As Rick notes below, the Supreme Court has just agreed to hear a case arising from enforcement of the wetlands permitting requirements of the Clean Water Act, Sackett v. EPA (the link is to the 9th Circuit's opinion). SCOTUSblog has links to the briefs at the cert stage.

Rick explained that the genesis of this case is in a dispute over wetlands filling. The Sacketts filled a half acre or so of their property with dirt and rock in preparation for a construction project. They did not seek a Clean Water Act § 404 permit. EPA, which believes the area filled was wetlands subject to federal jurisdiction, issued an order directing the Sacketts to restore the property to its condition prior to the filling. The Sacketts think they should be allowed to contest the validity of that order before EPA seeks to enforce it against them.

I wanted to add a couple of observations.

First, as it comes to the Court this is not exactly a Clean Water Act case. It's more general than that. The Court said in its order taking up the case that it would review whether the Administrative Procedure Act, the general background law governing federal agency actions, provides for pre-enforcement review of the order, and if not whether the lack of reviewability violates Due Process. Although the case isn't exactly about § 404, though, I think the Court's decision to hear it can't be divorced from that context. Several members of the Court are highly suspicious of wetlands protection. If you doubt that, re-read Justice Scalia's opinion, joined by Roberts, Alito, and Thomas, in *Rapanos v. U.S.*, 547 U.S. 715 (2006). The conservative wing of the court is likely to be sympathetic to the plight of these individual property owners, who they think are being strong-armed into pursuing an expensive permit process. Perhaps that sympathy explains why the Court is taking up this case shortly after denying cert in a CERCLA case raising similar issues, *General Electric v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010). Undoubtedly the Sacketts, and their attorneys, hope that judicial hostility to § 404 will bleed over into the court's opinion on the broader issue.

Second, there is no circuit split on the question of the availability of pre-enforcement review of compliance orders. The Ninth Circuit's *Sackett* opinion joins at least three other circuits which have reached the same conclusion under the Clean Water Act, that compliance orders are not reviewable until the agency seeks to enforce them. The general question of whether administrative orders have to be subject to pre-enforcement review has not been an easy one for the lower courts. The core problem for a party subject to a compliance order is that it risks sanctions for violating the order. But so long as sanctions for non-compliance can't be imposed without a judicial proceeding in which the validity of the order can be tested, the lower courts agree that it is not unconstitutional to make the party challenging it bear

the risk of being subject to sanctions if she ultimately proves to be wrong about the order's validity. That's the bottom line in the DC Circuit CERCLA case mentioned above, in the various Clean Water Act cases, and even in the 11th Circuit Clean Air Act case on which the Sackett's relied to establish (they said) a circuit split. In that case, *Tennessee Valley Authority v. Whitman*, 356 F.3d 1236 (11th Cir. 2003), the 11th Circuit found that the Clean Air Act violated due process to the extent it permitted the imposition of sanctions solely for violation of a compliance order, without any judicial finding that the order was properly imposed. All the lower courts agree that *some* type of judicial review is required before a party subject to a compliance order can be penalized for non-compliance. But the 11th Circuit did not question the rule , already well established by 2003, that the subject of a compliance order is not entitled to challenge the order *before* the agency seeks to enforce it.

Third, it's appropriate to worry about unfairness in this context. That, after all, is what due process is all about. But unfairness can't be evaluated just at the back end of the story. As the Sacketts present their case, they were unfairly put to the test of accepting and complying with an expensive restoration order they believed was unjustified or allowing potentially even more expensive penalties to rack up while they waited for EPA to bring a judicial action to enforce the order. Given the factual and legal difficulties of determining whether an area is a wetland or not, and if so it is subject to federal jurisdiction, that sounds like an unpleasant choice. What the Sacketts fail to acknowledge is that they could have avoided this dilemma by pursuing a third, straightforward, option. Before filling their property, they could have asked the Corps of Engineers whether the area contained jurisidictional wetlands. The Corps has an established procedure for providing official "jurisdictional determinations" to landowners. By choosing not to ask the Corps if their property was wetlands, the Sacketts took the risk that it might prove to be, and that undoing the harm they did to those wetlands might prove far more expensive than avoiding them would have been.