Westlaw Journal
ENVIRONMENTAL
Litigation News and Analysis • Legislation • Regulation • Expert Commentary
VOLUME 32, ISSUE 22 / MAY 22, 2012

Expert Analysis

Next Stop: The Courthouse Challenging Compliance Orders Under the Clean Water Act

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Challenging compliance orders issued by the Environmental Protection Agency pursuant to the Clean Water Act has in the past presented property owners with only two options, both of which were potentially expensive and fraught with risk. The recipient of the compliance order could either chose to comply with the order even though the recipient believed the order was *ultra vires* or the recipient could refuse to comply and risk incurring penalties while waiting for the EPA to bring an enforcement action. The one thing the recipient could not do, however, was institute a civil action to challenge the order or even the EPA's authority to issue it.

The unfair nature of this situation has been very apparent in the intersection of wetlands and construction, which has long been a swampy bog, both literally and figuratively, for those seeking to build on lots on or near lands considered to be wetlands and even on lots that may not be wetlands. The CWA confers authority on the EPA to regulate navigable waters, including adjacent wetlands.

Challenging the EPA's determination that an area is a wetland and is covered by the CWA had been a seemingly impossible task given the limited and generally untenable options set forth above. In *Sackett v. Environmental Protection Agency,* however, the Supreme Court cleared the way for property owners to challenge the EPA's authority to issue a compliance order.[1] Property owners no longer have to choose between ignoring an order they believe to be invalid, with the risk of incurring the associated penalties, and complying with the order to avoid the penalties. Although successfully challenging a compliance order may still prove difficult, the *Sackett* decision is a first step toward providing fairness to property owners by at least affording them the opportunity to challenge an order they believe to be *ultra vires*.

BACKGROUND

Michael and Chantell Sackett own a lot that is approximately two thirds of an acre in Idaho. The lot is near Priest Lake, but several lots stand between the Sacketts' lot and the lake. The Sacketts filled a portion of the lot when they were constructing a home.

They did so without first obtaining a permit from the U.S. Army Corps of Engineers because they did not believe that their property was subject to the CWA.

The EPA issued a compliance order to the Sacketts pursuant to the CWA. Among the EPA's findings and conclusions were that the lot was a wetland and that the Sacketts had filled more than half of it. According to the EPA, the fill constituted an unpermitted discharge of pollutants in violation of the CWA. The EPA then ordered the Sacketts to restore the lot and provide the EPA with access to the lot and all related documents. Once the EPA issued the order, the Army Corps would not process a permit for the Sacketts to allow them to fill the property, so they could not even cure the lack of a permit retroactively. Failure to comply with the order exposed the Sacketts to possible penalties of $75,000 a day.[2]

The Sacketts did not agree that their property constituted wetlands under the CWA or that it was subject to the EPA's jurisdiction. The EPA refused the Sackett's request for a hearing, but it did not initiate an enforcement action. This left the Sacketts with no attractive options: they could have ignored the order and risked the penalties while waiting for the EPA to initiate an enforcement action or they could have complied with the EPA's demands. Instead, they filed suit in federal court, arguing that the EPA's order was arbitrary, capricious and in violation of the Fifth Amendment. They sought review under the Administrative Procedure Act. Specifically, the Sacketts sought judicial review of a final agency action for which no other adequate judicial relief was available.[3]

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The U.S. District Court for the District of Idaho dismissed the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1), claiming that no subject matter jurisdiction existed to review the order. The 9th U.S. Circuit Court of Appeals affirmed, ruling that no subject matter jurisdiction existed because the CWA precluded judicial review of compliance orders before an enforcement action was brought.

Although the 9th Circuit acknowledged that there was a presumption of judicial review under the APA, it stated that every court in every jurisdiction that had decided the issue found that the CWA implicitly precludes judicial review of pre-enforcement compliance orders. 622 F.3d at 1143. The court felt that allowing review of the order in this case would eliminate the EPA's discretion to issue a compliance order or file an enforcement action. Further, since no sanctions could be imposed until the EPA filed the enforcement action, judicial review would be available then. *Id.*

In addition, the 9th Circuit held that the CWA provided for an express right to review of administrative penalties, but not compliance orders; the absence of such an express right for compliance orders was evidence that Congress did not intend to provide for such review. The 9th Circuit also believed that the statutory scheme did not support judicial review because it would impede the EPA's ability to act quickly to remedy discharges. *Id*. at 1144.

Finally, the 9th Circuit reviewed the CWA's legislative history and determined that it did not support judicial review. Therefore, the appeals court concluded that judicial review of compliance orders, and the order in this case, was precluded under the CWA. *Id*.[4] The Supreme Court granted *certiorari* on the narrow issue of whether or not subject matter jurisdiction existed.

THE SUPREME COURT'S ANALYSIS

The CWA confers authority on the EPA to regulate navigable waters. However, the scope of that authority has been described as "notoriously unclear." 132 S.Ct. at 1375 (Justice Alito, concurring). Non-navigable wetlands that are adjacent to navigable waters are within the scope, but seasonably ponded water that is not adjacent to navigable water is not. *Id*. at 1370.[5] Importantly, in this case, wetlands that are not adjacent to navigable-in-fact waters are not included within the scope of the CWA. *Rapanos v. United States*, 547 U.S. 715 (2006). The Sacketts believed that their property was not subject to the CWA because it was separated from navigable water by several lots.

The court did not decide that ultimate issue. Instead, it decided only the narrow issue of whether the Sacketts could challenge the EPA's authority to issue the order in federal court. For subject matter jurisdiction to exist, the Sacketts had to show that the order was a final agency action, they had no other adequate remedy and judicial review was not precluded.

Final agency action

The court began its analysis by first determining that the issuance of the order was in fact a "final agency action" as defined by the APA and determined by its prior decisions. In order to constitute a "final agency action," the order could not be "tentative or interlocutory in nature" and it had to determine rights and obligations or the source of legal consequences. *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

First, the court determined that the EPA had completed its decision-making process by issuing the order. The EPA unsuccessfully argued that because it invited the Sacketts to informally discuss the order, it had not completed its process and the order was not final. The court, however, rejected that contention, claiming that the "mere possibility" that the EPA might reconsider the order's provisions based upon an informal discussion did not affect the finality of the order itself. Because no other agency action would take place, the order was final.

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Second, the court determined that through the order, the EPA had determined the Sacketts' rights or obligations; for example, they were obligated to restore their property and give the EPA access to related documents. That determination was part and parcel of a final agency action. Moreover, legal consequences attached to the order in the form of penalties and the inability to obtain a permit from the U.S. Army Corps of Engineers.[6]

No other adequate judicial remedy

The court next determined that the Sacketts did not have any other adequate judicial remedy. The Sacketts could not initiate an enforcement action, and the EPA had not done so. Although the Sacketts could apply for a permit from the Army Corps, it was very unlikely that they would receive one. Regardless, challenging that determination would not have afforded them relief from the order. Thus, the Sacketts were in the unenviable position of being exposed to penalties unless and until the EPA filed suit.

CWA doesn't preclude judicial review

The EPA contended that even if the order was a "final agency action" and the Sacketts had no other adequate remedy, the CWA nevertheless precluded judicial review under the APA.[7]

The Supreme Court had held that "there is a strong presumption that Congress intends judicial review of administrative action." *Bowen v. Acad. of Family Physicians*, 476 U.S. 667 (1986). That presumption is overcome by specific language, legislative history or specific intent to preclude judicial review. *Id*. Despite the fact that the CWA does not expressly preclude judicial review, the EPA offered several arguments in support of its position that the CWA did not intend to allow judicial review of compliance orders, just as it had before the 9th Circuit.

Because the CWA did not expressly prohibit judicial review under the APA, the Supreme Court had to consider whether it did so implicitly based upon the entire act. That determination involved analyzing not only the express language of the statute, but its structure, objectives and legislative history and the nature of the administrative action. *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984).

The EPA contended that because the CWA gave it discretion to either issue a compliance order or to bring an enforcement action, this implicitly meant that Congress did not intend to allow judicial review of compliance orders. The court rejected that theory, noting that there were many differences between compliance orders and enforcement actions. The choice to use one or the other was based upon considerations other than the availability of judicial review. The high court stated that the CWA "does not guarantee the EPA that issuing a compliance order will always be the most effective choice." 132 S. Ct. at 1373.

The high court rejected the EPA's contention that because it had to enforce the order by filing an action, compliance orders were merely a part of its deliberative process, rather than a self-executing sanction subject to review.

The court similarly rejected the EPA's contention that because it had to enforce the order by filing an action, compliance orders were merely a part of its deliberative process, rather than a self-executing sanction that was subject to review. Although the EPA's argument on this point appears to relate more to whether the order was a final agency action, rather than whether the CWA implicitly prohibited review of the order, the Supreme Court noted that all final actions were subject to review, regardless of whether they were self-executing. The high court also noted that since the EPA had rejected the Sacketts' request for a hearing, the only remedy left was judicial, not administrative.

The EPA then argued that because the CWA expressly provided for judicial review only of penalties assessed during an administrative hearing, this meant that Congress did not intend judicial review to be available for compliance orders. The high court retorted that if one express provision in one section of a long and complicated statute could overcome the presumption that all final agency actions were judicially reviewable, "it would not be much of a presumption." The Supreme Court then summarily distinguished the cases upon which the EPA had relied for this theory.

Finally, the court dispatched the EPA's "efficiency" argument. The EPA's claim that it was less likely to use compliance orders if they were subject to judicial review was not relevant. The fact that the APA not only provides for such review, but that there is a presumption of judicial review, meant that Congress had already decided that efficiency was neither the only, nor the paramount, concern. The Supreme Court's comments regarding this argument were particularly caustic:

> There is no reason to think that the Clean Water Act was uniquely designated to enable the *strong-arming* of regulated parties into "voluntary compliance" without the opportunity for judicial review.

Id. at 1374 (emphasis added).

The court went on to note that compliance orders would still be effective in cases in which there was no dispute about the order's validity. This was not such a case, since the Sacketts were challenging the EPA's jurisdiction over their property, claiming that the property was not covered by the CWA. Accordingly, the Sacketts would have the opportunity to challenge the EPA's authority in court.

The mere granting of that opportunity is far from an assurance that the Sacketts will eventually prevail given the deference to agency actions under the APA.[8] However, at least they and others will have their day in court to challenge the EPA's authority to issue compliance orders.

Like the majority, Justice Samuel Alito appeared troubled by the lack of meaningful options available to a property owner when confronted with a compliance order. During oral argument, Justice Alito asked the EPA, "Don't you think that most ordinary homeowners would say this kind of thing can't happen in the United States?" When the EPA explained that this was its typical practice to tell owners to stop building and to restore the property, Justice Alito responded "Well, so what? ... What does the homeowner do, ... just ... put it aside as a nature preserve?" *Sackett*, Transcript, 2012 WL 38639, at *14.

Justice Alito's concurrence stated that the EPA's position would have "put the property rights of ordinary citizens at the mercy of" the EPA, echoing the majority's concern about the EPA's use of "strong-arm" tactics. Justice Alito, however, described the majority decision only as a "modest measure of relief" in light of the lack of clarity regarding the CWA's scope. He then called upon Congress and the EPA to define with specificity the CWA's reach. *Id*. at 1375.

Obviously, it is not at all clear that the EPA or Congress will choose to clarify the scope of the CWA or provide property owners with any meaningful options when faced with a compliance order, beyond the relief the Supreme Court provided in *Sackett*. However, property owners now have at least some recourse.

For example, in *Hardesty v. Sacrament Metropolitan Air Quality Management District*, 2012 WL 1131387 (E.D. Cal. 2012), the plaintiffs operated a gravel mining operation. The Army Corps of Engineers issued a cease-and-desist order, which was among the many actions challenged by the plaintiffs. The order directed the plaintiff to stop any activity until it obtained a permit from the Corps for the discharge of dredged material. *Id*. at 12.

The defendants argued, *inter alia*, that the CWA precluded review of cease-and-desist orders. The District Court found that, like the compliance order issued in *Sackett*, the cease and desist order from the Army Corps was a final agency action that was subject to judicial review. The *Hardesty* court rejected any distinction based upon the fact that the Corps, rather than the EPA, had issued the order, or that the Corps had the authority to issue the permits that the plaintiff needed. *Id*. at 14. Accordingly, the plaintiff was given leave to amend the complaint in light of *Sackett*.

No doubt, in addition to simply being used in cases involving the CWA, litigants will also attempt to broaden *Sackett*'s reach in other circumstances in which actions by regulatory agencies leave citizens only two options: to incur significant expenses in complying with an order believed to be invalid or *ultra vires* or to risk significant penalties by not complying with the order. It remains to be seen how extensively *Sackett*'s impact will be felt in these other contexts.[9]

What is clear, however, is that the Supreme Court has rejected the notion that regulatory agencies can deny citizens a meaningful opportunity to challenge the agencies' authority to issue orders, thus placing the citizens between the proverbial rock and hard place.

CONCLUSION

People who now receive compliance orders under the CWA no longer have to choose between complying with an order they believe to be invalid and risking penalties for failing to comply. Instead, they now can proceed straight to court to seek judicial review of the order. Although this is no guarantee of success, given the standard by which orders are reviewed under the APA, the Supreme Court has given some control back to property owners.

NOTES

1 132 S. Ct. 1367 (2012).

2 33 U.S.C. § 1319(d).

3 5 U.S.C. § 704.

4 The 9th Circuit also held that unavailability of judicial review did not violate the Fifth Amendment. *Sackett v. EPA,* 622 F.3d 1139 (9th Cir. 2010).

5 *See United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs,* 531 U.S. 159 (2001).

6 Interestingly, although the EPA was trying to distinguish the availability of judicial review for a compliance order from an enforcement action, it did admit that the Corps would treat the order the same as the initiation of an enforcement order. In either circumstance, the Corps would refuse to issue a permit. In addition, the court rejected the notion that obtaining a permit from the Corps would somehow address the consequences of the order.

7 5 U.S.C. § 701(a)(1).

8 Several times during oral argument, the justices expressed concern about whether or not the Sacketts would be able to ultimately prevail given the standard of review. Transcript, 2012 WL 38639, at *5-6.

9 Indeed, Justice Ruth Bader Ginsburg's concurring opinion specifically noted that the court was deciding only whether the Sacketts could challenge the EPA's authority over their property under the CWA, not whether they could also challenge the terms of the compliance order. 132 S. Ct. at 1374-75.

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