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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION

CHANTELL and MICHAEL SACKETT, Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; and STEPHEN L. JOHNSON, in his official capacity as Administrator of the Environmental Protection Agency, Defendants.	Case No. 2:08-cv-00185-N-EJL **PLAINTIFFS' OPPOSITION TO UNITED STATES' MOTION TO DISMISS COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION**

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Plaintiffs submit this opposition to the motion to dismiss filed by Defendants United States Environmental Protection Agency, *et al*. (collectively EPA).

INTRODUCTION

EPA contends that this Court lacks jurisdiction to review whether EPA has regulatory authority, under the Clean Water Act (CWA), 33 U.S.C. § 1251, *et seq*., to issue a compliance order to Plaintiffs, requiring them to remove fill material from and replant their property, and keep it in an undisturbed and fenced-off state for three years. EPA's dismissal motion is without merit.

The gist of Plaintiffs' action is that enforcing the compliance order without affording Plaintiffs an opportunity to contest the statutory authority for the order would violate Plaintiffs' due process rights secured under the Fifth Amendment to the Constitution. Unquestionably, the district courts have authority to adjudicate procedural due process challenges that seek injunctive and declaratory relief. On that basis alone, jurisdiction is proper. Moreover, on the merits question,[1] the challenged compliance order does indeed violate Plaintiffs' procedural due process rights.

Jurisdiction is also proper under the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq*., because the compliance order constitutes "final agency action," *see id*. § 702. The compliance order represents the culmination of EPA's decisionmaking process with respect to the agency's regulatory authority over Plaintiffs' property. Moreover, the compliance order determines Plaintiffs' legal rights and responsibilities, for violation of the compliance order is actionable *per se*. Lastly, review of the compliance order would not be inconsistent with the APA's prohibition of judicial review of agency action "precluded by statute," because judicial review of the compliance

[1] To the extent that EPA defends the compliance order against Plaintiffs' charge of constitutional infirmity, EPA's motion should be considered as made under Rule 12(b)(6), not 12(b)(1).

order is compelled by the Due Process Clause, the CWA notwithstanding. Similarly, Plaintiffs' action is prudentially ripe.

For these reasons, more fully explained below, the motion to dismiss should be denied.

ARGUMENT

I

THIS COURT HAS SUBJECT MATTER JURISDICTION TO REVIEW THE STATUTORY BASIS FOR ISSUANCE OF THE COMPLIANCE ORDER

A. District Courts Have Jurisdiction over Procedural Due Process Challenges to Agency Action That Request Declaratory and Injunctive Relief

Plaintiffs' Second and Third Claims for Relief assert that enforcement of the compliance order would violate Plaintiffs' procedural due process rights. To remedy that imminent constitutional injury, Plaintiffs seek declaratory and injunctive relief. It is well established that the district courts have jurisdiction to entertain such claims. *E.g.*, *Bolger v. District of Columbia*, 510 F. Supp. 2d 86, 91 (D.D.C. 2007) ("Federal courts have subject-matter jurisdiction over suits seeking declaratory and injunctive relief because the APA waives the federal agency's sovereign immunity even when the claim is one directly under the Constitution and not under the APA.").

EPA apparently does not contest this Court's power to adjudicate Plaintiffs' due process claims. Instead, EPA disputes those claims on the merits. *See* Motion to Dismiss at 23-31. EPA makes the conceptual mistake, however, of separating Plaintiffs' due process argument from the underlying question of whether the agency has CWA authority to regulate Plaintiffs' property. The two cannot be separated, for the violation of Plaintiffs' due process rights is inextricably linked to this latter question, namely, whether Plaintiffs are entitled to a judicial hearing to contest EPA's

assertion of that very statutory authority. Thus, through the vehicle of their due process challenge, Plaintiffs properly present both the statutory and constitutional issues before the Court.

B. Issuance of the Compliance Order Without Affording an Opportunity To Contest the Jurisdictional Basis of the Compliance Order Violates Due Process

EPA contends that its compliance order does not violate Plaintiffs' due process rights because EPA may enforce the order only through a judicial action, and, at that point, Plaintiffs will have an adequate opportunity to contest the bases for the order's issuance. *See* Motion to Dismiss at 25. In other words, EPA contends that a CWA compliance order is not *per se* actionable. EPA is mistaken. The CWA does not allow for judicial review of the jurisdictional component of a compliance order, or of the factual predicate that gives rise to its issuance, even though the order has the force of law.

That conclusion was confirmed by the Eleventh Circuit in *Tennessee Valley Authority (TVA) v. Whitman*, 336 F.3d 1236, 1258 (11th Cir. 2003). There, EPA issued a Clean Air Act (CAA) compliance order against TVA, which the latter refused to abide by on the theory that it could not be sued in federal court. The Eleventh Circuit held that enforcement of the compliance order would violate the Due Process Clause. Under the CAA, the EPA may issue a compliance order, on the basis of "any information available" to the agency, that the CAA has been violated, and thereupon require a regulated party to conform its conduct accordingly. *See* 42 U.S.C. § 7413(a)(1). Further, the CAA also authorizes the assessment of civil penalties for the violation of compliance orders. *Id*. § 7413(d). *See TVA*, 336 F.3d at 1242; *Alaska Dep't of Envtl. Conservation (ADEC) v. EPA*, 244 F.3d 748, 750 (9th Cir. 2001) (determining that a CAA compliance order is "final agency action" because it imposes *eo ipso* civil and criminal liability). In light of these provisions, the Eleventh

Circuit concluded that the enforcement of a CAA compliance order would violate the Due Process Clause, because enforcement would

> deprive[] the regulated party of a "reasonable opportunity to be heard and present evidence" on the two most crucial issues: (a) whether the conduct underlying the issuance of the [compliance order] actually took place and (b) whether the alleged conduct amounts to a CAA violation.

TVA, 336 F.3d at 1258 (quoting *Yakus v. United States*, 321 U.S. 414, 433 (1944)) (footnote omitted). In reaching that conclusion, the Eleventh Circuit observed that the constitutionally infirm CAA compliance order regime is nearly identical to the CWA compliance order regime. *TVA*, 336 F.3d at 1256 n.32. The court also noted that even if a regulated party were afforded a post-deprivation hearing, such review would be constitutionally inadequate.

> The statutory scheme relegates Article III courts to insignificant tribunals. The district courts serve as forums for the EPA to conduct show-cause hearings. And the courts of appeals are similarly emasculated, reviewing only whether the [compliance order] has been validly issued—*i.e.*, whether the Administrator based her decision to issue the [compliance order] based upon "any information" as opposed to no information at all.

See id. at 1259 (footnotes omitted).

The rationale leading the Eleventh Circuit to hold CAA compliance orders unconstitutional applies analogously to support Plaintiffs' contention that issuance of CWA compliance orders without affording the regulated party an opportunity to contest the basis of the order is unconstitutional. Both statutory schemes authorize the issuance of compliance orders on the basis of any information available without affording the regulated party an opportunity to contest the basis of the order. *Compare* 42 U.S.C. § 7413(a) *with* 33 U.S.C. § 1319(a)(1) & (3). Both schemes impose substantial civil penalties for violation of compliance orders. *Compare* 42 U.S.C. § 7413(d) *with* 33 U.S.C. § 1319(d). And neither scheme provides a sufficiently definite standard to allow for adequate judicial review at the enforcement (or post-deprivation) stage. Therefore, just as

enforcement of CAA compliance orders without provision of a pre-enforcement hearing would violate due process, so too would enforcement of CWA compliance orders.

C. The Proper Remedy Is Governed by *Alaska Department of Environmental Conservation*, Which Provides the Regulated Party with Pre-Enforcement Judicial Review

EPA argues that due process does not demand pre-enforcement review because the CWA provides for adequate judicial review if and when an enforcement action is brought. *See* Motion to Dismiss at 25-26. EPA's position is, however, based upon a mistaken belief that CWA compliance orders do not have the force of law and are not *per se* actionable. *See id*. at 27. Yet given, as explained above, that CWA compliance orders are themselves actionable, requiring immediate conformity of conduct at risk of significant civil penalties, pre-enforcement review is the proper remedy, a conclusion supported by the Ninth Circuit's decision in *ADEC v. EPA*, 244 F.3d 748.

In that case the petitioners challenged several CAA enforcement orders issued by EPA. The court held that the orders were subject to judicial review, even though the EPA had not commenced an enforcement action. The court reasoned that the orders constituted final agency action because they represented the EPA's final word as to the legality of the proposed construction of a power generator at a mining facility within the Arctic Circle, and because they had the effect of both stopping construction of the generator, as well as subjecting the petitioners to criminal and civil penalties for violation of those orders. *See id.* at 750 ("Under EPA's construction of its Orders, if it decides to institute such proceedings, Cominco and its employees would be subject to criminal and civil penalties for the violation of its Orders, as well as for the violation of the CAA.").

EPA argues that *ADEC* is inapposite because the court's conclusion is based upon a specific judicial review provision in the CAA having no parallel in the CWA. *See* Motion to Dismiss at 14-15 n.2. But this alleged distinction misses the point, which is that, because CWA compliance orders have the force of law and impose significant civil penalties for their violation, they both fulfill the elements for "final agency action," *see infra* Part I.D, and make immediate judicial review the process that is "due." That the CWA has been interpreted by some courts to preclude pre-enforcement judicial review has little if any persuasive value, if such preclusion would violate regulated parties' due process rights.[2]

In a related vein of argument, EPA relies upon several appellate court decisions rejecting pre-enforcement review of CWA compliance orders. *See* Motion to Dismiss at 26-27 (citing *S. Pines Assocs. v. United States*, 912 F.2d 713 (4th Cir. 1990); *Hoffman Group, Inc. v. EPA*, 902 F.2d 567 (7th Cir. 1990); *S. Ohio Coal Co. v. Office of Surface Mining, Reclamation, and Enforcement, Dep't of Interior*, 20 F.3d 1418 (6th Cir. 1994); *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995)). But all of these cases either expressly or impliedly assume the erroneous premise, advanced by EPA here, that pre-enforcement judicial review of compliance orders is not constitutionally mandated because adequate judicial review can be had in an enforcement proceeding. *See S. Pines Assocs.*, 912 F.2d at 717; *Hoffman Group*, 902 F.2d at 569; *S. Ohio Coal*, 20 F.3d at 1426-27; *Laguna Gatuna*, 58 F.3d at 566. Yet as explained above, and as confirmed by *TVA*, the CWA does not allow for meaningful judicial review of alleged compliance order violations

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[2] EPA also argues that the Supreme Court's approval, in *ADEC v. EPA*, 540 U.S. 461 (2004), of the Ninth Circuit's affording judicial review of the CAA compliance order undercuts Plaintiffs' constitutional argument. *See* Motion to Dismiss at 31. The contention is without merit. Plaintiffs argue that pre-enforcement judicial review of CWA compliance orders is constitutionally mandated. In *ADEC*, the Supreme Court affirmed that judicial review was appropriate, without addressing the constitutional questions that would have arisen if review had been precluded. Thus, nothing in either *ADEC* case argues against Plaintiffs' claims.

in an enforcement proceeding. *See TVA*, 336 F.3d at 1259. Rather, in such an instance judicial review is limited to determining whether EPA made a "find[ing]" that the CWA had been violated on the basis of "any information available to [it]." *See* 33 U.S.C. § 1319(a)(3). A defendant would be statutorily precluded from raising a challenge to EPA's CWA authority to issue the compliance order in the first place.

EPA argues that Plaintiffs interpret too narrowly the CWA's enforcement provisions, and that a challenge to EPA's authority to issue a compliance order is reviewable as part of Section 1319's "finding" requirement. *See* Motion to Dismiss at 30-31. Further, EPA contends that the "any information" requirement is not a content-less standard because a court applying it must still employ "traditional principles of judicial review." *Id*. at 29. These arguments are unconvincing, for two reasons. First, the requisite "finding" merely amounts to the factual assertions necessary to establish a violation of the CWA, namely, that a "person" "discharged" a "pollutant" from a "point source" into the "navigable waters of the United States." Second, a challenge to any part of that "finding" is limited to determining whether the finding was "based upon 'any information' as opposed to no information at all." *See TVA*, 336 F.3d at 1259. Thus, EPA's contention that enforcement review provides adequate post-deprivation review is without merit.

D. District Courts Have APA Jurisdiction over Procedural Due Process Challenges to Clean Water Act (CWA) Compliance Orders

1. The Compliance Order Constitutes Final Agency Action

The APA provides for judicial review of final agency action.[3] Interpreting that requirement, the Supreme Court in *Bennett v. Spear*, 520 U.S. 154 (1997), set forth a two-part test for ascertaining whether an agency action is final. First, the action must represent the consummation of the agency's decisionmakng process. Second, the action must affect the legal rights or responsibilities of the parties. *Id*. at 177-78. *See Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992) (""The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties."). The compliance order, as demonstrated below, meets both *Bennett* requirements.

a. The Compliance Order Is the Consummation of the Agency's Decisionmaking Process

As a logical prerequisite to the issuance of the challenged compliance order, EPA had to determine that it has regulatory authority under the CWA over Plaintiffs' property. The agency has done so. There are no further steps for the agency to take with respect to that issue. And it is no argument against finality that at some point in the undetermined future EPA may change its position on the extent of its authority; that is always possible (and would have been possible in *Bennett* itself). *Cf. Am. Petroleum Inst. v. EPA*, 906 F.2d 729, 739-40 (D.C. Cir. 1990) ("But an agency *always* retains the power to revise a final rule through additional rulemaking. If the possibility of

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[3] And contrary to EPA's argument, *see* Motion to Dismiss at 8-10, judicial review of administrative action (and thus the waiver of sovereign immunity) *is presumed*. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 298-99 & n.9 (2001) (noting "strong presumption in favor of judicial review of administrative action") (citing *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986)); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 498 (1991); *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974)).

unforeseen amendments were sufficient to render an otherwise fit challenge unripe, review could be deferred indefinitely."). What matters is that the agency has determined that it has authority, and has issued a putatively valid compliance order on that basis. The first *Bennett* prong is therefore met.

b. The Compliance Order Determines Rights and Responsibilities

The compliance order also passes the second part of the *Bennett* test. As set forth in greater detail above, *see supra* Part I.B, violation of the compliance order is actionable *per se*: liability attaches regardless of whether regulatory jurisdiction is present. Whereas prior to the compliance order's issuance Plaintiffs would have been at most liable for *statutory* violations of the CWA, in light of the compliance order's issuance Plaintiffs are now potentially liable for violations of the statute *and* violations of the compliance order itself, which can be punished by substantial civil penalties. *See* 33 U.S.C. § 1319(d) (authorizing civil penalty of up to $25,000 per day per violation). *See also* Motion to Dismiss Exh. A at 7 (amended compliance order describing potential liability for violations of order itself). Therefore, the compliance order has changed the rights and responsibilities of the parties. The second *Bennett* prong is met.

2. The CWA Cannot Preclude Judicial Review of the Compliance Order, Within the Meaning of the APA, Because To Preclude Such Review Would Violate Due Process

The right to judicial review under the APA for final agency action does not obtain where review is precluded by statute. *See* 5 U.S.C. § 701(a)(1). EPA contends that the CWA so precludes, but its argument proceeds upon the false premise that statutory preclusion of judicial review of compliance orders is constitutional. As explained above, *see supra* Part I.B, the CWA cannot constitutionally preclude judicial review of compliance orders. Therefore, the APA's exception for preclusion by statute does not apply here.

EPA argues to the contrary, relying upon the *Hoffman Group* line of cases. *See* Motion to Dismiss at 10-15. But again, as explained previously, *see supra* Part I.C, those cases are here unpersuasive because they fail to acknowledge that (1) violation of a compliance order is *per se* actionable, and (2) CWA enforcement hearing review does not entail review of (a) whether the conduct underlying the issuance of the compliance order actually took place, or (b) whether the alleged conduct amounts to a CWA violation.

3. The Compliance Order Is Ripe for Review

In *Abbott Laboratories v. Gardner (Abbott Labs)*, 387 U.S. 136 (1967), the Supreme Court established two general factors for determining the ripeness of a challenge to administrative action: (1) the fitness for judicial review of the issues presented; and (2) the degree of hardship that will befall the parties seeking review if review is withheld. *Id*. at 149. Other important considerations include whether a court's review would be helped by additional factual development of the record, *see Natural Resources Def. Council v. Abraham*, 388 F.3d 701, 705 (9th Cir. 2004), and whether judicial intervention would undercut or otherwise impede the agency's responsibility to administer its statutory obligations, *see Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 670 (9th Cir. 2005).

Under these factors, review of the challenged compliance order is ripe. No additional factual development is necessary for this Court to determine whether EPA was justified in issuing the compliance order. EPA argues to the contrary on the grounds that it would need more time to develop the administrative record. *See* Motion to Dismiss at 20. If EPA means that, as a logistical matter, it may take time for the record to be compiled, then that is a commonplace of judicial review of administrative action, and has never been considered a sufficient basis for withholding judicial

review *altogether* (as opposed to merely affording the agency a reasonable period to collect the relevant documents). But if EPA means that it needs more time *to add new materials* to the record to support its jurisdictional assertion, then the argument is meritless; for it is a fundamental rule of administrative law that an agency decision must be upheld if at all on the basis of the record before the agency at the time the decision was made, and not on the basis of subsequently gathered materials. *See, e.g., Fed. Power Comm'n v. Texaco, Inc.*, 417 U.S. 380, 397 (1974) (agency action to be upheld only on basis articulated in order itself).

EPA also argues that review of the compliance order would waste judicial resources. *See* Motion to Dismiss at 20-21. But if Plaintiffs are correct that the failure to afford judicial review now would violate their due process rights, then the administrative or judicial costs arising from the accommodation of those rights cannot be used to defeat the rights themselves.[4] *See, e.g., Penn. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way . . . .").

Lastly, EPA argues that withholding judicial review would not work a hardship, but EPA is mistaken because its view is predicated upon the demonstrably false proposition that the compliance order is not actionable *per se*. Even assuming that the Court would provide Plaintiffs, as a remedy to the potential due process violations, an opportunity to contest the bases for the compliance order in an enforcement proceeding, requiring Plaintiffs to wait would still cause them severe hardship because it would force upon them the Hobson's choice of incurring significant civil penalty liability,

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[4] For a related reason, EPA's contention that pre-enforcement review of the compliance order would trench upon the agency's prosecutorial discretion, Motion to Dismiss at 21-23, is inapt. Although it is true that the government normally cannot be forced to initiate enforcement proceedings, the fact remains that by issuance of the compliance order, the EPA has already exercised its enforcement discretion, because the compliance order is actionable *per se*.

or complying with the order and expending substantial sums without hope of recompense. Thus, the compliance order is ripe for review.

CONCLUSION

For the foregoing reasons, the motion to dismiss should be denied.

DATED: May 30, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of Month, 2008, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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