

Spill Prevention under the Proposed Waters of the United States Rule

Friday, April 4, 2014

We've [blogged](#) about the scope of **EPA's** proposed **Waters of the United States** rule and whether it provides any additional [clarity](#) to the current regulatory scheme. With this post, we'll start to outline some direct potential impacts on different segments of industry. Today, we briefly examine what an expanded regulatory scope of waters could mean for industries required to comply with the **Spill Prevention, Control, and Countermeasure** (SPCC) Rule under the **Oil Pollution Act** and the **Clean Water Act**.

The SPCC Rule applies to most types of facilities with an aboveground oil storage capacity greater than 1,320 U.S. gallons or an underground storage capacity greater than 42,000 U.S. gallons that "could reasonably be expected to discharge oil in quantities that may be harmful, as described in part 110 of this chapter, into or upon the navigable waters of the United States or adjoining shorelines...." 40 CFR 112.1(b). Sources subject to the SPCC Rule are required to do several things, including providing secondary containment for storage containers (40 CFR 112.7(c)) and developing a Spill Prevention, Control, and Countermeasure Plan. 40 CFR 112.3. The SPCC Rule connects to the definition of "navigable waters" in §502(7) of the Clean Water Act. 40 CFR 112.2.

The SPCC definition of navigable waters was previously the subject of litigation. In 2002, EPA issued a definitional change for the SPCC rule that contained a "broader definition" of the term "navigable waters." 73 FR 71942 (Nov. 26, 2008). Several industry groups challenged the definition, arguing that EPA failed to address Supreme Court cases discussing the definition of navigable waters. *API v. Johnson*, 541 F.Supp.2d 165, 178 (D.D.C. 2008). The court agreed with industry petitioners and vacated the definition, restoring the definition currently in place. *Id.* at 187. The jurisdictional trigger for the SPCC Rule is whether oil "could reasonably be expected" to discharge to navigable water. Therefore, any rule defining what waters are connected to navigable waters under the Clean Water Act could have an impact on the jurisdictional reach of the SPCC program.

Because the jurisdictional trigger for the SPCC Rule is whether oil "could reasonably be expected" to discharge to navigable water, an aggressive application of an expanded definition of waters that are connected to navigable water could increase the scope of SPCC jurisdiction. EPA could take the position that facilities that could reasonably be expected to discharge to waterbodies with a significant connection to navigable waters fall within the scope of the SPCC Rule. For example, EPA could potentially reach beyond even a jurisdictional puddle to facilities that could potentially discharge to that puddle. If you operate locations without SPCC plans based on previous conclusions that a release couldn't reasonably impact 'waters of the United States' at those locations, the new proposed EPA rule expanding the scope of such waters may warrant a review of those prior conclusions.

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