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I. Introduction

The EPA's administrative compliance orders (ACOs) are important enforcement tools used to enforce the Clean Air Act (CAA) and other environmental statutes.[1] It is clear why these informal agency actions have become the EPA's most commonly used enforcement device.[2] ACOs may be issued with relatively little administrative process and do not require the EPA to

1. *See* 2 ENVIRONMENTAL LAW INSTITUTE, LAW OF ENVIRONMENTAL PROTECTION § 9:9 (Sheldon M. Novick et al. eds., 2004) [hereinafter LAW OF ENVIRONMENTAL PROTECTION] (discussing the benefits of using ACOs for less serious violations that the DOJ or the Administrator would be hesitant to spend their time on).

2. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, FISCAL YEAR 2001 ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS REPORT, at 64–70 (2002) [hereinafter 2001 EPA ACCOMPLISHMENTS REPORT] (providing statistics that show the EPA's use of compliance orders and other enforcement mechanisms from 1999–2001 across a number of environmental statutes), *available at* http://www.epa.gov/compliance/resources/reports/accomplishments/oeca/fy01accomplishment.pdf.

go to court.[3] An ACO serves to provide a regulated entity with notice that the EPA regards it as in violation of statutory or regulatory requirements, and it often requires the party to take or refrain from taking a particular action in order to comply with the applicable law.[4] If the regulated party does not comply, the EPA may pursue judicial enforcement or administratively assess penalties.[5] Because disobeying an ACO is itself a separate violation of law over and above noncompliance with a particular provision of the Act, ACOs provide the agency with a powerful enforcement mechanism that requires a relatively modest expenditure of scarce agency resources.[6] Moreover, until recently, the EPA could issue ACOs without triggering a right to pre-enforcement judicial review because courts had not viewed the orders as "final agency action."[7] This gave the EPA added leverage to press regulated parties into compliance with the terms of the ACO, while retaining the discretion whether and when to seek enforcement.[8]

From the regulated entity's perspective, however, being on the receiving end of an ACO can present a painful "Hobson's choice."[9] The entity may disregard the order and risk accrual of civil and criminal penalties for either the underlying violation of the law or for violating the terms of an ACO.[10] On the

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3. *See* LAW OF ENVIRONMENTAL PROTECTION, *supra* note 1, § 9:9 (describing ACOs as quick, responsive and flexible enforcement tools).

4. *See* Daniel F. O'Sullivan, Note, *The Clean Air Act Amendments of 1990: Permits and Enforcement—The Guts of the New Law*, 18 U. DAYTON L. REV. 275, 304–05 (1992) (discussing the mechanics of the compliance order enforcement scheme).

5. *See* Clean Air Act § 113(b), 42 U.S.C. § 7413(b) (2000) (providing the EPA with the authority to seek enforcement of an order in a federal district court or administratively assess penalties of up to $27,500 per day per violation of the CAA, or both); *see also* Joseph M. Santarella, Jr., *Enforcement and Liability*, *in* ENVIRONMENTAL LAW HANDBOOK 57, 69 n.18 (Thomas F.P. Sullivan ed., 17th ed. 2003) (explaining that although the environmental statutes specifically authorize penalties of up to $25,000 per day, the Debt Collection Improvement Act of 1996 mandated that the EPA raise its civil penalties by 10 percent pursuant to the EPA's Civil Monetary Inflation Adjustment Rule found at 61 *Fed. Reg.* 69360 (Dec. 31, 1996) and codified at 40 C.F.R. Parts 19 and 27).

6. *See* Clean Air Act § 113(a)(3), 42 U.S.C. § 7413(a)(3) (2000) (providing civil or criminal liability for violating any rule, plan, order, waiver or permit issued under the CAA).

7. *See infra* Parts III & IV (discussing the availability of pre-enforcement review of ACOs including the recent trend toward allowing review under certain circumstances).

8. *See generally* Heckler v. Chaney, 470 U.S. 821, 837–38 (1985) (discussing the presumption that executive agency enforcement decisions are completely discretionary).

9. *See* MORRIS DICTIONARY OF WORD AND PHRASE ORIGIN 289–90 (Harper & Row 2d ed. 1988) (describing a Hobson's choice as an apparent choice that is really no choice at all because both options are equally undesirable); SPECTATOR, No. 509 (Oct. 14, 1712) (describing the Cambridge stable manager, Tobias Hobson, who rented his horses and obliged customers to take either the horse nearest the stable door or none at all).

10. *See* Clean Air Act § 113(b), 42 U.S.C. § 7413(b) (2000) (providing the EPA with the

other hand, a party can comply with the ACO, often at enormous cost, and potentially forfeit the right to obtain judicial review of the factual or legal accuracy of the EPA's position.[11]

In 2003, the Eleventh Circuit's decision in *Tennessee Valley Authority v. Whitman*[12] (*TVA II*) held unconstitutional the EPA's use of an administrative compliance order in the context of the Clean Air Act enforcement scheme.[13] The court held that the ACO scheme violated both the Due Process Clause of the Fifth Amendment[14] and separation of powers principles.[15] In the court's view, because failure to comply with the terms of an order can trigger severe civil or criminal penalties without giving the defendant an opportunity for meaningful judicial review, the ACO enforcement scheme could not withstand constitutional scrutiny.[16] As a result, the court reasoned that ACOs could not be given legal effect, and thus their validity is not subject to review in the federal courts of appeals.[17]

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authority to seek judicial or administrative penalties for noncompliance with the CAA or for noncompliance with an ACO).

11. *See, e.g.*, Allsteel, Inc. v. EPA, 25 F.3d 312, 316 (6th Cir. 1994) (Wellford, J., concurring) (noting the harsh consequences that can result from the EPA issuing an order and then sitting back knowing that courts ordinarily deny pre-enforcement review of ACOs). This scenario can play out anytime courts deny pre-enforcement review of an ACO, thereby leaving the regulated party to either obey the order or risk severe penalties in the event that the EPA initiates an enforcement action. If the agency never seeks enforcement in court, the regulated party could conceivably have complied with an invalid order without ever having had a day in court to challenge the merits of the order.

12. *See* Tenn. Valley Auth. v. Whitman, 336 F.3d 1236, 1258–59 (11th Cir. 2003), *cert denied*, Leavitt v. Tenn. Valley Auth., 124 S. Ct. 2096 (2004) (concluding that ACOs are legally inconsequential and do not constitute final agency action because of their inherent constitutional flaws). Tenn. Valley Auth. v. Whitman, 278 F.3d 1184 (11th Cir. 2002) (*TVA I*) was a preliminary decision by the Eleventh Circuit holding that the court had jurisdiction to hear a dispute between two executive branch agencies and that the EPA's Environmental Appeals Board decision constituted final agency action for purposes of judicial review under the Clean Air Act. *Id.* at 1199–1206.

13. *See TVA II*, 336 F.3d at 1258–59 (discussing the court's due process concerns).

14. *See id.* at 1258–60 (discussing the court's due process concerns with the ACO enforcement scheme under the CAA); U.S. CONST. amend. V, cl. 4 (stating "nor [shall any person] be deprived of life, liberty, or property, without due process of law").

15. *See TVA II*, 336 F.3d at 1259 (discussing the constitutional violations that the CAA enforcement scheme presents).

16. *See id.* at 1258 (determining that the statutory scheme denies the regulated party review on questions of whether the conduct underlying the issuance of the order actually took place and whether that conduct amounts to a violation of the CAA). *See generally* Administrative Procedure Act, 5 U.S.C. § 706 (2000) (describing the scope of federal judicial review of administrative action).

17. *See* Tenn. Valley Auth. v. Whitman, 336 F.3d 1236, 1260 (11th Cir. 2003) (concluding that the federal courts of appeals lack subject matter jurisdiction to review the

The Eleventh Circuit's decision is important because it casts a shadow over one of the EPA's most important and effective tools for enforcing the CAA against stationary sources of air pollution.[18] Currently, the Eleventh Circuit is the only jurisdiction in which the EPA is no longer issuing ACOs.[19] Indeed, the *TVA II* decision implicates the constitutionality of environmental laws in general to the extent that these statutes allow for government enforcement by means of compliance orders.[20] The EPA uses ACOs to enforce a number of other environmental statutes that may be negatively impacted by the decision, including the Clean Water Act (CWA)[21] and the Resource Conservation and Recovery Act (RCRA).[22]

Despite their efficiency and efficacy for the EPA, the use of ACOs raises procedural due process concerns because it may allow the EPA to deprive a regulated party of property without offering a meaningful opportunity to be heard on the issue of whether a party violated the order or the CAA.[23] These concerns turn on whether judicial review is available prior to an EPA-initiated

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validity of ACOs).

18. *See* Stephen L. Kass & Jean M. McCarroll, *Constitutional Status of the Clean Air Act's Compliance Orders*, N.Y.L. J., June 25, 2004, at 3 (discussing the importance of ACOs in the CAA enforcement); *see also* Clean Air Act § 111(a)(3), U.S.C. § 7411(a)(3) (2000) (defining a stationary source as "any building, structure, facility, or installation which emits or may emit any air pollutant").

19. *See* Robert R.M. Verchick, *Toward Normative Rules for Agency Interpretation: Defining Jurisdiction Under the Clean Water Act*, 55 ALA. L. REV. 845, 860 (2004) (noting the agency's deference to the Eleventh Circuit ruling in *TVA II*) (citing Interview with David Cozad, Environmental Protection Agency, Region VII, Kansas City, Missouri (Nov. 10, 2003)).

20. *See* Petition for Certiorari at 18, Tenn. Valley Auth. v. Whitman, 336 F.3d 1236 (11th Cir. 2003), 2004 WL 304351 (Feb. 13, 2004) (No. 03–1162) [hereinafter EPA Petition for Certiorari] (discussing potential negative consequences of the Eleventh Circuit's decision); Brief for Petitioner at i, Tenn. Valley Auth. v. Whitman, 82 Fed. Appx. 220, 2003 U.S. App. LEXIS 27278 (11th Cir. 2003) [hereinafter Brief for Petitioner] (discussing the significance of the issues involved in *TVA II*).

21. *See* 33 U.S.C. § 1319(a) (2000) (authorizing compliance orders that must state with reasonable specificity the nature of the violation and provide a specific time frame for compliance).

22. *See* 42 U.S.C. § 6928(a) (2000) (providing for orders that can assess a civil penalty for past or present violations of the act and require compliance immediately or within a specified time period).

23. *See* Tenn. Valley Auth. v. Whitman, 336 F.3d 1236, 1241 (11th Cir. 2003) ("The problem with ACOs stems from their injunction-like legal status coupled with the fact that they are issued without an adjudication or meaningful judicial review."); E.P. Krauss, *Unchecked Powers: The Supreme Court and Administrative Law*, 75 MARQ. L. REV. 797, 820 (1992) (describing procedural due process as requiring that persons affected by special burdens of agency action in consequence of past facts be afforded a meaningful opportunity to participate in the decisionmaking process).

judicial enforcement action.[24] Pre-enforcement review, in a federal court, would give regulated parties the opportunity to defend themselves on the merits of the conduct underlying the EPA's order and challenge the validity of the ACO before substantial financial harm could accrue.[25] Most courts, however, have denied pre-enforcement review of ACOs, resulting in a circuit split on this issue.[26]

The majority of courts hold that pre-enforcement review is unavailable for ACOs based primarily on two theories.[27] First, courts have found pre-enforcement review contrary to the congressional intent expressed in the legislative history of the CAA.[28] Second, courts have held that ACOs do not constitute final agency action and thus are not subject to review under the federal court's subject matter jurisdiction limitations.[29]

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24. *See TVA II*, 336 F.3d at 1241 (discussing the court's concerns with the ACO enforcement scheme).

25. This harm could take the form of noncompliance penalties that could accrue under Section 113(d) of the CAA after the EPA initiates an enforcement action, or it could be the harm caused by an order halting construction on a new or existing plant. *See, e.g.*, Alaska Dep't of Envtl. Conservation v. EPA, 244 F.3d 748, 750 (9th Cir. 2001) (suggesting that considerable costs in both time and money may accrue from a halt construction order on defendant's facility).

26. *See, e.g.*, Southern Pines Assocs., *ex rel.* Goldmeier v. United States, 912 F.2d 713, 715 (4th Cir. 1990) (concluding that an ACO that ordered the developer to cease and desist discharge of all fill materials into wetlands under the Clean Water Act was not reviewable prior to an EPA enforcement action); Solar Turbines, Inc. v. Seif, 879 F.2d 1073, 1082 (3d Cir. 1989) (concluding that a stop work order issued pursuant to Section 167 of the CAA did not constitute final agency action). *But see* Alaska Dep't of Envtl. Conservation v. EPA, 244 F.3d 748, 751 (9th Cir. 2001) (permitting review of a Section 113(a)(5) halt construction order on a power generator); Allsteel, Inc. v. EPA, 25 F.3d 312, 315 (6th Cir. 1994) (permitting review of a Section 113(a)(5)(A) stop construction order on Allsteel's Tennessee manufacturing facility).

27. *See* Asbestec Constr. Servs., Inc. v. EPA, 849 F.2d 765, 770 (2d Cir. 1988) (determining that an ACO requiring Asbestec to comply with proper methods for removing asbestos was not final agency action for purposes of judicial review); Lloyd A. Fry Roofing Co. v. EPA, 554 F.2d 885, 891 (8th Cir. 1977) (denying pre-enforcement judicial review of an EPA order requiring conformity with a visible air pollution provision of a State Implementation Plan (SIP)). In addition, the Third, Fourth, Seventh, Tenth, and Eleventh Circuits have all denied pre-enforcement review of ACOs either under the CAA or CWA. *See infra* Part III.D (discussing judicial treatment of ACOs).

28. *See, e.g.*, Solar Turbines, Inc. v. Seif, 879 F.2d 1073, 1077 (3d Cir. 1989) (discussing the judicial review provisions laid out by Congress in Section 307 of the CAA); Asbestec Constr. Servs., Inc. v. EPA, 849 F.2d 765, 767–68 (2d Cir. 1988) (concluding that the legislative history of the 1977 Amendments supported the EPA's position that pre-enforcement review of compliance orders issued under Section 7412(c) was unavailable); Hoffman Group, Inc. v. EPA, 902 F.2d 567, 569 (7th Cir. 1990) (concluding that pre-enforcement review of a Clean Water Act ACO was impliedly precluded by the statutory structure, which empowers the EPA to enjoin violations of the Act only through enforcement proceedings).

29. *See, e.g.*, Acker v. EPA, 290 F.3d 892, 894 (7th Cir. 2002) (determining that the ACO was not final agency action because it merely alerted the defendant to the potential for legal

In contrast, other courts have ruled that ACOs are reviewable under certain circumstances.[30] The Sixth and Ninth Circuits have held that ACOs may constitute final agency action if the impact of the order on the regulated party is practical and immediate.[31] This approach has also found that the CAA did not manifest convincing evidence of a legislative intent to preclude pre-enforcement judicial review.[32]

TVA II did not fall neatly into either category. The Eleventh Circuit's decision was novel because, although courts have raised the possibility that the ACO enforcement scheme may present due process concerns, no court has previously addressed those constitutional concerns in depth.[33] Following the Eleventh Circuit's decision, the United States Supreme Court denied the EPA's petition for certiorari.[34] Thus, the question remains open as to whether the use of ACOs violates the due process rights of regulated parties.[35]

This Note aims to provide a practical approach for the treatment of ACOs that mitigates the constitutional concerns raised by the EPA's enforcement scheme.[36] Part II of this Note will briefly describe the inherent enforcement difficulties faced by the EPA and how those problems gave rise to the ACO.[37]

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consequences if he failed to comply with the provisions of the CAA); *Solar Turbines*, 879 F.2d at 1079–80 (discussing the standards used to determine whether agency action is final).

30. *See* Alaska Dep't of Envtl. Conservation v. EPA, 244 F.3d 748, 750 (9th Cir. 2001) (concluding that the court had jurisdiction to review the EPA's stop-construction order on one of Cominco's power generators); Allsteel, Inc. v. EPA, 25 F.3d 312, 314 (6th Cir. 1994) (reviewing an EPA stop-work order on a facility in Tennessee).

31. *See Alaska Dep't of Envtl. Conservation*, 244 F.3d at 750 (noting that the EPA's order created an immediate and significant impact on Cominco's operations); *Allsteel*, 25 F.3d at 314–15 (assessing factors that contribute to the finality of agency action).

32. *See id.* at 314 (concluding that judicial review of CAA administrative orders was not barred by Congress).

33. *See* Southern Pines Assocs., *ex rel.* Goldmeier v. United States, 912 F.2d 713, 717 (4th Cir. 1990) (rejecting appellants claims that an ACO violated their due process rights because they were not subject to an injunction or penalty until the EPA initiated an enforcement proceeding); Lloyd A. Fry Roofing Co. v. EPA, 415 F. Supp. 799, 807 (W.D. Mo. 1976), *aff'd*, 554 F.2d 885 (8th Cir. 1977) (determining that due process was afforded by the EPA's enforcement scheme because the defendant could seek review in the Court of Appeals within thirty days of final agency action or by asserting claims as a defense in an EPA enforcement action).

34. *See* Leavitt v. TVA, 541 U.S. 1030, 1030 (2004) (denying the petition for certiorari by a unanimous vote).

35. *See* Kass & McCarroll, *supra* note 18, at 3 (discussing potential implications of the *TVA II* decision).

36. *See infra* Part V.B (suggesting that courts use an undue burden test to help determine finality of agency action).

37. *See infra* Part II (discussing the institutional obstacles faced by the EPA in attempting to carry out its enforcement duties).

Next, this Note will discuss the purposes of the ACO[38] and the uses to which the EPA has put the orders in administrative practice.[39] Part III will examine the division of authority on judicial review of ACOs by the federal courts.[40] Part IV will discuss the Eleventh Circuit's due process holding in *TVA II*.[41] Part V will explain why the Eleventh Circuit's decision should not be followed[42] and suggest an approach that courts may take in reviewing ACOs that mitigates the constitutional concerns raised by the ACO enforcement scheme.[43]

II. Purpose of the ACO Enforcement Scheme Under the Clean Air Act

A. Overview of the Enforcement Problems Inherent in Environmental Law

To understand the significance of the *TVA II* decision, it is important to recognize the inherent tension underlying environmental laws that makes their enactment and enforcement very difficult.[44] This tension derives from the radically redistributive effects of these laws.[45] Environmental laws impose substantial costs on regulated parties, often far removed spatially and temporally from those who would enjoy the benefits of those laws.[46] Because of the difficulties associated with analyzing cause and effect over vast spatial and temporal dimensions, it is problematic to ascertain scientifically the benefits of environmental regulation with any degree of certainty.[47] The more immediate and

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38. *See infra* Part II.B (discussing the goals that Congress designed ACOs to effectuate).

39. *See infra* Part II.C (describing the mechanics of the ACO enforcement scheme).

40. *See infra* Part III (discussing the general theories upon which judicial review of administrative action rests).

41. *See infra* Part IV (outlining the rationale taken by the Eleventh Circuit in holding the ACO enforcement scheme unconstitutional).

42. *See infra* Part V.A, B (discussing an alternate interpretation of the ACO enforcement provisions in the CAA).

43. *See infra* Part V.C (suggesting an approach that can avoid constitutional concerns and get the courts and the agency on the same page).

44. *See generally* Richard J. Lazarus, *Judging Environmental Law*, 18 TUL. ENVTL. L.J. 201, 206–08 (2004) (discussing the difficulties inherent in environmental lawmaking that arise from the mismatch between features of the natural environment and the features of the U.S. lawmaking process).

45. *See* Richard J. Lazarus, *A Different Kind of "Republican Moment" in Environmental Law*, 87 MINN. L. REV. 999, 1000 (2003) (discussing the barriers to enacting environmental protection laws).

46. *See id.* (describing the source of the obstacles to enactment of environmental laws as the spatial and temporal distribution of the costs and benefits of those laws).

47. *See id.* (discussing the problems associated with ecological cause and effect in ascertaining benefits of environmental laws).

concrete economic impact on regulated entities, however, is relatively simple to calculate and certain in its effects.[48] Thus, potent political forces, in the "here and now," often mobilize to oppose enactment and enforcement of laws that "will benefit those elsewhere or in the future."[49]

Furthermore, enactment of environmental laws does not ensure enforcement or compliance.[50] The primary problem with agency enforcement is a lack of resources.[51] For example, environmental laws often require states to assume enforcement responsibility subject to federal supervision.[52] State enforcement, however, is often lax and inconsistent with statutory requirements.[53] In such cases, the EPA may withdraw approval from a state enforcement program and assume federal control; however, this rarely happens because of the EPA's limited resources,[54] the ever-expanding number of regulated entities,[55] and the

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48. *See id.* (contrasting the relative ease of predicting economic impact in the here and now with environmental benefit in the future).

49. *Id.*; *see also* The Honorable Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1721, 1723 (1991) (discussing the thirteen-year battle over clean air legislation that culminated in the 1990 Amendments); Casey Bukro, *Congress' Antipollution Talk is All Hot Air Again*, CHI. TRIB., Oct. 30, 1988, at C4 (discussing the difficulties Congress faced in attempting to amend the CAA).

50. *See* Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297, 297 (1999) ("In all areas of law, there are gaps between the 'law on the books' and the 'law in action,' but in environmental law the gap is sometimes a chasm.").

51. *See* U.S. GEN. ACCOUNTING OFFICE, EPA AND THE STATES: ENVIRONMENTAL CHALLENGES REQUIRE A BETTER WORKING RELATIONSHIP, GAO/RCED-95-65, at 3 (Apr. 1995) (discussing the burdens faced by the states and the EPA in implementing environmental legislation).

52. *See* Farber, *supra* note 50, at 303–04 (discussing the problems created by noncompliance of state regulators).

53. *See id* at 303 (noting the enforcement difficulties associated with relying on often noncompliant state regulators).

54. *See id.* (discussing reasons for the EPA's lax oversight of state environmental regulators).

55. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, ENFORCEMENT AND COMPLIANCE ASSURANCE FISCAL YEAR 1998 ACCOMPLISHMENTS REPORT, at 10 (June 1999) [hereinafter 1998 EPA ACCOMPLISHMENTS REPORT] (noting that as of 1999 the EPA listed 39,961 facilities that were regulated under the stationary source provisions of the CAA), *available at* http://www.epa.gov/compliance/resources/reports/accomplishments/oeca/fy98accomplishment.pdf. Compare this number of facilities with the EPA's Office of Compliance and Enforcement staff, consisting of a total of 1464 full-time employees to enforce and monitor facilities across all environmental statutes. U.S. GENERAL ACCOUNTING OFFICE, INFORMATION ON THE ENVIRONMENTAL PROTECTION AGENCY'S ACTUAL AND PROPOSED FUNDING FOR ENFORCEMENT ACTIVITIES FOR FISCAL YEARS 2001 THROUGH 2002, GAO-02-1096R at 2 (Sept. 27, 2002), *available at* http://www.gao.gov/new.items/d021096r.pdf.

enormous strain that disapproval may create in federal-state relations.[56]

Environmental laws can amount to little if they are not enforced or if the consequences of noncompliance lack bite.[57] At his confirmation hearing in 1989, EPA Administrator William K. Reilly echoed this sentiment when he told senators that "aggressive enforcement . . . is the key to an effective EPA and to a clean environment."[58] Soon thereafter, Reilly ushered in an era of broad expansion in the breadth of the EPA's enforcement authority.[59] In response to calls for more rigorous enforcement of the CAA, Congress delegated several powerful enforcement tools to the EPA.[60] These enforcement tools enabled the agency to compel compliance more effectively, assess penalties, and deter violation of the agency's regulations.[61] One of these tools was the current form of the ACO.[62] Coupled with the expanded administrative authority to impose monetary penalties,[63] the ACO gave the agency the flexibility and efficiency needed to pursue a larger number of minor polluters.[64]

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56. *See, e.g.*, John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1216–24 (1995) (discussing the interdependence of state and federal agencies necessary to enforce the CAA).

57. *See* MARC K. LANDY ET AL., THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS 204 (1990) (noting that regulations only reveal their true meaning through enforcement); Howard Latin, *Regulatory Failure, Administrative Incentives, and the New Clean Air Act*, 21 ENVTL. L. 1647, 1707–09 (1991) (discussing failures in the administrative enforcement of environmental laws).

58. Nomination of William K. Reilly: Hearing Before the Senate Comm. on Environment and Public Works, 101st Cong., 1st Sess. 24 (1989).

59. *See* Clean Air Act Amendments of 1990, Pub. L. No. 101–549, 104 Stat. 2399 (1990) (revising the Act to include, *inter alia*, more efficient civil and criminal enforcement devices for the EPA); *see also* Waxman, *supra* note 49, at 1809–11 (summarizing the enhanced enforcement features of the revised Act).

60. *See* Clean Air Act § 113, 42 U.S.C. § 7413 (2000) (providing the federal enforcement devices granted to the EPA under the CAA).

61. *Id.*

62. *See* Clean Air Act § 113(a)(1)(A), (a)(2)(A), (a)(3)(B), 42 U.S.C. § 7413(a)(1)(A), (a)(2)(A), (a)(3)(B) (2000) (providing the EPA with authority to issue orders compelling compliance with various provisions of the CAA); Clean Air Act § 167, 42 U.S.C. § 7477 (2000) (authorizing orders and pursuit of injunctive relief as necessary to compel compliance with other sections of the CAA).

63. *See* Clean Air Act § 113(d), 42 U.S.C. § 7413(d) (2000) (providing for administratively assessed penalties of up to $27,500 per day, totaling up to $200,000).

64. *See* LAW OF ENVIRONMENTAL PROTECTION, *supra* note 1, § 9:9 (discussing the benefits of using ACOs for less serious violations that the DOJ or the Administrator would be hesitant to spend their time on); *see also infra* notes 90–97 and accompanying text (discussing the purpose and use of the administrative penalty order).

B. Defining an ACO

The ACO is an enforceable legal order that may require the recipient to take some corrective or remedial action within a given time, refrain from certain behavior, or require future compliance with a statute or regulation.[65] Although ACOs are not self-enforcing,[66] a party that refuses to obey an ACO is potentially subject to severe civil or criminal liability for the underlying violation of the statute or regulation if the order is enforced in court.[67] Violation of the ACO itself may also be a basis for civil or criminal penalties over and above any sanctions for the underlying violation of law.[68] ACOs are designed to be quick, responsive, and flexible enforcement tools that are often used, for example, to halt construction or modification of a facility,[69] or to force compliance with permit requirements[70] or state implementation plans.[71]

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65. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, ENVIRONMENTAL ENFORCEMENT: A CITIZEN'S GUIDE (Mar. 1990), *at* http://www.epa.gov/Region4/air/enforce/citizenf.htm (last visited Feb. 1, 2005) [hereinafter CITIZEN'S GUIDE] (describing the mechanics of the EPA's administrative enforcement scheme) (on file with the Washington and Lee Law Review).

66. *See* Clean Air Act § 113(b), 42 U.S.C. § 7413(b) (2000) (providing that the EPA is required to initiate a civil judicial action in a federal district court to enforce its orders); Student Pub. Interest Research Group of N.J., Inc. v. Fritzche, Dodge & Olcott, Inc., 759 F.2d 1131, 1138 (3d Cir. 1985) (ruling that ACOs issued under Section 1319 of the CWA are not self-executing but rather a separate enforcement action must be filed and litigated in district court).

67. *See* Clean Air Act § 113(c)(1), 42 U.S.C. § 7413(c)(1) (2000) (providing for criminal liability including fines, imprisonment, or both); Clean Air Act § 113(d), 42 U.S.C. § 7413(d) (2000) (allowing the EPA to assess civil penalties, based on the violation of an administrative order, of up to $27,500 per day, not to exceed to a total of $200,000).

68. *See* Clean Air Act § 113(b)(2), 42 U.S.C. § 7413(b)(2) (2000) (authorizing the EPA to seek judicial assessment of penalties of up to $27,500 per day per violation of the CAA); Clean Air Act § 113(c)(1), 42 U.S.C. § 7413(c)(1) (2000) (providing for criminal liability for violation of any rule or order issued under specific titles of the CAA).

69. *See* LAW OF ENVIRONMENTAL PROTECTION, *supra* note 1, § 9:9 (discussing the purpose of administrative compliance orders); *see, e.g.*, Alaska Dep't of Envtl. Conservation v. EPA, 244 F.3d 748, 749 (9th Cir. 2001) (discussing the EPA's order requiring Cominco to stop construction or modification at its Red Dog Mine Facility); Allsteel, Inc. v. EPA, 25 F.3d 312, 313 (6th Cir. 1994) (describing a stop construction order on a manufacturing facility thought to be in violation of the CAA).

70. *See* Tenn. Valley Auth. v. Whitman, 336 F.3d 1236, 1244 (11th Cir. 2003) (describing an order requiring the TVA to apply for permits to comply with the CAA's New Source Review permit program).

71. *See* Clean Air Act § 113(a)(2)(A), 42 U.S.C. § 7413(a)(2)(A) (2000) (providing the EPA with authority to issue ACOs for violations of SIPs and permit programs under Title V); Robert A. Wyman, Jr. et al., *Meeting Ambient Air Standards: Development of the State Implementation Plans*, *in* THE CLEAN AIR ACT HANDBOOK 41, 41–69 (Robert J. Martineau, Jr. & David P. Novello eds., 2d ed. 2004) (explaining that state implementation plans are plans prepared and submitted by the states to the EPA and used to enforce the EPA's established National Ambient Air Quality Standards for each of the EPA's listed criteria pollutants).

ACOs are vital enforcement tools because of the EPA's limited resources.[72] To effectively police environmental laws, the EPA needs streamlined, flexible, and efficient enforcement tools that avoid the necessity of constant litigation and are particularly well suited to minor violations.[73] The ACO serves this purpose by putting an alleged violator on notice that more severe action may be taken if the party fails to comply and by encouraging rapid settlements.[74]

In order to understand the purpose of the ACO in its current incarnation, it will be useful to summarize the evolution of the CAA enforcement scheme. The CAA has undergone three major overhauls in its thirty-five year history with the most recent and comprehensive revisions coming in 1990.[75] These Amendments to the CAA were designed in part to aid the EPA's ability to administer its regulations by broadening the scope of the agency's enforcement power.[76]

1. The Clean Air Act Prior to the 1990 Amendments

The pre-1990 Act lacked the flexibility and breadth of enforcement tools necessary to punish and deter polluters quickly and efficiently.[77] As a result, most

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72. *See* David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1571 (1995) (noting that, because the major environmental laws are federal, the quantity, variety, and geographic dispersion of regulated parties is so great that enforcement would be impossible if left solely to the federal government).

73. *See* LAW OF ENVIRONMENTAL PROTECTION, *supra* note 1, § 9:9 (discussing the purpose of the compliance orders).

74. *See* O'Sullivan, *supra* note 4, at 305 (discussing the utility of ACOs).

75. Clean Air Act Amendments of 1990, Pub. L. No. 101–549, 104 Stat. 2399 (1990); *see* Michael R. Barr, *Introduction to the Clean Air Act: History, Perspective, and Direction for the Future*, *in* THE CLEAN AIR ACT HANDBOOK 1, 2 (Robert J. Martineau, Jr. & David P. Novello eds., 2d ed. 2004) (noting that the major overhauls of the CAA were the amendments of 1970, 1977, and 1990). The 1970 Amendments established a major federal regulatory role in air regulation for the first time. *Id.* at 5. The 1977 Amendments doubled the size of the CAA, and the 1990 Amendments doubled it again including exponential growth of the EPA's regulations. *Id.* at 2.

76. *See* THE NEW CLEAN AIR ACT: COMPLIANCE AND OPPORTUNITY 286–87 (Reiner Lock & Dennis P. Harkawik eds., 1991) (discussing the additional targeted violations covered in the 1990 Amendments); *see also* Julie R. Domike & Alec C. Zacaroli, *Civil Enforcement*, *in* THE CLEAN AIR ACT HANDBOOK 567 (Robert J. Martineau, Jr. & David P. Novello eds., 2d. ed. 2004) (describing the enhanced enforcement scheme as including an operating permit program, broad penalty and compliance order authority, and full investigatory and emergency remedial powers).

77. *See* James Miskiewicz & John S. Rudd, *Civil and Criminal Enforcement of the Clean Air Act After the 1990 Amendments*, 9 PACE ENVTL. L. REV. 281, 310 (1992) (discussing the statutory flaws that hampered enforcement of the pre-1990 CAA).

of the EPA's significant enforcement actions were referred to the Department of Justice (DOJ) for prosecution in the civil judicial forum.[78] Litigation brought enormous costs and increased involvement by agency management that drained the EPA's enforcement resources and limited enforcement action to only the most high profile cases.[79] Resources were stretched so thin that the DOJ became reluctant to pursue "procedural violations" of the Act.[80] The DOJ argued that "unless the violations were connected with exceedances of emissions standards, where the public health was arguably threatened, judges would be unsympathetic."[81] This situation proved particularly difficult for the agency as testing, monitoring, recordkeeping, and reporting were crucial to the EPA's ability to carry out its mission of protecting human health and the environment.[82]

Prior to 1990, the utility of the ACO was limited because noncompliance could only be addressed through litigation.[83] Also, regulated parties had to comply within an unrealistically short thirty-day period that severely limited use of the orders.[84] The ACO lacked bite because the agency had no independent authority to assess penalties, except for a cumbersome, resource-intensive, and inflexible noncompliance penalty order.[85] As a result, the noncompliance order was seldom pursued and failed to provide the economic disincentive for which

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78. *See id.* (discussing the practical problems created by the agency's narrow enforcement authority).

79. *See id.* (discussing the problems associated with the agency's focus on civil judicial enforcement).

80. *See id.* (noting the DOJ's reluctance and describing procedural violations as including requirements of testing and monitoring of equipment, reporting, and recordkeeping).

81. *Id.*

82. *Id.*; *see also* RICHARD J. LAZARUS, MAKING OF ENVIRONMENTAL LAW 69 (noting that the EPA was created as a noncabinet agency with the exclusive function of protecting the environment). This arrangement was born out of a concern that vesting stewardship over the environment within several broader cabinet level agencies with competing governmental policies favoring resource exploitation would not yield positive results. *Id.*

83. *See* COMPLIANCE AND OPPORTUNITY, *supra* note 76, at 288 (comparing the EPA's pre and post-1990 enforcement authority).

84. *See* ARNOLD W. REITZE, JR., AIR POLLUTION CONTROL LAW: COMPLIANCE & ENFORCEMENT 527 (2001) (discussing the effect of the 1990 Amendments on enforcement of the CAA).

85. *See* Miskiewicz & Rudd, *supra* note 77, at 308 (discussing the difficulties associated with use of the noncompliance penalty order). The noncompliance penalty order was designed to penalize a polluter according to the economic value the source gained through noncompliance. The formula was so complex that the EPA needed to hire a contractor to compute the penalty. *See* Clean Air Act § 120(c), 42 U.S.C. § 7420(c) (1988) (authorizing the state or federal enforcing agency to contract with a third party to assist in determining the penalty assessment).

it was designed.[86] Thus, the EPA's power was limited to threatening a noncompliant party with expensive and time-consuming litigation that the agency often lacked the resources to pursue.[87]

2. *The Clean Air Act Amendments of 1990*

The 1990 Amendments set out to remedy many of these enforcement limitations by adding a wider range of response options, including field citations, permit programs, and enhanced criminal prosecution.[88] They alleviated the problem of thirty-day compliance schedules by extending the period up to one year, making the orders a more valuable and flexible enforcement tool.[89] The Amendments also enhanced the deterrent effect of the Act through the possibility of civil and criminal liability,[90] and enabled the agency to assess "administrative civil penalties" for noncompliance of up to $27,500 per day.[91] After receiving an administrative penalty, an alleged offender has thirty days to file a request for a hearing on the record that meets the requirements of the Administrative Procedure Act (APA).[92] The Administrator has the flexibility to compromise, modify, or remit these

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86. *See* Arnold W. Reitze, Jr., *A Century of Air Pollution Control Law: What's Worked; What's Failed; What Might Work*, 21 ENVTL. L. 1549 n.383 (1991) (noting that during the first ten years of the Section 120 noncompliance penalty order, the EPA concluded only 38 noncompliance cases and only 24 of these cases resulted in the imposition of a penalty of which the highest penalty was $45,528 and the average was only $13,526) (citing U.S. ENVIRONMENTAL PROTECTION AGENCY, REPORT ON EPA'S FEDERAL PENALTY PRACTICES FY 86–87 (1988)).

87. *See* COMPLIANCE AND OPPORTUNITY, *supra* note 76, at 288 (discussing the impact of the EPA's enhanced compliance order authority after the 1990 Amendments).

88. *See* REITZE, *supra* note 84, at 525 (discussing the use of compliance orders pre-1990 and after the 1990 Amendments); *see also* Clean Air Act § 113(d)(3), 42 U.S.C. § 7413(d)(3) (2000) (providing for a field citation program that is geared toward minor violations and is basically the equivalent of an EPA traffic ticket).

89. *See* REITZE, *supra* note 84, at 525 (discussing the effect of the 1990 Amendments on enforcement of the CAA).

90. *See* Clean Air Act § 113(b)(c)(d), 42 U.S.C. § 7413(b)(c)(d) (2000) (providing the EPA and the DOJ with the authority to seek judicial enforcement or civil or criminal penalties).

91. *See* Clean Air Act § 113(d)(1), 42 U.S.C. § 7413(d)(1) (2000) (providing a limit on penalty orders of $200,000, except when the Administrator and Attorney General jointly determine that a larger administrative penalty is appropriate).

92. *See* Clean Air Act § 113(d)(2)(A), 42 U.S.C. § 7413(d)(2)(A) (providing an opportunity for a hearing on the record in accordance with the APA); Administrative Procedure Act, 5 U.S.C. §§ 554, 556 (2000) (providing administrative agencies with a minimum level of procedures required for an adjudication or hearing on the record).

penalties with or without conditions.[93] The advent of the administrative penalty order elevated the ACOs potency because the agency could threaten a regulated party with substantial penalties without going to court.[94] The administrative civil penalty should not be confused with the civil judicial penalties available through an enforcement action in district court under CAA Section 113(b).[95] Unlike the administrative penalty, the judicial penalty has no cap and results in substantially larger monetary recovery for the agency.[96] Furthermore, judicial penalties are assessed under a strict liability theory and thus do not require a "knowing" violation of the CAA.[97]

C. Uses of the ACO

An ACO may simply be seen as putting the polluter on notice that further action may be taken if compliance is not achieved quickly.[98] The ACO provides the EPA with discretion on how to ensure compliance because the ACO satisfies the thirty-day notice requirement necessary for other enforcement actions to be taken.[99] The agency may choose to rely on the ACO alone, or it

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93. *See* Clean Air Act § 113(d)(2)(B), 42 U.S.C. § 7413(d)(2)(B) (2000) (providing that "[t]he Administrator may compromise, modify, or remit, with or without conditions, any administrative penalty which may be imposed under this subsection").

94. *See* Tenn. Valley Auth. v. Whitman, 336 F.3d 1236, 1258 (11th Cir. 2003) (noting that ACOs can lead directly to the imposition of severe civil and criminal penalties).

95. *See* Clean Air Act § 113(b), 42 U.S.C. § 7413(b) (2000) (providing the EPA with authority to commence a civil action for violation of an order and seek injunctive relief or to assess a civil penalty not to exceed $27,500 per day for each violation).

96. *See, e.g.*, U.S. Environmental Protection Agency, Environmental Results Through Smart Enforcement: Fiscal Year 2002 Enforcement and Compliance Assurance Accomplishments Report, at 59 (May 2003) [hereinafter 2002 EPA Accomplishments Report] (comparing the dollar value of EPA enforcement actions under various environmental statutes and charting fiscal year 2002 penalty assessments), *available at* http://www.epa.gov/compliance/resources/reports/accomplishments/oeca/fy02accomplishment.pdf (on file with the Washington and Lee Law Review). For example, the EPA assessed $5.9 million in administrative penalties under the CAA and $33.8 million in judicial penalties in 2002. *Id.*

97. *See* REITZE, *supra* note 84, at 546 (discussing the scope of the Section 113(b) civil penalty liability).

98. *See* O'Sullivan, *supra* note 4, at 305 (discussing the EPA's enforcement options after the 1990 Amendments); *see also* Acker v. EPA, 290 F.3d 892, 894 (7th Cir. 2002) ("All the order does is alert Acker to the *potential* for legal consequences if he fails to comply with his existing duties and obligations under the CAA.").

99. *See* Clean Air Act § 113(b), 42 U.S.C. § 7413(b) (providing for thirty day notice requirement that the party has violated or is in violation of some requirement or prohibition of the CAA).

may pursue other avenues of enforcement.[100] The ACO, however, is faster, less costly, and thus more beneficial to the EPA in its efforts to protect the environment.[101] The offender may respond quickly to avoid more serious enforcement consequences, thereby allowing ACOs to make the best use of limited agency enforcement resources.[102]

Several conditions apply to the issuance of ACOs.[103] First, the ACO must be based on any information available to the Administrator.[104] Second, the ACO must be issued within 30 days after the issuance of a Notice of Violation.[105] This notice alerts state regulators and alleged violators of impending federal enforcement and gives them the opportunity to comply and avoid enforcement altogether.[106] Third, the regulated party must be given an opportunity to confer with the EPA Administrator.[107] This conference gives the alleged violator a chance to present a legal argument and to offer evidence

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100. *See* Clean Air Act § 113(a)(3), 42 U.S.C. § 7413(a)(3) (2000) (providing the EPA with several enforcement options); *see also* 2002 EPA Accomplishments Report, *supra* note 96, at 59–67 (providing data that shows the EPA's use of its various enforcement mechanisms over the last five years).

101. *See* O'Sullivan, *supra* note 4, at 305 (noting how the efficiency of the ACO scheme may benefit the agency and the public through rapid compliance).

102. *Id.*

103. *See* Clean Air Act § 113(a), 42 U.S.C. § 7413(a) (2000) (providing the specific criteria necessary for issuing an ACO).

104. Clean Air Act § 113(a)(1)(A), 42 U.S.C. § 7413(a)(1)(A) (2000).

105. *See* Clean Air Act § 113(a)(1), 42 U.S.C. § 7413(a)(1) (2000) (stating that "the Administrator shall notify the person and the State in which the plan applies"); *see also* COMPLIANCE AND OPPORTUNITY, *supra* note 76, at 287 (noting that if the state is systematically failing in the enforcement of its SIP, the EPA may assume enforcement authority in that state from the time of public notice of the state's ineffectiveness until the state resumes authority over enforcement, thus alleviating the need for the EPA to give the normal 30 day notice of violation).

106. *See* LAW OF ENVIRONMENTAL PROTECTION, *supra* note 1, § 9:6 (discussing the purpose and use of the Notice of Violation). The Notice of Violation pertains to violations of state-developed requirements and not federally developed programs such as New Source Performance standards, hazardous emissions, federal inspection and information gathering requirements, or the automobile emissions requirements. *Id.*

107. *See* Clean Air Act § 113(a)(4), 42 U.S.C. § 7413(a)(4) (2000) (providing that an ACO does not become effective until after the violator has had the opportunity to confer with the EPA, except for those cases involving hazardous air pollutants); *see also* Steven Herman, Guidance on Implementation of the EPA's Penalty/Compliance Order Authority Against Federal Agencies Under the Clean Air Act, at 10 (Oct. 9, 1998) (explaining that parties should have the opportunity to confer with an EPA official who has the authority to issue ACOs and the conference with the EPA should be requested in less than the thirty day period required to seek a conference for penalty orders), *available at* http://www.epa.gov/Compliance/resources/policies/civil/federal/caagui98.pdf.

informally to persuade the EPA to withdraw or modify the order without resort to the judicial process.[108]

Because the ACO is the most expeditious and cost-effective method of resolving disputes with regulated parties, the EPA has relied heavily on ACOs in most of the enforcement programs that authorize them.[109] Since 1983, the EPA has issued 1500 to 3000 compliance orders per year across all the environmental statutes.[110] The widespread use of ACOs contrasts with the EPA's civil referrals to the DOJ, which increased from around 120 referrals per year in the early 1980s to peak at just over 400 per year by the late 1990s.[111]

To understand the mechanics of a typical ACO, consider the following hypothetical.[112] The EPA Administrator receives an anonymous tip that "Asbestos World," a company engaged in an asbestos removal project, is not complying with the removal procedures set forth in the CAA.[113] The Administrator then issues a notice of violation containing the EPA's belief that

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108. *See* Lloyd A. Fry Roofing Co. v. EPA, 554 F.2d 885, 891 (8th Cir. 1977) (noting that the conference procedure is an important means of abating violations without resorting to the judicial process); Domike & Zacaroli, *supra* note 76, at 576 (discussing the EPA's normal procedures in scheduling the conference with an alleged violator); *see also* LAW OF ENVIRONMENTAL PROTECTION, *supra* note 1, § 9:10 (suggesting that failure to bring issues to the EPA's attention at this informal stage may preclude subsequent judicial review on a theory of failure to exhaust administrative remedies).

109. *See* CITIZEN'S GUIDE, *supra* note 65, at 1 (explaining the advantages of administrative enforcement response efforts); 2001 EPA ACCOMPLISHMENTS REPORT, *supra* note 2, at 64–73 (providing statistics that show the EPA's use of compliance orders from 1999–2001 across a number of environmental statutes). During the three-year period, the EPA issued as many as 298 compliance orders under the CAA and as few as 192. *Id.* at 68. Under the Clean Water Act, compliance orders are used even more frequently; as many as 596 orders were issued in 2000 and as few as 374 were given in 2001. *Id.*

110. *See id.* at 68 (depicting compliance orders issued under each environmental program from 1999–2001); 1998 EPA ACCOMPLISHMENTS REPORT, *supra* note 55, at 90 (charting compliance order usage from 1996–98); U.S. ENVIRONMENTAL PROTECTION AGENCY, SUMMARY OF ENFORCEMENT ACCOMPLISHMENTS FISCAL YEAR 1987, at V (Apr. 1988) (charting compliance orders issued from 1980–87), *available at* http://www.epa.gov/compliance/resources/reports/accomplishments/oeca/fy87accomp-rpt.pdf.

111. *See* 1998 EPA ACCOMPLISHMENTS REPORT, *supra* note 55, at 94 (charting total civil referrals from the EPA to the DOJ from 1975–98). The EPA has not provided data regarding civil referrals to the DOJ in its two most recent accomplishments reports from 2001 and 2002. 2002 EPA ACCOMPLISHMENTS REPORT, *supra* note 96; 2001 EPA ACCOMPLISHMENTS REPORT, *supra* note 2.

112. This example is based loosely on Asbestec Constr. Servs., Inc. v. EPA, 849 F.2d 765 (2d Cir. 1988).

113. *See* Clean Air Act § 113(a), 42 U.S.C. § 7413(a) (2000) (providing that the compliance order authority may apply "on the basis of any information available to the Administrator"). This provision gives the agency extremely broad authority to issue orders even based on circumstantial evidence.

the company is violating a specific provision of the CAA's asbestos removal procedures. After thirty-days, the EPA finds the party has violated or is in violation of the Act and orders it both to identify all removal projects during the previous two years and to comply fully with the CAA in its future projects. The EPA then offers the company an opportunity to request an informal conference with the Administrator within ten days of the order.[114] Asbestos World decides that, according to its understanding of the regulations, it is already complying with the CAA and will therefore disregard the ACO.

At this point, the CAA provides the EPA with several choices. First, the EPA may initiate a civil judicial enforcement action or an action for injunctive relief in a district court.[115] Second, the agency may request that the Attorney General bring a criminal action against Asbestos World based on the EPA's belief that the company is knowingly violating the CAA.[116] Third, the agency may assess an administrative penalty order of up to $27,500 per day.[117] If the EPA waits and does not immediately initiate an enforcement proceeding, the company is at risk of accruing civil penalties for each day of each violation of the CAA.[118] Again, the ACO increases this risk because a regulated party is subject to liability for both a violation of a particular CAA provision and for violation of the ACO itself.[119] In effect, the EPA is able to use the economic threats of civil and criminal penalties and prolonged litigation to force a regulated party into a Hobson's choice. A party will either need to negotiate a settlement, comply with the Act, accrue penalties, or litigate. This powerful

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114. *See* Clean Air Act § 113(a)(4), 42 U.S.C. § 7413(a)(4) (2000) (providing regulated parties the opportunity to confer with the Administrator before an order issued under this subsection may take effect).

115. *See* Clean Air Act § 113(a)(1)(C), (a)(2)(C), (a)(3)(C), (b), 42 U.S.C. § 7413(a)(1)(C), (a)(2)(C), (a)(3)(C), (b) (2000) (providing the EPA with the authority to commence a civil judicial action in the district where the violation occurred, where the violator resides, or where the violators principle place of business is located).

116. *See* Clean Air Act § 113(a)(3)(D), 42 U.S.C. § 7413(a)(3)(D) (2000) (authorizing criminal punishment by a fine pursuant to Title 18, or by imprisonment not to exceed 5 years or both, and civil penalties up to $25,000 per day for violation of any "order" issued by the EPA).

117. *See* Clean Air Act § 113(d)(2)(A), 42 U.S.C. § 7413(d)(2)(A) (providing for the assessment of administrative penalty orders so long as the offender has the opportunity for a formal hearing on the record); Administrative Procedure Act, 5 U.S.C. §§ 554, 555 (providing the procedural requirements for agency adjudications and hearings on the record); *see also* 40 C.F.R. pt. 22 (providing the EPA's "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits"). This Part includes a list of procedures governing formal agency adjudication. *Id.* §§ 22.13–26.

118. *See* Clean Air Act § 113(b), 42 U.S.C. § 7413(b) (2000) (providing for assessment and recovery of civil penalties when the agency initiates a civil judicial enforcement action).

119. Clean Air Act § 113(a), 42 U.S.C. § 7413(a) (2000).

incentive to comply can be created at a relatively modest cost to the EPA because the agency's decision to prosecute or initiate any kind of formal adjudicatory proceedings is completely discretionary.[120]

III. Judicial Review of ACOs

Judicial review of administrative action is governed by the APA[121] and by a body of federal common law that has been described as "a whole congeries of judicial theories and practices."[122] This body of law includes the theories of ripeness, exhaustion, and finality.[123] Though separable, these concepts often overlap in attempting to consider a broad array of concerns on the appropriate timing for judicial review.[124] Although all three related theories are relevant to ACOs, courts have focused primarily on finality in determining whether pre-enforcement review of an order should be available.[125] The focus on finality stems from the fact that Section 307(b) of the CAA explicitly grants jurisdiction to review agency action in the court of appeals for "any other final action taken by the Administrator under this Act."[126] If courts deem ACOs

120. *See* Heckler v. Chaney, 470 U.S. 821, 837–38 (1985) (discussing the presumption that agency enforcement decisions are unreviewable under the APA unless Congress specifically provides otherwise).

121. *See* Administrative Procedure Act, 5 U.S.C. § 704 (2000) (providing that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review").

122. *See* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 329 (1965) (discussing the development of the common law of judicial review).

123. *See generally* Ticor Title Ins., Co. v. FTC, 814 F.2d 731 (D.C. Cir. 1987) (denying review in three separate opinions based on three respectively different theories of exhaustion, finality, and ripeness); Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967) ("Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.").

124. *See* Nat'l Automatic Laundry & Cleaning Council v. Schultz, 443 F.2d 689, 692 (D.C. Cir. 1971) (discussing the reviewability of an agency's interpretive action).

125. *See* Clean Air Act § 307(b), 42 U.S.C. § 7607(b) (2000) (providing for judicial review of final agency action in court of appeals for the appropriate circuit). The pre-enforcement review controversy that this Note contemplates revolves around whether a compliance order is considered final agency action and thus is subject to pre-enforcement review. *See also* Tenn. Valley Auth. v. Whitman, 336 F.3d 1236, 1259 (11th Cir. 2003) (concluding that the ACO scheme unconstitutionally delegates judicial power by relegating district courts to forums for the EPA to conduct show-cause hearings).

126. *See* Clean Air Act § 307(b), 42 U.S.C. § 7607(b) (2000) (providing for review if a person files within sixty days of the date that the EPA publishes its order in the Federal

final agency action, then a regulated party need not face the Hobson's choice of waiting and wondering whether the EPA will seek judicial enforcement of the order and can challenge the validity of the order immediately in a federal court.[127]

A. The Presumption of Reviewability

In *Abbott Laboratories v. Gardner*,[128] the Supreme Court explained that the APA embodies a basic presumption of judicial review for a person adversely affected or aggrieved by agency action.[129] This presumption favoring judicial review holds as long as no statute precludes review and the action is not committed by law to agency discretion.[130] Thus, judicial review should only be restricted upon a showing of "clear and convincing evidence" of a

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Register); *see also* Harrsion v. PPG Indus., 446 U.S. 578, 589 (1980) (determining that the phrase, "any other final action," in the absence of contrary legislative history, "must be construed to mean exactly what it says, namely, *any other* final action").

127. *See, e.g.*, Allsteel, Inc. v. EPA, 25 F.3d 312, 315 (6th Cir. 1994) (granting pre-enforcement review to an ACO determined to be final agency action). An interesting comparison of finality determinations can be drawn when looking at how courts have treated section 113 compliance orders and section 113 notices of violation. *See* West Penn Power Co. v. Train, 522 F.2d 302, 311 (3d Cir. 1975) (denying pre-enforcement review because the "effect of a notice of violation is to make the recipient aware that the 'definitive' regulations are not being met and to trigger the statutory mechanism for informal accommodation which precedes any formal enforcement measures").

128. Abbott Labs. v. Gardner, 387 U.S. 136 (1967). In *Abbott Laboratories*, the Commissioner of Food and Drugs published certain regulations requiring prescription drug manufacturers to print specific information on drug labels and advertisements. *Id.* at 137–38. Abbott Laboratories brought a pre-enforcement declaratory judgment action claiming that the Commissioner had exceeded his authority in establishing a rule that required labels and other printed materials to designate the established name of the drug "every time" its trade name was used in such material. *Id.* at 139. The Court granted review in holding that the regulations constituted final agency action. *Id.* at 149. The regulations were found to be "definitive" statements of the agency's position that "have the status of law and violations of them carry heavy criminal and civil sanctions." *Id.* at 152. Also, the impact on the regulated parties was thought to have a "direct and immediate . . . effect on the day-to-day business of all prescription drug companies." *Id.*

129. *See* Administrative Procedure Act, 5 U.S.C. § 702 (2000) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."); *Abbott Labs.*, 387 U.S. at 140 (1967) (discussing the limits on judicial review of agency action).

130. *See* Administrative Procedure Act, 5 U.S.C. § 701 (2000) (providing exceptions for cases in which statutes preclude review or agency action is committed to agency discretion by law); *Abbott Labs.*, 387 U.S. at 140 (discussing the APA's effect on the availability of judicial review).

contrary legislative intent.[131] This standard may be met not only by the express language of the statute but also impliedly when the congressional intent to preclude is "fairly discernible in the statutory scheme."[132] A court may find implied preclusion by looking to the "structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved."[133]

B. What Constitutes Final Agency Action?

To obtain judicial review of an administrative agency's action, that action must be final.[134] Courts have "interpreted the 'finality' element in a pragmatic way,"[135] in order to further the "policies especially peculiar to finality" such as agency efficiency and enforcement.[136] For example, in *Abbott Laboratories*, the regulations at issue were held to constitute final agency action because they were "definitive" statements of the agency's position that "have the status of law" and carry with them potentially severe penalties.[137] On the other hand, if the agency action lacks an immediate legal or practical effect upon the regulated party, the result of judicial review "is likely to be interference with the proper functioning of the agency and a burden for the courts."[138] Thus, the finality requirement allows an agency the opportunity to "correct its own mistakes and to apply its expertise."[139] Premature judicial intervention into agency action may also lead to "piecemeal review" that is inefficient and might prove to have been unnecessary upon completion of the agency's process.[140]

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131. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 141 (1967) (discussing the presumption of reviewability) (quoting Rusk v. Cort, 369 U.S. 367, 379–80 (1962)).

132. *See* Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 157 (1970) (discussing the presumption in favor of reviewability absent clear congressional intent to the contrary).

133. Block v. Cmty. Nutrition Inst., 467 U.S. 340, 345 (1984).

134. *See* ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 411 (1993) (discussing the requirements of final agency action); *see also* Administrative Procedure Act, 5 U.S.C. § 704 (2000) ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.").

135. *Abbott Labs.*, 387 U.S. at 149.

136. *See* AMAN & MAYTON, *supra* note 134, at 412 (discussing the distinction between the finality and exhaustion doctrines).

137. Abbott Labs. v. Gardner, 387 U.S. 136, 152 (1967).

138. FTC v. Standard Oil Co., 449 U.S. 232, 242 (1980).

139. *See id.* (discussing possible effects of premature judicial review).

140. *See id.* (concluding that judicial review of agency action that is not final would interfere with the proper functioning of the agency and become a burden on the courts).

C. *The* Bennett *Test*

The Supreme Court uses a general two-prong test for determining whether an agency action is final.[141] First, the Court inquires whether "the [agency] action mark[s] the consummation of the agency's decisionmaking process," and is "not of a merely tentative or interlocutory nature."[142] In other words, the agency's decision needs to be a final and binding determination as opposed to a mere recommendation.[143] This consideration seeks to ensure that judicial review will not disrupt the ordinary administrative process.[144] Second, the agency's action must determine rights or obligations, or be one from which "legal consequences will flow."[145] In contrast to the first prong, this requirement does not stem from a concern for the special functions of administrative agencies.[146] This requirement derives from application of the "traditional criteria for bringing judicial action into play."[147] This criteria includes the Constitution's Article III grant of judicial power to determine "cases or controversies."[148] It also encompasses the "procedural philosophy pertaining to the federal courts," whereby "Congress has been loath to authorize review of interim steps in a proceeding."[149] Therefore, to satisfy the second prong of the finality test, an agency action must at least order or require a party to do, or refrain from doing, something; it must grant or withhold a power or facility, subject the regulated party to civil or criminal liability, or change the party's existing or future status or condition.[150]

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141. *See* Bennett v. Spear, 520 U.S. 154, 177–78 (1997) (discussing the *Bennett* test for a finality determination).

142. *Id.*

143. *See* Franklin v. Massachusetts, 505 U.S. 788, 799 (1992) (concluding that a report from the Secretary of Commerce to the President carried no direct consequences and thus served as a tentative recommendation rather than a binding determination). "The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Id.* at 798.

144. *See* Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970) (discussing the relevant considerations in determining finality).

145. *Bennett*, 520 U.S. at 178.

146. *See* Rochester Tel. Corp. v. United States, 307 U.S. 125, 131 (1939) (discussing the limits of judicial review of administrative action).

147. *Id.*

148. *See* U.S. CONST. art. III, § 2 (providing that "the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . [and] to Controversies to which the United States shall be a Part"); *Rochester Tel. Corp.*, 307 U.S. at 131 (discussing the rationale behind requiring rights and obligations to change for a finding of final agency action).

149. *Rochester Tel. Corp.*, 307 U.S. at 131.

150. *See* United States v. Los Angeles & Salt Lake R.R. Co., 273 U.S. 299, 309–10 (1927)

D. The Circuit Split on Pre-enforcement Judicial Review of ACOs

For over twenty-five years, practitioners and courts have expressed confusion over whether a regulated party may seek judicial review of an ACO prior to an EPA initiated enforcement proceeding.[151] The majority approach, denial of pre-enforcement review, clears judicial dockets and prevents a potential flood of challenges to agency action that may be better dealt with at the administrative level.[152] Likewise, the EPA has, until recently, consistently maintained that ACOs do not constitute final agency action and thus should not be subject to pre-enforcement review.[153] This position leaves full discretion to the agency on whether to pursue an enforcement action, while enhancing its leverage over the regulated party during negotiations.[154] The agency benefits from this posture because it can save its limited resources for litigation as a last resort if negotiations fail.[155] Some courts recognize that this position may raise due process concerns because regulated parties may feel compelled to comply with an order or risk substantial accrual of monetary penalties while the EPA procrastinates.[156]

(discussing the reviewability of agency orders).

151. *See, e.g.*, Lloyd A. Fry Roofing Co. v. EPA, 554 F.2d 885, 886 (8th Cir. 1977) (reviewing the issue of pre-enforcement judicial review of ACOs as a matter of first impression in the courts of appeals). *But see* Allsteel, Inc. v. EPA, 25 F.3d 312, 315 (6th Cir. 1994) (permitting pre-enforcement review of a stop-work order because the order constituted "final" agency action).

152. *See* Asbestec Constr. Servs., Inc. v. EPA, 849 F.2d 765, 766 (2d Cir. 1988) (noting that to grant pre-enforcement review of an ACO would burden appellate courts and shackle the EPA from performing its duty of speeding-up the prevention and control of air pollution).

153. In *Alaska Department of Environmental Conservation v. EPA*, the EPA maintained its long-held position that ACOs did not constitute final agency action when the case was before the Ninth Circuit. Alaska Dep't of Envtl. Conservation v. EPA, 244 F.3d 748, 750 (9th Cir. 2001). When the case was heard by the Supreme Court, however, the Solicitor General, arguing on behalf of the EPA, reversed the EPA's position and agreed with the Ninth Circuit that the ACO in this case did constitute final agency action. Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 483 (2004). This was apparently the first time the agency had taken this position.

154. *See* Clean Air Act § 113(a)(4), 42 U.S.C. § 7413(a)(4) (2000) (providing that an order under this Section may not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator).

155. *See* Miskiewicz & Rudd, *supra* note 77, at 310 (discussing the EPA's limited enforcement resources).

156. *See* Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 483 (2004) (noting that the parties did not raise any question as to the adequacy of the EPA's preorder procedures under the Due Process Clause, which implies that the Court noticed the potential for concern); Rueth v. United States, 13 F.3d 227, 230–31 (7th Cir. 1993) (suggesting that if the EPA goes too far in leaving a regulated party in limbo before initiating an enforcement action subsequent to an ACO, the court would not hesitate to intervene in pre-enforcement activity).

1. The Majority Approach

To date, the Second, Third, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits have held that ACOs are not subject to pre-enforcement judicial review under the CAA or the CWA.[157] These courts have primarily based their decisions on theories of statutory preclusion and lack of finality.[158]

a. Implied Statutory Preclusion: Lloyd A. Fry Roofing v. EPA

The Eighth Circuit addressed the issue of pre-enforcement review of ACOs for the first time in *Lloyd A. Fry Roofing, Co. v. EPA*.[159] In *Lloyd A. Fry Roofing*, the EPA ordered an asphalt roofing plant to eliminate certain CAA violations in its visible emissions.[160] The company filed a complaint challenging the order and claimed that an exception under the CAA applied to its emissions.[161] The Eighth Circuit rejected the company's challenge and concluded that the statutory structure of the CAA impliedly precluded review of ACOs.[162] First, the legislative history of the Act indicated that the Conference Committee deleted language from the House and Senate versions of the bill that would have expressly provided for judicial review of compliance orders.[163] The Eighth

157. *See, e.g.*, Tenn. Valley Auth. v. Whitman, 336 F.3d 1236, 1259 (11th Cir. 2003) (concluding that ACOs lack finality because they do not pass the two prong *Bennett* test); Acker v. EPA, 290 F.3d 892, 894 (7th Cir. 2002) (reasoning that because an ACO has no legal force except to impose upon a party the already existing burden of complying with the CAA, the order could not be final agency action); Laguna Gatuna, Inc. v. Browner, 58 F.3d 564, 565 (10th Cir. 1995) (following the reasoning of *Southern Pines* and other sister circuits in concluding that an ACO under the CWA is precluded from review by the legislative history and language of the Act); Southern Pines Assocs. *ex rel.* Goldmeier v. United States, 912 F.2d 713, 716 (4th Cir. 1990) (discussing the legislative history of the Act and analogous environmental statutes in concluding Congress intended to preclude judicial review of compliance orders); Solar Turbines, Inc. v. Seif, 879 F.2d 1073, 1078–82 (3d Cir. 1989) (concluding that the statutory structure of the CAA precludes review, and furthermore, the agency action was not final).

158. *See* Andrew I. Davis, *Judicial Review of Environmental Compliance Orders*, 24 ENVTL. L. 189, 195–217 (1994) (discussing the decisions and theories by which ACOs have been denied review).

159. *See* Lloyd A. Fry Roofing Co. v. EPA, 554 F.2d 885, 890–91 (8th Cir. 1977) (reviewing the issue of pre-enforcement judicial review of ACOs as a matter of first impression in the courts of appeals).

160. *Id.* at 887.

161. *Id.*

162. *Id.* at 890–91 (finding that the legislative history and statutory structure of the CAA demonstrate convincing evidence that Congress intended to preclude judicial review of an abatement order).

163. *See id.* at 890 ("Any person subject to [an abatement order] and who undertakes

Circuit acknowledged that the legislative record contained no indication of the reason for the deletion but interpreted the deletion to suggest that "the intent of the omitted portion was rejected in the bill as passed."[164]

Second, the court determined that pre-enforcement judicial review was inconsistent with the Section 113 enforcement scheme established by Congress.[165] Pre-enforcement review would "severely limit the effectiveness of the [the EPA's informal] conference procedures as a means to abate violations of the Act without resort to the judicial process."[166] This approach could lead to the agency sidestepping pre-enforcement review by filing suit in a district court without issuing an ACO.[167] The court noted the possibility of the accrual of large fines and criminal penalties but concluded that a party could protect itself from the unconscionable accumulation of large fines by invoking the equitable doctrine of laches if the EPA fails to promptly seek enforcement.[168] In sum, the Eighth Circuit concluded that Lloyd Fry Roofing's only recourse was to assert its claims as a defense or counterclaim in an enforcement action brought by the EPA.[169]

b. Final Agency Action: Solar Turbines, Inc. v. Seif

The Third Circuit reached the same outcome on different reasoning in *Solar Turbines, Inc. v. Seif*.[170] In *Solar Turbines*, the EPA issued an ACO pursuant to

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compliance with such order shall not be foreclosed from instituting in the United States district court for the district in which the alleged violation occurred an action against the Secretary to challenge such order.").

164. *See id.* (discussing the contents of the proposed bills). *But see* Davis, *supra* note 158, at 199 (arguing that the unexplained deletion is not conclusive of legislative intent and thus fell short of the "clear and convincing evidence" standard for judicial review of administrative action established in *Abbott Laboratories v. Gardner*). Davis goes on to argue that even under the less demanding analysis of *Block v. Community Nutrition Institute*, the deletion did not erase "substantial doubt about the congressional intent" to preclude review and thus the general presumption favoring judicial review of administrative action should control. *Id.* Davis suggests that a reasonable interpretation of the deletion is that Congress saw no need to include the affirmative intent to include judicial review. *Id.* To do so would have been redundant and unnecessary because the case law established a strong presumption in favor of judicial review of final agency decisions. *Id.*

165. *See* Lloyd A. Fry Roofing Co. v. EPA, 554 F.2d 885, 891 (8th Cir. 1977) (interpreting the CAA to preclude pre-enforcement review).

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *See* Solar Turbines, Inc. v. Seif, 879 F.2d 1073, 1082 (3d Cir. 1989) (concluding that an EPA order issued under Section 167 did not constitute final agency action and was thus unreviewable). The first court to address the issue after *Lloyd A. Fry Roofing* was the Second

Section 167 of the CAA ordering Solar Turbines to cease construction of a gas turbine facility.[171] The state of Pennsylvania had issued a construction permit to the company without providing for controls on nitrogen oxide emissions.[172] The EPA determined that the company's failure to install the "best available control technology" for nitrogen oxide emissions would violate air quality permit requirements and thus ordered the company to stop construction.[173] On appeal, the Third Circuit dismissed the challenger's claim for lack of subject matter jurisdiction, reasoning that the agency's action was not final because no civil or criminal liabilities flowed from the violation of a Section 167 order.[174] The court found that the only meaningful enforcement mechanism under a Section 167 order is for the EPA to pursue injunctive relief in the district court.[175] The court concluded that because the company was not compelled to obey the order at the risk of sanctions and the order did not impose severe hardship on the company, the order was not final and therefore not subject to judicial review.[176]

Surprisingly, the Third Circuit failed to realize that violation of a Section 167 order may actually subject a party to criminal and civil penalties under Sections 113(a) and (b).[177] The court seems to have ignored or missed that these provisions provide for the same penalties that exist for violating Section 113 orders.[178] Therefore, the court's reasoning may have led to the opposite result had it realized penalties may accrue for the underlying violation of the Act or the violation of the order.

c. Review of ACOs Under the Clean Water Act

Based on similar reasoning, courts have denied pre-enforcement review of ACOs under the CWA.[179] In *Southern Pines Associations v. United*

Circuit in *Asbestec Construction Services v. EPA*. *See* Asbestec Constr. Serv., Inc. v. EPA, 849 F.2d 765, 769 (2d Cir. 1988) (concluding that an ACO was not final agency action because the regulated party failed to show its duties or obligations had been altered by the ACO).

171. *Solar Turbines*, 879 F.2d at 1076.

172. *Id.*

173. *Id.*

174. *Id.* at 1081.

175. *Id.*

176. *Id.* at 1082.

177. *See* Clean Air Act § 113(b)(2), (c)(1), 42 U.S.C. § 7411(b)(2), (c)(1) (2000) (providing for civil and criminal penalties for violating any order approved under this Act, including Section 167).

178. *See id.* (providing criminal liability for knowingly violating a Section 167 order).

179. *See, e.g.*, Rueth v. United States, 13 F.3d 227, 230 (7th Cir. 1993) (affirming the

States,[180] the EPA ordered Southern Pines to cease filling activities in a wetland because the company did not have a permit required by Section 301(a) of the CWA.[181] The Fourth Circuit agreed with the Seventh Circuit that the structure of the CWA evinces clear and convincing evidence that Congress impliedly precluded judicial review of ACOs except in an EPA initiated enforcement proceeding.[182] Reasoning that "[b]ecause the compliance order does not alter Southern Pines' obligations under the Act, and the EPA can bring a suit whether or not it issues an order," the court noted that "Southern Pines [is] not faced with any greater threat from the EPA just because the agency seeks to negotiate a solution rather than to institute civil proceedings immediately."[183] The Fourth Circuit also considered the EPA's enforcement authority under other environmental statutes.[184] For example, prior to 1986, courts held that pre-enforcement remedial actions taken by the EPA under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) were not subject to judicial review because litigation would interfere with CERCLA's policy of prompt agency response.[185] In 1986, Congress amended CERCLA to include a provision that specifically precludes federal jurisdiction over pre-enforcement remedial action.[186]

The Fourth Circuit found that the structure of the environmental statutes in general indicates congressional intent to allow the EPA to address environmental problems quickly without becoming immediately entangled in litigation.[187] The court bolstered this theory by noting that the CWA is not only similar in structure to the CAA and CERCLA, but Congress consciously

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district court dismissal for lack of subject matter jurisdiction because the Clean Water Act compliance order was not final agency action); United States v. Outboard Marine Corp., 789 F.2d 497, 505–06 (7th Cir. 1986) (holding that the language of CERCLA expressly precludes pre-enforcement review).

180. *See* Southern Pines Assocs. *ex rel.* Goldmeier v. United States, 912 F.2d 713, 716 (4th Cir. 1990) (finding that the ACO issued under the CWA did not have the force of law because the order did not alter the regulated parties' obligations under the Act).

181. *Id.* at 714.

182. *Id.*

183. *Id.*

184. *Id.* at 716.

185. *See id.* (discussing treatment of ACOs under CERCLA) (citing Wagner Seed Co. v. Daggett, 800 F.2d 310, 315 (2d Cir. 1986)); Wheaton Industries v. EPA, 781 F.2d 354, 356–57 (3d Cir. 1986); United States v. Outboard Marine Corp., 789 F.2d 497, 505–06 (7th Cir. 1986).

186. *See* 42 U.S.C. § 9613(h) (2000) ("No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 . . . or to review any order issued under section 9606(a) of this title . . . .").

187. *See* Southern Pines Assocs. *ex rel.* Goldmeier v. United States, 912 F.2d 713, 716 (4th Cir. 1990) (comparing enforcement schemes under various environmental statutes).

modeled the CWA's enforcement provisions after those of the CAA.[188] Nevertheless, Southern Pines argued that it had been denied its due process rights of notice and an opportunity to be heard prior to the issuance of the ACO.[189] The court rejected the claim and concluded that the company's due process rights were not violated because Southern Pines was not subject to an injunction or penalties until an EPA-initiated enforcement action.[190] Only then would the company have an opportunity to make their constitutional arguments.[191] Other circuits have agreed with the result and analysis in *Southern Pines*, including the Tenth Circuit in *Laguna Gatuna, Inc. v. Browner*[192] and the Seventh Circuit in *Rueth v. EPA*.[193]

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188. *See id.* (noting the similarities in the statutory structures of the CAA and CWA) (citing S. REP. NO. 92–414, at 63 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730).

189. *Id.* at 717.

190. *See id.* (discussing Southern Pines's due process challenge).

191. *See id.* (rejecting the challenger's due process arguments) (citing Hoffman Group, Inc. v. EPA, 902 F.2d 567 (7th Cir. 1990)).

192. Laguna Gatuna, Inc. v. Browner, 58 F.3d 564 (10th Cir. 1995). In this case, the Laguna Gatuna company dumped industrial waste water into a sinkhole in New Mexico. *Id.* at 565. After finding dead migratory birds near the sinkhole, the EPA issued a compliance order under the CWA directing the company to cease its dumping activities. *Id.* The company filed an action in the district court, claiming that the EPA had no jurisdiction over its activities because the sinkhole was not part of the "waters of the United States," and the order violated the company's procedural and substantive due process rights. *Id.* The Tenth Circuit relied on the reasoning of its sister circuits as set forth in *Southern Pines* and in *Rueth v. EPA*. The court agreed that the legislative history and text of the CWA indicate that Congress meant to preclude judicial review of compliance orders under the CWA. *Id.* at 566. Acknowledging that the company had strong due process arguments, the court nonetheless held that the order was not constitutionally intolerable and that allowing judicial review of every EPA compliance order would undermine the EPA's regulatory authority. *Id.*; *see also* Hoffman Group, Inc. v. EPA, 902 F.2d 567, 570 (7th Cir. 1990) (concluding that the CWA compliance order scheme was a detailed mechanism that impliedly precluded review of a compliance order because the only means to compel compliance was through an EPA enforcement proceeding, at which time the recipient can challenge the order).

193. Rueth v. United States, 13 F.3d 227 (7th Cir. 1993). In *Rueth*, the EPA issued a compliance order under Section 309(a) of the CWA requiring that Rueth cease all discharges into an area considered wetlands. *Id.* at 228. The agency found that the defendant had filled three acres of wetlands and navigable waters without a permit. *Id.* The Seventh Circuit agreed with its own reasoning in *Hoffman* that the CWA provides for judicial review only when the agency seeks judicial enforcement of an order, or the agency seeks administrative penalties. *Id.* at 231 (citing Howell v. United States Army Corps of Engineers, 794 F. Supp. 1072, 1075 (D.N.M. 1992)) ("[F]orcing the agency into litigation before it completes its wetlands delineation and permitting process will frustrate the statutory scheme that allows the agency to resolve violations in a flexible manner without judicial interference"). The court added that "the cease-and-desist letter is not 'final agency action . . . .' [It] is only the beginning of the administrative process, not its consummation." *Id.*

2. The Minority Approach

The Sixth and Ninth Circuits have held that pre-enforcement review of compliance orders is available in the context of construction or modification of new stationary sources of air pollution under Sections 113(a)(5) and 167 of the CAA.[194] In contrast to the majority approach, the Sixth Circuit found no express or implied congressional intent to deny pre-enforcement review.[195] In both cases, the burden placed on the regulated party was the decisive factor in determining that the agency action was final.[196]

a. The Sixth Circuit's New Approach: Allsteel, Inc. v. EPA

The first federal appellate court to depart from the established treatment of ACOs was the Sixth Circuit in *Allsteel, Inc. v. EPA*.[197] In *Allsteel*, the EPA issued an order to Allsteel, Inc., a steel company, to cease construction of a manufacturing facility in Tennessee.[198] The EPA believed Allsteel was in violation of the CAA even though the company was acting under the authority

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194. *See* Clean Air Act § 113(a)(5), 42 U.S.C. § 7413(a)(5) (2000) (authorizing the EPA to issue compliance order for failure to comply with New Source Review requirements). New Source Review (NSR) is a CAA program which subjects large new stationary sources of air pollution and, under certain circumstances, changes at large existing sources, to preconstruction review and permitting requirements. Clean Air Act § 111, 42 U.S.C. § 7411. The nature of these requirements depends on whether the source is located in an area that has attained or failed to attain the National Ambient Air Quality Standard for a given pollutant. *Id.* One of the most debated issues that arises in the context of the NSR program is the same issue that gave rise to the dispute in *TVA II*. Marnie Riddle, Note, *Interpreting the Relevance of Economic Harm in the Clean Air Act:* Tennessee Valley Authority v. EPA, 30 ECOLOGY L.Q. 617, 622 (2003). That is the issue of whether changes at an existing air pollution source will constitute "modification" (requiring a permit) or "routine maintenance" (exempt from permit requirements). *Id.*

195. *See* Allsteel, Inc. v. EPA, 25 F.3d 312, 314 (6th Cir. 1994) (noting that courts must presume the availability of judicial review absent clear and convincing evidence of a contrary legislative intent). The court noted that Section 307(b) of the CAA granted review of final agency action and stated that this affirmatively suggested that Congress provided no other indication of intent to preclude review of ACOs. *Id.*

196. *See* Alaska Dep't of Envtl. Conservation v. EPA, 244 F.3d 748, 750 (9th Cir. 2001) (determining that the effect of the order would cost a considerable amount of time and money to the challenger); Allsteel, Inc. v. EPA, 25 F.3d 312, 315 (6th Cir. 1994) (concluding that the ACO could jeopardize the very survival of Allsteel).

197. *See Allsteel*, 25 F.3d at 315 (finding an EPA stop construction order that imposed a new obligation and the threat of civil and criminal penalties to be suitable for pre-enforcement review).

198. *Id.* at 313.

of a state-issued permit.[199] The Sixth Circuit determined that Congress did not exhibit any express or implied intent to bar pre-enforcement judicial review of administrative orders under the CAA.[200] The court supported this notion with language of the CAA that provides review in the Courts of Appeals for "any other final action of the Administrator."[201] This provision was sufficient to indicate that Congress had not evinced "clear and convincing evidence" of an intent to preclude review of these orders.[202]

The court also found that the impact of the order was practical and immediate.[203] For example, the ACO required Allsteel to cease building a major new facility, which prevented the company from pursuing its business interests in an efficient manner and potentially endangered the firm's survival.[204] An order stopping construction on such a project imposes a new obligation, one not directly imposed by the CAA, and violation of that order could result in civil and criminal penalties.[205] Thus, the ACO was held to constitute final agency action.[206]

Judge Wellford's concurrence noted the possibility of due process concerns in the compliance order scheme.[207] He did not accept that Congress intended to give the EPA unreviewable authority to halt construction of a major plant—before the plant had released any emissions—without a full-scale hearing to determine whether the state-approved emissions system was in violation of the applicable laws.[208] Judge Wellford also noted that, in this case, the EPA made no effort to initiate an enforcement action, rather the agency was content that it had stopped construction, that Allsteel had no remedy in court,

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199. *Id.*

200. *Id.* at 314. *But see* S. Ohio Coal v. Office of Surface Mining, Reclamation and Enforcement, 20 F.3d 1418, 1427 (6th Cir. 1994) (concluding from the structure of the CWA that Congress had intended to preclude pre-enforcement review under that Act).

201. *Allsteel*, 25 F.3d at 314.

202. *Id.*; Abbott Labs. v. Gardner, 387 U.S. 136, 141 (1967) (explaining that absent clear and convincing evidence of a contrary Congressional intent courts should not restrict access to judicial review).

203. *See Allsteel*, 25 F.3d at 314 (noting that a stop-construction order on a new facility had practical and immediate effects on the company).

204. *Id.*

205. *Id.*

206. *Id.*

207. *See id.* at 316 (Wellford, J., concurring) (discussing the potential draconian consequences of indefinite delay of enforcement by the EPA).

208. *See id.* (Wellford, J., concurring) (noting that not every ACO would be considered final agency action but only in cases with an unusual fact situation such as that in *Allsteel* would the court deem an order final).

and that it would need to seek approval from the EPA for further action.[209] The judge argued that if the EPA did not bring an enforcement action within a reasonable time under these circumstances, the CAA "could be unenforceable as violative of constitutional due process."[210]

b. The Ninth Circuit Weighs in on Finality: Alaska Department of Environmental Conservation v. EPA

The second court to allow pre-enforcement review of an ACO was the Ninth Circuit in *Alaska Department of Environmental Conservation v. EPA*.[211] In that case, the EPA issued three enforcement orders that invalidated an air quality construction permit issued by state regulators to Cominco for the construction of a power generator at Cominco's Alaskan mining facility.[212] The Department challenged the EPA's authority to invalidate the permit under federal and state law.[213] The EPA argued that it had authority to regulate such construction under the CAA and that the court lacked jurisdiction to consider the claim because the ACOs were not final agency action and thus unreviewable until the agency commenced an enforcement action.[214]

The Ninth Circuit disagreed, holding that the EPA's orders satisfied both prongs of the *Bennett* finality test.[215] First, the agency had asserted its final position on the factual circumstances upon which the ACOs were made.[216] Indeed, the EPA admitted that its position would change only if the circumstances surrounding the construction changed.[217] Second, the orders determined the rights and obligations of the parties in the sense that the effect of the order was to halt construction at the Mine facility at a considerable cost

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209. *Id.* (Wellford, J., concurring).

210. *Id.* (Wellford, J., concurring).

211. *See* Alaska Dep't of Envtl. Conservation v. EPA, 244 F.3d 748, 749 (9th Cir. 2001), *aff'd*, 540 U.S. 461 (2004) (holding that the EPA's ACO represented the agency's "final position on the factual circumstances," and that the legal consequences would follow if the order were disregarded because the orders had determined the rights and obligations of the parties and thus was reviewable).

212. *Id.* at 749.

213. *Id.*

214. *Id.* at 750.

215. *See id.* at 750 (concluding that the EPA had asserted its final position and determined the rights and obligations of Cominco). For a discussion of finality see *supra* Part III.C (discussing the application of the *Bennett* test to agency action).

216. *See id.* at 750 (stating the EPA's position that if Cominco were to build the generator using low NOx technology it would be in violation of the CAA, the Alaskan SIP, and the ACO).

217. *See id.* (noting that the EPA's position was final).

of both time and money to Cominco.[218] Third, legal consequences would flow in the form of judicial penalties if Cominco disobeyed the order.[219] In short, the court weighed the unalterable nature of the EPA's position with the great burden that the challenger would suffer in holding this ACO final.[220]

When the case was heard by the Supreme Court in 2004, the EPA reversed its position and agreed with the Ninth Circuit that this particular order did in fact constitute final agency action.[221] The EPA admitted that, under the myriad of "pragmatic considerations" involved in a finality determination, the ACO in question was indeed final.[222] Perhaps this reversal was a strategic decision, designed to take advantage of the Ninth Circuit's favorable ruling on the merits.[223] In previous cases, the agency consistently maintained that compliance orders do not constitute final agency action.[224] The Supreme Court agreed with the Ninth Circuit's finality ruling and noted its satisfaction in the lower court's application of the *Bennett* test.[225] Curiously, the Court noted that no issue had been raised about the adequacy of the EPA's pre-order procedures

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218. *See id.* (discussing the effects of the orders on the regulated party).

219. *See id.* (noting that the EPA could request, and the district court could assess, penalties for Cominco's alleged violation of the CAA's Prevention of Significant Deterioration requirements and for alleged violation of the order). The court also noted that their review of the case would not benefit from further factual development of the record as the question of who bore ultimate responsibility to decide what emissions reductions were required from which sources under the CAA is a legal question. *Id.* at 750–51.

220. *Id.* at 750–51.

221. *See* Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 483 (2004) (noting that, in this Court, the EPA agreed with the Ninth Circuit's finality determination).

222. *See* Brief of Respondent EPA at 16, Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461 (2004) [hereinafter Brief of Respondent EPA] (discussing the application of the *Bennett* test to the ACO in this case) (citing FTC v. Standard Oil, 449 U.S. 232, 239–43 (1980)).

223. *See* Alaska Dep't of Envtl. Conservation v. EPA, 298 F.3d 814, 816 (9th Cir. 2002), *aff'd*, 540 U.S. 461 (2004) (holding that the EPA did not abuse its discretion and acted within its authority in determining that the state agency BACT determinations did not comply with the CAA or the Alaskan SIP).

224. *See, e.g.*, Solar Turbines, Inc. v. Seif, 879 F.2d 1073, 1076 (3d Cir. 1989) (arguing that the CAA precludes pre-enforcement review of Section 167 administrative orders); Asbestec Constr. Serv., Inc. v. EPA, 849 F.2d 765, 768 (2d Cir. 1988) (discussing the EPA's argument that an ACO is not final because an enforcement proceeding is still available) (citing Lloyd A. Fry Roofing Co. v. EPA, 554 F.2d 885, 891–92 (8th Cir. 1977)). For an idea of why the EPA might prefer to maintain that ACOs are not final agency action see *supra* notes 152–54 and accompanying text (describing the benefit to the agency in issuing nonreviewable orders).

225. *See Alaska*, 540 U.S. at 483 (discussing the Ninth Circuit's application of the finality test).

under the Due Process Clause or the APA but did not discuss the issue further.[226]

IV. The ACO Enforcement Scheme Is Held Unconstitutional: The Eleventh Circuit's Novel Approach in TVA v. Whitman

Although several courts had mentioned possible due process concerns with the ACO scheme in dicta, no court had passed judgment on the issue until the Eleventh Circuit did so in *TVA II*.[227] In that case, the court found the ACO scheme itself repugnant to the Due Process Clause and separation of powers principles.[228]

A. The Controversy

As a result of its broad enforcement powers and its goal of attaining global multi-facility settlements, the EPA has zealously pursued entire industries suspected of endemic CAA violations.[229] Nowhere is this more obvious than with alleged violations of the CAA's New Source Review (NSR) program pertaining to stationary sources of air pollution.[230] The NSR program requires a complex analysis before a new major stationary source of air pollution is constructed or before an existing stationary source undergoes a major modification.[231] In this context, the EPA has initiated enforcement actions

226. *Id.* This curious line in the opinion could be read to suggest that the Court was harboring reservations on the due process issues raised by the ACO scheme but was not willing to raise issues that were not briefed and argued by the parties.

227. *See, e.g.*, Laguna Gatuna, Inc. v. Browner, 58 F.3d 564, 566 (10th Cir. 1995) (noting the strength of Laguna's policy argument that is should not be necessary to violate an EPA order and risk civil penalties to obtain judicial review but ultimately holding that this situation was nonetheless not constitutionally intolerable); Allsteel, Inc. v. EPA, 25 F.3d 312, 316 (6th Cir. 1994) (Wellford, J., concurring) (explaining that to not hold a stop-work order final agency action and deny pre-enforcement review would involve serious due process concerns).

228. *See* Tenn. Valley Auth. v. Whitman, 336 F.3d 1236, 1258–59 (11th Cir. 2003) (discussing the constitutional problems the court viewed as inherent in the statutory scheme).

229. *See* Domike & Zacaroli, *supra* note 76, at 567 (discussing the EPA's broadened scope of authority granted under the 1990 Amendments to the CAA).

230. *Id.*; *see also* Bernard F. Hawkins, Jr. & Mary Ellen Ternes, *The New Source Review Program: Prevention of Significant Deterioration and Nonattainment New Source Review, in* THE CLEAN AIR ACT HANDBOOK 131, 136 (Robert J. Martineau, Jr. & David P. Novello eds., 2d. ed. 2004) (discussing the general framework of the New Source Review program). New or modified major stationary sources that may emit one or more of the regulated pollutants at certain thresholds must undergo new source review to obtain construction permits. *Id.*

231. *See id.* (outlining the NSR program's general focus); *see also* Clean Air Act

against petroleum refiners, the pulp and paper industry, and large utilities.[232] An action against utilities gave rise to the dispute in *TVA II*.[233]

The Tennessee Valley Authority is a unique federal agency charged with providing electric power to portions of the southeastern United States.[234] Controversies involving the CAA are very familiar to the TVA.[235] In 1999, the TVA became entangled with the EPA in yet another dispute.[236] From 1982 to 1996, the TVA undertook fourteen rehabilitation projects, including replacing boilers at nine of its coal-fired electric power plants.[237] The EPA determined that these projects were "modifications" and not merely "routine maintenance."[238] Thus, the EPA concluded that the project triggered New

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§ 111(a)(3), 42 U.S.C. § 7411(a)(3) (2000) (defining a stationary source as "any building, structure, facility, or installation which emits or may emit any air pollutant"); Clean Air Act § 112(a)(1), 42 U.S.C. § 7412(a)(1) (2000) (defining a "major source" as any stationary source or group of stationary sources within a contiguous area and under common control that emit in the aggregate more than ten tons per year of any hazardous pollutant or more than twenty-five tons per year of any combination of hazardous pollutants).

232. *See* Domike & Zacaroli, *supra* note 76, at 568 (describing the scope of some of the EPA's enforcement actions against entire industries). The EPA's position on power plants is that for many years a large number of plants have operated without the best available emissions control technology and as a result have increased the pollution in the surrounding areas and downwind of the facilities along the Eastern Seaboard. 2002 EPA Accomplishments Report, *supra* note 96, at 22. The primary pollutants emitted by the power plants that the EPA is concerned with are sulfur dioxide, nitrogen oxide, and particulate matter which cause adverse environmental and health impacts, particularly on asthma sufferers, the elderly, and children. *Id.*

233. *See* Tenn. Valley Auth. v. Whitman, 278 F.3d 1184, 1189 (11th Cir. 2002) (describing the factual development of the suit that evolved into *TVA II*).

234. 16 U.S.C. § 831n-4(h) (2000). The TVA is a unique agency in that it was created as a federal agency with the intention that it should have "much of the essential freedom and elasticity of a private business corporation." H.R. REP. NO. 73-130, at 19 (1933). For example, the TVA is run by a Board of Directors and the agency's personnel are not subject to the personnel laws normally applicable to federal officers and employees. 16 U.S.C. §§ 831a(g), 831b (2000).

235. Dean Hill Rivkin, *The TVA Air Pollution Conflict: The Dynamics of Public Law Advocacy*, 49 TENN. L. REV. 843, 844 (1982) (discussing litigation between the EPA and the TVA in the seventies when the TVA was the heaviest polluter of sulfur dioxide in the nation).

236. Tenn. Valley Auth. v. Whitman, 336 F.3d 1236, 1236 (11th Cir. 2003).

237. *Id.* at 1239.

238. *See* Clean Air Act § 111(a)(4), 42 U.S.C. § 7411(a)(4) (2000) (defining "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted"); 40 C.F.R. § 52.21(b)(2)(iii)(a) (providing that "[a] physical change in the method of operation shall not include . . . routine maintenance, repair and replacement"); *see also* Robert A. Greco, Comment, *When is Routine Maintenance Really Routine? A Proposed Modification to the EPA's New Source Review Program*, 88 MARQ. L. REV. 391, 393–95 (2004) (analyzing the history of the routine

Source Review permitting requirements.[239]

In November of 1999, the EPA issued an ACO that required the TVA to identify modifications taken without permits, apply for those permits, and enter into compliance agreements with the EPA.[240] Even after a series of negotiations and amendments to the ACO, the TVA refused to comply with the order because it argued that the modifications constituted routine maintenance and that no increase in emissions could be traced to the modifications.[241] Next, the EPA took an unusual step and sent the controversy to an Environmental Appeals Board (EAB) to adjudicate the question of whether the TVA was liable for a CAA violation.[242] Undoubtedly, part of the Eleventh Circuit's displeasure with the EPA's actions stemmed from the EAB proceedings that "lacked the virtues of most agency adjudications."[243] The EAB affirmed most of the amended ACO and entered a "final order" in favor of the EPA's position.[244] The TVA then sought review of the EAB's decision in the Eleventh Circuit Court of Appeals.[245]

B. Constitutional Violations

Aside from its argument before the Supreme Court in *Alaska*, the EPA has long taken the position that ACOs are not final agency action and thus are not subject to pre-enforcement judicial review.[246] Of course, this is a logical position for the EPA as it enhances the agency's leverage over alleged

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maintenance issue as applied to electric power plants).

239. *TVA II*, 336 F.3d at 1244.

240. *Id.*

241. *Id.*

242. *Id.* at 1245. The EPA did not bring an enforcement proceeding in the district court because its position was that there was no justiciable case or controversy. Tenn.Valley Auth. v. Whitman, 278 F.3d 1184, 1193 (11th Cir. 2002). The EPA maintained that two executive branch agencies serving at the pleasure of the President may not engage in litigation on the theory that commonly controlled agencies lack the concrete adversity necessary for an Art. III case or controversy (i.e. "a person may not sue himself"). *Id.* Thus, the EPA chose an ad hoc review procedure before its own Environmental Appeals Board (EAB) in order to determine the legitimacy of the ACO. *Id.*

243. Tenn. Valley Auth. v. Whitman, 336 F.3d 1236, 1245–46 (11th Cir. 2003).

244. *Id.* at 1246.

245. 42 U.S.C. § 7607(b) (2000) (providing for judicial review of final agency action).

246. *See supra* notes 152–55 and accompanying text (explaining why the EPA has maintained that ACOs do not constitute final agency action). *But see* Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 483 (2004) (noting that in front of this Court, the EPA agreed with the Ninth Circuit's determination that the ACO constituted final agency action).

offenders and avoids delaying enforcement actions indefinitely in a web of legal proceedings while the threat to the public health and the environment remains.[247] Nevertheless, the Eleventh Circuit disapproved of the fact that the EPA adopted a different position in court than it did toward the regulated party.[248] The court described the EPA's posturing as "employing the harsh provisions of the CAA when confronting a potentially recalcitrant party, but hesitant to reveal the legal significance of ACOs in court for fear that the very part of the CAA that makes ACOs so effective will be struck down."[249] The Eleventh Circuit found that the ACO scheme used in this context was repugnant to the Due Process Clause of the Fifth Amendment.[250]

The court offered two justifications for this result, beginning with the problem of procedural due process.[251] The problem stems from the fact that the CAA grants authority to an executive agency to issue orders with the force of law "on the basis of any information available" to the Administrator that a CAA violation has occurred.[252] The court reasoned that, before the government may impose severe civil and criminal penalties, the defendant is entitled to a full and fair hearing before an impartial tribunal.[253] The court found that the ACO scheme deprived the regulated party the opportunity to be heard and to present evidence on whether the conduct underlying the ACO took place and whether the conduct constitutes a violation of the CAA.[254]

Next, the court determined that the CAA scheme unconstitutionally delegates judicial power to a non-Article III entity.[255] The Eleventh Circuit's concern was that the CAA's statutory scheme "relegates Article III courts to

247. *See* Miskiewicz & Rudd, *supra* note 77, at 329 (1992) (discussing how the CAA's 1990 Amendments affected the availability of pre-enforcement review of compliance orders).

248. *See* Tenn. Valley Auth. v. Whitman, 336 F.3d 1236, 1251 (11th Cir. 2003) (discussing the inconsistency that the EPA displayed in court compared to how it treated the regulated party).

249. *Id.*

250. *See TVA II*, 336 F.3d at 1258 (discussing the constitutional violations the court found in the ACO scheme); *see also* U.S. CONST. amend. V (providing that no person shall be deprived of life, liberty, or property without due process of law).

251. *See id.* at 1258 (discussing the procedural due process and separation of powers problems the ACO scheme raises).

252. *Id.*

253. *See id.* (concluding that the ACO scheme did not afford a regulated party an adequate hearing) (citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). For a more in depth discussion of the requirements of procedural due process in the context of administrative law see Krauss, *supra* note 23, at 820–25 (discussing the general requirements of a valid due process claim).

254. Tenn. Valley Auth. v. Whitman, 336 F.3d 1236, 1258 (11th Cir. 2003).

255. *Id.*

insignificant tribunals" by allowing the district courts to serve as fora for the EPA to conduct proceedings akin to "show-cause hearings."[256] Similarly, in the Eleventh Circuit's view, the appellate courts are reduced to reviewing only whether the ACO was validly issued, rather than deciding whether the conduct in question actually violates the statute.[257]

C. The Eleventh Circuit's Conclusion

The *TVA II* court ultimately held that it lacked jurisdiction to review the ACOs because the orders did not constitute final agency action, and the court reached that result in a novel way.[258] The court pointed out that when the EPA uses any of the other three enforcement methods,[259] the defendant may make legal and factual arguments in an independent forum that will enable a defendant to utilize all of his pre-established procedural rights;[260] the ACO does not afford a defendant these same rights.[261] Although the CAA empowers the EPA to "issue ACOs that have the status of law," the court held "the statutory scheme unconstitutional to the extent that severe civil and criminal penalties can be imposed for noncompliance with the terms of an ACO."[262] Accordingly, the opinion concluded that ACOs are legally inconsequential and thus do not constitute final agency action.[263]

V. Analyzing TVA v. Whitman*: Should Courts Follow the Eleventh Circuit?*

Although the Eleventh Circuit's novel decision raised important questions, other circuits should not follow its reasoning. The decision unnecessarily read

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256. *Id.* at 1259.

257. *See id.* (noting that the appellate courts are emasculated in this scheme to reviewing only whether the ACO has validly issued, that is to say based on "any information available" as opposed to no information at all).

258. *See id.* at 1239 (holding that ACOs are legally inconsequential because the statutory scheme is unconstitutional).

259. *See supra* notes 125–27 and accompanying text (discussing the EPA's enforcement options under Section 113 of the CAA).

260. *See* Tenn. Valley Auth. v. Whitman, 336 F.3d 1236, 1241 (11th Cir. 2003) (discussing the EPA's various enforcement options).

261. *See id.* (reasoning that an ACO's injunction-like legal status coupled with the lack of opportunity for adjudication or meaningful judicial review create due process problems for the CAA enforcement scheme).

262. *Id.*

263. *See id.* (concluding that because ACOs are not final agency action, they are not reviewable by courts of appeals).

constitutional problems into the CAA statutory structure, misinterpreted key provisions of the statute, and broke from an established line of case law in the treatment of ACOs.

A. Statutory Interpretation: The Doctrine of Constitutional Doubt

A basic tenet of statutory interpretation, known as the doctrine of "constitutional doubt," provides that "courts are loath to infer a congressional intention to enact unconstitutional legislation."[264] The Eleventh Circuit previously adopted this doctrine in concluding that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, [we] will construe the statute to avoid the problems unless such a construction is plainly contrary to the intent of Congress."[265] Despite the fact that constitutional issues were neither raised nor briefed by the parties in *TVA II*, the Eleventh Circuit unnecessarily read due process problems into the statute.[266]

A reasonable reading of the ACO provisions of the CAA avoids the constitutional difficulties alluded to in *TVA II*. In *Alaska*, the EPA argued that the underlying merits of ACOs are always subject to judicial review, whether by petition for review to a court of appeals, or in an enforcement action brought by the agency.[267] For example, if Section 307(b) of the CAA provides the U.S. Court of Appeals exclusive jurisdiction to review the validity of ACOs, then the Act may be read to provide that ACOs do not become final agency action until the EPA seeks judicial enforcement of the order.[268] Accordingly, one could reasonably interpret the Act to permit the alleged offender to petition for review

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264. *See id.* at 1249 (discussing the court's method of constitutional interpretation of the statute) (citing Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 465–66 (1989)); *see also* INS v. St. Cyr, 533 U.S. 289, 299–300 (2001) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems."); Almendarez-Torres v. U.S., 530 U.S. 224, 238 (1998) (explaining that the constitutional doubt doctrine seeks to minimize disagreement between governmental branches by preserving congressional enactments "that might otherwise founder on constitutional objections").

265. United States v. Stone, 139 F.3d 822, 836 (11th Cir. 1998) (quoting DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

266. *See* EPA Petition for Certiorari, *supra* note 20, at 8 (noting that the court issued its opinion *sua sponte* after hearing oral arguments on the merits).

267. *See* Brief of Respondent EPA, *supra* note 222, at 19 (explaining the EPA's interpretation of the CAA review provisions).

268. *See* Brief for Petitioner, *supra* note 20, at 5–6 (discussing a plausible theory that avoids the constitutional concerns of the ACO scheme).

of the validity of the ACO in an appellate court, while obtaining a stay of the district court's proceedings pending a decision on the petition.[269]

Also, the Eleventh Circuit interpreted the scope of the judicial review of an ACO too narrowly. The court inferred from the language of the statute that an appellate court may only determine the formal validity of an ACO, that is, whether the ACO was issued based on "any information available" to the Administrator.[270] The court, however, failed to consider the context of the language within the statute, which provides for the issuance of ACOs when "on the basis of any information available to the Administrator, the Administrator finds that any person has violated or is in violation of an applicable" provision of the Act.[271] This provision requires the EPA to make a "find[ing]," which may be reasonably interpreted to mean that the Administrator must make some sort of determination that there has in fact been a violation of the Act, not simply the Administrator's bare suspicion that a violation exists.[272] Furthermore, the "any information available" standard does not relieve the agency from the duty of making a reasonable "finding," rather it suggests that the EPA need not follow formal hearing procedures or apply rules of evidence in determining whether a violation exists that warrants an ACO.[273] Therefore, when determining the validity of an ACO in a review proceeding, a court should include the question of whether the conduct giving rise to the ACO did in fact violate the Act.[274]

While the CAA provides for penalties for violation of an ACO,[275] nothing in those provisions suggests that civil penalties would accrue for an order determined to be substantially invalid.[276] In *Alaska*, the Court offered support

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269. *Id.* at 6.

270. *See* Tenn. Valley Auth. v. Whitman, 336 F.3d 1236, 1252 (11th Cir. 2003) (discussing the court's view on the limitation of the issues that the courts of appeals may consider in reviewing an ACO).

271. Clean Air Act § 113(a)(1), 42 U.S.C. § 7413(a)(1) (2000).

272. *See* EPA Petition for Certiorari, *supra* note 20, at 13 (arguing that the CAA enforcement scheme does not preclude effective judicial review of ACOs).

273. *See id.* (arguing that the Eleventh Circuit should not have read the provision to require a court to stop its analysis after the "any information available" standard has been met).

274. Only by inquiring whether the underlying conduct actually violated the Act may a reviewing court determine if agency action was arbitrary, capricious, or an abuse of discretion. *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2000) (providing the standard of review of agency action).

275. *See* Clean Air Act § 113(b)(2), 42 U.S.C. § 7413(b)(2) (2000) (providing for judicially assessed civil penalties for violation of a requirement of prohibition of any rule, order, or permit issued under this Act).

276. *See* EPA Petition for Certiorari, *supra* note 20, at 14 (noting that an invalid order should be insufficient to support civil or criminal penalties).

for this notion in noting that "Cominco would risk civil and criminal penalties if it defied a valid EPA directive."[277] Additionally, the CAA itself specifically provides that before assessing a civil penalty, the Administrator or the court "shall take into consideration . . . such factors as justice may require."[278] Surely, if a court determines that an order is invalid because a party has not violated an applicable provision of the CAA, justice would require that the court not impose penalties.[279] So long as courts maintain discretion to impose penalties and inquire into the underlying validity of the order, no constitutional violation can exist.[280] Thus, the Supreme Court, the EPA, and common sense all suggest that a court should not assess penalties for disregarding an ACO absent a reasonable showing that the subject of the order violated a provision of the statute in question.

B. Mitigating Due Process Concerns

Even if one were to conclude that pre-enforcement review of ACOs is never available, it does not necessarily follow that the enforcement scheme is violative of due process.[281] In order to offend due process, there would need to be deprivation of life, liberty, or property without an opportunity to be heard and present evidence on the question of the ACO's validity.[282] A reasonable interpretation of the CAA, however, permits a district court to hear a challenge to the validity of an ACO in an EPA-initiated enforcement action.[283] The Eleventh Circuit's mistaken interpretation of the review

277. Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 483 (2004).

278. Clean Air Act § 113(e)(1), 42 U.S.C. § 7413(e)(1) (2000).

279. *See* EPA petition for Certiorari, *supra* note 20, at 14 (arguing that civil penalties should not be imposed if a party has not actually violated a provision of the CAA); LAW OF ENVIRONMENTAL PROTECTION, *supra* note 1, § 9:10 (stating that ACOs are valid and enforceable only when they are supported by valid evidence and not arbitrary and capricious in their requirements); *see also* ASARCO, Inc. v. EPA, 616 F.2d 1153, 1162 (9th Cir. 1980) (invalidating an ACO because its requirements were arbitrary and capricious and not supported by the administrative record).

280. *See* Wagner Seed Co. v. Daggett, 800 F.2d 310, 316 (2d Cir. 1986) (concluding that "it is plain that there is no constitutional violation if the imposition of penalties is subject to judicial discretion").

281. *See, e.g.*, Laguna Gatuna, Inc. v. Browner, 58 F.3d 564, 566 (10th Cir. 1995) (rejecting the argument that denial of pre-enforcement review of an ACO issued pursuant to the Clean Water Act was a denial of due process).

282. *See* Yakus v. United States, 321 U.S. 414, 433 (1944) (discussing due process concerns related to judicial review of administrative action).

283. *See* Brief of Respondent EPA, *supra* note 222, at 19 (explaining that the EPA interprets the CAA to allow the subject of an ACO to challenge the validity of the order as a

provisions of the CAA stem from its insistence that a reviewing court is limited to inquiring "whether the Administrator possessed any information" suggesting that the Act had been violated and "any further inquiry into whether the EPA had 'substantial evidence' of a CAA violation would be unnecessary and unauthorized."[284] This rationale, however, conflicts with the APA's default standard[285] that the *Alaska* court used to conduct a more searching inquiry into the propriety of an ACO.[286] In *Alaska*, the Court held that, in either an EPA-initiated civil action or a challenge to an ACO filed in state or federal court, the burdens of production and persuasion remain with the EPA.[287] Thus, one should interpret the CAA to permit the defendant to allege the ACO's invalidity as a defense against liability for noncompliance with the order and to require the EPA to make a persuasive showing that it properly issued the ACO based on a reasonable finding of a violation of the Act.[288] The language of the CAA, its legislative history, and the EPA's own interpretation of the statute do not indicate that this interpretation would be inconsistent with the intent of Congress.[289]

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defense in an action brought to enforce the order).

284. *See* Tenn. Valley Auth. v. Whitman, 336 F.3d 1236, 1259–60 n.41 (11th Cir. 2003) (explaining the Eleventh Circuit's view of the limitations on review of an ACO).

285. *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2000) (providing that a reviewing court may set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

286. *See* Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 496 (2004) (determining that because the CAA does not provide a specific standard of judicial review for an ACO, the Court should apply the Section 706 default standard of the APA).

287. *See id.* at 494 (noting that the EPA may not retain different standards or burdens of proof through its choice of litigation forum).

288. *See id.* (holding that in an EPA initiated civil action or a challenge to an EPA stop-construction order filed in state or federal court, the production and persuasion burdens remain with the EPA); *see also* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) (holding that the EPA's interpretation of a statute that it administers is entitled to deference).

289. *See* Clean Air Act § 307 (b)(1), 42 U.S.C. § 7607(b)(1) (2000) (providing for review of final action taken by the Administrator); David Montgomery Moore, Comment, *Pre-enforcement Review of Administrative Orders to Abate Environmental Hazards*, 9 PACE ENVTL. L. REV. 675, 697–700 (1992) (discussing the legislative history behind the 1990 Amendments with respect to pre-enforcement review of administrative orders); *see also* Yakus v. United States, 321 U.S. 414, 444 (1944) ("There is no constitutional requirement that [the testing of the validity of an administrative order] be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process . . . .").

C. Making the ACO Enforcement Scheme Fair and Workable

Categorical allowance of pre-enforcement review for ACOs is unnecessary and contrary to the structure of the CAA enforcement scheme.[290] Judicial and administrative efficiency would be undermined because regulated parties would have an incentive to challenge all orders.[291] On the other hand, a bright-line rule that denies review is out of touch with the reality of the uses and burdens of this device.[292] Certain ACOs can coerce a regulated party into a Hobson's choice: Complying with the order may create an enormous financial burden on a company while the company awaits possible EPA enforcement, while ignoring the order may subject the party to severe criminal and civil penalties.[293] In such cases, the agency action is clearly "final" in the pragmatic sense and should be subject to pre-enforcement review.[294]

Because ACOs apply across a broad swath of statutes and various programs within those statutes, uniform treatment is impractical if not impossible.[295] Nevertheless, pre-enforcement judicial review should be favored under certain circumstances. Courts should employ the undue hardship prong of ripeness analysis used in *Abbott Laboratories* to aid in determining whether

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290. *See* LAW OF ENVIRONMENTAL PROTECTION, *supra* note 1, § 9:9 (noting that the purpose of ACOs is to allow the EPA a quick and responsive enforcement tool for less harmful violations of the Act). *But see* Davis, *supra* note 158, at 223–24 (1994) (arguing that pre-enforcement review should be granted to ACOs in general).

291. *See* Laguna Gatuna, Inc. v. Browner, 58 F.3d 564, 566 (10th Cir. 1995) (stating that "[j]udicial review of every unenforced compliance order would undermine the EPA's regulatory authority"). In *Lloyd A. Fry Roofing*, the Eighth Circuit raised a legitimate concern with permitting pre-enforcement review of ACOs by pointing out that such allowance could motivate the EPA to avoid the pre-enforcement review by side-stepping the order process altogether and simply filing suit in district court. Lloyd A. Fry Roofing Co. v. EPA, 554 F.2d 885, 891 (8th Cir. 1977). Such a scheme could greatly diminish the ACO's utility and the EPA's motivation to use the orders. *See* Moore, *supra* note 289, at 722 (arguing that pre-enforcement review of ACOs is a needless waste of agency resources and outweighed by the need to abate environmental damage).

292. *See, e.g.*, Allsteel, Inc. v. EPA, 25 F.3d 312, 316 (6th Cir. 1994) (Wellford, J., concurring) (stating that "[Judge Wellford could not] believe that Congress intended that EPA have the unreviewable authority to close down indefinitely construction of a major plant which had not yet initiated any emissions without the opportunity for a full-scale hearing to determine whether the emission system, already approved by the state environmental agency, was in violation of applicable law and regulations").

293. *Id.* (Wellford, J., concurring).

294. *See id.* at 315 (concluding that a stop-construction order that had practical and immediate consequences on the company was a final agency action).

295. *See* LAW OF ENVIRONMENTAL PROTECTION, *supra* note 1, § 9:10 (noting that the various contexts that permit issuance of ACOs include abating emergencies, assessing penalties, gathering information and effectuating *in rem* remedies such as stop sale orders).

the agency action was final and thus ripe for pre-enforcement review.[296] This approach will enable the EPA to maintain the flexibility necessary to effectuate prompt and efficient enforcement, yet removes the draconian possibilities the agency can impose on regulated parties by delaying enforcement proceedings indefinitely.[297] Furthermore, this approach to pre-enforcement review should sift out all but the most urgent claims in which irreparable injury awaits the regulated party.

D. Applying the Undue Hardship Test

A simple determination of whether agency action is final and thus ripe for review does not give courts sufficient guidance in the context of ACOs. As discussed in Part III of this Note, courts have disagreed whether an ACO in a given situation constitutes final agency action.[298] Courts should borrow from traditional ripeness analysis and consider the "hardship to the parties" in addition to the finality test when deciding whether an ACO is ripe for pre-enforcement review.[299]

Ordinarily, hardship to the parties has been considered along with "fitness" of the issues in determining ripeness for review.[300] The hardship test asks whether the challenger would bear substantial hardship through postponement of judicial review, thereby forcing the regulated party to wait for an agency enforcement action.[301] If the agency action requires an "immediate and significant change in the plaintiff's conduct of their affairs with serious penalties attached to noncompliance," courts will recognize a hardship.[302] Thus, the agency action must affect the "primary conduct" of the parties in

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296. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 153 (1967) (discussing the extent of the harm that could befall Abbott if they were denied pre-enforcement review).

297. *See Allsteel*, 25 F.3d at 316 (Wellford, J., concurring) (discussing the problems associated with the EPA waiting indefinitely to exercise its enforcement discretion).

298. *See supra* Part III.D (discussing different finality determinations in the federal courts of appeals).

299. For a discussion of traditional ripeness analysis, see David Floren, Comment, *Pre-enforcement Ripeness Doctrine: The Fitness of Hardship*, 80 OR. L. REV. 1107, 1108–12 (2001) (discussing the fitness and hardship elements of ripeness analysis).

300. *See Abbott Labs.*, 387 U.S. at 149 (stating that the problem of ripeness "is best seen in a twofold aspect, requiring [a court] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration").

301. *See id.* at 153 (explaining that when the legal issue is fit for judicial resolution and significant and unnecessary harm may await the defendant, access to the courts must be permitted under the APA and the Declaratory Judgment Act).

302. *Id.*

conducting their "day-to-day affairs."[303] Mere financial harm is not enough, rather significant changes in business practices and a high risk of exposure to strong sanctions are necessary to meet the undue burden standard.[304]

The inquiry does not end with a discussion of the hardship to the regulated party.[305] Courts may also consider the hardship that judicial review would bear on the agency.[306] This question is of paramount importance for the ACO enforcement scheme because the EPA simply does not have the resources necessary to defend every decision to issue an ACO in court.[307] Therefore, only by balancing the hardships to both parties can courts decipher which ACOs are ripe for pre-enforcement review while staying true to the legislative intent behind granting the EPA a relatively flexible enforcement scheme.[308]

In determining when an ACO may be ripe for immediate review, the hardship test would give courts added guidance beyond the question of finality. Some ACOs would clearly satisfy this test, particularly those that order a party to cease major construction projects.[309] On the other hand, certain ACOs are less oppressive and merely order a party to comply with a specific provision of

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303. *See* Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 164 (1967) (discussing the direct effects of the regulation on the challenger).

304. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 153–54 (1967) (discussing the possible effects of the challenged regulation on challenger's business conduct).

305. *See* Floren, *supra* note 299, at 1112 (noting that hardship to an agency faced with pre-enforcement litigation may be considered under this analysis).

306. *See* Carter Day Indus., Inc. v. EPA (*In re* Combustion Equip. Assocs., Inc.), 838 F.2d 35, 40 (2d Cir. 1988) (balancing the hardship to the challenger with the hardship to the EPA and the Superfund statutory scheme in requiring the agency to expend its resources in litigation in preliminary stages of an investigation).

307. *See* JOEL A. MINTZ, ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES 235 (1995) (noting the paucity of resources the EPA has available for enforcement activity and the negative impact it has had on EPA's performance).

308. An abundance of scholarship exists which argues that the EPA's current enforcement scheme is ineffective, inefficient, and needs an overhaul. Indeed, the EPA is regularly testing new programs and ideas. These arguments and proposals are beyond the scope of this Note. For further readings on more creative enforcement solutions see generally Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2445–59 (1995) (offering suggestions for effective integration of environmental and criminal law); Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181, 1220–42 (1998) (advocating the traditional deterrence-based approach to enforcing environmental laws and suggesting reforms to improve that approach).

309. *See* Alaska Dep't of Envtl. Conservation v. EPA, 244 F.3d 748, 750 (9th Cir. 2001) (finding an EPA cease construction order on a company's power generator burdensome); Allsteel, Inc. v. EPA, 25 F.3d 312, 314 (6th Cir. 1994) (noting the severe hardship that Allsteel would undergo if the court denied pre-enforcement review).

a regulation such as an asbestos removal procedure[310] or to cease dumping activities in a particular location.[311] For the sake of judicial and administrative efficiency, courts should treat these types of orders as non-final and leave regulated parties with the options of either negotiating with the EPA or challenging the order in a subsequent enforcement action.[312]

A final potentially thorny problem is a conundrum for the regulated party: How does one know if the agency action was final until one seeks review? The EPA and the courts have, for the most part, consistently maintained that ACOs are not final agency action.[313] Therefore, the simplest solution is for the EPA and regulated parties to operate from the rebuttable presumption that ACOs are not final agency action but if an ACO unduly burdens a regulated party, this presumption is rebuttable by a sufficient showing of hardship.[314]

Critics of this Note's approach could argue that an undue burden test will simply shift litigation from one issue to another. Rather than argue whether agency action was final, regulated parties will begin challenging agency action as overly burdensome and thus ripe for review. Furthermore, critics could argue what is needed by the regulated and administrative communities is certainty, that is, the ability to conduct their affairs in reliance on bright-line rules of law as opposed to imprecise and ambiguous judicial tests. Such claims, however, fail to appreciate the practicality of the undue hardship approach. Because the EPA uses ACOs in a myriad of circumstances under the CAA, courts have had difficulty in finding a unifying theory. This ripeness test will benefit courts in navigating the labyrinth of the finality doctrine.[315] Although framed as finality decisions, the existing case law on ACOs already acknowledges considerations of hardship and is readily applicable going forward.[316] Courts should have little trouble discerning a frivolous challenge to

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310. *See* Asbestec Constr. Servs., Inc. v. EPA, 849 F.2d 765, 767 (2d Cir. 1988) (discussing an EPA order requiring Asbestec to comply with asbestos removal procedures provided for in Section 112 of the CAA).

311. *See* Laguna Gatuna, Inc. v. Browner, 58 F.3d 564, 565 (10th Cir. 1995) (discussing a compliance order issued under the authority of the CWA).

312. Of course, this approach assumes that penalties may not accrue for invalid orders. *See supra* notes 268–78 and accompanying text (arguing that ACOs are invalid if a court later determines that the challenger did not commit a violation of the underlying Act).

313. *See supra* notes 245–48 and accompanying text (discussing the agency's reluctance to concede that an ACO is final agency action).

314. *See supra* Part V.D (discussing application of an undue hardship test).

315. *See* JAFFE, *supra* note 122, at 328–30 (discussing the difficulties associated with applying the finality test).

316. *See* Alaska Dep't of Envtl. Conservation v. EPA, 244 F.3d 748, 750 (9th Cir. 2001) (considering the extreme burden that the ACO brought to bear on the company's operations); Allsteel, Inc. v. EPA, 25 F.3d 312, 315 (6th Cir. 1994) (discussing the hardship that Allsteel

a routine ACO, yet at the same time will have clear guidance and concrete examples to aid in determining which compliance orders cross the threshold and cause undue hardship. Because adding the hardship prong of ripeness analysis to finality determinations filters out all but the most severe and urgent pre-enforcement ACO challenges, the courts will have a better idea of the types of orders that may be oppressive, while the EPA and regulated parties will likely resolve disputes earlier as a result of more well-defined limitations on the ACO enforcement scheme.

VI. Conclusion

The Eleventh Circuit declared the ACO enforcement scheme violative of due process because of a fundamental misinterpretation of the CAA.[317] Furthermore, the court went out of its way to read constitutional problems into the statute that a reasonable interpretation would have avoided.[318] Thus, the decision in *TVA II* should not be followed.

The categorical approaches, either denying or permitting pre-enforcement review of ACOs, as suggested in the past, are neither prudent nor necessary.[319] In the future, courts should use a pragmatic approach in deciding whether to grant pre-enforcement review of ACOs.[320] In addition to the *Bennett* finality test, courts should consider the nature of the particular ACO and the hardship it imposes on both the challenger and the agency.[321] In the future, the existing body of case law on the subject, coupled with a pragmatic method of determining the ripeness of an ACO for review, should provide courts with

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would undergo as a practical and immediate consequence of the ACO).

317. *See supra* notes 270–97 and accompanying text (describing the Eleventh Circuit's reading of the judicial review provisions of the Act as too narrow).

318. *See supra* notes 271–280 and accompanying text (describing an alternative interpretation of the Act that avoids the due process concerns expressed by the Eleventh Circuit).

319. *See supra* notes 290–96 and accompanying text (arguing that either of these approaches are too extreme to either effectuate the goals of Act or avoid due process concerns).

320. This approach is in accord with the finality guidance that the Supreme Court offered in *FTC v. Standard Oil*. *See* FTC v. Standard Oil, 449 U.S. 232, 239–40 (1980) (noting that courts have treated finality determinations in a pragmatic and flexible manner consistent with the facts and circumstances of the case).

321. The Sixth and Ninth Circuits essentially applied this type of analysis without actually labeling it as an "undue burden test." *See* Alaska Dep't of Envtl. Conservation v. EPA, 244 F.3d 748, 750 (9th Cir. 2001) (concluding that the rights and obligations of the company were altered by the order at a considerable cost of both time and money); Allsteel, Inc. v. EPA, 25 F.3d 312, 314 (6th Cir. 1994) (noting that compliance with the stop-construction order could have jeopardized the very survival of Allsteel).

adequate guidance on the proper treatment of ACOs.[322] This approach reconciles the existing enforcement scheme with the interests of all concerned parties, namely, the regulated parties, the EPA, the courts and the public.

From a regulated party's perspective, this approach can help avoid an oppressive Hobson's choice. A party that truly believes it is not in violation of the CAA will have assurance that if pre-enforcement review of an order is unavailable, they can challenge the validity of the order in a subsequent enforcement proceeding.[323] The EPA benefits because it may continue to use one of its most effective and efficient enforcement devices, while ensuring regulated parties will receive adequate procedural protections.[324] This approach also preserves judicial efficiency because courts will not face a deluge of challenges to administrative action that would likely result from declaring all ACOs "final agency action."[325] Finally, the public will benefit from quick and efficient abatement of potentially harmful or toxic acts of pollution.[326] This comports with the legislative purpose behind granting the EPA the compliance order authority because it frees up agency resources for pursuing more egregious violations of the CAA.[327] Ideally, a practical system that allows the EPA to maintain an effective enforcement scheme, while eliminating the need for regulated parties to make the most painful of Hobson's choices without an opportunity to challenge the validity of the ACO in court, will produce fairness, predictability, and efficiency within the Clean Air Act and other environmental laws.

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322. Under the approach suggested in this Note, most of the existing case law would still be good law. However, *TVA II*, *Solar Turbines*, and *Lloyd A. Fry Roofing* are inconsistent with this approach. *See* Tenn. Valley Auth. v. Whitman, 336 F.3d 1236, 1239 (11th Cir. 2003) (holding that the federal appellate courts lack jurisdiction to review ACOs under the CAA because of an unconstitutional statutory structure); Solar Turbines, Inc. v. Seif, 879 F.2d 1073, 1081 (3d Cir. 1989) (denying review to a particularly burdensome stop-construction order of a gas turbine facility); Lloyd A. Fry Roofing Co. v. EPA, 554 F.2d 885, 891 (8th Cir. 1977) (denying pre-enforcement review solely on a theory of implied statutory preclusion).

323. *See supra* notes 299–320 and accompanying text (discussing a practical interpretation of the scope of judicial review for ACOs).

324. *See supra* Part II.C (discussing the common uses of ACOs).

325. *See* Asbestec Constr. Servs., Inc. v. EPA, 849 F.2d 765, 769 (2d Cir. 1988) (concluding that immediate pre-enforcement review of some ACOs "serve[s] neither efficiency nor enforcement" of the CAA).

326. *See* LAW OF ENVIRONMENTAL PROTECTION, *supra* note 1, § 9:9 (discussing the purposes for which Congress granted the ACO issuing authority).

327. *See id.* (noting that the ACO is particularly useful in situations involving minor violations of the Act because the DOJ and the EPA Administrators prefer to use their limited time and resources in pursuing the most serious violators).