
ENVIRONMENTAL LAW & PROPERTY RIGHTS

SACKETT V. ENVIRONMENTAL PROTECTION AGENCY

COMPLIANCE ORDERS AND THE RIGHT OF JUDICIAL REVIEW¹

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The United States Supreme Court's decision in *Sackett v. Environmental Protection Agency* promises to be important for practitioners and members of the public who must deal with the Clean Water Act,² the scope of which, according to Justice Samuel Alito, "is notoriously unclear."³ The decision may also affect other federal statutes and administrative law generally. This short essay sets forth a synopsis of the case, the Court's opinions, and the decision's possible impacts.

I. Background Facts

In 2005, Mike and Chantell Sackett purchased a 0.63-acre lot within an existing residential subdivision in Priest Lake, Idaho. The Sacketts obtained all local building permits. In the spring of 2007, the Sacketts' employees began home construction by placing rock and gravel on the site to prepare for the home's foundation. A few days later, agents from the Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers entered the property and verbally ordered the Sacketts' employees to stop work. The agents stated that the lot contained wetlands protected under the Clean Water Act.

Shortly after the agents' visit, the Corps provided the Sacketts an after-the-fact wetlands fill permit application. The Sacketts were concerned, however, with submitting the application, because it required that they first concede that the Clean Water Act applied to their property. Over the course of the summer and fall of 2007, the Sacketts contacted EPA several times to request some written justification for the agency's verbal stop-work order. EPA reciprocated in November 2007, when it issued the Sacketts a compliance order under the Clean Water Act. Pursuant to that Act, EPA may issue a compliance order whenever, "on the basis of any information available," the agency believes that certain enumerated provisions of the Act have been violated.⁴ In the Sacketts' case, EPA charged the couple with having illegally filled in wetlands on their property without a permit. After a number of amendments, the order directed the Sacketts to remove the dirt and gravel that they had placed on the site, return the property to its alleged pre-disturbance wetlands status, and give EPA agents open access to the site and the Sacketts' business records to ensure that the compliance order would be carried out. The order also threatened the Sacketts with civil fines of up to \$32,500 per day if the Sacketts did not immediately comply.⁵

The Sacketts next requested an administrative hearing with EPA, which the agency denied. At that point, the Sacketts turned to the courts, filing a lawsuit in federal district court in Idaho to challenge the compliance order under the Administrative Procedure Act ("APA")⁶ and the Fifth

Amendment's Due Process Clause. The Sacketts' complaint advanced three claims. The first contended that the compliance order was arbitrary and capricious and therefore null and void under the APA. The second and third claims asserted that the compliance order deprived the Sacketts of liberty and property without due process of law.

Shortly after the complaint's filing, EPA moved to dismiss on the ground that a compliance order is not the type of agency action subject to judicial review. The district court agreed and dismissed the lawsuit.⁷ On appeal, the Ninth Circuit Court of Appeals affirmed. The court concluded that Congress did not want compliance orders to be judicially reviewable.⁸ The court reached that conclusion based on several factors, principally the statute's enforcement scheme and legislative history. By holding that the Sacketts could not seek review under the APA, the court was forced to address the Sacketts' constitutional argument that such preclusion would violate their due process rights. The Ninth Circuit concluded that there was no due process violation. To begin with, the Sacketts could not be subject to any sanction from EPA unless and until EPA decided to enforce the compliance order by bringing a civil action in federal court. At that point, the Sacketts would be offered plenary review of the compliance order as defendants.⁹ Moreover, the Sacketts could have avoided enforcement altogether by first seeking a wetlands fill permit from the Corps. If the Corps denied that permit, the Sacketts could sue in federal court and raise their jurisdictional claims.¹⁰

After an unsuccessful attempt to seek rehearing en banc, the Sacketts submitted a petition for writ of certiorari to the Supreme Court. The Sacketts' cert petition asked the Court to take up the case to answer the question whether the APA allows for judicial review of compliance orders. The Sacketts also requested that the Court address a circuit split between the Ninth and Eleventh Circuits. The Sacketts' petition pointed out that the Eleventh Circuit had held that Clean Air Act compliance orders are merely warning letters that have no legal impact,¹¹ whereas the Ninth Circuit had held that Clean Water Act compliance orders impose liability.¹²

The Supreme Court granted review in June 2011. The Court chose to rewrite the questions presented. The first question presented was whether the Sacketts may obtain judicial review of the compliance order under the APA. The second question presented was whether the Sacketts' due process rights would be violated if they were denied a hearing under the APA.

III. The Decision

The Court issued its decision on March 21, 2012. Justice Scalia delivered the opinion for a unanimous Court. Justices Ginsburg and Alito wrote concurrences.

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A. *The Unanimous Opinion of the Court*

Justice Scalia's majority opinion begins with a brief recitation of the facts and law, while also noting that the Court would not address the merits of the Sacketts' challenge to the compliance order.¹³ The opinion does, however, go over the Court's recent case law concerning the scope of EPA's and the Corps' authority under the Clean Water Act. It notes that in *Rapanos v. United States*¹⁴—the most recent case in which the Court addressed this issue—the Chief Justice wrote a concurrence strongly suggesting to the agencies that they issue new regulations interpreting the scope of their Clean Water Act authority.¹⁵ Several years have passed since *Rapanos* was decided, and no new regulations have been finalized. The Sacketts' struggles highlight the import of the agencies' decision not to adopt such regulations.

Following this short introduction, Justice Scalia's majority opinion moves on to address EPA's arguments as to why the Sacketts should not be able to challenge their compliance order under the APA. These arguments were, first, that the compliance order is not a "final agency action";¹⁶ second, that the Sacketts already have opportunities for meaningful judicial review under the Clean Water Act;¹⁷ and third, that Congress affirmatively precluded judicial review under the APA in enacting the Clean Water Act.¹⁸

1. Is the Compliance Order a Final Agency Action?

A condition to judicial review under the APA is that the agency action in question be "final." The Supreme Court has established a two-part test for determining finality. First, is the action the consummation of the agency's decision-making process? Second, does the action have legal effects? Accordingly, in arguing against finality, EPA contended that a compliance order is not "final" because it does not represent the end of the agency's enforcement decision-making. To support that contention, EPA relied on the compliance order's terms, which invite the Sacketts to discuss the order with EPA if the Sacketts disputed any of the order's components.

Also to undercut finality, EPA asserted that a compliance order has no significant real-world impact. A compliance order does not create any legal obligations above and beyond what a regulated party must abide by in the Clean Water Act. Although a compliance order does impose liability, EPA dismissed that legal impact on the ground that, generally speaking, the liability of a regulated party under a compliance order will not exceed the liability that the landowner would have incurred directly under the statute if the compliance order had never been issued. Last, EPA asserted that even with a compliance order outstanding, its recipient could still apply to the Corps for an after-the-fact permit.

The majority opinion rejects these arguments, noting that the Sacketts' compliance order "has all the hallmarks of APA finality that our opinions establish."¹⁹ The order is the end of the administrative process, a conclusion buttressed by the fact that EPA denied the Sacketts an administrative hearing. Simply because the order invites further "informal" discussion between the Sacketts and the agency does not undercut the order's finality.²⁰ Further, the order has several legal consequences. It

requires the Sacketts to restore their property to its alleged pre-disturbance wetlands status, an obligation nowhere explicitly found in the statute. The order also imposes a potential civil liability of \$37,500 per day for noncompliance. Finally, the order makes it much less likely that the Sacketts would be able to obtain an after-the-fact permit.²¹

2. Does the Clean Water Act Provide Sufficient Opportunities for Judicial Review?

Having established that the compliance order is a final agency action, the majority opinion goes on to address EPA's argument that the Sacketts already have meaningful review under the Clean Water Act. EPA made two arguments on this score. First, EPA argued that the Sacketts could not be fined or otherwise injured unless and until EPA brought a civil action in federal court, at which point the Sacketts would receive plenary review as defendants. The majority opinion rejects this argument on the grounds that the Sacketts cannot force EPA to bring such an action and that the Sacketts should not be required to risk immense civil liability as a condition of getting their day in court.²²

Second, EPA contended that the Clean Water Act's permitting regime offered meaningful review to the Sacketts of their jurisdictional challenge to the compliance order. The majority opinion rejects this contention as well, reasoning that the Sacketts should not have to initiate new agency action with a new agency, i.e., submit a wetlands fill permit application to the Corps, in order to receive tangential review of an existing agency action issued by a different agency, i.e., EPA's compliance order.²³

3. Did Congress Intend to Preclude Judicial Review of Compliance Orders?

In addition to its finality and "adequate review" arguments, EPA contended that the Sacketts should not be allowed to proceed with their APA challenge to the compliance order because the Clean Water Act precludes such review. The Court's decision rejects this "preclusion" argument, beginning its analysis by noting that the APA codifies a presumption in favor of judicial review of final agency action.²⁴ According to the decision, none of EPA's arguments against such review overcomes that presumption. EPA argued that allowing landowners to sue over compliance orders would frustrate Congress's intention to give EPA the enforcement discretion to choose between issuing a compliance order and bringing a civil action; thus, judicial review of compliance orders would undermine EPA's statutory choice to select between compliance orders and civil actions.²⁵ But Justice Scalia's opinion explains that it is improper to presume that the only relevant difference between these enforcement options is that one requires the agency to go to court whereas the other does not. Rather, a different but more reasonable basis to distinguish the two, concludes the majority opinion, is that compliance orders can encourage voluntary and expeditious compliance without resort to judicial process.²⁶

Adverting to its earlier "finality" discussion, the majority opinion again rejects EPA's contention that the compliance order is merely the beginning, not the end, of EPA's enforcement

process. The opinion also underscores that the APA provides review of final agency action whether or not an agency must resort to further judicial process before imposing any sanctions.²⁷ Indeed, the decision emphasizes its earlier observation that, once a compliance order issues, EPA's deliberation over its terms is basically at an end. The only decision left to the agency is over whether and when to bring a civil action.²⁸

EPA also argued that the statute's express authorization for review of administrative penalty orders should be read impliedly to preclude review of compliance orders. The majority rejects this argument, concluding that to infer preclusion based on such slender evidence would nullify the presumption in favor of judicial review.²⁹

Finally, the decision addresses EPA's central concern that judicial review of compliance orders would impede the agency's administration and thereby endanger the environment. With this argument, the majority opinion finds no merit. It reasons that, even assuming that EPA is correct in anticipating the effects of allowing judicial review, such review should still be allowed because the APA represents the judgment that the interests of judicial review supersede concerns about agency efficiency.³⁰ Notwithstanding judicial review, the majority opinion reminds EPA that a compliance order will still be a useful means of obtaining quick action, especially where there is little reason to question the order's legality.³¹

B. The Concurring Opinions of Justices Ginsburg and Alito

Although all nine Justices joined the majority opinion, two Justices wrote concurring opinions. Justice Ginsburg's concurring opinion sets forth her view that the majority decision is precedent only for the proposition that challenges to EPA's jurisdiction to issue compliance orders may be brought under the APA. She reasons that, because the Sacketts did not challenge the terms of their compliance order, it follows that the majority decision could not resolve whether such a challenge would be judicially cognizable.

The second concurrence was penned by Justice Alito. The gist of his concurrence is two-fold: EPA has mistreated the Sacketts and other property owners by denying them judicial review; and the underlying problem can be traced to the uncertain scope of EPA's and the Corps' authority under the Clean Water Act. Justice Alito's concurrence also appears to reveal indignation with the lack of process granted to the Sacketts. For example, it comments that, in "a nation that values due process, not to mention private property, such treatment [as the Sacketts received] is unthinkable." The concurrence concludes with an exhortation to Congress to pass legislation that clarifies (and presumably narrows) the Clean Water Act's scope.

IV. What Will Be the Impact of *Sackett v. EPA*?

Unquestionably, the surest impact of *Sackett* will be that the many hundreds of Clean Water Act compliance orders that EPA issues every year will now be eligible for judicial review. The decision may also have important impacts on other agency actions under the Clean Water Act. For example, the Corps by regulation issues "jurisdictional determinations" to interested landowners.³² These determinations set forth the agency's formal

opinion as to whether a site contains jurisdictional waters or wetlands. Before *Sackett*, one court of appeals had ruled that a landowner cannot seek judicial review of a jurisdictional determination.³³ The court reasoned that such a determination is not final because it has no legal impact. The Supreme Court's discussion of finality in *Sackett* may, however, lead to a reassessment of that conclusion. Another likely impact is that the regulated community can expect fewer compliance orders and, in their place, less formal communications (such as notices of violation). Moreover, the regulated community can expect that EPA will do its homework before issuing any compliance orders going forward, given that the agency knows that its record could be subject to judicial oversight.

The decision may also affect the reviewability of "cease and desist" orders that the Corps issues.³⁴ A cease and desist order need not be just a notice of violation; instead, such an order can go beyond a notice and impose corrective measures. Recall that the *Sackett* majority opinion found support for its holding that a compliance order is final agency action in the fact that such an order can impose remedial obligations not explicit in the statute itself. Thus, it is reasonable to conclude that, where a cease and desist order has a similar remedial component, that order should be deemed final agency action subject to judicial review.

Will *Sackett* affect the reviewability of agency action taken pursuant to other statutes? The Clean Air Act³⁵ as well as the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")³⁶ have compliance order provisions. Nevertheless, *Sackett's* impact on these statutes will probably be minimal. In the case of Clean Air Act compliance orders, the Supreme Court has already ruled that they are subject to review under the statute's own judicial review provision.³⁷ With respect to CERCLA compliance orders, most judicial review is precluded by statute.³⁸ Many parties have contended that, because such review is statutorily precluded, CERCLA compliance orders violate their recipients' due process rights. The Supreme Court in *Sackett* had an opportunity to address this question if it had ruled that the Sacketts could not seek judicial review under the APA. Because the Court ruled that such review is available, the Court had no occasion to address the CERCLA due process issue.

Another area of agency practice that the decision may affect is the issuance of warning letters. For example, the United States Fish and Wildlife Service routinely resorts to "warning" letters to coerce compliance with the Endangered Species Act. If such letters could qualify as final agency action, then *Sackett* would be a strong defense against the expected agency charge that judicial review of such letters would hamstring agency enforcement.

V. Conclusion

One interesting facet to *Sackett* is that, prior to the Supreme Court's decision, every lower court that had the chance to address the judicial review issue had ruled that a landowner is *not* entitled to judicial review of a compliance order.³⁹ The unanimous decision of the Supreme Court therefore stands out in even starker relief. The mismatch between the lower courts and the Supreme Court on this issue is probably owing to two

points. First, the lower courts accepted more readily than the Supreme Court EPA's contention that allowing landowners to sue over compliance orders would lead to maladministration and environmental harm. Second, in prior cases the lower courts were usually presented with factual scenarios much less attractive than the Sacketts' story: for example, big corporations as plaintiffs or individuals accused of having committed serious environmental crimes.

Finally, it is worth noting that the majority opinion is rather succinct. The opinion does not cite many of the precedents that the parties relied on in their merits briefing, such as *Ex parte Young*,⁴⁰ *Thunder Basin Coal Co. v. Reich*,⁴¹ and *Alaska Department of Environmental Conservation v. EPA*.⁴² The majority opinion also does not address the circuit split on which the Sacketts' cert petition was in part based. Later cases will have to address these issues. In any event, the full impact of *Sackett* will depend on EPA's willingness to ameliorate its enforcement program and to adopt a more modest understanding of its statutory authority.

Endnotes

1 For a lengthier treatment, please see my article, "*Sackett v. EPA: Compliance Orders and the Right of Judicial Review*," in the forthcoming volume of the *Cato Supreme Court Review*. A version of this article has appeared in the Summer 2012 volume of the *Journal of the James Madison Institute*.

2 33 U.S.C. § 1251, *et seq.*

3 *Sackett v. Envtl. Prot. Agency*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring).

4 33 U.S.C. § 1319(a)(3).

5 By the time the Supreme Court decided the case, EPA had increased the penalty maximum to \$37,500 per day. *See* 74 Fed. Reg. 626, 627 (Jan. 7, 2009).

6 5 U.S.C. §§ 701-706.

7 622 F.3d 1139 (9th Cir. 2010).

8 *See id.* at 1142-44.

9 *See id.* at 1146-47.

10 *See id.* at 1146.

11 *Tenn. Valley Auth. ("TVA") v. Whitman*, 336 F.3d 1236 (11th Cir. 2003).

12 *See Sackett*, 622 F.3d at 1144-46.

13 *Sackett v. Envtl. Prot. Agency*, 132 S. Ct. 1367, 1369-70 (2012).

14 547 U.S. 715 (2006).

15 *See id.* at 757-58 (Roberts, C.J., concurring).

16 *Cf.* 5 U.S.C. § 704 (authorizing judicial review of "final" agency action); *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (holding that an agency action is final if it is the consummation of the agency's decision-making and if it has legal effects).

17 Judicial review under the APA is limited to agency actions "for which there is no other adequate remedy in a court." 5 U.S.C. § 704.

18 The APA's judicial review provisions apply except to the extent that "statutes preclude judicial review" or "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(1)-(2).

19 *Sackett v. Envtl. Prot. Agency*, 132 S. Ct. 1367, 1371 (2012).

20 *Id.* at 1372.

21 *Id.* In its merits briefing in the Supreme Court, EPA had conceded that the compliance order produces these effects. The Court assumed for the sake of argument that EPA was correct, without actually deciding whether EPA's interpretation of the Clean Water Act and the Corps' permitting regulations was correct. *See id.* nn.2-3.

22 *Id.*

23 *Id.*

24 *Id.* at 1373.

25 The Clean Water Act directs EPA, whenever it determines that certain enumerated provisions of the Act have been violated, to "issue an order requiring . . . compl[iance] or [to] bring a civil action." 33 U.S.C. § 1319(a)(3) (emphasis added).

26 *Sackett*, 132 S. Ct. at 1373.

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.* at 1374.

31 *Id.*

32 *See* 33 C.F.R. § 320.1(a)(6).

33 *See Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 597 (9th Cir. 2008).

34 *Cf.* 33 C.F.R. §§ 326.3(d), 326.4(d)(3).

35 42 U.S.C. § 7401, *et seq.*

36 42 U.S.C. § 9601, *et seq.*

37 *See Alaska Dep't of Envtl. Conservation ("ADEC") v. EPA*, 540 U.S. 461, 483 (2004).

38 42 U.S.C. § 9613(h).

39 *See, e.g., Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995), *cert. denied*, 516 U.S. 1071 (1996); *S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418 (6th Cir. 1994), *cert. denied*, 513 U.S. 927 (1994); *S. Pines Assocs. v. United States*, 912 F.2d 713 (4th Cir. 1990); *Hoffman Group, Inc. v. EPA*, 902 F.2d 567 (7th Cir. 1990).

40 209 U.S. 123 (1908).

41 510 U.S. 200 (1994).

42 540 U.S. 461 (2004).

