

# Clean Water Act “Tug of War” Continues Between Federal Agencies & Courts

By Dana Lee Cole

On Dec. 30, just as 2022 was coming to a close, the Environmental Protection Agency (EPA) announced a final rule to establish yet another definition of “waters of the United States” (WOTUS) attempting to settle the regulatory back-and-forth over the scope of federal Clean Water Act (CWA) jurisdiction that has prevailed over the past four presidential administrations.

By way of background, the CWA regulates agricultural and industrial discharges into waterways falling into the WOTUS category, thereby triggering permitting requirements that may encumber the use of private property. Although the CWA defines impacted waterways as a “navigable water,” the law does not provide additional statutory clarity about what exactly “navigable” means, therefore punting the issue to a series of EPA rulemakings and related litigation.

The latest version of the rule will go into effect 60 days after publication in the Federal Register. EPA’s final rule, which will define the scope of federal water permits, restores onerous requirements that were in place prior to the “navigable waters rule” issued in 2015 under the previous administration. Agriculture groups characterized the Trump EPA’s “navigable waters rule,” issued in 2020, as having more clarity and flexibility than past iterations of the regulations. That said, the “navigable waters rule” also created uncertainty in the court system, with a federal court having vacated and remanded the regulations in August 2021.

The expanded WOTUS rule will have direct impacts on the hardwood sector. The expanded definition of navigable waterways will increase the scope of certain permit requirements, such as the use of herbicides in forest management into or over waterways meeting rule requirements. Added administrative burdens and legal uncertainties associated with the expansion can also drive down forestland values, thereby hastening forest conversion to other uses. Forest retention and expansion is an important tool for preserving water quality. By increasing pressure on forest conversion, the pro-



posed expansion could ultimately reduce water quality protections in forested areas, thereby undermining key tenets of the CWA. The new rule may also create uncertainty over the applicability of mandatory Best Management Practices (BMPs) for certain forestry activities. For example, expanding a WOTUS designation to an entire floodplain will create significant uncertainty regarding the extent of mandatory BMP applications for wetlands, particularly in areas where mandatory BMPs are unnecessary.

A broad cross-section of industry groups, including the American Farm Bureau Federation, are criticizing the new rule, claiming it will expand regulators’ reach over private property. The U.S. Chamber of Commerce has also expressed skepticism and urges the administration to pause new requirements before moving forward with regulations that may create additional uncertainty. Congressional leaders are also weighing in, with hardwood industry ally Rep. GT Thompson (R-PA) characterizing the rule as a “land grab.”

Assuming that past is prologue, litigation will no doubt follow issuance of the latest WOTUS rule. In the wake of the 2015 version, 27 states filed lawsuits

challenging the Obama Administration’s action. Industry groups, including the National Alliance of Forest Owners (NAFO), along with 13 other multi-industry groups, also filed a lawsuit, arguing that the 2015 regulations were inconsistent with the CWA and exceeded the agencies’ authority under the Constitution to regulate interstate commerce.

The path to fixing a key pillar of the broken CWA goes directly through Congress. Amending the CWA and clarifying statutory definitions provides the best chance of removing this important permitting issue from the agencies and the courts. It will be interesting to see what, if any, legislation is put forward that can finally put this lingering issue to bed. The Hardwood Federation will keep you posted on legislative and legal remedies that may emerge to mitigate the impacts of the new rule. ■



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