

Supreme Court Holds Clean Water Act Determinations Reviewable

JUNE 9, 2016

On May 31, 2016, the Supreme Court of the United States unanimously held in *Army Corps of Engineers v. Hawks Co.* that approved jurisdictional determinations (JDs) issued by the U.S. Army Corps of Engineers (USACE) under the Clean Water Act (CWA) are final agency actions and, therefore, subject to judicial review under the Administrative Procedure Act (APA).

The respondents in the case are three peat mining companies. In 2010, the respondents sought a CWA Section 404 permit from the USACE to discharge material onto wetlands located on property that the respondents own. The respondents obtained an approved JD from the USACE in 2012 which stated the property contained “waters of the United States.” After exhausting their administrative remedies, the respondents sought review of the approved JD in federal court. Their request was denied for want of jurisdiction; the United States District Court for the District of Minnesota held the approved JD was not a final agency action. The U.S. Court of Appeals for the Eighth Circuit reversed, and the Supreme Court granted *certiorari*.

In reaching its conclusion, the Supreme Court relied on the framework established by *Bennett v. Spear*, 520 U.S. 154 (1997), which held that two conditions must be met in order for an agency action to be final under the APA: (1) the action must mark the consummation of the agency’s decision making process (it must not be tentative or interlocutory in nature); and (2) the action must be one by which rights or obligations are determined, or from which legal consequences flow. The Supreme Court concluded that approved JDs meet these conditions because (1) approved JDs are issued after extensive fact finding by the USACE; and (2) the definitive nature of approved JDs gives rise to “direct and appreciable consequences” (for example, the Court noted that “negative” JDs create a five-year safe harbor for civil enforcement proceedings brought by the government).

The Supreme Court’s decision is a victory for landowners and project developers who will now be able to challenge USACE determinations in court immediately, rather than waiting for the Corps to initiate permitting or enforcement action.

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