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High Court Ruling Weakens Favored EPA Enforcement Tool

By **Derek Hawkins**

Law360, New York (March 21, 2012, 12:49 PM ET) -- The U.S. Supreme Court's ruling Wednesday in *Sackett v. Environmental Protection Agency* pares back a favored tool the EPA uses to enforce environmental laws and will likely lead the agency to turn to less potent measures, attorneys say.

The court ruled 9-0 that property owners could challenge EPA compliance orders in court before the EPA brings legal action to enforce them. The orders constituted "final agency actions," and the Clean Water Act didn't bar property owners from seeking pre-enforcement judicial review under the Administrative Procedure Act, the court said.

The ability to immediately file suit to block a compliance order could alter part of the EPA's enforcement strategy, under which the agency issues hundreds of compliance orders each year to resolve potential violations, according to attorneys.

"The court didn't like that the EPA could come after a property owner with a pretty stiff compliance order when the property owner really only has two choices — either you comply or you hang around and wait until the EPA goes to court to enforce it," Mintz Levin Cohn Ferris Glovsky & Popeo PC's Jennifer Sulla said. "The agency won't be able to issue compliance orders and count on people not being able to go to court. They will have to be very confident that they're right."

The *Sackett* case involved a compliance order the EPA issued in 2007 ordering landowners Chantell and Michael Sackett to halt development of a two-thirds-acre property near Priest Lake, Idaho, that the agency had determined to be a protected wetland. The Sacketts faced as much as \$75,000 in daily penalties if they didn't comply with EPA instructions to restore the land, which they had begun to fill with rock in preparation for building a house.

After the EPA denied the Sacketts a hearing on the order, the couple filed suit, claiming the EPA's decision was arbitrary and capricious and deprived them of their due process rights. The government contended that the order wasn't a final action subject to review, and emerged victorious in two lower courts.

In its ruling Wednesday, the Supreme Court rejected the EPA's argument that the order was "a step in the deliberative process" and that the Sacketts had other means to challenge the order, including engaging in an informal discussion with the agency.

It also shot down the government's claim that Congress didn't intend to allow judicial review of compliance orders because it gave the agency the option of choosing between judicial proceedings and administrative actions in Clean Water Act matters.

According to Adam Kushner, a Hogan Lovells partner and former director of the EPA's civil enforcement office, the ruling will force the EPA to take the extra step of preparing an administrative record when it decides to issue an administrative order.

Of some 1,300 administrative orders the EPA issued last year, the agency didn't draw up administrative records in most cases, he said, adding that going forward the agency would likely wind up reserving compliance orders for the most egregious cases.

"In an agency that's strapped with a shrinking budget, there is an increased burden associated with the preparation of administrative record, which will require the agency to adjust its practice under the Clean Water Act," Kushner said.

Insulation from judicial review wasn't the only reason compliance orders were useful, Justice Antonin Scalia said in the court's opinion, thereby disputing the government's argument that allowing judicial review would undermine the thrust of the Clean Water Act.

"The government warns that the EPA is less likely to use the orders if they are subject to judicial review," Scalia said. "That may be true — but it will be true for all agency actions subjected to judicial review. The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all."

To make up for the new restrictions on its regulatory authority, the EPA could use other mechanisms like notices of violations to try and achieve the same level of compliance, but they wouldn't have the same force as compliance orders, which can threaten civil penalties and seek injunctive relief, attorneys said.

The EPA would have some recourse against respondents who decide to challenge a compliance order, according to Kushner. The standard of review for such a challenge would favor the agency, affording it some deference, and a challenge would open the door for the agency to file a counterclaim for civil penalties and injunctive relief, he said.

"EPA may take the position that it needs to file a counterclaim in response to a respondent's challenge for fear that a subsequent court may argue that EPA's enforcement claim was compulsory precluding it from a separate and later enforcement action," he said.

The Supreme Court, the EPA and Congress have wrestled in recent years over the scope and meaning of the Clean Water Act. Justice Samuel Alito stressed the issue in a concurring opinion, calling the law "notoriously unclear" and going as far as to call on Congress to provide a rule regarding its reach.

Justice Ruth Bader Ginsburg wrote a one-paragraph concurring opinion, saying she joined the court on the understanding that its ruling was confined to a decision on the Sacketts' ability to litigate their jurisdictional challenge.

The EPA declined to discuss the details of the case Wednesday, saying in a statement that it was reviewing the opinion.

"EPA will of course fully comply with the Supreme Court's decision, which the agency is still reviewing, as we work to protect clean water for our families and future generations by using the tools provided by Congress to enforce the Clean Water Act," the agency said.

A lawyer for the Sacketts, Damien Schiff of the Pacific Legal Foundation, said the ruling would force regulators to perform more extensive due diligence when addressing potential wetlands and pollution violations in nonemergency situations.

"The justices have made it clear that EPA bureaucrats are answerable to the law and the courts just like the rest of us," Schiff said in an emailed statement. "EPA can't try to

micromanage people and their property — it can't order property owners to dance like marionettes — while denying them any meaningful right to appeal to the courts."

The Sacketts are represented by Damien Schiff of Pacific Legal Foundation.

The case is Chantell Sackett et vir. v. Environmental Protection Agency et al., case number 10-1062, in the U.S. Supreme Court.

--Editing by John Quinn.

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