



## Before and After *Sackett v. U.S. Environmental Protection Agency* By Lowell Rothschild

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*In March, the Supreme Court issued its much-anticipated ruling in Sackett v. EPA, a case which had the potential to significantly change the way the U.S. Environmental Protection Agency enforces the environmental laws. Despite a unanimous decision against it, EPA has been publicly stating that the case will not significantly change its enforcement approach. Is the agency underestimating Sackett's impact, or is it really just business as usual at EPA despite the apparent setback?*

## Introduction

On March 21, 2012, the U.S. Supreme Court unanimously rejected the Environmental Protection Agency's (EPA's) assertion that a recipient of a Clean Water Act (CWA) administrative order (AO) cannot challenge the order until EPA seeks its enforcement.<sup>1</sup> That decision was significant, but not as significant as why the case needed to be decided in the first place. And simply noting that the decision was a "win" for the regulated community—as most observers predicted after hearing the oral argument—is not as important as determining whether the decision will actually put the regulated community in a different position the next time EPA wishes to issue a CWA administrative order.

*Sackett* is the latest in a long line of cases, almost all of which favor the government, examining when a regulated party can challenge an AO issued by EPA. For years, EPA has issued AOs to individuals and industry—both large and small—ordering them to cease activities and take actions to remediate environmental impacts; these AOs have been based solely on EPA's belief that there has been a violation of environmental laws. As described below, these orders are typically accompanied by threats of significant fines or penalties for noncompliance, often compounded by penalties for violating the order itself. EPA has consistently taken the position that such orders cannot be challenged in court until the agency actually seeks to enforce them and has typically won these cases under statutes as varied as the Clean Water Act, Clean Air Act (CAA), Resource Conservation and Recovery Act (RCRA), and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The resultant general prohibition against pre-enforcement review is referred to as the pre-enforcement review bar.

The *Sackett* case began when Chantell and Michael Sackett received an administrative order and confronted the pre-enforcement review bar after starting construction of their home in Idaho. To prepare their two-thirds of an acre for construction, the Sacketts filled in a portion of the land with soil and rock, which EPA believed illegally impacted wetlands in violation of the CWA. As a result, EPA issued the Sacketts an AO directing them to remove the fill and restore the affected wetlands; the order stated that failure to comply with its terms could result in large daily penalties and other consequences. The Sacketts disagreed that the wetlands at issue were subject to EPA's jurisdiction and sought a formal administrative hearing to make their case. EPA refused on the grounds that neither the CWA nor its implementing regulations provide for such a hearing.<sup>2</sup>

The Sacketts responded by filing suit in federal district court, alleging that EPA's order was invalid: because the wetlands were not subject to federal jurisdiction, the order was arbitrary and capricious in violation of the Administrative Procedure Act (APA). The district and appellate courts both held that the Sacketts' claims were precluded by the pre-enforcement review bar.<sup>3</sup> At oral argument before the U.S. Supreme Court, based on the nature of the questions posed by seven of the justices, it was clear that a majority of the justices was inclined to side with the Sacketts; the fact that all nine justices did so was

somewhat surprising. A better understanding of why they all agreed requires a detour to examine EPA's approach to enforcing the environmental laws and the rise of the pre-enforcement review bar.

This article does just that, beginning with a discussion of the genesis of the pre-enforcement review bar, including its original rationale, and then addresses the current implications of the bar, including the other obstacles regulated entities face in resolving wetland enforcement actions and receiving wetland permits. The Supreme Court's decision in *Sackett* is briefly described, along with its implications for the regulated community. Finally, the article concludes with an examination of whether the decision will result in significant changes for entities defending EPA's enforcement actions in the wetland context.

## EPA's Enforcement Scheme

Despite a large and dedicated workforce, EPA faces a number of obstacles in effectively enforcing environmental laws. First and foremost, the agency is simply outnumbered; there have always been many more regulated entities than EPA employees. Added to this numerical disadvantage are the enforcement difficulties inherent in the geographic dispersal of regulated entities across the country (many of which are in fairly remote locations), travel and other budgetary restrictions, the need for extensive development of a factual record prior to judicial enforcement, and the passage of time between the acts giving rise to the alleged violation and the enforcement action itself. EPA has historically relied on a number of methods to help it overcome these obstacles, including heavy reliance on quick, less resource-intensive enforcement solutions. One such option has been an administrative order bolstered by threats of significant penalties for noncompliance.

All the major environmental laws authorize EPA to issue AOs.<sup>4</sup> EPA uses this tool frequently, in large part because the agency can issue them based "on any information" available to it, but the AOs nevertheless carry the force of law. Thus, EPA can command a party to act or cease to act—under threat of civil and sometimes criminal penalties—based on information that might not be sufficient to meet the strict judicial standards necessary to prosecute an enforcement action.

It is doubtful that EPA would rely so heavily on administrative orders if it had to gather and adjudicate the extensive factual record necessary to litigate an enforcement action; if it did, EPA would hardly be in a better position than if it simply brought an enforcement action in the first place. However, in most instances, EPA has been able to use AOs in conjunction with a mechanism that allows it to avoid the need to assemble that record. That mechanism is the pre-enforcement review bar.<sup>5</sup>

## The Genesis of the Pre-enforcement Review Bar

The pre-enforcement review bar stands at the crossroads of two significant public policy objectives. On the one hand, the American judicial system is based heavily on due process; prior to the government's taking away an individual's liberty or property, he or she has a right



to be heard by a neutral third party empowered to decide whether the taking is justified under the law and the facts. On the other hand, the public expects and deserves the administration of justice to be expeditious. Not every step of every decision at every level can or should be challenged; doing so would grind the system to a halt. Americans particularly value expediency in situations in which public health or welfare is at stake.

As a result of due process concerns, a number of federal laws include private rights of action that specifically outline when federal action can be challenged. For those laws that do not, Congress has provided a blanket right to review under the APA<sup>6</sup> that protects an individual's due process rights by allowing regulated entities to challenge agency actions that are arbitrary and capricious, an abuse of discretion, or are otherwise not in accordance with the law. However, in light of the balancing concerns about expediency, the APA restricts review to "final" agency actions and prohibits review if the statute that the agency is executing precludes it.<sup>7</sup> In practice, courts have implemented this balance by creating a presumption of judicial review under the APA unless there is clear and convincing evidence of congressional evidence to the contrary.

However, in environmental cases, courts have almost always found the evidence necessary to preclude judicial review. The resultant restriction against the APA's pre-enforcement judicial review of EPA administrative orders is long-standing; in some instances, it is based on explicit statutory prohibitions and, in other cases, on judicial determinations of Congress' intent to impose such a prohibition. CERCLA, for example, contains an express bar precluding review of EPA administrative orders.<sup>8</sup> The CAA does not specifically bar review of administrative orders but generally bars judicial review that is not otherwise provided for in the act.<sup>9</sup> RCRA and the CWA do not contain express bars, but courts have implied ones nonetheless.<sup>10</sup> Thus, as the U.S. Court of Appeals for the Ninth Circuit noted in the *Sackett* case (as discussed below), all four circuit courts that had previously examined the issue under the the CWA had found a bar to pre-enforcement review.

There is a common theme to the circuits' rationales for imposing an implied bar. Issuing the first ruling, the U.S. Court of Appeals for the Seventh Circuit held that Congress gave EPA a choice between filing an enforcement action and issuing an AO, and giving the regulated entity the ability to seek review of the AO would essentially eliminate that choice. The Seventh Circuit also noted that the CWA enforcement scheme is modeled after the CAA scheme and that there is a general bar under the CAA (as well as under CERCLA). Alleviating its due process concerns by stating that judicial review would be available to a recipient of an AO before a penalty could be imposed (that is, before the recipient would have to pay), the court stated that a pre-enforcement review bar should be implied.<sup>11</sup>

The U.S. Court of Appeals for the Fourth Circuit ruled next, explicitly agreeing with the Seventh Circuit and adding that "Congress intended to allow EPA to act to address environmental problems quickly and without becoming immediately entangled in litigation."<sup>12</sup> The U.S. Court of

Appeals for the Sixth Circuit followed, citing the rulings handed down by the Seventh and Fourth Circuits and highlighting the explicit availability under the CWA of judicial review of enforcement proceedings but not AOs and noting that explicit bars to review existed under the similar provisions of the CAA and CERCLA.<sup>13</sup>

By 1995, the bar was so firmly in place that the Tenth Circuit simply cited the opinions issued by the Seventh, Fourth, and Sixth Circuit in its own three-page decision, stating that those cases were indistinguishable and finding no reason to rule differently than those courts had. The Tenth Circuit noted that the plaintiff's "policy argument that it should not be necessary to violate an EPA order and risk civil and criminal penalties to obtain judicial review" was "well taken," but did not offer them a better option.<sup>14</sup> Fifteen years later, the Ninth Circuit's decision in *Sackett* revisited the rationales of all of these decisions and reached the same conclusion: under the Clean Water Act, Congress had implicitly barred judicial review of EPA compliance orders.<sup>15</sup>

The trouble with these rationales is that they overlook the "well taken" due process argument—that failure to afford entities pre-enforcement review allows their property or liberty to be taken without judicial review. Moreover, this rationale reflects a view, decades after the first ruling, which is presumptive, blanket, and intractable, and is based on a previous regulatory scheme that often is not used as originally intended and does not function as it did when the bar was enacted.

#### ***TVA v. Whitman***

In reaching its decision in *Sackett*, the Ninth Circuit went out of its way to distinguish the decision made by the U.S. Court of Appeals for the Eleventh Circuit in *TVA v. Whitman*, which thoroughly examined the due process implications of the pre-enforcement review bar. In *TVA*, the Eleventh Circuit ruled that EPA could not impose penalties for a violation of a CAA administrative order.<sup>16</sup> In light of the bar to pre-enforcement review, the Eleventh Circuit stated, allowing such penalties would be "repugnant to the Due Process Clause of the Fifth Amendment."<sup>17</sup> The court went so far as to rule that the CAA "is unconstitutional to the extent that mere noncompliance with the terms of an [AO] can be the sole basis for the imposition of severe civil and criminal penalties."<sup>18</sup>

The Eleventh Circuit's concern regarding the AO and pre-enforcement review bar scheme was based on the fact that administrative orders can be issued based on any information, such as "a staff report, newspaper clipping, [or] anonymous phone tip."<sup>19</sup> In essence, the Eleventh Circuit concluded that this system, under which EPA can mandate action, and the failure to undertake that action can result in enormous civil and criminal penalties, fundamental due process rights can be taken away without sufficient proof and without judicial review.

The Eleventh Circuit also indirectly identified the counterargument to the CWA cases discussed above, which had focused on the fact that Congress had authorized EPA to pursue either administrative or judicial remedies. Whereas those circuits focused on EPA, finding that it would defeat

the agency's ability to choose between the two remedies if an AO could be reviewed in court (thus forcing EPA to "choose" a judicial remedy), the Eleventh Circuit instead honed in on what that choice meant for the regulated entity. The court noted that a scheme under which EPA could issue an AO and obtain penalties for noncompliance with its terms is an "interpretation [that] is, to say the least, bizarre when one reads the rest of the statute. The other criminal provisions require the Government to prove that a defendant has negligently or knowingly released hazardous pollutants. Why would Congress bother with requiring the use of the full panoply of procedural rights found in the Federal Rules of Criminal Procedure when EPA could simply issue an ACO (administrative consent order) based upon 'any information' and, upon noncompliance with the ACO, obtain a conviction?"<sup>20</sup>

Given that the plain meaning of the CAA and judicial precedent barred judicial review of AOs prior to their enforcement, the Eleventh Circuit ruled that the only way to protect regulated entities' due process rights was to conclude that AOs do not have the force of law and that failure to comply with their terms cannot result in penalties.

In *Sackett*, the Ninth Circuit examined *TVA v. Whitman* and wiggled out from under its rationale by electing to read the due process violation out of the statute. When faced with the *TVA* opinion, the Ninth Circuit said that its responsibility was to read the statute in a constitutionally permissible manner if possible. It did so by concluding that, notwithstanding the language of the CWA, which allows EPA to enforce AOs without qualification, EPA could actually enforce an AO only if the agency simultaneously proved a violation of the CWA. The Ninth Circuit said that the Sacketts would have their day in court (notwithstanding the fact that they would be accruing penalties up to \$75,000 per day waiting for EPA to bring its enforcement action) at the time EPA provided that proof; thus, there was no due process violation. In short, the Ninth Circuit rejected the Sacketts' due process concerns by stating that EPA cannot recover penalties solely for violating an administrative order.<sup>21</sup>

However, the Ninth Circuit's rationale contradicts the language of the CWA, the AO issued to the Sacketts, and—most importantly—EPA's intent in issuing the AO. EPA has historically taken the position that it can seek penalties for violation of an AO even without an underlying violation of the act. EPA's contrary view of its AO authority was made clear in 2011 in *U.S. v. Range Production Company*,<sup>22</sup> a case in which EPA did exactly what the Ninth Circuit said it could not do and sought penalties under the Safe Drinking Water Act for violation solely of an AO.<sup>23</sup> EPA explicitly argued that it need not prove that the Safe Drinking Water Act had been violated in order to recover penalties for noncompliance with an AO. The judge in *Range* delayed his decision in the matter, issuing an opinion that this "difficult" and "important" issue should be decided after the Fifth Circuit ruled on a related motion in the case.<sup>24</sup> EPA subsequently withdrew the order and joined with *Range* to dismiss the case before the matter could be decided.

## Environmental Enforcement During the Rise of the Pre-enforcement Review Bar

In addition to creating due process concerns, the pre-enforcement review bar suffers from the fact that it was crafted during a different period of environmental enforcement. A blanket prohibition against judicial review prior to EPA enforcement arguably made sense 30 years ago at the inception of environmental regulation. At that time, most disputes between regulated entities and EPA were based on issues of fact, not law. Moreover, the enforcement situations faced by EPA and regulated entities at the time involved issues that were comparatively more straightforward.

CERCLA, for example, imposed almost universal liability on site owners, site operators, generators of waste, and parties who arranged for disposal, making them each retroactively, jointly and severally liable for site remediation regardless of the legality of their conduct at the time it occurred. Even though some have questioned the fairness of this statutory scheme, it was quite clear and left little room for legal maneuvering: if a site was contaminated with hazardous substances and the party sent those substances to the site, it had to clean it up, with almost no questions asked. There were few legal defenses to such actions; the primary question was what a party's share of liability should be. Thus, most parties could look at the facts in front of them and determine the fairness of an EPA order. On the other side of the public policy scale was the clear, significant harm that existed when CERCLA was adopted: there were hundreds of sites throughout the country where toxic substances threatened public health and the environment. The balance between the nature and extent of the harm on one hand and the relatively clear legal liability on the other hand meant that barring pre-enforcement review probably made sense.

Similarly, at that time, enforcement under the CWA and the CAA largely revolved around whether the regulated entity had a permit to discharge or emit the waste, and, if so, whether it had exceeded its permit limits, and the parties' own admissions often proved these factual disputes. Under the CWA, for example, permittees are required to submit discharge monitoring reports, which, if they reveal that they had exceeded the limits set by the permit, amount to admissions of liability. In the wetland context, at least by the late 1980s, there was also jurisdictional clarity: almost all wetlands at the time were regulated by the federal government.<sup>25</sup> The outer limits of federal wetland jurisdiction at the time were governed by the Migratory Bird Rule, which stated that, if the wetland was used as a habitat by birds regulated under the Migratory Bird Treaty Act—such as ducks and geese—the wetlands were subject to federal jurisdiction.<sup>26</sup> Thus, EPA and the Army Corps of Engineers have the power to regulate almost every wetland in the country. As with CERCLA, some questioned the fairness of such a comprehensive scheme, but there was clarity.

In situations like these, where there was obvious jurisdiction, significant environmental harm, and clear legal liability, as long as EPA enforcement was evenhanded, a pre-enforcement review bar was less objectionable. A

party could readily look at the facts, understand the scope of the law, and make a reasoned assessment of its liability. Many would say that those days of clarity and enforcement against the obvious violators and responsible parties are largely gone.

### The Pre-enforcement Review Bar Today

Today, most disputes between EPA and regulated parties relate to much more arcane issues of the law, and many disagreements over EPA's enforcement authority are legal—if not jurisdictional—rather than factual. The CAA regulatory scheme has expanded to such a degree that almost no legal or technical experts practice the entirety of the act. Since the 1990 CAA amendments, EPA has added more than 10,000 pages of CAA regulations (which have grown from 3,747 pages in 1990 to 14,220 in 2011). Many regulated entities now find it difficult simply to understand what conduct is prohibited under the Clean Air Act. Moreover, EPA has moved to enforcing much more complicated portions of the act.

Even enforcement under CERCLA has moved into gray areas as EPA has expanded its traditional use of CERCLA to investigate matters historically outside of its jurisdiction. In investigating the impacts of hydraulic fracturing on supplies of drinking water—one of the more contentious disputes with which the agency is currently dealing—EPA has been somewhat hamstrung since these activities are statutorily exempt from regulation under the most obvious regulatory regime, the Safe Water Drinking Act. Seeking an alternative course, EPA has turned to CERCLA to obtain information from fracking companies and attempt to identify violations of environmental laws. An EPA official recently acknowledged that the agency was searching for “holes” in the exemptions that might allow it to regulate this activity in situations in which most agree that EPA cannot.<sup>27</sup> The question of whether EPA is properly using CERCLA for such a purpose is a fundamental one about which reasonable minds can differ.

The Clean Water Act, particularly the provision related to wetlands enforcement—the situation in which the Sacketts found themselves—may present the clearest example of legal uncertainty. Legal certainty in the wetlands context vanished in 2001, when the U.S. Supreme Court abrogated EPA's Migratory Bird Rule.<sup>28</sup> Over the following decade, numerous court decisions and documents that provide regulatory guidance have offered little clarity as to which wetlands are subject to federal jurisdiction and which are not. Indeed, in 2006, the Supreme Court further muddled the waters in a 4-1-4 decision issued in the case of *Rapanos v. U.S.*—a decision that has provided two different tests for jurisdiction, neither of which is based on any language found in the Clean Water Act.<sup>29</sup> The test that is currently favored is whether the wetlands (1) have a “significant nexus” to a traditionally navigable water or (2) are adjacent to a traditionally navigable water or a perennial or intermittent water tributary of such water. So much uncertainty surrounds the significant nexus test that EPA and the Army Corps of Engineers have drafted their third guidance document in six years attempting to define its

scope. Compounding the confusion, because of a quirk of constitutional law in interpreting split Supreme Court decisions, the favored jurisdictional test is not available in the Eleventh Circuit, where the government can only show jurisdiction based on the second part of the favored test.<sup>30</sup>

For much of the last decade, almost all parties on both sides of the CWA jurisdictional issue have been able to agree on at least one thing: that the best solution is for Congress to pass a law or EPA and the Army Corps of Engineers to adopt a rule defining the scope of their jurisdiction, so that at least there is clarity. Requests for such clarity have come from the regulated community, non-governmental organizations, and Congress. Justice Alito reiterated the plea in his concurring opinion in *Sackett v. EPA*.<sup>31</sup> However, Congress has remained gridlocked on the issue, and the agencies have thus far failed to even propose a rule, most recently backtracking in March 2012 on a promise to do so. Thus, parties attempting to determine if they are subject to federal jurisdiction for activities in wetlands are left pondering iterative versions of guidance documents that are allegedly nonbinding and therefore not challengeable in court. However, as almost any practitioner will tell you, EPA and the Army Corps of Engineers hew extremely closely to the guidance documents, straying only in rare circumstances and only after extensive inter-agency discussions—often at the headquarters level.

This reliance on guidance documents is another significant change in environmental regulation over the past 20 years. As regulatory issues become more complex and rulemakings drag on and are more frequently challenged in court, EPA has come to rely to a much greater degree on guidance documents to ensure consistency. Emphasizing consistency is laudable, but, as noted above, it should not be done at the expense of providing a legal interpretation of a statute that can be challenged in court. Relying on “nonbinding” guidance documents that can only be challenged on an as-applied basis requires one company or individual to carry the burden of challenging a rule that is applied across the regulated community. Many individuals cannot shoulder the financial burden necessary to challenge a rule as applied; others will not do so for fear of negative publicity. This approach, which creates obstacles to challenging government policy, is troubling in and of itself, but, when combined with the pre-enforcement review bar, which prohibits such a challenge until EPA seeks significant financial penalties, the trend toward increased reliance on guidance documents is even more problematic.

Another compounding factor is EPA's effort to regulate through enforcement. In the absence of new environmental laws or rules that tighten pollution standards or increase mitigation requirements, in recent years, EPA has brought enforcement actions for the purpose of not just penalizing violators but also seeking emission restrictions from them that are more stringent than those available under regulations. Thus, alleged violators face the decision to either submit to strict pollution requirements to which they would not otherwise be subject (and to which their competitors are not) or fight a lengthy court case, which could

result in the imposition of extraordinarily high penalties. The pre-enforcement review bar accentuates the downside of mounting such a challenge, raising the possibility that a company will simply submit rather than litigate.

Finally, over the years, other developments have served to increase the potential exposure of a party wishing to challenge an EPA order. In the wetlands context, courts have generally held that every day that wetland fill remains in place is a day of violations. Violations—originally penalized at up to \$25,000 per day and now adjusted for inflation at up to \$37,500 per day—can be imposed for every different wetland in a wetland complex or, in some circumstances, for each act of filling. In 2002, for example, an evenly divided Supreme Court upheld penalties for the “deep ripping” of a wetland in which the regulated entity was penalized every time his tractor ripped through the same wetland—amounting to 10 separate violations for filling the same wetland.<sup>31</sup> The statute of limitations on wetland violations is five years, meaning that one act of filling a wetland can result in a statutory maximum penalty of \$68,475 million before the government files suit. And, as a result of the fact that filling in place constitutes a continuing violation, the suit can be brought any time after the activity occurred.

This was the regulatory morass in which the Sacketts found themselves.

### The Sacketts’ Case

Hoping to build their family home on a 0.63-acre residential lot in a developed subdivision, the Sacketts filled a portion of the property with dirt and rock. EPA’s eventual response was to issue a CWA administrative order directing the Sacketts to do the following:

- remove the fill and restore the wetlands,
- plant the site with container-sized native scrub-shrub and broad-leaved deciduous wetland plants and seed with native herbaceous wetland plants,
- fence the property for the first three growing seasons,
- monitor the growth of the plants for two years, and
- provide a copy of the order to anyone interested in purchasing the property at least 30 days prior to transfer.

Following EPA’s rejection of their request for an administrative hearing regarding the validity of the AO, the Sacketts sued EPA in federal district court, alleging violations of the Administrative Procedure Act and their right to due process. The district court dismissed the Sacketts’ claims and the Ninth Circuit affirmed the decision. In its decision, the Ninth Circuit held that the CWA implicitly precludes judicial review of the AO, while acknowledging that it does not do so explicitly. The court noted that the CWA’s “goal of enabling swift corrective action would be defeated by permitting immediate judicial review of compliance orders.”<sup>32</sup>

At oral argument before the U.S. Supreme Court, the government expressed the position that the penalties imposed under the CWA of \$37,500 per day applied to violations of the act as well as of the order itself and provided for a maximum penalty of \$75,000 per day. This appeared

to concern the justices, as did the government’s admission that the Army Corps of Engineers would be unlikely to issue the Sacketts a 404 permit until EPA’s administrative order O was resolved.<sup>33</sup> Thus, there was no real possibility the Sacketts could resolve EPA’s concerns by obtaining a permit after the fact.

The government stated that the Sacketts could have—and should have—sought a permit prior to acting. In other words, the Sacketts should have applied for a permit for an act they did not think required one in order to prove that they did not need the permit. There are two problems with this argument. First, it is questionable whether the Army Corps of Engineers would go to the effort of informing the Sacketts that no permit was required. Under a Memorandum of Agreement the Corps has with EPA, an extensive interagency review and submission process is required for the Corps to identify a wetland as nonjurisdictional. More fundamentally, the problem with this argument is that the permitting process is lengthy, cumbersome, and expensive. Even according to EPA, it takes two to six months to approve the average permit (after the agency receives an application, which can take another two to four months to prepare); if the application requires an Environmental Impact Statement under the National Environmental Policy Act, EPA states that the two to six months becomes closer to three years. Consultant costs to prepare an application can run from \$10,000 or \$20,000 for a simple application to millions of dollars if an Environmental Impact Statement is required. In short, the government’s position is that, because the regulatory landscape is uncertain, private entities should spend their time and money asking EPA and the Army Corps of Engineers to clarify that landscape one wetland at a time. Such an expenditure of resources cannot be in the public interest. The public as a whole would be better served by the clarity of a rulemaking that provides the regulated community with certainty and an understanding of when a permit application is truly necessary.

### The Outcome

There was little doubt following oral argument that the Sacketts would prevail. A majority of the justices appeared inclined to rule in their favor, including Chief Justice Roberts and Justices Thomas, Scalia, Alito, and Breyer. Justices Kagan, Sotomayor, and Ginsberg also expressed some doubt as to the government’s position. The fact that the Court decided the case unanimously, however, was somewhat surprising, reflecting the untenable nature of EPA’s position.

On its face, the decision is fairly narrow. The justices decided that the CWA administrative orders constitute “final agency action” for which there was no other adequate remedy at law and are therefore generally subject to judicial review under the Administrative Procedure Act.<sup>34</sup> The Court’s opinion did not consider the Sacketts’ due process argument or address judicial review under other environmental statutes. However, the Court did note that the CWA does not expressly bar judicial review.<sup>35</sup> It will be interesting to see how the lower courts addresses sub-



sequent requests for judicial review of AOs under statutes that contain an express bar, such as CERCLA.

In examining whether the Sacketts had a valid claim under the Administrative Procedure Act, the Court specifically analyzed whether they had an alternative, adequate legal remedy. The Court ruled that they did not, noting, among other things, that, under the AO, sizable penalties compiled daily, while the Sacketts could do nothing but wait “for the agency to drop the hammer.”<sup>36</sup> The justices discarded the argument that allowing judicial review would negate EPA’s ability to choose between administrative and judicial enforcement, stating that there are a number of reasons EPA might select an administrative approach even if it might result in judicial review. The Court flatly rejected EPA’s concern that permitting judicial review would slow down the enforcement process, noting that “[t]he APA’s presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all.”<sup>37</sup> To reinforce this point, the Court went on to conclude 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 of judicial review—even judicial review of the question whether the regulated party is within EPA’s jurisdiction.”<sup>38</sup> Thus, the Sacketts have the chance to return to federal district court and plead their case.

#### **After Sackett**

However, a number of obstacles still stand in the Sacketts’ way and will stand in the way of any parties who seek to take advantage of the Supreme Court’s decision in the future. As discussed below, the Sacketts now have to decide whether to settle their case in the face of mounting civil penalties or to challenge an EPA jurisdictional decision that will receive substantial deference from the courts. The approach of those who come after this decision will depend in part on how EPA responds to the ruling. As Justice Scalia presaged during oral argument, EPA might simply try to issue parties warnings that cannot be enforced, notifying the parties of their potential legal violation and informing them of the penalties they face if they do not remediate the fill. Such an option, stated Justice Scalia, would not implicate pre-enforcement review, because it would not be a final agency action or impose any penalties on the alleged violator. However, this alternative would not lower the potential \$68 million penalty available to EPA after five years of continuing violations nor would it make it any more likely that the Sacketts and those after them will be able to obtain an after-the-fact permit under the cloud of an AO.

Moreover, even though obtaining pre-enforcement review is a significant step toward judicial oversight of EPA, doing so is not likely to resolve all of industry’s concerns. First, there is nothing to say that pre-enforcement review will occur in federal court, at least immediately. Other environmental statutes provide pre-enforcement review through a largely administrative process. Under the Federal Insecticide, Fungicide and Rodenticide Act, for example, there are several levels of enforcement review.

The first is before an EPA administrative law judge; the second is an appeal of the administrative law judge’s ruling to EPA’s Environmental Appeals Board. Only after the time and expense of two administrative hearings is one’s dispute decided by an Article III court. Such a process is likely to fulfill a Supreme Court mandate that EPA must provide pre-enforcement review but it will be quite cumbersome for smaller litigants like the Sacketts.

Even if regulated entities obtain some form of immediate pre-enforcement review by an Article III court, such a right may not help them a great deal. First and foremost, as described above, the jurisdictional landscape under the CWA is muddy. In the most recent draft guidance document, EPA and the Army Corps of Engineers have claimed jurisdiction over a great many wetlands far up the tributary system. They have opined that wetlands can be considered “adjacent” to navigable waters if there is an ecological connection between the wetland and the tributary.<sup>39</sup> Thus, even if the wetland is separated by a berm or is located a significant distance from the tributary, the use of both by amphibians or waterfowl during the course of their lives may be sufficient to show adjacency. The agencies have stated their belief that the wetland’s significant nexus need not be shown by itself but can be aggregated with other similar wetlands in the watershed to show that they are significant in total. Ditches cut in uplands, though non-jurisdictional themselves, can create a connection between a jurisdictional body and a potentially jurisdictional one. The agencies will receive deference from the courts in interpreting the act, creating a significant possibility that their interpretation will be upheld. Thus, it is likely that the Sacketts and those who come after them, even if they choose to challenge EPA’s determination, will be found to be acting in federally jurisdictional waters.

Furthermore, if substantial pre-enforcement review is granted, the process will encumber significant EPA and Corps resources, as EPA will have to compile an administrative record for each AO it issues. Diverted from the permitting process to the enforcement process, the regulated community’s ability to obtain permits is likely to slow even further. In recent years, the individual permitting process has lengthened to a significant degree: nationwide permits, which previously excepted large classes of activities from the requirement to obtain a lengthy individual permit, have been restricted. As described above, obtaining a non-jurisdictional determination has become a byzantine maze—to such a degree that the Corps has adopted a regulatory guidance letter allowing entities to concede jurisdiction simply to get on with the process. Reviews undertaken under the National Environmental Policy Act, which are required for individual permits, have become more involved and correspondingly more expensive and time-consuming; their susceptibility to challenge also grows as their complexity expands. Permit applicants have found that to identify the least damaging practicable alternative, required under the wetland regulations in order to obtain an individual permit, they must move from the Corps to EPA, offering additional mitigation that EPA views as sufficient to complete the permitting process; those that do not

provide EPA greater degrees of mitigation find the permitting record replete with ammunition for private parties to challenge the National Environmental Policy Act's decision in court. Those challenges further delay the process. The cost in time and money, coupled with the regulatory and jurisdictional uncertainty, often tilts the permit applicant's decision-making balance toward simply agreeing with EPA regardless of how the applicant views the agency's requests.

The Sacketts' situation is a sympathetic one: they appear as David to EPA's Goliath, lacking extensive financial resources or knowledge of the regulatory scheme. But the obstacles the Sacketts face—in terms of the complexity of the regulatory scheme, the time and resources required to understand the process, and the inability to obtain prompt judicial review of EPA's decisions—are faced by all those attempting to comply with the Clean Water Act and other environmental statutes. And alleged violators with deeper pockets tend to face larger potential penalties. Even though the Environmental Protection Agency is outnumbered on an industry basis, on an individual basis, it has the upper hand. All parties, large and small, face an agency favored by enormous resources, tremendous statutory authority, prosecutorial discretion, judicial deference, and the claim to be protecting an environment that cannot protect itself. The deck is stacked heavily against anyone seeking to challenge an EPA enforcement action. In the end, obtaining pre-enforcement review is an important step to adding rationality and equity to the permitting and enforcement scheme, but it is only one of many necessary steps that can be taken. **TFL**



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## Endnotes

- <sup>1</sup>*Sackett v. U.S. EPA*, 132 S. Ct. 1367 (2012).
- <sup>2</sup>See *Sackett v. U.S. EPA*, 622 F.3d 1139, 1141 (9th Cir. 2010).
- <sup>3</sup>*Sackett*, 622 F.3d 1139 (D. Idaho) (Slip. Op. Aug. 7, 2008).
- <sup>4</sup>CWA, 33 U.S.C. § 1319(a); CAA, 42 U.S.C. § 7413; CERCLA, 42 U.S.C. § 9604; and RCRA, 42 U.S.C. §§ 6928(a), 6934(a).
- <sup>5</sup>See *Sackett*, 622 F.3d at 1142–1143.
- <sup>6</sup>5 U.S.C. § 704.
- <sup>7</sup>*Id.*; 5 U.S.C. § 701(a)(1).
- <sup>8</sup>42 U.S.C. § 9613(h).

<sup>9</sup>42 U.S.C. § 7607(e).

<sup>10</sup>See, e.g., *W.R. Grace & Co. v. EPA*, 959 F.2d 360 (1st Cir. 1992); and *Laguna Gatuna Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995).

<sup>11</sup>*Hoffman Group Inc. v. EPA*, 902 F.2d 567, 568 (7th Cir. 1990).

<sup>12</sup>*S. Pines Assocs. by Goldmeier v. United States*, 912 F.2d 713, 716 (4th Cir. 1990).

<sup>13</sup>*S. Ohio Coal Co. v. Office of Surface Mining Reclamation & Enforcement*, 20 F.3d 1418, 1426–1427 (6th Cir. 1994).

<sup>14</sup>*Laguna Gatuna*, 58 F.3d at 566.

<sup>15</sup>*Sackett*, 622 F.3d 1139.

<sup>16</sup>*TVA v. Whitman*, 336 F.3d 1236 (11th Cir. 2003).

<sup>17</sup>*Id.* at 1258.

<sup>18</sup>*Id.* at 1260.

<sup>19</sup>*Id.* at 1241.

<sup>20</sup>*Id.* at 1250 (citations omitted).

<sup>21</sup>*Sackett*, 622 F.3d at 1145–1146.

<sup>22</sup>793 F. Supp. 2d 814 (DC N.D. Texas 2011).

<sup>23</sup>*Id.* at 821.

<sup>24</sup>*Id.* at 824.

<sup>25</sup>Federal responsibility for wetland regulation is shared between EPA and the Army Corps of Engineers. Their various roles are spelled out statutorily and in Memoranda of Agreement but, as a general rule, the Army Corps of Engineers takes the lead on permitting and enforcement of permit violations, and EPA takes the lead when wetlands are allegedly filled without a permit. See Memorandum of Agreement between the Department of the Army and the Environmental Protection Agency Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act (Jan. 19, 1989), available at [water.epa.gov/lawsregs/guidance/wetlands/enfoma.cfm](http://water.epa.gov/lawsregs/guidance/wetlands/enfoma.cfm).

<sup>26</sup>51 FED. REG. 41217 (Nov. 13, 1986).

<sup>27</sup>InsideEPA.com (March 16, 2012), available at [insideepa.com/201203162393329/EPA-Daily-News/Daily-News/epa-examining-existing-authorities-to-step-up-regulation-of-fracking/menu-id-95.html?s=dn](http://insideepa.com/201203162393329/EPA-Daily-News/Daily-News/epa-examining-existing-authorities-to-step-up-regulation-of-fracking/menu-id-95.html?s=dn) (subscription required).

<sup>28</sup>*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

<sup>29</sup>*Rapanos v. U.S.*, 547 U.S. 715 (2006).

<sup>30</sup>*U.S. v. Robison*, 505 F.3d 1208 (11th Cir. 2007).

<sup>31</sup>132 S. Ct. at 1375.

<sup>32</sup>*Borden Ranch v. U.S. Army Corps of Engineers*, 537 U.S. 99 (2002).

<sup>33</sup>*Sackett*, 622 F.3d at 1144.

<sup>34</sup>Jan. 9, 2012 oral argument in *Sackett v. EPA*, 25–34, 40–41; available at [www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-1062.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1062.pdf).

<sup>35</sup>*Sackett*, 132 S. Ct. at 1372.

<sup>36</sup>*Id.* at 1372.

<sup>37</sup>*Id.* at 1374.

<sup>38</sup>*Id.*

<sup>39</sup>U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, *Draft Guidance on Identifying Waters Protected by the Clean Water Act* at 16–17 (May 2, 2011), available at [water.epa.gov/lawsregs/guidance/wetlands/upload/wous\\_guidance\\_4-2011.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf).