Compliance–or Else

The EPA's compliance order regime creates a Hobson's choice.

BY TIMOTHY SANDEFUR | *Pacific Legal Foundation*

Michael and Chantelle Sackett bought two-thirds of an acre of Idaho property in 2005, intending to build a new family home. What they got instead was a lesson in the arbitrary power of federal administrative agencies—one that has now taken them all the way to the U.S. Supreme Court.

As owners of a small construction company, the Sacketts knew well enough that building a house would require a lot of paperwork. So after patiently obtaining all the necessary permits, they were eager to begin construction. But not long after they began adding fill material to the site to prepare for laying a foundation, an envelope arrived from the Environmental Protection Agency. In it was a "compliance order," a legal document informing the Sacketts that their land had been deemed federal "wetland" subject to the Clean Water Act (CWA) and that their construction was therefore in violation of federal law. The order instructed the Sacketts to tear out what they had built and restore the property to its original state within five months. Failure to comply would incur fines totaling more than $37,500 per day.

The Sacketts were floored. The property hardly looks like a wetland: no water flows between it and nearby Priest Lake, there was no indication that the property was a wetland on their title documents or other paperwork accompanying their purchase, and several neighboring owners had been allowed to build on their sites. Yet the order commanded the Sacketts at their own expense to remove all fill material, plant native shrubbery on the land, and fence off their property for three years. Worse, the Sacketts learned that such compliance orders often serve as the basis of criminal charges, and disobeying one is illegal even if the underlying allegation of noncompliance is later disproved.

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How to Appeal?

The Sacketts requested a hearing before the EPA, where they could challenge the agency's claim that their property is a wetland and is subject to federal regulation. But the EPA refused. According to the agency, the CWA does not give property owners any right to a hearing about compliance orders. Nor could the Sacketts file a lawsuit themselves to have a federal judge determine whether the agency had acted wrongly. Instead, the Sacketts would have to wait for the EPA to file an "enforcement action," if and when it chose. Only then could they argue that their property was wrongly designated a wetland.

Yet if the Sacketts chose to ignore the compliance order and wait for an enforcement action, the $37,500 per-day toll would continue to run, possibly rising to millions of dollars before the EPA finally sought enforcement. Moreover, their failure to comply could be used as proof of "willfulness" and thus the basis of criminal prosecution and enhanced civil penalties. The Sacketts therefore faced a devastating choice: obey the order and restore the property at the cost of thousands of dollars—essentially giving up their dream of building a home—or ignore it and play chicken with the EPA.

Represented by attorneys at the Pacific Legal Foundation, the

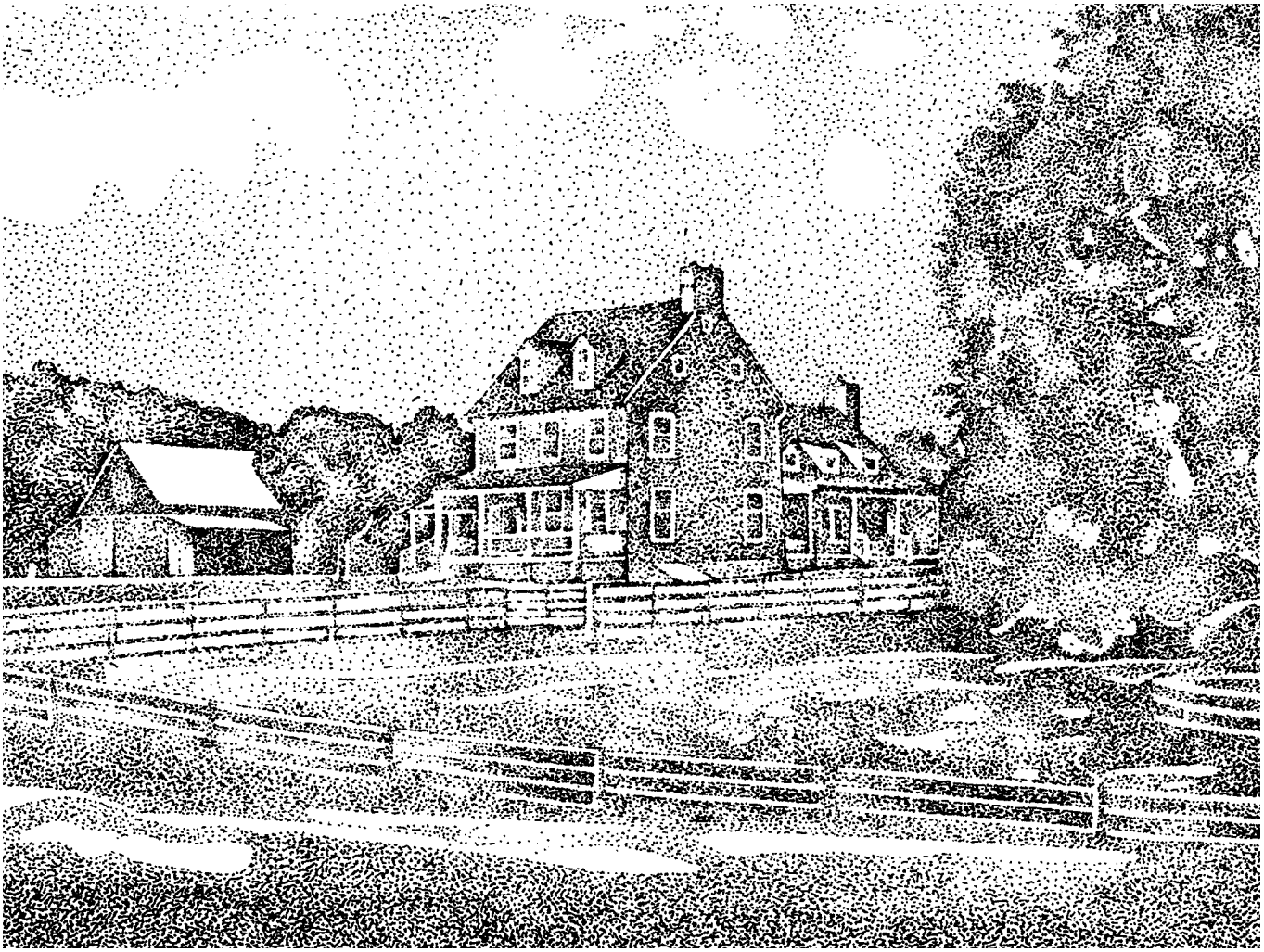

ILLUSTRATION BY MORGAN BALLARD

Sacketts filed their own lawsuit in federal court, arguing that the Administrative Procedure Act entitled them to a hearing—and if not, that the CWA's compliance order scheme violated their constitutional right to due process of law. Their case was very similar to a 2003 decision by the Eleventh Circuit Court of Appeals, called *TVA v. Whitman*, in which the court held that a similar compliance order mechanism in the Clean Air Act violated the Constitution because, while compliance orders are "injunction-like order[s] which, upon noncompliance, lead[] to a host of severe penalties," they are issued unilaterally by a single official, not in an adversary proceeding, and the EPA is under no obligation to consider a property owner's evidence that the allegation of lawbreaking is false. This scheme made the EPA "the ultimate arbiter of guilt or innocence" and "violate[d] the Due Process Clause and the separation-of-powers principle."

But other courts rejected the theory of the *Whitman* decision. The Tenth Circuit Court of Appeals ruled in 1995 that compliance orders did not give a person a right to a hearing, even while admitting that "it should not be necessary to violate an EPA order and risk civil and criminal penalties to obtain judicial review." Giving landowners the right to a hearing over a compliance order, it concluded, "would undermine the EPA's regulatory authority." The Sixth and Fourth Circuits also rejected the possibility of judicial review because "Congress intended to allow EPA to act to address environmental problems quickly and without becoming immediately entangled in litigation." And in 2010, the D.C. Circuit Court of Appeals did not even cite the *Whitman* case when it rejected General Electric's argument that a similar compliance order mechanism under the Comprehensive Environmental Response, Compensation, and Liability Act violated the company's due process rights.

Just a Warning?

Following such precedents, the Idaho federal court dismissed the Sacketts' lawsuit and the Ninth Circuit Court of Appeals agreed. A compliance order, it held, was really only a warning notice, without the kind of legal force that gives rise to due process concerns. After all, the Sacketts aren't required to actually *pay* the fine until the agency files an enforcement action, at which time they "will have a full and fair opportunity to raise challenges to the validity of the order." Thus a compliance order is more like a threatening letter than a decision by a federal agency; never mind that while the Sacketts wait for the EPA to file suit, the penalties for non-compliance continue to compound. This factor, the judges admitted, "could indeed

create a due process problem" if the CWA were read "in the literal manner the Sacketts suggest." But the judges chose to read the law in a non-literal manner, instead: only a compliance order that is ultimately upheld in the enforcement proceeding—which a court finds is based "on *actual,* not alleged, violations" of the law—can serve as the basis for liability.

This retailoring of the CWA makes compliance orders into little more than a warning: the EPA cannot actually *punish* a person without going through the regular judicial proceedings to prove that he or she acted illegally. Yet as the *Whitman* decision made clear, this non-literal reading of the law is not true to the wording of the CWA, which does provide that disobeying an order is *itself* a violation of the law, over and above the alleged illegality on which the order is based.

Worse, the Ninth Circuit rejected the Sacketts' argument that their due process rights were violated by being forced to risk massive, accumulated penalties while waiting for an enforcement action. The court held that the Sacketts did have an alternative: they "could seek a permit" from the EPA, and if the permit were denied, they could appeal to a federal court and argue that the agency was acting outside its jurisdiction. But federal regulations explicitly bar such "after the fact" permits and require that all pending compliance orders must be resolved before any permit can be issued. And even if such an avenue were available, getting a CWA permit is an exhausting and costly process. On average, such permits cost about $270,000 and take more than two years to obtain.

Hobson's Choice

After the Ninth Circuit threw out the Sacketts' lawsuit, the Supreme Court decided to intercede. In June, it agreed to review the case and determine whether the Sacketts have the right to judicial review of an order before the EPA chooses to file an enforcement action. The nine justices will hear oral argument in January of 2012.

The EPA's compliance order power has long been the source of criticism and confusion. As attorney Christopher M. Wynn notes, the EPA wants to keep courts out of the process because doing so "leaves full discretion to the agency on whether to pursue an enforcement action, while enhancing its leverage over the regulated party during negotiations." Such "leverage" is typically overwhelming, since few property owners are in a position to face down one of the federal government's most notorious agencies at the the risk of ruinous fines. Most people will simply obey an order whether or not it is justified. Yet the legal community has still not decided whether compliance orders are final, legally binding decisions, analogous to a finding of guilt in a criminal case, and therefore the sort of action that must, under the Due Process Clause, be accompanied by a fair hearing—or whether they are simply non-binding threats of potential, future agency action.

According to the EPA, compliance orders are only warnings because they do not impose penalties on landowners. The Ninth Circuit's "non-literal" reading of the CWA endorsed this view, because unlike the Eleventh Circuit's ruling in *Whitman,* the court held that disobeying an order is not punishable unless the EPA ultimately proves in court that the recipient really violated environmental laws. But even if this is true, a compliance order is much more than a warning letter. Since ignoring an order can expose a person to a subsequent charge of "willful" violation, an order is most closely analogous to a sentencing enhancement in a criminal trial—except that it is applied *before* a determination of guilt. In a criminal case, a defendant who is convicted of violating the law might suffer an increased sentence if the court finds that certain additional, enhancing factors are present; similarly, a compliance order is a conclusive decision that, if the EPA later prosecutes the landowner for violating the law, he or she will be sentenced to a harsher punishment than if the EPA had pursued the more traditional methods of enforcement.

However one characterizes compliance orders, they are a powerful example of the "in terrorem" power that administrative agencies wield, often without meaningful oversight by the elected branches of government. Rarely can a modest property owner who receives such an order undertake a daunting David-and-Goliath faceoff with the EPA, with its $10 billion annual budget and 17,000 employees. As Wynn writes,

> [T]he EPA is able to use the economic threats of civil and criminal penalties and prolonged litigation to force a regulated party into a Hobson's choice. A party will either need to negotiate a settlement, comply with the Act, accrue penalties, or litigate. This powerful incentive to comply can be created at a relatively modest cost to the EPA because the agency's decision to prosecute or initiate any kind of formal adjudicatory proceedings is completely discretionary.

Yet the EPA views this ability to intimidate as precisely the sort of "flexibility" it needs. The power to issue compliance orders without judicial oversight, the agency argued in court, "ensure[s] that the agency [can] act quickly to address environmental problems, without being entangled in defensive litigation."

Rule of Cleverness

Such an attitude ought to raise the eyebrows of judges concerned with procedural fairness. As far back as *Ex Parte Young* (1908), the Supreme Court held that due process of law is violated if a statute imposes "penalties for disobedience" that are "so enormous ... as to intimidate" a person "from resorting to the courts to test the validity of the legislation." Doing this, the Court said, would be "the same as if the law in terms prohibited the [person] from seeking judicial [review]." What the EPA calls the flexibility to compel behavior without "defensive litigation" is, in reality, a daunting power over ordinary citizens. The agency issues over 1,000 compliance orders each year, without hearings or public proceedings, and property owners are not given notice or an opportunity to be heard. The CWA, the Clean Air Act, and other environmental statutes allow individual bureaucrats to issue orders on the basis of "any information"—which, as courts have admitted, "presumably includes a staff report, newspaper clipping, anonymous phone

tip, or anything else," and is thus "less rigorous than the probable cause standard." Yet compliance orders often command extensive changes to property and cast a daunting cloud of legal doubt over any development project. Indeed, they often require landowners to allow federal agents on their property for compliance inspections—which would normally require a warrant under the Fourth Amendment.

The "flexibility" with which the compliance order scheme works is typical of the constitutional sloppiness of modern administrative agencies. Congress enacts broadly worded statutes threatening devastating penalties for vaguely worded violations—and leaves administrative officials the discretion to fill in the details. In most cases, agencies write their own rules, enforce those rules against alleged violators, and then judge those alleged violations in administrative hearings, thereby combining executive, judicial, and legislative powers. But rather than applying a more skeptical eye to these autonomous entities, courts generally take a deferential attitude, allowing the agencies to act as they will, except in the most extreme cases. Nor can elected officials usually cabin the agencies' authority, since a single member of Congress has little meaningful power over the decisions of career bureaucrats, especially if the lawmaker is from a minority party.

Indefinite delegations of administrative power are convenient for legislatures that want to be seen making good on promises of major reform without being bogged down by complex details. The CWA fits this well-known pattern: it simply prohibits the discharge of "pollutants" into "waters of the United States." But regulatory agencies have stretched the definitions of these terms—with little resistance from the courts—so that federal authority now reaches into even the minutest transactions of daily life and over virtually every waterway in the United States. With little accountability, bureaucrats have powerful incentives to expand their jurisdiction as far as possible and take shelter from responsibility in their purported expertise. As Hannah Arendt observed, a bureaucracy is essentially a law unto itself because it

> ignores all intermediary stages between issuance and application, and because it prevents political reasoning by the people through the withholding of information.... If rule by good laws has sometimes been called the rule of wisdom, rule by appropriate decrees may rightly be called the rule of cleverness.

Now that the Supreme Court has agreed to hear the Sacketts' case, there is hope of imposing some conception of checks and balances on the EPA. Administrative convenience should not be an excuse for dispensing with basic principles of the rule of law. R

READINGS

- "Facing A Hobson's Choice: The Constitutionality of the EPA's Administrative Compliance Order Enforcement Scheme under the Clean Air Act," by Christopher M. Wynn. *Washington and Lee Law Review,* Vol. 62 (2005).
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