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## Supreme Court Rules that U.S. EPA Unilateral Compliance Orders Under the Clean Water Act Are Final Actions Judicially Reviewable

*By John P. Krill, Jr., R. Timothy Weston, and Barry M. Hartman*

In *Sackett et vir v. Environmental Protection Agency*,<sup>1</sup> the United States Supreme Court held unanimously that a compliance order issued under §309(a)(3) of the Clean Water Act<sup>2</sup> is “final action” that is subject to judicial review under the Administrative Procedure Act.<sup>3</sup>

The Sacketts owned a lot in a residential development on which they wished to build a house. Their lot was several parcels distant from a lake. In preparation for construction, they filled in part of their lot with dirt and rock. Some months later, they received a compliance order from EPA. It was “unilateral,” i.e., there had been no opportunity for the Sacketts to have a hearing before it was issued. The order found that their lot contained wetlands and directed them immediately to restore the site in accordance with EPA criteria. The Sacketts asked for a hearing, but EPA refused to hold one. The Sacketts then filed suit in federal district court seeking review under the APA of the threshold question of whether their lot had wetlands that were subject to EPA’s jurisdiction. They also claimed that EPA’s unilateral action was a deprivation of property without due process of law. The district court dismissed the suit. The Ninth Circuit Court of Appeals affirmed, holding that the Clean Water Act precluded judicial review of compliance orders and that the preclusion did not violate the Fifth Amendment’s guarantee of due process. The Supreme Court granted *certiorari* and reversed.

The opinion of the Court, by Justice Scalia, noted that the order had all the earmarks of finality. It determined rights. It imposed a legal obligation. There were severe penalties for violating it. The order also marked the “consummation” of the agency’s decision-making process. The Court rejected the government’s contention that the invitation by EPA to “engage in informal discussions” of the order and to point out any inaccuracies in the findings made the order less than final.

The APA’s judicial review provision requires that a person seeking review of final agency action have “no other adequate remedy in a court.”<sup>4</sup> EPA argued that the Sacketts could get judicial review in a later civil action that could be brought by EPA.<sup>5</sup> The Court was unimpressed, noting that “the Sacketts cannot initiate that process, and each day they wait for the agency to drop the hammer, they accrue, by the Government’s telling, an additional \$75,000 in potential liability.”

The Court also rejected EPA’s suggested administrative pathway to review: applying to the Corps of Engineers for a wetlands permit and then filing suit under the APA if a permit is denied. The Court

<sup>1</sup> No. 10-1062; March 21, 2012.

<sup>2</sup> 33 U.S.C. §1319(a)(3). The Federal Water Pollution Control Act, since its 1972 amendments, has been commonly referred to as the “Clean Water Act.”

<sup>3</sup> U.S.C. §§701-708. A/k/a “the APA.”

<sup>4</sup> U. S. C. §704.

<sup>5</sup> A civil action is also authorized by 33 U. S. C. §1319.

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said that an appeal from a permit denial by a second agency “does not ordinarily provide an ‘adequate remedy’ for action already taken by another agency.”

Nothing in the Clean Water Act expressly precludes judicial review. In contrast, for example, §113(h) of CERCLA explicitly bars judicial review of unilateral orders prior to an enforcement or cost-recovery action.<sup>6</sup> The Court considered and rejected EPA’s policy argument for finding that the statute precluded judicial review: “The Government . . . suggests that they ‘provid[e] a means of notifying recipients of potential violations and quickly resolving the issues through voluntary compliance.’ . . . It is entirely consistent with this function to allow judicial review when the recipient does not choose “voluntary compliance.” The Act does not guarantee the EPA that issuing a compliance order will always be the most effective choice.” The Court gave more weight to the APA’s presumption of the availability of judicial review.

In the opinion of the Court and in the concurring opinion by Justice Alito, one sees concern over EPA’s tactics. Justice Scalia’s phrase about citizens “waiting for the hammer to drop” while potential penalties accrue was not the only indication. Scalia also characterized the APA’s presumption of review as a “repudiation of the principle that efficiency of regulation conquers all.” He also said that, “there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into ‘voluntary compliance’ without the opportunity for judicial review.” Justice Alito was even blunter:

The position taken in this case by the Federal Government—a position that the Court now squarely rejects—would have put the property rights of ordinary Americans entirely at the mercy of Environmental Protection Agency (EPA) employees.

. . .

If the owners do not do the EPA’s bidding, they may be fined up to \$75,000 per day . . . . And if the owners want their day in court to show that their lot does not include covered wetlands, well, as a practical matter, that is just too bad. Until the EPA sues them, they are blocked from access to the courts, and the EPA may wait as long as it wants before deciding to sue. By that time, the potential fines may easily have reached the millions. In a nation that values due process, not to mention private property, such treatment is unthinkable.

The Court’s decision provides a modest measure of relief. At least, property owners like petitioners will have the right to challenge the EPA’s jurisdictional determination under the Administrative Procedure Act. But 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 with little practical alternative but to dance to the EPA’s tune.

Justice Alito noted that “real relief” is beyond the power of the Court. It requires Congress to act.

Because the Court found that the APA provided judicial review, the Court did not have to reach the second question in the case: whether the unavailability of judicial review of a compliance order amounts to a deprivation of property without due process of law.

The second question, however, loomed over the case. It prompted briefs from *amici curiae*, such as the U.S. Chamber of Commerce, that detailed the routine use by EPA of the “strong-arm” tactics deplored by Justice Scalia. *Amici* showed the Court that EPA intentionally avoided taking courses of action that would expose it to judicial review. The frequent and massive use of the unilateral

<sup>6</sup> 42 U.S.C. §9613(h). “CERCLA” is an acronym for the Comprehensive Environmental Response, Compensation and Liability Act.

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administrative order (“UAO,” in EPA parlance), followed by threats about accruing penalties, had become EPA’s tactic of choice for cowing individuals, small businesses and even large corporations into surrendering. The Court was obviously affected by the *amici*.

This case may therefore be viewed as having advanced the education of the Court on the question of due process in unilateral administrative orders. In *General Electric Co. v. Jackson*,<sup>7</sup> the D.C. Circuit upheld the constitutionality of CERCLA UAOs, but the Supreme Court denied *certiorari*.<sup>8</sup> The D.C. Circuit relied on the notion that UAO recipients “may obtain a pre-deprivation hearing by refusing to comply and forcing EPA to sue in federal court.” The *Sackett* decision shows that the Court is becoming aware of the illusory nature of such a remedy, since EPA cannot be “forced” to sue, while penalty claims accrue as though they were liens. The Court’s expressions of concern in *Sackett* about the consequences of EPA’s use of unappealable orders suggest that there may be a due-process question that will be deemed *cert.*-worthy in the future.

The *Sackett* decision also has implications for other aspects of agency decision-making besides unilateral compliance orders. EPA and the Army Corps of Engineers frequently issue “jurisdictional determinations” on whether properties have wetlands. These determinations trigger high costs for landowners, who must, as a consequence, commission expert studies, develop mitigation plans and apply for permits, all of which can add up to costs in the hundreds of thousands, as well as years of delay. Yet these determinations have been considered unappealable. *See, e.g., Hampton Venture No. One v. United States*<sup>9</sup> and *Lotz Realty Co. v. United States*.<sup>10</sup> To the extent these and similar decisions relied on pre-*Sackett* case law analogizing to pre-enforcement review of compliance orders, they are now open to fresh consideration.

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### Authors:

**John P. Krill, Jr.**

john.krill@klgates.com  
+1.717.231.4505

**R. Timothy Weston**

tim.weston@klgates.com  
+1.717.231.4504

**Barry M. Hartman**

barry.hartman@klgates.com  
+1.202.778.9338

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<sup>7</sup> 610 F.3d 110 (D.C. Cir. 2010). GE filed an amicus brief in *Sackett*.

<sup>8</sup> 2011 U.S. LEXIS 4334 (June 6, 2011).

<sup>9</sup> 768 F. Supp. 174 (E.D. Va. 1991).

<sup>10</sup> 757 F. Supp. 692 (E.D. Va. 1990).

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