PRACTICAL IMPACTS OF THE *SACKETT* DECISION

BY

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This Essay discusses the practical impacts of the Sackett *decision for a party deciding whether to challenge an agency action under the Administrative Procedure Act. Although* Sackett's *impact on the finality requirement for such a challenge is clear, it will have little effect on how courts look at the ripeness and exhaustion requirements for such challenges.* Sackett *therefore provides clients with a new but limited decision pivot point—whether to incur the delays, costs, and risks involved in filing an early challenge to an agency decision, or to proceed in light of an agency order that, while onerous or even without clear merit, nevertheless promises a quick and relatively inexpensive path to the completion of a project. Further, the agency decision may now include both: 1) the presence of a more complete record, and 2) more listening by and input from seasoned staff that can result in real rather than dictated agreements.*

I. INTRODUCTION AND SHORT SUMMARY

The Supreme Court's recent decision in *Sackett v. Environmental Protection Agency*,[1] is already generating significant speculation. Other

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writers have begun discussing the decision's theoretical and scholarly aspects; we write to discuss its practical impacts. In this Essay, we draw on our diverse legal backgrounds: one attorney with many years of defending clients against agency orders, and one attorney with many years of enforcing agency orders—both now in private practice and frequently advising clients on the practical benefits and costs of whether to challenge an agency order or to cave-in to the order to avoid other costs. We do not write to suggest whether the Court's decision in *Sackett* was proper or improper; rather, we write simply to discuss the practical effects of this decision "in the streets," that is, how it is likely to be used or not used in real disputes. Although we come from different perspectives, we both conclude that, in practice, *Sackett* will provide clients with a new but limited decision pivot point: whether to incur the delays, costs, and risks involved in filing an early challenge to an agency decision, or to proceed in light of an agency order that—while onerous or even without clear merit—nevertheless promises a quick and relatively inexpensive path to completion of a project. Further, that decision may now include both: 1) the presence of a more complete record, and 2) more listening by and input from seasoned staff. Developed records and better listening open the door to real, rather than dictated, agreements—agreements that can be reached before any pre-enforcement hearing ever occurs.

II. APPLICABILITY BEYOND 33 U.S.C. section 1344?

The applicability of *Sackett* beyond section 404 of the federal Clean Water Act (CWA) remains an open question.[2] As Justice Ginsberg stated in her concurrence:

> 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 [Environmental Protection Agency (EPA)]'s authority to regulate their land under the Clean Water Act, but also, at this pre-enforcement stage, the terms and

and carbon capture and sequestration; audits and due diligence; and investigation of potential criminal matters. Tom helped to conceive and create the nation's first watershed-based multiple source NPDES permit, the nation's first statutory Prospective Purchaser Agreement protections, the nation's first multi-party/multi-species Candidate Conservation Agreement, the nation's first statutory environmental audit privilege, Oregon's water quality trading law, the Oregon Dry Cleaner Act, and the 2001 Oregon Sustainability Act.

1 132 S. Ct. 1367 (2012).

2 *See* Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1344 (2006). More specifically, it is CWA section 301(a), 33 U.S.C. § 1311(a), that requires the permit and not section 404. "Section 301(a) makes it unlawful to discharge a pollutant into waters of the United States except in compliance with specified CWA sections, section 404 among them. Section 404 itself merely authorizes the U.S. Army Corps of Engineers to administer a permit program." ROBERT MELTZ, CONG. RESEARCH SERV., R42450, THE SUPREME COURT ALLOWS PRE-ENFORCEMENT REVIEW OF CLEAN WATER ACT SECTION 404 COMPLIANCE ORDERS: *SACKETT V. EPA*, at 2 n.2 (2012), *available at* http://www.nationalaglawcenter.org/assets/crs/R42450.pdf. And it is section 309(a), 33 U.S.C. § 1319(a), that allows for the relevant sort of administrative orders.

> conditions of the compliance order, is a question today's opinion does not reach out to resolve.[3]

Given those limits, and the fact that the Supreme Court's decision did not address other statutes, much of the ultimate importance of *Sackett* will depend upon its interpretation and use by future courts.

III. JURISDICTION UNDER THE APA: FINALITY, RIPENESS, AND EXHAUSTION

A. Finality

The requirement that a federal court's jurisdiction to review agency actions extends only to "final" decisions is deeply embedded in federal jurisprudence. The final decision requirement starts with the Administrative Procedure Act (APA),[4] which expressly states that judicial review is limited to "final agency action for which there is no other adequate remedy in a court."[5] While this language seems to present a fairly simple concept, federal courts have struggled for decades to determine what constitutes a "final" agency action for purposes of judicial review under the APA.[6] Two other jurisdictional requirements are often considered together with finality: ripeness and exhaustion of administrative remedies. Indeed, some courts can agree that jurisdiction does not exist, but cannot agree as to whether jurisdiction is lacking based on the absence of a final judgment, because the issue before them is not ripe, or because plaintiffs have failed to exhaust administrative remedies.[7] *Sackett*, however, focuses solely on the finality requirement.

The *Sackett* decision is, in many ways, simply the latest affirmation by the Supreme Court that a court's jurisdiction under the APA extends only to final agency action. Indeed, *Sackett* does not add to the formulation of what constitutes final agency action. In finding the compliance order to be a final agency action, the Court applied its long-established test for determining whether a challenged agency action was final for purposes of judicial review. As the Court stated in *Bennett v. Spear*:[8]

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3 132 S. Ct. at 1374–75 (Ginsburg, J., concurring).

4 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2006).

5 *Id.* § 704.

6 *See* 4 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 12:20 (3d ed. 2012).

7 13B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3532.6 (3d ed. 2008). As pointed out by Wright and Miller, a panel of the D.C. Circuit once found that it lacked jurisdiction to review an action by the Federal Trade Commission, with each of the three judges relying on a different basis—lack of final agency action, lack of ripeness and failure to exhaust administrative remedies—for the finding. *Ticor Title Ins. Co. v. Fed. Trade Comm'n*, 814 F.2d 731, 732 (D.C. Cir. 1987) (Edwards, J.) (failure to exhaust administrative remedies); *id.* at 745 (Williams, J.) (lack of final agency action); *id.* at 750 (Green, J.) (lack of ripeness).

8 520 U.S. 154 (1997).

> As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.[9]

Finding that the EPA's administrative consent order met both tests, the Court found that the order was in fact "final" and could be challenged under the APA.[10] Not discussed in *Sackett* are the two other related jurisdictional tests for jurisdiction under the APA: ripeness and exhaustion.

B. Ripeness

While the line between ripeness and finality is not bright, courts have developed a separate set of factors to be applied to determine if an agency decision is not yet ripe for judicial review. The leading case here is *Abbott Laboratories v. Gardner*.[11] In *Abbott Laboratories*, the Court establishes the analytical framework for determining whether a particular case is ripe for review: "The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[12]

In 1997, the Court addressed the ripeness requirement in *Ohio Forestry Ass'n v. Sierra Club*,[13] where it focused on the ripeness of a challenge to a Land and Resource Management Plan (LRMP or Plan) developed under the National Forest Management Act of 1976 (NFMA)[14] for the Wayne National Forest in southern Ohio.[15] Pursuant to NFMA, the Forest Service was required to develop a plan to "guide all natural resource management activities"[16] in national forests, including the use of land for "outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness."[17] The LRMP for the Wayne National Forest permitted logging on 126,000 acres of federally owned land, while setting a total cap on the amount of timber that could be cut.[18] The LRMP did not, however, explicitly authorize the cutting of any trees.[19] Before logging could occur, the Forest Service had to undertake

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9 *Id.* at 177–78 (citations and internal quotations omitted).

10 *Sackett*, 132 S. Ct. 1367, 1374 (2012) ("[T]he compliance order in this case is final agency action for which there is no adequate remedy other than APA review, and . . . the Clean Water Act does not preclude that review.").

11 387 U.S. 136 (1967).

12 *Id.* at 149.

13 523 U.S. 726 (1998).

14 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2006) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93- 378, 88 Stat. 476 (1974)).

15 *Ohio Forestry*, 523 U.S. at 728.

16 36 C.F.R. § 219.1(b) (1997).

17 *See* 16 U.S.C. § 1604(e)(1) (2006).

18 *Ohio Forestry*, 523 U.S. at 729.

19 *Id.*

a number of analyses, including an environmental analysis under the National Environmental Policy Act (NEPA).[20]

The Sierra Club challenged the LRMP, asserting that the Forest Service relied on erroneous analyses that favored logging and clearcutting.[21] Sierra Club claimed violations of both NEPA and NFMA, but limited its request for relief to two items: 1) a declaration under NFMA that the Plan was unlawful, and 2) an injunction prohibiting the Forest Service from permitting or directing further timber harvest pending revision of the LRMP.[22] As discussed below, the Court held that the Sierra Club's NFMA challenge to the LRMP's timber harvesting provisions was not ripe for judicial review.

Applying the *Abbott Laboratories* test, the Court determined that withholding consideration "will not cause the parties significant hardship" because the Plan did not "command anyone to do anything or to refrain from doing anything."[23] Moreover, the LRMP did not grant or withhold a license, power, or authority and did not create any "legal rights or obligations."[24] In addition, because the Forest Service had to "focus upon a particular site, propose a specific harvesting method, prepare an environmental review, permit the public an opportunity to be heard, and (if challenged) justify the proposal in court," the Court concluded that Sierra Club had "ample opportunity" to bring its challenge at a later date when the harm was more imminent and certain.[25] The Court also focused on the agency's ability to revise the Plan or address concerns through site-specific proposals for logging, noting that "the possibility that further consideration will actually occur before the Plan is implemented is not theoretical, but real."[26] Finally, the Court concluded that judicial resources would be preserved by delaying consideration of the Plan because the "elaborate, technically based plan" affected numerous parcels of land in various ways.[27]

The Court, however, in dicta, expressly distinguished the ripeness of a challenge to a Forest Plan under NFMA from a challenge to an Environmental Impact Statement (EIS) under NEPA. The Court noted that a Forest Plan, which imposes standards that guide future use of forests, does not resemble an EIS developed under NEPA because "NEPA, unlike the NFMA, simply guarantees a particular procedure, not a particular result."[28] Therefore, a person alleging the violation of a prescribed "NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper."[29]

Courts reviewing agency action in the wake of *Ohio Forestry* generally draw a bright line between substantive challenges to the results of agency

20 *Id.* at 729–30; *see* National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006).
21 *Ohio Forestry*, 523 U.S. at 731.
22 *Id.* at 731–32.
23 *Id.* at 733 (internal quotations omitted).
24 *Id.*
25 *Id.* at 734.
26 *Id.* at 735.
27 *Id.* at 736.
28 *Id.* at 737.
29 *Id.*

decision making—such as a Forest Plan—and procedural challenges under NEPA. Because NEPA challenges involve allegations of procedural failures, most courts find that the injury occurred at the time the allegedly inadequate EIS was promulgated. Indeed, since *Ohio Forestry*, the Ninth Circuit (along with the Seventh and Tenth Circuits) has recognized "the distinction between substantive challenges which are not ripe until site-specific plans are formulated, and procedural challenges which are ripe for review when a programmatic EIS allegedly violates NEPA."[30]

In *Kern v. U.S. Bureau of Land Management*,[31] plaintiffs challenged the adequacy of the programmatic EIS prepared for a Resource Management Plan (RMP) under the Federal Land Policy and Management Act (FLPMA).[32] Defendants argued that the case was not ripe because the RMP was analogous to the Forest Plan in *Ohio Forestry*.[33] The Ninth Circuit rejected defendants' arguments, drawing a critical distinction between substantive challenges to the plans themselves, and a challenge to the EIS prepared in conjunction with the plans under NEPA.[34] The court made no attempt to distinguish a programmatic EIS from a project-level EIS, and concluded that

> [b]ecause the plaintiffs here bring a NEPA challenge to an EIS, rather than a NFMA (or a FLPMA) challenge to an RMP, they are able to show an imminence of harm to the plaintiffs and a completeness of action by the agency that the Court held were missing in *Ohio Forestry*.[35]

Where plaintiffs allege a procedural—rather than a substantive—injury, any such injury would occur "when the allegedly inadequate EIS was promulgated."[36]

The Tenth Circuit echoed the Ninth Circuit's language, holding that "*Ohio Forestry* establishes that a claim for the alleged failure of the DOE to comply with the NEPA (and presumably the ESA) is ripe at the time of failure."[37] The Tenth Circuit reviewed the ripeness of a suit challenging the Department of Energy's (DOE)'s failure to prepare an EIS prior to granting a road easement and its failure to undertake a section 7 consultation under the Endangered Species Act (ESA).[38] The court concluded that regardless of the future environmental reviews that would be necessary prior to construction of the road, the failure of DOE to review the environmental impacts of the

30 Laub v. U.S. Dep't of the Interior, 342 F.3d 1080, 1090 (9th Cir. 2003); *see also* Sierra Club v. U.S. Dep't of Energy, 287 F.3d 1256, 1263–64 (10th Cir. 2002); Heartwood, Inc. v. U.S. Forest Serv., 230 F.3d 947, 952–53 (7th Cir. 2000).

31 284 F.3d 1062 (9th Cir. 2002).

32 *Id.* at 1066; *see* Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1787 (2006).

33 *Kern*, 284 F.3d at 1070.

34 *Id.*

35 *Id.*

36 *Id.* at 1071. *Accord* Sierra Club v. U.S. Dep't of Transp., 310 F. Supp. 2d 1168, 1184 n.4 (D. Nev. 2004) (noting that Sierra Club's NEPA claims were ripe regarding the Federal Highway Administration's failure to prepare a supplemental EIS).

37 Sierra Club v. U.S. Dep't of Energy, 287 F.3d 1256, 1264 (10th Cir. 2002).

38 *Id.*; *see* Endangered Species Act of 1973, 16 U.S.C. § 1536(a) (2006).

easement constituted a procedural injury that was ripe for review.[39] Importantly, the court also stated that "[w]e see no reason why a procedural challenge to the failure of a federal agency to comply with ESA's procedures should not be treated in the same manner [as a NEPA challenge]."[40] The Seventh Circuit, also has held that an allegedly defective EIS is ripe upon issuance of the Record of Decision (ROD). In reviewing the ripeness of a challenge to the Forest Service's failure to conduct an Environmental Assessment or an EIS prior to issuing regulations creating new categorical exclusions relating to timber harvests, the Seventh Circuit concluded that plaintiffs "need not wait to challenge a specific project when their grievance is with an overall plan."[41]

The D.C. Circuit, however, has taken a more narrow view of the issue, treating a procedural challenge to a programmatic EIS as a substantive challenge and concluding that site-specific action was still necessary for the claim to ripen.[42] In *Wyoming Outdoor Council v. U.S. Forest Service*, the court rejected a NEPA challenge to an ROD making portions of a forest available for oil and gas leasing on grounds that the claim would not mature until the specific leases were issued.[43] The court treated the challenge to the EIS as a substantive challenge, drawing from *Ohio Forestry's* statement that a claim cannot be ripe if there is any possibility of further consideration prior to implementation. The court, however, made no attempt to distinguish the language in the *Ohio Forestry* opinion addressing the difference between NEPA claims and substantive challenges.[44]

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39 287 F.3d at 1264.

40 *Id.*

41 Heartwood, Inc. v. U.S. Forest Serv., 230 F.3d 947, 953 (7th Cir. 2000) (quotations and citations omitted). The Seventh Circuit's decision also relied on its pre-*Ohio Forestry* opinion in *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995), which concluded that a NEPA challenge to a programmatic EIS for a forest plan was ripe because once the ROD had been issued, "the procedural injury has been inflicted." *Id.* at 612. The court agreed with the Ninth Circuit's broader view of standing and stated that, "[u]nless a plaintiff's purported interest in the matter is wholly speculative, waiting any longer to address that injury makes little sense." *Id.*

42 Wyo. Outdoor Council v. U.S. Forest Serv., 165 F.3d 43, 50 (D.C. Cir. 1999).

43 *Id.* at 47, 49–50. The Ninth Circuit distinguished this case from challenges to other programmatic EISs because the claim was based on the Forest Service's "failure to include site-specific environmental review in the programmatic EIS." Laub v. U.S. Dep't of the Interior, 342 F.3d 1080, 1090 n.10 (9th Cir. 2003). As noted, the D.C. Circuit's opinion in *Wyoming Outdoor Council* does not indicate that the EIS was part of a *tiered* EIS; indeed, the opinion only notes that the "Forest Service was free to undertake additional efforts to comply with its NEPA obligations, including efforts to make its EIS sufficiently site-specific." 165 F.3d at 50.

44 Indeed, the court even cut around the language in the *Ohio Forestry* decision indicating that NEPA claims would be ripe upon issuance of the EIS, stating that, "[a]s the Supreme Court noted in *Ohio Forestry*, 'a person with standing who is injured by a failure to comply with [*some procedural requirement*] may complain of that failure at the time the failure takes place, for the claim can never get riper.'" *Wyo. Outdoor Council*, 165 F.3d at 51 (alteration in original) (emphasis added) (quoting *Ohio Forestry*, 523 U.S. 726, 737 (1998)).

C. Exhaustion

The final APA jurisdictional threshold to be considered is the exhaustion of administrative remedies. Generally, before seeking judicial review of an administrative decision, a plaintiff is required to exhaust all available administrative remedies. Thus, if an agency provides for some form of agency review of a decision, a potential plaintiff must first utilize the agency review procedures before seeking judicial review.[45] In *Darby v. Cisneros*,[46] the Supreme Court clarified that exhaustion of administrative remedies was not a requirement for judicial review under the APA where the agency decision goes into immediate effect.[47] *Darby* held that in cases in which the APA applies, requiring a party to exhaust administrative remedies is not a matter of judicial discretion. Rather, "an appeal to 'superior agency authority' is a prerequisite to judicial review *only* when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review."[48] Thus, absent either an express statutory requirement[49] or agency rule[50] requiring a potential plaintiff to seek further review from the agency, the reviewing court may not dismiss a complaint for failure to exhaust administrative remedies. As the Court stated in *Darby*, section 10(c) of the APA "explicitly requires exhaustion of all intra-agency appeals mandated either by statute or by agency rule; it would be inconsistent with the plain language of [section] 10(c) for courts to require litigants to exhaust optional appeals as well."[51]

D. Practical Effect of Sackett on Finality, Ripeness, and Exhaustion

Sackett's impact on the finality requirement, however, is clear. Lower courts will no longer be able to simply assume that administrative compliance orders are not "final" for purposes of judicial review. After

45 This requirement should be distinguished from the type of exhaustion claim that allows a district court to refuse to consider a specific issue that has not been first presented to the administrative agency as part of the underlying administrative process leading to the decision under review. *Compare* Kobleur v. Grp. Hospitalization and Med. Servs., Inc., 954 F.2d 705, 709, 713 (11th Cir. 1992) (holding that the Federal Employees Health Benefits Act of 1959 requires exhaustion of administrative remedies), *with* Resolution Trust Corp. v. Midwest Fed. Sav. Bank of Minot, 36 F.3d 785, 791 (9th Cir. 1993) (holding that the statutory exhaustion requirement for "claims" under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 includes counterclaims but not affirmative defenses); *see also* 4 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 12:21 (3d ed. 2012) (providing more information and case law on the exhaustion doctrine).

46 509 U.S. 137 (1993).

47 *Id.* at 137.

48 *Id.* at 154.

49 *See, e.g.*, Federal Power Act, § 313(a), (b), 16 U.S.C. § 825*l*(a), (b) (1994) (establishing right to review of orders issued by the Federal Power Commission).

50 *See, e.g.*, 5 C.F.R. § 890.105 (2012) (providing the procedural requirements for filing a claim with the Office of Personnel Management); Kennedy v. Empire Blue Cross & Blue Shield, 989 F.2d 588, 594–96 (2d Cir. 1993) (noting OPM regulations impose an exhaustion requirement on insurance benefit disputes for federal employees).

51 Darby v. Cisneros, 509 U.S. at 147.

Sackett, courts must find that the statute under which the ACO is issued either expressly precludes judicial review or determine whether inferences drawn from the statute as a whole can overcome the presumption favoring judicial review of administrative action. However, *Sackett* will likely have little practical effect on how courts will look at the long-standing ripeness and exhaustion requirements for challenges to agency action under the APA. The Court did not base its decision on either ripeness or exhaustion principles, nor did the Court address either doctrine in its opinion. Thus, potential plaintiffs will continue to be obligated to establish that the claim is ripe, and that no further administrative action is required either by statute or regulation.

III. TYPES OF ORDERS AND CHALLENGES TO THEM

Administrative compliance orders, such as the one at the heart of *Sackett*, can be found in numerous statutes, and a wide variety of statutes expressly preclude judicial review of agency actions. For example, decisions of the Commissioner of Social Security not to reopen a claim for benefits under the Social Security Act[52] and decisions by the Commissioner of Patents to issue or deny patents for inventions made or conceived under contract with the Atomic Energy Commission are excluded from such review.[53] Section 113(h) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)[54] expressly precludes judicial review of any challenge to most actions taken and orders issued under that Act. The Court in *Sackett* did not change this tenet.

A compliance order issued by EPA usually instructs the recipient to comply with a legal requirement by a certain deadline, and describes the potential noncompliance penalties.[55] The order itself does not impose penalties; those come with its subsequent enforcement. Before *Sackett*, absent compliance with the order, such enforcement was readily available and perhaps likely, especially given that no pre-enforcement review was allowed. If an ACO recipient disagreed with the facts or legal conclusions contained in the order, it faced a difficult choice. The recipient could do nothing and wait to challenge the order if and when EPA filed an enforcement action in court, risking a substantial civil penalty if the challenge failed—up to $37,500 per day for each CWA violation.[56] Or, the recipient could comply with the order, likely at a substantial compliance cost and despite disagreeing with it. It could then apply for a permit, and sue EPA in the event that the permit was improperly conditioned or denied.[57]

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52 *See* 42 U.S.C. § 405(h) (2006).

53 *See* Atomic Energy Act of 1954, 42 U.S.C. § 2182 (2006).

54 42 U.S.C. § 9613(h) (2006).

55 CONG. RESEARCH SERV., *supra* note 2, at Summary.

56 Clean Water Act, 33 U.S.C. § 1319(d) (CWA violation); § 1319(g)(2)(a) (compliance order violation); 40 C.F.R. pt. 19 (adjusting for inflation, to $37,500, the maximum daily penalty per violation available under the CWA, as required by the Debt Collection Improvement Act of 1996, Pub. L. 104-134, 110 Stat. 1321, 1373 (amending the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, 104 Stat. 890)).

57 CONG. RESEARCH SERV., *supra* note 2, at 2.

Prior to the Supreme Court's decision in *Sackett*, every federal circuit court that had considered the issue concluded that the CWA precluded such pre-enforcement review.[58] For most entities, spending the time and money trying to obtain pre-enforcement review, or trying to get the Supreme Court to reverse the circuit courts' decisions, was simply not an option.

Before *Sackett*, there had been other policy considerations related to whether or not to allow or encourage pre-enforcement review. Earlier we noted some of the Supreme Court's decisions on whether pre-enforcement review was available in other contexts. To some observers the environmental context might appear different because most, if not all, environmental-related laws are clearly intended for the protection of public health or safety. For that reason, one might expect that the courts would use various means to uphold "protective" decisions under those laws. For example, the focus on protecting public health and the environment relates to doctrines of statutory construction.[59] However, even if statutes intended to protect the public arguably are to be liberally construed (as Professor Mintz notes in his Essay on underutilized principles of statutory interpretation), apart from this application in construing CERCLA, "federal judicial invocation of the liberal interpretation principle is still exceptional in other environmental matters. In fact, the U.S. Supreme Court has expressly declined to apply the principle in that context for more than four decades."[60]

Further, the importance of protecting the public is also seen in other contexts, where the very idea of pre-enforcement review would be appalling to even the most ardent supporter of such reviews. For example, at times, in the face of a fast-racing urban fire, one must dynamite the home of an innocent person in order to halt the fire—any delay for court procedures simply cannot be allowed.[61] Nevertheless, in construing federal statutory law

58 Sackett v. EPA, 622 F.3d 1139, 1143–44 (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 (1994); S. Pines Assocs. v. United States, 912 F.2d 713, 715–16 (4th Cir. 1990); Hoffman Grp., Inc. v. U.S. Envtl. Prot. Agency, 902 F.2d 567, 569 (7th Cir. 1990).

59 *See, e.g.*, Joel A. Mintz, *Can You Reach New "Greens" If You Swing Old "Clubs"? Underutilized Principles of Statutory Interpretation and Their Potential Applicability in Environmental Cases*, 7 ENVTL. LAW. 295 (2000).

60 *Id.* at 304.

61 The doctrine of public necessity is the use of private property by a public official for a public reason. The potential harm to society necessitates the destruction or use of private property for the greater good, and courts are split on whether the injured private individual can recover for the damage caused by the necessity. One leading case is *Surocco v. Geary*, 3 Cal. 70 (1853). San Francisco was hit by a major fire and Surocco was attempting to save items from his home while the fire raged nearby. The mayor of San Francisco, Geary, authorized that Surocco's home be demolished to stop the progress of the fire and to prevent its spread to nearby buildings. Surocco sued Mayor Geary, claiming he could have recovered more of his possessions had his house not been blown up. The case raised the issue of whether a person can be held liable for the private property of another if destroying that property would prevent imminent public disaster. In *Surocco*, that decision was no. *Id.* at 75. The right of necessity falls under natural law and exists independent of society and government. Individual rights must give way to the higher law of impending necessity. A house on fire or about to catch on fire is a

(as opposed to common law or state law), Justice Scalia's unanimous opinion in *Sackett* stated, "The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all."[62]

Given this background, we now turn to how EPA is responding to the *Sackett* decision.

IV. EPA'S RESPONSE TO *SACKETT*

Immediately following the Court's decision, bloggers and other observers began speculating about the decision's impact on EPA's enforcement of the CWA. Early reactions ranged from one extreme—that the CWA had been undermined and that EPA could no longer enforce it as rigorously[63]—to the other extreme—that EPA's enforcement of the CWA would continue as it always had and, because of the fear of penalties, compliance orders would not be contested.[64] Of course, reality lies nearer the middle ground. Among other things, EPA itself provided a written response in that middle.

On May 24, 2012, sixteen GOP senators, led by Senator James Inhofe (Ranking Member of the Senate's Committee on Environment and Public Works), sent a letter to EPA Administrator Lisa Jackson and also released that letter to the press.[65] In their letter they suggested that the EPA had not heeded the lessons of *Sackett*.[66] On July 10, 2012, EPA's Assistant Administrator for Enforcement and Compliance Assurance, Cynthia Giles, responded to the Senators, and to her response she attached a June 19 EPA memo to EPA's Regional Counsels and many other EPA enforcement officials setting forth EPA's response to *Sackett*.[67]

public nuisance, which is lawful to abate. Otherwise, one stubborn person could destroy an entire city. If property is destroyed without apparent necessity, the destroying person would be liable to the property owner for trespass. Here, blowing up Surocco's house was necessary to stop the fire. Any delay to allow him to remove more of his possessions, or to have a court decide on whether the mayor could order the destruction, would have defeated the purpose of the action.

62 *Sackett*, 132 S. Ct. 1367, 1374 (2012).

63 *See e.g.*, Joel Mintz, *After Sackett: What Next for Administrative Compliance Orders?*, CTR. FOR PROGRESSIVE REFORM, Mar. 4, 2012, http://www.progressivereform.org/CPRBlog.cfm?idBlog=4530CE02-CDDC-F5B7-080BE0BBA3E97180 (noting that the *Sackett* decision will likely "create significant practical difficulties for EPA's enforcement staff").

64 *See e.g.*, Linda Roeder, *EPA Official Sees No Major Shift in Agency's Use of Compliance Orders*, BNA, May 4, 2012, www.bna.com/epa-official-sees-n12884909211/ (last visited Nov. 18, 2012) (quoting an EPA official: "I do not anticipate dramatic shifts in how administration enforcement authority is used").

65 Letter from Sen. James M. Inhofe et al., to Lisa Jackson, Administrator, U.S. Envtl. Prot. Agency (May 24, 2012), *available at* http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=e8fd687d-62a7-47ee-a55b-b069593fdb99 .

66 *Id.* at 2 (expressing concern that EPA "plans to continue business as usual and sees no need to change their use of compliance orders in response" to *Sackett*).

67 Letter from Cynthia Giles, Assistant Administrator, EPA Office of Enforcement and Compliance Assurance, to James M. Inhofe, U.S. Senator (July 10, 2012), *available at* http://news.agc.org/wp-content/uploads/2012/08/Giles-Memo-RE-CWA-Section-309a-Compl Order-Aft-Sackett.pdf.

Specifically, the June 19 memo directed EPA staff to add language to CWA compliance orders specifying that recipients can challenge the allegations in court before the agency seeks to enforce them or impose penalties.[68] Of course, such notice is meaningless unless there is some chance that a recipient might actually undertake a challenge; this involves risk-based decision making that we will discuss further below. Yet this links directly to the next aspect of the memo.

Not so explicitly spelled out as a different or renewed approach—but clearly implied—was the suggestion that administrative records, and perhaps also sections of the administrative order, must in the future better reflect both detailed fact gathering (i.e., an already established compelling evidentiary record) and detailed legal analyses that clearly support the order. As stated in the June 19 memo: "The *Sackett* decision 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."[69]

This aspect of the memo is perhaps the most significant for both EPA practice and those who receive the orders. This is because that "extra" fieldwork and factual basis, together with clearer and more compelling legal analyses, make it a slower and more arduous process for EPA. However, if EPA does take that time and make that investment, then an order's recipient is less likely to challenge that order, and even less likely to do so successfully.

In the June 19 memo, EPA also urged its staff to consider more use of notices of violation (NOVs) and warning letters in the early stages of enforcement proceedings, and to continue efforts to negotiate compliance options for alleged CWA violations with parties as quickly as possible.[70] Both NOVs and warning letters at least arguably are not final agency action, so each may escape judicial review and lead to the "voluntary" acceptance of EPA's position. Further, the express direction to EPA staff to "negotiate compliance options," while falling short of an express direction to engage in meaningful discussions and negotiations, may be helpful when an order's recipient seeks to have actual discussions or negotiations.

One large question left open by the EPA memo is whether EPA will at some point decide itself to provide an opportunity for a pre-enforcement review hearing on the record and, if so, would that hearing be before an Administrative Law Judge or would EPA rely on the Justice Department?

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68 Memorandum from Pamela J. Mazakas, Acting Dir., EPA Office of Civil Enforcement, to Regional Enforcement Offices and Personnel 1 (June 19, 2012), *available at* http://news.agc.org/wp-content/uploads/2012/08/Giles-Memo-RE-CWA-Section-309a-Compl Order-Aft-Sackett.pdf.

69 *Id.* at 2.

70 *Id.*

V. WHERE CHALLENGES MAKE SENSE

Environmental law has several distinguishing characteristics. Among these is that it is administrative in nature. Although it does involve statutes, it is largely a collection of agency regulations, policies, memoranda, written and unwritten guidance, practice, and agency (and common law) precedent. Another key characteristic is that environmental law frequently involves very complex issues that are as much if not more technical than legal. An attorney or regulated entity may be asked to address the mixing zones of pollutants during varying stream flows, the transport and fate of groundwater contamination in different soils, the risks of health effects in varying populations, the effects of different water treatment approaches on different ecological systems, or the physical delineation of "waters of the United States."[71] All of these are the sort of complex matters that can be "notoriously unclear."[72]

These characteristics help make the day-to-day practice of environmental law especially interesting for its practitioners, but especially agonizing for those who want clarity in its requirements. And these characteristics also lead to many differing understandings of matters to which the law applies, and help establish what the applicable law might be. In turn, those different understandings can lead to an agency issuing a compliance order to an entity that has been acting both in good faith and on good legal advice. When that happens, the recipient must determine its course of conduct. It will immediately review in detail both its own legal analysis and its own fact investigation, and perhaps extend both in light of the new agency input. But the ACO recipient must also then make a real-world decision—it must consider benefits and risks of complying and balance them against the benefits and risks of challenging the order and then decide which to do. That means weighing each project's benefit and cost, each potential penalty, the likelihood of prevailing or losing on each point of contention, and the likely delays involved in complying or challenging the compliance order. Each of these is measured as a percentage probability rather than as a certainty. Thus, the recipient must also consider the difficulty of moving forward with its life or business in the face of these uncertainties.

In our experience, challenges to administrative orders, depending upon the facts and analyses, can cost between many tens of thousands of dollars and several hundreds of thousands of dollars. And they require significant

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71 *See* Clean Water Act, 33 U.S.C. § 1362(7) (2006) (defining jurisdictional "navigable waters" under the CWA as "the waters of the United States"); *see also* Rapanos v. United States, 547 U.S. 715 (2006) (establishing two separate tests for "navigable waters" jurisdiction based on the opinions of Justices Scalia and Kennedy and ultimately holding that the CWA does not extend to isolated wetlands); Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corp of Eng'rs, 531 U.S. 159, 174 (2001) (holding that the precedence of migratory birds does not confer CWA jurisdiction over isolated intrastate waters); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985) (holding that wetlands adjacent to "navigable waters" were jurisdictional under the CWA).

72 *Sackett*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring) (referring to the scope of CWA jurisdiction).

time to conclude. Worse still, given the deference to administrative agencies and the complexity of the issues, they are extremely difficult to win. However, even the threat of such challenges may be of great value to the regulated community. That is because the challenges provide an opportunity to bring new or additional decision makers into a renewed, or initial, negotiation.

According to statements made by EPA's lawyer during the January 9, 2012 oral arguments before the Supreme Court, in some cases the agency had not completed its investigation at the time of issuing the compliance order. In response to a question from Justice Ruth Bader Ginsburg on whether new evidence might be gathered following issuance of an order, Deputy Solicitor General Malcolm Stewart said, "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."[73] This is at least in tension with EPA's Assistant Administrator Giles' July 10, 2012 suggestion noted above that EPA will continue to ensure that it has the appropriate factual and legal record before issuing an order.[74] Whoever was correct, one practical benefit is that EPA now must face potential challenges to its record, and thus it is perhaps even more likely to complete its investigations before issuing such orders.

Apart from better facts and law in the record, there may also be more seasoned judgment brought to the dispute. When dealing with agency personnel, it is not unusual to encounter somewhat inexperienced agency staff who have either undeveloped or strong but narrow views of their own regulations. This is not a criticism; every employer must start with less-trained staff. Further, agencies are often overloaded with assignments but limited in senior staff to manage them; again, this is not a criticism but simply a fact of life. Agencies must therefore at times rely on lightly-supervised junior staff to make key decisions and enforcement calls. And often those junior staff members who make those initial calls feel compelled to stick to them even in the face of alternative interpretations or options. It is critical in such situations to get someone from the agency, or from the Department of Justice, involved in the negotiations to bring that more developed perspective. The threat of—or an actual filing for—pre-enforcement review of an order can lead to that involvement, and thus to more listening, discussion, and resolution. Perhaps only a few challenges to orders may actually go to trial, but the option of challenging orders may be of enormous value to the regulated entities by facilitating real discussions.

Logically, the *Sackett* decision could level the playing field between EPA and regulated entities. "Before *Sackett*, compliance order recipients could not challenge the orders until EPA sought to enforce them and recipients could either 'voluntarily' comply or wait many months or years for judicial review, all the while risking the imposition of accumulating civil

[73] Transcript of Oral Argument at 52, Sackett v. U.S. Envtl. Prot. Agency, 132 S. Ct. 1367 (2012), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1062.pdf.

[74] Letter from Cynthia Giles, *supra* note 67, at 1–2.

penalties should EPA prevail."[75] Now, for the first time, judicial review of these orders is available and the option of challenging any such order arguably might lead some to consider it less of an issue when they are balancing risks and benefits. However, as a practical matter, actually going to court to gain that review may be unwise. Today, many if not most issues likely will be clear or heavily weighted toward the agency's position, especially if EPA now more fully investigates the matter and prepares the record and analysis. Thus, "immediate judicial review should only be beneficial in those few cases where CWA jurisdiction is truly in doubt,"[76] or there exists some similarly complex issue where deference to the agency might not be a large factor for an unsympathetic court.[77] Because the *Sackett* court did not address the issue of whether penalties or fines are stayed, those order recipients seeking prompt judicial review still risk incurring hefty civil penalties both if the court agrees with the agency's interpretation of the jurisdictional or other complex issue, and again later on if EPA brings an enforcement action.[78]

Additional factors that a recipient of an order might consider when deciding whether to seek pre-enforcement review of an agency order include: Does the agency's decision have a fundamental impact on the viability of the project? If you as the recipient comply with the order, will that compliance result in an unacceptable increase in costs? (E.g., need to redesign, need to change technology). If you choose to challenge the decision, will the delay inherent in judicial proceedings result in an unacceptable delay? Does the agency's action raise difficult legal issues in the "notoriously unclear" way referenced by Justice Alito? Does the client want to "make law" or to implement its project—and is it willing to pay the costs of doing so? Does the ability to "make law" have an ongoing and future impact on the business?

VI. RELATED THOUGHTS

In today's political climate, another aspect of the *Sackett* discussion might be whether the case is an indicator that the Supreme Court is weighted against EPA or regulatory agencies in general. If so, then it raises

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75 David B. Weinstein et al., *Bolstering the Presumption of APA Reviewability: The Supreme Court Subjects CWA Compliance Orders, and Potentially Other Agency Actions, to Immediate Judicial Review*, ENVTL. ENFORCEMENT & CRIMES COMM. NEWSL., Aug. 2012, at 8 (2012), *available at* http://www.americanbar.org/content/dam/aba/publications/nr_newsletters/eecc/201208_eecc.authcheckdam.pdf.

76 *Id.*

77 Other examples of such complex issues and risk balancing might include whether a possible change in a determination of a "maximum practicable" requirement under the Clean Water Act's treatment standard for stormwater outweighs the cost of delay and litigation over a specific project; whether the determination of "adjacency" under the Clean Air Act outweighs the costs of delay and litigation for a single project; or whether a finding that a project has an adverse effect on historic properties under section 106 of the National Historic Preservation Act outweighs the cost of delay and litigation for the project. *See* 16 U.S.C. § 470 (2006).

78 Weinstein et. al., *supra* note 75.

the question of whether environmental non-governmental organizations or the agencies themselves are wise in trying to raise cases to that Court. Some commentators on *Sackett* spoke as if it should be read flatly as a slap by the Supreme Court at EPA.[79] Although we do not agree with that reading, we do note that *Sackett* was not alone last term in creating issues for EPA. *Southern Union Co. v. United States*[80] is the second Supreme Court decision from this term that could make it more difficult for EPA to enforce environmental laws. Twelve years ago, in *Apprendi v. New Jersey*,[81] the Supreme Court ruled that the Sixth Amendment right to a jury trial, incorporated against the states through the Fourteenth Amendment, prohibited judges from enhancing criminal sentences beyond statutory maximums based on facts other than those decided by the jury beyond a reasonable doubt.[82] In *Southern Union*, the Supreme Court extended *Apprendi* to criminal fines when it reversed a $38.1 million fine imposed on Southern Union Company, a natural gas distributor, for unlawfully storing liquid mercury at a facility in Rhode Island in violation of the Resource Conservation and Recovery Act (RCRA).[83] With certain exceptions, RCRA requires that owners and operators of facilities that treat, store, or dispose of hazardous waste obtain permits.[84] Criminal liability may be imposed under RCRA for knowing violations,[85] and the statute authorizes criminal penalties of up to $50,000 "for each day of violation."[86] The Supreme Court found that the judge's $38.1 million fine violated the company's right to a jury trial because the jury—which did not make a specific finding about the number of days that Southern Union violated RCRA—did not make the factual findings required to impose a fine in excess of the statutory minimum.[87] After the *Southern Union* ruling, facts that would increase a statutory fine must be proven to a jury beyond a reasonable doubt.[88]

At a different level, *Sackett* might affect not only interpretation of the CWA but also other statutes, both environmental and otherwise. As one commentator stated:

> *Sackett* may also affect final agency actions authorized by other statutory schemes that, like the CWA, fail to adequately demonstrate Congress's intent to preclude judicial review. An inference that a statutory scheme overcomes the APA's presumption in favor of judicial review should require more than was

79 *See, e.g.*, Richard A. Epstein, *The Supreme Court Finally Clamps Down on the EPA*, RICOCHET, Mar. 22, 2012, http://ricochet.com/main-feed/The-Supreme-Court-Finally-Clamps-Down-on-the-EPA (last visited Nov. 25, 2012); *S. Union Co.*, 132 S. Ct. at 2349.

80 132 S. Ct. 2344 (2012).

81 530 U.S. 466 (2000).

82 *Id.* at 490.

83 Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992k (2006) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992 (1965)).

84 *See* 42 U.S.C. § 6925(a) (2006).

85 *See id.* § 6928(d).

86 *Id.* (also authorizing up to 5 years in prison).

87 *S. Union Co.*, 132 S. Ct. at 2352.

88 *Id.* at 2350–51.

> found by the Ninth Circuit in analyzing the CWA. Courts may be more cautious in drawing such inferences in the future."[89]

And, as a March 2012 Congressional Research Service report to Congress noted:

> The significance of *Sackett* turns to some extent on how widely it is applied by the lower courts, given the opinion's narrow language confined to CWA Section 404. The number of Section 404 [adminstrative compliance orders] issued by EPA during any given year is but a small fraction of the total number issued by the agency (in FY2011, they constituted 97 out of 1,324). . . . [T]he legacy of *Sackett* will be greater if the decision is viewed by lower courts as applying elsewhere in the CWA outside Section 404, and outside the CWA entirely.
>
> No glib prediction can be made as to this extra-section-404 application, since every statute varies.[90]

VII. CONCLUSION

Sackett has certainly expanded the ability of those receiving an administrative compliance order to challenge the validity of that order. It has also provided an incentive to EPA and other regulatory agencies that use administrative compliance orders to create a more robust and complete record prior to issuing those orders and, perhaps, to proceed with greater caution before acting. What remains unclear is whether *Sackett* has in real day-to-day life opened a new avenue for challenging agency actions. While *Sackett* may give those who are affected by agency orders and determinations new hope for relief from the impact of those orders on their businesses and lives, that hope must be tempered by the cost—both in time and resources—of seeking judicial review of those orders and determinations.

89 Weinstein, et. al., *supra* note 75, at 6, 8.

90 CONG. RESEARCH SERV., *supra* note 2, at 6.