

*U.S. Army Corps of Engineers v. Hawkes Co.*, No. 15-290

The Clean Water Act prohibits private parties from discharging dredged or fill material into “waters of the United States” without first obtaining a permit from the U.S. Army Corps of Engineers. Because this permitting process is expensive and time-consuming, the Corps created a procedure for providing landowners with “jurisdictional determinations” (JDs) that establish the Corps’ position on whether a parcel of land contains “waters of the United States” for which a permit would be required. Today, in a unanimous opinion by Chief Justice Roberts, the Supreme Court held that JDs are final agency actions subject to judicial review under the Administrative Procedure Act (APA).

In order to be reviewable under the APA, an agency action must (1) be the consummation of the agency’s decisionmaking process and (2) give rise to legal consequences, and (3) there must be no adequate alternatives to APA review in court. The Court held that all of these requirements were met. First, it explained, a JD is the consummation of the Corps’ decisionmaking process because it is considered valid for five years and is “typically not revisited” during that time. Second, the Court held, a JD gives rise to legal consequences: the Corps and the Environmental Protection Agency have agreed that JDs are binding on the federal government and will represent its legal position in subsequent litigation. Thus, a negative JD (one finding no “waters of the United States”) protects a landowner from any government enforcement suits for its five-year duration.

Finally, the Court concluded that landowners have no adequate alternative to APA review in court. Although landowners can discharge fill material without a permit and wait to raise the jurisdictional issue in a possible enforcement proceeding, the Court found this route inadequate because it exposes landowners to “serious criminal and civil penalties” if their position on jurisdiction proves to be wrong. And although landowners who receive an unfavorable JD can apply for a Clean Water Act permit and then raise the jurisdictional issue during the permitting process, the Court held that this option was inadequate because the permitting process was often “arduous, expensive, and long,” meaning that a landowner should not have to undergo it merely in order to challenge jurisdiction.

The Court’s decision is a welcome development for landowners whose land potentially contains “waters of the United States” subject to the Clean Water Act. Those landowners can now obtain judicial review immediately if they receive a JD concluding that their property is covered by the Act, potentially saving them the expense of the permitting process. More generally, the opinion indicates that the Court is receptive to arguments that delaying judicial review will impose hardship on regulated parties, which could be helpful to businesses regulated by other federal agencies.

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