SHIFTING THE ADMINISTRATIVE CALCULUS:
SACKETT V. ENVIRONMENTAL PROTECTION AGENCY

By: Kenneth Anspach[1]

In the U.S. Supreme Court's recent decision in *Sackett v. Environmental Protection Agency ("Sackett")*, 132 S. Ct. 1367, 182 L. Ed. 2d 367 (2012), the Court held a person who had been issued an administrative order directing compliance with § 309(a)(3) of the federal Clean Water Act, 33 U.S.C. § 1319(A)(3), can challenge that order pursuant § 704 of the federal Administrative Procedure Act, 5 USCS§ 704. Commentators on the ruling have stated that, "the decision is a victory for individual rights not only because it establishes the right of judicial review for compliance orders, but also because it reduces the incentive for agencies to adopt cavalier positions when threatening individuals with ruinous fines." Damien M. Schiff and Luke A. Wake, *Leveling the Playing Field in David v. Goliath: Remedies to Agency Overreach*, 17 Tex. Rev. Law & Pol. 97. This article will explore the *Sackett* holding, itself, as well as decisional law consistent *Sackett* impacting the rights of litigants facing similar adverse administrative action at the state level. In particular, this article will focus on the State of Illinois, which has an administrative environmental structure similar to that faced by the *Sackett* plaintiffs.

I. The *Sackett* Ruling and its Significance as a Departure from Prior Decisional Law.

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In *Sackett* the U.S. Environmental Protection Agency ("USEPA") issued a compliance order which accused the owners of depositing fill materials on a residential lot they owned, stating that the owners engaged in the discharge of pollutants into a navigable waterway without a permit, in violation of § 301 of the Clean Water Act, 33 U.S.C § 1311. The order further directed the owners to restore the site in accordance with a USEPA-created restoration work plan. USEPA denied the owners' request for a hearing, and the owners sued USEPA, claiming that USEPA acted arbitrarily and capriciously in violation of 5 U.S.C. § 706(2)(A), and violated their right to due process of law, when it issued the compliance order. The Supreme Court found that the owners could bring a civil action under § 704 of the federal Administrative Procedure Act ("APA"), 5 USCS § 704, to challenge USEPA's order. That statute allowed judicial review of final agency actions for which there was no other adequate remedy in a court. The Court noted that USEPA's compliance order was a final order, such that review under 5 USCS § 704 was appropriate, and that there was nothing in the Clean Water Act that prohibited such judicial review.

In holding that the compliance order was reviewable under § 704 of the APA, the Court examined what constituted a "final" agency decision. The Court stated:

> The Sacketts brought suit under Chapter 7 of the APA, which provides for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U. S. C. § 704. We consider first whether the compliance order is final agency action. There is no doubt it is agency action, which the APA defines as including even a "failure to act." §§ 551(13), 701(b)(2). But is it *final?* It has all of the hallmarks of APA finality that our opinions establish. Through the order, the EPA "'determined'" "'rights or obligations.'" * * *. …Also, "'legal consequences . . . flow'" from issuance of the order. * * * For one, according to the Government's current litigating position, the order exposes the Sacketts to double penalties in a future enforcement proceeding…

> The issuance of the compliance order also marks the "'consummation'" of the agency's decisionmaking process. * * * As the Sacketts learned when they unsuccessfully sought a hearing, the "Findings and Conclusions" that the compliance order contained were not subject to further agency review. The Government resists this conclusion, pointing to a portion of the order that invited the Sacketts to "engage in informal discussion of the terms and requirements" of the order with the EPA and to inform the agency of "any allegations [t]herein which [they] believe[d] to be inaccurate." …But that confers no entitlement to further agency review. 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. 132 S. Ct. at 1372.

Thus, the Court found that an order is "final" when it has the "hallmarks of…finality." These hallmarks include that the rights and obligations of the regulated party are determined, that legal consequences such as fines flow from the order, and that the order marks the "'consummation' of the agency's decisionmaking process." Finally, the Court also noted that, "Nothing in the Clean Water Act *expressly* precludes judicial review under the APA or otherwise." *Sackett*, 132 S. Ct. at 1372.

Prior to the Supreme Court's decision in *Sackett*, agency compliance orders such as involved here were deemed unreviewable until enforcement proceedings were instituted by USEPA. *See, e.g.*, *Sackett v. United States EPA*, 622 F.3d 1139, 1143 (9th Cir. 2010), rev'd, 132 S. Ct. 1367 (2012); *see also Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995); *Southern Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418 (6th Cir. 1994); *Southern. Pines Assocs. v. United States*, 912 F.2d 713 (4th Cir. 1990); *Hoffman Group., Inc. v. EPA*, 902 F.2d 567 (7th Cir. 1990). These courts had determined that a party-respondent who received a compliance order that he believed to be unlawful had two only two unpalatable options, *i.e.* either ignore the order and risk incurring heavy civil penalties of as much as $75,000 per day in the event that USEPA brought an action to enforce the compliance

order or submit to USEPA's unilateral order. What was, indeed, revolutionary about the Court's decision in *Sackett* was that a party-respondent no longer faced this Hobson's Choice. That party may now obtain judicial review of an order he believes is unlawful without having to wait for USEPA to take the initiative and without incurring ruinous penalties.

The ruling in *Sackett* was grounded in a jurisdictional issue, *i.e.*, whether there was "judicial review of the question whether the regulated party is within the EPA's jurisdiction." *Sackett,* 132 S. Ct. at 1374 (Ginsburg, J. concurring.) The Court expressly did not decide the underlying issue of whether the Sacketts had violated § 301 of the Clean Water Act, 33 U.S.C § 1311, which is a "question [that] remains open for another day and case. Sackett, 132 S. Ct. at 1374 (Ginsburg, J. concurring.)

II. Consistent with *Sackett*, Violation Notices Issued by the Illinois EPA in are Reviewable.

Since *Sackett* was a decision interpreting federal environmental law, *i.e.*, the Clean Water Act, within the context of federal administrative law, *i.e.*, the APA, whether it will have a direct impact upon Illinois state administrative law, particularly in the environmental arena, has yet to be seen. This is so, particularly because "federal court decisions do not constitute binding precedent" upon Illinois state courts. *I.C.S. Ill., Inc. v. Waste Mgmt. of Ill., Inc.*, 403 Ill. App. 3d 211, 931 N.E.2d 318 (Ill. App. Ct. 1st Dist. 2010).

It is also the case that in Illinois, under the exhaustion of administrative remedies doctrine, a party must first pursue all administrative remedies provided by statute before seeking review in the courts. *People v. NL Industries*, 152 Ill. 2d 82, 94, 604 N.E.2d 349, 354 (1992). Requiring the exhaustion of remedies allows the administrative agency to fully develop and consider the facts of the cause before it; it allows the agency to utilize its expertise; and it allows the aggrieved party to ultimately succeed before the agency, making judicial review unnecessary.

Castaneda v. Ill. Human Rights Commission, 132 Ill. 2d 304, 308, 547 N.E.2d 437, 439 (1989). The doctrine also helps protect agency processes from impairment by avoidable interruptions, allows the agency to correct its own errors, and conserves valuable judicial time by avoiding piecemeal appeals. *Id.*

For some time Illinois courts have been grappling with the issue of reviewability of the Illinois Environmental Protection Agency's ("IEPA") issuance of the statutory equivalent of USEPA's compliance order which was the subject of the *Sackett* ruling. In particular, the issue concerns whether the issuance of a violation notice ("Violation Notice") by IEPA pursuant to § 31(a)(1) of the Illinois Environmental Protection Act, 415 ILCS 5/31(a)(1) ("§ 31(a)(1)"), constitutes a final order such that it is subject to judicial review. Section 31(a)(1) provides:

> **Sec. 31.** Notice; complaint; hearing. (a)(1) Within 180 days after becoming aware of an alleged violation of the Act, any rule adopted under the Act, a permit granted by the Agency, or a condition of such a permit, the Agency shall issue and serve, by certified mail, upon the person complained against a written notice informing that person that the Agency has evidence of the alleged violation. At a minimum, the written notice shall contain:
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> **(A)** a notification to the person complained against of the requirement to submit a written response addressing the violations alleged and the option to meet with appropriate agency personnel to resolve any alleged violations that could lead to the filing of a formal complaint;
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> **(B)** a detailed explanation by the Agency of the violations alleged;
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> **(C)** an explanation by the Agency of the actions that the Agency believes may resolve the alleged violations, including an estimate of a reasonable time period for the person complained against to complete the suggested resolution; and
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> **(D)** an explanation of any alleged violation that the Agency believes cannot be resolved without the involvement of the Office of the Illinois Attorney General or the State's Attorney of the county in which the alleged violation occurred and the basis for the Agency's belief.

In other words, § 31(a)(1) provides that IEPA shall issue a Violation Notice upon becoming aware of a violation of the Illinois Environmental Protection Act. For alleged violations that remain the subject of disagreement between IEPA and the party respondent following IEPA's fulfillment of the requirements of § 31(a)(1), under § 31(b) of the Illinois Environmental Protection Act, 415 ILCS 5/31(b), IEPA must serve another notice stating it intends to pursue legal action. Then, under§ 31(c) of the Illinois Environmental Protection Act, 415 ILCS 5/31(c), once the requirements of subsections (a) and (b) have been fulfilled, the Illinois Attorney General or State's Attorney of the county in which the alleged violation occurred may file suit against that party respondent.

Is judicial review of the receipt of a Violation Notice available where no suit has been filed against the alleged violator under § 31(c) of the Illinois Environmental Protection Act, 415 ILCS 5/31(c)? This question is the same as that addressed by the U.S. Supreme Court in *Sackett*, but on the state level. Whether judicial review is provided by statute for the issuance of a Violation Notice is governed by the Administrative Review Law, Article III of the Code of Civil Procedure, 735 ILCS 5/301 *et seq*. Section 3-102 of the Code of Civil Procedure, 735 ILCS 5/3-102, provides that the Administrative Review Law "govern[s] every action to review judicially a final decision of any administrative agency where the Act creating or conferring power on such agency, by express reference, adopts the provisions of Article III of this Act."

Such express adoption of the Administrative Review Law is set forth at § 41(a) of the Illinois Environmental Protection Act, 415 ILCS 5/41(a). There, the statute has adopted the provisions of the Administrative Review Law, but seemingly only for certain aggrieved parties, as follows:

> Sec. 41. Judicial review. (a) *Any party to a Board hearing, any person who filed a complaint on which a hearing was denied, any*

> *person who has been denied a variance or permit under this Act, any party adversely affected by a final order or determination of the Board, and any person who participated in the public comment process under subsection (8) of Section 39.5 of this Act [415 ILCS 5/39.5] may obtain judicial review,* by filing a petition for review within 35 days from the date that a copy of the order or other final action sought to be reviewed was served upon the party affected by the order or other final Board action complained of, under the provisions of the Administrative Review Law [735 ILCS 5/3-101 et seq.], as amended and the rules adopted pursuant thereto, except that review shall be afforded directly in the Appellate Court for the District in which the cause of action arose and not in the Circuit Court.

In other words, such review is specifically allowed for "any party to a Board hearing, any person who filed a complaint on which a hearing was denied, any person who has been denied a variance or permit under this Act, any party adversely affected by a final order or determination of the Board, and any person who participated in the public comment process under subsection (8) of Section 39.5 of this Act."

Query, then, whether judicial review is available for a party receiving a Violation Notice, given that such party is not listed under 415 ILCS 5/41(a)? Certainly, such a party cannot be found in the list of those for which judicial review is explicitly therein set forth. Therefore, does that party need to wait for judicial review until if and when the Attorney General files suit against it under § 31(c) of the Illinois Environmental Protection Act, 415 ILCS 5/31(c)? With few exceptions, circuit courts have original jurisdiction over all justiciable matters. (Ill. Const. 1970, art. VI, § 9.) *People v. NL Industries*, 152 Ill.2d at 96. While the legislature generally cannot deprive courts of this jurisdiction, an exception arises in administrative actions. *Id.* Because it establishes administrative agencies and statutorily empowers them, the legislature may vest exclusive jurisdiction in the administrative agency. *People v. NL Industries*, 152 Ill.2d at 96-97. The exhaustion of remedies doctrine is applied only where the agency has exclusive

jurisdiction to hear an action. *People v. NL Industries,* 152 Ill.2d at 96-97. In *People v. NL Industries,* 152 Ill.2d at 96-97, the Court found that the courts had concurrent jurisdiction with the Illinois Pollution Control Board to hear cost recovery actions under the § 22.2 of the Illinois Environmental Protection Act, 415 ILCS 22.2. If an exception to the administrative process may be made in that instance, may it not also be made in the instance of judicial review of a Violation Notice?

Are there other situations, such as under § 31(a)(1), where the courts countenance deviations from the exhaustion doctrine? While Illinois courts generally require strict compliance with this doctrine, they recognize several exceptions. *Castaneda,* 132 Ill. 2d at 308-309. An aggrieved party may seek judicial review of an administrative decision without complying with the exhaustion of remedies doctrine where a statute, ordinance or rule is attacked as unconstitutional on its face, where multiple administrative remedies exist and at least one is exhausted, where the agency cannot provide an adequate remedy or where it is patently futile to seek relief before the agency, where no issues of fact are presented or agency expertise is not involved, where irreparable harm will result from further pursuit of administrative remedies, or where the agency's jurisdiction is attacked because it is not authorized by statute. *Id.*

The courts have found other similar deviations from the exhaustion doctrine under the Illinois Environmental Protection Act. Thus, where the constitutionality of Illinois Pollution Control Board rules issued under the Illinois Environmental Protection Act have been in issue, the courts have held that reviewability is not limited by 415 ILCS 5/41(a). In *Central Illinois Public Service Co. v. Pollution Control Board,* 36 Ill. App. 3d 397, 402-403 (5th Dist. 1976), the court found:

> The respondent cites sections 29[2] and 41 of the Environmental Protection Act * * * as authority for the proposition that the constitutionality of the regulation is a separate and distinct issue from the permit denial hearing provided for in section 40 of the Act * * *. Neither of these sections, though, precludes other methods for challenging the constitutionality of the Board's rules and the respondent has not directed us to any cases which have limited such actions to the procedures contained within the Act. Section 29 merely states, "Any person * * * may obtain determination of the validity or application of such a rule or regulation by petition for review under Section 41 of this Act." *Section 41 makes use of a similar "may" clause when it states a party "may obtain judicial review" of a Board hearing or final action. It is our opinion that had the legislature intended these sections to be exclusive remedies to challenge the constitutionality of the Board's rules, it would not have used the words "may obtain." In addition there is no section within the Act which provides that the remedies are limited to those set forth within the Act.* Furthermore, there is no indication in the record that petitioner was a party to any of the hearings at which the contested water rules were adopted. (Citations omitted; emphasis added.)

Thus, at least to the extent that the constitutionality of a Board rule is at issue, reviewability is not limited by 415 ILCS 5/41(a).

If that is so, then what other causes of action may allow for such judicial review? The issue of whether such review was allowable for a section of the Illinois Environmental Protection Act similar in nature to § 31(a)(1), *i.e.*, Section 4(q) of the Illinois Environmental Protection Act, 415 ILCS 5/4(q), was addressed in *National Marine v. Illinois EPA ("National Marine")*, 159 Ill. 2d 381 (1994). In *National Marine* IEPA issued a pre-enforcement notice to the landowner

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[2] Section 29 of the Illinois Environmental Protection Act, 415 ILCS 5/29.

> (a) Any person adversely affected or threatened by any rule or regulation of the Board may obtain a determination of the validity or application of such rule or regulation by petition for review under Section 41 of this Act [415 ILCS 5/41].
> (b) Action by the Board in adopting any regulation for which judicial review could have been obtained under Section 41 of this Act [415 ILCS 5/41] shall not be subject to review regarding the regulation's validity or application in any subsequent proceeding under Title VIII, Title IX or Section 40 of this Act.

under what is now denominated as § 4(q) of the Act, 415 ILCS 5/4(q), which is similar in effect to a Violation Notice under § 31(a)(1), informing the landowner of its potential liability for a release of a hazardous substance on its property. Section 4(q) of the Act, 415 ILCS 5/4(q) provides:

> The Agency shall have the authority to provide notice to any person who may be liable pursuant to Section 22.2(f) of this Act [415 ILCS 5/22.2] for a release or a substantial threat of a release of a hazardous substance or pesticide. Such notice shall include the identified response action and an opportunity for such person to perform the response action.

The landowner brought suit against IEPA, seeking a declaration of the unconstitutionality of § 4(q) of the Illinois Environmental Protection Act, 415 ILCS 5/4(q), and issuance of a writ of *certiorari* to review IEPA's record and to quash the notice. The Court held that the circuit court properly dismissed the entire complaint because the claim was premature and not ripe for judicial resolution, and because allowing the landowner judicial review at this preliminary stage in the administrative process would have thwarted the legislative intent and statutory scheme. It found that pre-enforcement review of the issuance of a § 4(q) notice was not available to a notice recipient, regardless of the form of relief sought.

While the issuance of a 4(q) notice was deemed not reviewable, the issue of judicial review of a Violation Notice was directly addressed by the Court in *Alternate Fuels, Inc. v. Director of the Ill. EPA ("Alternate Fuels")*, 215 Ill. 2d 219 (2004). In *Alternate Fuels*, IEPA issued a Violation Notice under § 31(a)(1) of the Illinois Environmental Protection Act, for the company's failure to secure a permit to burn alternate fuel at one of its plants. When the parties could not agree on whether the alternate fuel was "waste" under the Illinois Environmental Protection Act, the company sought a declaration of rights pursuant to § 2-701 of the Code of

Civil Procedure, Declaratory Judgments, 735 ILCS 5/2-701 ("2-701").[3] The declaration of rights the company sought was whether a business which has been issued a Violation Notice under § 31(a) of the Illinois Environmental Protection Act, 415 ILCS 5/31(a), for failure to secure a permit as allegedly required by the Illinois Environmental Protection Act may bring a declaratory action to test the validity of the Violation Notice and for attorney fees under the Illinois Administrative Procedure Act, 5 ILCS 100/1-1, based on the Agency's allegedly impermissible rule-making. The parties cross-appealed summary judgment granted by the trial court, and affirmed by the appellate court, for the company on the declaratory action and for IEPA on attorney fees.

IEPA argued that the declaratory action was not justiciable or ripe for review[4] and that the fuel was "discarded material" under the Illinois Environmental Protection Act's definition of waste. In determining whether the claim was justiciable, the Court construed § 2-701, reasoning that:

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[3] 735 ILCS 5/2-701(a) provides, in pertinent part, as follows: "No action or proceeding is open to objection on the ground that a merely declaratory judgment or order is sought thereby. The court may, in cases of actual controversy, make binding declarations of rights, having the force of final judgments, whether or not any consequential relief is or could be claimed, including the determination, at the instance of anyone interested in the controversy, of the construction of any statute, municipal ordinance, or other governmental regulation, or of any deed, will, contract or other written instrument, and a declaration of the rights of the parties interested."

[4] While IEPA did not so argue, it is worth noting that just as the compliance order in *Sackett* invited the Sacketts to "engage in informal discussion the terms and requirements" thereof, § 31(a)(2)(C) of the Illinois Environmental Protection Act, 415 ILCS 5/31(a)(2)(C), provides the opportunity for the respondent to "request…a meeting with appropriate [IEPA] personnel," which, pursuant to § 31(a)(2)(C)(4) of the Illinois Environmental Protection Act, 415 ILCS 5/31(a)(2)(C)(4), affords "an opportunity for the person complained against to respond to each alleged violation." However, as the U.S. Supreme Court pointed out in *Sackett* the right to an informal meeting "confers no entitlement to further agency review. 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." *Sackett*, 132 S. Ct. at 1372. Accordingly, such a provision does not render a Violation Notice, *ipso facto*, non-final.

> The declaratory judgment statute must be liberally construed and should not be restricted by unduly technical interpretations. *** This remedy is used to afford security and relief to the parties so as to avoid potential litigation. *** "*Our courts have recognized that 'the mere existence of a claim, assertion or challenge to plaintiff's legal interests, *** which casts doubt, insecurity, and uncertainty upon plaintiff's rights or status, damages plaintiff's pecuniary or material interests and establishes a condition of justiciability*.' *** (Citations omitted; emphasis added.)
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The Court found that plaintiff's challenge to the issuance of the Violation Notice was both ripe and justiciable since an actual controversy existed fit for judicial decision and hardship would result if the declaratory action was not resolved. Since the fuel was recycled, it was not "discarded" and was not "waste" that would require a permit. IEPA's interpretation of "discarded material" was not a statement of general applicability, so no rule-making occurred to trigger the right to fees. Accordingly, the Court affirmed the trial court's granting of summary judgment to the plaintiff.

In so ruling the Court distinguished *National Marine*, stating, *inter alia*:

> We find the primary authority proffered by the Agency, *National Marine, Inc. v. Illinois Environmental Protection Agency*, 159 Ill. 2d 381, 639 N.E.2d 571, 203 Ill. Dec. 251 (1994), distinguishable. In *National Marine*, the Agency issued a notice informing the plaintiff that it could be potentially liable for a "release or a substantial threat of a release of a hazardous substance on the property" pursuant to section 4(q) of the Act. *National Marine*, 159 Ill. 2d at 383; Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1004(q).
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> [T]he present relief sought is not similar to that sought in *National Marine*. AFI did not seek the issuance of a writ of *certiorari* to review the Agency's record or to quash the section 31(a) notice. AFI sought nothing precluding the Agency from continuing its investigation, issuing a notice under section 31(b), or referring the matter to a prosecutorial authority under section 31(c). Nevertheless, nothing in the record demonstrates that the Agency sought to further pursue its investigation of AFI. Additionally, nothing prevented the Agency from continuing its investigation

> under the Act which could have culminated in a counterclaim in the present action. AFI alleges that the only error the Agency committed was in its interpretation of the Act. Thus, the present action is not "preenforcement," as there is no allegation that AFI sought to evade Agency action, nor is there any indication that the Agency wished to refer a matter concerning a discontinued operation to a prosecutorial authority.

Thus, the Court distinguished *National Marine* on the basis, *inter alia*, that in *Alternate Fuels* no writ of *certiorari* was sought, and that nothing in the plaintiff's suit prevented IEPA from referring the matter to the Attorney General under § 31(c) of the Act, 415 ILCS 5/31(c).

In conclusion, in *Sackett* the U.S. Supreme Court held a person who had been issued an administrative order directing compliance with § 309(a)(3) of the federal Clean Water Act, 33 U.S.C. § 1319(A)(3), can challenge that order pursuant § 704 of the federal Administrative Procedure Act to, 5 USCS§ 704. Consistent with the *Sackett* decision, the Illinois Supreme Court in *Alternate Fuels* held that the issuance of a Violation Notice directing compliance under § 31(a)(1) of the Illinois Environmental Protection Act, 415 ILCS 5/31(a)(1), is properly the subject of judicial review pursuant to § 2-701 of the Code of Civil Procedure, Declaratory Judgments, 735 ILCS 5/2-701.