United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510–6175

May 24, 2012

The Honorable Lisa Jackson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Jackson:

We are deeply concerned by remarks made recently by a senior Environmental Protection Agency (EPA) official regarding enforcement practices in light of the Supreme Court's recent ruling in *Sackett v. EPA* ("*Sackett*"). In its May 7, 2012, edition, *Inside EPA* reported:

> A top EPA official is downplaying the impact of the unanimous High Court ruling that opens up Clean Water Act (CWA) compliance orders to pre-enforcement judicial review, saying it will have little effect on how the agency enforces the water law, while floating several options it is considering for new documents that may be exempt from review. "What's available after *Sackett*? Pretty much everything that was available before *Sackett*," Mark Pollins, director of EPA's water enforcement division, said. [. . .] "Internally, it's same old, same old."

Additionally, a BNA article from May 4, 2012, "EPA Official Sees No Major Shift In Agency's Use of Compliance Orders," also recounted Mr. Pollins' remarks downplaying the Supreme Court's decision in *Sackett*. It is very troubling that an EPA official with water enforcement responsibilities would believe that the Supreme Court's decision in *Sackett* has little effect on how the agency enforces the Clean Water Act.

As you know, in *Sackett v. EPA*, the Supreme Court held that EPA compliance orders are subject to pre-enforcement review by the federal courts. Compliance orders often declare that the recipient is in violation of law and threaten thousands, or even millions, of dollars in fines for the initial violations followed by thousands or millions of dollars in additional fines for not complying with the "compliance order" itself. Thus, EPA's refusal to agree to such review in the first place left the Sackett family, as it has done to many other Americans, in a state of legal limbo—at risk of substantial civil or criminal penalties if they proceeded with development of their private property but without the ability to seek a court order to determine whether EPA was acting in accordance with the Clean Water Act.

Indeed, the Sacketts faced a terrible choice: Give into EPA's overreaching involvement by foregoing the reasonable use of their private property, or force EPA's hand by proceeding with

development of their property at the risk of bankruptcy or imprisonment. EPA afforded them no opportunity to seek a neutral arbiter's evaluation of EPA's assertion of jurisdiction. No American should be faced with that choice. In fact, the Supreme Court's 9-0 ruling strongly demonstrates the absurdity of EPA's position in this case. Regrettably, we do not believe this is an isolated case with "little effect" on EPA's practices. To the contrary, as the *Wall Street Journal* explained in a March 22, 2012 editorial, "The ordeal of the Sacketts shows once again how [EPA] with a $10 billion budget and 17,000 agents has become a regulatory tyranny for millions of law-abiding Americans." The Congressional Research Service recently found that EPA issues over 1,000 administrative compliance orders annually, which provides ample reason to question how *Sackett* will impact the agency's approach to CWA enforcement.[1]

The Court's decision points toward a broader concern: EPA should not use its enforcement authority to intimidate citizens into compliance. As Justice Scalia noted in the majority opinion, "There is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into voluntary compliance without judicial review." Nevertheless, as evidenced by these comments made by Mr. Pollins, it seems that EPA plans to continue business as usual and sees no need to change their use of compliance orders in response to the Court's holding. In order to help us understand the steps the EPA is taking following the *Sackett* decision, we request you clarify the comments made by Mr. Pollins and explain how the agency's enforcement office plans to proceed in pursuing CWA enforcement in light of *Sackett*.

Thank you for your prompt attention to this matter.

Sincerely,

[1] CRS Report, *The Supreme Court Allows Pre-enforcement Review of Clean Water Act Section 404 Compliance Orders: Sackett v. EPA* (March 26, 2012).