The article "Supreme Court to EPA: CWA Compliance Orders Are Subject To Review" by W. Parker Moore appeared in the Environmental Litigation and Toxic Torts Committee Newsletter, Vol. 13, No. 2, July 2012, Section of Environment, Energy, and Resources, American Bar Association.

SUPREME COURT TO EPA: CWA COMPLIANCE ORDERS ARE SUBJECT TO REVIEW

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In a long-awaited decision, on March 21, 2012, a unanimous U.S. Supreme Court told the U.S. Environmental Protection Agency (EPA) to stop "strong-arming . . . regulated parties" that want to challenge administrative compliance orders ("ACOs") based on assertions of Clean Water Act ("CWA") jurisdiction. EPA had long maintained that ACOs were not subject to judicial review, meaning that property owners could not challenge assertions of federal jurisdiction over their property when the agency ordered them to restore wetlands and waters that were filled without authorization by a CWA permit. Accordingly, property owners either had to comply with the order or wait for EPA to bring a civil suit against them for alleged CWA violations before they could seek judicial review. Under that practice, landowners who chose to stand their ground, arguing that the wetlands and waters on their property were not jurisdictional, often were assessed substantial penalties for each day they failed to abide by an ACO and for violating the CWA's unauthorized discharge prohibition. In *Sackett v. EPA*, No. 10-1062 (U.S. Mar. 21, 2012), the Supreme Court put an end to that. Moreover, the Court's ruling may have implications for EPA's enforcement activities under other federal environmental statues.

Background

The Clean Water Act prohibits the "discharge of any pollutant" into jurisdictional waters except in compliance with a permit. 33 U.S.C. §§ 1311, 1342, 1344. Thus, when a landowner plans to discharge dredged or fill material into waters or wetlands that are subject to CWA jurisdiction, it must first obtain a section 404 permit from the U.S. Army Corps of Engineers. *Id.* § 1344. Although the Corps and EPA share enforcement authority under the CWA, the statute provides EPA with a broader range of options for enforcing CWA violations. When EPA believes that an unlawful discharge to jurisdictional waters has occurred, it may (1) assess civil penalties against the discharger, (2) bring a civil action against the discharger in federal district court, or (3) issue an ACO ordering the discharger to remediate the affected waters and restore them to pre-discharge conditions. *Id.* § 1319. The CWA authorizes penalties of up to $37,500 per day for failure to comply with an ACO and daily penalties of the same amount for violating the CWA's unauthorized discharge prohibition. *Id.* § 1319(a); *see also* 40 C.F.R. § 19.4 (providing EPA's adjustments for inflation to civil monetary penalties).

EPA chose the third enforcement option, an ACO, when it determined that Idaho couple Mike and Chantell Sackett had discharged dredged or fill material into jurisdictional wetlands on their property without first obtaining a section 404 permit. The Sacketts' troubles began when, preparing to build a house in Bonner County, Idaho, they filled wetlands on their property with dirt and rock. The Sacketts believed those wetlands were not jurisdictional under the CWA because several lots containing permanent structures separated their land from a nearby lake—the closest navigable water body. The Corps and EPA believed otherwise, and EPA issued an ACO ordering the Sacketts to remove the fill from the wetlands and restore their property to its original condition.

Seeking to make their case that the wetlands on their land were not jurisdictional, the Sacketts requested an administrative hearing from EPA but were turned away. They then filed suit in the U.S. District Court for the District of Idaho, asking the court to review the propriety of the jurisdictional determination underlying the ACO. EPA opposed the lawsuit by arguing that an ACO is not "final" agency action that is subject to judicial review under the Administrative Procedure Act (APA), and that the Sacketts could obtain judicial review only if EPA attempted to enforce the order by

initiating a civil suit against them in federal court. The district court agreed and dismissed the case, finding that the Clean Water Act precludes pre-enforcement judicial review of ACOs. On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed, holding that the CWA "impliedly" prohibited pre-enforcement review of ACOs under APA. *Sackett v. EPA*, 622 F.3d 1139 (9th Cir. 2010).

The Supreme Court's Ruling

The Supreme Court wasted little time in reversing the Ninth Circuit, ruling that ACOs are clearly "final" agency actions that are subject to judicial review because nothing in the Clean Water Act precludes such review under APA. Justice Scalia, writing for the unanimous Court, said a citizen should not have to "wait for the agency to drop the hammer" of suing the citizen in order for that citizen to put the threshold issue of disputed CWA jurisdiction before a federal judge.

The Court explained that APA authorizes judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Considering the first issue, the Court had little difficulty finding that ACOs issued under the CWA bear "all the hallmarks of APA finality that our opinions establish." The justices explained that EPA's order "determined rights or obligations" because it required the Sacketts to restore their property to pre-discharge conditions pursuant to a plan approved by the agency. Moreover, the Sacketts were subject to "legal consequences"—namely, fines and penalties and increased difficulty in obtaining a section 404 permit—for failure to comply with the order. Finally, the Court reasoned that issuance of the ACO was not merely "a step in the deliberative process," as EPA had suggested. Rather, it consummated EPA's decision-making process because the order's requirements, while open to "informal discussion," were not subject to further agency review.

The Court next found that the Sacketts satisfied the second requirement for APA review because they had no other adequate remedy for challenging the ACO in court. EPA had no choice but to concede this issue because it had long argued that the Sacketts either had to comply with the order or wait until the agency initiates a civil suit in federal court before challenging the order and any penalties associated with it.

Finally, the Court determined that the CWA did not bar pre-enforcement review of ACOs. Although the statute does not expressly bar such review of administrative orders, EPA argued that the CWA's structure, purpose, and history suggest that Congress "impliedly" intended to bar pre-enforcement judicial review of ACOs. The Court rejected that argument, finding that allowing pre-enforcement review of compliance orders would not frustrate the CWA's enforcement scheme because, while ACOs are an important mechanism for achieving voluntary compliance with the CWA, "[i]t is entirely consistent with this function to allow judicial review when the recipient does not choose voluntary compliance." The Court further explained that the CWA's authorization of prompt judicial review of administrative penalties cannot "overcome the APA's presumption of reviewability for all final agency action."

For these reasons, the Court concluded, an ACO issued under the Clean Water Act constitutes final agency action that is subject to pre-enforcement judicial review under the Administrative Procedure Act. As a result, the Sacketts now will have the opportunity to immediately challenge the assertion of federal jurisdiction over the wetlands on their property.

Conclusions and Implications

The Supreme Court's emphatic decision in *Sackett* made short work of EPA's "do or die" policy under the CWA of forcing citizens either to comply with a disputed ACO or face a federal lawsuit along with substantial penalties for every day a citizen declines to abide by the agency's order. With the possibility of pre-enforcement judicial review of its orders now in play, EPA may be forced to be more selective about when it issues an ACO. And when it determines that an ACO is appropriate, the agency may need to take extra steps to ensure that its decision is supported by a comprehensive administrative record that allows the order to withstand judicial review.

The decision may have broader implications as well. EPA issues administrative compliance orders, like the order at issue in *Sackett*, under other federal

environmental statutes, including the Clean Air Act and the Resource Conservation and Recovery Act. Like the CWA, those statutes do not expressly preclude pre-enforcement judicial review of compliance orders. As a result, though narrowly worded, *Sackett* may affect EPA's enforcement activities under those laws as well as how lower courts apply the ruling to them.

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