



## Supreme Court Ruling Pushes Back on Agency

June 2, 2016

The Supreme Court's unanimous ruling in the *U.S. Army Corps of Engineers v. Hawkes Co.* case may not bode well for the final disposition of the WOTUS rule. The complete opinion can be found here, [http://www.supremecourt.gov/opinions/15pdf/15-290\\_6k37.pdf](http://www.supremecourt.gov/opinions/15pdf/15-290_6k37.pdf). Although there is no direct "nexus" to the WOTUS Rule (the Rule will continue to be considered by the 6<sup>th</sup> Circuit), the strong reaction of the Justices does imply real concerns with the wetlands program. Justice Kennedy, whose opinion in *Rapanos* case led to the nexus ruling, was particularly concerned. In this case, involving a peat mining operation in Minnesota, regulators issued an approved jurisdictional determinations (JD) that an area of dry ground 120 miles from the Red River of the North was a navigable water. Based on the approved JD, the owners were left with no good choices under the current regulatory procedures. The Supreme Court ruling allows the property owners could go to court and obtain a "prompt judicial review."

### A Third Option to Two Bad Alternatives.

As noted in the Court's opinion, a regulatory agency's "final" action is reviewable under Administrative Procedures Act (APA) only if no adequate alternatives exist. The Corps contended that the respondents had adequate alternatives: they could either proceed without a permit or, suggesting that it was the Congressional intent, continue permitting efforts then seek judicial relief after completing the permit process. The Court disagreed totally and allowed a third option: allow respondents go to court and challenge the regulators' ruling of jurisdiction. By this decision, all the justices have agreed that landowners may go to court immediately to seek a court review. The decision is considered as strengthening property rights.

### Kennedy Opinion and Agencies' WOTUS Decisions

Justice Kennedy, joined by Justices Alito and Thomas, rendered a strong opinion that makes it clear he is not in agreement with agency's interpretation of his opinion in *Rapanos*. Referring to his opinion in this case as an "an observation", Justice Kennedy stated "...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." The Act, he further states, "...continues to cast doubt on the full use and enjoyment of private property throughout the Nation."

### WESTCAS and arid West Implications

This decision although directed at allowing court appeals of decisions based on the Clean Water Act does support the broader concerns that WESTCAS has made in comments on the WOTUS Rule. Particularly in the arid West, the potential to extent navigable waters determinations to remote and isolated waters is very real. The Justices unanimous decision recognizes that JD determinations are not a class to be considered "final ruling" under APA and, therefore, can be subjected to immediate court appeals. Further, Justice Kennedy has opined that the agency overreached in its interpretation and application of his "nexus" opinion. It follows that in future cases, Justice Kennedy may more clearly state and confine the "nexus" rule.

*It's not too late  
join us in Santa Fe!*



**WESTCAS**  
Western Coalition of Arid States