# Will Sackett Impact the USEPA's Regulation of Hydraulic Fracking?

***Hydraulic Fracturing News Flash***

March 2012 by Earl Hagström

On March 21, 2012, the U.S. Supreme Court handed down a decision that clarified the U.S. Environmental Protection Agency's (USEPA) administrative enforcement authority. The decision, *Sackett, et al. v. EPA, et al.* (Docket 10-1062), held that parties subject to an Administrative Compliance Order (ACO) under 33 U.S.C. section 1319 of the Clean Water Act (CWA) are entitled to seek pre-enforcement review under the Administrative Procedures Act (APA). The decision, while framed in the context of the CWA, may impact the USEPA's use of its administrative authority under section 1431 of the Safe Drinking Water Act (SDWA) to regulate hydraulic fracking.

The Court, in a 9-0 decision, gave property owners the right to sue the USEPA and immediately challenge ACOs. In *Sackett*, the USEPA issued an ACO requiring the Sacketts to remove fill they placed on their property during the process of developing the property and building a house. The USEPA had determined that the fill violated the CWA because the property included a wetland subject to CWA jurisdiction. The Sacketts petitioned the USEPA for a hearing to challenge the wetland determination and, after the USEPA denied their petition, the Sacketts filed suit in U.S. District Court. The USEPA took the position that its order was not subject to review unless it first sued the Sacketts, which it had not, and demanded the Sacketts comply with the ACO or face penalties of $37,500 per day for violating the ACO and $37,500 per day for violating the CWA.

The principal issue before the Court was whether "pre-enforcement review" of the USEPA's ACO was available. In *Sackett*, the USEPA argued that a property owner may ***not*** obtain judicial review of an USEPA ACO and that the USEPA did not need to bring suit against the Sacketts to require compliance with the ACO.

The Court noted that the USEPA's ACO "determined rights or obligations" of the Sacketts, as it required the Sacketts to restore their property according to an agency-approved restoration plan and that the Sacketts faced "legal consequences" in the form of fines and penalties for failure to comply with the ACO. Procedurally, the ACO also hampered the Sacketts' ability to apply for and obtain a

permit from the U. S. Army Corps of Engineers to fill the property, thus making compliance with the ACO the only viable option available to the Sacketts.

Justice Antonin Scalia rejected the USEPA's position, which had been upheld by the Ninth Circuit Court of Appeals (*Sackett* v. *EPA*, 622 F.3d 1139 (9th Cir. 2010)), writing that access to judicial review was necessary to prevent "the strong-arming of regulated parties" by government agencies. The Court ruled that because the ACO constituted a "final agency action" under the CWA, the Sacketts were entitled to seek pre-enforcement judicial review under the APA. In ruling for the Sacketts, the Court rejected the USEPA's argument that the ACO was simply "a step in the deliberative process," which is not subject to challenge under the APA.

The *Sackett* decision restricts the USEPA's authority to force compliance upon the regulated community. While the decision may have restricted the USEPA's enforcement reach under the CWA, it may have provided the USEPA with a procedural tool in its attempt to regulate hydraulic fracking under the SDWA.

Several environmental statues provide the USEPA with the option of issuing an agency order or commencing a civil action upon receipt of "information" that a person is in violation of the statute at issue. (*See, e.g.*, 42 U.S.C. section 9606(a) (CERCLA); 42 U.S.C. sections 6934, 6973 (RCRA) and 33 U.S.C. section 1319 (CWA)). Thus, the USEPA has the option of filing suit in district court where it will be required to prove its case by a preponderance of the evidence or, issuing an unilateral order setting forth "findings of fact" and "conclusions of law" in support of its action.

Section 1431 of the SWDA provides a similar option. Upon "receipt of information" that an endangerment exists and state or local agencies have failed to act, the USEPA has the option to file suit in district court, or issue an administrative order. In *Range Resources* (Docket No. SDWA-06-2011-1208) the USEPA opted to issue an administrative order to Range Resources in an attempt to regulate its hydraulic fracking operations.

On December 7, 2010, using its authority under section 1431 of the SDWA, the USEPA issued an Emergency Administrative Order (EAO) to Range Resources, requiring Range Resources to halt its drilling activities and to investigate, among other issues, whether its fracturing operations caused

methane contamination in private drinking water wells located on neighboring properties. In part, the USEPA concluded that: (1) the presence of methane in the water wells "may present an imminent and substantial endangerment to the health of persons"; (2) the presence of methane was "likely to be due to impacts from gas development and production activities in the area"; and (3) the gas wells operated by Range Resources "are the only gas production facilities within approximately 2,000 feet of the domestic wells." (Docket No. SDWA-06- 2011-1208). The USEPA alleged but had not proven these claims at the time it issued the EAO. The EAO directed Range Resources to expend considerable sums to investigate gas flow pathways within the aquifer, submit a plan to sample private water wells within 3,000 feet of the wellbore and remediate areas of the aquifer that had allegedly been impacted by gas. The EAO also provided that civil penalties of up to $16,500 per day of violation may be assessed by the district court.

On January 18, 2011, the USEPA also brought an action, *U.S.A. v. Range Resources, et. al*., (Docket No. 3:11-CV-00116-F ND TX) to enforce the EAO alleging that Range Resources violated the EAO and sought a permanent injunction requiring compliance and civil penalties. Range Resources in turn filed a petition for review in the Fifth Circuit Court of Appeals, asserting that the EAO was ***not*** a final agency action and that the EPA bore the burden of proof in the District Court action to prove the statutory requisites under the SDWA before the USEPA could enforce the EAO. Range Resources asserted that the EAO deprived it of its constitutional right to be heard. If the USEPA's EAO was found to be a non-final agency action, Range Resources, unlike the Sacketts, would be free to ignore the order without consequences until such time as the USEPA proved its case. That issue remains pending.

Range Resources argued that the USEPA's strategic use of its emergency authority under section 1431 of the SDWA, as opposed to its administrative compliance authority under section 1423, allowed the USEPA to enforce the EAO "without pleading and proof of a violation of law or the elements of some other theory of liability under the [SDWA]." (Docket No. 3:11-CV-00116-F, Doc. No. 7 at p.16). Range Resources' argument is not without merit. While the USEPA's decision to use section 1431 limited its ability to unilaterally impose civil penalties for non-compliance, section 1431 does not require the USEPA to prove its case when issuing an EAO.

*Sackett* found that when an agency action "creates new obligations from which legal consequences will flow" it is a final agency action subject to judicial review. The central issue in *Range Resources* is

whether the EAO was a final agency action. If so as a final agency action the EAO would be subject to judicial review and Range Resources would be required to either comply with the EAO or challenge it in district court. As noted above section 1431 does not require the USEPA to prove its case. In essence, the burden of proof rests with Range Resources. Thus, the USEPA's decision to utilize an EAO as an enforcement mechanism may with the 2012 *Sackett* decision provide the USEPA with a procedural advantage in its efforts to regulate hydraulic fracturing under the SDWA.

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