Southeastern Legal Foundation

FAST FACTS & BACKGROUND ON THE NEW WOTUS RULE

Southeastern Legal Foundation is challenging EPA's unauthorized overregulation and the executive branch's power grab from the legislative branch and seeking to restore constitutional separation of powers between the three branches. The effect of EPA's interpretation of the Clean Water Act (CWA) by redefining "Waters of the United States" (WOTUS) grants it almost limitless power and jurisdiction, and is akin to EPA's interpretation of the Clean Air Act (CAA) in our present and future CAA challenges. The most recent cases have been successfully argued before the United States Supreme Court.

Under the new WOTUS definition, the Agencies have significantly expanded their authority and can assume jurisdiction over waters and water-like features that – up until this time – they were precluded from touching. The WOTUS rule will have far-reaching impacts as it could affect any landowner with a wet feature present on the property. Early EPA analysis indicates compliance and enforcement will cost as much as $400 million per year; however, the real cost to the economy in compliance, requisite studies, and regulation enforcement is estimated to be more than $1 billion per year.

The new WOTUS rule is arguably the most expansive invasion of private property ownership, use and enjoyment protected under the Constitution in our nation's history.

Two elements here are most important:

1) The new Rule expands EPA authority to cover all water features within 4,000 feet of what could be deemed a "navigable water." If an overlay of the continental United States were shown, the new Rule would cover every square inch of the U.S.

2) The new Rule, counter to case law that limits the definition of "navigable waters," instead expands and blurs the lines of the definition and will require case-by-case studies and determinations to find "covered" land and water. Initial enforcement of this Rule is already resulting in multiple parties facing fines of up to $75,000 a day.

The Army Corps of Engineers admitted that the expanded WOTUS rule would likely be struck down in court. Sen. Inhofe's letter to the Corps in July outlines the specific Corps assertions that it had little voice in the final Rule. Since that report, the Corps has backed off its assessment under political pressure.

Besides divorcing itself from the statutory text, the WOTUS rule also ignores recent Supreme Court precedent. In cases in 2001 and 2006, the Supreme Court questioned or struck down the Agencies' broad interpretation of their jurisdictional authority under the Clean Water Act. Instead of following that precedent and promulgating a rule more closely tied to the statutory text, the Agencies created a rule granting themselves more authority over more waters and water features. *SWANCC v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006).

Dynamics of Multiple Filings in Multiple Jurisdictions

Currently, more than two dozen cases have been filed, with SLF leading a group of non-state petitioners, including plaintiffs like former GA Governor Sonny Perdue. 31 states have filed actions to stop WOTUS, including Georgia. EPA will likely have a preference for a Circuit Court, rather than District Court, consolidation. Meanwhile, the EPA has requested to stay all the District Court cases in order to let the Circuit Court decide if they will keep the case. The 6th Circuit in Cincinnati currently is considering whether they will have jurisdiction to hear the consolidated cases. If EPA's motion for consolidation is granted and a Circuit Court decides to keep the case, the path forward becomes simpler. Currently, there are competing cases in various Circuits and District Courts, although the Circuit cases have been consolidated into the 6th Circuit in Cincinnati. It will be a period of months before final resolution of which courts have proper and final jurisdiction in the omnibus WOTUS challenges.