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Chalk one up for property rights. The U.S. Supreme Court just changed the playing field for wetland permitting, notably tipping the balance toward landowners and developers seeking clarification of whether their planned activities require Army Corps of Engineers authorization. Moreover, in somewhat of a rarity in environmental cases, the court did so unanimously.

The Clean Water Act requires a landowner to obtain a Corps permit before working in “waters of the United States,” a phrase that defines the reach of the Act. Contrary to what one might expect, it often is not clear whether a property contains such waters. Therefore, the Corps has long provided property owners Approved Jurisdictional Determinations that state the agency’s definitive position on whether a project area contains protected waters.

If the Corps determines that a planned project area does not contain protected waters (a negative JD), the project can proceed without a permit. A negative JD generally gives the property owner a five-year “safe harbor” for work in the evaluated area. However, if the Corps determines that the area contains protected waters (a positive JD), the landowner typically seeks Corps authorization before proceeding.

In this case, a company in Minnesota sought to expand its existing peat-mining operation to nearby lands. Before doing so, it requested an Approved JD from the Corps for certain wetlands in the expansion area. The Corps issued a positive JD based on the wetlands’ “significant nexus” to a river some 120 miles away. Moreover, the Corps indicated to the company that the required permitting process would take years and be very expensive.

Corps regulations specifically allow a party to appeal an Approved JD to a higher level within the Corps. The company pursued such an appeal, but the Corps affirmed its original determination. The company then sought review of the Approved JD by a court.

For years, courts have supported the Corps’ position that Approved JDs are not judicially reviewable. This recently began to change, causing inconsistencies among the lower courts. The Supreme Court accepted this case to definitively resolve the issue.

The authority of a court to hear such an appeal turns in part on whether the agency action at issue — here, the Approved JD — has legal consequences. The Corps has long argued that Approved JDs effectively have no legal consequences because landowners still have the options of applying for a permit and appealing any unsatisfactory results, or proceeding without a permit on the theory that the Corps’ Approved JD is faulty.

All eight Supreme Court justices (the late Antonin Scalia would have made it nine) rejected the Corps’ position, finding the agency’s articulated options inadequate. The court observed that getting a permit can be time-consuming and expensive, citing a study from 1999 showing that permits, such as the one required here, take an average of 788 days and \$271,596 to obtain. (These figures have likely risen significantly since then.) Moreover, a positive JD deprives landowners of the five-year safe harbor, exposing them to potential civil penalties of up to \$37,500 per day, and even higher criminal fines and imprisonment. The court found these to be tangible legal consequences that make Approved JDs appropriate for judicial review.

The Corps’ response to this decision is difficult to predict. Since the Clean Water Act does not require the Corps to issue Approved JDs, the agency could simply stop the practice. However, one justice warned the

Corps about such a move.

In a concurring opinion, Justice Anthony Kennedy stated that the Clean Water Act, especially without the JD procedure, raises “troubling questions regarding the government’s power to cast doubt on the full use and enjoyment of private property throughout the nation.” In other words, dropping the practice of providing Approved JDs may prompt heightened scrutiny of the Corps’ authority under the Act. The court will likely soon have an opportunity to scrutinize the Corps’ Clean Water Act authority when, as most expect, it reviews a controversial rule defining which “waters” the Act protects.

Assuming the Corps continues its practice of issuing Approved JDs, this decision will change the dynamics between the Corps and landowners. Landowners will gain leverage in the JD process. The prospect of a resource-consuming judicial appeal will make the Corps less likely to push the envelope on JDs and more likely to seek common ground. Landowners should carefully consider the legal implications of this case, and how it ties into other recent Clean Water Act developments, before discussing planned projects with the Corps.

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