

Construction and the Law

United States v. Hawkes: A Win for Developers Against the Army Corps



Michael Bosse is a shareholder at Bernstein Shur in Portland, Maine. He is the chair of the firm's Construction Law Practice Group and recently authored a book entitled "Building the Construction Case: A Blueprint for Litigators." Michael can be reached at mbosse@bernsteinshur.com.

In a new United States Supreme Court opinion issued on May 31, 2016, the United States Supreme Court indicated that land owners seeking permits to make permitted discharges under the Clean Water Act can now appeal much earlier than they otherwise would be able to prior to this decision. This new decision from the high court is an important ruling for developers and those working with them in interacting with permitting regulations such as those present under the Clean Water Act.

This case arose as Hawkes had three companies engaged in peat mining in Minnesota. He was mining the peat, an organic material that forms in waterlogged ground such as wetlands and bogs, and can also provide structural support and moisture for smooth stable greens for golfers.

Peat mining also can have significant environmental and ecological impacts and therefore is regulated by federal and state environmental protection agencies such as the Army Corps of Engineers. Hawkes owned a 530-acre tract that included wetlands along with high quality peat.

In December 2010, he applied to the Army Corps of Engineers for a permit for the property that allowed for the discharge of dredged or fill material into navigable waters. The corps indicated over the course of several communications that the permitting process would be very expensive and would take several years to complete, and that the cost expended in making assessments of various features of the property would exceed \$100,000. In February 2012, however, the corps also issued

an approved jurisdictional determination stating that the property contained waters of the United States as the wetlands, in the opinion of the corps, had a nexus to the river called Red River of the North, and those required a Clean Water Act permit. Hawkes appealed the jurisdictional determination, and the regional corps commander later reaffirmed the original conclusion that Hawkes would have to procure a permit. Hawkes then sought judicial review of the jurisdictional determination in federal court. The Federal District Court dismissed the case indicating that the jurisdictional determination was not a final agency action and therefore the District Court had nothing that it could currently review and lacked jurisdiction over the matter. The Court of Appeals for the Eighth Circuit concluded otherwise and the United States Supreme Court granted certiorari.

On appeal to the United States Supreme Court, the Army Corps of Engineers argued that the jurisdictional determination that it had made that Hawkes' property was subject to the Clean Water Act was not a final agency action and could not be reviewed. The United States Supreme Court disagreed. The Supreme Court concluded that the approved jurisdictional determination was actual decision-making by the corps. The corps indicated that it was issued after extensive fact-finding regarding the physical and hydrological characteristics of the property and is typically not revisited if Hawkes was to proceed forward to try to get a permit.

The affirmative jurisdictional determina-

tion but made by the corps could have had serious legal consequences for Hawkes. For instance, the lack of review would have deprived Hawkes of some safe harbor provisions that would have protected him during the permitting process that otherwise would subject him to civil and criminal penalties if he was in violation of the act before he had a permit approved.

Although the corps argued that there were other alternatives to allowing Hawkes to proceed to court, the United States Supreme Court found those alternatives to be inadequate. First, the corps argue that Hawkes could discharge fill material without the permit and could argue that no permit was required or he could apply for the permit and seek judicial review if he was later dissatisfied with a denial of the permit. As to the first issue, the court concluded that it had long held that parties need not wait enforcement proceedings before challenging a final agency action when there is a serious risk of criminal and civil penalties. If Hawkes had discharged fill material without a permit in the mistaken belief that the property did not contain waters covered by the Clean Water Act, he would expose himself to civil penalties of up to \$37,500 a day never mind criminal liability.

The court also concluded that Hawkes should not be placed in a position where he would have to take that kind of chance or risk while engaging in a lengthy and costly permitting process at the same time. That leads to issue two, where the corps had already indicated to Hawkes that the permit process with arduous, expensive and long. The court finally concluded that because the approved jurisdictional determination already had been made, there was no need for Hawkes to have to expend that much time and that much money in order to seek judicial review of the decision that the corps already had effectively made.

This is an important decision for people developing land that may be near wetlands covered by either the Federal Clean Water Act or similar state acts, and for construction companies working with landowners or developers on such projects. This will allow landowners to appeal decisions made much earlier in the process, so as to either allow a development to go forward in a timely fashion, or to declare the development dead or unfeasible at a much earlier time.



**BERN
STEIN
SHUR**