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**Recent Federal Court Decisions Curtail EPA’s Clean Water Act Authority: The Shape of Things to Come?**

The U.S. Supreme Court unanimously held in *Sackett v. U.S. Environmental Protection Agency* ("Sackett") that the Clean Water Act ("CWA" or "Act") does not preclude pre-enforcement judicial review of CWA compliance orders, thereby imposing significant limitations on an oft-used and much maligned Environmental Protection Agency ("EPA” or “Agency”) enforcement tool.¹ Two days later, the U.S. District Court for the District of Columbia held in *Mingo Logan Coal Co., Inc. v. EPA* ("Mingo Logan") that EPA exceeded its CWA authority when it unilaterally withdrew permission to discharge fill material from coal mining operations at certain disposal sites set out in an Army Corps of Engineers (hereinafter, “Corps”) National Pollutant Discharge Elimination System ("NPDES") permit.² Viewed together, these two cases impose significant limitations on the Agency’s view of its powers under the Act and serve as a signal to EPA that it needs to be more judicious when exercising such powers.

I. Sackett v. EPA

Michael and Chantell Sackett hoped to build a house on their residential lot in Bonner County, Idaho. In preparation, they filled part of the lot with dirt and rocks. Several months later, however, the Sacketts received an administrative compliance order from EPA directing them to immediately restore purported wetlands on the site. Issued pursuant to the Agency’s authority under section 309 of the CWA,³ the order alleged that the Sacketts had violated section 301 of the Act⁴ by causing the discharge of fill material into navigable waters without an NPDES permit.

The Sacketts, who did not believe that their property contained wetlands or other “navigable waters of the United States,” sought a hearing from EPA, but the Agency refused. The Sacketts then sought declaratory and injunctive relief from the U.S. District Court for the District of Idaho on grounds that EPA’s issuance of the compliance order was “arbitrary and capricious” under the Administrative Procedure Act (“APA”),⁵ and deprived them of “life, liberty, or property, without due process of law,” in violation of the Fifth Amendment to the U.S. Constitution.

The District Court dismissed the claims for want of subject matter jurisdiction, and the United States Court of Appeals for the Ninth Circuit affirmed.⁶ The Ninth Circuit concluded that the CWA “preclude[s] preenforcement judicial review of compliance orders,” and that such preclusion does not violate the Fifth Amendment’s due process guarantee.⁷

The Supreme Court granted certiorari and reversed the Ninth Circuit, holding that the Sacketts can bring a civil action under the APA to challenge EPA’s compliance order. The APA permits judicial review of “final agency action for which there is no other adequate remedy in a court.”⁸ Without reaching the merits of the case – the scope of “navigable waters” under the Act – the Court found that the EPA’s compliance order bore all the hallmarks of final agency action.⁹ Namely, a final agency action: (1) determines rights or obligations of a party; (2) has legal consequences; and (3) marks the consummation of a decision-making process.¹⁰

The compliance order met the first element of final agency action because it determined the Sacketts’ “rights or obligations.” Specifically, it required the petitioners to restore their property according to an EPA Restoration Work Plan and to provide the Agency access to the property and all documentation related to the property’s conditions.¹¹

Second, “legal consequences” flowed from the order by exposing the Sacketts to civil penalties of up to $75,000 per day should they violate its provisions.¹² The Agency had taken the position that when it prevails in an action to enforce a compliance order, the maximum civil penalty is $75,000 per day for each violation (up to $35,000 for violating the statute¹³ and an additional $37,500 for violating the compliance order). As Chief Justice Roberts noted in oral arguments, the steep penalties for violating compliance orders effectively insulate EPA from having to justify its decision to classify properties like the Sacketts’ as wetlands because no landowners are going to risk $75,000 in daily penalties for the chance to challenge the order. The Court found that the order

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⁶ *Sackett v. EPA*, 622 F.3d 1139 (9th Cir. 2010).
⁷ *Id.* at 622 F.3d 1144-1147.
⁹ *Supra* note 1 at 5.
¹¹ *Supra* note 1 at 5.
¹² *Id.*
also effectively limited the Sacketts’ ability to obtain a permit to discharge the fill material, as Corps regulations prohibit the processing of an NPDES permit application for a property subject to an EPA compliance order, unless doing so is “clearly appropriate.”

With respect to the third element, the Court found that the issuance of the compliance order marked the “consummation” of the Agency’s decision-making process. The Court rejected the Agency’s contention that inviting the Sacketts to engage in informal discussions concerning the order’s requirements and allegations forestalled final agency action. “The mere possibility that an Agency might reconsider in light of ‘informal discussions’ and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal.”

The Court also found that the Sacketts had “no other adequate remedy in court.” In the CWA enforcement context, judicial review occurs only when EPA brings a civil action, and the Sacketts cannot initiate that process. Although the Sacketts could apply for a Corps fill permit and seek judicial review of the Corps’ denial of such a permit, the remedy for denial by one agency does not ordinarily provide an adequate remedy for actions already taken by another.

Finally, the Court found that the APA creates a presumption favoring judicial review of administrative action that is neither overcome by the express terms of the CWA, nor inferences of intent drawn from the Act’s statutory scheme as a whole. Although the Act gives EPA the choice of addressing a violation with a compliance order or an enforcement proceeding, the former option is not intended to insulate EPA from judicial review, but rather to provide the Agency with a means of expeditiously resolving the issue through voluntary compliance. Nor does the fact that the Act expressly provides for judicial review of administrative penalties imply that judicial review of other final agency actions is impermissible, given the complex structure of the statute. Critically, the Court was unmoved by the argument that a decision allowing judicial review of compliance orders would reduce EPA’s use of this low-cost compliance mechanism. “The APA’s presumption of judicial review is a repudiation of the principle that efficiency of regulations conquers all.”

II. Mingo Logan Coal Co., Inc. v. EPA

Mingo Logan Coal Company, Inc. (“Mingo Logan”) operates a coal mine in West Virginia known as the Spruce No. 1 Mine. In January 2007, the Corps issued Mingo Logan an NPDES permit under section 404(a) of the CWA, which authorized the discharge of excess rock, topsoil, and debris from its mountaintop coal mining operations into nearby streams. The permit was issued after an extensive process, including the preparation of an environmental impact statement (“EIS”). The permit issuance process included extensive consultation with EPA, which expressed concern over the water quality impacts of Mingo Logan’s proposed discharges. EPA reiterated these concerns during various iterations of the EIS, but ultimately indicated in a November 2, 2006 email that it had “no intention of taking our Spruce Mine concerns any further from a section 404 standpoint . . . .” The permit, which expires on December 31, 2031, contains a provision authorizing the Corps to reevaluate its permit decision any time the circumstances warrant, but provides no comparable authority to EPA.

Almost two years after the Corps issued the Mingo Logan permit, EPA urged the Corps to use its discretionary authority to suspend, revoke, or modify the permit based on new information and circumstances that it believed justified reconsideration. The Corps refused, and on March 26, 2010, EPA proposed to withdraw specifications for two streams as disposal sites, pursuant to section 404(c) of the CWA, which states:

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

As EPA acknowledged in an earlier, October 16, 2009 letter to the Corps, and reiterated in its press release announcing the proposed withdrawal, the Agency “has never before used its Section 404(c) authority to review a previously permitted project since Congress enacted the Clean Water Act in 1972.” On April 2, 2010, the company filed suit in the U.S. District Court for the District of Columbia seeking to enjoin EPA from finalizing the withdrawal determination. Before the district court ruled on the case, the Agency finalized its withdrawal determination on January 13, 2011. The loss of the disposal sites effectively limited the Sacketts’ ability to obtain a permit to discharge the fill material, as Corps regulations prohibit the processing of an NPDES permit application for a property subject to an EPA compliance order, unless doing so is “clearly appropriate.”

In a strongly worded opinion, the district court challenged EPA’s view that section 404(c) “grants it plenary authority to unilaterally modify or revoke a permit that has been duly issued by the Corps – the only permitting agency identified in the statute – and to do so at any time.”

This is a stunning power for an agency to arrogate to itself when there is absolutely no mention of it in the statute. It is not conferred by section 404(c), and it is contrary to the language, structure, and legislative history of section 404 as a whole.

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14 33 C.F.R. § 326(e)(1)(iv).
15 Supra note 1 at 5.
16 Supra note 1 at 6.
17 Id.
18 Supra note 1 at 7 (citing Block v. Community Nutrition Institute, 467 U.S. 340, 349 (1984)).
19 Supra note 1 at 9.
20 Supra note 2 at 6.
22 Supra note 2 at 2.
23 Supra note 2 at 10.
24 Id.
Relying on both the statutory scheme and legislative history, the district court found compelling that the exclusive delegation of permitting power under sections 404(a) and (b) of the CWA is to the Corps.

The district court did recognize that section 404(c) gives EPA the opportunity to derail the permit process and prohibit the specification of an area as a disposal site if it determines that the discharge would have certain “unacceptable” environmental consequences. It found unpersuasive, however, EPA’s argument that section 404(c), and in particular, the use of the word “whenever” means that EPA can withdraw its assent to a disposal site at any time.

This reading does not exactly leap off the page. Putting aside the parenthetical phrases for the moment, the straightforward portions of the provision authorize the EPA to “prohibit” the specification of any defined area as a disposal site or to “deny or restrict” the use of any defined area for specification as a disposal site. Id. Since a permit can only be issued by the Corps for a “specified” (note the past tense) site, the act of prohibiting a specification, or denying the use of an area for specification, eliminates the necessary foundation for the issuance of a permit...Thus, the clear import of the provision, as all of the parties agree, is that Congress gave EPA the right to step in and veto the use of certain disposal sites at the start, thereby blocking the issuance of permits for those sites.25

The district court recognized that section 404(c) is poorly drafted and leads to significant confusion about EPA’s authority. Nevertheless, it found that even if “whenever” authorizes EPA to assert its section 404(c) authority at any time, the provision still does not go so far as to confer express authority to undermine an existing permit. “[W]hatever section 404(c) means, it only talks about prohibiting, restricting, or withdrawing a specification, and it does not give EPA any role in connection with permits.”26

In addition, the district court found that the structure of section 404, in its entirety, indicates that EPA’s action is invalid:

EPA claims that it is not revoking a permit – something it does not have the authority to do – because it is only withdrawing a specification. Yet EPA simultaneously insists that its withdrawal of the specification effectively nullifies the permit. To explain how this would be accomplished in the absence of any statutory provision or even any regulation ...EPA resorts to magical thinking. It posits a scenario involving the automatic self-destruction of a written permit issued by an entirely separate federal agency after years of study and consideration. Poof! Not only is this non-revocation revocation logistically complicated, but the possibility that it could happen would leave permittees in the untenable position of being unable to rely upon the sole statutory touchstone for measuring their Clean Water Act compliance the permit.27

The district court also found that nothing in the CWA’s legislative history suggests Congress intended to confer permit revocation authority on EPA. Although Congress expected EPA to fulfill its role as environmental steward when performing its functions under section 404, the forward looking language in the legislative history makes clear that Congress anticipated EPA would act before a permit was issued, and indeed, that it would not unnecessarily slow down the process while doing so.

### III. Implications

Viewed together, these two cases suggest that challenges to EPA’s claimed authority can yield dividends. In this regard, EPA recently withdrew an emergency administrative order and related enforcement action brought under the Safe Drinking Water Act (“SDWA”);28 against two companies, involved in hydraulic fracturing operations near Hood County, Texas.29 Based on sampling indicating the presence of methane, benzene, and related constituents, EPA had ordered Range Resources Corporation and its subsidiary, Range Production Company (collectively, “Range”), to develop and implement under EPA supervision a plan to sample and remediate a nearby drinking water aquifer. The order was issued pursuant to EPA’s emergency authority under the SDWA to address imminent and substantial endangerment to public health.30 EPA issued the order in spite of a preliminary finding by the Texas Railroad Commission, the state agency with authority over oil and gas production activities, that contamination stemmed from the release of natural gas pockets into the aquifer several years prior to Range’s operations.

EPA sought to enforce the unilateral administrative order in the United States District Court for the Northern District of Texas,31 in response to which Range filed a motion to dismiss the action for lack of subject matter jurisdiction and failure to state a claim.32 Range argued that the order did not constitute final agency action, and thus was not within the court’s jurisdiction, because the order failed to include a factual finding that Range caused or contributed to the alleged contamination. Instead, EPA simply presented the requisite endangerment finding as a legal conclusion.

It is not clear to what extent the Sackett or Mingo Logan decisions may have played a role, but EPA and Range agreed to jointly dismiss the suit within less than two weeks following these decisions. It could be that Range’s agreement to participate in a study on the effects of hydraulic fracturing helped pave the way for the dismissal.33 It is certainly clear in light of Sackett and Mingo Logan that EPA overreached, at least in crafting a unilateral administrative order that did not fully lay out the basis for the Agency’s exercise of its SDWA authority.

The Agency often does not get it right and companies facing similar allegations should closely consider whether in the long run, a quick settlement is the best approach for dealing with EPA. Based on these recent decisions, it will be imperative that a company receiving a compliance order, whether under the CWA or other similar environmental statutes, carefully reviews the administrative record and determines whether EPA has sufficient grounds to justify the order. If not, the company should consider seeking judicial review under the APA. Caution is warranted, however, given that Federal courts typically afford EPA wide

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25 Supra note 2 at 11-12.
26 Supra note 2 at 14.
27 Supra note 2 at 31.
28 42 U.S.C. § 300f, et seq.
30 42 U.S.C. § 300i.
32 See Motion to Dismiss, United States v. Range Production Co., No. 3:11-cv-00116-F (N.D. Tx. Mar. 21, 2011).
33 See Motion to Dismiss at 6, United States v. Range Production Co., No. 3:11-cv-00116-F (N.D. Tx. Mar. 21, 2011).
discretion when reviewing agency action. The company will need to have a strong case before it decides to proceed. As such, the likelihood of success must be balanced against the time and expense of fighting EPA in court.

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