Sackett’s Limit

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For nearly forty years, the Environmental Protection Agency (EPA) and Army Corps’ of Engineers have relied heavily on administrative compliance orders to enforce the Clean Water Act (CWA). The Supreme Court’s decision in Sackett v. Environmental Protection Agency will likely affect drastic changes in this traditional enforcement strategy. Contrary to the unanimous consensus of federal courts, Sackett decided that compliance orders issued by the EPA under the CWA are subject to judicial review on the underlying question of jurisdiction even before EPA brings an enforcement action. Even this narrow holding is a dramatic departure from decades of CWA enforcement. Moreover, it is unclear from Sackett whether the opinion’s effect will remain so narrow or whether every compliance order issued by the Agency under the CWA faces the specter of pre-enforcement judicial review. This Note argues that federal courts should take a narrow reading of Sackett and limit pre-enforcement judicial review of compliance orders to the special issue of establishing CWA jurisdiction. Only a narrow interpretation of Sackett will allow federal courts to avoid the unfortunate ecological consequences of the Court’s hostility to water quality regulation.

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INTRODUCTION

The Supreme Court’s decision in *Sackett v. Environmental Protection Agency*\(^1\) could affect a sea change in enforcement of the Clean Water Act (CWA). Contrary to the unanimous consensus of federal courts, *Sackett* decided that administrative compliance orders issued by the Environmental Protection Agency (EPA) under the CWA are subject to judicial review on the underlying question of jurisdiction even before an EPA enforcement action. Even this narrow holding is a dramatic departure from decades of CWA enforcement. Moreover, it is unclear from *Sackett* whether the opinion’s effect will remain so narrow or whether every compliance order issued by the Agency under the CWA faces the specter of pre-enforcement judicial review. A broad reading of *Sackett*, which would permit judicial review of CWA compliance orders on any grounds before enforcement, also risks subjecting every compliance order under any environmental statute to similar pre-enforcement review. Undoubtedly, how these ambiguities in *Sackett* are resolved by federal courts will have enormous consequences for the future of American environmental law.

This Note argues that federal courts should take a narrow reading of *Sackett* and limit pre-enforcement judicial review of compliance orders to the special issue of establishing CWA jurisdiction. The argument proceeds in four parts. Part I explores the history of CWA enforcement and focuses on the compliance order authority. Part II articulates the Court’s CWA jurisdiction jurisprudence and the role this jurisprudence played in the *Sackett* opinion. Part III argues that the history, purpose and language of the Act, as well as the emphasis placed by the *Sackett* Court on the “notoriously unclear”\(^2\) issue of CWA jurisdiction, inexorably lead to the conclusion that pre-enforcement judicial review should not extend beyond the question of jurisdiction. Part IV concludes by situating the *Sackett* decision within the modern enforcement strategy of the CWA and considering the negative consequences the decision could have for the environment. Only a narrow interpretation of *Sackett* will allow federal courts to avoid the unfortunate ecological consequences of the

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2. *Id.* at 1375 (Alito, J., concurring).
Court’s hostility to water quality regulation.

I. THE HISTORY OF THE CLEAN WATER ACT COMPLIANCE ORDER AUTHORITY

A. A Summary of Clean Water Act Enforcement Options

When Congress enacted the Federal Water Pollution Control Act Amendments of 1972, the foundation for the modern CWA, it had a clear idea of how it wanted to enforce federal water pollution laws. Granted, passage was “bitterly contested.”3 The bitterness stemmed from the shift to effluent limitations in lieu of water quality standards.4 The Senate thought industrial dischargers could achieve “zero discharge” in nine years; the House “was not nearly so sanguine.”5 Despite disagreements over when the amendments would be able “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” nearly everyone agreed federal officials needed better enforcement options.6

The Water Pollution Control Act of 1948—the first comprehensive federal effort to address water pollution—suffered from serious enforcement deficiencies. Congress set a high threshold for enforcement actions: enforcement could only commence when the “pollution of interstate waters” endangered the “health or welfare” of persons in another state. Meanwhile, the enforcement procedure was “fraught with obstacles and delay”7 because enforcement was limited to judicial relief against prospective polluters only after federal officials issued two notices of abatement to the polluter, obtained state approval to proceed, and proved the “physical and economic feasibility” of abatement.8 Unsurprisingly, this “Alice in Wonderland technique” did little to slow water pollution.9

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3. Robert J. Rauch, The Federal Water Pollution Control Act Amendments of 1972: Ambiguity as a Control Device, 10 HARV. J. ON LEGIS. 565, 565 (1972–73) (“Final approval climaxed one of the most bitterly contested legislative battles in the 25 years of the federal water pollution program.”).

4. Rauch, supra note 3, at 571 (“The 1972 amendments to the Federal Water Pollution Control Act represent a major shift in enforcement policy from reliance on water quality standards to adoption of specific effluent limitations. Water quality standards specify the maximum concentration of various pollutants which is compatible with a desired use of the water; effluent standards limit the absolute quantity of particular pollutants which may be discharged by individual sources.”); id. (“Effluent limitations were tied not to existing water quality standards, but to the available control technology. Existing water quality standards provide a basis for enforcement only if they require a higher degree of control than that mandated by the new technology-based standard.”). See also Clean Water Act, 33 U.S.C. § 1311 (2012) (“Effluent Limitations”).

5. See Rauch, supra note 3, at 570.

6. 33 U.S.C. § 1251(a). They settled on 1985. Id. § 1251(a)(1) (“[I]t is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985.”).


8. Id. at 211–12.

9. Id. at 212 n.60 (citing Murray Stein, Water Pollution Control Legislation, 1971: Oversight Hearings Before the House Comm. on Public Works, 92d Cong., 1st Sess. 184 (1971)).
Though Congress tried to tweak the existing procedure, by 1972 it was forced to restructure federal water pollution enforcement. Of course, Congress was not working from a blank slate; it was responding to the failure of prior federal enforcement provisions to address water pollution. The resulting 1972 Amendments established the framework for the present-day CWA administered by the EPA and Army Corps of Engineers (Corps). The modern pollution control strategy begins with section 301(a), which prohibits “the discharge of any pollutant by any person” into “navigable waters” without proper permitting. To implement this prohibition, section 301(a) requires a discharger to obtain and comply with a permit issued by EPA through the National Pollutant Discharge Elimination System under section 402 “for the discharge of any pollutant, or combination of pollutants” or by the Corps under section 404 for “dredged or fill material.” Unlike the prior regime, federal officials do not have to prove some discharge poses a unique environmental or social harm. Instead, enforcement is authorized whenever any person discharges pollutants into navigable waters without a permit or in violation of a permit.

In addition to lowering the threshold for liability, Congress armed EPA with a relatively impressive array of tools to enforce the Act. When EPA finds a violation of section 301(a), the 1972 Amendments offer the agency two options. First, EPA can bring a civil enforcement suit in federal court. Second, EPA can issue an administrative compliance order to the polluter. If the discharge violates a state-issued permit, EPA must notify the discharger and the state of the violation. The state has thirty days to take “appropriate enforcement action” before EPA is authorized to issue a compliance order or

10. 33 U.S.C. § 1311(a). Because commentators and practitioners use the original section language from the Clean Water Act (i.e., section 301(a) instead of § 1311(a)), this Note will do so as well.
11. 33 U.S.C. § 1344 (allowing for permitted discharges into “navigable waters”); id. § 1362(7) (defining “navigable waters” as “the waters of the United States, including the territorial seas”).
15. There are three types of permits authorizing discharges. Nationwide permits are “designed to regulate with little, if any, delay or paperwork certain activities having minimal impacts.” 33 C.F.R. § 330.1 (2012). For nationwide permits, “[p]ublic comment is required only when the Corps sees fit to promulgate the standards for a nationwide permit and not with each and every activity by a developer under the permit.” Reuth v. EPA, 13 F.3d 327, 329 (7th Cir. 1993). The second kind of permit is regional. See 33 C.F.R. § 323.3. The final permit is site-specific. See id. Site-specific permits are issued after administrative proceedings and investigation “which include site-specific documentation, public notice and consideration of all public comments on the specific activity.” Reuth, 13 F.3d at 329; 33 C.F.R. pt. 323.
16. See 33 U.S.C. § 1319 (“Enforcement”). The EPA Administrator is authorized to enforce violations of both section 402, administered by EPA, and section 404, implemented by the Corps. Id.
17. Id. § 1319(b).
18. Id. § 1319(a).
19. Id. § 1319(a)(1).
bring a civil enforcement suit. If the discharge violates a federal permit, the agency is authorized to issue a compliance order or institute a civil enforcement action without providing notice to the discharger or state. In 1987, Congress added a third enforcement option: administrative penalties.

Beyond these provisions, the 1972 Amendments provided EPA the authority to bring criminal prosecutions for negligent and knowing violations of the CWA and created “emergency powers” to “immediately restrain” dischargers with a civil injunction when the pollution source poses “an imminent and substantial endangerment” to the health and welfare of persons. Congress even allowed citizens a role in enforcement of the CWA. There can be little doubt, given the breadth and historical context of the 1972 Amendments, that Congress wanted effluent limitations enforced efficiently and effectively.

B. Pre-Enforcement Review of Compliance Orders Before Sackett

Among the CWA enforcement tools Congress provided EPA in 1972, the compliance order authority is certainly the most intriguing. Completely unlike prior iterations of the CWA, which limited enforcement actions to civil suits in federal court, the 1972 Amendments authorize EPA to issue compliance orders. A compliance order “is a document served on the violator, setting forth the nature of the violation and specifying a time for compliance with the Act.” The order is not self-executing; EPA must bring an enforcement action in federal court. But the order does have teeth, even before enforcement. Although penalties in direct civil enforcement actions are “not to exceed [§37,500] per day for each violation,” when EPA enforces the CWA after issuing a compliance order, and the violator has failed to comply, the limit on

20. Id. § 1319(a)(2).
21. Id. § 1319(a)(3). By charting this enforcement avenue, Congress “recognize[d] that federal enforcement power is concurrent with that of state governments.” Andreen, supra note 7, at 218. See also Rauch, supra note 3, at 566 (“From the passage of the Federal Water Pollution Control Act in 1948 to the Water and Environmental Quality Improvement Act of 1970, federal responsibility for pollution control gradually increased as the states proved unwilling or unable to assume primary responsibility for the task.”).
22. Id. § 1319(g) (“Administrative penalties”).
23. Id. § 1319(c) (“Criminal penalties”).
24. Id. § 1364 (“Emergency powers”).
25. Id. § 1365 (“Citizen suits”).
26. See id. § 1319(a).
27. S. Pines Asocs. by Goldmeier v. United States, 912 F.2d 713, 715 (4th Cir. 1990). See also Beth Ginsberg et al., Enforcement: Sections 309 and 505, in THE CLEAN WATER ACT HANDBOOK 231, 240 (2011) (Compliance “can include restoration of filled wetlands, completion of BMP (best management practices) plans, and cessation of an ongoing discharge. EPA usually invites respondents to negotiate different terms to an order if the order terms are not practicable. Extensions of time to comply are also often granted if the facts dictate a longer period of time to come into compliance.”).
29. Id. § 1319(d); see also 40 C.F.R § 19.4 (2012) (“Penalty adjustment and table”).
the statutory penalty doubles to $75,000 “per day for each violation.”30 By authorizing pre-enforcement penalties through the compliance order process, Congress hoped to encourage (or, from another perspective, “strong-arm”)31 regulated parties to comply with the CWA without invoking the lengthy litigation process that plagued water pollution enforcement before the 1972 Amendments.32

In general, federal environmental statutes authorized compliance orders to enable “EPA to act to address environmental problems quickly without becoming immediately entangled in litigation.”33 The CWA is no different.34 But unlike other statutes, which expressly preclude judicial review of compliance orders before EPA brings an enforcement action,35 the CWA is silent on the question of judicial review. It does not declare whether judicial review of compliance orders before EPA initiates suit is allowed or precluded.

Normally, courts presume that administrative action, like issuing a compliance order, is subject to judicial review under the Administrative Procedure Act (APA).36 The APA requires judicial review of “final agency action for which there is no other adequate remedy in a court.”37 However, not all “final agency action[s]” are reviewable.38 The APA presumption can be

30. Id. § 1319(d). This interpretation of the Act has been called into doubt by Sackett. See Sackett v. EPA, 132 S. Ct. 1367, 1372 n.2 (2012) (noting that the Court assumes without deciding that EPA can impose “double penalties”). At the same time, the penalty for failing to comply with the order is not automatic. The statute requires a court to “consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.” 33 U.S.C. § 1319(d).


32. See notes 7–9 supra and accompanying text.

33. S. Pines Assocs. by Goldmeier v. United States, 912 F.2d 713, 716 (4th Cir. 1990). See also Andrew I. Davis, Judicial Review of Environmental Compliance Orders, 24 ENVTL. L. 189, 190 (1994) (“The purpose of the compliance order is to ‘provide a quick, responsive, and flexible enforcement tool, particularly well-suited to remedying less important violations.’”) (quoting LAW OF ENVIRONMENTAL PROTECTION § 8.01(5)(b) (Sheldon M. Novick et al. eds., 1990)).

34. See S. REP. NO. 92-414 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3730 (1972) (“One purpose of these new requirements is to avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement. Enforcement of violations of requirements under this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay.”).


36. See e.g., Sackett v. EPA, 622 F.3d 1139, 1142 (9th Cir. 2010) (“We begin with the presumption favoring judicial review of administrative action.”); Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967), overruled on other grounds by Califano v. Sanders, 430 U.S. 99 (1977) (“The Administrative Procedure Act . . . embodies the basic presumption of judicial review to one ‘suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute,’ 5 U.S.C. § 702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. § 701(a).”).


38. See Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 218 (1994) (“We conclude that the Mine Act’s administrative structure was intended to preclude district court jurisdiction over petitioner’s claims
overcome when Congress expressly precludes judicial review or “the congressional intent to preclude judicial review is fairly discernible in the statutory scheme.”

On first glance, it seems more than “fairly discernible” from the CWA scheme that Congress precluded judicial review of EPA’s compliance order authority. Congress passed the 1972 Amendments to streamline EPA’s enforcement authority and even provided EPA the option of bringing suit without first issuing a compliance order. The very purpose of the compliance order authority—to expedite enforcement of federal water pollution laws—would ostensibly be gutted by presuming judicial review of the orders. Though this authority might raise moral or constitutional concerns, the conclusion that the CWA precludes judicial review of compliance orders appears unavoidable.

For several decades, federal courts unanimously arrived at just that conclusion. In 1990, the Seventh Circuit became the first federal appellate court to address the question of whether the CWA impliedly precludes pre-enforcement judicial review of compliance orders. In *Hoffman Group v. EPA*, a residential property developer received a compliance order for allegedly filling wetlands in violation of the CWA. The property developer insisted it was entitled to judicial review of the compliance order even though EPA had not yet decided to bring suit. The Seventh Circuit concluded the property developer’s jurisdictional challenge was precluded by the CWA. First, the court looked to the statute itself. Congress gave EPA two options to enforce the CWA; the Agency may issue a compliance order or file suit. However, the developer’s interpretation of the statute “would eliminate that choice.” Second, the court cited decisions interpreting the Clean Air Act (CAA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which also provide EPA the option of enforcing environmental

40. *Ginsberg et al., supra* note 27, at 240 (“The courts have held that there is no pre-enforcement review of section 309(a) orders.”).
41. *See Part IA supra* and accompanying text.
42. 33 U.S.C. § 1319(b).
43. *See Sackett v. EPA*, 622 F.3d 1139, 1144 (9th Cir. 2010) (“This goal of enabling swift corrective action would be defeated by permitting immediate judicial review of compliance orders.”).
44. *See Davis, supra* note 33, at 190 (”[W]ithout judicial review, the compliance order may become an instrument of intimidation.”).
45. *Cf. Sackett*, 622 F.3d at 1147 (“We therefore hold that precluding pre-enforcement judicial review of CWA compliance orders does not violate due process.”).
46. *See Hoffman Grp., Inc. v. EPA*, 902 F.2d 567, 569 (7th Cir. 1990) (”[T]he question involved in this case is apparently one of first impression for a court of appeals”).
47. *Id.*
48. *Id.*
49. *Id.*
standards via compliance order, to “hold that agency compliance orders such as involved here are unreviewable until enforcement proceedings are instituted.” Third, the court took note that when Congress chose to add administrative penalties to EPA’s enforcement arsenal in 1987, it also chose to subject such penalties to judicial review while leaving the compliance order language unchanged. Finally, the court explained the property developer would have a “full opportunity” to be heard before any sanctions would be imposed because EPA invariably must enforce the compliance order in federal court.

The Fourth Circuit came to the same conclusion later that year. In Southern Pines v. United States, a land developer and its construction company received a compliance order from EPA for discharging fill material into wetlands without a permit. The recipients attempted to obtain judicial review of EPA’s jurisdiction, but the suit was dismissed by the district court. The Fourth Circuit affirmed. According to the court, “the statutory structure and history of the CWA provides clear and convincing evidence that Congress intended to exclude this type of action.” Like the Seventh Circuit in Hoffman, the Fourth Circuit noted that “Congress provided EPA with a choice of procedures for enforcing the Act.” Further, the court emphasized the structure of similar environmental statutes that bestow compliance order authority on EPA, such as the CAA and CERCLA, “indicates that Congress intended to allow EPA to act to address environmental problems quickly and without becoming immediately entangled in litigation.” The court went on to explicitly reject the plaintiffs’ attempt to escape this conclusion by challenging the existence of jurisdiction, as well as plaintiffs’ constitutional objections.

Every other court of appeals to address the question—the Sixth, Ninth,
and Tenth\textsuperscript{65} Circuits—followed the path laid by Hoffman Group and Southern Pines.\textsuperscript{66} When faced with the question of whether the CWA precludes judicial review of compliance orders before suit, federal courts consistently answered in the negative. According to the courts, the CWA gives EPA options to address the monumental task of enforcing federal water pollution laws. Judicial review of compliance orders—including review of jurisdictional challenges\textsuperscript{67}—would functionally eliminate one of those options. Moreover, given Congress expressly provided for judicial review of the administrative penalty option in 1987, but did not apply that provision to compliance orders, it is fairly safe to assume that Congress intended to preclude review of the latter.

\textbf{C. The Sacketts Go to Court}

Michael and Chantell Sackett own a two-thirds-acre residential parcel in Idaho.\textsuperscript{68} The parcel is north of Priest Lake, and separated from the lake by multiple properties with permanent structures.\textsuperscript{69} After filling part of the parcel with dirt and rock, the Sacketts received a compliance order from EPA.\textsuperscript{70} The Agency indicated that the parcel included “jurisdictional wetlands” adjacent to “navigable waters” and that the Sacketts violated the CWA by filling and discharging pollutants into the parcel.\textsuperscript{71} Believing their parcel was not subject to the CWA, the Sacketts appealed to EPA for a rehearing.\textsuperscript{72} Their appeal was denied.\textsuperscript{73}

Instead of waiting for EPA to bring an enforcement action the Sacketts brought suit against EPA in the District of Idaho.\textsuperscript{74} The complaint alleged that the issuance of the compliance order was “arbitrary and capricious” in violation of the APA\textsuperscript{75} and unconstitutionally deprived the Sacketts of “life, liberty, or property, without due process of law.”\textsuperscript{76} The District Court dismissed the court drew an inference that Congress meant to preclude pre-enforcement judicial review of environmental compliance orders. \textit{Id.}

\textsuperscript{65} Laguna Gatuna, Inc. v. Browner, 58 F.3d 564 (10th Cir. 1995).


\textsuperscript{67} \textit{See e.g.}, Laguna Gatuna, 58 F.3d at 565–66 (reviewing cases specifically addressing potential jurisdictional challenges to “waters in the United States” determination by EPA).

\textsuperscript{68} \textit{Sackett v. EPA}, 132 S. Ct. 1367, 1370 (2012).

\textsuperscript{69} \textit{Id.}

\textsuperscript{70} \textit{Id.}

\textsuperscript{71} \textit{Id.}

\textsuperscript{72} \textit{Id.} at 1371.

\textsuperscript{73} \textit{Id.}


\textsuperscript{76} \textit{See U.S. CONST. amend. V.}
complaint for lack of subject-matter jurisdiction in an unpublished opinion.\textsuperscript{77} On appeal, the Ninth Circuit affirmed the District of Idaho.\textsuperscript{78} The Ninth Circuit’s analysis should be familiar. It began by noting that although the CWA does not explicitly allow pre-enforcement judicial review of compliance orders, neither does the statute preclude pre-enforcement review.\textsuperscript{79} The task for the court was to determine whether preclusion was “fairly discernible from the statutory scheme.”\textsuperscript{80} Like every other court that had previously addressed the issue,\textsuperscript{81} the Ninth Circuit decided that “the CWA impliedly precludes judicial review of compliance orders until the EPA brings an enforcement action in federal district court.”\textsuperscript{82}

Predictably, the Ninth Circuit relied on three factors to guide its decision.\textsuperscript{83} First, the court examined the structure of the CWA and the nature of the administrative action before the court.\textsuperscript{84} The court found that the CWA offers EPA the choice of issuing a compliance order or bringing a civil action, and that judicial review of compliance orders would eliminate that choice.\textsuperscript{85} Second, the court considered the objectives of the CWA.\textsuperscript{86} According to the court, pre-enforcement compliance orders allow EPA to bring “swift corrective action” to address environmental problems without the prospect of entangling litigation.\textsuperscript{87} Third, the court looked to the legislative history of the CWA.\textsuperscript{88} Although the CWA’s legislative history did not offer any controlling insight, it did “support the inference” that judicial review of pre-enforcement compliance orders is precluded.\textsuperscript{89} The Ninth Circuit concluded that the CWA impliedly precludes pre-enforcement judicial review of EPA compliance orders issued under the Act.\textsuperscript{90}

The Sacketts petitioned the Supreme Court for a writ of certiorari. The Court granted the Sacketts’ petition on two questions: “1. May petitioners seek pre-enforcement judicial review of the administrative compliance order pursuant to the [APA]? 2. If not, does petitioners’ inability to seek pre-enforcement judicial review of the administrative compliance order violate

\textsuperscript{77} Sackett, 2008 WL 3286801 at *2–3 (finding that the “numerous” circuit and district court opinions concluding the CWA precludes pre-enforcement judicial review of compliance orders “to be well reasoned and consistent with the law”).

\textsuperscript{78} Sackett v. EPA, 622 F.3d 1139 (9th Cir. 2009).

\textsuperscript{79} Id. at 1142.

\textsuperscript{80} Sackett, 622 F.3d at 1144 (quoting Block v. Cmty. Nutrition Inst., 467 U.S. 340, 351 (1984)).

\textsuperscript{81} The Ninth Circuit explained “[t]he reasoning of these courts is persuasive to us, as well as the broad uniformity of consensus on this issue.” Sackett, 622 F.3d at 1143.

\textsuperscript{82} Id. at 1144.

\textsuperscript{83} Id.

\textsuperscript{84} Id.

\textsuperscript{85} Id.

\textsuperscript{86} Id.

\textsuperscript{87} Id.

\textsuperscript{88} Id.

\textsuperscript{89} Id.

\textsuperscript{90} Id. The Ninth Circuit also dismissed the Sacketts’ constitutional objections. Id. at 1147.
their rights under the Due Process Clause?" 91 Though the Ninth Circuit is no stranger to reversals, given the unanimity of the federal appellate courts on the question presented, the Court’s decision to grant this petition must have come as a surprise to EPA.

II. CONSTITUTIONAL AVOIDANCE AND JURISDICTION UNDER THE CLEAN WATER ACT

EPA could be excused for being surprised by the Court’s decision to grant the Sacketts’ petition. For over two decades, federal courts had unanimously reached the same conclusion as the Ninth Circuit. And for nearly four decades, EPA had used the compliance order authority without pre-enforcement judicial review. But there could be no excuse after reading the first few pages of the Court’s opinion; the only possible reaction could have been dismay. EPA’s fate was sealed the moment the Court cited to its history with CWA jurisdiction. This was not the Court’s first encounter with CWA jurisdiction and it let that fact be known up front by describing the controversy as one about CWA jurisdiction. 92 The Court’s CWA jurisdiction should thus frame any analysis of Sackett.

A. The Court’s Unhappy History with CWA Jurisdiction

CWA jurisdiction is “notoriously unclear." 93 The statute reaches the nation’s “navigable waters,” 94 which are defined as “the waters of the United States, including the territorial seas.” 95 At the very least, the CWA’s legislative history “makes it clear” that Congress intended jurisdiction to extend to waters not traditionally thought to be navigable. 96 According to the House Report, “[t]he Committee fully intend[ed] that the term ‘navigable waters’ be given the broadest possible constitutional interpretation, unencumbered by agency determinations which have been made or may be made for administrative purposes.” 97 The Senate Public Works Committee explained that the broad jurisdictional scope was necessary because “[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.” 98 By
tying the jurisdiction of the CWA to the constitutional breadth of the statute,99 the 1972 Amendments guaranteed that federal courts would be forced to play a continuing role, alongside EPA and the Corps, in defining jurisdictional waters.100

Historically, federal courts have deferred to federal agencies when interpreting CWA jurisdiction. The Supreme Court’s 1985 decision in United States v. Riverside Bayview Homes exemplifies this deference.101 In Riverside Bayview, the Court had to decide whether “respondent’s property [was] an ‘adjacent wetland’ within the meaning of the applicable regulation, and, if so, whether the Corps’ jurisdiction over ‘navigable waters’ gives it statutory authority to regulate discharges of fill material into such a wetland.”102 A unanimous Court concluded that the property satisfied the Corps’ test for an “adjacent wetland” and that the Corps had statutory authority to regulate such wetlands.103 Though, as the Court acknowledged, it may seem “unreasonable” to classify any lands as waters—let alone “navigable waters”—to “do[] justice” to the inherent difficulties of drawing jurisdictional lines under the Act and “the realities of the problem of water pollution that the Clean Water Act was intended to combat,” the Court felt it must defer to the agency’s interpretation.104 The Court also noted that Congress originally intended the term “navigable waters” to be interpreted broadly.105

Following the decision in Riverside Bayview, the Corps added the “Migratory Bird Rule” to its statement of jurisdiction. The Rule provided, among other things, for EPA authority over intrastate waters that were habitats for migratory birds but had no connection to traditional navigable waters.106 This rule was too much for the Court. In its 2001 decision in Solid Waste Agency of North Cook County v. U.S. Army Corps of Engineers (SWANCC), the Court held that public entities attempting to convert an abandoned mine pit into a waste disposal site were not subject to CWA jurisdiction for filling seasonal

99. See Robin Kundis Craig, THE CLEAN WATER ACT AND THE CONSTITUTION 118 (2d ed. 2009) (“Given this legislative history, the federal courts soon achieved broad consensus that the Act extended to the limit of Congress’s Commerce Clause powers.”).

100. See Downing, supra note 96, at 12 (“The CWA’s legislative history links the statutory jurisdiction of the CWA to the constitutional authority of the federal government to regulate waters and water pollution, leaving both matters to be addressed in the future by the federal courts.”); Craig, supra note 99, at 119 (“The statutory jurisdictional analysis became a constitutional analysis, and Commerce Clause challenges to the Act began almost immediately.”).

101. Riverside Bayview, 474 U.S. at 121; see also Craig, supra note 99, at 122 (“More generally, the [Riverside Bayview] Court’s focus on Congress’ purposes suggested that federal courts should broadly construe federal jurisdiction under the CWA.”).

102. Id. at 126.

103. The Court was careful to point out that it had not decided whether the Corps could regulate discharges “into wetlands that are not adjacent to bodies of open water.” Riverside Bayview, 474 U.S. at 131 n.8.

104. Id. at 132.

105. Id. at 135–36.

or permanent ponds on the property.107 The Court explained that it upheld the Corps’ prior interpretation of its jurisdiction in *Riverside Bayview* because of the “significant nexus” between the wetlands at issue and navigable waters.108 Even though the pit had ponds and habitat for migratory birds, the ponds were not navigable or adjacent to navigable waters.109 According to the Court, subjecting the statute to the Corps’ interpretation would read “navigable” out of the CWA.110

Further, the Court worried the Corps’ regulations would raise “significant constitutional questions.”111 Expansive interpretations of CWA jurisdiction could impinge on the “states’ traditional and primary power over land and water use,” with little obvious connection to interstate commerce, even though Congress had not made anything “approaching a clear statement” that jurisdiction extended to the relevant property.112 The Court read the statute to avoid such constitutional concerns, though it did not go so far as to define “navigable waters.”113

This attempt to avoid the constitutional question had an interesting effect on the resulting opinion. By deciding *SWANCC* on statutory grounds, the Court effectively replaced the basic constitutional questions posed by CWA jurisdiction—a statute explicitly situated along the outer bounds of Congress’s Commerce Clause power—with an analysis of the statute’s jurisdictional element.114 The question of CWA jurisdiction took on constitutional dimensions.115 Because the issue of CWA jurisdiction turned on constitutional analysis, the deference the *Riverside Bayview* Court showed the Corps in interpreting the CWA was noticeably absent from *SWANCC*. Agencies may deserve deference when they competently interpret statutes, but constitutional questions are for federal courts.

At the same time, courts interpreting *SWANCC* limited the opinion to the question of isolated waters and deferred to federal agencies regarding tributaries and their wetlands.116 This deferential posture set up the Court’s

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107. *Id.* at 166–67.
108. *Id.* at 167.
109. *See id.* at 164.
110. “We thus decline respondents’ invitation to take what they see as the next ineluctable step after *Riverside Bayview Homes*: holding that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404(a)’s definition of ‘navigable waters’ because they serve as habitat for migratory birds.” *Id.* at 171–72.
111. *Id.* at 173.
112. *Id.* at 174.
113. *Id.*
114. *See Craig, supra* note 99, at 125 (“The [SWANCC] Court reversed the Seventh Circuit solely on statutory grounds. In so doing, however, the Court made federalism concerns an integral consideration of the CWA’s practical meaning.”).
115. *Id.* at 128 (“In future cases where the agencies’ interpretation was relevant, the federal courts had no choice, under *SWANCC*, but to assess the potential constitutional effect of applying those regulations to the situation at issue.”).
116. Downing, *supra* note 96, at 15 (“Although the *SWANCC* holding addressed isolated waters, the Court’s discussion was wider ranging and provided an opportunity for raising broader issues of
most recent encounter with CWA jurisdiction in 2006. The resulting opinion in *Rapanos v. United States* did little to clarify the outer bounds of the statute’s jurisdiction. 117 The *Rapanos* Court failed to produce a majority opinion and federal courts have struggled to divine much guidance from the splintered decision.

Unlike the wetlands directly adjacent to conventional navigable waters in *Riverside Bayview* or the isolated ponds in *SWANCC*, *Rapanos* presented the issue of the Corps’ jurisdiction over wetlands adjacent to tributaries of conventional navigable waters. 118 Three Justices joined Justice Scalia’s plurality opinion. The plurality was concerned that the CWA’s jurisdiction had come to include “any plot of land” 119 containing some channel of water and held the “only plausible interpretation” of CWA jurisdiction was limited to “relatively permanent, standing or continuously flowing bodies of water akin to streams, rivers, lakes or oceans as commonly understood.” 120 Given the rising costs associated with water pollution enforcement, 121 the increasingly tenuous claims to jurisdiction by the Corps and EPA, 122 and the strong federalism interests at issue, the plurality felt no need to go beyond the “plain meaning” of the CWA and reversed the circuit court. 123

Justice Kennedy concurred with the plurality that the circuit decision should be remanded, but “disagreed with them as to almost everything else—especially the proper test for establishing CWA jurisdiction.” 124 In essence, he wrote a concurring opinion “because neither the plurality nor the dissent addresses[d] the nexus requirement.” 125 According to Justice Kennedy, *Riverside Bayview* and *SWANCC* created the proper analytic framework: “Do the Corps’ regulations, as applied to the wetlands [at issue] constitute a reasonable interpretation of ‘navigable waters’ as in *Riverside Bayview* or an

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CWA jurisdiction. . . . A significant majority of subsequent lower court decisions viewed *SWANCC* as focused on isolated waters.” (citations omitted).

118.  *Id.* at 729.
119.  *Id.* at 722.
120.  *Id.* at 739. Though the plurality held that a “continuous surface connection” is a necessary condition, it did not find it sufficient. *Id.* at 739 n.7 (”[R]elatively continuous flow is a necessary condition for qualification as a ‘water’ not an adequate condition.”).
121.  *Id.* at 721 (“The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes.”) (citing David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59 74–76 (2002)).
122.  *Id.* at 734 (“In applying the definition to ‘ephemeral streams,’ ‘wet meadows,’ storm sewers and culverts, ‘directional sheet flow storm events,’ drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term ‘waters of the United States’ beyond parody.”).
123.  *Id.*
invalid construction as in SWANCC."\(^{126}\)

For Justice Kennedy, the nexus requirement “must be assessed in terms of the statute’s goals and purposes.”\(^{127}\) Wetlands, for example, perform essential functions for the integrity of the Nation’s waters and can thus satisfy the nexus requirement.\(^{128}\) The Corps can, as a matter of law, assert jurisdiction over wetlands adjacent to navigable waters by showing adjacency alone.\(^{129}\) In other cases, the wetlands connection to navigable waters might be “speculative or insubstantial” and fail to support jurisdiction.\(^{130}\) Absent adjacency, the Corps must “establish a significant nexus on a case-by-case basis.”\(^{131}\) Justice Kennedy concludes this interpretation of the CWA jurisdictional element gives the word “navigable” meaning, while avoiding the constitutional infirmities of extreme readings of the statute, such as those espoused in the plurality and dissent.\(^{132}\)

Chief Justice Roberts also filed a concurring opinion, though he joined Justice Scalia’s plurality opinion. He admonished the Corps for failing to amend their regulations following the Court’s decision in SWANCC and instead adhering to “its essentially boundless view of the scope of its power.”\(^{133}\) The Chief Justice felt it “unfortunate” that no majority opinion emerged because parties would have to “feel their way on a case-by-case basis.”\(^{134}\) The result, though, was not entirely negative: “The upshot today is another defeat for the agency.”\(^{135}\)

As might be expected, federal courts have struggled to determine which standard governs analysis of CWA jurisdiction following Rapanos. The First, Third and Eighth Circuits have followed the dissent’s advice\(^{136}\) and held that jurisdiction is established under either the plurality’s “continuous surface connection test” or Justice Kennedy’s articulation of the “significant nexus” test.\(^{137}\) The Seventh, Ninth and Eleventh Circuits have concluded that Justice

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\(^{126}\) *Id.* at 767.

\(^{127}\) *Id.* at 779.

\(^{128}\) *Id.*

\(^{129}\) *Id.* at 780.

\(^{130}\) *Id.*

\(^{131}\) *Id.* at 782; see also *id.* at 798 (Stevens, J., dissenting) (“Seemingly alarmed by the costs involved, the plurality shies away from Riverside Bayview’s recognition that jurisdiction is not a case-by-case affair.”).

\(^{132}\) *Id.* at 782 (“This interpretation of the Act does not raise federalism or Commerce Clause concerns sufficient to support a presumption against its adoption. To be sure, the significant-nexus requirement may not align perfectly with the traditional extent of federal authority. Yet in most cases regulation of wetlands that are adjacent to tributaries and possess a significant nexus with navigable waters will raise no serious constitutional or federalism difficulty.”).

\(^{133}\) *Id.* at 758 (Roberts, C.J., concurring) (“The proposed rulemaking went nowhere.”).

\(^{134}\) *Id.*

\(^{135}\) *Id.*

\(^{136}\) See *id.* at 810 (Stevens, J., dissenting).

\(^{137}\) See United States v. Johnson, 467 F.3d 56 (1st Cir. 2006); United States v. Donovan, 661 F.3d 174 (3d Cir. 2011); United States v. Bailey, 571 F.3d 791 (8th Cir. 2009).
Kennedy’s test is the narrowest and, under Marks v. United States, should control. EPA and the Corps, for their part, have “blended” the tests developed by the plurality and Justice Kennedy. The agencies decided that jurisdiction would be asserted over four types of waters: “[t]raditional navigable waters,” “[w]etlands adjacent to traditional navigable waters,” “non-navigable tributaries of traditional navigable waters that are relatively permanent which the tributaries typically flow year-round or have continuous flow at least seasonally,” and “[w]etlands that directly about such tributaries.” For other waters, the agencies will decide jurisdiction “based on a fact-specific analysis” that determines whether a significant nexus exists with a traditional navigable water.

Though little can be discerned with certainty from the Court’s encounters with CWA jurisdiction, at least one important theme has developed: the question of CWA jurisdiction is fundamentally a constitutional question that must often be answered on a case-by-case basis. Like all statutes, CWA jurisdiction has limits. But because the limits on CWA jurisdiction are ultimately constitutional, federal courts, not administrative agencies, should have the final say. Though the statute does not explicitly push jurisdiction to the fullest extent possible under the Commerce Clause, Congress intended CWA jurisdiction to press the outer bounds of its constitutional authority. When the Corps or EPA steps beyond these bounds, they necessarily push the limits of the Constitution.

Functionally, the Court has crafted a doctrine of constitutional avoidance for CWA jurisdiction. Federal courts are charged with determining case-by-case whether the Corps or EPA has gone too far by weighing federalism interests that are “often in the eye of the beholder”—an unenviable task
given the uncertain state of the underlying jurisprudence. Because of the constitutional tenor of these interests, the normal relationship between federal courts and administrative agencies, where courts show deference to agency interpretations of the statute, has been flipped on its head. At the margins, defining CWA jurisdiction invariably raises issues of constitutional significance that compel judicial review.

B. The Sackett Opinion

Sackett is a narrow opinion, the logical consequence of implicitly connecting CWA jurisdiction to Congress’s Commerce Clause power. Written by Justice Scalia for a unanimous Court, the opinion begins by explaining the decision only addresses whether a dispute about the scope of CWA jurisdiction could make its way to court through a compliance order challenge. Given the narrowness of this dispute, the Court thought the “reader will be curious . . . to know what all the fuss is about.”

The fuss, apparently, is about the jurisdictional reach of the CWA. The Court first pointed out to the reader that in Riverside Bayview, wetlands adjacent to navigable waters were deemed within CWA jurisdiction. Next, the Court informed the reader that in SWANCC, an abandoned sand and gravel pit that was only “seasonally ponded” was nonnavigable. Rapanos concluded the Court’s explanation of the fuss. The Court noted no single rationale controlled a majority in Rapanos and, following the decision, parties were left to fend for themselves on a case-by-case basis. To the Court, the Sacketts were “interested parties feeling their way.”

After providing this framework, the Court turned to the dispute itself. The opinion presents two major issues. Initially, the Court considered whether EPA’s decision to issue a compliance order is a “final agency action for which there is no other adequate remedy in court.” If so, judicial review is required unless the CWA precludes such review before enforcement by EPA. After ruling that the compliance order was a “final agency action” subject to the APA, the Court could not find sufficient justification in the CWA’s statutory


148. Id.

149. Sackett v. EPA, 132 S. Ct. 1369, 1370 (2012) (“The particulars of this case flow from a dispute about the scope of ‘the navigable waters’ subject to this enforcement regime. Today we consider only whether the dispute may be brought to court by challenging the compliance order—we do not resolve the dispute on the merits.”).

150. Id.

151. Id.

152. Id.

153. Id.

154. Id.

155. Id. at 1371; see also 5 U.S.C. § 704 (2012).
scheme to upset “[the] presumption favoring judicial review of administrative action” created by the APA.156

EPA offered four primary reasons to support its position that the CWA precludes pre-enforcement judicial review of compliance orders, but the Court found each unavailing. First, the Court found that the choice offered to EPA by the CWA between compliance orders and civil enforcement actions does not depend on judicial review. Instead, “[t]here are eminently sound reasons other than insulation from judicial review why compliance orders are useful.”157 Second, the Court dismissed the observation that compliance orders are not self-executing by noting that the APA provides for judicial review of all “final agency actions,” not simply self-executing sanctions.158 Third, the Court considered the fact that the CWA provides for express judicial review of administrative penalties issued after a hearing before EPA.159 Even though Congress did not expressly provide for judicial review of compliance orders, the Court concluded that the CWA could not overcome the presumption in favor of judicial review inherent in the APA. As the Court explained, “[t]he cases on which the Government relies simply are not analogous.”160

Finally, the Court weighed the possibility that EPA may issue fewer compliance orders to the detriment of efficient remediation of water pollution.161 Despite that risk, the Court explained that efficiency does not trump all other administrative values.162 The Court found that the risk of fewer compliance orders is not great anyway: compliance orders should remain effective for voluntary compliance “where there is no substantial basis to question their validity.”163

C. Ambiguities After Sackett

Despite its brevity, Sackett contains an important ambiguity that could have far-reaching implications for enforcement of federal environmental laws. Though the Court begins the opinion by explaining the “fuss is all about” the uncertainty inherent in CWA jurisdiction, the Court’s subsequent analysis is troublesome. Sackett does not clearly limit its holding that the Sacketts’ compliance order is subject to pre-enforcement review to the Sacketts’ facts. An eminently reasonable interpretation of the Court’s preclusion analysis could be that all CWA compliance orders are subject to pre-enforcement review. The Court’s language supports both a narrow and broad reading.

On the one hand, Sackett appears limited to the narrow issue of whether

156. Sackett, 132 S. Ct. at 1372–73.
157. Id. at 1373.
158. Id.
159. Id.; see also 33 U.S.C. § 1319(g)(8) (2012).
160. Sackett, 132 S.Ct. at 1373.
161. Id. at 1374.
162. Id.
163. Id.
the CWA precludes judicial review of challenges to agency jurisdiction. The opinion framed its analysis with the Court’s CWA jurisdiction jurisprudence and ultimately concluded that “the compliance order in this case” was subject to judicial review, which had not been precluded by the CWA.\textsuperscript{164} The Court also took care to note that recipient parties cannot challenge a compliance order before enforcement without a “substantial basis” for doing so.\textsuperscript{165} Justice Ginsburg, who joined the dissent in both \textit{SWANCC} and \textit{Rapanos}, explained in concurrence the Court “holds that the Sacketts may immediately litigate their jurisdictional challenge in federal court.”\textsuperscript{166} But according to Justice Ginsburg, the opinion does not extend to whether the Sacketts can challenge the “terms and conditions” of the compliance order before EPA enforcement.\textsuperscript{167} Justice Alito also filed a concurring opinion, but one with an entirely different tenor. He argues that EPA’s interpretation of the CWA would have imperiled the property rights of millions of Americans.\textsuperscript{168} Justice Alito considers the Court’s decision a “modest measure of relief,” but will not be satisfied until Congress provides a “reasonably clear rule regarding the reach of the Clean Water Act.”\textsuperscript{169} Based on this language, \textit{Sackett} ostensibly holds only that the CWA does not preclude pre-enforcement judicial review of compliance orders when the recipient party pleads facts sufficient to establish a “substantial basis” for challenging CWA jurisdiction.\textsuperscript{170}

On the other hand, the Court’s analysis could imply that \textit{Sackett} extends to all compliance orders issued under the CWA. When the Court discusses whether the compliance order constitutes “final agency action,” it explains how the order determines rights and obligations, exposes the parties to stiff penalties and “marks the ‘consummation’ of the agency’s decisionmaking process.”\textsuperscript{171} The Court was also not persuaded that waiting for an enforcement action or applying for a permit is an adequate remedy.\textsuperscript{172} Given the sweeping language of the “final agency action” section, the Court’s discussion of preclusion could be read to hold that the CWA does not preclude judicial review of compliance orders at all. Further, the Court concludes the CWA was not designed to strong-arm regulated parties without judicial review—“even judicial review of the question whether the regulated party is within the EPA’s jurisdiction.”\textsuperscript{173} This language could mean that the CWA does not preclude any judicial review—even review of jurisdictional challenges.

\begin{itemize}
\item \textsuperscript{164} \textit{Id}.
\item \textsuperscript{165} \textit{Id}.
\item \textsuperscript{166} \textit{Id}.
\item \textsuperscript{167} \textit{Id}.
\item \textsuperscript{168} \textit{Id}.
\item \textsuperscript{169} \textit{Id}.
\item \textsuperscript{170} \textit{Id}.
\item \textsuperscript{171} \textit{Id}.
\item \textsuperscript{172} \textit{Id}.
\item \textsuperscript{173} \textit{Id}.
\end{itemize}
Determining whether *Sackett* allows judicial review of all CWA compliance orders or only those orders where there is “a substantial basis to question their validity” is vitally important for the future of environmental law. The decision has already begun to cause a fundamental change in EPA’s water pollution enforcement strategy.174 Beyond the apparent effect on enforcement of the CWA, *Sackett’s* characterization of CWA compliance orders as “final agency actions” almost certainly applies to other federal environmental statutes. Consequently, if *Sackett* allows pre-enforcement review of CWA compliance orders because of the nature of compliance orders, there appears to be little standing between *Sackett* and pre-enforcement review of compliance orders issued under different environmental statutes without explicit preclusion provisions, like the CAA.175

The uncertain breadth of the opinion is best exemplified by the various ways *Sackett* has already begun to rear its head in federal courts. Some questions are squarely controlled by the decision. In *William L. Huntress v. Mugdan*,176 the plaintiffs are challenging a 2002 agency determination that three pieces of land in New York contain wetlands within CWA jurisdiction.177 This determination set the stage for a subsequent compliance order issued by EPA for unpermitted discharge of dredge and fill material into the wetlands. When the order recipients tried to obtain judicial review, the district court ruled that EPA’s jurisdictional determination and compliance order were not final agency actions. As the complaint alleges, the district court’s holding was functionally overruled by *Sackett*, which held that jurisdictional determinations for compliance orders are final agency actions.178

Other questions are more complicated. In *Alt v. EPA*, agriculture industry groups are challenging an EPA compliance order enforcing the CWA for stormwater runoff containing dust, feathers and fine particles of dander and manure from Concentrated Animal Feeding Operations.179 In November 2011, EPA issued an order to Alt’s poultry operation, home of 125,000 broiler hens,
for failure to obtain a discharge permit.\textsuperscript{180} According to industry groups, EPA’s interpretation of “discharge” illegitimately expands the jurisdictional scope of the CWA while limiting the statutory exemption Congress provided for “agricultural stormwater discharges” from farming operations.\textsuperscript{181} Unlike \textit{Sackett}, the industry groups are not challenging the EPA’s interpretation of the jurisdictional element of the CWA—whether the discharges are into navigable waters—but the agency’s interpretation of “discharge.” This issue is not directly addressed by \textit{Sackett}, though \textit{Sackett} certainly might open the door to judicial review of quasi-jurisdictional questions.

The suit brought by energy industry plaintiffs in \textit{Gasco Energy v. EPA} best highlights the different directions \textit{Sackett} could take.\textsuperscript{182} In \textit{Gasco Energy}, industry plaintiffs are asking the district court to review an EPA compliance order requiring Gasco to obtain a dredge-and-fill permit under section 404 of the CWA. The company is trying to construct an access road and drilling well pad near a river in a 100-year floodplain. According to the complaint, EPA’s compliance order “fails to comply with the applicable standards for delineating wetlands” and, even if the wetlands designation is correct, EPA cannot establish jurisdiction under the “continuous surface connection” or “significant nexus” tests from \textit{Rapanos}.\textsuperscript{183}

Though the two claims are related, there is an important distinction: challenging the wetlands delineation itself pulls courts into highly scientific debates where EPA has already developed extensive guidance and usually relies on administrative appeals.\textsuperscript{184} Ultimately, “[w]hether something constitutes a wetland is a different question than whether the wetland is jurisdictional—the question is whether the wetland delineation itself, not just the jurisdictional determination is subject to [\textit{Sackett}].”\textsuperscript{185} To answer this question, courts will have to decide whether to “tak[e] a narrow view” of \textit{Sackett} that limits pre-enforcement judicial review to questions of jurisdiction or a broader view of uncertain scope.\textsuperscript{186}

\textbf{III. THE CLEAN WATER ACT COMPLIANCE ORDER AUTHORITY AFTER SACKETT}

\textit{Sackett}’s breadth depends on how far one takes the opinion’s preclusion

\begin{itemize}
  \item \textsuperscript{181} Complaint, supra note 179.
  \item \textsuperscript{182} Complaint, Gasco Energy, Inc. v. EPA, No. 1:12-cv-01658 (D. Colo. June 25, 2012).
  \item \textsuperscript{183} Id.
  \item \textsuperscript{184} Bridget DiCosmo, Driller’s Suit Provides Broadest Test of Sackett’s Reach Over Water Act Orders, Water Policy Report (July 30, 2012), Lexis.
  \item \textsuperscript{185} Id.
  \item \textsuperscript{186} Id.
\end{itemize}
analysis. By determining the Sacketts’ compliance order was subject to judicial review, the Court held that the CWA does not preclude all pre-enforcement judicial review of compliance orders. Following *Sackett*, when the order recipient has a substantial basis to challenge jurisdiction, the CWA does not preclude pre-enforcement judicial review. But that holding does not mean compliance order recipients can challenge every compliance order on any substantial basis. The important issue for federal courts following *Sackett* is to identify when, if at all, the CWA precludes judicial review beyond the underlying question of jurisdiction. Two basic principles emerge from *Sackett* to help federal courts resolve this issue. First, *Sackett* is a case about the constitutionally infirm reach of CWA jurisdiction. Second, *Sackett* dictates that future preclusion analysis should be guided by the Court’s opinion in *Block v. Community Nutrition Institute*. Based on these principles, the only tenable interpretation of *Sackett* is a narrow one.

### A. Strictly Jurisdiction

CWA jurisdiction raises special concerns for reviewing courts. As exemplified by *SWANCC* and *Rapanos*, the CWA presses the outer bounds of the Constitution and the Court has resolved to avoid constitutional questions by narrowing the statute on a case-by-case basis. Both before and after *Sackett*, the normal deference that federal courts show agencies falls by the wayside when the issue of CWA jurisdiction arises. Because the question of CWA jurisdiction is, at the margins, inherently constitutional, the issues confronted by *SWANCC* and *Rapanos* were not within the technical expertise of EPA or the Corps. Instead, the agencies’ interpretation of jurisdiction in those cases raised serious constitutional concerns that the Court ultimately avoided through careful statutory construction.

Given the constitutional questions inherent in cases involving marginal CWA jurisdiction, the result in *Sackett* should not be surprising. EPA should not be able to impose any terms and conditions on order recipients without first clearing the jurisdictional hurdles set explicitly by the CWA and implicitly by

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the Constitution. Moreover, the normal administrative appeals process is inherently inadequate for questions of jurisdiction because CWA jurisdiction does not rely solely on statutory construction or scientific expertise. 189 Constitutional avoidance informs the CWA jurisdictional analysis and federal courts are the proper forum for deciding constitutional issues. Echoing sentiments expressed in SWANCC and Rapanos, without a clear statement from Congress expressly precluding judicial review of jurisdictional determinations underlying EPA compliance orders, the Sackett Court was unwilling to deny review. 190

The constitutional issues raised by CWA jurisdiction have forced the Court to adopt a relatively rare doctrine of avoidance for the statute. 191 Unlike the usual case where the Court declares that a statute should be interpreted so as to avoid running afoul of the Constitution, 192 the Court’s CWA jurisdiction jurisprudence does not establish one clearly constitutional interpretation of the CWA. Instead, federal courts are forced to make jurisdictional determinations on a case-by-case basis. Sackett should be understood in light of this constitutional avoidance.

Undoubtedly, federal courts will face difficult situations of defining precisely when order recipients are challenging jurisdiction and, alternatively, when the challenge goes to the merits of the compliance order. Oftentimes, jurisdictional issues bleed into the merits. 193 But those difficulties cannot justify extending Sackett beyond its proper breadth; such is the nature of making ostensibly constitutional decisions on a case-by-case basis. Even if a challenge cannot be properly classified as “jurisdictional” or “not jurisdictional,” federal courts can look for the hallmark of CWA jurisdictional

189. Califano v. Sanders, 430 U.S. 99, 109 (1977) (“Constitutional questions obviously are unsuit to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions.”).

190. See also Califano, 430 U.S. at 109 (“[I]t is a well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the ‘extraordinary’ step of foreclosing jurisdiction unless Congress’ intent to do so is manifested by ‘clear and convincing’ evidence.”) (citing Johnson v. Robison 415 U.S. 361, 366–67 (1974); Weinberger v. Salfi, 422 U.S. 749, 762 (1975); Mathews v. Eldridge, 424 U.S. 319 (1976)).

191. Craig, supra note 99, at 128 (“The CWA is not the only federal statute that the Supreme Court has limited on general federalism grounds.”). Professor Craig also identifies the constitutional avoidance doctrine at work in the Court’s Controlled Substances Act jurisprudence. Id.; see also Gonzales v. Oregon, 546 U.S. 243, 270–71 (2006) (refusing to give the Attorney General’s interpretation of the Act, which prohibited doctors from prescribing regulated drugs for physician-related suicide that were legal in Oregon, any deference because of federalism concerns).

192. See e.g., INS v. St. Cyr, 533 U.S. 289, 299–300 (2001) (“[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is ‘fairly possible,’ see Crowell v. Benson, 285 U.S. 22, 62 (1932), we are obligated to construe the statute to avoid such problems.”).

193. See e.g., Arbaugh v. Y&H Corp., 546 U.S. 500, (2006) (“Subject matter jurisdiction in federal-question cases is sometimes erroneously conflated with a plaintiff’s need and ability to prove the defendant bound by the federal law asserted as the predicate for relief—a merits-related determination.”) (quoting 2 J. Moore et al., MOORE’S FEDERAL PRACTICE § 12.30[1] (3d ed. 2005)).
challenges, namely the importance of the constitutional concerns raised by the order recipient. The more the recipient’s challenge undermines the constitutional basis for CWA jurisdiction, the wider federal courts should open their doors. Alternatively, the more the recipient’s challenge requires investigation into the scientific or technical justifications for the agency’s decision, the less federal courts should listen to the recipient, at least before EPA brings an enforcement action.

Of course, the Court did not explicitly tie its implied preclusion analysis to the doctrine of constitutional avoidance invoked in its prior CWA jurisdiction jurisprudence. Instead, the Court analyzed the extent of CWA preclusion of pre-enforcement review under its decision in Block. Consequently, for federal courts to effectively limit Sackett to the underlying question of jurisdiction, that conclusion must be consistent with preclusion analysis according to Block.

B. Building Block

Based on Sackett alone, the Block analysis appears deceptively simple. According to Sackett, Block holds that the presumption created by the APA favoring judicial review can be “overcome by inferences of intent drawn from the statutory scheme as a whole.” By “inferences of intent drawn from the statutory scheme as a whole,” the Sackett Court appears to intend for federal courts to limit their analysis to the statute itself. In Sackett, for example, the Court examined the enforcement options provided by the 1972 Amendments, turned to the effect of the administrative penalties provisions added in 1987, considered other cases where the statutory scheme itself implied preclusion and decided that “[t]he cases on which the Government relies simply are not analogous.” Relying merely on the CWA’s structure, and without considering the Act’s history or context, the Sackett Court was concluded the CWA does not preclude all pre-enforcement judicial review of compliance orders.

But Block did not say that preclusion analysis is limited to an examination of statutory structure. The Block Court itself was able to resolve the question of judicial review by a limited examination of the structure of the underlying statute. Because the statute expressly provided judicial review for milk handlers, and allowed handlers to work with producers and the government

195. The Court’s refusal to consider the purpose or legislative history of the CWA is reminiscent of SWANCC and the Rapanos plurality. See Mark A. Latham, (Un)Restoring the Chemical, Physical, and Biological Integrity of Our Nation’s Waters: The Emerging Clean Water Act Jurisprudence of the Roberts Court, 28 VA. ENVTL. L.J. 411 (2010).
196. Sackett, 132 S. Ct. at 1373.
197. Block, 467 U.S. at 349 (“More important for purposes of this case, the presumption favoring judicial review of administrative action may be overcome by inferences of intent drawn from the statutory scheme as a whole.”).
developing milk orders, but nowhere contemplated the “participation by consumers in any proceeding,” the Court was persuaded that judicial review of consumer complaints was precluded by the statute. At the same time, other factors informed the Court’s decision. The Court acknowledged the decisions made by federal agencies regulating agricultural products are “complex” and “technical,” and Congress vested authority in a federal agency to resolve such questions with the necessary “expertise.” According to the Court, allowing consumers to bring suit “would severely disrupt this complex and delicate administrative scheme.”

More importantly, besides relying on the value of agency expertise for its decision—a value independent of the statutory scheme itself—the Block Court laid out the framework for deciding when Congress intended to preclude judicial review. To decide “[w]hether and to what extent a particular statute precludes judicial review,” Block instructed federal courts to look at the statute’s “express language, . . . the structure of the statutory scheme, its objectives, its legislative history, and the nature of administrative action.” According to the Court, though courts should look for “clear and convincing evidence” of preclusion, the test is “but a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling.” The Court also identified different types of evidence that could overcome the presumption favoring judicial review, such as “specific language or specific legislative history that is a reliable indicator of congressional intent,” “contemporaneous judicial construction barring review and the congressional acquiescence in it,” “the collective import of legislative and judicial history behind a particular statute,” or, as emphasized in Sackett, “inferences of intent drawn from the statutory scheme as a whole.”

Why did Sackett, unlike Block, only consider the statutory structure of the CWA while ignoring the extensive judicial and legislative history associated with the CWA compliance order authority? Could the Court have been subtly undercutting the more complete analysis described by Block? This is an unlikely possibility, not only because it would require a drastic reinterpretation of Block, but also because the Court has recently been loath to rely on anything other than the statutory text of the CWA to make its decisions. Riverside Bayview, for example, quoted liberally from the legislative history of the CWA before according deference to the Corps, while SWANCC and the Rapanos plurality attempted to restrict the CWA to the plain meaning of “waters of the

198. It at 346–47 (“The structure of this Act indicates that Congress intended only producers and handlers, and not consumers, to ensure that the statutory objectives would be realized.”).
199. Id. at 347.
200. Id.
201. Id. at 345.
202. Id. at 351.
203. Id. at 349.
United States.”

Though one might accuse the Court of cherry-picking legislative history, a stronger doctrinal explanation flows from the constitutional dimension of CWA jurisdiction. When the Court is addressing an agency interpretation of jurisdiction that raises serious constitutional concerns, the Court will not defer to the agency unless Congress has made its intent to authorize the jurisdiction at issue unmistakably clear. Furthermore, the Sackett Court was answering a narrow question. In the terminology of Block, the Sackett Court addressed “whether” the CWA precludes all pre-enforcement judicial review of compliance orders; Sackett did not decide “to what extent” the statute precludes such review.

A hint as “to what extent” the CWA precludes pre-enforcement judicial review of compliance orders can be drawn from the cases relied on by Sackett. Unlike the holding in Sackett, which was limited to the question of jurisdiction, the preclusion cases cited by the Court denied all judicial review to the prospective challengers. In Block, for example, the Court decided that milk consumers could not receive judicial review for any claims. The Court in United States v. Erika held that judicial review of Medicare awards under Part B was precluded because, while Congress expressly authorized review under Part A, it made no mention of review under Part B. Given the strong parallels between Part A and Part B, and the “legislative history of the statute,” the Court decided that Congress “deliberately intended to foreclose” review under Part B. Even though the Sackett Court was not persuaded that the CWA “statutory scheme” foreclosed all judicial review, like the statutes in Block and Erika, there is no intimation that the CWA does not preclude any judicial review. Although Block and Erika were not sufficiently analogous to Sackett to justify precluding all judicial review of CWA compliance orders, the cases ostensibly suggest a strong preference for preclusion and unquestionably support the claim that the CWA precludes some judicial review.

Sackett was not a repudiation of Block, but a specific application of preclusion analysis to the issue of CWA jurisdiction when EPA issues

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204. See id.; Craig, supra note 99, at 126 (“The [SWANCC] Court accepted no evidence—not legislative history, not previous definitions by courts, not the agencies’ expanded definition of ‘waters of the United States’ after 1974 nor Congress’ acquiescence to those regulations, not the phrasing of §404(g)(1)—that, by using the phrase ‘navigable waters,’ ‘Congress intended to exert anything more than its commerce power over navigation.’” (quoting SWANCC, 531 U.S. at 168 n.3)).

205. See Latham, supra note 147, at 9 (“As one of the hallmarks of the Rehnquist Court, however, in SWANCC legislative history was looked at only as necessary to reject the Corps’ claim that legislative history supported the migratory bird rule as consistent with congressional intent.”).

206. Block, 467 U.S. at 345.

207. Id. at 352 (“The structure of this Act implies that Congress intended to preclude consumer challenges to the Secretary’s market orders.”).


209. Id. (“The legislative history confirms this view and explains its logic.”).

210. Id.
compliance orders. As the Court has explained in the CWA jurisdiction context, when Congress intends to take actions at the constitutional margins, it should speak clearly. Consequently, when the CWA implicates judicial review, Sackett directs federal courts to not foreclose all judicial review unless Congress explicitly says so or the statute itself is unmistakably clear. Given the constitutional questions raised by CWA jurisdiction, the Court in Sackett was compelled to conclude the CWA does not foreclose judicial review of jurisdictional questions before EPA enforcement.

C. Post-Sackett Preclusion

Though Sackett decided the CWA does not preclude all judicial review, it raises an even more complicated question: “to what extent” does the CWA preclude pre-enforcement judicial review of compliance orders? By using Sackett’s jurisdictional framework and Block’s preclusion factors to guide the way, federal courts can begin to explicate under what circumstances recipients can challenge compliance orders before enforcement. Though the CWA may not entirely preclude judicial review of compliance orders, Sackett and Block strongly suggest that such review should be extremely limited.

First, the CWA statutory scheme itself implies that Congress intended to preclude judicial review of most compliance orders before enforcement. The 1972 Amendments offered EPA a choice between initiating a civil enforcement suit or issuing a compliance order. Moreover, when Congress added an enforcement option—administrative penalties—in 1987, it provided judicial review of the penalties but did not amend the compliance order provision. Of course, as the Sackett Court observed, “[t]here are eminently sound reasons other than insulation from judicial review why compliance orders are useful.”

Second, the CWA’s legislative history reliably indicates Congress intended to preclude most pre-enforcement judicial review of compliance orders. The 1972 Amendments were passed in response to the decades-long failure of federal authorities to adequately respond to the water pollution crisis.

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212. Block, 467 U.S. at 345.
213. Sackett, 132 S. Ct. at 1373.
214. Block, 467 U.S. at 349 (explaining that “the specific legislative history is a reliable indicator of congressional intent”).
Among the important changes made to federal water pollution law, the 1972 Amendments crafted enhanced enforcement options for federal agencies. Prior federal water pollution laws had been plagued by unduly extensive notice and review requirements, which produced an “Alice in Wonderland” enforcement scheme. The compliance order authority, which was created in the 1972 Amendments, must be read against this background. Through compliance orders, Congress offered EPA a more efficient way to address water pollution that was not subject to expansive judicial review. As the Sackett Court observes, the value of efficiency does not alone decide the scope of preclusion. However, the paramount value of efficient enforcement embodied by the 1972 Amendments should not be banished from future considerations of the CWA compliance order authority.

Third, “the collective import of legislative history and judicial history behind” the CWA suggest that compliance orders should generally not be subject to judicial review. As federal courts addressing the issue prior to Sackett found, the CWA was passed alongside other federal environmental statutes to address the growing ecological crisis facing the Nation. CERCLA, for example, goes so far as to expressly preclude judicial review. From one perspective, the failure to include an express preclusion clause in the CWA could militate against precluding judicial review. But Block instructs federal courts to consider the “collective import” of the statute in addition to textual analysis. CERCLA was, for the most part, passed after the CWA and more likely represents Congress’s attempt to explicate what it had previously left implied. An interpretation of the CWA compliance order authority that allows extensive pre-enforcement judicial review simply ignores the historical context of federal environmental laws.

Though Sackett clarifies that the CWA does not preclude all pre-enforcement judicial review of compliance orders, Block suggests that such judicial review should arise in a very narrow set of circumstances. Federal courts face the arduous task of deciding what judicial review Sackett allows. Historically, federal courts expressed the concern that allowing any pre-enforcement judicial review of compliance orders—even review of the jurisdictional element—would open the door to all pre-enforcement review. Sackett forces courts to address this concern head on. Unless federal courts can discern a limit on the breadth of pre-enforcement judicial review of CWA compliance orders, they risk subverting the enforcement scheme Congress.
established with the 1972 Amendments.

Fortunately, *Sackett* suggests just such a limit: the jurisdictional element of the CWA. Not only does *Sackett* frame the decision with reference to the Court’s CWA jurisdiction jurisprudence, limiting pre-enforcement judicial review of CWA compliance orders to the question of jurisdiction preserves the integrity of the CWA. Absent the jurisdictional limit, *Sackett* becomes an impermissible intrusion on the legislative function of Congress. The 1972 Amendments make clear that compliance orders should generally not be subject to judicial review. If *Sackett* truly held that recipients can challenge any compliance order before enforcement so long as they have a “substantial basis” for doing so, the opinion amounts to judicial amendment of the CWA forty years after Congress first granted the enforcement authority to EPA. This would be an especially incredible result considering the Court did not even cite any of the numerous (and unanimous) federal appellate decisions on the issue. In the wake of *Sackett*, federal courts should thus be wary of accepting review of compliance order challenges that go beyond strictly jurisdictional issues. Though the resulting *Sackett* standard might generate some uncertainty regarding what constitutes a “jurisdictional” issue, the alternative—a world where any compliance order is potentially subject to pre-enforcement review—is unacceptable under the CWA and subverts the clear intent of Congress.

### IV. THE FUTURE OF CLEAN WATER ACT ENFORCEMENT

*Sackett* is not the death knell for the CWA. Under any interpretation of *Sackett*, EPA may still use its compliance order authority, though that authority might be subject to varying degrees of judicial scrutiny. While some recipients might immediately challenge the order, thereby raising the costs of enforcement, in many cases the order could still pave the way for voluntary compliance. Violators are made aware of the pending civil enforcement action and can take remedial action according to EPA’s compliance order. Moreover, considering EPA must bring an action in federal court to enforce a compliance order, judicial review is functionally inevitable. Even at its most extreme, *Sackett* could be characterized as moving judicial review to an earlier part of the enforcement process only when order recipients choose to bring suit. Under this optimistic view, *Sackett* does not add much to the enforcement process. If the recipient has a weak argument, the court will dismiss the claim and EPA will be allowed to proceed. If the recipient has a strong argument, *Sackett* demonstrates the federal court forum should be open.

221. See Fletcher v. Peck, 10 U.S. 87, 136 (1810) (Marshall, C.J.) (“It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.”).

222. See Hoffman Grp., Inc. v. EPA, 902 F.2d 567 (7th Cir. 1990); S. Pines Assocs., 912 F.2d 713; S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement, 20 F.3d 1418 (6th Cir. 1994); Laguna Gatuna, Inc. v. Browner, 58 F.3d 564 (10th Cir. 1995); *Sackett* v. EPA, 622 F.3d 1139 (9th Cir. 2010).
At the same time, Sackett certainly will not benefit the environment. The United States currently enjoys some of the best water quality in the world, even though its waters were a disaster when the 1972 Amendments were passed.\(^223\) The turnaround in water quality can be attributed almost entirely to the CWA, with some describing the Act as “perhaps the most important piece of environmental legislation in American history.”\(^224\) Though the Court has harped on the costs of water pollution, the benefits are tremendous.\(^225\) Water quality forms the basis for innumerable industries and underlies society itself.\(^226\) The CWA recognizes the fundamental importance of water quality to the Nation,\(^227\) and though we cannot know with certainty how our actions will affect ecology, the CWA errs on the side of caution by disallowing all discharges without a permit and arming EPA with a broad array of enforcement tools.\(^228\) This caution was borne from experience; traditional legal tools had proved inadequate to account for the vast, deleterious effects of water pollution.\(^229\) Despite the CWA’s incredible success—success flowing from extreme actions taken to address drastic circumstances—Sackett now asks federal agencies to tone it down.

EPA, at least, has taken the Court’s message to heart. Before Sackett, EPA primarily relied on its compliance order authority to enforce the CWA.\(^230\) Unfortunately for the Agency, the compliance order it issued to the Sacketts created a public relations quagmire. The Sacketts became near-celebrities during the litigation,\(^231\) with none other than presidential candidate Mitt

\(^{223}\) See Latham, supra note 195, at 411 (“Thirty years ago the nation’s waters were in terrible shape—Lake Erie on its deathbed, Ohio’s Cuyahoga River bursting into flames, lakes, streams and beaches closed to fishing and swimming. There has been great progress since then, almost entirely the result of the 1972 law.”), William L. Andreen, Water Quality Today—Has the Clean Water Act Been a Success?, 55 ALA. L. REV. 537 (2004).


\(^{225}\) See Rapanos v. United States, 547 U.S. 715, 798 (2006) (Stevens, J., dissenting) (“More significant than the plurality’s exaggerated concern about costs, however, is the facts that its omission of any discussion of the benefits that the regulations at issue have produced sheds revelatory light on the quality (and indeed the impartiality) of its cost-benefit analysis.”).

\(^{226}\) Id. at 799.


\(^{228}\) See supra Part I.

\(^{229}\) David Drelich, Restoring the Cornerstone of the Clean Water Act, 34 COLUM. J. ENVTL. L. 267, 268 (2009) (“Enforcement serves as the cornerstone of the Clean Water Act, but in recent years it has eroded. Two of the causes are obvious—eight years of an Administration notoriously hostile to environmentalism, and a pair of damaging Supreme Court cases. The final cause of its disrepair is not obvious at all, although it is much more deeply rooted. It is the increasingly serious failure to recognize every Clean Water Act violation and available compliance remedy.”).

\(^{230}\) See Ginsberg et al., supra note 27, at 240 (“EPA uses its administrative order authority broadly.”).

\(^{231}\) See e.g., Editorial, The Sacketts and the Clean Water Act, N.Y. TIMES (Jan. 8, 2012) http://www.nytimes.com/2012/01/09/opinion/the-sacketts-and-the-clean-water-act.html?_r=0 (“Chantell and Michael Sackett’s case against the Environmental Protection Agency before the Supreme Court on Monday might appear to be David versus Goliath. But those supports the Sacketts with friend-of-the-
Romney arguing “an unelected government bureaucrat robbed [the Sacketts] of their freedom.”232 After such a sharp rebuke from the Court and the American media, EPA has already showed signs of altering its CWA enforcement strategy.233 EPA has instructed staff to include language in compliance orders that judicial review is available before an enforcement action, and urged staff to consider using notices of violation or warning letters as alternatives to compliance orders because both options may still escape judicial review after Sackett.234

This turn of events could lead to tragic consequences for the American environment. Although Sackett may not, on its own, eliminate the value of the CWA, decisions like Sackett, which add incremental obstacles to enforcement of federal water pollution laws, have an incredible cumulative impact.235 Like any law, the CWA is only as consequential as its enforcement.236 Federal courts should not allow the CWA to be swallowed whole by the uncertainty inherent in environmental regulation. A narrow reading of Sackett will not stem the rising tide of CWA non-enforcement, but it can help.