

U.S. SUPREME COURT RULES THAT A CLEAN WATER ACT COMPLIANCE ORDER CAN NOW BE CHALLENGED IN COURT

Enforcement orders issued by the Environmental Protection Agency for discharges of pollutants into “navigable waters” in violation of the Clean Water Act carry hefty penalties—upwards of \$37,500 per day. Prior to yesterday’s U.S. Supreme Court’s unanimous decision in *Sackett v. Environmental Protection Agency*, a party receiving such an order, and facing these steep penalties, had no way to seek prompt judicial review or appeal of the EPA’s determination that “navigable waters” were at issue. Instead, they had to wait until the EPA brought an enforcement action, by which time tens of thousands, or even millions of dollars, in potential fines could accrue. This put alleged violators in an impossible situation: capitulate quickly to the EPA’s demands, or risk stifling, ongoing daily penalties while the EPA decided whether to enforce the order in court. *Sackett* changes all that. A party receiving an EPA enforcement order can now immediately challenge that order in federal court.

In *Sackett*, the property owners placed “dirt and rock” on a portion of their 2/3-acre residential lot in Idaho in preparation for constructing a house. The Sacketts’ lot was separated from a lake by several lots containing permanent structures. Some months after placing the fill, the EPA issued a compliance order finding, among other things, that: (i) the Sacketts’ property contained “wetlands;” (ii) the wetlands were adjacent to a lake that constituted “navigable waters” within the meaning of the Clean Water Act; and (iii) the Sacketts’ placing of fill on their property constituted a discharge of pollutants into “navigable waters” in violation of the Act. The Sacketts disputed that the Act applied and asked the EPA for a hearing. The EPA declined. The Sacketts then sued the EPA in federal court under the Administrative Procedures Act (the “APA”) seeking declaratory and injunctive relief. The district court dismissed the Sacketts’ lawsuit for lack of subject matter jurisdiction, and the Ninth Circuit affirmed.

In a unanimous decision, the U.S. Supreme Court concluded that the Sacketts could bring a lawsuit under the APA to challenge the compliance order (but the Court did not decide the merits of that claim; that is, the Court did not decide the scope of “navigable waters,” expressly leaving that for another case). The Court’s reasoning is straightforward:

- The APA permits judicial review of a “final” agency action for which there is “no other adequate remedy in court.”
- The EPA’s order had “all of the hallmarks” of a “final” decision because:
 - > the order determined the Sacketts’ obligations (it required them to restore property pursuant to an EPA restoration work plan);

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- > legal consequences flow from the order (it exposed the Sacketts to double penalties in a future enforcement proceeding (according to the EPA's interpretation, which the Court accepted without deciding) and "severely limits" the Sacketts' ability to obtain a Corps permit for their fill);
- > the order marked the "consummation" of the EPA's decisionmaking process (there was no agency review of the order's "Finding and Conclusions").
- There was "no adequate remedy in court" because only the EPA can bring a civil action to enforce the order, and the Sacketts had no ability to initiate the process.
- The APA's preclusion of judicial review where another statute has precluded judicial review did not apply because the Clean Water Act did not preclude judicial review.

The Court rejected the EPA's argument that judicial review of compliance orders would cause the EPA to issue orders less frequently. "The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And 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 *Sackett* decision will be particularly important to those parties facing a Clean Water Act compliance order based on a tenuous link between an alleged discharge and "navigable waters." Under such circumstances, instead of being caught between a rock and a wet place, regulated parties now have the option of immediately bringing an action seeking judicial review of the compliance order.

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