

No. 10-1062

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In the Supreme Court of the United States

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CHANTELL SACKETT AND MICHAEL SACKETT,  
PETITIONERS

*v.*

UNITED STATES ENVIRONMENTAL PROTECTION  
AGENCY, ET AL.

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

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**BRIEF FOR THE RESPONDENTS**

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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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**BRIEF FOR THE RESPONDENTS**

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 622 F.3d 1139. The opinion of the district court (Pet. App. C1-C7) is unreported.

**JURISDICTION**

The judgment of the court of appeals was entered on September 17, 2010. A petition for rehearing was denied on November 29, 2010 (Pet. App. D1). The petition for a writ of certiorari was filed on February 23, 2011, and was granted on June 28, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

**CONSTITUTIONAL, STATUTORY AND REGULATORY  
PROVISIONS INVOLVED**

Pertinent constitutional, statutory and regulatory provisions are set forth in an appendix to this brief. See App., *infra*, 1a-8a.

**STATEMENT**

1. a. Congress enacted the Clean Water Act (CWA or Act) “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. 1251(a); see Pub. L. No. 92-500, § 2, 86 Stat. 816 (33 U.S.C. 1251 *et seq.*). Section 301 of the CWA prohibits the “discharge of any pollutant by any person” except in compliance with the Act. 33 U.S.C. 1311(a). The term “pollutant” is defined to include, *inter alia*, “dredged spoil,” “rock,” and “sand.” 33 U.S.C. 1362(6). “[D]ischarge of a pollutant” is defined to mean “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. 1362(12). The Act defines the term “navigable waters” to mean “the waters of the United States, including the territorial seas.” 33 U.S.C. 1362(7). The waters of the United States include certain wetlands. See 40 C.F.R. 230.3(s); *Rapanos v. United States*, 547 U.S. 715, 724-725 (2006) (plurality opinion); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985).

The CWA establishes two complementary permitting schemes through which appropriate federal or state officials may authorize discharges of pollutants from point sources into the waters of the United States. The permitting regime implicated in this case is set forth in Section 404 of the CWA, 33 U.S.C. 1344. That provision authorizes the United States Army Corps of Engineers (Corps), or a State with an approved program, to issue

a permit “for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” 33 U.S.C. 1344(a) and (g)-(h). Section 402 authorizes the United States Environmental Protection Agency (EPA), or a State with an approved program, to issue a National Pollutant Discharge Elimination System permit for the discharge of pollutants other than dredged or fill material. See 33 U.S.C. 1342.

b. The Corps and EPA share responsibility for implementing and enforcing the CWA’s Section 404 permitting provisions. See, *e.g.*, 33 U.S.C. 1344(b) and (c). The two agencies have promulgated regulations governing the Corps’ processing and issuance of Section 404 permits. See 33 C.F.R. Pts. 320-325; 40 C.F.R. Pt. 230. Those regulations afford a number of options to persons who wish to discharge dredged or fill material on property that may be subject to the CWA.

The CWA authorizes the Corps to issue general permits on a state, regional, or nationwide basis for discharges of dredged or fill material that will have only minimal effects. 33 U.S.C. 1344(e)(1); see 72 Fed. Reg. 11,092 (Mar. 12, 2007) (current nationwide general permits). When the Corps receives a Section 404 permit application, it first determines whether the proposed discharge is covered by an existing general permit. 33 C.F.R. 330.1(f). A discharge made in compliance with the conditions imposed by an applicable general permit can lawfully be undertaken without an individual permit. See generally 33 C.F.R. 330.1.

If no general permit covers the proposed discharge, the Corps then determines whether an individual permit should be issued. In considering the permit application, the Corps considers whether the property contains waters or wetlands covered by the CWA, and whether and

on what conditions a permit should be granted. See 33 C.F.R. Pts. 325-326. Subject to the administrative appeal process, see 33 C.F.R. 331.5, 331.12, the Corps' issuance or denial of a permit—and any associated determination of the CWA's application to a particular site—constitutes final agency action that is subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* See, *e.g.*, *Baccarat Fremont Developers, LLC v. United States Army Corps of Eng'rs*, 425 F.3d 1150, 1153 (9th Cir. 2005), cert. denied, 549 U.S. 1206 (2007); 33 C.F.R. Pt. 331.

Without going through the entire permitting process, a potential discharger can also request an informal or formal Corps determination on whether particular waters (including wetlands) are covered by the CWA. See 33 C.F.R. 331.2 (jurisdictional determination); U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 08-02 (2008). In addition, the Corps has created numerous guidance documents designed to assist parties in determining whether the CWA may apply to their land and whether they may need a permit. See, *e.g.*, U.S. Army Corps of Engineers, *Recognizing Wetlands: An Informational Pamphlet (Wetlands)*, [http://www.usace.army.mil/CECW/Documents/cecwo/reg/rw\\_bro.pdf](http://www.usace.army.mil/CECW/Documents/cecwo/reg/rw_bro.pdf); *Pictorial Representations of Jurisdiction*, [http://www.usace.army.mil/CECW/Documents/cecwo/reg/juris\\_images.pdf](http://www.usace.army.mil/CECW/Documents/cecwo/reg/juris_images.pdf). The Corps also encourages people to contact its local offices for assistance in determining whether a permit is required. See *Wetlands*.

c. When pollutants are discharged into covered waters without a permit, the Act and its implementing regulations establish a number of different enforcement mechanisms. See, *e.g.*, 33 U.S.C. 1318, 1319, 1344(n) and (s). In 1989, the Corps and EPA executed a memoran-

dum of agreement that allocates enforcement responsibility between the two agencies.<sup>1</sup> The Corps and EPA coordinate their efforts when taking enforcement actions and rely on the agreement to determine which agency will be the lead enforcement authority in a particular matter.

When (as in this case) EPA is the lead enforcement agency and finds “that any person is in violation of” Section 301 or other enumerated provisions of the CWA, the agency can either “issue an [administrative compliance] order requiring such person to comply with such section or requirement,” or “bring a civil action in accordance with” Section 309(b). 33 U.S.C. 1319(a)(3). Alternatively, after providing an opportunity for an administrative hearing, either EPA or the Corps may assess administrative penalties (subject to smaller dollar limits than those that apply in judicial enforcement proceedings) for certain violations of the Act. 33 U.S.C. 1319(g). A person against whom an administrative penalty has been assessed may obtain judicial review of the order at the conclusion of the agency process. 33 U.S.C. 1319(g)(8).

If the recipient of a Section 309(a)(3) compliance order disobeys the order, EPA may not enforce the order directly. Rather, EPA may initiate a judicial enforcement action for appropriate relief, including a temporary or permanent injunction, “for any violation for which [EPA] is authorized to issue a compliance order” under Section 309(a)(3). 33 U.S.C. 1319(b). In an action brought under Section 309(b), the district court may impose civil penalties for violations of the Act, as well as

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<sup>1</sup> The agreement is available at <http://water.epa.gov/lawsregs/guidance/wetlands/enfoma.cfm>.

for violations of any prior administrative compliance order. 33 U.S.C. 1319(d). The defendant may assert any available ground for concluding that its conduct did not violate the CWA, including that the waters into which pollutants were discharged were not covered by the Act. If the court finds that a violation of the CWA occurred, it may award civil penalties up to a specified maximum (currently \$37,500, see 40 C.F.R. Pt. 19) for each day of the violation, after considering several specified factors. 33 U.S.C. 1319(d). Persons who negligently or knowingly violate the Act are also subject to criminal prosecution in certain circumstances. 33 U.S.C. 1319(c).

2. Petitioners own a .63-acre parcel of undeveloped property in Idaho near Priest Lake. See Pet. App. A2. In April and May 2007, without consulting with the Corps or seeking a permit, petitioners filled in approximately one-half acre of their property with dirt and rock in preparation for building a house. *Ibid.* On November 26, 2007, EPA issued a compliance order to petitioners pursuant to Section 309(a)(3). J.A. 16-31; see Pet. App. A3.

The compliance order stated EPA's finding that petitioners had violated 33 U.S.C. 1311(a) by discharging fill material into regulated wetlands without a permit. J.A. 19-20; see Pet. App. A3. The order directed petitioners to remove the fill and restore the wetlands by April 15, 2008. J.A. 21.<sup>2</sup> In addition, however, the order "encour-

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<sup>2</sup> Consistent with EPA's general regulatory approach, the compliance order in this case stated that "[e]ach day the fill material remains in place without the required permit constitutes an additional day of violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a)." J.A. 20-21. That view underlay EPA's conclusion that removal of the fill, and restoration of the site to its prior condition, were necessary to bring an end to the violation and achieve prospective compliance with the Act. See

age[d]” petitioners to contact EPA and “address any allegations herein which [petitioners] believe to be inaccurate or requirements which may not be attainable and the reasons why.” J.A. 21-23; see Pet. App. A3. The compliance order stated that failure to comply with the order could expose petitioners to civil penalties or to a suit for injunctive relief. J.A. 23-24. EPA subsequently revised the order to extend the compliance schedule and eliminate certain requirements related to restoration of the wetlands. Pet. App. F1-F3, G1-G7, H1-H4, I1-I4.

Between November 26, 2007, and April 1, 2008, petitioners never contacted EPA. On April 1, 2008, they requested a formal administrative hearing, asserting that the wetlands at issue were not regulated by the CWA. Pet. App. A3; C.A. R.E. 28. Neither the Act nor EPA’s implementing regulations establish a formal hearing procedure for administrative compliance orders. Pet. App. A3. On April 4, based on the agency’s assessment of ground and weather conditions at the site, EPA revised the prior order to extend the compliance schedule, directing petitioners to remove the unauthorized fill material by May 15, 2008. *Id.* at I1-I2. On April 11, EPA responded to petitioners’ hearing request by letter, reiterating EPA’s view that petitioners had violated the CWA, but stating that the agency was still in the process of “reviewing your letter and evaluating” enforcement options, and that a more detailed response would follow.

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*ibid.* Petitioners’ complaint did not challenge that aspect of the compliance order. Thus, while petitioners alleged that the site at which they discharged fill was not subject to the CWA at all (see J.A. 13), they did not allege that the compliance measures specified in the order would be inappropriate if the Act applied.

C.A. R.E. 25. EPA also invited petitioners to contact the agency with questions or concerns.<sup>3</sup> See *ibid*.

3. On April 28, 2008, before EPA had supplemented its response to petitioners' request, petitioners filed suit in federal district court. J.A. 5-15. Petitioners alleged, *inter alia*, that the compliance order was arbitrary and capricious under the APA, 5 U.S.C. 706(2)(A), because the property on which they had discharged fill was "not subject to the CWA" under this Court's decision in *Rapanos, supra*. J.A. 13. EPA moved to dismiss the complaint for lack of subject-matter jurisdiction. Pet. App. A3. The district court granted EPA's motion and dismissed the suit. The court held that the CWA's text and structure indicated that Congress intended to preclude pre-enforcement judicial review of CWA compliance orders by channeling review of such orders into enforcement actions initiated by EPA under Section 309(b). *Id.* at C1-C7.

4. The court of appeals affirmed. Pet. App. A1-A15. The court explained that "[e]very circuit that has confronted this issue has held that the CWA impliedly precludes judicial review of compliance orders until the EPA brings an enforcement action in federal district court." *Id.* at A6 (citing cases). The court of appeals concluded that Section 309's structure, purposes, and history indicated that Congress intended to foreclose

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<sup>3</sup> The government is currently considering whether to file a civil enforcement action against petitioners. Absent a tolling agreement with petitioners, if the United States does not bring an enforcement action by April or May 2012—five years after the alleged discharges—the government may face the contention that, under Ninth Circuit precedent, its claims are barred by the general five-year statute of limitations for enforcement of civil fines, 28 U.S.C. 2462. See *FEC v. Williams*, 104 F.3d 237, 240 (1996), cert. denied, 522 U.S. 1015 (1997).

pre-enforcement review of compliance orders. *Id.* at A6-A9. The court explained that immediate judicial review of such orders would vitiate EPA's statutorily-conferred discretion either to issue a compliance order or to file a Section 309(b) enforcement action. *Id.* at A7.

The court of appeals further held that the Act's preclusion of pre-enforcement judicial review of compliance orders does not violate petitioners' due process rights. Pet. App. A10-A15. The court explained, *inter alia*, that "a [district] court cannot assess penalties for violations of a compliance order under § 1319(d) unless the EPA \* \* \* proves, by a preponderance of the evidence, that the defendants actually violated the CWA in the manner alleged." *Id.* at A12.

The court of appeals also rejected petitioners' argument that, because compliance orders expose recipients to potential civil penalties, such orders effectively preclude recipients from seeking judicial review. Pet. App. A13-A15. Relying on *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994), the court explained that statutory preclusion of pre-enforcement judicial review violates due process only when compliance is so onerous, and the penalties for noncompliance so coercive, as to have the practical effect of foreclosing access to the courts. Pet. App. A13. The court observed that the CWA permitting process enables regulated entities to obtain an agency determination as to the legality of proposed action—and judicial review of that determination—without incurring potential monetary liability. *Id.* at A13-A14. The court further explained that the amount of any civil penalty ultimately imposed under Section 309(d) would be determined by the court, based on factors specified in the CWA, "only after the [peti-

tioners] have had a full and fair opportunity to present their case in a judicial forum.” *Id.* at A14-A15.

#### SUMMARY OF ARGUMENT

Petitioners deposited fill materials on their Priest Lake property without first seeking a Section 404 permit, a jurisdictional determination, or informal guidance from the Corps or EPA. EPA subsequently issued a compliance order to notify petitioners of its view that they were in violation of the CWA. The compliance order further advised petitioners that, unless they took specified measures to achieve prospective compliance with the Act, the agency might seek penalties and/or injunctive relief through a judicial enforcement action. Because the order imposed no new legal obligations beyond those to which petitioners were already subject under the CWA, it is not subject to immediate pre-enforcement review under the APA. And because the CWA provides ample procedural safeguards and alternative avenues of obtaining judicial review, petitioners have no constitutional right to bring a pre-enforcement challenge to the compliance order itself.

I. A Section 309(a)(3) compliance order (a) sets forth EPA’s conclusion that the recipient is in violation of the CWA, and (b) identifies the measures that EPA believes are necessary to achieve prospective compliance with the Act. By statute, a compliance order cannot impose any legal obligations on the recipient beyond those imposed by the CWA. Such orders thus fall within the broad range of communications that agencies use to inform regulated parties of governing legal requirements and existing violations, to encourage voluntary compliance or remedial measures, and to initiate consultation between the agency and the regulated person. Courts

have widely recognized that, when agencies issue such communications, a recipient who disagrees with the government's legal or factual assessments generally has no right to immediate judicial resolution of the disagreement. A rule that broadly authorized immediate judicial review of such agency communications would ultimately disserve the interests of both the government and regulated parties, by discouraging interactive processes that can obviate the need for judicial action.

II. The compliance order at issue here is not reviewable under the APA.

A. The compliance order is not "final agency action." See 5 U.S.C. 704. A Section 309(a)(3) order marks only a step in EPA's decision-making process, not its consummation. The order invited petitioners to contact EPA if they believed that the allegations in the order were inaccurate or that the specified compliance measures were infeasible. Even if petitioners failed to implement the specified measures, moreover, they could be subjected to monetary sanctions for violating the order only if (a) EPA commenced a Section 309(b) enforcement action against petitioners, and (b) the court in that suit determined that petitioners had violated the CWA as well as the order. The order therefore did not have the kind of concrete legal consequences that generally are necessary to constitute "final agency action." See *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997); *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 239-243 (1980) (*Standard Oil*).

B. Even if the compliance order were "final agency action" within the meaning of the APA, petitioners could not obtain immediate judicial review because Congress's intent to preclude pre-enforcement review of compliance orders is "fairly discernible in the statutory scheme."

*Block v. Community Nutrition Inst.*, 467 U.S. 340, 351 (1984) (citation omitted); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994). When EPA determines that a discharger is in violation of the CWA, the Act authorizes the agency either to commence an enforcement action immediately or instead to seek to induce compliance by issuing a compliance order. EPA's discretion to determine when and whether suit should be filed, and its ability to use the compliance-order mechanism for its intended purpose, would be substantially undermined if compliance-order recipients could immediately hale the agency into court.

III. Petitioners have no constitutional right to immediate judicial review of EPA's compliance order. Petitioners cannot be subjected to civil penalties for violating the order unless and until a court determines that a CWA violation has occurred and considers the statutory factors bearing on the appropriate penalty amount. 33 U.S.C. 1319(d). Although the risk of civil-penalty liability might deter some persons from engaging in discharges that would not actually violate the CWA, that potential deterrent effect would exist even if EPA had not issued a compliance order because the Act itself imposes liability for unlawful discharges. Petitioners have no generalized constitutional entitlement to an advisory opinion assessing the legality of conduct in which they wish to engage. Petitioners, moreover, face a choice between complying with the order and defending against a possible enforcement action only because they discharged fill on their property without first seeking a permit or consulting with EPA or the Corps. If petitioners had sought a permit, they could have obtained a final agency determination on the question of CWA coverage,

and immediate judicial review of that determination, without exposing themselves to potential penalties.

#### ARGUMENT

**I. A SECTION 309(a)(3) COMPLIANCE ORDER IS A MEANS OF PROVIDING REGULATORY GUIDANCE AND ENCOURAGING VOLUNTARY COMPLIANCE, RATHER THAN A SELF-EXECUTING ENFORCEMENT MEASURE, AND COURTS HAVE RECOGNIZED THAT SUCH AGENCY COMMUNICATIONS ORDINARILY SHOULD NOT BE SUBJECT TO PRE-ENFORCEMENT JUDICIAL REVIEW**

A Section 309(a)(3) compliance order sets forth EPA's conclusion that a person is in violation of the CWA, and it identifies the measures that EPA believes are necessary to bring the recipient into compliance with the Act.<sup>4</sup> Such orders may obviate the need for judicial intervention, either by inducing voluntary implementation of the measures specified therein, or by triggering a process of consultation between the agency and the alleged violator that produces a mutually acceptable alternative resolution. Such orders are not self-executing, however, and they impose no binding requirements beyond those that already flow from the CWA itself. Section 309(a)(3) compliance orders therefore fall

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<sup>4</sup> Based on EPA's longstanding view that a violation of Section 404 of the CWA continues for as long as unlawfully discharged fill remains in covered waters, the agency concluded that removal of the fill and restoration of the site were necessary for petitioners to achieve prospective compliance with the Act. See note 2, *supra*. Implementation of the measures specified in the compliance order would not retroactively authorize the prior discharges or insulate petitioners from potential legal liability for those acts. Implementation of those measures would, however, influence EPA's discretionary decision whether to seek penalties for the earlier discharges.

within the broad range of communications that agencies use to inform regulated parties of governing legal requirements and warn them that failure to comply may result in an enforcement action.

A. 1. When EPA determines that a person is in violation of the CWA, Section 309(a)(3) provides the agency with two enforcement options. 33 U.S.C. 1319(a)(3). The agency may file suit under Section 309(b) to seek a judicial determination that the recipient has violated the CWA, an injunction requiring remediation, and appropriate civil penalties for each day of the violation. 33 U.S.C. 1319(a)(3), (b) and (d). Alternatively, EPA may “issue an order requiring such person to comply with” the Act. 33 U.S.C. 1319(a)(3).

A compliance order under Section 309(a)(3) typically states EPA’s determination that the recipient is in violation of the CWA, and it identifies the measures the agency believes are necessary to achieve compliance going forward. If the recipient fails to implement the prescribed measures, however, EPA cannot take coercive steps to compel compliance with the order or assess monetary penalties for its violation. Rather, if EPA regards the recipient’s response as unsatisfactory, its recourse is to file a civil action under Section 309(b).

In a Section 309(b) enforcement action—whether or not the suit is preceded by a compliance order—EPA must establish that the defendant has violated the CWA.<sup>5</sup> See, e.g., *United States v. Deaton*, 332 F.3d 698,

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<sup>5</sup> In their petition for a writ of certiorari, petitioners contended that penalties can be assessed for violations of a CWA compliance order even if the relevant conduct does not violate the CWA. Pet. 16. Petitioners have correctly abandoned that argument in their brief on the merits. Section 309(b) of the CWA provides that EPA may “commence a civil action for appropriate relief \* \* \* for any violation for which

701-702 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004). If the defendant in such a suit contends that the waters into which it discharged pollutants were not covered by the CWA, the court resolves the dispute between the parties on that issue without giving deference to any EPA factual determinations reflected in a prior compliance order. See Pet. App. A12; see also, *e.g.*, *United States v. Brace*, 41 F.3d 117, 124-129 (3d Cir. 1994) (considering compliance-order recipient’s challenges to the agency’s authority to regulate in the context of an enforcement action), cert. denied, 515 U.S. 1158 (1995); 33 U.S.C. 1319(b). If the court concludes that a violation has occurred, it then determines whether the requested injunctive relief is appropriate. See 33 U.S.C. 1319(b). If the agency seeks the civil penalties authorized by Section 309(d), the imposition of penalties (including the determination of the appropriate amount) is likewise entrusted to the court, based on its consideration of various factors set forth in the statute. 33 U.S.C. 1319(d). Thus, although compliance orders often identify the sanctions to which the recipient may be subject if it fails to comply with the order (see, *e.g.*, Pet. App. G7), those sanctions cannot actually be imposed unless EPA persuades a court that the defendant has violated the CWA and that the requested remedies are appropriate.

2. Petitioners are therefore incorrect in analogizing a compliance order to an “injunction,” Br. 39, that “for-

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[the EPA] *is authorized* to issue a compliance order.” Pet. App. A12 (emphasis added; brackets in original); 33 U.S.C. 1319(b). That language demonstrates that “EPA must bring an action alleging a violation of the CWA itself,” and “a court cannot assess penalties for violations of a compliance order under [Section] 1319(d) unless the EPA also proves \* \* \* that the defendants actually violated the CWA.” Pet. App. A12.

bids the otherwise lawful use of the property,” Br. 33 n.13. A crucial attribute of an injunction is that non-compliance with its requirements while it remains in effect may be punishable as contempt, even if the injunction is ultimately set aside on appeal. See, e.g., *Walker v. City of Birmingham*, 388 U.S. 307, 315-320 (1967); *United States v. United Mine Workers of Am.*, 330 U.S. 258, 293-294 (1947). In that sense an injunction creates an independent legal barrier to the conduct it proscribes, over and above the pre-existing law(s) that the injunction is intended to enforce. By contrast, if the recipient of a compliance order fails to obey its directives, but the court in a subsequent EPA enforcement action determines that the recipient’s conduct did not violate the CWA, the recipient cannot be punished for violating the order itself.<sup>6</sup>

Indeed, petitioners’ prior course of conduct belies their current contention that an EPA compliance order has the legal effect of an injunction. Although petitioners briefly sought a TRO in the district court, they withdrew that request and did not seek a stay of the compliance order during the district-court proceedings. Petitioners did seek a stay of the order pending appeal in the Ninth Circuit, but the court of appeals denied that

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<sup>6</sup> Petitioners are also wrong in asserting (Br. 41) that a compliance order “can \* \* \* initiate criminal proceedings.” Criminal penalties may not be imposed for violating a compliance order, but rather can be imposed only for negligently or knowingly violating certain enumerated provisions of the CWA, for violating a permit, or for introducing certain substances into a sewer system. 33 U.S.C. 1319(c). With respect to a violation of the CWA that continues after a compliance order is issued, the defendant’s receipt of (and non-compliance with) the order might be offered as evidence of the scienter required for criminal liability. See *ibid.* But many types of formal or informal agency warnings concerning ongoing violations could be used to the same effect.

request. Petitioners nevertheless do not assert, and the record does not suggest (and the government has no reason to believe), that they have removed the fill from their land or restored the site as the compliance order specifies. To be sure, petitioners have filed suit to contest the compliance order's validity. But if the compliance order actually had the legal effect of an injunction, the pendency of that challenge would not obviate petitioners' obligation to comply with the order unless and until it was stayed or set aside.

3. Rather than imposing *additional* obligations on regulated parties, administrative compliance orders issued pursuant to Section 309(a)(3) set forth EPA's views as to the steps particular persons must take to achieve prospective compliance with the CWA itself. By notifying regulated parties that EPA believes they are in violation of the Act, such orders may encourage recipients to implement corrective measures. In addition, Section 309(a)(3) compliance orders often invite the recipient to inform the agency if the regulated party disputes the finding of a violation or regards the specified corrective measures as infeasible. The order may thus trigger a process of consultation through which the recipient persuades EPA to accept compliance measures other than those specified in the original order. Either by persuading the recipient to adhere to its terms, or by initiating a consultative process that culminates in a different mutually acceptable resolution, a compliance order may obviate the need for a judicial enforcement action. And even in cases where the government ultimately seeks penalties for past violations, compliance orders may help regulated parties to limit their potential financial exposure, by identifying the measures that EPA views as

necessary to bring the violation (and thus the accrual of possible per-day penalties) to an end.

The compliance order at issue in this case was representative of wetlands-related orders. The order set forth EPA's "findings and conclusions" that petitioners had violated the CWA by placing fill in "jurisdictional" or "covered" wetlands without a permit. Pet. App. G1-G4. The order then stated that, in order to achieve compliance with the Act's requirements, petitioners should "remove all unauthorized fill material placed within [the] wetlands" and restore the site to its original condition. *Id.* at G4-G5. In a section entitled "SANCTIONS," the order provided "[n]otice" that "violation of, or failure to comply with, the foregoing Order may subject" petitioners to statutory penalties under Section 309(d) or a civil action under Section 309(b). *Id.* at G7.<sup>7</sup> The order further stated that petitioners were "encouraged to discuss any allegations herein which [petitioners] believe to be inaccurate or requirements which may not be attainable and the reasons why." *Id.* at G5-G6. The order stated that "[a]lternative methods to attain the objectives of this Order may be proposed" and that, "[i]f acceptable to EPA, such proposals may be incorporated into amendments to this Order." *Id.* at G6.

B. Administrative agencies routinely employ a wide range of formal and informal measures to inform regulated parties of the agency's view that they may be vio-

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<sup>7</sup> The compliance order in this case also referred to the possibility of an administrative penalty proceeding under Section 309(g) of the CWA, 33 U.S.C. 1319(g). See Pet. App. G7. Although Section 309(g) authorizes EPA to assess administrative penalties (subject to judicial review, see 33 U.S.C. 1319(g)(8)) for violations of the CWA itself, it does not authorize administrative penalties for violation of a Section 309(a)(3) compliance order. See 33 U.S.C. 1319(g)(1)(A).

lating the law. Although the reviewability of particular agency conduct depends on the circumstances and the statutory scheme at issue, such pre-enforcement opinions or warnings generally are not subject to immediate judicial review. In so holding, courts have applied various administrative-law doctrines, while agreeing on the essential principles: agencies frequently engage in notification, negotiation, and similar measures to induce voluntary compliance; such practices are beneficial to both agencies and regulated parties; and allowing immediate judicial review of these actions would ultimately be detrimental to both the government and the regulated community.

1. Many agencies issue letters or similar communications to inform a regulated party that the agency has found a violation, or is investigating a violation, and that enforcement measures may follow if the potential violation is not rectified. For example, the Food and Drug Administration (FDA) issues Warning Letters identifying violations “of regulatory significance” in order to “give individuals and firms an opportunity to take voluntary and prompt corrective action before [the FDA] initiates an enforcement action.” FDA, *Regulatory Procedures Manual* § 4-1, <http://www.fda.gov/ICECI/ComplianceManuals/RegulatoryProceduresManual/ucm176870.htm#SUB4-1-10>. These letters explain the factual allegations supporting the violation, identify the corrective measures that must be taken by a specified date, and warn that “failure to achieve prompt correction may result in enforcement action without further notice.” *Id.* § 4-1-10. Courts have held that those letters are not reviewable. See, e.g., *Dietary Supplement Coal., Inc. v. Sullivan*, 978 F.2d 560, 563 (9th Cir. 1992) (not final agency action), cert. denied, 508 U.S. 906 (1993).

Other agencies utilize similar warning letters to notify companies of alleged violations and potential penalties, stating that failure to remedy the violations may result in enforcement action.<sup>8</sup> See, e.g., *Air Cal. v. United States Dep't of Transp.*, 654 F.2d 616, 618-622 (9th Cir. 1981) (Federal Aviation Administration letter stating that failure to remedy violation “will warrant our pursuance of contractual, injunctive, and civil penalty remedies” was not final agency action); *Air Brake Sys. Inc. v. Mineta*, 357 F.3d 632, 638-646 (6th Cir. 2004) (National Highway Traffic Safety Administration opinion letters informing brake manufacturer that its products did not comply with agency standard were not final agency action).

An agency also may inform a regulated entity that the government may initiate an investigation or adjudication unless the party takes specified corrective action. The Consumer Products Safety Commission (CPSC), for instance, informs parties that it is considering making a preliminary determination that a product is hazardous, thereby triggering administrative proceedings, unless the party voluntarily corrects the issue. See 16 C.F.R. 1115.20; *Reliable Automatic Sprinkler Co. v. CPSC*, 324 F.3d 726, 731-732 (D.C. Cir. 2003) (*Reliable*) (not final agency action). The Equal Employment Opportunity

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<sup>8</sup> Other examples abound. The Department of Agriculture issues Official Warning Letters notifying parties of alleged Animal Welfare Act violations and warning that “any further infractions may result in more serious consequences such as a civil penalty or criminal prosecution.” See [http://www.aphis.usda.gov/animal\\_welfare/enforcement\\_types.shtml](http://www.aphis.usda.gov/animal_welfare/enforcement_types.shtml). The Department of Energy uses “enforcement letters” that notify contractors of violations and necessary remedial measures. See U.S. Dep’t of Energy, Office of Enforcement, *Enforcement Process Overview* 23-24 (June 2009).

Commission (EEOC) utilizes similar communications to employers known as Letters of Determination. Such Letters state that the EEOC has reason to believe that the employer may have engaged in discrimination, and they invite the employer to take part in dispute resolution, subject to a potential enforcement suit if the matter is not resolved informally. See *AT&T v. EEOC*, 270 F.3d 973, 974-975 (D.C. Cir. 2001) (not final agency action); see also <http://www.eeoc.gov/employers/process.cfm>. The Securities and Exchange Commission issues “Wells notices,” which inform a party that it is the target of an investigation and provide an opportunity to rebut the charges. See Enforcement Division, SEC, *Enforcement Manual* § 2.4 (2011).

More broadly, agencies issue innumerable letters and opinions setting forth their interpretation of the legal frameworks they administer, often in response to inquiries from regulated parties. See, e.g., *City of San Diego v. Whitman*, 242 F.3d 1097, 1099-1100 (9th Cir. 2001) (letter from EPA Administrator responding to city’s inquiry regarding EPA legal interpretation concerning future permit application was not “final agency action”); *Wilson v. Pena*, 79 F.3d 154, 161 (D.C. Cir. 1996) (EEOC letter explaining how it would calculate back pay was not final); *USAA Fed. Sav. Bank v. McLaughlin*, 849 F.2d 1505, 1508-1510 (D.C. Cir. 1988) (letter stating extent of regulatory jurisdiction, in response to inquiry, was not reviewable); *American Fed’n of Gov’t Employees, AFL-CIO v. O’Connor*, 747 F.2d 748, 754-757 (D.C. Cir. 1984) (R.B. Ginsburg, J.) (Merit Systems Protection Board opinion letter was unripe for review), cert. denied, 474 U.S. 909 (1985).

2. The communications described above serve important administrative purposes, and their effectiveness

(and the agencies' willingness to employ them) would be substantially reduced if they were subject to immediate judicial review at the behest of a recipient or other dissatisfied private party. By interacting with regulated entities outside of more formal administrative-adjudication or judicial-enforcement settings, agencies can conserve resources and prioritize their enforcement efforts to respond to the most severe violations. See *AT&T*, 270 F.3d at 976. These interactions also provide benefits similar to those associated with administrative-exhaustion requirements, by giving agencies an opportunity to correct their own mistakes and to refine their views without the need for judicial intervention.

From the regulated party's perspective, such communications give recipients an opportunity to conform their conduct to the agency's guidance before being subjected to an enforcement action. To be sure, a regulated party that disagrees with the agency's view of the relevant law or facts may be uncertain whether to continue its ongoing conduct, risking eventual enforcement action and potential penalties, or to acquiesce in the agency's interpretation, thereby forgoing activities that a court might ultimately have determined to be lawful. See *Reliable*, 324 F.3d at 732-733 ("These consequences attach to any parties who are the subjects of Government investigations and believe that the relevant law does not apply to them."). In such situations, the regulated party might wish to seek immediate judicial review in order to clarify the legal status of its preferred course of conduct. Particularly when an agency simply states its understanding of existing legal requirements, however, regulated parties are not generally entitled to obtain pre-enforcement judicial review simply to gain certainty about the validity of an interpretation that the agency

might or might not seek to enforce in the future. Cf. *National Park Hospitality Ass'n v. Department of the Interior*, 538 U.S. 803, 811 (2003) (rejecting argument that “mere uncertainty as to the validity of a legal rule constitutes a hardship for purposes of the ripeness analysis” because “courts would soon be overwhelmed with requests for what essentially would be advisory opinions”).

The courts’ general reluctance to review agency communications of that character serves the long-term interests of regulated parties as well as those of the government. That reluctance rests in part on the courts’ recognition that, although pre-enforcement judicial review might sometimes assist private parties by clarifying their rights and obligations at an earlier point, “[t]o permit suits for declaratory judgments upon mere informal, advisory, administrative opinions might well discourage the practice of giving such opinions, with a net loss of far greater proportions to the average citizen than any possible gain which could accrue.” *National Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 699 (D.C. Cir. 1971) (citation omitted). To be sure, EPA compliance orders differ in meaningful respects from some less formal agency communications, and the Court’s analysis of the questions presented here should take account of those distinctions. See pp. 29-32, *infra*. The Court’s analysis should also be guided, however, by the background principles described above, under which agency efforts to achieve voluntary compliance by warning alleged violators of their potential liability are not ordinarily viewed as proper objects of judicial scrutiny.

## II. PETITIONERS MAY NOT OBTAIN PRE-ENFORCEMENT JUDICIAL REVIEW OF THE EPA COMPLIANCE ORDER PURSUANT TO THE ADMINISTRATIVE PROCEDURE ACT

### A. The Compliance Order Is Not “Final Agency Action”

The compliance order issued to petitioners is not reviewable under the APA because it is not “final agency action.” The APA authorizes judicial review of “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. 704. Two conditions must be met for agency action to be “final.” *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997). “First, the action must mark the consummation of the agency’s decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.” *Ibid.* (internal citations and quotation marks omitted). In determining whether a challenged agency action is final, this Court has “interpreted the ‘finality’ element in a pragmatic way.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), abrogated on other grounds, 430 U.S. 99 (1977). Neither attribute of finality is present here.

1. EPA’s issuance of the compliance order in this case did not represent the culmination of the agency’s decision-making process. By its terms, the order’s findings and conclusions with respect to the existence of a CWA violation were subject to alteration and revision through consultation with petitioners. Thus, the order invited petitioners to “engage in informal discussion of the terms and requirements of this Order” and to inform EPA of “any allegations herein which [petitioners] believe to be inaccurate.” Pet. App. G5-G6. Similarly, al-

though the order described in mandatory terms the corrective actions that EPA believed were necessary to achieve prospective compliance with the CWA, it also invited petitioners to propose alternatives that could be incorporated as amendments to the order. *Id.* at G6. Because EPA indicated that the allegations and conclusions underlying the order were subject to revision based on any additional information that petitioners might provide, and that the prescribed corrective measures were subject to negotiation, the compliance order cannot properly be viewed as representing the agency's final conclusions. See *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 241 (1980) (where an administrative complaint initiated adjudicative proceedings, the complaint represented only a "threshold determination that further inquiry is warranted," whose allegations were not "definitive" because they could be challenged in the proceeding); see also, *e.g.*, *Phillips Petroleum Co. v. Lujan*, 963 F.2d 1380, 1387-1388 (10th Cir. 1992) (agency's request for information that provided party with opportunity to negotiate compliance was not final agency action, even though it alluded to the possibility of a later enforcement suit if negotiations were unsuccessful).

Petitioners contend (Br. 54-55) that the order represented the agency's final decision at least with respect to the CWA's applicability to the property at issue in this case. The order's invitation to contest its allegations, however, applies to all of the order's terms, including those relating to CWA coverage. See Pet. App. G5-G6; *id.* at G6 (stating that petitioners were "encouraged to discuss any allegations herein which [petitioners] believe to be inaccurate"). Although the compliance order reflected EPA's determination "for now that it has jurisdiction to regulate," *Reliable*, 324 F.3d at 731-732, the

agency also made clear that it was open to persuasion on all legal or factual issues implicated by the order.<sup>9</sup>

A variety of different regulatory outcomes would have been consistent with the terms of the compliance order. Responsive submissions by petitioners and further EPA investigation might have led the agency to conclude that the order was erroneously issued because petitioners' property is not covered by the CWA, or because the agency was mistaken as to the nature of petitioners' discharges. Negotiations between the parties could also have induced EPA to amend the order to incorporate alternative compliance measures proposed by petitioners. And even if petitioners had simply ignored EPA's invitation to propose alternative solutions, the government's decision whether to commence a judicial enforcement action would have entailed consideration of such factors as the severity of the violation, the need to seek an injunction compelling remedial measures, the appropriateness of seeking monetary penalties, and the proper allocation of the agency's resources. The compliance order itself did not commit the agency to any particular view concerning those discretionary considerations.<sup>10</sup>

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<sup>9</sup> EPA employs a variety of formal and informal mechanisms to communicate with regulated parties that the agency believes are or may be in violation of the CWA. Short of filing a lawsuit under Section 309(b), or seeking the assessment of administrative penalties pursuant to Section 309(g), issuance of a Section 309(a)(3) compliance order is the step that conveys the greatest degree of agency confidence that a CWA violation has in fact occurred. As the order in this case makes clear, however, Section 309(a)(3) compliance orders remain tentative in an important respect, as they allow recipients an opportunity to persuade the agency to rethink its views before judicial proceedings are initiated.

<sup>10</sup> Although the relative formality or informality of a particular agency communication is surely relevant to the question whether "final

By contrast, the filing of a Section 309(b) action seeking judicial enforcement of the CWA would have represented the consummation of EPA's decision-making process, effectively transferring responsibility for resolution of any disputed issues from the agency to the courts. The complaint in such a suit would have reflected EPA's considered conclusions, after any consultation with petitioners and further investigation, about the facts at issue, the CWA's application to those facts, the prospective relief that would best serve the Act's purposes, and the appropriateness of penalties. The filing of a complaint would also at least implicitly have reflected a determination that the pursuit of judicial relief in this case represented an appropriate expenditure of governmental resources. See, e.g., *AT&T*, 270 F.3d at 975 (“[T]here clearly would be final agency action if the Commission filed a lawsuit against AT&T” because “[a]t that point the agency would have decided not only how it views AT&T's legal obligations, but also how it plans to act upon that view.”). The compliance order here thus marks only a step in the process that might culminate in judicial enforcement, with substantial further deliberation necessary before the agency reaches the endpoint of its deliberations. See *Standard Oil*, 449 U.S. at 241-242.

2. The compliance order likewise is not a decision that determines legal rights or obligations or from which legal consequences flow.

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agency action” exists, it is not dispositive. The administrative complaint at issue in *Standard Oil* was a formal agency filing that triggered an adjudication before an administrative law judge. See 449 U.S. at 234-235. The Court nevertheless held that the complaint was not “final agency action” because additional steps were necessary before the agency's definitive position could be established. See *id.* at 241-242.

a. The order does not purport to impose substantive obligations beyond those imposed by the CWA, but instead “‘expresse[s] [the agency’s] view of what the law requires.’” *Fairbanks N. Star Borough v. United States Army Corps of Eng’rs*, 543 F.3d 586, 594 (9th Cir. 2008) (*Fairbanks*) (quoting *AT&T*, 270 F.3d at 975), cert. denied, 129 S. Ct. 2825 (2009). That limitation on the scope of permissible compliance orders follows directly from the text of Section 309(a)(3). That provision applies when EPA finds that a person “is in violation of” specified CWA provisions or existing permit requirements, and it authorizes EPA to “issue an order requiring such person to comply with” the relevant legal norm. 33 U.S.C. 1319(a)(3). Section 309(a)(3) does not authorize issuance of an administrative order if no violation has occurred, and it does not vest EPA with power to impose new obligations going beyond pre-existing law.

Before and after the order in this case was issued, petitioners therefore faced essentially the same legal regime and substantially the same risks. Petitioners’ property was potentially subject to the CWA’s restrictions; petitioners had already acted on their belief that the statute did not apply by depositing fill into the wetlands without first obtaining a permit; and petitioners were (or should have been) aware that they could be subject to an enforcement action under Section 309(b) if EPA disagreed with their view of the law or facts. Moreover, because the court in an enforcement action would give no deference to any factual determinations reflected in the compliance order, issuance of the order did not increase the likelihood that the government would prevail if an enforcement suit were filed. See Pet. App. A12.

Petitioners' primary objection to the compliance order is that it presented them with a Hobson's choice between forgoing development activities that they believed to be lawful, and potentially incurring substantial civil penalties if they proceeded with their development and a court ultimately found a violation of the CWA. But since the issuance of a compliance order is not a legal prerequisite to EPA's initiation of an enforcement suit, petitioners would have faced the same basic dilemma even if EPA had given no indication that it regarded their conduct as unlawful. To be sure, by informing recipients that EPA has focused on their activities and views them as illegal, compliance orders may affect recipients' assessments of the relative costs and benefits of alternative courses of action. In itself, however, that incentive does not create the sort of legal effect on a party's rights that can render agency action "final." See *Reliable*, 324 F.3d at 732-733; *National Ass'n of Home Builders v. Norton*, 415 F.3d 8, 13-16 (D.C. Cir. 2005) (incentive to comply voluntarily with agency's guidance is insufficient to establish legal consequences under *Bennett* when the underlying statutory violation would still have to be established in an enforcement action).

b. In two respects, compliance orders have potential consequences that go beyond simply informing recipients of EPA's views as to their existing obligations. Neither of those potential consequences, however, alters petitioners' legal rights in a manner that is sufficiently concrete or substantial to render the order "final agency action."

*First*, EPA's issuance of a compliance order could increase petitioners' civil-penalty exposure if EPA ultimately files an enforcement suit and petitioners are held liable. A person who violates the CWA may be subject

to civil penalties up to a specified amount for each day of the violation, whether or not a compliance order was issued. 33 U.S.C. 1319(d). When a compliance order has been issued, the CWA also authorizes the imposition of monetary penalties for violating the compliance order itself. See *ibid.*

As explained above, Section 309(a)(3) compliance orders are valid only to the extent that they accurately reflect the pre-existing requirements of the CWA. Thus, if a defendant were held to have violated a compliance order but not to have violated the Act, civil penalties would be unavailable, since the order would be invalid to the extent it proscribed otherwise-lawful conduct. If a court finds that particular conduct violated both the CWA and a valid compliance order, however, it can impose separate penalties for the two violations, and it could in theory impose a civil penalty that exceeded the statutory maximum for the statutory violation alone.

The amount of civil penalties to be imposed in a particular case, however, remains subject to the court's discretion. Because courts in dredge-or-fill cases rarely impose penalties in an amount that approaches the statutory maximum for a CWA violation, see, e.g., *United States v. Scruggs*, No. G-06-776, 2009 WL 500608, at \*3-\*6 (S.D. Tex. Feb. 26, 2009), the possibility that a compliance order could ultimately result in penalties that exceed that maximum is speculative at best. That remote possibility—which is contingent on, *inter alia*, EPA's commencement of an enforcement action and a court's resolution of the suit in EPA's favor—provides no sound basis for distinguishing, for “final agency action” purposes, between Section 309(a)(3) compliance orders and the broad range of agency advisory actions that have consistently been held to be unreviewable.

See pp. 18-23, *supra*. To be sure, even in cases where the total civil penalty does not exceed the statutory maximum for the CWA violation itself, the imposition of separate penalties for a CWA violation and a violation of the compliance order will increase the defendant's total financial exposure. But even if EPA used a less formal communication to inform the recipient that the agency viewed its conduct as unlawful, a defendant who disregarded that warning and was ultimately found liable by a court could face greater penalties (within the statutory maximum) as a result. See 33 U.S.C. 1319(d) (court may consider, *inter alia*, "any good-faith efforts to comply with the applicable requirements" and "such other matters as justice may require"); cf. note 6, *supra*.

*Second*, EPA's issuance of a compliance order may complicate—but does not foreclose—the recipient's efforts to obtain an after-the-fact permit. Persons who discharge pollutants into covered waters, but who have not received compliance orders, generally may apply for after-the-fact permits from the Corps. If granted, such permits retroactively condone the otherwise-prohibited discharges that have already occurred. See 33 C.F.R. 326.3(e). In order to avoid interfering with EPA's enforcement prerogatives, the Corps' regulations provide that "when [the Corps] is aware of enforcement litigation that has been initiated" by other agencies—including, in the Corps' view, when EPA has issued a compliance order—"no permit application will be accepted \* \* \* unless [the Corps] determines that concurrent processing of an after-the-fact permit application is clearly appropriate." 33 C.F.R. 326.3(e)(1)(iv).

Although the Corps' general practice is not to entertain after-the-fact permit applications when compliance orders remain unresolved, the "clearly appropriate"

standard provides the agency with considerable discretion. Because the limitation on concurrent processing arises out of the agencies' desire for coordinated enforcement, the agencies are free to decide, after inter-agency consultation, see 33 C.F.R. 326.3(g), that the Corps may appropriately consider a particular compliance-order recipient's permit application. Moreover, even when the applicant for a Corps after-the-fact permit has not received an EPA compliance order, the Corps may decline to accept the permit application until the applicant has performed specified remedial measures. 33 C.F.R. 326.3(e)(1). In both contexts, the ultimate grant of the permit depends on whether the Corps concludes, after coordination with EPA where appropriate, that a permit would be consistent with the purposes of the CWA. 33 C.F.R. 326.3(e)(2). Thus, to the extent that an EPA compliance order may hinder the recipient's efforts to obtain an after-the-fact permit for past discharges, the burdens it imposes are not different in kind from those the applicant would otherwise face.

3. Petitioners contend (Br. 55-56) that EPA's compliance order constitutes "final agency action" under *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461 (2004) (*ADEC*). Petitioners are incorrect.

*ADEC* concerned a mining company's compliance with the Clean Air Act (CAA) permitting scheme for construction of new facilities. The company had obtained a state permit allowing construction of a generator with certain emissions controls, which would ordinarily have been sufficient to comply with the CAA. Gov't Br. at 17, *ADEC*, *supra* (No. 02-658). EPA issued an order prohibiting construction, however, which "effectively invalidated" the state permit and enabled EPA

to seek significant penalties for the company's violation of both the CAA and the order itself. 42 U.S.C. 7413(a)(5) and (b)(3); see also 42 U.S.C. 7477. The compliance order was issued after extended interactions among EPA, the mining company, and the state permitting agency, and the order emphasized that EPA would not alter its terms unless circumstances changed. See *Alaska Dep't of Env'tl. Conservation v. EPA*, 244 F.3d 748, 750 (9th Cir. 2001).

Although EPA initially argued that the order was not final, the court of appeals rejected that contention, and the government conceded in this Court that the order was "final agency action" because it "imposed 'new legal obligations on'" the mining company. See *ADEC*, 540 U.S. at 481 & n.10 (quoting Oral Argument Tr. 43-44). The Court agreed. That conclusion flowed both from the fact that the order represented the agency's final position on the construction barring post-order developments, and from the fact that its issuance altered the mining company's legal rights by changing what was arguably full compliance with the CAA—construction pursuant to a state permit—to a violation of the statute, see 42 U.S.C. 7413(b)(3). See *ADEC*, 540 U.S. at 483.

The *ADEC* Court's "final agency action" analysis focused on the terms of a particular compliance order and its role within the relevant statutory scheme; the Court did not announce a categorical rule governing all EPA compliance orders under all federal environmental laws. In contrast to the order at issue in *ADEC*, which was issued after consultations among the interested parties and made clear that EPA would not alter its terms unless circumstances changed, the compliance order in this case "encouraged" petitioners "to discuss any allegations herein which [petitioners] believe to be inaccur-

rate or requirements which may not be attainable.” Pet. App. G6. The order also did not alter petitioners’ obligations under the CWA or render otherwise-lawful actions unlawful. Rather, it simply informed petitioners that EPA believed they were in violation of the CWA, *id.* at G3; ordered petitioners to take specified steps to achieve compliance with the Act, *id.* at G4-G5; and identified the penalties to which petitioners might be subject in a potential enforcement action, *id.* at G7.

**B. The CWA Precludes Pre-enforcement Judicial Review Of Administrative Compliance Orders**

Even if the compliance order at issue here were “final agency action” within the meaning of the APA, petitioners could not seek immediate judicial review of the order because the CWA precludes pre-enforcement review. The APA authorizes judicial review of “final agency action,” 5 U.S.C. 704, except to the extent that other “statutes preclude judicial review,” 5 U.S.C. 701(a)(1). “Whether a statute is intended to preclude initial judicial review is determined from the statute’s language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful review.” *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994) (citation omitted) (*Thunder Basin*); see *Block v. Community Nutrition Inst.*, 467 U.S. 340, 345 (1984); see also *United States v. Fausto*, 484 U.S. 439, 443-444 (1988). Although the Court applies a “strong presumption” that Congress did not intend to *foreclose* judicial review of agency action, that presumption is “not implicate[d]” where, as here, a statutory scheme simply channels or postpones judicial review until the conclusion of the agency’s decision-making process. *Thunder Basin*, 510 U.S. at 207 n.8; see *Shalala v. Illinois Coun-*

*cil on Long Term Care, Inc.*, 529 U.S. 1, 19-20 (2000) (When judicial review is merely postponed, any “presumption must be far weaker than a presumption against preclusion of all review in light of the traditional ripeness doctrine, which often requires initial presentation of a claim to an agency.”).

Congress’s intent to preclude pre-enforcement review of EPA compliance orders is “fairly discernible in the statutory scheme.” *Block*, 467 U.S. at 351 (citation omitted); see *Thunder Basin*, 510 U.S. at 207; see also *Fausto*, 484 U.S. at 452. Section 309(a)(3) authorizes EPA either to file an enforcement action immediately or to issue a compliance order. EPA’s ability to exercise the enforcement discretion conferred by Congress would be substantially undermined if compliance-order recipients could immediately hale the agency into court. Other aspects of the CWA’s structure, history, and purposes reinforce the conclusion that Congress did not intend Section 309(a)(3) compliance orders to be subject to immediate review.

1. Various aspects of the CWA indicate that pre-enforcement judicial review of administrative compliance orders would be inconsistent with Congress’s intent.<sup>11</sup>

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<sup>11</sup> Relying on 5 U.S.C. 559, petitioners contend (Br. 52) that immediate judicial review under the APA can be foreclosed only by express preclusive language in another law. See also APA Watch Amicus Br. 10; Mountain States Legal Found. Amicus Br. 7-13. This Court has consistently applied the *Block* framework, however, and has held that pre-enforcement review is precluded when congressional intent to do so is fairly discernible from the statutory structure, purpose, and legislative history, even in the absence of an express preclusion provision. *E.g.*, *Thunder Basin*, 510 U.S. at 207; *Shaughnessy v. Pedreiro*, 349 U.S. 48, 50-52 (1955). The Court has similarly applied ripeness principles even in the absence of statutory language expressly designating

*First*, when EPA determines that a regulated entity is in violation of the CWA, Section 309(a)(3) authorizes the agency either to proceed directly to court by filing a Section 309(b) civil action, or to issue an administrative compliance order. Which path to pursue is committed to EPA's discretion. See 33 U.S.C. 1319(a)(3) (EPA "shall issue an order \* \* \* or \* \* \* shall bring a civil action"); see also *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (enforcement decisions such as "whether the particular enforcement action \* \* \* best fits the agency's overall policies" is committed to agency's absolute discretion).

A principal advantage of the compliance-order mechanism is that it may obviate the need for judicial intervention by inducing compliance with the CWA, either through implementation of the measures specified in the order, or through an alternative resolution to which EPA agrees after consultation with the recipient. EPA's statutory discretion to choose between the two enforcement mechanisms would be substantially undermined if compliance-order recipients could trigger an immediate judicial proceeding by seeking pre-enforcement review of the order itself. See *Hoffman Group, Inc. v. EPA*, 902 F.2d 567, 569 (7th Cir. 1990) (*Hoffman*) ("Congress gave the EPA two options under" Section 309(a)(3), and "judicial review of a compliance order before any enforcement suit is brought would eliminate this choice."). EPA would then be forced to litigate in court such issues as the applicability of the CWA to particular waters, the accuracy of the order's factual allegations, and the appropriateness of the chosen measures for achieving com-

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particular agency action as unripe for immediate review. See, e.g., *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 732-737 (1998).

pliance, before the agency had determined whether a request for judicial enforcement represented a sound use of governmental resources. Cf., e.g., *Chaney*, 470 U.S. at 831 (agency’s decision whether to undertake enforcement action depends not only on “whether a violation has occurred,” but also on such discretionary factors as “whether agency resources are best spent on this violation or another”); *AT&T*, 270 F.3d at 976 (immediate review of EEOC letter informing company of the possibility of enforcement action would “preempt the Commission’s discretion to allocate its resources as between this issue and this employer, as opposed to other issues and other employers”).

Such a proceeding, moreover, would not necessarily produce a definitive resolution of the contested issues. If CWA compliance orders are reviewable under the APA, they would ordinarily be reviewable under the APA’s deferential “arbitrary [and] capricious” standard. See 5 U.S.C. 706(2)(A). A court’s determination that a compliance order was not arbitrary and capricious—*i.e.*, that EPA *reasonably believed* that the recipient was in violation of the CWA—would not prevent the recipient from arguing, in a subsequent civil enforcement action, that its conduct did not *actually* violate the statute. Alternatively, courts might seek to pretermitt such duplicative proceedings, either by requiring the government to prove an actual CWA violation in order to sustain the validity of the compliance order against the recipient’s APA challenge, cf. *ADEC*, 540 U.S. at 493-494, or by treating the government’s potential claims for civil penalties and injunctive relief as compulsory counterclaims (see Federal Rule of Civil Procedure 13) that will be forfeited unless they are asserted in the recipient’s APA suit. Either of those approaches, however, would exac-

erbate the intrusion on EPA enforcement prerogatives that judicial review of compliance orders inherently entails, by allowing a compliance-order recipient to put EPA to an immediate decision whether to pursue an enforcement suit.

*Second*, Section 309(a)(3) compliance orders are not self-executing, but must instead be enforced in a plenary judicial action. By making the legal consequences of these compliance orders contingent on EPA's commencement and successful prosecution of a civil lawsuit, Congress further indicated that it viewed issuance of such orders as a step in the deliberative process that might lead to enforcement, rather than as a coercive sanction that itself must be subject to judicial review. 33 U.S.C. 1319(a)(3) and (b). And by providing that the order is enforceable only if it is supported by an underlying violation, 33 U.S.C. 1319(b), pp. 14-15, *supra*, Congress ensured that persons who are actually subjected to enforcement suits can raise all of their challenges to the orders in those proceedings. See *Hoffman*, 902 F.2d at 569.

*Third*, Congress expressly authorized immediate judicial review on the administrative record when EPA takes coercive action itself by assessing administrative penalties after a hearing. See 33 U.S.C. 1319(g)(8). Congress's express authorization of judicial review for administrative-penalty assessments, combined with the absence of any comparable authorization for review of compliance orders, reinforces the inference that Congress did not contemplate immediate review in the latter context. See *Fausto*, 484 U.S. at 448 (inferring that statute's failure to include class of employees in judicial-review provisions indicated that Congress intended to preclude review for that class); *United States v. Erika*,

*Inc.*, 456 U.S. 201, 208 (1982) (noting that provision for judicial review of awards under one part of Medicare Act but not another indicated that no judicial review was available for awards under latter part); *Block*, 467 U.S. at 345-346.

2. The CWA's purposes and the compliance order's function within the CWA's enforcement framework further indicate that Congress intended to allow EPA to issue administrative compliance orders without being haled prematurely into court. A major impetus for the CWA was Congress's perception that the enforcement provisions of existing water-pollution laws were cumbersome and inefficient. See S. Rep. No. 414, 92d Cong., 1st Sess. 2, 5 (1971) (Senate Report) (describing existing law's provision for a years-long process of negotiation and hearings before the government could bring a civil enforcement action). In the CWA, Congress "delete[d] the cumbersome conference and hearing procedures in the existing law" that had "contribute[d] to delay." *Id.* at 5, 64. Congress then gave EPA its current enforcement options, emphasizing that EPA was to act expeditiously to remedy violations. See *id.* at 64; see also *Southern Pines Assocs. v. United States*, 912 F.2d 713, 716 (4th Cir. 1999).

The CWA's compliance-order provisions serve the statutory purposes by providing a means of notifying recipients of potential violations and quickly resolving the issues through voluntary compliance. That course conserves agency and judicial resources for the most severe violations and avoids the potential delays of a judicial enforcement action. Treating compliance orders as immediately reviewable would create a significant disincentive to their use by forcing EPA to consider, before issuing each order, whether it is willing to be im-

mediately drawn into litigation. That disincentive would hinder the agency's ability to inform the public of the Act's requirements and to work with regulated parties to mitigate any noncompliance. The function of compliance orders within the statutory scheme thus confirms Congress's intent that such orders should not be immediately reviewable. See *Morris v. Gressette*, 432 U.S. 491, 501-503 (1977) (holding that the nature of Voting Rights Act's preclearance proceeding, and in particular its function of providing expeditious review by the Attorney General, indicated that Congress intended the Attorney General's determination not to be reviewable); *NLRB v. United Food & Commercial Workers Union Local 23*, 484 U.S. 112, 132 (1987) (holding that the National Labor Relations Act impliedly precludes judicial review of decision to settle with an employer after an administrative complaint is filed, in part because such review would hinder expeditious resolution of claims and decrease employer's willingness to settle).

3. Petitioners argue (Br. 47, 49) that other environmental statutes—the Clean Air Act (CAA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)—support the inference that Congress intended CWA compliance orders to be immediately reviewable. Petitioners are incorrect.

*First*, petitioners argue (Br. 49) that, because Congress modeled Section 309 on the enforcement provisions in the CAA, see Senate Report 63-64, and because this Court reviewed a CAA compliance order in *ADEC*, CWA compliance orders must likewise be reviewable. Unlike the CWA, however, the CAA was amended in 1977 to authorize judicial review of all “final action[s],” thus making clear that the statute does not preclude review of any action that is final under *Bennett*. Pub. L.

No. 95-95, Tit. III, § 305, 91 Stat. 772-777 (codified as amended at 42 U.S.C. 7607(b)(1)). And while the Court in *ADEC* held that the challenged CAA order was final, see *ADEC*, 540 U.S. at 483, that order differed in significant respects from the compliance order at issue in this case. See pp. 32-34, *supra*. Because the reviewability of a particular compliance order depends on the terms of the order and its role within the overall statutory scheme, the decision in *ADEC* is not controlling here.

Petitioners also argue (Br. 41) that the CAA's grant of authority to issue immediately effective emergency compliance orders, 42 U.S.C. 7603, indicates that Congress believed that judicial review of ordinary compliance orders in the CWA would not undermine their purposes. But Congress's grant of emergency powers to address the imminent-endangerment situations that can arise from the types of pollution that the CAA addresses does not raise any inference about CWA compliance orders.

*Second*, petitioners argue (Br. 47) that, because Congress amended CERCLA in 1986 to preclude judicial review of unilateral administrative orders under that Act, Pub. L. No. 99-499, Tit. I, § 113(c)(2), 100 Stat. 1649 (42 U.S.C. 9613(h)), the absence of any comparable CWA provision indicates that CWA compliance orders are reviewable. Congress's subsequent amendment of a different statute, however, is a poor basis for inferring Congress's intent in enacting the CWA. See, *e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 530 n.27 (2007).

4. Finally, requiring petitioners to challenge EPA's compliance order in the context of an enforcement suit does not deprive them of meaningful judicial review. See *Thunder Basin*, 510 U.S. at 207. Petitioners' complaint alleged that the compliance order is inconsistent

with the CWA because the property on which they discharged fill was not covered by the Act. See J.A. 13. That argument can be raised in response to any EPA enforcement suit under Section 309(b), and it can be “meaningfully addressed” by the district court in that proceeding. *Thunder Basin*, 510 U.S. at 215 (holding that meaningful review was available because company’s constitutional challenge to agency action could be adjudicated in petition for review of eventual agency enforcement action).<sup>12</sup>

Petitioners do not dispute that the court in any EPA enforcement suit could entertain their contention that the property at issue is not covered by the CWA. Petitioners argue, however, that review in that context would be inadequate because petitioners must “risk[] \* \* \* immense liability” in order to preserve the question for resolution in that setting. Br. 36-37. If petitioners perceive a risk of ultimate financial liability, however, it can only be because they are less than fully confident that a court would agree with their position on the issue of CWA coverage. Even if EPA had not issued a compliance order, that uncertainty would have created a disincentive to petitioners’ contemplated development activities; yet petitioners would have had no right to an advisory judicial opinion as to the legality of their contemplated discharges. To be sure, the compliance order was likely to affect (and was intended to affect) petition-

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<sup>12</sup> Petitioners contend (Br. 36) that *Thunder Basin* is inapposite because the mining company in that case could initiate the administrative review process that would eventually culminate in judicial review, thereby limiting its exposure to daily penalties. That is a difference only in degree, however, as the company faced mounting exposure during the administrative process, the duration of which was not under the company’s control. 510 U.S. at 205-206 & n.6.

ers' assessment of the respective costs and benefits of alternative courses of action. But a wide range of agency communications having analogous effects have been held not to be subject to immediate judicial review. See pp. 18-23, *supra*.

Petitioners' reliance (Br. 36-37) on *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 130 S. Ct. 3138 (2010), is also misplaced. The plaintiffs in *Free Enterprise Fund* sought to challenge the constitutionality of the agency itself, separate and apart from any specific agency action or threat of enforcement. *Id.* at 3150. In rejecting the government's argument that the statutory procedures for reviewing sanctions imposed by the Board precluded district-court review of the plaintiffs' constitutional claim, the Court observed that the plaintiffs "object[ed] to the Board's existence, not to any of its auditing standards," and that their "general challenge to the Board [wa]s 'collateral' to any [Securities and Exchange] Commission orders or rules from which review might be sought." *Ibid.* The Court also stated that the plaintiffs should not be required to commit a violation of law simply to "incur a sanction" that they could then use to "win access to a court of appeals." *Id.* at 3150-3151. Here, by contrast, petitioners do not challenge EPA's existence; they instead allege that the particular wetlands into which they discharged fill are not covered by the CWA. See J.A. 13. Courts routinely decide such issues in the course of adjudicating EPA enforcement actions. And unlike the plaintiffs in *Free Enterprise Fund*, petitioners have already committed acts that have exposed them to potential enforcement action.

*McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991) (see Pet. Br. 45), is inapposite for similar rea-

sons. In *McNary*, this Court held that statutory provisions authorizing judicial review of individual deportation decisions did not preclude an action raising constitutional challenges to general Immigration and Naturalization Service policies. Requiring such claims to be brought in the context of petitions for review of individual deportation orders would effectively foreclose all judicial review, the Court explained, in part because the plaintiffs' constitutional claims required presentation of additional evidence beyond that contained in the administrative record of any deportation proceeding. 498 U.S. at 492, 496-497. The Court also characterized the plaintiffs' general constitutional challenge as "collateral" to any determination regarding a particular alien's immigration status. *Id.* at 492. Here, by contrast, petitioners' contention that the CWA does not cover their property is precisely the sort of claim that landowners often raise in response to EPA enforcement actions, and petitioners will be able to proffer any relevant evidence in the district court.

### **III. THE DUE PROCESS CLAUSE DOES NOT ENTITLE PETITIONERS TO PRE-ENFORCEMENT REVIEW OF THE COMPLIANCE ORDER**

Petitioners contend that the issuance of the compliance order deprived them of constitutionally protected interests without a hearing. Petitioners further argue that they have a constitutional right to immediate review because they would be forced to risk severe penalties in order to preserve their challenges for judicial consideration in a possible EPA enforcement suit. Those contentions lack merit.

**A. The Issuance Of The Compliance Order Did Not Subject Petitioners To A Pre-Hearing Deprivation**

For the first time in this Court, petitioners contend that the issuance of the compliance order deprived them of constitutionally protected interests—namely, the economically viable use of their property, the right to exclude others from the property, and the right to be free from unreasonable searches—without a pre-deprivation hearing. Br. 17-19. Petitioners did not raise that argument in the lower courts or present it in their petition for a writ of certiorari, and the Court therefore should not consider it. In any event, the issuance of the compliance order did not deprive petitioners of any property interest.

Petitioners assert that the compliance order deprived them of any economically viable use of their property by rendering their property “a conservation preserve.” Br. 18. That characterization misapprehends the effect of the order. Petitioners’ ability to discharge fill free of federal restrictions turns on whether the CWA applies to the property at issue. If it does, petitioners were legally obligated to comply with the Act’s requirements even before the compliance order was issued. Although the order apprised petitioners of EPA’s view that their property contained wetlands protected by the Act, and warned them that failure to comply could lead to enforcement proceedings, it did not impose any additional legal restriction on petitioners’ use of their land beyond those already imposed by the CWA. See pp. 13-18, *supra*. Nor did the order impose a lien or any other self-enforcing restraint on petitioners’ property. Cf. *Connecticut v. Doehr*, 501 U.S. 1, 12 (1991) (“[A]ttachments, liens, and similar encumbrances \* \* \* merit due process protection.”).

Like a wide range of agency communications warning regulated parties that they are or may be in violation of the law, the compliance order created a practical disincentive to continued development of petitioners' land. Such warnings, however, do not deprive their recipients of any constitutionally protected property interest. Treating such warnings as constitutional deprivations would deter diverse formal and informal agency communications that serve the interests of the government, the general public, and the regulated parties themselves.

The other alleged deprivations to which petitioners point—denial of petitioners' right to exclude EPA representatives from their property and to be free from unreasonable searches and seizures of records—are similarly illusory. In providing that EPA may inspect petitioners' property, the compliance order simply restates Section 308's provision that EPA may enter onto property and require the provision of certain information "[w]henever required to carry out" the CWA. 33 U.S.C. 1318(a); see Pet. App. G1 (noting that compliance order was issued pursuant to 33 U.S.C. 1318 and 1319(a)); J.A. 18. That provision does not purport to supersede applicable constitutional requirements. Thus, to the extent that a particular entry onto petitioners' land would otherwise require a judicial warrant, the compliance order does not authorize EPA officials to dispense with that safeguard. Because the issuance of the order did not deprive petitioners of any protected interest, EPA was not, as petitioners argue, Br. 19-23, required to afford petitioners a prompt post-deprivation hearing. Cf. *FDIC v. Mallen*, 486 U.S. 230, 240 (1988).

**B. Because The CWA Contains Constitutionally Adequate Procedural Safeguards Before Petitioners May Be Subject To Penalties, The Due Process Clause Does Not Require Pre-enforcement Review Of Compliance Orders**

Petitioners contend that the threat of allegedly coercive civil penalties arising from the issuance of the compliance order impermissibly forces them to choose between complying with the order, thereby forgoing a judicial determination of whether their wetlands are subject to the CWA, or risking severe penalties. See Br. 23-32. To the contrary, the CWA provides extensive safeguards to ensure that any penalties to which petitioners might eventually be subject would not be “ruinous.” Br. 54. Petitioners, moreover, face a dilemma largely of their own making, since they discharged fill into wetlands without first seeking a permit or consulting with EPA or the Corps. In any event, petitioners would have been subject to a potential civil enforcement action even if EPA had not first issued a compliance order or otherwise alerted them that it viewed their conduct as unlawful. By apprising petitioners of the measures that EPA viewed as necessary to achieve compliance, the order gave petitioners a significant opportunity that they would not have received if EPA had simply continued to scrutinize their activities and to deliberate internally regarding the advisability of an enforcement suit.

1. a. In contending that the potential penalties for violating the CWA are so coercive as to foreclose judicial review, petitioners rely primarily on *Ex parte Young*, 209 U.S. 123 (1908).<sup>13</sup> In *Young*, the Court considered

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<sup>13</sup> Petitioners apparently have abandoned the due process argument that they pressed below and in their petition for a writ of certiorari, namely, that the CWA’s judicial-review framework denies them due

the constitutionality of state laws that imposed mandatory penalties for charging certain railroad freight rates. *Id.* at 127-128. A company could obtain review of those laws only by disobeying them and risking substantial automatic penalties if it did not prevail. *Id.* at 145-146. The Court held the laws unconstitutional, reasoning that the burden of automatic penalties was so severe that the laws effectively “preclude[d] a resort to the courts \* \* \* for the purpose of testing [their] validity.” *Id.* at 146-148.

Since *Young*, the Court has clarified that statutes imposing fines for non-compliance with a regulatory requirement are constitutional as long as imposition of penalties is not automatic but instead is subject to a “good faith” defense, judicial discretion, or plenary review. See *Thunder Basin*, 510 U.S. at 218 (finding no constitutional violation where penalty assessment became payable only after full review by an administrative body and federal court of appeals); *Reisman v. Caplin*, 375 U.S. 440, 446-447 (1964) (statute creating penalties for failure to respond to summons did not violate *Young* where penalty provision “d[id] not apply where the witness appears and interposes good faith challenges to the summons”); *Yakus v. United States*, 321 U.S. 414, 437-438 (1944) (no denial of due process where statute provided an opportunity to test the validity of regulations without necessarily incurring penalties).

This case differs from *Young* in another respect as well. The plaintiffs in *Young* sought to challenge state statutes and administrative orders that *changed* the applicable law by establishing new (and allegedly unrea-

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process because penalties can be assessed for violations of a CWA compliance order even if no violation of the Act itself has occurred. Pet. 16; see note 5, *supra*.

sonable) rates for railway service. See 209 U.S. at 130-131. The compliance order at issue here, by contrast, does not purport to subject petitioners to new legal obligations, but simply sets forth EPA's view of the duties to which petitioners were already subject under the CWA. This Court's decisions do not suggest that regulated parties have a constitutional right to immediate judicial review of agency pronouncements of that character.

b. Accordingly, a statute may constitutionally preclude pre-enforcement judicial review of administrative orders so long as it contains sufficient pre-penalty safeguards to ensure that the "practical effect of coercive penalties for noncompliance [is not] to foreclose all access to the courts." *Thunder Basin*, 510 U.S. at 218. The CWA's enforcement framework ensures that petitioners would not be effectively precluded from putting EPA to its burden of establishing a CWA violation in court.

*First*, any penalty against petitioners will be imposed only after plenary review of EPA's allegations regarding the underlying violation of the CWA and, if the court finds a violation, the exercise of judicial discretion regarding the appropriate amount of penalties. 33 U.S.C. 1319(d). The CWA currently exposes regulated parties to civil penalties of up to \$37,500 per day for violations of the Act, 33 U.S.C. 1319(d); 40 C.F.R. 19.4, and EPA may seek up to the same amount in additional penalties for violation of a compliance order. The amount of penalties to be awarded in an enforcement suit, however, is determined by the court after consideration of several statutory factors. Those factors include the seriousness of the statutory violation, any good-faith efforts to comply with the applicable requirements, the economic im-

pact of the penalty on the violator, and any other relevant equitable considerations. 33 U.S.C. 1319(d).

When courts in dredge-or-fill cases impose penalties after considering these factors, they often award far less than the statutory maximum.<sup>14</sup> By identifying a broad range of factors as potentially relevant to the penalty calculation, Section 309(d) ensures that a violator will be subject to penalties only in an amount that the court finds appropriate after considering all of the equities.<sup>15</sup> Cf. *Thunder Basin*, 510 U.S. at 218 (stating that although statutory civil penalties “may become onerous if petitioner chooses not to comply,” there is no “constitutionally intolerable” choice because civil penalties “become final and payable only after full review” by a federal court).

*Second*, after receiving the compliance order, petitioners could have asked the Corps to consider possible issuance of an after-the-fact permit. 33 C.F.R. 326.3(e).

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<sup>14</sup> See, e.g., *Scruggs*, 2009 WL 500608, at \*3-\*6 (concluding that “a severe penalty is not appropriate” based on analysis of the defendant’s ability to pay, the lack of economic benefit from the violation, and the relatively low severity of the violation; awarding \$65,000 when the statutory maximum exposure was \$1.3 million); *United States v. Bay-Houston Towing Co.*, 197 F. Supp. 2d 788, 823 (E.D. Mich. 2002) (declining to award penalties in view of party’s efforts to obtain a permit in good faith).

<sup>15</sup> Petitioners assert (Br. 19-21) that EPA can allow potential penalties to accrue before filing suit, subject only to a five-year statute of limitations. See 28 U.S.C. 2462. In determining the amount of the penalty, however, the court may take into account any undue delay by EPA in pursuing enforcement action. See *Lloyd A. Fry Roofing Co. v. EPA*, 554 F.2d 885, 891 (8th Cir. 1977). In any event, if EPA wished to maximize potential penalties in a particular case by sandbagging a landowner in the manner petitioners suggest, it presumably would not alert the regulated entity to its risk of CWA liability by issuing a compliance order.

Such a permit would have retroactively approved the discharges in which petitioners had previously engaged, thereby insulating petitioners from potential CWA liability. See pp. 31-32, *supra*. In the course of the permitting process, petitioners could have raised their argument that the CWA does not apply to their land. When the Corps denies a permit, or issues a permit subject to conditions that the applicant opposes, the applicant may seek judicial review of that decision, including any determination about whether the wetlands on its property are covered by the Act. See 33 U.S.C. 1344(a); 5 U.S.C. 704; 33 C.F.R. 331.10, 331.12; see also *Precon Dev. Corp. v. United States Army Corps of Eng'rs*, 633 F.3d 278, 287-297 (4th Cir. 2011) (reviewing Corps' determination regarding CWA coverage in the context of suit challenging the jurisdictional determination and subsequent permit denial). Petitioners also could have engaged in the informal discussions that EPA's compliance orders invite, which might have avoided the need for judicial review.

c. Despite those safeguards, petitioners contend (Br. 28-32) that Section 309's framework is constitutionally inadequate under *Thunder Basin* because the CWA does not permit them to initiate an action for judicial review of the compliance order while complying with its terms. As petitioners observe, the Mine Act framework that the Court approved in *Thunder Basin* permitted the regulated party to initiate an administrative-review process that would ultimately lead to judicial review, even if the party had complied with the agency's directive. 510 U.S. at 207-208, 216-217. The Court did not suggest, however, that this opportunity is an essential prerequisite to a constitutional administrative-review framework. Rather, the Court emphasized that the ulti-

mate question is whether the framework presents the “constitutionally intolerable” choice condemned in *Young*. *Id.* at 217-218. In concluding that the Mine Act did not create such an impermissible choice, the Court relied in part on the fact that “the Secretary’s penalty assessments become final and payable only after full review by both the Commission and the appropriate court of appeals.” *Id.* at 218; see *Reisman*, 375 U.S. at 447 (upholding summons on the ground that if recipient refused to comply, he would have a good-faith defense before penalties could be imposed). The same is true here.

2. Petitioners’ due process argument also ignores the fact that petitioners’ current dilemma is largely of their own making. By seeking a permit *before* discharging pollutants on their land, petitioners could have obtained agency guidance and judicial review of whether the CWA covers their property, without exposing themselves to any potential penalties. The CWA is premised on a comprehensive permit system that provides a “means of achieving and enforcing” the Act’s discharge limitations. *EPA v. California*, 426 U.S. 200, 205 (1976). The Act is therefore designed to encourage regulated parties to seek permits, and to obtain judicial review of permitting decisions, before they discharge pollutants. Petitioners could have applied for a permit, argued to the agency that no permit was actually required because the Act did not apply, and then sought APA review of the permitting decision and any associated jurisdictional determinations. See, e.g., *Precon Dev. Corp.*, *supra*; see also 33 U.S.C. 1344(a); Pet. App. A13-A14. Even if the Corps had decided to grant the permit, petitioners could have challenged the underlying jurisdictional determination in court after exhausting their administrative reme-

dies. See *Baccarat Fremont Developers, LLC v. United States Army Corps of Eng'rs*, 425 F.3d 1150, 1152-1158 (9th Cir. 2005); 33 C.F.R. 331.5, 331.12.

Although petitioners argue (Br. 30-31) that the permitting process is burdensome, they have not established that the procedure is so onerous as to foreclose resort to it. Cf. *West Va. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 169-170 (4th Cir. 2010) (noting that Congress considered the costs of a permitting system before deciding that “a permitting scheme is the crucial instrument for protecting natural resources”).<sup>16</sup> In addition, the Corps has a shorter, less costly process whereby a potential discharger can request an informal or formal determination of whether particular waters, including wetlands, are covered by the CWA. See 33 C.F.R. 331.2 (jurisdictional determination). If petitioners had invoked that process before they removed the wetland soils on their property and replaced them with fill, they would have had the benefit of the agency's

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<sup>16</sup> Petitioners and their amici assert that the average cost of applying for an individual permit is more than \$271,000. See Br. 30; Alaska, *et al.* Amicus Br. 10. Even assuming that average figure is accurate, however, it significantly overstates the costs associated with smaller parcels of affected wetlands like that at issue here. The study on which petitioners rely, Br. 30, states that the average cost is (in 2002 dollars) \$43,687 plus \$11,797 per affected acre. David Sunding & David Zilberman, *The Economics of Environmental Regulation By Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 74 (2002). Many persons seeking permits associated with smaller parcels of land, moreover, may be able to avail themselves of nationwide permits, such as “Nationwide Permit 29,” which covers residential developments with up to .5 acres of affected wetlands. See [http://www.usace.army.mil/CECW/Documents/cecwo/reg/nwp/NWP\\_29\\_2007.pdf](http://www.usace.army.mil/CECW/Documents/cecwo/reg/nwp/NWP_29_2007.pdf). In many circumstances, persons may undertake activities authorized by a nationwide permit without prior notice to the Corps. 33 C.F.R. 330.1(e).

views on the CWA's applicability, and they could have sought judicial review of any subsequent permitting decision that was premised on that coverage determination. See, *e.g.*, *Fairbanks*, 543 F.3d at 594 & n.9. To the extent that petitioners regard their current range of options as unpalatable, the problem results from their own prior conduct, not any constitutional defect in the Act.

3. Finally, this Court's resolution of petitioners' due process claim should reflect an awareness that regulated parties have no general constitutional right to advisory judicial opinions when the existence of legal uncertainty presents them with difficult practical choices. Even if EPA had never issued a compliance order, petitioners would (or should) have been aware that their filling of wetlands subjected them to at least the possibility of an EPA enforcement action. Petitioners could have responded to that possibility by (a) removing the fill and restoring the site to minimize the likelihood of an enforcement suit; (b) initiating consultation with EPA and/or the Corps in an effort to develop a mutually acceptable solution; or (c) continuing to act on the assumption that the CWA did not apply to their discharges, and asserting that position in response to any EPA enforcement suit. Although EPA's issuance of the compliance order understandably affected petitioners' assessment of the relative advantages and disadvantages of the various alternatives, it did not reduce the range of available options. To treat the compliance order as triggering a constitutional right to immediate judicial review, where no immediate right of access to the courts had previously existed, would deter a broad range of beneficial agency communications.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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**APPENDIX**

1. 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 \* \* \* .

2. 33 U.S.C. 1311(a) provides:

**Effluent limitations**

**(a) Illegality of pollutant discharges except in compliance with law**

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.

3. 33 U.S.C. 1319 provides in pertinent part:

**Enforcement**

**(a) State enforcement; compliance orders**

\* \* \* \* \*

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 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.

\* \* \* \* \*

**(b) Civil actions**

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

\* \* \* \* \*

**(d) Civil penalties; factors considered in determining amount**

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State,<sup>1</sup> or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and 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

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<sup>1</sup> So in original.

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.

\* \* \* \* \*

**(g) Administrative penalties**

**(1) Violations**

Whenever on the basis of any information available—

(A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by a State, or

(B) the Secretary of the Army (hereinafter in this subsection referred to as the “Secretary”) finds that any person has violated any permit condition or limitation in a permit issued under section 1344 of this title by the Secretary,

the Administrator or Secretary, as the case may be, may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.

\* \* \* \* \*

**(5) Finality of order**

An order issued under this subsection shall become final 30 days after its issuance unless a petition for judicial review is filed under paragraph (8) or a hearing is requested under paragraph (4)(C). If such a hearing is denied, such order shall become final 30 days after such denial.

\* \* \* \* \*

**(8) Judicial review**

Any person against whom a civil penalty is assessed under this subsection or who commented on the proposed assessment of such penalty in accordance with paragraph (4) may obtain review of such assessment—

(A) in the case of assessment of a class I civil penalty, in the United States District Court for the District of Columbia or in the district in which the violation is alleged to have occurred, or

(B) in the case of assessment of a class II civil penalty, in United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business,

by filing a notice of appeal in such court within the 30-day period beginning on the date the civil penalty order is issued and by simultaneously sending a copy of such notice by certified mail to the Administrator or the Secretary, as the case may be, and the Attorney General. The Administrator or the Secretary shall promptly file in such court a certified copy of the record on which the order was issued. Such court shall not set aside or

remand such order unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion and shall not impose additional civil penalties for the same violation unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion.

\* \* \* \* \*

4. 33 U.S.C. 1344 provides in pertinent part:

**Permits for dredged or fill material**

**(a) Discharge into navigable waters at specified disposal sites**

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

\* \* \* \* \*

5. 33 C.F.R. 326.3 provides in pertinent part:

**Unauthorized activities**

\* \* \* \* \*

(d) *Initial corrective measures.* (1) The district engineer should, in appropriate cases, depending upon the nature of the impacts associated with the unauthorized, completed work, solicit the views of the Environmental Protection Agency; the U.S. Fish and Wildlife Service; the National Marine Fisheries Service, and other Federal, state, and local agencies to facilitate his decision on what initial corrective measures are required. If the district engineer determines as a result of his investigation, coordination, and preliminary evaluation that initial corrective measures are required, he should issue an appropriate order to the parties responsible for the violation. In determining what initial corrective measures are required, the district engineer should consider whether serious jeopardy to life, property, or important public resources (see 33 CFR 320.4) may be reasonably anticipated to occur during the period required for the ultimate resolution of the violation. In his order, the district engineer will specify the initial corrective measures required and the time limits for completing this work. In unusual cases where initial corrective measures substantially eliminate all current and future detrimental impacts resulting from the unauthorized work, further enforcement actions should normally be unnecessary. For all other cases, the district engineer's order should normally specify that compliance with the order will not foreclose the Government's options to initiate appropriate legal action or to later require the submission of a permit application.

(2) An order requiring initial corrective measures that resolve the violation may also be issued by the district engineer in situations where the acceptance or processing of an after-the-fact permit application is prohibited or considered not appropriate pursuant to § 326.3(e)(1) (iii) through (iv) below. However, such orders will be issued only when the district engineer has reached an independent determination that such measures are necessary and appropriate.

(3) It will not be necessary to issue a Corps permit in connection with initial corrective measures undertaken at the direction of the district engineer.

(e) *After-the-fact permit applications.* (1) Following the completion of any required initial corrective measures, the district engineer will accept an after-the-fact permit application unless he determines that one of the exceptions listed in subparagraphs i-iv below is applicable. Applications for after-the-fact permits will be processed in accordance with the applicable procedures in 33 CFR parts 320 through 325. Situations where no permit application will be processed or where the acceptance of a permit application must be deferred are as follows:

(i) No permit application will be processed when restoration of the waters of the United States has been completed that eliminates current and future detrimental impacts to the satisfaction of the district engineer.

(ii) No permit application will be accepted in connection with a violation where the district engineer determines that legal action is appropriate (§ 326.5(a)) until such legal action has been completed.

(iii) No permit application will be accepted where a Federal, state, or local authorization or certification, required by Federal law, has already been denied.

(iv) No permit application will be accepted nor will the processing of an application be continued when the district engineer is aware of enforcement litigation that has been initiated by other Federal, state, or local regulatory agencies, unless he determines that concurrent processing of an after-the-fact permit application is clearly appropriate.

\* \* \* \* \*

(g) *Coordination with EPA.* In all cases where the district engineer is aware that EPA is considering enforcement action, he should coordinate with EPA to attempt to avoid conflict or duplication. Such coordination applies to interim protective measures and after-the-fact permitting, as well as to appropriate legal enforcement actions.