University of Florida Journal of Law & Public Policy

Volume 23 | Issue 2 Article 5

2012

Feeling Our Way Through the Clean Water Act: Pre-Enforcement Judicial Review of the EPA Compliance Orders Under Sackett v. Environmental Protection Agency

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CASE COMMENT

FEELING OUR WAY THROUGH THE CLEAN WATER ACT: PRE-ENFORCEMENT JUDICIAL REVIEW OF THE EPA COMPLIANCE ORDERS UNDER *SACKETT v. ENVIRONMENTAL PROTECTION AGENCY*

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I. INTRODUCTION

In *Sackett v. Environmental Protection Agency*, ___ U.S. ___, 132 S. Ct. 1367 (2012), U.S. Supreme Court Justice Samuel Alito remarked, in his concurring opinion, that "[t]he reach of the Clean Water Act [the CWA] is notoriously unclear."[1] Indeed, since its enactment in 1972, Congress has never defined what it meant by "the waters of the United States," which both the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) seek to protect under the CWA. While the U.S. Supreme Court has had several opportunities over the years to curb the EPA and the Corps' interpretation of the phrase "waters of the United States" as an "essentially limitless grant of authority," the "precise reach of the [CWA] remains unclear."[2] This lack of clarity, and the factual scenario presented in *Sackett*, prompted Justice Alito to call for Congress "to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the [CWA]" in order to "rectify the underlying problem."[3] While the *Sackett* case has called EPA to task for putting ordinary American property owners like Michael and Chantell Sackett (Sacketts) "at the agency's mercy," in reality, the decision is unlikely to yield much in terms of substantive changes to the EPA enforcement procedures.[4] The *Sackett* majority kept its opinion deliberately narrow.

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1. Sackett v. EPA, 132 S. Ct. 1367, 1375 (2012) (*Sackett*) (Alito, J., concurring); Federal Water Pollution Control Act (CWA), 33 U.S.C. §§ 1251-1376 (1972).

2. *Id.* (Alito, J., concurring); *see also id.* at 1370 (citing various U.S. Supreme Court cases since 1985 addressing the scope of the CWA).

3. *Id.* at 1375-76 (Alito, J., concurring).

4. *See generally id.*

II. BACKGROUND

The Sackets own a 0.63 acre lot near Priest Lake, Idaho, upon which they intended to build their home.[5] Prior to purchasing it, the Sacketts investigated the property, including its permitting history and applicable regulatory requirements.[6] After they completed their due diligence effort, the Sacketts were unaware, and had no reason to believe, that their property contained wetlands regulated under the CWA.[7] After obtaining all required local permits and beginning to build their new home, the EPA issued the Sacketts a compliance order, which charged them with violating the CWA by placing fill material on their lot.[8] On its face, the compliance order was severe.[9] It suggested that the EPA had already determined there to be violations of the CWA and as a result, had imposed serious and costly sanctions on them.[10] The compliance order contained both prohibitive and mandatory features.[11] Specifically, it:

- Enjoined the Sacketts from the only authorized use of the property under the law;[12]
- Revoked the Sacketts' fundamental right to exclude others from their property;[13]
- Controlled the use of the Sacketts' property even after completion of the fill removal;[14]

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5. Petitioners' Brief on the Merits, Sackett v. U.S. Envtl. Prot. Agency, 2011 WL 4500687, at *6 (*Petitioners' Brief on the Merits*); Brief for the Respondents, Sackett v. U.S. EPA, 2011 WL 5908950, at *6 (*Brief for the Respondents*); Sackett v. U.S. EPA, 622 F.3d 1139, 1145 (9th Cir. 2010) (*EPA II*), *cert. granted in part*, 131 S. Ct. 3092 (U.S. 2011), *and rev'd sub nom.*, Sackett v. EPA, 132 S. Ct. 1367 (U.S. 2012).

6. *Petitioners' Brief on the Merits*, 2011 WL 4500687, at *6.

7. *Id.*

8. Sackett v. U.S. EPA, 2008 WL 3286801, at *1 (*EPA I*); *EPA II*, 622 F.3d at 1141; *Sackett*, 132 S. Ct. at 1370.

9. *Petitioners' Brief on the Merits*, 2011 WL 4500687, at *9.

10. *Id.* at *6; *see also EPA I*, 2008 WL 3286801, at *1; *EPA II*, 622 F.3d at 1141; *Sackett*, 132 S. Ct. at 1370-71.

11. *Petitioners' Brief on the Merits*, 2011 WL 4500687, at *7; *see also EPA I*, 2008 WL 3286801, at *1; *EPA II*, 622 F.3d at 1141; *Sackett*, 132 S. Ct. at 1370-71.

12. *Petitioners' Brief on the Merits*, 2011 WL 4500687, at *7; *see also EPA I*, 2008 WL 3286801, at *1; *EPA II*, 622 F.3d at 1141; *Sackett*, 132 S. Ct. at 1370-71.

13. *Petitioners' Brief on the Merits*, 2011 WL 4500687, at *7; *see also EPA I*, 2008 WL 3286801, at *1; *EPA II*, 622 F.3d at 1141; *Sackett*, 132 S. Ct. at 1370-71.

14. *Petitioners' Brief on the Merits*, 2011 WL 4500687, at *7; *see also EPA I*, 2008 WL 3286801, at *1; *EPA II*, 622 F.3d at 1141; *Sackett*, 132 S. Ct. at 1370-71.

- Subjected the Sacketts' property, by virtue of the compliance order's very existence, to a federal mandate that (1) prohibited the intended, authorized use; (2) required expensive remedial actions, substantially reducing the value of the property; and (3) limited the Sacketts' ability to alienate the property;[15] and,

- Imposed significant civil penalties and threatened criminal penalties upon the Sacketts.[16]

Obviously, the Sacketts could no longer continue to build their home without incurring sanctions, even though they believed their property did not include wetlands under the EPA's jurisdiction.[17] They first tried to resolve the compliance order informally, but the EPA refused to address the Sacketts' jurisdictional arguments.[18] In the meantime, the Sacketts were accruing civil penalties of up to $37,500 *per day* (and, as explained later, an additional $37,500 per day, for a total of $75,000 *per day*) by not immediately complying with the order, which the CWA did not explicitly permit the Sacketts to challenge "under the APA or otherwise."[19]

III. U.S. DISTRICT COURT

Thus, in April 2008, the Sacketts filed suit in federal district court to contest the jurisdictional basis for the order,[20] asserting three claims:

- The EPA does not have jurisdiction over the property, and as a consequence the compliance order should be set aside under the APA;[21]

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15. *Petitioners' Brief on the Merits*, 2011 WL 4500687, at *8; *see also EPA I*, 2008 WL 3286801, at *1; *EPA II*, 622 F.3d at 1141; *Sackett*, 132 S. Ct. at 1370-71.

16. *Petitioners' Brief on the Merits*, 2011 WL 4500687, at *8-*9; *see also EPA I*, 2008 WL 3286801, at *1; *EPA II*, 622 F.3d at 1141; *Sackett*, 132 S. Ct. at 1370-71.

17. *Petitioners' Brief on the Merits*, 2011 WL 4500687, at *9; *Sackett*, 132 S. Ct. at 1371.

18. *Petitioners' Brief on the Merits*, 2011 WL 4500687, at *9; *Sackett*, 132 S. Ct. at 1371.

19. *Petitioners' Brief on the Merits*, 2011 WL 4500687, at *8; *Sackett*, 132 S. Ct. at 1370, 1372-73; Federal Administrative Procedure Act (APA), 5 U.S.C. § 500 (2006) (authorizing, in 706(2)(A), a reviewing court to set aside final agency action that is, among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law").

20. *Petitioners' Brief on the Merits*, 2011 WL 4500687, at *9; *EPA I*, 2008 WL 3286801, at *1; *EPA II*, 622 F.3d at 1141; *Sackett*, 132 S. Ct. at 1371.

21. *Petitioners' Brief on the Merits*, 2011 WL 4500687, at *9-*10; *EPA I*, 2008 WL 3286801, at *1; *EPA II*, 622 F.3d at 1141; *Sackett*, 132 S. Ct. at 1371.

- The compliance order violates Sacketts' due process rights because, before a person can be deprived of liberty or property, he is entitled to a full and fair hearing "at a meaningful time and in a meaningful manner";[22] and,

- The compliance order violates Sacketts' due process rights because a person cannot be punished for conduct that violates an "impermissibly vague" law.[23]

After the Sacketts filed their complaint and the EPA issued an amended compliance order, the EPA moved to dismiss the Sacketts' action, contending that the compliance order was not subject to judicial review under the APA, and that it did not violate due process.[24] In a memorandum decision issued August 7, 2008, the district court granted the EPA's motion to dismiss, holding that it lacked jurisidction to adjudicate the Sacketts' APA and due process claims.[25] In an order issued October 9, 2008, the district court denied the Sacketts' motion for clarification and reconsideration, concluding that its dismissal order did not need clarification and that the Sacketts had not stated an adequate basis for reconsideration.[26]

IV. NINTH CIRCUIT COURT OF APPEALS

The Sacketts appealed the district court's order to the Ninth Circuit Court of Appeals.[27] In a decision issued September 17, 2010 affirming the district court's dismissal, the Ninth Circuit construed the CWA to preclude judicial review of compliance orders like the one the EPA issued to the Sacketts.[28]

The Ninth Circuit's decision consisted of a three-part analysis.[29]

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22. *Petitioners' Brief on the Merits*, 2011 WL 4500687, at *10 (citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965)); *EPA I*, 2008 WL 3286801, at *1; *EPA II*, 622 F.3d at 1141; *Sackett*, 132 S. Ct. at 1371.

23. *Petitioners' Brief on the Merits*, 2011 WL 4500687, at *10 (citing Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982)); *EPA I*, 2008 WL 3286801, at *1; *EPA II*, 622 F.3d at 1141; *Sackett*, 132 S. Ct. at 1371.

24. *Petitioners' Brief on the Merits*, 2011 WL 4500687, at *10; *EPA I*, 2008 WL 3286801, at *1; *EPA II*, 622 F.3d at 1141; *Sackett*, 132 S. Ct. at 1371.

25. *Petitioners' Brief on the Merits*, 2011 WL 4500687, at *10; *EPA I*, 2008 WL 3286801, at *2-*3; *EPA II*, 622 F.3d at 1141; *Sackett*, 132 S. Ct. at 1371.

26. *Petitioners' Brief on the Merits*, 2011 WL 4500687, at *10; *EPA II*, 622 F.3d at 1141.

27. *Petitioners' Brief on the Merits*, 2011 WL 4500687, at *10; *EPA II*, 622 F.3d at 1141; *Sackett*, 132 S. Ct. at 1371.

28. *Petitioners' Brief on the Merits*, 2011 WL 4500687, at *10-*11; *EPA II*, 622 F.3d at 1147; *Sackett*, 132 S. Ct. at 1371.

29. *Petitioners' Brief on the Merits*, 2011 WL 4500687, at *11; *EPA II*, 622 F.3d at 1141-

First, the Ninth Circuit analyzed whether the compliance order was agency action reviewable under the APA, in light of the fact that the CWA neither expressly provides for, nor expressly precludes, the pre-enforcement judicial review of compliance orders.[30] Acknowledging a general presumption in federal case law that favors the judicial review of administrative action, the Ninth Circuit engaged in an analysis that relied upon three of the four factors (not including the express language in the statute) set forth in *Block v. Community Nutrition Institute*, 467 U.S. 340, 351 (1984), for determining whether Congress intended to preclude judicial review under the APA, which if established would overcome this general presumption.[31] Specifically, the court analyzed the CWA's structure, purposes, and legislative history.[32] Based upon its analysis, the Ninth Circuit concluded that a congressional intent to preclude pre-enforcement judicial review of compliance orders was "fairly discernible in the statutory scheme" of the CWA.[33]

Second, the Ninth Circuit cited to several judicial decisions from other courts that have held that the CWA precludes review of pre-enforcement actions such as compliance orders, indicating that "[t]he reasoning of these courts is persuasive to us, as well as the broad uniformity of consensus on this issue."[34] Even so, the court acknowledged that a literal construction of the CWA's provisions could in theory render it unconstitutional because it would deprive the Sacketts of their due process right to meaningful judicial review of the compliance order at a meaningful time. Specifically, the court cited the Eleventh Circuit's 2003 construction of an analagous provision in the Clean Air Act (CAA), wherein the Eleventh Circuit took issue with the fact that the compliance order could be issued by the EPA "on the basis of any information available" without any hearing, and that the CAA made civil and criminal penalties dependent on violations of compliance orders whether or not there was an actual violation of the CAA.[35] Ultimately, the court refused to adopt a similarly literal interpretation of the CWA's text, instead holding that if and when the EPA chooses to enforce the compliance order in federal court, the Sacketts could raise a jurisdictional defense at that time.[36]

Finally, the Ninth Circuit assessed whether forcing the Sacketts to

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30. *EPA II*, 622 F.3d at 1142.

31. *Id.* at 1142-43.

32. *Id.* at 1143-44.

33. *Id.* at 1147.

34. *Id.* at 1143.

35. *Id.* at 1144-45 (citing Tenn. Valley Auth. v. Whitman, 336 F.3d 1236, 1256 (11th Cir. 2003)).

36. *See id.* at 1145-46.

wait until the EPA brings an enforcement action would constitute a due process violation, insofar as the Sacketts would risk accruing "frightening penalties" by refusing to comply.[37] In support of its analysis, the court applied the U.S. Supreme Court test in *Thunder Basin Coal Co. v. Reich*,[38] which held that the statutory preclusion of pre-enforcement judicial review of administrative orders violates due process only when "the practical effect of coercive penalties for noncompliance [is] to foreclose all access to the courts so that compliance is sufficiently onerous and coercive penalties sufficiently potent that a constitutionally intolerable choice might be presented."[39] The Ninth Circuit reasoned that because the Sacketts could contest the EPA's jurisdiction to issue a compliance order by applying for a permit and seeking judicial review of the permit's denial, and because the amount of any civil penalties sought by the EPA would be left to the equitable discretion of a federal judge (not the EPA), it was "not persuaded that the potential consequences from violating CWA compliance orders are so onerous as to foreclose all access to the courts and create a constitutionally intolerable choice."[40] Accordingly, the Ninth Circuit concluded that the CWA precludes APA review, and that such preclusion does not violate the Sacketts' due process rights.[41]

V. U.S. SUPREME COURT

The Sacketts appealed the Ninth Circuit's decision to the U.S. Supreme Court, which accepted jurisdiction on June 28, 2011,[42] to "consider whether [the Sacketts] may bring a civil action under the [APA] to challenge the issuance by the [EPA] of an administrative compliance order under § 309 of the [CWA]."[43]

A. *Briefs*

In their *Brief on the Merits*, the Sacketts took issue with several aspects of the Ninth Circuit's decision. Specifically, the Sacketts, represented by Pacific Legal Foundation[44] argued that the Ninth Circuit:

37. *Id.* at 1146.

38. Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994).

39. *Id.* (internal quotations omitted).

40. *Id.* at 1146-47 (internal quotations omitted).

41. *Id.* at 1147.

42. *Petitioners' Brief on the Merits*, 2011 WL 4500687, at *1; *Sackett*, 132 S. Ct. at 1371.

43. *Sackett*, 132 S. Ct. at 1369.

44. Established March 5, 1973, Pacific Legal Foundation is the "oldest and most successful public interest legal organization that fights for limited government, property rights, individual rights and a balanced approach to environmental protection." *See* "About PLF," at

- Created a constitutional problem by reading the CWA narrowly to preclude pre-enforcement judicial review of the compliance order, because the Sacketts had been made subject to penalties based upon alleged violations of the compliance order even though the underlying violations of the CWA had not been established.[45]

- Never considered, when assessing whether the CWA statutorily precluded judicial review of administrative orders under the APA, if contrary inferences might support the conclusion that Congress *did* intend for individuals like the Sacketts to obtain review under the APA.[46]

- Failed to consider one of the *Block* factors—whether the "nature of the administrative action" (in this instance, the compliance order) supported judicial review under the APA—which was significant because the APA forbids the imposition of sanctions (the nature of the action at issue) unless an agency acts within its statutory jurisdiction and authority in the first instance.[47]

- Cited judicial decisions from other courts that have held that the CWA precludes review of pre-enforcement actions such as compliance orders, but that ignored, or addressed only cursorily, the due process implications of denying judicial review to individuals like the Sacketts.[48]

- Reasoned that the Sacketts were not deprived of due process because they could contest the EPA's jurisdiction to issue the compliance order by applying for a permit and seeking judicial review of the permit's denial, but did not explain the manner in which the permitting process could provide review of the compliance order, given that (1) review would be limited to the permit denial or contested permit conditions; and (2) the Sacketts are effectively precluded by regulation from even applying for a permit until the compliance order is resolved.[49]

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http://www.pacificlegal.org (last accessed on June 9, 2012).

45. *Petitioners' Brief on the Merits*, 2011 WL 4500687, at *10.

46. *Id.*

47. *Id.*; *see also* 5 U.S.C. § 558(b).

48. *Petitioners' Brief on the Merits*, 2011 WL 4500687, at *12.

49. *Id.* at *13.

- Did not address the Sacketts' contention that, under *Thunder Basin*, the CWA permitting process is too onerous to provide constitutionally adequate review because that process is frequently ruinously expensive and time-consuming, and its costs are not recoverable.[50]

- Did not address the fact that if and when the EPA seeks civil penalties for the Sacketts' failure to comply with the compliance order, even a subsequent substantial "good faith" reduction in liability by a federal judge sitting in equity would still leave the Sacketts paying an immense civil penalty (a 99% reduction to the statutory maximum for four years of noncompliance would exceed $500,000).[51]

On the other hand, unsurprisingly, the EPA agreed with the Ninth Circuit's analysis in its *Brief on the Merits*, citing with approval, the court's determinations that:

- Every circuit that has confronted the issue has held that the CWA impliedly precludes judicial review of compliance orders until the EPA brings an enforcement action in federal district court.[52]

- The CWA's structure, purposes, and history indicate that Congress intended to foreclose the pre-enforcement review of compliance orders because providing for the immediate judicial review of such orders would "vitiate EPA's statutorily-conferred discretion either to issue a compliance order or to file a Section 309(b) enforcement action."[53]

- Construing the CWA to preclude the pre-enforcement judicial review of compliance orders would not violate the Sacketts' due process rights because (1) a district court cannot assess penalties for violations of a compliance order under Section 309(d) unless the EPA proves by a preponderance of the evidence that the alleged violators actually violated the CWA in the manner alleged; and (2) such preclusion would violate due process "only when compliance is so onerous, and the penalties for

50. *Id.*
51. *Id.* at *13-*14.
52. *Brief for the Respondents*, 2011 WL 5908950, at *8.
53. *Id.* at *8-*9.

noncompliance so coercive, as to have the practical effect of foreclosing access to the courts," which was not the case here, because the Sacketts could have sought judicial review under the CWA permitting process.[54]

- The amount of any civil penalty imposed would be determined by a federal district court, based upon factors specified in the CWA, "only after the [Sacketts] have had a full and fair opportunity to present their case in a judicial forum."[55]

B. *Oral Arguments*

On January 9, 2012, the U.S. Supreme Court heard oral arguments.[56] The toughest questions and comments were aimed at counsel for the U.S. (EPA), Mr. Malcolm Stewart.

For example, Justice Alito asked Mr. Stewart whether "if [he] related the facts of this case as they come to [the Court] to an ordinary homeowner,"[57] and whether Mr. Stewart thought that "most ordinary homeowners would say this kind of thing can't happen in the United States?"[58] Similarly, Chief Justice Roberts asked what Mr. Stewart would do if he had received the Sacketts' compliance order.[59] When Mr. Stewart responded that one could apply for an after-the-fact permit, Chief Justice Roberts replied: "You wouldn't do that, right? You know you will never get an after-the-fact permit if the EPA has sent you a compliance order saying you've got wetlands."[60]

Regarding the EPA's argument that the Sacketts could contest the EPA's jurisdiction to issue a compliance order by applying for an after-the-fact permit and seeking judicial review of the permit's denial, Justice Kagan rhetorically asked the Sacketts' Counsel whether the "critical" point was whether the EPA would even entertain such an application while a compliance order was pending.[61] Moreover, Justice Alito expressed the view that it "seem[ed] very strange . . . for a party to apply for a permit on – on the ground that they don't need a permit at all."[62]

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54. *Id.* at *9.

55. *Id.* at *9-*10 (internal citations omitted).

56. Sackett v. EPA, 132 S. Ct. 1367 (2012), U.S. Supreme Court Official Transcript, Case No. 10-1062, at 37 [hereinafter *Official Transcript*].

57. *Id.*

58. *Id.*

59. *Id.* at 36.

60. *Id.* at 36-37.

61. *Id.* at 12.

62. *Id.* at 14.

When Mr. Stewart relayed the EPA's alternative solution—complying with the compliance order—Chief Justice Roberts's response was incredulous: "That's what you would do? You would say: I don't think there are wetlands on my property, but EPA does. So, I'm going to take out all the fill; I'm going to plant herbaceous trees or whatever it is; and . . . that way, I'll just do what the government tells me I should do?"[63]

With respect to the finality of the compliance order for purposes of judicial review, Justice Breyer remarked that:

> [F]or 75 years the courts have interpreted statutes with an eye towards permitting judicial review, not the opposite. . . . And yet – so, here you're saying this statute that says nothing about it precludes review, and then the second thing you say is that this isn't final. So I read the order. It looks like about as final a thing as I've ever seen.[64]

Additionally, Justice Ginsburg asked Mr. Stewart whether once the EPA had made a determination that jurisdictional wetlands do exist on the property, that determination brought the matter to a close from the EPA's perspective.[65] Mr. Stewart responded, "I think they have reached that conclusion for now. I don't think it would be accurate to say that we have done all the research we would want to do if we were going to be required to prove up our case in court."[66] This response drew ire from Justice Alito:

> That makes the EPA's conduct here even more outrageous: We -- we think now that this is -- wetlands that -- that qualify; so we're going to hit you with this compliance order, but, you know, when we look into it more thoroughly in the future, we might change our mind?[67]

C. *Decision*

The U.S. Supreme Court issued its decision on March 21, 2012.[68] It concluded that "the compliance order in this case is final agency action for which there is no adequate remedy other than APA review, and that

63. *Id.* at 36-37.
64. *Id.* at 51.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Sackett*, 312 S. Ct. at 1367.

the [CWA] does not preclude that review."[69] It thus reversed the Ninth Circuit's judgment and remanded the case for further proceedings.[70]

The Court first considered whether the compliance order was *final* agency action.[71] The Court concluded that it was final because it "ha[d] all of the hallmarks of APA finality. . . ."[72] Specifically, the Court found that the compliance order "determined" the Sacketts' "rights or obligations," because "[b]y reason of the order, the Sacketts have the legal obligation to restore their property . . . and must give the EPA access to their property and to records and documentation related to the conditions at the Site."[73] Additionally, the Court found that several "legal consequences flow" from the EPA's issuance of the compliance order to the Sacketts, such as the fact that the compliance order exposed the Sacketts to double penalties in any future enforcement proceeding and severely limited the Sacketts' ability to obtain a permit for their fill from the Corps.[74] The Court also determined that issuance of the compliance order marked the consummation of the EPA's decisionmaking process, notwithstanding the EPA's arguments to the contrary (based upon language in the compliance order inviting informal discussions regarding same), because "[t]he mere possibility that an agency might reconsider [its compliance order] in light of informal discussion and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal."[75]

Having concluded that the compliance order was indeed final agency action, the Court next addressed whether the Sacketts had an "adequate remedy in a court" other than pursuant to the APA.[76] The Court observed that in CWA enforcement cases, judicial review ordinarily comes by way of a civil action brought by the EPA; but the Sacketts could not initiate such a lawsuit, and while they waited for the EPA to decide whether to do so, they would continue to accrue significant liability under the CWA.[77] The Court also found the CWA permitting process to be an inadequate option, because "[t]he remedy for denial of [an] action that might be sought from one agency [the Corps] does not ordinarily provide an adequate remedy for action already taken by another agency [EPA]."[78]

Finding the Sacketts' only real option for judicial review of the

69. *Id.* at 1374.
70. *Id.*
71. *Id.* at 1371.
72. *Id.*
73. *Id.* (internal quotations omitted).
74. *Id.* at 1371-72 (internal quotations omitted).
75. *Id.* at 1372.
76. *Id.* at 1372.
77. *Id.*
78. *Id.*

EPA's pre-enforcement compliance order was to do so pursuant to the APA, the Court next considered whether the CWA implicitly precludes judicial review pursuant to the APA under the factors enunciated in *Block*.[79] The Court was not persuaded by the EPA's arguments to the contrary, including the EPA's contentions that the effectiveness of compliance orders would be undermined if they were subjected to judicial review, or that Congress viewed compliance orders as merely "a step in the deliberative process."[80] The Court noted that even if compliance orders were subject to judicial review, they would still be useful because they nevertheless "provide a means of notifying recipients of potential violations and quickly resolving the issues through voluntary compliance[,]" particularly "in those many cases where there is no susbtantial basis to question their validity."[81] Additionally, the Court explained that "[a]s the text (and indeed the very name) of the compliance order makes clear, the EPA's deliberation over whether the Sacketts are in violation of the [CWA] is at an end," because following issuance of the compliance order, 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)."[82] Accordingly, the Court found that the EPA had not overcome the APA's presumption favoring judicial review of administrative action based upon "inferences of intent drawn from the statutory scheme as a whole," and concluded that the CWA does not preclude APA review.[83]

VI. CONCLUSION

What does this mean going forward? How far does *Sackett* extend? On its face, it applies only to enforcement actions brought under the CWA, a point carefully made by the Court.[84] But even the Ninth Circuit acknowledged that both the CWA and the CAA permit the EPA to issue compliance orders "on the basis of any information available," and contain enforcement provisions subjecting any person that violates a compliance order to a civil penalty, suggesting at least that the CAA

79. *Id.* at 1372-73.

80. *Id.* at 1373.

81. *Id.* at 1373-74 (internal quotations omitted).

82. *Id.* at 1373.

83. *Id.* at 1373-74 (citing Block v. Cmty. Nutrition Inst., 467 U.S. 340, 345 (1984) (internal quotations omitted)).

84. "We conclude that the compliance order in this case is final agency action for which there is no adequate remedy other than APA review, and *that the Clean Water Act does not preclude that review.*" *Sackett*, 312 S. Ct. at 1374 (emphasis added).

could suffer from the same constitutional defects as the CWA.[85] Thus, its reach, while intended to affect only CWA enforcement, may reverberate in other enforcement contexts.[86]

So what changes can we expect from the EPA? The *Sackett* decision could prompt an overhaul of the EPA's enforcement procedures, possibly the creation of a mechanism to provide for administrative review of compliance orders. However, that is by no means a certain outcome. As a practical matter, it might result simply in the EPA being more cautious in how it words its enforcement orders—for example, "compliance orders" may become "notices of violation" or orders to "show cause," and indicate they are "non-final."[87] The nomenclature may change, but the effect on ordinary citizens with limited resources—the feeling of being completely at the mercy of the EPA—would be unlikely to change. Various sources have opined that the EPA will simply need to "be sure of its facts" and jettison the cases on which its enforcement case is shaky or be more judicious about pursuing compliance orders against violators with deep pockets. However, one can only hope that the EPA will take this opportunity to create a meaningful opportunity for review of its compliance orders that affords the due process that the *Sacketts* were denied.

85. Sackett v. U.S. EPA, 622 F.3d 1139, 1145 (9th Cir. 2010), *cert. granted in part*, 131 S. Ct. 3092 (U.S. 2011), *and rev'd sub nom.*, Sackett v. EPA, 132 S. Ct. 1367 (U.S. 2012).

86. *See* 33 U.S.C. § 1319 (2006) (CWA enforcement); 42 U.S.C. § 7413 (2006) (CAA enforcement); 42 U.S.C. § 6928 (2006) (RCRA enforcement). Like the CWA, neither the CAA nor the Resource Conservation and Recovery Act (RCRA) contain express provisions prohibiting pre-enforcement judicial review, and contain many other similar if not identical provisions.

87. *See* Bridget DiCosmo, *Downplaying High Court Ruling, EPA Floats Options for CWA Enforcement*, INSIDEEPA.COM (Aug. 2, 2012), http://insideepa.com/Inside-EPA-General/Inside-EPA-Public-Content/downplaying-high-court-ruling-epa-floats-options-for-cwa-enforcement/menu-id-565.html (noting that the potential options the agency is considering include greater use of "notice of violation" (NOV) letters (like those used in the CAA office) and "show cause" letters (like those used in the RCRA office), which are not eligible for judicial review.

UNIVERSITY OF FLORIDA JOURNAL OF LAW AND PUBLIC POLICY

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VOLUME 23 DECEMBER 2012 NUMBER 3

University of Florida Journal of Law and Public Policy

VOLUME 23 | DECEMBER 2012 | NUMBER 3

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The *Journal* thanks Marjorie A. Niblack and the Office of Instructional Resources, University of Florida, for the use of the Century Tower graphic on the back cover.

ACKNOWLEDGMENT

This issue of the *University of Florida Journal of Law and Public Policy* is a direct result of the collaboration and hard work of the *Journal* members, staff, advisors, sponsors, and contributing authors.

The *Journal* extends its deep appreciation for the generosity of the University of Florida Fredric G. Levin College of Law and the Huber C. Hurst Fund in supporting and assisting the *Journal* in its publication of this issue and for supporting our multidisciplinary journal concept.

Special thanks to our faculty advisor, Teresa J. Reid, and our staff editor, Victoria A. Redd.

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The *University of Florida Journal of Law and Public Policy* (ISSN# 1047-8035) is published three times per year and is sponsored by the Warrington College of Business Administration and the Levin College of Law, University of Florida. Printed by Western Newspaper Publishing Co., Indianapolis, IN.

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