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Environmental Client Service Group

To: Our Clients and Friends

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Supreme Court Weakens EPA's Enforcement Regime

The United States Supreme Court handed landowners a major victory against the United States Environmental Protection Agency (EPA) in its unanimous decision in *Sackett v. EPA*, No. 10-1062. The decision announced March 21, 2012, held that Clean Water Act compliance orders can be challenged in court under the Administrative Procedures Act, undercutting EPA's historic practice of using compliance orders to, in the words of the Court, "strong-arm" parties into voluntary compliance.

The case began when EPA issued a compliance order to Michael and Chantell Sackett, claiming they had violated the Clean Water Act when they placed dirt on their vacant private property. EPA claimed the Sackett's property was subject to the jurisdiction of the federal government because it contained regulated wetlands. EPA ordered the Sackett's to remove the dirt and restore the land to its former condition. The Order threatened penalties of at least $32,500 a day.

The Sacketts decided to fight. After the EPA denied their request for a hearing, the Sacketts brought suit in the U.S. District Court. The district court found, and the Ninth Circuit agreed, that until EPA brought an enforcement action, the Sacketts did not have a right to challenge the EPA's decision to claim jurisdiction over their land. The courts held that the Clean Water Act precluded judicial review of administrative compliance orders prior to enforcement. In other words, the Sacketts either had to comply with the Order or wait for the EPA to bring a court action against them. As Justice Alito pointed out in his concurrence, "[u]ntil 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."

The Supreme Court found the situation untenable. "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 Supreme Court has struggled in recent years to determine the scope of Clean Water Act jurisdiction as applied to wetlands and intrastate waters. See *Rapanos v. United States*, 547 U.S. 715 (2006). The *Sackett* decision did not address this issue. However, the decision should expedite the process for recipients of CWA compliance orders to challenge jurisdictional determinations. Instead of waiting for EPA to sue them while potential penalties accrue, they can have their day in court.

The case has potential ramifications beyond the Clean Water Act. Other than CERCLA (which has an express provision barring pre-enforcement review), key environmental statutes such as the Clean Air Act and RCRA contain similar administrative order regimes.

Bryan Cave LLP regularly defends clients facing EPA compliance orders and enforcement actions. Bryan Cave also has significant experience litigating the scope of Clean Water Act jurisdiction.

If you would like to discuss how this matter may affect your organization, please contact one of the following members of Bryan Cave's Environmental Client Service Group:

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