The Legal Intelligencer

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Administrative Action: Must There Be Noncompliance to Get a Court Order?

Earlier this month, the Commonwealth Court issued an unpublished opinion affirming a contempt order in a Pennsylvania Safe Drinking Water Act case, *Department of Environmental Protection v. Peckham*.

David G. Mandelbaum

2012-09-18 12:00:00 AM

Commentary

Earlier this month, the Commonwealth Court issued an unpublished opinion affirming a contempt order in a Pennsylvania Safe Drinking Water Act case, *Department of Environmental Protection v. Peckham*, No. 2094 C.D. 2011 (Sept. 7, 2012). That decision provides an occasion to consider a question that arises only from time to time, but with important case management implications: whether a defendant must be out of compliance with a requirement imposed by the department or the Environmental Protection Agency before the government may seek to "enforce" the administrative action in court.

Peckham itself does not present this issue. Peckham is the more conventional enforcement case. In that matter, the defendants operated a campground. The campground provided drinking water to those who stayed there. The defendants had no permit for the drinking water system.

A "system for the provision to the public of water for human consumption" is a "public water system" under the Safe Drinking Water Act if it "regularly serves an average of at least 25 individuals daily at least 60 days out of the year." Operating a public water system requires a permit from the DEP.

The DEP issued notices of violation to Thomas and Patricia Peckham. Notices of violation do not require any particular corrective action by the recipient, and they are typically not appealable to the Environmental Hearing Board. (See *Fiore v. Department of Environmental Protection,* 510 A.2d 880 (Pa. Commw. Ct. 1986).) If they do impose obligations, they may be appealable. In the Peckhams' case, the DEP did not seek to impose any obligations until it issued an administrative cease-and-desist order.

The Peckhams appealed that order to the EHB.They failed to make the required prehearing filings, and the appeal was dismissed.

Nevertheless, the campground continued to provide water to too many users and the DEP sought an enforcement order from the court of common pleas. The court of common pleas granted the order, and the defendants failed to comply. The DEP sought and received an order holding the defendants in contempt. The defendants appealed, and the Commonwealth Court affirmed.

In that case, the DEP's order became administratively final after disposition of the Peckhams' appeal to the EHB. Some agency actions, however, cannot be appealed immediately. The department or the EPA know that the action presents a dispute. The government may have a reason to accelerate resolution of that dispute. Can it obtain a judicial resolution if the defendant has not failed to comply with the administratively-imposed requirement? That is, can the government obtain what amounts to pre-enforcement review?

This is the reverse of the issue addressed by the Supreme Court in *Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367 (2012). Sackett held that persons who receive a compliance order from the EPA under Section 309 of the Clean Water Act may seek review of that order in district court under the judicial review provisions of the Administrative Procedure Act. (See "The High Court and Pre-enforcement Review Under the Clean Water Act," published April 10 in *Pennsylvania Law Weekly*.) But what if the EPA had wanted to dispose of any defense that Chantell and Michael Sackett might have had to enforcement of that order right away, even before the Sacketts were out of compliance? Can the EPA bring an enforcement action?

In the specific case of the Clean Water Act, an action for either injunctive relief or penalties may only be brought when the defendant has failed to comply with either a requirement of the statute or of a Section 309 compliance order. Section 309(b) authorizes an action to restrain a violation "for which [EPA] is authorized to issue a compliance order." That action is de novo, and any earlier administrative order is not determinative. A violation of the administrative order may give rise to claim for a civil penalty, and perhaps other relief. No statutory provision seems to exist that explicitly authorizes a pre-emptive claim by the EPA to determine whether a compliance order properly imposes future obligations on the defendant.

The United States takes the position under the Superfund statute that it may recover a mandatory injunction under Section 106 of the Comprehensive Environmental Response, Compensation and Liability Act after the EPA has issued a unilateral administrative order but before the defendant has violated that order. That position appears to be correct if the United States seeks a judicial order for relief under the first sentence of Section 106(a).

The claim under the first sentence of Section 106(a), however, appears to require de novo proof that the judicial order is "such relief as may be necessary to abate [the] danger or threat" from a release of a hazardous substance from a facility, and that the order is "such relief as the public interest and the equities of the case may require." The underlying unilateral administrative order neither establishes the government's entitlement to relief, nor has very much to do with the claim under Section 106(a).

The government, however, believes that it may recover a mandatory injunction requiring compliance with a unilateral order merely upon proof that the defendant is liable under CERCLA and that the underlying administrative order was not arbitrary and capricious or otherwise contrary to law. No statutory provision explicitly authorizes that claim unless the government can prove that the defendant failed to comply with the underlying administrative order. The defendant then has an opportunity to establish that it had "sufficient cause" not to comply, a proof that the defendant cannot even theoretically make until it actually does not comply.

The opportunity to establish a "sufficient cause" defense appears to be necessary for the whole CERCLA scheme of administrative orders and deferred judicial review to be constitutional. (*General Electric v. Jackson,* 610 F.3d 110 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 2959 (2011).)

Similarly, in a contempt proceeding in Pennsylvania, a defendant may not be held in contempt if he or she

has no way to purge it. For example, in *Department of Environmental Protection v. Cromwell Twp.,* 32 A.3d 639 (Pa. 2011), township supervisors who failed to amend their Sewage Facilities Plan could not be held in contempt after they had resigned their positions. Once out of office, they could not purge the contempt.

The federal government properly observes that it sometimes issues CERCLA orders in hotly disputed circumstances; were there no dispute, a consent order or decree, rather than a unilateral administrative order might be expected. Unilateral orders are not appealable until the government brings an enforcement action. That is, CERCLA operates the way the government in Sackett contended the Clean Water Act worked. If the government wishes to resolve the uncertainty posed by the dispute over a CERCLA administrative order, the government must bring an action against the ordered party. Yet, the government does not wish to give up the deferential review of its order afforded by the statute. 42 U.S.C. § 9613(j). The government would therefore like to argue that the statute implies a pre-violation enforcement claim as an alternative to the de novo claim for an injunction under the first sentence of Section 106(a).

One might say that CERCLA is unique. The government can only want pre-violation enforcement when the administrative action is not reviewable.

If the regulated entity must appeal the administrative action, then disputes are resolved once the administrative action — the order, for example — becomes final after appeal or after the appeal period lapses. Typically, administrative orders are immediately reviewable in Pennsylvania. However, the Hazardous Sites Cleanup Act has a bar on pre-enforcement review parallel to the provisions of CERCLA. Interestingly, the Land Recycling and Environmental Remediation Standards Act (known as "Act 2") permits pre-enforcement review.

However, in Pennsylvania rulemaking is not subject to immediate review. (*Neshaminy Water Resources Auth. v. Department of Environmental Resources*, 513 A.2d 979 (Pa. 1986).)

If the government wants to test the enforceability of one of its regulations or policies against a regulated entity, it has difficulty doing so until a violation occurs.

The government only rarely wishes to test the enforceability of its administrative actions early. However, circumstances can arise that make it desirable. For example, if an order or rule requires a lengthy construction project, litigation of an enforcement action after a violation occurs may be impossibly rushed or may risk missing construction windows.

A declaratory judgment action seems to be the appropriate course to resolve these sorts of issues. However, the environmental laws do not seem to provide for declaratory relief explicitly, and when they do — as in the case of the Superfund statute — the provisions are hard to decipher. (See "Declaratory Judgments and Superfund Eyed by 2nd Circuit," published December 27, 2011, in *Pennsylvania Law Weekly*.). As management of environmental litigation becomes more sophisticated, this issue will have to be worked out. •

David G. Mandelbaum *is national co-chair of the environmental practice group of Greenberg Traurig. His principal office is in Philadelphia. He teaches "Oil and Gas Law," "Environmental Litigation: Superfund" and "Global Climate Change" in rotation at Temple University's Beasley School of Law, and serves as vice chair of the Pennsylvania Statewide Water Resources Committee. He was educated at Harvard College and Harvard Law School.*