U.S. Army Corps of Engineers v. Hawkes Co., Inc.: Wetlands Jurisdictional Determinations and the Right of Federal Judicial Review

*By Damien M. Schiff & Mark Miller**

Note from the Editor:

This article discusses *U.S. Army Corps of Engineers v. Hawkes*, a case that is pending at the Supreme Court on certiorari to the U.S. Court of Appeals for the Eighth Circuit; the authors work for Pacific Legal Foundation, which represents the Respondents in the case. The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the authors. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

• Brief for the Petitioner, *U.S. Army Corps of Eng'rs v. Hawkes*, No. 15-290, *available at* http://www.scotusblog.com/wp-content/uploads/2016/01/15-290-ts-United-States-Army-Corps-of-Engineers.pdf.

• *Belle Co. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383 (5th Cir. 2014), *available at* https://www.ca5.uscourts.gov/opinions%5Cpub%5C13/13-30262-CV0.pdf.

I. Introduction

In early December, 2015, the Supreme Court granted review of *United States Army Corps of Engineers v. Hawkes Co., Inc.*[1] The Court has set the case for argument on March 30, 2016. The case involves administrative law, environmental law, and the right of access to the courts.

In *Hawkes*, a panel of the Eighth Circuit Court of Appeals held that a jurisdictional determination (JD) constitutes final agency action that a landowner may challenge in federal court.[2] That decision conflicted with the Ninth Circuit's decision in *Fairbanks N. Star Borough v. U.S. Army Corps of Engineers*,[3] and the Fifth Circuit's decision in *Belle Co., LLC v. U.S. Army Corps of Engineers*.[4] The Court granted certiorari in *Hawkes* to resolve the conflict among these circuits.[5]

II. Jurisdictional Determinations[6]

Under regulations promulgated by the United States Army Corps of Engineers (Corps), a landowner may request from the Corps a JD in order to determine whether the Corps believes the landowner's property falls within federal jurisdiction pursuant to the Clean Water Act (CWA).[7] The JD constitutes the Corps' official and written statement as to whether the federal government has regulatory wetland authority over the property.[8] The Corps has also provided an administrative appeal process to challenge a JD.[9] Through this process, the landowner receives one level of appeal, usually to the Corps division engineer.[10] That determination is final, but the Corps can ignore the results of that appeal.[11]

The JD process can help the regulated public and the Corps. A landowner learns early on in the development process whether the Corps will claim jurisdiction and demand a CWA dredge-and-fill permit, and the Corps determines whether it needs to expend any of its limited funds and manpower on working with a landowner in the permit process. But what happens when the landowner disagrees with the JD? That question confronts the Court in *Hawkes*.

III. Judicial Review

The federal courts may review agency action under the Administrative Procedure Act (APA),[12] so long as that action is: (1) "final,"[13] (2) not specifically made unreviewable by statute,[14] and (3) not wholly committed to the agency's discretion.[15]

Until *Hawkes*, the circuit courts to address the question said that a JD did not meet the APA standard for judicial review.[16] The Corps agrees, notwithstanding that the Corps' own regulations refer to a JD as "Corps final agency action."[17] A number of district court decisions ruled the same way.[18] These decisions generally concluded that the issuance of a JD did not change the legal rights or obligations of either the landowner or the Corps, and therefore a JD could not constitute final agency action.

The Supreme Court has interpreted the APA's authorization of judicial review of "final agency action" to mean agency action that both marks the consummation of the agency's decision-making process, and produces legal consequences.[19] Hence, the district court decisions have concluded that JDs do not amount to final agency action on the asserted basis that "[t]he legal rights and obligations of the parties [are] precisely the same the day after the [JD is] issued as they were the day before."[20] In *Fairbanks*, the Ninth Circuit also held that although a JD does amount to the consummation of the agency decision-making process, it did not amount to final action by which obligations are determined or from which legal consequences flow.[21] Likewise, in *Belle Company*, the Fifth Circuit held that no consequences flowed from the JD.[22] Until *Hawkes*, the courts agreed that they could not review JDs. But the story does not end there.

The Supreme Court of the United States addressed a similar question—whether compliance orders (not JDs) are judicially reviewable—in 2012 in the *Sackett* case and its answer

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suggests that the *Fairbanks* and *Belle* courts answered the JD reviewability question incorrectly.[23] A review of *Sackett* and its logical application to JDs helps shed light on why the Eighth Circuit correctly decided *Hawkes* and why the Supreme Court will likely affirm.

IV. *Sackett*

In *Sackett*, the Court unanimously held—contrary to the circuit courts that had previously addressed the question[24]—that the federal courts can judicially review EPA compliance orders.[25]

Mike and Chantell Sackett bought a small parcel of property in 2005 with the intent to build a three-bedroom family home on it. Their lot sat in a residential area, and neighbors built their own houses. The Sacketts obtained a county permit to build and started laying gravel. But then the EPA, without hearings or notice, claimed the property was federal "wetlands" and ordered them to return the property to its original state on pain of astronomical fines.[26]

With good reason to believe the land did not meet the definition of wetlands within the meaning of the CWA (or, for that matter, at all), the Sacketts wished to contest EPA's claim.[27] But the EPA denied their request for a hearing—and the Ninth Circuit ruled they had no right to immediate judicial review.[28] It held that the Sacketts would first have to go through a years-long permitting process, which could cost 12 times the value of their land.[29]

The Supreme Court reversed the Ninth Circuit unanimously and overturned decades of uniform case law prohibiting judicial review of compliance orders issued pursuant to the CWA. The Court held that a JD issued through a compliance order is "final" and subject to judicial review under the Administrative Procedure Act. Relying on *Bennett*, the Court had no trouble finding that the compliance order "marks the 'consummation' of the agency's decision-making process."[30] The Court held the order marked the consummation of the agency's decision-making process because "the 'Findings and Conclusions' that the compliance order contained were not subject to further agency review." *Id*. This description of the compliance order applies with equal force to the JD in *Hawkes*.

The "Findings and Conclusions" in *Sackett* included a jurisdictional decision or determination not unlike the JD in *Hawkes*. In fact, the JD in *Sackett* served as the predicate finding of a violation. Justice Ginsburg's concurring opinion makes this clear:

> Faced with an EPA administrative compliance order threatening tens of thousands of dollars in civil penalties per day, the Sacketts sued "to contest the *jurisdictional bases* for the order." Brief for Petitioners 9. "As a logical prerequisite to the issuance of the challenged compliance order," the Sacketts contend, "EPA had to determine that it has regulatory authority over [our] property." *Id*. at 54-55. The Court holds that the Sacketts may immediately litigate their *jurisdictional challenge* in federal court. I agree, for the Agency has ruled definitively on that question.[31]

Justice Ginsburg's conclusion applies with equal force in *Hawkes*, because the compliance order at issue in *Sackett* contained no more indicia of finality than the JD did in *Hawkes*. That perceptive comment from Justice Ginsburg on finality is as good a place as any to turn to *Hawkes* and the EPA's overreaching sibling: the Army Corps of Engineers.

V. Factual and Procedural Background of Hawkes

In *Hawkes*, a Minnesota business sought permission to harvest 530 acres of swampland for peat moss used in landscaping. The owner conceded from the beginning that the swampland amounted to wetlands by definition. However, under the Supreme Court decision in *Rapanos*, only wetlands adjacent to a permanent water body, or which have a "significant nexus" with traditional navigable waters, are subject to federal jurisdiction under the CWA. Since the nearest river sat 120 miles away, and no water bodies connected the swampland to the river, Hawkes argued, nobody could reasonably find these wetlands subject to federal jurisdiction.

But the Corps nevertheless issued a Jurisdictional Determination asserting the swamp was covered by the Act, without demonstrating the requisite connection to traditional navigable waters, so Hawkes sought to challenge the determination in court.[32] Hawkes argued that the *Sackett* decision requires judicial review of JDs.[33] Hawkes' argument flowed from the logic of *Sackett*: (1) the JD represented the consummation of the Corps' decision-making process, and (2) the JD had immediate legal consequences for Hawkes.[34]

The trial court rejected the application of *Sackett*.[35] It ruled for the government and held that Hawkes had three options: (1) abandon the project and, perhaps, the business; (2) seek an arguably unnecessary federal permit at a devastating cost of over $270,000; or (3) go forward without a permit risking civil fines of up to $75,000 per day and/or criminal sanctions including imprisonment. Those did not amount to immediate legal consequences, in the court's estimation—despite the *Sackett* decision.[36]

Pacific Legal Foundation represented Hawkes as it appealed that decision to the Eighth Circuit. The court of appeals reversed.[37] The court held, relying on *Sackett*, that JDs are final agency actions subject to immediate challenge in court.[38] In discussing the three "alternatives" that the trial court held demonstrated a lack of immediate legal consequence, the court explained:

> 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 whether its expansive assertion of jurisdiction—rejected by one of their own commanding officers on administrative appeal—is consistent with the Supreme Court's limiting decision in *Rapanos*.
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> The Court's decision in *Sackett* reflected concern that failing to permit immediate judicial review of assertions of CWA jurisdiction would leave regulated parties unable, as a practical matter, to challenge those assertions. The Court

concluded that was contrary to the APA's presumption of judicial review.[39]

In holding for *Hawkes* on the question of legal consequences arising from the JD, the court explained why the Corps' arguments to the contrary held no water:

> The Corps' assertion that the Revised JD is merely advisory and has no more effect than an environmental consultant's opinion ignores reality. "[I]n reality it has a powerful coercive effect." *Bennett*, 520 U.S. at 169, 117 S Ct. 1154. Absent immediate judicial review, the impracticality of otherwise obtaining review, combined with 'the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case . . . leaves most property owners with little practical alternative but to dance to the EPA's [or to the Corps'] tune.'" "In a nation that values due process, not to mention private property, such treatment is unthinkable." *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring).[40]

In other words, due process requires nothing less than the opportunity to go to court when the government tramples one's constitutional rights—here, due process and property rights. The *Sackett* Court said so unanimously, and the *Hawkes* panel gave the same response.

Judge Kelly, in her concurrence, explicitly relied on Justice Ginsburg's explanation for her vote (as described above) in finding the JD reviewable. In *Sackett*, Ginsburg's vote turned on the EPA's determination of jurisdiction that set the dispute in motion; likewise, as Judge Kelly pointed out, the JD set the dispute in motion in *Hawkes*.[41]

VI. The Eighth Circuit Panel Decided Hawkes Correctly

There are at least three consequences arising from a JD that meet the *Bennett* test for agency action finality, and demonstrate that the Eighth Circuit got the finality question right. First, a JD finding jurisdiction makes it much more likely that any civil fine assessed against the landowner will be greater than if the JD found no jurisdiction.[42] Second, a JD directly and immediately alters a landowner's course of conduct. A JD constitutes the Corps' authoritative determination that a given site is subject to CWA regulation and, therefore, that the site's owner thus must seek a permit prior to commencing any dredge or fill activity.[43] Third, a JD fulfills *Bennett*'s legal consequences requirement because a JD can provide legal immunity, through an estoppel defense, to landowners.[44] *Hawkes* got it right.

The *Hawkes* decision is not only correct as a matter of law, but is also good judicial policy because it allows the public to avoid the dilemma for the regulated public that the *Fairbanks* and *Belle Company* courts did not allow. Once a landowner receives a JD finding jurisdiction, he can: (1) abandon his development plans; (2) seek a permit, expending considerable sums that cannot be refunded regardless of how jurisdiction is ultimately resolved; or (3) proceed with his development at the risk of serious civil and criminal penalties.[45] The law does not support forcing this choice upon landowners.

And this choice is abhorrent to sound environmental policy. Both the regulated public and the Corps have strong interests in ascertaining the extent of CWA jurisdiction as early as possible. For the landowner, finding out whether jurisdiction exists helps to avoid the costs of litigating unnecessarily over jurisdiction. For the Corps, an early judicial determination regarding jurisdiction helps to focus the agency's enforcement efforts. There is no reason to expend manpower and resources in a prolonged permit or enforcement proceeding if CWA jurisdiction is absent. Agency resources could instead be directed to those cases where jurisdiction has been judicially determined to be present.[46]

Moreover, because JDs are not typically issued within the context of an enforcement action, and are not a necessary prelude to such an action, judicial review would not hamper the Corps' administration of the CWA. Relatedly, judicial review of pre-enforcement activities would not effectively deny the Corps the power of election among enforcement mechanisms (e.g., a pre-enforcement order as opposed to immediate judicial action), because the issuance of a JD does not presuppose that the applicant has already or is continuing to violate the CWA.

VII. Conclusion

Like the jurisdictional decision in *Sackett*, the formal JD in this case has immediate and direct legal consequences. It is, in fact, an adjudicative decision that applies the law to the specific facts of this case and is legally binding on the agency and the landowner, thereby fixing a legal relationship; these are the elements of a "final agency action." Therefore, the Corps' Jurisdictional Determination or JD is justiciable.

Recent agency actions in this area of the law heighten the need for the Supreme Court to open the courthouse doors to landowners. On June 29, 2015, the Corps and EPA issued a controversial new rule redefining "waters of the United States" subject to federal control under the Clean Water Act.[47] Among other things, this rule expands the scope of the Act to cover tributaries and isolated waters this Court held could not be regulated in *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*[48] and *Rapanos*. The new rule will affect millions of landowners nationwide.

Questions of reviewability of EPA and Corps actions under the CWA have been in the federal courts for decades. Much of the case law has focused on the reviewability of pre-enforcement actions. For a host of reasons, before *Sackett*, and now *Hawkes*, the courts had consistently held that APA review is unavailable for these types of actions. The Supreme Court in *Sackett* and the Eighth Circuit in *Hawkes* correctly changed the trajectory of administrative law and hemmed in agencies that had long ago left the bounds of reasonableness. That is why the Supreme Court of the United States should affirm the Eighth Circuit's wise decision in *Hawkes*—that case, like *Sackett* before it, recognized the need to protect due process and basic fairness, and to cabin the power of agencies that for too long have acted well beyond their constitutional limits.

Endnotes

1 782 F.3d 994 (8th Cir. 2015), *rev. granted*, 2015 WL 8486656 (Dec. 11, 2015).

2 *Id.* at 1002.

3 543 F.3d 586, 591–93 (9th Cir. 2008).

4 761 F.3d 383 (5th Cir. 2014), *cert. denied*, ___ U.S. ___, (U.S. Mar. 23, 2015), motion for reh'g pending (No. 14-493). *Belle Company*, a case now known as *Kent Recycling*, remains pending before the Court on a motion for reconsideration and will likely remain so until the Court rules on *Hawkes* on the merits.

5 This article is an update to, and extension of, Damien Schiff's *Fairbanks North Star Borough v. United States Army Corps of Engineers: Can a Landowner Seek Judicial Review of a Jurisdictional Determination (JD) Under the Clean Water Act?*, published in the ABA's Water Quality and Wetlands Committee Newsletter, January 2009, at 6.

6 For further background of how this issue has developed in the courts, *see* Damien Schiff's "Fairbanks North Star Borough v. United States Army Corps of Engineers*: Can a Landowner Seek Judicial Review of a Jurisdictional Determination (JD) Under the Clean Water Act?*," published in the ABA's Water Quality and Wetlands Committee Newsletter, January 2009, at 6.

7 *See* 33 C.F.R. § 320.1(a)(6).

8 *See id*. § 331.2.

9 *See id*. §§ 331.1-331.12.

10 S*ee id*. § 331.7(a).

11 *See id*. § 331.9(c).

12 5 U.S.C. § 551 et seq.

13 S*ee id*. § 704.

14 *See id*. § 702.

15 *Id*.; *see generally Bennett v. Spear*, 520 U.S. 154 (1997).

16 *See Belle Company*, 761 F.3d at 394; *Fairbanks*, 543 F.3d at 593.

17 33 C.F.R. § 320.1(a)(6).

18 *See*, *e.g.*, *St. Andrews Park, Inc. v. U.S. Army Corps of Engineers*, 314 F. Supp. 2d 1238 (S.D. Fla. 2004).

19 *See Bennett*, 520 U.S. at 177-78.

20 *St. Andrews Park*, 314 F. Supp. 2d at 1245.

21 543 F.3d at 593.

22 761 F.3d at 394.

23 *See Sackett v. EPA*, __ U.S. __, 132 S. Ct. 1367 (2012).

24 Before *Sackett*, every circuit court to have addressed that question has answered in the negative. *See Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995) (EPA compliance order); *S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418 (6th Cir. 1994) (same); *Rueth Dev. Co. v. EPA*, 13 F.3d 227 (7th Cir. 1993) (same); *S. Pines Assocs. v. United States*, 912 F.2d 713 (4th Cir. 1990); and *Hoffman Group, Inc. v. EPA*, 902 F.2d 567 (7th Cir. 1990) (same).

25 *Sackett*, 132 S. Ct. at 1374.

26 *Id.* at 1370-71. *See* Damien Schiff, *Jan. 9: Supreme Court will hear PLF's Sackett property rights case*, PLF Release (Jan. 5, 2012), *available at* http://www.pacificlegal.org/page.aspx?pid=4577.

27 *Id*.

28 *Id*. at 1371.

29 *Id*.

30 *Sackett*, 132 S. Ct. at 1372.

31 *Sackett*, 132 S. Ct. at 1374 (Ginsburg, J., concurring) (emphasis added, citations in original).

32 *See Hawkes Co., Inc. v. United States Army Corps of Engineers*, 782 F.3d 994, 999 (8th Cir. 2015).

33 *Id*.

34 *Id*.

35 *Id*.

36 *Id*.

37 *Id*. at 1002.

38 *Id*.

39 *Id*. at 1001-02.

40 *Id*. at 1002 (citations in original).

41 *Id*. at 1003-04 (citing *Sackett*, 132 S. Ct. at 1374-75 (Ginsburg, J., concurring)).

42 *See* 33 U.S.C. § 1319(d) (noting "good faith" as one of the factors). *Cf. United States v. Key West Towers, Inc.*, 720 F. Supp. 963, 965-66 (S.D. Fla. 1989) (filling of wetlands in violation of Corps' cease-and-desist letter justifies substantial civil penalty); *Hanson v. United States*, 710 F. Supp. 1105, 1109 (E.D. Tex. 1989) (upholding substantial administrative penalty owing in part to violation of three cease-and-desist orders); *United States v. Ciampitti*, 669 F. Supp. 684, 699 (D.N.J. 1987) (substantial civil penalty justified based upon defendant's knowing disregard of CWA).

43 *Cf. Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 987 (9th Cir. 2006) ("[A]n agency action may be final if it has a direct and immediate . . . effect on the day-to-day business of the subject party.") (internal quotation marks omitted).

44 *See United States v. Tallmadge*, 829 F.2d 767, 773 (9th Cir. 1987) (noting that an estoppel defense "applies when an official tells the defendant that certain conduct is legal and the defendant believes the official") (internal quotation marks omitted). *Cf. Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) ("In some circumstances, if the language of the document is such that private parties can rely on it as a norm or safe harbor by which to shape their actions, it can be binding as a practical matter.").

45 *See supra* n.35.

46 *See generally* Damien M. Schiff, *Fairbanks North Star Borough v. United States Army Corps of Engineers: Can a Landowner Seek Judicial Review of a Jurisdictional Determination (JD) Under the Clean Water Act?*, ABA Water Quality and Wetlands Committee Newsletter (January 2009), at 9.

47 80 Fed. Reg. 37,054.

48 531 U.S. 150 (2001).

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