SQUIRE SANDERS

Unanimous Supreme Court Allows Pre-Enforcement Review of Clean Water Act Compliance Orders

In a rare unanimous decision, the US Supreme Court has ruled that pre-enforcement judicial review is available for an administrative compliance order issued by US EPA under Section 309 of the Clean Water Act (CWA). *Sackett v. EPA,* No. 10-1062 (March 21, 2012). The decision, authored by Justice Scalia, with concurring opinions by Justices Ginsburg and Alito, overturns a long string of lower court rulings that such orders can be challenged only if and when US EPA brings a separate action in federal court to enforce against a party's failure or refusal to comply with the terms and conditions of the order.

The order at issue in this case asserted that Michael and Chantell Sackett had violated the CWA by filling part of their 2/3 acre residential lot near Priest Lake, Idaho with dirt and rock in preparation for constructing a house. The order made specific findings that the lot contained "wetlands" subject to federal jurisdiction, that the wetlands were "adjacent to" Priest Lake, and that Priest Lake was a "navigable water" and "waters of the United States" within the meaning of the CWA. On the basis of these findings, the order directed the Sacketts to restore the site in accordance with a US EPA-created restoration work plan.

US EPA refused the Sacketts' request for a hearing on whether their property was subject to the CWA. The Sacketts then brought an action in federal court, asking it to rule that the order was "arbitrary and capricious" under the Administrative Procedure Act (APA) and a deprivation of property "without due process of law" under the Fifth Amendment to the US Constitution. The district court dismissed their claims for want of subject matter jurisdiction, and the Ninth Circuit Court of Appeals affirmed, finding a "broad uniformity of consensus" among the courts that the CWA precludes pre-enforcement judicial review of such compliance orders. *Sackett v. EPA,* 622 F.3d 1139 (2010).

The Ninth Circuit's decision was squarely in line with similar rulings under the CWA by four other circuit courts and a half-dozen district courts over the past two decades. *See Laguna Gatuna, Inc. v. Browner,* 58 F.3d 564 (10th Cir. 1995); *Southern Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement,* 20 F.3d 1418 (6th Cir. 1994); *Southern Pines Assocs. by Goldmeier v. United States,* 912 F.2d 713 (4th Cir. 1990); and *Hoffman Group, Inc. v. EPA,* 902 F.2d 567 (7th Cir. 1990). In addition, numerous other courts have reached the same conclusion with regard to compliance orders issued under the equivalent provision in the Clean Air Act (CAA), going as far back as 1977. *Lloyd A. Frye Roofing Co. v. EPA,* 554 F.2d 885 (8th Cir. 1977). *See also Asbestec Construction Services v. EPA,* 849 F.2d 765 (2d Cir. 1988) and *Acker v. EPA,* 290 F.3d 892 (7th Cir. 2002). More recently, the same reasoning used in the CWA and CAA cases has been applied to compliance orders issued under the Resource Conservation and Recovery Act (RCRA) as well. *Ross Incineration Services, Inc. v. Browner,* 118 F. Supp. 2d 837 (N.D. Ohio 2000).

The Supreme Court's ruling in *Sackett,* therefore, is far more than a conventional rebuke of one often-reversed court of appeals. It has potentially far-reaching implications for US EPA's entire enforcement program under three of the four flagship environmental statutes. (Unlike the CWA, CAA or RCRA, the Comprehensive Environmental Response, Compensation and Liability Act [CERCLA] contains an explicit statutory bar against pre-enforcement review.) Writing for the unanimous court, Justice Scalia had no trouble in finding that US EPA's order was reviewable under the APA as a "final agency action for which there is no other adequate remedy in a court." The order "determined" rights or obligations because it found they had the legal obligation to restore their property. "Legal consequences" flowed from the order because it exposed the Sacketts not only to US$37,500 per day in penalties for

violation of the CWA, but to *another* US$37,500 in penalties for every day they failed to comply with the order. The order marked the "consummation" of US EPA's decision-making process because the denial of an administrative hearing showed that it was not subject to further agency review. Finally, the Sacketts had "no other adequate remedy in a court" because they could not themselves initiate a separate enforcement proceeding and would accrue an additional US$75,000 in penalties each day they waited for US EPA to "drop the hammer." Finding that nothing in the CWA expressly precludes judicial review, Scalia noted that the APA creates a presumption favoring judicial review of administrative action that, in this case, could not be overcome by inferences of intent drawn from the statutory scheme as a whole. He concluded that the APA's presumption in favor of judicial review "is a repudiation of the principle that efficiency of regulation conquers all. And there is no reason to think that the CWA was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review – even judicial review of the question whether the regulated party is within US EPA's jurisdiction."

Just how far-reaching the impact of the *Sackett* decision will be remains to be seen. Justice Scalia suggested that compliance orders will remain an effective means of securing prompt voluntary compliance in those many cases where there is no substantial basis to question their validity. In a separate concurring opinion, Justice Ginsburg noted that whether a party like the Sacketts could challenge at the pre-enforcement stage not only US EPA's authority to regulate but also the terms and conditions of a compliance order was a question this decision does not resolve. Hence it remains unclear whether the rationale of *Sackett* will apply only to cases in which a party sues to contest the jurisdictional bases for the order. Further, *Sackett* determined only whether a dispute over the scope of US EPA's jurisdiction under the CWA can be raised in pre-enforcement review of a compliance order issued under that statute. It is likely, though not certain, that the decision's reasoning would apply to similar jurisdictional challenges to orders issued under the CAA and RCRA as well.

Justice Alito's concurring opinion makes it clear that the outcome in *Sackett* was driven largely by the fact that it involved what is one of the most disputed issues under current environmental law – the scope of federal jurisdiction over "wetlands" that are not traditionally navigable waters. In recent years, the Supreme Court itself has split 5-4 on the question whether a "seasonally ponded" sand and gravel pit not adjacent to open waters was subject to US EPA jurisdiction. *Solid Waste Agency of Northern Cook Co. v. Army Corps of Engineers,* 531 U.S. 159 (2001). And in *Rapanos v. United States,* 547 U.S. 715 (2006), no single rationale commanded a majority of the Court, which split 4-4-1 in considering whether a wetland not adjacent to navigable-in-fact waters was regulated by the CWA.

In this case, although the Court did not address the merits of the Sacketts' jurisdictional claim, Justice Alito's concurring opinion raises interesting questions about the future direction of US EPA's current efforts to clarify the scope of its authority. He notes that US EPA's latest attempt at an informal "guidance" document on this subject (recently submitted for review by OMB), far from providing clarity and predictability, advises property owners that many jurisdictional determinations can be made only on a case-by-case basis by US EPA field staff. Consequently, he suggests that "real relief" from the uncertainty faced under current law will require Congress to amend the CWA to provide a reasonably clear rule defining its scope.

Contacts

David W. Burchmore
T +1 216 479 8779
david.burchmore@squiresanders.com

Geoffrey K. Barnes
T +1 216 479 8646
geoffrey.barnes@squiresanders.com

Karen A. Winters
T +1 614 365 2750
karen.winters@squiresanders.com