No. 10-1062

In the Supreme Court of the United States

CHANTELL SACKETT, ET AL., *Petitioners*,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., *Respondents*.

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

BRIEF OF AMICI CURIAE WET WEATHER PARTNERSHIP, SOUTH CAROLINA WATER QUALITY ASSOCIATION, NORTH CAROLINA WATER QUALITY ASSOCIATION, WEST VIRGINIA MUNICIPAL WATER QUALITY ASSOCIATION, VIRGINIA ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES, NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, AND CITY OF NEW YORK IN SUPPORT OF PETITIONERS

F. Paul Calamita*
Christopher D. Pomeroy
AquaLaw, PLC
6 South 5th Street
Richmond, VA 23219
(804) 716-9021
paul@aqualaw.com
Attorneys for Amici Curiae
**Counsel of Record*

Date: September 29, 2011

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. EPA Has Abused its Administrative Order Authority in the Asserted Absence of Pre-Enforcement Judicial Review 7

II. Petitioners May Seek Pre-Enforcement Judicial Review of the Administrative Compliance Order Pursuant to the APA 14

A. The Strong APA Presumption of the Availability of Judicial Review Has Not Been Rebutted 15

B. The Clean Water Act Does Not, on Its Face, Preclude Pre-Enforcement Review 16

C. The Clean Water Act Does Not Implicitly Preclude Pre-Enforcement Judicial Review Under this Court's *Block* Analysis 17

1. The Structure of the Clean Water Act's Statutory Scheme Does Not Indicate a Clear Congressional Intent to Preclude Pre-Enforcement Judicial Review 18

2. Pre-Enforcement Judicial Review is Consistent with the Objectives of the Clean Water Act 21

3. There is No Legislative History To Rebut the Presumption that Review Is Available. 23

4. The Nature of the Administrative Action Involved Supports the Availability of Pre-Enforcement Review 25

D. The Cases on which the Lower Court Relied Are either Inconsistent with Supreme Court Precedent or Based on a Misconception About the Effect of Pre-Enforcement Review on EPA's Ability to Address Environmental Issues Quickly ... 26

III. Denial of Pre-Enforcement Judicial Review Violates the Due Process Clause 30

CONCLUSION 33

TABLE OF AUTHORITIES

Page(s)

Cases

Abbott Labs. v. Gardner,
387 U.S. 136 (1967)..... 15, 19, 27

Armstrong v. Manzo,
380 U.S. 545 (1965)..... 30

Block v. Cmty. Nutrition Inst.,
467 U.S. 340 (1984)..... 15, 17, 25

Ex parte Young,
209 U.S. 123 (1908)..... 30

Hilton v. Braunskill
481 U.S. 770 (1987)..... 23

Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 246 (1981)..... 12

Hoffman Group, Inc. v. EPA,
902 F.2d 567 (7th Cir. 1990)..... 26

Laguna Gatuna, Inc. v. Browner,
58 F.3d 564 (10th Cir. 1995)..... 26, 29

Lloyd A. Fry Roofing Co. v. EPA,
554 F.2d 885 (8th Cir. 1977)..... 23, 24

MedImmune, Inc. v. Genentech, Inc.,
549 U.S. 118 (2007)..... 31

New York v. United States,
505 U.S. 144 (1992)..... 12

Nken v. Holder,
129 S. Ct. 1749 (2009)..... 23

Printz v. United States,
521 U.S. 898 (1997)..... 12

Sackett v. EPA.,
622 F.3d 1139 (9th Cir. 2010)..7-8, 18-19, 21, 23-25

S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement,
20 F.3d 1418 (6th Cir. 1994)..... 26, 27

S. Pines Assocs. by Goldmeier v. United States,
912 F.2d 713 (4th Cir. 1990)..... 26, 27

Tennessee Valley Authority v. Whitman,
336 F.3d 1236 (11th Cir. 2003)..... 32, 33

Constitution, Statutes, and Regulations

U.S. Const. Amend. V 30

5 U.S.C. § 701(a)..... 15

5 U.S.C. § 704 15

33 U.S.C. § 1319(a)(3) 16, 25, 32

33 U.S.C. § 1319(g)..... 20

33 U.S.C. § 1364 22

42 U.S.C. § 7413(a)(1) 32

42 U.S.C. § 9613(h) 16

40 C.F.R. § 19.4 20

40 C.F.R. § 124.10 20

40 C.F.R. §124.19 20

Administrative Compliance Orders

City of Cedar Rapids, Iowa, Docket No. CWA-07-2008-0029 (EPA Jan. 31, 2008), *available at* http://yosemite.epa.gov/oa/rhc/epaadmin.nsf/Advanced%20Search/F93B3A9FC54B60088525764E0066E4ED/$File/CWA-07-2008-0029.pdf 11

City of Oak Ridge, Tennessee, Docket No. CWA-04-2010-4772 (EPA Sep. 27, 2010), *available at* http://www.cortn.org/PW-html/EPA AdministrativeOrder.pdf. 10

City of Topeka Kansas, Docket No. CWA-07-2010-0129 (EPA Oct. 1, 2010) (amended Jan. 27, 2011), *available at* http://yosemite.epa.gov/oa/rhc/epaadmin.nsf/Advanced%20Search/AFCD74DD31994A81852577BD001B82A9/$File/CWA-07-2010-0129.pdf.....11, 12

Hampton Roads Sanitation District, Docket No. CWA-03-2007-0277 (EPA Aug. 1, 2007), *available at* http://www.hrsd.com/pdf/EPA/UAO/AO%20and%20Information%20Request%2008-03-07.pdf ..8-9

Other

Andrew I. Davis, *Judicial Review of Environmental Compliance Orders*, 24 Envtl. L. 189 (1994) 19, 24, 31

EPA, National Enforcement Trends: Top 25 Civil Enforcement Cases in FY 2006 - FY 2010, Based on Estimated Value of Complying Actions to be Taken in Response to EPA's Concluded Enforcement Actions, *available at* http://www.epa.gov/oecaerth/resources/reports/nets/nets-j5-topinjrelfcases.pdf. 13

H.R. Rep. No. 1980, 79th Cong., 2d Sess. 41..... 17

Louis L. Jaffee, *Judicial Control of Administrative Actions* 357 (1965)..... 19, 27

David Montgomery Moore, *Pre-enforcement Review of Administrative Orders to Abate Environmental Hazards*, 9 Pace Envtl. L. Rev 675 (1992) 32

Pet'rs' Br. on the Merits..... 30

23 Va. Reg. Regs. 4078 (Aug. 6, 2007)..... 9

INTEREST OF *AMICI CURIAE*

The Wet Weather Partnership ("WWP"), South Carolina Water Quality Association, Inc. ("SCWQA"), North Carolina Water Quality Association, Inc. ("NCWQA"), West Virginia Municipal Water Quality Association, Inc. ("WVMWQA"), Virginia Association of Municipal Wastewater Agencies, Inc. ("VAMWA"), National Association of Clean Water Agencies ("NACWA"), and City of New York, (collectively, "*Amici*"), have received the parties' written consent to file this *amici curiae* brief in support of the Petitioners.[1]

WWP is an association of communities with combined sewer systems from across the country. The WWP seeks environmentally responsible solutions to all urban wet weather issues in a fiscally prudent manner. It is dedicated to ensuring that federal and state water quality regulatory programs are scientifically based, affordable, and cost-effective.

SCWQA is a statewide association of twenty-eight owners and operators of publicly owned treatment works. Its primary purpose is to ensure that federal and state water quality programs are based on sound science and regulatory policy so that its members can protect public health and the

[1] Under Rule 37.6 of the Rules of this Court, *Amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than *Amici*, their members, or their counsel contributed monetarily to the preparation and submission of this brief. Letters of consent to file this brief are on file with the Clerk of the Court under Rule 37.3.

environment in the most affordable and cost-effective manner possible.

NCWQA is a statewide association of thirty public water, sewer, and storm water utilities throughout North Carolina, serving a significant majority of the sewered population in the state. Its primary purpose is to ensure that federal and state water quality programs are based on sound science and regulatory policy so that its members can protect public health and the environment in the most affordable and cost-effective manner possible.

WVMWQA is a statewide association of thirty owners and operators of publicly owned treatment works. Its primary purpose is to ensure that state and federal water quality programs are based on sound science and regulatory policy so that its members can protect public health and the environment in the most affordable and cost-effective manner possible.

VAMWA is a Virginia non-profit corporation comprising fifty-seven local governments, wastewater authorities, and districts that own and operate wastewater treatment plants throughout Virginia. VAMWA's membership serves approximately ninety-five percent of Virginia's sewered population, as well as business and industry throughout the Commonwealth. For over twenty years, VAMWA has worked to ensure that federal and state water quality programs are scientifically robust, affordable, and cost-effective.

NACWA is a voluntary, non-profit national trade association representing the interests of the nation's publicly owned wastewater and storm water utilities. NACWA's members include nearly three-hundred of the nation's municipal clean water agencies, which collectively serve the majority of the sewered population of the United States. For over forty years, NACWA has maintained a leadership role in legal and policy issues affecting the public authorities responsible for cleaning the nation's wastewater and storm water.

The City of New York is a municipal corporation organized under the laws of the State of New York. The City, through its Department of Environmental Protection ("DEP"), operates a wastewater treatment system that conveys and treats over one billion gallons of wastewater each day, as well as a large municipal separate storm sewer system. The City's system is highly regulated under the Clean Water Act, and DEP has frequent contact with its regulators, including the Environmental Protection Agency ("EPA"). On occasion, the City is subject to administrative compliance orders from EPA, most recently in an order requiring reconstruction of a wastewater conveyance structure in a time frame that was substantially shorter than the time necessary for DEP to both procure the services necessary to repair the structure and complete the repair. As a consequence, the City will be unable to meet the final milestone in the order.

EPA frequently imposes administrative compliance orders on public entities, such as *Amici* and their members, under the same authority as the

order issued to the Sacketts in this case. Such orders, issued without the critical public safeguards of notice, opportunity for comment, and the right of pre-enforcement review, have, not surprisingly, been abused by EPA. Administrative Compliance orders routinely impose obligations costing municipalities tens of millions of dollars of public funds. *Amici* have a significant interest in defending the critical public safeguard and constitutional right of pre-enforcement judicial review of such orders.

SUMMARY OF ARGUMENT

EPA enforcement orders are very threatening and intimidating to recipients, whether a family such as the Sacketts or a major community. They place the recipients in immediate and dire threat of administrative, civil, and criminal sanctions for any non-compliance. While the legal and practical jeopardy in which EPA has put the Sacketts is both legally wrong and grossly unfair, it is just the tip of the iceberg. EPA routinely imposes such quandaries on order recipients nationwide. EPA increasingly asserts this unbridled and unfettered authority to impose requirements outside of the Clean Water Act permitting program and the public safeguards of notice, comment, and judicial review provided therein. EPA's use of administrative orders has also circumvented the significant public safeguards provided by the federal judiciary. This is grossly unfair to permittees and other environmental stakeholders. After all, EPA can order almost anything it pleases—no matter how arbitrary or coercive—without fear of any review whatsoever. Such unrestrained authority is not authorized by the Clean Water Act and, in fact, is inherently inconsistent with its enforcement structure. Moreover, such unbridled authority, devoid of any procedural safeguards, violates the Due Process Clause.

This Court should find that the Clean Water Act does not preclude pre-enforcement judicial review of administrative compliance orders, and, accordingly, review of the order in question is available under the Administrative Procedure Act, 5 U.S.C. § 704. This

conclusion is supported by the structure of the Clean Water Act's statutory enforcement scheme, the statute's objectives, its legislative history, and the nature of administrative compliance orders.

However, if this Court concludes that pre-enforcement judicial review of administrative compliance orders is not available under the Administrative Procedure Act, it should find that denial of pre-enforcement judicial review violates the Due Process Clause of the Fifth Amendment. The Court should find persuasive the Eleventh Circuit's reasoning in *Tennessee Valley Authority v. Whitman*, which concluded that an analogous administrative compliance order provision in the Clean Air Act violated the Due Process Clause of the Fifth Amendment.

ARGUMENT

I. EPA HAS ABUSED ITS ADMINISTRATIVE ORDER AUTHORITY IN THE ASSERTED ABSENCE OF PRE-ENFORCEMENT JUDICIAL REVIEW.

In the absence of pre-enforcement judicial review, EPA has abused its authority to issue administrative compliance orders under the Clean Water Act, 33 U.S.C. § 1319(a)(3), demanding far-reaching injunctive relief from both private parties, such as the Sacketts, and public entities, such as *Amici* and their members. EPA routinely overreaches in its administrative compliance orders, often ordering actions beyond its legal authority in impossibly and, some believe, intentionally short time frames. The Court should uphold the right to pre-enforcement judicial review of administrative compliance orders to provide order recipients with a meaningful opportunity to contest the validity of EPA orders. Otherwise, the agency will continue to use administrative compliance orders to circumvent critical public safeguards set forth in the Clean Water Act, including notice, comment, and judicial review provided in the environmental permitting program.

In this case, EPA issued the Sacketts an administrative compliance order that prohibited them from building a house on their property, required them to restore the property to its original condition, and threatened significant penalties for noncompliance. *Sackett v. EPA*, 622 F.3d 1139, 1141 (9th Cir. 2010). Despite the significant injunctive

relief contained in the order, EPA refused to grant the Sacketts a hearing on whether their property was a wetland within the jurisdiction of the Clean Water Act. *Id.* at 6. While the Sacketts' administrative compliance order required costly actions on behalf of their family, orders which EPA issues to public entities under the Clean Water Act often require injunctive relief on a more massive scale—at the cost of tens or hundreds of millions of dollars of ratepayers' money.

EPA has issued administrative compliance orders to public entities ranging from large cities to the smallest towns, villages, and boroughs. These orders address storm water, wastewater, and other issues varying in scope from narrow allegations of noncompliance to comprehensive, community-wide sewer system rehabilitation and replacement.

An example of a comprehensive order to a large public entity is the forty-three page (plus numerous attachments) administrative compliance order issued to the Hampton Roads Sanitation District ("HRSD"),[2] which required a complete sewer system evaluation and remediation. Hampton Roads Sanitation District, Docket No. CWA-03-2007-0277 (EPA Aug. 1, 2007), *available at* http://www.hrsd.com/pdf/EPA/UAO/AO%20and%20Information%20Request%2008-03-07.pdf. Among other things, the HRSD order required the

[2] HRSD is a member of one of the *Amici* associations and operates a regional wastewater collection and treatment system serving approximately 1.6 million people in Tidewater, Virginia.

development of a Flow Monitoring Program; a Regional Hydraulic Model and Hydraulic Assessment; a Capacity and Condition Assessment Plan; a modified Management, Operations, and Maintenance program; a Regional Wet Weather Management Plan; a Short Term Wet Weather Operational Plan; a Sanitary Sewer Overflow Emergency Response Plan; and a Public Participation Plan. *Id.* The order also mandated that HRSD coordinate with numerous localities in the region, and it imposed extensive reporting and record keeping requirements. *Id.* The requirements in the HRSD order are both extremely broad and extremely detailed. *See id.* HRSD operates ten wastewater treatment plants subject to National Pollutant Discharge Elimination System ("NPDES") permits, so EPA easily could have gone through the permitting process to mandate these long-term, comprehensive requirements. Instead, EPA resorted to an administrative compliance order, thereby avoiding the public notice, comment, and judicial review safeguards of the permitting process. *Id.* This order is particularly egregious in that EPA issued the order to frustrate the Commonwealth of Virginia's effort to impose a similar state order that had been the subject of public notice and comment during the summer of 2007. *See* 23 Va. Reg. Regs. 4078 (Aug. 6, 2007). There was no need for the EPA order whatsoever as the Commonwealth's order addressed the same issues but came with the added benefit of public notice, comment, and right of appeal. *See id.* No environmental or public-health emergency necessitated EPA's issuance of the order.

Broad compliance orders, with extensive injunctive requirements, are also issued to smaller systems, such as the City of Oak Ridge, Tennessee's Wastewater Treatment Plant and Associated Wastewater Collection and Transmission System. *See* City of Oak Ridge, Tennessee, Docket No. CWA-04-2010-4772 (EPA Sep. 27, 2010), *available at* http://www.cortn.org/PW-html/EPAAdministrative Order.pdf. The Oak Ridge order required extensive, long-term injunctive relief, including: a community-wide Sewer System Evaluation and Rehabilitation Plan, Capacity Assessment Plan, Capacity Assessment Report, Sewer System Evaluation Survey, Wastewater Collection and Transmission System Remediation Plan, Sanitary Sewer Overflow Response Plan, Information and Management System Program, Sewer Mapping Program, Sewer System Design Program, Sewer Construction and Rehabilitation Inspection Program, Continuing Sewer System Assessment Program, Pump Station Performance and Adequacy Program, Infrastructure Rehabilitation Program, Routine Pump Station Operation Program, Emergency Pump Station Operation Program, Electrical Maintenance Program, Mechanical Maintenance Program, Physical Maintenance Program, Pump Station Repair Program, Gravity Line Preventive Maintenance Programs, and Quarterly Reports. *Id.* Seemingly arbitrary deadlines are provided for each requirement, *see id.*, giving the City insufficient time to accomplish the order's objectives. Recipients of orders like Oak Ridge typically are given no opportunity to provide input on the substantive requirements and time frames imposed by such orders.

An order issued to the City of Cedar Rapids, Iowa in 2008 provides an extreme example of the unreasonable deadlines set by EPA in Clean Water Act administrative compliance orders. *See* City of Cedar Rapids, Iowa, Docket No. CWA-07-2008-0029 (EPA Jan. 31, 2008), *available at* http://yosemite.epa.gov/oa/rhc/epaadmin.nsf/Advanced%20Search/F93B3A9FC54B60088525764E0066E4ED/$File/CWA-07-2008-0029.pdf. The Cedar Rapids order required the City to choose an engineering consultant to develop a Sanitary Sewer Collection System Improvements Plan within *one day* from when the order was served on the City. *Id.* This would be impossible for most municipal governments, even in the absence of public procurement requirements. The order further required the system-wide plan to be developed within a mere six months. *Id.* Only sixty days were provided to complete a number of storm water improvements, including dissemination of educational materials to landowners, formalizing pesticide and fertilizer application control and public information and education programs, conducting dry weather inspections of all outfalls, and updating the Storm Water Management Plan and programs. *Id.*

EPA's overreaching in administrative compliance orders is further illustrated by an order issued to the City of Topeka, Kansas in 2010. City of Topeka, Kansas, Docket No. CWA-07-2010-0129 (EPA Oct. 1, 2010) (amended Jan. 27, 2011), *available at* http://yosemite.epa.gov/oa/rhc/epaadmin.nsf/Advanced%20Search/AFCD74DD31994A81852577BD001B82A9/$File/CWA-07-2010-0129.pdf. The order required that the City "enact an ordinance to address post-

construction runoff from new development and redevelopment projects to the extent allowable under state and local law," within ninety days. *Id.* Thus, we have an EPA official issuing a command to a city's legislative council to adopt an ordinance to fulfill state and local (but not federal) law, within ninety days. We do not read the Clean Water Act to make EPA the enforcer of state and local laws. Moreover, the Clean Water Act does not authorize the federal EPA to order local legislative action without any public involvement or judicial review. Such an order is likely unconstitutional. *See New York v. United States*, 505 U.S. 144, 161 (1992) (explaining that the federal government cannot compel a state to enact or administer a federal regulatory program—the same reasoning would apply to cities or other political subdivisions of the states); *Printz v. United States*, 521 U.S. 898, 925-35 (1997) (holding that it is unconstitutional for the federal government to commandeer state officers); *see also Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 246, 288 (1981) (upholding federal environmental cooperative federalism statutes only once the Court found they did not require the states to enforce federal law).

None of these examples of administrative compliance orders address, or are purported by EPA to address, emergencies. Rather, they address collection system and treatment issues that have long been in existence. Each of these issues is a perfect fit for appropriate notice, comment, and review procedures provided by federal law, whether EPA chooses to address such issues through NPDES permits or other Clean Water Act authorities.

Municipalities frequently receive orders that require tens, or even hundreds, of millions of dollars in public expenditures. The following table provides examples of EPA's own estimates of compliance costs for Clean Water Act administrative compliance orders issued to public entities:

Compliance Costs for Clean Water Act Administrative Compliance Orders Issued to Municipalities Included on EPA's Top 25 Civil Enforcement Cases Lists for FY 2006-2010.[3]		
ICIS Enforcement Action Name	Final Order Date	Compliance Costs (FY 2010 $)
Sewerage and Water Board of New Orleans	1/10/2006	164,226,000
City of Richwood	7/19/2006	189,700,000
City of Charlotte, NC	2/13/2007	207,564,000
Hampton Roads Sanitation District	8/1/2007	133,963,500
Metropolitan Wastewater Management Commission, Cities of Eugene & Springfield	3/3/2008	41,067,000
Prasa Puerto Nuevo WWTP, Santurce Sanitary Sewer System	9/5/2008	37,518,000
City of Spencer, Iowa	1/27/2009	32,544,000

[3] EPA, National Enforcement Trends: Top 25 Civil Enforcement Cases in FY 2006 - FY 2010, Based on Estimated Value of Complying Actions to be Taken in Response to EPA's Concluded Enforcement Actions, *available at* http://www.epa.gov/oecaerth/resources/reports/nets/nets-j5-topinjrelfcases.pdf.

Despite the immense expense to which these compliance orders put local governments, their citizens are not provided with opportunities for public notice, comment, or pre-enforcement judicial review. The Clean Water Act does not preclude pre-enforcement judicial review of administrative compliance orders. Moreover, such review is necessary to ensure that EPA does not resort to administrative compliance orders to avoid the extensive public safeguards provided throughout the statute, such as those available in the NPDES permitting process. The NPDES permitting process, rather than administrative compliance orders, should be used to impose such extensive, long-term requirements as called for in these and most other orders.

II. PETITIONERS MAY SEEK PRE-ENFORCEMENT JUDICIAL REVIEW OF THE ADMINISTRATIVE COMPLIANCE ORDER PURSUANT TO THE APA.

EPA has failed to overcome the important presumption under the Administrative Procedure Act ("APA") that judicial review is available to challenge Clean Water Act administrative compliance orders. This important presumption ensures essential and minimum public procedural safeguards against agency action.

A. The Strong APA Presumption of the Availability of Judicial Review Has Not Been Rebutted.

The APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. Judicial review is available except in the rare circumstances in which Congress has precluded review or committed the action to agency discretion. 5 U.S.C. § 701(a).

In analyzing whether the Clean Water Act precludes pre-enforcement judicial review of administrative compliance orders, the starting point is "the presumption favoring judicial review of administrative action." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). "Clear and convincing evidence" of congressional intent to preclude judicial review is required to overcome that presumption. *Abbott Labs*, 387 U.S. at 141. That intent must be "fairly discernible in the statutory scheme." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 347 (1984). With respect to Clean Water Act administrative compliance orders, "substantial doubt about the congressional intent exists," so the "presumption favoring judicial review of administrative action is controlling." *See id.* at 350-51.

Given the fundamental private interests at stake here for the Sacketts and the hundreds of millions of dollars at stake for *Amici* and their members, the

strong presumption in favor of pre-enforcement judicial review has not been rebutted, and certainly not by any clear and convincing evidence.

B. The Clean Water Act Does Not, on Its Face, Preclude Pre-Enforcement Review.

The Clean Water Act does not explicitly preclude pre-enforcement judicial review of administrative compliance orders. *See* 33 U.S.C. § 1319(a)(3). Congress' failure to specifically and unambiguously prohibit review in the Clean Water Act is significant in that Congress has done so in other statutes. For example, section 113(h) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") provides, "[n]o Federal court shall have jurisdiction . . . to review any order issued under section 9606(a) of this title" except in certain limited circumstances. 42 U.S.C. § 9613(h). The inclusion of this explicit prohibition on judicial review of EPA's CERCLA administrative compliance orders demonstrates that Congress knew how to preclude pre-enforcement judicial review and would have done so explicitly in the Clean Water Act if that was its intention.

The absence of an explicit grant of pre-enforcement judicial review for administrative compliance orders in the Clean Water Act does not imply that pre-enforcement judicial review should be denied. As the House Report in the legislative history of the APA stated:

> To preclude judicial review under [the APA] a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.

H.R. Rep. No. 1980, 79th Cong., 2d Sess., 41, *quoted in Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 156-57 (1970).

C. The Clean Water Act Does Not Implicitly Preclude Pre-Enforcement Judicial Review Under this Court's *Block* Analysis

In addition to express statutory language, this Court has identified the following factors to decide whether a statute implicitly precludes judicial review of an administrative action: "the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984). Application of these factors here demonstrates that the Clean Water Act does not preclude pre-enforcement judicial review of administrative compliance orders.

1. The Structure of the Clean Water Act's Statutory Scheme Does Not Indicate a Clear Congressional Intent to Preclude Pre-Enforcement Judicial Review.

The structure of the Clean Water Act does not indicate any legislative intent, and especially not a clear and convincing one, to preclude pre-enforcement judicial review of administrative compliance orders. The Ninth Circuit erroneously concluded that allowing pre-enforcement judicial review would eliminate EPA's choice between issuing an order and bringing a civil action in court because EPA would then end up in court under either option. *See Sackett v. EPA*, 622 F.3d 1139, 1143 (9th Cir. 2010). To the knowledge of the *Amici*, only a very small percentage of NPDES permits are appealed despite a clear right to appeal under the Clean Water Act. The same should be true for reasonable Clean Water Act administrative orders. Daily civil and criminal penalties are so high for non-compliance with administrative compliance orders that they would not be challenged lightly due to the risk of non-compliance penalties accruing during the pendency of the appeal. Litigation costs are a further gate-keeper against frivolous appeals. In all likelihood, a very high percentage of order recipients would choose simply to comply with the order without challenging it in court. Therefore, pre-enforcement judicial review does not in any way undermine EPA's choice between issuing an administrative compliance order, which would likely avoid formal litigation in most cases, and bringing a civil action in district court.

Furthermore, pre-enforcement judicial review of an administrative compliance order would be a substantially different proceeding than a civil action brought by EPA. Review of compliance orders would be subject to deferential review under section 706 of the APA while EPA enforcement through a civil action is a de novo proceeding. Andrew I. Davis, *Judicial Review of Environmental Compliance Orders*, 24 Envtl. L. 189, 201-02 (1994). Therefore, "EPA's enforcement options are not eliminated or undermined by allowing review of a compliance order because they each carry different legal effects when reviewed. This difference maintains the integrity of EPA's statutory enforcement options." *Id*. at 202.

The inclusion of judicial review procedures in the Clean Water Act for administrative penalties does not, as the Ninth Circuit found, indicate congressional intent to implicitly preclude judicial review for administrative compliance orders. *See Sackett v. EPA*, 622 F.3d 1139, 1143 (9th Cir. 2010). As this Court has stated, "[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) (*quoting* Louis L. Jaffee, *Judicial Control of Administrative Actions* 357 (1965)).

In fact, allowing EPA to exercise unfettered discretion to issue administrative compliance orders in the absence of pre-enforcement judicial review is

inconsistent with the safeguards provided for Clean Water Act administrative penalties issued under 33 U.S.C. § 1319(g). Administrative penalties are subject to public notice and comment, and recipients have an absolute right of appeal. *Id.* Furthermore, the total value of an administrative penalty may not exceed $177,500.[4] 40 C.F.R. § 19.4. Given that administrative penalties have extensive public safeguards despite the strictly limited penalty amounts, it is illogical to interpret the Clean Water Act as denying pre-enforcement judicial review for administrative compliance orders that may impose injunctive relief costing hundreds of millions of dollars. *See supra* Part I.

Insulating administrative compliance orders from pre-enforcement judicial review is inconsistent with the statutory scheme of the Clean Water Act because doing so essentially nullifies the critical public safeguards set forth in other sections of the act. In the municipal context, EPA frequently uses administrative compliance orders to require comprehensive injunctive relief, such as the development of short-term and long-term sewer infrastructure management plans; infrastructure rehabilitation, replacement, and improvement plans; and spending on capital projects. *See supra* Part I. Such requirements are ordinarily included in NPDES permits, which are subject to essential public notice, comment, and appeal procedures. *See* 40 C.F.R. §§ 124.10, 124.19. Allowing EPA to

[4] In 2007, when EPA issued the administrative order to the Sacketts, the total amount of an administrative penalty was limited to $157,500. 40 C.F.R. § 19.4.

circumvent this process by setting treatment and capital requirements, construction deadlines, and other long-term injunctive relief in administrative compliance orders not subject to judicial review contravenes the public safeguards critical to the Clean Water Act's statutory scheme.

2. Pre-Enforcement Judicial Review is Consistent with the Objectives of the Clean Water Act.

Pre-enforcement judicial review of administrative compliance orders is also consistent with the objectives of the Clean Water Act. Contrary to the Ninth Circuit's view, pre-enforcement review would not inhibit the legislative "goal of enabling swift corrective action." *See Sackett v. EPA*, 622 F.3d 1139, 1144 (9th Cir. 2010). The Ninth Circuit's concern is misplaced. Ironically, there has been no swift corrective action in this case. The same is true for the many administrative compliance orders issued to public entities. In fact, this case is about EPA *not* acting swiftly. By issuing a compliance order to the Sacketts without pre-enforcement review and not bringing a timely enforcement action, EPA left the Sacketts in legal and regulatory limbo to this very day. To enforce the underlying administrative order against the Sacketts, EPA will have to file for an injunction in order to compel or enjoin the action required under the order. Allowing for pre-enforcement review will not result in any delay, but will provide the Sacketts with essential and fundamental due process. In this case, it would have accelerated the restoration of the wetlands in

question, to the extent they are truly wetlands within the regulatory reach of EPA.

Pre-enforcement judicial review of administrative compliance orders would not interfere with EPA's ability to respond promptly to emergencies. Most orders *Amici* and their members have received address non-emergency, long-term public sewer management and infrastructure programs. Moreover, in a true emergency, EPA may seek an injunction or proceed under its emergency powers. The Clean Water Act has a separate "Emergency powers" section authorizing EPA to file suit in district court to deal with situations in which pollution "is presenting an imminent and substantial endangerment" to health or welfare. 33 U.S.C. § 1364. This section demonstrates that Congress envisioned a suit in district court, rather than an administrative compliance order, as the procedure for addressing emergencies presenting an "imminent and substantial endangerment." Allowing pre-enforcement judicial review of administrative compliance orders would have no impact on the congressional scheme for EPA to address emergencies and is more consistent with the statutory structure than precluding pre-enforcement review.

Significantly, pre-enforcement judicial review does not alter the immediate effectiveness of administrative compliance orders. Such orders remain binding on the recipient unless they carry the heavy burden of demonstrating to the court that a stay is warranted. To determine whether a stay is warranted, the courts would weigh (1) the likelihood

of success on the merits; (2) irreparable harm to the recipient if the order is not stayed; (3) harm to other interested parties if the stay is issued; and (4) the public interest. *See Nken v. Holder*, 129 S. Ct. 1749, 1761, (2009) (*quoting Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). Therefore, pre-enforcement judicial review would not interfere with the use of administrative compliance orders in the very rare case where EPA truly needs to act quickly. In any event, EPA must resort to the Courts to really compel action, particularly swift action with which the order recipient disagrees—such as the restoration of the alleged wetlands in this case.

3. There Is No Legislative History To Rebut the Presumption that Review Is Available.

Nothing in the legislative history of the Clean Water Act suggests that Congress intended to preclude pre-enforcement judicial review of administrative compliance orders. The inquiry should stop there, and the strong APA presumption that review is available should control.

Unable to find anything in the legislative history of the Clean Water Act itself, the Ninth Circuit resorted to the legislative history of the Clean Air Act. The court pointed to the deletion by the Congressional Conference Committee of a provision in the Senate's version of the Clean Air Act that would have explicitly provided for pre-enforcement review of compliance orders, inferring from that an intent to preclude judicial review. *Sackett v. EPA*, 622 F.3d 1139, 1144 (9th Cir. 2010) (*citing Lloyd A.*

Fry Roofing Co. v. EPA, 554 F.2d 885, 890 (8th Cir. 1977)).

However, even the Ninth Circuit conceded that "[s]uch an inference is not unassailable." *See Sackett v. EPA*, 622 F.3d 1139, 1144 (9th Cir. 2010) (*citing* Andrew I. Davis, *Judicial Review of Environmental Compliance Orders*, 24 Envtl. L. 189, 199 (1994)). As the Eighth Circuit noted, the Congressional Conference Committee's report does not provide any explanation for the deletion of the Clean Air Act pre-enforcement judicial review provision. *Lloyd A. Fry Roofing Co.*, 554 F.2d at 890. Furthermore, other plausible explanations for the deletion exist. *See* Andrew I. Davis, *Judicial Review of Environmental Compliance Orders*, 24 Envtl. L. 189, 199 (1994). For example, the Conference Committee may have viewed pre-enforcement review to be such a well established right that there was no need to specifically provide for it. *Id*.

A weak, and readily assailable, implication from the legislative history of an entirely different statute is insufficient to demonstrate clear and convincing congressional intent to overcome the strong presumption in favor of pre-enforcement judicial review of Clean Water Act administrative compliance orders.

4. The Nature of the Administrative Action Involved Supports the Availability of Pre-Enforcement Judicial Review.

The Ninth Circuit failed to consider the final factor set forth in *Block* for determining whether a statute precludes judicial review—"the nature of the administrative action involved." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984). The nature of EPA's Clean Water Act administrative compliance orders supports the availability of pre-enforcement judicial review.

Administrative compliance orders frequently involve significant injunctive relief which is extremely costly and time consuming for the recipient. The compliance order issued to the Sacketts prohibited them from constructing a home on their property, required them to undertake costly projects to restore the property to its original condition, and threatened significant civil and criminal penalties for noncompliance. *Sackett v. EPA*, 622 F.3d 1139, 1141 (9th Cir. 2010). Administrative compliance orders issued to municipalities, including some of the *Amici* and their members, require injunctive relief on a much more massive scale, often costing the recipient tens of millions of dollars in public funds to comply. *See supra* Part I. These costly compliance orders may be issued "on the basis of any information" available to EPA. 33 U.S.C. § 1319(a)(3). Recipients are subject to substantial daily penalties for any non-compliance with an administrative compliance order.

The extreme severity of the requirements in administrative orders which EPA imposed on the Sackets and on others, including *Amici* and their members, compels a finding that Congress would not have authorized the issuance of Clean Water Act administrative compliance orders "on the basis of any information" without the essential public safeguard of pre-enforcement judicial review.

D. The Cases on which the Lower Court Relied Are either Inconsistent with Supreme Court Precedent or Based on a Misconception About the Effect of Pre-Enforcement Review on EPA's Ability to Address Environmental Issues Quickly.

The precedents on which the Ninth Circuit based its decision on the preclusion of pre-enforcement judicial review addressed the issue only superficially. *See Laguna Gatuna, Inc. v. Browner,* 58 F.3d 564 (10th Cir. 1995); *S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement,* 20 F.3d 1418 (6th Cir. 1994); *S. Pines Assocs. by Goldmeier v. United States,* 912 F.2d 713 (4th Cir. 1990); *Hoffman Group, Inc. v. EPA,* 902 F.2d 567 (7th Cir. 1990).

The Seventh Circuit rested its decision in *Hoffman Group* on the theory that "having provided a detailed mechanism for judicial consideration of a compliance order via an enforcement proceeding, Congress has impliedly precluded judicial review of a compliance order except in an enforcement proceeding." *Hoffman Group,* 902 F.2d at 569. This implicit preclusion reasoning cannot be reconciled

with this Court's holding that "[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others." *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) (*quoting* Louis L. Jaffee, *Judicial Control of Administrative Actions* 357 (1965)). And, in fact, the Seventh Circuit made no attempt to reconcile its holding with this binding precedent. The Seventh Circuit also argued that allowing pre-enforcement review would eliminate the choice between an administrative compliance order and a civil action. This ignores both the practical reality that most administrative compliance orders would not be appealed, and the legal distinction between the standards of review applicable to pre-enforcement judicial review and a civil action. *See supra* Part II.C.1.

The Fourth Circuit and Sixth Circuit additionally relied on EPA's need to act quickly to respond to environmental problems, as a basis for finding that the CWA implicitly precludes pre-enforcement review. *S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement,* 20 F.3d 1418 (6th Cir. 1994); *S. Pines Assocs. by Goldmeier v. United States,* 912 F.2d 713 (4th Cir. 1990). Ironically, in this case, the dispute centers on the fact that EPA has not acted quickly at all. Instead, EPA elected to use the administrative order to put and keep the Sacketts in legal, regulatory, and financial limbo to this day. The fact that EPA strung the Sacketts along in this way, denying them a pre-enforcement hearing while never bringing an enforcement action, suggests that EPA is (1) uncertain about its determination that the Sacketts' property contained

wetlands subject to Clean Water Act jurisdiction; or (2) seeking to punish the Sacketts by keeping them in legal, regulatory, and financial limbo; or (3) both of the above. Denial of pre-enforcement review provides EPA an unchecked opportunity to act arbitrarily and even in an abusive manner.

Allowing for pre-enforcement judicial review does not impede EPA's ability to quickly address environmental issues. First, if EPA's unbridled administrative order authority is properly subject to review, EPA will be less arbitrary and capricious in writing its orders. Thus, appeals should be rare, just as in other contexts where pre-enforcement review is available. Order recipients are more likely to comply with reasonable orders and avoid risky and expensive litigation. Second, even if an appeal is filed, the order would remain in effect during the judicial review unless the reviewing court issues a stay after the order recipient meets the high burden to warrant a stay. *See supra* Part II.C.2. Additionally, EPA's need to respond promptly in rare cases of true emergencies should not allow an agency to act in an unfettered and arbitrary manner. Any review could be done on an expedited basis if speed was a real concern. In many of the cases cited, the matters at hand represent long standing compliance issues and not a sudden event requiring immediate action without time for review. Again, even where speed is critical, EPA can only compel a recalcitrant order recipient to actually act or refrain from acting through court order.

The concern about EPA's ability to act quickly is a red herring. If the validity of an administrative

compliance order is truly in dispute, EPA will need to bring an enforcement action in court to compel or enjoin the action at issue, hardly a quick process. Additionally, EPA often issues compliance orders in cases such as the Sacketts' when there is no imminent threat. By issuing an administrative order in such a case without allowing for judicial review, EPA may actually compel environmental harm because the recipient will have to violate the order to goad EPA into bringing an enforcement action to allow the recipient to challenge the validity of the order in court.

In *Laguna Gatuna*, the Tenth Circuit offered no additional legal analysis from that identified in the decisions above. *See Laguna Gatuna, Inc. v. Browner,* 58 F.3d 564 (10th Cir. 1995).

All of these cases ignored the fact that EPA uses administrative compliance orders to avoid the public safeguards provided by the other Clean Water Act civil enforcement options (including the Emergency Powers enforcement authority) and the NPDES permitting process. The Seventh Circuit's finding of implicit preclusion is fatally flawed given this Court's holding in *Abbott Laboratories* and the strong presumption of judicial review absent clear and convincing evidence to the contrary. *See supra* Parts II.A., II.C.1. The Fourth and Sixth Circuits relied on a red herring in focusing on EPA's need to move quickly. Nothing about pre-enforcement review slows EPA down one bit. The agency can still fire off orders. Order recipients will still face immediate non-compliance but could limit that non-compliance period by getting to a stay hearing. In

truly contested issues, EPA still needs the courts to compel or prevent actions. Contrary to the concern of the Fourth and Sixth Circuits, it is only because EPA is not acting quickly here that this case is before this Court so many months after the order in question was issued, without any meaningful attempt by EPA to address the alleged environmental harm (filling of jurisdictional wetlands).

III. DENIAL OF PRE-ENFORCEMENT JUDICIAL REVIEW VIOLATES THE DUE PROCESS CLAUSE.

Pre-enforcement judicial review is required under the Due Process Clause of the Fifth Amendment. U.S. Const. Amend. V. The administrative compliance orders issued to the Sacketts and numerous municipalities, such as *Amici* and their members, exact constitutionally cognizable deprivations of liberty and property interests. *See* Pet'rs' Br. on the Merits 17-19. The Due Process Clause requires that a hearing "be granted at a meaningful time and in a meaningful manner" in response to a deprivation of life, liberty or property. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

This Court has long recognized that "[a] law which . . . impos[es] such conditions upon the right to appeal for judicial relief as work an abandonment of the right rather than face the conditions upon which it is offered or may be obtained is . . . unconstitutional." *Ex parte Young*, 209 U.S. 123, 147 (1908). Stated another way, given a "genuine threat of enforcement," the Court does "not require, as a

prerequisite to testing the validity of the law in a suit for injunction, that the plaintiff bet the farm, so to speak by taking the violative action." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007). Yet that is precisely what the Sacketts face—they must bet their mortgage (not that they could get one in these circumstances). In the absence of pre-enforcement judicial review, to test the order's validity, the Sacketts must bet their home on the invalidity of EPA's order by building the house in violation of EPA's order and, thereby, risking (1) an injunction requiring them to tear down the house, (2) accrual of large daily penalties both for the underlying Clean Water Act violation and for violation of the order itself, (3) potential criminal charges if they proceed to build in an effort to goad EPA into acting, and (4) incurring legal fees on top of what they have incurred so far.

Therefore, "[t]he dynamics of this scheme effectively coerce the alleged violator into compliance" with the agency's unreviewable view of what is required, "whatever the merits of the claim of violation underlying the order." Andrew I. Davis, *Judicial Review of Environmental Compliance Orders*, 24 Envtl. L. 189, 189 (1994). The knowledge that the recipient of an invalid order is unlikely to risk the penalties of noncompliance encourages EPA to abuse its power by ordering actions beyond its legal authority. *See supra* Part I (providing examples of how EPA overreaches in its compliance orders). This "scheme" contravenes the Fifth Amendment.

Furthermore, "as a practical matter, review may be denied altogether if EPA never brings an

enforcement action." David Montgomery Moore, *Pre-enforcement Review of Administrative Orders to Abate Environmental Hazards*, 9 Pace Envtl. L. Rev. 675, 695 (1992). EPA can readily "raise the ante"—as they have done to the Sacketts—by delaying an enforcement action and, thereby, subjecting the order recipient to potentially crushing fines and/or criminal liability. Without pre-enforcement review, the ability of EPA to unilaterally delay or deny judicial review of administrative compliance orders violates the Due Process Clause.

In *Tennessee Valley Authority ("TVA") v. Whitman*, the Eleventh Circuit concluded that administrative compliance orders issued under an analogous Clean Air Act provision violated the Due Process Clause of the Fifth Amendment. 336 F.3d 1236, 1258 (11th Cir. 2003). The court explained that the "problem with ACOs stems from their injunction-like legal status coupled with the fact that they are issued without an adjudication or meaningful judicial review." *Id.* at 1241. Under both the Clean Air Act and Clean Water Act, administrative compliance orders requiring extensive injunctive relief may be issued "on the basis of any information available," despite the fact that this standard is less demanding than even a probable cause determination for a warrant. *Id.* (*citing* 42 U.S.C. § 7413(a)(1)); 33 U.S.C. § 1319(a)(3). Additionally, civil or criminal penalties may be imposed for the violation of an administrative compliance order itself, separate from penalties for the underlying statutory violation. *TVA*, 336 F.3d at 1256. This renders the administrative compliance provision "a loophole of

the highest order" because EPA can obtain a conviction for violation of the order without ever having to prove the underlying statutory violation. *Id.* at 1250. The *TVA* court concluded that the "statutory scheme established by Congress—in which the head of an executive branch agency has the power to issue an order that has the status of law after finding, 'on the basis of any information available,' that a [statutory] violation has been committed—is repugnant to the Due Process Clause of the Fifth Amendment." *Id.* at 1258. This Court should apply the Eleventh Circuit's analysis to the similar Clean Water Act administrative compliance order provision. If this Court finds that the Clean Water Act implicitly precludes pre-enforcement review, it must strike that statutory loophole as violative of the Due Process Clause.

CONCLUSION

In the absence of pre-enforcement judicial review, administrative compliance orders have been abused by EPA, at great cost to both private citizens and public entities, and used to avoid the Clean Water Act's critical public safeguards. The Clean Water Act does not expressly or implicitly preclude pre-enforcement judicial review of administrative compliance orders. Even if it did, the inability to seek pre-enforcement judicial review violates the Due Process Clause of the Fifth Amendment in the circumstances of this case and the orders that have been issued to *Amici* and their members.

This Court should reverse the decision of the Ninth Circuit and order the case remanded for a

hearing on the legality of the administrative order in question. The Administrative Procedure Act requires this outcome. Moreover, the Sacketts have been egregiously denied their due process rights.

Respectfully submitted,

F. Paul Calamita*
Christopher D. Pomeroy
AquaLaw, PLC
6 South 5th Street
Richmond, VA 23219
(804) 716-9021
paul@aqualaw.com
Attorneys for Amici Curiae
**Counsel of Record*

Of Counsel:

Nathan Gardner-Andrews
National Association of
Clean Water Agencies
1816 Jefferson Place, NW
Washington, D.C. 20036
(202) 833-2672

Carrie Noteboom
City of New York
100 Church Street
New York, NY 10007
(212) 788-0771