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US Supreme Court Offers Clean Water Act Plaintiffs Their Day in Court

In *Sackett v. Environmental Protection Agency* [132 S.Ct. 1367 (2012)], decided by the US Supreme Court Mar. 21, 2012, Justice Antonin Scalia introduced plaintiffs Chantell and Michael Sackett as “interested parties feeling their way” around Clean Water Act (CWA) jurisdiction. In this latest opinion addressing the CWA, Scalia presented the quandary facing all who are touched by the regulatory regime of this act. Summarizing the Court’s decisions as to the jurisdictional reach of the CWA over “navigable waters,” Scalia states that after the Court’s fractured decision in *Rapanos v. United States* [547 U.S. 715 (2006)], interested parties are “left to feel their way on a case-by-case basis.” The question decided by the Court in *Sackett* is when the regulated are entitled to seek judicial review of decisions concerning the CWA’s reach.

MAKING THE CASE

The Sacketts purchased half an acre of land in a platted residential neighborhood in Priest Lake, Idaho. They subsequently obtained a building permit, filled the property to build their home, and were soon engulfed in a regulatory nightmare. The Sacketts were notified by the US Environmental Protection Agency (USEPA) that they had violated the CWA by illegally filling jurisdictional wetlands and that they must immediately comply with a USEPA order requiring removal of the fill and restoration of the property or face massive fines and penalties. The order directed the Sacketts to restore the property as specified in a detailed and costly plan. It also warned that if they did not comply with the order they would be subject to penalties of up to \$37,500 per day for violating the CWA and that the penalty would double for violating the restoration order.

The Sacketts immediately requested a hearing before the USEPA to present arguments that their property was not a wetland subject to CWA regulation, but their request was denied. They then sought judicial review in federal court. Both the district court and the Ninth Circuit Court of Appeals declined to hear the Sacketts’ case on the basis that the CWA precludes pre-enforcement judicial review of compliance orders. Essentially, the lower courts’ orders required the Sacketts to go through their plans to build a home on the property and spend more



than the purchase price of the property to comply with the USEPA order or suffer severe financial penalties—all without the ability to challenge the USEPA's basis for jurisdiction.

The Sacketts appealed and reached the US Supreme Court on two questions: (1) whether they could seek pre-enforcement review of the compliance order pursuant to the Administrative Procedure Act (APA) and (2) if they were unable to obtain pre-enforcement review, whether that inability violated the Due Process Clause of the US Constitution. The USEPA argued that compliance orders do not constitute final agency action because they are merely steps in the deliberative process and are therefore not ripe for judicial review until the USEPA determines to file enforcement action against the parties who violated the orders.

RENDERING THE DECISION

The Supreme Court's opinion, written by Scalia, determined that the APA's presumption in favor of judicial review entitled the Sacketts to a pre-enforcement hearing; as such, the Court did not need to resolve the constitutional due process issue. The Supreme Court's decision was based on its determination that the compliance order was actually a final agency action as contemplated by the APA because in issuing the compliance order the USEPA had come to a final determination as to the rights and obligations of the parties that had direct legal consequences. The Supreme Court also determined that the Sacketts did not have any other adequate legal remedy and that the CWA neither explicitly nor impliedly precludes judicial review under the APA.

Of particular interest are the two concurring opinions by Justices Ginsburg and Alito. Ginsburg's opinion emphasizes that the Supreme Court's majority opinion is limited to the issue of agency jurisdiction and does not decide whether the terms and conditions of the compliance order were appropriate, a matter not readily apparent from the Scalia opinion. Alito's opinion, which focuses on the CWA's nebulous definition of "water of the state" as the underlying cause of the dispute, calls for Congressional action to rein in the USEPA and put an end to the costly and inadequate solution of case-by-case judicial decision-making.

The *Sackett* case concerns a compliance order issued under the CWA. Both the Supreme Court's majority opinion and the two concurring opinions voiced frustration over the confused extent of USEPA's jurisdiction over "navigable waters" and "adjacent wetlands." Nevertheless, the case may have significant effects on the USEPA's use of compliance orders pursuant to statutes other than the CWA as well as on the regulatory practices of states adminis-

tering programs delegated by the USEPA and state statutes modeled on the CWA. The Supreme Court was unmoved by the government's arguments about such potential chilling effects.

The Supreme Court's decision highlights the legal reasoning in a similar case, *Fairbanks North Star Borough v. U.S. Army Corps of Engineers* [543 F.3d 586 (9th Cir. 2008)], in which the Ninth Circuit Court of Appeals closed the gates of judicial review to property owners seeking relief from adverse CWA Section 404 jurisdiction determinations issued by the US Army Corps of Engineers. The affected property owners in both *Sackett* and *Fairbanks* challenged the government's determination that jurisdictional wetlands existed on their private property. In *Fairbanks*, however, the court affirmed the lower court's order holding that approved jurisdiction determinations do not constitute final agency action pursuant to the APA, reasoning that jurisdiction determinations merely represent the US Army Corps of Engineers' opinion that jurisdiction does or does not exist and therefore do not have direct legal consequences. Thus the court held that a challenge to a jurisdictional determination would not be ripe until the US Army Corps of Engineers ultimately denies a permit or takes enforcement action against the parties.

The *Sackett* decision places greater emphasis on what Alito aptly described as the "notoriously unclear" reach of the CWA and represents another strong signal to the USEPA and Congress to provide clarity in this area.

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