

## environmental lawflash

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### Clean Water Act Orders Subject to Pre-Enforcement Review

*Supreme Court decision determines that the Clean Water Act's statutory scheme does not preclude judicial review of EPA's jurisdiction in enforcement cases.*

In a much-anticipated decision, *Sackett v. EPA*, 566 U.S. \_\_\_\_\_ (2012), the U.S. Supreme Court unanimously decided yesterday that a party may seek judicial review of the U.S. Environmental Protection Agency's (EPA's) jurisdiction to issue an administrative compliance order under the Clean Water Act before EPA enforces the order. The decision is significant because parties subject to an enforcement order under the Clean Water Act may now be able to challenge an EPA order without the risk of incurring additional daily penalties and further enforcement. Previously, EPA maintained that its order could only be challenged by waiting for enforcement to occur.

The plaintiffs in *Sackett* were property owners who filled in part of their residential lot, which EPA considered regulated wetlands, with dirt and rocks in preparation for constructing a home. EPA issued a compliance order to the Sacketts under the Clean Water Act, finding that the Sacketts discharged materials into wetlands without a permit and requiring that the Sacketts restore the site, provide EPA with access to the site, and provide EPA with access to all records relating to the site. Noncompliance with the order was subject to penalties that potentially accrued at a rate of \$75,000 per day. The Sacketts contended that their property was not a regulated wetlands subject to EPA's jurisdiction.

The Administrative Procedures Act (APA) provides a mechanism for judicial review of final agency actions. Judicial review, however, is prohibited by Section 701 of the APA to the extent that the subject statute precludes judicial review. The Court found that nothing in the Clean Water Act expressly precludes judicial review under the APA. The Court also rejected the government's arguments that allowing pre-enforcement review would compromise EPA's enforcement powers. The Court's opinion noted that "there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review." The Court concluded that the compliance order issued to the Sacketts was a final agency action for which there was no other adequate review other than under the APA, and that the Clean Water Act did not preclude such review.

The case provides parties subject to Clean Water Act compliance orders with the ability to seek pre-enforcement judicial review of the question of whether they are subject to EPA's jurisdiction. Moreover, Justice Ruth Bader Ginsburg's concurring opinion raises whether pre-enforcement judicial review also is available to contest the terms and conditions of such compliance orders—a question the full Court did not reach. This decision may also open the door for pre-enforcement review of orders under other environmental statutes that do not expressly preclude judicial review, such as "imminent hazard" orders issued under Section 7003 of the Resource Conservation and Recovery Act.

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