $37,500 per day for each day a landowner or developer violates the underlying statutory provision, which is the impetus of the order. In such situations, a 309(a)(3) order exposes landowners and operators to penalties as great as $75,000 per day per violation for as long as each violation continues.[3]

In *Sackett*, the Court swept away all prior precedent when the Court unanimously concluded "there is no reason to think that the Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction."[4]

JURISDICTIONAL DETERMINATIONS

The Corps' regulatory guidance describes a JD as a "definitive, official determination that there are, or that there are not, jurisdictional 'waters of the United States' on a site," and that a JD "can be relied upon by a landowner, permit applicant, or other affected party . . . for five years."[5]

The JD is an advisory mechanism to inform a landowner whether it will need to seek a CWA Section 404 permit from the Corps to fill wetlands. A party may seek a JD without seeking a permit, and it may seek a permit without seeking a JD.

After the Corps' district engineer renders a final written JD, the JD is subject to an administrative appeal.[6] In determining the appeal, the division engineer is required to conduct an independent review of the administrative record addressing the contested issues stated in the appeal.[7] The division engineer must render an opinion on the appeal within 12 months of the filing of the request for an appeal.[8] The administrative appeal process concludes after the district engineer renders a written determination, which is filed as part of the project's administrative record.[9]

JUDICIAL REVIEW OF JDS

Courts are divided about whether a JD is a final agency action ripe for judicial review under the Administrative Procedures Act ("APA").

The APA provides for judicial review of a "final agency action for which there is no other adequate remedy in a court."[10] The APA "evinces Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials."[11]

The Supreme Court established the test for determining whether an agency action is final:

> 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.[12]

In *Fairbank*s, the 9th Circuit Court of Appeals held that a JD is not an action by which rights or obligations have been determined or from which "legal consequences will flow."[13] The court agreed with the Corps' position that JDs merely help parties determine where they stand on potential permitting issues and are only a step leading to an agency decision rather than a final agency action.[14]

Following *Fairbanks*, the 5th Circuit Court of Appeals also ruled that JDs are not final agency actions subject to review by the courts.[15] The *Belle* court ruled that the JD is only a notification of the property's wetland classification and does not oblige or prohibit Belle from doing anything to its property.[16] Further, the court dismissed as speculative Belle's argument that a JD could be a factor in calculating civil and criminal penalties in future enforcement actions because Belle was put on notice of the wetlands in the JD.[17]

The *Belle* court noted that "[33 U.S.C.] § 1319(d) does not mention JDs or assign them specific evidentiary weight, so the speculative penalties could be a practical effect but not a legal consequence."[18] As additional justification, the *Belle* court points out that"[A]uthorizing judicial review of JDs, to the extent that it would disincentivize the Corps from providing them, would undermine the system through which property owners can ascertain their rights and evaluate their options with regard to their properties *before* they are subject to compliance orders and enforcement actions for violation of the CWA."[19]

The 8th Circuit Court of Appeals took a different tack. In *Hawkes*,the court concluded that a JD is a final agency action ripe for judicial review.

In the *Hawkes* case, Hawkes met with the Corps to discuss their plan to expand peat mining operations to include additional property. Corps representatives urged Hawkes to abandon its plan, emphasizing the delays, cost and uncertain outcome of the permitting process. Hawkes sought and obtained a preliminary determination from the Corps that the property was a jurisdictional wetland. The Corps then urged Hawkes to sell the property to a "wetlands bank," and advised them that an environmental impact statement would likely be required to issue a permit, which would likely take several years to obtain. Hawkes challenged the Corps' preliminary determination, and, following a lengthy series of administrative processes, obtained a final JD. Hawkes filed a judicial action challenging the JD, arguing that the subject property was not subject to CWA jurisdiction. The case was dismissed on grounds that the JD was not a final agency action ripe for judicial review.

When the case reached the 8th Circuit, the court was not persuaded by the Corps' argument that applicants are free to either (a) complete the permit process and appeal if the permit is denied; or (b) commence with the project absent a permit and challenge the agency's authority if it issues a compliance order or commences a civil

enforcement action. The court pointed to the prohibitive costs, risks and project delays inherent in delaying judicial review. On the one hand, obtaining an individual Section 404 permit can take years and thousands of dollars; on the other hand, proceeding without a permit could result in an enforcement action, i.e., a Section 309 order, civil penalties or criminal sanctions. These choices, according the *Hawkes* court, left the "appellants with no immediate judicial review and no adequate alternative remedy," which would achieve the result the Corps sought: abandonment of the project.[20]

SUPREME COURT REVIEW

Given the uncertainty about the scope of the CWA—particularly as it relates to the limits of federal jurisdiction over wetlands—it is essential for landowners and developers to understand whether the Act applies to their property. Before *Hawkes*, landowners and developers needed to obtain a CWA permit or risk being a target of a federal enforcement action to contest the reach of the Act. However, with the inconsistent Circuit Court rulings in *Hawkes* on the one hand, and *Fairbanks* and *Belle* on the other, the U.S. Supreme Court has decided to settle the question of whether federal courts may review Corps JDs.

The outcome of the case could have a significant impact on landowners and developers of all kinds across the country. For that reason, the National Association of Home Builders sought and obtained permission to file a brief as amicus curiae in the matter.

The Court will have to consider whether a Corps' JD consummates the agency's decision-making process. If so, the Court will then consider whether the "legal consequences" test is met when a landowner or developer must choose between completing the CWA permit process or risking substantial enforcement penalties to challenge the Corps' JD. If the *Sackett* case is any guide, the Court may well conclude that final JDs are ripe for judicial review.

Notes:

[1] In *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 139 (1985), the Supreme Court held that the U.S. Army Corps of Engineers may require permits for the discharge of fill material into wetlands adjacent to the "waters of the United States"; in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159, 166 (2001), the Court rejected the Corps' assertion of CWA jurisdiction over "nonnavigable, isolated, intrastate waters" where migratory birds are present; in *Rapanos v. United States,* 547 U.S. 715, 782 (2006), the Court concluded that Corps' asserted jurisdiction over "wetlands based on adjacency to nonnavigable tributaries" went beyond its statutory authority and established two tests for CWA jurisdiction based on hydrologic continuity and nexus. In the wake of these decisions, the Corps and the U.S. Environmental Protection Agency revised the definition of waters of the United States. See 80 Fed. Reg. 37054 (June 29, 2015); 40 C.F.R. 230.3. However, the 6th Circuit Court of Appeals stayed implementation of the rule (http://www.ca6.uscourts.gov/opinions.pdf/15a0246p-06.pdf). The Corps and EPA issued a joint memorandum on how the agencies will implement the Act while the litigation is pending (http://www.epa.gov/sites/production/files/2015-11/documents/2015-11-16_signed_cwr_post-stay_coordination_memo.pdf).

[2] *Sackett v. EPA*, 622 F.3d 1139, 1142-43 (9th Cir 2010).

[3] 33 U.S.C. § 1319(d); 40 C.F.R. Part 19.

[4] *Sackett*, 132 S. Ct. at 1374.

[5] *Hawkes Co. v. United States Army Corps of Engineers*, 782 F.3d 994, 999 (8th Cir. 2015) citing *Fairbanks North Star Borough v. U.S. Army Corps of Engineers,* 543 F.3d 586, 593 (9th Cir. 2008).

[6] *See* 33 CFR § 320.1(a)(2).

[7] *See id.* § 331.3(b)(2).

[8] *See id*. § 331.8.

[9] *See id.* § 331.9(c).

[10] 5 U.S.C. § 704.

[1]] *Hawkes*, 782 F.3d at 999, citing *Califano v. Sanders*, 430 U.S. 99 (1977).

[12] *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

[13] *See Fairbanks*, 543 F.3d at 593.

[14] *Id.*

[15] *See Belle Company v. United States Army Corps of Engineers*, 761 F.3d. 383 (5th Cir. 2014).

[16] *Id*. at 391.

[17] *Id.* at 392.

[18] *Id.* citing *Fairbanks*, 543 F.3d at 595 citing *Ctr. for Auto Safety v. NHTSA*, 452 F.3d 798, 811 (D.C. Cir. 2006).

[19] *Id.* at 394 (emphasis in original).

[20] *See Hawks Co,* 782 F.3.d at 1001.

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