

## SCOTUS Army Corps Case Will Impact EPA Clean Water Rule

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While property owners are in limbo waiting for challenges to the U.S. Environmental Protection Agency's clean water rule, in particular the new definition of "waters of the United States," to wind through the courts, the U.S. Supreme Court has ruled that they no longer need to await enforcement proceedings before challenging an Army Corps' jurisdictional determination that waters of the United States exist on a property. *U.S. Army Corps of Engineers v. Hawkes Co. Inc.*, \_\_\_ U.S. \_\_\_, Case No. 15-290 (May 31, 2016).



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The Supreme Court has severely undermined the Army Corps' ability to extend its reach to upstream waters, which require a "significant nexus" determination, by deciding that the Army Corps' jurisdictional determinations are immediately reviewable as final agency actions under the Administrative Procedures Act. Prior to the *Hawkes* case, if the Army Corps issued a jurisdictional determination that a property contains waters of the United States, the property owner could not challenge the determination. The party's only recourse was to go through the long and expensive permit process or await enforcement before seeking judicial review of the Clean Water Act jurisdiction.

Now, following *Hawkes*, the property owner may immediately challenge an Army Corps decision to regulate the property under the Clean Water Act. With the new threat of judicial review hanging over its head, the Army Corps may be more thorough in its effort to find a "significant nexus" between upstream waters and navigable waters of the United States.

In *Hawkes*, three companies sought permission from the Army Corps to mine peat for golf courses and discharge material onto wetlands located on their property. Prior to seeking a Section 404 permit, the companies sought a jurisdictional determination concerning the presence of navigable waters of the United States, which would trigger the need for the permit. The Army Corps determined that wetlands on the property had a "significant nexus" to the Red River of the North, located 120 miles away. After exhausting all administrative remedies, the companies sought review of the Army Corps' jurisdictional determination in federal district court under the Administrative Procedure Act. The district court dismissed on jurisdictional grounds stating the case lacked a "final agency action for which there is no other adequate remedy in a court," 5 U. S. C. §704. The Eighth Circuit reversed.

The Supreme Court affirmed, holding that the parties should not need to await enforcement proceedings before challenging final agency action where such proceedings carry the risk of "serious criminal and civil penalties," quoting *Abbott Labs v. Gardner*, 387 U. S. 136, 153 (1967). The court noted

that the permitting process is costly and lengthy and should not be required if the jurisdictional determination should be overturned on review.

In June 2015, the EPA replaced the 1986 regulations with its new clean water rule, codifying many of the policies that it had articulated in memorandums and guidance documents pertaining to the “significant nexus” jurisdictional test. The new clean water rule lists six categories of waters that are jurisdictional by rule: (1) traditional navigable waters, (2) interstate waters (including interstate wetlands), (3) territorial seas, (4) impoundments, (5) tributaries, and (6) adjacent waters. The rule also includes a seventh category that relies on a case-by-case analysis using the significant nexus test articulated by Supreme Court Justice Anthony Kennedy in his concurring opinion in *Rapano v. United States*, 547 U.S. 715 (2006).

The Sixth Circuit issued an order staying the EPA’s new regulations nationwide. Importantly, during the stay, property owners are subject to the 1986 regulations, including the Army Corps’ case-by-case determination concerning a significant nexus between upstream waters and waters of the United States to justify regulating the property under the act. The 1986 regulations, and the accompanying EPA memorandum regarding Clean Water Act jurisdiction following *Rapanos v. United States*, provide that the Army Corps must look at upstream waters on a case-by-case basis to determine if a significant nexus exists to navigable waters, when determining whether the government has jurisdiction to regulate a property.

The new regulations promulgated by the EPA, which are stayed pending the court challenge, would have codified the options provided in the memorandum and guidance, allowing the Army Corps and the EPA to cast a wide net to determine that a significant nexus exists between upstream waters and waters of the United States. In the interim, the 1986 regulations allow the agencies the same broad, unfettered discretion to find a significant nexus, following the policies articulated in the 1986 memorandum and guidance in lieu of the new regulations.

Although the Sixth Circuit cannot rely on *Hawkes* as precedent in the case before it now, it may take its cue from the Supreme Court’s tone in *Hawkes* and find the EPA’s new definition is overreaching and invalidate the new rule altogether. Even if the clean water rule survives the court challenges, the *Hawkes* decision may impact the rule’s eventual implementation.

If the new rule survives and becomes the law of the land, the Supreme Court’s *Hawkes* decision would be applied to the category of waters in the rule known as “significant nexus” waters. These waters are jurisdictional under the clean water rule on a case-by-case basis, if the Army Corps determines that there is a “significant nexus” to traditional navigable waters, interstate waters or territorial seas. Water will be subject to the significant nexus test if it is located within the 100-year floodplain, or 4,000 feet of the high-tide line, or ordinary high water mark, of traditional navigable waters, interstate waters or territorial seas. For adjacent waters, only a portion will trigger the significant nexus test, and then the entire water body or wetland will be subject to Clean Water Act jurisdiction.

The first prong of the significant nexus test in the new rule identifies that the water is either alone or is in combination with other similarly situated waters in the region. The second prong of the test is that such water significantly affects the chemical, physical or biological integrity of traditional navigable waters, interstate waters or territorial seas. Under the second prong, there must be more than a speculative or insubstantial impact to the integrity of traditional navigable waters, interstate waters or territorial seas. The agencies may determine the chemical, physical or biological integrity of jurisdictional waters by: sediment trapping, nutrient recycling, pollutant trapping, transformation, filtering or transport, retention and attenuation of flood waters, runoff storage, contribution of flow,

export of organic matter or food resources, and provision of aquatic habitat for species located in traditional navigable waters, interstate waters or territorial seas.

Under the new rule, an agency may determine a water body has a significant nexus to a traditional navigable waterway even without any surface or shallow subsurface hydrologic connection. It is possible that property located thousands of feet from a navigable waterway, interstate water, or territorial sea could still be subject to jurisdiction.

This is where the Hawkes decision will come into play. Post-Hawkes, property owners will be able to immediately challenge jurisdictional determinations based on the significant nexus test under the new rule. Courts may still defer to the Corps when its significant nexus determinations are challenged, but now the property owner will have the recourse of immediate judicial review rather than waiting to complete the permit process or for costly and time-consuming enforcement.

Now, at least until the Sixth Circuit hears and decides the challenge to the EPA's clean water rule, the Army Corps' discretion to find a significant nexus is subject to immediate review. If a property owner challenges the Army Corps' jurisdictional determination on the grounds that there is no basis for a finding of significant nexus, or that the Army Corps was arbitrary and capricious, the jurisdictional determination could be vacated and either remanded for further support or invalidated. While it may prove to be burdensome for the Army Corps to justify its jurisdictional determinations in the near-term, it will protect property owners from overreaching in situations when the only potential water on a property is an upstream water that has no, or only a tenuous, connection to navigable water.

In the long-term, if the clean water rule survives all court challenges and becomes effective, the Army Corps will still be subject to immediate judicial review pursuant to Hawkes for determinations that there is a "significant nexus" between a water body and navigable waters.

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