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Attorneys Amy Brigham Boulris and Terry Cole say a Supreme Court property-rights case has led to proposals that proscribe federal jurisdiction according to a more clear and limiting definition of "navigable waters" than exists in either the Clean Water Act or high court interpretations. A8

High court gives urgency to Clean Water Act woes

Commentary by Amy Brigham Boulris and Terry Cole

The U.S. Supreme Court recently issued its decision in the nationally watched case, *Sackett v. Environmental Protection Agency*, rejecting in unison an agency practice so abusive that Justice Samuel Alito asked its attorney, "Don't you think most ordinary homeowners would say this kind of thing can't happen in the United States?"

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What happened to the Sacketts in Bonner County, Idaho, is shocking but unfortunately has not been uncommon for landowners confronted with an assertion of federal wetlands jurisdiction.

To begin building a three-bedroom home, the Sacketts placed some fill on a half-acre lot in a built-out residential subdivision. Even though they had building permits from the county, EPA employees showed up later with a compliance order declaring their lot to be "navigable waters" regulated under the Clean Water Act and ordering the Sacketts to restore the property to the EPA's satisfaction or risk civil penalties up to $75,000 per day for non-compliance and possibly criminal sanctions.

Stunned by the characterization of their lot as navigable waters, the Sacketts asked for a hearing to review whether the agency's jurisdictional assertion was legally correct. The EPA refused to provide a hearing and informed the Sacketts that the only way they could obtain legal review of its order would be to dare non-compliance, expose themselves to those staggering fines, and raise their jurisdictional challenge in defense of an enforcement action — to be initiated by EPA at a time of its choosing.

Finding this untenable, the Sacketts sued for judicial review of the agency's wetlands determination in federal court. Both the trial court and the U.S. Court of Appeals for the Ninth Circuit sided with EPA and ruled that there can be no review of agency wetlands determinations under the Clean Water Act except in defense of an enforcement action initiated by the agency.

Fortunately for landowners, in a rare display of unanimity on a property-rights issue, the Supreme Court reversed with a stinging rebuke of this agency practice, noting that it blocks access to courts, allows "strong-arming" of citizens and is treatment "unthinkable" in a nation that values due process and property rights.

Beyond the Sacketts' vindication, the high court's decision may level the wetlands playing field nationally in two important ways.

First, it opened a meaningful avenue of judicial review for the hundreds of landowners who annually receive wetlands compliance orders from EPA or the Army Corps of Engineers. Now those citizens can require agencies to justify their actions to a federal judge, without incurring the risk of ruinous fines to even mount the courthouse steps. The availability of direct judicial review opened by *Sackett* should provide a measure of protection against "strong arming" and hopefully a proactive level of deterrence against attenuated claims of regulatory jurisdiction.

Second, the decision may have opened the door to legislative relief by overtly calling upon Congress to clarify the regulatory reach of the Clean Water Act. Writing for the unanimous court, Justice Antonin Scalia noted the longstanding "fuss" over interpretation of the act and that the lingering ambiguity over what constitutes "navigable waters of the United States" leaves landowners like the Sacketts having to "feel their way on a case-by-case basis." In a specially concurring opinion, Justice Alito was even more pointed, lamenting that the scope of the act has been "notoriously unclear" for 40 years, that Congress has "done nothing to resolve this critical ambiguity," and that "EPA has not seen fit to promulgate a rule providing a clear and sufficiently limited definition of the phrase." Concluding that only clarification of the act's reach will rectify the underlying problem, he cautioned that absent Congressional action, even after *Sackett*, landowners may yet have "little practical alternative but to dance to EPA's tune."

The Sacketts' experience and the court's call out to Congress has not gone unnoticed. Congressional hearings have been convened, and in the wake of the court's decision, several bills have been introduced. All of the currently pending bills would ban past and future attempts by EPA to expand the scope of the act through agency rulemaking or "guidance" publications, recent versions of which would extend federal permitting jurisdiction even to isolated ponds and man-made ditches.

Two bills initiated by U.S. Senator Rand Paul, R-Kentucky, as the Defense of Environment and Property Act of 2012 would proscribe federal jurisdiction according to a far more clear and limiting definition of "navigable waters" than presently exists in either the act or case-by-case Supreme Court interpretations. If passed in its current form, this new act would also prohibit trespass by federal agents onto private property, allow states to maintain more control over local land use and require compensation to landowners in certain circumstances.

Whether or not any of these reactionary bills pass, *Sackett* has drawn appropriate national attention to the pervasive problems under the current Clean Water Act regime. Whether this notoriety leads to more than mere debate remains to be seen but should be closely watched by landowners and their legal counsel.

Amy Brigham Boulris, a shareholder at Gunster, focuses her practice on the defense of property rights in the context of eminent domain, inverse condemnation, property-related civil rights claims and land-use litigation. Gunster shareholder Terry Cole focuses on environmental law, governmental administrative law and litigation.