

Sackett v. EPA: U.S. Supreme Court Unanimously Affirms Judicial Review of EPA Clean Water Act Unilateral Compliance Orders

April 4, 2012

The U.S. Supreme Court issued a unanimous decision on March 21, 2012, in the case of *Sackett v. Environmental Protection Agency et al.*, No. 10-1062, 2012 WL 932018, 566 U.S. ____ (Mar. 21, 2012), finding that a compliance order issued by the U.S.

Environmental Protection Agency (EPA) under the federal Clean Water Act constitutes a final agency action subject to pre-enforcement judicial review under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A). This decision may well pave the way to what are likely to be hotly contested challenges to EPA's enforcement authority under the Clean Water Act, and other federal statutes.

The Sacketts purchased property near Priest Lake in Idaho and had begun to fill in part of the property with fill dirt in preparation for construction when they received a compliance order from the EPA stating that their property contained jurisdictional wetlands and that their construction project therefore violated the Clean Water Act. The EPA ordered the Sacketts to restore the property pursuant to an EPA-prepared work plan and provide EPA with access to their property. The Sacketts sought a hearing with EPA to challenge the contention that their property contained jurisdictional wetlands and, when that request was denied, they sought declarative and injunctive relief in the federal District Court on the grounds that the EPA's compliance order was "arbitrary and capricious" under the APA and deprived them of their due process rights under the Fifth Amendment. The District Court dismissed the case for lack of subject matter jurisdiction and the Ninth Circuit affirmed that decision on the grounds that the Clean Water Act precludes pre-enforcement judicial review of compliance orders and does not violate the right to due process.

In reversing the decision of the Ninth Circuit Court of Appeals, the U.S. Supreme Court determined that the EPA's compliance order constituted a "final agency action for which there is no other adequate remedy in a court," and for which there is a right to judicial review under the APA (5 U.S.C. § 704). For the "final agency action" component, the Court found that EPA's compliance order was final in that it imposed a legal obligation on the Sacketts to restore their property, and exposed them to potential penalties of up to \$37,500 per day per violation of the Clean Water Act, and an additional per day penalty for violating EPA's compliance order. As the EPA's findings in the compliance order were not subject to further agency review, the Court further determined that the order marked the "consummation" of the agency's decision-making process.

The Court next considered whether the Sacketts had "no other adequate remedy in court." Although judicial review in Clean Water Act enforcement cases typically comes about through a civil action brought by the EPA, here, the Sacketts could not initiate that proceeding and each day they waited for EPA to bring an enforcement action against them potentially exposed them to significant daily penalties. The other potential route of applying to the Army Corps of Engineers for a permit and then filing a suit under the APA upon denial of the permit application also was deemed by the U.S. Supreme Court as not an "adequate remedy" insofar as a remedy from one government agency does not ordinarily provide an adequate remedy for the actions taken by another government agency.

The U.S. Supreme Court limited its decision in this case to whether the Clean Water Act compliance order could be challenged in court, and did not resolve the dispute on the merits. Although the Court referenced its decision in *Rapanos v. United States* (547 U.S. 715 (2006)), in which it determined that wetlands not adjacent to navigable waters do not fall within the scope of the Clean Water Act, it acknowledged that no one rationale was articulated by the Court in arriving at that decision, leaving the door open for parties "to feel their way on a case-by-case basis" regarding the Clean Water Act's reach. In addition, the Court rejected the government's policy argument that compliance orders should not be subject to pre-enforcement judicial review which would undermine their effectiveness as a "stick" in getting prompt remediation through voluntary compliance. The Court broadly stated that "there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review."

Significantly, the Court, having found that the APA provided the relief sought, did not reach the broader due process of law issue that was raised and well-briefed in the case; that is, whether the unavailability of judicial review of the unilateral compliance order amounted to a deprivation of property without due process. That constitutional issue is likely to come up again in subsequent challenges to EPA's use of unilateral administrative or compliance orders under statutes that don't contain an express pre-enforcement bar to judicial review, such as under the Resource Conservation Act and the Clean Air Act. Unlike the Comprehensive Environmental, Response, Compensation and Liability Act ("CERCLA" or the Federal Superfund law), the Clean Water Act does not contain an express preclusion of judicial review unless and until EPA commences an enforcement action. The Supreme Court previously has denied *certiorari* in a challenge to the constitutionality of a CERCLA unilateral administrative order (*General Electric Co. v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010), *cert. denied* 131 S. Ct. 2959 (2011)).

Thus, the U.S. Supreme Court's decision in *Sackett v. EPA* should not only be viewed as a significant victory for those parties seeking pre-enforcement challenges to unilateral administrative orders but, also, particularly in light of the Court's broad language, it has the potential to change EPA's paradigm of "strong-arming" parties by issuing such unilateral orders and then waiting for the penalties to pile up before seeking to enforce its order.

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