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ORAL ARGUMENT IN *SACKETT V. EPA* (US SUPREME COURT): JUDICIAL REVIEW OF AN EPA COMPLIANCE ORDER

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The Supreme Court heard oral argument on January 9, 2012 in *Sackett v. EPA*, No. 10-1062. EPA had issued a compliance order charging the Sacketts with filling in a wetlands, in the course of building their home, in violation of the Clean Water Act and requiring them to restore their property. The Sacketts dispute that their property is a wetlands and seek an opportunity for judicial review of EPA's order. EPA argues that the Sacketts could comply with the EPA order or submit an application for a wetlands permit or defend if EPA brings an enforcement action, but may not seek judicial review of EPA's order.

The tenor of the oral argument did not bode well for the United States. Some of the Court's questions seemed to focus on how to write the opinion and the consequences of a ruling for the Sacketts. If the Sacketts prevail, it will be important to see how EPA responds and what if any changes are made to EPA's practice and procedure for issuing orders in wetlands and perhaps other matters. The transcript of the Supreme Court argument is available here.

The toughest questions and comments were aimed at counsel for the United States, Malcolm Stewart. Justice Alito stated: "Mr. Stewart, if you related the facts of this case as they come to us to an ordinary homeowner, don't you think most ordinary homeowners would say this kind of thing can't happen in the United States?" (Tr. 37)

Chief Justice Roberts asked "what would you do, Mr. Stewart, if you received this compliance order? (Tr. 35). When Stewart responded that one could apply for an after-the-fact permit," Chief Justice Roberts replied "You wouldn't do that, right? You know you will never get an after the fact permit if the EPA has sent you a compliance order saying you've got wetlands." (Tr. 36) Earlier, Justice Kagan had asked counsel for the Sacketts rhetorically whether the critical point wasn't that EPA would not entertain an after-the-fact permit while a compliance order is outstanding. (Tr. 12). Justice Alito expressed the view it "seems very strange for that, for a party to apply for a permit on the ground that they don't need a permit at all." (Tr. 14).

The government's alternative solution, that one could comply with the compliance order, met with an incredulous response from Chief Justice Roberts: "That's what you would do? You would say, I don't think there are wetlands on my property but EPA does, so I'm going to take out all the fill, I'm going to plant herbaceous trees or whatever it is, and I will worry about whether to -- that way, I'll just do what the government tells me I should do." (Tr. 36-37).

Justice Breyer focused on the finality of the EPA order for purposes of judicial review, stating "for 75 years the courts have interpreted statutes with an eye towards permitting judicial review, not the opposite. And yet -- so here you are saying that this statute that says nothing about it precludes review, and then the second thing you say is that this isn't final. So I read the order. It looks like about as final a thing as I have ever seen." (Tr. 41)

Justice Ginsburg asked Mr. Stewart whether, once EPA made the determination that there were wetlands, that be the end of the matter as far as EPA is concerned. Mr. Stewart got himself in difficulty when he replied " I think they have reached that conclusion for now. I don't think it would be accurate to say that we have done all the research we would want to do if we were going to be required to prove up our case in court." (Tr. 51) Justice Alito was not pleased with that reply: "Well, that makes the EPA's conduct here even more outrageous. We think now that this is -- these are wetlands that -- that qualify, so we're going to hit you with this compliance order, but, you know, when we look into it more thoroughly in the future, we might change our mind?" (Tr. 51)

In questions to counsel for the Sacketts, Justice Breyer noted the government's concern that "when you get judicial review of this kind of order, the Court doesn't refer on fact-finding that isn't made on a record. * * * And so they'll have a hard time -- or a harder time -- in each of these cases subjecting it to judicial fact-finding." Justice Breyer suggested that EPA might change its procedure if the Sacketts prevail, and providing some type of pre-order or post-order procedure that would be open to change. (Tr. 55)

It is of course always difficult to predict the outcome of a Supreme Court case with certainty simply based on oral argument. That being said, it is also difficult to be optimistic about the government's chances of prevailing based on the comments made by the court during oral argument today. Whatever the outcome, the Court's ruling will likely be an important environmental and administrative law precedent.

If you have any questions concerning the material discussed in this testimony or about this case, please contact the following member of our firm:

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