Supreme Court Broadens the Types of Federal Agency Actions That Can Be Challenged in Court

The Supreme Court recently held, in *Sackett v. Environmental Protection Agency*, that "compliance orders" unilaterally issued by the EPA, which the agency contended were informal directives not subject to judicial review, qualify as "final" agency actions that can be challenged in court under the Administrative Procedure Act (APA). The decision is not limited to EPA compliance orders, although many hundreds of those are issued each year, which now will be subject to judicial review. *Sackett* applies more broadly because it expands the types of federal agency actions that will be deemed final, and thus subject to judicial challenge, under the APA. Any agency action that has coercive legal effect, and no established avenue for agency-level review, is now potentially challengeable under *Sackett*.

The APA authorizes federal courts to enjoin or set aside agency action that is arbitrary, capricious, or contrary to law, and to compel agency action unlawfully withheld or unreasonably delayed. In any such case, however, it is a jurisdictional requirement that the agency action be "final." The rationale is that courts should not interfere with ongoing agency decision-making. Such finality is relatively clear when a party challenges a regulation or an order resulting from formal agency adjudications (*e.g.*, license or permit proceedings). But most actions of federal regulatory agencies fall into neither category, and instead constitute what practitioners call "informal" agency adjudication. EPA compliance orders are in that category; they do not result from any well-defined agency proceeding. So are many other types of agency directives and procedures.

Sackett involved a couple who, in the course of developing a residential lot they owned into a home site, filled in part of the lot with dirt and rock. Unbeknownst to the Sacketts, their lot contained wetlands that the EPA considered to be within federal regulatory jurisdiction under the Clean Water Act (CWA). If that were true, the Sacketts could not lawfully fill the wetlands without a federal permit. The EPA issued a compliance order containing "Findings and Conclusions" that the lot did in fact contain wetlands subject to EPA jurisdiction. The order also directed the Sacketts to restore the lot in accordance with an EPA work plan and to provide EPA with access to the lot and to records concerning conditions at the lot.

The Sacketts, who believed their lot did not contain wetlands subject to the CWA, requested a hearing before the EPA, which the agency refused to provide. The Sacketts then filed suit, but the lower courts dismissed it, finding that the compliance order did not qualify as final agency action under the APA. Thus, the Sacketts were unable to initiate a judicial proceeding to resolve the dispute over whether their wetlands were subject to the CWA. But if the EPA later went to court to enforce its compliance order, the government contended that statutory per-day penalties owing from the Sacketts would double, and that obtaining a necessary permit would be more onerous under applicable regulations. In essence, therefore,

the EPA compliance order was coercive -- if the Sacketts "voluntarily" complied with the order, they would avoid the double penalties and the additional permitting requirements.

That coercive effect was central to the Supreme Court's reasoning in holding that the compliance order was a final agency action, subject to judicial review. The coercive effect of the EPA compliance order in *Sackett* is also what makes the decision potentially applicable to other, similarly-coercive agency directives and procedures. Under the test articulated by the Court in a 1997 decision, *Bennett v. Spear*, agency action is "final" for APA purposes if it both "determines rights and obligations" and marks the "consummation" of the agency's decision-making process. The Court in *Sackett* found the former requirement satisfied because "legal consequences" flowed from the compliance order, *i.e.*, the doubling of the statutory penalties and tightening of the wetlands permitting requirements. The government contended, however, that even though the EPA refused the Sacketts' request for a hearing, the compliance order was not the end of the Agency's decision-making process. The government pointed to a portion of the order that invited the Sacketts to "engage in informal discussion" with the EPA regarding the order's terms and requirements and/or any allegations in the order that they believed to be inaccurate. The Court rejected this argument, and found the compliance order sufficiently final, because it conferred no "entitlement" to further Agency review. The Court concluded that the "mere possibility" that an agency might reconsider as a result of informal discussions "does not suffice to make an otherwise final agency action nonfinal."

Underlying the *Sackett* decision is a concern, expressly noted by the Court, that agencies should not be allowed to "strong-arm . . . regulated parties into 'voluntary compliance' without the opportunity for judicial review." When regulated parties face such strong-arming at the hands of federal agencies they should now consider whether, pursuant to *Sackett*, judicial redress is available under the APA.

———

This *GT Alert* was prepared by Jerry Stouck and David B. Weinstein. Questions about this information can be directed to:

- Jerry Stouck | 202.331.373 | stouckj@gtlaw.com
- David B. Weinstein | 202.331.3110 (Washington, DC)| 813.318.5701 (Tampa, FL) | weinsteind@gtlaw.com
- Any member of Greenberg Traurig's Government Litigation Group or Environmental Litigation Group
- Or your Greenberg Traurig attorney

For more insight into environmental law issues, please visit GT's e2 Environmental Law blog.

Albany 518.689.1400	Delaware 302.661.7000	Mexico City+ +52 55 5029.0000	Palm Beach County S. 561.955.7600	Tallahassee 850.222.6891
Amsterdam + 31 20 301 7300	Denver 303.572.6500	Miami 305.579.0500	Philadelphia 215.988.7800	Tampa 813.318.5700
Atlanta 678.553.2100	Fort Lauderdale 954.765.0500	New Jersey 973.360.7900	Phoenix 602.445.8000	Tel Aviv^ +972 3 636.6000
Austin 512.320.7200	Houston 713.374.3500	New York 212.801.9200	Sacramento 916.442.1111	Tysons Corner 703.749.1300
Boston 617.310.6000	Las Vegas 702.792.3773	Orange County 949.732.6500	San Francisco 415.655.1300	Washington, D.C. 202.331.3100
Chicago 312.456.8400	London* +44 (0)203 349 8700	Orlando 407.420.1000	Shanghai +86 21 6391 6633	White Plains 914.286.2900
Dallas 214.665.3600	Los Angeles 310.586.7700	Palm Beach County N. 561.650.7900	Silicon Valley 650.328.8500	