No. 10-1062

In the
Supreme Court of the United States

CHANTELL SACKETT, et vir,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

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

BRIEF OF NATURAL RESOURCES DEFENSE COUNCIL, IDAHO CONSERVATION LEAGUE, LAKE PEND OREILLE WATERKEEPER, KOOTENAI ENVIRONMENTAL ALLIANCE, IDAHO RIVERS UNITED, AND WATERKEEPER ALLIANCE AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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NOVEMBER 30, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

Statutes, regulations and rules:

OTHER:

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Pursuant to this Court's Rule 37.3(b), Natural Resources Defense Council, Idaho Conservation League, Lake Pend Oreille Waterkeeper, Kootenai Environmental Alliance, Idaho Rivers United, and Waterkeeper Alliance respectfully request leave of the Court to file this brief amici curiae in support of Respondents. The questions presented in this case have a critical and direct impact on the enforcement of the Clean Water Act. As organizations involved in environmental advocacy, *Amici* have a unique perspective and interest in the outcome of this case.

Written consent to the filing of this brief has been granted by counsel for the Respondents. Counsel to the Petitioners declined consent, necessitating the filing of this motion.

DATED: December, 2011

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae Natural Resources Defense Council (NRDC) is a national, non-profit environmental advocacy organization incorporated under the laws of the State of New York. NRDC has over one million members and online activists nationwide. In its effort to protect natural resources and public health, NRDC has litigated numerous cases under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387. NRDC and its members have a significant interest in maintaining CWA protection for our nation's waters.

Idaho Conservation League, Lake Pend Oreille Waterkeeper, Kootenai Environmental Alliance, and Idaho Rivers United are environmental organizations committed to preserving and restoring the pristine nature of Idaho's lakes, rivers and wetlands. Collectively, they represent thousands of Idaho residents and their desire for clean water, healthy forests and biologically sound wetlands protected by state and federal environmental laws such as the CWA.

Waterkeeper Alliance ("WKA") is an international, nonprofit corporation organized under the laws of the State of New York. WKA is an

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission.

umbrella organization comprised of nearly 200 member Waterkeeper programs globally. WKA works to restore and protect the waters of the United States through education, scientific research, litigation, and other advocacy. WKA supports EPA's efforts to develop and execute a robust enforcement regime to comply with its mandate under the CWA.

STATEMENT OF THE CASE

Petitioners own a .63 acre lot at 1604 Kalispell Bay Road in Bonner County, Idaho, approximately 500 feet from the shore of Priest Lake.[2] Petitioners claim they had "absolutely no fair reason to believe that their property was regulable under the CWA," Cert. Pet. at 5, when they received an EPA compliance order indicating that the property is a protected wetland that may not be filled without a CWA permit. But facts not disclosed to this Court by petitioners indicate that they were repeatedly informed by a wetlands scientist in *their* employ, by EPA, and by the U.S. Army Corps of Engineers ("Corps") that their property may be a protected wetland *long* before they received the administrative compliance order ("ACO" or "Order") challenged here. Petitioners nonetheless chose not to seek a permit.

The Priest Lake Region: Priest Lake has been described as Idaho's "crown jewel."[3] The lake

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[2] *Sackett Family Comments on EPA During Property Rights Forum* (Oct. 13, 2011), *available at* http://www.youtube.com/watch?v=hqp-Q9mggQ8 ("*Property Rights Forum*").

[3] *See* Priest Lake Chamber of Commerce, Priest Lake Idaho, http://www.priestlake.org (last visited Nov. 23, 2011).

measures nineteen miles long and comprises over 26,000 acres of unusually clear waters, fed by streams cascading from the peaks of the Selkirk Mountains.[4] Priest Lake also is home to several native fish species, and is considered critical habitat for bull trout, a threatened species.[5] The surrounding area is home to dense forests of cedar, fir, and tamarack trees as well as important populations of whitetail deer, bears, moose, and bald eagles.[6]

Protecting the animal habitats, the scenic beauty of Priest Lake, and the accompanying economic activity requires responsible stewardship by both the federal and state governments.[7] To the east and south of the lake lies Priest Lake State Park; to the west, just past the state border, lies Colville National Forest. Nearly seventy percent of Bonner County is woodland, most of which lies in Kaniksu National Forest or Priest Lake State Forest, while only a small portion of the region's woodland is privately owned.

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[4] *See* Idaho Department of Parks and Recreation, Priest Lake State Park, http://parksandrecreation.idaho.gov/parks/priestlake.aspx (last visited Nov. 23, 2011) ("Priest Lake State Park").

[5] Revised Designation of Critical Habitat for Bull Trout in the Coterminous United States, 75 Fed. Reg. 63942 (Oct. 18. 2010).

[6] *See* Priest Lake State Park.

[7] *See* Priest Lake State Lessees' Association, http://priestlakestatelessees.org/ (last visited Nov. 23, 2011).

The Statutory and Regulatory Backdrop: The CWA protects "waters of the United States," which applicable regulations define to include "intrastate lakes . . . the use, degradation or destruction of which could affect interstate or foreign commerce," as well as wetlands "adjacent" to such lakes. 33 C.F.R. § 328.3(a); *see also Rapanos v. U.S.*, 547 U.S. 715 (2006). The regulations define "adjacent" to mean "bordering, contiguous, or neighboring," and explain that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 33 C.F.R. § 328.3(c).

The Corps processes permit applications under Section 404 of the CWA for the discharge of dredged or fill material into "waters of the United States." 33 U.S.C. § 1344. Decisions to deny a permit, or to issue one with conditions, are subject to judicial review following exhaustion of administrative appeals. 33 C.F.R. § 331.12. A property owner uncertain of whether his or her property includes waters covered by the Act may obtain a "jurisdictional determination" (or "JD"), which is either a "preliminary" or "approved" written statement from the Corps addressing whether a permit would be required to discharge fill material on a particular parcel. 33 C.F.R. § 331.2. Under the Corps' regulations, both "preliminary" and "approved" JDs must be in writing. *See* 33 C.F.R. § 331.2. JDs are subject to administrative appeal, *see* 33 C.F.R. Pt. 331, as per a Congressional directive, *see* 65 Fed. Reg. 16,486, 16,487, and typically are binding upon the Government in any legal disputes arising within the next five years. *See* MEMORANDUM BETWEEN THE DEPARTMENT OF THE ARMY AND THE ENVIRONMENTAL

PROTECTION AGENCY CONCERNING THE DETERMINATION OF THE SECTION 404 PROGRAM AND THE APPLICATION OF THE EXEMPTIONS UNDER SECTION 404(F) OF THE CLEAN WATER ACT (Jan. 19, 1989, as amended Jan. 4, 1993) (JDs binding on the government in future legal action), *available at* http://www.usace.army.mil/CECW/Documents/cecwo/reg/mou/404f2.pdf; Regulatory Guidance Letter 05-02, EXPIRATION OF GEOGRAPHIC JURISDICTIONAL DETERMINATIONS, U.S. ARMY CORPS OF ENGINEERS (JUNE 14, 2005) (five year rule), *available at* http://www.usace.army.mil/CECW/Documents/cecwo/reg/cwa_guide/app_f_rgl05-02.pdf.

The Events Leading up to Petitioners' Lawsuit: Petitioners own Sackett Contracting and Excavating, which operates in the Priest Lake area and employs as many as forty people. *See Property Rights Forum* (full citation in footnote 2, above). Petitioners purchased their lot in 2005. They filed this lawsuit on April 28, 2008.

Petitioners' brief provides little explanation for what happened leading up to the present suit, stating only:

> [The Sacketts] obtained all required local permits and began to build their new home when they were issued an EPA compliance order. [Citation omitted.] The Sacketts were devastated when they received the compliance order. . . Believing that their property was not a "wetland" within EPA's jurisdiction, the Sacketts attempted to resolve the compliance order informally, but EPA refused to address the

> Sacketts' jurisdictional arguments. . . . Therefore, in April, 2008, the Sacketts filed suit to contest the jurisdictional bases for the order.

Cert. Pet. Br. at 6-9. This description omits integral parts of petitioners' own prior account of their experience.

Documents obtained from the Corps via a request under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), include a "[t]ime line of what has taken place" at the "[p]roperty at 1604 Kalispell Bay Road" provided by petitioner Chantell Sackett to the Corps on May 23, 2007. Lodged Materials 16-21.[8] That document indicates that petitioners "[s]tarted clearing property at 1604 Kalispell Bay Rd. for shop and home" on April 30, 2007. *Id.* at 16. Only three days later, on May 3, 2007, "3 people from EPA" (including an individual named Carla Fromm) "showed up" and "asked the equipment operator to stop" work "pushing pit run that was brought in to build up the site where the house and shop are to be built."[9] *Id.* EPA officials asked the operator "for a permit to fill in wetlands but he said he had nothing at the site." *Id.* When the operator was unable to

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[8] On the same day this brief was filed, *Amici* sought permission to lodge with the Court, under Supreme Court Rule 32, all documents provided by the Corps in response to the request and the Corps' cover letter conveying them. The name of the requesting party has been redacted to protect the requestor's privacy.

[9] "Pit run" is a contractor's term for material consisting of a mixture of gravel, sand, rock, rock fragments, and other material as found in natural deposits such as a gravel pit.

produce a permit, EPA officials went to the office of petitioners' construction firm and "asked for any information on the project." *Id.* The Sackett employee apparently did not provide any information, but questioned EPA's "authority . . . to shut down a job site, when they don't have any supporting evidence that proves the property is wetland." *Id.* In response, according to Ms. Sackett's timeline, the EPA officials noted that they had observed "water there" on the job site. *Id.*

The next day, May 4, Ms. Sackett received a call from "John Olsen from the EPA," who "said that he had been to the Corps of Engineers and that they have no information on the project." *Id.* Mr. Olson indicated that he would work on "finding out if [petitioners' property] is wetlands." *Id.* That same day, Ms. Sackett called a "professional wetland scientist," *id.* at 28, named Tom Duebendorfer "to see if he could determine whether [the subject property] is wetlands." *Id.* at 16. Mr. Duebendorfer asked Ms. Sackett to "send him some information on the site and he would get back to [her] the following week." *Id.* Ms. Sackett also reached out on May 4 to Ms. Fromm at EPA and informed her that Mr. Duebendorfer had been asked "to determine if this site is wetlands." *Id.* Ms. Sackett offered to have Mr. Duebendorfer contact Ms. Fromm with the results of his analysis, and "Carla was good with that." *Id.*

On May 21, 2007, Ms. Sackett and Mr. Duebendorfer "met at [petitioners'] property," and the latter announced that he "did determine that the site is part of a wetland." *Id.* at 17. According to Mr. Duebendorfer, the site "is not an isolated wetland" because "it joins a wetland to the South and to the

West across a road." *Id.* Mr. Duebendorfer offered his further opinion that petitioners "should continue not to do any work to the site until [they had] the US Army Corps evaluate the site on the best way to proceed." *Id.*[10]

On May 22, Ms. Sackett "went to go see Beth Reinhart at the US Army Corps" in Coeur d'Alene, Idaho. *Id.* Ms. Reinhart was "out of the office," but Ms. Sackett was able to meet with Dean Hilliard of the Corps "on the site at 1604 Kalispell Road." *Id.* Mr. Hilliard collected some information from Ms. Sackett, and "said that [petitioners] should not do anything until Beth has had a chance to look at the information." *Id.* During their meeting, however, Mr. Hilliard "gave [Ms. Sackett] an application to fill out for a permit" to fill wetlands. *Id.* On May 23, Ms. Sackett spoke with Mr. Hillard again, and he asked her to "send him the facts on what had taken place" and "Ms. Sackett agreed." *Id.*[11]

Also on May 23, Ms. Sackett spoke again with Mr. Duebendorfer "to see if he knew who had jurisdiction" over the site between EPA and the Corps. *Id.* Mr. Duebendorfer indicated that "EPA deals with water quality issues and . . . that wetlands are regulated by the Core [sic]." *Id.* Ms. Sackett then "asked [Mr. Duebendorfer] if he would

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[10] The FOIA documents also include a June 2007 letter from Mr. Duebendorfer to Ms. Sackett that refers to 1604 Kalispell Bay Road as "your 'wetland' property" and describes soils removed from that lot as "wetland soils." Lodged Materials 28.

[11] This agreement presumably resulted in the timeline prepared by Ms. Sackett from which these facts are taken.

get in touch with Carla Fromm from the EPA and let her know that he did determine the site to be part of a wetlands and [Mr. Duebendorfer] said he would." *Id.*

Later that same day, Ms. Sackett spoke again with Mr. Hillard at the Corps by phone. Ms. Sackett's notes indicate that during that call she described the siting of the subject parcel to Mr. Hilliard thus:

> There is no drainage to the West of my property as the elevation is higher. The property to the East of my property is the same as mine, wetlands, but there is no drainage for that. There are no culverts under Kalispell Bay Road from the South side [where lot 1604 is located] to the North side where there are wetlands. The Rudie Trust wetlands on the North side do drain West towards Kalispell Creek.[12]

Id. at 17, 21. According to her notes, however, Ms. Sackett argued to Mr. Hilliard that "[i]f there is no drainage off my property into any water system, then it seems to me that my property would be considered *isolated* wetlands," *Id.* 21 (emphasis added), perhaps reflecting her view that "isolated" wetlands are not wetlands regulable under the CWA. *See* 33 C.F.R. § 328.3(c).

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[12] The FOIA documents include hand-drawn maps, faxed from the machine of "Mike Sackett, Inc.," to the Corps, confirming the position expressed in Ms. Sacketts' notes that there are wetlands on three sides of the subject property. Lodged Materials 19, 20.

In sum, there are a number of facts in Ms. Sackett's notes from the time during which petitioners began construction that would appear relevant here, including:

- EPA officials observed "water there" on petitioners' land when they visited on May 3, 2007, and Ms. Sacketts' own notes reflect her view that the parcel includes wetlands and is surrounded by wetlands (at least some of which she believed are regulable under the CWA) on three sides.
- EPA officials told the petitioners only *three days* after petitioners "[s]tarted clearing [the] property" that they might be filling wetlands in violation of the CWA.
- The professional wetland scientist apparently *engaged by petitioners* opined on May 21, 2007—only three weeks after they began clearing their land—that their land was a wetland, and *not* an "isolated" wetland, and that petitioners should not do any more work on the site until obtaining the Corps' advice on how to proceed.
- The Corps *provided a permit application to petitioners* on May 23, 2007 and invited them to complete it.
- On that same day, Ms. Sackett instructed the wetland scientist she had hired to *inform EPA that he had determined petitioners' property to be a regulable wetland.*
- Ms. Sackett's notes—prepared long before the ACO issued—expressly recognize that petitioners' parcel *is* a wetland; she apparently thought that

it was not a *regulable* wetland because it purportedly did not drain into Kalispell Creek or Priest Lake.

There appears to be some tension between these facts and petitioners' claims before this Court that they had "absolutely no fair reason to believe that their property was regulable under the CWA." Pet. App. 5.

The Administrative Compliance Order: Even after being 1) informed by their expert that their property was potentially subject to the CWA and 2) invited by the Corps to file a permit seeking permission to fill, petitioners made no effort to apply for an "after-the-fact" permit as allowed under Corps regulations. *See* 33 C.F.R. § 326.3. Nor did they perform any remediation on their site. Against this backdrop—and a full six months after petitioners were first informed that they may have been illegally filling a wetland in contravention of the CWA—EPA issued the petitioners an ACO on November 26, 2007. *See* Pet. App. G. The Order reiterated EPA's view that petitioners' property contains regulable wetlands and that discharging fill into those wetlands without a permit violates the CWA. *Id.* at G-1 to G-4. Based on that view, EPA provided a plan for petitioners to restore the wetland to its pre-fill state. The plan provided conditions that should be met to comply with the CWA, a time frame for achieving that compliance, and noted that penalties and fines that could be assessed against petitioners by a federal court. *Id.* at G-4 to G-6. By petitioners' estimate, their cost of compliance with the ACO would be $27,000. Pet. Br. at 18.

Importantly, the ACO expressly provided petitioners a chance to redress any allegations in the Order that they believed to be inaccurate. "EPA encourages Respondents to engage in informal discussion of the terms and requirements of this Order upon receipt. Such discussions should address any allegations herein which Respondents believe to be inaccurate or requirements which may not be attainable and the reasons why." Pet. App. G-5, G-6. The ACO was amended three times to extend the time for compliance in light of additional facts about the condition of the property that came to EPA's attention following issuance of the original order. Cert. Opp. 4-5.

Petitioners waited over four months from the issuance of the ACO before they reached out to EPA. Even then, rather than contacting EPA—as the ACO invited petitioners to do—to continue the kind of informal discussions with the government in which petitioners had engaged prior to issuance of the Order, petitioners sought a formal hearing.[13] Due to the resource-intensive nature of formal adjudication, however, agencies are reluctant to undertake such hearings, particularly when an informal channel of communication has been provided. *See* below at 23. EPA did not grant a formal hearing to petitioners. Finally, on the eve of the date set for compliance, petitioners filed an action in federal court seeking "a declaration that Plaintiffs' property is not subject to the CWA, and that enforcement of the ACO without providing Plaintiffs a hearing violates Plaintiffs' procedural due process rights." Complaint ¶ 3.

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[13] *See* Complaint Att. B.

Petitioners' lawsuit is premised on the assumption that an ACO issued by EPA under sections 308 and 309(a) of the CWA, 33 U.S.C. §§ 1318 and 1319(a), concludes EPA's deliberations and has independent legal significance. But an ACO issued by EPA is *not* self-executing, and penalties cannot be assessed until a district court determines that a violation of the CWA occurred. *See* 33 U.S.C. § 1319(d); *Hoffman Group, Inc. v. EPA*, 902 F.2d 567, 569 (7th Cir. 1990). Moreover, the judge is under no obligation to impose the maximum fines authorized by statute, but instead is required to "consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." 33 U.S.C. § 1319(d). As a consequence, the penalties imposed may be relatively small compared to the potential penalties available. *See, e.g.*, *U.S. v. Donovan*, 466 F.Supp.2d 595, 600 (D. Del. 2006) ("Reviewing the totality of the circumstances in this case . . . the Court concludes that a $256,000 penalty is appropriate . . . [although] the maximum penalty for Defendant's repeated violations would fall in the range of $11 million to $15 million dollars in fines.").

It also bears emphasis that landowners seeking to fill wetlands covered by the CWA can avoid ACOs by obtaining a Section 404 permit and adhering to the conditions set forth in the permit.

Petitioners argue that the process of obtaining a Section 404 permit is "ruinously expensive." Pet. Br. at 30 (citing one estimate of the cost of an *individual*

Clean Water Act permit). But single family construction projects, like the one petitioners claim they wished to build, often do not require an individual permit from the Corps; rather under Nationwide Permit 29, such construction can often proceed subject to very limited review if the construction will fill less than half an acre of waters and other conditions are met. *See* 72 Fed. Reg. 11,092, 11,186 (Mar. 12, 2007).[14] Such nationwide permits are designed to streamline the process of obtaining a permit for an activity that will have "minimal individual and cumulative impacts."[15] And while preparation of a required "pre-construction notification" may take some time and resources, it is not "ruinously expensive," Pet. Br. at 30—the median cost of obtaining a permit of this sort has been estimated to be $11,800 and a simple project (like the petitioners') could be as little as $2,000.[16]

In short, there is more to this case than is suggested by the briefs of petitioners and their *amici*. Ms. Sackett herself expressed the view that petitioners' property includes wetlands and borders wetlands in three directions, and that at least some of those neighboring wetlands are subject to the CWA; the wetland scientist she consulted advised

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[14] Ms. Sacketts' notes indicate that "just under ½ acre" was filled on petitioners' parcel. Lodged Materials 17.

[15] 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, 61-63 (2002).

[16] *Id*. at 74 n. 67. Surely this is far less than the typical cost of litigating a case in federal court.

that petitioners' should consult with the Corps. And while it may have taken some time and effort to pursue a Section 404 permit, developers and construction firms routinely obtain such permits. Finally—and of great importance here—if such a permit application is denied, the applicant is entitled to pursue an administrative appeal and, subsequently, seek judicial review of a final agency action. 33 C.F.R. §§ 331.10, 331.12. Petitioners chose to ignore the options available to them and seek to challenge a non-final agency action.

SUMMARY OF ARGUMENT

I. The Order that petitioners seek to challenge is not "final" for purposes of judicial review because it fails both prongs of the test for finality set forth in *Bennett v. Spear*, 520 U.S. 154 (1997). The ACO did not "mark the consummation of the agency's decisionmaking process," *id.* at 177-78, because the Order expressly invited petitioners to contact the agency to engage in further "informal discussion" to "address" any of the Order's "allegations" that petitioners "believe[d] to be inaccurate." Pet. App. at G-5, G-6. Although petitioners had engaged in many informal contacts with the government *before* the ACO issued, they declined the Order's invitation to pursue further discussions.

The Order also fails *Bennett*'s second prong, because it is not an order by which legal rights or obligations are determined or from which legal consequences flow. 520 U.S. at 177-78. ACOs under the CWA are not self-executing; rather, in order "to enforce a compliance order, the EPA must bring an action alleging a violation of the CWA itself." Pet. App. A-12. Moreover, even if EPA were to bring an

enforcement action against the Sacketts and prove a violation of the CWA, it is the *district court* that must set the amount of any penalty under the CWA, *not* EPA. *See* 33 U.S.C. § 1319(d). In short, then, it is violating the *CWA*—not anything about the ACO—that subjects the Sacketts to fines and penalties; if they discharged fill into a water of the United States without a permit, they were in violation of the CWA before the ACO issued, and they still are.

A rule treating ACOs as final actions would undermine EPA's enforcement discretion, allowing the recipients of ACOs to hale EPA into court before the agency has otherwise determined whether to pursue civil enforcement action. This would create a disincentive for EPA to issue ACOs and thereby eliminate the important notice function served by such orders, which provide an opportunity for parties to limit their liability in advance of (or avoid entirely) a potential civil enforcement action.

Petitioners also should not be rewarded for failing to utilize the multiple administrative processes that they could (and should) have followed to achieve a resolution of their concerns, both prior to commencing construction on their property and between commencement of construction and issuance of the ACO. First, the Corps has established a process for obtaining formal determinations of whether a permit would be required to discharge fill material on a particular parcel, *see* 33 C.F.R. Pt. 331, but petitioners began construction without seeking such a ruling. Second, parties may obtain judicial review of whether their proposed activities are subject to the CWA by applying for a permit from the Corps and, in the event of an adverse permit decision

(including a permit issued with conditions objectionable to the applicant), exhausting administrative appeals to obtain a final agency action. 33 U.S.C. § 1344(a), 33 C.F.R. Pt. 331. Petitioners could have done so, moreover, even after commencing construction, by applying for an "after-the-fact" permit. 33 C.F.R. § 326.3(e).

This Court should also reject petitioners' due process arguments. First, the ACO did not deprive petitioners of a cognizable property interest because it does not compel them to do anything not already compelled by the CWA. Moreover, EPA's opinion expressed in the ACO—that petitioners' property does constitute a "water of the United States"—is neither the agency's last word on the subject nor the legal system's last word on the subject. Indeed, to give the Order any legal force, EPA must still prove up the basis for the Order's findings in court, based on a preponderance of the evidence, at which time petitioners are entitled to the most robust "process" provided by the American system of administrative law—an adversarial, adjudicatory hearing before an Article III judge.

II. Petitioners' *amicus* General Electric ("GE") revisits its losing positions in *GE v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010), *cert. denied GE v. Jackson,* 131 S. Ct. 2559 (2011), and those arguments should also be rejected by this Court. First, GE suggests that the ACO's "market" effects—such as allegedly raising petitioners' "borrowing costs," GE Br. 12—represent a deprivation of property. As the D.C. Circuit held, however, "independent market reactions" to administrative action with such limited, consequential effects on property holders do not

merit protection under the due process clause. *GE*, 610 F.3d at 308-10. The D.C. Circuit also rejected GE's argument that the possibility of "enormous" fines under an administrative order violates due process, holding that is not so where—as here—fines proposed by the agency are "subject to a 'good faith' or 'reasonable ground[s]' defense" and "the imposition of penalties is subject to judicial discretion." *Id.* at 307 (internal citations omitted).

Petitioners and their *amici* also repeatedly suggest that the ACO here violates due process because "EPA has no administrative process the exhaustion of which will produce an action reviewable in court." *See e.g.*, Pet. Br. at 14. But the CWA's permitting process provides parties the opportunity for review without exposing themselves to potential penalties, and that process *does* lead to judicially reviewable final agency action. Petitioners' objections to that process boil down to (1) they allegedly did not know about it; and (2) the process is supposedly too expensive to count for due process purposes. But just as these objections are insufficient to overcome the need for final agency action to qualify for judicial review—and, moreover, are contradicted by the facts—they also cannot justify the petitioners' failure to pursue the process to which they were entitled.

III. While *Amici* Competitive Enterprise Institute and American Petroleum Institute, *et al.*, suggest that the Court should authorize petitioners to seek judicial review of the ACO because it is otherwise difficult to subject questions about the scope of the CWA to judicial scrutiny, that is simply not true. There is no shortage of federal court decisions on

whether particular aquatic features constitute "waters of the United States" subject to the CWA, including recent decisions by this Court and nearly every federal court of appeals.

ARGUMENT

I. EVEN IF THE CWA DOES NOT PRECLUDE JUDICIAL REVIEW OF EPA's ORDER, REVIEW IS UNAVAILABLE UNDER THE APA.

Amici agree with the Ninth Circuit that Congress intended the CWA to *prohibit* pre-enforcement review of ACOs regardless of whether they would otherwise have been reviewable under the APA. Pet. App. A-6 to A-9. But even if this Court reverses the Ninth Circuit's holding that the CWA precludes review, it should remand for the lower courts to address APA issues in the first instance. If this Court does reach the APA issues, however, it should hold that petitioners cannot obtain judicial review under the APA because there has been no "final" agency action, which is a prerequisite to judicial review of agency action under 5 U.S.C. § 704.

A. The Order does not Satisfy this Court's Requirements for "Final" Agency Action.

This Court has set forth clear guidelines for determining when agency action is "final" for purposes of review under the APA. Specifically, in *Bennett,* 520 U.S. at 177-78 (internal quotations omitted), the Court held that to be "final," an agency action must (1) "mark the consummation of the agency's decisionmaking process," and (2) "be one by which rights or obligations have been determined, or

from which legal consequences will flow." The ACO here fails both prongs of this analysis.

1. The Order did not mark the consummation of the agency's decisionmaking process.

Petitioners acknowledge the hurdles imposed by *Bennett*, but argue that the ACO meets those requirements. Pet. Br. at 54-56. With respect to the first prong—consummation of the agency process—petitioners make two separate arguments, although their brief makes no distinction between them. First, petitioners claim that "[t]he order does not initiate any administrative process, nor is there any administrative process whereby the Sacketts can seek review of the order." *Id.* at 55. This argument is flatly wrong—indeed, it ignores the terms of the Order itself. Petitioners' second, more elliptical, claim is that the ACO represented a jurisdictional determination by EPA, and that such determinations are immediately appealable. *See id*. As set forth below, that argument is also completely untenable.

a. The ACO is not "final" because it invited petitioners to engage in informal discussions with EPA, before the agency decides whether the ACO's allegations warrant a civil enforcement action.

The applicable (amended) version of the ACO states that petitioners' land "contains wetland within the meaning" of EPA's regulations; that petitioners "discharged fill materials into wetlands" on their land; and that such discharge was in violation of sections 301 and 502(12) of the Act, 33 U.S.C. §§

1311 and 1362(12). Pet. App. G-2, G-3. The Order accordingly indicates that petitioners must "remove all the unauthorized fill material placed within" their parcel and restore the site "to its original, pre-disturbance topographic condition." *Id.* at G-4. But the Order does not stop there—rather, it specifically "encourages [the Sacketts] to engage in informal discussion of the terms and requirements of the Order," including "any allegations herein which Respondents believe to be inaccurate or requirements which may not be attainable and the reasons why." *Id.* at G-5, G-6.

As set forth above, petitioners engaged in a lengthy period of informal contacts with EPA (and the Corps) *before* the ACO issued. Ms. Sackett had repeated contacts, both in person and by phone, with Carla Fromm and John Olson at EPA, and even instructed the wetlands scientist whom petitioners apparently engaged to let Ms. Fromm know that he had found petitioners' land to be a wetland subject to regulation under the CWA. Petitioners were thus fully aware of how "to engage in informal discussion" with EPA, Pet. App. G-5, and entirely capable of doing so.

In light of the Order's express invitation to petitioners to engage in further "informal discussion" with the agency *and* their repeated earlier contacts with the agency, their claim that there is "no administrative process whereby [they] can seek review of the Order," Pet. Br. at 55, is puzzling. There is a clear "administrative process" for seeking further review—the "informal discussion" process identified by the Order itself. Petitioners' argument

simply ignores the ACO's invitation to informal discussion.

Petitioners also appear to argue, however, that EPA's failure to grant them a *formal* hearing demonstrates that there was no "administrative process whereby [they] can seek review of the order," *id.*, and thereby established the ACO's finality for purposes of judicial review. That is simply not so. It is true that EPA did not grant petitioners' request for a formal hearing, but that does not demonstrate the finality of the Order. As both this Court and the lower courts have pointed out, administrative agencies frequently deny *formal* hearings because they simply do not have the resources to engage in that particular kind of review with respect to all the decisions that they are required to make under the law. *See infra* at 35. In this case, however, the agency offered petitioners *informal* review instead, which provides the opportunity to persuade agency decisionmakers that some or all of the order's allegations were incorrect *before* EPA consummates its decisionmaking process by determining whether to file an enforcement action in court. *See* SG Br. at 26-27. In these circumstances, the agency's unwillingness or inability to grant a formal hearing does not render the ACO final.

b. Petitioners' argument that the ACO represents a "jurisdictional determination" that is immediately appealable is incorrect.

Petitioners' second argument with respect to "consummation" of the agency process appears to be that because someone at EPA "had to determine that [the agency] had regulatory authority over the

Sacketts' property" as a "logical prerequisite" to issuing an ACO, the ACO represents a jurisdictional determination by EPA that is immediately appealable. Pet. Br. at 54-55. Petitioners claim that "[t]here are no further steps for the agency to take *with respect to jurisdiction*" and—although they do not explain why—they appear to believe that the ACO's finding of EPA jurisdiction over their property is, accordingly, immediately appealable.

If this is, in fact, petitioners argument, it badly misconceives the nature of the APA's "finality" requirement. It is, of course, true that *any* time an executive agency issues an order purporting to regulate anything, *someone* at the agency has made an implicit determination that the agency has regulatory authority over the property or conduct in question. But that fact has essentially nothing to do with the test for "finality" under *Bennett*. The fact that *someone* at EPA—in this case, Richard B. Parkin, Acting Director of the Office of Ecosystems, Tribal and Public Affairs, in EPA's Seattle, Washington office—believed that petitioners' land was subject to the CWA does not mean that the agency has "consummated" its decisionmaking process on that issue. And, of course, we know from the ACO itself that the agency has not done so, as it invited petitioners to engage in informal discussions with EPA if they disagreed with any aspect of the ACO.

Writing in support of petitioners, *amici* the States of Alaska, et al., make an argument similar to petitioners' claim that the ACO constitutes a jurisdictional determination that is immediately reviewable. Specifically, the States argue that the

ACO here necessarily "mark[ed] the end of the agency's decisionmaking process on [the] underlying [jurisdictional] determination" because the Ninth Circuit in another case had found that "a jurisdictional finding by the Corps" was its "ultimate administrative position regarding the presence of wetlands." States Br. at 8 (quoting *Fairbanks Northstar Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 592 (9th Cir. 2008) ("*Fairbanks*")). Again, however, this argument simply ignores the fact that the ACO itself makes clear that it does not represent EPA's "ultimate administrative position"; rather, the agency invited petitioners to engage in further discussion to reach such a decision. In contrast, the jurisdictional determination in *Fairbanks* represented the "Corps' considered, definite and firm position about the presence of jurisdictional wetlands on Fairbanks' property." *Fairbanks*, 543 F.3d at 593. Even more important, the States relegate to a footnote in their brief the actual holding of *Fairbanks*: The Ninth Circuit held that the jurisdictional determination in that case was *not* "final" for purposes of judicial review because it failed the second *Bennett v. Spear* hurdle (discussed below at 26-27).[17]

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[17] Notably, the *Fairbanks* holding that agency determinations of CWA jurisdiction are generally *not* final agency action subject to immediate, pre-enforcement judicial review is consistent with the view of other lower courts. *See, e.g., Greater Gulfport Properties, LLC v. U.S. Army Corps of Eng'rs*, 194 F. App'x 250 (5th Cir. 2006); *Comm'rs of Pub. Works of Charleston v. United States,* 30 F.3d 129 (4th Cir. 1994) (table decision); *Acquest Wehrle LLC v. U. S.*, 567 F.Supp.2d 402 (W.D.N.Y. 2008); *St.*

2. The Order was not final because it was not one by which rights or obligations were determined or from which legal consequences flowed.

The Order also fails the second prong of the *Bennet v. Spear* analysis—the requirement of an agency action by which legal rights or obligations are determined and from which legal consequences flow, 520 U.S. at 177-78. Any such rights, obligations, or legal consequences for petitioners would flow only from a contingent, future determination of a CWA violation by a district court judge, following a determination by EPA to prosecute the alleged violation in court. As the court below held, it is well established that Section 1319 "does not authorize the EPA to bring enforcement actions for mere violations of compliance orders." Pet. App. A-12; *see also Hoffman Group*, 902 F.2d at 569 (a party "cannot be compelled to comply with the Compliance Order without an opportunity to challenge the Order's validity in court"). Rather, in order "to enforce a compliance order, the EPA must bring an action alleging a violation of the CWA itself." Pet. App. A-12.

It is true that, *if* EPA chooses to bring a civil enforcement action, and *if* a court finds violations of both the CWA and an ACO, the CWA authorizes the district courts to impose, in theory, fines exceeding the maximum penalty for the underlying CWA violations alone, 33 U.S.C. § 1319(d). Nonetheless, it

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Andrews Park, Inc. v. United States Dep't of the Army Corps of Eng'rs, 314 F.Supp.2d 1238, 1244-45 (S.D. Fla. 2004).

is always the *district court* that must set the amount of any penalty associated with the order, *not* EPA. *See* 33 U.S.C. § 1319(d) (setting forth equitable factors the court "shall consider" in "determining the amount of a civil penalty"). As the government notes in its brief, this is, in practice, "a remote possibility," since courts in wetlands fill cases "rarely impose penalties in an amount that approaches the statutory maximum."[18] SG Br. at 30.

In short, then, it is violating the *CWA*—not anything about the ACO—that subjects petitioners to fines and penalties; if they discharged fill into a water of the United States without a permit, they were in violation of the CWA and subject to a potential civil enforcement action before the ACO issued, and they still are.[19]

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[18] Moreover, although not noted in EPA's brief, presumably EPA would also have to decide to *seek* penalties at such a level for this unlikely scenario to unfold, following issuance of an ACO.

[19] For this reason, *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461 (2004), is distinguishable. As petitioners observe, this Court held in *Alaska Dep't of Envtl. Conservation* ("*ADEC*") that an EPA ACO under the Clean Air Act (CAA) met *Bennett*'s second prong because of the "practical and legal consequences" that flowed from the order, including "vulnerability to penalties." *See id.* at 483. In *ADEC*, however, EPA's order subjected the regulated party to penalties for activity that, absent the order, was expressly authorized under a CAA permit issued by another agency. *Id.*

3. A rule holding ACOs to be final agency actions would undermine EPA's enforcement discretion and create perverse incentives that disserve the interest of all parties.

Today, EPA plainly has discretion to decide whether or not to bring an enforcement action after issuing an ACO. If, however, ACOs are deemed to be final agency action subject to immediate review, the subjects of such orders will have the essentially unilateral ability to force EPA to proceed to enforcement immediately, eliminating the agency's enforcement discretion. *Cf.*, *Heckler v. Cheney*, 470 U.S. 821, 835-36 (1985) (federal Food, Drug, and Cosmetic Act commits "complete discretion" to the agency regarding enforcement).

Such a rule would create a perverse incentive for EPA to remain silent in situations where it believes violations exist unless it is prepared to immediately litigate in federal court. The statute of limitations for civil penalty actions is generally five years. 28 U.S.C. § 2462. During that time, of course, daily penalties for ongoing violations would continue to pile up without the defendant being made aware of that potential liability. In other words, the notice function currently served by issuance of ACOs is actually a *good* thing for parties in petitioners' position. EPA employs ACOs to place such parties, who proceed to construction without seeking a permit from the Corps, on notice that they may be violating the CWA *before* construction gets very far along. Such parties can limit their liability for a continuing violation of the Act by taking corrective action called for by the ACO. If, however, EPA could be sued the moment an

ACO issues, that would be a strong disincentive for the agency to issue such Orders at all, resulting in far greater remediation costs for such parties in many instances.

4. Petitioners should not be rewarded for *failing* to take appropriate steps at the agency.

Petitioners and their *amici* insist that the ACO should be considered final for purposes of judicial review because they do not have any recourse at the agency. But even assuming that petitioners are correct that administrative avenues are now closed to them, it is clear that there were multiple administrative processes they *could* (and should) have followed to achieve a resolution of their concerns, both prior to commencing construction on their property and between commencement of construction and issuance of the ACO.

First, as discussed *supra* at 4, the Army Corps has established a process for obtaining formal determinations of whether a permit would be required to discharge fill material on a particular parcel. *See also* 33 C.F.R. Pt. 331. Nothing in the record suggests that there is anything particularly difficult or expensive about seeking such a determination. Of course, as also discussed above, determinations that the CWA does apply to certain activities on a particular tract of land are not subject to immediate judicial review,[20] but they are a way

[20] In concluding that a positive jurisdictional determination is not final agency action, the Court need not opine on whether a *negative* jurisdictional determination—*i.e.*, a determination that a given location

that entities and individuals like petitioners may seek a definitive statement of the Government's determination, following formal opportunities to present evidence and pursue an administrative appeal, *see, e.g.,* 33 C.F.R. 331.6(c), regarding the applicability of the CWA to their land, *see supra* at 4-5.

Second, parties may obtain judicial review without exposing themselves to potential penalties by seeking a permit from the Corps and, in the event of an adverse permit decision, obtaining judicial review following the exhaustion of administrative appeals. 33 U.S.C. § 1344(a), 33 C.F.R. Pt. 331. Petitioners could have done so in this case, not only prior to commencing construction, but even afterwards, by applying for an "after-the-fact" permit as allowed under the Corps' regulations. 33 C.F.R. § 326.3(e). Indeed, as noted *supra* at 9, the Corps directly provided Ms. Sackett with an application for such a permit only days after construction began on petitioners' land.

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does not constitute a water of the United States—is a final agency action. Lower courts have held that such negative determinations *are* final agency action because, from the perspective of finality under the APA, they are the functional equivalent of issuing a permit. *See, e.g.*, *Deerfield Plantation Phase II-B Prop. Owners Ass'n, Inc. v. U.S. Army Corps of Eng'rs*, 4:09-CV-01023-RBH, 2011 WL 2746232, *10 (D.S.C. July 12, 2011) (citing *Nat'l Wildlife Fed'n v. Hanson,* 859 F.2d 313 (4th Cir. 1988)).

II. THIS COURT SHOULD REJECT THE DUE PROCESS CLAIMS OF PETITIONERS AND THEIR *AMICI*.

Petitioners' *amicus* GE presents a particularly unabashed variation of the Sacketts' theme that fairness in this case requires circumvention of the usual hurdles to judicial review. GE expressly urges the Court to abandon the "normally sound practice of resolving cases on the narrowest possible ground" and to turn directly to "the fundamental due process concerns raised by EPA's exercise of it [sic] unilateral order authority and provide guidance regarding the constitutional principles applicable to such administrative schemes generally." GE Br. 10-11. GE's brief, however, not only urges an unnecessarily broad opinion—contrary to the canon of avoiding constitutional questions whenever possible—but its due process arguments (which mirror those of petitioners themselves) are simply wrong.

A. The ACO did not Deprive the Sacketts of a Cognizable Property Interest.

The ACO does not compel the Sacketts to do anything not already compelled by the CWA and it is not self-enforcing: "[T]o enforce a compliance order, the EPA must bring an action alleging a violation of the CWA itself." Pet. App. A-12. The Ninth Circuit's analysis in the *Fairbanks* case is directly on point—whether the CWA applies to petitioners' land, as EPA has opined, or whether petitioners' parcel does not contain waters of the United States that are regulated under the Act, as they maintain, their "legal obligations arise directly and solely from the CWA, and not from [EPA's] issuance" of an ACO. *Fairbanks*, 543 F.3d at 594.

Moreover, EPA's opinion expressed in the ACO, that the property does constitute a "water of the United States," is neither the agency's last word on the subject nor the legal system's last word on the subject. The Order expressly stated that its findings are open to revision pending informal discussion with the Sacketts. In addition, even if EPA maintains its initial opinion, in order to give the order any legal force the agency must still prove up the basis for its finding in court, based on a preponderance of the evidence, at which time the Sacketts are entitled to the most robust "process" provided by the American system of administrative law—an adversarial, adjudicatory hearing before an Article III judge. To date, however, there has been no adjudication of any potential obligations petitioners may have under the CWA and therefore no deprivation of property.

GE's "market" argument revisits its losing position in *GE v. Jackson*, 610 F.3d 110. There GE maintained that a unilateral administrative order ("UAO") issued by EPA under CERCLA (42 U.S.C. § 9696) directing GE to clean up a hazardous waste site violated the due process clause because EPA had acted without first providing a hearing before a neutral decision maker. GE further argued that the "market" effects of the UAO's issuance—allegedly including the lowering of GE's stock price, harming of its brand value, and increasing its costs of financing—constituted an immediate deprivation of property. The D.C. Circuit disagreed, explaining that GE lacked a "legitimate claim of entitlement" to the asserted property. *GE*, 610 F.3d at 308 (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). According to the D.C. Circuit,

consequential injuries resulting from "independent market reactions to the issuance of a UAO" do not merit protection under the due process clause except in extreme cases where such reactions completely destroy the value of the property in question. 610 F.3d at 308-10. In the present case, it is conceivable—albeit barely—that EPA's ACO to the Sacketts gave the markets for "financing," GE Br. 16, better notice of a potential CWA violation than was previously available and that the Sacketts might accordingly face "higher borrowing costs," *id.* at 12, or other consequential damages as a result. But, as the D.C. Circuit held in *GE v. Jackson*, such limited effects on property holders do not constitute deprivation of a property interest within the meaning of the due process clause.

GE's brief to this Court also revisits its *GE v. Jackson* argument that the ACO "violate[s] the holding of *Ex parte Young*, 209 U.S. 123, 147 (1908), that due process precludes fines 'so enormous . . . as to intimidate [parties] . . . from resorting to the courts to test the[ir] validity.'" GE Br. 12. But as the D.C. Circuit held, "statutes imposing fines—even 'enormous' fines—on noncomplying parties may satisfy due process if such fines are subject to a 'good faith' or 'reasonable ground[s]' defense," and the courts have also held that "there is no constitutional violation if the imposition of penalties is subject to judicial discretion." *GE*, 610 F.3d at 307 (internal quotations and citations omitted). It is undisputed here that any CWA fines imposed on the Sacketts by a district court would be subject to a "good faith" defense, 33 U.S.C. § 1319(d), and that the district court would have broad discretion to limit or even

eliminate any fine. *See, e.g.*, *U.S. v. Donovan*, 466 F.Supp.2d at 600.

B. Even if the ACO Affected a Property Interest, Petitioners Have Been Provided Adequate Opportunities for Process.

Petitioners and their *amici* repeatedly suggest that the ACO here violates due process because "EPA has no administrative process the exhaustion of which will produce an action reviewable in court." *See e.g.*, Pet. Br. at 14. As discussed above, however, the CWA's permitting process provides parties the opportunity for review without exposing themselves to potential penalties, and that process *does* lead to judicially reviewable final agency action. Petitioners' objections to that process boil down to (1) they allegedly did not know about it; and (2) the process is supposedly too expensive to count for due process purposes. But just as these objections were insufficient to overcome the need for final agency action to qualify for judicial review—and, moreover, are contradicted by the facts—they also cannot justify the petitioners' failure to pursue the process to which they were entitled.[21]

Moreover, it is clear that EPA's procedures in this case were more than sufficient under the three-part analysis of *Mathews v. Eldridge*, 424 U.S. 319 (1976). As the Fifth Circuit explained in *Buttrey v. U.S.*, 690 F.2d 1170 (5th Cir. 1982), the "fiscal and

[21] If this Court agrees that the ACO is not a final agency action under the APA, it follows implicitly from this Court's decades of APA jurisprudence that an ACO recipient has no due process right to immediate judicial review of that order.

administrative burdens" prong of that analysis is decisive, as it is unrealistic to think that an agency could grant formal hearings as a matter of course. *Buttrey* involved a developer who *did* seek a permit from the Corps, and requested a formal hearing on the permit. *Id.* at 1173. In addressing the "fiscal and administrative burdens" prong of the due process analysis, the court wrote:

> We understand that a routine imposition of trial-type procedures on the Corps would entail a substantial, and probably unbearable burden. [The Corps] has testified that the Mobile[, Alabama] District alone processes some 1200 [§ 404] applications per year . . . Trial-type hearings, if routinely or even often granted, would not simply impose a "burden" on the Corps. Such a requirement in all likelihood would make it impossible for the Corps to carry out its Congressional mandate under section 404 at all.

Buttrey, 690 F.2d at 1178. In light of these resource issues, the Fifth Circuit concluded that "the Corps should not be required routinely to grant" requests for formal hearings. *Id.*

Perhaps even more relevant here—the Fifth Circuit noted that "[t]he Corps' situation is not atypical." *Id.* Indeed, "[i]n connection with a related water pollution control program, for instance, the Supreme Court has emphasized that if the EPA were required to grant oral hearings in 'most' of its 2200 yearly applications, there would be 'serious questions about the EPA's ability to administer the. . .

program.'" *Id.* (quoting *Costle v. Pac. Legal Found.*, 445 U.S. 198, 215 (1980)). Given the enormous administrative burdens of granting formal hearings in all cases like the one now before this Court—and the availability of informal review as set out in the ACO—petitioners' due process argument must be rejected under the *Mathews v. Eldridge* balancing.

III. IMMEDIATE JUDICIAL REVIEW OF ACOs IS NOT NECESSARY TO ENSURE ADEQUATE JUDICIAL SCRUTINY OF CWA JURISDICTIONAL ISSUES.

Amici Competitive Enterprise Institute and American Petroleum Institute, *et al.*, suggest that the Court should authorize petitioners to seek judicial review of the ACO because it is otherwise difficult to subject questions about the scope of the Clean Water Act to judicial scrutiny. In truth, however, there is no shortage of litigation, on the merits, about whether particular aquatic features constitute "waters of the United States" subject to the CWA. This Court has considered the issue twice in just over a decade, *see Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Rapanos*, 547 U.S. 715, and nearly every federal court of appeal has addressed the scope of the law since this Court's *Rapanos* decision, *see, e.g., United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006); *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199 (2d Cir. 2009); *Donovan*, 466 F.Supp.2d 595; *Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278 (4th Cir. 2011); *United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008); *United States v. Cundiff*, 555 F.3d 200 (6th Cir. 2009); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006);

United States v. Bailey, 571 F.3d 791 (8th Cir. 2009); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007); *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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NOVEMBER 30, 2011