Supreme Court Ruling Allows Clean Water Act Suit to Proceed, Offers Clues About Court's Direction on Other Challenges to Federal Agency Advice

June 9, 2016

Environmental and Litigation

The Supreme Court last week unanimously ruled that property owners seeking to discharge material onto land potentially subject to federal Clean Water Act restrictions may bring direct court challenges to "approved jurisdictional determinations" issued by the U.S. Army Corps of Engineers ("Corps"). The Court rejected the Corps' position that property owners must either complete the expensive and time-consuming permitting process or risk a federal civil or criminal enforcement action before challenging these determinations in federal court. Although the ruling was unanimous, the various opinions reveal discomfort among some Justices regarding the scope of the Clean Water Act as currently applied, as well as differences among the Justices regarding when an agency action becomes final for purposes of court review under the Administrative Procedure Act ("APA"). The opinions should be of interest not only to companies potentially subject to the Clean Water Act, but also those subject to other federal regulatory schemes in which agencies make determinations at various stages of a proceeding.

In *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, companies that intended to mine peat on a 530-acre tract that included wetlands applied to the Corps for a permit to discharge dredged or fill material in connection with the planned mining activity. As part of the permitting process, the Corps issues "jurisdictional determinations" reflecting its position on whether the land subject to the permit application contains "waters of the United States" (and thus is subject to Clean Water Act restrictions).

The Corps issued an "approved JD" taking the position that the tract in question includes "waters of the United States." Corps regulations define an approved JD as a "final agency action," and the approved JD binds the Corps and the Environmental Protection Agency for five years (under the Supreme Court's reading of a memorandum of agreement between the Corps and the EPA). Nonetheless, when the mining companies sued to challenge the approved JD, the Corps argued that a court challenge was unavailable because such a determination is not a "final agency action for which there is no other adequate remedy in a court" within the meaning of the APA.

The Supreme Court, in a majority opinion written by Chief Justice Roberts and joined in full by all of the Justices except Justice Ginsburg (who joined in part), rejected the government's argument. The majority held that existing precedent—as set forth in a 1997 Supreme Court case, *Bennett v. Spear*—sets two conditions for when an agency action is considered "final" under the APA, both of which were satisfied. First, the action must not be tentative or interlocutory; rather it "must mark the consummation of the agency's decision-making process."

The government conceded that an approved JD satisfies this first condition. An agency action also must establish parties' rights or obligations or otherwise have "direct and appreciable legal consequences." The Corps argued that an approved JD by itself does not have legal consequences, but the Court held otherwise. The majority concluded that, in light of the agreement between the Corps and EPA making approved JDs binding on those agencies, an approved JD that a property does *not* contain waters of the United States effectively creates a five-year safe harbor from agency enforcement actions, as well as reducing the potential damages available in civil suits. According to the Court, an approved JD coming to the opposite conclusion denies property owners those legal benefits.

The Court went on to reject the government's argument that recipients of approved JDs have adequate alternatives to APA review in court. According to the Court, the alternatives the Corps offered—completing the permitting process or proceeding without a permit and mounting a defense to future enforcement actions—are inadequate. The permitting process can be "arduous, expensive, and long," the Court said (the Corps disputed such characterizations), and parties need not risk substantial civil and criminal liability "while waiting for EPA to 'drop the hammer' in order to have their day in court."

Finally, the majority rejected the government's argument that because the jurisdictional determination process is itself discretionary (rather than mandated by statute), the alternatives the Corps offered to property owners should be considered adequate because they would be the only options available if the Corps had never adopted the jurisdictional determination process. The majority held that "such a 'count your blessings' argument is not an adequate rejoinder to the assertion of a right to judicial review under the APA."

Justice Kennedy, joined by Justices Thomas and Alito, stated in a concurring opinion that the Clean Water Act, "especially without the JD procedure were the Government permitted to foreclose it, 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." Justice Kennedy also criticized the government's claim that it had "unfettered discretion" to revoke or alter the agreement between the Corps and the EPA, and stated that even if in an ordinary case inter-agency agreements do not establish finality, "the Court is right to construe a JD as binding in light of the fact that in many instances it will have a significant bearing on whether the Clean Water Act comports with due process." Justice Kennedy reiterated a point made by Justice Alito in an earlier case, that "the Act's reach is 'notoriously unclear' and the consequences to landowners even for inadvertent violations can be crushing." This concurrence reflects continued skepticism on the Court about the scope of the government's Clean Water Act powers, and suggests that efforts to expand that power—such as by altering the jurisdictional determination process, by removing a "finality" label from such decisions, or through expansion of the definition of "waters of the United States" (as in a 2015 rule currently stayed by a court challenge)—may face an uphill battle in future cases.

The concurring opinions also highlight a broader debate about whether a definitive agency action must carry direct legal consequences in order to be "final" for purposes of judicial review. The majority sidestepped this question (which was raised in several briefs) when it concluded that, in any case, approved JDs do have direct legal consequences, relying in large part on the agreement between the Corps and the EPA that made all approved JDs binding on both agencies for five years (despite the government's argument that the inter-agency agreement should be read more narrowly). Justice Kagan, in her concurrence, took the position that the agreement was "central to the disposition of this case." In contrast, Justice Ginsburg declined to

join the majority's reliance on the inter-agency agreement, explaining that because approved JDs are "definitive" and have "an immediate and practical impact," they are final agency actions.

The government had argued that jurisdictional determinations are simply a form of agency guidance provided to regulated parties and that courts previously had denied judicial review of such guidance. The government warned that if the Court ruled that such "agency guidance [is] immediately reviewable … agencies would hesitate to devote limited resources" to issuing such guidance. Nonetheless, the majority declined to give any deference to the government's interpretation of the Corps-EPA agreement, possibly signaling an erosion of support on the Court for the broadly deferential approach to agency actions articulated in precedents such as *Chevron*.

Given the majority's reliance on the legal effect of the agreement between the Corps and the EPA and the government's position that the agencies may revise that agreement at will, future cases may require the Court to address the reviewability of such guidance more directly. It will be interesting to see whether, in the wake of this decision, agencies limit the types of determinations they are willing to issue or whether agencies are less willing to suggest that such determinations have binding effect.

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