

Chapter 10

Administrative Appeals, Judicial Review and Enforcement

When the Corps of Engineers or EPA takes an action under the Clean Water Act, or fails to take an action, landowners, interest groups, states, and any number of other persons may seek to challenge the agencies' action or inaction. Part I of this chapter examines the administrative and judicial avenues for appealing those decisions.

However, the Corps and EPA are not simply *defendants* in administrative and judicial proceedings. Whenever a person fails to comply with the permitting requirements or other requirements of the Clean Water Act, the agencies can take a variety of administrative or judicial enforcement actions. Part II of this chapter examines those enforcement options.

I. Administrative Appeals and Judicial Review

A. Administrative Appeals of Corps' decisions

The Clean Water Act does not explicitly provide for an administrative process to review the Corps' actions in administering the Section 404 permit program and there was no administrative appeal process for the program for the first several decades of its existence. To the extent that persons wanted to challenge a Corps decision to issue or deny a permit or to take some other action, they

could only challenge those actions in court, if at all. However, in 1999 and 2000, the Corps of Engineers adopted regulations that created an administrative appeal program for final permit decisions, see [64 Fed. Reg. 11,708 \(March 9, 1999\)](#) and final jurisdictional determinations. See [65 Fed. Reg. 16,486 \(March 28, 2000\)](#). One of the advantages of the program for the Corps and for landowners is that it should lead to more uniform and consistent decision-making. As noted in Chapters 4 and 5, absent an appeal, final permit decisions and final jurisdictional determinations are made at the District level, by 43 different District Engineers. The appeal process adopted by the Corps provides for review at the Division level. Since there are only 9 Divisions, as opposed to 43 Districts, the decision-making should be more uniform and consistent. (Note: Although there are 9 Divisions, the Transatlantic Division does not issue Section

Resources

[Corps Administrative Appeal Regulations Fact Sheet and Request for Appeal](#)
(Mississippi Valley Division of the Corps)
[Corps videos](#) describing appeals process
Flow chart of appeal process for [permit decisions](#) and for [approved jurisdictional determinations](#)
[RGL 06-01](#) - Timeliness of a request for appeal

404 permits, since the Division only encompasses the Middle East and Asia).

Since administrative processes are generally quicker and less expensive than judicial processes, the administrative appeal process should also save the Corps and challengers time and money by keeping challenges out of court. It should also provide the Corps with an additional opportunity to develop a record that can withstand judicial challenge if the agency's decision is ultimately contested in court.

1. Reviewable Actions

The Corps' regulations limit the agency actions that can be appealed administratively. Under the regulations, landowners and permit applicants can appeal: (1) an **approved** jurisdictional determination; (2) a written denial of an individual permit application with prejudice (**a permit denial**); and (3) an individual permit or letter of permission that the applicant has declined to accept because he has objections to the terms and conditions of the permit (**a declined permit**). See [33 C.F.R. § 331.2](#).

Appealable action means an approved jurisdictional determination, a permit denial, or a declined permit. [33 C.F.R. § 331.2](#).

Consequently, a **preliminary** jurisdictional determination, in which the Corps indicates that there **may** be jurisdictional waters on a parcel of property or which indicates the approximate location of jurisdictional waters on a parcel of property, **cannot** be appealed administratively, while an **approved** jurisdictional determination **can** be appealed administratively. *Id.* As noted in Chapter 4, *supra*, an **approved** jurisdictional determination is an official determination by the Corps that there **are, or are not**, jurisdictional waters on a parcel of property, and outlining the limits of the waters. See [33 C.F.R. § 331.2](#).

Regarding permit decisions, if the Corps denies an individual permit request **without prejudice**, for instance, because a state denied Section 401 certification or refused to certify that the discharge was consistent with a coastal zone management plan, the Corps' permit denial cannot be administratively appealed. *Id.* The Corps' denial of an individual permit request can only be challenged administratively when the Corps denies the permit **with prejudice**. Further, if the Corps determines that a **general permit** does not authorize a particular activity, that decision cannot be appealed administratively. The administrative appeal process is limited to individual permit decisions. *Id.*

In addition to limiting the actions that can be challenged administratively, the regulations limit **who** can raise those challenges. Only "**affected parties**", defined as permit applicants, landowners or other persons with a substantial and identifiable legal interest in the property at issue, can bring administrative challenges. *Id.* Neighbors, competitors, interest groups, state or local governments, and other interested parties

can only challenge actions of the Corps judicially, if at all.

2. Review Process

At the time that the Corps makes a decision at the District level that can be appealed under its regulations, the agency provides a notice to the person to whom the decision is directed that the decision can be appealed, a fact sheet describing the appeal process, and a form that the person can use to request an appeal of the decision. See [33 C.F.R. § 331.4](#). If the permit applicant or landowner wishes to appeal, they must file a request for appeal, stating the reasons for the appeal, within sixty days of the notice from the Corps. [Id. § 331.6](#).

While EPA's administrative appeal process and the administrative appeal processes of many agencies provide for review and decision-making by a centralized body, usually at the headquarters level, the Corps' regulations provide for review and ultimate decision-making on appeals at the Division level. [Id. § 331.9](#). Thus, when a permit applicant or landowner appeals a decision of a Corps District, a Review Officer for the Division will oversee the appeal. [Id. § 331.3](#). The regulations do not require that the Corps provide public notice of the appeal and do not provide for a formal hearing. Instead, the regulations authorize an informal meeting or conference call for appeals of jurisdictional determinations and an informal conference for appeals of permit decisions. [Id. § 331.7](#). Ultimately, the Division Engineer has limited authority to overturn the District's decisions. The Division Engineer can only overturn the District Engineer's **factual** findings if they are not supported by **substantial evidence** on the administrative **record** prepared by the District. [Id. § 331.9](#). In addition, the Division Engineer can only overturn other portions of the decision below if they are "arbitrary, capricious, an abuse of discretion, ..., or plainly contrary to a requirement of law, regulation, an Executive Order, or officially promulgated Corps policy guidance." [Id. § 331.9\(b\)](#). The Division Engineer must issue a final decision in writing, *id.*, and should normally make the decision within 90 days after the permit applicant or landowner begins the appeal process. [Id. § 331.8](#).

The Corps' regulations provide that decisions on appeals are "only applicable to the instant appeal and [have] no other precedential effect." [Id. § 331.7\(g\)](#). Nevertheless, each of the Divisions that is involved in Section 404 permitting makes those decisions available on a website for the Division. The following table provides links for the Divisions.

Great Lakes and Ohio River	Mississippi Valley	North Atlantic	Northwestern
Pacific Ocean	South Atlantic	South Pacific	Southwestern

Questions and Comments

1. Preliminary jurisdictional determinations of the Corps cannot be administratively appealed. Neither can permit denials without prejudice, cease and desist orders issued by the Corps, delays in processing of Corps permits, and many other Corps actions. Why do you think that the Corps did not provide for administrative appeals of a broader range of actions? Similarly, why did the Corps establish the appeals process for permit decisions and jurisdictional determinations in separate rulemakings? See [65 Fed. Reg. 16,486 \(March 28, 2000\)](#); [64 Fed. Reg. 11,708 \(March 9, 1999\)](#).
2. **Third parties:** Only permit applicants and landowners can file administrative appeals of Corps actions. While federal rules for intervention may provide opportunities for third parties to become involved in **judicial challenges** to Corps actions, those rules do not apply to **administrative proceedings**. Instead, the Corps regulations do not provide any procedure for third parties to seek to be involved in the appeal process and only provide limited authority for the Review Officer to invite appropriate third parties to participate informally in the proceedings. See [33 C.F.R. § 331.7\(e\)\(3\)](#).
3. **Volume:** When the Corps issued the initial notice of proposed rulemaking for the administrative appeals program, it anticipated that the program would consume significant resources because there would be a high volume of appeals. See 60 Fed. Reg. 37,280, 37,283 (July 19, 1995). However, fewer than 1% of individual permit and jurisdictional determinations are appealed. See Kim D. Connolly, *The Corps Administrative Appeal Process*, in *Wetlands Law and Policy: Understanding Section 404 361* (American Bar Association, Section on Environment, Energy and Resources 2005).
4. **Issue Exhaustion:** To the extent that the Corps' regulations require persons to challenge the agency's decisions administratively before challenging the decisions in court, see [33 C.F.R. § 331.12](#), general administrative law principles require challengers to alert the agency to their specific positions and contentions in the administrative appeal "in order to allow the agency to give the issue meaningful consideration" or face dismissal of those challenges in court for failure to exhaust administrative remedies. See, e.g., [Forest Guardians v. United States Forest Service, 641 F.3d 423 \(10th Cir. 2011\)](#).

Hypotheticals

In which of the following cases could the challenger pursue an administrative appeal?

1. Juan Lagares would like to challenge the preliminary jurisdictional determination that the Corps issued because the Corps concluded that the wetlands on his property may be “waters of the United States.”
2. Phyllis Jones would like to challenge the approved jurisdictional determination that the Corps issued to her neighbor, Juan Lagares, because the Corps ultimately concluded that the wetlands on his property were not “waters of the United States.”
3. Rollie Wright planned to build a dock on his property and indicated to the Corps that he planned to construct the dock in accordance with a regional general permit issued by the local Corps district. The local Corps district informed Wright that the construction was not authorized by the general permit, and he would like to challenge that decision.
4. Rollie Wright applied to the Corps for an individual Section 404 permit to authorize construction of his dock, but the State refused to issue a Section 401 certification. Accordingly, the Corps denied Wright’s permit application without prejudice. Wright would like to challenge that decision.
5. The Shea Development Corporation applied to the Corps for an individual Section 404 permit to authorize construction of a golf course. The Corps issued the permit with a condition that Shea restore or enhance 50 acres of wetlands in the watershed in which the development will take place or purchase mitigation credits to restore or enhance 50 acres of wetlands in that watershed. Shea would like to challenge the mitigation condition in the permit.

Research Problems

Although the Corps' administrative appeal decisions are not available on Westlaw or Lexis, the Corps' Divisions post the decisions on their websites, as noted above. Please answer the following questions based on the information provided on the agency's websites.

1. Your client was denied a Section 404 permit for development in Cherry Hill, New Jersey and you are considering an administrative appeal. Between 2001 and 2013, how frequently did the Corps Division that will hear your appeal find that an appeal of a permit denial or proffered permit had merit?

2. Your client wants to challenge an approved jurisdictional determination for property that she owns in Galveston, Texas, as she believes that the ponds on her property are not "waters of the United States." You have heard that the Division that would hear your appeal overturned a jurisdictional determination from your district with similar facts in 2012. Although the Corps' administrative appeal decisions are not precedential, you are interested in examining that decision. Please find that decision and identify the reasons that the Division concluded that the landowner's appeal had merit.

3. For decisions appealed in 2011, in the South Atlantic Division, from which District did most of the meritorious appeals to permitting decisions originate? From which district did most of the meritorious appeals to jurisdictional determinations originate? Between 2000 and 2012, when permit applicants challenged a permit denial to the Division, how frequently did the challenge ultimately result in a permit issuance by the Corps District?

B. Judicial Review

1. Reviewable Actions

The Clean Water Act includes a **judicial review provision** that authorizes review of many EPA actions, but the provision does not explicitly apply to any of EPA's actions regarding the Section 404 program, and it does not apply to any actions of the Corps of Engineers. See [33 U.S.C. § 1369](#). When the regulations adopted by EPA and the Corps to define "waters of the United States" were challenged, the agencies argued that the judicial review provision applied and required the challenges to be brought in the United States Courts of Appeals, but the Supreme Court rejected that argument in [National Association of Manufacturers v. Department of Defense, 138 S.Ct. 617 \(2018\)](#), holding that 33 U.S.C. § 1369 did not apply, and that challenges to the regulations should be brought in federal district courts under the APA

The Act also includes a **citizen suit provision**, discussed later, that authorizes suits against **EPA** if the agency fails to perform a non-discretionary duty. See [33 U.S.C. § 1365](#). However, most of the lawsuits that might be brought against EPA regarding wetlands, such as a challenge to regulations implementing Section 404, approval or

denial of state program assumption, exercise of a Section 404 veto, or an enforcement order, involve the exercise of **discretion** by the agency, rather than a failure to perform a **non-discretionary duty**. The citizen suit provision is even less helpful with regard to challenging actions of the Corps, as the statute only explicitly authorizes suits against “the Administrator” (EPA), and not the Corps. While the Corps takes some actions regarding wetlands pursuant to its Rivers and Harbors Act authority, that statute also does not have a provision authorizing judicial review of the Corps’ actions. The only provision in either statute that expressly authorizes judicial review of an action by EPA or the Corps is a provision, discussed later, that authorizes review of administrative penalties imposed by EPA. See [33 U.S.C. § 1319\(g\)\(8\)](#).

Consequently, persons seeking judicial review of actions of the Corps or EPA regarding wetlands usually must rely on the Administrative Procedures Act (APA). The APA provides that a “final agency action for which there is no other adequate remedy in a court ..[is] subject to judicial review”, see [5 U.S.C. § 704](#), and “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” See [5 U.S.C. § 702](#). Significantly, the APA defines “agency action” to include a “failure to act.” See [5 U.S.C. § 551\(13\)](#). The APA waives the government’s sovereign immunity to the extent that the challenger is seeking declaratory or injunctive relief. See [5 U.S.C. § 702](#). While the APA does not grant jurisdiction to any court to hear the challenges that it makes reviewable, litigants can usually rely on [28 U.S.C. § 1331](#) (the general federal question jurisdiction statute) or other general jurisdictional statutes to establish jurisdiction for their lawsuit. The general federal question jurisdiction statute provides “[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” *Id.*

Thus, persons who can demonstrate standing to sue, as discussed below, will generally be able to challenge actions of EPA or the Corps regarding wetlands in federal district court as long as the action is a **final agency action**. In general, the Supreme Court has held that for an action to be final, it “must mark the ‘consummation’ of the agency’s decisionmaking process” (not be of a tentative or interlocutory nature) and “must be one by which ‘rights or obligations have been determined’ or from which ‘legal consequences will flow.” See [Bennett v. Spear, 520 U.S. 154,178 \(1997\)](#).

a. Permitting Decisions

One might assume that a **permit applicant** could challenge the Corps’ **denial of a Section 404 permit with prejudice** or any **unwanted conditions included in a Section 404 permit** issued by the Corps as a final agency action under the APA, but the Corps’ administrative appeals regulations require permit applicants to appeal those decisions administratively **before** suing in court. See [33 C.F.R. § 331.12](#). If the Corps affirms the denial of the permit or affirms the inclusion of the unwanted conditions when it makes a decision on the administrative appeal, the permit applicant can challenge those decisions in court at that time.

Persons other than the permit applicant who want to challenge the Corps' decision to issue a permit, deny a permit, or include conditions in the permit have no obligation to pursue any administrative appeal process before suing in court because they have no right to appeal in the administrative process. However, if they challenge the Corps' decision to issue or deny a permit and the permit applicant is pursuing, or could still pursue, an administrative appeal, a court will likely conclude that the challenger cannot bring their lawsuit until the administrative process has concluded, because the agency's decision is not "the 'consummation' of the agency's decision-making process" and is not a final agency action. See [33 C.F.R. § 331.10](#). (identifying the final decision of the Corps in the event of an administrative appeal).

b. Jurisdictional Determinations

For jurisdictional determinations, a **preliminary jurisdictional determination** (a decision that there may be waters of the United States on a parcel of land) is likely not subject to judicial review because it is tentative and subject to further review and modification within the agency. See [33 C.F.R. § 331.2](#). An **approved jurisdictional determination** (a decision that waters of the United States exist or do not exist on a parcel of land and outlining the extent of the jurisdictional waters) can be appealed administratively, and, for many years, EPA and the Corps argued that an approved jurisdictional determination that confirms the presence of "waters of the United States" on property was not a **final agency action** that could be challenged in court. Instead, they argued that persons could only challenge those decisions in court after they applied for a permit and the Corps or EPA made a decision on the permit. Their position was endorsed by the Fifth Circuit and the Ninth Circuit Courts of Appeals. See [Belle Corp., L.L.C. v. U.S. Army Corps of Engineers, 761 F.3d 383 \(5th Cir. 2014\)](#), [Fairbanks North Star Borough v. U.S. Army Corps of Engineers, 543 F.3d 586 \(9th Cir. 2008\)](#). The agencies did not, however, resist judicial review of an **approved jurisdictional determination** that found that property did not contain "waters of the United States." In those cases, the government's determination is not tentative and, in essence, authorizes the landowner to move ahead with development projects without seeking a Section 404 permit. The landowner is unlikely to challenge that decision, but neighbors, competitors, interest groups and other third parties may challenge the decision. See [Golden Gate Audubon Society v. United States Army Corps of Engineers, 717 F. Supp. 1417 \(N.D. Cal. 1988\)](#).

While EPA and the Corps argued that approved jurisdictional determinations that confirm the presence of "waters on the United States" could not be challenged in court, in 2016, the Supreme Court held, in [United States Army Corps of Engineers v. Hawkes Co., et al., 136 S.Ct. 1807 \(2016\)](#), that all approved jurisdictional determinations are "final agency actions" that can be reviewed under the APA. Several factors influenced the Court in its decision. Significantly, the Corps' regulations define approved jurisdictional determinations as "final agency action", see [33 C.F.R. § 320.1\(a\)\(6\)](#), and the determinations are binding on both the Corps and EPA for five years. See [EPA](#),

[Memorandum of Agreement: Exemptions Under Section 404\(F\) of the Clean Water Act § VI-A \(1989\)](#). Applying the Supreme Court’s two part test for determining whether an action is a final agency action, the *Hawkes* Court first held that the agency action “mark[ed] the consummation of the agency’s decisionmaking process .. [and was] not of a merely tentative or interlocutory nature” because the Corps conceded that approved jurisdictional determinations met that requirement. 136 S.Ct. at 1813-1814. The Court also concluded that approved jurisdictional determinations met the second part of the test – that the agency action must “be one by which rights or obligations have been determined, or from which legal consequences will flow.” *Id.* at 1813. The Court reasoned that an approved jurisdictional determination that finds that property does not contain waters of the United States has legal consequences for landowners because the determination binds the agencies for five years and creates a safe harbor from enforcement actions for the landowner for that period. *Id.* at 1814. Similarly, the Court reasoned that an approved jurisdictional determination that finds that property contains waters of the United States has legal consequences for the landowner because it denies the landowner the safe harbor from enforcement actions. *Id.* at 1815.

In addition to arguing that approved jurisdictional determinations were not “final agency actions”, the Corps argued that they should not be reviewable under the APA because the APA only authorizes review of final agency action if there are not other adequate alternatives to APA review in court. *Id.* The Corps argued that landowners could obtain review of the Corps’ determination either by “discharg[ing] fill material without a permit, risking an EPA enforcement action during which they can argue that no permit was required, or apply[ing] for a permit and seek[ing] judicial review if dissatisfied with the results.” *Id.* The Court, however, concluded that neither alternative was adequate. First, the Court indicated, “we have long held [that] parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of ‘serious criminal and civil penalties.’” *Id.* Regarding the Corps suggestion that landowners apply for a permit and challenge the agency’s permit decision, the Corps noted that “the permitting process can be arduous, expensive and long” and would not alter the finality of the approved jurisdictional determination or affect its suitability for judicial review. *Id.* at 1815-1816.

In light of the Court’s decision, the Corps issued a Regulatory Guidance Letter that confirms that approved jurisdictional determinations can be challenged in court. See [U.S. Army Corps of Engineers, Jurisdictional Determinations, Regulatory Guidance Letter 16-01 \(Oct. 2016\)](#). Despite the Supreme Court’s decision and the agency’s change in policy, there has not been a significant increase in the number of judicial challenges to approved jurisdictional determinations by the Corps. See Amena H. Saiyid, *Challenges to Corps Waters Findings Still a Trickle After Ruling*, 48 Env. Reporter 355 (Feb. 24, 2017).

c. Enforcement actions and other agency actions

Regarding other permitting decisions, when the Corps or EPA determines that an

activity **doesn't qualify** for a general permit or a permit exemption, the agencies argue that the developer must apply for an individual permit and can only challenge the general permit or exemption determination judicially as part of a challenge to the agencies' ultimate decision on the permit application. In *Avella v. U.S. Army Corps of Engineers*, 916 F.2d 721 (11th Cir. 1990), the Eleventh Circuit affirmed a district court's finding that the Corps' determination that a developer's activity was not authorized by a nationwide permit was not a final agency action because the agency's decision did not have a binding legal effect on the developer. If, however, the government determines that an activity **qualifies** for a general permit or a permit exemption, the decision can generally be challenged in court at that time, since the government's decisionmaking process is complete and has a similar binding legal effect as the issuance of an individual permit. See [Orleans Audubon Society v. Lee, 742 F.2d 901 \(5th Cir. 1984\)](#).

There are many actions that EPA and the Corps take in administering Section 404 of the Clean Water Act other than issuing or denying permits and making jurisdictional determinations. However, for all of those other actions, the road to the courthouse door is the same as for the permitting and jurisdictional decisions. The agencies' actions are reviewable if they are final agency actions. Although the cases are fact-sensitive, this means that regulations adopted by the Corps or EPA will frequently be subject to APA challenge as final agency actions, since they are legally binding and often have direct legal effect on challengers, while guidance documents and policy statements will not be subject to review, since they are not legally binding and don't have a direct legal effect. EPA's exercise of its Section 404(c) authority represents the consummation of the agency's procedures and has the same legal effect on a landowner as the denial of a Section 404 permit, so it will generally be judicially reviewable.

In the enforcement context, for many years, EPA and the Corps argued that cease and desist orders and administrative enforcement orders issued by the agencies could not be challenged because they were not final agency action and because the statute implicitly precluded review of the orders. Several courts agreed with the agencies until the Supreme Court issued the following decision.

Sackett v. Environmental Protection Agency

566 U.S. ____ (2012)

JUSTICE SCALIA delivered the opinion of the Court.

We consider whether Michael and Chantell Sackett may bring a civil action under the Administrative Procedure Act * * * to challenge the issuance by the Environmental Protection Agency (EPA) of an administrative compliance order under §309 of the Clean Water Act, 33 U.S.C. §1319. The order asserts that the Sacketts'

Resources for the Case

[Unedited opinion](#) (From Justia)
[Google Map of all of the cases in the coursebook](#)
[Oral Argument audio](#) (from the Oyez Project)
[EPA Compliance Order at issue](#)
[Administrative Record](#)
[EPA Guidance Post-Sackett](#)
[Local media article re: the Sackett case](#)

property is subject to the Act, and that they have violated its provisions by placing fill material on the property; and on this basis it directs them immediately to restore the property pursuant to an EPA work plan.

I

The Clean Water Act prohibits, among other things, “the discharge of any pollutant by any person” * * * without a permit, into the “navigable waters,”* * * which the Act defines as “the waters of the United States” * * * . If the EPA determines that any person is in violation of this restriction, the Act directs the agency either to issue a compliance order or to initiate a civil enforcement action. §1319(a)(3). When the EPA prevails in a civil action, the Act provides for “a civil penalty not to exceed [\$37,500] per day for each violation.” * * * §1319(d). And according to the Government, when the EPA prevails against any person who has been issued a compliance order but has failed to comply, that amount is increased to \$75,000—up to \$37,500 for the statutory violation and up to an additional \$37,500 for violating the compliance order.

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. * * *

The Sacketts * * * own a 2/3-acre residential lot in Bonner County, Idaho. Their property lies just north of Priest Lake, but is separated from the lake by several lots containing permanent structures. In preparation for constructing a house, the Sacketts filled in part of their lot with dirt and rock. Some months later, they received from the EPA a compliance order. The order contained a number of “Findings and Conclusions,” including the following:

“1.4 [The Sacketts’ property] contains wetlands within the meaning of 33 C.F.R. §328.4(8)(b); the wetlands meet the criteria for jurisdictional wetlands in the 1987 ‘Federal Manual for Identifying and Delineating Jurisdictional Wetlands.’

“1.5 The Site’s wetlands are adjacent to Priest Lake within the meaning of 33 C.F.R. §328.4(8)(c). Priest Lake is a ‘navigable water’ within the meaning of section 502(7) of the Act, 33 U.S.C. §1362(7), and ‘waters of the United States’ within the meaning of 40 C.F.R. §232.2.

“1.6 In April and May, 2007, at times more fully known to [the Sacketts, they] and/or persons acting on their behalf discharged fill material into wetlands at the Site. [They] filled approximately one half acre. . . .

“1.9 By causing such fill material to enter waters of the United States, [the Sacketts] have engaged, and are continuing to engage, in the ‘discharge of pollutants’ from a point source within the meaning of sections 301 and 502(12) of the Act, 33 U.S.C. §§1311 and 1362(12).. . .

“1.11 [The Sacketts’] discharge of pollutants into waters of the United States at the Site without [a] permit constitutes a violation of section 301 of the Act, 33 U.S.C. §1311.” App. 19–20.

On the basis of these findings and conclusions, the order directs the Sacketts, among other things, “immediately [to] undertake activities to restore the Site in accordance with [an EPA-created] Restoration Work Plan” and to “pro- vide and/or obtain access to the Site . . . [and] access to all records and documentation related to the conditions at the Site . . . to EPA employees and/or their designated representatives.” *Id.*, at 21–22, ¶¶2.1, 2.7.

The Sacketts, who do not believe that their property is subject to the Act, asked the EPA for a hearing, but that request was denied. They then brought this action in the United States District Court for the District of Idaho, seeking declaratory and injunctive relief. Their complaint contended that the EPA’s issuance of the compliance order was “arbitrary [and] capricious” under the Administrative Procedure Act (APA) * * * and that it deprived them of “life, liberty, or property, without due process of law,” in violation of the Fifth Amendment. The District Court dismissed the claims for want of subject- matter jurisdiction, and the United States Court of Appeals for the Ninth Circuit affirmed * * *. It concluded that the Act “preclude[s] pre-enforcement judicial review of compliance orders,” * * * and that such preclusion does not violate the Fifth Amendment’s due process guarantee * * *. We granted certiorari. * * *

II

The Sacketts brought suit under Chapter 7 of the APA, which provides for judicial review of “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. §704. We consider first whether the compliance order is final agency action. There is no doubt it is agency action, which the APA defines as including even a “failure to act.” §§551(13), 701(b)(2). But is it final? It has all of the hallmarks of APA finality that our opinions establish. Through the order, the EPA “ ‘determined’ ” “ ‘rights or obligations.’ ” *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quoting *Port of Boston Marine Terminal Assn. v. Re- deriaktiebolaget Transatlantic*, 400 U. S. 62, 71 (1970)). By reason of the order, the Sacketts have the legal obligation to “restore” their property according to an agency-approved Restoration Work Plan, and must give the EPA access to their property and to “records and documentation related to the conditions at the Site.” App. 22, ¶2.7. Also, “ ‘legal consequences . . . flow’ ” from issuance of the order. *Bennett, supra*, at 178 (quoting *Marine Terminal, supra*, at 71). For one, according to the Government’s current litigating position, the order exposes the Sacketts to double penalties in a future enforcement proceeding.² It also severely

² We do not decide today that the Government’s position is correct, but assume the consequences of the order to be what the Government asserts.

limits the Sacketts' ability to obtain a permit for their fill from the Army Corps of Engineers * * *. The Corps' regulations provide that, once the EPA has issued a compliance order with respect to certain property, the Corps will not process a permit application for that property unless doing so "is clearly appropriate." 33 CFR §326.3(e)(1)(iv) (2011).³

The issuance of the compliance order also marks the " 'consummation' " of the agency's decisionmaking process. *Bennett, supra*, at 178 (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U. S. 103, 113 (1948)). As the Sacketts learned when they unsuccessfully sought a hearing, the "Findings and Conclusions" that the compliance order contained were not subject to further agency review. The Government resists this conclusion, pointing to a portion of the order that invited the Sacketts to "engage in informal discussion of the terms and requirements" of the order with the EPA and to inform the agency of "any allegations [t]herein which [they] believe[d] to be inaccurate." App. 22–23, ¶2.11. But that confers no entitlement to further agency review. The mere possibility that an agency might reconsider in light of "informal discussion" and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal.

The APA's judicial review provision also requires that the person seeking APA review of final agency action have "no other adequate remedy in a court," 5 U.S.C. §704. In Clean Water Act enforcement cases, judicial review ordinarily comes by way of a civil action brought by the EPA under 33 U. S. C. §1319. But the Sacketts cannot initiate that process, and each day they wait for the agency to drop the hammer, they accrue, by the Government's telling, an additional \$75,000 in potential liability. The other possible route to judicial review—applying to the Corps of Engineers for a permit and then filing suit under the APA if a permit is denied—will not serve either. The remedy for denial of action that might be sought from one agency does not ordinarily provide an "adequate remedy" for ac- tion already taken by another agency. The Government, to its credit, does not seriously contend that other available remedies alone foreclose review under §704. Instead, the Government relies on §701(a)(1) of the APA, which excludes APA review "to the extent that [other] statutes preclude judicial review." The Clean Water Act, it says, is such a statute.

III

Nothing in the Clean Water Act expressly precludes judicial review under the APA or

³ The regulation provides this consequence for "enforcement litigation that has been initiated by other Federal . . . regulatory agencies." 33 C.F.R. §326.3(e)(1)(iv) (2011). The Government acknowledges, however, that EPA's issuance of a compliance order is considered by the Corps to fall within the provision. * * * Here again, we take the Government at its word without affirming that it represents a proper interpretation of the regulation.

otherwise. But in determining “[w]hether and to what extent a particular statute precludes judicial review,” we do not look “only [to] its express language.” *Block v. Community Nutrition Institute*, 467 U.S. 340, 345 (1984). The APA, we have said, creates a “presumption favoring judicial review of administrative action,” but as with most presumptions, this one “may be overcome by inferences of intent drawn from the statutory scheme as a whole.” *Id.*, at 349. The Government offers several reasons why the statutory scheme of the Clean Water Act precludes review.

The Government first points to 33 U. S. C. §1319(a)(3), which provides that, when the EPA “finds that any person is in violation” of certain portions of the Act, the agency “shall issue an order requiring such person to comply with [the Act], or . . . shall bring a civil action [to enforce the Act].” The Government argues that, because Congress gave the EPA the choice between a judicial proceeding and an administrative action, it would undermine the Act to allow judicial review of the latter. But that argument rests on the question-begging premise that the relevant difference between a compliance order and an enforcement proceeding is that only the latter is subject to judicial review. There are eminently sound reasons other than insulation from judicial review why compliance orders are useful. The Government itself suggests that they “provid[e] a means of notifying recipients of potential violations and quickly resolving the issues through voluntary compliance.” * * * It is entirely consistent with this function to allow judicial review when the recipient does not choose “voluntary compliance.” The Act does not guarantee the EPA that issuing a compliance order will always be the most effective choice.

The Government also notes that compliance orders are not self-executing, but must be enforced by the agency in a plenary judicial action. It suggests that Congress therefore viewed a compliance order “as a step in the deliberative process[,] . . . rather than as a coercive sanction that itself must be subject to judicial review.” * * * But the APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction. And it is hard for the Government to defend its claim that the issuance of the compliance order was just “a step in the deliberative process” when the agency rejected the Sacketts’ attempt to obtain a hearing and when the next step will either be taken by the Sacketts (if they comply with the order) or will involve judicial, not administrative, deliberation (if the EPA brings an enforcement action). As the text (and indeed the very name) of the compliance order makes clear, the EPA’s “deliberation” over whether the Sacketts are in violation of the Act is at an end; the agency may still have to deliberate over whether it is confident enough about this conclusion to initiate litigation, but that is a separate subject.

The Government further urges us to consider that Congress expressly provided for prompt judicial review, on the administrative record, when the EPA assesses administrative penalties after a hearing, see §1319(g)(8), but did not expressly provide for review of compliance orders. But if the express provision of judicial review in one section of a long and complicated statute were alone enough to overcome the APA’s presumption of reviewability for all final agency action, it would not be much of a

presumption at all.

* * *

Finally, the Government notes that Congress passed the Clean Water Act in large part to respond to the inefficiency of then-existing remedies for water pollution. Compliance orders, as noted above, can obtain quick remediation through voluntary compliance. The Government warns that the EPA is less likely to use the orders if they are subject to judicial review. That may be true—but it will be true for all agency actions subjected to judicial review. The APA’s presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into “voluntary compliance” without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA’s jurisdiction. Compliance orders will remain an effective means of securing prompt voluntary compliance in those many cases where there is no substantial basis to question their validity.

* * *

We conclude that the compliance order in this case is final agency action for which there is no adequate remedy other than APA review, and that the Clean Water Act does not preclude that review. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GINSBURG, concurring.

Faced with an EPA administrative compliance order threatening tens of thousands of dollars in civil penalties per day, the Sacketts sued “to contest the jurisdictional bases for the order.” * * * “As a logical prerequisite to the issuance of the challenged compliance order,” the Sacketts contend, “EPA had to determine that it has regulatory authority over [our] property.” * * * The Court holds that the Sacketts may immediately litigate their jurisdictional challenge in federal court. I agree, for the Agency has ruled definitively on that question. Whether the Sacketts could challenge not only the EPA’s authority to regulate their land under the Clean Water Act, but also, at this pre-enforcement stage, the terms and conditions of the compliance order, is a question today’s opinion does not reach out to resolve. Not raised by the Sacketts here, the question remains open for another day and case. On that understanding, I join the Court’s opinion.

Questions and Comments

1. **Final agency action:** Would the Court have reached the same conclusion regarding the finality of EPA’s compliance order if the agency did not take the

position that it could double the penalties that it could recover in a judicial enforcement action by issuing a compliance order? Does the Court believe that EPA is likely to modify a compliance order based on informal discussions with the alleged violator after the order is issued? If EPA routinely made such changes, should that affect the Court's conclusion?

2. **Preclusion of review:** As noted in the *Sackett* opinion, while the APA includes a presumption that final agency actions are reviewable, it includes an exception to reviewability if statutes preclude review. See [5 U.S.C. § 701\(a\)\(1\)](#). As evidenced by the Court's opinion in *Sackett*, the presumption in favor of reviewability is very strong. Although it can be rebutted either expressly or implicitly, the *Sackett* Court was unwilling to find that the Clean Water Act precluded judicial review of compliance orders despite arguments based on the structure and purposes of the statute.
3. **Terms of the Order:** Did the Court hold that EPA's order was invalid and that the agency lacked jurisdiction over the wetlands at issue? If the Sacketts want to challenge the restoration plan required by the order, or EPA's requirement that they provide records to the agency, does the Court's opinion authorize them to raise those challenges in court? Litigation between the Sacketts and EPA continued for at least the next decade. See, e.g. [Sackett v. EPA](#), No. 19-35469, (9th Cir. May 30, 2019).
4. **Jurisdictional determinations:** *Sackett* involved judicial review of an EPA compliance order. Would the rationale of the decision also apply to a preliminary or approved jurisdictional determination? Would they constitute final agency action, based on the Court's analysis, or can they be distinguished?
5. **Due Process:** Does the Court resolve the Sackett's due process claim? If so, how? If not, why not? What sort of a hearing is required by due process? Could a hearing before an administrative tribunal suffice? Could a hearing after an initial decision by the government suffice?
6. **Impact of decision:** How might the Court's decision affect how frequently EPA issues administrative compliance orders to address Section 404 violations, as opposed to using other enforcement tools? How might it impact the documentation that EPA prepares in support of compliance orders? Is the Court's decision likely to accelerate resolution of disputes over Clean Water Act jurisdiction over waters of the United States or will it severely hamper government enforcement efforts? Are there less stringent alternatives to administrative compliance orders? Would they be subject to judicial review? At oral argument, Justice Scalia predicted, "They'll just issue warnings is what they'll do." See Craig N. Johnston, *Sackett: The Road Forward*, 42 *Envtl. L.* 993 (2012); Albert Ferlo & Tom Lindley, *Practical Impacts of the Sackett Decision*, 42 *Envtl. L.* 1009 (2012); Richard E. Glaze Jr., *A Detailed Look at the Effects of*

Sackett v. EPA on Administrative Enforcement Orders, 42 *Env'tl. L. Rep. News & Analysis* 11030 (Nov. 2012).

7. **Waters of the United States:** In a concurring opinion that is not reproduced above, Justice Alito chastised Congress and EPA for failing to provide concrete rules outlining the boundaries of federal jurisdiction over “waters of the United States” and called for Congress to clarify the reach of the statute.
8. **Non-enforcement:** The *Sackett* case involved an APA challenge to an EPA enforcement order. However, can a person who is upset because EPA or the Corps are **not** bringing an enforcement action against someone bring suit against the agencies based on the APA, since agency action can include a failure to act? See [5 U.S.C. § 701\(a\)\(2\)](#); [Heckler v. Chaney, 470 U.S. 821 \(1985\)](#). Could they bring a suit against EPA or the Corps for non-enforcement under the citizen suit provisions of the Clean Water Act, alleging that the agencies failed to perform a non-discretionary duty? See [Sierra Club v. U.S. Environmental Protection Agency, 268 F.3d 898 \(9th Cir. 2001\)](#).

Hypotheticals

1. Walt Pinkman recently observed Jessie White dumping several tons of dirt onto wetlands on her property to build a new tennis court. He immediately contacted EPA, and the agency sent an investigator to her house to determine whether she was violating the Clean Water Act. After conducting an inspection of the property, the EPA investigator issued Jessie a “notice of violation” under [Section 309\(a\) of the Clean Water Act](#), which indicated that she was discharging fill material into “waters of the United States” and that she could potentially be fined and ordered to restore the wetlands to their natural state. The notice was not, however, an administrative compliance order, and did not require her to take any immediate action. Can Jessie challenge the notice in court?

2. Shortly after EPA issued the notice of violation, a representative of the Corps of Engineers visited the property and issued a preliminary jurisdictional determination, finding that the wetlands on White’s property may be “waters of the United States”. Can Jessie challenge the jurisdictional determination in court?

3. When Jessie did not cease her wetland filling activities, EPA issued an administrative compliance order, notifying her that she was discharging fill material into “waters of the United States” and ordering her to restore the wetlands pursuant to a restoration plan that was included in the order. Jessie will not challenge the agency’s determination that the wetlands on her property are “waters of the United States”, but she would like to challenge the terms of the restoration plan. Can Jessie challenge the terms of the restoration plan in court?

4. Jessie ultimately applies for a Section 404 permit to authorize the construction of her tennis court, but the Corps of Engineers denies the permit application on the grounds that there are practicable alternatives to the project that would have less adverse impacts on the aquatic environment. Jessie does not appeal the permit denial administratively within the period in which appeals can be brought. Can Jessie challenge the permit denial in court if she can no longer challenge it administratively?

2. Limits on Judicial Review

Even if a litigant can demonstrate that the action of the EPA or the Corps that they wish to challenge is a final agency action, they may face some additional obstacles to bringing their lawsuit.

A primary roadblock for some plaintiffs may be the **standing** requirement. In order to bring suit, a plaintiff must demonstrate that (1) they **have suffered**, or **imminently will suffer**, an **injury** that was **caused** by the action that they are challenging and which can be **redressed** by the relief that they are seeking in the lawsuit; and (2) the interest that they are suing to protect is arguably within the **zone of interests** sought to be protected

by the statute under which they are suing. See [Bennett v. Spear, 520 U.S. 154 \(1997\)](#). The first requirement, the “injury in fact” requirement, derives from Article III of the Constitution, which limits the judicial role to resolving “cases or controversies.” For many years, the Supreme Court referred to the second requirement, the “zone of interests” requirement, as a *prudential* limit imposed on plaintiffs by courts based on concerns for a limited judicial role in a democratic society. *Id.* However, in [Lexmark International, Inc. v. Static Control Components, Inc., 134 S.Ct. 1377, 1387 \(2014\)](#), the Court held that the “zone of interests” analysis should not be identified as a standing test, prudential or otherwise, and that the test is not a jurisdictional test. According to the Court, the “zone of interests” analysis still applies in cases involving challenges to agency actions, but the analysis focuses on the statutory interpretation question of whether Congress authorized the plaintiff to bring the cause of action against the agency.” *Id.*

When a permit applicant is challenging a permit denial, the conditions included in a permit, or an EPA veto of a permit, or a landowner is challenging a determination that their property contains waters of the United States, the challenger should have little trouble demonstrating that they have standing to sue under that test. Normally, the permit denial or the conditions in the permit will cause the applicant or landowner some economic injury that can be avoided if the permit is granted or the conditions are removed or altered. Similarly, if a landowner or permittee has been issued an enforcement order and can demonstrate that the government’s action is final agency action, they should usually be able to demonstrate that they meet the requirements for standing. The order will likely cause them some economic injury or other injury, which could be avoided if the order were rescinded. However, when neighboring landowners, competitors, or other third parties challenge the government’s decisions to issue permits, cover activities through general permits, exempt activities from permitting requirements, or find that property does not contain waters of the United States, it may be more difficult to demonstrate the standing requirements. See, e.g. [Save Ourselves v. U.S. Army Corps of Engineers, 958 F.2d 659 \(5th Cir. 1992\)](#). The plaintiffs may not yet have suffered any injury and may have a difficult time proving that they *will* be imminently injured in a concrete way by the government action or that the relief that they are seeking will redress that injury. Similarly, when regulated entities, interest groups, or other persons challenge regulations issued by the Corps or EPA, standing may be an obstacle to suit.

In addition to the standing limitation, a plaintiff may find that their lawsuit against the EPA or the Corps will be dismissed if it is not brought in a timely manner. While the Clean Water Act does not have a judicial review provision that establishes time limits for actions against EPA and the Corps relating to the Section 404 program, the general six year **statute of limitations** for civil actions against the United States applies to those lawsuits. See [28 U.S.C. § 2401\(a\)](#). That statute runs from the time the cause of action first arose. *Id.* There are more restrictive time limits for citizen suits against the government for failure to perform a non-discretionary duty, but those time limits will be discussed in the citizen suit section of this chapter, since there are few, if any, lawsuits

that could be brought against EPA or the Corps for failure to perform a non-discretionary duty with regard to the Section 404 program. There are also more restrictive time limits that apply to appeals of administrative penalty orders, but they will be discussed in the enforcement section of this chapter.

Even if a plaintiff brings their lawsuit within the six year statute of limitations, a court may dismiss the action as untimely if the claims in the lawsuit are *moot*. For instance, in [Vieux Carre Property Owners v. Brown, 948 F.2d 1436 \(5th Cir. 1991\)](#), the Fifth Circuit held that a litigant's claim that the Corps did not comply with the National Environmental Policy Act when deciding to issue a section 404 permit was moot because the retail complex that was authorized by the permit was substantially completed at the time of the lawsuit. Similarly, in [Sierra Club v. U.S. Army Corps of Engineers, 277 Fed. Appx. 170 \(3d Cir. 2008\)](#), the Third Circuit held that a litigant's challenge to the Corps' issuance of a Section 404 permit was moot when the plaintiff brought the challenge after 98% of the wetlands at issue were filled, structures had been built for the project and mitigation had been completed.

3 Standards of Review and Remedies

Since judicial challenges to actions of the Corps and EPA regarding wetlands will be brought pursuant to APA authority, the judicial review provisions of the APA apply in those actions. In general, courts review the decisions of EPA and the Corps based on the record prepared by the agencies to support their decisions and the justifications articulated by the agencies for those decisions, and do *not* hold evidentiary hearings or gather new evidence. See [Preserve Endangered Areas of Cobb's History v. U.S. Army Corps of Engineers, 87 F.3d 1242, 1246-1247 \(11th Cir. 1996\)](#); [Friends of the Earth v. Hintz, 800 F.2d 822, 828-829 \(9th Cir. 1986\)](#); [Avoyelles Sportsmen's League v. Marsh, 715 F.2d 897, 907 \(5th Cir. 1983\)](#).

When reviewing the record prepared by the agencies, courts do not generally engage in de novo review. Instead, they review the agencies' decisions under very deferential standards. The judicial review provisions of the APA indicate that a reviewing court shall

- “(2) hold unlawful and set aside agency action, findings, and conclusions found to be
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an

- agency hearing provided by statute; or
- (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.”

See [5 U.S.C. § 706](#).

As noted in earlier chapters, when a court reviews an agency’s interpretation of a statute adopted through legislative rulemaking or in some other contexts, the court will apply the *Chevron* analysis. See Chapter 4, *supra*. If the court is not reviewing an agency’s interpretation of a statute, it will normally review the agency’s decision under the **arbitrary and capricious** standard, another deferential standard, and uphold the agency’s decision as long as it is reasonable. As the Supreme Court has indicated, the arbitrary and capricious standard of review “is a narrow one” and the “court is not empowered to substitute its judgment for that of the agency.” See [Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 \(1971\)](#).

If the reviewing court ultimately decides that an action taken by the Corps or EPA is arbitrary and capricious, the court will usually set aside the decision and remand the matter to the agency to reconsider. On remand, the agency can resolve the matter differently than it did initially, but it is also free to make the same decision as it made initially, as long as it addresses the court’s concerns and can support the decision as reasonable. See [Securities and Exchange Commission v. Chenery, 332 U.S. 194 \(1947\)](#).

Questions and Comments

1. **Beyond the record:** While APA review of most actions of the Corps and EPA is limited to the administrative record prepared by the agency, in rare situations, a court may take evidence if the record is incomplete or if there is a strong showing of bad faith or improper behavior.
2. **Intervention:** Since the judicial review provisions of the Clean Water Act do not apply to review of actions of the Corps or EPA regarding Section 404, intervention in lawsuits against the Corps and EPA is governed by the normal federal rules of civil procedure. See [Fed. R. Civ. P. 24](#).

II. Enforcement

The Corps of Engineers and EPA share enforcement authority over Section 404 violations under the Clean Water Act. In 1989, the agencies entered into a Memorandum of Agreement to coordinate their enforcement activities. See [U.S. Environmental Protection](#)

Resources

[EPA Citizen Violation Report form](#)
[EPA IG report re: Enforcement](#)
[EPA Wetland Enforcement Web Page](#)
[EPA Region 9 Wetlands Enforcement Web Page](#)
[EPA Enforcement Web Page](#)

[Agency & U.S. Army Corps of Engineers, Memorandum of Agreement: Federal Enforcement for the Section 404 Program of the Clean Water Act \(Jan. 19, 1989\).](#)

Pursuant to the agreement, in most cases, the Corps conducts initial investigations of Section 404 violations, making a determination of whether waters of the United States are present on the property where a discharge occurred and whether there has been a violation of Section 404. *Id.* While the Corps conducts most initial investigations, the memorandum provides that EPA will normally be the lead enforcement agency for discharges where the violator does not have a permit, while the Corps will be the lead enforcement agency for discharges that violate a Corps permit. *Id.*

As noted in Chapter 4, *supra*, the prohibition on filling wetlands derives from Section 301 of the Clean Water Act, which, when read in conjunction with Section 502 (the definition section), prohibits the **addition** of a **pollutant** into **navigable waters** from a **point source** by a **person** unless the person is adding the pollutant **in accordance with a Section 404 permit** or a Section 402 permit, and is complying with other requirements of the statute listed in Section 301. See [33 U.S.C. § 1311](#). Section 404 permits are issued to authorize the **discharge** of **dredged** or **fill material** into navigable waters. See [33 U.S.C. § 1344](#). Thus, if the Corps or EPA bring an enforcement action against someone for filling wetlands without a Section 404 permit or in violation of a Section 404 permit, they have **the burden of proving** that there was an addition of a pollutant into navigable waters from a point source by a person (to demonstrate a violation of section 301) and that there was a discharge of dredged or fill material (to demonstrate that a Section 404 permit, rather than a Section 402 permit, was required.) If the enforcement action is based on violation of the terms or conditions of a Section 404 permit, the government has the burden of proving that the defendant violated the permit terms or conditions. If the defendant argues that a Section 404 permit is not required because the activity that caused the alleged violation was exempt from the permit requirement or because it was covered by a general permit, the **defendant** has the burden of proof.

Except in criminal enforcement proceedings, in making out the prima facie case, the government does not have to prove that the defendant acted with a specific mental state. The government merely has to prove that the defendant took the action that was prohibited by the Clean Water Act. See [Kelly v. United States, 203 F.3d 519 \(7th Cir. 2000\)](#); [Stoddard v. Western Carolina Regional Sewer Authority, 784 F.2d 1200 \(4th Cir. 1986\)](#). The statute defines “person” broadly to include an “individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.” See [33 U.S.C. § 1362\(5\)](#). EPA’s regulations clarify that a Federal agency, its agents and employees, and an “agent or employee” of any entity listed in the statutory definition can also be liable as a “person”. See [40 C.F.R. §232.2](#).

The enforcement process begins when EPA or the Corps learn about a potential section 404 violation. The Corps encourages members of the public to report violations, see [33 C.F.R. § 326.3\(a\)](#), so the government may become aware of violations from citizen complaints. In addition, the Corps works with state, local and other federal agencies to

watch for potential violations, so the Corps or one its partners may discover a violation through its surveillance program. *Id.* The Corps relies on those tools to identify violations of permit conditions as well as unpermitted discharges, because, unlike other environmental statutes, the Clean Water Act does not require Section 404 permittees to monitor their activities or file periodic reports with the Corps. EPA has limited field resources and relies on reports from citizens or referrals from the Corps or other federal agencies to identify potential violations. However, a 2009 report of EPA's Office of Inspector General found that the agency's passive and reactive approach to wetlands enforcement was not effective in identifying violations. See [U.S. Environmental Protection Agency, Office of Inspector General, 10-P-0009, EPA Needs a Better Strategy to Identify Violations of Section 404 of the Clean Water Act \(Oct. 6, 2009\)](#). Consequently, the Inspector General recommended that the agency implement "a §404 enforcement strategy that includes increased communication/coordination with enforcement partners, a system to track repeat and flagrant violators, performance measures, and cross-training" and the agency agreed to make those changes. *Id.* at 6.

Once the Corps or EPA discover a potential violation, they can choose from a broad range of administrative and judicial enforcement options, including both civil and criminal sanctions. The Clean Water Act gives the agencies broad discretion to choose the appropriate enforcement tool and does not mandate a specific type of enforcement action for any particular violation.

A. Administrative Enforcement

1. Administrative Compliance Orders and Cease and Desist Letters

Resources

[Corps Enforcement Regulations](#)
[EPA Enforcement Regulations](#)
[EPA Region 9 Enforcement Web Page](#) - incl. compliance orders and consent decrees
Example of an [EPA compliance order](#)

Most violations will be resolved administratively, rather than in court. The least stringent enforcement tools available to the agencies are notices of violation and administrative orders. The Clean Water Act authorizes **EPA** to issue orders (**administrative compliance orders**) that require persons to comply with the Clean Water Act or with Section 404 permits that are issued by States, see [33 U.S.C. § 1319\(a\)\(3\)](#), and authorizes the **Corps** to issue orders (**cease and desist letters**) that require persons to comply with the terms and conditions of Section 404 permits that the Corps issued. See [33 U.S.C. § 1344\(s\)](#). If a permittee has already completed the fill activity that violates a permit, the Corps will usually issue a notice of violation and request for remedial action, instead of a cease and desist letter. See 33 C.F.R. § 326.3(c). When EPA issues an administrative compliance order or the Corps issues a cease and desist letter, the agencies provide a copy of the order or letter to the state where the violation occurred and any other states affected by the violation. See 33 U.S.C. §§ [1319\(a\)\(4\)](#); [1344\(s\)\(2\)](#).

If the person who receives an order does not comply with the order, the agencies can

only enforce the order by bringing an action in court, *id.* §§ [1319\(b\)](#); [1344\(s\)\(3\)](#). As the *Sackett* Court noted, in a judicial action to enforce an administrative order, the government will seek to recover penalties for the violation of the order, as well as for the violation that led to the issuance of the order.

Although the Clean Water Act does not explicitly authorize persons who receive administrative compliance orders or cease and desist letters to challenge them in court, the *Sackett* Court held that the recipient of an EPA administrative compliance order could challenge the agency’s jurisdictional determination in that order in court. The Court’s decision did not, however, address cease and desist letters of the Corps.

2. Administrative Penalty Orders

Both EPA and the Corps have authority to impose administrative penalties on violators. Section 309(g) authorizes both agencies to assess civil penalties on persons who fill wetlands without a permit (or otherwise violate the Clean Water Act) or who violate the terms or conditions of a permit, although, as noted above, the Corps generally takes the lead on violations of permits issued by the Corps. See [33 U.S.C. § 1319\(g\)\(1\)](#). The statute establishes two categories of administrative penalties, based on the severity of the violation. **Class I penalties** may not exceed \$11,000 per violation or \$32,500 overall, and **Class II penalties** may not exceed \$11,000 per day of violation or \$157,500 overall. See [33 U.S.C. § 1319\(g\)\(2\)](#); [40 C.F.R. § 19.4](#). (Note: The original maximum penalty amounts in the statute were lower, and were increased by the Debt Collection Improvement Act, 31 U.S.C. § 3701).

For **Class I penalties**, the statute requires the government to provide notice and an opportunity for a hearing **before** assessing a penalty. See [33 U.S.C. § 1319\(g\)\(2\)\(A\)](#). The hearing is an informal hearing, though, and the statute only requires the government to provide the potential recipient of the order “a reasonable opportunity to be heard and to present evidence.” *Id.*

For **Class II penalties**, the statute requires the government to provide notice and the opportunity for a **formal hearing** following the procedures of the APA ([5 U.S.C. § 554](#)) before assessing a penalty. See [33 U.S.C. § 1319\(g\)\(2\)\(B\)](#).

In determining the amount of the penalties, the statute directs the agencies to “take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.” [Id. § 1319\(g\)\(3\)](#).

Resources

[EPA’s Administrative Penalty Regulations](#)
[Corps’ Administrative Penalty Regulations](#)
[EPA’s Civil Penalty Policy](#)
[EPA’s Environmental Appeals Board](#)

For both types of penalties, the Corps or EPA must also provide **public notice** of the proposed penalty order and an **opportunity to comment** on the order before issuing the order. See [33 U.S.C. § 1319\(g\)\(4\)](#). Unlike administrative compliance orders, the statute explicitly provides that persons who are assessed an administrative penalty **or** persons who commented on the administrative penalty order can challenge the order in court, as long as they challenge the order within 30 days. [Id. § 1319\(g\)\(8\)](#). Class I penalties must be challenged in federal district court, while Class II penalties must be challenged in the federal appellate courts. *Id.* The general rules regarding judicial review, discussed above (i.e. review limited to the record, application of the arbitrary and capricious standard), apply to review of these orders. However, if the Class II penalties are issued after a formal hearing, the appellate court reviews the agency's **factual findings** under the **substantial evidence** test. See [5 U.S.C. § 706\(2\)\(E\)](#).

Before challenging an administrative penalty order in court, recipients of the orders must exhaust their administrative remedies. There is no administrative appeal process for Class I penalty orders, so recipients can challenge those orders immediately. However, recipients of a Class II penalty order must appeal the order administratively before challenging the order in court. See [40 C.F.R. § 22.27\(d\)](#).

If the Corps or EPA issues an administrative penalty order and the recipient does not comply with the order, the Clean Water Act authorizes the government to bring an action in federal district court to recover the penalties. See [33 U.S.C. § 1319\(g\)\(9\)](#). Significantly, in that action, "the validity, amount and appropriateness of ...[the] penalty shall not be subject to review." *Id.*

Questions and Comments

1. **Jury Trial:** When courts review administrative penalty orders, they generally limit review of the order to the record created by the agency and review the decision based on the arbitrary and capricious standard. In [Sasser v. Administrator, 990 F.2d 127 \(4th Cir. 1993\)](#), the Fourth Circuit rejected an argument that such a procedure violated the order recipient's 7th Amendment right to a jury trial. The court concluded that the case involved a dispute over "statutory public rights," to which the 7th Amendment did not apply.
2. **Civil Penalty Policy:** While the statute outlines criteria for EPA and the Corps to consider in determining the amount of administrative penalties, EPA has also developed a civil penalty policy to establish uniformity and consistency in calculating administrative and judicial civil penalties for Clean Water Act Section 404 violations. See [U.S. Environmental Protection Agency, Issuance of Revised CWA Section 404 Settlement Penalty Policy \(Dec. 21, 2001\)](#). The policy identifies the **minimum** amounts that the agency should recover in **settlements**, but acknowledges that the agency will seek and attempt to recover more if settlement is not possible. The policy creates the following formula for

determining the minimum civil penalty:

Penalty = Economic Benefit + (Preliminary Gravity Amount +/- Gravity Adjustment Factors) - Litigation Considerations - Ability to Pay - Mitigation Credit for SEPs.

Id. at 8. Under the formula, EPA is primarily concerned with ensuring that the violator does not receive any economic benefit by violating the statute. The agency calculates the economic benefit using a computer model (BEN). *Id.* at 9. In calculating and adjusting the “gravity” of the violation, the agency assigns numerical rankings to factors such as harm to human health or welfare, extent of impacts, severity of impacts, duration of violation, degree of culpability, compliance history of the violator, and the need for deterrence, among others. *Id.* at 9-15. After determining an appropriate penalty based on the economic benefit and gravity factors, the agency may reduce the penalty that it is seeking based on litigation considerations (i.e. weaknesses in the case), the ability of the violator to pay, and the violator’s agreement to implement a supplemental environmental project (SEP). SEPs are “environmentally beneficial projects that a violator agrees to undertake as part of a settlement, but is not otherwise legally obligated to perform.” *Id.* at 20. Thus, EPA may be willing to reduce the penalty it assesses a violator when the violator agrees to take an environmentally beneficial action that the agency could not have forced them to take otherwise. . During the Trump Administration, the Department of Justice issued a [memo](#) prohibiting agencies from including SEPs in settlements, but that decision was [reversed](#) by the Biden Administration shortly after President Biden took office.

3. **After the fact permits:** In addition to the administrative options outlined above, when the Corps discovers an illegal discharge of dredged or fill material, it can issue an “after the fact” permit to authorize the discharge, which protects the violator from further enforcement action. See [33 C.F.R. § 326.3\(e\)](#). As noted in Chapter 6, *supra*, the illegal discharger must follow the normal permit application procedures, the Corps processes the application through the normal procedures for individual permits, and EPA retains the right to veto the permit. The Corps regulations provide, though, that the Corps will not accept an after the fact permit application when the district engineer determines that legal action is appropriate, or where federal, state or local regulatory agencies have initiated litigation against the applicant. *Id.*

B. Judicial Enforcement - Civil and Criminal

While the Corps and EPA will address most violations through administrative processes, they also have judicial enforcement tools, and they do not have to pursue administrative

Resources

[EPA Region 9 Wetlands Enforcement](#)

Example of a Wetlands Enforcement [Consent Decree](#)

DOJ ENRD [Proposed Consent Decrees](#) (not just wetlands)

EPA - [Summary of Case Settlements](#) (not just wetlands)

remedies before seeking judicial relief. Similarly, they can pursue judicial relief even though they have already pursued administrative remedies.

The Clean Water Act authorizes the government to seek a broad range of civil and criminal penalties for violations of the statute, although the Department of Justice brings the lawsuits on behalf of the agencies. While EPA's regulations do not indicate precisely the violations that would motivate the agency to refer a case to the Department of Justice for judicial enforcement, the Corps' regulations suggest that appropriate cases for referral involve violations that are "willful, repeated, flagrant, or of substantial impact." See [33 C.F.R. § 326.5](#). In addition, in 1990, EPA and the Corps issued guidance regarding judicial enforcement priorities. See [U.S. Army Corps of Engineers and U.S. Environmental Protection Agency, Guidance on Judicial Civil and Criminal Enforcement Priorities \(Dec. 1990\)](#). As part of that guidance, the agencies suggested that enforcement personnel should consider the following factors when deciding whether to refer a case for civil enforcement: (1) quality of the waters affected; (2) impact of the discharge; (3) culpability of the violator; (4) deterrence value; (5) benefit from the violation; and (6) equitable considerations. *Id.*

1. Civil Enforcement

The Clean Water Act authorizes EPA and the Corps to seek civil penalties and injunctive relief for any violations of the Clean Water Act, the terms and conditions of any Section 404 permit, or any administrative orders issued under the Act. See 33 U.S.C. §§ [1319\(b\), \(d\)](#); [1344\(s\)](#). The lawsuits must be brought in federal district court in the district in which the defendant is located, resides, or does business, and the government must notify the state where the discharge occurs when the government files the suit. *Id.* The government will normally refrain from filing suit if a state is pursuing an enforcement action, but the statute does not preclude federal enforcement simply because a state is also bringing an enforcement action.

In an enforcement action under the Clean Water Act, courts can award penalties up to \$37,500 per day per violation. *Id.* Although the statute originally authorized a maximum penalty of \$25,000 per day per violation, the amount has been increased over time in accordance with the Federal Civil Penalties Inflation Adjustment Act, 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act, 31 U.S.C. § 3701. See [40 C.F.R. § 19.4](#). The government takes the position, and several courts have agreed, that each day that dredged or fill material remains in place constitutes a separate day of violation. See, e.g. *United States v. Cumberland Farms of Conn., Inc.*, 647 F.Supp. 1166, 1183 (D. Mass. 1986), *aff'd* [826 F.2d 1151 \(1st Cir. 1987\)](#), *cert denied* 484 U.S. 1061 (1988); *United States v. Tull*, 615 F. Supp. 610, 626 (E.D. Va. 1983), *aff'd* [769 F.2d 182 \(4th Cir. 1985\)](#), *rev'd on other grounds* 481 U.S. 412 (1987). Under this "continuing violation" theory, therefore, if a defendant illegally filled wetlands, the defendant would be subject to \$37,500 penalties not only for each day during which the filling occurred, but also for each day during which the fill remained in place.

Just as the statute outlines factors for the agencies to consider in determining an appropriate administrative penalty amount, the statute identifies a similar list of factors that courts should consider in determining the amount of civil penalties. The statute directs courts to consider the following factors in setting civil penalties: “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.” See 33 U.S.C. §§ [1319\(d\)](#); [1344\(s\)](#). Since the factors outlined in the statute are similar for administrative and judicial penalties, the Department of Justice relies on the same EPA civil penalty policy in judicial settlement negotiations as the agency relies on in administrative settlement negotiations. Ultimately, the penalties that are recovered are paid into the general fund of the United States Treasury, and are not paid to EPA, the Corps or the Department of Justice.

In addition to civil penalties, the statute authorizes courts to award declaratory relief and temporary and permanent injunctive relief. See 33 U.S.C. §§ [1319\(b\)](#), [\(d\)](#); [1344\(s\)](#). Pursuant to that authority, courts frequently order defendants to cease any discharging activities, remove dredged or fill material, and to restore sites where dredged or fill material has been discharged to their condition before the filling activity occurred. If restoration is not possible, the government will normally seek appropriate mitigation.

The statute does not include a statute of limitations, so courts apply the general five year limit on federal civil penalty actions to Clean Water Act civil penalty suits. See [28 U.S.C. § 2462](#). However, courts have held that the statute does not begin to run until the government becomes aware of the violation, see *United States v. Hobbs*, 736 F.Supp. 1406 (E.D. Va. 1990), *aff’d* [947 F.2d 941 \(4th Cir. 1991\)](#), *cert. denied* 504 U.S. 940 (1992), and the statute does not apply to suits for injunctive relief, so courts can order defendants to cease prohibited activities, remove dredged or fill material, and restore wetlands, even though the five year statutory time period for a civil penalty action has expired. See [United States v. Banks](#), [115 F.3d 916, 919 \(11th Cir. 1997\)](#).

Although most cases settle before trial, if a Clean Water Act enforcement action reaches the trial stage, the Supreme Court has held that defendants have a constitutional right to a jury trial in those actions. See [Tull v. United States](#), [481 U.S. 412 \(1987\)](#). However, the *Tull* Court only held that defendants have a right to a jury trial on the issue of liability. *Id.* As a result, the judge, rather than the jury, determines the appropriate remedy, regardless of whether the remedy is a civil penalty or injunctive relief. In addition, if the government is only seeking injunctive relief, there is no constitutional right to a jury trial, even on liability, since the Seventh Amendment right is limited to actions at common law. See [U.S. Const., Amend. VII](#).

As noted above, in an enforcement action, the government has the burden of proving all of the elements of a Section 301/404 violation, while the defendant has the burden of proving any affirmative defenses. The statute does not identify specific affirmative

defenses, but a defendant might argue that their activity is exempt from the Section 404 permit requirement or is covered by a general permit. In addition, to the extent that a permittee is complying with a Section 404 permit, including a general permit, the Clean Water Act provides that the permittee is complying with Sections 301, 307 and 403 of the Act, for purposes of federal enforcement actions and citizen suits. See [33 U.S.C. § 1344\(p\)](#). To the extent that EPA or the Corps would like to rely on guidance documents to assist them in prosecuting wetlands violations, a January, 2018 Justice Department [memorandum](#) makes that difficult, as it provides that the Department will not bring enforcement actions in cases where guidance documents are used as the basis for proving violations of law. See Amena H. Saiyid, *Justice Department Memo Muddies Enforcement of Water Permits*, 49 Env. Rep. 250 (Feb. 16, 2018).

A defendant cannot avoid an enforcement action by arguing that the application of the Clean Water Act constitutes a taking of their property. See [United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 \(1985\)](#). While the defendant can bring a separate action for a taking of property, see Chapter 11, *infra*, the claim is not a defense to an enforcement action.

Research Problems

While DOJ makes pending consent decrees available online, once the decrees are finalized, it is more difficult to search for them online. Consent decrees involving EPA are available on Lexis and on EPA's website, as noted above. Consent decrees involving the Corps are not available on Lexis, Westlaw, or the agency's website. Without using Lexis, please answer the following questions:

1. In 2012, the U.S. and defendants resolved the case of *United States v. Snowden*, involving illegal fill of wetlands at Falls Creek Farm in Sterling, Connecticut, through a consent decree. What was the amount of civil penalties that the defendants agreed to pay? What are the amounts of stipulated penalties that the parties agreed upon in the event that the defendants fail to timely fulfill requirements of the consent decree?

2. Pursuant to the consent decree in *United States v. Savoy Senior Housing Corporation*, what is the total amount of money that the defendants agreed to pay as civil penalties and to fund the injunctive relief required by the decree? Can representatives of the United States enter the defendants' property to oversee the restoration activities under the consent decree?

2. Criminal Enforcement

The final, and most severe, enforcement option that the government can pursue is criminal prosecution. The Clean Water Act

Resources

[Search EPA Database of Criminal Prosecutions](#)
[EPA Criminal Enforcement Web Page](#)

authorizes criminal prosecution for negligent violations, knowing violations, and knowing endangerment (placing someone in danger of death or injury). See [33 U.S.C. §§ 1319\(c\)\(1\)-\(3\)](#). For purposes of criminal sanctions, the statute defines “person” to include “responsible corporate officers”. *Id.* § 1319(c)(6). The government normally refrains from bringing criminal enforcement actions unless the defendant’s action caused significant environmental harm, the defendant continued to engage in illegal conduct after repeated warnings from the Corps or EPA, or the defendant will receive significant economic benefit from continuing to violate the statute. Conversely, when a person self-reports a violation, discovered a violation through an environmental audit, or implements compliance programs to improve compliance after discovering a violation, the government will be less likely to pursue a criminal action against the person. See [U.S. Department of Justice, Environment and Natural Resources Division, *Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator* \(July 1, 1991\)](#). The government generally prefers to prosecute high visibility cases, to maximize the deterrent effect of the prosecution.

Courts can impose fines between \$2,500 and \$25,000 per day per violation and imprisonment up to one year for **negligent** violations of the Clean Water Act. *Id.* § 1319(c)(1). For **knowing** violations, courts can impose fines that are twice as high and imprisonment for up to three years. *Id.* § 1319(c)(2). Finally, for **knowing endangerment**, courts can impose fines up to \$250,000 per violation (or \$1,000,000 per violation for organizations) and imprisonment for up to fifteen years. *Id.* § 1319(c)(3). In all cases, the maximum penalties are doubled for violations committed after the defendant has been previously convicted. See [33 U.S.C. §§ 1319\(c\)\(1\)-\(3\)](#). According to EPA’s website, the most significant criminal wetlands case involved the development of a subdivision that impacted 260 acres. In that case, *United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008), the court fined Robert Lucas Jr, his daughter and his engineer \$15,000 each, assessed restitution of \$1,407,400 for each defendant, and fined Lucas’ two companies \$5,300,000. See [U.S. Environmental Protection Agency, *Section 404 Enforcement*](#).

The following case examines when courts will consider a violation to be a **knowing** violation under the Clean Water Act.

United States v. Wilson

133 F.3d 251 (4th Cir. 1997)

Resources for the Case

[Unedited opinion](#) (From Justia)

[Google Map of all the cases in the coursebook](#)

NIEMEYER, Circuit Judge, writing for the court on parts I, II, V and VI:

The defendants in this case were convicted of felony violations of the Clean Water Act for knowingly discharging fill and excavated material into wetlands of the United States

without a permit. On this appeal they challenge: (1) the validity of federal regulations purporting to regulate activities that "could affect" interstate commerce; * * * [and] (4) the district court's interpretation of the mens rea required for a felony conviction under the Act * * * ;

Because we conclude that 33 C.F.R. § 328.3(a)(3) (1993) (defining waters of the United States to include those waters whose degradation "could affect" interstate commerce) is unauthorized by the Clean Water Act as limited by the Commerce Clause and therefore is invalid, and that the district court erred in failing to require mens rea with respect to each element of an offense defined by the Act, we reverse and remand for a new trial.

In February 1996, after a seven-week trial, a jury convicted James J. Wilson, Interstate General Co., L.P., and St. Charles Associates, L.P., on four felony counts charging them with knowingly discharging fill material and excavated dirt into wetlands on four separate parcels without a permit, in violation of the Clean Water Act, 33 U.S.C. §§ 1319(c)(2)(A) & 1311(a). The district court sentenced Wilson to 21 months imprisonment and 1 year supervised release and fined him \$1 million. It fined the other two defendants \$3 million and placed them on 5 years probation. The court also ordered the defendants to implement a wetlands restoration and mitigation plan proposed by the government.

Wilson, a land developer with more than 30 years of experience, was the chief executive officer and chairman of the board of directors of Interstate General. He was personally responsible for various decisions relevant to the defendants' convictions in this case. Interstate General was a publicly traded land development company with 340 employees, 2,000 shareholders, and assets of over \$100 million. It was the general partner of St. Charles Associates, a limited partnership that owned the land being developed within the planned community of St. Charles, which lies between the Potomac River and the Chesapeake Bay in Charles County, Maryland. The convictions involve discharges onto four parcels that are part of St. Charles.

* * *

At trial, the government introduced evidence that during the period from 1988 to 1993, the defendants attempted to drain at least three of the four parcels of land involved in this case by digging ditches. The excavated dirt was deposited next to the ditches--a process known as "sidecasting." The government also introduced evidence that the defendants transported a substantial amount of fill dirt and gravel and deposited it on three of the parcels; only one parcel involved sidecasting without the addition of fill. The government presented evidence that all four of these parcels contained wetlands and that the defendants failed to obtain permits from the Army Corps of Engineers * * * prior to making efforts to drain and fill the parcels.

Although the parcels in question were not, because of neighboring development, located in pristine wilderness areas, the government presented substantial evidence

about the physical characteristics which identified them as wetlands, including testimonial and photographic evidence of significant standing water, reports of vegetation typical to hydrologic soils, and infrared aerial photographs showing a pattern of stream courses visible under the vegetation. Evidence also showed that the properties were identified as containing wetlands on public documents including the National Wetlands Inventory Map and topographical maps of Charles County and the State of Maryland. The government demonstrated that water from these lands flowed in a drainage pattern through ditches, intermittent streams, and creeks, ultimately joining the Potomac River, a tributary of the Chesapeake Bay.

The government also produced evidence of the defendants' awareness of the physical conditions of their land. The very development work underlying the present prosecution involved efforts to improve the drainage of the areas to make building feasible. Substantial fill was later added in an attempt to raise the ground level of the parcels. Some construction work involved repeated reshoring efforts because of wetness-induced ground shifting and collapse. Evidence was introduced that bids for work at one of the parcels actually contained different price quotations for wet and dry work because of the level of moisture on parts of the property. And witnesses gave testimony that despite the attempts at drying the property through ditching and draining or through the pumping off of standing water, and even after hundreds of truck loads of stone, gravel and other fill had been added to three of the parcels, wetland-loving plants continued to sprout through the fill.

Witnesses also testified at trial that a private consulting firm retained by the defendants informed the defendants that its observations of conditions on the parcels led it to conclude that the parcels contained wetlands. The firm recommended seeking permits from the Army Corps of Engineers before beginning development. The defendants were also contacted by Charles County zoning authorities concerned about the possible presence of wetlands in the vicinity of the new construction projects. Finally, the government presented evidence that even as the defendants complied with an Army Corps of Engineers order to cease construction on one of the parcels and remove fill dirt that had already been added, they continued to develop the other parcels without notifying the Corps or making an effort to ascertain whether a permit was necessary.

The defendants introduced contradictory evidence suggesting that whether the four parcels were wetlands under the Clean Water Act was unclear. They offered evidence which they claim showed that the Army Corps of Engineers was inconsistent in asserting jurisdiction over the parcels in question, claiming that the Corps took action on only one parcel, even though it had been aware for years of the ongoing development. Defendants also introduced an internal Corps memorandum that stated that while the areas in the St. Charles community have the "necessary parameters ... to be considered wetlands when using the Corps Wetland Delineation Manual," "it is not clear to me that these areas can be interpreted as 'waters of the United States' within the meaning or purview of Section 404." That memo suggested obtaining guidance from higher authority as to what constitutes "waters of the United States." The defendants also

introduced evidence indicating their belief that they had legally drained three parcels prior to introducing fill, and that no fill was discharged into the fourth which was being drained by the digging of ditches.

Following 15 hours of deliberation, the jury convicted all defendants of the four felony counts. Because of the felony convictions, the defendants were not convicted of four misdemeanor counts for the "negligent" violations of the Clean Water Act involving the same parcels.

* * *

V

The defendants * * * contend that the district court erred in instructing the jury about the criminal intent, the "mens rea," required to prove a felony violation of the Clean Water Act. They argue (1) that the statute requires a showing that they were aware of the illegality of their conduct, and (2) that the required mens rea, however it is defined, must accompany each element of the offense. They note that the district court's jury instructions comported with neither requirement.

The district court charged the jury that the government must prove each of four elements of the offense beyond a reasonable doubt:

First, that is the defendant knowingly ... discharged or caused to be discharged a pollutant.

Second, that the pollutant was [dis]charged from a point source.

Third, that the pollutant entered a water of the United States; and fourth, that the discharge was unpermitted.

The court defined an act as "knowingly" done "if it is done voluntarily and intentionally and not because of ignorance, mistake, accident or other innocent reason." For each felony count, the court stated,

the government must prove that the defendants knew, one, that the areas which are the subject of these discharges had the general characteristics of wetland; and, two, the general nature of their acts. The government does not have to prove that the defendants knew the actual legal status of wetlands or the actual legal status of the materials discharged into the wetlands. The government does not have to prove that the defendants knew that they were violating the law when they committed their acts. (Emphasis added).

Finally, the court instructed on willful blindness, which it stated could stand in the place of actual knowledge.

Determining the mens rea requirement of a felony violation of the Clean Water Act requires us to make an interpretation based on "construction of the statute and ... inference of the intent of Congress." * * * We thus begin our analysis by looking at the language of 33 U.S.C. § 1319, as well as its place in the larger statutory structure.

Section 1319(c)(2)(A), making an illegal discharge of a pollutant a felony if accompanied by the defined mens rea, provides: "Any person who knowingly violates section 1311 ... shall be punished." (Emphasis added). Section 1311 makes unlawful "the discharge of any pollutant" without a permit. And finally, § 1362 defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source" and defines "navigable waters" as "waters of the United States." * * * Within that statutory structure, we must determine the nature of intent that the statute requires for each element of the offense.

On a first reading of the clause, "any person who knowingly violates section 1311 shall be punished," the order of words suggests that "knowingly" modifies "violates" so that the clause imposes punishment only when one violates the statute with knowledge that he is violating it, i.e. with knowledge of the illegality of his conduct. But the statute's structure, the architecture of which includes a series of sections incorporating other sections, its legislative history, and the body of Supreme Court jurisprudence addressing mens rea of federal criminal statutes caution that our first reading may not so simply lead us to the proper interpretation.

Our first concern is a pragmatic one engendered by the overall structure of the Clean Water Act. The conduct that is made criminal with the "knowingly violates" language encompasses numerous elements from other substantive statutory sections. See 33 U.S.C. § 1319(c)(2)(A). Each of those substantive sections may also be enforced with other civil and criminal penalties if the actions proscribed therein are performed with different scienter. See *generally* 33 U.S.C. § 1319. If Congress intended that the "knowing" mens rea accompany each element of the offense, as we have previously assumed is the case, * * * the task of inserting the alternative mens rea requirements for the multiple civil and criminal enforcement provisions within each substantive prohibition would require confusingly repetitious drafting. A shorthand method of accomplishing the same purpose thus would be to insert "knowingly" in a single place where the conduct is made criminal, in this case, § 1319(c)(2)(A). See *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 562 (1971) (the phrase "knowingly violates [applicable regulations]" was "a shorthand designation for specific acts or omissions which violate the act").

Our second and more profound problem with our first-blush interpretative proposal arises from a recognition of two general common law principles regarding mens rea. First, in Anglo-American jurisprudence, criminal offenses are ordinarily required to have a mens rea. * * * This supposition is based on "the contention that an injury can amount to a crime only when inflicted by intention." * * * Indeed, statutes requiring no mens rea

are generally disfavored. * * * But a second and deeply-rooted common law principle is that ignorance of the law provides no defense to its violation. * * * Thus, while some level of deliberateness is usually required to impose criminal punishment, it is also usually true that the defendant need not appreciate the illegality of his conduct. Applying those principles to a statute similar to the one before us, the Supreme Court in *International Minerals* declined "to attribute to Congress the inaccurate view that [the] Act requires proof of knowledge of the law, as well as the facts." * * * In that case, the statute--which provided that whoever "knowingly violates any such regulation" shall be fined or imprisoned--was held to be a "shorthand designation" for knowledge of the specific acts or omissions which violate the Act. * * * When so viewed, the Court noted, "the Act ... does not signal an exception to the rule that ignorance of the law is no excuse." * * * In light of these background rules of common law, we may conclude that mens rea requires not that a defendant know that his conduct was illegal, but only that he "know the facts that make his conduct illegal," * * * unless Congress clearly specifies otherwise. And this knowledge must generally be proven with respect to each element of the offense. * * *

Finally, our first-blush reading of the phrase "knowingly violates" is cast into doubt by the legislative history, which suggests that Congress, by amending the statute in 1987, intended to facilitate enforcement of the Clean Water Act and increase the impact of sanctions by creating a separate felony provision for deliberate, as distinct from negligent, activity. Before the amendment, the Act imposed a single set of criminal penalties for "willful or negligent" violations. See 33 U.S.C. § 1319(d)(1) (1986). The 1987 amendments, however, segregated the penalties for negligent violations, making them misdemeanors, and added felony provisions for knowing violations. See 33 U.S.C. § 1319(c)(1)(A) ("negligent" violation) & § 1319(c)(2)(A) ("knowing" violation). Thus, before 1987, the statute proscribed "willful or negligent" violations and after 1987 it proscribed separate "knowing" and "negligent" violations. In changing from "willful" to "knowing," we should assume that Congress intended to effect a change in meaning. * * * Because "willful" generally connotes a conscious performance of bad acts with an appreciation of their illegality, * * * we can conclude that Congress intended to provide a different and lesser standard when it used the word "knowingly." If we construe the word "knowingly" as requiring that the defendant must appreciate the illegality of his acts, we obliterate its distinction from the willfulness.

Based upon these interpretative guides, then, we cannot conclude that Congress intended to require the defendant to know that his conduct was illegal when it stated that "Any person who knowingly violates [incorporated statutory sections] ... shall be punished." The ready alternative interpretation is that Congress intended that the defendant have knowledge of each of the elements constituting the proscribed conduct even if he were unaware of their legal significance. This interpretation would not carry with it the corollary that the defendant's ignorance of his conduct's illegality provides him a defense, but would afford a defense for a mistake of fact. Thus, if a defendant thought he was discharging water when he was in fact discharging gasoline, he would not be guilty of knowingly violating the act which prohibits the discharge of pollutants.

See *United States v. Ahmad*, 101 F.3d 386, 393 (5th Cir.1996); see also *International Minerals*, 402 U.S. at 563-64 * * *

Accordingly, we hold that the Clean Water Act * * * requires the government to prove the defendant's knowledge of facts meeting each essential element of the substantive offense, * * * but need not prove that the defendant knew his conduct to be illegal * * *.

In light of our conclusion that the government need only prove the defendant's knowledge of the facts meeting each essential element of the substantive offense and not the fact that defendant knew his conduct to be illegal, in order to establish a felony violation of the Clean Water Act, we hold that it must prove: (1) that the defendant knew that he was discharging a substance, eliminating a prosecution for accidental discharges; (2) that the defendant correctly identified the substance he was discharging, not mistaking it for a different, unprohibited substance; (3) that the defendant knew the method or instrumentality used to discharge the pollutants; (4) that the defendant knew the physical characteristics of the property into which the pollutant was discharged that identify it as a wetland, such as the presence of water and water-loving vegetation; (5) that the defendant was aware of the facts establishing the required link between the wetland and waters of the United States;* and (6) that the defendant knew he did not have a permit. This last requirement does not require the government to show that the defendant knew that permits were available or required. Rather, it, like the other requirements, preserves the availability of a mistake of fact offense if the defendant has something he mistakenly believed to be a permit to make the discharges for which he is being prosecuted.

While we thus reject the defendants' challenge to the district court's instructions based on the contention that the government must prove awareness of the illegality of their conduct, we agree that the instructions did not adequately impose on the government the burden of proving knowledge with regard to each statutory element. For this reason, a new trial is required.

Questions and Comments

1. Compare the instructions given by the trial court regarding the prima facie case to the instructions required by the appellate court. Do you understand the difference?
2. **Mistake of fact v. mistake of law:** Note that the Court suggests that a mistake of fact defense may still be available in a criminal prosecution for a wetlands violation, even though a mistake of law defense is not. If the wetlands at issue were not adjacent to a traditionally navigable water, could a defendant avoid criminal liability by providing evidence that the defendant was not aware that the wetlands had any connection to other waters of the United States? What if the defendant was aware that the wetlands were adjacent to a non-navigable stream,

but the defendant did not know that the stream had a “significant nexus” to a traditionally navigable water?

3. **Administrative orders and notice:** The court notes that the defendants were complying with an administrative order from the Corps for filling wetlands at the same time that they continued to discharge fill material on other wetlands on the property. One factor that may motivate the government to bring a criminal action is a defendant’s violation of an administrative order. However, if the defendant in *Wilson* was not violating the order, do you understand why the issuance of the order is relevant to the question of whether the defendant was “knowingly” violating the Clean Water Act?
4. **Standard of proof:** Note that the district court required the government to prove each element of the case beyond a reasonable doubt. In criminal prosecutions under the Clean Water Act, all of the normal protections afforded to criminal defendants apply.
5. **Other circuits:** The Ninth Circuit interpreted the knowing requirement of the Clean Water Act in a manner similar to the *Wilson* court in a case that did not involve discharges into wetlands. See [United States v. Weitzenhoff, 35 F.3d 1275 \(9th Cir. 1994\)](#). The Second Circuit adopted a similar reading of the statute, in another case that didn’t involve wetlands, but extended liability to persons who deliberately and consciously avoided knowledge of the facts surrounding a violation. See [United States v. Hopkins, 53 F.3d 533 \(2d Cir. 1995\)](#).
6. **Press coverage of criminal enforcement:** While EPA limits criminal enforcement actions and tries to select high profile cases that will deter violators, criminal wetlands prosecutions can lead to bad press for EPA, regardless of the nature of the defendant’s actions. For instance, in the early 1990s, EPA brought a criminal prosecution against John Pozgai, a landowner who bought wetlands at a reduced price, knowing that they were wetlands, and who filled 4 acres of wetlands with 400 truckloads of fill, flooding his neighbors properties, while ignoring cease and desist letters from the Corps, as well as a temporary restraining order from federal district court. See Royal C. Gardner, *Mitigation in Wetlands Law and Policy: Understanding Section 404* 170 (American Bar Association, Section on Environment, Energy and Resources 2005). Despite his conduct, the local press generally vilified the agency as jackbooted thugs unfairly prosecuting a Hungarian immigrant and violating his private property rights. *Id.*
7. **Public involvement in settlement of enforcement actions:** When DOJ settles environmental enforcement cases and prepares a consent decree, the Department provides public notice of the consent decree and allows the public to comment on the decree for 30 days. See [28 C.F.R. § 50.7](#). Among other places, the proposed consent decrees are available on the website for the Environment and natural Resources Division of the Department. See [U.S. Department of](#)

[Justice, Environment and Natural Resources Division, Welcome to ENRD.](#) Depending on the comments, the Department may decide to withdraw from the settlement or proceed to file the order with the court. *Id.*

Interview



Stephen Samuels, an Assistant Section Chief in the Environmental Defense Section of the Environment and Natural Resources Division of the U.S. Department of Justice, explains how federal wetland enforcement priorities are set. ([YouTube](#))

Hypotheticals

1. Oliver Douglas recently purchased 100 acres of farmland in Springfield, Iowa from Virgil Haney. Haney was aware that there were several prairie pothole wetlands on the property and he did not farm on those sections of the property. However, he did not ever mention anything to Douglas about the wetlands. Douglas moved to Iowa from New York City and was unfamiliar with farming or prairie potholes. At the time that he bought the property, there was no water in the potholes and they did not look like wetlands to Douglas' untrained eye. Although the plants that were growing in the wetlands were wetland plants, Douglas did not recognize them as such. Similarly, he did not know that the water marks on a few trees near the wetlands were evidence of periodic inundation of the area. Since his wife, Lisa, was not pleased with the size of the small farmhouse on the property, Douglas hired a construction company to build an addition to the house. When the construction company dug a new basement and foundation, Douglas directed the company to dump the dirt from the construction into several depressional areas on the property (the prairie potholes) to level them out. If EPA, upon learning about Douglas' activities, brought a criminal action against Douglas for "knowingly" violating Section 301 of the Clean Water Act, could he likely be held liable for criminal fines and imprisonment?

2. Assume that there was no continuous surface or groundwater connection between the prairie potholes in question 1 and any other traditionally navigable water, but that the potholes provided flood protection and filtered pollutants out of water that eventually flowed into the Springfield River, a traditionally navigable water. In addition, many tourists visited Springfield each fall to observe migratory birds that relied on the potholes in the region as temporary habitat during their migration. If Douglas was aware that the potholes were wetlands, but was not aware of the connections between the wetlands and the Springfield River or the migratory birds, and Douglas directed the construction company to dump the dirt into the potholes, could he likely be held criminally liable for "knowingly" violating Section 301 of the Clean Water Act?

3. Assume that Douglas was aware that the potholes were wetlands and a representative of the Corps of Engineers visited his property while he was building the house and told him that he could not dump the dirt from the construction into the wetlands. If Douglas' attorney incorrectly informed him that the fill was authorized by a general permit that the Corps had issued and Douglas relied on that information, could he likely be held criminally liable for "knowingly" violating Section 301 of the Clean Water Act?

Hypothetical

As outlined above, the Federal government has many enforcement options when a person fills wetlands in violation of the Clean Water Act. The following hypothetical focuses on the choice of an appropriate enforcement tool.

In March 2008, Wilbur Dunphy contacted the Corps of Engineers because he planned to purchase property near Interstate 70 west of Columbia, Missouri to build a shopping center and he was concerned that the construction might impact some wetlands on the property. Representatives of the Corps visited the site and verbally told Dunphy that the wetlands on the property were not connected, in any way, to jurisdictional waters, and were not “waters of the United States” that were regulated under the Clean Water Act. Although there were many other parcels of land available that did not have any wetlands on them, Dunphy preferred the parcel that the Corps examined because it was located adjacent to an exit off the Interstate. If the wetlands on the parcel were “waters of the United States,” it is unlikely that Dunphy would have been able to acquire a permit to authorize the shopping center construction.

Based on the information that Dunphy received from the Corps, he bought the property and filled 50 acres of wetlands to build the shopping center. Six years later, a local citizens group complained to EPA that the construction of the shopping center was contributing to pollution problems in the nearby Missouri River, a traditionally navigable water. Although the wetlands that were filled did not have a continuous surface connection to the Missouri River, a series of ditches, gullies, and intermittent streams had connected the wetlands to the Missouri River. In fact, a few years before Dunphy had contacted the Corps, and unbeknownst to the Corps, a Natural Resource Conservation Service employee had examined the site and had collected data to demonstrate that the wetlands decreased sedimentation, pollutants and flood waters to the Missouri River. Before the citizens group contacted EPA, the agency was not aware that any filling activity had taken place on Dunphy’s property. The citizens group believed that recent major floods near Columbia would not have been as extreme if the wetlands had not been destroyed. The citizens group also believes that the wetlands that were destroyed had provided habitat for several different species of endangered amphibians, which were killed when the wetlands were converted.

At the same time that the citizens group complained to EPA about the filling activity, they complained to the Corps. A representative of the Corps met with the citizens group and, after reviewing the data collected by the Natural Resource Conservation Service employee, told the members of the citizens group that it is often difficult, after the *Rapanos* decision, to demonstrate that wetlands adjacent to non-navigable waters are “waters of the United States.” Nevertheless, the representative of the Corps told the citizens group that she would explore enforcement options with management at the District.

The shopping center is very profitable and is currently worth over \$15 million. It is an economic hub for the area and provides hundreds of jobs for local residents. It would be impossible to restore the wetlands on the property at this time without tearing down major portions of the shopping center. Which agency, if any, should pursue an enforcement action at this time? If the Corps or EPA pursue an enforcement action, what relief should they seek? Should the agency pursue administrative remedies, judicial civil remedies, or judicial criminal remedies? What are the advantages and disadvantages of each option?

C. Citizen Suits

Like many federal environmental statutes, the Clean Water Act anticipates that federal or state governments will take the lead in enforcing the law, but allows citizens to file lawsuits to enforce the law in the absence of government enforcement. Thus, citizen suit authority serves multiple purposes. In some cases, the threat of a citizen suit may spur the government to take enforcement action. In other cases, citizen suits fill the enforcement gap when the government fails to take action against persons who violate the Clean Water Act. The language of the citizen suit provision of the Clean Water Act is reproduced below:

Resources

[CWA citizen suit primer and model complaint](#)

- Stack & Associates

[Citizens Guide to CWA Enforcement](#) - Ohio Environmental Council

Example of CWA citizen suit complaint - plaintiffs - [Quad Cities Waterkeeper](#)

Except as provided in subsection (b) of this section * * * **any citizen** may commence a civil action on his own behalf

(1) against **any person** (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is **alleged to be in violation** of (A) an **effluent standard or limitation** under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the **Administrator** where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is **not discretionary** with the Administrator.

[33 U.S.C. § 1365\(a\)](#).

1. Suits allowed

As is apparent from the language above, the statute authorizes citizen suits in two types of situations: (1) suits against anyone who violates an effluent standard or limit or administrative order regarding an effluent standard or limit; and (2) suits against EPA for failing to perform a non-discretionary duty. As noted above, there are few mandatory requirements for EPA in the Clean Water Act Section 404 program, so there are very few citizen suits based on that authority. Most of the Clean Water Act wetlands citizen suits are brought under Section 505(a)(1), 33 U.S.C. § 1365(a)(1), against persons who violate effluent standards or limits or orders related to those standards or limits.

For purposes of the citizen suit provision, the Clean Water Act defines “**effluent standard or limitation**” to include Section 401 certifications and actions that violate section 301(a) of the Act, among other things. See [33 U.S.C. § 1365\(f\)\(1\),\(5\)](#). Thus, **citizens** can sue any persons who fill wetlands **without a Section 404 permit**, if one is required, since the persons would be violating an effluent standard or limitation by violating Section 301(a). While Section 505(a)(1) allows citizens to sue persons who fill wetlands **without a permit**, it is not clear that the provision authorizes them to sue persons who **have a Section 404 permit** (including general permit) and who **violate the terms or conditions of the permit**. The Clean Water Act explicitly defines “effluent standard or limitation” to include a **Section 402 (NPDES) permit** or conditions in a Section 402 permit, but it does not explicitly define the term to include **Section 404 permits**, so some courts have held that citizens cannot sue persons who violate the terms or conditions of a Section 404 permit. See [Atchafalaya Basinkeeper, et al. v. Chustz, 682 F.3d 356 \(5th Cir. 2012\)](#); [Northwest Environmental Defense Center v. U.S. Army Corps of Engineers, 118 F. Supp. 2d 1115 \(D. Ore. 2000\)](#).

Since the statute limits citizen suits to situations where persons are **alleged to be in violation**, citizens cannot sue persons who violated the Clean Water Act **in the past**, but are **no longer violating it at the time of the lawsuit**. See [Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, 484 U.S. 49, 64 \(1987\)](#). The Supreme Court has interpreted the “**alleged to be in violation**” language to limit citizen suit jurisdiction to cases where the plaintiff can “make a **good faith allegation of continuous or intermittent violation**” of an effluent standard or limit. *Id.* If the Clean Water Act violation challenged is not continuing or reasonably likely to recur after the date that the lawsuit is filed, courts will dismiss the citizen suit. *Id.* However, to the extent that litigants advance, and courts are willing to embrace, the government’s theory that each day that fill material remains in place constitutes a separate day of violation, plaintiffs should be able to avoid the *Gwaltney* limit for cases where the illegal fill remains in place.

Section 505(a)(1) also clarifies that **persons** who can be sued for violating effluent standards or limits include the United States, federal agencies, states and state agencies (subject to limits imposed by the 11th Amendment). However, the remedies available in those citizen suits are limited. Plaintiffs can only obtain **injunctive relief and “coercive” civil penalties** (fines imposed to induce agencies to comply with injunctions or other judicial orders designed to modify behavior prospectively) and not “punitive” civil penalties, when suing the federal government for filling wetlands without a permit. See [Department of Energy v. Ohio, 503 U.S. 607 \(1992\)](#) (interpreting the citizen suit provisions of the Clean Water Act and the Resource Conservation and Recovery Act, but not involving Section 404 violations). Further, the 11th Amendment likely prevents plaintiffs from bringing citizen suits against states to recover civil penalties, see [Seminole Tribe v. Florida, 517 U.S. 44 \(1996\)](#) (finding that Congress can only abrogate state immunity if Congress unequivocally expresses its intent to do so and acts pursuant to authority of the 14th Amendment), but plaintiffs can probably bring

citizen suits against **state officials** for **injunctive relief** (i.e. cessation of filling activities or restoration of wetlands) when a state or state agency is illegally filling wetlands. See [Ex Parte Young, 209 U.S. 123 \(1908\)](#); [Natural Resources Defense Council v. California Department of Transportation, 96 F. 3d 420 \(9th Cir. 1996\)](#).

2. Jurisdiction, Venue and Relief available

The Clean Water Act authorizes citizens to file their lawsuits in federal district court. See [33 U.S.C. § 1365\(a\)](#). When the plaintiff is alleging that the defendant is violating an effluent standard or limitation or an order regarding an effluent standard or limitation, the plaintiff must bring the suit in the district in which the source of the violation is located. *Id.* § 1365(c). The district courts can order persons violating effluent standards, limits, or orders to comply with those requirements and can order the Administrator to perform non-discretionary duties. *Id.* § 1365(a). In addition, the court can impose civil penalties on the defendant (subject to the limits discussed above for federal and state defendants). *Id.* As with government enforcement, though, the civil penalties are paid into the general fund of the United States Treasury and are not paid to the plaintiffs. The statute does not authorize the court to award any damages to plaintiffs, and there is no implied right of action for damages, so plaintiffs must rely on common law theories to recover any compensation for personal injury, property damage or similar injuries. See [Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 \(1981\)](#).

The statute also authorizes the court to award litigation costs, including reasonable attorneys fees and expert witness fees, to any **prevailing or substantially prevailing party** whenever the court determines an award is **appropriate**. *Id.* § 1365(d). In order to be a prevailing or substantially prevailing party, the party seeking costs must have succeeded on a significant issue in the litigation. See [Public Interest Research Group of New Jersey, Inc. v. Windall, 51 F.3d 1179 \(3d Cir. 1995\)](#) (Clean Water Act case that didn't involve wetlands). Prior to 2001, many courts held that a plaintiff could recover attorneys fees as a prevailing party when their lawsuit acted as a **catalyst** for a voluntary change in the defendant's conduct that achieved the outcome that the plaintiff desired to achieve in bringing the citizen suit. However, in [Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598 \(2001\)](#), a case involving the Americans with Disabilities Act and the Fair Housing Amendments Act, the Supreme Court held that a party must secure a judgment on the merits or a court-ordered consent decree, which can include a consent decree that enforces a settlement agreement, to recover attorneys' fees as a prevailing party.

3. Limits on citizen suits

Standing

Section 505(a) of the Clean Water Act authorizes **any citizen** to bring a citizen suit, and the statute defines a **citizen** as “a person or persons having an interest which is or maybe adversely affected.” See [33 U.S.C. § 1365\(g\)](#). While the statute authorizes a broad category of persons to sue, Congress cannot eliminate Article III standing requirements through legislation, so plaintiffs must still demonstrate that they have suffered or imminently will suffer an injury that was caused by the Clean Water Act violation about which they are suing and that the relief that they are seeking in the citizen suit (injunction, damages, etc.) will redress their injury. See [Friends of the Earth, Inc. v. Laidlaw Environmental Services, 528 U.S. 167, 181-183 \(2000\)](#) (noting that aesthetic injuries suffered by the plaintiff can suffice, as can injuries suffered by the plaintiff that are caused by the plaintiff’s reasonable concerns that the defendant’s conduct will cause harm). Depending on the facts of the case, a plaintiff may have a difficult time demonstrating that they have already been injured by the defendant’s conduct or that they will imminently be injured by the conduct, or that an injunction or civil penalties will redress their injuries.

As noted above, in order to demonstrate standing, plaintiffs normally also must show that their interest in the litigation is arguably within the zone of interests sought to be protected by the statute under which they are suing. However, this **prudential standing** requirement is less problematic for plaintiffs in the Clean Water Act context than the **Article III** standing (injury in fact) requirement. It is less problematic because it is an easy test to meet in most cases. In [Clarke v. Securities Industry Association, 479 U.S. 388, 399-400 \(1987\)](#), the Supreme Court held that standing will be denied under that test only if the plaintiff’s interests are “so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.” In [Bennett v. Spear, 520 U.S. 154 \(1997\)](#), the Supreme Court clarified that, in determining whether the zone of interests test is met, the court examines the purpose of the section of the statute under which the plaintiff is suing, rather than the general purposes of the statute. Thus, in a citizen suit alleging violations of Section 404, the plaintiff would have to demonstrate that their interests not simply marginally related to or inconsistent with the purposes of Section 404. When citizens are alleging environmental injuries caused by the defendant’s Section 404 violation, it is not difficult to demonstrate that the injuries are within the zone of interests sought to be protected by Section 404. However, if the plaintiffs are competitors of the defendants and are alleging that they have suffered economic harm caused by the violation, it may be more difficult to satisfy the zone of interest test.

It is likely, though, that the zone of interests test will not serve as a roadblock to citizen suits in any case because it probably does not apply at all in the Clean Water Act citizen suit context. Although Congress cannot eliminate Article III standing requirements through legislation, the Supreme Court held, in [Bennett v. Spear, 520 U.S. 154 \(1997\)](#), that Congress eliminated the “zone of interest” requirement for citizen suits under the

Endangered Species Act when it enacted a broadly worded citizen suit provision that authorized **any person** to sue for violations of the statute. Since Section 505 also broadly authorizes **any citizen** to sue, there is a strong argument available to plaintiffs that Congress eliminated the zone of interest requirement for citizen suits under the Clean Water Act, as well. However, in finding that the language of the Endangered Species Act citizen suit provision was broad enough to demonstrate Congress' intent to eliminate the "zone of interest" requirement for that statute, the Supreme Court pointed out that the language was broader than the language used in other environmental statutes, specifically contrasting the language of Section 505 of the Clean Water Act. Thus, it is possible that Clean Water Act citizen suit plaintiffs may still need to satisfy the zone of interest test.

Notice and Diligent Prosecution Bar

As noted above, citizen enforcement is designed to supplement, rather than replace, government enforcement. Consequently, before a plaintiff can file a citizen suit, they must provide, to the defendant, EPA, and the state where the violation is occurring, a notice of their intent to sue at least 60 days before filing suit. See [33 U.S.C. § 1365\(b\)](#). If they are suing EPA for failure to perform a non-discretionary duty, they must provide EPA with notice of their intent to sue at least 60 days before filing suit. *Id.* EPA has adopted regulations that further specify the content of the required notice, the manner in which it must be served, and the persons to whom it must be directed. See [40 C.F.R. §§ 135.1 - 135.3](#). If a plaintiff files their citizen suit without filing the required 60 day notice, the court will dismiss the suit for lack of jurisdiction. See [Hallstrom v. Tillamook County, 493 U.S. 20, 26 \(1989\)](#) (interpreting similar language in RCRA).

If a citizen files their notice of intent to sue a defendant for violating an effluent standard or limitation or order regarding an effluent standard or limitation, and EPA or the state **commence** and are **diligently prosecuting** a civil or criminal action in **state or federal court** to enforce the standard, limitation or order **before the plaintiff files a citizen suit**, the plaintiff is precluded from filing suit. See [33 U.S.C. § 1365\(b\)](#). That limit is consistent with the goal of the statute to establish the government as the primary enforcement authority. The Clean Water Act also prohibits citizen suits when the Corps, EPA or States are diligently prosecuting administrative penalty proceedings." See [33 U.S.C. § 1319\(g\)\(6\)](#). While courts are reluctant to find that the government is not **diligently prosecuting** a lawsuit if the government has commenced the lawsuit in court, there are cases where a plaintiff can prove lack of diligent prosecution. For instance, a Clean Water Act case that didn't involve wetlands or Section 404 reached the Supreme Court when the district court allowed the citizen suit to go forward, finding that a state enforcement action was not being diligently prosecuted because the defendant drafted the complaint against itself, drafted the settlement agreement, filed the lawsuit against itself and paid the filing fee, and because the agreement was entered into with "unusual haste" and provided for civil penalties that were less than the economic benefit that the defendant received by violating the Clean water Act. See

[*Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167 \(2000\)](#). The *Laidlaw* case is unusual, though, and judicial enforcement actions by government usually will preclude citizen suits. If the plaintiff cannot bring a citizen suit because the government is diligently prosecuting an enforcement action, the statute authorizes the citizen to intervene as of right in enforcement actions brought in federal court. See [33 U.S.C. § 1365\(b\)](#).

While the statute bars citizen suits when the government is diligently prosecuting an enforcement action, if a plaintiff files a notice of intent to sue in accordance with the statute and neither the state nor the federal government commence a judicial enforcement action, the plaintiff can file its citizen suit and can proceed with the suit *even* if the state or federal government bring an enforcement action *after* the plaintiff files the citizen suit. The bar on citizen suits in Section 505 only applies when the government brings enforcement actions *before* the plaintiff files suit. When the plaintiff brings a citizen suit, though, the Clean Water Act requires the plaintiff to serve a copy of the complaint on the Attorney General and EPA and authorizes EPA to intervene in the citizen suit as of right. See [33 U.S.C. § 1365\(c\)](#). In addition, the statute prohibits the court from entering a consent judgment in a citizen suit if the United States isn't a party to the suit until 45 days after the Attorney General and EPA receive a copy of the proposed consent judgment. *Id.* EPA's regulations provide more detail regarding the manner of service of the complaint and consent judgment. See [40 C.F.R. §§ 135.4 - 135.5](#).

Interview



Jan Goldman Carter, Senior Manager and Counsel for the National Wildlife Federation's Wetlands and Water Resources Program, discusses:

1. the mission and structure of the National Wildlife Federation, and work that the organization does to protect wetlands ([YouTube](#)).
2. the role that litigation plays in protecting wetlands, and the manner in which the National Wildlife Federation chooses litigation priorities. ([YouTube](#)).

Hypotheticals

The Griffin Heavy Equipment Company, which manufactures construction vehicles, recently broke ground on a new factory in the suburbs of Seattle, Washington. Flanders Construction Company, a competitor of Griffin, has most of its manufacturing facilities on the east coast, but hoped to open a factory on the west coast and was in negotiations to acquire the property which Griffin eventually acquired. The city provided Griffin with significant tax incentives and Flanders has not been able to find another suitable location in the state of Washington.

While driving by the Griffin property in April of last year, Ed Flanders, the CEO of Flanders Construction Company, noticed that Griffin was filling 20 acres of wetlands on the property to build the factory. Ed Flanders was still upset that Griffin acquired the property that he wanted to acquire for his factory, so he consulted his corporate counsel to see whether he could do anything to “make life difficult” for Griffin.

After speaking to his attorney and learning that Griffin did not have a permit authorizing the filling activity, Flanders sent a letter to the Griffin Heavy Equipment Company, copying EPA and the Washington State Department of Ecology, indicating that Flanders intended to sue Griffin under Section 505(a)(1) of the Clean Water Act, because Griffin was violating Section 301 of the Clean Water Act by discharging fill material into navigable waters without a permit.

A week later, Griffin completed the filling of wetlands and poured the concrete pad for the factory. Flanders waited another 3 months before taking any other action. Griffin did not engage in any additional filling activities during that time and neither EPA nor the State of Washington took any administrative, civil or criminal action against Griffin. Three and a half months after sending the letter to Griffin threatening a lawsuit, Flanders filed a citizen suit against Griffin under Section 505(a)(1) of the Clean Water Act in the Federal District Court for the Eastern District of Washington, located in Spokane, Washington. Flanders felt that the judges in that court would be more sympathetic to his case than the judges in the Western District, where the property was located.

In his complaint, Flanders alleged that he had an economic interest in bringing suit and would be injured, as a competitor, because Griffin was able to lower its operating costs by building a factory without complying with the Clean Water Act. Flanders did not allege any interest in clean water or the environment in his complaint. What defenses could Griffin raise in response to the complaint? With what success? If EPA brought an enforcement action under Section 309 after Flanders sued, and EPA sought civil penalties, but did not seek restoration of the wetlands, could Flanders proceed with his suit?

Drafting Exercise

You have been retained by Friends of the Ocmulgee (“Friends”), a non-profit organization, to file a citizen suit against Middle Georgia River Runners, Inc. (“MGRRI”), because MGRRI allegedly discharged dredged or fill material into navigable waters without a Clean Water Act Section 404 permit. Friends was incorporated in Georgia and has its headquarters at 12345 Sixth Street, Macon, Georgia, 31207. Their phone number is (478) 987-6543. MGRRI is a corporation that was incorporated in Georgia, has its headquarters on River Road in Juliette, Georgia, 31046, and is doing business in Georgia.

Friends was created to protect and advocate for the water quality of the Ocmulgee River and the recreational use and enjoyment of the River. Friends has numerous members in Macon, Juliette, and Middle Georgia who live, work or travel along the Ocmulgee River and recreate in or near the River (by fishing, hiking, walking, photographing, plant gathering and boating).

MGRRI operates a rafting tour business from its property on River Road, which is adjacent to the Ocmulgee River. On October 10, 2014, members of Friends observed employees of MGRRI using a Caterpillar Backhoe Loader to clear ½ acre of wetlands adjacent to the Ocmulgee River on the River Road property. On the same day, they observed those employees using the Backhoe Loader to add rock and soil to the wetlands to construct a parking lot for the rafting tour business. For purposes of this exercise, assume that the Ocmulgee River is a tributary of an interstate water. MGRRI did not have a Section 404 permit that authorized the clearing or filling of the wetlands. The fill material remains in place today.

The recreational, economic, aesthetic and/or health interests of Friends and its members have been, are being, and will be adversely affected by MGRRI’s violations of the Clean Water Act. The relief sought in the lawsuit will redress the injuries to those interests.

Friends would like to bring a citizen suit against MGRRI under the Clean Water Act for a declaratory judgment that MGRRI is violating the Act, an injunction to require MGRRI to remediate the harm caused by the violation, imposition of civil penalties, an award of costs, including attorneys’ fees and expert witness fees, and other appropriate relief.

1. Draft the 60 day notice required by the Clean Water Act. EPA’s regulations regarding the notice requirements are codified at [40 C.F.R. §§ 135.1 - 135.3](#). The materials included in the “Resources” box at the beginning of the section of this Chapter that addresses “Citizen Suits” should also be helpful in drafting the notice.

2. Draft the complaint for the citizen suit. The materials included in the “Resources” box, referenced in the last question, should be helpful in drafting the notice. For purposes of this exercise, you do not need to conform the pleading to the local rules of the federal district court in which you will file the complaint. Remember to include the 60 day notice that you prepared in response to the last question as an attachment.

Chapter Quiz

Now that you've finished Chapter 10, why not try a CALI lesson on the material at <http://www.cali.org/aplesson/10766> It should take about 45 minutes.

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