



By Richard Lazarus

A Tale of Two Superfund Cases

Good news can be short-lived, as EPA learned this past June. The agency hardly had time to celebrate the Supreme Court's denial of the petition for a writ of certiorari in *General Electric v. Jackson*, a case EPA had good reason to worry the Court would hear, before the Court surprisingly granted review in *Sackett v. EPA*, a case that had largely escaped most Court watchers' radar screens.

The issue in *General Electric* was one that the business community had long sought to persuade the High Court to take up: whether the Comprehensive Environmental Response, Compensation, and Liability Act violates due process by barring pre-enforcement judicial review of EPA administrative orders to clean up releases of hazardous substances. The agency has for decades relied heavily on such administrative orders, precisely because of the absence of pre-enforcement judicial review, to strong arm potentially responsible parties to engage in cleanup activities and to settle cases. Indeed, CERCLA administrative orders have long served as the linchpin of EPA Superfund enforcement.

EPA had good reason to worry about the *GE* petition. Although the lower courts have uniformly rejected due process challenges to the nonreviewability of CERCLA administrative orders, the Supreme Court has not shied in the past from casting a more

skeptical eye. Most recently, in *Burlington Northern v. United States*, the Court in 2009 rejected the applicability of joint and several liability in a case presenting facts in which lower courts had routinely applied that standard.

The business community had also brought out its heavy hitters to press its case. Sidley & Austin had long championed the due process argument in the lower courts, and had frequently enlisted constitutional law scholar Laurence Tribe as its advocate. In petitioning the Supreme Court, Sidley's celebrated Supreme Court litigator Carter Phillips was joined by Kathleen Sullivan, former dean of Stanford Law School, now head of Quinn Emanuel's Supreme Court practice, and a Tribe protégée from her days as a student and faculty member at Harvard Law School. Sullivan was also on the winning side of the *Burlington Northern* case.

When the Court nonetheless denied review in *General Electric* in June 2010, EPA and Justice Department attorneys understandably assumed that the nonreviewability of EPA administrative orders would remain secure. But when, less than three weeks later, the Court granted review in *Sackett*, concerning the validity of nonreviewable administrative orders under the Clean Water Act, it seemed that *GE* may have instead whetted the Court's appetite.

The most revealing difference between the two cases, however, is not the most obvious one. The most obvious difference is that *Sackett* presents more compelling facts in support of the constitutional claim. *Sackett*, unlike *GE*, involves a real life "person" in the corporeal (rather than merely corporate) sense. *Sackett* also challenges an administrative order that compelled action in a factual context — the allegedly unlawful filling of a wetland in violation of the Clean Water Act — that four justices have already decried as raising fundamental unfairness concerns, the same number required to grant certio-

rari. Environmental lawyers may recall Justice Antonin Scalia's plurality opinion in *Rapanos v. United States*, emphasizing the plight of individual owners of wetlands subject to Section 404 of the CWA.

The far more revealing distinction is that CERCLA expressly bars pre-enforcement judicial review and the CWA does not. To be sure, the federal courts of appeals have uniformly construed the CWA's language to bar such review implicitly, which is why the petitioners in *Sackett* declined even to raise the statutory interpretation issue in the cert petition and raised only the due process challenge. But, in granting the petition, the Court added the statutory interpretation issue on its own initiative. To add a nonjurisdictional threshold issue, not raised by the parties, is a clear sign of where the Court may well be heading: a possible ruling in favor of the petitioners and against the government on the statutory interpretation issue without reaching the constitutional issue.

For conservative justices, avoiding reliance on substantive due process would also be attractive. Substantive due process smacks of the kind of judicial activism conservative jurists normally condemn. And,

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while a statutory ruling would not pertain to CERCLA, its practical effect on EPA's enforcement authorities in a host of other pollution contexts would nonetheless be significant.

Of course, what the justices are thinking when cert is granted is not necessarily what they are thinking after full briefing and oral argument. But the peculiar circumstances surrounding the grant in *Sackett* (which was scheduled for argument in early January) immediately following the denial in *GE* strongly suggest that EPA has some persuading to do.

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