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California Land Use & Development Law Report

# **EPA Compliance Orders Are Subject to Judicial Review**

A source of great frustration to property owners and developers has been the inability to obtain judicial review of compliance orders issued by the Environmental Protection Agency. Instead, under prevailing caselaw, the choices have been either to comply with the order or face civil enforcement proceedings, including possible civil penalties. Today, the Supreme Court unanimously rejected the EPA's position that compliance orders issued under the Clean Water Act are not subject to judicial review under the Administrative Procedure Act. *Sackett v. Environmental Protection Agency*, No. 10-1062. In 2007, Idaho residents the Sacketts received a compliance order from EPA informing them that by placing dirt on their vacant lot in preparation for construction of their home they had filled wetlands in violation of the Clean Water Act. The EPA ordered the Sacketts to restore their lot to its original condition. After EPA denied the Sacketts' request for an administrative hearing, the Sacketts sought relief from the U.S. District Court. The EPA argued that judicial review was available only if the EPA filed an enforcement action against them, and the District Court and Ninth Circuit Court of Appeals agreed. The Supreme Court reversed, holding that compliance orders constitute a "final agency action for which there is no other adequate remedy in a court," and for which there is a right to judicial review under the APA. The EPA's compliance order was final in that it imposed a legal obligation on the Sacketts to restore their property, and exposed them to potential penalties of up to \$37,500 per day per violation of the Clean Water Act, and an additional daily penalty for violating EPA's compliance order. The Court rejected the government's argument that enabling judicial review would make compliance orders less efficient and would deter the EPA from using them: 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 opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction. Compliance orders will remain an effective means of securing prompt voluntary compliance in those many cases where there is no substantial basis to question their validity. The Court did not reach the underlying issue—the question of what constitutes a "navigable water" for purposes of regulation under the Clean Water Act—instead urging Congress and/or the regulatory agencies to more clearly define that term. In addition to almost certain impacts on EPA's enforcement regime under the Clean Water Act, the decision in *Sackett* has potential implications for other regulatory enforcement practices.

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