

# Wetlands, Property Rights, and the Due Process Deficit in Environmental Law

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In 2005, Michael and Chantell Sackett purchased a two-thirds-acre lot in Bonner County, Idaho, with the intention of building a single-family home. Two years later, after obtaining the necessary local permits, the Sacketts began work, only to be told by the U.S. Environmental Protection Agency that they had violated the Clean Water Act by laying gravel on the site without a permit. According to the EPA, the Sacketts' parcel constituted a wetland subject to federal regulation as part of "the waters of the United States." A November 2007 administrative compliance order (ACO) from the EPA directed the Sacketts to cease construction and undertake specified restoration efforts.<sup>1</sup> Failure to comply, the Sacketts were told, would expose them to fines of up to \$65,000 per day—\$32,500 each for violating the CWA and the EPA's ACO.<sup>2</sup> The Sacketts contested

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<sup>1</sup> The initial compliance order directed the Sacketts to, among other things, plant "container stock of native scrub-shrub, broadleaved deciduous wetland plants and . . . native herbaceous wetland plants" throughout the site; plant trees; fence the property; and monitor the site's vegetation for three years. See Petitioner's Brief on the Merits at 7–8, *Sackett v. EPA*, 132 S. Ct. 1367 (2012) (No. 10-1062), 2011 U.S. S. Ct. Briefs LEXIS 1347. The EPA subsequently amended the order to "remove all unauthorized fill material" and restore the site to its prior condition. *Id.* at 7. The order also required the Sacketts 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." See *Sackett v. EPA*, 132 S. Ct. 1367, 1371 (2012).

<sup>2</sup> By the time this case reached the Supreme Court, the maximum penalty had increased to \$37,500 per violation per day. See *Sackett*, 132 S. Ct. at 1370 n.1.

the EPA's claim of CWA jurisdiction, but were denied an administrative hearing. So they proceeded to court.<sup>3</sup>

The federal district court and U.S. Court of Appeals for the Ninth Circuit both turned away the Sacketts' legal claim.<sup>4</sup> Both courts concluded they lacked jurisdiction to hear the Sacketts' claim because an ACO is not subject to judicial review. Although the order carried with it a threat of substantial fines for failure to comply, both courts ruled that the Sacketts could not obtain review of the order unless and until the EPA brought an enforcement action against them in federal court. As the Ninth Circuit explained, the CWA "impliedly" precluded pre-enforcement review, so the timing and nature of any judicial review of the EPA's commands would be up to the EPA.<sup>5</sup> In the meantime, the Sacketts' legal liability would increase each day they failed to accede to the EPA's commands.

In March 2012, the Supreme Court sided with the Sacketts.<sup>6</sup> In a unanimous opinion, the Court held that the EPA's ACO was a final agency order subject to immediate judicial review. Contrary to the claims of the federal government, and the conclusions of the lower courts, nothing in the CWA precluded courts from hearing the Sacketts' claim. Under the Administrative Procedure Act,<sup>7</sup> the ACO qualified as a "final agency action" for which there was "no adequate remedy" other than judicial review.<sup>8</sup>

As a consequence of this decision, the Sacketts will get their day in court, but they will still have to wait before restarting work on their home. More than four years after receiving the EPA's order, all the Sacketts won was "a modest measure of relief"—the right to challenge the EPA's jurisdictional claim in federal court.<sup>9</sup> The

<sup>3</sup> For a fuller account of the litigation, see, elsewhere in this volume, Damien M. Schiff, *Sackett v. EPA: Compliance Orders and the Right of Judicial Review, 2011–2012* Cato Sup. Ct. Rev. 113 (2012); see also Timothy Sandefur, *Compliance—Or Else: The EPA's Compliance Order Regime Creates a Hobson's Choice*, 34 Regulation 8 (Winter 2011–2012).

<sup>4</sup> See *Sackett v. EPA*, 2008 WL 3286801 (D. Idaho 2008), *aff'd* 622 F.3d 1139 (9th Cir. 2010).

<sup>5</sup> *Sackett*, 622 F.3d at 1132.

<sup>6</sup> *Sackett v. EPA*, 132 S. Ct. 1367 (2012).

<sup>7</sup> 5 U.S.C. § 500 et seq.

<sup>8</sup> *Sackett*, 132 S. Ct. at 1374.

<sup>9</sup> *Id.* at 1375 (Alito, J., concurring).

Supreme Court's narrow and rather straightforward ruling is important, but it does not get landowners like the Sacketts out of the swamp. Nor does it do much to alleviate the serious due process concerns that plague the application and enforcement of federal wetlands regulation.

The Sacketts were not the first landowners bogged down by federal wetlands regulation, and they will not be the last. Controversy and confusion have enveloped federal regulation of wetlands for decades. Under the CWA, federal regulators have asserted authority over waters and dry lands alike and sought to expand federal jurisdiction well beyond constitutional limits. The resulting regulatory morass provides landowners with little notice and even less certainty as to which lands are covered, under what authority, or with what effect. Unreviewable ACOs are only one source of the due process deficit plaguing federal wetlands regulation.

### **Federal Regulation of Wetlands**

The scope of federal regulatory authority under the Clean Water Act has been contested since the law was enacted in 1972, particularly (though not exclusively) with regard to wetlands. The CWA prohibits the "discharge of any pollutant," including dredged or fill material, into the "navigable waters" of the United States without a permit.<sup>10</sup> The CWA further defines "navigable waters" as "waters of the United States,"<sup>11</sup> and authorizes the U.S. Army Corps of Engineers to issue permits "for the discharge of dredged or fill material" into such waters, subject to EPA oversight.<sup>12</sup> While the CWA unquestionably asserted authority beyond those waters that were truly navigable in 1972, there was still some question as to how far federal jurisdiction would reach. The CWA is "notoriously unclear" as to the extent to which it projects federal regulatory authority over private land.<sup>13</sup> As the Supreme Court observed in 1985, "On a purely linguistic level, it may appear unreasonable to classify 'lands,' wet

<sup>10</sup> See 33 U.S.C. § 1311(a) (prohibiting the discharge of pollutants); 33 U.S.C. § 1362(6) (defining "pollutant" to include dredged material, rock, and sand).

<sup>11</sup> See 33 U.S.C. § 1362(7).

<sup>12</sup> See 33 U.S.C. § 1344(a), (c).

<sup>13</sup> Sackett, 132 S. Ct. at 1375 (Alito, J., concurring).

or otherwise, as ‘waters.’”<sup>14</sup> Yet that is precisely what has happened under the CWA.

From the outset, the two agencies entrusted with protecting the nation’s “waters” disagreed on what this meant. The EPA insisted that “waters” included wetlands, but the Corps was not so sure. The latter promulgated regulations that did not purport to cover wetlands and many other intrastate waters.<sup>15</sup> Environmental groups shared the EPA’s perspective and filed suit. In *Natural Resources Defense Council v. Callaway*, the U.S. District Court for the District of Columbia held that Congress “asserted federal jurisdiction over the nation’s waters to the maximum extent permissible under the Commerce Clause of the Constitution,” which meant that at least some of the nation’s wetlands were subject to federal control.<sup>16</sup>

Federal jurisdiction expanded in the wake of the *Callaway* decision, but it was still murky. In 1975, the Corps issued interim regulations slightly expanding the definition of “waters.”<sup>17</sup> Then, in 1982, the Corps and the EPA promulgated regulations defining “waters of the United States” to include *all* waters used for interstate commerce, *all* interstate waters and wetlands, *all* tributaries or impoundments of such waters, and “all other waters” and wetlands “the use, degradation or destruction of which *could* affect interstate commerce,” including those waters and wetlands that *could* be used for commercial, industrial, or recreational purposes.<sup>18</sup> As an estimated three-quarters of wetlands are privately owned,<sup>19</sup> these regulations represented a dramatic expansion of federal regulatory authority over private land, as did subsequent agency manuals detailing what would constitute a “wetland.”<sup>20</sup> Even with the jurisdictional expansion, there were still questions as to what would constitute a “water”

<sup>14</sup> *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985).

<sup>15</sup> See 33 Fed. Reg. 12,119 (Apr. 3, 1974); see also *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 168 (2001) (noting that the Corps originally adopted a narrow interpretation of its jurisdiction under the CWA).

<sup>16</sup> See 392 F.Supp. 685, 686 (D.D.C. 1975).

<sup>17</sup> 40 Fed. Reg. 31,320, 31,324 (July 25, 1975) (33 C.F.R. § 328.3(a)(3) (1988)).

<sup>18</sup> 33 C.F.R. § 328.3(a) (emphasis added).

<sup>19</sup> See Jon Kusler, *Wetlands Delineation: An Issue of Science or Politics?*, *Env’t, Mar.* 1992, at 29.

<sup>20</sup> Particularly controversial was the wetland delineation manual released by the EPA in 1989, which greatly broadened the definition of what could constitute a wetland and expanded the amount of land covered from an estimated 100 million acres to 200 million acres. See Nancie G. Marzulla, *The Property Rights Movement: How It*

or “wetland,” and different agencies offered different answers at different times.<sup>21</sup> Were that not enough, the agencies asserted that nearly any activity undertaken on regulated waters or wetlands could be subject to federal control, even riding a bike or walking.<sup>22</sup> Any *de minimis* exception was due not to any limit on federal statutory authority, but bureaucratic grace.

Part of the problem for landowners is that a given parcel of land need not contain water or be particularly wet in order to be considered a “wetland” and thus part of the “waters of the United States.”<sup>23</sup> A more basic part of the problem is that the regulations promulgated by the Corps and EPA seem to extend beyond the scope of federal regulatory authority. The CWA was enacted pursuant to the Commerce Clause, which grants Congress the power to “regulate Commerce . . . among the several states.”<sup>24</sup> As interpreted by the modern Supreme Court, this clause grants Congress substantial power to regulate “economic activity.” Yet like all enumerated powers, it is subject to limits—limits neither the Corps nor the EPA made any effort to observe.

Early on, landowners challenged the Corps’ regulations, but without much initial success—and without creating much regulatory certainty. In 1985, for example, the Supreme Court concluded that CWA regulatory authority extended to “wetlands adjacent to navigable waters and their tributaries,” but the Court said little more by way of defining the scope of permissible federal regulation.<sup>25</sup>

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Began and Where It Is Headed, in *Land Rights: The 1990s’ Property Rights Rebellion*, 17 (Bruce Yandle ed., 1995).

<sup>21</sup> James DeLong notes that between 1986 and 1994 the “basic definition of wetlands used by the government changed at least six times.” See James V. DeLong, *Property Matters: How Property Rights are Under Assault—And Why You Should Care* 134 (1997). See also U.S. General Accounting Office, *GAO/RCED-98-150, Wetlands Overview: Problems with Acreage Data Persist* (1998) (noting lack of uniform federal definition of what constitutes a “wetland” for the purpose of various federal programs).

<sup>22</sup> See 58 Fed. Reg. 45,008, 45,020 (Aug. 25, 1993) (asserting authority to regulate “walking, bicycling, or driving a vehicle through a wetland” because such activities could result in the “discharge of dredged material.”).

<sup>23</sup> 33 U.S.C. § 1362.

<sup>24</sup> U.S. Const. art. I, § 8.

<sup>25</sup> See *Riverside Bayview Homes, Inc.*, 474 U.S. 121.

Around the same time, the EPA and Corps began to assert federal regulatory jurisdiction even more aggressively, relying on nothing more than the potential presence of migratory birds.<sup>26</sup> Specifically, in 1986 the Corps issued the so-called migratory bird rule, which declared that the Corps' regulatory authority extended to intrastate waters (including wetlands) that, among other things, "are or would be used as habitat" by migratory birds.<sup>27</sup> This so-called rule was not even a rule at all, as it was contained in a regulatory preamble and was issued without following the notice and comment procedures required by the Administrative Procedure Act.<sup>28</sup> The "rule" served nonetheless as a basis for the agencies' jurisdictional determinations.

Then, in 1995, in *United States v. Lopez*, a case having nothing to do with wetlands, the Supreme Court invalidated the Gun-Free School Zones Act, holding that in passing it, Congress had exceeded its authority under the Commerce Clause.<sup>29</sup> This decision reaffirmed that the federal government possesses only enumerated powers subject to judicially enforceable limits.<sup>30</sup> Under *Lopez*, the federal government can use its Commerce Clause authority to regulate the "channels of interstate commerce" and their use, the "instrumentalities" of and persons and things in interstate commerce, and those activities that "substantially affect" interstate commerce.<sup>31</sup> So construed, the commerce power is broad, but it is not infinite.

*Lopez* marked the first time the Court had invalidated a federal law on Commerce Clause grounds in 58 years. Commentators immediately recognized the potential vulnerability of federal wetland

<sup>26</sup> See, e.g., *Nat'l Wildlife Fed'n. v. Laubscher*, 662 F. Supp. 548 (S.D. Tex. 1987) ("a wetland visited by migratory birds is a wetland within the jurisdiction of the federal defendants"); see also Karol J. Ceplo, *Land-Rights Conflicts in the Regulation of Wetlands*, in *Land Rights: The 1990s' Property Rights Rebellion*, *supra* note 20, at 114–15.

<sup>27</sup> See 51 Fed. Reg. 41,217 (1986).

<sup>28</sup> See *Solid Waste Agency v. U.S. Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 164 n.1 (2001); see also *Tabb Lakes v. United States*, 715 F.Supp. 726 (E.D. Va. 1988), *aff'd* 885 F.2d 866 (4th Cir. 1989) (holding that Corps could not assert jurisdiction based migratory bird rule due to failure to follow notice and comment requirements).

<sup>29</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>30</sup> *Id.* at 552 ("We start with first principles. The Constitution creates a Federal Government of enumerated powers.").

<sup>31</sup> See *id.* at 558–59.

regulations to constitutional challenge.<sup>32</sup> Writing in *The Environmental Forum*, noted environmental law professor Richard Lazarus warned that the federal wetlands regulations then on the books were “clearly out of bounds” under *Lopez* and would need to be rewritten.<sup>33</sup> The commerce power unquestionably reached navigable-in-fact waters, such as major rivers and waterways, as well as those activities that have a “substantial effect” on interstate commerce. Yet the Corps and EPA sought to regulate far more. In particular, the regulations purported to reach those waters and wetlands with only a potential effect on commerce, let alone an actual and “substantial” one.<sup>34</sup> Further, under the “migratory bird rule,” the agencies sought to reach isolated waters and wetlands due to nothing more than their potential use by migratory birds—a theory some commentators referred to as the “glancing goose” test.<sup>35</sup> Whether a wayward goose glanced longingly at a given parcel of land was a tenuous reed on which to establish federal jurisdiction.

Despite this and other warnings, the Corps and EPA were content to stand pat. No reevaluation of their jurisdiction was forthcoming. Unsurprisingly, litigation ensued. Most federal appellate courts, however, were not particularly sympathetic to commerce-based challenges to federal wetland regulations.<sup>36</sup> Fortunately for landowners, the Supreme Court saw things differently. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC) the Supreme Court rejected the Corps’ claim of jurisdiction over

<sup>32</sup> See, e.g., David A. Linehan, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 *Tex. Rev. L. & Pol.* 365 (1998); Lori J. Warner, *The Potential Impact of United States v. Lopez on Environmental Regulation*, 7 *Duke Env'tl. L. & Pol'y F.* 321 (1997); see also Jonathan H. Adler, *Wetlands, Waterfowl and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 *Env'tl. L.* 1, 5 (1999).

<sup>33</sup> Richard J. Lazarus, *Corps Slips on Lopez, FWS Wins*, *Env'tl. F.*, Mar.–Apr. 1998, at 8.

<sup>34</sup> For more on the questionable constitutional validity of federal wetlands regulations as currently drafted, see Adler, *supra* note 32, at 30–40.

<sup>35</sup> DeLong, *supra* note 21, at 131–32.

<sup>36</sup> See, e.g., *Hoffman Homes v. EPA*, 999 F.2d 256 (7th Cir. 1993); *United States v. Pozsgai*, 999 F.2d 719 (3d Cir. 1993); *Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir. 1995); *Solid Waste Ass'n of N. Cook County v. U.S. Army Corps of Eng'rs*, 191 F.3d 845 (7th Cir. 1999). But see *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997).

several permanent and seasonal ponds due to the occasional presence of migratory birds.<sup>37</sup> These waters were neither adjacent to nor hydrologically connected to navigable waters. As a consequence, accepting the Corps' claim of jurisdiction "invoke[d] the outer limits of Congress' power" and could not be sustained.<sup>38</sup> Citing such federalism concerns, the Court held that the CWA does not confer federal regulatory jurisdiction over isolated, intrastate waters, and the Corps' jurisdictional regulations "as clarified and applied to petitioner's balefill site pursuant to the 'Migratory Bird Rule' exceeds the authority granted" to the Corps under the CWA.<sup>39</sup>

The Corps and EPA remained undaunted.<sup>40</sup> The agencies briefly considered revising their jurisdictional regulations to account for the SWANCC decision, but then had better ideas.<sup>41</sup> As Chief Justice John Roberts would note the next time CWA jurisdiction came before the Court, instead of "refining its view of its authority" in light of SWANCC, "the Corps chose to adhere to its essentially boundless view of the scope of its power."<sup>42</sup> With the old regulations still on the books, and the Corps and EPA continuing to assert broad regulatory authority, lower courts continued to split over the federal government's regulatory reach. Despite the existence of nationally applicable regulations, there was little uniformity in the application or enforcement of the relevant rules, and no more certainty as to the scope of federal regulatory jurisdiction.<sup>43</sup>

<sup>37</sup> 531 U.S. 159 (2001).

<sup>38</sup> *Id.* at 172.

<sup>39</sup> *Id.* at 174. For more on the SWANCC decision, see Jonathan H. Adler, *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 *Sup. Ct. Econ. Rev.* 205 (2001).

<sup>40</sup> See, e.g., Memorandum from Gary S. Guzy, General Counsel, U.S. EPA, & Robert M. Andersen, Chief Counsel, U.S. Army Corps of Eng'rs, *Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters* (Jan. 19, 2001).

<sup>41</sup> See Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 *Fed. Reg.* 1991 (Jan. 15, 2003); Eric Pianin, *EPA Scraps Changes to Clean Water Act: Plans Would Have Reduced Protection*, *Wash. Post*, Dec. 17, 2003, at A20.

<sup>42</sup> See *Rapanos v. United States*, 547 U.S. 715, 758 (Roberts, C.J., concurring).

<sup>43</sup> See Robert W. Adler, *The Law at the Water's Edge: Limits to "Ownership" of Aquatic Ecosystems*, in *Wet Growth: Should Water Law Control Land Use?* 201, 228 (Craig Anthony (Tony) Arnold ed., 2005) (jurisdictional reach after SWANCC was "perhaps as uncertain as it has been since the *Callaway* decision in 1975").



In 2006, the Supreme Court again considered and rejected the Corps and EPA theories of regulatory jurisdiction under the CWA. In *Rapanos v. United States* the Court considered the application of the CWA to properties with tenuous connections to navigable-in-fact waters.<sup>44</sup> One of the parcels in question was over 10 miles from the nearest navigable waterway.<sup>45</sup> The Corps nonetheless claimed jurisdiction because water from wetlands on the site drained into a ditch that drained into a creek that, in turn, flowed into a navigable river.<sup>46</sup> For knowingly depositing fill material on his land without a federal permit, John Rapanos faced criminal prosecution, up to five years in jail, and hundreds of thousands of dollars in fines.<sup>47</sup>

In rejecting the bases upon which the Corps asserted jurisdiction over Rapanos's parcel, a majority of the Court reaffirmed that federal regulatory authority is subject to outer limits and that the CWA should be construed narrowly as a result. Four justices sought to limit the CWA to those waters and wetlands with a relatively permanent or "continuous surface connection" to navigable waters,<sup>48</sup> while Justice Anthony Kennedy would have required identification of only a "significant nexus" between a given intrastate water or wetland and navigable waters.<sup>49</sup> In this regard, the Court reaffirmed the reasoning of *SWANCC* that "waters of the United States" extend only to those waters and wetlands that have a "significant nexus" and are "inseparably bound up with the 'waters' of the United States."<sup>50</sup>

<sup>44</sup> *Rapanos v. United States*, 547 U.S. 715 (2006). For more on the *Rapanos* decision and its effects, see Jonathan H. Adler, Reckoning with *Rapanos*: Revisiting "Waters of the United States" and the Limits of Federal Wetland Regulation, 14 *Mo. Env'tl. L. & Pol'y Rev.* 1 (2006); Jonathan H. Adler, Once More, With Feeling: Reaffirming the Limits of Clean Water Act Jurisdiction, *The Supreme Court and the Clean Water Act: Five Essays* (L Kinvin Wroth ed., 2007), available at <http://www.vjel.org/books/pdf/PUBS10004.pdf>.

<sup>45</sup> *Rapanos*, 547 U.S. at 720 (Scalia, J., plurality).

<sup>46</sup> *Id.* at 725.

<sup>47</sup> *Id.* at 721.

<sup>48</sup> *Id.* at 739–42.

<sup>49</sup> *Id.* at 759 (Kennedy, J., concurring in the judgment).

<sup>50</sup> *SWANCC*, 531 U.S. at 168 (quoting *United States v. Riverside Bayview Homes*, 474 U.S. 121, 134 (1985)); see also *Rapanos*, 547 U.S. at 758 (Scalia, J., plurality) (noting "significant nexus" requirement of *SWANCC*).

Again the Corps and EPA suffered a defeat, and again they failed to respond. Even though the Court's controlling opinion suggested the issuance of clarifying regulations, and two justices wrote separately to urge the same, the Corps and EPA have continued to rely on decades-old jurisdictional rules, the application of which has been twice rejected by the Supreme Court. Instead of clarifying their regulations, they have issued a series of guidance documents, final and otherwise, that do little to resolve the underlying confusion about the extent to which private land use is subject to regulation under the CWA.<sup>51</sup> As Justice Samuel Alito noted in *Sackett*, "far from providing clarity and predictability, the agency's latest informal guidance advises property owners that many jurisdictional determinations concerning wetlands can only be made on a case-by-case basis by EPA field staff."<sup>52</sup> Indeed, despite *SWANCC* and *Rapanos*, both agencies continue to assert a near-boundless conception of the scope of their own authority.<sup>53</sup>

Given this history, it is no wonder that landowners in the *Sacketts'* position would be left uncertain whether the Corps and EPA could claim federal jurisdiction over their land. Wetland characteristics may be necessary for the CWA to apply to a given plot of land, but they are not sufficient. A parcel must still have a "significant nexus" to the "waters of the United States" for it to be subject to federal control. In the absence of clarifying regulations, such determinations

<sup>51</sup> See, e.g., U.S. Env'tl. Prot. Agency & U.S. Army Corps of Eng'rs, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States* (June 5, 2007); U.S. Env'tl. Prot. Agency & U.S. Army Corps of Eng'rs, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States* (Dec. 2, 2008); Draft Guidance from the EPA and the U.S. Army Corps of Eng'rs on Identifying Waters Protected by the Clean Water Act, (May 2, 2011), <http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous;usguidance;us4-2011.pdf>.

<sup>52</sup> *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring) (citing Brief of Amicus Curiae The Competitive Enterprise Institute in Support of Petitioners at 7–13, *Sackett v. EPA*, 132 S. Ct. 1367 (2012) (No. 10-1062), 2011 U.S. S. Ct. Briefs LEXIS 1672).

<sup>53</sup> See, e.g., Richard E. Glaze, Jr., *Rapanos* Guidance III: "Waters" Revisited, 42 Env'tl. L. Rep. 10,118, 10,118 (2012) (draft Corps-EPA guidance "would provide the agencies a basis for exercising broader authority over the nation's waters than current policy supports"); Diedre G. Duncan & Kerry L. McGrath, EPA and U.S. Army Corps Seek to Expand Jurisdiction under the Clean Water Act, Engage, Mar. 2012, at 64 (draft Corps-EPA guidance would "expand" agency jurisdiction under CWA).

can be made only on a case-by-case basis.<sup>54</sup> Given both agencies' history of overzealous assertions of their own authority, one could excuse landowners for doubting the jurisdictional claim made by an agency enforcer—yet acting on such doubts could have serious legal and financial consequences, as the Sacketts discovered.

### **Enforcing the Clean Water Act**

When faced with an alleged CWA violation, such as the discharge of fill material onto a jurisdictional wetland without a permit, the EPA has several enforcement options. First, the agency may initiate a civil or criminal enforcement action in federal court.<sup>55</sup> Second, it may seek to impose administrative penalties on the alleged violator, after providing an opportunity for a hearing.<sup>56</sup> Of note, if the EPA pursues either of these first two options, the alleged violator is guaranteed notice and an opportunity to be heard before any penalties or other serious consequences attach.

The EPA's third option is to issue an administrative compliance order (ACO) that sets forth the nature of the alleged CWA violation and identifies those actions necessary for the alleged violator to come into compliance.<sup>57</sup> Under the CWA, an ACO may be issued "on the basis of any information available" to the EPA administrator.<sup>58</sup> There is no hearing or other adjudication before an ACO is issued, nor may a landowner obtain an agency hearing afterwards. Although an ACO is not self-executing—the EPA must bring an enforcement action in federal court to enforce it—failing to comply with an ACO is itself subject to penalties equal to those imposed for violating the relevant provisions of the CWA.<sup>59</sup> In the Sacketts' case, they were informed that violating the EPA's ACO could result in "civil penalties of up to \$32,500 per day of violation."<sup>60</sup>

<sup>54</sup> Rapanos, 547 U.S. at 782 (Kennedy, J., concurring in the judgment); *id.* at 758 (Roberts, C.J., concurring).

<sup>55</sup> See 33 U.S.C. § 1319(b).

<sup>56</sup> See 33 U.S.C. § 1319(g).

<sup>57</sup> See 33 U.S.C. § 1319(a).

<sup>58</sup> See 33 U.S.C. § 1319(a)(3).

<sup>59</sup> See 33 U.S.C. § 1319(d); see also Sackett, 132 S. Ct. at 1372 ("according to the Government's current litigating position, the order exposes the Sacketts to double penalties in a future enforcement proceeding.").

<sup>60</sup> See Sackett, 622 F.3d at 1141. By the time this case reached the Supreme Court, however, the maximum fine had been increased to \$37,500 per day. See *supra* note 2.

The EPA maintained that ACOs are not final agency actions reviewable in federal court unless and until the agency elects to pursue an enforcement action. Before the Ninth Circuit, and again in their petition for certiorari, the Sacketts claimed that the CWA-ACO regime violated their due process rights. Specifically, they argued that, under the Fifth Amendment's Due Process Clause, they were constitutionally entitled to some form of judicial review of the ACO. Otherwise, they would be left with a Hobson's Choice because the only way to challenge the EPA's assertion of authority would be to violate the ACO at risk of substantial penalties—penalties that derived from violating an ACO, which could, in turn, be based on a mere scintilla of evidence.<sup>61</sup>

The Ninth Circuit rejected the Sacketts' due process argument, but not without some concern. "If the CWA is read in the literal manner the Sacketts suggest, it could indeed create a due process problem," the court explained.<sup>62</sup> As written, the CWA would seem to provide that the Sacketts could be penalized for violating an ACO that was issued without a hearing of any sort on the basis of "any information available," even if they had not violated the CWA itself. Such an interpretation would have raised serious constitutional questions, so the Ninth Circuit announced it would "decline to interpret the CWA" as written.<sup>63</sup> Instead, the court explained, it would read the CWA to provide that the EPA could bring an enforcement action to enforce an ACO only if the agency also alleged a violation of the act itself, and that a court could assess civil penalties for violating an ACO only if "the EPA also proves, by a preponderance of the evidence, that the defendants actually violated the CWA in the manner alleged."<sup>64</sup> So construed, the Ninth Circuit concluded, the CWA's preclusion of pre-enforcement judicial review of ACOs did not violate due process.

The Ninth Circuit had acknowledged the Sacketts' due process concerns, but still left them in a difficult position. Refusal to comply

<sup>61</sup> See Sandefur, *supra* note 3; Christopher M. Wynn, Facing a Hobson's Choice? The Constitutionality of the EPA's Administrative Compliance Order Enforcement Scheme under the Clean Air Act, 62 Wash. & Lee L. Rev. 1879, 1896 (2005).

<sup>62</sup> Sackett, 622 F.3d at 1145.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

with the ACO could still bring substantial penalties—penalties that would continue to accrue unless and until they complied with all of its terms or the EPA brought a civil action against them. Although the Sacketts maintained their land was beyond the scope of EPA jurisdiction, the incentive to settle would be overwhelming for people of ordinary means, as they had few other options. Nonetheless, the Ninth Circuit concluded that the potential penalties were not “so onerous as to ‘foreclose all access to the courts’ and ‘create a constitutionally intolerable choice.’”<sup>65</sup>

As the Ninth Circuit saw it, the Sacketts retained the option to “seek a permit to fill their property and build a house.”<sup>66</sup> A permit denial, unlike an ACO in its view, would be a final agency action immediately appealable in court.<sup>67</sup> Yet the Army Corps of Engineers would not accept a permit application from the Sacketts unless and until they complied with the ACO.<sup>68</sup> Moreover, applying for a permit is no small matter. Obtaining an individual permit from the Corps can take years and cost tens (if not hundreds) of thousands of dollars.<sup>69</sup> Furthermore, to apply for a permit would be to accept the very claim the Sacketts sought to contest: that their land was subject to the regulatory jurisdiction of the CWA.<sup>70</sup>

In their petition for certiorari, the Sacketts focused on the alleged due process violation.<sup>71</sup> Not only had the Ninth Circuit denied them the opportunity to challenge the EPA’s ACO and the fines for non-compliance with the ACO, but the CWA would continue to accumulate so long as the EPA wished to wait. This scenario, the Sacketts maintained, presented them with a “constitutionally intolerable

<sup>65</sup> *Id.* at 1146 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994)).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Sackett*, 132 S. Ct. at 1372.

<sup>69</sup> See David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 *Nat. Resources. J.* 59, 74–76 (2002).

<sup>70</sup> As the Court also noted, “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.” *Sackett*, 132 S. Ct. at 1372.

<sup>71</sup> *Petition for Writ of Certiorari, Sackett v. EPA*, 132 S. Ct. 1367 (2012) (No. 10-1062), 2011 U.S. S. Ct. Briefs LEXIS 851; See Schiff, *supra* note 3, at 122.

choice” between seeking to vindicate their rights and risking substantial financial liability.<sup>72</sup> As the Court had long maintained, due process of law is violated if the “practical effect of coercive penalties for noncompliance” is to “foreclose all access to the courts.”<sup>73</sup> As the Court had observed in 2010, “We normally do not require plaintiffs to ‘bet the farm . . . by taking the violative action’ before ‘testing the validity of the law.’”<sup>74</sup>

However important the due process questions were, they did not attract the Court’s attention—at least not enough to engender serious consideration. In agreeing to hear the case, the Supreme Court reformulated the questions presented, adding a preliminary question about whether the CWA actually precluded judicial review as the EPA maintained and lower courts had held. Specifically, the Court asked the parties to answer the question, “May petitioners seek pre-enforcement judicial review of the administrative compliance order pursuant to the Administrative Procedure Act, 5 U. S. C. §704?”<sup>75</sup>

That the Court added a preliminary statutory question should not have been surprising. The Court has gone out of its way to avoid addressing due process questions arising from regulatory enforcement, denying certiorari in cases raising similar due process claims under other environmental statutes. The Court’s refusal to hear *Tennessee Valley Authority v. Whitman*<sup>76</sup> had been particularly surprising. In *TVA*, the U.S. Court of Appeals for the Eleventh Circuit had held a similar ACO regime under the Clean Air Act was unconstitutional because the orders were issued without providing regulated parties a sufficient opportunity to be heard.<sup>77</sup> As the Eleventh Circuit saw it, ACOs have the force of law, yet could be issued “on the basis of

<sup>72</sup> Petition for Writ of Certiorari at 7, *Sackett v. EPA*, 132 S. Ct. 1367 (2012) (No. 10-1062), 2011 U.S. S. Ct. Briefs LEXIS 851 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994)).

<sup>73</sup> *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994) (citing *Ex parte Young*, 209, U.S. 123, 148 (1908)).

<sup>74</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 (2010) (citations omitted).

<sup>75</sup> *Sackett v. EPA*, 131 S. Ct. 3092 (2011) (granting cert.).

<sup>76</sup> *Leavitt v. TVA*, 541 U.S. 1030 (2004) (denying cert.).

<sup>77</sup> *TVA v. Whitman*, 336 F.3d 1236 (11th Cir. 2003).

any information available” (much like ACOs under the CWA).<sup>78</sup> The Court had also turned away efforts by General Electric to challenge administrative orders under the Comprehensive Environmental Response, Compensation, and Liability Act (a.k.a. “Superfund”).<sup>79</sup> If the Court had wished to address the due process question, it had been given plenty of opportunities.

Although some on the Court may have been concerned about the due process implications of the CWA regulatory regime,<sup>80</sup> the Court in the end saw no need to reach that far. Rather, a unanimous Court was able to resolve the case on narrow statutory grounds, relying on the Administration Procedure Act and well-established administrative law principles—all without expressly considering the Sacketts’ due process concerns. The ACO had all the characteristics of a “final agency action” in that it “determined” the Sacketts’ “rights or obligations” by exposing the Sacketts to double penalties for violating the CWA and imposing upon them an obligation to restore the site in accordance with the EPA’s commands.<sup>81</sup> Further, the ACO marked the “consummation” of the EPA’s decisionmaking. This factor was enough to establish that the ACO could be subject to judicial review. Contrary to the reading of the Ninth Circuit, nothing in the CWA expressly precluded a suit challenging the ACO, and the Court was not going to read such a limit into the CWA’s text. The APA embodies a presumption of reviewability, and this presumption was enough to overcome statutory silence on the preclusion of review.

But what if the CWA had not been silent on the question? What if the CWA had expressly precluded pre-enforcement review of ACOs? This is not an idle question. Other environmental statutes expressly preclude judicial review of compliance orders, and some commentators have urged Congress to amend the CWA so as to

<sup>78</sup> *Id.* at 1258. Because the Court concluded that it would be unconstitutional for ACOs to have the force of law, it concluded an ACO should *not* be considered final agency action, and should be treated as legally inconsequential. *Id.* at 1260.

<sup>79</sup> See *Gen. Elec. Co. v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 2959 (2011).

<sup>80</sup> See, e.g., *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring).

<sup>81</sup> *Sackett*, 132 S. Ct. at 1372–72 (quoting *Bennet v. Spear*, 520 U.S. 154, 178 (1997)) (citation omitted).

make ACOs unreviewable here as well.<sup>82</sup> The aforementioned federal Superfund statute, for example, bars federal courts from hearing challenges to “unilateral administrative orders” (UAOs), which are used to force companies to undertake cleanup activities, often at considerable expense.<sup>83</sup> Courts have wrestled with the constitutionality of Superfund UAOs,<sup>84</sup> although such orders have largely been upheld.<sup>85</sup> Should an equivalent limit on the judicial review of ACOs under the CWA pass constitutional muster?

### What about Due Process?

The Supreme Court concluded that the Sacketts could seek pre-enforcement judicial review of the EPA’s ACO. This holding was based on statutory grounds—specifically, the text of the CWA and the presumption of reviewability of agency action under the APA. As a consequence, it could be reversed by Congress, much as Congress has sought to preclude judicial review of administrative orders under a handful of other statutes.<sup>86</sup> Yet statutory preclusion of judicial review of ACOs would raise serious due process concerns.

The guarantee of due process of law is “by far the oldest of our civil rights.”<sup>87</sup> Magna Carta guaranteed that “no free man” would be “imprisoned or disseised or outlawed or exiled or in any way ruined . . . except by the lawful judgment of his peers or by the law of the land.”<sup>88</sup> This principle required, at a minimum, that any

<sup>82</sup> See, e.g., Nina Mendelson, SCOTUS Decision in *Sackett v. EPA* Weakens Government’s Ability to Respond to Urgent Threats to Water Quality, CPRBlog (Mar. 21, 2012, 5:50 PM), <http://progressivereform.org/CPRBlog.cfm?fkScholar=36> (“Congress should amend the Clean Water Act . . . to clarify, at least for urgent environmental threats, that judicial review of a compliance order should have to wait.”).

<sup>83</sup> See 42 U.S.C. § 9613(h).

<sup>84</sup> See Frank B. Cross, Procedural Due Process under Superfund, 1986 BYU L. Rev. 919, 925–36 (1986) and cases cited therein; see also Cheryl Kessler Clark, Due Process and the Environmental Lien: The Need for Legislative Reform, 20 B.C. Env’tl. Aff. L. Rev. 203 (1993).

<sup>85</sup> See, e.g., *Gen. Elec. Co. v. Jackson* 610 F.3d 110 (D.C. Cir. 2010); *Employers Ins. of Wausau v. Browner*, 52 F.3d 656 (7th Cir. 1995); *Solid State Circuit, Inc. v. EPA*, 812 F.2d 383, 391–92 (8th Cir. 1987); *Wagner Seed Co. v. Daggett*, 800 F.2d 310 (2d Cir. 1986).

<sup>86</sup> Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–75 (2006).

<sup>87</sup> Edward L. Rubin, Due Process and the Administrative State, 72 Calif. L. Rev. 1044, 1044 (1984).

<sup>88</sup> Magna Carta, art. 39.



deprivation of life, liberty, or property must be in accordance with law. Thus, in order to conform with due process, executive action must be duly authorized and judicial proceedings must observe minimal procedural guarantees. As former Tenth Circuit Judge Michael McConnell and Nathan Chapman note in a recent article, “Fundamentally, ‘due process’ meant that the government may not interfere with established rights without legal authorization and according to law.”<sup>89</sup>

The Fifth Amendment to the U.S. Constitution likewise provides that no person shall “be deprived of life, liberty, or property, without due process of law.”<sup>90</sup> When this amendment was adopted it was well understood to mean that “the executive could not deprive anyone of a right except as authorized by law, and that to be legitimate, a deprivation of rights had to be preceded by certain procedural protections, characteristic of judicial process.”<sup>91</sup> In the administrative context, this provision has meant that regulatory agencies may adopt legislative-like rules—that is, regulations—only in accordance with the authority delegated to them by the legislature.<sup>92</sup> When adjudicating the particularized rights or obligations of individuals, moreover, administrative agencies must engage in individualized decision-making and observe additional procedural due process guarantees—above all else, notice and the opportunity to be heard.<sup>93</sup>

<sup>89</sup> Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 *Yale L.J.* 1672, 1679 (2012); see also Bernard H. Siegan, *Property Rights: From Magna Carta to the Fourteenth Amendment* 16–17 (2001) (noting due process traditionally required, among other things, that the reason for a deprivation be found in a “legitimately enacted law.”).

<sup>90</sup> This clause of the Fifth Amendment imposes due process obligations on the federal government. Equivalent language in the Fourteenth Amendment imposes equivalent obligations on state governments. See U.S. Const. amend. XIV (“nor shall any State deprive any person of life, liberty, or property, without due process of law”).

<sup>91</sup> See Chapman & McConnell, *supra* note 89, at 1679.

<sup>92</sup> See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“It is axiomatic that an administrative agency’s power to promulgate legislative regulation is limited to the authority delegated by Congress.”); see also *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (“an agency literally has no power to act . . . unless and until Congress confers power upon it.”).

<sup>93</sup> See *Londoner v. Denver*, 210 U.S. 373 (1908); see also Ruben, *supra* note 87, at 1051 (noting that “procedural controls do not apply when rules of general applicability are declared, but do apply to binding legal determinations regarding specified individuals.”).

This guarantee is understood to require that the federal government provide some degree of fair process before depriving someone of a protected interest.

A threshold requirement for procedural due process is whether the aggrieved individual has been deprived of a protected interest—life, liberty, or property.<sup>94</sup> The due process clause does not bar such deprivations, however. It merely guarantees that the federal government will not deprive someone of such interests without providing a minimum degree of process. If an individualized agency action does not affect a deprivation of a protected interest, however, due process concerns do not apply.

Being subject to a permitting system is not, in itself, a due process violation.<sup>95</sup> Ownership of land does not entitle the owner to be free of any and all government regulation. Yet basic principles of due process should entail that landowners not be subjected to costly permitting requirements not duly authorized by the legislature. In the case of wetlands, the existing regulations are of questionable validity, the scope of the statute is unclear, and there is a history of efforts to extend regulatory authority to the limits of federal constitutional authority and beyond. This heightens the due process concerns because the regulation of private land-use decisions beyond that which is statutorily authorized (or constitutionally permitted) is not “authorized by law.”

In *Sackett*, both the federal government and environmentalist *amici* contended that the ACO did not deprive the Sacketts of a cognizable property interest. Although the ACO may have discouraged the Sacketts from continuing to develop their land, the solicitor general argued, it did not impose limitations on the use of their property that were not derived from the CWA.<sup>96</sup> Similarly, the environmentalist *amici* asserted that whether the Sacketts’ parcel was subject to regulation under the CWA as “waters of the United States” was independent of the ACO.<sup>97</sup>

<sup>94</sup> See *Amer. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) (“The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in ‘liberty’ or ‘property.’”).

<sup>95</sup> See *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

<sup>96</sup> Brief for the Respondents in Opposition at 45–46, *Sackett v. EPA*, 132 S. Ct. 1367 (2011) (No. 10-1062), 2011 U.S. S. Ct. Briefs LEXIS 852.

<sup>97</sup> Brief of Natural Resources Defense Council, et. al as Amici Curiae in Support of Respondents at 30–31, *Sackett v. EPA*, 132 S. Ct. 1367 (2011) (No. 10-1062).

Both the federal government and environmentalist *amici* construed the affected interests too narrowly. The ACO, by its very terms and the express language of the CWA, imposed legal obligations on the Sacketts independent of the CWA itself.<sup>98</sup> Had the ACO not been issued, it has yet to be determined whether the Sacketts would have been under any obligation to seek a permit from the Corps or otherwise submit to regulation under the CWA. And even if the Sacketts' land is subject to federal regulation, the ACO altered their rights and obligations. Whether or not the specific land restoration requirements were necessitated by the CWA's goals, these requirements—and, in particular, the original requirement to plant specific types of trees in a particular way—were imposed on the Sacketts by the EPA through the ACO.<sup>99</sup> Further, the ACO ordered the Sacketts to allow EPA officials access to the parcel and relevant records, which arguably infringed upon the Sacketts' constitutional right to exclude others from their property, particularly since the ACO was not the result of an individualized adjudication, let alone supported by probable cause.

The Supreme Court has recognized that an administrative action need not, by itself, deprive a landowner of title or impose direct financial consequences in order to amount to a cognizable deprivation for due process purposes. In *Connecticut v. Doehr*, for instance, the Court explained that "even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection."<sup>100</sup> On this basis, lower courts have found that even nonpossessory attachments are sufficient to trigger due process protections.<sup>101</sup>

Not only did the ACO double the Sacketts' potential liability and bar them from engaging in an otherwise lawful use of their property, it also required them to undertake significant and potentially costly remedial measures—and even ordered them to inform any prospective purchaser of the ACO before selling or otherwise transferring

<sup>98</sup> Sackett, 132 S. Ct. at 1371.

<sup>99</sup> See *supra* note 1 and accompanying text.

<sup>100</sup> 501 U.S. 1, 12 (1991).

<sup>101</sup> See, e.g., *Pinsky v. Duncan*, 898 F.2d 852 (2d Cir. 1990) ("a nonpossessory attachment of real estate deprives the owner of a constitutionally protected property interest under the fourteenth amendment.").

their land.<sup>102</sup> These requirements imposed substantial financial burdens and, like a lien or nonpossessory attachment, impaired their ability to transfer their property. Justified or not, it is difficult to see how the ACO did not affect a deprivation of a cognizable property interest.<sup>103</sup>

Establishing that the Sacketts were deprived of a cognizable property interest is only the first step in the analysis, however. Determining that they were entitled to due process does not determine the degree of process they were due. At a minimum, Fifth Amendment procedural due process guarantees notice and “the opportunity to be heard at a meaningful time and in a meaningful manner.”<sup>104</sup> The degree of process due is heavily dependent on context.<sup>105</sup> What should be clear, however, is that the right to be heard cannot be meaningful if the government is free to penalize it.<sup>106</sup>

Under *Ex parte Young*, it is impermissible for the government to impose penalties “so enormous . . . as to intimidate” individuals seeking judicial review, since “the result is the same as if the law in terms prohibited” anyone from seeking judicial vindication of their rights.<sup>107</sup> The Supreme Court rejected an *Ex parte Young* claim pressed by a mining company in *Thunder Basin Coal Co. v. Reich*,<sup>108</sup> but on grounds that are easily distinguished in that the statute at

<sup>102</sup> Petitioner’s Brief on the Merits at 8, *Sackett v. EPA*, 132 S. Ct. 1367 (2012) (No. 10-1062), 2011 U.S. S. Ct. Briefs LEXIS 1347.

<sup>103</sup> See, e.g., *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 298–301 (treating immediate or partial cessation order against surface mining operation as a cognizable deprivation for due process purposes).

<sup>104</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

<sup>105</sup> Under *Mathews v. Eldridge*, the amount of process that must be afforded is determined by application of a three-part balancing test that considers (1) the nature of the private interest affected, (2) the risk of an erroneous deprivation and the likely value of additional procedural safeguards in reducing the likelihood of such a deprivation, and (3) the government’s interest, including the financial or administrative burden of affording more process. *Mathews*, 424 U.S. at 335. Some commentators have been quite critical of this test. See also, e.g., Rubin, *supra* note 87, at 1137 (“Its premises are debatable; its methodologies are impractical; and each of its three factors is of questionable relevance.”).

<sup>106</sup> See Cross, *supra* note 84, at 937 (The opportunity to be heard “loses much of its meaning if the government can penalize its exercise.”).

<sup>107</sup> 209 U.S. 123, 147 (1908).

<sup>108</sup> 510 U.S. 200 (1994).

issue provided far greater process than would have been available under the EPA's interpretation of the CWA. Thunder Basin Coal had no claim that its activities were beyond the scope of the agency's regulatory authority and provided no evidence that pre-enforcement compliance would impose a significant burden.<sup>109</sup> Further, the statute at issue provided for prompt administrative review of any citation and complying with the regulatory requirements did not require the company to forgo mounting a legal challenge to the rule.<sup>110</sup> Thus, the mine operator was not subject to the sort of "intolerable choice" anticipated in *Ex parte Young*.<sup>111</sup>

For the Sacketts, however, the EPA could declare them in violation of the CWA on the thinnest evidence—thereby limiting their ability to make normal use of their land—imposing restoration obligations on them, and increasing their exposure to civil fines. The CWA, as interpreted and enforced by the EPA, provides less procedural protection than the statute at issue in *Thunder Basin Coal*. Further, the penalties for violating an ACO can accumulate substantially. If penalties of up to \$75,000 per day assessed on small landowners do not seem to reach the scale necessary to trigger *Ex parte Young*, consider this: The EPA could delay bringing suit for as long as five years, at which time the maximum penalty would near \$70 million.

In many due process cases, the question is whether the complaining party is entitled to a hearing before the deprivation occurs. In *Sackett*, however, all that was sought was a hearing after the ACO was issued, but before it was enforced, and before the penalties had time to mount. Allowing judicial review undoubtedly lessens the attractiveness of ACOs for regulators, but that hardly makes the insulation of such orders from judicial review constitutional.

The EPA feared that allowing pre-enforcement judicial review of ACOs would undermine enforcement of the CWA. Yet judicial review does not automatically stay enforcement of the order, so allowing regulated entities their day in court does not necessarily entail allowing them to continue to engage in allegedly polluting behavior. It does, however, prevent agencies from using enforcement leverage to force compliance with rules that may not even apply.

<sup>109</sup> *Id.* at 217–18.

<sup>110</sup> *Id.* at 221 (Scalia, J., concurring in part and concurring in the judgment).

<sup>111</sup> *Id.* at 218.

In the Sacketts' case, for instance, the fundamental question is whether their land is subject to federal regulation in the first place. Granting pre-enforcement review does not automatically entitle them to continue building their house, but it does prevent the EPA from piling on penalties before the jurisdictional question is answered. The very reason ACOs are so favored by regulatory agencies is because they are a low-cost way for agencies to place tremendous pressure on parties to comply with agency goals.<sup>112</sup> Warning letters and informal communications are equally effective at alerting landowners of their regulatory obligations, and may effectively discourage some potentially polluting behavior. What the EPA has not shown is that the added force of the unreviewable ACO, with its draconian sanctions, is necessary for effective enforcement of environmental regulations.

### Lack of Notice

Notice is an essential element of due process. Among other things, the principle requires that the laws be intelligible and indicate what they require or forbid. As the Court noted in *Connally v. General Construction*, a statute that defines obligations or prohibitions "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."<sup>113</sup> A unanimous Court reaffirmed this principle this term in *FCC v. Fox Television Stations*, stressing the "fundamental principle" that "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."<sup>114</sup> As Justice Kennedy wrote in *Fox*, "clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment."<sup>115</sup> By this standard, federal wetlands regulations are wanting.

The concern for notice in the administrative context arises not only in the First Amendment context. In *General Electric v. EPA*, for example, the U.S. Court of Appeals for the D.C. Circuit recognized that the Due Process Clause "requires that parties receive fair notice

<sup>112</sup> See Wynn, *supra* note 61, at 1896–97.

<sup>113</sup> *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

<sup>114</sup> *FCC v. Fox TV Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012).

<sup>115</sup> *Id.*

before being deprived of property.”<sup>116</sup> As the D.C. Circuit had held before, due process of law “prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires.”<sup>117</sup> Thus, the EPA and Army Corps of Engineers may deserve deference in determining whether a given parcel has a “significant nexus” to “waters of the United States,” but it would violate due process to impose civil or criminal liability on a private party for failing to abide by the agencies’ conclusions absent fair notice, such as would be provided by a clear regulatory standard of the sort neither the EPA nor the Corps has seen fit to promulgate.<sup>118</sup>

Many landowners do not have “fair notice” that their lands may be subject to federal regulation under the CWA. The federal government has not clearly delineated the scope of federal regulatory jurisdiction under the CWA and CWA regulation extends far beyond what many would consider to be “waters of the United States.” The CWA is the source of substantial regulation of private land, yet the CWA, by its terms, prohibits only the unpermitted discharge of material into “waters of the United States.”<sup>119</sup> Only regulations promulgated by the EPA and Corps, not a statute, expressly extend federal regulation to wetlands and other “waters.” But the extent to which the agencies’ regulatory jurisdiction reaches such waters remains unclear. As a consequence, “men of common intelligence” lack notice that federal regulation of such “waters” may reach private lots in the middle of residential subdivisions that are completely dry much, if not most, of the year and lack any discernible nexus to navigable waters.

Federal regulation of private land use remains the exception, not the norm. Federal regulation of land use occurs only where such regulation is necessary to further another purpose, such as species

<sup>116</sup> Gen. Elec. Co. v. EPA, 53 F.3d 1324, 1328 (D.C. Cir. 1995).

<sup>117</sup> *Id.* (quoting Gates & Fox Co. v. OSHRC, 790 F.2d 154, 156 (D.C. Cir. 1986)).

<sup>118</sup> See *id.* at 156–57 (“In the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability.”).

<sup>119</sup> Actually, as noted above, the statute prohibits the unpermitted discharge into “navigable waters,” which are in turn defined as “waters” in a separate section of the statute.

conservation or pollution control.<sup>120</sup> A landowner may thus well expect to find his or her land governed by a local zoning board or other authority, but there is no general expectation of federal involvement in local land use. Federal regulation of local land-use is proscribed not only by statute, but by the Constitution as well. Federal authority to regulate “commerce . . . among the several states” hardly implies a power to regulate any and all lands that may contain wetland features or other ecological values.<sup>121</sup> Federal courts have repeatedly admonished federal regulators to clarify the necessarily limited scope of federal regulatory authority, but to no avail.<sup>122</sup> The regulations applied by the Corps and the EPA remain those promulgated for more than 25 years, despite repeated challenges in which assertions of regulatory jurisdiction based on such regulations have been rejected. For this reason, even a well-informed landowner could be unclear as to how far federal regulatory jurisdiction extends.

Challenged as to how landowners in the Sacketts’ position could be aware of a potential obligation to obtain a permit, the federal government’s attorney did not have much of an answer, other than to say that, in most cases, there would have been some prior communication between the EPA or Corps and the landowner alerting the owner of the potential problem.<sup>123</sup> At which point, he explained, the landowner could apply for a permit. Yet whether a permit is necessary in the first place is precisely what is at issue. It hardly satisfies the principles of due process to force landowners into a permitting regime that may not even lawfully reach their lands. As Chief Justice Roberts quipped at oral argument, the federal government’s position seems to be: Since you didn’t ask us whether we could regulate your property, “we can do it.”<sup>124</sup> After all, Roberts noted later, most

<sup>120</sup> SWANCC, 531 U.S. at 174 (“Regulation of land use [is] a function traditionally performed by local governments”) (citing *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994)).

<sup>121</sup> See Adler, *Wetlands*, *supra* note 32, at 7 (quoting Lopez, 514 U.S. at 588 n.2).

<sup>122</sup> Rapanos, 547 U.S. at 726 (“Following our decision in *SWANCC*, the Corps did not significantly revise its theory of federal jurisdiction under § 1344(a.)”; *id.* at 758 (Roberts, C.J., concurring) (“Lower courts and regulated entities will have to feel their way on a case-by-case basis.”).

<sup>123</sup> Transcript of Oral Argument at 37–38, *Sackett*, 132 S. Ct. 1367 (No. 10-1062).

<sup>124</sup> *Id.* at 39.



landowners will not violate the order and risk the resulting accumulation of penalties just to get their day in court.

The federal government lacks authority to regulate every ecologically valuable property in the nation merely because it is ecologically valuable. The heart of the Sacketts' substantive claim is that their land was beyond federal regulators' reach. As Justice Antonin Scalia noted for the Court, if the government is threatening to prosecute, you may often go to court to seek a declaratory judgment to resolve the question, rather than "wait for the prosecutor to . . . drop the hammer."<sup>125</sup> Yet here, where the government has done more than merely threaten prosecution, no such pre-enforcement review is available. Worse, refusing to comply with the government's order is itself a legal violation. It would be one thing to defend this sort of system where time is of the essence—such as where prompt action is necessary to prevent severe, ongoing contamination, as may result from a hazardous waste spill.<sup>126</sup> It is quite another to try to defend it as "due process" when what is at issue is the deposit of clean fill on a half-acre plot of land that may not even be within the scope of federal regulatory jurisdiction in the first place.

## **Conclusion**

Despite *Sackett*, there remains a due process deficit in environmental law, and in the federal regulation of wetlands in particular. The EPA and Army Corps of Engineers exercise their regulatory power without due regard for the limits on their own authority or the need to provide private landowners with adequate notice of what federal law may require of them. Efforts to challenge ACOs or their equivalent under other laws have been largely unsuccessful.

The reach and force of federal environmental statutes challenge traditional conceptions of limited government power.<sup>127</sup> Property rights, in particular, are routinely compromised in the name of environmental protection that extends far beyond statutory bounds. Were that not bad enough, such incursions are often for naught, as

<sup>125</sup> *Id.* at 49.

<sup>126</sup> See, e.g., Jackson, 610 F.3d at 114 (noting EPA "must first determine 'that there may be an imminent and substantial endangerment to the public health or welfare or the environment'" before issuing a UAO under CERCLA).

<sup>127</sup> See Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 Iowa L. Rev. 377, 379–80 (2005).

those regulatory programs least friendly to owners are often those least effective at advancing environmental values. Imposing regulatory burdens on private landowners in the name of species conservation, for example, can actually undermine the conservation of endangered species.<sup>128</sup> When those landowners who own potential species habitat are burdened with land-use restrictions under the Endangered Species Act, they become less likely to cooperate with conservation efforts. At the extreme, landowners respond to the economic incentives such regulatory schemes create and take preemptive action to avoid regulatory constraints in the future—at the expense of habitat for endangered species. At the same time, promising non-regulatory means of advancing environmental protection—means that do not raise the same sorts of due process concerns—remain largely ignored.<sup>129</sup>

For over a decade, this nation has struggled to reconcile the needs of national security with constitutional guarantees. Progressives in particular have recognized that we need not sacrifice fundamental liberties in order to keep Americans safe from terrorist threats. It is strange, then, that Progressives have been unable to reach the same recognition in the context of environmental law.<sup>130</sup> Recognizing the constitutional rights of small landowners, some fear, risks granting legal protections to potentially polluting corporations.<sup>131</sup> Yet private landowners and corporations accused of environmental wrongs are no less worthy of due process protections than alleged terrorists. If

<sup>128</sup> See Jonathan H. Adler, *Money or Nothing: The Adverse Environmental Consequences of Uncompensated Land-Use Controls*, 49 B.C. L. Rev. 301 (2008); *Rebuilding the Ark: New Perspectives on Endangered Species Act Reform* (Jonathan H. Adler ed., 2011).

<sup>129</sup> See David Sunding, *An Opening for Meaningful Reform?*, 26 Regulation 30 (Summer 2003); Adler, *Money*, *supra* note 128, at 358. (“Compared to existing regulatory programs, these approaches seem quite cost-effective—and are far less controversial.”).

<sup>130</sup> As Richard Lazarus has observed, “Any reform is equated with a gutting, undermining, and selling out of essential environmental protection safeguards.” Richard J. Lazarus, *Fairness in Environmental Law*, 27 *Envtl. L.* 705, 738 (1997).

<sup>131</sup> See, e.g., Editorial, *The Sacketts and the Clean Water Act*, N.Y. Times, Jan. 8, 2012, at A18 (arguing that a decision for the Sacketts would hand “a big victory to corporations and developers who want to evade the requirements of the Clean Water Act.”).

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it is possible to reconcile liberty and security, it should also be possible to reconcile liberty with sustainability. The principles of due process should not need to be sacrificed in either case.