

## Should Pre-Enforcement Judicial Review of Administrative Compliance Orders Be Available Under the Clean Air Act?

*“The history of the Clean Air Act is still only about twenty-five years old. Like most twenty-somethings, it is still a work in progress. Every CAA practitioner can affect its development.”*<sup>1</sup>

### I. INTRODUCTION

Congress’s enactment of the Clean Air Act (CAA) granted the United States Environmental Protection Agency (EPA) authority to develop and implement programs for air pollution prevention.<sup>2</sup> Although the traditional route to ensure compliance with an environmental law is judicial enforcement, the EPA can target alleged violators of the CAA with any one of four enforcement tools.<sup>3</sup> The EPA may request that the Attorney General commence a criminal action against the alleged violator, file a civil action in district court, assess civil penalties against the alleged violator after a formal adjudication, or direct an alleged violator to comply with statutory requirements by issuing an administrative compliance order.<sup>4</sup> Administrative compliance orders are the most common mechanism for enforcement because they promote early reconciliation of violations and avoid litigation.<sup>5</sup>

---

1. MICHAEL R. BARR ET AL., *THE CLEAN AIR ACT HANDBOOK* 3 (Robert J. Martineau & David P. Novello eds., 1997).

2. CAA, 42 U.S.C. § 7601 (2000) (discussing delegation of powers and duties to EPA). The code states that:

“[T]he Administrator may delegate to any officer or employee of the Environmental Protection Agency such of his powers and duties under this chapter, except the making of regulations subject to § 7607(d) of this title, as he may deem necessary or expedient . . . . Upon the request of an air pollution control agency, personal of the Environmental Protection Agency may be detailed to such agency for purposes of carrying out the provisions of this chapter.

*Id.*; see R. SHEP MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT* 39 (1983) (discussing President Nixon’s creation of EPA). At its inception, the EPA’s largest program targeted air pollution control. MELNICK, *supra*, at 39.

3. See 42 U.S.C. § 7413 (delineating EPA enforcement options); see also *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1240-41 (11th Cir. 2003) (outlining EPA enforcement options); *Allsteel, Inc. v. EPA*, 25 F.3d 312, 314 (6th Cir. 1994) (summarizing tools for regulating parties involved in unlawful activity under CAA).

4. Daniel F. O’Sullivan, *The Clean Air Act Amendments of 1990: Permits and Enforcement—The Guts of the New Law*, 18 U. DAYTON L. REV. 275, 303-09 (1992) (discussing EPA enforcement options for alleged CAA violators).

5. See Andrew I. Davis, *Judicial Review of Environmental Compliance Orders*, 24 ENVTL. L. 189, 190 (1994) (highlighting compliance order as quick and responsive enforcement tool); David M. Moore, *Pre-Enforcement Review of Administrative Orders to Abate Environmental Hazards*, 9 PACE ENVTL. L. REV. 675,

Administrative compliance orders are issued, pursuant to section 7413 of the CAA, for violations of applicable state implementation plans or permits.<sup>6</sup> Failure to comply with a compliance order could result in a formal judicial proceeding and the imposition of daily civil penalties and criminal sanctions.<sup>7</sup> Parties subject to administrative compliance orders argue that they should be afforded the opportunity to challenge the basis of the EPA's order because of the potential consequences of noncompliance.<sup>8</sup> While parties are usually denied judicial review until the EPA seeks enforcement in a district court, some federal circuits interpret the CAA as permitting pre-enforcement review of administrative compliance orders.<sup>9</sup>

This Note examines the availability of pre-enforcement judicial review of administrative compliance orders issued by the EPA to alleged violators of the CAA.<sup>10</sup> First, this Note details the standards that courts apply to determine whether pre-enforcement judicial review of agency action is available.<sup>11</sup> This Note then discusses differences in the application of the standards among circuit courts.<sup>12</sup> Finally, this Note concludes that recent decisions providing pre-enforcement judicial review of administrative compliance orders are misguided, and that courts should provide pre-enforcement judicial review only when the EPA files an enforcement action in district court.<sup>13</sup>

## II. MECHANISMS FOR SEEKING PRE-ENFORCEMENT JUDICIAL REVIEW OF AN

---

722 (1992) (arguing bar of pre-enforcement review and rapid clean-up benefits EPA, responsible party, and public); O'Sullivan, *supra* note 4, at 305 (noting time and cost benefits of issuing compliance orders).

6. 42 U.S.C. § 7413. The statute states that the "Administrator may . . . issue an order requiring such party to comply with the requirements or prohibitions of such [state] plan or permit." *Id.*

7. 42 U.S.C. § 7413(c)(1) (providing convicted violators punished by fine, imprisonment of five years or less, or both). Further, section 7413(d) permits the EPA to assess civil penalties based upon the violation of any "order" issued by the agency. *Id.* § 7413(d).

8. See *Tenn. Valley*, 336 F.3d at 1239 (petitioning for review of administrative compliance order); *Acker v. EPA*, 290 F.3d 892, 894 (7th Cir. 2002) (requesting judicial review by seeking dismissal of administrative order); *Ala. Dep't of Env'tl. Conservation v. EPA*, 244 F.3d 748, 749 (9th Cir. 2001) (seeking judicial review of three enforcement orders); *Solar Turbines, Inc. v. Seif*, 879 F.2d 1073, 1076 (3d Cir. 1989) (attempting to obtain pre-enforcement review); *Asbestec Constr. Servs., Inc. v. EPA*, 849 F.2d 765, 767 (2d Cir. 1989) (arguing in favor of pre-enforcement review by court of appeals); *Lloyd A. Fry Roofing Co. v. EPA*, 554 F.2d 885, 886 (8th Cir. 1977) (seeking pre-enforcement judicial review).

9. Compare *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1239 (11th Cir. 2003) (denying petition seeking pre-enforcement judicial review of administrative compliance order because court lacked jurisdiction), *Solar Turbines*, 879 F.2d at 1082 (denying pre-enforcement judicial review because issue not ripe until enforcement action pursued), and *Asbestec*, 849 F.2d at 768 (rejecting pre-enforcement review in court of appeals), with *Ala. Dep't of Env'tl. Conservation*, 244 F.3d at 751 (approving pre-enforcement judicial review), and *Allsteel, Inc. v. EPA*, 25 F.3d 312, 315 (6th Cir. 1994) (holding order subject to pre-enforcement judicial review because "practical, immediate, and significant").

10. *Infra* notes 14-18 and accompanying text (presenting requirements of EPA administrative compliance orders).

11. *Infra* Part II.B (outlining standards for determining availability of pre-enforcement judicial review); *infra* notes 19-22, 26 and accompanying text (same).

12. *Infra* Parts III-IV (discussing split among circuit court decisions).

13. *Infra* Part V (analyzing case law and rejecting Eleventh Circuit's grant of judicial review).

## ADMINISTRATIVE COMPLIANCE ORDER

When the EPA chooses an administrative compliance order as its enforcement tool, it must issue the order at least thirty days after notifying the alleged violator of its noncompliance action.<sup>14</sup> The Administrator may base the order on any information available, and it must provide the alleged violator with the opportunity to confer with the Administrator.<sup>15</sup> Administrative compliance orders are valid one year from the date of issuance, unless otherwise specified, and require the alleged violator to comply with the order “as expeditiously as practicable.”<sup>16</sup> Issuance of a compliance order pursuant to section 7413(a) does not prevent the EPA from pursuing other available enforcement mechanisms under the CAA.<sup>17</sup> Because the EPA typically issues administrative compliance orders without prior review by an administrative board, alleged violators often challenge the order before the EPA files an enforcement action.<sup>18</sup>

In *Abbott Laboratories v. Gardner*,<sup>19</sup> the Supreme Court set forth a standard for determining whether pre-enforcement judicial review of a compliance order is available to aggrieved parties.<sup>20</sup> Under the *Abbott* standard, a court must initially determine whether the statutory language either explicitly prohibits pre-enforcement judicial review or reveals “clear and convincing evidence” of

---

14. CAA, 42 U.S.C. § 7413(a)(1) (2000) (providing EPA may notify alleged violator at anytime after thirty days following initial notice issued); see *Tenn. Valley*, 336 F.3d at 1241 (setting forth requirements for issuing administrative compliance orders); *Allsteel*, 25 F.3d at 314 (discussing actions EPA must take to issue compliance orders under CAA).

15. 42 U.S.C. § 7413. Section 7413(a)(1) provides that the Administrator may issue a compliance order “on the basis of any information available to the Administrator.” *Id.* § 7413(a)(1). The section also requires that “the person to whom [the compliance order] is issued has had an opportunity to confer with the Administrator” before it takes effect. *Id.* § 7413(a)(4); see BARR, *supra* note 1, at 495 (recognizing benefits of “opportunity to confer”). At the conference, the alleged violator can attempt to persuade the EPA to withdraw or modify the compliance order. BARR, *supra* note 1, at 495.

16. 42 U.S.C. § 7413(a)(4) (suggesting time table for compliance with order).

17. 42 U.S.C. § 7413(a)(4) (presenting available enforcement mechanisms). The Code states, in pertinent part, that issuance of an administrative compliance order “shall [not] prevent the State or the Administrator from assessing any penalties nor otherwise affect or limit the State’s or the United States authority to enforce under other provisions of this chapter.” *Id.* Consequently, one function of the administrative compliance order is to place the alleged violator on notice that the EPA may enforce the order upon failure of immediate compliance. O’Sullivan, *supra* note 4, at 305 (noting availability of enforcement actions even after compliance order issued).

18. See *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1241 (11th Cir. 2003) (discussing legal-like status of compliance orders despite lack of judicial review prior to issuance). The court noted that the EPA issued six administrative compliance orders without adjudication. *Id.* at 1241 n.9; *Ala. Dep’t of Env’tl. Conservation v. EPA*, 244 F.3d 748, 749 (9th Cir. 2001) (petitioning administrative compliance order review without EPA filing enforcement action); see also *Allsteel, Inc. v. EPA*, 25 F.3d 312, 313 (6th Cir. 1994) (challenging stop-work order issued by EPA).

19. 387 U.S. 136 (1967).

20. *Id.* at 140-41, 149-50 (outlining requirements for permitting pre-enforcement judicial review of administrative actions).

an intent to bar judicial review.<sup>21</sup> Absent express or implied preclusion of judicial review, a court subjects the administrative action to a “finality” test.<sup>22</sup>

Typically, the general review provisions of the Administrative Procedure Act (APA) provide for judicial review when the substantive statute does not expressly preclude judicial review.<sup>23</sup> The CAA is silent with respect to the pre-enforcement judicial review of administrative compliance orders.<sup>24</sup> The APA, however, is not a source of subject matter jurisdiction because section 7607(b)(1) of the CAA trumps the APA by specifically providing judicial review of *final* agency actions.<sup>25</sup> As a result of section 7607(b)(1), the finality of administrative compliance orders determines whether alleged violators of the CAA are entitled to pre-enforcement judicial review of the compliance order.<sup>26</sup>

#### *A. Express and Implied Preclusion of Pre-Enforcement Judicial Review*

The CAA neither implicitly nor explicitly precludes pre-enforcement judicial review of administrative compliance orders.<sup>27</sup> *Lloyd A. Fry Roofing v.*

---

21. See *id.* at 140-42 (establishing explicit language or congressional intent serves to bar judicial review); *infra* notes 27-30 and accompanying text (discussing express and implied preclusion of pre-enforcement judicial review); see also Moore, *supra* note 5, at 722 (noting congressional silence regarding pre-enforcement review should serve as bar to avoid needless litigation). Moore notes the threat of environmental damage is more important than lengthy litigation attempting to discern hidden congressional intent. Moore, *supra* note 5, at 722.

22. See *FTC v. Standard Oil Co.*, 449 U.S. 232, 239-43 (1980) (presenting factors for determining finality of agency action). In order to determine finality, courts evaluate whether an action is the agency’s final and definitive statement, whether preclusion of review would have a “practical” and “immediate” effect on the party, whether the legal issues presented are fit for judicial resolution, and whether immediate review would foster agency and judicial efficiency. *Id.* at 239-43; *Asbestec Constr. Servs., Inc. v. EPA*, 849 F.2d 765, 768 (2d Cir. 1988) (applying factors set forth in *Standard Oil*). In addition to the *Standard Oil* factors, a court may examine whether the EPA’s action marked the consummation of a decision-making process, and whether the EPA action determines rights or obligations of the party, or carries legal consequences. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (outlining two additional factors for finality analysis); see *infra* note 42 and accompanying text (discussing application of *Bennett* finality factors).

23. APA, 5 U.S.C. § 704 (1988) (identifying judicially reviewable actions). The APA provides judicial review of “final agency action for which there is no other adequate remedy in a court.” *Id.* See generally *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871 (1990) (providing judicial review pursuant to APA provision when no authorization granted by Endangered Species Act); *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980) (determining jurisdiction based on APA finality analysis).

24. CAA, 42 U.S.C. § 7601 (2000) (setting forth procedure for administrative proceedings and judicial review under CAA).

25. 42 U.S.C. § 7607. Section 7607(b)(1) provides for judicial review of “final action” taken by the EPA Administrator in the United States Court of Appeals for the District of Columbia. *Id.* § 7607(b)(1).

26. See, e.g., *Acker v. EPA*, 290 F.3d 892, 895 (7th Cir. 2002) (precluding pre-enforcement judicial review because agency action not final); *Ala. Dep’t of Env’tl. Conservation v. EPA*, 244 F.3d 748, 751 (9th Cir. 2001) (recognizing court has jurisdiction because of final agency action); *Asbestec*, 849 F.2d at 768 (categorizing compliance order as final agency action allowing for pre-enforcement judicial review).

27. 42 U.S.C. § 7607. Congress authorizes judicial review of certain enumerated actions in section 7607(b)(1), but it does not specifically address administrative compliance orders. *Id.*; see, e.g., *Allsteel, Inc. v. EPA*, 25 F.3d 312, 314 (6th Cir. 1994) (quoting section 7607(b)); *Asbestec*, 849 F.2d at 767 (same); *Lloyd A. Fry Roofing Co. v. EPA*, 554 F.2d 885, 889 (8th Cir. 1977) (discussing section 1857 as amended by section 7607).

*EPA*, an Eighth Circuit case, exemplifies legislative scheme analysis of the availability of pre-enforcement judicial review.<sup>28</sup> In discussing the CAA's legislative history, purpose, and design, the Eighth Circuit focused primarily on two factors implicating preclusion of pre-enforcement judicial review: the Conference Committee removal of language in the bill critical to preserving the right to pre-enforcement judicial review, and the collision of pre-enforcement judicial review with the CAA's other enforcement mechanisms.<sup>29</sup> Notwithstanding the Eighth Circuit's decision, the CAA's legislative scheme is no longer the basis for precluding pre-enforcement judicial review of administrative compliance orders because after *Fry Roofing*, the 1970 version of the CAA underwent major revisions.<sup>30</sup>

### B. Determining Finality of Administrative Actions

By adding the language "any other final action" to section 7607(b)(1) of the CAA Amendments of 1977, Congress expanded the jurisdiction of the federal courts of appeals.<sup>31</sup> The statute, however, failed to define "final action."<sup>32</sup> In

---

28. *Fry Roofing*, 554 F.2d at 890-91 (concluding history of 1970 Amendments to CAA indicate congressional intent to preclude pre-enforcement judicial review).

29. *Fry Roofing*, 554 F.2d at 890-91 (discussing influence of legislative scheme on court's decision to preclude pre-enforcement judicial review). The court construed the deletion of language mentioning judicial review as "clear and convincing" evidence that Congress intentionally omitted the right to review, even though the Conference Committee's report failed to shed light on Congress's reason for deleting the pertinent language. *Id.* The court considered an administrative compliance order an informal conference procedure necessary to initiate a compliance proceeding in the district court. *Id.* at 891. Permitting pre-enforcement judicial review during the conference period effectively negates the purpose of an informal proceeding because it allows a party to transfer the dispute to an adjudicative setting. *Id.* at 890; see Davis, *supra* note 5, at 198-200 (discussing court's legislative scheme analysis in *Fry Roofing*).

30. See Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399; Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685. The 1977 Amendments authorized pre-enforcement judicial review of final agency action. Clean Air Act Amendments of 1977, sec. 305, § 7607(b)(1), 91 Stat. 685, 776. Although the 1990 Amendments resulted in major changes to the CAA, they did not clarify what constituted "final action" for purposes of section 7607. Clean Air Act Amendments of 1990, sec. 109-10, 302, 702, 706, 707, 710, § 7607, 104 Stat. 2399, 2469, 2574, 2681, 2683 (encompassing all amendments to CAA section 7607). See generally James Miskiewicz & John S. Rudd, *Civil and Criminal Enforcement of the Clean Air Act After the 1990 Amendments*, 9 PACE ENVTL. L. REV. 281 (1992) (discussing new and modified administrative authorities under CAA); O'Sullivan, *supra* note 4 (discussing amendments to CAA since 1970).

31. CAA, 42 U.S.C. § 7607 (2000). A petitioner may only file for judicial review in the United States Court of Appeals for the District of Columbia. *Id.*; *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 591 n.7 (1980) (recognizing congressional intent to expand court of appeals' jurisdiction). The *Harrison* Court suggested that Congress's inclusion of "any other final action," rather than simply "other final action," indicates Congress did not intend to limit the construction of section 7607(b)(1). *Harrison*, 446 U.S. at 589.

32. See 42 U.S.C. §§ 7401-7671 (excluding definition of "final action"); see also Miskiewicz & Rudd, *supra* note 30, at 328-32 (outlining legislative attempts to clarify "final action" in 1990 Amendments). During the 101st Congress, both the House and Senate introduced legislation seeking to clarify the availability of pre-enforcement judicial review of administrative orders. Miskiewicz & Rudd, *supra* note 30, at 329. After committees, only the Senate bill retained specific language barring pre-enforcement review. *Id.* at 330. Ultimately, the Senate reached a compromise that permitted informal hearings for administrative compliance orders. *Id.* at 331. The House bill, which lacked language pertaining to pre-enforcement judicial review, prevailed because Congress concluded that those courts that precluded pre-enforcement judicial review

*Harrison v. PPG Industries, Inc.*,<sup>33</sup> the Court addressed the scope of section 7607(b)(1) in an attempt to determine what actions the statute exempts from pre-enforcement judicial review.<sup>34</sup> By applying a literal interpretation to the phrase “any other,” the Court established a broad reading of section 7607(b)(1).<sup>35</sup> The Court, however, failed to delineate any defining characteristics of “final action.”<sup>36</sup> Shortly after *Harrison*, the Court defined “finality” in *FTC v. Standard Oil Co.*<sup>37</sup> The Court specified the following factors (*Standard Oil* factors): whether the action is the agency’s final and definitive statement; whether preclusion of review will have a “practical and immediate” effect on the aggrieved party; whether the issues presented are purely legal or otherwise fit for judicial resolution; and whether immediate review will foster agency and judicial efficiency.<sup>38</sup>

In *Bennett v. Spear*,<sup>39</sup> the Court proffered additional factors for determining the finality of agency action (*Bennett* factors).<sup>40</sup> The Court focused on whether

---

resolved the issue. *Id.* at 331-32.

33. 446 U.S. 578 (1980).

34. *Id.* at 587-94 (discussing legislative history of 1977 Amendments). PPG petitioned the court of appeals for judicial review. *Id.* at 584. PPG could only establish jurisdiction, however, if the EPA Administrator’s decision constituted final action. *Id.* PPG argued in favor of a broad interpretation by focusing on the word “any.” *Id.* at 587.

35. *Id.* at 589 (construing “any other final action” literally). The Court declared the Administrator’s ruling “final” for purposes of section 7606 (b)(1) because short of an enforcement action, the EPA had rendered its “last word on the matter.” *Id.* at 586. The Court rejected respondent’s argument that because Congress did not include specific language expanding the courts of appeals’ jurisdiction, to do so would violate canons of statutory construction. *Id.* at 592. *But see Harrison*, 446 U.S. at 600 (Rehnquist, C.J., dissenting) (rejecting majority’s interpretation of section 7607). Justice Rehnquist applied the rule of *ejusdem generis* and interpreted “any other final action” in relation to the statute’s prior enumerated actions subject to review. *Id.* at 601 (Rehnquist, C.J., dissenting). Consequently, under Justice Rehnquist’s interpretation, only actions requiring notice and an opportunity for comment or hearing would constitute final action pursuant to section 7607(b)(1). *Id.* at 600 (Rehnquist, C.J., dissenting).

36. *Id.* at 590-94 (illustrating court’s analysis lacks consideration of defining factors for determining finality of EPA actions).

37. 449 U.S. 232, 239-43 (1980) (delineating factors for determining finality of *Standard Oil* complaint). The Court sought guidance from the *Abbott Laboratories v. Gardner* decision and analyzed the practical consequences of pre-enforcement judicial review. *Id.* at 239 (discussing *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967)).

38. *Standard Oil*, 449 U.S. at 243. The Court held that issuance of the complaint was not final agency action. *Id.* The Court viewed the complaint as a “threshold determination” that required further inquiry rather than a definitive statement of the EPA’s position. *Id.* at 241. The order could not have a legal or practical effect on the daily operations of the respondent because the complaint lacked finality. *Id.* at 242. The Court also noted that pre-enforcement judicial review would deny the EPA the opportunity to complete its agency process, unnecessarily burden courts with undeveloped factual records, and provide alleged violators with an immediate delay tactic. *Id.* at 242; *see, e.g., Acker v. EPA*, 290 F.3d 892, 894-95 (7th Cir. 2002) (applying *Standard Oil* factors to administrative compliance order issued pursuant to section 7413); *Allsteel, Inc. v. EPA*, 25 F.3d 312, 314-15 (6th Cir. 1994) (considering *Standard Oil* factors in assessing finality of stop-work order); *Asbestec Constr. Servs., Inc. v. EPA*, 849 F.2d 765, 767 (2d Cir. 1988) (examining *Standard Oil* factors to establish reviewability of compliance order issued pursuant to CAA). *See generally* Davis, *supra* note 5, at 189 (summarizing *Standard Oil* factors and analysis).

39. 520 U.S. 154 (1997).

40. *Id.* at 177-78 (utilizing different approach to determining finality); *see, e.g., Tenn. Valley Auth. v.*

the EPA's issuance of a compliance order marked the "consummation of the agency's decisionmaking process."<sup>41</sup> Additionally, the Court considered whether legal consequences could flow from issuance of the compliance order or whether it could determine the rights or obligations of the party.<sup>42</sup> Overall, in deciding finality, courts focus on the EPA action's effect on an aggrieved party, the nature of the potential legal issue presented before the court, and the EPA's basis for issuing the order.<sup>43</sup>

### III. CIRCUIT COURTS SPLIT ON THE APPLICATION OF THE FINALITY TEST TO ADMINISTRATIVE COMPLIANCE ORDERS

#### A. Administrative Compliance Orders Do Not Constitute Final Agency Action

In reviewing the finality of administrative compliance orders issued pursuant to section 7413 of the CAA, both the Second and Seventh Circuits preclude pre-enforcement judicial review under section 7607(b)(1).<sup>44</sup> In *Asbestec Construction Services v. EPA*,<sup>45</sup> three of the four *Standard Oil* factors influenced the court's decision to deny pre-enforcement judicial review.<sup>46</sup>

---

Whitman, 336 F.3d 1236, 1248 (11th Cir. 2003) (analyzing *Bennett* conditions for finality); *Acker*, 290 F.3d at 894 (analyzing administrative order under *Bennett* factors); Ala. Dep't of Env'tl. Conservation v. EPA, 244 F.3d 748, 750 (9th Cir. 2001) (applying *Bennett* factors to three enforcement orders issued pursuant to CAA).

41. *Bennett*, 520 U.S. at 178 (noting "merely tentative or interlocutory" action insufficient for finality).

42. *Bennett*, 520 U.S. at 177-78 (detailing reasons for finding finality). In *Bennett*, the United States Fish and Wildlife Service issued a Biological Opinion pursuant to the Endangered Species Act concluding that continuing a water project would threaten an endangered species and its habitat. *Id.* at 159. Two irrigation districts challenged the evidence supporting the Biological Opinion's findings, and the Government challenged judicial review under the APA, arguing the Biological Opinion did not constitute final agency action. *Id.* The Court concluded that the Biological Opinion constituted final agency action because it resulted from formal consultation and a biological assessment by the Fish and Wildlife Service, and it altered the District's legal rights by requiring compliance with the prescribed conditions. *Id.* at 158-60, 178.

43. See *Acker*, 290 F.3d at 894-95 (holding order failed finality test because imposed no additional burdens on petitioner); *Asbestec*, 849 F.2d at 768-69 (finding agency action not burdensome on petitioner). In *Asbestec*, the court rejected the petitioner's argument that it would be "stigmatized" and suffer "diminished opportunities" without pre-enforcement judicial review. 849 F.2d at 768. The court reasoned that the order did not impose an additional obligation on the petitioner, nor did it deny petitioner a legal right. *Id.*

44. *Acker v. EPA*, 290 F.3d 892, 895 (7th Cir. 2002) (denying court authorization to review EPA action); *Asbestec Constr. Servs., Inc. v. EPA*, 849 F.2d 765, 769 (2d Cir. 1988) (concluding EPA compliance order not final agency action within meaning of section 7607(b)(1)); cf. *Rueth v. EPA*, 13 F.3d 227, 231 (7th Cir. 1993) (precluding pre-enforcement judicial review of EPA orders under Clean Water Act); *Hoffman Group, Inc. v. EPA*, 902 F.2d 567, 569 (7th Cir. 1990) (denying pre-enforcement judicial review of administrative orders under Clean Water Act); *United States v. Outboard Marine Corp.*, 789 F.2d 497, 505-06 (7th Cir. 1986) (precluding pre-enforcement judicial review of EPA order under Comprehensive Environmental Response, Compensation, and Liability Act); *W. Penn Power Co. v. Train*, 522 F.2d 302, 310 (3d Cir. 1975) (denying pre-enforcement judicial review of CAA order under APA).

45. 849 F.2d 765 (2d Cir. 1988).

46. *Id.* at 768 (describing determinative factors in court's decision). The EPA issued a compliance order after citing *Asbestec Construction Services* for improperly removing asbestos from a site. *Id.* at 767. The EPA argued that the compliance order did not constitute final action because it could still initiate an enforcement proceeding against *Asbestec*. *Id.* at 768.

Despite the court's conclusion that the compliance order represented the EPA's final position, it weighed in favor of denying pre-enforcement judicial review because of the limited effect of precluding review on the petitioner and the negative impact of permitting pre-enforcement judicial review on administrative and judicial efficiency.<sup>47</sup>

Likewise, in *Acker v. EPA*,<sup>48</sup> the Seventh Circuit rejected finality of an administrative compliance order because it considered the compliance order as a means of alerting alleged violators of their duties and obligations under the CAA.<sup>49</sup> In reaching its decision, the Seventh Circuit relied solely on the *Bennett* factors.<sup>50</sup> The court viewed the administrative compliance order as merely a warning that reinforced Acker's existing obligation to comply with the CAA regulations.<sup>51</sup> In addition, the court ruled that the issuance of the administrative compliance order did not mark the "consummation of a decision-making process" because the EPA still had the opportunity to initiate a future enforcement action.<sup>52</sup> Both the Second and Seventh Circuits only support judicial review if and when the EPA brings an enforcement action against the alleged violators.<sup>53</sup>

---

47. *Asbestec*, 849 F.2d at 768 (discussing analysis supporting denial of pre-enforcement judicial review). Being identified as a CAA violator could potentially diminish the petitioner's contract opportunities. *Id.* The court indicated, however, that precluding judicial review must alter Asbestec Construction Services' legal duties or obligations, and not just affect its economic well-being before agency action is considered final. *Id.* at 768-69. Further, the court reasoned that because section 7607(b)(1) only provides jurisdiction in the appellate courts, presenting purely factual issues to a non-fact-finding court contradicts a finding of finality because it places an unnecessary burden on the appellate courts. *Id.* at 769. Lastly, the court determined that permitting pre-enforcement judicial review of the administrative compliance order would unnecessarily delay the EPA's ability to effectively prevent pollution control and protect public health. *Id.* *But see* Davis, *supra* note 5, at 215-17 (rejecting basis for *Asbestec* decision).

48. 290 F.3d 892 (7th Cir. 2002).

49. *Acker*, 290 F.3d at 894 (suggesting tentative nature of administrative compliance orders). In the compliance order, the EPA cited Acker for violating asbestos regulations and directed him to comply with the regulations before continuing the suspect renovation activity. *Id.* at 893-94. The order served as a warning because no penalties were assessed or imposed for the violations cited in the order. *Id.* at 894-95.

50. *Id.* (analyzing factors in light of *Bennett* factors). The court noted that as a practical matter the order had no effect on Acker. *Id.*

51. *Id.* at 894 (explaining order only alerts Acker to potential enforcement for future non-compliance).

52. *Id.* (failing first *Bennett* factor). The court bolstered the point by referring to the *Standard Oil* holding requiring a legal or practical effect on the party before judicial review is appropriate. *Id.*

53. *See id.* at 895 (noting issue not fit for judicial resolution). The court emphasized that administrative compliance orders require the EPA to make an affirmative effort to enforce the compliance order before it can impose any sanction or administrative penalty against a regulated party. *Id.* As a result, an administrative compliance order is a tentative action that lacks legal force. *Id.*; *Asbestec Constr. Servs. v. EPA*, 849 F.2d 765, 768 (2d Cir. 1988) (noting effect of compliance order same as obligations imposed by regulations). With or without an administrative compliance order, the regulated party is still obligated to comply with the CAA regulations. *Asbestec*, 849 F.2d at 769. *But see* *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1256 (11th Cir. 2003) (arguing administrative compliance orders have status of law but CAA scheme precludes judicial review). Although the court ultimately concluded the CAA's preclusion of pre-enforcement judicial review of administrative compliance orders violated constitutional due process, the court decided that the CAA gives administrative compliance orders the status of law by permitting the imposition of civil and criminal penalties for noncompliance. *Id.* at 1256.

*B. Administrative Compliance Orders Constitute Final Agency Action*

Over the last decade, decisions by the Sixth and Ninth Circuits created a split among federal circuit courts regarding the availability of pre-enforcement judicial review of administrative compliance orders.<sup>54</sup> Instead of viewing administrative compliance orders as tentative agency action, the Sixth and Ninth Circuits hold that administrative compliance orders constitute final action within the meaning of section 7607(b)(1).<sup>55</sup> In *Allsteel, Inc. v. EPA*,<sup>56</sup> the Sixth Circuit applied the *Standard Oil* factors in its analysis of the finality of a stop-work order issued by the EPA.<sup>57</sup> The court viewed the compliance order as the EPA's final word because the order required immediate action by Allsteel, and the EPA's only remaining option would be to seek court enforcement for noncompliance.<sup>58</sup> Requiring Allsteel to stop construction of its facility not only had a "practical and immediate" effect on its business, but the compliance order also created a new and unique legal obligation that resulted in penalties for noncompliance.<sup>59</sup> As a result, the court granted pre-enforcement judicial review of the order.<sup>60</sup>

In *Alaska Department of Environmental Conservation v. EPA*,<sup>61</sup> the Ninth Circuit also held that a stop-work order constituted final agency action, but the court based its holding on the *Bennett* factors.<sup>62</sup> After the EPA reviewed the factual circumstances, it determined that if the Department of Conservation built a generator according to its construction permit, it would be in violation of

---

54. See *Ala. Dep't of Env'tl. Conservation v. EPA*, 244 F.3d 748, 749-50 (9th Cir. 2001) (applying *Bennett* factors in finding of finality); *Allsteel, Inc. v. EPA*, 25 F.3d 312, 314-15 (6th Cir. 1994) (holding finality under *Standard Oil* supports finality of agency action).

55. Compare *Ala. Dep't of Env'tl. Conservation*, 244 F.3d at 751 (characterizing administrative compliance order as final agency action supporting pre-enforcement judicial review), *Allsteel*, 25 F.3d at 315 (confirming availability of pre-enforcement judicial review based on finding of finality), and *Tenn. Valley*, 336 F.3d at 1259 (noting due process violation if pre-enforcement judicial review denied), with *Acker v. EPA*, 290 F.3d 892, 895 (7th Cir. 2002) (precluding pre-enforcement judicial review of administrative compliance order), *Solar Turbines Inc. v. Seif*, 879 F.2d 1073, 1078 (3d Cir. 1989) (denying pre-enforcement judicial review of section 7477 compliance order), and *Asbestec*, 849 F.2d at 769 (rejecting arguments in favor of pre-enforcement judicial review). See generally *Tenn. Valley*, 336 F.3d at 1256-58 (providing thorough discussion of cases seeking pre-enforcement judicial review of administrative compliance orders).

56. 25 F.3d 312 (6th Cir. 1994).

57. *Id.* at 314-15 (applying *Standard Oil* factors). After the court concluded that the CAA does not prohibit pre-enforcement judicial review of compliance orders, it analyzed the finality of the order. *Id.* at 314.

58. *Id.* at 315 (discussing first *Standard Oil* factor requiring action be final and definitive statement).

59. *Allsteel*, 25 F.3d at 315 (analyzing second, third and fourth *Standard Oil* factors). Even though the EPA had not yet sought enforcement, the court held that the order constituted the EPA's final position. *Id.* at 314. Allsteel argued that the EPA could not issue the stop-work order because the state sanctioned the construction, and without judicial review a conflict would exist between the EPA and the state. *Id.*

60. *Id.* at 315 (providing court's holding in favor of pre-enforcement judicial review). While Justice Wellford noted in his concurring opinion that the holding did not apply to all administrative compliance orders, he failed to explain how the facts in this case were unique. *Id.* (Wellford, J., concurring).

61. 244 F.3d 748 (9th Cir. 2001).

62. *Id.* at 750 (applying *Bennett* factors).

the CAA.<sup>63</sup> According to the court, the EPA's position was final because only if the Department of Conservation had different construction plans would the EPA have altered its position.<sup>64</sup> Furthermore, because the EPA would subject the Department of Conservation to civil and criminal penalties if it disregarded the order, legal consequences "flowed" from the EPA's order.<sup>65</sup> Accordingly, the court held in favor of pre-enforcement judicial review.<sup>66</sup> Following the precedent set forth by the Sixth and Ninth Circuits, an administrative compliance order represents the EPA's "last word" and final determination that compliance is necessary to avoid potential public health hazards.<sup>67</sup> As a result, aggrieved parties subject to an administrative compliance order may seek pre-enforcement judicial review of the order pursuant to section 7607(b)(1) of the CAA in the Sixth and Ninth Circuits.<sup>68</sup>

#### IV. MODERN CONSTITUTIONAL ARGUMENT IN FAVOR OF PRE-ENFORCEMENT JUDICIAL REVIEW

The Eleventh Circuit, in *Tennessee Valley Authority v. Whitman*,<sup>69</sup> departed from traditional arguments favoring pre-enforcement judicial review of

---

63. *Id.* at 750 (discussing first *Bennett* factor requiring consummation of decision-making process). See generally Tara McBrien, Note, *Alaska v. EPA: The Ninth Circuit Upholds Administrative Orders Against Facilities for State's Violation of the Clean Air Act*, 16 TUL. ENVTL. L.J. 189 (2002) (summarizing court's analysis and holding).

64. *Ala. Dep't of Env'tl. Conservation*, 244 F.3d at 750. The court did not decide whether the EPA's ability to bring a subsequent enforcement action indicated the order was merely tentative. *Id.* Because the EPA's Findings of Facts illustrated its impetus for issuing the compliance order, the court viewed the order as a reflection of the EPA's final position. *Id.*

65. *Id.* (reasoning EPA's ability to institute enforcement action does not detract from finality of order).

66. *Id.* (noting court's holding); *cf.* *Solar Turbines v. Seif*, 879 F.2d 1073, 1082 (3d Cir. 1989) (holding order not final agency action without risk of sanctions for noncompliance). In *Solar Turbines*, the EPA issued an order under section 7477 of the CAA, but the court analogized the section 7477 order to a section 7413 order. *Solar Turbines*, 879 F.2d at 1077. The CAA does not permit the imposition of civil and criminal penalties for section 7413 orders; therefore, the court held that *Solar Turbines* did not face hardship constituting final action, even though the order represented the EPA's final position. *Id.* at 1082.

67. See *supra* notes 55, 59 and accompanying text (discussing rationales for characterizing administrative compliance orders as final action); see also Davis, *supra* note 5, at 223-24 (supporting availability of pre-enforcement judicial review to alleged violators of CAA). The CAA does not preclude pre-enforcement judicial review of compliance orders, and with the EPA's expectation of full compliance upon issuance, an administrative compliance order represents its final position. Davis, *supra* note 5, at 223. From a policy perspective, providing judicial review of administrative compliance orders expedites enforcement and permits courts to check the EPA's judgment in the enforcement process. *Id.*

68. See *Alaska Dept. of Env'tl. Conservation v. EPA*, 244 F.3d 748, 749-50 (9th Cir. 2001) (finding finality in judicial review). The court in *Alaska Department of Environmental Conservation*, however, did not review the administrative compliance order because the court required the submission of a more developed factual record. *Id.* at 751. The court also granted the EPA an opportunity to assert an argument against finality in the district court. *Id.* at 751. But see *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1257 n.34 (11th Cir. 2003) (rejecting Sixth and Ninth Circuits' decisions). The Eleventh Circuit dismissed the approach by the Sixth and Ninth Circuits because it failed to address the constitutional due process associated with giving administrative compliance orders the status of law. *Id.* at 1257.

69. 336 F.3d 1236 (11th Cir. 2003).

administrative compliance orders and reasoned that the CAA violates due process rights afforded under the Constitution.<sup>70</sup> Before addressing the issue of due process, however, the court addressed the finality tests for determining reviewability of administrative compliance orders.<sup>71</sup> Rather than apply the *Standard Oil* or *Bennett* finality factors, the court analyzed the legislative history of the CAA to determine whether Congress intended to permit the EPA to issue compliance orders with the status of law.<sup>72</sup> The court concluded that the statute expressly permits the EPA to issue compliance orders with the status of law because the statute permits the imposition of civil and criminal penalties, which is a characterization synonymous with final agency action.<sup>73</sup> Despite concluding that compliance orders are final actions, the court denied pre-enforcement judicial review and analyzed the constitutionality of imposing criminal and civil sanctions without due process.<sup>74</sup>

The Eleventh Circuit is the first court to directly address the constitutionality of compliance orders issued pursuant to section 7413 of the CAA.<sup>75</sup> The court

---

70. *Id.* at 1258-59 (setting forth constitutional argument alleging due process violation). Tennessee Valley Authority engaged in a series of projects it considered “routine maintenance” involving the replacement of boiler components at its coal-fired power plants. *Id.* at 1244. The EPA, however, alleged that the projects involved modifications that would result in significant coal emissions. *Id.* After the EPA issued the original administrative compliance order and subsequent amendments, the Environmental Appeals Board (EAB) conducted an informal adjudication of the order. *Id.* at 1245. The EAB referred to its decision as a final order whereas all prior references by the EPA to the administrative compliance orders merely referred to them compliance orders. *Id.* at 1246. Consequently, Tennessee Valley Authority petitioned for review pursuant to section 7607(b)(1) of the CAA. Although neither party asserted a constitutional claim, the court questioned whether the statutory scheme established by section 7413(c)(1) deprived a regulated party of the opportunity to present evidence contradicting the EPA’s basis for issuing an administrative compliance order. *Id.* at 1258. See generally Christopher D. Man, *Restoring Effective Judicial Review of Environmental Regulations in Civil and Criminal Enforcement Proceedings*, 5 ENVTL. LAW. 665 (1999) (discussing due process violations of environmental statutes).

71. *Tenn. Valley*, 336 F.3d at 1247-56 (detailing three-part finality discussion performed by circuit court). The court recognized both the *Standard Oil* and *Bennett* tests as the standards for measuring finality. *Id.* at 1248.

72. *Id.* at 1249-56 (presenting arguments in favor and against elevating administrative compliance orders to status of law). The EPA believes administrative compliance orders lack the status of law. *Id.* at 1250. The court discussed how a “complaint-like device” begins a bargaining process between the EPA and the regulated party and triggers civil and criminal penalties. *Id.* Hence, the court rejected the common practice of judicial deference to the agency’s statutory interpretation. *Id.* at 1251.

73. *Id.* at 1255-56 (explaining how plain language of CAA gives administrative compliance orders status of law). The court notes that canons of statutory construction do not override the unambiguous language of a statute. *Id.* at 1255; see Davis, *supra* note 5, at 223 (supporting decisions holding administrative compliance orders constitute final agency action).

74. *Tenn. Valley*, 336 F.3d at 1256 (concluding compliance orders have status of law and continuing with constitutional argument in favor of pre-enforcement judicial review).

75. *Id.* at 1256 (acknowledging lack of precedent dealing with due process claim); see also *Asbestec Constr. Servs., Inc. v. EPA*, 849 F.2d 765, 769 (2d Cir. 1988) (rejecting constitutional argument because elements of due process not presented). The *Asbestec* court did not fully analyze the due process argument because the aggrieved party failed to show that the order altered or extinguished a recognized interest. *Asbestec*, 849 F.2d at 770. The court denied pre-enforcement judicial review of the administrative compliance order and rejected the constitutional claim. *Id.* at 770.

held that the Due Process Clause of the Fifth Amendment entitles an alleged violator of the CAA to a full and fair hearing to determine whether the conduct constitutes a violation before the EPA issues the order.<sup>76</sup> The CAA expressly permits issuance of a noncompliance order without prior adjudication, and it immediately subjects the aggrieved party to daily fines of up to \$25,000 per day.<sup>77</sup> Under the Eleventh Circuit's constitutional analysis, the CAA violates an aggrieved party's right to due process.<sup>78</sup> The court further noted that even if the EPA conducted a voluntary, pre-adjudication hearing, such a hearing would not cure the constitutional violation because pre-adjudication hearings are not authorized under the CAA.<sup>79</sup> The court ultimately concluded that it did not have jurisdiction to hear the complaint pursuant to section 7607(b)(1) of the CAA because the administrative compliance order failed the second prong of the *Bennett* finality test, which would require the EPA's order to pose a threat to the Tennessee Valley Authority's legal rights and obligations.<sup>80</sup> As a result, the court permitted the Tennessee Valley Authority to ignore the administrative compliance order without incurring severe penalties for noncompliance.<sup>81</sup>

---

76. *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1258 (11th Cir. 2003) (noting CAA's scheme denies aggrieved party opportunity to present evidence); *see* U.S. CONST. amend. V.

77. *Tenn. Valley*, 336 F.3d at 1258 (illustrating how enforcement hearing deprives party opportunity to present evidence on conduct underlying order). The court does not presume that the alleged violator will have an opportunity to dispute the underlying violation in a subsequent enforcement proceeding because section 7413 expressly permits the EPA to obtain penalties for violations of the order without a hearing. *Id.*; *see supra* note 7 and accompanying text (discussing applicable penalties for violation of administrative compliance order).

78. *Tenn. Valley*, 336 F.3d at 1258-60 (presenting Eleventh Circuit's constitutional argument).

79. *Tenn. Valley*, 336 F.3d at 1259 (highlighting EPA's inability to amend statute). Even if the CAA did permit adjudication before issuing an administrative compliance order, such an order would be unconstitutional because the statute would be empowering a non-Article III tribunal with judicial authority. *Id.*

80. *Tenn. Valley*, 336 F.3d at 1248, 1258-60 (discussing administrative compliance orders failing finality test). If Tennessee Valley Authority were not liable for violating the CAA, then the EPA would not threaten Tennessee Valley Authority's legal rights and obligations, and the court would not categorize the compliance order as final agency action. *Id.* at 1260; *see Allsteel, Inc. v. EPA*, 25 F.3d 312, 315-16 (6th Cir. 1994) (Wellford, J., concurring) (recognizing due process violation if pre-enforcement judicial review of stop work order precluded). *Contra Virginia v. United States*, 74 F.3d 517, 522 (4th Cir. 1996) (denying claim framed as constitutional challenge to CAA). Parties cannot litigate in district court, circumventing the jurisdiction of the court of appeals jurisdiction set forth in section 7607(b)(1) of the CAA by advancing a constitutional challenge to the statute. *Id.*; Moore, *supra* note 5, at 713-15 (proffering reasons why due process argument should be rejected). The EPA cannot force a party who opposes the terms of an administrative compliance order to comply unless the EPA first files an enforcement action. Moore, *supra* note 5, at 714-15. The court may not assess civil or criminal penalties until the actual enforcement hearing, at which time the party may contest the underlying basis for the EPA's order. *Id.* at 715. Because the compliance order does not affect a party's property rights until after the enforcement hearing, there is no deprivation of due process. *Id. But cf. Wagner Seed v. Daggett*, 800 F.2d 310, 317 (2d Cir. 1986) (holding threat of penalties for violating Comprehensive Environmental Response, Compensation, and Liability Act order not due process violation); *W. Penn Power Co. v. Train*, 522 F.2d 302, 314 (3d Cir. 1975) (rejecting argument asserting CAA violates due process rights).

81. *See Tenn. Valley*, 336 F.3d at 1259 (waiving imposition of penalties). *See generally* Man, *supra* note 70 (characterizing environmental statutes as severe because defendants face sanctions without due process).

## V. ANALYSIS

## A. Congressional Intent

Even though courts no longer preclude pre-enforcement judicial review of administrative compliance orders based on the CAA's legislative scheme, such an analysis is an indispensable tool in interpreting the CAA's language.<sup>82</sup> With four enforcement mechanisms available to the EPA, administrative compliance orders allow the EPA to avoid formal judicial proceedings and immediately protect the public from environmental hazards associated with air pollution.<sup>83</sup> By permitting pre-enforcement judicial review, formal adjudication in the court of appeals hinders the compliance order's expediency.<sup>84</sup> The potential for delay is further exacerbated by the EPA's ability to file enforcement actions in both the district court and the court of appeals.<sup>85</sup> Because judicial review in the district court is an independent enforcement mechanism available to the EPA, it is unlikely that Congress also intended to provide the EPA with a second formal review process in the court of appeals.<sup>86</sup>

Moreover, the CAA does not require the EPA to develop a factual record to support its decision to issue an administrative compliance order.<sup>87</sup> Permitting pre-enforcement judicial review, however, allows an alleged violator to file an action in the court of appeals.<sup>88</sup> Congress did not likely intend to establish jurisdiction in the court of appeals because it is a non-fact finding court.<sup>89</sup> As a result, pre-enforcement judicial review unnecessarily burdens the court of appeals with cases lacking developed factual records.<sup>90</sup>

The CAA merely requires that aggrieved parties have an "opportunity to confer" with the EPA before the compliance order becomes effective.<sup>91</sup> This

---

82. See *supra* notes 28-29 and accompanying text (examining outdated case precluding pre-enforcement judicial review based on CAA legislative scheme analysis).

83. See *supra* text accompanying note 4 (outlining enforcement mechanisms available to EPA for CAA violations); *supra* note 5 (citing benefits of administrative compliance orders); *supra* note 16 and accompanying text (requiring alleged violators to comply with order "as expeditiously as practicable").

84. See *supra* note 5 and accompanying text (discussing positive nature of administrative compliance order).

85. *Supra* note 17 and accompanying text (recognizing EPA's ability to simultaneously file multiple enforcement actions against alleged violators).

86. *Supra* text accompanying note 4 (detailing four distinct enforcement mechanisms available to EPA); *supra* note 17 and accompanying text (noting EPA's ability to simultaneously utilize more than one enforcement mechanism).

87. See *supra* notes 15-17 (detailing statutory process for issuing administrative compliance order).

88. *Supra* note 25 (granting jurisdiction to United States Court of Appeals for the District of Columbia).

89. *Asbestec Constr. Servs., Inc. v. EPA*, 849 F.2d 765, 769 (2d Cir. 1988) (recognizing undue burden placed on court of appeals because not structured for fact-finding).

90. *Supra* note 38 and accompanying text (addressing *Standard Oil* concerns regarding whether review provides judicial efficiency).

91. CAA, 42 U.S.C. § 7413 (2000) (outlining statutory requirement granting alleged violator "opportunity to confer" with EPA).

language indicates the beginning of a bargaining process rather than a conclusive step in a decision-making process.<sup>92</sup> Accordingly, administrative compliance orders cannot represent final agency action.<sup>93</sup>

Lastly, even if Congress did not implicitly preclude pre-enforcement judicial review in the statutory scheme of the CAA, Congress did not intend to provide pre-enforcement judicial review by granting administrative compliance orders with the status of law.<sup>94</sup> The statute specifically states that the CAA should not be construed to grant judicial review of regulations or orders issued by the EPA except as provided in the CAA.<sup>95</sup> The statute does not explicitly provide pre-enforcement judicial review of administrative compliance orders, but it does explicitly provide for judicial review of final agency action under section 7607(b)(1).<sup>96</sup> The statute, however, does not define final agency action.<sup>97</sup> If Congress intended to make compliance orders final agency action, it had an opportunity to incorporate changes that defined “final action” in the 1990 Amendments.<sup>98</sup> The 1990 Amendments, however, failed to address the reviewability of administrative compliance orders.<sup>99</sup> Instead, Congress chose to rely on the courts to interpret the statute as precluding pre-enforcement judicial review.<sup>100</sup> Consequently, courts should defer to the EPA’s interpretation of the statute and follow precedent established by the Second and Seventh Circuits.<sup>101</sup>

#### *B. Effect of Circuit Court Decisions Favoring Pre-Enforcement Judicial Review*

Decisions of the Sixth and Ninth Circuits encourage the EPA to abandon the

---

92. *Supra* note 29 (discussing effect of pre-enforcement judicial review on informal conference period).

93. *Supra* note 49 and accompanying text (rejecting finality of administrative compliance order).

94. *Supra* notes 43, 47 and accompanying text (citing courts’ decisions denying pre-enforcement judicial review because orders not EPA’s final position).

95. 42 U.S.C. § 7413 (providing statutory language giving court guidance for permitting pre-enforcement judicial review).

96. *Id.* § 7607(b)(1) (setting forth availability of judicial review).

97. *Supra* note 32 (noting absence of definition in CAA, but outlining *Standard Oil* factors for determining finality); *supra* text accompanying note 38 (same).

98. *Supra* note 32 (discussing congressional opportunity to clarify availability of pre-enforcement judicial review before enactment of 1990 Amendments).

99. *Supra* note 30 (noting addition of “final action,” but 1990 Amendments failed to clarify definition).

100. *Supra* note 32 (noting Senate debate resulted in decision to rely on courts’ interpretation).

101. *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1250 (11th Cir. 2003) (identifying EPA’s longstanding position denying compliance order status of law and precluding pre-enforcement judicial review); *Acker v. EPA*, 290 F.3d 892, 894 (7th Cir. 2002) (accepting EPA’s position to deny pre-enforcement judicial review); *Asbestec Constr. Servs., Inc. v. EPA*, 849 F.2d 765, 768-69 (2d Cir. 1988) (agreeing with EPA’s argument characterizing compliance order as tentative action); *Miskiewicz & Rudd*, *supra* note 30, at 329 (discussing EPA’s position regarding effect of allowing pre-enforcement judicial review). Pre-enforcement judicial review could delay enforcement actions for an indefinite period of time, but, more importantly, the threat to public health and the environment would remain unabated. *Miskiewicz & Rudd*, *supra* note 30, at 329.

use of compliance orders as an enforcement tool because by allowing pre-enforcement judicial review, the courts render this method inefficient.<sup>102</sup> In *Alaska Department of Environmental Conservation and Allsteel*, the courts of appeals suggested that the EPA develop factual records to support their basis for issuing the administrative compliance orders.<sup>103</sup> The EPA, however, saves time by immediately filing in the district court after a violation, rather than issuing an administrative compliance order, because it avoids the court of appeals and subsequent delays in enforcement while developing a factual record.<sup>104</sup> As a result, pre-enforcement judicial review negates congressional intent for quick and immediate resolutions to violations of the CAA.<sup>105</sup>

### C. The Eleventh Circuit's Attempt to Reconstruct the Clean Air Act

Only Congress can pass legislation to reconstruct a statute.<sup>106</sup> The *Tennessee Valley Authority* decision, however, directly contradicts the CAA by rendering moot an express enforcement mechanism available to the EPA.<sup>107</sup> In the Eleventh Circuit, an alleged violator may ignore an administrative compliance order without risking liability despite Congress's intent to include an enforcement mechanism in the CAA that provides an alternative to a lengthy litigation process.<sup>108</sup> Although civil and criminal penalties are potential consequences of noncompliance, the actual imposition of penalties does not occur until the EPA files an enforcement proceeding.<sup>109</sup> Furthermore, the aggrieved party must have an opportunity to meet with the EPA to discuss the compliance order before it is issued under the CAA.<sup>110</sup> The preliminary

---

102. *Supra* note 25 (noting availability of filing in court of appeals when concluding order final).

103. *Ala. Dep't of Env'tl. Conservation v. EPA*, 244 F.3d 748, 751 (9th Cir. 2001) (providing EPA with option to submit administrative record); *Allsteel, Inc. v. EPA*, 25 F.3d 312, 315 (6th Cir. 1994) (noting remand to EPA if factual questions raised).

104. *Supra* notes 4, 25 and accompanying text (discussing EPA's jurisdictional options available when seeking compliance with CAA).

105. *Supra* notes 15, 16 and accompanying text (providing quick and efficient reconciliation of issue, rather than undergoing litigation process); O'Sullivan, *supra* note 4, at 305 (setting forth procedure for issuing compliance orders). The EPA uses the administrative compliance order to quickly resolve issues by putting the alleged violator on notice that the EPA will take action in the event of noncompliance. *Davis*, *supra* note 5, at 190 (encouraging reconciliation through compliance process as alternative to litigation); O'Sullivan, *supra* note 4, at 305.

106. *Supra* note 30 and accompanying text (discussing congressional amendments to CAA).

107. *Supra* note 81 and accompanying text (permitting aggrieved party to disregard administrative compliance order because of due process violation).

108. *Supra* notes 5 and 80 (disregarding administrative compliance order actually defeats congressional intent to resolve compliance issues without lengthy litigation).

109. CAA, 42 U.S.C. § 7413(c)(1) (2000) (stating only upon conviction may EPA impose fine or imprisonment as penalty); *see Moore*, *supra* note 5, at 714-15 (discussing EPA's inability to impose penalties until after enforcement hearing).

110. 42 U.S.C. § 7413 (stating conference required between EPA Administrator and alleged CAA violator); *BARR*, *supra* note 1, at 495 (pointing out violator has opportunity to investigate EPA's grounds for issuing compliance order).

meeting provides the aggrieved party with the opportunity to challenge or sway the EPA against issuing the compliance order.<sup>111</sup>

After the compliance order is issued, the enforcement proceeding provides a formal judicial process and affords the aggrieved party an opportunity to challenge the grounds for the administrative compliance order in an adjudicative setting.<sup>112</sup> The aggrieved party's constitutional right to due process is satisfied because penalties are not imposed until after a full and fair hearing before both the EPA and the courts.<sup>113</sup> The Eleventh Circuit's analysis is flawed because it disregards compliance orders as an enforcement mechanism, and limits the EPA to burdensome formal proceedings in order to compel alleged violators to comply with the CAA.<sup>114</sup>

## VI. CONCLUSION

The EPA must have some degree of freedom when it seeks to fulfill Congress's mandate in the CAA. Administrative compliance orders provide the EPA with a mechanism to expedite air pollution prevention and protect public health. Pre-enforcement judicial review of administrative compliance orders hinders the purpose of the statute. Courts should not follow precedent of the Sixth and Ninth Circuits because those cases overlook the value of administrative compliance orders as an opportunity to reach a negotiated settlement prior to full litigation. Decisions by the Second and Seventh Circuits accurately reflect Congress's intent to grant the EPA a means to immediately reconcile CAA violations by providing administrative compliance orders as an enforcement mechanism. In the future, the fate of pre-enforcement judicial review of section 7413 administrative compliance orders can only be determined by a legislative amendment to the CAA.

*Valerie L. Starr*

---

111. BARR, *supra* note 1, at 495 (discussing options available to alleged violator during conference with EPA).

112. *Supra* note 79 (noting aggrieved party's opportunity to contest underlying basis for order during enforcement proceeding).

113. *Supra* note 79 (citing threat of penalties not violation of due process under CAA and other similar environmental statutes).

114. *Supra* text accompanying notes 79-80 (disregarding EPA's administrative compliance order permitted without penalties applying).