No. 10-1062

In the Supreme Court of the United States

CHANTELL SACKETT AND MICHAEL SACKETT,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the prohibition on pre-enforcement judicial review of administrative compliance orders imposed by the Clean Water Act, 33 U.S.C. 1251 *et seq.*, violates petitioners' rights under the Due Process Clause.

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OPINIONS BELOW

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

JURISDICTION

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

STATEMENT

1. Congress enacted the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. 1251(a). The CWA prohibits the "discharge of any pollutant by any person" except in compliance with the Act. 33 U.S.C. 1311(a). The term "pollutant" is defined to include, *inter alia*, "dredged spoil," "rock," and "sand." 33 U.S.C. 1362(6). "[D]ischarge of a pollutant" is defined to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12). The Act defines "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

The CWA establishes two complementary permitting schemes. Section 1344 of Title 33 authorizes the Secretary of the Army, acting through the United States Army Corps of Engineers (Corps), or a State with an approved program, to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a) and (g)-(h). Section 1342 authorizes the United States Environmental Protection Agency (EPA), or a State with an approved program, to issue a National Pollutant Discharge Elimination System permit for the discharge of pollutants other than dredged or fill material. See 33 U.S.C. 1342.

The Corps and EPA share responsibility for implementing and enforcing the CWA's permitting provisions. See, *e.g.*, 33 U.S.C. 1344(b) and (c). The two agencies have promulgated regulations governing the Corps' processing and issuance of Section 1344 permits. See 33 C.F.R. Pts. 320-325; 40 C.F.R. Pt. 230. After completing its review of a permit application, the Corps

must determine whether to issue the permit with or without conditions, or to deny the permit. See 33 C.F.R. Pts. 325-326. Subject to the administrative-appeal process, the Corps' issuance or denial of a permit constitutes final agency action that is subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 704. See, *e.g.*, *Baccarat Fremont Developers, LLC* v. *United States Army Corps of Eng'rs*, 425 F.3d 1150, 1153-1154 (9th Cir. 2005), cert. denied, 549 U.S. 1206 (2007); 33 C.F.R. Pt. 331.

Apart from the CWA's permitting provisions, the Act and its implementing regulations provide the Corps and EPA with a number of different mechanisms by which to enforce the Act's prohibition on discharging pollutants into regulated waters. See, *e.g.*, 33 U.S.C. 1319, 1344(n) and (s). As relevant here, when EPA finds "that any person is in violation of section 1311" or other enumerated provisions of the CWA, the agency shall either "issue an [administrative compliance] order requiring such person to comply with such section or requirement," or bring a civil action to enforce the Act. 33 U.S.C. 1319(a)(3). Section 1319(b), in turn, authorizes EPA to initiate a judicial enforcement action for appropriate relief, including a temporary or permanent injunction, "for any violation for which [EPA] is authorized to issue a compliance order" under Section 1319(a)(3). 33 U.S.C. 1319(b). In an action brought under Section 1319(b), the district court may impose civil penalties for violation of the Act and for violation of an administrative compliance order issued pursuant to Section 1319(a)(3).[1] 33 U.S.C. 1319(d).

[1] Other enforcement mechanisms include criminal prosecutions for negligent or knowing violations of the Act, 33 U.S.C. 1319(c), and administrative penalty orders for violations of the Act, 33 U.S.C. 1319(g).

Administrative compliance orders issued under Section 1319(a)(3) thus are not self-executing. If the recipient of a compliance order fails to obey its requirements, EPA may enforce the order only by filing a civil action under Section 1319(b). In such an action, EPA may seek injunctive relief for violations of the Act, as well as civil penalties for statutory violations and for failure to obey the administrative compliance order. 33 U.S.C. 1319(b) and (d). Before determining the amount of civil penalties, the court must consider several factors, including "the seriousness of the violation or violations," "any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." 33 U.S.C. 1319(d).

2. Petitioners own a .63-acre parcel of undeveloped property in Idaho near Priest Lake. See Pet. App. A2. On November 26, 2007, EPA issued an administrative compliance order to petitioners pursuant to Section 1319(a). See *id.* at A3. The compliance order stated that petitioners had violated 33 U.S.C. 1311(a) by discharging fill material into regulated waters and wetlands without a permit. Pet. App. A3. The compliance order directed petitioners to remove the fill material and restore the wetlands, but it also "encouraged" petitioners to contact EPA and "discuss any allegations herein which [petitioners] believe to be inaccurate or requirements which may not be attainable and the reasons why." *Ibid.*; *id.* at G5-G6. The compliance order stated that failure to comply with the order could expose petitioners to "civil penalties of up to $32,500 per day of violation," as well as administrative penalties. *Id.* at G7 (citing 33 U.S.C. 1319(d), 40 C.F.R. Pt. 19). EPA revised the compliance order on three occasions, extending

the compliance schedule. See *id.* at F1-F3, G1-G7, H1-H4, I1-I4.

Petitioners did not comply with the order. Instead, they requested a formal hearing with EPA, asserting that the wetlands at issue were not regulated by the CWA. Pet. App. A3. EPA did not grant the hearing request. *Ibid.*

3. Petitioners then filed suit in the District Court for the District of Idaho, alleging, *inter alia*, that the compliance order was arbitrary and capricious under the APA, 5 U.S.C. 706(2)(A), and that the order violated their rights under the Due Process Clause because it was issued without a hearing. Pet. App. A3. EPA moved to dismiss the complaint for lack of subject matter jurisdiction. *Ibid.* The district court granted EPA's motion and dismissed the suit. The court held that the CWA's text and structure indicated that Congress intended to preclude pre-enforcement judicial review of CWA compliance orders by channeling review of such orders into enforcement actions initiated by EPA under Section 1319(b). *Id.* at C1-C7.

4. The court of appeals affirmed. Pet. App. A1-A15. The court explained that "[e]very circuit that has confronted this issue has held that the CWA impliedly precludes judicial review of compliance orders until the EPA brings an enforcement action in federal district court."[2] *Id.* at A6 (citing *Laguna Gatuna, Inc.* v. *Browner*, 58 F.3d 564 (10th Cir. 1995), cert. denied, 516 U.S. 1071 (1996); *Southern Ohio Coal Co.* v. *Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418 (6th Cir.), cert. denied, 513 U.S. 927 (1994); and

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[2] Petitioners do not challenge that statutory holding in this Court. See Pet. 8-17.

Hoffman Group, Inc. v. *EPA*, 902 F.2d 567 (7th Cir. 1990); *Southern Pines Assocs.* v. *United States*, 912 F.2d 713 (4th Cir. 1990)). The court stated that it found "[t]he reasoning of these courts * * * persuasive." *Id.* at A7; see *id.* at A7-A9.

The court of appeals further held that the CWA's preclusion of pre-enforcement judicial review of compliance orders does not violate petitioners' due process rights. Pet. App. A10-A15. The court rejected petitioners' argument that the court in a CWA enforcement action may impose penalties for violation of the compliance order regardless of whether petitioners violated the CWA. *Id.* at A10-A12. The court explained that, under the CWA's judicial-enforcement provision, EPA may bring an action "for any violation for which [the EPA] is authorized to issue a compliance order." *Id.* at A12 (quoting 33 U.S.C. 1319(b)). The court construed that provision to mean that, in order "to enforce a compliance order, the EPA must bring an action alleging a violation of the CWA itself." *Ibid.* Accordingly, the court held that "a [district] court cannot assess penalties for violations of a compliance order under [Section] 1319(d) unless the EPA also proves, by a preponderance of the evidence, that the defendants actually violated the CWA in the manner alleged." *Ibid.*

The court of appeals also rejected petitioners' argument that the potential civil penalties to which a compliance order exposes a recipient effectively prevent them from seeking judicial review. Pet. App. A13-A15. Relying on *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 218 (1994), the court explained that statutory preclusion of pre-enforcement judicial review violates due process only when compliance is so onerous, and the penalties for noncompliance so coercive, as to have the practical

effect of foreclosing access to the courts. Pet. App. A13. The court observed that the CWA permitting process enables regulated entities to obtain an agency determination as to the legality of proposed action—and judicial review of that determination—before the party has incurred any costs. *Id.* at A13-A14. The court further explained that, under Section 1319(d), any civil penalties for violating a compliance order would be imposed by the district court only after petitioners have had "a full and fair opportunity to present their case in a judicial forum" and the court had considered several statutory factors in determining the appropriate amount of penalties. *Id.* at A14-A15.

DISCUSSION

Petitioners contend (Pet. 8-18) that the CWA's preclusion of pre-enforcement judicial review of administrative compliance orders violates their rights under the Due Process Clause. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioners contend that "the practical effect" of limiting pre-enforcement judicial review of an administrative compliance order is to foreclose judicial review entirely, because recipients of such orders are faced with an unconstitutional choice between risking coercive penalties by violating the order, and applying for a permit at their own expense. Pet. 9; see Pet. 8-15. That argument lacks merit.

a. As petitioners acknowledge (Pet. 8-9), the courts of appeals that have addressed the issue have uniformly concluded that the CWA provisions governing judicial review of compliance orders do not violate the Due Pro-

cess Clause. See Pet. App. A6-A7 (citing cases); *Laguna Gatuna, Inc.* v. *Browner*, 58 F.3d 564, 565-566 (10th Cir. 1995) (holding that Due Process Clause is not violated when a plaintiff must wait to challenge the basis for a compliance order until EPA pursues an enforcement action), cert. denied, 516 U.S. 1071 (1996); *Southern Pines Assocs.* v. *United States*, 912 F.2d 713, 717 (4th Cir. 1990) (holding that administrative order under the CWA did not raise due process concerns because the recipient was not subject to injunction or penalties until EPA pursued an enforcement action, and the recipient could raise all challenges to the order in that context); cf. *Hoffman Group, Inc.* v. *EPA*, 902 F.2d 567, 569-570 (7th Cir. 1990) (stating that the statutory scheme assures plaintiff a full opportunity to present its arguments, including constitutional objections, before any sanction is imposed). Absent any conflict among the courts of appeals, further review is not warranted.

b. The court of appeals' analysis of the constitutional issue is correct, and it represents a straightforward application of *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994) (*Thunder Basin*). The Court in *Thunder Basin* held 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.'" Pet. App. A13 (quoting *Thunder Basin*, 510 U.S. at 218). The court of appeals correctly concluded that "the potential consequences from violating CWA compliance orders are [not] so onerous" as to create a "constitutionally intolerable" choice between complying with the order and risking "coercive penalties." *Id.* at A-13 (citing *Thunder Basin*, 510 U.S. at 218). That is so for two reasons.

First, the CWA provides that no penalties may be imposed prior to judicial review of both the legality of the compliance order and the appropriateness of penalties. Although a compliance order exposes a party to civil penalties of up to $37,500 per day for violations, 33 U.S.C. 1319(d), 40 C.F.R. 19.4, the order is not self-executing. In order to seek civil penalties or to compel a party to comply with the CWA, EPA must file suit under Section 1319(b) and establish to the court's satisfaction that the defendant violated the statute. See *Hoffman Group*, 902 F.2d at 569 (The CWA "assures [a party] of a full opportunity to present its arguments before any sanctions can be imposed."); 33 U.S.C. 1319(a)(3) and (b); Pet. App. A10-A13. Under Section 1319(b), a civil action is authorized only to redress an underlying CWA violation for which EPA "is authorized to issue a compliance order," not for a violation of the compliance order itself. 33 U.S.C. 1319(b). As discussed below, the recipient of a compliance order therefore has a full opportunity to argue in the enforcement action that the order is invalid because the conduct on which it was premised did not violate the CWA. See pp. 13-15, *infra*; see also, *e.g.*, *United States* v. *Brace*, 41 F.3d 117, 124-129 (3d Cir. 1994) (considering compliance-order recipient's challenges to the agency's authority to regulate in the context of an enforcement action), cert. denied, 515 U.S. 1158 (1995).

Even if the court in a Section 1319(b) action finds that a CWA violation has occurred, moreover, the imposition of penalties is "committed to judicial, not agency discretion." Pet. App. A14. In imposing penalties for failing to comply with a compliance order, the court must consider several statutory factors, including the seriousness of the statutory violation, any good-faith

efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and any other relevant equitable considerations. 33 U.S.C. 1319(d); see, *e.g.*, *United States* v. *Scruggs*, No. G-06-776, 2009 WL 500608, at *3-*6 (S.D. Tex. Feb. 26, 2009) (concluding that "a severe penalty is not appropriate" based on analysis of the defendant's ability to pay, the lack of economic benefit from the violation, and the relatively low severity of the violation). These provisions ensure that a party who violates an administrative compliance order will not be subject to penalties prior to the completion of judicial review. See *Thunder Basin*, 510 U.S. at 218 (stating that although statutory civil penalties "may become onerous if petitioner chooses not to comply," there is no "constitutionally intolerable" choice because civil penalties "become final and payable only after full review" by a federal court).

Second, the CWA permits parties to obtain judicial review without exposing themselves to potential penalties by applying for a permit and then seeking review of the permitting decision under the APA. See 33 U.S.C. 1344(a); 5 U.S.C. 704; 33 C.F.R. 331.10; Pet. App. A13-A14. Petitioners could have sought a permit or, after receiving the compliance order, engaged in the informal discussions that EPA's compliance orders invite, Pet. App. G5-G6, which might have obviated the need for judicial review. Although petitioners suggest (Pet. 12-13) that the permitting process is burdensome and may not result in the grant of a permit, they have not established that the procedure is so onerous as to foreclose resort to it. Cf. *West Va. Highlands Conservancy, Inc.* v. *Huffman*, 625 F.3d 159, 169-170 (4th Cir. 2010) (noting that Congress considered the costs of a permitting

system before deciding that "a permitting scheme is the crucial instrument for protecting natural resources").

2. Petitioners further contend (Pet. 15-17) that, in a suit filed by EPA under Section 1319(b), the CWA precludes the defendant from asserting a "jurisdictional defense"—*i.e.*, an argument that the conduct at which the compliance order is directed is beyond the scope of EPA's regulatory authority. Every court of appeals to address the issue has held that the underlying merits of CWA compliance orders, including the question whether the defendant's conduct was regulated by the CWA, are subject to judicial review in enforcement proceedings. See, *e.g.*, *Southern Ohio Coal Co.* v. *Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418, 1426-1427 (6th Cir.) ("Congress provided one forum in which to address all issues, including constitutional challenges, raised by the issuance of a compliance order: an enforcement proceeding"; recipients may bring a "jurisdictional challenge to the agency's issuance of an order" in the context of an enforcement action.), cert. denied, 513 U.S. 927 (1994); *Hoffman*, 902 F.2d at 569-570 (same); *Southern Pines Assocs.*, 912 F.2d at 717 ("[A party] can contest the existence of EPA's jurisdiction if and when EPA seeks to enforce the penalties provided by the Act."). Petitioners argue (Pet. 15-17), however, that the court of appeals' decision, which holds that challenges to EPA's regulatory authority may be asserted in a Section 1319(b) suit, conflicts with the Eleventh Circuit's decision in *Tennessee Valley Auth.* v. *Whitman*, 336 F.3d 1236 (2003) (*TVA*), cert. denied, 541 U.S. 1030 (2004). Petitioners are incorrect.

a. In *TVA*, the Eleventh Circuit considered the provisions of the Clean Air Act (CAA) that govern judicial enforcement of EPA compliance orders. In the Elev-

enth Circuit's view, the "only issue" in a proceeding brought to enforce a CAA compliance order is whether the defendant violated the order itself. 336 F.3d at 1243. The court construed the statute to authorize the imposition of civil penalties based solely on the recipient's violation of a compliance order, regardless of whether the EPA was authorized to issue the order or whether the recipient had actually violated the CAA. *Ibid.*; see *id.* at 1241-1242. The court also observed that EPA's initial decision to issue a compliance order could be based on "any information available," 42 U.S.C. 7413(a)(1), which the Eleventh Circuit interpreted as establishing an evidentiary standard "less rigorous" than probable cause. *TVA*, 336 F.3d at 1241. Having so construed the CAA, the Eleventh Circuit held that the relevant provisions violated the regulated parties' due process rights. *Id.* at 1243, 1258-1260.

The decision below does not squarely conflict with *TVA* because *TVA* involved the CAA rather than the CWA. Although the court below observed that the compliance-order provisions of the two statutes have some common features, Pet. App. A10-A11, the court relied on statutory language unique to the CWA in declining to apply *TVA*'s holding to this case. Specifically, the court emphasized that under Section 1319(b), EPA may "commence a civil action for appropriate relief * * * *for any violation for which [the EPA] is authorized to issue a compliance order*." *Id.* at A12 (quoting 33 U.S.C. 1319(b)). That language, the court held, demonstrates that "the EPA must bring an action alleging a violation of the CWA itself," and that "a court cannot assess penalties for violations of a compliance order under [Section] 1319(d) unless the EPA also proves * * * that the defendants actually violated the CWA." *Ibid.*

There is consequently no circuit conflict warranting this Court's review.[3]

b. As the court of appeals correctly held, the defendant in an action to enforce a compliance order under the CWA may challenge the merits of the compliance order. The CWA authorizes EPA "to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which [EPA] is authorized to issue a compliance order." 33 U.S.C. 1319(b). Because EPA is authorized to issue a compliance order only if it finds that the recipient has violated the CWA or a permit under the CWA, 33 U.S.C. 1319(a)(3), Section 1319(b) establishes that in order "to enforce a compliance order, the EPA must bring an action alleging a violation of the CWA itself." Pet. App. A12. The CWA does "not authorize the EPA to bring enforcement actions for mere violations of compliance orders." *Ibid.* If the court in a Section 1319(b) suit determines that the recipient of the order has not violated the CWA, or that EPA otherwise lacked authority to issue the order, then it may not impose civil penalties. See *Hoffman Group*, 902 F.2d at 569-570.

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[3] The government disagrees with the Eleventh Circuit's holding with respect to the scope of judicial review that is available under the CAA. In *TVA*, the Solicitor General filed a petition for a writ of certiorari on behalf of EPA, arguing that the court in a suit to enforce a CAA compliance order may inquire into the validity of the order. See 03-1162 Pet. 12-15. This Court denied the petition. 541 U.S. 1030 (2004). The instant case, however, would not be a suitable vehicle for determining the appropriate scope of judicial review under the CAA, in light of the differences between the relevant provisions of that statute and the CWA. And while the Eleventh Circuit in *TVA* observed that the CWA "uses many provisions that are identical to those found in the [CAA]," 336 F.3d at 1255 n.32, the court had no occasion to discuss the language in 33 U.S.C. 1319(b) on which the court below relied.

Petitioners argue (Pet. 16) that because the CWA permits EPA to issue a compliance order on the basis of "any information available," 33 U.S.C. 1319(a)(3), such an order may result in penalties regardless of whether the recipients have violated the CWA. Petitioners are incorrect. EPA's authority to issue a compliance order based on "any information available" simply means that the agency need not apply judicial rules of evidence or follow formal hearing procedures in determining whether there has been a violation of the CWA that warrants issuance of an order.[4] Section 1319(a)(3) does not alter the evidentiary standards that apply when EPA seeks to establish in a judicial enforcement action that the party subject to the order violated the CWA. If the district court concludes that a compliance order is not premised on an underlying violation of the CWA, the statute contemplates that the district court will not enforce the order.

To the extent the CWA is ambiguous on this point, the principle that statutes should be construed if possible to avoid substantial constitutional questions is a sufficient ground for rejecting petitioners' interpretation. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *INS* v. *St. Cyr*, 533 U.S. 289, 299-300 (2001). The court of appeals therefore correctly construed the CWA to allow the defendant in a Section 1319(b) suit to contest the existence of an underlying CWA violation.[5]

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[4] Cf. 18 U.S.C. 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

[5] Petitioners' amici raise a number of contentions that are not urged by petitioners, were not passed on below, and are not within the ques-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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tion presented. See National Ass'n of Home Builders & Am. Farm Bureau Fed'n Amicus Br. 6-17 (arguing that pre-enforcement judicial review is required under *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976)); Center for Constitutional Jurisprudence & Nat'l Fed'n of Indep. Bus. Small. Bus. Legal Ctr. Amicus Br. 3 (arguing that landowners are burdened by uncertainty about what wetlands are regulated by the CWA); American Civil Rights Union Amicus Br. 3-4, 11-12 (arguing that the compliance order may be an unconstitutional taking of petitioners' property). Review of these arguments is not warranted. See *United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981) (The Court ordinarily does not review a claim interjected by an amicus curiae where the claim "was not raised by either of the parties here or below.").