

Testing Waters: Supreme Court Agrees To Hear Army Corps' Clean Water Act Determinations Challenge

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On Friday, the U.S. **Supreme Court** agreed to hear a challenge to the Eighth Circuit's April 2015 ruling that **U.S. Army Corps of Engineers'** ("Army Corps") jurisdictional determinations are final agency actions subject to judicial review. The Eighth Circuit's decision is contrary to a July 2014 Fifth Circuit ruling and thus created a circuit split. The Supreme Court's decision could resolve that split and settle the question of whether parties may challenge Army Corps' jurisdictional determinations.

Many types of development projects may impact "waters of the U.S." under the **Clean Water Act (CWA)**. Such activities might therefore be subject to the Army Corps' requirements for permitting and implementation of mitigation measures. Whether "waters of the U.S." may be impacted by a project is often far from clear, so project developers and property owners frequently request jurisdictional determinations from the Army Corps before proceeding with a project. The Army Corps' long-standing position is that its jurisdictional determinations are not judicially reviewable final decisions since a party is not required to act or refrain from acting based solely on the decision. Rather, the Army Corps has taken the position that a party's rights are not affected until a party is either denied a permit or subject to enforcement proceedings for acting without a permit. Developers and property owners have long struggled with this position, since a party must either go through the time intensive and costly permitting process before being able to seek review of the underlying jurisdictional decision, or choose to act without a permit and then possibly be subject to enforcement proceedings.

The Fifth Circuit Decision

In [Belle Co. LLC et al. v. U.S. Army Corps of Engineers](#), 761 F.3d 383 (5th Cir. 2014), the Army Corps had issued a jurisdictional determination that a portion of the property in question was a "water of the U.S."

On appeal to the Fifth Circuit, the Court decided that the Army Corps' jurisdictional determinations are not final agency actions subject to judicial review, but are simply "notifications" regarding a property's classification. The Fifth Circuit explained that for an agency action to be final it must: 1) be the "consummation of the agency's decisionmaking", and 2) the action must be a vehicle "by which rights or obligations have been determined, or from which legal consequences will flow." The Fifth

Circuit ruled that although jurisdictional determinations are the consummation of agency action, they do not determine legal rights or consequences, these decisions merely serve as a “notice.” Agreeing with the Army Corps’ position, the Court reasoned that the jurisdictional determination did not force the companies to refrain from acting on the property, and did not impose a penalty scheme for continuing with the project.

The Eighth Circuit Decision

The more recent Eighth Circuit decision, [Hawkes Co., Inc., et al v. U.S. Army Corps of Engineers](#), 782 F.3d 994 (8th Cir. 2015), dealt with the Hawkes Company’s plan to mine peat. The Army Corps determined there were “waters of the U.S.” on the proposed mining site so the company would need a CWA permit before it could start mining. At the first stage of judicial review, the District Court denied Hawkes’ challenge, agreeing with the Fifth Circuit’s view that the determination was not a final agency action. The Eighth Circuit reversed, holding that Army Corps’ jurisdictional determinations are judicially reviewable final agency actions under the Administrative Procedure Act. The Eighth Circuit held that the Fifth Circuit had misapplied the law in ruling otherwise.

The Eighth Circuit noted that without judicial review the Hawkes Company had no choice other than “to incur substantial compliance costs (the permitting process), forego what they assert is lawful use of their property, or risk substantial enforcement penalties.” These options adversely affected the property and business interests of the company. The Court reasoned: “the prohibitive costs, risk, and delay of these alternatives to immediate judicial review evidence a transparently obvious litigation strategy: by leaving [property owners] with no immediate judicial review and no adequate alternative remedy, the Corps will achieve the result its local officers desire . . . without having to test whether its expansive assertion of jurisdiction” would ultimately be upheld in the courts. The Eighth Circuit found the jurisdictional determination process analogous to the administrative order process at issue in the 2012 Supreme Court decision in *Sackett*. There the Court ruled “[t]here is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into ‘voluntary compliance’ without the opportunity for judicial review – even judicial review of the question whether the regulated party is within the [federal agency’s] jurisdiction.” *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012).

The Eighth Circuit found the Army Corps’ contention that Hawkes had adequate alternative remedies – either seeking a permit or acting without one and then challenging any compliance action that resulted – was untenable and failed to consider that Hawkes could never recover the time it lost or expense it incurred in taking either action.

Practical Implications of a Supreme Court Decision

The Supreme Court’s upcoming decision could have important practical implications for project developers and property owners. The Army Corps’ long-term position has left the regulated community with few pre-permitting or enforcement options. The Eighth Circuit decision, and the Supreme Court’s decision to review this issue, provide some hope to developers and property owners that they may soon be able to seek judicial review of jurisdictional determinations before going through the permitting process.

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