

ALERTS

EPA Proposes Rulemaking: Revising The Regulatory Definition Of "Waters Of The United States"

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EPA and the Corps of Engineers (the Agencies) released a pre-publication version of a proposed rule to revise the definition of "waters of the United States." The 370-page proposal should be published in the Federal Register within the next week, starting a 90-day comment period. The proposed rule replaces the definition of "waters of the United States" and the definition of "navigable waters" as used in 12 sections of the Code of Federal Regulations, affecting nine different regulatory programs. The proposal and additional documents and information can be found at www.epa.gov/uswaters.

Under the proposed rule, all tributaries of navigable waters, interstate waters, and the territorial seas (collectively referred to as Traditional Navigable Waters or TNW) and all waters adjacent to TNW or their tributaries are jurisdictional by rule because there is a presumed significant nexus between such waters and a TNW. The Agencies only need to determine that the water meets the definition of "tributary" or "adjacency."

For waters that escape the expanded definitions of tributary or adjacency, the Agencies may still find a significant nexus on a case-by-case basis, considering all similarly situated waters located in the same region. The definition of "significant nexus" makes it clear that all waters in the same watershed are in the same region.

On its face, the proposal appears similar to the existing regulatory definition of "waters of the United States." However, the proposal adds a definition of "tributary" and expands the definition of what water is adjacent. These new definitions significantly expand the universe of water that is jurisdictional by rule. While the Agencies have historically relied upon their best professional judgment to make the significant nexus determination, the proposal will ask for comment on various factors and assumptions to simplify the regulator's determination. In addition, the proposed rule changes the test for the "other waters" category from one based on impacts to interstate commerce to one based on ecological impacts, expanding what was already a category that courts had determined was overly broad.

While expanding the Agencies' jurisdictional reach, the proposal also would codify certain exemptions, including the waste treatment system exemption and the prior converted cropland exemption set forth in previous regulations. The rule also would codify policy statements from previous Federal Register preambles. However, given the increased jurisdictional scope of the proposed rule, more waters would become subject to jurisdiction than would be exempted.

[Click here](#) to see which waters are excluded and those that not excluded.

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