



Written by [Thomas R. Eddlem](#) on February 22, 2012

## The EPA's Property Wrongs in America

Imagine you paid thousands of dollars for a vacant lot where you wanted to build your dream house. The lot is 500 feet from a rural lake, with only a couple of houses between the lot and the lake, with a partial view of the lake. You obtained all the appropriate permits from the county and state, and then — just days after you laid some gravel — the federal government came in and told you that you couldn't build on the land.



They then told you that you were subject to a fine of \$32,500 per day until you ripped the gravel up and planted the lot with trees and shrubs. And what if the federal government's plan for restoration of the "wetlands" would cost some \$27,000, a bit more than what you paid for the vacant lot.

You'd probably be pretty mad, and you'd want to sue in court.

And that's just what Mike and Chantell Sackett (pictured above left) thought they'd do when the federal government's Environmental Protection Agency said that their .61 acre lot — which already had a municipal sewer hook-up — was suddenly federally protected wetlands, allegedly connected to interstate navigable waters of the United States.

But the EPA said the Feds didn't have to explain their rationale to the Sacketts, and that the Sacketts didn't even merit a day in court to defend the property they'd purchased. The Sacketts couldn't argue that the property wasn't wetlands, as the EPA claimed, or that these wetlands and the lake itself had no connection to navigable waters, as "navigable waters of the United States" means you can conduct commercial trade on the water from state to state.

Why didn't they merit their day in court? Because the EPA said so — saying they aren't entitled.

Yes, the EPA says that it can tell the Sacketts what to do with the property they purchased, and that they are not entitled to a day in court — or at least not until after the Sacketts have racked up millions of dollars in fines. The U.S. district and appellate courts have ruled that the Sacketts must wait until the EPA decides to sue them — and can claim millions of dollars in fines — before they can get a day in court. The EPA actually issued an "administrative order" that doubled the original daily fine levels — which with other increases in federal fines now come to some \$75,000 per day. Today, four years later, for dumping a couple of truck loads of clean gravel and loam on their property, with the blessing of state and county permits, the Sacketts are facing possibly \$80 million in fines from the EPA, and counting. Yet the EPA is still arguing at the Supreme Court that the Sacketts are not yet entitled to a day in court.

The U.S. Supreme Court recently [heard argument](#) on the case, and the justices put the EPA through the ringer. Chief Justice John Roberts [asked](#) EPA lawyer Malcolm L. Stewart what he'd do if he were in the



Sackett's place:

CHIEF JUSTICE ROBERTS: What would you — what would you do, Mr. Stewart, if you received this compliance order? You don't think your — your property has wetlands on it, and you get this compliance order from the EPA. What would you do?

MR. STEWART: Well, as we know from documents that have — were not in the record of the case, but have been provided to —

CHIEF JUSTICE ROBERTS: If they weren't in the record, I don't want to hear about them. You appreciate that rule, that we don't consider things that aren't in the record. You get a compliance order. You don't think your property has wetlands. What do you do?

MR. STEWART: I think, at that stage, your options would be limited. You could apply for an after-the-fact permit.

CHIEF JUSTICE ROBERTS: You wouldn't do that, right? You know you'll never get an after-the-fact permit if the EPA has sent you a compliance order saying you've got wetlands.

MR. STEWART: Or you could simply comply with the compliance order at the cost of, it's been estimated, \$27,000. Once the compliance order has been resolved, there would be no further impediment.

CHIEF JUSTICE ROBERTS: That's what you would do? You would say: I don't think there are wetlands on my property, but EPA does. So, I'm going to take out all the fill; I'm going to plant herbaceous trees or whatever it is; and I'll worry about whether to — that way, I'll just do what the government tells me I should do.

MR. STEWART: It may be that the Sacketts at that point were in an unattractive position. But I think in determining whether it's an unfair position or how the statutory scheme is supposed to operate, we ought to look not just at the opportunities that were available to them at that moment but the opportunities that they had forgone already.

Likewise, Justices Samuel Alito and Roberts [phrased](#) the EPA's argument against the Sacketts as one in which the EPA was taking their constitutional rights without a trial.

JUSTICE ALITO: Well, 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 — you 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.

MR. STEWART: Well, the first thing I would say is, as a matter of standard EPA practice, the compliance order would not be the first communication from the agency that would alert the landowner to the belief that there was a violation. The record in this case does not make clear whether that agency practice was followed in this case, but EPA's typical practice is to alert landowners through prior communications that a violation is existing —

JUSTICE ALITO: Well, so what? Somebody from the EPA says we think that your backyard is a wetlands; so, don't build. So, what do we — what does the homeowner do, having bought that property?



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MR. STEWART: Well, once that —

JUSTICE ALITO: Well, all right, I'm just going to put it aside as a nature preserve.

MR. STEWART: At the time that that sort of letter is issued, there's no compliance order, and there's no impediment to an after-the-fact permit. That is, at that point, the landowner could ask for a permit and —

CHIEF JUSTICE ROBERTS: In other words, what the landowner is supposed to do — the agency says, because you didn't apply for a permit, you're in trouble because you didn't give us a chance to say whether we were going to take away your constitutional rights or not; so, we can do it.

Indeed, the Fifth Amendment to the U.S. Constitution guarantees Americans that their government cannot take their property, except if the property is for public use. And even then it must guarantee full compensation for the taking under the [Fifth Amendment](#): "No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

But the EPA did not offer to buy the land from the Sacketts. Instead, the agency tried to take the land without compensation, claiming that adding some gravel to a lot 500 feet from a lake that is distantly connected to the navigable waters of the United States constitutes putting pollutants in interstate rivers.

The EPA says it didn't even want to grant a hearing to the Sacketts because, in the words of the government's Deputy Solicitor General Malcolm Stewart, that would be the equivalent to giving a hearing to a drug dealer under investigation for criminal charges.

MR. STEWART: EPA said no to a formal hearing, but I think that would be characteristic agency practice; that is, when the agency is exercising what is essentially its prosecutorial function, that is, warning regulated parties we may do — we may sue you if you don't do the following things. It would be quite common for enforcement personnel to entertain informal overtures from the regulated party or his legal representative, but I think it would be extraordinary, for instance, for a U.S. Attorney's Office to grant a formal hearing to a potential criminal defendant in order to discuss the — in order to resolve the question criminal charges should be brought.

Stewart said this even though he acknowledged that the EPA's so-called scientific ruling on wetlands was not final and that the agency might later determine the land was not wetlands. In this conversation with Justices Ruth Bader Ginsberg and Samuel Alito, Stewart says that the agency might change its mind:

JUSTICE GINSBURG: But as far — as far as the EPA is concerned, they're finished with that question. This is not something that, well, we might look at it again tomorrow based on new evidence. The determination that these are qualifying wetlands — that has been made.

MR. STEWART: I think they have reached that conclusion for now. I don't think it would be accurate to say that we have done all the research we would want to do if we were going to be required to prove up our case in court. And that's really the second half of the — the problem, that if Petitioners' claim were reviewable and a court held EPA didn't do sufficient investigation based on the record before it at the time, there was no sound basis —

JUSTICE ALITO: That makes the EPA's conduct here even more outrageous: We — we think now that this is wetlands that are — that qualify; so, we're going to hit you with this compliance order, but, you know, when we look into it more thoroughly in the future, we might change our mind.

MR. STEWART: I would assume that any prosecutor, any enforcement person, would want to be



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better prepared when a case actually went to trial than when he was communicating to the potential defendant that there's a real likelihood that we would sue you.

The Sacketts are clearly victims of an arbitrary and tyrannical government they have rightly described as a bully. The EPA has attacked property owners with the Clean Air Act and the Clean Water Act, using interpretations of the law that were designed to be applied to large industrial polluters dumping toxins into interstate rivers, and not designed to be applied against individual homeowners for simply filling out their lots with clean fill.

The actions of the Sacketts, even if their property was indeed wetlands, could never be understood to be polluting the waters of the United States. Gravel does not pollute. Clean loam does not pollute. The EPA knows this, but the EPA is not primarily about stopping pollution. It is primarily about the arbitrary exercise of government power, something it does frequently and very efficiently. And that's a purpose the U.S. Supreme Court justifiably seems likely to trim when it comes out with its decision this summer.



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