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-N-EJL **PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR CLARIFICATION AND FOR RECONSIDERATION**

Plaintiffs Chantell and Michael Sackett, pursuant to Local Civil Rule 7.1(b)(3), respectfully submit this Reply to the Opposition to Plaintiffs' Motions for Clarification and Reconsideration, filed by Defendants United States Environmental Protection Agency and Stephen L. Johnson (EPA).

INTRODUCTION

EPA contends that the Sacketts' clarification motion should be denied on two grounds: the Court's memorandum order dismissing the Sacketts' action is not ambiguous; and the Sacketts' motion improperly requests an advisory opinion. EPA also contends that the Sacketts' reconsideration motion should be denied on two grounds: the Court's dismissal was correct under the law; and the Court had no occasion or reason to address the merits of the Sacketts' due process claims.

EPA's opposition arguments are without merit. With respect to clarification, the Sacketts have demonstrated that the Court's memorandum order is ambiguous,[1] because it can be interpreted in two ways, and because one of those permissible interpretations would conflict with other legal conclusions made within the order. Thus, the Sacketts do not ask for the Court to opine on a matter not before it—an advisory opinion—but rather simply to make clear the analysis that supports the Court's conclusion, but which is not evident from the Court's memorandum order.

With respect to reconsideration, EPA does not even attempt to engage or respond to the authority cited in the Sacketts' opening brief, which fully supports their contention that the waiver of sovereign immunity contained within 5 U.S.C. § 702 applies to all declaratory and injunctive

[1] To the extent that EPA argues that the clarification motion should be denied because Rule 60(a) authorizes the correction only of clerical mistakes, the contention is without merit. The case law establishes that Rule 60(a) motions are proper to ensure that the written order or judgment actually reflects what the court intended, *see Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1033 (9th Cir. 1990) (for Rule 60(a) purposes the "focus is on what the court originally intended to do"), an understanding of the rule that comfortably embraces the correction of ambiguities.

relief actions against the United States, not just to actions brought pursuant to 5 U.S.C. § 704 of the Administrative Procedure Act (APA). EPA's observation that the Court did not dismiss the Sacketts' claims pursuant to Rule 12(b)(6) is accurate but irrelevant: the Court did not address the merits of their due process claims because it *erroneously* concluded that it lacked jurisdiction to do so. Thus, EPA's observation supports if anything the reconsideration motion.

ARGUMENT

I

THE MOTION FOR CLARIFICATION SHOULD BE GRANTED

A. The Court's Memorandum Order Is Ambiguous

EPA, quoting the Court's memorandum order for the proposition that a district court lacks jurisdiction over Clean Water Act (CWA) compliance orders, contends that the order is not ambiguous. *See* United States' Memorandum in Opposition to Plaintiffs' Motion for Clarification and for Reconsideration (Opp'n) at 2 (quoting Mem. Order at 4). The Sacketts agree that the Court's *conclusion* is not ambiguous—clearly, the Court has determined that it lacks jurisdiction. The ambiguity comes, rather, in the *reasons* for the Court's conclusion. As explained in the Sacketts' opening brief, the memorandum order can be read as holding that (1) the Sacketts can seek plenary review of the compliance order at some later date, and will be held harmless for compliance order violations in the interim, *or* (2) the Sacketts can seek full review later but only at the cost of incurring additional liability. *See* Memorandum of Points and Authorities in Support of Motion for Clarification and for Reconsideration (Pls.' P&As) at 3. As EPA recognizes, *see* Opp'n at 2, the Court chose not to address whether *Tennessee Valley Authority (TVA) v. Whitman*, 336 F.3d 1236 (11th Cir. 2003) (en banc), would change its jurisdictional analysis, because the Court concluded

that the outcome would not vary. *See* Mem. Order at 4 n.2 (noting that the result in *TVA*—no jurisdiction—is the same result obtained without *TVA*).

The difficulty with this analysis, as already explained, *see* Pls.' P&As at 3, is that *TVA* came to its "no jurisdiction" result *only* because it held the compliance order there at issue to be *unconstitutional* and therefore without legal effect. Yet there is an ocean of difference between a holding of "no jurisdiction" on the basis of an unenforceable compliance order, and a holding of "no jurisdiction" on the basis of an *enforceable* compliance order. The Court's memorandum order, however, does not clearly state what the Court's reasoning is here. The ambiguity is vitally important because the propriety of the Court's treatment of *TVA* hinges upon it.

In sum, the Sacketts are not asking the Court to make an advance determination of a question not yet presented. They are asking that the Court help them understand what it has already decided. The Sacketts face important decisions about whether to obey the compliance order now, or whether to await a hearing that the EPA may some day afford them. It is obviously critically important to them to know whether potentially ruinous penalties are piling up already under the compliance order, or whether any future contest about whether they have, or have not (as they contend) violated the Clean Water Act will be decided on a level playing field unaffected by the compliance order. Therefore, clarification is called for.

B. Plaintiffs Do Not Request an Advisory Opinion

EPA's contention that the clarification motion is tantamount to a request for an advisory opinion is a red herring. The issuance of an advisory opinion presupposes that the matter before the Court does not actually raise the issue addressed in the opinion. But that is not the case here. All sides agree that the Court has indeed addressed the jurisdictional issue; the only question is whether the *reasons* for the Court's jurisdictional conclusion—reasons which necessarily were present to the

Court at the time it made its decision—are adequately set forth in the memorandum order. EPA speaks of events that have not occurred. Events *have* occurred, namely, the issuance of a compliance order that may (or may not, depending upon the resolution of an ambiguity) be a source of liability *independent* of the statute. This issue was before the Court on EPA's motion to dismiss. Because the Court's opinion does not clearly explain the Court's reasoning on this issue, the clarification motion is warranted.

II

THE MOTION FOR RECONSIDERATION SHOULD BE GRANTED

A. The Court's Dismissal of Plaintiffs' Due Process Claims on Sovereign Immunity Grounds Was a Manifest Error of Law Meriting Reconsideration

EPA contends, in a conclusory fashion, that the reconsideration motion should be denied because the Court's dismissal was correct under the law. *See* Opp'n at 3. Yet EPA nowhere addresses two salient points: (1) the Court's jurisdictional dismissal was based on sovereign immunity grounds, *see* Mem. Order at 3-4; and (2) the case law is clear that the APA waiver of sovereign immunity is effective for claims not just under the APA but also under the Constitution, *see* Pls.' P&As at 5. The Sacketts have decisively established that due process claims against the federal government fall squarely within this Court's federal question jurisdiction, *see* 28 U.S.C. § 1331, and enjoy the waiver of sovereign immunity set forth in 5 U.S.C. § 702, *see, e.g.*, *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178 (D.C. Cir. 2006).

It is possible that EPA's erroneous understanding of the jurisdictional issue arises from the fact that, although a discrete agency action may not be subject to *APA review* because it is "final agency action," *see* 5 U.S.C. § 704, or because review is precluded by statute, *see id.* § 701(a)(1), the same action may be susceptible to *constitutional challenge*, by virtue of the general waiver of

sovereign immunity found at 5 U.S.C. § 702. The Court's memorandum order adopts EPA's manifestly erroneous jurisdictional argument; for that reason, reconsideration is proper.

B. That the Court Did Not Dismiss Plaintiffs' Due Process Claims Under Rule 12(b)(6) *Supports*—Rather Than Undercuts—Plaintiffs' Reconsideration Motion

EPA argues that the Court did not improperly dismiss the Sacketts' due process claims under Rule 12(b)(6), but rather that the Court correctly dismissed those claims on sovereign immunity grounds under Rule 12(b)(1). EPA also contends that Plaintiffs improperly ask this Court to rule upon a factual and legal scenario that has not yet materialized. *See* Opp'n at 3-4. None of these contentions has merit.

First, the Sacketts do not contend that the Court improperly dismissed their due process claims under Rule 12(b)(6), for the very obvious reason that the Sacketts contend that the Court improperly dismissed those claims *under Rule 12(b)(1)*. The nub of the Sacketts' argument, however, is that not only does this Court have jurisdiction over these claims, *but also* that the Sacketts have properly stated claims for relief for violation of procedural and substantive due process. *See* Pls.' P&As at 6-7. Therefore, on reconsideration, the appropriate course for the Court to take would be to address the merits of those claims, *i.e.*, whether the absolute denial (or significant deferral) of judicial review of the CWA compliance order, coupled with the vague standard for issuance of the same, violate the Sacketts' procedural and substantive due process rights.

Second, although EPA contends that the Sacketts can seek full airing of their contentions at a subsequent hearing, this argument has merit only by supposing the truthfulness of the asserted conclusion, namely, that adequate judicial review *can* in fact be had. In other words, EPA's argument against the Sacketts' reconsideration motion is convincing only if the Sacketts can obtain

full judicial review of the compliance order without risking significant civil penalties. Of course, that question is the very issue raised by the Sacketts' due process claims. Thus, EPA's objection to reconsideration on this score is essentially a conclusion *on the merits*, not a defense of the Court's jursidictional dismissal. Reconsideration is warranted.

CONCLUSION

For these reasons, the Sacketts request that their motions for clarification and reconsideration be granted.

DATED: September 26, 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 26th day of September, 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:

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