

SACKETT V. EPA: PARTIES MAY SUE TO CHALLENGE CLEAN WATER ACT COMPLIANCE ORDERS

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The Supreme Court issued its long awaited decision in *Sackett v. EPA*. In a unanimous decision, the Court held that the Sacketts may bring a civil action under the Administrative Procedure Act to challenge EPA's compliance order. The court rejected the government's argument that EPA is less likely to use orders if they are subject to judicial review, saying that "[t]he APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all." 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. [See link to the Sackett opinion.](#)

EPA had issued a compliance order charging the Sacketts with filling in a wetland during construction of their home, in violation of the Clean Water Act, and requiring them to restore their property. The Sacketts argued that they were entitled to prompt judicial review because they faced severe penalties for noncompliance and disputed that their property is a wetland. The United States argued that the Sacketts could comply with the EPA order and 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, as previously reported. The Court's unanimous opinion, reversing the Ninth Circuit, bears that out.

The court's opinion, written by Justice Scalia, starts with the proposition that the APA provides for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. §704. The court concludes that EPA's compliance order has all the hallmarks of APA finality: it required the Sacketts to restore their property according to an agency-approved plan, exposed the Sacketts to double penalties in future enforcement proceedings, and severely limits their ability to obtain a Section 404 permit from the Army Corps of Engineers. See 33 U. S. C. §1344; 33 CFR§326.3(e)(1)(iv). Rejecting the government's argument, the court held that applying to the Corps of Engineers for a permit and then filing suit under the APA if that permit is denied does not provide an adequate remedy.

The Court also had little difficulty in disposing of the government's argument that the Clean Water Act should be read as precluding judicial review under the APA, 5 U. S. C. §701(a)(1). The APA creates a presumption favoring judicial review of administrative action, and the Court concluded that nothing in the Clean Water Act's statutory scheme precludes APA review. The court was similarly not persuaded that the issuance of a compliance order is simply a step in the deliberative process, given that EPA rejected the Sackett's attempt to obtain a hearing, and the next step will involve judicial and not administrative deliberation. Justice Scalia's opinion concludes that "there is no reason to think the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review – even judicial review of the question whether the regulated party is within the EPA's jurisdiction."

Justice Alito's concurring opinion is of interest because of its emphasis on the fact that the "reach of the Clean Water Act is notoriously unclear." Citing an amicus brief filed by the Competitive Enterprise Institute, Justice Alito cites EPA's guidance advising property owners that jurisdictional

determinations concerning wetlands will be made on a case-by-case basis. His opinion concludes that allowing property owners to sue under the APA is “better than nothing,” but only clarification of the reach of the Clean Water Act can rectify the underlying problem.

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 *Sackett* decision will be relied upon by parties who are subject to orders under other statutes that EPA administers. For some of the reasons cited by Justice Alito, the *Sackett* decision also underscores the need for clarification of the reach of the Clean Water Act. Stay tuned.

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

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