

No. 10-1062

In the
Supreme Court of the United States

CHANTELL SACKETT and MICHAEL SACKETT,
Petitioners,

v.

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

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

PETITIONERS' REPLY BRIEF

LESLIE R. WEATHERHEAD	M. REED HOPPER
Witherspoon Kelley	*DAMIEN M. SCHIFF
422 West Riverside Avenue	* <i>Counsel of Record</i>
Suite 1100	Pacific Legal Foundation
Spokane, WA 99201	930 G Street
Telephone: (509) 624-5265	Sacramento, CA 95814
E-mail: lwlibertas@aol.com	Telephone: (916) 419-7111
	Facsimile: (916) 419-7747
	E-mail: mrh@pacificlegal.org
	E-mail: dms@pacificlegal.org

Counsel for Petitioners

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
I. DUE PROCESS REQUIRES THAT THE SACKETTS BE AFFORDED JUDICIAL REVIEW OF THE COMPLIANCE ORDER	2
II. THE CLEAN WATER ACT DOES NOT PRECLUDE APA REVIEW OF THE COMPLIANCE ORDER	9
III. THE COMPLIANCE ORDER IS FINAL AGENCY ACTION	14
A. The Compliance Order Is the Culmination of EPA's Decisionmaking	14
B. The Compliance Order Creates Numerous Legal Effects	18
1. The Compliance Order Imposes Additional Liability	18
2. The Compliance Order Imposes Additional Legal Obligations	20
CONCLUSION	23

TABLE OF AUTHORITIES

	Page
Cases	
<i>Alaska Dep't of Env'tl. Conservation v. EPA</i> , 540 U.S. 461 (2004)	19, 21-22
<i>Alaska v. U.S. EPA</i> , 244 F.3d 748 (9th Cir. 2001)	17, 19, 21
<i>Am. Canoe Ass'n v. Murphy Farms, Inc.</i> , 412 F.3d 536 (4th Cir. 2005)	7
<i>Am. Petroleum Inst. v. U.S. EPA</i> , 906 F.2d 729 (D.C. Cir. 1990)	16
<i>Bennett v. Spear</i> , 520 U.S. 154 (1997)	14
<i>Douglas County v. Babbitt</i> , 48 F.3d 1495 (9th Cir. 1995)	3
<i>Ex parte Young</i> , 209 U.S. 123 (1908)	6
<i>Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs</i> , 543 F.3d 586 (9th Cir. 2008)	8, 16-17
<i>Free Enterprise Fund v. Public Company Accounting Oversight Board</i> , 130 S. Ct. 3138 (2010)	13
<i>Gen. Elec. Co. v. EPA</i> , 290 F.3d 377 (D.C. Cir. 2002)	16
<i>McNary v. Haitian Refugee Center, Inc.</i> , 498 U.S. 479 (1991)	13-14
<i>MedImmune, Inc. v. Genentech</i> , 549 U.S. 118 (2007)	13
<i>Morris v. Gressette</i> , 432 U.S. 491 (1977)	11

TABLE OF AUTHORITIES—Continued

	Page
<i>N. Cal. River Watch v. City of Healdsburg</i> , 496 F.3d 993 (9th Cir. 2007)	12
<i>N. Cal. River Watch v. Wilcox</i> , 633 F.3d 766 (9th Cir. 2011)	12
<i>National Labor Relations Board v. United Food & Commercial Workers Union, Local 23</i> , 484 U.S. 112 (1987)	11
<i>Nollan v. Cal. Coastal Comm’n</i> , 483 U.S. 825 (1987)	5
<i>Pub. Util. Dist. No. 1 v. Bonneville Power Admin.</i> , 506 F.3d 1145 (9th Cir. 2007)	21
<i>Rapanos v. United States</i> , 547 U.S. 715 (2006)	12
<i>Reisman v. Caplin</i> , 375 U.S. 440 (1964)	7
<i>Thunder Basin Coal Co. v. Reich</i> , 510 U.S. 200 (1994)	5-6
<i>United States v. Dell’Aquila</i> , 150 F.3d 329 (3d Cir. 1998)	7

Statutes

5 U.S.C. § 551(6)	15
§ 704	16
33 U.S.C. § 1251(b)	4
§ 1319(a)(3)	15-16
§ 1319(b)	11, 15
§ 1319(d)	7, 16

TABLE OF AUTHORITIES—Continued

	Page
§ 1319(g)	11
§ 1319(g)(8)(B)	7

Regulations

33 C.F.R. § 326.3(e)(1)	8, 20-21
§ 326.3(e)(1)(ii)	20
§ 326.3(e)(1)(iv)	21

INTRODUCTION

Contrary to the insinuations of Respondent Environmental Protection Agency (EPA), *see* Brief for the Respondents (Resp. Br.) at 12-13, 52-54, Petitioners Michael and Chantell Sackett did not know and had no reason to know that the small lot on which they had started to build their dream home might be a wetland subject to regulation by a federal agency, *see* Decl. of Chantell Sackett in Support of Pet'rs' Objections ¶ 5; J.A. 7 (Compl. ¶ 6 ("Nothing in the [property's] title documents or title policy indicated any limitation on development.)); J.A. 34 (Sacketts' counsel's letter to EPA asserting that "the Site is not a wetland."). The Sacketts seek judicial review of EPA's compliance order, which threatens crushing daily civil fines and has put their homebuilding on indefinite hold. Although EPA contends that the Sacketts have no right to a meaningful day in court to challenge the jurisdictional findings on which EPA's order is based, EPA's arguments cannot withstand scrutiny.

First and foremost, the compliance order deprives the Sacketts of protected property interests, most prominently by denying them the use of their property and the right to build their family home. Because the Clean Water Act does not provide the Sacketts adequate post-deprivation review, due process can be satisfied only by giving the Sacketts the right to challenge EPA's order under the Administrative Procedure Act (APA). Second, Congress did not intend to deny landowners like the Sacketts an opportunity for meaningful judicial review of EPA compliance orders under the APA. The agency wants landowners like the Sacketts to cower before the immense penalties that a compliance order imposes, but does not

want them to be able effectively to challenge its assertion of power. Congress could not have intended to authorize such a perverse regime. And third, in light of the foregoing, a compliance order is final agency action under the APA. A compliance order is not a friendly invitation to talk about the law. Nor is it a casual informational document. It is, instead, a direct “order,” based on case-specific “findings,” that imposes severe “sanctions” for conduct inconsistent with its commands. Accordingly, the Sacketts’s APA action should proceed.

ARGUMENT

I

DUE PROCESS REQUIRES THAT THE SACKETTS BE AFFORDED JUDICIAL REVIEW OF THE COMPLIANCE ORDER

The compliance order has deprived the Sacketts of due process because they have received no prompt judicial post-deprivation hearing. The Sacketts’ rights will continue to be violated until they are afforded such review. EPA rhetorically defends itself on the ground that the Sacketts’ travails are their own fault. *See* Resp. Br. at 52. EPA argues that a prompt judicial hearing is not required because the compliance order has purportedly not deprived the Sacketts of a protected interest, reasoning that the compliance order merely restates the Sacketts’ existing statutory obligations and does not impose any new obligations. *See id.* at 45-46. EPA also contends that the statute’s built-in review provisions satisfy the Sacketts’ due

process rights. *See id.* at 49-52. EPA's arguments are without merit.¹

To begin with, the Sacketts' current predicament is decidedly not of their own making. Prior to commencing construction, the Sacketts had obtained all government approvals that they thought necessary. J.A. 10. The Sacketts had no reason to believe that their property contained any wetlands, let alone wetlands under EPA's control. The property is within an existing subdivision bounded by two other lots and two county roads. *See* J.A. 9-10. Within just hundreds of feet of the Sacketts' lot are many developed structures. *Id.* There is no continuous surface water connection between the property and Priest Lake, J.A. 10, or any wetlands, *id.* at 34. By faulting the Sacketts for not having contacted them before beginning construction, EPA seeks to become national land use agency, requiring that every earthmoving project in the country first get pre-clearance from it or the United

¹ EPA contends that the Sacketts should not be allowed to raise their post-deprivation claim here because it was not raised below. *See* Resp. Br. at 45. EPA is incorrect. *See* J.A. 13-14 (Compl. ¶ 46 (due process challenge to the compliance order)). The Sacketts have consistently pressed their due process claims, in particular the claim that the failure to afford APA review results in a violation of their due process rights. *See* Pet. for Cert. at 9-10; Apps.' 9th Cir. Opening Br. at 13; Pls.' Opp'n to U.S.'s Mot. to Dismiss Compl. for Lack of Subject Matter Jurisdiction at 1. To be sure, in their opening brief in this Court the Sacketts explain in greater detail than they have previously the precise contours of their due process arguments. But unlike issues, a party is always entitled further to explicate its legal arguments on appeal. *Cf. Douglas County v. Babbitt*, 48 F.3d 1495, 1502 n.8 (9th Cir. 1995) ("[T]here is no bar to . . . raising new arguments . . . if those arguments are purely legal.").

States Army Corps of Engineers.² Congress did not countenance such an arrogation of power. *See* 33 U.S.C. § 1251(b) (“It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . .”).

Further, EPA cannot evade due process by claiming that the Clean Water Act itself, and not the compliance order, caused any deprivation. *Cf.* Resp. Br. at 45-46, 54. The Act may have provided the authority, but EPA chose the enforcement mechanism. It is the issuance of the compliance order that is the final agency action. Had EPA opted to file an action in court, rather than issue a compliance order, there would have been no due process violation.

Neither can EPA evade due process by claiming that the compliance order is like an informal, informational “warning letter.” The order is much more than that. It is based on specific factual “findings” that are determinative of EPA’s conclusions in the compliance order that the Sacketts’ property is subject to federal regulation, that a violation of the Clean Water Act has occurred, and that nothing short of complete restoration of the property is required in remediation. *See* J.A. 51-53, 55.

Indeed, unlike a “warning letter,” violation of the compliance order itself imposes potential civil liability above and beyond any liability for having violated the Clean Water Act, liability now set at \$37,500 per day.

² *Cf.* Brief of the States of Alaska, *et al.*, in Support of Petitioners at 1-4; Brief of Amici Curiae Wet Weather Partnership, *et al.*, in Support of Petitioners at 3-4.

This liability derives directly from the compliance order, regardless of liability for statutory violations. *See* 33 U.S.C. § 1319(d). Accordingly, simply because the compliance order is not “self-executing,” *see* Resp. Br. at 45, is irrelevant to the constitutional question. The compliance order is not advisory. It is mandatory. The order does not merely warn of an enforcement action. It *is* an enforcement action. Were it considered otherwise, then an agency could subvert due process by the simple expedient of ostensibly giving a landowner the freedom to reject a proposed deprivation, but then coercing the landowner to relinquish his protected interest by severely punishing the landowner’s supposedly free choice not to comply. This Court has rejected an analogous “out-and-out plan of extortion” before, *see Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987), and it should do so here again.

Assuming that the compliance order deprives the Sacketts of protected interests, EPA nevertheless contends that the Clean Water Act provides “extensive safeguards” for their due process rights—namely, the judicial review obtainable as a defendant in a Section 309(b) civil action, and the statute’s permitting process. But, as shown below, neither of these supposed safeguards allows the Sacketts to protect the interests that the *compliance order* impinges.

Review under Section 309(b) is not constitutionally adequate simply because civil penalty liability becomes “final and payable only after full [judicial] review.” Resp. Br. at 50 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994)). *See also* Resp. Br. at 51-52. The gist of *Ex parte Young*, 209 U.S. 123 (1908), as confirmed in *Thunder Basin*, is that, *notwithstanding such full review*, a statute still

violates due process if review can be obtained only by risking significant liability. *Thunder Basin*, 510 U.S. at 217-18; *id.* at 221 (Scalia, J., concurring in part and concurring in the judgment). Thus, the fact that the Sacketts' bank accounts cannot be docketed until after EPA successfully brings a civil action does not make Section 309(b) review constitutionally adequate.

In contending that Section 309(b) review is constitutionally adequate, EPA attempts to distinguish *Ex parte Young* on two grounds: (1) the challenged rate orders changed the applicable law by imposing confiscatory rates; and (2) the penalties were "automatic." See Resp. Br. at 48-49. The decision, however, cannot be distinguished on those grounds. First, the Sacketts' compliance order *does* change existing law by imposing a number of remedial obligations on the Sacketts that are traceable only to the order, not the statute, and by imposing a new and distinct civil liability for failing to abide by the order. Second, the penalties in *Ex parte Young* were not automatic, in that they could not have been assessed until *after* the railroad officials had been duly convicted. See 209 U.S. at 148 (holding the rate order laws unconstitutional because they "impos[ed] such enormous fines and possible imprisonment as a result of an *unsuccessful* effort to test the validity of the laws themselves") (emphasis added).

Nor can the rule of *Ex parte Young* be distinguished from this case on the theory that the Sacketts could assert a *partial* good-faith defense to civil penalty liability. This Court has held that the *Ex parte Young* infirmity can be avoided only if good faith operates as a *complete* defense to liability. Cf. *Reisman v. Caplin*, 375 U.S. 440, 446-47 (1964), *cited*

in Resp. Br. at 48 (holding that punishment for violation of IRS summons did not violate the rule of *Ex parte Young* because “noncompliance is *not subject to prosecution thereunder* when the summons is attacked in good faith”) (emphasis added). The Clean Water Act, however, imposes a regime of strict liability. *See Am. Canoe Ass’n v. Murphy Farms, Inc.*, 412 F.3d 536, 540 (4th Cir. 2005). And the statute authorizes a district court to take good faith into account as *only one of many factors* to assessing a civil penalty. *See* 33 U.S.C. § 1319(d). Such discretionary power cannot avoid the *Ex parte Young* problem, given that even a 99% reduction in the statutory maximum for compliance order violations on account of their good faith would still leave the Sacketts paying hundreds of thousands of dollars in fines. *See* Pet’rs’ Brief on the Merits (Pet. Br.) at 29-30. Thus, EPA’s assertion that district courts “often award far less than the statutory maximum,” Resp. Br. at 50, is no remedy for the Sacketts’ constitutional injury, particularly where it is the custom of lower courts presumptively to impose the statutory maximum. *See United States v. Dell’Aquila*, 150 F.3d 329, 339 (3d Cir. 1998).

Moreover, the compliance order itself states that “violation of, or failure to comply with, the foregoing [o]rder” may result in “administrative penalties . . . pursuant to 309(g) of the Act.” J.A. 56. Assuming that EPA has this authority and chooses to assess administrative penalties to enforce the compliance order, and the Sacketts challenge these penalties under Section 309(g)(8), the finding of violation would be set aside only if not supported by substantial evidence. *See* 33 U.S.C. § 1319(g)(8). In other words, a court’s review of penalties in this

instance is limited to “abuse of discretion” without any consideration of “good faith” efforts.

Also, the statute’s permitting process is no substitute for adequate judicial review, either.³ *Cf.* Resp. Br. at 50-51. The permitting process can never provide the Sacketts with meaningful review of the *compliance order*. EPA itself acknowledges that the permitting process provides review only of the Corps’ permitting decision, *not* EPA’s compliance order. *See* Resp. Br. at 51 (“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*”) (emphasis added). Further, meaningful review means more than that the Sacketts could test the agency’s jurisdiction over their property within the context of a lawsuit challenging a permit denial.⁴ The issue of EPA’s jurisdiction is important only because it means that the Sacketts cannot build their family home without *first* satisfying EPA’s demands⁵ and obtaining a decision from the

³ EPA’s argument that the permitting process is not time-consuming and expensive is based principally on the existence of Nationwide Permits. *See* Resp. Br. at 53 & n.16. Notably, EPA never asserts that the *Sacketts*’ homebuilding project could qualify for a Nationwide Permit, and never before in this litigation has EPA asserted that such a permit would be available. EPA’s speculative suggestion is simply not credible.

⁴ Contrary to EPA’s view, a jurisdictional determination from the Corps is of no help to the Sacketts, given that (1) the compliance order has already been issued, and (2) such a determination would not be judicially reviewable. *See Fairbanks N. Star Borough v. U.S. Army Corps of Eng’rs*, 543 F.3d 586, 597 (9th Cir. 2008).

⁵ Once a compliance order has been issued, a permit can be
(continued...)

Corps on an application for a permit which they do not believe they are legally mandated to acquire. Thus, allowing the Sacketts to obtain review of EPA's jurisdiction only after having met the compliance order's demands is meaningless.

Accordingly, the Sacketts' due process rights can be satisfied only by prompt judicial review under the APA.

II

THE CLEAN WATER ACT DOES NOT PRECLUDE APA REVIEW OF THE COMPLIANCE ORDER

Congress did not intend to preclude judicial review of compliance orders under the APA. In arguing to the contrary, EPA never comes to terms with the cumulative impact of the factors that differentiate the Clean Water Act's compliance order regime from other instances where the Court has held judicial review to be precluded. Here, the compliance order: (1) ends the administrative process without providing any means for the recipient to initiate administrative or judicial review, let alone to expedite such review; (2) constitutes one of the agency's *enforcement* measures, *not* a prelude to enforcement; (3) makes findings and adjudicates a violation of the statute; and (4) imposes severe sanctions for violation of its particular terms. EPA's failure to cite any decision of this Court precluding APA review of an agency action

⁵ (...continued)

obtained—if at all—only once the permittee completes “any required initial corrective measures,” 33 C.F.R. § 326.3(e)(1), which presumably in the Sacketts' case would mean substantial compliance with the compliance order's terms.

like the compliance order is not surprising. To credit EPA's view would allow the agency to badger, harass, intimidate, and threaten the Sacketts for years, all the while intending to affect the Sacketts' choice of actions, *cf.* Resp. Br. at 42-43, but leaving the Sacketts powerless to defend themselves. Congress could not have intended such an unfair result. Rather, Congress intended for compliance order recipients to bring their own APA action.

Contrary to EPA's assertions, judicial review of compliance orders under the APA would be consistent with EPA's enforcement discretion, and would not drain the agency's resources. *Cf.* Resp. Br. at 36-38. The possibility for judicial review of compliance orders would not dictate how EPA chooses to enforce the Clean Water Act, although it may discourage overzealous enforcement when the agency is unsure of the facts. This would advance the Act's purpose to defend against real risks while promoting the constitutionally protected rights of the individual. EPA's fears of drained budgets are exaggerated because they are based on the unfounded assumption that all compliance order recipients will seek judicial review of their orders. But most compliance order recipients will not seek judicial review owing to the costs and time that litigation requires. Those cases for which review is sought will likely be the cases where EPA's jurisdiction is most in doubt and the salutary check of judicial review most needed. *See* Pet. Br. at 48.

Further, judicial review of compliance orders would be consistent with the Clean Water Act's enforcement provisions. The compliance order is not just one step in the "deliberative process" which might

lead to enforcement. *Cf.* Resp. Br. at 38. Rather, the compliance order is *itself* an enforcement action, coequal with EPA’s other enforcement options, *i.e.*, a civil action and an administrative penalty proceeding. *Cf.* 33 U.S.C. § 1319(b), (g). Indeed, the statutory basis for a compliance order—a finding of statutory violation—is the same for all these enforcement options. Thus, EPA’s reliance on *Morris v. Gressette*, 432 U.S. 491 (1977), and *National Labor Relations Board v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112 (1987), is misplaced. Judicial review cannot constrain EPA’s enforcement powers because the compliance order is a consummated enforcement act. Hence, judicial review under the APA would serve as a post-deprivation hearing, not a pre-deprivation hearing.

EPA also contends that judicial review of compliance orders would not necessarily resolve all compliance issues, and “might” force EPA to bring an enforcement action as a compulsory counterclaim. *See* Resp. Br. at 37-38. But to use such speculative outcomes as the basis for imputing to Congress the intent to preclude judicial review under the APA would effectively eviscerate the strong presumption in favor of such review, a presumption that even EPA acknowledges. *See id.* at 34. And in any event, EPA fails to recognize that judicial review of the compliance order *would* definitively resolve the *jurisdictional* issues, which is the resolution that the Sacketts seek. Such a result would also benefit EPA, which would be able to direct its enforcement budgets to those activities over which it has jurisdiction. *See* Pet. Br. at 48.

Judicial review of compliance orders would not create a disincentive for EPA's use of "informational" warning letters. *Cf.* Resp. Br. at 39-40. To the contrary, it would likely expand the agency's use of such letters. EPA admits that a compliance order is different from a warning letter in that the former creates its own liability. *Cf. id.* at 30. Unlike warning letters, compliance orders require affirmative actions and impose potential liability for failure to comply. Therefore, authorizing judicial review of compliance orders would not elevate warning letters to final agency action as EPA argues.

That Congress did not intend to preclude judicial review of compliance orders is confirmed by the fact that the Sacketts cannot obtain *meaningful* judicial review of the compliance order as defendants in a civil action brought by EPA. Even if the Sacketts could raise a jurisdictional defense to any alleged violations of the compliance order or the statute itself in such a proceeding, *cf. id.* at 41-42, that fact does not make such review meaningful, if the cost of getting to that point requires the Sacketts to risk significant civil liability. The Sacketts' fear of such liability is not "because they are less than fully confident that a court would agree with their position on the issue of CWA coverage." *Id.* at 42. No party can predict with absolute certainty whether he will ultimately prevail in litigation.⁶ For that reason, this Court has

⁶ That is especially so given that this Court has not agreed to a single rule for determining which wetlands are jurisdictional. *See Rapanos v. United States*, 547 U.S. 715, 742 (2006) (plurality op.); *id.* at 759, 780 (Kennedy, J., concurring in the judgment); *id.* at 787, 788 (Stevens, J., dissenting). The Ninth Circuit itself is conflicted as to the controlling rule. *Compare N. Cal. River Watch* (continued...)

recognized that it would be expecting too much of human nature to demand that a party “bet the farm” just to get a chance at judicial review. See *MedImmune, Inc. v. Genentech*, 549 U.S. 118, 129 (2007).

EPA’s attempts to distinguish the Sacketts’ supporting authority fail. It is true that, unlike this case, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010), the petitioners objected to the agency’s constitutionality, not to any action taken by the agency under the statute, and they had not already incurred a sanction. *Cf.* Resp. Br. at 43. But these differences are irrelevant to the particular holding on which the Sacketts rely—namely, a given avenue of judicial review is categorically not meaningful if review can be obtained only by risking a “sizable fine.” *Free Enter. Fund*, 130 S. Ct. at 3150-51. That rule applies regardless of the nature of the claims that a party seeks to raise. And although the *Free Enterprise Fund* petitioners had not yet incurred any liability, the point is irrelevant to determining, *prospectively*, whether a party must chance *additional* liability to obtain judicial review. The Sacketts are therefore in the same position as the *Free Enterprise Fund* petitioners, in that they must violate the compliance order and invite a civil action (thus triggering substantial civil liability) to have any hope of Section 309(b) judicial review.

⁶ (...continued)

v. City of Healdsburg, 496 F.3d 993, 999-1000 (9th Cir. 2007) (“Justice Kennedy’s concurrence provides the controlling rule of law for our case.”), *with N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 781 (9th Cir. 2011) (observing that *Healdsburg* does not foreclose use of the *Rapanos* plurality test).

EPA's attempt to distinguish *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), fails for the same reason. EPA is correct that the *McNary* petitioners' constitutional claims were collateral to determining the immigration status of any given alien, and that it would have been difficult to litigate such constitutional claims on the truncated administrative record used in a deportation proceeding. See Resp. Br. at 44. But just as in *Free Enterprise Fund*, so in *McNary*: these differences were irrelevant to the Court's specific determination that deportation proceedings were categorically not meaningful avenues of relief, because to obtain such review aliens would have been required to "voluntarily surrender themselves for deportation," a course of action which, "[q]uite obviously, . . . is tantamount to a complete denial of judicial review." *McNary*, 498 U.S. at 496-97.

Without a judicial hearing, the Sacketts are deprived of meaningful review of the compliance order. The Clean Water Act does not preclude such review.

III

THE COMPLIANCE ORDER IS FINAL AGENCY ACTION

Under *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997), the Sacketts' compliance order is final agency action: it marks the consummation of EPA's decisionmaking process, and creates new legal obligations and liabilities. The intent of Congress, the Clean Water Act's text, the procedural history of this case, and the precedents of this Court confirm that conclusion.

A. The Compliance Order Is the Culmination of EPA's Decisionmaking

The compliance order marks the consummation of EPA's decisionmaking process with respect to whether EPA has jurisdiction and whether the Sacketts' conduct has violated the Clean Water Act. The Act makes clear that Congress intended such orders to be final. To issue a compliance order EPA first "finds" that the statute has been violated. *See* 33 U.S.C. § 1319(a)(3). Once that finding has been made, the statute directs that the agency "shall issue an order requiring [compliance]." *Id.* The act of making a finding and issuing an order traditionally denotes finality.⁷

The compliance order's text also supports the order's finality. The document describes itself as an "ORDER." J.A. 50. It sets forth "FINDINGS AND CONCLUSIONS" that substantiate an alleged violation of law. *See id.* at 50-53. It "ORDER[S]" a number of onerous remedial measures. *Id.* at 53-55. It imposes "SANCTIONS" for violation of its terms. *Id.* at 56. None of these aspects of the order is consistent with EPA's characterization of the order as tentative, informal, or merely informative.

Indeed, such a characterization is inconsistent with EPA's own interpretation of the order. Although EPA contends that the order does not become final until EPA brings a civil action, Resp. Br. at 27, EPA nevertheless maintains that the Sacketts can be held liable for violating both the Clean Water Act *and* the compliance order itself, *id.* at 30, 49. But liability

⁷ *See* 5 U.S.C. § 551(6) (defining "order" in part as "the whole or a part of a *final* disposition") (emphasis added).

flowing from the compliance order would begin to accrue *before* EPA brought a civil action. Thus, EPA impermissibly wants its “find[ing]” of violation supporting the compliance order, *cf.* 33 U.S.C. § 1319(a)(3), to be considered nonfinal, but wants that same finding supporting a civil action, *cf. id.* § 1319(b), to be considered final.

That the order ends, rather than begins, EPA’s decisionmaking, further supports the order’s finality. Unlike the agency actions at issue in EPA’s cited authority, *see* Resp. Br. at 25-27, the compliance order is not a prelude to enforcement. Rather, the compliance order *is* enforcement. The statute itself makes clear that the issuance of the compliance order is one of two equal *enforcement* options that EPA may take once it “finds” that the statute has been violated. *See* 33 U.S.C. § 1319(a)(3) (authorizing EPA to “issue an order requiring such person to comply with such section or requirement, *or* [to] bring a civil action”). *Cf.* 33 U.S.C. § 1319(d) (treating violations of the statute and a compliance order as equivalents for purposes of civil penalties).

The fact that the compliance order “encourage[s] the Sacketts] to discuss any allegations herein which [the Sacketts] believe to be inaccurate” does not undercut the order’s finality. *Cf.* Resp. Br. at 25-26 (quoting Pet. Cert. App. G-6). The quoted language merely articulates the fundamental proposition that an agency can always reconsider otherwise final actions that it takes. *See Gen. Elec. Co. v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002); *Am. Petroleum Inst. v. U.S. EPA*, 906 F.2d 729, 739-40 (D.C. Cir. 1990). *See generally* 5 U.S.C. § 704 (“[A]gency action otherwise final is final for the purposes of this section whether or not there

has been presented or determined an application for . . . any form of reconsideration . . .”). Simply because an agency reserves to itself the power to change its mind if new or different facts or circumstances emerge does not render an otherwise final action nonfinal. *See Fairbanks*, 543 F.3d at 592 n.4 (holding that the Corps’ jurisdictional determination did not become any less final simply because “physical condition[s]” on the site might change); *Alaska v. U.S. EPA*, 244 F.3d 748, 750 (9th Cir. 2001) (holding that Clean Air Act compliance orders were final agency action where the orders presented the agency’s “final position on the factual circumstances upon which the Orders are predicated,” even though the agency’s position might change if the relevant factual “circumstances” were to change) (emphasis added). What matters is that an agency has definitively applied the law to a given set of alleged facts, which is precisely what EPA has done here.

The Sacketts’ own experience confirms that the compliance order’s “encourage[ment]” for “consultation” (as EPA describes it) is illusory. Following issuance of the compliance order, the Sacketts’ counsel sent a letter to EPA requesting an administrative hearing to dispute the facts on which the compliance order is based. J.A. 32-36. EPA’s answer provided that the agency intended in the near future to give “a more detail[ed] response stating EPA’s position” regarding “the various authorities available to EPA to enforce compliance with the Compliance Order and/or seek penalties for the underlying Clean Water Act violations.” Appellants’ ER at 25. Yet EPA never provided that detailed response to the Sacketts’ letter. Thus, the Sacketts’ experience confirms that EPA had no intention to revisit its legal determinations, and

instead planned merely to provide the Sacketts with a brief on how EPA could compel compliance with the order and seek penalties. *Cf.* Br. Amicus Curiae of U.S. Chamber of Commerce in Support of Petitioners at 7 (quoting internal EPA documents indicating that EPA trains “its personnel to make the terms of unilateral orders ‘ugly, onerous, and tough’ and ‘very unpleasant,’ in order to coerce settlements,” and “to threaten recipients with games of ‘Russian Roulette’”).

Accordingly, because the compliance order marks the consummation of EPA’s decisionmaking process to issue a compliance order, the order satisfies *Bennett’s* first prong.

B. The Compliance Order Creates Numerous Legal Effects

The compliance order satisfies *Bennett’s* second prong because it imposes new legal obligations, as well as new legal liabilities. To begin with, the compliance order does more than merely restate the Clean Water Act’s general obligations. Indeed, the order *applies* those general obligations directly to the Sacketts by finding that the lot contains regulable wetlands, J.A. 51-52, and that the Sacketts have acted illegally by filling those wetlands without a permit, *id.* at 52-53. The compliance order also goes further than the statute by requiring that the site be “restored,” *id.* at 53, to its “pre-disturbance, vegetative condition,” *id.* at 55, and that buyers be provided notice of the compliance order, *id.* at 55. Neither obligation is found explicitly in the Clean Water Act.

EPA itself admits that the compliance order has legal effect in two ways: by subjecting the Sacketts to additional civil penalty liability; and by making it

more difficult for them to obtain an after-the-fact permit.

1. The Compliance Order Imposes Additional Liability

With respect to civil penalties, EPA concedes that, if “a court finds that particular conduct violated both the [Clean Water Act] and a valid compliance order,” the court “can impose separate penalties for the two violations,” such that the ensuing “civil penalty [would] exceed[] the statutory maximum for the statutory violation.” Resp. Br. at 30. EPA’s concession establishes that the compliance order has independent legal effect.

That conclusion follows whether or not it is a “remote possibility” (owing to EPA’s prosecutorial discretion and a district court’s equitable powers) that the Sacketts would ultimately have to pay a civil penalty greater than what they would have had to pay if the compliance order had never been issued. *See* Resp. Br. at 30. The *Bennett* test concerns finality, not likelihood of enforcement. For an agency action to be final, it does not matter whether the affected parties are ultimately better or worse off. *See Alaska*, 244 F.3d at 750 (holding a Clean Air Act compliance order final agency action because its recipient *could* be held liable for violations of the order as well as the statute), *aff’d*, *ADEC*, 540 U.S. 461, 483 (2004) (holding that the order produced legal consequences because a party “would *risk* civil and criminal penalties if it defied a valid EPA directive”) (emphasis added). In any event, the likelihood of an elevated penalty is greater than EPA depicts. For example, a court could impose a small fine for the original statutory violation because of a landowner’s ignorance. But the court could well

decide to impose a steep fine for violation of a subsequently issued compliance order, on the theory that the order put the landowner on notice.

In light of these legal liabilities, analogizing the compliance order to agency warning letters, notices of violation, or similar documents, *see* Resp. Br. at 19-21, is untenable. Unlike a compliance order, these other agency actions do not impose liability for violation of their own terms. *Cf. id.* The compliance order goes beyond mere notification or explanation of legal rights or responsibilities: it actually imposes concrete obligations the violation of which trigger a liability that is separate and distinct from any liability for having violated the authorizing statute itself. The Sacketts' compliance order is not a friendly invitation to chat about the Clean Water Act's requirements with EPA officials. Indeed, the order threatens them with substantial civil penalties if they do not comply. *See* J.A. 56. No reasonable person would interpret the compliance order as anything other than a mandatory directive, backed by the full weight of the United States government, to comply with its terms or risk severe civil or criminal sanctions.

Hence, because the compliance order indisputably imposes an additional liability for civil penalties, the order satisfies *Bennett's* second prong.

2. The Compliance Order Imposes Additional Legal Obligations

In addition to its imposition of civil penalty liability, the compliance order satisfies the second prong of the *Bennett* test because it makes it materially harder for the Sacketts to obtain an after-the-fact

permit.⁸ EPA concedes that, once a compliance order has been issued, the Corps will accept for processing an after-the-fact permit application only if the Corps determines that processing the application would be “clearly appropriate.” *See* Resp. Br. at 31 (citing 33 C.F.R. § 326.3(e)(1)(iv)). In contrast, if no compliance order has been issued, the Corps will accept an after-the-fact permit application upon completion of any “required initial corrective measures.” *See* Resp. Br. at 32 (citing 33 C.F.R. § 326.3(e)(1)). The added burden of meeting the “clearly appropriate” standard satisfies *Bennett’s* second prong. *See Pub. Util. Dist. No. 1 v. Bonneville Power Admin.*, 506 F.3d 1145, 1152 (9th Cir. 2007) (agency action that creates “new benefits and obligations” is final).

This Court’s decision in *ADEC* supports the conclusion that the Sacketts’ compliance order is final agency action, notwithstanding EPA’s attempts to distinguish *ADEC*. *Cf.* Resp. Br. at 32-34.

First, that the *ADEC* order was preceded by “interactions” between the agency and the regulated party is irrelevant to whether the order itself is final, *i.e.*, whether the order represents the *agency’s* final say. Second, just as in *ADEC*, the compliance order issued to the Sacketts makes clear that, *assuming the facts to be as EPA believes them*, it is EPA’s position that the Sacketts’ conduct violated the Clean Water Act. Although the compliance order “encourages”

⁸ It is the Sacketts’ position that they are categorically ineligible for an after-the-fact permit under the Corps’ regulations. *See* 33 C.F.R. § 326.3(e)(1)(ii). For the sake of establishing the compliance order’s finality, however, the Sacketts assume that EPA is correct and that an after-the-fact permit may be available. *See id.* § 326.3(e)(1).

future communication with respect to the order's allegations that may be "inaccurate" or remedial actions that are unattainable, *see* J.A. 54-55, it does not invite discussion of EPA's position regarding the allegations' legal significance. Thus, the fact that the compliance order leaves open the possibility of amendment based on new information or changed circumstances is no different from the *ADEC* order. *See Alaska*, 244 F.3d at 750; *ADEC*, 540 U.S. at 483 (observing that "EPA had asserted its final position on the factual circumstances underpinning the Agency's orders") (internal quotation marks omitted). Third, as already noted, the compliance order *does* impose specific new legal obligations on the Sacketts. Yet, even if the order imposed no obligation beyond the statute, *ADEC* would still be apposite. The Court there expressly noted that *Bennett's* second prong can be satisfied if the agency action determines "rights or obligations" *or* produces "legal consequences." *See* 540 U.S. at 483. The Court concluded that the order at issue met that test because the order imposed "practical and legal consequences (lost costs and vulnerability to penalties)." *Id.* The compliance order here produces substantially the same practical and legal consequences for the Sacketts: it stops their homebuilding project and denies them all lawful use of their property, it requires them to undo their work at a price tag of \$27,000, it commands them to "restore" their property to wetlands, and it imposes enormous daily civil fines for violation of its terms. *See* Pet. Br. at 17-18. *ADEC* is therefore in point.

Because the compliance order imposes obligations and liabilities on the Sacketts beyond what would exist in the absence of the order, it satisfies *Bennett's* second

prong. And because the compliance order also marks the consummation of EPA's decisionmaking, the order constitutes final agency action.

CONCLUSION

The judgment of the court of appeals should be reversed.

DATED: December, 2011.

Respectfully submitted,

LESLIE R. WEATHERHEAD
Witherspoon Kelley
422 West Riverside Avenue
Suite 1100
Spokane, WA 99201
Telephone: (509) 624-5265
E-mail: lwlibertas@aol.com

M. REED HOPPER
*DAMIEN M. SCHIFF
**Counsel of Record*
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: mrh@pacificlegal.org
E-mail: dms@pacificlegal.org

Counsel for Petitioners

