No. 10-1062

In The

Supreme Court of the United States

CHANTELL SACKETT AND MICHAEL SACKETT,

Petitioners,

v.

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

Respondents.

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

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS AND AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF THE PETITIONERS

Danielle Quist
American Farm Bureau Federation and Affiliated Companies
600 Maryland Ave, SW
Suite 1000W
Washington, D.C. 20024
(202) 406-3618

Thomas J. Ward*
Jeffrey B. Augello
Holli J. Feichko
National Association of Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 866-8200
tward@nahb.org
* *Counsel of Record*

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INTEREST OF *AMICI CURIAE*

The National Association of Home Builders (NAHB) and the American Farm Bureau Federation (AFBF) have received the parties' written consent to file this *amici curiae* brief in support of Petitioner.[1]

NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's more than 160,000 members are home builders or remodelers, and its builder members construct about 80 percent of the new homes each year in the United States.

NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the property rights and interests of its members. NAHB was a petitioner in another Clean Water Act (CWA) case, *NAHB v. Defenders of Wildlife,* 551 U.S. 644 (2007). It also has participated before this

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[1] Under Rule 37.6 of the Rules of this Court, *Amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than *Amici,* their members, or their counsel contributed monetarily to the preparation and submission of this brief. Counsel of record for all parties received timely notice of *Amici's* intent to file this brief under Rule 37.2(a), and letters of consent to file this brief are on file with the Clerk of the Court under Rule 37.3.

Court as *amicus curiae* or "of counsel" in a number of cases involving landowners aggrieved by excessive regulation under a wide array of statutes and regulatory programs. *See* Appendix A.

Amicus AFBF is a voluntary general farm organization formed in 1919 to protect, promote, and represent the business, economic, social, and educational interests of American farmers. The AFBF represents more than 6.2 million member families through member organizations in all fifty states and Puerto Rico.

Most of the AFBF member families own and operate farmlands that produce the row crops, livestock, and poultry that provide safe and affordable food, fiber and fuel for Americans and a growing global population. The reach and expansion of federal jurisdiction over farmland and the lack of due process to contest regulatory decisions is one of the most serious problems facing farmers and ranchers today.

Amici's organizational policies have long advocated that the federal courts must be available for all landowners to adjudicate their rights and duties arising under federal law. The court of appeals' decision undermines this objective. As a result of the fragmented opinion in *Rapanos v. United States,* landowners must determine the extent of CWA jurisdiction by "feel[ing] their way on a case-by-case basis." 547 U.S. 715, 758 (2006) (Roberts, C.J., concurring). In this case, the U.S. Environmental Protection Agency (EPA or the Agency) determined that it had authority over the Petitioners' private property, Petitioners' actions violated federal law, and that Petitioners' must dedicate significant time and resources to implement the EPA's orders – all without any type of

hearing and at the risk of significant civil and criminal penalties.

The Court should grant certiorari to confirm that the Fifth Amendment's guarantee of Due Process is violated when an agency deprives landowners of their property rights without a hearing. Correcting this blatant deprivation of due process would restore some balance to the lop-sided and unjust system by which the Executive Branch subjects private property to CWA jurisdiction.

SUMMARY OF ARGUMENT

The Petitioners' received a letter and Compliance Order from the EPA that makes clear the Agency had determined:

> i) what activities occurred on the Petitioners' private property;
> ii) that they were guilty of violating federal law; and
> iii) that the Petitioners must complete all of the specific actions established in the Order by specified deadlines.

In response, the Petitioners requested a hearing, which the EPA ignored. Pet. for Writ of Cert. at 6.

The Court of Appeals held that the EPA's procedures did not violate the Due Process Clause.[2] In doing so, the court completely ignored the three factors used to determine whether a person has been deprived of life, liberty, or property without due process:

> First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest.

Mathews v. Eldrige, 424 U.S. 319, 335 (1976).

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[2] U.S. Const. amend. V.

This Court should grant certiorari and determine whether the Petitioners were provided a constitutionally sufficient process under *Mathews v. Eldrige*.

ARGUMENT

I. THE COURT BELOW IGNORED THIS COURT'S DUE PROCESS PRECEDENT BY FAILING TO APPLY THE THREE *MATHEWS*' FACTORS.

Generally, to satisfy the Due Process Clause[3] no hearing at the preliminary stage of an administrative proceeding is required, "so long as the requisite hearing is held before the final administrative order becomes final." *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 598 (1950); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (providing that "an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.") (emphasis added). The required hearing, however, is "not fixed in form." *Boddie*, 401 U.S. at 379. It may be postponed until after the government deprives a person of his rights, but only in "extraordinary situations where some valid government interest is at stake that justifies" the postponement. *Boddie*, 401 U.S. at 379; *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) ("[W]here a State must act quickly, or where it would be impractical to provide

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[3] In this instance the Fifth Amendment Due Process Clause is implicated because the federal government deprived the Sacketts of "life, liberty, or property." U.S. Const. amend. V. *Amici* rely on both Fifth and Fourteenth Amendment due process cases, as the Court has never found that "due process of law" means something different in the two Amendments. *Malinski v. People of State of New York*, 324 U.S. 401, 415 (1945) (J. Frankfuter concurring) ("To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.").

predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause."). The required hearing "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). And it is "the decisionmaker's obligation to inform himself about facts relevant to his decision and to learn the claimant's own version of those facts." *Heckler v. Campbell*, 461 U.S. 458, 471 n.1 (1983) (J. Brennan concurring).

To determine what process is constitutionally due, this Court has "generally balanced three distinct factors," *Gilbert*, 520 U.S. at 931:

> First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest.

Mathews v. Eldrige, 424 U.S. 319, 335 (1976). The court below failed to follow this Court's established due process analysis, instead relying on a case that is factually distinguishable from the case at bar.

A. The EPA Found the Sacketts Guilty of Violating the CWA Without a Hearing.

On November 26, 2007, the EPA sent the Sacketts a letter and Compliance Order (Order) that "require[d] [them] to perform specified restoration activities" to their private property. App. B2. In addition, the EPA commanded that the Sacketts "provide certain specified information" to the

Agency. *Id.* This was the first notification received by the Sacketts alleging that they were not in compliance with federal law.[4] The Order was final and left no room for interpretation – the Sacketts had no choice but to follow the government's instructions.

First, there was no suggestion that the Agency would entertain any challenges to the Order. The closing paragraph of EPA's letter provides that the Sacketts could ask "questions" of two EPA employees, but offered the Sacketts no opportunity to "present [their] side of the story." App. B2; *Goss v. Lopez*, 419 U.S. 565, 581-82 (1975) (explaining that students who are suspended for 10 days or less must be provided an opportunity to explain their version of the facts).

Furthermore, the language used in the Order unmistakably required the Sacketts to obey the Agency. The Order begins with EPA's "FINDINGS AND CONCLUSIONS." App. B5. This is not simply EPA's "FINDINGS," which may offer the recipient an opportunity to provide information that could affect the Agency's final "conclusion." Instead, "FINDINGS AND CONCLUSIONS" means that the Agency had reached a final determination, and the recipient had no opportunity to provide information to influence the outcome. Similarly, in the next section, "ORDER," the EPA used the word "shall" eighteen times when referring to actions that it believed the Sacketts needed to complete. App.

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[4] Subsequently, the EPA sent various modifications and amendments to the Order. The latest "Amended Compliance Order" was dated May 15, 2008 – after the Sacketts filed their suit in district court. Pet. for Writ of Cert. App. G-1-G-7.

B6, paras. 2.1-2.14. Additionally, the EPA required many of those actions be completed by specific dates.[5] The last section of the Order provided an in-depth, authoritative "SCOPE OF WORK," requiring the Sacketts to, among other things: (1) install a fence around the site for "three growing seasons;" (2) revegetate the site using only certain plant species; (3) purchase plant seed from specified vendors; and (4) grant the government access to their property. App. B13 – B17.

Thus, the EPA's letter and Order offered no opportunity for the Sacketts to discuss the situation with the EPA. The Agency had already decided:

i) what took place on the Sacketts' property;
ii) that the Sacketts were guilty of violating federal law; and
iii) that the Sacketts must complete all of the specific actions established in the Order by specified deadlines.

All of this occurred with no input from the Sacketts. In response, the Sacketts, as encouraged by the EPA,[6] requested a hearing to provide information relevant to the EPA's authority over their property. The Agency ignored that request. Pet. for Writ of Cert. at 6.

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[5] For example, fill had to be removed "no later than April 15, 2008," and the Sacketts had to "re-plant[ ] the Site by April 20, 2008." App. B6, paras. 2.2, 2.6.

[6] App. B8, para. 2.11.

B. The Ninth Circuit Failed to Evaluate the Process Actually Available to the Sacketts.

According to the Ninth Circuit, in response to a compliance order, a landowner has two avenues to obtain a (delayed) hearing: (1) she can apply for a permit and later challenge the agency's decision denying the permit application; or (2) she is afforded a district court hearing after the government seeks civil or criminal penalties in an enforcement action. *Sackett v. U.S. E.P.A.*, 622 F.3d 1139, 1146-47 (9th Cir. 2010). But access to a hearing under either avenue is conjectural, indirect, and ultimately controlled by the agency that has possibly overstepped its authority. This Court should determine if the Due Process Clause demands more.

The Ninth Circuit explained that, under the first "avenue," a landowner may seek judicial review after the agency denies a section 404 permit application. *Sackett*, 622 F.3d at 1146 (citing 33 C.F.R. § 331.10; 5 U.S.C. § 704). However, the landowner receives her day in court only ***if*** she succumbs to possible agency overreach by spending time and money to implement the order's commands;[7] ***if*** she spends an average of 788 days and

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[7] Where the U.S. Army Corps of Engineers (Corps) has determined that a landowner filled wetlands without authorization, she must apply for an "after-the-fact" permit. 33 C.F.R. § 326.3(e)(1). But the Corps – "exercis[ing] the discretion of an enlightened despot" – will not process the application until the district engineer is satisfied that the landowner has fully restored the wetlands and eliminated any current or future detrimental impacts. *Id.* at § 326.3(e)(1)(i); *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality). The

$271,596 (excluding mitigation costs and design changes) to complete the section 404 permit application process;[8] ***if*** the agency denies the permit application;[9] and ***if*** she

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landowner must also agree to toll the statute of limitations. 33 C.F.R. § 326.3(e)(1)(v).

[8] This Court noted that "[t]he average applicant for an individual permit spends 788 days and $271,596," excluding mitigation costs and design changes. *Rapanos*, 547 U.S. at 721 (citing Sunding & Zilberman, 42 NAT. RESOURCES J. 59, 74-76 (2002) (discussing the results of a 1999 survey)). Private and public entities spend an estimated $1.7 billion each year to obtain wetlands permits. *Id.*

[9] Alternatively, if the Corps issues the permit, the landowner may either challenge permit conditions or decline the permit. If no compliance order has been issued, the landowner submits objections to the district engineer, and then appeals to the division engineer if she receives an unfavorable decision. If the appeal is accepted, the reviewing officer examines the record, confers with the parties, and issues a decision. After exhausting administrative remedies, the landowner may appeal the permitting decision to a federal court. 33 C.F.R. §§ 331.1-.12, App. A-B.

This appeal process is further complicated when the landowner must apply for an "after-the-fact" permit. 33 C.F.R. § 331.11. If the district engineer determines that corrective measures have not been "completed to [his] satisfaction," the Corps will not accept the application or a later appeal. *Id.* It is also unclear if the terms of the compliance order are "relevant" to the issues in the appeal process or that they may be raised in district court if they

exhausts all administrative remedies.[10] Only ***then*** the landowner is afforded a hearing to challenge the agency's decision denying the permit that she believes was not required. *See Sackett*, 622 F.3d at 1146. The Ninth Circuit assumes that the landowner may then challenge both the permit decision and the compliance order.

But, even if the landowner successfully challenges the agency's permitting decision (or proves that it had no authority to issue the order), she has forfeited the substantial cost and time to comply with the order, complete the permit application process, wait for a decision on the permit, and litigate the agency's unlawful exercise of authority – delaying the profitable and preferred use of her property.

More importantly, the Ninth Circuit overlooked that this "avenue" to judicial review is likely unavailable to landowners in the Sacketts' position. When the EPA has taken the lead in enforcement and issued a compliance order, the landowner may not access the Corps's administrative appeal process for permitting decisions. 33 C.F.R. § 331.11 (the administrative appeal process is unavailable "if the unauthorized activity is the subject of a referral to the Department of Justice or the EPA, or for which the EPA has the lead enforcement authority or has

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have been deemed irrelevant in the administrative appeal process.

[10] The Ninth Circuit incorrectly notes that a permit denial is "immediately appealable to a district court under the APA." *Sackett*, 622 F.3d at 1146. Corps regulations require the landowner to exhaust all administrative remedies. 33 C.F.R. §§ 331.10, 331.12.

requested lead enforcement authority."). Thus, the Sacketts had to wait for the government to file an enforcement action, and therefore, in reality, had only one way to access judicial review under the Ninth Circuit's framework.

Under the second "avenue," the landowner can seek judicial review of civil or criminal penalties after the government files an enforcement action. *Sackett*, 622 F.3d at 1146-47. However, under this avenue, the landowner receives her day in court only ***if*** the agency refers the matter to the Department of Justice (DOJ) for civil or criminal enforcement;[11] ***if*** the DOJ files a civil or criminal complaint in federal court; and ***then*** she can present her version of the facts and law in a federal district court. Of course, if she has ignored the compliance order, then she has risked prison time and hundreds of thousands of dollars in civil and criminal fines.[12] Conversely, if she obtains judicial review having complied with the order, then she may have spent hundreds of thousands of dollars and altered her property to learn that the Agency never had jurisdiction.

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[11] Alternatively, the agency could choose to impose administrative penalties, in which case the landowner also must exhaust administrative remedies before judicial review is available. 33 C.F.R. §§ 331.10, 331.12.

[12] In the *Rapanos* litigation, for example, Mr. Rapanos faced 63 months in prison and hundreds of thousands of dollars in criminal and civil fines for filling wetlands on his property without a permit. *United States v. Rapanos,* 235 F.3d 256, 260 (6th Cir. 2000).

Thus, as a result of the Order, the Sacketts could have: (i) ignored[13] or complied[14] with the Order, and waited for the government to bring an enforcement action; or (ii) expended time and resources complying with the Order and submitted to the government's jurisdiction by filing a CWA permit application.

> Based on the impact of these procedures on the Sacketts, the court below should have applied the three *Mathews* factors and determined whether the process satisfied the Due Process Clause. Instead, the Ninth Circuit incorrectly relied on *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994) (hereinafter *Thunder Basin*) to find that a landowner may be deprived of a property right without any type of hearing.

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[13] Any person who violates the CWA is potentially subject to penalties of $37,500 per day. 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4. The Ninth Circuit noted that civil penalties are "committed to judicial, not agency, discretion." *Sackett*, 622 F.3d at 1146. But the court ignored that, under the civil penalty provision, the landowner risks more ruinous penalties by ignoring the compliance order and waiting for her day in court. 33 U.S.C. § 1319(d) (allowing an upward penalty adjustment for the "economic benefit" of delayed compliance and reflecting "good-faith efforts to comply").

[14] As illustrated by the SCOPE OF WORK, compliance with an order will obviously cost a property owner time and money. App. B11 – B17.

C. The Ninth Circuit Improperly Relied on *Thunder Basin*.

Due process analysis requires a court to closely review the process provided by the government because the procedures that are constitutionally required "vary according to the interests at stake." *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 261 (1987). Instead of reviewing the process afforded the Sacketts, the court below improperly relied on *Thunder Basin* to find that the EPA had satisfied the Due Process Clause. *Sackett*, 622 F.3d at 1146.

In *Thunder Basin,* a mine operator brought suit in district court claiming that the "statutory-review provisions [of the Mine Act] violate[d] due process by depriving [it] of meaningful review." *Thunder Basin*, 510 U.S. at 214 (evaluating the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 801, *et seq.*). The Mine Act requires mine operators to post information pertaining to "representatives" chosen by its miners. 30 C.F.R. § 40.4. Objecting to the chosen representatives, the operator refused to post the information and complained to the Mine Safety and Health Administration (MSHA). Rather than follow the "usual procedure," the mine operator preemptively sued MSHA in district court to dispute "an anticipated citation and penalty." *Thunder Basin*, 510 U.S. at 206 (citing the Tenth Circuit's decision in *Thunder Basin Coal Co. v. Martin*, 969 F.2d 970, 975 (10th Cir 1992)). Thus, the operator sought judicial review even before the MSHA district manager sent a letter instructing the operator to post the information. *Id.* at 205.

Under the "usual procedure," operators who refuse to comply with the Mine Act would "receive[] a citation, then an order, and a proposed assessment of penalty. A citation, order, or proposed assessment [could] be contested before an administrative law judge (ALJ), and thereafter appealed to the Federal Mine Safety and Health Review Commission . . . ." *Thunder Basin*, 969 F.2d at 973 (internal citations omitted). After exhausting these administrative remedies, the operator could appeal "to a United States court of appeals . . . ." *Id.*

The Ninth Circuit failed to recognize the distinguishing facts between *Thunder Basin* and the Sacketts' case. First, the mine operator in *Thunder Basin* sought judicial review before it received any type of order; thus making it a case concerning "anticipated" government action. *Thunder Basin,* 969 F.2d at 975. In contrast, the Sacketts received an Order commanding that they alter their private property; thus, their case concerns a deprivation of property rights without a hearing "in excess of [the agency's] delegated powers." *Leedom v. Kyne*, 358 U.S. 184, 188 (1958).

Second, the procedure at issue in *Thunder Basin* is quite different from the process a property owner is afforded under the CWA. Under the Mine Act, a mine operator may challenge an order within 30 days of receipt, and receive a hearing before an independent ALJ. 30 U.S.C. § 815(a). The ALJ decision can then be appealed to the Commission for discretionary review. 30 U.S.C. § 823(d). In contrast, the CWA requires a property owner who receives an order to either: (i) wait for the government to file an enforcement action; or (ii) comply with the order, submit a permit application, wait for the government to accept, process, and issue a decision on the application

(all on its own timeframe), and then seek judicial review. *See* Part I.B., *supra* at 10. Consequently, the CWA does not provide a compliance order recipient with a right to a hearing, and there is no set timeframe in which she can present her version of the facts. *See, e.g., Barry v. Barachi*, 443 U.S. 55, 66 (1979) (providing that a horse trainer must be provided a "prompt postsuspension hearing, one that would proceed and be concluded without appreciable delay."). The Ninth Circuit erred by relying on *Thunder Basin* and ignoring the differences between the process afforded mine operators under the Mine Act and property owners under the CWA.

* * *

Thus, a recipient of an order under the CWA must either wait for the government to act, or comply with the order before he or she can "present their side of the story." NAHB, therefore, respectfully requests the Court review this matter under the *Mathews* test and determine whether the procedure established under the CWA satisfies the requirements of the Due Process Clause.

II. THE LOWER COURTS HAVE USED DECISIONS PERTAINING TO COMPLIANCE ORDERS TO HOLD THAT OTHER AGENCY ACTIONS ARE NOT REVIEWABLE.

By ruling that the CWA precludes judicial review of compliance orders, the Ninth Circuit and other courts have impacted the rights of landowners interested in challenging the validity of other agency actions. Relying on court decisions barring judicial review of compliance orders, several courts have held that other agency decisions are also unreviewable. The impact of this rule is compounded by widespread confusion among judges, the

regulated community, and government agencies concerning what constitutes jurisdictional "waters of the United States"[15] 33 U.S.C. § 1362(7).

In a case factually similar to *Sackett*, *Rueth Development Co. v. EPA*, 1992 WL 560944 (N.D. Ind. 1992) (hereinafter *Rueth I*), involved a landowner had allegedly discharged unpermitted fill material into isolated wetlands on its property. By compliance order, the EPA ordered Rueth to cease its discharge activities and to undertake action to restore the filled wetlands. *Id.* at *1. Instead of challenging the order, the landowner filed suit, challenging EPA's underlying "jurisdictional determination"[16] that the isolated wetlands were "waters

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[15] Since the Supreme Court's decision in *Rapanos*, the EPA and Corps have issued two guidance documents to clarify the meaning of "waters of the United States." EPA/Corps, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (originally issued June 5, 2007; rev. Dec. 2, 2008), http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf. The agencies recently drafted yet another guidance document, which is under review at the Office of Management and Budget. Nick Juliano, *EPA Readies Guidance Aimed at Expanding Clean Water Jurisdiction* (Jan. 11, 2011) (subscription required), *available at* http://insideepa.com (last visited Mar. 22, 2011).

[16] A jurisdictional determination is a written Corps decision that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. § 1344) or a written decision that a waterbody is subject to regulatory jurisdiction under

of the United States." *Id.* The district court dismissed the case for lack of subject matter jurisdiction based on *Hoffman Group Inc. v. EPA*, 902 F.2d 567, 569 (7th Cir. 1990), which held that compliance orders are not judicially reviewable. The court reasoned that "[i]f agency compliance orders are not reviewable until the enforcement stage, then it follows that an agency's initial determination that it has authority to either require permitting or issue compliance orders in the absence of a permit application must also be unreviewable." *Rueth I*, 1992 WL 560944 at *2.

On appeal, the Seventh Circuit affirmed the lower court's decision with two reservations. *Rueth v. EPA*, 13 F.3d 227 (7th Cir. 1993) (*Rueth II*). First, the circuit court acknowledged that *Rueth I* leaves landowners "in limbo" during the period between the issuance of a compliance order and the filing of a judicial or administrative enforcement action. *Rueth II*, 13 F.3d at 230. The court also recognized that this "predicament" may have significant economic and legal consequences for the landowner, but reasoned that an "experienced developer" such as Rueth should anticipate the potential presence of regulable wetlands and plan accordingly.[17] *Id.* at 230-31. In addition, the court conceded that there is a real

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Sections 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 401, *et seq.*).

[17] Although not an "experienced developer" with institutional expertise and knowledge, the Sacketts, prior to purchase of their property, conducted a full due-diligence search that revealed no wetlands permitting issues or requirements for the property. Pet. for Writ of Cert. at 4 - 5.

possibility that the EPA or the Corps might "completely overextend their authority" over potentially regulable wetlands. *Id.* at 231. In such instances the circuit court forewarned agencies that it would not hesitate to intervene. *Id.*

Similarly, in *Lotz Realty Co. v. United States*, 757 F. Supp. 692, 694 (E.D. Va. 1990), a developer sought judicial review of a Corps jurisdictional determination that wetlands were present on its property and that an individual permit was necessary for the proposed development. Thus, *Lotz* also involved a challenge to an agency decision that "preceded" issuance of a compliance order. Relying on the Fourth Circuit's holding in *S. Pines Assocs. v. United States*, 912 F.2d 713 (4th Cir. 1990), the district court concluded that "because . . . judicial review of a compliance order is pre-enforcement review . . . then it necessarily follows that judicial review at a stage even more preliminary is also precluded." *Lotz Realty Co.*, 757 F. Supp. at 695; *see also Coxco Realty v. U.S. Army Corps of Eng'rs*, No. 3:06-CV-416-S, 2008 WL 640946 at *6 (W.D. Ky. 2008) (holding that if "judicial review of a compliance order is pre-enforcement review precluded by the statute, then it necessarily follows that judicial review at a stage even more preliminary, such as a jurisdictional determination, is also precluded.") (citing *Southern Ohio Coal Co. v. Office of Surface Mining*, 20 F.3d 1418 (6th Cir. 1994)).

Most recently the district courts have barred review of EPA and Corps decisions regarding traditional navigable water (TNW)[18] determinations. In *National Association of*

[18] The term "traditional navigable waters" (TNWs) is a legal term of art referring to waters that "are presently

Homebuilders v. EPA, 731 F. Supp. 2d 50, 51 (D.D.C. 2010), trade associations challenged the EPA and Corps's determinations that two reaches of the Santa Cruz River in Arizona are TNWs. NAHB argued that cases challenging compliance orders were inapplicable to its lawsuit because TNW determinations are not based on an individual landowner's conduct, impact multiple stakeholders, and do not involve any type of enforcement action. The court found the distinction immaterial, noting that "the dispositive factor is the timing of the court's review, rather than the specific pre-enforcement action of which the court's review is sought." *National Association of Homebuilders*, 731 F. Supp. 2d at 55. Thus, the court concluded that because TNW determinations are even more preliminary than compliance orders, cease-and-desist orders, or even jurisdictional determinations, one must conclude that judicial review of TNW determinations are also barred. *Id.*

Therefore, similar to the decisions above, the Ninth Circuit's holding will impact review of agency decisions occurring earlier in time than a compliance order. These decisions have immediate importance to farmers, developers, miners and homeowners – in short, all people who own land and want to use it.

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used, or have been used in the past, or may be susceptible for use to transport some type of interstate or foreign commerce." 33 C.F.R. § 329.4; *see also The Daniel Ball*, 77 U.S. 557 (10 Wall. 557) (1870); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-408 (1940).

CONCLUSION

For the reasons state above, the Court should grant certiorari and reverse the decision of the U.S. Court of Appeals for the Ninth Circuit.

DATED: March 28, 2011.

Respectfully submitted,

Danielle Quist
American Farm Bureau
Federation and
Affiliated Companies
600 Maryland Ave, SW
Suite 1000W
Washington, D.C. 20024
(202) 406-3618

Thomas J. Ward*
Jeffrey B. Augello
Holli J. Feichko
National Association of
Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 866-8200
tward@nahb.org

* *Counsel of Record*