The Fallout from Hawkes: A Little Relief

By Quentin Riegel, Vice President and Deputy General Counsel

The Supreme Court’s unanimous ruling two weeks ago in the Hawkes Co. case is an important victory that will allow manufacturers immediately to challenge agencies that improperly claim that one needs a permit. The decision gives a property owner the right to go to court after an agency—in this case the U.S. Army Corps of Engineers—decides that his or her property is under its regulatory authority. The scope of an agency’s own jurisdictional reach is critical to avoiding—or having to comply with—a vast number of regulatory requirements with civil and criminal fines for violations.

For the Hawkes Company, the ruling means that the company can proceed in federal district court to resolve whether the Corps actually had jurisdiction over the peat mining at issue. Another company, Kent Recycling Services, LLC, also has an appeal pending at the Supreme Court, and that case is expected to be reversed and remanded to the lower courts for reconsideration.

The Court’s ruling is grounded on the conclusion that the Corps’ jurisdictional determination was final agency action subject to judicial review. The critical questions are whether the agency action ends the agency's decision-making process and whether the company’s rights or obligations are determined, creating legal consequences. In this case, the Court said “yes” to both questions, making court challenges possible for the tens of thousands of jurisdictional determinations approved every year by the Corps.

Can this ruling be applied to jurisdictional determinations by other agencies under other laws? The decision arises from requirements in the Administrative Procedure Act, which creates a presumption of reviewability of final action by many federal agencies. Even before this case, courts had granted judicial review of prescription drug labeling...
decisions by the Food and Drug Administration and transport decisions for agricultural commodities by the Interstate Commerce Commission. Consider, for example, whether court challenges become available when the Environmental Protection Agency or state enforcement authorities decide which areas of land are subject to clean-up requirements under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

The Manufacturers’ Center for Legal Action (http://lists.nam.org/t/139082/121602/1673547/23/) (MCLA), which filed an amicus brief calling for this result, is interested in learning from you about other regulatory decisions that might become immediately reviewable in court, aside from final regulations that are already the focus of many of our litigation efforts. We’ll update you with what we hear.

**MCLA in the Courts**

**Environmental**

*NAM files supplemental brief on California cap-and-trade rules:* The National Association of Manufacturers (NAM) filed additional briefing in response to questions from a California appeals court regarding that state’s cap-and-trade auction allowance system. We argued that no property right is conferred by the auction allowances and that the revenues far exceed amounts needed to implement the auction system, thus constituting a tax. An oral argument date should be set shortly.

More Information: [California Chamber of Commerce v. California Air Resources Board](http://lawcenter.nam.org/Results.aspx?P=California%20Chamber%20of%20Commerce&Y=active) (California Court of Appeals)

*5th Circuit sends ExxonMobil case back for further consideration:* A federal appeals court reversed a lower court decision that had declined to impose $642 million in penalties against ExxonMobil for various permit violations at its Baytown, Tex., facility. This decision lowers the bar for plaintiffs to sue companies for Clean Air Act violations and increases potential industry liability for unplanned emissions. The NAM filed an amicus brief supporting ExxonMobil and urging the court to not impose the penalties.


*NAM, industry groups and states continue challenge to so-called Clean Power Plan:* The NAM and other coalition members challenging the Environmental Protection Agency’s (EPA) latest rules targeting electric utilities on greenhouse gases filed their final reply brief. We argued that the EPA lacks statutory authority to assert such a broad and novel regulatory power; the Clean Air Act forecloses emission reductions that can’t be applied to individual regulated stationary sources; and the Clean Air Act does not allow the EPA to regulate many of the sources the new rule attempts to regulate. We also raised a 10th Amendment argument that the EPA is usurping state power.


*NAM supports EPA recycling rule against environmental challenges:* While part of our lawsuit challenges some of EPA’s decisions regulating the recycling process, we filed a brief supporting other EPA decisions that are being disputed by environmental groups, whose challenges to the rule are inaccurate and mischaracterize the reclamation process. The case is awaiting an oral argument date.


*NAM pushing to keep water case in Texas:* A federal appeals court believes it has jurisdiction to hear arguments challenging the EPA’s and the Army Corps of Engineers’ assertion of jurisdiction over large amounts of land that affect “waters of the United States.” The NAM disagrees and is pushing back against the effort to dismiss the case from a federal district court in Texas.

More Information: [American Farm Bureau Federation v. EPA](http://lawcenter.nam.org/Results.aspx?id=2073) (U.S. District Court for the Southern District of Texas)

**Jurisdiction**
California Supreme Court hears arguments in litigation tourism case: The California Supreme Court heard arguments concerning whether California courts can entertain class action lawsuits in the state even though the plaintiffs are not residents and the defendant is an out-of-state manufacturer. The NAM filed a brief supporting Bristol-Myers Squibb and warning about the potential burden on manufacturers and how unreasonable it would be to extend jurisdiction to cases of this kind.


Labor Law

Manufacturers seek to protect confidentiality in workplace investigations: The NAM filed a brief challenging a National Labor Relations Board (NLRB) decision that prohibits employers from recommending employee confidentiality during workplace investigations. We argued that, in addition to violating employers' free speech, this ruling unduly impedes effective workplace investigations.


ALJ rules that racist statements are not grounds for firing: The NAM filed a brief on behalf of Cooper Tire & Rubber Company in a case concerning an administrative law judge’s (ALJ) decision that the company violated the National Labor Relations Act (NLRA) for discharging an employee for racist statements made on a picket line. The ALJ found that the employee’s “statements most certainly were racist, offensive and reprehensible,” but they did not forfeit the protection of the NLRA. Last month, the NLRB ruled against Cooper Tire, upholding the ALJ’s decision ordering reinstatement of the picketer who made racial epithets.

More Information: [In re Cooper Tire & Rubber Company](http://lawcenter.nam.org/Results.aspx?P=In%20re%20Cooper%20Tire%20%26%20Rubber%20Company) (NLRB)

OSHA

NAM presses on in challenge to OSHA’s silica rule: The NAM filed its Statement of Issues in a lawsuit against the Occupational Safety and Health Administration’s (OSHA) silica rule. The issues we outlined include the justification of the permissible exposure limit, the lack of substantial supporting evidence, and technological and economic infeasibility.


State Protectionism

Manufacturers urge review of protectionist state legislation: The NAM filed a brief urging the Supreme Court to hear a case concerning the expansion of protectionist state auto dealer laws to include equipment dealers. Protectionist state legislation is anti-competitive and harms consumers. This case presents the Court an opportunity to ensure that statutes voiding private contracts are meaningfully reviewed to assess the merits of a purported public benefit against the harms of the economic restriction.


Questions or Comments?

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