

SUPREME COURT SUBJECTS EPA'S ADMINISTRATIVE COMPLIANCE ORDERS TO JUDICIAL REVIEW

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One of the more powerful devices in the Environmental Protection Agency's (EPA) enforcement arsenal is the administrative compliance order, by which the EPA finds violations and orders remedies—all without judicial review. Recently, however, the U.S. Supreme Court unanimously held in *Sackett v. EPA* (decided March 21, 2012) that administrative compliance orders under the Clean Water Act (CWA) are subject to judicial review under the Administrative Procedure Act (APA) if they have “all of the hallmarks of APA finality.” In an opinion by Justice Antonin Scalia that may well have ramifications beyond the CWA, the Supreme Court overturned the EPA's pre-enforcement review policy that barred judicial review of administrative compliance orders until the EPA either commenced a civil enforcement action or sought to impose administrative penalties. Notably, the Supreme Court limited its decision to the provisions of the APA and did not address the due process concerns that had animated much of the media's discussions of the case.

The controversy began when Michael and Chantell Sackett started construction of a modest home on their 2/3-acre residential lot by filling the proposed construction area with dirt and rock. Thereafter, they received an administrative compliance order from the EPA, which contained findings of fact, conclusions of law, and orders to comply. The EPA found that the Sacketts' property contained wetlands, as defined by the CWA, and that the Sacketts had discharged fill material into wetlands in violation of the statute. To remedy the violation, the order required the Sacketts to conduct site-restoration work in accordance with an EPA-mandated work plan and to allow the EPA access to their property. Not believing their property contained wetlands, the Sacketts asked the EPA for a hearing. After their request was denied, the Sacketts commenced an action in the U.S. District Court for the District of Idaho, seeking judicial review under the APA and alleging due process violations. The District Court dismissed the Sacketts' claims, and the Ninth Circuit affirmed, concluding that the CWA precludes pre-enforcement judicial review of compliance orders, and that such preclusion does not violate due process. The Supreme Court granted certiorari.

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The APA governs federal rulemaking along with certain agency enforcement actions and procedures, and provides for judicial review of administrative determinations. But not all federal administrative actions are reviewable under the APA. Because only “final agency action” is judicially reviewable under the APA, the Supreme Court commenced its review of the case by conducting a finality analysis of the EPA’s compliance order. The Supreme Court’s analysis concluded that:

- The order determined rights or obligations because it required the Sacketts to restore their property and give the EPA access.
- Legal consequences flow from issuance of the order since a violation of the order is a basis for additional penalties, and the order inhibits the ability to obtain other necessary permits.
- Issuance of the order marked the consummation of the EPA’s decision-making process. Since no hearing was permitted, the order was not subject to further agency review.
- The Sacketts had no other avenue to pursue judicial review.

Having found that the EPA’s order was final, the only question left to be resolved was whether the CWA precludes judicial review under the APA. The EPA argued that the CWA’s statutory scheme precluded judicial review because Congress gave the EPA the choice between judicial and administrative enforcement, and allowing judicial review of administrative enforcement would undermine the purpose of the CWA. But, as nothing in the CWA expressly precludes judicial review of administrative compliance orders, the Supreme Court operated under the presumption that the CWA allows it. Having found the administrative compliance order reviewable under the APA, the Supreme Court did not address the Sacketts’ due process arguments.

While only time will tell the extent to which the Supreme Court’s decision will impact the EPA’s enforcement efforts, some preliminary assumptions can be made at this point. First, the EPA will likely develop internal policies to ensure a proper record is developed before issuing administrative compliance orders. This may result in their less-frequent use. Second, the practical implications of judicial review may be somewhat limited by the applicable standard of review. Administrative compliance orders will be reviewed under the “arbitrary and capricious” or “otherwise in violation of the law” standards, entitling the EPA to great deference. If the EPA can demonstrate a reasonable basis to justify its actions, potential plaintiffs will face an uphill battle in court. Third, administrative compliance orders under other environmental statutes are likely to be reviewable. While the Sackett decision addressed only orders under the CWA, it is nonetheless analogous to administrative orders issued under other environmental statutes. Neither the Resource Conservation and Recovery Act (RCRA) nor the Clean Air Act (CAA) expressly prohibit judicial review of administrative compliance orders. To the extent orders under these statutes meet the finality test, they are likely to be reviewable under the APA. An administrative order under the CAA or RCRA that requires action, imposes penalties for violation of the order itself, and prohibits further agency review will likely be reviewable under the APA. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), on the other hand, expressly prohibits pre-enforcement review. Therefore, APA review of CERCLA administrative orders would continue to be unavailable, but the unanswered due process questions may yet be explored in this arena.

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While the standard of review favors the EPA, the regulated community now has some vehicle to challenge administrative orders before being sued. If the *Sackett* criteria are met, alleged violators will have their day in court without having to accrue significant remedial costs and daily penalties waiting for the EPA to commence a civil enforcement action.

