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Environmental BULLETIN

Supreme Court Rips Clean Water Act

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In a decision narrow in scope but important in practical impact, the U.S. Supreme Court has allowed a court challenge to the U.S. Environmental Protection Agency (EPA) by people otherwise facing the prospect of having to expend significant funds to "restore wetlands" on their property or risk severe penalties. In *Sackett v. EPA*, a unanimous Court held on March 21, 2012, that the Clean Water Act (Act) does not preclude a challenge to an order on the grounds that the EPA is exceeding its jurisdiction.

Plaintiffs in *Sackett* were an Idaho couple who had bought a residential lot in an already developed subdivision not far from a local lake (the property owners). They filled in some portions of the lot in order to get it ready for home construction. (There were already a number of homes constructed even closer to the lake.) The EPA sent the property owners a notice and order asserting that they had illegally filled wetlands of the United States, and requiring them to restore the wetlands pursuant to an agency-approved plan. Faced with dashed housing plans and the imposition of up to $75,000 per day in penalties for not complying, the property owners went to Court, pursuant to the Administrative Procedures Act, alleging they were faced with agency "final action," and that they had no other remedy at law. The U.S. District Court for the District of Idaho and the U.S. Court of Appeals for the Ninth Circuit disagreed, holding that the Act precludes challenges to agency compliance orders, and that such preclusion does not violate a recipient's due process rights.

The Supreme Court reversed. The property owners consequently will get their day in court on the issue of whether their backyard was truly a "water of the United States" within the meaning of the law. This is so because the finding of "wetlands" existing on the property is essentially a "final action," and waiting any longer for a challenge risks serious penalties. The Court ruled that the Act does not require interpretation to preclude the usual presumptions that people adversely affected by final government action may seek judicial review.

The issue of what "wetlands" are, whether "wetlands" are waters of the United States, and other relevant issues, have been repeatedly put into question since the Act's passage in 1972. Justice Samuel A. Alito notes in a concurring opinion in *Sackett* that "the reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act." Justice Alito adds that the law has been problematic for years, with wetlands issues reaching the Supreme Court at least twice previously. "[T]he combination of the uncertain reach of the Clean Water Act and the draconian penalties still leaves most property owners with little practical alternative but to dance to the EPA's tune." Justice Alito indicates that Congress should clarify the law so that it is not so vague and potentially coercive.

While limited in its practical effect to cases where there is serious doubt about the wetlands classification of property, Court's decision is likely to reverberate through the environmental bar and affect the rights of parties in other regulated areas where similar prohibitions on judicial review are in place, such as Superfund (CERCLA) and the Clean Air Act. *Sackett* should also be seen as an invitation to the Congress to engage in some meaningful reform that restores respect for due process to the EPA's internal enforcement decisions.

Sackett v. EPA

For further information, please contact Harvey M. Sheldon or your regular Hinshaw attorney.
