LANDOWNERS CAN NOW CHALLENGE CORPS WITHOUT FEAR OF PENALTIES

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The Environmental Protection Agency and U.S. Army Corps of Engineers have lost one of their most significant levers in regulating wetlands under the Clean Water Act. Today, in *Sackett v. Environmental Protection Agency, et al*., the United States Supreme Court ruled unanimously that landowners have the right to seek judicial review before being forced to comply with enforcement orders.

In this case, the EPA issued a compliance order asserting that landowners violated the Clean Water Act because they filled wetlands on their land without obtaining a permit. The EPA relies on these compliance orders and the threat of significant fines (up to $37,500 a day) to "urge" landowners to comply quickly with such orders. These landowners fought back, claiming their property was not a wetland, but, under previous rulings, they had no way to challenge the EPA's unilateral wetland claim. That is, the landowners had a Hobson's choice of complying with an order with which they did not agree or risking the expense of a defense of and possible imposition of significant penalties if EPA filed and successfully prosecuted an enforcement action.

With this ruling, landowners can now confront the government's interpretation of what constitutes a wetland under the Clean Water Act by challenging the agency's basis for demanding compliance.

While the Supreme Court didn't agree with the landowners' broader claim of a due process violation, it held that the landowners could challenge the government's claims under the Administrative Procedure Act (APA); the APA provides for challenges to agency decision making.

In sum, the EPA and the Corps will likely face challenges to their unilateral determination of the scope of the jurisdiction. And, while the case focused on the Clean Water Act, it may affect the use of administrative compliance orders under other statutes, such as the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).