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High Court Water Case Could Put Target On Agencies' Backs

By **Juan Carlos Rodriguez**

Law360, New York (March 29, 2016, 9:10 PM ET) -- Landowners and the U.S. Army Corps of Engineers will square off Wednesday at the U.S. Supreme Court in a test of when exactly a party may challenge the Corps' determination that it has jurisdiction over a wetland — a case that could open government agency decisions up to more challenges across the board.

The Corps is appealing the Eighth Circuit's ruling that so-called approved jurisdictional determinations are final agency actions that can be reviewed by courts under the Administrative Procedure Act. The agency said that finding runs counter to a 2014 ruling from the Fifth Circuit, which concluded that a jurisdictional determination is merely a notification of a property's classification and does not satisfy the test for final agency action because it does not impose legal obligations or consequences beyond those already imposed by the Clean Water Act.

If the high court upholds the Eighth Circuit's opinion outright — a 4-4 tie would leave that decision intact but would not affect other circuits — it could establish a new threshold under the APA for when a party may challenge an agency decision.

The court will have to consider the significant obligations associated with the permitting process after a jurisdictional determination is complete, said Lowell Rothschild, a senior counsel at Bracewell LLP.

"It's really going to be a question for the court as to how significant those obligations have to be in terms of time and money to provide for judicial review," he said. "So it will be helpful not just in the wetlands context, but also for other regulated industries in other circumstances when they have a certain obligation that’s imposed upon them by the Corps or EPA."

For example, Rothschild said, if the Supreme Court finds that the time and money it takes to challenge a jurisdictional determination is "significant," then another party that finds itself facing a similar set of obligations could argue there's a threshold.

Michael Kimberly, a partner at Mayer Brown LLP, noted that many of the briefs cited in the high court challenge are not even Clean Water Act cases.

"Ultimately, this is first and foremost an Administrative Procedure Act case. So I think the likelihood that it will have a spillover effect on what other sorts of adjudicative agency decisions are reviewable is a sure thing," Kimberly said.

Andrew Perellis, a partner at Seyfarth Shaw LLP, agreed that if the Supreme Court finds this jurisdictional determination to be a final agency action, then perhaps other government agency actions will be more susceptible to evaluation or challenge over whether they're immediately reviewable.

One of the key considerations for the high court will be to what extent there are real, tangible consequences in terms of what the property owner can or cannot do with a property following the issuance of a jurisdictional determination, Perellis said.

The case was sparked after Hawkes Co. Inc. applied for a permit from the Corps in December 2010 to mine peat on 530 acres of land in northwestern Minnesota. Two years later, the Corps issued an approved jurisdictional determination to Hawkes explaining that the property contains approximately 150 acres of wetlands that have a significant nexus with the Red River, a traditional navigable water.

Hawkes challenged the jurisdictional determination as arbitrary and capricious under the APA, and the Eighth Circuit eventually held that the Corps' argument ignored the "prohibitive cost" of taking either of two alternative actions to obtain judicial review of the Corps' assertion of CWA jurisdiction over the property.

Hawkes had two ways to contest the Corps' jurisdictional determination in court: complete the permit process and appeal if a permit is denied, or commence peat mining without a permit and challenge the agency's authority if it issues a compliance order or commences a civil enforcement action.

Perellis said a jurisdictional determination definitely has a tangible impact on a property owner.

"If you were a developer and you were planning a particular development and the agency comes out with a jurisdictional determination that says there's a wetland involved, and you would then have to mitigate it, it would impact whether and you could go forward with your development in the manner you had planned," he said.

And Cynthia L. Taub, of counsel at Steptoe & Johnson LLP, said property owners are stuck between a rock and a hard place, facing either the costly, time-consuming permit process, or the risky tactic of forgoing the Corps' opinion altogether and facing an enforcement action.

"This is a significant case because it would give property owners and developers the ability to obtain judicial review on the jurisdictional issues upfront, rather than having to either risk enforcement or go through the permitting process even when they think there is no Corps jurisdiction. And getting a permit can be very complicated," she said.

But Rothschild said from the government's perspective, keeping a third party out of the process for as long as possible is the goal.

"In the Corps' mind, the more points in the process for a third party to insert themselves, the slower the process is, the more expensive the process is for them. They would prefer to do as much as they can without third-party review because it's faster and easier for them," he said.

The Corps is represented by Donald B. Verrilli Jr., John C. Cruden, Malcolm L. Stewart, Ginger D. Anders, Jennifer Scheller Neumann and Robert J. Lundman of the U.S. Department of Justice.

Hawkes is represented by M. Reed Hopper and Mark Miller of the Pacific Legal Foundation.

The case is U.S. Army Corps of Engineers v. Hawkes Co. Inc. et al., case number 15-290, in the Supreme Court of the United States.

--Editing by Mark Lebetkin and Katherine Rautenberg.
