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USA Wetlands Protections After Sackett v. EPA

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On May 25, 2023, the United States Supreme Court delivered their decision in Sackett v. EPA, ruling that as many as half of the 118 million acres of wetlands in the US are no longer protected by the Clean Water Act. Since 1972, the Clean Water Act (CWA) has been essential to the protection of the country's waterways. What constituted a "water of the United States" under the CWA has now been changed to exempt isolated wetlands, which the court said don't significantly affect US waters. Justice Alito wrote for the 5-4 majority that a wetland must now have a continuous surface connection to a water body with no clear demarcation between the two. The four justices in the minority claimed that scientific evidence clearly shows that wetlands with visual demarcations from adjacent bodies of water still affect and protect waters downstream.

What does this mean for Michigan wetlands?

Wetlands regulations in Michigan remain stable after the Sackett v. EPA ruling because Michigan has authority granted by the federal government to administer its own wetlands protections under state law. The definition of a regulated wetland has been challenged and changed federally numerous times since the passing of the CWA, but Michigan's wetlands protections are secured by state law, which has provided clear definitions since being enacted in 1979. "Neither the rules in Michigan, nor our commitment to protecting freshwater resources, has changed in the wake of this ruling," said James Clift, an EGLE deputy director.

For more information on how the State of Michigan protects wetlands or how this ruling will affect wetlands protections elsewhere in the United States, contact Director of Resource Assessment and Management Dianne Martin at dmartin@asti-env.com or 800-395-ASTI.

Michigan's Governor Whitmer Signs Changes to Tax Increment Financing and Brownfields Funds Bills

Governor Gretchen Whitmer signed legislation on Tuesday July 18, 2023, that will establish flexible new financing tools that expand the brownfield incentives while changing the process for brownfield eligibility. Known as SB 129-132, these bills will modify Act 381 to provide additional benefits and streamline some processes.

Arguably the biggest change is that housing properties, regardless of whether the land is contaminated, can now qualify for brownfield tax increment financing (TIF) for a range of existing eli-

gible costs, and some new eligible costs. Housing properties include one or more unit of residential housing that is constructed, rehabilitated or otherwise used as a dwelling. As long as the housing property is located in a community with an identified specific housing need, and the brownfield plan includes additional information, eligible costs for reimbursement have expanded to include, in addition to the traditional eligible costs, a number of costs specific to housing developments. For projects that include income qualified households that are purchasers or renters, additional eligible costs are reimbursable.

For non-market rate housing properties, the work plans for eligible non-environmental costs will now be approved by the Michigan State Housing Development Authority.

There are also significant changes that apply to other types of brownfield properties:

- The definition of eligible property has been expanded to include property that is a former dump or landfill, or property with fill material from a nonnative source.
- Incremental tax capture can now be conducted even if a project is using payment in lieu of taxes.
- Grants and loans from a local brownfield revolving fund no longer require an approved brownfield plan.
- An existing tax increment financing authority can now enter into an agreement to forego or transfer captured taxes to a brownfield plan.
- Municipalities and authorities can also take advantage of a number of changes including:
- The definition of Blighted Properties owned by a unit of government has been expanded, so that the property can now be eligible if it was previously developed and not just tax reverted, and ownership is expanded beyond qualified local governmental units to include any municipality.
- For properties owned or under the control of a municipality, the costs of clearing or quieting title, or selling and convey the property, are now eligible, but acquisition costs are still limited to land banks and qualified local governmental units.
- The eligible administrative and operating costs have been expanded to include monitoring compliance, and brownfield plan costs associated with permitting, planning, engineering, architecture, testing, legal and accounting fees.

These are only a few highlights of the changes. There are sure to be some policy changes and guidelines as MSDHA, MEDC and EGLE incorporate the new requirements into their existing programs. We will incorporate those changes into our programs as they occur. In the meantime, if you are interested in learning more about the program, or determining if your project may qualify for TIF, please contact Tom Wackerman, Director of Brownfield Redevelopment at ASTI Environmental at twacker@asti-env.com.

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