Cross posted at CPRBlog.

As usual, I'm behind Rick on commenting on the latest Supreme Court development. (In my defense, it is the first day of classes, although I know that's not much of an excuse.)

Unlike Rick, I didn't attend the oral argument (see lame excuse above), but having read the transcript I agree with the general consensus that EPA is going to lose this case.

However, I don't agree with Rick's conclusion that "the Sacketts will wind up winning their long legal battle with federal regulators." That remains to be seen. Remember, this is all a preliminary skirmish. EPA has said at this point that it believes the Sacketts are in violation of the Clean Water Act. Sacketts disagree, and think they should be able to challenge EPA's view without waiting for EPA to bring an enforcement action against them. The lower courts said no to that. The Supreme Court seems certain to reverse, but all that means is that Sacketts will get their day in court. If EPA is right, Sacketts will still not be able to fill their parcel without a permit, and they'll still be subject to EPA's order that they remove the fill and restore the property.

Three other things I take away from my read of the transcripts.

1. This decision is going to be statutory, based on the Administrative Procedure Act and Clean Water Act. The Court showed no interest in the due process claim, which it doesn't need to reach if it holds there is a statutory right of pre-enforcement review.

2. The decision is unlikely to go beyond the Clean Water Act context. Although several environmental statutes authorize administrative compliance orders, they differ enough in their details that the Court can easily hold that pre-enforcement review is allowed under the CWA without reaching those other statutes. Remember that shortly before taking up Sackett the Court denied review in a similar CERCLA case. And although as Rick noted the Court's questioning today seemed quite hostile to EPA, I think that hostility is specifically directed at the agency's implementation of CWA section 404. I'll be very surprised if it reaches out to CERCLA, or even the Clean Air Act, through this opinion.

3. Anyone who worries about efficient use of judicial resources has reason to worry about a decision in the Sacketts favor. The Sacketts don't just want one bite at the judicial apple, they want two. They contended at oral argument that they should be allowed to challenge the compliance order before EPA seeks to enforce it, AND even if they lose in that action that shouldn't affect their ability to defend if and when EPA seeks to enforce. In other words, even if one court thinks EPA had sufficient grounds to find a violation of the statute

(the standard for issuing a compliance order), that would just allow the order to remain in place. The Sacketts contend that they should then get a judicial do-over of sorts when EPA brings an enforcement action, arguing all over again that they are not in violation.The prospects for disgruntled landowners tying up a lot of court (not to mention EPA and Department of Justice) time and resources are all too real.

4. And finally, the Sacketts and their allies may find this a Pyrrhic victory. Much of the argument today focused on the fact that EPA had sent the Sacketts a formal Compliance Order rather than just a warning. The US tried to argue that the compliance order had no more legal effect than a warning, but no one was buying that (not even me). But it seems clear that EPA could achieve much the same effect at no risk of the kind of litigation tangle described above by just taking the word "order" out of the letter it sends. As a practical matter, a letter simply expressing EPA's view that a landowner is in violation of the law and describing the potential penalties is going to be just as coercive as the order the agency sent the Sacketts. Would you build your dream house under the threat that you might be forced to tear it down in the future? And would you laugh at $37,500 per day in potential liability but quail at $75,000? The end result of this decision, if I'm right about the direction it's going, may be just to force EPA to change the wording of its communications with landowners, without changing the substance or practical effect of those communications. This case may well be much ado about not much.