



Written by [Joe Wolverton, II, J.D.](#) on December 19, 2011

## Sackett v. EPA Headed to the Supreme Court

Congress completed action on [The National Defense Authorization Act](#) last week, and the Act now awaits President Obama's signature. This law will empower the President to send the military to capture and indefinitely imprison citizens suspected of committing a "belligerent act" without access to an attorney or a trial on the merits of the charges.



On the Executive side, the Environmental Protection Agency, a department of the Executive Branch, has declared in a case pending before the Supreme Court (shown above, that no one — not the people, the Congress, or the courts — should have any oversight of its myriad regulations. Its word, they demand, should be law.

A [CBN story](#) begins this way:

When Mike and Chantell Sackett purchased land for their dream home near Priest Lake, Idaho, they obtained all the permits required by the county.

They even checked with the Army Corps of Engineers to make sure the federal government would okay their project.

But as workers began laying in gravel in May 2007, Environmental Protection Agency officials showed up and demanded they stop, saying the property was in a protected wetlands zone.

The bureaucrats brought with them an EPA compliance order instructing the Sacketts to immediately cease construction on their home.

The "injunction" issued by the EPA informed the Sacketts that their .63-acre lot was a federally-protected wetland. The Sacketts were dubious about this assertion given that they had a bundle of permits and that their land abuts several other residential lots and that the entire area was zoned for residential purposes.

[CBN](#) relates what happened next:

The Sacketts checked the EPA's coordinates and found their land wasn't really in that inventory. Neighbors also attested they weren't in the wetlands inventory and had never been hassled by EPA. The Sacketts hired three experts who determined their property was not a part of the wetland area.

"In the Sacketts' case, there are no wetlands anywhere near the property[.]" [said] Damien Schiff, an attorney with the Pacific Legal Foundation.

When the Sacketts brought these facts to the attention of the EPA representatives, they were ignored and they were furthermore informed that every day they failed to conform to the mandates of the order would cost them \$32,500 in fines.



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Fines are assessed by penalty provisions of the Clean Water Act. Since the day the penalties began accruing until now, the Sacketts have reportedly racked up over \$40 million in fines, according to a statement made by Mike Sackett.

The Sacketts told the EPA agents that they would see them in court.

Not so fast.

According to other applicable provisions of the Clean Water Act, “offenders” may not challenge the order until the EPA first seeks judicial enforcement of it, a legal process that could last for years.

Why does the regulation not allow recourse to the courts? The EPA [responds thus](#):

A rule that broadly authorized immediate judicial review of such agency communications would ultimately disserve the interests of both the government and regulated parties, by discouraging interactive processes that can obviate the need for judicial action.

In plain English, that means that federal officials cannot allow the Constitution’s promise of due process to get in the way of the federal government’s regulatory process.

An insightful analysis of the situation was [recently published](#) by *Reason* magazine:

Of course, the whole point of due process is that people sometimes do have “the need for judicial action” against overreaching government officials. Why should those people have to give up that right to the EPA? More to the point, why should the Supreme Court allow it to happen?

As the Institute for Justice observes in the friend of the court brief it filed on behalf of the Sacketts, “If other governmental agencies were to adopt an enforcement mechanism like that used by the Environmental Protection Agency in this case, the constitutional guarantee of due process under the law would be severely harmed and the ability to own and use private property would be subject to the unrestrained and unreviewed orders of government officials.” There’s a term for that sort of unchecked government power, and it’s not interactive processes.

Naturally, the EPA has no answer, for it considers itself above the law.

In the Sackett case, the EPA asserted its supremacy when it told the stunned Sackett family that to qualify as being in conformance with the terms of the order, not only would they have to stop building their house, but they would have to return the land to its previous condition and do it on their own dime.

The precise demands made in the EPA’s compliance order were recited by Chantell Sackett: “...you need to plant these special wetland plants that are not native to the area, you need to fence it, and you need to watch it and monitor it for three years.”

Basically, a group of unelected and unaccountable federal officials has shattered the dreams of the Sackett family, robbed them of the due process of law guaranteed to every citizen by the Constitution, and charged them \$32,500 a day for the privilege.

The Sacketts were resigned to surrender their land to the EPA rather than face the economic ruin which would have resulted from the fines. To their shock, however, the EPA rejected their offer. It seems that EPA officials didn’t want the land; they preferred to be obeyed.

Suit was filed and two lower courts held in favor of the EPA, ruling that the agency’s compliance orders must be followed without judicial review. Thus, the two federal courts that have already handed down



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an opinion in the case have found in favor of the federal officials and denied due process to the Sacketts.

At this point, the Pacific Legal Foundation entered the fray, successfully appealing the case of the Sacketts to the Supreme Court.

“Every American is entitled to his day in court before the government can say, ‘You can’t build your home on your property,’” declared Daniel Schiff, of the Pacific Legal Foundation.

As the *Reason* article states:

This case boils down to the protection of a fundamental constitutional right. It’s not about hamstringing bureaucrats or overturning environmental laws. The Supreme Court simply needs to ensure that the Sacketts — and all other property owners—get their day in court by ruling that administrative compliance orders are subject to judicial review. Due process demands nothing less.

There are, of course, those who see no harm in an omnipotent federal government. Advocates of that position have been quoted in a few articles siding with the EPA’s unchallengeable compliance orders.

“The compliance order tool is one of a few mechanisms that EPA has to resolve and resolve quickly, pollution problems,” Jon P. Devine, a senior attorney with the National Resources Defense Council, told [BusinessWeek](#).

Someone quoted in the CBN piece compared the situation of the Sacketts to that of someone caught speeding: “The traditional remedy is that you appeal the ticket in court. The Sacketts, however, are essentially arguing that they should get to go to court to dispute the facts before the cop even issues the ticket.”

The Sacketts understand the enormity of the issue raised by their pouring of a little gravel on less than an acre of land. Said Mrs. Sackett: “The EPA can come in and turn your life upside down. They can make you feel really small and insignificant. And they take away from you your sense of America.”

Oral arguments in the case of [Sackett v. Environmental Protection Agency](#) are set to begin on [January 9, 2012](#).

*Photo: Supreme Court building*



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