

## U.S. Supreme Court Constrains Federal Clean Water Act Enforcement

By Kenneth F. Whittaker Ph.D., Esq.

The United States Environmental Protection Agency (EPA) has the authority under the federal Clean Water Act (Act) to bring enforcement actions against parties who discharge to or fill certain wetlands. EPA has had the discretion of either issuing a compliance order directing a remedial action or instituting a civil enforcement action against the alleged offending parties. Historically, EPA's compliance orders have been immune from judicial review; only its enforcement actions have been subject to such review. (Enforcement actions are usually brought if the EPA's attempt at compliance through an order is not successful).

However, a recent United States Supreme Court case, *Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367 provides a new legal mechanism for review of compliance orders. The result, which many hail as a victory of "individual property rights" places a heavier burden on the EPA to defend its enforcement actions and makes it more likely that parties subject to a compliance order will dispute EPA's determinations and choose to fight that order at the risk of later penalties.

The Clean Water Act prohibits the discharge by any person of any pollutant into the navigable waters of the United States without a permit, including discharge to or filling of wetland areas considered navigable waters. Where such a prohibited discharge is found, the EPA is directed to issue either a compliance order or to pursue a civil enforcement action. Penalties are severe and can amount to as much as \$37,500 per day. Where the party refuses to comply with a compliance order a civil enforcement action may be

brought, and the penalties can double. Under the Act, any alleged wrongdoer blocked from judicial review of a compliance order must wait (and possibly incur additional penalties) for EPA to bring the civil enforcement action before that party can get their day in court. (Readers should note that this situation is not analogous to what may occur under state law and where appeal rights are provided under an administrative order from the Massachusetts Department of Environmental Protection).

Michael and Chantal Sackett of Idaho found themselves in just this situation. The Sacketts admitted to filling a wetlands area on their property, separated from a nearby lake by several residences, presumably believing that those wetlands did not meet the definition "navigable waters" and therefore were not subject to the Act<sup>1</sup>. EPA did not agree and issued a compliance order for removal of the fill and restoration of the wetland. When the Sacketts attempted to dispute EPA's determination and claim that "their" wetlands were not subject to the Act, they found no route of judicial appeal, that is, the door of the court was barred against them. Therefore, they were placed in a position to either comply with the order or wait for EPA to bring an enforcement action (which would be appealable) and risk the continuing and higher penalties.

In an attempt to get their day in court regarding the compliance order the Sacketts brought suit under the Federal Administrative Procedures Act (APA). The heart of the case was not whether the Sacketts had filled wetlands on their property (which they did) but whether the wetlands that were filled were subject to the Clean Water Act and therefore

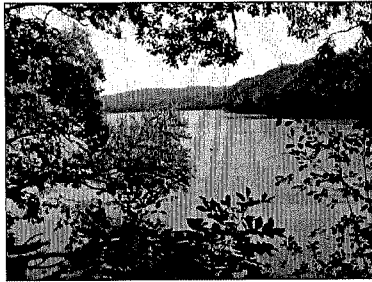


needed a federal permit. The APA provides for judicial review of "final agency action for which there is no other adequate remedy of law."

The Supreme Court found that the EPA's compliance order issued to the Sacketts could, under the APA, be characterized as "final" agency action because in issuing that order the agency had determined the Sacketts' "rights and obligations" in this matter. It also established legal obligations that could be imposed on the Sacketts via the order (in other words, the obligations to restore the filled area, allow EPA access to the property for inspectional purposes, etc.). Additionally, it took steps that represented the "consummation of the Agency's decision-making process" and made findings and decisions that were not subject to further agency review. By creating this effective end point for the need for further agency review to support enforcement, the Supreme Court found in a

<sup>1</sup> Consideration of what waters and forms of wetlands are subject to the jurisdiction of the federal Clean Water Act is too complex a topic to address here, but suffice it to say that the US Supreme Court has been dealing with this issue for years through consideration of a number of cases including *United States v. Bayview Homes, Inc.*, 474 U.S. 1221 (1985), *SWANCC v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) and then more recently in *Rapanos v. United States*, 547 U.S. 715 (2006)

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tinuing to illegally develop rivers, streams or sensitive habitat by seeking an injunction or 'stop work order' from Superior Court. At the same time, the town could also ask the court to impose a civil penalty, leading to an increase in compliance with the law.

MACC is grateful for the leadership of Senate President Murray and Senator Eldridge. They and their colleagues in the Senate recognize that cities and towns need effective tools to enforce their own laws. If enacted, this measure will help communities promote smart land use and protect local natural resources.

The bill is now in the House of Representatives for consideration. MACC is working closely with the House Sponsor of the bill, Representative Stephen Kulik, to pass the bill in the House and enact it into law before July 31, 2012, the end of this legislative session.

*Linda Orel is the Executive Director of MACC.*

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unanimous decision that such a compliance order under the Act was indeed final agency action subject to the review provisions of the APA. The case was remanded back to a lower court to provide that level of review for the Sacketts.

The Sacketts, and those who disagree with EPA's jurisdictional basis for imposing a compliance order for filling of wetlands without a permit, now have means to dispute the validity of the order to a federal judge under the criteria of the APA. In simple terms, the disputing party may have a chance to prevail if they can show that EPA's determination supporting the enforcement action lacked a reasonable basis or was made in an arbitrary and capricious manner. Although such affected parties still have a very high burden to meet in overturning any agency decisions (as courts generally tend to uphold administrative agency decisions regarding its own regulations) there is nonetheless an alternate way to dispute enforcement rather than waiting, and incurring potential fines, for EPA to commence the enforcement action in the courts.

*Kenneth Whittaker is an attorney at Gonzalez, Saggio & Harlan and a former MACC Director.*

**Town of Hanson  
Town Planner/Conservation  
Agent**

The Town of Hanson (pop. 10,000) is seeking a highly-motivated and qualified individual for the position of full-time Town Planner/Conservation Agent. This salaried, supervisory, department head position serves as the primary contact for the Planning Board and Conservation Commission under the supervision of the Town Administrator and serves as a key member of the Town's community development team.

The Town Planner/Conservation Agent is responsible for performing a wide range of cross-disciplinary activities including assuring compliance with State and local wetlands regulations; conducting site plan, special permit and subdivision reviews; drafting various regulations and bylaws; attending evening meetings; supervision of a full-time administrative assistant and coordinating activities amongst other various town departments.

Candidates should have demonstrable experience in many areas of planning and conservation related issues; be willing and able to work in a team environment and possess excellent communication and administrative skills. Supervisory experience preferred.

Please send cover letter, resume and three references to Mr. Rene' J. Read, Town Administrator, Hanson Town Hall, 542 Liberty Street, Hanson, MA 02341 by 4:00 p.m. Wednesday, July 18, 2012. Salary range \$45,000 - \$70,000.

Full job description available on the Town of Hanson website, [www.hanson-ma.gov](http://www.hanson-ma.gov)

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