

Construction Law Alert

Supreme Court Allows Appeal of EPA Wetlands Compliance Order

David P. Ray | March 28, 2012

In a unanimous ruling on March 21, 2012, the United States Supreme Court held, for the first time, that landowners who have been ordered by the Environmental Protection Agency (EPA) to restore wetlands may bring a lawsuit to challenge the order. *Sackett v. EPA*, 566 U. S. ____ (2012). Prior to this decision, lower courts ruled that there could be no judicial review of such orders from the EPA. This left landowners and developers with a Hobson's choice: either comply with the EPA mandate or wait – as the potential fines for noncompliance piled up – until the EPA commenced an enforcement action to challenge it. The decision means that a homeowner can go immediately to court to challenge the order.

An Idaho couple intended to construct a home on a small lot near, but not abutting, a lake. In preparation for the home construction, they imported fill on the property. Some months later, the EPA concluded that the lot contained wetlands adjacent to navigable waters of the United States and that the importation of the fill was in violation of the Clean Water Act, 33 U. S. C. §1319. The EPA issued a compliance order demanding that the landowners remove the fill and subjecting them to possible fines of \$75,000 per day until they did so.

The couple commenced an action in federal court challenging the EPA order. The lower court dismissed the action leaving the couple subject to the rapidly accumulating potential fines and with no judicial remedy. The U.S. Supreme Court reversed the decision stating that because of the finality of the order, the potential assessment of increasingly large fines and the lack of any other remedy, the landowners could proceed to challenge the EPA order in court. The decision did not resolve the underlying dispute about whether or not the property included wetlands but the owners will now have an opportunity to have a court decide the issue. This may be an important issue for developers facing EPA compliance orders that they wish to challenge.

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