**Title:** New Jersey Businesses Closely Watching EPA Case Before Supreme Court

**Subtitle:** Last month, the U.S. Supreme Court considered the validity of one of the Environmental Protection Agency’s most frequently used enforcement tools under the Clean Water Act—administrative compliance orders.

**Meta Description:** A Supreme Court case involving the EPA is being closely watched by developers and other New Jersey businesses with commercial real estate interests.

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While the case involves private property owners, it is being closely watched by developers and other New Jersey businesses with commercial real estate interests.

Four years ago, Chantell and Mike Sackett purchased a tract of land in a development overlooking Priest Lake in Idaho. The couple was advised that the property, which periodically contains water but isn’t adjacent to any standing body of water, was not considered wetlands. However, soon after the Sacketts started to build their home, EPA officials ordered them to stop and restore the property to its original condition, claiming the lot did contain wetlands protected under the CWA.

The Sacketts were told they would have to undertake costly restoration and monitoring activities before they could go through the wetlands permitting appeals process. The Sacketts challenged the order, arguing that they have the right to dispute the EPA’s assertion that the property contains wetlands before taking any further action. They have now taken their fight all the way to the Supreme Court.

Up to this point, lower courts have ruled that the order cannot be challenged until the EPA asks a federal judge to enforce it. Therefore, property owners like the Sackettts who receive an EPA administrative compliance order generally have one of two options: bear the costs of complying with the requirements of the order, or risk penalties of up to $37,500 a day if the agency later obtains a court ruling to enforce the order.

Critics of the EPA allege that by issuing compliance orders without first giving property owners the opportunity to contest them in court, the agency violates federal law and deprives owners of their Fifth Amendment guarantee of due process.

In a friend of the court brief, a number of business associations, including the National Association of Realtors, argue, “Due process is not satisfied by allowing judicial review of an [administrative compliance order] only (1) after the arduous permitting process or (2) after the regulated party violates the [administrative compliance order] and incurs massive penalties, and (3) after the government decides, at its discretion, to bring an enforcement proceeding.”

Meanwhile, the Justice Department contends that owners like the Sacketts are not entitled to a "pre-enforcement hearing" under the law. Moreover, allowing offenders to seek judicial review would severely impede the agency’s efforts to pursue swift action against polluters. The Sacketts "face a dilemma largely of their own making, since they discharged fill into wetlands without first seeking a permit or consulting EPA," lawyers argued before the Court.

While a decision won’t be issued until this summer, the justices did express concern over the EPA’s heavy-handed approach during oral testimony. Justice Samuel Alito characterized the EPA's conduct "outrageous," while Justice Antonin Scalia noted the "high-handedness of the agency" in dealing with private property.

The current judicial refusal to permit pre-enforcement review of EPA's administrative orders has provided EPA with a powerful legal tool to compel enforcement of the environmental statutes it administers, while denying the ordered parties what can be considered as their due process rights to immediately judicially challenge EPA's orders, without having to incur the potential imposition of penalties upon EPA's enforcement of its administrative orders in court. If the U.S. Supreme Court permits pre-enforcement review of EPA's administrative wetlands order in this case, it will represent a sea change in EPA's enforcement powers and the ability of private parties to challenge EPA's environmental orders.

Notwithstanding the present refusal of the courts to allow pre-enforcement review of EPA administrative orders, there are ways to address and negotiate EPA environmental requirements before they become embodied in an administrative order. Our attorneys assist and counsel clients in identifying beneficial and cost effective environmental approaches and negotiating with the Agency at the earliest possible stage, before an administrative order is issued.

Source: Wall Street Journal

**Raw Content:** <!-- wp:heading -->
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<h3><strong>The Facts of the Case</strong></h3>
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<p>Source: <a href="http://online.wsj.com/article/SB10001424052970203436904577149001510886324.html">Wall Street Journal</a></p>
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