

Sackett v. EPA: Compliance Orders and the Right of Judicial Review

*Damien M. Schiff**

I. Introduction

The Clean Water Act casts a nationwide regulatory net that snags individual citizens doing ordinary, everyday activities. Unlike other environmental statutes, the Clean Water Act's scope is not obvious or intuitive to the layman. Its reach is extremely broad, requiring a permit for the discharge of "pollutants" from a "point source" into the "waters of the United States."¹ These "waters of the United States" have been interpreted by regulation to include "wetlands."² Wetlands, in turn, are defined by complex criteria—including soil type, vegetation, and hydrology—which the average person cannot readily identify.³ Indeed, the government routinely finds regulable "wetlands" on land that to the layman appears totally dry. As testament to the difficulty of determining federal jurisdiction over "wetlands" and other waters, in just the last decade, the Supreme Court has twice ruled that the Environmental Protection Agency and the United States Army Corps of Engineers have overextended their reach under the Clean Water Act.⁴ It is no surprise, then, that average

* Principal attorney, Pacific Legal Foundation; counsel of record in *Sackett v. EPA*, 132 S. Ct. 1367 (2012).

¹ 33 U.S.C. § 1362 (2006).

² 40 C.F.R. § 230.3(s)(7) (1993); 33 C.F.R. § 328.3(a)(7) (1993).

³ U.S. Army Corps of Engineers, Wetlands Delineation Manual (Jan. 1987), available at <http://el.erdc.usace.army.mil/wetlands/pdfs/wlman87.pdf> (last visited April 18, 2012).

⁴ See *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001). Although the EPA has principal responsibility for administering the Clean Water Act, the Corps administers the Act's permitting process for the discharge of dredged and fill material. Yet even then, the EPA retains oversight for the Corps's activities. See Memorandum of Agreement between the Dep't of the Army and the EPA Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act (Jan. 19, 1989) (Guidance), available at <http://water.epa.gov/lawsregs/guidance/wetlands/enfoma.cfm> (last visited

people may not, and sometimes cannot, know whether they have regulable “wetlands” on their property, and that jurisdictional disputes arise.⁵

Moreover, even if the agencies have formally determined that a site contains jurisdictional “wetlands,” the property owner has no right to judicial review of that determination. The EPA for its part is not obligated to accept the professional opinion of a landowner’s wetlands experts. Despite any evidence, professional opinions, or agency advice a property owner receives, the EPA may still impose sanctions if it has “any information” that the property contains a jurisdictional “wetland.”⁶

Michael and Chantell Sackett were individual citizens unwittingly ensnared in this regulatory net. In 2005, the Sacketts purchased a 0.63-acre lot within an existing residential subdivision in Priest Lake, Idaho. After having obtained all the necessary local building permits, the Sacketts’ employees commenced work on the construction of a three-bedroom family home on the site. A few days into construction, with only a layer of gravel having been put down, agents from the EPA and the Corps came onto the property and verbally ordered the Sacketts’ employees to stop work. The agents stated that the lot contained wetlands protected under the Clean Water Act.

Following the agents’ visits, the Sacketts contacted their local Corps office, which provided them an application for an after-the-fact wetlands-fill permit. The Sacketts declined to submit the application, however, because it required them to concede that their property contained wetlands. The Sacketts then contacted the EPA several times over the summer and fall of 2007 to request a written explanation of the agency’s authority to stop the Sacketts’ homebuilding. The only written response to these inquiries came in November, 2007, when the EPA issued the Sacketts a compliance order under

April 18, 2012). See also 33 U.S.C. § 1344(c) (2006) (authorizing the EPA to veto certain Corps-approved discharges).

⁵ Mark Latham, *Rapanos v. United States: Significant Nexus or Significant Confusion? The Failure of the Supreme Court to Clearly Define the Scope of Federal Wetland Jurisdiction*, in *The Supreme Court and the Clean Water Act: Five Essays* 5 (L. Kinvin Wroth ed., 2007), available at <http://www.vjel.org/books/pdf/PUBS10004.pdf> (last visited April 18, 2012).

⁶ Cf. 33 U.S.C. § 1319(a)(3) (2006).

the Clean Water Act. The Act authorizes the EPA to issue a compliance order when the agency believes, “on the basis of any information available,” that certain enumerated provisions of the Act have been violated.⁷ The Sacketts’ compliance order charged them with having violated the Clean Water Act by discharging rock and gravel into regulated wetlands without a permit. Following several amendments, the order required the Sacketts to remove all “fill” from the site, “restore” the property to its pre-disturbance vegetative condition with the original “wetlands” soils, and allow EPA agents access to the property and the Sacketts’ business records to ensure compliance with the order. If the Sacketts did not immediately comply, the order threatened civil fines of up to \$32,500 per day, among other sanctions.⁸

The EPA’s vigorous enforcement of the Clean Water Act and rough treatment of the Sacketts are far from unusual. Both the EPA and the Corps have a long and sordid history of turning the lives of property owners into nightmares. For example, Florida father-and-son property owners Ocie and Carey Mills were each sentenced to nearly two years in a federal penitentiary for having cleaned out a small residential lot and drainage ditch, notwithstanding that the state Department of Environmental Resources and a district court judge agreed that the site in question was probably not wetlands.⁹ Another example is John Rapanos, a Michigan landowner who wanted to convert a cornfield into a shopping center. After having moved some dirt on the property, the EPA charged Rapanos with illegally discharging “pollutants” into “navigable waters.” The EPA then obtained a felony conviction.¹⁰ Yet another example is Charlie Johnson and his family, Massachusetts cranberry farmers. They had been raising cranberries for years when the EPA swooped in to contend that during those years they had been violating the Clean Water Act by farming without a permit. It didn’t matter that no other cranberry farmers in the area had ever obtained a permit or

⁷ *Id.*

⁸ By the time the Supreme Court decided the case, the EPA had increased the penalty maximum to \$37,500 per day. See Civil Monetary Penalty Inflation Adjustment Rule, 74 Fed. Reg. 626, 627 (Jan. 7, 2009) (to be codified at 40 C.F.R. pt. 19).

⁹ *United States v. Mills*, 221 F.3d 1201 (11th Cir. 2000).

¹⁰ *Rapanos v. United States*, 547 U.S. 715 (2006).

had any reason to believe that such a permit would be necessary. The EPA brought a civil suit and dragged the family through more than a decade of litigation and hundreds of thousands of dollars in fees.¹¹

In light of this practice, the Sacketts were understandably frightened when they received the compliance order. A few months after having received the original order, the Sacketts' local attorney requested an administrative hearing to demonstrate that their property contained no wetlands. The EPA perfunctorily denied the request. At that point, the Sacketts' attorney contacted the Pacific Legal Foundation, being familiar with PLF's work over the years in fighting back against government abuse of property owners, particularly against the Corps and the EPA under the Clean Water Act.

In its almost 40-year existence, PLF has regularly represented property owners in state and federal courts throughout the country who have been abused by government overreach. In particular, PLF has fought many battles to open up the courthouse doors to injured property owners. For example, in *Stewart & Jasper Orchards v. Salazar*, PLF won the right of farmers to challenge water cutbacks imposed because of Endangered Species Act restrictions.¹² And in *Barnum Timber Co. v. EPA*, PLF won the right of property owners to challenge EPA designations of "impaired waterbodies" under the Clean Water Act that reduce the value of their property.¹³

PLF has also routinely policed the EPA and the Corps when these agencies have overextended their authority under the Clean Water Act. Most prominently, in 2006 PLF successfully represented John Rapanos (the Michigan landowner) in the Supreme Court to overturn the EPA's and the Corps's "hydrological connection" theory—under which the agencies could regulate any alleged "wetland" under the Clean Water Act so long as one drop of water could flow from the land to a navigable-in-fact water body.

Hence, when the Sacketts presented their story to PLF, we were excited to get involved. Not only did the case present an important issue concerning the scope of the agencies' authority to regulate

¹¹ *United States v. Johnson*, 437 F.3d 157 (1st Cir. 2006), vacated, 467 F.3d 56 (1st Cir. 2006).

¹² 638 F.3d 1163 (9th Cir. 2011).

¹³ 633 F.3d 894 (9th Cir. 2011).

seemingly dry land under the Clean Water Act, it also raised a key procedural issue. At that time, the general rule among the lower courts was that a landowner had *no* right to sue the EPA when it issued a compliance order.¹⁴ The lower courts had ruled either that such an order was not sufficiently “final” or that Congress, in enacting the Clean Water Act, did not intend to allow landowners to sue the EPA in these circumstances. Instead, these courts reasoned that landowners either had to go through the permitting process before suing or had to invite the EPA to bring a civil action against them.

II. Litigation in the Lower Courts

In April 2008, PLF filed a lawsuit in federal district court in Idaho on behalf of the Sacketts, challenging the compliance order under the Administrative Procedure Act¹⁵ and the Fifth Amendment’s Due Process Clause. The Sacketts’ complaint advanced three claims. The first, under the APA, asserted that the compliance order was arbitrary and capricious because the EPA had no statutory jurisdiction over the Sacketts’ property. The second asserted that the issuance of the compliance order without notice and a hearing violated the Due Process Clause. The third asserted that the standard for issuing a compliance order—“on the basis of any information available”¹⁶—was unconstitutionally vague.

Although our complaint stated these claims separately, in briefing we placed principal emphasis on our first claim. That claim, however, presupposed that the Sacketts were entitled to a hearing. Accordingly, to protect the Sacketts’ interests, we added the two due process claims, which could give the Sacketts some relief if they could not get a hearing.

The distinction is important. If the Sacketts were to win on their first claim, their remedy would include *both* a statement that the EPA has no jurisdiction over the property *and* an invalidation of the compliance order. A victory on due process would get the Sacketts

¹⁴ See, e.g., *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995), cert. denied, 516 U.S. 1071 (1996); *S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418 (6th Cir.), cert. denied, 513 U.S. 927 (1994); *S. Pines Assocs. v. United States*, 912 F.2d 713 (4th Cir. 1990); *Hoffman Group, Inc. v. EPA*, 902 F.2d 567 (7th Cir. 1990).

¹⁵ 5 U.S.C. §§ 701–706 (2006).

¹⁶ See 33 U.S.C. § 1319(a)(3) (2006).

just the invalidation of the order, without any judicial declaration concerning the EPA's statutory authority under the Clean Water Act. Regardless of remedy, the addition of the due process claims performed an important signaling function, alerting the court that the denial of a hearing would have constitutional implications.

The district court ultimately granted the EPA's motion to dismiss, concluding that the compliance order is not the type of agency action subject to judicial review.¹⁷ The district court's opinion did not break any new ground, but simply followed the significant body of case law ruling the same way. We then filed an appeal to the U.S. Court of Appeals for the Ninth Circuit, emphasizing that due process entitled the Sacketts to a hearing on the EPA's jurisdiction. In a related vein, we contended that the Clean Water Act did not afford constitutionally adequate review. To begin with, the Sacketts could not receive adequate review as defendants in a lawsuit brought by the EPA, because in such an action the Sacketts would not be allowed to contest the jurisdictional bases for the compliance order. Instead, they could only raise whether the agency in fact had "any information" available at the time it issued the order to justify its jurisdiction.

A. *Creative Use of Precedent*

To support this argument that judicial review of the compliance order as defendants would be inadequate, we relied on the Eleventh Circuit's decision in *Tennessee Valley Authority v. Whitman*.¹⁸ There, the court held that Clean Air Act compliance orders are not judicially reviewable because their enforcement would violate due process. The court reasoned that the Clean Air Act does not authorize plenary review of compliance orders, as due process required.¹⁹ Rather, the Act, as interpreted by the Eleventh Circuit, authorizes federal courts to conduct what amounts to a "show cause" hearing.

At first glance, it might seem peculiar that we relied so heavily in the Ninth Circuit on the Eleventh Circuit's decision, given that the outcome in the latter case—no judicial review—was exactly the opposite of what we wanted for the Sacketts. Our strategic decision was driven by the state of the law. As noted earlier, at the time we

¹⁷ *Sackett v. EPA*, No. 08-cv-185-N-EJL, 2008 U.S. Dist. LEXIS 60060 (N.D. Idaho Aug. 7, 2008).

¹⁸ 336 F.3d 1236 (11th Cir. 2003).

¹⁹ *Id.* at 1258.

were litigating in the Ninth Circuit, every court to have addressed the issue of judicial review of Clean *Water Act* compliance orders had ruled against the Sacketts' position. The Ninth Circuit, however, had never addressed the issue. Our plan therefore was to use *parts* of the Eleventh Circuit's decision to bolster our main argument in favor of judicial review and perhaps produce a circuit split that would make the case ripe for Supreme Court review.

Specifically, we relied on two related holdings from the Eleventh Circuit's decision: first, assuming that a court *could* review a compliance order, its review would be very limited, something akin to a "show cause" hearing; and second, because such review would be limited, it would not satisfy the due process rights of the parties who received such orders. (A basic tenet of due process is that the government cannot deprive a person of liberty or property without first affording him notice and an opportunity to be heard.) Hence, our argument to the Ninth Circuit was as follows: (1) if you follow the other precedents and rule that judicial review is not available, you will have to overturn the compliance order regime as violative of due process (see the Eleventh Circuit); (2) courts, though, should be loath to overturn statutes if a constitutional interpretation is available; (3) a constitutional interpretation *is* available—namely, allowing judicial review of compliance orders under the Administrative Procedure Act. Therefore, a court could both avoid the constitutional question and give the Sacketts what they wanted.

B. Resurrecting a Good but Old Supreme Court Doctrine

We realized, though, that reliance on an outlier out-of-circuit precedent would not be enough to convince the Ninth Circuit, particularly given that the government was arguing that the Sacketts could have avoided enforcement altogether by having applied for a Clean Water Act wetlands fill permit. We therefore sought to bolster our position by relying on the Supreme Court's decision in *Thunder Basin Mining Co. v. Reich*²⁰ to argue that the Clean Water Act's permitting process could not provide adequate review. In *Thunder Basin* (a case concerning judicial review under the Federal Mine Safety and Health Amendments Act of 1977), the Court, following its landmark decision in *Ex parte Young*,²¹ observed that otherwise constitutionally

²⁰ 510 U.S. 200 (1994).

²¹ 209 U.S. 123 (1908).

adequate judicial review could become inadequate if too many conditions attach to obtaining such review. Accordingly, we made two arguments in favor of the Sacketts based on these precedents, one related to enforcement actions, the other related to the permitting process. First, we argued that another reason why the Sacketts should not have to wait until an EPA lawsuit for them to get judicial review is that it would violate the principle of *Thunder Basin* and *Ex parte Young*—that the right to judicial review would be conditioned on the Sacketts’ violating the compliance order and thereby risking significant civil liability. Second, we used this principle for the same purpose to undercut the permitting option: A permitting regime ceases to provide adequate judicial review if the costs of permitting are too onerous. In light of the very high costs involved in applying for a Clean Water Act permit,²² we argued that the Act’s permitting regime is constitutionally inadequate under *Thunder Basin*.

C. *The Ninth Circuit Toes the Party Line*

Unfortunately, the Ninth Circuit rejected these arguments.²³ Based on the Clean Water Act’s structure and legislative history, the court ruled that Congress did not intend compliance orders to be judicially reviewable.²⁴ The court credited the government’s contention that judicial review of compliance orders would frustrate Congress’s enforcement options and would hamper the agency’s effective administration of the Act. The court also concluded that preclusion of judicial review does not impinge upon the Sacketts’ due process rights. To begin with, the court rejected the argument that a compliance order recipient is statutorily foreclosed from challenging the EPA’s jurisdiction to issue a compliance order in the context of an EPA civil action. The court acknowledged that the Eleventh Circuit had held otherwise, but the court concluded that the statutory language could be read either way and that the court was bound to

²² A 2002 study estimated the average cost of an individual Clean Water Act permit to be over \$270,000. See Rapanos, 547 U.S. at 720 (plurality opinion) (citing Sunding & Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Res. J. 59, 74–76 (2002)).

²³ *Sackett v. EPA*, 622 F.3d 1139 (9th Cir. 2010).

²⁴ *Id.* at 1142–44.

construe the statute to preserve its constitutionality. This holding would later become important for us as we drafted the Sacketts' petition for writ of certiorari in the Supreme Court because it represented a genuine split in the circuit courts.

To bolster its holding that the Clean Water Act's built-in review provisions were constitutionally adequate, the Ninth Circuit noted that before the EPA could assess any penalties against the Sacketts, the agency must first bring an action in court—at which point the Sacketts would be able to make their arguments about the EPA's lack of authority over their homebuilding project.²⁵ In adopting that conclusion, the court accepted the government's argument that compliance orders are not "self-executing" but instead can be enforced only with judicial assistance. Accordingly, an EPA civil action does, in the Ninth Circuit's view, provide the Sacketts adequate judicial review.

Similarly, the Ninth Circuit held that the Clean Water Act does not present a constitutionally intolerable choice between complying with the statute and foregoing judicial review on the one hand and obtaining judicial review only by accepting onerous conditions on that review on the other. The court explained that the Sacketts could both comply with the statute *and* seek judicial review by requesting a permit, the denial of which could be challenged under the APA.²⁶ The court did not address, however, the Sacketts' *Thunder Basin* argument that the permitting regime is too expensive to be considered a constitutionally adequate means of review.

III. Merits Briefing in the Supreme Court

Having lost in the lower courts, PLF and the Sacketts turned their attention to the Supreme Court. In strategizing over how best to present the Sacketts' case, we were faced with a significant problem. Generally speaking, the Supreme Court does not take up cases just to affirm the lower court and, in the Sacketts' case, every lower court to have addressed the issue ruled the same way—no judicial review of compliance orders. We thus had two options: emphasize the national importance of the issue or identify a conflict. We chose both.

²⁵ *Id.* at 1146–47.

²⁶ *Id.* at 1146.

On the first score, we drafted our cert petition to highlight the injustice that the Sacketts and other property owners have endured. It's no secret that the Supreme Court likes to take up cases that tell a good story; we knew we stood on good ground there. After all, the underlying issue was not whether some large corporation could discharge toxic waste into a river but whether two hardworking Americans could build their dream home without being accused of being environmental polluters for putting some gravel on a half-acre residential lot. This was a golden story.

We also decided to play up the constitutional side of the case, casting our cert petition explicitly in terms of due process and explaining how the judicial review regime sanctioned by the lower courts effectively cut off landowners' rights to judicial review. Although none of us expected the Supreme Court to take up the case simply to hold the Clean Water Act constitutional, we believed that the constitutional flavor of the case might attract the attention of some of the justices and ultimately convince the Court to rule in the Sacketts' favor on statutory grounds.

We filed our cert petition in late February 2011, asking the Court to address whether the Sacketts may obtain judicial review of the compliance order. The petition's "question presented" asked, "Do Petitioners have a right to judicial review of an Administrative Compliance Order issued without hearing or any proof of violation under Section 309(a)(3) of the Clean Water Act?" As the foregoing question underscores, we continued to rely on the Eleventh Circuit's decision in *TVA v. Whitman* both to emphasize the injustice of the judicial review regime to which the Sacketts were subject and to highlight a circuit split that would support Supreme Court review.

In late June, the Court granted review but rewrote the Sacketts' question presented into two separate issues. The first rewritten question presented asked, "May Petitioners seek pre-enforcement judicial review of the Administrative Compliance Order pursuant to the Administrative Procedure Act, 5 U.S.C. § 704?" The second question presented, assuming a negative answer to the first question, asked, "[D]oes Petitioners' inability to seek pre-enforcement judicial review of the Administrative Compliance Order violate their rights under the Due Process Clause?" The Court's action was significant for several reasons. First, the Court wanted to assure itself the opportunity to address the constitutional question, but the Court also signaled that it would address that question only if absolutely necessary. Second, the rewritten questions presented indicated that the

Court wanted the parties to address whether the compliance order qualified for judicial review under the APA, a question that would include an analysis of whether the order was sufficiently “final,” whether existing modes of judicial review were adequate substitutes for APA review, and whether the Clean Water Act affirmatively precluded APA review. Third, the Court’s description of what the Sacketts were seeking—“preenforcement” review—seemed to indicate some sympathy with the lower court decisions holding that such review was generally the exception, not the rule.

Our merits briefing continued to focus on the due process issue, notwithstanding the Court’s new questions presented. We reasoned that the stronger the due process argument, the more likely that the Court would avoid due process altogether by holding that the Sacketts may proceed under the APA. Accordingly, we conceded that their due process rights would be satisfied if APA review were available. We also chose not to press our *TVA v. Whitman* argument that judicial review of compliance orders would be statutorily restricted. Dumping *TVA* was born of two considerations: we really did not want the *TVA* outcome, and *TVA*’s statutory analysis was not beyond criticism. Instead, we decided to cast the case as a straightforward application of the principle of *Thunder Basin* and *Ex parte Young*—judicial review cannot be conditioned on risking significant liability. Specifically, we argued that the compliance order had deprived the Sacketts of a number of protected interests, including the right to use and enjoy their property, and that the Clean Water Act afforded no adequate review of that deprivation.

Admittedly, this tack was somewhat risky. Never before had we fully articulated the precise nature of our due process claim under *Ex parte Young*, in part because the Supreme Court itself had never done so either. Also, we were reluctant to go into great detail because, arguably, the nature of the deprivation that the Sacketts had suffered was not intuitive. After all, the EPA had conceded that it could not dock the Sacketts’ checking accounts for fines—or send gendarmes onto the property to stop their homebuilding—unless and until the EPA had obtained a *judicial* approval of the compliance order. And, of course, before a court could act, the Sacketts would be given notice and an opportunity to be heard.

Our argument that an EPA civil action would not provide adequate review was also made more difficult by our decision not to

press the Eleventh Circuit's approach. We therefore had to come up with substitute reasons as to why such a hearing would not be adequate. We decided to emphasize two points: first, the Sacketts could not *initiate* an EPA civil action but instead were at the mercy of the EPA's enforcement whim; and second, such review could only be had by violating the compliance order and risking thousands of dollars per day in civil fines.

We recognized, however, that to win we had to do more than establish that the Sacketts should not have to wait for the EPA to "drop the hammer" of a lawsuit before getting judicial review. Our difficulty was that, unlike in *Ex parte Young* and *Thunder Basin*, the statute here provided a permitting route, whereby a regulated party could avoid liability altogether by applying for a permit and, if denied, suing over that denial. We still had our argument from below that the permitting route was too expensive to provide meaningful review. But that might not hold true in all circumstances. For example, a permit applicant might be exceedingly wealthy, or a permit applicant might be eligible for a streamlined and cheaper permit. Accordingly, we chose in briefing to emphasize two points as to why the permitting route was not adequate for the Sacketts: first, because a compliance order had already been issued, the Sacketts were essentially ineligible for "after the fact" permit consideration; and second, the permitting route was inadequate because, even if available, it provided no review of the compliance order itself, which was the agency action that had caused all the trouble.²⁷

In its reply brief, the EPA expended great effort to recharacterize the nature of the compliance order as an informal or tentative agency action, akin to a warning letter or telephone call. In retrospect, this approach was, in my view, a strategic error. The simplest reason for this conclusion is that the argument was a very bad one. It is unusual for something denominated an "order" and imposing its own liability for violation of its terms to be considered "tentative" or "uncertain." For the same reason, it is difficult to characterize such an action as having no real-world effect. At a more tactical level, the EPA's argument was bad because the agency did not need to win on the point in order to win the case. That is, for the Sacketts

²⁷ See Brief for the Appellant-Petitioner on the Merits at 19–31, *Sackett v. EPA*, 132 S. Ct. 1367 (2012) (No. 10-1062).

to win, they had to show *both* that the compliance order was a final agency action *and* that the Clean Water Act did not preclude judicial review. For the EPA to win, it needed to show only that the Clean Water Act precluded review, regardless of the compliance order's finality. By focusing so much attention on a hard and unnecessary issue to win, the EPA wasted gas.

Nevertheless, the EPA argued strenuously that the order was not a final agency action because its terms were open to negotiation and had no real-world effect. The EPA dismissed the likelihood that the Sacketts might be held liable for elevated fines or prevented from obtaining a permit. The EPA underscored that the order itself invited the Sacketts to engage in informal discussions concerning the order's terms.²⁸ The EPA also contended that the order did not violate the Sacketts' due process rights. It argued that the order had not deprived the Sacketts of any protected interest. Rather, the Sacketts could continue to use their property and ignore the order, and no adverse action could be taken against the Sacketts until the EPA sought to enforce the order in a civil action. Moreover, the Clean Water Act's review options for the Sacketts—a civil action and the permitting process—did not violate the principle of *Ex parte Young*. Again, no fines could be collected without the EPA's first prevailing in a civil action. Further, the Sacketts could avoid liability altogether by applying for a permit and suing over a permit denial. That process would allow the Sacketts to raise the same jurisdictional objections that they would otherwise make in a direct challenge to the compliance order.²⁹

IV. Amicus Briefs

From the time that the Court announced that it would hear the Sacketts' case, we went to work in organizing *amicus curiae* support. Amicus briefs are often very helpful, particularly if they explain difficult technical issues or give examples of how various rulings would have different impacts on the regulated public. We made it a high priority to assemble a broad array of amicus support, from private property groups and industry associations to state and local governments, to prove to the Court that the Sacketts' position was

²⁸ See Brief for the Appellee-Respondent at 13–33, Sackett, 132 S. Ct. 1367 (No. 10-1062).

²⁹ *Id.* at 44–54.

mainstream and the EPA's position extreme. To that end, we hosted an amicus coordinating session and put together an email list for interested parties to follow. Ultimately, over a dozen amicus briefs were filed in support of the Sacketts by nearly 50 separate organizations, a diverse assortment including property rights groups such as the Institute for Justice and Mountain States Legal Foundation, trade associations such as the American Farm Bureau and the National Association of Manufacturers, as well as several states and even the City of New York.

In stark contrast, the EPA received only one amicus brief, submitted by the Natural Resources Defense Council and several Idaho environmental groups. Half of the brief comprised a simple reiteration of the legal points made by the EPA. But the rest of the brief added a bit of controversy to the case. The general rule is that the record of a case is closed for an appeal and the parties are not allowed to add new facts or documents for the Supreme Court's consideration. Notwithstanding that rule, NRDC submitted a collection of documents with its amicus brief that it had obtained from the Corps through a Freedom of Information Act request. These documents, the NRDC contended, demonstrated that the Sacketts had had several opportunities between the time EPA agents came onto the property in May 2007 and when the compliance order was issued in November of that year to resolve the matter informally. The NRDC also suggested that the Sacketts could have applied for a streamlined wetlands-fill permit and that it was likely that such a permit would have been granted.

We objected strongly to the NRDC's amicus brief and additional documents. We noted that it was tremendously unfair to the Sacketts to allow the NRDC to paint a biased factual picture of their story without giving the Sacketts an opportunity to respond. We also noted that none of the documents was relevant to the issues before the Court. The NRDC's new material concerned the Sacketts' knowledge and actions *after* EPA agents came onto the property and told the Sacketts' employees to stop work. Nothing in what the NRDC submitted had anything to do with the Sacketts' knowledge *before* they began their allegedly illegal homebuilding.

In any event, we submitted a new declaration from Chantell Sackett in support of our objections to NRDC's filing. That declaration made clear that it was the EPA, not the Sacketts, that was the intransigent party. Ultimately, the Supreme Court allowed the filing of the

NRDC's amicus brief but did not rule on its request to submit the extra-record documents. Arguably, the Court made a de facto ruling on that latter request in the course of the following exchange at oral argument between Chief Justice John Roberts and the EPA's attorney, Deputy Solicitor General Malcolm Stewart:

CHIEF JUSTICE ROBERTS: What would you—what would you do, Mr. Stewart, if you received this compliance order? You don't think your—your property has wetlands on it, and you get this compliance order from the EPA. What would you do?

MR. STEWART: Well, as we know from documents that have—were not in the record of the case, but have been provided to—

CHIEF JUSTICE ROBERTS: If they weren't in the record, I don't want to hear about them. You appreciate that rule, that we don't consider things that aren't in the record.³⁰

The chief justice's curt rebuff of the EPA's attempt to rely on the NRDC's documents was particularly gratifying.

V. Oral Argument

Following the skirmish over the NRDC's amicus brief, preparation for oral argument began in earnest. The Court scheduled argument for January 9, 2012, the first day of oral arguments for the new calendar year. My preparation comprised principally of four moot court sessions, two in Sacramento at PLF's headquarters and two the week before the argument in Washington, D.C.³¹ Most of the questioning at these sessions focused on whether the Sacketts already had adequate opportunities for judicial review under the Clean Water Act, through the permitting process and as defendants in an EPA civil action. There was also a fair mix of administrative procedure and due process questions.

It was therefore surprising that no justice at oral argument asked a question regarding due process, and nearly all the questions

³⁰ Transcript of Oral Argument at 36, *Sackett*, 132 S. Ct. 1367 (No. 10-1062).

³¹ I would like to take this opportunity publicly to thank both the Supreme Court Institute at the Georgetown University Law Center and the Heritage Foundation for hosting moot court sessions for me.

directed to me dealt not with the merits of our arguments, but with the type of remedy that the Sacketts would receive if they were to prevail. Specifically, the Court was interested in what the standard of review would be in the district court, what the record would look like, and what impact the Sacketts' action would have on any future civil action that the EPA might choose to bring. During the course of my argument-in-chief, I was somewhat surprised by how vigorous the questioning was. But any discomfort that such questioning might have engendered was quickly dispelled once the deputy solicitor general took the podium and was subjected to 30 minutes of verbal assault.

All eight justices who spoke during argument—Justice Clarence Thomas was characteristically silent—revealed significant circum-spection about the EPA's position, in particular that the compliance order was not final and that the Clean Water Act already offered adequate opportunities for judicial review. In response to the EPA's attempt to make light of the civil liability attaching to compliance order violations, Justice Antonin Scalia observed that such a violation "could as a theoretical matter double the penalties."³² When the deputy solicitor general added that no reported case had actually imposed such penalties, Justice Scalia wryly noted, "I'm not going to bet my house on that."³³ Justice Sonia Sotomayor added that the compliance order appeared to impose obligations beyond the statute. She distinguished between "the affirmative act prohibited by the statute . . . [and] the violation of the remedial steps that the compliance order [imposes]."³⁴

The Court also showed little tolerance for the EPA's view that the Sacketts could obtain judicial review through the permitting process. As the chief justice reminded, "You know you'll never get an after-the-fact permit if the EPA has sent you a compliance order saying you've got wetlands."³⁵ The Court also appeared to show real sympathy for the Sacketts' plight since the EPA issued its compliance order. Justice Samuel Alito remarked that "if you related the facts of this case as they come to us to an ordinary homeowner . . . most ordinary

³² Transcript of Oral Argument, *supra* note 30, at 30.

³³ *Id.* at 31.

³⁴ *Id.* at 32.

³⁵ *Id.* at 36–37.

homeowners would say this kind of thing can't happen in the United States."³⁶

Later, Justice Alito repeated his view of the agency's conduct in criticizing the EPA's position that judicial review would hamper the investigation process: "That makes the EPA's conduct here even more outrageous. [W]e think now that this is wetlands . . . that qualify; so, we're going to hit you with this compliance order, but, you know, when we look into it more thoroughly in the future, we might change our mind."³⁷

The chief justice echoed similar frustration with the EPA's arguments: "In other words, what the landowner is supposed to do—the agency says, because you didn't apply for a permit, you're in trouble because you didn't give us a chance to say whether we were going to take away your constitutional rights or not; so, we can do it."³⁸

Following oral argument, most Court watchers predicted a win for the Sacketts, based on the highly skeptical questions that the justices posed to the EPA. I was also optimistic, in large measure because the questions I fielded were mainly focused on remedies. I assumed that the Court would not have been interested in the Sacketts' requested remedy if it did not agree with their arguments on the merits.

VI. The Decision

The Court issued its decision on March 21, 2012. Justice Scalia delivered the opinion for a unanimous Court. Justices Alito and Ruth Bader Ginsburg wrote concurrences.

A. Justice Scalia for the Unanimous Court

The opinion begins with a brief recitation of the facts and the Clean Water Act, and notes that the decision does not address the underlying merits of the Sacketts' claims against the EPA.³⁹ Nevertheless, the opinion rehearses the case law concerning the Clean Water Act's regulation of "the waters of the United States." Justice Scalia observed that in the Court's most recent Clean Water Act

³⁶ *Id.* at 37–38.

³⁷ *Id.* at 53.

³⁸ *Id.* at 39.

³⁹ Sackett, 132 S. Ct. at 1370.

decision, *Rapanos*, the chief justice concurred expressly to urge the EPA and the Corps to clarify their jurisdiction through new rulemaking—because without such clarification the regulated public would be placed in a very difficult position.⁴⁰ But the agencies have yet to engage in new rulemaking and the Sacketts' plight demonstrates the impact of the agencies' failure. Although the Court's opinion does not address this underlying jurisdictional issue, it is fair to interpret the opinion as an acknowledgment that the law is not clear, a fix has to be provided, and that the fix will come from the judiciary if Congress or the agencies do not act.

The bulk of the Court's opinion addresses the EPA's principal arguments against judicial review: (1) the compliance order is not "final";⁴¹ (2) the Clean Water Act already affords adequate judicial review of compliance orders;⁴² and (3) the Clean Water Act precludes judicial review of compliance orders.⁴³

1. *Final Agency Action*

Speaking to the EPA's finality arguments, the Court concluded that the Sacketts' compliance order "has all the hallmarks of APA finality that our opinions establish."⁴⁴ First, the order determines rights or obligations because it requires the Sacketts to "restore" their property and to give the EPA access to their property and records. Second, the order produces legal effects: violation of the order exposes the Sacketts to double liability of \$75,000 per day (\$37,500 for violating the statute, and \$37,500 for violating the order); and the order's issuance makes it materially harder for the Sacketts to obtain an after-the-fact permit from the Corps.⁴⁵ Third, the order

⁴⁰ *Rapanos v. United States*, 547 U.S. 715, 757–58 (2006) (Roberts, C.J., concurring).

⁴¹ Cf. 5 U.S.C. § 704 (2006) (authorizing judicial review of "final" agency action); *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (holding that an agency action is final if it is the consummation of the agency's decisionmaking and if it has legal effects).

⁴² Judicial review under the Administrative Procedure Act is limited to agency actions "for which there is no other adequate remedy in a court." 5 U.S.C. § 704 (2006).

⁴³ The Administrative Procedure Act's judicial review provisions apply except to the extent that "statutes preclude judicial review" or "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(1)-(2) (2006).

⁴⁴ *Sackett*, 132 S. Ct. at 1371.

⁴⁵ *Id.* at 1372. In its merits briefing in the Supreme Court, the EPA had conceded that the compliance order produces these effects. The Court assumed for the sake of argument that the EPA was correct, without actually deciding whether that interpretation of the Clean Water Act and the Corps' permitting regulations was correct. See *id.* at 1372 nn.2–3.

marks the consummation of EPA decisionmaking, a conclusion underscored by the fact that the Sacketts had requested an administrative hearing and been denied. Although the order indicates that the EPA is open to informal discussion of the compliance order's terms, the Court nevertheless concluded that the "mere possibility that an agency might reconsider in light of 'informal discussion' and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal."⁴⁶

2. *Adequate Existing Judicial Review*

The Court next addressed the EPA's contention that the Sacketts had other adequate opportunities for judicial review under the Clean Water Act. In response to the EPA's argument that the agency can only seek fines after having brought a civil action, the Court observed that a civil action would be inadequate review because the Sacketts cannot force the EPA to file such an action and because ignoring the compliance order subjects the Sacketts to immense daily civil penalties.⁴⁷

The EPA fared no better with its other "adequacy" contention—namely, the Sacketts can apply for a Clean Water Act permit and, if denied, may sue in federal court. The Court rejected that argument because the "remedy for denial of action that might be sought from one agency does not ordinarily provide an 'adequate' remedy for action already taken by another agency."⁴⁸ This part of the opinion is particularly interesting, because the Court dispensed with the EPA's principal merits arguments in two terse paragraphs.

3. *Preclusion of Judicial Review*

Moving on to the EPA's final argument—that the Clean Water Act precludes judicial review under the APA—the Court prefaced its "preclusion" discussion with the observation that the APA creates a presumption in favor of judicial review.⁴⁹ The Court then addressed the EPA's contention that judicial review of compliance orders would undermine the agency's statutory choice to select between

⁴⁶ *Id.* at 1372.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 1373.

compliance orders and civil actions.⁵⁰ The Court rejected this argument because the EPA's understanding of its enforcement powers impermissibly presumed that the only relevant difference between issuing a compliance order and bringing a civil action is that the latter subjects EPA actions to judicial review. But there are other good reasons, the Court noted, for allowing the EPA to issue compliance orders regardless of whether they can be judicially reviewed, such as the desire to encourage quick, voluntary compliance.⁵¹

The EPA also contended that the compliance order was merely one step in the "deliberative process" and that the order was not self-executing in the sense that, to collect fines or to enforce the order, the agency must first resort to judicial process. Consistent with its finality analysis, the Court rejected the EPA's characterization of the compliance order as just one step in the enforcement process. The Court noted that the APA provides for judicial review "of all final agency actions, not just those that impose a self-executing sanction."⁵² The Court also observed that the Sacketts had been denied any administrative relief after the compliance order's issuance and that the only real deliberation left to the EPA was over whether to file a lawsuit, not over the order's terms.⁵³

The Court also summarily rejected the argument that preclusion of judicial review of compliance orders is implied by the Clean Water Act's express authorization of review for administrative penalty orders.⁵⁴ The Court reasoned that to credit such an implied preclusion would effectively reverse the presumption in favor of judicial review.⁵⁵

After having distinguished a number of precedents on which the EPA had relied, the Court then rejected what was perhaps the agency's strongest policy argument: allowing judicial review would hamper the agency's administration of the statute. Assuming the

⁵⁰ The Clean Water Act directs the EPA, whenever it determines that certain enumerated provisions of the law have been violated, to "issue an order requiring . . . compl[iance] or [to] bring a civil action." 33 U.S.C. § 1319(a)(3) (2006) (emphasis added).

⁵¹ Sackett, 132 S. Ct. at 1373.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Cf. 33 U.S.C. § 1319(g) (2006).

⁵⁵ Sackett, 132 S. Ct. at 1373.

truth of the assertion, the Court still refused to accept the argument as a basis to infer preclusion, observing that “it will be true for all agency actions subjected to judicial review.” Yet the “APA’s presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all.”⁵⁶ In any event, the Court reminded the EPA that compliance orders “will remain an effective means of securing prompt voluntary compliance in those many cases where there is no substantial basis to question their validity.”⁵⁷

By ruling that the Sacketts are entitled to a hearing under the APA, the Court was able to avoid entirely its second question presented, concerning the constitutional consequences of denying the Sacketts such a hearing. The Court therefore sidestepped a number of thorny due process issues, such as whether the compliance order actually caused a deprivation. For the same reason, the Court had no occasion to address the Sacketts’ *Ex parte Young* argument, that forcing them to choose between (1) complying with the order and forfeiting judicial review and (2) ignoring the order and risking immense civil penalty liability would violate due process.

B. *The Concurrences*

In her concurrence, Justice Ginsburg wrote that she believed that the majority’s decision only extended to *jurisdictional* challenges to compliance orders, and not challenges to an order’s terms.⁵⁸ This distinction is consistent with the questions she asked at oral argument.

Justice Alito, in his concurrence, emphasized both the injustice of denying landowners judicial review of compliance orders and how that injustice persists to some degree after the Court’s decision because of confusion over the Clean Water Act’s scope.

As to the first point, Justice Alito observed that under the old regime, “if [land]owners want their day in court to show that their lot does not include covered wetlands, well, as a practical matter, that is just too bad.”⁵⁹ He went on to point out that, in “a nation

⁵⁶ *Id.* at 1374.

⁵⁷ *Id.*

⁵⁸ *Id.* at 1374–75 (Ginsburg, J., concurring).

⁵⁹ *Id.* at 1375 (Alito, J., concurring).

that values due process, not to mention private property, such treatment is unthinkable.”⁶⁰

As to the second point, Justice Alito underscored that “[r]eal relief requires Congress to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act.”⁶¹ He rejected the utility of the EPA’s informal guidance interpreting the scope of its own regulations because the guidance says that jurisdiction is ultimately a case-by-case determination. Although acknowledging that the Court’s decision helps landowners to some extent, Alito admonished that “only clarification of the reach of the Clean Water Act can rectify the underlying problem.”⁶²

VII. The Decision’s Impact

The decision’s clearest impact will be to make compliance orders like the Sacketts’ judicially reviewable. It is important to note, however, that the Court’s opinion states that the “compliance order *in this case*” is reviewable under the APA.⁶³ It is thus conceivable that the EPA will argue that the Court’s decision does not make all compliance orders subject to judicial review, particularly if the agency changes its position on what an order’s impacts are or if the EPA institutes a formal post-issuance administrative process. Thus, if the EPA were to change its position on the legal impacts of compliance orders, or if it were to institute a post-issuance administrative appeal process, then a reanalysis of the finality question would be warranted.

The decision’s application to other agency actions under the Clean Water Act is not entirely clear. By regulation, the Corps issues “jurisdictional determinations” to interested landowners.⁶⁴ These determinations represent the Corps’ formal opinion on whether a site contains regulable wetlands and water bodies. Thus, a “positive” jurisdictional determination in effect requires a landowner to proceed through the Clean Water Act’s arduous permitting process should he wish to develop his property. Prior to *Sackett*, one court of appeals

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 1376.

⁶³ *Id.* at 1374 (Scalia, J., opinion for the Court) (emphasis added).

⁶⁴ See 33 C.F.R. § 320.1(a)(6) (2000).

had ruled that jurisdictional determinations are not final agency action because they do not change the legal rights or responsibilities of their recipients.⁶⁵ The relevant portion of the Court's finality discussion in *Sackett* relies on, among other things, the compliance order's imposition of new legal obligations, as well as a distinct civil penalty liability. The Court's finality discussion may therefore support the conclusion that jurisdictional determinations do have legal and real-world effects that make them final agency actions. The *Sackett* decision may also make some Corps cease-and-desist orders reviewable.⁶⁶ These orders can go beyond merely stopping ongoing work to prescribing remedial measures. The Court in *Sackett* relied in part on the remedial component of the compliance order to conclude that it was a final agency action. It is therefore plausible that the same conclusion can be drawn with respect at least to those Corps cease-and-desist orders that contain an analogous remedial component. Indeed, the EPA itself recognized the significance of the remedial component of its orders. The agency amended the Sacketts' compliance order the day before moving to dismiss their action in the trial court. The amendments removed many of the remedial portions of the order.⁶⁷ Presumably, these amendments were an attempt to undercut the order's finality.

The decision's impact on the reviewability of agency actions under other statutes is also hard to judge. Perhaps the two most prominent federal laws containing compliance order provisions other than the Clean Water Act are the Clean Air Act⁶⁸ and the Comprehensive Environmental Response, Compensation, and Liability Act.⁶⁹ The Supreme Court has already held that Clean Air Act compliance orders are judicially reviewable under the Clean Air Act's own review provision.⁷⁰ And Congress has expressly precluded most

⁶⁵ See *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 597 (9th Cir. 2008).

⁶⁶ Cf. 33 C.F.R. §§ 326.3(d) (2000), 326.4(d)(3) (2000).

⁶⁷ At oral argument, Justice Scalia castigated the EPA for this litigation tactic. See Transcript of Oral Argument, *supra* note 30, at 34–35 (“I must say I was not edified by the fact that, when litigation was threatened or actually brought, the EPA modified its order: Oh, you don’t have to plant trees.”).

⁶⁸ 42 U.S.C. §§ 7401–7671q (2006).

⁶⁹ 42 U.S.C. §§ 9601–9675.

⁷⁰ *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461, 483 (2004).

“pre-enforcement” judicial review of CERCLA compliance orders.⁷¹ That the Supreme Court in *Sackett* did not address the due process implications of precluding judicial review of compliance orders means that the constitutionality of CERCLA’s preclusion remains to be decided.

VII. Conclusion

What’s the next step for the Sacketts? The Court’s ruling results in a remand to the district court to allow the Sacketts to proceed to challenge the substance of the compliance order. Thus, although the decision is important, it is only one step on the road to ultimate victory for the Sacketts—building their family home.

It is, however, fair to expect that the Court’s decision in *Sackett* will have a significant impact on the EPA’s manner of enforcing the Clean Water Act, in two ways. First, it is likely that the agency will issue fewer compliance orders and will instead resort to less formal communications, such as oral orders or warning letters, to encourage compliance. These more casual communications are much less likely to be deemed “final agency action” and to be judicially reviewable. Second, when the EPA does issue a compliance order, it will probably be preceded by significantly more research and investigation. When the agency knew that it could not be hailed into court for its compliance orders, it had no incentive to shore up its administrative record; now that such a result is possible, the EPA has a real incentive to do its homework before acting.

That the Supreme Court took up the *Sackett* case and unanimously reversed what had been the rule adopted by every lower court to have addressed the issue should give practitioners and the regulated public some pause. How can it be that so many courts got it wrong, and why did the Supreme Court let the error persist for so long? As to the first question, most courts too readily accepted the EPA’s argument that judicial review would lead to environmental catastrophes because of hampered agency enforcement. Also, it is probably true that many compliance order recipients are unsympathetic (for example, big corporations or harmful polluters), and so lower courts were less willing to do them any favors. As to the second question,

⁷¹ 42 U.S.C. § 9613(h) (2006).

the Court was waiting for an attractive story and attractive parties to address the issue. With the Sacketts' case the Court got both.

The relatively sparse legal analysis and citation in Justice Scalia's opinion for the Court is at first blush surprising. The opinion contains none of the zingers that Scalia-admirers have come to expect, although the justice did quip when reading the decision from the bench that "the Sacketts were surprised by the EPA's decision that their land contained 'waters of the United States,' since they had 'never seen a ship or other vessel cross their yard.'"⁷² The absence of judicial *bons mots* and detailed analysis may be due to the fact that Justice Scalia wrote for a unanimous Court on a clear-cut issue of agency abuse that required no further explication. Even so, it is still peculiar that the Court did not once cite, much less discuss, the most important decisions that both sides argued over vigorously in the briefing, such as *Ex parte Young* and *Thunder Basin*. Indeed, the Court did not even address the circuit split on which the Sacketts' cert petition was in part based.⁷³ To be sure, the Court has in the past avoided difficult questions concerning the Clean Water Act's constitutionality. But the *Sackett* decision is different because the Court declined to discuss the important cases addressing the legal issues that the Court *did* in fact decide. Ultimately, the full impact of *Sackett* will depend on the EPA's willingness to fix its enforcement program and adopt a more modest understanding of its statutory authority.

In any event, there is no doubt that *Sackett v. EPA* is a great win for the liberty-oriented public-interest law movement. Before *Sackett*,

⁷² Robert Barnes & Juliet Eilperin, "Supreme Court Allows Idaho Couple to Challenge EPA on Wetlands Ruling," *Washington Post*, Mar. 21, 2012, available at http://www.washingtonpost.com/politics/supreme-court-allows-idaho-couple-to-challenge-epa-on-wetlands-ruling/2012/03/21/gIQAFgdsRS_story.html?wprss=rss_politics.

⁷³ In their cert petition, the Sacketts had contended that the Ninth Circuit's decision conflicted with the decision of the Eleventh Circuit in *TVA*, 336 F.3d 1236. As noted above, in *TVA*, the Eleventh Circuit had held that Clean Air Act compliance orders were not judicially reviewable because they had no legal impact. They had no legal impact, the court reasoned, because their enforcement would violate the due process rights of their recipients. See *id.* at 1260. The court reached that result based on its view that the Clean Air Act does not authorize courts to review the jurisdictional sufficiency of such compliance orders. It was on this latter point that the Eleventh Circuit's decision conflicted with the Ninth Circuit's decision. See *Sackett*, 622 F.3d at 1144–46.

landowners had no effective means of fighting back against EPA compliance orders. Now, although a landowner may not wish to bring a lawsuit, the mere fact that he *can* bring one will, as noted above, have a salutary effect on the EPA's enforcement practice. An agency will act more carefully if it knows that it can be held to account by the courts.

The decision also, in my view, exemplifies the right type of case to advance the cause of liberty in the courts by means of public-interest litigation. The Sacketts have a great story to tell, but they could never have afforded to litigate this case using traditional for-profit counsel. Indeed, the fact that the Sacketts' piecemeal plight is not unusual is one reason why the EPA can often take a cavalier attitude in enforcement: The agency has vastly greater technical and litigation resources than the average compliance order recipient and stands to lose much less than a resolute compliance order recipient.

Finally, the case proves that perseverance pays off. The fact that no court in the nation had ruled in their favor was not a deterrent to the Sacketts or their attorneys at the Pacific Legal Foundation. In these respects, *Sackett v. EPA* is a victory for landowners and pro-freedom groups alike throughout the country.