The Legal Intelligencer

ALM Properties, Inc.
Page printed from: *The Legal Intelligencer*

Back to Article

The High Court and Pre-Enforcement Review Under the Clean Water Act

On March 21, in *Sackett v. Environmental Protection Agency*, a unanimous U.S. Supreme Court (mirabile dictu) held that regulated entities may obtain judicial review of administrative compliance orders issued by the Environmental Protection Agency under the Clean Water Act even if the EPA has not sued on an order. The court expressed some consternation over the EPA's assertion of the ability to take unreviewable enforcement actions merely because without review, enforcement orders would more quickly induce "voluntary" compliance.

David G. Mandelbaum

2012-04-10 10:00:00 AM

On March 21, in *Sackett v. Environmental Protection Agency*, a unanimous U.S. Supreme Court (mirabile dictu) held that regulated entities may obtain judicial review of administrative compliance orders issued by the Environmental Protection Agency under the Clean Water Act even if the EPA has not sued on an order. The court expressed some consternation over the EPA's assertion of the ability to take unreviewable enforcement actions merely because without review, enforcement orders would more quickly induce "voluntary" compliance.

Environmental practitioners will be familiar with a bar on pre-enforcement review of even very consequential decisions of the EPA under the federal Comprehensive Environmental Response, Compensation and Liability Act.

In Section 113(h) of CERCLA, Congress divested federal courts of jurisdiction over most challenges to selection of a remedy or enforcement actions under the Superfund program. The EPA and the Department of Justice sought to import Superfund principles into the Clean Water Act. The court would have none of it.

Michael and Chantell Sackett owned a parcel of land — less than an acre — on which they intended to build a house. In preparation for building, they filled in a portion of the property with gravel. Filling a wetland that constitutes "waters of the United States" without a permit under Section 404 of the Clean Water Act violates the prohibition on discharges of pollutants contained in Section 301 of the act.

The U.S. Army Corps of Engineers administers the Section 404 "dredge and fill" permit program However, the EPA enforces violations of the permit requirement or permit terms. The EPA determined that the Sacketts had filled wetlands under federal jurisdiction, and that they had therefore violated the act.

The EPA has two enforcement tools under Section 309 of the Clean Water Act. The EPA can sue for civil penalties and for an injunction to abate the violation, or the EPA can issue an administrative compliance order directing the recipient to abate the violation. Section 309 also allows administrative assessment of penalties through a somewhat more formal administrative process.

In the Sacketts' case, the EPA issued an administrative compliance order directing them to remove the fill. The EPA threatened a civil penalty of up to $37,500 per day for violating the statute on each day that the fill was not removed as well as another penalty of up to $37,500 per day for violating the order. Thus, each day that the Sacketts failed to comply risked a penalty of up to $75,000.

The Sacketts disagreed with the EPA's determination that their land contained wetlands subject to federal regulatory jurisdiction. The Supreme Court muddied the waters of federal jurisdiction over wetlands with its 2006 decision in *Rapanos v. United States. Rapanos* — as well as the 2001 decision in Solid Waste Authority of Northern Cook County v. Army Corps of Engineers — invalidated assertion of federal jurisdiction over all wetlands that the United States could constitutionally regulate. However, the court could not agree on a standard for determining which wetlands were within the regulated scope of the Clean Water Act.

Pennsylvania practitioners tend not to focus as intently as practitioners in other jurisdictions on the Rapanos confusion because the Clean Streams Law and Dam Safety and Encroachments Act make virtually all wetlands "waters of the commonwealth" subject to state regulation. The Clean Water Act prohibits discharges to "navigable waters." However, Section 502 defines "navigable waters" to mean "waters of the United States."

The court understands "waters of the United States" to be different from waters that are navigable in fact, and has reiterated that distinction as recently as February in PPL Montana v. Montana, a case about whether the beds of non-navigable segments of navigable waters were owned by the state under the equal footing doctrine.

"Waters of the United States" includes wetlands adjacent to actually navigable streams, some wetlands adjacent to some non-navigable waters, and perhaps some nonadjacent wetlands. The justices differ over which ones. Accordingly, the extent of federal jurisdiction is not always clear. The Sacketts asserted that it was not clear in their case.

The Sacketts sought to bring an action challenging the EPA's jurisdictional decision. The Clean Water Act did not specify an avenue for review, so they asserted a claim under the Administrative Procedure Act. The EPA responded by arguing that issuance of administrative compliance orders under Section 309 could only be challenged when the EPA brought a lawsuit to enforce them. Otherwise, the EPA argued, the choice of remedies provided by Congress to the EPA would prove illusory. EPA would end up in court whether it issued an administrative order or brought a lawsuit. Moreover, the EPA argued, allowing pre-enforcement review would make enforcement more cumbersome and impede the EPA's efforts to induce prompt abatement of violations.

The court observed that the Administrative Procedure Act creates a presumption in favor of judicial review of all final agency action unless Congress has specifically prohibited review. Further, the Administrative Procedure Act itself offers the basis for review if no other review is available. Congress did not prohibit review of the EPA's Section 309 order. The order was final in the sense that it created legal rights and duties and the EPA was not considering its underlying findings and determinations further. Moreover, the Clean Water Act did not provide any other avenue for judicial review.

The Supreme Court in effect decided that for purposes of enforcement, the Clean Water Act is not like CERCLA, the Superfund statute. Many environmental practitioners — including many within the government

— think of CERCLA enforcement as a template for all other environmental issues. After all, can one really say that the EPA's efforts to get fill removed from a wetland are all that different from the EPA's efforts to get waste removed from the ground? The answer, for purposes of judicial review of clean up orders, appears to be that one can.

According to the Supreme Court's 2009 opinion in Burlington Northern & Santa Fe Railway v. United States, CERCLA has twin purposes: "to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts [are] borne by those responsible for the contamination." In order to obtain that "timely cleanup," in Section 113(h) of CERCLA, Congress withdrew federal jurisdiction to review (a) selection of any remedial action (that is, permanent cleanup) or removal action (that is, interim cleanup) or (b) any enforcement order to obtain a cleanup under Section 106. Judicial review can only be obtained if the United States sues on certain specified claims or if someone else sues after the cleanup is complete.

That CERCLA scheme makes Superfund enforcement easier for the government. The government can select a remedy and the government can order a party it alleges to be responsible to implement the remedy without fear of litigation. If the party refuses to comply, it faces draconian sanctions including daily penalties, just like the Sacketts. General Electric challenged that scheme as unconstitutional and litigated for almost a decade. The U.S. Court of Appeals for the Second Circuit found no due process problem in General Electric v. Jackson, decided in 2010, and just last year the Supreme Court denied certiorari.

In *Sackett,* the Supreme Court did not see enough similarity between these two issues even to cite a CERCLA case, and there are ample appellate authorities from about half the courts of appeals. So, the teaching of *Sackett* at one level seems to be that Superfund is sui generis.

Sackett, in principle, applies to all regulatory programs in the federal system. Unless the authorizing statute has precluded judicial review, any enforcement order ought to be immediately reviewable. It ought to apply generally to enforcement orders under the Clean Air Act or the Resource Conservation and Recovery Act, for example.

The court's decision, though, does not change the requirement that administrative actions must be final in order to be reviewable. Thus, even under the Clean Water Act, adoption of a water quality standard is not reviewable until it is incorporated into a permit. The same appears to have been true of individual control strategies when they take the form of a state-issued permit.

David 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.*