THOMAS E. MOSS, ISB No. 1058
United States Attorney
NICHOLAS J. WOYCHICK, ISB No. 3912
Assistant United States Attorney
District of Idaho
Washington Group Plaza IV
800 Park Boulevard, Suite 600
Boise, ID 83712-9903
Telephone: (208) 334-1211
Facsimile: (208) 334-1414

UNITED STATES DEPARTMENT OF JUSTICE
RONALD J. TENPAS
Assistant Attorney General
Environment & Natural Resources Division
CYNTHIA J. MORRIS
Environmental Defense Section
P.O. Box 23986
Washington, D.C. 20026
Telephone: (202) 616-7554
Facsimile: (202) 514-8865

Attorneys for the Environmental Protection Agency

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CHANTELL and MICHAEL SACKETT, Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendant.	Case No. CV-08-0185-EJL UNITED STATES' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION

The United States Environmental Protection Agency ("EPA") submits this memorandum in support of its motion to dismiss the Complaint filed by Plaintiffs Chantell and Michael Sackett on grounds that this Court lacks subject matter jurisdiction over the claims asserted.

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INTRODUCTION

Plaintiffs Chantell and Michael Sackett own a parcel of undeveloped property located at 1604 Kalispell Bay Road in Bonner County, Idaho. The property is situated adjacent to Priest Lake and near Kalispell Creek. Complaint ¶¶ 23, 24.

On November 26, 2007, EPA issued to Plaintiffs an Administrative Compliance Order ("Compliance Order") pursuant to sections 308 and 309(a) of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1318 and 1319(a). (A copy of the Compliance Order was attached to Plaintiffs' Complaint as Attachment A, and is attached to this Memorandum as Exhibit A). The Compliance Order recited EPA's determination that Plaintiffs' property contained wetlands within the meaning of 33 C.F.R. § 328.3(b) and 40 C.F.R. § 230.3(t) and charged that Plaintiffs, or persons acting on their behalf, had violated section 301 of the CWA by discharging fill material into regulated waters without having obtained a permit. The Compliance Order required Plaintiffs to remove the fill material and restore the wetlands in accordance with a Scope of Work, and set forth a schedule requiring the removal of fill material by April 15, 2008. The Compliance Order also invited consultation and negotiation of its terms, and indicated that it may be amended to provide for alternative methods of achieving compliance with the CWA:

> EPA encourages [Plaintiffs] to engage in informal discussion of the terms and requirements of this Order upon receipt. Such discussions should address any allegations herein which [Plaintiffs] believe to be inaccurate or requirements which may not be attainable and the reasons why. Alternative methods to attain the objectives of this Order may be proposed. If acceptable to EPA, such proposals may be incorporated into amendments to this Order at EPA's discretion.

Compliance Order at ¶ 2.11. The Compliance Order was revised by EPA on April 4, 2008, to

extend the compliance dates by 30 days, because the weather was not suitable for removal of the fill material. (A copy of the April 4, 2008 revision to the Compliance Order is attached as Exhibit B). Under the revised schedule, removal of the unauthorized fill material was to begin on May 1, 2008.

Plaintiffs did not contact EPA to discuss the allegations of the Compliance Order or to discuss the requirements for compliance, as they were invited to do. Rather, Plaintiffs waited until April 29, 2008 – the eve of the date compliance with the Compliance Order was to begin – and then filed the instant lawsuit challenging the Compliance Order and seeking emergency relief.

The Compliance Order was amended again on May 1, 2008, to extend the compliance schedule for another 30 days due to weather conditions that continued to make removal of fill material not feasible. (A copy of the May 1, 2008 amendment is attached as Exhibit C.) In light of the extended compliance schedule, Plaintiffs withdrew their motion for temporary restraining order, and the parties proposed a briefing schedule for this Motion to Dismiss and agreed to extend the United States' time to respond to Plaintiffs' Complaint and Motion for Preliminary Injunction.

The Compliance Order was superceded and replaced with an Amended Compliance Order on May 15, 2008. The Amended Compliance Order again extended the compliance schedule and modified the restoration requirements, after EPA determined that the short growing season would result in a high probability that replanting of the wetlands after removal of the fill material may not be successful. Since replanting will not be required in the 2008 growing

season, there was no need to require the immediate removal of fill material. Accordingly, the compliance schedule was revised to require removal of the fill material and replacement of original wetland soils prior to October 31, 2008 (the beginning of the winter season, when removal of the fill material may become infeasible). A copy of the Amended Compliance Order is attached as Exhibit D, and hereinafter referred to as the "Order".

In their Complaint, Plaintiffs allege that the property is not subject to CWA jurisdiction and that the Order is unconstitutional because it will impose penalties without first providing Plaintiffs an opportunity to be heard, and because the statutory standard for issuance of the Order is unconstitutionally vague. Plaintiffs' jurisdictional challenges are not before the Court by virtue of this Motion to Dismiss. The only issues before the Court at this time are whether the Court has subject matter jurisdiction to address the issues raised in Plaintiffs' Complaint and whether EPA's Order is constitutional.

STATUTORY AND REGULATORY BACKGROUND

The Clean Water Act ("CWA") is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To accomplish this goal, the CWA prohibits the discharge of any "pollutant" into "navigable waters" from a "point source" unless authorized by a permit or specific exemption under the CWA. 33 U.S.C. §§ 1311(a), 1362(12). See generally EPA v. California ex rel. State Water Resources Control Bd., 426 U.S. 200, 204-06 (1976); S. Pines Assocs. v. United States, 912 F.2d 713, 715 (4th Cir. 1990). Congress defined "pollutant" and "navigable waters" broadly in the CWA. For example, "pollutant" is defined to include, inter alia, "dredged spoil," "rock"

and "sand," 33 U.S.C. § 1362(6), and "navigable waters" is defined to encompass all "waters of the United States," 33 U.S.C. § 1362(7), which includes wetlands. See United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123 (1985); United States v. Akers, 785 F.2d 814 (9th Cir. 1986). EPA regulations also define waters of the United States to include wetlands. 40 C.F.R. § 230.3(s). Wetlands are identified in accordance with the 1987 Federal Manual for Identifying and Delineating Jurisdictional Wetlands. See also, Rapanos v. United States, 547 U.S. 715 (2006); N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007).

CWA section 404 authorizes the Secretary of the Army, acting through the Corps of Engineers ("Corps"), to issue permits for discharges of dredged or fill material into waters of the United States. 33 U.S.C. § 1344(a).[1]/ The primary objective of the permit program is to protect the public interest by balancing the favorable and detrimental impacts of activities conducted in the nation's waters. See generally Riverside Bayview, 474 U.S. at 123-25 (discussing CWA section 404 permit program). The Corps and EPA have promulgated regulations governing the Corps' processing and issuance of CWA section 404 permits. See 33 C.F.R. pts. 320-25; 40 C.F.R. pt. 230. Upon completion of the Corps' review of a permit application, the Corps must determine whether to issue the permit with or without conditions, or deny the permit. See 33 C.F.R. § 326.3(e)(2). Subject to the administrative appeal process, the issuance or denial of a permit by the Corps constitutes final agency action that may be judicially reviewed under the Administrative Procedure Act ("APA"). See, e.g., Slagle v. United States, 809 F. Supp. 704, 711

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[1]/ A separate permitting program is contained in CWA section 402 and governs discharges of other pollutants, primarily from industrial point sources. 33 U.S.C. § 1342.

(D. Minn. 1992); 33 C.F.R. pt. 331.

The Corps and EPA share enforcement jurisdiction under CWA § 404. The CWA and its implementing regulations provide the United States with a number of different enforcement alternatives. S. Pines Assocs, 912 F.2d at 715. For example, the Corps may notify a person of its views, through what is called a "jurisdictional determination," that a proposed activity at a particular parcel will result in a discharge into regulated "waters of the United States," which requires a permit. 33 C.F.R. § 320.1(a)(6). The Corps may also issue a "cease-and-desist" order pursuant to 33 C.F.R. § 326.3(c) in response to a violation of the CWA for filling jurisdictional waters without a permit. The Corps may seek penalties for a violation of the CWA or of an order. 33 C.F.R. § 326.5.

Section 309 of the CWA provides EPA with various enforcement alternatives. CWA § 309(a)(3) authorizes EPA to issue an administrative compliance order or bring a civil action in response to a violation of the CWA:

> Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1318, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

33 U.S.C. § 1319(a)(3). CWA § 309(b) authorizes EPA to initiate a judicial enforcement action for violation of the CWA and seek any appropriate relief, including a temporary or permanent injunction. 33 U.S.C. § 1319(b). CWA § 309(c) authorizes EPA to initiate a criminal prosecution for negligent or knowing violation of the CWA. 33 U.S.C. § 1319(c). CWA §

309(d) authorizes EPA to seek a civil penalty for violation of the CWA or for violation of an administrative order issued pursuant to CWA § 309(a)(3). 33 U.S.C. § 1319(d). CWA §309(g) authorizes EPA to issue an administrative penalty order for a violation of the CWA, and specifically provides a right to judicial review to the recipient of such an order. 33 U.S.C. § 1319(g)(8). In such a proceeding, the alleged violator may seek to establish that the administrative penalty order is not supported by substantial evidence on the record or constitutes an abuse of discretion. Id.

Administrative compliance orders issued by EPA pursuant to CWA § 309(a)(3) are not self-executing. If a recipient fails to comply with an administrative compliance order, EPA can enforce the order only by bringing a civil action pursuant to CWA § 309(b) to obtain injunctive relief for violation of the CWA, and/or pursuant to CWA § 309(d), to seek penalties for the violation or for failure to comply with the administrative order. In any such judicial proceeding, the alleged violator may raise all defenses, including any challenges to the United States' assertion of jurisdiction over the activity at issue.

STANDARD OF REVIEW

On a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), the Court must "satisfy itself that it has the power to hear the case." Land v. Dollar, 330 U.S. 731, 735 n.4 (1947). The court should not review the merits of a claim until it has determined that it has subject matter jurisdiction to do so. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 93-94 (1998); Kyocera Corp. v. Prudential-Bache Trade Services, Inc., 341 F.3d 987 (9th Cir. 2003). On a motion to dismiss for lack of subject matter jurisdiction, the party asserting claims against the

government has the burden of demonstrating that jurisdiction exists. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994); Thornhill Publ'g Co. v. Gen. Tel. & Elec. Corp., 594 F.2d 730, 733 (9th Cir. 1979). To make such a jurisdictional showing, Plaintiffs must properly invoke an applicable waiver of sovereign immunity. As discussed below, Plaintiffs have not established that the Court has subject matter jurisdiction, nor can they.

ARGUMENT

This Court lacks jurisdiction over this action for several reasons, discussed more fully below. First, there is no waiver of sovereign immunity. Neither the Federal Question Statute, 28 U.S.C. § 1331, nor the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, nor the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559, 702, provides an independent basis for this Court's jurisdiction. Second, the CWA precludes pre-enforcement review of EPA's administrative compliance orders, as reflected by the language and structure of the CWA enforcement provisions. Third, EPA's findings do not constitute "final agency action" and are therefore not subject to judicial review under the APA. Fourth, the related doctrine of ripeness precludes Plaintiffs' attempt to challenge an administrative order before EPA has sought to enforce the order. Finally, judicial review of EPA's administrative order would constitute improper judicial interference with EPA's enforcement authority. For all of these reasons, the Court lacks subject matter jurisdiction, and the Complaint should be dismissed with prejudice.

Plaintiffs also claim that the administrative compliance order is unconstitutional if pre-enforcement review is not authorized. Accordingly, this motion to dismiss will also address Plaintiffs' constitutional challenges. As discussed more fully in Argument II, below, the

administrative order is not constitutionally flawed, because there is no deprivation of procedural or substantive due process. There is no procedural due process concern because the administrative order can be enforced only in a civil enforcement action brought by EPA in federal court, at which point Plaintiffs will have the full panoply of procedural due process protections available. Nor is there a substantive due process concern, because the standard for issuing the administrative order is not unconstitutionally vague and, in any event, is ultimately subject to judicial review. Therefore, the enforcement provisions of the CWA and the administrative compliance order are constitutionally valid.

I. THE COURT LACKS SUBJECT MATTER JURISDICTION FOR PRE-ENFORCEMENT REVIEW OF THE ADMINISTRATIVE ORDER

A. There is No Waiver of Sovereign Immunity

It is axiomatic that the United States cannot be sued without its consent. FDIC v. Meyer, 510 U.S. 471, 475 (1994); Block v. North Dakota, 461 U.S. 273, 280 (1983). "'The United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" United States v. Mitchell, 445 U.S. 535, 538 (1980) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)). Waivers of immunity "must be unequivocally expressed in [the] statutory text, and will not be implied." Lane v. Pena, 518 U.S. 187, 192 (1996) (citations omitted). Even where Congress has waived sovereign immunity, the waiver must be strictly construed in favor of the United States and must not be "'enlarge[d] . . . beyond what the [statutory] language requires.'" United States v. Nordic Village, Inc., 503 U.S. 30, 34 (1992) (quoting Ruckelshaus v. Sierra Club, 463 U.S. 680, 685 (1983)). See also, Library of Congress v. Shaw, 478 U.S. 310, 318-19

(1986). If a statute can be read in a manner both to allow and to disallow a waiver, it must be interpreted against the waiver. United States v. Nordic Village, Inc., 503 U.S. at 37-38.

Plaintiffs assert that jurisdiction over the Complaint exists under 28 U.S.C. § 1331 (the general federal question statute), 28 U.S.C. §§ 2201 & 2202 (the Declaratory Judgment Act), and the 5 U.S.C. § 702 (the APA). Complaint at ¶ 4. However, none of these statutory provisions provide the necessary waiver of sovereign immunity to afford this Court subject matter jurisdiction over the claims in Plaintiffs' Complaint.

It is well-settled that 28 U.S.C. § 1331, the general federal question statute, does not provide a waiver of the United States' sovereign immunity from suit. Randall v. United States, 95 F.3d 339, 345 (4th Cir. 1996) (section 1331 'is not a general waiver of sovereign immunity. It merely establishes a subject matter that is within the competence of federal courts to entertain.") (citation omitted). Garcia v. United States, 666 F.2d 960, 966 (5th Cir. 1982) ("28 U.S.C.A. § 1331 is not a waiver of sovereign immunity. . . . An immunity waiver, if it exists at all, must be found in the statute giving rise to the cause of action."); Nat'l Ass'n of Counties v. Baker, 842 F.2d 369, 372 (D.C. Cir. 1988) ("We begin [the jurisdictional] analysis by determining whether any other federal statute provides a waiver of sovereign immunity for the type of relief sought . . . .").

Likewise, it is well settled that the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, does not itself confer federal subject matter jurisdiction, but merely provides an additional remedy in cases where jurisdiction is otherwise established. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-72 (1950); Delavigne v. Delavigne, 530 F.2d 598, 601 (4th Cir. 1976)

(citing Skelly Oil Co., 339 U.S. at 671-72) ("[i]t is axiomatic that the [Declaratory Judgment] Act does not supply its own jurisdictional base, and where jurisdiction is lacking, declaratory relief should be denied."); Amalgamated Sugar Co. v. Bergland, 664 F.2d 818, 822 (10th Cir. 1981) ("[i]t is settled that 28 U.S.C. § 2201 does not itself confer jurisdiction on a federal court where none otherwise exists"). See also, Progressive Consumers Fed. Credit Union v. United States, 79 F.3d 1228, 1230 (1st Cir. 1996); Schulke v. United States, 544 F.2d 453, 455 (10th Cir. 1976); Balistrieri v. United States, 303 F.2d 617, 619 (7th Cir. 1962). This statute merely allows a declaratory judgment to be entered where subject matter jurisdiction already exists. Id. See also McGrath v. Weinberger 541 F.2d 249, 252 n.4 (10th Cir. 1976); Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. at 671-72 (same); B.R. MacKay & Sons, Inc. v. United States, 633 F. Supp. 1290, 1295 (D. Utah 1986) (Declaratory Judgment Act provides neither an independent basis for subject matter jurisdiction, nor a waiver of the United States' sovereign immunity for a challenge to an EPA CERCLA response action).

Finally, the APA does not provide a jurisdictional basis for judicial review of the administrative order because the CWA precludes such review, as discussed in Argument B, below, and because the administrative order is not a final agency action, as discussed in Argument C, below.

B. The CWA Precludes Judicial Review of EPA's Administrative Compliance Order

The APA provides for judicial review of "final" agency action, 5 U.S.C. § 704, except to the extent that "statutes preclude judicial review." Id. § 701(a)(1). Preclusion of judicial review is a question of statutory construction. In this regard, the Supreme Court has held:

> Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.

Block v. Community Nutrition Inst., 467 U.S. 340, 345 (1984); United States v. Fausto, 484 U.S. 439, 443-44 (1988). Any presumption favoring judicial review is overcome "whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" Block, 467 U.S. at 351 (citation omitted); Fausto, 484 U.S. at 452. The Supreme Court has determined that congressional intent to preclude review may be discerned based on "'inferences of intent drawn from the statutory scheme as a whole.'" Fausto, 484 U.S. at 452 (quoting Block, 467 U.S. at 349).

It is well-established, by every circuit court that has considered the issue, that the CWA precludes pre-enforcement review of an administrative order such as the one at issue here. Congressional intent to preclude judicial review of administrative orders is reflected in the language and structure of the CWA enforcement provisions. As explained above, section 309 of the CWA provides EPA with various options for enforcing violations of the CWA, including issuing administrative orders and bringing civil actions in federal district court seeking penalties and injunctive relief. One of the reasons Congress provided these options was to ensure that EPA could act quickly to address environmental problems, without being entangled in defensive litigation. S. Pines Assocs. v. United States, 912 F.2d at 716.

The preclusion of pre-enforcement judicial review of administrative orders under the CWA is not a novel issue. Although the issue has never been decided by the Ninth Circuit,

numerous other appellate and district courts have undertaken a thorough analysis of the statutory and regulatory enforcement process and have overwhelmingly agreed that the CWA precludes courts from reviewing administrative orders.

The first appellate court to analyze the issue of pre-enforcement review under the CWA was the Seventh Circuit in Hoffman Group, Inc. v. EPA, 902 F.2d 567 (7th Cir. 1990). That case involved an EPA compliance order, like the one challenged here, issued pursuant to CWA section 309(a)(3), 33 U.S.C. § 1319(a)(3), which directed Hoffman Group to stop filling federally protected wetlands and to restore those wetlands that had been filled. The Seventh Circuit rejected Hoffman Group's request for pre-enforcement judicial review of the compliance order, holding that immediate review of such an order would effectively eliminate the choice provided to EPA by Congress in CWA § 309(a)(3) either to issue a compliance order or to immediately commence a district court enforcement action. The court specifically held:

> As the statutory language shows, Congress gave the EPA two options under this provision: first, issue a compliance order, or second, file a suit for enforcement. Hoffman's position that it is entitled to judicial review of a compliance order before any enforcement suit is brought would eliminate this choice.

Hoffman Group, 902 F.2d at 569; see also S. Pines, 912 F.2d at 716 ("Considering this legislative history, the structure of these statutes, the objectives of the CWA, and the nature of the administrative action involved, we are persuaded that Congress meant to preclude judicial review of compliance orders under the CWA . . . .").

In reaching its conclusion, the Seventh Circuit emphasized that a civil action is the only mechanism by which EPA can enjoin a violation of the CWA, seek civil penalties and compel a party to comply with an administrative order. Hoffman Group, 902 F.2d at 569. The court also

determined that precluding pre-enforcement review would not prejudice the party challenging the administrative order because the party would have a full and fair opportunity to raise challenges to the validity of the order if any action were actually brought by the United States to enforce the order. Id. Accordingly, the court held that by "provid[ing] 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." Id. (citing Block, 467 U.S. at 349; Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 14 (1981)).

The Fourth, Sixth and Tenth Circuits, as well as numerous district courts, have followed the Seventh Circuit's decision in Hoffman Group and rejected efforts by parties to seek review of administrative orders issued pursuant to CWA § 309(a)(3) prior to an enforcement action. See e.g., Laguna Gatuna, Inc. v. Browner, 58 F.3d 564, 566 (10th Cir. 1995); S. Ohio Coal Co. v. OSM, 20 F.3d 1418, 1426-28 (6th Cir. 1994); Rueth v. EPA, 13 F.3d 227, 230 (7th Cir. 1993); S. Pines Assocs., 912 F.2d at 716-17; see also Sharp Land Co. v. United States, 956 F. Supp. 691, 693-94 (M.D. La. 1996); Child v. United States, 851 F. Supp. 1597, 1533 (D. Utah 1994); Salt Pond Assocs. v. U. S. Army Corps of Eng'rs, 815 F. Supp. 766, 771 n.16 (D. Del. 1993); Brd. of Managers v. Bornhoft, 812 F. Supp. 1012 (D.N.D. 1993), aff'd, 48 F.3d 1223 (8th Cir. 1995); Howell v. U. S. Army Corps of Eng'rs, 794 F. Supp. 1072, 1074 (D.N.M. 1992); Mulberry Hills Dev. Corp. v. United States, 772 F. Supp. 1553, 1557 (D. Md. 1991); Lotz Realty Co. v. United States, 757 F. Supp. 692, 695 (E.D. Va. 1990); Route 26 Land Dev. Ass'n v. United States, 753 F. Supp. 532, 540 (D. Del. 1990), aff'd, 961 F.2d 1568 (3d Cir. 1992); McGown v. United

States, 747 F. Supp. 539, 541-42 (E.D. Mo. 1990); Fiscella & Fiscella v. United States, 717 F. Supp. 1143, 1147 (E.D. Va. 1989). [2]/

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[2]/ Courts have consistently reached the same conclusion that pre-enforcement review of administrative orders is precluded by other environmental statutes that have similar enforcement provisions. See, e.g., administrative orders issued under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6927, 6934, 6973: Ross Incineration Srvcs. Inc. v. Browner, 118 F. Supp. 2d 837, 843-45, 847 (N.D. Ohio, 2000); Amoco Oil Co. v. EPA, 959 F. Supp. 1318, 1323-24 (D. Colo. 1997); Pac. Resins & Chems. Inc. v. United States, 654 F. Supp. 249 (W.D. Wash. 1986); and administrative orders issued under the Clean Air Act, 42 U.S.C. § 7607 prior to 1994: Lloyd Fry Roofing Co. v. EPA, 554 F.2d 885; Asbestec Constr. Servs., Inc. v. EPA, 849 F.2d 765 (2d Cir. 1988); Solar Turbines Inc. v. Seif, 879 F.2d 1073 (3d Cir. 1989) (CAA). By contrast, two courts (including the Ninth Circuit) have held that judicial review of administrative orders issued under the Clean Air Act is not precluded, relying on a provision in the CAA allowing for judicial review of "any . . . final agency action." The courts reasoned that the inclusion of the comprehensive judicial review provision reflects congressional intent that orders issued by EPA under the CAA would be governed by the APA judicial review provision for final agency action, and not subject to the exception from the APA where judicial review is precluded by the statute. ADEC v. EPA, 244 F.3d 748 (9th Cir. 2001); Allsteel, Inc. v. EPA, 25 F.3d 312 (6th Cir. 1994). The broad language providing for judicial review of "any other final agency action" was added in the 1977 amendments to the CAA. Prior to that, courts had held that the CAA precluded judicial review of administrative orders. See, e.g., Lloyd A. Fry Roofing Co. v. EPA, 554 F.2d 885. That comprehensive provision for judicial review of agency action is not found in

Plaintiffs allege that the Order is invalid and should be subject to pre-enforcement review because their property is not subject to jurisdiction under the CWA, However, similar arguments have been consistently rejected by the courts that have considered the issue, noting that a challenge to the agency's authority to issue the order is indistinguishable from challenges to the order itself. See, e.g., S. Ohio Coal Co., 20 F.3d at 1426-27; Laguna Gatuna, Inc., 58 F.3d at 565; Rueth, 13 F.3d at 230; S. Pines, 912 F.2d at 716-17. Accordingly, challenges to the agencies' authority to act, like a challenge to the order itself, "can only be had in an enforcement proceeding." S. Ohio Coal Co., 20 F.3d at 1427.

Plaintiffs' arguments that the property is not subject to CWA jurisdiction and that the Order is arbitrary and capricious can be raised if and when the United States initiates an enforcement action in federal court. Accordingly, Plaintiffs will not be prejudiced by dismissal of their claims challenging the Order. This Court should reject Plaintiffs' attempt to short-circuit the CWA's enforcement process, and should dismiss Plaintiffs' pre-enforcement challenge to the Order for lack of subject matter jurisdiction.

C. EPA's Administrative Compliance Order is Not Final Agency Action

Even if the CWA did not preclude review, judicial review under the APA is limited to "final agency action." 5 U.S.C. § 704. If the challenged agency action is not final, this Court lacks subject matter jurisdiction. NRDC v. Thomas, 845 F.2d 1088, 1091 (D.C. Cir. 1988)

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the CWA, thus the rationale for pre-enforcement review of CAA administrative orders does not apply to CWA administrative orders.

("General principles of administrative law require finality of decision, and a chance for the agency to deal with [the] specific question and make an adequate record thereon.") (citations omitted). Because the Order is not a final agency action, judicial review is not available.

The Supreme Court has held that the appropriate factors for determining whether agency action is final are whether: (1) the challenged action represents a definitive statement of the agency's position; (2) the action has "the status of law" with penalties for noncompliance; (3) the action has a "direct and immediate . . . effect on the day-to-day business" of the complaining party; (4) immediate compliance is expected; and (5) immediate judicial review would serve judicial and administrative efficiency and facilitate enforcement of the statutory scheme. FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 239-40, 243 (1980) ("SoCal") (citations omitted); see also Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948) (to be final an order must "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process").

None of the factors identified by the Supreme Court are present in this case. The Order does not state the agency's final or definitive position regarding compliance with the CWA but, on the contrary, the Order encourages Plaintiffs to contact EPA to discuss the Order and expressly states that the Order may be amended, if appropriate:

> EPA encourages Respondents to engage in informal discussion of the terms and requirements of this Order. Such discussions should address any questions Respondents have concerning compliance with this order. In addition, Respondents are encouraged to discuss any allegations herein which Respondents believe to be inaccurate or requirements which may not be attainable and the reasons why. Alternative methods to attain the objectives of this Order may be proposed. If acceptable to EPA, such proposals may be

> incorporated into amendments to this Order at EPA's discretion. After compliance with the requirements of this Order, Respondents are also encouraged to contact the EPA representative identified in Paragraph 2.8 to discuss restoration of the Site to its pre-disturbance, vegetative condition.

Order at 2.07. Indeed, the original Compliance Order has already been revised three times by EPA. See Exhibits B, C, and D. Thus, the Order is not necessarily EPA's final word and may be further amended, even now.

Second, the Order does not impose immediate obligations or penalties for non-compliance. As explained above, an administrative compliance order is not self-executing. It is no more than a step in a process that may lead to a civil enforcement action under the CWA, 33 U.S.C. § 1319(b). The Order, by itself, does not subject Plaintiffs to any binding obligations. To impose any binding obligation on Plaintiffs, or to obtain penalties for violation of the Order, the United States must bring an enforcement action in district court. 33 U.S.C. § 1319(a); see S. Pines, 912 F.2d at 715; Hoffman Group, 902 F.2d at 569.

Finally, immediate judicial review of the Order would neither serve judicial and administrative efficiency nor facilitate enforcement of the statutory scheme. Indeed, the entire dispute will become academic if Plaintiffs decide to comply with the Order or if EPA decides not to commence a civil action. In any event, as discussed above, immediate judicial review would upset Congress' decision to provide EPA with the authority to choose between an administrative compliance order and a civil enforcement action.

The Order at issue in this case is readily distinguishable from the administrative stop work order issued by EPA under the Clean Air Act ("CAA"), as considered by the Ninth Circuit

in ADEC v. EPA, 244 F.3d 748.[3]/ First, the Order challenged here does nothing more than require Plaintiffs to comply with the CWA; thus the legal obligation is imposed by the statute, not by the Order. By contrast, the administrative order considered in ADEC required respondents to stop construction, which was not directly required by the CAA, and thus imposed legal obligations beyond those imposed by the statute. Second, the order considered in ADEC was an order to stop construction of a facility that had been authorized by the State permitting authority. The Order challenged here, by contrast, requires removal of fill material that was never authorized in the first instance. Third, it was not disputed in ADEC that EPA's determination as reflected in the order (a determination concerning the pollution control technology for the facility required by the CAA) was its final decision, and its position was unalterable. As explained above, the Order in this case is not EPA's final and unalterable determination. On the contrary, the Order encourages Plaintiffs to contact EPA to discuss the Order and expressly states that the Order may be amended, if appropriate. Order at ¶ 2.07. (See Exhibit D).

The Order in this case is more analogous to the administrative complaint at issue in SoCal. In that case, the Supreme Court held that the Federal Trade Commission's issuance of the

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[3]/ As discussed above (in footnote 2), the most significant difference is that the CWA precludes judicial review of an administrative compliance order, whereas the CAA judicial review provision considered in ADEC authorizes judicial review of "any other final action." 42 U.S.C. § 7607(b)(1).

complaint did not constitute final agency action for purposes of judicial review under the APA. The Court reasoned that issuance of the complaint "[s]erv[ed] only to initiate the proceedings" and that the complaint "ha[d] no legal force comparable to that of the regulation at issue in Abbott Laboratories [v. Gardner, 387 U.S. 136, 149-54 (1967),] nor any comparable effect upon SoCal's daily business." SoCal, 449 U.S. at 242. The Court, therefore, concluded that the agency had made no definitive ruling that could be subject to judicial review. Similarly, the Order in this case "[s]erves only to initiate the proceedings," and "has no legal force" in and of itself. Such an order is intended to prompt informal communication to further identify and clarify the acts and issues in dispute before the agency pursues a civil enforcement action. The Order in this case will have no legal force unless and until the United States initiates a civil judicial enforcement action for the alleged violations of the CWA or for penalties for failure to comply with the Order.

The Order here does not impose any binding legal obligations on Plaintiffs beyond those imposed by the CWA itself, and while it presents EPA's initial position on what Plaintiffs must do to come into compliance with the CWA, it does not constitute the agency's final definitive position on compliance. Accordingly, it is not a final agency action subject to review under the APA.

D. Plaintiffs' Claims Are Not Ripe For Review

Even assuming, arguendo, that a statutory basis for judicial review exists, Plaintiffs' claims are still subject to dismissal because the issues presented are not ripe for judicial review. The ripeness doctrine exists "to prevent the courts, through avoidance of premature adjudication,

from entangling themselves in abstract disagreements over administrative policies" and "to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Abbott Labs. v. Gardner, 387 U.S. at 148-49. Application of the ripeness doctrine requires consideration of two basic factors: (1) "the fitness of the issues for judicial decision;" and (2) the "hardship to the parties" of withholding review. Id. Neither factor is present in this case.

The issues presented by Plaintiffs are not fit for judicial resolution at this time, as EPA has not developed a complete administrative record for judicial review. In the absence of a complete record, the court would be hampered in discerning the basis and support for EPA's findings as reflected in the Order, as necessary to apply the arbitrary and capricious standard of review. If judicial review of the Order occurred in the context of a civil enforcement proceeding, the parties and the court would have a complete record.

In addition, judicial review at this stage may be wasteful of the judicial resources, since the entire controversy before this Court may be mooted prior to any civil enforcement action. For example, Plaintiffs may chose to comply with the Order and remedy the violation, in which case EPA may decide that a civil enforcement action for the violation of the CWA is not warranted. Or Plaintiffs may consult with EPA, as the Order invites them to do, and the parties may reach agreement, in which case EPA may amend or withdraw the Order. Or EPA may simply choose not to pursue enforcement of the Order, in order to allocate its limited resources to other matters. Thus, allowing review at this time would serve only to unnecessarily burden judicial resources, disrupt the administrative process, inappropriately entangle the Court in basic

regulatory and administrative processes, and make voluntary or negotiated compliance less likely. Accordingly, depending upon the outcome of the administrative process, it may never be necessary for the Court to address any of the issues presented in Plaintiffs' lawsuit.

By contrast, Plaintiffs will suffer no hardship if review is deferred. At this juncture, EPA has notified Plaintiffs of its view that wetlands on Plaintiffs' property were jurisdictional waters of the United States, and that the unpermitted discharge of fill material constituted a violation of the CWA, and EPA has proposed a method of compliance to abate the violation. As explained above, the Order is not self-executing and has no immediate legal effect on Plaintiffs. If EPA elects to pursue a civil enforcement action under the CWA, Plaintiffs will have a full opportunity at that time to raise all of the arguments that it presents in this case to support its contention that the project is not subject to CWA jurisdiction. Thus, Plaintiffs will suffer no hardship if review is withheld at this time. Because the balance weighs heavily in favor of the institutional interests in postponing review, the Court should decline to review the matter at this time.

E. The Judiciary May Not Enjoin Executive Branch Discretionary Authority

By seeking pre-enforcement review of EPA's administrative compliance order, Plaintiffs would have this Court effectively force EPA to pursue enforcement of the CWA violation through a civil action pursuant to CWA § 309(b), rather than exercising its administrative enforcement options under CWA § 309(a)(3). In other words, Plaintiffs are seeking to compel EPA to exercise its discretionary enforcement authority in a specific manner. Such relief is an impermissible invasion upon the executive branch's discretion to determine when and how to enforce a statute under its authority. Article II of the Constitution vests the Executive, not the

Judiciary, with the exclusive authority to "take care that the Laws be faithfully executed." U.S. CONST. Art. II, § 3. See, e.g., United States v. Batchelder, 442 U.S. 114, 124 (1979). See also Community for Creative Non-Violence v. Pierce, 786 F.2d 1199, 1201 (D.C. Cir. 1986). Thus, "[w]here a statute vests . . . discretion in an executive officer . . . to act under a given set of circumstances . . . and he is to act in the light of the facts he ascertains, and the judgment he forms, a court cannot restrain him from acting on the ground that he has exceeded his jurisdiction by reason of an error either of fact or law which induced his conclusion." Adams v. Nagle, 303 U.S. 532, 542 (1938). EPA's administrative order in this case clearly falls within this construct.

This conclusion is underscored by the firmly established doctrine of prosecutorial discretion. It is well settled that an agency's decision whether and when to take civil enforcement action is presumptively immune from judicial review. Heckler v. Chaney, 470 U.S. 821, 831-32 (1985). ("[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."). The principle of prosecutorial discretion applies with respect to EPA's enforcement decisions for violations of the CWA. See, Sierra Club v. Whitman, 268 F.3d 898 (9th Cir. 2001) (EPA cannot be sued for failure to take enforcement action); Dubois v. Thomas, 820 F.2d 943, 946-47 (8th Cir. 1987) (the Administrator of the EPA has discretion to enforce violations of the CWA); Sierra Club v. Train, 557 F.2d 485, 491, (5th Cir. 1977) (CWA § 309(a)(3) and (b) duties are discretionary); State Water Control Brd. v. Train, 559 F.2d 921, 927 (4th Cir. 1977) (EPA has power to exercise enforcement discretion and not bring penalty action when municipality is making good faith effort to comply); Delaware County Safe Drinking Water Coal., Inc. v. McGinty, No. 07-1782,

2007 WL 4225580, at *3 (E.D. Pa. Nov. 27, 2007) ("It is a bedrock principle of administrative law that agency enforcement decisions are presumptively 'committed to an agency's absolute discretion."); Rushing v. Leavitt, No. Civ. A. 03-1969, 2005 WL 555415 at *2 (D.D.C. Mar. 7, 2005) (dismissing case against EPA for alleged failure to "assure fairness and uniformity" in the enforcement of the CWA); City of Olmsted Falls v. EPA, 233 F. Supp. 2d 890, 901-04 (N.D. Ohio 2002) (section 309(a)(3) does not impose a mandatory duty on the EPA to enforce); New Jersey Dep't of Envtl. Prot. v. Gloucester Envtl. Mgmt. Servs., 668 F. Supp. 404, 407 (D.N.J. 1987) ("EPA's prosecutorial discretion . . . [under the CWA] is presumptively immune from judicial review.").

While Heckler (and the other cited cases) involve decisions not to take enforcement action, the Court's reasoning applies equally to the present situation where Plaintiffs seek to restrain EPA's regulatory discretion. As discussed above, the CWA provides EPA with a range of options and broad discretion in determining how best to enforce compliance with the statute. Hoffman Group, 902 F.2d at 569. If the Court were to dictate EPA's decision regarding whether to enforce violations administratively or judicially, the Court would eliminate the discretion the CWA affords an executive branch agency and entangle the Court in EPA's administrative process. Such a result would be contrary to Congress' intent under the CWA and the respective roles of the judiciary and executive branch as established under the Constitution.

II. THE ADMINISTRATIVE COMPLIANCE ORDER ISSUED UNDER THE CWA IS CONSTITUTIONAL

Plaintiffs mount a two-pronged attack on the constitutionality of the CWA enforcement provisions and EPA's enforcement authority. First, Plaintiffs assert that the Order issued in this

case violates principles of procedural due process because it was issued without an opportunity for a hearing. But, as discussed below, there can be no deprivation prior to EPA's enforcement of the Order, at which point Plaintiffs will be entitled to full due process in the federal court.

Second, Plaintiffs assert that section 309(a) of the CWA is unconstitutionally vague because it authorizes EPA to issue an administrative order "based on any information available." However, Plaintiffs have misunderstood the applicable standard. While EPA may consider any information available, the administrative order must be based upon its finding that there has been a violation of the CWA.

A. Procedural Due Process Does Not Necessitate Pre-enforcement Review of the Order

Procedural due process must be afforded when civil or criminal enforcement of the CWA leads to a deprivation of a protected interest. U.S. Const. Amend. V. Due process, however, does not require that all government decisionmaking comply with standards that "assure perfect, error-free determinations." Mackey v. Montrym, 443 U.S. 1, 13 (1979). Because procedural due process is a flexible concept, its requirements depend upon the particular situation. Zinermon v. Burch, 494 U.S. 113, 127 (1990). The Supreme Court has set forth factors to be evaluated in determining what process is due. Mathews v. Eldridge, 424 U.S. 319, 333-35 (1976). The analysis requires the balancing of (1) the private interest affected by government action, (2) the risk of erroneous deprivation of that interest, and (3) the countervailing government interest. EPA's issuance of the Order in this case easily passes constitutional muster under the Eldridge test.

First, the only private interest affected by EPA's Order is monetary; i.e., Plaintiffs must remove unauthorized material and replace the wetland soils that were removed from the property without a permit, or face potential monetary penalties for noncompliance, but violation of the Order does not authorize EPA to seek criminal sanctions. It is well-established that deprivations of monetary interests do not require as strict a level of due process as deprivations of life or liberty. See Eldridge, 424 U.S. at 333. Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 596-97 (1931) ("[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate"). Accordingly, the first Eldridge factor weighs heavily in favor of constitutionality.

The second Eldridge factor also weighs in favor of constitutionality, because the statutory scheme under the CWA provides Plaintiffs an opportunity for meaningful judicial review before there can be any deprivation of their monetary or liberty interests. City Of Tacoma v. Taxpayers Of Tacoma, 357 U.S. 320, 334-36 (1958) (when Congress acts within its constitutional authority, it "may prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had"). The injunctive relief ordered, and the penalties authorized for violation of the Order, can only be imposed by a federal court, after a hearing - which affords all of the due process required by the judicial system. Thus, if Plaintiffs believe EPA's Order is erroneous they can refuse to comply, and they will suffer no deprivation of any interest unless EPA elects to bring an enforcement action in federal court to seek compliance with the CWA or to seek civil penalties for violation of the Order. At that stage, Plaintiffs would be entitled to judicial review of the Order, including the issues of CWA jurisdiction and liability.

Accordingly, Plaintiffs are fully entitled to obtain judicial review of EPA's Order before being deprived of any monetary interest.

Merely because Plaintiffs must wait until EPA decides to bring a civil enforcement action before they have an opportunity for judicial review is not a denial of procedural due process. The Supreme Court has held that pre-enforcement review is not required where the statutory scheme merely postpones, but does not foreclose, judicial review of petitioner's constitutional claim. Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207 n.8, 214-18 (1994) (considering pre-enforcement review of orders issued under the Mine Safety and Health Act). The court found no need to consider petitioner 's claim that the bar to pre-enforcement review violated its due process rights "because neither compliance with, nor continued violation of, the statute [would] subject petitioner to a serious prehearing deprivation." Id. at 216. The Court recognized that while penalties "may become onerous if petitioner chooses not to comply" with the Act's requirements, the case did not create a "constitutionally intolerable" choice because the civil penalties "become final and payable" only after full review by an independent commission and the federal court of appeals. Id. at 218. In his concurring opinion in Thunder Basin, Justice Scalia emphasized that "preclusion of pre-enforcement judicial review is constitutional whether or not compliance produces irreparable harm – at least if . . . judicial review is provided before a penalty for noncompliance can be imposed." Id. at 220-21 (emphasis in original). Were this not the case, he remarked, pre-enforcement challenges would be the rule, not the exception. Id.

The very same rationale has been applied in finding that due process does not require pre-enforcement review of administrative orders issued under the CWA. See e.g., S. Pines Assocs., 912 F.2d at 717 (procedural due process claim against EPA for issuing an administrative order

under the CWA was dismissed because plaintiff was not subject to injunction or penalties until EPA pursues an enforcement action and plaintiff could raise its constitutional claims then); Hoffman Group, 902 F.2d at 569-70 (EPA's administrative order under the CWA is unreviewable because the statutory scheme assures plaintiff a full opportunity to present its arguments, including constitutional ones, before any sanction is imposed); S. Ohio Coal, 20 F.3d at 1426-27 (concluding that Congress had provided one forum to address all challenges to an administrative order, including constitutional ones, and that is the enforcement proceeding); Laguna Gatuna, 58 F.3d at 565-66 (dismissed an action against EPA for an administrative order under the CWA because due process is not offended when a plaintiff must wait until EPA pursues an enforcement action).

Tennessee Valley Authority v. Whitman, 336 F.3d 1236 (11th Cir. 2003) ("TVA"), does not support Plaintiffs' claim. There, the Eleventh Circuit held that an administrative order issued by EPA under the CAA failed to satisfy principles of procedural due process because a failure to comply with the Administrative order "leads automatically to imposition of severe civil penalties and perhaps imprisonment." Id. at 1256 (emphasis added). However, nothing under the CWA provides that noncompliance with an EPA order leads inexorably to civil or criminal sanctions; rather any penalties could only be ordered by a district court after a meaningful opportunity to be heard. Therefore, because there can be no deprivation of property under the Order until after a hearing is afforded, the second Eldridge factor weighs in favor of constitutionality.

Finally, the third Eldridge factor also cuts in favor of constitutionality because additional procedural requirements at the pre-enforcement stage would surely compromise EPA's interests. EPA's authority to issue administrative orders is a significant component of the agency's effort to

protect human health and the environment. Under the CWA, EPA is charged with restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. § 1251(a). If pre-enforcement review were available in every instance where EPA issues an administrative order, it would create a substantial impediment to enforcement efforts, especially where quick action is necessary. S. Pines Assocs., 912 F.2d at 715-16 ("[t]he structure of [CWA] indicates that Congress intended to allow EPA to act to address environmental problems quickly and without becoming immediately entangled in litigation."); Laguna Gatuna, 158 F.3d at 566 ("[j]udicial review of every unenforced compliance order would undermine the EPA's regulatory authority").

On balance, the statutory scheme established under the CWA protects EPA's interest in issuing orders where it finds violations of the CWA; but no less surely, the CWA also protects Plaintiffs' monetary interests by providing them a full, fair, and timely opportunity to be heard in federal court if and when EPA brings a civil enforcement action to compel compliance with the CWA or to seek civil penalties for violation of the Order. There is no procedural due process violation here.

B. The Statutory Standard for Issuing the Order Is Not Unconstitutionally Vague.

Plaintiffs assert that their substantive due process rights were violated because the standard EPA applies when issuing an administrative order is impermissibly vague. Complaint ¶ 49. The vagueness doctrine "reflects the principle that a statute which either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." Roberts v. U. S. Jaycees, 468 U.S. 609, 629 (1984) (internal quotations omitted). Due process

prohibits a "lack of precision" in language giving law enforcement "an impermissibly wide discretionary range in which to determine who is in violation." Community for Creative Non-Violence v. Turner, 893 F.2d 1387, 1395 (D.C. Cir. 1990).

Plaintiffs assert that issuance of an order pursuant to CWA § 309(a) is unconstitutionally vague because the statute authorizes EPA to issue the administrative order "on the basis of any information available." 33 U.S.C. § 1319(a)(3). However, the plain language of the statute requires that there be a finding that a person has violated an enumerated provision of the CWA before the administrative order can issue:

> Whenever on the basis of any information available to him the Administrator finds that any person is in violation of [the Act], . . . he shall issue an order requiring such person to comply with such section or requirement[.]

33 U.S.C. § 1319(a)(3) (emphasis added). This standard is not so vague that "persons of common intelligence must necessarily guess at to comprehend its meaning". EPA can issue an order on the basis of "any information available" only if that information is deemed reliable and sufficient to support EPA's "finding" of a violation of the CWA.

The "any information available" language simply means that EPA need not apply rules of evidence or follow formal hearing procedures in determining whether there has been a violation of the CWA that warrants issuance of an administrative order. But if and when EPA elects to bring an enforcement proceeding in federal court to seek penalties for violation of or failure to comply with an administrative order, the court must employ traditional principles of judicial review to determine if the order was properly issued..

Moreover, CWA § 309(d) provides additional standards for the court to consider in assessing civil penalties for violation of, or failure to comply with, an administrative order. 33

U.S.C. § 1319(d). Specifically, the Court must consider various factors, including Plaintiffs' "good faith efforts to comply with the applicable requirement" and/or on "such other matters as justice may require." Id. The statutory factors provide further protection against excessive or unjust penalties for noncompliance with an administrative order.

Plaintiffs again place undue reliance on the Eleventh Circuit's decision in TVA, which held that the "any information available" standard for EPA's decision to issue the Administrative order under the CAA was unconstitutional. TVA, 336 F.3d at 1263. However, that Court erroneously assumed that judicial review of an administrative order would be limited to a determination of whether the administrative order was based on "any information available". As discussed above, a more reasonable interpretation is that the Administrator must make a finding that there has been a violation of the CWA, and that the court must find that the order was properly issued.

The TVA Court also held that the CAA is "unconstitutional to the extent that mere noncompliance with the terms of an [administrative order] can be the sole basis of severe civil and criminal penalties." Id. at 1241-42, 1260 (emphasis added). That is not the case presented here. While EPA may seek criminal sanctions for a negligent or knowing violation of the CWA, the agency has no authority to seek criminal sanctions for noncompliance with an administrative order. Similarly, the injunctive relief ordered in an administrative order can be enforced only by the court in a civil enforcement action pursuant to CWA § 309(b) and must be based on an underlying violation of the CWA. In addition, as noted above, civil penalties for noncompliance with an administrative order can be imposed only by a federal court in a civil enforcement action

under CWA § 309(d). In such a proceeding, the court would necessarily have to be satisfied that the administrative order was properly issued.

In any event, TVA is not binding on this Court, and it is inconsistent with the decision of the Ninth Circuit in Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 483 (2004), holding that an administrative order issued under the CAA was valid. Even if this Court were to find the TVA analysis persuasive, the bedrock principle that statutes should be construed to avoid substantial constitutional problems would be sufficient to refute TVA's conclusion. Hooper v. California, 155 U.S. 648, 657 (1895) ("[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality. This approach . . . also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.")

In sum, the challenged Order, and the statutory basis upon which it was issued, are not unconstitutional.

CONCLUSION

For the reasons stated above, the Court should dismiss Plaintiffs' amended complaint pursuant to Fed. R. Civ. P. 12(b)(1), with prejudice.

Respectfully submitted,

THOMAS E. MOSS, ISB No. 1058
United States Attorney

/s/ Nicholas J. Woychick
NICHOLAS J. WOYCHICK, ISB No. 3912
Assistant United States Attorney
District of Idaho

Washington Group Plaza IV
800 Park Boulevard, Suite 600
Boise, ID 83712-9903
Telephone: (208) 334-1211
Facsimile: (208) 334-1414

UNITED STATES DEPARTMENT OF JUSTICE
RONALD J. TENPAS
Assistant Attorney General
Environment & Natural Resources Division

/s/ Cynthia J. Morris
CYNTHIA J. MORRIS, Attorney
U.S. Department of Justice
Environmental Defense Sec.
P.O. Box 23986
Washington, D.C. 20026
(202) 616-7554

Attorneys for EPA

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