

CLIENT ALERT

EPA's Proposed WOTUS Rule – What Industry Needs to Know (VIDEO)

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Crowell & Moring partner **Kirsten Nathanson** discusses the federal rulemaking proposal to define "waters of the United States" (WOTUS) in a three-part video series.

Click below to view two-minute videos on Crowell.com in which Kirsten outlines the basics of the proposed WOTUS Rule, including the scope of water features EPA and the Corps of Engineers propose to subject to federal control and the industrial sectors that could be affected by the proposed rule with increased permitting requirements and compliance costs.

Kirsten also discusses what the regulated community can do to prepare for the final WOTUS Rule (currently projected by EPA to issue in April), what companies should do after the rule is finalized, and what can be done if a newly regulated water body is the basis for an EPA or citizen enforcement action.

Part 1: What is the Proposed WOTUS Rule?

Part 2: How to Prepare for the Final WOTUS Rule.

Part 3: Enforcement and the WOTUS Rule.

Transcript

What is WOTUS?

WOTUS stands for Waters of the United States. It's a regulation currently under development by the United States Environmental Protection Agency that will dramatically expand the meaning of Federal jurisdiction under the Clean Water Act. It's actually the most sweeping rulemaking the agency has yet to engage in under the Act. It's going to set the boundaries of Federal jurisdiction for the Act, meaning it's going to define what types of water features and water bodies are under Federal control, which is going to subject people to new Federal permitting requirements under the Act.

Why should companies care about WOTUS?

Now for the regulated community, if companies own property, if they own or operate stand-alone facilities, or if they have plans to increase or develop new facilities or intermittent new projects, they're going to be potentially affected by this rule. For a specific example, let's talk about businesses that have on-site waters. By that I mean industrial ditches, storm water ditches, storm water ponds, fire ponds -- any surface impoundment of water -- they're also going to be affected by this Rule and subject to new Federal permitting requirements. New permitting requirements increase compliance costs. They increase timelines for project development in terms of the length of time it takes for Federal reviews that will be triggered under NEPA, under the Endangered Species Act. Importantly, this is going to increase enforcement risk both from the Federal EPA and from citizen activist groups.

Given that WOTUS is imminent, what should companies do?

Companies first and foremost need to monitor the progress of this regulation as it goes through the agency, which they can do through their trade associations, through their consultants, and through their counsel to see if this proposed rule with its dramatically expanded definitions is going to go final. If it appears it is going to go to final, they need to do internal compliance auditing and internal assessment of their operations to determine the full scope of the enforcement and compliance risk they face, and whether or not they're going to face new permitting obligations, and whether that is going to affect the timeline of various projects they have, if they have to now seek particularly Section 404 permits due to these new definitions. After the rule goes final, if it is along the lines as proposed, should enforcement actions ensue based on these new definitions, companies should work with their counsel, and particularly counsel who really know the rule and understand its implications, and determine whether a challenge to the rule and a challenge to the water bodies that are being targeted is an appropriate defense.

How are you advocating for your clients now to impact the rule as it develops?

We're currently deeply engaged in the regulatory development process with our clients by reviewing and analyzing the rule, we're offering advocacy to the agency on behalf of a number of industries. And we're hoping to convince the agency to narrow the scope of these dramatically expanded definitions and to keep Clean Water Act jurisdiction in line with the guidance provided by the Supreme Court.

How will you help companies once the rule does go into effect?

If this rule should go final, we would recommend that our clients do in-depth assessment of their operations in terms of the scope of their waters that may be affected by this rule. This is akin to various enforcement actions that we have seen in the past where the meaning of the Waters of the United States (WOTUS) can be a central defense to an enforcement action, whether that comes from the EPA or from the citizen groups. Should EPA expand the definition of jurisdiction even further, we would expect that this issue of analyzing whether the water body should truly be subject to federal jurisdiction, whether that is a viable defense, is going to be a critical factor going forward.

What specific industries are enforcement targets for WOTUS?

Enforcement targets, right now we're talking about refineries and coal-fired power plants, which separate from this rulemaking, are currently in the cross hairs of EPA's enforcement sights. And so this rule is going to provide an

additional federal hook both for EPA and for the citizen activists. And so they need to really be concerned with their Clean Water Act compliance coming out of this rulemaking. But beyond refineries and coal-fired power plants, this rule is going to affect heavy manufacturing, upstream energy development, big box retailers, pulp and paper plants, home builders -- they all need to be concerned about the impact of this rule.

What are surprising examples of companies or industries that will be affected?

Another EPA enforcement priority that is going to be implicated by this rule is their focus on storm water management and storm water enforcement. Storm water is something that affects everyone from Fortune 10 companies on down to individual small businesses. In recent years, EPA has had several high profile settlements both with home builders and with big box retailers implicating storm water management. Now if the body of waters that are subject to federal control increases, that increases your enforcement risk for this storm water management program. Companies need to take a hard look at their compliance and assess their facilities for what water features may be affected by this rule.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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