No. 10-1062

# In The Supreme Court of the United States

CHANTELL SACKETT, et vir,

*Petitioners,*

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,

*Respondents.*

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

## BRIEF OF THE STATES OF ALASKA, WYOMING, HAWAII, SOUTH CAROLINA, VIRGINIA, NORTH DAKOTA, NEBRASKA, ARIZONA, COLORADO, AND MICHIGAN AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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## INTEREST OF AMICI CURIAE[1]

Amici curiae, the states of Alaska, Wyoming, Hawaii, South Carolina, Virginia, North Dakota, Nebraska, Arizona, Colorado, and Michigan have strong interests in the Court's resolution of whether administrative compliance orders issued by either the United States Environmental Protection Agency (EPA) or the United States Army Corps of Engineers (Corps) under the Clean Water Act, 33 U.S.C. § 1251, *et seq*. (CWA), are subject to pre-enforcement judicial review. Amici States' interests are twofold.

First, amici have an interest in maintaining and protecting the States' primary power and responsibility over land and water use and development, which is usurped by the federal agencies' use of compliance orders. In enacting the CWA, Congress recognized the "primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution," and "to plan the development and use (including restoration, preservation, and enhancement) of land and water resources" within their respective boundaries. 33 U.S.C. § 1251(b); *see also Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 174 (2001) (acknowledging States' "traditional and primary power over land and water use"

[1] The State of Alaska provided written notice to the parties of the intent to file this amici brief on September 7, 2011. This brief was not written in whole or in part by parties' counsel, and no one other than amici made a monetary contribution to its preparation. *See* Sup. Ct. R. 37.6.

under the CWA); *Rapanos v. United States (Rapanos)*, 547 U.S. 715, 738 (2006) (recognizing that regulation of land use "is a quintessential state and local power"). This Court has noted the "immense expansion of federal regulation of land use that has occurred under the Clean Water Act – without any change in the governing statute – during the past five Presidential administrations." *Rapanos*, 547 U.S. at 722. The EPA's expansive assertion of jurisdiction and its use of purportedly unreviewable orders to force compliance undermines state and local authority. The States provide adequate and reasonable safeguards to protect the environment from development activities with an array of laws and regulations. *See, e.g.*, Alaska Stat. § 46.03.100 (2010) (integrated waste discharge permitting authority); Alaska Admin. Code tit. 18, Ch. 70 (2011) (Alaska water quality standards); Alaska Admin. Code tit. 18, Ch. 72 (2011) (wastewater disposal); Alaska Admin. Code tit. 18, Ch. 83 (2011) (Alaska Pollutant Discharge Elimination System Program); Wyo. Stat. Ann. § 35.11.302(a)(v) (2010) (Wyoming Pollution Discharge Elimination System program authority); Wyo. Stat. Ann. § 35.11.309 (2010) (Wyoming's wetlands policy); Ch. 1 of the Wyoming Water Quality Rules and Regulations (Wyoming's Surface Water Standards); Ch. 2 of the Wyoming Water Quality Rules and Regulations (Wyoming Pollution Discharge Elimination System regulations); Va. Code Ann. § 62.1-44.15 (authorizing establishment of water quality standards and administration of Virginia's Pollutant Discharge Elimination System Permit program); Va. Code Ann. § 62.1-44.15:20

(water protection permitting for excavating or filling wetlands).

Second, as landowners, amici States have an interest in judicial review of CWA compliance orders because of the untenable situation the orders create.[2] Without judicial review to determine the validity of a compliance order, the recipient of the order faces a "Hobson's choice": either to comply with an order at the cost of significant development expenses and meaningful judicial review of the wetlands determination, or to decline to comply and risk significant

[2] For example, amicus State of Alaska is the owner of over 100 million acres of land, granted by Congress at statehood to help the State finance its new government. *See* Alaska Statehood Act, § 6, Pub. L. No. 85-508, 72 Stat. 339 (1958). The State of Alaska also regulates the largest geographic area of any state in the nation, with countless remote tributaries and ponds, and over 174 million acres of wetlands, more wetlands than in all other states combined. U.S. Fish and Wildlife Service, Status of Alaska Wetlands 19 (1994), available at http://www.fws.gov/wetlands/_documents/gSandT/StateRegionalReports/StatusAlaskaWetlands.pdf. Many of these wetlands are remotely located and far removed from any navigable waterbody. The prevalence of isolated waters and wetlands in the state means that more often than not public infrastructure development – such as water and sewer, roads, or airport projects – as well as private development projects – such as home building – in Alaska involve work in wetlands or non-navigable waters. As this Court has recognized, more than half of the surface area of Alaska could potentially qualify as "waters of the U.S." subject to federal regulation under the CWA. *Rapanos*, 547 U.S. at 722; *see also* U.S. Fish and Wildlife Service, Status of Wetlands 18, *supra*. Virginia has 808,000 acres of freshwater wetlands and almost 237,000 acres of tidal and coastal wetlands. Status of Virginia's Water Resources, App. 1.

civil, and possibly criminal, penalties. The States have a sovereign interest to protect their property interests. They also have a strong interest in protecting responsibly-conducted development for housing, infrastructure, and other purposes from overreaching federal regulation that is administered so zealously that it exceeds the objectives of the CWA.

## SUMMARY OF ARGUMENT

Pre-enforcement judicial review of CWA administrative compliance orders, including review of the agency's jurisdictional determination underpinning the orders, is authorized by section 704 of the Administrative Procedure Act (APA), 5 U.S.C. § 704, and required by the Due Process Clause. The APA provides for judicial review of final agency action when no other court remedy is available. In this case, the Ninth Circuit declined to follow the long-established presumption favoring judicial review of agency action, based on its view that the CWA statutory scheme implicitly signals congressional intent to preclude judicial review of compliance orders. But the court's conclusion was based on incorrect analysis of the CWA and inapposite comparison of the CWA to other environmental statutes. Nothing in the CWA suggests that Congress intended to preclude judicial review of CWA compliance orders; nothing runs counter to APA section 704; and nothing rebuts the presumption of reviewability.

Even if this Court agrees that the CWA implicitly precludes pre-enforcement judicial review under the

APA, the lack of pre-enforcement judicial review violates due process. Defying a compliance order, even one ultimately found to be unsupportable, exposes the recipient to civil and criminal penalties. Federal law places limits on orders that constitute "final agency action" to protect the regulatory interests of the states and the due process rights of landowners and developers. Pre-enforcement judicial review under the APA ensures that the federal government does not irreversibly exceed those limits in overzealously administering the CWA. But when judicial review must wait until the government decides to bring an action, recipients of compliance orders suffer such coercive consequences as to be effectively denied meaningful process at all.



## ARGUMENT

### I. PRE-ENFORCEMENT JUDICIAL REVIEW OF CLEAN WATER ACT COMPLIANCE ORDERS IS AUTHORIZED UNDER SECTION 704 OF THE ADMINISTRATIVE PROCEDURE ACT.

Federal authority to regulate waters and wetlands under the CWA is not without limits. *Rapanos*, 547 U.S. at 757, *SWANCC*, 531 U.S. at 159. But because the government takes an expansive view of its jurisdiction under the act, *Rapanos* at 725, 731-32, 739, courts inevitably will be asked to provide the necessary check on this exercise of authority.

Judicial review of CWA compliance orders is authorized by APA section 704, which provides the

right to judicial review of "final agency action for which there is no other remedy in a court." This appeal right applies unless either a statute precludes judicial review or the agency action is committed by law to agency discretion. 5 U.S.C. § 701(a). The Court has recognized a well-established presumption favoring judicial review of agency action, which is overcome only if there is "clear and convincing evidence" of a contrary legislative intent. *Abbott Laboratories v. Gardner (Abbott)*, 387 U.S. 136, 141 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Contrary intent may be found if "congressional intent to preclude judicial review is fairly discernible in the statutory scheme." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984). Because a compliance order constitutes the final agency action as to the underlying wetlands determination and neither of the APA section 701(a) exceptions to judicial review applies, judicial review should be allowed.

### A. EPA's Compliance Order Constitutes Final Agency Action Under Section 704 of the Administrative Procedure Act.

The Ninth Circuit did not discuss whether the EPA's order to the Sacketts was "final agency action," but instead focused solely on whether the CWA precludes pre-enforcement judicial review. *Sackett v. EPA*, 622 F.3d 1139 (9th Cir. 2010). While the court's silence on finality might be interpreted to mean that it accepted the order as "final agency action," the opinion is not clear. Whether agency action is final is a threshold requirement to trigger a court's jurisdiction over an APA claim. Consideration of whether a

compliance order constitutes final agency action also informs the due process analysis, if the Court finds that the CWA precludes pre-enforcement judicial review.

The Court has established a two-part test for determining whether agency action is final. "First, the action must mark the 'consummation' of the agency's decisionmaking process . . . – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted). "Purely advisory" action is not final agency action; an agency action that affects the legal rights of others and imposes direct and appreciable legal consequences is. *Id*. at 178.

Here, the compliance order conclusively determined that the Sacketts' property contained wetlands that were "waters of the U.S." subject to federal regulation under section 404 of the CWA. 33 U.S.C. § 1344. EPA directed the Sacketts to stop earthwork on their roughly half-acre residential lot,[3] spend considerable funds to restore the land, reestablish native flora, implement a three-year monitoring program, and then embark upon the CWA's expensive and time-consuming section 404 permitting process (with no guarantee of ultimately getting a permit).

[3] The lot was one of several located in a residential area where some development had already occurred.

Although they disagreed with the wetlands determination, the Sacketts' only alternatives were either to comply or to face significant penalties for failing to comply. EPA denied the Sacketts' request for administrative review of the compliance order – including the underlying jurisdictional determination – and the Sacketts sought judicial review.

EPA's affirmative jurisdictional determination is the necessary, core finding that serves as the basis for issuing the compliance order. The order also marks the end of the agency's decisionmaking process on that underlying determination. Indeed, the Ninth Circuit in another case recognized that such a jurisdictional finding by the Corps is the "ultimate administrative position regarding the presence of wetlands," and the finding is "devoid of any suggestion that it might be subject to subsequent revision or 'further agency consideration or possible modification.'" *Fairbanks Northstar Borough v. U.S. Army Corps of Engineers (Fairbanks)*, 543 F.3d 586, 592 (9th Cir. 2008). The Ninth Circuit in *Fairbanks* rejected the Corps' assertion that changed circumstances to the property in the future might alter the agency's jurisdictional finding, stating that under that view, no agency action would ever be deemed final. *Id*. at 592 n.4. As in *Fairbanks*, the compliance order issued to the Sacketts, underpinned by EPA's necessary

jurisdictional finding, satisfies the first prong of the *Bennett* test.[4]

The second prong of the *Bennett* test is also met. The order is "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" 520 U.S. at 177-78. A compliance order issued to property owners like the Sacketts leaves the recipient with clear legal obligations and little choice.[5] To restore property to its original condition in response to a compliance order in many instances will require the owner to incur costs that exceed the value of the property itself, and to sacrifice earlier investment in developing it. Embarking on the CWA section 404 permitting process routinely requires an owner to enter into legally-binding construction design contracts and contracts with third parties for mitigation projects to offset the loss of wetlands associated with construction. This Court has recognized, on data that was compiled nearly a decade ago, that completing

[4] The Ninth Circuit in *Fairbanks*, which did not involve a compliance order, went on to hold that the Corps' affirmative jurisdictional determination in that case did not satisfy part two of the *Bennett* test, and therefore there was no "final agency action." 543 F.3d at 586. Because of this conclusion, the court specifically stated it did not reach the question of whether the CWA precluded pre-enforcement judicial review. *Id*.

[5] *See also* Christopher M. Wynn, Note, *Facing a Hobson's Choice? The Constitutionality of the EPA's Administrative Compliance Order Enforcement Scheme Under the Clean Air Act*, 62 Wash. & Lee L. Rev. 1879, 1920 (2005).

the section 404 permitting process can be expensive and time-consuming:

> The burden of federal regulation on those who would deposit fill material in locations denominated "waters of the United States" is not trivial. . . . The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915 – *not counting* costs of mitigation or design changes. . . . "[O]ver $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits."

*Rapanos*, 547 U.S. at 721 (emphasis added; footnote and citations omitted). With inflation, costs associated with the permitting process undoubtedly have increased.

Recipients of compliance orders also face significant penalties should they fail to comply with the order, including civil penalties of up to $37,500 per day, administrative penalties of up to $11,000 per day, and criminal penalties, including jail time. 33 U.S.C. § 1319(c) and (d); 28 U.S.C. § 2461; 74 Fed. Reg. 626, 627 (Jan. 7, 2009). The threat of these oppressive penalties obviously coerces recipients into compliance, into undoing existing development efforts, and restoring the land. They have no alternative opportunity to challenge the legitimacy of an order and its underlying determination of affirmative federal jurisdiction.

This Court's precedent supports the position that EPA's order to the Sacketts is final agency action. In *Alaska Department of Environmental Conservation (ADEC) v. EPA*, 540 U.S. 461 (2004), the Court affirmed the Ninth Circuit's decision that EPA's Clean Air Act compliance orders were "final agency action" subject to judicial review under the *Bennett* test. *Id*. at 481-83 (2004). That case involved a challenge to EPA's issuance of multiple administrative compliance orders under its Clean Air Act oversight authority of the State of Alaska's air permitting program. One order directed the State not to issue a proposed air quality control permit (which the state did later issue), while another order directed the permittee, Cominco, to stop construction of a facility that the state-issued permit had authorized. In its orders, EPA stated that the permit improperly allowed construction of a facility that, in EPA's view, would not comply with the Clean Air Act's best available control technology (BACT) requirements. *Id*. at 479-81.

EPA initially argued that the Ninth Circuit did not have jurisdiction to review the orders because they were "interlocutory" until EPA commenced an enforcement action in district court. *Id*. at 482. EPA later abandoned this position and conceded its order imposed "new legal obligations on Cominco," and the Ninth Circuit found jurisdiction under 42 U.S.C. § 7607(b)(1), which allows challenges involving "any . . . final [EPA] action." *See id*. at 481-82. The court held that EPA had given its final judgment on whether the State had adequately supported its issuance of the

permit, and that this EPA finding was the basis for issuance of the compliance orders. The court also noted that EPA's orders effectively halted construction of the facility, that Cominco would have risked civil and criminal penalties if it continued construction in defiance of the order, and that halting construction of the facility would cost Cominco considerable time and money. *Id*. at 482-83. Thus, the Ninth Circuit had "little trouble concluding . . . that both *Bennett* conditions are met here. . . . [T]he findings in the Orders are [EPA's] 'last word' on its position as to [BACT] and Cominco is in legal jeopardy if it fails to comply with the Orders." *Alaska Department of Environmental Conservation v. EPA*, 244 F.3d 748, 750 (9th Cir. 2001).[6]

The Court affirmed the Ninth Circuit's finding that the compliance order was final agency action:

> We are satisfied that the Court of Appeals correctly applied the guides we set out in *Bennett v. Spear* (to be "final," agency action must mark consummation of the agency's decisionmaking process," and must either determine "rights or obligations" or occasion "legal consequences. As the Court of Appeals

[6] Similarly, the Sixth Circuit concluded in, *Allsteel Inc. v. United States EPA*, 25 F.3d 312, 315 (6th Cir. 1994), that the impact of EPA's Clean Air Act compliance order "was practical, immediate, and significant," requiring Allsteel to stop construction of its facility, preventing it "from conducting its business in an efficient manner," likely jeopardizing its business viability, and subjecting it to civil and criminal penalties if it defied the order.

> stated, *EPA had asserted its final position on the factual circumstances" underpinning the Agency's orders*, *and if EPA's orders survived judicial review, Cominco could not escape the practical and legal consequences (lost costs and vulnerability to penalties)* of any ADEC-permitted construction Cominco endeavored.

540 U.S. at 483 (emphasis added) (citations and parenthetical omitted).

Here, as in *ADEC*, both prongs of the *Bennett* test are met and judicial review should be allowed. The Ninth Circuit failed to even mention *ADEC*, and failed to discuss whether the order constituted final agency action, even in its analysis of the Sacketts' due process claim. This omission is particularly inexplicable because not only did this Court recognize the "practical and legal consequences" of the compliance orders, but both the Ninth Circuit and this Court allowed judicial review of the orders.

### B. The Clean Water Act Does Not Preclude Pre-enforcement Judicial Review of Compliance Orders Under the Administrative Procedure Act.

Contrary to the conclusion of the Ninth Circuit, the CWA does not preclude judicial review under APA section 701(a). Availability of judicial review of final agency action is presumed absent "clear and convincing evidence" of a contrary legislative intent, *Abbott Laboratories*, 387 U.S. at 141, and the CWA does not expressly preclude pre-enforcement judicial review of

federal compliance orders. And yet the Ninth Circuit held that the presumption favoring review was overcome, finding "a congressional intent to preclude preenforcement judicial review of compliance orders . . . fairly discernible in the statutory scheme" of the CWA. 622 F.3d at 1144 (internal quotation marks omitted). In reaching that conclusion, the court erred in its analysis of the CWA's statutory scheme, relied on decisions from other circuits in other contexts (many of which involved other statutes), and failed to analyze *Abbott Laboratories* and its progeny. In reaching this conclusion, the Ninth Circuit also sends the CWA on a constitutional collision course with the Due Process Clause, U.S. Const. amend. V, when the Ninth Circuit should have construed the act to avoid such a result. "'[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'" *SWANCC*, 531 U.S. at 173 (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

In finding that Congress intended to preclude judicial review, the Ninth Circuit relied on the structure of CWA section 309, 33 U.S.C. § 1319. *Id*. at 1142-43. Section 309 addresses compliance orders and enforcement of the Act. Subsection 309(a)(3) – enacted as part of the Federal Water Pollution Control Amendments of 1972 – authorizes the Administrator to issue a compliance order or file suit for

enforcement when he finds a violation. Although that subsection is silent as to judicial review, a later provision, subsection 309(g), added in 1987 to authorize civil penalties, provides for judicial review of a civil penalty assessment. From these two subsections, the Ninth Circuit found that "Congress's express grant of judicial review for administrative penalties helps to persuade us that the absence of a similar grant of judicial review for compliance orders was an intentional omission that must be respected." *Id.* at 1143 (citation omitted). But the court failed to note that the two subsections were enacted 15 years apart.

The Ninth Circuit's lack of detailed analysis perhaps is due to the court's reliance on several cases also devoid of careful analysis. It relied on a 1990 Seventh Circuit opinion that held that section 309 is part of a statutory scheme in which "Congress chose to make assessed administrative penalties subject to review while at the same time it chose not to make a compliance order judicially reviewable unless the EPA decides to bring a civil suit to enforce it." *Hoffman Group, Inc. v. EPA*, 902 F.2d 567, 569 (7th Cir. 1990). Other circuits rotely followed this conclusion. *See Southern Pines Assn. v. U.S.*, 912 F.2d 713 (4th Cir. 1990); *Southern Ohio Coal Co. v. Office of Surface Mining, Reclamation, and Enforcement,* 20 F.3d 1418, 1426 (6th Cir. 1994); *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995).

But this conclusion is incorrect. Characterizing congressional silence on judicial review of compliance orders as an "intentional omission," as the panel below

did, or as a "choice not to make a compliance order judicially reviewable," as the Seventh Circuit did, reads too much into provisions that were enacted cumulatively over a decade and a half.

A more plausible interpretation is that Congress understood CWA compliance orders to be final agency action reviewable under the APA when it enacted the 1987 amendments and that it intended reviewability to continue, seeing no need to expressly and redundantly amend other subsections to specify that compliance orders are reviewable. As of 1987, courts had held that CWA compliance orders were reviewable under the APA, and it appears that none had held otherwise. *See, e.g., P.F.Z. Properties, Inc. v. Train,* 393 F. Supp. 1370 (D. D.C. 1975); *Swanson v. United States*, 600 F. Supp. 802 (D. Idaho 1985), *aff'd*, 789 F.2d 1368 (9th Cir. 1986) and *Leslie Salt Co. v. United States*, 660 F. Supp. 183 (N.D. Cal. 1987). Because the APA unequivocally provided for judicial review of administrative compliance orders and courts were reviewing them, the "silence" in the 1987 amendments indicates that Congress intended no change in the right of judicial review. Nothing in the CWA statutory scheme supports the Ninth Circuit's conclusion that the 1987 amendments somehow repealed the then-existing right of judicial review.

The Ninth Circuit relied on and compounded the cursory analyses of the CWA by the Seventh Circuit in *Hoffman Group* and of the Fourth Circuit in *Southern Pines*, neither of which discussed the pre-1987 CWA statutory scheme. The Ninth Circuit also

compounded the earlier opinions' imprecise and inapposite comparisons to the Clean Air Act and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The earlier decisions appeared to find particularly persuasive a 1977 Eighth Circuit opinion holding that Clean Air Act compliance orders were not subject to judicial review. *See Southern Pines*, 912 F.2d at 717 (citing *Lloyd A. Fry Roofing Co. v. United States EPA,* 554 F.2d 885 (8th Cir. 1977)); *Hoffman Group*, 902 F.2d at 569 (citing *Fry Roofing* and CERCLA cases). However, they failed to note that in 1977, the same year as the Eighth Circuit decision, Congress amended the Clean Air Act to expressly provide for appellate review of "any other final action of the Administrator under this chapter."[7] And in analogizing to CERCLA, the courts overlooked an important distinction: CERCLA addresses the cleanup of releases of hazardous substances into the environment, situations where judicial review of a compliance order may delay the ability to immediately respond to a release. *Hoffman Group*, 902 F.2d at 569; *Southern Pines*, 912 F.2d at 716. The comparisons to the CERCLA statutory scheme have little applicability in construing the CWA, especially as to the reviewability of compliance orders making wetlands determinations and addressing

[7] *See* 42 U.S.C. § 7607(b)(1); *see also* Construction and application of § 307(b)(1) of Clean Air Act (42 U.S.C.A. § 7607(b)(1)) pertaining to judicial review by courts of appeals, 86 A.L.R. Fed. 604 (1988).

the routine placement of fill in the course of land development.

Regardless of these other federal environmental statutory regimes, the courts had no basis to conclude that congressional "silence" shows intent to make them unreviewable. This conclusion stands the presumption of reviewability on its head. Before 1990, courts believed that they did have jurisdiction under the APA to review CWA compliance orders. *See, e.g.*, *P.F.Z. Properties,* 393 F. Supp. 1370 (finding, in CWA case challenging both an EPA notice of violation *and* cease and desist order, that court had jurisdiction over the case pursuant to APA sections 701-706, and holding trial on whether the agency had jurisdiction over mangrove wetlands). In short, the Ninth Circuit's analysis and conclusion that congressional silence implies intent to preclude judicial review is flawed and ignores the more plausible explanation that Congress intended judicial review to continue.

Another explanation is that Congress never contemplated or intended that the agencies would use compliance orders to force compliance with federal wetlands regulations without judicial review – that owners of property arguably not jurisdictional wetlands would be forced into the Hobson's choice of either complying at great cost or developing their lands at the peril of severe fines and damages. Instead, one might reasonably conclude that Congress intended that compliance orders would not have the force of law unless they were judicially reviewable. The Eleventh Circuit interpreted the Clean Air Act in

this way, stating that "[h]ad Congress wanted [administrative compliance orders] to have the force of law, it surely would have made them subject to judicial review." *Tennessee Valley Authority (TVA) v. Whitman*, 336 F.3d 1236, 1251 (11th Cir. 2003) (holding that because the Act's administrative compliance orders violate due process, the orders in that case were legally inconsequential, lacked finality, and therefore were not reviewable). The legislative history of section 309, while sparse, suggests that Congress did not intend compliance orders to be so widely used, and did not consider administrative convenience to outweigh landowners' ability to get judicial review of the jurisdictional basis for compliance orders in wetlands cases.[8]

The Ninth Circuit's conclusion that the "silence" in CWA section 309 conveys implicit intent to preclude judicial review also runs directly counter to this Court's admonition in *Abbott Laboratories* that "'[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. *The right to review is too important to be excluded on such slender and indeterminate evidence*

[8] The 1972 Senate Report on CWA section 309 states: "Enforcement of violations of requirements under this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay." P.L. 92-500, FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, S. REP. NO. 92-414, 1972 U.S.C.C.A.N. 3668, 3730, 1971 WL 11307.

*of legislative intent*.'" 387 U.S. at 141 (emphasis added).

The Ninth Circuit's analysis also is inconsistent with *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). In *Thunder Basin*, the Court found that the structure of the Mine Act showed that Congress intended to preclude a miner operator's challenge to inspection rights. It found that the Mine Act established a "comprehensive review process [which] does not distinguish between preenforcement and post-enforcement challenges, but applies to all violations of the Act and its regulations." *Id*. at 208-09 (citation omitted). Further, it found that the Act "expressly authorizes district court jurisdiction in only two provisions, which respectively empower the Secretary to enjoin habitual violations of health and safety standards and to coerce payment of civil penalties. Mine operators enjoy no corresponding right but are to complain to the Commission and then to the court of appeals." *Id*. at 209 (citation and footnote omitted). No similar comprehensive scheme appears in section 309 or anywhere in the CWA evidencing an intent to preclude judicial review of administrative compliance orders.

The Ninth Circuit also failed to heed this Court's directive in *Thunder Basin* that "[w]hether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history, . . . *and whether the claims can be afforded meaningful review*." *Thunder Basin*, 510 U.S. at 207 (citations omitted; emphasis

added). Absent pre-enforcement judicial review of coercive compliance orders, claims by recipients of federal compliance orders will not be afforded any meaningful review.

The Ninth Circuit's conclusion that the CWA implicitly precludes pre-enforcement judicial review prevents consideration of the very real consequences facing the recipients of compliance orders. The circumstances in this case – a compliance order that makes a couple's construction of a family home economically unfeasible – demonstrate the consequences of unchecked federal exercise of CWA authority. Nothing in the CWA, either expressly or impliedly, suggests that Congress intended to preclude meaningful pre-enforcement judicial review of compliance orders that rest upon a federal agency's affirmative jurisdictional wetlands determination, and nothing overcomes the presumption of reviewability.

## II. DUE PROCESS REQUIRES THAT RECIPIENTS OF AN EPA COMPLIANCE ORDER BE ALLOWED A PRE-ENFORCEMENT HEARING TO CHALLENGE THE EXERCISE OF FEDERAL JURISDICTION AND ENFORCEMENT AUTHORITY.

While delay in judicial review does not necessarily violate due process, delayed review is unconstitutional if "the practical effect of coercive penalties for noncompliance [is] to foreclose all access to the courts," and "compliance is sufficiently onerous and coercive penalties sufficiently potent." *Thunder Basin*,

510 U.S. at 216. To impose on a party "the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines . . . is, in effect, to close up all approaches to the courts." *Ex parte Young*, 209 U.S. 123, 148 (1908) (holding unconstitutional the provisions of an act precluding pre-enforcement judicial review of rates and associated fixed civil and criminal penalties for failure to comply with rates).

In this case, the Ninth Circuit found no violation of due process, stating that "[w]e are not persuaded that the potential consequences from violating CWA compliance orders are so onerous so as to "'foreclose all access to the courts'" and create a "'constitutionally intolerable choice.'" 622 F.3d at 1146 (quoting *Thunder Basin*, 510 U.S. at 218). But the court underestimated the scope of the agencies' power and the resulting harm to landowners. Precluding pre-enforcement judicial review buttresses a regime where EPA has assumed the authority to enjoin development by issuing unreviewable compliance orders. Such a result is repugnant to the core principle in the Due Process Clause that "[n]o person shall be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Further, application of this federal regulatory enforcement tool without judicial oversight tailgates other expansive federal regulatory action that cumulatively frustrates the States' primary authority to regulate land and

water use within their respective boundaries. 33 U.S.C. § 1251(b).

Even those courts that find that the CWA implicitly precludes pre-enforcement judicial review have noted that EPA's exercise of its compliance order authority may go too far. For example, in *Rueth v. United States Environmental Protection Agency*, 13 F.3d 227 (7th Cir. 1993), the Seventh Circuit stated: "[I]t is not inconceivable that the EPA or the Corps might completely overextend their authority. In such a case we suggest to those agencies that we will not hesitate to intervene in pre-enforcement activity." *Id*. at 231. The court's expression that it might review agency orders in certain circumstances even while holding that the CWA bars judicial review further underscores the questionable constitutionality of the barrier to judicial review that the Seventh Circuit, Ninth Circuit, and other circuits have read into the CWA.[9]

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[9] In a case involving the federal Resource Conservation and Recovery Act, another court also acknowledged that review might be mandated by due process in some cases:

> . . . [T]he Court can conceive of some pre-enforcement orders where due process concerns would be implicated. Where, for instance, the order itself is directly and irreversibly confiscatory, preventing any *meaningful* judicial review, and the agency acts in a manner which appears designed to thwart judicial review of its order, due process concerns could override an otherwise evident congressional intent to generally prohibit pre-enforcement judicial review. Indeed, these

(Continued on following page)

And the Eleventh Circuit found that the Clean Air Act violates due process in similar circumstances. In *T.V.A. v. Whitman*, after finding that the Clean Air Act implicitly precluded pre-enforcement judicial review of administrative compliance orders, the court held that "the statutory scheme is unconstitutional to the extent that severe civil and criminal penalties can be imposed for noncompliance with the terms of an [administrative compliance order]." 336 F.3d at 1239. Consideration of the "legal consequences" of the order is necessary in order to determine whether the agency's order was "final," and "[o]nly if noncompliance with the terms of [the order] amounts to an independent violation of the Clean Air Act (thus triggering civil penalties and criminal sanctions) can an [order] be said to have legal consequences" and finality. *Id*. at 1257. Thus, where the compliance order has the force of law, (that is, where noncompliance with the order itself, regardless of the underlying CWA determination that led EPA to issue the order, exposes the recipients to imposition of severe civil and criminal penalties), opportunity for meaningful judicial review must be allowed.

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were the precise circumstances Judge Wellford found present in the *Allsteel* case when he premised his concurrence on due process grounds.

*Armco v. United States EPA*, 124 F. Supp. 2d 474, 478 (N.D. Ohio 2000) (emphasis in original) (citing *Allsteel*, 35 F.3d at 316).

As this Court held in *Fuentes v. Shevin*,

> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of possessions. . . . [T]he prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference.

407 U.S. 67, 80-81 (1972).

In this case, the Sacketts purchased a small lot and had all local permits in hand to construct a modest home in the midst of a residential area where some development had already occurred. EPA ordered the Sacketts to cease construction, undo the work they had already completed, restore the property to its original condition, and then conduct a three-year environmental monitoring review of the property. Only then will they be eligible to engage in the section 404 process to obtain a permit that they do not believe is required, that may not be granted, and that may contain provisions so onerous that it effectively forecloses development.[10] And if they defy the order, they face significant civil and criminal penalties, including enormous fines. As petitioners noted in

[10] 33 C.F.R. § 326.3(e)(1)(ii) provides that no application under the CWA can be accepted until a compliance order is resolved.

their Petition for Writ of Certiorari, at 10, "[j]ust one month of noncompliance puts the landowner at risk of civil liability of $750,000. A year's worth of noncompliance puts the liability at $9,000,000."

The order issued to the Sacketts has a "practical and immediate effect," represents EPA's "last word" on its wetlands determination,[11] and will result in a "serious prehearing deprivation" of a constitutionally protected interest. *Thunder Basin*, 510 U.S. at 781. If the Court concurs with the Ninth Circuit that the statutory scheme precludes review under the APA, then due process nonetheless requires that the Sacketts receive meaningful opportunity to be heard before deprivation of their property interest. *See Mathews v. Eldridge*, 424 U.S. 319 (1976) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.").

[11] *See, e.g.*, *ADEC*, 540 U.S. at 481-83 (ruling that EPA's determination of what equipment would comply with Clean Air Act requirements was final); *Allsteel*, 25 F.3d at 314-15 (finding that "the balance tips in favor of the conclusion that the stop-work order is a final action"); *Harrison v. PPG Industries*, 446 U.S. 578, 586 (1980) (holding "EPA's determination concerning the applicability of the 'new source' standards to PPG's power facility" was final agency action).

## CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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