PRE-ENFORCEMENT REVIEW OF ACOS—PERHAPS SOMETIMES

Environmental and Land Use Section

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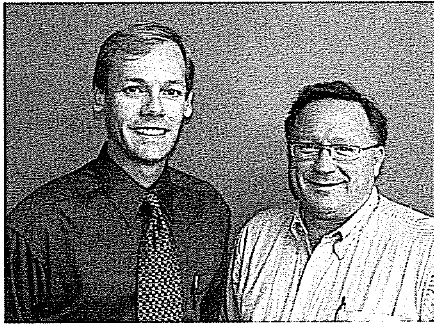

On June 11, 2011, the United States Supreme Court declined to hear a challenge to the prohibition on pre-enforcement judicial review of administrative compliance orders ("ACOs") issued under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" aka the Superfund program). In doing so, it held that the bar to pre-enforcement review of administrative orders does not violate due process protections guaranteed by the Fifth Amendment to the U.S. Constitution. Given the textually inclined nature of a potential majority of the justices, this comes as little surprise; to them, the words in § 113(h) of CERCLA—"No Federal court shall have jurisdiction ... to review any order issued under section [106(a)]" except in the circumstances set forth at § 13(h)(1)-(5)—no doubt spoke expressly and unambiguously.

As to other environmental statutes where the provisions addressing pre-enforcement judicial review are far less explicit, the outcome might be less certain. For example, the pre-enforcement review provision of the Clean Water Act ("CWA") will be reviewed by the Supreme Court next term, when it hears an appeal from the Ninth Circuit decision barring pre-enforcement judicial review of an ACO issued pursuant to the CWA. In *Sackett v. U.S. EPA,* 622 F.3d 1139 (9th Cir. 2010), involving the unpermitted discharge of "dredged or fill material" into jurisdictional wetlands, the Sacketts brought suit in the district court, challenging the ACO. In affirming the district court, the Ninth Circuit directly addressed whether the CWA precludes pre-enforcement judicial review of ACOs and concluded that, while generally judicial review of administrative actions is presumed, the presumption is lost where "congressional intent" to preclude such review is "fairly discernable in the statutory scheme," taking into account factors such as the statute's express language, structure, objectives, legislative history, and the nature of the administrative action itself.

Pre-enforcement judicial review of administrative compliance orders; not all environmental statutes are the same.

Acknowledging that the CWA does not expressly preclude pre-enforcement review, the Ninth Circuit, relying upon decisions from the Tenth, Sixth, Fourth and Seventh Circuits, nevertheless found that the CWA's structure, objectives and legislative history revealed a "congressional intent to preclude pre-enforcement judicial review of compliance orders." The Ninth Circuit also found no due process violations in precluding pre-enforcement review because post-enforcement review was available, the Sacketts could have sought a permit and adjudicated any denial of that permit, and any penalties would be court-imposed, not by EPA.

In their arguments to the Ninth Circuit, the Sacketts relied upon the decision in *TVA v. Whitman,* 336 F.3d 1236 (11th Cir. 2003), *cert. denied,* 541 U.S. 1030 (2004), where the Eleventh Circuit interpreted a similar ACO provision in the Clean Air Act as violating due process because of the "severe civil and criminal penalties" that could be imposed for violating the ACO without any meaningful pre-enforcement judicial review. Curiously, the Ninth Circuit ignored the Supreme Court's denial of certiorari in the *Whitman* case. We wait to see if the Supreme Court determines the matter based on textual differences in the statutes or upholds existing judicial precedents barring pre-enforcement review of ACOs under the CWA. Stay tuned.

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