

**Supreme Court Opens District Courts to Challenges of
Clean Water Act Compliance Orders**

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The United States Supreme Court issued a decision yesterday in the case *Sackett v. Environmental Protection Agency*. The *Sackett* case is an important development for property owners because the Court held that a compliance order issued under the Clean Water Act, 33 U.S.C. § 1251 et seq., can be challenged in district court.

A compliance order is an administrative order issued by the EPA when the agency finds, based on any information available, that a person is in violation of the Clean Water Act or a permit issued under the Act. Prior to the *Sackett* decision, most district and circuit courts had found that a compliance order issued under the Clean Water Act was not subject to judicial review unless and until the EPA brought an enforcement action against the recipient in district court. The property owner was left with the untenable choice of either complying with the order at great cost or ignoring the order and risking enhanced penalties.

Complying with a compliance order requires restoring the property to its prior state (e.g., removing fill material) and applying for a Section 404 permit, a costly endeavor that property owners are reluctant to undertake when they dispute the existence of federal jurisdiction over their property.

However, according to the government's argument, a property owner who violates a compliance order risks double penalties for violating both the Clean Water Act and the compliance order if the agency prevails in an enforcement action, penalties that are currently up to \$75,000 per day.¹

The *Sackett* decision does not address whether, in the absence of a compliance order, a jurisdictional determination (a finding that a property contains federal jurisdictional wetlands) can be appealed without the necessity of first applying for and being denied a Section 404 permit. Justice Ginsburg's concurring opinion suggests that the assertion of federal wetland jurisdiction would also be found to be reviewable in district court.

¹ The Court declined to decide whether the government's position regarding the potential liability for double penalties is correct.