U.S. Army Corps v. Hawkes: A New Appeal Option May Not Be So Appealing to Localities

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In May 2016, the U.S. Supreme Court, in *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, held that jurisdictional determinations ("JD" or "JDs") by the U.S. Army Corps of Engineers are final agency actions that may be appealed under the federal Administrative Procedure Act. Before *Hawkes*, landowners could only challenge a JD after receiving a Clean Water Act permit from the Army Corps of Engineers following a cost-intensive and lengthy application process. This article will explore the impacts the Court's holding may have on Virginia local governments in their dual-role as regulators of private land-development activities and as landowners/developers themselves. The first section is a primer on jurisdictional determinations and Section 404 of the Clean Water Act. The second provides an overview of the Supreme Court's decision in *Hawkes*. The third sections identifies impacts of *Hawkes* for Virginia local governments, including failure to remove all regulatory barriers to construction, leaving administration of local government programs beholden to the federal appeals process, creating an opportunity for earlier third party challenges to development projects, and creating a new forum to consider in litigation strategy. This article concludes that, on balance, the impacts of *Hawkes* are less favorable for local governments than favorable but the unfavorable impacts will only come to light if developers and third parties decide to start appealing JDs.

What is a Jurisdictional Determination?

Before a landowner can begin developing his property, he should identify whether any waterbodies on the property are subject to state and/or federal regulation that requires a permit before beginning construction activities. Development activities that impact waterbodies in Virginia are regulated by the federal Clean Water Act (33 U.S.C. 1251 et seq.), Sections 9 and 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §§ 403, 404), the Wetlands Act of 1972 (Va. Code Title 28.2, Ch. 13), and the State Water Control Law (Va. Code, Title 62.1, Ch. 3.1). The State Water Control Law includes the following articles relevant to this Article: the Virginia Water Resources and Wetlands Protection Program (Article 2.2, Va. Code § 62.1-44.15:20, et seq.); the Stormwater Management Act (Article 2.3, Va. Code § 62.1-44.15:24 et seq.); the Erosion and Sediment Control Law (Article 2.4, Va. Code § 62.1-44.15:51, et seq.); and the Chesapeake Bay Preservation Act (Article 2.5, Va. Code § 62.1-44.15:67 et seq.). The regulatory bodies charged with implementing and enforcing this statutory framework include U.S. Army Corps of Engineers (Corps), U.S. Environmental Protection Agency (EPA), Virginia Department of Environmental Quality (DEQ), Virginia Marine Resources Commission (VMRC), local wetlands boards, and local governments. Given the sheer number of laws and distinct regulatory bodies overseeing protection of waterbodies in Virginia during development, a critical first step in land development is to characterize the type of waterbodies present on the subject property and determine which legal requirements apply.

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The Clean Water Act protects waterbodies across the U.S. by prohibiting the discharge of any pollutant to "navigable waters" unless the discharge is pursuant to a permit issued by either EPA or the Army Corps of Engineers. *See* 33 U.S.C. §§ 1311(a), 1362(12). "Navigable waters" is defined as "waters of the U.S.,"[1]

[1] This term has been the subject of much litigation and debate since the scope of "waters of the United States" became unclear after two U.S. Supreme Court decisions in 2001 and 2006. This article does not consider the issues or current litigation related to the meaning of "waters of the United States."

a term that has been construed by both the Corps and the Supreme Court to include waterbodies and wetlands that are not traditionally navigable in fact. 33 U.S.C. § 1362(7); 33 C.F.R. § 328.3; *see Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 167 (2001); *see also Rapanos v. United States*, 547 U.S. 715, 759 (2006).

The Corps, pursuant to the Clean Water Act, has created a process for determining when a waterbody falls under the federal jurisdiction (and, therefore, the permitting requirements) of the Clean Water Act. This process begins with gathering information about the waterbody to determine if it meets the definition of "waters of the United States" and culminates in what is known as a "jurisdictional determination." "Approved jurisdictional determination means a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel." *Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 282-83 (4th Cir. 2011). If, by approving a JD, the Corps finds that waterbody on the property meets the definition of "waters of the U.S.," development activity impacting the waterbody is regulated under Section 404 of the Clean Water Act.

Section 404 of the Clean Water Act (33 U.S.C. § 1344) regulates the discharge of dredged or fill material to waters of the United States. Landowners whose development will impact waters of the United States, including wetlands, by dredging and/or filling must apply for and obtain a permit, known as a "404 permit," before such dredging or filling activities may occur. 33 C.F.R. Pt. 323. Before applying for a 404 permit, landowners request JDs from the Corps to determine whether a waterbody meets the definition of waters of the United States. If the waterbody is not a water of the United States, then it is not subject to federal jurisdiction and there is no need to obtain a federal 404 permit. This is the crux of the argument in *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.* 136 S. Ct. 1807 (2016). Once the Corps makes its JD, local governments in Virginia have elected to rely on that decision as a basis for administration of their own regulatory programs.

Discussion of *U.S. Army Corps of Engineering v. Hawkes*

In *Hawkes*, a peat mining company in Minnesota wanted to expand its operations to an adjacent property and was unhappy with a JD from the Corps, which concluded that the proposed expansion site contained wetlands that were connected to a river located approximately 120 miles from the site. *Hawkes Co., Inc. v. U.S. Army. Corps of Eng'rs*, 963 F. Supp.2d 868, 870-71 (D. Minn. 2013). Nonetheless, the Corps expected the peat mining company to proceed with applying for and obtaining a 404 permit on the basis of a JD that it disagreed with. *See Hawkes Co., Inc. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 1001 (8th Cir. 2015). If after obtaining the permit, the Corps reasoned, the peat mining company still disagreed with the JD, it could appeal the permit. *Id.* The company believed it should be able to challenge the Corps' JD first without having to go through the time and expense of applying for and receiving a 404 permit that may be based on an incorrect JD. *Id.*

The peat mining company administratively appealed the JD to the Corps and the Corps confirmed its previous decision that the JD was correct. *Id.* at 998. Having exhausted its administrative remedies, the company then filed suit in federal court challenging the jurisdictional determination. *Id.* On appeal from the trial court, the U.S. Court of Appeals for the Eighth Circuit determined that a JD, like the one here, marked "the consummation of the Corps' decisionmaking process" and that legal consequences flow from the decision. *Id.* at 999, 1001. Accordingly, the court found that a JD is a final agency action and that judicial review was available under the federal Administrative Procedure Act (APA). *Id.* at 1002. The Corps requested that the Supreme Court review the question of whether a JD constitutes a

final agency action subject to judicial review under the APA. On December 11, 2015, the Supreme Court granted the Corps' petition for certioria.[2] 136 S. Ct. 615 (Mem) (2015).

The National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, the International Municipal Lawyers Association, and the International City/County Management Association joined an amicus brief urging the Court adopt the Eighth Circuit's decision because:

> The Army Corps' determination that a property contains jurisdictional wetlands significantly impacts the Amici as landowners, as regulators under the Act, and as partners with private entities, significantly affecting their ability to fulfill their responsibilities to their citizens.

Amicus Brief, p. 7. Without prompt judicial review of JDs, the local government organizations argued, local governments would be forced to pay potentially unnecessary costs of obtaining permits. Amicus Brief at 9. Not only that, they wrote, but local governments depend on regulatory certainty to meet their obligations for long-term planning and economic development. Amicus Brief at 8.

On May 31, 2016 the Court affirmed the Eighth Circuit's decision that a JD is a final agency action that is subject to judicial review under the APA. *Id.* at 1816. The conservative public interest law firm who represented the peat mining company on its appeal to the Eighth Circuit viewed the Supreme Court's decision as "holding regulators accountable to the courts" by allowing an immediate court challenge to jurisdictional determinations. Hopper, Reed, When regulators label property as 'wetlands,' owners may seek judicial review. The National Association of Counties blog called the win a "small victory for counties" but stated:

> Without this ruling, counties that disagreed with a JD related to a particular project would only have two options: either the county would have to go through the 404 permit process or proceed with the project and risk facing civil penalties under the Clean Water Act (CWA). Both options would potentially increase project costs and hinder economic development and capital infrastructure planning.

Igleheart, Austin et al., *Small Victory for Counties as Supreme Court Rules Against Army Corps in Water Case*, June 15, 2016.

Impacts of *Hawkes* for Virginia Local Governments as Regulators and as Landowners/Developers

Proponents of the Supreme Court's decision in *Hawkes* lauded it as a success for landowners because they can now seek immediate judicial review of a JD, which generates regulatory certainty and avoids the costs and time associated with the 404 permitting process. While this is certainly true for those who appeal JDs and win, it is clear from the state and local regulatory framework in Virginia that successfully appealing a JD removes only one of many layers of legal prerequisites for beginning a construction project. Second, local governments have incorporated JDs into their local regulatory programs to the extent that if a developer or third party appeals a JD, the local government is forced to halt its process until a court decides the appeal. Third, one unintended consequence of *Hawkes* is that local governments may have lost some control over their projects because JD appeals are available to anyone

[2] Notably, the Court had twice previously denied cert for petitions to review circuit court decisions holding that a JD is *not* a final agency action subject to judicial review. *See Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F. 3d 586, 597 (9th Cir. 2008), *cert. denied*, 557 U.S. 919 (2009) and *Belle Co., LLC v. U.S. Army Corps of Eng'rs*, 761 F.3s 383 (5th Cir. 2014). In March 2015, the U.S. Supreme Court denied certiorari of the Fifth Circuit's decision, one month before the Eighth Circuit issued its opinion reaching the opposite conclusion. 135 S. Ct. 1548 (2015); 782 F.3d 994 (8th Cir. 2015).

who can demonstrate they have standing to bring an appeal, not just to property owners. Fourth, because of *Hawkes*, local governments who disagree with a JD for their property have a new option for litigation at an earlier stage in the federal permitting process.

After Hawkes, No Drastic Change in the Regulatory Landscape for Local Governments

In Virginia, a successful appeal of a JD (meaning that a waterbody previously designated as protected by the Clean Water Act is no longer protected because it is not a "water of the U.S.") does not guarantee that *no* regulations apply to that waterbody. It is nearly impossible to avoid regulation of a waterbody in Virginia because the scope of the Commonwealth's authority exceeds that of the Corps'. Thus, appealing a JD successfully only removes one layer of regulation and does not clear the regulatory path to allow construction activities immediately after receiving a favorable decision from the court.

The Commonwealth's jurisdiction over waterbodies, to the extent it coincides with the Corps' jurisdiction, can go beyond the Corps' jurisdiction. *See Treacy v. Newdunn Associates, LLP*, 344 F.3d 407, 409, 412-13 (4th Cir. 2003). In fact, it does go beyond the Corps' jurisdiction. *Id.* The Virginia State Water Control Law creates state jurisdiction over *all* surface water, ground water, and wetlands, which is broader than the federal government's jurisdiction under the definition of waters of the U.S. in the Clean Water Act. Va. Code §62.1-44.3 ("State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands.); *cf Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (holding that "waters of the U.S." does not include isolated wetlands). With the passage of the Virginia Water Resources and Wetlands Protection Act, the General Assembly intended to exceed the jurisdiction of the Corps to protect waterbodies when they fell outside federal Clean Water Act protections. *See Treacy* at 412 ("environmentalists petitioned the Virginia General Assembly to fill the regulatory vacuum [left by two federal court decisions narrowing federal protections for Virginia wetlands]. Delegate L. Preston Bryant, Jr., responded to this call, and co-patroned a bill to provide the state with a comprehensive, nontidal wetlands permitting program."). Accordingly, it is important for local governments who are developing properties to realize that a successful appeal of a JD does not relieve the local government of all pre-construction permitting obligations because the protections afforded to Virginia waterbodies under state law encompass, and *exceed*, the protections afforded by Section 404 of the Clean Water Act.

Local Government Regulatory Programs Depend on JDs

JDs are primarily a tool for informing the federal 404 permitting process. However, when implementing their own regulatory programs, and in spite of the fact that regulation of Virginia waterbodies by the state and the Corps is not coextensive, local governments rely on JDs as an authoritative determination of site-specific environmental features when administering their own programs. Examples include the local government programs under the Chesapeake Bay Preservation Act ("Bay Act") and the Erosion and Sediment Control Law and the Stormwater Management Act. If a JD is being reviewed in federal court, there will be a delay in the local government's ability to administer these programs to the extent that they cannot move forward without an approved JD.

The Chesapeake Bay Preservation Act ("Bay Act") establishes regulations that are administered by local governments in "Tidewater Virginia" and allows local governments to incorporate JDs into local regulation of waterbodies. Tidewater Virginia is defined in the Bay Act as those localities east of the Interstate 95 corridor that are in the Chesapeake Bay watershed. Va. Code. §62.-44.15:68. There are 84 local governments in this defined area. "Local Government Liaison Network." The Bay Act requires these 84 Tidewater Virginia localities to adopt a local program implementing the Bay Act, which must include, among other things "[a] plan of development process prior to the issuance of a building permit to assure that use and development of land in Chesapeake Bay Preservation Areas is

accomplished in a manner that protects the quality of state waters." 9 VAC 25-830-60. In their plan of development, local governments may include a requirement that all site plans submitted by developers include the boundaries of environmental features identified in a JD from the Corps. If the program is designed with this requirement, the local government may be forced to delay approval of a site plan until an appeal of JD is resolved and the developer can meet the requirement of submitting a site plan or plat showing all boundaries for JD waterbodies. Another element of local government programs under the Bay Act is the use of JDs to confirm the Resource Protection Area (RPA) boundaries identified during site-specific evaluations for connected and contiguous wetlands. *See* 9 VAC 25-840-110 ("Local governments may accomplish [site-specific evaluations] either by conducting the site evaluations themselves or requiring the person applying to use or develop the site to conduct the evaluation and submit the required information for review."). If the JD is appealed by a landowner, the local government's RPA confirmation will be delayed until the JD issue is resolved. A delay in the RPA will also delay final site plan and plat approval because RPA boundaries must be shown on final plan or plat. 9 VAC 25-830-190(A)(4) ("Local land development ordinances and regulations shall provide for (i) depiction of Resource Protection Area and Resource Management Area boundaries on plats and site plans…").

Another way that JDs are utilized at the local level is under the Erosion and Sediment Control Law and the Stormwater Management Act, through which local governments have authority, delegated by the State Water Control Board, to manage stormwater runoff and soil disturbance during development. Under these programs, developers must obtain a land disturbance permit (also called a VSMP authority permit) from the local government for man-made changes to the land through clearing, grading, or excavating. Va. Code § 62.1-44.15:24. Before the locality is authorized to administer the Virginia Stormwater Management Program will issue a land disturbance permit, it may require that a developer to attest that he has secured all required permits. One such permit is a 404 permit, which, again, is issued on the basis of an approved JD from the Corps. Like in the examples above, if a JD is appealed, the issuance of a land disturbance permit at the local level will be delayed until the appeal is resolved and the developer can attest that he has obtained a 404 permit.

Because local governments incorporate JDs into their own regulatory schemes, those schemes are dependent on reliable, final JDs. If a JD is challenged, the JD and the boundaries of the waterbodies it identified are no longer final or reliable. Consequently, local government permitting and regulation, which depend on the correctness of Corps' JD, will grind to a halt while an appeal makes its way through the court system. If developers begin to file appeals routinely because of *Hawkes*, local governments will have to evaluate whether, in the exercise of their regulatory powers, they should continue to rely on JDs for identification of environmental features in its plan of development process. Without the option to rely on the Corps' JDs, local governments would have to assume field work and administrative duties from the Corps and begin independently evaluating every waterbody on every piece of property being developed in its jurisdiction. This new volume of work would require additional staff and monetary resources to fill the void left by the Corps. Thus, *Hawkes* has shed light on one weakness in Virginia's regulation of dredging, excavating, and filling of state waters: that by relying on JDs in their own permitting and planning processes, administration of local regulatory programs are beholden to any JD appeal, which necessarily generates creates uncertainty over the reliability of that JD until the appeal is decided.

A New Risk of Third Party Challenges

It is understood, after *Hawkes*, that governmental landowners can challenge a JD affecting their property, but one unintended consequence of the decision is the opportunity for *third parties* to challenge JDs. Groups like homeowners' associations, environmental groups, and other local NGOs whose cause relates to a specific waterbody or piece of property (e.g., Friends of Reedy Creek) may have an interest in a JD for waterbodies on government-owned

property. Of course, the reason that such a group would want to challenge a JD is because such an appeal will delay the development.

For example, a local government may request a JD for a parcel that contains wetlands adjacent to a stream because it intends to construct a new government building on the parcel. The stream is used by the public as a kayaking and fishing destination. A local group is concerned that impacts to the wetlands during development will impact their enjoyment and use of the adjacent stream. Before *Hawkes*, the group would have to wait until a 404 permit was issued to contest the development of the property and any perceived impacts on the stream. Now because of *Hawkes*, if the JD is approved, the local group could argue it has an immediate right to challenge the JD even though it is not an owner of the parcel.

Just as before *Hawkes*, the success of the group's suit will depend on whether it can prove it has standing. To satisfy the "case or controversy" requirement of Article III of the U.S. Constitution, for all federal litigation, a plaintiff must have standing to sue. *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 472 (1982). Under the federal APA, "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof" and the courts' review is limited to final agency actions for which no adequate remedies exist other than judicial review. 5 U.S.C. §§ 702, 704. More specifically, in an environmental case, "a plaintiff need only show that he used the affected area, and that he is an individual 'for whom the aesthetic and recreational values of the area [are] lessened' by the defendant's activity." *Piney Run Preservation Ass'n v. Cty. Com'rs of Carroll Cty. Md*, 268 F.3d 255, 263 (4th Cir. 2001) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735, (1972)); *see also State Water Control Bd. v. Crutchfield*, 265 Va. 416, 427 (2003) (adopting the *Piney Run* standard). Thus, it is not particularly difficult for a homeowners' association or other group to demonstrate it has standing to challenge a final agency action. Of course, now under *Hawkes*, JDs are final agency actions. Time will tell whether groups decide to appeal JDs as a means of protecting environmental features they care about at a much earlier stage in the development process. In the meantime, local governments should be aware that *Hawkes* has created the opportunity for third party challenges to their development projects at an earlier step in the permitting process than developments undertaken pre-*Hawkes*.

A New Option for Litigation

One potential benefit of *Hawkes* for local governments that wish to challenge a JD is that it provides a new forum-shopping opportunity. The local government-landowner that is filing a permit application for federal and state permits must get an approved JD before those permits can issue. Once the JD is approved, the local government now, after *Hawkes*, has three appeal options. First, under the federal APA, it could file an appeal in federal court for judicial review of the JD as soon as the JD is approved. Second, it could wait until a state Virginia Water Protection permit is issued and file an appeal in state court for a review of the wetlands boundaries adopted by the State Water Control Board, which were based on the Corps' JD. The issuance of a permit by the State Water Control Board is a final agency action under state law and any landowner aggrieved by the decision is entitled to judicial review. Va. Code § 62.1-44.29. Third, he could wait until the federal permit is issued and file an appeal in federal court This is the option the peat miner in *Hawkes* was attempting to avoid, but it remains an option after Hakes because the issuance of a permit is a final agency action distinct from approving a JD.

After the *Hawkes* decision, Virginia local government-landowners have an earlier opportunity to weigh the federal appeals process against the state appeals process. There may be advantages to bringing a JD appeal to federal court before a permit is issued. Or perhaps, under case-specific circumstances, the matter would be best tried before a state court under state law. Either way, *Hawkes* provided one more option for judicial review that can influence litigation strategy in the event of an unfavorable JD.

CONCLUSION

The U.S. Supreme Court's decision in *Hawkes* that JDs are final agency actions subject to appeal under the federal APA has created several unfavorable results for Virginia local governments. Namely, when developing properties, localities are still subject to state and local requirements that exceed the jurisdiction of the Clean Water Act; local government programs rely on JDs and will be forced to halt their approval processes while a JD is appealed in federal court; and third parties who oppose developments by local governments may now challenge those developments at an earlier time. However, Hawkes does provide a new option for challenging the Corps when a local government disagrees with its findings, allowing local governments a new tool for litigation. On balance, the Supreme Court's decision that JDs are final agency actions that can be appealed does not provide a significant benefit to local governments in Virginia.

Nonetheless, the downsides of *Hawkes* will only be realized if developers and third parties decide to exercise the right to appeal JDs. It is too early to tell whether these groups will decide to utilize this new option. In the meantime, local governments would benefit from a legal review of their ordinances and regulatory programs to identify instances where JDs are utilized to determine if an appeal would significantly impact their ability to administer that program. In addition, local governments, in their own construction projects, should be mindful of their new right under *Hawkes* to appeal JDs they disagree with.