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Supreme Court Allows Judicial Review of EPA Administrative Orders Under the Clean Water Act - But How Much Will It Help?

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By: ***Jason B. Hutt***

On March 21, a unanimous Supreme Court ruled that courts can review EPA administrative orders under the Clean Water Act before EPA seeks to enforce them. The Supreme Court's ruling, while significant, is of uncertain benefit to those regulated by EPA.

The case of *Sackett v. EPA* arose out of the efforts by Chantell and Michael Sackett to build their family home on a residential lot in Idaho. To prepare their two-thirds of an acre for construction, they leveled it with new soil and rock, which EPA believed illegally filled in wetlands in violation of the Clean Water Act. As a result, EPA issued an administrative order to the Sacketts, 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 property at issue was subject to EPA's jurisdiction and sought a formal administrative hearing to make their case. EPA refused, on the grounds that neither the Clean Water Act nor its implementing regulations provide for such a hearing.

The Sacketts responded by filing suit in federal District Court, alleging that EPA's order was invalid – that, because the property was not subject to federal jurisdiction, the order was arbitrary and capricious in violation of the Administrative Procedure Act. The District and Appellate Courts both held that the Sacketts' case was precluded by a precedential bar to pre-enforcement judicial review, which prevented challenge to EPA administrative orders unless and until EPA sought to enforce them in court. The Supreme Court ruled that the Sacketts can sue, overturning the Ninth Circuit's decision and precedent from four other circuits, all of which had stated that pre-enforcement review under the Clean Water Act was prohibited.

The decision was not really in doubt, although the unanimity of the court was. At oral argument, the justices had expressed concern, among other things, that penalties under the order could double the CWA penalties to $75,000 per day and that the Army Corps of Engineers would be unlikely to issue the Sacketts a wetland permit until the EPA order was resolved.

A significant question remains as to what the *Sackett* case means for the Sacketts and others that may want to follow the Sacketts' lead in challenging EPA. The Sacketts themselves have an uphill road ahead of them if they continue their litigation to try to prove that the wetlands in their case were nonjurisdictional. Showing a lack of jurisdiction may be hard given the

government's expansive view of its jurisdiction, the nebulousness of the law, and the deference given the agency. As Justice Alito stated in his concurring opinion in *Sackett*, "the combination of the uncertain 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 little practical alternative but to dance to EPA's tune."

For others that may want to question EPA, it is unclear how much *Sackett* will help. First, they face the same obstacles to judicial review the Sacketts themselves do – deference to EPA may lead to most wetlands being found to be jurisdictional, so most administrative orders may be upheld. Second, EPA already has an easy way around the ruling. As Justice Scalia noted at oral argument, EPA might be able to avoid the pre-enforcement review mandate by simply issuing a warning to parties rather than an enforceable order. Of course, notices of violation are already in EPA's enforcement tool kit and EPA could simply shift its enforcement emphasis in that direction with the addition of remedial measures that EPA would like to see the recipient take to avoid an administrative order or other enforcement action. Such notices would not be final agency action subject to review under the APA, but penalties would still accrue at up to $37,500 a day, because every day fill remains in a jurisdictional wetland is another day of penalties. Also, after notice, the alleged violation may be considered a "knowing" violation and subject the recipient to different and additional enforcement options.

Finally, the Supreme Court's rationale in *Sackett* is based in part on the absence of Congressional language prohibiting pre-enforcement review. The pure holding in *Sackett* will not apply to other laws, such as Superfund, where Congress has explicitly barred pre-enforcement review. However, the implications from *Sackett* are potentially far reaching as courts will likely have to confront constitutional due process issues arising from the unilateral ordering authority given to EPA. In short, courts may no longer be able to avoid whether the unilateral authority granted under various environmental laws is constitutional by declaring unilateral orders to be shy of final agency action. The *Sackett* case is critical in providing a level of review over EPA's enforcement activities, but it is only the first of several necessary steps to do so completely.