



## U.S. Supreme Court to Decide Whether Jurisdictional Determinations May be Appealed

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The U.S. Army Corps of Engineers determines the presence or absence of wetlands and other "waters of the United States" on a particular site by issuing a "jurisdictional determination" (JD). A JD is of great significance to property owners because it often dictates the extent to which their property can be developed. That's why the development community has taken a big interest in *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, a case now before the U.S. Supreme Court. The issue before the Supreme Court is straightforward: To what extent can property owners who disagree with the JD obtain immediate review of it in court?

The case concerns a dispute arising from Hawkes' 2010 application for a permit to mine peat on property in Minnesota. The Corps derailed Hawkes' plan by issuing a JD that found the property contained significant wetlands subject to federal jurisdiction. 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 seeking review under the Administrative Procedures Act (APA). The court found that, although the JD was the consummation of the Corps' decision-making process, it was not a "final agency action" within the meaning of the APA. Hawkes lost. The decision meant Hawkes had two options: either (i) proceed with the project without a wetlands permit from the Corps and face the prospect of civil and criminal liability, 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 was issued or formally denied. So naturally, Hawkes appealed.

The Eighth Circuit reversed the district court's decision. Using similar reasoning to that advanced by the U.S. Supreme Court in *Sackett v. EPA*, the Eighth Circuit held that a JD is "final agency action" subject to review under the APA because it is a conclusive determination by the Corps. The appeals court said the Corps' assertion that an approved JD is merely advisory and has no more effect than an environmental consultant's opinion "ignores reality." It found that, "in reality, it has a powerful coercive effect" and that the inability of property owners to obtain judicial review of it "leaves most property

owners with little practical alternative but to dance to ?the Corp?s [sic] tune.?

The Corps appealed to the U.S. Supreme Court, and that Court accepted the appeal. It did so to resolve the split among the circuit courts of appeal created by the Fifth Circuit?s 2014 decision in *Belle Co., LLC v. Corps*. There, the Fifth Circuit reached the opposite result. Although the Supreme Court declined to hear *Belle* in March, 2015, it will hear oral arguments in *Hawkes* on March 30, 2016.

The Supreme Court in *Sackett* made clear that property owners have an immediate right to judicial review of a compliance order issued by EPA because such orders are ?final agency action.? The decision of the Court in that case was unanimous, something that does not bode well for the Corps? position in *Hawkes*.

Briefs filed in *Corps of Engineers v. Hawkes Co, Inc.* (U.S. Sup Ct.)

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