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## Hawkes Co. v. United States Army Corps of Engineers

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***Hawkes Co. v. United States Army Corps of Engineers*, No. 13- 107  
ADM/TNL, 2017 U.S. Dist. LEXIS 10680, 2017 WL 359170 (D.  
Minn. Jan. 24, 2017)**

**Sarah M. Danno**

A peat mining company will not be required to obtain a permit under the Clean Water Act to discharge dredged and fill material into wetlands. The United States District Court for the District of Minnesota held that the United States Army Corps of Engineers fell short in its attempts to establish jurisdiction over the wetlands by twice failing to show a significant nexus existed between the wetlands and navigable waters. Further, the district court enjoined the Corps from asserting jurisdiction a third time because it would force the mining company through a “never ending loop” of administrative law.

I. INTRODUCTION

Wetlands may qualify as waters of the United States (“WOTUS”) under the uncertain reach of the Clean Water Act (“CWA”).<sup>1</sup> The United States Army Corps of Engineers (“Corps”) is authorized to issue permits for the discharge of dredged and fill material into wetlands so long as they are WOTUS.<sup>2</sup> The Corps determines whether wetlands fall under the WOTUS classification by applying the judicially created significant nexus test.<sup>3</sup> If the wetlands at issue are determined to be WOTUS under the test, the Corps assumes jurisdiction over them.<sup>4</sup> The Corps issues an “Approved Jurisdictional Determination” (“JD”) upon making its jurisdictional finding.<sup>5</sup> A JD finding the Corps has jurisdiction subjects the property to its permitting requirements.<sup>6</sup> A permit applicant may challenge a JD by administratively appealing to a designated Corps Review Officer.<sup>7</sup>

In *Hawkes Co. v. U.S. Army Corps of Engineers*, a peat mining company (“Hawkes”), seeking to expand its operations into 150 acres of wetlands, sought a jurisdictional finding from the Corps to determine whether its wetlands were WOTUS.<sup>8</sup> The Corps found the wetlands were

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1. *Hawkes Co. v. U.S. Army Corps of Eng’rs*, No. 13-107 ADM/TNL, 2017 U.S. Dist. LEXIS 10680, 2017 WL 359170 (D. Minn. Jan. 24, 2017).

2. *Id.* at \*1; *see* 33 U.S.C. §§ 1251(a), 1311(a), 1362(6), 1344 (2012).

3. *Hawkes*, 2017 WL 359170, at \*1 (*see generally* Rapanos v. United States, 547 U.S. 715, 778–82 (2006) (Kennedy, J., concurring)).

4. *Id.*

5. *Id.*; *see* 33 C.F.R. §§ 320.1(b), 325.9, 331.2 (2012).

6. *Hawkes*, 2017 WL 359170, at \*1.

7. *Id.* at \*4.

8. *Id.* at \*1.

under its jurisdiction leading Hawkes to administratively appeal the Corps' initial JD.<sup>9</sup> The initial JD was found deficient by the Corps Review Officer, prompting the Corps to issue a revised JD which Hawkes also challenged.<sup>10</sup> The Corps initially argued the revised JD was not administratively reviewable.<sup>11</sup> This argument reached the United States Supreme Court which held that a JD was a final agency action reviewable under the Administrative Procedures Act ("APA").<sup>12</sup> The revised JD concluded that the wetlands at issue fell under the Corps' jurisdiction.<sup>13</sup> Hawkes argued the determination lacked sufficient evidence supporting the Corps' jurisdiction over the wetlands and was thus in violation of the APA.<sup>14</sup> On remand, the United States District Court for the District of Minnesota agreed with Hawkes and found the JD arbitrary and capricious.<sup>15</sup> Further, the district court deviated from the general rule of remanding an issue to an agency for additional investigation or explanation, and instead prevented the Corps from getting "a third bite at the apple" by enjoining the Corps from asserting jurisdiction over the wetlands.<sup>16</sup>

## II. FACTUAL AND PROCEDURAL BACKGROUND

Property owners seeking to discharge dredged or fill material into waters within their property boundaries are heavily reliant on the CWA's uncertain breadth.<sup>17</sup> Discharges into WOTUS, including wetlands, are prohibited by the CWA without a permit from the Corps.<sup>18</sup> Through application of the significant nexus test, the Corps evaluates the connection between the wetlands and navigable waters in light of the CWA's mission: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters".<sup>19</sup> The Corps then issues a JD stating whether specific wetlands qualify as WOTUS and are subject to the permitting requirement.<sup>20</sup>

Wetlands are included under the CWA because they perform functions crucial to maintaining the integrity of other waters.<sup>21</sup> They are evaluated under the significant nexus test accordingly.<sup>22</sup> Wetlands satisfy

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9. *Id.* at \*4–\*6.

10. *Id.*

11. *Id.*; *see also* U.S. Army Corps of Eng'rs v Hawkes Co., 136 S. Ct. 1807, 1814 (2016).

12. *Id.*

13. *Hawkes*, 2017 WL 359170, at \*1.

14. *Id.*

15. *Id.* at \*11.

16. *Id.* at \*12.

17. *Id.* at \*1, \*12.

18. *Id.* at \*1.

19. *Id.* (quoting 33 U.S.C. § 1251(a) (2012)).

20. *Id.*

21. *Id.* (citing 33 C.F.R. § 320.4(b)(2) (2017)).

22. *Id.*

the test if they, either alone or in combination, significantly affect the chemical, physical, and biological integrity of navigable waters.<sup>23</sup> Only a showing that the wetlands significantly affect one of these three qualities is necessary.<sup>24</sup> However, a showing that is merely speculative or insubstantial fails the test.<sup>25</sup> The test limits the assertion of jurisdiction by requiring “some” evidentiary support of the wetland’s effect on navigable waters.<sup>26</sup>

In 2012, over a year after Hawkes applied for a permit, the Corps issued a JD determining that a significant nexus existed between the wetlands Hawkes wanted to mine for peat and the Red River.<sup>27</sup> Although the Red River flows at least 93 river miles and 42 aerial miles from the wetlands, the Corps found a nexus existed due to a series of hydrologic connections.<sup>28</sup> Hawkes administratively appealed the JD arguing the Corps failed to meet the significant nexus test by showing nothing more than a “speculative or insubstantial effect on the chemical, physical, or biological integrity of the Red River.”<sup>29</sup>

Based on various deficiencies in the Corps’ chemical, physical, and biological assessments, the Administrative Appeal Decision found the Administrative Record insufficient to support a positive significant nexus determination.<sup>30</sup> The Appeal Decision remanded the matter to the Corps with instructions to revise and supplement the JD.<sup>31</sup> Specifically, the Corps was required to include sufficient documentation and analysis regarding whether the wetlands had more than a speculative or insubstantial effect on the Red River.<sup>32</sup> Two months later, the Corps completed a revised JD reaching the same conclusion as the original JD—a significant nexus existed between the wetlands and the Red River.<sup>33</sup>

Arguing the revised JD was based on the same administrative record previously found insufficient, Hawkes filed suit under the APA.<sup>34</sup> The Corps moved to dismiss Hawkes’ complaint arguing the revised JD was not a final agency action under the APA.<sup>35</sup> The district court granted the Corps’ motion only only to have the United States Court of Appeals for the Eighth Circuit reverse the decision and hold the revised JD was a

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23. *Id.* at \*2.

24. *Id.*

25. *Id.*

26. *Id.* at \*2 (quoting *Precon Dev. Corp., Inc. v. U.S. Army Corps of Eng’rs*, 633 F.3d 278, 294 (4th Cir. 2011)).

27. *Id.* at \*2.

28. *Id.* The wetlands are part of a complex that flows through a man-made ditch, an unnamed seasonal tributary, two culverts, a wetland drainage, and the Middle River, and eventually joins the Red River. *Id.* at \*3.

29. *Id.* at \*4.

30. *Id.* at \*4, \*5.

31. *Id.* at \*5.

32. *Id.*

33. *Id.* at \*6.

34. *Id.*

35. *Id.*

reviewable final action under the APA.<sup>36</sup> The United States Supreme Court granted certiorari and affirmed the Eighth Circuit's holding.<sup>37</sup> The case was remanded back to the district court to determine whether the revised JD's finding was arbitrary and capricious.<sup>38</sup>

### III. ANALYSIS

On remand, Hawkes and the Corps filed cross motions for summary judgment.<sup>39</sup> The district court reviewed the Administrative Record to determine whether the revised JD was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>40</sup> The district court examined the revised JD by looking at the three significant attributes of the nexus test—physical, chemical, and biological—to determine whether the Corps adequately established the existence of a significant nexus between the wetlands and the Red River.<sup>41</sup>

#### A. *Physical Connection*

The district court began its analysis by identifying the physical connection deficiencies in the Corps' original JD.<sup>42</sup> The original JD failed to provide evidence identifying a flow in the tributary channel, evidence establishing a significant physical nexus between the number of flow events and their effect on the Red River, or documentation establishing the extent of the flow through the man-made ditch.<sup>43</sup> The Corps also stated in the original JD that further site investigations would also be necessary to determine hydrologic connectivity.<sup>44</sup>

Upon comparing the deficiencies in the original JD to the revised JD, the district court found the Corps' changes inadequate.<sup>45</sup> The Corps argued that while it did not conduct any additional site investigations to establish hydrologic connectivity, it added site-specific flow documentation to establish the physical connection between the wetlands and the Red River.<sup>46</sup> However, the district court found the Corps' changes were hypothetical, based on assumed variables, and did not remedy the lack of sufficient evidence or the Corps' failure to identify the presence of any flow in the tributary channel or the man-made ditch.<sup>47</sup> Finding the allegedly additional information to be the same

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36. *Id.*  
37. *Id.* at \*6.  
38. *Id.*  
39. *Id.*  
40. *Id.* at \*7 (citing 5 U.S.C. § 706(2)(A) (2012)).  
41. *Id.*  
42. *Id.*  
43. *Id.* at \*7, \*9.  
44. *Id.* at \*7.  
45. *Id.* at \*8.  
46. *Id.* at \*7, \*8.  
47. *Id.* at \*8.

fragmentary material found in the original JD, the district court proceeded to evaluate the Corps' chemical connection analysis.

### *B. Chemical Connection*

The insufficiencies in the original JD regarding the chemical connection resembled those in the physical connection analysis.<sup>48</sup> A significant chemical connection was not established due to the lack of site-specific facts and data supporting a significant nexus between the wetlands and the Red River.<sup>49</sup> The Corps argued that the revised JD included further documentation of the chemical functions served by the wetlands.<sup>50</sup> However, the district court found the additional documentation was not new and the revised JD discussed the same points deemed insufficient in the original JD.<sup>51</sup>

### *C. Biological Connection*

The district court analyzed and compared the Corps' failure to establish a biological connection in the original JD with the revised JD.<sup>52</sup> The original JD failed to show a biological connection between the wetlands and Red River due to a lack of water flow evidence and a complete lack of species analysis.<sup>53</sup> The Corps argued the revised JD included additional information establishing a biological connection.<sup>54</sup> For example, the Corps stated the tributary could serve as a movement corridor and species could utilize stream channels for migration purposes.<sup>55</sup> The district court found these were speculative assertions, generalities, and the revised JD lacked site-specific data.<sup>56</sup>

## IV. CONCLUSION & IMPLICATIONS

Finding the revised JD to be based on the same insufficient information as the original JD, the district court held the Corps' conclusion that a significant nexus existed between the wetlands and the Red River was arbitrary and capricious.<sup>57</sup> The district court acknowledged the role of agency deference in its decision and concluded that it was not substituting its own judgment in place of the Corps'

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48. *Id.* at \*10.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at \*11.

expertise.<sup>58</sup> Justifying its assertion, the district court pointed out that the Corps' own expert found the original JD insufficient.<sup>59</sup>

Upon reaching its conclusion that the revised JD violated the APA, the district court considered the proper remedy.<sup>60</sup> The district court acknowledged the general rule that when an agency decision is not supported by the administrative record it is proper to remand the matter back to the agency.<sup>61</sup> However, seeking to avoid a "never ending loop" for Hawkes by giving the Corps "a third bite at the apple," the district court enjoined the Corps from asserting jurisdiction of the wetlands.<sup>62</sup> The district court explained that the Corps was already given two opportunities to establish jurisdiction and had years to collect data on the wetland's nexus to the Red River.<sup>63</sup> Finally, the district court refused to leave Hawkes unable to mine its land while the Corps continuously litigated the matter.<sup>64</sup>

The district court's decision limits the ambiguous breadth of the CWA and provides property owners with promise of a practical solution. While CWA jurisdiction may continue to have its uncertainties, the district court set clear expectations for the Corps—not only is a JD reviewable under the APA, but it must be backed by site-specific evidentiary support. Further, the district court's holding will likely serve as an avenue for states to assume greater regulatory authority over their permitting processes. Increased state authority may encourage constituents to rely more heavily on the states, rather than the federal government, for assurance that land use operations impairing water quality face a thorough regulatory process.

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58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at \*12.

63. *Id.*

64. *Id.*