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 PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF PETITIONERS

Of counsel:
Sam Kazman
Hans Bader
COMPETITIVE ENTERPRISE INSTITUTE
1899 L St. N.W.
12th Floor
Washington, D.C. 20036
(202) 331-1010

Theodore L. Garrett
Counsel of Record
Mark W. Mosier
Matthew J. Berns
COVINGTON & BURLING LLP
1201 Pennsylvania Ave. N.W.
Washington, D.C. 20004
(202) 662-6000
tgarrett@cov.com

Counsel for Amicus Curiae

September 2011

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. Prompt Judicial Review Is Necessary In Light Of Uncertainty About The Validity Of The Agencies' Exercise Of Jurisdiction Under The CWA. 3

A. Rather than Clarify the Scope of the Agencies' Jurisdiction, the Recent EPA and Corps Guidance Documents Attempt To Extend the CWA's Jurisdictional Reach. 5

B. Congress Is Unlikely To Resolve the Uncertainty Regarding the Limits of the CWA. 13

II. Judicial Oversight Of Compliance Orders Will Be Effectively Unavailable If Parties Cannot Promptly Seek Review. 15

A. A Civil Action Brought by EPA Is Not an Adequate Substitute for Prompt Judicial Review of a Compliance Order. 15

B. The Permitting Process Does Not Provide an Adequate Avenue by Which To Seek Review........................ 18

III. The Clean Water Act Does Not Foreclose Judicial Review of Compliance Orders. 22

A. A Strong Presumption of Reviewability Favors Allowing Challenges to Compliance Orders. 23

B. Congress Did Not Override the Presumption that EPA Compliance Orders Are Subject to Judicial Review. 25

C. The Statute Should Be Read To Avoid the Serious Due Process Concerns Associated with Preclusion of Nonstatutory Review. 29

CONCLUSION 31

TABLE OF AUTHORITIES

Page(s)

CASES

Abbott Labs. v. Gardner, 387 U.S. 136 (1967) 17, 23, 27

Ashwander v. TVA, 297 U.S. 288 (1936) 29

Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970) 25

Baccarat Fremont Developers, LLC v. U.S. Army Corps of Eng'rs, 425 F.3d 1150 (9th Cir. 2005) 20

Block v. Cmty. Nutrition Inst., 467 U.S. 340 (1984) 23

Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667 (1986) 23, 29

Butte Envtl. Council v. U.S. Army Corps of Eng'rs, 620 F.3d 936 (9th Cir. 2010) 22

Comm'rs of Pub. Works of Charleston v. United States, 30 F.3d 129 (4th Cir. 1994) 20

Dickerson v. Adm'r, EPA, 834 F.2d 974 (11th Cir. 1987) 26

Dunlop v. Bachowski, 421 U.S. 560 (1975)............... 23

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) 29, 30

Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs, 543 F.3d 586 (9th Cir. 2008) 20, 22

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) 1, 18

Gen. Elec. Co. v. Jackson, 610 F.3d 110 (D.C. Cir. 2010), *cert. denied* 131 S. Ct. 2959 (2011) 26

Greater Gulfport Prop., LLC v. U.S. Army Corps of Eng'rs, 194 Fed. App'x 250 (5th Cir. 2006) 20

James Madison Ltd. v. Ludwig, 82 F.3d 1085 (D.C. Cir. 1996) 28

Massachusetts v. EPA, 549 U.S. 497 (2007) 1

Micei Int'l v. Dep't of Commerce, 613 F.3d 1147 (D.C. Cir. 2010) 28

Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010) 1

Nat'l Ass'n of Home Builders v. EPA, 731 F. Supp. 2d 50 (D.D.C. 2010) 22

Norton Constr. Co. v. U.S. Army Corps of Eng'rs, 280 Fed. App'x 490 (6th Cir. 2008) 10

P & V Enters. v. U.S. Army Corps of Eng'rs, 516 F.3d 1021 (D.C. Cir. 2008) 17

Precon Dev. Corp. v. U.S. Army Corps of Eng'rs, 633 F.3d 278 (4th Cir. 2011) 8, 20

Rapanos v. United States, 547 U.S. 715 (2006) .... passim

Rueth v. U.S. EPA, 13 F.3d 227 (7th Cir. 1993) 16, 20

Sackett v. U.S. EPA, 622 F.3d 1139 (9th Cir. 2010) 26, 27

Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1 (2000) 18, 23

Shields v. Utah Idaho Cent. R.R. Co., 305 U.S. 177 (1938) 23, 24

Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001) .... passim

Stark v. Wickard, 321 U.S. 288 (1944) 25

Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994) 23, 24

United States v. Cundiff, 555 F.3d 200 (6th Cir. 2009) 4, 16

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 5, 6

Wagner Seed Co. v. Daggett, 800 F.2d 310 (2d Cir. 1986) 26

Watters v. Wachovia Bank, N.A., 550 U.S. 1 (2007) 1

STATUTES AND LEGISLATIVE MATERIALS

33 U.S.C. §1251 *et seq.* 2, 3

33 U.S.C. §1311 5

33 U.S.C. §1319 .... 16, 26, 27, 28

42 U.S.C. §9601 *et seq.* 25, 26

42 U.S.C. §9606 26

42 U.S.C. §9613 26

Clean Water Authority Restoration Act of 2003, S. 473, 108th Cong. 14

Clean Water Authority Restoration Act of 2005, H.R. 1356, 109th Cong. 14

Clean Water Restoration Act of 2007, H.R. 2421, 110th Cong. 14

Clean Water Restoration Act, S. 787, 111th Cong. (2009) 14

Hearing on Status of the Nation's Waters, Including Wetlands, Under the Jurisdiction of the Federal Water Pollution Control Act: Hearing Before the H. Comm. on Transportation and Infrastructure, 110th Cong. (2007) 13

H.R. 2354, 112th Cong. §108 (2011) 14

H.R. Rep. No. 79-1980 (1946) 25

Pub. L. No. 100-04, §314(a) (1987) 28

S. Rep. No. 111-361 (2010) 13

SWANCC *Supreme Court Decision: Impact on Wetlands Regulations: Hearing Before the Subcomm. on Fisheries, Wildlife, and Water of the S. Comm. on Environment and Public Works*, 108th Cong. (2003) 14

REGULATIONS AND AGENCY MATERIALS

33 C.F.R. §326.3 19

33 C.F.R. §328.3 5

33 C.F.R. §331.8 21

40 C.F.R. §19.4 16

40 C.F.R. §122.2 5

51 Fed. Reg. 41,250 (Nov. 13, 1986) 5

68 Fed. Reg. 1991 (Jan. 15, 2003)............................. 11

76 Fed. Reg. 24,479 (May 2, 2011)........................ 8, 12

U.S. Envtl. Prot. Agency & U.S. Army Corps of Eng'rs, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in* Rapanos v. United States & Carabell v. United States (June 5, 2007).......... 7, 8

U.S. Envtl. Prot. Agency & U.S. Army Corps of Eng'rs, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in* Rapanos v. United States & Carabell v. United States (Dec. 2, 2008)..... passim

Comments of Agricultural Retailers Association et al. (July 29, 2011)......................... 13

Comments of National Association of Clean Water Agencies (July 29, 2011)........................... 13

Comments of National Wildlife Federation et al. (July 31, 2011)... 13

U.S. Envtl. Prot. Agency & U.S. Army Corps of Eng'rs, *Draft Guidance on Identifying Waters Protected by the Clean Water Act* (May 2, 2011).. passim

U.S. Envtl. Prot. Agency, Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction 10 (April 27, 2011) .... passim

U.S. Army Corps of Eng'rs, The Mississippi River and Tributaries Project (May 19, 2004), http://www.mvn.usace.army.mil/pao/bro/ misstrib.htm 10

U.S. Army Corps of Eng'rs, Philadelphia District, Jurisdictional Determinations (Aug. 10, 2000), http://www.nap.usace.army.mil/cenap-op/regulatory/jd.htm 20, 21

U.S. Army Corps of Eng'rs, Regulatory Guidance Letter No. 08-02, Jurisdictional Determinations at 4 (June 26, 2008)................... 21

OTHER AUTHORITIES

Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 Envtl. L. 1 (1999) 2

Louis L. Jaffe, *The Right to Judicial Review*, 71 Harv. L. Rev. 769 (1958) 27

Jonathan Tolman, Swamped: How America Achieved "No Net Loss" 21-22 (April 1997) 2

INTEREST OF THE *AMICUS CURIAE*

The Competitive Enterprise Institute (CEI) is a nonprofit public interest organization dedicated to advancing the principles of individual liberty and limited government.[1] To those ends, CEI engages in research, education, and advocacy efforts involving a broad range of regulatory and legal issues.

Since the organization's founding in 1984, attorneys on CEI's staff have represented CEI or other groups or individuals before this Court and lower federal courts in numerous matters involving issues of administrative and constitutional law. In recent terms, CEI attorneys have served as co-counsel for the petitioners in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010), and represented amici in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007), and *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007).

CEI staff have published studies of federal wetlands policy and have testified before Congress on the subject. One comprehensive CEI analysis of wetlands policy found that the Clean Water Act's Section 404 permitting program deterred

---

[1] The parties have consented to the filing of this brief, which is accompanied by the letters acknowledging their consent. No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* or its counsel made a monetary contribution intended to fund the preparation of this brief.

development and imposed heavy regulatory costs while not effectively protecting wetlands. *See* Jonathan Tolman, Swamped: How America Achieved "No Net Loss" 21-22 (April 1997), *available at* http://cei.org/pdf/2302.pdf (last visited Sept. 28, 2011); *see also* Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 Envtl. L. 1 (1999).

SUMMARY OF ARGUMENT

The Court should hold that the Clean Water Act (CWA or Act), 33 U.S.C. §1251 *et seq.*, does not preclude judicial review of compliance orders.

Allowing parties like the Sacketts to contest federal jurisdiction over their property would facilitate administration of the Act. The outer limits of federal authority under the CWA are anything but clear. Congress and the responsible federal agencies have not clarified the reach of the Act, and therefore assessments of whether particular wetlands are subject to the Act's requirements remain unpredictable. In light of the prevailing uncertainty, prompt judicial review of compliance orders would provide property owners with an authoritative statement about the Act's applicability to their property, prevent the agencies from exceeding their authority, and help settle outstanding questions about the scope of the Act. The Government contends that review of compliance orders is unnecessary because courts can resolve a jurisdictional dispute if the United States files a civil enforcement suit or if the property owner completes the permitting process, but these alternatives are wholly inadequate.

Nothing in the CWA precludes judicial review of compliance orders. Because reading the statute to foreclose review would raise serious concerns about its constitutionality, the Court should interpret the CWA to allow prompt judicial review.

ARGUMENT

I. Prompt Judicial Review Is Necessary In Light Of Uncertainty About The Validity Of The Agencies' Exercise Of Jurisdiction Under The CWA.

The breadth of federal jurisdiction over wetlands under the Clean Water Act (CWA or Act), 33 U.S.C. §1251 *et seq.*, has been a contentious issue since its enactment in 1972. The Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps), the agencies jointly tasked with administering the statute, have wielded their authority broadly. In recent years, this Court has intervened to curb their overreaching. *See Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159 (2001).

In the five years since *Rapanos*, the EPA and the Corps have published successive, non-binding guidance documents addressing the scope of their jurisdiction under the CWA. These documents have not only failed to bring clarity to the issue, but have also raised concerns that the agencies are once again exceeding the proper scope of their authority. Despite attempts to pass clarifying legislation, Congress has been unable to resolve the uncertainty that currently exists. As a result, even property

owners who are aware of the Act are often uncertain whether their property is subject to its requirements, and even the best-intentioned regulators may exceed the limits of their jurisdiction.

Allowing prompt judicial review of compliance orders will mitigate the negative effects of the prevailing jurisdictional uncertainty. A district court's ruling would give property owners a definitive answer as to whether they need to comply with the Act's requirements. In cases where the court agrees with the agency, property owners may decide to begin their restoration work earlier than they would have in the absence of judicial review, when years may pass before a jurisdictional dispute arrives in court. *See, e.g.*, *United States v. Cundiff*, 555 F.3d 200, 204 (6th Cir. 2009) (noting that the United States filed suit only after "eight years of failed negotiations and ignored orders"). And a district court ruling against the agency would unburden the owners' use of their property.

Prompt judicial review of compliance orders would also facilitate proper administration of the statute by keeping the EPA and the Corps from overstepping the limits of their jurisdiction. And, over time, judicial decisions applying the CWA will help settle the outstanding questions about its scope. As the boundaries of the CWA become more clear, the EPA and the Corps can devote more agency resources to enforcement actions that will be sustained in court and fewer resources on wetlands outside their jurisdiction.

A. Rather than Clarify the Scope of the Agencies' Jurisdiction, the Recent EPA and Corps Guidance Documents Attempt To Extend the CWA's Jurisdictional Reach.

Subject to certain exceptions, the CWA prohibits the discharge of dredged or fill materials into "navigable waters," 33 U.S.C. §1311, which are defined as "the waters of the United States, including the territorial seas," *id.* §1362(7). This language does not by itself suggest that any wetlands are covered by the statute, let alone which ones. *Cf. United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985) ("On a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters.'").

While the EPA and the Corps have interpreted the statute's vague language as a broad delegation of authority over wetlands,[2] this Court has not read the CWA's jurisdiction-conferring provisions as

[2] The agencies' regulations assert that the CWA applies to "interstate wetlands," 33 C.F.R. §328.3(a)(2), and "[w]etlands adjacent to," *id.* §328.3(a)(7), traditional interstate navigable waters, *id.* §328.3(a)(1), interstate waters, *id.* §328.3(a)(2), "other waters" that "could affect interstate or foreign commerce," *id.* §328.3(a)(3), an impoundment or tributary of any of these waters, *id.* §328.3(a)(4), (5), or the territorial seas, *id.* §328.3(a)(6). *See also* 40 C.F.R. §122.2. These regulations reflect the agencies' broad interpretation of the CWA but not the more restrictive reading later adopted by this Court. The regulations are now twenty-five years old, 51 Fed. Reg. 41,250 (Nov. 13, 1986), outdated, and no longer authoritative in light of *SWANCC* and *Rapanos*.

generously. *See Rapanos*, 547 U.S. 715; *SWANCC*, 531 U.S. 159 (holding that the agencies cannot establish jurisdiction over an isolated, intrastate, non-navigable water based solely on the water's use as a habitat by migratory birds that cross state lines). *But see Riverside Bayview Homes*, 474 U.S. at 139 (deferring to the agencies' decision to exercise jurisdiction over wetlands that directly abut a navigable-in-fact waterway).

Most recently, in *Rapanos*, the Court considered the CWA's applicability to wetlands that did not contain, and were not adjacent to, waters that are navigable in fact. The Court's plurality (joined by four Justices) concluded that establishing federal jurisdiction over such wetlands "requires two findings." 547 U.S. at 742 (plurality opinion by Justice Scalia). First, the wetlands must be adjacent to a channel that contains "a relatively permanent body of water connected to traditional interstate navigable waters." *Id.* Second, the wetlands must have "a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.*

A concurring opinion concluded that jurisdiction would exist if "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780 (Kennedy, J., concurring in the judgment). Under this standard, the federal agencies can establish jurisdiction by showing that wetlands are adjacent to tributaries that are navigable in fact or, for wetlands adjacent to non-navigable tributaries, by

demonstrating "on a case-by-case basis" a "significant nexus" between the wetlands and a traditional navigable water. *Id.* at 782.

In a separate concurrence, the Chief Justice lamented that, without an opinion for the Court "on precisely how to read Congress' limits on the reach of the Clean Water Act," "[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis." *Id.* at 758 (Roberts, C.J., concurring). Three Justices suggested that the EPA and the Corps clarify the scope of their jurisdiction under the CWA through notice-and-comment rulemaking. *See id.* at 757-58; *id.* at 780-81 (Kennedy, J., concurring in the judgment); *id.* at 811 (Breyer, J., dissenting).

Unwilling to undertake such rulemaking, the agencies have instead published a series of controversial guidance documents.[3] These guidance

---

[3] New guidance or draft guidance documents were issued in 2007, 2008, and 2011. *See* U.S. Envtl. Prot. Agency & U.S. Army Corps of Eng'rs, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in* Rapanos v. United States *&* Carabell v. United States (June 5, 2007), *available at* http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf (last visited Sept. 28, 2011) [hereinafter 2007 Guidance]; U.S. Envtl. Prot. Agency & U.S. Army Corps of Eng'rs, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in* Rapanos v. United States *&* Carabell v. United States (Dec. 2, 2008), *available at* http://www.usace.army.mil/CECW/Documents/cecwo/reg/cwa_guide/cwa_juris_2dec08.pdf (last visited Sept. 28, 2011) [hereinafter 2008 Guidance]; U.S. Envtl. Prot. Agency & U.S. Army Corps of Eng'rs, *Draft Guidance on Identifying Waters Protected by the Clean Water Act*, (May 2, 2011), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_g (continued…)

documents have endorsed a case-by-case approach that renders jurisdictional determinations more discretionary and less predictable. The lack of binding regulations has also left the scope of the agencies' jurisdiction more likely to change with the political tides.

Perhaps most significantly, all of the guidance documents permit the agencies to improperly aggregate many non-contiguous wetlands when applying the "significant nexus" test.[4] In one case, the Corps relied on the 2007 and 2008 guidance documents to establish CWA jurisdiction over 4.8 acres of wetlands that lie approximately seven miles from the nearest traditional navigable water. *See Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278 (4th Cir. 2011).[5] The Corps concluded that it had jurisdiction because, in its view, the 4.8 acres of wetlands at issue were "similarly situated" to all

---

uidance_4-2011.pdf (last visited Sept. 28, 2011) [hereinafter 2011 Guidance]; *see also* 76 Fed. Reg. 24,479 (May 2, 2011).

[4] The 2007 and 2008 guidance documents instructed field staff that they should assert jurisdiction over a tributary and all of its adjacent wetlands if "it is determined that [the] tributary and its adjacent wetlands collectively have a significant nexus with traditional navigable waters." 2007 Guidance at 9; 2008 Guidance at 10.

[5] This patch of wetlands sits adjacent to (but does not directly abut) a 2,500-foot manmade drainage ditch, which flows from February through April into another perennial drainage ditch 900 feet away, which runs into a larger tributary about 3,000 feet away, which eventually flows, after approximately three to four miles, into a traditional navigable water. *See Precon*, 633 F.3d at 282.

448 acres of non-contiguous wetlands adjacent to a three-mile network of tributaries, and the 448 acres of wetlands, in combination, significantly affected the traditional navigable water. *See id.* at 283-86, 290-93.

The Fourth Circuit required the agency to reassess its significant nexus determination on remand. *See id.* at 293-97. The court upheld the Corps' decision to aggregate the 448 acres of wetlands, but stated that "the Corps' record on this point gives us a bare minimum of persuasive reasoning to which we might defer," *id.* at 292, and "urge[d] the Corps to consider ways to assemble more concrete evidence of similarity before again aggregating such a broad swath of wetlands," *id.* at 293.

Rather than heed the Fourth Circuit's advice, the Corps and the EPA proposed new guidance that would allow field staff to aggregate not only wetlands but also tributaries on an even grander scale. Under the proposed guidance issued in May 2011, all tributaries or wetlands in a watershed will be found to have a "significant nexus" if a single tributary or wetland significantly affects a traditional navigable water, or if two or more tributaries or wetlands in combination have a significant effect. 2011 Guidance at 9-10.

Under the agencies' new approach to aggregation, the ecological nature of any particular wetlands and their proximity to the traditional navigable water become largely irrelevant. The agencies will frequently be able to avoid analyzing a particular tributary or wetlands based on a presumption that those waters are "similarly

situated" with other wetlands or waters in the same watershed.[6] As the EPA has acknowledged, this approach allows the agencies to vastly expand their jurisdiction based on minimal fact-finding. Significant nexus determinations will be "less time-consuming" under the revised aggregation approach because of the larger watershed scale and because the agency can rely on prior "significant nexus" determinations, rather than needing to conduct a new analysis.[7]

In addition to the new aggregation standards, several other policy shifts in the new guidance also expand the agencies' regulatory authority. First, the 2011 Guidance reasserts the agencies' jurisdiction over so-called "other waters"—waters that are

---

[6] This presumption is unwarranted in light of the vast size of many watersheds. A relatively small "HUC-10" watershed might be as large as a quarter-million acres, 2011 Guidance at 8, and the large Mississippi River Drainage Basin "drains 41 percent of the 48 contiguous states" and "covers more than 1,245,000 square miles," U.S. Army Corps of Engineers, The Mississippi River and Tributaries Project (May 19, 2004), http://www.mvn.usace.army.mil/pao/bro/misstrib.htm (last visited Sept. 28, 2011). *Cf. Norton Constr. Co. v. U.S. Army Corps of Eng'rs*, 280 Fed. App'x 490, 493 (6th Cir. 2008) (unpublished) (describing the Muskingum Watershed, which "encompasses 18 counties in Ohio"). There is no basis to presume, for example, that all tributaries in the Mississippi River Drainage Basin have a "significant nexus" to the river simply because one tributary has such a nexus.

[7] U.S. Envtl. Prot. Agency, Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction 10 (April 27, 2011) [hereinafter EPA Cost-Benefit Analysis].

isolated, intrastate, and not navigable. 2011 Guidance at 19-20, 32-33. Previous guidance had explained that federal jurisdiction over "other waters" was "uncertain[] after *SWANCC*" and instructed field staff that they "should seek formal project-specific Headquarters approval prior to asserting jurisdiction over such waters." 68 Fed. Reg. 1991, 1996 (Jan. 15, 2003).

Second, the 2011 Guidance would allow the agencies to designate more waters as "traditionally navigable" than they could under the previous guidance.[8] This in turn would allow the agencies to exercise jurisdiction over their adjacent wetlands without establishing a significant nexus and to claim even more wetlands as significantly affecting traditional navigable waters. Their jurisdiction would grow from "waters of the United States" to "moistures of the United States."

Third, the proposed guidance gives the agencies broader discretion to delineate the upstream boundaries of tributaries and to designate them "navigable" or "relatively permanent."[9] This

---

[8] The proposed guidance makes it easier for the agencies to prove that a water is susceptible to use in commercial navigation, explaining only that the agency's finding "should be supported by some evidence." 2011 Guidance at 6. The 2008 Guidance required that susceptibility to commercial navigation be "clearly documented" by, for example, "development plans, plans for water dependent events, etc." 2008 Guidance at 5 n.20.

[9] The 2011 Guidance abandons the 2008 Guidance's definition of a "tributary" as "the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower (continued…)

change, too, brings more wetlands within the agencies' reach.

The EPA and the Corps announced that "under th[eir] proposed guidance the number of waters identified as protected by the [CWA] will increase compared to current practice." 76 Fed. Reg. 24,479, 24,479 (May 2, 2011). All told, the EPA estimates that the 2011 Guidance would extend federal jurisdiction to cover 17% of intrastate waters that are isolated and non-navigable. EPA Cost-Benefit Analysis at 7, 28-29. Additionally, while the Corps found that it lacked jurisdiction over 1.5% of the non-isolated wetlands and 2% of the streams it analyzed under the 2008 Guidance in fiscal year 2009-2010, the EPA assumes that the proposed guidance would render all of these waters (803 acres of wetlands and 9.3 miles of stream) subject to the CWA. *See id.* at 6-7.

The EPA and the Corps have recognized the need for more certainty at the edges of their

---

order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream)." 2008 Guidance at 6 n.24. It likewise omits the previous guidance documents' assertion that "relatively permanent" waters must "have continuous flow at least seasonally (e.g., typically three months)," 2008 Guidance at 1; *see* 2011 Guidance at 13. Third, the 2011 Guidance explains that tributaries that might otherwise be "classified as perennial, intermittent and ephemeral," may instead be "described as dynamic zones within stream networks." 2011 Guidance at 13. Further, the 2011 Guidance announces that the agencies "generally expect" to assert CWA jurisdiction over any tributary that is "part of a tributary system" to a jurisdictional water. *Id.* at 13-14.

jurisdiction, but their new guidance fails to provide clearer direction to field staff or to reduce uncertainty among landowners. Indeed, stakeholders from across the policy spectrum have encouraged the agencies to initiate a rulemaking to clarify the Act's scope.[10] The guidance binds no one, and the field staff who determine whether to assert jurisdiction have a greater degree of discretion than they had previously.

B. Congress Is Unlikely To Resolve the Uncertainty Regarding the Limits of the CWA.

Members of Congress have taken note of the recent uncertainty surrounding CWA jurisdiction, S. Rep. No. 111-361, at 4, 6, 7 (2010), which has now been the subject of multiple congressional hearings. *See* H*earing on Status of the Nation's Waters,*

---

[10] *See, e.g.*, Comments of National Wildlife Federation et al. at 65 (July 31, 2011) ("[A] revised regulation would establish a binding rule that would provide . . . greater certainty and consistency in jurisdictional determinations for landowners, agency field staff, and the courts."); Comments of National Association of Clean Water Agencies at 1 (July 29, 2011) ("[T]he issue of CWA jurisdiction deserves the full attention of the rulemaking process and the formal notice and comment procedures that go with it."); Comments of Agricultural Retailers Association et al. at 5, 9-20 (July 29, 2011) [hereinafter Industry Comments] ("Continuing to address and readdress this fundamentally important issue through guidance . . . does a disservice to all."). Industry groups also raised numerous concerns about the breadth of the authority claimed by the agencies in the 2011 Guidance. *See* Industry Comments. (All comments are available online at http://www.regulations.gov.)

Including Wetlands, Under the Jurisdiction of the Federal Water Pollution Control Act: Hearing Before the H. Comm. on Transportation and Infrastructure, 110th Cong. (2007); SWANCC *Supreme Court Decision: Impact on Wetlands Regulations: Hearing Before the Subcomm. on Fisheries, Wildlife, and Water of the S. Comm. on Environment and Public Works*, 108th Cong. (2003).

In each of the last four Congresses, Members have introduced legislation that would clarify the statute's reach by overriding *SWANCC* (and, more recently, *Rapanos*). *See* Clean Water Authority Restoration Act of 2003, S. 473, 108th Cong.; Clean Water Authority Restoration Act of 2005, H.R. 1356, 109th Cong.; Clean Water Restoration Act of 2007, H.R. 2421, 110th Cong.; Clean Water Restoration Act, S. 787, 111th Cong. (2009). This legislation would answer questions about the scope of the statute, but courts, agencies, and landowners would still be left to grapple with questions about the constitutional limits of federal regulation.

On the other hand, the current House of Representatives has passed a bill that would deny the Corps funds "to develop, adopt, implement, administer, or enforce a change or supplement to" the 1986 regulations defining "waters of the United States" or the 2003 and 2008 guidance documents implementing *SWANCC* and *Rapanos*. An Act Making Appropriations for Energy and Water Development and Related Agencies for the Fiscal Year Ending September 30, 2012, and for Other Purposes, H.R. 2354, 112th Cong. §108 (as passed by the House of Representatives, July 15, 2011). Rather than promote certainty in the area of wetlands

regulation, this bill would prevent the EPA and the Corps from promulgating regulations to clarify the outer bounds of the CWA.

* * *

The extent of federal authority over wetlands remains unclear five years after *Rapanos*. Prompt judicial review will mitigate the uncertainty facing landowners and will help to ensure that EPA and Corps assertions of jurisdiction do not exceed statutory bounds.

II. Judicial Oversight Of Compliance Orders Will Be Effectively Unavailable If Parties Cannot Promptly Seek Review.

The Government contends that there is no need for property owners who receive an EPA compliance order to obtain prompt judicial review because they could challenge the EPA's jurisdiction in another proceeding. But the alternatives suggested by the Government are inadequate and, in certain circumstances, unavailable. As a result, for property owners like the Sacketts, a suit for declaratory and injunctive relief provides the only meaningful opportunity to test the agencies' assertion of jurisdiction over their property.

A. A Civil Action Brought by EPA Is Not an Adequate Substitute for Prompt Judicial Review of a Compliance Order.

The Government asserts that review of compliance orders is unnecessary because a property owner can challenge the EPA's jurisdiction if and when the EPA brings an enforcement action. But the

possibility of contesting the EPA's jurisdiction in an enforcement action does not provide an adequate substitute for prompt judicial review.

An enforcement action is not a sufficient means for permitting judicial review because the penalties for disobeying a compliance order are sufficiently severe that many individuals will obey an order of doubtful validity rather than risk substantial fines and even imprisonment. For example, if a year elapsed between the compliance order and the commencement of a civil action by the United States, the Sacketts would have already accumulated potential fines of $11 million in addition to the costs of complying with any injunctive relief.[11] In the meantime, they might suffer collateral consequences of the EPA's outstanding order. *Cf. Rueth v. U.S. EPA*, 13 F.3d 227, 230 (7th Cir. 1993) (Recipients of compliance orders may "encounter some problems, such as securing bank loans or obtaining title insurance."). For these reasons, property owners like the Sacketts might well decide to comply with an order that they disagree with because defying the order creates risks that they are

---

[11] At the time the Sacketts received the EPA's order, failure to comply subjected them to civil penalties of up to $32,500 per day or administrative penalties of up to $11,000 per day. *See* 33 U.S.C. §1319(d); 40 C.F.R. §19.4. The maximum fines have since increased to $37,500 and $16,00 per day, respectively. *See* 40 C.F.R. §19.4. And the Government is able to increase the cost of non-compliance by waiting long periods before filing suit. *Cf. Cundiff*, 555 F.3d at 204 (noting that the United States filed suit only after "eight years of failed negotiations and ignored orders").

unwilling to assume. Of course, when a property owner decides to comply with an order, there will likely be no enforcement action, and thus no opportunity to challenge EPA's jurisdiction.

The Government contends that the threat of substantial fines is an insufficient basis for permitting prompt judicial review because such a suit would be a "pre-enforcement" challenge to a compliance order, which the CWA does not permit. This characterization of the Sacketts' suit, though adopted by lower courts, is mistaken. The paradigmatic pre-enforcement action challenges a statute or rule of general applicability before the agency has applied it to the particular plaintiff. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 139 & n.1 (1967) (defining a "pre-enforcement" action as "a suit brought by one before any attempted enforcement of the statute or regulation against him").[12] Here, by contrast, the agency has made detailed findings that the Sacketts are in violation of the CWA, ordered costly remedial action, and left the Sacketts exposed to a substantial fine that escalates daily.

---

[12] In the CWA context, a true pre-enforcement challenge might attack new Corps' regulations as substantively or procedurally flawed, or a new guidance document as having been improperly adopted without notice and comment. *See, e.g.*, *P & V Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021 (D.C. Cir. 2008) (holding that the plaintiff's challenge to the definition of "waters of the United States" in the Corps' 1986 regulations was untimely because the agency had not reopened the rulemaking with its 2003 Advance Notice of Proposed Rulemaking).

In the absence of immediate judicial review, the plaintiffs face a classic Hobson's choice: Do nothing and risk severe punishment, or comply and acquiesce to an agency order that they believe to be unlawful. Given the extraordinarily high costs of waiting for the United States to file a civil suit, "[d]elayed review . . . may mean no review at all," *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 47 (2000) (Thomas, J., dissenting). *Cf. Free Enter. Fund*, 130 S. Ct. at 3150-51 (explaining that a plaintiff lacks "a 'meaningful' avenue of relief" if it must "*incur* a sanction (such as a sizable fine)" in order to challenge an agency action in court, where it will face "severe punishment should its challenge fail").

B. The Permitting Process Does Not Provide an Adequate Avenue by Which To Seek Review.

The Government has suggested that the CWA's permitting process offers parties like the Sacketts an alternative route to judicial review and that the Sacketts could have avoided exposing themselves to sanctions "by applying for a permit and then seeking review of the permitting decision under the APA." Brief for the Respondents in Opposition to the Petition for Writ of Certiorari at 10. This was not an option for the Sacketts once they received the compliance order and will not be a realistic option for others who do not believe that their property is subject to the CWA.

The primary problem with the Government's suggestion that landowners request a permit if they want to contest federal jurisdiction is that many will

not have the slightest idea that their land is subject to federal permitting requirements. Given the persistently unclear and constantly shifting scope of the federal agencies' jurisdiction, many landowners will not know of the Corps' and EPA's position that they need a permit until it is too late.

For landowners like the Sacketts who begin landscaping without first obtaining a wetlands fill permit, the permitting process will often be unavailable. Corps regulations allow property owners who have already violated the CWA to file "after-the-fact permit applications," but only after they complete any "initial corrective measures" required by agency order. 33 C.F.R. §326.3(e)(1). Even so, the Corps and the EPA typically reserve the right to pursue further enforcement actions against property owners who undertake the required corrective measures. *See id.* §326.3(d)(1) (retaining "the Government's options to initiate appropriate legal action" in all but certain "unusual cases"). And if the Corps determines that further legal action is appropriate or if another federal, state, or local agency initiates enforcement proceedings, the Corps will not accept the property owners' permit application until the litigation has concluded. *See id.* §326.3(e)(1)(ii), (iv). Thus, the permitting process is typically unavailable to someone who has unwittingly violated the agencies' interpretation of the CWA.

Even when the permitting process is available, it is not an adequate substitute for prompt judicial review. Although a property owner may request a jurisdictional determination (JD) from the Corps as an initial step toward applying for a permit, several

courts have held that JDs are not themselves reviewable.[13] As a result, a property owner who disputes the Corps' jurisdiction must complete the entire permitting process before seeking review.[14] This is so regardless of whether the property owner would rather abandon the planned project altogether than incur the costs of mitigation and other permit conditions. It would be anomalous—and indeed the height of inefficiency—to require an individual to go through the time and expense to secure a permit that he or she believes is not required.[15]

---

[13] *See Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586 (9th Cir. 2008); *Greater Gulfport Prop., LLC v. U.S. Army Corps of Eng'rs*, 194 Fed. App'x 250 (5th Cir. 2006) (unpublished); *Comm'rs of Pub. Works of Charleston v. United States*, 30 F.3d 129 (4th Cir. 1994) (unpublished); *cf. Rueth v. EPA*, 13 F.3d 227 (7th Cir. 1993) (declining to allow the recipient of a compliance order to contest the agency's determination that it has jurisdiction without challenging the order itself).

[14] *See, e.g.*, *Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278 (4th Cir. 2011) (permit applicant contested Corps jurisdiction in challenging permit denial); *Baccarat Fremont Developers, LLC v. U.S. Army Corps of Eng'rs*, 425 F.3d 1150 (9th Cir. 2005) (resolving jurisdictional challenge brought by developer who obtained conditional permit and reserved the right to contest jurisdiction).

[15] Moreover, JDs would not provide a good substitute for prompt judicial review because requesting a JD from the Corps is costly and time-consuming. Even JD requests submitted by small-property owners (whom one Corps district describes as "'mom and pop' applicants") are required to include a U.S. Geological Survey Quadrangle map showing the footprint of the site, a surveyed property boundary plan, and photographs keyed to the survey plan. *See* U.S. Army Corps of Engineers, (continued…)

The Corps encourages property owners to reduce the costs and delays associated with obtaining a JD by requesting only a "preliminary JD." Preliminary JDs are "advisory" and "non-binding" "indications that there may be waters of the United States" on a parcel or "indications of the approximate location(s)" of those waters, JD Guidance at 3, rather than the Corps' "official" determination that it has jurisdiction, *id.* at 1. The cost of requesting a preliminary JD, however, is waiver of the right to challenge the Corps' jurisdiction. *See id.* at 4. So a property owner who wants to contest the applicability of the CWA in court must endure the more cumbersome process.

Philadelphia District, Jurisdictional Determinations (Aug. 10, 2000), http://www.nap.usace.army.mil/cenap-op/regulatory/jd.htm (last visited Sept. 28, 2011). "Mom and pop landowners are [therefore] encouraged to reduce their application processing time by electing to use environmental consultants to delineate their properties," *id.*—not an insubstantial burden for property owners who "are typically interested in constructing a single family home or other structure on a small parcel of land (one acre or less)," *id.*

Obtaining a final JD can also be time-consuming. The Corps' stated goal is for its district engineers to complete every JD within 60 days of the request, U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 08-02, Jurisdictional Determinations at 4 (June 26, 2008), *available at* http://www.usace.army.mil/CECW/Documents/cecwo/reg/rgls/rgl08-02.pdf (last visited Sept. 28, 2011) [hereinafter JD Guidance], but this window does not include the time for administrative appeals, which may take up to a year, 33 C.F.R. §331.8.

Even apart from the jurisdictional determination, the Corps' permitting process is onerous to property owners who do become aware of the risk that their property is subject to the CWA before they begin their landscaping. "The permitting process can be arduous and expensive, and may result in the Corps' refusal to issue a permit, frustrating property owners' plans to develop their land." *Nat'l Ass'n of Home Builders v. EPA*, 731 F. Supp. 2d 50, 52 (D.D.C. 2010) (internal citations omitted); *see also Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 596 (9th Cir. 2008) ("[N]avigating the CWA permitting process is no small task."). As the *Rapanos* plurality explained, 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 . . . ." 547 U.S. at 721. For larger projects, a developer might spend over two years *preparing to apply* for a permit. *See, e.g.*, *Butte Envtl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936 (9th Cir. 2010) (public developer of a local business park finally applied for a permit in August 2007 after spending February 2005 to February 2006 preparing an environmental impact statement and October to December 2006 consulting with the Fish and Wildlife service).

III. The Clean Water Act Does Not Foreclose Judicial Review of Compliance Orders.

Petitioners have argued compellingly that the Due Process Clause grants the recipient of an EPA compliance order the right to review of that order in district court, but there is no need for the Court to reach the constitutional question. The Court can and

should resolve this case on the narrower ground that the Administrative Procedure Act and the CWA permit individuals like the Sacketts to obtain judicial review of CWA compliance orders.

A. A Strong Presumption of Reviewability Favors Allowing Challenges to Compliance Orders.

The Administrative Procedure Act codified a "basic presumption of judicial review" that can be overcome "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." *Abbott Labs.*, 387 U.S. at 140-41; *cf. Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984) (Congressional intent to preclude review must be "fairly discernible in the statutory scheme.").

While nonstatutory review of final agency action is presumptively available, the strength of the presumption depends on whether the plaintiff will have other means of obtaining review of the agency's action. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 & n.8 (1994); *Illinois Council*, 529 U.S. at 19-20. "'[T]he strong presumption that Congress did not mean to prohibit all judicial review,'" *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 672 (1986) (quoting *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975)), should be given its full force in this case.

Supreme Court precedent antedating the Administrative Procedure Act confirms that compliance orders are the kind of agency action for which judicial review should be presumptively available. In *Shields v. Utah Idaho Central Railroad Co.*, 305 U.S. 177 (1938), the Court held that a

railroad could seek immediate judicial review of the Interstate Commerce Commission's determination that the railroad did not operate an "interurban electric railway" exempt from the Railway Labor Act (RLA). *See id.* at 179, 183. Following the Commission's decision, the Mediation Board ordered the railroad, on penalty of criminal charges, to post the statutorily required notice that labor disputes between the railroad and its employees would be handled under the RLA. *See id.* Because the Commission's decision "has the effect, if validly made, of subjecting the [railroad] to the requirements of the [RLA]," the Court explained, "[t]he nature of the determination points to the propriety of judicial review." *Id.* at 183.

So too here. Once the EPA issued a compliance order asserting jurisdiction over the Sacketts' property, they faced an intolerable choice: Comply with the order or face daily escalating civil penalties and the possibility of criminal prosecution. As in *Shields*, the nature of the agency action at issue "points to the propriety of judicial review," *id.*

The Court's more recent decisions in *Thunder Basin* and *Illinois Council* are not to the contrary. In both cases, the party seeking review of an agency action could have challenged the agency's decision by participating in the administrative process and then asking a court to review the resulting final agency action. *See Thunder Basin*, 510 U.S. 200 (mine operator could seek judicial review of an agency's interpretation of its regulations after imposition of civil penalties and exhaustion of administrative appeals); *Illinois Council*, 529 U.S. 1 (nursing home was entitled to judicial review of regulations

governing termination of Medicare-provider status after termination and an adverse decision in an administrative hearing). Here the administrative process has already come to an end and resulted in the final agency action the Sacketts now challenge.

Under the Government's interpretation of the CWA, review of the compliance order would be available, if at all, only at the whim of the United States. Because preclusion of the Sacketts' current lawsuit would leave them without any opportunity to seek judicial review, the presumption of reviewability should apply in its strongest form.

B. Congress Did Not Override the Presumption that EPA Compliance Orders Are Subject to Judicial Review.

The text of the CWA does not on its face bar judicial review of compliance orders. Indeed, the plain words of the CWA say nothing one way or the other about judicial review of compliance orders. That silence "is certainly no evidence of [congressional] intent to withhold review," *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157 (1970) (quoting H.R. Rep. No. 79-1980, at 41 (1946)), and given the presumption of reviewability, should weigh in favor of permitting nonstatutory review of the EPA's order. *Cf. Stark v. Wickard*, 321 U.S. 288, 309 (1944).

The statutory silence here is striking because Congress has expressly foreclosed review of compliance orders in other environmental statutes. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42

U.S.C. §9601 *et seq.*, authorizes the issuance of abatement orders upon a determination "that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." *Id.* §9606(a). The statute strips courts of jurisdiction to review an order under §9606(a) except in specifically enumerated proceedings including an action to enforce an order or to compel a remedial action. *See id.* §9613(h). CERCLA illustrates that Congress will expressly foreclose review of environmental compliance orders when it believes that judicial intervention will not be in the public interest.[16]

The Ninth Circuit, following other lower courts, read the CWA to give the EPA "a choice" between issuing a compliance order "*or*" bringing a civil action in the district court, and concluded that permitting the Sacketts to seek judicial relief from the compliance order would "eliminate this choice" *Sackett v. U.S. EPA*, 622 F.3d 1139, 1143 (9th Cir. 2010). This reasoning does not withstand scrutiny. The Government's argument might have some force

---

[16] Unlike CERCLA orders, CWA orders such as the one received by the Sacketts are not premised on a finding of imminent and substantial endangerment, but simply upon a finding that the CWA has been violated. 33 U.S.C. §1319(a). Industry claims that CERCLA's bar of prompt review violates the Due Process Clause have been rejected. *See, e.g.*, *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 127-29 (D.C. Cir. 2010), *cert. denied* 131 S. Ct. 2959 (2011); *Dickerson v. Adm'r, EPA*, 834 F.2d 974, 978 & n.7 (11th Cir. 1987); *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 315-17 (2d Cir. 1986).

if it read the word "or" to make compliance orders and civil actions mutually exclusive. But they aren't. The agency can, and regularly does, avail itself of both options. And to the extent that the statute gives the EPA a "choice" to proceed by compliance order or civil action, the Sacketts' lawsuit does not deprive the agency of that choice. The EPA has already exercised its option to issue a compliance order and still has the option of filing a civil suit.[17]

The Ninth Circuit based its decision to foreclose review in part on the existence of a provision specifically authorizing appeals from administrative penalties, 33 U.S.C. §1319(g)(8). But when Congress expressly provides for judicial review of only some agency actions, it does not generally follow that Congress has precluded review of others. *See Abbott Labs.*, 387 U.S. at 144; *see also* Louis L. Jaffe, *The Right to Judicial Review*, 71 Harv. L. Rev. 769, 771 (1958) ("The 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 of legislative intent."). In any event, Congress enacted §1319(g)

---

[17] The Government argued below that the statutory preclusion of review "is consistent with the Constitution's vesting of enforcement discretion—including when and how to enforce a statute—with the executive branch" and that "the Sacketts are seeking to compel EPA to exercise its discretionary enforcement authority in a specific manner." Brief of Appellee at 14-15, *Sackett v. U.S. EPA*, 622 F.3d 1139 (9th Cir. 2010). The Ninth Circuit did not address this argument and for good reason: It would cast constitutional doubt on all pre-enforcement review.

fifteen years after the provisions governing compliance orders. *See* Pub. L. No. 100-04, §314(a) (1987). The former can hardly inform the meaning of the latter. Moreover, §1319(g)(8) routes appeals of certain administrative penalties directly to the courts of appeals and imposes a 30-day deadline on all appeals. Express authorization of these appeals was necessary if Congress wanted to override the default rule that agency actions are reviewable in the district court subject to a six-year limitations period. *See Micei Int'l v. Dep't of Commerce*, 613 F.3d 1147, 1151-52 (D.C. Cir. 2010); *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1093-94 (D.C. Cir. 1996). Conversely, Congress could remain silent and expect courts to apply the ordinary rules governing nonstatutory review. The express provision for review of administrative penalties therefore says little about review of compliance orders.

The Ninth Circuit's reliance on the legislative history of a different statute, 622 F.3d at 1144, is even less persuasive. Even if the Congress that enacted the CWA's enforcement provisions modeled them on provisions of the Clean Air Act, the legislative history of the Clean Air Act hardly sheds light on the meaning of the CWA.

In short, the CWA contains no evidence that Congress sought to foreclose nonstatutory review of compliance orders.

C. The Statute Should Be Read To Avoid the Serious Due Process Concerns Associated with Preclusion of Nonstatutory Review.

For the reasons discussed in Petitioners' Brief on the Merits, because of the property rights at stake, serious due process problems would flow from a decision precluding judicial review of compliance orders. In order to avoid the constitutional question, the Court should construe the CWA to preserve the right to judicial review of compliance orders. *See Bowen*, 476 U.S. at 681-82 & n.12; *cf. Ashwander v. TVA*, 297 U.S. 288 (1936).[18]

Ruling that the Due Process Clause requires judicial review of CWA compliance orders would unnecessarily implicate the constitutional validity of other regulatory regimes. Such a decision could, for example, be read to suggest that judicial review of CERCLA compliance orders is likewise mandatory. *See supra*, at 25-26 & n.16. A decision based not on the Constitution but on the text of the CWA would appropriately leave undisturbed the Government's administration of programs authorized by differently worded statutes.

Statutory preclusion of judicial review of CWA compliance orders "would raise serious constitutional problems," *Edward J. DeBartolo Corp. v. Fla. Gulf*

---

[18] Although there should be no need to reach the constitutional question, if the Court reaches the issue, it should hold that the Due Process Clause requires that the recipient of an EPA compliance order have the right to judicial review of that order.

Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). The Court should therefore "construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.* Because Congress did not clearly express its intent to foreclose review here, the Sacketts' challenge to EPA's compliance order should be heard on the merits.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed and the case remanded for further proceedings.

Respectfully submitted,

Theodore L. Garrett
Counsel of Record
Mark W. Mosier
Matthew J. Berns
COVINGTON & BURLING LLP
1201 Pennsylvania Ave. N.W.
Washington, D.C. 20004
(202) 662-6000
tgarrett@cov.com

Counsel for Amicus Curiae

September 2011

Of counsel:
Sam Kazman
Hans Bader
COMPETITIVE ENTERPRISE INSTITUTE
1899 L St. N.W.
12th Floor
Washington, D.C. 20036
(202) 331-1010