



What Does WOTUS Mean for the Timber Industry?

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On August 28, 2015, a new rule promulgated by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers took effect in Florida. The rule, called WOTUS, seeks to clarify the definition of “waters of the United States,” which is critical to those agencies’ regulatory reach under the Clean Water Act (CWA). The CWA prohibits the discharge of pollutants into waters of the United States without a permit. Violators are subject to penalties of thousands of dollars per day (even if unintentional) or costly lawsuits by neighbors or environmental groups.

Many of the waters subject to federal jurisdiction are easy to identify: navigable water bodies, rivers, streams, creeks, impoundments of those waters, and wetlands directly adjoining any of those waters. Beyond those, though, what qualifies has been unclear for decades. A series of U.S. Supreme Court cases created confusion because the justices could not agree on just how far federal agencies could reach. This meant that, for many small waters and wetlands, the Corps had to perform a site-specific jurisdictional determination (called a “JD” for short). While burdensome to the agencies, case-by-case analysis at least forced the agencies to use science to determine whether more-isolated waters and wetlands had a “significant nexus” with a water that was subject to federal jurisdiction.

Now, the federal agencies have adopted WOTUS, a rule that will mean fewer case-by-case analyses. While this may make the process more “efficient” for the agencies, that comes at the expense of more areas automatically being deemed as falling under federal jurisdiction simply because the agency says so, rather than because of any scientific connection to another water.

Thus, WOTUS now designates all tributaries and waters and wetlands “adjacent” to or “neighboring” other jurisdictional waters as falling under federal jurisdiction. In some cases, waters and wetlands 1,500 feet away

from another water body are considered “neighboring,” even if there is no hydrologic connection. Even ephemeral drains and ditches that water only flows in after a rain are now almost always under federal jurisdiction.

These changes may not seem important at first glance, since the timber industry has traditionally been excluded from a number of permitting requirements. For example, CWA permits are not required to manage the runoff from many common forestry practices, such as site preparation, thinning, control burns, and road construction, as long as they are undertaken in accordance with standard industry practice. Even so, WOTUS is important to watch because it will expand the need for obtaining CWA permits for some commonplace practices, such as for application of herbicide and fertilizers in and near wetlands and for construction of some roadside ditches near wetlands. Prudent professionals should now think twice about past “common knowledge” for whether a CWA permit is required.

WOTUS has provoked fierce opposition. Legislation to block it is progressing, but it would likely face a presidential veto. At least half the states are challenging WOTUS. A federal judge recently enjoined the rule’s implementation in thirteen states, but this did not include Florida. Therefore, while the ultimate fate of WOTUS remains unclear, what is certain is that Florida’s timber landowners and those who work with them must comply with it today.

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