CARLTON FIELDS

SCOTUS Gives Landowners New Tools to Challenge Wetlands Permitting Decisions

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The United States Supreme Court handed landowners and developers a win this month in a unanimous decision allowing appeals to federal courts of Army Corps of Engineers determinations that a body of water or wetland is subject to the Clean Water Act. Under the ruling, landowners have a new option to challenge Army Corps federal wetlands jurisdictional determinations, rather than risking severe penalties for not obtaining a permit to fill wetlands or delaying projects for years to acquire a potentially unnecessary permit. In *United States Army Corps of Engineers v. Hawkes Co., Inc.*, the Court upheld the Eighth Circuit's decision that an "approved jurisdictional determination" issued by the Corps is a final agency action subject to judicial review under the federal Administrative Procedure Act (APA). The Clean Water Act (CWA) prohibits unpermitted discharges of pollutants including fill material into "waters of the United States," however, determining whether a particular wetland or drainage ditch qualifies under the Act can be difficult. To address this problem, the Corps issues jurisdictional determinations (JDs) stating the agency's position on a case-by-case basis. The Corps can either issue a "preliminary" JD, which is merely advisory, or an "approved" JD which is binding on both the Corps and the Environmental Protection Agency (EPA) for five years. The Hawkes Company and two affiliated companies sought to mine peat from wetlands on a 530-acre tract near their existing peat mining operation. The companies applied to the Corps for a Section 404 "dredge and fill" permit authorizing the discharge of material into navigable waters. During the course of the permitting process, the Corps issued an approved JD that the wetlands were a "water of the United States" under the CWA because of their "significant nexus" to the Red River of the North, located 120 miles away. The companies sought review of the JD in federal district court under the Administrative Procedure Act. The Corps argued that the JD did not constitute "final agency action," and, even if it did, the companies had adequate alternatives to challenging it in court and therefore the court did not have jurisdiction. The District Court agreed and dismissed the case. The Eighth Circuit reversed on appeal and the Supreme Court granted certiorari. Chief Justice Roberts' opinion for the Court applied the two-part test distilled in *Bennett v. Spear*, 520 U.S. 154 (1997), to determine whether an approved JD constitutes final agency action. He wrote

that an approved JD "mark[s] the consummation of the Corps' decision-making process" on the question of whether a body of water is a "water of the United States," satisfying the first *Bennett* prong. The Court's analysis of the second *Bennett* prong, that "direct and appreciable legal consequences flow" from the agency action, focused on the effects of so-called "negative JDs." A negative JD is an agency determination that a particular property does *not* contain a water of the United States. This determination is binding on both the Corps and the EPA for five years, creating a temporary safe harbor from governmental prosecution. An affirmative JD, therefore, represents the denial of this safe harbor, a sufficient legal consequence under *Bennett*. The Corps argued that a JD is not reviewable in court under the APA, regardless of whether it constitutes final agency action, because adequate alternatives to judicial review exist. The Corps contended that property owners receiving an unfavorable JD have two options: (1) discharge fill material into the water body without first obtaining a permit and argue in any ensuing EPA enforcement action that no permit was required, or (2) apply for a permit and seek judicial review upon an unsatisfactory result. The Court disagreed, noting that the first option required property owners to "expose themselves to civil penalties of up to $37,500 for each day they violated the Act, to say nothing of potential criminal liability." Nor was the second option adequate, particularly considering the length and cost of the application process, which takes an average applicant 788 days and costs $271,596, according to one study cited by the Court. As a result, owners of property burdened by a dubious JD are no longer required to blindly choose between suffering (possibly unnecessary) pain now or proceeding while Damocles' Sword swings overhead. They can take option 3, through the courtroom door. This decision offers a tremendous new tool to assist landowners with potential wetlands on a property to get certainty on how to proceed with projects. Consulting with counsel on applying this new precedent may give new options to curtail the expense and uncertainty associated with wetlands issues. Carlton Fields' environmental practice group has experience with Army Corps wetland determinations and U.S. Department of Justice environmental litigation. We represent a broad array of landowners facing permitting, administrative, and litigation decisions associated with federal wetlands issues, as well as the state and local levels.

Authored By

Benjamin E. Stearns

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