



# SACKETT V. EPA























250 Old Schneider Rd. Priest River, ID 83856

# The Compliance Order

Case 2:08-cv-00185-EJL Document 15-5 Filed 05/16/2008 Page 4 of 10

“Notice is hereby given that violation of, or failure to comply with, the foregoing order may subject Respondents to (1) civil penalties of up to \$32,500 per day of violation.”

and documentation related to the conditions at the Site and the restoration activities conducted pursuant to this Order.”

Respondents.

The following FINDINGS AND CONCLUSIONS are made and ORDER issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency (“EPA”) by sections 308 and 309(a) of the Clean Water Act (“the Act”), 33 U.S.C. §§ 1318 and 1319(a). This authority has been delegated to the Regional Administrator, Region 10, and has been duly redelegated to the undersigned Director of the Office of Ecosystems, Tribal and Public Affairs. This AMENDED COMPLIANCE ORDER (“Order”) supersedes and

AMENDED COMPLIANCE ORDER - 1  
DOCKET NO. CWA-10-2008-0014

U.S. Environmental Protection Agency  
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# The Ninth Circuit's Opinion

FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

CHANTELL SACKETT; MICHAEL  
SACKETT.

“[T]he civil penalties provision is committed to judicial, not agency, discretion. . . . Any penalty ultimately assessed against the Sacketts would therefore reflect a discretionary, judicially determined penalty, taking into account a wide range of case-specific equitable factors, and imposed only after the Sacketts have had a full and fair opportunity to present their case in a judicial forum.”

*Opinion by Judge Gould*



# At the U.S. Supreme Court







**Chief Justice Roberts**





**Justice Alito**



# The Court's Opinion

(Slip Opinion)

OCTOBER TERM, 2011

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## Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

## SUPREME COURT OF THE UNITED STATES

“The Government warns that the EPA is less likely to use [compliance] orders if they are subject to judicial review. That may be true---but it will be true for all agency actions subject to judicial review. The APA’s presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all.”

order or initiate a civil enforcement action. §1319(a)(3). The resulting civil penalty may not “exceed [\$37,500] per day for each violation.” §1319(d). The Government contends that the amount doubles to \$75,000 when the EPA prevails against a person who has been issued a compliance order but has failed to comply.

The Sacketts, petitioners here, received a compliance order from the EPA, which stated that their residential lot contained navigable waters and that their construction project violated the Act. The Sacketts sought declarative and injunctive relief in the Federal District Court, contending that the compliance order was “arbitrary [and] capricious” under the Administrative Procedure Act (APA), 5 U. S. C. §706(2)(A), and that it deprived them of due process in violation of the Fifth Amendment. The District Court dismissed the claims for want of subject-matter jurisdiction. The Ninth Circuit affirmed, concluding that the Clean Water Act precluded pre-enforcement judicial review of compliance orders and that such preclusion did not violate due process.

*Held:* The Sacketts may bring a civil action under the APA to challenge the issuance of the EPA’s order. Pp. 4–10.

(a) The APA provides for judicial review of “final agency action for which there is no other adequate remedy in a court.” 5 U. S. C. §704. The compliance order here has all the hallmarks of APA finality. Through it, the EPA “determined” “rights or obligations,” *Bennett v.*



# Justice Alito's Concurrence

Cite as: 566 U. S. \_\_\_\_ (2012)

1

ALITO, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 10-1062

“The position taken by the Federal Government [in this case] would have put the property rights of ordinary Americans entirely at the mercy of [EPA] employees.”

“The reach of the Clean Water Act is notoriously unclear.”

“In a nation that values due process, not to mention private property, such treatment [like what the Sacketts received] is unthinkable.”

“Real relief requires Congress to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act.”

matter, that is just too bad. Until the 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



# Is this a water of the United States?





# *Rapanos v. United States*

- Plurality opinion
  - Relatively permanent waters
  - Wetlands with a continuous surface water connection, *and* the line-drawing problem
- Kennedy concurrence
  - Significant nexus
  - Substantially affects the physical, chemical, and biological integrity of downstream waters



# Draft Clean Water Act Guidance

## Draft Guidance on Identifying Waters Protected by the Clean Water Act

This draft guidance clarifies how the Environmental Protection Agency (EPA)<sup>\*</sup> and the U.S. Army Corps of Engineers (the Corps)<sup>1</sup> will identify waters protected by the Federal Water Pollution Control Act Amendments of 1972<sup>1</sup> (Clean Water Act or CWA or Act) and implement

Traditional navigable waters

Interstate waters

Wetlands adjacent to traditional navigable or interstate waters

Relatively permanent waters

Wetlands that directly abut relatively permanent waters

Procedure Act. This process is expected to start with a proposed rule, to clarify further via regulation the extent of Clean Water Act jurisdiction, consistent with the Court's decisions. EPA and the Corps decided to begin this process with draft, nonbinding guidance in order to clarify their existing understandings while also considering and receiving the benefit of public comments.

Congress enacted the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and this guidance will help the agencies implement specific provisions of the Act to achieve this objective.<sup>4</sup> The CWA has a number of programs designed to protect and restore the Nation's waters. Together, these programs provide effective protection from pollution for waterbodies across the country, including waters that

<sup>\*</sup> To increase clarity of this document, endnotes that primarily provide citations will be indicated with Arabic numerals, and footnotes that provide additional substantive information will be indicated with Roman numerals.

<sup>1</sup> EPA Regions will use this guidance to oversee and implement programs under the Clean Water Act, including those under sections 303, 311, 401, 402 and 404, 33 U.S.C. §§ 1313, 1321, 1341, 1342 and 1344. (See endnote 1 for an explanation of the relevant history of the Clean Water Act.)

<sup>4</sup> Corps Districts will utilize this guidance to implement Clean Water Act section 404, 33 U.S.C. § 1344.

<sup>iii</sup> Specifically, this memorandum supersedes the "Joint Memorandum" providing clarifying guidance on *SWANCC*, dated January 15, 2003 (68 Fed. Reg. 1991, 1995), and "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*," dated December 2, 2008.



# Jurisdiction with a significant nexus

## Draft Guidance on Identifying Waters Protected by the Clean Water Act

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Tributaries to traditional navigable or interstate waters

Wetlands adjacent to such tributaries

Potentially other waters such as mudflats, sandflats, sloughs, prairie holes

respect to CWA jurisdiction, consistent with Supreme Court decisions and existing agency regulations. Each jurisdictional determination, however, will be made on a case-by-case basis considering the facts and circumstances of the case and consistent with applicable statutes, regulations, and case law.

After receiving and taking account of public comments on this document, EPA and the Corps expect to finalize it and to undertake rulemaking consistent with the Administrative Procedure Act. This process is expected to start with a proposed rule, to clarify further via regulation the extent of Clean Water Act jurisdiction, consistent with the Court's decisions. EPA and the Corps decided to begin this process with draft, nonbinding guidance in order to clarify their existing understandings while also considering and receiving the benefit of public comments.

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# Problems with the Guidance



PACIFIC LEGAL FOUNDATION

June 23, 2011

Expansive understanding of “adjacent” to allow for jurisdiction *without* a hydrological connection, so long as the wetland is close enough or there is an “ecological” connection

Finding a significant nexus based on physical, chemical, *or* biological impacts

Finding jurisdiction over wetlands that are clearly distinguishable from relatively permanent waterbodies

Finding jurisdiction over all interstate waters, *whether or not navigable*

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