

Environmental Protection Agency Criticized by U.S. Supreme Court Justices Over Treatment of Land Owners In Wetlands Controversy

January 10, 2012 by [Rosa Schechter](#)

Developers and home builders in Florida are very familiar with government's forceful conservation efforts to protect that naturally environmental area commonly known as Wetlands. Developers and builders in our state are increasingly familiar with the complexity, expense and bureaucracy involved in dealing with state and federal agencies that regulate wetlands, and interestingly, they now have much in common with [Idaho land owners Mike and Chantell Sackett](#), whose complex legal battle against the EPA may have long lasting consequences in Florida and elsewhere.

Here in Florida, our Wetlands are famous. In fact, [just pick up practically any Carl Hiassen book, the wetlands play a big role in most of his stories.](#)

What are the Wetlands?

According to the Clean Water Act ([40 CFR 230.3\(t\)](#)), "wetlands" are " ... areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas."

The [EPA describes the wetlands on its site](#) as " ...lands where saturation with water is the dominant factor determining the nature of soil development and the types of plant and animal communities living in the soil and on its surface (Cowardin, December 1979)." And, the EPA should know about wetlands: [this is the federal agency in charge of protecting these water areas from being harmed](#) by land development, industrial toxins, and the like.

Developers and builders in Florida routinely investigate the existence and extent of wetlands in any project. Wetlands studies and mitigation efforts are technically complex and add significant expense to many proposed developments. Often, wetlands are easy to identify (as being a combination of wet area and dry area that clearly fits the EPA or similar state definitions). Sometimes, however, wetlands are surprisingly found in areas that do not seem that wet at all, and developers engage in efforts to protect them and to mitigate any potential disturbance of the wetlands. This makes many developers and consultants in our neck of the woods feel like gardeners, counting trees and marshes, and measuring how plants and species can grow and survive alongside the people who will, hopefully, eventually move in next door.

Florida Developers Nod as Supreme Court Justices Criticize EPA Actions Against Idaho Couple

The United States Supreme Court heard oral arguments this week in a wetlands case with wide ramifications. [Several of the justices made comments from the bench, criticizing the EPA's handling of Michael and Chantell Sackett's attempts to build their family home on a site they had bought three years earlier along an Idaho river.](#)

Seems the EPA marched in after the Sacketts had paid for the land as well as for fixing the site up (leveling with gravel, etc.) in preparation for building their home and issued an EPA order declaring the home site a "protected wetlands." Since the Sacketts didn't have a permit to build on protected wetlands, the EPA blocked their build. The Sacketts, of course, sued.

Since then, the Sacketts have literally taken their fight to the Highest Court in the land, with oral arguments before the U.S. Supreme Court taking place this week and an opinion probably coming out from the Supremes by next summer.

Land developers and those who have dealt with the EPA over the years were not surprised as U.S. Supreme Court Justice Antonin Scalia publically challenged the "[high-handedness](#)" of the federal agency in dealing with someone's private property.

That was big language, but Justice Samuel Alito was even more descriptive: he called the EPA "[outrageous](#)," and Alito commented from the bench that many Americans would assume that "[... this kind of thing can't happen in the United States.](#)"

The crux of the problem here: the EPA just had its say and that was that. The technical aspects of the case are complex. At the heart of the case is the right of the Sacketts to a pre-enforcement challenge of the EPA order, and they have made a compelling due process argument before the courts. It is surprising and sad that at the end of the day, it took filing a federal lawsuit for the Sacketts to have the opportunity to be heard and to challenge the EPA's determination that there were, indeed, protected wetlands on their property.

They did so at a big risk; as Chief Justice John Roberts pointed out, there are big fines that can be levied against those who fail to comply with the EPA's Orders, and the risk of those money fines means lots of people will not fight the EPA.

[Roberts from the bench:](#)

"Because of the administrative compliance order, you're really never going to be put to the test, because most land owners aren't going to say, `I'm going to risk the \$37,000 a day....All EPA has to do is make whatever finding it wants, and realize that in 99 percent of the cases, it's never going to be put to the test."

For those who have felt they were fighting shadows in their attempts to get fairness from the EPA, reading the [full text of the oral argument in Case No. 10-1062, Sackett v. EPA](#), might prove very interesting.