NAR Issue Summaries

Environment / Water Resources and Water Quality

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 have attempted several times over the past several years to clarify which water bodies are 'U.S. waters', as defined by the Clean Water Act, 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?

Depending on the proposal under consideration, this kind of regulatory revision may require property owners to obtain 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 waters subject to Clean Water Act regulations; and requiring that local officials and affected property owners be notified in a timely manner about the presence of these waters.

NAR supported Supreme Court decisions to reject federal agency attempts to assert jurisdiction beyondnavigable waters to all waters.

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, thereby 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), under the Obama Administration, 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 final rule expanded jurisdiction and authority over more waters of the U.S., negatively impacting economic development and property rights and lacked the certainty and clarity

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needed by regulated stakeholders.

In 2017, the EPA and the Corps, under the Trump Administration, rescinded the Obama Rule and finalized a rule that balanced regulatory clarity and transparency with robust environmental protection of waters and wetlands.

In November 2021, Pres. Biden rescinded the Trump Rule and promulgated a new rule that would sweep in more waters of the U.S. and expanded jurisdiction and authority over more waters of the U.S., negatively impacting economic development and property rights. NAR joined litigation in North Dakota and Texas focused on stopping implementation of the rule nationwide.

Under the second Trump Administration, the EPA and the Corps are taking the approach that the current rule needs additional language to align with recent Supreme Court cases and with input from a broad range of regulated stakeholders, a regulation can be developed that will provide adequate certainty and clarity, while protecting water quality.

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 Water Resources and Water Quality page.

Current Legislation/Regulation (bill number or regulation)

None at this time.

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