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United States Army Corps of Engineers v. Hawkes Co.

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***United States Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016).**

Jonah Brown

When landowners seek to determine if a permit is required from the Army Corps of Engineers to discharge dredged or fill material into waters within their property boundaries, they may first obtain a jurisdictional determination specifying whether “waters of the United States” are present. In an 8-0 judgment, *Army Corps of Engineers v. Hawkes* was a victory for landowners, concluding that an approved jurisdictional determination is a final agency action reviewable under the Administrative Procedure Act.

I. INTRODUCTION

Determining whether “waters of the United States” (“WOTUS”) are present on private property can be a challenging process.¹ Because of this difficulty, the Army Corps of Engineers (“Corps”) allows a property owner to obtain a preliminary or approved “jurisdictional determination” (“JD”) that specifies whether their property contains such waters.² *United States Army Corps of Engineers v. Hawkes* concerned an approved JD concluding that land owned by peat mining companies (“Respondents”) contained WOTUS because of its nexus to the Red River.³ Respondents argued that an approved JD was reviewable under the Administrative Procedure Act (“APA”). The Corps argued that an approved JD is not reviewable because it is not a final agency action. Further, the Corps argued that Respondents have the option to proceed without a permit and assert that one is not required, or complete the permit process and then seek judicial review.⁴ The United States District Court for the District of Minnesota dismissed the action in favor of the Corps, holding that a JD is not a final agency action.⁵ The Eighth Circuit reversed, holding that an approved JD is reviewable and parties do not need to await enforcement proceedings before they challenge the final agency action.⁶ By applying the two part test used in *Bennett v. Spear* to determine the finality of an agency action, the United States Supreme Court agreed with the Eighth Circuit that an approved JD is conclusory and affirmed the Eighth Circuit ruling.⁷

¹ United States Army Corps of Eng’rs v. Hawkes Co., 136 U.S. 1807, 1812 (2016).

² *Id.*

³ *Id.* at 1813.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 1816 (citing *Bennett v. Spear*, 520 U.S. 154 (1997)).

II. FACTUAL AND PROCEDURAL BACKGROUND

Obtaining a permit to discharge fill material into wetlands can be a challenging and expensive process that may take years.⁸ A landowner seeking to discharge such material into waters within their land may obtain a JD to ensure compliance with the Clean Water Act's ("CWA") section 404 permitting requirement.⁹ There are substantial criminal and civil penalties associated with discharge into such waters without a permit, but obtaining a permit is extremely costly.¹⁰ One study shows that the average applicant spends 788 days and \$271,596 in completing the process.¹¹ Further, "general" permits may take applicants over 300 days to complete.¹²

Though it is not an express requirement, the Corps may issue a JD stating whether or not the property contains WOTUS when a landowner wishes to discharge fill material into such waters.¹³ The Corps defines WOTUS to include "mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, [and] playa lakes[.]"¹⁴ The application of this definition to wetlands throughout the United States has allowed the Corps to regulate over 270-to-300 million acres of lands in the United States – including half of Alaska and an area the size of California in the lower 48 States.¹⁵

JDs may come in two different varieties: preliminary or approved. A preliminary JD is issued when the Corps has determined that there may be waters of the United States within the property. An approved JD, on the other hand, states with finality whether or not such waters are present.¹⁶ If an approved JD is issued specifying that there are no WOTUS, a landowner may discharge without a permit and will not risk CWA violations. However, if the JD identifies the land as containing WOTUS, then the landowner must pursue a permit in order to avoid penalties.¹⁷

The land at issue in this case involved a 530-acre tract that included wetlands owned by Respondents in Minnesota.¹⁸ Respondents operated peat mining companies near the tract in question and desired to expand their operation, believing that the tract contained high-quality peat.¹⁹ Peat is an organic material that can be burned as fuel or provide

⁸ *Hawkes*, 136 S.Ct. at 1813.

⁹ *Id.* (citing 33 U.S.C. § 1344(a)) "A section 404 permit authorizes the 'discharge of dredged or fill material into the navigable waters at specified disposal sites.'"

¹⁰ *Id.* at 1809 (citing 33 U.S.C. §§ 1311(a), 1319(c), (d), 1344(a)).

¹¹ *Id.* at 1812 (citing *Rapanos*, 547 U.S. at 721).

¹² *Id.* See 33 CFR § 323.2(h) defining "general" permits.

¹³ *Id.* at 1811 (citing 33 C.F.R. § 331.2).

¹⁴ *Id.* at 1811 (citing 33 C.F.R. § 328.3(a)(3) (2012)).

¹⁵ *Id.* at 1811-1812 (citing *Rapanos*, 547 U.S. at 722).

¹⁶ *Id.* at 1812.

¹⁷ *Id.* (citing 33 U.S.C. § 1344 (a)).

¹⁸ *Id.* at 1812.

¹⁹ *Id.*

structural support for golf course greens.²⁰ Peat is found in waterlogged grounds such as wetlands and, in spite of its wide usage, peat mining can have significant environmental impacts.²¹

Respondents applied for a permit from the Corps in December 2010, seeking authorization to discharge material into the waters within their property.²² As a preliminary measure to the permitting process, the Corps issued an approved JD that specified the wetlands in question were WOTUS because they had a “significant nexus” to the Red River, some 120 miles away.²³ Respondents first appealed this JD, which was remanded. On remand, the Corps reaffirmed its decision and issued a revised JD furthering its conclusion.²⁴

Respondents sought judicial review of the JD under the APA.²⁵ The United States District Court for the District of Minnesota held that the JD was not a “final agency action for which there is no other adequate remedy in court,” and thus dismissed the case for lack of subject matter jurisdiction.²⁶ On appeal, the Eighth Circuit reversed the district court’s decision, concluding that an approved JD is a final agency action, and was therefore reviewable under the APA.²⁷

III. ANALYSIS

The Supreme Court examined the issue of whether a JD is a final agency action that may be reviewed under the APA.²⁸ The court looked to the test in *Bennett* to determine whether the agency action was final.²⁹ *Bennett* established a two-part test that generally must be satisfied to constitute a final action under the APA: “First, the action must mark the consummation of the agency’s decision making process . . . And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.”³⁰

When the Court applied the *Bennett* test, it found that a preliminary JD would not be a consummation of an agency’s decision making process because it is merely an indeterminate conclusion.³¹ In contrast, the court found that an approved JD was the consummation of the Corps’ evaluation because it “definitively” determines that certain

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 1813.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* See 5 U.S.C. § 500.

²⁶ *Id.* (quoting *Hawkes Co. v. U.S. Army Corps of Eng’rs*, 963 F.Supp.2d 868, 872, 878 (Minn.2013)).

²⁷ *Id.* (citing *Hawkes Co. v. U.S. Army Corps of Eng’rs*, 782 F.3d 994, 1002 (8th Cir. 2015)).

²⁸ *Id.* at 1811.

²⁹ *Id.* at 1813.

³⁰ *Id.* (quoting *Bennett* 520 U.S. at 177-178).

³¹ *Id.*

property contains jurisdictional waters.³² Further, the Corps did not dispute that the first prong of the *Bennett* test was satisfied when an approved JD was issued.³³

Turning then to the second prong of the test, the Court found that since there was a definitive nature associated with approved JDs, there were legal consequences that flowed from them.³⁴ Both positive and negative JDs have consequences because of a negative JDs potential to limit liability landowners may face, as they will not be subject to enforcement proceedings under the CWA for discharge into the corresponding wetlands during the established time period.³⁵ Further, the Corps and the EPA share a memorandum of agreement that binds the two agencies to a five-year safe harbor from CWA enforcement proceedings if a negative JD is issued.³⁶ A positive JD has legal consequences as well because it is a denial of protection from enforcement proceedings if the landowner is to discharge into those waters, and a violation may subject the owner to criminal and civil penalties if they fail to obtain a permit.³⁷

Regardless of whether or not an agency action is final, there must be no adequate alternatives to the APA in order for the action to be reviewable.³⁸ Consequently, the Corps asserted that Respondents had two viable alternatives: discharging fill material without a permit with the assumption that the land does not require a permit, or apply for a permit and then seek review if the result is unsatisfactory.³⁹

Having determined that an approved JD was final, the Court found that neither one of the alternatives presented were an adequate remedy. If a party was to discharge without a permit, with the mistaken belief that they did not require such a permit, they would face penalties of up to \$37,000 for every day that the CWA was violated.⁴⁰ It has also been well settled that parties do not need to wait for enforcement proceedings before they challenge a final agency action when they are at risk of criminal and civil penalties.⁴¹ The Court thus concluded that the judgment of the Eighth Circuit should be affirmed.⁴²

IV. CONCLUSION & IMPLICATIONS

³² *Id.* at 1813-1814.

³³ *Id.* at 1813.

³⁴ *Id.* at 1814.

³⁵ *Id.*

³⁶ *Id.* (See Memorandum of Agreement §§ IV-C-2, VI-A). Justice

Ginsburg, concurring in the judgment, disagreed that the memorandum of agreement and the safe harbor were not a basis for determining that a JD is final. *Id.* at 1818-1819.

³⁷ *Id.* at 1814-15.

³⁸ *Id.* at 1815 (citing 5 U.S.C. § 704).

³⁹ *Id.*

⁴⁰ *Id.* See 33 U.S.C. §§ 1319(c)-(d).

⁴¹ *Id.* (citing *Abbot Labs v. Gardner*, 387 U.S. 136, 153 (1967)).

⁴² *Id.*

The Supreme Court's decision in *Army Corps of Engineers v. Hawkes* may be fairly regarded as a victory in favor of private property rights and landowners that seek assurance with regard to their CWA compliance. Landowners hoping to obtain a determination of whether their property contains WOTUS are now provided with, what the Court unanimsously believes to be, procedural due process under the CWA. Those dissatisfied with an approved JD may now immediately litigate in federal court rather than having to bear the risk of discharging without a permit, or waiting until the arduous permitting process is complete.

Further, this decision is a victory in favor of those in opposition to the broad reaches of the CWA. In his concurring opinion, Justice Anthony Kennedy opined that "the reach and systemic consequences of the Clean Water Act remain a cause for concern." Justice Kennedy then followed by extending Justice Alito's description of the CWA as "notoriously unclear."⁴³ Justice Kennedy's opinion, in which Justices Thomas and Alito joined, presents doubts with regard to the constitutionality of the CWA and its implications on landowners use and enjoyment of their land. Thus, it is unclear whether this case will serve as a basis for a narrower interpretation of the CWA. Directly, however, the decision will likely result in a more predictable and less expensive process for landowners, as they are no longer required to complete the whole permitting process only to have their permit denied.

⁴³ *Id.* (quoting Justice Alito in *Sackett*, 132 U.S. at 1367, 1374-1375).