

November 22, 2021

Rule proposal would codify Supreme Court decisions in definitions of Waters of the United States

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On November 18, 2021, EPA and the Department of the Army announced the signing of a proposed rule to revise the definition of “waters of the United States” (WOTUS). The proposed rule would put back in place the pre-2015 definition of WOTUS as well as codify past Supreme Court decisions into the definitions.

Specifically, in the proposal (https://www.epa.gov/system/files/documents/2021-11/revise-definition-of-wotus_nprm_pre-publication_version.pdf), the agencies define waters of the United States under § 328.3 Definitions to include traditional navigable waters, interstate waters, and the territorial seas, and their adjacent wetlands; most impoundments of “waters of the United States”; tributaries to traditional navigable waters, interstate waters, the territorial seas, and impoundments that meet either the relatively permanent standard or the significant nexus standard; wetlands adjacent to impoundments and tributaries, that meet either the relatively permanent standard or the significant nexus standard; and “other waters” and “significant nexus standard” are also defined in the proposed rule.

The agencies will hold public hearings about the proposal on January 12, 13, and 18, 2022. Links to register for the hearings are available in the prepublication (https://www.epa.gov/system/files/documents/2021-11/revise-definition-of-wotus_nprm_pre-publication_version.pdf) version of the Federal Register notice, which will be finalized this week. The comment period will be open for 60 days from the publication date.

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