

# Client Alert.

March 21, 2012

## U.S. Supreme Court Opens Courthouse Doors for Early Challenges to Environmental Agency Orders

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The Supreme Court today handed down its decision in the widely discussed case of *Sackett v. Environmental Protection Agency*, addressing the question of whether a regulated party can obtain pre-enforcement review of EPA administrative compliance orders under the Clean Water Act (CWA).<sup>1</sup> In a unanimous decision, the Court dealt EPA a major setback by reversing the lower court decision and holding that the petitioners are entitled to bring suit under the Administrative Procedure Act (APA) to challenge the jurisdictional basis for such orders. This decision is certain to affect procedures for issuance and review of pre-enforcement actions under the CWA and possibly other environmental statutes.

### BACKGROUND

Plaintiffs Michael and Chantell Sackett own a 0.63-acre undeveloped lot near Priest Lake, Idaho, where they wish to build their family home. The lot is separated from the lake by several lots that contain permanent structures. In April and May 2007, the Sacketts filled approximately one-half acre of their property in preparation for construction. In November 2007, the EPA issued a compliance order asserting that the property was subject to the CWA because it contained wetlands and was adjacent to the lake, a “navigable water” under the statute.<sup>2</sup> The compliance order found a CWA violation because filling had been conducted without the required permit from the Army Corps of Engineers (Corps). The compliance order directed the Sacketts to restore the parcel within a year and warned that failure to comply may lead to civil penalties of up to \$32,500 per day.<sup>3</sup> In April 2008, the Sacketts requested a formal administrative hearing, which the EPA denied.

The Sacketts filed suit in the U.S. District Court for the District of Idaho challenging the jurisdictional basis for the order. Specifically, the Sacketts alleged that the compliance order (1) should be set aside as arbitrary and capricious under the APA, which provides for judicial review of final agency actions “for which there is no other adequate remedy in a court,”<sup>4</sup> and (2) violates the Sacketts’ procedural due process rights because it was issued without a hearing. The EPA moved to dismiss the action. In August 2008, the district court granted EPA’s motion, holding that the CWA precluded judicial review of compliance orders before the EPA has filed an enforcement action.

On appeal, the Ninth Circuit affirmed, joining courts in other circuits by holding that the CWA impliedly precludes pre-enforcement judicial review of a compliance order because the structure and objectives of the Act indicated that Congress

<sup>1</sup> *Sackett v. Environmental Protection Agency*, 566 U.S. \_\_\_\_ (2012), No. 10-1062, slip. op., March 21, 2012.

<sup>2</sup> The CWA prohibits the discharge of any pollutant into navigable waters, which the Act defines as “waters of the United States,” without a permit. 33 U.S.C. §§ 1311, 1344, 1362(7). Under the statute, the EPA is authorized to issue a compliance order or to initiate a civil enforcement action upon finding a violation of the statute. § 1319(a)(3).

<sup>3</sup> The maximum per-day penalty amount increased to \$37,500 effective January 12, 2009. 40 C.F.R. § 19.4.

<sup>4</sup> 5 U.S.C. § 704.

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intended to preclude judicial review of compliance orders by confining their review to enforcement actions. The Court of Appeals also held that such preclusion does not violate due process, rejecting the Sacketts' argument that the potential consequences from violating the compliance order are so onerous as to "foreclose all access to the courts" because the Sacketts could contest EPA's jurisdiction by applying for a permit and challenging its denial as a final agency decision reviewable under the APA. In addition, the penalty for failure to abide by the compliance order is subject to judicial, not agency, discretion, taking into account the factors set forth in the statute, and would have been imposed only after the Sacketts had a full and fair opportunity to present their case in court.<sup>5</sup>

The U.S. Supreme Court granted certiorari to address the following questions:

1. May the Sacketts seek pre-enforcement judicial review of the compliance order under the APA?
2. If not, does the Sacketts' inability to seek pre-enforcement review of the compliance order violate their due process rights?<sup>6</sup>

The case attracted significant amicus briefing. Oral argument took place on January 9, 2012. Several Justices expressed concern about the fact that the Sacketts would be subject to double penalties and would likely not be able to obtain an after-the-fact CWA fill permit.

## THE SUPREME COURT'S DECISION

In a unanimous opinion authored by Justice Scalia, the Supreme Court held that: (1) the EPA's compliance order is a final agency action reviewable under the APA, and (2) the CWA does not preclude that review. The Court did not address the Sacketts' due process argument.

### The Compliance Order as a Final Agency Action

The Court agreed with the Sacketts, holding that the EPA's compliance order is a "final agency action for which there is no other adequate remedy in a court."<sup>7</sup> Here, the Court reasoned that, through the compliance order, the EPA "determined" "rights or obligations" by requiring the Sacketts to restore their property according to an EPA-approved plan. "[L]egal consequences ... flow" from the order. First, the order exposes the Sacketts to double penalties in a future enforcement proceeding by the EPA. Second, it severely curtails their ability to obtain a permit from the Corps, as the Corps' regulations provide that the agency will not process a permit application once the EPA has issued a compliance order, unless doing so "is clearly appropriate."<sup>8</sup> In addition, EPA's issuance of the order represents the "consummation" of its decision-making process because, once the Sacketts were denied an administrative hearing, the order's findings and conclusions were not subject to further agency review. Finally, the Court concluded that the Sacketts had "no other adequate remedy in a court" for two reasons. First, only the EPA, and not the Sacketts, can initiate an enforcement action giving rise to judicial review under the CWA and, second, applying for a permit from the Corps and then seeking judicial review of its denial under the APA does not provide an adequate remedy for review of the EPA's action.

<sup>5</sup> *Sackett v. Environmental Protection Agency*, 622 F.3d 1139, 1141 (9th Cir. 2010).

<sup>6</sup> *Sackett v. Environmental Protection Agency*, 131 S. Ct. 3092, at \*1 (2012).

<sup>7</sup> *Sackett v. EPA*, 566 U.S. \_\_\_\_ (2012) (citing 5 U.S.C. § 704).

<sup>8</sup> 33 C.F.R. § 326.3(e)(1)(iv).

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## The CWA Does Not Preclude Judicial Review under the APA

The Court also held that the CWA is not a statute that “preclude[s] judicial review” under the APA.<sup>9</sup> While the APA creates a presumption favoring judicial review of administrative agency actions, this presumption “may be overcome by inferences of intent drawn from the statutory scheme as a whole.” The High Court rejected the EPA’s various reasons to support its argument that the CWA precludes judicial review under the APA. The Court did not accept the EPA’s argument that Congress gave the agency the choice between an enforcement action and a compliance order, the latter of which is meant to quickly resolve violations through voluntary compliance. Neither did it agree with the agency that compliance orders are merely a step in the deliberative process because they are not self-executing. The Court reasoned that it is entirely consistent with the functions served by compliance orders to allow judicial review when the recipient does not choose voluntary compliance, and that the order could not possibly be just a step in the process when the EPA had denied the Sacketts an administrative hearing and the next step entailed the Sacketts’ compliance with the order or an enforcement action that only EPA can initiate.

In separate concurring opinions, Justices Ginsburg and Alito agreed with the Court that the Sacketts are entitled to litigate their jurisdictional challenge to the compliance order under the APA.

### IMPLICATIONS OF THE SACKETT V. EPA DECISION

There is no doubt that the U.S. Supreme Court’s highly anticipated decision will have a major effect on the review of pre-enforcement actions and on the EPA’s approach to compliance orders, possibly including beyond the CWA context. In its most specific application, the Sacketts are now entitled to bring a federal action to challenge the EPA’s CWA jurisdiction over their property prior to an enforcement action. Such enforcement action, however, may still find that there is a wetland on their property and require the Sacketts to obtain a CWA permit.

More generally, the decision may have implications concerning the availability of pre-enforcement review under other environmental statutes and associated implications on the continued use of agency compliance orders as an alternative to enforcement actions. The EPA had warned the Court that it is less likely to use compliance orders if they are subject to judicial review. The Court agreed but stated that this is true of all agency actions subject to judicial review. Only time will tell how EPA and other administrative agencies will change their practices. It could be that, after this decision, the EPA will issue notices of violation rather than administrative orders. However, certain administrative orders are unaffected by the decision, such as those issued under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) that explicitly bar pre-enforcement review.<sup>10</sup>

The High Court’s decision may also give rise to more judicial challenges to EPA’s wetland determinations and the reach of the CWA, a complex question that the petitioners did not advance and the Court did not address but that the concurring opinions raise. The majority opinion states that it did not resolve the dispute on the merits, but it did not expressly limit the scope of the petitioners’ challenge to the compliance order. In her concurring opinion, Justice Ginsburg joined the Court on the understanding that “at this pre-enforcement stage, the terms and conditions of the compliance order, is a question today’s opinion does not reach out to resolve.”<sup>11</sup> Justice Alito further warned that the remedy this decision provides is

<sup>9</sup> The APA provides for judicial review of “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704.

<sup>10</sup> 42 U.S.C. § 7413(h).

<sup>11</sup> 566 U.S. \_\_\_ (Ginsburg, J., concurring).

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limited, for “[r]eal relief requires Congress to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act.”<sup>12</sup> Relying on the brief from the Competitive Enterprise Institute, Justice Alito reasoned that Congress has not clarified the statute’s reach through legislation, nor has the EPA issued a rule that clearly and sufficiently limits the definition of “waters of the United States” under the CWA. Instead, the agency’s informal guidance advises property owners that jurisdictional determinations are to be made on a case-by-case basis. This issue, coupled with the “draconian” penalties imposed under the statute, “still leaves most property owners with little practical alternative but to dance to the EPA’s tune.”

To view the Court’s decision, click [here](#).

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<sup>12</sup> *Id.* (Alito, J., concurring).