

# Supreme Court Hears Oral Argument on When Agency Enforcement Action Can Be Challenged in Court

---

January/February 2012

On January 9, 2012, the Supreme Court heard oral arguments in *Sackett v. EPA*, a case that will determine whether the recipient of a federal agency's compliance order can challenge that order in court. Under the Administrative Procedure Act, a common mechanism used to sue federal agencies, only "final agency action" may be challenged. What constitutes "final agency action" under the law is sometimes a bit nebulous. But, as the Sacketts, Idaho landowners, allege, it should clearly include an order requiring them to comply with the Environmental Protection Agency's (EPA) demand to cease construction of their home or face up to a \$75,000-a-day penalty.

The Sacketts own land near Priest Lake, Idaho, where, in 2007, they began preparing to construct their home, including bringing in fill dirt. After filling in the property, EPA and the Army Corp of Engineers ordered that all construction preparation must be stopped because the agencies believed the land contained sensitive wetlands. Several months later, EPA issued a compliance order informing the Sacketts that they must return the property to its wetland state before seeking a building permit, and that failure to comply could result in a daily fine.

When the Sacketts challenged EPA's compliance order in court, the agency argued that the order could not be challenged because it was not final agency action. The Idaho District Court and the Ninth Circuit agreed. They held that the proper time for the Sacketts and other similarly situated parties to challenge compliance orders is at the same time the EPA attempts to prove the violations to a judge (and tries to have fines levied).

The Sacketts have argued that the compliance order is mandatory because they either must essentially forfeit their land or pay fines that could ruin them financially. And even waiting to find out if EPA will impose fines and the amount of those fines deprives them of the use of their land. The government, on the other hand, asserts that compliance orders are an efficient way to ensure the environment is protected and that allowing such orders to be subject to judicial review would subject an efficient process to protracted litigation.

If oral arguments are an indication of how the Supreme Court will rule, the Ninth Circuit's holding will be overturned. Justices expressed concern about the amount of the penalty the compliance order threatens to impose on the Sacketts. The government responded that the \$75,000-a-day fine was merely the maximum allowed by law—a theoretical amount. Court members did not seem persuaded that, while such a large amount was not probable, it was impossible.

Justice Alito expressed his rather scathing opinion of the government's position when he questioned the Deputy U.S. Solicitor General:

"Mr. Stewart, if you—if you related the facts of this case as they come to us to an ordinary homeowner, don't you think most ordinary homeowners would say this kind of thing can't happen in the United States? You don't buy property to build a house. You think maybe there's a little drainage problem in part of your lot. So, you start to build the house, and then you get an order from the EPA which says: You have filled in wetlands; so, you can't build your house. Remove the fill, put in all kinds of plants, and now you have to let us on your premises whenever we want to. You have to turn over to us all sorts of documents, and for every day that you don't do all this, you're accumulating a potential fine of \$75,000. And, by the way, there's no way you can go to court to challenge our determination that this is a wetlands until such time as we choose to sue you."

The Supreme Court's decision will have broad implications beyond the Clean Water Act and these particular facts, setting a precedent for what type of agency enforcement actions—be it payment of fines, injunctions, or orders of mandamus—against both small private parties and large public corporations can be challenged in court. Check future issues of Wiley Rein's *Product Stewardship & Sustainability Report* for the Court's pivotal decision.