

GROWERTALKS

JZ on D.C.

3/1/2020

Final WOTUS Rule Out

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On January 23, the EPA and Army Corps of Engineers released a new rule defining the Waters of the United States (WOTUS) and clarifying federal authority under the Clean Water Act. While (as of press time) we're reviewing the details of the final rule, we believe the rule will provide much-needed clarity about which water bodies are subject to federal regulation and which will be regulated by states.

In addition to the confusing definitions, the 2015 rule had been the subject of numerous lawsuits, and as a result, was only implemented in some of the states. The new rule is similar to a proposed rule that the two agencies issued in December 2018.

The 2015 Clean Water Act Rule, which this rule replaces, expanded the scope of waters subject to the Clean Water Act to nearly all water bodies and included a host of definitions that were subject to interpretation. Under the new rule, the federal government will continue to have regulatory jurisdiction over permanent waterways, such as lakes, rivers, streams and other bodies that always or usually contain water, but usually dry areas will not generally be considered federal waters.

EPA and the Army Corps of Engineers will hold a webinar to explain the key provisions of the new rule on February 13, 2020. Additional information on the rule and a link to the webinar are available at [epa.gov](https://www.epa.gov).

—Laurie Flanagan, Executive Vice President at DC Legislative and Regulatory Services, Inc.

Full Court Press to Address H-2B Cap Crisis

AmericanHort continues to take a two-prong approach to H-2B reform—to encourage the Department of Homeland Security to immediately release all of the nearly 65,000 additional visas authorized by the December 2019 spending law, and to encourage Congress to pass H-2B reform legislation that permanently addresses the inadequate H-2B cap.

Over a quarter of Senate and House members recently sent a letter to the Department of Homeland Security asking that DHS immediately make available all of the additional visas authorized under the law. We have also been meeting with our House and Senate issue champions, and the House and Senate Judiciary Committees, to discuss a permanent solution.

As we have met with H-2B user members during the various winter association meetings, we've heard from companies that have been assigned in each of the various groups A through E for H-2B processing purposes.

Stated plainly, those in Group A are virtually assured getting workers under the 33,000 statutory cap. If Acting Homeland Security Secretary Chad Wolf releases an additional 30,000 visas, as was done last year, Group B and a good portion of Group C will get workers.

Release of all the authorized visas will address most, but not all, of the seasonal employment needs as reflected in applications to the Department of Labor for temporary labor certification. We'll keep you updated on our advocacy efforts.

—Craig Regelbrugge, VP of Government Relations & Research, AmericanHort

The Lay of the Land on Trucking

The trucking sector has undergone several regulatory changes over the past few years. Altogether, these changes have made shipping green products slightly more complicated. AmericanHort has been on the forefront of this fight, working to make the regulatory environment clearer and easier to navigate for the horticulture industry.

In 2012, Congress passed the Moving Ahead for Progress in the 21st Century act. This law mandated all drivers and fleets adopt more advanced Electronic Logging Devices (ELDs) by December of 2017. These devices would tie directly into the truck's diagnostic systems and record the identity of the driver and carrier, the driver's duty status, the status of the engine and its operating hours, whether the vehicle was in motion, miles driven, locations visited and any malfunction data. Most importantly, unlike paper logs, the connection to the vehicle meant logs must be kept accurate and current to be presented for inspection upon request.

Understanding that agricultural products require more flexibility in transportation due to their perishability and the special handling required to load/unload them from a vehicle, the Federal Motor Carrier Safety Administration created special rules for individuals shipping these goods.

When transporting a qualified commodity, drivers are exempt from the Hours of Service requirements, so long as they're transporting the goods to a destination that's within 150 air-miles of the origin. From chrysanthemums to cattle, this exemption ensures that the goods arrive healthy and quickly, and that drivers aren't penalized for the special handling requirements of these products.

When the ELD mandate took effect, AmericanHort began hearing from our members in early 2018 about a few unintended consequences of these changes.

First, and most obviously, freight prices increased as much as 50% to 80% in some areas of the country. Second, for those utilizing common carriers for their products, certain areas experienced a drop in availability due to ambiguity on which goods qualified for the agricultural exemption. We heard of several different conversations between drivers and enforcement officials about whether or not horticultural products qualified as agriculture. The longer this uncertainty continued, the more likely it was to be detrimental to the industry's transportation needs.

With these dual challenges conspiring to affect your bottom line, we've been working to clarify that horticulture and floriculture do count as "agricultural commodities" for the purposes of this regulation. Last year, Congressmen Austin Scott (GA-8) and Kurt Schrader (OR-5) introduced the Agricultural Trucking Relief Act (H.R. 1673), which would clarify this position in law. We encouraged Senators David Perdue (GA) and Jeff Merkley (OR) to introduce a companion bill in the Senate (S. 2025) just a few months later.

The House bill boasts 34 co-sponsors and the Senate bill nine, so both bills have gained healthy bipartisan support. Our conversations with the Administration have been equally fruitful. Earlier this year, the FMCSA opened a

rulemaking seeking to clarify the definition internally. AmericanHort submitted comments, encouraging the agency to properly and clearly define agriculture and eliminate the ambiguity that has caused these issues.

Horticultural products already qualify as agriculture for taxation, for many workforce and labor programs, and research initiatives throughout the federal government. Resolving this one ambiguity in the transportation definition is likely to bolster the strength of our industry's efforts in keeping harmony between definitions of agriculture across the multitude of federal agencies.

—*Tristan Daedalus, Director of Advocacy & Political Communications, AmericanHort*

Need Advice on the New Overtime Rule?

In September 2019, the U.S. Department of Labor (DOL) announced a final rule adjusting the earnings thresholds necessary to exempt executive, administrative and professional employees from the Fair Labor Standards Act's (FLSA) minimum wage and overtime pay requirements. The final rule also allows employers to count a portion of certain bonuses or commissions towards meeting the salary level. The new rule took effect January 1.

In summary, the new DOL overtime rule:

- Raises the “standard salary level” from the currently enforced level of \$455 per week to \$684 per week (equivalent to \$35,568 per year for a full-year worker)
- Raises the total annual compensation requirement for “highly compensated employees” from the currently enforced level of \$100,000 per year to \$107,432 per year
- Allows employers to use nondiscretionary bonuses and incentive payments (including commissions) paid at least annually to satisfy up to 10% of the standard salary level, in recognition of evolving pay practices
- Revises the special salary levels for workers in U.S. territories and the motion picture industry

Because the horticulture industry often struggles with overtime issues—especially when it comes to the agricultural exemption, the “white collar exemptions” rule and ongoing challenges with overtime compliance—AmericanHort held a webinar in December explaining the complexities and providing tips on how to make sure you're in full compliance. If you're a member of AmericanHort and you missed it, the archived version can be found in their Knowledge Center on their website at [AmericanHort.org](https://www.AmericanHort.org).

—JZ