



You can't blame the U.S. Environmental Protection Agency of late for feeling it's under siege. All of the current Republican presidential candidates are regularly excoriating EPA on the campaign trail, and Congress has conducted oversight hearings and threatened all sorts of legislative action designed to clip EPA's regulatory wings.

Now the U.S. Supreme Court appears poised to get into the act.

The justices heard oral arguments on Monday in the most important environmental case on the Court's docket this Term: *Sackett v. USEPA*. I've previously [written](#) about the *Sackett* case, but here's the short version: the Sacketts own a small parcel of land near a lake in rural Idaho, and graded their lot preparatory to building a private residence there. USEPA issued an administrative compliance order (ACO) to the Sacketts, informing them that they'd illegally filled a wetlands area without a permit, in violation of section 404 of the federal Clean Water Act.

The Sacketts contest EPA's view that their parcel constitutes wetlands subject to EPA jurisdiction. But when their efforts to seek an administrative hearing before EPA on that issue failed, the Sacketts sued the agency in federal court. The district court dismissed their lawsuit, and the U.S. Court of Appeals for the Ninth Circuit affirmed in 2010. They ruled that recipients of ACOs such as the Sacketts can only seek judicial review if and when EPA first goes to court to enforce an ACO. The Sacketts, represented by the Pacific Legal Foundation, argue that this presents them with a Hobson's choice: either agree to EPA's demand that they submit to EPA regulatory jurisdiction and restore the property to its original condition at considerable cost; or leave themselves open to daily civil penalties of up to \$70,000 per day.



The Sacketts' property

In their arguments before the Supreme Court, which agreed to hear their case, the Sacketts contend that they have a right under the Clean Water Act and Administrative Procedure Act to seek judicial review of the ACO; and that if those federal statutes don't provide such review, their constitutional rights of due process are violated. Today's Supreme Court arguments strongly suggest that the justices agree with the Sacketts, and are poised to rule against EPA.

What distinguishes this case from a routine examination of dry administrative law concepts is the overt hostility towards EPA and its regulatory efforts that many of the justices displayed in their questions from the bench. (A copy of the argument transcript can be found [here](#); it makes for riveting reading.)

In recent decisions, the Supreme Court has expressed considerable skepticism towards EPA's broad assertion of wetlands permitting jurisdiction under section 404. In *Sackett*, petitioners' characterization of the litigation as an unfair David-and-Goliath struggle appears to resonate with many of the justices. Illustrative are Justice Alito's musing from the bench that "this sort of thing can't happen in the United States," and the Chief Justice's pointed question to EPA's counsel, "what would you do if you got an administrative compliance order" like the Sacketts? Justice Kennedy went so far as to ask the Sacketts' counsel whether EPA's issuance of the ACO in these circumstances might provide the basis of a viable regulatory takings claim.

There seems little doubt from the oral arguments that the Sacketts will prevail before the Supreme Court, and that the lower court decisions will be reversed. (Having attended today's arguments, I count at least seven justices siding with the Sacketts, and it's conceivable that the opinion may even be unanimous.) The more difficult-and intriguing-question is how sweeping or narrow a decision will the justices issue? Will the anticipated ruling against EPA be confined to enforcement of the Clean Water Act, or might it extend to a host of other federal environmental laws that EPA frequently enforces through

the issuance of ACOs? And will the Court base its decision exclusively on statutory grounds, or will it follow the urging of several of Sacketts' amici to find that the lack of judicial review of ACOs represents an unconstitutional deprivation of due process?

The answer to those questions, in turn, may well depend on which justice writes the majority opinion. That decision will be made by John Roberts, who will undoubtedly vote with the majority and assigns the Court's opinion as part of his responsibilities as Chief Justice. If Justices Scalia, Alito or Thomas—or Chief Justice Roberts himself—authors the Court's opinion, EPA may well be on the short end of a strong opinion that broadly limits the agency's environmental enforcement powers. Truth be told, however, even some justices who normally side with environmental regulators—Sotomayor, Kagan and Breyer—expressed considerable skepticism towards the EPA's arguments in *Sackett* in their comments and questions from the bench.

But two things are rather certain: first, the Sacketts will wind up winning their long legal battle with federal regulators, via a favorable decision the justices will issue by the end of June. Second, the steady drumbeat of criticism EPA has been enduring of late will soon extend beyond the “political” branches of the federal government to include the highest Court in the land.