



## Environment, Land Use & Natural Resources ADVISORY ■

**APRIL 14, 2015**

### Expanding Judicial Review of Environmental Agency Action

**By Damien Schiff**

In *Hawkes v. United States Army Corps of Engineers* (8<sup>th</sup> Cir. April 10, 2015), the United States Court of Appeals for the Eighth Circuit ruled that jurisdictional determinations issued under the Clean Water Act are subject to immediate judicial review. The court diverged from decisions of the Fifth and Ninth Circuits, but arguably acted consistently with the U.S. Supreme Court's most recent Clean Water Act ruling. The Eighth Circuit's decision promises to have a significant impact for regulated parties not just within that circuit's jurisdiction, but potentially throughout the Mountain West and the Eastern Seaboard.

Under the Clean Water Act, the discharge of dredged or fill material into navigable waters requires a permit from the U.S. Army Corps of Engineers (other types of discharges require a permit from the U.S. Environmental Protection Agency or its state-agency designates). Although on its face seemingly straightforward, the question of what constitutes "navigable waters" has long perplexed the agencies, the regulated public and the courts alike. Indeed, as Justice Alito noted in *Sackett v. EPA*, the Supreme Court's most recent Clean Water Act decision, "[t]he reach of [that statute] is notoriously unclear," such that "[a]ny piece of land that is wet at least part of the year is in danger of being classified ... [as] covered by the Act." This uncertainty is made all the more significant given the substantial penalties—almost \$40,000 per day—that landowners would incur should they proceed with unpermitted activity in areas subsequently determined to be within the Act's scope.

To provide property owners some measure of assistance in determining whether their land is subject to Clean Water Act regulation, the Corps has instituted by regulation a process for the solicitation of "jurisdictional determinations." Under this system, a landowner may ask the Corps for its opinion on whether an area is jurisdictional. The Corps then provides its answer, which is generally valid for five years.

In *Hawkes*, the plaintiff property owner sought a jurisdictional determination from the Corps concerning several hundred acres on which it wanted to mine peat. After an extended and highly contested administrative

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proceeding, the Corps concluded that it had jurisdiction over the plaintiff's acres. The plaintiff then brought suit, challenging the Corps' determination under the Administrative Procedure Act. Under that Act, an aggrieved party may seek judicial review of "final" agency action for which no other adequate review is available. To be final, an agency action must be the consummation of the administrative process, and it must produce legal consequences. The Corps argued—and the district court agreed—that the case should be dismissed because a jurisdictional determination is not final. The plaintiff appealed to the Eighth Circuit, which reversed.

In holding that jurisdictional determinations are reviewable, the Eighth Circuit made several key points.

First, agreeing with other courts that have addressed the issue, it concluded that a jurisdictional determination is the consummation of the administrative process, at least with respect to the Corps' views on jurisdiction.

Second, disagreeing with two other circuit court decisions (*Fairbanks North Star Borough v. U.S. Army Corps of Eng'rs* (9<sup>th</sup> Cir. 2008) and *Belle Co. v. U.S. Army Corps of Eng'rs* (5<sup>th</sup> Cir. 2014)), the Eighth Circuit concluded that a jurisdictional determination produces sufficiently severe consequences to warrant immediate judicial review. The court explained that a jurisdictional determination forces landowners "either to incur substantial compliance costs (the permitting process), forego what they assert is lawful use of their property, or risk substantial enforcement penalties." The court concluded that a jurisdictional determination can harm a landowner, notwithstanding that the determination is "not-self-executing."

Third, the Eighth Circuit concluded that landowners like Hawkes have no other adequate remedy for challenging a jurisdictional determination. The Corps had argued that adequate remedies could be found either in the permitting process or as a defendant in an enforcement action brought by the Corps. But this argument, according to the court, "ignores the prohibitive cost of taking either of these alternative actions," for "as a practical matter, the permitting option is prohibitively expensive and futile." And to proceed in the face of the jurisdictional determination "would expose [Hawkes] to substantial criminal monetary penalties and even imprisonment for a knowing [Clean Water Act] violation."

Evidently underlying the Eighth Circuit's decision is a concern that the Corps' position would give the agency unfair (and legally unjustified) leverage over property owners whose land lies at the margins of the Corps' regulatory authority. As the court explained, the "prohibitive costs, risk, and delay of these alternatives to immediate judicial review evidence a transparently obvious litigation strategy: by leaving [Hawkes] with no immediate judicial review and no adequate alternative remedy, the Corps will achieve the result its local officers desire," namely, the "abandonment of the peat mining project, without having to test whether its expansive assertions of jurisdiction" are supportable.

The Eighth Circuit's decision comes at a particularly important time for the Clean Water Act, as the Corps and EPA [are preparing to issue a new regulation](#) interpreting "navigable waters." That proposal has received sharp criticism from property rights advocates, farmers and other businesses dependent on access to land and aquatic resources as an unjustified expansion of the Act. The agencies, however, have countered that the proposal is not nearly as ambitious as its critics contend. This interpretive conflict underscores the importance to the regulated community of the jurisdictional determination process, and in turn the Eighth Circuit's decision providing judicial review of that process.

Additionally, the Eighth Circuit's decision is an important development in the case law governing judicial review of Clean Water Act agency action. In *Sackett*, the Supreme Court held that landowners are entitled to immediate judicial review of EPA-issued compliance orders. The Court explained that such orders are final agency action because, among other things, they double the recipient's civil penalty liability and can impose remedial obligations over and above any duty created by the statute itself. In contrast, a jurisdictional determination does not impose liability on its own and does not create any duty over and above what the statute itself requires. Nevertheless, the Eighth Circuit concluded that *Sackett* supports judicial review of jurisdictional determinations, reasoning that in both situations the agency action has profound practical impacts that, without the safeguard of immediate judicial review, would coerce the regulated entity to abide by the agencies' dictates.

The Eighth Circuit's decision is an important one, not just for those landowners arguably regulated under the Clean Water Act, but for all entities that must deal with federal (and state) agencies. It underscores that courts should employ "a properly pragmatic analysis of ripeness and final agency action principles" to determine whether an aggrieved party should have the right to immediate judicial review. That generous approach bodes well for the regulated public.

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