LESLIE R. WEATHERHEAD
lwlibertas@aol.com
Idaho Bar No. 3916
Witherspoon Kelley Davenport & Toole
422 West Riverside Avenue, Suite1100
Spokane, Washington 99201
Telephone: (509) 624-5265
Facsimile: (509) 458-2728

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

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION

CHANTELL and MICHAEL SACKETT, Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; and STEPHEN L. JOHNSON, in his official capacity as Administrator of the Environmental Protection Agency, Defendants.	Case No. 2:08-cv-00185-EJL **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR CLARIFICATION AND MOTION FOR RECONSIDERATION (FRCP 60(a); FRCP 59(e))**

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INTRODUCTION

Plaintiffs Chantell and Michael Sackett respectfully submit this Memorandum of Points and Authorities in support of their concurrently filed Motion for Clarification pursuant to Rule 60(a) of the Federal Rules of Civil Procedure (FRCP), which seeks clarification of the Court's August 8, 2008, memorandum order dismissing their action against Defendants Environmental Protection Agency and Stephen L. Johnson (EPA); and Motion for Reconsideration pursuant to FRCP 59(e), which seeks reconsideration of the Court's dismissal of Plaintiffs' Second and Third Claims for Relief under the Fifth Amendment to the U.S. Constitution.

STANDARD

FRCP 60(a) provides, in relevant part, that a "court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." *Cf. Hasbrouck v. Texaco, Inc.*, 879 F.2d 632, 636 (9th Cir. 1989) ("motion . . . requesting clarification is construed properly under Rule 60(a)"). "A district court has very wide latitude in correcting clerical mistakes in a judgment." *Blanton v. Anzalone*, 813 F.2d 1574, 1577 (9th Cir. 1987). "A judge may invoke Rule 60(a) in order to make a judgment reflect the actual intentions of the court, plus the necessary implications. Errors correctable under Rule 60(a) include those where what is written or recorded is not what the court intended to write or record." *Id.* (citing *Jones & Guerrero Co. v. Sealift Pac.*, 650 F.2d 1072, 1074 (9th Cir. 1981)).

The decision whether to grant a motion for reconsideration pursuant to FRCP 59(e) is committed to the district court's sound discretion. *See Sch. Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993). The motion may be granted if the Court is presented with newly discovered evidence, or the Court committed clear error in its original decision, or if there is an intervening change in the law. *Circuit City Stores, Inc. v. Mantor*, 417

F.3d 1060, 1064 n.1 (9th Cir. 2005). Although an FRCP 59(e) motion should not be used to rehash old theories or evidence, its use is appropriate to correct "manifest errors of law or fact." *Templet v. Hydrochem, Inc.*, 367 F.3d 473, 478-79 (5th Cir. 2004).

ARGUMENT

MOTION FOR CLARIFICATION

Pursuant to FRCP 60(a), Plaintiffs request clarification of an apparent but presumably unintended ambiguity in the Court's memorandum order. In determining that it lacked jurisdiction to review Plaintiffs' due process and Administrative Procedure Act claims,[1] the Court observed that a landowner who is alleged to have violated the Clean Water Act (CWA) "is subject to the same injunction and penalties whether or not EPA has issued a compliance order." Mem. Order at 3 (quoting *S. Pines Assocs. v. United States*, 912 F.2d 713, 715-16 (4th Cir. 1990)). The Court also noted that EPA can only obtain penalties and injunctive relief through an enforcement action, in which "the alleged violator may raise all defenses, including any challenges to the EPA's assertion of jurisdiction over the activity at issue." Mem. Order at 3. The implication from the foregoing is that the recipient of a compliance order can challenge all aspects of that compliance order in an enforcement proceeding, *and* that the recipient cannot be held liable simply for the violation of a compliance order *per se*.

Yet these conclusions are in tension with the Court's treatment of *Tennessee Valley Authority (TVA) v. Whitman*, 336 F.3d 1236 (11th Cir. 2003), which Plaintiffs relied upon to justify their contention that CWA compliance orders are judicially reviewable. The Court chose not to address whether *TVA* should apply to CWA compliance orders because, the Court reasoned, the outcome

[1] The Complaint raises three claims: the first under the APA, Compl. ¶¶ 42-44, the second under procedural due process, *id*. ¶¶ 45-47, and the third under substantive due process, *id*. ¶¶ 48-50.

in *TVA*—Clean Air Act (CAA) compliance orders are not judicially reviewable—is the same outcome that would obtain through a straightforward application of the "no judicial review for CWA compliance orders" rule first announced in *Hoffman Group, Inc. v. Environmental Protection Agency*, 902 F.2d 567 (7th Cir. 1990). *See* Mem. Order at 4 n.2.

The ambiguity created by the Court's analysis, however, arises from its treatment of the reason for the dismissal in *TVA*: there the court held that, because the CAA compliance order was *unconstitutional*, it had no legal effect, and thus could not qualify as "final agency action." *See TVA*, 336 F.3d at 1260. Pursuant to *TVA*'s reasoning, the recipient of a compliance order can *never* be liable for violations of the compliance order *per se*, but rather can be liable only for violations of the underlying statute. The memorandum order's treatment of the *TVA* and *Hoffman Group* dismissals as equivalents conflicts with the memorandum order's discussion of CWA compliance orders. That discussion is thereby rendered ambiguous: it can be read as holding that

> (1) a CWA compliance order recipient can seek full review of a compliance order during an enforcement proceeding, but he is still liable for violations of that compliance order (in addition to the CWA itself) accrued during the pendency of judicial review,
>
> *or*
>
> (2) a CWA compliance order recipient is immune from any liability arising from the compliance order itself, regardless of whether CWA jurisdiction is ultimately affirmed in court.

TVA is consistent with the latter interpretation, but not the former; yet the Court's treatment of the issue in its memorandum order collapses the two.

Clarification of this ambiguity is critically important to Plaintiffs, because its resolution may dictate whether they wish to seek appellate review of this Court's decision. If the Court meant to adopt the *TVA* interpretation of compliance orders (number 2 above), then Plaintiffs may well decide that appellate review is unnecessary, having been assured that they can contest all *statutory* violations at a subsequent enforcement proceeding and will be held harmless of all *compliance order* violations. But if this Court has adopted the *Hoffman Group* interpretation of compliance orders (number 1 above), then Plaintiffs may be able to seek appellate review only at the cost of risking additional, significant civil penalties. For it is likely that an appeal cannot be adjudicated until well into next year, yet Plaintiffs will have to decide whether to begin cooperation with the compliance order long before that. This circumstance would thereby force upon Plaintiffs the option of either complying with EPA's mandate while seeking judicial review (and thus incurring nonreimbursable, significant costs), or not complying, thus risking serious civil penalties. Clarification of the memorandum order may make this Hobson's choice unnecessary.

MOTION FOR RECONSIDERATION

Plaintiffs have also moved, pursuant to FRCP 59(e), for reconsideration of this Court's dismissal of Plaintiffs' Second and Third Claims for Relief under the Fifth Amendment's Due Process Clause. In its memorandum order, the Court dismissed those claims on sovereign immunity grounds, reasoning that neither the general federal question statute, 28 U.S.C. § 1331, nor the Declaratory Judgment Act, *id*. § 2201, provides the requisite waiver of sovereign immunity. *See* Mem. Order at 3-4. Nevertheless, the Court's dismissal of Plaintiffs' due process claims on jurisdictional grounds was a manifest error of law.

A. The Court Committed Manifest Error in Dismissing Plaintiffs' Due Process Claims on Sovereign Immunity Grounds

In opposition to EPA's motion to dismiss the due process claims, Plaintiffs cited, *exempli gratia*, to *Bolger v. District of Columbia*, 510 F. Supp. 2d 86 (D.D.C. 2007), which holds that "[f]ederal courts have subject-matter jurisdiction over suits seeking declaratory and injunctive relief because the [Administrative Procedure Act (APA)] waives the federal agency's sovereign immunity even when the claim is one directly under the Constitution and not under the APA." *Id*. at 91. For that proposition, *Bolger* cited to, among other authorities, *Trudeau v. Federal Trade Commission*, 456 F.3d 178 (D.C. Cir. 2006). There, the D.C. Circuit was asked to decide whether the APA's waiver of sovereign immunity, *see* 5 U.S.C. § 702, applies to all actions against the federal government, or just APA actions. The court held the former.

> [W]e hold that APA § 702's waiver of sovereign immunity permits not only Trudeau's APA cause of action, *but his nonstatutory and First Amendment actions as well*. We also hold that the waiver applies regardless of whether the FTC's press release constitutes "final agency action." *Accord Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 (9th Cir. 1989) (holding that the government's "attempt to restrict the waiver of sovereign immunity to actions challenging 'agency action' as technically defined in § 551(13) offends the plain meaning of the amendment"); *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988) (rejecting the contention that the waiver in § 702 "exists only to allow review of a final agency decision," and holding that "[t]he waiver of sovereign immunity contained in section 702 is not dependent on application of the . . . review standards of the APA"). The district court therefore had subject-matter jurisdiction to hear Trudeau's suit under 28 U.S.C. § 1331, and its dismissal of the complaint for lack of jurisdiction pursuant to Rule 12(b)(1) was erroneous.

Trudeau, 456 F.3d at 187 (emphasis added). *See Wang. v. Reno*, 81 F.3d 808, 813-15 (9th Cir. 1996) (affirming district court's assertion of jurisdiction over due process claim against United States). *Cf. United States v. Morros*, 268 F.3d 695, 699-700 (9th Cir. 2001) ("'Where the complaint . . . seek[s] recovery directly under the Constitution or laws of the United States, the federal court . . . must entertain the suit.'") (quoting *Bell v. Hood*, 327 U.S. 678, 681-82 (1946)).

B. Plaintiffs Have Stated Claims for Relief for Violations of Procedural and Substantive Due Process

To the extent that a court, when presented with a sovereign immunity objection, may treat a motion to dismiss under FRCP 12(b)(1) as a motion to dismiss under FRCP 12(b)(6), *see Coos County Bd. of County Comm'rs v. Kempthorne*, 531 F.3d 792, 802-03 (9th Cir. 2008), the Court's dismissal remains manifestly in error. To state a claim for violation of procedural due process, a plaintiff must identify a liberty or property interest that the government has impinged. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570-72 (1972). Hence, a claim for relief is stated where the plaintiff contends that serious civil penalties will be imposed without first providing the plaintiff a full and fair hearing before an impartial tribunal "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). The Complaint's Second Claim for Relief states a claim for relief. *See* Compl. ¶ 46 (alleging imminent imposition of substantial civil and criminal penalties without providing an opportunity to be heard).[2]

To state a claim for violation of substantive due process on vagueness grounds with respect to a statute that imposes civil and criminal penalties, a plaintiff must contend that the statute is "impermissibly vague," *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982), in that it provides no standard of conduct, *see id.* at 495 n.7, or delegates basic policy matters to the executive branch without affording an adequate basis for judicial review, *see id.* at 498. *See also TVA*, 336 F.3d at 1259 (citing numerous authorities). The Complaint's Third Claim for Relief states a claim for relief. *See* Compl. ¶ 49 (alleging that CWA compliance order provision

[2] Also, the denial of immediate judicial review deprives Plaintiffs of due process because it forces them to expend significant costs to comply with the compliance order, costs which are not reimbursable. *See supra* at 4.

is impermissibly vague by allowing for order's issuance on the basis of "any information available" and therefore provides an inadequate basis for judicial review).

*****

The foregoing authority fully substantiates Plaintiffs' assertion that this Court has jurisdiction to hear and adjudicate Plaintiffs' due process claims. The memorandum order's holding to the contrary is a manifest error of law and clear error. Therefore, relief under FRCP 59(e) is proper.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court clarify its memorandum order and reconsider its dismissal of Plaintiffs' Second and Third Claims for Relief.

DATED: August 20, 2008.

Respectfully submitted,

LESLIE R. WEATHERHEAD
Witherspoon Kelley Davenport & Toole

M. REED HOPPER
DAMIEN M. SCHIFF
Pacific Legal Foundation

By /s/ Damien M. Schiff
DAMIEN M. SCHIFF
Cal. Bar No. 235101
Pro Hac Vice
Telephone: (916) 419-7111

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of August, 2008, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing, and I served the foregoing to the following via e-mail:

Leslie R. Weatherhead, Attorney for Plaintiffs
lwlibertas@aol.com

Nicholas J. Woychick, Attorney for Defendants
Nick.Woychick@usdoj.gov

/s/ Damien M. Schiff
DAMIEN M. SCHIFF
Attorney for Plaintiffs