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Insights

The Army Corps' Jurisdictional Wetland Determinations, Like EPA's, Now Subject to Judicial Review

May 31, 2016

By: Stephen A. Studer

Even without Justice Antonin Scalia to pen the opinion, the United States Supreme Court has once again unanimously delivered a victory for landowners who wish to challenge wetlands determinations handed down by the federal government. Yesterday, the Court issued a much anticipated decision in *U.S. Army Corps of Engineers v. Hawkes Co., Inc.* and held that a "jurisdictional determination" made by the Corps is a "final agency action" subject to judicial review. But before turning to a discussion of *Hawkes* and its implications, it is helpful to discuss an earlier Supreme Court decision, *Sackett v. U.S. Environmental Protection Agency*, issued in March, 2012.

In *Sackett*, the Court—in an opinion Justice Scalia authored—unanimously determined that an Idaho couple, who had filled low areas on their residential land in order to build a house, could maintain a federal lawsuit which challenged an "administrative compliance order" issued by the United States Environmental Protection Agency ("EPA"). EPA's order had determined that the low areas the Sacketts had filled were federally-protected wetlands and then claimed that filling them violated provisions of the Clean Water Act (the "CWA"). EPA's order went on to command the Sacketts to remove the fill or face astronomical fines. *Id.* at 1369-71.

Despite the clear coercive intent of the order, EPA refused to grant the Sacketts an administrative hearing where they could challenge the agency's actions, so the Sacketts filed a complaint seeking judicial review in United States District Court for the District of Idaho. Unfortunately, the district court denied the Sacketts their day in court and dismissed the complaint reasoning that the CWA prohibited "pre-enforcement" judicial review of EPA's compliance order. On intermediate appeal, the Ninth Circuit Court of Appeals affirmed the dismissal. *Id.* at 1371. In overturning both lower courts, the Supreme Court stated, "… there is no reason to think that the [CWA] 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 EPA's jurisdiction." *Id.* at 1374.

In *Hawkes*, the Supreme has again addressed when an administrative agency's wetland determination can be subject to judicial scrutiny. This time the wetland determination was issued by the Corps in what the agency calls a "jurisdictional determination." The Court's opinion centers on 530-acres of Minnesota property owned by the Hawkes Company Inc. ("Hawkes") close to its existing peat moss mining operations. Seeking to grow its operations, Hawkes planned to expand mining operations onto the 530-acres, but there was a familiar problem—the tract contained wetlands.

A dispute soon arose between Hawkes and the Corps over whether the wetlands were regulated under the CWA. Hawkes believed the wetlands were too isolated from "navigable waters" to be subject to regulation and relied on another landmark Supreme Court decision, *Rapanos v. United States*, in support. However, the Corps disagreed and issued a jurisdictional determination that rested on the cursory conclusion that there was a "significant nexus" between the wetlands and the Red River of the North, located some 120 miles away. Hawkes administratively appealed the determination to the Corps, but while the agency issued a revised determination, its conclusion remained the same.

Just as the Sacketts had done with EPA's compliance order, Hawkes sought to challenge the Corps' determination in court. Hawkes' complaint was received with a similar reaction and was dismissed. However, unlike the intermediate appellate court in *Sackett*, the Eighth Circuit Court of Appeals reversed the dismissal and ruled that Hawkes could file a legal challenge seeking to undermine the Corps' jurisdictional determination. Undeterred, the Corps sought and were granted Supreme Court review.

On review, the Corps argued that Hawkes must wait to appeal the Corps' jurisdictional determination until the end of the permitting process. This was, after all, the normal administrative course. The Corps went on to argue that the delay did not prejudice Hawkes because the company could simply choose to ignore the jurisdictional determination and proceed, without a permit, to mine the peat.

The Supreme Court dismissed the Corps' arguments. It held that waiting until the permitting process was complete was simply not an adequate alternative to judicial review because the "permitting process can be arduous, expensive, and long." The Court then dismissed the Corps' roll-the-die argument finding that the regulated community should not be forced to "assume the risk" and wait for EPA or the Corps to "drop the hammer" in order to have their day in court.

The Court's decision is significant. Prior to *Hawkes*, a landowner—be it a farmer, developer or any other person or business seeking to use its property—who had received a jurisdictional determination from the Corps with which it disagreed had two unenviable choices.

First, the landowner could proceed at its own risk and if later sued by the government could defend and challenge the jurisdictional determination at that time. This choice carried with it, however, substantial criminal and civil penalties of up to $37,500 for each day they violated the CWA.

Second, the landowner could proceed through the Section 404 permitting process and challenge the permit, or failure to receive the permit, in court after the permit issuance. The problem with this approach, as noted by the Court in *Hawkes*, is that, on average, EPA takes 313 days to issue a "general" permit which costs landowners, on average, $29,000, while an "individual" permit takes 788 days and costs a mind-blowing $272,000. Thus, one could go through the "arduous, expensive and long" permitting process without any assurance the original jurisdictional determination is even correct.

The Supreme Court's decisions in *Sackett* and *Hawkes* have important practical implications. Landowners now have a clear path to challenge a determination by either EPA or the Corps that seek to assert federal Clean Water Act jurisdiction over wetlands or other "waters," no matter how tenuous these claims may be.

[1] In his concurring opinion Justice Alito provided an even more colorful description of the issue:

> The position taken in this case by the Federal Government—a position that the Court now squarely rejects—would have put the property rights of ordinary Americans entirely at the mercy of Environmental Protection Agency (EPA) employees.
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> The reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act, and according to the Federal Government, if property owners begin to construct a home on a lot that the agency thinks possesses the requisite wetness, the property owners are at the agency's mercy. . . . And if the owners want their day in court to show their lot does not include covered wetlands, well, as a practical matter, that is just too bad. . . . In a nation that values due process, not to mention private property, such treatment is unthinkable.

Sackett, 132 S.Ct. at 1375.

[2] As the Court recognized, the Corps issues jurisdictional determinations (or "JDs") on a case-by-case bases to specify whether a particular property contains "waters of the United States." 33 C.F.R. § 331.2. The determinations can be either "preliminary" to advise as to whether there *may* be "waters of the United States" or "approved" to definitely state the absence or presence of such waters. *Id.* "Waters of the United States" is a defined term that contains, among other things, "wetlands." *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054, 37055-37056 (June 29, 2015).

The Supreme Court has repeatedly addressed the scope of the statutory term "waters of the United States" and both the EPA's and the Corp's regulatory interpretation of that term. *See e.g. United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 537 U.S. 159 (2001). In the watershed case, *Rapanos v. United States*, the Court agreed that the term includes some waters that are not traditionally "navigable," but could not agree on a test to determine which waters to include. 547 U.S. 715 (2006). As a result a plurality opinion was issued that left the law rather confused. Four justices interpreted the term to include "relatively permanent, standing or continuously flowing bodies of water," excluding "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall," but they found the term did not necessarily include "streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought" or "seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months." *Id.* at 732, n. 5. Justice Kennedy concurring opinion offered a different, "significant nexus" test which provides that the term includes waters that are hydrologically connected to navigable waters. *Id.* at 786-87.