

NAR Summary of Testimony

“Waters of the U.S.” Proposed Rule

Background on EPA’s Proposed Rule

Contrary to EPA and the Army Corps assertions, the U.S. Waters proposed rule expands the practical application and scope of Clean Water Act regulations to more homeowners.

- Today, site visits, data and analysis are required before EPA and the Corps can regulate specific waters. The Supreme Court imposed this requirement and it currently applies to most waters.
- If adopted, the proposed rule would:
 - Eliminate the requirement for agencies to conduct a water-by-water analysis before regulating; this – in EPA’s own view – is the principal obstacle to regulating in many parts of the U.S.
 - Shift the burden of proof to the homeowner to perform the very analysis that EPA asserts is too expensive; if there’s a nearby wetland or stream (even if dry most of the year), the homeowner is automatically “in” until an expensive consultant proves they’re “out.”

More Questions than Answers for Homeowners

The proposal does “clarify” EPA’s default is a homeowner is subject to regulation unless he or she proves otherwise, but that is not the kind of “clarity” homeowners were requesting. Home buying doesn’t work without information, but this rule doesn’t tell buyers:

- What can I and can’t I do on my own land without a lengthy, costly federal permit?
 - Not spelled out but could include planting, pruning, clearing, and fencing.
- What do I need to do to get a permit?
 - Under the rule, we would know which properties are regulated, but not specifically what activities regarding building and improvement.
 - Permits are issued regionally. The Environmental Law Institute found no consistent standards for permits across regions.
- How do I appeal if I disagree with regulatory decisions?
 - Provides no clear appeals process.
 - Shifts burden, now EPA must prove what waters are regulated. Under the proposed rule, the same property owners would be required to prove that they are not regulated.
 - Property owners would be required to perform the analysis that EPA says is too burdensome.

Bottom Line for REALTORS®

Home buyers could walk away from the closing table or demand price reductions to compensate for the hassle of lengthy federal negotiations and costly, inconsistent permitting requirements for an undisclosed number of home improvements.

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EPA Arguments and Rebuttal

EPA will argue that the existing regulatory definition already includes most “waters,” and they’re merely “clarifying” or “reducing” the scope. However,

- While technically not adding terms like “playa lakes,” “prairie potholes,” or “mudflats,” the proposal does remove the current analytical requirement which, according to EPA, is preventing them from regulating in more places like Arizona and Georgia.
- Codifying longstanding exemptions (prior converted crop land and waste treatment facilities) doesn’t reduce the current scope of definition; it simply writes into regulation what the agencies have already been excluding in practice for many years.
- Giving up jurisdiction over “ornamental” (bird baths), “reflecting or swimming pools” is an empty gesture, as it’s doubtful that any court would have let the agencies regulate these, anyway.

EPA has chosen this approach because the agency believes the cost and administrative burden of a water-by-water analysis is too high. Instead, EPA proposes to satisfy the Supreme Court requirement with a less resource intensive literature “synthesis” based on previous research. Yet,

- It breaks no new ground. For EPA to move forward, many stakeholders would like to see new science as a basis for changing policy.
- EPA has yet to explain why it cannot justify the cost to taxpayers of conducting data and analysis to support regulatory decisions but it can justify making tax paying homeowners pay for that analysis in order to appeal those decisions.