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Opening The Door To EPA Challenges — But Only So Far

Law360, New York (April 13, 2012, 1:31 PM ET) -- In its March 21, 2012, opinion in the case of Sackett v. U.S. Environmental Protection Agency (EPA), et al., No. 10-1062, 566 U.S. ___ (March 21, 2012), the U.S. Supreme Court unanimously ruled a party may bring a civil action in a federal court under the Administrative Procedure Act (APA), 5 U.S.C. § 706, to challenge the issuance of a compliance order by the EPA for a violation of the Clean Water Act (CWA).

In issuing this decision, the Supreme Court not only reversed the U.S. Court of Appeals for the Ninth Circuit's decision that the CWA itself contained an implied intent to preclude pre-enforcement judicial review of compliance orders, but it also veered from the decisions of multiple U.S. Courts of Appeals in different circuits who previously confronted the issue.

Though any lasting effects of the Sackett decision must now play out over time, from first glance, it appears the EPA may face increased burdens in its compliance-order process and many more civil lawsuits brought by cited parties.

The Underlying Facts and Procedural History

The CWA prohibits the discharge of "any pollutant" without a permit into "navigable waters." 33 U.S.C. §§ 1311, 1344. The act defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7).

Several Supreme Court decisions have construed "navigable waters" to include certain properties adjacent to navigable in-fact waters, for example adjacent freshwater wetlands. See United States v. Riverside Bayview Homes Inc., 474 U.S. 121 (1985).

Petitioners Michael and Chantell Sackett owned property in Bonner County, Idaho, separated from a body of water known as Priest Lake by several lots containing permanent structures. Sackett v. Environmental Protection Agency, et al., No. 10-1062, 566 U.S. ___, slip opinion at 3 (March 21, 2012).

In 2007, when the Sacketts filled in part of their lot with dirt and rock in order to start construction of a house, the EPA issued a compliance order stating the Sacketts' lot contained "wetlands" adjacent to Priest Lake. Id.

The compliance order identified Priest Lake as a "navigable water" per the CWA and stated the discharge of fill material onto the Sacketts' property, a purported wetland, without a permit constituted the discharge of pollutants into the waters of the United States in violation of the act. Id.

The compliance order directed the Sacketts to immediately restore the site by removing all fill material and to provide the EPA with access to their lot and all records and documentation related to their lot. Id. at 4; Sackett v. U.S. EPA, 622 F.3d 1139, 1141 (9th Cir. 2010). The compliance order also provided for civil penalties of up to $32,500 per day for a violation or failure to comply. Sackett v. U.S. EPA, 622 F.3d at 1141.

After receiving the compliance order, the Sacketts first attempted to seek a hearing with the EPA due to their belief that the CWA did not apply to their property. Sackett v. Environmental Protection Agency, et al., No. 10-1062, 566 U.S. ___, slip opinion at 4 (March 21, 2012). The EPA denied this request. Id.

Following this rejection, the Sacketts brought the present action in the United States District Court for the District of Idaho, seeking declaratory and injunctive relief. Sackett, 622 F.3d at 1141. The Sacketts argued that the EPA's compliance order was "arbitrary and capricious" under the APA, that the compliance order violated the Sacketts' procedural due process rights and that the EPA issued the compliance order on the basis of an "unconstitutionally vague" standard. Id.

The district court dismissed the Sacketts' claims due to a lack of subject-matter jurisdiction, and the Ninth Circuit affirmed after a de novo review of the district court's dismissal of the complaint. Sackett, 622 F.3d at 1147.

The Supreme Court Decision

The Supreme Court's opinion, delivered by Justice Antonin Scalia, breaks the analysis of the Sacketts' claims into two sections:

1. Whether the APA provides the Sacketts the ability to challenge an EPA compliance order issued under the CWA; and
2. Whether the CWA itself precludes judicial review of compliance orders.

In the first part of the opinion, the court determined the APA did offer the Sacketts the ability to challenge an EPA compliance order issued under the CWA by initiating a civil action. The APA provides for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704.

Relying chiefly on the features of finality listed in Bennett v. Spear, 520 U.S. 154, 178 (1997), the court answered affirmatively that a compliance order from the EPA constitutes a "final" agency act. Sackett v. Environmental Protection Agency, et al., No. 10-1062, 566 U.S. ___, slip opinion at 5 (March 21, 2012).

The compliance order at issue determined the rights or obligations of the Sacketts, by imposing obligations to restore property and to give the EPA access to the property; legal consequences also flowed from the order, due to the possible imposition of double penalties for noncompliance and the fact that the order limited the Sacketts' ability to gain a permit for the fill on their property from the Army Corps of Engineers. Id.

As another hallmark of "finality," the court found the compliance order did mark the consummation of the EPA's decision-making process, particularly due to the fact that the EPA expressly told the Sacketts their compliance order was not subject to further agency review. Id. at 6.

In addition to the issue of finality, in order for a party to challenge an administrative act through the APA, no other adequate remedy in a court must exist. 5 U.S.C. § 704. The court found the Sacketts' situation met this requirement, because judicial review for CWA compliance only occurs when the EPA initiates a civil action for a violation of a compliance order. Id. at 6.

The Sacketts could not initiate such a process, and, therefore, they must either comply with the order or wait for the EPA to initiate litigation against them while incurring a $75,000 per day penalty — double the amount listed in the compliance order — in the process. Id.

In the second part of the court's opinion, the court determined that the CWA did not preclude judicial review of compliance orders. Id. at 7. The APA creates a "presumption favoring judicial review of administrative action." Id. Thus, the court looked to the statutory scheme of the act as a whole to determine if the act intended to preclude such review and determine if the evidence overcomes the APA presumption.

Though the Ninth Circuit, in its analysis of the statutory scheme of the CWA, found an implied intent to preclude judicial review, the Supreme Court emphasized that nothing in the CWA expressly precludes judicial review of compliance orders. Id.

Further, the court found the act's specific grant of judicial review in a separate section for a different type of penalty for a CWA violation did not rise to the level of evidence of intent necessary to overcome the APA presumption. Id. at 8.

Due to the lack of any express statements showing an intent to preclude judicial review, or evidence of an implied intent, the presumption created by the APA remained intact, and the court reversed the district court's dismissal of the Sacketts' claims.

Impact

Many speculate the Sackett decision will decrease the effectiveness and frequency of compliance orders from the EPA for CWA violations by opening the door to widespread challenges to this compliance mechanism in federal courts. Certainly, the Sackett case will likely generate more pause before the delivery of compliance orders and, possibly, more attempts to build evidence of jurisdiction on the frontend of such orders.

However, the court notes the limitations of the Sackett opinion within the opinion itself. The second part of Scalia's two-part analysis focuses solely on the provisions and legislative history of the CWA. See Id. at 7-10.

It is not clear whether another scheme, similar to the procedure for compliance orders in the CWA, will come under attack and lack enough ammunition to overcome the presumption of judicial review created by the APA.

For example, as noted in the Ninth Circuit's analysis of the Clean Air Act (CAA), the model for the enforcement provisions in the CWA, the legislative history for the CAA notes the specific deletion of a provision allowing for judicial review of compliance orders. Sackett, 622 F.3d at 1144.

This more pronounced evidence of an intent not to provide for judicial review of CAA compliance orders weighs against the ability of the APA to provide cited parties with a remedy such as that established in Sackett.

Justice Ruth Bader Ginsberg's concurring opinion points to another limitation in the Sackett decision. This concurring opinion states point blank that it is based on the understanding that the Sacketts may challenge the authority of the EPA to issue a compliance order under the CWA, but not the terms and conditions of the order itself. Sackett v. Environmental Protection Agency, et al., No. 10-1062, 566 U.S. ___, slip opinion, Ginsberg concurrence at 1 (March 21, 2012).

Ginsberg states the Sacketts failed to raise this issue, and, therefore, it remains unresolved.

Cited parties may see the Sackett case as a way to complicate and delay the EPA's compliance procedure, but, as the majority notes and Ginsberg's concurrence suggests, compliance orders should remain an effective way to gain voluntary compliance when no argument exists that the CWA does apply.

In an additional concurring opinion, Justice Samuel Alito goes so far as to claim that the court's decision still leaves no practical alternative to cited parties other than compliance, due to the uncertainty of the language in the CWA and the risk of severe penalties. Sackett v. Environmental Protection Agency, et al., No. 10-1062, 566 U.S. ___, slip opinion, Alito concurrence at 2 (March 21, 2012).

Though the court attempts to dispel claims that the Sackett case defeats the efficiency and practicality of EPA compliance orders for CWA violations, many questions do remain about the effects of the decision, including whether a challenge pursuant to the APA stays imposition of the daily fines for noncompliance established by the act and the EPA.

If not, as noted by Alito, challenges under the APA may appear much too risky to the largest portion of cited parties, particularly if little doubt exists as to the CWA's application to the particular land involved.

--By Jennifer Lamirand, Sheppard Mullin Richter & Hampton LLP

Jennifer Lamirand is an associate in Sheppard Mullins' Los Angeles office.