

# ADMINISTRATIVE WATCH

ADDRESSING ENVIRONMENTAL, ENERGY AND NATURAL RESOURCE ISSUES



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## U.S. Supreme Court Finds Clean Water Act Jurisdictional Determinations Reviewable

On May 31, 2016, the Supreme Court of the United States unanimously ruled in *U.S. Army Corps of Engineers v. Hawkes Co.* that approved jurisdictional determinations (JDs) issued by the U.S. Army Corps of Engineers (USACE) under the federal Clean Water Act are final agency actions subject to judicial review. Like the Court's 2012 landmark opinion in *Sackett v. EPA* (finding that an Administrative Order to Comply is immediately appealable), the *Hawkes* decision effects a fundamental change in the framework for addressing jurisdictional disputes under the statute.

The Clean Water Act regulates the discharge of pollutants into "waters of the United States," imposing substantial criminal and civil penalties for unpermitted discharges. Because it is often difficult for an owner to determine whether a specific parcel contains jurisdictional waters, the USACE issues two types of JDs on a case-by-case basis. "Preliminary" JDs are expressly non-binding, merely advising a property owner that jurisdictional waters *may* be present on a parcel. "Approved" JDs, on the other hand, convey the Corps' definitive position as to the presence or absence of jurisdictional waters. Moreover, the USACE and the U.S. Environmental Protection Agency (USEPA) are parties to a Memorandum of Agreement (MOA) that makes Approved JDs binding on both agencies for five years.

In *Hawkes*, the plaintiffs received an Approved JD that found a peat wetland (that plaintiffs sought to mine) constituted jurisdictional waters because of its "significant nexus" to the Red River of the North, located some 120 miles away. Alleging that completing the application process for the required permit would have cost more than \$100,000, the plaintiffs appealed the Approved JD administratively, and then to the U.S. District Court for the District of Minnesota. The district court dismissed the complaint, finding that an Approved JD is not a final agency action subject to review under the federal Administrative Procedure Act. On appeal, the U.S. Court of Appeals for the Eighth Circuit reversed, reaching the opposite conclusion.

In upholding the Eighth Circuit's decision, Chief Justice Roberts, writing for the Court, applied the two-step analysis first set forth in *Bennett v. Spear*, 520 U.S. 154 (1997). First, Roberts found that an Approved JD is the consummation of the USACE's decision-making process, in part because it is issued after extensive fact-finding regarding the physical and hydrological characteristics of particular property. Second, Roberts found that an Approved JD is an action "by which rights or obligations have been determined," because it binds the USACE and USEPA for a five-year period, creating a safe harbor from enforcement proceedings that are inconsistent with it.

Five justices either wrote or joined in concurring opinions. Justice Kennedy (writing also for Justices Thomas and Alito), noted the government's position on brief that the USACE-USEPA MOA might be revoked at any time. In their view, if that was to occur and an Approved JD ceased to be judicially reviewable, this would cause the Clean Water Act's "ominous reach" to again be "unchecked," raising significant questions as to whether the statute "comports with due process."

Should you have questions regarding the *Hawkes* decision or other issues under the Clean Water Act and its state analogues, please contact Christopher "Kip" Power at 681-265-1362 or [cpower@babstcalland.com](mailto:cpower@babstcalland.com), or Michael K. Reer at 412-394-6583 or [mreer@babstcalland.com](mailto:mreer@babstcalland.com).