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Sackett Decision: More Eyes Watching the EPA

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In March 2012, the U.S. Supreme Court released a highly anticipated opinion addressing the authority of the Environmental Protection Agency (EPA) to issue administrative compliance orders without providing an avenue for pre-enforcement judicial review. In *Sackett v. EPA*, the court held that nothing in the Clean Water Act (CWA) expressly or impliedly precluded pre-enforcement judicial review. Although the case involved a challenge to a compliance order issued under Section 404 of the CWA, the court set a high bar for rebutting the presumption favoring judicial review contained in the Administrative Procedure Act (APA). The court's reliance on the APA means that *Sackett* will likely affect compliance orders issued pursuant to other environmental statutes that do not contain an expressed preclusion provision, such as the Clean Air Act, the Resource Conservation and Recovery Act and the Safe Drinking Water Act. The effect of *Sackett*, however, may extend beyond the EPA to other administrative agencies. The case tentatively stands for the broad proposition that a party is entitled to challenge the actions of an administrative agency in court if the agency sanctioned the party, even preliminarily, without providing an adequate avenue for review.

Background of Case

The case began in 2007 when Mike and Chantell Sackett filled a portion of their property with dirt and rock in preparation for constructing a new house. Shortly thereafter, the EPA issued a compliance order, which stated that the Sacketts had violated Section 404 of the CWA by discharging fill material into waters of the United States. The order informed the Sacketts that they needed to restore the land because their property was a wetland adjacent to navigable water. The Sacketts filed suit in a federal district court after the EPA denied their request for a hearing to contest the compliance order. The Sacketts asserted that the compliance order was "arbitrary and capricious" in violation

of the APA and deprived them of a constitutionally protected property interest without affording them adequate due process. The district court and the U.S. Court of Appeals, Ninth Circuit, held that the CWA precluded pre-enforcement review of compliance orders.

In a unanimous decision, the Supreme Court disagreed and held that the Sacketts were entitled to pre-enforcement review under Chapter 7 of the APA, which authorizes judicial review of "final agency action for which there is no other adequate remedy in a court." The court made three determinations in reaching its holding. First, it ruled that the compliance order was final agency action. The court explained that the order determined the rights and obligations of the Sacketts and was the 'consummation' of the agency's decision-making process."

Second, the justices determined that no other adequate remedy was available in court. The high court noted that the Sacketts could only obtain a predeprivation hearing by refusing to comply with the order and then waiting for the EPA to file a suit in federal court. The *Sackett* court explicitly stated that waiting for the EPA to file suit while the amount of damages continued to accrue was not an adequate judicial remedy.

Third, the court found that nothing in the CWA precluded judicial review of Section 404 compliance orders. Emphasizing the APA's presumption favoring judicial review, the court asserted that the EPA failed to overcome this presumption and stated that "there is no reason to think that 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 of whether the regulated party is within the EPA's jurisdiction."

The justices did not address the procedural due-process question it raised in the granting of certiorari. The court's avoidance of the due-process issue was not surprising in light of its decision in 2011 to deny a petition for a writ of certiorari in *General Electric v. Jackson*, a case involving a procedural due-process challenge of the provision in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) that precludes pre-enforcement review of unilateral administrative orders.

Consequently, *Sackett* leaves the EPA with primarily three enforcement options under these facts: prepare a fuller administrative record for each jurisdictional determination, initiate civil enforcement actions for monetary penalties or issue nonbinding noncompliance letters.

What This Means to You

The significance of *Sackett* will unfold in future litigation that attempts to extend the court's holding to statutes that do not contain a provision expressly precluding pre-enforcement review of administrative orders. Having set a relatively high bar for establishing that a statute impliedly

precludes judicial review, the court has opened the door to arguments that compliance orders issued under other statutes, such as the Clean Air Act and the Resource Conservation and Recovery Act, are also final agency action for which there is no adequate remedy when the EPA denies a request for a hearing. On May 9, a magistrate judge in Texas issued the first judicial opinion discussing *Sackett*. The case involved a Coast Guard investigation to determine whether a ship had intentionally discharged oil/pollutants into the sea. The judge asserted that *Sackett* stands for the principle that a party is not entitled to judicial review of final agency action when a party can successfully request an administrative hearing.

Although the long-term effect of *Sackett* on the way the EPA uses its enforcement tools is unknown, the case is already having an effect. A few days after losing in the Supreme Court, the EPA dismissed an action it had filed against Range Resources, a natural gas company engaged in hydraulic fracturing. An important distinction between Range Resources and the *Sackett* ruling is that Range Resources involved an emergency administrative order issued pursuant to the Safe Drinking Water Act (SDWA), and the *Sackett* court did not address emergency orders or the SDWA. Nonetheless, after the *Sackett* decision, the EPA did not want to risk a court determining that Range Resources was entitled to a predeprivation hearing for an emergency administrative order.

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