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SACKETT v. EPA

US SUPREME COURT OPENS DOOR TO PRE-ENFORCEMENT REVIEW

by Richard M. Glick, Davis Wright Tremaine (Portland, OR)

INTRODUCTION

In a rare display of unity, a unanimous US Supreme Court (Court) held that recipients of US Environmental Protection Agency (EPA) compliance orders under federal Clean Water Act (CWA) section 404 are entitled to judicial review. In *Sackett v. EPA*, 566 U.S. ___(2012) — decided March 21st — the Court rejected EPA's long held position that compliance orders are not "final" orders subject to review under the Administrative Procedures Act (APA) and that review is available only if EPA brings enforcement action for noncompliance with the order. To the contrary, the Court concluded that compliance orders meet all the standards of judicially determined final agency action and that nothing in the Clean Water Act precludes review.

BACKGROUND

The Sacketts owned land in Idaho upon which they wished to build a home. In so doing, they filled about half an acre of land that EPA determined to be jurisdictional wetlands under CWA § 404. EPA issued an order to the Sacketts to restore the site in accord with an EPA work plan, turn over records, and allow EPA access to their land. The Sacketts disagreed with the wetlands determination and requested a hearing, which was denied. They then filed an action in US District Court alleging that the order was arbitrary and capricious under the APA and had deprived them of due process under the Fifth Amendment. The District Court dismissed the claim, which was affirmed by the Ninth Circuit Court of Appeals. The Ninth Circuit found that the CWA precludes pre-enforcement review and that preclusion does not violate the constitutional guarantee of due process.

SACKETT DECISION

In an opinion written by Justice Scalia, the Supreme Court reversed in an unequivocal rejection of EPA's position. The Court considered: (a) whether EPA's order was "final" under the APA; (b) whether there was no other adequate remedy in a court; and (c) whether the CWA precludes pre-enforcement review.

Final Agency Action

EPA argued that its compliance order was not a final agency action since it invited the Sacketts to participate in an informal discussion of the order and any possible errors in the allegations. This notwithstanding, the Court observed that the order imposes legal obligations on the Sacketts and represents the "consummation" of EPA decision-making as the Sacketts were denied a hearing. The informal discussion offered by EPA did not persuade the Court.

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Writing for the Court, Justice Scalia concluded:

> But [the offer of informal discussion] confers no entitlement to further agency review. The mere possibility that an agency might reconsider in light of "informal discussion" and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal.

Slip Op. at 6.

Other Adequate Remedy

The APA allows review of final agency orders only if there is no alternative adequate remedy in a court. 5 U.S.C. § 704. EPA pointed out that judicial review comes when the agency brings a civil action to enforce the order. However, the Court noted that the Sacketts cannot themselves initiate the enforcement action and that the potential assessment of penalties accruing at up to $75,000 per day places the Sacketts at an unacceptable risk. "But the Sacketts cannot initiate that process, and each day they wait for the agency to drop the hammer, they accrue, by the Government's telling, an additional $75,000 in potential liability." *Slip Op*. at 6.

Although EPA did not rely on this argument, the Court acknowledged that the Sacketts could also pursue a permit with the Corps of Engineers, and then seek review if the permit is denied. However, Corps regulations make it nearly impossible to process a wetlands fill permit application pending an EPA compliance order. 33 CFR § 326.3(e)(1)(iv). Further, the Court finds this alternative avenue into a court unsatisfactory:

> The remedy for denial of action that might be sought from one agency does not ordinarily provide an "adequate remedy" for action already taken by another agency.

Slip Op. at 6.

CWA Preclusion of Pre-Enforcement Review

Even though the CWA does not expressly allow judicial review, the Court cited its earlier opinion in *Block v. Community Nutrition Institute,* 467 U.S. 340, 349 (1984), that the APA creates a presumption in favor of judicial review, which may be "overcome by inferences of intent drawn from the statutory scheme as a whole." *Slip Op.* at 7, quoting *Block*. EPA pointed to several provisions of the CWA to rebut the presumption, none of which the Court found persuasive.

First, EPA argued that the CWA authorizes EPA to pursue alternative modes of action:

> the agency "shall issue an order requiring such person to comply with [the Act], or . . . shall bring a civil action [to enforce the Act]."

Id. at 7, quoting 33 U.S.C. § 1319(a)(3).

EPA argued that since one alternative contemplates judicial action and the other administrative action, allowing parties to go to court in the former would undermine the latter. However, the Court found independent reasons for Congress to have provided for the administrative action alternative other than preclusion of judicial review, citing EPA's argument that compliance orders offer speedy resolution and the opportunity for voluntary compliance.

The Court observed:

> It is entirely consistent with this function to allow judicial review when the recipient does not choose "voluntary compliance." The Act does not guarantee the EPA that issuing a compliance order will always be the most effective choice.

Id. at 7.

Second, EPA argued that compliance orders are not self-executing — rather, they must be enforced through judicial action. Congress, according to EPA, must have seen the orders as just part of the process and not the end point. The Court disagreed, finding that the compliance order and the denial of a hearing represents EPA's disposition of the matter:

> And it is hard for the Government to defend its claim that the issuance of the compliance order was just "a step in the deliberative process" when the agency rejected the Sacketts' attempt to obtain a hearing and when the next step will either be taken by the Sacketts (if they comply with the order) or will involve judicial, not administrative, deliberation (if the EPA brings an enforcement action). As the text (and indeed the very name) of the compliance order makes clear, the EPA's "deliberation" over whether the Sacketts are in violation of the Act is at an end; the agency may still have to deliberate over whether it is confident enough about this conclusion to initiate litigation, but that is a separate subject.

Id. at 8.

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Compliance Orders & Efficiency

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Third, the Court was similarly dismissive of EPA's argument that express provision for judicial review in other parts of the CWA precludes implied judicial remedies where it is not provided:

> But if the express provision of judicial review in one section of a long and complicated statute were alone enough to overcome the APA's presumption of reviewability for all final agency action, it would not be much of a presumption at all.

Id. The Court found the list of cases propounded by EPA in support of its position to be inapposite (not pertinent).

Fourth, EPA argued that Congress intended to make the government's water pollution control activities more efficient. Compliance orders often lead to amicable resolution and EPA asserted that inserting judicial review prior to enforcement would discourage their use. The Court was unmoved by this argument, rejecting it in strong terms:

> The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And there is no reason to think that the Clean Water Act 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 the EPA's jurisdiction. 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.

Id. at 9-10.

Unresolved Issues

It is important to note that the case was narrowly decided, focusing entirely on the procedural question of pre-enforcement review, and not the merits. Nor does the Court reach the due process issue. The Court specifically did not address the question of whether EPA reached the correct conclusion that the filled lands at issue were indeed jurisdictional wetlands. But Justice Scalia did note that the uncertainty surrounding wetlands determinations underlies the case. *Id.* at 2 and 5 (fn. 2).

The uncertainty of CWA jurisdiction over the Sackett's property was an important theme in concurring opinions by Justices Ginsburg and Alito, but for different reasons. Justice Ginsburg supports the right of the Sacketts to have their day in court, but the question of EPA's authority to regulate their land "remains open for another day and case." *Ginsburg Concurring Slip Op.* at 1. Justice Alito writes that the Court's decision allowing judicial review is small comfort to land owners like the Sacketts because the ambiguity remains as to how to determine which wetlands are subject to regulation. Alito recounts the Court's own tortured efforts to bring clarity — *see* for example, *Rapanos v. U.S.*, 547 U. S. 715 (2006) — but finds the greatest fault with Congress and EPA:

> Real relief requires Congress to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act. …For 40 years, Congress has done nothing to resolve this critical ambiguity, and the EPA has not seen fit to promulgate a rule providing a clear and sufficiently limited definition of the phrase. Instead, the agency has relied on informal guidance. But far from providing clarity and predictability, the agency's latest informal guidance advises property owners that many jurisdictional determinations concerning wetlands can only be made on a case-by-case basis by EPA field staff.

Alito Concurring Slip Op. at 2.

CONCLUSION

While property owners have stronger procedural rights under the *Sackett* decision, the question remains whether the case will alter EPA's behavior in any significant way. It could cause EPA to attempt informal settlements before issuing compliance orders and may limit enforcement to instances where the agency is confident it will prevail in court. Because of the ambiguity in how jurisdictional wetlands are determined, an emphasis on early attempts at informal settlement should benefit property owners.

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WEBSITE: case available at: www.supremecourt.gov/opinions/11pdf/10-1062.pdf

