Baby Steps, Not Leaps, Toward Relief. Anatomizing Sackett v. EPA

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According to former presidential hopeful Mitt Romney, "an unelected government bureaucrat robbed them of their freedom . . . they were given no recourse, no remedy. They could do what the E.P.A. wanted, or they could risk millions of dollars in fines." 2 Justice Scalia believed the edict "show[ed] the high-handedness of the E.P.A." 3 The two men were speaking of an administrative compliance order issued to an Idaho couple by the Environmental Protection Agency ("EPA") alleging they filled in "wetlands" subject to EPA jurisdiction under the Clean Water Act ("CWA"). The order demanded the couple to undertake costly remediation efforts or pay huge fines for non-compliance— and all without any opportunity for court review.

The EPA is authorized to issue compliance orders to enforce provisions of the CWA; the Clean Air Act ("CAA"); the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"); and the Safe Drinking Water Act ("SDWA"), in addition to other legislation. 4 The EPA issues over one thousand compliance orders per year, of which over four hundred are under the CWA. 5 These orders have been controversial for many years because those who receive them are

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5 Id.
typically liable for profusely large fines. Recipients who believe an order was unjustifiably issued to them have little recourse against the powerful enforcement mechanisms available to the agency. Until the Supreme Court’s recent decision in \textit{Sackett v. EPA}, every federal circuit court hearing the issue had rejected judicial review of the EPA’s jurisdiction and power to issue these compliance orders.\textsuperscript{6}

The following comment anatomizes the Supreme Court’s ruling in \textit{Sackett v. EPA}, an appeal from the Ninth Circuit – a ruling that for the first time allows pre-enforcement judicial review of administrative compliance orders.\textsuperscript{7} Many believe that the Supreme Court’s decision will provide much relief to those who feel they have been harmed by a wrongfully issued administrative compliance order.\textsuperscript{8} Although the Court’s ruling constitutes a major change in the law, this comment will analyze the legal magnitude of this change and whether it truly provides the protections many hoped it would.

\section*{II. FACTS AND HOLDING}

Michael and Chantell Sackett are owners of a residential lot comprising about two-thirds of an acre in Bonner County, Idaho.\textsuperscript{9} The Sacketts’ lot is in close proximity to Priest Lake, yet separated from the lake by several other lots containing permanent structures.\textsuperscript{10} In April and

\begin{itemize}
\item \textsuperscript{7} \textit{Sackett v. E.P.A.}, 132 S. Ct. 1367 (2012).
\item \textsuperscript{9} \textit{Sackett}, 132 S. Ct. at 1370.
\item \textsuperscript{10} \textit{Id.} The Sackett’s circuit court appellate brief described their property: “Between the property (south of Old Schneider Road) and Priest Lake are several developed lots with numerous permanent structures. There is no surface water connection between the property and Kalispell Creek. Further, there is no surface water connection between the
\end{itemize}
May of 2007, the Sacketts filled in part of their lot with rock and dirt in preparation for building a house.\textsuperscript{11}

Shortly after filling in their lot, the Sacketts received a letter of compliance from the EPA alleging: (1) their Bonner County property contained federally protected wetlands;\textsuperscript{12} (2) those wetlands were adjacent to "navigable waters" protected by the CWA,\textsuperscript{13} (3) on or about April and May 2007, the Sackets discharged fill material into one half acre of wetlands; and (4) that allowing and continuing to allow such fill material to enter protected waters without a permit violates the CWA.\textsuperscript{14} Based on these findings, the EPA directed the Sacketts to immediately restore the property and to produce documents relating to the condition of the site.\textsuperscript{15}

The Sacketts contended their property was not subject to the jurisdiction of the EPA under the CWA.\textsuperscript{16} After the EPA denied their request for a hearing on the matter, the Sacketts brought an action under property and Priest Lake. The Sacketts bought the land to build a house on; they have obtained all the necessary state and local permits to build their house." Brief of Plaintiffs-Appellants at 6, Sackett v. EPA, 622 F.3d 1139 (9th Cir. 2010) (No. 08-35854).

\textsuperscript{11} \textit{Sackett}, 132 S. Ct. at 1370-71.

\textsuperscript{12} 33 C.F.R. § 328.3(b) (2013).


\textsuperscript{14} \textit{Sackett}, 132 S. Ct. at 1370-71.

\textsuperscript{15} \textit{Id.} at 1371. The order required the Sacketts to "immediately undertake activities to restore the Site in accordance with an EPA-created Restoration Work Plan and to provide and/or obtain access to the Site . . . and access to all records and documentation related to the conditions at the Site . . . to EPA employees and/or their designated representatives." \textit{Id.} More specifically, "the order mandated that the fill material be removed by April 15, 2008, and that the property be replanted by April 30, 2008. Further, the order required that the site be fenced off for three growing seasons. Lastly, the order stated that failure to comply with the order may subject [the Sacketts] to civil penalties of up to $32,500 per day and administrative penalties of up to $11,000 per day for each continuing violation. Appellants' Opening Brief at 5-6, Sackett v. EPA, 622 F.3d 1139 (9th Cir. 2008) (No. 08-35854).

\textsuperscript{16} \textit{Sackett}, 132 S. Ct. at 1371.
the Administrative Procedure Act\(^7\) ("APA") in United States District Court for the District of Idaho seeking judicial review of the EPA’s decision in addition to declaratory and injunctive relief.\(^8\) The Sacketts claimed the issuance of the compliance order was "arbitrary and capricious" under the APA and violated their Fifth Amendment due process rights.\(^19\)

Meanwhile, the EPA contended the compliance order was not subject to judicial review for several reasons: (1) the compliance order was not a final agency action because the order invited the Sacketts to engage in an informal hearing with the EPA to discuss any allegations they believed to be inaccurate;\(^20\) (2) the CWA provides for judicial review to be brought under 33 U.S.C. § 1319 and APA review can only be sought where no other adequate remedy is available;\(^21\) and (3) the CWA creates a statutory scheme that precludes APA judicial review.\(^22\)

The district court dismissed the Sackett’s action for lack of subject matter jurisdiction.\(^23\) The Ninth Circuit affirmed, agreeing with the EPA’s third argument, and concluded the CWA “precludes pre-enforcement judicial review of compliance orders, and that such preclusion does not violate the Fifth Amendment’s due process guarantee.”\(^24\) The United States Supreme Court granted certiorari to decide whether the CWA precludes pre-enforcement judicial review and whether such preclusion violates the due process clause of the Fifth Amendment.\(^25\)

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\(^8\) Sacket, 132 S. Ct. at 1371.
\(^9\) Id.
\(^10\) Id. at 1372.
\(^11\) Id.
\(^12\) Id. at 1373. The government’s main contention is that, in enforcing the Act, the EPA is allowed to bring either a civil or administrative action, and allowing for judicial review undermines the latter, rendering such administrative actions ineffective and inefficient.
\(^13\) Id. at 1371.
\(^14\) Id.
\(^15\) Id.
During oral arguments, the EPA faced immediate hostility from the nine Justices. Justice Scalia, when questioning the EPA's counsel as to the contents of the compliance order, interrupted the EPA's argument, saying "it shows the high-handedness of the agency, it seems to me, putting in there stuff that is simply not required by the EPA." After EPA's counsel suggested that he personally would have complied with the order, Chief Justice Roberts responded sarcastically, "That's what you would do? You would say: I don't think there are wetlands on my property, but EPA does. So... I'll just do what the government tells me I should do." Justice Alito posed a similar sarcastic question and answer, "somebody from the EPA says we think that your backyard is a wetlands; so, don't build. So... what does the homeowner do, having bought that property?... 'well, all right, I'm just going to put it aside as a nature preserve.' Justice Breyer attacked the EPA's counsel on APA reviewability stating, "for 75 years the courts have interpreted statutes with an eye towards permitting judicial review, not the opposite... So, I read the order. It looks like about as final a thing as I've ever seen." Predictably, the Court reversed and remanded the Ninth Circuit's decision, finding the EPA’s compliance order issued to the Sacketts by the EPA was a final agency decision and subject to judicial review under the APA.

26 See Transcript of Oral Argument, supra note 3.
27 Id. at 35. Justice Scalia, using the phrase "stuff that is simply not required by the EPA," was referring to the compliance order's requirement that the Sackett's plant plants on their lot. Id.
28 Id. at 36-37.
29 Id. at 38.
30 Id. at 41.
III. LEGAL BACKGROUND

A. The Clean Water Act

Congress passed the CWA in 1972 with the goal of "restor[ing] and maintain[ing] the chemical, physical and biological integrity of [the] Nation's waters." Among its principal provisions for accomplishing this goal is Section 301 of the Act, which forbids "the discharge of any pollutant by any person," without a permit, into "navigable waters." Pollutant is broadly defined to include, in addition to traditional pollutants, "dredged soil . . . rock, sand, cellar dirt" and other forms of waste. Under Section 404 of the Act, persons may receive a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites" from the Army Corps of Engineers ("Corps"). Section 402 of the Act, known as the National Pollutant Discharge Elimination System ("NPDES"), requires all industrial facilities discharging any pollutant (other than dredge and fill) from any point source into "waters of the United States" to obtain a permit. NPDES permit holders are required to meet technology-based and emission-based standards stipulated by their permit.

33 Id. §§ 1311(a), 1362(12).
34 Id. § 1362(6).
35 Id. at § 1344(a).
36 Id. § 1342; see also ENVIRONMENTAL PROTECTION AGENCY, WATER PERMITTING 101 (2012), available at http://www.epa.gov/npdes/pubs/101pape.pdf [hereinafter WATER PERMITTING]. Common examples of "facilities that discharge pollutants from a point source" are municipal utilities and confined animal feeding operations.
37 WATER PERMITTING, supra note 36. "The permit provides two levels of control: technology-based limits (based on the ability of dischargers in the same industrial category to treat [the discharged] wastewater) and water quality-based limits (if technology-based limits are not sufficient to provide protection of the water body)." Id.
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B. The Clean Water Act’s Jurisdictional Reach

The CWA’s jurisdiction extends to “navigable waters,” which are defined as “waters of the United States.” The current Corps regulations interpret ‘the waters of the United States’ to extend CWA jurisdiction to, in addition to traditional interstate navigable waters, ‘all interstate waters including interstate wetlands,’ ‘all other waters such as intrastate lakes . . . the use, degradation or destruction of which could affect interstate or foreign commerce,’ . . . and ‘wetlands adjacent to such waters and tributaries.’ Wetlands are defined as “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.” In Rapanos v. United States Army Corps of Engineers, the Supreme Court attempted to provide more clarity as to the jurisdictional reach of the CWA under these regulations.

In Rapanos, John Rapanos filled in three separate sites compromising fifty-four acres of land “with sometimes-saturated soil conditions.” These parcels of land lay near ditches, drains, or a series of both that allowed water to flow into traditional navigable waters subject to the CWA. For these reasons, the Corps deemed the land as “wetlands” subject to the CWA’s jurisdiction. The Corps brought a Section 309 enforcement action against Rapanos for discharging dredge and fill materials without a Section 404 permit. Rapanos argued his lands did

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40 Id. § 328.3(a)(2).
42 33 C.F.R. § 328.3(b).
43 Rapanos, 547 U.S. at 715.
44 Id. at 719-20.
45 Id. at 715.
46 Id. at 720-21.
47 Id. at 729.
not fall within the CWA's jurisdiction because "navigable waters" and "waters of the United States must be limited to waters that are navigable in fact or susceptible of being rendered so."48 The district court held Rapanos liable for violating the CWA because his lands fell under the CWA's jurisdiction as wetlands "adjacent to other waters of the United States."49 On appeal, the Court of Appeals for the Sixth Circuit affirmed, holding CWA jurisdiction existed because "there were hydrological connections between all three sites and corresponding adjacent tributaries of navigable waters."50

The Supreme Court reversed and remanded the Sixth Circuit decision, finding the court applied the wrong standard in determining Rapanos' wetlands to be "waters of the United States."51 Justice Scalia, writing for a plurality, created a two-pronged test for determining CWA jurisdiction over wetlands, first, the wetland must be adjacent to "a relatively permanent body of water connected to traditional interstate navigable waters"; and, second, the wetland must have a continuous surface connection with the adjacent body of water, making it difficult to determine where the 'water' ends and the 'wetland' begins."52 Justice Kennedy, writing alone, wrote a concurring opinion that set forth a "significant nexus" test.53 Under the "significant nexus" test jurisdiction may be asserted over those wetlands that "either alone or in combination

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48 Id. at 730. For his defense, Rapanos cited the Supreme Courts 1871 decision in The Daniel Ball, holding that "navigable waters of the United States" are waters which "are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." The Daniel Ball, 77 U.S. 557, 563 (1870).
49 Rapanos, 547 U.S. at 729.
50 Id. at 729-30.
51 Id. at 730-32.
52 Id. at 742. This definition of "waters of the United States "refers to water as found in "streams," "oceans," "rivers," "lakes," and "bodies" of water "forming geographical features," and "excludes channels containing merely intermittent or ephemeral flow." Id. at 732-34.
53 Id. at 758-59.
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with similarly situated lands in the region, significantly affect the chemical, physical and biological integrity of . . . ‘navigable waters’.”54

Lower courts and the federal government have struggled in their interpretation of the Rapanos decision.55 While multiple courts have found Kennedy’s “significant nexus” test to be controlling, others have found that jurisdiction may be obtained under either test.56 The EPA and the Corps have stated their agencies will continue to assert jurisdiction over waters satisfying either the plurality test or the “significant nexus” test.57 The EPA has emphasized that it will make its jurisdictional determinations on a case-by-case basis, making “full use of the authority provided by the CWA to include waters within the scope of the Act, as interpreted [in Rapanos].”58

54 Id. at 755.
56 Id. “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’ Marks v. U.S., 430 U.S. 188, 193 (1977). Courts interpreting Rapanos have differed in their interpretation of Marks. Both the Seventh and Eleventh Circuits have found the “significant nexus” test to be controlling because it is most narrow in that it is the most restrictive on government power. United States v. Gerke, 464 F.3d 723, 724-25 (7th Cir. 2006); United States v. Robinson, 521 F.3d 1319, 1321 (11th Cir. 2008). The First, Third and Eighth Circuits found it would be inappropriate to apply Marks to Rapanos and employed Justice Steven’s reasoning in his Rapano’s dissent that jurisdiction could be satisfied by either test. United States v. Johnson, 467 F.3d 56, 64 (1st Cir. 2006); U.S. v. Donovan, 661 F.3d 174, 181-82 (3rd Cir. 2011); United States v. Bailey, 571 F.3d 791, 799 (8th Cir. 2009).
58 Id. Guidance for identifying waters subject to CWA jurisdiction has provided discussion for the jurisdictional implications of both Rapanos tests. Id.
C. Enforcement of the Act

The CWA directs the EPA to enforce Section 301 by either issuing an administrative compliance order or by initiating a civil action. The EPA may also issue compliance orders to Section 404 or NPDES permit holders who fall out of compliance with the terms of their permit. In the case of dredge and fill violations, a compliance order may require a landowner to cease discharge of dredge and fill materials, take action to remove already present discharge, and otherwise restore the site to its original condition. If the EPA prevails in a civil action the CWA allows for up to $37,500 per day in fines for each violation of the Act. If the EPA prevails against a person who has also failed to comply with a compliance order the amount may be increased to $75,000 per day.

D. Judicial Review of Compliance Orders

Section 1369 of the CWA enumerates several EPA administrative actions that may be subject to judicial review in a Federal district court. Section 309 compliance orders are not listed among those actions directly subject to judicial review under the Act. Enforcement actions taken by the EPA under the Act are normally subject to judicial review when the EPA files suit in an EPA induced Section 309 civil action. Although the Act does not expressly provide for judicial review of compliance orders, nowhere does it explicitly preclude such judicial review.

60 Id. §§ 1319(a)(3), 1342(k), 1344(n).
63 Sackett, 132 S. Ct. at 1370.
64 33 U.S.C. § 1369(b)(1).
65 Id.
66 Sackett, 132 S. Ct. at 1372.
67 Id. at 1373; See also 33 U.S.C. §1369.
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A statute separate from the CWA, the APA provides for judicial review of any "final agency action[s] for which there [are] no other adequate remedy in a court."68 APA judicial review may be utilized except to the extent that a statute precludes judicial review.69 The Supreme Court has held that "whether and to what extent a particular statute precludes judicial review is determined not only from [the statute’s] express language" but from the statutory scheme as a whole.70 Furthermore the Court has said the APA creates "a presumption in favor of judicial review of an administrative action" that "may be overcome by inferences of intent drawn from the statutory scheme as a whole."71

The APA allows a reviewing Federal judge to "hold unlawful and set aside an agency action, findings, and conclusions found to be arbitrary, capricious, [or] an abuse of discretion."72 "An ‘agency action’ includes the whole or a part of an agency . . . order, license, sanction, . . . or failure to act."73 The Supreme Court has held an agency’s action is final where it "mark[s] the ‘consummation’ of the agency’s decision making process"74 and "it is an action ‘by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’"75

Although the text of the CWA does not bar pre-enforcement review of compliance orders, every federal circuit court hearing the issue has ruled they lack jurisdiction to do so because the CWA bars such review.76 In Rueth v. EPA, the Seventh Circuit denied pre-enforcement

69 Id. § 701(a)(1).
71 Id. at 349.
73 Id. § 551(13).
75 Bennett, 520 U.S. at 178 (citing Port of Boston Marine Terminal Assn. v. Rederiatkebolaget Transatlantic, 400 U.S. 62, 71 (1970)).
76 Kalmuss-Katz, supra note 6.
review of a Section 404 CWA administrative compliance order for lack of jurisdiction.\textsuperscript{77} In \textit{Rueth}, the EPA issued Harold Rueth a compliance order condemning discharges by his development company of dredged and fill materials into EPA deemed wetlands.\textsuperscript{78} Rueth brought a claim in federal district court seeking injunctive and declaratory relief against the EPA’s “unauthorized exercise of jurisdiction over [his development].”\textsuperscript{79} The EPA moved to dismiss the claim and the district court granted the motion because the EPA had not “issued a final appealable order.”\textsuperscript{80}

On appeal, the Seventh Circuit affirmed on two grounds. First, the Seventh Circuit reasoned “Congress intended [the CWA] to preclude judicial review of an EPA compliance order unless the government [initiates] an enforcement action.”\textsuperscript{81} This conclusion of the court rests on the assumption that because Congress gave EPA the choice to either issue a compliance order or file suit, judicial review would force the EPA into court immediately, limiting the effectiveness of and therefore completely undermine, the compliance order option.\textsuperscript{82} Allowing judicial review “would delay the agency’s response in the same manner as litigation contesting the extent of the EPA’s jurisdiction.”\textsuperscript{83} The court extended this preclusion to suits brought under the APA.\textsuperscript{84} Second, in addition to holding that the CWA precludes judicial review, the Seventh Circuit agreed with the district court that compliance orders are not a “final agency decision” as required to bring suit under the APA.\textsuperscript{85}

In \textit{City of Baton Rouge v. EPA} the Fifth Circuit similarly denied pre-enforcement judicial review of an order requiring compliance with an

\begin{itemize}
\item \textsuperscript{77} Rueth v. E.P.A., 13 F.3d at 227, 231 (7th Cir. 1993)
\item \textsuperscript{78} Id. at 228.
\item \textsuperscript{79} Id.
\item \textsuperscript{80} Id.
\item \textsuperscript{81} Id at 229.
\item \textsuperscript{82} Id. at 230 (citing Hoffman Grp., Inc. v. E.P.A., 902 F.2d 567, 569 (7th Cir. 1990)).
\item \textsuperscript{83} \textit{Rueth}, 13 F.3d at 230 (citing S. Pines Assoc. v. United States, 912 F.2d 713, 717 (4th Cir. 1990)).
\item \textsuperscript{84} \textit{Rueth}, 13 F.3d at 231.
\item \textsuperscript{85} Id.
\end{itemize}
EPA issued NPDES permit. In *Baton Rouge*, the EPA issued the City of Baton Rouge a NPDES permit requiring the city to keep human waste from its treatment facility out of the Mississippi River. After the city violated this permit on forty-nine separate occasions the EPA issued a compliance order requiring them to submit a plan for a program for preventing the discharge of waste within thirty days. The city immediately filed a petition for review of the order in the Fifth Circuit. The EPA filed a motion to dismiss for lack of jurisdiction to review the administrative compliance order.

The Fifth Circuit agreed with the EPA and dismissed the case for lack of jurisdiction. In doing so, the court held with the United States Court of Appeals for the Second Circuit in establishing a rule that “the Courts of Appeals have jurisdiction for direct review only of those EPA actions specifically enumerated in 33 U.S.C. § 1369(b)(1).” The court explained that “none of the specific clauses in section 1369(b)(1) describe the issuance of an order . . . requiring compliance with a NPDES permit.”

**IV. INSTANT DECISION**

In *Sackett v. EPA*, the United States Supreme Court overturned the Ninth Circuit’s dismissal of an APA challenge to an administrative compliance order, holding such orders are in fact subject to judicial review. Justice Scalia, writing for a unanimous court, set forth an opinion rejecting a series of the EPA’s arguments against APA judicial

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86 City of Baton Rouge v. E.P.A., 620 F.2d 478, 479 (5th Cir. 1980).
87 *Id.*
88 *Id.* Specifically, the order directed Baton Rouge to submit a program for preventing bypassing of the sewer system due to power failures and to submit copies of contracts, work orders, and purchase orders needed to execute the program. *Id.*
89 *Id.*
90 *Id.* at 480.
91 *Id.*
92 *Sackett*, 132 S. Ct. 1367.
review of an EPA compliance order. On appeal from the Ninth Circuit, the Sacketts were granted certiorari on two issues: whether the APA precludes judicial review of EPA compliance orders under the CWA; and whether such preclusion violates the Fifth Amendment’s due process clause. Because the Court found in favor of the Sacketts on the first issue, it did not need to address the second issue. Instead, the Court focused on whether an EPA compliance order is a final agency decision subject to APA judicial review, and whether the CWA expressly or impliedly precludes judicial review.

The EPA advanced several arguments as to why an EPA compliance order is not subject to APA review. The EPA contended the compliance order was not a final agency action because the order invited the Sacketts to engage in an informal hearing with the EPA to discuss any allegations they believed to be inaccurate. The EPA also cited the APA’s judicial review provision requiring a person seeking APA review to have first exhausted his administrative remedies.

The Court rejected the informal review argument, holding the compliance order constituted a final agency decision because legal consequences could flow from the Sackett’s failure to restore their property and the order’s issuance was the “consummation” of the agency’s

93 Id.
94 Id. at 1374.
95 Id. at 1371.
96 Id.
97 Id. at 1373.
98 Id. at 1372.
99 Id.
decision-making process. Furthermore, the Court found no merit to the Government's citation of its own "informal review" clause writing, "that confers no entitlement to further agency review. The mere possibility that an agency might reconsider in the light of informal discussion and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal." The Court also held the Sacketts had no other remedy in court because their alternative, litigating an action brought by the EPA under 33 U.S.C. § 1319, would require them to accrue further liability until the EPA decided to initiate the action.

The Court also found no merit to the EPA's arguments that the CWA precludes APA review. Citing Block v. Community Nutrition Institute, the Court reaffirmed that the APA creates a presumption favoring judicial review of an administrative action. Even though the Block presumption "may be overcome by inferences of intent drawn from the statutory scheme as a whole," the EPA's arguments did not support this inference.

On this question, the EPA set forth a series of arguments that the CWA creates a statutory scheme precluding APA judicial review. First, the EPA pointed to 33 U.S.C. § 1319, which gives the EPA discretion under the CWA to issue a compliance order or to bring a civil action to enforce the Act. The EPA argued that allowing judicial review on enforcement instruments undermines the purpose of the compliance order

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100 Id. at 1371.
101 Id. at 1372.
102 Id. ("...the Sacketts cannot initiate that process, and each day they wait for the agency to drop the hammer, they accrue, by the Government's telling, an additional $75,000 in potential liability").
103 Id. at 1373-74.
106 Id. at 1373-74.
107 Id. at 1373.
as an alternative to litigation.\textsuperscript{108} Secondly, the EPA argued that due to Congress expressly granting judicial review in other provisions of the CWA, Congress meant to preclude judicial review of compliance orders.\textsuperscript{109} Thirdly, the EPA argued Congress passed the CWA to increase the efficiency of remedies for water pollution, and the EPA is far less likely to use these orders if they are subject to judicial review.\textsuperscript{110}

The Court rejected all three of these arguments, noting that the CWA does not expressly preclude judicial review.\textsuperscript{111} Responding to the first argument, the Court wrote that allowing judicial review of compliance orders would not undermine their purpose because compliance orders are useful in ways other than insulation from judicial review, and the CWA does not guarantee a compliance order will always be the most effective choice.\textsuperscript{112} The Court held the express prescription of judicial review in select provisions of the CWA does not moot the APA’s presumption of APA review for all final agency action.\textsuperscript{113} Lastly, for the sake of argument, the Court wrote, “the APA’s presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And there is no reason to think that [the Clean Water Act] was uniquely designed to enable the strong-arming of regulated parties.”\textsuperscript{114} The Court again noted compliance orders would continue to be an effective means of securing voluntary compliance.\textsuperscript{115}

In sum, the Court concluded the compliance order, in this case, was a final agency action for which there was no other adequate remedy

\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Id. at 1374.
\textsuperscript{111} Id. at 1373-74.
\textsuperscript{112} Id. (explaining that compliance orders will still be most efficient and useful in cases of voluntary compliance.)
\textsuperscript{113} Id. (“If the express provision of judicial review in one section of a long and complicated statute were alone enough to overcome the APA’s presumption of reviewability for all final agency action, it would not be much of a presumption at all.”)
\textsuperscript{114} Id. at 1374.
\textsuperscript{115} Id.
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other than APA judicial review, and the CWA does not preclude that review.116 The Court reversed and remanded the Ninth Circuit decision.117

Two justices wrote concurring opinions. Justice Ginsburg praised the majority for holding that the Sacketts may immediately seek judicial review of the EPA’s jurisdiction to issue a compliance order.118 However, her opinion stresses that the only issue before the Court was judicial review of the EPA’s CWA jurisdictional determination.119 Justice Ginsburg would hold the majority opinion does not extend to allow judicial review of the terms and conditions of compliance orders.120 Justice Alito wrote that the majority holding will protect the property rights of ordinary Américans from harsh EPA determinations but labeled the opinion as “a modest measure of relief.”121 After referring to the reach of the CWA as “notoriously unclear,” Justice Alito charged Congress to take action to provide a clear definition of the Act’s jurisdictional reach.122

V. COMMENT

The Supreme Court’s ruling constitutes a major change in federal statutory and case law surrounding EPA-issued compliance orders. The Court needed to address three main issues created by thirty years of district and circuit court rulings to hold that the CWA does not preclude APA judicial review of administrative compliance orders. The issues the Court needed to resolve were: (1) whether a Section 309 compliance order constitutes a “final agency action” for APA purposes; (2) whether the

116 Id.
117 Id.
118 Id. at 1374-75 (Ginsburg, J. concurring).
119 Id.
120 Id.
121 Id. at 1375 (Alito, J. concurring).
122 Id.
Sacketts had no other remedy in court under the CWA; and (3) whether the CWA’s statutory scheme precludes APA judicial review.\textsuperscript{123}

The Court’s holding that a compliance order marks the “consummation” of the EPA’s decision-making process and that legal consequences flow from that decision disposes of the first issue.\textsuperscript{124} This overrules reasoning in circuit court cases like \textit{Rueth, supra}, that compliance orders are not final agency actions because they only “mark the beginning of the administrative process.”\textsuperscript{125} On the second issue, the Court overruled precedent also utilized in \textit{Rueth} that judicial review is precluded because its challenger’s proper remedy is to wait for the EPA to file an enforcement action.\textsuperscript{126} The Court recognized that because a compliance order recipient cannot initiate such an action, she is required to accrue large penalties until the EPA initiates such the enforcement action.\textsuperscript{127} Lastly the Court did away with the reasoning that the CWA precludes judicial review by applying the precedent set in \textit{Block v. Community Nutrition Institute} rather than the more stringent standard employed by lower courts in \textit{Abbott Laboratories v. Gardner}.\textsuperscript{128} The Court essentially rejected past inferences of exclusion utilized by circuit courts, and most importantly rejected the reasoning that allowing judicial

\textsuperscript{123} \textit{Id.; ROBERT MELTZ, CONG. RESEARCH SERV., R42450, THE SUPREME COURT ALLOWS PRE-ENFORCEMENT JUDICIAL REVIEW OF CLEAN WATER ACT SECTION 404 COMPLIANCE ORDERS: SACKETT v. EPA 4 (2012), available at www.nationalaglawcenter.org/assets/crs/R42450.pdf.}

\textsuperscript{124} \textit{Sackett}, 132 S. Ct. at 1371-72.

\textsuperscript{125} \textit{Rueth}, 13 F.3d at 231 (citing Howell v. U.S. Army Corps of Eng’rs, 794 F. Supp 1072, 1075 (D.N.M. 1992)).

\textsuperscript{126} \textit{Compare Sackett}, 132 S. Ct. at 1372 (2012) (rejecting the argument that judicial review is predicated upon agency enforcement action) \textit{with Rueth}, 13 F.3d at 229 (1993) (stating that judicial review was precluded until commencement of agency enforcement action).

\textsuperscript{127} \textit{Sackett}, 132 S. Ct. at 1372.

\textsuperscript{128} \textit{Id.} at 1372-73 (citing \textit{Block v. Cmty. Nutrition Inst.}, 467 U.S. 340 (1984), as creating a “presumption favoring judicial review of administrative action.”); \textit{Rueth}, 13 F.3d at 231, (citing \textit{Abbott Laboratories v.Gardner}, 387 U.S. 136 (1967), requiring the court determine whether or not Congress intended to allow pre-enforcement review before deciding to review a regulation that has not been enforced).
review of compliance orders undermines the choice between compliance orders and enforcement actions.129

Although the Court's holding is a major change in statutory federal law, the opinion on its face offers little protection to those harmed by frivolously issued compliance orders. The Court did not reach the larger issue on which it granted certiorari, whether or not statutory preclusion of judicial review violates the Fifth Amendment Due Process Clause. The result handed down was a narrow opinion that may leave many CWA compliance orders precluded from review. Furthermore, property owners seeking judicial review of a compliance order are still left with the difficult task of litigating the muddled jurisdiction of the CWA. As an official from the EPA's water enforcement division stated, "[w]hat's available after Sackett? Pretty much everything that was available before Sackett. Internally, it's same old, same old."130

A. The Court Completely Ignored the Fifth Amendment Due Process Issue

Had the Court reached this larger issue raised by the Sacketts, that statutory preclusion of pre-enforcement judicial review of compliance orders violates the Fifth Amendment Due Process Clause, its ruling would be a change of substantial breadth. Such a ruling would not only have allowed judicial review of Section 309 CWA compliance orders, but would likely extend judicial review to any other act enforced through similar compliance orders. Even orders issued under acts that expressly preclude judicial review of compliance orders would be reviewable.

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129 Sacket, 132 S. Ct. at 1373; Rueth, 13 F.3d at 229.
The fact that the Court did not resolve this due process issue is of no surprise. The Court typically skates around constitutional questions where they do not have to be answered. This practice of judicial prudence was appropriate because once the Court found that review under the CWA was not foreclosed the due process challenge became moot. If the Court had answered this question it may have been considered an advisory opinion. In the future this issue may have its day in court with a challenge to a statute that expressly precludes pre-enforcement review, such as the CERCLA.

**B. The Court's Opinion is Narrowly Tailored to Review of Jurisdiction**

The majority opinion utilized language that suggests CWA judicial review be applied narrowly, "[w]e conclude that the compliance order in this case is final agency action or which there is not adequate remedy other than APA review, and that the CWA does not preclude that review." Perhaps the most narrowing aspect of the majority opinion is that it fails to resolve the issue of whether the right to judicial review extends to review of the terms and conditions of compliance orders.

131 MELTZ, supra note 123, at 4.
132 Id.
133 Id.
134 Article III of the Constitution grants federal courts the power to determine a "case" or "controversy." U.S. Const. art. III, § 2; Muskrat v. U.S., 219 U.S. 346, 356-357 (1911). Where no "case or controversy" exists between litigants a federal court lacks jurisdiction. Id. Where a court lacking jurisdiction renders a determination that "judgment [can] not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question." Id. Once the Court held that the CWA does not preclude judicial review of compliance orders, the "controversy" of whether or not preclusion violates the Due Process Clause no longer existed. If the Court had then decided to rule on the issue of Due Process, it would have lacked jurisdiction to do so, and its ruling would have been merely an expression of opinion, i.e., an advisory opinion.
136 Sackett, 132 S. Ct. at 1374; MELTZ, supra note 124, at 3.
137 Sandra Edwards, Supreme Court Expands Judicial Review of CWA Enforcement Orders, AMERICANBAR.ORG (Apr. 2, 2012),
BABY STEPS, NOT LEAPS, TOWARD RELIEF: ANATOMIZING SACKETT v. EPA

The Sacketts petitioned the Court asking for judicial review of the EPA's jurisdiction "wetlands" determination, not the specific terms of the order. Justice Ginsburg suggested in her concurrence that the majority opinion grants judicial review for determining the EPA's power to assert jurisdiction under the CWA, not to the terms and conditions of the order. Justice Alito's concurrence elaborated, "the Court's decision provides a modest measure of relief. At least, property owners like [the Sacketts] will have the right to challenge the EPA's jurisdictional determination under the [APA]."

If post-Sackett district and circuit courts interpret the Courts ruling as only granting judicial review of the EPA's jurisdiction to issue a compliance order, a large majority of CWA compliance orders will be still be precluded from review. Where compliance orders are issued to CWA permit holders, the EPA has already obtained jurisdiction over the permit holder's property.

Under this interpretation, permit violators subjected to superfluous compliance order requirements would still be barred from seeking judicial review of those requirements, whether or not the EPA properly determined CWA jurisdiction before issuing the permit. This would be true even if the requirements of the compliance order could be deemed "arbitrary and capricious" under the APA. In City of Baton Rouge v. EPA, supra, the city sought judicial review of a compliance order's requirement that they

http://apps.americanbar.org/litigation/committees/environmental/news.html. Although the issue was not directly before it, the fact that the Court did not at least mention judicial review for the content and requirements of compliance orders is surprising. At oral argument, many of the Justices' attacked at the EPA's counsel and alluded to the unlawful requirements of the Sackett's compliance order. Transcript of Oral Argument, supra note 3, at 35-42. Specifically, the justices did not showed hostility towards the order's requirement that the Sackett's plant vegetation, fence off their land, and refrain from making use of it for three years. Id.

138 Sackett, 132 S. Ct. at 1371.
139 Id. at 1374 (Ginsburg J., concurring).
140 Id. at 1375 (Alito, J. concurring).
design and implement a plan to overhaul their sewer system within thirty
days. Like Sacketts, the City of Baton Rouge faced accrual of
substantial penalties for failing to comply with the order until the EPA
brought a Section 309 enforcement action in district court. Sackett likely
does not overrule cases like Baton Rouge.

By potentially only providing for jurisdictional review the Court
likely excluded a large majority of compliance orders from the judicial
review they sought to create. If the Sackett opinion is interpreted
narrowly, as the Court suggests it should be, NPDES, Section 402, and
Section 404 permit holders may still be subject to accrual of substantial
carriages for failure to comply with compliance orders while they can
litigate the orders requirements in an EPA brought enforcement action.
This issue is sure to be litigated in the future; current CWA permit holders
may even assert a right to retroactively review of past EPA jurisdictional
determinations that brought them under the scope of the CWA.

C. The Decision Does Nothing to Mend the CWA’s Lack of
Jurisdictional Clarity

Although this issue was not before the Court, the CWA’s lack of
jurisdictional clarity may render judicial review insubstantial. Even
though the Sacketts have won a large battle they must still litigate the
merits of their case in district court. Specifically, the Sacketts are now
left with the great burden of proving their property does not contain
wetlands subject to the CWA. The EPA’s jurisdiction under the CWA
is notoriously unclear and vast; proving that a property is not subject to the
CWA is extremely difficult.

The legal arsenal for litigants challenging an EPA or Corps
jurisdictional determination consists of the vague CWA statutory and

141 City of Baton Rouge, 620 F.2d at 479.
142 MELTZ, supra note 123, at 5.
143 Id.
144 Sackett, 132 S. Ct. at 1375 (Alito, J., concurring).
regulatory scheme, the Supreme Court’s fractured decision in *Rapanos*, and a widely varied collection of post-*Rapanos* Federal circuit court decisions. The Court heavily justified its granting of judicial review by reassuring “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.” This statement, however, illustrates exactly how compliance orders will continue to be oppressive. Because courts and the federal government have failed to provide a clear substantial legal basis to challenge the jurisdictional power of the CWA, voluntary compliance will still be forced in most cases, even where not warranted. With no clear definition of the CWA’s jurisdictional reach, recipients of compliance orders still lack a strong substantial basis to question their compliance order’s validity, undermining their newly obtained right of judicial review.

As Justice Alito wrote in his concurring opinion, “Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act.” 145 “The uncertain reach of the [CWA] and the draconian penalties imposed for the sort of violations alleged in this case still leaves most property owners with little practical alternative to dance to the EPA’s tune.” 146 The issue of jurisdictional reach was not before the court and therefore was appropriately not addressed by the majority opinion. That being said, the issue is important in considering the practical effect of the *Sackett* decision. “Real relief requires Congress to do what is should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act.” 147

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145 *Id.*
146 *Id.*
147 *Id.*
VI. Conclusion

The *Sackett* decision is a major change in federal and statutory law, and the court practiced appropriate judicial prudence in addressing the issue before it. This being so, the opinion takes only baby steps towards relief for those improperly swept under the jurisdiction of the CWA. Recipients of CWA compliance orders who feel the EPA has wronged them may still have substantially the same remedies they had before *Sackett*. What the Court’s opinion is sure to do is spark further litigation over the extent of compliance order reviewability and the CWA’s jurisdictional reach. Although many will criticize this opinion for doing too little, it was of an opinion of appropriate breadth and may spur lower courts and the Federal government to resolve the enduring issue of CWA’s notoriously unclear jurisdictional reach.\(^{148}\)

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\(^{148}\) See, MELTZ, *supra* note 123.