

EPA Proposal to Expand Dramatically Clean Water Act Jurisdiction Could Impact Your Activities

On April 21, 2014 EPA published a proposed regulation to expand Clean Water Act (CWA) definition of “waters of the United States.” 79 Fed. Reg. 2218 (2014). This proposed action could subject a broad range of routine activities of industrial facilities, commercial establishments, agricultural operations and local governments to jurisdiction of the CWA and trigger the need for federal permits for these activities. Provided below is a brief summary of this issue and the potential impacts for metalcasting operations.

Expanded Definition of “Waters of U.S.”

Permits are required when pollutants, dredged or fill materials, or other discharges are released into the waters of the U.S. In light of numerous controversies and several recent U.S. Supreme Court decisions on the scope of CWA jurisdiction, EPA has sought to provide clarity on which waters, wetlands and other areas associated with waters should be covered by the requirements of the CWA. Specifically, EPA has proposed to expand the definition of “waters of the U.S.” to include navigable waters (which would encompass even very small streams), interstate waters, territorial seas, tributaries, adjacent waters and wetlands, and other waters determined to have a significant nexus to the other waters listed above. Each of these categories has elaborately broad descriptions to include a wide array of areas associated with water.

For example, EPA has proposed to expand the definition of tributaries as water that contributes a flow directly or through another water (including rivers, streams, creeks, lakes, ponds or wetlands) that are natural, man-altered, or man-made. The flow of these tributaries may be continuous, perennial, intermittent, or ephemeral (i.e., a short-term, transitory or fleeting flow). Under this definition, any area through which water flows could be a tributary, and therefore, a “water of the U.S.”

In addition, EPA has proposed to include in the definition of “waters of the U.S.” adjacent waters that are contiguous, bordering or neighboring to navigable or interstate waters or territorial seas. This would include all riparian areas and floodplains associated with the water. If this was not enough, EPA has also proposed to include “other waters” in the definition based on a case-by-case determination where the area may have a significant nexus to a water of the U.S.

Impact of Proposal on Broad Range of Activities

The net result of this proposal is that EPA has expanded the jurisdiction of the CWA to include nearly every square mile in some areas when intermittent and ephemeral tributaries, riparian areas, and floodplains are taken into consideration. EPA specifically stated in the preamble to the proposed rule that it had considered subjecting “puddles” to CWA jurisdiction, but in the end chose not to include them in the definition of “waters of the U.S.” Nonetheless, the proposed regulation appears to subject almost all other areas that water touches to CWA jurisdiction.

Those areas that are not included in the definition of “waters of the U.S.” (such as the site of your facility) are likely to have activities that could affect the surrounding “waters of the U.S.” and therefore, be subject to CWA jurisdiction. For example, moving dirt, mowing grass, applying or using chemicals, storing metals, or most any industrial activity could result in a potential discharge of a pollutant into a “water of the U.S.” and trigger the need for a federal permit. This could include water quality standards, total maximum daily loads (TMDLs), oil and spill prevention programs, NPDES permits, stormwater discharges, and dredge and fill permits. Industrial facilities such as metalcasting operations need to be aware of the potential impacts of the rule for all of their activities.

Given the broad jurisdiction of the CWA in the proposed rule, facilities will be faced with a substantial increase in regulatory requirements, numerous potential disputes over the applicability of these requirements, delays in making improvements and other changes at the facility, possible enforcement actions, and numerous legal challenges. Many industries are not yet aware of these potentially debilitating regulatory burdens posed by the proposed regulation. EPA appears to ignore these potential impacts and continues to downplay their significance.

Commenting on the Proposal

EPA will accept comments on the proposed rule until July 21, 2014 (although many industry groups and federal lawmakers have requested extensions of the comment period). Several industrial, commercial, agricultural and local government groups are in the process of developing comments on the proposed rule. As part of the rulemaking process, EPA and stakeholders must assess whether the proposed rule is consistent with the CWA and the recent U.S. Supreme Court cases on the scope of CWA jurisdiction. In addition, EPA will need to consider the substantial administrative burdens the rule will impose on federal, state and local agencies that will be charged with reviewing and issuing permits as well as attempt to enforce the requirements that will apply to almost any industrial, commercial, agricultural or government activities.

The summary above only begins to scratch the surface of the many complex issues associated with this proposed rule. Nonetheless, the proposal has far-reaching impacts on a very broad range of activities. If you have any questions on this proposed rule and its potential impacts on metalcasting operations or you would like additional information, please contact Jeff Hannapel with the AFS Washington office at jhannapel@thepolicygroup.com.