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# *Environmental Viewpoint*

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## **Wetlands: Challenging A Federal Compliance Order**

*In a much watched case, the United States Supreme Court issued a unanimous decision on March 21, 2012, allowing recipients of an Environmental Protection Agency's (EPA) administrative compliance order under the Clean Water Act (CWA) to appeal such order. See Sackett v. EPA, 2012 U.S. LEXIS 2320 (U.S. Mar. 21, 2012). While the story of Chantell and Michael Sackett's (Sacketts) home construction may not occur in utility trenches, their legacy will provide a method to seek judicial review of EPA's compliance orders that are issued under the CWA's authority.*



**T**he Sacketts purchased a small piece of land in Idaho near a lake and obtained a building permit to construct a house. They moved dirt and rocks onto the land for fill in preparation for their home construction. Shortly thereafter, EPA issued a compliance order demanding that the Sacketts remove the fill and restore the property to its original condition. If the Sacketts failed to comply with the order, they could be subject to a daily fine of up to \$75,000, which was an increased penalty based on failure to comply with the compliance order. The Sacketts sued after EPA failed to provide them with a hearing to review and challenge the compliance order.

EPA's options to enforce the CWA were "to either issue a compliance order or initiate a civil enforcement action." CWA § 1319(a)(3). The govern-

ment argued that the compliance order was not final agency action (because the enforcement action was available) and the Sacketts should not be afforded judicial review of the compliance order. The Supreme Court found that the CWA does not preclude judicial

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review and accordingly, held that the Sacketts could bring a civil action to review whether the EPA had jurisdiction to issue the compliance order. Jurisdiction is a complicated matter under the CWA due to the ever expanding definition of the “waters of the United States.”

This recent case will allow contractors to challenge EPA’s jurisdiction in issuing a compliance order under the CWA through judicial review. Contractors will now have the right to a hearing to determine whether EPA has authority to issue a compliance order under the CWA before being required to immediately implement a compliance order. The ruling, however, does not clarify all portions of an enforcement order. The decision only addressed jurisdiction and at this time it is not clear whether contractors will also be able to challenge the terms and conditions of a CWA compliance order in such hearing.

***This case may be of equal importance to recipients of other federal compliance orders. The principle of allowing judicial review before voluntary enforcement of compliance or-***

***ders may be applied to those orders issued under other federal statutes, such as the Clean Air Act or the Resource Conservation and Recovery Act. If the compliance orders are similarly situated with no means for review and the other statutes do not expressly prohibit pre-judicial review, then this case may be used in other instances to allow judicial review. ■***

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