Clarity or *Confusion?*

The new Clean Water Act rules may be muddying the waters for the industry.

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On June 29, the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers issued a much-anticipated rule defining "waters of the United States" (WOTUS) for purposes of the federal Clean Water Act (CWA).

This rule is important for all domestic industries, including mining and energy, because it delineates, going forward, which waters are subject to regulation by EPA and the Corps. In particular, whether operators will be required to obtain permits from EPA, the Corps and/or states with delegated CWA-authority to discharge pollutants into, or to divert or otherwise engage in fill activities (including construction activities), with respect to a particular body of water.

The rule is the culmination of the agencies' efforts to narrow and clarify their jurisdiction in the light of two Supreme Court decisions (SWANCC and Rapanos) that overturned the agencies' prior assertion of jurisdiction over certain non-navigable bodies of water.

Although the agencies maintain that they have accomplished these goals, many regulated entities and legislators disagree. So far, more than three dozen states and industry groups – including the National Mining Association and the Utility Water Act Group – have filed lawsuits to invalidate the rule as unduly broad and overly stringent, and members of Congress are attempting to derail the rule through procedural maneuvers, the appropriations process and other legislation. In addition to these objections, environmental groups also have brought suit, alleging the rule is not sufficiently protective of the nation's waters.

We cannot in a brief article address all portions of this complex and lengthy rule. Instead, we focus on two issues of significant concern to the U.S. mining industry: (1) whether artificial ponds at mining sites will be regulated as WOTUS; and (2) the status of ephemeral and intermittent drainages that often criss-cross mining properties.

ARTIFICIAL PONDS

Mining facilities utilize an array of artificial (i.e., made-made) ponds and impoundments as part of their production and pollution control operations. These include tailings storage facilities, stormwater collection ponds, cooling and mine water holding ponds, waste treatment ponds and heap leach ponds. Particularly in the western U.S., where water is precious, many ponds never discharge to surface water, but instead are parts of systems in which liquids – including wastewaters, mine water, stormwater, groundwater and process fluids – are recycled and reused in closed-loop operations. In those instances where there is a discharge to surface water, the discharge is permitted under the CWA.

Except possibly for artificial ponds that are constructed by impounding WOTUS, the agencies have never asserted that mining artificial ponds are subject to regulation under the CWA. Instead, such ponds have been permitted, if at all, under state laws aimed at protecting groundwater.

The agencies' rule as proposed in April 2014 could have been construed to define some mining artificial ponds as WOTUS. That would have meant, for example, that operators must obtain CWA permits to discharge liquids into these ponds, and then only after treat-

The agencies' ruling has been opposed by the mining industry as well as environmental groups.

ment to meet CWA effluent limitations and water quality standards.

It also would have meant that companies must obtain CWA permits to expand or otherwise modify existing ponds, or close or reclaim them at the end of their operating lives. The National Mining Association, and many individual companies, submitted extensive comments pointing out the lack of environmental need to regulate these artificial ponds as WOTUS, and the adverse economic consequences that would result.

Except possibly for artificial ponds that are constructed by impounding WOTUS, the agencies have never asserted that mining artificial ponds are subject to regulation under the Clean Water Act.

The final rule makes clear that mining artificial ponds will not be regulated as WOTUS, at least so long as they are not constructed by impounding WOTUS. Specifically, the final rule excludes several types of features from CWA jurisdiction including: stormwater control ponds; water-filled depressions incidental to mining; wastewater detention and retention basins; other constructed ponds such as settling basins and cooling ponds; and waste treatment systems, including treatment ponds or lagoons. These exclusions generally require that the artificial pond be constructed on "dry land," which although not defined in the rule, has been interpreted by the agencies to mean areas that are not water features such as streams, rivers, wetlands, lakes, natural ponds and the like. The rule's preamble emphasizes that not only are such artificial

ponds themselves excluded from regulation, but so too are any ditches or constructed channels that convey waters or solutions to and from such ponds. While there may remain some ambiguities, these exclusions provide reasonable assurance to mining operators that artificial ponds not constructed by impounding WOTUS remain outside of the agencies' jurisdiction under the CWA.

EPHEMERAL AND INTERMITTENT DRAINAGES

A second major concern of U.S. mining companies is the potential regulation of ephemeral and intermittent drainages. Ephemeral drainages flow only in response to precipitation events, while intermittent drainages typically flow in response to precipitation or, during parts of the year, due to groundwater inflow. Such drainages do not (in industry's view) contribute meaningful flow to streams, rivers, or traditional navigable waters (TNW). Indeed, in the arid West, the upper reaches of such drainages may flow at most for a few days every year, while the lower regions may flow once per decade. Even when there is flow, water in these drainages – particularly in the arid West – normally percolates into the ground or evaporates before reaching a TNW or tributary thereof. Prior to the final rule, the regulatory status of ephemeral or intermittent drainages was determined on a case-by-case basis depending upon the extent of impact, if any, they might have on the chemical, physical or biological integrity of a TNW, after considering their frequency, volume and duration of flow, distance to the nearest TNW and local evaporation/precipitation rates.

The final rule expands the agencies' jurisdiction over such drainages. The rule defines WOTUS to include all ephemeral and intermittent drainages that are "tributaries." This encompasses all drainages that have physical indicators (or historically had indicators) of flow, signified by the presence of a bed, banks and ordinary high water mark (OHWM), and that contribute surface flow to a TNW either directly or through other waters. There is no minimum flow that must be contributed. The preamble makes clear that if an ephemeral or intermittent drainage has a bed, banks and OHWM, then that is considered proof of sufficient flow to be deemed WOTUS if the channel of the drainage physically reaches a TNW or tributary thereof.

The final rule also provides that "erosional features" – including gullies, rills and "other ephemeral features that do not meet the definition of a tributary" will not be subject to the agencies' jurisdiction. The preamble states that ephemeral features that lack a bed, banks and OHWM fall within this exclusion, while ephemeral features that do have a bed, banks and OHWM and that physically connect by channel to a TNW or tributary, do not. The preamble does not address the status of ephemeral features that have a bed, banks and OHWM for some of their length, but that lose channel definition prior to physically connecting with a TNW or tributary. A fair reading of the final rule is that such ephemeral drainages are not regulated as WOTUS, but the agencies may construe this provision differently.

The final rule also asserts jurisdiction over any ephemeral or intermittent drainage (other than an erosional feature as defined above) that either: (1) is "neighboring," defined as either located within 100 feet of the OHWM of a TNW or tributary, or both located within 1,500 feet of the OHWM of a TNW or tributary and in the 100-year floodplain of a TNW; or (2) has a "significant nexus" to a TNW and is either in the 100-year floodplain of a TNW or within 4,000 feet of a TNW. A significant nexus exists when, based on case-specific circumstances, the drainage in combination with all "similarly situated" drainages in the watershed significantly impacts the integrity of a TNW. Given the agencies' prior expansive application of "significant nexus," the latter category could potentially encompass the great majority of ephemeral and intermittent drainages in the U.S.

Mining and other industries are up in arms over the scope of ephemeral/intermittent drainages regulated by the final rule. The industry believes the agencies have greatly expanded their jurisdiction and have made more confusing which drainages are subject to jurisdiction. The already-filed industry lawsuits focus on this issue. If the rule is upheld by the courts, and legislative attempts at derailing the rule are unsuccessful, mining companies will be forced to obtain permits from the Corps prior to constructing or expanding facilities that might touch upon such drainages, thereby increasing both costs and delays of construction projects. Indeed, due to the rule's lack of clarity, extensive costs will likely be incurred to evaluate which drainages are jurisdictional, and to seek jurisdictional determinations from the Corps.

The court challenges to the rule will likely take years to complete (after all appeals). In the meantime, it remains to be seen how the agencies themselves will construe their newly-defined jurisdiction in practice. **EMI**