The Supreme Court Allows Pre-enforcement Review of Clean Water Act Section 404 Compliance Orders: *Sackett v. EPA*

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Summary

On March 21, 2012, the Supreme Court resolved a long-simmering issue of federal environmental enforcement. The issue in *Sackett v. Environmental Protection Agency* involved the "administrative compliance order" (ACO), frequently used by the Environmental Protection Agency (EPA) to enforce statutes it administers. The Court held that the Administrative Procedure Act makes available "pre-enforcement review" of ACOs under Section 404 of the Clean Water Act (CWA), which establishes the federal wetlands permitting program. Recipients of Section 404 ACOs no longer have to wait, while penalties accrue, until EPA files an action to enforce the ACO before they can have jurisdictional objections to the order heard by a court.

In an ACO, EPA directs the recipient to comply with a statutory, regulatory, or permit requirement and recites the penalties that noncompliance may entail should EPA file an enforcement action in court. ACOs are often described as a quick, flexible enforcement tool that serves as an advance warning allowing the recipient to sit down with EPA to negotiate a reasonable settlement that generally avoids penalties. From the recipient's vantage point, however, there is a distinct downside: for ACOs issued under CWA Section 404, the lower courts had barred pre-enforcement review. Thus, if the recipient disagreed with the facts or legal conclusions on which the ACO was based, the recipient faced a dilemma. The recipient could do nothing, challenging the order only later when EPA brought an enforcement action. If so and the challenge failed, the recipient faced the prospect of large civil penalties—up to $75,000 per day. Or, the recipient could comply with the order at sometimes substantial cost, even though disagreeing with it, then apply for a permit later and challenge any denial thereof.

This was the dilemma faced by the petitioners in *Sackett*. The Sacketts filled in a lot to prepare it for house construction. EPA then claimed they should have first obtained a wetlands fill permit and so issued an ACO ordering them to restore the lot to its pre-fill condition, even if they intended at some point to apply for a permit. EPA denied the Sacketts' request for a hearing as to whether their land was a wetland covered by the CWA. The couple then sued, but the lower courts found that pre-enforcement review of ACOs issued under Section 404 was unavailable. The Supreme Court reversed unanimously, holding as described above.

Though the *Sackett* decision was written narrowly to apply only to ACOs under CWA Section 404, it has wider implications. First and most importantly, it may serve as precedent for establishing the availability of pre-enforcement review under other CWA sections, or outside the CWA entirely. Second, EPA would seem to have at least three enforcement options following *Sackett*. It may simply prepare fuller administrative records supporting each jurisdictional determination, a course involving a trade-off between ensuring the defensibility of its ACOs and the number of ACOs it can issue. Or it might forego ACOs occasionally and proceed directly to civil enforcement actions seeking money penalties, an option offering less opportunity for landowners to sit down and negotiate with the agency, avoiding penalties in many cases. Or EPA could turn increasingly to sending out nonbinding noncompliance letters. Unlike an ACO, these would have no direct legal consequences and thus likely would be deemed unreviewable.

Third*, Sackett* might lead to a reappraisal of the current allocation of Section 404 enforcement responsibility between EPA and the Corps of Engineers. And finally, it may prompt litigation efforts to reverse current case law under which jurisdictional determinations by the Corps under Section 404 are deemed nonfinal, hence unreviewable in the courts.

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Introduction

On March 21, 2012, the Supreme Court resolved a long-simmering issue of federal environmental enforcement. The issue in *Sackett v. Environmental Protection Agency*[1] involved the "administrative compliance order" (ACO), a device frequently used by the Environmental Protection Agency (EPA) to enforce statutes it administers. The Court held that the Administrative Procedure Act[2] makes available "pre-enforcement review" of ACOs under Section 404 of the Clean Water Act (CWA), which establishes the federal wetlands permitting program.[3] Simply put, recipients of Section 404 ACOs no longer have to wait until the EPA files a civil action to enforce the ACO before they can have jurisdictional objections to the order heard by a court. A second issue in the case, whether a bar on pre-enforcement review of Section 404 ACOs would comport with due process, did not have to be reached by the Court.

The importance of this ruling is suggested by the fact that, combining all of EPA's statutes, the agency issues over 1,000 ACOs a year—1,302 in FY2010, for example.[4] The EPA statutes under which the largest number of ACOs are issued each year are the CWA, Safe Drinking Water Act, Superfund Act, and Clean Air Act.[5] As will be discussed, however, the applicability of *Sackett* beyond CWA Section 404 is an open question.

In an ACO, EPA directs the recipient to comply with a specified statutory, regulatory, or permit requirement by a stated deadline, and recites the penalties that noncompliance may entail (the order *itself* imposes no penalties).[6] It is often described as a quick, flexible enforcement tool that serves as an advance warning allowing the recipient to sit down with EPA to negotiate a reasonable settlement that generally avoids penalties. It is said to be less confrontational, and less expensive for all parties, than EPA's other enforcement options. Under the CWA, Clean Air Act, and Safe Drinking Water Act, those other options are three. First, the agency may assess a civil money penalty[7]—in which case the alleged violator is entitled to be heard and present evidence to the agency, the public is entitled to comment, and any assessed penalty is subject to judicial review.[8] Second, EPA can file a civil enforcement action in federal district court.[9] And third, in limited circumstances the agency can seek criminal penalties in federal district court.[10]

For all their advantages, however, ACOs sometimes come with a distinct downside from the recipient's vantage point: for ACOs issued under Section 404, the lower courts had barred pre-

[1] 2012 Westlaw 932018 (U.S. March 21, 2012) (No. 10-1062).

[2] In particular, 5 U.S.C. §704.

[3] 33 U.S.C. §1344. *See also* note 13 *infra*.

[4] *See* http://www.epa.gov/compliance/resources/reports/nets/nets-e4-acos.pdf, covering FY1994 through FY2010. During this period, the number of ACOs issued annually by EPA was usually between 1,200 and 2,000. The number of ACOs issued in FY2011 has been reported as 1,324. Amena Saiyid, *Attorneys Say EPA Will Be More Deliberative With Compliance Orders After Sackett Case*, BNA Daily Env't Rpt. (March 22, 2012) (hereinafter *Saiyid*).

[5] In FY2010, EPA issued 532 ACOs under the CWA, 407 under the Safe Drinking Water Act, 119 under the Superfund Act (more formally, Comprehensive Environmental Response, Compensation, and Liability Act, or CERCLA), and 109 under the Clean Air Act. See website cited *supra* in note 4.

[6] ACOs under the CWA are issued pursuant to CWA Section 309(a)(3), 33 U.S.C. §1319(a)(3).

[7] CWA §309(g); 33 U.S.C. §1319(g).

[8] CWA §§309(g)(4), 309(g)(8); 33 U.S.C. §§1319(g)(4), 1319(g)(8).

[9] CWA §309(b); 33 U.S.C. §1319(b).

[10] CWA §309(c); 33 U.S.C. §1319(c).

enforcement review. Thus, if the recipient disagreed with the facts or legal conclusions on which the ACO is based, he/she/it faced a difficult dilemma. The recipient could do nothing, challenging the order only later when EPA filed an enforcement action in court. If so and the challenge failed, the recipient faced the prospect of large civil penalties—in the case of the CWA, up to $37,500 per day for each violation of the act and an additional $37,500 per day for violating the ACO.[11] Alternatively, the recipient could comply with the order even though disagreeing with it, at sometimes substantial cost, then apply for a permit and challenge any denial thereof (or unacceptable conditions therein) in court.

This dilemma—forcing the Section 404 ACO recipient, in the absence of pre-enforcement review, to risk large penalties or incur substantial compliance costs for an ACO the recipient disputes—has long attracted interest in the legal literature[12] and in the lower courts. Very likely, it is also what prompted the Supreme Court to take the *Sackett* case. And while *Sackett* concerned ACOs under only Section 404 of the CWA, the implications of the holding for ACOs under other statutes have been lost on no one.

Facts and Lower Court Decisions in *Sackett*

Michael and Chantelle Sackett own a 0.63 acre undeveloped lot in Idaho near a lake. In the spring of 2007, they filled in most of the lot with dirt and rock to prepare it for house construction. Months later, EPA issued them an ACO alleging that the parcel was a "jurisdictional wetland"—that is, was within the coverage of CWA Section 404, which requires a permit to fill in wetlands constituting "waters of the United States."[13] The ACO required the Sacketts to remove the fill material and restore the lot to its pre-fill condition, and set out a compliance schedule. The order also encouraged the Sacketts "to engage in informal discussion of the terms and requirements of this Order" and indicated that the order could be amended to provide for alternative methods of complying with the CWA. Finally, it stated that failure to comply with the order could trigger "(1) civil penalties of up to $32,500 per day of violation pursuant to section 309(d) of the [CWA] ... ; (2) administrative penalties of up to $11,000 per day for each violation pursuant to section 309(g) of the [CWA] ... or (3) civil action in federal court for injunctive relief pursuant to section 309(b) of the [CWA]."[14]

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[11] The fact of such double liability appears not to have been introduced into the *Sackett* litigation until counsel for EPA mentioned it at oral argument before the Supreme Court. For purposes of its decision, the Court assumed, but expressly did not decide, that the government's position is correct. Slip op. at 5 n.2.

[12] *See, e.g.,* Christopher M. Wynn, Note, *Facing a Hobson's Choice? The Constitutionality of the EPA's Administrative Compliance Order Enforcement Scheme Under the Clean Air Act*, 62 Wash. & Lee L. Rev. 1879 (2005); Jason D. Nichols, *Towards Reviving the Efficacy of Administrative Compliance Orders: Balancing Due Process Concerns and the Need for Enforcement Flexibility in Environmental Law*, 57 Admin. L. Rev. 193 (2005); Andrew I. Davis, *Judicial Review of Environmental Compliance Orders*, 24 Envtl. L. 189 (1994).

[13] 33 U.S.C. §1344. To be precise, it is CWA Section 301(a), 33 U.S.C. §1311(a), that requires the permit—not Section 404. Section 301(a) makes it unlawful to discharge a pollutant into waters of the United States except in compliance with specified CWA sections, Section 404 among them. Section 404 itself merely authorizes the U.S. Army Corps of Engineers to administer a permit program.

[14] Earlier in this report, the penalty for ACO noncompliance was said to be up to $37,500 per day for each violation, not, as in the sentence footnoted here, up to $32,500 per day for each violation. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, P.L. 101-410, the statutory maximums for civil penalties imposed under most federal statutes, including the CWA, are required to be regularly adjusted for inflation by the administering agency. At the time the Sacketts received the ACO, the maximum was $32,500. Effective January 12, 2009, EPA increased that maximum to $37,500. 40 C.F.R. §19.4.

The Sacketts sought a hearing to challenge the jurisdictional finding, which EPA denied. They then sued in federal district court. Holding that the CWA precludes judicial review of ACOs before EPA has filed an enforcement action in court, the district court dismissed the case.[15] In support, the court noted that all federal circuits to address that question (a total of four), and all district courts to do so ("over ten," the court said), have ruled against pre-enforcement review of CWA ACOs as well.[16] On appeal, the Ninth Circuit affirmed, holding both that the CWA prohibits pre-enforcement review of ACOs, and that the Due Process Clause is not offended thereby.[17]

In granting certiorari, the Supreme Court posed a statutory question and a constitutional one: (1) whether pre-enforcement review of the ACO issued against the Sacketts is available under the Administrative Procedure Act (APA), and (2) if not, whether this inability to seek pre-enforcement review violates the Due Process Clause.[18] Widely noted was the fact that while granting certiorari in *Sackett*, the Court denied a contemporaneous petition for certiorari raising the due process issue in connection with "unilateral administrative orders" under the Superfund Act.[19] Though the Court's certiorari process is famously opaque, one may speculate that the Court's greater receptiveness to the *Sackett* petition may have stemmed from the opportunity it afforded the Court to resolve the ACO pre-enforcement issue statutorily rather than constitutionally. Some also surmise that the different treatment of the two petitions may have turned on the concerns of the Court's conservative wing as to what it seems to regard as an over-expansive definition of wetlands by the federal agencies that administer CWA Section 404.[20]

Supreme Court Decision in *Sackett*

In resisting the ACO, the Sacketts had sued EPA under the APA provision making judicial review available for "final agency action for which there is no other adequate remedy in a court."[21] The Supreme Court's holding was unambiguous and narrow, confined to CWA Section 404: "We conclude that the compliance order in this case is final agency action for which there is no adequate remedy other than APA review, and that the Clean Water Act does not preclude that review."[22] Given this ruling, the Sacketts now may seek judicial review of EPA's jurisdictional determination underlying the ACO and need not await the agency's enforcing the order in a court. The decision shows every sign of having been an easy one for the Court: the questioning at oral argument tilted heavily against EPA's arguments, the decision came down only 10 weeks after oral argument, and most obviously, it was unanimous. The Court gave not even passing mention

[15] Sackett v. U.S. Environmental Protection Agency, 2008 Westlaw 3286801 (D. Idaho Aug. 7, 2008).

[16] For a listing of all four circuit court opinions and five of the district court opinions, see the Ninth Circuit's decision on appeal, note 17 *infra*, at 1143.

[17] Sackett v. U.S. Environmental Protection Agency, 622 F.3d 1139 (9th Cir. 2010).

[18] U.S. amend. V: "No person shall … be deprived of life, liberty, or property without due process of law." A CWA bar on pre-enforcement review would have implicated the Due Process Clause's promise that the opportunity to be heard granted a person whose rights are deprived be granted "at a meaningful time and in a meaningful manner." Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004), *quoting* Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

[19] General Elec. Co. v. Jackson, 610 F.3d 110 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 2969 (2011).

[20] *See, e.g.*, Rapanos v. United States, 547 U.S. 715, 722-729 (2006) (plurality opinion by Justice Scalia noting, for example, the "immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute …").

[21] 5 U.S.C. §704.

[22] Slip op. at 10.

to the substantial lower-court precedent holding to the contrary of its ruling, other than the Ninth Circuit decision it reversed.

The Court needed to resolve three issues to reach its holding, and had little difficulty with any of them. First, it held that the Section 404 ACO against the Sacketts was "final agency action," required by the APA for judicial review under that act. The ACO, said the Court, "has all of the hallmarks of APA finality that our opinions establish."[23] It determines rights and remedies since it imposes a duty on the Sacketts to restore their property, requires them to give EPA access, exposes them to penalties, and limits their ability to obtain a Section 404 permit. Nor was the order's invitation to the Sacketts to "engage in informal discussion" of the order with EPA seen to undermine that finality, since "it confers no entitlement to formal agency review."[24]

Second, the Court determined that there is "no other adequate remedy in a court" for a Section 404 ACO, another prerequisite for APA review. EPA argued that there is indeed "adequate remedy in a court"—namely, when EPA enforces the ACO in federal district court. The Court saw it differently, pointing out that the Sacketts have no control over when the civil action is filed, while in the meantime civil penalties accrue at up to $75,000 per day. Nor is applying to the Corps of Engineers for a permit and then suing under the APA if the permit is denied or unacceptably conditioned an "adequate remedy." A remedy for a Corps action is not, said the Court, adequate to remedy an action by EPA, a different agency.

Finally, the Court saw nothing in the CWA that precludes judicial review of Section 404 ACOs, the final prerequisite for APA review.[25] Invoking the well-established presumption favoring judicial review of agency action, the Court found EPA's arguments against reviewability based on the structure of the CWA not to overcome this presumption. For example, EPA argued that because the CWA gives EPA the choice between going to court and acting on its own, it would undercut the latter course of action to allow pre-enforcement review by a court. Responded the Court: "[t]here are eminently sound reasons other than insulation from judicial review why compliance orders are useful."[26]

Not reached by the Court's opinion in *Sackett* was the second, constitutional question in the grant of certiorari: whether a bar on pre-enforcement review here satisfies procedural due process. This was unsurprising, since the Court's ruling that pre-enforcement review is available for CWA ACOs made reaching the constitutional question unnecessary. Under the doctrine of constitutional avoidance, courts are particularly resistant to taking on constitutional issues in a case when unnecessary. Even at the oral argument, the constitutional question was barely mentioned.

Not reached as well, because not raised by the Sacketts on appeal, is the merits issue. The Sacketts sued because they argue that their property does not, as EPA contends, contain a wetland subject to permitting under CWA Section 404. On remand to the district court, the Sacketts will now be able to press this issue, and nothing in the Supreme Court's decision intimates what the lower court's answer should be.

[23] Slip op. at 5.

[24] Slip. op. at 6.

[25] 5 U.S.C. §701(a)(1).

[26] Slip op. at 7.

Analysis

The wetlands permit requirement that EPA sought to enforce through the ACO against the Sacketts has not been a stranger in the Supreme Court. On no less than three occasions, the Court has grappled with the geographic scope of this program—where federal authority ends and exclusively state authority applies.[27] It is one of the most vexing issues in all of federal environmental law. Though the geographic scope of Section 404 was not directly before the Court in *Sackett*, one may imagine that if there were a clear definition of the act's reach the Sacketts might not have found cause to bring this suit in the first place.

As noted in the preceding section, the Supreme Court decision is hardly the final hurdle for the Sacketts. Should they still wish to build on their property, they must now litigate in district court their claim that their tract contains no jurisdictional wetlands. If the court agrees, they are home free, at least as far as CWA permitting is concerned. Section 404 does not apply. However, if the court finds jurisdictional wetlands on their land, they must then apply to the Corps of Engineers for a Section 404 permit. If that is denied, or granted with conditions unacceptable to the Sacketts, their building prospects will depend on their returning to district court in a new suit, this time against the Corps, arguing that the denial or conditions should be invalidated.

The following comments speak to the wider implications of the ruling—

EPA's enforcement options. In response to *Sackett*, EPA will have to decide which of at least three enforcement options to pursue under Section 404, and possibly other statutes involving ACOs. The first, most restrained, option is simply to make sure that ACOs are backed up by an administrative record that makes legal challenge unlikely.[28] Litigation is expensive, and government agencies have the advantage that courts defer to their determinations. Thus, a full record supporting an ACO may hold challenges by recipients of such orders to a small number. Of course, under this option, EPA faces a trade-off between preparation of full administrative records and the number and timeliness of ACOs it can issue. For this reason, commentators have predicted that after *Sackett*, EPA will issue fewer ACOs, perhaps concentrating them on the most egregious violators.[29]

A second option is that the agency could forego compliance orders in some instances and proceed directly to civil enforcement actions in court seeking money penalties.[30] This would reduce opportunities for negotiating with the recipient, who, under ACOs, typically does not wind up paying penalties.[31] Because it also would require a greater commitment of government enforcement resources, this option is unlikely to be a major response to *Sackett*.

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[27] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, 531 U.S. 159 (2001); Rapanos v. United States, 547 U.S. 715 (2006). *See generally* CRS Report RL33263, *The Wetlands Coverage of the Clean Water Act (CWA) Is Revisited by the Supreme Court: Rapanos v. United States*, by Robert Meltz and Claudia Copeland.

[28] *See Saiyid*, *supra* note 4 (quoting prominent environmental attorneys suggesting this first option will have to be EPA's response to *Sackett*).

[29] John Henry Stam, *ABA Panelists See No Significant Shift After Sackett, but Some Changes in Order*, BNA Daily Env't Rpt. (Mar. 27, 2012).

[30] CWA §309(d) ; 33 U.S.C. §1319(d).

[31] *See* Nancy J. Moore, *EPA Lawyer Says Pre-enforcement Review Would Eliminate Forum for Settlements*, BNA Daily Env't Rpt. (Aug. 11, 2011).

The third option might be increased EPA use of noncompliance letters, sometimes called notices of violation. These inform recipients of a suspected violation, instruct on how to come into compliance, and invite negotiations. In sharp contrast with ACOs, however, they have no direct legal consequences. In particular, no penalties attach to failing to heed the letter, only to violating the underlying statute. Not being the consummation of the agency's decision-making process nor determining any rights or obligations, a noncompliance letter of this kind would not likely be deemed "final agency action" under the APA and thus entitled to review. At the same time, a prudent landowner notified by letter that he is believed by EPA to be violating a statute with potentially large daily fines arguably would be inclined to contact the agency, as under an ACO, and determine what corrective behaviors would satisfy EPA.

Breadth of application. The significance of *Sackett* turns to some extent on how widely it is applied by the lower courts, given the opinion's narrow language confined to CWA Section 404. The number of Section 404 ACOs issued by EPA during any given year is but a small fraction of the total number issued by the agency (in FY2011, they constituted 97 out of 1,324). And reportedly, a very large fraction of the Section 404 ACOs are negotiated with the agency to a mutually acceptable solution (though this fraction may drop as ACO recipients, after *Sackett*, consider litigation options). Thus, the legacy of *Sackett* will be greater if the decision is viewed by lower courts as applying elsewhere in the CWA outside Section 404, and outside the CWA entirely.

No glib prediction can be made as to this extra-section-404 application, since every statute varies. While most of EPA's regulatory statutes grant authority to issue ACOs, a preliminary survey reveals that in at least some instances, the courts already have ruled (or assumed) that pre-enforcement review is available. Two examples are Safe Drinking Water Act emergency orders[32] and Clean Air Act compliance orders.[33] As well, some statutes come replete with their own internal directive that a "final action" by EPA is reviewable, obviating resort to the more complex APA standard at issue in *Sackett*.[34] Contrariwise, the Superfund Act expressly states that pre-enforcement review of orders is *not* available, teeing up the constitutionality argument left unaddressed by *Sackett*.[35]

Parenthetically, there may be a question as to *Sackett*'s applicability even within the Section 404 program. In a solo concurrence, Justice Ginsburg states her understanding that the Court's opinion speaks only to pre-enforcement challenges to EPA determinations whether a given property contains covered wetlands, not to the terms of the compliance order.

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[32] W.R. Grace & Co. v. EPA, 261 F.3d 330, 338 (3d Cir. 2001); Trinity American Corp. v. EPA, 150 F.3d 389, 394 (4th Cir. 1998); Imperial Irrigation Dist. v. EPA, 4 F.3d 774, 774 (9th Cir. 1993). None of these decisions offers analysis of the reviewability issue. They simply assert, in contexts where EPA had not brought an enforcement action, that the Safe Drinking Water Act emergency order in question is final and reviewable under the act's judicial review provision. For a recent statement of EPA's views, see brief of respondent EPA in *Range Resources Corp. v. U.S. EPA*, No. 11-60040 (5th Cir. filed Jan. 20, 2011). EPA's brief states with regard to the Safe Drinking Water Act emergency order in that case: "The recipient of a section 1431 emergency order may seek immediate federal judicial review …." *Id*. at 5. Later in the brief, EPA argues that the emergency order is a final agency action. *Id*. at 15.

[33] *See, e.g.,* Alaska Dep't of Envtl. Conservation v. U.S. EPA, 244 F.3d 748, 750 (9th Cir. 2001) (court finds review jurisdiction over EPA order under Clean Air Act on grounds of order's finality, despite EPA's argument that reviewability must await enforcement action).

[34] *See, e.g.,* Safe Drinking Water Act §1448(a)(2), 42 U.S.C. §300j-7(a)(2).

[35] CERCLA (see note 5) §113(h), 42 U.S.C. §9613(h).

Joint EPA-Corps of Engineers responsibility under Section 404. Within the Section 404 permitting program, it may be speculated whether changes will be made after *Sackett* in the current divvying up of enforcement responsibilities between EPA and the Corps of Engineers. Under a 1989 memorandum of agreement between the two agencies,[36] EPA generally has responsibility for Section 404 enforcement where, as in *Sackett*, the landowner fails to apply for a permit—so-called "unpermitted discharges." The Corps, by contrast, issues Section 404 permits and enforces against noncompliance with permit terms—that is, "permit violations."

Reviewability of Corps jurisdictional determinations. *Sackett* should be contrasted with current case law *denying* judicial reviewability for Corps of Engineers formal jurisdictional determinations. Such determinations may be made by Corps district offices at the request of those contemplating a project on their land and unclear as to whether a Corps permitting authority such as CWA Section 404 applies.[37] They are separate from and prior to the permit application process.

Corps regulations declare that these jurisdictional determinations "shall constitute a Corps final agency action,"[38] suggesting reviewability under the APA. However, the Corps' characterization as final is not binding on courts, which uniformly have held that Corps regulations notwithstanding, the agency's formal jurisdictional determinations are *not* final agency action entitled to review.[39] It seems unlikely, though not unthinkable, that *Sackett* would be deemed to undermine this line of case authority. *Sackett*, in finding finality, focused on the fact that ACOs are the consummation of the agency's decision-making process and fix rights and obligations.[40] While a Corps formal jurisdictional determination arguably fixes obligations—the landowner must apply for a permit if the landowner elects to proceed with the project—it is not easily characterized as the consummation of the agency's decision-making process. Still, in the wake of *Sackett* one may expect efforts by landowners to reopen the question of the reviewability of Corps jurisdictional determinations.

Conclusion

In sum, *Sackett* is unlikely to be the last word in the ancient debate over when pre-enforcement review of ACOs is or should be available. There are legitimate interests of both government agency and order recipient to be balanced. One may expect future developments on both the judicial and administrative fronts, wrestling with, among other issues, the precedential reach of the Court's decision. Congress, for its part, may wish to devote renewed attention to the concern expressed by the Court in *Sackett* as to the vagueness of current criteria for determining when a wetland is jurisdictional, leaving interested parties, as the Court put it, "to feel their way on a case-by-case basis."[41]

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[36] *Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act* (Jan. 19, 1989), *reprinted in* Margaret N. Strand (ed.) WETLANDS DESKBOOK (Envtl. L. Inst. 1997).

[37] 33 C.F.R. §320.1(a)(6).

[38] *Id*.

[39] *See, e.g.*, Fairbanks North Star Borough v. U.S. Army Corps of Engineers, 543 F.3d 586, 591, 591 n.3 (9th Cir. 2008).

[40] *See* Bennett v. Spear, 520 U.S. 154, 177-178 (1997) (articulating standards for when an agency action is "final" for APA purposes).

[41] Slip op. at 3, quoting the concurring opinion of Chief Justice John Roberts in *Rapanos v.United States*, 547 U.S. 715, 758 (2006). Every Congress since 2001 has seen bills introduced seeking to clarify the geographic scope of the CWA, (continued...)

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but none has been enacted. *See generally* CRS Report RL33263, *The Wetlands Coverage of the Clean Water Act (CWA) Is Revisited by the Supreme Court: Rapanos v. United States*, by Robert Meltz and Claudia Copeland.