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## After Shutdown, US EPA Announces New Hearing Date for the New WOTUS Rule

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As a result of the recent lapse in appropriations, the US EPA and US Department of the Army (Army) [delayed](#) a planned January 23, 2019 hearing regarding the proposed new “Waters of the United States” (WOTUS) definition. Publication of the proposed rule and the start of the comment period on the rule were also postponed due to the shutdown. On February 6, 2019, EPA [announced](#) that the hearing will now be held on February 27 and 28, 2019. The Office of the Federal Register has not yet published the proposed rule, which will start the clock on the 60-day comment period.

Because it determines the scope of the Clean Water Act, the definition of “waters of the United States” has been a hot-button issue since it was amended, and significantly broadened, by the Obama administration in mid-2015. The [2015 rule](#) was challenged by 31 states and numerous other stakeholders in multiple lawsuits. In October 2015, the Sixth Circuit issued a nationwide stay of the rule. The nationwide stay was lifted when the US Supreme Court determined on January 13, 2017, that review of the rule falls within the jurisdiction of the district courts. Although the nationwide stay is no longer in effect, decisions by the US District Courts for the [Districts of North Dakota](#), Southern District of Georgia, and Southern District of Texas, preliminarily enjoining the 2015 rule in 28 states remain in effect. Thus, the Obama-era rule is in effect in only 22 states, the District of Columbia, and US territories.

In an effort to eliminate or narrow the Obama-era rule and reestablish a consistent nationwide rule, on December 11, 2018, the US EPA and the Army signed a newly [proposed rule](#) revising the WOTUS definition. The proposed rule is part of the agencies’ two-step plan to remove and replace the 2015 rule, which the agencies believe exceeds US EPA’s statutory authority. The first step, a rule which suspended the application of the 2015 rule, was [enjoined and vacated](#) by two district courts. Despite this roadblock, the agencies moved forward with step two and submitted the new proposed definition rule to the Office of the Federal Register. However, due to the shutdown, it has not yet been published. The 60-day comment period for the rule will begin on the date of publication.

Under the proposed rule “waters of the United States” encompasses “traditional navigable waters, including the territorial seas; tributaries that contribute perennial or intermittent flow to such waters; certain ditches; certain lakes and ponds; impoundments of otherwise jurisdictional waters; and wetlands adjacent to other jurisdictional waters.” Importantly, the agencies propose to eliminate the case-by-case application of the significant nexus test, which under the 2015 rule extends the definition of WOTUS to water, including wetlands, that “significantly affects the chemical, physical, or biological integrity of a water.” The agencies propose instead “the establishment of clear categories of jurisdictional waters.”

The new WOTUS definition would also exclude from regulation some tributaries and waters adjacent to jurisdictional waters. The 2015 rule extends to adjacent waters that are bordering, contiguous or neighboring a jurisdictional water, which broadly encompasses any water within 100 feet of a jurisdictional water or water located within the 100-year floodplain of a jurisdictional water. By contrast, the proposed rule includes only adjacent wetlands that “abut or have a direct hydrological surface connection” to a water. Under the 2015 Obama-era rule, a tributary is a water that contributes flow to a jurisdictional water. The proposed rule eliminates ephemeral flows from being considered a tributary, requiring a water that contributes at least “perennial or intermittent flow.” Given these and other significant differences between the two rules, once published, the

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proposed rule is certain to draw intense debate over the proper reach of the Clean Water Act.

US EPA is not alone in experiencing delays, as the federal rulemaking process ground to a halt during the shutdown. The Office of the Federal Register (OFR) issued "[Government Shutdown FAQs](#)," stating that in an appropriations lapse the OFR may publish documents from unfunded agencies "directly related to the performance of governmental functions necessary to address imminent threats to safety of human life or protection of property." And, in the case of a partial shutdown, where some agencies are funded, the OFR may publish documents from funded agencies "if delaying publication until the end of the appropriations lapse would prevent or significantly damage the execution of funded functions at the agency."

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