Sacketts Win Right to Pre-Enforcement Review: A Victory for "Ordinary Americans"

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The Supreme Court in March 2012 issued its long-awaited decision in *Sackett v. EPA*, 132 S. Ct. 1367 (2012), a case in which "ordinary Americans" were left "entirely at the mercy" of EPA, according to Justice Alito. In a 9–0 smackdown decision, the Court held that the Sacketts may bring a civil action under the Administrative Procedure Act (APA) to challenge an EPA compliance order.

In his opinion for the Court, Justice Scalia had little difficulty in disposing of the government's argument that the Clean Water Act should be read as precluding judicial review under the APA, 5 U.S.C. § 701(a)(1). The APA creates a presumption favoring judicial review of administrative action, and the Court concluded that nothing in the Clean Water Act's statutory scheme precludes APA review. The Court rejected the government's argument that EPA is less likely to use orders if they are subject to judicial review, saying that "[t]he APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all." 132 S. Ct. at 1374.

EPA has now formally acknowledged that the *Sackett* decision applies to other environmental regulatory programs. It will be important to see what changes are made to EPA's practice and procedure for issuing orders and warnings, and how the courts react to lawsuits challenging EPA orders.

Mr. and Mrs. Sackett purchased a 0.63-acre lot in Priest Lake, Idaho, in 2005, to build a new home. The lot was in a residential area, and the Sacketts obtained the necessary local building permits. Early in 2007, rock and gravel were placed on the property to prepare for laying the foundation of the home. In November 2007, EPA issued a Clean Water Act compliance order to the Sacketts. The order stated that the Sacketts had unlawfully filled in wetlands and ordered the Sacketts to remove the dirt and gravel and return the property to its prior wetlands condition. The order also stated that failure to comply was punishable by civil fines of up to $32,500 per day.

The EPA order placed the Sacketts in a bind. If they violated the order, they would be exposed to civil penalties. On the other hand, if they complied, they would be spending money to comply with an order that they apparently believed was invalid. The Sacketts responded to the order by requesting an administrative hearing, a request that was denied by EPA. Thereafter, the Sacketts filed a lawsuit in federal district court in Idaho to challenge the compliance order. The Sacketts' complaint alleged that the EPA order was arbitrary and capricious under the APA and that the order violated the due process clause of the Constitution. EPA filed a motion to dismiss the Sacketts' lawsuit, arguing that the Clean Water Act precluded pre-enforcement review of EPA compliance orders. EPA argued that such preclusion could be inferred from the statutory scheme because Congress gave EPA discretion to choose among several enforcement options. The district court agreed with EPA's argument that the compliance order is not subject to judicial review and granted EPA's motion to dismiss the Sackett's lawsuit.

The Sacketts appealed to the Ninth Circuit, which affirmed the decision below. The Ninth Circuit's opinion states that although the Clean Water Act does not expressly preclude judicial review, every circuit that has addressed this issue has held that the Clean Water Act "impliedly precludes judicial" review of compliance orders "until the EPA brings an enforcement action in federal district court." 622 F.3d 1139, 1147. The court found it "fairly discernible" from the statutory scheme that Congress intended to preclude pre-enforcement judicial review of EPA compliance orders. *Id.* at 1144. The Ninth Circuit rejected the Sacketts' due process claim, reasoning that the Sacketts could challenge the order if and when EPA brought a civil lawsuit to enforce the order and thus the Sacketts were not foreclosed of all access to the courts.

The Sacketts thereupon submitted a petition for writ of certiorari to the Supreme Court, reiterating their argument that compliance orders may be reviewed under the APA. In June 2011, the Supreme Court granted the petition for review, describing the questions presented as follows: whether the Sacketts may obtain judicial review of the compliance order under the APA, and whether the Sacketts' due process rights would be violated in the absence of a hearing. 131 S. Ct. 3092 (2011).

Oral Argument

Oral argument did not bode well for EPA's position. Several Justices expressed concern that a homeowner facing such an EPA order might be exposed to doubled penalties of as much as $75,000 for each day of violation, because EPA could seek penalties for the underlying violation of the Clean Water Act as well as for violation of the EPA order. Deputy Solicitor General Malcolm Stewart said that while the government had not adopted a policy to rule it out, he was not aware that EPA had ever sought double penalties. Justice Scalia remarked "I'm not going to bet my house on that." Transcript of Oral

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Argument at 31, available at: ww.supremecourt.gov/oral_arguments/argument_transcripts/10-1062.pdf. Stewart offered that the Sacketts had not even been aware of the double penalty prospect before reading the government's brief, to which Justice Anthony M. Kennedy rejoined: "They were getting a good night's sleep . . . before they read your brief?" *Id.*

There is no reason to think the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into voluntary compliance without the opportunity for judicial review.

Stewart noted that the Sacketts could inform EPA if they thought some of EPA's demands were "infeasible." Justice Scalia rejoined: "That's very nice, when you have received something called a compliance order, which says . . . you're subject to penalties of 32.5 [thousand dollars] for every day of violations." Justice Scalia stated flatly that the agency had been "high-handed" demanding things of the Sacketts that simply were not required by the law. *Id.* at 35.

Perhaps the most telling comment was offered by Justice Alito, who posed the dilemma of a person who is advised by EPA that he had wetlands, that every day "you're accumulating a potential fine of $75,000" and "by the way, there's no way you can go to court to challenge our determination that this is a wetlands until such time as we chose to sue you." *Id.* at 38. Concluding, Justice Alito stated: "Mr. Stewart, if you related the facts of this case as they come to us to an ordinary homeowner, don't you think most ordinary homeowners would say this kind of thing can't happen in the United States?" *Id.* at 37.

I suspect that most lawyers who were present at, or read the transcript of, oral argument were not optimistic that the government would prevail.

The Court's Decision

The Supreme Court's unanimous opinion issued on March 21, 2012, written by Justice Scalia, concludes that EPA's compliance order has all the hallmarks of finality under 5 U.S.C. § 704: it required the Sacketts to restore their property according to an agency-approved plan, exposed the Sacketts to double penalties (for violating both the Clean Water Act and the EPA order) in a future enforcement proceeding, and severely limited their ability to obtain a Section 404 permit from the U.S. Army Corps of Engineers (Corps). *See* 33 U.S.C. § 1344; 33 CFR § 326.3(e)(1)(iv) (the Corps will not process a permit application, once EPA has issued a compliance order regarding a property, unless doing so is "clearly appropriate"). The Court emphasized that although a portion of the order invited the Sacketts to engage in informal discussions with EPA, it "confers no entitlement to further agency review," and "does not suffice to make an otherwise final agency action nonfinal." 132 S. Ct. 1367, 1372.

The Court was similarly not persuaded that the issuance of a compliance order is simply a step in the deliberative process. As Justice Scalia stated:

> it is hard for the Government to defend its claim that the issuance of the compliance order was just "a step in the deliberative process" when the agency rejected the Sacketts' attempt to obtain a hearing and when the next step will either be taken by the Sacketts (if they comply with the order) or will involve judicial, not administrative, deliberation (if the EPA brings an enforcement action).

Id. at 1373.

The Court had little difficulty in disposing of the government's argument that the Clean Water Act should be read as precluding judicial review under the APA, 5 U.S.C. § 701(a)(1). The APA creates a presumption favoring judicial review of administrative action, and the Court concluded that nothing in the Clean Water Act's statutory scheme precludes APA review. The Court rejected EPA's argument that the order lacked finality because it invited further "informal" discussion with EPA, noting that the order has legal consequences. 132 S. Ct. at 1372.

The Court rejected EPA's argument that the Sacketts have adequate options for judicial review because they can be fined only after EPA files a civil action, which will afford the Sacketts the opportunity for judicial review. That avenue left the Sacketts exposed to large penalties while waiting for an opportunity to challenge EPA's order.

The Court similarly rejected the notion that the Sacketts should have submitted a wetlands fill permit application to the Corps and then filed suit if the Corps denied the permit, stating: "The remedy for denial of action that might be sought from one agency does not ordinarily provide an 'adequate remedy' for action already taken by another agency." *Id.* at 1372.

Nor was the Court impressed by EPA's claim that judicial review of compliance orders would make EPA enforcement less efficient, stating:

> Finally, the Government notes that Congress passed the Clean Water Act in large part to respond to the inefficiency of then-existing remedies for water pollution. Compliance orders, as noted above, can obtain quick remediation through voluntary compliance. The Government warns that the EPA is less likely to use the orders if they are subject to judicial review. That may be true—but it will be true for all agency actions subjected to judicial review. The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all.

Id. at 1374.

Justice Scalia's opinion concludes that "there is no reason to think the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary

compliance' without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction." *Id.*

The Court in *Sackett* stressed that it was not deciding whether the Sacketts will prevail on the merits, but only that they had a right to file a lawsuit to challenge the EPA's order. And although some have wondered why the government did not try to settle this David versus Goliath case, the NRDC amicus brief suggests that similar questions could be asked of the Sacketts. According to NRDC's amicus brief, after EPA informally advised the Sacketts that they might be filling wetlands, the Sacketts hired a wetlands scientist who advised the Sacketts that their land was a wetland. Despite the advice of their wetlands scientist, according to NRDC's brief, the Sacketts asked EPA for a formal hearing to challenge EPA's finding that the property was a wetland. At this point, all that can be said is that facts and circumstances, not in the record and thus not considered by the Supreme Court, may inform the decision on remand.

In a brief concurring opinion, Justice Ginsburg agreed with the holding that the Sacketts may litigate their jurisdictional challenge in court, but joined with the understanding that the Court's opinion did not address the question of whether the Sacketts could also challenge the terms and conditions of the EPA order at the pre-enforcement stage. If Justice Ginsburg intended to suggest that the terms and conditions of an order could not be challenged prior to enforcement, that would create a seemingly anomalous bifurcation of review: a party who believed that the terms and conditions of an order were arbitrary and unlawful could challenge the agency's jurisdictional determination but would still face penalties for non-compliance without the opportunity for judicial review of the terms of the order. If the order is final agency action under the APA for purpose of reviewing the jurisdictional determination, why would it not also be final for the purpose of judicial review of the terms of the order?

The *Sackett* opinion also contains some commentary on the state of the law regarding EPA's jurisdiction. Justice Scalia's opinion, explaining "what all the fuss is about," notes that in *Rapanos v. United States*, 547 U.S. 715 (2006), the Court ruled that a wetland not adjacent to navigable-in-fact waters was not within the scope of the act, but "no one rationale commanded a majority of the Court." 132 S. Ct. at 1370. Foreshadowing the problems that would ensue, Chief Justice Roberts wrote a concurring opinion in *Rapanos* expressing concern that interested parties would lack guidance on how to read Congress' limits, suggesting that the agencies should issue regulations interpreting the scope of their Clean Water Act authority.

The lack of clear guidance on the scope of the Clean Water Act was the focus of Justice Alito's concurring opinion in *Sackett*. Citing a brief filed by the Competitive Enterprise Institute, Justice Alito notes that for forty years Congress has not resolved this ambiguity, and EPA has not seen fit to promulgate a rule providing a clear and sufficiently limited definition, leaving determinations concerning wetlands to be made on a case-by-case basis by EPA field staff. His opinion states that the combination of the "uncertain reach" of the Clean Water Act and the "draconian penalties" imposed leaves most property owners with "little practical alternative but to dance to the EPA's tune." Justice Alito states that, in "a nation that values due process, not to mention private property, such treatment is unthinkable." 132 S. Ct. at 1375. Allowing property owners to sue under the APA is "better than nothing," he concludes, but "only clarification of the reach of the Clean Water Act can rectify the underlying problem." *Id.* at 1376. As this article went to press, it was reported that EPA and the Corps had prepared a draft proposed rule defining the scope of federal Clean Water Act jurisdiction and submitted the draft for Office of Management and Budget review. If past is prologue, that rule will engender more controversy.

Application to Other Statutes

When the *Sackett* case was decided by the Supreme Court, an unresolved issue was the extent to which the decision would make pre-enforcement review available for EPA orders under other regulatory programs. Environmental groups may have hoped that the opinion would be applied only to the Clean Water Act. However, the Supreme Court relied on the APA's presumption of review, which one would expect to apply equally to other environmental statutes that do not expressly preclude judicial review.

EPA has now acknowledged that, as a result of the *Sackett* decision, pre-enforcement review is available for orders issued under other programs. In a memorandum dated March 21, 2013 (available at www2.epa.gov/sites/production/files/documents/languagerarding-sackett032113.pdf), EPA's Office of Enforcement and Compliance Assurance has concluded that it is important to advise recipients of EPA unilateral orders under other programs of their opportunity to seek pre-enforcement judicial review of such orders.

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In particular, EPA has directed enforcement staff to immediately begin adding the following language to typical unilateral orders under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), the Clean Air Act (CAA), the Safe Drinking Water Act (SDWA) and the Emergency Planning and Community Right-To-Know Act (EPCRA):

> Respondent may seek federal judicial review of the Order pursuant to [insert applicable statutory provision providing for judicial review of final agency action.]

The foregoing language applies, *inter alia*, to stop sale, use, or removal orders under FIFRA section 13; stop work or compliance orders under CAA sections 113(a) and 167; compliance orders or emergency orders under SDWA sections 1414 and 1431; and administrative compliance orders under EPCRA section 325(a).

With respect to compliance and corrective action orders under the Resource Conservation and Recovery Act (RCRA) sections 3008(a), 3008(h), 9003(h), and 9006(a), EPA's

Memorandum directs enforcement staff to include language advising respondents that they may seek administrative review in accordance with 40 CFR Part 22 or 24, as applicable.

EPA believes that the reasoning in *Sackett* does not warrant similar language for unilateral orders issued under statutory authorities other than those discussed in the Memorandum.

Since the Supreme Court's decision in *Sackett*, there have been relatively few decisions addressing the issue of pre-enforcement review. In *United States v. Range Resources Corp.*, 793 F. Supp. 2d 814 (N.D. Tex. 2011), EPA sought injunctive relief and penalties for violating an administrative order relating to contamination of water wells. EPA took the position that it need plead and prove only that Range violated the order. Meanwhile, in the Fifth Circuit, Range challenged the constitutionality of EPA's position that Range could not challenge EPA's findings. The district court stayed the litigation pending the Fifth Circuit's review of EPA's order. Shortly after the *Sackett* decision was rendered, EPA withdrew the Range Resources order and stipulated to dismiss the enforcement action.

In *Hardesty v. Sacramento Metropolitan Air Quality Management District*, 2012 WL 1131387 (E.D. Cal. 2012), a mine operator sued federal and state officials, including the Corps, alleging Fifth Amendment due process violations stemming from warrantless inspections that concluded with a cease and desist order by the Corps. Applying the reasoning of *Sackett*, the district court rejected the government's argument that judicial review was precluded by the availability of the Clean Water Act section 404 permitting process.

Even EPA's withdrawal of a compliance order might not be sufficient to prevent pre-enforcement review. In *Alt v. EPA*, 2013 WL 5744778 (N.D.W. Va. No. 2:12–CV–42, Oct. 23, 2013), EPA issued an enforcement order against a poultry farm on the grounds that the farm failed to obtain a Clean Water Act permit for its storm water discharges. The owner of the poultry farm filed suit in U.S. district court in West Virginia challenging the EPA order. Subsequent to the Supreme Court's decision in the *Sackett* case, EPA withdrew the order and filed a motion to dismiss the pre-enforcement lawsuit as moot. *Id.* at *3, 6–8. The district court denied the motion on the ground that EPA had not changed its underlying position concerning whether the discharges constitute exempt agricultural storm water exempt from permit requirements, noting that EPA reserved the possibility of reissuing the order if there was a significant change in the poultry farm's operations. *Id.* at *5, 7. The court then reached the merits and held that that no permit was required because the discharges were exempt agricultural wastes. *Id.* at *13.

EPA's March 21, 2013, Memorandum states that EPA believes that the reasoning in *Sackett* does not warrant similar language for unilateral orders issued under statutory authorities other than those discussed in the Memorandum. Noticeably absent from the EPA Memorandum is any reference to unilateral administrative orders (UAOs) under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). EPA presumably reasons that CERCLA is different because the provisions in section 113(h), as interpreted by the courts, expressly deprive the courts of jurisdiction to review challenges to removal or remedial actions selected or orders issued under section 106 of CERCLA, unless one of the statutory exceptions applies.

That leaves the question whether judicial review of UAOs issued under CERCLA is nonetheless required by constitutional due process. The constitutional argument was raised by General Electric in two rounds of proceedings before a district court and the D.C. Circuit. After the district court ruled for EPA a second time, finding no violation of due process, the D.C. Circuit affirmed. *General Electric v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010). The Supreme Court denied General Electric's petition for certiorari without opinion on June 6, 2011 (131 S. Ct. 3092). Two months later, the Supreme Court granted certiorari in *Sackett*. 131 S. Ct. at 3092. In addition to the APA argument, the Sacketts claimed that pre-enforcement review was required by due process. However, the Supreme Court did not need to address the constitutional issue in *Sackett*, because it ruled in the Sacketts' favor on APA grounds. Whether due process requires pre-enforcement review of UAO orders under CERCLA thus is undecided by the Supreme Court. It remains to be seen whether the Supreme Court will agree to decide this issue in the future.

Application to Decisions Other Than Compliance Orders

Does *Sackett* apply to actions other than compliance orders? In *Furie Operating Alaska LLC v. U.S. Department of Homeland Security*, 2013 WL 1628639 (D. Alaska No. 3:12-CV-00158 JWS, Apr. 15, 2013), a district court in Alaska denied the government's motion to dismiss a challenge to a $15 million penalty imposed under federal maritime law. Relying on *Sackett*, the court held that plaintiff may obtain pre-enforcement review and rejected the department's argument that the penalty was not final agency action because a judicial enforcement proceeding had not been instituted.

However, courts have been less receptive to attempts to challenge agency actions that do not constitute compliance orders or penalty assessments. A district court in Minnesota dismissed a suit challenging an agency determination that a water body is subject to Clean Water Act jurisdiction. The court reasoned that "the Corps' jurisdictional determination clarifies a plaintiff's position but does not alter it." *Hawkes Co. v. U.S. Army Corps of Engineers*, 2013 WL 3974484 at *4 (D. Minn. No. 13-107 ADM/TNL, Aug. 1, 2013), appeal docketed, No. 13-3067 (8th Cir. Sept. 19, 2013). This decision is on appeal to the Eighth Circuit. A district court in Louisiana dismissed a similar suit in *Belle Co., LLC v. U.S. Army Corps of Engineers*, 2013 WL 773730 (M.D. La. No. 12-247-BAJ-SCR, 2013), appeal docketed, No. 13-30262 (5th Cir. Mar. 15, 2013). This decision is on appeal to the Fifth Circuit. The argument made by appellants and amici is that a jurisdictional determination

compelled Belle to seek a section 404 permit from the Corps, and thus the Corps' action was final and reviewable. The district court decisions in *Hawkes* and *Belle* are consistent with an earlier Ninth Circuit opinion that jurisdictional determinations are not final actions subject to judicial review. *Fairbanks N. Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586 (9th Cir. 2008). On appeal, the Fifth and Eighth Circuits, and other courts, will be asked to decide the question whether the *Sackett* decision compels a different result.

Impact of the Sackett *Decision*

The *Sackett* decision has been trumpeted as a victory for the individual being squeezed by the bureaucracy. Justice Alito described the case as "the property rights of ordinary Americans entirely at the mercy of Environmental Protection Agency . . . employees." He emphasized that "[i]n a nation that values due process, not to mention private property," the treatment the Sacketts received, exposed to accumulating fines until EPA decides to sue them, "is unthinkable." *Id.* at 1375.

However, the Court's decision did not give the Sacketts a green light to build their home, because the Court did not resolve the underlying issue of whether EPA's compliance order was valid. Instead, the decision left the Sacketts with the opportunity to pursue their lawsuit and to argue that their property is not a wetland subject to the Clean Water Act and/or that EPA's order was otherwise arbitrary and unlawful.

Environmental groups may have been relieved that the Court did not address the question whether preclusion of judicial review would violate the due process clause. That was not surprising, because the Supreme Court had previously denied certiorari in the *General Electric* case, as noted above, which expressly raised the due process issue under CERCLA.

However, the *Sackett* case was based on a broad reading of the APA, and EPA has since acknowledged that *Sackett* applies to compliance orders issued under a number of statutes and programs. It will be important to see whether, as a consequence, EPA will issue fewer compliance orders and instead will take actions not subject to judicial review, such as issuing warning letters or notices of violation that have a similar coercive or deterrent effect. The U.S. Fish and Wildlife Service, for example, frequently issues warning letters alleging noncompliance with the Endangered Species Act. Some of the early decisions, post-*Sackett*, suggest that the courts may not be receptive to the argument that such agency warning should be considered final agency action that may be challenged in pre-enforcement lawsuits.

The *Sackett* decision also provides an incentive for EPA to base its decisions on a solid record and careful analysis, in light of the prospect that the agency's decisions may be challenged in court. Citizens who believe they are being "strong-armed" by the government may seek pre-enforcement review of an EPA compliance order. Faced with such an order, individuals and companies can challenge a final enforcement order under the APA after they receive the order and need not wait until EPA decides to sue, all the while accumulating potential penalties. Although the decision has been hailed as a "David versus Goliath" victory, it obviously has application to both ordinary individuals and large companies subject to orders they dispute.

Finally, although the *Sackett* decision provides a path for pre-enforcement review, the practical difficulty is that the reach of the Clean Water Act remains unclear, leaving affected parties and the courts with less than desirable guidance to resolve disputes. As noted by Justice Alito in *Sackett*, it would be helpful, in this regard, if Congress clarified the reach of the Clean Water Act, so that there is more certainty and less room for dispute in individual cases.