In *United States Army Corp of Engineers v. Hawkes* [2] the Supreme Court ruled unanimously that an approved jurisdictional determination that property contains “waters of the United States” may be immediately reviewed in court. The State and Local Legal Center (SLLC) filed an *amicus brief* [3] in this case arguing in favor of this result.

Per the Clean Water Act, “waters of the United States” (WOTUS) are federally regulated. Property owners may seek an approved jurisdictional determination (JD) from the US Army Corp of Engineers definitively stating whether such waters are present or absent on a particular parcel of land.

Three companies wanted to mine peat from wetland property in Minnesota. The Corp issued an approved JD that the property contained WOTUS because its wetlands had a “significant nexus” to a river located about 120 miles away.

Per the Administrative Procedures Act judicial review may be sought only from final agency actions. Per *Bennett v. Spear* [4] (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 Court, in an opinion written by Justice Chief Roberts, concluded that an approved JD is a final agency action subject to court review because it meets both conditions laid out in *Bennett*. The Corp didn’t argue that an approved JD is tentative; its regulations describe approved JDs as “final agency action” valid for five years. Approved JDs give rise to “direct and appreciable legal consequences,” the Court reasoned, because the Corp is bound by them for five years. And a “longstanding memorandum of agreement” between the Corp and the Environmental Protection Agency (EPA) binds the EPA. So per an approved JD the two agencies authorized to bring civil enforcement proceedings under the Clean Water Act, practically speaking, grant or deny a property owner a five-year safe harbor from such proceedings.

The SLLC *amicus brief* [3] pointed out states and local governments would be negatively affected as landowners and partners with the business community responsible for economic development and capital infrastructure planning if judicial review of JDs is not possible. The Court agreed that neither alternative to judicial review is adequate. Proceeding without a permit could lead to civil penalties of up to $37,500 a day; seeking a permit can be “arduous, expensive, and long.”

Interestingly in three separate concurrences (each about a page long) Justices Kennedy, Thomas, Alito, Kagan, and Ginsburg debate whether an approved JD really is binding on EPA and whether it matters. Justice Kennedy warns that if it isn’t, “the Act’s ominous reach would again be unchecked by the limited relief the Court allows today.” In light of this discussion the Corp and EPA are likely to clarify the nature of their agreement.

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* [3] which was written...

By:

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Tags:

Clean Water Act, Supreme Court, Waters of the United States, approved jurisdictional determination, court review

Policy Area: Environment, Water, Quality