THE NATIONAL LAW JOURNAL

APRIL 9, 2012

An ALM Publication

EPA Overreaching

WINNERS: Chantell and Michael Sackett on their Idaho property. The high court held they were entitled to challenge an EPA administrative order.

BRIAN FEULNER/PACIFIC LEGAL FOUNDATION

Agency's threats of administrative orders have become commonplace; in cases like 'Sackett,' they are so draconian that they implicate due process protections.

BY JEFFREY R. PORTER

A unanimous U.S. Supreme Court has published its decision in *Sackett v. EPA*, an Idaho couple's lawsuit challenging an Environmental Protection Agency administrative order issued to the couple after they partly filled a 0.63-acre lot to build their house without first obtaining a federal permit under the Clean Water Act.

The Supreme Court held that the Sacketts were entitled to challenge the EPA's administrative order as a final agency action subject to judicial review under the Administrative Procedure Act because the Clean Water Act did not otherwise preclude such review.

As a liberal Democrat, and a lawyer to the regulated community, I'm concerned that EPA lawyers and their bosses will miss this opportunity to reflect on why they find themselves under attack on Capitol Hill and in the courts. Justice Samuel Alito Jr. asked the deputy solicitor general attempting to defend EPA's conduct in the Sackett case: "Don't you think most ordinary homeowners would say this kind of thing can't happen in the United States?"

The EPA's order to the Sacketts alleged that their land was a wetland subject to federal Clean Water Act jurisdiction and that the Sacketts violated the act by adding

fill to the land without a federal permit. The EPA threatened a penalty of $32,500 (now $37,500) for each day that the Sacketts did not comply with the order. The EPA refused the Sacketts a hearing. The Sacketts sued. The federal district court dismissed the lawsuit on the ground that the Clean Water Act barred judicial review of an order before the EPA chooses to bring an action in court to enforce it. The U.S. Court of Appeals for the Ninth Circuit affirmed. The Supreme Court took the case.

The EPA's lawyer told the Supreme Court it should not be concerned about EPA's heavy-handedness because the Sacketts could have sought a federal permit before they began to build their house. Several of the justices, including Justice Elena Kagan, noted the "weirdness" of that response, which suggested that every landowner should pre-emptively apply for a federal permit that they might not need in the hope of avoiding the Sacketts' fate.

In a concurring opinion, Alito rightly called on Congress to address this "weirdness" by doing what three separate Supreme Court decisions during the past 30 years have not done—"provide a reasonably clear rule regarding the reach of the Clean Water Act."

The EPA's lawyer also said that the Sacketts would have their day in court when the EPA chooses to seek judicial enforcement of its order. Chief Justice John Roberts Jr. responded that "most land owners aren't going to say, 'I'm going to risk the $37,000 a day.' All EPA has to do is make whatever finding it wants, and realize that in 99 percent of the cases it's never going to be put to the test."

Roberts is absolutely right. Administrative orders were meant to be the nuclear weapons in the EPA's enforcement arsenal, used only when absolutely necessary to mitigate an imminent and substantial threat to human health or the environment. Under the Clean Water Act, the EPA has other enforcement options: It can assess an administrative penalty, in which case the respondent has a right to be heard and present evidence, and to immediate judicial review. Or it can institute an enforcement action in federal district court, which also entitles the respondent to immediate judicial review. Now recipients of administrative orders under the Clean Water Act can also seek judicial review of those orders. Of course the EPA can also engage in compliance assistance, forgoing enforcement altogether.

Instead, EPA threats of administrative orders have become commonplace, part and parcel of an EPA enforcement "bubble" that has, in cases like *Sackett*, caused EPA behavior so draconian it implicates the due process protections guaranteed by the 14th Amendment to the Constitution.

Why has EPA's Office of Enforcement and Compliance Assurance put so much weight on enforcement relative to compliance?

I think there are four main reasons for this enforcement "bubble."

First, in a justifiable hurry to address the absence of federal or state laws adequately protecting human health and the environment, Congress passed the environmental statutes of the late 1970s and early 1980s, giving the EPA the ability to promulgate broader regulations and policies. The new laws and regulations were then reviewed by courts inclined to give the EPA the benefit of every doubt in cases involving circumstances that, thankfully, are largely a thing of the past. Not surprisingly, this led to the development of precedent that further emboldened the EPA.

> "The EPA would be better served if it took this opportunity to adjust its course.

Second, facing very real budgetary constraints, regulators have determined that enforcement provides a bigger "bang for the buck" so compliance assistance has been reduced relative to "compliance monitoring."

Third, the economic recession made the regulated community less popular while the "green" movement continues to heighten environmental sensitivity. This emboldened regulators to even more aggressively pursue enforcement.

Fourth, the regulators' elected and appointed "managers" are not able to manage their staffs in the way private-sector managers can. They are, for the most part, unable to hire and fire their subordinates who think, for good reason, that they'll be able to outlast their superiors. The subject matter of enforcement proceedings is often sufficiently complicated that it is impossible for elected and appointed "managers" to understand the details of those proceedings in a way that allows them to effectively challenge their staffs even if they were inclined to do so.

In 1972, when Sen. Edmund Muskie (D-Maine) introduced what is now the Clean Water Act, he could not have imagined that the Sacketts would find themselves in the Supreme Court. Now the Court has taken some air out of EPA's enforcement "bubble" in its Sackett decision. The EPA might respond by continuing to overuse the threat of administrative orders, leaving it to the courts or Congress to further regulate its behavior. However, the EPA, its mission and all of us would be better served if the agency took this opportunity to adjust its course.

Jeffrey R. Porter chairs the environmental law section at Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., and is based in the firm's Boston office. He can be reached at JeffPorter01778@Twitter.com.