No. 10-1062

In The Supreme Court of the United States

CHANTELL SACKETT and MICHAEL SACKETT,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and LISA P. JACKSON, Administrator,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. May Petitioners seek pre-enforcement judicial review of the administrative compliance order pursuant to the Administrative Procedure Act, 5 U.S.C. § 704?

2. If not, does Petitioners' inability to seek pre-enforcement judicial review of the administrative compliance order violate their rights under the Due Process Clause?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37(3), Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioners.[1]

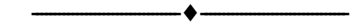
IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to the defense and preservation of individual liberty, the right to own and use property, limited and ethical government, and the free enterprise system. Since MSLF's creation in 1977, MSLF attorneys have been involved in numerous cases involving the proper interpretation and administration of the Clean Water Act ("CWA"). *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, ___ U.S. ___, 129 S.Ct. 2458 (2009) (amicus curiae); *Carlota Copper Co. v. Friends of Pinto Creek*, ___ U.S. ___, 129 S.Ct. 896 (2009) (amicus curiae);

[1] Pursuant to Supreme Court Rule 37(6), counsel for MSLF affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than MSLF, its members, or counsel, made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

National Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007) (amicus curiae); *Rapanos v. United States*, 547 U.S. 715 (2006) (amicus curiae); *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133 (10th Cir. 2005), *cert. denied*, 547 U.S. 1065 (2006) (amicus curiae); *Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336 (2001) (represented plaintiff); *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995), *cert. denied*, 516 U.S. 1071 (1996) (represented plaintiff); *Riverside Irrigation District v. Andrews*, 758 F.2d 508 (10th Cir. 1985) (represented intervenor); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) (amicus curiae).

Moreover, MSLF has members throughout the United States. MSLF's members have a tangible interest in this case. Many of these members' livelihoods depend on the continued development of minerals, oil and gas, timber, agriculture, livestock, and commercial and residential real estate. Many of these activities require the use of land and water resources that could be impacted by the regulatory authority asserted by Respondents. Therefore, MSLF respectfully submits this amicus curiae brief, urging that the judgment of the Ninth Circuit be reversed.



SUMMARY OF THE ARGUMENT

The Sacketts' compliance order is final agency action, reviewable under 5 U.S.C. § 704. The compliance order is premised on the Environmental Protection

Agency ("EPA") Administrator's determination that the subject property falls under the jurisdiction of the CWA, and that the Act has been violated. The compliance order represents the consummation of the agency's decisionmaking process with respect to these issues and violation of the compliance order carries with it independent legal consequences.

Because the CWA was enacted subsequent to the Administrative Procedure Act ("APA"), section 12 of the APA requires that any modification of the judicial review provisions of the APA must be "expressly" stated in the CWA. 5 U.S.C. § 559. Here, the Ninth Circuit entirely ignored the controlling significance of the fact that the CWA does not expressly preclude immediate judicial review of compliance orders. Instead, the Ninth Circuit focused on "fairly discernable" inferences gleaned from the CWA. *Id*. The Ninth Circuit's approach violates the plain language of the APA and this Court's precedents.

Moreover, the Ninth Circuit's conclusion that the structure of the CWA, its objectives, its legislative history, and the nature of compliance orders all indicate that the CWA forecloses immediate judicial review is plainly in error. By analyzing the statutory scheme in a vacuum, the Ninth Circuit failed to recognize that the EPA has expanded its jurisdiction to such an extent that denying immediate judicial review of compliance orders in this context is inconsistent with Congressional intent in passing the

CWA. Accordingly, the judgment of the Ninth Circuit should be reversed.

ARGUMENT

I. JUDICIAL REVIEW OF THE SACKETTS' COMPLIANCE ORDER IS AVAILABLE UNDER THE APA, BECAUSE THE CWA DOES NOT "EXPRESSLY" PRECLUDE REVIEW.

A. The Sacketts' Compliance Order Is Final Agency Action, Reviewable Under 5 U.S.C. § 704.

The APA provides for judicial review of "final agency action for which there is no other adequate remedy in a court. . . ." 5 U.S.C. § 704. The CWA provides no opportunity for immediate review of compliance orders, and therefore they are judicially reviewable under the APA if they are "final agency action." *See Sackett v. EPA*, 622 F.3d 1139, 1143 (9th Cir. 2010); Petitioners' Brief on the Merits ("Petitioners' Brief") at 54. This Court has adopted a two-part test for determining the finality of an agency action. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). First, the action must represent the consummation of the agency's decisionmaking process; "it must not be of a merely tentative or interlocutory nature." *Id*. at 177-78. Second, "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id*. at 178 (quoting *Port of Boston Marine Terminal Assn. v.*

Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970)); *see also Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992) ("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."). As demonstrated below, the Sacketts' compliance order satisfies the *Bennett* test and is therefore final agency action reviewable under the APA.

The compliance order is premised on the EPA Administrator's determination that the subject property falls under the jurisdiction of the CWA, and that the Act has been violated. 33 U.S.C. § 1319(a)(3); *see Bennett*, 520 U.S. at 177-78. The compliance order represents the consummation of the agency's decisionmaking process with respect to these issues. *See Alaska Dept. of Environmental Conservation v. EPA*, 540 U.S. 461, 483 (2004) ("*ADEC*") (holding, in challenge to Clean Air Act ("CAA") compliance order, that "[w]e are satisfied that the Court of Appeals correctly applied the guides we set out in *Bennett v. Spear*. . . ."); *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586, 592 (9th Cir. 2008); *Allsteel, Inc. v. EPA*, 25 F.3d 312, 315 (6th Cir. 1994). Here, the compliance order represents the agency's "considered, definite and firm position" that it has regulatory authority over the Sacketts' property pursuant to the CWA. *Fairbanks North Star Borough*, 543 F.3d at 593; *Sackett*, 622 F.3d at 1141 ("The compliance order alleged that the Parcel is a wetland subject to the Clean Water Act. . . .").

Therefore, under the first prong of the *Bennett* test, the Sacketts' compliance order is final agency action reviewable under the APA.

The Sacketts' compliance order also satisfies the second prong of the *Bennett* test, because violation of the compliance order carries with it independent legal consequences. *See Bennett*, 520 U.S. at 178; *ADEC*, 540 U.S. at 483. Although issuance of the compliance order is premised on a violation of the CWA, the compliance order creates independent remedial obligations and disobedience of these obligations results in additional, free-standing penalties – penalties which are entirely separate from those flowing from a violation of the substantive provision of the CWA. *See* 33 U.S.C. § 1319(d) (authorizing civil penalty of up to $25,000 per day for violation of a compliance order); *cf. Solar Turbines, Inc. v. Seif*, 879 F.2d 1073, 1081 (3d Cir. 1989) (no penalties flowed from violation of stop-work order under [CAA], so order was not final action); *Asbestec Constr. Servs. v. EPA*, 849 F.2d 765, 767-68 (2d Cir. 1988) (order under [CAA], requiring "future compliance" with statute imposed no new obligations and was not a final action). Here, the compliance order required the Sacketts "to remove the fill material and restore the Parcel to its original condition." *Sackett*, 622 F.3d at 1141. If the Sacketts fail to undertake the remedial measures dictated in the compliance order, they face civil and administrative fines of up to $43,500 per day. *Id*. Plainly, "legal consequences will flow" from the issuance of the compliance order. *Bennett*, 520

U.S. at 178. Therefore, under the second prong of the *Bennett* test, the compliance order is final agency action reviewable under the APA.

B. Under 5 U.S.C. § 559, The CWA Cannot Preclude Judicial Review Because It Does Not "Expressly" Supersede The APA.

As demonstrated above, the Sacketts' compliance order is final agency action reviewable under 5 U.S.C. § 704. The Ninth Circuit implicitly reached this same conclusion, consistent with this Court's related precedent. *ADEC*, 540 U.S. at 483. Where the Ninth Circuit erred in this case was in its application of *Block v. Cmt. Nutrition Inst.*, 467 U.S. 340, 351 (1984), to determine that judicial review was precluded by section 10 of the APA, 5 U.S.C. § 701(a)(1) ("This chapter applies, according to the provisions thereof, except to the extent that . . . statutes preclude judicial review."). *Sackett*, 622 F.3d at 1144. The Ninth Circuit's *Block* analysis focused on "fairly discernable" inferences gleaned from the CWA rather than its express language. *Id*. As demonstrated below, this departure from the express language of the CWA violates section 12 the APA. *See* 5 U.S.C. § 559; Petitioners' Brief at 52. Accordingly, judicial review of the Sacketts' compliance order is available under the APA and the Ninth Circuit erred in concluding otherwise.

Statutes enacted subsequent to the APA cannot "preclude judicial review" under section 10 of the APA unless they do so "expressly." 5 U.S.C. § 559 ("Subsequent statute may not be held to supersede or modify [5 U.S.C. §§ 701-706] except to the extent that it does so expressly."); *Marcello v. Bonds*, 349 U.S. 302, 310 (1955); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 50 (1955). The provision of the CWA at issue here, 33 U.S.C. § 1319, was passed subsequent to the APA, and, as the Ninth Circuit recognized, "[t]he CWA . . . does not expressly preclude pre-enforcement judicial review" of compliance orders. *Sackett*, 622 F.3d at 1143; *compare* Administrative Procedure Act, 79 Pub. L. No. 404, §§ 10, 12, 60 Stat. 237, 243-44 (1946) *with* Federal Water Pollution Control Amendments of 1972, 92 Pub. L. No. 500, § 309, 86 Stat. 816, 859 (1972). Even the earliest statutory ancestor of 33 U.S.C. § 1319 was also passed after the APA. *See* Water Pollution Control Act of 1948, 80 Pub. L. No. 404, § 2, 62 Stat. 1155, 1156 (1948). Thus, section 12 of the APA requires that if the CWA was intended to supersede the judicial review provisions of the APA, it must have done so "expressly." Thus the Ninth Circuit erred by departing from the express language of the CWA.

As this Court has noted, "[e]xemptions from the terms of the Administrative Procedure Act are not lightly to be presumed in view of the statement in section 12 of the Act that modifications must be express." *Marcello*, 349 U.S. at 310; *Shaughnessy*, 349 U.S. at 50. Various Courts of Appeals have likewise

recognized that "[s]ection 559 therefore prevents a statute from amending the APA by implication." *Five Points Road Joint Venture v. Johanns*, 542 F.3d 1121, 1127 (7th Cir. 2008); *see also Lake Carriers' Ass'n v. EPA*, 2011 WL 2936926, *4 (D.C. Cir. 2011); *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1193 (9th Cir. 2000); *Lane v. U.S. Dept. of Agriculture*, 120 F.3d 106, 109 (8th Cir. 1997).

This Court's decisions in *Shaughnessy* and *Marcello* illustrate the folly of the Ninth Circuit's analysis in this case. These decisions demonstrate that statutes passed subsequent to the APA must employ express language in order to supersede the judicial review provisions of the APA.

In *Shaughnessy*, this Court held that the APA provided a right to judicial review of deportation orders issued under the Immigration and Nationality Act of 1952. 349 U.S. at 51-52. This was so because the 1952 Act contained "no language which 'expressly' supersedes or modifies the expanded right of review granted by section 10 of the Administrative Procedure Act." *Shaughnessy*, 349 U.S. at 51 (quoting 5 U.S.C. § 559). The government had urged this Court to interpret the 1952 Act to preclude judicial review, as this Court had done when reviewing deportation orders issued under the Immigration Act of 1917, which pre-dated the APA. *See Heikkila v. Barber*, 345 U.S. 229, 234 (1953). The *Shaughnessy* Court,

however, declined to implicitly preclude judicial review under section 10 of the APA:

> Such a restrictive construction of the finality provision of the present Immigration Act would run counter to § 10 and § 12 of the Administrative Procedure Act. Their purpose was to remove obstacles to judicial review of agency action under subsequently enacted statutes like the 1952 Immigration Act.

349 U.S. at 51. Likewise, the CWA is a subsequently enacted statute that cannot be read to implicitly preclude judicial review under section 10 of the APA. The Ninth Circuit failed to follow this Court's decision in *Shaughnessy* and its judgment should therefore be reversed.

In *Marcello*, decided just one month after *Shaughnessy*, this Court made clear that 5 U.S.C. § 559 requires that subsequent legislation can modify judicial review under the APA only when it does so expressly. *Marcello*, 349 U.S. at 309. The question presented in *Marcello* was whether the Supplemental Appropriation Act of 1951 was intended to modify the "separation of functions" provision of section 5(c) of the Administrative Procedure Act, 5 U.S.C. § 554(d), with respect to deportation orders. *Id*. at 305-06. This Court concluded that because the 1951 Act "expressly states: 'The procedure (herein prescribed) shall be the sole and exclusive procedure for determining the deportability of an alien under this section[,]' " it provided "clear and categorical direction [that the 1951 Act] was meant to exclude the application of

[section 5(c) of] the Administrative Procedure Act." *Id*. at 309. Thus, *Marcello* demonstrates the sort of "clear and categorical direction" this Court has required in order for subsequently enacted statutes to overcome the judicial review provisions of the APA. No such direction is present in the CWA, and the Ninth Circuit therefore erred in foreclosing judicial review of the Sacketts' compliance order.

This Court's decision in *Block* is consistent with the requirements of 5 U.S.C. § 559. *See* 467 U.S. at 345. Unlike the CWA at issue in this case, the statute in *Block* was passed before the APA. *Id*. at 341 (citing Agricultural Marketing Agreement Act of 1937, ch. 296, 50 Stat. 246, as amended, 7 U.S.C. § 601 *et seq*.). Thus, the requirement that a "[s]ubsequent statute may not be held to supersede or modify [5 U.S.C. §§ 701-706] except to the extent that it does so expressly" was inapplicable in *Block*. *See Webster v. Doe*, 486 U.S. 592, 607 n. (1988) (Scalia, J., dissenting) ("While a right to judicial review of agency action may be created by a separate statutory or constitutional provision, once created it becomes subject to the judicial review provisions of the APA unless specifically excluded, *see* 5 U.S.C. § 559."). The *Block* court was thus not constrained in the way that this Court is in the present case by 5 U.S.C. § 559.

This Court's subsequent decisions are likewise consistent with 5 U.S.C. § 559. This Court has looked to the express statutory language of post-APA statutory schemes when determining whether 5 U.S.C. § 701 forecloses review. *See Dickinson v. Zurko*, 527

U.S. 150, 155 (1999) ("[5 U.S.C. § 559's] intent that legislative departure from the norm must be clear suggests a need for similar clarity in respect to grandfathered common-law variations."); *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 12-13 (2000) (relying on the Medicare Act's express bar to conclude that judicial review was foreclosed); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 208-09 (1994) (holding federal court jurisdiction was precluded by the "comprehensive review process" of the Federal Mine Safety and Health Amendments Act of 1977, 91 Stat. 1290, as amended, 30 U.S.C. § 801 *et seq*.); *see also United States v. Erika, Inc.*, 456 U.S. 201, 206-08 (1982) (relying on Medicare Part B's express administrative review provisions to conclude that judicial review was foreclosed). On the contrary, in cases where the statute at issue pre-dates the APA (and is thus not subject to 5 U.S.C. § 559) this Court has required a weaker showing to preclude judicial review of agency action. *See Nat'l Labor Relations Bd. v. Un. Food & Comm. Workers Union*, 484 U.S. 112, 117 (1987) (foreclosing judicial review absent express language, but under section 10(f) of the National Labor Relations Act, 49 Stat. 455 (1935), which predates the APA); *Block*, 467 U.S. at 345; *Heikkila*, 345 U.S. at 234.

Because the CWA was enacted subsequent to the APA, section 12 of the APA requires that any modification of the judicial review provisions of the APA must be "expressly" stated in the CWA. 5 U.S.C. § 559; *Marcello*, 349 U.S. at 309; *Shaughnessy*, 349

U.S. at 51. Here, the Ninth Circuit entirely ignored the controlling significance of the fact that "[t]he CWA . . . does not expressly preclude pre-enforcement judicial review" of compliance orders. *Sackett*, 622 F.3d at 1143. Instead, as discussed in more detail below, the Ninth Circuit focused on "fairly discernable" inferences gleaned from the CWA. *Id*. The Ninth Circuit's approach violates 5 U.S.C. § 559 and this Court's decisions in *Marcello* and *Shaughnessy*. Accordingly, the judgment of the Ninth Circuit should be reversed.

II. CONGRESS DID NOT INTEND TO PRECLUDE JUDICIAL REVIEW OF COMPLIANCE ORDERS THAT ASSERT JURISDICTION BASED ON FACTUALLY INTENSIVE ANALYSIS.

As demonstrated above, the Ninth Circuit erred in its application of *Block* in this case. Nevertheless, the Ninth Circuit's analysis under *Block* fails to capture Congressional intent as embodied in the CWA, especially in light of recent developments impacting the scope of the EPA's purported CWA jurisdiction.

Congress could not have predicted the vast expansion of jurisdiction that the EPA has pursued since the CWA was enacted. Congress passed the CWA for the stated purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). At the same time, Congress chose to "recognize,

preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the [EPA] Administrator in the exercise of his authority under this chapter." *Id*. § 1251(b). Almost since the passage of the CWA, the EPA has pursued a relentless crusade to expand its authority under the Act. *See, e.g.,* 40 C.F.R. § 230.3; 76 Fed. Reg. 24,479 (May 2, 2011) ("2011 Draft Guidance"); "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*" (Dec. 2, 2008) ("2008 Guidance"); 68 Fed. Reg. 1991 (Jan. 15, 2003). EPA's latest attempt to expand its jurisdiction sets a new high-water mark for regulatory overreach; with the 2011 Draft Guidance, the EPA has eviscerated the responsibilities and rights of States that Congress intended to leave untouched by the CWA and has asserted jurisdiction over essentially the entire Nation.

This jurisdictional expansion has worked a dramatic realignment of the *Block* factors. *Block,* 467 U.S. at 351 (Congressional intent to preclude review must be "fairly discernible" based on "the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved."). The Ninth Circuit did not address how this change in CWA jurisdiction impacts the regulatory system intended by Congress when it passed the CWA.

The Ninth Circuit concluded that each of the *Block* factors – except the CWA's text, which it ignored – indicated that Congress intended to limit immediate judicial review of compliance orders. However, as demonstrated below, the Ninth Circuit analyzed the statutory scheme in a vacuum. The Ninth Circuit failed to recognize that the EPA has consistently expanded its CWA jurisdiction since the Act was first passed. As illustrated by the facts of the Sacketts' case, the EPA has expanded its jurisdiction to such an extent that denying immediate judicial review of compliance orders in this context is inconsistent with Congressional intent in passing the CWA. The EPA's ongoing attempt to further expand its authority will only compound this problem. Accordingly, the judgment of the Ninth Circuit should be reversed.

A. The CWA's Statutory Scheme Does Not Evince An Intent To Limit Judicial Review Of Compliance Orders.

The Ninth Circuit's consideration of the CWA's statutory scheme conflates the enforcement options available to the EPA with the due process rights of property owners:

> Congress gave the EPA a choice of "issu[ing] an order requiring such person to comply with such section or requirement, *or* . . . bring[ing] a civil action [in district court]." 33 U.S.C. § 1319(a)(3) (emphasis added). Authorizing pre-enforcement judicial review of

> compliance orders would eliminate this choice by enabling those subject to a compliance order to force the EPA to litigate all compliance orders in court. . . . Such a result would be discordant with the statutory scheme.

Sackett, 622 F.3d at 1143 (citation omitted). That the CWA gives the EPA two enforcement options does nothing to suggest that property owners may not challenge the EPA's jurisdiction pursuant to the APA. This is especially so because – despite the EPA's self-serving efforts to expand the scope of the CWA – the Act was not intended to provide the singular mechanism for regulating water pollution. *Cf. Block,* 467 U.S. at 341-42; 33 U.S.C. § 1251(b). If Congress had intended such a result, it knew how to override the judicial review provided by the APA. *Cf.* 42 U.S.C. § 9613(h); *Cannon v. Gates*, 538 F.3d 1328, 1332 (10th Cir. 2008) ("In enacting this jurisdictional bar, Congress intended to prevent time-consuming litigation. . . ."); Andrew I. Davis, *Judicial Review of Environmental Compliance Orders*, 24 ENVTL. L. 189, 203 n. 72 (1994) ("In 1986, Congress provided for express preclusion of pre-enforcement review in the Superfund Amendments and Reauthorization Act.").

Moreover, the CWA's enforcement options present an illusory choice for the EPA – compliance order sanctions must be imposed through the courts. *Sackett*, 622 F.3d at 1143. The Ninth Circuit thus "infer[red] that Congress intended that all challenges to the compliance order be brought in one proceeding," but this ignores the fact that the language of the

CWA indicates no intent to limit the jurisdiction of the federal courts under the APA. *Id*.; *cf*. 42 U.S.C. § 9613(h). Thus, contrary to the Ninth Circuit's conclusion, "enabling those subject to a compliance order to force the EPA to litigate all compliance orders in court" is not "discordant with the statutory scheme"; rather, the CWA requires all compliance orders to be litigated before they can be enforced and does nothing to limit the rights of property owners to bring an action in federal court to challenge the basis for a compliance order before crippling fines begin to accumulate. *Id*.; *see McNary v. Haitian Refugee Center, Inc.,* 498 U.S. 479, 496 (1991) (holding judicial review is not foreclosed by availability of federal court enforcement mechanism).

B. The Objectives Of The CWA Are Not Hampered By Judicial Review Of Compliance Orders.

The Ninth Circuit concluded that the statutory objective of compliance orders was to allow swift enforcement of environmental protection laws. *Sackett*, 622 F.3d at 1144. But this swift enforcement was intended to take place in a jurisdictional context far different than that which exists today. Congress envisioned that compliance orders would be used in "relatively narrow fact situations requiring a minimum of discretionary decision making or delay." S. Rep. No. 92-414, 1972 U.S.C.C.A.N. 3668 at 3730 (1972). Given the extent of the EPA's jurisdiction at the time of the CWA's enactment, jurisdictional

questions would not be factually intensive or require a great deal of discretion.

As the Sacketts' case illustrates, the EPA has expanded its jurisdiction to such an extent that the "relatively narrow fact situations" envisioned by Congress are no longer the norm. Instead, the EPA regularly conducts "fact-specific analysis to determine whether [lands and waters] have a significant nexus with a traditional navigable water." 2008 Guidance at 5; 2011 Draft Guidance at 5. For example, in this case there is no continuous surface connection between the Sacketts' property and any relatively permanent water body. Petitioners' Brief at 6. The Sacketts performed the normal round of due diligence inspections before buying the land and had no reason to believe that development of the land would be subject to CWA permitting. *Id*. Accordingly, Congress could not have intended to preclude judicial review of compliance orders in the present context, where the EPA's authority is based on tedious, factually intensive analysis of complicated hydrological systems.

C. The CWA's Legislative History Does Not Evince An Intent To Limit Judicial Review Of Compliance Orders.

The Ninth Circuit found no support for its theory in the CWA's legislative history, so it reviewed the legislative history of the CAA instead. *Sackett*, 622 F.3d at 1144. Although the two statutes share common features, whatever inferences can be conjured

from the legislative history of one Act can hardly be imported to the unique factual context of another. The Ninth Circuit thought it significant that the CAA's legislative history reflects a conference committee amendment that removed a provision that would have expressly provided for pre-enforcement review of CAA administrative compliance orders. *Id*. But that deletion was unexplained and the Conference Committee may have simply seen the review provision in the CAA as redundant of the APA's express grant of judicial review. Davis, *Judicial Review of Environmental Compliance Orders*, 24 ENVTL. L. at 199. Congressional intent to limit immediate judicial review of CWA compliance orders is thus not fairly discernable from this strained reading of the CAA's legislative history.

Moreover, whatever might be gleaned from the CAA's legislative history, the *CWA's* legislative history plainly contradicts the notion that Congress intended that the EPA would exercise broad authority to dispense compliance orders at the fringes of Congress's constitutional authority, with no judicial oversight until such time as the EPA deemed judicial review necessary. Instead, Congress intended the CWA to apply in those "relatively narrow fact situations requiring a minimum of discretionary decision making or delay," where the EPA's authority was clear and unambiguous. S. Rep. No. 92-414, 1972 U.S.C.C.A.N. 3668 at 3730 (1972). Accordingly, Congress could not have intended to preclude judicial review of compliance orders in the present context, where the EPA's

authority is based on tedious, factually intensive analysis of complicated hydrological systems.

D. The Nature Of Compliance Orders Calls Out For Immediate Judicial Review.

The Ninth Circuit misconstrued the nature of the administrative action involved here. In analyzing the Sacketts' due process argument, the Ninth Circuit viewed the compliance order as a mere precursor to actual enforcement of a violation of the CWA. *Sackett*, 622 F.3d at 1145-46. This conclusion ignores the consequences of defying a compliance order and is contradicted by the plain text of the CWA.

The CWA imposes substantial consequences for failing to comply with the terms of a compliance order. Just one month of noncompliance puts a property owner at risk of civil liability of more than $750,000. *See* 33 U.S.C. § 1319(d) (imposing maximum civil penalty of $25,000 per day per violation). A year's worth of noncompliance puts the liability over $9,000,000. *Id*. Moreover, a landowner who continues with a construction project in the face of a compliance order greatly increases the risk that the agency will seek criminal penalties against him. *See* 33 U.S.C. § 1319(c)(1)-(2) (imposing criminal penalties for negligent and knowing violations of the Act). If a property owner believes, as the Sacketts do, that the EPA has no authority to issue a compliance order their options are to acquiesce to the terms of the unlawful compliance order, or risk hundreds of

thousands of dollars in fines as they wait for EPA to enforce the demands contained in the compliance order. That creates a "constitutionally intolerable choice" between compliance with an unlawful order and crippling civil fines, coupled with the threat of criminal penalties. *Thunder Basin Coal Co.,* 510 U.S. at 218.

Moreover, it is a choice that creates perverse incentives for the EPA, especially in the face of its increasingly tenuous jurisdictional expansion. In a case where the EPA's jurisdiction is questionable, the agency has a strong incentive to bluff by issuing a compliance order. The EPA can then simply wait for the property owner to acquiesce to the compliance order. If the property owner complies, the EPA will have achieved whatever ends it sought. If the property owner does not comply, every day of noncompliance brings increased fines and therefore increased leverage for the EPA to force compliance. *See, e.g., Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336, 340 (2001) (noting that the plaintiff ceased all disposal operations after receiving a compliance order from the EPA and eventually sold for salvage the improvements it had made).

In a case like the Sacketts', where the property owner innocently filled an alleged wetland, the EPA loses nothing by taking this approach. The wetlands have already been filled. Whether the land is returned to its previous state now or later is immaterial. By threatening the property owner with a compliance order, the EPA avoids any direct challenge

to its jurisdiction until such time as it chooses to cash in its compliance order in federal court. But by that time, the "practical effect of coercive penalties for noncompliance [is] to foreclose all access to the courts." *Thunder Basin Coal Co.,* 510 U.S. at 218.

Also, as the Ninth Circuit acknowledged, the plain text of the CWA "could indeed create a due process problem." *Sackett*, 622 F.3d at 1145. That is because the CWA plainly allows the EPA to pursue penalties for violation of a compliance order, even if no violation of the CWA is ever proved. The CWA's enforcement provision provides, "any person who violates any order issued by the Administrator under [33 U.S.C. § 1319(a)], shall be subject to a civil penalty . . . for each violation." 33 U.S.C. § 1319(d). The Ninth Circuit simply assumed that the EPA would have to prove an underlying violation of the CWA; however, the Act plainly does not require this. *Id*.

As the foregoing demonstrates, the Ninth Circuit's conclusion that each of the *Block* factors forecloses immediate judicial review of compliance orders is plainly in error. By analyzing the statutory scheme in a vacuum, the Ninth Circuit failed to recognize that the EPA's consistent expansion of its CWA jurisdiction has worked a dramatic realignment of the *Block* factors. As illustrated by the facts of the Sacketts' case, the EPA has expanded its jurisdiction to such an extent that denying immediate judicial review of compliance orders in this context is inconsistent with Congressional intent in passing the CWA. The EPA's ongoing attempt to

further expand its authority will only compound this problem. Accordingly, the judgment of the Ninth Circuit should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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