



Developers Prepare to Gain Density and Reduced Wetlands Restrictions After EPA Policy Change

Article
09.14.2023

In 2011, the Obama administration's Environmental Protection Agency (the "EPA") issued a rule interpretation that vastly broadened the definition of "Waters of the United States" subject to the EPA's regulatory jurisdiction. Prior to 2011, the definition was understood to be waters that are "navigable" in that the body of water may be traversed by boat. Although the 2011 EPA rule specifically exempted "puddles" from the definition of "Waters", nearly all other small bodies of water fell under the EPA's revised definition, including isolated "water filled depressions," and "prairie potholes."

In addition to broadly defining "Waters," the 2011 EPA rule also provided that any land located within a 100-year flood plan to be considered "navigable waters," and therefore, the *land* – in addition to the water – fell under the EPA's jurisdiction via the United States Clean Water Act. This 2011 rule enabled the EPA to broadly categorize large parcels of land as being encumbered by "Wetlands." This categorization significantly reduced many coastal developers' ability to construct housing and other improvements on parcels of dry land that had previously been available for construction improvements.

In 2020, the Trump administration attempted to undo the 2011 EPA Clean Water Act rules. Then, in 2022, the Biden administration reversed the 2020 policy and enabled the EPA to expand its definition of "Waters" even more broadly than the 2011 rule. The 2022 interpretation and rule branded large swaths of dry land as "wetlands," even where no continuous surface connection existed,

RELATED PROFESSIONALS

John P. Carroll

RELATED CAPABILITIES

Real Estate

Developers Prepare to Gain Density and Reduced Wetlands Restrictions After EPA Policy Change

and the non-continuous waters were clearly distinguishable from traditionally navigable waters, such as streams, oceans, rivers, and lakes.

This dizzying series of policy changes led to uncertainty and less development along coastal communities and in other areas within 1,500 feet from “Waters of the United States,” including nearly all waters larger than a puddle. Many considered the 2022 expansion of the definition as regulatory overreach.

In May 2023, the United States Supreme Court weighed in on the issue in *Sackett v. EPA*. The Court issued a unanimous 9-0 decision, forcing the EPA to relax its definition of “Waters.”

The facts of the *Sackett* case arose from a dispute between the EPA and private property owners Chantell and Michael Sackett. The Sacketts began backfilling their private land, but the EPA claimed to have jurisdiction over that land. The Sacketts received a notice from the EPA ordering them to return the land to its original state or face a federal fine of up to \$40,000 per day. The primary issue of the case was whether or not the Sackett’s property was subject to the Clean Water Act, and if the 2022 definition of “Waters of the United States” was overly broad.

The *Sackett* Court sided with the property owners and ordered the EPA to narrow its definition of navigable waters, which, in turn, narrows the definition of “Waters of the United States.” The *Sackett* Court held that the Clean Water Act’s definition of “Waters” must “refer only to ‘geographic features that are described in ordinary parlance as “streams, oceans, rivers and lakes” and to adjacent wetlands that are “indistinguishable” from those bodies of water due to a continuous surface connection.”

Congressman Jeff Duncan of South Carolina stated that the “The federal government has abused the ‘Waters of the United States’ rule to regulate virtually every body of water, from streams to puddles,” and that “the Supreme Court’s *Sackett v. EPA* ruling drastically shrinks the scope of the bureaucratic interpretation of the Clean Water Act and reaffirms our freedoms.”

Although the *Sackett* ruling was published in May 2023, many developers remained hesitant to declare victory. The EPA’s jurisdiction and the definition would not formally change until the EPA had issued a new rule as required to comply with the *Sackett* ruling. In late August 2023, that decision finally came when the EPA published its new Clean Water Act rule. The new rule appears to restrict the apparent regulatory overreach that existed prior to the *Sackett* ruling.

This is good news for developers seeking to develop workforce housing and community projects in communities located near the coast, the Savannah River, or the Great Lakes.

One developer has already voiced to Burr & Forman that the EPA’s new rules will allow the developer to enjoy a 30% increase in housing density to develop an affordable townhome community in South Carolina. Similar doors to development are likely to open throughout the Southeast, which will likely alleviate the United States housing shortage. In its popular show, *All Things Considered*, NPR predicts that the EPA’s new Clean Water Act rules will open development to more than 50% of the real property in the United States

Developers Prepare to Gain Density and Reduced Wetlands Restrictions After EPA Policy Change

previously defined as undevelopable wetlands.