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We again ask for your help in submitting articles or suggesting topics for upcoming issues. While all submissions are welcome, we are specifically looking for someone who is interested in preparing a CERCLA case law update. As we wish to increase publication opportunities for law students, please pass the word to your alma mater that we welcome student submissions.

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Call for nominations

The Section invites nominations by May 14, 2012 for the following awards that will be presented at the ABA Annual Meeting in Chicago, in August 2012.

- ***Environment, Energy, and Resources Government Attorney of the Year***—exceptional achievement by a federal, state, tribal, or local government attorney who has worked or is working in the field of environmental, energy, or natural resources and is esteemed by his/her peers and viewed as having consistently achieved distinction in an exemplary way.
- ***Law Student Environment, Energy, and Resources Program of the Year***—best student-organized educational program or public service project of the year focusing on issues in the field of environmental, energy, or natural resources law.
- ***State or Local Bar Environment, Energy, and Resources Program of the Year***—best CLE program or public service project of the year focused on issues in the field of environmental, energy, or natural resources law.

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SACKETT TO 'EM: COULD THE SUPREME COURT DECISION IN *SACKETT V. EPA* LIMIT EPA'S AUTHORITY UNDER CERCLA

Seth Jaffe

I. Introduction/Background

On June 28, the Supreme Court granted certiorari in *Sackett v. EPA*, which challenges the constitutionality of the Environmental Protection Agency's (EPA) use of unilateral administrative orders under section 309 of the Clean Water Act (CWA). Chantell and Michael Sackett own a lot in a residential subdivision. After the lot was graded to build their home, the Sacketts received an administrative compliance order from EPA claiming that they filled a jurisdictional wetland without a federal permit. According to the petitioners, they were provided no evidentiary hearing or opportunity to contest the order.

The Court's order granting certiorari identified two questions—whether pre-enforcement judicial review of an administrative compliance order is available under the CWA and, if not, whether the inability to seek pre-enforcement judicial review violates the Due Process Clause of the Constitution. If the Court reaches the constitutional question in *Sackett*, it could very well have significant implications for the Comprehensive Environmental Response, Compensation, and Liability Act's (CERCLA) unilateral administrative order provisions.

The Court's decision to grant certiorari in *Sackett* was surprising, to say the least. Earlier this summer, the Supreme Court denied a very similar certiorari petition by GE seeking to challenge the constitutionality of EPA's use of unilateral administrative orders issued under section 106 of CERCLA. Furthermore, the Ninth Circuit decision being appealed in *Sackett* followed the lead of all four other circuit courts that had already addressed the question of pre-enforcement review under the CWA. So, not only did the Supreme Court grant certiorari in a CWA case even though it denied certiorari challenging a very similar provision under CERCLA, it did so without a circuit split to resolve.

Obviously, the Court could affirm the Ninth Circuit and uphold the CWA's scheme as constitutional. Such an outcome would solidify the constitutionality of the CERCLA scheme as well. What is much more difficult to assess is the effect on CERCLA of a Supreme Court ruling in *Sackett* that strikes down the CWA's unilateral administrative order procedures.

The Court could reverse the Ninth Circuit on three alternative grounds, two of which would pose little or no threat to the continued use of administrative orders under CERCLA. First, the Court could find that the text of the CWA does not bar pre-enforcement review. Second, the Court could find that the CWA gives unilateral administrative orders the independent force of law. Either of these holdings would necessarily be based on the text of the CWA, which differs significantly from CERCLA. Thus, any opinion based on these lines of reasoning would not extend to CERCLA. However, were the Court to conclude that the Due Process Clause requires that pre-enforcement judicial review be available for unilateral administrative orders under the CWA, such a holding would likely render CERCLA's scheme unconstitutional as well, though a few distinguishing factors may be able to save it.

II. Potential Holdings Based on Statutory Interpretation of the CWA

A. Pre-enforcement Review Is Available Under the CWA

The narrowest ground on which the Court could reverse the Ninth Circuit would be that the CWA in fact provides for pre-enforcement review of unilateral administrative orders. Such a holding would rely on the absence of any explicit bar to pre-enforcement review in the text of the CWA and on section 704 of the Administrative Procedure Act (APA), which provides for judicial review of "final agency action for which there is no other adequate remedy in a court." Section 704 of the APA requires that judicial review be available for "final agency action," but also permits a statute to expressly provide when an agency action is not yet "final." Unlike CERCLA, which explicitly bars pre-enforcement review, the CWA has no explicit language barring pre-enforcement review or classifying unilateral administrative orders as nonfinal action. Although the Ninth Circuit found that the statute *implicitly* bars pre-enforcement review, the Supreme Court could overturn that interpretation based on the text of the statute and find that pre-enforcement review is available under the current scheme.

B. CWA Makes a Compliance Order Issuable on the Basis of "Any Available Information" and Gives It the Independent Force of Law

The second potential holding rooted in the text of the CWA would find its basis in the Eleventh Circuit case of *TVA v. Whitman*, 336 F.3d 1236 (11th Cir. 2003), on which the Sacketts have relied extensively. *TVA* dealt with administrative compliance orders (ACOs) under the Clean Air Act (CAA). The Eleventh Circuit found the CAA scheme unconstitutional because the ACOs were issuable "on the basis of any information available" *and* noncompliance with an ACO automatically triggered civil and criminal penalties. The court reasoned that, because an ACO can be issued unilaterally by the administrator and then becomes an independent obligation, the defendant never gets an opportunity to argue, before a neutral tribunal, that he/she has not violated the CAA. In such a situation, the administrator is the ultimate arbiter of guilt or innocence, and the courts are relegated to a forum that conducts a proceeding on the issue of whether the EPA *order*, not the CAA itself, has been violated. The Eleventh Circuit relied on the details of the precise scheme in the CAA, which both gave the administrator broad discretion to issue ACOs without review and gave those ACOs the force of law (holding that "a violation of an ACO can itself serve as the basis for the imposition of extensive civil fines or imprisonment. *Section 7413(b)*, for example, provides that a civil action can be commenced not only when a person has violated an SIP or EPA regulation, but also after a party fails to comply with an 'order.'") The Ninth Circuit in *Sackett* found that the CWA scheme did not have both of these troublesome elements, despite the Eleventh Circuit's explicit insistence in *TVA* that the CAA and CWA statutory regimes with respect to these issues were substantively identical.

The Supreme Court could adopt the position of the Eleventh Circuit and the Sacketts, finding that the CWA's administrative order scheme is substantively

equivalent to the CAA's, and therefore unconstitutional. Such a holding would find its basis in two provisions of the CWA. First, the CWA permits the Administrator to issue an order "[w]henever *on the basis of any information available to him* the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title. . . ."

The CWA then provides that violating such orders is an independent offense for which the administrator may impose a civil penalty, stating that "any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. . . ." Indeed, the Ninth Circuit acknowledged that the CWA, read literally, creates the same constitutional problem as the CAA. However, invoking the doctrine requiring courts to interpret statutes to avoid constitutional problems whenever possible, the Ninth Circuit interpreted "any order" "to refer only to those compliance orders that are predicated on *actual*, not alleged, violations of the CWA, as found by a district court in an enforcement action according to traditional civil evidence rules and burdens of proof." However, the current Supreme Court may not be inclined to work so hard to avoid the apparent plain meaning of the statute, particularly when the legislative history suggests that the CWA was crafted using the CAA as a model. The more literal reading that the Court might adopt would be that the CWA scheme contains the constitutionally offensive combination of unilateral orders issuable on "any information" and an independent obligation to abide by such orders.

If the Supreme Court were to rule against EPA on either of the above grounds, CERCLA's order authority would not be in jeopardy. As mentioned previously, CERCLA explicitly bars pre-enforcement review, so any holding in *Sackett* that there is no such bar in the CWA would be inapplicable to CERCLA. Second, although unilateral administrative orders under CERCLA are issuable on "any available information," the statute does not give them the independent force of law. Instead, CERCLA requires that an action be brought in district court to enforce the order, during which proceeding an underlying violation of CERCLA must be proved for the court to impose penalties. CERLCA thus authorizes the courts, not EPA, to impose penalties, and requires that the court find a statutory violation before enforcement. Thus, CERCLA would survive even if the CWA were struck down on those grounds.

III. Supreme Court Reversal on Due Process Grounds

While the two potential narrow holdings discussed above would pose little or no threat to the continued use of unilateral administrative orders under CERCLA, a broader holding finding that pre-enforcement review is *constitutionally required* would likely render provisions of CERCLA inoperative. If the Court, in deciding *Sackett*, interprets the CWA to bar pre-enforcement review and finds such a bar unconstitutional, CERCLA's administrative order provisions would presumably be unconstitutional as well.

The D.C. Circuit in *GE v. Jackson* ruled that CERCLA's bar on pre-enforcement review was not unconstitutional because, in the ultimate enforcement action, the court can only impose penalties if the party violating the valid order "willfully" failed to comply "without sufficient cause." According to the court, these "willfulness" and "sufficient cause" requirements are analogous to "good faith and reasonable grounds defenses the Supreme Court has found sufficient to satisfy due process." The Ninth Circuit in *Sackett* found language in the CWA that also was, in its opinion, equivalent to good faith and reasonable grounds defenses. The CWA commits the final determination of the amount of a civil penalty to judicial discretion and lists six equitable factors that the court should consider in setting the amount of the penalty. One of those factors is "good-faith efforts to comply." If the Supreme Court were to find that, despite the protections of equitable discretion, the CWA is unconstitutional, then CERCLA would almost certainly be unconstitutional as well. There is very little to distinguish between the equitable defenses against civil penalties provided by the two statutes. If the "good-faith" and other defenses do not cure the due process violation in the CWA setting, the "willfulness" and

"sufficient cause" defenses likely do not cure the defect in the CERCLA setting.

IV. Could CERCLA's Order Authority Still Be Saved?

There is, however, one potentially dispositive aspect in which the CWA and CERCLA differ—CERCLA requires that EPA determine that an "imminent hazard" exists prior to issuance of an administrative order. Neither the Ninth Circuit in *Sackett* nor the D.C. Circuit in *GE v. Jackson* had occasion to address EPA's argument that the statutes are, at a minimum, constitutional in emergency situations, or to consider a defendant's likely retort that EPA does not actually issue orders only in emergencies. However, the Supreme Court *has* historically recognized in other contexts that, in emergency situations, rapid administrative action is justified by the need to protect the public health and safety, and therefore an exception to pre-enforcement review may be available. Under this reasoning unilateral administrative orders under CERCLA might survive a broad adverse ruling in *Sackett*, because CERCLA more directly confines the issuance of administrative orders to emergency situations.

The CWA has specific "Emergency Powers" sections, which are *not* the sections challenged by the Sacketts providing for the use of unilateral administrative orders. The provisions challenged by the Sacketts allow for the use of administrative orders without any requirement that EPA determine that an emergency exists. In contrast, section 106 of CERCLA, which authorizes the use of unilateral administrative orders, does so only if the administrator makes a finding of an "imminent and substantial endangerment to the public health or welfare or the environment." Because CERCLA more strictly limits the use of unilateral administrative orders, it is conceivable that CERCLA's unilateral order authority could survive, even if the Court were to hold that EPA's analogous unilateral order authority under the CWA is unconstitutional.

VI. Conclusion

If the Supreme Court affirms the Ninth Circuit decision in *Sackett*, EPA's authority under CERCLA would not be at risk. In fact, if the Supreme Court reaches the constitutional question in *Sackett*, and still affirms, then the question regarding EPA's authority under CERCLA will once and for all be put to bed. Even if the Supreme Court reverses the Ninth Circuit, in two of the three scenarios presented, EPA's order authority under CERCLA still would not be in jeopardy. However, if the Supreme Court in Sackett holds that EPA's order authority under the CWA violates the Due Process Clause, then EPA's order authority under CERCLA would be at serious risk; it would survive only if the courts distinguished CERCLA from the CWA on the ground that, because section 106 of CERCLA requires an imminent hazard as a prerequisite to issuance of an order, such exigent circumstances warrant the provision of less process than is required under the CWA. Although that is certainly possible, if I were in EPA's shoes, I would be very concerned across the board if the Supreme Court finds a Due Process problem with unilateral administrative orders under the CWA.

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