

# Written and Oral Arguments in *U.S. Army Corps of Engineers v. Hawkes Co.*

## What's at Stake for Businesses and Landowners?

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# Speakers



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# What is This All About?

- The Clean Water Act, with limited exceptions, prohibits the “discharge of any pollutant” without a permit. A “discharge of a pollutant” as an “addition of any pollutant to *navigable waters* from any point source,” and “navigable waters,” are “the waters of the United States, including the territorial seas.”
- EPA recently issued a new regulation defining “waters of the United States,” which has led to widespread legal challenges.
- A water or land feature deemed to be a “water of the United States” falls within the regulatory jurisdiction of the agency.
- Thus, the determination of whether a water or land feature is a “water of the United States” is a *jurisdictional determination*.
- *Is a jurisdictional determination reviewable under the APA?*

# What are the “Waters of the United States”?

- “The reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified . . . as wetlands covered by the Act.” *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring).
- Waters of the United States include:
  - (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (2) All interstate waters including interstate wetlands; (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) Which are used or could be used for industrial purpose by industries in interstate commerce; (4) All impoundments of waters otherwise defined as waters of the United States under the definition; (5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section; (6) The territorial seas; (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section. 33 C.F.R. § 328.3(a).

# Section 402 (NPDES) and 404 (Dredge and Fill) Permitting—Steps Involved

- Individual vs. general permits
  - Average individual permit: 788 days, \$271,000
  - Average general permit: 313 days, \$29,000
- Corps' application Form 4345 (with attached illustrations)
- Corps frequently requests additional information
- Notice and comment period
- Corps issues decision, based on discretionary considerations
- Possible administrative appeal if permit denied

# Jurisdictional Determinations (JDs)

- The Corps' regulations authorize (but do not require) the Corps to provide an inquiring party with a "jurisdictional determination," which is "a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel." 33 C.F.R. 331.2.
- A "jurisdictional determination" is "a written Corps determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. 1344) \* \* \*." 33 C.F.R. 331.2.
- Jurisdictional determinations "do not include determinations that a particular activity requires a \* \* \* permit." *Ibid.*
- Approved vs. preliminary determinations
- Referred to as a Corps "final agency action" (33 C.F.R. § 320.1(a)(6))
- Subject to administrative appeal

# Past Supreme Court Decisions

- *SWANCC v. U.S. Army Corps of Engineers* (2000)
  - Waters of the United States = waters with a “significant nexus” to navigable waters
  - Rejects Corps’ “Migratory Bird Rule”
- *Rapanos v. United States* (2006)
  - No majority opinion
  - Four conservatives: disagree with Corps
  - Four liberals: defer to Corps
  - Justice Kennedy: would adhere to “significant nexus” test

# Past Supreme Court Decisions (II)

- *Sackett v. EPA* (2012)

- Reviewability of EPA compliance orders under CWA
- Unanimous decision: compliance orders are reviewable “final agency actions”
- Court rejects argument that landowners should have to go through permitting to get judicial review, or risk violating law



## *Hawkes*—the Facts

- Property located in Minnesota, 120 river miles from navigable water (Red River of the North)
- Hawkes purchased the land for peat harvesting
- Individual permit application submitted
- While pending, Corps issues preliminary JD indicating CWA jurisdiction
- Hawkes asks for approved JD
- Corps finds “significant nexus” between property and Red River, and thus CWA jurisdiction
- Administrative appeal reverses—but Corps reissues “final JD” with same findings

# Reviewability Under the APA

- 5 U.S.C. § 704: “Agency action made reviewable by statute and **final agency action for which there is no other adequate remedy in a court** are subject to judicial review.”
- “Final agency action” assessed under *Bennett* test
  1. Is the action the “**consummation**” of the agency’s decisionmaking process?
  2. Does the action determine legal **rights or obligations** or lead to legal **consequences**?

# *Hawkes*—Procedural History

- Hawkes files suit under the Administrative Procedure Act
- District court dismisses
- Eighth Circuit reverses, holds that approved JDs are immediately reviewable

## *Hawkes*—Question Presented

Whether the determination that property contains “waters of the United States” protected by the Clean Water Act constitutes “final agency action for which there is no other adequate remedy in a court,” and is therefore subject to judicial review under the Administrative Procedure Act.

# *Hawkes*—Government’s Arguments

- Government concedes that JDs are “consummations” of agency’s decision-making
- CWA creates legal consequences—JDs don’t
- Effects of JDs are practical only
- Nothing in CWA requires JDs at all
- Other avenues of judicial review are adequate
  - Landowners confident in their position can proceed with development
  - Otherwise, can apply for permit

# *Hawkes*—Respondent's Arguments

- JDs are government's final word on jurisdiction
- Legal consequences:
  - Formal adjudication of jurisdiction
  - Increased legal liability
  - Loss of right to use property
  - Landowner effectively forced into permitting process
- Alternative avenues of review are inadequate
  - Risk of liability is too great not to seek permit
  - Permitting process is expensive, lengthy

## *Hawkes*—Noteworthy Amici

- 16 amicus briefs supporting *Hawkes*, including 20 business & industry groups, 29 states, and 6 associations of state & local governments
- **0** briefs supporting the government
- American Farm Bureau Federation et al.: landowners' perspective, emphasis on practicalities
- West Virginia + 22 states: precluding review would raise federalism concerns
- North Dakota + 5 other states: critical of WOTUS Rule
- Council of State Governments, et al.: impact on state & local governments

# What's at Stake?

If government wins:

- Landowners between a rock and a hard place
- Litigation over the WOTUS Rule becomes more critical (ACE memo concerning new rule)

If Hawkes wins:

- Landowners get clarity, earlier in the process
- Would the Corps stop issuing JDs?



# Thoughts on Oral Argument

- Major themes
- Key questions
- Active justices and their apparent leanings
- Possible outcomes

## Conclusion: Current State of Play

- Corps and EPA are likely to continue taking an expansive approach to CWA jurisdiction
- Challenge to WOTUS Rule proceeding in Sixth Circuit, but uncertainty about the outcome
  - Does the court have jurisdiction? Interlocutory en banc review or petition for certiorari before judgment on this question?
  - Could a decision on the merits by the Sixth Circuit be vacated by the Supreme Court for lack of jurisdiction?
- Given this uncertainty, the best outcome for landowners here is a ruling allowing for early judicial review

# Thank You

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