

NAR Issue Summary

Environment / Clean Water Act

NAR Committee:

Land Use, Property Rights and Environment Committee

What is the fundamental issue?

Contrary to prior Supreme Court decisions, the Environmental Protection Agency (EPA) has proposed to "clarify" which water bodies are 'U.S. waters' and therefore subject to Clean Water Act regulations. See *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); and *Rapanos v. United States*, 547 U.S. 715 (2006).

I am a real estate professional. What does this mean for my business?

The Act will require expensive, time-consuming federal permits to develop private property near most water bodies -- not just those which are navigable. In addition, property owners may experience a taking under the regulation without adequate compensation, as prescribed under the 5th Amendment of the Constitution.

NAR Policy:

NAR supports using appropriate scientific criteria to identify regulated areas, keeping the focus on preserving high value wetlands; requiring that local officials and affected property owners be notified about the presence of wetlands; and using wetlands mitigation banking.

NAR and others supported the Supreme Court decisions to reject federal agency attempts to assert jurisdiction beyond navigable waters to all waters based on theories like the presence of migratory birds.

Opposition Arguments:

Opponents counter that the Clean Water Act was originally supposed to be read broadly, and see these agencies as attempting to restore federal protections over all waters of the U.S. From their perspective, the Supreme Court decisions weakened the law leaving many of the nation's streams and wetlands vulnerable to over development and pollution.

Legislative/Regulatory Status/Outlook

On April 21, 2014, the EPA and Army Corps of Engineers (Corps) jointly proposed a rule to "clarify" which water bodies are "waters of the U.S." (WOTUS) and thereby regulated under the Clean Water Act. The proposal expanded jurisdiction and authority over more waters of the U.S., negatively impacting economic development and property rights in communities across the country.

This rule was finalized and went into effect on August 28, 2015. While the EPA made several changes to the proposed rule in response to public comments, the final rule still expands federal jurisdiction over more U.S. waters beyond past practice, guidance and the limitations affirmed by two Supreme Court

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decisions. Property owners still lack clarity about what is needed or required to not be regulated by the Army Corps of Engineers or the EPA under the Clean Water Act.

Legally, the rule was stayed nationwide by a federal appeals court on October 9, 2015. This means the Corps and the EPA are prohibited from implementing the rule while the court engages in additional legal review of the rule. While temporary, the ban demonstrates the legal weaknesses of the rule. That stay is still in effect.

The EPA and Army Corps of Engineers have recently proposed a rule to repeal of the 2015 Clean Water Rule and recodify the pre-existing Rules.

This proposal constitutes the first part of a two-step process to meet the Feb. 28 executive order directing the rule's review. The second step will be a separate notice and comment rulemaking that will consider developing a new definition for the extent of federal jurisdiction under the CWA.

NAR wrote a comment letter that reiterated concerns that the Clean Water Rule (1) failed to preserve the States' traditional and primary authority over land and water use; (2) ignored the limits set by Congress and recognized by the Supreme Court; and (3) were confusing, arbitrary and deleted current scientific data.

NAR believes that only Congress can fundamentally alter the Clean Water Act and will continue to oppose any efforts, whether through policy, guidance or regulation, to expand the Act's reach or otherwise infringe on property rights. Visit NAR's webpage on this issue at www.nar.realtor/topics/clean-water-act.

Current Legislation/Regulation (bill number or regulation)

Read the proposed regulatory definition of "Waters of the United States":

<https://www.epa.gov/wotus-rule/proposed-rule-definition-waters-united-states-recodification-pre-existing-rules>

NAR's webpage contains comprehensive information and resources about the proposed rule:

<http://www.nar.realtor/topics/clean-water-act>.

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