

## Chapter 3

# What Does WOTUS Really Mean? Practical Consequences for Mining and Oil and Gas Operations

David Y. Chung  
Sherrie A. Armstrong  
*Crowell & Moring LLP*  
Washington, DC<sup>1</sup>

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<sup>1</sup> The opinions expressed in this chapter are the authors’ alone and should not be attributed to Crowell & Moring LLP. Nothing in this chapter should be construed as legal advice.

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**§ 3.01. Introduction and Overview.**

Agency rulemakings rarely attract the type of controversy as the joint U.S. Environmental Protection Agency’s (EPA) and the U.S. Army Corps of Engineers’ (the Corps) rulemaking to revise the definition of “waters of the United States” or “WOTUS” under the Clean Water Act (CWA). The WOTUS rule defines the scope of the waters protected under the CWA based on the agencies’ interpretation of the statute, the science, and trio of Supreme Court decisions.<sup>2</sup> Depending on how the WOTUS rule is ultimately interpreted and applied in the field, it could dramatically expand agency jurisdiction under the CWA.

The agencies repeatedly have disclaimed any intent to expand their CWA jurisdiction, claiming instead that the final WOTUS rule — also called the Clean Water Rule — was intended to provide clarity and regulatory certainty.<sup>3</sup> Many stakeholders who generally support the rule have similarly expressed the view that the rule has not significantly changed the scope of

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<sup>2</sup> The agencies jointly proposed the rulemaking in April 2014 and finalized the rule in June 2015. *See* Definition of ‘Waters of the United States’ Under the Clean Water Act, 79 Fed. Reg. 22,188 (Apr. 21, 2014) (proposed rule); Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054 (June 29, 2015) (final rule).

<sup>3</sup> *See, e.g.*, 80 Fed. Reg. at 37,054 (“The scope of jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as ‘waters of the United States’ under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities . . . would need to make jurisdictional determinations on a case-by-case basis.”).

CWA jurisdiction. The final rule's terms, however, are sufficiently ambiguous to cast doubt on the resulting scope of the CWA's jurisdiction. The rule thus has drawn harsh criticism from the mining and oil and gas industries (among others), whose nationwide operations potentially stand to be affected by increased compliance and permitting costs, increased enforcement actions, and citizen suits that force them to defend a narrow interpretation of the vague definitions in the rule.

This chapter provides an overview of the current definition of waters of the United States<sup>4</sup> and the new WOTUS rule's significant changes to that definition, which will be effective for all CWA programs on August 28, 2015. It also explores whether the rule provides the clarity championed by the agencies and its possible implications for the mining and oil and gas industries. This chapter concludes by briefly examining ways in which those industries can prepare to comply with, and defend their interpretation of, the final rule.

### **[1] — Current Legal Landscape.**

The Clean Water Act, 33 U.S.C. § 1251 *et seq.*, applies to “navigable waters,” which the Act defines simply as “waters of the United States.”<sup>5</sup> Defining which water features are covered under the Act has long been the focus of agency regulations and guidance, and judicial scrutiny.

Current regulations define “waters of the United States” to include “a laundry list of features (from wetlands to intermittent streams to wet meadows), ‘the use, degradation or destruction of which could affect interstate or foreign commerce.’”<sup>6</sup> That definition extends beyond waters that

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<sup>4</sup> The recently promulgated WOTUS rule does not take effect until August 28, 2015. Thus, for purposes of this chapter, the “current” definition is the one that appears in the Code of Federal Regulations at the time this chapter was prepared (July 2015).

<sup>5</sup> C.W.A. Section 502(7); 33 U.S.C. § 1362(7) (defining “navigable waters” as “the waters of the United States”).

<sup>6</sup> W. Parker Moore, *et al.*, “Mining Through the Proposed CWA Jurisdiction Changes and Impacts,” *ABA SEER*, Mining and Mineral Extraction Committee Newsletter, at 3 (July 2014), available at [http://www.americanbar.org/content/dam/aba/publications/nr\\_newsletters/mn/201407\\_mn.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/nr_newsletters/mn/201407_mn.authcheckdam.pdf).