WHITE & CASE

Client**Alert**

Environmental Practice

March 2012

Supreme Court Expands Right to Challenge Federal Assertions of Clean Water Act Regulatory Jurisdiction

On March 21, 2012, the US Supreme Court ruled that landowners may bring a civil action under the Administrative Procedure Act to challenge administrative compliance orders issued under the Clean Water Act. *Sackett v.* EPA, __ US ___, 2012 WL 932018 (US March 21, 2012) (No. 10-1062).

Highlights

- The US Supreme Court, in *Sackett v. Environmental Protection Agency*, ruled that property owners can challenge in federal court Environmental Protection Agency ("EPA") administrative compliance orders issued under the Clean Water Act.
- The effect of the decision will likely not be limited to administrative compliance orders, but may allow challenges to formal wetland jurisdictional determinations, because the Supreme Court rejected the principal defenses that EPA and US Army Corps of Engineers ("Corps") have used to minimize judicial review of their assertions of wetland jurisdiction.
- The decision gives landowners and project proponents a much greater ability to challenge federal agencies' assertions of Clean Water Act wetland jurisdiction over specific properties.
- The likely increase in challenges by parties to broad assertions of wetland jurisdiction by the agencies may well result in the limiting by federal courts of the scope of that jurisdiction.

Case Background

The *Sackett* case involved a residential lot in Idaho owned by Michael and Chantell Sackett. The Sacketts filled a part of their lot with dirt and rock, without checking with or otherwise communicating with EPA or the Corps. When EPA became aware of the filling activity, it issued the Sacketts an administrative compliance order pursuant to Clean Water Act § 309, 33 USC. § 1319. The compliance order determined that the Sacketts had violated the Clean Water Act because their lot contained wetlands subject to EPA's regulatory jurisdiction under the Clean Water Act and the Sacketts had discharged dredged and fill material into those wetlands without the required Clean Water Act § 404 permit. The compliance order directed the Sacketts to immediately restore the alleged wetlands, and to provide EPA access to the site and all documents related to the site's conditions. At oral argument before the Supreme Court EPA took the position that if the agency ultimately were to file a civil enforcement action in US District Court and prevail, then the Sacketts would be subject to a penalty of US$75,000 for each day that they had not complied with the administrative compliance order (which is double the potential daily penalty if no compliance order had been issued).

Neal McAliley
Partner, Miami
+ 1 305 995 5255
nmcaliley@whitecase.com

Douglas Halsey
Partner, Miami
+ 1 305 995 5268
dhalsey@whitecase.com

Richard Horsch
Partner, New York
+ 1 212 819 8866
rhorsch@whitecase.com

White & Case LLP
1155 Avenue of the Americas
New York, NY 10036
United States
+ 1 212 819 8200

After EPA denied the Sacketts' request for a hearing on the compliance order, the Sacketts filed an action against EPA in federal court in Idaho, bringing claims pursuant to the Administrative Procedure Act ("APA") and the due process clause of the Fifth Amendment. The Idaho District Court dismissed the case for lack of subject matter jurisdiction, on grounds that there was no "final agency action" necessary for judicial review under the APA, and because the Clean Water Act impliedly precludes pre-enforcement review of compliance orders. *Sackett v. EPA*, 2008 WL 3286801 (D. Idaho 2008). The Ninth Circuit affirmed, and also held that the preclusion of judicial review did not violate the Sackett's due process rights under the Fifth Amendment. *Sackett v. EPA*, 622 F.3d 1139 (9th Cir. 2010).

The Supreme Court's Ruling

In a rare display of agreement by the US Supreme Court in a wetland case, the justices unanimously ruled that the Sacketts could challenge EPA's administrative compliance order in US District Court. The Court did not reach the merits of the Sacketts' claims that their property does not contain wetlands regulated under the Clean Water Act and that the order violated their due process rights. Rather, the Court held on narrower grounds that EPA's administrative order was immediately reviewable under the APA.

Writing for the Court, Justice Scalia first ruled that an administrative compliance order represents "final agency action," a prerequisite for judicial review under the APA, 5 USC. § 704. Longstanding precedent provides that an agency action is final if it 1) determines rights or obligations, or is an action from which legal consequences flow, and 2) marks the consummation of the agency's decision-making process.[1] The Court held that EPA's order determined rights or obligations because it created a legal obligation for the Sacketts to restore the property and give EPA access to the site and to documents, and created legal consequences for the Sacketts by exposing them to increased daily penalties and limiting their ability to obtain an after-the-fact Section 404 permit from the Corps. The order also represented the consummation of the agency's decision-making process, the Court held, because the Sacketts had no legal entitlement to further agency review.

The Court next found that the Sacketts had satisfied a second prerequisite for a claim under the APA—that they had no other adequate remedy in court, 5 USC. § 704. In particular, the Court held that it was not an adequate alternative remedy for the Sacketts to apply for an after-the-fact permit from the Corps, or to wait for the agencies to file an enforcement action against them.

Finally, the Court held that the Clean Water Act does not impliedly preclude judicial review. For decades, lower federal courts had refused to hear challenges to Clean Water Act administrative enforcement orders on grounds that the Act precluded pre-enforcement review.[2] In *Sackett*, however, the Court ruled that the APA creates a presumption of judicial review of administrative agency actions, and held that nothing in the Clean Water Act indicated that there should not be judicial review of an administrative enforcement order.[3]

Justices Ginsburg and Alito each filed concurring opinions. Justice Ginsburg wrote that the decision allows the Sacketts to litigate "EPA's authority to regulate their land under the Clean Water Act," but stated that the decision did not allow them to litigate "the terms and conditions of the compliance order." Justice Alito also wrote that "property owners like petitioners will have the right to challenge the EPA's jurisdictional determination under the Administrative Procedure Act" pursuant to the decision, but faulted both Congress and the agencies for not clarifying the scope of Clean Water Act regulatory jurisdiction through statutory amendments or through promulgation of a new regulation.

Significance of the *Sackett* Decision

The decision in *Sackett* will have significant effects on the long-running debate over the proper geographic scope of the EPA and Corps' wetland jurisdiction, because it further opens federal courthouses' doors to private parties that dispute the agencies' assertion of wetland jurisdiction.

Prior to this decision, there were only two ways that private parties could be assured of obtaining judicial review of EPA and Corps' assertions of wetland jurisdiction over specific properties: by waiting for the Corps to issue or deny a Clean Water Act § 404 permit and then filing a challenge under the APA,[4] or by waiting for the Justice Department to file an enforcement action against a person in US District Court.[5] Most courts have refused to hear challenges to administrative compliance orders on grounds that such orders did not represent "final agency action" and that the Clean Water Act barred pre-enforcement review. On similar grounds, courts also generally have refused to hear challenges to formal "jurisdictional determinations" issued by the Corps.[6] The result was that most property owners had little choice but to acquiesce to EPA and Corps assertions of wetland jurisdiction over their properties, even if they disagreed with the agencies, because the price of getting into court was too high.

Now, the Supreme Court in *Sackett* has held that parties named in administrative compliance orders can bring such challenges in US District Court pursuant to the APA. While that is the narrow holding of the case, the decision likely will increase the ability of property owners to challenge other EPA and Corps assertions of Clean Water Act regulatory jurisdiction, as well. The Court rejected one of the agencies' primary defenses in challenges to wetland jurisdictional determinations, the claim that the Clean Water Act bars pre-enforcement review. In ruling that a compliance order represents "final agency action," the Court also cast doubt on the reasoning behind prior lower court rulings that jurisdictional determinations are not "final agency action." Notably, in the two concurring opinions from members of the Court's liberal and conservative wings, both justices indicated that the opinion allowed the Sacketts to litigate EPA's wetland jurisdiction over their land, in a case where the agency had not even reached the point of preparing a jurisdictional determination. The *Sackett* decision therefore gives property owners and project proponents much stronger grounds to seek judicial review of agency assertions of wetland jurisdiction over their properties. This means that private parties have more options available to them when they disagree with the agencies' assertion of regulatory jurisdiction over them, and have greater potential to limit federal agency oversight of their activities.

With more cases addressing EPA and Corps wetland determinations, it is likely that the debate over the proper scope of Clean Water Act wetland jurisdiction will intensify. As Justice Alito noted in his concurring opinion, the EPA and the Corps never promulgated new regulations to clarify the scope of their Clean Water Act jurisdiction after the Supreme Court rulings in *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Eng'rs*, 531 US 159 (2001), and *Rapanos v. United States*, 547 US 715 (2006). Instead, the agencies have issued a series of "guidance memoranda" which emphasize the case-by-case nature of jurisdictional determinations under the Clean Water Act. Since there is no formal regulation with bright-line rules regarding the scope of federal wetland jurisdiction, the courts will be issuing their decisions on a case-by-case basis, and some may give little deference to the agencies' informal interpretation of their authority. The result easily could be a growing body of federal common law which will place more limits on the scope of Clean Water Act regulatory jurisdiction than the agencies currently assert. In light of that risk, the EPA and the Corps may become less aggressive in their assertions of wetland jurisdiction to avoid creating adverse legal precedent.

While the *Sackett* case does not directly address the scope of federal wetland jurisdiction, by expanding private parties' access to federal court to challenge an agency's assertion of jurisdiction, the result may be that the scope of Clean Water Act jurisdiction will be limited.

---

1 *See, e.g., Bennett v. Spear,* 520 US 154, 178 (1997); *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 US 62, 71 (1970).

2 *See, e.g., Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995); *Southern Ohio Coal Co. v. Office of Surface Mining Reclamation and Enforcement*, 20 F.3d 1418 (6th Cir. 1994); *Rueth v. EPA*, 13 F.3d 227 (7th Cir. 1993); *Southern Pines Assocs. v. United States*, 912 F.2d 713 (4th Cir. 1990).

3 The Clean Water Act is different, in this respect, from CERCLA, which expressly prohibits judicial review of EPA compliance orders before the EPA brings a civil action. *See* 42 U.S.C. § 9613(h). In 2010, the DC Circuit rejected a claim by General Electric that the limited right of judicial review for a unilateral administrative order under CERCLA violates the due process clause of the United States Constitution. *General Electric Co. v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010), *cert. denied*, 131 S.Ct. 2959 (2011).

4 *E.g, Precon Devel. Corp. v. US Army Corps of Eng'rs*, 633 F.3d 278 (4th Cir. 2011).

5 *E.g. United States v. Vierstra*, 73 ERC 1566 (D. Idaho 2011).

6 *E.g., Fairbanks North Star Borough v. Army Corps*, 543 F.3d 586 (9th Cir. 2008).

NY/0312/CC/A/06894_3