

United States Senate
WASHINGTON, DC 20510

March 12, 2014

The Honorable Nancy Stoner
Acting Assistant Administrator for Water
U.S. Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, DC 20460

Dear Ms. Stoner,

We write to express concern over Region 8 of the United States Environmental Protection Agency's (EPA) "Findings of Violation and Administrative Order for Compliance" (Compliance Order) for construction activities conducted by Andrew Johnson in Uinta County, Wyoming. According to the Compliance Order, Mr. Johnson violated the Clean Water Act by building a dam on a creek without a permit from the Army Corps of Engineers (Corps), and he is therefore required to fully restore the creek to pre-impact condition and grade.

We are troubled by EPA's Compliance Order. Rather than a sober administration of the Clean Water Act, the Compliance Order reads like a draconian edict of a heavy-handed bureaucracy. The Compliance Order also appears to rest on a broad assertion of federal jurisdiction under the Clean Water Act, offering an ominous signal of EPA's intentions for its current "waters of the United States" rulemaking. For these reasons, more fully set forth below, we request EPA to immediately withdraw the Compliance Order.

First, the Compliance Order's terms are unreasonable and crushing for an individual landowner.¹ Based on EPA's belief that Mr. Johnson discharged dredged and fill material into a jurisdictional water, the agency has ordered him to submit within 30 days a plan prepared by a consultant that assesses the impacts of the supposed unauthorized discharges, provides a restoration plan that must be approved by EPA, and contains a schedule requiring all restoration work to be completed within 60 days of the plan's approval.² Of course, this is no small task, but EPA's warning that Mr. Johnson may be subject to \$37,500 per day in civil penalties if he fails to live up to the Compliance Order's terms as well as an additional \$37,500 per day in penalties for statutory violations makes EPA's threats especially severe.³ Indeed, EPA appears more interested in intimidating and bankrupting Mr. Johnson than it does in working cooperatively with him.

Second, although the Compliance Order repeatedly asserts that Mr. Johnson constructed a dam, it is our understanding that Mr. Johnson maintains he in fact built a stock pond. As EPA is

¹ See Compliance Order at 2 (Docket No. CWA-08-2014-0012) (attached).

² See *id.* at 5-7.

³ See *id.* at 9.

aware, the discharge of dredged or fill material for the purpose of constructing a farm or stock pond is generally exempt from Clean Water Act permitting requirements,⁴ and this may explain Mr. Johnson's apparent non-response to initial Corps inquiries.⁵ More to the point, fairness and due process require that EPA base its Compliance Order on more than an assumption. Instead of treating Mr. Johnson as guilty until he proves his innocence by demonstrating his entitlement to the Clean Water Act section 404(f)(1)(C) stock pond exemption, EPA should make its case that a dam was built and that the Section 404 exemption does not apply. As it stands now, EPA's failure to demonstrate in detail how Mr. Johnson's building activities constituted the construction of a dam prejudices his opportunity to meaningfully respond to the Compliance Order.

Third, we are skeptical of the Compliance Order's claim that Six Mile Creek—into which Mr. Johnson allegedly discharged dredged and fill material—"is and was at all relevant times a 'waters of the United States.'"⁶ The only information contained in the Compliance Order which supports this threshold determination is that Six Mile Creek "is a perennial tributary of the Blacks Fork River, which is a tributary of the Green River . . . [which] is, and was at all relevant times a navigable, interstate water of the United States."⁷ Yet, to the extent EPA's is predicated federal jurisdiction on Six Mile Creek's connection to the Green River, the significance of this connection is unclear; we suspect the connection may be tenuous given the Compliance Order's inference that Six Mile Creek flows directly into the Blacks Fork River, and not the Green River. Again, in light of the stakes faced by Mr. Johnson, EPA has an obligation to more fully support its claim that Six Mile Creek is a jurisdictional water. If instead the Compliance Order stands as an example of how EPA intends to operate after completing its current "waters of the United States" rulemaking, it should give pause to each and every landowner throughout the country.

EPA recently committed to "[p]ursue vigorous civil and criminal enforcement that targets the *most serious* water, air, and chemical hazards in communities to achieve compliance."⁸ We believe EPA's Compliance Order belies this commitment and unfortunately perpetuates "the high-handedness of the agency."⁹ Accordingly, we request EPA to withdraw the Compliance Order immediately. We ask also that EPA advise us in writing no later than March 24, 2014 as to whether the Compliance Order has been withdrawn; if the Compliance Order has not been withdrawn by that time, we request that EPA explain why it feels the Compliance Order is justified. As EPA provided Mr. Johnson with only ten calendar days to respond its Compliance Order, we trust that the agency is capable of responding within a similar timeline.¹⁰

⁴ See 33 U.S.C. § 1344(f)(1)(C).

⁵ See Compliance Order at 2.

⁶ *Id.* at 3.

⁷ *Id.* at 2.

⁸ See U.S. Environmental Protection Agency, *Draft FY 2014–2018 EPA Strategic Plan* at 42 (Nov. 19, 2013) (emphasis added), available at http://www.eenews.net/assets/2013/12/09/document_gw_01.pdf.

⁹ Transcript of Oral Argument at 35, *Sackett v. EPA*, 132 S. Ct. 1367 (2012) (No. 10-1062).

¹⁰ See Compliance Order at 5.

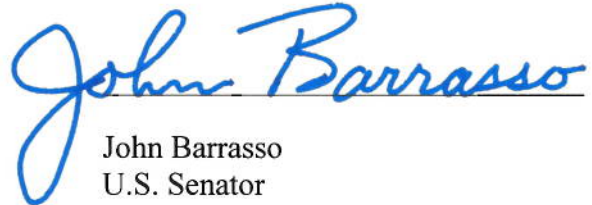
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If you have any questions regarding this letter, please contact the Environment and Public Works Committee staff at (202) 224-6176.

Sincerely,



David Vitter
U.S. Senator



John Barrasso
U.S. Senator



Mike Enzi
U.S. Senator

cc: The Honorable Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works,
U.S. Department of Defense
The Honorable Shaun McGrath, Region 8 Administrator,
U.S. Environmental Protection Agency