

# E – O U T L O O K

ENVIRONMENTAL HOT TOPICS AND LEGAL UPDATES

Year 2016

Environmental & Natural Resources Law Section

Issue 3

OREGON STATE BAR

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## *US Army Corps of Engineers v. Hawkes, Co.*

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### **Introduction**

The United States Supreme Court decision in *US Army Corps of Engineers v. Hawkes, Co.* is part of the long struggle to interpret the jurisdiction of the Clean Water Act ("Act"). 136 S. Ct. 1807, 1807 (2016) ("*Hawkes III*"). The battle over the meaning of "waters of the United States" has baffled even the most experienced layers. Even worse, challenging the meaning of those words requires years of litigation and expense.

This case does not address the Act's jurisdiction, but rather the jurisdiction of the court to hear appeals of the "jurisdictional decisions" of the Army Corps of Engineers ("Corps"). See 33 CFR 331.2. These jurisdictional decisions provide a way for property owners to preemptively determine where "waters of the United States" are located on their property. To alleviate the confusion over the Act's interpretation, the Corps offers jurisdictional decisions to define the extent of the Act's jurisdictional waters on a property. *Id.* The Corps is bound to its jurisdictional decisions in any future permit applications in the area for five years allowing developers to work without fear of liability. *Id.* at 1813.

Previously jurisdictional decisions were not considered "final agency action" as defined by the Administrative Procedures Act ("APA"), meaning no review was available for the jurisdictional decisions. If individuals wanted to challenge the determination, they faced two unsatisfying methods for access to the courts. One option

was to apply for a permit, complete the Corps' extensive studies and design reviews, and receive a decision on the permit. *Id.* The process meant waiting for years, at considerable expense, to receive a decision on the permit before being able to access the courts for review of the original wetland determination. The other option was to begin work in the challenged area without a permit and wait for the Corps to impose civil and criminal penalties, providing the needed "final agency action." *Hawkes III* at 1813. While this case does not directly address the brewing conflicts over the meaning of "waters of the United States," the case has opened the door to further challenges to jurisdictional decisions and allow for more challenges to the Act's jurisdiction.

### **Background of the *Hawkes* Decision**

The plaintiffs owned a five hundred and thirty-acre parcel in Marshall County, Minnesota. *Hawkes Co. v. United States Army Corps of Eng'rs*, 963 F. Supp. 2d 868, 870 (D. Minn. 2013) ("*Hawkes I*"). A portion of the property contained a minable peat and the plaintiffs sought a permit to begin extraction. *Id.* The company met several times with the Corps regarding the mining plans and requested a jurisdictional decision for the property. *Id.* The Corps determined that the property contained "waters of the United States" and would require a permit. *Id.* The jurisdictional decision was appealed to the "Review Officer" with the agency appeal process, and thereafter the Corps issued a revised jurisdictional decision, informing the plaintiffs that the jurisdictional decision was the final decision and no further review was available. *Id.*; See 33 C.F.R. § 331.2, 331.3. The plaintiffs sought judicial review.

### **Jurisdictional Determinations or Clarifications?**

The APA requires that, before judicial review of an agency decision, the agency must have made a "final agency action for which there is no other adequate remedy." 5 U.S.C. § 704. The finality test under *Bennett v. Spear* has two prongs. First, the action must be a "consummation of the agency's decision-making process" and not an "interlocutory" review of the agency's interim decisions. See *Bennett v. Spear*, 520 U.S. 154, 177 (1997) (citations omitted) ("*Bennett*"). Second, the action must determine "rights or obligations" from which "legal consequences will flow." *Id.* The APA's grant of judicial review cannot be used if another statutory grant of judicial review provides an "adequate remedy." See *Hawkes I* at 877; See also *Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012) ("*Sackett*"); 5 U.S.C. § 704.

The court was not the first to approach the question of whether jurisdictional decisions constitute a "final agency action." The court cited several cases in other circuits that decided jurisdictional decisions satisfy the first prong (and are the

culmination of the agency's decision-making process), but do not satisfy the second prong. See *Hawkes I* at 872. As decided by these cases, judicial review was still available as part of the permitting process, therefore an adequate remedy was available and the APA review was unavailable. See *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586 (9th Cir. 2008).

In addition, these cases decided that the second prong was not satisfied because jurisdictional decisions do not determine any rights of the parties. *Hawkes I* at 872. According to the reasoning in these cases, any rights or obligations under the Act existed already. *Id.* at 873. The jurisdictional decisions merely “clarifies a plaintiff’s position but does not alter it.” *Id.* (emphasis added). While jurisdictional decisions have limited administrative review, judicial review is limited to final permit decisions. 33 C.F.R. § 331.12. The plaintiffs in *Hawkes*, however, requested review of the jurisdictional decision without spending the time, money, and effort of completing the full permitting process.

### **District Court and Court of Appeals for the Eighth Circuit**

The district court in *Hawkes* added itself to the long list of courts denying judicial review of jurisdictional decisions. *Hawkes I* at 878. In applying *Sackett v. EPA*, the district court determined that, unlike compliance orders, jurisdictional decisions fail the second part of the “final agency action” test. *Id.* Jurisdictional decisions do not change obligations or change any rights of the requestor; they merely inform the requester of a liability that already exists. See *Sackett* at 1367. Additionally, the district court found that remedy in court existed through enforcement actions or appeals of permit decisions.

The Court of Appeals for the Eighth Circuit reversed the district court’s decision and decided that jurisdictional decisions are final agency actions under the holding in *Sackett*. *Hawkes Co. v. United States Army Corps of Eng'rs*, 782 F.3d 994, 1002 (8th Cir. 2015), *aff'd* 136 S. Ct. 1807 (2016) (“*Hawkes II*”). The appellate court decided the district court had “understate[d] the impact of the regulatory action.” *Id.* at 1000. The appellate court stated that jurisdictional decisions require individuals to either incur “substantial compliance costs (the permitting process), forego what they assert is lawful use of their property, or risk substantial enforcement penalties.” *Id.* The jurisdictional decisions also have an especially “coercive effect” because they are directed at a specific property. *Id.* Finally, jurisdictional decisions “adversely affects appellants’ right to use their property in conducting a lawful business activity,” caused by the Corps actions and not the Act. *Id.*

Moreover, the appellate court disagreed with the district court's characterization of the two remedies allegedly available to the appellants. *Id.* at 1001. Applying for the permit would be extremely burdensome to the appellant and had little chance of success. *Id.* Acting in defiance of the jurisdictional decision was rejected because acting in violation of the jurisdictional decision would be a knowing Act violation, and would impose additional criminal liability including imprisonment. *Id.*

## **United States Supreme Court**

The Supreme Court affirmed the appellate court's interpretation of the *Sackett* holding in support of judicial review of jurisdictional decisions. *Hawkes III* at 1816. When analyzing the first prong of the finality test, the Court concluded that it was the culmination of the agency's decision-making and had "ruled definitively." *Id.* at 1814 (citing *Sackett* at 374 (Ginsburg, J., concurring)). Since jurisdictional decisions are "typically not revisited if the permitting process moves forward," the jurisdictional decisions easily satisfy the first prong of the test.

When the Court analyzed the second prong, the analysis focused on the effects of a negative jurisdictional decision. *Id.* at 1814. (A negative jurisdictional decision occurs when the Corps determines that no "waters of the United States" exist on a property.) Because a negative jurisdictional decision binds the Corps and the United States Environmental Protection Agency for five years, they provide protection from liability for that period. *Id.* The legal effects of binding the agencies' actions and reducing potential liability satisfied the second prong of the finality test. *Id.*

The Court also believed the two remedies argued by the Corps did not provide adequate alternatives to APA review in court. *Id.* at 1815. The Court stated that "parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of 'serious criminal and civil penalties.'" *Id.* (Citing *Abbot Labs v. Gardner*, 387 U.S. 136, 153 (1967)). The other remedy, proceeding with the permit application, would not adequately address the jurisdictional decision. *Id.* Since the denial of a permit would not address the underlying jurisdictional decision, the jurisdictional decision would never be reviewed by a court. *Id.*

## **Conclusions**

The *Hawkes* litigation did not directly address the meaning of "waters of the United States," but will certainly have an effect on its resolution. With the ability of future judicial review of jurisdictional decisions, it is likely that courts will face more litigation contesting the Act's jurisdiction. Further, this decision may expand the

reviewability of other agency final actions. The Court relied on the holding in *Sackett* (dealing with compliance orders) to expand review to other agency actions, namely jurisdictional decisions. This case may indicate a trend of expansion of judicial review for other agency actions that have substantive legal effects and no further administrative review.

## E-Outlook October, 2016

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