JONES WALKER
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ENERGY, ENVIRONMENT & NATURAL RESOURCES
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# SUPREME COURT SLAMS EPA ON PRE-ENFORCEMENT WETLANDS REVIEW NINE TO ZERO: BETTER SOONER THAN NEVER

On March 21, 2012, the U.S. Supreme Court ruled unanimously in favor of private landowners in a wetlands dispute with the U.S. Environmental Protection Agency. *Sackett v. Environmental Protection Agency*, No. 10-1062.

The Sacketts purchased a small piece of property, less than an acre, in Idaho, and commenced building a house by filling the lot with rock and dirt. Some months later, EPA issued a compliance order to them calling the area wetlands, requiring them to cease activity, requiring restoration and threatening penalties. The Sacketts asked for a hearing on the EPA's determinations, but EPA denied an administrative hearing. The Sacketts then proceeded to sue EPA in court, challenging Clean Water Act wetlands jurisdiction. The EPA defended on grounds that the Clean Water Act impliedly does not allow the Sacketts' pre-enforcement judicial review. That is, to obtain any type of legal review, the Sacketts must first wait for the EPA to sue them over violations.

The Supreme Court led by Justice Scalia, ruled unanimously that there was pre-enforcement review under the Clean Water Act over the EPA's administrative order. The Court considered the EPA's administrative order final agency action subject to federal court jurisdiction. There was nothing in the Act itself which indicated judicial review needed to await the unfolding of some extensive statutory scheme first. The Court considered the administrative order on wetlands to be the consummation of the agency decision-making process, notwithstanding the EPA's concerns that further meetings and discussions were available to the Sacketts. Justice Ginsberg (noting that the Sacketts' potential sanctions by EPA were not before the Court) and Justice Alito concurred.

Justice Alito in particular expressed disgust with the vague scope of wetland jurisdiction under the Clean Water Act and stated the following:

…[t]he combination of the certain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case still leaves most property owners with little practical alternatives but to dance to the EPA's tune….

Real relief requires Congress to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act…Congress did not define what it meant by the "waters of the United States;"…Unsurprisingly, the EPA and the Army Corps of Engineers interpreted the phrase as essentially limitless grant of authority. We rejected that bottomless view…but the precise reach of the Act remains unclear. For forty years, Congress has done nothing to resolve this critical ambiguity, and the EPA has not seen fit to promulgate a rule providing a clear and sufficient and limited definition of the phrase.

This case means that the recipient of an EPA administrative order on wetlands would be entitled to seek judicial review of the wetland determination in court. It is expected that EPA may modify its administrative orders to be more like warning letters to prevent early judicial challenges, as the agency does not really have its act together supporting wetland determinations at the early order stage.

This case also dealt with EPA administration orders, not the more prevalent Corps of Engineers' cease and desist orders. Cease and desist orders, as currently worded, are more like warning letters, and they are not as detailed or as formal as EPA administrative orders, which besides calling the area wet and to cease activity, require restoration and threaten

penalties. The cease and desist orders by the Corps simply calls an area wet and to cease activity (sort of a "drive-by injunction"). Still, a substantial $37,500.00 per day penalty is possible for any unauthorized work done on either an EPA or Corps order.

The scope of judicial review under the Administrative Procedures Act ("APA") was not discussed in the *Sackett* opinion, but it was raised in the oral argument in Court. The Court generally felt that the APA arbitrary and capricious test would apply to a wetland challenges in court, which in general is deferential to the agency administrative record. This means that if a private party wants to resist the agencies in court, he or she would need to send a detailed report early on to the agency in response to the administrative order, or cease and desist order, challenging in detail why an area is not regulated. Then the private parties would hopefully have something solid in the administrative record to outweigh the Corps' own determination. Otherwise, the court would have the option to not simply vacate the regulatory jurisdictional determination by the agency, but to remand the administrative record back to the agencies for follow-up, which places the parties back to square one.

Additionally, the *Sackett* case dealt with enforcement, not permitting. The Corps of Engineers permits the wetlands under the Clean Water Act, subject to EPA oversight. The Corps of Engineers does have an administrative process, involving jurisdictional determination, an application for permit, public notice, public comments, wetland mitigation, and the possibility of an administrative appeal to the Corps of Engineers before a permit is finally issued. In other words, in a normal permitting scheme, a private party would have to go through the permit process first to exhaust their administrative remedies, before they could challenge the Corps' wetland mitigation conditions or wetlands determinations in court. The administrative process could take over a year to complete before a party can sue. The *Sackett* case did not discuss whether a court would have regulatory jurisdiction in a routine case when a permit process is available to the private parties. Judicial review certainly would be available at the culmination or exhaustion of the entire permit process, unlike an enforcement action over which the Court says the Clean Water Act does not bar immediate pre-enforcement.

Contact Jones Walker if you have questions about agency compliance orders.

–Louis E. Buatt, Pauline F. Hardin, and Stanley A. Millan

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*Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:*

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