

# Trump Administration Rulemaking Process to Redefine Scope of Clean Water Act – How Your Company Can Participate

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by Wells Parker

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One of the most difficult and costly aspects of developing mining projects in the United States is the permitting requirements under the Clean Water Act (CWA). The Trump administration is currently undertaking a rulemaking process to examine and redefine the scope of the CWA. Companies with mining projects in the United States should consider participating in the rulemaking process to assure that their interests are represented.

In 2015, the U.S. Environmental Protection Agency (EPA) and the U.S Army Corps of Engineers (Corps) (collectively the Agencies) adopted final regulations redefining the term “waters of the United States,” which defines the scope of federal regulatory jurisdiction under the CWA. States, industry groups, and environmental organizations immediately challenged the rule in the federal courts, and a nationwide stay issued by the 6th Circuit Court of Appeals has prevented the Agencies from implementing the 2015 regulations. In light of the circumstances, and pursuant to an Executive Order from President Trump, dated February 28, 2017, the Agencies are currently reviewing the definition of “waters of the United States” under the CWA. The Agencies have proposed a two-step process for this review. First, in July, the Agencies proposed a rule to repeal the 2015 regulations and re-codify the regulations that existed prior to 2015. The public comment period for this proposed rule runs through September 27, 2017. Second, the Agencies will propose new regulations substantively redefining “waters of the United States” and the scope of CWA Jurisdiction.

This rulemaking is particularly important for natural resource companies because the breadth of topographic features to which the CWA applies has a major impact on project permitting. Natural resources projects are generally subject to two types of CWA permits. Under Section 402 of the CWA, parties are required to obtain a National Pollutant Discharge Elimination System (NPDES) permit from the EPA, or a delegated state agency, for any point sources where pollution may enter into waters of the United States. Under Section 404 of the CWA, parties are required to obtain a 404 permit from the Corps prior to the discharge of dredge or fill material into waters of the United States. The cost and timing for permitting and the feasibility of natural resources projects can

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largely depend on whether topographic features within or near a project are considered “waters of the United States” and subject to these CWA permitting requirements. Thus, the Agencies review of the scope of the definition for “waters of the United States” should be of particular interest to anyone operating, permitting, or investing in natural resource projects in the United States.

As part of their review process pursuant to the February 28th Executive Order, the Agencies recently announced they would hold 11 sessions this Fall to give stakeholders an opportunity to provide recommendations on a revised definition of “waters of the United States.” Nine of the 11 sessions will be tailored for specific industries, with the stakeholder session for “Mining” scheduled for October 31, 2017, from 1pm to 3pm ET. Registration for each of the stakeholder sessions will close one week prior to the scheduled date of the session. The Agencies will also be accepting written recommendations and comments on the rulemaking process, which should be submitted on or before November 28, 2017. Over the past several years, Dorsey has represented mining companies in rulemaking processes under the CWA and similar environmental statutes, through participation in stakeholder meetings and the submission of comments that communicate to the regulatory agencies our mining clients’ concerns and objectives.

The Federal Register notice announcing the schedule of public sessions is available at [www.gpo.gov/fdsys/pkg/FR-2017-08-28/pdf/2017-18214.pdf](http://www.gpo.gov/fdsys/pkg/FR-2017-08-28/pdf/2017-18214.pdf). Information on registering for the sessions is available at [www.epa.gov/wotus-rule/outreach-meetings](http://www.epa.gov/wotus-rule/outreach-meetings).