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8th Circuit Appears To Back Bid For Review Of CWA Jurisdiction Findings

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U.S. Court of Appeals for the 8th Circuit judges at oral arguments appeared to back property owners' claims that they can pursue judicial pre-enforcement review of Clean Water Act (CWA) jurisdiction findings, which could create a circuit split on whether the findings are reviewable and force the Supreme Court to weigh in to resolve the fight.

During the Dec. 11 oral arguments in *Hawkes Co., et al. v. U.S. Army Corps of Engineers,* judges called the Corps' claim that jurisdictional determinations (JDs) are exempt from judicial review "government by regulatory tyranny," and questioned "how the Corps is hurt" by lawsuits challenging JDs prior to any enforcement actions.

Agencies such as EPA and the Corps use the JDs to determine which waterbodies are subject to various CWA requirements. At least one other circuit has ruled on the issue in the Corps' favor, with the 5th Circuit's July 30 decision in *Belle Company, LLC, et al. v. U.S. Army Corps of Engineers* saying the findings are not reviewable.

8th Circuit Judge James B. Loken however said at arguments in Hawkes that "I disagree with *Belle*. . . . I respect the analysis, but it's conventional pro-agency analysis," suggesting the findings should be reviewable.

If the appellate court -- which covers North Dakota, South Dakota, Nebraska, Iowa and other states -- finds that JDs are reviewable then it would be a decision at odds with the conclusion in *Belle.* That would mean a split with the 5th Circuit, which covers Texas, Louisiana and Mississippi. A split would make it more likely that the Supreme Court could grant an appeal of either case in order to resolve the divergent rulings.

Belle is now the subject of a petition for a writ of *certiorari* for the high court to take the case, under the title *Kent Recycling Services v. U.S. Army Corps of Engineers.*

The Corps' response is not due until Dec. 31, but industry and conservatives, including Sen. David Vitter (R-LA), have already filed *amicus* briefs supporting review.

At issue in both the *Kent* appeal to the high court and the Hawkes appellate suit is whether the recipient of a JD can challenge the jurisdictional nature of a waterbody in court immediately, or must wait for regulators to take an additional "final action" as defined by the Administrative Procedure Act (APA) -- either issuing a discharge permit or taking enforcement action against the property owner -- which would then be subject to suit.

But during the Hawkes arguments, Loken said the Corps is interpreting the definition of "final action" too narrowly. "The Supreme Court's interpretation of the APA's finality requirements is flexible and pragmatic. And you are treating it as inflexible and absolute. . . . If [the JD] had been in a judicial determination, in a district court, it would have been subject to . . . pragmatic and needed interlocutory review. The Corps, by your argument, is ruling that out for all the people it regulates," he said.

Judge Myron H. Bright asked why the Corps would oppose pre-enforcement review as a practical matter. "I want to know how the government is prejudiced if . . . the only issue to be decided is whether or not the act falls under the jurisdiction of the Corps. Tell me how the Corps is hurt by that," he said.

The judges also seemed to back industry arguments that the Corps' position forces a property owner to either shoulder the expenses of a permit application or risk criminal penalties for illegal discharges for no compelling reason.

"I can't see much difference between this and a final action, for example, if the plaintiffs here went ahead without a permit, and the Corps penalized them, and fined them, and took it up to court. The same issues would be there. Here, we get away from the risk of the plaintiff having to spend a lot more money, and one of the only way to proceed is to subject the plaintiff to fine and maybe to criminal sanctions," Loken said.

Despite that claim, the Corps allows property owners to file an administrative appeal of a JD. At the Hawkes arguments, Judge Jane Louise Kelly questioned why the Corps allows such appeals if the JDs are not suitable for review in court.

"What's the purpose of having the agency allow for sort of a mini-review of that decision initially, then? Why isn't it just part of the entire permit process? It seems like the agency has treated that decision differently" from the overall permit, she said.

The 8th Circuit judges had comparatively minor questions for industry attorney Reed Hopper during his segment of argument, focused mainly on whether Hawkes could be certain that its application for a permit to excavate peat from a Minnesota wetland would be rejected, and why it would be expensive to see the process through if there was already no question as to the result.

"If you were so confident that the Corps was going to deny the permit, what's the 'great cost' in riding it through to denial? If you're confident the agency's position is that you cannot mine for peat on this wetland, that shouldn't take a half a million dollars and three years to get a final action," Loken said.

He stopped short of agreeing with Hopper's argument that blocking judicial review of JDs until the end of the permitting process is "discriminatory" against property owners who cannot afford the cost of an application. "What Supreme Court case supports that assertion? To my knowledge, none," Loken asked.

While courts have consistently ruled that JDs are not "final" under the CWA because they do not carry legal consequences, industry has argued in new cases, including Hawkes and Kent, that the Supreme Court's landmark 2012 decision in *Sackett v. EPA* implicitly overrules those past decisions.

The high court in *Sackett* opened the agency's CWA compliance orders, as well as some other pre-enforcement actions, to suit, ruling that because such orders open recipients to enhanced penalties for violating the water law, they satisfy the test for "final action." Industry says the same logic should apply to JDs, but EPA and the Corps have countered that because a JD is not an "order" subject to violation, it cannot be independently challenged.

In Sackett, the justices held that recipients of CWA compliance orders can challenge the orders in court even before the agency seeks to enforce them, placing a major hurdle in front of regulators' efforts to force voluntary compliance or require the agency to amend language in the orders.

Writing for the court, Associate Justice Antonin Scalia found that the compliance orders, as currently crafted, constitute "final agency action" under the APA and are eligible for judicial review.

Scalia's opinion in *Sackett* did not explicitly call for expanded court review of compliance orders issued outside of the CWA framework. But the ruling said compliance orders that carry the threat of fines or other penalties for noncompliance may be subject to pre-enforcement review, which has been widely seen as opening the door to challenges against orders issued under other statutes that rely on a similar enforcement approach as the CWA, as well as jurisdictional determinations under the CWA.

But in the 5th Circuit's decision in *Belle*, Judge Stephen A. Higginson says a JD lacks the hallmarks of "final action" that the justices cited to support their ruling in *Sackett*. "[T]he use of the JD in assessing future penalties is speculative, whereas in *Sackett* the order caused penalties to accrue pending restoration of the property," the decision says.

Industry has argued that even though there are no direct fines or other consequences for ignoring a determination, the existence of a JD can be evidence that a property owner did not act in "good faith" -- which can increase the legal penalties for CWA violations.

A determination "puts a recipient on notice that the Corps has determined that its parcel contains jurisdictional waters. If the landowner disagrees with that determination and begins development activity, the Corps will likely argue in any later enforcement proceeding that the landowner was on notice and therefore should be assessed a greater civil penalty," industry groups argued in a Dec. 1 *amicus* brief to the high court in *Kent*.

The brief cites CWA section 309, which allows enhanced penalties for "knowing" violations of the act, including prison terms. Because a JD "establishes knowledge of CWA jurisdictional waters, it has legal effect," the brief says. -- *David LaRoss*

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