No. _____

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

PETITION FOR WRIT OF CERTIORARI

LESLIE R. WEATHERHEAD
Witherspoon Kelley
Davenport & Toole
422 W. Riverside Ave.,
Suite 1100
Spokane, WA 99201
Telephone: (509) 624-5265
Facsimile: (509) 458-2728
E-mail: lwlibertas@aol.com

M REED HOPPER
*DAMIEN M SCHIFF
Counsel of Record
Pacific Legal Foundation
3900 Lennane Dr., Suite 200
Sacramento, CA 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: mrh@pacificlegal.org
E-mail: dms@pacificlegal.org

Counsel for Petitioners

QUESTION PRESENTED

Chantell and Michael Sackett own a small lot in a built-out residential subdivision that they graded to build a home. Thereafter, the Sacketts received an Administrative Compliance Order from the Environmental Protection Agency claiming that they filled a jurisdictional wetland without a federal permit in violation of the Clean Water Act. At great cost, and under threat of civil fines of tens of thousands of dollars per day, as well as possible criminal penalties, the Sacketts were ordered to remove all fill, replace any lost vegetation, and monitor the fenced-off site for three years. The Sacketts were provided no evidentiary hearing or opportunity to contest the order. And, the lower courts have refused to address the Sacketts' claim that the lot is not subject to federal jurisdiction.

Do Petitioners have a right to judicial review of an Administrative Compliance Order issued without hearing or any proof of violation under Section 309(a)(3) of the Clean Water Act?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Chantell and Michael Sackett respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.[1]

OPINIONS BELOW

The panel opinion of the Court of Appeals is published at 622 F.3d 1139 (9th Cir 2010), and included in Petitioners' Appendix (Pet. App.) at A. The panel opinion denying the petition for rehearing *en banc* is not published but is included in Pet. App. at D. The opinion of the district court granting the motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) of Respondents United States Environmental Protection Agency, *et al.* (EPA), is not published but is included in Pet. App. at C.

JURISDICTION

On August 7, 2008, the district court granted EPA's motion to dismiss the Sacketts' action and entered judgment in favor of EPA. The Sacketts filed a timely appeal to the Ninth Circuit Court of Appeals. On September 17, 2010, a panel of the Court of Appeals affirmed the district court's dismissal. The Sacketts then filed a timely petition for rehearing *en banc*. On November 29, 2010, the panel denied the

[1] Pursuant to Supreme Court Rule 35.3, Ms. Jackson has been substituted for Stephen L. Johnson as Administrator of the United States Environmental Protection Agency

petition, no judge of the Court of Appeals having requested a vote. *See* Fed. R. App. P. 35(f). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

U.S. Const. amend. V.

The Clean Water Act provides in pertinent part:

> Except as in compliance with this section and sections [1312, 1316, 1317, 1328, 1342, and 1344 of this title], the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a).

The term "discharge of a pollutant" and the term "discharge of pollutants" each means

> (A) any addition of any pollutant to navigable waters from any point source.

33 U.S.C. § 1362(12)(A).

> The term "navigable waters" means the waters of the United States, including the territorial seas.

33 U.S.C. § 1362(7).

> Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section [1311 of this title], . . . 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).

> Any person who violates . . . any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

33 U.S.C. § 1319(d).

INTRODUCTION

The issue raised by this petition is whether basic principles of due process entitle a landowner who

receives a compliance order from EPA pursuant to the Clean Water Act (CWA) to immediate judicial review of that order. The Ninth Circuit's decision holding that judicial review is unavailable foists an intolerable choice on landowners. According to the decision, landowners who have received a compliance order, and who believe that the compliance order is invalid, can get their day in court only by (1) spending hundreds of thousands of dollars and years applying for a permit that they contend they do not even need, or (2) inviting the agency to bring an enforcement action for potentially hundreds of thousands of dollars in civil penalties for violations of the order, and criminal penalties for underlying violations of the Act. Further, the Ninth Circuit's decision squarely conflicts with the decision of the Eleventh Circuit Court of Appeals in *Tennessee Valley Authority (TVA) v. Whitman*, 336 F.3d 1236 (11th Cir 2003). For these reasons, more fully explained below, the petition for writ of certiorari should be granted.

STATEMENT OF THE CASE

The Sacketts own an approximately half-acre parcel of land near Priest Lake, Idaho, which they bought for the purpose of building a house. Pet. App. A-2. The lot exists within a built-out area near the Lake. *See* Pet. App. E-2. The lot's north side is bordered by a road, on the other side of which is a ditch. Pet. App. E-2 - E-3. The lot itself has an existing sewer hookup, and is zoned for residential construction. *See* Pet. App. E-2. Prior to their purchase, the Sacketts completed the normal round of

due diligence inspections. None of their research indicated any CWA permitting history or requirements for the property *See id.* In short, the Sacketts had absolutely no fair reason to believe that their property was regulable under the CWA.

The Sacketts began some earthmoving work with all local building permits in hand. Shortly thereafter, EPA sent the Sacketts a compliance order under the CWA asserting that their property is subject to the CWA, and that they had illegally placed fill material into jurisdictional wetlands on their land. *Cf.* Pet. App. G.[2] The compliance order functions as an injunction that has both prohibitive and mandatory features. As originally issued, it prohibited the Sacketts from pursuing construction of their home on their property, as previously authorized by local authorities. And, it required the Sacketts immediately to begin substantial and costly restoration work, including removal of the fill material, replanting, and a three-year monitoring program during which the property must be left untouched.[3] *See* Pet. App. G-4 - G-5; H-3. Further, the compliance order subjected the Sacketts to significant civil penalties for failure to

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[2] The original compliance order was issued in November, 2007 The order included in Petitioners' Appendix reflects subsequent amendments made by EPA to the original order's schedule for restoration work. *See infra* nn.3-4.

[3] Although the amended compliance order, unlike the original order, does not expressly contemplate a three-year monitoring regime, the amended order nevertheless requires the Sacketts to "restore" the property to its pre-disturbance condition. Pet. App. G-4 - G-6. The Sacketts therefore have every reason to believe that such restoration will not be deemed accomplished by EPA without such a monitoring period. *Cf.* Pet. App. H-3.

abide by its dictates without providing the Sacketts an opportunity to be heard and to contest EPA's findings. *See* Pet. App. G-7

Believing that their property was not a wetland within the jurisdiction of the United States, the Sacketts requested a hearing to test EPA's jurisdiction over their property; EPA ignored their request. Pet. App. A-3. The Sacketts then filed suit demanding an opportunity to contest the jurisdictional bases for the compliance order.[4] The district court dismissed the suit. *Id.* at C-7 The Sacketts then appealed to the Ninth Circuit.

The panel affirmed the district court's dismissal. The panel decision comprises a three-part analysis. First, the panel analyzed whether the CWA authorizes review of compliance orders. The court acknowledged the general presumption in favor of judicial review of administrative action, but noted that the presumption is overcome " 'whenever the congressional intent to preclude judicial review is fairly discernible in the statutory scheme.' " Pet. App. A-6 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984))). The panel observed that the other courts to have addressed the issue have uniformly held that the CWA precludes review of "pre-enforcement" actions, such as compliance orders. Pet. App. A-6. The panel found those cases persuasive, while relying for support for its conclusion of no "pre-enforcement judicial review" on

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[4] During the pendency of the action in the district court, the Sacketts received amendments to the compliance order, each postponing the due date for the Sacketts to remove the fill and to complete the replanting during the growing season. *See* Pet. App. F-1, H-1, I-1.

the CWA's statutory structure, purposes, and legislative history. *See* Pet. App. A-6 - A-9.

Second, the panel analyzed whether preclusion of pre-enforcement judicial review of compliance orders violates the Sacketts' due process rights. The Sacketts had argued that the CWA on its face purports to allow EPA to enforce a compliance order against a landowner even if there is no jurisdictional basis for the order in the first place. In other words, the Sacketts argued that the CWA attempts to authorize civil liability for violations of compliance orders, regardless of whether the CWA itself has been violated. The court acknowledged that this reading of Section 309(a)(3), adopted by the Eleventh Circuit in *TVA v. Whitman* for an analogous provision of the Clean Air Act, would mean that compliance orders are unconstitutional if they are not subject to judicial review *See* Pet. App. A-10 - A-11. But the court declined to interpret Section 309(a)(3) according to its plain meaning, instead holding that, if and when EPA chooses to enforce a compliance order in federal court, a landowner may at that time raise a jurisdictional defense. Pet. App. A-11 - A-12.

Third, the panel held that mere delay in judicial review of compliance orders does not "create a 'constitutionally intolerable choice'" which violates a landowner's due process rights. Pet. App. A-13 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994))). A landowner who contests EPA's jurisdiction to issue a compliance order can apply for a permit and seek judicial review of the permit's denial. Pet. App. A 13 A-14. Further, if and when EPA seeks civil penalties for violation of a compliance order, the

amount of those penalties is left to the equitable discretion of a court, not EPA. Pet. App. A-14 A-15.

Thus, the panel's decision leaves property owners like the Sacketts in an impossible situation: either go through with the permit process that you believe is completely unnecessary and spend more money than your property is worth to "purchase" your chance at your day in court; or invite an enforcement action by EPA that may give you your day in court but only at the price of ruinous civil penalties and, depending on EPA's ire, criminal sanctions for underlying violations of the CWA. Such a regime as countenanced by the Ninth Circuit would be unconstitutional. For the reasons that follow, review in this Court is merited.

REASONS FOR GRANTING THE WRIT

I

CERTIORARI SHOULD BE GRANTED BECAUSE THE RULE ADOPTED BY THE NINTH CIRCUIT AND SEVERAL OTHER CIRCUITS WILL HAVE A SIGNIFICANT NATIONWIDE IMPACT

The Ninth Circuit's decision holds that the CWA compliance order regime does not violate landowners' due process rights, even though that regime effectively eliminates any meaningful opportunity for judicial review The rule that the Ninth Circuit has adopted is consistent with that of four circuits which have already

held against judicial review in these circumstances.[5] For this reason, the rule is functionally nationwide in scope. But the decision below is significant just within the Ninth Circuit, whose jurisdiction covers over 500 million acres. According to the rule adopted below and by four other circuits, a landowner who receives a compliance order and believes that his property is not subject to EPA jurisdiction has two constitutionally "adequate" avenues open to him. One, he can ignore the compliance order at great financial and legal peril to himself and invite EPA to bring an enforcement action against him in court. Two, he can apply for a permit, spending hundreds of thousands of dollars and years in the process, have it denied, then sue over the denial, and perhaps ultimately win, but never be able to recoup the money that he has spent in the process. Neither of these ostensible "options" is constitutionally tolerable.

Although delay in judicial review does not necessarily violate due process, *see Thunder Basin Coal Co. v. Reich*, 510 U.S. at 216 (due process not offended if "neither compliance with, nor continued violation of, the statute will subject petitioner to a serious prehearing deprivation"), deferring judicial review to some undefined point in the future is unconstitutional if "the practical effect of coercive penalties for noncompliance [is] to foreclose all access to the courts," where "compliance is sufficiently onerous and coercive penalties sufficiently potent." *Id.*

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[5] *See Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995), *cert. denied*, 516 U.S. 1071 (1996); *S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418 (6th Cir. 1994), *cert. denied*, 513 U.S. 927 (1994); *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).

at 218. As this Court observed in *Ex parte Young*, 209 U.S. 123 (1908), requiring "a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts" would effectively "close up all approaches to the courts." *Id.* at 148.[6]

Ignoring the compliance order is no option, for several reasons. First, the CWA imposes significant civil penalties for violating compliance orders. *See* 33 U.S.C. § 1319(d) (imposing maximum civil penalty of $25,000 per day per violation).[7] Just one month of noncompliance puts the landowner at risk of civil liability of **$750,000**. A year's worth of noncompliance puts the liability at **$9,000,000**. Moreover, a landowner who continues with his construction project in the face of a compliance order greatly increases the risk that the agency will seek criminal penalties against him. *See id.* § 1319(c)(1)-(2) (imposing criminal

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[6] *See also Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79, 102 (1901) ("But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts, that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of [his constitutional liberties] ").

[7] The CWA authorizes civil fines of up to $32,500 per day for violations of the Act, *see* Pet. App. F-2, and, as noted in the text, $25,000 per day for violations of a compliance order, 33 U.S.C. § 1319(d) The Act also authorizes administrative penalties, assessed by EPA directly in an administrative proceeding, of up to $125,000 total. *See id.* § 1319(g)(2)(A)-(B).

penalties for negligent and knowing violations of the Act).[8]

Contrary to the Ninth Circuit's decision, the assurance of judicial review for any CWA penalties gives cold comfort to landowners. There is no guarantee that a court will approve a *de minimis* fine or penalty, especially in light of the already very high ceilings that the Act authorizes. Given the potential for significant civil penalties (and criminal penalties for violations of the CWA itself), the "option" to pursue judicial review by violating the compliance order, or the Act, or both, is really no option at all.[9] *Cf. MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) ("Given this genuine threat of enforcement, we

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[8] The CWA authorizes: (i) fines of up to $25,000 per day and imprisonment for one year for first time negligent violations of the Act, 33 U.S.C. § 1319(c)(1); (ii) fines of up to $50,000 per day and imprisonment for two years for repeated negligent violations, *id.*, (iii) fines of up to $50,000 per day and imprisonment for three years for knowing violations, *id.* § 1319(c)(2); and (iv) fines of up to $100,000 per day and imprisonment for six years for repeated knowing violations, *id.*

[9] It is noteworthy that EPA claims a power to prohibit and require action by an injunction-like compliance order (without notice and a prompt hearing) that even the federal judiciary does not enjoy *See Granny Goose Foods v. Bhd. of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 438-39 (1974) ("The stringent restrictions imposed by . Rule 65, on the availability of *ex parte* temporary restraining orders reflect the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute. *Ex parte* temporary restraining orders are no doubt necessary in certain circumstances, but under federal law they should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer.") (footnote & citation omitted).

did not require, as a prerequisite to testing the validity of the law in a suit for injunction, that the plaintiff bet the farm, so to speak, by taking the violative action."); Andrew I. Davis, *Judicial Review of Environmental Compliance Orders*, 24 Envtl. L. 189, 223 (1994) ("The absence of direct review of compliance orders effectively coerces a recipient to comply with the order under threat of mounting penalties during the period prior to EPA enforcement."); Christopher M. Wynn, Note, *Facing a Hobson's Choice? The Constitutionality of the EPA's Administrative Compliance Order Enforcement Scheme Under the Clean Air Act*, 62 Wash. & Lee L. Rev. 1879, 1920 (2005) ("Certain [compliance orders] can coerce a regulated party into a Hobson's choice: Complying with the order may create an enormous financial burden on a company while the company awaits possible EPA enforcement, while ignoring the order may subject the party to severe criminal and civil penalties.").

Applying for a permit is no help to landowners either, for two reasons. First, in many instances the agencies will not entertain a permit application until the compliance order has been resolved. *See, e.g.*, 33 C.F.R. § 326.3(e)(1)(ii) ("No permit application will be accepted in connection with a violation where the district engineer determines that legal action is appropriate . . . until such legal action has been completed."). For the Sacketts, that would mean (a) removing all the fill, and, (b) restoring the preexisting "wetlands," which would necessitate leaving the property untouched for a prolonged period

of time.[10] *See* Pet. App. G-4 - G-5. Few landowners could afford the cost or the time. Second, the time and money involved in just applying for a permit is significant. *See Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion) ("The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes."). There is no guarantee that the permit will be granted, with or without substantial conditions. And should a landowner succeed in a subsequent lawsuit challenging the agency's permitting jurisdiction, none of the permitting costs would be refundable. *Cf. Thunder Basin*, 510 U.S. at 220-21 (Scalia, J., concurring in part and concurring in the judgment) ("[C]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs."). Thus, this "option" too is really no option at all.

EPA's use of the compliance order is far from rare: between 1980 and 2001, the agency issued from 1,500 to 3,000 compliance orders every year across the country Wynn, *supra*, at 1895. EPA's recent practice is somewhat below historical trends. *See* U.S. EPA, Office of Enforcement and Compliance Assurance,

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[10] As noted earlier, *see supra* n.3, the original compliance order contained an express three-year monitoring program during which the property would have to be left untouched.

OECA FY 2008 Accomplishments Report App. B (Dec. 2008)[11] (1,390 compliance orders issued). But given the agency's recent public commitment to increasing its enforcement program,[12] there is every expectation that EPA's reliance on the compliance order will continue and increase. That reliance is troubling when one considers that, as of the late 1990s, EPA referred only about 400 cases annually for judicial enforcement to the Department of Justice. Wynn, *supra*, at 1895. These statistics imply that EPA circumvents the normal avenues of enforcement through courts, by in their place using essentially unreviewable administrative orders to compel landowners to comply with the agency's dictates.

The Ninth Circuit reasoned that the Sacketts and other innocent landowners have no right of access to a federal court because no formal action has yet been brought to sanction them. But that assessment ignores the realities of the Sacketts' and other landowners' circumstances, in its implicit assumption that the Sacketts (and all citizens in similar situations) can afford to defy an order, backed by threats of severe financial penalty, issued by the United States government, and simply await an action for sanctions. The reality of the Sacketts' situation is that they have been unambiguously commanded by their government not to complete their home-building project, to take

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[11] *Available at* http://www.epa.gov/compliance/resources/reports/accomplishments/oeca/fy08accomplishment.pdf (last visited Feb. 17, 2011).

[12] *See generally* U.S. EPA, Office of Enforcement and Compliance Assurance, *Clean Water Act Action Plan* (Oct. 15, 2009, rev Feb. 22, 2010), *available at* http://www.epa.gov/oecaerth/resources/policies/civil/cwa/actionplan101409.pdf (last visited Feb. 17, 2011).

expensive measures to undo the improvements that they have made to their land, and to maintain their land essentially as a public park until the property is "restored" to the satisfaction of the EPA. They have been threatened with frightening penalties if they do not immediately obey; but they have been refused the prompt hearing they should have received as a matter of right in any court. Thousands of landowners across the country are in similar straights. This Court's review is merited.

II

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE COURTS OF APPEALS

Essential to the Ninth Circuit's holding that the CWA's compliance order regime does not violate due process was the court's interpretation of Section 309(a)(3) to permit property owners to raise a jurisdictional defense if and when EPA decides to seek in court enforcement of a compliance order, or penalties for its violation. Pet. App. A-11 - A-12. The Ninth Circuit's interpretation of Section 309(a)(3) directly conflicts with the Eleventh Circuit's decision in *TVA v. Whitman*. Although *TVA* dealt with the Clean Air Act (CAA) compliance order regime, the Eleventh Circuit expressly noted that the two statutory regimes are, for the issues presented here, substantively identical. *See TVA*, 336 F.3d at 1256 n.32

In *TVA*, EPA issued a 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

because the CAA did not afford any basis for contesting the compliance order. *See id.* at 1258. Under the CAA, as under the CWA, 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)(3)(B). Further, the CAA, just as the CWA, authorizes the assessment of civil penalties for violations of compliance orders. *Id.* § 7413(d). *See TVA*, 336 F.3d at 1242. Critical to the Eleventh Circuit's holding that CAA compliance orders are unconstitutional was its conclusion that CAA compliance orders have the force of law and impose liability independent of the statute. *See TVA*, 336 F.3d at 1255-56. Under the plain logic of *TVA*, that conclusion holds for CWA compliance orders as well.

The Ninth Circuit acknowledged that its interpretation of CWA Section 309(a)(3) was contrary to the Eleventh Circuit's reading, but reasoned that the statutory language "is 'not a model of clarity,' " and that the language could—and should—be interpreted in a way that would avoid unconstitutionality. Pet. App. A-11 (quoting *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1137 (11th Cir. 1990)). Yet in response to this "avoidance" approach, the Eleventh Circuit was clear: "no canon of statutory interpretation can trump the unambiguous language of a statute." *TVA*, 336 F.3d at 1255. The statutory language, according to the Eleventh Circuit, unambiguously precludes the recipient of a compliance order from raising a jurisdictional defense, and for that reason the compliance order cannot be enforced without first giving the order's recipient an

opportunity to contest it.[13] *Cf.* Jason D. Nichols, *Towards Reviving the Efficacy of Administrative Compliance Orders: Balancing Due Process Concerns and the Need for Enforcement Flexibility in Environmental Law*, 57 Admin. L. Rev. 193, 215 (2005) ("[T]he *TVA* opinion . . . deserves credit for observing the constitutional frailties of the EPA's [compliance order] process."). This clear conflict between the Ninth Circuit's decision and the Eleventh Circuit's decision in *TVA* merits this Court's review.

CONCLUSION

The EPA's compliance order regime puts the Sacketts, and innocent landowners like them throughout the country, in an impossible situation. To get their day in court, these landowners must either

[13] The CAA provides in relevant part that "whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated, or is in violation of, any other requirement or prohibition of this title . . , the Administrator may . . . issue an order requiring such person to comply with such requirement or prohibition." 42 U.S.C. § 7413(a)(3)(B). The CWA provides in relevant part that "[w]henever on the basis of any information available to him the Administrator finds that any person is in violation of [various provisions 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). Hence, the Eleventh Circuit's conclusion that the two statutory compliance order regimes are essentially the same is substantiated by the statutes' plain meaning. In fact, the CAA regime is on its face *less* offensive to due process principles than the CWA regime, because the former generally requires the EPA Administrator to provide notice before issuing a compliance order, *see* 42 U.S.C. § 7413(a)(4), whereas the CWA has no such requirement.

run the risk of ruinous penalties and imprisonment, or "purchase" their right of judicial review through the permit process, even if the purchase price is more than the value of their land. If the Sacketts and other landowners are not given an opportunity for full judicial review of their compliance order free of EPA's onerous conditions, their due process rights will be violated. This Court's review is needed.

The petition for writ of certiorari should be granted.

DATED: February, 2011.

Respectfully submitted,

LESLIE R. WEATHERHEAD
Witherspoon Kelley
Davenport & Toole
422 W Riverside Ave.,
Suite 1100
Spokane, WA 99201
Telephone: (509) 624-5265
Facsimile: (509) 458-2728
E-mail: lwlibertas@aol.com

M. REED HOPPER
*DAMIEN M. SCHIFF
Counsel of Record
Pacific Legal Foundation
3900 Lennane Dr., Suite 200
Sacramento, CA 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: mrh@pacificlegal.org
E-mail: dms@pacificlegal.org

Counsel for Petitioners

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHANTELL SACKETT; MICHAEL SACKETT, *Plaintiffs Appellants,* v UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; STEVEN L. JOHNSON, Administrator, *Defendants - Appellees.*	No. 08-35854 D C. No. 2:08-cv-00185-EJL **OPINION**

Appeal from the United States District Court
for the District of Idaho
Edward J Lodge, District Judge, Presiding

Argued and Submitted
December 9, 2009
Submission Withdrawn December 23, 2009
Resubmitted August 18, 2010
Seattle, Washington

Filed September 17, 2010

Before: Robert R. Beezer, Ronald M. Gould and
Richard C. Tallman, Circuit Judges

Opinion by Judge Gould

COUNSEL

Leslie R. Weatherhead, Witherspoon Kelley Davenport & Toole, Spokane, Washington, M. Reed Hopper, Damien M. Schiff (argued), Pacific Legal Foundation, Sacramento, California, for the plaintiffs-appellants.

Ankur K. Tohan, United States Environmental Protection Agency, Seattle, Washington, Ronald J. Tenpas, Assistant Attorney General, Cynthia J Morris, Aaron P Avila, Jennifer Scheller Neumann (argued), United States Department of Justice Environment and Natural Resources Division, Washington, DC, for the defendants-appellees.

OPINION

GOULD, Circuit Judge:

We determine whether federal courts have subject-matter jurisdiction to conduct review of administrative compliance orders issued by the Environmental Protection Agency pursuant to the Clean Water Act, 33 U.S.C. § 1319(a)(3), before the EPA has filed a lawsuit in federal court to enforce the compliance order. We join our sister circuits and hold that the Clean Water Act precludes pre-enforcement judicial review of administrative compliance orders, and that such preclusion does not violate due process.

I

Chantell and Michael Sackett ("the Sacketts") own a 0.63-acre undeveloped lot in Idaho near Priest Lake ("the Parcel"). In April and May of 2007, the Sacketts filled in about onehalf acre of that property with dirt and rock in preparation for building a house.

On November 26, 2007, the EPA issued a compliance order against the Sacketts. The compliance order alleged that the Parcel is a wetland subject to the Clean Water Act ("CWA") and that the Sacketts violated the CWA by filling in their property without first obtaining a permit.[1] The compliance order required the Sacketts to remove the fill material and restore the Parcel to its original condition. The compliance order states that "[v]iolation of, or failure to comply with, the foregoing Order may subject Respondents to (1) civil penalties of up to $32,500 per day of violation . . [or] (2) administrative penalties of up to $11,000 per day for each violation."

The Sacketts sought a hearing with the EPA to challenge the finding that the Parcel is subject to the CWA. The EPA did not grant the Sacketts a hearing and continued to assert CWA jurisdiction over the Parcel. The Sacketts then filed this action in the United States District Court for the District of Idaho seeking injunctive and declaratory relief. They challenged the compliance order as (1) arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A); (2) issued without a hearing in violation of the Sacketts' procedural due process rights; and (3) issued on the basis of an "any information available" standard that is unconstitutionally vague.

The district court granted the EPA's Federal Rule of Civil Procedure 12(b)(1) motion to dismiss the Sacketts' claims for lack of subject-matter jurisdiction. It concluded that the CWA precludes judicial review of

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[1] The compliance order charged the Sacketts with discharging pollutants into the waters of the United States, absent a permit, in violation of 33 U.S.C. § 1311(a).

compliance orders before the EPA has started an enforcement action in federal court. The Sacketts filed a Federal Rule of Civil Procedure 59(e) motion for clarification and reconsideration that was also denied. The Sacketts appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291.

II

We review de novo the dismissal of a complaint for lack of subject-matter jurisdiction. *Mangano v. United States*, 529 F.3d 1243, 1245 n.2 (9th Cir 2008).

The EPA has determined that the Sacketts discharged pollutants into the waters of the United States in violation of the CWA. When the EPA identifies a CWA violation, it has three main civil enforcement options.[2] First, it can assess an administrative penalty 33 U.S.C. § 1319(g). When the EPA assesses an administrative penalty, the alleged violator is entitled to "a reasonable opportunity to be heard and to present evidence," the public is entitled to comment, and any assessed penalty is subject to immediate judicial review. 33 U.S.C. § 1319(g)(4), (8). Second, the EPA can initiate a civil enforcement action in federal district court. 33 U.S.C. § 1319(b). Third, the EPA can issue, as it did here, an administrative "compliance order." 33 U.S.C. § 1319(a).

A compliance order "is a document served on the violator, setting forth the nature of the violation and specifying a time for compliance with the Act." *S. Pines Assocs. by Goldmeier v. United States*, 912 F.2d 713, 715 (4th Cir 1990). The EPA derives its power to issue compliance orders from 33 U.S.C. § 1319(a)(3), which states:

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[2] Criminal penalties are also available. 33 U.S.C. § 1319(c).

> 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, 1328, or 1345 of this title, . . . 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 [33 U.S.C. § 1319(b)]

[1] To enforce a compliance order, the EPA must bring an enforcement action in federal court under 33 U.S.C. § 1319(b). The compliance order issued against the Sacketts exposed them to potential court-imposed civil penalties not to exceed $32,500 "per day for each violation" of the compliance order.[3] 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4. In assessing the amount of the penalty, courts "shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." 33 U.S.C. § 1319(d).

The Sacketts argue that compliance orders are judicially reviewable prior to the EPA filing an enforcement action in federal court. The CWA, however, does not expressly provide for pre-enforcement judicial review of compliance orders. *See* 33 U.S.C. § 1319. The Sacketts argue that federal courts are nonetheless authorized to conduct pre-enforcement review of compliance orders pursuant to the APA. Under the APA, "[a]gency action made reviewable by statute and final agency action for which

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[3] The maximum per-day penalty amount increased to $37,500 effective January 12, 2009 40 C.F.R. § 19.4.

there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. Agency action is not reviewable under the APA, however, where the relevant statute "preclude[s] judicial review " 5 U.S.C. § 701(a)(1).

[2] Whether the CWA precludes pre-enforcement review of compliance orders is an issue of first impression in our circuit. We begin with the presumption favoring judicial review of administrative action. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967), overruled on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977). That presumption is overcome, however, "whenever the congressional intent to preclude judicial review is fairly discernible in the statutory scheme." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984) (quotation marks omitted). "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." *Id.* at 345. The CWA does not expressly preclude preenforcement judicial review of such compliance orders. So we must consider the other factors identified by the Supreme Court to determine whether the CWA impliedly precludes pre-enforcement judicial review.

[3] In this assessment, we do not work from a blank slate. Every circuit that has confronted this issue has held that the CWA impliedly precludes judicial review of compliance orders until the EPA brings an enforcement action in federal district court. *See, e.g., Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995); *S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418 (6th

Cir 1994); *S. Pines Assocs. by Goldmeier v. United States*, 912 F.2d 713 (4th Cir 1990); *Hoffman Group, Inc. v. EPA*, 902 F.2d 567 (7th Cir. 1990). Many district courts have also so held. *See, e.g., Sharp Land Co. v. United States*, 956 F Supp. 691, 693-94 (M.D. La. 1996); *Child v. United States*, 851 F Supp. 1527, 1533 (D. Utah 1994); *Bd. of Managers, Bottineau Cnty. Water Res. Dist. v. Bornhoft*, 812 F. Supp. 1012, 1014-1015 (D.N.D. 1993); *McGown v. United States*, 747 F Supp. 539, 542 (E.D. Mo. 1990); *Fiscella & Fiscella v. United States*, 717 F. Supp. 1143, 1146-47 (E.D. Va. 1989). The reasoning of these courts is persuasive to us, as well as the broad uniformity of consensus on this issue.

[4] First, we look to the structure of the statutory scheme and the nature of the administrative action involved. Here, Congress gave the EPA a choice of "issu[ing] an order requiring such person to comply with such section or requirement, or . . . bring[ing] a civil action [in district court]." 33 U.S.C. § 1319(a)(3) (emphasis added). Authorizing pre-enforcement judicial review of compliance orders would eliminate this choice by enabling those subject to a compliance order to force the EPA to litigate all compliance orders in court. *E.g.*, Hoffman Group, 902 F.2d at 569. Such a result would be discordant with the statutory scheme.

[5] Moreover, no sanctions can be imposed, or injunctions issued, for noncompliance with a compliance order until the EPA brings a civil enforcement action in district court. *See* 33 U.S.C. § 1319(d); *Hoffman Group*, 902 F.2d at 569. Given that an enforcement action gives an opportunity for judicial consideration of the compliance order, we infer that

Congress intended that all challenges to the compliance order be brought in one proceeding. *See id.*; *cf. Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14 (1981) ("In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.").

[6] In addition, by contrast to how it treated compliance orders, Congress set forth an explicit mechanism for judicial review of administrative penalties assessed by the EPA for CWA violations. *See* 33 U.S.C. § 1319(g)(8). Congress's express grant of judicial review for administrative penalties helps to persuade us that the absence of a similar grant of judicial review for compliance orders was an intentional omission that must be respected. *See S. Ohio Coal Co.*, 20 F.3d at 1426.

[7] Second, we look to the objectives of the statutory scheme. Here, courts have concluded that compliance orders, like pre-enforcement administrative orders in other environmental statutes, are meant to "allow EPA to act to address environmental problems quickly and without becoming immediately entangled in litigation." *S. Pines Assocs.*, 912 F.2d at 716; *see also* S. Rep. No. 92-414, at 3730 (1972) ("One purpose of these new requirements is to avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement. Enforcement of violations of requirements under this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay."). This goal of enabling swift corrective action would be defeated by permitting immediate judicial review of compliance orders.

[8] Third, we consider the legislative history of the CWA. The enforcement provisions of the CWA were modeled on enforcement provisions in the Clean Air Act ("CAA"), and many courts have relied on similar provisions in the CAA in concluding that the CWA precludes pre-enforcement judicial review of compliance orders. *Laguna Gatuna*, 58 F.3d at 565; *S. Pines Assocs.*, 912 F.2d at 716; *see also* S. Rep. No. 92-414, at 3730. During the enactment of the CAA, the Conference Committee which reconciled the House and Senate versions of the CAA deleted a provision in the Senate's version of the bill that would have expressly provided for preenforcement review of CAA administrative compliance orders. *See Lloyd A. Fry Roofing Co. v. EPA*, 554 F.2d 885, 890 (8th Cir. 1977). At least one court has inferred from this deletion that it was intended to preclude pre-enforcement judicial review of compliance orders. *See id.* (citing *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974)). Such an inference is not unassailable. *See* Andrew I. Davis, *Judicial Review of Environmental Compliance Orders*, 24 Envt'l L. 189, 199 (1994). Nevertheless, and subject to the general caution with which we must view all legislative history not adopted by both houses and enacted as law, that inference is supported by the structure of the CWA and its statutory language discussed above.

[9] In view of the above considerations, we hold that a congressional intent to preclude pre-enforcement judicial review of compliance orders is "fairly discernible in the statutory scheme." *Block*, 467 U.S. at 351.

III

[10] The Sacketts argue that CWA compliance orders must be judicially reviewable before enforcement because preclusion of pre-enforcement review violates their due process rights. They rely on the Eleventh Circuit's opinion in *Tennessee Valley Authority v. Whitman*, 336 F.3d 1236 (11th Cir. 2003) [hereinafter *TVA*], in which that court identified constitutional problems with a similar compliance-order provision in the CAA, *see id.* at 1260. The Eleventh Circuit concluded that the complete preclusion of judicial review of compliance orders issued under the CAA would raise serious constitutional questions where compliance orders, "if ignored, lead[ ] automatically to the imposition of severe civil penalties and perhaps imprisonment." *Id.* at 1256. The chief problem with the CAA, as the Eleventh Circuit saw it, was that a compliance order could be issued by the EPA "on the basis of any information available" without any hearing, and that the CAA made civil and criminal penalties dependent on violations of compliance orders whether or not there was an actual violation of the CAA. *See id.* (citing Davis, *supra* at 194 ("Regardless of the merits of the alleged violation underlying the compliance order, disregarding the order potentially subjects the recipient to accruing daily penalties.")).

[11] If the CWA is read in the literal manner the Sacketts suggest, it could indeed create a due process problem. Like the CAA, the CWA permits the EPA to issue compliance orders "on the basis of any information available," 33 U.S.C. § 1319(a)(3), which presumably includes "a staff report, newspaper clipping, anonymous phone tip, or anything else that

would constitute 'any information,' " *TVA*, 336 F.3d at 1241 (observing that "[t]he standard is less rigorous than the probable cause standard"). And according to the plain text of the enforcement provision, "any person who violates any order issued by the Administrator under [33 U.S.C. § 1319(a)], shall be subject to a civil penalty . for each violation." 33 U.S.C. § 1319(d). Thus, the Sacketts' reading of the CWA suggests that they risk substantial financial penalties for violating the compliance order, even if they did not violate the CWA, if the EPA establishes in an enforcement proceeding that the compliance order was validly issued based on "any information available." *See TVA*, 336 F.3d at 1259 (concluding that "[t]he district courts serve as forums for the EPA to conduct show-cause hearings").

[12] We decline to interpret the CWA in this manner. The civil penalty provision of the CWA is "not a model of clarity" *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1137 (11th Cir. 1990). Although the term "any order" in 33 U.S.C. § 1319(d) could be interpreted to refer to all compliance orders issued on the basis of "any information available," the term could also be interpreted to refer only to those compliance orders that are predicated on actual, not alleged, violations of the CWA, as found by a district court in an enforcement action according to traditional civil evidence rules and burdens of proof.

[13] Mindful of the Supreme Court's repeated instruction that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality," *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S.

648, 657 (1895)), we believe that the latter interpretation is the better interpretation of "any order" in § 1319(d). The EPA is authorized only "to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which [the EPA] is authorized to issue a compliance order" 33 U.S.C. § 1319(b) (emphasis added). Read carefully, this provision does not authorize the EPA to bring enforcement actions for mere violations of compliance orders. Rather, to enforce a compliance order, the EPA must bring an action alleging a violation of the CWA itself. Given that the CWA does not empower the EPA to bring an enforcement action on the basis of a violation of a compliance order alone, it follows that a court cannot assess penalties for violations of a compliance order under § 1319(d) unless the EPA also proves, by a preponderance of the evidence, that the defendants actually violated the CWA in the manner alleged.[4] Under this interpretation, if the EPA does not prove that the CWA was actually violated, the compliance order is unenforceable, even if it was validly issued on the basis of "any information available." We therefore hold that the term "any order" in § 1319(d) refers only to orders predicated on actual violations of the CWA as identified by a district court in an enforcement proceeding according to traditional rules of evidence and standards of proof.

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[4] This interpretation of the term "any order" is in accord with other circuits' readings of the CWA. *See, e.g.*, *Hoffman Group*, 902 F.2d at 569 ("Hoffman cannot be compelled to comply with the Compliance Order without an opportunity to challenge the Order's validity in court."); *S. Pines Assocs.*, 912 F.2d at 717 ("Southern Pines and Vico can contest the existence of EPA's jurisdiction if and when EPA seeks to enforce the penalties provided by the Act.").

The Sacketts further allege that forcing them to wait until the EPA brings an enforcement action "ignores the realities of [their] circumstances," because of the "frightening penalties" they risk accruing by refusing to comply. The increase in penalties from noncompliance with an administrative order not subject to immediate judicial review, however, does not necessarily constitute a due process violation. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994) ("Although the [Mine] Act's civil penalties unquestionably may become onerous if petitioner chooses not to comply, the Secretary's penalty assessments become final and payable only after full review by both the Commission and the appropriate court of appeals."). Rather, statutory preclusion of pre-enforcement judicial review of administrative orders violates due process only when the "practical effect of coercive penalties for noncompliance [is] to foreclose all access to the courts" so that "compliance is sufficiently onerous and coercive penalties sufficiently potent that a constitutionally intolerable choice might be presented." *Id.*

[14] We are not persuaded that the potential consequences from violating CWA compliance orders are so onerous so as to "foreclose all access to the courts" and create a "constitutionally intolerable choice." We reach this conclusion for two reasons. First, the CWA has a permitting provision. *See* 33 U.S.C. § 1344(a). The Sacketts could seek a permit to fill their property and build a house, the denial of which would be immediately appealable to a district court under the APA. *See* 33 C.F.R. § 331.10; 5 U.S.C. § 704. If the Sacketts were denied a permit and then took an appeal, they could challenge whether their property is subject to the jurisdiction of the CWA. *See*

id., *Baccarat Fremont Devs., LLC v. U.S. Army Corps of Eng'rs*, 425 F.3d 1150, 1154 (9th Cir 2005) (concluding that the Army Corps had jurisdiction over the plaintiff's property under the CWA). Therefore, rather than completely foreclosing the Sacketts' ability to use their property or challenge CWA jurisdiction, the CWA channels judicial review through the affirmative permitting process. *See Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 19 (2000) (noting the distinction "this Court has often drawn between a total preclusion of review and postponement of review" and highlighting similar "channeling requirement[s]"); *United States v. Dunifer*, 219 F.3d 1004, 1008 (9th Cir. 2000) ("[I]t is important to note that this is not a case in which Dunifer had no means to obtain judicial review of the regulations. Dunifer could have applied for a license and sought a waiver of the applicable FCC rules . . ." (citing *Thunder Basin*, 510 U.S. at 212-13)).

[15] Second, the civil penalties provision is committed to judicial, not agency, discretion. *See* 33 U.S.C. § 1319(d). The amount of the penalty for noncompliance with a CWA compliance order is to be determined by a court and is determined on the basis of six factors: (1) the seriousness of the violation, (2) the economic benefit resulting from the violation, (3) any history of CWA violations, (4) good-faith efforts to comply, (5) the economic impact of the penalty on the violator, and (6) such other matters as justice may require. *Id.* Any penalty ultimately assessed against the Sacketts would therefore reflect a discretionary, judicially determined penalty, taking into account a wide range of case-specific equitable factors, and imposed only after the Sacketts have had a full and

fair opportunity to present their case in a judicial forum.

[16] We therefore hold that precluding pre-enforcement judicial review of CWA compliance orders does not violate due process.

IV

In conclusion, we hold that it is "fairly discernable" from the language and structure of the Clean Water Act that Congress intended to preclude pre-enforcement judicial review of administrative compliance orders issued by the EPA pursuant to 33 U.S.C. § 1319(a)(3). We further interpret the CWA to require that penalties for noncompliance with a compliance order be assessed only after the EPA proves, in district court, and according to traditional rules of evidence and burdens of proof, that the defendants violated the CWA in the manner alleged in the compliance order. Thus we do not see any sharp disconnect between the process given a citizen and the likely penalty that can be imposed under the CWA. Under these circumstances, preclusion of pre-enforcement judicial review does not violate the Sacketts' due process rights. The district court properly dismissed this case for lack of subject-matter jurisdiction.[5]

AFFIRMED.

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[5] Given this conclusion, we need not and do not reach the claims of due process violations based on the failure to provide notice and a hearing before an impartial tribunal or the contention that the CWA compliance order provision is impermissibly vague.

Appendix B–1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED Dec. 9, 2010

CHANTELL SACKETT and MICHAEL SACKETT, Plaintiffs - Appellants, v UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and STEVEN L. JOHNSON, Administrator, Defendants - Appellees.	No. 08-35854 D.C. No. 2:08-cv-00185-EJL U.S. District Court for Idaho, Boise **MANDATE**

The judgment of this Court, entered September 17, 2010, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT·

Molly C. Dwyer
Clerk of Court

Gabriela Van Allen
Deputy Clerk

Appendix C–1

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO,

NORTHERN DIVISION

FILED Aug. 7, 2008

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. 08-cv-185-N EJL **MEMORANDUM ORDER**

Pursuant to Federal Rule of Civil Procedure 12(b)(1), Defendant United States Environmental Protection Agency ("EPA") moves to dismiss this action for lack of subject matter jurisdiction. Plaintiffs Chantell and Michael Sackett oppose the motion. Having fully reviewed the record, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, this

matter shall be decided on the record before this Court without oral argument.

Background

Plaintiffs own a parcel of undeveloped property located at 1604 Kalispell Bay Road, near Kalispell Creek, in Bonner County, Idaho. On November 26, 2007, EPA issued to Plaintiffs an Administrative Compliance Order ("Compliance Order")[1] pursuant to sections 308 and 309(a) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. §§ 1318 and 1319(a). The Compliance Order charged that Plaintiffs, or persons acting on their behalf, had violated section 301 of the CWA, 33 U.S.C. § 1311, by discharging fill material into regulated waters without first obtaining a permit. The Compliance Order required Plaintiffs to remove the fill material and restore the wetlands, and set forth a schedule for the removal of the fill material and replanting of the disturbed area.

The Compliance Order was revised by the EPA on April 4, 2008 and again on May 1, 2008, to amend the compliance schedule. Each Compliance Order encouraged Plaintiffs "to engage in informal discussion of the terms and requirements of this Order upon receipt," and indicated that the Compliance Order could be amended to provide for alternative methods of achieving compliance with the CWA. Each Compliance Order also warned that "failure to comply with, the foregoing Order may subject Respondents to (1) civil penalties of up to $32,500 per day of violation pursuant to section 309(d) of the Act, 33 U.S.C. § 1319(d), and 40

[1] "A compliance order is a document served on the violator, setting forth the nature of the violation and specifying a time for compliance with the Act." *S. Pines Ass'n v. United States*, 912 F.2d 713, 715 (4th Cir. 1990) (citing 33 U.S.C. § 1319(a)(5)(A)).

C.F.R. Part 19; (2) administrative penalties of up to $11,000 per day for each violation, pursuant to section 309(g) of the Act, 33 U.S.C. § 1319(g), and 40 C.F.R. Part 19; or (3) civil action in federal court for injunctive relief, pursuant to Section 309(b) of the Act, 33 U .S.C. § 1319(b)."

On April 28, 2008, Plaintiffs initiated the present action, alleging that the property is not subject to CWA jurisdiction and that the Compliance Order is a violation of Plaintiffs' due process rights. EPA, in turn, moved to dismiss the Plaintiffs' Complaint, contending that the Court lacks subject matter jurisdiction over the Plaintiffs' claims.

Statutory Framework

Congress delegated the authority for enforcement of CWA jointly to both the EPA and the Corps of Engineers, and gave both agencies a range of enforcement tools. Relevant here, the EPA can issue administrative compliance orders or bring civil enforcement actions in federal court. "The violator is subject to the same injunction and penalties whether or not EPA has issued a compliance order." *S. Pines Ass'n v. United States*, 912 F.2d 713, 715-16 (4th Cir. 1990). However, violation of an administrative compliance order will not result in an injunction or penalties until EPA brings an enforcement proceeding in federal district court pursuant to section 309(b) of the CWA, 33 U.S.C. § 1319(b). *Id.* at 717. In any such judicial proceeding, the alleged violator may raise all defenses, including any challenges to the EPA's assertion of jurisdiction over the activity at issue. *Id.*

Discussion

The United States, as a sovereign, may not be sued in federal court without its consent. *United States v. Testan*, 424 U.S. 392, 399 (1976). Where the United States has not consented to suit, the court lacks jurisdiction over the subject matter of the action and dismissal is required. *Hutchinson v. United States*, 677 F.2d 1322, 1327 (9th Cir. 1982). The "party bringing a cause of action against the federal government bears the burden of showing an unequivocal waiver of immunity." *Baker v. United States*, 817 F.2d 560, 562 (9th Cir. 1987).

The Plaintiffs have failed to carry their burden on this issue. Plaintiffs first argue that the Court has subject matter jurisdiction over Plaintiffs' Complaint because Plaintiffs seek declaratory and injunctive relief to prevent an imminent due process injury. According to Plaintiffs "[i]t is well established that the district courts have jurisdiction to entertain such claims." (Pls.' Opp'n at 2 (citing one district court case, from the District of Columbia)).

Plaintiffs' assertion, however, is incorrect. To the contrary, "[i]t is well-settled that 28 U.S.C. § 1331, granting district courts jurisdiction over cases arising under the Constitution, is not a waiver of sovereign immunity" *Humphreys v. United States*, 62 F.3d 667, 673 (5th Cir 1995). And it is similarly "settled that [the Declaratory Judgment Act,] 28 U.S.C. § 2201, does not itself confer jurisdiction on a federal court where none otherwise exists." *Amalgamated Sugar Co. v. Bergland*, 664 F.2d 818, 822 (10th Cir. 1981). Therefore, the mere fact that Plaintiffs allege a constitutional violation and ask for declaratory and injunctive relief does not satisfy their burden of

establishing an unequivocal waiver of sovereign immunity.

The Plaintiffs next assert that "[j]urisdiction is also proper under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.*, because the Compliance Order constitutes 'final agency action.'" (Pls.' Opp'n at 1). In support of this theory, Plaintiffs rely upon a Clean Air Act case from the Eleventh Circuit, *Tennessee Valley Authority ("TVA") v. Whitman*, 336 F.3d 1236 (11th Cir. 2003), and argue that *TVA* "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." (Pls.' Opp'n at 4).

There is no need, however, for the Court to resolve the matter before it by applying Eleventh Circuit case law interpreting the Clean Air Act.[2] That is because there are numerous Circuit Court opinions addressing the very same situation presented here, with all of them finding that a district court lacks jurisdiction to review a pre-enforcement compliance order issued under the CWA. In all these opinions, the courts held

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[2] Furthermore, Plaintiffs neglect to mention that in *TVA* the Eleventh Circuit's actual conclusion was that "we lack jurisdiction to review the ACO [administrative compliance order] because it does not constitute 'final' agency action." 226 F.3d at 1239. So that even if the Court believed it appropriate to extend TVA's analysis of the Clean Air Act to the CWA, which it does not, it would result in the very same outcome as here: dismissal of the Plaintiffs' action for lack jurisdiction. *Id.* at 1260 (ruling that "ACOs lack finality . . . [and] we thus conclude that courts of appeals lack jurisdiction to review the validity of ACOs."). Plaintiffs also cite *Alaska Dep't of Envtl. Conservation v. EPA*, 244 F.3d 748, 750 (9th Cir 2001), which like *TVA* is a Clean Air Act case and therefore is equally inapposite.

that, based on their interpretation of the legislative history and structure of the CWA, Congress intended to preclude judicial review of compliance orders prior to the initiation of a civil action. *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564, 565-66 (10th Cir 1995) (holding that CWA did not provide for judicial review of EPA compliance order); *Southern Ohio Coal Co. v. Office of Surface Mining*, 20 F.3d 1418, 1426- 27 (6th Cir.1994) (same); *Reuth v. EPA*, 13 F.3d 227, 229-30 (7th Cir 1993) (holding that challenge to government's right to assert jurisdiction over wetlands in proposed development could not be brought unless government initiates judicial enforcement action); *Southern Pines Assocs. v. United States*, 912 F.2d 713 (4th Cir 1990) (holding that review of compliance orders issued under CWA were precluded until judicial enforcement action commenced); *Hoffman Group Inc. v. EPA*, 902 F.2d 567 (7th Cir. 1990) (same).

Moreover, it appears that every published district court decision on this same issue, including one issued within the last two months, also has concluded that there is no jurisdiction over a administrative compliance order issued under the CWA. *See, e.g*, *Acquest Wehrle LLC v. United States*, __ F Supp. 2d ___, 2008, 2008 WL 2522386 at *7 (W.D. N Y June 20, 2008); *see also* Def.'s Mem at 13-14 (listing over ten district court cases). The Court finds these opinions to be well reasoned and consistent with the law. Accordingly, the Court will follow the same in finding that the Court lacks jurisdiction to review the Compliance Order and granting EPA's Motion to Dismiss for lack of subject matter jurisdiction.

ORDER

Based on the foregoing, the Court being fully advised in the premises it is **HEREBY ORDERED** that the United States' Motion to Dismiss Plaintiffs' Complaint for Lack of Subject Matter Jurisdiction (docket no. 14) is **GRANTED.**

IT IS FURTHER ORDERED that this case is **DISMISSED** in its entirety.

DATED: **August 7, 2008**

/s/ Edward J. Lodge
Honorable Edward J Lodge
U.S. District Judge

Appendix D–1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED Nov. 29, 2010

CHANTELL SACKETT; MICHAEL SACKETT, Plaintiffs - Appellants, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, STEVEN L. JOHNSON, Administrator, Defendants - Appellees.	No. 08-35854 D.C. No. 2:08-cv 00185-EJL District of Idaho, Boise **ORDER**

Before: BEEZER, GOULD and TALLMAN, Circuit Judges.

The full court has been advised of Appellant's Petition for Rehearing En Banc, and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. Appellant's Petition for Rehearing En Banc is DENIED.

LESLIE R. WEATHERHEAD
lwlibertas@aol.com
Idaho Bar No. 3916
Witherspoon Kelley Davenport & Toole
422 West Riverside Avenue, Suite 1100
Spokane, Washington 99201
Telephone: (509) 624-5265
Facsimile: (509) 458-2728

M. REED HOPPER (*pro hac vice pending*)
mrh@pacificlegal.org
Cal. Bar No. 131291
DAMIEN M. SCHIFF (*pro hac vice pending*)
dms@pacificlegal.org
Cal. Bar No. 235101
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Attorneys for Plaintiffs

FILED Apr. 28, 2008

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO,
NORTHERN DIVISION

CHANTELL and MICHAEL SACKETT,	)	Case No._____
Plaintiffs,	)	**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**
v.	)	
UNITED STATES ENVIRONMENTAL	)	

PROTECTION AGENCY,)
and STEPHEN L.)
JOHNSON, in his official)
capacity as Administrator of)
the Environmental Protection)
Agency,)
Defendants.)
_____)

* * * *

PARTIES

6. Plaintiffs Chantell and Michael Sackett own the property that is the subject of this action. Plaintiffs own Sackett Construction, a small construction company located at Priest Lake, Idaho. They do work around Priest Lake, and also on projects further south in Coeur D'Alene and Spokane. Plaintiffs purchased the property with the intention to build a house on it. They applied for and obtained the requisite building permits. Nothing in the title documents or title policy indicated any limitation on development.

* * * *

FACTUAL ALLEGATIONS

23. Plaintiffs own a 63-acre dirt lot parcel located at 1604 Kalispell Bay Road, in Bonner County, Idaho. The property is presently undeveloped. The property is bounded to the north by Kalispell Bay Road, to the east and west by undeveloped lots, and to the south by Old Schneider Road.

24. The property lies to the north of Priest Lake. A ditch runs along the north side of Kalispell Bay

Road. Water in that ditch flows westward until discharging in Kalispell Creek, which is approximately 500 feet west of the property. There is no ditch on the south side of Kalispell Road. Between the property and Priest Lake are several developed lots with numerous permanent structures.

* * * *

Appendix F–1

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101-3140

Reply to: ETPA-083

May 15, 2008

SENT VIA CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Chantell and Michael Sackett
P.O. Box 425
Nordman, ID 83848-0368

Re: **In *the Matter of Chantell and Michael Sackett* Amended Administrative Compliance Order, EPA Docket No. CWA-10-2008-0014**

Dear Mr. and Mrs. Sackett:

With this letter, the U.S. Environmental Protection Agency (EPA) is issuing an amended administrative compliance order ("Amended Compliance Order") that supersedes and replaces the order issued to you on November 26, 2007. The Amended Compliance Order is issued pursuant Sections 308 and 309(a) of the Clean Water Act, 33 U.S.C. §§ 1318 and 1319(a). EPA is issuing this order in connection with the unauthorized placement of fill material into wetlands at your property located at 1604 Kalispell Bay Road near Kalispell Creek, Bonner County, Idaho ("Site").

Appendix F–2

It has become apparent that the amended dates for compliance detailed in my letter to you dated May 1, 2008, may not result in successful establishment of revegetated wetland species at the Site because of the short growing season in northern Idaho. Please note that this Amended Compliance Order removes the obligation that wetland vegetation be re-planted at the Site by July 1, 2008. In addition, the Amended Compliance Order extends the date for removal of fill material and replacement of original wetland soils to October 31, 2008 (ahead of the winter season when removal of fill material and replacement of wetland soils would be infeasible). Since replanting will not be required in the 2008 growing season, there is no need to require the immediate removal of fill material. This Amended Compliance Order will account for the ecological constraints in northern Idaho and will also remove the need for immediate judicial resolution of EPA's motion to dismiss the complaint (Case No. CV-08-0185-EJL) you filed on April 28, 2008.

Successful compliance with the Amended Compliance Order does not preclude EPA from bringing a formal enforcement action for penalties or further injunctive relief to address the Clean Water Act violations associated with your property located at the Site. Please also be aware that failure to comply with the Amended Compliance Order may subject you to civil penalties of up to $32,500 per day for each violation, administrative penalties of up to $11,000 per day for each day during which the violation continues or a civil action in Federal court for injunctive relief, pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

Should you have any questions concerning this matter, please have your attorney contact Mr. Ankur Tohan directly at 206-553-1796.

Sincerely,

/s/ Richard B. Parkin
Richard Parkin, Acting Director
Office of Ecosystems, Tribal,
and Public Affairs

cc: H. Reed Hopper, Pacific Legal Foundation
Damien Schiff, Pacific Legal Foundation
Leslie Weatherhead, Witherspoon,
Kelley, Davenport & Toole
Greg Taylor, ID Dept. of Water Resources
Beth Rienhart, U.S. Army Corps of Engineers

Appendix G–1

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101

In the Matter of:	)	
	)	
CHANTELL AND	)	DOCKET NO
MICHAEL SACKETT	)	CWA-10-2008-0014
	)	
Bonner County, Idaho	)	**AMENDED**
	)	**COMPLIANCE**
Respondents.	)	**ORDER**
	)	

The following FINDINGS AND CONCLUSIONS are made and ORDER issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by sections 308 and 309(a) of the Clean Water Act ("the Act"), 33 U.S.C. §§ 1318 and 1319(a). This authority has been delegated to the Regional Administrator, Region 10, and has been duly redelegated to the undersigned Director of the Office of Ecosystems, Tribal and Public Affairs. This AMENDED COMPLIANCE ORDER ("Order") supersedes and replaces the Compliance Order issued under Docket Number CWA 10-2008-0014 to Respondents on November 26, 2007.

I. FINDINGS AND CONCLUSIONS

1.1 Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into waters of the United States by any person, except as authorized by a permit issued pursuant to section 402

or 404 of the Act, 33 U.S.C. §§ 1342 or 1344. The unpermitted discharge of any pollutant from a point source constitutes a violation of section 301(a) of the Act, 33 U.S.C. § 1311(a). Section 502(12), 33 U.S.C. § 1362(12), defines the term "discharge of any pollutant" to include "any addition of any pollutant to navigable waters from any point source." "Navigable waters" are defined as "waters of the United States." 33 U.S.C. § 1362(7).

1.2 Respondents Chantell and Michael Sackett (hereinafter collectively "Respondents") are "persons" within the meaning of Sections 301(a) and 502(5) of the Act, 33 U.S.C. §§ 1311(a) and 1362(5).

1.3 Respondents own, possess, or control real property identified as 1604 Kalispell Bay Road near Kalispell Creek, Bonner County, Idaho; and located within Section 12, Township 60 North, Range 5 West, Boise Meridian ("Site"). The Site is adjacent to Priest Lake, and bounded by Kalispell Bay Road on the north and Old Schneider Road on the south.

1.4 The Site contains wetlands within the meaning of 40 C.F.R. § 230.3(t) and 33 C.F.R. § 328.3(b); and the wetlands meet the criteria for jurisdictional wetlands in the 1987 "Federal Manual for Identifying and Delineating Jurisdictional Wetlands."

1.5 The Site's wetlands are adjacent to Priest Lake within the meaning of 40 C.F.R. § 230.3(s)(7) and 33 C.F.R. § 328.3(a)(7). Priest Lake is a "navigable water" within the meaning of section 502(7) of the Act, 33 U.S.C. § 1362(7), and "waters of the United States" within the meaning of 40 C.F.R. § 232.2

1.6 In April and May, 2007, at times more fully known to Respondents, Respondents and/or persons acting on their behalf discharged fill material into wetlands at the Site. Respondents filled approximately one half acre.

1 7 Upon information and belief, Respondents and/or persons acting on their behalf used heavy equipment to place the fill material into the wetlands. The heavy equipment used to fill these waters is a "point source" within the meaning of section 502(14) of the Act, 33 U.S.C. § 1362(14).

1.8 The fill material that Respondents and/or persons acting on their behalf caused to be discharged included, among other things, dirt and rock, each of which constitutes a "pollutant" within the meaning of section 502(6) of the Act, 33 U.S.C. § 1362(6).

1.9 By causing such fill material to enter waters of the United States, Respondents have engaged, and are continuing to engage, in the "discharge of pollutants" from a point source within the meaning of sections 301 and 502(12) of the Act, 33 U.S.C. §§ 1311 and 1362(12).

1.10 Respondents' discharges of dredged and/or fill material was not authorized by any permit issued pursuant to section 402 or 404 of the Act, 33 U.S.C. §§ 1312 or 1314.

1.11 Respondents discharge of pollutants into waters of the Untied States at the Site without a permit constitutes a violation of section 301 of the Act, 33 U.S.C. § 1311.

1.12 As of the effective date of this Order, the fill material referenced in Paragraph 1 6 above remains in place.

1 13 Each day the fill material remains in place without the required permit constitutes an additional day of violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

1.14 Taking into account the seriousness of this violation and Respondents' good faith efforts to comply with applicable requirements, the schedule for compliance contained in the following Order is reasonable and appropriate.

II. ORDER

Based upon the foregoing FINDINGS AND CONCLUSIONS and pursuant to sections 308 and 309(a) of the Clean Water Act, 33 U.S.C. §§ 1318 and 1319(a), it is hereby ORDERED as follows:

2.1 In compliance with the Clean Water Act, Respondents shall remove all unauthorized fill material placed within wetlands located at Section 12, Township 60 North, Range 5 West, Boise Meridian ("Site"). The removed fill material is to be moved to a location approved by the EPA representative identified in Paragraph 2.8. To the maximum extent practicable, the Site shall be restored to its original, pre-disturbance topographic condition with the original wetlands soils that were previously removed from the Site. Acceptable reference topographic conditions exist on wetlands immediately adjacent to and bordering the Site.

2.2 Compliance activities described under Paragraph 2.1 must be completed no later than **October 31, 2008**.

2.3 At least 48 hours prior to commencing compliance activity on the Site, Respondents shall provide verbal notification to the EPA representative identified in Paragraph 2.8.

2.4 Within 7 days of completion of the compliance activities under Paragraph 2.1, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.8. The written notification shall include photographs of Site conditions prior to and following compliance with this Order.

2.5 Upon receipt of the notification referenced under Paragraph 2.4, EPA may schedule an inspection of the Site by EPA or its designated representative.

2.6 Respondents shall provide and/or obtain access to the Site and any off-Site areas to which access is necessary to implement this Order; and shall provide access to all records and documentation related to the conditions at the Site and the restoration activities conducted pursuant to this Order Such access shall be provided to EPA employees and/or their designated representatives, who shall be permitted to move freely at the site and appropriate off-site areas in order to conduct actions that EPA determines to be necessary.

2.7 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 direction. 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.

2.8 All submissions and notifications required by this ORDER shall be sent to:

John Olson
U.S. EPA, Idaho Operations Office
1435 North Orchard Street
Boise, ID 83706
Phone: (208) 378-5756
Fax: (208) 378-5744

2.9 Prior to the completion of the terms of this Order, Respondents shall provide any successor in ownership, control, operation, or any other interest in all or part of the Site, a copy of this Order at least 30 days prior to the transfer of such interest. In addition, Respondents shall simultaneously notify the EPA representative identified in Paragraph 2.8 in writing that the notice required in this Section was given. No real estate transfer or real estate contract shall in any way affect Respondent's obligation to comply fully with the terms of this Order.

2.10 This Order shall become effective on the date it is signed.

III. SANCTIONS

3.1 Notice is hereby given that violation of, or failure to comply with, the foregoing Order may subject Respondents to (1) civil penalties of up to $32,500 per day of violation pursuant to section 309(d) of the Act, 33 U.S.C. § 1319(d), and 40 C.F.R. Part 19; (2) administrative penalties of up to $11,000 per day for each violation, pursuant to section 309(g) of the Act, 33 U.S.C. § 1319(g), and 40 C.F.R. Part 19; or (3) civil action in federal court for injunctive relief, pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b).

3.2 Nothing in this Order shall be construed to relieve Respondents of any applicable requirements of federal, state, or local law. EPA reserves the right to take enforcement action as authorized by law for any violation of this Order, and for any future or past violation of any permit issued pursuant to the Act or of any other applicable legal requirements, including, but not limited to, the violations identified in Part I of this Order.

Dated this 15th day of May, 2008

/s/ Richard B. Parkin
RICHARD PARKIN, Acting Director
Office of Ecosystems, Tribal and Public Affairs

Appendix H–1

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101-3140

Reply to: ORC-158

May 1, 2008

SENT VIA CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Chantell and Michael Sackett
P.O. Box 425
Nordman, ID 83848-0368

Re: **In *the Matter of Chantell and Michael Sackett***
Administrative Compliance Order,
EPA Docket No. CWA-10-2008-0014

Dear Mr. and Mrs. Sackett:

With this letter, the U.S. Environmental Protection Agency (EPA) is modifying the terms of the administrative compliance order ("Compliance Order") issued to you on November 26, 2007. The Compliance Order requires you to perform specified restoration activities including, but not limited to, removal of unauthorized fill and restoration of the site. Activities under the Compliance Order were modified on April 4, 2008, to account for ground conditions making fill removal and re-planting infeasible. The modified Compliance Order required to fill removal to begin on May 1, 2008, and re-planting to be completed on May 30, 2008. The specific elements for all activates in

the compliance Order are detailed in the Scope of Work for Restoration Work Plan attached to and incorporated into the compliance Order.

EPA has learned that snow cover and low temperatures continue to persist in the Priest Lake area. Consequently, ground conditions remain unfavorable for fill removal and re-planting at this time. Therefore, EPA is extending the deadlines for fill removal and replacement of the wetland soil to June 2, 2008, and for re-planting the site to July 1, 2008. These revisions change Section 2.2 and Section 2.6 of the Compliance Order and Section II.1., Section II.7., and Section VI.1. of the Scope of Work for a Restoration Work Plan. The complete revised schedule is as follows.

Action	**Commence-ment No Later Than**	**Completion No Later Than**
Fill shall be removed and wetland soil returned	June 2, 2008	June 15, 2008[1]

[1] At least 48 hours prior to commencing removal activity on the Site, Respondents shall provide verbal notification to the EPA representative identified in Paragraph 2.12 of the Order Within 7 days of completion of the earthmoving work, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.12 or the Order The written notification shall include photographs of Site conditions prior to and following earthmoving activities.

Appendix H–3

EPA or its representative conducts an inspection of Site	As soon as possible after notification	Prior to planting
Re-Planting of the entire Site	June 15, 2008	July 1, 2008[2]
Monitoring of the entire Site	October 1, 2008	October 31, 2008
Monitoring of the entire Site	June 1, 2009	June 31, 2009
Monitoring of the entire Site	October 1, 2009	October 31, 2009
Monitoring of the entire Site	October 1, 2010	October 31, 2010

Should you have any questions concerning this matter, please have your attorney contact Mr Ankur Tohan directly at 206-553-1796.

Thank you for your cooperation.

Sincerely,
/s/ Richard B. Parkin
Richard Parkin
Acting Director,
Office of Ecosystems, Tribal, and Public Affairs

[2] Within 7 days of completion of re-planting work, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.12 of the Order. The written notification shall include photographs of Site conditions prior to and following re-planting.

cc: John Olson (IOO)
Ankur Tohan (ORC)
H. Reed Hopper
Damien Schiff
Leslie Weatherhead

Appendix I–1

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
IDAHO OPERATIONS OFFICE
1435 N. Orchard St.
Boise, Idaho 83706

April 4, 2008

Chantell and Michael Sackett
P O. Box 425
Nordman, ID 83848-0368

Re: **In *the Matter of Chantell and Michael Sackett***
Administrative Compliance Order,
EPA Docket No. CWA-10-2008-0014

Dear Mr. and Mrs. Sackett:

This is in further regard to the administrative compliance order ("Compliance Order") issued to you by the U.S. Environmental Protection Agency (EPA) dated November 26, 2007. The Compliance Order requires you to perform specified restoration activities including, but not limited to, removal of the unauthorized fill and restoration of the site. The specific elements are detailed in the Scope of Work for a Restoration Work Plan which is attached to and incorporated into the Compliance Order. Deadline for removal of the fill and replacement of the wetland soil is April 15, 2008; deadline for re-planting of the site is April 30, 2008.

Appendix I–2

EPA is aware that the site is still covered by a substantial amount of snow, thereby making the fill removal and re-planting not feasible at this time. Therefore, EPA is extending the deadline for removal of the fill and replacement of the wetland soil to May 15, 2008 and the deadline for re-planting of the site to May 30, 2008. These revisions change Section 2.2 and Section 2.6 of the Compliance Order and Section II.1., Section II.7., and Section VI.1. of the Scope of Work for a Restoration Work Plan. The complete revised schedule is as follows:

Action	**Commence-ment No Later Than**	**Completion No Later Than**
Fill shall be removed and wetland soil returned	May 1, 2008	May 15, 2008[1]
EPA or its representative conducts an inspection of Site	As soon as possible after notification	Prior to planting

[1] At least 48 hours prior to commencing removal activity on the Site, Respondents shall provide verbal notification to the EPA representative identified in Paragraph 2.12 of the Order Within 7 days of completion of the earthmoving work, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.12 or the Order The written notification shall include photographs of Site conditions prior to and following earthmoving activities.

Appendix I–3

Re-Planting of the entire Site	May 15, 2008	May 30, 2008[2]
Monitoring of the entire Site	October 1, 2008	October 31, 2008
Monitoring of the entire Site	June 1, 2009	June 31, 2009
Monitoring of the entire Site	October 1, 2009	October 31, 2009
Monitoring of the entire Site	October 1, 2010	October 31, 2010

If you should have any technical questions regarding the restoration effort, please feel free to contact me at 208-378-5756. For other questions concerning this matter, please contact Ankur Tohan with the EPA Office of Regional Counsel at 206-553-1796.

Thank you for your cooperation in this matter.

Sincerely,

/s/ John M. Olson
John M. Olson
Wetland Ecologist

[2] Within 7 days of completion of re-planting work, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.12 of the Order The written notification shall include photographs of Site conditions prior to and following re-planting.

cc: Ankur Tohan, EPA ORC-158
Barbara Benge, Corps of Engineers, Walla Walla

Mr. Leslie R. Weatherhead
Witherspoon, Kelley, Davenport & Toole
608 Northwest Boulevard, Suite 401
Coeur d'Alene, ID 83814-2146