AMERICAN BAR ASSOCIATION
Section of Environment, Energy, and Resources

# Special Committee for Young Lawyers Newsletter

**Vol. 2, No. 2** **August 2016**

## MESSAGE FROM THE CHAIR

Mathew Todaro

As the ABA year nears its close, it is worth looking back on some of the largest successes the Special Committee on Young Lawyers (committee) has had. The committee hosted three exceptional webinars focusing on practice development, each chocked full with engaging panelists dispensing concrete and practical advice. The committee also teamed up with the ABA's Young Lawyers Division on Energy, Environment, and Resources to publish a joint newsletter, likely the first of its kind. Additionally, the committee launched an interview initiative aimed at pairing the Section's young lawyers with seasoned veterans to conduct informative interviews published on the Section's podcast channel. The committee also worked to shape the programming at SEER's upcoming Fall Conference in Denver, Colorado, to include sessions aimed at skills development for young lawyers along with novel activities such as an early morning fun run. And last, but certainly not least, the committee began branding itself as "SCYLs," (pronounced "Skills,") and the name, for good reason, is starting to stick.

As for the newsletter, just as the prior edition, this newsletter is full of exceptional content. This edition features a timely article on TSCA reform by a leading industry expert, an analysis of how and when species are delisted under the Endangered Species Act, an examination of the latest wrinkle in the ongoing Clean Water Act jurisdiction saga, and essential tips for business development for young lawyers. We hope that you find value in this and every edition. If you would like to publish an article in a future newsletter, please contact me for additional details (mtodaro@verrilldana.com).

Finally, I would like to conclude by thanking each member of this year's committee. In addition to our programming successes, our committee operated as a team of young professionals dedicated to forwarding the goals of the Section and at the same time helping each other become stronger in our various practices. In my opinion, this type of camaraderie exemplifies the true value of SEER, especially for young lawyers. You all have my sincere thanks and gratitude.

## Join a Section Committee

**The Section offers 33 substantive committees related to environmental, energy, and natural resources law.**

**Joining enables you to receive announcements of electronic newsletters and communications geared towards your specific areas of interest.**

**There are NO additional costs for Section members to join a committee, so join today!**

**www.ambar.org/EnvironCommittees**
**@ABAEnvLaw**

**Special Committee for Young Lawyers Newsletter**
**Vol. 2, No. 2, August 2016**
**Gary Steinbauer and Keith Zahniser, Editors**

*In this issue:*





AMERICAN BAR ASSOCIATION
**SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES**

## CALENDAR OF SECTION EVENTS

October 5-8, 2016
**24th Fall Conference**
Westin Denver Downtown
Denver, CO

October 26, 2016
**Environmental and Workplace Safety Criminal Enforcement Conference**
Westin City Center
Washington, DC

March 28-29, 2017
**35th Water Law Conference**
Loews Hollywood Hotel
Los Angeles, CA

March 29-31, 2017
**46th Spring Conference**
Loews Hollywood Hotel
Los Angeles, CA

October 18-21, 2017
**25th Fall Conference**
Baltimore Waterfront Marriott
Baltimore, MD

**For full details, please visit www.ambar.org/EnvironCalendar**

## TSCA REFORM: WHAT EVERY YOUNG LAWYER SHOULD KNOW

Lynn L. Bergeson

If you think that the revisions to the Toxic Substances Control Act (TSCA), referred to as H.R. 2576, the Frank R. Lautenberg Chemical Safety for the 21st Century Act, signed into law by President Obama on June 22, 2016, do not impact you professionally, think again. TSCA reform impacts virtually every business sector in the United States, including the wide range of practice areas that American Bar Association (ABA) Young Lawyers members work in—enforcement defense, mergers and acquisitions, tort and product liability, and business counseling, among other areas.

### TSCA Reform: What Just Happened?

TSCA is the federal law that authorizes the U.S. Environmental Protection Agency (EPA) to regulate the importing, manufacturing, and processing of industrial chemical substances, defined to include nearly every industrial chemical going into a manufacturing process for a finished good. TSCA's implementation has long been hampered by the lack of a clear mandate to prioritize, evaluate, and regulate the 62,000 plus chemicals originally "grandfathered" under TSCA (and, thus, beyond EPA's scope for pre-commercialization review) in the mid-1970s. TSCA also lacked clear legal authority effectively to compel the testing of these chemical substances. This meant that thousands of chemical substances used daily in as many manufacturing processes have never been assessed under TSCA for their impacts on human health or the environment.

### The New and Improved TSCA

The rules of engagement in the chemical world as we know it changed dramatically on June 22, 2016. Lawyers laboring under the misimpression that TSCA is for "chemical producers" only, and that they need not concern themselves with that "chemical law," are mistaken. The new TSCA fundamentally revises and greatly expands EPA's authority and will improve public health protection and restore much of the public's confidence in chemical safety, a regrettable victim of the previous TSCA's deficits. The law shifts the burden of demonstrating chemical safety to chemical manufacturers, processors, and manufacturers of the finished goods that contain them, and away from EPA proving the opposite. Key provisions include:

- Mandating safety reviews for chemicals in commerce;
- Eliminating the challenging "least burdensome" requirement for the assessment of chemicals in commerce that for years prevented EPA from taking meaningful action on chemicals in commerce;
- Establishing a health-based safety standard, and authorizing the consideration of cost in developing risk abatement measures;
- Requiring the protection of vulnerable populations, including children and pregnant women;
- Limiting the ability of entities to claim information as confidential, and authorizing the sharing of certain confidential information with states and first responders, as necessary;
- Establishing judicially enforceable deadlines by which EPA must act to implement the law;
- Preserving the role of states to regulate chemicals as balanced against the need for a clear and centralized federal chemical management law; and
- Requiring EPA to prioritize its review of chemicals that are persistent and bioaccumulative, and that are known carcinogens and highly toxic.

### Impacts of the New TSCA

Here is what Young Lawyers members need to know about how the new law works, when these impacts will occur, and how best to be prepared for them.

First, know the law. While long and detailed, nothing beats reading the original text of that which Congress has penned.

Second, know which chemicals are core to your clients' business. The new law mandates that EPA prioritize and evaluate "high priority" chemicals according to an aggressive and judicially enforceable schedule. EPA's Work Plan for Chemical Assessments list of chemicals is a must-read and, if this program is unfamiliar to you, it would be helpful for you to review EPA's TSCA Work Plan for Chemical Assessment website (*available at* https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/tsca-work-plan-chemicals). EPA's review and evaluation of these chemicals, and other "high priority chemicals" will have significant impacts on the chemicals reviewed, their uses and applications, and even their availability.

Third, reassess confidential business information (CBI) claims and qualify new claims carefully. Transparency is the name of the game and the new law embraces the right-to-know mind-set, which makes it harder to assert and sustain CBI, and requires claims substantiation. This process is not a gimme, and will take time and resources to do it well and comprehensively.

Fourth, expect more chemical testing. The new TSCA will result in more testing of chemicals as EPA now has "order" authority to compel testing. It will be important to assess product liability coverage and related insurance issues, among many other legal and business considerations.

Fifth, focus on the upside and seize opportunities to innovate new products to fill the inevitable chemical product deselection void. Lawyers can be instrumental in using the new law to encourage innovation and favorable marketing that accompanies product ingredients that are more sustainable and less environmentally consequential than incumbent chemicals, and to help inspire the business benefits that derive from these actions.

Sixth, engage robustly in the many rulemakings that the new law requires. Implementation will take years and require dozens of rulemakings. Counsel need to understand the implications of rulemakings, and to know which milestones are critically important to clients.

## Conclusion

As TSCA has now been reformed, it is time to think strategically and prepare to engage in the many initiatives that the new law requires—the collective result of which will fundamentally revolutionize chemical management in the United States. This is a critically important challenge and opportunity that requires counsel critically to assess clients' product lines' chemical feedstocks, to prepare for the impacts of the new law, and to seize opportunities for change by innovating in ways that improve product safety.

**Lynn L. Bergeson** *is Managing Partner of Bergeson & Campbell, P.C. (B&C®), a Washington, D.C., law firm focusing on conventional, nanoscale, and biobased industrial, agricultural, and specialty chemical product regulation and approval matters, environmental health and safety law, chemical product litigation, and associated business counseling and litigation issues. She is President of The Acta Group (Acta®), with offices in Washington, D.C., Manchester, UK, and Beijing, China, and President of B&C® Consortia Management, L.L.C. (BCCM), with offices in Washington, D.C.*

## DEBUNKING THE DELISTING MYTHS: WHAT'S WORKING AND WHAT ISN'T

Stephanie N. Clark, Ashley J. Remillard, and Sarah C. Wells

In a political climate increasingly focused on endangered species issues, and perhaps in response to criticism that once a species is listed under the Endangered Species Act (ESA) it is never removed, the Obama administration often touts its ESA successes. The administration routinely cites to the fact that it has delisted more endangered and threatened species due to recovery than any other administration. In May 2015, the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (collectively, the "services") announced four broad goals intended to improve the effectiveness and flexibility of the ESA. See https://www.fws.gov/news/ShowNews.cfm?ref=us-fish-and-wildlife-service-noaa-propose-actions-to-build-on-successes-of&_ID=34998. In doing so, the services noted the number of delistings based on recovery—including the Virginia northern flying squirrel, 78 Fed. Reg. 14,022 (Mar. 4, 2013), and brown pelican, 74 Fed. Reg. 59,444 (Nov. 17, 2009)—and proclaimed a goal of focusing agency resources on achieving more successes. More recently, in May 2016, the Council on Environmental Quality (CEQ) published "Wildlife Wins: Obama Administration Successes in Protecting Our Nation's Species" commemorating the administration's "99 wildlife wins" of species' recoveries, delistings, prevented listings, and downlistings, including the iconic Louisiana black "Teddy bear." See https://www.whitehouse.gov/sites/default/files/wildlifewinsfinal.pdf.

### The Reality of Delisting

Review of the entire record of listings and delistings indicates, however, that the total number of listed species is growing, not shrinking. For example, in 2015, FWS listed 30 species, while only delisting two—the Delmarva fox squirrel, 80 Fed. Reg. 70,700 (Nov. 16, 2015), and the Oregon chub, 80 Fed. Reg. 9126 (Feb. 19, 2015). In fact, there are many instances in which the services decline to remove a species from the list of endangered and threatened species. In addition, while delistings based on recovery are publicly celebrated—and rightly so—it often seems forgotten that ESA regulations also provide for delistings in situations where a species has been extirpated or the initial listing of the species was in error.

Pursuant to the ESA, the determination of whether to list a species must be based on any one or a combination of the following factors: (1) the present or threatened destruction, modification, or curtailment of habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; and (5) any other natural or man-made factors affecting the species' existence. 16 U.S.C. § 1533(a)(1). Further, a species may be delisted only if the best scientific and commercial data available substantiate that a species is neither endangered nor threatened for one or more of the following reasons: (1) extinction; (2) recovery; or (3) original data for listing classification, or interpretation of such data, was in error. 50 C.F.R. § 424.11(d). While extinction and error are expressly set forth in the regulations as valid reasons for delisting a species, in practice, the services are often disinclined to utilize these options.

For example, in 2004, FWS delisted two bird species native to Guam and the Northern Mariana Islands that were originally listed in the late 1970s and early 1980s. 69 Fed. Reg. 8116 (Feb. 23, 2004). Despite extensive surveys and no sightings recorded after 1984, it was not until 20 years later that FWS delisted the species due to extinction. In delisting both species, FWS noted that local protections remained in place—a curious thing to note for extinct species. This appears to be one of only 12 instances in which the services have used the extinction basis for delisting. And, even when used, the services appear to require decades of data demonstrating extinction. *E.g.*, 73 Fed. Reg. 63,901 (Oct. 28, 2008) (Caribbean monk seal); 48 Fed. Reg. 46,336 (Oct. 12, 1983) (Santa Barbara song sparrow).

Likewise, it is often difficult to convince the services that a species was improperly listed in the first place. One example is the California gnatcatcher. Originally listed as threatened in 1993, it was subsequently discovered that the science underlying the gnatcatcher's listing was not sound. 58 Fed. Reg. 16,742 (Mar. 30, 1993); *see also* Petition to Delist California Gnatcatcher at 3, *available at* https://ecos.fws.gov/docs/petitions/92100/793.pdf. Despite this, FWS denied a 2010 delisting petition on the basis that the petition did not include nucleic DNA testing showing that the gnatcatcher is not a subspecies, only mitochondrial DNA sampling. As a consequence, citizens and agencies alike still treat the gnatcatcher as threatened, despite the growing indications that it was listed in error. Although FWS acknowledged in 2014 that scientific and commercial data regarding the gnatcatcher may warrant delisting, it is unclear whether the agency will depart from its pattern of delisting only "recovered" species, even when the original listing was in error. 79 Fed. Reg. 78,775 (Dec. 31, 2014); *see also* http://ecos.fws.gov/tess_public/reports/delisting-report. Moreover, this case illustrates how the services tend to impose a higher bar for delisting than listing, which is contrary to the ESA's "best available science" standard.

Under the ESA, the services are also required to prepare recovery plans for any listed species. 16 U.S.C. § 1533(f). It is well established that recovery plans are advisory, and that species may qualify for delisting, even where the recovery plan's goals are not achieved. *Fund for Animals v. Rice*, 85 F.3d 535, 547 (11th Cir. 1996) ("[R]ecovery plans are for guidance purposes only."); *Friends of Blackwater v. Salazar*, 691 F.3d 428, 434 (D.C. Cir. 2012) (species may satisfy delisting criteria without achieving recovery plan goals). In practice, however, the services generally decline to delist a species until a recovery plan is approved and all of the recovery plan goals are achieved. As a result, the recovery plan process can impede a species' delisting. *E.g.*, 80 Fed. Reg. 67,386 (Nov. 2, 2015) (issuance of draft recovery plan 23 years after listing the Snake River fall-run Chinook salmon (SRFC)); 81 Fed. Reg. 33,469 (May 26, 2016) (declining to delist the SRFC, in part due to failure to satisfy draft recovery plan criteria).

In sum, the existing statutory framework presents many challenges for advocates of a species' delisting.

## What Is Being Done, and Is It Enough?

The services recently proposed revisions to the regulations governing ESA petitions. The proposed rule, however, appears to ignore the inherent differences between petitions to list and delist species. 81 Fed. Reg. 23,448 (Apr. 21, 2016); 80 Fed. Reg. 29,286 (May 21, 2015). For example, in instances where a prior review of a species resulted in the services declining to delist, a petitioner would be required to present "new information" to satisfy the statutory standard that "substantial information" indicates that the petitioned action may be warranted. 81 Fed. Reg. at 23,449. This requirement could be problematic insofar as a petitioner seeks to delist on the grounds that the initial listing was made in error. The proposed rule, if finalized, may make delisting less achievable for petitioners offering a new interpretation or analysis of previously considered information, rather than new data or studies. In short, the proposed rule is problematic in that it is not attuned to delisting, instead focusing on managing the flood of listing petitions that have been filed in recent years.

In order to maximize the full potential of the ESA, the services must actively delist species that never required protection (data error) and that are extinct, particularly in situations where a species' outdated listing status continues to impose burdens on the regulated community and the services, while no conservation benefit is being realized. While the ultimate objective of the ESA is to recover species, Congress intended the delisting process to be an important part of the ESA statutory scheme, providing the tools and resources in the ESA to focus on truly imperiled species. Yet, in practice, delistings are the rare exception to the rule. In furtherance of the services' commendable goal of focusing resources to improve efficiency and achieve additional successes, delisting particular

species, when warranted, would benefit the services and the regulated community alike.

**Ashley Remillard** *advises clients on issues regarding environmental compliance, including with the Endangered Species Act, the National Environmental Policy Act, the California Environmental Quality Act, the National Historic Preservation Act, and the Clean Water Act. Ms. Remillard has experience both litigating and counseling clients in areas of environmental permitting, land use, endangered species, wildlife, wetlands, water quality, wastewater, and transportation. Ms. Remillard also has experience in advising clients on issues relating to oceans and fisheries management, including issues arising under the Magnuson-Stevens Fishery Conservation and Management Act, the Animal Welfare Act, and the Marine Mammal Protection Act.*

**Stephanie Clark** *is a member of Nossaman's Environment & Land Use Practice Group. She advises clients on a variety of land use and environmental matters, including matters dealing with the California Environmental Quality Act, Endangered Species Act, the National Environmental Policy Act, the Administrative Procedures Act, the California Planning and Zoning Law, the Clean Water Act, the Migratory Bird Treaty Act, and federal and state constitutions. Ms. Clark assists in representing resource developers, industry organizations, landowners, and public agencies on matters involving federal and state permitting issues, local zoning issues, environmental planning and litigation, and wildlife impact and permitting issues. Ms. Clark assists in state and federal litigation, and has assisted in administrative hearings before various state and local hearing bodies.*

**Sarah Wells** *focuses her practice primarily on natural resources law, including the Endangered Species Act, the Bald and Golden Eagle Protection Act, the Migratory Bird Treaty Act, the Clean Water Act, and the National Environmental Policy Act. She also addresses federal public lands issues and has experience in Texas and local environmental and land use laws. Ms. Wells currently advises electric utility and renewable energy industry groups on federal wildlife issues and counsels potential investors in renewable energy projects on adherence to federal wildlife laws. She also advises interstate pipeline projects on federal wildlife concerns and assists in the development of habitat conservation plans and species conservation banking initiatives.*

## HEAR ME NOW (AND BELIEVE ME LATER)

Ronit Barrett

As a young lawyer, it is tempting to concentrate your effort and resources on turning out top-notch legal work. That is, of course, incredibly important in the short term. But there are plenty of good lawyers out there. To truly develop your practice and advance within your firm you must set yourself up so that potential clients select you from among the pool of good lawyers. Therefore, young lawyers should not myopically focus on substantive excellence to the exclusion of business development activities.

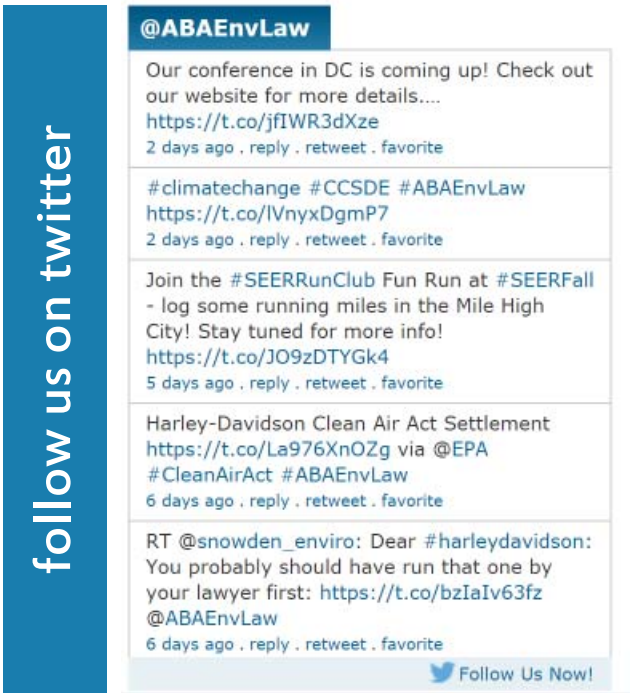
Now is the time to get your name and face out there. Now is the time to build networks within your firm; with co-counsel, opposing counsel, and other members of the bar; and with your in-house counterparts at existing clients and potential clients. This does not mean simply joining LinkedIn or friending people on Facebook.

This means attending conferences relevant to your practice area and speaking to people while you are there: network, mingle, and make friends. This means engaging in social justice or charitable initiatives in your area. For example, find a nonprofit cause that is near and dear to your heart and get involved: volunteer in support of its initiatives or better yet ask to join the board. This also means taking your counterparts at existing and potential clients out to lunch or drinks and getting to know them as people, not just in the context of the case that you are working on. And the same is true of your coworkers: be a team player and do not be afraid to make others look good.

At the same time, make sure people are noticing you. Contact ranking services such as Leading Lawyers and Chambers & Partners and fill out their applications. Exceed your clients' and your partners' expectations. Find a formal or informal mentor to guide you and sing your praises.To be sure, it is easy to put off taking on a non-billable business development project like writing an article, and you probably have the best intentions when you plan to attend the next practice development social event—when things are not so busy or when you are not so tired or when the weather is not so nice. The truth of the matter is that as you get older and your work-related and personal obligations increase, you will have less time and will be more tired, and those beautiful days will be even more precious. And the longer you wait, the harder it is to jump into the fray.

Sometimes it is scary to put yourself out there, but it is important and it will get easier. Too often lawyers realize this five or ten years too late, when their firm expects them to have developed a network of contacts and clients. At that point, solely doing great work may no longer be enough to stay relevant.

**Ronit Barrett** *is a partner at Eimer Stahl LLP in Chicago. Ronit focuses her practice on utility regulatory matters. She was named as an Emerging Lawyer by Leading Lawyers for 2015. Ronit serves on the Board of Directors of Christopher House, is active in the Chicago Bar Foundation's annual Investing in Justice Campaign, and is a past member of the Board of Directors of the Chicago Lawyers' Committee for Civil Rights Under Law, Inc. She can be reached at rbarrett@eimerstahl.com.*



## WHEN FINAL AGENCY ACTIONS ARE FINAL AGENCY ACTIONS: SUPREME COURT SAYS JURISDICTIONAL DETERMINATIONS ARE RIPE FOR JUDICIAL REVIEW

Michael C. Kondrla

On May 31, 2016, the U.S. Supreme Court unanimously held in *United States Army Corps of Engineers v. Hawkes Co*., Inc., that an Army Corps of Engineers jurisdictional determination (JD) is a judicially reviewable final agency action under the Administrative Procedure Act (APA). No. 15-290, slip op., 578 U.S. ___ (May 31, 2016).

The Clean Water Act (CWA) prohibits the unpermitted discharge of pollutants to "waters of the United States," the scope of which was arguably expanded by the U.S. Environmental Protection Agency (EPA) and Corps May 27, 2015, final rule, which was stayed nationwide by the Sixth Circuit Court of Appeals. See *State of Ohio, et al. v. U.S. Army Corps of Eng'rs, et al.*, Nos. 15-3799/3822/3853/3887, 2015 U.S. App. LEXIS 17642 (6th Cir. Oct. 9, 2015). Obtaining a discharge permit is costly, but noncompliance with CWA permitting requirements is even more so and serious violators may be subject to criminal penalties. 33 U.S.C. §§ 1319(c), (d), 1344(a). Thus, to determine whether a stream, wetland, or water body is a "water of the United States," and accordingly, whether a permit is needed to discharge to same, a private party may request a JD from the Corps. 33 C.F.R. § 331.2.

JDs come in two forms—preliminary JDs, which are non-binding "written indications that there may be waters of the United States, including wetlands, on a parcel," and approved JDs, which are official Corps determinations that jurisdictional "waters of the United States," "navigable waters of the United States," or both are either present or absent at a site. Id. An approved JD is valid for five years, meaning a landowner, permit applicant, or other "affected party" may rely on same during the permit application process. U.S. Army Corps of Engineers Regulatory Guidance Letter No. 08-02, Jurisdictional Determinations, § 2.b(2) (June 26, 2008). An approved JD may also be immediately appealed through the Corps' administrative appeal process, pursuant to 33 C.F.R. pt. 331. *Id.* at § 2.b(4).

Prior to Hawkes, the Corps maintained that approved JDs were not judicially reviewable under the APA. Until the Eighth Circuit Court of Appeals decided otherwise in *Hawkes Co., Inc., et al. v. U.S. Army Corps of Engineers*, 782 F.3d 994 (8th Cir. 2015), parties were effectively left with two options to challenge an approved JD—(1) apply for a permit knowing the application could be denied and resultantly, challenge its denial after the costly application process, or (2) discharge pollutants to "waters of the United States" without a permit and hope to not get caught. Hawkes, 578 U.S. ___ (slip op. at 8–9).

The facts underlying *Hawkes* are straightforward. Three companies, engaged in the mining of peat in Minnesota, sought to expand operations to a nearby plot of land. In 2010, they applied to the Corps for a CWA section 404 permit, and in 2012, the Corps issued an approved JD stating that the property contained "waters of the United States" due to its wetlands having a "significant nexus" to the Red River of the North, located 120 miles away. *Id.* at 4. The companies appealed to the Corps, who on remand, reaffirmed its original conclusion and issued a "revised JD" to that effect. In turn, the aggrieved sought judicial review via the APA, but the district court held that the revised JD was not a final agency action "for which there is no other adequate remedy in a court." *Hawkes Co., Inc. v. U.S. Army Corps of Eng'rs*, 963 F. Supp. 2d 868, 872, 878 (D. Minn. 2013). The Eighth Circuit reversed, and the Supreme Court granted certiorari.

Before *Hawkes*, the Court heard *Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367 (2012), which considered whether landowners have a right to challenge an EPA-issued CWA compliance order under the APA. In a similar unanimous decision, the Sackett Court held that pre-enforcement compliance orders, akin in effect to JDs, were final agency actions. The Court

arrived at this conclusion using the very same analysis it would employ in *Hawkes*. In *Bennett v. Spear*, 520 U.S. 154 (1997), the Court created a two-prong test to determine the finality of an agency action under the APA. For such an action to be final, two conditions must be satisfied—first, the action must "mark the consummation of the agency's decisionmaking process," and second, "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Hawkes*, 578 U.S. ___ (slip op. at 5).

The Corps did not dispute that an approved JD satisfies the first Bennett condition and frankly, it could not. Citing to 33 C.F.R. § 320.1(a)(6), the Court highlighted how the Corps itself describes an approved JD as "final agency action." *Id.* at 6. The Court went so far as to consider that the Corps may revise an approved JD within five years of issue, but even same is a "common characteristic of agency action, and does not make an otherwise definitive decision nonfinal." *Id*.

Turning to the second *Bennett* condition, the Court found that the "definitive nature of approved JDs also gives rise to 'direct and appreciable legal consequences.'" *Id*. The Court weighed the effect of a "negative" JD, or an approved JD indicating no jurisdictional waters, to arrive at this conclusion. Pursuant to "a longstanding memorandum of agreement between the Corps and EPA," a "negative" JD will bind the Corps for five years in subsequent federal action or litigation. *Id.* This in turn, creates a "five-year safe harbor" for the JD-acquiring party, protecting the same from civil liability for past violations in CWA citizen suits. Id. at 7. Conversely, an "affirmative" JD, or one that finds jurisdictional waters on applicant property, represents denial of that safe harbor. *Id.* To the Court, such effects are legal consequences satisfying the second Bennett prong. *Id.*

The Court swiftly rejected the Corps' last contention that the respondent companies had adequate alternatives to APA review. Citing to plain logic, the Court said parties should not have to await enforcement proceedings, especially those carrying serious civil and criminal penalties, before challenging final agency action. *Id.* at 8. Further, parties should not need to first expend considerable resources to apply for a permit and then seek judicial review of an unfavorable decision. *Id.* at 9.

The *Hawkes* holding is significant, if not predictable to the regulated communities. Plainly, it provides aggrieved private parties the opportunity to judicially challenge designated jurisdictional waters on their properties, which in theory should incentivize the Corps and EPA to issue more "honest" JDs. However, *Hawkes* may spur the Corps to pen more preliminary JDs, or simply, provide the Corps and EPA the impetus to remain silent or altogether removed on jurisdictional issues. Whatever the direct effect, the *Hawkes* decision will have an undoubted influence on the "waters of the United States" rulemaking, sure to see its day in the Supreme Court.

**Michael C. Kondrla** *is an associate attorney with Lieberman & Blecher, P.C., located in Princeton, N.J. His practice focuses on environmental and land use issues at the federal, state, and local levels. Prior to law school, Michael worked as an environmental, health, and safety consultant, and he is particularly interested in environmental regulatory compliance and strategy. Michael may be reached at MCK@LiebermanBlecher.com.*