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Environmental Law Updates

Sackett v. EPA,

132 S. Ct. 1367 (2012)

In *Sackett v. EPA*, the Supreme Court held that the Sacketts may challenge the issuance of an administrative compliance order under the Clean Water Act, 33 U.S.C. § 1319, by the Environmental Protection Agency ("EPA") through a civil action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 *et seq.*

The Sacketts' own a residential lot north of Priest Lake, separated by several permanent structures. The Sacketts' received an administrative compliance order asserting that the Sacketts' property contained navigable waters, and they had violated the Clean Water Act by depositing fill material on their property. The Sacketts were ordered to restore their property in accordance with an EPA created Restoration Work Plan. The Sacketts asked the EPA for a hearing, but was denied. The Sacketts then brought suit seeking declaratory and injunctive relief in the United States District Court for the District of Idaho under the APA, contending the EPA's compliance order was "arbitrary and capricious" and "deprived them of 'life, liberty, or property, without due process of law,' in violation of the Fifth Amendment." The District Court dismissed the claims due to subject-matter jurisdiction, and the United States Court of Appeals for the Ninth Circuit affirmed.

The Sacketts brought suit under chapter 7 of the APA, which provides for judicial review of a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The Supreme Court first considered whether the compliance order was a final agency action. The Court found compliance order was an agency action under the APA. Furthermore, the compliance order was final because the EPA had determined legal obligations and legal consequences due to the issuance of the order. Additionally, once the order had been issued, it was not subject to any further agency review. The Government claimed the order was subject to further agency review because the order invited the Sacketts to engage in informal discussions. However, the Court held an informal discussion and invited contentions of inaccuracy are not sufficient to make an agency action not final.

In addition to a final agency action, judicial review under the APA also required there to be "no other adequate remedy in court." 5 U.S.C. § 704. Normally, in Clean Water Act enforcement cases, judicial review is through a civil action under 33 U.S.C. § 1319. However, the Sacketts could not initiate that process. The only other possible route to judicial review is by applying to the Corps of Engineers for a permit, and then filing suit under the APA if the permit is denied. Nevertheless, the Government does not rely on such, but rather on § 701(a)(1) of the APA, which excludes APA review to the extent that other statutes preclude judicial review.

The Government claims the Clean Water Act is such a statute. There is nothing in the Clean Water Act that expressly precludes judicial review under the APA. Nonetheless, in determining whether a statute precludes judicial review, the Court looks to more than the express language. The Court will examine inferences of intent drawn from the statutory scheme as a whole.

The Government offered several reasons why the statutory scheme of the Clean Water Act precludes judicial review. The Government argued that Congress gave the EPA the choice between a judicial proceeding or an administrative action under 33 U.S.C. § 1319(a)(3), and it would undermine the Clean Water Act to allow a judicial review of the administrative action. However, the Court was not convinced because it would create the premise that the relevant difference between a compliance order and an enforcement proceeding is that only the latter is subject to a judicial review. There are other sound reasons why compliance orders are useful other than to provide insulation from judicial review. The Government suggested that compliance orders provide a means of notifying recipients of potential violations, and allow for an opportunity of voluntary compliance. Allowing judicial review when a recipient chooses not to comply with the order is consistent with this function.

The Government also argues that compliance orders are not self-executing, but must be enforced by the agency in a judicial action. Therefore, the compliance order is merely a step in a process, and not a

sanction subject to judicial review. However, the APA provides for a judicial review of all final agency actions, and not just those that impose a self-executing sanction.

Another argument the Government put forth is that Congress expressly provided for judicial review on the administrative record when the EPA assesses administrative penalties after a hearing. However, Congress did not expressly provide for judicial review on compliance orders. Nevertheless, the express provision of judicial review in one section of a long and complicated statute is not enough to overcome the APA's presumption of reviewability for all final agency actions.

The Government's final argument was that Congress passed the Clean Water Act largely to respond to the inefficiency of the then-existing remedies for water pollution. Compliance orders allow for a quick remedy, and the EPA is less likely to use compliance orders if they will be subject to judicial review. The EPA may be less likely to use compliance orders if they are subject to judicial review; however, that is true for all agency actions subject to judicial review. The APA's presumption of judicial review demonstrates that efficiency of regulation is not the most important consideration. There is also no reason to believe that the Clean Water Act was specially designed to force people to comply without the opportunity for judicial review.

In this case, the compliance order was a final agency action for which there is no other adequate remedy other than APA review. The Clean Water Act does not preclude judicial review of the compliance order. Therefore, the Court reversed the judgment of the Court of Appeals and remanded the case for further proceedings.

Justice Ginsburg, concurring

Justice Ginsburg agreed with the Court, and felt the Agency ruled definitively, in that the Sacketts may immediately litigate their jurisdictional challenge in federal court. However, whether the Sacketts could challenge the EPA's authority to regulate their land under the Clean

Water Act, and at the pre-enforcement state, when the terms and conditions of the compliance order has yet to be determined. Only on that understanding, did Justice Ginsburg join the opinion of the Court.

Justice Alito, concurring

Justice Alito felt the reach of the Clean Water Act is unclear. Any land that is wet at least part of the year could be classified by the EPA as wetlands, and thereby fall under the Clean Water Act. If the property owners begin constructing a house, they could face up to $75,000 in fines per day for refusal to obey the EPA's compliance order, demanding the owners cease construction, engage in expensive remedial measures, and abandon the property. Furthermore, until the EPA sues the property owners, they are blocked from the courts. This Court's decision does provide some relief for property owners. Property owners have the right to challenge the EPA jurisdictional determination under the APA. However, to provide real relief, Congress should provide a reasonably clear rule regarding the reach of the Clean Water Act.

MARRIAM LIN

Department of Environmental Services, City and County of Honolulu v. Land Use Commission, State of Hawai'i

2012 WL 1571503 (Haw. 2012)

The Department of Environmental Services for the City and County of Honolulu, Hawai'i ("DES") appealed an order from the Land Use Commission ("LUC") approving the department's application for a special use permit to expand the Wailmanalo Gulch Sanitary Landfill ("WGSL"). The DES appealed only the validity of a condition prohibiting the WGSL from accepting municipal solid waste. The DES argued that the restriction was not supported by the substantial evidence, and is invalid.

The WGSL consists of approximately 200 acres in the state agricultural district on the island of O'ahu. Since 1989, 107.5 acres of the land have been used as a landfill. The WGSL is both the only O'ahu landfill permitted to receive municipal solid waste and the only landfill permitted to accept the ash and residue produced by Honolulu's H-POWER waste-to-energy facility. A need for additional space to accommodate the volume of these two categories of waste prompted the DES to apply for a permit for expansion of the landfill in 2008.

Under the zoning requirements of the City of Honolulu, the landfill needs a revised Special Use Permit ("SUP") to expand the landfill portion of its land. An SUP must first be approved by the Planning Commission of the City and County of Honolulu ("Planning Commission"), and then approved by the LUC, which is empowered to approve, approve with modification, or deny the permit application. The Planning Commission approved the permit, allowing the expansion of WGSL until it reaches the capacity allowed by the State Department of Health. Its acceptance required that the City find and develop new landfill sites before November 1, 2010 and continue to use alternative waste disposal methods to reduce Honolulu's dependence on WGSL. The Planning Commission noted that

a minimum of seven years would be necessary to develop a new landfill site, and so declined to place an expiration date on the SUP

The LUC also accepted the permit application, but added a condition that the WGSL would stop accepting municipal solid waste after July 31, 2012. On March 1, 2010, the DES filed a brief with the circuit court arguing that the closure deadline was arbitrary and capricious, and an abuse of discretion, because the record before the Planning Commission established that there will always be waste material that cannot be disposed of through other methods. They argued that this requires the option to dispose of municipal solid waste at the WGSL beyond the proposed July 31, 2012 deadline. Though the circuit court found that DES was "aggrieved," it affirmed the deadline. On July 14, 2011, DES filed a timely application to have the case transferred to the Supreme Court of Hawai'i, which was accepted on August 1, 2011.

The court found that, although the LUC has authority to impose restrictive conditions in permit approvals, the conditions must be supported by substantial evidence. The evidence presented throughout the application process indicates both that the timeline required to develop a new landfill site, and that a landfill is necessary to accommodate proper solid waste management. This record does not support the LUC's deadline condition. As such, the court held that the condition was an abuse of discretion and vacated it.

Further, because the application's approval was conditioned on the added deadline, the court found that the approval was also invalidated. Based on case law from other jurisdictions, the court found that a commission's conditional decision cannot be implemented if a required condition is vacated, unless the commission could only reach the conclusion that the permit should have been issued. As such, it must be remanded to the LUC for further proceedings.

MICHAEL POWELL

North Carolina Wildlife Federation v. North Carolina Department of Transportation

2012 WL 1548685 (4th Cir. 2012)

The North Carolina Wildlife Federation, Clean Air Carolina, and Yadkin Riverkeeper (collectively, the "Conservation Groups") filed suit against the North Carolina Department of Transportation and the Federal Highway Administration (collectively, the "Agencies"), contending that the process by which the Agencies approved the construction of a twenty-mile toll road violated the National Environmental Protection Act ("NEPA"). The district court granted summary judgment to the Agencies, and the Conservation Groups appealed to the Fourth Circuit.

The North Carolina Department of Transportation has repeatedly proposed the construction of the Monroe Connector Bypass, but has not been successful. In 2007, the department, supervised by the Federal Highway Administration, began the NEPA-mandated environmental assessment process. The project sought to address capacity deficiencies on U.S. Highway 74. In addition to the required variety of alternatives, the Agencies created a "no build" baseline using information from the Mecklenburg-Union Metropolitan Planning Organization ("MUMPO"). For a variety of reasons, most notably that the projected traffic volume for the "build" scenario was actually less than the "no build" scenario's traffic volume, the Agencies were repeatedly queried whether the "no build" scenario in fact assumed that the Monroe Connector Bypass would be built.

In response to these queries, the Agencies repeatedly stated that the MUMPO projections did not assume the construction of the bypass. On the basis of those statements, the Fish and Wildlife Service issued its Endangered Species Act concurrence, which allowed the process to proceed. On August 27, 2010, the Agencies completed the final component of the NEPA process by issuing their Record of Decision, at which point the Conservation Groups again asked whether the projections actually represented a "no build" scenario. The Record of Decision again

responded with denials, and a site was selected for the Monroe Connector Bypass at an estimated cost of $800 million.

On November 12, 2010, the Conservation Groups filed suit seeking to enjoin construction of the bypass, alleging that the Agencies violated NEPA by "(1) failing to analyze the environmental impacts of the Monroe Connector[ ]; (2) conducting a flawed analysis of alternatives; and (3) presenting materially false and misleading information to other agencies and to the public." In response, the Agencies admitted for the first time that the MUMPO projections assumed the construction of the bypass, but asked for and were granted summary judgment, as the district court ruled that their reliance on the MUMPO projections was reasonable, and thus did not violate NEPA.

NEPA requires that agencies take a "hard look" at environmental consequences of their proposed actions and to provide for the dissemination of environmental information. It does not require particular substantive results, but only that the agencies engage in a process that informs them of the environmental implications of their actions. Specifically, it requires that agencies proposing major action prepare an environmental impact statement that includes alternatives to the proposed action and the environmental impact of the proposed action.

There is no dispute that the Monroe Connector Bypass represents a major action under NEPA, and the Agencies concede much of the Conservation Groups' arguments, essentially only arguing that, despite the flawed analysis, they conducted a "thorough analysis of the environmental impacts," and that the court should defer to their expertise. However, as the purpose of the environmental impact statement is to provide a basis for public comment on the action, the court held that Agencies' actions do not fulfill the requirements of NEPA, as the public comment relied on the Agencies' repeated, incorrect claim that the "no build" scenario did not assume the construction of the bypass. Thus, because of the Agencies' failure to uphold the procedural requirements of NEPA, the court vacated the judgment of the district court and remanded the project for further proceedings.

ENVIRONMENTAL LAW UPDATES

MICHAEL POWELL

Missouri Coalition for the Environment Foundation v. Jackson

2012 U.S. Dist. LEXIS 19723

The Clean Water Act ("CWA") makes states initially responsible for assigning uses to the state's waters and setting standards consistent with the water's assigned use. The CWA requires states to review their water standards every three years. In the course of the review, the state determines whether a body of water may be used for fishing or swimming. If a body of water is unfit for those uses, the state must include a scientific study showing that use cannot be achieved. This review is then sent to the Environmental Protection Agency ("EPA"). The EPA then can approve or disapprove of the state's new standards. The EPA also has authority under a discretionary clause to promulgate standards for the state regardless of what standards were submitted to the EPA.

Missouri lists some of its lakes and streams on its water quality lists. Those appearing on the list are known as "classified waters," those bodies of water not appearing on the state's lists are known as "unclassified waters." Only classified waters were subjected to Missouri's CWA review and were assigned uses. In 2000, the EPA sent a letter to the director of the Missouri Department of Natural Resources, in which the EPA expressed its view that unclassified waters should also be subjected to review.

During its 2005 review, Missouri assigned uses to some but not all of its waters. This review was submitted to the EPA. The EPA concluded its review of Missouri's water standards in 2007 without addressing Missouri's failure to assign uses to some waters.

The Missouri Coalition for the Environment Foundation filed suit against the EPA. The coalition alleged that the EPA's decision to ignore the fact that Missouri's review was incomplete was arbitrary and capricious. The coalition claimed that the EPA's decision not to bring Missouri into compliance was arbitrary and capricious.

The District Court for the Western District of Missouri held that the CWA required states to include all the state's waters in its review and

Missouri's decision to include only some of the state's waters was a violation of the CWA.

The court held that, because the CWA limited the EPA's approval or disapproval to new standards set by the state, the EPA did not act arbitrarily when it did not approve or disapprove of Missouri's limited review. The court also reasoned that because the letter to the Missouri Department of Natural Resources did not condition approval of Missouri's review on the inclusion of all the state's waters, there was no past policy requiring the inclusion of all of Missouri's waters in the review. Therefore there was no arbitrary or capricious deviation from the EPA's past policy.

The court held that the EPA's decision not to promulgate default uses for Missouri's unclassified waters was not subject to judicial review. Judicial review is unavailable where the issue is committed to agency discretion and there is no law to apply. The court held that the CWA did not provide any standard as to when the EPA should exercise its discretion. The EPA's own regulations repeat the CWA and, the court held, do not provide guidance for the use of the EPA's discretion. Because there was no law to apply here, the EPA's discretion was outside judicial review.

AARON ROWLEY

Friends of Back Bay v. U.S. Army Corps of Engineers,

681 F.3d 581 (4th Cir. 2012).

Following a notice and comment period, the Corps of Engineer's ("the Corps) issued a permit allowing construction of additional boat slips in a cove connected by tributary to an area of Virginia Beach known as Back Bay ("the Bay"). The permit approved dredging, excavation, and relocation of silt materials within the Bay as well as construction of various structures. The purpose of the construction project ("the Project") was to house additional watercraft owned by residents living in near by properties, which would be used recreationally in the Bay's waters. The permit specified that any vegetated wetland area cleared during construction required the creation of an equal amount of vegetated wetland in a nearby area and required any plant life displaced by the Project be relocated into that mitigation area. Finally, the permit contained optional conditions such as the creation of a no-wake zone indicated by the posting of signs.

When it issued the permit, the Corps did so despite having received over 350 comments from the public almost all of which were opposed to the permit. In those comments were statements from various state and federal agencies including the EPA and NFS. These entities felt the project would cause irreversible ecological and environmental damage to the Bay and its ecosystem and they universally recommended that the permit either be denied or substantially modified. Specifically, there was concern that increased traffic from motorized watercraft would disturb and destroy the marshland ecosystem in the Bay. The NSF stated that it would withdraw is opposition provided that the permit require adequate funding for the enforcement of a no-wake zone ("NWZ") in the Bay which would mitigate the increased boat traffic by preventing the production of destructive wakes in the bay area. In the alternative, the NFS recommended that the Corps issue an Environmental Impact Statement regarding the Project's effect on the Bay.

In June 2006, following consideration of these comments, the Corps issued a Local Order imposing a NWZ in the Bay area. Then, in October of 2008, the Corps issued its Environmental Assessment required under the National Environmental Protection Act ("NEPA") in which the Corps made a Finding of No Significant Impact ("FONSI") vis-à-vis the Project thereby rendering an Environmental Impact Statement ("EIS") unnecessary. That same day the Corps granted the permit. While recognizing the environmental importance of a NWZ, the permit did not mandate the creation or enforcement of a NWZ instead making the NWZ an optional condition, nor did the permit mandate adequate funding for the enforcement of the NWZ. This was problematic because local and national environmental enforcement agencies were understaffed and underfunded and therefore unable adequately enforce the NWZ inside the Bay. Thus, a group called Friends of Back Bay ("Plaintiffs") filed suit in United States District Court seeking review of the Corps's action under the NEPA alleging that the Corps's FONSI was arbitrary and capricious and alleging that the Corps violated the Clean Water Act by issuing the permit. After considering the parties' briefs, the district court issued an order and opinion in favor of the Corps finding that the Corps acted within its broad agency discretion when making its FONSI and granting the permit without first preparing an EIS was therefore not contrary to law. Plaintiffs appealed the district court's decision to the Fourth Circuit Court of Appeals.

On appeal, the Fourth Circuit revealed the case *de novo* indicating that while review of agency action is highly deferential it is not "a rubber stamp" of approval. The court then explained that reversal was appropriate only if the agency's action could be deemed arbitrary and capricious. The Plaintiffs argued that the Corps' FONSI was based on the environmental mitigation provided by the creation of a NWZ, but pointed out that the permit failed to mandate the creation of a NWZ and failed to require adequate funding for the enforcement of a NWZ thus making the decision arbitrary and capricious. Conversely, the Corps argued that the FONSI was based on a consideration of the environment during the two-year period in which the NWZ had been in effect pursuant to the Local Order. Thus, according to the Corps, the FONSI was based on a

consideration of the efficacy of the NWZ in addressing the aforementioned environmental concerns.

The court noted prior decisions holding arbitrary and capricious various actions taken by agencies on the basis of inaccurate baseline assumptions regarding the existence of some underlying condition. In this case, the court pointed out that the Corps' FONSI was based on the assumed existence and enforcement of a NWZ pursuant to its Local Order. The court opined that this constituted a material misapprehension of the reality of the situation because absent additional funding there would be no efficacious enforcement of the NWZ and thus no prevention of the previously discussed environmental harms. Moreover, the court noted the absence of funding had left the NWZ unmarked. Thus, the public remained unaware that the NWZ existed meaning that even persons who would have voluntarily complied with the NWZ could not do so. Ultimately, the court reversed and remanded holding that the FONSI was arbitrary and capricious since it was premised on the Corps' incorrect assumption that an effective NWZ existed when in fact, the NWZ had inadequate funding for effective enforcement and therefore would not provide the presumed environmental protections which had led to the FONSI. Having reversed and remanded on the NEPA issue, the court declined to address Plaintiffs' contentions under the Clean Water Act. However, noting that the policy goals underlying the NEPA are best served if regulatory agencies err in favor of preparing an ESI whenever there is a substantial possibility that a proposed project may have a significant environmental impact, the court recommend that on remand the Corps conduct an ESI.

RYAN NIEHAUS