

FINAL AGENCY ACTIONS AND  
JUDICIAL REVIEW:  
*UNITED STATES ARMY CORPS OF  
ENGINEERS V. HAWKES CO.*

By James S. Burling

Note from the Editor:

This article discusses the Supreme Court's recent decision in *United States Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016) and forecasts possible implications of the decision.

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- Brief for Amicus Curiae Natural Resources Defense Council in Support of Respondent, *Sackett v. Environmental Protection Agency*, 566 U.S. \_\_\_ (2012) (No. 10-1062), available at [https://www.nrdc.org/sites/default/files/media-uploads/nrdc\\_sackett\\_brief\\_with\\_motion.pdf](https://www.nrdc.org/sites/default/files/media-uploads/nrdc_sackett_brief_with_motion.pdf).

- Larry Levine, *David vs. Goliath -- or Goliath vs. David? Supreme Court to Hear Industry-Backed Challenge to Clean Water Enforcement*, NRDC EXPERT BLOG (January 6, 2012), available at <https://www.nrdc.org/experts/larry-levine/david-vs-goliath-or-goliath-vs-david-supreme-court-hear-industry-backed>.

INTRODUCTION: WETLANDS AND ADMINISTRATIVE ACTIONS

Two unanimous wetlands-related decisions from the Supreme Court could signal a change in attitude towards what heretofore has been a regime of extreme judicial deference towards agency decision-making. These decisions may or may not affect the substantive issues at hand—whether particular parcels of property contain jurisdictional wetlands—nor do they address what level of deference an agency should be accorded when a landowner challenges a wetlands determination. But they do allow landowners to have the substantive issues heard in court *before* facing ruinous delays, permitting costs, fines, and incarceration. More importantly, these cases—and some others—may reflect an impatience with the predilection of federal agencies and the Department of Justice to force ordinary citizens into Kafkaesque nightmares made real by the administrative state.

Regulatory restrictions and administrative procedures may appear to be divinely inspired to some, benign to others, and necessary evils to still others—at least where the targets of the regulatory commands are large, faceless corporate entities. To such entities, with armies of compliance officers and attorneys, the cost of the administrative state is the cost of doing business, offset by the decreased competition from smaller outfits unable to help write the rules and unwilling to contend with a multitude of new offices and swarms of officers. But where the same regulatory zeal is applied with equal force to ordinary citizens such as homeowners and small business owners, the courts are beginning to understand that something is amiss.

*Sackett v. Environmental Protection Agency* brought this lesson home when the Court held in favor of a small contractor and his wife who were attempting to build their modest family home in a residential neighborhood.<sup>1</sup> The details of the case have been laid out elsewhere,<sup>2</sup> but it should suffice to say that the Court was appalled by the plight of the couple being threatened with a compliance order replete with fines of \$75,000 per day.<sup>3</sup> It took many years for the Court to recognize the problem here; indeed as late as three weeks before taking up the Sacketts' case, it turned away a petition for certiorari by General Electric on a nearly identical issue.<sup>4</sup> The EPA's application of essentially the same process and

1 566 U.S. \_\_\_, 132 S. Ct. 1367 (2012).

2 See, e.g., Damien Schiff, *Sackett v. Environmental Protection Agency: Compliance Orders and the Right of Judicial Review*, 13 ENGAGE 2 (July 2012), available at <http://www.fed-soc.org/publications/detail/sackett-v-environmental-protection-agency-compliance-orders-and-the-right-of-judicial-review>.

3 Or, as Justice Alito remarked at oral argument, “don’t you think most ordinary homeowners would say this kind of thing can’t happen in the United States?” *Sackett v. United States Environmental Protection Agency*, No. 10-1062, 2012 WL 38639, at \*37 (U.S. Oral. Arg., Jan. 9, 2012), available at [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-1062.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1062.pdf).

4 See *General Electric Company v. Jackson*, cert. denied, 563 U.S. 1032 (2011). At issue was whether a “unilateral administrative order” was justiciable, noting the threat of huge fines for noncompliance. General Electric noted in its petition that in the preceding decade EPA had issued over 1,700 such orders to 5,400 companies with total compliance costs exceeding \$5 billion. A copy of General Electric’s petition can be found at <http://sblog.s3.amazonaws.com/wp-content/uploads/2011/04/10-871.pdf>.

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attitude towards the Sacketts as it had displayed towards corporate players like GE led to the ultimate demise of the practice of issuing compliance orders unchecked by judicial review.

In *Sackett*, the would-be homeowners had begun the process of developing a small lot for their home when the EPA paid them a visit and told them to stop because they were filling a wetland.<sup>5</sup> They received a compliance order telling them to remove the fill, plant wetlands vegetation, wait three years, and then apply for an after-the-fact permit to regularize the allegedly illegal fill (which would have been removed). If they failed to comply, they would face fines of up to \$75,000 per day. The Sacketts, however, consulted a former Corps wetlands scientist and concluded that there were not wetlands on their lot, so they appealed. They lost at the trial court and the Ninth Circuit, both of which concluded that compliance orders were not “final agency actions” under the Administrative Procedure Act (APA)<sup>6</sup> and, therefore, not justiciable.<sup>7</sup> The Supreme Court unanimously reversed.

Few Americans receive EPA compliance orders that will hang over them like the sword of Damocles until they cave and do the EPA’s bidding. But many more people—just about anyone who owns any undeveloped land—are concerned about whether the use of a parcel of property is affected by the presence of wetlands. Indeed, under the EPA’s new proposed “Waters of the United States” or WOTUS rule, the amount of acreage potentially covered by the rule could rise dramatically. In 2006, the Supreme Court noted that there are between 270 and 300 million acres of wetlands, a figure that could be merely the baseline under the proposed rule.<sup>8</sup>

#### I. UNITED STATES ARMY CORPS OF ENGINEERS V. HAWKES CO.<sup>9</sup>

The Hawkes Company, which is in the business of harvesting peat moss in northern Minnesota, disagreed with a Corps “jurisdictional determination” (JD) that concluded that wetlands on Hawkes’ property were subject to federal jurisdiction. Hawkes argued that its property had no connection to interstate commerce, and noted that the closest navigable waterway was 120 miles away.<sup>10</sup> Hawkes won an administrative appeal, but on remand the Corps’ district engineer perfunctorily reinstated the jurisdictional determination.<sup>11</sup>

5 132 S. Ct. at 1370-71.

6 5 U.S.C. § 704.

7 *Sackett*, 132 S. Ct. at 1371.

8 *Compare* Rapanos v. United States, 547 U.S. 715, 722 (2006) (270-300 million acres), with statements by the American Farm Bureau Federation, “How WOTUS Will Affect Farmers”, <http://www.fb.org/issues/wotus/resources/> (last visited Aug. 23, 2016) (“will radically expand federal jurisdiction”), and Environmental Protection Agency, *Facts About the Waters of the U.S. Proposal*, [https://www.epa.gov/sites/production/files/2014-09/documents/facts\\_about\\_wotus.pdf](https://www.epa.gov/sites/production/files/2014-09/documents/facts_about_wotus.pdf) (last visited Aug. 23, 2016) (“NOT dramatically expanding jurisdiction.”). The text of the WOTUS rule can be found at [https://www.epa.gov/sites/production/files/2015-06/documents/preamble\\_rule\\_web\\_version.pdf](https://www.epa.gov/sites/production/files/2015-06/documents/preamble_rule_web_version.pdf) (last visited Aug. 23, 2016). The rule is presently subject to numerous challenges.

9 \_\_\_ U.S. \_\_\_, 136 S. Ct. 1807 (2016).

10 *Id.* at 1810.

11 *Id.* at 1813.

At that point, the Corps told Hawkes that it had three options. First, Hawkes could abandon its peat mining plans. Second, the company could apply for a permit that would cost several hundred thousand dollars and several years of its time. This was after a Corps bureaucrat said the agency would never issue a permit, and even kindly advised a long-term Hawkes employee to look for a new job. But, the Corps said, Hawkes could only challenge the wetlands JD after trying to get a permit, which it hinted would inevitably be denied.<sup>12</sup> The third choice was to harvest the peat anyway and hope for the best in the inevitable civil and criminal enforcement action—risking fines of at least \$37,500 per day plus considerable time in a federal prison.<sup>13</sup> Hawkes appealed the JD to the federal district court in Minnesota.<sup>14</sup>

Following the logic of the Ninth Circuit’s decision in *Fairbanks North Star Borough v. United States Army Corps of Engineers*,<sup>15</sup> the trial court found that the JD did not constitute final agency action justiciable under Section 704 of the Administrative Procedure Act.<sup>16</sup> The Eighth Circuit reversed, holding:

The prohibitive costs, risk, and delay of these alternatives to immediate judicial review evidence a transparently obvious litigation strategy: by leaving appellants with no immediate judicial review and no adequate alternative remedy, the Corps will achieve the result its local officers desire, abandonment of the peat mining project, without having to test . . . its expansive assertion of jurisdiction . . . .<sup>17</sup>

The United States petitioned for and was granted certiorari, essentially arguing that JDs have no legal consequences because it is the Clean Water Act that defines jurisdiction, not the JDs themselves. Instead, JDs are merely “helpful” to landowners. The Court did not agree. In an opinion written by Chief Justice Roberts, all eight Justices agreed that landowners have the right to challenge JDs in court. This ends a practice of more than 40 years where the Corps has been issuing JDs and courts have been denying landowners the right to challenge them in court.<sup>18</sup>

While the Court has rebuffed the Corps’ attempts to unduly expand its jurisdiction in some cases, it has only done so where an entity or an individual was defending against an enforcement action, and where there was a threat of massive fines or worse. Thus the Corps had been rebuffed when it tried to expand its

12 See Respondent’s brief in *United States Army Corps of Engineers v. Hawkes Co., Inc.*, 2016 WL 750545 (U.S.), 10 (U.S., 2016).

13 *Hawkes Co., Inc. v. United States Army Corps of Engineers*, 782 F.3d 994, 1001-02 (8th Cir. 2015) (discussing alternatives); *Hawkes*, 136 S.Ct. at 1815 (noting fines and alternatives).

14 136 S.Ct. at 1812.

15 543 F.3d 6 (9th Cir. 2008). In *Fairbanks* the borough had sought to build a playground on permafrost wetlands and disputed that the wetlands were within the jurisdiction of the Corps. The Ninth Circuit found that the JD was not appealable under the Administrative Procedure Act.

16 *Hawkes Co. v. U.S. Army Corps of Engineers*, 963 F. Supp. 2d 868 (D. Minn. 2013).

17 *Hawkes*, 782 F.3d at 1001-02.

18 See, e.g., *Hoffman Group, Inc. v. Environmental Protection Agency*, 902 F.2d 567, 568 (7th Cir. 1990) (finding of jurisdictional wetlands not justiciable outside permit or enforcement process).

each into isolated ponds because they were visited by ducks,<sup>19</sup> into dry farmland,<sup>20</sup> into vast expanses of permafrost wetlands in Alaska,<sup>21</sup> and into usually dry desert arroyos. But these were only in cases where landowners were facing severe penalties and had standing to challenge JDs as defendants.<sup>22</sup> In the vast majority of cases where the Corps has asserted unwarranted jurisdiction, as alleged in *Hawkes*, the courts have been unable or unwilling to intercede because of a purported lack of a final agency action subject to judicial review. That changed in *Hawkes*.

There were two bases for the decision. The first, which a concurring Justice Kagan would have found “central,” was predicated on a Memorandum of Agreement (MOA) entered into between the Corps and the EPA in which each agency agreed to be bound by jurisdictional determinations of the other.<sup>23</sup> Thus, if the Corps issued a “negative JD,” a finding of *no* wetlands, it would bind both agencies. The Court reasoned that, since a negative JD’s safe harbor was clearly of legal consequence, so too was a positive JD as in *Hawkes*.<sup>24</sup>

The second, and more far-reaching, rationale was based on *Abbott Labs. v. Gardner*<sup>25</sup> and *Frozen Food Express v. United States*,<sup>26</sup> in which the Court previously held that a citizen need not risk severe penalties in order to challenge a final administrative action under the APA. Similarly, in *Bennett v. Spear*<sup>27</sup> the Court noted that a final agency action ought to have “legal consequences” before it is justiciable. In *Hawkes*, the Court found that in accordance with *Abbott Labs.*, *Frozen Foods*, and *Bennett*, when there are no adequate alternatives available, then the agency action may well be final and justiciable.<sup>28</sup> The *Hawkes* Court reiterated its holding from *Sackett* that citizens “need not assume such risks while waiting for the EPA ‘to drop the hammer.’”<sup>29</sup>

In response to the government’s argument that the permitting process provided all the process the law required, the Court found that the process was “arduous, expensive and long,” and cited a long list of information the Corps demanded from

*Hawkes*—from a “hydrogeological assessment of the rich fen system” to groundwater pH studies to an inventory of vegetation “in the area.”<sup>30</sup> But as the Court noted, not only was gathering this information quite burdensome, but all of the demanded information merely described the nature of the wetlands in question. That might be relevant to whether a permit should be granted, but it is not relevant to the legal questions of finality and judicial review.<sup>31</sup>

Lastly, the majority opinion addressed the Corps’ suggestion that it was doing landowners a favor because the Clean Water Act did not mandate the issuance of JDs. Reflecting Justice Roberts’ penchant for one-liners, the Court rejected the notion of a “count your blessings” exception to the Administrative Procedure Act.<sup>32</sup>

## II. IMPLICATIONS FOR WOTUS:

The Court has previously noted the broad reach of the Clean Water Act’s wetlands rules and the difficulty that landowners have in determining what is and what is not a wetland.<sup>33</sup> There is some indication in *Hawkes* that the patience of at least some of the Justices is wearing thin. At oral argument, the United States indicated that, if the Court were to base its opinion on the memorandum of understanding between the Corps and the EPA, then it might simply rescind that agreement.<sup>34</sup> This led to a rejoinder by Justice Kennedy that “the Clean Water Act is unique in both being quite vague in its reach, *arguably unconstitutionally vague*, and certainly harsh in the civil and criminal sanctions it puts into practice.”<sup>35</sup>

Now, in a concurrence in *Hawkes*, writing for himself and Justices Alito and Thomas, Kennedy opined that:

[t]he Act, especially without the JD procedure were the Government permitted to foreclose it, continues to raise troubling questions regarding the Government’s power to cast doubt on the full use and enjoyment of private property throughout the Nation.<sup>36</sup>

If anything, this could well portend judicial skepticism of the WOTUS rule, which is currently stayed and subject to numerous legal challenges.<sup>37</sup>

While defenders of property rights are obviously pleased by the *Hawkes* decision, it does not solve landowners’ problems; it

19 See, e.g., *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (striking down migratory bird rule).

20 *Rapanos*, 547 U.S. at 722.

21 See, e.g., *Fairbanks North Star Borough*, 543 F.3d 586.

22 See, e.g., *Rapanos*, 547 U.S. 715.

23 *Hawkes*, 136 S. Ct. at 1817 (Kagan, J., concurring.)

24 Notably, Justice Ginsburg issued a separate concurrence specifically taking issue with Justice Kagan’s opinion that the MOA was controlling and with any reliance upon the MOA by the Court. *Id.* at 1817-18 (Ginsburg, J., concurring.)

25 387 U.S. 136 (1967) (holding that drug labeling regulations were justiciable because of the serious penalties for noncompliance).

26 351 U.S. 40 (1956) (Interstate Commerce Commission listing of commodities as either subject to or exempt from the statute was a final agency action subject to judicial review).

27 520 U.S. 154 (1997) (ranchers and irrigation districts had right to challenge agency action concerning the Endangered Species Act).

28 136 S. Ct. at 1815.

29 *Id.* (citing *Sackett*, 132 S. Ct. at 1372).

30 *Id.* at 1816.

31 136 S.Ct. at 1816 (“And whatever pertinence all this might have to the issuance of a permit, none of it will alter the finality of the approved JD, or affect its suitability for judicial review. The permitting process adds nothing to the JD.”).

32 *Id.* (“True enough. But such a ‘count your blessings’ argument is not an adequate rejoinder to the assertion of a right to judicial review under the APA.”).

33 See, e.g., *Rapanos*, 547 U.S. 715 and *Sackett*, 132 S. Ct. 1367.

34 No. 15-290, 2016 WL 1243207, at \*16 (U.S. Oral. Arg., Mar. 30 2016).

35 *Id.* at \*18 (emphasis added). This is ironic considering Justice Kennedy authored the “significant nexus” concurrence in *Rapanos*, 547 U.S. at 742, a test that itself is fraught with ambiguity.

36 136 S. Ct. at 1817.

37 See, e.g., Julio Columba, *PLF files brief on jurisdiction of Waters of the United States rule challenges*, LIBERTY BLOG (July 11, 2016), available at <http://blog.pacificlegal.org/42296-2/>.

merely gives them an avenue for a neutral decision maker to rule on whether a property is subject to federal jurisdiction. The case does not help define what wetlands are, and judicial review of the intensely factual questions of wetlands definition and jurisdiction will likely prove to be “arduous, expensive and long.”<sup>38</sup> Thus, the overarching conflict between landowners and the enforcement of wetlands regulations remains. If Congress does not reform the Clean Water Act, then the Court is going to have to limit its application in order to preserve its constitutionality. The *Sackett* and *Hawkes* decisions are steps in that direction.

### III. POSTSCRIPT

It should be noted that the import of the *Hawkes* decision will not be confined to wetlands. Already it has been relied upon in other questions of the justiciability of final agency actions outside the context of the Clean Water Act. Thus in *Rhea Lana, Inc. v. Department of Labor*,<sup>39</sup> issued *four days* after the Supreme Court decided *Hawkes*, a Department of Labor “advisory letter” sent to an employer regarding back wages was found justiciable because, like the *Hawkes* JD, it had “direct and appreciable legal consequences” on potential liability that count for purposes of finality.<sup>40</sup> In *Texas v. Equal Employment Opportunity Commission*,<sup>41</sup> the court found justiciable a guidance document on disparate impact issued by the Equal Employment Opportunity Commission. Cases arising out of actions involving the Department of Transportation,<sup>42</sup> the Railroad Retirement Board, and the Social Security Administration had similar results.<sup>43</sup> And, most recently, a federal district court found that the Obama administration’s bathroom policy for transgender students was a final agency action based on *Hawkes*.<sup>44</sup> *Hawkes* should be seen as an administrative law decision in the broadest sense—affecting all federal agencies across the wide spectrum of their activities throughout this country. It is much more than a mere wetlands case. Judging from these early returns, it is likely that its impact will reverberate throughout administrative law for a long time.

<sup>38</sup> *Hawkes*, 136 S.Ct. at 1815. As of September 6, 2016, the remand of the Sacketts’ challenge to the EPA’s assertion of jurisdiction remains mired in federal district court.

<sup>39</sup> Case No. 15-5014, 824 F.3d 1023, 2016 WL 3125035 (D.C. Cir. June 3, 2016).

<sup>40</sup> *Id.* at \*6 (internal citation omitted). Another Department of Labor action found justiciable based on *Hawkes* was *Berry v. United States Dep’t of Labor*, No. 15-6316, 2016 WL 4245459 (6th Cir. Aug. 11, 2016) (refusal to reopen his claim for workers’ compensation benefits under Energy Employees Occupational Illness Compensation Program Act based on new evidence).

<sup>41</sup> Case No. 14-10949, \_\_\_ F.3d \_\_\_, 2016 WL 3524242 (5th Cir. June 27, 2016).

<sup>42</sup> *Southwest Airlines Co. v. United States Dep’t of Transp.*, No. 15-1036, \_\_\_ F.3d \_\_\_, 2016 WL 4191190, at \*4 (D.C. Cir. Aug. 9, 2016) (noting that the Supreme Court in *Hawkes* “looked to the way in which the agency subsequently treats the challenged action”).

<sup>43</sup> *Stovic v. R.R. Ret. Bd.*, No. 14-1251, 2016 WL 3457645, at \*2 (D.C. Cir. June 24, 2016).

<sup>44</sup> *Texas v. United States*, N.D. Tex. Case No. 7:16-cv-00054-0, Preliminary Injunction Order, Aug. 21, 2016, at 17.

