Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Water Case Shows Justices Warm To Review Of Fed. Agencies

By **Juan Carlos Rodriguez**

Law360, New York (May 31, 2016, 11:27 PM ET) -- While the U.S. Supreme Court's Tuesday ruling giving landowners a green light to challenge determinations that their property is subject to Clean Water Act regulation stayed closely confined to the facts of that case, experts say the decision shows the high court's willingness to allow judicial review of a broader swath of agency actions.

The eight justices unanimously decided in U.S. Army Corps of Engineers v. Hawkes that when the agency completes an approved jurisdictional determination, finalizing whether a piece of property contains a "water of the United States" as defined under the Clean Water Act and is subject to the statute's regulations, the landowner may challenge that finding in a federal court.

The government unsuccessfully urged the court not to allow judicial review, arguing so-called JDs aren't a "final agency action" as defined under the Administrative Procedure Act and that landowners had sufficient alternative remedies to litigation.

Coupled with the Supreme Court's 2012 ruling in Sackett v. U.S. Environmental Protection Agency, which held that that property owners could challenge EPA compliance orders in court before the EPA brings legal action to enforce them, the ruling in Corps v. Hawkes indicates that the justices are willing to address the practical impacts of agency actions, according to Jerry Stouck, a partner at Greenberg Traurig LLP and chair of the firm's federal regulatory and administrative law practice group.

"A lot of agencies around Washington issue all kinds of 'information guidance' that's not binding. But if the regulated parties don't follow that guidance, there can be some very significant adverse consequences — and agencies do that in order to try to insulate themselves from judicial review. This opinion really cuts back some of their ability to do that," Stouck said.

And Thaddeus R. Lightfoot, a partner at Dorsey & Whitney LLP, said if the Hawkes and Sackett opinions are viewed together, it's clear that the court is going to support the presumption of judicial review for administrative actions unless a statute says that judicial review is barred.

"I think [the Hawkes opinion] is clear … and I think it has application to other statutes and potentially to other agencies. There is no question this sends a strong message that administrative actions, unless Congress has clearly said they are not subject to judicial review, will be subject to it," Lightfoot said.

There is some room for interpretation on that point, however, said William M. Jay, a partner at Goodwin Procter LLP and co-chair of the firm's appellate litigation practice.

Chief Justice John Roberts, writing for the majority, tethered the opinion in large part to a memorandum of understanding between the Corps and the EPA that binds each agency to the outcome of a jurisdictional determination for five years: It's a deal that bestows benefits to properties that aren't subject to CWA jurisdiction and imposes drawbacks on those that are. He said the memo is an example of the legal consequences flowing from a JD.

But Chief Justice Roberts did not explicitly state that the memorandum was the key to the entire case, and Justices Elena Kagan and Ruth Bader Ginsburg differed on the importance of the memo, with Justice Kagan saying it is all-important in a separate concurrence and Justice Ginsburg saying it isn't important at all in another.

"The big question mark is: How important is this memorandum of understanding?" Jay said. "I think one question for the Clean Water Act lawyers is going to be: Could the agencies try, between themselves, to rewrite their MOU and take away this right of judicial review?"

Stouck pointed to language in Roberts' opinion that pointed out the "definitive" nature of a JD and its "direct and appreciable legal consequences" as evidence that the memo isn't the only thing that motivated the opinion.

"The definitive nature is what makes [a JD] have legal consequences," Stouck said. "And that … doesn't really depend at all on the memorandum."

Andrew Perellis, a partner at Seyfarth Shaw LLP, agreed, noting that previously, lower courts have found that even administrative orders were not immediately reviewable or that an agency had to proceed to court in order to enforce its order.

"There is potentially a universe of agency actions such as guidance documents or opinion letters that in the past have evaded judicial review that may be reviewable because those agency determinations have immediate consequences," Perellis said, drawing on language from Justice Ginsburg's concurrence.

Aside from the opinion's wider impacts in the area of administrative law, the ruling will have clear and immediate effects in Clean Water Act matters. In particular, it is likely to lead to new body of common law regarding the scope of Clean Water Act jurisdiction, said Neal McAliley, a partner at White & Case LLP.

He said most landowners choose to either scuttle a project or apply for a permit after being confronted with a JD. If the landowner chooses the permit route, McAliley said, it's uncommon for the Corps to completely deny a permit, so the landowner often feels it's better to just take the permit and get on with a project than to take the whole thing to court.

And the cases that do go to court are enforcement cases brought by the agency, he said, which has chosen the matter carefully and frames it in the light most favorable to itself.

"What this decision is going to mean is that there are a lot of parties that don't want to go through the permitting process and are going to be now able to go into court and to challenge the scope of the agency's jurisdiction in the more marginal cases," McAliley said.

Tim Bishop, a partner at Mayer Brown LLP who represented the American Farm Bureau Federation,

which filed an amicus brief on behalf of the landowners in the Hawkes case, agreed, saying he's worked with clients on several projects that have fallen apart because the cost of permitting is so enormous.

"I've had a number of clients over the years who would have brought suit at that point because of the costs involved in going forward with a permit," he said.

And Neil Gormley, an attorney at Earthjustice, said there is likely to be more litigation around jurisdictional determinations.

"I think that environmental groups will have a good argument as well that they're entitled to judicial review of Corps determinations that certain waters are not jurisdictional," he said.

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

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.

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 Christine Chun.