



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Language Regarding Judicial Review of Certain Administrative Enforcement Orders Following the Supreme Court Decision in *Sackett v. EPA*

FROM: Susan Shinkman, Director
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TO: Regional Counsel, Regions 1-10
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On March 21, 2012, the Supreme Court held that a unilateral administrative compliance order issued under Section 309(a) of the Clean Water Act (CWA) was final agency action subject to pre-enforcement judicial review under the Administrative Procedure Act (APA). *Sackett v. EPA*, 132 S.Ct. 1367 (2012). Following the decision, the EPA began adding language to unilateral CWA §309(a) compliance orders to ensure that recipients of such orders are fully aware of their opportunity to seek pre-enforcement judicial review of these orders. In the same spirit of informing recipients of EPA unilateral administrative enforcement orders when they may seek review of final agency action, the EPA now has identified certain administrative enforcement orders¹ under other statutes for which similar language should generally be included, as explained below. The reasoning in *Sackett* does not lead us to believe that similar language is appropriate for unilateral administrative enforcement orders issued under statutory authorities other than those discussed herein.

The EPA issues administrative enforcement orders to address a variety of public health, welfare and environmental concerns, including violations of environmental laws, imminent and substantial endangerments, substantial hazards, and substantial threats. Each EPA administrative

¹ The term "administrative enforcement order" as used in this memorandum refers to administrative compliance, corrective action, emergency, imminent and substantial endangerment, substantial hazard and similar types of enforcement orders, but it does not refer to penalty orders.

enforcement order is issued after careful review and analysis of the applicable statutory and regulatory requirements, relevant case law and facts of the case. Part of that analysis now includes an examination of the Supreme Court's decision in *Sackett*. When the analysis indicates that the order may be found to be a final agency action subject to pre-enforcement judicial review if challenged, language informing the recipient of the ability to seek such review should be included in the order.²

Unilateral Orders under Other Statutes: Although administrative enforcement orders are based on the specific facts of each case, the EPA has analyzed the potential effect of the *Sackett* decision on administrative enforcement orders issued under statutory provisions other than Section 309(a) of the CWA. In particular, the EPA analyzed the Supreme Court's decision, along with other relevant case law, statutory language, existing guidance documents, and the EPA's prior and existing positions regarding the finality and opportunity for pre-enforcement judicial review of administrative orders. As a result of this review, the EPA has determined that it generally would be appropriate to include language regarding a respondent's ability to seek judicial review in certain categories of unilateral administrative enforcement orders issued under other statutes. The following types of unilateral administrative enforcement orders generally appear suitable for this additional language:

- (i) Stop Sale, Use, or Removal Orders (SSUROs) under section 13 of the Federal Insecticide and Fungicide Act (FIFRA);
- (ii) Stop Work Orders under sections 113(a)(5) or 167 of the Clean Air Act (CAA);
- (iii) Administrative Compliance Orders under section 113(a) of the CAA;
- (iv) Administrative Compliance Orders under section 1414 of the Safe Drinking Water Act (SDWA);
- (v) Emergency Orders under section 1431 of SDWA;
- (vi) Administrative Compliance Orders under section 325(a) of the Emergency Planning and Community Right-To-Know Act (EPCRA);
- (vii) Administrative Compliance Orders under section 3008(a) of the Resource Conservation and Recovery Act (RCRA)³;
- (viii) Interim Status Corrective Action Orders under section 3008(h) of RCRA;
- (ix) Corrective Action Orders under section 9003(h) of RCRA; and
- (x) Administrative Compliance Orders under section 9006(a) of RCRA.⁴

Thus, enforcement staff should immediately begin adding the following language to a typical *unilateral* administrative enforcement order issued under the FIFRA, CAA, SDWA and EPCRA statutory sections cited in (i) through (vi) above:

Respondent may seek federal judicial review of the Order pursuant to [insert applicable statutory provision providing for judicial review of final agency action].

² This guidance does not apply to orders issued to federal agencies. When taking an action involving a federal agency, the Regions should consult with the Federal Facilities Enforcement Office.

³ These orders are often incorporated into documents commonly entitled "Complaint, Compliance Order and Notice of Opportunity for Hearing."

⁴ These orders are often incorporated into documents commonly entitled "Complaint, Compliance Order and Notice of Opportunity for Hearing."

For the RCRA orders cited in (vii) through (x) above, the following language should be included in a typical *unilateral* administrative enforcement order:

Upon receipt of a [insert compliance order or corrective action order, as applicable] issued under RCRA section [insert 3008 or 9006, as applicable], respondent may seek administrative review in accordance with 40 C.F.R. Part [insert 22 or 24, as applicable]. The respondent may seek judicial review of the [insert compliance order or corrective action order, as applicable] order pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, once it is final and reviewable pursuant to RCRA section [insert 3008(b) or 9006(b), as applicable] and 40 C.F.R. Part [insert 22 or 24, as applicable].

The specific language for each type of unilateral order listed above, with the applicable judicial review statutory provision, is provided in the Attachment.⁵ As previously mentioned, the reasoning in *Sackett* does not lead us to believe that similar language is appropriate for unilateral administrative enforcement orders issued under statutory authorities other than those set out above.⁶

Consent Orders: A typical order *on consent* should instead include language by which the respondent waives the ability to seek review of the order in federal court. A key benefit that the EPA and a respondent gain from settling cases and entering into orders on consent is that the agency and the respondent achieve certainty in the outcome, which in turn saves both parties resources and expedites compliance. These benefits would be lost if an order on consent does not contain language by which the respondent waives the ability to seek judicial review of the consent order. Because orders on consent are often negotiated individually, there is no specific language required for all cases. An order on consent, however, should not be signed absent *some* language clearly waiving the respondent's ability to seek judicial review of the order. The following language is based on language currently being included in CWA §309(a) compliance orders on consent, and provides a template for orders on consent issued under any of the above statutory provisions.⁷

Respondent waives any and all remedies, claims for relief and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this Order on Consent, including any right of judicial review under [insert applicable statutory provision (e.g., APA or otherwise) providing for judicial review of final agency action].

Special Circumstances: Importantly, the language discussed herein for both unilateral orders and orders on consent applies to *typical* orders issued under typical circumstances. While there

⁵ Note also, that the language presently included in CWA §309(a) unilateral orders is being modified slightly for consistency (*see* Attachment).

⁶ Note that the SDWA already provides specific procedures applicable to administrative orders issued under the underground injection control (UIC) program, including the right of judicial review under certain circumstances. *See* SDWA §1423(c)(6). The *Sackett* decision does not lead us to believe that a change to the current practice of generally informing recipients of UIC orders of their rights under the SDWA is appropriate or necessary.

⁷ *See* the Attachment for the appropriate statutory provisions to reference for different types of orders.

may be a presumption that the specific language above regarding the recipient's ability to seek review is appropriate for the above-noted administrative enforcement orders, this is only a presumption and legal enforcement staff should analyze each administrative enforcement order individually. When a Region is considering deviating from this language or is issuing an administrative enforcement order under atypical circumstances, it should discuss that order with Headquarters early in the process and address whether the unique circumstances of the case impact the appropriateness of including the above language. In addition, if a Region plans to issue an order under multiple authorities, the Region should discuss with Headquarters whether and/or how to include the relevant language in the order. Regions should continue to secure review by enforcement counsel and consult with Headquarters before issuing any order that raises a nationally significant or precedential issue, or is likely to be the subject of litigation. These practices will help ensure that the EPA's unilateral administrative enforcement orders appropriately inform a recipient of any ability to challenge an order in federal court.⁸

If you have questions, please contact the appropriate division that handles such matters. Thank you in advance for your assistance in improving our administrative practice.

cc:

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⁸ This memorandum and any internal procedures adopted for its implementation are intended solely as guidance for employees of the EPA. Such memorandum and procedures do not constitute rulemaking by the agency and may not be relied on to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. The agency may take action at variance with this document and its internal implementing procedures.

Attachment
Language Regarding Judicial Review for Certain
Unilateral Administrative Enforcement Orders

(i) SSUROs under section 13 of FIFRA

Respondent may seek federal judicial review of the Order pursuant to section 16 of FIFRA, 7 U.S.C. § 136n.

(ii) Stop Work Orders under sections 113(a)(5) or 167 of the CAA

Respondent may seek federal judicial review of the Order pursuant to section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1).

(iii) Administrative compliance orders under section 113(a) of the CAA

Respondent may seek federal judicial review of the Order pursuant to section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1).

(iv) Administrative compliance orders under section 1414 of SDWA

Respondent may seek federal judicial review of the Order pursuant to section 1448(a) of the Safe Drinking Water Act, 42 U.S.C. § 300j-7(a).

(v) Emergency orders under section 1431 of SDWA

Respondent may seek federal judicial review of the Order pursuant to section 1448(a) of the Safe Drinking Water Act, 42 U.S.C. § 300j-7(a).

(vi) Administrative compliance orders under section 325(a) of EPCRA

Respondent may seek federal judicial review of the Order pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

(vii) Administrative compliance orders under section 3008(a) of RCRA

Upon receipt of a compliance order issued under RCRA section 3008(a), respondent may seek administrative review in accordance with 40 C.F.R. Part 22. The respondent may seek judicial review of the compliance order pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, once it is final and reviewable pursuant to RCRA section 3008(b) and 40 C.F.R. Part 22.

(viii) Interim status corrective action orders under section 3008(h) of RCRA

Upon receipt of a corrective action order issued under RCRA section 3008(h), respondent may seek administrative review in accordance with 40 C.F.R. *[insert Part 22 or Part 24, as applicable; see 40 C.F.R. § 24.01]*. The respondent may seek judicial review of the corrective action order pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, once it is final and reviewable pursuant to RCRA section 3008(b) and 40 C.F.R. *[insert Part 22 or Part 24, as applicable; see 40 C.F.R. § 24.01]*.

(ix) Corrective action orders under section 9003(h) of RCRA

Upon receipt of a corrective action order issued under RCRA section 9003(h), respondent may seek administrative review in accordance with 40 C.F.R. *[insert Part 22 or Part 24, as applicable; see 40 C.F.R. § 24.01]*. The respondent may seek judicial review of the corrective

action order pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, once it is final and reviewable pursuant to RCRA 9006(b) and 40 C.F.R. *[insert Part 22 or Part 24, as applicable; see 40 C.F.R. § 24.01]*.

(x) Administrative compliance orders under section 9006 of RCRA

Upon receipt of a compliance order issued under RCRA section 9006, respondent may seek administrative review in accordance with 40 C.F.R. Part 22. The respondent may seek judicial review of the compliance order pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, once it is final and reviewable pursuant to RCRA section 9006(b) and 40 C.F.R. Part 22.

(xi) Administrative compliance orders under section 309(a) of the CWA (revised)

Respondent may seek federal judicial review of the Order pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.