

NAR Issue Summaries

Environment / Clean Water Act

NAR Committee:

Land Use, Property Rights and Environment Committee

What is the fundamental issue?

The Environmental Protection Agency (EPA) and the Army Corps of Engineers are proposing 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 expanded federal jurisdiction over more U.S. waters beyond past practice, guidance and the limitations affirmed by two Supreme Court decisions. Property owners still lacked clarity about what was needed or required to not be regulated by the Army Corps of Engineers or the EPA under the Clean Water Act.

In 2017, the EPA and Army Corps of Engineers proposed a rule to replace the 2015 Clean Water Rule. NAR submitted comments in support of this proposal. This rule, The Navigable Waters Protection Rule (NWPR), balanced regulatory clarity and transparency with robust environmental protection of waters and wetlands and was finalized on 4/21/20.

In November, 2021, Pres. Biden issued an Executive Order that rescinded the NWPR and set forth a new proposed rule that would sweep in more waters of the U.S. NAR submitted comments detailing our concerns about how this proposal will expand jurisdiction and authority over more waters of the U.S., negatively impacting economic development and property rights in communities across the country. NAR also joined litigation in North Dakota and Texas focused on stopping implementation of the rule nationwide.

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.

For comprehensive information and resources about the proposed rule, visit [NAR's Clean Water Act page](#).

Current Legislation/Regulation (bill number or regulation)

None at this time.

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