

Wetland Jurisdictional Determinations: Reviewable or Not?

Last week, the Supreme Court heard oral arguments in the case of *United States Army Corps of Engineers v. Hawkes Co.* (Supreme Court Case No. 15-290), which poses the question of whether a determination by the Army Corps that a property contains "waters of the United States" under the Clean Water Act is a final agency action that may be challenged in court. This is an important question, since a Jurisdictional Determination can significantly affect a landowner's right to develop and there has been a notable lack of clarity under the law over the last decade regarding what waters are covered by the Clean Water Act and what waters are not. A Jurisdictional Determination is an official decision by the Corps that a property contains waters, such as wetlands, that are subject to the Clean Water Act's permitting requirements. If a property is subject to such a determination, the landowner must obtain a permit from the Corps before developing the property and could be subject to heavy fines if he or she violates this requirement. There is a split among the circuit courts on whether an aggrieved landowner can challenge such a determination in court. In 2014, the Fifth Circuit ruled that a Jurisdictional Determination is not a final agency action subject to judicial review, on the ground that it merely alerts the landowner that a permit will be required in the future if the landowner pursues plans to develop the subject property. Under this line of reasoning, an aggrieved landowner must wait to challenge the determination in court until there is either a final decision by the Corps on a permit application or some form of enforcement action by the federal government (such as the issuance of a compliance order or a proceeding to impose fines). *See Belle Company v. U.S. Army Corps of Engineers*, 761 F.3d 383 (5th Cir. 2014). The court reached a similar conclusion in *National Association of Home Builders v. U.S. Environmental Protection Agency*, 956 F. Supp. 2d 198 (D.D.C. 2013), *affirmed on other grounds*, 786 F.3d 34 (D.C. Cir. 2015). But the Eighth Circuit reached the opposite result in the *Hawkes* case in April 2015, concluding that a Jurisdictional Determination has "a powerful coercive effect" and should be subject to "immediate judicial review." *Hawkes Co., Inc. v. United States Army Corps of Engineers*, 782 F.3d 994 (8th Cir. 2015). In December 2015, the Supreme Court agreed to review the Eighth Circuit's decision. At the oral argument last week, the government faced a number of tough questions and serious concerns were expressed by the Justices about its position that Jurisdictional Determinations are merely a type of informal advice or information, rather than a binding determination with legal consequences that should be subject to judicial review. Based on the oral argument, it appears the Justices may be looking for a narrow way to make Jurisdictional Determinations immediately reviewable, without broadly affecting other forms of compliance advice that is routinely provided by federal agencies. Stay tuned for the final decision.

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