



[How to Beat the EPA in Court](#)

Damon W. Root Nov. 9, 2012 4:17 pm

On March 21 the U.S. Supreme Court issued a major decision [affirming](#) the due process rights of property owners who are forced to deal with the Environmental Protection Agency. [At issue](#) in *Sackett v. EPA* was the agency's use of so-called administrative compliance orders, which were essentially government commands not subject to judicial review. In its unanimous ruling, the Court refused to let these EPA actions skirt the constitutional requirements of due process. As Justice Antonin Scalia's majority opinion put it, "there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review."

Writing in the [latest installment](#) of the Cato Institute's annual *Cato Supreme Court Review*, Damien Schiff, the Pacific Legal Foundation attorney who argued and won the case, offers an insider's account of both the legal issues at stake and how he and colleagues organized their litigation. It's a fascinating and revealing look at how public-interest lawyers go about doing their valuable work. Here's a snippet: Having lost in the lower courts, PLF and the Sacketts turned their attention to the Supreme Court. In strategizing over how best to present the Sacketts' case, we were faced with a significant problem.

Generally speaking, the Supreme Court does not take up cases just to affirm the lower court and, in the Sacketts' case, every lower court to have addressed the issue ruled the same way—no judicial review of compliance orders. We thus had two options: emphasize the national importance of the issue or identify a conflict. We chose both.

On the first score, we drafted our cert petition to highlight the injustice that the Sacketts and other property owners have endured. It's no secret that the Supreme Court likes to take up cases that tell a good story; we knew we stood on good

ground there. After all, the underlying issue was not whether some large corporation could discharge toxic waste into a river but whether two hardworking Americans could build their dream home without being accused of being environmental polluters for putting some gravel on a half-acre residential lot. This was a golden story.

We also decided to play up the constitutional side of the case, casting our cert petition explicitly in terms of due process and explaining how the judicial review regime sanctioned by the lower courts effectively cut off landowners' rights to judicial review. Although none of us expected the Supreme Court to take up the case simply to hold the Clean Water Act constitutional, we believed that the constitutional flavor of the case might attract the attention of some of the justices and ultimately convince the Court to rule in the Sacketts' favor on statutory grounds.

Download the whole article [here](#). Click below to watch ReasonTV's report on the case.