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Wetlands

No Backers for U.S. Position in Supreme Court Water Case

BNA Snapshot

DOJ Has No Supporting Amicus Briefs

Key Development: Attorneys say no briefs filed to back the Justice Department's position in a U.S. Supreme Court case that argues against making Clean Water Act jurisdictional determinations subject to judicial reviews.

By **Amena H. Saiyid**

March 3 — The federal government's argument that Clean Water Act jurisdictional determinations do not count as final agency actions that can be challenged in court isn't being supported by any other groups in briefs to the U.S. Supreme Court, attorneys told Bloomberg BNA March 3.

"There were no amicus briefs in support of the US. That is certainly unusual," said Timothy Bishop, a partner in the Chicago office of Mayer Brown LLP, who filed an amicus brief on behalf of a coalition led by the American Farm Bureau Federation to support Hawkes Co. Inc., the Minnesota-based peat farming operation ([42 DEN A-14, 3/3/16](#)).

Hawkes is challenging the U.S. Army Corps of Engineers determination that wetlands on its property can be regulated under the Clean Water Act, which would require the company to obtain a Section 404 dredge-and-fill permit prior to extracting peat from the wetlands.

"Amicus briefs must be filed within seven days of the party one is supporting, so the time has run for all amicus briefs," Reed Hopper, senior attorney for the Pacific Legal Foundation that is representing Hawkes, told Bloomberg BNA March 3, following a press conference previewing the court case.

The Justice Department's brief was filed Jan. 22, meaning the deadline for filing briefs on its behalf was Jan. 29, said Bishop, who noted that the deadline for filing briefs in support of Hawkes was March 2.

So far, Bishop said, "I have seen 11 briefs in support of Hawkes, but there may be even more."

States Oppose Government

West Virginia Attorney General Patrick Morrisey and Ohio Attorney General Mike DeWine and the attorneys general from 21 other states supported Hawkes' position in a [friend-of-the-court brief](#), but no states have filed briefs backing the government (*U.S. Army Corps of Eng'rs v. Hawkes*, U.S., No.15-290, brief filed, 3/2/16).

"I can only assume that the government did not get any amicus support because the government position is not supportable or no one opposes immediate judicial review of jurisdictional determinations," Hopper said.

The Natural Resources Defense Council had presented arguments in support of the Justice Department during oral arguments held 2011 in *Sackett v. EPA* ([132 S.Ct. 1367, 182 L. Ed. 2d 367, 73 ERC 2121, 2012 BL 67234](#) (U.S. 2012)).

In that case, the Supreme Court unanimously ruled that a Clean Water Act administrative compliance order issued by the EPA prior to commencing a civil enforcement action is a final agency action subject to judicial review.

When asked whether the NRDC or another environmental group planned to support the government in Hawkes, Jon Devine, NRDC senior attorney, said the time for filing briefs in support of the government was over, "and I'm not aware of any that have been filed." He stopped short of explaining why.

The National Wildlife Federation also considered filing a brief in support of the government, but chose not to and didn't say why.

Possible Reasons for No Support

Thomas Ward, who is vice president for legal advocacy with the National Association of Home Builders, and Virginia Albrecht, special counsel with the Washington D.C. office of Hunton & Williams LLP, both separately noted that the government in *Sackett* had the support of only one brief, and that was filed by the NRDC.

"My guess is that this direct issue does not impact the environmental advocates because they do not (generally) obtain jurisdictional determinations for their land," said Ward who filed an amicus brief in support of Hawkes.

Albrecht said she wasn't surprised by the lack of support for the government.

"Who wants to march up the hill in support of the notion that the executive branch can do whatever they want and the affected citizen has no recourse?" said Albrecht, who with her colleagues at Hunton penned an amicus brief supporting Hawkes' position on behalf of the Utility Water Act Group (UWAG) and the Foundation for Environmental and Economic Progress (FEEP).

UWAG is a coalition of 191 energy companies and three national energy trade associations: the Edison Electric Institute, National Rural Electric Cooperative Association and American Public Power Association. FEEP represents a national coalition of landholding companies that tackle federal environmental policies as they pertain to land use.

Christopher Locke, senior partner with the San Francisco-based Farella Braun + Martel LLP, said he too wasn't surprised by the lack of support for the government's position.

"I do not find it unusual that stakeholders on both sides would want immediate review of jurisdictional determinations," Locke said, adding "What I do find unusual is that the government is persisting in its position in a case that quite clearly fits the *Sackett* criteria for immediate review, and where the corps persisted in its position even though its own administrative appeal process did not support the Corps' jurisdictional determination."

Unsurprised by Lack of Support

Unlike the other lawyers, Justin Pidot, a law professor at the University of Denver's Sturm College of Law, didn't find it surprising or unusual that the environmental groups chose not to support the government in *Hawkes* in contrast to their support in *Sackett*.

"If an environmental group thinks that a jurisdictional determination is too narrow, that group may want to bring a challenge itself," Pidot said. "The same dynamics weren't at play in *Sackett* because enforcement is more of a one-way ratchet. Environmental groups want there to be more enforcement, but they want a particular outcome when it comes to jurisdictional determinations."

Moreover, Pidot noted that writing an amicus brief requires a significant investment of resources. "In a case like this, if there's no constituency (other than the government) that has a strong interest in insulating jurisdictional determinations from judicial review, even those that may agree with the government as a matter of law may not want to put in the effort to file a brief," he said.

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For More Information

The states amicus brief filed in the U.S. Supreme court in *U.S. Army Corps of Eng'rs v. Hawkes Co.* is available at <http://1.usa.gov/1SiLmQI>.