



Unanimous Supreme Court Decision Concerning Certain Jurisdictional Determinations

On May 31st, the Supreme Court of the United States issued a rare, unanimous decision in favor of land owners in the wetland case. *USACE v. Hawkes Co., Inc., et al.* The case centered around three companies which own a 530-acre tract near an existing peat mining operation in Minnesota. The tract in question contains high quality peat to extend their mining operations for 10 to 15 years. Peat is an organic material composed of roots and other detritus that forms in waterlogged ground, such as wetlands and bogs. The US Army Corps of Engineers (USACE) exerted jurisdiction over wetlands on the property in 2012 by issuing an “*Approved Jurisdictional Determination*” (*Approved JD*) concluding the wetlands had a “significant nexus” to the Red River 120 miles away. The owners appealed this decision to the USACE Mississippi Valley Division Commander, who remanded to the USACE District for further fact finding. On remand, the District of the USACE reaffirmed its original conclusion and issued a revised JD. The owners sought judicial review of the revised JD under the Administrative Procedures Act, but the US District Court dismissed the case holding that the revised JD was not a “final agency action.” Only a final agency action is reviewable in court. The owners appealed the case to the Court of Appeals Eighth Circuit. The Supreme Court granted certiorari, allowing the case to essentially skip the appeal and move directly to the Supreme Court.

What is interesting is that this case was *not* about whether the USACE had jurisdiction; rather whether an Approved JD should be considered a “final agency action”, and thus can be appealed in court after the USACE’S administrative appeal process is concluded per 33 CFR Part 331. The Supreme Court found the Approved JD was a final agency action and can be appealed in Court. This ruling allows land owners, for the first time, to appeal USACE decisions regarding jurisdiction to a federal US Court after the USACE’s administrative appeal process is completed. Until now, a jurisdictional determination on its own was not reviewable by a court because the USACE reasoned they were not final agency actions. Owners, until now, as explained by the USACE during the court case, would have to do one of either two things before the courts could review the government’s jurisdiction over a wetland or water: 1) secure a permit and then appeal the permit and the underlying jurisdiction, or 2) take the imprudent step of discharging fill material without a permit to cause an enforcement action to be initiated by the USEPA. This second alternative allows the owner the opportunity to argue the government’s jurisdiction is incorrect and the enforcement action unnecessary, at their own peril.

As the Supreme Court reasoned “neither alternative is adequate.” The Court has long held there are two tests an agency action must pass to be considered a final agency action:

“First, the action must mark the consummation of the agency’s decision making process – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined or from which legal consequences will flow.”

In short, the Court unanimously agreed that an Approved JD meets both tests, and is a final agency action.

For clarification, there are two forms of JDs, and only one of them can be appealed to a Court. The bulk of JDs issued by the Norfolk District USACE are entitled “*Preliminary Jurisdictional Determinations*” (*Preliminary JD*), and cannot be appealed. The Preliminary JD confirms the boundaries, location and acreage of the wetlands and waters. However it only concludes that “...there ‘may be’ waters of the United States on the subject project site”. That is because it does not make a case-specific determination of how the USACE would exert jurisdiction over those particular

“adjacency determination” to arrive at *how* those wetlands and waters are tied to the Navigable Waters of the United States, and thus are assumed to be under the jurisdiction of the United States government. A Preliminary JD is therefore simpler and quicker to prepare for the USACE, and can be utilized in permitting. It cannot however, be administratively appealed within the USACE or be appealed to a federal Court. An Approved JD however, includes this additional step of the formal jurisdictional analysis, and therefore can be both administratively appealed, and now appealed to the courts pursuant to the *Hawkes* case. A Preliminary JD can be formalized into an Approved JD upon request of the owner to the USACE. This Supreme Court decision therefore opens the judicial appeal process to landowners who feel that the USACE’S Approved JD takes jurisdiction too far and have exhausted the administrative appeals process with the USACE.

Kerr Environmental Services Corp. provides environmental consulting, water resources engineering, stream and wetland restoration, and shoreline stabilization.

Questions or comments? Email us at bkerr@kerrenv.com, chickman@kerrenv.com or call (757) 963-2008.

1008 Old Virginia Beach Road, Suite 200 · Virginia Beach, VA 23451
Phone 757.963.2008 | Fax 757.963.8322