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Judicial Review of Federal Compliance Orders After Sackett v. EPA

Challenging EPA Administrative Proceedings Prior to Enforcement

TUESDAY, MAY 15, 2012

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Sackett v. EPA

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Sackett v. EPA – Factual Background

- Plaintiffs Michael and Chantell Sackett.
- Purchased 0.6 acre lot near Priest Lake, Idaho to build a home.
- Property was in a residential subdivision, and zoned for that use. Separated from the lake by a road and other structures.
- All local building permits granted.



Sackett v. EPA – Factual Background (con't)

- Sacketts filled in a poorly drained section of their property to prepare for construction, April-May 2007.
- Received a compliance order from EPA pursuant to CWA, November 2007:
 - ❑ Subject to jurisdiction as a wetland and “water of the U.S.;
 - ❑ Cease construction and remove fill;
 - ❑ Penalties for each day of non-compliance.
- Sacketts requested a hearing on jurisdiction, denied by EPA.



Sackett v. EPA, Proceedings Below

- Sacketts filed suit in U.S. District Court, Idaho, April 2008:
 - challenging EPA jurisdiction;
 - asserting a due process violation, and right to review under the Administrative Procedure Act (APA).
- Represented by Pacific Legal Foundation.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION

CHANTELL and MICHAEL SACKETT,) Case No. _____
Plaintiffs,)
v.)
UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY; and STEPHEN L.)
JOHNSON, in his official capacity as Administrator)
of the Environmental Protection Agency,)
Defendants.)

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

Sacketts v. EPA, Proceedings Below: The District Court

- EPA's Rule 12(b) motion to dismiss granted August 2008:
 - Congressional intent indicates a lack of jurisdiction under CWA to review compliance orders prior to initiation of a civil action by the Agency.
 - Multiple prior decisions cited.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION

CHANTELL and MICHAEL SACKETT,
Plaintiffs,
v.
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, and STEPHEN L.
JOHNSON, in his official capacity as Administrator
of the Environmental Protection Agency,
Defendants.

Case No. 08-cv-185-N-EJL
MEMORANDUM ORDER

Pursuant to Federal Rule of Civil Procedure 12(b)(1), Defendant United States Environmental Protection Agency ("EPA") moves to dismiss this action for lack of subject matter jurisdiction. Plaintiffs Chantell and Michael Sackett oppose the motion. Having fully reviewed the record, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, this matter shall be decided on the record before this Court without oral argument.

Background

Plaintiffs own a parcel of undeveloped property located at 1604 Kalispell Bay Road, near Kalispell Creek, in Bonner County, Idaho. On November 26, 2007, EPA issued to

MEMORANDUM ORDER - 1

Sacketts v. EPA, Proceedings Below: The 9th Circuit

- Affirmed on appeal, 622 F.3d 1139 (9th Cir. 2010):
 - Structure of CWA evidences Congressional intent to preclude judicial review of compliance orders.
 - Pre-enforcement review of a similar provision in CAA rejected by Congress.
 - Policy goal of swiftly addressing threats to the environment served.
 - Compliance order penalties not onerous because a permit could be applied for and a rejection challenged; and because the amount of penalties is ultimately committed to judicial discretion, not EPA.
 - **BUT:** Penalties for ignoring a compliance order must rest upon a demonstrated violation of the statute.

Sackett v. EPA - U.S. Supreme Court Decision

- Certiorari granted, argued January 9, 2012, decided March 31, 2012.
- Justice Scalia opinion for a unanimous court, 2 concurrences:
 - There is a strong presumption of review of final Agency action under the APA.
 - The CWA compliance order was final Agency action in that it obligated Sacketts to take action, and EPA declined to reconsider.
 - No other adequate way to review this order.
 - There is no express or implied preclusion in CWA:
 - Providing for both enforcement actions and compliance orders in statute does not require a finding of no pre-enforcement review.
 - “Efficiency of regulation does not conquer all.”

Sackett v. EPA: A Significant Decision, that Leaves Many Questions Unanswered

1. Justice Ginsberg's concurrence: What components of a compliance order are subject to immediate review?

Cite as: 566 U. S. ____ (2012)

1

GINSBURG, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 10-1062

CHANTELL SACKETT, ET VIR, PETITIONERS v. ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[March 21, 2012]

JUSTICE GINSBURG, concurring.

Faced with an EPA administrative compliance order threatening tens of thousands of dollars in civil penalties per day, the Sacketts sued “to contest the jurisdictional bases for the order.” Brief for Petitioners 9. “As a logical prerequisite to the issuance of the challenged compliance order,” the Sacketts contend, “EPA had to determine that it has regulatory authority over [our] property.” *Id.*, at 54–55. The Court holds that the Sacketts may immediately litigate their jurisdictional challenge in federal court. I agree, for the Agency has ruled definitively on that question. Whether the Sacketts could challenge not only the EPA’s authority to regulate their land under the Clean Water Act, but also, at this pre-enforcement stage, the terms and conditions of the compliance order, is a question today’s opinion does not reach out to resolve. Not raised by the Sacketts here, the question remains open for another day and case. On that understanding, I join the Court’s opinion.

The Ginsburg Concurrence



- Sacketts claimed the administrative order (“AO”) in question was “arbitrary and capricious” under the Administrative Procedure Act because EPA lacked jurisdiction to issue the AO under the CWA.
- Ginsburg’s opinion was short and sweet, meant to capture one point: the majority opinion does not reach the issue of whether pre-enforcement judicial review is available to challenge the terms of an AO.

Limitations of *Sackett*

- Concurrence likely used to limit application of *Sackett* to determination of EPA's jurisdiction to issue an order in the first instance, rather than pre-enforcement litigation over the terms of an AO.
- Majority: allowing pre-enforcement judicial review does not obviate AO scheme, which still allows EPA to work with regulated parties to reach "voluntary" compliance.
- But if terms could be challenged in the first instance, could lead to much more litigation; may make sense to litigate terms at enforcement action stage.
- However, despite fact that only jurisdiction was before the Court, the majority is (intentionally?) murky as to the reach of its opinion, perhaps telegraphing willingness to go further.
- EPA seems to be treading lightly (see *Range Resources*).

Sackett v. EPA: A Significant Decision, that Leaves Many Questions Unanswered (con't)

2. Justice Alito's concurrence: The scope of jurisdiction: What are "waters of the United States?"

Cite as: 566 U. S. ____ (2012)

1

ALITO, J., concurring

SUPREME COURT OF THE UNITED STATES

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JUSTICE ALITO, concurring.

The position taken in this case by the Federal Government—a position that the Court now squarely rejects—would have put the property rights of ordinary Americans entirely at the mercy of Environmental Protection Agency (EPA) employees.

The reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act, and according to the Federal Government, if property owners begin to construct a home on a lot that the agency thinks possesses the requisite wetness, the property owners are at the agency's mercy. The EPA may issue a compliance order demanding that the owners cease construction, engage in expensive remedial measures, and abandon any use of the property. If the owners do not do the EPA's bidding, they may be fined up to \$75,000 per day (\$37,500 for violating the Act and another \$37,500 for violating the compliance order). And if the owners want their day in court to show that their lot does not include covered wetlands, well, as a practical matter, that is just too bad. Until the EPA sues them, they are blocked from access to the courts, and the EPA may wait as long as it wants before deciding to sue. By that time, the potential fines may easily have reached the

The Alito Concurrence



- Concurrence goes well beyond the matter before the Court
- Court's decision only provides "a modest measure of relief"
- Definition of "waters of the United States" is the real culprit
- Rules of the game unclear—no "clarity and predictability"
- "In a nation that values due process, not to mention private property, such treatment is unthinkable."
- Court, *Rapanos* and *SWANCC*, rejected EPA's and Army Corps "boundless view"—now it's Congress' turn
- Cites *amicus* brief of Competitive Enterprise Institute (CEI "promotes environmental policies based on economic freedom, property rights, and limited government")

Waters of the United States

Current Status of the Definition

- Purpose of CWA is to eliminate discharge of pollutants into navigable waters
- Definition of navigable waters means the waters of the US [33 USC 1362(7)]
- Regulations define waters of the US [33 CFR 328.3]:
 - *intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate commerce, and all tributaries and wetlands adjacent to such waters*
- After long period of expansion, Supreme Court pulled back

Jurisdictional Reach under CWA Supreme Court Decisions

- *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps (5-4) (2001)*
 - ❑ Migratory Bird Rule
 - ❑ Sand and gravel pit—bird habitat
 - ❑ No significant nexus to navigable waters
 - ❑ Dissent: isolated waters may be covered by CWA; “dredge and fill” affects interstate commerce



Waters of the United States (con't)

- *Rapanos v United States (plurality) (2006)*
 - Confirmed “waters” are more than just “navigable” but still must be qualified (court declines to say how)
 - Here, Army Corps’ interpretation “stretches the outer limits”
 - Does not include intermittent drainage ditches physically remote hydrologically
 - Only wetlands with continuous surface connection
 - Kennedy concurrence: Court should have used *SWANCC*’s significant nexus test
 - Dissent: ditch drains to ground then to tributary then to “waters”
- Back to Alito—is he saying only Congress can bring more clarity or has the Court not finished its work here?

Waters of the United States (con't)

- EPA Regulatory Action
- May 2, 2012 Federal Register [76 FR 24479]
- Notice of Availability and Request for Comments
- Opens up question of the reach of CWA and how to implement *SWANCC* and *Rapanos*
- Don't count out the Supreme Court

Sackett v. EPA: A Significant Decision, that Leaves Many Questions Unanswered (con't)

3. Are compliance orders under other environmental statutes subject to similar review?

Other Statutes

- 1300 compliance orders under multiple environmental statutes issued yearly, 500 plus under CWA.
- CWA isn't the only environmental statute that uses an AO scheme.
- RCRA, SDWA, CAA and CERCLA do, too!



RCRA

- No express preclusion of pre-enforcement judicial review.
- Courts have held based on “legislative intent” and statutory scheme, review is precluded.
- But RCRA’s AO scheme is very similar to CWA, and CWA decisions in the past have been analogized to find no review under RCRA.
- Likely *Sackett* will mean review under RCRA.

The CAA

- CAA does have an express provision on review, §7607: authorized for “final agency action.”
- Circuits split re “finality” of compliance orders
- Test is *Bennett v. Spear* finality test used by majority in *Sackett*.

The CAA Split

- Compliance orders aren't final: 2nd Circuit in *Asbestec Construction Services*, and 7th Circuit in *Acker v. EPA*.
- Compliance orders are final: 6th Circuit in *Allsteel* and 9th Circuit in *Alaska DEC*.
- Could *Sackett* resolve the split? Likely.

SDWA

- SDWA also has an express provision on review, section 300j-7(a)(2): authorized for “final agency action” if petition for review is filed within 45 days
- *Sackett* reinforces sparse case law holding emergency compliance orders constitute final agency action
- Other (non-emergency) AOs subject to *Bennett v. Spears* finality test as applied by *Sackett*

CERCLA

- CERCLA has a provision expressly precluding pre-enforcement judicial review.
- Therefore, *Sackett* holding won't apply to CERCLA.
- But, would the Court ever reach a similar result via a Due Process challenge to CERCLA?

Sackett v. EPA: A Significant Decision, that Leaves Many Questions Unanswered

4. Is the decision retroactive?

Sackett v. EPA: A Significant Decision, that Leaves Many Questions Unanswered: Retroactivity

- **OLD RULE:** *Chevron v. Huson*, 404 U.S. 97 (1971):
 - ❑ New legal rule, overturning precedent, or question of first impression;
 - ❑ Will retroactive application affect the new rule or statute;
 - ❑ Equity.

Sackett v. EPA: A Significant Decision, that Leaves Many Questions Unanswered: Retroactivity (con't)

- **NEW RULE:** *Harper, et al. v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993): “When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or post date our announcement of the rule.”
- **INTERPRETATION:** If AO issued within SOL of 6 years on civil actions against U.S., 28 U.S.C. § 2401, and the order is not the subject of a final decision by a court, then is it challengeable under *Sackett*?

Sackett v. EPA: A Significant Decision, that Leaves Many Questions Unanswered (con't)

5. Has this affected EPA's thinking, and if so how?

EPA's View After *Sackett*

- EPA's traditional mantra—no pre-enforcement review
- Administrative and judicial enforcement are separate processes
- After *Sackett*, EPA says
 - “...no dramatic shift in how administration enforcement authority is used”
 - Decision is “a narrow one” and compliance orders still enforceable
 - BUT admits there may be modifications in administrative enforcement practices
 - Perhaps more NOV's and warning letters

Range Resources v. EPA

- Texas natural gas driller utilizing “fracking”
- December 2010, EPA issued administrative emergency order under SDWA claiming aquifer contamination
- RR sued in 5th Circuit claiming no due process
- EPA sued for enforcement in District Court—in June 2011, case stayed pending circuit decision
- EPA withdrew order on March 30 to work with the company (less than 10 days after *Sackett*)

Sackett v. EPA: A Significant Decision, that Leaves Many Questions Unanswered (con't)

6. Are all compliance orders that provide for the accrual of penalties before judicial review violative of Due Process, regardless of the enabling statute?

Due Process Next?

- SCOTUS did not reach Due Process argument in *Sackett* (even though included in Petitioners' briefs).
- Even so, are other statutes, including those with a specific ban on pre-enforcement review, the next target?
- Due Process argument: penalties imposed for violation of an AO not subject to pre-enforcement judicial review constitute unconstitutional deprivation of Due Process.
- Courts have generally held Due Process not violated under CERCLA because validity of AOs can be challenged via enforcement action.
- CERCLA also allows "good faith" defense for noncompliance with AO.

Due Process Next? (con't)

- SCOTUS also recently (in 2011) denied cert for a Due Process challenge to CERCLA in the *GE* case.
- But *GE* plaintiff was a large corporation subject to scores of AOs, not exactly the sympathetic Sacketts.
- Would SCOTUS be willing to reach the question with more sympathetic plaintiffs? More difficult to find sympathetic plaintiffs for these property rights questions under CERCLA.
- Right now, seems SCOTUS may be unwilling to reach the question – but they will have to in order to produce the end result of *Sackett* under CERCLA.

Sackett v. EPA: A Significant Decision, that Leaves Many Questions Unanswered (con't)

7. What process is due the Sacketts and others in their situation?

7. What process is due? The standard for review

- Is there “substantial evidence” for specific factual determinations?
- Are the Agency’s interpretations and applications “arbitrary and capricious,” an abuse of discretion, or not otherwise in compliance with the law?
- Has the Agency:
 - Relied only on those factors provided for in the statute, and not on others?
 - Considered all the facts, in particular the “important ones?”
 - Made its decision in a manner consistent with the evidence?
 - Taken a “hard look?”
 - *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).



7. What process is due? Deference and Procedure

- Great deference accorded in enforcement of statutes, *Massachusetts v. EPA*, 549 U.S. 487 (2007).
- Also deference to Agency interpretations in the absence of specific Congressional direction. Particularly in areas within its expertise, *NRDC v. Chevron*, 467 U.S. 387 (1984). (Like how to define a wetland, and whether it does or can affect a water of the U.S.??)
- Procedure:
 - Agency compilation of an administrative record, considering all evidence, all documents considered in making the decision and any public comments;
 - Review restricted to the record?
 - Limited or no discovery?

Thanks, questions or comments?



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