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STATEMENT OF THE

NATIONAL ASSOCIATION OF REALTORS®

SUBMITTED FOR THE RECORD TO

THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

HEARING TITLED

POTENTIAL IMPACTS OF PROPOSED CHANGES TO THE CLEAN WATER ACT JURISDICTIONAL RULE

JUNE 11, 2014

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EQUAL HOUSING OPPORTUNITY

INTRODUCTION

On April 21, 2014, the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) proposed to reduce the amount of scientific analysis needed in order to declare a "water of the U.S." including wetlands on private property across the country. On behalf of 1-million members involved in all aspects of commercial and residential real estate, the National Association of REALTORS® (NAR) thanks you for holding this oversight hearing and for the opportunity to submit these written comments for the record.

Currently before declaring a water of the U.S., the agencies must first conduct a "significant nexus" analysis for each stream or wetland to determine that regulation could prevent significant pollution from reaching an ocean, lake or river that is "navigable," the focus of the Clean Water Act. Because, in the agency's view, a full-blown scientific analysis for each water or wetland is "so time consuming and costly," the agencies are proposing instead to satisfy this requirement with a more generic and less resource intensive "synthesis" of academic research showing "connectivity" between streams, wetlands and downstream water bodies. On this basis, the agencies believe that they can waive the full analysis before regulating most of streams and wetlands, and reduce the analysis for any "other water" that has more than a "speculative or insubstantial" impact. We disagree.

NAR opposes this vague and misguided "waters of the U.S." proposed regulation. While perhaps an administrative inconvenience, site-specific data and analysis forces the agencies to justify their decision to issue wetland determinations on private property and focus on significant impacts to navigable water. By removing the analytical requirement for regulation, the agencies will make it easier not only to issue more determinations but also force these property owners to go through a lengthy federal negotiation and broken permit process to make certain improvements to their land.

At the same time, the proposal does not 1) delineate which improvements require a federal permit, 2) offer any reforms or improvements to bring clarity or consistency to these permit requirements, or 3) define any kind of a process for property owners to appeal U.S. water determinations based on "insubstantial" or "speculative" impacts. The resulting lack of certainty and consistency for permits, or how to appeal "wetland determinations," will likely complicate real estate transactions such that buyers will walk away from the closing table or demand price reductions to compensate for the hassle and possible transaction costs associated with these permits. We urge Congress to stop these agencies from moving forward with this proposal until they provide a sound scientific basis for the regulatory changes and also streamline the permitting process to bring certainty to home- and small-business owners where wetlands are declared.

PROPOSED RULE ELIMINATES THE SOUND SCIENCE BASIS FOR U.S. WATER DETERMINATIONS

Today, the EPA and Army Corps may not regulate most "waters of the U.S.," including wetlands, without first showing a significant nexus to an ocean, lake or river that is navigable, the focus of the Clean Water Act. "Significant nexus" is a policy and legal determination based on a scientific site-specific investigation, data collection and analysis of factors including soil, plants, and hydrology.

The agencies point to this significant nexus analysis as the reason they are not able to enforce the Clean Water Act in more places like Arizona and Georgia.[1] On its website, EPA supplies these "representative cases" where it's currently "so time consuming and costly to prove the Clean Water Act protects these rivers." EPA also documents the "enforcement savings" from the proposal in its economic analysis.[2] None of these major-polluter examples involve home or small business owners, which typically do not own significant acreage (the typical lot size is a ¼ acre)[3], let alone disturb that amount of wetland with a typical home project.

Under this proposal, the agencies would waive the site-specific, data-based analysis before regulating land use on or near most streams and wetlands in the United States (see table 1). The proposal:

- Creates two new categories of water – i.e., "all tributaries" and "adjacent waters."
- Adds most streams, ponds, lakes, and wetlands to these categories. "Tributary" is anything with a bed, bank and "ordinary high water mark," including some "ditches." "Adjacent" means within the "floodplain" of the tributary, but the details of what constitutes a floodplain, like how large an area (e.g., the 5-year or 500 year floodplain), are left to the unspecified "best professional judgment" and discretion of agency permit writers.
- Moves both categories from column B (analysis required for regulation) to column A (regulated without site specific data and analysis).

[1] http://www2.epa.gov/uswaters --for links to the examples, click "Enforcement of the law has been challenging."
[2] http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf
[3] American Housing Survey, 2009.

Table 1. Proposed changes to "Waters of the U.S." regulatory definition

Column A **(Regulated without analysis)**	**Column B** **(Analysis required for regulation)**

Navigable or Interstate
 	
• The Ocean
• Most Lakes
• Most Rivers
 	
Non-Navigable and Intrastate
 	
• **All** ~~**Some**~~ Tributaries (Streams, Lakes, Ponds)
  o Perennial
  o Seasonal
  o **Ephemeral**
• **Most** ~~**Some**~~ Wetlands
  o Adjacent to navigable water
  o **Adjacent to** ~~**Directly Abutting**~~ covered stream
	Non-Navigable and Intrastate
	
	• ~~**Rest of the Tributaries**~~
	  o ~~**Ephemeral**~~
	• Rest of Wetlands
	  o ~~**Adjacent to tributary**~~
	  o Not adjacent
	• Any other water
	  o ~~**Adjacent to navigable water**~~
	  o ~~**Adjacent to tributaries**~~
	  o Not-adjacent

For any remaining or "other water," the agencies would continue regulating case-by-case using a significant nexus analysis. However, the amount of analysis is dramatically reduced. Under this proposal, all agency staff would have to show is more than a "speculative or insubstantial" impact to navigable water. If, for instance, there were many wetlands within the watershed of a major river, no further analysis would be required to categorically regulate land use within any particular wetland with that river's watershed. Also, the data and analysis from already regulated water bodies could be used to justify jurisdiction over any other "similarly situated" water without first having to visit the site and collect some scientific data.

Contrary to agency assertions, this proposal does not narrow the current definition of "waters of U.S."

- While technically not adding "playa lakes," "prairie potholes," or "mudflats" to the definition, the proposal does remove the analytical barrier which, according to EPA, is preventing both agencies from issuing U.S. waters determinations on private property in more places including Arizona and Georgia.
- Codifying longstanding exemptions (prior converted crop land and waste treatment) does not reduce the current scope of definition; it simply writes into regulation what the agencies have already been excluding for many years.
- Giving up jurisdiction over "ornamental" (bird baths), "reflecting or swimming pools" is not a meaningful gesture, as it's doubtful that any court would have let them regulate these, anyway.
- It is not clear that many ditches would meet ALL of the following conditions – i.e., wholly excavated in uplands AND drains only uplands AND flows less than year-round -- or never ever connects to any navigable water or a tributary in order to qualify for the variance. Also, the term "uplands" is not defined in the proposal so what's "in or out" is likely to be litigated in court, which does not provide certainty to the regulated community.

LITERATURE REVIEW AND SYNTHESIS DOES NOT SUPPORT THE PROPOSED RULE

In lieu of site-specific, data-based analysis, the EPA and the Corps are proposing to satisfy the significant nexus requirement with a less resource intensive "synthesis" of academic studies. The agencies believe these studies show "connectivity" between wetlands, streams and downstream water bodies, and that's sufficient in their view to justify and waive the full analysis for land-use regulations on or within the floodplain of one of these waters.

However, this synthesis is nothing more than a glorified literature review.[4] EPA merely compiles, summarizes and categorizes other studies, and labels them a "synthesis." EPA conducts no new or original science to support or link these studies to its regulatory decisions. Three quarters of the citations included were published before the Supreme Court's decision in Rapanos v. U.S. (2006), and the rest appear to be more of the same. It breaks no new ground. The Supreme Court did not find this body of research to be a compelling basis for prior regulatory decisions, either in Rapanos or SWANCC v. the Army Corp (2001). Putting a new spin on old science does not amount to new science.

[4] For EPA's synthesis: http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=238345

In addition, scientists with GEI Consultants[5] reviewed the literature synthesis and concluded that these studies do not even attempt to measure, let alone support a significant nexus finding. According to GEI,

> "Most of the science on connectivity … has been focused on measuring the flow of resources (matter and energy) from upstream to downstream. …[T]hese studies have not focused on *quantifying the ecological significance* of the input of specific tributaries or headwaters, alone or in the aggregate, and ultimately whether such effects could be linked directly and causally to impairment of downstream waters." [6]

Knowing how many rocks downstream came from upstream won't tell you what the Supreme Court determined needs to be known, which is how many times rocks can be added before downstream water becomes "impaired" under the Clean Water Act. Asking the Science Advisory Board if the synthesis supports the first conclusion (i.e., some rocks come from upstream) doesn't answer the second (how many times can rocks be added downstream before significantly impacting the water's integrity?). EPA is asking entirely the wrong set of policy questions. As GEI puts it,

> "The Science Advisory Board (SAB) charge questions were of such limited scope that they will do little to direct the Synthesis Report toward a more useful exploration of the science needed to inform policy … The questions will not provide the SAB panel with needed directive to require substantive revisions to the report such that it … inform(s) policy with regard to Clean Water Act jurisdiction."[7]

THERE IS NO SUBSTITUTE FOR SITE-SPECIFIC DATA & ANALYSIS TO DETERMINE U.S. WATERS

Here's how EPA's synthesis of generic studies stacks up against a more targeted study specific to and based on data for each stream or wetland.

[5] For GEI's credentials, see: http://www.geiconsultants.com/about-gei-1
[6] For NAR's summary and link to GEI's comments: http://www.realtor.org/articles/nar-submits-comments-on-draft-water-report
[7] For NAR's summary and link to GEI's comments: http://www.realtor.org/articles/nar-submits-comments-on-draft-water-report

Table 2. EPA synthesis of research versus significant nexus analysis

Significant Nexus	Synthesis of Research
Proves that regulation of a stream or wetland will prevent pollution to an ocean, lake or river	Shows *presence* of a connection between streams, wetlands, and downstream, and not *significance*
Shows how much matter/energy can be added to a tributary or wetland before the Act applies	Shows how much of the matter/energy moved from upstream to downstream
Based on site specific data and analysis of soil, plants, hydrology, and other relevant factors	Dependent upon whatever data and analysis academics have used for their connectivity study
Requires an original scientific investigation, data and analysis for each water body to be regulated	Includes no new or original science by agencies; it's a literature review
Relies on timely and water-body-specific facts, data and analysis	Relies on substantially the same body of research which the Supreme Court didn't find compelling

The EPA may not want to "walk the nexus" and collect data on soil, plants and hydrology, but it's forced the Agency to justify their regulatory decisions, according to the staffs' own interviews with the Inspector General:[8]

- "Rapanos has raised the bar on establishing jurisdiction."
- "…lost one case … because no one walked the property…"
- "…have to assemble a considerable amount of data to prove significant nexus."
- "…many streams have no U.S. Geological Survey gauging data."
- "…need several years of biotic observations…."
- "…there is currently no standard stream flow assessment methodology."

[8] Congressionally Requested Report on Comments Related to Effects of Jurisdictional Uncertainty on Clean Water Act Implementation, Report No. 09-N-0149 (April 30, 2009). For a link: http://www.epa.gov/oig/reports/reportsByTopic/Enforcement_Reports.html

- "…biggest impact is out in the arid West, where it is comparably difficult to prove significant nexus."

As a result, many U.S. water determinations (which would not previously have been questioned) are now being reviewed and are not holding up to either EPA or Justice Department scrutiny. Again, from the EPA interviews:

- "Of the 654 jurisdictional determinations [in EPA region 5] … 449 were found to be non-jurisdictional."
- "An estimated total of 489 enforcement cases … [were] not pursued … case priority was lowered … or lack of jurisdiction was asserted as an affirmative defense…"
- "In the past, everyone *just assumed* that these areas are jurisdictional" (emphasis added).

"Walking the nexus" may be an administrative inconvenience, but the data don't support an approach based on 'just assuming.' The main reason for the site-specific, data-based analysis is that it provides a sound scientific basis for agency regulatory decisions. Analysis also raises the cost of unjustified U.S. water determinations. It forces the agencies to do what Congress intended, which is to focus on waters which are either a) in fact navigable or b) significantly impact navigable water. It also prevents agencies from regulating small businesses or homeowners that are not major contributors to navigable water quality impairment.

PROPOSED RULE WILL OVERCOMPLICATE ALREADY COMPLEX REAL ESTATE TRANSACTIONS

Small-business and homeowners are not the problem. Few own enough property to be able to disturb a 1/2-acre of wetland, which is how the Nationwide 404 Permit Program defines *de minimis* impact to the environment. The typical lot size is a ¼ acre with three-quarters having less than an acre.[9] None of the big polluter examples EPA presents involves a homeowner or small business. Yet, by removing the analytical barrier to regulation, agencies will be able to issue more U.S. water determinations on private properties in more places like Arizona, Georgia or wherever else it's now "too time consuming and costly to prove the Clean Water Act protect these rivers," according to the EPA.[10]

The home buying process[11] will not work unless there is sufficient property information to make informed decisions. This is why buyers are provided with good faith estimates and disclosures about

[9] American Housing Survey, 2009.
[10] http://www2.epa.gov/uswaters -- for the examples, click on "Enforcement of the law has been challenging"
[11] In previous comments, the International Council of Shopping Centers, National Association of Homebuilders, NAR and others have thoroughly documented the commercial and homebuilding impacts of the U.S. waters proposed rule. In this statement, NAR focuses on the impact to existing homeowners which have not been documented.

material defects and environmental hazards. It is why they are entitled to request a home inspection by a professional before making decisions. It is also why there's such a thing as owner's title insurance. Contracts and legal documents have to be signed to ensure that buyers receive full information and understand it. Later, you can sue if the property isn't as advertised or there are misrepresentations.

The "waters of the U.S." proposal introduces yet another variable – letters declaring wetlands on private property – into an already complicated home buying process. By removing the analytical requirement before issuing one of these letters, the agencies will make it easier to issue more of them and in more places. The problem is each letter requires the property owner to get a federal permit in order to make certain improvements to their land. But they don't know which improvements require a permit. Those aren't delineated anywhere in the proposal. If on the other hand, they take their chances and don't initiate a potentially lengthy federal negotiation as part of a broken permit process, they could face civil fines amounting to tens of thousands of dollars each day and possibly even criminal penalties.

Also, what's required can vary widely across permits – even within the same district of the Corps. No one will inform you where the goal posts are; just that it's up to you and they'll let you know when you get there. Often, applicants will go through this year-long negotiation only to submit the permit application, find that staff has turned over and they have to start over with a new staffer who has completely different ideas about how to rewrite the permit.

While more U.S. waters letters could be issued under this proposal, the agencies do not provide the detailed information needed for citizens to make informed decisions about these letters. The letter could state for instance: "the parcel is a matrix of streams, wetlands, and uplands" and "when you plan to develop the lot, a more comprehensive delineation would be recommended." Real estate agents will work with sellers to disclose this information, but buyers won't know which portion of the lot can be developed, what types of developments are regulated, or how to obtain the permit. They may consult an attorney about this but will most likely be advised to hire an engineer to "delineate" the wetlands without being told what that means. And even if this step is taken, there is no assurance that this analysis will be accepted by the agency or that a permit will ever be issued.

The potential for land-use restrictions and the need for costly permits will increase the cost of home ownership and make regulated properties less attractive to buyers. Of two homes, all else equal (lot size, number of rooms, etc.), the one with fewer restrictions should have higher property value.[12]

[12] There is strong empirical data to support this proposition, although economists may disagree. For instance:

- E.L. Glaeser, and B.A. Ward, The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston. Journal of Urban Economics 65 (2009) 265-278.

However, before buying, the buyer will want to know in exactly which ways the property could be restricted as well as how much those restrictions could cost (time, effort, money). They will need this information when weighing whether to come to the closing table and deciding how much to ask in reducing listing price in order to compensate for the hassle of a potential federal negotiation for each unspecified improvement on the property they're considering purchasing.

To illustrate the point, after Congress revised the flood insurance law, many buyers refused to consider floodplain properties not due to the actual insurance cost but because they read in a newspaper about $30,000 flood insurance premiums. Others negotiated reduced sales prices because they feared the property was "grandfathered", and they could potentially see their rates skyrocket, even when, in fact, the home was not grandfathered and the provision of concern had not taken effect and would not for several years. While it may be entirely true that the proposed rule will not cover all homes in a floodplain (only those where a U.S. water is filled) nor regulate such normal home projects as mowing grass and planting flower beds, the takeaway from the flood insurance experience is that buyers make decisions based on fear and uncertainty, both real and *imagined*.

In the case of wetlands, buyers have legitimate reason for concern. Many will have heard the horror story of the Sacketts in Priest Lake, Idaho, who were denied their day in court when they questioned a wetlands determination.[13] Others just south of here in Hampton Roads, Virginia, will read the cautionary tales of buyers suing sellers over lack of wetlands disclosures[14] or neighbor-on-neighbor water wars for mowing grass or planting seedlings.[15] Some might even have a neighbor to two who've been sued over the years for tree removals or grading (e.g., Catchpole v Wagner[16]). This all reinforces the need for the EPA and the Corps to provide more information rather than less about the rule, what it does and does not do, and provide as much detail as possible all upfront.

So far the agencies have responded by breaking up the rulemaking process into two parts, and putting forward only the first. This proposal, which clarifies "waters of the U.S.," determines "who is regulated." The issue here is whether site-specific data and analysis is required before a wetlands letter is issued. "What is regulated" is not a part of this proposal. Nor does the proposal lay out the full range of home projects that trigger a permit. The wetland permitting process itself is an entirely separate rulemaking. The issue there is what exactly I must do when I get one of these letters and how to appeal it.

- K.R. Ihlanfeldt, The Effect of Land Use Regulation on Housing and Land Prices. Journal of Urban Economics 61 (2007) 420-435.

[13] For the chilling facts of case, see: http://www.pacificlegal.org/Sackett

[14] http://hamptonroads.com/2010/05/cautionary-tale-wetlands-violations-will-cost-you

[15] http://hamptonroads.com/2012/05/newport-news-gets-swamped-wetlands-dispute

[16] 210 US Dist LEXIS 53729, at *1 (W.D. Wash. 2010)

Based on a report by the Environmental Law Institute (ELI),[17] that permitting process is broken and needs reform and streamlining to provide some consistency, timeliness, and predictability. But any comments or suggestions about this have been deemed non-germane and will not be considered by the agencies in the context of a "waters of the US" proposal. Because the agencies have decided to play a regulatory shell game with the "who" vs. the "what," property owners have been put in an untenable position of commenting on a regulation without knowing its full impact. Those who own a small business will be denied the opportunity under another law to offer significant alternatives that could clarify or minimize the proposed "waters of U.S." impact while still achieving the Clean Water Act's objectives.[18]

These are some property buyer questions which are not answered by the immediate proposed rule:

- What is the full range of projects that will require a federal permit?
- What can I do on my property without first having to get a permit?
- What do I have to do to get one of these permits?
- What's involved in the federal application process?
- What information do I have to provide and when?
- How long will the permit application take?
- How will my project and application be evaluated?
- What are the yardsticks for avoiding or minimizing wetlands loss?
- What are the full set of permit requirements and conditions?
- Are there changes I can make in advance to my project and increase my chances of approval?
- Can I be forced to redesign my home project?
- What kinds of redesigns could be considered?
- What if I disagree with the agency's decision, can I appeal?
- What exactly is involved in that appeal?
- What do I have to prove in order to win?
- Will I need an attorney? An engineer? Who do I consult?
- And how much will all this cost me (time, efforts, money)?

The "Waters of the U.S." proposal creates these uncertainties into the property buying process.

Uncertainty #1: The "waters of the U.S." proposal does not tell me what I can and cannot do on my own property without a federal permit.

[17] http://www.eli.org/research-report/wetland-avoidance-and-minimization-action-perspectives-experience
[18] For EPA's justification against conducting a small business review panel under the Regulatory Flexibility Act, see: 79 Fed. Reg. 22220 (April 21, 2014).

Not all property owners in the floodplain will be regulated, only those who conduct regulated activities. Again, that information is not found in the "waters of U.S." proposal, and there is not much more in the decision documents from the previous regulation for the "nationwide" (general) permit program (2012). The general permit for commercial real estate (#39) is separate from residential (#29), but both include a similarly vague and uber-general statement about what's regulated:

> "Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of a single residence, a multiple unit residential development, or a residential subdivision. This NWP authorizes the construction of building foundations and building pads and attendant features that are necessary for the use of the residence or residential development. Attendant features may include but are not limited to roads, parking lots, garages, yards, utility lines, storm water management facilities, septic fields, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development)."[19]

However, construction projects are not the only ones that may require a permit. For example, home owners have been sued for not obtaining one to perform these activities:

- Landscaping a backyard (Remington v. Matheson [neighbor on neighbor])
- Use of an "outdated" septic system (Grine v. Coombs)
- Grooming a private beach (U.S. v. Marion L. Kincaid Trust)
- Building a dam in a creek (U.S. v. Brink)
- Cleaning up debris and tires (U.S. v. Fabian)
- Building a fruit stand (U.S. v. Donovan)[20]
- Stabilizing a river bank (U.S. v. Lambert)
- Removing small saplings and grading the deeded access easement (Catchpole v. Wagner)[21]

Also, the proposal includes exemptions for specific activities performed by farmers and ranchers, but not homeowners or small businesses. The agencies would not have exempted these activities from permits unless they believed these activities could trigger them. Yet, none of these "normal

[19] http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP_29_2012.pdf

[20] Note: The defendant lost because he couldn't finance an expert witness to refute the Corps' wetlands determination; under this proposed rule, the Corps would no longer have to provide any data and analysis at all to support its future determinations; the burden would be entirely on the property owner to come up with that data and analysis on their own.

[21] There is an extended history between Catchpole and Wagner over activity on this easement, and the Corps has been repeatedly drawn into the dispute. In one instance the Sheriff was called, and the Corps had to step in and referee that "normal mowing activity" was not a violation that the Corps would pursue under the Clean Water Act. NAR would expect more of these kinds of disputes to arise, should the proposed rule be finalized.

farming" practices appear to be uniquely agricultural, opening up the non-farmers to regulation. Here are a couple of the listed exemptions but the full set can be found on EPA's website.[22]

- Fencing (USDA practice #383)
- Brush removal (#314)
- Weed removal (#315)
- Stream crossing (#578)
- Mulching (#484)
- Tree/Shrub Planting (#422)
- Tree Pruning (#666)

While the proposal could open up more properties to wetlands letters, permits and lawsuits, it does not in any way limit who can sue over which kinds of activities for lack of permits. It does, on the other hand, reduce the amount of data and analysis the Corps or EPA need in order to declare U.S. waters on these properties, and shifts the entire burden to the property owner to prove one these waters do not exist on their property before they can win or get a frivolous case dismissed.

Uncertainty #2: The proposal doesn't tell me how to get a permit, what's required and how long it will take.

Again, the permitting process is not a part of the 'waters of the U.S.' proposal, denying home owners and small businesses an opportunity to comment on the proposed rule's full impact or offer reasonable alternatives that could minimize the impact while protecting navigable and significant nexus waters. EPA's economic analysis on page 16 does provide an estimate of the average cost for a general permit ($13,000 each).

Costs go up from there. The estimate of $13,000 is only for a general permit and for the application alone; it doesn't include re-designing a project to obtain permit approval or the conditions and requirements which can vary widely across permits. While not providing an estimate of the time it takes to get one of these permit, U.C. Berkeley Professor David Sunding found based on a survey that the "[general] permits in our sample took an average of 313 days to obtain."[23] Individual permits can take even longer and be significantly more expensive.

The reason that general permits have the lowest price tag is because they are intended to reduce the amount of paper work and time to start minor home construction projects that "result in minimal adverse environmental effects, individually or cumulatively." One of the conditions for the permit is

[22] http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_404_exempt.pdf
[23] http://areweb.berkeley.edu/~sunding/Economcs%20of%20Environmental%20Regulation.pdf

a project may not disturb more than a ½ -acre of wetlands or 300 linear feet of streambed, the Corp's definition of *de minimis*. However, transaction costs and requirements may vary.

The Environmental Law Institute studied the process, and found very little consistency, predictability or timeliness across permits.[24] The process begins with a letter from the agency declaring U.S. water on the property. Home owners may be given a copy of the law, told to submit any "plans to develop the lot", and be reminded that the burden of proof is entirely on them. No examples of how to comply are offered. There might be a check list (which is widely frowned upon) but there is no single definition or yard stick or practical guidance of any sort for the key compliance terms "avoidance," "minimization" and "practicable."

If you ask "which part of my property can I develop?", the answer is "hire an engineer and delineate it." "What if I make these changes to my project before applying?", the answer may be "I'll know it when we see it." There is no standard approach that the Corps follows to evaluate the project. According to the ELI's interviews, it is common for applicants to go through an entire negotiation and upon submitting an application, find staff turned over and the new individual has a completely different concept of what's most important to avoid and the best way to minimize.

The following are more actual quotes by regulators documented in the ELI report:

- "The question is, how much is enough? It's all judgment. It depends on the person's mood and is extremely variable."
- "We ask them to document plans and show how they get to where they are. If I think you can do more, I'm going to show you. The burden is on the applicant to show me where they've been in the journey."
- "I like to be a rule maker with regard to work I've done, but the more I standardize, the more I restrict myself with regard to find possible solutions."
- "[B]ecause judgments on which impacts are more avoidable or more important exists in a grey area, a lot of the decision making within the Corps depends on professional judgment, causing a lot of variability."
- "There are times when the agency will pressure the applicant to do more avoidance or minimization during the permitting process."
- "There are times when they won't sign off because they want a certain thing. That's the subjective aspect and I think that is the way it ought to work."

[24] For ELI's report, http://www.eli.org/research-report/wetland-avoidance-and-minimization-action-perspectives-experience

Permit decisions appear completely subjective, iterative and not uniform across individual applicants. It seems that whatever the agency assumes is necessary to avoid or minimize wetlands loss, goes. If you refuse to provide a single piece of information or don't go along 100% with a proposed design modification, your permit is summarily denied. In at least one example (Schmidt v. the Corps), the agency denied the permit to build a single family home on a lot in part because the Corps identified other lots the land owner owned and his neighbors didn't seem to be objecting to construction on those lots (yet).

For these reasons, the ELI recommended several reforms to the wetlands permit process, including developing guidelines identifying common approaches and quantifiable standards. But at this time, the agencies don't appear interested in sensible recommendations like these, even if it brings some consistency, certainty or reduces the burden on small business or homeowners while still protecting the environment. "Nationwide permits do not assert jurisdiction over waters and wetlands …. Likewise, identifying navigable waters … is a different process than the NWP authorization process," according to the Corps.[25]

Uncertainty #3: The proposal doesn't tell me what to do if I disagree with an agency decision, or how to prove the Clean Water Act does not apply to my property.

The proposal asserts jurisdiction over any U.S. water or wetland with more than a "speculative or insubstantial" impact on navigable water. Yet, nowhere does this proposal define those terms or a process for how a homeowner may appeal a U.S. water determination based on "insubstantial or speculative" impacts.

The proposal will eliminate the need for agencies to collect data and perform analysis to justify regulation for most water bodies. Before, it was up to the agencies to prove the Clean Water Act applies, but under this proposal, the burden would shift 100% to the property owners to prove the reverse. And the cost will be higher for property owners because (1) they don't have the expertise needed, (2) there is no guidance for delineating "insubstantial/speculative" impacts, and (3) they have not been learning-by-doing these analyses as the agencies have for decades.

Ironically, the rationale for the proposed rule is these agencies cannot justify the taxpayer expense of site specific data and analysis, yet the proposal is forcing individual taxpayers to hire an engineer and pay for the very same analysis themselves or else go through a broken permit process.

[25] 77 Fed. Reg. 10190 (Feb. 21, 2012)

Administrative inconvenience is not a good excuse. If it's too hard for the federal government to do some site visits, data collection and analysis in order to justify their regulations, then perhaps it's simply not worth doing.

Conclusion

Based on the forgoing, NAR respectfully requests that Congress step in and stop these agencies from moving forward with a proposed rule that removes the scientific basis for "waters of U.S." regulatory decisions. It does not provide certainty to taxpayers who own the impacted properties and will complicate property and home sales upon which the economy depends.

Thank you for the opportunity to submit these comments. NAR looks forward to working with committee members and the rest of Congress to find workable solutions that protect navigable water quality while minimizing unnecessary cost and uncertainty for the Nation's property owners and buyers.