

**SACKETT v. EPA USES STATUTORY INTERPRETATION TO LIMIT
THE EPA’S POWER OVER WETLANDS, OVERRULING A
MAJORITY AND LEAVING CIRCUITS SPLIT OVER
DUE PROCESS**

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“[E]nvironmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits.”

— Justice Sandra Day O’Connor¹

I. INTRODUCTION

The Sacketts’s long journey to the Supreme Court began near Priest Lake, Idaho, in the spring of 2007.² Michael and Chantell Sackett began filling their soggy land to prepare to build a house, and the Environmental Protection Agency (“EPA”) came knocking.³ After warning the Sacketts that their land was a wetland protected by the Clean Water Act (“CWA”), the EPA slapped them with an administrative order.⁴ The order directed the Sacketts to remove the fill, restore the wetland, and wait three years to apply for a permit.⁵ The administrative order threatened fines of up to \$75,000 *per day* for not complying.⁶ Although the hefty administrative fines were ultimately subject to

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¹ Cal. Coastal Comm’n v. Granite Rock Co., 480 U.S. 572, 587 (1987).

² Sackett v. U.S. EPA, 622 F.3d 1139, 1141 (9th Cir. 2010), *rev’d*, Sackett v. EPA, 132 S. Ct. 1367 (2012).

³ *Id.*

⁴ Brief of National Resources Defense Council et al. as Amici Curiae in Support of Respondents at 2, *Sackett*, 132 S. Ct. 1367 (No. 10-1062), 2011 WL 8473188.

⁵ See Petitioners’ Brief on the Merits at 7-8, 18, *Sackett*, 132 S. Ct. 1367 (No. 10-1062), 2011 WL 4500687.

⁶ *Sackett*, 132 S. Ct. at 1370 & n.1.

judicial enforcement, the Sacketts themselves had no way to challenge the EPA's determination that their property contained wetlands.⁷

It became apparent in January of 2012 that the Sacketts won over many of the Supreme Court Justices at oral argument.⁸ The Sacketts had the pro bono backing of the Pacific Legal Foundation,⁹ and many corporate giants like General Electric ("GE") filed amicus briefs in support of their position.¹⁰ They argued in part for a statutory interpretation that would allow a judicial hearing to determine the EPA's jurisdiction under the CWA, timely to the issuance of the administrative order and its penalties.¹¹ Because the CWA does not expressly preclude judicial review,¹² if the Supreme Court interpreted the administrative order as "final agency action," it would be subject to review under the Administrative Procedure Act ("APA").¹³ In the alternative, the Sack-

⁷ See *id.* at 1373.

⁸ See Transcript of Oral Argument at 35, 53, *Sackett*, 132 S. Ct. 1367 (No. 10-1062) (Justice Scalia stated, "[I]t shows the high-handedness of the agency," and Justice Alito stated, "That makes the EPA's conduct here even more outrageous."), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1062.pdf.

⁹ Lawrence Hurley, *Idaho Couple's Permit Fight Drags Wetlands Back to Supreme Court*, N.Y. TIMES (Sept. 19, 2011), <http://www.nytimes.com/gwire/2011/09/19/19greenwire-idaho-couples-permit-fight-drags-wetlands-back-31906.html> ("The case would likely have not made it to the Supreme Court if it weren't for the Pacific Legal Foundation . . . which brings its own agenda to the table.").

¹⁰ See Brief of American Petroleum Institute et al. as Amici Curiae in Support of Petitioners at 17, 23-24, 27, *Sackett*, 132 S. Ct. 1367 (No. 10-1062), 2011 WL 4872035; Brief of General Electric Co. as Amicus Curiae Supporting Petitioner at 1-3, 11, 26, 29, *Sackett*, 132 S. Ct. 1367 (No. 10-1062), 2011 WL 4590827; Brief of Amici Curiae National Ass'n of Home Builders et al. in Support of the Petitioners, *Sackett*, 132 S. Ct. 1367 (No. 10-1062), 2011 WL 4542131; Brief Amicus Curiae of National Ass'n of Manufacturers in Support of Petitioners, *Sackett*, 132 S. Ct. 1367 (No. 10-1062), 2011 WL 4590835.

¹¹ See *Sackett*, 132 S. Ct. at 1372; Brief of American Petroleum Institute et al. as Amici Curiae in Support of Petitioners, *supra* note 10, at 17, 23-24, 27; Brief of General Electric Co. as Amicus Curiae Supporting Petitioner, *supra* note 10, at 1-2, 11, 26, 29; Brief of Amici Curiae National Ass'n of Home Builders et al. in Support of the Petitioners, *supra* note 10, at 12; Brief Amicus Curiae of National Ass'n of Manufacturers in Support of Petitioners, *supra* note 10, at 4-7.

¹² *Sackett*, 132 S. Ct. at 1372.

¹³ *Id.* at 1373-74.

etts argued that the hefty fines in the administrative order impeded their constitutional right to due process.¹⁴

In a brief opinion rendered on March 21, 2012, the Supreme Court came down on the Sacketts's side in a unanimous vote.¹⁵ Justice Scalia, writing for the majority, quickly disposed of many arguments found in cases of both statutory interpretation and due process,¹⁶ finding in favor of judicial review of administrative compliance orders under the APA.¹⁷ The Court also overruled the holdings of several circuits (not just the Ninth Circuit) that the CWA impliedly precludes judicial review of administrative compliance orders,¹⁸ which are also used in the Clean Air Act ("CAA")¹⁹ and the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA").²⁰

Justice Alito, in his concurrence, appealed to Congress to adopt a clear definition of "wetlands."²¹ In its opinion the Court admitted, "The particulars of this case flow from a dispute about the scope of 'the navigable waters' subject to this enforcement regime," yet it pointed out that it did "not resolve the dispute on the merits."²² Despite this statement, the Court went on to describe its varying interpretations of "wet-

¹⁴ *Id.* at 1371.

¹⁵ *Id.* at 1374.

¹⁶ *Id.* at 1373-74.

¹⁷ *Id.* at 1374.

¹⁸ *See, e.g.*, *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564, 565-66 (10th Cir. 1995); *S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418, 1426-27 (6th Cir. 1994); *S. Pines Assocs. v. United States*, 912 F.2d 713, 716-17 (4th Cir. 1990); *Hoffman Grp., Inc. v. EPA*, 902 F.2d 567, 569 (7th Cir. 1990).

¹⁹ 42 U.S.C. §§ 7401-7671(q) (2006 & Supp. IV 2010); *see* *Lloyd A. Fry Roofing Co. v. U.S. EPA*, 554 F.2d 885, 890-92 (8th Cir. 1977) (finding that the legislative history of the CAA forecloses judicial review of administrative compliance orders).

²⁰ 42 U.S.C. §§ 9601-9675 (2006 & Supp. IV 2010); *see* *Gen. Electric Co. v. Jackson (GEV)*, 610 F.3d 110, 128 (D.C. Cir. 2010) (holding that the EPA's process of issuing administrative orders under CERCLA did not constitute a due process violation), *cert. denied*, 131 S. Ct. 2959 (2011).

²¹ *Sackett*, 132 S. Ct. at 1375-76 (Alito, J., concurring).

²² *Id.* at 1370 (majority opinion). If the Court had considered the merits, it possibly would have found that the Sacketts had knowledge that they were building on a wetland yet continued to do so without seeking a permit. Even without actual knowledge, the low price paid for their lot, which has a view of Priest Lake, imposes constructive knowledge on the Sacketts that the land was not suitable for development. *See generally* Brief of National Resources Defense Council et al. as Amici Curiae in

lands” under the CWA, which the Court most recently narrowed in its decision in *Rapanos v. United States*.²³ The *Sackett v. Environmental Protection Agency* decision is yet another step by the Supreme Court in the direction of hindering the EPA’s enforcement capabilities,²⁴ yet the decision does not acknowledge the practical environmental costs and instead claims the definition of “wetlands” is too vague.²⁵

It is easy to feel sympathetic towards the Sacketts for at least two reasons. Their due process and fundamental right to property arguments resonate among all citizens,²⁶ and everyone wants to avoid becoming victim to the EPA or other overreaching government agencies.²⁷ According to the Fifth Amendment, some review of agency action is constitutionally appropriate when it comes to interference with our right to own property.²⁸ But the EPA is doing the job that Congress empowered it to do, and when it comes to large corporate polluters, the legislature has decided that some efficacy is needed to protect the environment.²⁹ The history of the Sacketts’s amici, GE in particular,³⁰ invokes grave concern for environmentalists as the EPA quite possibly faces judicial review of every administrative order it issues.³¹

Support of Respondents, *supra* note 4, at 7-8, 10 (arguing the Sacketts had knowledge about their property being a wetland prior to beginning construction).

²³ See *Sackett*, 132 S. Ct. at 1370 (describing the recent Supreme Court cases that interpret the definition of “wetlands” (citing *Rapanos v. United States*, 547 U.S. 715, 732-35 (2006) (finding that the definition of “wetlands” does not include ephemeral or intermittent flows of water); *Solid Waste Agency v. U.S. Army Corps of Engr’s*, 531 U.S. 159, 167-68 (2001) (finding that isolated wetlands serving as habitats for migratory birds do not constitute “wetlands”); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985) (holding that “wetlands” adjacent to navigable waters fit the statutory definition))).

²⁴ See *Sackett*, 132 S. Ct. at 1374.

²⁵ See *id.* at 1375 (Alito, J., concurring) (“The reach of the Clean Water Act is notoriously unclear.”).

²⁶ See U.S. CONST. amend. V.

²⁷ See, e.g., *Sackett*, 132 S. Ct. at 1370-71.

²⁸ U.S. CONST. amend. V.

²⁹ See, e.g., 33 U.S.C. § 1319 (2006); S. REP. NO. 92-414, at 3731 (1971) (“[E]nforcement provisions must be swift and direct.”).

³⁰ See *infra* notes 84-88 and accompanying text.

³¹ See *infra* notes 80-82, 89-90 and accompanying text.

Corporate giants like GE have been pushing for due process review of the EPA's administrative orders for decades;³² some posit for the reason of delaying the enforcement of environmental statutes and the cost of cleanup that inevitably follows.³³ While the Sacketts can now enjoy building their new home in Idaho (supposing they defeat the EPA in their jurisdictional hearing), large polluters like GE that face numerous administrative orders can file actions in district court challenging the EPA's findings on each one.³⁴ Regardless of whether the corporations are successful on the merits of their hearings, they will likely succeed in both slowing down the enforcement of environmental laws and delaying the cleanup of catastrophic contamination.³⁵

Wetlands are significant for a multitude of reasons. What most do not realize about wetlands is that they not only provide food and natural habitats for marine species and recreational opportunities for the public, but they are often referred to as the "kidneys" of a water body because they act as a filter for aquatic pollutants.³⁶ This function helps keep larger lakes and rivers clean—notably Priest Lake, which is known "for its extremely clear water."³⁷ Wetlands are also "carbon sinks" that absorb large amounts of carbon dioxide, keeping a healthy, natural balance to our ecosystem.³⁸ Through development, agriculture, industrialization, dredging, and pollution, over half of the nation's origi-

³² See *infra* Parts II.B, IV.B.

³³ See, e.g., S. REP. NO. 101-228, at 3750 (1989) ("Any judicial review of administrative orders may be carried out only at the time the government or another person seeks to enforce such orders. Otherwise, enforcement for violations of the [Clean Air] Act could be delayed indefinitely pending judicial review in the Federal courts of appeal.").

³⁴ See, e.g., Lawrence Hurley, *EPA Enforcement Case Highlights Hat Trick for Big Business*, E&E PUBLISHING, LLC (July 2, 2012), <http://eenews.net/public/Greenwire/2012/07/02/1> (stating that corporations took special interest in *Sackett v. EPA*, 132 S. Ct. 1367 (2012), and will likely benefit from the ruling).

³⁵ See *id.*; see *infra* text accompanying notes 327-29.

³⁶ FLA. DEP'T OF ENVTL. PROT., FLORIDA STATE OF THE ENVIRONMENT—WETLANDS: A GUIDE TO LIVING WITH FLORIDA'S WETLANDS 2-3, available at <http://www.dep.state.fl.us/water/wetlands/docs/erp/fsewet.pdf> (last visited Mar. 18, 2013).

³⁷ *Welcome to Priest Lake*, IDAHO ST. PARKS AND RECREATION, <http://parksandrecreation.idaho.gov/parks/priest-lake> (follow "About" hyperlink) (last visited Mar. 18, 2013).

³⁸ Emily Caldwell, *Scientist: Temperate Freshwater Wetlands are 'Forgotten' Carbon Sinks*, OHIO ST. U. (Jan. 26, 2012), <http://researchnews.osu.edu/archive/>

nal wetlands have been destroyed.³⁹ Just in the brief period between the mid-1970s and mid-1980s, over 4.4 million acres of inland freshwater wetlands were destroyed, along with over 71,000 acres of coastal wetlands.⁴⁰ Congress, acting through statutory directives to the EPA, has attempted to protect these vital areas,⁴¹ but the *Sackett* decision pushes environmental legislation a giant step backwards.

The next steps in response to the *Sackett* decision are critical in determining the future enforcement of environmental laws.⁴² If the EPA alters its procedure only insofar as replacing an administrative compliance order with a warning letter,⁴³ yet still assessing penalties, this could set the stage for a future due process argument.⁴⁴ In fact, many of the arguments for the “final agency action” statutory interpretation are similar to the arguments advanced in favor of a due process hearing.⁴⁵ And if Congress chooses to statutorily preclude judicial re-

freshwetlands.htm; *Carbon Sequestration 101*, NOAA, <http://www.habitat.noaa.gov/coastalcarbonsequestration.html> (last visited March 18, 2013).

³⁹ *Wetlands Loss and Degradation*, N.C. ST. U., <http://www.water.ncsu.edu/watershedss/info/wetlands/wetloss.html> (last visited March 18, 2013).

⁴⁰ *Id.*

⁴¹ *See supra* note 29 and accompanying text.

⁴² At least one commentator has opined on the future of EPA enforcement: [D]espite recent comments from EPA officials, it is yet to be determined how EPA will approach future compliance efforts. To date, EPA has issued no guidance on its view of the scope of *Sackett*. In response to the *Sackett* decision, EPA will likely be faced with two options. The simplest approach would be for EPA to avoid issuing administrative compliance orders and use other enforcement tools instead. A second alternative would be for EPA simply to follow the same process and issue administrative orders, which would then potentially be subject to a pre-enforcement challenge.

Leslie Garrett Allen & Chris Carron, *Sackett v. EPA: Implications for Administrative Compliance*, TRENDS: ABA SEC. ENVTL., ENERGY, & RESOURCES NEWSL., Sept./Oct. 2012, at 27.

⁴³ *See* Transcript of Oral Argument, *supra* note 8, at 57 (Justice Scalia: “But they’ll just issue warnings, is what they’ll do.”).

⁴⁴ *See infra* text accompanying notes 280-82.

⁴⁵ *See infra* notes 271-75 and accompanying text.

view of administrative orders in the CWA (as it did in CERCLA⁴⁶), this might also prompt due process litigation.⁴⁷

This Article first describes the viewpoints from opposite ends of the spectrum by exploring the backgrounds of the *Sackett* and *General Electric Co. v. Jackson* cases;⁴⁸ then surveys the circuit split involving the due process arguments and statutory interpretations of “final agency action” (which is no longer a split due to the recent decision in *Sackett*).⁴⁹ Section IV analyzes these statutory and due process holdings in relation to the *Sackett* ruling.⁵⁰ Section V concludes by commenting on the Court’s recent trend of narrowing federal wetlands jurisdiction and explores the possible congressional, judicial, and agency reactions to the *Sackett* decision.⁵¹

II. BACKGROUND

A. *Sackett v. EPA: The Individual Property Owners’ Side*

In 2005, Michael and Chantell Sackett purchased a 0.63-acre parcel near Priest Lake, Idaho, in hopes of fulfilling a lifelong dream of living lakefront.⁵² The Sacketts paid only \$23,000 for the lot, and they secured local permits before spreading fill material in 2007.⁵³ Later in 2007, the EPA issued an administrative compliance order notifying the Sacketts that they had filled wetlands without a permit in violation of the CWA and requiring them to remove the fill and restore the wetlands or face penalties up to \$32,500 per day, which could double if the Sacketts violated the compliance order.⁵⁴

⁴⁶ Congress modified CERCLA in 1986 to expressly preclude judicial review of preenforcement remedial actions. 42 U.S.C. § 9613(h) (2006); *see* 42 U.S.C. §§ 9601-9675 (2006).

⁴⁷ *See infra* Part IV.B.

⁴⁸ *See infra* Part II.

⁴⁹ *See infra* Part III.

⁵⁰ *See infra* Part IV.

⁵¹ *See infra* Part V.

⁵² Hurley, *supra* note 9.

⁵³ *Id.*

⁵⁴ *Sackett v. U.S. EPA*, 622 F.3d 1139, 1141 (9th Cir. 2010), *rev’d*, *Sackett v. EPA*, 132 S. Ct. 1367 (2012).

The facts surrounding the issuance of the order differ depending on whose side you believe.⁵⁵ In one account, the Sacketts had no idea they needed a federal permit to build,⁵⁶ and the EPA denied their later request for a discretionary hearing to argue that their lot was not a wetland.⁵⁷ According to other sources, the Sacketts knew well in advance that the lot contained wetlands and refused to seek a permit,⁵⁸ and the EPA repeatedly invited the Sacketts to discuss the compliance requirements, but the Sacketts never responded.⁵⁹

The Ninth Circuit reviewed both the statutory interpretation argument and the due process argument that the Sacketts presented and found against them on both.⁶⁰ In regard to the statutory argument, the court found that when the penalties from an administrative compliance order are judicially enforced, the court must consider several factors, including “the seriousness of the violation, . . . any history of such violations, and any good-faith efforts to comply, . . . and such other matters

⁵⁵ Nina Totenberg, *When Property Rights, Environmental Laws Collide*, NPR (Jan. 7, 2012), <http://www.npr.org/2012/01/07/144797552/when-property-rights-environmental-laws-collide>.

⁵⁶ *Id.*

⁵⁷ Appellants’ Opening Brief, *Sackett*, 622 F.3d 1139 (No. 08-35854), 2008 WL 5550653.

⁵⁸ Brief of National Resources Defense Council et al. as Amici Curiae in Support of Respondents, *supra* note 4, at 3 (noting that the Sacketts’s own professional wetland scientist advised them to halt construction because the property contained wetlands, among other factors); *see also* Nina Mendelson, *In Sackett v. EPA, Troubling Potential for SCOTUS to Undermine Government’s Ability to Promptly Respond to Environmental Threats*, CPR BLOG (Jan. 4, 2012), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=A706AFFB-D70B-9B5D-C6405D7D8237CEF9> (“Another possible understanding of the events: a property owner engaged in a ‘catch me if you can’ or ‘build now, apologize later’ strategy — one with real environmental consequences.”); Judith Lewis Mernit, *Pity the Sacketts? Not Much*, HIGH COUNTRY NEWS, Jan. 27, 2012, <http://www.hcn.org/wotr/pity-the-sacketts-not-much> (“A timeline Chantell Sackett created for the Army Corps of Engineers reveals that she and her husband knew early on that they were building on a wetland. The Sacketts run an excavation and construction business; the law should not have been a mystery to them. Even the local golf course brags about its stunning wetlands.”).

⁵⁹ Mendelson, *supra* note 58. Regrettably, the Supreme Court did not address the underlying merits of the *Sackett* case. *See supra* note 22 and accompanying text.

⁶⁰ *Sackett v. U.S. EPA*, 622 F.3d 1139, 1141 (9th Cir. 2010), *rev’d*, *Sackett v. EPA*, 132 S. Ct. 1367 (2012).

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as justice may require.”⁶¹ The Ninth Circuit also noted the choice of enforcement techniques given to the EPA and opined that requiring judicial review of compliance orders would “eliminate this choice” and “force the EPA to litigate all compliance orders in court.”⁶² Further, the court found that the objectives of prompt enforcement and remediation of pollution “would be defeated” by allowing pre-enforcement judicial review.⁶³

In regard to the Sacketts’s due process argument, the Ninth Circuit addressed the Sacketts’s reliance on an Eleventh Circuit opinion finding compliance orders unconstitutional, but the court stated, “We decline to interpret the CWA in this manner.”⁶⁴ The court also dismissed the argument that the penalties “foreclose[d] all access to the courts” because “the CWA channels judicial review through the affirmative permitting process.”⁶⁵ The Sacketts did not follow the statutory permitting process, and therefore the court found “preclusion of pre-enforcement judicial review does not violate the Sacketts’[s] due process rights.”⁶⁶

The Supreme Court did not review the merits of the case⁶⁷ but instead strictly decided the issues of whether the APA allowed judicial review of the EPA’s administrative compliance orders under the CWA based on their status as “final agency action,” and if not, whether this constituted a due process violation.⁶⁸ The Supreme Court issued its

⁶¹ *Id.* at 1142 (quoting 33 U.S.C. § 1319(d) (2006)).

⁶² *Id.* at 1143.

⁶³ *Id.* at 1144.

⁶⁴ *See id.* at 1145 (citing *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236 (11th Cir. 2003)); *see infra* Part III; *see also* Christopher M. Wynn, *Facing a Hobson’s Choice? The Constitutionality of the EPA’s Administrative Compliance Order Enforcement Scheme Under the Clean Air Act*, 62 WASH. & LEE L. REV. 1879, 1915-16 (2005) (“[T]he Eleventh Circuit’s novel decision . . . unnecessarily read constitutional problems into the CAA statutory structure, misinterpreted key provisions of the statute, and broke from an established line of case law in the treatment of [administrative compliance orders].”).

⁶⁵ *Sackett*, 622 F.3d at 1146.

⁶⁶ *Id.* at 1147.

⁶⁷ *Sackett v. EPA*, 132 S. Ct. 1367, 1370 (2012) (“[W]e do not resolve the dispute on the merits.”).

⁶⁸ *Sackett v. EPA*, 131 S. Ct. 3092 (2011) (“Petition for writ of certiorari granted limited to the following questions: 1. May petitioners seek pre-enforcement judicial

opinion in *Sackett* on March 21, 2012, finding in favor of the Sacketts's statutory interpretation.⁶⁹ As a result, the Court did not address the due process issue.⁷⁰

B. General Electric Co. v. Jackson: *The Corporate Side*

The case and cause sparking the most concern for environmentalists is *General Electric Co. v. Jackson*, in which the D.C. Circuit held that the EPA's issuance of unilateral administrative orders ("UAOs") under CERCLA did not constitute a due process violation.⁷¹ The Supreme Court denied review of this case not even a month before granting it to the Sacketts.⁷² One proposed theory for this is the Sacketts's status as persons, as opposed to big business, owning real estate.⁷³ But GE and other corporations provided support with amici curiae briefs⁷⁴ in the Sacketts's "David-and-Goliath"⁷⁵ battle against the EPA, in hopes that their due process claims would be heard.⁷⁶

review of the administrative compliance order pursuant to the Administrative Procedure Act, 5 [sic] U.S.C. § 704? 2. If not, does petitioners' inability to seek pre-enforcement judicial review of the administrative compliance order violate their rights under the Due Process Clause?"

⁶⁹ *Sackett*, 132 S. Ct. at 1374.

⁷⁰ *See id.*

⁷¹ *GE V*, 610 F.3d 110, 114, 129 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 2959 (2011).

⁷² *See Sackett*, 131 S. Ct. 3092; *Gen. Electric Co. v. Jackson*, 131 S. Ct. 2959 (2011); *see also* Sam Wheeler, *Ninth Circuit: EPA Compliance Orders Are Not Subject to Pre-Enforcement Judicial Review*, 38 *ECOLOGY L.Q.* 611, 617 (2011) ("The Supreme Court may accept the Sacketts' petition for certiorari in order to resolve this circuit split. . . . [I]f the Supreme Court does take the case it will most likely affirm that the CWA precludes judicial review and this preclusion does not violate due process.").

⁷³ *See* Peter Bella, *Sackett v. EPA: Supreme Court Will Decide Property Rights Case*, *WASH. TIMES* (Jan. 9, 2012), <http://communities.washingtontimes.com/neighborhood/middle-class-guy/2012/jan/9/sackett-v-epa>; Holly Doremus, *More on Sackett v. EPA*, *LEGAL PLANET: THE ENVTL. L. & POL'Y BLOG* (June 28, 2011), <http://legalplanet.wordpress.com/2011/06/28/more-on-sackett-v-epa>.

⁷⁴ *See* sources cited *supra* note 10.

⁷⁵ Timothy Sandefur, *Compliance—Or Else: The EPA's Compliance Order Regime Creates a Hobson's Choice*, *REG.*, Winter 2011-12, at 10.

⁷⁶ *See* sources cited *supra* note 10.

The environmental concerns are not unfounded.⁷⁷ At the time of the opinion, the EPA had issued approximately sixty-eight administrative orders to GE, and GE was involved in seventy-nine cleanup sites with the possibility of receiving future administrative orders.⁷⁸ Among these efforts is the Hudson River Superfund Site Dredging Project, taking place along 200 miles of the Hudson River.⁷⁹

From 1947 to 1977, GE discharged approximately 1.3 million pounds of polychlorinated biphenyls (“PCBs”) into the Hudson River from two of its capacitor manufacturing plants.⁸⁰ PCBs are believed to be human carcinogens, endangering humans through the consumption of contaminated fish.⁸¹ Other associated health risks include low birth weight, thyroid disease, and disorders related to learning, memory, and the immune system.⁸² In 2002, the EPA called for a two-phase dredging project of approximately 2.65 million cubic yards of sediment from the Hudson River.⁸³

According to reports, however, GE has been less than cooperative in cleanup efforts.⁸⁴ GE has lobbied Congress, brought suit in federal court, and spread a mass media campaign against dredging;⁸⁵ GE

⁷⁷ See *infra* notes 78-88 and accompanying text.

⁷⁸ *GE V*, 610 F.3d 110, 115 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 2959 (2011).

⁷⁹ See *Hudson River PCBs Superfund Site: Hudson River Cleanup*, U.S. EPA, <http://www.epa.gov/hudson/cleanup.html#quest1> (last updated July 11, 2012).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See *infra* notes 85-91 and accompanying text.

⁸⁵ See *Historic Hudson River Cleanup to Begin After Years of Delay, But Will GE Finish the Job?*, NAT. RESOURCES DEF. COUNCIL, <http://www.nrdc.org/water/pollution/hudson.asp> (last revised Mar. 23, 2007) (“[F]or years, GE fought the development of a cleanup plan with every tool it could buy, lobbying Congress, attacking the Superfund law in court, and launching a media blitz to spread disinformation about the usefulness of the cleanup, claiming that dredging the river would actually stir up PCBs.”); *The Battle over Dredging*, RIVERKEEPER, <http://www.riverkeeper.org/campaigns/stop-polluters/pcbs/dredging-battle> (last visited Mar. 18, 2013) (“April 22, 1998 — shareholder meeting, GE CEO Jack Welch claimed: ‘PCBs do not pose adverse health risks.’” “2000 — Federal law required the EPA to consider local opinion before it issues a final decision in Superfund cases. GE mounted a high-profile political and public relations campaign to stop the dredging plan. GE spent millions of dollars on television commercials, newspaper ads,

used all these tactics at first to avoid, but eventually to delay, the Hudson River superfund project.⁸⁶ Meanwhile, officials closed fisheries and warned pregnant women and children not to eat fish.⁸⁷ The EPA entered into a consent decree with GE in 2006, and in 2010, GE announced that it would begin the second phase of the Hudson River superfund cleanup project.⁸⁸

In its seemingly never-ending case, originally filed in 2000,⁸⁹ GE argued that the EPA's issuance of UAOs under CERCLA deprived GE of property and violated due process because there was no hearing before a neutral decision maker.⁹⁰ GE argued that the constitutional violations stemmed from the fines, costs of compliance, and the loss of stock price and brand value, all of which "intimidate[d]" GE from seeking judicial review.⁹¹

billboards, bus signs, newsletters and web sites. GE hired Community Research Group (CRG), a Utica-based firm, to poll upstate residents via phone. CRG representatives told citizens that they were calling to provide information about 'an important environmental issue in Upstate New York.' Their first question was whether residents belonged to an environmental group. If the answer was 'Yes,' the call ended abruptly, with the caller stating, 'Thank you very much; we've already met the goals of the survey.'").

⁸⁶ *Historic Hudson River Cleanup to Begin After Years of Delay, But Will GE Finish the Job?*, *supra* note 85.

⁸⁷ *Id.*

⁸⁸ *Hudson River PCBs*, RIVERKEEPER, <http://www.riverkeeper.org/campaigns/stop-polluters/pcbs> (last visited Mar. 18, 2013).

⁸⁹ *GE IV*, 595 F. Supp. 2d at 12. *See generally* Gen. Electric Co. v. Jackson (*GE IV*), 595 F. Supp. 2d 8 (D.D.C. 2009) (ruling against GE on its pattern-and-practice challenge); Gen. Electric Co. v. Johnson (*GE III*), 362 F. Supp. 2d 327 (D.D.C. 2005) (ruling against GE on its facial challenge); Gen. Electric Co. v. Whitman (*GE I*), 257 F. Supp. 2d 8 (D.D.C. 2003) (dismissing GE's claim for lack of jurisdiction based on CERCLA's prohibition against preenforcement judicial review), *rev'd and remanded* by Gen. Electric Co. v. EPA (*GE II*), 360 F.3d 188 (D.C. Cir. 2004) (allowing a facial constitutional challenge to CERCLA). GE appealed the district court rulings in *GE III* and *GE IV* to the D.C. Circuit in *GE V*, 610 F.3d 110 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 2959 (2011).

⁹⁰ *GE V*, 610 F.3d at 113; *GE IV*, 595 F. Supp. 2d at 14.

⁹¹ *GE V*, 610 F.3d at 117-18.

In *GE IV*, the district court applied the *Mathews v. Eldridge* balancing test⁹² after its initial determination that GE indeed had protected property interests in the response costs it incurred with administrative order compliance.⁹³ In the second prong of the *Mathews* analysis, the *GE IV* court “identif[ied] the private interest impacted by government action, the government interest in avoiding additional pre-decision process, and the risk that the current process will result in error.”⁹⁴

When weighing the private interest at stake, the *GE IV* court considered GE’s estimated compliance costs of \$4 million and costs of noncompliance at “some substantial, unidentified amount.”⁹⁵ Although the district court found that GE’s interests were “primarily financial,” they were “sufficiently large and ha[d] enough potential collateral effects to constitute weighty private interests.”⁹⁶ The *GE IV* court, however, discounted GE’s assertion⁹⁷ that it and other UAO recipients would be “indefinitely ‘left in limbo’ if they choose not to comply with a UAO.”⁹⁸ The court found that GE had offered no evidence to show that the EPA actually delays in bringing judicial enforcement proceedings.⁹⁹

In identifying the government interest involved, the *GE IV* court found, “The greater the government’s need for prompt action, the greater the government interest in avoiding additional pre-deprivation process.”¹⁰⁰ The court, however, found that the EPA lacked a need for prompt action because under CERCLA the EPA can file a cost recovery action when it has cleaned up a site itself due to an emergency.¹⁰¹ Ad-

⁹² *GE IV*, 595 F. Supp. 2d at 21-39 (applying the Court’s balancing test as announced in *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

⁹³ *Id.* at 28. Note that *GE V* overruled *GE IV*’s finding that prehearing stock-price and brand-value deprivations caused by noncompliance were protected property interests. *GE V*, 610 F.3d at 128.

⁹⁴ *GE IV*, 595 F. Supp. 2d at 29 (citing *Mathews*, 424 U.S. at 335).

⁹⁵ *Id.* at 30.

⁹⁶ *Id.* at 30-31.

⁹⁷ *See id.* at 31.

⁹⁸ *Id.*

⁹⁹ *Id.* at 32 (“GE has not demonstrated that EPA in fact routinely waits as long as the CERCLA statutes of limitations allow before bringing enforcement or cost recovery actions.”).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

ditionally, the timeframe between the identification of pollutants and issuance of UAOs is usually years, demonstrating that the EPA does not consider promptness to be a central theme in issuing the administrative orders.¹⁰²

The *GE IV* court next considered the additional costs of the process, specifically GE's request for "a full judicial hearing before an Article III judge," stating, "Judicial proceedings . . . are fraught with considerable expense and delay, and courts rarely import the judicial model into administrative decision-making."¹⁰³ Considering the sheer volume of UAOs issued every month¹⁰⁴ and the fact that the EPA usually only issues administrative orders when negotiations have failed, the court found that most parties would contest the order through a pre-enforcement hearing.¹⁰⁵ The court felt that this would "involve significant fiscal and administrative burdens," and "generate a substantial impairment of the government's interest measured in the financial and administrative costs of that additional process."¹⁰⁶

Finally, the *GE IV* court addressed the EPA's risk of error in issuing the administrative orders.¹⁰⁷ GE argued that because EPA officials issue UAOs without review and approval from headquarters, this could result in a higher error rate.¹⁰⁸ The court, however, found that the EPA's "informal pre-issuance process" gives the party "several opportunities to be heard before a UAO is issued," and even includes representation by counsel.¹⁰⁹ Further, the court found that "courts often defer to agencies' highly technical decisions, reviewing such decisions only on an 'arbitrary and capricious' standard," knocking out GE's argument that "the highly factual, highly technical nature" of administrative order decisions increases the EPA's risk of error.¹¹⁰ Lastly, looking towards the concrete evidence, the court found that the EPA actually had an

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 33 ("On average . . . EPA has issued approximately six UAOs to nineteen [parties] every *month*.").

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 33-37.

¹⁰⁸ *Id.* at 34.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

error rate of about 4.4%—which the court described as a “miniscule error rate.”¹¹¹

Having considered the private and government interests and risk of error, the *GE IV* court proceeded to the *Mathews v. Eldridge* balancing test.¹¹² The court noted, “The balancing process is dynamic—for example, while greater process could reduce the risk of error, it also adds cost and delay, thereby burdening both government and private interests.”¹¹³ In order to justify the additional process, the court found that the costs must be minimal because the risk of error is already low.¹¹⁴ Further, GE’s interests were not significant enough to justify the increased burden of judicial review with so little to gain by way of decreased error rate.¹¹⁵ With these considerations, the *GE IV* court found that a judicial hearing was not “constitutionally necessary,” and that GE had not proven its due process pattern and practice claim.¹¹⁶

Affirming the *GE IV* court’s finding that administrative fines and costs of compliance were “protected property interests,”¹¹⁷ the *GE V* court addressed GE’s due process argument, which was based on the 1908 case of *Ex Parte Young*.¹¹⁸ In *Young*, the Court held that “fines so enormous . . . as to intimidate the [affected party] from resorting to the courts to test the validity of the legislation” constitute a due process violation;¹¹⁹ however, the *GE V* court found that other cases decided since *Young* have narrowed this rule.¹²⁰ Now, if the fines are subject to a “good faith” or “reasonable grounds” defense¹²¹ and if the imposition of fines is ultimately subject to judicial discretion¹²² (both are the case

¹¹¹ *Id.* at 37.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 38-39.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 39.

¹¹⁷ *Id.* at 22.

¹¹⁸ See *GE V*, 610 F.3d 110, 118 (D.C. Cir. 2010) (citing *Ex parte Young*, 209 U.S. 123, 147 (1908)), *cert. denied*, 131 S. Ct. 2959 (2011).

¹¹⁹ *Ex parte Young*, 209 U.S. at 147.

¹²⁰ *GE V*, 610 F.3d at 118.

¹²¹ *Okla. Operating Co. v. Love*, 252 U.S. 331, 338 (1920); *GE V*, 610 F.3d at 118 (citing *Reisman v. Caplin*, 375 U.S. 440, 446-50 (1964)).

¹²² *GE V*, 610 F.3d at 118 (citing *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 316 (2d Cir. 1986)).

under CERCLA), then there is no constitutional violation.¹²³ Although some have criticized this analysis as “unwise”¹²⁴ and “inappropriate,”¹²⁵ it follows the path of at least three other circuits.¹²⁶

In affirming *GE IV*, the *GE V* court also found that CERCLA’s regime did not violate due process because parties may obtain a hearing by refusing to comply with the order, thus forcing the EPA to court.¹²⁷ Further, the court ultimately determining the appropriate penalty must consider whether the administrative order was proper and whether the party failed to comply “willfully” and “without sufficient cause,”¹²⁸ and even then may decide not to impose fines.¹²⁹ The *GE V* court reasoned that because the imposition of fines and the liability determination are ultimately subject to judicial review, GE “face[d] no Hobson’s choice,” and therefore no due process violation existed.¹³⁰

III. OVERRULING THE MAJORITY’S STATUTORY INTERPRETATIONS AND LEAVING THE CIRCUITS SPLIT OVER DUE PROCESS

The Ninth Circuit was certainly not the first court to address the argument for judicial review of administrative orders based on statutory interpretation.¹³¹ In fact, a number of circuits have also addressed the due process argument, either in regards to the CWA or other environ-

¹²³ *Id.*

¹²⁴ See Recent Case, *D.C. Circuit Upholds EPA Superfund Authority to Issue Cleanup Orders Reviewable Only Under Threat of Penalty: General Electric Co. v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010), 124 HARV. L. REV. 1572, 1572 (2011) (criticizing the court for not analyzing “for instance, the deprivation at stake or the magnitude of the penalty, the feasibility of an earlier hearing, the clarity of the statute and the predictability of what might constitute good faith, or the degree to which a party might ultimately feel coerced by the interaction of those factors”).

¹²⁵ *Id.* at 1576.

¹²⁶ See *GE V*, 610 F.3d at 119 (citing *City of Rialto v. W. Coast Loading Corp.*, 581 F.3d 865, 872 (9th Cir. 2009); *Emp’rs Ins. of Wausau v. Browner*, 52 F.3d 656, 664 (7th Cir. 1995); *S. Pines Assocs. v. United States*, 912 F.2d 713, 717 (4th Cir. 1990)).

¹²⁷ *Id.* at 113.

¹²⁸ *Id.* at 118 (citing 42 U.S.C. §§ 9606(b)(1), 9607(c)(3) (2006 & Supp. IV 2010)).

¹²⁹ *Id.* at 119.

¹³⁰ See *id.*

¹³¹ See, e.g., *Hoffman Grp., Inc. v. EPA*, 902 F.2d 567, 569 (7th Cir. 1990) (holding that the statutory structure of the CWA impliedly precludes judicial review of administrative orders); *Solar Turbines, Inc. v. Seif*, 879 F.2d 1073 (3d Cir. 1989)

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mental statutes that have the same congressional objectives in mind.¹³² Those circuit court cases that did find a congressional implication in the CWA precluding preenforcement review,¹³³ and perhaps those with similar holdings under the CAA,¹³⁴ were overruled by the recent decision in *Sackett*.¹³⁵

A. *The Circuit Court Cases Overruled by the Supreme Court in Sackett: Legislative History, Objectives, and Statutory Interpretation*

Regardless of which environmental law it is enforcing, the EPA is subject to the regulations of the APA, under which “final agency action . . . [is] subject to judicial review.”¹³⁶ As interpreted by most circuits, however, the statutory structure and objectives of the CWA and the CAA¹³⁷ “preclude[d] judicial review.”¹³⁸ Before the Supreme Court issued its opinion in *Sackett*, most circuits had settled the issue of

(holding that the CAA precludes preenforcement review of administrative compliance orders).

¹³² See, e.g., *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1256-60 (11th Cir. 2003) (addressing the due process argument in regards to administrative compliance orders issued under the CAA); *S. Pines Assocs. v. United States*, 912 F.2d 713 (4th Cir. 1990) (finding no due process violation in the CWA’s administrative order process).

¹³³ See, e.g., *Hoffman Grp., Inc.*, 902 F.2d at 569-70; *S. Pines Assocs.*, 912 F.2d at 717.

¹³⁴ See, e.g., *Solar Turbines, Inc.*, 879 F.2d 1073; *Lloyd A. Fry Roofing Co. v. U.S. EPA*, 554 F.2d 885 (8th Cir. 1977).

¹³⁵ See *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012).

¹³⁶ 5 U.S.C. § 704 (2006).

¹³⁷ Some courts have considered § 7607(b)(1) of the CAA as calling for judicial review of “any other final action,” but similar to the difficulties faced in the APA analysis, the CAA does not define “final action.” See *Allsteel, Inc. v. U.S. EPA*, 25 F.3d 312, 314 (6th Cir. 1994).

¹³⁸ *Sackett v. U.S. EPA*, 622 F.3d 1139, 1142-43 (9th Cir. 2010); see also *Hoffman Grp., Inc.*, 902 F.2d at 569 (holding that the statutory structure of the CWA impliedly precludes judicial review of administrative orders); *S. Pines Assocs.*, 912 F.2d at 716 (“The CWA is not only similar in structure to the CAA and CERCLA, but its enforcement provisions were modeled after the enforcement provisions of the CAA.”); *Lloyd A. Fry Roofing Co.*, 554 F.2d at 886 (holding that the CAA precludes judicial review of administrative orders).

whether the EPA's issuance of administrative compliance orders constituted "final agency action."¹³⁹

1. The Seventh Circuit: *Hoffman Group, Inc. v. EPA*

The Seventh Circuit was the first circuit to address administrative compliance orders issued under the CWA in *Hoffman Group, Inc. v. EPA*.¹⁴⁰ Hoffman Group, Inc. ("Hoffman") was a residential developer that filled wetlands in preparation for construction of a subdivision and received an administrative compliance order from the EPA requiring restoration of the site.¹⁴¹ A few months later, the EPA sought administrative penalties against Hoffman in the amount of \$125,000.¹⁴²

Although it did not reach the constitutional argument that Hoffman proffered,¹⁴³ the court concluded that Congress did not intend judicial review of administrative orders based on the structure of the CWA.¹⁴⁴ The *Hoffman* court reasoned that Congress gave the EPA a choice: it can either issue a compliance order or bring a civil action.¹⁴⁵ Thus, allowing judicial review before enforcement "would eliminate this choice."¹⁴⁶

Further, the court found that this statutory structure assured Hoffman a chance to present its arguments in court "before any sanctions can be imposed," and that Hoffman "cannot be compelled to comply" without this opportunity.¹⁴⁷ Thus, the court would be the final arbiter of sanctions and penalties, and "[u]ntil then," the court con-

¹³⁹ See, e.g., *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564, 566 (10th Cir. 1995) (noting that "[a] decision must be final to be reviewable"); *Asbestec Constr. Servs., Inc. v. U.S. EPA*, 849 F.2d 765, 769 (2d Cir. 1988) (finding that the administrative order was not final action); *Solar Turbines, Inc.*, 879 F.2d 1073 (holding that the administrative order did not constitute final action).

¹⁴⁰ *Hoffman Grp., Inc.*, 902 F.2d at 569.

¹⁴¹ *Id.* at 568.

¹⁴² *Id.*

¹⁴³ *Id.* at 570 ("Hoffman will have an opportunity to present any constitutional arguments if the administrative law judge approves the proposed EPA penalty or if the EPA seeks judicial enforcement of the compliance order.").

¹⁴⁴ *Id.* at 569.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

cluded, “Hoffman is not subject to an injunction or any penalties for not obeying the Compliance Order.”¹⁴⁸

2. The Eighth Circuit: *Lloyd A. Fry Roofing Co. v. U.S. EPA*

The first circuit to address the possibility of preenforcement judicial hearings to verify the validity of EPA’s abatement orders under the CAA was the Eighth in *Lloyd A. Fry Roofing Co. v. U.S. EPA*.¹⁴⁹ There was no procedural due process argument presented, and the court was able to resolve the case using the legislative history of the CAA to foreclose the possibility of judicial review of administrative orders.¹⁵⁰

The *Lloyd A. Fry Roofing* court first pointed to the “silent deletion” of an express provision, which would have allowed judicial challenge of CAA orders, by a Conference Committee prior to the CAA’s enactment, which the court felt “strongly suggests that the intent of the omitted portion was rejected in the bill as passed.”¹⁵¹ Secondly, the court noted that the enforcement method provided by Congress included two options, either bringing a judicial enforcement action or issuing an administrative order.¹⁵² The court felt that preenforcement judicial review of administrative orders would “severely limit the effectiveness” of that procedure.¹⁵³ Further, *Lloyd A. Fry Roofing Co.* had “future relief available” if the EPA sought judicial enforcement; it could present its case to the court during that time.¹⁵⁴

Therefore, the *Lloyd A. Fry Roofing* court held that “Congress knowingly meant to and did foreclose plaintiff from maintaining [a preenforcement review] action.”¹⁵⁵ The Eighth Circuit opinion was unique in that it did give weight to the potential accumulation of penalties while the party challenging the order waits for the EPA to sue and offered the creative solution of “invoking the equitable doctrine of

¹⁴⁸ *Id.* at 570.

¹⁴⁹ *Lloyd A. Fry Roofing Co. v. U.S. EPA*, 554 F.2d 885, 886 (8th Cir. 1977).

¹⁵⁰ *Id.* at 889-91.

¹⁵¹ *Id.* at 890.

¹⁵² *Id.* at 890-91.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 891.

¹⁵⁵ *Id.*

laches if the Agency fails to act promptly to seek enforcement.”¹⁵⁶ It is clear, however, that the Eighth Circuit would fall in line with the majority of other circuits that later decided the issue of pre-enforcement review hearings of EPA compliance orders, finding they are an unnecessary hindrance to environmental regulation.¹⁵⁷

3. The Sixth Circuit: *Allsteel, Inc. v. U.S. EPA*

In the Sixth Circuit case of *Allsteel, Inc. v. U.S. EPA*, Allsteel, Inc. (“Allsteel”) received an EPA “stop-work” order issued under the CAA, directing it to halt construction of a manufacturing facility in Milan, Tennessee.¹⁵⁸ The EPA disagreed with the Tennessee Department of Environment and Conservation’s permitting process and felt that it did not meet CAA requirements.¹⁵⁹ The *Allsteel* court is one of only two courts to hold that an EPA administrative order constituted “final agency action.”¹⁶⁰

The *Allsteel* court reached its conclusion by first tackling the *Abbott Laboratories v. Gardner* standard for judicial review of agency action (whether there is “clear and convincing evidence” that Congress manifested an intent to preclude review), and next moving to the *Federal Trade Commission v. Standard Oil Co.* test for whether agency action is “final.”¹⁶¹

Although it considered a previous, similar analysis of the CWA, which concluded that Congress did intend to preclude judicial review of compliance orders,¹⁶² the *Allsteel* court differentiated its interpretation

¹⁵⁶ *Id.* at 891.

¹⁵⁷ See *supra* notes 149-52 and accompanying text.

¹⁵⁸ *Allsteel, Inc. v. U.S. EPA*, 25 F.3d 312, 313 (6th Cir. 1994).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*; *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1257 (11th Cir. 2003) (describing *Allsteel, Inc.*, 25 F.3d 312 and *Alaska v. EPA*, 244 F.3d 748 (9th Cir. 2001) as “the only two cases that have, to our knowledge, ever held that judicial review of an EPA order under the CAA or CWA can be had prior to an EPA-enforcement proceeding”).

¹⁶¹ *Allsteel, Inc.*, 25 F.3d at 313-14.

¹⁶² *Id.* at 313-14 (citing *S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418 (6th Cir. 1994)).

based on language found in section 7601(b)(1) of the CAA.¹⁶³ The statutory language allows judicial review of “any other final action of the Administrator,”¹⁶⁴ which the court took as Congress’s affirmative suggestion of no contrary intent under the *Abbott Labs* standard.¹⁶⁵ Therefore, the remaining question for the *Allsteel* court to resolve was whether the administrative order met the *Standard Oil* factors.¹⁶⁶

The court first found that the order was “the agency’s final and definitive statement” because it was the “last word” from the EPA short of filing a judicial enforcement action.¹⁶⁷ In regard to the second factor, whether the effect of the order in preventing Allsteel from building a new facility was “practical and immediate,” the court felt it “probably would have jeopardized Allsteel’s very survival.”¹⁶⁸ The *Allsteel* court also noted that the penalties for noncompliance with the order imposed “a new obligation,” separate from the statutory obligation, the violation of which “could have meant greater penalties than Allsteel would have faced if EPA had simply brought an enforcement action without first issuing an order.”¹⁶⁹ Third, the court felt that the issues were “purely legal”¹⁷⁰ but added that the EPA could deal with any factual questions that arise.¹⁷¹ Finally, the *Allsteel* court felt that the EPA’s filing of an enforcement action in district court would perhaps better serve efficiency and economy, and a preenforcement hearing would not hinder that avenue.¹⁷²

The *Allsteel* opinion included a noteworthy concurrence, which brought up “serious due process concerns” that might be implicated by not granting Allsteel a preenforcement hearing.¹⁷³ The concurring jus-

¹⁶³ *Id.* at 314.

¹⁶⁴ 42 U.S.C. § 7607(b)(1) (Supp. IV 2010).

¹⁶⁵ *Allsteel, Inc.*, 25 F.3d at 314.

¹⁶⁶ *See id.* at 314-15 (citing *FTC v. Standard Oil Co.*, 449 U.S. 232, 239-42 (1980)).

¹⁶⁷ *Id.* at 315.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* (referring to “the propriety of a stop-work order . . . when a state agency has issued a construction permit”).

¹⁷¹ *Id.*

¹⁷² *Id.* at 315.

¹⁷³ *Id.* at 316 (Wellford, C.J., concurring) (“I cannot believe that Congress intended that EPA have the unreviewable authority to close down indefinitely construction of a

tice further noted that the EPA had failed to initiate an enforcement action “over a period of months,” which led this justice to conclude that “unless EPA brought an enforcement action . . . within a reasonable time, the Clean Air Act may be unenforceable as violative of constitutional due process.”¹⁷⁴ Despite this conclusion, the concurring justice also noted the “unusual fact situation” of this case and that normally “not every administrative stop order would be deemed final agency action.”¹⁷⁵

B. The Remaining Circuit Split: Due Process Arguments

Although the *Sackett* decision used statutory interpretation to introduce judicial review of compliance orders,¹⁷⁶ and currently any due process argument is presumptively moot, the circuit courts remain split in regard to the overarching due process analysis.¹⁷⁷ In fact, the *Sackett* Court did not even address the EPA’s current conundrum in the Eleventh Circuit since that court has found administrative orders to be unconstitutional.¹⁷⁸

Depending on how Congress and the EPA react to the *Sackett* decision, these due process arguments may resurface in future litigation.¹⁷⁹ This is probable considering the tension created by the Eleventh Circuit decision finding a due process violation under the CAA¹⁸⁰ and the *GE* decision, which found no due process violation under CER-

major plant which had not yet initiated any emissions without the opportunity for a full-scale hearing to determine whether the emission system, already approved by the state environmental agency, was in violation of applicable law and regulations.”).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ See *Sackett v. EPA*, 132 S. Ct. 1367, 1372-73 (2012).

¹⁷⁷ See *Gen. Electric Co. v. Jackson*, 610 F.3d 110, 129 (D.C. Cir. 2010) (holding no due process violation under CERCLA), *cert. denied*, 131 S. Ct. 2959 (2011); *cf.* *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1258 (11th Cir. 2003) (finding a due process violation under the CAA); *Asbestec Constr. Servs., Inc. v. U.S. EPA*, 849 F.2d 765, 769 (2d Cir. 1988) (finding inadequate liberty interests at stake to warrant due process protection).

¹⁷⁸ See *Sackett v. EPA*, 132 S. Ct. 1367 (2012); *Tenn. Valley Auth.*, 336 F.3d at 1239 (finding administrative compliance orders issued under the CAA unconstitutional).

¹⁷⁹ See *id.* at 1252 n.27 (suggesting that appellate courts attach to future remand cases a list of judge-made procedures that the EPA should adopt).

¹⁸⁰ *Id.* at 1239.

CLA.¹⁸¹ Other circuits' interpretations of the constitutional issue are also informative, especially considering the similarity between the due process arguments and those in favor of a statutory interpretation allowing judicial review.¹⁸²

1. The Fourth Circuit: *Southern Pines Associates v. United States*

In *Southern Pines Associates v. United States*, the Fourth Circuit found no due process violation in the EPA's practice of issuing administrative orders under the CWA.¹⁸³ *Southern Pines Associates* ("Southern Pines"), like the Sacketts, received an administrative compliance order for discharging fill material into wetlands without a permit.¹⁸⁴ Although the opinion was brief, the *Southern Pines* court dismissed the due process argument by looking at the congressional intent and statutory structure of the CWA and joined the Seventh Circuit in its similar conclusion in *Hoffman*¹⁸⁵ by finding clearly demonstrated intent to forbid preenforcement judicial review.¹⁸⁶

The *Southern Pines* court laid its analytical foundation by looking to the objective of the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"¹⁸⁷ and noting that Congress intended the EPA to act quickly in addressing environmental problems and "without becoming immediately entangled in litigation."¹⁸⁸

The *Southern Pines* court also highlighted the choices Congress provided the EPA for enforcement of the CWA: it can either issue the administrative order or bring a civil action.¹⁸⁹ Because administrative

¹⁸¹ *Gen. Electric Co.*, 610 F.3d at 129.

¹⁸² See *infra* notes 299-301 and accompanying text.

¹⁸³ *S. Pines Assocs. v. United States*, 912 F.2d 713, 717 (4th Cir. 1990).

¹⁸⁴ *Id.* at 714.

¹⁸⁵ *Id.* at 715 (citing *Hoffman Grp., Inc. v. EPA*, 902 F.2d 567, 568-69 (7th Cir. 1990)).

¹⁸⁶ *Id.* at 715.

¹⁸⁷ *Id.* (quoting 33 U.S.C. § 1251 (2006)).

¹⁸⁸ *Id.* at 716 (citing S. REP. NO. 92-414 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3711).

¹⁸⁹ *Id.* at 715 (citing 33 U.S.C. § 1319(a)(3) (2006)).

orders assessing fines are subject to judicial review, “[t]he penalties for violating either the Act or a compliance order are the same,” and “[t]he violator is subject to the same injunction and penalties whether or not EPA has issued a compliance order.”¹⁹⁰ Therefore, the court found that Southern Pines did “not face[] . . . any greater threat from EPA just because EPA seeks to negotiate a solution rather than to institute civil proceedings immediately.”¹⁹¹

Finally, the *Southern Pines* court looked to other environmental statutes, such as the CAA and CERCLA, and other circuits’ interpretations precluding judicial review of orders issued by the courts under those statutes.¹⁹² In regard to CERCLA, the *Southern Pines* opinion cites cases where courts interpreted that judicial review would “interfere with CERCLA’s policy of prompt agency response” prior to Congress’s 1986 amendment to CERCLA expressly precluding judicial review.¹⁹³

Considering all the above factors, the *Southern Pines* court concluded that Congress intended to bar preenforcement judicial review of compliance orders issued under the CWA, and this bar did not raise a Fifth Amendment violation “because [appellants] are not subject to an injunction or penalties until EPA pursues an enforcement proceeding.”¹⁹⁴

2. The Second Circuit: *Asbestec Construction Services, Inc. v. U.S. EPA*

The Second Circuit addressed the procedural due process argument in regard to administrative orders issued under the CAA in *Asbestec Construction Services, Inc. v. U.S. EPA*.¹⁹⁵ Asbestec Construction Services, Inc. (“Asbestec”) was an asbestos removal con-

¹⁹⁰ *Id.* at 715-16.

¹⁹¹ *Id.* at 716 n.3.

¹⁹² *Id.* at 716.

¹⁹³ *Id.* (citing *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 315 (2d Cir. 1986); *Barnes v. U.S. District Court*, 800 F.2d 822, 822 (9th Cir. 1986); *United States v. Outboard Marine Corp.*, 789 F.2d 497, 505-06 (7th Cir. 1986); *Wheaton Indus. v. U.S. EPA*, 781 F.2d 354, 356-57 (3d Cir. 1986); *J.V. Peters & Co. v. EPA*, 767 F.2d 263, 264-65 (6th Cir. 1985)).

¹⁹⁴ *S. Pines Assocs. v. United States*, 912 F.2d 713, 717 (4th Cir. 1990).

¹⁹⁵ *Asbestec Constr. Servs., Inc. v. U.S. EPA*, 849 F.2d 765, 766 (2d Cir. 1988).

tractor that received a compliance order after the EPA learned that it was not properly removing asbestos from a plant in New Jersey, causing the emission of dust and debris.¹⁹⁶ In *Asbestec*, the court first determined that compliance orders did not constitute “final action” as described in section 7607(b)(1) of the CAA.¹⁹⁷ It then addressed Asbestec’s argument that the EPA’s administrative order issued under the CAA deprived it of liberty and property without due process.¹⁹⁸

In its determination of whether the administrative orders constituted “final action” under the CAA, the *Asbestec* court considered four factors from *Standard Oil*: (1) whether the action is the final statement of the agency, (2) whether the absence of review would have a “practical and immediate” effect, (3) whether the issues are legal or factual, and (4) whether allowing immediate review “would foster agency and judicial efficiency.”¹⁹⁹ Although the court felt the compliance order was a definitive and final statement of the EPA’s position, the court found for the EPA on the other three factors.²⁰⁰

The *Asbestec* court found no “practical and immediate” effects such as “the imposition of an obligation, the denial of a right, or some other establishment of a legal relationship.”²⁰¹ Further, because the issues were mostly factual and the courts of appeals “are not designed and are ill-equipped to serve as fact-finding forums,” the third factor weighed in favor of the EPA.²⁰² Finally, the court found that “speedy action is essential” and noted Congress’s concerns in enacting environmental protection laws such as CERCLA.²⁰³ The court said,

Here, the EPA must have some degree of free rein to protect the public from exposure to asbestos. To introduce the delay of court review of administrative action taken to ameliorate a potential public health hazard

¹⁹⁶ *Id.* at 766-67.

¹⁹⁷ *Id.* at 769.

¹⁹⁸ *Id.* at 769-70.

¹⁹⁹ *Id.* at 768 (citing *FTC v. Standard Oil Co.*, 449 U.S. 232, 239-43 (1980)).

²⁰⁰ *Id.* at 768-69.

²⁰¹ *Id.* at 768.

²⁰² *Id.* at 769.

²⁰³ *Id.*

would conflict with Congress' aim to 'accelerate . . . the prevention and control of air pollution.'²⁰⁴

Without jurisdiction (under the CAA's standard of "final action") to hear Asbestec's challenge of the merits of the administrative order, the court moved on to its analysis of Asbestec's due process arguments.²⁰⁵

With respect to the due process arguments, the *Asbestec* court did not even reach the *Mathews v. Eldridge* balancing test.²⁰⁶ It found Asbestec's "future business prospects" were insufficient liberty interests to warrant due process protection.²⁰⁷ Similarly, the court felt that Asbestec's "opportunity to obtain a federal contract" was not a protected property right with regard to the due process clause.²⁰⁸ Therefore, the EPA's regime of issuing compliance orders under the CAA deprived Asbestec of neither protected property nor liberty interests, and the court found that due process protection was not warranted.²⁰⁹

3. The Eleventh Circuit: *Tennessee Valley Authority v. Whitman*

An anomaly among circuit rulings regarding the constitutionality of administrative orders issued under environmental laws, the Eleventh Circuit decision in *Tennessee Valley Authority v. Whitman*²¹⁰ was the main case that the Sacketts relied upon before the Supreme Court.²¹¹ In *Tenn. Valley Auth.*, the Eleventh Circuit found that administrative orders issued under the CAA, which is structurally similar to the CWA, did not constitute "final agency action" because they were unconstitutional²¹²—a leap that no other circuit made, and a decision even the Supreme Court did not reach.²¹³

²⁰⁴ *Id.* (quoting 42 U.S.C. § 7401(b)(2) (2006)).

²⁰⁵ *Id.* at 769.

²⁰⁶ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

²⁰⁷ *Asbestec Constr. Servs., Inc.*, 849 F.2d at 769.

²⁰⁸ *Id.* at 770.

²⁰⁹ *Id.*

²¹⁰ *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236 (11th Cir. 2003).

²¹¹ See Petitioners' Brief on the Merits, *supra* note 5, at 12, 18, 22, 56.

²¹² *Tenn. Valley Auth.*, 336 F.3d at 1239.

²¹³ See *Sackett v. EPA*, 132 S. Ct. 1367, 1373 (2012).

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The Tennessee Valley Authority (“TVA”) is an electricity provider that owns several coal-fired power plants.²¹⁴ During the 1980s and 1990s, TVA began to replace components in the plants, invoking the EPA’s jurisdiction under the CAA.²¹⁵ In 1999, the EPA issued an administrative compliance order directing TVA to obtain the necessary permits.²¹⁶ After amending the compliance order six times, the EPA held an administrative hearing upholding the order.²¹⁷ TVA, like the Sacketts, held firm to its position that it had not violated the CAA.²¹⁸

Delving into a lengthy review of finality and the decisions of other circuits, the *Tenn. Valley Auth.* court found that administrative compliance orders have the status of law (and thus constitute final agency action) because “several provisions of the CAA undeniably authorize the imposition of severe civil and criminal penalties based solely upon noncompliance with an ACO.”²¹⁹ The *Tenn. Valley Auth.* court felt that judicial enforcement of an administrative compliance order could result in penalties “even if the EPA is incapable of proving an act of illegal pollution”²²⁰

The court felt that the government could therefore impose severe penalties without a fair hearing before a neutral decisionmaker “at a

²¹⁴ *Tenn. Valley Auth.*, 336 F.3d at 1243.

²¹⁵ *Id.* at 1244; *see also* 42 U.S.C. § 7411(a)(4) (2006) (defining “modification”).

²¹⁶ *Tenn. Valley Auth.*, 336 F.3d at 1244.

²¹⁷ *Id.* at 1245-46.

²¹⁸ *Id.* at 1244-45.

²¹⁹ *Id.* at 1255 (abbreviating “administrative compliance order” as ACO).

²²⁰ *Id.* at 1256. This is a different approach than that of other circuits with regard to the imposition of penalties solely for a violation of the administrative order. Even those circuits that have noted the possibility did not find the practice unconstitutional. *See, e.g.*, *Hoffman Grp., Inc. v. EPA*, 902 F.2d 567, 568 (7th Cir. 1990) (“[T]he court . . . may impose civil penalties of up to \$25,000 per day for each violation of the compliance order.”); *S. Pines Assocs. v. United States*, 912 F.2d 713, 715 (4th Cir. 1990) (“The court . . . may impose civil penalties of up to \$25,000 per day for each violation of the Act, a permit, or a compliance order.”); *see also Wheeler, supra* note 72, at 615 (“If a court were to rule that the underlying CWA violation did not occur, it would be illogical for the court to then assess penalties for a compliance order violation that the EPA could not have brought to the court without the CWA violation.”).

meaningful time and in a meaningful manner.”²²¹ This construction of the CAA enabled the *Tenn. Valley Auth.* court to find that “the statutory scheme established by Congress . . . is repugnant to the Due Process Clause of the Fifth Amendment.”²²² As a result, the Eleventh Circuit is the only jurisdiction in the nation where the EPA cannot issue compliance orders for violations of the CAA.²²³

IV. ANALYSIS

A. *Sackett Makes Overruling a Majority of Circuits Look Easy*

The Supreme Court issued the *Sackett* opinion on March 21, 2012.²²⁴ By adhering to its doctrine of “constitutional avoidance,”²²⁵ the Supreme Court found that the APA allows judicial review of administrative orders issued under the CWA²²⁶ and managed to circumvent the issue of whether the EPA’s administrative order regime caused a due process violation.²²⁷ Instead, the *Sackett* Court interpreted administrative orders issued under the CWA as “final agency action”²²⁸ by looking at the standards that Justice Scalia himself set forth in *Bennett v. Spear*,²²⁹ an approach similar, yet simpler, than that taken by other circuits tackling the same issue using the *Standard Oil* factors.²³⁰

²²¹ *Tenn. Valley Auth.*, 336 F.3d at 1258 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

²²² *Id.* at 1258.

²²³ Jason D. Nichols, *Towards Reviving the Efficacy of Administrative Compliance Orders: Balancing Due Process Concerns and the Need for Enforcement Flexibility in Environmental Law*, 57 ADMIN. L. REV. 193, 217 (2005); Wynn, *supra* note 64, at 1883.

²²⁴ *Sackett v. EPA*, 132 S. Ct. 1367 (2012).

²²⁵ See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) (“The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts.”); see also *Tenn. Valley Auth.*, 336 F.3d at 1248-49 (“[C]ourts are loath to infer a congressional intention to enact unconstitutional legislation.”).

²²⁶ *Sackett*, 132 S. Ct. at 1374.

²²⁷ See generally *id.* (avoiding the due process discussion).

²²⁸ *Id.*

²²⁹ *Id.* at 1371 (citing *Bennett v. Spear*, 520 U.S. 154, 178 (1997)).

²³⁰ See *FTC v. Standard Oil Co.*, 449 U.S. 232, 239-40 (1980); see, e.g., *Allsteel, Inc. v. U.S. EPA*, 25 F.3d 312, 313-15 (6th Cir. 1994); *Asbestec Constr. Servs., Inc. v. U.S. EPA*, 849 F.2d 765, 768 (2d Cir. 1988).

The test for “final agency action” set forth in *Bennett v. Spear* consists of two general conditions: “First, the action must mark the ‘consummation’ of the agency’s decisionmaking process,” and second, the action must determine “rights or obligations” or produce “legal consequences.”²³¹ This is essentially a watered-down version of the *Standard Oil* test used by both the Second Circuit in *Asbestec* and the Sixth Circuit in *Allsteel*.²³² The *Standard Oil* factors that determine “final agency action,” borrowed from the seminal case of *Abbott Labs v. Gardner*,²³³ consider not only whether the action is the agency’s final decision and any immediate and practical effects,²³⁴ but also the nature of the issues being determined (whether they are legal or factual) and whether judicial review would promote efficiency.²³⁵

Under the *Bennett* test, the *Sackett* Court first found that the administrative order “determined rights or obligations” to restore the property and to give the EPA access to inspect the property.²³⁶ It also found that “legal consequences . . . flow” from the order because of the penalties accrued and the difficulty in obtaining an after-the-fact permit from the Army Corps of Engineers (“Corps”).²³⁷ The Court also determined that the administrative order “marks the consummation of the agency’s decisionmaking process” because the Sacketts were not entitled to further review by the EPA.²³⁸

The cases utilizing the *Standard Oil* factors to determine final agency action reach different results on two extreme and opposite sides.²³⁹ In *Allsteel*, although it was an “unusual” case,²⁴⁰ the Sixth Circuit found that the EPA’s order did impose “a new obligation, not one

²³¹ *Bennett*, 520 U.S. at 177-78.

²³² Compare *id.*, with *Standard Oil Co.*, 449 U.S. at 239-40 (citing *Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967)).

²³³ *Abbott Labs.*, 387 U.S. at 149-54.

²³⁴ *Standard Oil Co.*, 449 U.S. at 239-40.

²³⁵ *Id.*

²³⁶ *Sackett v. EPA*, 132 S. Ct. 1367, 1371 (2012).

²³⁷ *Id.* at 1371-72.

²³⁸ *Id.* at 1372.

²³⁹ See, e.g., *Allsteel, Inc. v. U.S. EPA*, 25 F.3d 312, 313-15 (6th Cir. 1994); *Asbestec Constr. Servs., Inc. v. U.S. EPA*, 849 F.2d 765, 768 (2d Cir. 1988).

²⁴⁰ *Allsteel, Inc.*, 25 F.3d at 316 (Wellford, C.J., concurring) (“I would also add that not every administrative stop order would be deemed final agency action.”).

directly imposed by statute,” mainly due to the effect of the order in shutting down a manufacturing facility and imposing “greater penalties than Allsteel would have faced if EPA had simply brought an enforcement action.”²⁴¹ The *Allsteel* court also found that the question was “purely legal,” stating, “To the extent that the petition may raise factual questions, they could be dealt with by remand to the agency”²⁴²

In *Asbestec*, the Second Circuit gave more weight to the EPA on the final three factors, finding that “neither [Asbestec’s] duties nor its obligations have been altered by the compliance order,” and noting simply, “Petitioner need only comply with the law.”²⁴³ The *Asbestec* court also found the issues to be mostly factual, thus placing “a significant burden on appellate courts.”²⁴⁴ Finally, the court found that “speedy action is essential. . . . [T]he EPA must have some degree of free rein to protect the public from exposure to asbestos,” and preenforcement judicial review “would serve neither efficiency nor enforcement of the Clean Air Act.”²⁴⁵ The Tenth Circuit succinctly noted in its review of an administrative compliance order issued under the CWA in *Laguna Gatuna, Inc. v. Browner* that “[j]udicial review of every unenforced compliance order would undermine the EPA’s regulatory authority.”²⁴⁶

Perhaps if the *Sackett* Court had considered the final two *Standard Oil* factors, it would have at least noted that the jurisdictional issues are purely factual, and allowing this type of challenge to each order would ultimately lead to inefficiency and delay in enforcement.²⁴⁷ A determination of whether a certain property contains wetlands requires

²⁴¹ *Id.* at 315. This is a different view than that held by the Fourth Circuit in *Southern Pines*, which noted that violators are “subject to the same injunction and penalties whether or not EPA has issued a compliance order.” *S. Pines Assocs. v. United States*, 912 F.2d 713, 715-16 (4th Cir. 1990).

²⁴² *Allsteel, Inc.*, 25 F.3d at 315.

²⁴³ *Asbestec Constr. Servs., Inc.*, 849 F.2d at 768-69.

²⁴⁴ *Id.* at 769.

²⁴⁵ *Id.* (citations omitted) (internal quotation marks omitted).

²⁴⁶ *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564, 566 (10th Cir. 1995).

²⁴⁷ *Compare* *FTC v. Standard Oil Co.*, 449 U.S. 232, 239-40 (1980) (stating the final two factors are whether the challenge is a “legal issue . . . fit for judicial resolution” and whether judicial review would promote efficiency), *with* *Sackett v. EPA*, 132 S. Ct. 1367 (2012) (failing to consider either of the final two factors from *Standard Oil Co.*, 449 U.S. at 239-40).

an engineer or scientist to conduct surveys and take samples of the species living in the area.²⁴⁸ A factual determination this narrow²⁴⁹ normally invokes discretion towards the agency's findings,²⁵⁰ but the Court also should have realized that this type of judicial review would essentially be a battle of the experts and, therefore, more appropriate for agency determination.²⁵¹

The *Sackett* Court next addressed the APA requirement that there must be "no other adequate remedy in a court."²⁵² The Sacketts could not initiate court proceedings against the EPA under the CWA enforcement provisions, and the Court noted, "[E]ach day they wait for the agency to drop the hammer, they accrue . . . an additional \$75,000 in potential liability."²⁵³ The Court here apparently disregarded the discretion of the judiciary to reduce fines in an enforcement action.²⁵⁴ In *GE*

²⁴⁸ See, e.g., ENVTL. TECHNICAL SERVS. CO., US ARMY CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL, PT. 4, § E, available at <http://www.wetlands.com/coe/87manp4e.htm> (last revised Nov. 19, 1995).

²⁴⁹ See *Sackett v. U.S. EPA*, 622 F.3d 1139, 1144 (9th Cir. 2010) ("Enforcement of violations of requirements under this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay. This goal of enabling swift corrective action would be defeated by permitting immediate judicial review of compliance orders." (quoting S. REP. NO. 92-414 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3730)), rev'd, *Sackett v. EPA*, 132 S. Ct. 1367 (2012).

²⁵⁰ 5 U.S.C. § 706(2)(A) (2006) (using the reviewing standard of "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

²⁵¹ See *The Lands Council v. McNair*, 537 F.3d 981, 1000 (9th Cir. 2008) ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive."); see also *Californians for Alternatives to Toxics v. U.S. Fish & Wildlife Serv.*, 814 F. Supp. 2d 992, 1005 (E.D. Cal. 2011) (finding that when the agency is operating within its area of expertise, "a reviewing court is not to entertain a 'battle of the experts' when plaintiffs proffer expert testimony to set against the agency's professional judgment").

²⁵² *Sackett*, 132 S. Ct. at 1371 (citing 5 U.S.C. § 704 (2006)).

²⁵³ *Id.* at 1372.

²⁵⁴ See *GE V*, 610 F.3d 110, 118 (D.C. Cir. 2010) ("Courts have also held that 'there is no constitutional violation if the imposition of penalties is subject to judicial discretion.'" . . . Further, a party only faces fines "if a federal court finds (1) that the [administrative order] was proper; (2) that the [party] 'willfully' failed to comply 'without sufficient cause'; and (3) that, in the court's discretion, fines and treble damages are appropriate." (citing 42 U.S.C. §§ 9606(b)(1), 9607(c)(3) (2006 & Supp. IV 2010))), cert. denied, 131 S. Ct. 2959 (2011).

V, the court even noted that “the district court has authority to decide not to impose fines even if it concludes that a recipient ‘without sufficient cause, willfully violate[d], or fail[ed] or refuse[d] to comply with’” an administrative order.²⁵⁵

Moreover, in *GE IV* the D.C. Circuit discounted GE’s assertion²⁵⁶ that it and other recipients of administrative orders would be “indefinitely ‘left in limbo’” if they did not immediately comply with the EPA’s directives.²⁵⁷ The court found that GE had offered no evidence to show that the EPA actually delays in bringing judicial enforcement proceedings,²⁵⁸ unlike the *Sackett* Court, which did not consider any facts.²⁵⁹ Further, the *GE V* court noted, “[R]ecipients may be complying in large numbers not because they feel coerced, but because they believe that [administrative orders] are generally accurate and would withstand judicial review.”²⁶⁰

The *Sackett* Court next quickly dismissed the EPA’s interpretation of the structure of the CWA to overcome the APA’s strong presumption of judicial review.²⁶¹ The Court found that the choice between judicial and administrative action under the CWA does not imply preclusion of judicial review of the latter (in contrast to the findings of the Seventh,²⁶² Eighth,²⁶³ and Fourth²⁶⁴ Circuits) because there are

²⁵⁵ *Id.* at 119.

²⁵⁶ See *GE IV*, 595 F. Supp. 2d 8, 31 (D.D.C. 2009) (noting that GE “has not offered any evidence to suggest that EPA in fact delays enforcement”).

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 32 (“GE has not demonstrated that EPA in fact routinely waits as long as the CERCLA statutes of limitations allow before bringing enforcement or cost recovery actions.”).

²⁵⁹ See *supra* note 22 and accompanying text.

²⁶⁰ *GE V*, 610 F.3d at 128.

²⁶¹ See *Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012) (“Nothing in the Clean Water Act expressly precludes judicial review under the APA or otherwise.”).

²⁶² See *Hoffman Grp., Inc. v. EPA*, 902 F.2d 567, 569 (7th Cir. 1990) (explaining that allowing judicial review of a compliance order before an enforcement proceeding “would eliminate this choice”).

²⁶³ See *Lloyd A. Fry Roofing Co.*, 554 F.2d at 890-91 (“[P]re-enforcement judicial review is wholly inconsistent with the enforcement mechanism established by Congress.”).

²⁶⁴ See *S. Pines Assocs.*, 912 F.2d at 715 (“Congress provided EPA with a choice of procedures for enforcing the Act.”).

other reasons “why compliance orders are useful,” for example, in cases of “voluntary compliance.”²⁶⁵

The *Sackett* Court does not explain how allowing preenforcement review of compliance orders promotes the purpose of “voluntary compliance.”²⁶⁶ Nor does it address the unknown reason why the EPA would choose to issue an administrative order against a party that could judicially challenge the order rather than seek judicial enforcement from the beginning.²⁶⁷ Perhaps those who are unaware of their new right to challenge administrative orders (or who cannot afford to bring suit) will “voluntarily comply.”²⁶⁸ Further, the *Sackett* decision implies that administrative orders will be subject to both preenforcement review as well as judicial enforcement,²⁶⁹ leaving the judiciary as the ultimate arbiter of the EPA’s jurisdiction, findings, and penalties in cases where there is no “voluntary compliance.”²⁷⁰

The *Sackett* Court next reasoned that the required judicial enforcement of administrative orders does not mean the orders are not “final agency action.”²⁷¹ The Court simply said, “[T]he EPA’s ‘deliberation’ over whether the Sacketts are in violation of the Act is at an end; the agency may still have to deliberate over whether it is confident enough about this conclusion to initiate litigation, but that is a separate

²⁶⁵ *Sackett*, 132 S. Ct. at 1373 (“It is entirely consistent with this function to allow judicial review.”).

²⁶⁶ *Id.* The *Sackett* Court did say, “The Act does not guarantee the EPA that issuing a compliance order will always be the most effective choice.” *Id.* Post-*Sackett*, the effectiveness of the administrative compliance order remains to be seen.

²⁶⁷ *See id.* (recognizing that “Congress gave the EPA the choice between a judicial proceeding and an administrative action” but not exploring the motives behind each choice).

²⁶⁸ *See id.* at 1374 (suggesting that recipients of compliance orders have other options besides “voluntary compliance”).

²⁶⁹ *See Wynn, supra* note 64, at 1899 (“Premature judicial intervention into agency action may also lead to ‘piecemeal review’ that is inefficient and might prove to have been unnecessary upon completion of the agency’s process.”).

²⁷⁰ *See Sackett*, 132 S. Ct. at 1374 (“[T]here is no suggestion that Congress sought to exclude compliance-order recipients from the Act’s review scheme; . . . the Act’s primary review mechanisms are open to the Sacketts.”).

²⁷¹ *Id.* at 1373 (noting that judicial review was proper because the only remaining options were the Sacketts’s compliance or, if the Sacketts did not comply, judicial review of the enforcement action brought by the EPA).

subject.”²⁷² The Seventh,²⁷³ Eighth,²⁷⁴ and Fourth²⁷⁵ Circuits apparently viewed it as the same subject, at least insofar as believing that parties could challenge the EPA’s jurisdiction during an enforcement hearing.

Finally, the *Sackett* Court devoted one paragraph to the objective of the CWA, to “obtain quick remediation.”²⁷⁶ The Court managed to strike down the efficiency argument while still acknowledging that judicial review will hinder the EPA’s objective of swiftly correcting environmental issues.²⁷⁷ It reasoned, “[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.”²⁷⁸ The Court concluded by stating, “Compliance orders will remain an effective means of securing prompt voluntary compliance in those many cases where there is no substantial basis to question their validity.”²⁷⁹

B. Future Due Process Arguments

Although violators of the CWA are now entitled to judicial review of administrative compliance orders,²⁸⁰ the *Sackett* Court did not touch on the due process interpretations of other circuits (specifically, whether the new review process invalidates the constitutional argument).²⁸¹ It is easy to imagine a scenario where a company like GE emits pollutants into a wetland, setting the stage for a due process argu-

²⁷² *Id.*

²⁷³ *Hoffman Grp., Inc. v. EPA*, 902 F.2d 567, 569 (7th Cir. 1990) (“Hoffman [gets] a full opportunity to present its arguments before any sanctions can be imposed.”).

²⁷⁴ *Lloyd A. Fry Roofing Co. v. U.S. EPA*, 554 F.2d 885, 891 (8th Cir. 1977) (“[P]laintiff must assert its claims as a defense or counterclaim in any action brought by the Administrator of EPA under section 113 of the Clean Air Act.”).

²⁷⁵ *S. Pines Assocs. v. United States*, 912 F.2d 713, 717 (4th Cir. 1990) (“Southern Pines . . . can contest the existence of EPA’s jurisdiction if and when EPA seeks to enforce the penalties provided by the Act.”).

²⁷⁶ *Sackett*, 132 S. Ct. at 1374.

²⁷⁷ *See id.* (“[T]he Government warns that the EPA is less likely to use the orders if they are subject to judicial review. That may be true—but it will be true for all agency actions subjected to judicial review.”).

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *See id.* at 1374.

²⁸¹ *See generally id.*

ment under the CWA instead of CERCLA.²⁸² By noting that the CWA does not “*expressly* preclude[]” judicial review of administrative orders,²⁸³ the Court may be suggesting an appropriate legislative reaction.²⁸⁴ Admittedly, *Sackett* has hampered the efficiency of the EPA’s administrative orders issued in response to violations of the CWA.²⁸⁵

If Congress takes advice from the bench²⁸⁶ and decides to rewrite the definition of “wetlands,” Congress could also explicitly preclude judicial review of all environmental statutes, or the EPA could begin to utilize warning letters assessing administrative fines in the place of compliance orders,²⁸⁷ either of which might open the due process argument for future litigants.²⁸⁸ It is also interesting to note that the arguments for “final agency action” and due process are similar in this context,²⁸⁹ so the Supreme Court’s current reaction to these arguments may foreshadow a future due process decision.²⁹⁰

The Fifth Amendment of our Constitution guarantees us “due process of law” before we are “deprived of life, liberty, or property.”²⁹¹ Courts usually consider competing interests under the *Mathews v. El-*

²⁸² 33 U.S.C. § 1362(5) (2006) (defining “person” as including corporations); *see, e.g.*, *Gen. Electric Co. v. Jackson*, 610 F.3d 110, 113-14 (D.C. Cir. 2010) (noting how companies are liable for hazardous waste sites under CERCLA); Brenner Fissell et al., *Environmental Crimes*, 49 AM. CRIM. L. REV. 611, 621-22, 643-47, 658-59 (2012) (noting that “[c]riminal penalties may be assessed against any ‘person’ who fails to comply with the statutory requirements of the CWA” and discussing constitutional defenses commonly asserted against various environmental violations, including CERCLA and the CWA).

²⁸³ *See Sackett*, 132 U.S. at 1372.

²⁸⁴ *Id.* at 1375 (Alito, J., concurring); *see also infra* note 277 and accompanying text.

²⁸⁵ *See id.* at 1374 (majority opinion) (“The Government warns that the EPA is less likely to use the orders if they are subject to judicial review. That may be true—but it will be true for all agency actions subjected to judicial review. The APA’s presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all.”).

²⁸⁶ *See id.* at 1375 (Alito, J., concurring) (“Real relief requires Congress to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act.”).

²⁸⁷ *See supra* note 43.

²⁸⁸ *See supra* notes 43-44, 299-301 and accompanying text.

²⁸⁹ *See infra* notes 299-301 and accompanying text.

²⁹⁰ *See infra* notes 298-301 and accompanying text.

²⁹¹ U.S. CONST. amend. V.

dridge balancing test, which weighs the private interests against the governmental interests, while considering such factors as the “risk of an erroneous deprivation” and “the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”²⁹² Before exploring *Mathews v. Eldridge*, however, a court must first determine whether the property interests at stake qualify for protection.²⁹³

The property interests at issue in *GE* and *Sackett* are considerably different, possibly another reason why the Court granted certiorari for the Sacketts.²⁹⁴ The consequential diminution of GE’s market share and reputation, the D.C. Circuit held, was not enough to trigger due process review.²⁹⁵ However, the *GE* court cited *Connecticut v. Doehr* and found that “real property attachments qualify as deprivations within the meaning of the Due Process Clause.”²⁹⁶ Therefore, regardless of whether the party is an individual or a corporation, due process review may arise in the future if the protected interest is real property.²⁹⁷

The core arguments that the *Sackett* Court scrutinized also apply in a due process analysis.²⁹⁸ These arguments include the structure of the statute in providing a choice of enforcement techniques to the EPA,²⁹⁹ the legislative history and objectives underlying the efficiency

²⁹² *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

²⁹³ *See* *Gen. Electric Co. v. Jackson*, 610 F.3d 110, 120 (D.C. Cir. 2010) (citing *Connecticut v. Doehr*, 501 U.S. 1, 111 (1991)), *cert. denied*, 131 S. Ct. 2959 (2011); *Asbestec Constr. Servs., Inc. v. EPA*, 849 F.2d 765, 769-70 (2d Cir. 1988) (finding that “future business prospects” are insufficient to constitute a liberty interest).

²⁹⁴ *Sackett v. EPA*, 132 S. Ct. 1367, 1370-71 (2012) (discussing the Sacketts’s CWA violation, which directed the Sacketts to restore their private property); *Gen. Electric Co.*, 610 F.3d at 115-16 (noting that under GE’s violation the company was subject to punishment by fines and treble damages).

²⁹⁵ *Gen. Electric Co.*, 610 F.3d at 120-21 (citations omitted).

²⁹⁶ *Id.* at 120 (citing *Doehr*, 501 U.S. at 11).

²⁹⁷ Due process review is more probable if the EPA initiates an action under the CWA rather than under the CAA or CERCLA, where costs and market share are more likely at stake. *See id.*; *see also* Brief of Amicus Curiae National Ass’n of Home Builders in Support of the Petitioners at 17-18, *Fairbanks N. Star Borough v. U.S. Army Corps of Eng’rs*, 543 F.3d 586 (9th Cir. 2008) (No. 08-1052), 2009 WL 788657; *supra* text accompanying note 294.

²⁹⁸ *See infra* notes 299-301 and accompanying text.

²⁹⁹ *Sackett v. EPA*, 132 S. Ct. 1367, 1373 (2012); *see also Hoffman Grp., Inc. v. EPA*, 902 F.2d 567, 569 (7th Cir. 1990) (using the “choice” argument in a statutory

of the administrative order process,³⁰⁰ and most importantly, a court's ultimate imposition and enforcement of any administrative penalties outlined in an administrative order.³⁰¹ Although the *Sackett* Court downplayed these arguments, they have survived in other circuits,³⁰² which the *Sackett* decision did not address.³⁰³

Although the option available to the EPA to either issue administrative orders or proceed directly to judicial enforcement tips the scales in favor of the government,³⁰⁴ the requirement of judicial approval and enforcement of administrative penalties³⁰⁵ balances this option with the protection of private property interests.³⁰⁶ Judicial enforcement also reduces the "risk of an erroneous deprivation."³⁰⁷ The clear legislative objectives behind empowering the EPA with the administrative order³⁰⁸ underscore the additional burdens that Congress

construction analysis); *S. Pines Assocs. v. United States*, 912 F.2d 713, 715 (4th Cir. 1990) (noting the EPA's "choice" in a due process analysis).

³⁰⁰ *Sackett*, 132 S. Ct. at 1374; *see also S. Pines Assocs.*, 912 F.2d at 716 (using congressional objectives in a due process analysis); *Lloyd A. Fry Roofing Co. v. U.S. EPA*, 554 F.2d 885, 890-93 (8th Cir. 1977) (using the legislative history of the CAA to foreclose judicial review of compliance orders).

³⁰¹ *Sackett*, 132 S. Ct. at 1373; *see also Hoffman Grp., Inc.*, 902 F.2d at 569 (finding the enforcement hearing adequate opportunity to challenge the validity of the administrative order in a statutory analysis); *S. Pines Assocs.*, 912 F.2d at 715-16 (noting that a violator is not subject to additional penalties just because the EPA issued a compliance order).

³⁰² *See supra* notes 299-301; *see also Sackett v. U.S. EPA*, 622 F.3d 1139, 1143 (9th Cir. 2010) (noting the persuasiveness of "the broad uniformity of consensus on this issue"), *rev'd*, *Sackett*, 132 S. Ct. 1367.

³⁰³ *See Sackett*, 132 S. Ct. 1367.

³⁰⁴ "Government interests" in this context would be more aptly referenced as "the public interest" in protecting the environment, which benefits society as a whole along with our future generations. *See United States v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999) ("The criminal provisions of the CWA constitute public welfare legislation.").

³⁰⁵ 33 U.S.C. § 1319(g) (2006).

³⁰⁶ *See Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring) (discussing the ramifications of a compliance order that is not reviewable and the potential outcome for private property owners).

³⁰⁷ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

³⁰⁸ *See supra* notes 29, 33 and accompanying text.

foresaw in allowing judicial review prior to enforcement—that it would only reduce expediency.³⁰⁹

Although these issues may not arise again without congressional or agency response to *Sackett*, the Court has clearly expressed its admonition of the administrative order procedure³¹⁰ and will likely discount these arguments in a future due process challenge.³¹¹ The Court's ultimate objective is at this point unclear, but by allowing judicial review of administrative orders, it could be strategizing a plan to further constrict the EPA's jurisdiction over "wetlands."³¹²

V. CONCLUSION AND COMMENTARY

The *Sackett* decision likely appears to many observers as the next logical step in the Supreme Court's current disapproval of the EPA's environmental regime over wetlands.³¹³ After the Supreme Court's extremely brief opinion, the EPA's most effective tool for hastily remedying environmental violations now faces judicial scrutiny on the basic issue of jurisdiction.³¹⁴ Admittedly ignoring the underlying merits of the dispute,³¹⁵ the Supreme Court overruled many circuits that had considered and reasonably analyzed the merits of their cases.³¹⁶

The *Sackett* decision could also be seen as a method to introduce judicial review of the underlying CWA violations, and if a difficult case arises questioning the definition of "wetlands," the Supreme Court may again jump at the chance to restrict the meaning.³¹⁷ The Court has narrowed the EPA's jurisdiction by altering the definition of "wetlands"

³⁰⁹ See *supra* notes 188, 194, 276-77 and accompanying text.

³¹⁰ See *supra* note 8 and accompanying text.

³¹¹ See *supra* notes 179-81, 280-88 and accompanying text.

³¹² See *supra* note 23 and accompanying text.

³¹³ See *supra* note 24 and accompanying text.

³¹⁴ See *supra* notes 11, 15-17, 247 and accompanying text.

³¹⁵ See *supra* note 22 and accompanying text.

³¹⁶ See *supra* notes 132-35 and accompanying text.

³¹⁷ See *supra* notes 16-23 and accompanying text.

over the past decade,³¹⁸ yet it criticizes the EPA's continued determination of jurisdiction based on the factual circumstances of each case.³¹⁹

The Court fails to realize that this is the nature of wetlands—it is hard to draw a black-and-white line.³²⁰ In fact, the line is constantly changing.³²¹ Many states and local governments have recognized the importance of wetlands as filters between land and water,³²² yet the Supreme Court continues down its path of restricting the enforcement of federal environmental laws protecting these areas.³²³ Justice Scalia's joke from the bench that the Sacketts would not have known their lands contained wetlands because they had “never seen a ship or other vessel cross their yard”³²⁴ exemplifies the public's general misunderstanding of the role and importance of the nation's wetlands.³²⁵

The *Sackett* opinion ends with the prophecy, “Compliance orders will remain an effective means of securing prompt voluntary compliance in those many cases where there is no substantial basis to

³¹⁸ See *supra* note 21 and accompanying text.

³¹⁹ *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring) (“But far from providing clarity and predictability, the agency's latest informal guidance advises property owners that many jurisdictional determinations concerning wetlands can only be made on a case-by-case basis by EPA field staff.”).

³²⁰ Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37122, 37128 (July 19, 1977) (codified in part at 33 C.F.R. pts. 209, 320-29) (“The regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . but must focus on all waters that together form the entire aquatic system.”).

³²¹ *Id.* (“Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system.”).

³²² See *Wetlands*, ASS'N OF ST. WETLAND MANAGERS, <http://aswm.org/wetlands/about-wetlands> (last visited Mar. 18, 2013).

³²³ See *supra* note 24 and accompanying text.

³²⁴ Robert Barnes & Juliet Eilperin, *Supreme Court Allows Idaho Couple to Challenge EPA on Wetlands Ruling*, WASH. POST (Mar. 21, 2012), http://www.washingtonpost.com/politics/supreme-court-allows-idaho-couple-to-challenge-epa-on-wetlands-ruling/2012/03/21/gIQAFgdsRS_story.html.

³²⁵ *Wetlands*, *supra* note 322 (“Sprawl and development pressure, confusing Supreme Court cases and legal battles, climate change impacts and invasive species, plus the public's general lack of understanding about the value of wetlands hinder the wetland manager's ability to protect wetlands.”). See also *supra* notes 36-40 and accompanying text.

question their validity.”³²⁶ What the Court either overlooks or ignores is that corporate polluters like GE can now challenge all of the EPA’s initial findings, and a simple cost-benefit analysis may lead many corporations to challenge administrative orders regardless of the merits.³²⁷ As long as corporations can file an action in district court to delay, challenge, and possibly avoid the cost of cleanup, they likely will—if GE is any example.³²⁸ This will effectively slow the enforcement of environmental laws, resulting in more pollution and damage to our surroundings.³²⁹ It is now up to Congress to take the next steps in clarifying the EPA’s jurisdiction and to impose lawful procedures that protect the environment expediently and efficiently, without creating a loophole for corporations wishing to escape liability.³³⁰

³²⁶ Sackett v. EPA, 132 S. Ct. 1367, 1374 (2012).

³²⁷ See *supra* notes 30-35 and accompanying text.

³²⁸ See *supra* notes 30-35 and accompanying text.

³²⁹ See Valerie L. Starr, Note, *Should Pre-Enforcement Judicial Review of Administrative Compliance Orders Be Available Under the Clean Air Act?*, 38 SUFFOLK U. L. REV. 903, 918 (2005) (“Pre-enforcement judicial review of administrative compliance orders hinders the purpose of the statute.”); Wheeler, *supra* note 72, at 618 (“The administrative compliance order is a powerful tool for the EPA, and serves as an important rapid response to prevent ongoing environmental damage. The Ninth Circuit was right to hold that these orders should not be subject to immediate judicial review.”).

³³⁰ See Andrew I. Davis, Comment, *Judicial Review of Environmental Compliance Orders*, 24 ENVTL. L. 189, 224 (1994) (“Congress should clarify this enforcement device and decide whether penalties should be imposed and judicial review available, or whether the compliance order should serve merely as a form of notice to the alleged violator.”); Starr, *supra* note 329, at 918 (“In the future, the fate of pre-enforcement judicial review of section 7413 administrative compliance orders can only be determined by a legislative amendment to the CAA.”).