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**U.S. Supreme Court Affords Pre-Enforcement Judicial Review of EPA**

**Administrative Compliance Orders For Landowners in *Sackett v.***

***Environmental Protection Agency***

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In March 2012, the U.S. Supreme Court, in *Sackett v. Environmental Protection Agency (EPA)*,<sup>1</sup> unanimously provided landowners the additional tool of judicial review to defend property interests from EPA's issuance of administrative compliance orders (ACOs). In *Sackett*, the Court struck down the longstanding notion that § 309(a)(3) of the Clean Water Act (CWA) implicitly precludes pre-enforcement review of administrative compliance orders.<sup>2</sup> *Sackett's* impact will likely stretch beyond the issuance of compliance orders under the CWA, as the Clean

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<sup>1</sup> 132 S. Ct. 1367 (2012).

<sup>2</sup> *Id.* at 1371-74; see 33 U.S.C. § 1319(a)(3); Richard E. Glaze Jr., *A Detailed Look at the Effects of Sackett v. EPA on Administrative Enforcement Orders*, 42 *Env'tl. L. Rep. News & Analysis* 11030, 11035 (2012).

Air Act (CAA) contains a similar implicit ban.<sup>3</sup> Although the Court afforded landowners additional leverage in pursuing activities under EPA's jurisdiction, *Sackett* likely breathed new life into EPA's use of administrative compliance orders under § 113 of the CAA in the Eleventh Circuit.<sup>4</sup> Nonetheless, landowners' ability to challenge ACOs will increase the administrative burden on EPA, likely resulting in increased due diligence on EPA's part prior to issuing orders and potential reduction in the number of compliance orders issued by EPA.

The dispute in *Sackett* arose from EPA's issuance of an administrative compliance order under CWA § 309(a)(3) in response to Mike and Chantell Sackett's filling of alleged wetlands without a permit. The order directed the Sacketts to remove the fill and restore the site to its original condition, threatening possible penalties of up to \$75,000 per day for violating substantive provisions of the CWA and the administrative compliance order.<sup>5</sup>

The Sacketts purchased the 0.63-acre parcel of land in 2005 to build a home overlooking Priest Lake, Idaho.<sup>6</sup> The lot sits 500 feet from the shoreline of Priest

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<sup>3</sup> 42 U.S.C. § 7413; *see* Glaze, *supra* note 2, at 11034-35.

<sup>4</sup> Glaze, *supra* note 2, at 11035.

<sup>5</sup> The maximum penalty under the CWA is \$37,500 per day for each violation. 33 U.S.C. § 1319(g); 69 Fed. Reg. 7121 (Feb. 13, 2004); *see also* *PLF and the Sacketts: an important win at the Supreme Court*, PACIFIC LEGAL FOUNDATION, <http://www.pacificlegal.org/cases/PLF-and-the-Sacketts-an-important-win-at-the-Supreme-Court> (last visited May 10, 2013) [hereinafter *PLF and the Sacketts*].

<sup>6</sup> *PLF fights the EPA to protect a couple's dream*, PACIFIC LEGAL FOUNDATION, (Sept. 20, 2011), <http://www.youtube.com/watch?v=Pe8TBXgwpnw> [hereinafter *PLF fights the EPA*].

Lake in an established neighborhood.<sup>7</sup> Despite no standing water on the lot or hydrologic connection to any body of water, the land is in the immediate vicinity of known wetland areas.<sup>8</sup>

The Sacketts obtained the necessary building permits from the local authorities and began filling low-lying areas of the property with dirt and rock in the spring of 2007.<sup>9</sup> EPA and United States Army Corps of Engineers entered the property and verbally ordered the Sacketts to cease working, stating the lot contained wetlands protected under the Clean Water Act.<sup>10</sup> The Corps provided the Sacketts with an “after-the-fact” permit application, which, if granted, would retroactively authorize the filling of the lot.<sup>11</sup> The Sacketts, concerned about conceding that the CWA applied to their property, opted not to file the application

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<sup>7</sup> *Id.*

<sup>8</sup> Larry Levine, *David vs. Goliath -- or Goliath vs. David? Supreme Court to Hear Industry-Backed Challenge to Clean Water Enforcement*, NATURAL RESOURCES DEFENSE COUNCIL BLOG (Jan. 6, 2012), [http://switchboard.nrdc.org/blogs/llevine/david\\_vs\\_goliath\\_-\\_or\\_goliath.html](http://switchboard.nrdc.org/blogs/llevine/david_vs_goliath_-_or_goliath.html).

<sup>9</sup> *Id.*; John Echeverria & Andrew Fowler, *US Supreme Court Authorizes Pre-enforcement Judicial Review of CWA Compliance Orders*, VERMONT LAW SCHOOL, <http://watchlist.vermontlaw.edu/u-s-supreme-court-authorizes-pre-enforcement-judicial-review-of-clean-water-act-compliance-orders/> (last visited May 11, 2013); see also *PLF fights the EPA*, *supra* note 6.

<sup>10</sup> Damien Schiff, *Sackett v. EPA: Compliance Orders and the Right of Judicial Review*, THE FEDERALIST SOCIETY (July 30, 2012), <http://www.fed-soc.org/publications/detail/sackett-v-environmental-protection-agency-compliance-orders-and-the-right-of-judicial-review>.

<sup>11</sup> *Id.*; Levine, *supra* note 8.

and requested written justification of EPA's jurisdictional determination.<sup>12</sup> EPA replied by issuing an administrative compliance order in November 2007.<sup>13</sup>

The Sacketts', not believing their property is subject to the Clean Water Act, petitioned the EPA for a formal hearing, but EPA agreed only to meet with the Sacketts informally.<sup>14</sup> Dissatisfied with EPA's proposed informal meeting, the Sacketts challenged the order in district court as "arbitrary and capricious" under the Administrative Procedure Act (APA) and depriving them of their Fifth Amendment due process right.<sup>15</sup> The district court, following precedent, dismissed the Sackett's challenge for lack of subject matter jurisdiction, concluding that the CWA precludes pre-enforcement judicial review of compliance orders, and found no violation of due process.<sup>16</sup> The Sacketts appealed, and consistent with every circuit that has confronted this issue regarding the CWA, the Ninth Circuit affirmed.<sup>17</sup>

Although avoiding the Sacketts' broader due process claim, the Supreme Court diverged from the longstanding notion that the CWA implicitly precludes pre-enforcement review of ACOs and held that the orders were a "final agency action"

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<sup>12</sup> Schiff, *Sackett v. EPA*, *supra* note 10.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Sackett*, 132 S. Ct. at 1371.

<sup>16</sup> *Sackett v. EPA*, 2008 WL 3286801 (D. Idaho Aug. 7, 2008); *see also* Glaze, *supra* note 2, at 11031.

<sup>17</sup> 622 F.3d 1139 (9th Cir. 2010); *See, e.g.*, *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995), *S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418 (7th Cir. 1994), *S. Pines Assocs. By Goldmeier v. United States*, 912 F.2d 713 (4th Cir. 1990).

for purposes of allowing judicial review under the Administrative Procedure Act.<sup>18</sup>

The Court concluded that the compliance order “has all the hallmarks of APA finality.”<sup>19</sup>

The Supreme Court found that EPA determined the Sacketts’ “rights or obligations” by imposing the legal obligation to restore the property according to an agency-approved Restoration Work Plan.<sup>20</sup> Also, legal consequences flowed from the issuance of the order as the Sacketts may be subject to up to \$75,000 per day penalties for non-compliance and severely limited in obtaining a permit for their fill.<sup>21</sup> Furthermore, the Court found that the issuance of the compliance order marks the “consummation” of the agency’s decision process and that the order’s findings were not subject to further agency review.<sup>22</sup> The Sacketts were also provided “no other adequate remedy in court” as they could only try to apply for a permit through the Corps and if denied, sue over that denial, or ignore the EPA’s compliance order, potentially accruing \$75,000 in fines per day, inviting a civil suit from EPA.<sup>23</sup>

The immediate impact of *Sackett* is that landowners now have the opportunity to bring judicial challenges against EPA administrative compliance

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<sup>18</sup> *Sackett*, 132 S. Ct. at 1371-74.

<sup>19</sup> *Id.* at 1371.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*; see also Damien M. Schiff, *Beyond Jurisdiction: What Sackett v. Environmental Protection Agency portends for wetlands regulation and enforcement*, PACIFIC LEGAL FOUNDATION, to be published in *BEYOND JURISDICTION: THE FUTURE OF WETLANDS LAW AND POLICY* (Kim Diane Connolly, ed.) [hereinafter Schiff, *Beyond Jurisdiction*].

orders under § 309(a)(3) of the Clean Water Act.<sup>24</sup> The holding may also extend to similar provisions of the Clean Air Act, resolving a circuit split on whether Section 307(b)(1) of the CAA, providing judicial review for final agency actions, applies to compliance orders, and also reestablishing EPA's ability to issue compliance orders under the CAA in the Eleventh Circuit.<sup>25</sup> As a result, *Sackett* will impose an increased administrative burden on EPA when issuing compliance orders.<sup>26</sup>

Statutes with similar implicit bans on pre-enforcement judicial review, such as the Clean Air Act, will likely fall within the scope of *Sackett*.<sup>27</sup> However, statutes with explicit bans on judicial review, such as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),<sup>28</sup> and statutes providing administrative review, such as Resource Conservation and Recovery Act (RCRA),<sup>29</sup> will not be affected.<sup>30</sup>

*Sackett's* holding that an administrative compliance order is a "final agency action" for APA purposes will likely resolve the split authority regarding whether Section 307 allows pre-enforcement review of orders under Section 113 of the

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<sup>24</sup> *Id.*

<sup>25</sup> Glaze, *supra* note 2, at 11034-35.

<sup>26</sup> *Id.*; see also Schiff, *Beyond Jurisdiction*, *supra* note 23.

<sup>27</sup> Steve Jones, Russell Prugh and Brad Marten, *Sackett v. EPA: Unanimous Supreme Court Allows Pre-Enforcement Review Under Clean Water Act*, 2012 LEXISNEXIS EMERGING ISSUES 6266 (2012).

<sup>28</sup> 42 U.S.C. § 9601.

<sup>29</sup> 42 U.S.C. § 6928(b);

<sup>30</sup> See Megan Anderson, *EPA Enforcement After Sackett v. EPA: The Future of EPA Compliance Orders*, MICH. J. ENVTL. & ADMIN. L. (Apr. 5, 2012) <http://students.law.umich.edu/mjeal/2012/04/epa-enforcement-after-sackett-v-epa-the-future-of-epa-compliance-orders/>.

CAA.<sup>31</sup> The Second and Seventh Circuits previously held that a Section 113 administrative order is not a final action within the meaning of Section 7607(b)(1) of the APA; therefore Section 307 review is unavailable.<sup>32</sup> The Sixth and Ninth Circuits have interpreted Section 113 orders as final agency actions, providing pre-enforcement review under Section 307.<sup>33</sup>

*Sackett* will also likely have a unique impact on the EPA's CAA enforcement in the Eleventh Circuit. Rendering administrative compliance orders as "final agency action" subject to judicial review under the Administrative Procedure Act, the Supreme Court undercut the Eleventh Circuit's determination that the ACO enforcement scheme of CAA § 113(a)(3) violated the Due Process Clause.<sup>34</sup> Consequently, EPA once again has authority to issue compliance orders under § 113(a)(3) in Alabama, Florida, and Georgia.<sup>35</sup>

Although EPA exudes a "business as usual" attitude towards the potential administrative impact of *Sackett*, EPA will face increased burdens when issuing ACOs under the CWA.<sup>36</sup> EPA must now consider the possibility of judicial review.<sup>37</sup> This consideration may require EPA to conduct significantly more investigation and

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<sup>31</sup> Jones, *supra* note 27.

<sup>32</sup> See *Asbestec Constr. Servs., Inc. v. EPA*, 849 F.2d 765 (2d Cir. 1988); and *Acker v. EPA*, 290 F.3d 892, 895 (7<sup>th</sup> Cir. 2002).

<sup>33</sup> See *Ala. Dep't of Env'tl. Conservation v. EPA*, 244 F.3d 748, 749-50 (9<sup>th</sup> Cir. 2001); and *Allsteel, Inc. v. EPA*, 25 F.3d 312, 314-15 (6<sup>th</sup> Cir. 1994).

<sup>34</sup> Glaze, *supra* note 2, at 11035.

<sup>35</sup> *Id.*

<sup>36</sup> Schiff, *Beyond Jurisdiction*, *supra* note 23.

<sup>37</sup> *Id.*

analysis prior to issuing an ACO.<sup>38</sup> Historically, EPA issues 1,500 to 3,000 compliance orders per year.<sup>39</sup> To avoid being bogged down in court by landowners, many being large organizations with significant resources, not individuals such as the Sacketts, EPA will likely issue fewer compliance orders.<sup>40</sup>

Although *Sackett* will place an increased burden on EPA's enforcement efforts, the benefits to landowners may not extend as far as one might expect. Justice Ruth Bader Ginsberg, in her concurrence, clarified that, while a plaintiff may challenge EPA's jurisdictional determination, they may not challenge the terms and conditions of the compliance order.<sup>41</sup> Furthermore, EPA is still entitled deference in determining whether they acted in an "arbitrary and capricious" manner in issuing ACOs.<sup>42</sup> Maintaining the deferential standard mitigates some of EPA's concern when issuing ACOs, as they will only need to show that their determination was not arbitrary and capricious.

There are several unresolved concerns moving forward from *Sackett*. The Supreme Court did not address the issue of whether EPA could collect double penalties, up to \$75,000 per day, for each day that a party fails to comply with a CWA administrative order.<sup>43</sup> It is also uncertain whether these penalties accrue

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<sup>38</sup> *Id.*

<sup>39</sup> *PLF and the Sacketts*, *supra* note 5.

<sup>40</sup> *Id.*; *see also* Levine, *supra* note 8.

<sup>41</sup> *Sackett*, 132 S. Ct. at 1374 (Ginsberg, R., concurring).

<sup>42</sup> *Id.* (citing *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)).

<sup>43</sup> Jones, *supra* note 27.



while a recipient seeks pre-enforcement review.<sup>44</sup> Additionally, it is unclear how *Sackett* will affect parties currently negotiating with EPA regarding compliance orders.<sup>45</sup> These issues bear watching and perhaps further academic exploration.

Nonetheless, the Supreme Court in *Sackett* bucked the longstanding notion that § 309(a)(3) of the Clean Water Act (CWA) implicitly precludes pre-enforcement review of administrative compliance orders.<sup>46</sup> Landowners now have the opportunity to bring judicial challenges against CWA administrative compliance orders, rather than conceding to EPA jurisdiction and applying for a permit or waiting for EPA to sue for noncompliance, risking considerable penalties. Although the extent remains uncertain, *Sackett* will create an increased burden on EPA, likely requiring more thorough investigation and analysis and potentially a reduction in the number of compliance orders issued.

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Sackett*, 132 S. Ct. at 1371-74; see 33 U.S.C. 1319(a)(3); see Glaze, *supra* note 2, at 11035.