

## *Sackett v. EPA*: U.S. Supreme Court Decision Opens Door for Pre-Enforcement Judicial Review of Compliance Orders Under Clean Water Act

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On March 21, 2012 the Supreme Court of the United States decided *Sackett v. EPA*, holding that a party subject to a compliance order issued by the United States Environmental Protection Agency (“EPA”) pursuant to the federal Clean Water Act (“CWA”) may bring an action to challenge that order without waiting for EPA to commence an enforcement action of its own.

The Sacketts were owners of a residential lot in Idaho near to, though separated by several other lots from, a lake. In April and May 2007, the Sacketts had filled in half an acre of their land in the process of developing the lot. EPA issued a compliance order (“Order”), finding that the property contained wetlands, and that by placing fill on the property the Sacketts had discharged a pollutant without a permit in violation of the CWA. The Order asserted the Sacketts were in continuing violation of the Act, and directed the Sacketts to restore the property under an EPA workplan.

The Sacketts disagreed that the property contained wetlands subject to the CWA requirements and sought a hearing with EPA, which EPA denied. The Sacketts then filed an action in federal district court, seeking declaratory and injunctive relief and asserting that the issuance of the compliance order was arbitrary and capricious within the meaning of the federal Administrative Procedure Act (“APA”). The district court and the intermediate appellate court both held that the Order was not immediately judicially reviewable and that the Order could only be challenged in court after EPA commenced an enforcement action potentially involving substantial fines for non-compliance.

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In finding that the Order was a final agency action subject to immediate review, the Supreme Court held that the Sacketts had no other remedy in court, since it was within EPA's discretion whether and when to commence an enforcement action. Such an action might be commenced after potentially ruinous fines had already accrued (up to \$75,000 per day). Further contrary to EPA's contention, the Court found that in light of the EPA's denial of the Sacketts' hearing request, the findings and conclusions in the Order were not subject to further agency review.

The case is important in that it supports the right of a party, under appropriate circumstances, to challenge agency action without the need to await full blown agency enforcement proceedings. It should be noted, however, that the long-term impact of the court's decision on future EPA enforcement actions.

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