

Comments on Defining “Waters of the United States”

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The Environmental Protection Network (EPN) is an organization of more than 550 US Environmental Protection Agency (EPA) alumni volunteering their time to protect the integrity of EPA, human health, and the environment. EPN prepared these comments in response to EPA’s request for recommendations on promulgating a new definition of “waters of the U.S.” (WOTUS). EPN supports EPA’s decision to replace the 2020 Navigable Waters Protection Rule (NWPR) because that rule is inconsistent with the objectives of the federal Clean Water Act (CWA) to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters”; ignores well-established science; and fails to protect waters that are critical to the health and welfare of the American people, particularly given the extreme weather challenges from climate change and the disproportionate impact on environmental justice communities. As a general statement, EPN believes that the NWPR erred by excluding from consideration an evaluation of the significant nexus of ephemeral, some intermittent streams, and many adjacent wetlands when determining the federal jurisdictional status of those waters. EPN also urges EPA to repeal the NWPR as quickly as possible because the many ongoing jurisdictional determinations based on that rule are resulting in the permanent loss of many valuable streams and wetlands. EPN’s recommendations for a replacement rule are presented below, organized by major themes.

Regionalization of WOTUS Definition

EPN recommends that EPA promulgate a national definition of jurisdictional tributaries based on those tributaries impacting the chemical, physical, and biological integrity of navigable waters. EPN further recommends that EPA regionalize that definition by describing the physical characteristics of jurisdictional streams and wetlands using five of the ecoregions developed for EPA’s National Aquatic Resource Surveys. These ecoregions (Coastal Plains, Eastern Mountains and Upper Midwest, Interior Plains, Western Mountains, and Xeric) are areas with similar flow characteristics, climate, vegetation, soil type, and geology such that each have distinct stream features and wetland types. An ecosystem approach to defining jurisdictional waters would allow EPA to account for regional differences in ephemeral and intermittent streams as well as differences in adjacent wetlands that range from the expansive marshes of the coasts to the forested swamps, meadows, and waterfowl-rich prairie potholes of the interior plains. EPA has been conducting National Aquatic Resource Surveys on coastal waters, lakes, rivers and streams, and wetlands since 2007, measuring a suite of chemical, physical, and biological indicators on an ecoregional basis that could be used to support this regionalization of the WOTUS definition.

In order to ensure the new tributary definition is based on sound science, EPN recommends that EPA use the 2015 report entitled “[Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence](#)” and the 2008 report entitled “[The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-Arid American Southwest](#).” The jurisdictional status of intermittent and ephemeral waters and their adjacent wetlands is a critical aspect of a new definition of waters of the U.S. As EPA reported in 2008, 59% of streams in the U.S. (excluding Alaska) and 81% of streams in the arid Southwest states are intermittent or ephemeral. Over 117 million people, a third of the populace, drink water that relies, at least in part, on these waters. Given their importance and vast extent, individual ephemeral and intermittent streams and their adjacent wetlands cannot be examined in isolation and must be aggregated with a watershed-scale approach.

Interstate Waters

EPN recommends that EPA reinstate 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 a minimum level of safety and quality. 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 since 1972. The 2020 rule’s removal of automatic jurisdictional status from non-navigable interstate waters threatens the collapse of the good neighbor policy.

Agricultural Considerations

In the new rule, EPN recommends EPA clarify that the CWA has always exempted normal farming, silviculture, and ranching practices that are part of an established (i.e., on-going) 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. The rule should explain that EPA does not have the authority to promulgate any override of the permitting exemptions in the CWA.

With regard to which waters are jurisdictional, EPA should be very clear that road potholes, puddles, and certain types of ditches are not jurisdictional. EPA should explain that a ditch constructed in a jurisdictional wetland or stream is also jurisdictional, but one constructed in dry land for stormwater drainage is not, even if it is colonized by wetland vegetation. EPA should retain the 2015 Clean Water Rule’s jurisdictional exemptions for artificial lakes or ponds constructed on dry land and used for rice growing, stock watering, aesthetics, or irrigation. EPA should also be clear that CWA jurisdiction does not apply to dry land, only to waters and wetlands as defined in the CWA.

Wetland Adjacency Issue

EPN recommends that EPA now begin building a database supporting differentiation of ephemeral from intermittent streams and, consistent with the 1985 Supreme Court Decision in *United States v. Riverside Bayview*, for the identification of adjacent wetlands to perennial, intermittent, and ephemeral waters in order to support a decision on which waters/wetlands should be jurisdictional. EPN further recommends that EPA provide jurisdictional status for wetlands that connect with jurisdictional waters through ground water, citing the April 2020 Supreme Court decision in *County of Maui, Hawaii v. Hawaii Wildlife Fund* as additional justification for not excluding ground water-connected wetlands as the Navigable Waters Protection Rule did.

Regulatory Impact Assessment

EPN recommends that EPA begin immediately to collect the information needed to prepare a robust regulatory impact assessment (RIA) for the new rule. It will take some time to promulgate a new definition, but EPA needs to use every minute of that time to collect the necessary data. A credible RIA will be key to overcoming the inevitable legal challenges to the new definition. EPA should review the public comments and peer reviewed journal articles critiquing the 2020 rule’s RIA to identify and collect critical missing data. Critical missing data include the identification of ephemeral and intermittent streams and their adjacent wetlands in order to better estimate where and how many of these waters and wetlands will be excluded

from jurisdiction under the new rule. This does not mean that EPA must do a comprehensive census of all such areas. The National Aquatic Resource Surveys have demonstrated the power of using statistically representative geographic sampling to characterize the nation's waters. If EPA regionalizes the WOTUS definition as we have recommended, it can use the representative streams and wetlands selected for those ecoregions to support that approach and to develop the RIA. EPA must also conduct research to identify better ways of valuing ephemeral and intermittent streams and wetlands, including monetizing their benefits in filtering urban and agricultural runoff, trapping sediments, mitigating floods, protecting downstream public water supplies, and providing a nursery for wildlife. In addition, EPA must improve the estimation of state capabilities to permit dredge and fill activities and pollutant discharges in non-jurisdictional waters.