Courts begin to question EPA authority

By Stephen T. Holzer, Esq.

Since the inception of the federal Environmental Protection Agency some four decades ago, the Courts have generally deferred to the agency as to how best to enforce the Clean Water Act and the Clean Air Act. However, three recent court decisions have sent a strong signal that judicial deference may have reached its limits.

Take the March 21 decision in *Sackett v. Environmental Protection Agency*, for example. A couple began construction of a home near a lake in Idaho, and the EPA subsequently determined that the construction was on wetlands which were a "navigable water of the United States" within the meaning of the Clean Water Act. The agency ordered the couple to restore the site's original habitat.

The couple challenged the EPA order at both the district court and 9th Circuit levels; but each court dismissed the challenge on the basis that the judiciary had no jurisdiction until either the EPA decided to file a lawsuit to enforce the order. Compliance with the order would cost thousands and thousands of dollars, but failure to comply would potentially subject the homeowners to enforcement action fines of $37,500-$75,000 per day, with the fines mounting daily while the EPA took its time deciding whether or not to bring the action.

The U.S. Supreme Court decided to hear the case and unanimously sided with the aggrieved couple. Justice Samuel Alito stated in a concurring opinion that by the time aggrieved persons choosing to fight the order could get judicial review, "potential fines may easily have reached the millions. In a nation that values due process, not to mention private property, such treatment is unthinkable."

Five days after *Sackett*, the 5th Circuit Court of Appeals gave the EPA another slap on the wrist in *Luminant Generation Company, et al. v. U.S. Environmental Protection Agency*. In this case, Texas issued a permit covering a number of "minor" emissions-producing entities on the basis that the entities all emitted the same type of pollutants and that these emissions, even when lumped together, did not exceed the National Ambient Air Quality Standards set by the Clean Air Act.

But the EPA refused to approve the state's decision to issue the permit, contending that the act authorized the EPA to require the state to measure pollutant emissions on the basis of narrowly-defined emission sources (e.g., a specific industry) rather than on the basis of emission types (e.g., different industries emitting the same type of pollutant). Texas and others sued, claiming the EPA has no authority under the act to limit the state's decision as to how to issue permits so long as the effect was to keep overall emissions within the standards. The 5th Circuit agreed, stating, among other things, that the act limits the EPA's review of State permits in minor-source cases, leaving the agency "with no discretion to do anything other than ensure that a state's submission meets the [act's] requirements [on limiting overall pollution] and, if it does, approve it. ..."

In *Mingo Logan Coal Company v. U.S. Environmental Protection Agency* issued on March 23, the Federal District Court for the District of Columbia (Judge Amy Berman Jackson) was asked to wrestle with a complicated Clean Water Act statute dividing jurisdiction between the EPA and the Army Corps of Engineers. Section 404(a) of the act provides, as to permits to discharge pollutants into the navigable waters of the U.S., that "[t]he Secretary [of the Army] may issue permits ... at specified disposal sites." On the other hand, Section 404(c) of the act provides that under prescribed circumstances "[t]he [EPA] Administrator is authorized to prohibit the specification ... of any defined area as a [permitted] disposal site. ..."

Mingo Logan, a coal mining company, had in 2007 received a permit under Section 404(a) from the Army Corps of Engineers to dump its dredging fill in three waterways in Logan County, West Virginia. About two years later, EPA, ostensibly pursuant to 404(c), announced that the agency intended, among possibly other things, to withdraw specification of the disposal sites at issue as being eligible for a permit. EPA asked the Corps to revoke or at least modify the permit. The Corps refused to do so.

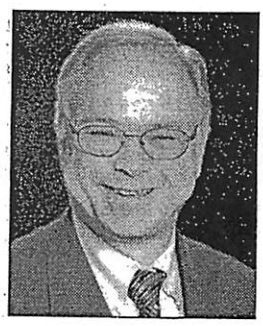
In March, 2010, the EPA published notice of its proposed decision to withdraw or modify the permit; and in January, 2011, EPA announced its final determination to withdraw the permit. In response, Mingo Logan challenged the EPA's decision, arguing that the EPA had no jurisdiction to withdraw a permit once the Army Corps issued one. Judge Jackson agreed.

The EPA's counsel argued that, while the act specified only the Army was entitled to grant (or for that matter to revoke) permits, the EPA had the authority under 404(c) to withdraw the "specification" of a disposal site and that, without the specification, the permit — even if already issued — could not stand, no matter what the Corps wanted. Judge Jackson rejected this construction of the act, noting that while EPA contended it has authority unilaterally to modify or revoke a permit, the Army Corps is "the only permitting agency identified in the statute. ...".

Judge Jackson concluded that Section 404(c) gives the EPA the authority to intervene to prevent the Army Corps from issuing a permit by refusing to specify a given site as a disposal site but that, once a permit is issued, the EPA has no right to second-guess the Corps by withdrawing the specification and thus undermining the permit.

It must be emphasized that the *Sackett, Luminant* and *Mingo Logan* decisions each had specific factual contexts. For example, in a concurrence in *Sackett*, Justice Ruth Bader Ginsburg emphasized that she regarded the opinion as limited only to EPA jurisdiction and that there was not necessarily a general pre-enforcement right of judicial review. Also, the D.C. Circuit recently heard arguments challenging the agency's implementation of rules regulating carbon-dioxide emissions (*Coalition for Responsible Regulation v. EPA*) and may very well uphold the EPA's position.

Nonetheless, this trio of March decisions is noteworthy as being the first concerted example of judicial roadblocks to the EPA's freedom of action.



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