

Legislative Changes to the Clean Water Act Could Affect Property Owners

There is possible legislation being introduced that could expand the federal jurisdiction of the Clean Water Act (CWA) to allow federal agencies to regulate not only “navigable waters” but virtually all “waters of the United States” including ditches, culverts, pipes, and water features.

Although, the National Association of REALTORS® (N.A.R.) has advocated for the CWA and an associated wetlands permitting program that is consistent, predictable, timely, and focused on protecting the nation’s aquatic resources, N.A.R. does not support replacing “navigable” with “waters of the United States.” This will not reduce confusion over federal-state water boundaries; the subject of multiple Supreme Court cases. It could, however, prompt another round of administrative rulings that further restrict property development or make the process more cumbersome where wetlands are discovered.

N.A.R. recognizes that the CWA has helped make significant strides in improving the quality of our water resources. N.A.R. has also supported implementing measures that honor the Congressional intent to provide a cooperative federal and state program where the Corps’ and EPA’s efforts are complemented by efforts in the states to improve water quality. By improving its implementation, removing redundancy, and further clarifying roles, the CWA can do an even better job at facilitating compliance and protecting the aquatic environment.

In addition, N.A.R. supports using appropriate scientific criteria to identify regulated areas, such as: keeping the focus on preserving high-value wetlands, requiring local officials and affected property owners to be notified about the presence of wetlands, and using wetlands mitigation banking.

For years, landowners and regulators alike have been frustrated with the continued uncertainty with the scope of federal jurisdiction over “the waters of the United States” under the CWA. However, legislative amendments or changes to the CWA that would vastly increase federal regulatory power over private property and open the door for increased litigation and permit requirements will not benefit the real estate industry or the overall economy. Such proposed changes are not consistent with the original legislative intent of the CWA. These proposed changes would also represent a marked departure from Supreme Court decisions and raise significant constitutional questions.

N.A.R. believes Congress must not expand the CWA's scope to cover all intrastate waters for the following reasons:

1. Such an approach would greatly disserve the original intent of the 1972 Act, which struck a reasonable balance between modernizing federal power over traditional navigable waters and maintaining state oversight of intrastate waters that have no demonstrable nexus to channels of interstate commerce;
2. A massive expansion of federal control over all intrastate waters raises serious constitutional and property rights questions. H.R. 2421 would only resuscitate the very same constitutional debate that caused confusion in the courts and on the ground in the pre-SWANCC years; and
3. In the post-Rapanos era, the federal agencies are finally starting to do the hard, factual work of evaluating evidence as to whether a particular non-navigable water feature has substantial connections to traditional navigable waters. Congress should allow this process to continue before seeking legislation.

There is no doubt that wetlands and other non-navigable features serve important ecological and societal functions. Their protection is necessary and is provided for by a cooperative effort between the federal government and the individual states. CWA regulation cannot go to extreme lengths that may subvert the Act's purpose to "recognize, preserve, and protect the primary rights and responsibilities of States" to control water resources and address water pollution within their borders. 33 U.S.C. at 1254(b).

With these considerations in mind, it would be highly controversial and constitutionally questionable for Congress to amend the CWA in a manner that protects all intrastate waters. Such an approach would wander far astray from the 1972 Act's original intent. It would greatly undermine the careful balance among competing policies that Congress, the Supreme Court, and the Executive Agencies have been searching for in the 35 years since the CWA's enactment.

Congress held hearings last year on legislation that expands wetlands jurisdiction under the Clean Water Act. The legislation has been reintroduced in the Senate but not the House. Congress could take up the legislation later this year.

Beverly Scott, President
Yosemite Gateway Association of REALTORS®
www.ygaor.com – Your Gateway to Real Estate