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CLEAN WATER ACT

Two recent court decisions rejected the Environmental Protection Agency's policies implementing the Clean Water Act in the areas of wetlands and mountaintop removal mining. The author of this article argues that a critical underlying problem is the ambiguity of the statute itself in laying out EPA authority and the limits on that authority. Until Congress offers more clarity, citizens, agencies, and courts may have to continue ''feeling their way'' through the ambiguous statutory language for years to come, he writes.

EPA Suffers Two Big Court Losses in Three Days: Congress Gets Part of the Blame

BY RICHARD G. STOLL

In the space of three days last week, the Environmental Protection Agency suffered two major federal court losses under the Clean Water Act.

Both decisions have been applauded in some quarters for bringing a measure of justice to citizens and companies against a heavy-handed federal bureaucracy. But another theme comes through in these new decisions: They strongly take Congress to task for ambiguous and indecipherable CWA language that often leaves all interested parties—including EPA—floundering in uncertainty and litigation.

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On March 21, the U.S. Supreme Court issued its unanimous opinion in *Sackett v. EPA*, No. 10-1062, 73 ERC 212 (*Sackett*). [1] The issue driving the dispute was whether CWA jurisdiction attached to the Sacketts' land. The Court's opinion did not resolve that issue. The Court strongly indicated its displeasure, however, over the fact that the entire dispute could have been avoided if Congress had provided more clarity in the CWA.

On March 23, an Obama-appointed federal judge issued her opinion in *Mingo Logan Coal Company v. EPA*, No. 10-0541, D.D.C. (*Mingo*). She ruled, in a case of first impression, that EPA has no authority under the CWA to nullify a Section 404 permit issued by the Army

[1] *See* 55 DEN A-12, 3/22/12.

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Corps of Engineers (the Corps) after the permit had been issued.[2] EPA relied on one subsection of the CWA to claim such authority, but she criticized Congress's ''garbled'' wording in that subsection as wholly inadequate to support EPA's claim.

Sackett v. EPA

The CWA's jurisdiction extends to ''waters of the United States'' (hereafter U.S. waters). In addition to regulating piping of wastes into traditional ''navigable'' waters such as rivers and lakes, the CWA regulates ''dredging'' or ''filling'' of materials onto land near or related to navigable waters. Anyone conducting development or construction activities (such as grading, filling, etc.) on that kind of land must first obtain a permit from the Corps under CWA § 404. Failure to secure a permit can subject a party to severe penalties.[3]

The fundamental problem precipitating the *Sackett* case is the CWA's failure to define the circumstances in which land *near* navigable waters is deemed U.S. waters. EPA has taken inconsistent positions and courts – even the Supreme Court – have had extreme difficulty in finding a bright line based on the CWA's words.[4] In a 2006 opinion, Chief Justice John Roberts lamented that the CWA forces interested parties ''to feel their way on a case-by-case basis.''[5]

The Sacketts felt their way into a holy mess. They own a ¾-acre residentially zoned lot *near* a lake in Idaho. Between their lot and the lake are a road and several lots with homes. The Sacketts placed approximately ½-acre of dirt and rock on their lot so they could build a house.

EPA issued a ''compliance order'' under CWA § 309(a) finding the Sacketts' lot to be U.S. waters and declaring the Sacketts in violation of the CWA for placing dirt and rock on their lot without a permit. EPA's order mandated that the Sacketts restore the land to its original condition and exposed them to penalties of up to $75,000 for each day they failed to comply.

After EPA refused the Sacketts request to reconsider, they filed suit under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), seeking to contest EPA's conclusion. In the lower federal courts, EPA successfully rebuffed the Sacketts' attempts to litigate (*Sackett v. EPA*, 622 F.3d 1139, 71 ERC 2036 (9th Cir. 2010)). EPA argued (consistent with its longstanding position that has been upheld by lower courts) that the CWA precludes judicial review of its compliance orders unless and until EPA initiates judicial enforcement action.

The Supreme Court rejected EPA's position and ruled that the Sacketts had a right to sue immediately to contest EPA's finding that their lot was U.S. waters. The Court pointed out that EPA's position put the Sacketts and other landowners in the untenable position of risking penalties of $75,000 per day while waiting for EPA to bring its own lawsuit – which it might take years to do or might never do.[6] As Justice Alito stated, upholding EPA's position ''would have put the property rights of ordinary Americans entirely at the mercy'' of EPA employees.[7]

The Court did not take up the issue of whether the Sacketts' lot is U.S. waters—the effect of the ruling is that the Sacketts are now free to sue EPA on its determination. But the Court's opinion decried the CWA's vagueness on the issue, and Justice Alito's concurrence lamented the CWA's ''notoriously unclear'' scope. [8]

Justice Alito condemned the pivotal undefined CWA phrase ''waters of the United States'' to be ''hopelessly indeterminate.''[9] He called upon Congress to amend the CWA so citizens will not have to be dragged through arduous expensive litigation over what land is water: ''Real relief requires Congress to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act.''[10]

Mingo Logan Coal Co. v. EPA

Mingo involved the Obama EPA's attempt to block a West Virginia coal mining project that had received a CWA permit during the Bush administration. Under CWA § 404, the Corps issues CWA permits for dredge-and-fill activities, but EPA has certain veto rights under § 404(c). EPA has occasionally vetoed a Corps-proposed permit. But never before has EPA sought to nullify a Corps-issued permit *after* the permit was issued without EPA's objection.

In *Mingo*, Judge Amy Berman Jackson—an Obama appointee—ruled against the Obama EPA's attempts. The Corps had issued the permit in early 2007, and the Obama EPA sought to nullify the permit more than three years later. Judge Jackson found that the words, structure, and legislative history of the CWA—as well as principles of fairness—pointed strongly against any EPA authority to nullify a Corps-issued permit. She found that the CWA included a strong policy favoring the finality of permits so that the permit holder, along with lenders and investors, could rely on the permit to proceed with projects and not be subject to ''open-ended risk of cancellation.''[11]

EPA argued that one CWA subsection—§ 404(c)—supported its position. The portion of § 404(c) that EPA relied upon states:

> The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearing, that the discharge of such materials into such area will have an unacceptable adverse effect . . . .

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[2] *See* 57 DEN A-12, 3/26/12.

[3] CWA § 301(a) prohibits the ''discharge of any pollutant'' without a permit. CWA § 502(12) defines ''discharge of a pollutant'' to mean the addition of pollutants to ''navigable waters.'' CWA § 502(7) defines ''navigable waters'' to mean ''waters of the United States, including the territorial seas.'' The CWA does not, however, provide a definition for ''waters of the United States.''

[4] In *Rapanos v. United States*, 547 U.S. 715 62 ERC 1481 (2006), the Supreme Court issued separate four-justice plurality opinions taking distinctly different tacks for determining the CWA's jurisdictional approach. *See also* 118 DEN A-1, 6/20/06. Further confusion can be found in earlier Supreme Court decisions on the issue. *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

[5] *Rapanos, supra*, at 758 (concurring opinion).

[6] *Slip op.* at 5

[7] *Slip op.* at 1 (concurring opinion)

[8] *Id.*

[9] *Id.* at 2

[10] *Id.*

[11] *Slip op.* at 31.

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But Judge Jackson found this subsection ''awkwardly written and extremely unclear;'' ''clumsy;'' and ''garbled.'' [12] She was particularly offended by the parentheticals in Section 404(c), which she said ''muddy the waters.'' [13] She added that the parentheticals are so poorly written that ''it is difficult to ascertain what they are supposed to modify.''[14] Her opinion then labored through several paragraphs of alternative word-parsing theories seeking to divine how all the words could be made to fit together intelligently.

After this laborious textual analysis, she concluded that ''at best, the text is ambiguous.''[15] In light of her analysis of other statutory provisions and legislative history all pointing against EPA's claim of nullification authority, she found the ambiguous wording of CWA § 404(c) insufficient to give EPA the authority it claimed. Consistent with the Supreme Court's complaints two days earlier about Congress' failure to be precise in its legislative language, she ruled in effect that if Congress wanted to give EPA the authority to nullify a Corp-issued permit, Congress must say so with intelligible prose.

She also had harsh words for EPA's attempts to justify its actions based upon such tenuous legislative language. Calling EPA's action ''stunning,'' she added that EPA was engaging in ''magical thinking,'' and said its actions had ''the air of a disappointed player's threat to take his ball and go home.'' [16]

Forty Years' Opportunity to Clarify

The unhelpful and ambiguous CWA provisions criticized in *Sackett* and *Mingo* have been law since 1972. Sometimes in the legislative process, the only way to secure enough votes for passage is to leave certain issues unresolved with the understanding that citizens, agencies, and courts will have to grapple with them. This might explain in part why Congress has not endeavored to clarify these provisions.

Moreover, particularly over the last decade, environmental politics has become exceedingly polarized (as witnessed by the Obama EPA's attempt to nullify the Bush EPA's *Mingo* permit) and attempts to secure any new meaningful legislative provisions have failed. Thus, citizens, agencies, and courts may have to continue ''feeling their way'' through the brambles of ambiguous statutory language on pivotal issues for years to come.

[12] *Slip op.* at 2, 12, 15.
[13] *Id*. at 12.
[14] *Id*. at 10.
[15] *Id*. at 15.
[16] *Id*. at 10, 27 n. 11, 31.