

# Supreme Court Bolsters Regulated Entities' Right to Challenge Agency Enforcement Actions in Court

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The U.S. Supreme Court awarded a win to agency-regulated entities by finding they have the right to challenge some agency enforcement actions, even if not expressly allowed by statute.

On March 21, 2012, the Court determined that private land owners Michael and Chantell Sackett could bring an action challenging the Environmental Protection Agency's (EPA) administrative compliance order under section 309 of the Clean Water Act (CWA). As explained in more detail in our previous article, EPA issued a compliance order to the Sacketts, who had filled in parts of their land in Bonner County, Idaho, with dirt and rock in preparation for building. EPA's order first found that the Sacketts' property contained wetlands-the land was adjacent to Priest Lake, a "navigable water" and "water[] of the United States." It further alleged that the Sacketts' filling of their land was the "discharge of pollutants" from a "point source" into "waters of the United States" without a permit, in violation of the CWA. The order required the Sacketts' to restore their land to its previous state or face penalties of up to \$75,000 a day.

After EPA denied the Sacketts' request for a hearing, the couple sued the Agency alleging that the compliance order was arbitrary and capricious, in violation of the Administrative Procedure Act (APA), and deprived them of their property without due process of law, in violation of the Fifth Amendment. Both the Idaho District Court and the Ninth Circuit dismissed the Sacketts' case for lack of jurisdiction because, as the Ninth Circuit stated, the CWA "preclude[s] pre-enforcement judicial review of compliance orders." 622 F. 3d 1139, 1147 (9th 2010).

The Supreme Court disagreed. Under the APA, judicial review is only available for "final agency action for which there is no other adequate remedy in court." 5 U.S.C. § 704. The Court found that EPA's compliance order had "all of the hallmarks of APA finality that our opinions establish." First, EPA's order "determined" "rights or obligations." It forced the Sacketts to restore their property to its previous condition. Second, "legal consequences . . . flow[ed]" from EPA's order. The order not only hindered the Sacketts' ability to obtain a permit-which regulations restrict if a compliance order has been issued-but it threatened "double" penalties should EPA initiate an enforcement proceeding. (Under the statute, EPA can impose a daily penalty of up to \$37,500 for each day of each violation, which can be doubled for each day the recipient fails to comply with an order.) Finally, EPA's issuance of a compliance order is the "consummation" of the Agency's decision-

making process. Although the Sacketts were entitled to an "informal discussion" with the Agency, the Court did not agree that a "mere possibility" of Agency consideration through an informal process was sufficient to render the Agency's action not final.

Turning to the second part of the APA's grant of jurisdiction-that there be "no other adequate remedy in a court"-the Court found that the Sacketts' other options were not adequate. Under the CWA, only the EPA, not the regulated party, can seek judicial review of enforcement actions. Thus, the Sacketts would be forced to wait and see if EPA decided to bring an enforcement action, and, if it did, whether and how much of the up-to-\$75,000-a-day penalty it would seek. The government also argued that the Sacketts could bring an APA challenge against the Army Corps of Engineers, the agency charged with issuing permits under the CWA, for failing to issue a permit. Such recourse, however, requires the Sacketts to first seek a permit and then wait for the Corps to deny it.

In addition, the Court disagreed with the government's assertion that the CWA expressly precluded judicial review under the APA. The government first pointed to language in the CWA that authorized EPA to issue an order or bring a civil action upon a finding of violation. The government argued that because this provision allowed EPA to choose between a compliance order and judicial review, allowing judicial review of a compliance order would "undermine the Act." However, as the government argued in its own brief, there are a variety of reasons why EPA may choose the less onerous option of a compliance order. The Court held that this discretion does not preempt a party from challenging such an order in court.

The government also argued that the CWA's express grant of prompt post-hearing judicial review after EPA assesses penalties indicated that such review was not available for compliance orders, since that provision does not contain a similar express grant. The Court again disagreed, noting that allowing one provision in a long and complicated statute to overcome the APA's presumption of reviewability of Agency action would render that presumption meaningless.

And, finally, the government argued that one of the purposes of the CWA was to correct previous inefficient remedies. Hence, EPA has the authority to issue compliance orders, which can quickly remedy a violation. If these orders are subject to judicial review, the government argued, EPA would be less likely to use them. The Court was unmoved: "[t]he APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all." Where EPA had a valid basis for issuing compliance orders, voluntary compliance likely will occur.

Justices Ginsburg and Alito wrote separate concurring opinions. Justice Ginsburg merely pointed out that the Court did not address the Sacketts' right to challenge the terms and conditions of the pre-enforcement compliance order, only their right to challenge EPA's authority to regulate them under the CWA.

Justice Alito's concurring opinion was a direct call to Congress to amend the CWA to more clearly define "waters of the United States." "The Court's decision provides a modest measure of relief . . . . Real 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."

### **What Is the Impact of This Decision?**

Of course, this decision's ramifications on EPA and other agencies' enforcement actions over time are yet to be determined. As a matter of law, the decision only applies to EPA's compliance orders under the CWA. As Justice Alito pointed out in his concurrence, the CWA has raised a myriad of problems because its reach is unclear. However, the Court's decision should have the effect of giving agencies pause before they issue compliance orders under statutes that provide no further substantive agency review and otherwise suffer from a similar lack of clarity. The decision should also empower regulated industry to challenge an agency's *arbitrary* use of its enforcement power.