



Developing Environmental Regulatory Issues and

“Regulated Water” Redefined (Again)

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Environmental regulatory issues with the potential to affect agriculture have been developing quickly. In January 2023 alone, there were two announcements that were of interest. The first is the Cumulative Impacts Addendum (to Environmental Justice).

This issue caught the attention of the National Agricultural Law Center – they have expressed concern about the potential impact on future water discharge permits from farms, specifically as it relates to Total Maximum Daily Load.

The second announcement relates to a proposed study of effluent discharges from concentrated animal feeding operations (Effluent Program Plan, Plan 15). This potential study (funding dependent) is the result of a 2021 lawsuit brought by Food and Water Watch (“Petition to Revise the Clean Water Act Regulations for Concentrated Animal Feeding Operations,” submitted March 8, 2017). This could bring more regulatory scrutiny to livestock agriculture operations.

Everyone in agriculture should keep an eye on these regulatory developments.

The environmental regulation that is currently on the minds of most is the recently-announced (December 2022) new definition of waters of the United States, or WOTUS. This is an important issue for anyone that develops or uses land for their livelihood – especially those involved in farming.

Waters of the United States (WOTUS)

We have written in the past for GreenStone’s Partners magazine about the never-quite-settled definition of regulated waters (under the Clean Water Act). In our 2020 update, we discussed what was then referred to as the Navigable Waters Protection Rule - NWPR (under the previous administration in Washington D.C.). The then-new definition of regulated waters was by all accounts simpler to understand/implement and viewed favorably by the regulated community. Environmental groups, on the other hand, believed the NWPR was too lenient.

When President Biden took office, he made it clear that his administration would repeal the NWPR and (again) redefine regulated waters.

On December 30, 2022, the new WOTUS rule was released. The regulated community, including farming groups, have been critical of the new rule.

One of the main concerns is that the final rule will leave many decisions regarding regulated waters to case-by-case determinations. This, in many situations, does not allow a potentially-regulated entity to determine with any certainty whether the regulation applies to activity on their property. Accordingly, they might move forward with activity such as tiling a field, expanding a farm field, constructing a drainage ditch, building a home, etc. . . . only to be told later that they were in violation, resulting in fines and penalties as well as interruptions or cancellation of projects. Additionally, obtaining determinations by regulators prior to conducting what is, in many instances, routine farming needs will only result in delays – in some cases for years.

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We won’t get in the weeds on the new WOTUS rule because the ink was barely dry on the latest definition when two lawsuits were filed seeking to overturn the rule.

WOTUS Legal Setback

The new WOTUS rule has already had one set back. On March 19, 2023, the US District Court for the Southern District of Texas enjoined the WOTUS rule in Texas and Idaho (the ruling does not affect other states). In ruling on the case, the Judge stated that there is a “substantial likelihood” that the 2023 Rule exceeds the Agencies statutory authority under the Act.

Coalition of States File Suit

A coalition of 24 states, led by West Virginia, has filed a lawsuit in North Dakota. The states are requesting a federal court to vacate the new WOTUS rule and declare it unlawful.

Awaiting Supreme Court Ruling on WOTUS Case

Adding a complication to the new WOTUS rule is the pending decision by the Supreme Court of the United States (Sackett v. EPA) on a question of Clean Water Act jurisdiction. At issue is a residential development on a half-acre of land in Idaho. The plaintiffs, Chantell and Michael Sackett, have been waiting for this matter to be resolved since their development was halted in the spring of 2007. Several groups urged the Biden Administration to withhold the final WOTUS rule until the Supreme Court ruled on the Sackett Case, which some court watchers believe will be ruled in favor of the Sacketts and limit the EPA’s jurisdictional authority over regulated waters.

Oral arguments were heard on October 3, 2022. Expect a court decision on the case this spring or early summer.

So have we heard the last on the WOTUS issue? Not likely.

Over the past couple of years, environmental regulatory issues are being brought forward with increased frequency. As outlined above, many of these regulations have the potential to affect agriculture – so pay careful attention as these (and other) issues move toward implementation or are modified. ■

ABOUT THE AUTHOR

Alan Hahn has an undergraduate degree in Environmental Studies and completed a graduate program in Environmental Management. He has worked in environmental management for 45 years. He has written hundreds of blogs and articles. In addition to GreenStone Partners, his published work includes Progressive Dairy, Manure Manager, Michigan Lawyers Weekly, Detroit, Michigan Forward, and HazMat Magazine.

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