Is the Bell About to Toll on EPA's Enforcement Order Authority? The Supreme Court Hears Oral Argument in Sackett

January 10, 2012 by Seth Jaffe

I am generally loath to speculate about what the Supreme Court will do based on oral argument, but the overwhelming reaction to the oral argument in *Sackett v. EPA* was that EPA is going to lose. What would a loss mean? In simplest terms, EPA would no longer be able to issue enforcement orders under the Clean Water Act without those orders being subject to judicial review. Such a decision would undeniably be significant. Everyone practicing in this area knows how coercive EPA enforcement orders can be. A person who thinks that he is not liable or that the order is inappropriate, and faced with having to violate the order and wait for EPA to bring an enforcement action to obtain judicial review, is truly between a rock and a hard place – or perhaps Scylla and Charybdis (I'm not sure which, but it's not good, either way). The opportunity for preenforcement review would eliminate much of EPA's coercive power.

The big question is whether a decision against EPA would be so broad as to make it clear that EPA's order authority under other statutes, such as CERCLA, would be similarly affected. Here, speculation really is difficult, because the Supreme Court could invalidate EPA's CWA authority several different ways, with differing impacts on other statutes. Readers who want to explore the issue in more depth than a blog post can review an article I did in the ABA Superfund and Natural Resource Damages Litigation Committee Newsletter.

As long as I am speculating, I'm going to go out on limb and predict that the Court's decision will not be easily limited to the CWA. I think EPA's order authority is in trouble across the board.

The next big question is when lower courts are going to actually start paying attention to what the Supreme Court says about environmental cases. I'm tired of this pattern. A series of cases are decided by lower courts, almost universally in EPA's favor. Indeed, one of the striking things about *Sackett* is that the Supreme Court took the case without a circuit court split – EPA had won before every circuit court that had reached the question. The Supreme Court applies principles that are broadly accepted outside the environmental arena, but which for reasons unknown to everyone but the lower court judges have been thought inapplicable to environmental cases, and EPA loses. The next several years are spent with EPA, DOJ, and the lower courts merrily constructing some new edifice which allows EPA to continue to win – until the Supreme Court takes another case and says "No, we really meant it."

There is a lesson here for lower courts, if they would but listen. Environmental cases are not *sui generis*. EPA does not necessarily win just because it is protecting the environment. General principles of corporate, administrative, and constitutional law apply. Under this framework, EPA will still win most of the time. That's the nature of administrative law. Expert agencies receive a lot of deference from the courts in interpreting their organic statutes and applying their expertise. But they don't win all the time, and they don't win just because they are EPA.

Rant over. Let's see what the Supremes actually do.
