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Board of Contributors: Supreme Court EPA case highlights need for regulatory scrutiny

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The U.S. Supreme Court recently heard oral argument in the closely watched Sackett v. EPA case — the David v. Goliath environmental law case of 2012.

The Sackett's own an undeveloped parcel in Idaho slightly over a half an acre in size, upon which they had set out to build a home. In 2007, in preparation of building the home they filled a portion of their property without a Clean Water Act permit. The Environmental Protection Agency determined that the fill violated the CWA because the parcel contained a "jurisdictional wetland." Jurisdictional wetlands are wetlands regulated by the U.S. Army Corps of Engineers under section 404 of the CWA. They must exhibit hydrology, hydrophytes and hydric soils as set forth in 40 CFR 232.2(r). The EPA then issued an administrative compliance order requiring the Sackett's to remove the fill and restore the parcel to its original condition or face fines of up to $37,500 per day for every day the fill remained in the wetland.

The Sackett's petitioned the EPA for a hearing to challenge the wetland determination. The EPA refused and the Sackett's filed suit. The district court dismissed the Sackett's case for lack of jurisdiction stating that a review of an agency order was barred unless the agency sued first. The 9th U.S. Circuit Court of Appeals affirmed the district court's ruling concluding the CWA impliedly barred pre-enforcement review under the Administrative Procedure Act and this bar did not violate due process.

The states of Alaska, Wyoming, Hawaii, South Carolina, Virginia, North Dakota, Nebraska, Arizona, Colorado and Michigan have filed an amici curiae brief in support of the Sackett's setting forth their "interest in maintaining and protecting the states' primary power and responsibility over land and water use and development, which is usurped by the federal agencies' use of compliance orders" in addition to states "sovereign interest to protect their property interests" and protect "responsibly-conducted development for housing, infrastructure, and other purposes from overreaching federal regulation that is administered so zealously that it exceeds the objectives of the CWA."


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Although Florida did not join in the amici brief, the state is no stranger to challenging the EPA's efforts to implement programs under the CWA as evident in Florida's present efforts to maintain its role in setting numeric nutrient standards for the state rather than simply allowing the EPA to unilaterally set the standards.

While initially the tenor of the argument appeared to be less of a David v. Goliath and more of a boring droll of administrative law regarding whether the Sackett's had exercised all their options to avoid EPA intervention, this came to an end when counsel for the EPA began to unfold his argument. The justices began to focus on the issue of double penalty as the EPA conceded the possibility of double penalties.

In so doing, the EPA conceded the maximum penalties faced by the Sackett's totaled $75,000 per day — not $37,500 — and that the CWA provides separate penalties for violating the statute and violating the compliance order. Counsel for the EPA explained that double penalties were a legal possibility, but he did not know of a case in which double penalties had been assessed. "I'm not going to bet my house on that," Justice Antonin Scalia remarked.

Argument came to a climax when the heat was placed on counsel for the EPA with a question by Justice Samuel Alito: "What would you do … if you received this compliance order? You don't think your property has wetlands on it and you get this compliance order from the EPA." The response prompted a strong retort from Justice Alito:

"Don't you think most ordinary homeowners would say this kind of thing can't happen in the United States? You buy property to build a house. You think maybe there is a little drainage problem in part of your lot, so you start to build the house and then you get an order from the EPA which says: You have filled in wetlands, so you can't build your house; remove the fill, put in all kinds of plants; and now you have to let us on your premises whenever we want to. You have to turn over to us all sorts of documents, and for every day that you don't do all this you are accumulating a potential fine of $75,000. And by the way, there is no way you can go to court to challenge our determination that this is a wetland until such time we choose to sue you."

By the end of oral argument, eight of the justices had expressed strong concerns with the EPA's case. The Sackett's attorney offered to rest without rebuttal.

Although a decision is pending, if oral argument is any indication, the Supreme Court may be on its way to putting some restraints on the EPA's enforcement powers under the CWA and possibility many other federal environmental laws. As a result, Floridians may find themselves in a stronger defense position against allegations of violations and determinations of jurisdictional wetlands. But pre-enforcement review of an administrative compliance order would not relieve compliance with such orders so that the alleged violator could continue in their fill activities or other controverted behavior, nor would a pre-enforcement challenge result in an automatic stay of enforcement.

Rather, it would simply allow them their day in court.

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