The issue in *U.S. Army Corp of Engineers* v. *Hawkes* is whether a court may review an Army Corp of Engineers “jurisdictional determination” (JD) that property contains “waters of the United States” (WOTUS) per the Clean Water Act. The State and Local Legal Center (SLLC) filed an amicus brief arguing in favor of court review.

Hawkes wanted to mine peat from wetland property in Minnesota. The Army Corp of Engineers issued a JD that the property contained WOTUS because it was connected by culverts and unnamed streams to a traditional navigable water way about 120 miles away.

To commence mining Hawkes would have had to obtain a (costly and time consuming) permit unless a court would review (and overturn) the JD. So Hawkes sought court review.

Per the Administrative Procedures Act judicial review may be sought only from final agency actions. Per *Bennett v. Spear* (1997), agency action is final when it marks the consummation of the agency’s decision making process and when legal consequences flow from the action.

The Eighth Circuit concluded that Hawkes may challenge the JD in court immediately and not wait until the permit is denied to sue.

The court found a JD is the consummation of the Corp’s decision making process because the Corp describes an approved JD as a “definitive, official determination” that there are or aren’t WOTUS on a site. A JD may be relied on for five years.

The court concluded that “rights or obligations have been determined” and “legal consequences flow” from a JD because Hawkes’ two choices following it are cost prohibitive. It can complete the permitting process which will be costly, time consuming, and--in this case the Corp already told them--futile. Or Hawkes may proceed without a permit and risk an enforcement action. But doing so after obtaining an unfavorable JD could expose Hawkes to criminal monetary penalties or imprisonment for knowingly violating the Clean Water Act.

The SLLC amicus brief points out states and local governments will be negatively affected in their various roles if judicial review of JDs is not possible. As landowners, they face timing and cost burdens. If they choose to proceed with a project without a permit, they could lose federal grant funding necessary to complete the project where the grants require applicants to comply with all applicable federal laws. As a partner with the business community responsible for economic development and capital infrastructure planning, states and local governments need the certainty provided by prompt judicial review of JDs.

The **Council of State Governments** [5], **National Association of Counties** [6], **National League of Cities** [7], **United States Conference of Mayors** [8], **International City/County Management Association** [9], and the **International Municipal Lawyers Association** [10] joined the SLLC amicus brief which was written by Foley & Lardner attorneys **Joe Jacquot** [12], **Linda Benfield** [13], **Richard Still** [14], **Michael Leffel** [15].
and Sarah Slack [16].

By: Thursday, March 3, 2016 at 09:58 AM