

Attachment B

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April 1, 2008

Via: Facsimile 208-378-5744

Mr. John Olson
U.S. E.P.A.
Idaho Operations Office
1435 N. Orchard Street
Boise, Idaho 83706

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

Dear Mr. Olson:

Our firm has been retained by Chantell and Michael Sackett to represent them in the above-referenced matter. My clients are in receipt of the Administrative Compliance Order issued pursuant to Sections 308 and 309(a) of the Clean Water Act, 33 U.S.C. §§ 1318 and 1319(a). This Order was issued in connection with the placement of fill material at the property located at 1604 Kalispell Bay Road near Kalispell Creek, Bonner County, Idaho ("Site").

The purpose of this letter is to request that the E.P.A. afford the Sacketts a hearing as to its Compliance Order. Our clients dispute the alleged Findings of Fact and Conclusions of Law contained in the Compliance Order on the following grounds:

1. The site does not contain a wetland within the meaning of 33 C.F.R. §328.3(8)(b) and the wetlands do not meet the criteria for jurisdictional wetlands in the 1987 Federal Manual for Identifying and Delineating Jurisdictional Wetlands.

Our clients dispute the allegation that they engaged in, or are continuing to engage in, the discharge of pollutants from point source within the meaning of Sections 301 and 502(12) of the Act, 33 U.S.C. §§ 1311 and 1362(12). The Compliance Order erroneously, without foundation, concludes that Site contains wetlands within the meaning of 33 CFR §328.3(8)(b).

There is a ditch along the north side of Kalispell Bay Road which apparently flows to the west and eventually discharges into Kalispell Creek (approximately 500'

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west of the Site). There is no ditch along the south side of Kalispell Bay Road. There is no direct surface water connection from the Site to Kalispell Creek. Subsurface flows, if there are any at all, are likely from the north to the south (i.e., Priest Lake is south of the Site). There are no ditches or other conveyance features, or contiguous wetlands from the Site to Priest Lake. Therefore, the Site is not a wetland. A wetland must have a connection to a traditional navigable waterway (TNW) by a tributary that is a relatively permanent waterway (RPW). A wetland, which has a continuous surface connection with a non-navigable waterway that is not relatively permanent, would not be within the jurisdiction of the United States. Only those wetlands that have a continuous surface connection to a body that is a "water of the United States" in its own right are jurisdictional. *Rapanos v. United States*, 547 U.S. 715, 126 S. Ct. 2208, 2226 (2006). According to the *Rapanos* guidance, a body that is a "water of the United States" in its own right includes TNWs and tributaries of the TNW that are RPWs. *Id.* at 2222-25. Thus, a wetland that has a continuous surface connection to a TNW or a tributary that is a RPW is within the jurisdiction of the United States. To the contrary, a wetland that has a continuous surface connection with a non-navigable waterway that is not relatively permanent would not be within federal jurisdiction.

The plurality in *Rapanos* coined the phrase "continuous surface connection" stating that the term means that "there is no clear demarcation between 'waters' and wetlands." *Id.* at 2226. Here, there is a very clear demarcation between the Site and Priest Lake. This clear demarcation is evidenced by the distance between the Site and Priest Lake, the roadway that separates these features, and the fact there is no hydrological connection between the Site and Priest Lake. In the post-*Rapanos* guidance, we understood that the EPA acknowledged the plurality's interpretation by effectively equating the term "continuous surface connection" with the term "directly abut."

For a wetland to directly abut the RPW, the wetland must border or be immediately adjacent to the RPW and not be separated by a berm, dike, or similar feature. Even if a man-made ditch or culvert would connect the Site during certain higher flow periods, this does not make the Site directly abut a RPW. Thus, under any reasonable interpretation of the post-*Rapanos* guidance, the Site does not directly abut a RPW and therefore it cannot be categorically within federal jurisdiction. Rather, the Site must be reviewed under the significant nexus test outlined by Justice Kennedy. There has been no demonstration or explanation on how the Site has any significant nexus to a TNW. Effectively, EPA appears to rely solely on the fact that the Site may be remotely hydrologically connected to the TNWs during limited times of the year. Justice Kennedy rejected the notion that a mere hydrological connection establishes a

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significant nexus. *Id.* at 2247-49. Here, EPA failed to establish any facts to support a finding of significant nexus.

The Sacketts contest any jurisdictional assertion of a wetland and reasonableness of the Order made by the EPA. They regard the findings as tentative and non-binding (and insufficient to be the basis for any penalty or other adverse action), and request a hearing. Finally, we assume based upon the case of *Tennessee Valley Authority v. Whitman*, 336 F. 3d 1236 (11th Cir. 2003) that the Sacketts are free to ignore the Administrative Compliance Order without the risk of the imposition of penalties for noncompliance with its terms. If you disagree with this assessment, please advise.

Request is hereby made, pursuant to the Freedom of Information Act (FOIA) for the entire Administrative file related to this matter.

Sincerely,

WITHERSPOON, KELLEY, DAVENPORT
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By: _____

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cc: Client
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