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Legal Alerts

Unanimous Supreme Court Rules that Clean Water Act Administrative Compliance Orders Issued by EPA Are Entitled to Judicial Review

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The regulated community scored a victory last week when the U.S. Supreme Court unanimously ruled that Clean Water Act Administrative Compliance Orders issued by EPA are entitled to pre-enforcement judicial review. The Court's decision in *Sackett v. EPA*[1] involved a four-year battle that started when the Sacketts received an Administrative Compliance Order alleging they violated the federal Clean Water Act ("CWA") by filling wetlands as part of building their home. The Order was issued without any hearing and demanded that the Sacketts stop filling their land and restore it, or face significant penalties.

In response to the Order, the Sacketts first asked for a hearing with EPA, which was denied. Next, they filed a lawsuit in federal court, which was dismissed. Fortunately, the U.S. Supreme Court reversed that decision, finding that the CWA Compliance Order qualified as "final agency action" eligible for judicial review under the APA. In reaching its decision, the Court 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."

Justice Alito, in a strongly-worded concurring opinion, said that the position taken by the Federal Government "would have put the property rights of ordinary Americans entirely at the mercy of the Environmental Protection Agency (EPA) employees."

The reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act, and according to the Federal Government, if property owners begin to construct a home on a lot that the agency thinks possesses the requisite wetness, the property owners are at the agency's mercy. The EPA may issue a compliance order demanding that the owners cease construction, engage in expensive remedial measures, and abandon any use of the property. If the owners do not do the EPA's bidding, they may be fined up to $75,000 per day ($37,500 for violating the Act and another $37,500 for violating the compliance order). And if the owners want their day in court to show that their lot does not include covered wetlands, well, as a practical matter that is just too bad. Until the EPA sues them, they are blocked from access to the courts, and the EPA may wait as long as it wants before deciding to sue. By that time, the potential fines may easily have reached the millions. In a nation that values due process, not to mention private property, such treatment is unthinkable."2

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Alito concludes by saying that "allowing aggrieved property owners to sue under the Administrative Procedures Act is better than nothing, but only clarification of the reach of the Clean Water Act can rectify the underlying problem."3

The Sackett case is an important decision for recipients of CWA Administrative Compliance Orders because the orders can now be challenged in court immediately. While the Order before the Court involved wetlands, it is likely that any CWA Compliance Order issued by EPA will be eligible for challenge in Court. While it remains to be seen whether this decision will prompt EPA to issue fewer CWA Administrative Orders, one thing is sure - when those Orders are issued and recipients disagree with the alleged violations, they will no longer have to comply or risk incurring substantial penalties.

If you would like additional information about this case or the federal Clean Water Act, please contact Lori Terry Gregory (lori.terry@foster.com | 206.447.8902).

1 *Sackett v. Environmental Protection Agency*, No. 10-1062, March 21, 2012 (PDF).
2 Id., Alito Concurrence at p. 2.
3 Id., p. 3

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