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Recent cases seek increased access to courts to challenge Clean Water Act enforcement actions

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The 2014 Missouri Water Seminar was recently held in Columbia, Missouri. The Water Case Law Update session highlighted three recent court cases that attempted to expand the Supreme Court's landmark ruling in *Sackett v. EPA* , 132 S.Ct. 1367 (2012). In *Sackett*, the Supreme Court held that an administrative compliance order (ACO) issued by EPA concerning alleged wetland violations was subject to judicial review because it constituted "final agency action". Before *Sackett* was decided, recipients of ACOs had to wait to sue until either the regulatory agency issued an adverse permitting decision or decided to initiate an enforcement action.

The first case is *Belle Co. LLC v. Corps*, a 5th Circuit case that was decided on July 30, 2014. In *Belle*, the plaintiffs argued that a jurisdictional determination issued by the Corps was similar to an ACO and thus was final agency action subject to judicial review. The JD was issued in response to a request by Belle for a wetlands permit to conduct clearing and excavation activities on the property relating to the construction of a regional landfill. The 5th Circuit disagreed with Belle and held that unlike the ACO in *Sackett*, the JD was not final agency action because it did not impose any legal obligations on Belle or trigger any penalties.

The second case is *National Association of Home Builders (NAHB) v. EPA,* which is currently pending appeal in the D.C. Circuit. In *NAHB*, the plaintiff argued that a "traditional navigable water" (TNW) designation by the Corps of Engineers was like an ACO, and thus final agency action subject to judicial review. The Corps had designated two reaches of the Santa Cruz River as TNW, and was going to use those designations to complete pending and future JDs for the Santa Cruz River watershed. The District Court held that the TNW designation was not final agency action and therefore plaintiff was not entitled to judicial review. The Court said that the TNW was more like a JD than an ACO because it did not impose any legal obligations on the plaintiff.

The final case is *Duarte Nursery Inc. v. Corps of Engineers*, which is currently in the federal district court for the Eastern District of California. In *Duarte*, the plaintiff argued that a "cease and desist order" (CDO) issued by the Corps regarding property on which they farmed wheat was a denial of due process and therefore subject to judicial review. The plaintiffs alleged that in order to comply with the CDO, they were forced to leave their wheat crop unattended resulting in the loss of $50,000. They also claimed losses for having to disclose the notices of violation to potential buyers. Finally, the plaintiffs allege that they were denied due process when the Corps issued the CDO without providing an opportunity for a hearing, either before or after. In response, the Corps argued that the CDO was not final agency action, so judicial review was not yet warranted. The District Court disagreed with the Corps, and stated that a finding of final agency action is not needed for a constitutional claim. The court also found that the plaintiffs had succeeded in stating such a claim. On August 11, 2014, the court allowed the plaintiffs to file a supplemental complaint.

The law with respect to the availability of judicial review of unilateral regulatory enforcement actions is in a state of flux. Following the *Sackett* decision, EPA began adding language to its compliance orders to ensure that the recipients of those orders are fully aware of their rights to pre-enforcement judicial review. In addition, EPA began scaling back on its use of those orders and is instead using other enforcement tools.

Real estate owners, developers and facilities contemplating construction should be alert to the changing legal landscape with regard to the availability of judicial review of enforcement actions by the Corps or EPA. We are continuing to watch developments in this area.