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In *Sackett v. EPA*, the U.S. Supreme Court struck down the bar against pre-enforcement review under the Clean Water Act (CWA). Ever since the *Sackett* decision came down, many have wondered how much impact the case would have on EPA's enforcement of the CWA. The first answer to that question has come in the form of an opinion from Judge Preston Bailey, a U.S. District Court Judge in West Virginia, who recently found that airborne "manure, litter and dander" blown by henhouse ventilation systems and then carried into the Mudlick River as stormwater runoff was not subject to regulation under the Clean Water Act.

In *Alt v. EPA*, the court held that runoff contaminated with "incidental manure and litter are related to the raising of the poultry and are therefore related to agriculture." Since Congress has specifically exempted "agricultural stormwater" from the CWA's National Pollutant Discharge Elimination System (NPDES) permit requirement, the court held that there was no need to obtain an NPDES permit for the runoff.

The Impact of *Sackett* on EPA's Enforcement of the CWA

While Judge Bailey neither referred to nor relied on last year's Supreme Court decision in *Sackett*, the impact of the case was apparent from EPA's conduct in *Alt*. EPA initially commenced an enforcement action against Ms. Lois Alt in November 2011, demanding that she obtain an NPDES permit for the stormwater runoff from her farm and threatening "civil penalties of up to \$37,500 per day" and the possibility of criminal action. A year later, the Agency withdrew its enforcement action, but only after Ms. Alt had sued EPA, claiming that it lacked authority to require a permit for "agricultural stormwater." Ms. Alt was joined by the American Farm Bureau and the West Virginia Farm Bureau, both of which intervened and sought their own declaratory judgment that EPA could not regulate stormwater if the contaminants came from windblown or other incidental deposition of waste.

Based on the withdrawal of its enforcement action, EPA then moved to dismiss the declaratory judgment actions as moot. Judge Bailey denied EPA's motion, relying on the fact that EPA had not "withdrawn, rescinded, repudiated or otherwise altered its legal position." Judge Bailey felt compelled to dispose of the case, finding that "Plaintiffs' claims are not moot simply because the decision notices are withdrawn."

By refusing to allow EPA's dismissal of its enforcement action to moot the case, and then by ruling against EPA, Judge Bailey validated EPA's worst fears regarding the implications of *Sackett* – namely, that the Agency's use of administrative orders would trigger judicial review and rejection of its enforcement authority.

Details of the *Alt* Decision

In deciding the merits of the case, Judge Bailey relied on "two principles of statutory construction: plain English and common sense." Employing the time-honored judicial canon of "if it looks like a duck," Judge Bailey held that

"[c]ommon sense and plain English lead to the inescapable conclusion that Ms. Alt's poultry operation is 'agricultural' in nature and that precipitation-caused runoff from her farmyard is 'stormwater.'" Since the CWA requires NPDES permits for discharges "unless that discharge is an 'agricultural stormwater discharge,'" EPA had no authority to require an NPDES permit.

Judge Bailey's decision stands in contrast to an earlier decision from a North Carolina state court, which held that an egg-production facility could be required to obtain an NPDES permit, based on the fact that feathers and dust carrying ammonia nitrogen and fecal coliform expelled from henhouses by ventilation fans made the facility a point source. Because the North Carolina decision came from a state trial court and concerned a state environmental agency seeking a permit for discharge to state waters, it may not have as broad an application; however, the authority under which the permit was sought was still the federal CWA.

***Alt* Does Not Bar Regulation of All Airborne Contaminants under the CWA**

Since the decision in *Alt* is based on the exemption in the CWA for "agricultural stormwater," the ultimate impact of the case remains to be seen. The question of whether other airborne contaminants picked up by stormwater (e.g., mining waste or other airborne industrial emissions) has not been resolved and may be the subject of future litigation.

For more information on this case, contact Steve Jones in Holland & Hart's Salt Lake City office, or any other member of Holland & Hart's Environmental Compliance practice group.

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