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LITIGATION UPDATE

EPA's Administrative Compliance Orders Ruled Unconstitutional

By Mary Margaret McCleroy*

On June 24, 2003, the Eleventh Circuit Court of Appeals declared the Environmental Protection Agency's ("EPA") authority to issue legally binding administrative compliance orders ("ACOs") unconstitutional.¹ This decision could foreshadow a broader movement to weaken EPA's ability to enforce the broad range of environmental and public health statutes that it is responsible for implementing. While this decision undermines EPA's ability to enforce ACOs, it does not leave EPA completely helpless to enforce environmental laws.

When the EPA obtains information that an individual, business, or agency is violating a law, it has four options to enforce compliance.² First, the EPA can request the Attorney General to enforce a criminal prosecution.³ Second, the EPA can file suit in district court for injunctive relief to temporarily stop an action (or non-action) until a trial on the merits can be heard.⁴ Third, the EPA can adjudicate liability under the Administrative Procedures Act ("APA") and assess civil penalties against the violators.⁵ All of these actions are subject to judicial review and none of them are affected by the Eleventh Circuit's ruling.

The EPA's fourth option is to issue an ACO directing compliance.⁶ If the violator continues to ignore the law, then the EPA may assess fines and penalties against the violator.⁷ The Eleventh Circuit argues that ACOs are not a final agency action and are therefore not subject to judicial review.⁸ A violation of an ACO is its own violation, leading to fines and imprisonment.⁹ The Eleventh Circuit claims that ACOs, which in themselves have the status of law with their own civil fines and criminal penalties, are not subject to adjudication about any EPA violations, they therefore are unconstitutional.¹⁰ Because ACO receivers are not afforded an opportunity to represent themselves in a neutral tribunal, ACOs violate the violation of the Due Process Clause of the constitution.¹¹ Furthermore, because ACOs have the status of law and carry their own fines, civil penalties, and criminal punishment, ACOs furthermore violate the separation-of-power principal between the judicial branch and the executive branch in the EPA.¹²

Whether ACOs are truly unconstitutional is a subject for debate. In a separate case, the EPA filed a Supreme Court brief on July 16, 2003, in which the EPA claims that the Eleventh Circuit's reasoning for determining that ACOs are unconstitutional was flawed.¹³ First, the EPA claims that all

EPA orders, including ACOs, are subject to judicial review either on petition for review or in an action brought by the EPA to enforce the order in court.¹⁴ Secondly, the EPA claims that the Eleventh Circuit's understanding of the Due Process Clause was erroneous; the Due Process Clause does not require a formal evidentiary hearing in all circumstances.¹⁵

The Supreme Court will ultimately decide the constitutionality of EPA ACOs. However, even without ACOs the EPA still has three methods of enforcement at its disposal. The EPA will still be able to initiate criminal prosecutions, injunctive relief, assessment of liability, and civil penalties. If the Supreme Court deems that ACOs are unconstitutional, the EPA will expend more time, money, and court resources than would have been conserved during an informal ACO process. The absence of ACOs does not render the EPA defenseless or void; it still has the ultimate avenues of statutory enforcement available- the courts.

The Silvery Minnow: Rio Grande's Canary in the Coal Mine

In a highly anticipated ruling released on June 12, 2003, the 10th Circuit Court of Appeals in Denver, Colorado, upheld a New Mexico District Court's decision allowing the Bureau of Reclamation ("BOR") to release water from dams along the Middle Rio Grande River to preserve the endangered silvery minnow.¹ This case has become a "show-down in the West" between man's need for water versus animals', in this case a protected species under the Endangered Species Act ("ESA").² It set legal precedents for water rights in New Mexico and other arid areas of the United States and may have saved the endangered silvery minnow from extinction.³

The controversy at issue arose from two acts of Congress: The Sam Juan-Chama Project ("SJCP") and the Middle Rio Grande Project ("MRGP").⁴ The SJCP authorized the Secretary of the Interior, acting on behalf of the Bureau of Reclamation, to enter into a contract with the City of Albuquerque to furnish water for municipal, domestic, and industrial uses for which the city would pay the costs for constructing the Heron Dam, the enlargement of the El Vado Dam, and general water use for the city.⁵ The United States agreed to construct, operate, and maintain the MRGP Project works in exchange for their repayment of construction and maintenance costs.⁶ Both of these contracts ensure perpetual water deliveries to the city of Albuquerque, New Mexico, whose underground aquifer continues to shrink as its desert population

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continues to grow at unprecedented rates.⁷

The silvery minnow was listed as an endangered species in 1994.⁸ This once prosperous species, one of the last five native species left in the river, now occupies less than 5% of its historic range.⁹ The 10th Circuit Court of Appeals quoted Aletta Belin, attorney for Plaintiffs-Appellees, that the silvery minnow is the Rio Grande's equivalent of a canary in a coal mine; in effect, the silvery minnow is the litmus test for the health of the Rio Grande ecosystem.¹⁰

The main issue before the Court of Appeals was whether the BOR had the ability to negotiate the amount of water it supplies to New Mexico by complying with the ESA in releasing more water for the Rio Grande, the designated critical habitat for the silvery minnow.¹¹ The BOR maintained that because their contracts were enacted before 1973 and contain no express clause that permits the BOR to reduce deliveries of project water below their fixed amounts that they were unable to comply with the ESA.¹² BOR cited *Sierra Club v. Babbitt* to support this argument, which holds that Congress did not intend for section 7 of the ESA to apply to an agreement finalized before passage of the ESA where the federal agency lacks the discretion to influence private activity for the benefit of the protected species.¹³

The Court of Appeals distinguished the case from *Sierra Club* based on several distinctive clauses contained in the BOR contracts.¹⁴ BOR limited its liability in case of drought "or other causes" which might affect "the quantity of water available from the reservoir storage complex."¹⁵ The contract further recognizes that if the actual water supply is less than normal yield, that the non-federal parties will share what water is available.¹⁶ Therefore, the Court of Appeals held that the BOR retained discretion to determine the amount of available water that would be made, including diverting water in times of scarcity to protect the habitat of an endangered species.¹⁷

By affirming, the Court of Appeals also upheld and affirmed the landmark 1978 decision of *TV/A v. Hill*, placing endangered species at the highest level of priorities in our country. *TV/A v. Hill* prioritized the continued existence of the endangered snail darter above the economic benefits of a nearly-completed dam. The 10th Circuit Court of Appeals decision in this case sends a strong message to the United States to conserve and use our water and other natural resources in sustainable ways.

However, recent legislation proposed by Senator Pete Domenici (NM), may thwart any chances of survival that the silvery minnow won by its victory in court. Public opinion after the 10th Circuit's ruling coupled with an unprecedented drought in New Mexico prompted Senator Domenici to submit his bill as "an effort to stop any radical interpretation of the ESA on the Rio Grande," by mandating that the SJCP and the MRGP water contracts supercede the ESA.¹⁸ Although some environmentalists think that the Bush administration will encourage this bill, others feel that Domenici's bill is an

exaggerated and emotional reaction to the current conditions in New Mexico.¹⁹

If Domenici's bill passes, it could, in one fatal blow, effectively render the ESA moot after a thirty-year history of protecting and promoting endangered and threatened species. The destiny of the Rio Grande silvery minnow is not solely about the survival of one species of fish, but the larger problems our world is only beginning to face: overpopulation, scarce natural resources, urban sprawl, and sustainable development.

(EPA ACO Endnotes)

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¹ *TV/A v. Whitman*, 2003 U.S. App. LEXIS 12830, at *2 (11th Cir. June 24, 2003).

² *Id.* at *6.

³ Clean Air Act, 42 U.S.C. § 7413 (a)(3)(D), (c) (2003).

⁴ 42 U.S.C. § 7413 (b).

⁵ 42 U.S.C. § 7413 (d).

⁶ 42 U.S.C. § 7413 (a)(3)(B).

⁷ 42 U.S.C. § 7413 (a)(1).

⁸ *TV/A*, 2003 U.S. App. LEXIS 12830, at *8.

⁹ 42 U.S.C. § 7413 (d).

¹⁰ *TV/A*, 2003 U.S. App. LEXIS 12830, at *9, *10.

¹¹ *See Id.*

¹² 42 U.S.C. § 7413 (c)(1), (d); *TV/A*, 2003 U.S. App. LEXIS 12830 *10.

¹³ Respondent's Brief for the EPA at *12, *Alaska Dep't of Env't Conservation v. EPA* (No. 02-658).

¹⁴ Respondent's Brief at *19, *Alaska Dep't of Env't Conservation* (No. 02-658).

¹⁵ *See Id.*

(Silvery Minnow Endnotes)

¹ *Rio Grande Silvery Minnow v. Keys*, D.C. No. CIV-99-1320 JP/RLP, 2003 U.S. App. LEXIS 11672, at *5-6 (10th Cir. N.M. June 12, 2003).

² *See* Douglas Jehl, *Take City's Water or Let Minnow Die*, N.Y. Times, Jan. 19, 2003, at A1 (This case poses the most direct confrontation yet between the ESA...and the waters rights held by cities like Albuquerque in Western states where water is becoming increasingly scarce...).

³ Kate Nash, *City, Fish See Fates in Court*, Albuquerque Tribune, Jan. 13, 2003, available at: http://www.abqtrib.com/archives/news03/011303_news_fish.shtml.

⁴ *Rio Grande Silvery Minnow*, 2003 U.S. App. LEXIS 11672, at *31.

⁵ Colorado River Storage Project Act, 43 U.S.C. § 620 (2003).

⁶ Flood Control Acts of 1948 and 1950, 33 U.S.C. §§ 701(s), 701(f)-(2) (2003).

⁷ *See Rio Grande Silvery Minnow*, 2003 U.S. App. LEXIS 11672, at *31.

⁸ 50 C.F.R. § 17.11 (1999).

⁹ *Appellate Court Affirms Bureau of Reclamation's Responsibility to Conserve Rio Grande Ecosystem*, available at: <http://www.fguardians.org/news/pr030612.html>.

¹⁰ *See Id.*

¹¹ 50 C.F.R. 17.11; *See Rio Grande Silvery Minnow*, 2003 U.S. App. LEXIS 11672, at *5.

¹² *See Rio Grande Silvery Minnow*, 2003 U.S. App. LEXIS 11672, at *48-50.

¹³ *Id.*

¹⁴ *See Id.* at *55.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Thomas Hargrove, *Domenici Move in Minnow Case a Credible Threat to Endangered Species Act*, *Environm. Say*, ALBUQUERQUE TRIBUNE, June 20, 2003, available at: http://www.abqtrib.com/archives/news03/062103_news_minnow.shtml.

¹⁹ *See Id.*