

**EPN Remarks at OMB Meeting on  
Revised Definition of “Waters of the United States”  
October 17, 2022**

The [Environmental Protection Network](https://www.epn.org/) (EPN) is an organization of more than 550 U.S. Environmental Protection Agency (EPA) alumni volunteering their time to protect the integrity of EPA, human health, and the environment. EPN supports the agencies’ decision to promulgate a rule based on the pre-2015 definition of waters of the U.S. that has governed the Clean Water Act (CWA) protections for decades, has been codified multiple times, and has been implemented by every administration for the last 35 years. The definition is based on the 1986 regulations in place for both the Corps of Engineers and EPA and reflects an interpretation of waters of the U.S. in use from 1977 to 2015, with amendments for Supreme Court case law.

EPN supports this rule for two key reasons: First, the rule is based on best available science concerning the functions provided by upstream tributaries, adjacent wetlands, and “other waters” to restore and maintain the water quality of downstream foundational waters (navigable, interstate, and territorial waters). Second, the rule appropriately limits federally protected waters to those upstream waters significantly affecting the integrity of downstream navigable waters and leaves the regulation of other waters to states and tribes. We provide support for key parts of EPA’s rule in the following comments.

**Need for both Rapanos standards**

EPN agrees with the conclusions of the legal analysis that: 1) agencies must consider the rule’s effect on the chemical, physical, and biological integrity of the nation’s waters and 2) the relatively permanent standard fails to do that if used as the sole standard. The need for both Justice Scalia’s “relatively permanent standard” and Justice Kennedy’s “significant nexus standard” is consistent with the statutory text and the documentation available on Congressional intent. As a result, EPN agrees that tributaries, adjacent wetlands, and “other waters” are waters of the U.S. if they meet either the relatively permanent or significant nexus standard. We further commend the agencies for providing jurisdictional status for wetlands that connect with jurisdictional waters through ground water, citing the Supreme Court decision in *County of Maui, Hawaii v. Hawaii Wildlife Fund* as additional justification for not excluding groundwater-connected wetlands.

**Scientific basis of the rule**

EPN applauds the agencies for basing this rule on the best available science, including the 2015 report entitled “*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*” as well as new peer-reviewed scientific studies. We call attention to the fact that many of the new studies support the inclusion of “other waters” as waters of the U.S. because they meet the significant nexus standard. For example, new studies find that non-floodplain wetlands can

have demonstrable hydrologic and biogeochemical downstream effects, such as decreasing peak flows, maintaining base flows, and performing nitrate removal, particularly when considered cumulatively.

The rule documents the overwhelming evidence that perennial, intermittent, and ephemeral streams significantly affect the water quality of downstream waters. While the smallest streams represent an estimated three-quarters of the total length of stream and river channels in the U.S., they represent over 80 percent of the streams in the arid southwest and have enormous aggregate effects. Most streams and wetlands in states like Arizona and New Mexico would lose protection under the restrictive rule promulgated by the last administration. The proposed rule also documents that adjacent wetlands can moderate extremes in waterflow, aid in the purification of water, and maintain and recharge the groundwater resource.

EPN agrees with the agencies' list of factors that should be considered when assessing whether waters "significantly affect" downstream foundational waters and agrees that these factors are similar to the list of factors the Supreme Court identified in *Maui* for assessing the functional equivalent of a direct discharge. We hope that the final rule will add a specific list of functions of upstream waters to aid in making a significant nexus determination.

### **State/Tribal vs. Federal Jurisdiction**

EPN commends the agencies for reinstating non-navigable interstate waters as waters of the U.S. The entire purpose of the federal CWA is to "restore and maintain the chemical, physical, and biological integrity of the nation's waters," which are largely interconnected and which flow over and between state lines. In the 1972 amendments to the CWA, Congress made clear that states were to continue to administer most CWA programs but must do so consistent with a broad federally-mandated regulatory scheme to combat nationwide water quality problems and assure minimum water quality standards. Congress wanted to make sure all states would follow a good neighbor policy and provide water to a downstream state that met the water quality standards of that state. As a result, all interstate waters have been treated as jurisdictional waters until the 2020 Navigable Water Protection Rule (NWPR) removed automatic jurisdictional status from non-navigable interstate waters.

EPN also commends the agencies for reinstating ephemeral streams and adjacent wetlands with a subsurface connection to a jurisdictional water as jurisdictional if they meet the significant nexus standard. The NWPR had removed federal jurisdictional status and turned them over to state/tribal authority despite their critical impact on foundational waters.

### **Agricultural Considerations**

EPN further commends the agencies for clarifying that the CWA has always exempted normal farming, silviculture, and ranching practices that are part of an established operation from needing a permit to discharge dredged or fill material into jurisdictional waters or wetlands unless the wetland

had never previously been used for farming. We further commend the agencies for being clear that road potholes, puddles, and certain types of ditches are not jurisdictional as well as artificial lakes or ponds constructed on dry land and used for rice growing, stock watering, aesthetics, or irrigation.

### **Conclusion**

EPN agrees with the agencies that this rule is consistent with the statutory text, advances the objective of the CWA, is supported by the scientific record, and appropriately considers the objective in Section 101(a) of the Act and the policy in Section 101(b). In addition, because the rule reflects consideration of the agencies' expertise and experience as well as updates in implementation tools and resources, this rule is familiar and implementable. We urge the administration to finalize and implement this rule as soon as possible to protect the nation's invaluable water resources.