



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

JUL 10 2012

ASSISTANT ADMINISTRATOR
FOR COMPLIANCE AND
COMPLIANCE ASSURANCE

The Honorable James M. Inhofe
Ranking Member
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Senator Inhofe:

Thank you for your May 24, 2012 letter to Administrator Lisa Jackson regarding the United States Environmental Protection Agency's (the EPA) plans to enforce Clean Water Act (CWA) requirements in light of the Supreme Court's decision in *Sackett v. EPA* which held that CWA section 309(a) administrative compliance orders are not subject to judicial review by the federal courts. I appreciate the opportunity to discuss the EPA's enforcement program.

The EPA will, of course, fully comply with the Supreme Court's decision as we work to protect clean water for our families and future generations by using the tools provided by Congress to enforce the CWA. The Supreme Court's decision marked a significant change in the law concerning the reviewability of Section 309(a) administrative compliance orders. Prior to the Supreme Court's decision, all five federal circuit courts of appeals had held that Section 309(a) administrative compliance orders were not subject to pre-enforcement review. We are taking an necessary step to ensure that compliance orders issued by the agency comply with the Court's mandate. The EPA has directed all enforcement staff to ensure that the regulated community is fully aware of the right to challenge a Section 309(a) administrative compliance order and to include guidance for respondents of this right with any administrative compliance order issued by the agency. Attached is a memorandum from Pamela J. Mazakas, Acting Director of the Office of CWA Enforcement, to the regions highlighting the importance of the *Sackett* decision and integrating it into the consequent changes to the CWA enforcement program.

In your letter, you express concern about remarks made by EPA enforcement officials at the *Wetlands Law and Regulation Seminar* on May 5, 2012, as reported by the publications *Issue 1 PA* and *BNL*. Both articles focused solely on a single statement by the EPA official at the seminar. The *Sackett* decision has not changed the EPA's approach to enforcement. The EPA's approach to enforcement is based on a statement taken out of context.

or the agency's position that the *Sackett* decision does not significantly change the law concerning reviewability of CWA administrative compliance orders. The focus of the presentation and discussion at the May 5, 2012 seminar was that compliance orders issued under 309(a) of the CWA will now be subject to judicial review, and that the agency will ensure that its compliance orders are supported by an administrative record that describes the factual and legal basis for the order. It was clear from the entire presentation by the EPA speaker that EPA has and will continue to continue sound scientific and legal evidence gathering and legal analysis to support its administrative compliance orders, and that the EPA expects that judicial review will reaffirm the fact that the regulatory program and orders issued by the agency are

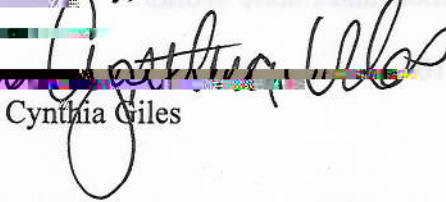
EPA has consistently stated since the *Backett* decision that recipients of CWA section 309(a) compliance orders must be afforded an opportunity to be heard. The agency is confident in the integrity of its administrative enforcement process and as always will issue compliance orders only when they are well supported by the facts and the law.

JUL 10 2012

For questions, please contact your staff contact

Director, Office of Congressional and Intergovernmental Relations, at (202) 564-1859.

Sincerely,



Cynthia Giles

Enclosure



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

JUN 19 2012

OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Use of Clean Water Act Section 309(a) Administrative Compliance Orders Authority in *Sackett v. EPA*

FROM: Pamela J. Mazakas, Acting Director, Office of Civil Enforcement

TO: Address

As you know, on June 21, 2012, the Supreme Court unanimously in *Sackett v. EPA*, 132 S. Ct. 1367, that administrative compliance orders issued under Section 309(a) of the Clean Water Act (CWA) are subject to pre-enforcement judicial challenge under the Administrative Procedure Act (APA). The Supreme Court's decision marked a significant change in the law concerning the reviewability of Section 309(a) administrative compliance orders prior to the Supreme Court's decision, all of the federal circuit courts to consider the issue have held that Section 309(a) administrative compliance orders were not subject to pre-enforcement review. The purpose of this memorandum is to provide guidance on the use of Section 309(a) administrative compliance orders in light of the *Sackett* decision.

As a result of the Supreme Court's holding in *Sackett*, Section 309(a) administrative compliance orders are now subject to pre-enforcement judicial challenge under the APA before EPA brings an action to enforce them. This right is not previously available to the courts. It is therefore incumbent on EPA enforcement staff to ensure that the regulated community and in particular all responsible parties are fully aware of this new right. Language clarifying this right should be included with any unilateral Section 309(a) administrative compliance order issued by the Agency.

¹ *Southern Pines Assoc. v. United States*, 502 F.2d 1312 (11th Cir. 1975), cert. denied, 429 U.S. 927 (1976); *Hoffman Group, Inc. v. EPA*, 902 F.2d 567 (7th Cir. 1990); *Sackett v. EPA*, 622 F.3d 1139 (9th Cir. 2010), cert. denied, 133 S.Ct. 1353 (2010); *Liggett & Company, Inc. v. EPA*, 58 F.3d 564 (10th Cir. 1995), cert. denied, 516 U.S. 1071 (1995).



The Supreme Court's decision presents the Agency with an opportunity to evaluate how it can make the best use of limited enforcement resources to achieve compliance with environmental laws, while issuance of Section 309(a) administrative compliance orders remains a valuable tool to ensure compliance with the CWA. We will continue to evaluate other enforcement approaches in hopes of finding more appropriate in given circumstances. Other tools, such as less formal notices of violation or warning letters, can sometimes be helpful in resolving violations.

The Agency will continue to encourage a practice of inviting parties to meet and discuss how CWA violations (and other environmental impacts or violations) can be avoided as quickly as possible. The goal in the administrative enforcement process is to address violations preferably by a mutually agreed upon resolution through measures such as an administrative compliance order on consent. Using consensual administrative compliance orders, which may include a third party cost, where regulated parties are willing to work cooperatively to resolve violations and avoid potential harm to human health and the environment.

Finally, the inclusion of Section 309(a) administrative compliance orders provides the opportunity to be even more transparent in maintaining the basis for our enforcement orders. The Agency will continue to apply the principles of evidence gathering and legal analysis to ensure that Section 309(a) administrative compliance orders are supported by documentation of the legal and factual foundation for the Agency's position that the party is not in compliance with the CWA. This will aid in the successful defense of any Section 309(a) administrative compliance order in court should an order be challenged, and allow us to fulfill our statutory responsibility to address violations affecting the nation's waters.

We will continue to work closely with the Regions, Office of General Counsel, and the Department of Justice on any issues identified as we continue to evaluate and respond to the additional questions, please contact me or Mark Bellini at (202) 564-4001.

- Addressees:
- OECA Office Directors and Deputies
 - Regional Counselors, Regions 1 - 10
 - Regional Enforcement Division Directors, Regions 1 - 10
 - Regional Enforcement Coordinators, Regions 1 - 10
 - Water Management Division Directors, Regions 1 - 10
 - Randy Hill, OWM
 - Steve Redgeborn, OWM
 - Latitia Friskbay, EDS/DOJ
 - Steven Samuels, EDS/DOJ
 - Janine Fisher, EES/DOJ
 - Ken D. ... EES/DOJ