



Open Letter to Congress on Congressional Review of the Waters of the United States Rule

March 2, 2023

Dear Member of Congress,

As alumni of the Environmental Protection Agency (EPA), we are writing to share our perspectives on congressional review of the Clean Water Act “Waters of the United States” rule. The Environmental Protection Network (EPN) taps the bipartisan expertise of more than 550 former EPA staff who volunteer their unique perspectives as scientists and former regulators, permit issuers, and grant providers with decades of historical knowledge and subject matter expertise.

A Constructive Framework for Assessing EPA Rules Using the Congressional Review Act

Congress has an important responsibility to ensure that EPA and other federal agencies are faithful to congressional intent when issuing rules. Congress’ congressional review responsibilities are laid out in law, commonly referred to as the “Congressional Review Act” (CRA).

Rulemaking, when done appropriately, is a methodical process built upon deep understanding of complex and technical information and informed by a wide range of stakeholders with different perspectives. The bipartisan drafters of the CRA recognized the vital roles agencies play in implementing laws, and they strove to strike a balance between “reclaiming for Congress some of its policymaking authority, without at the same time requiring Congress to become a super regulatory agency.”¹

The drafters of the CRA shined a light on how to navigate this balance, recommending that Congress intervene where rules are “surprisingly different from the expectations of Congress or the public.”²

In addition to avoiding taking on the role of “super regulatory agency,” Congress must consider the full ramifications of a resolution of disapproval, which prohibits agencies from taking substantially similar action. The CRA acts like a sledgehammer, not a scalpel. A CRA disapproval resolution can leave a chaotic tangle of regulatory uncertainty and confusion in its wake, resulting in significant harm to the public, regulated entities, and the environment. According to the Congressional Research Service, Congressional disapproval:

"creates uncertainty and could restrict the agency’s ability to act going forward. This can potentially create a difficult situation for an agency if Congress uses the CRA to disapprove rules that were specifically required by law..."³

¹ “Statement for the Record by Senators Nickles, Reid and Stevens,” Congressional Record, April 18, 1996, [S3683](#)

² *ibid*

³ Congressional Research Service, “[The Congressional Review Act \(CRA\): Frequently Asked Questions](#),” Updated November 12, 2021

Historically, members of Congress from both parties have cited the “bluntness” of the CRA tool as the reason they rejected congressional disapproval even when they did not agree with the underlying rule.⁴

EPN suggests a constructive framework of four key questions that Congress should consider when determining whether a rule is “surprisingly different from the expectations of Congress,” without venturing into the territory of becoming a “super regulatory agency”:

1. **Follow the Law:** Did the agency follow the law, as directed by Congress and the courts?
2. **Follow the Science:** Did the agency follow the science, including adequately explaining its factual basis and reasoning?
3. **Listen to Stakeholders:** Did the agency meaningfully engage with and respond to all major stakeholders, taking different perspectives meaningfully into account?
4. **Do No Harm:** Would congressional disapproval worsen or improve outcomes for public health, the environment, and stakeholders, including regulated entities?

In pursuing this framework, members of Congress can provide meaningful oversight of actions, while minimizing the harm created by the CRA. In today's climate, with cyclical swings of the political pendulum, there is already significant regulatory whiplash and chaos. Congress should do everything in its power to lessen this confusion, not add to it.

Applying the Framework to the Waters of the United States Rule

EPN believes that Congress should support the “Revised Definition of ‘Waters of the United States’” rule published by EPA and the Army Corps of Engineers on January 18, 2023. This rule protects waters that are critical to the health and welfare of the American people. The rule is not “surprisingly different from the expectations of Congress or the public.” In fact, the rule conforms to the Supreme Court’s instructions and largely reverts to the long-existing rule that pre-dates the regulatory confusion that has prevailed for too long.

Further, a congressional resolution of disapproval in this case risks a prolonged and perhaps permanent state of regulatory confusion that will create more uncertainty for landowners and others who deserve clear answers on how to comply with the Clean Water Act.

A thoughtful exploration of the four framing CRA questions we pose above will demonstrate that EPA has in fact done its job and done it well.

- (1) **EPA Followed the Law:** The rule is consistent with the objectives of the federal Clean Water Act 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. The agencies are interpreting “waters of the United States” to mean the waters defined by the familiar pre-2015 regulations, with amendments to reflect the agencies’ determination of the statutory limits on the scope informed by Supreme Court precedent, the best available science, and the agencies’ experience and technical expertise. In response to both the case law and the science, the 2023 rule only includes upstream

⁴ See for example statements [from Republicans](#) in 2017 and [from Democrats](#) in 2021

waters and wetlands as waters of the U.S. when they significantly affect the integrity of waters for which federal interest is indisputable (traditional navigable waters, territorial seas, and interstate waters).

EPA has also clearly recognized Supreme Court precedent, which, of course, could change with the expected decision in *Sackett v. United States*.

- (2) **EPA Followed the Science:** The agency incorporates well-established science and protects 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. For the first time, the 2023 rule provides a detailed definition of the functions that must be assessed and the specific factors that must be considered in determining whether a water has a significant nexus to a water for which federal interest is indisputable. This definition is well supported by scientific evidence and is consistent with the factors the Supreme Court recently identified as critical for determining whether a discharge is jurisdictional in *County of Maui, Hawaii v. Hawaii Wildlife Fund*.
- (3) **EPA Responded to Stakeholders Concerns:** EPA is to be commended on a particularly thorough and [far-reaching stakeholder engagement process](#), ultimately choosing a middle road that supports public health, environmental protection, agricultural activity, and economic growth. It covers less than the Obama administration proposed in 2015 but more than the Trump administration's rule. The agency conducted regional roundtables throughout the country, as well as solicited input from small businesses, tribes, and the public through multiple channels. In response to farmers concerns, the 2023 rule expands the number of waters exempted from CWA jurisdiction, exempting certain types of ditches, irrigated areas, farm ponds, and water-filled depressions in dry land, and erosional features such as gullies and rills.
- (4) **Congressional Disapproval Would Create a Chaotic Mess:** A congressional vote of disapproval would create prolonged uncertainty and confusion for stakeholders that need to know what waters are protected by the Clean Water Act. Such an action would also endanger the drinking water, fisheries, and flood control for communities throughout the nation.

Congress should support this rulemaking process as it moves through the courts, and refrain from adding more confusion to the situation. Allowing EPA and the Army Corps to complete their job as defined in the law and overseen by the courts will create the kind of clarity stakeholders need.

We are happy to make EPN experts available to you to discuss this further.

Sincerely,



Michelle Roos
Executive Director
Environmental Protection Network