Déjà vu: Supremes hold Corps' jurisdictional determinations constitute "final agency actions"

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For the second time in just four years, the Supreme Court has expanded the list of Clean Water Act (CWA) actions immediately reviewable by the courts under the Administrative Procedure Act (APA). In 2012, a unanimous Court held in *Sackett v. EPA* that a U.S. Environmental Protection Agency (EPA) administrative compliance order, in which EPA determined a landowner had violated the CWA by filling wetlands, was "final agency action" subject to immediate judicial review under the APA. On March 30, 2016, the Court heard argument on a similar question in *United States Army Corps of Engineers v. Hawkes Co.*: Are "jurisdictional determinations" (JDs)—decisions by the U.S. Army Corps of Engineers (Corps) regarding whether waters on a property fall under federal Clean Water Act jurisdiction as "waters of the United States"—"final agency action" and thus also immediately reviewable in federal court? In a ruling that closely tracked the oral argument, the Court unanimously held on May 31, 2016, that a JD *is* "final agency action."

Background

The Hawkes Co. wishes to mine peat on wetlands in Minnesota, but under section 404 of the CWA, it cannot do so without a dredge or fill permit from the Corps if the wetlands constitute "navigable waters of the United States." Hawkes' dilemma stems from the confusion that has surrounded the term "navigable waters" since the CWA's inception. The Supreme Court has repeatedly attempted to clarify that term but has only further muddied those jurisdictional waters. Its most recent effort in *Rapanos v. United States* (2006) resulted in a fractured opinion and two very different tests for determining which waters are "waters of the United States." The 2015 attempt by EPA and the Corps to clarify the scope of navigable waters via its final Clean Water Rule has caused much consternation and the Sixth Circuit has stayed the Rule nationwide pending judicial review.

Procedural history

It is against this backdrop that Hawkes sought a JD from the Corps to settle the status of its wetlands. In 2012, the Corps issued a JD finding jurisdictional waters on Hawkes' land. In response, Hawkes availed itself of the only remedy available under existing law, an administrative appeal. A Corps officer vacated the JD because the record did not support it, but the Corps issued another positive JD upon reconsideration.

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Hawkes sued in federal court, arguing the JD was arbitrary and capricious. The district court held that a JD is not "final agency action" and therefore not reviewable. The Eighth Circuit, relying on *Sackett*, reversed. In seeking *certiorari*, both parties framed their arguments using the two-pronged test in *Bennett v. Spear* (1997), under which agency action is "final" if it (1) marks the consummation of an agency's decision-making process and (2) is an action that determines "rights or obligations" or "from which legal consequences will flow."

Oral argument—finality

At oral argument, Deputy Solicitor General Malcolm Stewart made an early concession with respect to *Bennett* "finality." When queried by Justice Alito as to whether JDs were binding on the government in future litigation, Mr. Stewart asserted that JDs do not bind the United States in later agency proceedings, but admitted that if they did, JDs *would* constitute final agency action. With this admission in hand, Justice Alito and Chief Justice Roberts turned to a Memorandum of Agreement (MOA) between the Corps and EPA stating that JDs are "binding" on the government. Justice Sotomayor asked for any example where a JD was issued but later ignored by the government. Mr. Stewart could not point to a single instance.

Oral argument—legal consequences

According to the United States, a JD has no legal consequences because it is "merely" an informational tool the Corps provides to help landowners make informed decisions about their conduct. Mr. Stewart emphasized that landowners would be faced with the same decision if JDs did not exist, but would have less information. Except for Justice Kagan, the bench, led largely by Justice Breyer, was skeptical. Chief Justice Roberts expressed the Court's general sentiment when he observed that JDs are a "significant enforcement tool" that allow the Corps "to exercise extraordinary leverage" over citizens facing ultimate penalties and "to exercise their authority without effective judicial review." Justices Ginsburg and Breyer agreed, the former noting the "arduous and very expensive" permitting process a landowner must undertake before a JD can be challenged.

The *Hawkes* ruling

While *Hawkes* was a closer call than *Sackett* because the legal effects of a JD are less immediate and less overtly coercive than a compliance order, the Court nonetheless returned a unanimous decision in favor of Hawkes. The main opinion of the Court, authored by Chief Justice Roberts and joined by Justices Kennedy, Thomas, Breyer, Alito, Sotomayor, and Kagan, essentially adopted Hawkes' argument that JDs are final and definitive in nature and that those JDs have direct and appreciable legal consequences for regulated parties. The opinion, along with the outcome itself, is wholly consistent with the issues identified at oral argument. Interestingly, Justice Kagan filed a single paragraph concurring opinion saying that, for her, the MOA "is central to the disposition of this case," while Justice Ginsburg filed a single paragraph

concurrence stating that she "join[s] the Court's opinion, save for its reliance upon the Memorandum of Agreement between the Army Corps of Engineers and the Environmental Protection Agency." Hmmm.

Hawkes' implications

Under *Hawkes*, landowners now have the right to quickly and directly challenge in court a finding of federal CWA jurisdiction over their lands. This will be an important tool as the regulated and the regulators continue to contest the scope of CWA jurisdiction, both now and under the new Clean Water Rule (if and when it is implemented).

The larger picture painted by *Hawkes*, along with *Sackett* and *Rapanos*, is that until Congress steps in to clear the air, the Supreme Court will be forced to play referee between the federal government and landowners to sort out which waters are "navigable waters." During the *Hawkes* argument, Justice Kennedy summed up the Court's increasing frustration with the government's management of the section 404 program by musing aloud that the CWA is "arguably unconstitutionally vague." More significantly, Justice Kennedy, joined by Justices Alito and Thomas, doubled down on this sentiment in a concurring opinion, stating that "the reach and systemic consequences of the Clean Water Act remain a cause for concern" and questioning whether the CWA would "comport[] with due process" if JDs were not binding. The three Justices appear ready to rethink the broad wetlands jurisdiction that Justice Kennedy himself spawned via his "significant nexus" test in *Rapanos*. With a likely Supreme Court appeal from the Sixth Circuit on the Clean Water Rule looming on the horizon, and with apparent agreement by at least three of the four justices necessary to grant *certiorari*, the Court may soon get another bite at the apple.

Stay tuned.