IADC Committee Newsletter

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The author reviews the U.S. Supreme Court's decision in Sackett v. EPA.

Supreme Court Recognizes Pre-Enforcement Review of EPA Action Under the Clean Water Act ... And Beyond?

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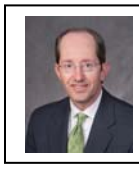

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When it comes to general interest in U.S. Supreme Court's 2012 term, it is hard to compete with the two day drama that unfolded earlier this year during its review of the jurisprudential and constitutional issues surrounding the Affordable Care Act. The decision from the Court later this summer remains one of the most highly anticipated in years. Yet for veteran counsel in the field of toxic tort litigation, another of the Court's decisions this term holds particular significance.

On March 21, 2012, a unanimous Court held in *Sackett v. EPA*, 566 U.S. __ (2012), that a compliance order under the Clean Water Act constitutes a final agency action that triggers a right to pre-enforcement review under the Administrative Procedure Act (APA). That decision, as we discuss below, not only has significant effects for those subject to compliance orders under the Clean Water Act but also could affect EPA's orders under a variety of other laws.

The Sackett *Decision*

Michael and Chantell Sackett wanted to build their home on a lot that they owned near Priest Lake, Idaho. To support a structure, the lot required some preparation, including the addition of fill dirt and rock. Several months after the Sacketts commenced site preparation, they received a compliance order from EPA, which found that their property was "wetlands" as defined by the Clean Water Act. Based on that conclusion, EPA determined that the Sacketts had violated the Act and required them "'immediately [to] undertake activities to restore" the lot to its original condition and to "provide and/or obtain access to the Site ... [and] access to all records and documentation related to the conditions at the Site ... to EPA employees.'"[1]

The Sacketts disagreed that their lot was protected wetlands and asked EPA for a hearing to plead their case. EPA refused, leaving the Sacketts in a no-win situation—either comply with EPA's order at significant financial cost (and stop construction on their home) or defy the order, force EPA to sue, and face up to $75,000-a-day penalties if they lost in court. Neither of those options was appealing. So, the Sacketts decided to file suit against EPA. They sued for declaratory and injunctive relief under the Administrative Procedure Act and the Due Process Clause of the Fifth Amendment.[2] The U.S. District Court for the District of Idaho dismissed their claims, holding that it lacked subject-matter jurisdiction to review EPA's decision before it had been enforced against the Sacketts. The Ninth Circuit affirmed.[3]

The Supreme Court granted certiorari on two questions: (1) whether the Sacketts could seek pre-enforcement review of the administrative compliance order under the APA; and (2) if not, whether their inability to seek pre-enforcement review violated their right to due process.[4] In a unanimous decision, the Court reversed. Addressing only the first question presented, the Court held that the Sacketts were entitled to sue under the APA because the compliance order was "final agency action for which there is no other adequate remedy in a court."[5] That order, the Court held, was "final" because it determined the Sacketts' rights and obligations, legal consequences flow from the order, and EPA's "findings" in

[1] *Sackett v. EPA*, 566 U.S. __ (2012), slip op. at 4 (quoting compliance order) (alterations in original).
[2] *Id.*
[3] *See* 622 F.3d 1139 (9th Cir. 2010).
[4] *Sackett v. EPA*, 131 S. Ct. 3092 (Jun. 28, 2011).
[5] 5 U.S.C. § 704; *see also Sackett*, slip op. at 10.

the order were not subject to further agency review.[6] And the Sacketts had "no other adequate remedy in court" because the CWA provided no means for them to initiate suit but instead required them to "wait for the agency to drop the hammer," each day "accru[ing] ... an additional $75,000 in potential liability."[7]

EPA marshaled several arguments but chiefly contended that the Sacketts could not make use of the APA's judicial review provision because the Clean Water Act precludes judicial review.[8] The Court rejected that view, holding instead that "[n]othing in the Clean Water Act *expressly* precludes judicial review under the APA or otherwise."[9] The Court reserved its strongest language for EPA's argument that "because Congress gave the EPA the choice between a judicial proceeding and an administrative action, it would undermine the Act to allow judicial review of the latter."[10] That is wrong, the Court reasoned, because "[i]t is entirely consistent with this function to allow judicial review when the recipient does not choose 'voluntary compliance.' The Act does not guarantee the EPA that issuing a compliance order will always be the most effective choice."[11]

Significance of the Sackett *decision*

Sackett has an immediate effect on parties who face compliance orders issued under the Clean Water Act. Those parties now can sue to challenge EPA's authority to issue those orders, even before EPA moves to enforce them. (It is important to note, however, that the Court left open the question—as Justice Ginsburg explained in a concurring opinion—whether parties can challenge the *merits* of a compliance order before EPA has moved to enforce it.)[12] But that holding could also have a more far-reaching impact, both for Clean Water Act enforcement and beyond. For example, some have wondered whether the decision will change the way that EPA regulates under the Clean Water Act.[13] Even more significantly, to the extent that other environmental laws do not "expressly preclude[] judicial review under the APA or otherwise," *Sackett* could allow parties to challenge preemptively EPA's jurisdiction to issue compliance orders under those laws as well.

Extension to Other EPA-Administered Laws?

Two examples immediately come to mind. Neither the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.*, nor the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, expressly precludes judicial review of compliance orders issued under their purview. The Court has essentially invited parties regulated under these laws to bring the same challenge as the Sacketts brought under the Clean Water Act, and these arguments appear

[6] Slip op. at 5–6.
[7] *Id.* at 6.
[8] *Id.* (describing EPA's argument that APA § 701(a)(1) excludes review "to the extent that [other] statutes preclude judicial review").
[9] *Id.* at 7.
[10] *Id.*
[11] *Id.*

[12] *See Sackett* slip op. (Ginsburg, J., concurring); *see also* Gibson Dunn, *U.S. Supreme Court Allows Pre-Enforcement Review of Administrative Compliance Orders Issued by EPA Under the Clean Water Act* (Mar. 23, 2012), http://www.gibsondunn.com/publications/Pages/USSupremeCourtAllowsPreEnforcementReview-AdministrativeComplianceOrders-EPACleanWaterAct.aspx.
[13] *See Sackett* slip op. at 9–10; *see also* John P. Krill, Jr. et al, *Supreme Court Rules that U.S. EPA Unilateral Compliance Orders Under the Clean Water Act Are Final Actions Judicially Reviewable* (Mar. 22, 2012), http://www.jdsupra.com/post/documentViewer.aspx?fid=cfb0f5ea-30a1-44c0-8df4-3588e9c72c76.

to have a strong chance of success after *Sackett*.

It is less clear whether other congressional acts under EPA's purview will be affected by *Sackett*. For instance, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) expressly precludes judicial review under the APA. *See* 42 U.S.C. § 9613(h) ("No Federal court shall have jurisdiction . . . to review any order issued under section 9606 (a) . . . in any action except . . . [a]n action to enforce an order issued under section 9606 (a)"). EPA will likely be able to distinguish *Sackett* in that context.

The CERCLA example highlights the importance of the question left open in *Sackett*—namely, whether the inability to seek pre-enforcement review of a compliance order violates due process. By deciding the case on APA grounds, the Court avoided the Sacketts' compelling argument that EPA's compliance order deprived them of a protected interest because it "render[ed] their property a conservation preserve for the indefinite future" in a determination that escaped any meaningful review.[14] EPA responded that there was review of the order if and when it decided to take judicial action to enforce its order. That review is not "meaningful," the Sacketts argued, because under *Ex parte Young*, judicial review is not meaningful "if it can only be obtained by risking immense civil liability."[15]

Even though the Court avoided this question by interpreting the Clean Water Act to not "expressly preclude judicial review," the question no doubt lingers on for parties subject to compliance orders under other environmental laws like CERCLA. In fact, the Court gave that argument at least a couple kernels of hope. First, Justice Alito wrote separately to excoriate Congress and EPA for failing to "provide a reasonably clear rule regarding the reach of the Clean Water Act."[16] Although his concurring opinion focuses on the "essentially limitless grant of authority" in the "notoriously unclear" Clean Water Act, he grounded his concerns in due process.[17] Second, Justice Scalia's opinion for the Court perhaps hints at due process concerns in more subtle ways by decrying EPA's "strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review."[18] These statements give at least a window of opportunity to argue that laws like CERCLA violate due process unless they are subject to pre-enforcement review.[19]

That was the argument of General Electric in an appeal the Supreme Court declined to take up last year. In that case, *General Electric Co. v. Jackson*, both the district court and the D.C. Circuit rejected GE's arguments that Section 106 of CERCLA violates constitutional due process rights.[20] GE maintained that the penalties for non-compliance with an administrative order were so onerous—treble damages plus a penalty of $37,500 per day—that the effective

[14] Petitioners' Brief, *Sackett v. EPA*, at 18, available at http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-1062_petitioner.authcheckdam.pdf.
[15] *Id.* at 24.
[16] *Sackett* slip op. at 2 (Alito, J., concurring).
[17] *Id.* ("In a nation that values due process, not to mention private property, such treatment is unthinkable.").
[18] *Id.* at 9–10 (majority op.).
[19] Some have suggested that Congress may revisit this question in the first instance. *See, e.g.*, Gibson Dunn, *supra* n.12 ("Congress may be asked to address its rationale for why pre-enforcement review is available under only certain environmental statutes.).
[20] *See Gen. Elec. Co. v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010).

unavailability of judicial review ran afoul of *Ex parte Young*.[21] To show how thoroughly this scheme prevents judicial challenge, GE pointed out that of the more than 1,700 compliance orders issued under CERCLA in the last thirty years, "only a very small handful" of regulated entities have ever received independent judicial review of an order.[22] The United States responded that administrative safeguards built into CERCLA, combined with the availability of judicial review both before compliance (by defying the order and forcing EPA to bring suit) and after (by seeking to recoup cleanup costs) sufficiently protect a regulated party's due process rights.[23] Moreover, the government argued, the onerous penalties of which GE complained were maximum penalties that could be imposed by a federal court only after the noncomplying entity had an opportunity to argue that it was not liable.[24]

Conclusion

Although the *Sackett* decision provides some hope that the Supreme Court might come around to the due process arguments of parties subject to EPA's compliance orders, congressional action is the only sure way to resolve the uncertainties that exist in the laws that EPA enforces. *Sackett* provides immediate relief under the APA in certain circumstances, but time will tell whether EPA's enforcement of laws within its purview needs further clarification from the Court in due process terms.

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[21] Petition for Certiorari, *Gen. Elec. Co. v. Jackson*, at 20, available at http://www.scotusblog.com/case-files/cases/general-electric-co-v-jackson/.
[22] *Id.* at 20–21.
[23] Brief in Opposition, *Gen. Elec. Co. v. Jackson*, at 11, available at http://www.scotusblog.com/case-files/cases/general-electric-co-v-jackson/.
[24] *Id.* at 14.

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