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Supreme Court Decision in *Sackett v. EPA* Allows Regulated Parties to Challenge EPA's Authority Under the Clean Water Act

On March 21, 2012, the U.S. Supreme Court issued a unanimous decision in *Sackett v. Environmental Protection Agency*, 566 U.S. __ (2012), finding that an administrative compliance order issued by the Environmental Protection Agency (EPA) under the Clean Water Act (CWA) was final agency action reviewable under the Administrative Procedure Act (APA) and that the CWA does not preclude pre-enforcement review of the compliance order. This decision is important for groups facing CWA jurisdictional questions with the U.S. Army Corps of Engineers (Corps) or EPA because it allows groups to challenge the agency's assertion of jurisdiction in a compliance order issued under the CWA in federal court. The decision may also open the door for groups seeking judicial review of CWA jurisdictional determinations made outside the context of a compliance order.

In preparation for constructing a house on their residential lot in Priest Lake, Idaho, the Sacketts filled in part of their lot with dirt and rock. Months later, the Sacketts received an administrative compliance order from EPA finding that the property contains jurisdictional wetlands, asserting that the Sacketts violated the CWA by discharging fill material, and ordering the Sacketts to immediately restore the site pursuant to an EPA work plan. If the Sacketts did not comply with the compliance order, the Sacketts could face civil penalties of up to $37,500 per day for violating the CWA and an additional $37,500 for violating the compliance order.

The Sacketts, who do not believe that their property is subject to CWA jurisdiction, sought a hearing with EPA, but the hearing request was denied. The Sacketts then brought suit in federal court contending that EPA's issuance of the compliance order was arbitrary and capricious under the APA and violated the Fifth Amendment's due process protections. The U.S. District Court for the District of Idaho dismissed the claims for lack of subject matter jurisdiction. The U.S. Court of Appeals for the Ninth Circuit affirmed, concluding that the CWA precludes pre-enforcement judicial review of compliance orders and that such preclusion did not violate due process guarantees.

In an opinion written by Justice Scalia, the U.S. Supreme Court reversed and held that the compliance order was final agency action subject to APA review and that the CWA does not preclude that review. The Court found that the compliance order was final agency action under the APA because it placed legal obligations on the Sacketts to restore their property, it was not subject to further agency review and therefore marked the "consummation" of the agency's decisionmaking process, and the Sacketts had no other adequate remedy in court. The Court noted that judicial review in CWA enforcement cases typically occurs when EPA brings a civil action. Because the Sacketts cannot initiate that process, they were essentially forced to "wait for the agency to drop the hammer," all the while accruing potential civil penalties. Moreover, the Court found nothing in the CWA expressly precludes judicial review under the APA and that there is no suggestion that Congress sought to overcome the APA's presumption of judicial review or exclude compliance order recipients from the CWA's review scheme. The Court further stated that "there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review."

Although the Court did not reach the merits of EPA's underlying assertion of CWA jurisdiction in the compliance order, it noted that the Sacketts' suit over the compliance order flows from an underlying dispute over the scope of "waters of the United States" subject to CWA jurisdiction. Justice Scalia referenced the Court's previous decisions in *United States v. Riverside Bayview Homes, Inc.*, *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, and *Rapanos v. United States*, and noted that interested parties like the Sacketts lack clear guidance on the limits of the reach of the CWA. Similarly, in a concurring opinion, Justice Alito noted that the Court's decision provided *some* relief for property owners like the Sacketts because they have the right to challenge EPA's jurisdictional determinations under the EPA, but that solving the underlying problem of agency overreach requires Congress or the agencies to provide a reasonably clear definition of "waters of the United States" subject to jurisdiction under the CWA. Even Justice Ginsburg noted, in a concurring opinion, that the Sacketts "may immediately litigate their jurisdictional challenge in federal court."

Prior to the *Sackett* decision, as Chief Justice Roberts noted during the *Sackett* oral arguments, when EPA made a jurisdictional determination that an area is a "water of the United States" subject to the permitting requirements of the CWA, the lack of pre-enforcement review essentially meant that the agencies were "never going to be put to the test." Although the *Sackett* opinion does not clarify the scope of waters subject to CWA jurisdiction under *Rapanos*, because of this decision, the agencies' overbroad assertions of CWA jurisdiction may be given greater scrutiny.

Thus, under *Sackett v. EPA*, property owners subject to the agency's assertion of jurisdiction in a compliance order under the CWA may challenge the compliance order in federal court prior to the agencies initiating an enforcement action. Moreover, the *Sackett* decision also provides useful support for groups seeking to challenge CWA jurisdictional determinations made by the agencies outside the context of a compliance order.

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