

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   CHANTELL SACKETT, ET VIR.,                   :

4                   Petitioners                   :

5                   v.                               :   No. 10-1062

6   ENVIRONMENTAL PROTECTION AGENCY,       :

7   ET AL.                                       :

8   - - - - - x

9   Washington, D.C.

10    Monday, January 9, 2012

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12                   The above-entitled matter came on for oral

13   argument before the Supreme Court of the United States

14   at 10:03 a.m.

15   APPEARANCES:

16   DAMIEN M. SCHIFF, ESQ., Sacramento, California; for

17   Petitioners.

18   MALCOLM L. STEWART, ESQ., Deputy Solicitor General,

19   Department of Justice, Washington, D.C.; for

20   Respondents.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in Case 10-1062, Sackett v. The  
5 Environmental Protection Agency.

6 Mr. Schiff.

7 ORAL ARGUMENT OF DAMIEN M. SCHIFF

8 ON BEHALF OF THE PETITIONERS

9 MR. SCHIFF: Thank you, Mr. Chief Justice,  
10 and may it please the Court:

11 Mike and Chantell Sackett are here today  
12 because 4 years ago the Environmental Protection Agency  
13 issued against them a compliance order charging them  
14 with violations of the Clean Water Act, requiring that  
15 they restore their property to its alleged  
16 predisturbance wetlands condition, and imposing upon  
17 them the threat of tens of thousands of dollars per day  
18 in civil fines if they did not immediately comply with  
19 the order.

20 But in these 4 years, the Sacketts have  
21 never been offered a meaningful opportunity for judicial  
22 review of the compliance order, an opportunity that they  
23 are guaranteed under the Due Process Clause and the  
24 Administrative Procedure Act.

25 JUSTICE SCALIA: Of course, there would have

1    been a daily fine with or without the compliance order,  
2    wouldn't there, if they were indeed in violation of  
3    the -- the Act?

4               MR. SCHIFF:   Justice Scalia, the fine would  
5    only have been attributable to the statute itself.  But  
6    with the compliance order in effect, essentially, the  
7    Sacketts are now subject to double liability.  They can  
8    be held liable for the statute as well as for actions  
9    inconsistent with the compliance order.

10              JUSTICE KAGAN:  So, Mr. Schiff, your  
11   understanding is that each day your clients are subject  
12   to \$37,500 of fines for the violation of the statute,  
13   and an additional 37.5 for violation of the compliance  
14   order.  Is that the way you understand the penalties  
15   scheme to work?

16              MR. SCHIFF:  Yes -- yes, Justice Kagan.  It  
17   is -- it is in fact, I might add, how the EPA  
18   understands the penalty provisions.  In its brief at  
19   pages 30 and 31, they essentially concede that the  
20   existence of the compliance order does subject the  
21   Sacketts to liability for both violations of the statute  
22   as well as violations of the compliance order.

23              JUSTICE GINSBURG:  But the court of appeals  
24   did say that there would be no independent liability  
25   under the -- for violation of the compliance order.

1 That is, unless there was a violation of the statute,  
2 there would be no penalty for violation of the  
3 compliance order.

4 MR. SCHIFF: That is correct, Justice  
5 Ginsburg. The court held that as a predicate for any  
6 liability for a compliance order violation, there must  
7 be first a finding of a statutory violation. But that  
8 doesn't change the fact -- even according to the Ninth  
9 Circuit, doesn't change the fact that one can still be  
10 held liable for both, that there is a distinct civil  
11 liability that is traceable only to the compliance  
12 order.

13 JUSTICE GINSBURG: What -- what kind of  
14 review are you seeking? I mean, one thing you could say  
15 is you dispute that this property is subject to the Act.  
16 That might be a question that's reviewable. Do you seek  
17 more than that? Do you seek review at this stage of  
18 anything more than whether the property is subject to  
19 the Act?

20 MR. SCHIFF: No, Your Honor, we seek review  
21 of that jurisdictional question as it is incorporated  
22 into the compliance order. The compliance order is the  
23 agency action for which we believe the Sacketts have a  
24 right of review under the Administrative Procedure Act.  
25 And our challenge under the APA to the compliance order

1 is precisely that there is no jurisdiction and,  
2 therefore, there has been no statutory violation.

3 JUSTICE KENNEDY: Can you tell me, what  
4 would be the scope of your holding? How would -- how  
5 would -- if you could write the opinion for the Court on  
6 this part of your case, what would the rule be?

7 I mean, health inspectors go into  
8 restaurants all the time and say: Unless you fix this,  
9 I'm going to give you a citation. Fire inspectors, the  
10 same thing. And I'm -- I'm wondering how your general  
11 theory or your general principle that you want us to  
12 adopt would fit with that rather routine type of  
13 enforcement?

14 MR. SCHIFF: Well, Justice Kennedy, we do  
15 not believe that what we are articulating extends as far  
16 as -- as creating a right under the APA for review  
17 because a health inspector has come onto your property.  
18 All we're arguing is that the compliance order is a  
19 final agency action; it has stopped the Sacketts home  
20 building; it has imposed upon them significant civil  
21 liability; and, therefore, they should have a right  
22 under the APA --

23 JUSTICE KENNEDY: So, this is under -- this  
24 is under the APA.

25 MR. SCHIFF: Correct.

1 JUSTICE KENNEDY: This is the APA prong of  
2 your argument.

3 MR. SCHIFF: Correct, Justice Kennedy. And  
4 -- and we should emphasize that we believe that the  
5 Sacketts' due process rights can be satisfied by  
6 allowing their APA cause of action to go forward.

7 JUSTICE SCALIA: It seems to me there --  
8 there's another distinction, a more significant one,  
9 between routine inspections by fire marshals or -- or  
10 restaurant inspectors, and that is that if you -- if you  
11 disobey their order, you're not subjected to any more  
12 substantial liability than -- than you would have been  
13 subjected to had they not issued the order.

14 It isn't the order that -- that produces  
15 any -- any new fine, is it?

16 MR. SCHIFF: That is exactly correct,  
17 Justice Scalia. That's -- that's the principal  
18 distinction between the compliance order in this case  
19 and many of the agency actions that the EPA has set  
20 forth in its brief.

21 CHIEF JUSTICE ROBERTS: What if the sanction  
22 imposed each day was not the \$37,000, but was \$10? If  
23 you don't comply, you know, we can bring an action any  
24 time to enforce this, and you'll be subject to the  
25 statutory maximum, but during the period, the additional

1 sanction for the -- under the administrative order, or  
2 the compliance order, is \$10 a day.

3 MR. SCHIFF: Mr. Chief Justice, I don't  
4 believe that would change the Court's finality analysis  
5 under Bennett. The -- the fact that the fine is only  
6 \$10 as opposed to 37,000 doesn't --

7 CHIEF JUSTICE ROBERTS: But it might go to  
8 adequacy of judicial review, the adequacy of the  
9 judicial review that would come when the EPA brings the  
10 enforcement action. I understood your argument to be  
11 that there was a significant extortion impact from the  
12 fact that these were such significant fines -- double,  
13 as you say -- that you could rack up for 5 years. But  
14 if it's only \$10 a day, that takes a lot of the wind out  
15 of your sails, doesn't it?

16 MR. SCHIFF: Well, to begin with,  
17 Mr. Chief Justice, in addition to the independent  
18 liability that the compliance order imposes, there are  
19 other legal effects. Even if the compliance order had  
20 no independent liability, there are other legal effects  
21 that even EPA has conceded to. For example, the  
22 existence of the compliance order makes it materially,  
23 substantially more difficult for the Sacketts to apply  
24 for an after-the-fact permit. A higher --

25 JUSTICE KENNEDY: To apply for a --



1           MR. SCHIFF: For an after-the-fact permit.  
2     The -- once an compliance order is issued, an  
3     after-the-fact permit is -- can only be applied for  
4     under the "clearly appropriate" standard in the Corps's  
5     regulations.

6           But -- but, Mr. Chief Justice, in response  
7     to the question, yes, of course, the amount of the fine  
8     certainly factors into meaningfulness of review. It  
9     factors into coerciveness. But even if there were no  
10    fines, there is -- attributable to the compliance order,  
11    there is still the fact that the Sacketts cannot  
12    independently initiate, cannot trigger, review of the  
13    compliance order.

14           JUSTICE SCALIA: What -- what do you care?  
15    I mean, you have the fines, don't you? So, why don't  
16    you just argue that? Why do we have to wrestle with the  
17    more difficult situation where there are no fines? It's  
18    conceded that there are fines, isn't it?

19           MR. SCHIFF: That's correct, Justice Scalia.

20           JUSTICE SCALIA: So, you know, sufficient  
21    unto the day the evil thereof. We don't have to  
22    consider more difficult cases.

23           But, as I understand it, you can get review  
24    by applying for an after-the-fact permit from the Corps,  
25    and the only -- the only expense you would incur in

1 order to get that would be to fill in, as the order  
2 requires you to do, which is something like, what,  
3 \$27,500 or so?

4 MR. SCHIFF: Well, Justice Scalia --

5 JUSTICE SCALIA: Is that such a hard -- a  
6 hard hit? That's a lot less than, you know, 37.5 a day.

7 MR. SCHIFF: Well, the difficulty,  
8 Justice Scalia, is that the Sacketts cannot obtain  
9 judicial review of the compliance order within the  
10 context of the permitting process. The compliance order  
11 is the order that has caused the deprivation, that has  
12 imposed upon the Sacketts this double liability.

13 JUSTICE SCALIA: Well, but their challenge  
14 to the compliance order is simply that they don't have  
15 wetlands. It's the jurisdiction of the EPA. And surely  
16 that can be raised in the -- before the Corps of  
17 Engineers, no?

18 MR. SCHIFF: That issue might be raised,  
19 Your Honor, but the Sacketts could never get review of  
20 that issue within the context of the compliance order,  
21 which is, of course, the -- the agency action that has  
22 caused their harm. Moreover, there's frankly no  
23 guarantee that the Sacketts could even get into court  
24 through the permitting process, because the Corps might  
25 very well say, well, you know, we don't believe that

1    there are wetlands on the property; and so, we're not  
2    going to issue you a permit. And, therefore, there is  
3    nothing for the Sacketts to then litigate over in  
4    Federal court.

5                   JUSTICE SCALIA: How long does it take to  
6    get one of those after-the-fact permits?

7                   MR. SCHIFF: There -- there is a study, Your  
8    Honor. In terms of averages, I think it's about a year.  
9    But there's nothing in our record that would show  
10   necessarily that the Sacketts are eligible for a  
11   nationwide permit. But more importantly is the fact  
12   that the permitting process doesn't provide review of  
13   the burden of the deprivation that the Sacketts are  
14   enduring right now.

15                  CHIEF JUSTICE ROBERTS: Could the -- I don't  
16   understand what exactly you might get from the Army  
17   Corps of Engineers. Obviously, they might give you a  
18   permit, and I take it that cuts off liability; you can  
19   do what you're hoping to do. They might say you don't  
20   get a permit because these are wetlands. Can they do  
21   something in the middle, which is: It's kind of hard  
22   for us to tell; you're on your own?

23                  MR. SCHIFF: Very much so. In addition to  
24   saying we're not going to issue a permit because we  
25   don't believe there are wetlands on the property, they

1     could also say, under the regulations that even EPA  
2     cites in its brief, that we're not even going to  
3     entertain your after-the-fact permit application while  
4     the compliance order is still outstanding, meaning that  
5     you will likely have to comply, be fully deprived, with  
6     everything the compliance order says, allow EPA onto  
7     your property, requiring significant expensive  
8     restoration of your property to its alleged wetlands  
9     state, before you even have the privilege of applying  
10    for a permit.

11                 JUSTICE KAGAN:  Is that what -- is that  
12    what's critical, Mr. Schiff?  If that were not true, if  
13    you could go in, even with the compliance order on your  
14    property, and get an adjudication of whether you had  
15    wetlands in the context of an after-the-fact permit  
16    proceeding, would that be sufficient?

17                 MR. SCHIFF:  No, it would not, Justice  
18    Kagan, because, again, the fact is that the -- the  
19    compliance order is -- well, the permitting process is  
20    an entirely separate agency action.  It's -- it's an  
21    agency action that the Army Corps goes through.  The  
22    Sacketts could get no review of the -- of the compliance  
23    order.

24                 JUSTICE KAGAN:  Well, why does that matter?  
25    You're getting review of the question that you care

1 about, which is the question whether you have wetlands  
2 on your property. And if they said you don't have  
3 wetlands on your property, here's a permit, your  
4 problems are finished.

5 MR. SCHIFF: Justice Kagan, the difficulty  
6 is that that judicial decision would have no impact and  
7 would not remedy the deprivation that the Sacketts are  
8 currently enduring.

9 JUSTICE SCALIA: Do they issue permits when  
10 there are no wetlands? I thought it was a permit  
11 allowing you to do something on wetlands which otherwise  
12 would -- would not be allowed?

13 MR. SCHIFF: That's -- that's correct,  
14 Justice Scalia.

15 JUSTICE SCALIA: So, if they decide that  
16 there's -- that it's not a wetland, what do they -- what  
17 do they do? They do nothing? Is that it?

18 MR. SCHIFF: That's my understanding. The  
19 Corps would simply say there's nothing to permit because  
20 there are no wetlands to fill. But the difficult --

21 JUSTICE KENNEDY: But then the compliance  
22 order would automatically be vacated? I mean, doesn't  
23 the compliance order presume that they are wetlands?  
24 Hasn't the agency already made that determination?

25 MR. SCHIFF: The difficulty,

1 Justice Kennedy, is that we're talking about two  
2 agencies. And this -- this is really the -- why -- one  
3 additional reason why the permitting process is -- is an  
4 inapt solution to the Sacketts' problem. The Sacketts  
5 have been injured by EPA, by the compliance order. And  
6 now --

7 JUSTICE ALITO: That seems very strange for  
8 that -- for a party to apply for a permit on -- on the  
9 ground that they don't need a permit at all. If you  
10 apply for a permit, is the Army Corps of Engineers going  
11 to decide whether you -- whether it's wetlands? Isn't  
12 it presupposed if you're applying for a permit that you  
13 -- you need one because there's -- they are wetlands?

14 MR. SCHIFF: That's -- that's exactly right,  
15 Justice Alito. The -- that underscores how bizarre it  
16 is to force the Sacketts to go through a process.  
17 They've been injured by the EPA, by a compliance order,  
18 and they're told they must initiate an entirely separate  
19 administrative action with an entirely different agency  
20 in order to get indirect, tangential, possible review of  
21 the compliance order that has turned their world upside  
22 down for the last 4 years.

23 The -- that is why the permitting process  
24 cannot provide meaningful judicial review to the  
25 Sacketts. That's why the Administrative Procedure Act

1 is the ready-made answer. And, frankly, there's no  
2 indication that Congress intended anything other than  
3 the Administrative Procedure Act to provide an adequate  
4 administrative review for the -- for the adjudication of  
5 compliance orders.

6 JUSTICE GINSBURG: What would the standard  
7 be that -- before -- you have APA review. So, it's just  
8 that -- that the EPA acted reasonably in determining  
9 that you have wetlands?

10 MR. SCHIFF: Yes, Justice Ginsburg, it would  
11 be your typical arbitrary and capricious standard of  
12 review, substantial evidence based upon the record that  
13 was before the EPA when it made its finding of statutory  
14 violation, which is the statutory predicate for the  
15 issuance of the compliance order.

16 JUSTICE SCALIA: Well, wait, wait. Surely,  
17 you wouldn't go in and -- and try to fight arbitrary or  
18 capricious. It's arbitrary or capricious or otherwise  
19 in violation of the law. Wouldn't you go in and say  
20 that this is in violation of the law?

21 MR. SCHIFF: No, exactly, Justice Scalia. I  
22 mean, I don't mean to limit ourselves to just that one  
23 standard of review. But it would be a --

24 JUSTICE SCALIA: I don't think that one  
25 standard of review would do you very much good, to tell

1 you the truth. They've thought about this. Maybe they  
2 got it wrong, but to say it's arbitrary or capricious,  
3 you're going to lose.

4 MR. SCHIFF: Well, I certainly hope not,  
5 Justice Scalia. But -- but the difficulty is we don't  
6 even know at this point what sort of record the EPA has.  
7 In fact, the law as it stands now is that EPA doesn't  
8 even need probable cause to issue a compliance order.  
9 And --

10 JUSTICE ALITO: Given -- given the rather  
11 vague nature of the test that's been adopted for  
12 determining whether something is part of the waters of  
13 the United States, wouldn't you have a very difficult  
14 time showing that a determination that it was, was  
15 arbitrary and capricious?

16 MR. SCHIFF: There's no question,  
17 Justice Alito, that there -- there -- yes, it would be a  
18 difficult time. But that -- just because the Sacketts  
19 might have an uphill battle I don't believe is any  
20 reason to say that they should have no opportunity. I  
21 mean, as it stands now, they've been told you cannot  
22 build your home, you must convert your property into  
23 wetlands, and you are being charged \$37,500 per day if  
24 you don't immediately comply. And yet, you get no day  
25 in court?



1 JUSTICE KAGAN: And, Mr. Schiff, is the way  
2 you see this operating that you bring an action  
3 contesting on the basis of the arbitrary and capricious  
4 clause or -- or otherwise not in accordance with law?  
5 If -- if then the court rules against you but you  
6 continue to fail to comply, does the EPA then have to  
7 bring a separate enforcement action?

8 MR. SCHIFF: Yes. The only way EPA can  
9 actually take money away from the Sacketts is by filing  
10 a civil action, but that would be true whether or not  
11 the Sacketts bring an APA cause of action.

12 CHIEF JUSTICE ROBERTS: Well, you -- would  
13 collateral estoppel apply to you because of the judicial  
14 determination on the compliance order in the subsequent  
15 enforcement action? In other words, you lose. You seek  
16 APA review, and the court says, you know, we think it's  
17 a wetland. And then the EPA brings an enforcement  
18 action. They have to establish it's a wetland. Don't  
19 they just attach a copy of the decision?

20 MR. SCHIFF: Well, not necessarily,  
21 Mr. Chief Justice, because, for one, the standard of  
22 review would be different. It would be -- under the  
23 APA, it would be the traditional deference afforded to  
24 agency action.

25 CHIEF JUSTICE ROBERTS: Well, not -- I guess

1 I'm back to Justice Scalia's question. This -- it  
2 struck me as a purely legal, jurisdictional issue: Are  
3 these wetlands or not? And I don't know why you would  
4 give deference to the agency's determination on a legal  
5 jurisdictional issue like that.

6 MR. SCHIFF: No, you're correct,  
7 Mr. Chief Justice. I mean more in terms of the  
8 substantial evidence standard that usually supports  
9 agency action under the APA. But -- but certainly here  
10 the Sacketts also contend, regardless of questions of --  
11 of Rapanos and connection to navigable waters, the  
12 Sacketts contend that there are no wetlands at all on  
13 this property, and that ultimately is -- is, of course,  
14 a factual question that would be informed by what's in  
15 the record.

16 JUSTICE KAGAN: But to go back to the Chief  
17 Justice's --

18 JUSTICE KENNEDY: If they're wrong about  
19 that, if there is a finding in the APA process that  
20 these are wetlands, is that the end of it? Or within  
21 that, the context of that review, can you say, well,  
22 they are wetlands, but only to a minor extent, and these  
23 conditions were onerous and -- and far more than  
24 necessary to protect the wetlands? Can you argue that  
25 in the APA review? Or is it just up or down: Wetlands,

1     you lose; not wetlands, you win. That's it?

2                   MR. SCHIFF: No. I mean -- Justice Kennedy,  
3     we would argue that, even if there are wetlands on the  
4     property, which we do not believe there are, that --  
5     that the compliance order would still be invalidated if  
6     there were not a significant nexus between the -- the  
7     alleged wetlands on the property and some navigable  
8     water in the vicinity. But -- but --

9                   JUSTICE SOTOMAYOR: Who would review that  
10    and where? Going back to Justice Kagan's question of --  
11    let's assume you went through an APA process, and they  
12    found it was wetlands and that the compliance terms  
13    were -- had a substantial nexus. What happens when you  
14    go into an enforcement action?

15                  MR. SCHIFF: Well, at that point, then both  
16    sides get to create a new record, consistent with what  
17    the Ninth Circuit held. That --

18                  JUSTICE KAGAN: So, the Chief Justice's  
19    suggestion that there would be preclusion you do not  
20    agree with?

21                  MR. SCHIFF: No. In addition to the fact  
22    that the standards of review would be different,  
23    preponderance of the evidence in a civil action as  
24    opposed to substantial evidence in the APA, it would  
25    also be the fact that -- that, even as the Ninth Circuit

1 understood a civil action, when it goes forward, both  
2 sides have an opportunity to create a new record or  
3 to -- to establish by a preponderance of the evidence  
4 the elements of -- of the offense.

5 JUSTICE SOTOMAYOR: So, does anything get  
6 estoppel?

7 MR. SCHIFF: I'm sorry, Justice --

8 JUSTICE SOTOMAYOR: Does anything get  
9 estoppel? Assuming it's not a legal question, would the  
10 factual findings that there's a substantial nexus  
11 between the remedy ordered and the violation -- would  
12 that get estoppel?

13 MR. SCHIFF: It -- it would be difficult to  
14 imagine a case of estoppel, because, again, in the APA  
15 context, it's just based upon the record at the time the  
16 compliance order is issued. And so, the records are  
17 always going to be different, because the civil action  
18 will build upon that administrative record. And then,  
19 secondly, in terms of the differing standards of review,  
20 I suppose one could find a -- a purely factual question  
21 perhaps that -- where the standards of review wouldn't  
22 matter, or a purely legal question, but --

23 JUSTICE SCALIA: This wouldn't be a problem  
24 if -- if this procedure were not employed, if there were  
25 not this -- this prior compliance order that issues

1 before actual suit by the -- by EPA to hold you liable  
2 for violating the Act. Then you'd just have one -- one  
3 suit, and the -- the issue would be clear as to what  
4 burden the agency has to sustain. But it's -- it's  
5 really the dual nature of this process that creates the  
6 difficulty, isn't it?

7 MR. SCHIFF: Yes, Justice Scalia, to some  
8 extent it is, of course, the process that -- that  
9 Congress --

10 JUSTICE SCALIA: But that's in the statute.  
11 The agency didn't make that up, right? The statute  
12 provides for compliance orders, and it calls them  
13 "compliance orders," doesn't it?

14 MR. SCHIFF: It -- it does indeed. And so,  
15 even if the Sacketts on remand don't get their ideal  
16 mode of judicial review, something is frankly better  
17 than nothing. They have been told for 4 years they  
18 cannot build their home. They have been threatened with  
19 ruinous civil penalties. And, to date, they have had no  
20 opportunity for their day in court.

21 The -- the Sacketts cannot trigger an  
22 enforcement action. I mean, perhaps if Congress had  
23 written the statute differently to allow for some sort  
24 of judicial review that the Sacketts could -- could  
25 initiate for a compliance order, that might -- that

1 might answer, Justice Scalia, your concerns. But that  
2 is not the statute we have. We have a statute where  
3 Congress has said EPA can issue a compliance order, and  
4 we have in combination with that the presumption in  
5 favor of judicial review of final agency action; we have  
6 the avoidance canon; all that point to allowing for the  
7 Sacketts to get their day in court and at the same time  
8 to satisfy and to vindicate Congress's intent.

9 Congress wanted EPA to be able to issue  
10 these -- these compliance orders. Congress gave  
11 significant statutory penalties for violating these  
12 compliance orders. But at the same time, there has to  
13 be balance. One cannot tell landowners --

14 JUSTICE SCALIA: Of course, you know, you're  
15 -- you're not going to be out of the woods. Even if you  
16 get this APA review, okay, some of the factual questions  
17 that go to whether these are wetlands or not are going  
18 to be decided giving substantial deference to the  
19 agency's determination of the facts, right?

20 MR. SCHIFF: No, that is correct,  
21 Justice Scalia. And that --

22 JUSTICE SCALIA: And so, even if you lose on  
23 that, you might still think you can win when the EPA  
24 finally brings a -- a civil action seeking to impose a  
25 penalty, where the burden will be on the EPA without --

1 without any deference to its factfinding. So, you still  
2 won't know where you are, will you?

3 MR. SCHIFF: Well --

4 JUSTICE SCALIA: You've lost one, but you  
5 may win the other. You'll have to roll the dice.

6 MR. SCHIFF: Well, respectfully,  
7 Justice Scalia, it's more than rolling the dice. It's  
8 subjecting the -- the Sacketts to an interminable  
9 Damoclean sword, if -- if the only way they can get  
10 review is simply waiting, well, when will EPA let the  
11 sword drop and bring a civil action to enforce this  
12 compliance order that who knows how old it is?

13 With EPA's theory of continuing violation,  
14 the statute of limitations never even runs. And so, you  
15 have the Sacketts who are forever subject to this cloud  
16 over themselves, cloud over their title. They can't get  
17 anyone to come onto their property to build their home.

18 JUSTICE GINSBURG: Is there no limitation on  
19 the compliance order? It just -- it can be there  
20 forever until the EPA decides to bring an enforcement  
21 action?

22 MR. SCHIFF: As -- Justice Ginsburg, as EPA  
23 interprets the -- the statute of limitations for  
24 collecting civil penalties, so long as the "discharge,"  
25 quote, unquote, remains in place, it's considered a

1 continuing violation. And so, the statute of  
2 limitations never even begins to run. And so, Sacketts  
3 might -- might build their home and, 10 years down the  
4 road, be surprised that here comes EPA with its civil  
5 action.

6 Oh, now the Sacketts get judicial review but  
7 at a significant cost. They can't even enjoy the home  
8 that they might build because there is always this cloud  
9 hanging over them, a cloud that can be dispelled if they  
10 can simply have an opportunity, which, Justice Scalia,  
11 may not be the best opportunity, but something is better  
12 than nothing, an APA cause of action to review the EPA's  
13 assertion of its authority over their property.

14 JUSTICE GINSBURG: I asked you earlier, in  
15 this APA review, would there be any further question  
16 after the determination is it wetlands, is it not? And  
17 you had said no, that's -- that would be it. But you  
18 answered another question that would suggest it may be  
19 wetlands, but it shouldn't -- there should be -- you  
20 should be allowed to build your home anyway.

21 MR. SCHIFF: Allow me to clarify, Justice  
22 Ginsburg. In this APA cause of action, the Sacketts  
23 challenge the -- the jurisdictional predicate, and that  
24 is really a two-part determination. One is, are there  
25 wetlands on the property? And, two, are those wetlands



1 sufficiently connected to navigable waters to justify  
2 Federal regulation? And both of those fit into our  
3 first claim for relief, our APA cause of action.

4 And so, in this case, that is what our APA  
5 cause of action on remand would look like. We would say  
6 let's look at the -- at the record that EPA has  
7 assembled at the time it issued the compliance order,  
8 and does that record support the finding of statutory  
9 violation?

10 JUSTICE SOTOMAYOR: You're conceding that  
11 the compliance order, assuming there is a violation, is  
12 all right? You're not challenging any of the terms of  
13 the compliance order other than the finding of a  
14 violation?

15 MR. SCHIFF: That -- that is correct,  
16 Justice Sotomayor. Yes, that is correct. That is all  
17 that we are challenging.

18 Mr. Chief Justice, if I may reserve the  
19 balance of my time.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Mr. Stewart.

22 ORAL ARGUMENT OF MALCOLM L. STEWART

23 ON BEHALF OF THE RESPONDENTS

24 MR. STEWART: Mr. Chief Justice, and may it  
25 please the Court:

1 I'd like to begin with the question of  
2 double penalties because I think it helps to clarify  
3 exactly what the compliance order does and does not do  
4 in terms of altering the legal regime to which the  
5 Sacketts are subject.

6 The compliance order is intended to specify  
7 the violation that EPA believes to have occurred and the  
8 measures that EPA believes are necessary in order to  
9 achieve prospective compliance. And the statute does  
10 provide separately for penalties for violating the  
11 statute and penalties for violating the compliance  
12 order.

13 And, as an exercise of our duty of candor to  
14 the Court, we acknowledged in our brief that the  
15 Government reads the statute to allow the legal  
16 possibility of double penalties; that is, up to 37,500  
17 per day for violating the statute, up to 37,500 per day  
18 for violating the compliance order. I think that's  
19 really a theoretical rather than a practical --

20 JUSTICE BREYER: Why? You say "practical."  
21 The order itself says that. It says you don't do it,  
22 you're going to get penalized up to 32.5, which is now  
23 37.

24 MR. STEWART: Well, that language in the  
25 order would have been accurate even if the statute

1 didn't authorize penalties for violating the -- the  
2 order itself. That is, even if the statute authorized  
3 penalties only for violating the Act, it would have been  
4 accurate for EPA to say we believe this is what is  
5 necessary to achieve compliance, and if you don't do it,  
6 you will potentially be subject to these civil  
7 penalties; namely, civil penalties for violating the  
8 statute.

9 But the reason I say that it's -- the double  
10 penalties as a theoretical possible -- let me say that  
11 again. If there were no provision for penalties for  
12 violating the compliance order, only penalties for  
13 violating the statute, EPA could accurately have said we  
14 believe that the following steps are necessary in order  
15 to achieve prospective compliance with the Act, and if  
16 you don't do these things, you will be subject to the  
17 following penalties because you will then be in  
18 violation of the Act and you will be subject to the  
19 penalties --

20 JUSTICE KAGAN: But, Mr. Stewart --

21 CHIEF JUSTICE ROBERTS: I don't follow -- I  
22 didn't follow that. What is your response to the  
23 assertion that you're subject to double penalties?

24 MR. STEWART: It is --

25 CHIEF JUSTICE ROBERTS: One, for violating

1 the Act; two, for violating the compliance order.

2 MR. STEWART: The first is it is a legal  
3 possibility. We're not aware of any case in which a  
4 district court has ever imposed penalties of greater  
5 than the 37,000 --

6 CHIEF JUSTICE ROBERTS: Well, but you don't  
7 doubt that -- you don't doubt that they have the  
8 authority to do that?

9 MR. STEWART: They have the authority to do  
10 that. I guess the other thing I would say is the  
11 possibility that penalties would be increased doesn't  
12 distinguish this scheme from the sort of regime that  
13 Justice Kennedy referred to or the sorts of regimes that  
14 we've discussed in our brief. That is, it's very common  
15 for law enforcement agencies of all sorts to give  
16 warnings to regulated parties: We think you're  
17 violating the statute.

18 JUSTICE ALITO: Has the --

19 JUSTICE SOTOMAYOR: Well, Mr. Stewart,  
20 given --

21 JUSTICE ALITO: Has the --

22 JUSTICE SOTOMAYOR: I'm sorry.

23 CHIEF JUSTICE ROBERTS: Justice Alito.

24 JUSTICE ALITO: Has the United States  
25 adopted a rule or announced a policy that it will never

1 seek anything more than the penalty for the underlying  
2 violation? It will not seek an additional penalty for  
3 violation of the compliance order?

4 MR. STEWART: We have not adopted a policy  
5 to that effect.

6 And I guess what I -- I do want to  
7 clarify --

8 JUSTICE ALITO: So, it's more than  
9 theoretical, then. I don't really understand what  
10 you're saying. You're saying that we may ask for more,  
11 but it's unlikely courts will actually provide for more.

12 MR. STEWART: I guess the two -- I don't  
13 know that we have ever asked for more than the 37,500  
14 per day. Now, I think it is often the case what -- that  
15 what district courts will do is, within the 37,500  
16 statutory maximum, they will say we are imposing a  
17 greater penalty for the period after the compliance  
18 order was issued because it shows greater culpability to  
19 continue with the violation after you've been warned.

20 But that's not a feature of the compliance  
21 order that distinguishes it from all manner of other  
22 agency warnings.

23 JUSTICE SCALIA: Well, your order could have  
24 read, it could have read -- "Notice is hereby given that  
25 violation of or failure to comply with the foregoing

1 Order" -- cap "O" -- "may subject Respondents to, one,  
2 civil penalties" of up to 32.5 -- now 37.5 per day.  
3 That's how it reads. It could have read: Violation of  
4 or failure to comply with the Environmental Protection  
5 Act may subject Respondents to civil penalties.

6 It's quite specific that it is violation of  
7 -- failure to comply with the foregoing order, which  
8 includes not letting -- filling in immediately and so  
9 forth. It says what it says. It's the violation of the  
10 order that -- that the additional penalties are attached  
11 to.

12 MR. STEWART: And, again, we don't dispute  
13 that violating the order could as a realistic matter  
14 cause the penalties to be greater within the statutory  
15 maximum. But, as I was saying, in many situations,  
16 agencies give warnings to regulated parties: If you  
17 keep doing this, you may be subject to penalties.

18 JUSTICE SCALIA: It could -- it could as a  
19 theoretical matter double the penalties.

20 MR. STEWART: That's correct.

21 JUSTICE SCALIA: You're just saying, as a  
22 practical matter, it doesn't often do that.

23 MR. STEWART: As a practical matter, we are  
24 not aware of any case in which the penalties imposed  
25 have been greater than the per-day statutory maximum for

1 the violation.

2 JUSTICE SCALIA: I'm not going to bet my  
3 house on that.

4 MR. STEWART: It -- in terms -- I think,  
5 first of all, we would say that until we floated the  
6 theoretical possibility in our opening brief, the  
7 Sacketts seemed to be entirely unaware of it. That is,  
8 all of the Sacketts' calculations as to the penalties to  
9 which they would be exposed if they continued to engage  
10 in their present conduct were premised on the idea that  
11 37,500 was the statutory maximum. But the main point I  
12 want to --

13 JUSTICE SOTOMAYOR: Mr. Stewart, I --

14 JUSTICE KENNEDY: They were getting a good  
15 night's sleep? But they are getting a good night's  
16 sleep before they read your brief?

17 (Laughter.)

18 MR. STEWART: I don't think -- I guess  
19 that's really my point, that the one thing the Sacketts  
20 have never argued is, if it were just the 37,500 per day  
21 for violating the statute, we would be willing to build  
22 our house and take our chances, but once you double  
23 that, we're not willing to take the risk any longer,  
24 that the --

25 CHIEF JUSTICE ROBERTS: Well, and that's not

1 their argument today, either.

2 MR. STEWART: Right.

3 The one point before I move on that I do  
4 want to make clear is, in a wide variety of contexts,  
5 agencies will issue warnings to regulated parties that  
6 they are believed to be in violation of a statute. And  
7 it is common under schemes where the amount of the  
8 sanction is up to the judge's discretion that penalties  
9 will -- may be greater for conduct that occurs after the  
10 person has been warned --

11 JUSTICE SOTOMAYOR: Counsel, but those  
12 situations are slightly different because the Act  
13 doesn't specify any specific remedies that apply to any  
14 specific property. It just says you violate the Act by  
15 filling in wetlands. It doesn't say that you violate  
16 the Act by not removing the fill and not planting trees  
17 and not doing this or doing that. What it says is you  
18 violate the Act if you don't comply with the compliance  
19 order that tells you to do those things. So, it's a  
20 very theoretically different violation that's going on.

21 One is in the affirmative act prohibited by  
22 the statute; that's the violation of the statute. And  
23 the other is the violation of the remedial steps that  
24 the compliance order is the only thing that has set  
25 forth.



1                   MR. STEWART: I don't think that's correct,  
2 Your Honor. First, as to of the requirement in earlier  
3 versions of the compliance order that herbaceous plants  
4 be planted, et cetera, those were removed from the --

5                   JUSTICE SOTOMAYOR: But those are not in the  
6 statute. They're permitted by the statute, but they're  
7 not set forth as requirements under the statute.

8                   MR. STEWART: EPA's view of the statute is  
9 that -- without regard to the issuance of a compliance  
10 order, once fill material is deposited in waters of the  
11 United States, EPA's view of the penalty provisions  
12 would be that the violation continues for as long as the  
13 fill remains in the wetlands.

14                  JUSTICE SOTOMAYOR: That has nothing to do  
15 with the fact that the Act doesn't specifically tell you  
16 to remove it.

17                  MR. STEWART: The Act doesn't  
18 specifically -- and the Act doesn't specifically tell  
19 the person to remove it, but that's our interpretation  
20 of the statute. And it's either right or wrong. That  
21 is, if we're wrong about that, if the only days on which  
22 penalties can be assessed for violating the statute  
23 itself are days on which fill was actually discharged,  
24 then the provisions of the compliance order that  
25 directed the Sacketts to remove the fill and restore the

1 property would be beyond the scope of a proper  
2 compliance order under 13 --

3 CHIEF JUSTICE ROBERTS: Counsel, you  
4 referred a couple of times to the EPA's view of the  
5 statute. I take it that's your view as well?

6 MR. STEWART: That's our view as well. I'm  
7 just saying that hasn't been definitively resolved by  
8 this Court. But the position that we've taken, again,  
9 with respect to the statute itself is that in computing  
10 the daily penalties and asking how many days of  
11 violation were there, the district court should take  
12 into account not just the days on which fill was  
13 actually deposited but the days on which fill remained  
14 in the wetlands.

15 And Petitioners have specifically expressed  
16 agreement this morning with that view of the statute. I  
17 think the view of the Petitioners' amici is to the same  
18 effect, because in many of the amicus briefs there are  
19 calculations of the very large penalties to which people  
20 could be subject if they didn't adhere to compliance  
21 orders, and they're all premised on the idea that every  
22 day fill remains in the wetlands --

23 JUSTICE SCALIA: What about those provisions  
24 of the original order? I must say I was not edified by  
25 the fact that, when litigation was threatened or

1 actually brought, the EPA modified its order: Oh, you  
2 don't have to plant the trees.

3 Does it do this as a matter of practice,  
4 issue compliance orders that go well beyond what the --  
5 what the EPA would -- would demand?

6 MR. STEWART: I don't know about well  
7 beyond. I think the -- every version of the compliance  
8 order said to the Sacketts if you think that there are  
9 things here -- in here that are wrong or compliance  
10 measures that you regard as infeasible, you're welcome  
11 to tell us. And I think --

12 JUSTICE SCALIA: Well, that's very nice.

13 (Laughter.)

14 JUSTICE SCALIA: That's very nice, when  
15 you've received something called a compliance order,  
16 which says you'll -- you're subject to penalties of 32.5  
17 for every day of violation.

18 MR. STEWART: I think the portion of the  
19 order dealing with the planting of plants, which is the  
20 primary one that was eliminated in the final iteration  
21 of the order, is really removed from what the Sacketts  
22 have been complaining about. That is, the Sacketts --

23 JUSTICE SCALIA: But it shows the  
24 high-handedness of the agency, it seems to me, putting  
25 in there stuff that is simply not required by the EPA.

1           MR. STEWART: Well, I think in the main what  
2 every version of the compliance order required was  
3 appropriate if you accept the initial determination that  
4 there was a violation, that these were waters of the  
5 United States.

6           CHIEF JUSTICE ROBERTS: What would you --  
7 what would you do, Mr. Stewart, if you received this  
8 compliance order? You don't think your -- your property  
9 has wetlands on it, and you get this compliance order  
10 from the EPA. What would you do?

11          MR. STEWART: Well, as we know from  
12 documents that have -- were not in the record of the  
13 case, but have been provided to --

14          CHIEF JUSTICE ROBERTS: If they weren't in  
15 the record, I don't want to hear about them. You  
16 appreciate that rule, that we don't consider things that  
17 aren't in the record.

18                You get a compliance order. You don't think  
19 your property has wetlands. What do you do?

20          MR. STEWART: I think, at that stage, your  
21 options would be limited. You could apply for an after-  
22 the-fact permit --

23          CHIEF JUSTICE ROBERTS: You wouldn't do  
24 that, right? You know you'll never get an  
25 after-the-fact permit if the EPA has sent you a

1 compliance order saying you've got wetlands.

2 MR. STEWART: Or you could simply comply  
3 with the compliance order at the cost of, it's been  
4 estimated, \$27,000. Once the compliance order has been  
5 resolved, there would be no further impediment --

6 CHIEF JUSTICE ROBERTS: That's what you  
7 would do? You would say: I don't think there are  
8 wetlands on my property, but EPA does. So, I'm going to  
9 take out all the fill; I'm going to plant herbaceous  
10 trees or whatever it is; and I'll worry about whether to  
11 -- that way, I'll just do what the government tells me I  
12 should do.

13 MR. STEWART: It may be that the Sacketts at  
14 that point were in an unattractive position. But I  
15 think in determining whether it's an unfair position or  
16 how the statutory scheme is supposed to operate, we  
17 ought to look not just at the opportunities that were  
18 available to them at that moment but the opportunities  
19 that they had forgone already.

20 JUSTICE KAGAN: Could I ask you --

21 JUSTICE ALITO: Well, Mr. Stewart, if you --  
22 if you related the facts of this case as they come to us  
23 to an ordinary homeowner, don't you think most ordinary  
24 homeowners would say this kind of thing can't happen in  
25 the United States? You don't -- you buy property to

1 build a house. You think maybe there's a little  
2 drainage problem in part of your lot. So, you start to  
3 build the house, and then you get an order from the EPA  
4 which says: You have filled in wetlands; so, you can't  
5 build your house. Remove the fill, put in all kinds of  
6 plants, and now you have to let us on your premises  
7 whenever we want to. You have to turn over to us all  
8 sorts of documents, and for every day that you don't do  
9 all this, you're accumulating a potential fine of  
10 \$75,000. And, by the way, there's no way you can go to  
11 court to challenge our determination that this is a  
12 wetlands until such time as we choose to sue you.

13 MR. STEWART: Well, the first thing I would  
14 say is, as a matter of standard EPA practice, the  
15 compliance order would not be the first communication  
16 from the agency that would alert the landowner to the  
17 belief that there was a violation. The record in this  
18 case does not make clear whether that agency practice  
19 was followed in this case, but EPA's typical practice is  
20 to alert landowners through prior communications that a  
21 violation is existing --

22 JUSTICE ALITO: Well, so what? Somebody  
23 from the EPA says we think that your backyard is a  
24 wetlands; so, don't build. So, what do we -- what does  
25 the homeowner do, having bought that property?

1 MR. STEWART: Well, once that --

2 JUSTICE ALITO: Well, all right, I'm just  
3 going to put it aside as a nature preserve.

4 MR. STEWART: At the time that that sort of  
5 letter is issued, there's no compliance order, and  
6 there's no impediment to an after-the-fact permit. That  
7 is, at that point, the landowner could ask for a permit  
8 and --

9 CHIEF JUSTICE ROBERTS: In other words, what  
10 the landowner is supposed to do -- the agency says,  
11 because you didn't apply for a permit, you're in trouble  
12 because you didn't give us a chance to say whether we  
13 were going to take away your constitutional rights or  
14 not; so, we can do it.

15 MR. STEWART: Well, the first two things I  
16 would -- the first thing I would say is it's not simply  
17 a hypothetical means of challenging CWA coverage to seek  
18 a permit. That is, in both SWANCC, Solid Waste Agency  
19 of Northern Cook County, and Carabell, which was one of  
20 the two companion cases that this Court adjudicated in  
21 Rapanos, that was the way that the suit got into Federal  
22 court.

23 The landowners applied for permits, they  
24 were denied, they sought judicial review of the permit  
25 denials and argued, inter alia, that there was no need

1 for a permit because the relevant tracts were not waters  
2 of the United States.

3 The second thing I would say is it's often  
4 the case that judicial review is contingent upon  
5 complying with some sort of deadline or some sort of  
6 prerequisite, and once a person has missed the deadline,  
7 that person may as a practical matter be in the same  
8 position as if judicial review had not been made  
9 available at all.

10 JUSTICE KAGAN: But I'm --

11 JUSTICE SCALIA: Suppose the Corps of  
12 Engineers agrees that it's not a wetland, and its basis  
13 for refusing to issue the permit is we don't give a  
14 permit; you don't need a permit.

15 MR. STEWART: It would issue a letter either  
16 to the effect that there was no wetland or that it was a  
17 wetland that was not covered by --

18 JUSTICE SCALIA: Is that binding on --

19 MR. STEWART: Yes, we --

20 JUSTICE SCALIA: -- the Environmental  
21 Protection Agency?

22 MR. STEWART: Yes, we would --

23 JUSTICE BREYER: How can they bring an  
24 action? I'd like some clarification here. The Corps's  
25 regs say the Corps will accept an after-the-fact permit.



1 I mean, one after -- if they applied tomorrow, the day  
2 after getting this order, you'd run up against the reg,  
3 which says we won't give you any after the fact -- we  
4 won't even consider this matter, until any required  
5 initial corrective measures are made.

6 And then, just to be safe, they say that no  
7 permit application will be accepted unless the Corps  
8 determines that concurrent processing of an  
9 after-the-fact permit application is clearly  
10 appropriate. "Clearly."

11 So, I looked at those two things and said,  
12 of course, you can't apply to the Corps of Engineers;  
13 they're not going to accept it unless you have a very  
14 unusual case. So, I expect you to tell me why I'm wrong  
15 about that, if I am, or how many after-the-fact permit  
16 applications has the Corps of Engineers accepted. Maybe  
17 there are a lot.

18 MR. STEWART: It's not precluded, but I  
19 would agree with you: It's very unlikely that without  
20 complying with the order --

21 JUSTICE BREYER: Okay. All right. I agree.  
22 Then, if we agree, then look, for 75 years the courts  
23 have interpreted statutes with an eye towards permitting  
24 judicial review, not the opposite.

25 MR. STEWART: But --

1 JUSTICE BREYER: And yet -- so, here you're  
2 saying this statute that says nothing about it precludes  
3 review, and then the second thing you say is that this  
4 isn't final. So, I read the order. It looks like about  
5 as final a thing as I've ever seen. So, tell me why I'm  
6 wrong on those two points.

7 MR. STEWART: Well, we're not arguing that  
8 the statute precludes all judicial review. That is, the  
9 question whether the Clean Water Act applied to this  
10 tract could have been teed up for a court in either of  
11 two ways.

12 JUSTICE BREYER: Okay. If it doesn't --

13 JUSTICE KAGAN: Well, you are arguing --

14 JUSTICE BREYER: -- you're on the final  
15 part.

16 JUSTICE KAGAN: You are arguing that the  
17 presumption of reviewability does not apply.

18 MR. STEWART: To this particular order.

19 JUSTICE KAGAN: And that seems a very  
20 strange position. Why would the presumption of  
21 reviewability not apply?

22 MR. STEWART: I think first because the  
23 order doesn't express the final -- the agency's final  
24 view both in the sense that it invites the Sacketts to  
25 provide further comment --

1 JUSTICE GINSBURG: But they asked -- they  
2 asked for a hearing. Didn't they ask EPA for a hearing  
3 on whether their lands fell within the statute? They  
4 did ask for a hearing, and the EPA said no.

5 MR. STEWART: EPA said no to a formal  
6 hearing, but I think that would be characteristic agency  
7 practice; that is, when the agency is exercising what is  
8 essentially its prosecutorial function, that is, warning  
9 regulated parties we may do -- we may sue you if you  
10 don't do the following things. It would be quite common  
11 for enforcement personnel to entertain informal  
12 overtures from the regulated party or his legal  
13 representative, but I think it would be extraordinary,  
14 for instance, for a U.S. Attorney's Office to grant a  
15 formal hearing to a potential criminal defendant in  
16 order to discuss the -- in order to resolve the question  
17 criminal charges should be brought. But --

18 JUSTICE GINSBURG: There's -- there's one  
19 thing I do want you to tell us is -- EPA has three  
20 choices. It can go to a compliance order; it can issue  
21 an administrative -- trigger an administrative penalty  
22 when -- where there would be APA review; or it can bring  
23 an enforcement action. How does the agency decide which  
24 of those three routes it's going to take in a given  
25 case?

1           MR. STEWART: I think the -- the agency's  
2 normal practice would be to issue an administrative  
3 compliance order before initiating judicial proceedings.  
4 That is, the statute doesn't require it, but the EPA  
5 ordinarily would not commence a lawsuit without first  
6 giving the regulated party one final opportunity to come  
7 into compliance.

8           JUSTICE GINSBURG: But what about this  
9 administrative order that -- the administrative order  
10 internally within EPA subject to judicial review? When  
11 does it use that as opposed to a compliance order?

12           MR. STEWART: It could use that. It would  
13 typically use that for violations that it perceived to  
14 be less serious. The statutory cap on penalties is much  
15 lower than the cap in the judicial enforcement actions.  
16 I think it would probably be the case that it would  
17 issue an administrative compliance order in those  
18 situations as well.

19           Now, one of the things that the  
20 administrative -- the cover letter to the administrative  
21 compliance order does say is, even if you comply, you  
22 are still not immune from the possibility of enforcement  
23 proceedings with respect to past violations. And I  
24 think that's --

25           JUSTICE SCALIA: Can -- can the EPA issue a

1 warning instead of using this -- this order procedure?  
2 Compliance order procedure?

3 MR. STEWART: Oh, absolutely. I mean, there  
4 is no express statutory authorization for that, but I  
5 think most agencies regard it as within their ordinary  
6 authority to enforce the statute to send less formal  
7 communication.

8 JUSTICE KAGAN: And doesn't most of --

9 JUSTICE SCALIA: So, they could just -- just  
10 dispense with this compliance order and tell the  
11 Sacketts, in our view, this is a warning; we believe  
12 you're in violation of the Act; and you'll be subject  
13 to -- you are subject to penalties of 37.5 per day for  
14 that violation; and to remedy the violation, in our  
15 judgment, you have to fill in and you have to plant, you  
16 know, pine trees on the lot. It could do that?

17 MR. STEWART: They could use the letter for  
18 that mechanism. And --

19 JUSTICE SCALIA: And there would be no  
20 review of that.

21 MR. STEWART: We would certainly argue there  
22 would be no review of that. And if the Court said that  
23 there was review of the administrative compliance order  
24 based on features that were distinct to the order,  
25 namely, the fact that it is couched as an order, the

1 fact that penalties can be imposed for violation of the  
2 order itself, an opinion along those lines wouldn't  
3 suggest that.

4 JUSTICE BREYER: Is there anything you've  
5 got by -- I mean, I'm -- you've got me now into the  
6 area; we're applying the APA; and the question is Abbott  
7 Labs and is it final? Well, here there doesn't seem  
8 anything more for the agency to do, and here the -- the  
9 person whom the order is directed against is being hurt  
10 a lot.

11 So, the only thing I -- left in my mind here  
12 is the order itself does say come in and talk to us  
13 about this. Which may suggest it isn't final. So, do  
14 you have any information on that point? That is, have  
15 you looked up or has the EPA told you that really when  
16 we issue these things, in fact people come in and we  
17 modify them X percent of the time?

18 MR. STEWART: We don't have statistics on  
19 that. Now --

20 JUSTICE BREYER: Do you have any impression  
21 that you could tell us?

22 MR. STEWART: I -- I would have the  
23 impression that it's -- in a nontrivial number of cases,  
24 the landowner does approach EPA. Now, it's--

25 JUSTICE BREYER: Do they --

1           MR. STEWART: Well, I will -- I will say  
2   that the statistics I do have are that only a very small  
3   percentage, you know, a rough estimate somewhere on the  
4   order of 3 percent of wetlands-related compliance orders  
5   under the Clean Water Act ultimately culminate in  
6   lawsuits for enforcement.

7           JUSTICE KAGAN: But, Mr. Stewart, you --

8           CHIEF JUSTICE ROBERTS: If you --

9           MR. STEWART: That would -- that would  
10   encompass both the cases in which the landowners came in  
11   and talked to EPA and those in which they just complied.  
12   I'm sorry.

13          JUSTICE KAGAN: Mr. Stewart, you suggested  
14   that -- that some communication occurs before this  
15   compliance order. And my guess would be that most of  
16   the back and forth between the agency and the person  
17   does happen before the compliance order rather than  
18   after.

19          And the notion that the person can come in  
20   after the compliance order and say you were wrong --  
21   well, they can, but they can do that with respect to any  
22   administrative action. So, am I wrong about that? That  
23   really the back and forth here takes place before the  
24   compliance order issues rather than after?

25          MR. STEWART: I mean, I think you're right

1 as a matter of typical agency practice that there would  
2 be an invitation well before the compliance order was  
3 issued to come in and give your side of the story. And  
4 you're probably right that, if we got to the point where  
5 a compliance order was issued, then the likelihood that  
6 further communications would sway the agency  
7 substantially might be reduced.

8 JUSTICE SOTOMAYOR: Mr. Stewart --

9 MR. STEWART: So, I would think your point  
10 there --

11 JUSTICE SOTOMAYOR: I'm sorry. Finish your  
12 answer, and then --

13 MR. STEWART: So, yes, I would agree with  
14 that.

15 JUSTICE SOTOMAYOR: You were cut-off. You  
16 were saying if we were troubled by the additional  
17 penalties, and you were going to suggest something. If  
18 we were troubled by that aspect of the order alone, and  
19 you haven't dealt with the permit issue after the fact,  
20 what would be your approach to the case then?

21 MR. STEWART: Well, I guess the two things,  
22 one of which may be more troubling rather than less  
23 troubling, is to say that if you're troubled by this,  
24 then there are a lot of other things that might be  
25 troubling as well because it's often the case that



1 warnings are issued to regulated parties, and it's often  
2 the case that if the regulated party continues with the  
3 conduct after receiving the warning, the penalties may  
4 be enhanced.

5 JUSTICE BREYER: This is not a warning. I  
6 mean, really all you have to do is look at it. I was  
7 quite moved by the fact when I looked at it, it didn't  
8 say a warning. It said this is an order. It looks  
9 extremely formal. I even overstated in your favor the  
10 question of negotiating because it doesn't say  
11 negotiating about changing the order; it says  
12 negotiating about amending the order. And -- so, this  
13 is not just a warning, is it?

14 MR. STEWART: It is not -- it is phrased as  
15 an order, but the only thing that EPA is authorized to  
16 do under section 1319(a)(3) is to order people to do  
17 what they were already legally complied -- required to  
18 do; that is, order them to comply with their legal  
19 obligations.

20 JUSTICE SCALIA: Can't you usually obtain a  
21 declaratory judgment if prosecution is threatened and  
22 you think that there is no basis for it, and you  
23 can't -- you're not -- you're not compelled to just  
24 stand there and wait for the prosecutor to -- to drop  
25 the hammer? Can't you normally bring a declaratory

1 judgment action saying there's no basis for prosecution?

2 MR. STEWART: There is no -- the Court has  
3 held that there is no constitutional bar to that and  
4 that a declaratory judgment remedy can be made available  
5 in that circumstance. But, again, I think it would  
6 cause a huge upheaval in the practices of many agencies  
7 to say that declaratory relief is --

8 JUSTICE BREYER: No, but the --

9 MR. STEWART: -- typically available when  
10 the agency issues an informal warning.

11 JUSTICE SCALIA: Well, in -- maybe with an  
12 informal warning, but when you have something as formal  
13 as this which shows that the agency does intend to  
14 prosecute, why wouldn't you be able to bring a  
15 declaratory judgment action?

16 MR. STEWART: Again, I don't think that  
17 there would be any value to agencies or to regulated  
18 parties to encourage the agencies to hedge their bets or  
19 to say less than what they really mean. That is --

20 JUSTICE BREYER: More of a -- that's what  
21 I'm trying to get you to talk about just for one minute.  
22 I mean, you're talking about a huge upheaval. My honest  
23 impression is that it is the Government here that is  
24 fighting 75 years of practice --

25 MR. STEWART: Well, to speak --

1 JUSTICE BREYER: -- because -- because the  
2 issue is the Abbott Labs issue of finality.

3 MR. STEWART: The --

4 JUSTICE BREYER: And, of course, a warning  
5 isn't reviewable. But this seems to meet the test where  
6 that fails. Now, please correct me if I'm wrong about  
7 the agency practice. I can't find support for you --

8 MR. STEWART: The Court in Abbott Labs  
9 emphasized that that was an industry-wide regulation  
10 having the force of law and that the basis for  
11 challenging it was a purely legal ground. And one of  
12 the reasons that we think judicial review of the  
13 administrative compliance order within this scheme would  
14 make no sense, would be out of keeping with the rest of  
15 the statutory regime, is that it wouldn't solve the  
16 problem.

17 As the discussion in the first part of the  
18 argument made clear, Petitioners share our view that the  
19 administrative compliance order would be subject to  
20 review if it's reviewable under a deferential standard.  
21 And if the Court held that the order was not arbitrary  
22 and capricious, that still wouldn't eliminate the  
23 possibility that if we pursued an enforcement action --

24 JUSTICE GINSBURG: But in concrete, Mr.  
25 Stewart --

1                   MR. STEWART:  -- the Petitioners could argue  
2   that they weren't actually in violation.

3                   JUSTICE GINSBURG:  -- how would it work?  
4   You say it's a lesser standard under the APA.  But the  
5   question is, is this wetlands or is it not?

6                   MR. STEWART:  It's more than just is it  
7   wetlands.  It's are these wetlands that have the  
8   requisite connection to traditional navigable waters?  
9   And that can turn in part on factual and scientific  
10  judgments, and those are --

11                  JUSTICE GINSBURG:  But as far -- as far as  
12  the EPA is concerned, they're finished with that  
13  question.  This is not something that, well, we might  
14  look at it again tomorrow based on new evidence.  The  
15  determination that these are qualifying wetlands -- that  
16  has been made.

17                  MR. STEWART:  I think they have reached that  
18  conclusion for now.  I don't think it would be accurate  
19  to say that we have done all the research we would want  
20  to do if we were going to be required to prove up our  
21  case in court.  And that's really the second half of  
22  the -- the problem, that if Petitioners' claim were  
23  reviewable and a court held EPA didn't do sufficient  
24  investigation based on the record before it at the time,  
25  there was no sound basis --

1 JUSTICE ALITO: That makes the EPA's conduct  
2 here even more outrageous: We -- we think now that this  
3 is wetlands that are -- that qualify; so, we're going to  
4 hit you with this compliance order, but, you know, when  
5 we look into it more thoroughly in the future, we might  
6 change our mind.

7 MR. STEWART: I would assume that any  
8 prosecutor, any enforcement person, would want to be  
9 better prepared when a case actually went to trial than  
10 when he was communicating to the potential defendant  
11 that there's a real likelihood that we would sue you.  
12 But the other --

13 JUSTICE SOTOMAYOR: But you're required to  
14 make a finding that there's a violation. You're not  
15 suggesting that the government is going to act  
16 willy-nilly and it's not going to act on sufficient  
17 evidence in -- in sending a letter that says we find you  
18 are violating the Act.

19 MR. STEWART: Obviously, we would feel that  
20 we had sufficient evidence for doing that. But the  
21 second part of the point that I was going to make is,  
22 even if a court found that we didn't have sufficient  
23 evidence before us at the time the administrative  
24 compliance order was issued and that the order was  
25 therefore arbitrary and capricious, that wouldn't

1 provide the Sacketts the protection that they needed,  
2 because that wouldn't foreclose EPA from --

3 CHIEF JUSTICE ROBERTS: Well, that's --  
4 that's right. In other words, you hope you have --  
5 you've looked at it. You hope you have a sufficient  
6 basis. And because of the administrative compliance  
7 order, you're really never going to be put to the test  
8 because most landowners aren't going to say, I'm going  
9 to risk the \$37,000 a day. All EPA has to do is make  
10 whatever finding it wants and realize that in 99 percent  
11 of the cases, it's never going to be put to the test.

12 MR. STEWART: I -- I guess the only point I  
13 would make is, if Petitioners had wanted a judicial  
14 resolution of the coverage question without subjecting  
15 themselves to potential penalties, they could have filed  
16 a permit application before discharging. They could  
17 have gotten review there. All we're saying is they  
18 can't discharge fill, wait to see whether EPA notices,  
19 and then insist upon immediate judicial review if EPA  
20 notices and objects.

21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 Mr. Schiff, you have 4 minutes remaining.

24 REBUTTAL ARGUMENT OF DAMIEN M. SCHIFF

25 ON BEHALF OF THE PETITIONERS

1                   MR. SCHIFF: Mr. Chief Justice, unless the  
2 Court has any additional questions --

3                   JUSTICE BREYER: I do, actually, because I  
4 see their point better than I did. This, I think, is  
5 what they're worried about: They're worried that when  
6 you get judicial review of this kind of order, the court  
7 doesn't refer on factfinding that isn't made on a  
8 record. The substantial evidence test applies to  
9 factfinding made on a record, or 556/557. And so,  
10 they'll have a hard time -- or a harder time -- in each  
11 of these cases subjecting it to judicial factfinding.

12                   And they think that the purpose of this, the  
13 purpose of this procedure given to them by statute was  
14 to call it -- the shots in favor of them, because there  
15 might be thousands of these things, and they can't  
16 prepare all that formal thing. Now, I -- I see that as  
17 a -- as a -- now I understand their concern. I'm not  
18 saying they're right. I understand their concern.

19                   So, if you want to comment, is there some  
20 way to accommodate their concern that also accommodates  
21 judicial review? Or are we just in a kind of -- they're  
22 in a Hobson's choice, in a sense.

23                   MR. SCHIFF: Well, Justice Breyer, the  
24 difficulty is essentially of EPA's own creation. I  
25 don't understand why -- why EPA would want the power to

1 issue compliance orders that, as the Court has  
2 recognized, are -- are tremendously coercive. And not  
3 have --

4 JUSTICE BREYER: They want the power because  
5 they have thousands of these things. They investigate  
6 it, and they find the facts. They think it's  
7 sufficient, but judicial factfinding is carried out  
8 before a judge who doesn't have their experience, et  
9 cetera, and, therefore, there is a risk of incorrect  
10 decisionmaking, at least too -- under the statute, it  
11 would be too pro-homeowner rather too pro-environment.  
12 That's why it's more of a dilemma than I thought.

13 MR. SCHIFF: I think, Justice Breyer, the --  
14 the fear of it being too pro-homeowner is in fact  
15 protected by the fact of the APA standard of review.  
16 We're not talking about -- about the agency being forced  
17 to sort of --

18 JUSTICE SCALIA: Yes, but maybe the agency  
19 is only entitled to deference when in fact it has made a  
20 record. When it hasn't made a record, maybe there's no  
21 reason to give it deference.

22 MR. SCHIFF: You're correct, Justice Scalia.  
23 If there is no record, certainly there's by necessity no  
24 substantial evidence, and in that case, the compliance  
25 order would be --



1 JUSTICE BREYER: Well, they might -- the  
2 might change their -- their system here, if you -- if  
3 you win this, and provide for various kinds of pre-order  
4 procedure or post-order procedure where they'd be open  
5 to change. I see a number of possibilities. I can see  
6 their dilemma.

7 JUSTICE SCALIA: But they'll just issue  
8 warnings, is what they'll do.

9 JUSTICE KENNEDY: Are there cases in the  
10 courts of appeals or the district courts where  
11 landowners, having received these notices or compliance  
12 orders, have said that there's a taking of the property,  
13 inverse condemnation?

14 MR. SCHIFF: I'm not aware of that, Your  
15 Honor, but -- Justice Kennedy, but, as this Court I  
16 believe held in Riverside Bayview, a takings claim under  
17 the Clean Water Act is not considered ripe until a  
18 permit application has been -- has been attempted.

19 Now, if a compliance order is issued, then  
20 the permit application might be off the table. And, in  
21 fact, one could see that a compliance order might  
22 potentially have a total taking effect in this case.

23 But certainly, at this point, we are willing  
24 to let EPA have the power. Yes, let EPA administer the  
25 Act and issue compliance orders, but let's also give

1 landowners a fair shake, too. Let them have their day  
2 in court to contest what the agency has done.

3 JUSTICE KAGAN: Mr. Schiff, I take it -- the  
4 Government agrees that there's not much of a chance that  
5 you could get an after-the-fact permit, but its view is  
6 you should have gotten a before-the-fact permit. And  
7 putting aside the weirdness which Justice Alito points  
8 out of making you go get a permit for something you  
9 don't think you need a permit for -- putting that aside,  
10 couldn't you have gotten the legal determination that  
11 you wanted through that process?

12 MR. SCHIFF: We -- Justice Kagan, we don't  
13 deny that by applying for a permit and having the Corps  
14 make a decision on the permit that that's one way to get  
15 into court. But the difficulty for the Sacketts and  
16 for, you know, the thousands of folks in this country  
17 who are recipients of compliance orders is that that's  
18 small or no solace once EPA has already acted, you know,  
19 once EPA has made the finding of violation and then  
20 threatens these ruinous penalties on -- on landowners.

21 JUSTICE KAGAN: Well, I think what EPA is  
22 saying is, as long as you knew that your lands were  
23 potentially wetlands, you could have gone in from the  
24 get-go and -- and sought a determination that they were  
25 not wetlands through the permit process.

1                   MR. SCHIFF: That's correct, Justice Kagan.  
2     But, frankly, the way EPA and the Corps interpret the  
3     scope of their jurisdiction, that would make essentially  
4     every landowner in this country potentially on notice  
5     requiring them to apply for a permit or some other  
6     manner, and the agency will then probably have even a  
7     worse situation; it will be flooded by permits.

8                   CHIEF JUSTICE ROBERTS: Thank you, counsel,  
9     counsel.

10                  The case is submitted.

11                  (Whereupon, at 11:04 a.m., the case in the  
12     above-entitled matter was submitted.)

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