No. 10-1062

In the
Supreme Court of the United States

CHANTELL SACKETT and MICHAEL SACKETT,
Petitioners,

v.

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

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITIONERS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

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

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

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OPINIONS BELOW

The panel opinion of the Court of Appeals is published at 622 F.3d 1139 (9th Cir. 2010), and is included in Petitioners' Appendix to the Petition for Writ of Certiorari (Pet. Cert. App.) at A. The panel opinion denying the petition for rehearing en banc is not published but is included in Pet. Cert. App. at D. The opinion of the district court granting the motion of Respondents United States Environmental Protection Agency, *et al*. (EPA), to dismiss under Federal Rule of Civil Procedure 12(b)(1), is not published but is included in Pet. Cert. App. at C.

JURISDICTION

On August 7, 2008, the district court granted EPA's motion to dismiss the action of Petitioners Michael and Chantell Sackett and entered judgment in favor of EPA. The Sacketts filed a timely appeal to the Ninth Circuit Court of Appeals. On September 17, 2010, a panel of the Court of Appeals affirmed the district court's dismissal. The Sacketts then filed a timely petition for rehearing *en banc*. On November 29, 2010, the panel denied the petition, no judge of the Court of Appeals having requested a vote. *See* Fed. R. App. P. 35(f). On February 23, 2011, the Sacketts filed a timely petition for certiorari. On June 28, 2011, this Court granted the petition for writ of certiorari. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. V.

The Clean Water Act provides in pertinent part:

> Except as in compliance with this section and sections [1312, 1316, 1317, 1328, 1342, and 1344 of this title], the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a).

The term "discharge of a pollutant" and the term "discharge of pollutants" each means

> (A) any addition of any pollutant to navigable waters from any point source.

33 U.S.C. § 1362(12)(A).

> The term "navigable waters" means the waters of the United States, including the territorial seas.

33 U.S.C. § 1362(7).

> Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section [1311 of this title], . . . he shall issue an order requiring such person to comply with such section or requirement, or

> he shall bring a civil action in accordance with subsection (b) of this section.

33 U.S.C. § 1319(a)(3).

> Any person who violates . . . any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

33 U.S.C. § 1319(d).

> (a) This chapter [5 U.S.C. §§ 701, *et seq*.] applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review . . . .

5 U.S.C. § 701(a)(1).

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

5 U.S.C. § 704.

STATEMENT OF THE CASE

The Clean Water Act casts a nationwide regulatory net that snags individual citizens doing ordinary, everyday activities. Unlike other environmental statutes, the Clean Water Act is not directed toward a certain field of activity where those involved would be expected to know the applicable regulations. Any citizen engaged in a range of activities may run afoul of the Act. The Clean Water Act's reach is extremely broad, requiring a permit for the discharge of "pollutants"[1] from a "point source"[2] into the "waters of the United States,"[3] which phrase has been interpreted by regulation to include "wetlands."[4] Wetlands are themselves defined by complex criteria—including soil type, vegetation, and hydrology[5]—which defy consistent application and are not apparent to the average citizen. The government finds regulable "wetlands" even on land that appears to be totally dry. As testament to the difficulty of determining federal jurisdiction over "wetlands" and other waters, in just the last decade, this Court has

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[1] A "pollutant" is defined as, among other things, "dredged spoil, . . . rock, sand, [and] cellar dirt." 33 U.S.C. § 1362(6).

[2] A "point source" is defined as "any discernible, confined and discrete conveyance." *Id.* § 1362(14).

[3] *Id.* § 1362(7).

[4] *See* 40 C.F.R. § 230.3(s)(7) (2011); 33 C.F.R. § 328.3(a)(7) (2011).

[5] *See generally* U.S. Army Corps of Engineers, Wetlands Delineation Manual 9-10 (Jan. 1987), *available at* http://el.erdc.usace.army.mil/wetlands/pdfs/wlman87.pdf (last visited Sept. 15, 2011).

twice ruled that EPA and the United States Army Corps of Engineers[6] have overextended their reach under the Clean Water Act. *See Rapanos v. United States Army Corps of Eng'rs*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001). It is no surprise then that average citizens may not, and sometimes cannot, know whether they have regulable "wetlands" on their property and that jurisdictional disputes arise.[7]

To make matters worse, if EPA has completed an analysis and made a determination that the property contains jurisdictional "wetlands," the citizen has no right to judicial review of that analysis. If the citizen hires professionals to conduct a "wetlands" determination, EPA is not obligated to accept it. Despite any evidence, professional opinions, or agency advice the citizen obtains, EPA may still impose sanctions by a compliance order if it has "any

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[6] Although EPA has principal responsibility for administering the Clean Water Act, the Corps administers the Act's permitting process for the discharge of dredged and fill material. Yet even then, EPA retains oversight for the Corps' activities. *See* Memorandum of Agreement Between the Dep't of the Army and the EPA Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act (Jan. 19, 1989) (Guidance), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/enfoma.cfm (last visited Sept. 15, 2011). *See also* 33 U.S.C. § 1344(c) (authorizing EPA to veto certain Corps-approved discharges).

[7] *See* Mark Latham, Rapanos v. United States*: Significant Nexus or Significant Confusion? The Failure of the Supreme Court to Clearly Define the Scope of Federal Wetland Jurisdiction*, *in The Supreme Court and the Clean Water Act: Five Essays* 5, 6 (2007), *available at* http://www.vjel.org/books/pdf/PUBS10004.pdf (last visited Sept. 15, 2011).

information" that the property contains a jurisdictional "wetland." *Cf.* 33 U.S.C. § 1319(a)(3).

Petitioners Michael and Chantell Sackett are individual citizens unwittingly ensnared in this regulatory net. They own a small (0.63 acre) lot near Priest Lake, Idaho, on which they intend to build their family home. Pet. Cert. App. A-2. The lot is within an existing built-out subdivision and is zoned for residential use. *See id.* E-2. There are roads on two sides of the lot and residential lots on the other two sides. Between the lot and the lake are a road as well as other lots on which homes have been built. *See id.* E-2 - E-3; J.A. 10. Prior to purchasing the lot, the Sacketts completed the normal due diligence, including inspecting the property and researching permitting history and regulatory requirements. The Sacketts had obtained no information that gave them any reason to believe that their property contained "wetlands" regulated under the Clean Water Act. They obtained all required local permits and began to build their new home when they were issued an EPA compliance order. *See id.*

The Sacketts were devastated when they received the compliance order. The order charges them with violating the Clean Water Act by placing fill material on their lot. *See* J.A. 20 ("Respondents discharge of pollutants into waters of the United States at the Site without a permit constitutes a violation of section 301 of the Act . . . ."). It suggests that EPA has adjudicated the charge and as a result has imposed serious and costly sanctions on them. *See id.* at 23-24 ("Notice is hereby given that violation of, or failure to comply with, the foregoing Order may subject Respondents to . . . civil penalties . . . or . . . civil action in federal

court . . . ."). The order contains both prohibitive and mandatory features. First, the order enjoins them from the only authorized use of the property under local law. *See id.* at 21 (directing the Sacketts to "immediately undertake activities to restore the Site" and requiring that the "[f]ill shall be removed and wetland soil returned"). The order, as subsequently amended, requires them, at their own expense, to "remove all unauthorized fill material" and move it to "a location approved by [an] EPA representative," Pet. Cert. App. G-4, as well as to prepare for EPA "photographs of [s]ite conditions prior to and following compliance" with the order. *Id.* G-5. The order revokes their fundamental right to exclude others from their property, requiring them (1) to allow EPA to conduct "an inspection of the Site," (2) to grant "access to the Site and any off-Site areas to which access is necessary to implement" the order, (3) to allow EPA officials "to move freely at the site," and (4) to allow EPA officials to engage in any "actions that EPA determines to be necessary" on the site. *Id.* Given that the order is not based on probable cause, it withdraws the Sacketts' constitutional right to be free of unreasonable searches by requiring them to grant access to "all records and documentation related to the conditions at the [s]ite and the restoration activities conducted pursuant to this [o]rder." *Id.*

Even after completion of the fill removal, the compliance order continues to control the use of the Sacketts' property. As originally crafted, the order required that: (1) the "entire [s]ite shall be planted with container stock of native scrub-shrub, broad-leaved deciduous wetland plants and seeded with native herbaceous wetland plants"; (2) "[t]rees and tall shrub species shall be planted approximately 10 feet

apart on center over the entire Site"; (3) "[f]ast growing, native perennial woody species common to wetland areas of northern Idaho shall be incorporated into the plantings"; (4) the "[s]ite shall be fenced for the first three growing seasons"; and (5) "[m]onitoring of vegetation on the restored [s]ite for survival and ground coverage shall be performed in October 2008, June 2009, October 2009, and October 2010." J.A. 26-28. Following several amendments made after the filing of the Sacketts' lawsuit, the order now requires that the Sacketts restore the site "to its original, pre-disturbance topographic condition with the original wetlands soils that were previously removed from the Site." Pet. Cert. App. G-4. The very existence of the order, subjecting the property to a federal mandate, prohibiting the intended, authorized use, and requiring expensive remedial actions, substantially reduces the value of the property and limits the Sacketts' ability to alienate it. As if to ensure this deprivation of their property interest, the compliance order requires the Sacketts to provide a copy of the order to anyone interested in the property "at least 30 days prior to the transfer of such interest." *Id.* G-6.

Although there has been no judicial decision to establish EPA's jurisdiction and authority to impose these deprivations, the compliance order threatens the Sacketts with various "SANCTIONS," Pet. Cert. App. G-7, including civil penalties of up to $37,500 per day if they do not comply with the order.[8] Further,

[8] The Clean Water Act provides that civil penalties cannot exceed $25,000 per day. *See* 33 U.S.C. § 1319(d). Congress, however, has authorized EPA to increase that amount to reflect the effects of inflation. *See* 28 U.S.C. § 2461 note, *as amended*, 31 U.S.C. § 3701 note. At the time the amended compliance order (continued...)

although violation of a compliance order does not itself incur criminal penalties, the order puts the Sacketts on notice that EPA believes that their property contains jurisdictional wetlands; and such notice can often be the moving factor in convincing the Department of Justice to bring a criminal action.[9] The order imposes these dire consequences based on "any information" that the Sacketts' activity may be a violation of the Clean Water Act. *See* 33 U.S.C. § 1319(d).

Believing that their property was not a "wetland" within EPA's jurisdiction, the Sacketts attempted to resolve the compliance order informally, but EPA refused to address the Sacketts' jurisdictional arguments. Pet. Cert. App. A-3. Therefore, in April, 2008, the Sacketts filed suit to contest the jurisdictional bases for the order. The Sacketts' complaint asserts three claims.

The first claim alleges that EPA does not have jurisdiction over the property, and that as a consequence the compliance order should be set aside under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. *See* J.A. 13. The APA authorizes a

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[8] (...continued)
was issued against the Sacketts, EPA had augmented the civil penalty amount, pursuant to this authority, to $32,500 per day. *See* Pet. Cert. App. G-7. But effective January 12, 2009, EPA increased the penalty again to $37,500. *See* 74 Fed. Reg. 626, 627 (Jan. 7, 2009). Therefore, as stated in the text, the Sacketts today stand liable for up to $37,500 per day in civil penalties for failing to comply with the compliance order.

[9] *See* U.S. EPA, Guidance on Choosing Among Clean Water Act Administrative, Civil and Criminal Enforcement Remedies, at 4-5 (Aug. 28, 1987), *available at* http://www.epa.gov/compliance/resources/policies/civil/cwa/cwacivcriminenfremed-mem.pdf (last visited Sept. 15, 2011).

reviewing court to set aside final agency action that is, among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

The second and third claims assert that the compliance order violates the Sacketts' due process rights. J.A. 13-14. The second claim turns on the basic principle that, before a person can be deprived of liberty or property, he is entitled to a full and fair hearing "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). The third claim is based on the related principle that a person cannot be punished for conduct that violates an "impermissibly vague" law. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982).

Shortly after the complaint's filing and the issuance of the existing amended compliance order, EPA moved to dismiss the Sacketts' action. EPA contended that the order is not subject to judicial review under the APA, and that it does not violate due process. In a memorandum decision issued August 7, 2008, the district court granted EPA's motion to dismiss, holding that it lacked jurisdiction to adjudicate the Sacketts' APA and due process claims. *See* Pet. Cert. App. C. In an order issued October 9, 2008, the district court denied the Sacketts' motion for clarification and reconsideration, concluding that its dismissal order did not need clarification and that the Sacketts had not stated an adequate basis for reconsideration. *See* J.A. 2.

The Sacketts then appealed to the Ninth Circuit Court of Appeals. In a decision issued September 17,

2010, the court affirmed the district court's dismissal. *See* Pet. Cert. App. A.

The Ninth Circuit's decision comprises a three-part analysis. In the initial part, the court created a constitutional problem by reading the Clean Water Act to preclude judicial review of the compliance order. The court acknowledged both that the Clean Water Act's express language does not mandate the interpretation it ultimately adopted, Pet. Cert. App. A-6, and that courts should avoid statutory interpretations that raise serious constitutional questions. Nevertheless, the Ninth Circuit strove to support its interpretation by relying on just three of the factors set forth in *Block v. Community Nutrition Institute*, 467 U.S. 340, 351 (1984), for determining whether Congress intends to preclude judicial review under the APA. The factors that the Ninth Circuit used were the Clean Water Act's purported statutory structure, purposes, and legislative history. *See* Pet. Cert. App. A-6 - A-9.

But in relying on these factors, the court never considered whether contrary inferences might support the conclusion that Congress *did* intend for individuals like the Sacketts to obtain review under the APA. Similarly, the court never considered whether the nature of the compliance order itself (one of the *Block* factors that the Ninth Circuit left unaddressed) supports review under the APA. The court's failure to assess the factor dealing with the "nature of the administrative action" is significant, given that the APA forbids the imposition of sanctions unless an agency acts within its statutory jurisdiction and authority, *see* 5 U.S.C. § 558(b), two considerations naturally inviting judicial review.

The Ninth Circuit also sought support for its interpretation from other courts that have held that the Clean Water Act precludes review of purportedly "pre-enforcement" actions, such as compliance orders,[10] Pet. Cert. App. A-6, even though these cases ignored, or addressed only cursorily, the due process implications of denying judicial review to individuals like the Sacketts.

Later, the Ninth Circuit attempted to resolve the constitutional quandary it created by its narrow reading of the Clean Water Act. The court acknowledged that the Sacketts have a due process right to meaningful judicial review of the compliance order at a meaningful time, and that the Act's failure to provide such review could in theory be unconstitutional. The court also acknowledged that the Clean Water Act, read literally, authorizes civil liability for violations of compliance orders, regardless of whether the Act itself has been violated. And, the court acknowledged that this reading of the Act (adopted by the Eleventh Circuit in *Tennessee Valley Authority (TVA) v. Whitman*, 336 F.3d 1236 (11th Cir. 2003), for an analogous provision of the Clean Air Act) would mean that the Sacketts' compliance order is unconstitutional if it is not subject to judicial review. *See* Pet. Cert. App. A-10 - A-11. But the court rejected a literal interpretation of the Clean Water Act's text, instead holding that, if and when EPA chooses to enforce the compliance order in federal court, the

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[10] *See Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995), *cert. denied*, 516 U.S. 1071 (1996); *S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418 (6th Cir.), *cert. denied*, 513 U.S. 927 (1994); *S. Pines Assocs. v. United States*, 912 F.2d 713 (4th Cir. 1990); *Hoffman Group, Inc. v. EPA*, 902 F.2d 567 (7th Cir. 1990).

Sacketts may then raise a jurisdictional defense. Pet. Cert. App. A-11 - A-12.

In the final part of its analysis, the Ninth Circuit held that delaying judicial review of the Sacketts' compliance order does not create a "'constitutionally intolerable choice'" of suffering onerous compliance costs or accepting judicial review only at the risk of significant liability. Pet. Cert. App. A-13 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994)). The court based this conclusion on two grounds.

First, the court reasoned that the Sacketts can contest EPA's jurisdiction to issue a compliance order by applying for a permit and seeking judicial review of the permit's denial. Pet. Cert. App. A-13 - A-14. The court, however, did not explain the manner in which the permitting process can provide review of the compliance order, given that (1) review would be limited to the permit denial or contested permit conditions, and (2) the Sacketts are precluded by regulation from even applying for a permit until the compliance order is resolved. Also, the court did not address the Sacketts' contention that, under *Thunder Basin*, the Clean Water Act permitting process is too onerous to provide constitutionally adequate review, because that process is frequently ruinously expensive and time-consuming, and its costs are not recoverable.

Second, the court reasoned that, if and when EPA seeks civil penalties for the Sacketts' failure to comply with the compliance order, the amount of those penalties will be left to the equitable discretion of a federal judge, not EPA. Pet. Cert. App. A-14 - A-15. But the court did not address the fact that even a substantial "good faith" reduction in liability would

still leave the Sacketts paying an immense civil penalty; indeed, a 99% reduction to the statutory maximum for four years of noncompliance would exceed $500,000.

Accordingly, the court concluded that the Clean Water Act precludes APA review, and that such preclusion does not violate the Sacketts' due process rights. Pet. Cert. App. A-15.

SUMMARY OF ARGUMENT

The compliance order violates the Sacketts' due process rights. The order has deprived the Sacketts of their right to the reasonable use and enjoyment of their property, and their right to be free from unreasonable searches and seizures. The order will continue to deprive them of these rights for the indefinite future.

The Sacketts have never been offered any opportunity for meaningful review of the compliance order. EPA has no administrative process the exhaustion of which will produce an action reviewable in court. The Clean Water Act's compliance order enforcement provisions do not provide meaningful review, either. The Sacketts cannot initiate such review, but instead are left to the mercy and whim of EPA, never certain whether or when the agency will bring an enforcement action. Such review is available, if at all, only by ignoring or violating the compliance order and thereby incurring the potential for sanctions of up to $37,500 per day. Even if the Sacketts comply with the order, they still cannot seek judicial review.

This Court's precedents confirm that judicial review that can be obtained only on such terms as EPA offers the Sacketts is constitutionally inadequate.

Under the principle of *Ex parte Young*, 209 U.S. 123 (1908), judicial review is constitutionally inadequate if it can be obtained only by running the risk of significant civil or criminal liability, and if judicial review cannot otherwise be had while complying. That principle applies fully to the Sacketts' predicament: review in an EPA enforcement proceeding can occur (if at all) only through the Sacketts' refusal to comply. There is no process whereby the Sacketts can comply with the order and seek review.

Nothing in *Thunder Basin*, the Court's most recent explication of *Ex parte Young*, is to the contrary. Unlike the parties in *Thunder Basin*, (1) the Sacketts cannot initiate review, (2) the Sacketts have already been subjected to a serious deprivation, (3) the Clean Water Act does not authorize temporary relief from compliance orders or provide any post-issuance process; and (4) the Sacketts cannot comply with the order *and* seek review.

Nevertheless, constitutionally adequate review of the compliance order should be available under the APA. That Act establishes a strong presumption in favor of judicial review of agency action, and there is no competent evidence that Congress intended otherwise. When considered *in pari materia* with the APA, the Clean Water Act can and should be read so as not to preclude judicial review of compliance orders.

Contrary to the decision of the Ninth Circuit, the nature of a Clean Water Act compliance order supports the need for judicial review. Unlike a cease and desist order, a compliance order operates like a mandatory injunction and imposes sanctions for its violation, attributes that are well-fitted for prompt judicial review. Also, the structure and purpose of the Clean

Water Act support an interpretation favoring judicial review. The Clean Water Act contains no "channeling" structure or provision expressly precluding review, and such review would be consistent with the Act's enforcement objectives. Allowing judicial review under the APA would not limit EPA's prosecutorial discretion or its ability to respond quickly to environmental emergencies, but would in fact support EPA's administration by giving both individuals like the Sacketts and the agency an early decision as to whether EPA has authority over a given land-use activity and the Clean Water Act's legislative history provides no support for a contrary view.

Further supporting review is this Court's "avoidance" canon, which counsels courts to avoid statutory interpretations that would create serious constitutional questions. By construing the Clean Water Act to allow review under the APA, the due process violation resulting from the absence of such review can be avoided.

Last, the compliance order constitutes final agency action. It represents the consummation of EPA's decisionmaking process, as there is no further administrative process governing the order; and the order imposes severe sanctions on the Sacketts. The order's finality is confirmed by *Alaska Department of Environmental Conservation (ADEC) v. EPA*, 540 U.S. 461 (2004), in which this Court held that a closely analogous Clean Air Act compliance order was final agency action.

Accordingly, the Sacketts should be allowed to seek judicial review under the APA.

ARGUMENT

I

THE CLEAN WATER ACT COMPLIANCE ORDER ISSUED AGAINST THE SACKETTS VIOLATES THEIR DUE PROCESS RIGHTS

The Sacketts base their due process claims on the facts that (1) EPA has imposed on them severe sanctions that deprive them of fundamental property interests, and (2) the Clean Water Act provides them no opportunity for meaningful judicial review of the compliance order. "[T]he central meaning of procedural due process [is that] '[p]arties whose rights are to be affected are entitled to be heard.'" *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1864)). The hearing must be provided "at a meaningful time and in a meaningful manner." *Armstrong*, 380 U.S. at 552. As demonstrated below, the compliance order violates the Sacketts' due process rights because the Clean Water Act, as interpreted by the Ninth Circuit and EPA, does not afford meaningful judicial review.

A. The Compliance Order Has Deprived the Sacketts of Protected Interests

The compliance order has deprived the Sacketts of the only permitted economically viable use of their property. *Cf. Fuentes*, 407 U.S. at 86 ("Any significant taking of property . . . is within the purview of the Due Process Clause."); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 342 (1969) (Harlan, J., concurring) (deprivation of the use of property falls within the Due Process Clause's scope). The compliance order states that the Sacketts have committed "a violation of

section 301 of" the Clean Water Act, and as a consequence they must immediately cease their homebuilding project by "remov[ing] all unauthorized fill material placed" on their lot, Pet. Cert. App. G-3 - G-4, at a cost of approximately $27,000, *see* Decl. of Michael Sackett ¶ 6. Further, the order mandates that the property be "restored" to EPA's satisfaction, Pet. Cert. App. G-4, G-6. In essence, the compliance order renders the Sacketts' property a conservation preserve for the indefinite future. The order also denies the Sacketts the fundamental right to exclude others from their property by requiring them to grant access "to EPA employees and/or their designated representatives" and to allow these persons "to move freely at the site and appropriate off-site areas in order to conduct actions that EPA determines to be necessary." *Id*. G-5. *Cf*. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (observing that the "right to exclude others from entering and using her property [is] perhaps the most fundamental of all property interests").

Additionally, because the order was issued without probable cause, *cf*. *TVA*, 336 F.3d at 1241 (the standard for the issuance of a Clean Water Act compliance order "is less rigorous than the probable cause standard"), it therefore denies the Sacketts the right to be free from unreasonable searches[11] by

[11] The Court has only lessened the traditional Fourth Amendment requirements of warrant and probable cause for "pervasively regulated" industries, *New York v. Burger*, 482 U.S. 691, 702 (1987), and even then only when, among other things, the discretion given to those doing the searching is "'carefully limited in time, place, and scope,'" *id*. at 703 (quoting *United States v. Biswell*, 406 U.S. 311, 315 (1972)). Not only is homebuilding not (continued...)

requiring that they "provide access to all records and documentation related to the conditions at the Site and the restoration activities conducted pursuant to [the compliance order]." J.A. 22. The order requires that the Sacketts fall into line or else suffer a frightful gamut of "SANCTIONS," Pet. Cert. App. G-7, including civil penalties of up to $37,500 per day. *Cf. Connecticut v. Doehr*, 501 U.S. 1, 24 (1991) (holding that an attachment to real property, which did not inhibit the owner's direct use or enjoyment of his property, nevertheless violated due process because the attachment was not preceded by a hearing).

Thus, the order "as a practical matter drive[s the Sacketts] to the wall," *Sniadach*, 395 U.S. at 341-42, deprives them of recognized property interests, and undermines the Constitution's due process guarantees.

B. The Sacketts Have Not Been Afforded Meaningful Review of the Compliance Order

The Sacketts have been afforded no review of the compliance order, but instead have been kept in a state of limbo and uncertainty, never knowing if or when EPA will bring an enforcement action or whether they will ever obtain meaningful review of the compliance order. Regardless of whether the order should have been preceded by a hearing, *cf. ADEC*, 540 U.S. at 483 (raising *sua sponte* but not resolving due process issues

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[11] (...continued)
a pervasively regulated industry, but the Sacketts' compliance order is by no means carefully limited in its scope. Rather, the order essentially gives unfettered access to EPA's representatives. Thus, as stated in the text, the order deprives the Sacketts of their interest in being free from unreasonable searches and seizures of their property and effects.

involved in the procedure producing a Clean Air Act compliance order), the order should have been followed by a prompt hearing. *See Barry v. Barchi*, 443 U.S. 55, 60, 66 (1979) (holding that due process was violated when a horse trainer's occupational license was suspended for 15 days and no hearing was provided during that time, and the relevant statute provided no deadline for a hearing to be held); *Fuentes*, 407 U.S. at 75 (overturning a state replevin procedure that "eventually" allowed for a post-deprivation hearing). *Cf. Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 610 (1974) (upholding a state sequestration procedure in part on the grounds that the party deprived could trigger an "immediate" hearing on the legality of the sequestration); *id.* at 625 (Powell, J., concurring) ("An opportunity for an adversary hearing must . . . be accorded promptly after sequestration . . . .").

To determine how long of a delay is justified in affording a post-deprivation hearing, the Court "examine[s] the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken." *Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 242 (1988).

In this case, the original compliance order was issued in November, 2007, and since that time the Sacketts have been afforded no review. There is no post-issuance administrative process and no judicial process that the Sacketts can initiate. Thus, where the balancing of interests might otherwise justify a delayed post-deprivation hearing, the regime under which the Sacketts have labored—one that provides *no* process

that they can initiate to seek review—is deficient under *Mallen*.

Further, the *Mallen* factors themselves compel the conclusion that a delay in review of four years (and counting) is constitutionally deficient.

First, the Sacketts' interest in the use of their land is an established, fundamental property right, and the compliance order completely deprives them of that use for the indefinite future.[12] *Cf. Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992) (observing that the fee simple interest in land "is an estate with a rich tradition of protection at common law"); *id.* at 1019 n.8 (observing that the Court's cases "evince an abiding concern for the productive use of, and economic investment in, land").

Second, although EPA has an interest in the effective administration of the Clean Water Act, it has no interest in delaying indefinitely a determination of the legality of the Sacketts' homebuilding. *Barry*, 443 U.S. at 66 ("We . . . discern little or no state interest . . . in an appreciable delay in going forward with a full hearing," as "it would seem as much in the State's interest as [the regulated party's] to have an early and reliable determination with respect to [liability].").

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[12] Moreover, as already noted, the compliance order requires the Sacketts to give EPA's representatives extensive access to their property, *see* Pet. Cert. App. G-5, thereby substantially infringing on the Sacketts' right to exclude, *cf. Lingle*, 544 U.S. at 539, and their right to be free from unreasonable searches and seizures, *see supra* n.11.

Third, the compliance order process presents a high risk of erroneous determinations. The process that produces the order is entirely secret, with no notice given to property owners like the Sacketts. There is not even a "probable cause"-type hearing, the existence of which this Court has relied on to uphold deprivations under statutes that did not provide a full evidentiary hearing prior to a deprivation. *See Mallen*, 486 U.S. at 240-41; *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-46 (1985); *Mathews v. Eldridge*, 424 U.S. 319, 337-40 (1976); *Mitchell*, 416 U.S. at 605-06. And to issue a compliance order, EPA can rely on "any information available" to it, *see* 33 U.S.C. § 1319(a)(3), which can include "a staff report, newspaper clipping, [or] anonymous phone tip." *TVA*, 336 F.3d at 1241. Indeed, as already noted, the standard for issuing a compliance order "is less rigorous than the probable cause standard." *Id.* Thus, the risks of a compliance order having been erroneously issued are high. Accordingly, consideration of the *Mallen* factors confirms that the Sacketts have not been afforded prompt and meaningful review.

At bottom, no system of review can be considered "prompt" where a landowner must wait indefinitely to receive a hearing. For that reason, the Clean Water Act compliance order regime is far worse than the suspension provision at issue in *Mallen*, where the employee was assured a hearing within 90 days, *see* 486 U.S. at 242-43, or the replevin law at issue in *Fuentes*, where review could be had "eventually," *see* 407 U.S. at 75. *Cf. Barry*, 443 U.S. at 74 (Brennan, J., concurring in part) ("To be meaningful, an opportunity for a full hearing and determination must be afforded at least at a time when the potentially irreparable and

substantial harm . . . can still be avoided . . . ."). The original compliance order was issued in November, 2007, and the Sacketts have still not obtained any review, let alone meaningful review. Therefore, enforcement of the order without such review violates the Sacketts' due process rights.

C. The Modes of Review That the Ninth Circuit Concluded Constitute Meaningful Review of the Compliance Order Are Either Not Meaningful or Are Nonexistent

The Ninth Circuit ruled below that the Sacketts' due process rights have not been violated because the Sacketts do have opportunities for meaningful review. *See* Pet. Cert. App. A-11 - A-15. That is simply not so.

1. A Clean Water Act Enforcement Action Does Not Provide Meaningful Review of a Compliance Order

The Ninth Circuit reasoned that the Sacketts can obtain meaningful review through an action brought by EPA to enforce the compliance order under Section 309(b), 33 U.S.C. § 1319(b), of the Clean Water Act. *See* Pet. Cert. App. A-11 - A-13. But such review is constitutionally deficient for at least two reasons.

First, the Sacketts cannot initiate Section 309(b) review. Rather, such review is at the mercy and unreviewable whim of EPA. Review cannot be meaningful if the regulated party must be forever subject to a Damoclean sword, never certain whether or when EPA will let the sword drop and seek immense penalties at the rate of $37,500 per day, or use the party's continued activity despite the order as a reason

to seek criminal penalties. *Cf. Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (White, J., concurring in part and dissenting in part) (observing that the promise of ultimate judicial vindication means little in such circumstances because "the value of a sword of Damocles is that it hangs—not that it drops"). Further, an argument that such review is meaningful would be inconsistent with this Court's case law emphasizing that a post-deprivation hearing must be given promptly. *See Gilbert v. Homar*, 520 U.S. 924, 932 (1997); *Mallen*, 486 U.S. at 242-43; *Barry*, 443 U.S. at 66; *Mitchell*, 416 U.S. at 610; *id.* at 625 (Powell, J., concurring).

Second, review through Section 309(b) can only be had if the Sacketts violate or fail to comply with the compliance order. As noted, each day the Sacketts fail to comply with the order (by, for example, not removing the fill and commencing restoration), they incur potential liability of up to $37,500 in civil penalties. But it is a fundamental principle of due process that review is not meaningful, and thus is constitutionally inadequate, if it can only be obtained by risking immense civil liability. *See Ex parte Young*, 209 U.S. at 148; *Thunder Basin*, 510 U.S. at 217-18; *id.* at 221 (Scalia, J., concurring in part and concurring in the judgment).

The Court's leading decision in this area of Due Process jurisprudence is *Ex parte Young*. The case arose out of nine suits in equity brought by shareholders of various railroad companies to challenge the validity of several passenger and freight rate orders. *See* 209 U.S. at 127-29. The shareholders contended that the rate orders were unconstitutional both because they were confiscatory, and because there

was no way to obtain judicial review of the orders without violating them and thereby risking significant civil and criminal liability. *See id*. at 131.

This Court agreed with the stockholders. The Court held that "when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate" a party from seeking judicial review, "the result is the same as if the law in terms prohibited" such review. *Id*. at 147. The Court therefore held unconstitutional the enforcement provisions of the rate laws and orders. The Court reasoned that to offer a party judicial review only on the condition "that if unsuccessful he must suffer imprisonment and pay fines" is the functional equivalent of closing up all access to the courts. *Id*. at 148.

Thus, the principle of *Ex parte Young* is that review is constitutionally deficient if it can only be had by risking significant civil or criminal liability, where compliance with the law foregoes the possibility of judicial review. *Cf. Thunder Basin*, 510 U.S. at 218 (describing *Ex parte Young* as affirming the principle that due process is violated when a party must "choose" between "onerous" compliance costs and "coercive penalties" to obtain judicial review); *id*. at 221 (Scalia, J., concurring in part and concurring in the judgment) ("The constitutional defect in *Young* was that the dilemma of either obeying the law and thereby for-going any possibility of judicial review, or risking 'enormous' and 'severe' penalties, effectively cut off all access to the courts.").

Accordingly, review of a compliance order under Section 309(b) is constitutionally inadequate. Such review is only possible if the Sacketts ignore and

thereby violate the order, and in so doing trigger substantial potential liability in civil penalties. A single year of noncompliance with the order amounts to more than $13 million in potential liability. To the Sacketts, that is as "immense" as the liability the railroad companies faced in *Ex parte Young*, and thus has as much, if not more, of a chilling effect on the exercise of the right of judicial review that the Due Process Clause guarantees. And like the railroad companies, the Sacketts cannot obtain review of the order by complying with the order, nor can they recover compliance costs. Rather, compliance merely compounds the constitutional injury by forcing the Sacketts to forego their homebuilding and to leave their parcel undeveloped and unusable for the indefinite future. Thus, obedience to the compliance order produces a result just as "confiscatory" as obedience to the rate orders in *Ex parte Young*.

The conclusion that Section 309(b) review is constitutionally inadequate is consistent with *Thunder Basin*, on which the Ninth Circuit relied below. *Thunder Basin* arose out of the Federal Mine Safety and Health Amendments Act, 30 U.S.C. § 801, *et seq*. The Act and its regulations authorize mining employees to elect representatives who have the right to inspect a mine twice yearly and obtain health and safety information about a mine. *See Thunder Basin*, 510 U.S. at 203 (citing, inter alia, 30 U.S.C. §§ 813, 819). Also under the Act, mining companies are required to post the names of the employees' representatives. *See Thunder Basin*, 510 U.S. at 204 (citing 30 C.F.R. § 40.4 (1994)).

In *Thunder Basin*, the mining company objected that the Mining Act required it to recognize two

members of the United Mine Workers Association (who were not employees of the mining company) as its employees' designated representatives. *See* 510 U.S. at 204. The mining company therefore filed suit in district court contending that the designation of union nonemployees violated the company's collective bargaining rights. *See id*. at 205. Although the district court ruled in the mining company's favor, the court of appeals reversed, holding that the mining company could not seek review through its own district court action, but instead had to pursue review first through the Mining Act's administrative process. *See id*. at 206 (citing *Thunder Basin Coal Co. v. Martin*, 969 F.2d 970 (10th Cir. 1992)).

Before this Court, the mining company argued that it was entitled to judicial review by an Article III court because the mining company's due process rights would be violated without such review. *See* 510 U.S. at 216. The Court rejected the mining company's argument. The majority observed that compliance with the Mining Act would not effect a serious deprivation, because it was very unlikely that the representatives of the mining employees would abuse their privileges and that, even if such abuse were in theory possible, the record before the Court did not substantiate such abuse. *See id*. at 216-17. Similarly, the majority noted that compliance with the Act's administrative review process while ignoring the Act's requirements would not create a serious pre-hearing deprivation for the mining company. Any fines incurred would become due and payable only after an adjudication, which would allow review of the administrative order or citation. *See id*. at 217-18. Further, the Act authorizes mine operators to obtain temporary relief from certain orders, and to expedite

the administrative process. *See id.* at 218 (citing 30 U.S.C. §§ 815, 816). The majority therefore concluded that the mining company was not in the same position as the railroad companies in *Ex parte Young*. The majority also noted that the mining company's quandary did not "approach a situation in which compliance is sufficiently onerous and coercive penalties sufficiently potent that a constitutionally intolerable choice might be presented." *Thunder Basin*, 510 U.S. at 218. The *Thunder Basin* concurrence expanded upon the majority's distinction by noting that the mining company, unlike the railroad officials, could comply with an agency order while seeking review of that order. *See id.* at 221 (Scalia, J., concurring in part and concurring in the judgment). *See also Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 49 n.12 (2000) (Thomas, J., dissenting).

But the Sacketts are in a much worse position than the mining company in *Thunder Basin*. First, the Sacketts cannot initiate review of the compliance order: unlike the Mining Act, the Clean Water Act provides no mechanism for review initiated by compliance order recipients. Second, the Sacketts already have been subjected to a serious deprivation. *See supra* Part I.A. *Cf. Doehr*, 501 U.S. at 11-12. Unlike the mining company, which simply had to post certain information and submit to a biannual inspection, the Sacketts have been ordered to stop using their property entirely for the indefinite future, and allow essentially unfettered access to their property and records. Third, the Clean Water Act, unlike the Mining Act, does not authorize temporary relief from compliance orders or provide for expedited review. Indeed, the Clean Water Act provides no

means of review at all. Finally, the Sacketts, unlike the mining company, cannot comply with the order *and* seek judicial review. Rather, Section 309(b) review can be maintained only by a failure to comply. Thus, a comparison of the Sacketts' predicament to the mining company's in *Thunder Basin* confirms that Section 309(b) review is constitutionally inadequate: the Sacketts can only hope to obtain such review by risking immense civil liability and even then, the Sacketts' failure to comply cannot compel EPA to bring an enforcement action.

2. Neither the Clean Water Act's Allowance for Good Faith in Assessing Civil Penalties Nor the Act's Permitting Process Provide Meaningful Review of Compliance Orders

The Ninth Circuit attempted to distinguish the rule of *Ex parte Young* (as discussed in *Thunder Basin*) on two grounds: (1) the amount of any civil penalty is left ultimately to the judiciary; and (2) the Clean Water Act contains a permitting process, the outcome of which is judicially reviewable. *See* Pet. Cert. App. A-13 - A-15. But, as shown below, neither basis can legitimately distinguish the principle of *Ex parte Young*.

First, the fact that the judiciary has ultimate responsibility for imposing a civil penalty under the Clean Water Act does not make Section 309(b) review constitutionally adequate. The good faith of the Sacketts would be just one among many factors that a reviewing court might take into account. *See* 33 U.S.C. § 1319(d). There is no guarantee, however, that a court will reduce an otherwise immense civil penalty merely

because of the Sacketts' good faith. Requiring landowners like the Sacketts to gamble on the mercifulness of a district court judge is as demanding a condition to judicial review as requiring the Sacketts to brave potentially millions of dollars in civil liability. And in any event, even a 99% reduction in the maximum penalty for four years of noncompliance is still over $500,000, a figure extremely onerous and coercive to small landowners like the Sacketts.

Second, the Clean Water Act permitting process is no remedy either. In challenging a permitting decision, the Sacketts could never challenge the compliance order itself. For example, they could not argue that the order should never have been issued, or that they should not be liable for any fines. Rather, the Sacketts would be limited to contesting the agency's decision on the permit, *not* the agency's issuance of the compliance order. Moreover, the Sacketts cannot even initiate the permitting process until after the compliance order is fully resolved. *See* 33 C.F.R. § 326.3(e)(1)(ii) (2011). Hence, by the time the Sacketts could apply for a permit, there would no longer be any outstanding compliance order for which judicial review could be sought.

Finally, the permitting process does not provide meaningful review because it is ruinously expensive, potentially imposing costs greater than the value of the contemplated project. *Cf. Rapanos*, 547 U.S. at 721 (plurality opinion) (observing that the average cost of an individual Clean Water Act permit is about $270,000); Jonathan H. Adler, *Once More, With Feeling: Reaffirming the Limits of Clean Water Act Jurisdiction*, *in The Supreme Court and the Clean Water Act—Five Essays* 81, 83 ("All told, one study

estimates that the public and private sectors together spend $1.7 *billion* annually to obtain wetland permits."). And those costs are in addition to all the expenses (including civil penalties) necessary to resolve the compliance order and become merely eligible to submit a permit application.

Thunder Basin states that judicial review ceases to be meaningful if the costs of compliance are "sufficiently onerous." 510 U.S. at 218. That is the situation in which the Sacketts find themselves. Even with judicial review they will still have suffered irreparable harm. *Cf. Thunder Basin*, 510 U.S. at 220-21 (Scalia, J., concurring in part and concurring in the judgment) ("[C]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs."). And, obedience to the compliance order is exceedingly onerous. The order requires that the Sacketts: (1) "remove all unauthorized fill material" on the site; (2) place the removed fill material in "a location approved by . . . EPA"; and (3) "restor[e the site] to its original, pre-disturbance topographic condition with the original wetlands soils that were previously removed from the [s]ite." Pet. Cert. App. G-4. Just the removal of the fill will cost $27,000, on a small residential lot. *See* Decl. of Michael Sackett ¶ 6. The Sacketts must obey the compliance order's costly dictates just to apply for a permit to authorize a modest homebuilding project that is worth far less than the compliance costs that EPA is demanding. The Sacketts' compliance costs are therefore sufficiently onerous that the permitting process does not provide meaningful judicial review.

In sum, the compliance order has deprived the Sacketts of the only economically viable use of their

property permitted under local law, deprived them of their right to exclude unwanted persons from their property, and deprived them of their right to be free from unreasonable searches of their property and effects. The Sacketts have never received any review, let alone meaningful review, of the compliance order. Therefore, issuance of the compliance order without such review violates the Sacketts' due process rights.

II

CONGRESS DID NOT INTEND TO FORECLOSE MEANINGFUL AND CONSTITUTIONALLY ADEQUATE REVIEW OF THE COMPLIANCE ORDER UNDER THE ADMINISTRATIVE PROCEDURE ACT

The preceding section demonstrates that the compliance order drives the Sacketts "to the wall" by terminating their homebuilding project, depriving them of the only permitted economically viable use of their property, and violating their privacy. The severe effects of that order, coupled with the fact that it was issued without any process at all, underscores the need for judicial review under the APA. As discussed in greater detail below, the Sacketts' predicament distinguishes their case from others where this Court has held that APA review is unavailable: (1) the order is the end of the administrative process; (2) the order is directed to the Sacketts specifically; (3) the order has already adjudicated a violation of the Clean Water Act; (4) the order imposes severe sanctions, including devastating civil penalties at the rate of $37,500 per day; and (5) the Sacketts cannot initiate judicial review of the order.

These facts support the conclusion that the compliance order should be subject to judicial review under the APA. The presumption in favor of judicial review of agency action, the intent of Congress, and canons of statutory construction buttress that conclusion.

A. Congress Intended to Allow Review of Compliance Orders Under the Administrative Procedure Act

1. Judicial Review of Agency Action Is Presumed

The APA "embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (quoting 5 U.S.C. § 702).[13] When determining whether an administrative action is subject to judicial

[13] The Sacketts have suffered legal wrong and have been aggrieved by agency action in the form of EPA's compliance order. *Cf.* 5 U.S.C. § 702. The order both forbids the otherwise lawful use of the property and requires the Sacketts to embark on a costly wetlands "restoration" scheme without any hope of reimbursement. *Cf. Thunder Basin*, 510 U.S. at 220-21 (Scalia, J., concurring in part and concurring in the judgment) (observing that compliance with a government regulation later found to be invalid "almost *always* produces the irreparable harm of nonrecoverable compliance costs"). Further, as explained above, the order imposes liability of $37,500 per day for violations. Thus, not only do the Sacketts have Article III standing to challenge the compliance order, *cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), they fall within the Clean Water Act compliance order provision's zone of interests, *see Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970) (complainant must be "within the zone of interests to be . . . regulated by the statute").

review, the Court gives the APA's "generous" review provisions and "hospitable" interpretation. *Abbott Labs.*, 387 U.S. at 141. *See also Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) ("We begin with the strong presumption that Congress intends judicial review of administrative action."). The Court has emphasized that" '[v]ery rarely do statutes withhold judicial review' "; were it otherwise, then "'statutes would in effect be blank checks drawn to the credit of some administrative officer or board.'" *Id.* at 671 (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)).

2. A Congressional Intent to Preclude Judicial Review Under the Administrative Procedure Act Must Be "Fairly Discernible" from the Statute

"[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Labs.*, 387 U.S. at 140. "The statutory preclusion of judicial review must be demonstrated clearly and convincingly." *Nat'l Labor Relations Bd. v. Un. Food & Comm. Workers Union*, 484 U.S. 112, 131 (1987). Although this Court does not apply the "clear and convincing standard" in a strictly evidentiary sense, nevertheless "'the standard serves "as a useful reminder that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling."'" *Michigan Academy*, 476 U.S. at 672 n.3 (quoting *Block*, 467 U.S. at 350-51).

Consistent with the strong presumption in favor of judicial review, the paramount consideration in

determining if Congress intended to foreclose a given avenue of judicial review is whether meaningful review is otherwise available. *See Thunder Basin*, 510 U.S. at 207; *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991). Other considerations that inform the analysis include the nature of the administrative action, as well as the statute's language, structure, objectives, and legislative history. *See Block*, 467 U.S. at 349. *See also Michigan Academy*, 476 U.S. at 673.

3. Judicial Review of the Compliance Order Under the Administrative Procedure Act Is Consistent With the Clean Water Act

a. The Absence of Meaningful Judicial Review of Compliance Orders Under the Clean Water Act Strongly Supports Judicial Review Under the Administrative Procedure Act

The leading consideration in determining statutory preclusion is whether a party can obtain meaningful judicial review of the agency action at issue if review under the APA is precluded. *See Thunder Basin*, 510 U.S. at 207. *Cf. Leedom v. Kyne*, 358 U.S. 184, 190 (1958) ("This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers."). This consideration is founded on the common-sense presumption that Congress does not intend to foreclose meaningful judicial review. *McNary*, 498 U.S. at 496. And judicial review is not meaningful if it can be obtained only by exposing oneself to significant liability. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138,

3150-51 (2010); *McNary*, 498 U.S. at 496-97. *Accord Ex parte Young*, 209 U.S. at 148.

Under this standard of "meaningfulness," the Clean Water Act does not offer adequate judicial review. The only provision authorizing review of compliance orders is Section 309(b). But the Sacketts cannot initiate review under that provision, and there is no administrative process through which the Sacketts can contest the compliance order and ultimately seek review in court. That is in sharp contrast to the preclusion cases where a regulated party could initiate review through an administrative process that would ultimately produce a judicially reviewable agency decision. *See Block*, 467 U.S. at 346; *Shalala*, 529 U.S. at 20-22; *Thunder Basin*, 510 U.S. at 209. Most important, the Sacketts' only chance at review (which is not even guaranteed) under Section 309(b) requires them to violate the order and invite an enforcement action, thereby running the risk of $37,500 per day in fines indefinitely.

Judicial review that can be obtained exclusively by risking such immense liability is categorically *not* meaningful. In *Free Enterprise Fund*, the petitioners contended that the Public Company Accounting Oversight Board violated the separation of powers doctrine and the Constitution's Appointments Clause. The government had argued that the petitioners could obtain adequate review of their claims through the Security and Exchange Commission, by violating the law and inviting the Board to impose a sanction, which could then be reviewed through the Commission and ultimately the courts. This Court rejected the government's position, concluding that judicial review is not meaningful if it

requires a party to run the risk of "a sizable fine." *See Free Enterp. Fund*, 130 S. Ct. at 3138.

The same conclusion should obtain here. To have any hope of judicial review under Section 309(b), the Sacketts must violate the compliance order, thereby exposing themselves to significant civil penalties. Review that can only be had by risking over $13 million in fines per year is not meaningful review. *See also McNary*, 498 U.S. at 496-97 (holding that judicial review within the context of a deportation proceeding was not meaningful review for illegal aliens who sought to challenge the government's handling of their amnesty petitions). *Cf. Shalala*, 529 U.S. at 22 (holding that review triggered at the cost of "a minor penalty" is meaningful).

Allowing judicial review of the compliance order under the APA is also supported by a comparison of the Sacketts' case to *Thunder Basin*. As noted previously, the Court there held that the petitioner mining company was not entitled to pre-enforcement review of a dispute arising under the Federal Mine Safety and Health Amendments Act. But the Mining Act's statutory scheme and the judicial review options open to the mining company were significantly different from the Sacketts' case; and those differences support a decision in favor of judicial review of the compliance order.

One important distinction is that the *Thunder Basin* mining company was truly seeking pre-enforcement review. In other words, no enforcement action of any sort had been taken against the mining company. Instead, the only action that had been taken was that a government agent had written to the mining company informing it that its conduct was not

in conformity with the law. *See Thunder Basin*, 510 U.S. at 204-05. Here, however, enforcement action *has* commenced against the Sacketts, in the form of a compliance order, complete with the assertion that substantial penalties are already accruing.

In *Thunder Basin*, the Mining Law's statutory scheme provided for an administrative process, initiated by the regulated party, to review citations and orders issued against mining companies, and that administrative process resulted in a judicially reviewable decision. *See id.* at 207-08 (citing, inter alia, 30 U.S.C. § 816). The Court therefore likened the case before it to those "involving *delayed* judicial review of final agency actions [where] Congress has allocated *initial* review to an administrative body." 510 U.S. at 207 (emphasis added). In contrast, the Clean Water Act offers no administrative process that can be initiated by the regulated party to review a compliance order, much less a process that produces a judicially reviewable agency decision, or a process that merely allocates initial decisionmaking to an agency.

Finally, the *Thunder Basin* mining company had the option of complying with any order or citation *and* seeking judicial review *without* incurring additional liability. *Thunder Basin*, 510 U.S. at 221 (Scalia, J., concurring in part and concurring in the judgment). *See Shalala*, 529 U.S. at 49 n.12 (Thomas, J., dissenting). But here, the only way for the Sacketts to obtain judicial review of the compliance order under Section 309(b) is to fail to comply with the compliance order; there is no way for the Sacketts to comply with the order and yet still obtain judicial review of the order. Thus, even by the standards of *Thunder Basin*,

the Sacketts cannot obtain meaningful judicial review under the Clean Water Act.

Accordingly, a strong presumption arises that Congress intended to provide meaningful judicial review of compliance orders under the APA.

b. The Nature of the Compliance Order Supports Judicial Review Under the Administrative Procedure Act

Statutory preclusion analysis also looks to the nature of the administrative action at issue. *See Block*, 467 U.S. at 345. The Sacketts' compliance order is like an injunction. The order forbids the Sacketts to build a house, and requires the Sacketts to "remove all unauthorized fill material," "restore[the site] to its . . . original wetlands soils," allow EPA officials "to move freely at the site and appropriate off-site areas," and "provide access to all records and documentation" related to the site's condition and restoration, among other actions. *See* Pet. Cert. App. G-4 - G-6. Like an injunction, the order imposes severe penalties on the Sacketts for noncompliance; indeed, the order imposes "SANCTIONS," *id*. G-7, including civil penalties for such failures. An agency, however, can impose sanctions on a party only to the extent that the agency has jurisdiction and has been authorized by law to do so. *See* 5 U.S.C. § 558(b). Both of these factors—jurisdiction and statutory authorization—are matters quintessentially disposed to judicial review. Moreover, even EPA concedes that a compliance order is fit for immediate judicial review, in the context of an enforcement action. Thus, the compliance order's

injunction-like nature, imposing "SANCTIONS" for noncompliance, supports judicial review.

This Court has held that a statutory remedy which by its nature depends on the discretion of a governmental actor and is meant to take effect quickly is an action that Congress probably did not intend for judicial review. *See Morris v. Gressette*, 432 U.S. 491, 501-05 (1977) (holding that the remedy set forth in Section 5 of the Voting Rights Act is not subject to judicial review). So also, the Court has held that a decision by a government agency not to proceed with an investigation—a decision which does not "necessarily affect[] any citizen's ultimate rights"—is an action that Congress probably did not intend for judicial review, because of its minimal ramifications. *See S. Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 454-55 (1979) (holding that the Interstate Commerce Commission's decision not to initiate an investigation into the legality of a proposed railroad rate increase is not subject to judicial review).

However, a comparison of the Sacketts' compliance order to the agency actions at issue in *Morris* and *Southern Railway Co.* supports judicial review under the APA. Unlike the Section 5 Voting Rights Act remedy in *Morris*, Congress did not intend compliance orders necessarily to be enforced or resolved expeditiously. In fact, one of the many inequities of the compliance order regime is precisely that EPA cannot be compelled to bring an enforcement action and can thereby let penalty liability increase. *See* Andrew I. Davis, Comment, *Judicial Review of Environmental Compliance Orders*, 24 Envtl. L. 189, 200-01 (1994). Further, if Congress had wanted and expected expeditious enforcement, it could have provided (but

did not provide) EPA the power to issue "super" compliance orders like those authorized by the Clean Air Act, 42 U.S.C. § 7401, *et seq*. *See id*. § 7603. Under that latter provision, EPA is authorized to issue a compliance order that operates exactly like a temporary restraining order. These orders immediately have the force of law and do not require judicial approval, but expire after 60 days. Congress also authorized the issuance of "standard" Clean Air Act compliance orders, which require judicial approval for enforcement and which this Court *has* held to be judicially reviewable. *See ADEC*, 540 U.S. at 483. That the Clean Water Act does not contain a "super" compliance order provision underscores that Congress did not believe that expeditious enforcement was necessary.

Unlike the Interstate Commerce Commission's decision not to investigate in *Southern Railway Co.*, compliance orders under the Clean Water Act *do* have significant impact on the rights and liabilities of recipients. In addition to the potential civil penalty liability, *see* 33 U.S.C. § 1319(d), compliance orders can also serve to augment liability for statutory violations and initiate criminal proceedings. *See* 95 Cong. House Hearings 1977, 209-10 ("[A]n intentional flouting of an order issued by the Administrator . . . would certainly require a more severe penalty than a negligent or unintentional violation."); Guidance, *supra*, n.6.

Thus, because of compliance orders' powerful coercive effect, as well as the absence of any congressional intent that such orders be enforced quickly, their nature supports judicial review under the APA.

c. The Clean Water Act's Structure and Enforcement Scheme Are Consistent with Judicial Review of Compliance Orders Under the Administrative Procedure Act

The Clean Water Act authorizes EPA to issue and enforce compliance orders in federal court, 33 U.S.C. § 1319(a)-(b), to obtain injunctive and other relief against violators, *id.* §§ 1319(b), 1364, to seek criminal and civil penalties for violations of the statute, *id.* § 1319(c)-(d), and to assess administrative penalties, *id.* § 1319(g). Judicial review of compliance orders under the APA is consistent with this scheme, for several reasons.

First, the bare fact that a statute does not expressly provide for judicial review of an agency action does not preclude review. *Michigan Academy*, 476 U.S. at 671. Rather, "nonreviewability [must] fairly be inferred." *Barlow v. Collins*, 397 U.S. 159, 166 (1970).

Second, Congress's allowance for judicial review of administrative penalty orders under Section 309(g), 33 U.S.C. § 1319(g), does not imply that review of compliance orders is unavailable. Administrative penalty orders are not the equivalent of compliance orders. *Compare* 33 U.S.C. § 1319(g)(1) *with id.* § 1319(a)(3). Moreover, an express provision for judicial review of one type of action under a statute is no reason to conclude that review of other actions under the statute is unavailable. *See Abbott Labs.*, 387 U.S. at 144.

Third, Congress's authorization for EPA to enforce compliance orders under Section 309(b) does not imply that Congress meant to foreclose compliance order recipients from obtaining their own review under the APA. Section 309(b) is addressed solely to agency enforcement. It does not address, let alone define, the scope of review a recipient of a compliance order may obtain. It therefore follows that no legitimate inferences can be drawn about Congress's intent with respect to judicial review of compliance orders based on a provision that only addresses agency enforcement of such orders.

This Court's case law supports that conclusion. In determining that a statute's structure precludes judicial review under the APA, the Court has often relied on a statute's administrative "channeling" provision to infer preclusion of other review not expressly forbidden; or the Court has relied on a provision that expressly precluded other forms of review to reach the same conclusion. *See, e.g.*, *Block*, 467 U.S. at 346 (relying on the statute's authorization for milk handlers to obtain review of milk market orders to conclude that judicial review by milk consumers was foreclosed); *United Food & Commercial Workers Union*, 484 U.S. at 131 (relying on the statute's intricate administrative and judicial review provisions for National Labor Relations Board orders to conclude that judicial review of prosecutorial decisions by the Board's general counsel was foreclosed); *Shalala*, 529 U.S. at 10, 12-13 (relying on the statute's channeling provision and express bar to other review to conclude that judicial review of regulations governing Medicare nursing home remedies and sanctions, outside of the channeling provision, was foreclosed); *Thunder Basin*, 510 U.S. at

208-09, 216 (relying on the statute's comprehensive scheme for review of orders by the Federal Mine Safety and Health Commission to conclude that review outside of that scheme was foreclosed); *United States v. Erika, Inc.*, 456 U.S. 201, 206-08 (1982) (relying on Medicare Part B's express administrative review provisions for amount determinations to conclude that judicial review of those determinations was foreclosed).

But the Court has never used the existence of a statutory authorization for the agency to initiate judicial action—an authorization which would indirectly allow a regulated party to obtain judicial review as a defendant—as a basis to conclude that Congress intended to foreclose other means of review for the regulated public. For example, in *Thunder Basin* this Court concluded that pre-enforcement judicial review was foreclosed in part because the statute contains (unlike the Clean Water Act) an express administrative review process, the results of which could be challenged in the courts of appeals. *See* 510 U.S. at 208-09 (citing 30 U.S.C. § 816(a)(1)). The statute also contains (like the Clean Water Act, *see* 33 U.S.C. § 1319(b)) express authorizations for the government to seek relief against an alleged violator directly in district court. *See* 30 U.S.C. §§ 818(a), 820(j). But the Court did not reason that pre-enforcement judicial review should be foreclosed because the mining company could indirectly obtain review as a defendant in a district court enforcement action. Rather, the Court found significant that Congress had authorized district court review for the agency *and* court of appeals review *for the regulated public*. Yet, as noted, there is no analogous court of appeals review structure for Clean Water Act

compliance orders that would preclude judicial review under the APA.

In *McNary*, 498 U.S. 479, this Court held that general federal question jurisdiction was available to review the petitioners' challenge to the Immigration and Naturalization Service's handling of amnesty applications, notwithstanding that illegal aliens could have obtained review of their legal claims in a deportation action brought by the agency. *See id.* at 496-97. Thus, in *McNary* the availability of judicial review within the context of a government-initiated enforcement action had no impact on the Court's ultimate conclusion with respect to the availability of other review.

Accordingly, the Clean Water Act cannot foreclose APA review of compliance orders simply because the Clean Water Act authorizes EPA to enforce those orders in court. The Act's structure and enforcement scheme are consistent with APA review of compliance orders.

d. The Clean Water Act's Objectives Support Review Under the Administrative Procedure Act

Another factor that the Court looks to in analyzing preclusion is the statute's objectives. *Block*, 467 U.S. at 345. The Clean Water Act's "stated objective was 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004) (quoting 33 U.S.C. § 1251). Judicial review of compliance orders under the APA is fully consistent with the Clean Water Act's objectives.

i. EPA's Prosecutorial Discretion

Judicial review is consistent with Congress's understanding of the extent of EPA's prosecutorial discretion under the Clean Water Act. Although allowing judicial review under the APA might result in EPA being in federal court sooner than it had planned, such review would not foreclose the agency from bringing its own enforcement action under Section 309(b). In other words, an APA action seeking review of a compliance order would have absolutely no legal effect on EPA's decision whether to enforce the compliance order under Section 309(b). *See* Davis, *supra*, 203.

ii. EPA's Ability to Respond Quickly to Environmental Hazards

Judicial review of compliance orders under the APA is consistent with EPA's ability to respond expeditiously to environmental dangers, for several reasons.

First, the Clean Water Act has an emergency provision, 33 U.S.C. § 1364, that authorizes the agency to go into court to obtain a temporary restraining order to respond to pressing environmental danger. The inclusion of such a provision implies that Congress did not intend compliance orders to be the principal vehicle for EPA to deal with environmental emergencies.

Second, as previously noted, the Clean Water Act does not provide EPA with the power to issue sweeping "super" compliance orders like those under the Clean Air Act. The fact that Congress gave EPA only the power to issue "standard" compliance orders to enforce

the Clean Water Act is further evidence that Congress did not intend EPA to address emergency situations with the compliance order power. It follows, therefore, that Congress did not believe that preclusion of judicial review of compliance orders was necessary for EPA to administer the Clean Water Act.

Third, when Congress is concerned that judicial review of compliance orders may hamper EPA's administration, it knows what to do: amend the law. Congress did precisely that with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9628, to provide that pre-enforcement review is generally unavailable for CERCLA compliance orders. *See id*. § 9613(h); P.L. 99-499, § 113(c), 100 Stat. 1647, 1649-50 (Oct. 17, 1986) (adding a new subsection (h)). Congress has not made any similar express limitation in the Clean Water Act. That there is no such express limitation implies that Congress did not intend to foreclose judicial review of compliance orders under the APA.

iii. Judicial and Administrative Workloads

Judicial review of compliance orders under the APA would be manageable for both courts and the agency, for several reasons.

First, an increase in federal court dockets is not a sound basis for inferring that judicial review is precluded under the APA. *See Abbott Labs.*, 387 U.S. at 154-55 (rejecting the contention that judicial review would result in "a multiplicity of suits in various jurisdictions challenging other regulations," because "the courts are well equipped to deal with such eventualities").

Second, EPA should welcome judicial review of compliance orders because it can provide both the agency and the regulated public with an early judicial determination about whether a statutory violation is actually ongoing and therefore must be addressed through permitting or enforcement. *See* Davis, *supra*, at 223-24. Indeed, this Court has underscored the value to the agency of early judicial review. *See Abbott Labs.*, 387 U.S. at 154 (noting approvingly that review of the challenged labeling regulations would be beneficial to the government because, "if the Government prevails, a large part of the industry is bound by the decree; if the Government loses, it can more quickly revise its regulation"). *See also Barry*, 443 U.S. at 66.

Third, only a small percentage of compliance order recipients will even seek judicial review, because (a) litigation is expensive and time-consuming, (b) many compliance order recipients, such as local governments and developers, will be repeat players with the agency and will have a strong incentive to get along, and (c) filing an APA lawsuit would not necessarily toll the effectiveness of the compliance order, such that the potential liability of suing and not complying may be too great to justify a lawsuit, *see* Davis, *supra*, at 205. Thus, most judicial challenges will be at the margins where the fact of the discharge is denied or a legitimate question of jurisdiction is presented.

Accordingly, APA review of compliance orders is consistent with the Clean Water Act's objectives.

e. The Clean Water Act's Legislative History Is Consistent With Judicial Review Under the Administrative Procedure Act

Another factor to determine statutory preclusion is the existence of "specific legislative history that is a reliable indicator of congressional intent." *Michigan Academy*, 476 U.S. at 673. The Clean Water Act's legislative history contains no specific statement that would support preclusion of judicial review of compliance orders under the APA. The legislative history merely indicates that the Act's compliance order provisions were modeled after the Clean Air Act's analogous provisions.[14] *See* S. Rep. No. 92-414 at 63-64 (1971). But the Clean Air Act's enforcement provisions do not support the conclusion that judicial review of compliance orders is foreclosed. This Court held in *ADEC* that a Clean Air Act compliance order is reviewable final agency action. *See ADEC*, 540 U.S. at 483. Thus, it would be incongruous to rely on Clean Air Act legislative history to conclude that Clean Water Act compliance orders are unreviewable but Clean Air Act compliance orders are.[15] Accordingly, the Clean

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[14] Other enforcement provisions of the Clean Water Act were modeled after the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 407. *See* S. Rep. No. 92-414, at 63-64 (1971).

[15] It is true that a proposed version of the Clean Air Act contained an express authorization for judicial review compliance orders, and that the authorization was deleted without comment before enactment. *See Lloyd A. Fry Roofing Co. v. U.S. EPA*, 554 F.2d 885, 890 (8th Cir. 1977). But there are many reasons why such a provision would have been deleted, reasons having nothing to do with Congress' intent as to reviewability. *See* Davis, *supra*, at 199.

(continued...)

Water Act's legislative history offers no basis to preclude review of compliance orders under the APA.

4. The Ninth Circuit's Interpretation of the Clean Water Act Is Fundamentally Flawed

The Ninth Circuit below recognized that the Clean Water Act does not expressly or by clear implication preclude judicial review of compliance orders as part of a Section 309(b) enforcement proceeding. Pet. Cert. App. A-12, A-15. Nevertheless, the court ruled that the Sacketts are precluded from initiating review under the APA because of purported inferences from the Clean Water Act showing that Congress intended that review of compliance orders, and their enforcement, should take place in a single action. *See id*. A-6 - A-9. The court reached this conclusion through an analysis that failed to employ basic principles of statutory interpretation, gave no weight to the presumption of judicial review, and misapplied the statutory preclusion factors.

The Ninth Circuit's analysis ignores the obligation to interpret the Clean Water Act and the APA *in pari materia*. *Cf. Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 315-16 (2006) ("[U]nder the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read as if they were one law.") (internal quotation marks

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[15] (...continued)
See generally Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 170 (2001) ("A bill can be proposed for any number of reasons, and it can be rejected for just as many others."). Accordingly, a congressional intent to preclude judicial review cannot be supported by such slender evidence from the legislative history.

omitted). By limiting its analysis to just the Clean Water Act, the court failed to acknowledge the provisions of the APA that add weight to the presumption of judicial review, such as the provision governing the imposition of sanctions. That section of the Act provides that "[a] sanction may not be imposed . . . except within jurisdiction delegated to the agency and as authorized by law." 5 U.S.C. § 558(b). The issues of agency jurisdiction and statutory authority therefore call for judicial review.

Further, the Ninth Circuit's analysis produces the incongruous conclusion that the Clean Water Act creates a different mode of judicial review of EPA's actions than that prescribed by the APA when judicial review does occur as part of a Section 309(b) enforcement action. The review that the Ninth Circuit envisioned is not cabined by the "administrative record" rule which generally governs review of agency action. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-20 (1971). Rather, review in a Section 309(b) enforcement action (as delimited by the Ninth Circuit) is to be conducted on a record created for judicial review and not on the record before the agency at the time the decision was made. *See* Pet. Cert. App. A-11 - A-12. According to the Ninth Circuit, the reviewing court is free to substitute its judgment for that of the agency based on the court's independent weighing of the evidence presented in the action. *See id.* at A-12 ("We therefore hold that the term 'any order' in § 1319(d) refers only to orders predicated on actual violations of the [Clean Water Act] as identified by a district court in an enforcement proceeding according to traditional rules of evidence and standards of proof."). In crafting this nonstatutory review proceeding, the Ninth Circuit unwittingly

revived the moribund doctrine of *Crowell v. Benson,* 285 U.S. 22, 60-65 (1932) (allowing a de novo trial of jurisdictional facts previously determined in an agency proceeding).

Relatedly, the Ninth Circuit's reasoning creates a new concept of an "order" outside of the APA's definition of an order as the "final disposition . . . of an agency in a matter." 5 U.S.C. § 551(6). The court's implicit new definition is that a Clean Water Act compliance order is a type of preliminary determination based on a minimal record that will not be enforceable until the agency creates a new record at a later date.

Most important, the Ninth Circuit's ruling is not based on the Clean Water Act's express language. Rather, it is based on inferences the court found to be "fairly discernible" from that statute. Yet, the APA expressly prohibits the use of this form of analysis to modify its provisions. *See* Administrative Procedure Act, 79 Pub. L. No. 404, § 12, 60 Stat. 237, 244 (1946) ("No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly.").

The Ninth Circuit's flawed analysis notwithstanding, the nature of compliance orders, along with the Clean Water Act's text, structure, objectives, and legislative history, support judicial review under the APA. Without the APA, the Sacketts would have no meaningful review. The Clean Water Act therefore does not preclude such review.

B. The Avoidance Canon Confirms That the Clean Water Act Should Be Read to Preserve the Sacketts' Due Process Rights and Meaningful Judicial Review

A cardinal rule of statutory construction is the avoidance canon, which provides that, "where 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." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The doctrine, having its roots in the opinions of Chief Justice Marshall, directs that "'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Id.* (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Avoiding interpretations that would render statutes unconstitutional "not only reflects the prudential concern that constitutional issues not be needlessly confronted"; such an approach "also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution." *Id.* The Court "will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties." *Id.*

The avoidance doctrine requires that the Clean Water Act be construed as not forbidding meaningful judicial review of compliance orders through the APA. As explained above, *see*, *supra*, Part I, without judicial review under the APA, the Sacketts are deprived of fundamental property and privacy rights without due process of law. The Clean Water Act does not offer

meaningful review of the compliance order. There is no administrative process for review of compliance orders. The Sacketts cannot initiate review under the Clean Water Act. And the only "review" the Sacketts can obtain through a Section 309(b) enforcement action comes at the risk of incurring significant civil liability, and the added risk of criminal liability.

Congress could not have intended to leave landowners like the Sacketts at the mercy of EPA, forever threatened by ruinous penalties. In short, Congress could not have intended to deprive the Sacketts of meaningful judicial review under the APA. The avoidance doctrine therefore confirms the appropriateness of an interpretation of the Clean Water Act that would afford such meaningful review to the Sacketts under the APA.

III

THE COMPLIANCE ORDER CONSTITUTES FINAL AGENCY ACTION

Judicial review of agency action under the APA is based in part on the existence of a "final agency action." *See* 5 U.S.C. § 704. This Court has interpreted the Act's finality requirement as mandating a two-part analysis: (1) whether the action represents the consummation of the agency's decisionmaking; and (2) whether the action determines the rights or obligations of the parties, or is an action from which legal consequences flow. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The Sacketts' compliance order constitutes final agency action.

First, the compliance order represents the consummation of EPA's decisionmaking process. As a logical prerequisite to the issuance of the challenged

compliance order, EPA had to determine that it has regulatory authority over the Sacketts' property. The agency has done so. There are no further steps for the agency to take with respect to jurisdiction, or with respect to the order's issuance. The order does not initiate any administrative process, nor is there any administrative process whereby the Sacketts can seek review of the order. Moreover, the order is immediately enforceable in court by the EPA under Section 309(b).

The compliance order is no less final simply because, at some point in the undetermined future, EPA may change its position on the extent of its authority. That is always possible (and would have been possible in *Bennett* itself). *Cf. Am. Petroleum Inst. v. EPA*, 906 F.2d 729, 739-40 (D.C. Cir. 1990). What matters is that EPA has determined that it has authority, and has issued a putatively valid compliance order on that basis. The agency's decisionmaking process with respect to whether to issue the order is complete.

Second, legal consequences flow from the compliance order. Violation of the order is itself actionable and punishable by civil penalties. *See supra* n.8. Whereas prior to the order's issuance the Sacketts would have been at most liable for statutory violations of the Clean Water Act, in light of the order's issuance the Sacketts are now potentially liable for violations of the statute *and* violations of the order itself.

That the compliance order issued against the Sacketts is final agency action is confirmed by this Court's decision in *ADEC*, 540 U.S. 461. There, the petitioner sought review of a compliance order issued under the Clean Air Act. Before addressing the merits

of the petitioner's challenge, the Court analyzed whether the order constituted final agency action under the Clean Air Act's judicial review provision, 42 U.S.C. § 7607(b). *See ADEC*, 540 U.S. at 483. The Court affirmed the Ninth Circuit's conclusion that the order was final agency action under *Bennett*. The Court held that the order represented EPA's "final position" on whether the underlying permit at issue used the best available control technology under the Clean Air Act. *See id.* The Court also held that the order met *Bennett*'s second prong because of the "practical and legal consequences" that flow from the order, including the "vulnerability to penalties." *See id.* As noted above, these same points apply with equal force to the order issued against the Sacketts. *Cf. TVA*, 336 F.3d at 1256 n.32 (observing that the Clean Water Act and Clean Air Act compliance order regimes are substantially the same). Accordingly, under *Bennett* and *ADEC*, the compliance order issued against the Sacketts constitutes final agency action under 5 U.S.C. § 704.[16]

CONCLUSION

EPA has ordered the Sacketts to stop their homebuilding project, restore their property to its original condition, and leave the property in an untouched state for the indefinite future. The Sacketts must comply with EPA's command or risk immense civil penalties and possibly criminal penalties as well.

[16] Further, the Sacketts have no other adequate judicial remedy. *Cf.* 5 U.S.C. § 704. That conclusion follows for the same reasons that the Clean Water Act does not afford the Sacketts meaningful judicial review of the compliance order. *See*, *supra*, Part II.A.3.a.

The Sacketts have abided under the order's prohibitive strictures for nearly four years, yet they have never been given any review, much less meaningful review. Without such review, the Sacketts' due process rights are violated. But the constitutionality of the Clean Water Act can be upheld if this Court holds that Congress did not intend to foreclose judicial review of compliance orders under the APA.

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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