

APRIL 2, 2012

### ***Sackett v. EPA***: Property Owners May Challenge EPA Orders

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The United States Supreme Court has unanimously ruled that Environmental Protection Agency (EPA) administrative orders under the Clean Water Act are subject to pre-enforcement judicial review. However, the Supreme Court's decision did not define the limits of EPA's Clean Water Act jurisdiction. Controversy is likely to continue over EPA's most recent attempt to issue guidance regarding that issue, and given the Supreme Court's decision, that controversy will likely continue to involve the courts.

Chantell and Michael Sackett own a 2/3-acre lot in Idaho, which they partly filled in with dirt and rock to build a house. EPA issued an order finding that the filling violated the Clean Water Act. EPA ordered the Sacketts to remove the fill and restore the property to its original condition and threatened up to \$75,000 in penalties for each day they failed to do so.

EPA refused the Sacketts a hearing. The Sacketts sued. The Federal District Court dismissed the lawsuit on the grounds that the Clean Water Act barred judicial review of an order before EPA chooses to bring an action in court to enforce it. The Ninth Circuit Court of Appeals affirmed.

The Supreme Court reversed the Ninth Circuit, holding that the EPA order was a final agency action subject to judicial review that was not precluded by the Clean Water Act.

Writing for the Court, Justice Scalia noted that the case arose out of the long-running dispute over the scope of EPA's jurisdiction under the Clean Water Act, including three other Supreme Court decisions over the past thirty years that have failed to provide a clear rule.

Justice Alito's concurrence emphasized that "real relief" requires Congress to clarify the extent of EPA's jurisdiction under the Clean Water Act.

The opinion leaves several questions unanswered. First, the Court did not address whether a property owner may seek pre-enforcement judicial review of the terms and conditions of a compliance order. Justice Ginsburg's concurrence noted that the Court ruled that property owners may judicially challenge at the pre-enforcement stage only EPA's regulatory authority over their property under the Clean Water Act.

Second, the Court did not address the impact of its analysis on other statutes that do not expressly bar pre-enforcement judicial review. For instance, the Resource and Conservation Recovery Act (RCRA), like the Clean Water Act, does not expressly bar such review. *Sackett* provides an argument that such review is available to challenge EPA orders issued under those statutes.

It remains to be seen how EPA will respond to the *Sackett* decision. It is possible that the threat of judicial review of administrative orders will cause the Agency to be more circumspect about the use of this enforcement tool.

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1769-0312-NAT-ENV