
Ninth Circuit: EPA Compliance Orders Are Not Subject to Pre-Enforcement Judicial Review

INTRODUCTION

Administrative compliance orders allow the Environmental Protection Agency to respond quickly to ongoing violations of federal environmental law. While the Ninth Circuit was right to deny pre-enforcement judicial review of Environmental Protection Agency compliance orders in *Sackett v. EPA*,¹ the Environmental Protection Agency should meet alleged violators halfway by providing an administrative forum early in the enforcement process.

Sackett incorporates two broad holdings. First, the court found that federal courts do not have jurisdiction to review administrative compliance orders issued under the Clean Water Act in response to alleged violations.² Second, the court held that such a restriction on pre-enforcement review of administrative compliance orders does not violate constitutional rights to due process.³ The result reached by the Ninth Circuit is in line with the strong, although not unanimous, consensus of several other circuits, and is based on sound reasoning.⁴

After the Ninth Circuit denied en banc review, the Sacketts filed a petition for certiorari to the Supreme Court.⁵ If the Court chooses to hear the case, it will most likely affirm the Ninth Circuit's decision. However, the

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1. *Sackett v. EPA*, 622 F.3d 1139, 1141 (9th Cir. 2010).

2. *Id.*

3. *Id.*

4. *See, e.g., 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. ex rel. Goldmeier v. United States*, 912 F.2d 713 (4th Cir. 1990); *Hoffman Group, Inc. v. EPA*, 902 F.2d 567 (7th Cir. 1990). *But see Tenn. Valley Auth. v. Whitman (TVA)*, 336 F.3d 1236, 1239–40 (11th Cir. 2003) (holding that, although the court lacked jurisdiction to review a compliance order issued under an analogous provision of the Clean Air Act, due process concerns would render the compliance order meaningless when properly reviewed during an enforcement proceeding).

5. *Sackett*, 622 F.3d 1139, *petition for cert. filed*, No. 10-1062, 2011 WL 688727 (U.S. Feb. 23, 2011). The Sacketts and the public interest law firm representing them have also made efforts to try their case in the court of public opinion, including a video clip published to YouTube and an appearance on the Fox News program *Fox and Friends*. *See* Pac. Legal Found., *Big Trouble in Idaho*, YOUTUBE (Nov. 17, 2010), http://www.youtube.com/watch?v=wYf2qSW_yRk; *Fox and Friends* (Fox News Channel television broadcast Dec. 16, 2010).

administrative compliance order process nevertheless creates the disconcerting possibility of potential penalties increasing over an indefinite period of time. Although judicial discretion may ensure that any penalty assessed will fall within constitutional bounds, Environmental Protection Agency regulations providing early administrative hearings could ensure greater predictability and thus improve the administrative compliance order enforcement process.

I. BACKGROUND

In 2007, petitioners Michael and Chantell Sackett began filling a portion of their Idaho property with rocks and dirt, in preparation for building a house.⁶ Shortly after, the Environmental Protection Agency (EPA) issued an administrative compliance order alleging that the property was a wetland and subject to the Clean Water Act (CWA), and that by laying fill materials, the Sacketts unlawfully discharged pollutants into the waters of the United States in violation of the CWA.⁷ The order required the Sacketts to remove the fill material, restore the property to its original condition, and complete a three-year monitoring program during which the property would remain untouched.⁸ The potential civil penalties began at \$32,500 per day of noncompliance and have since increased to a maximum of \$37,500 per day.⁹ The Sacketts refused to engage in informal negotiations¹⁰ and instead requested a formal administrative hearing, which the EPA denied.¹¹

A year after beginning to fill their property, the Sacketts filed a complaint in the U.S. District Court for the District of Idaho seeking a declaratory judgment that their property is not a wetland subject to the CWA, and that enforcement of the compliance order without a hearing would violate their due process rights.¹² The Sacketts also requested an injunction against enforcement of the compliance order without a hearing.¹³ However, the district court granted the EPA's motion to dismiss for lack of subject matter jurisdiction, finding no authority for judicial review of an administrative compliance order.¹⁴

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

7. *Id.* at 1141 n.1; 33 U.S.C. § 1311(a) (2006).

8. ENVTL. PROT. AGENCY, CWA-10-2008-0014, IN RE CHANTELL & MICHAEL SACKETT, ADMINISTRATIVE COMPLIANCE ORDER, ATTACHMENT 1: RESTORATION WORK PLAN (2007).

9. *Sackett*, 622 F.3d at 1141, 1142 n.3 (citing 40 C.F.R. § 19.4 (2009)).

10. United States' Memorandum in Support of Motion to Dismiss Plaintiffs' Complaint for Lack of Subject Matter Jurisdiction at 1–3, *Sackett v. EPA*, No. CV-08-0185-N-EJL, 2008 WL 3286801 (D. Idaho Aug. 7, 2008).

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

12. Complaint ¶ 3, *Sackett v. EPA*, No. CV-08-0185-N-EJL, 2008 WL 3286801 (D. Idaho Aug. 7, 2008).

13. *Id.*

14. *Sackett v. EPA (Sackett (District Court))*, No. CV-08-0185-N-EJL, 2008 WL 3286801, at *2–3 (D. Idaho Aug. 7, 2008).

II. JURISDICTIONAL HOLDING

The *Sackett* court first decided that Congress had not given jurisdiction to the federal courts to hear the Sacketts' claim. The opinion focused on whether the CWA expresses congressional intent to preclude review, thus eliminating the Administrative Procedure Act (APA) as a basis of jurisdiction.¹⁵

Because the CWA does not explicitly address judicial review of compliance orders, the Ninth Circuit based its conclusion on the factors laid out in by the Supreme Court in *Block v. Community Nutrition Institute*.¹⁶ There the Court held that intent to preclude review need not be explicit in the statute, but can instead be implicit in "the structure of the statutory scheme, its objectives, its legislative history, [or] the nature of the administrative action involved."¹⁷

The structure of the CWA suggests that the administrative compliance order is designed to allow the EPA to enforce the CWA without immediate litigation.¹⁸ The CWA grants the EPA a choice in responding to violations: the EPA may issue a compliance order, assess administrative penalties, or bring a civil action in district court.¹⁹ The CWA's treatment of compliance orders contrasts with the CWA's explicit allowance of judicial review of administrative penalties.²⁰ If the statute explicitly grants judicial review for only some available enforcement actions, it logically does not anticipate review of actions for which there is no such explicit grant.²¹ Finally, the EPA cannot assess penalties for violation of a compliance order unless it brings an enforcement action in court, suggesting that courts should consider all litigation regarding compliance orders in a single action brought at the EPA's discretion.²²

Next, the court noted that an objective of the CWA's compliance order provision is to provide rapid enforcement in response to unambiguous

15. *Sackett*, 622 F.3d at 1142–44. The doctrine of sovereign immunity prevents suits against the United States except where jurisdiction has been specifically granted by Congress. See *Sackett (District Court)*, 2008 WL 3286801, at *2. The APA waives immunity for challenges to federal agency final determination, except where allowing review would contravene congressional intent. 5 U.S.C. §§ 701(a)(1), 704 (2006).

16. *Sackett*, 622 F.3d at 1142–43 (citing *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984)). In contrast, the CAA was amended to explicitly permit judicial review of all final actions, thus distinguishing this case from the Ninth Circuit's holding that review of a CAA compliance order was within its jurisdiction in *Alaska v. EPA*, 244 F.3d 748, 749 (9th Cir. 2001). See 42 U.S.C. § 7607(b)(1) (2006); Response Brief of Appellees at 16–17 n.2, *Sackett*, 622 F.3d 1139 (9th Cir. 2010) (No. 08-35854). Despite this provision, some circuits have nonetheless held that the CAA also implicitly precludes review of compliance orders. See *TVA*, 336 F.3d 1236, 1256 n.33 (11th Cir. 2003) (listing authorities).

17. *Sackett*, 622 F.3d at 1143 (quoting *Block*, 467 U.S. at 345).

18. *Id.* (citing *Hoffman Grp. v. EPA*, 902 F.2d 567, 569 (7th Cir. 1990)).

19. *Id.* at 1142 (citing 33 U.S.C. § 1319(a), (b), (g) (2006)).

20. *Id.* at 1143 (citing 33 U.S.C. § 1319(g)(8); *S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418, 1426 (6th Cir. 1994)).

21. *Id.*

22. *Id.* (citing 33 U.S.C. § 1319(d); *Hoffman Grp.*, 902 F.2d at 569; *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14 (1981)).

violations of the CWA.²³ The court thus concluded that allowing for judicial review of compliance orders would undermine the goal of “swift corrective action.”²⁴ Although the rationale for this conclusion is largely left unsaid in the opinion, one possibility is the belief that the EPA would delay issuing orders for known violations until it was prepared to respond to potential litigation.²⁵ Permitting immediate litigation in response to administrative compliance orders could also bring preliminary injunctions staying these orders and could delay the EPA’s ability to proceed to an enforcement action.

Finally, the court examined the legislative history of the CWA and the Clean Air Act (CAA),²⁶ noting that Congress modeled the CWA after the CAA.²⁷ The Senate’s version of the CAA originally included explicit authorization for judicial review of pre-enforcement compliance orders.²⁸ Congress deleted this provision during reconciliation, possibly suggesting the intent to preclude judicial review of these orders.²⁹ Acknowledging criticism of that interpretation, the court nonetheless stated that the CWA’s structure and statutory language support this conclusion.³⁰

Thus, based on the structure, objective, and history of the compliance order provision, the court held that Congress intended under the CWA to preclude judicial review of administrative compliance orders; therefore, the court had no jurisdiction in this case under the APA.³¹

III. DUE PROCESS HOLDINGS

The Sacketts next argued that denial of pre-enforcement judicial review of compliance orders violates due process.³² The Ninth Circuit addressed two of the Sacketts’ due process claims.³³ First, the court held that the compliance order provision must be construed to allow for penalties only when an underlying violation of the CWA has been committed, thus avoiding the

23. *Id.* at 1144 (citing *S. Pines Assocs. ex rel. Goldmeier v. United States*, 912 F.2d 713, 716 (4th Cir. 1990); S. REP. NO. 92-414, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730).

24. *Id.*

25. *See id.*

26. *Id.*

27. *Id.* (citing *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564, 565 (10th Cir. 1995); *S. Pines Assocs.*, 912 F.2d at 716).

28. *Id.*

29. *Id.* (citing *Lloyd A. Fry Roofing Co. v. EPA*, 554 F.2d 885, 890 (8th Cir. 1977)).

30. *Id.* (citing Andrew I. Davis, *Judicial Review of Environmental Compliance Orders*, 24 ENVTL. L. 189, 199 (1994)).

31. *See id.*

32. *Id.*; *see* U.S. CONST. amend. V.

33. *Sackett*, 622 F.3d at 1144–47. Based on its overall holding that jurisdiction was lacking, the appellate court did not reach the Sacketts’ due process claims regarding failure to provide notice, failure to provide a hearing before an impartial tribunal, or the vagueness of the compliance order provision. *Id.* at 1147 n.5. In contrast, the district court did not reach any due process claims, holding that an alleged constitutional violation does not create jurisdiction where it is otherwise lacking. *See Sackett (District Court)*, No. CV-08-0185-N-EJL, 2008 WL 3286801, at *2 (D. Idaho Aug. 7, 2008).

Sacketts' fear that they could be subject to penalties based on a standard of proof less than probable cause.³⁴ Second, the penalties for violating a compliance order, if it is ultimately determined to be valid in an enforcement action, are not so onerous that they effectively foreclose access to the courts for compliance order recipients who wish to contest their alleged violations.³⁵

A. *Due Process I: Fair Hearing Holding*

According to the Sacketts, the Eleventh Circuit's reasoning in *Tennessee Valley Authority v. Whitman (TVA)* regarding the CAA was applicable to the CWA.³⁶ Both the CWA and the CAA authorize penalties for the violation of "any order" issued by the EPA under certain sections of the statutes.³⁷ In *TVA*, the Eleventh Circuit held that compliance orders under the CAA were unconstitutional and invalid based on its interpretation that penalties could be assessed for a violation of an order regardless of whether an underlying violation of the statute had in fact occurred.³⁸ As the EPA issues compliance orders based on "any information available," this denies a potential defendant the constitutional right to trial.³⁹ In an enforcement action, an actual violation of the CAA would be irrelevant to whether the defendant violated the compliance order.⁴⁰

The Ninth Circuit, however, chose a different path than the *TVA* court. While a literal interpretation of the penalty portion of the CWA may pose due process problems, the court invoked the constitutional avoidance doctrine to hold that, if the EPA fails to prove that a defendant actually violated the CWA, it cannot assess penalties for violating a compliance order.⁴¹ The CWA authorizes civil penalties for violating "any order," but the EPA may not commence a civil *action* merely for a compliance order violation.⁴² Rather, the potential defendant must also have violated the CWA itself.⁴³ If a court were to rule that the underlying CWA violation did not occur, it would be illogical for the court to then assess penalties for a compliance order violation that the EPA could not have brought to the court without the CWA violation.⁴⁴

34. *Sackett*, 622 F.3d at 1145–46. Compliance orders are issued based on "any information available" to the EPA. *Id.* at 1145 (citing 33 U.S.C. § 1319(a)(3) (2006)).

35. *Sackett*, 622 F.3d at 1146.

36. *See Sackett*, 622 F.3d at 1144; *Tenn. Valley Auth. v. Whitman (TVA)*, 336 F.3d 1236, 1260 (11th Cir. 2003).

37. 33 U.S.C. § 1319(d) (2006); 42 U.S.C. § 7413(b)(2) (2006).

38. *TVA*, 336 F.3d at 1256, 1260.

39. *Id.* at 1258; *see Sackett*, 622 F.3d at 1145.

40. *See TVA*, 336 F.3d at 1258.

41. *Sackett*, 622 F.3d at 1145 (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

42. *Id.* The EPA may commence a civil action only for "any violation for which [it] is authorized to issue a compliance order," and it is not authorized to issue a compliance order for a violation of another compliance order. *Id.* (quoting 33 U.S.C. § 1319(b) (2006)).

43. *See id.*

44. *See id.*

The court therefore held that denying judicial review of the compliance order at this stage ultimately would not deprive the Sacketts of their constitutional right to a fair hearing because penalties may only be assessed for noncompliance with an order *after* proof of the underlying violation in federal court.⁴⁵

B. Due Process II: Access Holding

The court rejected the Sacketts' argument that the potential penalties for failure to comply with the order, which could continue to accrue until the EPA brought an enforcement action, would essentially prevent them from reaching a courtroom if pre-enforcement review was not granted.⁴⁶ In denying this claim, the court questioned both the potential penalties of continued noncompliance and the Sacketts' inability to proactively seek review.⁴⁷

The court noted that the CWA charges the courts, not the EPA, with assessing the magnitude of penalties.⁴⁸ Any civil penalty actually assessed against the Sacketts would not be a tally of daily fines, but instead would reflect "a wide range of case-specific equitable factors."⁴⁹ Factors that can be considered under the CWA include "the economic benefit resulting from the violation . . . the economic impact of the penalty on the violator, and . . . such other matters as justice may require."⁵⁰

Additionally, the court concluded that the timing of judicial review is not left solely to the EPA.⁵¹ Although the Sacketts could not successfully challenge the compliance order itself, they may apply for a permit to engage in the same activities that the order prohibits.⁵² If the permit is denied, the Sacketts would be authorized to challenge the denial in court as a final agency action with no implied preclusion of review.⁵³

Thus, denying judicial review of the compliance order does not violate due process, both because the potential penalties the Sacketts would incur if they wait for the EPA's enforcement action are restricted to amounts that would not "foreclose all access to the courts," and because the Sacketts need not wait for

45. *Id.* at 1145–47.

46. *See id.* at 1146–47.

47. *Id.*

48. *Id.* at 1146 (citing 33 U.S.C. § 1319(d) (2006)).

49. *Id.* at 1146–47.

50. *Id.* at 1146 (citing 33 U.S.C. § 1319(d)).

51. *See id.*

52. *Id.* (citing 33 U.S.C. § 1344(a) (2006)).

53. *Id.* (citing 33 C.F.R. § 331.10 (2000); 5 U.S.C. § 704 (2006); *Baccarat Fremont Developers, L.L.C. v. U.S. Army Corps of Eng'rs*, 425 F.3d 1150, 1154 (9th Cir. 2005)). The court also cited *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000), in support of the constitutionality of "channeling requirement[s]" for judicial review. *Sackett*, 622 F.3d at 1146 (quoting *Shalala*, 529 U.S. at 19).

the EPA to grant administrative review if the Sacketts instead proactively seek a permit.⁵⁴

IV. ANALYSIS

This case represents a further step in a circuit split that puts the Eleventh Circuit on one side and the Fourth, Sixth, Seventh, Tenth, and now Ninth Circuits on the other.⁵⁵ *TVA* appears at first to be distinguishable from *Sackett* due to the different statutes involved and the unique circumstances of that case.⁵⁶ However, the Eleventh Circuit's *TVA* opinion ultimately rests on a very different interpretation of a very similar compliance order provision.⁵⁷ The Supreme Court may accept the Sacketts' petition for certiorari in order to resolve this circuit split. The broader consensus in favor of the constitutionality of compliance orders, and against allowing pre-enforcement review,⁵⁸ indicates that if the Supreme Court does take the case it will most likely affirm that the CWA precludes judicial review and this preclusion does not violate due process.⁵⁹

However, as the court acknowledged in *Sackett*, "the civil penalty provision of the CWA is 'not a model of clarity.'"⁶⁰ The results of this case, while probably decided correctly, are likewise imperfect. Relying on the courts to assess a constitutionally permissible penalty at the conclusion of a potentially long-delayed enforcement action creates significant uncertainty as to what the penalty will ultimately total if the defendant is found to have violated the CWA. In treating the permitting process as a viable means of obtaining a trial, the court did not address the Sacketts' claims regarding the time and cost of that process.⁶¹

Supposing that the EPA issued a defendant a compliance order where no violation had occurred,⁶² the harm suffered by that defendant probably would not rise to the level of a constitutional violation, for the generally sound reasons

54. *Sackett*, 622 F.3d at 1146–47.

55. See cases cited *supra* note 4.

56. In *TVA*, the EPA was relying on a compliance order because it erroneously believed that it did not have the ability to bring an enforcement action against the TVA. *TVA*, 336 F.3d 1236, 1245 n.19 (11th Cir. 2003).

57. See generally *id.* (holding punishment permissible for violations of compliance orders regardless of any underlying violations of the statute); *Sackett*, 622 F.3d at 1145 (holding punishment permissible for violations of compliance orders only when founded on actual violations of the statute).

58. See cases cited *supra* note 4.

59. See generally *Sackett*, 622 F.3d 1139 (following consensus view that the CWA precludes judicial review of compliance orders).

60. *Sackett*, 622 F.3d at 1145 (quoting *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1137 (11th Cir. 1990)).

61. See *id.* at 1146. This omission could be based on the idea that litigation is itself expensive and time consuming, and thus an additional cost or delay is not a constitutional injustice.

62. Neither the court's opinion nor this In Brief address the merits of the Sacketts' claim that they did not violate the CWA.

presented by the court in *Sackett*.⁶³ However, the uncertainty regarding potential penalties may in some circumstances deter lawful behavior. Some courts agreeing with the *Sackett* outcome have expressed concern about the policy implications of their decisions.⁶⁴ Administrative hearings may not be sufficient to cure constitutional defects in process,⁶⁵ but as the court concluded, the harm caused by denying pre-enforcement review of compliance orders does not rise to that level.⁶⁶ An expansion of such hearings, in order to determine early in the process both whether a violation has occurred and an appropriate penalty rate for continued noncompliance, would substantially diminish the uncertainty of the compliance order process without imposing the full burden of immediate litigation on the EPA.

CONCLUSION

The administrative compliance order is a powerful tool for the EPA, and serves as an important rapid response to prevent ongoing environmental damage. The Ninth Circuit was right to hold that these orders should not be subject to immediate judicial review. However, the EPA should not sacrifice all predictability and accountability in the name of effective enforcement. Providing administrative hearings for administrative compliance order recipients would help to realize these goals.

Sam Wheeler

63. See *Sackett*, 622 F.3d at 1146–47.

64. See, e.g., *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564, 566 (10th Cir. 1995) (“Laguna’s policy argument that it should not be necessary to violate an EPA order and risk civil and criminal penalties to obtain judicial review is well taken.”).

65. See *TVA*, 336 F.3d 1236, 1259–60 (11th Cir. 2003).

66. See *Sackett*, 622 F.3d at 1147.

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