



# Issue Fact Sheet

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## WETLANDS AND THE CLEAN WATER ACT

### Background

The Clean Water Act (CWA) protects the quality of surface waters through a series of regulations that restrict direct pollutant discharges into waterways, finance municipal wastewater treatment facilities and manage polluted runoff. Among other things, the CWA requires developers who disturb wetlands to receive a federal permit.

However, a series of U.S. Supreme Court decisions involving the extent of federal CWA jurisdiction over certain wetlands have created confusion for federal regulators and the regulated community. Specifically, the Court rejected the notion that the CWA was limited to “navigable” waters and observed that cases of jurisdiction under the CWA would need to be determined on a case-by-case basis until such time as clear federal agency regulations were issued.

The federal agencies, including the EPA and Army Corps of Engineers, have been stymied in their efforts to promulgate new regulations, and a coalition of interests is seeking legislation that would re-define which waters are subject to CWA by removing the term “navigable” from the law. Such legislation would effectively require developers to obtain federal permits before breaking ground on any land that has water or a tenuous connection to a body of water.

### NMHC/NAA Position

The apartment industry supports the protection of water resources under the Clean Water Act, but opposes the expansion of federal jurisdiction beyond those that are navigable to include **all** waters of the United States. We believe that striking the term “navigable” will create a host of additional problems and result in an increase in lawsuits and exacerbate the protracted delays in obtaining permits under the CWA.

Furthermore, regulation of non-navigable waters is currently the domain of state and local policymakers, and we believe that state and local regulators are in the best position to apply more stringent criteria for the management of water resources that may require specific, heightened intervention for maintaining high water quality standards.

### Current Status

- On April 27, EPA and the U.S. Army Corps of Engineers issued a proposed guidance document that sets forth the regulatory philosophy of the federal agencies that will support permitting decisions, enforcement and jurisdictional determinations related to the CWA. This latest guidance would supersede earlier guidance issued in 2003 and 2008 that have been the source of ongoing litigation. The new policy is strongly opposed by diverse industry stakeholders, and 170 members of Congress have signed a letter cautioning that such guidance should not act as a substitute for an official rulemaking.
- The Supreme Court heard arguments in the case of *Sackett v. EPA*, a case with important implications for clarifying EPA’s authority and enforcement procedures. In the case, EPA ordered the property owner, Sackett, to restore an active building site to its original condition after EPA determined that the residential building lot was a protected wetland, even though the site had no direct hydrological connection to a body of water. The Court will decide whether such an owner has a constitutionally-protected right to demand judicial review of these determinations under the CWA.
- The House passed a measure supporting NMHC/NAA’s long-held position that state and local policymakers are in the best position to manage their water resources. The Clean Water Cooperative Federalism Act of 2011 (H.R. 2011), sponsored by Rep. Mica (R-FL) and Rahall (D-WV), vests final decisions under the CWA with the states opposed to the EPA; the Senate has not taken up the matter.

## **Relevant Committees**

House Appropriations Committee  
Senate Environment and Public Works Committee

House Transportation and Infrastructure Committee  
Senate Appropriations Committee

## **NMHC/NAA Contact Information**

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