

June 29, 2011

U.S. SUPREME COURT TO REVIEW TWO CASES WITH POTENTIALLY SIGNIFICANT CONSEQUENCES FOR WETLANDS AND WATERWAYS

The U.S. Supreme Court recently decided to hear two environmental cases in its 2011-2012 term, which begins in October. The two cases will have consequences for waterbodies that may be subject to the public trust and for property owners and facilities operators who are given administrative compliance orders under federal environmental laws.

The first case, *PPL Montana, LLC v. State of Montana*, USSC No. 10-218, addresses the public trust doctrine and involves a dispute over the ownership three Montana rivers: the Missouri, Madison and Clark Fork Rivers. The State of Montana claims ownership of those waterways in trust for current and future residents as an incident of state sovereignty. PPL Montana, which operates hydroelectric plants on the three rivers, argues the waterways are private property. The issue turns on whether, under federal law, the rivers were “navigable” when Montana was admitted to the Union. The matter was first litigated in Montana state courts, with the Montana Supreme Court ruling that each of the rivers was “navigable” and that title vests in the State of Montana. In its [petition](#) to the U.S. Supreme Court, PPL Montana asserts that the Montana court used the wrong legal standard for navigability and improperly considered contemporaneous evidence to find the three disputed rivers were navigable.

PPL Montana has implications for thousands of miles of inland rivers and lakes, as public trust principles (which vary from state to state) generally require management for long-term protection and preservation of trust resources. And as this case illustrates, a great deal of money is at stake. Montana claims PPL Montana owes the State approximately \$40 million in royalties for use of the three rivers to generate hydroelectric power.

The second case, [*Sackett v. U.S. Environmental Protection Agency*](#), USSC No. 10-1062, involves an enforcement dispute between an Idaho couple and the EPA that arose under the federal Clean Water Act (“CWA”). The EPA issued the Sacketts an administrative compliance order claiming property they had filled with dirt and rock to build a house was actually a wetland subject to the CWA. The order directed the Sacketts to restore the property to its original condition or face monetary penalties under the CWA. The Sacketts unsuccessfully sought an administrative appeal challenging the jurisdictional status of the wetland before challenging the order in federal court, claiming that EPA’s issuance of the order was factually erroneous. The district court dismissed the case after finding the CWA bars judicial review of compliance orders until the EPA brings its own enforcement action, and the Ninth Circuit upheld that ruling. [The Sacketts asked the Supreme Court to review the matter](#), arguing that the Ninth Circuit’s decision forces them to either pursue a costly permit or ignore the order and face sizeable penalties. The U.S. Supreme Court granted to resolve whether the Sacketts may seek pre-enforcement judicial review of the EPA compliance order under the APA; and if not, whether the absence of such recourse to the courts violates their constitutional due process rights.

The Court’s decision in *Sackett* will have implications beyond the CWA and could affect enforcement of other federal environmental statutes with similar enforcement provisions.

Both cases will be decided by the Supreme Court by June 2012.

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