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

The United States Environmental Protection Agency ("EPA") submits this memorandum in reply to Plaintiffs' Memorandum in Opposition to the United States' Motion to Dismiss. ("Pltfs. Opp. Mem.").

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INTRODUCTION

Plaintiffs' Opposition Memorandum ("Pltfs. Opp. Mem.") is rife with inconsistent legal arguments, incorrect factual assertions, and false assumptions.

Plaintiffs argue on one hand that the Clean Water Act ("CWA") is unconstitutional because it precludes judicial review of the administrative order, relying on Tennessee Valley Authority v. Whitman, 336 F.3d 1236 (11th Cir. 2003) ("TVA"). Pltfs. Opp. Mem. at 3-5. On the other hand, they assert that the CWA does not preclude judicial review of the administrative order, relying on Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 483 (2004) ("ADEC"). Pltfs. Opp. Mem. at 5-7. Plaintiffs are wrong on both counts, as discussed below.

Moreover, Plaintiffs have based all of their arguments on the flawed premise that the administrative compliance order issued by EPA is "actionable *per se*" – a term apparently coined by Plaintiffs and repeatedly asserted as an undisputed fact. *See* Pltfs. Opp. Mem. at 1, 5, 9, 10, 11.[1] When stripped of this faulty premise, Plaintiffs' arguments fall apart. Although the term is not defined, Plaintiffs use the term to convey several false assertions: (1) that the Order itself is enforceable as an independent cause of action, without requiring proof of the underlying violation of the CWA (Pltfs. Opp. Mem. at 10), (2) that the Order requires immediate compliance with its terms and that failure to comply will automatically subject the violator to significant civil

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[1]The erroneous assertion that the Order is "actionable *per se*" forms the basis for all of Plaintiffs' arguments. They contend that the Order is a final agency action subject to judicial review under the APA because it is "actionable per se" (Pltfs. Opp. Mem. at 1, 9), that judicial review of the Order is not precluded by the CWA because it is "actionable per se" (Pltfs. Opp. Mem. at 10), that due process mandates a right to pre-enforcement review of the Order because it is "actionable per se" (Pltfs. Opp. Mem. at 5), that the Order is ripe for judicial review because it is "actionable per se" (Pltfs. Opp. Mem. at 11), and that pre-enforcement judicial review does not interfere with the exercise of EPA's enforcement discretion because the Order is "actionable per se"(Pltfs. Opp. Mem. at 11 n.4).

penalties (Pltfs. Opp. Mem. at 5, 11-12), and (3) that Plaintiffs may be liable for violation of the Order regardless of whether the agency has regulatory authority over their property (Pltfs. Opp. Mem. at 9). Plaintiffs are simply wrong. As explained in the United States' Memorandum in Support of Motion to Dismiss ("U.S. Mem.") and further clarified below, the Order is not self-executing; EPA cannot itself compel compliance with its terms nor assess or impose penalties for failure to comply. Only a federal court can order injunctive relief to compel compliance with the CWA, and only the federal court and impose penalties for violation of, or failure to comply with, the Order, and then only after Plaintiffs have had an opportunity to raise their legal challenges to the Order, including their challenge to EPA's regulatory authority over their property.

I. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER THE ORDER

The United States advanced five separate reasons why the Court lacks subject matter jurisdiction over the Plaintiffs claims. Rather than responding to those arguments, Plaintiffs attempt to avoid the threshold jurisdictional issue by incorrectly asserting that "EPA apparently does not contest this Court's jurisdiction to adjudicate Plaintiffs' due process claims." Pltfs. Opp. Mem. at 2. It is not clear how Plaintiffs could reach such a conclusion, as EPA's Motion to Dismiss is based on exactly that argument -- that this Court does not have subject matter jurisdiction *at this time* to adjudicate any of Plaintiffs' claims challenging the Order.[2/]

Relying on their erroneous assumption that the Court has jurisdiction over their due

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[2/]Plaintiffs suggest that EPA has addressed the "merits" of their due process claims in the motion to dismiss. However, EPA has only addressed the due process claims to rebut Plaintiffs' argument that due process requires that the administrative compliance order must be subject to pre-enforcement review. If Plaintiffs are attempting to assert a waiver argument by suggesting that the United States has not challenged the Court's jurisdiction over the constitutional claims, the effort is futile. Questions of subject matter jurisdiction cannot be waived, and the court must satisfy itself of subject matter jurisdiction, even if not raised by the defendant. B.C. v. Plumes Unified School Dist., 192 F.3d 1260, 1264 (9th Cir. 1999).

process claims, Plaintiffs attempt to bootstrap their related statutory claims, asserting that the due process arguments cannot be separated from the underlying question of whether the agency has CWA authority to regulate Plaintiffs' property. Pltfs. Opp. Mem. at 2-3. The United States has not separated the claims as Plaintiffs suggest, but agrees that both constitutional and statutory claims challenging the Order should be adjudicated at the same time. The question, however, is not *whether* Plaintiffs' challenges to the Order can be raised, but *when* they can be raised. The Order is not presently subject to judicial review on any grounds. However, all of Plaintiffs' challenges - statutory and constitutional - can be raised if and when an enforcement proceeding is initiated in federal court.

Plaintiffs' responses to the substantive jurisdictional arguments advanced by the United States are addressed below.

A. There is No Waiver of Sovereign Immunity

Plaintiffs rely upon the Administrative Procedure Act ("APA") for a waiver of sovereign immunity,[3] arguing that this Court has jurisdiction to consider their claims for declaratory and injunctive relief because the "APA waives the federal agency's sovereign immunity even when the claim is directly under the constitution and not the APA." Pltfs. Opp. Mem. at 2 (quoting Bolger v. District of Columbia, 510 F. Supp. 2d 86, 91 (D.D.C. 2001)). The United States concurs that constitutional challenges to agency action may be raised when the APA affords a

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[3]Plaintiffs also advance the novel view that the waiver of sovereign immunity is presumed. Pltfs. Opp. Mem. at 8, n. 3. The Supreme Court has consistently held exactly the opposite. Lane v. Pena, 518 U.S. 187, 192 (1996); United States v. Nordic Village, Inc., 503 U.S. 30, 33-34, 37-38 (1992); Ruckelshaus v. Sierra Club, 463 U.S. 680, 685 (1983); Library of Congress v. Shaw, 478 U.S. 310, 318-19 (1986). The cases cited by Plaintiffs address only the presumption of judicial review of final agency action under the APA, and those cases recognize that the presumption is overcome when the statutory scheme indicates intent to preclude judicial review.

right to judicial review of that action. However, Plaintiffs' circular reasoning assumes that the APA provides that right to judicial review. As the United States explained in its Motion to Dismiss, the APA provides for judicial review of "final agency action," except to the extent that "statutes preclude judicial review." 5 U.S.C. §§ 701(a)(1), 704. U.S. Mem. at 8-9. Plaintiffs have failed to establish that the administrative compliance order constitutes the agency's final action, and they have offered no rebuttal to the United States' argument that the APA does not waive the United States' sovereign immunity in matters where judicial review is precluded, as it is in the CWA.

B. The CWA Precludes Pre-Enforcement Judicial Review of the Order

Plaintiffs give short shrift to EPA's principal argument, dismissing as "unpersuasive" an entire line of cases holding that the CWA precludes judicial review of administrative compliance orders such as the one before this Court. Pltfs. Opp. Mem. at 10. Plaintiffs would have this Court ignore those decisions of more than a dozen courts, including four Courts of Appeals, that have held that the CWA precludes judicial review of administrative orders,[4] in favor of two decisions addressing a different statute. See Pltfs. Opp. Mem. at 6. Both TVA and ADEC involved administrative orders issued under the Clean Air Act ("CAA"), which has a different statutory enforcement scheme and a different judicial review provision than the CWA.[5] The CWA provides EPA with the choice of proceeding in a civil action or by administrative compliance order, and the CWA does not have the comprehensive provision for judicial review of agency action as found in the CAA; thus, the rationale for pre-enforcement review of CAA

[4] See discussion of those cases in U.S. Mem. at 11-14.

[5] The legislative history establishing the differences between the judicial review provisions of the CAA and the CWA is described in the U.S. Mem. at 14 n.2.

administrative orders does not apply to CWA administrative orders.[6]

C. The Order Does Not Constitute Final Agency Action

Plaintiffs properly articulate the two-part test for final agency action as set forth by the Supreme Court in Bennett v Spear, 520 U.S. 154 (1997),[7] but they proceed to incorrectly apply it to the facts of this case. On the first issue, Plaintiffs argue that the Order constitutes the consummation of the agency's decision-making process because EPA has determined that it has CWA regulatory authority over the Plaintiffs' property. Pltfs. Opp. Mem. at 8. While it is fair to conclude that EPA presently believes it has regulatory authority over Plaintiffs' property, there is no basis for Plaintiffs' assumption that the Order represents EPA's final word on that issue -- or on any other issues addressed in the Order (such as Plaintiffs' actions in violation of the CWA). On the contrary, the Order itself encourages Plaintiffs to contact EPA to discuss the findings of EPA as expressed in the Order, and indicates that the Order may be amended prior to compliance with any of its requirements. Order ¶ 2.07. Thus, by its very terms, the Order is not the agency's "final" decision.

Plaintiffs' comparison of EPA's right to amend the Order to an agency's power to revise a final rule through additional rulemaking (Pltfs. Opp. Mem. at 8-9) is inapposite. In the rulemaking context, the agency's final rule represents the end of that rulemaking process, and any

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[6]Plaintiffs suggest that this distinction between the CWA and the CAA misses the point. Pltfs. Opp. Mem. at 6. However, Plaintiffs conflate the argument that the CWA precludes judicial review of a compliance order with the separate argument that the compliance order is not final agency action subject to review under the APA. The different statutory provisions of the CAA and CWA are key to the different outcomes on the question of preclusion.

[7]The United States analyzed the final agency action requirements under the test set out by the Supreme Court in FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 239-40, 243 (1980). However, the Bennett test is equally valid, and also supports EPA's view that the Order in this case is not a final agency action subject to judicial review under the APA.

amendment to the final rule would necessarily require the commencement of a new process. Here, the Order does not conclude the process - as the Order may be revised by EPA.[8] The Order is thus more akin to a proposed rulemaking, where the agency initiates the rulemaking process by requesting comments on a proposed rule and, after consideration of comments, may make changes to the proposal in the final rule.

Nor does the Order meet the second prong of the Bennett test, because it does not directly affect the rights and responsibilities of the parties. Plaintiffs incorrectly assume that they may be held liable and subject to civil penalties for violation of the Order, regardless of whether regulatory jurisdiction exists. Pltfs. Opp. Mem. at 9. That is simply not so. Plaintiffs cannot be found liable for violation of the Order, nor can civil penalties be imposed, unless and until EPA chooses to bring an enforcement action in federal court. In such a proceeding, Plaintiffs would have the right to challenge EPA's CWA regulatory authority over their property and, if Plaintiffs were to succeed in establishing that EPA did not have such authority at the time the Order was issued, then the Order would be deemed invalid, they would not be liable for violation of its requirements, and no penalties would be imposed. It is thus the outcome of a civil enforcement proceeding - not the issuance of an administrative compliance order - that affects the rights and responsibilities of the parties.

D. The Order is Not Ripe for Judicial Review

Plaintiffs have addressed only two of the relevant factors for determining ripeness, and have missed the mark on both.

First, Plaintiffs mischaracterize EPA's argument with respect to development of the administrative record. Pltfs. Opp. Mem. at 10-11. A final administrative penalty order issued by

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[8] As detailed in the U.S. Mem. at 1-3, the Order has, in fact, been amended by EPA on three occasions for various reasons.

EPA pursuant to CWA § 309(g), 33 U.S.C § 1319(g), would be a subject to immediate judicial review, based on the administrative record and subject to the deferential standard of review. 33 U.S.C. § 1319(g)(8). However, the Order at issue here was issued pursuant to CWA § 309(a)(3), and, for all of the reasons set forth in the United States' Motion to Dismiss, there is no right to judicial review of a CWA § 309(a)(3) administrative order. Rather, a penalties for violation of a CWA § 309(a)(3) order can be awarded only by a federal court pursuant to CWA § 309(d), in a civil enforcement proceeding initiated pursuant to CWA § 309(b). In such a proceeding, judicial review would not be limited to the administrative record supporting EPA's findings as stated in the administrative order. Plaintiffs would be entitled to present evidence to rebut EPA's assertions and to support their defenses - including their challenges to EPA's regulatory authority over their property.

In the second, Plaintiffs have relied, again, on their claim that the Order is "actionable *per se*" and forces upon them the "Hobson's choice" of complying with its terms or incurring significant civil penalties. Pltfs. Opp. Mem. at 11-12. Once again, Plaintiffs are mistaken. The issuance of the Order affords Plaintiffs three distinct options -- but under none of the options can EPA compel compliance with the Order or impose penalties for non-compliance.

First, Plaintiffs may chose to comply with the Order and abate the violation of the CWA. By doing so, Plaintiffs would avoid the risk of an enforcement proceeding and would avoid the risk of being assessed civil penalties for violation of the Order.

Second, if Plaintiffs have grounds to challenge the Order or its terms, they may communicate with EPA prior to compliance with the Order. Thus, for example, if Plaintiffs demonstrate to EPA that the area in which fill material was placed was not waters of the United States, then EPA could withdraw the Order. Or, if Plaintiffs contend that the compliance terms of the Order are inappropriate, they may propose alternative means of compliance and, if EPA

agrees, EPA could amend the Order to address Plaintiffs' concerns.

Third, Plaintiffs may simply choose not to comply with the Order. In that event, EPA must decide whether to initiate a civil enforcement proceeding against Plaintiffs for violation of the CWA. If a civil action is initiated, then the federal court can order the injunctive relief and impose civil penalties for violation of the CWA, and/or impose penalties for violation of the Order. But Plaintiffs cannot be compelled to comply with the CWA, or assessed penalties until a federal court orders as much, following a hearing in which they may present evidence.

E. Pre-Enforcement Review of the Order Would Interfere With the Exercise of Enforcement Discretion

Plaintiffs have chosen not to address the United States' argument that pre-enforcement review of the Order would interfere with the agency's exercise of enforcement discretion except by footnote reasserting the oft-repeated mantra that the Order is "actionable *per se*". Pltfs. Opp. Mem. at 11 n.4. As explained earlier, that premise is simply incorrect.

II. DUE PROCESS DOES NOT COMPEL PRE-ENFORCEMENT REVIEW

Plaintiffs argue that due process requires that the administrative compliance order be subject to pre-enforcement review. But Plaintiffs have not established what process is due. Conspicuously absent from Plaintiffs' Opp. Mem. is any reference to the relevant factors for making that determination as set forth by the Supreme Court in Mathews v. Eldridge, 424 U.S. 319, 333-35 (1976). As explained in the United States' Memorandum in Support of Motion to Dismiss, issuance of the Order does not itself violate Plaintiffs' due process rights, because there can be no deprivation unless and until EPA initiates an enforcement action. See U.S. Mem. at 24-28.

Plaintiffs base their constitutional challenge to the administrative order entirely on the erroneous premise that "the CWA does not allow for judicial review of the jurisdictional

component of a compliance order, or the factual predicate that gives rise to it issuance." Pltfs. Opp. Mem. at 3. Once again, the assumed premise is simply not valid. If and when EPA initiates an enforcement proceeding, Plaintiffs would at that time be able to challenge EPA's assertion of CWA regulatory authority over their property, and all predicate facts upon which the alleged violation is based. Indeed, it would be EPA's burden in such a proceeding to establish its regulatory authority over Plaintiffs' property. Similarly, EPA would have to establish that Plaintiffs or persons acting on their behalf engaged in the conduct asserted in the Order (the unauthorized placement of fill material in waters of the United States) and EPA would have to establish that the conduct alleged constitutes a violation of the CWA.

This is confirmed by Plaintiffs' own argument. Plaintiffs acknowledge that judicial review of an administrative compliance order would require review of EPA's "finding" to establish a violation of the CWA and that "the requisite 'finding'" by EPA requires proof of 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'." Pltfs. Opp. Mem. at 7. Plaintiffs then contradict their own position, stating that the "finding" subject to review does not include the determination of EPA's regulatory authority over Plaintiffs' property, a statement that appears to be directly at odds with their assertion, on the very next page of their brief, that "[a]s 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." Pltfs. Opp. Mem. at 8.

The only support offered by Plaintiffs for their due process argument is TVA. As discussed in the United States' Motion to Dismiss, that case was decided under the CAA and is simply not applicable to an administrative order issued under the CWA, and in any event is inconsistent with the decision of the Ninth Circuit in ADEC. See U.S. Mem. at 27, 30-31.

CONCLUSION

For the above reasons, and as more fully set forth in the United States' Memorandum in Support of Motion to Dismiss, Plaintiffs' Complaint should be dismissed for lack of subject matter jurisdiction.

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 Section
P.O. Box 23986
Washington, D.C. 20026
(202) 616-7554

Attorneys for EPA

Dated: June 6, 2008

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

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CHANTELL and MICHAEL SACKETT, Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendant.	))))))))))	Case No. CV-08-0185-EJL CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June, 2008, a copy of the United States' Reply Memorandum in Support of Motion to Dismiss was served, by first class mail, postage prepaid, and delivered electronically via e-mail, to the following counsel of record:

LESLIE R. WEATHERHEAD
lwilbertas@aol.com
Witherspoon Kelley Davenport & Toole
422 West Riverside Ave., Suite 1100
Spokane, Washington 99201

M. REED HOPPER
mrh@pacificlegal.org
DAMIEN M. SCHIFF
dms@pacificlegal.org
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834

/s/ Cynthia J. Morris
CYNTHIA J. MORRIS, Attorney