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EPA ENFORCEMENT ORDERS SUBJECT TO NEW JUDICIAL SCRUTINY

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In a case with potentially broad-reaching implications, the U.S. Supreme Court recently held in *Sackett v. EPA* that landowners may bring civil actions in federal court pursuant to the Administrative Procedure Act ("APA") to challenge EPA compliance orders stemming from alleged Clean Water Act ("CWA") violations. In so doing, the Court has dealt a potentially strong blow to EPA's current enforcement protocols under a variety of environmental statutes and provided private parties with a meaningful mechanism to challenge compliance orders that previously did not exist. In-house lawyers whose work pertains to real estate or environmental matters should familiarize themselves with this landmark decision to understand the benefits and limits afforded by this new judicial access.

The facts of *Sackett* are straightforward; a husband and wife sought to construct a home on a 2/3-acre vacant residential lot in Idaho. The lot was located near a lake but was distanced from the waterway by several occupied lots. To facilitate their development, the Sacketts filled in part of their lot with dirt and rock, resulting in the issuance of an EPA compliance order contending that the Sacketts had disturbed wetlands in violation of the CWA by filling in approximately one half acre. Accordingly, EPA contended the Sacketts violated the CWA by engaging in the discharge of pollution from a point source.

The EPA can enforce the CWA by issuing an order to an alleged offender to cease polluting a wetland and to remedy any violation, or by bringing a civil lawsuit against the alleged offender for the same relief. The CWA authorizes a $37,500 per day fine for violating the CWA by polluting a wetland without a permit, a fine that can be doubled if a court finds that the alleged offender also violated an EPA order to halt the pollution. In this matter, it would have subjected the Sacketts to $75,000 in daily fines.

When parties have filled wetlands without a permit or otherwise allegedly violated the CWA, EPA has historically taken the position that landowners could not challenge an EPA assertion of jurisdiction in court based on the issuance of compliance orders. Therefore, when the Sacketts asked EPA for a hearing to assert their position that their property did not contain wetlands, their hearing request was denied. The Sacketts ultimately sought injunctive and declaratory relief in the United States District Court of Idaho and the United States Court of Appeals for the Ninth Circuit after the District Court found it lacked subject matter jurisdiction. The Ninth Circuit affirmed the District Court, holding that the CWA "precludes pre-enforcement judicial review of compliance orders." The Ninth Circuit also found that this lack of judicial review was not constitutionally problematic as it did not violate the Fifth Amendment's due process guarantee.

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In a unanimous and strongly worded decision in favor of the Sacketts, the Court found that "there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of 'voluntary compliance' without the opportunity for judicial review." Accordingly, such aggrieved parties are now permitted to go directly to court to contest CWA compliance orders. In so deciding, the Court examined the CWA compliance order issued to the Sacketts and determined it had "all of the hallmarks" of a final agency action, such that the APA was available to the Sacketts as a means of establishing judicial review. Justice Scalia found it particularly egregious that the Sacketts had no adequate remedy to challenge the EPA compliance order in court since only EPA alone can initiate a civil action under the CWA while the Sacketts had to simply "wait for the agency to drop the hammer." In a concurring opinion, Justice Alito went further, writing "until 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…in a nation that values due process, not to mention private property, such treatment is unthinkable."

In the short-term, *Sackett* provides landowners the ability to directly challenge questionable CWA compliance orders and ends the specter of cumulative daily penalties associated with such orders while landowners are forced to wait for EPA to bring a suit on its own timetable. What remains to be seen is whether EPA compliance orders issued pursuant to environmental statutes beyond the CWA can be challenged. Like the CWA, numerous environmental statutes including the Clean Air Act, the Toxic Substances Control Act and the Resource Conservation and Recovery Act do not expressly preclude judicial review of compliance orders. Only CERCLA has explicit language that prohibits pre-enforcement review. Therefore, it is not a stretch to envision that federal courts could soon extend the logic of the narrowly worded *Sackett* opinion to allow for APA judicial review of compliance orders issued under a variety of environmental laws.

For property owners who have long bemoaned the inability to challenge what Justice Alito described as "an essentially limitless grant of authority" to EPA and the Army Corps of Engineers in the context of wetlands permitting and CWA enforcement, *Sackett* provides the promise of a day in court that can be initiated by the landowner. Due to the potential broad-reaching significance of this decision, in-house counsel working with entities facing EPA compliance orders and enforcement actions pertaining to the scope of CWA jurisdiction or more generally under most environmental laws, would be well served to closely follow how *Sackett* is applied by courts going forward.