



THE SHALE PLAY TODAY



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The U.S. Supreme Court Deals A Major Blow to EPA's Strong-Arm Enforcement Tactics

On Wednesday, March 22, the United States Supreme Court ruled that a compliance order issued under EPA's Clean Water Act enforcement authority to individuals for allegedly filling part of their property without the necessary "dredge and fill" permit could be challenged in federal district court. The ruling marks a major loss for EPA's enforcement practices under the Clean Water Act. Judge Alito also authored a concurring opinion, discussed below, that was extremely critical of EPA and Congress' failure to clearly define "waters of the United States" after 40 years of uncertainty.

Historically, EPA has used its compliance order enforcement authority under § 309 of the Clean Water Act to "encourage" - read coerce - entities into "compliance" with alleged violations by threatening penalties of up to \$75,000 per day of violation - \$37,500 for the underlying alleged violation and an additional \$37,500 for violating the compliance order. The challenging part for anyone in receipt of a compliance order is that EPA has always taken the position that the compliance orders are not final agency action and therefore not reviewable in court. EPA's approach upped the ante for anyone considering ignoring the compliance order and testing EPA's resolve to take the more resource-intensive and time-consuming path of bringing a civil action in court (EPA's other enforcement option under § 309).

The plaintiffs, the Sacketts, own a 2/3 acre lot in Bonner County, Idaho and in preparation to build a home, filled in

In The News



2012 Regular Session of the W.Va. Legislature - A Summary

by [Michael J. Basile](#)
Charleston, W.Va.

In the 2012 regular session of the West Virginia Legislature, several resolutions were passed with potential future impact on the shale gas industry. Below is a summary of those significant resolutions.

Senate Concurrent Resolution No. 52

This resolution requests the Joint Committee on Government and Finance to study the viability of increasing severance tax rates on shale gas. The idea is to take advantage of current high levels of industry activity and availability of mineral resources to fund future opportunities for West Virginians. The Committee will determine and make recommendations on the possibility of creating a Future Generations Fund with the increase in severance tax revenues, as well as lowering residents' tax burdens through reducing real property taxes and increasing the Homestead Tax Exemption. The Committee will report back on their findings and recommendations and present draft legislation to the 2013 regular session of the West Virginia Legislature.

Read the full article on our [website](#).

part of their lot with dirt and rocks. Some months later EPA issued a compliance order that, among other things, required the Sacketts to restore the site to its original condition pursuant to EPA's "Restoration Work Plan" and "to provide and/or obtain access to the Site . . . [and] access to all records and documentation related to the conditions at the Site . . . to EPA employees and/or their designated representatives." Slip op. at 4. The Sacketts challenged the compliance order in the United States District Court in Idaho - contending that the compliance order was arbitrary and capricious under the Administrative Procedure Act ("APA") and in violation of the Fifth Amendment - depriving them of life, liberty or property without due process of law. The District Court dismissed the case for lack of subject matter jurisdiction and the Court of Appeals for the Ninth Circuit affirmed - concluding that the Clean Water Act precludes "pre-enforcement judicial review of compliance orders."

The Supreme Court, in an opinion authored by Justice Scalia, first dismissed EPA's contention that compliance orders are not "final agency action." The Court found that EPA's order "determined rights or obligations" and that "legal consequences . . . flow' from issuance of the order." Slip op. at 5. The Court also found that issuance of the order marked the "consummation" of the EPA's decision-making process, in part because EPA had earlier denied the Sacketts' request for a hearing and stating that the "Findings and Conclusions" in the order were not subject to further review or discussion. EPA's argument that the order "invited the Sacketts to 'engage in informal discussion of the terms and requirements'" demonstrated the order was not "final" was rejected by the Court. In the context of evaluating whether the Sacketts had any other adequate remedy, the Court found unconvincing EPA's argument that the Sacketts could apply for a 404 permit and then appeal the Corps of Engineers' denial of the permit (because the Corps won't issue a 404 permit if there is an outstanding compliance order).

The Supreme Court then addressed EPA's argument that the Clean Water Act precludes judicial review under the APA. Initially the Court noted that in their opinion, the APA creates a presumption in favor of judicial review. The Court did not accept EPA's argument that because Congress gave EPA the discretion under § 309 to bring either a judicial proceeding or an administrative action, "it would undermine the Act to allow judicial review of the latter." Slip op. at 7. Since compliance orders are not "self-executing" and must be enforced by the agency, EPA argued that "Congress therefore viewed a compliance order 'as a step in the deliberative process[.] . . . rather than as a coercive sanction that itself must be subject to judicial review.'" Slip op. at 8. The Court rejected this argument as well, stating that "the APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction." *Id.* The Court concluded that the "compliance order in this case is final agency action for which there is no adequate remedy other than APA review, and that the Clean Water Act does not preclude that review." Slip op. at 10.

Read the full article on our [website](#).



Shell Chooses Pa. as Location for Cracker Plant

After a months-long competition among Pennsylvania, West Virginia and Ohio, Shell selected a site in Beaver County, Pa. as the location of its cracker facility. Gov. Tom Corbett hailed the plant as "the single biggest industrial project in the state's southwest in a generation."

Click [here](#) to read more.



Spilman Attorneys Address Shale Gas Industry Leaders at Water Management Conference

Nearly 400 leaders from the shale gas industry, including energy companies, midstream operators, policymakers and legal professionals, gathered Wednesday and Thursday at the Shale Gas Water Management Marcellus Initiative 2012 at the Hilton Garden Inn in Canonsburg. A delegation of attorneys from Spilman participated in the conference, providing valuable perspectives and insights on legal concerns related to water management in the shale gas plays.

Click [here](#) to read more.



Pa. Townships Fight State Shale Drilling Law

Seven Pa. municipalities filed suit in the Commonwealth Court on March 29, 2012 to challenge the provision of Act 13, the state's new law governing shale gas drilling, whereby the state law preempts the local regulation of natural gas drilling by municipalities and townships. The provision of Act 13 governing the preemption of local ordinances is to go into effect on April 14, 2012.

Click [here](#) to read more.

Useful Resource:



Marcellus on Main Street

Marcellus on Main Street is an online business directory that endeavors to support responsible shale gas development by connecting the natural gas industry to local vendors, suppliers and services. It serves the Marcellus and Utica Shale communities.

Click [here](#) to check it out.

Featured Shale Team Member



Mark D. Clark (Charleston, W.Va.)

Mark has more than 30 years of legal experience advising clients on energy, oil & gas, regulatory and real property matters. His 15 years with Columbia Gas Transmission Corp. allowed him to advise management on gas purchase contracts, natural gas pricing arbitration, bankruptcy and real property issues. Mark recently co-authored an article on West Virginia's new Natural Gas Horizontal Well Control Act. Click [here](#) to read his full professional biography.



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