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## Environmental Protection Agency's Enforcement Mechanisms After Sackett v. EPA

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# ENVIRONMENTAL PROTECTION AGENCY'S ENFORCEMENT MECHANISMS AFTER *SACKETT V. EPA*

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## I. INTRODUCTION

This saga begins with an Idaho couple—Mike and Chantell Sackett—small business owners from Bonner County, Idaho, who dreamt one day they would live in a home they personally built.<sup>1</sup> In 2007, not long after the Sacketts began construction of their house, the Sacketts' dream was put on hold when Environmental Protection Agency (EPA) officials visited their property.<sup>2</sup> EPA officials informed the Sacketts that their property contained a wetland and that construction of their home violated the Clean Water Act (CWA).<sup>3</sup> In EPA's pursuit of enforcement,

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1. *See Sackett v. U.S. Env't Prot. Agency*, 132 S. Ct. 1367, 1370 (2012) (discussing the Supreme Court's decision, which held that administrative compliance orders are judicially reviewable under the Administrative Procedures Act).

2. *See id.*

3. *Id.* at 1368.

it issued an administrative compliance order directing the Sacketts to restore their property according to the compliance order or face monetary penalties in the thousands for every day they failed to comply.<sup>4</sup> Believing their property did not contain a wetland, the Sacketts brought suit against EPA under the Administrative Procedures Act (APA).<sup>5</sup> After four long years of litigation, the United States Supreme Court decided to hear the Sacketts' case.<sup>6</sup> On March 21, 2012, with a 9-0 decision, the Court ruled in the Sacketts' favor holding that the Sacketts and landowners everywhere have a right to direct and meaningful judicial review of administrative compliance orders.<sup>7</sup>

EPA's enforcement power is not new. For four decades, EPA had tremendous, broad power abating and controlling pollution, and ensuring compliance with pollution preventing measures.<sup>8</sup> EPA has been "strong-arm[ing]" parties, big and small, into compliance since its inception in the 1970s.<sup>9</sup> Furthermore, EPA has significant "resources, tremendous statutory authority, prosecutorial discretion, and judicial deference."<sup>10</sup> However, with the Supreme Court's decision in *Sackett*, EPA's considerable enforcement power has been largely halted, and its primary enforcement mechanism—the administrative compliance order—is being questioned.<sup>11</sup>

In light of the decision in *Sackett*, this article will attempt to answer the following questions: Will EPA continue to issue administrative compliance orders? If so, how will administrative compliance orders be utilized by EPA? Alternatively, will EPA resort to less formal communications, such as notices of violations (NOVs), to ensure compliance? If so, will NOVs trigger judicial review under the APA?

This article will begin by briefly outlining the historical background of EPA and the CWA. To understand the future of EPA's enforcement power, it is also necessary to understand where EPA and the CWA came from. Second, this article will set forth EPA's enforcement scheme and general enforcement mechanisms under all major federal environmental

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4. *Id.*

5. *Id.*

6. *Id.* at 1371.

7. *Sackett*, 132 S. Ct. at 1368.

8. Letter from Richard Nixon, President, U.S., to Congress, U.S. (July 9, 1970), available at <http://www2.epa.gov/aboutepa/reorganization-plan-no-3-1970> (in which Nixon addressed Congress in 1970 and charged EPA with "protecting the environment by abating pollution.").

9. See Kathleen Hartnett White, *The EPA's Overreach Problem*, PRARIEPUNDIT (May 2, 2012), <http://prairiepundit.blogspot.com/2012/05/epas-overreach-problem.html>.

10. Lowell Rothschild, *Despite Sackett Ruling, Industry Still Faces Challenges with EPA in Permitting and Enforcement Matters*, ENERGY L. BLOG (July 19, 2012, 9:16 AM), <http://www.energylegalblog.com/archives/2012/07/19/4014>.

11. See Richard E. Glaze Jr., *A Detailed Look at the Effects of Sackett v. EPA on Administrative Enforcement Orders*, 42 ENVTL. L. REP. 11030, 11036 (2012) (arguing that *Sackett* "will give EPA the incentive to ensure evidence in the record that supports an ACO is sufficient to withstand judicial review, thereby reducing the potential for issuing orders not supported by the facts.").

statutes. Third, enforcement mechanisms under the CWA will be examined, with a focus on administrative penalties, civil enforcement actions, and administrative compliance orders. Next, this article will set forth the facts and procedural history of *Sackett*, the circuit split prior to *Sackett*, a history of pre-enforcement review, and the Supreme Court's decision in *Sackett*. The *Sackett* test must be wholly understood in order to comprehend the future of EPA enforcement mechanisms. Lastly, a list of recommendations will be offered for EPA to implement with a focus on two alternative actions EPA could consider taking: (1) continuing to issue administrative compliance orders so long as they are altered to not trigger the final agency action test laid out in *Bennett v. Spear*,<sup>12</sup> and (2) exercising other possible enforcement mechanisms that satisfy the final agency action test set forth in *Bennett v. Spear*. The analysis portion of this article sets forth these alternative actions and provides empirical data on the status of post-*Sackett* EPA enforcement, but additional data as to what EPA is doing is further required to understand the true scope and impact of *Sackett*.

## II. ENVIRONMENTAL PROTECTION AGENCY AND THE CLEAN WATER ACT: A BRIEF HISTORY

In order to understand the Supreme Court's decision in *Sackett*, the full effect of *Sackett* on EPA administrative compliance orders, and the future of enforcement mechanisms under EPA, it is necessary to discuss the EPA and the CWA and where they both began. This section of the article will first set forth a brief history of EPA: its origin, purpose, goals, means of enforcement, and broad power over pollution abatement. And second, this section will discuss the creation of the CWA and how it has become the principal statute in regulating water pollution within the United States.

When Congress created EPA in 1970, America was just opening its eyes to the seriousness of its pollution problem. According to the agency, EPA was established:

[As] part of the response to growing public concern and a grass roots movement to "do something" about the deteriorating conditions of water, air, and land. For years, raw sewage, industrial and feedlot wastes had been discharged into rivers and lakes without regard for the cumulative effect that made our waters unfit for drinking, swimming, and boating. . . . For decades Americans had assumed that air and water were free and plentiful and the industrial community gave little thought to pollution. . . . By the 1960s it was obvious that decisive steps had to

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12. *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

be taken to correct this imbalance and to prevent future reoccurrences.<sup>13</sup>

On July 9, 1970, President Richard Nixon spoke to Congress about reorganization plans to establish EPA.<sup>14</sup> Reorganization Plan No. 3 of 1970 “pull[ed] together into one agency”—what is today known as EPA—“a variety of research, monitoring, standard-setting and enforcement activities” that were dispersed “through[out] several [other] departments and agencies.”<sup>15</sup> Nixon charged EPA with “protecting the environment by abating [and controlling] pollution.”<sup>16</sup> The principal roles and functions of EPA as set forth in 1970 included:

- Establish[ing] and enforc[ing] . . . environmental protection standards consistent with national environmental goals.
- Conduct[ing] . . . research on the adverse effects of pollution and on methods and equipment for controlling it, . . . gather[ing] . . . information on pollution, and . . . us[ing] . . . this information in strengthening environmental protection programs and recommending policy changes.
- Assisting others, through grants, technical assistance and other means in arresting [environmental pollution].
- Assisting the Council on Environmental Quality in developing and recommending to the President new policies for the protection of the environment.<sup>17</sup>

Nixon insisted on viewing the environment as a whole, stating “the environment must be perceived as a single, interrelated system.”<sup>18</sup> Today, EPA can be summed up as an organized governmental action guarantying the protection of the environment and human health.<sup>19</sup> Furthermore, EPA has become “the primary federal agency for regulating the national environment.”<sup>20</sup> It works to protect the surrounding environment and to ensure that all Americans are protected from significant health risks.<sup>21</sup> Today EPA regulates “air pollution, water pollution, . . . hazardous waste disposal, pesticides, radiation, toxic substances, and

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13. Phil Wisman, *EPA History (1970–1985)*, U.S. ENV'L. PROT. AGENCY (Nov. 1985), <http://www2.epa.gov/aboutepa/epa-history-1970-1985>.

14. Nixon, *supra* note 8; *see also* Reorganization Plan No. 3 of 1970, 35 F.R. 15623 (Dec. 2, 1970), *reprinted in* 5 U.S.C. app. at 698 (2012).

15. Nixon, *supra* note 8.

16. *Id.*

17. *Id.*

18. *Id.*

19. 40 C.F.R. § 1.3 (2013).

20. ROBERT W. COLLIN, *THE ENVIRONMENTAL PROTECTION AGENCY: CLEANING UP AMERICA'S ACT 1* (2006).

21. U.S. ENV'L. PROT. AGENCY, *FY 2013 ANNUAL PLAN* (2013), *available at* [http://www.epa.gov/oig/reports/2013/EPA\\_OIG\\_FY\\_2013\\_Annual\\_Plan\\_not508.pdf](http://www.epa.gov/oig/reports/2013/EPA_OIG_FY_2013_Annual_Plan_not508.pdf).

wildlife.”<sup>22</sup> However, this article will be focused particularly on water pollution, the CWA, and EPA’s enforcement of water quality under the CWA.

The CWA has a very long history beginning with the River and Harbor Act of 1886, which was re-codified in the Refuse Act of 1899 (Rivers and Harbors Act of 1899) and ended with the CWA that we know today.<sup>23</sup> Congress modeled the CWA after the Clean Air Act,<sup>24</sup> and today the CWA is the principal federal statute governing water pollution in the United States.<sup>25</sup> Congress enacted the CWA “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>26</sup> EPA, along with other federal, state, and local agencies, oversees all CWA programs.<sup>27</sup>

The Refuse Act of 1899 was the federal government’s first attempt to control water pollution.<sup>28</sup> The Act provided that “[i]t shall not be lawful to throw, discharge, or deposit . . . any refuse matter of any kind . . . other than that flowing from streets and sewers and passing therefrom in a liquid state into any navigable water of the United States[.]”<sup>29</sup> Essentially the Act cemented the federal government’s authority to prevent pollution in navigable waters.<sup>30</sup> Almost fifty years later, Congress passed the Federal Water Pollution Control Act (FWPCA) on June 30, 1948, so as to “enhance the quality and value of our water resources and to establish a national policy for the prevention, control and abatement of water pollution.”<sup>31</sup> The FWPCA has been amended several times since 1948: the Water Pollution Control Act Extension of 1952, the Water Pollution Control Act Amendments of 1956, the FWPCA Amendments of 1961, the Water Quality Act of 1965, the Clean Water Restoration Act of

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22. COLLIN, *supra* note 20, at 1.

23. N. William Hines, *History of the 1972 Clean Water Act: The Story Behind How the 1972 Act Became the Capstone on a Decade of Extraordinary Environmental Reform*, J. ENERGY & ENVTL. L. 80, 83 (2013), available at <http://gwujeel.files.wordpress.com/2013/10/4-2-hines.pdf>.

24. *Sackett v. U.S. Env’t Prot. Agency*, 622 F.3d 1139, 1144 (9th Cir. 2010), *rev’d*, 132 S.Ct. 1367 (2012) (citing *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564, 565 (10th Cir. 1995)); see also *S. Pines Assocs. ex rel. Goldmeier v. U.S.*, 912 F.2d 713, 716 (4th Cir. 1990) (citing S. Rep. No. 92 – 414, 92d Cong., 1st Sess. 63 (1971), reprinted in, 1971 U.S. Code Cong. & Admin. News pp. 3668, 3730).

25. CHRISTOPHER L. BELL ET AL., ENVIRONMENTAL LAW HANDBOOK 317 (Thomas F.P. Sullivan ed., 20th ed. 2009).

26. 33 U.S.C. § 1251(a) (2006).

27. 33 U.S.C. § 1252(a) (2006).

28. U.S. ENVTL. PROT. AGENCY, *A Brief Summary of the History of NPDES*, <http://www.epa.gov/region1/npdes/history.html> (last visited May 28, 2014).

29. 33 U.S.C. § 407 (2006); see also 33 C.F.R. § 329.4 (2012) (defining “navigable waters” for purposes of the Rivers and Harbors Act).

30. See 33 U.S.C. § 407 (2006).

31. COLLIN, *supra* note 20, at 20–21.

1966, and the Water Quality Improvement Act of 1970.<sup>32</sup> Despite these many amendments, the FWCPA did not effectively implement the law set forth by Congress.<sup>33</sup> Thus, the FWCPA underwent a substantial change in 1972; it was restructured to give the EPA administrator the authority over water pollution control.<sup>34</sup> Today's CWA traces its origin to the FWPCA amendments of 1972.<sup>35</sup> The 1972 amendments are known for accomplishing two important tasks.<sup>36</sup> First, the amendments enacted broad federal standards and a federal permit program that established minimum water protections, which were to be observed by the states and citizens.<sup>37</sup> Second, the amendments vested power in EPA and the U.S. Army Corps of Engineers (the Corps) as enforcement agencies.<sup>38</sup>

The CWA prohibits “the discharge of any pollutant by any person” without a permit, into “navigable waters[,]” which are defined as “the waters of the United States.”<sup>39</sup> The term “pollutant” includes, “dredged spoil . . . rock, [and] sand . . . .”<sup>40</sup> Furthermore, “discharge of a[n]y pollutant” means “any addition of any pollutant to navigable waters from any point source.”<sup>41</sup> The Code of Federal Regulations defines “waters of the United States” as “intrastate lakes, rivers, streams . . . mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds . . . .”<sup>42</sup> Therefore, a property owner must obtain a permit prior to discharging fill material (such as soil and rock) into navigable waters (such as a wetland). If a property owner fails to do so, they are in violation of the CWA.

The CWA establishes two permit schemes. The first authorizes the Secretary of the Army, through the Corps, to issue a permit “for the discharge of dredged or fill material into the navigable waters . . . .”<sup>43</sup> The second authorizes EPA to issue a permit for the discharge of pollutants not including dredged or fill material.<sup>44</sup> Thus, the Corps and EPA share responsibility in executing and enforcing the CWA's permit provisions.

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32. ROBIN KUNDIS CRAIG, *THE CLEAN WATER ACT AND THE CONSTITUTION: LEGAL STRUCTURE AND THE PUBLIC'S RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT* 10–22 (2d ed., 2009).

33. COLLIN, *supra* note 20, at 21.

34. *Id.*

35. *See generally id.* (giving several examples of how the 1972 amendments fundamentally shifted the way the act is implemented.).

36. *See* CRAIG, *supra* note 32, 22–27.

37. *Id.*

38. *Id.*

39. 33 U.S.C. § 1311 (2006) (“the discharge of any pollutant by any person shall be unlawful.”); 33 U.S.C. § 1344 (2006) (“The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters . . . .”); 33 U.S.C. § 1362(7) (2006) (“the waters of the United States.”); *Sackett v. U.S. Env't Prot. Agency*, 132 S. Ct. 1367, 1368 (2012).

40. 33 U.S.C. § 1362(6) (2006).

41. 33 U.S.C. § 1362(12) (2006).

42. 33 C.F.R. § 328.3 (2013).

43. 33 U.S.C. § 1344(a), (g)–(h) (2006).

44. *See generally* 33 U.S.C. § 1342 (2006) (remaining silent on the discharge of dredged or fill material).

Section 404 of the CWA is the principal statute for regulating all activities within wetland areas.<sup>45</sup> Section 404 “has three goals: [1] protect the environment and human health and safety, [2] deter violations, and [3] treat the regulated community fairly and equitably.”<sup>46</sup> When a party has violated Section 404 of the CWA, the Corps or EPA may bring an action to compel the restoration of any property that was filled without the proper permit.<sup>47</sup> Thus, the CWA permits either the Corps or EPA to engage in enforcement activities and bring an action compelling the return of any property into compliance. However, the CWA is not the only environmental statute that permits EPA to compel compliance—it is one of many. The next section of this article discusses EPA’s enforcement scheme and the many enforcement options at its disposal.

### III. EPA’S ENFORCEMENT SCHEME & ENFORCEMENT MECHANISMS UNDER ENVIRONMENTAL STATUTES GENERALLY

EPA faces many “obstacles in effectively enforcing environmental laws.”<sup>48</sup> First, the agency is outnumbered because there are more regulated entities than EPA employees.<sup>49</sup> Second, the “geographic dispersal of [these] entities across the country” is large.<sup>50</sup> Third, the agency faces travel and budgetary restrictions.<sup>51</sup> Fourth, a factual record is required prior to judicial enforcement, which takes time and resources to gather.<sup>52</sup> Finally, “the passage of time between the acts [causing] . . . the alleged violation and” EPA’s action can be lengthy.<sup>53</sup> EPA relies on a number of civil enforcement mechanisms “to help it overcome these obstacles.”<sup>54</sup> Generally, enforcement mechanisms under all of the major federal environmental statutes governed by EPA include:

- Administrative penalties imposed by agencies for various violations;
- Administrative orders to respond to violations;
- Civil actions for relief;

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45. See BELL ET AL., *supra* note 25, at 359.

46. *Water: Outreach & Communication, Section 404 Enforcement*, EPA, <http://water.epa.gov/type/wetlands/outreach/fact15.cfm> (last updated Oct. 9, 2012).

47. See BELL ET AL., *supra* note 25, at 364–65.

48. Lowell Rothschild, *Before and After Sackett v. U.S. Environmental Protection Agency*, 59 FED. LAW. 46–47 (2012).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

- Civil penalties up to \$32,500 per violation or per day of violation;
- Citizens' civil actions to compel compliance with violations;
- Criminal sanctions against organizations and individuals for misrepresentation or knowing or negligent violation of the statutes.<sup>55</sup>

Due to inflation adjustments, civil penalties in 2012 were increased from \$32,500 to \$37,500 per violation or per day of violation.<sup>56</sup> EPA has great deference to decide whether to issue civil penalties, and the statutory language of many of the major environmental statutes provides considerable amount of discretion regarding enforcement.<sup>57</sup> Normally, the agency starts a continuing penalty from the first determination of a violation and the final proof that the alleged violator is in compliance, and then adjusts the penalty up or down, as it deems necessary.<sup>58</sup>

EPA pursues some enforcement actions vigorously while declining to enforce others, letting other actions settle or choosing to drop actions altogether.<sup>59</sup> If an alleged violator acts in bad faith, acts with knowledge, or is a repeat offender, EPA is more likely to bring an enforcement action to ensure compliance.<sup>60</sup> However, there are numerous examples of EPA initiating an enforcement action against first-time offenders.<sup>61</sup> When EPA decides to pursue an enforcement action against a potential violator, it can do so internally or refer the case to the Department of Justice (the DOJ).<sup>62</sup> However, if EPA decides to pursue the action internally, the action is subject to EPA's procedural rules, and the prosecutor is likely to be more familiar with EPA.<sup>63</sup> Therefore, EPA enjoys considerable benefits by pursuing the action internally.

Since *Sackett v. EPA* dealt specifically with an administrative compliance order under the CWA, it is necessary to also set forth the types of enforcement mechanisms under the CWA.

#### IV. ENFORCEMENT MECHANISMS UNDER THE CLEAN WATER ACT

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55. See CRAIG, *supra* note 32, at 20–29.

56. *Sackett v. U.S. Env't Prot. Agency*, 132 S. Ct. 1367, 1370 n. 1 (2012) (“The Federal Civil Penalties Inflation Adjustment Act of 1990, 104 Stat. 890 . . . as amended by the Debt Collection Improvement Act of 1996 . . . authorizes EPA to adjust the maximum penalt[ies] for inflation.”); 40 C.F.R. § 19.4 (2013).

57. See Barnett M. Lawrence, *EPA's Civil Penalty Policies: Making the Penalty Fit the Violation*, 22 ENVTL. L. REP. 10529, 10529 (1992), <http://elr.info/news-analysis/22/10529/epas-civil-penalty-policies-making-penalty-fit-violation>.

58. BELL ET AL., *supra* note 25, at 94.

59. *Id.* at 95.

60. *Id.*

61. *Id.*

62. See *id.* at 96; see also Lawrence, *supra* note 57, at 10533–34.

63. BELL ET AL., *supra* note 25, at 96–97.

Similarly, enforcement mechanisms under the CWA trace their origin to the Refuse Act of 1899 and the FWCPA of 1948.<sup>64</sup> Under the Refuse Act of 1899, the Secretary of the Army permitted deposits of materials in navigable waters, so long as anchorage and navigation of vessels were not hindered as a result.<sup>65</sup> The Corps had the administrative task of issuing and monitoring the conduct that followed.<sup>66</sup> Historically, the Corps relied on “friendly persuasion” and recommended prosecution only in cases of “flagrant violation.”<sup>67</sup>

[I]t has long been standing policy to secure compliance with . . . provisions short of legal proceedings. Prosecution was recommended only in cases of willful or intentional violations. It was the Corps’ established policy not to recommend prosecution when the violation was “trivial, apparently unpremeditated, and [resulted] in no material public injury” or when the violation was “minor, unintentional, or accidental, and the party responsible [made] good the damages suffered.”<sup>68</sup>

Under the FWPCA, the Surgeon General of the Public Health Service and the Federal Works Administrator held responsibilities relating to water pollution control.<sup>69</sup> The Surgeon General would issue a formal notification to the person(s) discharging a pollutant on the basis of reports, surveys, and studies.<sup>70</sup> The notification set forth recommended remedial measures and specified a reasonable time for compliance.<sup>71</sup> If the recipient did not comply within the specified time, the Surgeon General would recommend the state where the discharge occurred initiate a suit.<sup>72</sup> If, within a reasonable time after the notification, the alleged violator did not comply, and if the state where the discharge occurred failed to initiate a suit, the Federal Security Administrator would call a public hearing where the board—made up of five or more persons appointed by the Administrator—upon the presentation of evidence would make recommendations to the Administrator concerning the necessary actions needed to secure compliance.<sup>73</sup> After providing the alleged violator an opportunity to comply with the board’s recommendations, the Federal

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64. See generally Diane D. Eames, *The Refuse Act of 1899: Its Scope and Role in Control of Water Pollution*, 58 CALIF. L. REV. 1444 (1970), available at <http://scholarship.law.berkeley.edu/californialawreview/vol58/iss6/5/> (exploring “possible modes of action and remedies available under” The Refuse Act of 1899).

65. 33 U.S.C. § 407 (2013).

66. Eames, *supra* note 64, at 1452.

67. *Id.* at 1453.

68. *Id.* at 1453 n.61 (alteration in original).

69. Federal Water Pollution Control Act of 1948, Pub. L. No. 80-845, § 1, 62 Stat. 1155, (1948).

70. *Id.* § 2(d)(2), 62 Stat. at 1156.

71. *Id.*

72. *Id.*

73. *Id.* § 2(d)(3), 62 Stat. at 1156–57.

Security Administrator could then request the Attorney General initiate a suit to bring the alleged violator into compliance.<sup>74</sup>

Today, Section 1319 of the CWA governs the standards and enforcement mechanisms EPA may utilize.<sup>75</sup> When EPA determines there has been a violation of the CWA there are three main civil enforcement options at its disposal: First, EPA may assess administrative penalties; second, EPA may commence a civil action; lastly, EPA may issue an administrative compliance order.<sup>76</sup> Note, if EPA pursues either the first or second option, the alleged violator is guaranteed notice and an opportunity to be heard prior to assessment of any penalties.<sup>77</sup> Normally EPA will choose to pursue an option that is appropriate for the violation and the least resource consuming.<sup>78</sup> Under all of the options, EPA must first notify the recipient of the violation and whether EPA intends to bring an enforcement action against such recipient.<sup>79</sup>

#### A. Administrative Penalties

As a civil enforcement option, EPA may assess administrative penalties under §1319(g)(1) of the CWA.<sup>80</sup> This section provides that “[w]henever on the basis of any information available[,] the Administrator finds that any person has violated” specific sections of the CWA or “the Secretary of the Army . . . finds that any person has violated any permit condition or limitation” they may assess Class I or Class II civil penalties.<sup>81</sup> Class I penalties “may not exceed \$10,000 per violation” and may add up to a maximum amount of \$32,500.<sup>82</sup> As previously stated, due to inflation, civil penalties in 2012 increased from \$32,500 to \$37,500 per violation or per day of violation.<sup>83</sup> Class II penalties “may not exceed \$10,000 per day for each day during which the violation continues” and up to a maximum amount of \$125,000.<sup>84</sup> EPA must give the alleged violator written notice of the proposed penalty “and an opportunity to request, within thirty days[,]” a hearing in which the violator will have “a reasonable opportunity to be heard and to present evidence” prior to issuing a Class I penalty.<sup>85</sup> Prior to assessing Class II penalties, EPA must give the alleged violator notice and an opportunity for an ad-

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74. *Id.* § 2(d)(4), 62 Stat. at 1157.

75. 33 U.S.C. § 1319 (2012).

76. *Id.* § 1319(a)(2)–(g).

77. *Id.* § 1319(g).

78. LYNN M. GALLAGHER, CLEAN WATER HANDBOOK 173–74 (3d ed. 2003).

79. 33 U.S.C. § 1319(a) (2001); BELL ET AL., *supra* note 25, at 371.

80. *See* 33 U.S.C. § 1319(g)(1) (2001).

81. *Id.* § 1319(g)(1).

82. *Id.* § 1319(g)(2)(A).

83. *Sackett v. U.S. Env't Prot. Agency*, 132 S. Ct. 1367, 1370 n.1 (2012) (“The Federal Civil Penalties Inflation Adjustment Act of 1990, 104 Stat. 890 . . . as amended by the Debt Collection Improvement Act of 1996 . . . authorizes the EPA to adjust [the] maximum penalt[ies] [above] for inflation.”); *see* 40 C.F.R. § 19.4 (2012).

84. 33 U.S.C. § 1319(g)(2)(B) (2006).

85. 33 U.S.C. § 1319(g)(2)(A) (2006).

judicatory hearing according to Section 554 of Title 5.<sup>86</sup> In 2011, EPA obtained \$48 million from issued Class I and Class II administrative penalties.<sup>87</sup>

Generally, upon the assessment of an administrative penalty, either Class I or Class II, the recipient is entitled to an “opportunity to be heard and to present evidence.”<sup>88</sup> Furthermore, the public is entitled to comment, and any penalty assessed is subject to judicial review.<sup>89</sup> In determining the amount of any administrative penalty assessed under the CWA, EPA or the Secretary of the Army, at their discretion, may take into consideration a number of equitable factors including: (1) the seriousness of the violation, (2) the economic benefit to society resulting from the violation, (3) the record of past CWA violations (4) good-faith efforts to comply, (5) the violator’s ability to pay, and (6) other such matters surrounding the violation.<sup>90</sup>

### B. Civil Enforcement Actions

As a second enforcement option, EPA may commence a civil enforcement action in District Court seeking civil penalties for CWA violations. Section 1319(b) provides that “the administrator is authorized to commence a civil action for appropriate relief . . . for any violation for which he is authorized to issue a compliance order under subsection (a) of this section.”<sup>91</sup> An alleged violator is afforded a jury trial, however, the court holds the power in determining the appropriate penalty amount.<sup>92</sup> In calculating an appropriate penalty amount, EPA created an equation, which includes a component of economic benefit, plus gravity of the violation, plus or minus adjustments.<sup>93</sup> The gravity component consists of four considerations: “(1) the significance of the violation, (2) the actual or potential harm to human health or the environment, (3) the number of violations, and (4) the duration of noncompliance.”<sup>94</sup> Adjustments are added or subtracted to the equation based on four circum-

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86. *Id.*; 5 U.S.C. § 554 (2012) (stating the requirements for adjudications under the Administrative Procedure Act).

87. *Compliance and Enforcement Annual Results 2011 Fiscal Year*, U.S. ENV’T. PROT. AGENCY, <http://www.epa.gov/compliance/resources/reports/endofyear/eoy2011/eoy-data.html> (last updated Dec. 8, 2011) [hereinafter *Annual Results 2011 Fiscal Year*] (stating administrative penalties for 2011 as \$47,880,973).

88. 33 U.S.C. § 1319(g)(4)(B) (2006); *see also* *Sackett v. U.S. Env’t Prot. Agency*, 622 F.3d 1139, 1142 (9th Cir. 2010), *rev’d*, 132 S.Ct. 1367 (2012) (holding that a violator is entitled to the “opportunity to be heard and to present evidence” (citation omitted)).

89. 33 U.S.C. § 1319(g)(4)(A), (g)(8) (2006).

90. 33 U.S.C. § 1319(g)(3) (2006); *see also* *Sackett*, 622 F.3d at 1142; Frank B. Cross, *Administrative Orders and Penalties*, 2 FED. ENV’T L. REG. OF REAL ESTATE § 5.29 (2013).

91. 33 U.S.C. § 1319(b) (2006).

92. *See* GALLAGHER, *supra* note 78, at 177–78.

93. *See* BELL ET AL., *supra* note 25, at 378–79.

94. *Id.* at 378.

stances: (1) a history of non-cooperation, (2) ability to pay, (3) litigation considerations, and (4) other considerations.<sup>95</sup> “It is EPA’s policy that penalties should recover the full” amount “of noncompliance, calculated from the beginning of noncompliance until” the alleged violator is in compliance.<sup>96</sup>

### C. Administrative Compliance Orders

EPA may issue an administrative compliance order as a third civil enforcement option. Section 1319(a) provides:

Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements [various sections of the CWA] . . . he shall notify the person in alleged violation . . . if beyond the thirtieth day after the Administrator’s notification . . . the Administrator shall issue an order requiring such person to comply with such condition . . .<sup>97</sup>

EPA officials assert that administrative compliance orders are the beginning of the conversation between EPA and an alleged violator.<sup>98</sup> EPA has issued administrative compliance orders “to individuals and industry—both large and small.”<sup>99</sup> At its core, administrative compliance orders are issued to those whom EPA believes are in violation of the CWA.<sup>100</sup> The orders set forth the nature of the violation, specify a date by which the individual must comply with applicable law<sup>101</sup> and often include a compliance schedule and interval assignments that must be completed while taking the necessary steps to compliance.<sup>102</sup> “There is no hearing or other adjudication” prior to the issuance of an administrative compliance order, nor may a recipient obtain an agency hearing afterwards.<sup>103</sup> After an administrative compliance order has been issued and EPA has determined a violation has occurred, EPA will impose ad-

95. *Id.* at 379.

96. GALLAGHER, *supra* note 78, at 178.

97. 33 U.S.C. § 1319(a) (2006).

98. Megan Anderson, *EPA Enforcement After Sackett v. EPA: The Future of EPA Compliance Orders*, MICH. J. OF ENVTL. & ADMIN. L. (Apr. 5, 2012), available at <http://students.law.umich.edu/mjeal/2012/04/epa-enforcement-after-sackett-v-epa-the-future-of-epa-compliance-orders/>.

99. Rothschild, *supra* note 48, at 47.

100. *Id.*

101. *Id.*; see also *Sackett v. U.S. Env’t Prot. Agency*, 622 F.3d 1139, 1142 (9th Cir. 2010), rev’d, 132 S.Ct. 1367 (2012) (quoting *S. Pines Assocs. by Goldmeier v. United States*, 912 F.2d 713, 715 (4th Cir. 1990)).

102. See GALLAGHER, *supra* note 78, at 175; see also BELL ET AL., *supra* note 25, at 377.

103. Jonathan H. Adler, *Wetlands, Property Rights, and the Due Process Deficit in Environmental Law*, CATO SUP. CT. REV. 139, 149 (2012), available at <http://www.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2012/9/scr-2012-adler.pdf> (discussing the *Sackett v. U.S. Env’t Prot. Agency* case, federal regulations of wetlands, and CWA enforcement).

ministrative penalties according to the process as described in Part IV-A of this article. The agency believes “administrative compliance orders are . . . commands”; they are not judgments and do not impose sanctions for violating the CWA or violating the compliance order itself.<sup>104</sup> However, some EPA officials and agents believe that administrative compliance orders are only warnings.<sup>105</sup> Failing to comply with an administrative compliance order could create the basis for a knowing violation in a criminal case or a claim of bad faith in a civil action.<sup>106</sup> Administrative compliance orders allow EPA to respond quickly to ongoing violations of major environmental laws without becoming immediately entangled in litigation.<sup>107</sup> A Senate report from 1972 stated:

One purpose of these new requirements [for administrative compliance orders] is to avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement. 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.<sup>108</sup>

EPA issues administrative compliance orders mostly because “the agency can issue them based ‘on any information’ available to it.”<sup>109</sup> Thus, EPA can require a party to comply “based on information that [may] not be sufficient to meet . . . judicial standards” required to prosecute a violation of the CWA.<sup>110</sup> Out of all of the enforcement options at EPA’s disposal, administrative compliance orders are EPA’s primary enforcement option.<sup>111</sup> As the table below indicates, in 2011 EPA issued a total of 1,324 administrative compliance orders under all major environmental statutes.<sup>112</sup>

<p><b>Fiscal Year 2011</b>  <b>Enforcement &amp; Compliance Assurance Accomplishments</b>  <b>Civil Enforcement and Compliance Activities<sup>113</sup></b></p>
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104. See GALLAGHER, *supra* note 78, at 176; see also BELL ET AL., *supra* note 25, at 377.

105. Timothy Sandefur, *Compliance—or Else: The EPA’s Compliance Order Regime Creates a Hobson’s Choice*, 34 REG. 8, 10 n.4 (Winter 2011-2012), available at <http://www.cato.org/pubs/regulation/regv34n4/v34n4-2.pdf>.

106. See GALLAGHER, *supra* note 78, at 176.

107. Sam Wheeler, *Ninth Circuit: EPA Compliance Orders Are Not Subject to Pre-Enforcement Judicial Review*, 38 ECOLOGY L.Q. 611, 611–12 (2011) (discussing what administrative compliance orders are and the Ninth Circuit Court of Appeals decision in *Sackett v. U.S. Env’t Prot. Agency*, 622 F.3d 1139 (9th Cir. 2010)).

108. S. Rep. No. 92-414, at 3730 (1972).

109. Rothschild, *supra* note 48, at 47.

110. *Id.*

111. See *Annual Results 2011 Fiscal Year*, *supra* note 87 (comparing administrative compliance orders with other civil enforcement actions such as civil judicial complaints).

112. *Id.*

113. *Id.*

Referrals of Civil Judicial Enforcement Cases to Department of Justice (DOJ)	199
Supplemental Referrals of Civil Judicial Enforcement Cases to DOJ	33
Civil Judicial Complaints Filed with Court	148
Civil Judicial Enforcement Case Conclusions	182
Administrative Penalty Order Complaints	1,760
Final Administrative Penalty Orders	1,735
<b>Administrative Compliance Orders</b>	<b>1,324</b>
Cases with Supplemental Environmental Projects	103
Inspections/Evaluations	19,000
Civil Investigations	177
Compliance Assistance Center User Sessions	3,500,000

Furthermore, in the same year EPA issued 1,760 administrative penalty order complaints and 1,735 administrative penalty orders.<sup>114</sup> As previously discussed, administrative penalty orders (aka administrative penalties) are issued after an administrative compliance order *or* a civil action is brought and a violation is deemed to have occurred.<sup>115</sup> Thus, although the data indicates a greater number of administrative penalties were issued over administrative compliance orders, when fully understood, administrative compliance orders in 2011 outnumbered administrative penalties.<sup>116</sup> Moreover, a comparison between administrative compliance orders and civil judicial complaints filed with the court and civil judicial enforcement case conclusions again indicate that administrative compliance orders are used more often than any other enforcement mechanism.<sup>117</sup> Specifically, EPA issued 148 civil judicial complaints filed with the court and 182 civil judicial enforcement case conclusions in 2011.<sup>118</sup> Both of these combined totals do not outnumber administrative compliance orders.<sup>119</sup>

Of the 1,324 issued compliance orders in 2011, EPA issued 479 administrative compliance orders under the CWA.<sup>120</sup> Of those 479 admin-

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114. *Id.*

115. GALLAGHER, *supra* note 78, at 175–76.

116. *Annual Results 2011 Fiscal Year*, *supra* note 87.

117. *Id.*

118. *Id.*

119. *Id.*

120. Carolyn L. McIntoch, *Sackett: A Victory, But Not a Solution: Supreme Court Rules on Important Clean Water Act Case*, COAL AGE MAG. 80 (April 2012), available at

istrative compliance orders issued pursuant to the CWA, EPA issued 370 administrative compliance orders pursuant to the CWA-NPDES,<sup>121</sup> the National Pollutant Discharge Elimination System that “controls water pollution by regulating point sources that discharge pollutants into waters of the United States.”<sup>122</sup> However, EPA issued only twelve administrative compliance orders under the CWA-311,<sup>123</sup> the Oil Spill Prevention Compliance Monitoring section that “regulates oil storage.”<sup>124</sup> Comparing these numbers among the CWA sections, it is clear that the greatest number of administrative compliance orders have been issued under the NPDES section of the CWA.<sup>125</sup> This determination does not subtract from the belief that administrative compliance orders are EPA’s most used enforcement mechanism, but adds to it.<sup>126</sup>

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[http://www.pattonboggs.com/files/News/d84685bd-cb16-41eb-bc12-7c9cbf852d8c/Presentation/NewsAttachment/3d3b7ce9-70c0-4253-b4ce-7e8c0115cf8d/CA\\_April\\_LEGAL.pdf](http://www.pattonboggs.com/files/News/d84685bd-cb16-41eb-bc12-7c9cbf852d8c/Presentation/NewsAttachment/3d3b7ce9-70c0-4253-b4ce-7e8c0115cf8d/CA_April_LEGAL.pdf); see, e.g., U.S. ENV’L. PROT. AGENCY, NATIONAL ENFORCEMENT TRENDS REPORT 6 (June 2012), available at <http://www.epa.gov/compliance/resources/reports/nets/nets-e4-acos.pdf> [hereinafter EPA] (National Enforcement Trends graph showing the number of EPA administrative compliance orders from 1994 to 2011 for all major environmental statutes governed by EPA).

121. *National Enforcement Trends: FY 1994 – FY 2011 Administrative Compliance Orders*, U.S. ENV’L. PROT. AGENCY (2011).

122. *National Pollutant Discharge Elimination System*, U.S. ENV’L. PROT. AGENCY, <http://cfpub.epa.gov/npdes/index.cfm> (last updated Mar. 12, 2009, 11:32 PM).

123. *Id.*

124. *Oil Spill Prevention Compliance Monitoring*, U.S. ENV’L. PROT. AGENCY, <http://www.epa.gov/compliance/monitoring/programs/cwa/oilspill.html> (last updated June 13, 2012).

125. *Id.*

126. *Id.*

Fiscal Year 2001-2011 EPA Administrative Compliance Orders<sup>127</sup>

Statute	01	02	03	04	05	06	07	08	09	10	11
CAA	192	144	197	198	187	166	135	156	152	109	154
CERCLA	217	194	206	189	164	224	235	155	346	119	144
CWA- NPDES	367	490	558	678	749	414	361	367	392	420	370
CWA- 311	12	11	10	7	17	8	17	13	6	14	12
CWA- 404	66	45	87	90	77	81	54	59	85	98	97
EPCRA	1	0	0	0	0	0	0	0	0	0	0
FIFRA	12	12	38	93	55	162	62	71	71	98	83
MPRSA	NR	NR	0	0	0	0	0	0	0	0	0
RCRA	30	34	31	28	28	20	26	25	24	30	37
SDWA- PWSS	542	283	419	478	609	308	278	482	495	393	402
SDWA- UIC	35	36	33	43	42	51	68	57	16	14	19
TSCA	0	1	2	0	0	0	1	1	0	1	0
Multi- Program	1	0	1	3	8	4	10	4	1	6	6
Total	1,476	1,250	1,807	1,936	1,936	1,438	1,247	1,390	1,588	1,302	1,324

Thus, it appears that administrative compliance orders are EPA's preferred enforcement tool due to the comparison between other enforcement mechanisms, the sheer number of orders issued, and the understanding that EPA may issue the orders based on any information made available to it.<sup>128</sup>

Additionally, EPA and the Corps have evolved in their efforts to abate and control water pollution. In retrospect, a comparison of how the Corps and Surgeon General enforced violations of the Refuse Act of 1899 and violations of the FWPCA of 1948 with how the Corps and EPA enforce violations and ensure compliance today, illustrates EPA has moved away from *friendly persuasion* towards more aggressive enforcement tactics.<sup>129</sup> In the past, the federal government may have been more forgiving when it came to water pollution since the ramifications of pol-

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127. *Id.*

128. *Id.*

129. Compare Eames, *supra* note 64, at 1470, with EPA, *supra* note 123, at 6.

lution were not fully understood. Additionally, the federal government was fairly new at enforcing water pollution; the Refuse Act of 1899 was only recently created.<sup>130</sup> Also it appears that before the creation of EPA, the federal government was more eager to hold public hearings prior to initiating suits.<sup>131</sup>

However, today as EPA has grown and its powers have increased, cases like *Sackett v. EPA* give the impression that EPA no longer has the time nor wants to hold public hearings prior to initiating a suit.<sup>132</sup> This indicates that EPA officials have forgotten the original intentions behind the agency's foundation. As the years have passed and the ramifications of pollution have been clarified, we can see that EPA and the Corps have cracked down on enforcement.<sup>133</sup> No longer do EPA and the Corps consider violations to be trivial, unpremeditated, minor, unintentional, or accidental, as many times enforcement actions are taken against parties big and small.<sup>134</sup> The millions of dollars collected in administrative penalties each year and the hundreds of administrative compliance orders issued to recipients in every region of the United States strongly indicate a large shift from preventing only flagrant violations to preventing *any* violation irrespective of whether it is minor or willful.<sup>135</sup>

In light of the background provided on the CWA's enforcement tools, it is necessary to set forth the U.S. Supreme Court's decision in *Sackett v. EPA* in order to understand where EPA's enforcement tools stand today and where they need to be in order to pass muster.

## V. THE SACKETT V. EPA DECISION

On March 21, 2012 a unanimous U.S. Supreme Court handed down a long-awaited decision holding that property owners and regulated entities may bring suit challenging EPA compliance orders under the APA.<sup>136</sup> Prior to the decision, EPA opined that administrative compliance order recipients could not challenge EPA's jurisdiction arguing that recipients had to either comply with the order or wait for EPA to bring a civil suit, and only then could they seek judicial review.<sup>137</sup> Many recipients who chose to challenge EPA's administrative compliance orders were often assessed extensive monetary penalties for each day they failed to comply.<sup>138</sup> The Supreme Court's decision has sparked a nationwide discussion among scholars and practitioners about the future of

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130. *See Eames, supra* note 64.

131. *See id.* at 1456.

132. *See Wheeler, supra* note 107, at 612.

133. *See EPA, supra* note 123, at 6.

134. *See id.*

135. *See id.*

136. *Sackett v. U.S. Env't Prot. Agency*, 132 S. Ct. 1367, 1374 (2012).

137. *Id.* at 1340.

138. *Id.*

EPA's use of administrative compliance orders.<sup>139</sup> Many wonder if EPA will change its procedures to allow a more thorough examination of the law before issuing an administrative compliance order or if EPA will continue its current practices.<sup>140</sup> It will be important to see how EPA responds to this decision over time because the decision affects both those at the top—EPA—and those at the bottom—the everyday property owner.<sup>141</sup>

#### A. Facts & Procedural History

In 2005, Michael and Chantell Sackett, owners of a small construction company, purchased 0.63 acres within an existing residential subdivision in Bonner County, Idaho, just north of Priest Lake.<sup>142</sup> Several other lots, some containing permanent structures, separated their lot from the lake.<sup>143</sup> After obtaining the necessary local building permits nearly two years later, the Sacketts' employees began work on the construction of their three-bedroom, single-level, family home.<sup>144</sup> In April and May of 2007, while in the process of building their home, the Sacketts filled part of their lot with fill materials—soil and rock.<sup>145</sup> A few days into the construction of their home, EPA and Corps agents came onto the Sacketts' property and verbally ordered their employees to stop working.<sup>146</sup> After EPA's visit, "the Sacketts contacted their local Corps office...for an after-the-fact wetlands fill-permit."<sup>147</sup> However, the Sacketts declined to submit the application because it required them to concede that their property contained wetlands.<sup>148</sup> During that summer and fall of 2007, the Sacketts contacted EPA several times to inquire as to why EPA officials stopped the Sacketts' homebuilding.<sup>149</sup> However, EPA did not issue a response.<sup>150</sup>

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139. See Turner Smith & Margaret Holden, Case Comment, *Sackett v. EPA*, 37 HARV. ENVTL. L. REV. 301 (2013).

140. See David Weinstein et al., *Bolstering the Presumption of APA Reviewability: The Supreme Court Subjects CWA Compliance Orders, and Potentially Other Agency Actions, to Immediate Judicial Review*, 13 NO. 2 ABA ENVTL. ENFORCEMENT & CRIMES COMM. NEWSL. 6, 6–8 (2012).

141. See *Sackett*, 132 S. Ct. at 1370.

142. Greg Stohr, *Supreme Court, Mike and Chantell Sackett vs. the EPA*, BLOOMBERG BUSINESSWEEK MAGAZINE (Aug. 11, 2011), <http://www.businessweek.com/magazine/mike-and-chantell-sackett-vs-the-epa-08112011.html>.

143. *Sackett v. U.S. Env't Prot. Agency*, 132 S. Ct. 1367, 1370 (2012).

144. Damien M. Schiff, *Sackett v. EPA: Compliance Orders and The Right of Judicial Review*, CATO SUPREME COURT REVIEW 113, 114 (Ilyia Shapiro et al. eds., 2012).

145. *Sackett*, 132 S. Ct. at 1370.

146. Schiff, *supra* note 144, at 114.

147. *Id.*

148. *Id.*

149. *Id.*

150. See *id.*

In November 2007, EPA issued the Sacketts an administrative compliance order under the CWA.<sup>151</sup> EPA's administrative compliance order stated that the Sacketts' lot contained wetlands subject to federal jurisdiction, which the Sacketts had unlawfully filled without a permit.<sup>152</sup> Specifically, the administrative compliance order concluded: (1) the Sacketts' property "contained wetlands within the meaning of 33 C.F.R. § 328.4," (2) the property's wetlands were adjacent to Priest Lake, which is "a navigable water," (3) the Sacketts "discharged fill material into wetlands" at their property, (4) "[b]y causing such fill material to enter waters of the United States, the Sacketts have engaged, and are continuing to engage, in the discharge of pollutants," and (5) the Sacketts violated the CWA by discharging fill materials into the waters of the United States without a permit.<sup>153</sup> EPA's compliance order directed the Sacketts to immediately restore their property in accordance with EPA's Restoration Work Plan, which included restoring the property to its "pre-disturbance vegetative condition" and providing EPA employees access to the Sackett property and all records and documentation relating to the property.<sup>154</sup> If the Sacketts failed to restore their property as set forth under the administrative compliance order they would be fined \$37,500 per day.<sup>155</sup>

Under the CWA, courts have generally held that every day a wetland remains filled without a permit is a day a violation is accrued.<sup>156</sup> The statute of limitations under CWA regarding wetlands is five years.<sup>157</sup> Accordingly, one act of filling a wetland without a permit, in theory, could result in a maximum penalty of \$68,475,000 before EPA filed a suit.<sup>158</sup>

The Sacketts requested a hearing with EPA officials, arguing that their property was not subject to EPA control. Their request was denied.<sup>159</sup> Upon the denial of their request, the Sacketts were limited to three choices: (1) comply with the administrative compliance order, (2) refuse to comply, while waiting for EPA to bring a civil action to enforce the administrative compliance order and thus their compliance, all the while risking the imposition of incurring up to \$37,500 per day in civil administrative penalties, or (3) file suit in district court under the APA.<sup>160</sup> The Sacketts thus faced a devastating choice: obey the administrative compliance order and restore their residential lot, which would

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151. *Id.* at 114–15.

152. *Sackett v. U.S. Env't Prot. Agency*, 132 S. Ct. 1367, 1370–71 (2012).

153. *Id.* at 1371.

154. Schiff, *supra* note 144, at 115.

155. *Id.* at 130.

156. *Sackett*, 132 S. Ct. at 1370.

157. Rothschild, *supra* note 48, at 48.

158. *Id.*

159. *Sackett v. U.S. Env't Prot. Agency*, 132 S. Ct. 1367, 1371 (2012).

160. Weinstein et al., *supra* note 140, at 8 (discussing *Sackett v. U.S. E.P.A.* and its implications).

cost them thousands of dollars, or ignore the order and take their chances with EPA.<sup>161</sup> Furthermore, ignoring the administrative compliance order could be viewed as proof of knowingly violating the CWA and thus enhance any civil penalties they could be hit with later.<sup>162</sup>

The Sacketts chose to bring suit in the United States District Court for the District of Idaho, requesting declaratory and injunctive relief.<sup>163</sup> The Sacketts contended the wetlands were not subject to EPA jurisdiction, and argued that EPA's issuance of the administrative compliance order was "arbitrary and capricious" under the APA because it deprived them of "life, liberty, or property, without due process of law," a violation of the Fifth Amendment.<sup>164</sup> EPA moved to dismiss on the grounds that an administrative compliance order was not subject to judicial review.<sup>165</sup> The District Court agreed and dismissed the Sacketts' claim for want of subject matter jurisdiction reasoning that an administrative compliance order was not "final" agency action subject to judicial review under APA and that CWA precludes pre-enforcement judicial review of administrative compliance orders.<sup>166</sup> The District Court's opinion followed the significant amount of case law holding the same.<sup>167</sup> The Sacketts appealed and the Ninth Circuit affirmed, holding that the CWA prohibited pre-enforcement review of administrative compliance orders under APA.<sup>168</sup> The Ninth Circuit determined that based on the CWA's structure and legislative history, Congress did not intend compliance orders to be judicially reviewable.<sup>169</sup> It held that an administrative compliance order was really only a warning notice that lacked the kind of legal force that gives rise to due process concerns.<sup>170</sup> Furthermore, the Ninth Circuit "credited the government's contention that judicial review of compliance orders would frustrate Congress's enforcement options and would hamper the agency's effective administration of the Act."<sup>171</sup> The result reached by the Ninth Circuit was in line with the consensus of several other sister circuits.<sup>172</sup> Following the Ninth Circuit's decision, the U.S. Supreme Court granted certiorari.<sup>173</sup>

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161. *See id.*

162. *See id.*

163. *Sackett v. U.S. Env't Prot. Agency*, 132 S. Ct. 1367, 1371 (2012).

164. *Id.*; *see also* Rothschild, *supra* note 48.

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

166. *See id.*

167. *Sackett v. U.S. Env't Prot. Agency*, 622 F.3d 1139, 1141 (9th Cir. 2009), *rev'd*, 132 S. Ct. 1367 (2012).

168. *Id.* at 1139.

169. *Id.* at 1142-44.

170. *Id.* at 1145-46.

171. Schiff, *supra* note 144, at 120.

172. Wheeler, *supra* note 107 at 617 (discussing the Ninth Circuit Court of Appeals decision in *Sackett v. U.S. Env't Prot. Agency*, 622 F.3d 1139 (9th Cir. 2010), the circuit split between the Eleventh Circuit and the Fourth, Sixth, Seventh, Tenth and Ninth Circuits, and the author's agreement with the Ninth Circuit, believing it was correct to hold that administrative compliance orders should not be subject to judicial review).

173. *Sackett v. U.S. Env't Prot. Agency*, 132 S. Ct. 1367, 1367 (2012)

B. Circuit Split Prior to Supreme Court's Decision in *Sackett v. EPA*

The Sacketts' case was very similar to a 2003 Eleventh Circuit case, *Tennessee Valley Authority v. Whitman*, (*TVA v. Whitman*), in which the court held that EPA could not impose penalties for a violation of an administrative compliance order under the Clean Air Act (CAA) because the order itself did not constitute "final" agency action and was not judicially reviewable as its enforcement would violate due process.<sup>174</sup> As previously mentioned, the CWA was modeled after the CAA; the two acts have very similar enforcement tools.<sup>175</sup> EPA issued an administrative compliance order concluding that the Tennessee Valley Authority (TVA) violated the CAA when it undertook rehabilitation projects at nine power plants without permits.<sup>176</sup> The administrative compliance order required that TVA take costly, burdensome actions to comply.<sup>177</sup> EPA delegated to the Environmental Appeals Board (EAB) the task of informally adjudicating whether TVA was liable by reconsidering the administrative compliance order.<sup>178</sup> The EAB decided that TVA did violate the CAA when it acted without a proper permit.<sup>179</sup> The TVA filed a petition for review with the Eleventh Circuit requesting that asking it set aside the EAB order.<sup>180</sup> The Eleventh Circuit ultimately held that "because an [administrative compliance order] can be issued 'on the basis of any information available' to the Administrator, and because non-compliance with an [administrative compliance order] automatically triggers civil and criminal penalties . . . . The EPA is the ultimate arbiter of guilt or innocence . . . [and] this [CAA] scheme violates the Due Process Clause and the separation-of-powers principle."<sup>181</sup>

However, other circuits rejected the theory in *TVA v. Whitman*,<sup>182</sup> and many district courts followed suit.<sup>183</sup> In 1995, the Tenth Circuit held

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174. *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1239 (11th Cir. 2003).

175. *Sackett v. U.S. Env't Prot. Agency*, 622 F.3d 1139, 1141 (9th Cir. 2009) (citing *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564, 565 (10th Cir. 1995)); *see also* *S. Pines Assocs. ex rel. Goldmeier v. U.S.*, 912 F.2d 713, 716 (4th Cir. 1990) (citing S. Rep. No. 92-414, 92d Cong., 1st Sess. 63 (1971), *reprinted in* 1972 U.S. Code Cong. & Admin. News pp. 3668, 3730).

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

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 1243.

182. *See, e.g., Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564, 564 (10th Cir. 1995); *S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418, 1418 (6th Cir. 1994); *S. Pines Assocs. ex rel. Goldmeier v. U.S.*, 912 F.2d 713, 713 (4th Cir. 1990); *Hoffman Grp., Inc. v. Env't Prot. Agency*, 902 F.2d 567, 567 (7th Cir. 1990); *but see* *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1236 (11th Cir. 2003).

183. *See, e.g., Sharp Land Co. v. U.S.*, 956 F. Supp. 691, 693-94 (M.D. La. 1996); *Child v. U.S.*, 851 F. Supp. 1527, 1533 (D. Utah 1994); *Bd. of Managers, Bottineau Cnty. Water Res. Dist. v. Bornhoft*, 812 F. Supp. 1012, 1014-15 (D. N.D. 1993); *McGown v. U.S.*,

that administrative compliance orders did not give a party a right to a judicial hearing reasoning that it would undermine EPA's regulatory authority.<sup>184</sup> Both the Fourth and Seventh Circuits concluded that Congress intended to preclude judicial review of administrative compliance orders prior to the commencement of enforcement proceedings because "the structure of these environmental statutes indicate[d] that Congress intended to allow EPA to act to address environmental problems quickly and without becoming immediately entangled in litigation."<sup>185</sup> The Seventh Circuit believed that:

In drafting the Clean Water Act, Congress chose to make assessed administrative penalties subject to review while at the same time it chose not to make a compliance order judicially reviewable unless the EPA decides to bring a civil suit to enforce it . . . . Having provided a detailed mechanism for judicial consideration of a compliance order via an enforcement proceeding, Congress has impliedly precluded judicial review of a compliance order except in an enforcement proceeding.<sup>186</sup>

In 1994, the Sixth Circuit joined the Fourth and Seventh Circuits holding that district courts are without jurisdiction to review pre-enforcement orders issued under the CWA.<sup>187</sup> Furthermore, as previously mentioned, in 2010 the Ninth Circuit joined the Tenth, Fourth, Seventh, and Sixth Circuits holding that Congress did not intend for the judicial review of administrative compliance orders.<sup>188</sup>

### C. Pre-Enforcement Review

To understand the Ninth Circuit's decision in dismissing the *Sackett* case it is necessary to understand what constitutes pre-enforcement review and why pre-enforcement review was created. Pre-enforcement review can trace its' origin to two conflicting but very important public policy objectives: (1) due process and (2) the prompt and efficient administration of justice.<sup>189</sup> The Fifth Amendment provides that "No person shall be deprived . . . of life, liberty, or property, without due process of law."<sup>190</sup> Under the Fifth Amendment there is a common understanding that "prior to the government's taking away an individual's liberty or property, he or she has a right to be heard by a neutral third party em-

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747 F. Supp. 539, 542 (E.D. Mo. 1990); *Fiscella & Fiscella v. U.S.*, 717 F. Supp. 1143, 1146-47 (E.D. Va. 1989).

184. *Laguna Gatuna, Inc.*, 58 F.3d at 565.

185. *S. Pines Assocs.*, 912 F.2d at 716; *Hoffman Grp., Inc.*, 902 F.2d at 569; *see also S. Ohio Coal Co.*, 20 F.3d at 1426.

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

187. *S. Ohio Coal Co.*, 20 F.3d at 1427.

188. *Sackett v. U.S. Env't Prot. Agency*, 622 F.3d 1139, 1142-44. (9th Cir. 2009), *rev'd*, 132 S. Ct. 1367 (2012).

189. Rothschild, *supra* note 48, at 48.

190. U.S. CONST. amend. V.

powered to decide whether the taking is justified under the law and the facts.”<sup>191</sup> On the other hand, parties expect the administration of justice to be prompt. To ensure justice is swift, not every decision at every level can be challenged.

Concerned with due process, a number of statutes include private rights of action indicating when an action can be challenged.<sup>192</sup> For those statutes that do not provide such rights, Congress provided for review of administrative actions under the APA.<sup>193</sup> Section 706 of the APA provides that “the reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>194</sup> However, in light of expediency concerns, the APA restricts review to “final” agency actions.<sup>195</sup> “Final” agency action is judicially reviewable under the APA when the action: (1) “mark[s] the ‘consummation’ of the agency’s decision making process,”<sup>196</sup> and (2) “[is] one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’”<sup>197</sup> Conversely, agency action is not reviewable under the APA if the relevant statute “preclude[s] judicial review.”<sup>198</sup> Therefore in practice, there is a presumption of judicial review under the APA unless there is clear and convincing evidence to the contrary.<sup>199</sup> Thus, the Supreme Court in *Sackett* was left to employ this in coming to its conclusion.

#### D. Supreme Court Decision

The *Sackett* Court considered two issues in reaching its holding: (1) whether the administrative compliance order was final agency action;<sup>200</sup> and (2) whether the CWA’s statutory scheme precluded APA review.<sup>201</sup> The Court swiftly dismissed the first issue holding that there was no doubt the administrative compliance order was agency action, and that the administrative compliance order had all the “hallmarks of APA fi-

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191. Rothschild, *supra* note 48, at 49.

192. *Id.* at 48.

193. Presumption of Judicial Review Unless Precluded, 2 FED. PROC., L. ED. § 2.282 (2012).

194. 5 U.S.C. § 706(2)(A) (2012).

195. 5 U.S.C. § 704 (2012).

196. *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.* 333 U.S. 103, 113 (1948)).

197. *Id.* (quoting *Bos. Marine Terminal Ass’n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

198. 5 U.S.C. § 701(a)(1) (2012); *Sackett v. U.S. Env’t Prot. Agency*, 622 F.3d 1139, 1142 (9th Cir. 2009).

199. Rothschild, *supra* note 48, at 48.

200. *Sackett v. U.S. Env’t Prot. Agency*, 132 S. Ct. 1367, 1371 (2012).

201. *Id.* at 1372–73.

nality” because EPA determined the Sacketts’ obligations through the compliance order.<sup>202</sup>

First, the administrative compliance order articulated that the Sacketts have a legal obligation to restore their property according to the EPA’s Restoration Work Plan, and provide the EPA agents access to the Sacketts’ property and to all relevant property documents.<sup>203</sup> Second, the administrative compliance order stated that legal consequences flow from the issuance of the order.<sup>204</sup> Specifically, the administrative compliance order exposed the Sacketts to double civil penalties in future enforcement proceedings and severely limited their ability to obtain a permit from the Corps for fill materials.<sup>205</sup> Furthermore, the Court determined that the issuance of the administrative compliance order marked the “consummation” of EPA’s decision making process because, as the Sacketts learned when their hearing with the EPA was denied, the “Findings and Conclusions” within the administrative compliance order were not subject to further agency review.<sup>206</sup> Additionally, EPA’s invitation to the Sacketts to engage in “informal discussion of the terms and requirements” and to inform the EPA of any allegations which the Sacketts believed were inaccurate, did not present a claim for further agency review.<sup>207</sup> The possibility that EPA might reconsider the order during an informal discussion did “not suffice to make an otherwise final agency action nonfinal.”<sup>208</sup>

Finally, the APA requires that the person seeking APA review of final agency action have “no other adequate remedy in a court.”<sup>209</sup> There were only two possible paths the Sacketts could take to obtain judicial review of the administrative compliance order: (1) wait for the EPA to bring a civil action against them or (2) apply for a permit from the Corps and then file suit under the APA if the permit was denied.<sup>210</sup> Since the Sacketts could not take action as just described, the Court concluded they had no other remedy in court.<sup>211</sup> Generally, in CWA enforcement cases, judicial review begins via a civil action brought by the EPA under 33 U.S.C. § 1319.<sup>212</sup> However, alleged violators such as the Sacketts could not initiate a civil action against the EPA; every day they

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202. *Id.* at 1371 (“We consider first whether the compliance order is final agency action. There is no doubt it is agency action, which the APA defines as including even a ‘failure to act.’ §§ 551(13), 701(b)(2). But is it *final*? It has all of the hallmarks of APA finality that our opinions establish. Through the order, the EPA, ‘determined’ ‘rights or obligations.’”). *Id.*

203. *Id.* at 1371.

204. *Id.*; *see also* *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quoting *Bos. Marine Terminal Ass’n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

205. *Sackett v. U.S. Env’t Prot. Agency*, 132 S. Ct. 1367, 1372 (2012).

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*; *see also* 5 U.S.C. § 704 (2012) (The Administrative Procedure Act is limited to agency actions “for which there is no other adequate remedy in a court.”).

210. *Sackett*, 132 S. Ct. 1367 at 1372.

211. *Id.* at 1372–74.

212. *Id.* at 1369.

waited for the EPA to bring suit against them they accrued an additional \$75,000 (“\$37,500 for violating the Act and another \$37,500 for violating the compliance order”)<sup>213</sup> in potential liability.<sup>214</sup> Justice Alito in his concurrence stated, “in a nation that values due process, not to mention private property, such treatment is unthinkable.”<sup>215</sup> Furthermore, the Court went on to state that “the remedy for denial of action that might be sought from one agency does not ordinarily provide an ‘adequate remedy’ for action already taken by another agency.”<sup>216</sup> Thus, determining that suit brought under the APA, after a Corps’ permit is denied does not provide an “adequate remedy” for an action taken by EPA.

Regarding the second issue, the Court concluded that the CWA’s statutory scheme did not preclude APA review because nothing in the CWA expressly precluded judicial review under the APA.<sup>217</sup> APA’s presumption favoring judicial review may be overcome by interpreting the intent of the entire statute’s scheme.<sup>218</sup>

The Government set forth four arguments attempting to explain why the statutory scheme of the CWA precludes review.<sup>219</sup> First, “because Congress gave the EPA the choice between a judicial proceeding and an administrative [compliance order], it would undermine the Act to allow judicial review of [an order].”<sup>220</sup> The Government further argued that an administrative compliance order provided a way of notifying recipients of alleged violations and “quickly resolving issues through voluntary compliance.”<sup>221</sup> However, the Court disagreed, holding that judicial review is consistent with this function of notification and speedy resolution even when a recipient does not choose voluntary compliance, and that the CWA does not guarantee the EPA that an administrative compliance order is always the most effective tool.<sup>222</sup>

Second, the Government argued that administrative “compliance orders are not self-executing,” rather, they “must be enforced by the agency in a . . . judicial action,” which suggested that Congress viewed an order “as a step in the deliberative process” rather than a sanction subject to judicial review.<sup>223</sup> Again the Court disagreed, holding that the issuance of the compliance order was not just “a step in the deliberative process” because when the EPA denied the Sacketts’ hearing, the next

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213. *Id.* at 1375 (Alito, J., concurring).

214. *Id.* at 1372.

215. *Id.* at 1375 (Alito, J., concurring).

216. *Sackett*, 132 S. Ct. at 1372.

217. *Id.* at 1372–74.

218. *Id.* at 1373.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Sackett*, 132 S. Ct. at 1373.

223. *Id.*

step in the process was to either comply with the EPA's order or face a judicial action.<sup>224</sup>

Third, the Government argued that Congress did not expressly provide for judicial review of compliance orders.<sup>225</sup> This third argument was also dismissed because the Court reasoned that the cases the EPA relied upon were not analogous, and there was no suggestion that Congress sought to "exclude compliance-order recipients from the Act's review scheme."<sup>226</sup> Finally, the Government warned the Court that the EPA would be less inclined to use administrative compliance orders if they were subject to judicial review.<sup>227</sup> The Court disagreed with this argument as well holding that if the EPA would be less inclined to issue administrative compliance orders then such belief is "true for *all* agency actions subject[ ] to judicial review."<sup>228</sup> The Court further stated:

[T]here is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction. 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.<sup>229</sup>

The Court concluded that the issued administrative compliance order was final agency action and the CWA does not preclude judicial review.<sup>230</sup> Thus, the Sacketts were allowed to bring suit to challenge the EPA's administrative compliance order under the APA.<sup>231</sup> The Ninth Circuit was reversed, resolving the circuit split between the Eleventh Circuit and the Fourth, Sixth, Seventh, and Tenth Circuits.<sup>232</sup> The case was remanded for further proceedings consistent with the Supreme Court's opinion.<sup>233</sup>

#### VI. THE FUTURE OF EPA ENFORCEMENT MECHANISMS: OPTIONS AND FINALITY

The Supreme Court's decision in *Sackett* will have an impact on how EPA will enforce the CWA. The most certain impact of *Sackett* will be the judicial reviewability of CWA administrative compliance orders

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224. *Id.*

225. *Id.*

226. *Id.* at 1374.

227. *Id.*

228. *Sackett*, 132 S. Ct. at 1374 (emphasis added).

229. *Id.*

230. *Id.*

231. *See id.* at 1369, 1374.

232. *See supra*, Circuit Split Prior to Supreme Court's Decision in *Sackett v. U.S. Env't Prot. Agency*,

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

issued by EPA.<sup>234</sup> In light of the Court's decision in *Sackett*, we are left with a two-part test to "determin[e] whether pre-enforcement review of EPA administrative action is allowed": (1) is the administrative compliance order a "final action" under the APA, and if so (2) "does the applicable statute expressly preclude pre-enforcement . . . review" of such order?<sup>235</sup> Practitioners should expect the court to examine whether a challenged agency action is final before examining whether the underlying statutory scheme precludes judicial review. Thus, many believe the EPA will need to be selective about when it issues an administrative compliance order.<sup>236</sup>

Despite the belief that there will be a positive impact against EPA, there are concerns within the industry regarding the Court's decision. Specifically, many are concerned that judicial review will not occur immediately, the process will be cumbersome for smaller parties like the Sacketts, and EPA and the Corps will exert more resources, as EPA will have to compile an administrative record for each issued administrative compliance order.<sup>237</sup> However, the benefits afforded to property owners, such as a fair and equitable process, outweigh these concerns. Furthermore, obtaining judicial review adds rationality and equity to EPA's enforcement scheme and is a significant step towards oversight of EPA.

To better incorporate *Sackett* and to better administer and issue administrative compliance orders, EPA should consider two recommendations: (1) continue issuing administrative compliance orders to recipients, however, in order to continue to allow EPA to respond quickly to ongoing violations, the orders *must* be altered so as to not trigger judicial reviewability under the APA or (2) begin administering less formal communications such as NOV's as long as they don't trigger the "final" action test as laid out in *Bennett v. Spear*. Either option will allow EPA to continue to abate and control pollution and ensure compliance with current and future environmental laws with the same determination, aggressiveness, and urgency as EPA does today. Such recommendations ensure everyday property owners are not run over and annihilated in the process, but also take into consideration what is fair and equitable.

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234. Schiff, *supra* note 144, at 134.

235. Leslie Garrett Allen & Chris Carron, *Sackett v. EPA: Implications for Administrative Compliance*, 44 NO. 1 ABA TRENDS 23, 26 (2012) (discussing the *Sackett v. U.S. E.P.A.* decision and its implications).

236. *See id.* at 27.

237. *See, e.g.*, Lowell Rothschild, *Despite Sackett Ruling, Industry Still Faces Challenges with EPA in Permitting and Enforcement Matters*, ENERGY LEGAL BLOG (Jul. 19, 2012, 9:16 AM), <http://www.energylegalblog.com/archives/2012/07/19/4014>.

A. Recommendation One: The Continued Use of Administrative Compliance Orders

Pondered questions after *Sackett*: Has *Sackett* had any impact on EPA's decision to issue or not issue administrative compliance orders? How many administrative compliance orders have been issued? How does the data compare to 2011? The empirical data indicate that *Sackett* may have had some influence. Specifically, in 2013, EPA issued 873 administrative compliance orders under all major environmental statutes.<sup>238</sup>

<b>Enforcement Annual Result Numbers at a Glance for Fiscal Year (FY) 2013</b>	
<b>Civil Enforcement and Compliance Activities<sup>239</sup></b>	
Referrals of Civil Judicial Enforcement Cases to Department of Justice (DOJ)	138
Supplemental Referrals of Civil Judicial Enforcement Cases to DOJ	25
Civil Judicial Complaints Filed with Court	137
Civil Judicial Enforcement Case Conclusions	176
Administrative Penalty Order Complaints	1,407
Final Administrative Penalty Orders	1,440
<b>Administrative Compliance Orders</b>	<b>873</b>
Cases with Supplemental Environmental Projects	110
Inspections/Evaluations	18,000

In 2011, EPA issued 1,324 administrative compliance orders.<sup>240</sup> In 2013, EPA issued 451 fewer administrative compliance orders under its enforcement scheme than it issued in 2011.<sup>241</sup> EPA officials have not directly and definitively stated that they issued fewer administrative compliance orders due to the *Sackett* decision. However, it is hard not to believe that the Court's decision in *Sackett* was the reason why 35% fewer administrative compliance orders were issued in 2013. Although many scholars, practitioners, and industry groups believed the *Sackett*

238. ENFORCEMENT ANNUAL RESULTS NUMBERS AT A GLANCE FOR FISCAL YEAR (FY) 2013, U.S. ENV'L. PROT. AGENCY, <http://www2.epa.gov/enforcement/enforcement-annual-results-numbers-glance-fiscal-year-fy-2013> (last visited May 28, 2014).

239. *Id.*

240. U.S. ENV'L. PROT. AGENCY, END OF YEAR DATA AND TRENDS 2011 ACCOMPLISHMENTS, COMPLIANCE AND ENFORCEMENT ANNUAL RESULTS 2011 FISCAL YEAR, <http://www.epa.gov/compliance/resources/reports/endofyear/eoy2011/eoy-data.html> (last visited May 28, 2014) [hereinafter END OF YEAR DATA AND TRENDS 2011 ACCOMPLISHMENTS].

241. *Id.* (stating EPA issued 1,324 administrative compliance orders).

decision was the death knell for administrative compliance orders, EPA is *clearly* issuing administrative compliance orders in many contexts. Therefore, although 35% is very significant, it appears EPA is not facing as grim of a future as what many believed.

Although the data indicates fewer administrative compliance orders have been issued in 2013, EPA has made it clear it will continue to issue administrative compliance orders. Mark Pollins, a top EPA official indicated as much during an American Law Institute–American Bar Association event on May 3, 2012.<sup>242</sup> Pollins stated that the *Sackett* decision would have very little effect on how EPA enforces the CWA.<sup>243</sup> Additionally, Pollins indicated that EPA would continue to use administrative compliance orders under the CWA, despite the Court's ruling.<sup>244</sup> When asked "What's available after *Sackett*?" Pollins responded, "Pretty much everything that was available before *Sackett* . . . internally it's the same old, same old."<sup>245</sup> Pollins further stated that the Court's ruling in *Sackett* did not limit EPA's authority to issue administrative compliance orders nor did it limit their applicability as the "[Supreme Court] did not hold the compliance order was substantially deficient."<sup>246</sup>

On March 21, 2013, EPA issued a Memorandum explaining that following the *Sackett v. U.S. Env't Prot. Agency* decision EPA will begin adding language to administrative compliance orders issued under the CWA to ensure that recipients of such orders are aware of their opportunity to seek pre-enforcement judicial review.<sup>247</sup> Specifically, the language states "Respondent may seek federal judicial review of the Order pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706."<sup>248</sup> However, the agency "may need to take extra steps to ensure that its decision is supported by a comprehensive administrative record that allows the order to withstand judicial review."<sup>249</sup> Informing the recipient of their right to seek pre-enforcement judicial review is a step forward but only one step.

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242. Linda Roeder, *EPA Official Sees No Major Shift in Agency's Use of Compliance Orders*, BLOOMBERG BNA (May 4, 2012), <http://www.bna.com/epa-official-sees-n12884909211/>.

243. *Id.*

244. Bridget DiCosmo, *Downplaying High Court Ruling, EPA Floats Options for CWA Enforcement*, INSIDE EPA.COM (MAY 7, 2012), <http://insideepa.com/Inside-EPA-General/Inside-EPA-Public-Content/downplaying-high-court-ruling-epa-floats-options-for-cwa-enforcement/menu-id-565.html>.

245. *Id.*

246. Roeder, *supra* note 242.

247. U.S. ENV'L. PROT. AGENCY, LANGUAGE REGARDING JUDICIAL REVIEW OF CERTAIN ADMINISTRATIVE ENFORCEMENT ORDERS FOLLOWING THE SUPREME COURT DECISION IN *SACKETT V. EPA*, EPA (2013), <http://www2.epa.gov/sites/production/files/documents/language-regarding-sackett032113.pdf>.

248. *Id.* at 3.

249. W. Parker Moore, *Supreme Court to EPA: CWA Compliance Orders Are Subject to Review*, ABA ENV'T'L LITIG. AND TOXIC TORTS COMM. NEWSLETTER, Jul. 2012, at 7, 8.

In order for EPA to continue to issue administrative compliance orders effectively, the orders must not be a “final” agency action and must not trigger judicial review under the APA. Thus, although EPA has altered administrative compliance orders to provide awareness of pre-enforcement judicial review, administrative compliance orders must still be altered further. As previously discussed “final” agency action is judicially reviewable under the APA when the action: (1) “mark[s] the ‘consummation’ of the agency’s decision-making process,” and (2) is “one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’”<sup>250</sup> Thus for proper implementation of option one, EPA must take two necessary actions to ensure administrative compliance orders do not trigger judicial reviewability under the APA.

First, EPA will need to guarantee notice and an opportunity to be heard prior to assessing penalties. “[A]dministrative agencies must engage in individualized decision-making and observe additional procedural due process guarantees . . . [such as], notice and the opportunity to be heard.”<sup>251</sup> Under this option, EPA will be required to provide notice to the recipient of the alleged violation and an informal hearing where the recipient can explain their actions and gain more information prior to assessing penalties. Upon doing so, the administrative compliance order will not mark the consummation of EPA’s decision-making thus, circumventing the first prong of the final agency action test.

Second, EPA will need to refrain from exposing the recipient or alleged violator to penalties for violating the applicable statute, and imposing upon the recipient an obligation to restore their property in accordance with EPA’s orders *until* a hearing has been conducted. Conducting an actual hearing will ensure that the recipient’s rights and obligations are not determined until the recipient has had an opportunity to be heard. Upon doing so, EPA will avoid the second prong of the final agency action test.

Both actions just described rest on one necessary requirement—an actual, direct, and meaningful public hearing. Currently, EPA obeys the CWA enforcement statute, 33 U.S.C. § 1319, however, upon a closer inspection, as in *Sackett*, it is clear EPA has not been properly following through with its obligations.<sup>252</sup> It is safe to say EPA provides notice to alleged violators through means such as administrative compliance orders and an opportunity to be heard as set forth by the statute, however EPA repeatedly denies recipients an actual, direct, and meaningful hearing where the recipient can explain their actions and ask questions in order to better understand the agency’s actions, requirements, and reasons behind the alleged violation.<sup>253</sup> It would seem EPA finds it easi-

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250. *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948); *Port of Bos. Marine Terminal Ass’n. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

251. *Adler*, *supra* note 103, at 155; *see also Londoner v. Denver*, 210 U.S. 373 (1908).

252. *See Sackett v. U.S. Env’t Prot. Agency*, 132 S. Ct. 1367 (2012).

253. *See, e.g., id.*; *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236 (11th Cir. 2003).

er and more time efficient to deny recipients a hearing, move on to the next step in the enforcement process—assessing penalties—and eventually move on to the next case.<sup>254</sup> It is absolutely necessary that EPA take that extra step and refrain from denying recipients direct public hearings in order to first, fully comply with 33 U.S.C. § 1319 and second, to better provide a fair and equitable determination that is expected under the law. Only then, will EPA be able to circumvent the entire final agency action test as set forth in *Bennett v. Spear* and restated by the Court.

It could appear that the actions—ensuring notice and an actual opportunity to be heard and refraining from exposing recipients to penalties prior to conducting an actual direct hearing—may be difficult for EPA to implement because such actions are not prevalent within EPA, however they are not impossible and conversely are realistic so long as EPA puts in the necessary time. Upon implementation, EPA can continue to issue administrative compliance orders without fear that they will be reviewed under the APA. This will take more time and effort on EPA's behalf, yet compared to the time spent litigating such matters in court, such time will be minimal and considered well spent.

Although Pollins stated on behalf of the agency that EPA will continue to issue administrative compliance orders,<sup>255</sup> such orders are not the only tool at EPA's disposal or at its discretionary use. Specifically, EPA may use less formal means of communication such as NOV's. Therefore, the second option recommended by this article suggests EPA retire administrative compliance orders and begin using this informal type of communication.

#### B. Recommendation Two – Notice of Violation

Justice Scalia foreshadowed during oral argument in *Sackett* that EPA may “try to issue parties warnings that cannot be enforced,” notify recipients of their potential violation, and inform recipients of the potential monetary penalties they face if they do not comply.<sup>256</sup> Doing so would not implicate judicial review because the actions would not be final agency actions or impose any penalties. NOV's fall into this warning category.<sup>257</sup> However, to date there is limited information available on this type of warning.

The Clean Air Act (CAA) issues NOV's to avoid judicial review.<sup>258</sup> Section 7413(a)(1) of the CAA provides that “EPA may issue a notice of violation when the Administrator finds that any person has violated or is in violation of any requirement or prohibition of an implementation

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254. See, e.g., *Sackett*, 132 S. Ct 1367; *Whitman*, 336 F.3d 1236.

255. Roeder, *supra* note 242.

256. Rothschild, *supra* note 48, at 52.

257. See DiCosmo, *supra* note 244.

258. *Id.*

plan or permit.”<sup>259</sup> After a thirty-day grace period has expired, the EPA may pursue other enforcement options such as issuing an administrative compliance order, imposing an administrative penalty, or bringing a civil action.<sup>260</sup> Additionally, the EPA states on its website that NOV is just one step in the EPA’s investigation and enforcement statutes and regulations.<sup>261</sup> EPA further indicated that

A[n] NOV notifies the recipient that EPA believes the recipient committed one or more violations and provides instructions for coming into compliance. NOVs typically offer an opportunity for the recipient to discuss their actions, including efforts to achieve compliance. NOVs are not a final EPA determination that a violation has occurred. EPA considers all appropriate information to determine the final enforcement response.<sup>262</sup>

Essentially, NOVs inform an alleged violator of a suspected violation they have committed and lay out potential enforcement options attempting to convince the alleged violator to work with EPA in order to come into compliance.<sup>263</sup> Finally, NOVs provide for an opportunity to meet, and do not impose penalties.<sup>264</sup> Thus, it is clear NOVs are not final agency action and thus are not subject to judicial review. NOVs do not trigger the final agency action test in *Bennett v. Spear* because NOVs do not mark the consummation of the agency’s decision-making process as NOVs are just one step of many in the EPA’s investigation and they provide an opportunity for the recipient to discuss their actions. Additionally, the rights or obligations of the recipient have not been determined and legal consequences do not flow therefrom.

Therefore, because NOVs do not trigger the final agency action test EPA may administer them in place of administrative compliance orders all the while still satisfying their enforcement obligations—ceasing the discharge of harmful pollutants—and furthering their main objective of abating and controlling pollution and providing recipients an opportunity to be heard in a fair and equitable way.

Despite industry concerns surrounding the *Sackett* decision, both recommendations are advantageous to EPA and to property owners everywhere. Specifically, property owners are afforded a fair and equitable adjudication as required by the law and EPA is able to issue administrative compliance orders without fear they will be judicially reviewable

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259. DAVID R. WOOLEY & ELIZABETH M. MORSS, CLEAN AIR ACT HANDBOOK § 11:2 (22nd ed. 2012).

260. *Id.*

261. U.S. ENV’L. PROT. AGENCY, WHAT IS A NOTICE OF VIOLATION (NOV)? , U.S. ENV’L. PROT. AGENCY, <http://compliance.supportportal.com/link/portal/23002/23009/Article/32970/What-is-a-Notice-of-Violation-NOV> (last visited May 28, 2014).

262. *Id.*

263. DiCosmo, *supra* note 244.

264. *See* WOOLEY & MORSS, *supra* note 259.

and thus, it will avoid expensive litigating costs in the long run. Therefore, either recommendation would be suitable for EPA to implement.

## VII. CONCLUSION

The Supreme Court's decision in *Sackett* is a small although important step in providing a more thorough oversight of EPA, and ensuring recipients are afforded notice and an actual, direct, and meaningful opportunity to be heard as required by law. Over time, the hope is the decision will improve compliance and further EPA's goals of protecting the environment in which we live. However, the implementation of either recommendation—the continued use of administrative compliance orders or NOVs—goes one step further by providing EPA with the ability to continue to utilize enforcement mechanisms without concern of judicial review and extensive litigating costs.

Moreover, it is evident *Sackett* has influenced EPA's issuance of administrative compliance orders as indicated from the collected empirical data. However, it appears that EPA is not facing as grim a future as many believed, and administrative compliance orders will continue to be used regularly.

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