

SACKETT V. EPA SIX MONTHS OUT: A WIDE-RANGING EFFECT WITH AN UNCERTAIN SIGNIFICANCE

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ABSTRACT

In an era of contentious 5-4 splits in the Supreme Court of the United States, the Court’s unanimous decision in Sackett v. EPA is striking. The decision involved the EPA’s breadth of authority in enforcing the Clean Water Act against a property developer—in this case, a couple building their dream home in Idaho. The decision verifies the strength of the Administrative Procedures Act, but to what end? This Article focuses on how lower courts have used the decision in the first six months after it was issued. The decision has made an impact on cases involving a wide variety of agencies. Yet the decision’s impact on protecting “the water of the United States’ —whatever those might be as Justice Alito’s concurrence wonders aloud—is a work in progress. The decision may hold special significance for the Sixth Circuit, and developers have to feel optimistic about this case. Though as it is still “business as usual” at the EPA, one can only wonder if this unanimous decision is the start of a movement to pump the brakes on agency authority in general—with a special focus on wetland regulation.

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I. INTRODUCTION

In March 2012, the Supreme Court handed down a unanimous decision in favor of Michael and Chantell Sackett against the Environmental Protection Agency (EPA).¹ The case was highly anticipated; for many, it was a vindication that the Due Process Clause still mattered in environmental law.² Using strong language, the Court reasoned that

[t]he [Administrative Procedures Act's] presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. . . . [T]here is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into “voluntary compliance” without the opportunity for judicial review—even judicial review

1. *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012).

2. See, e.g., Erika Johnsen, *Sackett v. EPA: The Battle is Won, but the War is Just Beginning*, TOWNHALL (Apr. 13, 2012, 11:35 AM), http://townhall.com/tipsheet/erikajohnsen/2012/04/13/sackett_v_epa_the_battle_is_won_but_the_war_is_just_beginning; Damien M. Schiff, *PLF and the Sacketts: An Important Win at the Supreme Court*, PAC. LEGAL FOUND., <http://www.pacificlegal.org/Sackett> (last visited May 26, 2013).

of the question [of] whether the regulated party is within the EPA's jurisdiction.³

The Court analyzed two issues, neither of which concerned the Sacketts' initial reason for challenging the EPA's finding that the Sacketts' property was subject to the Clean Water Act (CWA).⁴ First, the Court held that the EPA's compliance order was a "final agency action" and therefore subject to an Article III (federal) court's immediate judicial review.⁵ Second, the Court held that the CWA did not expressly preclude pre-enforcement judicial review of the EPA compliance order.⁶ In concurrence, Justice Samuel Alito reasoned that Congress should amend the CWA because it is unclear and puts too many private landowners in a precarious position.⁷ Yet as we stand over six months out from when the Supreme Court released its opinion, do we really know the practical effect of it?

Sackett v. EPA generated over 100 general citations in just six months, which is not an easy task. That is the kind of interest the Court's decision in *Sackett* has generated in legal research aids and cases. But only eight court cases have cited the decision.⁸ Various commentators have researched this case from an academic⁹ and practical¹⁰ standpoint. If a couple from Idaho building their house can successfully fight an EPA compliance order,¹¹ then other property developers with deep pockets may initiate litigation galore against EPA compliance orders. In reality, this does not generally happen. Rather, we are seeing a diverse use of the case in administrative litigation. So this Article will focus on the expectation versus the reality within the legal system since the Supreme Court issued its opinion in *Sackett*.

This Article will progress in two parts. First, the Sacketts themselves may not gain much from the case, but others may, and

3. *Sackett*, 132 S. Ct. at 1374.

4. *Id.* at 1368 (quoting 33 U.S.C.A. §§ 1311, 1344 (Westlaw 2013) ("The Clean Water Act prohibits, [among other things,] 'the discharge of any pollutant by any person,' without a permit, into the 'navigable waters'") (citations omitted)).

5. *Id.* at 1371.

6. *Id.* at 1372–74.

7. *Id.* at 1375–76 (Alito, J., concurring).

8. *See, e.g.*, Del Marcelle v. Brown Cnty. Corp., 680 F.3d 887 (7th Cir. 2012).

9. *See, e.g.*, Lowell Rothschild, *Before and After Sackett v. U.S. Environmental Protection Agency*, 59 FED. LAW. 46 (2012).

10. *See, e.g.*, 1 REAL ESTATE LAW DIGEST § 6:58 (4th ed. 2012).

11. *See Sackett*, 132 S. Ct. at 1367.

this has caused concern. Second, a surprising variety of cases only considered the *Sackett* reasoning on finality of administrative judgments. Therefore, the rule in *Sackett* is more beneficial to parties challenging other federal agencies, so far, than for property developers challenging the EPA. This Article examines only a small sliver of available evidence, and more analysis is needed in the future. Still, the immediate effect of *Sackett* is broader than some might expect, but the Court's holding has not yet yielded a prolific impact on EPA procedures.

II. BACKGROUND

The facts in *Sackett* are not terribly uncommon because they recount the way the EPA typically administers an agency order under the CWA.¹² The EPA's position that the CWA implicitly allowed a pre-enforcement bar to judicial review was always a tenuous one.¹³ Yet in light of the Supreme Court's recent pro-environment trend,¹⁴ the unanimous decision in *Sackett* surprised many observers.¹⁵

The way the EPA interacted with the Sacketts was typical. Generally, the EPA identifies a CWA violation.¹⁶ The CWA then gives the EPA the following three administrative options: (1) assess an administrative penalty under 33 U.S.C. § 1319(g), while giving the alleged violator a chance to present contrary evidence; (2) file a civil enforcement action in federal district court under § 1319(b); or (3) issue an agency order or "compliance order" under § 1319(a).¹⁷ As with any agency order, the EPA enforces its compliance order through an action brought in federal district court.¹⁸ Under § 1319(b), an alleged violator's noncompliance with the compliance order results in a fine of up to \$37,500 per day for each violation of the CWA.¹⁹

The EPA issued the compliance orders in *Sackett* under the assumption that a federal court could not review the order until the EPA attempted to enforce it.²⁰ Therefore, anyone who did not abide

12. *See id.*; accord Rothschild, *supra* note 9, at 47.

13. Rothschild, *supra* note 9, at 48.

14. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497 (2007).

15. Rothschild, *supra* note 9, at 47.

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

17. *See id.* at 1142.

18. *See id.*

19. *See id.* at n.3.

20. *Id.* at 1143.

by a compliance order would incur significant fines until the EPA decided to enforce the fines; this pre-enforcement bar to judicial review had support from federal circuits.²¹ The logical conclusion for many alleged violators was to voluntarily comply. It was this practice that led directly to the Supreme Court’s reasoning that the EPA was “strong-arming . . . regulated parties into ‘voluntary compliance’ without the opportunity for judicial review”²² The Sacketts’ legal woes were a good example to the Court of EPA “strong-arming.”

A. The Facts

As previously noted, the case involved one fact issue for resolution—whether the EPA had jurisdiction over the Sacketts’ property. In 2007, the Sacketts were building their home near Priest Lake in Idaho.²³ The Sacketts filled most of this 0.63 acre lot with dirt and rock to prepare for construction.²⁴ It is uncontested that Priest Lake is a navigable water under the CWA 33 U.S.C. § 1362(7).²⁵ And because the Sacketts’ property was adjacent to Priest Lake, the EPA found it was a wetland protected under § 1311.²⁶ In November 2007, the EPA issued a compliance order against the Sacketts alleging they violated the CWA when they filled in a protected wetland.²⁷ The EPA charged a \$37,500 fine for each day the Sacketts failed to comply with the order.²⁸ Further, the EPA alleged the penalty would double to \$75,000 per day if the court enforced it because then the Sacketts would have violated both an agency order and federal law.²⁹

The Sacketts sought a hearing to challenge the EPA’s finding because “several lots containing permanent structures” separated the Sacketts’ property from Priest Lake.³⁰ The EPA declined to hold a hearing because, unlike § 1319(b) and (g), § 1319(a) did not provide

21. See Rothschild, *supra* note 9, at 48 (citing various circuit court decisions that support a pre-enforcement bar to judicial review).

22. Sackett v. EPA, 132 S. Ct. 1367, 1374 (2012).

23. *Id.* at 1370–71.

24. Sackett, 622 F.3d at 1141.

25. Sackett, 132 S. Ct. at 1370.

26. *Id.* at 1370–71.

27. *Id.*

28. *Id.* at 1370.

29. *Id.*

30. *Id.*

for any kind of review.³¹ The EPA's position that compliance orders under § 1319(a) were precluded from pre-enforcement judicial review, as opposed to the definition of a wetland under the CWA as applied to the Sacketts' property, fueled the litigation. The Sacketts sued to challenge the EPA's finding that their property was a protected wetland under the CWA.³²

B. Procedural History

The district court granted the EPA's motion to dismiss for lack of subject matter jurisdiction.³³ The court concluded that the CWA precluded judicial review before judicial enforcement.³⁴

On appeal, the Ninth Circuit considered the dismissal of the Sacketts' complaint *de novo*.³⁵ It considered the Sacketts' main arguments under the Administrative Procedures Act (APA).³⁶ The Sacketts argued that APA 5 U.S.C. § 704 made the EPA decision subject to immediate judicial review because "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."³⁷ The Sacketts further argued that compliance orders under 33 U.S.C. § 1319(a) should receive pre-enforcement judicial review because judicial review was not explicitly precluded in § 1319(a) as required under the APA.³⁸

The Court of Appeals stated the basic presumption that courts will favor judicial review of administrative action.³⁹ But the presumption can be overcome if Congress's contrary "intent . . . is fairly discernible in the statutory scheme"⁴⁰ because Congress could not have intended to allow pre-enforcement judicial review of compliance orders. Allowing this would lead to a challenge of every compliance order—rendering it a useless tool in the CWA

31. *Sackett v. EPA*, 622 F.3d 1139, 1141–42 (9th Cir. 2010).

32. *Id.* at 1141.

33. *Id.*

34. *Sackett*, 132 S. Ct. at 1371.

35. *Sackett*, 622 F.3d at 1141–42.

36. *Sackett*, 132 S. Ct. at 1371–74.

37. *Sackett*, 622 F.3d at 1142 (quoting 5 U.S.C.A. § 704 (Westlaw 2013)).

38. *Id.* (quoting § 701(a)(1)).

39. *Id.* (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967)).

40. *Id.* at 1143 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984)).

enforcement arsenal.⁴¹ The court reasoned that EPA compliance orders are tools that Congress gives to the EPA for efficient enforcement of statutes.⁴² It then stated that Congress modeled the CWA after the Clean Air Act (CAA), “and many courts have relied on similar provisions in the CAA in concluding that the CWA precludes pre-enforcement judicial review of compliance orders.”⁴³

Using this interpretation, the court examined the Sacketts’ claim that the EPA’s actions violated the Due Process Clause.⁴⁴ The Sacketts relied heavily on *Tennessee Valley Authority v. Whitman*, which held that the Due Process Clause was violated when a compliance order was issued with no reviewable evidentiary finding, which could lead to civil penalties.⁴⁵ But a literal reading of the CWA would lead to a violation of the Due Process Clause.⁴⁶ So the court decided that the Sacketts received due process at the time the EPA sought to enforce its administrative order, even though the Sacketts continued to incur civil penalties.⁴⁷ Moreover, the court noted that the EPA only intended to enforce the compliance order through a federal district court.⁴⁸ But this runs contrary to the EPA’s stated intent in administrative order scenarios.⁴⁹

The court held that the Sacketts were not deprived of due process under the CWA because they would have received immediate access to judicial review if they had applied for a filling permit from the

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

42. *Id.* at 1144 (citing *S. Pines Assocs. by Goldmeier v. U.S.*, 912 F.2d 713, 716 (4th Cir. 1990)).

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

44. *See id.* at 1144–47.

45. *Id.* at 1144 (citing 336 F.3d 1236 (11th Cir. 2003)).

46. *Id.* at 1145.

47. *Id.*

48. *See id.* at 1145–46.

49. Rothschild, *supra* note 9, at 49.

[T]he Ninth Circuit’s rationale contradicts the language of the CWA, the [compliance order] issued to the Sacketts, and—most importantly—EPA’s intent in issuing the [compliance order]. EPA has historically taken the position that it can seek penalties for violation of [a] [compliance order] even without an underlying violation of the act. EPA’s contrary view of its [compliance order] authority was made clear in 2011 in *U.S. v. Range Production Company* [739 F. Supp. 2d 814 (N.D. Tex. 2011)]

Id.

EPA—even though the Sacketts did not think the EPA had jurisdiction over the property.⁵⁰ The court also held that the number of penalties the EPA claimed it could enforce under the statute was not necessarily the actual number because a court must consider certain fairness factors.⁵¹ Whittled down to the bare bones of its reasoning, it is not surprising that the Supreme Court unanimously overturned this holding.

C. The Supreme Court's Decision

Justice Antonin Scalia, writing the Court's opinion, began his analysis with a discussion of APA 5 U.S.C. § 704.⁵² Did the EPA's compliance order equate to a judicially reviewable "final agency action for which there is no other adequate remedy in a court"?⁵³ Importantly, the Court looked at whether the EPA treated the compliance order with a sense of finality.⁵⁴ The EPA determined the Sacketts' rights and obligations before issuing the compliance order.⁵⁵ And the EPA gave the Sacketts duties and consequences, which strongly indicated that the EPA had made up its mind.⁵⁶

Still, it was the EPA's decision not to grant the Sacketts a hearing that dictated a final decision because it showed that the EPA would not alter its position.⁵⁷ As the Court stated, in words that may echo for decades, "The 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."⁵⁸ The Court then considered the argument that, even if the EPA's action was final, there were other adequate court remedies. The court stated, "The Government, to its credit, does not seriously contend that other available remedies alone foreclose review under [5 U.S.C.] § 704."⁵⁹

It is worth noting that a unanimous Supreme Court agreed with the preceding and forthcoming analysis. *Sackett* was a critical

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

51. *See id.* at 1146–47.

52. *See Sackett v. EPA*, 132 S. Ct. 1367, 1371 (2012).

53. *Id.* (quoting 5 U.S.C.A. § 704 (Westlaw 2013)).

54. *See id.* at 1371–72.

55. *Id.* at 1371 (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)).

56. *See id.* at 1371–72.

57. *See id.*

58. *Id.* at 1372.

59. *Id.*

decision because it affirmed the APA's power over many agency-enabling statutes that take on a life of their own.⁶⁰ The Court gave particular deference to § 701(a)(1) and its presumption that judicial review is only precluded to the extent that a statute explicitly excludes it.⁶¹

The Court rejected all four of the EPA's arguments that the preclusion of pre-enforcement judicial review was part of the CWA's statutory scheme.⁶² First, the EPA argued that its ability to use a judicial proceeding or an administrative compliance order under 33 U.S.C. § 1319 meant that the compliance order was not subject to pre-enforcement judicial review. The Court reasoned that the EPA's view was narrow-minded and that there were other reasons to issue a compliance order, such as to efficiently notify potential violators.⁶³ The EPA then argued that the compliance order was merely "a step in the deliberative process" and not a sanction inviting judicial review.⁶⁴ The Court rejected this reasoning because the next step in the EPA's "deliberative process" was judicial enforcement without an opportunity for judicial review.⁶⁵

The Court reasoned that the EPA's next argument sought to upend the presumption of judicial review under the APA and was, therefore, implausible.⁶⁶ Finally, the EPA argued that Congress meant to give the EPA efficient tools for enforcement when it passed the CWA.⁶⁷ The Court agreed that this may have been Congress's intent when it passed the CWA;⁶⁸ however, the plain-meaning and intent of the APA made for stronger law.⁶⁹ Not surprisingly, the Court remanded the case to allow the Sacketts to appeal the issue of whether their property was subject to the EPA's jurisdiction.⁷⁰

60. See David Weinstein et al., *Bolstering the Presumption of APA Reviewability: The Supreme Court Subjects CWA Compliance Orders, and Potentially Other Agency Action, to Immediate Judicial Review*, A.B.A. ENVTL. ENFORCEMENT & CRIMES COMM. NEWSL., Aug. 2012, at 6–8.

61. See *Sackett*, 132 S. Ct. at 1372–73.

62. See *id.* at 1372–74.

63. *Id.* at 1373.

64. *Id.*

65. *Id.*

66. See *id.*

67. *Id.* at 1374.

68. See *id.*

69. *Id.*

70. See *id.*

In her concurrence, Justice Ruth Bader Ginsburg reasoned that the Court's opinion did not address whether the Sacketts could immediately appeal the terms of the EPA's compliance order, rather than the EPA's jurisdiction over the Sacketts' land through the CWA.⁷¹ Justice Alito also concurred, reasoning that the underlying problem lay not with the APA or § 1319.⁷² According to him, Congress should clarify or rewrite § 1367(a) because it applies to "the waters of the United States."⁷³ What are "the waters of the United States?" How far away from does this extend inland? He reasoned that the language was too vague, allowed the EPA to interpret nearly unlimited jurisdiction, and led to situations that courts must resolve.⁷⁴

III. ANALYSIS

The Supreme Court's opinion used strong language. In theory, the opinion is a big deal for most real estate developers. It was featured in the proceeding editions of the *Real Estate Law Digest*⁷⁵ and *Real Estate Transactions: Structure and Analysis with Forms*.⁷⁶ Still, has the Court's opinion delivered an immediate effect for those developers dealing with the EPA?

A. Sacketts' Impact

As an initial matter, it is unclear how the opinion helps the Sacketts. The Sacketts had to decide whether they should settle their case or challenge the EPA's designation of their property as a wetland.⁷⁷ That is a decision that could involve a significant amount of money because the EPA penalties could have accrued to potentially \$68 million over the course of the litigation.⁷⁸ Therefore, the Sacketts may only walk away from this court battle with a moral victory and the knowledge that they changed the fortunes of future land owners or other regulated parties.

71. *See id.* at 1374–75 (Ginsburg, J., concurring).

72. *See id.* at 1375–76 (Alito, J., concurring).

73. *Id.* at 1375 (quoting 33 U.S.C.A. § 1367(a) (Westlaw 2013)).

74. *See id.*

75. 1 REAL ESTATE LAW DIGEST § 6:58, 1 (4th ed. 2012).

76. 2 ALVIN L. ARNOLD, REAL ESTATE TRANSACTIONS: STRUCTURE AND ANALYSIS WITH FORMS § 15:28 (2012).

77. *See* Rothschild, *supra* note 9, at 52.

78. *Id.*

If the Supreme Court cast more doubt about the EPA's jurisdiction under the CWA, then the Sacketts may have an easier process on remand. Significantly, the EPA's jurisdiction under the CWA remains a contested issue.⁷⁹ To some, the Court's decision does very little to affect the CWA itself.⁸⁰ Indeed, the Court could have addressed the definition of "navigable waters" and followed a trend of hostility toward expanding that definition.⁸¹ Justice Alito's concurrence expressed a clear desire to take the Court's analysis into the issue of the EPA's reach under the CWA,⁸² but that was not the pressing issue before the Court. In fact, the EPA continues to extend its reach under the CWA to many "tributary systems" of water.⁸³

So if the CWA is not affected jurisdictionally, how could the Supreme Court's opinion impact future parties? For one thing, the decision changes the EPA's longstanding position that other courts have upheld—that a compliance order under the CWA involves an ongoing deliberative process without judicial review.⁸⁴ EPA compliance orders still exist, and the EPA's interpretation of jurisdiction under the CWA has not changed. Therefore, it would seem like what the EPA would change after *Sackett* is what the Supreme Court told it to change—the way it "strong-arms" the regulated.⁸⁵ Yet when pressed on this issue, Mark Pollins, head of the EPA Water Enforcement Division, stated that "[p]retty much everything that was available before *Sackett* [is still available after *Sackett*]. Internally, it's same old, same old."⁸⁶

Technically, Pollins's position is correct because EPA compliance orders and jurisdiction are largely unaffected on the EPA's end.⁸⁷ In the interest of fairness, the EPA responded to Congress's lack of amusement with Pollins's attitude and produced what amounted to an apology letter—with an attached copy of an

79. James Andreasen, *Regulatory Relations in Light of Sackett v. EPA*, 27 A.B.A. J. NAT. RESOURCES & ENV'T 57, 57–58 (2012).

80. See, e.g., Mark Squillance, *The Judicial Assault on the Clean Water Act*, 59 FED. LAW. 33, n.77 (2012).

81. *Id.* at 35.

82. *Sackett v. EPA*, 132 S. Ct. 1367, 1375–76 (2012) (Alito, J., concurring).

83. Rothschild, *supra* note 9, at 52.

84. Andreasen, *supra* note 79, at 58.

85. See *Sackett*, 132 S. Ct. at 1374.

86. Seth Jaffe, *EPA's Enforcement Authority after Sackett: Same Old, Same Old*, LAW & THE ENV'T (May 30, 2012), <http://www.lawandenvironment.com/2012/05/epas-enforcement-authority-after-sackett-same-old-same-old/>.

87. *Id.*

intra-agency memorandum stating that the agency must inform compliance order recipients of their rights.⁸⁸ Still, a regulated party would have to proactively challenge the compliance order with a judicial review of the EPA's jurisdictional power—a proposition that may prove more costly than voluntary compliance.⁸⁹ Observers have noted that regulated companies, like energy utilities or oil producers, could use the *Sackett* opinion to go after the EPA's jurisdiction under the CWA, with a potential net-positive for the company's bottom-line.⁹⁰

The *Sackett* Court has an unmistakable tone toward the EPA's processes; that tone could form the basis for attacking the EPA's jurisdiction under the CWA.⁹¹ Justice Ginsburg's concurrence clarifies that the Court will not examine jurisdiction under the CWA, but she does not offer a legitimate reason for why the Court should not.⁹² Conversely, Justice Alito's concurrence shares the hostile tone of the Court's opinion and offers specific examples of why the EPA's jurisdiction under the CWA is a problematic issue.⁹³ Many have concluded that the Court's tone in *Sackett* will have strong implications for the CWA, but it could also affect regulations beyond the CWA.⁹⁴ And is the suspect tone toward the EPA—mixed with the Court's reliance on a strict application of APA guidelines—enough to threaten other schemes of environmental regulation?

88. Letter from Cynthia Giles, Assistant Adm'r for Enforcement and Compliance Assurance, EPA, to Hon. James M. Inhofe, Ranking Member, Comm. on Env't and Pub. Works, U.S. Senate (Jul. 10, 2012), *available at* <http://blog.pacificlegal.org/wordpress/wp-content/uploads/2012/08/120710-Response-Re-Sackett.pdf>.

89. *See* Rothschild, *supra* note 9, at 52–53.

90. *E.g.*, Drew Bell et al., *Does Sackett Add to the Enforcement Defense Tool Box for Energy Companies*, KING & SPALDING: ENERGY NEWSL. (May 2012), *available at* <http://www.kslaw.com/library/newsletters/EnergyNewsletter/2012/May/article6.html>.

91. *Id.*

92. *See* *Sackett v. EPA*, 132 S. Ct. 1367, 1374–75 (2012) (Ginsburg, J., concurring).

93. *Id.* at 1375–76 (Alito, J., concurring).

94. *E.g.*, Seth Jaffe, *EPA Loses—Unanimously—In Sackett: How Broadly Does it Sweep?*, LAW & THE ENV'T (Mar. 21, 2012), <http://www.lawandenvironment.com/2012/03/epa-loses-unanimously-in-sackett-how-broadly-does-it-sweep/>.

The Comprehensive Environmental Response, Compensation, and Liability Act⁹⁵ contains an express bar to pre-enforcement judicial review of administrative orders:

No Federal court shall have jurisdiction . . . to review any order issued under section 9606(a) of this title, in any action except one of the following:

- (1) An action under section 9607 of this title to recover response costs or damages or for contribution.
- (2) An action to enforce and order issued under section 9606(a) of this title or to recover a penalty for violation of such order.⁹⁶

.....

To some, this precludes a strong connection between the Court's reasoning in *Sackett* and any challenges under the Comprehensive Environmental Response, Compensation, and Liability Act.⁹⁷ Still, it is possible that future cases could take up the issue.⁹⁸

It is also possible that the *Sackett* opinion could impact the CAA⁹⁹ and the Resource Conservation and Recovery Act¹⁰⁰ because both allow the EPA to use compliance orders.¹⁰¹ The Resource Conservation and Recovery Act, in particular, "is silent on prohibiting pre-enforcement review of administrative orders, but courts have held it precludes such review by implication."¹⁰² Courts might not continue this interpretation given the *Sackett* opinion's ringing endorsement of the APA's presumption that a statute does not preempt judicial review unless it does so explicitly.¹⁰³ If the EPA's arguments for pre-enforcement judicial review preemption were not enough to rebut this presumption in *Sackett*,¹⁰⁴ then the EPA's arguments under the Resource Conservation and Recovery Act might not prove effective either.

95. 42 U.S.C.A. § 9601 (Westlaw 2013).

96. § 9613(h).

97. *E.g.*, Jaffe, *supra* note 94.

98. *See* Rothschild, *supra* note 9, at 51–52.

99. § 7601.

100. § 6901.

101. Rothschild, *supra* note 9, at 47.

102. Andreasen, *supra* note 79, at 58 (citing *Amoco Oil Co. v. EPA*, 959 F. Supp. 1318 (D. Colo. 1997)).

103. *Sackett v. EPA*, 132 S. Ct. 1367, 1372–73 (2012).

104. *Id.* at 1372–74.

The EPA might stand on better legal ground under the CAA¹⁰⁵ because 42 U.S.C. § 7607(b)(1) gives a time frame for judicial review of a final agency action—it must occur within 60 days from the publishing of the action in the Federal Register.¹⁰⁶ Still, courts have rarely found the EPA’s actions under the CAA “final” until the EPA states that its actions are final.¹⁰⁷ Again, the *Sackett* Court’s reasoning could force other courts to take a close look at the EPA’s actions and consider 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.”¹⁰⁸ But the EPA is not the only federal agency to consider, as the *Sackett* opinion has ramifications in cases involving a variety of other federal agencies.

B. Unexpected Applications of Sackett

The *Sackett* opinion ranges wildly in its immediate effect and application on other courts. Of the eight opinions citing *Sackett* within the first six months of the decision, the opinion has proved an integral part of a decision on air quality regulation.¹⁰⁹ But the *Sackett* opinion also surfaced in a concurring opinion to a heavily divided federal circuit court case regarding “class of one” equal protection claims.¹¹⁰ The courts using the opinion generally look to the language regarding the finality of an agency action as it relates to judicial review under the APA, but some applications of the opinion are more unpredictable.

1. Hardesty v. Sacramento Metropolitan Air Quality Management District

In *Hardesty v. Sacramento Metropolitan Air Quality Management District*, a group of plaintiffs brought suit against numerous state and federal entities.¹¹¹ The plaintiffs’ complaint was

105. Andreasen, *supra* note 79, at 58.

106. 42 U.S.C.A. § 7607(b)(1) (Westlaw 2013).

107. Andreasen, *supra* note 79, at 58 (citing *Solar Turbines, Inc. v. Seif*, 879 F.2d 1073 (3d Cir. 1989)).

108. 132 S. Ct. at 1372.

109. See *Hardesty v. Sacramento Metro. Air Quality Mgmt. Dist.*, Civ. No. S–10–2414 KJM JFM, 2012 WL 1131387, at *14 (E.D. Cal. Mar. 29, 2012).

110. *Del Marcelle v. Brown Cnty. Corp.*, 680 F.3d 887, 905 (7th Cir. 2012) (Easterbrook, C.J., concurring).

111. 2012 WL 1131387, at *1.

that numerous state and federal agencies targeted the plaintiffs' industrial operations.¹¹² The complaint involved Equal Protection Clause issues; the plaintiffs alleged that the agencies were influenced to take action against them due to pressure from their competitors and associated elected officials.¹¹³ The government defendants launched 12(b)(1) and (6) motions.¹¹⁴ The analysis of the 12(b)(1) motion included a discussion of *Ashcroft v. Iqbal*,¹¹⁵ *Bell Atlantic Corp. v. Twombly*,¹¹⁶ and (for all you Basketball fans out there who can recall a certain player-coach chocking incident) *Latrell Sprewell v. Golden State Warriors*.¹¹⁷

The complaint began to focus on the federal defendants—the District and an employee of the U.S. Army Corps of Engineers (Corps)—who brought agency orders against the plaintiffs under the CAA and the CWA, respectively.¹¹⁸ As to the Corps' cease and desist agency order, the court found itself in a situation similar to *Sackett* because the Corps claimed pre-enforcement judicial review of the order was preempted under the CWA.¹¹⁹

Unfortunately for the Corps, it filed a motion to dismiss the plaintiffs' claims for lack of subject matter jurisdiction shortly before the *Sackett* opinion was released.¹²⁰ After *Sackett* was released, the district court gave the parties leave to amend this portion of the complaint, if possible, but also offered a strong analysis on the issue. The court acknowledged that the Corps' functions were not exactly the same as the EPA under the CWA because the Corps can simultaneously issue an administrative order and a permit. Still, the court reasoned that the Supreme Court's language in *Sackett* was so strong that a lower court could not construe the CWA as precluding pre-enforcement judicial review. Therefore, the court reasoned that it mattered little if the Corps had different abilities under the CWA.¹²¹

The *Sackett* decision also rendered one of the plaintiffs' complaints moot because the plaintiffs did not have to challenge the effect of the Corps' administrative order; rather, plaintiffs could

112. *Id.* at *1–6.

113. *Id.* at *1.

114. *Id.* at *1–3; *see* FED. R. CIV. P. 12(b)(1), (6).

115. 129 S. Ct. 1937 (2009).

116. 550 U.S. 544 (2007).

117. 266 F.3d 979 (9th Cir. 2001).

118. *Hardesty*, 2012 WL 1131387, at *1–6.

119. *Id.* at *14.

120. *Id.*

121. *Id.*

challenge the administrative order directly.¹²² This is the type of result developers or commercial interests want—the Corps rethinking its position on administrative orders because of the *Sackett* opinion. The district court did not have the opportunity to comment on how *Sackett* might affect the CAA because the District did not challenge the court’s jurisdiction to hear claims against it under the CAA.¹²³

2. *Nimmrich & Prahm Reederei GMBH & Co. v. United States*

In *Nimmrich & Prahm Reederei GMBH & Co. v. United States*, the United States Coast Guard initiated an investigation of a cargo ship under the Act to Prevent Pollution from Ships (APPS).¹²⁴ The ship was held so the Coast Guard could investigate for pollution.¹²⁵ The ship’s owner believed the Coast Guard was simply holding the ship and assessing penalties to coerce him to pay fines. He attempted to have the court review the Coast Guard’s findings.¹²⁶ The Coast Guard countered that its decision was not final under APA 5 U.S.C. § 704.¹²⁷

The court looked to the language of APPS, particularly § 1910(b)(1)–(2), which allowed for broad judicial review of agency actions except “prior to 60 days after the [agency] has given notice, in writing and under oath, to the alleged violator . . . or if the [agency] has commenced enforcement or penalty action.”¹²⁸ The Coast Guard successfully argued that the court should dismiss the action for lack of subject matter jurisdiction because the ship’s owner had not waited 60 days from the notice of violation to bring the action.¹²⁹ The court noted that the ship’s owner and the Coast Guard engaged in hearings and negotiations, and that the Coast Guard remained willing to negotiate.¹³⁰ And the court found that the Coast Guard had not issued its “final agency action” according to its interpretation of a final agency action.¹³¹

122. *Id.*

123. *Id.* at *1.

124. No. H-12-1142, 2012 WL 1641009, at *1 (S.D. Tex. May 9, 2012); 33 U.S.C.A. §§ 1901–1915 (Westlaw 2013).

125. *Id.* at *1–2.

126. *Id.* at *2–3.

127. *Id.* at *3–4.

128. *Id.* at *4.

129. *Id.* at *4–5.

130. *Id.* at *4.

131. *Id.* at *4 (citing 33 C.F.R. § 160.7(d) (2011)).

Not surprisingly, the ship's owner countered with the Supreme Court's decision in *Sackett* because the Coast Guard's action was nothing more than economic strong-arming.¹³² The court sharply distinguished the facts in this case from the facts in *Sackett*, noting that the parties were recently arguing about whether the ship's crewmembers could testify at an agency hearing.¹³³ In short, there was a legitimate back-and-forth process between the parties and during the 60-day statutory period,¹³⁴ which was not a take-it-or-leave-it approach from the Coast Guard.¹³⁵

The APPS 60-day statutory period is similar to the CAA 60-day statutory period for appeals after an agency decision is published in the Federal Register. The district court's analysis of the APPS could indicate that the Supreme Court's reasoning in *Sackett* will not affect the CAA.¹³⁶ First, the court's explicit language seemed to preclude the ship owner from challenging the Coast Guard's actions under APA 5 U.S.C. § 701(a)(2). Second, the court reasoned that the only two ways the ship's owner could seek judicial review, beyond the Coast Guard bringing an enforcement action in court, were for the ship's owner to (1) wait for the statutory period, or (2) prove this step was unnecessary because the Coast Guard offered a take-or-leave-it approach.¹³⁷ So it may be difficult to challenge the CAA using the *Sackett* reasoning, unless the enforcing agency displays a particularly cavalier attitude toward negotiation.

3. *Del Marcelle v. Brown County Corp.*

In *Del Marcelle v. Brown County Corp.*, the Seventh Circuit issued a *per curiam* opinion that upheld, by default, the decision of the lower court.¹³⁸ Though *Del Marcelle* initially litigated *pro se*, the court asked two attorneys to represent him because there were deeply fundamental issues litigated that required sharp legal arguments.¹³⁹ Judge Richard Posner authored the court's opinion and immediately asserted the fundamental proposition that the Fourteenth Amendment

132. *Id.* at *5 (citing *Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012)).

133. *Id.*

134. *Id.*

135. *Id.* at n.1 (distinguishing *Guiseppe Bottiglieri Shipping Co. v. U.S.*, 843 F. Supp. 2d 1241, 1246 (S.D. Ala. 2012)).

136. *See Andreasen*, *supra* note 79.

137. *Guiseppe Bottiglieri Shipping Co.*, 843 F. Supp. at 1249, 1253.

138. 680 F.3d 887, 888 (7th Cir. 2012) (*per curiam*).

139. *Id.* at 889.

does not require states to protect against private violence.¹⁴⁰ But was this violence so private? And could Del Marcelle sue his own local government as a class of one?

The issue in this case was fundamental to the definition of discrimination under the Equal Protection Clause.¹⁴¹ The facts of the case are compelling. Del Marcelle and a local motorcycle gang got into a dispute about a liquor license. The gang was associated with, or related to, members of the Brown County Sheriff's Department. When the gang began harassing Del Marcelle and his family, Del Marcelle turned to the Sheriff's Department for help. Ironically, the Sheriff's Department issued citations to Del Marcelle, but there was no record that the gang was cited for their harassing behavior.¹⁴² When Del Marcelle filed suit in federal district court against Brown County, and others, the court dismissed his complaint *sua sponte*.¹⁴³

The entire opinion addressed classes of one and legitimate reasons to sue under the Equal Protection Clause. The court affirmed the dismissal of the complaint.¹⁴⁴ Chief Judge Frank Easterbrook's concurrence warned against making a police officer's administrative decisions subject to the APA.¹⁴⁵ Assuming a police officer's actions were subject to the APA, Chief Judge Easterbrook thought Del Marcelle's argument asked too much under the APA.¹⁴⁶

Using *Sackett*, Chief Judge Easterbrook reasoned that a court would have to determine if an agency decision subject to the APA was "final" with every police officer's decision.¹⁴⁷ Yet the APA would preempt judicial review of any non-final agency decisions. Del Marcelle asked the court to disregard whether the police's decision was final and allow judicial review.¹⁴⁸ To Chief Judge Easterbrook, this was a legal fallacy layered on top of a hypothetical legal

140. *Id.* at 888 (citing *DeShaney v. Winnebago Co. Dep't of Soc. Serv.*, 489 U.S. 189, 197 (1989)).

141. *Id.* at 888–90 (citing and discussing the reasons for the Equal Protection Clause as a result of the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 70–71 (1872)).

142. *Id.* at 907 (Wood, J., dissenting).

143. *Id.*

144. *Id.* at 888.

145. *Id.* at 905 (Easterbrook, C.J., concurring).

146. *Id.*

147. *Id.* (citing *Sackett v. EPA*, 132 S. Ct. 1367, 1371–72 (2012)).

148. *Id.*

fallacy.¹⁴⁹ So his reasoning persuasively shows the problem with applying the reasoning of *Sackett* to local government units.

4. *Sierra Club v. Korleski*

In *Sierra Club v. Korleski*, a group of Ohio residents sued the head of Ohio's EPA.¹⁵⁰ Ohio proposed emission standards, which the federal EPA approved, and carried the force of law.¹⁵¹ The Ohio EPA Director was required to determine the "best available technology" when dealing with new polluters.¹⁵² The residents sued because Ohio stopped enforcing the best-available-technology requirement, even though the federal EPA had not taken action on the issue.¹⁵³

The residents sued under the CAA's citizens-suit provision.¹⁵⁴ There were two issues: (1) the definition of the word "violation," and (2) whether the statute authorized the residents to sue the State for not complying with the best-available-technology requirement, or if they could sue if the State actually polluted.¹⁵⁵ The latter definition was beneficial to the plaintiffs. The Sixth Circuit focused its analysis on *Bennett v. Spear* and the Supreme Court's analysis of the term "violation" under the Endangered Species Act.¹⁵⁶ The court held that the EPA could not reasonably interpret the plaintiff's desired use of "violation" because the CAA imposes severe penalties on violators.¹⁵⁷ The court "doubt[ed] that the CAA should be read to authorize the head of the federal EPA to impose those penalties against the head of the Ohio EPA."¹⁵⁸

The United States government weighed in on the issue, with an amicus brief in support of the plaintiffs. The brief stated that the CAA's penalties were not a real danger to the Ohio EPA head because the civil enforcement penalties it wielded were

149. *Id.*

150. 681 F.3d 342, 344–45 (6th Cir. 2012).

151. *Id.* at 344 (citing OHIO ADMIN. CODE ANN. § 3745-31-02(A) (Westlaw 2013); 40 C.F.R. § 52.1870(c)(127)(i) (2011)).

152. *Id.* (citing OHIO ADMIN. CODE ANN. § 3745-31-05(A)(3) (Westlaw 2013); 40 C.F.R. § 52.1870(c)(127)(i) (2011)).

153. *Id.* at 345.

154. *Id.* at 344–45; 42 U.S.C.A. § 7604(a)(1) (Westlaw 2013).

155. *Id.* at 345–46.

156. *Id.* at 346–49 (citing *Bennett v. Spear*, 520 U.S. 154, 173–74 (1997)); 16 U.S.C.A. § 1540(g)(1)(A) (Westlaw 2013).

157. *Id.* at 349; 42 U.S.C.A. § 7413(d)(1)(A) (Westlaw 2013).

158. *Id.*

“discretionary.”¹⁵⁹ The Sixth Circuit rebuked this interpretation.¹⁶⁰ In doing so, the court cited Justice Alito’s reasoning that “[t]he position taken in this case by the Federal Government—a position that the Court now squarely rejects—would have put the property rights of ordinary Americans entirely at the mercy of [EPA] employees.”¹⁶¹

This use of the *Sackett* opinion appears to transfer the Court’s analysis from the CWA to the CAA at some level. Yet *Nimmrich*’s reasoning probably lends more weight to this analysis because it dealt directly with the statutory preclusion of pre-enforcement judicial review of compliance orders.¹⁶² If anything, this case echoes the Supreme Court’s harsh tone toward the EPA’s presumed discretion with legislation that includes very damaging penalties. The Sixth Circuit’s reasoning may lead to issues for the EPA when litigating violations.

5. *Jech v. Department of the Interior*

In *Jech v. Department of the Interior*, the Tenth Circuit analyzed a situation involving the Osage Nation, elections, and the Bureau of Indian Affairs (BIA).¹⁶³ Members of the Osage Tribe, who also owned mineral rights in the Osage Nation, objected the Nation’s new constitution.¹⁶⁴ Congress approved the Reaffirmation of Certain Rights to the Osage Tribe Act (Reaffirmation Act).¹⁶⁵ This paved the way for Osage Tribe members, who did not own mineral rights, to vote on mineral issues.¹⁶⁶ So objecting members wrote to the BIA to reform the election process.¹⁶⁷ The BIA refused, finding the Osage constitution consistent with the Reaffirmation Act.¹⁶⁸ The BIA requires objecting members to appeal decisions to the Interior Board

159. *Id.* (citing Brief for United States as Amicus Curiae Supporting Affirmance, *Sierra Club v. Korleski*, 681 F.3d 342 (6th Cir. 2012) (No. 10-3269), 2010 WL 6707957, at *15, n.8).

160. *Id.*

161. *Id.* (citing *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring)).

162. *Nimmrich & Prahm Reederei GMBH & Co. v. United States*, No. H-12-1142, 2012 WL 1641009, at *4–5 (S.D. Tex. May 9, 2012).

163. 483 F. App’x 555, 556 (10th Cir. 2012).

164. *Id.* at 556–57.

165. Pub. L. No. 108-431, 2004 U.S.C.C.A.N. (118 Stat.) 2609.

166. *Jech*, 483 App’x at 557.

167. *Id.*

168. *Id.*

of Indian Appeals.¹⁶⁹ And the objecting Osage Tribe members did not appeal this decision.

Rather, the objecting Osage Tribe members sued the BIA in federal district court.¹⁷⁰ The issue before the court was whether the lower court correctly concluded that the plaintiffs' claims lacked subject matter jurisdiction.¹⁷¹ The court, citing *Sackett*, analyzed whether the plaintiffs truly had "no other adequate remedy in a court."¹⁷² The court found that the plaintiffs had another statutory appeal that functioned as an adequate remedy.¹⁷³ For the requirement not to apply, the plaintiffs had to show that exhausting these efforts would be futile—the court found the plaintiffs had not shown this.¹⁷⁴ The court did not definitively say that an available administrative appeal is always an adequate remedy, but according to the court, the plaintiffs failed to present any facts to show their administrative remedy was inadequate.¹⁷⁵ Therefore, this case shows that it is theoretically possible to use the *Sackett* reasoning to skip an administrative step if the step is futile, but strong proof is necessary.

6. *Air Transportation Association of America v. Export Import Bank of the United States*

In *Air Transportation Association of America v. Export Import Bank of the United States*, the trade associations representing the interest of United States airlines sued the Export Import Bank, an independent federal agency, to enjoin them from guaranteeing loans to Air India for aircrafts.¹⁷⁶ The trade associations claimed the bank violated the Export Import Bank Act of 1945 and its command that "the objects and purposes of the bank shall be to aid in financing and to facilitate exports of goods and services . . . between the United States . . . and [other countries] . . . to contribute to the employment of United States workers."¹⁷⁷ The base issue was whether the foreign purchase of American-made planes from Boeing Corporation

169. *Id.* at 557–58.

170. *Id.* at 558.

171. *Id.* at 557–58.

172. *Id.* at 558 (quoting *Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012)).

173. *Id.* at 558–60.

174. *Id.* at 560 (citing *Forest Guardians v. U.S. Forest Serv.*, 641 F.3d 423, 433 (10th Cir. 2011) (per curiam)).

175. *Id.*

176. 878 F. Supp. 2d 42, 47 (D.D.C. 2012).

177. *Id.* at 48 (quoting 12 U.S.C.A. § 635(a)(1) (Westlaw 2013)).

actually hurt domestic air service providers in violation of the statute. But similar to *Sackett*, the threshold issue before the court was whether the Bank Act preempted pre-enforcement judicial review.¹⁷⁸

The parties argued over the issue of the court's jurisdiction through the bank's 12(b)(6) motion for failure to state a claim.¹⁷⁹ The court determined that it could not examine the issue of jurisdiction in this case under 12(b)(1) because "[i]f a matter is 'committed to agency discretion,' the Court must dismiss any challenge thereto under Rule 12(b)(6)"¹⁸⁰ The court used APA 5 U.S.C. §§ 701 and 704 and the *Sackett* opinion as the bedrock for its analysis because of the *Sackett* opinion's strong affirmation that "[t]he APA . . . creates a 'presumption favoring judicial review of administrative action'"¹⁸¹ The court found that the problem with the bank's argument was that no part of 12 U.S.C. § 635 explicitly precluded pre-enforcement judicial review.¹⁸² Rather, the court reasoned that § 635 granted broad discretion to the bank by listing factors for the bank to consider when authorizing or guaranteeing a loan.¹⁸³ The court reasoned this form of power to the bank was still subject to judicial review for arbitrary and capricious conduct under § 635, absent express preclusion of judicial review.¹⁸⁴

The court, without getting to the principle issue, asserted jurisdiction over the claim and dismissed the bank's motion.¹⁸⁵ This case shows that the *Sackett* opinion had some significant effect in bolstering the presumption of judicial review.

7. *Sanchez v. U.S. Office of Border Patrol*

Sanchez v. U.S. Office of Border Patrol concerned a private citizen's class action suit against the United States Border Patrol for an alleged violation of 8 U.S.C. § 1357¹⁸⁶ after the Border Patrol

178. *Id.* at 47.

179. *Id.* at 51.

180. *Id.* (quoting *Sierra Club v. Jackson*, 647 F.3d 848, 855 (D.C. Cir. 2011)).

181. *Id.* (quoting *Sackett v. EPA*, 132 S. Ct. 1367, 1373 (2012) (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984))).

182. *Id.* at 67.

183. *Id.* at 67–68.

184. *Id.* at 67 (citing *Motor Vehicle Mfr. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

185. *Id.* at 80–81.

186. No. 12-5378-BHS, 2012 WL 3715719, at *1–2 (W.D. Wash. Aug. 27, 2012).

agents made multiple unreasonable stops of Sanchez and other similarly situated individuals. However, Sanchez amended his complaint to assert only that a federal court had a right to review the actions of the agency.¹⁸⁷ The district court noted that the *Sackett* opinion had bearing on the plaintiff's initial complaint because a party seeking APA review of a final agency decision must have "no other adequate remedy."¹⁸⁸ In *Sanchez*, the adequate remedy available began with filing the suit correctly so that the court would have jurisdiction to hear the claim, which the plaintiff ultimately did. Therefore, the court dismissed the defendant agency's motion to dismiss for lack of jurisdiction.¹⁸⁹

8. *United States v. Burwell*

In *United States v. Burwell*, the *Sackett* opinion made an appearance in a criminal law case.¹⁹⁰ The statutory construction issue was relatable to the issue in *Sackett* regarding the APA's presumption of judicial review.¹⁹¹ Does an accused felon need to know that the gun they are carrying is an automatic weapon to be charged under a statute that does not state the word "knowingly?"¹⁹² The dissent compared the presumption of a *mens rea* requirement in a criminal statute to the presumption of judicial review in the APA, and cited the *Sackett* opinion.¹⁹³ The dissent argued that the government must prove that a defendant knew he or she was carrying an automatic weapon, and not a semi-automatic weapon, for a conviction to prove proper.¹⁹⁴ This case certainly displays the diversity of *Sackett*'s effect on our jurisprudence.

IV. CONCLUSION

In the first six months, the breadth of the *Sackett* opinion proved impressive. One court used the opinion to mandate a pre-enforcement review of an administrative order under the CWA.¹⁹⁵ Yet neither the

187. *Id.* at *2–3.

188. *Id.* at *5 (quoting *Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012)).

189. *Id.*

190. 690 F.3d 500, 550 (D.C. Cir. 2012) (Kavanaugh, J., dissenting).

191. *See id.* at 502.

192. *See id.*

193. *Id.* (citing *Sackett*, 132 S. Ct. at 1373).

194. *Id.* at 553 (Kavanaugh, J., dissenting).

195. *Hardesty v. Sacramento Metro. Air Quality Mgmt. Dist.*, No. S102414KJMJFM, 2012 WL 1131387, at *14 (E.D. Cal. Mar. 29, 2012).

CAA nor any act using some kind of explicit preemption of pre-enforcement judicial review seems directly susceptible to the Court's opinion.¹⁹⁶ Surprisingly, the *Sackett* opinion's strongest point is that it affirms, or maybe strengthens, the power of the APA. The Supreme Court's broad reasoning that "the APA's . . . presumption of judicial review is a repudiation of the principle that efficient regulation conquers all"¹⁹⁷ came through in the above-analyzed court opinions as a matter of principal. The *Sackett* Court sets a strong tone against the EPA's perceived flexibility on enforcement issues, and maybe that could affect both the CWA and the CAA.¹⁹⁸

More importantly, lower courts have noted the way the Supreme Court brushed aside the EPA's arguments regarding the CWA's statutory scheme precluding pre-enforcement judicial review and set a very high bar for similarly situated federal agencies.¹⁹⁹ The *Sackett* Court had a lot to say about APA 5 U.S.C. §§ 701 and 704, and the Court's decision affected litigation involving the Bureau of Indian Affairs, the United States Coast Guard, the United States Army Corps of Engineers, the United States Border Patrol, the Export Import Bank of the United States, and a county in Wisconsin—all in the first six months after the opinion was released. Therefore, the *Sackett* opinion matters a great deal for federal agencies. But does the opinion help developers? Clearly, the opinion affects the CWA. Still, *Sackett* has not caused the sky to fall for the EPA or those concerned with environmental protection. Rather, the opinion is a boon to any private party, including developers, who feel an agency is "strong-arming" them.

Developers in the Sixth Circuit should pay particular attention to the Sixth Circuit's fondness for Justice Alito's concurrence in *Sierra Club v. Korleski*.²⁰⁰ With the Supreme Court's extremely recent decision in *Koontz v. St. Johns River Water Management District*,²⁰¹ our jurisprudence on environmental regulation may stand on the edge of new age—one that may well force our society to make important

196. See, e.g., *Nimrich & Prahm Reederei GMBH & Co. v. U.S.*, No. H-12-1142, 2012 WL 1641009, at *5 (S.D. Tex. May 9, 2012).

197. *Sackett*, 132 S. Ct. at 1374.

198. See *Sierra Club v. Korleski*, 681 F.3d 342, 349 (6th Cir. 2012).

199. See *id.* at 1372–74.

200. 681 F.3d 342, 344–45 (6th Cir. 2012). (citing *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring)).

201. No. 11-1447, 570 U.S. __ (2013)

and costly decisions in the pursuit of sustainability. These developments merit further investigation and analysis.

In the case that a couple from Idaho brought all the way to Washington, D.C., a piece of our regulatory future is made clear. The Supreme Court meant what it said and said what it meant: if a federal agency's enabling statute does not expressly preclude pre-enforcement judicial review, then the regulated party will likely get their day in court—and soon.