A Catch 22: The Price to Pay for Property Rights Under the Clean Water Act and Administrative Compliance Orders

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I. INTRODUCTION

What is the cost these days of building a home? When answering this question, one might consider such costs as buying land, hiring a builder, excavation, and building permits. What about wetland conservation? If the land is designated as a wetland under the Clean Water Act (CWA), additional expenses are inevitable.\(^1\) One might ask how bad could it be. The answer

\(^{1}\) In FY2011, EPA enforcement actions required companies to invest an estimated $19 billion in actions and equipment to control pollution through injunctive relief which was an EPA record; $8 billion of the $19 billion represents the CWA portion. See U.S ENVIRONMENTAL PROTECTION AGENCY, FY2011 ENFORCEMENT &
provides a catch twenty-two and could cripple a building family’s dream-home plans, financial outlook, and even result in a criminal prosecution. This picture is not what most home builders envision when they finally find that perfect piece of real estate to build their family home. A typical homeowner is not an expert in environmental law and would be surprised to know the potential costs and penalties associated with building a home on land designated as a wetland by the Environmental Protection Agency (EPA) and United States Army Corps of Engineers (USACE). To make matters more confusing, federal wetland regulations do not require wetlands to be mapped, and the overall “reach” of the EPA through CWA regulation has yet to be clarified by Congress.

In what has become an infamous example of the current cost of wetland regulation to residential home builders, Sackett v. EPA made headlines. The Sacketts, Mike and Chantell, bought a half-acre lot for $23,000 in 2005 to build a modest three bedroom home in a residentially zoned, platted subdivision. The Sacketts, who own a contracting business, obtained

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2 United States v. Lucas, 516 F.3d 316 (5th Cir. 2008).
5 Sackett v. EPA, No. 10-1062 (U.S. Mar. 21, 2012) (Alito, J., concurring) (stating that the reach of the CWA is uncertain and the “draconian” penalties involved in this case leave property owners without a practical solution to ACO compliance).
6 Sackett v. EPA, 622 F.3d 1139 (9th Cir. 2010).
7 Id.
all the necessary local permits.\textsuperscript{8} The property included sewer and water hookup.\textsuperscript{9} They hired a soil expert and a biologist to certify that the land was not a wetland.\textsuperscript{10} Ultimately, these cautionary measures still ended with an administrative compliance order (ACO) from the EPA. An ACO is an order to: (1) “cease and desist” any activity on the land and (2) comply with a restoration plan pursuant to EPA direction.\textsuperscript{11} The EPA, backed by the Ninth Circuit’s decision, provided the Sacketts with three options: (1) comply with the ACO by removing all fill material, replanting the vegetation, and waiting for a three year monitoring period costing tens of thousands of dollars; (2) seek an after-the- fact permit which is not allowed under the USACE’s procedure, and even if it were would cost the Sacketts over $200,000;\textsuperscript{12} or (3) violate the ACO and face hundreds of thousands of dollars in penalties\textsuperscript{13} and potential criminal prosecution for willful non-compliance.\textsuperscript{14}

As the Sackett’s situation illustrates, individual property owners need to have access to the courts before they are forced to make the Hobson’s Choice forced upon them by an ACO. A lack of pre-enforcement judicial review of ACOs issued by the EPA under the CWA, specifically

\begin{itemize}
  \item \textsuperscript{8} Id.
  \item \textsuperscript{9} Id.
  \item \textsuperscript{10} Mike and Chantell were renting a house, but wanted to build a home of their own. Six years ago they bought a 0.63-acre parcel for $23,000. The Sackett’s parcel is 500 feet west of Priest Lake, separated from the lake by a house and a road. EPA issued a “compliance” order, demanding that the Sacketts stop construction, remove the gravel and return the land to EPA’s liking. Moving the gravel would cost $27,000 — more than what the Sacketts paid for the land. Pacific Legal, \textit{PLF and the Sacketts Take EPA to the Supreme Court}, http://www.pacificlegal.org/sackett (last visited Feb. 17, 2012).
  \item \textsuperscript{11} See generally Frank B. Cross, § 5.27. \textit{Administrative Orders and Penalties}, \textit{1 Fed. Envir. Reg. of Real Estate} (2011).
  \item \textsuperscript{12}ACOs appear to be loopholes for the EPA in allowing unlimited time for enforcement. The USACE will act as the lead enforcement agency when the responsible party is not a repeat offender, a flagrant violator, or the EPA does not request to take the particular case. Jason D. Nichols, \textit{Towards Reviving the Efficacy of Administrative Compliance Orders: Balancing Due Process Concerns and the Need for Enforcement Flexibility in Environmental Law}, \textit{57 Admin. L. Rev.} 193, 197 (2005).
  \item \textsuperscript{13} Pet. For Writ of Cert. at 10, Sackett v. EPA, No. 10-1062, (9th Cir. 2011) (“Just 1 month of noncompliance puts the landowner at risk of civil liability of $750,000. A year’s worth of noncompliance puts the liability at $9,000,000.”).
  \item \textsuperscript{14} See \textit{supra} note 12 at 197.
\end{itemize}
the dredge and fill activity involved in building residential homes, violates property owners’ constitutional rights under Procedural Due Process.\textsuperscript{15} To resolve the issue, Congress should clarify the CWA’s statutory language and define the scope and reach of the EPA under the term “navigable waters.” In addition, the Court should make two distinctions when it interprets the statute: (1) the type of material involved in dredge and fill activity, and (2) the type of property owner facing ACO enforcement.

But the Circuits have split on the issue of whether to allow pre-enforcement judicial review of ACOs.\textsuperscript{16} The Fourth, Sixth, Seventh, Ninth, and Tenth Circuits have held that ACOs are not final agency action, the CWA precludes pre-enforcement judicial review of ACOs, and that this preclusion does not violate due process.\textsuperscript{17} The Eleventh Circuit stood alone, allowing pre-enforcement judicial review, until it was joined by the recent United States Supreme Court ruling in \textit{Sackett}.\textsuperscript{18} The Court’s holding, however, addresses only a part of the issue at hand.\textsuperscript{19} The Court determined that the ACO issued in \textit{Sackett} was final agency action, and the CWA did not preclude judicial review.\textsuperscript{20} The Court applied APA review as a remedy.\textsuperscript{21} But one cannot help but ask how the ruling will be applied to future cases because the Court’s ruling is based

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\textsuperscript{15} “For a violation of due process to exist, a governmental action must carry legal consequences that give rise to a deprivation of life, liberty, or property.” Tenn. Valley Auth. v. Whitman, 336 F.3d 1236 (11th Cir. 2003) (finding that ACOs have the status of law and that violations of such ACOs carry with them significant legal consequences for the ACO recipient and basing its determinations on statutory construction).
\textsuperscript{16} Sam Wheeler, \textit{Ninth Circuit: EPA Compliance Orders are Not Subject to Pre-enforcement Judicial Review}, 38 ECOLOGY L.Q. 611, n. 4 (2011).
\textsuperscript{17} Id.
\textsuperscript{18} “For a violation of due process to exist, a governmental action must carry legal consequences that give rise to a deprivation of life, liberty, or property.” Tenn. Valley Auth., 336 F.3d 1236 (finding that ACOs have the status of law and that violations of such ACOs carry with them significant legal consequences for the ACO recipient, basing its determinations on statutory construction); Sackett v. EPA, No. 10-1062 (U.S. Mar. 21, 2012) (holding that the compliance order in this case was final agency action and that pre-enforcement judicial review was not precluded by the CWA).
\textsuperscript{19} \textit{Sackett}, No. 10-1062 (U.S. Mar. 21, 2012) (holding that the compliance order in this case was final agency action and that pre-enforcement judicial review was not precluded by the CWA).
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\end{flushright}
only on the facts in *Sackett.* The Court did not decide whether property owners in general could challenge the EPA’s authority to regulate private property or the terms and conditions of an ACO. The ACO issue is magnified when there is no pre-enforcement judicial review because property owners are forced to carry the public burden of wetland conservation by themselves. This is not fair to those property owners. Property owners are getting tired of carrying the public’s burden by themselves when they are forced to comply with an ACO, and the EPA is difficult to stand up to and compete with when the opposing party is an average individual property owner. Everyday people do not have adequate resources to make this an even match with the EPA.

This comment seeks to enter a conversation that has been taking place for decades. Wetland regulations and the restrictions they place on private-property owners have been argued ad nauseum under substantive due process, takings law, state sovereignty; the list goes on. To get right to the point: where is the discussion of procedural due process? The procedure currently provided is not enough to adequately protect the rights of individual property owners.

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22 *Sackett*, No. 10-1062 (U.S. Mar. 21, 2012) (Alito, J., concurring) (stating that the reach of the CWA is uncertain and the “draconian” penalties involved in this case leave property owners without a practical solution to ACO compliance).
23 *Sackett*, No. 10-1062 (U.S. Mar. 21, 2012) (Ginsburg, J., concurring) (stating that the Court did not rule on whether the Sacketts could challenge the EPA authority to regulate their land under the CWA or the terms and conditions of the ACO at the pre-enforcement stage).
25 Id.
26 Timothy Sandefur, *Compliance- or Else The EPA’s Compliance Order Regime Creates a Hobson’s Choice*, PAC. LEGAL FOUND., Winter 2011, 8-11, 10, available at http://www.cato.org/pubs/regulation/regv34n4/v34n4-2.pdf (“Rarely can a modest property owner face off with the EPA when EPA has, $10 billion annual budget and 17,000 employees … The agency issues over 1,000 compliance orders each year, without hearings or public proceedings.”).
27 Merriam Webster’s Collegiate Dictionary (11th ed. 2003) (“To a sickening or excessive degree.”).
Individual property owners need to have access to the courts before they are forced to make such a Hobson’s choice and comply with ACO terms and conditions.\textsuperscript{29}

A problem exists in the way that wetland regulations are declared and enforced.\textsuperscript{30} A lack of pre-enforcement judicial review of ACOs in cases regulated by 404 permits violates property owners’ constitutional rights under the Fifth Amendment Procedural Due Process. Section II of this comment provides the background essential to understanding the law as it currently stands. Section III of this comment provides an explanation of why the current law is a violation of procedural due process under the Fifth Amendment. Finally, Section IV offers alternative solutions to clarify the current statutory language and to increase the amount of procedure currently provided in ACO enforcement of dredge and fill activity of individual private property owners building residential homes.

II. BACKGROUND AND CURRENT ENFORCEMENT

Although the circuits do not agree on whether to allow pre-enforcement judicial review of ACOs, the United States Supreme Court made a final decision to cure the circuit split.\textsuperscript{31} This

\textsuperscript{29} Hobson’s Choice is described as lacking a clear choice even where choices are given. Christopher M. Wynn, Comment, 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, n. 4 (2005); See Sackett v. E.P.A. 622 F.3d 1139 (9th Cir. 2010) (showing that the 9th Circuit joined the 4th, 6th, 7th, and 10th Circuits and held that the CWA precludes pre-enforcement judicial review of administrative compliance orders and that preclusion does not violate due process).

\textsuperscript{30} The ACO process allows the EPA to avoid proving a violation of an EPA regulation or SIP in any forum, be it civil proceeding in district court or an administrative hearing before an ALJ. As the TVA court observed, the ACO provision appears to be a loophole of the highest order. Tenn. Valley Auth., 336 F.3d 1236.

\textsuperscript{31} For a discussion on final agency action and implied denial of pre-enforcement judicial review, See Sackett, No. 10-1062 (U.S. Mar. 21, 2012) (holding that the compliance order in this case was final agency action and that pre-enforcement judicial review was not precluded by the CWA); See Tenn. Valley Auth., 336 F.3d 1236 (11th Cir. 2003) (Barkett concurring)(Although the Administrator in this case attempted to fill the gap in statute and provide some process to TVA, it cannot be deemed sufficient because constitutional due process cannot be provided on an ad hoc basis under the direction and control of the entity whose decision is being challenged, and the CWA does not expressly preclude pre-enforcement judicial review of such compliance orders. So we must consider the other factors to determine whether the CWA impliedly precludes pre-enforcement judicial review). See generally Andrew
comment does not seek to rehash this discussion: it accepts that an ACO is final agency action and that pre-enforcement judicial review is not precluded by the statute.\textsuperscript{32} This comment does, however, continue the discussion into the procedural due process and jurisdictional concerns of ACOs in general.

While environmental laws are very complex, this comment attempts a crash course in the definitions and statutory language under the CWA to provide context to the discussion of the procedural and statutory language problems in wetland dredge and fill activity in residential home building and its enforcement. The nation’s goal under the CWA is to protect the nation’s waters.\textsuperscript{33} In furtherance of that goal, discharging pollutants into navigable waters was made illegal.\textsuperscript{34} This comment assumes that a wetland determination has already been made (whether correctly or not) and addresses the procedural and statutory language problems involved in ACO enforcement under the CWA.

But defining the term “navigable waters” has proven difficult over the years.\textsuperscript{35} In fact, no statutory language provides guidance as to its meaning.\textsuperscript{36} The issue of defining navigable waters

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\textsuperscript{33} See sources at note 31.

\textsuperscript{34} 33 U.S.C.A. § 1251(a) (2008).

\textsuperscript{35} See \textit{United States v. Riverside Bayview Homes, Inc.}, 474 U.S. 121 (1985); \textit{See United States v. Eidson}, 108 F.3d 1336 (11th Cir. 1997); \textit{See Quivira Mining Co. v. U.S. Envtl. Prot. Agency}, 765 F.2d 126 (10th Cir. 1985); \textit{See...
arises most frequently when property owners have a piece of property that is inland and not visibly connected to the nation’s waters. The Court has given three possible definitions for property owners to apply, but not one of these definitions represents a consistent majority opinion within the Court today. One definition includes, “freshwater wetlands that were adjacent to other covered waters” within the meaning of navigable waters. A second definition indicates that navigable waters include, “only those relatively permanent, standing or continuously flowing bodies of water “forming geographic features” that are described in ordinary parlance as “streams[,] … oceans, rivers, [and] lakes,” and “only those wetlands with a continuous connection to bodies that are “waters of the United States” in their own right, so that there is no clear demarcation between “waters” and wetlands, are “adjacent to” such waters and therefore covered by the Act.” A third definition provides that a water or wetland must possess a “significant nexus” to waters that are or were navigable in fact or that could reasonably be so made. In the second definition, a significant nexus is required or jurisdiction under the Act is lacking.” All three definitions are relevant to current wetland discussions. Applying a definition of “navigable waters” is required to determine if the property involved is in fact a wetland and

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37 Sackett, No. 10-1062 (U.S. Mar. 21, 2012) (holding that the compliance order in this case was final agency action and that pre-enforcement judicial review was not precluded by the CWA); See Sackett, No. 10-1062 (U.S. Mar. 21, 2012) (Alito, J., concurring) (stating that the reach of the CWA is uncertain).
38 See Sackett, No. 10-1062 (U.S. Mar. 21, 2012) (Alito, J., concurring) (stating that the reach of the CWA is uncertain).
40 The majority in Rapanos provided the following definition: waters of the United States include “only those relatively permanent, standing or continuously flowing bodies of water “forming geographic features” that are described in ordinary parlance as “streams[,] … oceans, rivers, [and] lakes.” Rapanos v. United States, 547 U.S. 715, 731 (2006) (writing for the majority: Justice Scalia).
41 The dissent discussed and applied the significant nexus test from SWANCC. (citing Solid Waste Agency of Northern Cook Cty. v. Army Corps of Eng’rs, 531 U.S. 159 (2001)). The dissent applied the significant nexus test to provide a second definition of navigable waters, and stated that a water or wetland must possess a “significant nexus” to waters that are or were navigable in fact or that could reasonably be so made. “Absent a significant nexus, jurisdiction under the Act is lacking.” Rapanos, 547 U.S. at 767 (Kennedy, J., dissenting).
subject to regulation under the CWA.42 This comment does not seek to provide a final determination on which definition of navigable waters should be used under these circumstances. This comment seeks only to point to the practical effect and potential confusion such an indefinite description could have on property owners.43

Wetlands are harder yet to define. The difficulty with wetlands is simply that they do not fit neatly into a single category: land or water. Wetlands are both land and water, making them difficult to define.44 Property law, historically a state issue, must be included in the discussion of wetland regulation too.45 Consequently, no thorough discussion of wetland regulation can ignore the intertwining legal principals between federal water regulation and local and state property law.46 Property rights involve values such as: autonomy and fairness.47 Today, policy development is driven by a focus on environmental protection and public benefit, but takings law is still a relevant piece of that conversation because the same tests applied in takings precedent

42 See sources at note 35.
43 See sources at note 35.

The intersection of local decision-making processes focused on land and its potential uses with federal regulatory processes that seek to preserve the hydrologic aspects of wetlands and prevent their conversion to dry land creates inevitable tension. This tension results not just from the structure of section 404 but from the inherently transitional nature of wetlands—their failure to fit neatly into our dualistic view of the landscape as land and water.

States have an interest because the states’ primary power and responsibility over land, water use, and development is usurped by federal use of compliance orders. Alaska, Wyoming, Hawaii, South Carolina, Virginia, ND, Arizona, Colorado, and Michigan have strong interests in the Court’s resolution of whether ACOs under the CWA are subject to pre-enforcement judicial review.

46 Id.
47 Autonomy is the value of freedom to act without government interference on wetlands one owns… Where an individual seeks to engage in activities and regulation prevents or alters those plans, the landowner's autonomy is directly affected and fairness: most wetlands are privately owned… They have title to the land but cannot develop it
should be recycled and applied to resolve the procedural due process problems in ACO enforcement. 48 Precedent supports the fact that courts address property takings arguments on a case by case basis, applying tests of investment-backed expectations and economically viable use of the land. 50 The term “wetland” has been defined in a multitude of ways, each honored by the courts as long as the definition fits within the guidelines of the statute. 51 One such definition can be found in the Code of Federal Regulations which provides that wetlands are,

[T]hose 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. Wetlands generally include swamps, marshes, bogs, and similar areas.

Even given a definition, wetland determinations are still very complicated and hard to define because the statute is unclear and wetlands are ambiguous in nature.

In a perfect world, a landowner would know whether his or her land was a wetland before building begins. But in order for a landowner to know if the land involves a wetland, the landowner must undergo rigorous investigation of the property to determine its hydrological

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49 See generally Lucas, 516 F.3d 316.
50 KUSLER, supra note 4, at ii-x.
51 The United States Environmental Protection Agency (EPA) defines wetland as, “areas where water covers the soil, or is present either at or near the surface of the soil all year or for varying periods of time during the year, including during the growing season.” UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, WHAT ARE WETLANDS? http://water.epa.gov/type/wetlands/what.cfm. (last visited Feb. 13, 2012).
52 The congressional language in section 404 is unclear, as is seen in many environmental statutes. Instead, Congress left discretion to the EPA. In section 404, Congress fails to mention the word “wetland” completely. This failure to mention “wetland” is of most concern because it fails to bring the topic up at all. See generally Flournoy, supra note 44.
quality. To determine whether or not a piece of land is a wetland, the USACE developed an informational pamphlet intended to help property owners identify any wetland implications before building. The pamphlet references three factors for consideration: vegetation indicators, soil indicators, and hydrology indicators. Depending on thousands of fact specific signals, any one of the three factors could be implicated, indicating a potential wetland, and triggering additional investigation. Property owners are no better off after reading the pamphlet than before because in the end they are still referred by the pamphlet to a local Corps District Office or someone who is an expert in making wetland determinations which can be costly. This is the problem. It is just too difficult to make such a determination on one’s own. Many property owners, however, will never come across this pamphlet because they do not have any reason to believe their property involves a wetland to begin with. The Sacketts are a great illustration of this: the couple is in the business of contracting, and they obtained all the proper permits. Just as the Sacketts did, even the most attentive property owners move forward with their project and build their home blissfully after local permits are granted without any additional thought of wetland implications.

In protecting the nation’s waters from pollutants, the EPA regulates a variety of activities. This comment focuses on the activity of breaking ground in residential building: moving dirt, rock, sand and related earth material in connection with building a home. This

55 Id.
56 Id.
57 Id.
58 Id.
59 See generally Sackett, 622 F.3d 1139.
60 Id.
61 Id.
material is called “dredge and fill material,” and it is one thing that people are prohibited from adding to or taking from the wetlands. The discharge of dredge and fill material with or without a permit is subject to EPA regulation and enforcement. If wetlands are suspected, property owners can seek dredge and fill permits under Section 404 of the CWA from the EPA or USACE. As indicated, however, suspecting that a wetland exists is a difficult task in-and-of itself. An anticipated problem scenario involves a property owner that has already started to build. An investigation by the EPA or the USACE is then started. Initial investigations of property may be conducted by either the EPA or the USACE. The agency that conducts the initial investigation is also responsible for determining if there has been a violation of the CWA and the property therefore requires a permit to begin or proceed with the dredge and fill activity. The statute does not make a distinction between types of property owners; nor does the regulation distinguish between hazardous waste and the typical dredge and fill materials involved in residential building. If property owners do not suspect wetland implications, begin the

64 The term “pollutant” means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. 33 U.S.C.A. § 1362(5) (2008).
Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action.
66 Sackett, 622 F.3d 1139 (citing Olszak v. Town of New Hampton, 661 A.2d 768 (N.H. 1995)).
68 Id.
69 Id. at 2.
dredge and fill activity, and then receive an ACO: they are stuck. The USACE provides that no after-the-fact permit will be issued until the ACO is resolved.\textsuperscript{71}

In protecting the nation’s waters, the EPA has the power to enforce both the provisions of the CWA and the 404 permit process through the use of ACOs.\textsuperscript{72} This EPA enforcement tool is one of three available to the EPA.\textsuperscript{73} EPA’s enforcement options include: ACO, administrative penalty complaint, and civil or criminal judicial referral.\textsuperscript{74} Yet, ACOs are used most often.\textsuperscript{75} Enforcement is led by the USACE unless there is a situation involving repeat offenders or flagrant violations in which case the EPA would handle enforcement.\textsuperscript{76} Once an initial investigation has been conducted and a violation has been found, the enforcing agency will then notify the responsible parties of the violation.\textsuperscript{77} This comment focuses only on the ACO as an enforcement tool of the EPA.\textsuperscript{78}

The EPA can issue an ACO to stop dredge and fill activity on the basis of “any information available,” including: air photos, staff reports, newspaper clippings, non-expert sources, anonymous tips, etc.\textsuperscript{79} One might compare this scenario to the probable cause argument

\textsuperscript{71} "No after-the-fact permit shall be accepted until resolution has been reached through an appropriate enforcement response as determined by the lead enforcement agency. (e.g. until all administrative, legal and corrective action has been completed, or a decision has been made that no enforcement action is to be taken.” Memorandum Between the department of the army and the EPA. See also PAGE & HAMMER, supra note 66. See generally Brief for American Civil Rights Union as Amici Curiae Supporting Petitioners, Sackett v. E.P.A., 622 F.3d 1139 (9th Cir. 2010) (No. 10-1062).
\textsuperscript{72} See also PAGE & HAMMER, supra note 66.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Nichols, supra note 12 at 197 (expressing the recent increase in ACO use by the EPA). Since 1983, the EPA has issued 1500 to 3000 compliance orders per year across all the environmental statutes. The widespread use of ACOs contrasts with the EPA’s civil referrals to the DOJ, which increased from around 120 referrals per year in the early 1980’s to peak at just over 400 per year by the late 1990’s.
\textsuperscript{76} PAGE & HAMMER, supra note 66 at 1.
\textsuperscript{77} PAGE & HAMMER, supra note 66 at 2.
\textsuperscript{78} See supra note 45 at 6.
\textsuperscript{79} See generally KUSLER, supra note 5, at 33; See generally Sandefur, supra note 26.
in criminal procedure. Why is “any information” enough to issue such an order? ACOs demand that property owners jump through several hoops and threaten severe civil and criminal penalties of up to $37,500 a day and jail time for noncompliance. Property owners can be held liable not just for noncompliance with an ACO but also for violating a CWA provision, creating a double penalty. To make matters worse, courts have refused to allow property owners pre-enforcement judicial review of the ACO and wetland determination. While it is true that the Court recently ruled in *Sackett* that the property owners could seek pre-enforcement judicial review under the APA, many property owners are still left with impractical alternatives to ACO compliance. Property owners must wait until the EPA brings an enforcement action which may never come because doing so is at the complete discretion of the EPA. The result is a double penalty that most home builders cannot even consider as a potential option. This lack of option for the property owner is what creates the catch twenty-two: an unconstitutional Hobson’s Choice.

### III. PRE-ENFORCEMENT JUDICIAL REVIEW OF ADMINISTRATIVE COMPLIANCE ORDERS IS REQUIRED BY PROCEDURAL DUE PROCESS

80 See *Sandefur*, *supra* note 26.


82 See generally *supra* note 13.

83 See *supra* note 45.

84 *Sackett*, No. 10-1062 (U.S. Mar. 21, 2012) (Alito, J., concurring) (stating that the reach of the CWA is uncertain and the “draconian” penalties involved in this case leave property owners without a practical solution to ACO compliance).

85 See *supra* note 45 at 5 (“When judicial review must wait until the government decides to bring an action, recipients of compliance orders suffer such coercive consequences as to be effectively denied meaningful process at all.”).

86 See *supra* note 13.

87 Hobson’s Choice is described as lacking a clear choice even where choices are given. Christopher M. Wynn, Comment, *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, n. 4 (2005).
At its core, Procedural Due Process is about fundamental fairness. No fairness exists where property owners are coerced to comply with an ACO, lose control of their land, are forced to allow the EPA to enter their land, pay astronomical amounts of money, and are forced to fund what will essentially become a public park for an undetermined amount of time. ACOs go to the very heart of procedural due process because they allow the Government to act arbitrarily and deprive individual property owners of the right to defend themselves before that deprivation is made. The Fifth Amendment of the United States Constitution declares that, “No person shall be deprived of life, liberty, or property, without due process of law.” A lack of pre-enforcement judicial review of ACOs is less than the procedure required by the Constitution because ACOs deprive property owners of both property and liberty interests before any procedure is provided. Both liberty and property interests are implicated where a property owner is forced to comply with an ACO. Allowing the Government to interfere with these fundamental rights

88 Due Process is that which comports with the deepest notions of what is fair and right and just. (quoting Solesbee v. Balkcom 339 U.S. 9, 16 (1950)). Due Process represents, “some principle of justice so rooted in the traditions and conscious of our people as to be ranked as fundamental.” (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). Brief for Institute for Justice as Amici Curiae Supporting Petitioners, Sackett v. E.P.A., 622 F.3d 1139 (9th Cir. 2010) (No. 10-1062). A lack of pre-enforcement judicial review of ACOs is less than the procedure required by the Constitution because ACOs deprive property owners of both property and liberty interests before any procedure is provided. Both liberty and property interests are implicated where a property owner is forced to comply with an ACO.

89 Brian T. Hodges, County’s Shoreline Land Grab Appealed to U.S. Supreme Court, PAC. LEGAL FOUN., www.pacificlegal.org/page.aspx?pid=1716 (last visited Jan. 4, 2012) (“Property owners are stripped of control, without a penny in reimbursement … They still have to pay taxes and are responsible for the liability on the land. In effect, they’re forced to be unpaid administrators of public conservation areas.”).

90 See supra note 88 at 3.

91 U.S. Const. amend. V.


without providing property owners due process serves as a major threat to the existence of such rights.\textsuperscript{94}

Protecting individual property rights should be an essential component to any environmental regulation, especially wetland regulation and ACO enforcement.\textsuperscript{95} As it currently stands, however, property rights are not considered important enough to protect under the CWA and wetland specific regulation.\textsuperscript{96} Property interests are clearly implicated in wetland regulations because wetlands exist upon land.\textsuperscript{97} In some circumstances, the land involved is dry for a portion of the year making a wetland determination more offensive.\textsuperscript{98} Takings jurisprudence and precedent provides clear findings of property right deprivation where private land has been restricted in such a way as to deny the owner of economically beneficial use or investment-backed expectations.\textsuperscript{99} Obviously, denying a family’s ability to build a home upon land that they purchased with specific intent to build denies a property owner economically beneficial use of that property.\textsuperscript{100} It is also clear from recent studies that wetland regulations impact residential...
private-property owners’ investment-backed expectations: namely through declining property values.101 “One can be ninety-five percent confident that the extension of wetland[d] regulations to residential property significantly diminished sale prices.” Properties located in both wetlands and flood areas suffer an even greater discount.102 To make matters worse, the EPA is issuing ACOs under the CWA at record highs without any opportunity for the land-owner to challenge.103

Liberty interests are equally essential and should be considered in all regulations, as these are the fundamental building blocks of this country.104 ACOs under CWA enforcement compel


A study examined the effect of federal wetlands regulations on sale prices of residential properties in East Baton Rouge Parish, Louisiana. To measure the impact of such compliance, we compare sale prices for residential property prior to and after the Supreme Court's 1985 ruling in Riverside. We used a standard regression model to examine the relationships between real property price, wetlands delineation, and typical property characteristics (for example, square feet of living space, the number of days a property is on the market, age, date sold, number of bedrooms). Regression analysis in this context is a statistical method that measures the effect of an unknown variable (sale price), based on the values of known variables that should affect the sale price of a property. The average wetlands delineated property was discounted about $9,100. Given a mean selling price of nearly $86,500, this equates to a percentage discount of about 10.5%, relative to similar properties not located on wetlands.

See Jeffrey A. Michael & Raymond Palmquist, Environmental Land Use Restriction and Property Values, 11 VT. J. ENVTL. L. 437, 457 (2010) (citing Ihlandfeldt study: restrictions decreased land values and increased house prices. Each additional restriction was found to decrease average land values in a jurisdiction by approximately 14%, yet it increased the value of an average house by 7.7% in a cross-section of Florida cities.); See also Katherine Kiel, The Impact of Wetlands Rules on the Prices of Regulated and Proximate Houses: A Case Study, New England Public Policy Center at the Federal Reserve Bank of Boston (2007).

Study used data from Newton, Massachusetts to estimate the impact of wetland laws on single family home prices and the prices of those residential homes adjacent to those regulated properties. Data from 1988-2005, hedonic technique used. Having wetlands on a property decreases its value by 4% relative to non-regulated properties. Homes that are contiguous to regulated houses do not experience any change in price.

102 Guttery, Poe & Sirmens, An Empirical Investigation of Federal Wetland Regulation and Flood Delineation: Implications for Residential Property Owners, 37 AM. BUS. L.J. 299, 300-01 (2000) (“One can be ninety-five percent confident that the extension of wetlands regulations to residential property significantly diminished sale prices. Properties located in both wetlands and flood areas have an even greater discount.”)

103 The agency issues over 1,000 compliance orders each year, without hearings or public proceedings, and property owners are not given notice or an opportunity to be heard. Sandefur, supra note 26 at 10.

104 BLACK’S LAW DICTIONARY 712 (9th ed. 2009) (“[F]reedom from arbitrary or undue external restraint, especially by a government.”).
property owners to make a severely restricted choice— an unconstitutional Hobson’s Choice. \(^{105}\)

These choices are not free and independent as required by constitutional interpretation. \(^{106}\)

Property owners are forced to accept unacceptable options: pay immediately for compliance with the ACO or pay double for noncompliance with the ACO and face potential criminal penalties to boot. \(^{107}\) An enormous amount of risk is involved in the potential financial harm that non-compliance threatens, depriving individual property owners of their liberty interests. \(^{108}\) Property owners should not be required to expose themselves to such an extreme liability before being able to challenge an ACO. \(^{109}\) Consider as well that individual property owners come in many different shapes and sizes, specifically financially. Most, however, are unable to pay the high stakes involved in ACOs, forcing them into compliance. \(^{110}\)

Once the court has determined that there has been a deprivation of property and liberty interests because an ACO has been issued, an application of the *Mathews* factors is made to determine if the Government provided the procedure required by the Constitution before making

\(^{105}\) See *Sandefur*, supra note 26 at 10.

\(^{106}\) See supra note 88.

\(^{107}\) UAO recipients are able to refuse to compliance in theory, but penalties are so “draconian” that most times property owners will not take the risk. It is a combination of the threats, the “uncertainty” of the EPA’s action and timing, and lack of pre-enforcement review that makes this a non-choice for the property owner. See Steinberg & Mays, supra note 92.

\(^{108}\) See supra note 45. (“Just 1 month of noncompliance puts the landowner at risk of civil liability of $750,000. A year’s worth of noncompliance puts the liability at $9,000,000.”); See Steinberg & Mays, supra note 92 (“EPA has issued more than 1,500 UAOs directing PRPs to conduct removal actions, which have cost billions of dollars to implement … Compliance with some UAOs can require expenditures of as much as $200 million.”).

\(^{109}\) See supra note 88 at 17; See *Ex Parte Young*, 209 U.S. 123, 148 (1908) (“[P]rovisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face.'); See *Ex Parte Young*, 209 U.S. 123, 165 (1908) (“To await proceedings against the company in a state court, grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid. This risk the company ought not to be required to take.”).

\(^{110}\) See supra note 12.
that deprivation.\textsuperscript{111} The \textit{Matthews} factors require the courts to balance the governmental interest in making the deprivation with the property owner’s interest in receiving more process before that deprivation occurs.\textsuperscript{112} A balance is attainable in these cases and should be a main goal of the Court. The importance of both property and liberty interests is clear. This comment does concede that the Government’s interest, or the EPA’s interest, in acting swiftly to protect environmental hazards is important.\textsuperscript{113} But “strong-arming” property owners into “voluntary compliance” does not “conquer all.”\textsuperscript{114} In balancing the conflicting interests between the EPA and individual property owners, pre-enforcement judicial review could be given to accommodate both parties and avoid unwarranted deprivation. Two very important reasons exist which support pre-enforcement judicial review as a rational choice, and the Court should make these distinctions when interpreting the statute: in applying pre-enforcement judicial review to individual property owners building residential homes: (1) dredge and fill material is different than hazardous waste, and (2) individual property owners are different than other groups of property owners.\textsuperscript{115} In addition, Congress needs to provide clarification within the statutory language of the CWA to

\textsuperscript{111} Procedural Due Process requires consideration of three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) Government's interest, including fiscal and administrative burdens that additional or substitute procedures would entail. \textit{Mathews v. Eldridge}, 424 U.S. 319, 321 (1976).

\textsuperscript{112} Id.

\textsuperscript{113} Wheeler, \textit{supra} note 16 at 613 (“[A]n objective of the CWA’s compliance order provision is to provide a rapid enforcement in response to unambiguous violations of CWA”).

\textsuperscript{114} Sackett, No. 10-1062 (U.S. Mar. 21, 2012) (“[N]o reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into “voluntary compliance” without the opportunity for judicial review.”).


A solid waste is characteristically hazardous if it may “cause or significantly contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible illness; or … pose a substantial present or potential threat to human health or the environment when it is improperly treated, stored, transported, disposed of, or otherwise managed … is measured by an available standardized test … or … reasonably detected by generators through knowledge of their waste.
define the scope and reach of the EPA and ACO enforcement. And as a last resort, the Court should allow after-the-fact permits in cases where ACOs have been issued.

IV. ALTERNATIVE SOLUTIONS TO ENSURE PROTECTION OF INDIVIDUAL PROPERTY OWNERS

Congress and the United States Supreme Court has the ability to significantly reduce the property and liberty interest violations made in this country resulting from forced ACO compliance. The Court took a step in the right direction in Sackett by allowing pre-enforcement judicial review of ACOs issued under the CWA, but does the ruling allow a court to determine if a wetland is actually at issue to begin with? It is unclear as to whether such an effect was accomplished by the Court. Property owners outside of the Sackett case may still face coercion by the EPA through forced ACO compliance. There is currently no way for the EPA to know based upon “any information available,” whether a wetland even exists before an ACO is issued and a property owner forced into compliance.

If pre-enforcement judicial review of all issued ACOs is not a solution the EPA would consider or the United States Supreme Court would support, an enforcement distinction should be made in two areas to better protect those individual property owners suffering most from the deprivation: the type of material involved and the type of property owner facing the threats of ACO enforcement. By applying these distinctions, the procedural due process requirements of

116 See generally Sandefur, supra note 26.
117 Sackett, No. 10-1062 (U.S. Mar. 21, 2012) (Alito, J., concurring) (stating that the reach of the CWA is uncertain and the “draconian” penalties involved in this case leave property owners without a practical solution to ACO compliance).
118 Id.
119 There is no mechanism to determine whether such information even exists, to determine whether the Administrator is acting for the public good or for private interest, nor by which a property owner may inquire into the motivations, interests, or intent of the Administrator. The Administrator could simply make a mistake. The Due
the Fifth Amendment are better satisfied because the parties suffering most in these cases are individual property owners building their residential homes.\footnote{120} Individual property owners are less informed, less financially prepared, and less able to protect themselves against the severe threats issued by an ACO as compared to other groups of property owners.\footnote{121} Corporations, for example, are better prepared financially and have access to legal advice which better protect them against ACOs issued by the EPA.\footnote{122} Of course, Congress should also clarify the statutory language of the CWA to define the term “navigable waters.” By doing so, Congress could eliminate the confusion surrounding: (1) the EPA’s reach through ACO enforcement, and (2) the CWA’s jurisdiction as it applies to private property.\footnote{123} Finally, a contingency safeguard plan could be implemented as well by amending the USACE’s procedures as they currently stand and allowing for after-the-fact 404 permits.\footnote{124} While it is true that this solution could still result in additional unexpected cost to the property owner, making this change is better than what is currently offered and would clear up the confusion that currently exists in the process, making use of a solution that the courts already believe to be available to property owners.\footnote{125} In the end, it is better than what is currently in place.

\textbf{A. Allowing Pre-Enforcement Judicial Review}

In support of the recent \textit{Sackett} ruling by the Court, allowing pre-enforcement judicial review resolves the penalty risks and property deprivation property owners face when an ACO is

\footnote{120} See generally \textit{Sandefur, supra note 26}.  
\footnote{121} See generally \textit{U.S. Census Bureau, Net Worth and Asset Ownership of Households: 1998 and 2000 (2003)}.  
\footnote{122} \textit{Id.}  
\footnote{123} \textit{Sackett, No. 10-1062 (U.S. Mar. 21, 2012) (Alito, J., concurring) (stating that the reach of the CWA is uncertain)}.  
\footnote{124} \textit{See PAGE & HAMMER, supra note 66 at 8}.  

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issued by the EPA and allows the USACE to meet its goals at the same time.\(^{126}\) It is a win for both sides. One important goal of the USACE is to treat the community fairly and equitably.\(^{127}\) Fairness is also a main component in Procedural Due Process.\(^{128}\) By following the spirit of the Due Process Clause, the USACE and EPA can both meet their goals and meet the constitutional requirements of Due Process. Pointing to an additional element of fundamental unfairness to consider in these cases, it is important to note that complying with a regulation, even if it is later determined to be invalid, will usually result in compliance costs that a payer will not be able to recover later.\(^{129}\) While it is true that ultimately the courts have the discretion in determining penalties, a property owner that willfully avoids compliance with an ACO will still face significant penalties for his or her violation.\(^{130}\) In the end, no pre-enforcement judicial review of ACOs is coercive, forcing the property owner to make a Hobson’s Choice: costly immediate

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\(^{125}\) A landowner who contests EPA’s jurisdiction to issue a compliance order can apply for a permit and seek judicial review of the permit’s denial. *Sackett*, 622 F.3d at 1146.

\(^{126}\) Steinberg & Mays, supra note 92 at 15 (“The provision of a pre-deprivation hearing in a non-emergency situation and a prompt post-deprivation hearing in emergency situations would significantly reduce the risk.”).

\(^{127}\) Section 404 has 3 goals, 1 of which is: treat the regulated community fairly and equitably. EPA, WATER OUTREACH & COMMUNICATION, SECTION 404 ENFORCEMENT, http://water.epa.gov/type/wetlands/outreach/fact15.cfm (last updated Mar. 6, 2012) (“EPA's Section 404 enforcement program has three goals: protect the environment and human health and safety, deter violations, and treat the regulated community fairly and equitably.”)

\(^{128}\) See generally *supra* note 88.

\(^{129}\) See *supra* note 71 at 9. (citing Scalia, J., concurring opinion in Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994)) (“Complying with a regulation later held to be invalid almost always produces the irreparable harm of nonrecoverable compliance costs.”).

\(^{130}\) See generally *Sackett*, 622 F.3d 1139; See generally Nichols, *supra* note 12.
compliance or severe penalties for procrastinating.\textsuperscript{131} The Court has not yet held that this Hobson’s Choice is unacceptable.\textsuperscript{132} But if the Court does not, the EPA will have the ability to singly deprive property owners of their rights without providing meaningful review at a meaningful time.\textsuperscript{133} Given the inability of property owners to challenge both the wetland allegation and the issuance of an ACO, pre-enforcement judicial review is an essential component to counter the risk that the EPA makes a wrongful wetland determination.\textsuperscript{134}

\textit{B. Making a Distinction: Dredge and Fill Material versus Hazardous Waste}

Understandably, the Court may be hesitant to allow pre-enforcement judicial review of ACOs across the board. To address this concern, the Court should consider making two relevant distinctions when it allows pre-enforcement judicial review in regards to dredge and fill activity. To discuss the material distinction first, dredge and fill material is made up of rocks, sand, and dirt.\textsuperscript{135} While it is true that movement of such material can disrupt the nation’s waters, it is also true that there is a difference between the type of material that occurs naturally in the earth and hazardous waste which can pose a danger to the health and safety of the population.\textsuperscript{136} Given this distinction, the EPA’s argument that there exists a need for immediate correction and enforcement in removing these earth materials loses credibility because it is not an analogous

\begin{itemize}
  \item \textsuperscript{131} For the Sacketts, that would mean (a) removing all the fill; and, (b) restoring the preexisting “wetlands,” which would necessitate leaving the property untouched for a prolonged period. \textit{See supra} note 13.
  \item \textsuperscript{132} \textit{Sackett}, No. 10-1062 (U.S. Mar. 21, 2012) (holding that the compliance order in this case was final agency action and that pre-enforcement judicial review was not precluded by the CWA).
  \item \textsuperscript{133} \textit{Mathews}, 424 U.S. at 333 (quoting: Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).
  \item \textsuperscript{134} \textit{See supra} note 88 at 11.
  \item \textsuperscript{135} Dredged material is mostly a clean product that can be used again. This material can be compared to the soil found in one’s yard, garden, or compost pile. In most cases, this truth is only limited to industrial locations where dredge and fill material has been more affected by contaminants. \textbf{FOREST STEWARDSHIP COUNCIL, FACTS ABOUT DREDGED MATERIAL AS A RESOURCE: AN INFORMATIONAL UPDATE FROM THE IADC} 1 (2009).
  \item \textsuperscript{136} The CWA designates hazardous substances as those which, when discharged to navigable waters or adjoining shorelines, present an “imminent and substantial danger to the public health or welfare, including fish, shellfish, wildlife, shorelines, and beaches.” \textit{33 U.S.C.A. § 1321(b)(2)(A)} (2006).
\end{itemize}
material to hazardous waste which does require immediate action.\textsuperscript{137} Because no distinction is currently made in materials, the coverage of 404 permits regulating dredge and fill activity is too broad.\textsuperscript{138} It is a catch all category that serves to lump all regulated materials into the same group, treating all regulated materials with the same amount of urgency when clearly they are different. This point provides additional justification for making a distinction between types of material involved.\textsuperscript{139}

\textit{C. Making a Distinction: Individual Property Owners are at Risk}

The second distinction that should be made by the Court is that between ACO enforcement of individual property owners and industrial property owners. Part of the reasoning for this distinction can be tied back to the dredge and fill material argument. Materials involved in the dredge and fill activity of a residential home is typically different than that of an industrial structure.\textsuperscript{140} Corporations, or similar entities, are those that are more likely to conduct dredge and fill activity within industrial areas whereas individual home builders are not.\textsuperscript{141} Making this simple distinction would help the EPA focus its enforcement through ACOs on the main regulatory goal: protecting the nation’s waters.\textsuperscript{142} Given the intended use of many industrial structures, zoning does limit such building to locations where there exists additional concern of soil contaminants.\textsuperscript{143} However, this is not the case with most residential building sites.\textsuperscript{144}

\textsuperscript{139} Id.
\textsuperscript{141} Id.
\textsuperscript{142} The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the nation’s waters. 33 U.S.C.A. § 1251(a).
\textsuperscript{143} See Forest Stewardship Council, supra note 135 at 1.
\textsuperscript{144} See Ziegler, Rathkopf, & Rathkopf, supra note 140.
addition, ACO compliance clearly requires significant financial resources regardless of whether
the property owner chooses to comply or refuses to do so. How can a private property owner
be compared to a corporation, or related entity, that has the resources to deal with such an
expensive regulation? Financially, the two cannot play on the same field and should not be
lumped together under the statute and forced to do so. Because residential home building occurs
in areas with less risk of ground contaminants and individual property owners have less financial
backing than corporations, the Court should make a distinction to better protect this
disadvantaged group.

D. Congress Must Define the Term “Navigable Waters” Under the CWA

As the Court stated in Sackett, no definition of “Navigable waters” exists under the CWA
as it is currently written. In order for property owners and the Court to understand the
potential reach of the EPA through CWA regulation and the scope of ACO enforcement,
Congress must clarify what it meant by the term “Navigable waters” as it is written in the statute.
The statute provides that it is “unlawful to discharge … into the navigable waters [which] means
the waters of the United States, including the territorial seas.” The problem is that, given a
plain language read of the statutory language, the EPA is regulating property that falls outside

145 Sacketts could be subject to civil penalties of up to $32,500 per day of violation or administrative penalties of up
to $10,000 per day for each violation. See Cross, supra note 10 at 1; Individual permits can take on average 788
days and $271,596 in costs to complete the process. See supra note 45.
146 U.S. ENVIRONMENTAL PROTECTION AGENCY, FY2011 ENFORCEMENT & COMPLIANCE ANNUAL RESULTS CIVIL
PENALTIES ASSESSED 8 (Dec. 8, 2011).
  In FY 2011, EPA enforcement actions required companies to pay over $152
million in civil penalties, administrative and judicial, which was the highest in
the last 5 years. Administrative penalties that were assessed, made up $7 million
for CWA out of the $48 million total. Civil judicial penalties assessed were
made up of $38 million for CWA out of the $104 million total.
147 Steinberg & Mays, supra note 92 at 15; See U.S. CENSUS BUREAU, supra note 121.
the “plain meaning” definition of “navigable waters” when it regulates inland property and adjacent property.150

The Court has crafted three interpretations of the term “navigable waters”151 which helps to supplement the statutory language. The problem, however, is that property owners are no more likely to understand the term now than they were before such interpretations were made because the Court has no statutory language upon which to base its interpretation.152 The Court, itself, has stated that there is no definition of “navigable waters” that currently represents a majority opinion within the Court.153 In a plain language read of the statute, congressional intent is ambiguous.154 As a result, property owners are confused. How is jurisdiction of the CWA determined? How far reaching is the EPA’s authority under the CWA? And to what degree are the terms and conditions of an ACO enforceable as applicable to private property.155 These are fair questions that deserve answers. After decades of ambiguous language, the time has come for Congress to clarify its intent and better define “navigable waters” within the meaning of the CWA.

E. A Last Resort: Allowing After-the-Fact Permits

In the event that an individual property owner begins building without obtaining a 404 dredge and fill permit first, what then? This is not such an impossible scenario to conceive.156 Courts have already pointed out what they believe is an obvious option: just apply for an after-

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150 See also Sackett, No. 10-1062 (U.S. Mar. 21, 2012); See also Flournoy, supra note 44.
151 Sackett, No. 10-1062 (U.S. Mar. 21, 2012) (“[N]o one rationale commanded a majority of the Court.”).
152 See also Flournoy, supra note 44. See generally Id.
153 Id.
155 Id.
156 See generally Sackett, 622 F.3d 1139.
the-fact permit.\textsuperscript{157} That seems simple enough. The reality in many cases, however, is that no after-the-fact permit can be obtained until the ACO has been resolved.\textsuperscript{158} And in reality the EPA is not required to bring the enforcement action against the property owner in any set amount of time, so there is no incentive for the EPA to resolve an ACO, and once the ACO is in place the property owner is left with little choice.\textsuperscript{159} The result is an intolerable, unconstitutional choice for the property owner.\textsuperscript{160} While an after-the-fact permit is not ideal for the individual property owner because of the additional expense, it is a better solution to the problem than what is currently provided.\textsuperscript{161} Currently, there is no pre-enforcement resolution at all. Given that all real estate is considered “special” under the law, this option would at least allow a property owner to salvage a specific piece of real estate and avoid it being tied up in ACO compliance indefinitely.\textsuperscript{162}

Any of these proposed solutions would be a step in the right direction for property rights in this country. Significant improvement in the current process is attainable.\textsuperscript{163} Private-property owners building their residential homes or improving their residential homes should be treated differently than those entities building on industrial sites.\textsuperscript{164} This is not about creating a categorical rule, but about resolving a complete lack of fairness in the current process.\textsuperscript{165} If nothing else, individuals and corporations are worlds apart on a financial scale and cannot be

\textsuperscript{157} See supra note 13.
\textsuperscript{158} See PAGE & HAMMER, supra note 66.
\textsuperscript{159} See Wynn, supra note 87.
\textsuperscript{160} See generally Cross, supra note 11.
\textsuperscript{161} See supra note 72 at 10.
\textsuperscript{162} Id.
\textsuperscript{163} See supra note 13 at 17-18.
\textsuperscript{164} Steinberg & Mays, supra note 92 at 15; See U.S. CENSUS BUREAU, supra note 121.
\textsuperscript{165} See supra note 88.
limited to the same amount of pre-deprivation procedure.\textsuperscript{166} Again, the goal of the CWA is to protect the nation’s waters.\textsuperscript{167} The current regulations are aimed at immediately eliminating any activity occurring on a potential wetland.\textsuperscript{168} This is too broad of a goal because it fails to protect property rights in the process.\textsuperscript{169} The focus of the regulation should be on preventing imminent harm to the nation’s waters. But this goal is not met by depriving individual property owners of their property and liberty interests, namely residential home building, at least not to the extent that providing judicial review before deprivation occurs would change the end result and better protect wetlands.

V. CONCLUSION

Based on “any information,” wetland determinations are made and ACOs are issued ultimately forcing property owners into compliance whether the determination is accurately made or not.\textsuperscript{170} Determining wetlands is not an exact science.\textsuperscript{171} It is a very complicated process where experts are unable to make a determination with 100 percent certainty. How can the Court hold non-experts to such a definitive order without a chance for review? Property owners should have access to the courts to review both the order and the determination before they are forced into an unconstitutional Hobson’s Choice.\textsuperscript{172} This comment understands the hesitation by the Court to draw a bright line allowing all ACOs pre-enforcement judicial review. But he Court has already acknowledged that there is a problem in the current process by allowing APA review in

\textsuperscript{166} See U.S. CENSUS BUREAU, supra note 121.
\textsuperscript{167} 33 U.S.C.A. § 1251(a).
\textsuperscript{169} See supra note 88 at 10.
\textsuperscript{170} See generally Sandefur, supra note 26.
\textsuperscript{171} See generally Flournoy, supra note 44.
\textsuperscript{172} See Wynn, supra note 87.
the *Sackett* case.\(^{173}\) To take a step further and meet the standards of Procedural Due Process of the Fifth Amendment, the Court could carve out a pre-enforcement review process for those individual property owners building their residential homes.\(^{174}\) The Court can do this by making two simple, easily applied distinctions: type of property owner and type of material involved. These distinctions would add a component of fairness to the suffering parties involved in these cases. Corporate property owners can better afford the high stakes in ACO enforcement cases in comparison to individual property owners.\(^{175}\) Industrial structures are built in zoned areas that carry higher levels of pollutants.\(^{176}\) Residential homes, in comparison, are not.\(^{177}\) Finally, Congress needs to provide a clear definition of the term “navigable waters” under the CWA.\(^{178}\) Doing so would provide a clear direction for the Court and property owners to follow. And as a last resort, USACE’s procedures should be amended to allow after-the-fact permits in those cases where property owners do not suspect wetland implication before building.\(^{179}\)

The EPA is not going to initiate corrective measures to protect property owners on its own.\(^{180}\) The EPA has property owners in an unfair position: a catch twenty-two.\(^{181}\) Where is the incentive for change? Fundamental fairness under the Due Process Clause demands that the Court does better for those unable to defend themselves: to provide meaningful review at a meaningful time.\(^{182}\) A combination of pre-enforcement judicial review, distinctions made to

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\(^{173}\) *See generally Sackett*, No. 10-1062 (U.S. Mar. 21, 2012).

\(^{174}\) *Steinberg & Mays*, *supra* note 92 at 15; *See U.S. Census Bureau*, *supra* note 121.

\(^{175}\) *See U.S. Census Bureau*, *supra* note 121.

\(^{176}\) *See Ziegler, Rathkopf, & Rathkopf*, *supra* note 140.

\(^{177}\) *See supra* note 135.


\(^{179}\) *See PAGE & HAMMER*, *supra* note 66.

\(^{180}\) *See Nichols*, *supra* note 12.

\(^{181}\) *See Wynn*, *supra* note 87.

\(^{182}\) *Mathews*, 424 U.S. at 321.
protect individual property owners, and a clear definition of “navigable waters” is the best solution in these cases.