

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - x

CHANTELL SACKETT, ET VIR., :

Petitioners :

v. : No. 10-1062

ENVIRONMENTAL PROTECTION AGENCY, :

ET AL. :

- - - - - x

Washington, D.C.

Monday, January 9, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

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

MALCOLM L. STEWART, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; for
Respondents.

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	DAMIEN M. SCHIFF, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	MALCOLM L. STEWART, ESQ.	
7	On behalf of the Respondents	25
8	REBUTTAL ARGUMENT OF	
9	DAMIEN M. SCHIFF, ESQ.	
10	On behalf of the Petitioners	54
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(10:03 a.m.)

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

Mr. Schiff.

ORAL ARGUMENT OF DAMIEN M. SCHIFF

ON BEHALF OF THE PETITIONERS

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

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

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

JUSTICE SCALIA: Of course, there would have

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. SCHIFF: Correct.

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

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

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

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

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

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

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

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

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

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

25 JUSTICE KENNEDY: To apply for a --

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

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

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

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

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

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

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

4 MR. SCHIFF: Well, Justice Scalia --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. SCHIFF: The difficulty,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 MR. SCHIFF: Well --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Mr. Stewart.

22 ORAL ARGUMENT OF MALCOLM L. STEWART

23 ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

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

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

20 JUSTICE KAGAN: But, Mr. Stewart --

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

24 MR. STEWART: It is --

25 CHIEF JUSTICE ROBERTS: One, for violating

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

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

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

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

18 JUSTICE ALITO: Has the --

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

21 JUSTICE ALITO: Has the --

22 JUSTICE SOTOMAYOR: I'm sorry.

23 CHIEF JUSTICE ROBERTS: Justice Alito.

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

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

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

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

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

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

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

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

1 Order" -- cap "0" -- "may subject Respondents to, one,
2 civil penalties" of up to 32.5 -- now 37.5 per day.
3 That's how it reads. It could have read: Violation of
4 or failure to comply with the Environmental Protection
5 Act may subject Respondents to civil penalties.

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

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

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

20 MR. STEWART: That's correct.

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

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

1 the violation.

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

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

13 JUSTICE SOTOMAYOR: Mr. Stewart, I --

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

17 (Laughter.)

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

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

1 their argument today, either.

2 MR. STEWART: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 (Laughter.)

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

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

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

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

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

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

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

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

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

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

1 compliance order saying you've got wetlands.

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

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

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

20 JUSTICE KAGAN: Could I ask you --

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

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

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

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

1 MR. STEWART: Well, once that --

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

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

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

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

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

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

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

10 JUSTICE KAGAN: But I'm --

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

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

18 JUSTICE SCALIA: Is that binding on --

19 MR. STEWART: Yes, we --

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

22 MR. STEWART: Yes, we would --

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

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

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

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

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

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

25 MR. STEWART: But --

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

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

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

13 JUSTICE KAGAN: Well, you are arguing --

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

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

18 MR. STEWART: To this particular order.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE BREYER: Do they --

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

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

8 CHIEF JUSTICE ROBERTS: If you --

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

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

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

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

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

8 JUSTICE SOTOMAYOR: Mr. Stewart --

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

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

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

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

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

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

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

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

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

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

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

8 JUSTICE BREYER: No, but the --

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

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

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

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

25 MR. STEWART: Well, to speak --

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

3 MR. STEWART: The --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 Mr. Schiff, you have 4 minutes remaining.

24 REBUTTAL ARGUMENT OF DAMIEN M. SCHIFF

25 ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 The case is submitted.

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

13

14

15

16

17

18

19

20

21

22

23

24

25

A				
Abbott 46:6 51:2,8	23:21 24:5,12 24:22 25:3,5 40:24 43:23 47:22 50:1,15 51:23	32:5 45:5 50:6 50:17,18	amicus 34:18	15:17,18 16:2 16:15 17:3 51:21 53:25
able 22:9 50:14	actions 4:8 7:19 44:15	agency 1:6 3:5 3:12 5:23 6:19 7:19 10:21 12:20,21 13:24 14:19 17:24 18:9 21:4,11 22:5 29:22 35:24 38:16,18 39:10,18 40:21 43:6,7,23 46:8 47:16 48:1,6 50:10,13 51:7 56:16,18 58:2 59:6	amount 9:7 32:7 analysis 8:4 announced 28:25 answer 15:1 22:1 48:12 answered 24:18 anyway 24:20 APA 5:25 6:16 6:22,24 7:1,6 15:7 17:11,16 17:23 18:9,19 18:25 19:11,24 20:14 22:16 24:12,15,22 25:3,4 43:22 46:6 52:4 56:15	area 46:6 argue 9:16 18:24 19:3 45:21 52:1 argued 31:20 39:25 arguing 6:18 42:7,13,16 argument 1:13 2:2,5,8 3:3,7 7:2 8:10 25:22 32:1 51:18 54:24
above-entitled 1:12 59:12	actual 21:1	agency's 18:4 22:19 42:23 44:1	appeals 4:23 57:10	Army 11:16 12:21 14:10
absolutely 45:3	add 4:17	agreement 34:16	APPEARAN... 1:15	articulating 6:15
accept 36:3 40:25 41:13	addition 8:17 11:23 19:21	agrees 40:12 58:4	application 12:3 41:7,9 54:16 57:18,20	aside 39:3 58:7 58:9
accepted 41:7 41:16	additional 4:13 7:25 14:3 29:2 30:10 48:16 55:2	AL 1:7	applications 41:16	asked 24:14 29:13 43:1,2
accommodate 55:20	adequacy 8:8,8	alert 38:16,20	applied 9:3 39:23 41:1 42:9	asking 34:10
accommodates 55:20	adequate 15:3	alia 39:25	applies 55:8	aspect 48:18
account 34:12	adhere 34:20	Alito 14:7,15 16:10,17 28:18 28:21,23,24 29:8 37:21 38:22 39:2 53:1 58:7	apply 8:23,25 14:8,10 17:13 32:13 36:21 39:11 41:12 42:17,21 59:5	assembled 25:7 assertion 24:13 27:23
accumulating 38:9	adjudicated 39:20	allow 12:6 21:23 24:21 26:15	applying 9:24 12:9 14:12 46:6 58:13	assessed 33:22 assume 19:11 53:7
accurate 26:25 27:4 52:18	adjudication 12:14 15:4	allowed 13:12 24:20	approach 46:24 48:20	assumes 20:9 25:11
accurately 27:13	administer 57:24	allowing 7:6 13:11 22:6	appropriate 9:4 36:3 41:10	attach 17:19 attached 30:10 attempted 57:18
achieve 26:9 27:5,15	administrative 3:24 5:24 8:1 14:19,25 15:3 15:4 20:18 43:21,21 44:2 44:9,9,17,20 44:20 45:23 47:22 51:13,19 53:23 54:6	altering 26:4	arbitrary 15:11	Attorney's 43:14
acknowledged 26:14	adopt 6:12	amending 49:12		attributable 4:5 9:10
act 3:14,24 4:3 5:15,19,24 14:25 15:3 21:2 27:3,15 27:18 28:1 30:5 32:12,14 32:16,18,21 33:15,17,18 42:9 45:12 47:5 53:15,16 53:18 57:17,25	adopted 16:11 28:25 29:4	amici 34:17		authority 24:13 28:8,9 45:6 authorization 45:4 authorize 27:1 authorized 27:2
acted 15:8 58:18	affirmative 32:21			
action 5:23 6:19 7:6,23 8:10 10:21 12:20,21 14:19 17:2,7 17:10,11,15,18 17:24 18:9 19:14,23 20:1 20:17 21:22 22:5,24 23:11	afforded 17:23			
	after-the-fact 8:24 9:1,3,24 11:6 12:3,15 36:25 39:6 40:25 41:9,15 58:5			
	agencies 14:2 28:15 30:16			

<p>49:15 automatically 13:22 available 37:18 40:9 50:4,9 averages 11:8 avoidance 22:6 aware 28:3 30:24 57:14 a.m 1:14 3:2 59:11</p> <hr/> <p style="text-align: center;">B</p> <p>back 18:1,16 19:10 47:16,23 backyard 38:23 balance 22:13 25:19 bar 50:3 based 15:12 20:15 45:24 52:14,24 basis 17:3 40:12 49:22 50:1 51:10 52:25 54:6 battle 16:19 Bayview 57:16 before-the-fact 58:6 begins 24:2 behalf 2:4,7,10 3:8 25:23 54:25 belief 38:17 believe 5:23 6:15 7:4 8:4 10:25 11:25 16:19 19:4 27:4,14 45:11 57:16 believed 32:6 believes 26:7,8 Bennett 8:5 best 24:11 bet 31:2 bets 50:18</p>	<p>better 21:16 24:11 53:9 55:4 beyond 34:1 35:4,7 binding 40:18 bizarre 14:15 bought 38:25 Breyer 26:20 40:23 41:21 42:1,12,14 46:4,20,25 49:5 50:8,20 51:1,4 55:3,23 56:4,13 57:1 brief 4:18 7:20 12:2 26:14 28:14 31:6,16 briefs 34:18 bring 7:23 17:2 17:7,11 23:11 23:20 40:23 43:22 49:25 50:14 brings 8:9 17:17 22:24 brought 35:1 43:17 build 16:22 20:18 21:18 23:17 24:3,8 24:20 31:21 38:1,3,5,24 building 6:20 burden 11:13 21:4 22:25 buy 37:25</p> <hr/> <p style="text-align: center;">C</p> <p>C 2:1 3:1 calculations 31:8 34:19 California 1:16 call 55:14 called 35:15 calls 21:12 candor 26:13</p>	<p>canon 22:6 cap 30:1 44:14 44:15 capricious 15:11 15:18,18 16:2 16:15 17:3 51:22 53:25 Carabell 39:19 care 9:14 12:25 carried 56:7 case 3:4 6:6 7:18 20:14 25:4 28:3 29:14 30:24 36:13 37:22 38:18,19 40:4 41:14 43:25 44:16 48:20,25 49:2 52:21 53:9 56:24 57:22 59:10,11 cases 9:22 39:20 46:23 47:10 54:11 55:11 57:9 cause 7:6 16:8 17:11 24:12,22 25:3,5 30:14 50:6 caused 10:11,22 certainly 9:8 16:4 18:9 45:21 56:23 57:23 cetera 33:4 56:9 challenge 5:25 10:13 24:23 38:11 challenging 25:12,17 39:17 51:11 chance 39:12 58:4 chances 31:22 change 5:8,9 8:4 53:6 57:2,5 changing 49:11</p>	<p>Chantell 1:3 3:11 characteristic 43:6 charged 16:23 charges 43:17 charging 3:13 Chief 3:3,9 7:21 8:3,7,17 9:6 11:15 17:12,21 17:25 18:7,16 19:18 25:18,20 25:24 27:21,25 28:6,23 31:25 34:3 36:6,14 36:23 37:6 39:9 47:8 54:3 54:22 55:1 59:8 choice 55:22 choices 43:20 choose 38:12 Circuit 5:9 19:17,25 circumstance 50:5 citation 6:9 cites 12:2 civil 3:18 5:10 6:20 17:10 19:23 20:1,17 21:19 22:24 23:11,24 24:4 27:6,7 30:2,5 claim 25:3 52:22 57:16 clarification 40:24 clarify 24:21 26:2 29:7 clause 3:23 17:4 Clean 3:14 42:9 47:5 57:17 clear 21:3 32:4 38:18 51:18 clearly 9:4 41:9 41:10</p>	<p>clients 4:11 cloud 23:15,16 24:8,9 coercive 56:2 coerciveness 9:9 collateral 17:13 collecting 23:24 combination 22:4 come 6:17 8:9 23:17 37:22 44:6 46:12,16 47:19 48:3 comes 24:4 commence 44:5 comment 42:25 55:19 common 28:14 32:7 43:10 communicating 53:10 communication 38:15 45:7 47:14 communicatio... 38:20 48:6 companion 39:20 compelled 49:23 complaining 35:22 compliance 3:13 3:22 4:1,6,9,13 4:20,22,25 5:3 5:6,11,22,22 5:25 6:18 7:18 8:2,18,19,22 9:2,10,13 10:9 10:10,14,20 12:4,6,13,19 12:22 13:21,23 14:5,17,21 15:5,15 16:8 17:14 19:5,12 20:16,25 21:12 21:13,25 22:3 22:10,12 23:12</p>
--	--	--	---	---

<p>23:19 25:7,11 25:13 26:3,6,9 26:11,18 27:5 27:12,15 28:1 29:3,17,20 32:18,24 33:3 33:9,24 34:2 34:20 35:4,7,9 35:15 36:2,8,9 36:18 37:1,3,4 38:15 39:5 43:20 44:3,7 44:11,17,21 45:2,10,23 47:4,15,17,20 47:24 48:2,5 51:13,19 53:4 53:24 54:6 56:1,24 57:11 57:19,21,25 58:17 complied 47:11 49:17 comply 3:18 7:23 12:5 16:24 17:6 29:25 30:4,7 32:18 37:2 44:21 49:18 complying 40:5 41:20 computing 34:9 concede 4:19 conceded 8:21 9:18 conceding 25:10 concern 55:17 55:18,20 concerned 52:12 concerns 22:1 conclusion 52:18 concrete 51:24 concurrent 41:8 condemnation 57:13 condition 3:16</p>	<p>conditions 18:23 conduct 31:10 32:9 49:3 53:1 Congress 15:2 21:9,22 22:3,9 22:10 Congress's 22:8 connected 25:1 connection 18:11 52:8 consider 9:22 36:16 41:4 considered 23:25 57:17 consistent 19:16 constitutional 39:13 50:3 contend 18:10 18:12 contest 58:2 contesting 17:3 context 10:10,20 12:15 18:21 20:15 contexts 32:4 contingent 40:4 continue 17:6 29:19 continued 31:9 continues 33:12 49:2 continuing 23:13 24:1 convert 16:22 Cook 39:19 copy 17:19 Corps 9:24 10:16,24 11:17 12:21 13:19 14:10 40:11,25 41:7,12,16 58:13 59:2 Corps's 9:4 40:24 correct 5:4 6:25 7:3,16 9:19 13:13 18:6</p>	<p>22:20 25:15,16 30:20 33:1 51:6 56:22 59:1 corrective 41:5 cost 24:7 37:3 couched 45:25 counsel 25:20 32:11 34:3 54:22 59:8,9 country 58:16 59:4 County 39:19 couple 34:4 course 3:25 9:7 10:21 18:13 21:8 22:14 41:12 51:4 court 1:1,13 3:10 4:23 5:5 6:5 10:23 11:4 16:25 17:5,16 21:20 22:7 25:25 26:14 28:4 34:8,11 38:11 39:20,22 42:10 45:22 50:2 51:8,21 52:21,23 53:22 55:2,6 56:1 57:15 58:2,15 courts 29:11,15 41:22 57:10,10 Court's 8:4 cover 44:20 coverage 39:17 54:14 covered 40:17 create 19:16 20:2 creates 21:5 creating 6:16 creation 55:24 criminal 43:15 43:17 critical 12:12 culminate 47:5</p>	<p>culpability 29:18 currently 13:8 cuts 11:18 cut-off 48:15 CWA 39:17</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 daily 4:1 34:10 DAMIEN 1:16 2:3,9 3:7 54:24 Damoclean 23:9 date 21:19 day 3:17 4:11 7:22 8:2,14 9:21 10:6 16:23,24 21:20 22:7 26:17,17 29:14 30:2 31:20 34:22 35:17 38:8 41:1 45:13 54:9 58:1 days 33:21,23 34:10,12,13 deadline 40:5,6 dealing 35:19 dealt 48:19 decide 13:15 14:11 43:23 decided 22:18 decides 23:20 decision 13:6 17:19 58:14 decisionmaking 56:10 declaratory 49:21,25 50:4 50:7,15 defendant 43:15 53:10 deference 17:23 18:4 22:18 23:1 56:19,21 deferential 51:20</p>	<p>definitively 34:7 demand 35:5 denials 39:25 denied 39:24 deny 58:13 Department 1:19 deposited 33:10 34:13 deprivation 10:11 11:13 13:7 deprived 12:5 Deputy 1:18 determination 13:24 16:14 17:14 18:4 22:19 24:16,24 36:3 38:11 52:15 58:10,24 determines 41:8 determining 15:8 16:12 37:15 dice 23:5,7 different 14:19 17:22 19:22 20:17 32:12,20 differently 21:23 differing 20:19 difficult 8:23 9:17,22 13:20 16:13,18 20:13 difficulty 10:7 13:5,25 16:5 21:6 55:24 58:15 dilemma 56:12 57:6 directed 33:25 46:9 discharge 23:24 54:18 discharged 33:23 discharging</p>
---	--	--	--	---

54:16	effects 8:19,20	23:10,20,22	expense 9:25	25:2 39:21
discretion 32:8	either 32:1	24:4 25:6 26:7	expensive 12:7	feel 53:19
discuss 43:16	33:20 40:15	26:8 27:4,13	experience 56:8	fell 43:3
discussed 28:14	42:10	35:1,5,25	exposed 31:9	fight 15:17
discussion 51:17	elements 20:4	36:10,25 37:8	express 42:23	fighting 50:24
disobey 7:11	eligible 11:10	38:3,14,23	45:4	filed 54:15
dispelled 24:9	eliminate 51:22	43:2,4,5,19	expressed 34:15	filing 17:9
dispense 45:10	eliminated	44:4,10,25	extends 6:15	fill 10:1 13:20
dispute 5:15	35:20	46:15,24 47:11	extent 18:22	32:16 33:10,13
30:12	emphasize 7:4	49:15 52:12,23	21:8	33:23,25 34:12
distinct 5:10	emphasized	54:2,9,18,19	extortion 8:11	34:13,22 37:9
45:24	51:9	55:25 57:24,24	extraordinary	38:5 45:15
distinction 7:8	employed 20:24	58:18,19,21	43:13	54:18
7:18	encompass	59:2	extremely 49:9	filled 38:4
distinguish	47:10	EPA's 23:13	eye 41:23	filling 30:8
28:12	encourage 50:18	24:12 33:8,11		32:15
distinguishes	enduring 11:14	34:4 38:19	F	final 6:19 22:5
29:21	13:8	53:1 55:24	fact 4:17 5:8,9	35:20 42:4,5
district 28:4	enforce 7:24	ESQ 1:16,18 2:3	8:5,12 9:11	42:14,23,23
29:15 34:11	23:11 45:6	2:6,9	11:11 12:18	44:6 46:7,13
57:10	enforcement	essentially 4:6	16:7 19:21,25	finality 8:4 51:2
documents	6:13 8:10 17:7	4:19 43:8	33:15 34:25	finally 22:24
36:12 38:8	17:15,17 19:14	55:24 59:3	41:3 45:25	find 20:20 51:7
doing 30:17	21:22 23:20	establish 17:18	46:1,16 48:19	53:17 56:6
32:17,17 53:20	28:15 43:11,23	20:3	49:7 56:14,15	finding 5:7
dollars 3:17	44:15,22 47:6	estimate 47:3	56:19 57:21	15:13 18:19
double 4:7 8:12	51:23 53:8	estimated 37:4	factfinding 23:1	25:8,13 53:14
10:12 26:2,16	engage 31:9	estoppel 17:13	55:7,9,11 56:7	54:10 58:19
27:9,23 30:19	Engineers 10:17	20:6,9,12,14	factors 9:8,9	findings 20:10
31:22	11:17 14:10	et 1:3,7 33:4	facts 22:19	fine 4:1,4 7:15
doubt 28:7,7	40:12 41:12,16	56:8	37:22 56:6	8:5 9:7 38:9
drainage 38:2	enhanced 49:4	evidence 15:12	factual 18:14	finer 3:18 4:12
drop 23:11	enjoy 24:7	18:8 19:23,24	20:10,20 22:16	8:12 9:10,15
49:24	entertain 12:3	20:3 52:14	52:9	9:17,18
dual 21:5	43:11	53:17,20,23	fail 17:6	Finish 48:11
due 3:23 7:5	entirely 12:20	55:8 56:24	fails 51:6	finished 13:4
duty 26:13	14:18,19 31:7	evil 9:21	failure 29:25	52:12
D.C 1:9,19	entitled 56:19	exactly 7:16	30:4,7	fire 6:9 7:9
	Environmental	11:16 14:14	fair 58:1	first 3:4 5:7 25:3
	1:6 3:5,12 30:4	15:21 26:3	far 6:15 18:23	28:2 31:5 33:2
E	40:20	example 8:21	52:11,11	38:13,15 39:15
E 2:1 3:1,1	EPA 4:17 7:19	exercise 26:13	favor 22:5 49:9	39:16 42:22
earlier 24:14	8:9,21 10:15	exercising 43:7	55:14	44:5 51:17
33:2	12:1,6 14:5,17	existence 4:20	fear 56:14	fit 6:12 25:2
edified 34:24	15:8,13 16:6,7	8:22	feature 29:20	fix 6:8
effect 4:6 29:5	17:6,8,17 21:1	existing 38:21	features 45:24	floated 31:5
34:18 40:16	22:3,9,23,25	expect 41:14	Federal 11:4	flooded 59:7
57:22				

<p>folks 58:16 follow 27:21,22 followed 38:19 following 27:14 27:17 43:10 force 14:16 51:10 forced 56:16 foreclose 54:2 foregoing 29:25 30:7 forever 23:15,20 forgone 37:19 formal 43:5,15 45:6 49:9 50:12 55:16 forth 7:20 30:9 32:25 33:7 47:16,23 forward 7:6 20:1 found 19:12 53:22 frankly 10:22 15:1 21:16 59:2 fully 12:5 function 43:8 further 24:15 37:5 42:25 48:6 future 53:5</p> <hr/> <p style="text-align: center;">G</p> <p>G 3:1 general 1:18 6:10,11 getting 12:25 31:14,15 41:2 get-go 58:24 Ginsburg 4:23 5:5,13 15:6,10 23:18,22 24:14 24:22 43:1,18 44:8 51:24 52:3,11 give 6:9 11:17</p>	<p>18:4 28:15 30:16 39:12 40:13 41:3 48:3 56:21 57:25 given 16:10,10 28:20 29:24 43:24 55:13 giving 22:18 44:6 go 6:7 7:6 8:7 12:13 14:16 15:17,19 18:16 19:14 22:17 35:4 38:10 43:20 58:8 goes 12:21 20:1 going 6:9 11:2 11:24 12:2 14:10 16:3 19:10 20:17 22:15,17 26:22 31:2 32:20 37:8,9 39:3,13 41:13 43:24 48:17 52:20 53:3,15,16,21 54:7,8,8,11 good 15:25 31:14,15 gotten 54:17 58:6,10 government 26:15 37:11 50:23 53:15 58:4 grant 43:14 greater 28:4 29:17,18 30:14 30:25 32:9 ground 14:9 51:11 guarantee 10:23 guaranteed 3:23 guess 17:25 28:10 29:6,12 31:18 47:15</p>	<p>48:21 54:12</p> <hr/> <p style="text-align: center;">H</p> <p>half 52:21 hammer 49:25 hanging 24:9 happen 37:24 47:17 happens 19:13 hard 10:5,6 11:21 55:10 harder 55:10 harm 10:22 health 6:7,17 hear 3:3 36:15 hearing 43:2,2,4 43:6,15 hedge 50:18 held 4:8 5:5,10 19:17 50:3 51:21 52:23 57:16 helps 26:2 herbaceous 33:3 37:9 higher 8:24 high-handedn... 35:24 hit 10:6 53:4 Hobson's 55:22 hold 21:1 holding 6:4 home 6:19 16:22 21:18 23:17 24:3,7,20 homeowner 37:23 38:25 homeowners 37:24 honest 50:22 Honor 5:20 10:19 11:8 33:2 57:15 hope 16:4 54:4,5 hoping 11:19 house 31:3,22 38:1,3,5</p>	<p>huge 50:6,22 hurt 46:9 hypothetical 39:17</p> <hr/> <p style="text-align: center;">I</p> <p>idea 31:10 34:21 ideal 21:15 imagine 20:14 immediate 54:19 immediately 3:18 16:24 30:8 immune 44:22 impact 8:11 13:6 impediment 37:5 39:6 importantly 11:11 impose 22:24 imposed 6:20 7:22 10:12 28:4 30:24 46:1 imposes 8:18 imposing 3:16 29:16 impression 46:20,23 50:23 inapt 14:4 includes 30:8 inconsistent 4:9 incorporated 5:21 incorrect 56:9 increased 28:11 incur 9:25 independent 4:24 8:17,20 independently 9:12 indication 15:2 indirect 14:20 industry-wide 51:9</p>	<p>infeasible 35:10 informal 43:11 50:10,12 information 46:14 informed 18:14 initial 36:3 41:5 initiate 9:12 14:18 21:25 initiating 44:3 injured 14:5,17 insist 54:19 inspections 7:9 inspector 6:17 inspectors 6:7,9 7:10 instance 43:14 intend 50:13 intended 15:2 26:6 intent 22:8 inter 39:25 interminable 23:8 internally 44:10 interpret 59:2 interpretation 33:19 interpreted 41:23 interprets 23:23 invalidated 19:5 inverse 57:13 investigate 56:5 investigation 52:24 invitation 48:2 invites 42:24 issuance 15:15 33:9 issue 10:18,20 11:2,24 13:9 16:8 18:2,5 21:3 22:3,9 32:5 35:4 40:13,15 43:20 44:2,17,25</p>
---	--	---	---	--

<p>46:16 48:19 51:2,2 56:1 57:7,25 issued 3:13 7:13 9:2 20:16 25:7 29:18 39:5 48:3,5 49:1 53:24 57:19 issues 20:25 47:24 50:10 iteration 35:20</p> <hr/> <p style="text-align: center;">J</p> <p>January 1:10 judge 56:8 judge's 32:8 judgment 45:15 49:21 50:1,4 50:15 judgments 52:10 judicial 3:21 8:8 8:9 10:9 13:6 14:24 17:13 21:16,24 22:5 24:6 39:24 40:4,8 41:24 42:8 44:3,10 44:15 51:12 54:13,19 55:6 55:11,21 56:7 jurisdiction 6:1 10:15 59:3 jurisdictional 5:21 18:2,5 24:23 Justice 1:19 3:3 3:9,25 4:4,10 4:16,23 5:4,13 6:3,14,23 7:1,3 7:7,17,21 8:3,7 8:17,25 9:6,14 9:19,20 10:4,5 10:8,13 11:5 11:15 12:11,17 12:24 13:5,9 13:14,15,21</p>	<p>14:1,7,15 15:6 15:10,16,21,24 16:5,10,17 17:1,12,21,25 18:1,7,16,18 19:2,9,10,18 20:5,7,8,23 21:7,10 22:1 22:14,21,22 23:4,7,18,22 24:10,14,21 25:10,16,18,20 25:24 26:20 27:20,21,25 28:6,13,18,19 28:21,22,23,23 28:24 29:8,23 30:18,21 31:2 31:13,14,25 32:11 33:5,14 34:3,23 35:12 35:14,23 36:6 36:14,23 37:6 37:20,21 38:22 39:2,9 40:10 40:11,18,20,23 41:21 42:1,12 42:13,14,16,19 43:1,18 44:8 44:25 45:8,9 45:19 46:4,20 46:25 47:7,8 47:13 48:8,11 48:15 49:5,20 50:8,11,20 51:1,4,24 52:3 52:11 53:1,13 54:3,22 55:1,3 55:23 56:4,13 56:18,22 57:1 57:7,9,15 58:3 58:7,12,21 59:1,8 Justice's 18:17 19:18 justify 25:1</p>	<hr/> <p style="text-align: center;">K</p> <p>Kagan 4:10,16 12:11,18,24 13:5 17:1 18:16 19:18 27:20 37:20 40:10 42:13,16 42:19 45:8 47:7,13 58:3 58:12,21 59:1 Kagan's 19:10 keep 30:17 keeping 51:14 Kennedy 6:3,14 6:23 7:1,3 8:25 13:21 14:1 18:18 19:2 28:13 31:14 57:9,15 kind 5:13 11:21 37:24 55:6,21 kinds 38:5 57:3 knew 58:22 know 7:23 9:20 10:6,25 16:6 17:16 18:3 22:14 23:2 29:13 35:6 36:11,24 45:16 47:3 53:4 58:16,18 knows 23:12</p> <hr/> <p style="text-align: center;">L</p> <p>L 1:18 2:6 25:22 Labs 46:7 51:2,8 landowner 38:16 39:7,10 46:24 59:4 landowners 22:13 38:20 39:23 47:10 54:8 57:11 58:1,20 lands 43:3 58:22 language 26:24 large 34:19</p>	<p>Laughter 31:17 35:13 law 15:19,20 16:7 17:4 28:15 51:10 lawsuit 44:5 lawsuits 47:6 left 46:11 legal 8:19,20 18:2,4 20:9,22 26:4,15 28:2 43:12 49:18 51:11 58:10 legally 49:17 lesser 52:4 letter 39:5 40:15 44:20 45:17 53:17 letting 30:8 let's 19:11 25:6 57:25 liability 4:7,21 4:24 5:6,11 6:21 7:12 8:18 8:20 10:12 11:18 liable 4:8 5:10 21:1 likelihood 48:5 53:11 limit 15:22 limitation 23:18 limitations 23:14,23 24:2 limited 36:21 lines 46:2 litigate 11:3 litigation 34:25 little 38:1 long 11:5 23:24 33:12 58:22 longer 31:23 look 25:5,6 37:17 41:22 49:6 52:14 53:5 looked 41:11</p>	<p>46:15 49:7 54:5 looks 42:4 49:8 lose 16:3 17:15 19:1 22:22 lost 23:4 lot 8:14 10:6 38:2 41:17 45:16 46:10 48:24 lower 44:15</p> <hr/> <p style="text-align: center;">M</p> <p>M 1:16 2:3,9 3:7 54:24 main 31:11 36:1 making 58:8 MALCOLM 1:18 2:6 25:22 manner 29:21 59:6 marshals 7:9 material 33:10 materially 8:22 matter 1:12 12:24 20:22 30:13,19,22,23 35:3 38:14 40:7 41:4 48:1 59:12 maximum 7:25 29:16 30:15,25 31:11 mean 5:14 6:7 9:15 13:22 15:22,22 16:21 18:7 19:2 21:22 41:1 45:3 46:5 47:25 49:6 50:19,22 meaning 12:4 meaningful 3:21 14:24 meaningfulness 9:8 means 39:17</p>
---	---	--	---	---

<p>measures 26:8 35:10 41:5 mechanism 45:18 meet 51:5 middle 11:21 Mike 3:11 mind 46:11 53:6 minor 18:22 minute 50:21 minutes 54:23 missed 40:6 mode 21:16 modified 35:1 modify 46:17 moment 37:18 Monday 1:10 money 17:9 morning 3:4 34:16 move 32:3 moved 49:7</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 2:1,1 3:1 nationwide 11:11 nature 16:11 21:5 39:3 navigable 18:11 19:7 25:1 52:8 necessarily 11:10 17:20 necessary 18:24 26:8 27:5,14 necessity 56:23 need 14:9,13 16:8 39:25 40:14 58:9 needed 54:1 negotiating 49:10,11,12 never 3:21 10:19 23:14 24:2 28:25 31:20 36:24 54:7,11 new 7:15 19:16</p>	<p>20:2 52:14 nexus 19:6,13 20:10 nice 35:12,14 night's 31:15,15 Ninth 5:8 19:17 19:25 nontrivial 46:23 normal 44:2 normally 49:25 Northern 39:19 notice 29:24 59:4 notices 54:18,20 57:11 notion 47:19 number 46:23 57:5</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 30:1 objects 54:20 obligations 49:19 obtain 10:8 49:20 Obviously 11:17 53:19 occurred 26:7 occurs 32:9 47:14 offense 20:4 offered 3:21 Office 43:14 Oh 24:6 35:1 45:3 okay 22:16 41:21 42:12 old 23:12 once 9:2 31:22 33:10 37:4 39:1 40:6 58:18,19 onerous 18:23 open 57:4 opening 31:6 operate 37:16</p>	<p>operating 17:2 opinion 6:5 46:2 opportunities 37:17,18 opportunity 3:21,22 16:20 20:2 21:20 24:10,11 44:6 opposed 8:6 19:24 44:11 opposite 41:24 options 36:21 oral 1:12 2:2,5 3:7 25:22 order 3:13,19,22 4:1,6,9,14,20 4:22,25 5:3,6 5:12,22,22,25 6:18 7:11,13 7:14,18 8:1,2 8:18,19,22 9:2 9:10,13 10:1,1 10:9,10,11,14 10:20 12:4,6 12:13,19,23 13:22,23 14:5 14:17,20,21 15:15 16:8 17:14 19:5 20:16,25 21:25 22:3 23:12,19 25:7,11,13 26:3,6,8,12,18 26:21,25 27:2 27:12,14 28:1 29:3,18,21,23 30:1,7,10,13 32:19,24 33:3 33:10,24 34:2 34:24 35:1,8 35:15,19,21 36:2,8,9,18 37:1,3,4 38:3 38:15 39:5 41:2,20 42:4 42:18,23 43:16 43:16,20 44:3</p>	<p>44:9,9,11,17 44:21 45:1,2 45:10,23,24,25 46:2,9,12 47:4 47:15,17,20,24 48:2,5,18 49:8 49:11,12,15,16 49:18 51:13,19 51:21 53:4,24 53:24 54:7 55:6 56:25 57:19,21 ordered 20:11 orders 15:5 21:12,13 22:10 22:12 34:21 35:4 47:4 56:1 57:12,25 58:17 ordinarily 44:5 ordinary 37:23 37:23 45:5 original 34:24 ought 37:17 outrageous 53:2 outstanding 12:4 overstated 49:9 overtures 43:12</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 PAGE 2:2 pages 4:19 part 6:6 16:12 38:2 42:15 51:17 52:9 53:21 particular 42:18 parties 28:16 30:16 32:5 43:9 49:1 50:18 party 14:8 43:12 44:6 49:2 penalized 26:22 penalties 4:14 21:19 22:11</p>	<p>23:24 26:2,10 26:11,16 27:1 27:3,7,7,10,11 27:12,17,19,23 28:4,11 30:2,5 30:10,14,17,19 30:24 31:8 32:8 33:22 34:10,19 35:16 44:14 45:13 46:1 48:17 49:3 54:15 58:20 penalty 4:18 5:2 22:25 29:1,2 29:17 33:11 43:21 people 34:19 46:16 49:16 perceived 44:13 percent 46:17 47:4 54:10 percentage 47:3 period 7:25 29:17 permit 8:24 9:1 9:3,24 11:2,11 11:18,20,24 12:3,10,15 13:3,10,19 14:8,9,10,12 36:22,25 39:6 39:7,11,18,24 40:1,13,14,14 40:25 41:7,9 41:15 48:19 54:16 57:18,20 58:5,6,8,9,13 58:14,25 59:5 permits 11:6 13:9 39:23 59:7 permitted 33:6 permitting 10:10,24 11:12 12:19 14:3,23 41:23</p>
--	---	---	---	---

<p>person 32:10 33:19 40:6,7 46:9 47:16,19 53:8 personnel 43:11 per-day 30:25 Petitioners 1:4 1:17 2:4,10 3:8 34:15,17 51:18 52:1,22 54:13 54:25 phrased 49:14 pine 45:16 place 23:25 47:23 plant 35:2 37:9 45:15 planted 33:4 planting 32:16 35:19 plants 33:3 35:19 38:6 please 3:10 25:25 51:6 point 16:6 19:15 22:6 31:11,19 32:3 37:14 39:7 46:14 48:4,9 53:21 54:12 55:4 57:23 points 42:6 58:7 policy 28:25 29:4 portion 35:18 position 34:8 37:14,15 40:8 42:20 possibilities 57:5 possibility 26:16 28:3,11 31:6 44:22 51:23 possible 14:20 27:10 post-order 57:4 potential 38:9</p>	<p>43:15 53:10 54:15 potentially 27:6 57:22 58:23 59:4 power 55:25 56:4 57:24 practical 26:19 26:20 30:22,23 40:7 practice 35:3 38:14,18,19 43:7 44:2 48:1 50:24 51:7 practices 50:6 precisely 6:1 precluded 41:18 precludes 42:2,8 preclusion 19:19 predicate 5:5 15:14 24:23 predisturbance 3:16 premised 31:10 34:21 premises 38:6 prepare 55:16 prepared 53:9 preponderance 19:23 20:3 prerequisite 40:6 present 31:10 preserve 39:3 presume 13:23 presumption 22:4 42:17,20 presupposed 14:12 pre-order 57:3 primary 35:20 principal 7:17 principle 6:11 prior 20:25 38:20 privilege 12:9</p>	<p>probable 16:8 probably 44:16 48:4 59:6 problem 14:4 20:23 38:2 51:16 52:22 problems 13:4 procedure 3:24 5:24 14:25 15:3 20:24 45:1,2 55:13 57:4,4 proceeding 12:16 proceedings 44:3,23 process 3:23 7:5 10:10,24 11:12 12:19 14:3,16 14:23 18:19 19:11 21:5,8 58:11,25 processing 41:8 produces 7:14 prohibited 32:21 prong 7:1 proper 34:1 property 3:15 5:15,18 6:17 11:1,25 12:7,8 12:14 13:2,3 16:22 18:13 19:4,7 23:17 24:13,25 32:14 34:1 36:8,19 37:8,25 38:25 57:12 prosecute 50:14 prosecution 49:21 50:1 prosecutor 49:24 53:8 prosecutorial 43:8 prospective 26:9 27:15</p>	<p>protect 18:24 protected 56:15 protection 1:6 3:5,12 30:4 40:21 54:1 prove 52:20 provide 11:12 14:24 15:3 26:10 29:11 42:25 54:1 57:3 provided 36:13 provides 21:12 provision 27:11 provisions 4:18 33:11,24 34:23 pro-environm... 56:11 pro-homeowner 56:11,14 purely 18:2 20:20,22 51:11 purpose 55:12 55:13 pursued 51:23 put 38:5 39:3 54:7,11 putting 35:24 58:7,9</p>	<p style="text-align: center;">R</p> <hr/> <p>R 3:1 rack 8:13 raised 10:16,18 Rapanos 18:11 39:21 reached 52:17 read 29:24,24 30:3 31:16 42:4 reads 26:15 30:3 ready-made 15:1 real 53:11 realistic 30:13 realize 54:10 really 14:2 21:5 24:24 26:19 29:9 31:19 35:21 46:15 47:23 49:6 50:19 52:21 54:7 reason 14:3 16:20 27:9 56:21 reasonably 15:8 reasons 51:12 REBUTTAL 2:8 54:24 received 35:15 36:7 57:11 receiving 49:3 recipients 58:17 recognized 56:2 record 11:9 15:12 16:6 18:15 19:16 20:2,15,18 25:6,8 36:12 36:15,17 38:17 52:24 55:8,9 56:20,20,23 records 20:16 reduced 48:7 refer 55:7 referred 28:13</p>
---	--	--	---	---

<p>34:4 refusing 40:13 reg 41:2 regard 33:9 35:10 45:5 regardless 18:10 regime 26:4 28:12 51:15 regimes 28:13 regs 40:25 regulated 28:16 30:16 32:5 43:9,12 44:6 49:1,2 50:17 regulation 25:2 51:9 regulations 9:5 12:1 related 37:22 relevant 40:1 relief 25:3 50:7 remained 34:13 remaining 54:23 remains 23:25 33:13 34:22 remand 21:15 25:5 remedial 32:23 remedies 32:13 remedy 13:7 20:11 45:14 50:4 remove 33:16,19 33:25 38:5 removed 33:4 35:21 removing 32:16 representative 43:13 require 44:4 required 35:25 36:2 41:4 49:17 52:20 53:13 requirement 33:2 requirements</p>	<p>33:7 requires 10:2 requiring 3:14 12:7 59:5 requisite 52:8 research 52:19 reserve 25:18 resolution 54:14 resolve 43:16 resolved 34:7 37:5 respect 34:9 44:23 47:21 respectfully 23:6 Respondents 1:20 2:7 25:23 30:1,5 response 9:6 27:22 rest 51:14 restaurant 7:10 restaurants 6:8 restoration 12:8 restore 3:15 33:25 review 3:22 5:14 5:17,20,24 6:16 8:8,9 9:8 9:12,23 10:9 10:19 11:12 12:22,25 14:20 14:24 15:4,7 15:12,23,25 17:16,22 18:21 18:25 19:9,22 20:19,21 21:16 21:24 22:5,16 23:10 24:6,12 24:15 39:24 40:4,8 41:24 42:3,8 43:22 44:10 45:20,22 45:23 51:12,20 54:17,19 55:6 55:21 56:15 reviewability</p>	<p>42:17,21 reviewable 5:16 51:5,20 52:23 right 5:24 6:16 6:21 11:14 14:14 21:11 22:19 25:12 32:2 33:20 36:24 39:2 41:21 47:25 48:4 54:4 55:18 rights 7:5 39:13 ripe 57:17 risk 31:23 54:9 56:9 Riverside 57:16 road 24:4 ROBERTS 3:3 7:21 8:7 11:15 17:12,25 25:20 27:21,25 28:6 28:23 31:25 34:3 36:6,14 36:23 37:6 39:9 47:8 54:3 54:22 59:8 roll 23:5 rolling 23:7 rough 47:3 routes 43:24 routine 6:12 7:9 ruinous 21:19 58:20 rule 6:6 28:25 36:16 rules 17:5 run 24:2 41:2 runs 23:14</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 2:1 3:1 Sackett 1:3 3:4 3:11 Sacketts 3:20 4:7,21 5:23 6:19 7:5 8:23</p>	<p>9:11 10:8,12 10:19,23 11:3 11:10,13 12:22 13:7 14:4,4,16 14:25 16:18 17:9,11 18:10 18:12 21:15,21 21:24 22:7 23:8,15 24:2,6 24:22 26:5 31:7,8,19 33:25 35:8,21 35:22 37:13 42:24 45:11 54:1 58:15 Sacramento 1:16 safe 41:6 sails 8:15 sanction 7:21 8:1 32:8 satisfied 7:5 satisfy 22:8 saying 11:24 29:10,10 30:15 30:21 34:7 37:1 42:2 48:16 50:1 54:17 55:18 58:22 says 12:6 17:16 26:21,21 30:9 30:9 32:14,17 35:16 38:4,23 39:10 41:3 42:2 49:11 53:17 Scalia 3:25 4:4 7:7,17 9:14,19 9:20 10:4,5,8 10:13 11:5 13:9,14,15 15:16,21,24 16:5 20:23 21:7,10 22:1 22:14,21,22 23:4,7 24:10</p>	<p>29:23 30:18,21 31:2 34:23 35:12,14,23 40:11,18,20 44:25 45:9,19 49:20 50:11 56:18,22 57:7 Scalia's 18:1 scheme 4:15 28:12 37:16 51:13 schemes 32:7 Schiff 1:16 2:3,9 3:6,7,9 4:4,10 4:16 5:4,20 6:14,25 7:3,16 8:3,16 9:1,19 10:4,7,18 11:7 11:23 12:12,17 13:5,13,18,25 14:14 15:10,21 16:4,16 17:1,8 17:20 18:6 19:2,15,21 20:7,13 21:7 21:14 22:20 23:3,6,22 24:21 25:15 54:23,24 55:1 55:23 56:13,22 57:14 58:3,12 59:1 scientific 52:9 scope 6:4 34:1 59:3 second 40:3 42:3 52:21 53:21 secondly 20:19 section 49:16 see 17:2 54:18 55:4,16 57:5,5 57:21 seek 5:16,17,20 17:15 29:1,2 39:17 seeking 5:14 22:24</p>
--	--	--	--	--

seen 42:5	40:5,5 56:17	33:6,6,7,8,20	subject 4:7,11	15:16
send 45:6	sorts 28:13,15	33:22 34:5,9	4:20 5:15,18	surprised 24:4
sending 53:17	38:8	34:16 42:2,8	7:24 23:15	sustain 21:4
sense 42:24	Sotomayor 19:9	43:3 44:4 45:6	26:5 27:6,16	SWANCC 39:18
51:14 55:22	20:5,8 25:10	55:13 56:10	27:18,23 30:1	sway 48:6
sent 36:25	25:16 28:19,22	statutes 41:23	30:5,17 34:20	sword 23:9,11
separate 12:20	31:13 32:11	statutory 5:7 6:2	35:16 44:10	system 57:2
14:18 17:7	33:5,14 48:8	7:25 15:13,14	45:12,13 51:19	
separately 26:10	48:11,15 53:13	22:11 25:8	subjected 7:11	T
serious 44:14	sought 39:24	29:16 30:14,25	7:13	T 2:1,1
set 7:19 32:24	58:24	31:11 37:16	subjecting 23:8	table 57:20
33:7	sound 52:25	44:14 45:4	54:14 55:11	take 11:5,18
shake 58:1	speak 50:25	51:15	submitted 59:10	17:9 31:22,23
share 51:18	specific 30:6	steps 27:14	59:12	34:5,11 37:9
shots 55:14	32:13,14	32:23	subsequent	39:13 43:24
show 11:9	specifically	Stewart 1:18 2:6	17:14	58:3
showing 16:14	33:15,18,18	25:21,22,24	substantial 7:12	taken 34:8
shows 29:18	34:15	26:24 27:20,24	15:12 18:8	takes 8:14 47:23
35:23 50:13	specify 26:6	28:2,9,19 29:4	19:13,24 20:10	takings 57:16
side 48:3	32:13	29:12 30:12,20	22:18 55:8	talk 46:12 50:21
sides 19:16 20:2	stage 5:17 36:20	30:23 31:4,13	56:24	talked 47:11
significant 6:20	stand 49:24	31:18 32:2	substantially	talking 14:1
7:8 8:11,12	standard 9:4	33:1,8,17 34:6	8:23 48:7	50:22 56:16
12:7 19:6	15:6,11,23,25	35:6,18 36:1,7	sue 38:12 43:9	tangential 14:20
22:11 24:7	17:21 18:8	36:11,20 37:2	53:11	teed 42:10
simply 10:14	38:14 51:20	37:13,21 38:13	sufficient 9:20	tell 6:3 11:22
13:19 23:10	52:4 56:15	39:1,4,15	12:16 52:23	15:25 22:13
24:10 35:25	standards 19:22	40:15,19,22	53:16,20,22	33:15,18 35:11
37:2 39:16	20:19,21	41:18,25 42:7	54:5 56:7	41:14 42:5
situation 9:17	stands 16:7,21	42:18,22 43:5	sufficiently 25:1	43:19 45:10
59:7	start 38:2	44:1,12 45:3	suggest 24:18	46:21
situations 30:15	state 12:9	45:17,21 46:18	46:3,13 48:17	tells 32:19 37:11
32:12 44:18	States 1:1,13	46:22 47:1,7,9	suggested 47:13	tens 3:17
sleep 31:15,16	16:13 28:24	47:13,25 48:8	suggesting	terms 11:8 18:7
slightly 32:12	33:11 36:5	48:9,13,21	53:15	19:12 20:19
small 47:2 58:18	37:25 40:2	49:14 50:2,9	suggestion	25:12 26:4
solace 58:18	statistics 46:18	50:16,25 51:3	19:19	31:4
Solicitor 1:18	47:2	51:8,25 52:1,6	suit 21:1,3 39:21	test 16:11 51:5
Solid 39:18	statute 4:5,8,12	52:17 53:7,19	support 25:8	54:7,11 55:8
solution 14:4	4:21 5:1 21:10	54:12	51:7	Thank 3:9 25:20
solve 51:15	21:11,23 22:2	stopped 6:19	supports 18:8	54:21,22 59:8
Somebody	22:2 23:14,23	story 48:3	suppose 20:20	theoretical
38:22	24:1 26:9,11	strange 14:7	40:11	26:19 27:10
sorry 20:7 28:22	26:15,17,25	42:20	supposed 37:16	29:9 30:19
47:12 48:11	27:2,8,13	struck 18:2	39:10	31:6
sort 16:6 21:23	28:17 31:21	study 11:7	Supreme 1:1,13	theoretically
28:12 39:4	32:6,22,22	stuff 35:25	surely 10:15	32:20

theory 6:11 23:13	three 43:19,24	typically 44:13	36:2	56:4
thereof 9:21	time 6:8 7:24	50:9	versions 33:3	wanted 22:9
they'd 57:4	16:14,18 20:15	<hr/>	vicinity 19:8	54:13 58:11
the-fact 36:22	22:7,12 25:7	U	view 33:8,11	wants 54:10
thing 5:14 6:10	25:19 38:12	ultimately 18:13	34:4,5,6,16,17	warned 29:19
28:10 31:19	39:4 46:17	47:5	42:24 45:11	32:10
32:24 37:24	52:24 53:23	unattractive	51:18 58:5	warning 43:8
38:13 39:16	55:10,10	37:14	vindicate 22:8	45:1,11 49:3,5
40:3 42:3,5	times 34:4	unaware 31:7	violate 32:14,15	49:8,13 50:10
43:19 46:11	title 23:16	underlying 29:1	32:18	50:12 51:4
49:15 55:16	today 3:11 32:1	underscores	violating 21:2	warnings 28:16
things 27:16	told 14:18 16:21	14:15	22:11 26:10,11	29:22 30:16
32:19 35:9	21:17 46:15	understand 4:14	26:17,18 27:1	32:5 49:1 57:8
36:16 39:15	tomorrow 41:1	9:23 11:16	27:3,7,12,13	Washington 1:9
41:11 43:10	52:14	29:9 55:17,18	27:25 28:1,17	1:19
44:19 46:16	total 57:22	55:25	30:13 31:21	Waste 39:18
48:21,24 55:15	traceable 5:11	understanding	33:22 53:18	water 3:14 19:8
56:5	tract 42:10	4:11 13:18	violation 4:2,12	42:9 47:5
think 11:8 15:24	tracts 40:1	understands	4:13,25 5:1,2,6	57:17
17:16 22:23	traditional	4:18	5:7 6:2 15:14	waters 16:12
26:2,18 28:16	17:23 52:8	understood 8:10	15:19,20 20:11	18:11 25:1
29:14 31:4,18	trees 32:16 35:2	20:1	23:13 24:1	33:10 36:4
33:1 34:17	37:10 45:16	unfair 37:15	25:9,11,14	40:1 52:8
35:7,8,11,18	tremendously	United 1:1,13	26:7 27:18	way 4:14 17:1,8
36:1,8,18,20	56:2	16:13 28:24	29:2,3,19,25	23:9 37:11
37:7,15,23	trial 53:9	33:11 36:5	30:3,6,9 31:1	38:10,10 39:21
38:1,23 42:22	trigger 9:12	37:25 40:2	32:6,20,22,23	55:20 58:14
43:6,13 44:1	21:21 43:21	unquote 23:25	33:12 34:11	59:2
44:16,24 45:5	trouble 39:11	unusual 41:14	35:17 36:4	ways 42:11
47:25 48:9	troubled 48:16	upheaval 50:6	38:17,21 45:12	weirdness 58:7
49:22 50:5,16	48:18,23	50:22	45:14,14 46:1	welcome 35:10
51:12 52:17,18	troubling 48:22	uphill 16:19	52:2 53:14	went 19:11 53:9
53:2 55:4,12	48:23,25	upside 14:21	58:19	weren't 36:14
56:6,13 58:9	true 12:12 17:10	use 44:11,12,13	violations 3:14	52:2
58:21	truth 16:1	45:17	4:21,22 44:13	wetland 13:16
thoroughly 53:5	try 15:17	usually 18:8	44:23	17:17,18 40:12
thought 13:10	trying 50:21	49:20	VIR 1:3	40:16,17
16:1 56:12	turn 38:7 52:9	U.S 43:14	<hr/>	wetlands 3:16
thousands 3:17	turned 14:21	<hr/>	W	10:15 11:1,20
55:15 56:5	two 14:1 24:25	V	wait 15:16,16	11:25 12:8,15
58:16	28:1 29:12	v 1:5 3:4	49:24 54:18	13:1,3,10,11
threat 3:17	39:15,20 41:11	vacated 13:22	waiting 23:10	13:20,23 14:11
threatened	42:6,11 48:21	vague 16:11	want 6:11 29:6	14:13 15:9
21:18 34:25	two-part 24:24	value 50:17	31:12 32:4	16:23 18:3,12
49:21	type 6:12	variety 32:4	36:15 38:7	18:20,22,24,25
threatens 58:20	typical 15:11	various 57:3	43:19 52:19	19:1,3,7,12
	38:19 48:1	version 35:7	53:8 55:19,25	22:17 24:16,19

24:25,25 32:15	<hr/> X <hr/>	4 3:12,20 14:22		
33:13 34:14,22	x 1:2,8 46:17	21:17 54:23		
36:9,19 37:1,8	<hr/> Y <hr/>	<hr/> 5 <hr/>		
38:4,12,24	year 11:8	5 8:13		
52:5,7,7,15	years 3:12,20	54 2:10		
53:3 58:23,25	8:13 14:22	556/557 55:9		
wetlands-relat...	21:17 24:3	<hr/> 7 <hr/>		
47:4	41:22 50:24	75 41:22 50:24		
We'll 3:3	<hr/> \$ <hr/>	<hr/> 9 <hr/>		
we're 6:18 11:1	\$10 7:22 8:2,6	9 1:10		
11:24 12:2	8:14	99 54:10		
14:1 28:3	\$27,000 37:4			
31:23 33:21	\$27,500 10:3			
42:7 46:6 53:3	\$37,000 7:22			
54:17 56:16	54:9			
we've 28:14 34:8	\$37,500 4:12			
wide 32:4	16:23			
willing 31:21,23	\$75,000 38:10			
57:23	<hr/> 1 <hr/>			
willy-nilly 53:16	10 24:3			
win 19:1 22:23	10-1062 1:5 3:4			
23:5 57:3	10:03 1:14 3:2			
wind 8:14	11:04 59:11			
wondering 6:10	13 34:2			
woods 22:15	1319(a)(3) 49:16			
words 17:15	<hr/> 2 <hr/>			
39:9 54:4	2012 1:10			
work 4:15 52:3	25 2:7			
world 14:21	<hr/> 3 <hr/>			
worried 55:5,5	3 2:4 47:4			
worry 37:10	30 4:19			
worse 59:7	31 4:19			
wouldn't 4:2	32.5 26:22 30:2			
15:17,19 16:13	35:16			
20:21,23 36:23	37 26:23			
46:2 50:14	37,000 8:6 28:5			
51:15,22 53:25	37,500 26:16,17			
54:2	29:13,15 31:11			
wrestle 9:16	31:20			
write 6:5	37.5 4:13 10:6			
written 21:23	30:2 45:13			
wrong 16:2	<hr/> 4 <hr/>			
18:18 33:20,21				
35:9 41:14				
42:6 47:20,22				
51:6				