The U.S. Supreme Court issued its decision in the most closely watched environmental case on the Court's docket this Term: *Sackett v. U.S. Environmental Protection Agency*. As expected following an especially lively set of oral arguments in the *Sackett* case earlier this year, the justices ruled–unanimously–in favor of the private property owners who had brought this litigation under the wetlands provisions of the Clean Water Act, and against EPA.

The facts giving rise to *Sackett* are relatively straight-forward: after the Sacketts graded and filled their residential lot near Priest Lake, Idaho, preparatory to building a home on the property, EPA officials served the couple with an administrative compliance order advising them that their parcel constituted wetlands subject to federal permit jurisdiction under section 404 of the Clean Water Act. The order directed the landowners to restore the lot to its original condition without delay; and threatened the Sacketts with substantial daily fines (quantified by the Solicitor General at oral argument as up to $75,000/day) for non-compliance with the CWA and administrative order.

After the Sacketts sought and were denied a meeting with EPA regulators to address their contention that the property was not, in fact, wetlands, they filed suit in federal district court to challenge EPA's wetlands classification of their lot. The district court dismissed their lawsuit, holding that EPA administrative compliance orders issued under the CWA don't constitute final agency action subject to judicial review. The Ninth Circuit affirmed, joining numerous other federal circuits that had previously come to the same conclusion.

The Supreme Court reversed in a unanimous opinion authored by Justice Scalia.

Considering Scalia's well-known propensity for lengthy opinions and rhetorical flourishes–especially when it comes to property rights claims and environmental regulation– the decision in *Sackett* is remarkably terse and narrowly crafted.

The key (and only relevant) issue, according to the Court, is whether EPA's administrative

order constitutes "final agency action" subject to judicial review under the federal Administrative Procedure Act. Focusing on the detailed, prescriptive nature of the EPA order, Scalia's opinion concludes that "[i]t has all the hallmarks of APA finality." That being the case, the only remaining question is whether the Clean Water Act by its terms precludes pre-enforcement APA review. The CWA doesn't do so explicitly, and the justices were unwilling to imply from the CWA an abrogation of the APA's "presumption of judicial review." End of story, according to Justice Scalia and his colleagues.

Justice Ginsberg penned a short, concurring opinion, noting that the Court was only upholding the right of property owners to seek judicial review of EPA's threshold wetlands determination, not the terms and conditions of the administrative compliance order itself. Justice Alito wrote a separate concurrence in which he–and only he–continued the broad criticism of federal wetlands regulators and policy that he initiated from the bench during the January 9th oral arguments in *Sackett*: "In a nation that values due process, not to mention private property, such treatment is unthinkable."

So, what now? The federal government can take a measure of comfort from the fact that the Supreme Court's decision in *Sackett* couldn't have been much narrower. The justices ultimately declined to address the constitutional issue they had originally directed the parties to brief: whether denying the Sacketts pre-enforcement judicial review of EPA's administrative compliance order violates their right to due process. (Had the Court predicated its decision on due process grounds, it would have implicated a wide array of environmental–and non-environmental–enforcement programs administered by federal regulators.) Nor does *Sackett*'s statutory construction analysis directly affect any other federal environmental statutes–some of which (like CERCLA) *expressly preclude* pre-enforcement judicial review.

Some will argue that the availability of judicial review to contest administrative orders issued by EPA under the Clean Water Act will hamper federal enforcement efforts in the future. That's due in significant part to the fact that the vast majority of federal actions to enforce the CWA take the form of such orders, rather than formal administrative hearings or federal litigation that are more costly, resource-intensive and time-consuming for EPA.

Be that as it may, my own opinion is that Scalia and the Court got this one right. The *Sackett* decision's statutory analysis seems compelling, and the equities of this particular David-and-Goliath saga fall rather strikingly in favor of the Sacketts. I don't often find myself in agreement with Justice Scalia, but I confess that I do here. One of Scalia's closing observations in *Sackett* particularly resonated with me: "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–even judicial review of the question whether the regulated party is within the EPA's jurisdiction."