

No. 10-1062

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**In the Supreme Court of the United States**

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CHANTELL SACKETT, ET VIR, PETITIONERS

*v.*

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

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On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Ninth Circuit

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**BRIEF OF THE AMERICAN FARM BUREAU  
FEDERATION, NATIONAL COUNCIL OF FARMER  
COOPERATIVES, NATIONAL CATTLEMEN'S BEEF  
ASSOCIATION, AND PUBLIC LANDS COUNCIL AS  
*AMICI CURIAE* SUPPORTING PETITIONERS**

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici curiae* are trade associations whose members make their livelihoods through farming and ranching activities.

The American Farm Bureau Federation (“AFBF”) is the nation’s largest not-for-profit, voluntary general farm organization. Since 1919, AFBF has worked to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF members produce every type of agricultural crop and commodity grown in the United States, and the organization represents more than six million member families through member organizations in all 50 States and Puerto Rico.

The National Council of Farmer Cooperatives (“NCFC”) has been the voice of America’s farmer cooperatives since its formation in 1929. Farmer cooperatives handle, process, and market almost every type of agricultural commodity; furnish farm supplies; and provide credit and related financial services. NCFC’s members are regional and national farmer cooperatives, which in turn comprise nearly 3,000 local farmer cooperatives—local organizations owned and operated by farmers, ranchers, and growers. The majority of America’s two million

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<sup>1</sup> Pursuant to Rule 37.6, no counsel for any party authored this brief, in whole or part, and no counsel for a party or party made a monetary contribution to fund the preparation or submission of this brief. No entity or person, aside from the *amici curiae* and its counsel, made any monetary contribution for the preparation or submission of this brief. Counsel for the parties consented to this filing.

farmers and ranchers belong to one or more farmer cooperatives.

The National Cattlemen's Beef Association ("NCBA") is the marketing organization and trade association for America's cattle farmers and ranchers. Established in 1898, NCBA represents 147,000 of America's cattle producers through direct membership and state affiliate and breed organizations, which provide much of the nation's food. NCBA promotes responsible stewardship of America's land and natural resources.

The Public Lands Council ("PLC") has represented livestock ranchers who use public lands since 1968, preserving the natural resources and unique heritage of the West. PLC works to maintain a stable business environment in which livestock producers can conserve the West and feed the nation and world. Public land ranchers own nearly 120 million acres of the most productive private land and manage vast areas of public land that constitute a critical wildlife habitat and a natural resource.

Federal regulators have classified much farm and ranch property as "wetlands" or other "waters of the United States," thereby subjecting it to onerous regulation under the Clean Water Act. That regime restricts the ability of farmers and ranchers to cultivate and graze their livestock on it, and to build and maintain such necessary improvements as ponds, lagoons, ditches, and holding structures as part of ordinary farming and ranching activities. *Amici* and their members thus have a strong interest in federal enforcement of the Clean Water Act and, specifically, in the ability of farmers and ranchers to obtain

prompt judicial review of administrative compliance orders issued under the Act.

### **SUMMARY OF ARGUMENT**

A. “Normal agricultural activities” are exempt from the onerous regulatory regime of the Clean Water Act (CWA). As the CWA has been recently interpreted and applied by EPA and the Army Corps of Engineers, however, it does just the opposite. In designated areas, those regulators have claimed, for example, authority to determine how deep is too deep to plow a field without a permit. So too for earthen ditch crossings and “squaring off” fields, among other daily activities. The CWA has, in short, become a tool for regulators to micromanage even the most routine decisions of farmers and ranchers.

B. The APA’s provision of judicial review of Administrative Compliance Orders (ACOs) is essential to check such overreaching. This Court has long demanded clear and convincing evidence that Congress did not intend judicial review of administrative action. The CWA gives EPA a choice between issuing an ACO or filing suit, but that choice does not evaporate if a landowner may seek judicial review of an ACO—it just means that the underlying merits of the regulators’ position will face meaningful scrutiny. Likewise, it would turn the clear-and-convincing-evidence standard on its head to conclude that the CWA’s express provision for review of administrative penalties proves that Congress definitively meant to preclude it everywhere else.

The ACO issued to the Sacketts was undoubtedly “final agency action” subject to APA review. It issues

a series of direct commands that must be performed immediately, and it purports to be EPA’s final word. Unsurprisingly, this order has a “direct and immediate” effect on the Sacketts’ daily business. ACOs introduce serious uncertainty regarding permissible uses of land, and property values suffer accordingly. And then there are the massive costs associated with compliance—demanded on pain of even more severe civil and administrative penalties. Landowners are thus coerced into undertaking hugely expensive measures without judicial oversight.

C. The CWA permitting process offers no meaningful relief. Seeking an individual permit from the U.S. Army Corps of Engineers requires landowners to navigate a maze of forms and submission requirements, many of which require the services of lawyers, engineers, and consultants at significant expense. One study revealed that the mean cost for such work approaches \$300,000, not including the actual costs of any remediation or other work required. And these permits take, on average, more than *two years* to issue. Nationwide permits are no better. Their scope is exceedingly narrow, and the burdens of giving “pre-construction notification” to the Corps are nearly as onerous as seeking an individual permit and likewise result in long delays. As a practical matter, then, the CWA permitting process forecloses landowners’ access to the courts.

D. The effect of all this is to subject landowners to a constitutionally intolerable choice. They can (1) submit to regulators’ demands (usually at great expense) without any determination that such action is required by law; (2) risk catastrophic fines for non-compliance; or (3) expend significant time and

resources (upwards of two years and tens—and perhaps hundreds—of thousands of dollars) pursuing a CWA permit. That is no choice at all.

## ARGUMENT

### A. EPA’s Broad Interpretation Of The Clean Water Act Subjects Routine Agricultural Activities To Regulation

1. The CWA authorizes EPA and the Army Corps of Engineers to regulate “the discharge of dredged or fill material into the navigable waters at specified disposal sites.” 33 U.S.C. § 1344(a). “Discharge” is defined as “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12), (16). Any such discharge requires a federal permit.

Because of concerns that the Federal Water Pollution Control Act of 1972 (“FWPCA”—the predecessor of the CWA—would be interpreted to provide that “federal permits may be required by the rancher who wants to enlarge his stock pond, or the farmer who wants to deepen an irrigation ditch or plow a field,” Dep’t of the Army, Office of Chief of Engineers, Press Release (May 6, 1975), the Corps of Engineers in 1975 issued regulations exempting “normal” agricultural activities from its scope. The Corps thus excluded from its definition of “dredged material” and “fill material” any “[m]aterial resulting from normal farming, silv[i]culture, and ranching activities, such as plowing, cultivating, seeding, and harvesting, for the production of food, fiber, and forest products.” 33 CFR § 209(d)(4), (6) (1975); see also 40 Fed. Reg. 31,320, 31,321 (July 25, 1975). As Assistant Secretary of the Army Victor Veysey told a

House subcommittee in 1975, “[w]e must dispel fallacies that the Corps is proposing to regulate a farmer plowing his field.” *Corps Issues Interim Rules For Discharges of Dredged and Fill Materials*, 5 Envtl. L. Rep. 10143 (1975).

Congress codified the Corps’ regulations in the 1977 FWPCA amendments, which redesignated those provisions the “Clean Water Act.” The Corps explicitly exempted any “discharge” “from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices.” 33 U.S.C. § 1344(f)(1)(A). Members of Congress emphasized that the Corps’ regulations had correctly concluded that “normal farming, ranching, and silviculture activities do not belong in this permit program.” Report on Resolution Providing for Consideration of Conference Report on H.R. 3199, Clean Water Act of 1977, at 351 (statement of Rep. John Hammerschmidt); accord, *e.g.*, *id.* at 524 (stating that the bill “clarifies the exclusion of activities that do not involve point source discharges”) (statement of Sen. Howard Baker). The amendments also included a provision (sometimes referred to as the “recapture” provision) that requires permitting where the discharge of dredged or fill material has the purpose of “bringing an area of the navigable waters into a use to which it was not previously subject” where “the flow or circulation of navigable waters may be impaired or the[ir] reach \* \* \* reduced.” 33 U.S.C. § 1344(f)(2).

2. Despite the Act’s unambiguous exemption for “normal agricultural activities,” the Corps and EPA

have asserted authority over a variety of routine agricultural activities that in some way affect “navigable waters.” The statute defines that term as “the waters of the United States, including the territorial seas,” 33 U.S.C. § 1362(7); the Corps, however, has broadly defined it to include “mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows \*\*\* the use, degradation or destruction of which could affect interstate or foreign commerce \*\*\*.” 33 CFR § 328.3(a)(3). The Corps and EPA have interpreted those terms broadly, “stretch[ing] the term ‘waters of the United States’ beyond parody,” *Rapanos v. United States*, 547 U.S. 715, 734 (2006) (plurality opinion), and resulting in an “immense expansion of federal regulation of land use \*\*\* under the Clean Water Act—without any change in the governing statute.” *Id.* at 722 (plurality opinion); accord *Solid Waste Agency of N. Cook Cnty. v. Corps of Eng’rs*, 531 U.S. 159 (2001).

Those agencies’ regulation of agricultural activities is so widespread that it would be impossible to fully catalogue their efforts in the context of an amicus brief. But a few examples give a sense of the breadth of the agencies’ regulatory efforts:

- Although the statute explicitly excludes “plowing,” 33 U.S.C. § 1344(f)(1), and although courts have rejected the proposition that the incidental fallback of native soil constitutes the “addition” of pollutants, *e.g.*, *National Mining Ass’n v. Corps of Eng’rs*, 145 F.3d 1399 (D.C. Cir. 1998), EPA and the Corps have required farmers to seek permits before “deep plowing” land already used for grazing and raising alfalfa, wheat, and hay, to prepare it for

growing fruit crops or nuts. See *Borden Ranch P'ship v. Corps of Eng'rs*, 261 F.3d 810, 815–816 (9th Cir. 2001) (accepting agencies' interpretation), aff'd by an equally divided court, 537 U.S. 99 (2002). In the experience of *amici*, the Corps has rarely approved such permits, and has done so only after substantial delay. The Corps recently further narrowed its reading of the agricultural exception, telling farmers that use of a basic disc plow—the ubiquitous tool used to prepare soil for planting—may require a CWA permit when used to prepare the soil for planting nut trees. The Corps previously considered disc use “exempt activity” under the agricultural exception.<sup>2</sup>

- The agencies have asserted that pushing soil into a small portion of an existing ditch or dry wash to create a small earthen bridge so that farm equipment can access a field requires a CWA permit. See, e.g., Testimony of James K. Chilton, Jr., before the Committee on Small Business of the U.S. House of Representatives, July 22, 2009 (“Chilton Testimony”), at 4-5.

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<sup>2</sup> Compare Corps of Engineers, *Memorandum for Record, Meeting Summary – California Agriculture and CWA Jurisdiction*, Sept. 1, 2010, at 2 (“[C]onversion from annual row crops or pasture to tree and vine crops often involves discing or deep ripping and may trigger the recapture clause.”) with Letter from Michael S. Jewell, Chief, Central California/Nevada Section, Corps of Engineers, to Dave Bauer, July 6, 2001 (“[Y]our proposal to disc your property \*\*\* is considered an exemption activity under Section 404 \*\*\*.”).

- Farmers may seek to increase efficiency by cultivating portions of their existing fields adjacent to those actively farmed but that have fallen into disuse—sometimes because of the wide turning radius of large modern tractors, sometimes because of irregularities in the shape of fields manually cleared before mechanization. EPA has taken the position that “squaring off existing \*\*\* fields” in this way requires a CWA permit. *E.g., Filling Wetlands Costly for Vermont Dairy Farmers*, Env’t News Serv. (Sept. 8, 2008), available at <http://www.ens-newswire.com/ens/sep2008/2008-09-07-092.asp>.
- Although the CWA explicitly exempts “minor drainage” from the scope of activity requiring a permit, and although one of the Act’s principal sponsors stated that that provision would permit “draining poorly drained farm[land],” *A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Water Pollution Control Act* (1978), at 1042 (statement of Sen. Edmund Muskie), EPA and the Corps have construed that provision not to include any construction of drainage in wetlands. Rather, they construe the provision as “limited to discharges associated with the continuation of established wetland crop production” and drainage of “upland” (i.e., dry land) discharges. EPA and Corps of Engineers, *Memorandum: Clean Water Act Section 404 Regulatory Program and Agricultural Activities*, May 3, 1990, available at <http://water.epa.gov/lawsregs/guidance/wetland>

s/cwaag.cfm. Thus, this exemption has been interpreted not to permit any new wetland drainage, however “minor.”

In short, the Corps and EPA have interpreted the CWA’s exemption for “normal agricultural activities” to permit farmers and ranchers to continue only with their operations as they stood in 1977. Any change in activity to expand, however trivially, acreage in cultivation; to dig even a short new drainage ditch in an area classified as wetlands; to allow a tractor to cross a ditch; or to allow cattle to graze more broadly, potentially triggers the application of CWA jurisdiction to activity that is unquestionably a “normal” part of everyday agricultural activities.

#### **B. The Administrative Procedure Act Provides For Judicial Review Of Administrative Compliance Orders**

Statutory construction “begin[s] with the strong presumption that Congress intends judicial review of administrative action.” *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986); accord *INS v. St. Cyr*, 533 U.S. 289, 298 (2001) (same). The Administrative Procedure Act “embodies the basic presumption of judicial review,” such that statutes will be construed to preclude judicial review of an agency action “only upon a showing of ‘clear and convincing evidence’ of a contrary legislative intent.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 140–141 (1967); H.R. Rep. No. 1980, 79th Cong., 2d. Sess., at 41 (1946) (discussing APA) (“To preclude judicial review \* \* \* a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it.”). As

the Ninth Circuit acknowledged, Pet. App. A-6, the CWA does not expressly “preclude judicial review” (5 U.S.C. § 701(a)(1)) of ACOs. Thus, “clear and convincing evidence” of congressional intent to preclude judicial review must be found, if at all, from the “structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.” *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 778–779 (1985) (quoting *Block v. Community Nutrition Inst.*, 467 U.S. 340, 345 (1984)). The Ninth Circuit inferred Congress’s intent to repeal by implication the APA’s generally applicable review provisions simply because the Clean Water Act gives EPA a choice between issuing an ACO or bringing an enforcement action in district court, see generally 33 U.S.C. § 1319(a)(3). According to the Ninth Circuit, allowing judicial review of ACOs “would eliminate this choice.” Pet. App. A-7. The court found further evidence of Congress’s intent in the CWA’s express provision for judicial review of administrative penalties. *Id.* at A-8. The Ninth Circuit’s conclusion was fundamentally mistaken.

### **1. The Clean Water Act Does Not Implicitly Revoke APA Review Of Administrative Compliance Orders**

Allowing judicial review of administrative ACO determinations honors the government’s choice to proceed in the first instance through the streamlined administrative process rather than in an enforcement proceeding in federal court. The government would still derive all the benefits of its choice of initial factfinder and factfinding mechanism. Cf. *Alaska Dep’t of Envtl. Conservation*

v. *EPA*, 540 U.S. 461, 493–494 (2004). Indeed, for a variety of reasons (including the expense of seeking judicial review) a significant number of administrative actions would never find their way into court.

For similar reasons, the Ninth Circuit erred in its conclusion that allowing judicial review of the Sacketts’ ACO would impair EPA’s ability “to address environmental problems quickly and without becoming immediately entangled in litigation.” Pet. App. A-8 (quoting *S. Pines Assocs. v. United States*, 912 F.2d 713, 716 (4th Cir. 1990)). For a variety of reasons (including the expense of seeking judicial review), most landowners could be expected not to seek review of their ACO, particularly in instances where the alleged violation of the CWA is clear—which is precisely when agencies need to act “quickly.” *Ibid.* And except in those rare instances in which the landowners meet the high standards for preliminary relief, the ACO would remain in effect during the litigation.

Nor does the CWA’s explicit statutory review for administrative penalties provide the requisite “clear and convincing evidence” that Congress intended to foreclose the ordinary avenue of APA judicial review. See Pet. App. A-8. Because the APA “manifests a congressional intention that it cover a broad spectrum of administrative actions,” this Court has held that the statute’s “generous review provisions must be given a hospitable interpretation.” *Abbott Labs.*, 387 U.S. at 140–141 (internal quotation marks omitted). Accordingly, “[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others.” *Id.*

at 141 (internal quotation marks omitted). This Court has repeatedly held that express provision of judicial review for some types of claims does not carry with it a negative inference “suffic[ient] to support an implication of exclusion as to others” from judicial review. *Michigan Acad.*, 476 U.S. at 674 (quoting *Abbott Labs.*, 387 U.S. at 141). Rather, “silence on the subject leaves the jurisdictional grant of [the APA] untouched.” *Verizon Md., Inc. v. Public Serv. Comm’n of Md.*, 535 U.S. 635, 644 (2002); cf. *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1187 (2010) (“We normally do not read statutory silence as implicitly modifying or limiting Supreme Court jurisdiction that another statute specifically grants.”). “The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent.” *Abbott Labs.*, 387 U.S. at 141 (internal quotation marks omitted).<sup>3</sup>

At a minimum, it is not clear that Congress intended implicitly to revoke APA review for ACOs. As set forth below, see pp. 34–37, *infra*, an interpretation of the CWA that would prevent property owners from seeking review of ACOs would present grave due process concerns by effectively depriving property owners of review of administrative

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<sup>3</sup> The Ninth Circuit also noted that the Conference Committee that produced the final version of the Clean Air Act removed a provision that would have allowed pre-enforcement review of ACOs under that statute. Pet. App. A-8. But this Court has often noted the dangers of relying on Congress’s failure to enact a provision. *Cook Cnty. v. United States ex rel. Chandler*, 538 U.S. 119, 132 (2003) (“Inferring repeal from legislative silence is hazardous at best \*\*\*.”). Moreover, there is no comparable legislative history for the statute actually under review, the Clean Water Act.

restrictions on the use of their property. “When the constitutionality of a statute is challenged, this Court first ascertains whether the statute can be reasonably construed to avoid the constitutional difficulty.” *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 444 (1984). Because the CWA is readily interpreted to preserve APA review of ACOs, that reading is to be preferred to the constitutionally suspect reading that would bar such review. This principle gives effect to “the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.” *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Application of the presumption here is particularly sensible, because Congress presumably *did not* intend to deprive the Sacketts—and similarly situated landowners—of due process by being coerced to comply with ACOs that are effectively unreviewable by any court.

## **2. The Sacketts’ ACO Was “Final Agency Action” Subject To APA Review**

“The cases dealing with judicial review of administrative actions have interpreted the ‘finality’ element in a pragmatic way.” *Abbott Labs.*, 387 U.S. at 149. “[T]he nature of the claim being asserted and the consequences of deferment of judicial review are important factors in determining whether a statutory requirement of finality has been satisfied.” *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976). This Court has looked to a variety of factors in assessing the finality of an administrative order, including whether (1) it provides “definitive statements of the [agency’s] position”; (2) it has “a direct and immediate effect on the day-to-day

business of the complaining parties”; (3) it has “the status of law” and “immediate compliance with their terms was expected”; (4) the suit presents a “legal issue fit for judicial resolution”; and (5) the “challenge [i]s calculated to speed enforcement.” *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 239 (1980) (internal quotation marks and alterations omitted). Applying these principles points unambiguously to the conclusion that the Sacketts’ order was final agency action.

a. In *Bennett v. Spear*, 520 U.S. 154 (1997), the Court emphasized that, to be “final,” agency “action must mark the ‘consummation’ of the agency’s decisionmaking process—it must not be of a merely tentative or interlocutory nature.” *Id.* at 177–178. There is little question that the Sacketts’ ACO is a “definitive statement[] of [EPA’s] position” on their case. There is nothing “tentative” about EPA’s factual findings; the order definitively states EPA’s conclusion that the Sacketts discharged fill from a point source into wetlands on their property adjoining Priest Lake, a navigable waterway. Pet. App. G-2. There is no indication whatsoever that EPA’s investigation into the relevant facts was continuing or would be subject to revision because of ongoing factfinding: It is plainly conclusive. See *CSI Aviation Servs., Inc. v. United States Dep’t of Transp.*, 637 F.3d 408, 412 (D.C. Cir. 2011) (finding finality where agency “letter declared in no uncertain terms that ‘CSI has been acting as an unauthorized indirect air carrier in violation of section 41101’”). Thus, the Sacketts’ case “would not ‘benefit from further factual development of the issues presented.’” *Whitman v. Am. Trucking Ass’ns, Inc.*,

531 U.S. 457, 479 (2001) (quoting *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998)).

Nor is there anything “tentative” about the action EPA commands the Sacketts to take. It states in conclusive terms that they are “hereby ORDERED” to undertake a detailed course of action, Pet. App. G-4-G-5, which is set forth in explicitly mandatory terms: The Sacketts “*shall* remove all unauthorized fill material” and “*restore[]*” the site “to its original, pre-disturbance topographic condition,” and the work “must be completed” by a specified date. *Ibid.* (emphasis added). The order provides no grace period; it specifies that it is “effective on the date it is signed.” *Id.* at G-6. The order is, by its terms, a complete and self-contained remedial plan for the Sacketts’ alleged violation. “Short of an enforcement action, EPA has rendered its last word on the matter.” *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 586 (1980). Under such circumstances, there is no risk that judicial review of the order will “inappropriately interfere with further administrative action,” since EPA has concluded its consideration of the \*\*\* issue.” *Whitman*, 531 U.S. at 479 (quoting *Ohio Forestry Ass'n*, 523 U.S. at 733). Thus, the Sacketts’ order is “fit for judicial resolution.” *Standard Oil*, 449 U.S. at 240 (internal quotation marks omitted).

It is true that the Order “encourages” the Sacketts “to engage in informal discussion of the terms and requirements” of the ACO and states that “[a]lternative methods to attain the objectives of this Order may be proposed.” Pet. App. G-5-G-6. But that boilerplate language provides no indication that EPA is still considering any course of action other

than that set forth in the Order.<sup>4</sup> See *Fairbanks N. Star Borough v. United States Army Corps of Eng’rs*, 543 F.3d 586, 591–592 (9th Cir. 2008) (finding definitive agency statement where statement “would change only if new information supporting a revision is provided”) (internal quotation marks omitted). Indeed, “if the possibility \*\*\* of future revision in fact could make agency action non-final as a matter of law, then it would be hard to imagine when any agency rule \*\*\* would ever be final.” *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002).

b. In considering whether an ACO will have “a direct and immediate effect on the day-to-day business of the complaining parties,” *Standard Oil*, 449 U.S. at 239 (internal quotation marks and alteration omitted), it is useful to consider the effect of federal regulators’ simple determination that the CWA applies to their “activities or tracts of land.” 33 CFR § 320.1(a)(6). An agency’s mere “jurisdictional determination” immediately curtails the owner’s ability to engage in “a broad range of ordinary industrial and commercial activities” (*Rapanos*, 547 U.S. at 721 (plurality opinion) (quoting *Hanousek v. United States*, 528 U.S. 1102, 1103 (2000) (Thomas, J., dissenting from denial of certiorari))—to say nothing of routine farming and ranching activities—because they become subject to oversight and permitting under the CWA. Everyday activities would become subject to an onerous permitting process whose outcome and duration is uncertain, and whose sheer complexity makes the use of

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<sup>4</sup> Indeed, EPA rebuffed the Sacketts’ efforts to present information suggesting the property was not a jurisdictional wetlands. See Pet. Br. 9.

expensive attorneys and consultants essentially unavoidable. See pp. 29–31, *infra*.

When property is encumbered with an agency's "wetland" determination, the difficulty, expense, delays, and uncertainty of CWA regulation has an immediate and profound effect on property value. See Br. *Amicus Curiae* of Am. Petroleum Inst. *et al.*, at 26–27. One study determined that the presence of wetlands had a "significant negative impact on rural land prices." John E. Reynolds & Alex Regalado, *The Effects of Wetlands and Other Factors on Rural Land Values*, APPRAISAL J., April 2002, at 182. This effect is attributable not to the natural features of the land but to "state and federal 'jurisdiction' over the[] property and interference with \* \* \* private decision making." *Ibid.* Potential purchasers' well-founded concerns about "a myriad of forms and documents, delays, consultant fees, and parcel restrictions—which may add significantly to the cost of land use changes," and which thereby diminish owners' ability to "generate higher returns [from] their lands," *ibid.*—significantly depress its value. *Nat'l Ass'n of Home Builders v. Corps of Eng'rs*, 417 F.3d 1272, 1278 (D.C. Cir. 2005) (internal quotation marks omitted); *id.* at 1279–1280 (change to nationwide permits constituted final action where change would "directly affect \* \* \* investment and project development choices"); *Minard Run Oil Co. v. United States Forest Serv.*, No. 09-125, 2009 WL 4937785 (W.D. Pa. Dec. 15, 2009) (holding that drilling ban

was final where ban caused economic hardships to numerous energy companies).<sup>5</sup>

c. An administrative compliance order has still further onerous effects. As noted above, the Order purports to impose an immediate requirement to “remove all unauthorized fill material” by a required date and to return the property to the original condition “[t]o the maximum extent practicable,” Pet. App. G-4, warning that the order is “effective on the date it is signed” (i.e., immediately), *id.* at G-6. Moreover, “failure to comply with[] the foregoing Order may subject [the Sacketts] to (1) civil penalties of up to \$32,500 per day of violation \* \* \* [and] (2) administrative penalties of up to \$11,000 per day \* \* \*.” *Id.* at G-7. And the order states that the owner must “provide any successor in \* \* \* interest” to the land “with a copy of this Order at least 30 days prior to the transfer of” an interest in the property. *Id.* at G-6.

The undeniable purpose of the Order is to coerce immediate compliance with the agency’s remedial directive using the threat of massive civil and administrative penalties. This Court has unequivocally held that “EPA[] orders [that] effectively halt[]”

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<sup>5</sup> Other administrative decisions having similarly immediate and drastic impacts have been subject to immediate judicial review under a variety of regimes. *E.g., Stevenson v. Blaine Cnty.*, 9 P.3d 1222, 1223–1226 (Idaho 2000) (holding that preliminary plat approval was final where it authorized project that would allegedly harm neighbor by creating noise and increasing traffic); *A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483, 1485–1487 (11th Cir. 1988) (holding that city’s rezoning “constituted a final, definitive position,” where rezoning caused business to be “unable to meet expenses” and caused lenders to “foreclose[] on [the] property”).

activities because the owner “would risk civil and criminal penalties if it defied a valid EPA directive” are final and subject to review. *Alaska Dep’t of Envtl. Conservation*, 540 U.S. at 483; see also *Barrick Goldstrike Mines, Inc. v. Browner*, 215 F.3d 45, 47–48 (D.C. Cir. 2000) (finding agency action final, in part because of risk of enforcement action and fines that could result if party refused to follow agency position); *CSI Aviation Servs.*, 637 F.3d at 412 (agency cease-and-desist order had direct and immediate impact on regulated party).

In serving ACOs, agencies frequently use language that is plainly calculated to create alarm and intimidate landowners into immediate compliance with agency demands by threatening ruinous fines. One Iowa farmer, who had obtained state and county approvals to do work on an area adjacent to a river to level a pasture, received the following warning with EPA’s ACO in February of this year:

**Please read the Order carefully. It contains a number of specific requirements and deadlines, and compliance with the Order is mandatory.**

EPA also believes that an enforcement action in the form of a civil penalty is appropriate for the aforementioned violations. However, before we initiate an action to seek penalties, EPA would like to review the restoration or mitigation work plan required under \*\*\* the Order. Please note that, as long as the fill material remains [in place], your actions constitute a continuing violation of the CWA. The timeliness and quality of your work plan submission impacts the duration

of the violation and, therefore, will be factored in EPA's determination of a penalty.

We ask that you please contact us within seven days of receipt of this letter. \* \* \* If we do not hear from you within seven days, we will assume you are not interested in discussing this matter and may proceed to file an Administrative Complaint initiating a penalty action.<sup>6</sup>

Farmers and ranchers are particularly vulnerable to such pressures. They are frequently persons of modest means who lack the financial resources to risk the imposition of substantial fines from being in "continuing violation" of a purportedly "mandatory" agency order, and cannot afford to have the legal status of their property under a cloud for a prolonged period. Their land is typically their principal asset, and frequently provides collateral for loans and capital purchases needed to operate their farm or ranch. The agency's assertion that their property is subject to expensive remediation and that they face significant fines diminishes the value of their collateral and may affect their ability to obtain loans. Accordingly, farmers and ranchers frequently are forced by circumstances to accept whatever demands the agency makes.

The practical experience of farmers and ranchers demonstrates that ACOs often have their intended purpose of coercing prompt action. For example:

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<sup>6</sup> Letter from Karen A. Flournoy, Acting Director, Water, Wetlands and Pesticides Division, EPA Region 7, to David Ward, Feb. 8, 2011, at 1-2 (emphasis in original).

- Although one Mississippi farmer received a permit from state regulators to build a pond on his property, the Corps of Engineers determined that the addition violated the CWA. Rather than “come up with \$450,000 for another permit or 30 to 40 acres of a certain kind of land I didn’t have,” the landowner returned the property to its previous condition at his own expense. See Ray Van Dusen, *Man’s lake makes waves*, Clarion-Ledger, Sept. 20, 2009, at 2B.
- A third-generation Massachusetts farmer was found in violation of the CWA for digging drainage ditches, among other “violations.” He complied with the ACO’s requirement that he restore the land to its previous condition, commenting that he wished to “turn the farm over to his daughters without violations hanging over it.” Bob Dunn, *Pasiecnik says he’ll comply with EPA order*, The Recorder, Oct. 14, 2010, available at <http://www.buylocalfood.com/page.php?id=425&pagetype=page>.
- A husband and wife who operate a dairy farm in Vermont paid over \$100,000 in restoration, compensatory mitigation, and supplemental environmental projects demanded by EPA after they were cited for a violation for “expanding forage acres to support their dairy herd.” *Filling Wetlands Costly for Vermont Dairy Farmers, supra*.
- A rancher in California was required to convey a 300-acre parcel for conservation to settle

claims that he plowed “33 acres of vernal pools and swales” on his land to prepare it for planting.<sup>7</sup>

Whether farmers and ranchers must spend often hundreds of thousands of dollars to mitigate EPA-claimed “violations,” or lose their ability to operate, it is undeniable that ACOs have “a direct and immediate effect on the day-to-day business” of American farmers and ranchers. *Standard Oil*, 449 U.S. at 239 (internal quotation marks and alteration omitted).

### **C. CWA Permitting Is So Costly And Slow As To Foreclose Access To The Courts**

The Ninth Circuit concluded that “statutory preclusion of pre-enforcement judicial review of administrative orders violates due process only when the ‘practical effect of coercive penalties for noncompliance is to foreclose all access to the courts’ so that ‘compliance is sufficiently onerous and coercive penalties sufficiently potent that a constitutionally intolerable choice might be presented.’” Pet. App. A-13 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994) (alteration omitted)). The court’s judgment that foreclosure of APA review complied with due process relied on its assumption that landowners could obtain prompt review of an ACO by seeking a CWA permit and “immediately appeal[ing]” a denial. *Ibid.* Putting aside the absurdity of requiring landowners to seek a CWA

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<sup>7</sup> See *EPA settles wetlands enforcement case in Tulare County* (Sept. 22, 2004), available at <http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/37159a7a88718df5852570d8005e169a!OpenDocument>.

permit simply so they can obtain a judicial determination that they did not need one, seeking a CWA permit can be just as expensive as the potential penalties for violating an ACO. It can also leave landowners in a state of uncertainty during the one to two years applications typically are pending. The delays and costs of CWA permitting mean that thousands of American landowners “would not as a practical matter be able to obtain meaningful judicial review” of administrative compliance orders before circumstances force them to comply. *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991).

The wetland permitting process, set forth in Section 404 of the CWA, 33 U.S.C. § 1344, is primarily administered by the Army Corps of Engineers.<sup>8</sup> The Corps issues two types of Section 404 permits: individual permits and general (nationwide) permits.<sup>9</sup>

**1. Individual permits.** Individual permits are issued based on the Corps’ case-by-case consideration of a project, 33 CFR § 323.2(g), in light of the agency’s assessment of “the needs and welfare of the

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<sup>8</sup> States can assume jurisdiction over Section 404 permitting for “nonnavigable” waters, but only two—New Jersey and Michigan—have done so. See EPA, State or Tribal Assumption of the Section 404 Permit Program, *available at* <http://www.epa.gov/owow/wetlands/facts/fact23.html>; 40 CFR § 233.70–.71; N.J. Stat. Ann. 13:9B-1; Mich. Comp. Laws Ann. § 324.30304b.

<sup>9</sup> 33 U.S.C. § 1344(a), (e); 33 CFR § 323.2(g), (h); *id.* § 330.1(a); U.S. Army Corps of Engineers, South Atlantic Division, Regulatory Program, *available at* <http://www.sad.usace.army.mil/regulatory/RegulatoryPermit.htm>.

people.” *Id.* § 320.4(a). The formal process begins when the landowner files an application.<sup>10</sup> Then the Corps issues public notice and receives comments. *Corps Regulatory Jurisdiction* at 4.

a. The Corps’ standardized permit application form, ENG Form 4345, serves as the basic form for all individual permit applicants.<sup>11</sup> It requires the applicant to submit “[t]hree types of illustrations \*\*\* depict[ing] the work to be undertaken,” including “a Vicinity Map, a Plan View [and] a Typical Cross-Section Map,” as well as a detailed description of the development, including “dimensions of structures such as wing walls, dikes (identify the materials to be used in construction, as well as the methods by which the work is to be done), or excavations (length, width, and height),” as well as the type and amount of “material to be discharged within Corps jurisdiction.” Form 4345 Instructions.

But completing Form 4345 is just the first step. As one Corps office has acknowledged, “[b]ased on

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<sup>10</sup> For bigger projects, “[p]re-application consultation” may be warranted, involving one or several meetings between an applicant, Corps district staff, interested Federal, state, or local resource agencies, and “sometimes the interested public.” U.S. Army Corps of Engineers, Headquarters, *Regulatory Jurisdiction Overview*, at 3-4, available at [http://www.usace.army.mil/CECW/Documents/cecwo/reg/reg\\_juris\\_ov.pdf](http://www.usace.army.mil/CECW/Documents/cecwo/reg/reg_juris_ov.pdf) (“Corps Regulatory Jurisdiction”).

<sup>11</sup> 33 CFR § 325.1(c); *Application for Department of the Army Permit*, available at <http://www.usace.army.mil/CECW/Documents/cecwo/reg/eng4345a.pdf> (“Form 4345”); see also *Instructions for Preparing a Department of the Army Permit Application*, available at [http://www.usace.army.mil/CECW/Documents/cecwo/reg/eng4345\\_instructions\\_2009.pdf](http://www.usace.army.mil/CECW/Documents/cecwo/reg/eng4345_instructions_2009.pdf) (“Form 4345 Instructions”).

our experience, the environmental information necessary to make the public interest determination is often inadequate when only the ENG Form 4345 form is submitted.”<sup>12</sup> Thus, project managers frequently “must then request additional information from applicants, resulting in delays in project evaluation.” *Hawaii Questionnaire* 1. See generally 33 CFR § 325.1(e) (stating that applicant may be required to furnish additional information). Although Corps regulations state that “[d]istrict and division engineers are not authorized to develop additional information forms but may request specific information on a case-by-case basis,” see 33 CFR § 325.1(d)(1), some Corps offices routinely require applicants to submit multi-page supplemental questionnaires, forms, or checklists along with Form 4345.<sup>13</sup> Still other Corps offices have replaced Form 4345 with completely different forms, some of which are much more extensive than Form 4345, and which typically request data to ensure

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<sup>12</sup> U.S. Army Corps of Engineers, Honolulu District, Regulatory Branch, *Permit Application Questionnaire*, available at <http://www.poh.usace.army.mil/EC-R/forms/ecr-Questionnaire.doc> (“*Hawaii Questionnaire*”).

<sup>13</sup> See *Hawaii Questionnaire*; U.S. Army Corps of Engineers, New York District, Regulatory Branch, available at <http://www.nan.usace.army.mil/business/buslinks/regulat/formdocs/new-201r.pdf> (“*NY Questionnaire*”); U.S. Army Corps of Engineers, Alaska District, Permit Application & Instructions, *Applicant Proposed Mitigation Statement*, available at <http://www.poa.usace.army.mil/reg/PermitApp.htm> (“*Alaska Mitigation Statement*”). Corps regulations appear to prohibit local offices from using such supplemental forms.

compliance with state, as well as federal, environmental laws.<sup>14</sup>

These forms provide a sense of the dizzying array of detailed information regulators demand of landowners during the CWA process, including, for example, information about the “kind of substrate” found at the site, salinity levels, “the range of water levels which occur,” “water currents and water circulation patterns,” “the quality of the air,” the “history or possibility of contaminants/pollutants” in the soil used for the fill material, and even existing and anticipated future noise levels at the site. *Hawaii Questionnaire* 2-3. Applicants are told to submit “[b]iological survey reports from a qualified environmental professional,” *Hawaii Questionnaire* 3, and “photographs of the waterway vicinity \*\*\* taken at low tide,” together with an annotated “copy of your plan view, indicat[ing] the location and direction of each photograph as well as the date and time at which the photograph was taken.” *NY Questionnaire* 1; see also *Oregon Joint Application* 3

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<sup>14</sup> See, e.g., Oregon.gov, Wetlands/RF Forms & Publications, *Joint Application*, available at <http://www.oregon.gov/DSL/PERMITS/forms.html> (“Oregon Joint Application”); U.S. Army Corps of Engineers, Nashville District, Regulatory Branch, *Joint Application Form, Department of the Army/TVA*, available at <http://www.lrn.usace.army.mil/cof/pdf/CorpsTVAform.pdf> (“TVA Joint Application”); U.S. Army Corps of Engineers, New York District, Regulatory Branch, available at <http://www.nan.usace.army.mil/business/buslinks/regulat/formdocs/JtAp0910.pdf> (“NY Joint Application”); *Joint Federal and State Application Form for Activities Affecting Waters of the United States or Critical Areas of the State of South Carolina*, available at [http://www.sac.usace.army.mil/assets/pdf/regulatory/permits/joint\\_permit\\_application\\_form-Fillable%20\(3\).pdf](http://www.sac.usace.army.mil/assets/pdf/regulatory/permits/joint_permit_application_form-Fillable%20(3).pdf) (“SC Joint Application”).

(asking for “Recent Aerial photo (1:200, or if not available for your site, the highest resolution available”). One form asks the applicant to

[d]escribe the existing physical and biological characteristics of the wetland/waterway site by area and type of resource (Use separate sheets and photos, if necessary). For wetlands, include, as applicable: Cowardin and Hydrogeomorphic (HGM) wetland class(s); [d]ominant plant species by layer (herb, shrub, tree); \*\*\* [a]ssessment of the functional attributes of the wetland to be impacted[.] Identify any vernal pools, bogs, fens, mature forested wetland, seasonal mudflats, or native wet prairies in or near the project area.”

*Oregon Joint Application 5.*

Agencies also routinely require applicants to “[p]rovide a complete narrative description of the proposed work and its purpose[,] \*\*\* [i]nclud[ing]: description of current site conditions and how the site will be modified by the proposed project; \*\*\* type and quantity of materials to be used (i.e., square ft of coverage and cubic yds of fill material and/or structures below ordinary/mean high water); area of excavation or dredging, volumes of material to be removed and location of dredged material disposal or use; work methods and type of equipment to be used.” *NY Joint Application 2.* They must specify the “[l]ocation of staging areas[;][l]ocation of construction access[;][l]ocation of cross section(s), as applicable[;][l]ocation of mitigation area, if applicable,” *Oregon Joint Application 3.* Applicants are frequently asked to include “a thorough

discussion of alternatives to your proposal,” *NY Questionnaire 2*, and steps taken to “avoid[] impacts to \*\*\* wetlands[] to the maximum extent practicable,” and elements of the project design that “minimize the unavoidable impacts” on wetlands. *Alaska Mitigation Statement* 1-2. And, of course, applicants are routinely required to provide proposed “compensatory mitigation” measures—that is, what steps they will take to restore or enhance wetlands elsewhere to offset their construction efforts, or the payment of (frequently substantial) fees in lieu of such restoration. *E.g., id.* at 2.

b. As is apparent from the types of information these forms require, landowners are often unable to complete these forms on their own. Although the instructions for the basic Form 4345 form opine that “[a]n agent is not required” to complete the CWA permitting process, *Form 4345 Instructions* 1, the reality is that landowners typically engage “an attorney, builder, contractor, [or] engineer,” to serve as their agent, *ibid.*, and it is usually necessary to retain attorneys and consultants to furnish required information, to implement agency requirements, and simply to navigate the complex permitting process. *E.g.*, Chilton Testimony at 4 (noting necessity of “hiring attorneys and environmental consultants”). Indeed, agencies sometimes request—or demand—that landowners engage “an experienced professional” or “environmental consultant.”<sup>15</sup> The

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<sup>15</sup> See, *e.g.*, *Hawaii Questionnaire 3* (recommending “[b]iological survey reports from a qualified environmental professional”); Letter from Nicholas Baggett, Project Manager, Inland Branch, Regulatory Division, Corps of Engineers, Mobile District, to David Evans, Sept. 20, 2007 (directing landowner to “[p]rovide a description and survey of the jurisdictional area

heavy involvement of consultants is unsurprising given the complexity of the regulatory structure, and, indeed, the complexity of the agency's *guidance documents*: A recent draft of the Guidelines for Preparing a Compensatory Mitigation Plan, with appendices, weighs in at 114 pages.<sup>16</sup>

Applying for an individual permit is therefore an expensive and time-consuming task. According to one study, the mean cost for preparing an individual permit application was \$271,596, not including costs of mitigation, changes to designs, and carrying capital. David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RES. J. 59, 74 (2002). It takes an average of 788 days to obtain an individual permit. *Id.* at 75-76. Permits for even the simplest activities related to agriculture commonly cost tens of thousands of dollars and impose significant delays. See, e.g., Chilton Testimony at 4

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impacted by the activity. This survey should be conducted by an experienced professional \* \* \*."); Letter from Cindy J. House-Pearson, Office Manager, Birmingham Field Office, Regulatory Division, Corps of Engineers, Mobile District, to David Evans, Feb. 2, 2007 (state "[a]mount of jurisdictional waters/wetlands impacted onsite. Please be aware that making this determination may require the services of an environmental consultant."). See Corps of Engineers, Charleston District, Regulatory Division, *Courtesy List of South Carolina Environmental Consultants*, Aug. 2011, available at <http://www.sac.usace.army.mil/assets/pdf/regulatory/consultants.pdf>.

<sup>16</sup> See Corps of Engineers, Charleston District, *Guidelines for Preparing a Compensatory Mitigation Plan*, Oct. 7, 2010, available at <http://www.mvk.usace.army.mil/offices/od/odf/Charleston%20Method%202010%20Guidelines.pdf>.

(stating that approval to build bridge across dry wash on ranch took one year and \$40,000). The already-lengthy process is further delayed by an estimated backlog of 15,000-20,000 CWA permit requests nationally. *Ibid.* It is the experience of *amici* that the Corps is particularly slow in approving permits for certain types of agricultural activities, particularly “deep plowing,” used to convert land used for row crops or grazing to fruit or nut production. Some California deep-plowing permit applications have been pending literally for years.

**2. Nationwide permits.** The second type of permit issued by the Corps of Engineers is the nationwide permit (“NWP”).<sup>17</sup> The Corps issues such permits to authorize categories of activities on a nationwide basis. There are currently fifty NWPs in force.<sup>18</sup> One such permit—NWP 40—is specifically intended for agricultural activities, although its utility is quite limited: It permits not more than a one-half acre loss of wetlands or the relocation of 300 linear feet of drainage ditches, and is subject to a general requirement of compensatory mitigation. See U.S. Army Corps of Engineers, Sacramento District, *Nationwide Permit Summary, NWP 40, Agricultural Activities*, at 1, available at <http://www.spk.usace.army.mil/organizations/cespk->

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<sup>17</sup> 33 U.S.C. § 1344(a), (e); 33 CFR § 323.2 (h); *id.* § 330.1(a).

<sup>18</sup> See U.S. Army Corps of Engineers, Headquarters, Nationwide Permits Information, *2007 Nationwide Permits, Conditions, Further Information and Definitions (with corrections)*, available at [http://www.usace.army.mil/CECW/Documents/cecwo/reg/nwp/nwp2007\\_gen\\_conditions\\_def.pdf](http://www.usace.army.mil/CECW/Documents/cecwo/reg/nwp/nwp2007_gen_conditions_def.pdf) (“*2007 Nationwide Permits Conditions*”).

co/regulatory/nwp/nwp-40.pdf (“*Sacramento Permit Summary*”).

Once the landowner decides that his activity may be authorized under one or more of the Corps’ NWPs, the landowner must determine whether those permits require that the landowner give “pre-construction notification” to the Corps. 33 CFR § 330.1(e). Twenty-nine of the 50 NWPs—including NWP 40—require such notification.<sup>19</sup> Each NWP is subject to 28 general conditions, see, e.g., *Sacramento Permit Summary* 1-7, and a host of variable regional and local conditions. *Id.* at 7-12. To ensure that the applicant complies with that byzantine patchwork of regulation, regional Corps offices have promulgated myriad forms that landowners must use to give formal notification. These forms frequently exceed 20 pages.<sup>20</sup> Although labeled notification forms, they function like a permit application: The landowner may not begin construction until a Corps official notifies the landowner that the activity may proceed with any new conditions that the Corps may impose. See, e.g., *Sacramento Permit Summary*, at 5.

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<sup>19</sup> See 2007 *Nationwide Permits Conditions* 4-24.

<sup>20</sup> See, e.g., U.S. Army Corps of Engineers, Fort Worth District, Application Submittal Forms, available at <http://www.swf.usace.army.mil/pubdata/environ/regulatory/permitting/applicationforms/index.asp> (application forms for NWPs 3, 12–14, 21, 29, 39, and 43); U.S. Army Corps of Engineers, Sacramento District, Regulatory Program, *Nationwide Permit Pre-Construction Notification (PCN) Form*, available at [http://www.spk.usace.army.mil/organizations/cespk-co/regulatory/nwp/SPK\\_PCN\\_noCO.doc](http://www.spk.usace.army.mil/organizations/cespk-co/regulatory/nwp/SPK_PCN_noCO.doc) (“*Sacramento PCN Form*”); U.S. Army Corps of Engineers, Wilmington District, Regulatory Program, *Pre-Construction Notification (PCN) Form*, available at [http://www.saw.usace.army.mil/Wetlands/pcn/form/PCNv1\\_4.pdf](http://www.saw.usace.army.mil/Wetlands/pcn/form/PCNv1_4.pdf).

The pre-construction notification forms require applicants to supply a variety of information, including, for example:

- “For proposed discharges of dredged material into waters of the U.S. (including beach nourishment), please attach a proposed Sampling and Analysis Plan (SAP) prepared according to Inland Testing Manual (ITM) guidelines (including Tier I information, if available).” *Sacramento PCN Form* at 4.
- “Does the project have the potential to cause effects to any historic properties listed, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, *including previously unidentified properties?*” U.S. Army Corps of Engineers, Fort Worth District, *Application Submittal form for NWP 13*, at 5 (emphasis added), available at [http://www.swf.usace.army.mil/pubdata/environ/regulatory/permitting/applicationforms/USACE\\_NWP\\_13\\_Application\\_Form\\_Final\\_Protected.doc](http://www.swf.usace.army.mil/pubdata/environ/regulatory/permitting/applicationforms/USACE_NWP_13_Application_Form_Final_Protected.doc).
- “A detailed alternatives analysis pursuant to the Section 404(b)(1) Guidelines of the Clean Water Act. This analysis must demonstrate that all other available stormwater and sediment/erosion treatment controls will be implemented and that in-stream detention/retention is the only available practicable alternative that would meet the basic project purpose. This analysis should also include all project site specific factors that may render other stormwater detention/retention measures

impractical, such as: steep slopes; rock substrate; narrow floodplain; and pre-existing development.” U.S. Army Corps of Engineers, *Savannah District 2007 Nationwide Permit Regional Conditions* 2-3, available at [www.fws.gov/athens/stream\\_crossing/RegionalConditions2007.pdf](http://www.fws.gov/athens/stream_crossing/RegionalConditions2007.pdf).

Although nationwide permits are designed to simplify the permit application process, obtaining approval to use them is still costly and time-consuming. One study found that the mean time needed to obtain approval to use a nationwide permit was 313 days—nearly a year. Sunding & Zilberman, 42 NAT. RES. J. at 75-76. Moreover, the process sometimes costs over \$100,000; obtaining approval even in a typical case can cost nearly \$30,000. *Id.* at 74 & n.67.

**D. Requiring Landowners To Seek CWA Permits To Obtain Review Of Administrative Compliance Orders Subjects Them To A Constitutionally Intolerable Choice**

1. “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Eldridge*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Time and again, this Court has recognized that this bedrock requirement is not satisfied where limitations on access to courts deprive parties of “meaningful judicial review” “as a practical matter.” *McNary*, 498 U.S. at 496; accord *Eldridge*, 424 U.S. at 331 n.11.

Judicial review is necessary to avoid putting landowners of modest means to a “constitutionally intolerable choice” (*Thunder Basin*, 510 U.S. at 218) between (1) immediately removing improvements and undertaking expensive remediation to restore their property to its previous condition, frequently at a cost of tens of thousands of dollars or more; (2) not abiding by the order and risking devastating fines that, as agencies frequently remind landowners, can accrue at the rate of “\$32,500 per day for each violation,” Pet. App. F-2, while their ability to borrow correspondingly declines; or (3) devoting one to two years and an average of between \$30,000 and nearly \$300,000 pursuing a CWA permit, all for the chance to obtain the judicial review they need to prove that it is unnecessary. Under such circumstances, it is no wonder that so many landowners simply give in to regulators and remove improvements they believe to be lawful, because it is the only route that ends their uncertainty within a reasonable period and permits them to set a reasonable upper limit on their costs. It is difficult not to conclude that “the practical effect” of this situation is “foreclose all access to the courts” for thousands of law-abiding landowners. *Thunder Basin*, 510 U.S. at 218.

*Thunder Basin* is not to the contrary. There, this Court held that the absence of pre-enforcement judicial review of an agency decision under the Federal Mine Safety and Health Amendments Act did not deprive a mine operator of due process. But the Court emphasized that compliance with the order in that case (which required the operator merely to post the names of miners’ representatives) would not “subject [the mine operator] to serious

harm.” 510 U.S. at 216-217. Moreover, the mine operator had protections that property owners can only dream about, including an expedited administrative process followed by immediate judicial review, *id.* 218, as well as the prospect of “temporary relief of certain orders” while the matter was pending before the agency and the court. *Ibid.* While this Court readily concluded that compliance with the agency order was not “sufficiently onerous and coercive penalties sufficiently potent” to be “constitutionally intolerable,” *ibid.*, that situation was a far cry from what landowners face when they are subject to agency demands that they immediately remove improvements on pain of enormous civil and administrative penalties.

2. Review of ACOs both eliminates that “constitutionally intolerable” situation and also better accords with the demands of due process. See generally *Eldridge*, 424 U.S. at 335. Review of ACOs would fully protect the government’s legitimate interests by “allow[ing] EPA to act to address environmental problems quickly.” Pet. App. A-8 (quoting *S. Pines Assocs.*, 912 F.2d at 716). As noted above, see pp. 11–13, *supra*, the government cannot credibly claim that allowing review would interfere with agency decisionmaking. Regulators would lose only the power to browbeat landowners outside the view of federal courts.

But allowing review of such orders would provide an immediate benefit to landowners and significantly reduce “the risk of an erroneous deprivation.” *Eldridge*, 424 U.S. at 335. Judicial review of ACOs would provide landowners an opportunity to seek review of an agency’s determination that the

property contained “wetlands” and that the landowner’s actions were in violation of the CWA. Judicial review would act as a check on the agencies’ inordinately broad reading of their regulatory jurisdiction, and improve the reliability of the agencies’ ad hoc decisionmaking process, which on occasion “has been little short of capricious.” *In re Carsten*, 211 B.R. 719, 725–726 (Bankr. D. Mont. 1997) (describing a “litany of government conceit” although rancher had acted “in complete good faith” and “obeyed all the government’s orders—no matter how overbearing or contradictory such orders may have been”). The process would provide a significant benefit to both regulated landowners and regulators themselves, by helping to develop a body of law that could provide a framework for more predictable agency decisionmaking. That is something that has been in short supply for far too long.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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