No. 10-1062

In The

Supreme Court of the United States

CHANTELL SACKETT and MICHAEL SACKETT,
Petitioners,

v.

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

On Writ of Certiorari to
The United States Court of Appeals
For the Ninth Circuit

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS, THE REAL ESTATE ROUNDTABLE AND NATIONAL APARTMENT ASSOCIATION IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICI CURIAE*

The National Association of Home Builders (NAHB), The Real Estate Roundtable and National Apartment Association have received the parties' written consent to file this *Amici Curiae* brief in support of Petitioners.[1]

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

NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the property rights and interests of its members. NAHB was a petitioner in another Clean Water Act case, *NAHB v. Defenders of Wildlife,* 551 U.S. 644 (2007). It also filed an amicus brief in support of the Sacketts' Petition for Certiorari.

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[1] Under Rule 37.6 of the Rules of this Court, *Amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than *Amici*, their members, or their counsel contributed monetarily to the preparation and submission of this brief. The parties have given consent and the letters of consent to file this brief are attached.

The Real Estate Roundtable ("Roundtable") represents the leadership of the nation's top privately owned and publicly held real estate ownership, development, lending, and management firms, as well as the elected leaders of the 17 major national real estate industry trade associations. Collectively, Roundtable members hold portfolios containing over 5 billion square feet of developed property valued at over $1 trillion; over 1.5 million apartment units; and in excess of 1.3 million hotel rooms. Real estate firms represented through The Roundtable frequently obtain CWA permit coverage when developing and building their projects, under both section 402 (for discharges of stormwater) and section 404 (for discharges of fill material). Whether a land owner can obtain federal court review regarding "waters of the United States" jurisdiction on a parcel, which would trigger CWA permitting requirements, is of utmost importance to Roundtable members and the real estate community generally.

The National Apartment Association ("NAA") is the leading national advocate for quality rental housing. NAA is a federation comprised of 170 state and local affiliated associations, representing more than 50,000 members responsible for more than 5.9 million apartment units nationwide. NAA is the largest broad-based organization dedicated solely to rental housing in the United States. The association's membership is actively engaged in all aspects of the rental housing industry, including development, ownership, management, and financing of apartment communities.

NAA and NAA-affiliated associations advocate within the legal and legislative spheres on behalf of rental housing developers and operators, conduct apartment-related research, and promote the desirability of apartment living. The association actively participates in legal actions supporting the private property and due process rights of its members and advocates for fair governmental treatment of multi-family residential businesses with respect to taxation, fees, land use, zoning, and other issues affecting the real estate industry.

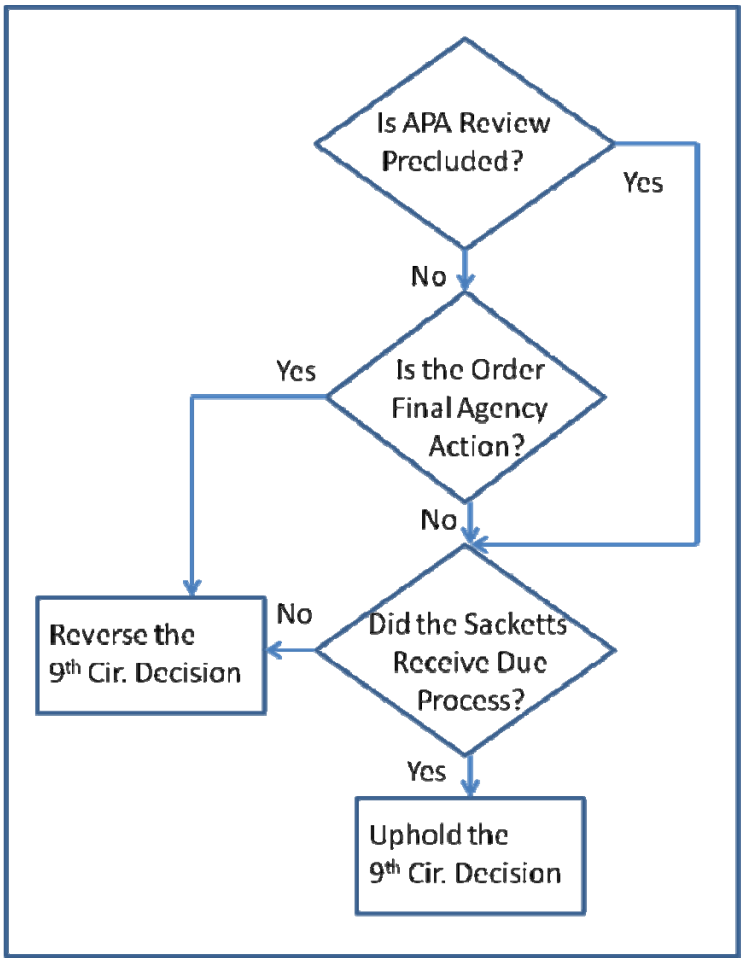
SUMMARY OF ARGUMENT

Straightforward application of two well-accepted principles of statutory construction should guide the Court's analysis. *See Figure* 1. The overriding principle is that constitutional issues should be avoided if the case can fairly be decided on statutory grounds. Also critical is the presumption that the Administrative Procedure Act ("APA") favors judicial review when it is not precluded by statute. With these precepts in mind, *Amici* suggest that the Court may use the following sequential process to decide this case:

- First, the Court should determine whether the Clean Water Act ("CWA") precludes APA judicial review over the Compliance Order issued to the Sacketts. To avoid a constitutional issue, and buttressed by the presumption favoring review, the answer to this question is "no" and APA review should be allowed. But this does not end the statutory inquiry.
- Second, the Court must decide whether the Compliance Order constitutes "final agency action" so as to trigger APA review. The well-accepted test for determining such finality must also be conducted against the backdrop of the constitutional avoidance principle. If EPA's Order is "final agency action," that is the end of the matter. The Sacketts get their day in court and there is no need to reach the constitutional question.
- Finally, *only* if the Court determines that APA review is precluded, or that the Compliance

Order is not a "final agency action," must it review the constitutionality of the process afforded to the Sacketts. Should the Court reach this stage, analysis of the factors established in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) reveals that the Sacketts did not receive due process under the Fifth Amendment. U.S. Const. amend. V.

Figure 1.



ARGUMENT

I. TO AVOID CONSTITUTIONAL QUESTIONS, THE CLEAN WATER ACT SHOULD BE CONSTRUED TO AFFORD JUDICIAL REVIEW TO THE SACKETTS.

A. The Avoidance Principle and the Presumption Favoring APA Judicial Review.

Two simple principles should guide the Court's review of this matter: The avoidance principle and the APA presumption favoring judicial review of final agency decisions.

Under the avoidance principle, "if an otherwise acceptable construction of the statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, [this Court is] obligated to construe the statute to avoid such problems." *Immigration and Naturalization Serv. v. St. Cyr* ("*INS*"), 533 U.S. 289, 299-300 (2001) (internal quotation marks and citations omitted). If there are two permissible constructions of a statute, the Court must choose the interpretation that avoids the unconstitutional result. *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).[2] In this case, a determination that the CWA

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[2] *See also Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs* ("*SWANCC*"), 531 U.S. 159, 173 (2001) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress") (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

allows APA judicial review of the Sacketts' administrative compliance order ("Compliance Order") will avoid the constitutional due process question.

In deciding whether the Sacketts can obtain judicial review, the second construction principle also comes into play: the APA offers a clear presumption favoring judicial review unless precluded by the underlying statute. The APA covers "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704, "except to the extent that -- (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." *Id.* § 701(a). Courts have interpreted these provisions to provide a presumption favoring judicial review of final agency decisions. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967) (APA's judicial review provisions should receive "'hospitable' interpretation"). Legislative history of the APA explains:

> Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.

S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945).

Nonetheless, the presumption may be overcome by "clear and convincing evidence" that Congress intended to preclude judicial review of certain

actions. *Abbott Labs,* 387 U.S. at 141. A court need not apply the "'clear and convincing evidence' standard in the strict evidentiary sense." *Block v. Cmty. Nutrition Inst.,* 467 U.S. 340, 350 (1984). Instead, a court may determine that Congress intended to preclude review based "not only [on the statute's] express language, but also [on] the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Id.* at 345.

B. The Text of the CWA Does Not Expressly Preclude Judicial Review of EPA Compliance Orders.

Judicial review is precluded where legislation explicitly states that the agency's decisions "shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision." U.S. Dept. of Justice, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, IX Section 10, JUD. REV. at 94 (1947). *See, e.g., Switchmen's Union of N. Am. v. Nat'l Mediation Bd.*, 320 U.S. 297 (1943) (Congress intended to preclude judicial review in statute stating "no … court of the United States shall have jurisdiction to review" certain actions of the Administrator of Veterans' Affairs).

The CWA's text does not expressly foreclose judicial review of administrative compliance orders. Section 509(b)(1) lists seven categories of EPA actions that may be filed in a U.S. Circuit Court of Appeals. 33 U.S.C. § 1369(b)(1). Compliance orders are not on this list, but there also is nothing to

explicitly preclude their review. Likewise, section 309(a) does not expressly preclude judicial review of such orders. 33 U.S.C. § 1319(a). Under this section, EPA has the discretion to either issue an administrative compliance order "on the basis of any information available," *id.* at § 1319(a)(3), or bring a civil enforcement action in U.S. district court "for any violation for which [EPA] is authorized to issue a compliance order." *Id.* at § 1319(b). In short, nothing in the CWA explicitly prevents the suit brought by the Sacketts.[3]

C. Nor Does the CWA's Structure or Intent Preclude Judicial Review of Compliance Orders.

While the CWA expressly states that some EPA actions are amenable to court review without mentioning compliance orders, this alone does not

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[3] By analogy, sections 309(a) and 509(b) are silent concerning challenges to permits issued by the U.S. Army Corps of Engineers under section 404. 33 U.S.C. §§ 1344, 1369(b). Yet, courts routinely accept challenges to section 404 permits under the APA. *E.g. Mich. Peat v. EPA*, 175 F.3d 422, 428 (6th Cir. 1999) (landowner's challenge to conditional section 404 permit was reviewable final agency action); *Nat'l Wildlife Fed'n v. Whistler*, 27 F.3d 1341 (8th Cir. 1994) (reviewing the Corps' issuance of a permit under section 404(b) of the CWA that contained 42 conditions); *Riverside Irrigation Dist. v. Stipo*, 658 F.2d 762, 767 (10th Cir. 1981) (Corps' decision that landowners were not qualified for a nationwide permit was reviewable final agency action); *Bankers Life & Cas. Co. v. Callaway*, 530 F.2d 625, 632 (5th Cir. 1976) (Corps' decision to issue a dredge and fill permit constituted final agency action under the APA and Rivers and Harbors Act); *Citizens Comm. for the Hudson Valley v. Volpe*, 425 F.2d 97, 102 (2d Cir. 1970) (same).

imply that such orders are shielded from judicial oversight:

> [T]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent.

Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 674 (1986) (citations omitted). Moreover, through the lens of the avoidance principle, allowing the Sacketts federal court access would not "severely disrupt [the CWA's] complex and delicate administrative scheme" or undermine Congress's intent. *Block*, 467 U.S. at 348.

The CWA's enforcement provisions were established "to avoid the necessity of lengthy fact finding, investigations, and negotiations," and that administrative compliance orders were intended for cases "based on relatively narrow fact situations requiring a *minimum* of discretionary decision making or delay."[4] S. Rep. No. 92-414, Cong., 2d Sess. at 3730 (1972) (emphasis supplied). Affording judicial review to the Sacketts would not disrupt any "delicate" CWA scheme. From EPA's administrative vantage point, it had decided all that was necessary

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[4] The determination of whether a geographic feature is "waters of the U.S." requires *maximum* agency discretion, especially after the fractured *Rapanos* decision. *Rapanos v. U.S.,* 547 U.S. 715 (2006). Such complicated questions of CWA jurisdiction are plainly *not* "committed to agency discretion *by law"* for purposes of the APA preclusion inquiry under 5 U.S.C. § 701(a)(2) (emphasis supplied).

to effectuate the Act's goals. The Compliance Order targeting the Sacketts made factual and legal conclusions that:

> i) Their property contained jurisdictional "waters of the United States;"
> ii) They conducted activities that violated federal law; and
> iii) They were obliged to complete all of the remedial actions in the Compliance Order by specified deadlines.

App.B1-B11.

Affording the Sacketts federal court access after issuance of a compliance order would not hinder EPA's ability to investigate potential violations or issue an order requiring compliance with the Act.

In truth, *Amici* believe there is nothing **pre**-enforcement about this case. The Sacketts have been the targets of *actual* enforcement actions, investigations, and conclusions made by EPA. The agency's Order unequivocally states that Petitioners violated federal law. App.B6-B7, paras 1.11, 1.13. Most definitely, this is not a case where an agency has refused to take action. Rather, EPA has "exercise[d] its coercive power over an individual's liberty or property rights [which] courts often are called upon to protect," and the Sacketts' Compliance Order is an "action [that] itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers." *Heckler v.*

Chaney, 470 U.S. 821, 832 (1985) (agency decision to not take enforcement action was not subject to APA review).

The CWA's penalty scheme also lends support for judicial review here. EPA is empowered to seek penalties both for violations of the Act and compliance orders. When EPA calculates those penalties, it may adjust them upward if the violator failed to comply with an administrative compliance order. 33 U.S.C. § 1319(d) (penalties for violations of "any order issued by the Administrator" may be adjusted based on the period of noncompliance and "good-faith efforts to comply").[5] Thus, landowners risk more exorbitant penalties for violations of administrative compliance orders if there are impediments to judicial review that delay compliance and extend the noncompliance period.

Accordingly, the CWA's structure does not preclude APA review of compliance orders, but rather its penalty provisions can be fairly construed to favor judicial oversight.

D. Cases Finding Statutory Structures That Foreclosed Judicial Review are Distinguishable.

Block v. Cmty. Nutrition Inst., 467 U.S. 340, 350 (1984), is a leading case where a statute's general scheme contextually precluded judicial review of

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[5] *See also* EPA, INTERIM CLEAN WATER ACT SETTLEMENT PENALTY POLICY, at 3, 12 (Mar. 1, 1995), http://www.epa.gov/compliance/resources/policies/civil/cwa/cwapol.pdf (*"Interim CWA Penalty Policy"*) (EPA may seek penalties for "violations of § 309(a) compliance orders" and may adjust them upward if the violator failed to comply with a compliance order).

agency action. The Court would not allow "ultimate consumers of dairy products" to obtain APA review of milk market orders issued under the Agricultural Marketing Agreement Act. 467 U.S. at 341. The act clearly allowed suits challenging milk orders by "handlers" who processed milk products. Because "[t]hese provisions for handler-initiated review make evident Congress' desire that some persons be able to obtain judicial review of the Secretary's market orders," the Court decided that the general consumer public *as a class* did not receive similar opportunities for court access:

> The remainder of the statutory scheme … makes equally clear Congress' intention to *limit the classes* entitled to participate in the development of market orders. … Nowhere in the Act, … is there an express provision for participation by consumers in any proceeding. In a complex scheme of this type, the omission of such a provision is sufficient reason to believe that Congress intended to foreclose consumer participation in the regulatory process. … [*T]he preclusion issue turns ultimately on whether Congress intended for that class to be relied upon to challenge agency disregard of the law*."

Id. at 346-47 (emphasis supplied).

The Sacketts, in contrast to the generic milk consumers in *Block*, are a class of one. What other plaintiffs could invoke the APA to test whether EPA's Compliance Order – which applies *only* to *their* property – was "an abuse of discretion," "not in accordance with law," "in excess of statutory

jurisdiction," or "contrary to constitutional right"? 5 U.S.C. §§ 706(2)(A), (B), (C). Guided by the constitutional avoidance principle, the CWA's enforcement regime should not be construed to imply legislative intent that blocks the Sacketts (or similarly situated property owners) from repairing to federal court. *See also Koretoff v. Vilsack,* 614 F.3d 532, 539 (D.C. Cir. 2010) (refusing a "radical interpretation" of *Block* that would "undermine the presumption in favor of judicial review that the Supreme Court has consistently reaffirmed") (citations omitted).

A key factor in the Court's subsequent treatment of *Block* has been whether the structure of the underlying statute provides an administrative process for aggrieved parties to obtain review of the challenged agency action. For example, in *United States v. Fausto,* 484 U.S. 439 (1988), the Civil Service Reform Act was held to preclude judicial review of an agency decision imposing a 30-day suspension of a federal employee who misused a government vehicle. Relying on *Block,* the Court found that the Merit Systems Protection Board was a "structural element" within the act establishing the "primacy … for administrative resolution of disputes over adverse personnel action," which could be followed by an available appeal from the Board to the Federal Circuit Court of Appeals. *Id.* at 449. Compare this result to *Bowen,* 476 U.S. 667 (1986). In *Bowen*, the Court allowed judicial review to a challenge against the validity of Medicare regulations. The underlying statute's structure did not allow a "fair hearing" by insurance carriers on issues raised by the plaintiffs regarding "'the

legality, constitutional or otherwise, … [of] regulations relevant to the Medicare program.'" *Id.* at 675-76.

Of course, nothing in the CWA gives the Sacketts an avenue for administrative review of EPA's Order with the promise of ultimate judicial oversight. They can only get to court if the government decides to bring suit or by seeking a CWA permit they believe is illegal in the first place. *Infra* pp. 27-31. The Court, however, "normally [does] not . . . require plaintiffs to 'bet the farm … by taking the violative action' before testing the validity of the law." *Free Enterp. Fund v. Public Co. Accounting Oversight Bd.,* 130 S.Ct. 3138, 3151 (2010) (citing, *inter alia*, *Ex Parte Young,* 209 U.S. 123 (1908)).

Of course, all of this begs the obvious: Why did Congress fail to expressly provide judicial review of CWA compliance orders? Chronology may provide one answer. The controversies surrounding "waters of the U.S." determinations by EPA were not a paramount regulatory or judicial concern when Section 309 was last amended in 1987, long before the *SWANCC* and *Rapanos* decisions in 2001 and 2006, respectively. In any event, if Congress did indeed have "waters of the U.S." controversies in mind when drafting the CWA's judicial review provisions, either it did not intend to provide court review of administrative compliance orders or it assumed that such review would be available under the APA. The first option raises a constitutional issue: If there is no judicial review of administrative compliance orders, then citizens in the Sacketts' position are deprived due process because they are not provided a meaningful opportunity to contest an

order. The second option avoids a constitutional issue: If an administrative compliance order is a final agency action, then the APA allows judicial review of the order.

In sum, the CWA does not explicitly foreclose judicial review of compliance orders. Furthermore, its statutory structure can be fairly construed in a manner that allows property owner to access the courts (and challenge significant penalties) without hindering EPA's ability to conduct administrative investigations. Applying the avoidance principle to this statutory framework weighs in favor of allowing judicial review of compliance orders that are final agency action.

II. THE EPA'S COMPLIANCE ORDER IS FINAL AGENCY ACTION

Concluding that the CWA does not preclude APA review of the Compliance Order does not end the statutory inquiry or avoid the due process question. The next step is to determine whether the Compliance Order is "final agency action." *Amici* submit that it is.

In *Bennett v. Spear*, this Court established a two-prong test for determining whether an agency action is "final" and subject to judicial review under the APA. *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997). First, the agency action must mark the "consummation" of the agency's decision making process, rather than being merely tentative or interlocutory in nature. Second, the action must be one "by which rights or obligations have been determined, *or* from which legal consequences will flow." *Id.* at 178 (internal quotation marks and

citations omitted). The focus of a "finality" determination is on the practical and legal impacts of the agency action, not the label attached to it. *Abbott Labs v. Gardner*, 387 U.S. 136, 149-50 (1967); *accord F.T.C. v. Standard Oil Co. of Cal.*, 449 U.S. 232, 239 (1980); *Abramowitz v. EPA*, 832 F.2d 1071, 1075 (9th Cir. 1987).

A. The EPA's Action Was Complete.

The EPA's November 26, 2007, Compliance Order[6] begins with EPA's "FINDING AND CONCLUSIONS," follows with an "ORDER" and concludes with "SANCTIONS." Such characterizations are ordinarily made by an agency or court on final disposition following a hearing. In the Sacketts' case there was no hearing or opportunity to submit information and inform EPA's final conclusions. The Agency unilaterally determined that jurisdictional wetlands were present on the Sacketts' property, pollutants had been discharged into those wetlands absent the required permits, and remediation of the site was required. App.B1-B18. There is nothing tentative or unfinished about ordering the Sacketts to halt construction and restore their property. This was EPA's "last word" and final determination that compliance was necessary. *Alaska, Dep't of Envtl. Conservation v. EPA*, 244 F.3d 748, 750 (9th Cir. 2001) ("*Alaska I*") aff'd, 540 U.S. 461 (2004) ("*Alaska II*") (holding that an EPA compliance order represented the agency's "final position on the

[6] The Compliance Order looked like a Court order, complete with a legal caption and numbered paragraphs.

factual circumstances," with regard to whether the CWA had been violated); *Allsteel, Inc. v. EPA*, 25 F.3d 312, 315 (6th Cir. 1994) (holding that an EPA compliance order was the Agency's "last word" because the order demanded immediate compliance by the regulated party, and the EPA's only remaining option was court enforcement for non-compliance).

The ring of finality is also found in the wording of the Compliance Order and accompanying Restoration Work Plan (RWP). For example, in the "ORDER" section of the Compliance Order, EPA used the word "shall" eighteen times in describing actions it believed the Sacketts had to complete. App.B7-B10. paras. 2.1-2.14. EPA required site remediation by a particular date, follow-up written notification to substantiate completion, and ongoing monitoring. *Id*. The RWP added another layer of finality to the Compliance Order by dictating the seed mix, acceptable deciduous plant species, inches between plantings, and "site…fenc[ing] for the first three growing seasons." App.B12-B16. paras. 1-9. Indeed, the Compliance Order and RWP reflect EPA's "definitive administrative position" on the question of the Sacketts' compliance with the CWA, thus satisfying the first prong of the *Bennett* test. *Alaska II*, 540 U.S. at 482-83; *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 591 (9th Cir. 2008).

B. The Compliance Order Determined Rights and Obligations, and Produced Legal Consequences.

In addition to being "final," the EPA's Compliance Order impacted the Sacketts' "rights and obligations" and produced "legal consequences." *Bennett*, 520 U.S. at 178.

The Sacketts own the "bundle of sticks" that make-up their property rights in 1604 Kalispell Bay Rd., Idaho. *United States v. Craft*, 535 U.S. 274, 278 (2002). The practical effect of the Compliance Order is the removal of at least two of those sticks. The Compliance Order effectively required the Sacketts to halt construction of their home at considerable cost of time, money, and other resources. This impacted their right to use their land. *C. Dickman v. Comm'r of Internal Revenue,* 465 U.S. 330, 336 (1984) ("Property is composed of constituent elements and of these elements the right to use the physical thing to the exclusion of others is the most essential and beneficial.") (internal citation omitted).

Furthermore, the Compliance Order deprived the Sacketts another "stick" in their bundle of rights by limiting their ability to freely transfer their property. The Compliance Order dictates "Respondent 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." App.B10, para. 2.13. Idaho law provides that any person who transfers real property must disclose all "material matters relating to the physical condition of the property to be transferred…." Idaho Code Ann.

§ 55-2506 (2011). This includes any condition that may affect a prospective purchasers "ability to clear title" and "any other problems, including legal, physical or other" known by the Seller. Idaho Code Ann. § 55-2508 (2011). Thus, should the Sacketts wish to sell their property, they are now obligated to disclose what amounts to a latent defect – the presence of jurisdictional wetlands and a federal compliance order. This negatively impacts both property value and marketable title. *See generally* Jeffrey A. Michael, Raymond B. Palmquist, *Envtl. Land Use Restriction and Prop. Values*, *in* 11 VT. J. OF ENVTL. L. 437, 747-49 (Issue 3, Spring 2010) (reviewing studies that illustrate the negative impact that wetlands have on a property's value).

Finally, the EPA itself admits it has imposed new obligations on the Sacketts. EPA's May 15, 2008 letter amending the Compliance Order states that "this Amended Compliance Order removes the *obligation* that wetland vegetation be re-planted at the site by July 1, 2008" but does not eliminate the Sacketts remaining restoration obligations. App.A2 (emphasis added). Thus, the Agency recognized that its initial Compliance Order imposed "obligations" on the Sacketts.

The second prong of the Bennett test can also be met when an agency action has "legal consequences." EPA's Compliance Order has several. First, upon issuance, the Sacketts' became subject to civil penalties should they choose to disregard the Compliance Order. In *Alaska I* the question confronted by the Ninth Circuit was whether three EPA administrative compliance orders, which effectively invalidated a Clean Air Act permit and

"prevent[ed] any further construction or modification" of a mining facility, constituted appealable final agency actions. *Alaska I*, 244 F.3d 748, 749-50. This Court adopted the Ninth Circuit's analysis in affirming that the compliance orders were final agency actions subject to review under the *Bennett* test. *Alaska II*, 540 U.S. 461, 483. With respect to the second *Bennett* prong, the Court accepted that the orders created "practical and legal consequences" in the form of "lost costs and *vulnerability to penalties*" if the site operator disobeyed the orders. *Id*. (emphasis added). The legal consequence of the Compliance Order issued to the Sacketts is the same. CWA section 309(d) allows a court to issue penalties of $37,500 against a person that violates a compliance order. 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4 (adjusting the maximum penalty amount for inflation). This authority is confirmed by the cover letter accompanying the Compliance Order. It provides "failure to comply with the 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…." App.B2; *see also* App.A2, A10.

Second, the Compliance Order carries legal consequences in that, unless complied with, it precludes the Sacketts from securing a CWA §404 permit. EPA maintains that the Sacketts can secure judicial review without exposure to potential legal penalties by submitting a §404 permit application to the U.S. Army Corps of Engineers ("Corps") and then requesting review of the permitting decision under

the APA. Brief of Resp'ts Envtl. Prot. Agency, et al. in Opp'n to Certiorari, No. 10-1062 (May 27, 2011) at 10. However, Corps regulations provide that no permit application will be accepted pending resolution of corrective measures detailed in a compliance order. 33 C.F.R. § 326.3(e)(1). Thus, the Sacketts could not conform to the CWA (by obtaining a permit) unless they first complied with EPA's Order.

There are also compounding legal penalties that stem from a violation of the Compliance Order. Penalties started to accrue the day the Order was violated and continue each day until it is satisfied. EPA, REVISED CWA SECTION 404 SETTLEMENT PENALTY POLICY, at 5 (Dec. 21, 2001), *available at* http://www.epa.gov/compliance/resources/policies/civil/cwa/404pen.pdf ("CWA 404 Penalty Policy"). A single day of not correcting the alleged CWA 402 and 404 violations detailed in the Compliance Order carries a civil penalty up to $75,000 -- $37,500 per day per violation for two violations. App.A2, A6, para 1.10; App.B2, B6, para. 1.10; 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4 (adjusting the maximum penalty amount for inflation). One week of non-compliance may inflate the civil penalty to $525,000. The EPA will also consider aggravating and mitigating circumstances before applying an administrative penalty or making penalty recommendations to a court. 33 U.S.C. § 1319(d). For example, a "recalcitrance" adjustment factor is often used to increase a penalty. *CWA 404 Penalty Policy,* at 8, 15 (Dec. 21, 2001); *Interim CWA Penalty Policy,* at 4, 12 (March 1, 1995). Recalcitrance relates to the alleged violators "delay or refusal to

comply with the law, to cease violating, to correct violations, or to otherwise cooperate with regulators once specific notice has been given and/or a violation has occurred." *Id.* at 15 (Dec. 21, 2001).

In the Sacketts' case, the longer the dredged or fill material remain in place, vegetation is not replanted and monitoring reports delayed, the greater the penalty. In some cases, applying the recalcitrance factor may result in a "gravity adjustment of up to 200 percent (200%) of the preliminary gravity amount." *Id.*

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Thus, the EPA's issuance of the Compliance Order was a "final action" that both affected the Sacketts' obligations and had legal consequences. Therefore, under the APA, the EPA's action was a "final agency action" that is judicially reviewable. 5 U.S.C. § 704.

III. THE EPA'S COMPLIANCE ORDER PROCESS VIOLATED THE SACKETTS' RIGHT TO DUE PROCESS.

If the Court determines that the CWA precludes APA review of CWA compliance orders, *or* that the Compliance Order issued in this case is not a final agency action, *then* it must determine whether the government deprived the Sacketts of "life, liberty or property without due process of law." U.S. Const., amend. V.[7] The familiar "two step" due process

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[7] In this matter the Fifth Amendment Due Process Clause is implicated because the federal government deprived the Sacketts of "life, liberty, or property." U.S. Const. amend. V. *Amici* rely on both Fifth and Fourteenth Amendment due

analysis requires the Court to first determine whether the Sacketts held an interest safeguarded by the Fifth Amendment's protection of life, liberty, or property. U.S. Const., amend. V. If so, then it must decide whether the EPA's procedures were "constitutionally sufficient." *Swarthout v. Cooke,* 131 S.Ct. 859, 861 (2011) ("As for the Due Process Clause, standard analysis under that provision proceeds in two steps: We first ask whether there exists a liberty or property interest of which a person has been deprived, and if so we ask whether the procedures followed by the State were constitutionally sufficient."); *Ingraham v. Wright*, 430 U.S. 651, 672 (1977).

"A fundamental requirement of due process is 'the opportunity to be heard.' It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). Furthermore, due process requires that "an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971); *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) ("[W]here a State must act quickly, or where it would

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process cases, as the Court has never found that "due process of law" means something different in the two Amendments. *Malinski v. People of State of New York*, 324 U.S. 401, 415 (1945) (J. Frankfuter concurring) ("To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.").

be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause."). It is "the decisionmaker's obligation to inform himself about facts relevant to his decision and to learn the claimant's own version of those facts." *Heckler v. Campbell*, 461 U.S. 458, 471 n.1 (1983) (J. Brennan concurring).

Finally, to determine whether a hearing procedure violates the Due Process Clause, the Court must balance three factors: "the private interest that will be affected;" the "risk of an erroneous deprivation of such interest through the procedures used;" and the Government's interest in the process. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

In this case, the EPA denied the Sacketts of a protectable property interest using a process that fails the *Mathews'* test.

A. The Sacketts Hold a Property Interest Protected by the Due Process Clause.

The Court has long held that an owner of property possesses an interest worthy of protection under the Due Process Clause.

In *Fuentes v. Shevin, et al.,* 407 U.S. 67 (1972), similar statutes in Florida and Pennsylvania allowed for the seizure of goods or chattels in a person's possession under a writ of replevin. *Id.* at 70. In holding that the replevin statutes violated the Fourteenth Amendment, the Court explained that the "Amendment's protection of 'property' . . . has never been interpreted to safeguard *only the rights of undisputed ownership*. Rather, it has been read broadly to extend protection to 'any significant

property interest,' including statutory entitlements." *Id.* at 86. (internal citations omitted) (emphasis added). Thus, the Court concluded that "undisputed ownership" is an interest protected by the Due Process Clause.

Similarly, in *Bd. of Regents of State Coll. v. Roth,* 408 U.S. 564, 572 (1972), a state university dismissed a professor after one year of employment. *Id.* at 566. In resolving whether the professor held a protectable property interest, the Court explained that "property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Id.* at 571-572. Thus, the Court established "ownership" as the baseline property interest protected by the Due Process Clause. *See also United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49 (1993) (holding that the plaintiffs home and land were "property interests protected by the due process clause.") (hereinafter *Good*); *Connecticut v. Doehr*, 501 U.S. 1, 10 (1991), explaining that ownership interests affected by attachment "are significant."); *DeBlasio v. Zoning Bd. of Adjustment for the Twp. of West Amwell*, 53 F.3d 592, 600 (3d Cir. 1995) (providing that "ownership is a property interest worthy of substantive due process protection.").

It is undisputed that the Sacketts own the property that the government is attempting to regulate. *Sackett v. U.S. E.P.A.*, 622 F.3d 1139, 1141 (9th Cir. 2010). That ownership interest is plainly a property interest worthy of Due Process protection.

B. The Process Established By the CWA Denied the Sacketts of Due Process.

Since the Sacketts hold a protectable interest, the Court must determine "whether the procedures followed by the [EPA] were constitutionally sufficient." *Swarthout,* 131 S.Ct. at 861. They were not.

1. The CWA Compliance Order Review Process.

Absent APA review, there are basically two avenues in which a recipient of a CWA compliance order can present his side of the story. As neither the CWA, nor the EPA, establishes an administrative hearing process, both avenues lead to court.

Under the first "avenue," a landowner in the Sacketts' position may seek judicial review after submitting to the Corps's section 404 permit application process. *Sackett*, 622 F.3d at 1146 (citing 33 C.F.R. § 331.10; 5 U.S.C. § 704). However, the landowner receives her day in court only ***if*** she succumbs to possible agency overreach by spending time and money[8] to implement the Order's commands;[9] ***if*** she spends an average of 788 days

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[8] As illustrated by the RWP, obeying a compliance order will obviously cost the recipient both time and money. App.B12 – B18.

[9] Where the Corps has determined that a landowner filled wetlands without authorization, she must apply for an "after-the-fact" permit. 33 C.F.R. § 326.3(e)(1). It cannot issue such a permit, however, until corrective measures are completed. *Id.* Additionally, the Corps – "exercis[ing] the discretion of an enlightened despot" – will not process the application until the

and $271,596 (excluding mitigation costs and design changes) to complete the section 404 permit application process;[10] ***if*** the agency denies the permit application;[11] and ***if*** she exhausts all

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district engineer is satisfied that the landowner has fully restored the wetlands and eliminated any current or future detrimental impacts. *Id.* at § 326.3(e)(1)(i); *Rapanos*, 547 U.S. at 721 (2006) (plurality). The landowner must also agree to toll the statute of limitations. 33 C.F.R. § 326.3(e)(1)(v).

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

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

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

administrative remedies.[12] Only ***then*** the landowner is afforded a hearing to challenge the agency's decision denying the permit that she believes was not required. *See Sackett*, 622 F.3d at 1146. The Ninth Circuit assumed that a landowner may then challenge both the permit decision and the Compliance Order.

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

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

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

reality, the Sacketts could only obtain a hearing if the government filed an action under section 309. 33 U.S.C. § 1319.

Under the second "avenue," the landowner can obtain a hearing if the government files[13] an action under Section 309(b). 33 U.S.C. § 1319(b). However, under this avenue, the landowner receives her day in court only ***if*** the agency refers the matter to the Department of Justice (DOJ) for civil or criminal enforcement;[14] ***if*** (and ***when***) the DOJ files a civil or criminal complaint in federal court; and ***then*** she can present her version of the facts and law in a federal district court. Of course, if she has disregarded the Compliance Order, then she has risked prison time and hundreds of thousands of dollars in civil and criminal fines.[15] Conversely, if she obtains judicial review having complied with the Order, then she may have spent time and money, and altered her property to learn that the Agency never had jurisdiction.

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[13] Under this avenue, it is the government that controls the timing and substance of the hearing. Thus, in reality it is the government's hearing, not the recipient's.

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

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

In sum, to obtain review, the recipient of a CWA compliance order may either (1) disregard[16] or comply with it, and wait for the government to bring an action seeking civil or criminal penalties, or (2) comply with the order, submit to the government's permitting process and later challenge the agency's permit decision. *Sackett*, 622 F.3d at 1146-47. This is not a constitutionally adequate process.

2. Application of the Mathews' Factors.

To determine if the EPA provided the Sacketts with a constitutionally sufficient process, the Court must balance three factors:

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

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Application of these factors to the CWA compliance

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[16] Any person who violates the CWA is potentially subject to penalties of $37,500 per day. 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4. The Ninth Circuit noted that civil penalties are "committed to judicial, not agency, discretion." *Sackett*, 622 F.3d at 1146. But the court ignored that, under the civil penalty provision, the landowner risks more ruinous penalties by ignoring the compliance order and waiting for her day in court. 33 U.S.C. § 1319(d) (allowing an upward penalty adjustment for the "economic benefit" of delayed compliance and reflecting "good-faith efforts to comply"); *Interim CWA Penalty Policy* (Mar. 1, 1995) at 3, 12; *CWA 404 Penalty Policy* (Dec. 21, 2001) at 15.

order review process confirms that the Sacketts were denied due process.

a. The Sacketts' Interest v. The Government's Interest.

The "private interest that will be affected" factor weighs strongly in favor of a determination that the process the Sacketts were afforded violated their right to due process. The "right to maintain control" over one's property "and to be free from governmental interference, is a private interest of historic[al] and continuing importance." *Good*, 510 U.S. 43, 53-54 (1993); *Fuentes*, 407 U.S. at 81 (providing that in the United States we place a "high value . . . on a person's right to enjoy what is his, free of governmental interference."). The Sacketts wished to build a home[17] on their private property. *Sackett*, 622 F.3d at 1141. The EPA, however, required the Sacketts to alter their land and refrain from putting it to their desired use. Thus, the Sacketts were denied important ownership rights, such as the right to unrestricted use and enjoyment, and the right to occupy. *Good,* 510 U.S. at 53-54.

In addition, property owners like the Sacketts have an interest in a prompt hearing because, faced

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[17] *See Silverman v. United States,* 365 U.S. 505, 512 (1961) ("'A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. . . . A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.'" (quoting *United States v. On Lee*, 193 F.2d 306, 315-316 (2d Cir. 1951) (dissenting opinion))).

with an order, they must decide whether to disregard it, or comply. Under the current process, ignoring the order could cost them up to $75,000 per day per violation. *Supra* p. 22. Therefore, compliance order recipients who believe the government is incorrect have an interest in a "prompt post-deprivation procedures" to keep the penalties from multiplying. *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 241 (1988).

Furthermore, should a landowner comply with a CWA compliance order and obtain a hearing under either avenue for review, that suit will not include a claim for damages.[18] Thus, should the court determine that no CWA violation existed, "this determination, coming months after" the initial order would not make compliance order recipients whole. *See Good,* 510 U.S. at 56 (quoting *Doehr*, 501 U.S. at 15.). Thus, recipients of CWA compliance orders have an interest in a prompt hearing so that they are not deprived of the time and money spent complying with an order that was erroneously issued.

The government may claim it has a legitimate interest in ensuring that the "waters of the United States" are not illegally degraded. The EPA's "general interest" in clean water, however, is not the issue in this case. *Id.* at 58 (providing that the government interest was whether the government

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[18] Under the Federal Tort Claims Act a person may obtain monetary damages from the federal government for the wrongful act of a government employee. 28 U.S.C. §1326(b). However, before bringing suit, the claimant must comply with the administrative procedures established in 28 U.S.C. § 2675.

needed to seize property before a hearing). The question is whether the government has an interest in a procedure that delays review of a compliance order until after the recipient complies with the order and submits to lengthy and expensive permit process.

There is certainly no reason to have the recipients of compliance orders wait for judicial review, which could take months, if not years. *See Good*, 510 U.S. at 56 (stating that because of the "congested civil docket" a property owner may not receive a hearing for "many months."). As the language of this Compliance Order confirms, the EPA had determined the facts, concluded that the Sacketts violated the law, and commanded that they take action to alter their property. *See supra* p.11. There was nothing more for the government to do. Thus, allowing the Sacketts to have a hearing would not disrupt the government's procedures. *See Barry v. Barachi*, 443 U.S. 55, 66 (1979) (explaining that there was no State interest in an "appreciable delay in going forward with a full hearing."). Therefore, this factor also weighs in favor of a determination that the Sacketts were denied due process of law.

b. The Risk of Erroneous Deprivation.

Finally, the Court must review the risk that the current process erroneously deprived the Sacketts' of their interests, and the value that additional procedures would provide. *Mathews,* 424 U.S. at 335. This final *Mathews*' factor also weighs against the constitutionality of the process afforded to the Sacketts.

First, the current process certainly provides a risk of erroneous deprivation to a person that receives a CWA compliance order. "Risk" can be separated into two components—the magnitude of the injury and the probability of such injury. *See United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947) (Judge Hand explaining that a duty is created when the burden is less than the probability multiplied by the magnitude.) Compliance orders can cause considerable injuries to recipients and unfortunately have an unacceptable high likelihood of being incorrectly issued.

For example, if a recipient of a compliance order decides to disregard it and moves forward with his project, he risks the possibility of losing the capital expended on the project, the cost of restoring the property, and penalties of $37,500 per day per violation while waiting for the government to initiate an action under section 1319(b) and for the court to make a decision. Similarly, if he decides to comply,[19] he risks the cost of restoring the property under the terms of the order and the permitting costs; just to later be found innocent of any wrongdoing. Therefore, whether the recipient of a CWA compliance order either complies with or ignores it, the magnitude of potential loss is very high.

Similarly, the EPA can issue a compliance order based on "any information available." 33 U.S.C. § 1319(b). Such information could include "a staff report, newspaper clipping, anonymous phone tip or

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[19] *Amici* submit that faced with possible penalties of $37,500 per day, a majority of people will comply with the type of order that the EPA issued to the Sacketts.

anything else . . . ." *Tenn. Valley Auth. v. Whitman,* 336 F.3d 1236, 1241 (11th Cir. 2003). The CWA does not require the Administrator to substantiate the information or conduct its own investigation, nor does it require that any legal conclusions be made by an attorney. Therefore, the reliability of compliance orders that are based on "any information" can certainly be questioned.

Moreover, one basis for issuing the Compliance Order in this case was the EPA's belief that the property in question was a "navigable water" and therefore a "water of the United States." 33 U.S.C. § 1362(7) (defining "navigable waters" as "waters of the United States."). It is an understatement to say that the meaning of this term is far from clear. *See e.g.*, *"Navigable Waters of the United States:" A Call for Transparency, Clarity, and Uniformity*, 9 LOY. MAR. L.J. 1, 21 (2011) (the combination of case law, statutory definitions and government regulations "have caused significant confusion over what types of wetlands are covered by the CWA."); Andrew L. Fono and Russ Krauss, *Jurisdictional Wetlands and Mitigation Banking in Texas, How the Water looks Today*, 48-APR Hou. Law. 16, 21 (2011) (explaining that the definition of jurisdictional wetlands is a "stable uncertainty.")

For example, in *Rapanos v. United States*, 547 U.S. 715, 720, 730 (2006), the Court addressed whether two separate wetlands (one and eleven miles from traditionally navigable waters, respectively) were "navigable waters". Unfortunately, "no opinion command[ed] a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act." *Id.* at

758 (C.J. Roberts concurring). Thus, even this Court, with a complete record and two lower court opinions, found it difficult to determine whether a geographic feature falls within CWA jurisdiction.

Furthermore, the EPA and Corps have struggled to determine which features are within their jurisdiction. Since *Rapanos*, the Agencies have developed two separate guidance documents interpreting the term "waters of the United States," and they are currently finalizing a third. In the latest draft guidance, the Agencies explain that "the extent of waters over which the agencies assert jurisdiction under the CWA will increase compared to the extent of waters over which jurisdiction has been asserted under existing guidance . . . ." *Draft Guidance on Identifying Waters Protected by the Clean Water Act*, 3 (2011), http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf (last visited Sept. 16, 2011). Hence, even though Congress has not changed the definition of the term "navigable waters" since 1972, the Agencies are now reinterpreting the term to increase their jurisdiction. If the Agencies' headquarters are unclear of their jurisdiction, compliance orders based on that jurisdiction can certainly be called into doubt.

Thus, the penalties and possible lost capital associated with CWA compliance order are ruinous, and there is a considerable possibility that the government's basis for issuing them is unfounded. Therefore, the risk of erroneous deprivation is high.

Finally, additional procedures could certainly mitigate some of the risk. Much of the "magnitude"

component occurs due to timing—penalties and the cost of compliance add up while waiting months if not years for judicial review. Furthermore, as compliance orders are based on "any information," additional procedures that would test the accuracy and reliability of that information would increase the likelihood that they are not erroneously issued.

Therefore, because additional procedures would mitigate the high risk of erroneous deprivation, the final *Mathews'* factor also weighs against the constitutionality of the current process.

* * *

Accordingly, being property owners, the Sacketts had a considerable interest in using and controlling their private property and the risk that the government had mistakenly deprived them of that interest is unacceptable high. Furthermore, it would have been a small burden on the government to provide the Sacketts with an opportunity to "present [their] side of the story." *Goss v. Lopez*, 419 U.S. 565, 581-82 (1975). Thus, on balance, the three *Mathews'* factors weigh against the constitutionality of the process the government afforded the Sacketts. Consequently, if the Court determines that the EPA's Compliance Order was not reviewable under the APA, it should find that the EPA deprived the Sacketts of due process in violation of the Fifth Amendment.

CONCLUSION

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

DATED: September 30, 2011.

Respectfully submitted,

Duane Desiderio
THE REAL ESTATE ROUNDTABLE
Market Square West
801 Pennsylvania Ave., N.W. , Suite 720
Washington, D.C. 20004

John J. McDermott
NATIONAL APARTMENT ASSOCIATION
4300 Wilson Blvd,
Suite 400
Arlington, VA 22203

Thomas J. Ward*
Jeffrey B. Augello
Holli J. Feichko
NATIONAL ASSOCIATION OF HOME BUILDERS
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 866-8200
tward@nahb.org
* *Counsel of Record*

APPENDIX

Sackett, Amended Administrative Compliance Order..... App. A1

Sackett, Administrative Compliance Order..... App. B1

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 REOUESTED

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. CW A-l0-2008-0014**

Dear Mr. and Ms. 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").

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 Reinhart, U.S. Army Corps of Engineers

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

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

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 40 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 l604 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 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 United 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 discretion. After compliance with the requirements of this Order, Respondents are also encouraged to contact the EPA representative identified in Paragraph 2.8 to discuss restoration of the Site to its pre-disturbance, vegetative condition.

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).

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///

///

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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, WA 98101

Reply to
Attn Of: ETPA-083

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:

Enclosed is an administrative compliance order ("Compliance Order") issued to you pursuant to Sections 308 and 309(a) of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1318 and 1319(a). The U.S. Environmental Protection Agency ("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"). The Compliance Order requires you to perform specified restoration activities and provide certain specified

information. It incorporates a Scope of Work for a Restoration Work Plan that includes specific elements for removal of the unauthorized fill, restoration of the site, time frames, and monitoring.

Please note that successful completion of the work required by the enclosed Compliance Order does not preclude EPA from bringing a formal enforcement action for penalties or further injunctive relief to address the CWA violations associated with your property located at the Site. Please also be aware that failure to comply with the 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. §13l9.

Please review the enclosed Compliance Order and Scope of Work, and contact Mr. John Olson at (208) 378-5756, if you have any technical questions concerning this order. If you have any legal questions concerning the order, then please contact Ankur Tohan, Assistant Regional Counsel, at (206) 553-1796, or ask your attorney to contact Mr. Tohan, if you are represented by counsel.

Sincerely,

/s/ Michelle Pirzadeh
Michelle Pirzadeh, Director
Office of Ecosystems,
Tribal and Public Affairs

cc: Greg Taylor, ID Dept. of Water Resources
Beth Reinhart, U.S. Army Corps of Engineers

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, WA 98101

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

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.

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 33 C.F.R. § 328.4(8)(b); 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 33 C.F.R. § 328.4(8)(c). 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 United 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 Respondents shall immediately undertake activities to restore the Site in accordance with the Restoration Work Plan, as detailed in the "Scope of Work." Attachment 1.

2.2 Fill shall be removed and wetland soil returned no later than **April 15, 2008**.

2.3 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 below.

2.4 Within 3 days of completion of the earthmoving work, Respondents shall notify, in

writing, the EPA representative identified in Paragraph 2:12 below. The written notification shall include photographs of Site conditions prior to and following earthmoving activities.

2.5 Upon receipt of the notification referenced under Paragraph 2.4 above, EPA will schedule as promptly as possible an inspection of Site by EPA or its designated representative.

2.6 Respondents shall complete re-planting the Site by **April 30, 2008**.

2.7 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.

2.8 Within 7 days of completion of replanting work, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.12 below.

The written notification shall include photographs of Site conditions prior to and following re-planting.

2.9 Upon receipt of the notification referenced under Paragraph 2.8 above, EPA will schedule as promptly as possible with Respondents an inspection of Site by EPA or its designated representative.

2.10 Failure to timely and appropriately implement to EPA's satisfaction any removal activities or conditions specified above or under the Restoration Work Plan shall be deemed a violation of this Order.

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

2.12 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

2.13 Prior to the completion of the terms of this Order, including the attached Scope of Work, 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 2.12 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.

2.14 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/or 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 26th day of November, 2007

/s/ Michelle Pirzadeh
MICHELLE PIRZADEH,
Director
Office of Ecosystems, Tribal and Public Affairs

App. B12

Attachment 1

SCOPE OF WORK
RESTORATION WORK PLAN
1604 Kalispell Bay Road near Kalispell Creek,
Bonner County, Idaho
Section 12, Township 60 North, Range 5 West,
Boise Meridian

Chantell and Michael Sackett ("Respondents")
P.O.Box 425
Nordman, ID 83848-0368

EPA Docket No. CWA-10-2008-0014

I. Introduction

In order to restore the area impacted by the unauthorized discharge of fill material into waters of the United States, Respondents shall remove all Unauthorized fill material placed within wetlands located at Section 12, Township 60 North, Range 5 West, Boise Meridian ("Site"). To the maximum extent practicable, the Site shall be restored to its' original, pre-project topographic and vegetative condition. The original vegetative condition at the Site was mature palustrine scrub-shrub wetland with a high diversity of native plants. Acceptable reference conditions exist on the adjacent wetland.

To this end, Respondents and/or their agent(s) shall implement this Restoration Work Plan, as referenced in Section II of the Compliance Order ("Order").

II. Restoration activities

1. Remove all unauthorized fill at the Site (after providing verbal notification to the EPA representative identified in Paragraph 2.12 of the Order, at least 48 hours in advance of fill removal activity). Fill removal shall be accomplished from the fill area and no work shall take place with equipment in the adjacent wetland. Removed fill shall be disposed of in an approved upland site.

2. Return all wetland soil that was previously removed from the Site. Level the soil to the pre-project elevations on the Site.

3. Notify (in writing) the EPA representative identified in Paragraph 2.12 of the Order within 3 days of completion of the earthmoving work. The written notification shall include photographs of Site conditions prior to and following earthmoving activities.

4. Fill shall be removed and wetland soil returned no later than April 15, 2008 (see schedule below). After removal, and prior to planting, Respondents shall notify the EPA representative identified in Paragraph 2.12 of the Order so that an inspection of the site can be conducted to determine if fill removal and soil placement has been successful.

5. The entire Site shall be planted with container stock of native scrub-shrub, broad-leaved deciduous wetland plants and seeded with native herbaceous wetland plants. Plantings shall include the species which were removed from the Site. Trees and tall shrub species shall be planted approximately 10 feet apart on center over the entire Site. Fast growing, native perennial woody species common to wetland areas of northern Idaho shall be incorporated into the plantings. Acceptable species include: red-osier dogwood (*Cornus stolonifera*), Douglas hawthorne (*Crataegus douglasii*), white alder (*Alnus incana*), paper birch (*Betula papyrifera*), larch (*Larix occidentalis*) and western red cedar (*Thuja plicata*). Low shrub species shall be planted approximately 18-24 inches apart on center over the entire site. Acceptable species include Douglas' spirea (*Spiraea douglasii*) and Wood's rose (*Rosa woodsii*). The entire site shall be seeded with an herbaceous seed mix of acceptable species: *Carex interior* (Inland sedge), *Carex rostrata* (Beaked sedge), *Carex aquatilis* (Water sedge), J*uncus balticus* (Baltic rush), *Pentaphylloides floribunda* (shrubby cinquefoil), *Deschampsia caespitosa* (tufted hairgrass), and *Phleum pratense* (common timothy).

6. The seed mix and container stock shall be obtained from a local or regional source, and shall consist of appropriately-sized container stock to ensure success of the restoration (e.g.,

10 cubic inch containers or larger for woody and herbaceous species).

7. Seeding and planting shall be completed no later than **April 30, 2008**. Within 7 days of completion of re-planting work, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.12 in the Order. The written notification shall include photographs of Site conditions prior to and following re-planting.

8. The Site shall be fenced for the first three growing seasons.

9. The following conditions shall be followed during restoration of the area to ensure violations of the state water quality standards do not occur:

   - Removal of fill and planting will be conducted in such a manner so as to minimize turbidity and comply with Idaho Water Quality Standards and Wastewater Treatment Requirements.
   - All fuel, oil and other hazardous materials will be stored arid equipment refueled away from the wetland.
   - All areas subject to erosion as a result of fill removal and planting will be protected by suitable methods of erosion control. These measures shall include but not be limited to applying mulch to all exposed soils.

- The use of fertilizers, pesticides, and herbicides will be consistent with label instructions.

Attachment 1

III. <u>Monitoring activities</u>

1. Monitoring of vegetation on the restored Site for survival and ground coverage shall be performed in October 2008, June 2009, October 2009, and October 2010.

2. Successful restoration shall require 75% of groundcover established under native wetland species. Any replanted woody and herbaceous plants that are included in the 75% criterion must have survived at least two complete growing seasons. Flexibility of the performance standard may be allowed based on the best professional judgment of U.S. EPA personnel's evaluation of current site conditions, and a demonstration of good faith efforts by Respondents to maintain the health and condition of the restored wetland within that three-year period.

3. A monitoring report shall be prepared and submitted to EPA within 30 days of each prescribed monitoring event. The report shall include photographic evidence as well as monitoring results. All photographs must be labeled with the date, location, and point of reference (e.g., facing north and looking at southern edge of Site). In addition, the monitoring report shall identify any problems discovered and recommend appropriate

corrective action(s) to ensure the success of restoration. If monitoring reports show that vegetation survival is not adequate to meet the success criteria, Respondents shall provide EPA a plan to achieve restoration at the Site. EPA may require modifications to the plan prior to its approval and implementation.

IV. Inspection activities

1. The property owner shall notify, and allow for inspections by, EPA personnel or their designated agent after completion of fill removal activities, after completion of planting activities, whenever any corrective action(s) are proposed, and after monitoring indicates that the criteria for success have been attained.

Attachment 1

VI. Schedule

1. The Restoration Plan shall be designed to accomplish restoration in accordance with the following schedule:

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

[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 3 days of completion of the earthmoving 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 earthmoving activities.

[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.