

If the requestor obtains judicial relief, the courts may award reasonable attorneys' fees and costs. There shall be a presumption in favor of awarding attorneys' fees and costs unless the municipality establishes that (1) the Supervisor found that it did not violate the law; (2) it reasonably relied in a published opinion of an appellate court of Attorney General opinion; (3) the request was intended to harass or intimidate; or (4) the request was made for a commercial purpose. The agency or municipality must waive any fees otherwise due to it for producing a record in the event the court award attorneys' fees and costs.

The court may also award punitive damages against the defendant agency or municipality in an amount of \$1,000 to \$5,000 if the requestor obtains judicial relief and has demonstrated that the agency or municipality "did not act in good faith"

#### **MMLA Priorities**

While the Act includes many of the Senate version's burdensome language, the compromise legislation does include several improvements advocated by MMLA including the requirement that requests be made in writing, the measurement of all timelines using business days, the exemption of smaller towns from the otherwise applicable fee reimbursement restrictions, the relief the Supervisor may grant if the request is frivolous or harassing and the maintenance of judicial discretion in the areas of attorneys' fees and damages.

While the MMLA favored the House language (particularly its emphasis on encouraging exhaustion of administrative remedies), the Act is a significant improvement over the Committee bill that was released last fall and up for quick action. If it was not for MMLA and MMA, the final package could have potentially been detrimental to local government and expose individuals to fines and penalties.

Burns & Levinson LLP, Massachusetts Municipal Association and MMLA will be co-sponsoring a forum on the new Act this fall. Please check [www.massmunilaw.org](http://www.massmunilaw.org) for details.

## **WATCHING WETLANDS LIKE A HAWKE: Good News, U.S. Supreme Court Enables Challenges of Jurisdictional Determinations**

*By: Kirsten Yerger, Intern, Robinson & Cole LLP  
and Dwight Merriam, Esq. of Robinson & Cole, LLP*

It is no easy task to identify what is and what is not a wetland.<sup>1</sup> The three-factor U.S. Army USACE of Engineers (USACE) and Environmental Protection Agency's (USEPA) test is hardly definitive: "Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."<sup>2</sup>

Municipal lawyers can very quickly find themselves up to their elbows in the jurisdictional muck when dragged into the wetlands delineation issues created not just by developers, but even by their own local governments making infrastructure and public facility improvements. No city or town solicitor wants to find their local government in the position of having violated federal law by damaging or destroying regulated wetlands. At the same time land is such a finite resource that solicitors want to help their communities make maximum use of it. Up until now, local governments were left in the intractable position of not being able to make timely challenges to disputes as to the limits of wetlands. But there is good news from the U.S. Supreme Court that benefits all of the stakeholders – developers, land owners, neighbors, advocacy groups, and of course state and local government.<sup>3</sup>

#### **The Clean Water Act**

The Clean Water Act (CWA) regulates specific land development by individuals, industrial and commercial facilities, and municipalities. Whether property can be

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Note: All the following references can be found at a single site: <http://tinyurl.com/HawkesResources>

1. Michael S. Klein, Michael W. Klemens & Dwight H. Merriam, *Where's Waldo? Finding Federal Wetlands After the Rapanos Decision*, 29 Zoning and Planning Report (2006)
2. <http://tinyurl.com/hb59a5a>
3. *United States Army Corps of Engineers v. Hawkes*, No. 15-290, (May 31, 2016) <http://tinyurl.com/ACOEHawkes>

developed at all often turns on regulation under CWA § 404 Dredge and Fill and consideration of whether there is a wetland.

The CWA regulates any “discharge” from a “point source” in to “waters of the United States;”<sup>4</sup> however, this standard is often met with much uncertainty. Over the years the USEPA and USACE have attempted to broaden the reach of the Clean Water Act, specifically the definition and application of the term “navigable waters.” While there is not much argument over what are traditional navigable waters (TNWs), i.e. those that are navigable-in-fact, those waters that are non-TNW, such as wetlands, are often the subject of confusion for those planning development. Wetlands wonks will call that an understatement.

In 2004-2005 the USACE, along with the USEPA, created a standardized system to document jurisdiction determinations (hereafter JDs), to alleviate the question of whether a body of water is in fact navigable.<sup>5</sup> A JD is defined as a “determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. 1344).”<sup>6</sup>

The question of whether or not a body of water is “navigable” and subject to regulation remained controversial up to, and after, the 2006 Supreme Court decision in *Rapanos v. U.S. and Carabell v. U.S. (Rapanos)*. *Rapanos* resulted in a plurality 4-1-4 opinion, establishing that non-TNWs and wetlands adjacent to non-TNWs are subject to CWA regulation if:

- (1) if the water body is relatively permanent, or if the water body is a wetland that directly abuts (e.g., the wetland is not separated from the tributary by uplands, a berm, dike, or similar feature) a relatively permanent water body (RPW), or (2) if a water body, in combination with all wetlands adjacent to that water body, has a *significant nexus* with TNWs. (*emphasis added*)<sup>7</sup>

### The Hobson’s Choice

After the decision in *Rapanos* the USEPA and the USACE prepared a memorandum, “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States*”,<sup>8</sup> in an attempt to provide guidance for identifying those waters which are categorically subject to regulation under the CWA, i.e. TNWs and waters adjacent to TNW, and those that require a case-by-case review and jurisdictional determination.

In addition to that Clean Water Act Jurisdiction memorandum, the USACE and USEPA are bound by the Memorandum of Agreement: Exemptions Under Section 404(F) of the Clean Water Act §VI–A (1989) (MOA). The MOA established that a JD is valid for five years.<sup>9</sup> In effect, the USACE and USEPA are barred, for five years, from bringing an action under the CWA with regard to an area that received a negative JD. In the classic what-the-government-gives-with-one-hand-it-takes-away-with-the-other, the MOA also effectively created a five year zone of potential liability for a positive JD. Applicants with a positive JD who believed the USACE or USEPA to be wrong had no real choices –they could abandon their projects, or go on with their work in the disputed areas risking major criminal and civil penalties, or subject themselves to the almost-always lengthy and expensive permitting process.<sup>10</sup>

### SCOTUS Swoops In with Hawkes

While the JD, and the decision in *Rapanos*, may have removed some question of whether a body is or is not jurisdictional, before the recent Supreme Court decision in *United States Army Corps of Engineers v. Hawkes* the JD was not reviewable in court. Prior to *Hawkes*, the United States Court of Appeals for the Fifth Circuit in *Belle Co. v. U.S. Army Corps of Engineers*,<sup>11</sup> rejected the notion that a JD is reviewable in court under the Administrative Procedure Act, stating that a JD is not a final agency action. The Fifth Circuit held that a JD was not an action “by which rights or obligations have

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4. 33 U. S. C. §§1311(a), 1362(7), (12)

5. U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook <http://tinyurl.com/jro663e>

6. 33 CFR § 331.2

7. U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook <http://tinyurl.com/jro663e>; Dwight H. Merriam, *Up the Creek Without a Paddle: The U.S. Supreme Court Decides Little in Deciding Rapanos and Carabell*, 55 American Planning Association, Planning and Environmental Law 3 (2006)

8. <http://tinyurl.com/RapanosJurid>

9. EPA, Memorandum of Agreement: Exemptions Under Section 404(F) of the Clean Water Act §VI–A (1989)

10. *United States Army Corps of Engineers v. Hawkes*, No. 15-290, 2016 U.S. LEXIS 3489 (May 31, 2016)

11. *Belle Co., L.L.C. v. United States Army Corps of Eng’rs*, 761 F.3d 383 (5th Cir. 2014) <http://tinyurl.com/BelleCo>

been determined, or from which legal consequences will flow,”<sup>12</sup> and therefore is not reviewable in court. However, a circuit split ensued when the Eight Circuit held that a JD is a final agency action and therefore reviewable in court reversing the District Court for the District of Minnesota in *Hawkes Co. v. United States Army Corps of Engineers*.<sup>13</sup>

In a unanimous 8-0 decision, the Supreme Court resolved the circuit split and determined that JDs are final decisions reviewable in Court. While the decision came with multiple concurring opinions, Chief Justice Roberts stated that a JD meets the two requirements set forth in *Bennet v. Spear* that the action is “the consummation of the agency’s decisionmaking process” and also “one by which rights or obligations have been determined, or from which legal consequences will flow”<sup>14</sup> and is therefore a final agency action subject to judicial review.<sup>15</sup>

Ultimately the Court stated that a JD is the result of the USACE’s decision making process on that question, and that the “definitive nature of approved JDs” as well as the applicable MOA gives rise to “direct and appreciable legal consequences.” The Court also noted that there is no adequate alternative to APA review in court.<sup>16</sup> An open question is whether the USACE and USEPA might negate the Court’s decision by issuing a new Memorandum of Agreement that steps back from such “direct and appreciable legal consequences” thereby making them in some way less definitive.

#### What’s Sauce For The Goose Is Sauce For The Gander

*Hawkes* not only created a timelier path to a remedy for private landowners and developers, but also for municipal leaders who are equally exposed to potential CWA liability. It is important that municipalities understand the effect of *Hawkes* on both the land use approval process, as well as instances in which municipalities are applicants themselves.

Municipalities are the ultimate arbitrators of the land use application and approval process. A landowner who intends to develop in a wetland area is almost certain to face requirements under the CWA. Now, post-*Hawkes* where an applicant plans to develop, has received a

positive JD, this JD may be reviewed in federal court without being forced into Procrustean Bed of the § 404 Dredge and Fill permitting process. This immediate challenge to the JD in many cases may expedite the I and use approval process by removing the need to obtain a permit or, just as importantly, by resolving the jurisdictional dispute and forcing a modification or abandonment of the development.

Likewise, municipalities often times are applicants themselves. When a municipality plans to build a new school, expand a police station, run a sewer line cross-country, or widen a local road, it must comply with the applicable federal statutes. If those improvements happen to fall within an area that may be subject to CWA regulation, the municipality may now find itself, just like any other developer, headed off to court to resolve a disagreement with the regulators over a positive JD. *Hawkes* is good for all concerned and it was a long time in coming. The net result should be more speed and certainty in development, less time and money spent in fighting over projects underway in disputed areas, and better protection for the valuable wetlands resources so critically important to sustainability.

## MUNICIPAL CASE LAW UPDATE

### SUZANNE PALITZ, TRUSTEE V. ZONING BOARD OF APPEALS OF TISBURY, ET AL. SJC-11678 – March 3, 2015

By: Carol Hajjar McGravey, Esq. Urbelis & Fieldsteel, LLP

In this case, the Supreme Judicial Court considered whether a division of land under G.L. c. 41, §81L (the “existing structures” exemption to the Subdivision Control Law) confers “grandfather” status on the structures on the lots, protecting them against new zoning nonconformities created by the division of the lots.

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12. *Belle Co.* at 9

13. *Hawkes Co. v. United States Army Corps of Eng’rs*, 782 F.3d 994 (8th Cir. 2015) <http://tinyurl.com/Hawkes8thCir>

14. *Hawkes* at 5

15. *Hawkes* at 8

16. *Hawkes* at 8