

How Does the Supreme Court's Hawkes Decision Affect Dredge and Fill Permitting Under the Clean Water Act?

By: John J. Lormon | 619.515.3227 | john.lormon@procopio.com

There are many incentives for land developers to challenge the government's determination of what are "waters of the United States" under the Clean Water Act—mainly the prospective savings of significant dollars in permits, mitigation and fees.

This past May, the Supreme Court ruled in the case of *US Army Corps of Engineers v. Hawkes Co.* that federal determinations of protected waters are subject to early judicial review—providing for judicial review without waiting for final agency action.

Hawkes Co., Inc. (Hawkes) was interested in harvesting peat from wetlands in northern Minnesota, and in 2010 applied to the Army Corps of Engineer (Corps) for permits to extract peat from the land. Hawke's plan derailed when the Corps argued that the property contained waters of the United States or "navigable waters" that are protected under Section 404 of the Clean Water Act.

The issue in this case was whether Hawkes could challenge the Corps' claim without having to wait until the Section 404 permit was issued or denied by the Corps, or whether Hawkes must go through the full permit process before they can bring a lawsuit.

The Supreme Court's ruling on the matter opens the door for landowners or land developers to challenge the waters of the United States "jurisdictional determination" without having to wait until the Section 404 full permitting process, which can take a year or more of additional time, is completed.

This latest ruling will prove helpful to the development community where challenges to jurisdictional determinations at an earlier point in time are deemed appropriate. Time will tell if this opportunity will result in more challenges to Corps jurisdiction. And, landowners and developers still have to address other environmental and natural resource permitting obligations if any apply to the project.

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