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Supreme Court Unanimously Approves Pre-enforcement Review of Clean Water Act "Jurisdictional Findings"

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The U.S. Supreme Court in a narrow, unanimous ruling approved pre-enforcement review of Clean Water Act (CWA) findings by EPA and the Corps of Engineers on whether particular waters are subject to permit limits and other CWA protections, but the decision relies in part on an agreement between agencies on how to conduct jurisdictional determinations that the White House has already signaled it may review. The May 31 decision in *Army Corps of Engineers v. Hawkes Co.*, written by Chief Justice John Roberts, allows property owners who receive a CWA jurisdictional determination (JD) saying their lands include waterbodies subject to the CWA to challenge those findings in court immediately, rather than waiting for EPA or the Corps to initiate permitting or enforcement action. The decision marks a significant shift from many lower courts' earlier decisions that had previously held a permit or enforcement action was necessary for a JD suit to go forward.

Roberts' decision says JDs are "final agency action" that carry legal consequences for recipients and can therefore be the subject of a lawsuit under the Court's landmark 1997 decision, *Bennett v. Spear*. However, that conclusion is narrow because it relies in part on a memorandum of agreement (MOA) between EPA and the Corps that binds agencies to follow a JD's conclusions in enforcement actions and other litigation for at least five years after its publication according to Roberts' opinion. The agencies' MOA means that a "negative" JD that finds no jurisdictional waters creates a binding "safe harbor" that ensures a property owner can fill in wetlands or discharge pollutants without fear of federal CWA penalties:

> [A]lthough the property owner may still face a citizen suit under the Act, such a suit -- unlike actions brought by the Government -- cannot impose civil liability for wholly past violations. In other words, a negative JD both narrows the field of potential plaintiffs and limits the potential liability a landowner faces for discharging pollutants without a permit. Each of those effects is a "legal consequence" . . . It follows that affirmative JDs have legal consequences as well: They represent the denial of the safe harbor that negative JDs afford.

In the case, Hawkes, a Minnesota peat mining firm, is contesting a JD finding jurisdictional waters on its land that it argues effectively bars collecting peat on the affected property. Roberts' decision stops short of embracing the argument Hawkes and other JD challengers have raised that JDs are inherently final action carrying legal consequences regardless of the MOA, because they represent

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a pledge from regulators to pursue federal enforcement action against unpermitted discharges. The challengers argued that a JD effectively denies property owners full use of their land unless they go through a potentially expensive permit process, and said that denial should be considered a "legal consequence" in itself.

However, the Court's reliance on the MOA could allow EPA and the Corps to dodge judicial review of future JDs despite unanimous decision, by amending its terms to remove the "safe harbor" provision Roberts cited. Deputy Solicitor General Malcolm L. Stewart said such a move was possible in the March 30 oral argument in *Hawkes*, telling the Justices: "If the agencies wanted to fix it, they easily could, simply by issuing a new [MOA] clarifying their view of the JDs' effect."

Roberts goes on to say that JD recipients have no adequate means of contesting regulators' view of CWA jurisdiction other than to challenge the JD itself in court -- a necessary finding to allow suits to proceed under the Administrative Procedure Act (APA). The Department of Justice (DOJ) argued on behalf of the Corps that property owners who believe their land includes no protected waters can either seek a permit and then sue over its terms, or discharge without a permit and raise jurisdiction as a defense against a federal enforcement action. Roberts disagreed: "Neither alternative is adequate. As we have long held, parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of 'serious criminal and civil penalties."

Finally, Roberts states that DOJ's argument that the recipient of a JD is legally no worse off than a property owner who never sought a JD and must rely on their own judgment of what the CWA requires is "[t]rue 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."

EPA and the Corps previously issued a controversial joint rule defining what is a "water of the United States" (WOTUS) subject to the CWA, but that rule is itself under challenge from a host of stakeholders, including MMA and the National Association of Manufacturers, and expected to reach the Supreme Court. The position on the new Roberts decision in Hawkes by those who oppose WOTUS rule has been strongly stated by Sen. John Barrasso (R-WY), one of Congress' most prominent critics of the WOTUS rule:

> The Obama administration may think it's above the law, but the Supreme Court confirmed today it certainly is not. This decision is just the latest blow to the president's regulatory rampage. Families and small businesses across the country shouldn't have to fight Washington just to use their own property. Now the Supreme Court should go one step further and strike down the entire Waters of the United States (WOTUS) rule before more Americans are strangled by this unprecedented Washington water grab.

If you would like to have more information concerning the Hawkes decision, including a copy of Roberts' opinion, please contact John Milner, MMA Environmental Counsel, at jmilner@brunini.com or by phone at (601) 291-4696.