SACKETT V. EPA

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Introduction

The Supreme Court has historically maintained a complicated, tumultuous relationship with Clean Water Act cases.[1] However, on March 21, 2012, the Court aligned in rare form to issue a unanimous, clear opinion in *Sackett v. EPA*.[2] The decision establishes Administrative Procedure Act judicial review for Administrative Compliance Orders under the Clean Water Act.[3] This Comment argues that while the decision changes the face of Clean Water Act enforcement law, it does so without affecting other administrative or environmental laws and with virtually no practical effect on Clean Water Act enforcement programs.

I. Background

A. Procedural History

Michael and Chantell Sackett ("the Sacketts") own an undeveloped residential lot in Bonner County, Idaho.[4] The lot is approximately 500 feet from Priest Lake, a critical habitat for many native fish species, including the threatened bull trout.[5] In April and May of 2007, the Sacketts began clearing property to prepare the site for construction,[6] and started to fill part of the lot

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[1] *See, e.g.*, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001); Rapanos v. United States, 547 U.S. 715 (2006).

[2] 132 S. Ct. 1367 (2012).

[3] 33 U.S.C. §§ 1251–1387 (2012).

[4] 132 S. Ct. at 1370; *see also* Sackett v. EPA, 622 F.3d 1139, 1141 (9th Cir. 2010).

[5] Brief of Natural Resources Defense Council et al. as Amici Curiae in Support of Respondents at 2–3, Sackett v. EPA, 132 S. Ct. 1367 (2012) (No. 10-1062), 2011 WL 8473188.

[6] The Sacketts started clearing the property on April 30, 2007. *Id.* at 6.

with dirt and rock.[7] On November 26, 2007, the Environmental Protection Agency ("EPA") issued an Administrative Compliance Order ("ACO" or "compliance order")[8] against the Sacketts pursuant to section 309 of the Clean Water Act ("CWA" or "the Act").[9] The compliance order stated that the lot contained navigable waters and that the Sacketts' construction project violated the CWA.[10] The order also required the Sacketts to remove the fill material and restore the wetlands immediately.[11] The ACO encouraged the Sacketts "to engage in informal discussion of the terms and requirements of this Order."[12] It also warned the Sacketts that failure to comply could subject them to civil penalties of up to $32,500 per day,[13] administrative penalties of up to $11,000 per day for each violation, or civil action in federal court for injunctive relief.[14]

The Sacketts claimed that they did not know, nor did they have reason to know, that their property was a wetland subject to restriction.[15] However, the amicus brief filed by the Natural Resources Defense Council ("NRDC") presents a different picture.[16] According to information NRDC obtained through a Freedom of Information Act[17] request, on May 3, 2007, just three days after the Sacketts began clearing part of their lot, EPA officials informed the Sacketts that they might be filling wetlands in violation of the CWA.[18] In response, the Sacketts hired a professional wetland scientist to evaluate their land.[19] On May 21, 2007, the scientist informed the Sacketts that the land was indeed a wetland, that it was not an isolated wetland, and that they should not continue to work on the land until they consulted with the U.S. Army Corps of Engineers ("the Corps").[20] The next day, Mrs. Sackett met with a member of the Corps on the site, who provided Mrs. Sackett with an application to apply for a permit to fill the wetlands.[21] That same day, Mrs. Sackett asked the wetland scientist employed by the Sacketts to inform EPA that he had determined that the land was a wetland.[22]

Even though they had been informed by EPA and a wetland scientist of their own employ that their land was a wetland, the Sacketts neither applied for

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[7] 132 S. Ct. at 1370.

[8] Joint Appendix at 16–31, Sackett v. EPA, 132 S. Ct. 1367 (2012) (No. 10-1062), 2010 WL 7634112; *see also Sackett*, 622 F.3d at 1141.

[9] 33 U.S.C. § 1319 (2012).

[10] 132 S. Ct. at 1370–71 (quoting Joint Appendix, *supra* note 8, at 19–20).

[11] *Id.* at 1371.

[12] Joint Appendix, *supra* note 8, at 22.

[13] Section 309(d) of the Clean Water Act imposes civil penalties of $25,000 per violation per day, 33 U.S.C. § 1319(d) (2006), which has been adjusted up to $37,500 per violation per day by EPA, 40 C.F.R. § 19.4 (2012).

[14] Joint Appendix, *supra* note 8, at 23–24.

[15] Petitioners' Reply Brief at 1, Sackett v. EPA, 132 S. Ct. 1367 (2012) (No. 10-1062), 2011 WL 6468681.

[16] *See* Brief of Natural Resources Defense Council, *supra* note 5, at 6–11.

[17] 5 U.S.C. § 552 (2012).

[18] Brief of Natural Resources Defense Council, *supra* note 5, at 6–7.

[19] *Id.* at 7–8.

[20] *Id.*

[21] *Id.* at 8.

[22] *Id.* at 8–9.

a permit from the Corps to fill the wetlands nor made any efforts to rehabilitate the site.[23] Rather, after they received the compliance order, they waited for over four months to respond.[24] When they did respond, rather than engaging in informal discussion with EPA about the terms of the compliance order, as the order invited, the Sacketts sought a formal hearing with EPA to challenge the finding that their lot was subject to CWA jurisdiction.[25] EPA did not grant the hearing.[26]

On April 28, 2008, the Sacketts brought suit against EPA in the United States District Court for the District of Idaho, alleging that their property is not a wetland subject to CWA jurisdiction and that the compliance order violated their due process rights.[27] The District Court dismissed the suit for lack of subject matter jurisdiction, finding that the CWA precludes judicial review of ACOs before EPA has initiated an enforcement action in federal court.[28]

The Court of Appeals for the Ninth Circuit affirmed.[29] Writing for the court, Judge Gould noted that although the CWA does not expressly preclude judicial review, "[e]very circuit that has confronted this issue has held that the CWA impliedly precludes judicial review of compliance orders until the EPA brings an enforcement action in federal district court."[30] The court examined the nature of the ACOs and the objectives and history of the CWA and held that it is "fairly discernible" from the statutory scheme that Congress intended to preclude pre-enforcement judicial review of EPA compliance orders.[31] The Court of Appeals further held that the preclusion of judicial review for ACOs does not violate due process as it does not foreclose all access to the courts.[32] In so holding, the court interpreted the phrase "any order" in section 1319(d) to refer "only to orders predicated on actual violations of the CWA," rather than "*all* compliance orders issued on the basis of 'any information available,' "[33] meaning that no penalties could ever be assessed against a party unless EPA ultimately proved in court that the Act itself had been violated. Thus, the Ninth Circuit affirmed the District Court opinion in favor of EPA.

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[23] *Id.* at 11.
[24] Brief of Natural Resources Defense Council, *supra* note 5, at 12.
[25] *Id.*
[26] 622 F.3d at 1141.
[27] Sackett v. EPA, No. 08-cv-185-N-EJL, 2008 WL 3286801, at *1 (D. Idaho Aug. 7, 2008).
[28] *Id.* at *2–3.
[29] 622 F.3d at 1147.
[30] *Id.* at 1143 (citing Laguna Gatuna, Inc. v. Browner, 58 F.3d 564 (10th Cir. 1995); S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement, 20 F.3d 1418 (6th Cir. 1994); S. Pines Assocs. by Goldmeier v. United States, 912 F.2d 713 (4th Cir. 1990); Hoffman Group, Inc. v. EPA, 902 F.2d 567 (7th Cir. 1990); Sharp Land Co. v. United States, 956 F. Supp. 691, 693–94 (M.D. La. 1996); Child v. United States, 851 F. Supp. 1527, 1533 (D. Utah 1994); Bd. of Managers, Bottineau Cnty. Water Res. Dist. v. Bornhoft, 812 F. Supp. 1012, 1014 (D.N.D. 1993); McGown v. United States, 747 F. Supp. 539, 542 (E.D. Mo. 1990); Fiscella & Fiscella v. United States, 717 F. Supp. 1143, 1146–47 (E.D. Va. 1989)).
[31] *Id.* at 1144.
[32] *Id.* at 1146–47.
[33] *Id.* at 1145–46 (interpreting provision saying that persons are subject to penalties for violation of "any order," whereas ACOs may be issued based on "any information available").

B. Supreme Court Opinion

The Supreme Court granted certiorari in *Sackett*,[34] only two months after denying a certiorari petition in *General Electric Co. v. Jackson*[35] that would have required the Court to answer the due process question dismissed by the Ninth Circuit *Sackett* decision.[36] In its grant of certiorari, the Court clarified the petitioners' ambiguous question presented, which seemed to focus on due process,[37] and limited its review to two questions: whether the Sacketts may bring a jurisdictional challenge to EPA's compliance order in federal court under the Administrative Procedure Act ("APA") or, if not, whether petitioners' inability to seek pre-enforcement judicial review of the ACO violates their rights under the Due Process Clause.[38] Notably, in its decision the Court omitted discussion of the petitioners' due process argument and focused on the former, narrow APA question. Justice Scalia delivered the opinion for a unanimous Court, holding that "the compliance order in this case is final agency action for which there is no adequate remedy other than APA review," and concluding that "the Clean Water Act does not preclude that review."[39]

After describing the facts of the case and explaining some of the ambiguities presented by the Clean Water Act,[40] Justice Scalia began the analysis by considering whether a compliance order is a "final agency action" under the APA.[41] The APA permits judicial review of "final agency action for which there is no other adequate remedy in a court."[42] Relying on the requirements for finality that the Court articulated in *Bennett v. Spear*[43] and *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*,[44] Justice Scalia first concluded that because the Sacketts are legally obligated to restore their prop-

[34] 131 S. Ct. 3092 (2011).

[35] *See* 131 S. Ct. 2959 (2011).

[36] *See* discussion *infra* Part II.A.

[37] The question presented in the Sacketts' petition for certiorari first stated a dramatic version of the facts suggesting that their argument centered on due process. Petition for Writ of Certiorari at i, Sackett v. EPA, 132 S.Ct. 1367 (2012) (No. 10-1062), 2011 WL 688727. The question presented explained that the Sacketts' ACO imposed "great cost" and the "threat of civil fines" and "criminal penalties" with "no evidentiary hearing or opportunity to contest the order." *Id.* However, their actual question asked: "Do petitioners have a right to judicial review of an Administrative Compliance Order issued without hearing or any proof of violation under Section 309(a)(3) of the Clean Water Act?" *Id.* This question fails to identify clearly whether they wish the Court to address the case under the APA or under due process.

[38] 131 S. Ct. at 3092.

[39] 132 S. Ct. at 1374.

[40] Justice Scalia chose not to elaborate on the scope of Clean Water Act jurisdiction. *Id.* at 1370. Instead, he only evaluated whether the dispute could be brought in court by challenging the ACO and briefly explained "what all the fuss is about," summarizing the Court's "navigable waters" cases. *Id.* The Act defines "navigable waters" to mean "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (2012). The Supreme Court has struggled for decades to define the term "waters of the United States." *See, e.g.*, Rapanos v. United States, 547 U.S. 715 (2006); Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs, 531 U.S. 159 (2001); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).

[41] 132 S. Ct. at 1371–72.

[42] 5 U.S.C. § 704 (2012).

[43] 520 U.S. 154 (1997).

[44] 400 U.S. 62 (1970).

erty in adherence with EPA's restoration plan, EPA "determined" "rights or obligations" through the ACO.[45] In addition, contrary to the Government's contention, ACOs do not simply "express [the agency's] view of what the law requires."[46] Rather, "legal consequences . . . flow" from the orders: The Sacketts' ACO exposed them to double penalties and restricted their ability to obtain a fill permit from the Corps.[47] Justice Scalia explained that the ACO is the "consummation" of EPA's decision-making process.[48] He rejected the Government's argument that the ACO does not represent the agency's final conclusions, noting 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."[49] Justice Scalia concluded the finality analysis by determining that the Sacketts have "no other adequate remedy in a court."[50]

Next, Justice Scalia turned to the question of whether the CWA precludes APA review. The APA creates a presumption of judicial review for "final agency action for which there is no other adequate remedy in a court,"[51] except "to the extent that [other] statutes preclude judicial review."[52] The Government argued that it would undermine the CWA to permit judicial review of ACOs because Congress gave EPA the option to bring a civil action *or* to issue a compliance order.[53] Justice Scalia responded that this argument relies on the faulty premise that the only relevant difference between an ACO and a civil action is judicial review, when in reality, there are other reasons why compliance orders may be preferable.[54] Justice Scalia also countered the Government's argument that ACOs are not self-executing but must be enforced by judicial action by noting that "the APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction."[55] He reiterated the Court's conclusion that the compliance order was not simply "a step in the deliberative process," but was a final decision.[56] He then addressed the Government's contention that the CWA *must* preclude judicial review because Congress clearly provided for judicial review in some instances in the CWA, but declined to provide for judicial review of ACOs.[57] The Court explained that the express provision of judicial review in one section of the CWA is not

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[45] 132 S. Ct. at 1371.

[46] Brief for the Respondents at 28, Sackett v. EPA, 132 S. Ct. 1367 (2012) (No. 10-1062), 2011 WL 5908950 (quotation marks omitted) (citing Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs, 543 F.3d 586, 594 (9th Cir. 2008)).

[47] 132 S. Ct. at 1371–72 (quoting Bennett v. Spear, 520 U.S. 154, 178 (1997)).

[48] *Id.* at 1372.

[49] *Id.*

[50] *Id.* at 1372 (quoting 5 U.S.C. § 704).

[51] 5 U.S.C. § 704.

[52] 5 U.S.C. § 701(a) (2012).

[53] 132 S. Ct. at 1373.

[54] *Id.*

[55] *Id.*

[56] *Id.* (quoting Brief for the Respondents at 38, Sackett v. EPA, 132 S. Ct. 1367 (2012) (No. 10-1062), 2011 WL 5908950).

[57] *Id.* at 1373.

enough to overcome the APA's presumption of review.[58] Finally, Justice Scalia rejected the Government's argument that "the EPA is less likely to use the orders if they are subject to judicial review," noting that "[t]he APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all."[59]

Justice Ginsburg wrote a brief concurrence, stating that she agreed with the holding that the Sacketts may litigate their jurisdictional challenge in court.[60] She noted, however, that the Court had not addressed the question of whether the Sacketts could challenge not only EPA's jurisdiction to regulate their land but also the terms and conditions of the ACO.[61] Justice Ginsburg emphasized that she joined the opinion with the understanding that this question remains open for another case.[62]

Justice Alito also concurred. His concurrence focused on the "notoriously unclear" nature of the CWA and the need for the Court to lend clarity.[63] Justice Alito described EPA as a merciless agency that forces landowners to "dance to [its] tune" and "do [its] bidding" if they think a plot of land "possesses the requisite wetness."[64] Justice Alito emphasized that the Court's opinion provides a modest amount of relief, but in his view, "[r]eal relief requires Congress to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act."[65]

II. Analysis

Sackett v. EPA adds an uncharacteristically lucid chapter to the Court's confused Clean Water Act jurisprudence. We first discuss the legal significance of the *Sackett* decision, concluding that the opinion does effect a change in reviewability of ACOs. We then highlight the decision's lack of practical significance on Clean Water Act enforcement and the consequences of noncompliance. We conclude that the Court's opinion is virtually harmless to both environmental and administrative laws, generally, and to Clean Water Act enforcement programs, specifically.

A. *Legal Significance*

Sackett is significant both for what it says and for what it omits. The narrow rule enunciated by *Sackett* is that CWA ACOs are final agency actions subject to prompt judicial review under the APA at the election of the regulated

[58] *Id.*
[59] 132 S. Ct. at 1374.
[60] *Id.* at 1374 (Ginsburg, J., concurring).
[61] *Id.* at 1374–75.
[62] *Id.* at 1375.
[63] *Id.* (Alito, J., concurring).
[64] *Id.*
[65] 132 S. Ct. at 1375.

party.[66] This section explains that while the *Sackett* opinion effects a change in judicial interpretation of the relevant Clean Water Act provisions, it leaves unscathed every other environmental and administrative statute potentially threatened by the Court's grant of the Sacketts' petition for certiorari.

Under the rule enunciated by *Sackett*, when EPA issues section 309 ACOs, EPA will be vulnerable to legal challenge under the APA, at least on the question of whether EPA has jurisdiction.[67] This changes the law insofar as it directly conflicts with precedent in every circuit that has confronted the issue.[68] The CWA no longer provides EPA with the ability to issue compliance orders immune from judicial review prior to agency enforcement. Thus, what the opinion does say actually changes the law from how it had been interpreted previously.

However, the Court's omission of any constitutional discussion,[69] apart from Justice Alito's lonely due process reference,[70] is perhaps more telling than the opinion's content.[71] This omission does not come as a surprise. As noted above,[72] the Court had denied a petition to review the constitutionality of preclusion of judicial review of Unilateral Administrative Orders ("UAOs") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")[73] in *Jackson*[74] only two months prior to granting certiorari in *Sackett*.[75] Had the Court taken up *Jackson*, it would have been unable to rest its decision on statutory grounds because the statute at issue expressly bars judicial review of UAOs, unlike the CWA's ambiguous treatment of ACOs. Instead, the Court would have had to decide whether issuance of the UAO is a deprivation of property without due process of law when that order is immune from judicial review.[76] Moreover, the Court added an APA question on review in *Sackett*[77]

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[66] *Id.* at 1374.

[67] *Id.* at 1374–75 (Ginsburg, J., concurring).

[68] *See supra* note 30.

[69] Justice Scalia's opinion deletes the due process question presented in the Court's grant of certiorari, 131 S. Ct. 3092 (2011), and solely presents the question of whether the ACO scheme survives scrutiny under the APA. *See* 132 S. Ct. at 1369.

[70] 132 S.Ct. at 1375 (Alito, J., concurring) ("In a nation that values due process, not to mention private property, such treatment is unthinkable.").

[71] Accordingly, InsideEPA reports that Mark Pollins, Director of EPA's Water Enforcement Division, stated at an American Law Institute-American Bar Association Wetlands Law and Regulation Course of Study that "[i]t's really, really critical what the court did not say." Bridget DiCosmo, *Downplaying High Court Ruling, EPA Floats Options For CWA Enforcement*, InsideEPA (May 7, 2012), http://insideepa.com/Inside-EPA-General/Inside-EPA-Public-Content/downplaying-high-court-ruling-epa-floats-options-for-cwa-enforcement/menu-id-565.html.

[72] *See supra* note 35.

[73] Under CERCLA, EPA may issue UAOs when EPA determines that a contaminated site must be cleaned up without court involvement. 42 U.S.C. § 9606(a) (2012). The Potentially Responsible Party ("PRP") named in the UAO must comply with the UAO or be subject to the threat of treble damages and penalties of up to $37,500 per day. 42 U.S.C. §§ 9606(b)(1), 9607(c)(3) (2012); 40 C.F.R. § 19.4 (2012). PRPs may not seek judicial review of UAOs; rather, EPA may bring an action to enforce the UAO. 42 U.S.C. § 9613(h) (2012).

[74] *See* 131 S. Ct. 2959 (2011).

[75] 131 S. Ct. 3092 (2011).

[76] Petition for Writ of Certiorari at i, Gen. Elec. Co. v. Jackson, 131 S. Ct. 2959 (2011) (No. 10-871), 2010 WL 5535746.

and ultimately rested its decision squarely on the APA's presumption of judicial review.[78] While acknowledging the due process issue raised below,[79] the Court did not invalidate the CWA's apparent lack of judicial review as unconstitutional under the due process clause, much to the dismay of the Pacific Legal Foundation and petitioners' amici.[80]

What does this mean for environmental and administrative law? A constitutional ruling would likely have decimated other statutes that expressly preclude judicial review, including CERCLA.[81] The requirement of judicial review in such contexts would make law enforcement in pursuit of important environmental objectives subject to legal challenge, and thus less efficient. For now, CERCLA's UAOs and other administrative orders are safe, as the Court has had ample opportunity to review their constitutionality and has consistently declined the invitations.[82] It is difficult to read into the Court's certiorari decisions anything about the cases it will take up in future sessions. However, its decision to take up *Sackett* and decide it on narrow grounds, while refusing *Jackson*, which would likely have merited a broad, constitutionally based decision, seems to indicate the Court's reluctance to overturn Congress's express preclusion of judicial review on due process grounds.

Thus, the legal significance of *Sackett* is limited to the addition of judicial review to section 309 ACOs; thankfully, the bulk of environmental and administrative law remains intact.

B. Practical Significance

Although the law has changed slightly, the practical significance of *Sackett* is likely to be extremely minimal. Before *Sackett*, EPA had relied heavily on use of ACOs to nudge CWA violators into compliance.[83] After *Sackett*, EPA will simply circumvent judicial review by using simple warning letters in lieu of formal orders under section 309. This changes practically nothing except for the theoretical penalties EPA could seek for violation of an ACO.

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[77] As noted by Professor Richard Lazarus, "[t]o add a nonjurisdictional threshold issue, not raised by the parties, is a clear sign of where the Court may well be heading: a possible ruling in favor of the petitioners and against the government on the statutory interpretation issue without reaching the constitutional issue." Richard Lazarus, *A Tale of Two Superfund Cases*, ENVTL. FORUM (Jan.–Feb. 2012), *available at* http://www.law.harvard.edu/faculty/rlazarus/docs/columns/Lazarus_Environmental_Law_Forum_Jan-Feb2012.pdf.

[78] *See* discussion *supra* note 69.

[79] *See* 132 S. Ct. at 1371.

[80] In a brief that ostensibly dealt with the APA, Pacific Legal Foundation raised judicial review under the Due Process Clause, Takings Clause, the right to be free from unreasonable searches, and the right to exclude persons from property. Petitioners' Brief on the Merits at 31–32, Sackett v. EPA, 132 S. Ct. 1367 (2012) (No. 10-1062), 2011 WL 4500687.

[81] 42 U.S.C. § 9613(h).

[82] *See, e.g.*, *Sackett*, 132 S. Ct. 1367 (2012); Gen. Elec. Co. v. Jackson, 610 F.3d 110 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 2959 (2011).

[83] The Court's sense that EPA has been acting as a bully under the Clean Water Act came through at oral argument. *See* Transcript of Oral Argument at 35: 23–25, 53: 1–6, Sackett v. EPA, 132 S. Ct. 1367 (2012) (No. 10-1062).

After this ruling, EPA can just send a party that it suspects is violating section 301 of the Act a warning letter outside of the statutory scheme detailing its suspicion and alerting the party to the possibility of CWA penalties of up to $37,500 per day per violation. As reportedly noted by Mark Pollins, director of EPA's water enforcement division, at an American Bar Association course of study, "What's available after *Sackett*? Pretty much everything that was available before *Sackett* . . . . Internally, it's same old, same old."[84]

Specifically, EPA could switch to use of the "notice of violation" ("NOV") letter in the Clean Water Act context, a nonbinding compliance mechanism used by multiple agencies,[85] including EPA,[86] to evade judicial review. Like an ACO, these letters would set forth a suspected violation of the CWA and delineate possible enforcement options EPA might take against the letter's recipient.[87] EPA could also issue "show cause" letters to suspected violators of the Act. These letters, which are prevalent throughout administrative law,[88] and are already used by EPA,[89] inform their recipient that the government will investigate or initiate an enforcement measure against the entity if that party fails to correct its CWA violations. Both NOV letters and show cause letters could plainly state the threat of sanctions of up to $37,500 per violation per day for violation of the Act itself without invoking coverage under section

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[84] DiCosmo, *supra* note 71.

[85] Many enforcement programs of the Federal Food and Drug Administration ("FDA") use NOV letters to encourage compliance by warning that "failure to achieve prompt correction may result in enforcement action without further notice." U.S. Food and Drug Admin., *Regulatory Procedures Manual* § 4-1, *available at* http://www.fda.gov/ICECI/ComplianceManuals/RegulatoryProceduresManual/ucm176870.htm#SUB4-1-10. Courts have held that these NOVs are not final agency actions and thus not subject to judicial review, contrary to CWA ACOs. *See, e.g.*, Dietary Supplemental Coal., Inc. v. Sullivan, 978 F.2d 560, 563 (9th Cir. 1992), *cert. denied* 508 U.S. 906 (1993). Other agencies also issue NOV letters that are similarly not final agency actions and are thus not reviewable, including the U.S. National Highway Traffic Safety Administration, *see, e.g.*, Air Brake Sys., Inc. v. Mineta, 357 F.3d 632, 638–46 (6th Cir. 2004), the U.S. Federal Aviation Administration, *see, e.g.*, Air Cal. v. U.S. Dep't of Transp., 654 F.2d 616, 618–22 (9th Cir. 1981), and the U.S. Department of Energy, *see* U.S. DEP'T OF ENERGY OFFICE OF ENFORCEMENT, ENFORCEMENT PROCESS OVERVIEW 23–24 (June 2009), *available at* http://www.hss.doe.gov/enforce/docs/overview/Final_EPO_June_2009_v4.pdf.

[86] EPA is accustomed to issuing NOVs in its Clean Air Act program to avoid judicial review. *See* CLEAN AIR ACT COMPLIANCE/ENFORCEMENT GUIDANCE MANUAL 6-3 (1986), *available at* http://envinfo.com/caain/enforcement/caad117.html.

[87] *See* DiCosmo, *supra* note 71.

[88] Agencies using these types of letters include the Equal Employment Opportunity Commission, *see* Am. Tel. & Tel. Co. v. Equal Emp't Opportunity Comm'n, 270 F.3d 973, 974–75 (D.C. Cir. 2001), and the Consumer Products Safety Commission, *see* Reliable Automatic Sprinkler Co. v. Consumer Product Safety Comm'n, 324 F.3d 726, 731–32 (D.C. Cir. 2003). Other agencies use "show cause" letters as well. Brief for the Respondents at 20–21, Sackett v. EPA, 132 S. Ct. 1367 (2012) (No. 10-1062), 2011 WL 5908950.

[89] *See, e.g.*, *Underground Storage Tank (UST) Compliance Monitoring and Enforcement Process: What Enforcement Actions Should be Taken?*, EPA, http://www.epa.gov/oecaerth/civil/rcra/ustcompendium/enforcement.html (last visited Jan. 23, 2013) (on file with the Harvard Law School Library) (explaining that in the context of the Resource Conservation and Recovery Act Underground Storage Tank Compliance Monitoring and Enforcement Process, "[w]hen appropriate, a 'Show Cause' letter is sent to the facility owner/operator, describing the alleged violations and inviting the owner/operator to engage in pre-filing negotiations.").

309 and the accompanying requirement of judicial review.[90] EPA's Mark Pollins has already acknowledged that both types of letters are options for the agency's CWA enforcement after *Sackett*.[91]

The only theoretical significance is that such letters would not technically be compliance orders under section 309, and violation of the letters would not authorize imposition of a second layer of penalties. Under EPA's current interpretation of section 309, the issuance of compliance orders could theoretically result in double penalties.[92] The violation of the Act itself authorizes the first layer of penalties. Additionally, violation of the compliance order authorizes a second layer of penalties. However, if EPA instead issues NOV or show cause letters, the ultimate result will remain the same. As the United States noted at oral argument, EPA is unaware of any case in which double penalties have ever been sought or ultimately imposed for violation of an ACO.[93] In a world in which imposition of double penalties for violation of both ACOs *and* the CWA is virtually nonexistent, a letter threatening a single penalty of $37,500 per violation per day for violation of the Act alone is likely to encourage compliance just as much as issuance of an ACO.[94] In other words, the practical penalties arising under both scenarios are equivalent and, thus, the practical effect will likely be the same,[95] much to the dismay of those who condemned EPA's

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[90] For a discussion of the relevant Clean Water Act provisions and accompanying regulations pertaining to these penalties, see *supra* note 13.

[91] *See* DiCosmo, *supra* note 71. The United States, in its brief before the Supreme Court, unsuccessfully attempted to portray ACOs as similar to these types of letters so as to avoid imposition of judicial review on compliance orders. *See* Brief for the Respondents at 19–22, Sackett v. EPA, 132 S. Ct. 1367 (2012) (No. 10-1062), 2011 WL 5908950.

[92] Transcript of Oral Argument at 26:13–22, Sackett v. EPA, 132 S. Ct. 1367 (2012) (No. 10-1062), *available at* http://www.oyez.org/cases/2010-2019/2011/2011_10_1062.

[93] Oral Argument at 30:21–25, 31:1–3, Sackett v. EPA, 132 S. Ct. 1367 (2012) (No. 10-1062).

[94] At least one other commenter disagrees. *See* Anna Hill, *Was Sackett v. EPA All About Protecting the Little Guy?*, MICH. J. OF ENVTL. & ADMIN. L. BLOG (Apr. 4, 2012), http://students.law.umich.edu/mjeal/2012/04/was-sackett-v-epa-all-about-protecting-the-little-guy/ ("If the EPA finds compliance orders too risky to issue what avenues for enforcement remain? They could issue a warning letter, which would give the advantage of providing notice of a violation, but is likely to do little to persuade voluntary compliance.").

[95] At oral argument, the Justices seemed well aware of the practical insignificance of declaring section 309 ACOs subject to judicial review. Justice Scalia asked Malcolm Stewart, the Deputy Solicitor General of the United States, "Can — can the EPA issue a warning instead of using this order procedure? Compliance order procedure?" Oral Argument at 44:25–45:2, Sackett v. EPA, 132 S. Ct. 1367 (2012) (No. 10-1062). When Mr. Stewart acknowledged this possibility, Justice Scalia went so far as to outline what EPA now will likely do:

> So, they can just dispense with this compliance order and tell the Sacketts: In our view, this is a warning; we believe you are in violation of the Act; and you'll be subject to — you are subject to penalties of 37.5 per day for that violation; and to remedy the violation, in our judgment, you have to fill in and you have to plant, you know, pine trees on the lot . . . . And there would be no review of that.

Oral Argument at 45:3–7, 9–20, Sackett v. EPA, 132 S. Ct. 1367 (2012) (No. 10-1062). Later in petitioners' oral argument, Justice Scalia reiterated "But . . . they'll just issue warnings is what they'll do." *Id.* at 57:7–8.

treatment of the Sacketts.[96] Thus, the Supreme Court's opinion issues a narrow rule of law with virtually no practical significance.

The more interesting question is *why* the Justices granted certiorari in the first place, only to write a short, tempered, and unanimous opinion of little to no consequence. Justice Scalia is usually outraged by regulatory agencies' expansion of Clean Water Act jurisdiction. For example, in *Rapanos*, he scathingly referred to the permitting agency as an "enlightened despot"[97] that impermissibly defined navigable waters so broadly as to reach "transitory puddles."[98] In contrast, in *Sackett*, Justice Scalia referred to the arguably *more* sympathetic petitioners[99] as simply "interested parties feeling their way"[100] and describes the Supreme Court wetlands jurisprudence as simply a "fuss."[101]

Justice Scalia's uncharacteristically calm opinion in the face of apparent agency overreaching may be his tacit acknowledgement that the alleged "bad facts" of this case are not really as bad as they appeared at the certiorari stage. When the Court granted certiorari, the Sacketts seemed to be the classic innocent victims of government abuse of power, a young couple precluded from living the American Dream by a nonsensical, excessively punitive federal order. However, NRDC's amicus brief, highlighting the Sacketts' knowledge that their land was a wetland and that they could avoid issuance of an ACO by consulting with the Corps,[102] undercuts the legitimacy of the Sacketts' claim that they were "unwittingly ensnared in this regulatory net" and thus "devastated" by issuance of the ACO.[103] Viewed in this light, the facts are not so offensive.

Alternatively, Justice Scalia may have been eager to clear his docket and display his newfound capacity to hold not just a majority, but a unanimous Court,[104] in anticipation of the following week's oral arguments in the healthcare case.[105] Ultimately, whatever the reason, the *Sackett* opinion does little to change the practical reality of Clean Water Act enforcement programs.

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[96] *Senate Republicans Request Answers on EPA's Sackett Comments*, CANADA FREE PRESS EPWBLOG (May 29, 2012), http://www.canadafreepress.com/index.php/article/46987.

[97] Rapanos v. United States, 547 U.S. 715, 721 (2006) (plurality opinion) ("In deciding whether to grant or deny a permit, the U.S. Army Corps of Engineers (Corps) exercises the discretion of an enlightened despot . . . .").

[98] *Id.* at 733.

[99] Whereas the Sacketts seemed the all-American innocent couple prior to the illumination of contrary facts by NRDC, Rapanos was clearly not a model citizen. As reported in Stevens's dissent, Mr. Rapanos "threatened to 'destroy' Dr. Goff if he did not destroy the wetland report" declaring his land a section 404 wetland and he "refused to pay Dr. Goff unless and until he complied." 547 U.S. 787, 789 (2006) (Stevens, J., dissenting) (internal citations omitted).

[100] 132 S.Ct. at 1370.

[101] *Id.*

[102] Brief of Natural Resources Defense Council, *supra* note 5, at 6–7.

[103] Petitioners' Brief on the Merits at 6, Sackett v. EPA, 132 S. Ct. 1367 (2012) (No. 10-1062), 2011 WL 6468681.

[104] *Cf.* Rapanos v. United States, 547 U.S. 715 (2006) (plurality opinion) (displaying Justice Scalia's inability to garner a majority of Justices for his opinion).

[105] *Compare* 132 S. Ct. at 1367 (showing that *Sackett* was decided on March 21, 2012), *with* Oral Argument at 3:19, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566 (2012) (No. 11-393), *available at* http://www.supremecourt.gov/oral_arguments/argument_audio_detail.aspx?ar-

Conclusion

The *Sackett* decision left EPA a triumphant loser. The decision changes the law in favor of parties regulated under the Clean Water Act insofar as it permits judicial review of section 309 ACOs. However, EPA lost this battle without wreaking havoc on other environmental or administrative laws, as a due process ruling would have done. Moreover, the decision will actually have little effect on the vitality of EPA's Clean Water Act enforcement programs as it allows EPA to evade judicial review through use of extra-statutory warning letters. While the opinion lacks practical significance to EPA or those regulated under its auspices, this near-miss should serve as a useful reminder to administrative agencies that with great power comes great responsibility and that EPA should use its power judiciously and steer clear of bad facts.

gument=11-393 (showing that the oral argument for the healthcare case occurred the week of March 26, 2012).