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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO**

CHANTELL and MICHAEL SACKETT,	)	Case No. CV-08-0185-EJL
	)	
Plaintiffs,	)	UNITED STATES' MEMORANDUM
v.	)	IN OPPOSITION TO PLAINTIFFS'
	)	MOTION FOR CLARIFICATION
UNITED STATES ENVIRONMENTAL	)	AND FOR RECONSIDERATION
PROTECTION AGENCY,	)	
	)	
Defendant.	)	
_____	)	

The United States Environmental Protection Agency ("EPA") opposes Plaintiffs' Motion for Clarification and Motion for Reconsideration.

**I. Plaintiffs' Motion for Clarification Should Be Denied.**

Plaintiffs bring their motion for clarification pursuant to Fed. R. Civ. P. 60(a), which authorizes correction of "a clerical mistake, or a mistake arising from oversight or omission." Plaintiffs' Motion for Clarification should be denied because there is no clerical mistake or mistake of oversight or omission in this Court's Memorandum Opinion. Plaintiffs do not even allege such a mistake. Rather, Plaintiffs allege that there is an ambiguity in this Court's Memorandum Opinion that warrants clarification. However, an alleged ambiguity in the Memorandum Opinion is not a basis for seeking clarification. In any event, there is no ambiguity in this Court's Memorandum Opinion, and Plaintiffs are not entitled to the relief requested.

A. The Court's Memorandum Opinion is Not Ambiguous.

There is nothing ambiguous about the Court's Memorandum Opinion. This Court very clearly -- and correctly -- elected to follow the long line of cases holding that "a district court lacks jurisdiction to review a pre-enforcement compliance order issued under the CWA." Mem. Op. at 4. This Court just as clearly rejected the TVA case relied upon by Plaintiffs (Tennessee Valley Authority v. Whitman, 336 F.3d 1236 (11th Cir. 2003)), noting that "there is no need, however, for the Court to resolve the matter before it by applying Eleventh Circuit case law interpreting the Clean Air Act." Mem. Op. at 4.

B. Plaintiffs' Motion for Clarification is an Improper Request for an Advisory Opinion.

Plaintiffs suggest that the Court's opinion is ambiguous because it does not clarify what relief EPA may seek *if* Plaintiffs fail to comply with the Compliance Order and *if* EPA chooses to initiate a civil enforcement proceeding and *if* EPA seeks, in such enforcement action, to recover civil penalties for violation of the Compliance Order. None of those events has yet occurred, and may not ever occur. What Plaintiffs seek is, in effect, an advisory opinion on an issue that is not

yet ripe, and may never be. There is no reason for this Court to “clarify” its decision to opine on an issue that was not presented to the Court by the United States’ Motion to Dismiss.

**II. Plaintiff’s Motion for Reconsideration Should Be Denied.**

A motion for reconsideration pursuant to Fed. R. Civ. P. 59(e) may be used to present the Court with new evidence, to correct a manifest error of law, or to address an intervening change in the law. Circuit City Stores, Inc. v. Mantor, 417 F.3d 1060, 1064 (9<sup>th</sup> Cir. 2005). As Plaintiffs acknowledge, a motion for reconsideration is not to be used to rehash old theories and arguments. Pltf. Br. at 2. Plaintiffs’ Motion for Reconsideration should be denied because it does not raise new facts or intervening changes in law, nor does it identify a manifest error of law. Rather, Plaintiffs merely rehash old theories and arguments that have been considered, and rejected, by this Court.

A. This Court Properly Dismissed Plaintiffs’ Due Process Claims Under F. R. Civ. P. 12(b)(1).

Notwithstanding this Court’s conclusion that it lacks subject matter jurisdiction to review the compliance order, Plaintiffs suggest that it was manifest error for the Court to fail to address their constitutional claims. This Court properly recognized that it does not have jurisdiction over Plaintiffs’ complaint merely because “Plaintiffs allege a constitutional violation and ask for declaratory and injunctive relief.” Mem. Op. at 4. Plaintiffs have offered nothing new and there is no reason for the Court to alter its decision on that issue.

B. The Court Did Not Dismiss Plaintiffs’ Constitutional Challenges Under Fed. R. Civ. P. 12(b)(6).

Plaintiffs argue that the Court improperly dismissed their constitutional claims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. Pltf. Br. at 6. But that is not the argument presented by the United States’ Motion to Dismiss, nor is it the

argument addressed by the Court. This Court held that it did not have jurisdiction to resolve Plaintiffs' constitutional claims - not that Plaintiffs failed to state a claim.

Plaintiffs' Motion for Reconsideration thus suffers from the same infirmities as the Motion for Clarification: The issue is not yet ripe for judicial review. This Court's decision that it does not have subject matter jurisdiction to review the compliance order does not operate as a rejection of Plaintiffs' claims or as a ruling on the merits of Plaintiffs' claims. Plaintiffs' constitutional challenges may be heard in a later proceeding if, and when, EPA initiates a civil enforcement action for the violations which were the subject of the compliance order and seeks penalties against Plaintiffs for failure to comply with the compliance order.

**CONCLUSION**

For the above reasons, Plaintiffs' Motion for Clarification and Motion for Reconsideration should be denied.

Respectfully submitted,

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Dated: September 24, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that on this 24<sup>th</sup> day of September, 2008, a copy of the United States' Memorandum in Opposition to Plaintiffs' Motion for Clarification and for Reconsideration was served, by first class mail, postage prepaid, and delivered electronically via e-mail, to the following counsel of record:

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