

Supreme Court Unanimously Holds That Clean Water Act Compliance Orders Are Subject To Immediate Review

March 30, 2012 | Legal Advisory

On March 21, 2012, the United States Supreme Court reversed the Ninth Circuit in a much anticipated decision that will likely impact the Environmental Protection Agency's (EPA) broad use of compliance orders to enforce environmental laws. The issue in *Sackett v. Environmental Protection Agency*, No. 10-1062, 2012 WL 932018 (U.S. Mar. 21, 2012), was whether the Clean Water Act (CWA) bars judicial review of compliance orders before the EPA brings a civil enforcement action, and whether such pre-enforcement review would violate constitutionally protected due process rights. In a unanimous decision, the Court held that regulated parties may seek immediate review of such compliance orders in federal court through claims brought under the Administrative Procedure Act (APA). The decision shifts the balance of power somewhat away from the EPA by giving regulated parties the ability to fight back with an immediate legal challenge.

When the EPA identifies what it believes to be a violation of the CWA, it has the option to press for voluntary compliance by issuing orders rather than initiating a civil enforcement action. Historically, the effect of compliance orders is that regulated parties act quickly to address the EPA's concerns because non-compliance is subject to hefty penalties that accrue daily for the duration of the alleged violation and the orders could only be challenged when EPA initiated an enforcement action. Simply put, the EPA motivates regulated parties into action by subjecting them to the risk of substantial penalties that might outweigh the cost of compliance with the EPA's unilateral order.

In 2007, when the Sacketts began to build a home on their property of less than an acre in Idaho, the EPA issued a compliance order for alleged filling of wetlands in violation of the CWA. The order imposed fines potentially as high as \$75,000 for non-compliance per day and directed them to implement a mitigation plan. The Sacketts contend that their property had no wetlands subject to regulation by the CWA. The EPA denied the Sacketts' request for a hearing and the lower federal courts rejected their subsequent efforts to obtain judicial review under

Attorneys

Michael A. Leon

Practice Areas

Development, Land Use and Permitting

Environmental, Regulatory and Compliance

Supreme Court Unanimously Holds That Clean Water Act Compliance Orders Are Subject To Immediate Review

the APA, adopting the Government's position that the CWA "preclude[s] pre-enforcement judicial review of compliance orders." Consequently, the Sacketts found themselves at the mercy of the EPA with no viable legal recourse.

Consequences of the Supreme Court Decision

The holding in *Sackett* is narrowly tailored to the issue of pre-enforcement review of CWA compliance orders. However, similar challenges will likely be brought with respect to compliance orders issued pursuant to the Clean Air Act and the Resource Conservation and Recovery Act. Courts will likely follow the holding in *Sackett* to find a right to pre-enforcement review because, like the CWA, these statutes do not contain explicit pre-enforcement bars.

The federal Superfund law (the Comprehensive Environmental Response, Compensation, and Liability Act or CERCLA) is a different story. Section 113(h) of CERCLA does expressly limit pre-enforcement review. In *General Electric Co. v. Jackson*, 610 F. 3d 110 (D.C. Cir. 2010), GE challenged the constitutionality of unilateral administrative orders issued to potentially responsible parties under CERCLA. GE claimed that the inability to obtain judicial review prior to compliance, other than in the context of non-compliance and the attendant risk of penalties and other costs, violated its constitutional due process rights. The D.C. Circuit sided with the EPA to uphold the constitutionality of CERCLA's statutory scheme and the Supreme Court refused to take the case in 2011. Thus, after *Sackett*, the Supreme Court has still not decided whether such express prohibitions violate constitutional due process guarantees.

Justice Ginsburg's Concurring Opinion

In a separate concurring opinion, Justice Ginsburg made a point to state that the Court's decision only reached the question of the Sacketts' right to immediately litigate their jurisdictional challenge. According to Justice Ginsburg, the decision leaves open whether the Sacketts could include a challenge to the terms and conditions of the compliance order. Administrative decisions reviewed under the APA are subject to an abuse of discretion standard and tested for whether they are arbitrary, capricious, or otherwise not in accordance with the law. While the APA limits review, nothing in the *Sackett* decision or in the APA's standard of review would appear to limit the scope of judicial inquiry as Justice Ginsburg suggests.

This advisory was prepared by Mary K. Ryan and Michael A. Leon, members of the Land Use, Permitting and Development practice group at Nutter McClennen & Fish LLP. For more information, please contact Mary, Mike or your Nutter attorney at 617-439-2000.

This advisory is for information purposes only and should not be construed as legal advice on any specific facts or circumstances. Under the rules of the Supreme Judicial Court of Massachusetts, this material may be considered as advertising.