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Lawyers Say Supreme Court Will Favor Idaho Couple Seeking Review of EPA Order

**05 DEN A-11**

**Enforcement**

**Lawyers Say Supreme Court Will Favor  
Idaho Couple Seeking Review of EPA Order**

*By Amena H. Saiyid*

The U.S. Supreme Court is likely to rule in favor of an Idaho couple that sought judicial review of an Environmental Protection Agency compliance order to restore wetlands found on their property, a panel of attorneys concluded Jan. 9.

Following oral arguments held in the Supreme Court the same day, the panel speaking at the Georgetown University Law Center concluded the court is either expected to rule 8-1 or unanimously in favor of Michael and Chantell Sackett of Idaho, who challenged the compliance order on grounds that it violated their constitutional right to due process. (See related story in this issue.)

In *Sackett v. EPA*, the justices appeared unconvinced that an EPA administrative compliance order did not constitute a final agency action, according to the panelists. A final action would be subject to judicial review.

EPA has characterized the administrative compliance order, issued under the Clean Water Act, as one that specifies the violation, suggests remedies, and spells out the penalties for noncompliance. The order remains unenforceable until EPA seeks civil enforcement action from a district court, which it said it did not do in the Sacketts' case.

EPA issued the administrative compliance order against the Sacketts in November 2007, alleging that the 0.62 acre of land on which the couple planned to build a house contained wetlands, subject to the Clean Water Act's dredge-and-fill permitting program.

The Sacketts disagreed and sued EPA, challenging the compliance order as arbitrary and capricious and a violation of their due process rights. Their lawsuit was dismissed by U.S. District Court for the District of Idaho and that ruling was upheld by the U.S. Court of Appeals for the Ninth Circuit in September 2010. The Supreme Court agreed June 28 to hear the case (125 DEN A-6, 6/29/11).

The couple also sought their statutory right to seek a judicial review of the compliance order under the Administrative Procedure Act.

**Argument 'Didn't Carry Any Weight.'**

Richard Frank, director of the California Environmental Law & Policy Center at the University of California-Davis School of Law, summed up the panelists' position when he said, "The government's characterization of the compliance order as not being a final action didn't carry any weight with any of the justices."

Joining Frank on the panel was Damien Schiff, Pacific Legal Foundation's senior attorney, who represented the Sacketts before the Supreme Court. Schiff said he was surprised that the justices completely ignored the due process aspect of the case.

Rather, "they were more interested in the statutory process," said Virginia Albrecht, a Hunton & Williams attorney specializing in wetlands issues.

Frank, Schiff, Albrecht, and Richard Lazarus, Harvard Law School professor, were on the panel that was moderated by Georgetown Law Center professor Lisa Heinzerling.

**BNA Snapshot**

Idaho Wetlands Case  
Before Supreme Court

**Key Development:**

Attorneys say the Supreme Court will likely grant judicial review to an Idaho couple over an EPA Clean Water Act compliance order.

**Impact:** A finding in favor of petitioners would subject administrative compliance orders to immediate review, without waiting until EPA files a civil action in court.

## **Justices Irritated by Government's Position**

The panelists said the justices, particularly Stephen Breyer, Sonia Sotomayor, and Chief Justice John G. Roberts Jr., were particularly irritated by the government's position that the administrative compliance order was not a final agency action.

Most of the justices questioned Deputy Solicitor General Malcolm Stewart about the legal status of an administrative compliance order, the panelists noted.

"This is not a warning," Breyer said to Stewart. "I mean, you only have to look at it. I was quite moved by the fact when I looked at it, it didn't say a warning. It said: 'This is an order.' It looks extremely formal."

Breyer, continuing, asked Stewart, "And so this is not just a warning, is it?" Stewart conceded that it was not a "warning," but "it is phrased as an order" for people to comply with their existing obligations.

Frank and Schiff called this a case of "David versus Goliath," with the government representing Goliath in this instance.

Moreover, Frank said, the Clean Water Act Section 404 permitting program is a "land use program masquerading as a pollution prevention program." The Section 404 permitting program regulates dredge and fill activities in waters of the United States, including wetlands.

## **EPA's Enforcement Ability**

Lazarus said the court's ruling, if favorable to the Sacketts, would not have an unduly adverse effect on EPA's enforcement ability because it has two other avenues: issuing civil penalties and taking enforcement action. If anything, the panelists suggested, EPA would continue to issue administrative compliance orders as warning letters.

Schiff and Heinzerling said the impact of a Supreme Court ruling favoring the petitioners would depend on whether the justices expand the decision to incorporate other environmental laws beyond the Clean Water Act. Schiff reminded the audience that Breyer repeatedly said during the arguments that the court over the past 75 years has given preference to judicial review.

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## **For More Information**

Text of the U.S. Supreme Court oral arguments in *Sackett v. EPA* is available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-1062.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1062.pdf).

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