Supreme Court Hears Clean Water Act Enforcement Case *Sackett v. EPA*

On January 9, 2012, the Supreme Court heard oral argument in the Clean Water Act (CWA) enforcement case *Sackett v. EPA*, No. 10-1062. Throughout the course of argument, Deputy Solicitor General Malcolm L. Stewart faced a hot bench that appeared particularly critical of the Environmental Protection Agency's (EPA) arguments. Most telling was a line of inquiry from Justice Alito, who pointedly asked: "if you related the facts of this case as they come to us to an ordinary homeowner, don't you think most ordinary homeowners would say this kind of thing can't happen in the United States?" This sentiment was furthered by Justices Breyer and Kagan, who repeatedly sought an explanation as to why the presumption of judicial reviewability should not apply to CWA compliance orders. Although it is difficult to know how the Court will resolve the case, questioning from the Justices appears to indicate that the Court will limit EPA's authority to issue administrative compliance orders without providing for judicial or administrative review, a result that could have wide-ranging impacts on EPA enforcement authority under the CWA as well as other environmental statutes.

Chantell and Michael Sackett planned to build a home on a half-acre parcel of land in Idaho. After the Sacketts placed fill on a portion of the land prior to construction, EPA issued an administrative compliance order asserting that the Sacketts violated the CWA by filling in a wetland without first obtaining a permit. EPA ordered the Sacketts to remove the fill material, restore the parcel to its original condition, and monitor the fenced-off site for three years, or face potential penalties of up to US$37,500 per day.

In response, the Sacketts sought a hearing with EPA to challenge the Agency's finding that the parcel was a wetland. After EPA refused to grant a hearing, the Sacketts filed an action in federal district court seeking an injunction against EPA. The Sacketts argued that EPA's order was arbitrary and capricious under the Administrative Procedure Act (APA) and that the failure to grant a pre-enforcement hearing constituted a violation of due process. The district court dismissed the Sacketts' claim, concluding that the CWA precludes judicial review of compliance orders before EPA initiates an enforcement action in federal court, and that failure to provide such review does not constitute a violation of due process.[1] On appeal, the Ninth Circuit affirmed the district court's decision, relying on similar decisions from the Fourth, Sixth, and Tenth Circuits.[2]

1 *Sackett v. EPA*, 2008 WL 3286801 (D. Idaho Aug. 7, 2008).

2 *Sackett v. EPA*, 622 F.3d 1139, 1147 (9th Cir. 2010).

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Just three weeks before the Supreme Court's decision to hear the Sacketts' case, it refused to take a similar challenge to administrative compliance orders brought by the General Electric Co. *See General Electric Co. v. Jackson*, No. 10-871. The Court's decision to take the Sacketts' appeal may suggest that the facts are so heavily weighted against EPA that the Court could overrule each of the four Circuits that have heard the issue. In this respect, it is worth noting that almost all of the *amici* that have submitted briefs on the case have done so on the side of the Sacketts, including the US Chamber of Commerce, the American Petroleum Institute, and the National Association of Homebuilders.

Any decision by the Supreme Court that EPA's Clean Water Act administrative orders are subject to pre-enforcement judicial review will likely have several far-reaching consequences. First, parties subject to administrative orders would have a significant new opportunity to challenge controversial orders rather than face the current Hobbesian choice of compliance with a potentially unreasonable order or facing substantial penalties. Indeed, the potential litigation of administrative compliance orders was one reason the Ninth Circuit rejected pre-enforcement review, noting that administrative orders are critical to the Agency's ability to "address environmental problems quickly and without becoming immediately entangled in litigation."[3] Second, the opportunity for pre-enforcement review would likely make the Agency more cautious in issuing administrative orders, using such orders only where it is confident that it has gathered sufficient evidence to make the order likely to stand up in court. Third, to the extent that EPA reduces its reliance on administrative compliance orders, nongovernmental environmental organizations may step into the enforcement vacuum by increasing citizen suit litigation efforts.

Finally, it is worth noting that any decision in *Sackett* will likely have implications for whether judicial review of administrative orders is also available under other environmental statutes such as the Clean Air Act and CERCLA. Indeed, in rejecting pre-enforcement review, the Ninth Circuit recognized that the statutory language addressing administrative orders under the Clean Water Act was virtually identical to similar provisions in the Clean Air Act. Further, Circuits that have addressed the issue under a variety of environmental statutes have often relied on similar legal reasoning in rejecting pre-enforcement review.

We would expect the Supreme Court to issue a decision in this case in the spring.

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3 *Id.* at 1144.