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Waters of the United States Clean Water Act: Aggregate Producers/Agricultural Organizations/Contractors File Judicial Challenge to U.S. Environmental Protection Agency/Corps of Engineers Final Rule

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A coalition of organizations representing various agricultural, construction, natural resources, and other interests filed a January 18th Complaint for Declaratory and Injunctive Relief (“Complaint”) in the United States District Court (Southern District of Texas – Galveston Division) challenging the final rule that the United States Environmental Protection Agency and United States Corps of Engineers (collectively, “EPA”) promulgated on December 30th revising the Clean Water Act definition of waters of the United States (“WOTUS”). See Civil Action No. 3:23-cv-20.

A link to a previous blog post describing the final rule can be found [here](#).

The organizations joining the Complaint include:

- American Farm Bureau Federation
- American Petroleum Institute
- American Road and Transportation Builders Association
- Associated General Contractors of America
- Leading Builders of America
- Matagorda County Farm Bureau
- National Association of Home Builders
- National Association of Realtors
- National Cattlemen’s Beef Association
- National Corn Growers Association
- National Mining Association
- National Multifamily Housing Council
- National Pork Producers Council
- National Stone, Sand and Gravel Association
- Public Lands Council

- Texas Farm Bureau
- U.S. Poultry and Egg Association

(collectively, “Plaintiffs”)

The Complaint is likely one of the first judicial challenges filed.

The definition of WOTUS is arguably one of the three critical jurisdictional terms of the Clean Water Act. Its importance is magnified by the fact that it is also relevant to non-National Pollutant Discharge Elimination System programs such as:

- Section 404 of the Clean Water Act Wetland Permits
- Section 311 – Oil/Hazardous Substances Release Requirements
- Clean Water Act Spill Prevention Control and Countermeasure Regulations

Consequently, the scope of the definition of WOTUS has been the subject of frequent litigation, legislative oversight, rulemakings and public policy debate since the enactment of the modern version of the Clean Water Act in 1972.

The Plaintiffs argue in the Complaint the following:

- The rule does not provide clarity for the regulated community
- EPA is determined to exert jurisdiction over a broad range of dry land and water features
- Plaintiffs’ members will constantly be at risk that any sometimes-wet feature on their property will be deemed WOTUS, using what is described as a vague and unpredictable standard
- The WOTUS rule should be held unlawful under the Administrative procedure Act because it adopts an unworkable definition that conflicts with:
 - Clean Water Act
 - Constitution
 - United States Supreme Court precedent
- The term “navigable waters” is defined in conflict with *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 195, 172 (2001)
- Improperly vague and malleable jurisdiction is asserted over features that alone or in combination with similarly situated waters in the region significantly affect navigable water, interstate waters, or tributaries, determined by multiple indeterminate factors that provide no practical guidance to the regulated community
- Improperly vague and malleable jurisdiction is asserted over wetlands that are neighboring or other nebulously defined features
- The federal-state framework is improperly altered by permitting federal encroachment upon the traditional state power over land and water which Congress expressly protected
- The rule exceeds the Agencies’ delegated authority under the Commerce Clause
- Because of its vagueness and expansive reach, the rule violates due process, the rule of lenity applied to statutes creating criminal penalties, the major questions doctrine, and the nondelegation doctrine
- The rule imposes impossible/unpredictable burdens on landowners, users, and purchasers by requiring them to assess not only their own land, but also vast expanses of land beyond their own holdings, using multiple vaguely defined connections to potentially remote features, in an effort to determine jurisdiction
- EPA conducted a flawed cost-benefit analysis that dramatically underestimated cost imposed by the WOTUS rule

A copy of the Complaint can be downloaded [here](#).