

# 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 5<sup>th</sup> 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.

During the 114<sup>th</sup> Congress, there was lots of activity, including:

- H.R. 1732, “The Regulatory Integrity Protection Act”, sponsored by Rep. Shuster (R-PA), passed the House on 5/13/15. This bill would require the EPA to withdraw the rule and start the rule development process from the beginning, making sure the regulatory process is followed.
- A companion bill in the Senate, S. 1140, “The Federal Water Quality Protection Act”, sponsored by Sen. Barrasso (R-WY), would have required the EPA to conduct and adhere to the appropriate regulatory process and includes definitions of the kinds of waters that should be excluded from the rule. This bill failed in a close vote in November 2015.
- A Resolution of Disapproval under the Congressional Review Act passed both the House and Senate, but was vetoed by the President on January 19, 2016. A vote was taken in the Senate to override the veto, but did not gather sufficient votes.
- A provision to prohibit the EPA from expending any funds to implement the WOTUS rule was not included in the FY2016 Appropriations Bill, but efforts are underway for the FY2017 appropriations.

NAR, along with the National Association of Home Builders, submitted an Amicus Brief on a recent Supreme Court case, *Hawkes v the U.S. Army Corps of Engineers (USACE)*. This case addresses the question of when a property owner can appeal a decision that the USACE has jurisdiction over a water body on a property. Currently, the owner is required to go through the entire permitting process before they can appeal the USACE's "jurisdictional determination" (JD). NAR believes this harms development and property rights and believes that the property owner should be allowed to appeal the JD immediately.

In a huge victory for property rights and homeowners, the Court decided, 8-0, in favor of *Hawkes*. The Court was strong in its belief that a property owner should have the right to appeal a JD before going through the entire permitting process.

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](http://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": <http://www2.epa.gov/uswaters>

NAR's webpage contains comprehensive information and resources about the proposed rule: <http://www.nar.realtor/topics/clean-water-act>.

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