SACKETT: THE ROAD FORWARD

BY

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This Essay surveys the Supreme Court's opinion in Sackett *and, in so doing, summarizes both the issues the Court resolved and the most important questions the Court left unaddressed. It also suggests how EPA is likely to respond and how the Author believes it should respond. Most significantly, this Essay suggests that EPA can take relatively minor steps that will likely ensure that* Sackett *has only minimal effects on EPA's ability to efficiently generate positive compliance outcomes.*

I. INTRODUCTION

On March 21 of this year, the Supreme Court unanimously held in *Sackett v. U.S. Environmental Protection Agency*[1] that the recipients of a compliance order issued under section 309(a) of the Clean Water Act (CWA)[2] were entitled to pre-enforcement review on the question whether the U.S. Environmental Protection Agency (EPA) had properly asserted jurisdiction over their property. While the decision overruled two decades worth of unanimous precedent from the federal courts of appeals,[3] in the end the result was unsurprising to those who had watched the issue for years, and particularly to those who had read the briefing or followed the oral argument.[4]

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1 132 S. Ct. 1367 (2012).

2 Federal Water Pollution Control Act, 33 U.S.C. § 1319(a) (2006).

3 Sackett v. U.S. Envtl. Prot. Agency, 622 F.3d 1139, 1141 (9th Cir. 2010), *rev'd*, 132 S. Ct. 1367 (2012); Laguna Gatuna, Inc. v. Browner, 58 F.3d 564, 566 (10th Cir. 1995), *cert. denied*, 516 U.S. 1071 (1996); S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement, 20 F.3d 1418, 1427 (6th Cir. 1994), *cert. denied*, 513 U.S. 927; S. Pines Assocs. v. United States, 912 F.2d 713, 715–16 (4th Cir. 1990); Hoffman Grp., Inc. v. Envtl. Prot. Agency, 902 F.2d 567, 569 (7th Cir. 1990).

4 *See, e.g.*, Robert Barnes, *Supreme Court Appears Sympathetic to Idaho Couple in 4-Year Battle with EPA*, WASH. POST, Jan. 9, 2012, http://www.washingtonpost.com/politics/supreme-court-appears-sympathetic-to-idaho-couple-in-4-year-battle-with-epa/2012/01/09/gIQAP9zSmP_story.html (last visited Nov. 18, 2012); Lyle Denniston, *A Weak Defense of EPA*, SCOTUSBLOG (Jan. 9, 2012), http://www.scotusblog.com/2012/01/a-weak-defense-of-epa (last visited Nov. 18, 2012).

The real question is what this means. In this brief Essay, I will first summarize the case, including its facts and lower court history, in addition to the Supreme Court opinion and the attendant concurrences. With that background, I will say a few words about four important, related questions that I expect the courts will have to work out in the wake of *Sackett*. That accomplished, I will speculate as to how EPA likely will respond to *Sackett* and suggest that, seen in this light, the decision is likely in the short run to negatively impact EPA's ability to induce compliance, but perhaps not disastrously so. And finally, I will offer another pathway that EPA could take that has the potential of turning the decision into a blessing in disguise.

II. FACTUAL BACKGROUND AND LOWER COURT HISTORY

Chantell and Michael Sackett own a 0.63-acre parcel of land near Priest Lake, in northern Idaho.[5] Although their property was damp, in April and May of 2007 the Sacketts began filling it in without first seeking a jurisdictional determination from the U.S. Army Corps of Engineers (Corps).[6] Altogether, they filled in approximately one-half acre of their lot.[7]

Within three days of when the Sacketts began their filling activities, EPA showed up, and asked the equipment operators who were engaged in the filling to stop operating if the Sacketts did not have a permit under section 404 of the CWA.[8] In response, the Sacketts hired a consultant to determine whether their land constituted jurisdictional wetlands under the CWA; this consultant determined both that the property was a wetland and that it was not an "isolated wetland."[9] Despite this, the Sacketts made no effort to apply for an "after-the-fact" permit from the Corps; instead, Chantell Sackett appeared to continue to believe that the property constituted an isolated wetland.[10]

In the face of the Sacketts' inaction, EPA issued them a compliance order in November of 2007.[11] This order reflected EPA's determination that the relevant area qualified as a wetland within the meaning of 33 C.F.R. § 328.4(8)(b), and that the relevant wetland was "adjacent" to Priest Lake, within the meaning of 33 C.F.R. § 328.4(8)(c).[12] The order required the Sacketts to restore the relevant site in accordance with an EPA-approved plan.[13] It further informed them that they would be subject to penalties of up

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5 *Sackett*, 622 F.3d at 1141.

6 *Id.*; *see also* 33 C.F.R. pt. 331 (2011) (defining jurisdictional determination, setting out the bases for a Corps determination, and outlining the administrative appeal process).

7 *Sackett*, 622 F.3d at 1141.

8 Brief for Natural Res. Def. Council et al. as Amici Curiae Supporting Respondents at 6–7, Sackett v. U.S. Envtl. Prot. Agency, 132 S. Ct. 1367 (2012) (No. 10-1062), 2011 WL 8473188.

9 *Id.* at 7–8. If the property were an isolated wetland, it would likely be beyond Clean Water Act jurisdiction due to the Supreme Court's opinion in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*), 531 U.S. 159, 171–72 (2001).

10 *Id.* at 9–11; *see also* 33 C.F.R. § 326.3(e) (2011) (authorizing after-the-fact permits).

11 *Sackett*, 622 F.3d at 1141.

12 Sackett v. U.S. Envtl. Prot. Agency, 132 S. Ct. 1367, 1370 (2012).

13 *Id.* at 1371.

to $32,500 per day of violation if they did not meet the order's terms,[14] but also invited them to "engage in informal discussion[s]" with EPA if they believed any of its allegations to be inaccurate.[15]

The Sacketts waited more than four months before they contacted EPA, on April 1, 2008. When they did, they requested a formal hearing. In accordance with its long-established practice, EPA denied this request.[16] The Sacketts then filed a judicial challenge in the United States District Court for the District of Idaho, seeking injunctive and declaratory relief. They argued that the order was arbitrary and capricious under the Administrative Procedure Act (APA);[17] they also argued that it violated their due process rights.[18] The district court granted EPA's motion to dismiss, determining that the CWA precluded pre-enforcement review of EPA's orders.[19] The United States Court of Appeals for the Ninth Circuit affirmed, agreeing with the unanimous view of the four other circuit courts that had considered the pre-enforcement review question.[20] The Ninth Circuit further determined that this denial of review did not violate due process, noting that, if and when EPA went to court to enforce the order, even if the order were deemed to be valid, the court could take any good faith arguments the Sacketts may have had into account in determining any applicable fines.[21]

III. THE SUPREME COURT'S OPINIONS

Justice Scalia's opinion for the unanimous Court is remarkably straightforward. The Court first determined, in only three paragraphs, that the order constituted a final agency action.[22] In so doing, the Court applied the familiar test from *Bennett v. Spear*[23] requiring that the action "mark the consummation of the agency's decisionmaking process," and that the action is one "by which rights and obligations have been determined, or from which legal consequences will flow."[24] Dealing with these in inverse order, the

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14 *Sackett*, 622 F.3d at 1141.

15 *Sackett*, 132 S. Ct. at 1372.

16 *Id.* at 1371.

17 5 U.S.C. § 706(2)(A) (2006).

18 *Id.*

19 Sackett v. U.S. Envtl. Prot. Agency, 2008 WL 3286801, at *3 (D. Idaho 2008), *aff'd*, 622 F.3d 1139 (9th Cir. 2010), *rev'd*, 132 S. Ct. 1367 (2012).

20 *Sackett*, 622 F.3d at 1144; *see also* Laguna Gatuna, Inc. v. Browner, 58 F.3d 564, 565 (10th Cir. 1995); S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement, 20 F.3d 1418, 1427 (6th Cir. 1994); S. Pines Assocs. v. United States, 912 F.2d 713, 715 (4th Cir. 1990); Hoffman Grp., Inc. v. Envtl. Prot. Agency, 902 F.2d 567, 569 (7th Cir. 1990).

21 *Sackett*, 622 F.3d at 1144–47. The court also expressly rejected the Eleventh Circuit's analysis in *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236 (11th Cir. 2003), that the "Clean Air Act is unconstitutional to the extent that mere noncompliance with the terms of an [administrative compliance order] can be the sole basis for the imposition of severe civil and criminal penalties." *Id.* at 1260. Instead, the Ninth Circuit determined that the Sacketts would be able to challenge the legality of the order if and when EPA were to enforce it. *Sackett*, 622 F.3d at 1145–46.

22 *Sackett*, 132 S. Ct. at 1371–72.

23 520 U.S. 154, 178 (1997).

24 *Id.* (internal quotations and citations omitted).

Court found that EPA's order met both prongs of the second test: it imposed on the Sacketts the legal obligation to restore their property, and with regard to legal consequences, the Court recognized the government's litigating position that the order doubled the Sacketts' exposure to penalties.[25] On the latter point, the Court also noted that EPA's order had the legal effect of making it less likely that the Sacketts could receive an after-the-fact permit.[26]

Next, the Court summarily concluded that the order marked the consummation of EPA's decision-making process. Noting, as the Sacketts had discovered, that the respondents had no right to a formal administrative hearing, the Court further determined that "[t]he mere possibility that an agency might reconsider in light of 'informal discussion' and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal."[27]

Thus concluding that the order easily met the *Bennett v. Spear* test, the Court then addressed the implied preclusion analysis that had underlain the unanimous body of circuit court precedent in EPA's favor. Here also, though, Justice Scalia's analysis was both quick and cutting, so much so that he never even bothered to cite any of the circuit court decisions.

The Court began with the three arguments EPA made based on the CWA's structural dynamics. First, Justice Scalia addressed EPA's best argument, that allowing judicial review would undermine the choice that Congress gave EPA between judicial and administrative enforcement.[28] The Court found, however, that this argument rested "on the question-begging premise that the relevant difference between a compliance order and an enforcement proceeding is that only the latter is subject to judicial review."[29] Noting that there were "eminently sound reasons other than insulation from judicial review [for] why compliance orders are useful"—such as notifying the recipients of potential violations and perhaps thereby quickly resolving some issues through voluntary compliance—Justice Scalia opined that the CWA "does not guarantee the EPA that issuing a compliance order will always be the most effective choice."[30]

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[25] *Sackett*, 132 S. Ct. at 1371–72 n.2. At oral argument, Malcolm Stewart of the Solicitor General's Office summarized this dynamic in the following terms: "The compliance order is intended to specify the violation that EPA believes to have occurred and the measures that EPA believes are necessary in order to achieve prospective compliance. And the statute does provide separately for penalties for violating the statute and penalties for violating the compliance order." Transcript of Oral Argument at 26, Sackett v. U.S. Envtl. Prot. Agency, 132 S. Ct. 1367 (2012) (No. 10-1062), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1062.pdf.

[26] *Sackett*, 132 S. Ct. at 1372 (noting that 33 C.F.R. § 326.3(e)(1)(iv) precludes the Corps from issuing such a permit once EPA has issued a compliance order, unless doing so is "clearly appropriate").

[27] *Id.*

[28] For most violations, the CWA provides EPA with two civil authorities for seeking to compel compliance. The agency may either go directly to court under section 309(b) or it can issue an administrative order. *See* Federal Water Pollution Control Act, 33 U.S.C. § 1319(a)(3) (2006).

[29] *Sackett*, 132 S. Ct. at 1373.

[30] *Id.*

The Court then turned to EPA's two other structural arguments. In response to the argument that EPA's orders are not self-executing, but rather must be enforced through judicial action, Justice Scalia noted that "the APA provides for judicial review for all final agency actions, not just those that impose a self-executing sanction."[31] And to the government's argument that Congress expressly provided for judicial review of EPA's administrative penalty orders,[32] but not of compliance orders, the Court simply stated, "if the express provision of judicial review in one section of a long and complicated statute were alone enough to overcome the APA's presumption of reviewability . . . it would not be much of a presumption at all."[33]

After distinguishing three cases the Court readily deemed not to be analogous,[34] the Court turned finally to the government's policy argument that allowing judicial review would hamper EPA's ability to enforce the CWA by undermining the usefulness of administrative compliance orders. Justice Scalia conceded that allowing review might make these orders a less attractive enforcement option. He rejected the notion, though, that this argument implied preclusion:

> The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And 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 whether the regulated party is within the EPA's jurisdiction.[35]

Justices Ginsburg and Alito wrote brief concurring opinions in *Sackett*. Justice Ginsburg wrote solely to note her view that the Court's opinion resolved only the issue of whether order recipients under the CWA can bring judicial challenges relating to questions of CWA jurisdiction; in her view, it leaves for another day whether pre-enforcement review is also available regarding the terms and conditions of such an order.[36] For his part, Justice Alito seemed to write for two reasons: 1) to say that he found the government's position "unthinkable" "in a nation that values due process";[37] and 2) to call upon Congress to more clearly define the reach of the CWA, while at the same time criticizing EPA for not writting a rule to provide such clarity in the wake of *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*),[38] and *Rapanos v. United States*.[39]

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31 *Id.*

32 *See* 33 U.S.C. § 1319(g)(8) (2006).

33 *Sackett*, 132 S. Ct. at 1373.

34 *Id.* at 1373–74 (distinguishing the instant case from Block v. Cmty. Nutrition Inst., 467 U.S. 340 (1984), United States v. Erika, Inc., 456 U.S. 201 (1982), and United States v. Fausto, 484 U.S. 439 (1988)).

35 *Id.* at 1374.

36 *Id.* at 1374–75 (Ginsburg, J., concurring).

37 *Id.* at 1375 (Alito, J., concurring).

38 431 U.S. 159 (2001).

39 *Sackett*, 132 S. Ct. at 1375; *see* Rapanos v. United States, 547 U.S. 159 (2006).

IV. WHAT WE LEARNED

Frankly, I do not believe that we learned that much—at least not much that is at all surprising. Many of us who teach in this area have long thought this result was essentially preordained, if and when the Supreme Court was to ever grant review. In fact, I have for years been using the case law finding implied preclusion under the CWA as an example for students as to why they should not take decisions from the courts of appeals as establishing black-letter law, even when the courts of appeals that have decided a particular issue have been unanimous in reaching a particular result.[40]

In particular, the Court's handling of the final-agency-action question was strongly foreshadowed in *Alaska Department of Environmental Conservation (ADEC) v. Environmental Protection Agency*,[41] in which the Court, in an opinion written by Justice Ginsburg, went out of its way to resolve the same question despite the government's decision not to contest the issue at the Supreme Court level:

> In this Court, EPA agrees with the Ninth Circuit's [determination that EPA's order was a final agency action]. We are satisfied that the Court of Appeals correctly applied the guides we set out in *Bennett v. Spear*. As the Court of Appeals stated, EPA had asserted its final position on the factual circumstances underpinning the Agency's orders, and if EPA's orders survived judicial review, Cominco could not escape the practical and legal consequences (lost costs and vulnerability to penalties) of any ADEC-permitted construction Cominco endeavored.[42]

And on the implied preclusion issue, the only real question was the strength of the APA's presumption in favor of reviewability. In describing the difficulty of overcoming this presumption, the Supreme Court has sometimes wavered between requiring "clear and convincing evidence" of a contrary congressional intent or, alternatively, requiring only that such an intent be "fairly discernible."[43] In the Clean Water Act cases, however, the lower courts had tended to emphasize only the latter formulation in finding such a discernible intent.[44]

Interestingly, in *Sackett* the Court did not deign to cite either of these interpretive formulations. Instead, it merely articulated that there is a presumption in favor of reviewability, and that none of the government's

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[40] Another, much sadder, environmental example of this dynamic came to pass in *SWANCC*, in which the Supreme Court overturned another unanimous body of appellate law upholding CWA jurisdiction over non-adjacent waters under the so-called "migratory bird rule." *SWANCC*, 431 U.S. at 171-172.

[41] 540 U.S. 461 (2004).

[42] *Id.* at 483 (internal quotations and citations omitted).

[43] *See, e.g.*, Block v. Cmty. Nutrition Inst., 467 U.S. 340, 350–51 (1984) (acknowledging the Court's "oft-quoted statement[s]" requiring clear and convincing evidence of congressional intent to overcome the presumption of reviewability, but nevertheless deeming the presumption rebutted by the lesser requirement that intent be "fairly discernible in the statutory scheme" (citations omitted)).

[44] *See, e.g.*, Sackett v. U.S. Envtl. Prot. Agency, 622 F.3d 1139, 1142–43 (9th Cir. 2010).

structural arguments regarding the role of CWA compliance orders were sufficient to overcome it. This is perhaps unsurprising given the weakness of EPA's case. Even to one who is both supportive of EPA's enforcement goals and concerned about its resource constraints, as I consider myself to be, Justice Scalia's rejoinders to the government's arguments ring all-too-true, especially concerning the absence of evidence that the CWA was uniquely designed to allow the government to use the threat of heightened penalties (beyond those that generally attend to noncompliance with the statute) to induce "voluntary compliance" without the opportunity for judicial review.[45] Indeed, if the presumption is more than just a tie-breaker, it is easy to see how the Court concluded it was not overcome in this case.[46]

So what in fact did we learn? I guess we learned that the Court is unanimous in regarding orders as final agency actions in situations that significantly "raise the stakes," in terms of the penalties the order recipients may face if they fail to comply with the edicts thereof. I guess we also learned that the presumption in favor of reviewability is not just a tie-breaker, or at the least that it is not overcome simply by pointing to either less than compelling statutory-structure dynamics or arguments based on statutory policy sounding in administrative convenience.

And frankly, I am skeptical of Justice Ginsburg's attempt to narrow the effect of the Court's holding. While I applaud her motives, it is hard to see how either the final-agency-action or implied-preclusion analysis would turn on the nature of the legal issue the administrative order recipient may seek to raise.

V. FOUR IMPORTANT THINGS THAT WE DID NOT LEARN

I would like to comment briefly on four issues that remain unresolved in the wake of *Sackett*. The first three of these relate directly to administrative orders and the fourth relates to the reviewability of administrative warning letters or notices of violation. Most obviously, there is the due process issue. Although the Supreme Court granted certiorari on

[45] *Sackett*, 132 S. Ct. at 1374. By contrast, of course, the interplay between sections 106 and 113(h) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) stand in dramatic contrast to the CWA dynamics. *See infra* text accompanying notes 49–51. Under section 106 of CERCLA, EPA has the power to issue unilateral orders requiring cleanup actions, even where those cleanups may cost millions of dollars. 42 U.S.C. § 9606 (2006). And section 113(h) expressly precludes courts from reviewing the legality of those orders until and unless either EPA goes to enforce them or a recipient has fully complied. *Id.* § 9613(h).

[46] To the extent that there may have been some doubt about the outcome when the Court granted review, it was largely obliterated by the oral argument. Indeed, Malcolm Stewart, who argued for the Government, was essentially in damage-control mode by the time he was three quarters of the way through his argument. *See* Transcript of Oral Argument, *supra* note 25, at 45. Indeed, the outcome on the statutory questions seemed so clear that the Justices did not ask a single question relating to the due process issue, which of course they knew they would only have to address if the statutory issues were to come out the other way.

this issue in *Sackett*,[47] its resolution of the case on statutory grounds negated any need to consider it. Not surprisingly, therefore, Justice Scalia's majority opinion says not a word about it.[48]

While the Supreme Court's resolution of the judicial review issue in *Sackett* essentially mooted any due process concerns under the CWA, the issue is alive and well under other statutes, most notably with regard to the unilateral orders that EPA often issues under section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[49] Under CERCLA, EPA often uses these orders at sites where the projected cleanup costs will run into the millions or tens of millions of dollars. And section 113(h) of CERCLA, in marked contrast to the dynamics that pertain under the CWA, expressly bars courts from reviewing these orders on a pre-enforcement basis.[50] Despite this, the four circuit courts that have considered the constitutionality of these orders have been unanimous in determining that they do not offend the Due Process Clause.[51]

While the *Sackett* Court was silent on this question, we may have learned something about how the Court views this issue through its handling of two petitions for review late in the 2011 term. Just before the Supreme Court granted review in *Sackett*, it denied review in *General Electric Co. v. Jackson*, the latest of the above-mention appellate cases under CERCLA. Interestingly, *General Electric* was framed as a "pattern and practice" case, which meant that GE's due process challenge could and did encompass EPA's entire history of issuing unilateral orders under the CERCLA program.[52] Despite this, and despite the much greater potential sanctions that EPA may threaten in the event of noncompliance under CERCLA,[53] the D.C. Circuit concluded that EPA's usage of these orders does not violate due process.[54]

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47 *See* 131 S. Ct. 3092 (2011) ("If [pre-enforcement judicial review is unavailable under the APA], does petitioners' inability to seek pre-enforcement judicial review of the administrative compliance order violate their rights under the Due Process Clause?").

48 As mentioned above, however, Justice Alito expressed his view, albeit briefly. *See Sackett*, 132 S. Ct. at 1375 (2012) (Alito, J., concurring) ("In a nation that values due process . . . such treatment is unthinkable.").

49 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9606 (2006).

50 *Id.* § 9613(h) (stating that, with few exceptions, "[n]o Federal court shall have jurisdiction . . . to review any challenges to removal or remedial action . . . or . . . any order").

51 Gen. Elec. Co. v. Jackson, 610 F.3d 110, 113–14 (D.C. Cir. 2010), *cert. denied*, 131B S. Ct. 2959 (2011); Emp'rs Ins. of Wausau v. Browner, 52 F.3d 656, 660 (7th Cir. 1995); Solid State Circuits, Inc. v. U.S. Envtl. Prot. Agency, 812 F.2d 383, 388–91 (8th Cir. 1987); Wagner Seed Co. v. Daggett, 800 F.2d 310, 315–17 (2nd Cir. 1986).

52 *Gen. Elec. Co.*, 610 F.3d at 127–29.

53 Under section 107(c)(3) of CERCLA, the recipient of such an order may be liable for punitive damages of up to three times the cost of cleanup if its noncompliance is deemed to be "without sufficient cause." 42 U.S.C. § 9607(c)(3).

54 *Gen. Elec. Co.,* 610 F.3d at 127–29. I should mention that section 106 of CERCLA has one feature that most order authorities do not have, and which may tend to alleviate any constitutional concerns. Under section 106(b) of CERCLA, one who receives such an order may petition EPA for reimbursement, either in whole or in part, after complying with its terms. 42 U.S.C. § 9606(b) (2006). If EPA denies such a petition, the recipient is entitled to judicial review

It is always hazardous, of course, to attribute too much significance to the Supreme Court's decisions in denying review in particular cases. It is worth noting, however, that it is hard to imagine the due process issues involving administrative orders being better teed-up than they were in the *General Electric* case. That the Court granted review in *Sackett* rather than in *General Electric* (or rather than in both) may suggest that the Court was more interested in the statutory issues in *Sackett* than it was in the due process question. If a block of four justices was particularly interested in the due process issue, one would expect that they would have voted to grant certiorari in *General Electric* as well.[55]

Another outstanding issue after *Sackett* involves the extent to which courts will be willing to stay the requirements of EPA's administrative orders pending judicial review. In *Sackett* itself, the Sacketts briefly sought a temporary restraining order, but then withdrew that request and did not seek to stay the effect of the compliance order while the district court proceedings were under way; they then, however, did seek to stay the order pending Ninth Circuit review, but the Court of Appeals denied that request.[56]

Perhaps obviously, the Supreme Court had no occasion to review the Ninth Circuit's denial of that request, as the Sacketts neither sought review of it nor sought a stay from the Supreme Court. In future cases, however, the appropriateness of such stays is likely to receive considerable attention. On this point, I can do no better than to quote my esteemed colleague Bill Funk, who wrote on this issue after the *Sackett* oral argument:

> The Administrative Procedure Act is clear that obtaining judicial review of a compliance order does not by itself relieve a person from the requirement to comply with that order pending judicial review. Instead, that Act provides that a person may seek a stay of the order first from the agency and then from the court if the agency denies the request, but that request will be judged on its own merits. For example, with respect to the Sacketts, it is unlikely a court would stay EPA's order to cease and desist from further damage to the alleged wetlands, but it might well stay the requirement that the Sacketts restore the wetlands until a determination of the validity of EPA's order. Thus, the judicial review the Sacketts seek would not enable continued harm to the environment during the review proceedings.[57]

of that denial. *Id.* § 9606(b)(2)(B). Interestingly, the D.C. Circuit reached its holding without reliance on this reimbursement mechanism. *See Gen. Elec. Co.*, 610 F.3d at 117–18.

[55] This point is underscored when one considers the caliber of the attorneys that urged the Court to grant review in *General Electric*. Among GE's counsel were both Carter Phillips and Kathleen Sullivan. Moreover, Paul Clement wrote a brief on behalf of the U.S. Chamber of Commerce, also urging the Court to grant review. *See* Brief for the Chamber of Commerce of the United States as Amicus Curiae in Support of Petitioner, United Gen. Elec. Co. v. Jackson (No. 10-871), 2011 WL 398299.

[56] Brief for Respondents at 16–17, Sackett v. U.S. Envtl. Prot. Agency, 132 S. Ct. 1367 (2012) (No. 10-1062), 2011 WL 5908950.

[57] William Funk, *The Need for a Judicial Check on Regulatory Compliance Orders*, REGBLOG (Jan. 9, 2012), https://www.law.upenn.edu/blogs/regblog/2012/01/the-need-for-a-judicial-check-

The third unresolved issue upon which I would like to quickly comment involves the standard of review that courts will apply to these orders. The parties in *Sackett* seemed to make some odd concessions in this regard. At oral argument, Damien Schiff, the lawyer for the Sacketts, seemed to concede that, if the Sacketts obtained judicial review, the relevant standard of review would be whether EPA's determination that the wetlands were jurisdictional was "arbitrary and capricious."[58] As mentioned earlier, this was consistent with the Sacketts' original complaint, which framed the relevant cause of action as being premised on the notion that EPA's order failed to meet this test.[59] For his part, Malcolm Stewart, the government's lawyer, tried to cash in on this concession.[60] Strangely, though, in its brief, the government was forthright in conceding that if it went to court under section 309 to enforce its order, it would bear the burden of establishing that a defendant has violated the CWA.[61] Even more pointedly, it conceded that:

> If the defendant in such a suit contends that the waters into which it discharged pollutants were not covered by the CWA, the court resolves the dispute between the parties on that issue without giving deference to any EPA factual determinations reflected in a prior compliance order.[62]

In turn, Damien Schiff seemed to embrace this logic at oral argument.[63] Thus, both the government and the Sacketts' lawyer seemed to contemplate a bizarre dichotomy pursuant to which the Sacketts could challenge the order subject only to the deferential standards of the APA. At the same time, however, both parties appeared to believe that if EPA were to go to court to enforce the order, it would have to make its case anew in the judicial proceeding, without the benefit of deference. At least Mr. Schiff appeared to believe that this would be true even if a prior court had upheld EPA's order against the onslaught of the Sacketts' attack. Not surprisingly, the Court seemed a bit perplexed by this view of the world, with the Justices asking a series of questions on the topic of whether collateral estoppel would have

on-regulatory-compliance-orders.html (last visited Nov. 18, 2012). The relevant provision of the APA dealing with the possibility of such stays is 5 U.S.C. § 705 (2006).

58 Transcript of Oral Argument, *supra* note 25, at 15.

59 *See Sackett*, 132 S. Ct. at 1371.

60 Transcript of Oral Argument, *supra* note 25, at 51. ("As the discussion in the first part of the argument made clear, Petitioners share our view that the administrative compliance order would be subject to review if it's reviewable under a deferential standard.")

61 Brief for Respondents, *supra* note 56, at 15 (remarking that the sanctions identified in an administrative compliance order "cannot actually be imposed unless EPA persuades a court that the defendant has violated the CWA and that the requested remedies are appropriate").

62 *Id.*

63 Transcript of Oral Argument, *supra* note 25, at 19–20 ("In addition to the fact that the standards of review would be different, preponderance of the evidence in a civil action as opposed to substantial evidence in the APA, it would also be the fact that . . . when [a civil action] goes forward, both sides have an opportunity to create a new record or . . . to establish by a preponderance of the evidence the elements of . . . the offense.").

any potential application in the second proceeding, with Mr. Schiff gamely answering no.[64]

It will be left to the lower courts to sort out how judicial review should work in these contexts. To this writer's mind, it would seem that whether an EPA order is entitled to deferential review under the APA should depend on whether EPA has built an adequate administrative record, and in particular on whether EPA has given the respondent an adequate opportunity to participate in the building of that record. If EPA has failed to do so, it may find its orders subject to de novo review;[65] alternatively, some courts may be inclined to remand the matter to EPA to give the respondent a chance to participate while still leaving the initial decisions in EPA's hands.[66] On the other hand, though, in situations in which EPA has both built a record and given the respondent an adequate chance to participate, it would seem that EPA should receive deferential review regardless of whether it is defending the order against judicial attack or seeking to invoke the power of a court to enforce it.[67]

The final, related issue that emerges from *Sackett* is whether EPA can avoid the judicial review required under *Sackett* by issuing warning letters or notices of violation. I will later address whether such an approach would generate most of the value that EPA historically has derived from orders in terms of promoting compliance. At this stage I mean only to speak to whether these warnings or notices will trigger a right of review.

Here the case law is decidedly in EPA's favor.[68] And there appears to be good reason for that. Warning letters and violation notices tend to be less definitive than orders in terms of the legal interpretations they reflect. They

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[64] *Id.* at 17–20.

[65] *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971) ("[*D*]*e novo* review is authorized when the action is adjudicatory in nature and the agency factfinding procedures are inadequate."); *see also* Sierra Club v. Peterson, 185 F.3d 349, 366–72 (5th Cir. 1999).

[66] Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743–45 (1985).

[67] *See* United States v. Akzo Coatings of Am., Inc., 949 F.2d 1409, 1425 (6th Cir. 1991) (determining that although consent decrees under CERCLA require judicial approval, courts are obligated to enforce EPA's selected remedy so long as the remedy is not arbitrary and capricious). In conceding in its brief that it would bear the burden of establishing, de novo, the validity of its order in any action to enforce it, the Government in *Sackett* merely cited two cases in which the courts had engaged in such review, without any opposition from the United States. Brief for Respondents, *supra* note 56, at 14–15 (citing *United States v. Deaton*, 332 F.3d 698, 701–02 (4th Cir. 2003), and *United States v. Brace*, 41 F.3d 117, 124–29 (3d Cir. 1994)). I suspect the reason the government never argued for deference in those cases is because it had not given the defendants a chance to participate in building the record.

[68] *See*, *e.g.*, Air Brake Sys., Inc. v. Mineta, 357 F.3d 632, 640 (6th Cir. 2004) (National Highway Traffic Safety Administration opinion letter was not final agency action); Dietary Supplement Coal., Inc. v. Sullivan, 978 F.2d 560, 563 (9th Cir. 1992) (Food and Drug Administration regulatory letter was not final agency action); Pacificorp v. Thomas, 883 F.2d 661, 661 (9th Cir. 1988) (Clean Air Act notice of violation was not a final agency action); Air Cal. v. U.S. Dep't. of Transp., 654 F.2d 616, 620–21 (9th Cir. 1981) (Federal Aviation Administration opinion letter was not final agency action); W. Penn Power Co. v. Train, 522 F.2d 302, 310–11 (3d Cir. 1975) (Clean Air Act notice of violation was not a final agency action).

purport to inform their recipients of legal obligations, not to establish them.[69] And perhaps most importantly, no direct legal consequences flow from their issuance. To be sure, they may raise the stakes slightly for their recipients; in a later enforcement action, EPA may argue for heightened penalties—within the statutory range—because the recipient was on notice of the Agency's legal interpretation. But this is a matter of judicial discretion. As such, it is significantly different from the dynamics in the order context where, as the Supreme Court assumed in *Sackett*, the order had the legal effect of doubling the maximum penalty range.[70]

Having said that, the regulated community is likely to raise these issues again, particularly if EPA comes to rely more heavily on these types of less formal agency responses. Indeed, two companies, Luminant Generation Co. LLC and Energy Future Holdings Corp., have already filed a petition for review of an EPA notice of violation under the Clean Air Act in the Fifth Circuit.[71]

VI. HOW EPA IS LIKELY TO RESPOND

There was a very interesting colloquy between Justice Breyer and Justice Scalia near the end of the oral argument in *Sackett*. During Damien Schiff's rebuttal on behalf of the Sacketts, Justice Breyer indicated that, as he understood it, EPA's concern was that it may have to issue "thousands of" administrative orders, and that it may be difficult for EPA to prepare the kinds of records that would entitle the government to deferential review.[72] He went on to add that, if the Sacketts were to win the right to pre-enforcement review, one upshot of the opinion might be that the government would "provide for various kinds of pre-order procedure or post-order procedure where they'd be open to change."[73] Justice Scalia responded tartly: "But they'll just issue warnings, is what they'll do."[74]

Justice Scalia's comment was likely premised on the idea that warning letters may be almost as effective as administrative orders. It may also have been premised on the notion that such letters would not trigger any right to judicial review.

Whatever the basis for Justice Scalia's statement, I suspect that he will be right, at least initially. In its recent guidance regarding the use of orders after *Sackett*, EPA specifically highlights the use of both warning letters and

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[69] Significantly, EPA appears unlikely to even argue that it is entitled to deference with respect to either the legal interpretations or factual determinations underlying such a warning letter or notice of violation. We can glean this from the government's brief in *Sackett*, in which it stated that even its determinations in issuing an order would be reviewed de novo in any subsequent enforcement action. *See* Brief for the Respondents, *supra* note 56, at 14–15.

[70] It is perhaps worth noting that, at the *Sackett* oral argument, both Justice Scalia and Justice Breyer seemed to assume that these types of warning letters would not be reviewable. Transcript of Oral Argument, *supra* note 25, at 44–45 (only Justice Scalia), 49 (both Justices).

[71] Petition for Review, Luminant Generation Co. v. U.S. Envtl. Prot. Agency, No. 12-60694 (5th Cir. Sept. 10, 2012).

[72] Transcript of Oral Argument, *supra* note 25, at 55.

[73] *Id.* at 57.

[74] *Id.*

notices of violation as possible ways of maximizing its enforcement resources, while at the same time signaling what may be an increased interest in negotiating administrative compliance orders on consent:

> The Supreme Court's decision presents the Agency with an opportunity to evaluate how it can make the best of limited enforcement resources to achieve compliance with environmental laws. While issuance of Section 309(a) administrative compliance orders remains a valuable tool to ensure compliance with the CWA, enforcement staff should continue to evaluate other enforcement approaches to promote compliance where appropriate in given circumstances. Other tools, such as less formal notices of violation or warning letters, can sometimes be helpful in resolving violations.
>
> EPA enforcement staff should continue the practice of inviting parties to meet and discuss how CWA violations (and amelioration of the environmental impacts of such violations) can be resolved as quickly as possible. The goal of the administrative enforcement process is to address violations preferably by a mutually-agreed upon resolution through measures such as an administrative compliance order on consent. Using consensual administrative compliance orders, when possible, can help to reduce EPA and third party costs where regulated entities are willing to work cooperatively to quickly correct CWA violations and abate potential harm to human health and the environment.[75]

As a third option, EPA mentions issuing unilateral orders, but notes that *Sackett* "underscores the need for enforcement staff to continue to ensure that Section 309(a) administrative compliance orders are supported by documentation of the legal and factual foundation for the Agency's position that the party is not in compliance with the CWA."[76]

While I don't have access to a full set of empirical information, I suspect that before *Sackett*, EPA may have over-relied on the power of its ability to issue unilateral orders that were not subject to pre-enforcement review, to the detriment perhaps of resolving settleable cases through settlement. Why negotiate—which may inevitably mean giving something away, for example, in terms of extending the length of the compliance schedule—when you can just issue an edict, at least in situations in which you can be highly confident that the recipient of the order will do what you tell it to do? During the oral argument at *Sackett*, Malcolm Stewart provided a "rough estimate" that only about 3% of wetlands-related compliance orders ultimately culminated in lawsuits for enforcement.[77] Undoubtedly, some of these compliance orders morphed into administrative compliance orders on consent. Still, though, if this means that EPA's pre-*Sackett*, wetlands-related compliance orders have

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[75] Memorandum from Pamela J. Mazakas, Acting Director, EPA Office of Civil Enforcement, to Regional Enforcement Offices and Personnel at 2 (June 19, 2012), *available at* http://news.agc.org/wp-content/uploads/2012/08/Giles-Memo-RE-CWA-Section-309a-ComplOrder-Aft-Sackett.pdf.

[76] *Id.*

[77] Transcript of Oral Argument, *supra* note 25, at 46–47.

generated a compliance rate of about 97%, either by their own terms or by prompting settlements, that is a remarkable compliance rate.

Going forward, EPA seems likely, at least initially, to rely on warning letters or notices of violation,[78] probably in the hope that they will either prompt immediate compliance or lead to negotiations designed to result in an administrative compliance order on consent. EPA might believe that a sternly-worded warning letter would generate nearly the same reaction as its pre-*Sackett* compliance orders. While such a letter would not be framed as one that imposed legal "orders" to take particular actions, and while it could not indicate that violating the letter itself might result in additional penalties beyond any underlying statutory violations, it could still be framed very threateningly, in terms along these lines:

> For these reasons, we believe you have committed X violations of the Clean Water Act. Under the statute, we have the ability to go to court to seek civil penalties of up to $37,500 per day for each of the above-referenced violations. At this point, we believe that your total maximum penalty exposure is $X,YYY,ZZZ. Please let us know within 30 days how you intend to respond to these violations. Be aware that you have a legal duty to terminate these violations immediately. Please also note that any further violations will increase the maximum penalty exposure referenced in this paragraph. And finally, please be aware that any settlement that may take more than 30 days to implement will need to be incorporated into an administrative compliance order on consent.[79]

While this stops short of what EPA's pre-*Sackett* administrative compliance orders stated, this language, or something like it, would still send chills down the necks of most regulated entities. Issuing a warning letter based on language of this type seems likely to be more efficient than trying either negotiations or compliance orders as a matter of first resort. Negotiations take time—and absent dire threats, the violators may not see a strong need to agree to EPA's terms.

Even more pointedly, going straight to the administrative compliance order option seems dreadfully inefficient as an initial matter. This would require EPA to build what it considers to be a legally sufficient record in each and every case. And, given the much greater prospect of judicial review, these administrative records would likely be more substantial than those that EPA has generated in the past.[80] Even so, the United States is

[78] I am using these terms essentially interchangeably. A "notice of violation" that is unencumbered by any statutory requirements or implications (as would be the case under section 309(a)) is essentially a letter. It gives the regulated entity notice that EPA believes it to be violating the law, and typically warns it that EPA may bring an enforcement action if the alleged compliance problem is not promptly addressed.

[79] I should point out that I made up this language from scratch. It is intended only by way of example and was not drawn from any EPA or state documents.

[80] At one point in the argument in *Sackett*, Malcolm Stewart made a remarkable concession about the government's record in that case: "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." Transcript of Oral Argument, *supra* note 25, at 52.

apparently of the view, as expressed in the government's brief in *Sackett*, that if the respondent were to disregard the order, EPA would still have to prove its case in court, without the benefit of record review.

So the most likely outcome may be that EPA will first issue warning letters, which it hopes will lead to either immediate compliance or negotiated administrative compliance orders on consent. While the warning letters may prompt many alleged violators to comply in one of these two ways, it seems unduly optimistic to predict that the compliance levels will approach the 97% level that Mr. Stewart suggested EPA's orders have generated in the past.[81]

One reason why I suspect this approach will never approach the levels of compliance EPA's orders have previously generated is the reduced leverage that EPA would have in discussing settlement. Pre-*Sackett*, order recipients were motivated to comply, through settlement or otherwise, because they knew that most regulated entities complied, and that EPA would then be in a position to take harsh action against the outliers.

Now, though, there may be a lot more uncertainty about how or whether EPA would follow through. In the event that a regulated entity disregards a warning letter, or negotiations break down, EPA would presumably at that point either go straight to court—which would involve proving its case de novo—or develop a record and issue a unilateral order. Either path would be resource intensive. The latter path would provide the prospect of double penalties, but at the cost of requiring EPA to defend its order, while perhaps at the same time requiring EPA to file a counterclaim seeking to have the court compel compliance with the Act. Again, under EPA's view, in this latter context it would need to prove its case in court without the benefit of deference, and the court would have the ultimate say regarding the remedy if EPA prevailed.[82]

VII. WHAT EPA SHOULD DO

What I think EPA should do is to follow the course set forth above, with a significant wrinkle. If the warning-letter approach doesn't generate compliance, through settlement or otherwise, EPA should develop a record and then issue a unilateral order. But, crucially, it should ensure that the enforcement target has an adequate opportunity to participate in the building of the record, including regarding the proposed remedy. These procedures need not be extensive; a mere opportunity to comment on the record and remedy should be sufficient, as it is in the CERCLA process.[83]

Upon issuing the order, EPA should then be prepared to promptly file a complaint upon the first instance of noncompliance, or to file an immediate

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[81] *See id.* at 46–47.

[82] *See* Brief for the Respondents, *supra* note 56, at 14–15.

[83] Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9622(e)(2)(B) (2006) (allowing potentially responsible parties who receive notice of an abatement action under section 9606 or a removal action under section 9604 to "propose" methods of compliance with proposed remedial actions).

counterclaim if the respondent exercises its newly-recognized right to judicial review. Under this course of action, EPA would have strong arguments that it would be entitled to deferential review in its actions to enforce the relevant orders—whether through direct suit or via counterclaim—on all issues, including those relating to the remedy. Moreover, if EPA were to successfully establish this legal precedent, and if it thereby convinces alleged violators that this is how it will follow through when its warning letters don't generate prompt compliance, it may dramatically increase the incentives that those who receive those letters will have to comply. If so, it may wind up with a 97% compliance rate, or higher, without the need to even issue unilateral orders.

In the end, I guess what I am arguing for is, perhaps surprisingly, a combination of the steps suggested (by Justice Scalia) or hinted at (by Justice Breyer) in their colloquy at the end of the *Sackett* argument.[84] I think Justice Scalia was right in seeming to presume the efficiency and bargain-rate effectiveness of warning letters. But I also think that Justice Breyer was right in alluding to the efficiencies that EPA might be able to generate by developing pre-order procedures that might shift the deference dynamics at the judicial enforcement stage. If EPA is willing to combine these two approaches, it might be able to use the former to get the number of cases down—because many letter recipients will either settle or simply comply—to the point where it becomes easier to build records in a way that will maximize the potential for deferential review.

VIII. CONCLUSION

The Supreme Court's opinion was *Sackett* was surprising only to those who had been lulled to sleep by the extent to which the courts of appeals unanimously had accepted the government's implied preclusion arguments. Many of my friends within EPA had been nervous for years about what would happen if and when the Supreme Court eventually granted review.

In the end, though, I would argue that if EPA responds appropriately, the decision is likely to constitute only a speed bump, not a significant impediment to EPA's enforcement objectives. By providing a few procedural protections, EPA may strengthen the effect of its orders, which in turn is likely to eventually lead to a dynamic where a warning letter either coupled with or followed by the mere threat of such an order will typically be enough to induce regulatory compliance.

[84] Transcript of Oral Argument, *supra* note 25, at 57.