

SUPREME COURT TO RESOLVE CIRCUIT SPLIT ON CLEAN WATER ACT ISSUE WITH IMPORTANT IMPLICATIONS FOR LANDOWNERS AND DEVELOPERS

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The Supreme Court has agreed to address a split among U.S. Courts of Appeal regarding whether “jurisdictional determinations” by the U.S. Army Corps of Engineers under the Clean Water Act (“CWA”) are final agency actions subject to judicial review. The Supreme Court’s resolution of this issue will have important implications for landowners, developers, and regulators who may be given the opportunity to obtain more definitive answers from the courts on whether particular properties are subject to federal regulation pursuant to the CWA.

A “jurisdictional determination” is an official determination by the Army Corps as to whether waters at any particular site constitute “waters of the United States” as defined under the CWA and thus subject to regulation. If the Corps determines that jurisdictional waters are present, then filling those waters requires a permit. The Army Corps’ long-standing position is that such determinations are not judicially reviewable final decisions because they do not require a party to act or refrain from acting. Yet, the determinations clearly impact a private landowner’s property rights and if there’s been an error in the Corps’ determination, the landowner should be able to take the issue to court.

The U.S. Courts of Appeal for the Ninth and Fifth Circuits, however, have agreed that such determinations are not final agency actions because they do not determine legal rights or consequences – but rather serve as an “advisory notice” – and therefore are not subject to review by the courts.

In April 2015, the Eighth Circuit disagreed.

In *U.S. Army Corps of Engineers v. Hawkes Co.*, the Eighth Circuit ruled that courts most definitely could review such determinations because the determinations are effectively final and leave the property owner without an adequate alternate remedy. If a landowner could not seek judicial review of the Corps’ determination, it would be left with two prohibitively costly and potentially futile options: (1) pursue contentious permit applications that likely would be denied or (2) commence filling activities without a permit and then await an agency enforcement action. This latter option “is even more plainly an inadequate remedy” because property owners cannot initiate the enforcement process in order to get the ball rolling and each day they wait for the agency to do so exposes them to additional potential liability. These are the only options currently available to landowners in the Ninth and Fifth Circuits, and the issue is even less clear in the remaining states where federal appellate courts have not faced the question.

The Corps already issues tens of thousands of jurisdictional determinations every year. The outcome of this case therefore is particularly important in light of the Obama administration’s recent enactment of a new Clean Water Rule that puts millions of additional acres of property within the definition of “waters of the United States” covered by the CWA, although the Sixth Circuit has stayed that rule recently. Whether “waters of the United States” may be impacted by a development project is often far from clear, so project managers frequently request jurisdictional determinations from the Army Corps before proceeding with a project. If the Supreme Court holds that jurisdictional determinations are reviewable by the courts, landowners, developers and regulators will be able to pursue definitive judicial

decisions as to whether the particular property at issue is indeed subject to federal jurisdiction before embarking on the timely and costly permitting or enforcement process. On the other hand, in response to such a Supreme Court decision, the Army Corps may be reluctant to issue these determinations, thereby potentially adding a layer of uncertainty in the permitting and development process.

The Supreme Court's decision to take this case nevertheless gives hope to landowners and developers. As stated by the property owner's attorney in this case, "when Clean Water Act officials assert control over someone's private property, they should be prepared to defend, in court, their claim that the property is, in fact wetlands" and "their decisions should not be insulated from scrutiny and examination."

BLG will continue to monitor developments associated with this case.