CLIENT ALERT

BEVERIDGE & DIAMOND PC

March 23, 2012

Authors:

W. Parker Moore
Principal
1350 I Street, N.W.
Suite 700
Washington, DC 20005
(202) 789-6028
pmoore@bdlaw.com

Gus B. Bauman
Of Counsel
1350 I Street, N.W.
Suite 700
Washington, DC 20005
(202) 789-6013
gbauman@bdlaw.com

SUPREME COURT RULES PROPERTY OWNERS MAY CHALLENGE EPA COMPLIANCE ORDERS

In a closely-watched case, the U.S. Supreme Court on March 21 told the Environmental Protection Agency ("EPA") to stop "strong-arming . . . regulated parties" who wish to go directly to court to contest compliance orders that assert jurisdiction over wetlands as well as other waters under the Clean Water Act ("CWA"). EPA had long maintained that property owners could not challenge in court the assertion of jurisdiction over wetlands and waters when EPA issues compliance orders against owners for filling those features without a permit. Accordingly, property owners had to wait for EPA to bring a civil suit against them for alleged CWA violations before they could argue in front of a judge that the wetlands or waters were not subject to federal jurisdiction. Meanwhile, EPA could and would assess heavy financial penalties against owners for each day they failed to abide by a compliance order, even if an owner believed the U.S. had no jurisdiction over its land.

In *Sackett v. EPA*, the high court unanimously reversed lower federal courts as well as decades of EPA practice, holding that citizens may initiate a civil action under the Administrative Procedure Act ("APA") to challenge EPA's issuance of an administrative compliance order under the CWA. Mike and Chantell Sackett, preparing to build a house in Bonner County, Idaho, filled part of their lot with dirt and rock without first obtaining a CWA Section 404 "dredge or fill" permit from the Army Corps of Engineers. The Sacketts had believed their property contained no federal wetlands, being separated from a nearby lake by several lots containing permanent structures. The Corps and EPA believed otherwise.

When the couple received the compliance order to restore their property, they requested a hearing from EPA but were denied. They then sued, claiming that a compliance order is "final" agency action under the APA, thus allowing judicial review of the order. But the lower courts, following years of precedents, dismissed the case, stating that the Clean Water Act precludes pre-enforcement judicial review of compliance orders, and EPA had not attempted to enforce the order by initiating a civil suit against the Sacketts in federal court.

The Supreme Court wasted little time in reversing, ruling that such orders are clearly "final" agency actions. Justice Scalia, writing for the Court, said a citizen should not have to "wait for the agency to drop the hammer" of suing the citizen in order for that citizen to get the threshold issue of disputed wetlands jurisdiction in front of a federal judge. He went on to rule that nothing in the Clean Water Act expressly precludes judicial review under the APA.

This emphatic decision puts to an end EPA's heavy-handed practice under the CWA of

forcing citizens either to comply, with no judicial recourse, with an arguably illegal order or, if the citizen refuses, to face a federal lawsuit along with mounting penalties for every day the citizen declines to adhere to the agency's compliance order. But the decision may have broader implications. EPA issues administrative compliance orders under other federal environmental statutes, including the Clean Air Act, Resource Conservation and Recovery Act, and Toxic Substances Control Act. Like the CWA, those statutes do not expressly preclude judicial review of compliance orders. As a result, though narrowly worded, the *Sackett* decision may affect EPA's enforcement activities under those laws as well as how lower courts apply *Sackett* to them.

A copy of the Supreme Court decision (and concurring opinions by Justices Ginsburg and Alito) can be found at http://www.bdlaw.com/assets/attachments/Sackett%20decision.pdf.

For more information, please contact Gus Bauman at 202-789-6013, gbauman@bdlaw.com; or Parker Moore at 202-789-6028, pmoore@bdlaw.com.

Office Locations:

Washington, DC

Maryland

New York

Massachusetts

New Jersey

Texas

California