The Supreme Court today dealt another blow to the Obama administration in a Clean Water Act case. The Court's unanimous opinion in *United States Army Corps of Engineers v. Hawkes Co.*, No. 15-290, addressed the finality of an Army Corps "approved jurisdictional determination" (JD) on whether a particular parcel of property contains "waters of the United States" and is therefore subject to Clean Water Act section 404 permitting requirements. Respondents, three peat mining companies in Minnesota, argued that the Army Corps JD is a final agency action judicially reviewable under the Administrative Procedure Act (APA). The Court agreed. Chief Justice Roberts penned the opinion. Justice Kennedy joined in full and wrote a concurring opinion (joined by Justices Thomas and Alito). Justice Kagan joined in full and wrote a concurring opinion in response to Justice Ginsburg, who concurred in part and concurred in the judgment.

Coastal Wetlands at Parker River National Wildlife Refuge in Newburyport, MA. Credit: Kelly Fike/USFWS.

An "approved jurisdictional determination" (JD) that a property contains "waters of the United States" means the property owner must obtain a Clean Water Act permit before discharging pollutants on the property. Approved JDs are valid for five years and will lead to a significant time and monetary investment in the permitting phase. The average project applicant for a permit like that at issue in this case spends almost 800 days and $275,000 in completing the permitting process. So it is understandable that property owners might seek judicial review of an approved JD. Allowing judicial review at this stage in the permitting process, however, could also flood the Army Corps and EPA with time-delaying and resource-sucking lawsuits.

In a win for property rights advocates, the Court concluded that an approved JD is judicially reviewable under the APA because it is a final agency action and there exist no adequate alternatives for challenging it in court.

In contrast to a preliminary JD, an approved JD constitutes a final agency action because it satisfies both conditions under the *Bennett* test. First, an approved JD "marks the consummation" of the Army Corps' extensive decisionmaking process on whether the applicant's property contains "water of the united States." Second, "direct and appreciable legal consequences" flow from an approved JD. A negative JD, the Court determined, is 1) binding on the federal government in litigation (the Army Corps challenged this binding nature of JDs) and therefore grants property owners a five-year safe harbor from civil enforcement proceedings, and 2) limits the potential liability a landowner faces via citizen suits for discharging without a permit. Therefore, the Court reasoned, an approved JD has the legal consequence of denying property owners the five-year safe harbor and serves as a warning that discharges without a permit risk significant criminal and civil penalties.

The Court also rejected the Army Corps' contention that Respondents have two alternatives to APA review in court: discharge fill material without a permit and challenge the permit requirement in an enforcement action, or apply for a permit and seek judicial review if unsatisfied with the result. The Court determined that the potential civil and criminal liabilities to which Respondents would be exposed under the first alternative and the high cost associated with the permitting process under the second alternative make these options inadequate. Consequently, approved JDs are judicially reviewable final agency actions.

From an environmental standpoint, Justice Kennedy's three-paragraph concurring opinion offers more food for thought. In what appears to be a gratuitous swipe at the Clean Water Act, Justice Kennedy opened by explaining, "[t]he following observation seems appropriate not to qualify what the Court says but to point out that, based on the Government's representations in this case, the reach and systemic consequences of the Clean Water Act remain a cause for concern. As Justice Alito has noted in an earlier case, the Act's reach is 'notoriously unclear' and the consequences to landowners even for inadvertent violations can be crushing." He then argued that a conclusion contrary to the Court's decision today would leave the "Act's ominous reach . . . unchecked." Justice Kennedy did not even concede that this "check" sufficiently limits the reach of the Clean Water Act, noting instead that "[t]he 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." Justices Alito and Thomas both joined this concurring opinion.

That three justices aggressively (and needlessly) questioned the Clean Water Act's reach in an opinion cannot bode well for the Obama administration's controversial 2015 Waters of the United States (WOTUS) rule. That rule is currently being litigated before the Sixth Circuit Court of Appeals, which is still resolving the merits briefing schedule. It will be interesting to see whether Justice Kennedy's concurrence influences the Sixth Circuit's decision on the merits. I imagine the Supreme Court will have the final say on WOTUS, but at least Justice Kennedy will have to wait awhile before taking another swipe at the Clean Water Act.