Regulated Parties - 2, Regulators - 0

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The United States Supreme Court has handed regulated parties their second win in four years concerning when they can take EPA and the U.S. Army Corps of Engineers to court over wetlands permitting issues. In 2012, the Supreme Court in *Sackett v. EPA* held unanimously that a compliance order issued under the Clean Water Act ? meaning an order determining that a party is violating the Act and requiring compliance ? was ?final agency action? subject to judicial review under the Administrative Procedures Act (APA). EPA had taken the position that no judicial review could occur until the person receiving the order refused to comply and EPA filed suit to enforce it. This presented regulated parties with a Hobson?s Choice: comply with the order even if they thought it was unlawful, or violate the order and face the prospect of significant fines if a court enforcing the order agreed with EPA. The Supreme Court found that EPA?s view had no basis under the Clean Water Act and held that regulated parties were entitled to pre-enforcement review. The decision in the case was not even close ? EPA lost 9-0. That?s why when *U.S. Army Corps of Engineers v. Hawkes Co., Inc.* went to the Supreme Court with a similar issue, we suspected the regulators would lose again. They did, 8-0. Again, not even close.

The issue before the court in *Hawkes* concerned wetland ?jurisdictional determinations? (JD). Property owners who are not certain whether their property contains wetlands may proceed with development without a permit, but few do so since the risk of being wrong can be significant. Instead, most have a wetlands delineation performed and then ask the Corps for a preliminary or approved JD. An approved JD is issued by the Corps to document whether wetlands are present or absent on property. It?s valid for five years and forms the basis on which wetland permits are issued.

But what happens if a regulated party disagrees with the JD? The Corps? position was that the regulated party could not go to court to contest it until *after* the Corps issued or denied a permit. This left regulated parties with two options: proceed without a wetlands permit from the Corps and face the prospect of civil and criminal liability if they are wrong, or (ii) spend significant time and money to apply for a wetlands permit *and then* finally have access to a court to contest the JD once a permit is issued or formally denied. (Sounds similar to the choices in *Sackett*, doesn?t it?)

In *Hawkes*, the applicant submitted an application to mine peat on property in Minnesota. The Corps issued an approved JD that found the property contained wetlands with a ?significant nexus? to other ?waters of the United States.? Hawkes did not agree; its position was that the wetlands on the property were not subject to federal jurisdiction. Hawkes appealed the JD to a federal district court, but the court

found issuance of a JD did not constitute ?final agency action? within the meaning of the APA. Hawkes lost, but appealed to the U.S. Court of Appeals for the Eighth Circuit where it won. Undaunted, the Corps appealed to the Supreme Court.

Once again, the Supreme Court unanimously rejected the regulator?s position. Chief Justice Roberts? opinion said that regulated parties shouldn?t have to wait for the Corps to ??drop the hammer? in order to have their day in court.? Justice Kennedy wrote a concurring opinion, joined by Justices Thomas and Alito, in which he said the Act is ?notoriously unclear? and ?the consequences to landowners even for inadvertent violations can be crushing.? He went on to say that the Act ?continues to raise troubling questions regarding the Government?s power to cast doubt on the full use and enjoyment of private property throughout the Nation.?

Many think these cases are a harbinger of things to come when EPA?s Clean Water Rule finally reaches the Supreme Court. Ultimately, it was a matter of fairness that carried the day in both*Sackett* and *Hawkes*, but whether ?fairness? will come into play when the Court considers the Clean Water Rule is anyone?s guess.

U.S. Army Corps of Engineers v. Hawkes Co., Inc., No. 15-290 (May 31, 2016).

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