U.S. Supreme Court to Hear Army Corps' Clean Water Act Appeal
December 15, 2015

On December 11, the United State Supreme Court agreed to take up a challenge to the Eighth Circuit decision in Hawkes Co. v. Army Corps of Engineers, 782 F.3d 994 (8th Cir. 2015), in which the court found a company seeking to extract peat moss from wetlands on its property has a right to judicial review—without the need to wait for the agency to bring an enforcement action and risk hefty fines—of the U.S. Army Corps of Engineers' determination there are wetlands on the property, subjecting the extraction project to the permitting requirements of the Clean Water Act.

The Supreme Court will decide whether a landowner is able to challenge agency jurisdictional determinations for planned projects prior to the agency seeking enforcement. This would remove much uncertainty from the process by eliminating the threat of financial penalties that come with enforcement, as well as avoiding unnecessary permitting costs for projects where the presence of jurisdictional wetlands is in question. This is particularly important given the uncertainties surrounding the new "waters of the United States" definition, which was recently stayed by the Sixth Circuit across the country pending resolution of the legal challenge to the rule. At risk for the EPA and Army Corps of Engineers is further strain on their limited resources due to the flood of legal challenges that will certainly follow in close cases if landowners have the ability to challenge all jurisdictional determinations relatively early in the process.

In Hawkes, the Corps is appealing the Eighth Circuit's ruling that "approved jurisdictional determinations" are final agency actions that can be reviewed by courts under the Administrative Procedure Act. The Eighth Circuit's final agency action ruling is squarely in opposition to the Fifth Circuit's July 2014 ruling in Belle Co. LLC v. U.S. Army Corps of Engineers, 761 F.3d 383 (5th Cir. 2014), which found no right to review because the Corps' jurisdictional determination is merely a notification of a property's classification and does not satisfy the test for final agency action. The Fifth Circuit's rationale was that the determination does not impose legal obligations or consequences beyond those already imposed by the Clean Water Act—essentially that they are advisory opinions.

The circuit split demonstrates the need for the Court to revisit the issue, last addressed by the Supreme Court in Sackett v. EPA, 132 S. Ct. 1367 (2012). In Sackett, the EPA issued a compliance order requiring the Sacketts to remove fill from their property that EPA deemed illegal because it viewed the property as a wetland subject to the permitting requirements of Section 404 of the Clean Water Act. The order directed them to restore the lot to its original condition without delay; and threatened the Sacketts with substantial daily fines (up to $75,000/day) for non-compliance with the CWA and administrative order. The Sacketts sought and were denied a meeting with EPA regulators to address their contention that the property was not, in fact, wetlands, leaving them with no options but to either comply with the compliance order or refuse to comply and wait for EPA to file an enforcement action, at which point they are exposed to substantial fines and penalties. The Supreme Court recognized the inequity of this situation in Sackett and held that the EPA's compliance order was a final agency action subject to judicial review. This marked a victory for landowners who often felt powerless to challenge EPA and Corps jurisdictional determinations—even those that were off-base or were close calls.

Now, in Hawkes, the Supreme Court will determine whether jurisdictional determinations by the Army Corps fit within the "flexible final agency action" standard announced in Sackett or if they are merely advisory opinions and not subject to judicial review.

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